

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Empire State Ambulatory Surgery Center
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-20-1166-2933

Applicant's File No. SS-144216

Insurer's Claim File No. 0405210220002

NAIC No. 36447

ARBITRATION AWARD

I, Cathryn Ann Cohen, the undersigned arbitrator, designated by the American Arbitration Association pursuant to the Rules for New York State No-Fault Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Insurance, having been duly sworn, and having heard the proofs and allegations of the parties make the following **AWARD**:

Injured Person(s) hereinafter referred to as: Assignor

1. Hearing(s) held on 08/04/2021
Declared closed by the arbitrator on 08/04/2021

Sabine Sciarrotto, Esq. from Samandarov & Associates, P.C. participated for the Applicant

Herman Buchanan from LM General Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,400.28**, was NOT AMENDED at the oral hearing.
Stipulations WERE NOT made by the parties regarding the issues to be determined.
3. Summary of Issues in Dispute

Applicant seeks \$2,400.28 reimbursement of charges for facility fees in connection with lumbar epidural steroid injections ("ESI") performed on October 18, 2019 (\$976.38) and November 8, 2019 (\$1,423.90) on Assignor a 30-year-old male driver involved in a motor vehicle accident on July 3, 2019. Respondent timely denied reimbursement for lumbar ESI performed on October 18, 2019 based on a peer review by Vijay Sidhwani, D.O. dated November 25, 2019; and timely denied reimbursement for lumbar ESI provided on November 8, 2019 based on a peer review by Vijay Sidhwani, D.O. dated December 9, 2019, opining the services, respectively, were not medically necessary.

Subsequently, by denial dated April 16, 2020, Respondent denied the claim for lack of coverage based on Assignor's material misrepresentation in the procurement of the policy as to the location of his residence and where the insured vehicle was garaged.

4. Findings, Conclusions, and Basis Therefor

Applicant seeks \$2,400.28 reimbursement of charges for facility fees in connection with lumbar epidural steroid injections ("ESI") performed on October 18, 2019 (\$976.38) and November 8, 2019 (\$1,423.90) on Assignor a 30-year-old male driver involved in a motor vehicle accident on July 3, 2019. Respondent timely denied reimbursement for lumbar ESI performed on October 18, 2019 based on a peer review by Vijay Sidhwani, D.O. dated November 25, 2019; and timely denied reimbursement for lumbar ESI provided on November 8, 2019 based on a peer review by Vijay Sidhwani, D.O. dated December 9, 2019, opining the services, respectively, were not medically necessary. Subsequently, by denial dated April 16, 2020, Respondent denied the claim for lack of coverage based on Assignor's material misrepresentation in the procurement of the policy as to the location of his residence and where the insured vehicle was garaged. I have reviewed the documents contained in the ADR Center record of the case maintained by the AAA as of the date of the hearing.

It is well settled that a health care provider establishes a prima facie case of entitlement to recover first-party no-fault benefits by submitting proof that the prescribed statutory billing forms, setting forth the fact and the amount of the loss sustained, had been mailed and received and that payment of no-fault benefits was overdue. (*see Insurance Law Sec. 5106[a]*; *Mary Immaculate Hosp v. Allstate Ins. Co.*, 5 AD3d 742 [2004]). Respondent's denial(s) indicating receipt of the proof of claim shows that Applicant mailed the proof of claim form(s) to the Respondent (*see Ultra Diagnostic Imaging v. Liberty Mutual Insurance Co.*, 9 Misc3d 97). The evidence is sufficient to make out a prima facie case of entitlement to recovery of Applicant's bills.

Once Applicant has established a prima facie case the burden shifts to the insurer to prove that the medical treatment was not medically necessary (*see Citywide Social Work & Psychological Services v Allstate Ins. Co.*, 8 Misc3d 1025A; *A.B. Medical Services, v Geico Ins. Co.*, 2 Misc3d 26). Neither the Insurance Law nor the Regulations define "medical necessity." A review of case law reveals that most courts have evaluated medical necessity based on whether or not services provided were in accord with the generally accepted medical practices. Therefore, to prove that the services were not medically necessary, at a minimum, lack of necessity must be supported by competent evidence such as an IME or peer review or other proof which sets forth a factual basis and medical rationale for denying the claim. A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards (*see Nir v. Allstate Insurance Company* 7 Misc3d 544).

Upon a showing of lack of medical necessity through a peer review, an Applicant is required

to rebut same (*see A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co.*, 16

Misc.3d 131(A).

As regards the lumbar ESI and accompanying services performed on October 18, 2019, the peer in his review dated November 25, 2019, notes that on July 3, 2019 Assignor was a restrained driver of a vehicle involved in a motor vehicle accident. Assignor was referred by his treating chiropractor for pain management to Dr. Patel who initially evaluated Assignor on July 23, 2019 for complaints of lower back and neck pain. The peer asserts there was no indication that Assignor had taken any oral NSAIDs. Range of motion was decreased in the cervical and lumbar spine with tenderness and spasm. Bilateral shoulder pain with upper extremity tingling and numbness was reported. Right lower leg pain with numbness and tingling was reported. Right knee injury was reported. Assignor was recommended physical therapy and Lidocaine patch was prescribed. Trigger point injections were performed on initial visit.

The peer discusses the IME by Dr. Jay Eneman dated September 19, 2019. He told the examiner he was on limited duties as a construction worker and had complaints of neck, back, bilateral shoulder, and bilateral knee pain with pain radiating to the legs. The IME found tenderness in the lumbar spine. Lumbar spine range of motion was decreased. MRI of the lumbar spine revealed multilevel degenerative disc disease.

The peer opines that the lumbar ESI was not medically necessary because the history suggests a resolving lumbar sprain/strain, superimposed upon multilevel pre-existing degenerative disc disease as well as constant exacerbation secondary to Assignor's body habitus (obesity) as well as his employment status as a construction worker. Regardless, he was still in the acute phase of treatment at the time this procedure was performed and that a longer and more aggressive course of therapy should have been provided. Also, the peer argues that the diagnosis of lumbar radiculopathy is "unclear" based on the medical reports and he discounts EMG/NCS testing by Gary Stevens, D.C. that revealed evidence of L5-S1 radiculopathy on the left.

The peer acknowledges that lumbar ESI are medically necessary when the patient presents with pain that has a clear radicular component, and where conservative approaches have been attempted and have not worked effectively. The peer points to a review declaring not to use ESI for acute low back pain without radiculopathy in the National Guideline Clearinghouse (2011).

The peer review does not meet the *Nir* standard of proof necessary to establish lack of medical necessity. The peer review is the opinion of the peer, standing alone, unsupported by evidence of medical standard of care. The peer review lacks factual basis and is contradicted by the medical records which demonstrate Assignor's lumbar pain had a radicular component. Dr. Patel's reports document Assignor's persistent low back pain radiating to the lower extremities with positive findings in the lumbar spine. The report by Dr. Apple of an examination on October 17, 2019 documented Assignor's constant low back pain radiating to the bilateral buttocks and hips with orthopedic findings in the lumbar spine including positive Kemp's test and positive SLR at 40 degrees on the right and left supporting the diagnosis of lumbar radiculopathy which was confirmed by EMG/NCS testing. These records meet the peer's own standard for performance of lumbar ESI. The peer review's medical rationale is insufficient in that the National Guideline Clearinghouse is not an authoritative publication establishing generally accepted standard of care in pain management. As for the peer's contention that Assignor's lumbar spine condition was due to degenerative disc disease and/or preexisting lumbar spine injuries, the peer does not rule out the possibility that Assignor's pre-existing lumbar spine injuries could have been exacerbated by the accident of record. As causation is presumed and exacerbation of pre-existing conditions are covered by the No-Fault Law (*see Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 AD3d 13), the peer's opinion carries little weight. As such, Respondent's denial raising a lack of medical necessity defense based on the peer review is not supported by substantial evidence. Applicant is entitled to reimbursement.

As for the lumbar ESI performed on November 8, 2019, the peer in his review dated December 9, 2019 is the same as his previous review. The peer claims further that following the lumbar ESI on October 18, 2018, there was no significant benefit derived from the initial injection, though the peer acknowledges that Dr. Patel's follow up evaluation on October 22, 2019 noted that Assignor's back pain improved 40%. The peer questions this improvement because the follow up visit was essentially unchanged suggesting very little benefit following the first injection. The peer argues repeat injections are frequently unnecessary and should only be done when documented functional improvement occurs. The peer cites the National Guideline Clearinghouse (2011) and the Chronic Pain Medical Treatment Guidelines 2009 adopted from the Work Loss Data Institute's Official Disability Guidelines (ODG).

The peer review does not meet the *Nir* standard of proof necessary to establish lack of medical necessity. The peer review is the opinion of the peer, standing alone, unsupported by evidence of medical standard of care. Contrary to the peer, Dr. Patel's reports dated October 22, 2019 and October 29, 2019 show the first lumbar ESI provided significant pain relief yet the pain returned warranting a repeat lumbar ESI based on the clinical findings on follow up exam. The peer review's medical rationale is insufficient in that the National Guideline Clearinghouse is not an authoritative publication, establishing generally accepted standard of care in pain

management nor do the ODG guidelines which are biased and designed to contain costs for insurers. Based on the clinical presentation, it cannot be said that performing a second lumbar ESI there was a departure from generally accepted standard of care. As such, Respondent's denial raising a lack of medical necessity defense based on the peer review is not supported by substantial evidence. Applicant is entitled to reimbursement.

Finally, as regards the denial based on material misrepresentation in the procurement of the policy, though Respondent's evidence in the form of Assignor's EUO testimony taken October 9, 2019 raises a triable issue that in procuring the subject policy Respondent indicated that he resided in Binghamton, NY, but actually resided in Valley Stream, NY, this defense is precluded if not raised in a timely denial (*see Westchester Med. Ctr. V. GMAC Ins. Co. Online, Inc*, 80 AD3d 603). Here, the bill for date of service October 18, 2019 was received November 11, 2019 and the bill for date of service November 8, 2019 was received November 25, 2019. Respondent's denial raising the defense of material misrepresentation in the procurement of the policy is dated April 16, 2020, more than 30 days after receipt of the bills, precluding the defense.

Accordingly, Applicant's request for reimbursement is granted.

5. Optional imposition of administrative costs on Applicant.
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

6. I find as follows with regard to the policy issues before me:

- ☐ The policy was not in force on the date of the accident
- ☐ The applicant was excluded under policy conditions or exclusions
- ☐ The applicant violated policy conditions, resulting in exclusion from coverage
- ☐ The applicant was not an "eligible injured person"
- ☐ The conditions for MVAIC eligibility were not met
- ☐ The injured person was not a "qualified person" (under the MVAIC)
- ☐ The applicant's injuries didn't arise out of the "use or operation" of a motor vehicle
- ☐ The respondent is not subject to the jurisdiction of the New York No-Fault arbitration forum

Accordingly, the applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	Empire State Ambulatory Surgery Center	10/18/19 - 10/18/19	\$976.38	Awarded: \$976.38
	Empire State Ambulatory Surgery Center	11/08/19 - 11/08/19	\$1,423.90	Awarded: \$1,423.90
Total			\$2,400.28	Awarded: \$2,400.28

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/26/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

In accordance with 11 NYCRR 65-3.9(c) interest shall be paid on the claim awarded in the amount of \$2,400.28 from May 26, 2020 the date the arbitration request was received by the AAA.

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

In accordance with 11 NYCRR 65-4.6(d) the insurer shall pay Applicant an attorney's fee on the claim awarded in the amount of \$2,400.28.

- D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York
SS :
County of New York

I, Cathryn Ann Cohen, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

08/23/2021
(Dated)

Cathryn Ann Cohen

IMPORTANT NOTICE

This award is payable within 30 calendar days of the date of transmittal of award to parties.

This award is final and binding unless modified or vacated by a master arbitrator. Insurance Department Regulation No. 68 (11 NYCRR 65-4.10) contains time limits and grounds upon which this award may be appealed to a master arbitrator. An appeal to a master arbitrator must be made within 21 days after the mailing of this award. All insurers have copies of the regulation. Applicants may obtain a copy from the Insurance Department.

ELECTRONIC SIGNATURE

Document Name: Final Award Form
Unique Modria Document ID:
7d8690f8eb542b4abcb6a1c1b8917850

Electronically Signed

Your name: Cathryn Ann Cohen
Signed on: 08/23/2021