

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Rockaways ASC Development LLC d/b/a
ASC of Rockaway Beach
(Applicant)

- and -

Hereford Insurance Company
(Respondent)

AAA Case No.	17-21-1199-6188
Applicant's File No.	none
Insurer's Claim File No.	91214-14
NAIC No.	24309

ARBITRATION AWARD

I, Nancy Kramer Avalone, 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 SC

1. Hearing(s) held on 07/13/2022
Declared closed by the arbitrator on 07/13/2022

Walter Pisiary, Esq., Of Counsel from The Law Offices of Hillary Blumenthal P.C.
(Melville) participated for the Applicant

Mark Zemcik, Esq., Of Counsel from Law Offices of Rubin & Nazarian participated for
the Respondent

2. The amount claimed in the Arbitration Request, **\$1,598.91**, 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 is seeking a facility fee associated with a lumber epidural steroid injection ("LESI") provided to Assignor SC on Nov. 11, 2020. Respondent denied the services as not medically necessary, based upon the peer view of Jason Cohen, MD, Board Certified in Pain Management and Anesthesiology. Applicant submitted a rebuttal report by Richard Apple, MD. No fee schedule defense was asserted.

The issue presented is whether the facility fee for the lumber epidural steroid injection was medically necessary.

After reviewing the records, including the bill and the denial of claim form, I find that Applicant established its *prima facie* case of entitlement to No-Fault compensation, and Respondent issued a timely denial of claim form preserving all defenses contained therein.

4. Findings, Conclusions, and Basis Therefor

This matter was decided based upon the submissions of the parties as contained in the electronic file ("E-file") maintained by the American Arbitration Association (MODRIA), and the oral arguments of the parties' representatives. The hearing was held via a web-based video conferencing platform (ZOOM). I have reviewed the documents contained in the E-file, heard the arguments of the parties, and make my decision in reliance thereon.

Pursuant to 11 NYCRR §65-4.5(o)(1), an arbitrator shall be the judge of the relevance and materiality of the evidence offered. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations.

Medical Necessity Issue.

Under Sec. 5102 of the New York Insurance Law (McKinney 1985), No-Fault first party benefits are reimbursable for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle.

Lack of medical necessity is a valid defense to an action to recover No-Fault benefits. *AJS Chiropractic, P.C. v Travelers Ins. Co.*, 25 Misc.3d 140(A) (App Term 2009).

The Respondent must, at a minimum, establish a detailed factual basis and a sufficient medical rationale for its asserted lack of medical necessity. *Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co.*, 21 Misc.3d 142A, 880 N.Y.S.2d 223 (2nd Dept. 2008). Additionally, it must be proven that said rationale is supported by evidence of the generally accepted medical/professional practices. *Nir v Allstate Ins. Co.*, 7 Misc.3d 544 (Civ Ct, Kings County 2005).

When the insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the Applicant/provider which must then present its own evidence of medical necessity. See generally, *W. Tremont Med. Diagnostic, P.C. v. Geico Ins. Co.*, 2006 NY Slip Op 51871(U), 13 Misc. 3d 131(A), 824 N.Y.S.2d 759 (App. Term).

Where the denial is predicated upon a peer review report, and the peer review report establishes *prima facie*, that there was no medical necessity for the services performed, the provider must refute the peer review doctor's determination. See *A Khodadadi*

Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co., 16 Misc. 3d 131(A), 841 N.Y.S.2d 824, 2007 NY Slip Op 51342(U), (App. Term 2007).

Similarly, where the insurer denies the claim based upon an Independent Medical Examination (IME) of the Assignor, and the IME establishes prima facie that there was no medical necessity for continued treatment, the Applicant/provider bears the burden of demonstrating that the treatment at issue was medically necessary by a preponderance of the credible evidence. See, *Amato v. State Farm Ins. Co.*, 40 Misc. 3d 129(A), 2013 NY Slip Op 51113(U), (App Term 2013).

In support of the lack of medical necessity defense, the Respondent relied upon the peer review report of Dr. Cohen, dated Jan. 8, 2020, in which the doctor concluded that the LESI was not medically necessary. He cited to a list of Dr. Cohen who noted that epidurals were never appropriate unless radiculopathy is documented. He remarked that there was no subjective radiating lumbar pain throughout the lower extremities in a radicular pattern documented by Pervaiz Qureshi, M.D. at the initial exam , nor is there evidence on examination of lumbar radiculopathy.

The peer review contained the following in quotations:

"(1) Radiculopathy must be documented. Objective findings on examination need to be present. Radiculopathy must be corroborated by imaging studies and/or electrodiagnostic testing. (2) Initially unresponsive to conservative treatment (exercises, physical methods, NSAIDs and muscle relaxants). (3) Injections should be performed using fluoroscopy

(live x-ray) and injection of contrast for guidance. [Emphasis added].

A review of the report of the exam shows that it was thorough, testing range of motion in the neck, low back, and extremities, and muscle strength, sensation and deep tendon reflexes throughout. The results are entirely normal with full and quantified ranges of motion, unreduced muscle strength, sensation and reflexes, and normal orthopedic tests. The examining physician concluded that all injuries were satisfactorily resolved and that any further treatment or diagnostic testing was not needed, i.e., not medically necessary. He also cited to studies which called for the efficacy of LESI treatment.

I deem the report to be sufficiently credible and persuasive to establish lack of medical necessity for the services at issue. The Respondent has met the burden of proof with respect to the lack of medical necessity. Thus, the burden thus shifts to the Applicant to rebut the Respondent's evidence.

In opposition, Applicant relied on the medical documentation in the Record and the rebuttal report by Dr. Apple, who disagreed with the peer reviewer. Dr. Apple examined the Assignor and documented radiating lower back pain with numbness and tingling. The straight leg raise test was found positive at forty degrees bilaterally which is

indicative of disc lesion and/or nerve root impingement or herniation. There was also a positive Kemps test indicative of the presence of disc protrusion. The neurological evaluation was reduced through the lower extremities. Dr. Apple advised that LESI is a treatment option for radicular pain syndrome that has lasted a minimum of three weeks when NSAIDs have been tried and without evidence of continuous improvement. He remarked that epidural injections are performed to help reduce the inflammation and the pain associated with nerve root compression which can be caused by multiple bases including herniation and spinal stenosis. Finally, Dr. Apple stated that the lumbar MRI studies revealed evidence of impingement. In his opinion, under these circumstances, the LESI was medically necessary and did not deviate from the standard of care.

After reviewing the totality of the credible and admissible evidence and considering the arguments of the parties, I find that the Applicant has established the medical necessity for the treatment. Dr. Apple's evaluation of the Assignor contradicted the statements in the peer regarding the Assignor's clinical condition, for example, radiating back pain with numbness and tingling. The neurologic exam revealed abnormalities and the MRI studies revealed impingement and disc lesions. It is also noted that the peer report itself listed insufficient response to treatment as a factor to determine whether a LESI was medically necessary.

I find that the Applicant successfully rebutted Respondent's *prima facie* evidence. The claim is awarded to the Applicant. *This award is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.*

Applicant is entitled to statutory interest, attorney fees and the filing fee, as set forth in Sections 6. B, C and D, below.

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
	ASC of Rockaway Beach	11/08/20 - 11/08/20	\$1,598.91	Awarded: \$1,598.91
Total			\$1,598.91	Awarded: \$1,598.91

B. The insurer shall also compute and pay the applicant interest set forth below. 04/06/2021 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from the date noted above until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty-day month.

C. Attorney's Fees

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

Respondent shall pay the Applicant attorney's fees in accordance with 11 NYCRR §65-4.6(d). As this matter was filed after 02/04/2015, this case is subject to the provisions promulgated by the Dept. of Financial Services in the Sixth Amendment to 11 NYCRR §65-4 (Ins. Reg. 68-D).

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 Nassau

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

07/25/2022
(Dated)

Nancy Kramer Avalone

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:
04698efb95d0a58a3b8e38f7e0090802

Electronically Signed

Your name: Nancy Kramer Avalone
Signed on: 07/25/2022