

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bryan M Elzholz, M.D., P.C.
(Applicant)

- and -

MVAIC
(Respondent)

AAA Case No. 17-22-1259-6689

Applicant's File No. 2820804

Insurer's Claim File No. 624501

NAIC No. Self-Insured

ARBITRATION AWARD

I, Melissa Melis, 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: patient

1. Hearing(s) held on 02/08/2023
Declared closed by the arbitrator on 02/08/2023

Jennifer Howard, Esq. from Israel, Israel & Purdy, LLP participated virtually for the Applicant

Frank D'Esposito, Esq. from Marshall & Marshall, Esqs. participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$994.75**, 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

The patient, a 47 year old female pedestrian was struck by an automobile on January 31, 2020. The Applicant provided the patient with an evaluation on March 29, 2022 and lumbar spine transforaminal injections with an epidurography on April 14, 2022. The claim of payment for the March 29, 2022 evaluation was not paid or denied. The Respondent alleged that it did not receive the bill for the date of service of March 29, 2022 and the date of service of April 14, 2022 was denied based on the peer review by Dr. Jeffry Beer dated June 1, 2022. The issue is whether or not the Applicant is entitled to No-fault benefits.

4. Findings, Conclusions, and Basis Therefor

Applicant is seeking reimbursement for the evaluation performed on March 29, 2022 and lumbar injections with epidurography performed on April 14, 2022. This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing.

In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations.

The Applicant submitted a proof of mailing of the bill for the date of service of March 29, 2022. Respondent alleged that it did not receive this bill. The proof of mailing submitted into evidence listed the name and address of the Respondent, the name of the Applicant, the name of the patient, the patient's account number, amount of the bill and a post mark of May 4, 2022 from the Great Neck, NY post office. I find this proof of mailing to be sufficient to show that the bill for date of service of March 29, 2022 was properly mailed on May 4, 2022 to the Respondent. The Respondent had until June 8, 2022 to pay or deny this bill. It denied receipt of the bill. I find based on the evidence that the Applicant is entitled to No-fault benefits for the evaluation conducted on March 29, 2022 in the amount of \$87.80 with interest from June 8, 2022 until the date of payment of this award.

The claim of payment for the lumbar transforaminal injection with epidurography conducted on the patient on April 14, 2022 was denied based on the peer review by Dr. Jeffry Beer dated June 1, 2022. Dr. Beer reviewed some medical records and opined that the lumbar transforaminal injection with epidurography was not medically necessary. Dr. Beer stated that the standard of care for a patient with acute musculoskeletal injuries is x-rays and conservative modalities with appropriate analgesic medications. The patient did not suffer from discogenic and radiculopathy syndrome. This injection was provided to the patient's lumbar spine. This injection did not require sedation. A local anesthetic alone would have been sufficient. In addition, he added that the epidurography was also not necessary since there was not a "...lack of obvious source of pain pathology..." Dr. Beer concluded that the lumbar transforaminal injection with epidurography conducted on April 14, 2022 was not medically necessary.

The Applicant submitted a rebuttal to the peer review from Dr Bryan Elzholtz dated January 10, 2023. Dr . Elzholtz stated that he disagreed with the opinion of Dr. Beer. He stated that he examined the patient and determined that the lumbar transforaminal injection with epidurography was medically necessary and warranted. This patient was two year post motor vehicle accident and still complaining of lower back pain radiating to the bilateral lower extremities with numbness and tingling. The patient complained of pain at a rate of 8-9/10. Dr. Elzholtz added that the patient's pre and post injection pain score was noted. The patient reported no side effects and stated that she had good pain relief. The patient received good results with previous medial branch nerve blocks. Dr. Elzholtz concluded that the injection provided to the patient on April 14, 2022 was medically necessary and warranted.

The Respondent submitted an addendum to the peer review from Dr. Beer dated January 13, 2023. He reviewed the rebuttal from Dr. Elzholtz and stated that his opinion was unchanged. He stated that the lumbar transforaminal injection with epidurography provided to the patient under fluroscopic guidance with sedation on April 14, 2022 was not medically necessary or warranted.

In order to support a lack of medical necessity defense, respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See, *Provvedere, Inc. v. Republic Western Ins. Co.*, 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to applicant. See generally, *Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006). The trial courts have held that a peer review report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See generally, *Nir v. Allstate Ins. Co.*, 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); See also, *All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

I find based on the evidence that the Respondent has failed to set forth the medical rationale and factual basis for denying payment for the lumbar transforaminal injection with epidurography provided to the patient under fluroscopic guidance on April 14, 2022. The denial was based on the peer review by Dr. Jeffry Beer dated June 1, 2022. Dr. Beer reviewed some medical records and concluded that the injection was not medically necessary. However, Dr. Beer did not relate his opinion with the examination and medical findings.

This patient was being treated for a period of two years. Yet, she was still suffering from radiating lower back pain with weakness and stiffness, thoracic spine tenderness and limited range of motion due to pain with bilateral lumbar lateral bending reproduces sciatica. Dr. Beer did not provide any specifics of the patient's condition when concluding that the injection was not medically necessary. As such, I find that the denial of payment for the lumbar transforaminal injection and epidurography provided under fluroscopic guidance on April 14, 2022 was not proper or substantiated.

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
	Bryan M Elzholz, M.D., P.C.	03/29/20 - 03/29/20	\$87.80	Awarded: \$87.80
	Bryan M Elzholz, M.D., P.C.	04/14/22 - 04/14/22	\$906.95	Awarded: \$906.95
Total			\$994.75	Awarded: \$994.75

- B. The insurer shall also compute and pay the applicant interest set forth below. 07/25/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is entitled to No-fault benefits for the evaluation conducted on March 29, 2022 in the amount of \$87.80 with interest from June 8, 2022 until the date of payment of this award.

With regard to the date of service of April 14, 2022, 11 NYCRR 65-3.9(a) provides, in pertinent part, "All overdue mandatory and additional personal injury protection benefits due an applicant or assignee shall bear interest at a rate of two percent per month, calculated on a pro rata basis using a 30 day month..." Since this bill was timely denied but the action was not instituted until 30 days after the date of the denial, interest is due at a rate of 2% per month, simple from the date after the date of filing of this arbitration until the date of payment of this award.

C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(d) which states: "For all other disputes subject to arbitration or court proceedings, subject to the provisions of subdivision (a) of this section, the attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon for each applicant per arbitration or court proceeding, subject to a maximum fee of \$1,360..."

- 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 NY

SS :

County of Suffolk

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

02/18/2023
(Dated)

Melissa Melis

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:
b597586b0edc11d380be8b4ebf7fc457

Electronically Signed

Your name: Melissa Melis
Signed on: 02/18/2023