

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 -

Integon National Insurance Company
(Respondent)

AAA Case No.	17-22-1243-1836
Applicant's File No.	STLG21-57579
Insurer's Claim File No.	9UINY08155
NAIC No.	29742

ARBITRATION AWARD

I, Philip Wolf, 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 02/15/2023
Declared closed by the arbitrator on 02/15/2023

Colleen Terry, Esq. from Strauss Terry Law Group, PLLC participated virtually for the Applicant

John Rossillo, Esq. from Rossillo & Licata LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$5,342.93**, was AMENDED and permitted by the arbitrator at the oral hearing.

Counsel for Applicant reduced the amount in dispute to \$5,292.97 in accordance with Respondent's fee audit.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

Assignor, a 35-year-old male, was the driver of a motor vehicle which was involved in an accident on June 20, 2020. As a result of the accident Assignor sustained injuries to his neck, lower back, and knees. Applicant is seeking reimbursement for the ambulatory

surgical center fee associated with Assignor undergoing a lumbar percutaneous discectomy on January 25, 2021. Respondent issued a timely denial predicated upon a March 10, 2021 peer review conducted by Jason R. Cohen, M.D. The issue in dispute is whether Respondent has established its lack of medical necessity defense.

4. Findings, Conclusions, and Basis Therefor

Applicant is seeking a total of \$5,292.97 for the ambulatory surgical center fee associated with Assignor undergoing a lumbar percutaneous discectomy on January 25, 2021. This award is rendered upon the oral arguments of counsel for both parties and upon the documentary evidence submitted by both parties. The documentary evidence submitted by the parties consists of the documents contained within the ADR Center for this matter as of March 11 18, 2023.

Applicants' Prima Facie Case

Assignor was the driver of a motor vehicle which was involved in an accident on June 20, 2020. As a result of the accident Assignor sustained injuries to his neck, lower back, and knees. On October 11, 2020, Assignor underwent an MRI of the cervical spine which revealed a herniated disc at C4-5 and bulges at C3-4, C5-6, and C6-7. On November 30, 2020, Assignor underwent an MRI of the lumbar spine which revealed bulges at L2-3, L3-4, L4-5 and L5-S1.

Assignor presented to Ketan D. Vora, D.O. on December 21, 2020 with complaints of neck pain, radiating lower back pain, and right knee. Neurological exam revealed hypoesthesia at the left lateral arm and hypoesthesia at the left distal medial thigh, and decreased muscle strength in bilateral hip flexion. Physical exam yielded positive findings with respect to Assignor's cervical spine, lumbar spine, left knee, and right knee. Doctor Vora recommended a lumbar epidural steroid injection at L4-5, a left knee genicular nerve block, a left knee intra-articular steroid injection, possible trigger point injections, and physical therapy.

On January 5, 2021, Assignor underwent a lumbar interlaminar epidural steroid injection with epidurography.

On January 18, 2021, Dr. Vora performed a telemedicine follow-up exam. At the time of the exam Assignor continued to complain of radiating lower back pain. Assignor reported a 25% improvement in pain after the lumbar epidural steroid injection. Doctor Vora recommended a lumbar discogram at L3-S1 level.

On January 25, 2021 Dr. Vora performed a follow-up exam. At the time of the exam Assignor complained of neck pain, radiating lower back pain, and bilateral knee pain. Neurological exam revealed hypoesthesia at the left lateral arm and hypoesthesia at the left distal medial thigh, and decreased muscle strength in bilateral hip flexion.

Physical exam yielded positive findings with respect to Assignor's cervical spine, lumbar spine, left knee, and right knee. Doctor Vora recommended a lumbar percutaneous discectomy.

On January 25, 2021, Assignor underwent a lumbar percutaneous discectomy at L3-L4 and lumbar trigger point injections.

After reviewing the evidence, I find that Applicant have submitted sufficient credible evidence to establish a prima facie case with respect to the ambulatory surgical center fee associated with Assignor undergoing the lumbar percutaneous discectomy on January 25, 2021. *See, Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 25 N.Y.3d. 498, 2015 NY Slip Op 04787, (2015).

Respondent's Peer Review Defense

Respondent issued a timely denial predicated upon a March 10, 2021 peer review conducted by Jason Cohen, M.D. Doctor Cohen opined that the lumbar percutaneous discectomy was not medically necessary. In reaching his opinion, Dr. Cohen does cite/reference to medical authority in compliance with the requirements set forth in *Jacob Nir, M.D. a/a/o Josaphat Etienne v. Allstate Ins. Co.*, 7 Misc. 3d 544, 796 N.Y.S.2d 857 (Civ. Ct. Kings Co. 2005) and *CityWide Social Work & Psychological Services, P.L.L.C. a/a/o Tremayne Brow v. Travelers Indemnity Company*, 3 Misc. 3d 608, 777 N.Y.S.2d 241 (Civ. Ct. Kings Co. 2004).

Doctor Cohen states "there is non-convincing evidence as to the efficacy of alternative nuclear decompression techniques." "Percutaneous discectomy is rarely indicated. It is sometimes useful in suspected septic discitis or in order to obtain diagnostic tissue. Percutaneous discectomy is not recommended for contained disc herniations or bulges with associated radiculopathy, due to lack of evidence to support long-term improvement." "There is no evidence or concern documented by Kean D. Vora, D.O. for discitis or need to obtain diagnostic tissue." "In case of failure of aggressive physical therapy and pharmacotherapy and along with confirmed diagnosis of radiculopathy the claimant should have been given a trial of epidural steroid injection X3 with outcome documented after each injection."

Respondent has also submitted a May 23, 2022 addendum to Dr. Cohen's peer review. Doctor Cohen reiterates his opinion. In addition, Dr. Cohen notes that percutaneous discectomy is not recommended for bulges with associated radiculopathy.

Applicant's Rebuttal

Applicant has submitted a rebuttal by Ketan Vora, D.O. Doctor Vora reiterates his history of exam findings. Doctor Vora states "contrary to the peer reviewer's statement, the patient's radiating pain, tenderness, spasm, trigger points, positive orthopedic tests, decreased muscle strength, decreased sensation and positive MRI findings warranted the necessity of these procedures. Thus a, it is clinically justified the need for Lumbar Discectomy with associated services." Doctor Vora states that percutaneous discectomy is recommended for patients that have "generally failed to improve with conservative

treatments, including medication, physical therapy, and spinal injections like Epidural Steroid Injection. Patients with a relatively small or contained disc herniation are better candidates than those with large herniations." "The clinical findings of this patient were of radicular nature which was further confirmed by positive MRI findings."

"Percutaneous discectomy is a widely accepted treatment for patients with small contained herniations for whom open surgical discectomy offers a outcome. It may also be a promising option for patients with large contained (non-ruptured disc) herniations for whom open surgery is not considered an appropriate treatment."

Determination of Medical Necessity

Where Respondent has presented sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to the Applicant, which must present its own evidence of medical necessity and/or rebuttal to Respondent's peer review. *See, A. Khodadadi Radiology, P.C. v. Central Mutual Fire Ins. Co.*, 2007 NY Slip Op 51342U, 16 Misc. 3d 131A (2nd Dept. 2007).

The MRI of the lumbar spine revealed bulging discs at L3-4 and L4-5. In his peer review and addendum, Dr. Cohen states that percutaneous discectomy is not recommended for bulging discs with radiculopathy. In his rebuttal, Dr. Vora repeatedly states that percutaneous discectomy is recommended for patients with disc herniations. However, Dr. does not state that percutaneous discectomy is recommended for patients with disc bulges.

In his peer review, Dr. Cohen states that Assignor should have undergone a series of three lumbar epidural steroid injections prior to undergoing a lumbar percutaneous discectomy. The evidence reveals that Assignor only underwent one lumbar epidural steroid injection prior to the subject percutaneous discectomy. In his rebuttal, Dr. Vora did not address Dr. Cohen's opinion regarding the need for a series of three steroid injections prior to undergoing a lumbar percutaneous discectomy. In his rebuttal, Dr. Vora states that a percutaneous discectomy is recommended when a patient fails to respond to conservative treatment such as epidural steroid injections. However, in his rebuttal, Dr. Vora noted that Assignor had a 25% improvement in pain level after undergoing the first lumbar epidural steroid injection.

Based upon the foregoing, and after reviewing the evidence, I find that Applicant has failed to submit sufficient credible evidence to rebut the peer review of Dr. Cohen. I am persuaded by the opinion of Dr. Cohen and his rationale as set forth herein and find that Applicant has failed to establish the medical necessity for the ambulatory surgical center fee associated with Assignor undergoing the lumbar percutaneous discectomy on January 25, 2021. Applicant's claim is denied in its entirety.

DECISION: Based upon the foregoing, Applicant's claim is denied in its entirety. This Award is in full disposition of all No-Fault benefit claims submitted to this Arbitrator.

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 claim is DENIED in its entirety

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

State of NY
SS :
County of Suffolk

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

03/11/2023
(Dated)

Philip Wolf

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:
8fe43331fdad496f764891551f330ee3

Electronically Signed

Your name: Philip Wolf
Signed on: 03/11/2023