

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 -

New York Marine & General Insurance
Company
(Respondent)

AAA Case No. 17-22-1236-6229

Applicant's File No. N/A

Insurer's Claim File No. ewr00212825

NAIC No. Self-Insured

ARBITRATION AWARD

I, Phyllis Saxe, 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(IS)

1. Hearing(s) held on 03/16/2023
Declared closed by the arbitrator on 03/16/2023

Kim Gitlin, Esq. from Dino R. DiRienzo Esq. participated virtually for the Applicant

Alejandra Perez, Esq. from Miller, Leiby & Associates, PC participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$12,256.06**, was AMENDED and permitted by the arbitrator at the oral hearing.

The parties amended the amount in dispute to \$6654.17.

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

3. Summary of Issues in Dispute

This no-fault arbitration dispute arises from an automobile accident that occurred on 7/2/21. The Assignor (IS) was a 43 -year-old male involved in an automobile accident and sustained injuries. On 8/27/21, IS had lumbar epidural steroid injections and trigger point injections with ultrasound guidance performed at Rockaway Surgery Center, and

on 9/19/21, IS underwent a lumbar percutaneous discectomy as well. The insurer issued two denials citing three peer review reports from Dr. Jefferey Perry, who argued that the procedures lacked medical necessity.

As a threshold matter, the parties agreed to reduce the amount in dispute to a total of \$6654.17 as per the fee schedule affidavit from CPC Spahr.

4. Findings, Conclusions, and Basis Therefor

Both parties appeared at the hearing via Zoom by counsel, who presented oral arguments and. I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center said submissions constitute the record in this case. 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.

Lack of Medical Necessity-

A peer reviewer must establish a factual basis and medical rationale for his asserted lack of medical necessity of the health care provider's services. See Amaze Medical Supply Inc. v. Allstate Ins. Co., 12 Misc.3d 142(A), 824 N.Y.S.2d 760 (Table), 2006 N.Y. Slip Op. 51412(U), 2006 WL 2035559 (App. Term 2d & 11th Dists. July 12, 2006). To support a lack of medical necessity defense, the 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 2, 11 and 13 Jud. Dists. nd th th 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 1 Dept. 2006).

The Lumbar Epidural Steroid Injections and Trigger point injections on 8/27/21.

Dr. Perry supplied a Peer review report dated 10/8/21. He argued that the medical records showed that the patient's pain was getting better and he was not taking medication. To him, this meant that the patient was responding to conservative treatment and there was no need for the Injections. Dr. Perry cited the ODG guidelines for support that Injections should only be performed if therapy and medication were not working. He also claimed that a twitch response is a necessary condition prior to performing trigger point injections.

Dr. Salem supplied a Rebuttal. He argued that the ODG Guidelines are not authoritative for No-Fault cases. He also pointed to the NIA Clinical Guidelines, Indications for epidural injections are- 1). Acute pain or exacerbation of chronic radicular pain with the following clinical time frames: a) Neck or back pain with acute radicular pain i) after 2 weeks or more of acute radicular pain that has failed to respond

or poorly responded to conservative (including medication) management unless the medical reason this conservative treatment cannot be done is clearly documented. b] Failed back surgery syndrome or epidural fibrosis causing radicular pain i) typically not done post-surgery immediately. Documentation requires a medical reason that clearly indicates why an injection is needed. ii) Patient must engage in some form of other active conservative treatment for a minimum of 6 weeks in the last 6 months or details of engagement in other forms of active conservative non-operative treatment if the patient had any prior spinal injections prior to epidural injections unless the medical reason this conservative treatment cannot be done is clearly documented. c] Spinal stenosis (foraminal, central or disc disease) causing radicular pain- patient must engage in some form of other active conservative treatment for a minimum of 6 weeks in the last 6 months or details of engagement in other forms of active conservative non-operative treatment if the patient had any prior spinal injections prior to epidural injections unless the medical reason this conservative treatment cannot be done is clearly documented. 2). Diagnostic transforaminal injection to identify the pain generator for surgical planning and 3). Pain causing functional disability or average pain levels of > 6 on a scale of 0 to 10.

As per the above-mentioned guidelines, in this clinical setting, the standard protocol was followed before proceeding to the LESI procedure as well as medical examination revealed persistent pain in the lumbar spine with positive subjective and objective findings along with the failure of the conservative treatment, which warranted the performance of the LESI procedure. Therefore, to get relief from such persistent lumbar pain symptom LESI procedure was taken into consideration and was medically necessary.

As for the trigger point injections and epidurography he argued that there was ample medical literature to support needing these procedures. A Twitch response is not the only criteria that is necessary. he pointed to multiple citations to support his opinion.

The Percutaneous Endoscopic Lumbar Discectomy on 9/19/21.

Dr. Perry supplied two Peer review reports for the Discectomy. In the 10/25/21 report, he referred to the ODG Guidelines which state that PCD is not efficacious He also took issue with the fact that before performing each procedures Dr. Hall examined the patient immediately prior to deciding to operate. To him, these evaluations were result oriented since he had already planned to perform the Injections and then the PED right after each evaluation. He argued that according to the medical documentation, the patient was participating in therapy, and surgery was not necessary. In his 11/3/21 Report, Dr. Perry reiterated his prior positions and concluded that neither procedure was medically necessary.

Dr. Salam's Rebuttal

With regards to lumbar discectomy, it should be noted that as per and article on the topic Discectomy by Alexander J. Butler; Chester J. Donnally III. Last Update: January 22, 2021, published in NCBI it is noted that indications: Urgent lumbar discectomy is necessary in cases of cauda equina syndrome and progressive or new motor deficit. Elective lumbar discectomy is indicated in cases of unremitting radicular symptoms that

correspond to radiographic evidence of nerve root compression by a herniated disc in patients that have failed conservative treatment methods. The Peer reviewer has overlooked that percutaneous disc discectomy is a minimally invasive procedure that effectively relieves pain for appropriate patients. As per the literature review on topic Minimum 2- Year Efficacy of Percutaneous Endoscopic Lumbar Discectomy versus Micro endoscopic Discectomy: A Meta-Analysis by Jietao Xu, et.al., World Neurosurgery Volume 138, June 2020, Pages 19-26 Minimally invasive surgery in the treatment of lumbar disc herniation has gained popularity in recent years, as 2 dominant techniques, percutaneous endoscopic lumbar discectomy (PELD) and microendoscopic discectomy (MED) obtained comparable short-term clinical outcomes.

Both PELD and MED can offer relatively effective and safe treatment for low back pain and radiculopathy associated with a herniated disc. PELD could obtain better midterm and long-term clinical outcomes compared with MED. This recent meta-analysis clearly justifies that lumbar percutaneous discectomy procedure is as effective which should not have been denied. This procedure has a much more rapid recovery, and can be an equally effective treatment.

Dr. Salem concludes that the LESI and the Discectomy were medically necessary and the clinical evidence supported that the patient needed these procedures performed to reduce his pain and limitations.

Thus, the Peer doctor's denial statement does not stand strong. Therefore, on 9/19/2021, the patient underwent a discectomy at the lumbar percutaneous discectomy, nucleus pulposus ablation at L4-L5 and L5-S1 levels, annuloplasty, and disc injection and radiographic Name: Issaka Sore Page | 7 interpretation performed by Andrew Hall, M.D. and assisted by Robert Robenov, PA-C., for the preoperative diagnosis of lumbar intervertebral disc displacement and lumbar radiculopathy. The post-operative diagnosis was the same as the pre-operative diagnosis.

After considering the three peer review reports, the medical case file's rebuttal, and counsel arguments, I find that the Insurer met its burden of proof. However, the applicant was able to refute Dr. Perry's concerns with medical support for each of the procedures. Admittingly the LESI was performed 3 weeks before the PED; however, nothing in the guidelines prohibited performing the PED so soon after the LEDI. Aside from the close proximity of the two procedures, no medical authority showed that this level of pain did not support these interventions. Nor is there any medical support that would indicate that PED is not efficacious. In fact, the current literature that the Applicant supplied states that there is growing approval in the medical community for performing the PED.

Accordingly, the Applicant is awarded \$6654.17 in full satisfaction of this claim.

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	Amount Amended	Status
	Rockaways ASC Developme nt LLC d/b/a ASC of Rockaway Beach	08/27/21 - 08/27/21	\$1,650.24	\$654.17	Awarded: \$654.17
	Rockaways ASC Developme nt LLC d/b/a ASC of Rockaway Beach	09/19/21 - 09/19/21	\$10,605.8 2	\$6,000.00	Awarded: \$6,000.00
Total			\$12,256.0 6		Awarded: \$6,654.17

- B. The insurer shall also compute and pay the applicant interest set forth below. 01/26/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals have interpreted this provision to apply regardless of whether the particular denial at issue was timely. *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217 (2009).

C. Attorney's Fees

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

1. Since this case was filed on or after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 11 NYCRR 65-4.6(d). For claims that fall under the Sixth Amendment to the regulation, the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved dispute, 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, Phyllis Saxe, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

04/13/2023
(Dated)

Phyllis Saxe

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:
f41c6804511a2f8082bf72f985d91be1

Electronically Signed

Your name: Phyllis Saxe
Signed on: 04/13/2023