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)	AAA Case No.	17-22-1268-0507
	Applicant's File No.	A-296
- and -	Insurer's Claim File No.	829247-GM
	NAIC No.	26093
Nationwide Affinity Insurance Company Of America (Respondent)		

ARBITRATION AWARD

I, Ioannis Gloumis, 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: EIP.

1. Hearing(s) held on 05/08/2023
   Declared closed by the arbitrator on 05/08/2023

   John Faris, Esq. from Law Offices of Solomon Aminov PC participated virtually for the Applicant

   Michele Rita, Esq. from Hollander Legal Group PC participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$7,898.71**, was NOT AMENDED at the oral hearing.
   Stipulations WERE made by the parties regarding the issues to be determined.

   Applicant stipulated that respondent timely denied the claim in dispute based upon the defense of lack of medical necessity.

3. Summary of Issues in Dispute

   Applicant seeks reimbursement of charges for ambulatory surgery center ("ASC") fees related to lumbar percutaneous discectomy, nucleus pulposis ablation, annuloplasty, and

disc injection procedures performed on April 18, 2022, following a January 6, 2022 motor vehicle accident. Respondent denied the claim in dispute based upon the defense of lack of medical necessity.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions contained in the American Arbitration Association's Electronic Case Folder in MODRIA, said submissions constituting the record in this case. This award is based upon the arguments that were presented by the parties during the arbitration hearing and the documentary evidence submitted by the parties. There were no witnesses that testified during the arbitration hearing.

SUMMARY OF FACTS

The EIP, then a 53-year-old female driver, was injured in a motor vehicle accident on January 6, 2022. Following the accident, the EIP sought private medical attention for multiple injuries. The EIP came under the care of multiple providers and underwent physical therapy, chiropractic care, and acupuncture. On April 18, 2022, Andrew Hall, M.D. performed lumbar percutaneous discectomy, nucleus pulposis ablation, annuloplasty, and disc injection procedures at Applicant's ASC.

Applicant billed Respondent $7,898.71 for the ASC's charges related to the lumbar percutaneous discectomy, nucleus pulposis ablation, annuloplasty, and disc injection procedures that were performed by Dr. Hall on April 18, 2022. Respondent received the bill for the claim in dispute on June 3, 2022.

LEGAL STANDARDS FOR PRIMA FACIE CASE

To establish a prima facie case, a claimant is required to submit proof that it timely sent its claim for no-fault benefits to the insurer, that the insurer received the claim, and that the insurer failed to pay or deny the claim within 30 days. See *Amaze Med. Supply Inc. v. Allstate Ins. Co*., 3 Misc.3d 133(A) (App Term, 2d & 11th Jud Dists 2004); *King's Med. Supply Inc. v. Country-Wide Ins. Co*., 5 Misc.3d 767 (Civ Ct, NY County 2004).

An insurer's denial of claim form indicating the date on which it was received adequately establishes that the claimant sent, and that the insurer received the claim. *Ultra Diagnostics Imaging v. Liberty Mutual Ins. Co*., 9 Misc.3d 97 (App. Term 9th & 10th Dists. 2005).

APPLICATION OF LEGAL STANDARDS TO THE CLAIM

Since Respondent's denial acknowledges that the claim in dispute was received by Respondent on June 3, 2022, Applicant has established its prima facie case. Furthermore, Applicant stipulated that Respondent timely denied the claim on August 30, 2022 based upon the defenses of lack of medical necessity.

DEFENSE - LACK OF MEDICAL NECESSITY

Peer Review Report - Jason Cohen, M.D. (August 26, 2022)

Dr. Cohen stated that the clinical impression following the evaluation performed by Dr. Hall on April 18, 2022 consisted of low back pain, lumbar radiculopathy, lumbar intervertebral disc displacement, lumbar facet syndrome, and myalgia. Dr. Cohen noted that the EIP was recommended percutaneous lumbar discectomy and annuloplasty, lumbar epidural steroid injection, lumbar medial branch block, and trigger point injection.

Dr. Cohen further stated that the operative report does not specify an exact placement of the compression and such inexact and generalized decompression cannot reasonably be expected to satisfactorily address the multilevel central disc herniation, bulging disc, severe multilevel facet disease, and bilateral lateral recess stenosis identified on MRI. Dr. Cohen also stated that Dr. Hall failed to indicate the medical necessity for his choice of decompression at the L1-L2 level despite multilevel pathology. Dr. Cohen opined that the complicated pathology identified on the MRI is best managed by a skilled spine surgeon.

Moreover, Dr. Cohen discussed the EUO testimony of the EIP. Respondent provided a copy of the EUO transcript. Dr. Hall discussed the EIP's use of medications, spine injection under anesthesia, employment status, and the description of the lumbar discectomy procedure. Dr. Cohen stated that the EIP testified that she was able to work the day after the surgery was performed. Dr. Cohen disagreed with the fact that the EIP could have worked as a home health care aide on the day after she had undergone lumbar discectomy. Dr. Cohen explained that it is a procedure under anesthesia and would take a minimum of three to five days to recover from the procedure. Dr. Cohen also cited the IME report by Dr. Levin dated May 13, 2022, which does not document any procedure or surgery being performed nor does the review of records section in the

report document any procedure report being reviewed. Dr. Cohen argued that this raises the question of whether the procedure was performed and can be clarified only on physical examination. Dr. Cohen also argued that the EIP agreed that the injection has not been helpful but continued to work in her regular capacity, which implies that she has no functional limitations and is not a candidate for any procedure.

Furthermore, Dr. Cohen stated that there is limited evidence to the efficacy of automated percutaneous lumbar discectomy; there is no evidence or concern documented by Dr. Hall for discitis or the need to obtain diagnostic tissue; there is inconsistent evidence surrounding the efficacy of annuloplasty; intradiscal annuloplasty is considered experimental, with no proven benefit over placebo; and there is a paucity of data surrounding sensitivity and efficacy of provocative discography.

Dr. Cohen further opined that even if there was suspicion of radiculopathy, physical therapy, pharmacotherapy including anti-inflammatories, gabapentinoids would have been the appropriate course of treatment, and the standard of care for physical therapy is two to three times per week for a six week duration which the claimant has completed; and in case of failure of combined physical therapy and pharmacotherapy, the claimant should have undergone a trial of epidural steroid injection x 3 with outcome documented after each injection on follow up consultation. Dr. Cohen opined that the accepted standard of practice has not been met to support the medical necessity for lumbar discectomy and all associated pre and post-operative services as the claimant had not completed epidural steroid injection x3 nor had trialed any aggressive pharmacotherapy including gabapentinoids; and in the event surgery was considered, the claimant should have been referred to surgical consultant and/or neurological consultant for further course of treatment. Dr. Cohen also opined that the treating physician has not ruled out other mechanisms of pain like spasm.

Rebuttal Evidence

Applicant presented a rebuttal from Dr. Gressel, wherein Dr. Gressel stated that the patient tolerated the surgical procedure well; there were no immediate complications from the procedures; the EIP was discharged to home in stable and ambulatory condition; and the operative report of the lumbar discectomy, dated April 18, 2022, clearly mentions all the procedures that were performed. Dr. Gressel opined that the procedures were medically necessary. Dr. Gressel stated that the MRI revealed a lumbar disc bulge, there was decreased range of motion, palpation of the lumbar facet revealed pain on both the sides at L3-S1 region, palpation of the bilateral sacroiliac joint area revealed right and left-sided pain, diminished muscle strength, decreased range of motion with pain and positive Straight Leg Raise test, and the EIP had mild relief with the injection; therefore, the next treatment option was lumbar discectomy.

Dr. Gressel cited Occupational Medicine Practice Guideline, published by ACOEM, second edition, which Dr. Gressel stated lists the following criteria to perform discectomy:

All of the following indications should be present:

1. Radicular pain syndrome with current dermatomal pain and/or numbness, or myotomal muscle weakness, all consistent with a herniated disc;

2. Imaging findings by MRI, or CT with or without myelography that confirm persisting nerve root compression at the level and on the side predicted by the history and clinical examination; and

3. Continued significant pain and functional limitation after 4 to 6 weeks of time and appropriate conservative therapy. (Hegmann K, Occupational Medicine Practice Guidelines, 2nd Ed (2008 Revision) - p. 851).

Dr. Gressel further stated that in this case, the patient demonstrated physical examination findings consistent with radicular pain syndrome (positive Straight Leg Raise Test, had a positive MRI finding (disc bulge) indicating radiculopathy/nerve root compression, and had failed extensive conservative treatment; thus, the discectomy was entirely warranted as per the OMP Guidelines.

Additionally, Dr. Gressel cited literature and stated that there are numerous studies which support the medical necessity of annuloplasty (IDET).

LEGAL STANDARDS FOR DEFENSE OF LACK OF MEDICAL NECESSITY

It is well established that the burden is on the insurer to prove that the medical treatment was medically unnecessary. See *A.B. Med. Servs., PLLC v. GEICO Ins*., 2 Misc.3d 26 (App Term, 2d & 11th Jud Dists 2003); *King's Med. Supply Inc. v. Country-Wide Ins. Co*., 5 Misc.3d 767, 772.

A denial premised on a lack of medical necessity must be supported by competent evidence such as an independent medical examination, a peer review or other proof which sets forth a factual basis and a medical rationale for denying the claim. See *Amaze Med. Supply Inc. v. Eagle Ins. Co*., 2 Misc.3d 128(A) (App Term, 2d & 11th Jud Dists 2003); *King's Med. Supply Inc. v. Country-Wide Ins. Co*., 5 Misc.3d 767, 771.

Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present

its own evidence of medical necessity. See *Prince, Richardson on Evidence §§ 3-104, 3-202* (Farrell 11th ed)); *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc.3d 131(A) (2006).

DECISION

Dr. Cohen opined that the accepted standard of practice has not been met to support the medical necessity for lumbar discectomy and all associated pre and post-operative services as the claimant had not completed an attempt of three epidural steroid injections nor had the EIP trialed any aggressive pharmacotherapy including gabapentinoids. Dr. Cohen also opined that in the event surgery was considered, the claimant should have been referred to surgical consultant and/or neurological consultant for further course of treatment.Dr. Cohen also questioned the procedure as the EIP testified that she returned to work on the day after the surgery.Dr. Gressel did not adequately address the opinion of Dr. Cohen or the arguments in his peer review report. Dr. Gressel only cited the Occupational Medicine Practice Guideline, published by ACOEM, second edition, for the criteria to perform discectomy and stated that the EIP had mild relief with the injection therefore the next treatment option was lumbar discectomy. Dr. Gressel did address Dr. Cohen's statement that the accepted standard of practice has not been met because the EIP had not completed an attempt of three epidural steroid injections nor had the EIP trialed any aggressive pharmacotherapy, or that the EIP should have been referred to a surgical consultant and/or a neurological consultant for further course of treatment. Dr. Gressel did not adequately explain why the discectomy and annuloplasty procedures were medically necessary after the first LESI, which provided partial relief according to the April 18, 2022 medical evaluation report by Dr. Hall. Dr. Gressel did not address the opinion of Dr. Cohen that the procedure under anesthesia would have required at least three days for recovery. I am not persuaded that the EIP was a surgical candidate and that the surgical procedures were medically necessary on April 18, 2022. I remain persuaded by the peer review report of Dr. Cohen in this case. Respondent's denial of the claim in dispute should be sustained.

Consequently, Respondent's denial of the charges related to the lumbar percutaneous discectomy, nucleus pulposis ablation, annuloplasty, and disc injection procedures are hereby denied in their entirety.

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 Nassau

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

06/07/2023
(Dated)

Ioannis Gloumis

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:
6d0f8dd8f291744740b1772fbdab232e

Electronically Signed

Your name: Ioannis Gloumis
Signed on: 06/07/2023