

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 -

Enterprise Rent A Car
(Respondent)

AAA Case No.	17-23-1303-6465
Applicant's File No.	TLD23-1031992
Insurer's Claim File No.	18568628
NAIC No.	Self-Insured

ARBITRATION AWARD

I, Marcie Glasser, 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: Claimant

1. Hearing(s) held on 10/30/2023
Declared closed by the arbitrator on 10/30/2023

Kurt Lundgren, Esq. from Thwaites, Lundgren & D'Arcy Esqs participated virtually for the Applicant

Johnny Ko, Esq. from McCormack, Mattei & Holler participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,555.03**, 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

This arbitration stems from treatment of a 43 year-old male who sustained injuries as a driver of a motor vehicle involved in an accident on June 29, 2022. The issue is whether the lumbar epidural steroid injection (L-ESI) and trigger point injection (TPI) administered on February 7, 2023, and therefore, the related service of the facility, were medically necessary. Denial is timely based on the Peer Review Report of Michael Tawfellos, M.D. dated March 30, 2023.

4. Findings, Conclusions, and Basis Therefor

This case was decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association and the oral arguments of the parties' representatives. I reviewed the documents contained in the electronic file for both parties and make a decision in reliance thereon.

The defense of medical necessity is premised on a Peer Review Report of Michael Tawfellos, M.D. dated March 30, 2023. Applicant submitted a Rebuttal Report of Hershel Kotkes, M.D. dated September 8, 2023.

A denial premised on lack of medical necessity must be supported by competent evidence such as an independent medical examination, peer review or other proof which sets forth a factual basis and medical rationale for denying the claim. *See, Healing Hands Chiropractic, P.C. v. Nationwide Assur. Co.*, 5 Misc3d 975 (2004). The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 2009 NY Slip Op 00351 (App Div. 2d Dept., Jan. 20, 2009); *Channel Chiropractic, P.C. v. Countrywide Ins. Co.*, 2007 Slip Op 01973, 38 A.D.3d 294 (1st Dept. 2007); *Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 NY Slip Op 27427, 17 Misc.3d 97 (App Term 1st Dept., 2007), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. 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, Jacob Nir, M.D. v. Allstate*, 7 Misc.3d 544, 796 N.Y.S 2d 857 (Civ. Ct Kings Co. 2005) 7; *All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Nir, supra*.

An insurance carrier must, at a minimum, establish a detailed factual basis and a sufficient medical rationale for its asserted lack of medical necessity. *Vladimir Zlatnick, M.D., P.C. v. Travelers Indem. Co.*, 2006 NY Slip Op 50963(U) (App. Term, 1st Dep't 2006); *accord Delta Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co.*, 21 Misc. 3d 142(A), 2008 NY Slip Op 52450(U) (App. Term, 2d Dep't, 2nd & 11th Jud. Dists. 2008).

Respondent's Peer Review Report

Dr. Tawfellos concluded that the injections were not medically necessary. The Claimant was evaluated on July 12, 2022 for lower back pain. Examination of the lumbar spine revealed decreased range of motion and straight leg raise test was positive. The Claimant underwent TPI on July 12, 2022. The diagnosis was myofascial pain syndrome. The Claimant received physical therapy and pain medication. The MRI report of the lumbar spine on September 2, 2022 revealed disc herniation. On September 22, 2022, the Claimant presented for evaluation and examination of the lumbar spine revealed decreased range of motion, tenderness and spasm. Facet loading testing was positive. Conservative treatment and lumbar facet block injection was recommended. Per the evaluation report of Dr. Kotkes on February 1, 2023, the Claimant had lower back pain. Examination revealed tenderness at L3-S1. Range of motion was decreased and straight leg raise test was positive. The diagnoses were lower back pain, lumbar radiculopathy, lumbar intervertebral disc displacement, and lumbar facet syndrome. Conservative treatment was recommended. On February 7, 2023 the Claimant underwent L-ESI under fluoroscopic guidance at L5 level with epidurography by Dr. Kotkes. The pre-operative and post-operative diagnoses were myofascial pain and myalgia. The Claimant received only six sessions of conservative treatment in the form of physical therapy and inadequate to resolve the pain. The Claimant should have received adequate conservative treatment before proceeding with L-ESI. Repeat TPI may be considered necessary when there is at least 50% pain relief for a minimum of six weeks following the injection. There is no evidence of this relief after the initial TPI on July 12, 2022 and September 13, 2022.

Applicant's Rebuttal Report

Dr. Kotkes disagreed with the Peer review Report. The patient had lumbar radiculopathy secondary to disc displacement based on the correlation between his signs and MRI results (disc herniation at L5-S1), pain and radicular symptoms recalcitrant to more than 7 months of conservative management including medications, lumbar support and physical therapy. Therefore, L-ESI was necessary. The records document that there was improvement in the lumbar myofascial pain after the initial TPI. However, considering that TPI on July 12, 2022 and September 13, 2022 only produced temporary relief in alleviating the pain, and the symptoms of lumbar myofascial pain returned, performing another TPI to the lumbar musculature was necessary. TPI for conditions such as fibromyalgia and myofascial pain syndrome may provide temporary relief and can be repeated as needed. The patient was evaluated on February 1, 2023. He had sharp and shooting lower back pain radiating to the buttock region and left lower extremity affecting the L5-S1 dermatomal distributions. Interim treatment consisted of physical therapy 3-4 times a week and anti-inflammatory medications with minimal short term pain relief. Examination of the lumbar spine revealed decreased range of motion on all planes tested secondary to pain, positive straight leg raise test indicative of nerve root compression secondary to disc displacement, and reduced motor muscle strength in the left lower extremity. Diagnoses were lumbar radiculopathy, lumbar intervertebral disc displacement and myalgia. Interventional pain management procedures which included L-ESI and TPI were recommended and performed on February 7, 2023. Despite

medication and physical therapy for over 7 months, the patient continued to complain of lower back pain affecting the L5-S1 dermatomal distributions, and malagia. LESI and TPI were medically necessary for lumbar radiculopathy and returning myofascial pain.

Legal Analysis

Applicant has established its *prima facie* entitlement to reimbursement based on submission of a properly completed claim form setting forth the amounts of the losses sustained and establishing that No-Fault payment is overdue. The denial is found to be sufficient as a matter of law. Therefore, Applicant's burden is also established by submission of sufficient medical records. *Ave. T MPC Corp. v Auto One Ins. Co.*, 32 Misc. 3d 128 (A), 934 N.Y.S. 2d 32 (Table), 2011 N.Y.S Slip Op. 41292(U), 2011 WL2712964 (App Term 2d, 11th & 13th Dists., 7/5/2011); *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D. 3d 782, 774 N.Y.S. 2d 564 (2nd Dep't., 2004), *Vista Surgical Supplies, Inc. v. Metropolitan Property and Casualty Ins. Co.*, 2005-1328 K.C., 2006 N.Y. Slip Op. 51047 (U), June 2, 2006.

The burden then shifts to Respondent to establish lack of medical necessity for L-ESI and TPI which warrants competent, expert proof in admissible form. *Citywide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co.*, 3 Misc. 3d 608, 777 N.Y.S. 2d 241, 2004 N.Y. Slip Op. 24034 (Civ Ct., Kings Co., 2004), *aff'd.*, 8 Misc. 3d 1025 (2005). I find that Respondent's Peer Review Report is sufficient to meet its burden of proof of lack of medical necessity. Therefore, the burden shifts back to Applicant to present competent medical proof as to the medical necessity by a preponderance of credible evidence. *West Tremont Medical Diagnostic, P.C. v. GEICO*, 13 Misc. 3d 131 [A], 824 N.Y.S. 2d 759 (Table), 2006 N.Y. Slip Op. 51871(U), 2006 WL 2829826 (App. Term 2d 11 Jud. Dists. 9/29/06), *A. Khodadadi Radiology, P.C. v. N.Y. Central Fire Mutual Insurance Company*, 16 Misc. 3d 131 [A], 841 N.Y.S. 2d 824, 2007 WL 1989432 (App Term 2d & 11 Dists. 7/3/09). Ultimately, the burden of proof rests with the Applicant (*See*, Insurance Law Section 5102).

I find that this burden has been met by Applicant's medical records, the Rebuttal Report of Dr. Kotkes, and the evidence collectively. I am convinced that this Claimant sustained causally related injuries which manifested as myofascial and radicular pain. The Claimant had attempted an adequate course of conservative treatment measures despite which the pain complaints persisted as confirmed by the medical reports. The Claimant had continued complaints of lumbar radiculopathy, with radiological and clinical findings consistent with this diagnosis, as well as myofascial pain. L-ESI and TPI are effective and standard treatment modalities for this Claimant's injuries, and therefore, I am persuaded that the standard of care was met in administering these injections. Dr. Kotkes addressed the salient points of the Peer Review Report. Applicant has presented competent medical proof as to the medical necessity by a preponderance of credible evidence.

No evidence was presented establishing that the bills in dispute were in excess of the applicable fee schedule. Respondent has not submitted a fee coder affidavit or any competent evidentiary proof that Applicant's claims exceeded the appropriate fee

schedules. *See, Continental Medical PC v. Travelers Indemnity Co.*, 11 Misc. 3d 145 A, 819 N.Y.S. 2d 847, 2006 NY Slip Op 50841U, 2006 N.Y. Misc. LEXIS 1109 (App. Term, 1st Dep't, , 2006).

Accordingly, in light of the foregoing, based on arguments of counsel and after thorough review and consideration of all submissions, I find in favor of the Applicant.

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
	Rockaways ASC Development LLC d/b/a ASC of Rockaway Beach	02/07/23 - 02/07/23	\$1,555.03	Awarded: \$1,555.03
Total			\$1,555.03	Awarded: \$1,555.03

- B. The insurer shall also compute and pay the applicant interest set forth below. 06/14/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Based on the submission of timely denials, interest shall be paid from the date of filing for arbitration on the amount awarded of \$1,555.03 at a rate of 2% per month, simple, and ending with the date of payment of the Award, subject to the provisions of 11 NYCRR 65-3.9(e).

C. Attorney's Fees

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

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 Applicant an attorney's fee in accordance with newly promulgated 11 NYCRR 65-4.6(d) on the amount awarded of \$1,555.03.

- 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 FL

SS :

County of Palm Beach

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

10/31/2023
(Dated)

Marcie Glasser

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:
209f39d17186c7b85bc34b7732ae0afe

Electronically Signed

Your name: Marcie Glasser
Signed on: 10/31/2023