

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bergenfield Surgical Center  
(Applicant)

- and -

Hereford Insurance Company  
(Respondent)

AAA Case No. 17-23-1282-9183

Applicant's File No. 00109016

Insurer's Claim File No. 97485-03

NAIC No. 24309

### ARBITRATION AWARD

I, Neal S Dobshinsky, 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: J Doe

1. Hearing(s) held on 10/11/2023  
Declared closed by the arbitrator on 10/11/2023

Sasha Hochman from Drachman Katz, LLP participated virtually for the Applicant

Adam Bird-Ridnell from Law Offices of Ruth Nazarian participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$6,608.28**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended the amount claimed to \$1,423.89 in accordance with its interpretation of the fee schedule. The fee as amended is consistent with Insurer's interpretation.

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

3. Summary of Issues in Dispute

On 11/2/22, a physician administered bilateral medical branch nerve block injections under fluoroscopic guidance to J Doe. The procedures were performed at Applicant's facility. Applicant sought payment of the facility fee.

Based on a report by its peer reviewer, Insurer denied payment on the ground that the injections were not causally related to the 3/16/22 accident and not medically necessary.

Were the injections causally related / medically necessary?

#### 4. Findings, Conclusions, and Basis Therefor

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##### Preliminary Note Regarding Linked Cases

Two administratively linked cases were heard by me on the same day. The cases involve common issues of fact and law-the same accident, injured person, insurer, and lack of causation / lack of medical necessity defense. AAA Case nos. 17-23-1283-4487 (physician's fee), and 17-23-1282-9183 (facility fee).

To avoid inconsistent awards, all the evidence has been considered in both cases even where a particular item may have been omitted from the submissions for one or another.

In addition, I have heard and decided several cases involving the same accident, injured person, and insurer. The cases involve these applicants/providers. The medical evidence on both sides is cumulative and repetitive. For purposes of this award, familiarity with the more detailed factual background of the accident, Doe's injuries, and ongoing treatments as recited in the several linked awards is assumed.

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I have read and considered the materials in the AAA ADR case file and the authorities cited by the parties that could be located and are not behind a paywall. I have heard and considered the arguments of counsel. I find as follows:

##### **Background**

On 3/16/22, J Doe, then 37 years old, was a passenger in a motor vehicle that was in an accident. The vehicle was insured for no-fault benefits by respondent Insurer. Doe claimed he was injured. He sought care and treatment from many providers.

Before 3/16/22 Doe had been under the active care of Jonathan Simhaee, MD, a pain management specialist, and other physicians at Brooklyn Premier Orthopedic Center for Musculoskeletal Disorders ("Applicant") for a work-related injury on 12/22/19 (low back), a prior motor vehicle accident on 8/27/21 (neck, low back, and other injuries) and other injuries. Doe had a cervical epidural steroid injection on 3/2/22. He had had hernia surgery on 1/13/22 and knee surgery on 2/8/22.

Following the 3/16/22 accident, Doe underwent several surgeries, injections, and other treatments.

On 11/2/22, Simhaee administered bilateral L3/4, L4/5, ALA medial branch nerve block injections under fluoroscopic guidance. The procedures were performed at applicant Bergenfield Surgical Center's facility in Bergenfield, New Jersey.

### **Applicant's Claim and Insurer's Denial**

Applicant, as Doe's assignee, timely submitted a claim, in the total amount of \$6,608.28, to Insurer for no-fault benefits for payment of the facility fee for the 11/2/22 procedures. At the hearing Based on a report by its peer reviewer, Insurer denied payment on the ground that the injections administered on 11/2/22 were not causally related / not medically necessary.

The only issue argued and submitted for determination was whether the injections were causally related to the 3/16/22 accident / medically necessary. All other issues were waived.

### **Medical Necessity / Causation and the Burden of Proof**

Medical necessity for services or supplies is established by proof of an applicant's properly submitted claim form. *All County Open MRI & Diagn. Radiology P.C. v Travelers Ins. Co.*, 11 Misc3d 131(A), 2006 NY Slip Op. 50318[U] [App Term, 2d Dept 9th & 10th Jud Dists 2006]. It is undisputed that Applicant's submission established the presumption of medical necessity for the procedures.

The insurer "bears both the burden of production and persuasion" as to its lack of medical necessity defense. *Nir v Allstate Ins. Co.*, 7 Misc3d 544, 546 [Civ Ct, Kings County 2005]. The defense must be supported by a peer review report or other evidence, such as an independent medical examination report. The report must set forth a sufficiently detailed factual basis and medical rationale for the denial. *Amaze Med. Supply v Eagle Ins. Co.*, 2 Misc3d 128[A], 2003 NY Slip Op 51701[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2003].

Furthermore, an [insurer] has the burden to come forward with proof in admissible form to establish "the fact" or the evidentiary "found[ation for its] belief" that the patient's treated condition was unrelated to his or her automobile accident. *Mount Sinai Hosp. v Triboro Coach Inc.*, 263 AD2d 11, 19-20 [2d Dept 1999] [internal citations omitted]. "Unlike negligence actions where plaintiffs must prove causation, plaintiffs seeking to recover first party no-fault payments bear no such initial burden, as causation is presumed." "Exacerbations of preexisting conditions are covered by the No-Fault Law. *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 AD3d 13, 21, 23 [2d Dept 2009] [internal citations omitted]. Aggravation of preexisting conditions is covered as well. 11 NYCRR 65-3.14 (a).

"[H]owever, it is the [applicant] who has the ultimate burden of proving, by a preponderance of the evidence, that the services at issue were necessary" (internal citations omitted). *Radiology Today, P.C. v Geico Ins. Co.*, 58 Misc3d 132(A), 2017 NY Slip Op 51768[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017].

### **The Peer Review and Insurer's Lack of Causation / Lack of Medical Necessity Defense**

Insurer's denial is based on an affirmed peer review by Vijay Sidhwani, DO, a physician board certified in physical medicine & rehabilitation and pain medicine. In his 12/6/22 report, Sidhwani gives his reasons and opinions why the injections and related services were not medically necessary and were unrelated to the injuries Doe sustained in the 3/16/22 accident.

Sidhwani lists the records and reports he reviewed. These included prior peer reviews, 6/29/22 and 10/18/22 and the records Sidhwani reviewed for those reports; procedure notes and related records for the bilateral lumbar medial branch block injections Simhaee performed on 11/2/22; and various other records and reports.

Sidhwani's report follows the same pattern as his other peer reviews. He gives a pages-long detailed history of Doe's treatments focused on the period after 3/16/22.

Sidhwani states that the bilateral lumbar medial branch blocks administered by Simhaee on 11/2/22 were not medically necessary and not related to the 3/16/22 accident.

Sidhwani fails to show, with a reasonable degree of medical certainty, that the accident was Sidhwani fails to show, with a reasonable degree of medical certainty, that the accident was not and could not have been the biological cause of the injury to Doe's lumbar spine. He does not show that the timing of the onset of Doe's complaints / symptoms / signs was not appropriate in relation to the accident. He does not offer another, more probable alternative explanation for the injury, complaints, symptoms, and signs than the accident, especially since he did not review any x-rays, MRIs, or other records or reports regarding Doe's physical / medical condition, and specifically regarding Doe's lumbar spine, prior to the underlying accident. He fails to discuss, explain, or exclude the possibility of aggravation or exacerbation of the pre-existing injuries he highlights. He fails to provide persuasive credible evidence to establish that Doe' claimed injury and, therefore, the injections were unrelated to the underlying accident.

Sidhwani's opinion is not consistent with the treatment history, the records reviewed or the voluminous records in the submissions, or the authorities he cites. Accordingly, Sidhwani fails to set forth an adequate factual basis or medical rationale to support Insurer's denial of Applicant's claim. Insurer did not meet its initial evidentiary burden. It failed to establish its lack of causation / lack of medical necessity defense.

Where an insurer fails to meet its initial evidentiary burden, no rebuttal is required. Nevertheless, I note that Applicant submitted a rebuttal to Sidhwani's peer review by Simhaee, dated 8/23/23 and that Insurer submitted a response (an addendum) by Sidhwani dated 9/5/23.. Neither the rebuttal nor the addendum was considered because Insurer did not meet its initial evidentiary burden.

**Conclusion**

Insurer failed to establish its lack of causation / lack of medical necessity defense.

Based on the parties' submissions, their arguments, the law, the regulations, and the weight of the credible evidence, I conclude that Applicant is entitled to \$1,423.89.

- 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
	<b>Bergenfield Surgical Center</b>	<b>11/02/22 - 11/02/22</b>	<b>\$6,608.28</b>	<b>\$1,423.89</b>	<b>Awarded: \$1,423.89</b>
<b>Total</b>			<b>\$6,608.28</b>		<b>Awarded: \$1,423.89</b>

- B. The insurer shall also compute and pay the applicant interest set forth below. 01/17/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Insurer shall compute and pay interest from the accrual date noted above-the date on which Applicant requested arbitration by filing with the AAA-at a rate of 2% per month, simple interest, calculated on a pro-rata basis using a 30-day month and ending with the date of payment subject to the provisions of 11 NYCRR 65-3.9.

C. Attorney's Fees

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

Insurer shall pay Applicant's attorney a fee in an amount equal to 20% of the total amount of the benefits plus interest awarded in this arbitration, subject to the provisions of 11 NYCRR 65-4.6.

- 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 NJ

SS :

County of Monmouth

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

11/10/2023  
(Dated)

Neal S Dobshinsky

**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:**  
87c265d5c7eb8a290e096f72ffa3a0bd

**Electronically Signed**

Your name: Neal S Dobshinsky  
Signed on: 11/10/2023