

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

CitiMed Surgery Center, LLC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-22-1267-3255

Applicant's File No. LIP-21873

Insurer's Claim File No. 1111947-02

NAIC No. 16616

ARBITRATION AWARD

I, Nancy Kramer Avalone, 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 DG

1. Hearing(s) held on 11/06/2023
Declared closed by the arbitrator on 11/06/2023

Usman Nawaz Esq. from Law Offices of Ilya E Parnas P.C. participated virtually for the Applicant

Helen Cohen, Esq., of Counsel from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,952.76**, 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

Assignor DG was a 50-year old male involved in a motor vehicle accident on March 17, 2022, as a rear-seated passenger. He was evaluated at Coney Island Hospital following the accident.

Applicant is an ambulatory surgery center seeking reimbursement associated with a Cervical Epidural Steroid Injection ("CESI) on June 1, 2022 and a Thoracic Epidural Steroid Injection ("TESI") provided to Assignor DG on June 29, 2022. Respondent denied the claims asserting that the (respective) procedures were not medically necessary based upon the peer review of Ajendra S. Sohal, MD, Board Certified in

Physical Medicine and Rehabilitation, and Pain Management. Applicant submitted a rebuttal report by Yeseniya Aronova, MD.

The issue presented is whether the facility fees associated with the Cervical and/or Thoracic Epidural Steroid Injections was medically necessary.

4. Findings, Conclusions, and Basis Therefor

The instant matter was decided based upon the submissions of the parties as contained in the electronic file ("E-file") maintained by the American Arbitration Association (MODRIA), and the oral arguments of the parties' representatives. The hearing was held via a web-based video conferencing platform (ZOOM). I have reviewed the documents contained in the E-file, heard the arguments of the parties, and make my decision in reliance thereon.

Pursuant to 11 NYCRR §65-4.5(o)(1), an arbitrator shall be the judge of the relevance and materiality of the evidence offered. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations.

Under Sec. 5102 of the New York Insurance Law (McKinney 1985), No-Fault first party benefits are reimbursable for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle.

An Applicant establishes its *prima facie* entitlement to reimbursement by proof that it submitted its claim, setting forth the fact and amounts of the losses sustained, and that payment of no-fault benefits was overdue. Insurance Law § 5106(a); *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (App. Div. 2004); *Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 2015 NY Slip Op 04787, 25 N.Y.3d 498, 14 N.Y.S.3d 283, 35 N.E.3d 451 (2015). After reviewing the Records, I find that Applicant established its *prima facie* case of entitlement to No-Fault compensation.

At the time of the hearing, Applicant asserted that the denial issued for date of service June 1, 2022 was untimely submitted; the claim was received on July 26, 2022 and denied on August 30, 2022. However, review of the Record showed that the Respondent requested additional verification from the Applicant which was not provided until after the denial was issued, on September 14, 2022. Thus, I do not find that the denial of claim form was untimely issued.

Lack of medical necessity is a valid defense to an action to recover No-Fault benefits. *AJS Chiropractic, P.C. v Travelers Ins. Co.*, 25 Misc.3d 140(A) (App Term 2009).

The Respondent must, at a minimum, establish a detailed factual basis and a sufficient medical rationale for its asserted lack of medical necessity. *Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co.*, 21 Misc.3d 142A, 880 N.Y.S.2d 223 (2nd Dept.

2008). Additionally, it must be proven that said rationale is supported by evidence of the generally accepted medical/professional practices. *Nir v. Allstate Ins. Co.*, 7 Misc.3d 544 (Civ Ct, Kings County 2005).

When the insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the Applicant/provider which must then present its own evidence of medical necessity. See generally, *W. Tremont Med. Diagnostic, P.C. v. Geico Ins. Co.*, 2006 NY Slip Op 51871(U), 13 Misc. 3d 131(A), 824 N.Y.S.2d 759 (App. Term).

Where the denial is predicated upon a peer review report, and the peer review report establishes prima facie, that there was no medical necessity for the services performed, the provider must refute the peer review doctor's determination. See *A Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co.*, 16 Misc. 3d 131(A), 841 N.Y.S.2d 824, 2007 NY Slip Op 51342(U), (App. Term 2007).

Similarly, where the insurer denies the claim based upon an Independent Medical Examination (IME) of the Assignor, and the IME establishes prima facie that there was no medical necessity for continued treatment, the Applicant/provider bears the burden of demonstrating that the treatment at issue was medically necessary by a preponderance of the credible evidence. See, *Amato v. State Farm Ins. Co.*, 40 Misc. 3d 129(A), 2013 NY Slip Op 51113(U), (App Term 2013).

In support of the lack of medical necessity for the CESI provided on June 1, 2022, the defense, the Respondent relied upon the peer review report of Dr. Sohal, dated August 24, 2022. Dr Sohal concluded that the injection was not medically necessary stating that the Assignor did not present with radicular pain generated from the cervical spine, nor was he taking medication which would have been indicative of radiculopathy. She also cited a medical journal article which stated that "[T]he optimum treatment of compressive cervical radiculopathy is the subject of continued debate, and there is little convincing evidence that any treatment improves upon the natural history of the condition." The year of publication was not noted.

Regarding the TESI provided on June 21 2022, Dr. Sohal drafted a peer review concluding that the services were not medically necessary. Dr. Sohal quoted "[T]he role of ESI is in the cases where there is significant leg pain more than mid back pain with sensory, motor and reflex deficits and dural tension signs as well as corresponding imaging findings. This is warranted in the cases where surgery is being contemplated as the surgery sparing procedure is also indicated when the claimant cannot participate in rehabilitative process." Per Dr. Sohal, the evaluating physician did not indicate the presence of neurological deficits and hardly any pharmacological intervention such as NSAIDS, steroids, Gabapentin prescribed.

However, Dr. Sohal also noted that the Assignor presented to the evaluating physician on June 21, 2022 and advised status post-CESI of June 1, 2022 was 60% relief; pain range was 6/10 in cervical spine, 7/10 in mid back with radiating pain to the shoulders; the patient's medical history included hypertension, Diabetes Meletus type II, and

morbid obesity. Again, Dr. Sohal cited an article which stated that the optimum treatment for cervical radiculopathy is subject of debate.

With respect to the CESI provided on June 1, 2022, Applicant relied on the medical documentation in the Record, and the rebuttal report by Dr. Aronova, a treating physician who stated as follows:

- Dr. Aronova advised that MRI study of the cervical spine conducted on May 10, 2022 revealed bulging disc at C2/3 with central herniation, indenting the thecal sac, limited right paracentral inferior extrusion of the herniation, further indenting the thecal sac, extruded right paracentral herniation at C3/4, containing an annular tear component, and indenting the thecal sac, inferiorly extruded central herniation at C4/5 with near cord impingement, bulging disc at C5/6 with thecal sac impingement and bulging disc at C6/7 with left bony foraminal stenosis;
- On May 17, 2022, the diagnosis was cervical disc disorder with radiculopathy: despite conservative treatment, the patient's condition did not truly improve; when he presented for further evaluation with complaints of neck pain radiating to the bilateral shoulder at 8/10; Examination of the cervical spine revealed muscle spasms, decreased range of motion with pain and positive Facet Loading Points as well as Spurling's test. Neurological examination of the upper extremities revealed decreased muscle strength. The diagnosis was cervical disc disorder with radiculopathy. Therefore, the patient was recommended cervical epidural steroid injection.

With respect to the TESI, the undersigned arbitrator previously deemed the services medically necessary in AAA Case No.: 17-22-1290-9685, after hearing date of May 17, 2022.

My review of the medical records revealed that after an evaluation by a neurologist on June 16, 2022, upper extremity EMG/NCV were recommended. The Assignor was diagnosed with radiculitis of the thoracic spine. It also appeared that the Assignor had been taking NSAIDs per the reports, and not acknowledged in the peer review.

It is clear that the Assignor was consistently complaining of ongoing cervical and thoracic pain with radiating pain since the time of the accident. He received two MRI studies of the thoracic spine per the report, on April 13, 2022 and May 10, 2022. The MRI showed herniation with impingement. He had undergone conservative treatment and trigger point injections with minimal relief. He had undergone CESI with 60% relief.

Additionally, regarding the TESI, Dr. Sohal contradicted herself in the peer when she stated that there was no motor loss in the second paragraph of her peer because she

noted loss of muscle strength in the first paragraph. Also, there were neurological deficits noted in the exam prior to the CESI which contradicted the facts stated by Dr Sohal regarding the CESI.

Based on all of the foregoing facts, I find that the medical documentation established the medical necessity for the facility fees associated with the CESI and the TESI by a preponderance of the evidence.

Therefore the claim is awarded to the Applicant. *This award is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.*

Applicant is entitled to statutory interest, attorney fees and the filing fee, as set forth in Sections 6. B, C and D, below.

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
	CitiMed Surgery Center, LLC	06/01/22 - 06/01/22	\$976.38	Awarded: \$976.38
	CitiMed Surgery Center, LLC	06/29/22 - 06/29/22	\$976.38	Awarded: \$976.38
Total			\$1,952.76	Awarded: \$1,952.76

B. The insurer shall also compute and pay the applicant interest set forth below. 09/22/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from the date noted above until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty-day month.

C. Attorney's Fees

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

Respondent shall pay the Applicant attorney's fees in accordance with 11 NYCRR §65-4.6(d). As this matter was filed after 02/04/2015, this case is subject to the provisions promulgated by the Dept. of Financial Services in the Sixth Amendment to 11 NYCRR §65-4 (Ins. Reg. 68-D).

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 Nassau

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

11/22/2023
(Dated)

Nancy Kramer Avalone

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:
d40458b49a21e9f1da7211a12d48c513

Electronically Signed

Your name: Nancy Kramer Avalone
Signed on: 11/22/2023