

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bryan M Elzholz, M.D., P.C.  
(Applicant)

- and -

Allstate Insurance Company  
(Respondent)

AAA Case No. 17-23-1300-3489

Applicant's File No. 2970776

Insurer's Claim File No. 0664509833

NAIC No. 29688

**ARBITRATION AWARD**

I, Lori Ehrlich, 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 12/12/2023  
Declared closed by the arbitrator on 12/12/2023

Jen Howard, Esq. from Israel Purdy, LLP participated virtually for the Applicant

Marina Sechenova, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$9,152.37**, 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

In dispute is Applicant's claim in the sum of \$9,152.37 for a lumbar discectomy and annuloplasty performed on Applicant's Assignor, S.G., a twenty five-year old female, said claim arising from an automobile accident on March 31, 2022.

Respondent has denied this claim based on the peer review and addendum of Dr. Michael Tawfellos, and Applicant relies on the rebuttal of Dr. Bryan Elsholz. The issue presented is one of medical necessity. Respondent also raises fee schedule issues.

The parties appeared via Zoom.

I have reviewed the documents entered into the ADR by December 12, 2023.

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

The surgery at issue was performed on the Claimant on February 27, 2023. Applicant has set forth a prima facie case for each of the claims at issue by the submission of a completed health claim form documenting the fact and amount of the loss sustained (*Amaze Medical Supply v. Eagle Ins. Co.*, 2 misc. 3d 128A, 784NYS 2d 918, 2003 NY Slip Op.517014 [App Term, 2d & 11 Jud. Dusts.]). Given that Applicant has set forth a prima facie case, the burden now shifts to the insurer to prove that the services at issue were not medically necessary. (see *Citywide Social Work & Psy. Serv. P.L.L.C v. Travelers Indemnity Co.*, 3 Misc. 3d 608, 2004 NY Slip Op 24034 [Civ. Ct., Kings County 2004]).

Dr. Tawfellos concluded that the surgery at issue was not medically necessary stating, " In this case, the claimant was involved in the MVA dated 3/31/2022 and had a complaint of pain in the lower back. The lumbar spine surgery was performed on 2/27/2023. As per the available medical records, the claimant was engaged in conservative sessions in the form of physical therapy and chiropractic treatment from 4/7/2022 to 7/22/2022. There was no indication of failure of the conservative care. The claimant discontinued the sessions till the surgery was performed. Also, there was no evidence that the pain was persistent. Further, as per the IME report dated 10/27/2022 by Regina O. Hillsman, M.D., examination of the lumbar spine revealed normal findings." Dr. Tawfellos further opined that because the surgery was not medically necessary, the related services were also medically unnecessary.

In response, Dr. Elsholz contends that Dr. Tawfellos' reliance on Dr. Hillsman's IME is misplaced, noting that her diagnosis of resolved sprain/strain of the lumbar spine is inconsistent with the medical records. Dr. Elsholz highlights that a lumbar MRI performed on May 14, 2022, revealed broad-based central disc herniation, thecal compression and impingement at the L3-L4 level and broad-based central disc herniation, thecal sac compression and impingement, and narrowing of the left neural foramen at the L4-L5 level; EMG/NCV studies performed on June 23, 2022, revealed bilateral L4-L5 lumbosacral radiculopathy; an MRI performed on July 26, 2022, revealed multiple levels of disc herniation, disc bulging, and nerve root impingement; and, "most importantly, an EMG/NCV study performed on February 3, 2023, which revealed ongoing evidence of right L4-L5 radiculopathy and objectively disproves Dr. Hillsman's contention that the patient's injuries had resolved at the time of her October 27, 2022, IME."

Dr. Elsholz states, "On February 10, 2023, I noted ongoing complaints including severe pain in the lower back (8/10 in severity) with significant radicular symptoms including pain radiating into the bilateral lower extremities (particularly along the posterior aspect of the bilateral feet, 4/5 weakness in the lower extremities, and sensory deficits in the

lower extremities. I noted that these symptoms were persistent despite conservative treatment including physical therapy, NSAIDs, and lumbar epidural steroid injections, contrary to Dr. Tawfellos's statements that "there was no evidence that the pain was persistent" and "no indication of failure of the conservative care." Thus, at this point, I appropriately recommended the surgery at issue, based on the benefits outlined below."

Dr. Elsholz further maintains that an MRI need not reveal "irreversible pathological changes" to warrant surgery, rather, he maintains that it is sufficient that the patient experience significant, ongoing radicular pain of discogenic origin despite conservative treatment, such as in this case.

Dr. Tawfellos submitted an addendum to his peer review stating that his position as to the medical necessity of the surgery remains unchanged despite reviewing the rebuttal.

Upon careful review of the evidence presented I find that the rebuttal is more compelling than the peer review. Accordingly, I defer to the opinion of the treating physician/surgeon in determining the medical necessity of the services at issue.

Respondent also raises a fee schedule defense. When raising a fee schedule defense, Respondent has the burden to come forward with competent evidentiary proof to support its fee schedule defenses. Robert Physical Therapy, P.C. v. State Farm Mut. Auto. Ins. Co., 13 Misc. 3d. 172(Civ. Ct. Kings Co. 2006). When a Respondent fails to demonstrate by competent evidentiary proof that an Applicant's claim was in excess of the appropriate fee schedules, Respondent's defense of noncompliance with the appropriate fee schedule cannot be sustained. Continental Medical, P.C. v. Travels Indemnity Co., 11 Misc. 3<sup>rd</sup> 145A (App. Term 1<sup>st</sup> Dept. 2006).

Respondent submits the affidavit of Jeffrey Futoran, a certified professional coder, who states that the total amount to which Applicant is entitled to be reimbursed is \$5,823.08. Mr. Futoran notes that the physician and physician assistant charges utilized CPT codes 62287, 22526, 22527, 62290, 77003, which are listed in the Surgery and Radiology sections of the fee schedule. He cites to the AMA CPT Assistant publication, July 2012, page 3, which provides reporting instructions for CPT code 62287, and states, "Do not report 62287 in conjunction with 62267, 62290, 62311, 77003, 77012, 72295, when performed at same level)" He further maintains that because CPT 62287 may not be reported separately, the code cannot be billed, and therefore Applicant is not entitled to any reimbursement for CPT procedures reported under CPT 62287.

Mr. Futoran further cites to Surgery Ground Rule 5 (GR 5), Multiple or Bilateral Procedures, which provides, "When multiple procedures, unrelated to the major procedure and adding significant time or complexity are provided at the same operative session, payment is for the procedure with the highest allowance plus half of the lesser procedures. The same rule applies of bilateral procedures when such are not specifically identified in the schedule." Mr Futoran concludes that per GR5, the first unit of CPT 22526 is reimbursed at 100 percent as the highest procedure, CPT 62290 is deemed a lesser procedure and paid at half, and CPT 22527 is an exempt "add-on code" and reimbursable at the full amount billed.

In addressing the radiology codes for the professional component billed by Applicant, Mr. Futoran states that the main code 72295, the Highest Procedure, is reimbursable as billed (\$246.64), an additional unit of CPT code 72295 is reimbursable at \$184.98 (75% of \$246.64) and CPT code 77003 is reimbursable at \$45.28, (75% of \$60.37 billed). I find that Respondent has submitted competent evidentiary proof that Applicant's claim was in excess of the appropriate fee schedules. Given that Applicant has failed to submit any evidence to rebut the Coder's affidavit, Applicant is awarded \$5,823.08.

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
	<b>Bryan M Elzholtz, M.D., P.C.</b>	<b>02/27/23 - 02/27/23</b>	<b>\$9,152.37</b>	<b>Awarded: \$5,823.08</b>
<b>Total</b>			<b>\$9,152.37</b>	<b>Awarded: \$5,823.08</b>

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/19/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Insurer shall pay interest at the rate of 2% per month, simple (not compounded), on a pro rata basis using a 30-day month. Interest shall be computed from May 19, 2023 to the date of payment.

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 as to attorney fee promulgated in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D): There is an attorney fee of 20% of benefits plus interest, with no minimum fee and a new maximum fee of \$1360.00. However, for all arbitration requests filed on or after April 5, 2002, if the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

- 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 Westchester

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

01/02/2024  
(Dated)

Lori Ehrlich

**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:**  
6e0a360ad9d916f5599e4bb60399aeaf

### Electronically Signed

Your name: Lori Ehrlich  
Signed on: 01/02/2024