

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Island Ambulatory Surgery Center LLC
(Applicant)

- and -

Avis Budget Group
(Respondent)

AAA Case No. 17-23-1321-9398

Applicant's File No. 00121216

Insurer's Claim File No. 228031238-007

NAIC No. Self-Insured

ARBITRATION AWARD

I, Kent Benziger, 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.C.

1. Hearing(s) held on 06/24/2024
Declared closed by the arbitrator on 06/24/2024

Mikhail Guseynov, Esq. from Drachman Katz, LLP participated virtually for the Applicant

Brian Kaufman, Esq. from Hollander Legal Group PC participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,920.40**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant has amended the amount in dispute to \$1,423.90 for the proper EAPG fee schedule for this ambulatory surgical fee pursuant to Respondent's certified coder.

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

3. Summary of Issues in Dispute

On August 28, 2022, the Assignor/Eligible Injured Party, a 30-year-old male, was, by history, involved in a motor vehicle accident. In dispute is Island Ambulatory Surgery Center's fee for the performance of lumbar facet joint injections (bilateral L3-4, L4-5, L5-S1 - 64493-50, 64494-50, 64495-50) performed on January 13, 2023. The

Respondent timely denied reimbursement based on the peer review of Dr. Gary Yen. . Applicant contends that the treatment records and diagnostic studies - which were not adequately discussed by the peer review - establish the necessity of the studies pursuant to the authoritative sources cited by the peer review. Applicant also relies on this arbitrator's prior decision for the surgical bills for this same procedure in Tri-Borough NY Medical Practice Pc v. Avis, AAA Case No. 17-23-1298-6092 (February 13, 2024).

4. Findings, Conclusions, and Basis Therefor

On August 28, 2022, the Assignor/Eligible Injured Party, a 30-year-old male, was, by history, involved in a motor vehicle accident. Following the accident, the Assignor reportedly was not evaluated in an emergency room. The Assignor was first evaluated by Kyungsook Bu FNP on August 29, 2022 for complaints of pain in the head, left shoulder, neck, left knee and middle and lower back. An exam noted decreased range of motion in the left knee, cervical spine, and left shoulder. Positive orthopedic findings included an SLR test. The Assignor commenced conservative care.

On October 3, 2022, a lumbar MRI was performed and interpreted as revealing diffuse bulges and protrusions measuring 2-3 mm causing mild narrowing and mild facet arthropathy. The assessment included lumbar radiculopathy and disc displacement.

Through a January 13, 2023 pre-operative evaluation with Sina Menshehoff, D.O., the Assignor complained of back pain rated 8/10. The lumbar MRI was reviewed including findings of bulging discs, disc protrusions, facet arthropathy and degenerative changes narrowing the central canal and left neural foramen. As the same day, lumbar facet joint injections (bilateral L3-4, L4-5 and L5-S1) were performed with an operative diagnosis of lumbar facet syndrome. The treatment was further described as intra-articular facet joint injections, diagnostic medial branch nerve blocks and facet joint denervation with radiofrequency (neurotomy). The stated purpose of the procedure was to reduce pain from inflammation and/or degenerative/spondylitic disease ,

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Denial. The Respondent issued a timely denial based on a peer review from Dr. Gary Yen who found the medical records failed to support the standard of care for the lumbar facet prevertebral injections and lab work. He cited the following sources:

The standard of care for medial branch block injections or intra-articular facet joint injections is as follows: recommended for patients with pain suspected to be largely facet in origin based on exam findings (i.e., nonradicular axial pain aggravated by extension-facet loading) and/or documented evidence (i.e.,

imaging study) of facet disease (facet arthropathy/hypertrophy at the targeted level(s). The pain has to be non radiating and absent of a dermatome pain pattern.

This is cited in Park, et al: "Numerous studies show that degenerative or anatomical changes of the spine, such as degenerative disc disease, spondylolisthesis, facet hypertrophy, facet angle and facet tropism, are associated with facet joint pain or facet degeneration [11,18,21,34,35,36,37]."

Again, cited in Sandhu H, et.al: "In clinical practice it would be unusual to do a diagnostic procedure before considering a therapeutic intra-articular facet joint injection; the diagnosis of probable facet joint pain is usually made on clinical grounds alone."

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The major indications for facet injections include strong clinical suspicion of the facet syndrome, focal tenderness over the facet joints, low back pain with positive degenerative radiological findings, post laminectomy syndrome with disc disease, and persistent low back pain after spinal fusion. Medial branch block injections or intra-articular facet joint injections are recommended for patients with pain suspected to be largely facet in origin based on exam findings (i.e., non-radicular axial pain aggravated by extension-facet loading) and/or documented evidence (i.e., imaging study) of facet disease (facet arthropathy/hypertrophy at the targeted level(s).

Dr. Yen opined that the medical records did not support that the Assignor's pain was largely coming from facet origin, but rather non-specific myofascial pain. The peer review, therefore, concluded that the lumbar facet injections/medial branch blocks were not medically necessary.

Analysis. A presumption of medical necessity attaches to a Respondent's admission of the Applicant's timely submission of proper claim forms. The Respondent then bears the burden to prove that the treatment was not medically necessary *Kings Med. Supply Inc. v. Country-Wide Ins.*, 5 Misc.3d 767 (2004); *Behavioral Diagnostics v. Allstate Ins. Co.*, 3 Misc.3d 246 (2004); *A.B. Med. Servs v. Geico Ins.* 2 Misc.3d 16 (App. Term 2d Dept. 2003). In this case, the peer review must submit "objective testimony or evidence to establish that his opinion is what is generally accepted in the medical profession." *Williamsbridge Radiology v. Travelers*, 14 Misc.3d 1231(a) (Civ. Ct Kings Co. 2007). When a carrier uses a peer review as basis for the denial, the report must contain evidence of the applicable generally accepted medical/professional standards as well as the provider's departure from those standards. *Acupuncture Prima Care v. State Farm Mut. Auto Ins. Co.* 17 Misc. 3d 1135 (Civ. Ct. Nassau, 12/03/07). Therefore, a peer reviewer must thoroughly review the relevant medical records and give evidence of generally accepted medical standards. Then, through careful analysis, the peer reviewer must apply those standards to the facts to document that the treatment in question was not medically necessary. See: *CityWide Social Work & Psychological Services v. Travelers Idem. Co.*, 3 Misc.3d 608, 609 (Civil Ct. Kings Co. 2004).

As a finding of fact, the peer review is not persuasive. Dr. Yen, the peer reviewer, has cited sources that studies have found that "anatomical changes of the spine, such as degenerative disc disease, spondylolisthesis, facet hypertrophy, facet angle and facet tropism, are associated with facet joint pain or facet degeneration". Dr. Yen concluded his report that the claimant's pain was largely coming not from the facet origin, but rather non-specific myofascial pain.

However, the treatment records and diagnostic studies were not adequately reviewed or discussed by the peer reviewer. These treatment records and diagnostic studies noted degenerative changes, facet arthropathy which, according to the sources cited by the peer reviewer, are indicative of facet syndrome. A peer review must incorporate, discuss and review the patient's complete medical history. *Carle Place Chiropractic v. New York Central Mut. Fire Ins. Co.*, 19 Misc.3d 1139(A), (Dist. Ct. Nassau Co., Andrew M. Engle, J., May 29, 2008). Following a clinical examination, the treating provider Sina Menshehoff, D.O., stated that the purpose of the disputed treatment was to reduce pain from inflammation and/or degenerative/spondylitic disease. Finally, a description of the procedures establish that the treatment and injections also included medial branch blocks. In sum, a close reading of the treatment records and diagnostic studies establish a proper diagnosis of facet origin pain pursuant to the sources cited by the peer review. The Respondent has failed to sustain its burden of proof of lack of medical necessity. *Nir v. Allstate Insurance Company*, 7 Misc.3d 544, 546, 547 (2005).

The above rationale was also the basis of my award for the surgical bills for this same treatment as reflected in *Tri-Borough NY Medical Practice Pc v. Avis*, AAA Case No. 17-23-1298-6092 (February 13, 2024). Applicant contends my prior decision on this same treatment constitutes collateral estoppel. The doctrine of collateral estoppel precludes a party from re-litigating in a subsequent action or proceeding, an issue that

was raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. See, *Ryan v. New York Telephone*, 62 N.Y.2d 494, 478 N.Y.2d 823 (1984). The doctrines of res judicata and collateral estoppel are fully applicable to arbitration proceedings. *American Ins. Co., v. Messinger*, 43 N.Y.2d 184, 401 N.Y.S.2d 36 (1977); *Clemens v. Apple*; 65 N.Y.2d 746, 492 N.Y.S.2d 20 (1985); *County of Rockland v. Aetna Casualty & Surety Co.*, 129 A.D.2d 606, 514 N.Y.S.2d 102 (2 Dept. 1987).

Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), an arbitrator is the judge of the relevance and materiality of the evidence offered.

Interest. The insurer shall compute and pay to the Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(d)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.33300 which is the total amount awarded one Applicant in one action from one provider. See: *LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co.*, 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

APPLICANT IS AWARDED REIMBURSEMENT OF \$1,423.90, TOGETHER WITH INTEREST AND ATTORNEYS' FEES.

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
	Island Ambulatory Surgery Center LLC	01/13/23 - 01/13/23	\$3,920.40	\$1,423.90	Awarded: \$1,423.90
Total			\$3,920.40		Awarded: \$1,423.90

B. The insurer shall also compute and pay the applicant interest set forth below. 10/20/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest. The insurer shall compute and pay to the Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(d)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.33300 which is the total amount awarded one Applicant in one action from one provider. See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

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 Orange

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

07/22/2024
(Dated)

Kent Benziger

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:
7adc09cc522114d434676eb5e05978ef

Electronically Signed

Your name: Kent Benziger
Signed on: 07/22/2024