

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 -

Allstate Insurance Company
(Respondent)

AAA Case No.	17-23-1324-7140
Applicant's File No.	TLD23-1048622
Insurer's Claim File No.	0681868170-01
NAIC No.	19232

ARBITRATION AWARD

I, Linda Filosa, 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

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

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

John Palatianos Esq from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,878.20**, 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

The Assignor is a 60 yr old female driver that was involved in a motor vehicle accident on 8/18/22. The Assignor received Radiofrequency denervation procedure and ultrasound guided trigger point injection on 6/12/23. The Applicant is seeking reimbursement for services rendered and the Respondent denied the claim based upon lack of medical necessity via peer review report of Jason Lipetz, MD.

4. Findings, Conclusions, and Basis Therefor

The record in this case consists of claimant's submission and respondent's submission. In accordance with 11 NYCRR 65-4.5 (o) (1) (Regulation 68-D), the Arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems to making an award that is consistent with the Insurance Law and Department Regulations.

A claimant "(makes) a prima facie showing of entitlement to judgment as matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of no-fault benefits were overdue." Mary Immaculate Hospital v. Allstate Insurance Company 5 AD 3rd 742, 774 N.Y.S 2d 564 (2nd Dept. 2004).

The Applicant has established their prima facie as stated above. The burden now switches to the Respondent.

The Respondent relies upon their timely denial and the peer review report of Jason S. Lipetz dated, 7/25/23.

The peer states in pertinent part, "As can be extrapolated from the lumbar literature and as is highlighted in Lumbar Axial Pain - An Algorithmic Methodology. In: Interventional Spine. An Algorithmic Approach. Slipman C, et al (eds). Elsevier. Philadelphia, PA. 2008. pgs 975-977, and Traeger, AC. Effect of primary care based education on reassurance in patients with acute low back pain. Systematic review and meta-analysis. JAMA Int Med, 2015. 175(5) 73343. an algorithmic approach to the patient with lumbar axial pain initially employs relative rest, activity modification, therapeutic exercise, and analgesic use for up to 4-6 weeks prior to introducing a more interventional approach."

The peer goes on to state that trigger point or dry needling is excessive. "The appropriate role for trigger point injection therapy in more select clinical scenarios is highlighted in Liss H, et al. Medical Rehabilitation. In: Interventional Spine - An Algorithmic Approach. Slipman CW, Derby R, Simeone FA, Mayer TG (eds). Saunders - Elsevier. Philadelphia, PA. 2008. Pgs. 871-92. While there are no randomized controlled trials supporting the use of trigger point injections for lumbar pain syndromes, there is extensive literature describing trigger points and injection technique. Trigger points, often comprised of taut bands which when palpated will result in characteristic pain referral patterns, are presumed to serve as a primary pain generator in myofascial pain syndromes. If such trigger points remain symptomatic despite an adequate trial of physical therapy, localized injection is reasonable. It is recommended that such injections be performed with local anesthetic alone or "dry needling" techniques. The use of steroid, such as Decadron, is reserved for cases in which significant muscular soreness is noted to have resulted from previous injection therapy. In this case, the patient was treated with a spinal approach which presumes a deeper-seated and primary spinal pain generator, namely a discogenic, posterior element, or radicular pain source. Medical justification cannot be established therefore for a concurrent multilevel trigger point injection procedure. If the patient's symptoms were felt to be of significant

myofascial origin, a less interventional trial of trigger point therapy should be exhausted prior to proceeding with a spinal injection approach."

It is noted that the Assignor did undergo physical therapy at a rate of 2-3 times per week as of 1/26/23 as noted in Dr. Herschel Kotkes report. In addition, lumbar epidural steroid injections were performed on 2/2/23, as was reviewed by the peer doctor. Therefore, based upon the Respondent's own authority and the Assignors continued positive findings during exam, provided indication for treatment rendered.

In order to support a lack of medical necessity defense respondent must "set forth a factual basis and medical rationale for his conclusion" as stated in Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 20140. Respondent bears the burden of production in support of it lack of medical necessity defense, which if established shifts the burden of persuasion to applicant. See generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 4(App. Term 2d & 11th Dists. Sept. 29, 2006).

I find that the Respondent has not met their burden in establishing a lack of medical necessity, as the authority and peer review show that physical therapy and less interventional injection therapy was tried and failed.

The claim is awarded. There being no support for a fee schedule argument, the claim is awarded in full.

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	06/12/23 - 06/12/23	\$1,878.20	Awarded: \$1,878.20
Total			\$1,878.20	Awarded: \$1,878.20

- B. The insurer shall also compute and pay the applicant interest set forth below. 11/10/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

N.Y. Comp. Codes R. & Regs. tit. 11, § 65-3.9 (2002), "Interest on overdue payments," the Respondent shall pay interest to the Applicant on the awarded overdue PIP benefit at a rate of two percent (2%) per month calculated on a pro rata basis using a thirty (30) day month.

Applicant is awarded interest pursuant to the no-fault regulations. 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm, 12 N.Y.3d 217 (2009)

C. Attorney's Fees

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

As this matter was filed after February 4, 2015, 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 the applicant an attorney's fee, in accordance with 11 NYCRR 65-4.6(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 Suffolk

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

07/24/2024

(Dated)

Linda Filosa

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:
e88c065720c3abe235e8c9a3ec7c9ced

Electronically Signed

Your name: Linda Filosa
Signed on: 07/24/2024