

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Portal Medical PC
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-24-1331-0872

Applicant's File No. 3153506

Insurer's Claim File No. 0524850890001

NAIC No. 36447

ARBITRATION AWARD

I, Andrew Horn, 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, eligible injured person, EIP.

1. Hearing(s) held on 07/09/2024
Declared closed by the arbitrator on 07/09/2024

Neda Melamed, Esq., from Israel Purdy, LLP, participated virtually for the Applicant

Maria Bona, claims representative, from LM General Insurance Company, participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$12,440.26**, was AMENDED and permitted by the arbitrator at the oral hearing.

The four bills comprising the claim were amended without objection to a total of \$9,730.92.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated the four bills comprising the claim were timely denied and the charges for the surgery, as amended, were in accordance with the applicable fee schedule.

3. Summary of Issues in Dispute

In dispute is Applicant Portal Medicine P.C.'s amended claim as the assignee of a 24-year-old female injured in a motor vehicle accident on February 2, 2023, for reimbursement for (1) an initial examination by Dr. Benjamin Portal, its owner, on March 8, 2023, (2) a lumbar epidural steroid injection (ESI) with epidurography and ultrasound-guided trigger point injections by Dr. Portal on April 2, 2023, (3) a lumbar percutaneous discectomy and associated services rendered by Dr. Portal and physician assistant (PA) Robert Robenov on July 18, 2023, and (4) a cervical epidural steroid injection (ESI) with epidurography and ultrasound-guided trigger point injections by Dr. Portal on August 15, 2023.

Respondent LM General Insurance Company paid in full for the examination.

The insurance carrier denied the remaining three bills comprising the claim on the ground that the services were medically unnecessary according to peer reviews by Dr. Stuart Stauber (dated April 19, 2023), Dr. Douglas Unis (dated June 18, 2023), and Dr. Matthew H. Kalter (dated September 13, 2023).

Although Applicant's attorney objected to consideration of Dr. Stauber's peer review, which was not uploaded until June 25, 2024, one month prior to the hearing, I declined to preclude it.

It is within an arbitrator's discretionary authority to entertain late submissions. 11 NYCRR § 65-4.2(b)(3)(ii); Matter of Global Liberty Ins. Co. v. Coastal Anesthesia Servs., LLC, 145 A.D.3d 644 (1st Dept. 2016); Matter of Mercury Cas. Co. v. Healthmakers Med. Group, P.C., 67 A.D.3d 1017 (2d Dept. 2009).

4. Findings, Conclusions, and Basis Therefor

An insurance carrier 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 142(A) (App Term 2d Dept. 2008); Vladimir Zlatnick, M.D., P.C. v. Travelers Indem. Co., 12 Misc.3d 128(A) (App Term 1st Dept. 2006).

In opining that the services rendered on April 2, 2023 were unneeded, Dr. Stauber, a Diplomate of the American Board of Internal Medicine, stated that the standard of care to treat injuries such as those suffered by the provider's assignor is "evaluation by a physician, ordering of plain radiographs ..., prescribing of medications such as anti-inflammatory medications, rest and / or conservative physiotherapy for a period of 6-8 weeks."

While he acknowledged that, after a trial of conservative treatment, "interventional pain management or surgery may be indicated depending upon the results of ... advanced

imaging or the progression of the condition," the peer reviewer did not then proceed to explain why the treatments rendered more than eight weeks after the accident, after assignor had been started on a therapy program seven weeks earlier, and after magnetic resonance imaging (MRI) revealed disc bulges, deviated from the standard of care.

While Dr. Stauber also stated that lumbar ESIs are "necessary when the patient presents with pain that has a clear radicular component, and where traditional or more conservative approaches have been attempted and have not worked effectively," the injured person when seen by Dr. Portal on March 9, 2023 continued to complain of back pain radiating to the knees and left foot with tingling and numbness. While the peer reviewer also contended that TPIs should "be used as an adjunctive treatment in combination with other active treatment modalities," the injured person was continuing to undergo physical therapy.

Consequently, given this presentation, it is unclear to me how the clinical situation fell outside the parameters set forth by Respondent's expert as warranting interventional pain management.

Thus, it appears to me that, at best, this is a situation where the peer reviewer overlooked or ignored medical records in his (or the insurer's) possession, see A.B. Med. Servs. PLLC v. Peerless Ins. Co., 13 Misc.3d 25 (App Term 2d Dept. 2006), or, at worst, where the "opinion ... offered by (an insurer's) medical expert" "reflect(s) the expert's ... lack of knowledge as to the assignor's medical condition," see Webster Ave. Med. Pavilion, PC v. Allstate Ins. Co., 42 Misc.3d 148(A) (App Term 1st Dept. 2014).

Accordingly, Respondent's denial of this bill is vacated.

2.

In opining that performance of the lumbar percutaneous discectomy was contrary to accepted medical standards, Dr. Unis stated that, in order for the surgery to be indicated, "(a)ll of the following should be present: (1) radicular pain syndrome with current dermatomal pain and/or numbness, or myotomal muscle weakness all consistent with a herniated disc; (2) imaging findings by MRI... or CT ... that confirm persistent nerve root compression at the level and on the side predicted by the history and clinical examination; and (3) continued significant pain and functional limitation after 4 to 6 weeks ... (of) appropriate non-operative therapy that usually includes NSAID(s)."

However, in the instant case, he maintained that there was neither any documented failure of anti-neuropathic pain medications nor evidence that a series of three epidural steroid injections (ESIs) had been rendered "prior to considering aggressive interventional procedures." Nor were there any "(p)rogressive neurological deficits," which he "considered a separate indication."

In opining that performance of the cervical ESI and other injections on August 15, 2023 were contrary to accepted medical standards, Dr. Kalter, a Diplomate of the American Board of Physical Medicine and Rehabilitation, stated that, while CESIs "have a clinically established role in the treatment of acute and sub-acute radicular pain in the

neck," they "should be restricted to patients with radicular pain of no greater than 6 months in duration" since "(i)t is unlikely that a temporary anti-inflammatory steroid injection will be curative for the patient at this point." As the subject services were performed more than six months after the accident, he concluded that their performance deviated from the standard of care.

Inasmuch as Dr. Unis and Dr. Kalter "demonstrated a factual basis and a medical rationale for (their) determination(s) that there was no medical necessity for the services at issue here," "the burden shifted to (the provider) to present (its) own evidence of medical necessity." See Cappello v. Global Liberty Ins. Co. of N.Y., 57 Misc.3d 143(A) (App Term 1st Dept. 2017).

In order for an applicant to prove that the disputed expense was medically necessary, it must meaningfully refer to, or rebut, the conclusions set forth in the peer review. See High Quality Medical, P.C. v. Mercury Ins. Co., 26 Misc.3d 145(A) (App Term 2d, 11th & 13th Dists. 2010); Pan Chiropractic, P.C. v. Mercury Ins. Co., 24 Misc.3d 136(A) (App Term 2d, 11th & 13th Dists. 2009).

Standing alone, an injured person's "subjective complaints of pain cannot overcome objective medical tests." Arnica Acupuncture, P.C. v. Interboard Ins. Co., 137 A.D.3d 421 (1st Dept. 2016).

It is ultimately the provider who must prove, by a preponderance of the evidence, that the services were reasonable and necessary. See Dayan v. Allstate Ins. Co., 49 Misc.3d 151(A) (App Term 2d Dept. 2015); Park Slope Med. & Surgical Supply, Inc. v Travelers Ins. Co., 37 Misc.3d 19, 22 n (App Term 2d, 11th & 13th Dists. 2012).

To refute Dr. Unis and Dr. Kalter's peer reviews, Applicant relies principally upon medical reports in the record: Electrodiagnostic testing, which showed, contrary to the former peer reviewer's contention, evidence of nerve root compression including posterior disc bulges at L1 - 2 and L4 - 5 levels and left L4-L5 radiculopathy; the lumbar ESI performed at L5 on April 2, 2023, which brought relief for a few months before the pain returned; Dr. Valeria Loukanova-Ivanov's February 9, 2023 report, which demonstrated that assignor was prescribed Tylenol, Motrin, Naproxen, and Lidocaine ointment and physical therapy and trigger point injections (TPIs) were ordered; Dr. Azriel Benaroya's May 12, 2023 report, which revealed assignor had been taking pain medications as needed and was advised to continue taking anti-inflammatories and muscle relaxants.; and Dr. Portal's June 18, 2023 report, which noted that, notwithstanding conservative treatment, assignor continued to complain of low back pain radiating to her left lower extremity on that date.

The conflicting medical expert opinions adduced by the parties sufficed to raise an issue as to the medical necessity of the treatment underlying the provider's first-party No-Fault claim. See Advanced Orthopedics, PLLC v. New York Cent. Mut. Fire Ins. Co., 42 Misc.3d 150(A) (App Term 2d, 11th & 13th Dists. 2014); Pomona Med. Diagnostics, P.C. v. Praetorian Ins. Co., 42 Misc.3d 126(A) (App Term 1st Dept. 2013).

After careful consideration of both parties' evidence, I find that, after Respondent made its showing that the underlying services were not medically necessary, Applicant met its burden of demonstrating, by a preponderance of the credible evidence, that the performance of the procedures on June 18, 2023 did not deviate from the standard of care. Although the insurer's orthopedist pointed out that there were no documented progressive neurological deficits, this is, as he noted, a separate indication for the procedure. Moreover, none of the authorities cited by Dr. Unis include as a prerequisite the performance of a series of three ESIs.

While I am cognizant that, in a related matter, Sedation Vacation Perioperative Medicine PLLC and LM General Ins. Co., AAA Case No. 17-23-1314-9363 (April 5, 2024), which involved a claim for the anesthesia administered during the procedure, I upheld the denial predicated upon Dr. Unis' peer review, that matter involved a different provider, and, thus, Applicant cannot be estopped from re-litigating the issue of medical necessity since the doctrine of collateral estoppel "applies only against those who were either a party, or in privity with a party, to a prior proceeding." See Russell v. New York Cent. Mut. Fire Ins. Co., 11 A.D.3d 668 (2d Dept. 2004); Alev Med. Supply, Inc. v. Allstate Prop. & Cas. Ins. Co., 36 Misc.3d 132(A) (App Term 2d, 11th & 13th Dists. 2012); Magic Recovery Med. & Surgical Supply, Inc. v. State Farm Mut. Auto. Ins. Co., 27 Misc.3d 67 (App Term 2d, 11th & 13th Dists. 2010).

On the other hand, I find that Applicant failed to meaningfully address, let alone refute, Dr. Kalter's contention that the services on August 15, 2023 were performed outside the six month window.

Accordingly, Respondent's denials of the second and third bills are vacated.

In sum, Applicant is awarded \$7,855.21.

This award is in full disposition of all No-Fault benefit claims submitted to this Arbitrator.

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
	Portal Medical PC	03/08/23 - 08/15/23	\$12,440.26	\$9,730.92	Awarded: \$7,855.21
Total			\$12,440.26		Awarded: \$7,855.21

B. The insurer shall also compute and pay the applicant interest set forth below. 01/03/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Inasmuch as Applicant failed to file for arbitration within 30 days of receipt of Respondent's denials, the statutory tolling provision applies. Accordingly, the insurer shall pay interest on the claim totaling \$7,855.21 from January 3, 2024, the date arbitration was initiated, until such time as payment is made.

C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee, subject to a maximum fee of \$1,360.00, 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 Rockland

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

09/12/2024

(Dated)

Andrew Horn

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:
00d92d5c1325f7735f4b9db516cf20d4

Electronically Signed

Your name: Andrew Horn
Signed on: 09/12/2024