

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Island Ambulatory Surgery Center LLC
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-24-1332-2302

Applicant's File No. 00127385

Insurer's Claim File No. 0502044180002

NAIC No. 36447

ARBITRATION AWARD

I, Hersh Jakubowitz, 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: EIP

1. Hearing(s) held on 09/11/2024
Declared closed by the arbitrator on 09/11/2024

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

Setera Iray from LM General Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$13,241.61**, was AMENDED and permitted by the arbitrator at the oral hearing.

Claim amount amended to \$12,531.10.

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

The Parties stipulated that Applicant had met its prima facie burden of proof, that Respondent's denials were interposed in a timely fashion and the amended claim amount adheres to the fee schedule.

3. Summary of Issues in Dispute

Applicant seeks reimbursement, along with interest and counsel fees, under the No-Fault Regulations, for the costs associated with the EIP undergoing a lumbar percutaneous discectomy, annuloplasty and intradiscal injection of Platelet Rich Plasma on November 10, 2023 at Applicant's surgery center in connection with injuries allegedly sustained by EIP in a motor vehicle accident on July 7, 2022. The payment, for the facility fee, was denied, following a review of the medical records and Peer Review by Dr. Miron Fayngersh, M.D., at Respondent's behest, as not medically necessary. The denial was timely. This decision is based upon the written submissions of counsel for the respective parties contained within the electronic case file maintained by the American Arbitration Association as well as oral argument at the hearing conducted on September 11, 2024.

4. Findings, Conclusions, and Basis Therefor

History

The dispute arises from an automobile accident on July 7, 2022, in which the EIP, a then 31-year-old male was involved in a motor vehicle accident as a restrained driver wherein he sustained numerous injuries. EIP was transported by ambulance to NYP Queens Hospital where he was treated and released.

The EIP consulted Dr. Bolesav Kosharsky, MD complaining of radiating back and neck pain. Examination revealed muscle spasms, tenderness, decreased range of motion and positive orthopedic tests. EIP was recommended that she undergo a discectomy. On November 10, 2023, EIP underwent a lumbar percutaneous discectomy, annuloplasty and intradiscal injection of Platelet Rich Plasma at Applicant's surgery center for which Applicant seeks facility fee reimbursement.

Prima Facie

The Applicant established its prima facie case by proof that the prescribed statutory billing forms had been received and that payment of no-fault benefits was not forthcoming. (See, New York & Presbyt. Hosp. v.

Countrywide Ins. Co., 44 A.D.3d 729 [N.Y. App. Div. 2d Dep't 2007]). Proof of the receipt of the Applicant's billing is implicit, in the timely denial issued by the Respondent.

Denial

The Respondent's denial raised the asserted absence of medical necessity based on the analysis of its designated peer Dr. Miron Fayngersh, M.D. The corresponding report dated November 30, 2023 has been submitted in support of the Respondent's position.

In considering the issue presented, I note that as part of its prima facie showing, the Applicant is not required to show that the contents of the statutory no-fault forms themselves are accurate or that the medical services documented therein were actually rendered or necessary. Stated another way, the Applicant is not required to establish the merits of the claim to meet its prima facie burden. (*Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 114 A.D.3d 33, 46, *aff'd* 25 NY3d 498)

On the contrary, "[m]edical necessity is presumed upon the timely submission of a no-fault claim (see [All County Open MRI & Diagn. Radiology P.C. v. Travelers Ins. Co.](#), 11 Misc. 3d 131[A], 815 N.Y.S.2d 493, 2006 NY Slip Op 50318[U] [App Term, 9th & 10th Jud Dists 2006]). Thus, ordinarily it falls to the defense to establish that the billed-for services were not medically necessary." (*Park Slope Med. & Surgical Supply, Inc. v. Progressive Ins. Co.*, 34 Misc. 3d 154[A] [N.Y. App. Term 2012] [concurring opinion, Golia, J.]; see, also, *Kings Med. Supply Inc. v. Country-Wide Ins. Co.*, 5 Misc. 3d 767, 771 [N.Y. Civ. Ct. 2004 ["It is by now firmly established that the burden is on the insurer to prove that the medical services or supplies in question were medically unnecessary {citation omitted}."])

The Respondent, to establish the validity of its denial on a prima facie level and put the Applicant to its proof, must, as a minimum, demonstrate both a factual predicate and medical rationale for the asserted absence of medical justification for the specific service provided to the EIP, and must premise its contention upon uncontroverted evidence of generally accepted medical standards of care. (See, *Nir v. Allstate Ins. Co.*, 7 Misc. 3d 544, 547 [N.Y. Civ. Ct. 2005])

Thus, the focus falls squarely on the Fayngersh report.

Peer

Critical of the challenged lumbar percutaneous discectomy, annuloplasty and intradiscal injection of Platelet Rich Plasma, Dr. Fayngersh, citing supportive medical literature, and based on his analysis of the EIP's medical records, opined that the clinical findings and reported symptoms did not rise to a level sufficient to justify the medical procedures performed on November 10, 2023, at the Applicant's surgery center.

In pertinent part, Dr. Fayngersh, notes: "*Discectomy procedures are indicated to patients with moderate to severe radicular pain when nerve root compression is confirmed by objective imaging, and who failed course of physical therapy, NSAIDs and epidural injections. According to the records presented for my review, epidural injections have not been tried in Mr. Yun's case. MRI study of lumbar spine performed on August 14, 2022 did not reveal direct nerve root compression at any level. Mr. Yun was complaining of mild pain (2 on the scale of 10) on November 10, 2023. The effectiveness of intradiscal PRP injections for patients with chronic discogenic pain has not been demonstrated by clinical studies.... Medical necessity of facility fee for lumbar percutaneous discectomy, annuloplasty and intradiscal injection of Platelet Rich Plasma billed by Island Ambulatory Surgery CEN for services rendered on November 10, 2023, CPT code 0490 x 4 for 62287, 22526 59, 22527 XS and 22899 59, has not been established.*"

Analysis

Where, as here, a peer review provides a factual basis and medical rationale for the opinions stated, the burden shifts to the Applicant to refute the Respondent's showing with sufficient contrary proof which, if it is to prevail, tends to establish the medical necessity for the service provided. (See, *Pan Chiropractic, P.C. v. Mercury Ins. Co.*, 24 Misc. 3d 136[A] [N.Y. App. Term 2009]; *A.M. Med. Servs., P.C. v. Deerbrook Ins. Co.*, 18 Misc. 3d 1139[A] [N.Y. Civ. Ct. 2008])

Rebuttal

The rebuttal by Dr. Roman Shulkin, MD, with supportive medical literature, however, specifically states "*However, nowhere in the literature*

provided by Dr. Fayngersh does it note failure of ESI treatment as a prerequisite to performing a percutaneous discectomy. The literature merely notes ESI treatment as one of the possible "steps" of treatment... Further, at the time of the 11/10/23 office visit at our clinic, the EIP had undergone extensive ongoing conservative care including physical therapy, chiropractic care, acupuncture treatment, medications and the use of durable medical equipment... Further, please refer to the 8/14/22 lumbar MRI that revealed a disc bulge and protrusion/herniation at the mid left foramen at the L3-4 level, and disc bulge and disc herniation, and mass effect on the thecal sac and right LS nerve root at the L4-5 level, clear lateralizing disc protrusions with nerve root pathology, indicative of radiculopathy... The presence of neurological symptoms, decreased motor function, and positive diagnostic tests underscore the seriousness of the condition, warranting prompt and appropriate intervention to prevent further deterioration and to restore the EIP's ability to perform activities of daily living (ADLs). Ignoring these findings could lead to significant worsening of the EIP's condition, further impairing their functional capacity and quality of life, thus emphasizing the necessity of treating these symptoms... Platelet Rich Plasma (PRP) is concentrated from your own blood which contains healing factors such as white blood cells and bioactive proteins, called growth factors and stem cell markers. These cells are vital for tissue regeneration and repair. Platelets have been significantly proven to be a great source of vital healing components. With advanced techniques, we can concentrate and process these regenerative healing cells in a simple outpatient setting."

Analysis

Where, as here, there are dueling reports from physicians each raising a factual basis and medical rationale for respective opinions there becomes a question of fact for me to resolve regarding causation and/or medical necessity. See *State Farm Mut. Auto. Ins. Co. v. Stack*, 55 A.D.3d 594, 869 N.Y.S.2d 536 (2nd Dept. 2008); *Radiology Today PC v. Travelers Ins.*, 39 Misc.3d 146(A) (App. Term 2nd Dept. May 14, 2013); *Westcan Chiropractic PC v. Elco Admin. Services*, 2018 NY Slip Op. 51045(U) (App. Term 2nd Dept. June 28, 2018). As the trier of fact, I am free to accept or reject opinions on credibility grounds. See *Webster Ave. Pavilion PC v. Allstate Ins. Co.*, 42 Misc.3d 148(A) (App. Term 1st Dept. March 19, 2014); *AP Orthopedic v. Allstate Ins. Co.*, 49 Misc.3d 144(A) (App. Term 2nd Dept. Nov. 12, 2015.)

The rebuttal by Dr. Shulkin , however, specifically states that the necessity of the medical procedures performed on November 10, 2023, at the Applicant's surgery center , that due to the seriousness of the condition, warranting prompt and appropriate intervention to prevent further deterioration and to restore the EIP's ability to perform activities of daily living. Indeed, Dr. Shulkin's rebuttal and the underlying medical records persuasively made the case that there was no deviation from generally accepted medical guidelines in the decision to proceed with the subject MRI.

Lastly, "[i]n the face of a course of treatment that has not been shown to have no medical purpose or performed towards no medical objective, this [forum] is not prepared to second guess a treating doctor who decides that a medical [service] is necessary for his/her diagnosis and treatment (see also [A.B. Med. Serv. v. New York Central Mut. Fire Ins. Co., supra](#); [Alliance Med. Office, P.C. v. Allstate Ins. Co., 196 Misc. 2d 268, 764 N.Y.S.2d 341 \[Civ Ct. Kings Co. 2003\]](#); see also [Citywide Social Work & Psy. Serv. P.L.L.C v. Travelers Indemnity Co., supra](#))." (A.R. Med. Art, P.C. v. State Farm Mut. Auto. Ins. Co., 11 Misc. 3d 1057[A] [N.Y. Civ. Ct. 2006]; see also, Matter of Integrated Neurological Assoc., PC v 21st Century North America Insurance Company, AAA No. 412013086392 [Arbitrator Moritz])

Accordingly, I find for Applicant.

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	11/10/23 - 11/10/23	\$13,241.61	\$12,531.10	Awarded: \$12,531.10
Total			\$13,241.61		Awarded: \$12,531.10

B. The insurer shall also compute and pay the applicant interest set forth below. 01/12/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Based on the submission of a timely denial, interest shall be paid from the above date, until the date that payment is made at a rate of 2% per month.

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 fee, in accordance with newly promulgated 11 NYCRR 65-4(d). After calculating the sum total of the first party benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of the sum total, subject to no minimum and a maximum of \$1,360.00.

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

09/17/2024
(Dated)

Hersh Jakubowitz

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:
5658b0cfe3c04d3f99ea7cc9cff979a1

Electronically Signed

Your name: Hersh Jakubowitz
Signed on: 09/17/2024