

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

RES Physical Medicine & Rehab Services (Applicant)	AAA Case No.	17-24-1339-3678
- and -	Applicant's File No.	24-54495
	Insurer's Claim File No.	0709083356 2MM
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

ARBITRATION AWARD

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 08/28/2024
Declared closed by the arbitrator on 09/13/2024

Nicole Jones, Esq. from The Morris Law Firm, P.C. participated virtually for the Applicant

Olga Gromyko, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,340.29**, 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 claimant was the 31-year-old male restrained driver of a motor vehicle that was involved in an accident on 3/25/23. Following the accident, the claimant suffered injuries which resulted in the claimant seeking treatment. At issue is the medical necessity of 9/13/23 intra-ligamentous and intra-tendinous injections into the cervical and upper thoracic spine under ultrasonic guidance, 39 sites performed by Applicant. Respondent timely denied the claim based on a 10/13/23 peer review by Michael E. Tawfelllos, M.D.

4. Findings, Conclusions, and Basis Therefor

Based on a review of the documentary evidence, this claim is decided as follows:

Applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

The claimant was the 31-year-old male restrained driver of a motor vehicle that was involved in an accident on 3/25/23. The claimant reportedly injured his neck, back, bilateral wrists and left index finger. There was no reported loss of consciousness. There were no reported lacerations or fractures. There was no reported emergency treatment sought or received. On 3/26/23 the claimant presented to Kevin Gaffney, P.A. of WellNOW UC with complaints of body aches, neck pain, back pain, pain to bilateral wrists and left index finger pain. The claimant was prescribed cyclobenzaprine 10 mg x21 and Ibuprofen 800 mg x30. On 3/26/23 the claimant presented to John Ward, D.C. with complaints of headaches, neck pain, bilateral wrist pain, mid back pain and low back pain. The claimant was initiated on chiropractic treatment. On 4/10/23, on referral from Dr. Ward, the claimant presented to John C. Bauers, M.D. of RES Physical Medicine & Rehab Services (Applicant) with complaints of neck pain, bilateral shoulder pain, bilateral wrist pain, middle back pain, low back pain and bilateral leg pain. Dr. Bauers notes that the claimant had been treated there prior for a 2018 MVA. Examination of the cervical spine revealed on palpation myospasms and paraspinal muscle tenderness, percussion over the spinous processes causes pain C4-7, occipital area was non tender on palpation and pain elicited on palpation of the sternocleidomastoid bilaterally, anterior, middle and posterior scalenes, cervicis capitus, and upper trapezius. Cervical Compression test was positive. Range of motion was decreased in all planes (quantified). Thoracic examination revealed tenderness on palpation of paraspinal muscles. Lumbar examination revealed on percussion over the spinous processes caused pain over the lumbar spine area. Palpation revealed myospasms with tenderness of the paraspinal, bilateral sacroiliac joints, bilateral gluteus maximus, medius and tensor fascia lata. Pain was elicited over the lateral border of the sacrum bilaterally. Slump test was positive. Range of motion was decreased in all planes (quantified). Deep tendon reflexes were normal 2+ patellar and Achilles symmetric with no clonus; but 1+ biceps/triceps and trace brachioradialis. Muscle strength and sensation were normal. The claimant was prescribed cyclobenzaprine 10 mg. and Diclofenac Sodium 1% gel. A urine toxicology screen was initiated. On 4/11/23 Dr. Bauers also prescribed Lidocaine 5% ointment and medical marijuana. On 4/25/23 Dr. Bauers discontinued the use of cyclobenzaprine and prescribed Gabapentin 100mg and Baclofen 10mg. A urine toxicology screen was initiated. On 4/25/23 Mikhail Strut, M.D. of RES Physical Medicine & Rehab Services (Applicant) conducted cervical spine and

lumbar spine DXD studies. On 5/23/23 Dr. Bauers discontinued the use of Baclofen and prescribed Methocarbomal 750mg and the claimant was recommended "for a consultation with Dr. Strut for regenerative injections." On 6/2/23 Dr. Strut conducted a follow-up examination was substantially similar to that of 4/10/23. Dr. Strut performed intra-ligamentous and intra-tendinous injections into the cervical and upper thoracic spine under ultrasonic guidance, 39 sites. The claimant was prescribed Percocet (5-325mg). On 6/20/23 Dr. Strut noted the claimant "quite impressed with results intra-ligamentous injection and would like to continue." Dr. Strut performed intra-ligamentous and intra-tendinous injections into the cervical and upper thoracic spine under ultrasonic guidance, 39 sites. On 8/8/23 the claimant presented for a follow-up examination that was substantially similar to that of 4/10/23. Dr. Strut noted the claimant was "quite impressed with results intra-ligamentous injection and would like to continue." Dr. Strut performed intra-ligamentous and intra-tendinous injections into the cervical and upper thoracic spine under ultrasonic guidance, 39 sites. On 9/13/23 Dr. Strut conducted a follow-up examination and performed intra-ligamentous and intra-tendinous injections into the cervical and upper thoracic spine under ultrasonic guidance, 39 sites. On 10/25/23 Dr. Strut conducted a follow-up examination and performed intra-ligamentous and intra-tendinous injections into the cervical and upper thoracic spine under ultrasonic guidance, 39 sites. On 11/22/23 Dr. Strut conducted a follow-up examination and performed intra-ligamentous and intra-tendinous injections into the cervical and upper thoracic spine under ultrasonic guidance, 39 sites. At issue are the 9/13/23 intra-ligamentous and intra-tendinous injections into the cervical and upper thoracic spine under ultrasonic guidance, 39 sites.

The burden has shifted to the Respondent as they have raised a medical necessity defense. In order to support a lack of medical necessity defense respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See, *Provvedere, Inc. v. Republic Western Ins. Co.*, 2014 NY Slip Op. 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its 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). As a general rule, reliance on rebuttal documentation will be weighed in light of the documentary proofs and the arguments presented at the arbitration. Moreover, the case law is clear that a provider must rebut the conclusions and determinations of the IME/peer doctor with his own facts. *Park Slope Medical and Surgical Supply, Inc. v. Travelers*, 37 Misc.3d 19 (2012).

Respondent timely denied the procedures at issue based on the 10/13/23 peer review by Michael E. Tawfellos, M.D. After reviewing the claimant's history, treatment, and medical records, Dr. Tawfellos opines "the medical records presented for peer review failed to support the medical necessity of repeat intra-ligamentous and intra-tendinous injections into the cervical spine and upper thoracic spine and associated services. However, the office visit was coded appropriately." Dr. Tawfellos continues in "reference to the repeat cervical and thoracic intra-ligamentous and intra-tendinous perfacet injections: As per the standard of care, a repeat paravertebral facet joint/nerve block injection would be adequate if significant improvement has been reported with increased motor strength and physical activity as well as a decrease in pain documented

on physical examination, after the initial block. At least 50% of the improvement is expected after the initial block that facilitates the performance of the subsequent procedure [*Citation omitted*]. As per [*Citation omitted*]: "Medial Branch Blocks (MBB): Dual MBBs, defined as injections performed in the same location(s) on two (2) separate occasions at least one week apart, are necessary to confirm the diagnosis due to the unacceptably high false positive rate of single MBB injections. A confirmatory injection is indicated only if the first injection results in a positive response. If the second injection also results in a positive response, the target joint(s) is/are the confirmed pain generator(s). If the first session of diagnostic MBBs are negative, a maximum of one additional session may be performed to determine the primary levels of involvement prior to proceeding with confirmatory blocks. A maximum of two (2) levels may be injected during a single session. Therapeutic Intraarticular (IA) Facet Joint Injections Therapeutic IA injections should be repeated no more than three times annually and only if the initial injection results in significant pain relief (at least 50%) for at least three (3) months." Dr. Tawfello asserts "based on the available medical records and the appropriateness of the service in question, I have come to the determination that the medical necessity for the repeat intra-ligamentous and intra-tendinous perifacet injections was not met, due to the following reasons: In this case, the claimant was involved in the MVA dated 3/25/2023 and sustained injuries to the neck and mid-back. The claimant underwent intra-ligamentous and intra-tendinous perifacet injections at C2-T4 levels on 6/2/2023, 6/20/2023 and 8/8/2023. The repeat injections were performed at the same levels on 9/13/2023. As per the standard of care, a repeat paravertebral facet joint/nerve block injection would be adequate if significant improvement has been reported with increased motor strength and physical activity as well as a decrease in pain documented on physical examination, after the initial block. At least 50% of the improvement is expected after the initial block that facilitates the performance of the subsequent procedure. As per the above -cited article, the injection should be repeated no more than three times annually and only if the initial injection results in significant pain relief (at least 50%) for at least three (3) months. In addition, a confirmatory injection is indicated only if the first injection results in a positive response. If the second injection also results in a positive response, the target joint(s) is/are the confirmed pain generator. However, based on the available medical records, there was no evidence that the claimant had pain relief after the initial injections. Moreover, there was no evidence of functional improvement. It was not clear why the injection procedure was repeated when the claimant reported no relief from the prior injections. The need to perform intra-ligamentous and intra-tendinous perifacet injections at C2-T4 levels was not clearly understood. Therefore, based on the available medical records, the standard of care, and the above-cited article, the repeat intra-ligamentous and intra-tendinous perifacet injections performed were not medically necessary [*Citation omitted*]. Dr. Tawfello expounds "as per the Hospitalist, Know Surgical Package Requirements before Billing Postoperative Care 2022: "The global surgical package comprises a host of responsibilities that include standard facility requirements of filling out all necessary paperwork involved in surgical cases (e.g. preoperative H&P, operative consent forms, preoperative orders). Additionally, the surgeon's packaged payment includes (at no extra charge): Preoperative visits after making the decision for surgery beginning one day prior to surgery; All additional postoperative medical or surgical services provided by the surgeon related to complications but not requiring additional trips to the operating room; Postoperative

visits by the surgeon related to recovery from surgery, including but not limited to dressing changes; local incisional care; removal of cutaneous sutures and staples; line removals; changes and removal of tracheostomy tubes; and discharge services; and Postoperative pain management is provided by the surgeon. Examples of services that are not included in the global surgical package, (i.e. are separately billable and may require an appropriate modifier) are: The initial consultation or evaluation of the problem by the surgeon to determine the need for surgery; Services of other physicians except where the other physicians are providing coverage for the surgeon or agree on a transfer of care (i.e., a formal agreement in the form of a letter or an annotation in the discharge summary, hospital record, or ASC record); Postoperative visits by the surgeon unrelated to the diagnosis for which the surgical procedure is performed unless the visits occur due to complications of the surgery; Diagnostic tests and procedures, including diagnostic radiological procedures; Clearly distinct surgical procedures during the postoperative period that do not result in repeat operations or treatment for complications; Treatment for postoperative complications that requires a return trip to the operating room (OR), catheterization lab, or endoscopy suite; Immunosuppressive therapy for organ transplants; and Critical-care services (CPT codes 99291 and 99292) unrelated to the surgery where a seriously injured or burned patient is critically ill and requires the constant attendance of the surgeon." Dr. Tawfellos concludes "based on the available medical records and the appropriateness of the service in question, I have come to the determination that the medical necessity for the associated services was not met, due to the following reasons: In this case, the intra-ligamentous and intra-tendinous perifacet injections performed on 9/13/2023 were not medically necessary. Therefore, the associated services of injection of anesthetic agent and/or steroid into suprascapular shoulder nerve, ultrasonic guidance for needle placement, unlisted supplies and materials, testing for the presence of drug, by chemistry analyzer, and drugs or substance measurement, 7 or more, were also not medically necessary."

Dr. Tawfellos indicates that the services at issue were medically unnecessary. I find that his peer review rebuts the presumption of medical necessity. Dr. Tawfellos provides a "factual basis and a medical rationale for his determination that there was no medical necessity for the services at issue here." *Renato M. Capello, DC v. Global Liberty Ins. Co. of New York*, 2017 N.Y. Slip. Op. 51415(U) (App. Term. 1st Dept., 2017). Without a rebuttal report or medical records that clearly support the medical necessity of the services at issue, I find that Applicant has not presented competent medical proof as to the issue of medical necessity of the services at issue by a preponderance of credible evidence. Accordingly, the claim is denied in its entirety.

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 claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of NY

SS :

County of Nassau

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

09/26/2024
(Dated)

Charles Blattberg

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:
380970c7c88ede2e171f71f1366e91a0

Electronically Signed

Your name: Charles Blattberg
Signed on: 09/26/2024