

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

All City Family Healthcare Center
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-23-1328-5154

Applicant's File No. TLD23-105617

Insurer's Claim File No. 0701167041
2PU

NAIC No. 29688

ARBITRATION AWARD

I, Eileen Casey, 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 09/12/2024
Declared closed by the arbitrator on 09/12/2024

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

Marilyn Oppedisano, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$10,504.50**, was AMENDED and permitted by the arbitrator at the oral hearing.

The original amount claimed was \$10,504.50 for the facility fee associated with a lumbar percutaneous discectomy performed on August 1, 2023. Applicant's counsel amended the amount claimed to \$5,292.93 pursuant to the fee schedule.

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

It was stipulated that Applicant established a prima facie case and Respondent issued a timely denial.

3. Summary of Issues in Dispute

The EIP (JH), a then 19-years-old male, was involved in a motor vehicle accident on January 11, 2023. The amount claimed, as amended, is \$5,292.93 for the facility fee associated with a lumbar percutaneous discectomy performed on August 1, 2023. Respondent denied Applicant's claim based on a September 22, 2023 peer review Howard Levy, M.D. The issue is whether Respondent established a defense of lack of medical necessity based on the peer review

4. Findings, Conclusions, and Basis Therefor

This case was decided based upon oral arguments and a review of the documents contained in the ADR Center maintained by the American Arbitration Association. The original amount claimed was \$10,504.50 for the facility fee associated with a lumbar percutaneous discectomy performed on August 1, 2023. Applicant's counsel amended the amount claimed to \$5,292.93 pursuant to the fee schedule.

The evidence demonstrates that the EIP (JH), a then 19-years-old male, was involved in a motor vehicle accident on January 11, 2023.

The Peer Review (Lack of Medical Necessity) Defense

Lack of medical necessity is a defense to an action to recover no-fault benefits, which an insurer may assert upon a timely denial, based either on a medical examination or a peer review report. *Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp.*, 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

Respondent denied Applicant's claim based on a September 22, 2023 peer review Howard Levy, M.D.

In his report, Dr. Levy listed the records he reviewed and detailed the EIP's pertinent medical history. The reports reviewed included a July 19, 2023 orthopedic IME report by Ernesto Seldman, M.D. Dr. Levy stated that the EIP received physical therapy from February 1, 2023 to July 27, 2023 in a total of 42 sessions for the lumbar spine. Dr. Levy noted that an August 1, 2023 re-evaluation report by Benjamin Portal, M.D. showed that the EIP had a complaint of lower back pain rated as 8-9/10 on the pain scale. The pain was radiating to the bilateral lower extremities. Examination of the lumbar spine revealed tenderness over the facet joint at L3-S1 levels. Straight Leg Raise test was positive. The diagnoses were lumbar radiculopathy, intervertebral disc displacement, facet syndrome, and lower back pain. Lumbar trigger point injection, epidural injection, medial branch block injection, percutaneous discectomy and annuloplasty were recommended.

Dr. Levy asserted that percutaneous discectomies are the least invasive procedure for disc prolapse, herniated disc, and spinal disc injuries. Dr. Levy stated that, as per the available medical records, the EIP was engaged in conservative treatment for lumbar spine pain. He asserted that there was no evidence of failure of the conservative treatment received by the EIP. Dr. Levy noted that, as per the July 19, 2023 IME report by Ernesto Seidman, M.D., the EIP had a complaint of lower back pain. Dr. Seldman's examination of the lumbar spine revealed normal findings. The diagnosis was status post lumbar spine sprain/strain resolved. Dr. Levy said that, as per Dr. Seldman's report, there was no need for future office visits, further accident-related physical therapy or orthopedic follow-up, diagnostic testing, injections, or surgery. Dr. Levy asserted that the need for performing the surgery was not clear when the complaints were already resolved. He added that surgery is only considered if the doctor can pinpoint the exact source of a patient's pain, such as a herniated disc or spinal stenosis. Dr. Levy stated that, as per the MRI report of the lumbar spine, there was no evidence of a herniated disc or spinal stenosis. Dr. Levy concluded that the surgery was not medically necessary.

When Respondent has timely raised and established lack medical necessity, the burden of proof then shifts to the Applicant to establish that the disputed services were reasonable and medically necessary. If the insurer's medical examination or peer review is not rebutted, the insurer is entitled to denial of the claim. *A Khodadadi Radiology v. New York Central*, 16 Misc.3d 131(A), 841 N.Y.S.2d 824, 2007 N.Y. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. 2007).

The courts have held that a peer review report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See, *Nir v. Allstate Ins. Co.* 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005).

Rebuttal

Applicant submitted an April 8, 2024 rebuttal by Benjamin Portal, the EIP's treating physician. Dr. Portal detailed the EIP's pertinent medical history. Dr. Portal noted that Dr. Levy's denial was based on the normal findings reported in the July 19, 2023 IME report by Ernesto Seldman, M.D. Dr. Levy pointed out that the May 23, 2023 evaluation report by Yelena Yakutilova, PA documents that the EIP had complaints of lower back pain at a level of 8-10/10 radiating to bilateral lower extremity. Examination of the lumbar spine revealed lumbar facet pain on both the sides at L3-S1 region; decreased ROMs with pain; palpation of bilateral sacroiliac joint area revealed right and left sided pain; positive Straight Leg Raise test bilaterally. The EIP had decreased strength by 4/5 in lower extremities. Dr. Levy also pointed out that his August 1, 2023 evaluation report documents substantially the same complaints and findings as noted in PA Yakutilova's

May 23, 2023 report . Dr. Portal said that it is clear that the EIP had lumbar radicular pain and symptoms both pre and post the IME. Therefore, Dr. Portal said the denial on the basis of IME cannot be sustained.

Dr. Portal explained that the surgery was performed to reduce the constant back pain so that the EIP, who was 19-year-old, could reach pre-accident health status at the earliest. Dr. Levy asserted that, at this age, the EIP needs to recover fast and early to perform routine activities and daily needs. Dr. Portal also said that all the positive objective findings and complaints indicated impairment of the EIP's lumbar spine, which necessitated the need for surgery. Dr. Portal noted that LESI helped the EIP for few weeks, but the pain had returned. Dr. Portal also noted that the MRI of the lumbar spine revealed Transitional vertebrae of the lumbosacral junction; Dextroscoliosis; L4-L5 annular disc bulge; L5-S1 annular disc bulge.

Findings

Based on the forgoing, I find that Dr. Levy's peer review failed to establish that the lumbar percutaneous discectomy did not meet generally accepted medical criteria. Dr. Levy relied on Dr. Seldman's IME findings to establish that the EIP's injuries had resolved and that there was no evidence of failure of the conservative treatment. However, Applicant's claim was denied based on Dr. Levy's peer review not the IME. Additionally, Dr. Seldman's IME findings were rebutted by the reports of the EIP's treating PA and physician. Furthermore, Dr. Levy failed to demonstrate that a herniated disc or spinal stenosis are the only conditions warranting a lumbar discectomy. Therefore, I find that Dr. Levy failed to establish an adequate factual basis and medical rationale to support his opinion that the lumbar percutaneous discectomy was not medically necessary. Accordingly, Applicant's claim, as amended, is granted 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Amount Amended	Status
	All City Family Healthcare Center	08/01/23 - 08/01/23	\$10,504.50	\$5,292.93	Awarded: \$5,292.93
Total			\$10,504.50		Awarded: \$5,292.93

B. The insurer shall also compute and pay the applicant interest set forth below. 12/12/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from the above date, which is the date that arbitration was requested, at the rate of 2% per month, simple, 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

Respondent shall pay Applicant an attorney's fee, in accordance with 11 NYCRR § 65-4.6(d). Therefore, the insurer shall pay the applicant an attorney's fee of 20% of benefits plus interest, with no minimum fee and a maximum fee of \$1,360. However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

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 Queens

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

10/13/2024
(Dated)

Eileen Casey

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:
c39bc81089945cdfb37cf698e2215b9b

Electronically Signed

Your name: Eileen Casey
Signed on: 10/13/2024