

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Avishai Neuman Medical PC  
(Applicant)

- and -

Allstate Property and Casualty Insurance  
Company  
(Respondent)

AAA Case No. 17-24-1344-0462

Applicant's File No. NF 3747461

Insurer's Claim File No. 0711342997  
2DD

NAIC No. 17230

**ARBITRATION AWARD**

I, Kent Benziger, 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: I.E.

1. Hearing(s) held on 09/30/2024  
Declared closed by the arbitrator on 09/30/2024

Vijay Gupta, Esq. from The Law Office of Thomas Tona, PC participated virtually for the Applicant

Billsy Reyes-Bakke, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$207.97**, 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

On April 17, 2023, the Assignor/Eligible Injured Party, a 54-year-old female, was involved in a motor vehicle accident. In dispute is anesthesia (01936, anesthesia for percutaneous image guided procedures - \$207.97) administered during a discectomy at Level L4-5. The Respondent denied reimbursement based on the peer review of Dr. Julio Westerland. Applicant contends that the peer review states, in essence, that surgery may have been medically necessary at Level L5-S1 but not at L4-5. Applicant's counsel contends that the peer review has failed to cite an authoritative source pursuant to Nir v. Allstate Insurance Company, 7 Misc.3d 544, 546, 547 (2005) to sustain its burden of proof. Further, counsel contends that the peer review failed to adequately

discuss numerous clinical and diagnostic findings. See: Carle Place Chiropractic v. New York Central Mut. Fire Ins. Co., 19 Misc.3d 1139(A), (Dist. Ct. Nassau Co., Andrew M. Engle, J., May 29, 2008).

#### 4. Findings, Conclusions, and Basis Therefor

On April 17, 2023, the Assignor/Eligible Injured Party, a 54-year-old female, was involved in a motor vehicle accident. In dispute is anesthesia (01936, anesthesia for percutaneous image guided procedures - \$207.97) administered during a discectomy at Level L4-5 including mechanical decompression, nucleoplasty: radio frequency ablation, annuloplasty, contrast injection and evaluation of nucleograms.

Denial/Peer Review. The Respondent denied reimbursement based on a peer review of Dr. Julio Westerband. Dr. Westerband found the lumbar surgery at L4-5 level was not supported by medical records. Dr. Westerband reviewed the medical records including a lumbar MRI performed on April 27, 2023 with findings of foraminal herniations at multiple levels. At L4-5, there was a disc bulge with right foraminal herniation with lateral foraminal impingement more prominent on the right than left. At L5-S1 there was right foraminal herniation with right foraminal impingement. In sum, Dr. Westerband found the MRI was positive for disc herniations at both the L4-5 and L5-S1 levels and the exact cause of the Assignor's pain could not be determined from the MRI studies. On June 29, 2023, an EMG/NCV study revealed right L5/S1 radiculopathy.

Dr. Westerband found the treating provider failed to explain why the L4-5 level needed surgery as opposed to the L5-S1 level which had the positive EMG/NCV findings. The peer reviewer stated the following:

The record does not explain how the treating provider concluded that L4-5 needed surgery. As stated before, there were findings on MRI at L5-S1 levels. There were positive nerve test findings at the L5-S1 level. It is not clear why L4-5 level was chosen for surgery when the records do not support this specific level as being responsible for the ongoing clinical picture. Therefore, it is my opinion that the L4-5 surgery conducted in this case was not medically necessary.

The peer review then cited sources as to the necessity of a lumbar discectomy which include persistent or worsening neurologic deficits due to lumbar radiculopathy and severe intractable nerve root pain or sensory deficits. Dr. Westerband then cited the Assignor's IME by Dr. Dorothy Scarpinato which found a normal lumbar examination of the lumbar spine. As Dr. Westerband concluded the surgery was not medically necessary, the associated anesthesia services were not medically necessary.

Analysis. A presumption of medical necessity attaches to a Respondent's admission of the Applicant's timely submission of proper claim forms. The Respondent then bears the

burden to prove that the treatment was not medically necessary *Kings Med. Supply Inc. v. Country-Wide Ins.*, 5 Misc.3d 767 (2004); *Behavioral Diagnostics v. Allstate Ins. Co.*, 3 Misc.3d 246 (2004); *A.B. Med. Servs v. Geico Ins.* 2 Misc.3d 16 (App. Term 2d Dept. 2003). In this case, the peer review must submit "objective testimony or evidence to establish that his opinion is what is generally accepted in the medical profession." *Williamsbridge Radiology v. Travelers*, 14 Misc.3d 1231(a) (Civ. Ct Kings Co. 2007). When a carrier uses a peer review as basis for the denial, the report must contain evidence of the applicable generally accepted medical/professional standards as well as the provider's departure from those standards. *Acupuncture Prima Care v. State Farm Mut. Auto Ins. Co.* 17 Misc. 3d 1135 (Civ. Ct. Nassau, 12/03/07). Therefore, a peer reviewer must thoroughly review the relevant medical records and give evidence of generally accepted medical standards. Then, through careful analysis, the peer reviewer must apply those standards to the facts to document that the treatment in question was not medically necessary. See: *CityWide Social Work & Psychological Services v. Travelers Idem. Co.*, 3 Misc.3d 608, 609 (Civil Ct. Kings Co. 2004).

As a finding of fact, the peer review is not persuasive and the logic is somewhat ambiguous. Dr. Westerband, at one point, refers to Dr. Scarpinato's IME which apparently had no positive findings. However, Dr. Westerband's peer review also discusses numerous positive findings on the both the MRI and EMG/NCV studies. Further, the treatment records from the fall of 2023 through the surgery on February 19, 2024 establish substantial clinical findings and the failure of conservative care including epidural and trigger point injections. The Assignor had positive findings of decreased sensation and radiculopathy which were corroborated by the diagnostic studies of lumbar radiculopathy and multiple herniations. Therefore, Dr. Scarpinato's IME is not credible.

Dr. Westerband appears to conclude that if the surgery was necessary, it was performed at the wrong level. Yet, under such an assumption, the peer review has failed to state that the anesthesia was not medically necessary. He has failed to cite any authoritative sources supporting his contention that the EMG/NCV study necessitated the performance of surgery or treatment at the L5-S1 level as opposed to L4-L5 level and that anesthesia would not be needed. Through *Nir v. Allstate Insurance Company*, 7 Misc.3d 544, 546, 547 (2005), the Carrier must establish the following:

A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards. For example, the medical rationale may be insufficient if not supported by evidence of the "generally accepted medical/professional practice." (*Citywide Social Work & Psy. Serv. P.L.L.C. v. Travelers Indemnity Co.*, 3 Misc. 3d 608, 777 N.Y.S.2d 241, 2004 NY Slip Op 24034 [Civ Ct, Kings County 2004].)

Dr. Westerband further failed to consider the treatment reports of Dr. Shulkin. On November 15, 2023, Dr Roman Shulkin administered interlaminar epidural

glucocorticosteroid injections with imaging guidance and epidurography at the L4-L5 level. One of the purposes of the epidural steroid injections was to elucidate the pain generators. Further, an earlier radiographic instability report noted positive findings at the L4-L5 level. Through a November 29, 2023 report, Dr. Shulkin noted the necessity of surgical intervention at the L4-L5 level. These findings were not adequately discussed by Dr. Westerband. A peer review must incorporate, discuss and review the patient's complete medical history. Carle Place Chiropractic v. New York Central Mut. Fire Ins. Co., 19 Misc.3d 1139(A), (Dist. Ct. Nassau Co., Andrew M. Engle, J., May 29, 2008). Finally, Dr. Westerband failed to discuss the findings on the operative report or the post-operative diagnosis. The Respondent has failed to sustain its higher burden or proof as to necessity of the surgery which included anesthesia. Applicant is awarded reimbursement.

Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), an arbitrator is the judge of the relevance and materiality of the evidence offered.

Interest. The insurer shall compute and pay to the Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(d)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.00 See: LMK Psychological Services,

**APPLICANT IS AWARDED REIMBURSEMENT OF \$207.97, TOGETHER WITH INTEREST AND ATTORNEYS' FEES.**

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
	Avishai Neuman Medical PC	02/19/24 - 02/19/24	\$207.97	Awarded: \$207.97
Total			\$207.97	Awarded: \$207.97

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/14/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest. The insurer shall compute and pay to the Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not compounded) using a 30-day month 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

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(d)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$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 Orange

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

10/23/2024

(Dated)

Kent Benziger

### **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:**  
e15d7744a62292b717ea3460af1f2ac5

### **Electronically Signed**

Your name: Kent Benziger  
Signed on: 10/23/2024