American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Island Ambulatory Surgery Center LLC (Applicant)	AAA Case No.	17-24-1343-1079
	Applicant's File No.	00131166
- and -	Insurer's Claim File No.	20339753
	NAIC No.	Self-Insured
Enterprise Rent A Car (Respondent)		

ARBITRATION AWARD

I, Nicole J. Simmons, 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: IP

1. Hearing(s) held on 10/11/2024
   Declared closed by the arbitrator on 10/11/2024

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

   Aditi Pascual, Esq. from McCormack, Mattei & Holler participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$1,259.33**, was AMENDED and permitted by the arbitrator at the oral hearing.

   Applicant has amended the amount in dispute to **$1,213.07**, thereby resolving all issues regarding compliance with the applicable provisions of the Workers' Compensation Fee Schedule.

   Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

   Whether Respondent's denial of Applicant's claim for a facility fee, based upon a peer review report, can be sustained.

The IP (SL), a 32-year-old male passenger, was involved in a motor vehicle accident on 11/5/23. Thereafter, the IP commenced conservative treatment for various complaints of pain. The instant claim is for the facility fee associated with a lumbar epidural steroid injection (LESI) and trigger point injection (TPI) performed on 1/11/24. Respondent denied the claim based upon the 2/1/24 peer review report by Dilip Subhedar, M.D.

4. Findings, Conclusions, and Basis Therefor

I have reviewed and considered all pertinent documents contained in the American Arbitration Association's ADR Center. The case was decided based upon the submissions of the parties and the oral arguments of the parties' representatives made at the arbitration hearing. There were no witnesses.

The Arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The Arbitrator may question any witness or party and independently raise any issue that the Arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations. 11 NYCRR 65-4.5(o)(1). (Regulation 68-D.)

I find that Applicant has established its prima facie case as Applicant has met the requirements enunciated in Ave T MPC Corp. v Auto One Ins. Co., 32 Misc 3d 128[A], 2011 NY Slip Op 51292[U] [App Term, 2d, 11th & 13th Jud Dists 2011]). The Court held that "A no-fault provider establishes its prima facie entitlement to summary judgment by proof of the submission to the defendant of a claim form, proof of the fact and the amount of the loss sustained, and proof that the defendant either failed to pay or deny the claim within the requisite 30-day period, or issued a timely denial of claim that was conclusory, vague or without merit as a matter of law," (see Insurance Law § 5106 [a]; Westchester Med. Ctr. v Nationwide Mut. Ins. Co., 78 AD AD3d 1168 [2010]; see also New York & Presbyterian Hosp v. Allstate 31 AD3d 512 [2006]).

When an insurer relies upon a peer review report to demonstrate that a service was not medically necessary, the peer reviewer's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory. As per the holding in Jacob Nir, M.D. v. Allstate Insurance Co., 7 Misc.3d 544 (2005), the peer reviewer must establish a factual basis and medical rationale to support a finding that the services were not medically necessary, including setting forth generally accepted standards in the medical community. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden to prove that the services were not medically necessary. CityWide Social Work & Psychological Services, PLLC v. Travelers Indemnity Co., 3 Misc.3d 608, 777 N.Y.S.2d 241 (N.Y.Civ. Ct. Kings Co. 2004).

If an insurer asserts that the medical test, treatment, supply or other service was medically unnecessary, the burden is on the insurer to prove that assertion with competent evidence such as an independent medical examination, a peer review or other proof that sets forth a factual basis and a medical rationale for denying the claim. (See A.B. Medical Services, PLLC v. Geico Insurance Co., 2 Misc. 3d 26 [App Term, 2nd & 11th Jud Dists 2003]; Kings Medical Supply Inc. v. Country Wide Insurance Company,

783 N.Y.S. 2d at 448 & 452; Amaze Medical Supply, Inc. v. Eagle Insurance Company, 2 Misc. 3d 128 [App Term, 2nd and 11th Jud Dists 2003]).

In support of its contention the subject lumbar spine injections and facility fee were not medically necessary Respondent submits the peer review report of Dr. Subhedar notes that the IP was evaluated by Leonid Reyfman, M.D. on 12/29/23 for complaints of neck and back pain. Cervical spine findings included revealed tenderness at paraspinal muscles, spinous process, interspinous ligaments, medial border of scapulae, and spasms at cervical paravertebral, occipital, trapezius, levator scapulae bilaterally, and decreased ROM. Lumbar spine findings included tenderness in the lower back, sacroiliac joint, and spinous process, and muscle spasms at lumbar paravertebral, multifidus, sacrospinalis, gluteus, and piriformis bilaterally with decreased ROM. The cervical compression and straight leg raise tests were positive. The IP was diagnosed with lumbar disc displacement, lumbar radiculopathy, cervical disc displacement, cervicalgia, back muscle spasms, and vertebrae ligament disorder. Conservative treatment off physical therapy, medication and LESI were recommended. The IP was again examined by Dr. Reyfman on 1/11/24 and the subject injections were performed. Dr. Subhedar contends that they were not medically necessary. He notes the standard of care for LESI is that it is recommended *as a short-term treatment for intervertebral disc herniation, degenerative changes, and/or spinal stenosis leading to radicular pain (defined as pain in a dermatomal distribution with corroborative findings of radiculopathy)*. LESI is not recommended for the treatment of spinal stenosis resulting in neurogenic claudication unless there are radicular findings on examination. Dr. Subhedar further contends that TPIs are not recommended for whiplash or chronic head, neck, shoulder, or back pain, or fibromyalgia or osteoarthritis. Trigger points are indicated for *palpation with twitch response as well as referred pain, symptoms persist for greater than 3 months, conservative treatments have Tailed, medical management has failed, radiculopathy is not present, repeat injections allowed if 50 percent or greater pain relief is achieved for at least 6 weeks, and documentation should include ongoing conservative treatment including home exercise and stretching*. Dr. Subhedar notes that he did not review conservative treatment records for the IP. He maintains that prior to injections, adequate conservative treatment of 4-6 weeks should be attempted. As such, the injections were not indicated in this case. Dr. Subhedar cites to medical literature in support of his opinion.

Where the Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden then shifts to the Applicant which must then present its own evidence of medical necessity. [see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed]), Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company, 2008 NY Slip Op 50456U, 18 Misc. 3d 1147A, 2008 N.Y. Misc. LEXIS 1121, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co. 13 Misc.3d 131, 824 N.Y.S.2d 759, 2006 NY Slip Op51871(U) (Sup. Ct. App. T. 2d Dept 2006)]. I find the peer review report of Dr. Subhedar sufficient to shift the burden to the Applicant.

Applicant submits the 2/1/24 rebuttal by treating physician Alan Zats, D.O. He notes that the IP's records of 12/29/23 to 1/11/24 noted the IP's severe lower back pain radiating to the buttocks and left leg with numbness and tingling in the feet/toes and objective findings including diminished sensation, decreased motor strength and reduced

reflexes in the lower extremities as well as a positive Straight Leg Raise test, clear specific radicular lower back pain and clinical radicular findings. He states that the IP's 12/27/23 lumbar spine MRI revealed *multilevel disc bulges with foraminal encroachment and canal stenosis, clear lateralizing disc findings (protrusion), with nerve root pathology, indicative of radiculopathy*. These findings along with the IP's symptomatology and positive physical examination, indicated that the IP had a component of acute radiculopathy to his pain. Dr. Zats further notes that the IP's pain decreased 30-40% from 8/10 to 4-5/10 following the injections thereby confirming radiculopathy and myofascial pain as the pain generators and the medical necessity of the provided injections. Dr. Zats further states that performing epidural and trigger point injections simultaneously, we have a better chance of achieving maximum results. The IP had undergone conservative care including physical therapy, chiropractic care, and medications starting on 11/8/23 and continued to have severe back pain radiating to the buttocks and left leg with numbness/tingling in the feet/toes and examination findings of tenderness and muscle spasm in the lumbar spine, diminished sensation, decreased motor strength and reduced reflexes in the lower extremities as well as a positive Straight Leg Raise test. Based on these findings, Dr. Zats asserts that the subject injections were indicated for the IP. He cites medical literature supporting the performance of the injections.

Comparing the relevant evidence presented by both parties against each other, I am persuaded by the medical documentation provided. I find that Applicant has met its burden of persuasion in rebuttal to Respondent's expert with regard to the injections at issue. The medical records reviewed document positive findings and persistent pain despite conservative treatment including physical therapy and explain why the LESI and TPI, and associated facility fee, were medically necessary to treat the IP.

Accordingly, Applicant's claim is awarded.

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	**01/11/24 - 01/11/24**	**$1,259.33**	**$1,213.07**	**Awarded: $1,213.07**
Total			**$1,259.33**		**Awarded: $1,213.07**

B. The insurer shall also compute and pay the applicant interest set forth below. 04/05/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

   The insurer shall compute interest and pay the Applicant the amount of interest computed from the filing date as indicated above at the rate of 2% per month, simple, not compounded, calculated on a pro rata basis using a thirty-day month, and ending with the date of payment of the award.

C. Attorney's Fees

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

   After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of that sum total, subject to a maximum fee of $1,360. See, 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 Nassau

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

11/10/2024
(Dated)

Nicole J. Simmons

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:
69c3a4f5947b6041235c99482dc8e8cd

Electronically Signed

Your name: Nicole J. Simmons
Signed on: 11/10/2024