American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

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| Sedation Vacation Perioperative Medicine PLLC<br>(Applicant) | AAA Case No. | 17-24-1354-3096 |
| | Applicant's File No. | NF3749941 |
| | Insurer's Claim File No. | IWN7205 |
| - and - | NAIC No. | 19070 |
| St. Paul Travelers Insurance Co.<br>(Respondent) | | |

## ARBITRATION AWARD

I, Paul Israelson, 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: injured person.

1. Hearing(s) held on 11/25/2024
   Declared closed by the arbitrator on 11/25/2024

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

   Shana Kleinman Esq. from Law Offices of Tina Newsome-Lee participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$356.52**, 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 date of the subject automobile accident was December 16, 2023, involving the injured person, a 53-year-old female, the restrained driver of the automobile involved in the subject automobile accident.

   The applicant made a claim in the amount of $356.52 for the anesthesia services provided in connection with the February 22, 2024 epidural steroid injection procedure to the injured person's cervical spine.

The respondent denied the applicant's claim on the basis that the February 22, 2024 cervical epidural steroid injection procedure was not medically necessary, and therefore, the subject anesthesia services provided in connection with that same procedure were not medically necessary.

The respondent also denied the applicant's claim on the basis that the injured person failed to appear for at least two prescheduled examinations under oath, as more sufficiently detailed below.

Was the February 22, 2024 cervical epidural steroid injection procedure medically necessary, thus making the subject anesthesia services provided in connection with that same cervical epidural steroid injection procedure medically necessary?

May the respondent deny the applicant's claim on the basis that the injured person failed to appear for at least two prescheduled examinations under oath ("EUO")?

4. Findings, Conclusions, and Basis Therefor

On November 25, 2024, the hearing for the within arbitration matter was conducted and closed.

At the hearing, the applicant did not raise any argument as to the timeliness of the respondent's denial of the applicant's claim.

At the hearing, the respondent did not articulate any argument as to the propriety or accuracy of the applicant's calculation of its requested fee.

THE INJURED PERSON'S EUO NO-SHOW DEFENSE:

As stated above, the respondent denied the applicant's claim on the basis that the injured person failed to appear for at least two prescheduled examinations under oath.

On February 21, 2024, the respondent's attorney corresponded with the injured person's attorney, with a copy to the injured person (at the injured person's address noted on the injured person's December 18, 2023 New York Motor Vehicle No-Fault Insurance Law Application For Motor Vehicle No-Full Benefits form), requesting that the injured

person appear on March 15, 2024 for an examination under oath. The respondent provided proof of mailing of this same February 21, 2024 notice to submit to an examination under oath in the form of an affidavit of service by mail. The injured person failed to appear for this same examination under oath.

On March 19, 2024, the respondent's attorney corresponded with the injured person's attorney, with a copy to the injured person (at the injured person's address noted on the injured person's December 18, 2023 New York Motor Vehicle No-Fault Insurance Law Application For Motor Vehicle No-Full Benefits form), requesting that the injured person appear on April 12, 2024 for an examination under oath. The respondent provided proof of mailing of this same March 19, 2024 notice to submit to an examination under oath in the form of an affidavit of service by mail. The injured person failed to appear for this same examination under oath.

On March 21, 2024, the respondent received the applicant's claim in the amount of $356.52 for the anesthesia services provided in connection with the February 22, 2024 epidural steroid injection procedure to the injured person's cervical spine.

On April 16, 2024, the respondent denied the applicant's claim on the basis that the injured person failed to appear for at least two prescheduled examinations under oath (issuing a general denial to the injured person's attorney, with copies to the applicant, the injured person and the injured person's attorney).

The respondent provided the March 15, 2024 and April 12, 2024 statements on the record by the person assigned to conduct the above described March 15, 2024 and April 12, 2024 examinations under oath indicating that the injured person failed to appear for these same examinations under oath.

The respondent provided affidavits of service by mail evidencing the mailing of the above described February 21, 2024 and March 19, 2024 correspondence from the respondent's attorney's office to the injured person's attorney and the injured person requesting that the injured person appear on March 15, 2024 and April 12, 2024 (respectively) for an examination under oath.

It is well settled that a medical provider's or injured person's appearance at an examination under oath is a condition precedent to coverage, and that the medical provider's or injured person's failure to appear for a properly scheduled examination under oath stays the insurer's 30 day period to pay or deny a no-fault claim, and could serve as a basis to deny the medical provider's no-fault claim, *cf.* "The claim for $501.50 was denied by defendant within 30 days of its receipt (see Insurance Department Regulations [11 NYCRR] § 65-3.8[a]; see also St. Vincent's Hosp. of Richmond v. Government Empls. Ins. Co., 50 AD3d 1123 [2008]; Delta Diagnostic Radiology, P.C.

v. Chubb Group of Ins., 17 Misc.3d 16 [App Term, 2d & 11th Jud Dists 2007]) on the ground that plaintiff had failed to appear for the two properly scheduled EUOs that had been previously requested by defendant with regard to the same accident and the same assignor. Since defendant demonstrated that plaintiff had failed to comply with a condition precedent to coverage, this claim was timely and properly denied (see ARCO Med. NY, P.C. v. Lancer Ins. Co., 34 Misc.3d 134[A], 2011 N.Y. Slip Op 52382[U] [App Term, 2d, 11th & 13th Jud Dists 2011] ). Contrary to the finding of the Civil Court, it was not necessary for defendant to issue new scheduling letters addressing this particular bill (id.)." Infinity Health Products, Ltd. v. Travelers Ins. Co., 38 Misc.3d 142(A) (App. Term 11th and 13th Dist. 2013).

"Defendant also demonstrated that plaintiff had failed to appear at the duly scheduled EUOs, and therefore had failed to satisfy a condition precedent to defendant insurer's liability on the subject policy (see Insurance Department Regulations [11 NYCRR] § 65-1.1; Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co., 35 AD3d 720 [2006])." Flatlands Medical, P.C. v. State Farm Mut. Auto. Ins. Co., 38 Misc.3d 135(A) (App. Term 2nd, 11th and 13th Judicial Districts 2013).

"In this action by a provider to recover assigned first-party no-fault benefits, plaintiff appeals from an order of the Civil Court which granted defendant's motion for summary judgment dismissing the complaint. A judgment was subsequently entered, from which the appeal is deemed to have been taken (see CPLR 5501[c]). Contrary to plaintiff's contentions on appeal, the affidavits submitted by defendant established that the EUO scheduling letters and the denial of claim form had been timely mailed (see St. Vincent's Hosp. of Richmond v. Government Empls. Ins. Co., 50 AD3d 1123 [2008]; Delta Diagnostic Radiology, P.C. v. Chubb Group of Ins., 17 Misc.3d 16 [App Term, 2d & 11th Jud Dists 2007]), and that plaintiff had failed to appear at either of the duly scheduled EUOs (see Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co., 35 AD3d 720 [2006]; W & Z Acupuncture, P.C. v. Amex Assur. Co., 24 Misc.3d 142 [A], 2009 N.Y. Slip Op 51732[U] [App Term, 2d, 11th & 13th Jud Dists 2009]). An appearance at an EUO is a condition precedent to an insurer's liability on a policy (see Insurance Department Regulations [11 NYCRR] § 65-1.1; Stephen Fogel Psychological, P.C., 35 AD3d 720). As plaintiff's remaining contention lacks merit, the judgment is affirmed. " All Boro Psychological Services, P.C. v. Hartford Ins. Co., 37 Misc.3d 126(A) (App. Term 2nd, 11th and 13th Judicial Districts 2012).

In this matter the injured person failed to appear for at least two prescheduled examinations under oath. There was proof of mailing for each examination under oath notice and proof of non-appearance for each pre-scheduled examination under oath. Therefore, pursuant to the above cited authorities, the applicant's claim had been properly denied on that same basis.

THE MEDICAL NECESSITY DEFENSE:

As stated above, the respondent denied the applicant's claim on the basis that the February 22, 2024 cervical epidural steroid injection procedure was not medically necessary, and therefore, the subject anesthesia services provided in connection with that same procedure were not medically necessary.

As to the medical necessity of the subject anesthesia services, "For an expense to be considered medically necessary, the treatment, procedure, or service ordered by a qualified physician must be based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed with. Such treatment, procedure, or service must be warranted by the circumstances as verified by a preponderance of credible and reliable evidence, and must be reasonable in light of the subjective and objective evidence of the patient's complaints." Nir v. Progressive Insurance Co., 7 Misc.3d 1006(A), 801 N.Y.S.2d 237 (Table), 2005 N.Y. Slip Op. 50466(U), 2005 WL 782806 (Civ. Ct. Kings Co., Nadelson, J., Apr. 7, 2005).

As well, "A no-fault insurer defending a denial of first-party benefits on the ground that the billed for services were not 'medically necessary' must at least show that the services were inconsistent with generally accepted medical/professional practices. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden of proving that the services were not 'medically necessary' , (Citywide Social Work & Psy, Serv. v. Travelers Indem. Co., 3 Misc.3d 608, 609 supra.). 'Generally accepted practice' is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and value that define its calling ( A.B. Med. Ser. v. New York Central Mut. Fire Ins. Co., 7 Misc.3d 1018[A][Civ. Ct. Kings Co.2005]; Citywide Social Work & Psy Serv. v. Travelers Indemnity Co., supra ).", A.R. Medical Art, P.C. v. State Farm Mut. Auto. Ins. Co., 11 Misc.3d 1057(A), 815 N.Y.S.2d 493 (Civ. Ct. Kings Cty. 2006).

The respondent provided the April 11, 2024 peer review report by Dr. Christopher Grammar M.D. in support of the respondent's argument that the February 22, 2024 cervical epidural steroid injection procedure was not medically necessary, and therefore, the subject anesthesia services provided in connection with that same procedure were not medically necessary. Dr. Grammar reviewed the records concerning the injured person's relevant medical history and condition and noted that the injured person sustained soft tissue injury as a result of the subject automobile accident, and did not sustain any cervical radiculopathy in connection with the subject automobile accident.

Dr. Grammar cited medical authority to argue that a cervical epidural steroid injection procedure may be warranted for patients with persistent and severe cervical radicular pain, and also argued that the injured person did not present with any symptoms of cervical radiculopathy. Dr. Grammar noted that the MRI of the injured person's cervical spine failed to disclose any narrowing of the cervical foramen and noted that the EMG NCV study of the injured person's upper extremities did not indicate any specific

dermatomal pattern of pain. Further, Dr. Grammar noted that the clinicians who treated the injured person did not describe any dermatomal pattern in the C5 or C6 distribution and there had been no reduction in sensation, reflexes or motor function that would target these same nerve roots or suggest cervical radiculopathy. As well, Dr. Grammar noted that the February 14, 2024 examination of the injured person did not report any sensory or motor deficits in the upper or lower extremities or any significant radicular complaints. And finally in this regard, Dr. Grammar noted that various peer record reviews by several physicians did not disclose any radicular complaints, radicular symptoms or significant clinical deficits in the upper or lower extremities. As such, Dr. Grammar concluded that neither the cervical MRI, EMG NCV testing or clinical data supported a diagnosis of cervical radiculopathy, and therefore, the February 22, 2024 cervical epidural steroid injection procedure was not medically necessary, and thus, the subject anesthesia services provided in connection with that same procedure were not medically necessary.

Consequently, pursuant to the above cited authorities, Dr. Grammar's April 11, 2024 peer review report sustained the respondent's burden of demonstrating that the February 22, 2024 cervical epidural steroid injection procedure was not medically necessary, and therefore, the subject anesthesia services provided in connection with that same procedure were not medically necessary.

The applicant has not provided any evidence to persuasively rebut the conclusion drawn by Dr. Grammar as expressed in his April 11, 2024 peer review report.

I have reviewed and considered all other arguments, contentions and evidence from both the applicant and the respondent, and find them to be without merit.

In accordance with the foregoing, the applicant's claim in the amount of $356.52 for the anesthesia services provided in connection with the February 22, 2024 cervical epidural steroid injection procedure is denied,*cf*. "the insurer may rebut the inference of medical necessity through a peer review and, if the peer review is not rebutted, the insurer is entitled to denial of the claim." e.g., A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table), 2007 N.Y. Slip Op. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. July 3, 2007); "Where the assertions of a peer reviewer setting forth a factual basis and medical rationale for his determination that there was a lack of medical necessity for services rendered are unrebutted [sic] by the provider, judgment should be granted to the insurer.", AJS Chiropractor, P.C. v. Travelers Ins. Co., 25 Misc.3d 140(A), 906 N.Y.S.2d 770 (Table), 2009 N.Y. Slip Op. 52446(U), 2009 WL 4639680 (App. Term 2d, 11th & 13th Dists. Dec. 1, 2009).

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

11/25/2024
(Dated)

Paul Israelson

**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:**
39dee6f2e40b732f3a3b68613ed967cb

**Electronically Signed**

Your name: Paul Israelson
Signed on: 11/25/2024