

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Kensington Radiology Group, P.C.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-15-1025-1400

Applicant's File No.

Insurer's Claim File No. 0489392390101021

NAIC No. 22055

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: D.D.

1. Hearing(s) held on 06/23/2017
Declared closed by the arbitrator on 06/23/2017

Frank Patruno, Esq. from Frank S. Patruno, Esq. participated by telephone for the Applicant

Jenna Fredericks, Esq. from Geico Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,670.40**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant has stipulated to amend the amount in dispute to \$2,450.47 pursuant to fee schedule and the Radiology Ground Rules.

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

3. Summary of Issues in Dispute

- 1) Whether the Applicant, Kensington Radiology Group, P.C., has made a prima facie showing of necessity for MRI studies of the cervical and lumbar spine and left shoulder;
- 2) Whether the Respondent has sustained its burden that it would be inconsistent with good and accepted practice to prescribe the MRI based on the peer reviews of Dr. Kevin Curley and Dr. Albert Tse.

This hearing was conducted using the electronic case folder maintained by the American Arbitration Association. All documents contained in that folder are made part of the records of this hearing. I have reviewed the documents contained in the electronic case folder as of the date of this award as well as any documents submitted upon continuance of the case. Any documents submitted after the hearing that have not been entered in the electronic case folder as of the date of this award will be listed immediately below and forwarded to the American Arbitration Association at the time this award is issued for inclusion in said case folder.

4. Findings, Conclusions, and Basis Therefor

In this proceeding, the Applicant, Kensington Radiology Group, P.C. is seeking reimbursement for an MRI studies of the cervical and lumbar spine and right knee. The Applicant denied reimbursement based on the accompanying peer review of Dr. Kevin Curley and Dr. Albert Tse.

On May 17, 2015 the Assignor/Eligible Injured Party, a 59-year-old female, was, by history, involved in a motor vehicle accident. Following the accident, the Assignor reportedly was not evaluated at an emergency room.

On May 25, 2015, the Assignor was evaluated at East Flatbush Medical, P.C. for complaints of neck, and low back pain, and left shoulder pain. On examination, the Assignor had decreased range of motion in the cervical spine and lumbar spine with tenderness at L4-5 and C4 -5. Range of motion was also decreased in the left shoulder. The impression was of a cervical and lumbar sprain/strain and left shoulder pain. The treatment plan included physical therapy, chiropractic, range of motion and muscle testing, V-s NCT testing, Kinesio taping, physical capacity testing, a neurological evaluation, and acupuncture. MRI studies of the cervical spine, lumbar spine and left shoulder were prescribed. The prescription stated that the purpose was to "r/o C&L herniation disc, c/o shoulder soft tissue injury r/o rotator cuff syndrome".

On May 25, 2015, an MRI of the left shoulder was performed which was interpreted as revealing increased signal within the supraspinatus tendon consistent with tendinosis, fluid within the tendon sheath of the long head of the biceps consistent with tenosynovitis, and small joint effusion.

On July 8, 2015, an MRI of the cervical spine was performed which was interpreted as revealing straightening of the cervical curve consistent with spasm, hypertrophic changes and central disc bulges encroaching the anterior theca sac at C4-5 and C5-6, mild hypertrophic changes diffusely with uncinata process hypertrophy narrowing the neuroforamina bilaterally at C4-5 and C5-6. On the same day, a lumbar MRI was performed which was interpreted as revealing straightening of the lumbar lordosis consistent with spasm, mild hypertrophic changes, disc herniations at L3-4 extend into the right neuroforamina encroaching on the right nerve root sleeve and a broad based L4-5 central disc herniations extending into the proximal neuroforamina bilaterally, encroaching on the right nerve root sleeve bilaterally.

As to the MRI study of the left shoulder, the denial was based on the accompanying peer review of Dr. Albert Tse, an internist. From his review of the medical records, the peer review noted that acute shoulder pain has a benign course in many patients. He opined that recurrences and functional limitations could have been minimized with appropriate conservative management, physical therapy, modalities, exercise and patient education. Radiographs are generally unnecessary. He noted that reasonable indications for an MRI of the shoulder would have been signs of myelopathy, indications of tumor or infection, presence of progressive neurological deficits or signs and symptoms of joint instability or unstable tears. He found no such signs with this patients. See Woodward TW, Best TM, The Painful Shoulder: Part II. Acute and Chronic Disorders. *American Family Physician*, 200; 61(11): 3291-300. McMahon PJ, Sallis RE: The Painful Shoulder. *Postgraduate Medicine* 1999; 106(7):36-49. Alguire, PC. Epstein, PE., eds. MKSAP 14 Medical Knowledge Self-Assessment Program - General Internal Medicine. American College of Physicians 2006: pp29-47.

The studies of the cervical and lumbar spine were denied based on the accompanying peer review of Dr. Kevin Curley. Based on his review of the medical records, Dr. Curley found that the initial examination revealed no motor or sensory deficits or deep tendon reflex abnormalities. Dr. Curley opined that MRI studies of the spine are typically performed to help pain intervention such as surgery or epidural steroid injections. Further, since Dr. Curley concluded there was a lack evidence of focal neurological deficits and neurological compromise, he found that the use of epidurals or surgery would not be indicated. He also opined that the results of the study would have no impact on the course of treatment.

Analysis. A prima facie case of entitlement to No-Fault compensation is made out where the evidence proves that a claimant submitted proof of claim to an insurer and that the billed amount was not paid within 30 days. *Westchester Medical Center v. Lincoln General Ins. Co.*, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2d Dept. 2009); *Westchester Medical Center v. Clarendon National Ins. Co.*, 57 A.D.3d 659, 868 N.Y.S.2d 759 (2d Dept. 2008).. 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, Dr. Tse's peer review is persuasive as to the denial of the MRI of the left shoulder. The only noted finding on the initial examination was of decreased range of motion. The peer review has cited sources that an MRI of an acute injury prescribed on the first evaluation was premature. Further, he cited sources as to reasonable indications for MRI studies which were not present especially in the absence of clinical findings as to progressive neurological deficits, joint instability or unstable tears.

However, Dr. Curley's peer review is not persuasive as to the MRI studies of the cervical and lumbar spine. The studies were performed more than six weeks post accident which would no longer be in the acute phase of treatment. Further, Dr. Curley was in possession of an EMG/NCV report performed on June 10, 2015 prior to the cervical and lumbar MRI study. The study was interpreted as revealing signs of denervation in the muscles innervated by the left C5-6 and L4-5 nerve root which was consistent with radiculopathy. In sum, the Assignor had positive findings prior to the studies which were not adequately discussed in the peer review. Further, the MRI studies noted numerous findings including extensive degenerative changes, spasm and lumbar herniations encroaching the nerve root sleeve. These findings which were not discussed by Dr. Curley could be considered neurological deficits. The reports from an independent medical examination must contain not only the results of a physical examination, but also incorporate, discuss and review the patient's medical history including all positive clinical and diagnostic findings. 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). Dr. Curley failed to discuss positive clinical findings, and the Respondent has failed to sustain its burden of proof. Nir v. Allstate Insurance Company, 7 Misc.3d 544, 546, 547 (2005). Applicant is awarded reimbursement for the MRI studies of the cervical and lumbar spine.

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(c)(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 which is the total amount awarded one Applicant in one action from one provider. See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

APPLICANT IS AWARDED REIMBURSEMENT OF \$1571.80 FOR THE MRI STUDIES OF THE CERVICAL AND LUMBAR SPINE, TOGETHER WITH INTEREST AND ATTORNEY'S FEES. REIMBURSEMENT IS DENIED FOR THE STUDY OF THE LEFT SHOULDER.

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
	Kensington Radiology Group, P.C.	05/25/15 - 07/08/15	\$2,670.40	\$2,450.47	Awarded: \$1,571.80
Total			\$2,670.40		Awarded: \$1,571.80

- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 12/30/2015, which 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(c)(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 which is the total amount awarded one Applicant in one action from one provider. See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

- 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 New York
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.

07/23/2017
(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:
688733ad6a3c8fc42f0b09bc6bbab591

Electronically Signed

Your name: Kent Benziger
Signed on: 07/23/2017