

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. 17-15-1025-1366
Applicant's File No.
Insurer's Claim File No. 0426187920101012
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.N.

1. Hearing(s) held on 03/03/2017, 08/17/2017, 08/18/2017
Declared closed by the arbitrator on 08/17/2017

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

Jenna Fredericks, Esq. from Law Offices of Bryan M. Kulak participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 4,427.74**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant has stipulated to amend the amount in dispute to \$3,988.14 pursuant to fee scheduled for multiple procedures performed on the same day.

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

3. Summary of Issues in Dispute

Whether the Applicant/Provider has made a prima facie showing of necessity for MRI studies of the cervical spine, right shoulder, left and right knees. lumbar spine, right and

left knee; 2) Whether the Respondent has established that it was inconsistent with good and accepted practice to prescribe the studies based on the peer reviews of Dr. Kenneth Marici, Dr. Andrew Bazos and Dr. Joseph Elfenbein, an orthopedic.

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

On May 20, 2015, the Assignor/Eligible Injured party, a 25-year-old male was, by history, involved in a motor vehicle accident. On May 25, 2015, the Assignor was evaluated at the offices of East Flatbush Medical, P.C. for complaints of neck and low back pain and pain in the right shoulder and both knees. On examination, the Assignor had decreased range of motion in the cervical and lumbar spine, right shoulder and both knees. Tenderness was noted at C4-C7 and L4-L5. The impression was of cervical and lumbar spine sprain/strains, right shoulder pain and sprains in both knees. The treatment plan included physical therapy, chiropractic, physical therapy, testing, neurological consultation and acupuncture. MRI studies of the cervical and lumbar spine, right shoulder and both knees. The prescription for the MRI studies lists a diagnosis to the "r/o C+L herniation disc r/o shoulder soft tissue injury rotator cuff syndrome, r/o knee tear soft tissue injury.

On May 28, 2015, an MRI of the left knee was performed with an impression of Grade II signal in the posterior horn of the medial meniscus and small joint effusion. On the same day, an MRI of the right knee was performed revealing Grade II signal in the posterior horn of the medial meniscus and small joint effusion and small bone island in medial femoral condyle.

On June 4, 2015, an MRI of the right shoulder was performed revealing small joint effusion.

On June 21, 2015, an MRI of the lumbar spine was performed which was interpreted as revealing straightening. On the same day, a cervical study was performed with reversal of the normal cervical curve.

The Respondent issued denials for all five of the studies based on peer reviews. The MRI studies of the knees were denied based on Dr. Elfenbein's peer review. From his review of the medical documents, Dr. Elfenbein noted no examination findings that would require an immediate referral for MRI studies without a trial of conservative care. He noted that an MRI of the knee is indicated in cases of instability and evidence of persistent sign of meniscal injury which has failed to respond to conservative care. He also recommended an orthopedic consult. He noted.

A paper by Jackson JL, O'Malley PG, Kroenke K Evaluation of acute knee pain in primary care *Annals of Internal Medicine*. 2003; 139(7): 575-588, discusses the work-up of acute knee pain in the primary care setting. The paper recommended that if the exam suggested internal derangement, then, the patient is referred for an orthopedic evaluation rather than immediately performing the MRI study. This is because an orthopedic or sport medicine specialist would be in a better position, especially in questionable cases, to determine whether or not a study was medically indicated.

The peer review of Dr. Andrew Bazos recommended against reimbursement for the MRI of the right shoulder. Dr. Bazos took issue with the inadequate documentation and thoroughly inadequate examination by Dr. Mittal. Dr. Bazos opined that a short course of treatment would address the Assignor's injuries:

As noted by Wolff, et al, in the *Journal of American Academy of Orthopedic Surgeons* 2006, Volume 14, No. 13, pages 715-725, individuals with shoulder pain should attempt a minimum of three months of nonsurgical treatment prior to undergoing any type of advance diagnostic imaging unless there is indication of significant pathology present upon initial examination. Additionally, according to *Shoulder Complaint Guidelines*, published by the American College of Occupational and Environmental Medicine, 2004, shoulder MRIs are not recommended without surgical indications.

In this instance, Dr. Bazos noted no significant pathology on the initial exam and no indication of a response to conservative treatment.

The cervical and lumbar studies were denied based on the peer review of Dr. Kenneth Marici, an internist. As to the cervical study, Dr. Marici cited a 1977 article in *Spine* which found that MRI studies are unnecessary in patients in the acute phase of care and become necessary with individuals presenting persistent and/or progressive neurological deficits. As to the lumbar studies, Dr. Marici cited Cho, et al. in the *Annals of Internal Medicine*, and guidelines set forth by the American College of Physicians that advanced imaging is necessary for low back pain when there are progressive neurological deficits

or when a patient is a candidate for surgery or epidural injections. Based on his review of the medical records Dr. Marici found none of those conditions present.

Analysis. A prima facie case of entitlement to No-Fault compensation is made out where the evidence proves that a clamant 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, the peer reviews of Drs. Bazos and Marici are persuasive. As to the MRI of the right shoulder, Dr. Bazos cited an authoritative source that found it inconsistent with good and accepted practice to prescribe the studies without a minimum of three months of nonsurgical treatment unless there was significant pathology on the initial exam. The treating provider performed an inadequate examination with no significant findings. As to the cervical and lumbar studies, Dr. Marici also cited specific authoritative sources that MRI studies of the cervical and lumbar spine are not medical necessary in the absence of findings of persistent and progressive neurological deficits in patients who are candidates for surgery or epidural injections The required medical conditions were not present and the studies are not necessary.

However, the peer review of Dr. Elfenbein are not persuasive. He fails to cite any authoritative source to support his contentions that a patient must undergo a trial of conservative care and have evidence of instability and persistent signs of a meniscal injury. Although such a statement may appeal to common sense, it fails to meet the standard of proof as required by *Nir v. Allstate Insurance Company*, 7 Misc.3d 544, 546, 547 (2005):

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. Elfenbein does cite an authoritative source that suggests that an orthopedic should be consulted prior to another specialist or provider prescribing an MRI. A close reading of the peer review establishes that this is not an accepted standard and practice. The Respondent has failed to sustain its burden of proof. Reimbursement is awarded for MRI studies of the right and left knee.

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(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 \$1,537.67 FOR MRI STUDIES OF THE RIGHT AND LEFT KNEE PERFORMED THE SAME DAY, TOGETHER WITH INTEREST AND ATTORNEY'S FEES. REIMBURSEMENT FOR MRI STUDIES OF THE CERVICAL SPINE, LUMBAR SPINE AND SHOULDER ARE DENIED.

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 PC	05/28/15 - 06/21/15	\$4,427.74	\$3,988.14	Awarded: \$1,537.67
Total			\$4,427.74		Awarded: \$1,537.67

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 12/24/2015, 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.

09/06/2017
(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:
bc089d57a1580371e0d0b505be6a3787

Electronically Signed

Your name: Kent Benziger
Signed on: 09/06/2017