

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Excell Clinical Lab
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-19-1128-5482

Applicant's File No. DK19-70899

Insurer's Claim File No. 1008627-02

NAIC No. 16616

ARBITRATION AWARD

I, Neal S. Dobshinsky, 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: J Doe

1. Hearing(s) held on 11/04/2020
Declared closed by the arbitrator on 11/04/2020

Henry Guindi from Korsunskiy Legal Group P.C. participated in person for the Applicant

Greg Etienne from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,996.00**, 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 the day that Doe was to undergo left knee arthroscopic surgery, the surgeon ordered urine drug screen testing on Doe. Applicant ran the tests and then sought payment.

Based on the report of its peer reviewer, Insurer denied Applicant's claim on the ground that there was no medical necessity and no causal relationship between the accident and the underlying surgery, and, therefore, for the related services. Insurer also contended that the fees sought were not in accordance with the fee schedule.

Was the drug screen testing medically necessary? If it was, how much is Applicant entitled to?

4. Findings, Conclusions, and Basis Therefor

I have read and considered the materials in the American Arbitration Association's ADR Center case file and heard and considered the parties' oral arguments. I find as follows:

Background

On 9/29/18, J Doe, a male, then 20 years old, was a passenger in a motor vehicle that was in an accident. Doe claims to have been injured. He then sought medical care and treatment.

MRIs of Doe's left knee were performed on 11/7/17. The MRIs showed mild joint effusion consistent with recent trauma.

On 11/15/17, Doe saw Alexios Apazidis, MD, a physician with Total Spine and Sports Care, for an initial evaluation. Doe presented with complaints of pain in his neck, back, and left knee. Doe reported that his knee is painful while he walks. He has to use a crutch. The knee is stiff and locks. It occasionally swells. Despite physical therapy, the knee was not improving. Apazidis examined Doe. He found that Doe's knee had positive mild effusion medially, positive tenderness over the medial joint line, positive full active range of motion with pain on flexion; positive McMurray's test; and muscle strength 4+/5. The diagnoses included unspecified internal derangement of the left knee. Apazidis recommended diagnostic knee arthroscopy.

On 12/2/17, Apazidis examined Doe. Doe's complained of left knee pain, throbbing, and stiffness. Apazidis stated that Doe's signs/symptoms are consistent with meniscal tear "and we will proceed with arthroscopic surgery for this patient who has failed nonsurgical care. Patient will benefit from physical therapy to improve pain ROM; rehab potential: fair-good."

On that same day, Apazidis performed (i) diagnostic left knee arthroscopy; (ii) lysis of plica; (iii) major synovectomy left knee multiple compartments; (iv) lateral partial menisectomy; and (v) partial ACL abrasion arthroscopy. The procedure was performed under IV sedation, monitored anesthesia care.

The records submitted show that on the day of the surgery, 12/2/17, at 7:55AM, a urine sample was collected from Doe at the surgery facility at the request of Apazidis, and the sample was submitted to applicant Excell Clinical Lab for urine toxicology testing. The results were not reported by Applicant until 12/6/17, 4 days post surgery.

Applicant's Claim and Insurer's Denial

Applicant, as Doe's assignee, timely submitted its bill to Insurer for no-fault benefits for payment for the urine toxicology testing.

Insurer timely denied Applicant's claim based on the report of its peer reviewer that the underlying "surgery and surgically related services to the left knee . . . [were] not causally related to the accident of record based on the attached peer review by Dr. Raghava R. Polavarapu, MD,. In addition, denied based on no medical necessity and no causal relationship between the accident and the knee surgery of 12/2/17."

At the oral hearing the only issue argued and submitted by the parties for determination was the medical necessity for the urine toxicology testing. All other issues were waived.

Medical Necessity and the Burden of Proof Under No-Fault

Medical necessity for services or supplies is established by proof of an applicant's properly submitted claim form. *All County Open MRI & Diagn. Radiology P.C. v Travelers Ins. Co.*, 11 Misc3d 131(A), 2006 NY Slip Op. 50318[U] [App Term, 2d Dept 9th & 10th Jud Dists 2006]. Here, Applicant's submission of its claim establishes the medical necessity for the testing in the first instance.

The insurer "bears both the burden of production and persuasion" as to its defense of lack of medical necessity. *Nir v Allstate Ins. Co.*, 7 Misc3d 544, 546 [Civ Ct, Kings County 2005]. The defense must be supported by a peer review report or other evidence, such as an independent medical examination report. The report must set forth a sufficiently detailed factual basis and medical rationale for the denial. *Amaze Med. Supply v Eagle Ins. Co.*, 2 Misc3d 128(A), 2003 NY Slip Op 51701[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2003].

Furthermore, an [insurer] has the burden to come forward with proof in admissible form to establish "the fact" or the evidentiary "found[ation for its] belief" that the patient's treated condition was unrelated to his or her automobile accident. *Mount Sinai Hosp. v Triboro Coach Inc.*, 263 AD2d 11, 19-20 [2d Dept 1999] [internal citations omitted]. "Unlike negligence actions where plaintiffs must prove causation, plaintiffs seeking to recover first party no-fault payments bear no such initial burden, as causation is presumed." "Exacerbations of preexisting conditions are covered by the No-Fault Law. *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 AD3d 13, 21, 23 [2d Dept 2009] [internal citations omitted]. Aggravation of preexisting conditions is covered as well. 11 NYCRR 65-3.14 (a).

"[H]owever, it is the [applicant] who has the ultimate burden of proving, by a preponderance of the evidence, that the services at issue were medically necessary" (citations omitted). *Radiology Today, P.C. v Geico Ins. Co.*, 58 Misc3d 132(A), 2017 NY Slip Op 51768[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017].

The Peer Review and Insurer's Lack of Medical Necessity and Causation Defenses

Insurer based its denial of Applicant's claim on the affirmed peer review report of Raghava R. Polavarapu, MD, a board certified orthopedic surgeon. In his 5/15/18 report, Polavarapu gives his reasons and opinion why "the surgery was not medically necessary, any derivative services related to, or as a result of the surgery, including lab testing, should be denied"

The doctor lists the records and reports he reviewed. These include: report of the MRI of Doe's left knee dated 11/7/17; reports from Apazidis dated 11/15/17 and 12/2/17; film review from a Dr. Fitzpatrick dated 3/8/18 reviewing the left knee MRI at the the request of Insurer' anesthesia record and operative report both dated 12/2/17; lab report dated 12/6/17; and a few other records and reports.

Polavarapu briefly mentions the accident; Doe's visit to a hospital emergency room; the examination by Apazidis; the findings on the knee MRI; and the arthroscopy.

Polavarapu states, based on the review by Fitzpatrick, "that there was no evidence of traumatic findings on the MRI; no information associated with acute traumatic injury for which there would be medical necessity for referral for knee arthroscopy; and no clinical findings to suggest the need for surgical intervention."

This peer review sets forth an adequate factual basis and medical rationale to rebut the presumption of medical necessity as to the drug screening was necessary.

Applicant's Rebuttal as to Medical Necessity

In response to the peer review, Applicant submits an affirmed rebuttal by Drora Hirsch, MD. In her 9/30/20 rebuttal, Hirsch states her reasons and opinions why the urine drug testing was medically necessary.

Other than stating that she is a licensed medical doctor, Hirsch does not give any details regarding her education, training, or experience. She does not state who requested her to opine on the medical necessity for the testing; or her relationship, if any, to any of the parties; or her interest, if any, in the outcome of the matter. She did not examine or treat Doe or order the testing at issue. She does not specifically identify all of the records or reports she may have reviewed.

Hirsch argues that the knee arthroscopy was medically necessary. She points out that Doe was referred for the urine drug screening on 12/2/17. She states that Doe presented for a pre-surgical evaluation on the day of the surgery. She then highlights that "the urine drug screening was necessary as part of clearance prior to surgery, and in contemplation of a change in medication treatment (patients are typically prescribed NSAIDs and pain killers following surgery. Surgery involved the administration of anesthesia and use of an antibiotic to prevent infection. Prior to the surgery [Doe] was already taking NSAIDs and other medications." She continues, "[t]he drug testing is a routinely performed prior to elective surgery since the information obtained is vital to planning patient's care during (whether any medications will interact with the anesthesia) and after the surgery (the patient is prescribed pain medication post-surgery). Urine drug testing is necessary in order to assist in medication adherence, reveal an

initial diagnosis of drug misuses or addiction-as an adjunct to self-reported drug history, and as a requirement for surgery."

Hirsch's argument would make sense if the testing was done sufficiently before the surgery and the results were reported to the physician before the surgery was started. But, the records show that that is not what happened. The anesthesia start time was 0906 and the end time was 1008. The surgery start time was 935 and the end time was 951. The urine sample was collected at 0755, and the results of the testing were not reported by Applicant until 12/6/15, 4 days after the surgery.

The results could not have been used in any way as part of the clearance prior to surgery. And as far post-surgery prescriptions are concerned, those were written on the day of the surgery as well.

Among the authorities Hirsch cites to support her opinions, she quotes from the introduction to an article in the American Family Physician to justify the need for the urine drug testing. Feely MA, Collins CS, Daniels PR, Kebede EB, Jatoi A, Mauck KF. *Preoperative Testing Before Noncardiac Surgery: Guidelines and Recommendations*. American Family Physician. 2013 Mar 15;87(6):414-8. But, specifically regarding urinalysis, which is what the article discusses, the authors state: "[t]here is little evidence that an abnormal result is associated with postoperative complications, and predictive values of routine urinalysis in asymptomatic patients are poor. Guideline consensus on the basis of expert opinion is that routine urinalysis is not recommended in asymptomatic patients except in those undergoing surgical implantation of foreign material (e.g., prosthetic joint, heart valve) or invasive urologic procedures."

On the limited point at issue-the necessity for the drug screen testing-the rebuttal is neither credible nor persuasive.

Conclusion

All of the contentions raised by both parties have been considered and evaluated. The authorities cited have been reviewed as have all of the records in the parties' submissions. Applicant has not overcome Insurer's showing that the drug screen testing was not medically necessary.

Based on the parties' submissions, their arguments, the law, the regulations, and the weight of the credible evidence, I conclude that Insurer has established its lack of medical necessity defense. Applicant is not entitled to payment.

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 New York

SS :

County of Nassau

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

12/03/2020
(Dated)

Neal S. Dobshinsky

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:
8e54ae40e9b66cb96afb2f23892ac7a1

Electronically Signed

Your name: Neal S. Dobshinsky
Signed on: 12/03/2020