American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

W Joseph Gorum MD PC (Applicant)	AAA Case No.	17-20-1165-3618
	Applicant's File No.	1042689
- and -	Insurer's Claim File No.	190437-05
	NAIC No.	36030
Maya Assurance Company (Respondent)		

ARBITRATION AWARD

I, Eileen Hennessy, 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: Assignor-J.M.

1. Hearing(s) held on 11/24/2020
   Declared closed by the arbitrator on 11/24/2020

   Tricia Smith from The Law Office Of Cohen & Jaffe, LLP participated by telephone for the Applicant

   Sung A. Lee from De Martini & Yi, LLP participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 9,021.97**, was AMENDED and permitted by the arbitrator at the oral hearing.

   Applicant amended the amount in dispute from the original amount of $9,021.97 to $3,766.57 in accordance with Respondent's fee audit by Dr. James S. Lee, CPC.

   Stipulations WERE made by the parties regarding the issues to be determined.

   The parties stipulated and agreed that (i) Applicant has met its prima facie burden by submitting evidence that payment of no-fault benefits is overdue, and proof of its claim was mailed to and received by Respondent; (ii) Respondent's denial of the subject claim was timely issued; and (iii) the amount claimed does not exceed the maximum permissible charges under the fee schedule applicable to the disputed services.

3. Summary of Issues in Dispute

The record reveals that the Assignor-J.M., a 36-year-old female, claimed injuries as a passenger of a motor vehicle involved in an accident that occurred on 5/26/2019. Applicant seeks reimbursement for the surgeon's fee for right knee arthroscopic surgery conducted on 9/20/2019. Respondent denied the claim based on a lack of medical necessity per the results of the peer review by Dr. Douglas Petroski, M.D., dated 10/23/2019. The issue to be determined is whether the services were medically necessary and causally related to the accident of 5/26/2019?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement for the surgeon's fee for right knee arthroscopic surgery. This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) for the case maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing.

In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations.

Legal Standards for Determining Medical Necessity

To support a lack of medical necessity defense, respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." *See* Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to applicant. *See generally,* Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S.2d 680 (2d Dept. 2009), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. *See* Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp., 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003). The appellate courts have not clearly defined what satisfies the insurer's evidentiary standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 41 Misc.3d 133(A),

981 N.Y.S.2d 633 (Table), 2013 NY Slip Op 51800(U), 2013 WL 5861523 (App. Term 1st Dept. Oct. 30, 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity. The trial courts have held that a peer review report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. *See generally* Nir v. Allstate Ins. Co., 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); *See also*, All Boro Psychological Servs. P.C. v. GEICO, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

Where a respondent meets its burden, it becomes incumbent on the claimant to rebut the peer review. Be Well Medical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 18 Misc.3d 139(A), 2008 WL 506180 (App. Term 2d & 11 Dists. Feb. 21, 2008); A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 2007 WL 1989432 (App. Term 2d & 11 Dists July 3, 2007. "[T]he insured/provider bears the burden of persuasion on the question of medical necessity. Specifically, once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, 'plaintiff must rebut it or succumb." Bedford Park Medical Practice, P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 2005 WL 1936346 at 3 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). "Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (*see* Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11 ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip. Op. 5187(U) at 2, 2006 WL 2829826 (App. Term 2d & 11 Dists. Sept. 29, 2006).

CAUSATION

Under New York's Comprehensive Motor Vehicle Insurance Reparation Act (the "No-Fault Law), an insurance carrier is obligated to reimburse an injured party (or his or her assignee), for all "reasonable and necessary expenses" and "medical expenses" arising from the use and operation of the insured vehicle. Unlike negligence actions where claimant must prove causation, claimants seeking No-Fault payments "bear no such initial burden, as causation is presumed." Kingsbrook Jewish Med. Center v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S.2d 680 (2nd Dept. 2009); Bronx Radiology, P.C. v. New York Central Mutual Fire Insurance Company, 17 Misc.3d 97, 2007 N.Y. Slip Op. 27427 (App. Term 1st Dept. 2007).

Causation is presumed since "it would not be reasonable to insist that (an applicant) must prove as a threshold matter that (a) patient's condition was 'caused' by the automobile accident." Mount Sinai Hospital v. Triboro Coach, 263 A.D.2d 11, 20, 699 N.Y.S.2d 77 (2nd Dept. 1999). Thus, the burden is on the insurer to come forward with proof establishing by "fact or founded belief" its defense that the claimed injuries have no nexus to the accident. Mount Sinai Hospital v. Triboro Coach, 263 A.D.2d 11, 19

(2nd Dept. 199) (*quoting* Central Gen. Hosp. v. Chubb Group of Ins. Cos., 90 N.Y. 2d 195, 199 (1997).

The case law holds that for respondent to show that a patient's treated condition was unrelated to his or her automobile accident, the affidavit of its medical expert must be supported by the evidence and not be conclusory or speculative. E.g., New York & Presbyterian Hospital v. Selective Ins. Co. of America, 43 A.D.3d 1019, 842 N.Y.S.2d 63 (2d Dept. 2007). Once Respondent provides proof that the condition was unrelated to the accident, the burden shifts to the Applicant to address such proof. Pommells v Perez, 4 NY3d 566, 577-578, 830 NE2d 278, 797 NYS2d 380 [2005]; *See also* Campbell v. Drammeh, 2018 NY Slip Op 03643 [161 AD3d 584] andLatus v Ishtarq, 2018 NY Slip Op 01417 (1st Dept. 2018) [Plaintiff's physician provided only a conclusory opinion that plaintiff's injuries were caused by the accident, without addressing the preexisting conditions documented in his own MRI, or explaining why plaintiff's current reported symptoms were not related to the preexisting conditions (*see Nakamura v Montalvo,* 137 AD3d 695, 696 [1st Dept 2016];*Farmer v Ventkate Inc.*, 117 AD3d 562, 562 [1st Dept 2014]).]

"Exacerbations of preexisting conditions are covered by the No-Fault Law (see Wolf v Holyoke Mut. Ins. Co., 3 AD3d 660, 660-661 [2004]; Mount Sinai Hosp. v Triboro Coach, 263 AD2d at 18), Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 871 N.Y.S.2d 680, 61 AD3d 13, 2009 NY Slip Op 351 (N.Y. App. Div., 2009).

Neither a failure to disclaim nor the issuance of a denial untimely on its face, preclude the Respondent from resisting a claim and asserting that its policy did not contemplate coverage in the first instance. (*See*, Cent. Gen. Hosp. v. Chubb Group of Ins. Cos., 90 N.Y.2d 195, 201 - 202 [N.Y. 1997]; see also, Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d 556 [N.Y. 2008]) St. Vincent's Hospital & Medical Center v. Allstate Ins. Co., 69 A.D. 3d 923, 893 N.Y.S.2d 589 (2d Dept. 2010).

Application of Legal Standards

The Assignor had right knee arthroscopic surgery on 9/20/2019. In support of its contention that the services were not medically necessary or causally related to the accident of 5/26/2019, Respondent relies upon the peer review of Douglas Petroski, M.D., dated 10/23/2019. Applicant submitted a formal rebuttal by W. Joseph Gorum, M.D., dated 4/22/2020.

Dr. Petroski noted in pertinent part:

> IMPRESSION: As stated in the medical records, the patient is a 36-year-old female who reportedly sustained injuries as a result of a motor vehicle accident on 05/26/19.
>
> CONCLUSION: Based on a review of the provided medical records, I concluded that the surgery of the right knee with associated services

> including prescription medication and postoperative supplies on 09/20/19-10/14/19 were not medically necessary or causally related to the accident of record.
> The surgery of the right knee was performed by Dr. Gorum on 09/20/19. According to the provided medical records, the claimant presented to Dr. Gorum on 09/03/19 for complaints of right knee pain. At that time, physical examination of the right knee revealed medial joint line tenderness and limited range of motion with slightly decreased motor strength. Lachman and posterior drawer were negative and McMurray's was positive. No effusion, crepitus or instability was reported and the MRI of the right knee showed no meniscal or ligament tear. Surgery of the right knee was indicated by Dr. Gorum after the office visit on 09/03/19 and the procedure was performed on 09/20/19.
> Based on the above, there is not adequate medical indication to justify the surgery of the right knee. In addition, there is no evidence that this claimant's right knee was deteriorating despite conservative treatment.
> Additionally, according to the examination report dated 08/15/19 by Dr. Salkin, the claimant was diagnosed with "resolved right knee contusion" and there was no need for surgery indicated at that time.
> …
> Therefore, the surgery of the right knee with associated services including prescription medication and post-operative supplies on 09/20/19-10/14/19 were not medically necessary or causally related to the accident of record.
>
> The AMA (American Medical Association)defines medical necessity as , "Health care services orproducts thataprudent physicianwouldprovide to a patientforthe purposeofpreventing, diagnosing, or treatinganillness, injury,disease or itssymptomsinamanner that is(a)inaccordance with generally accepted standards ofmedicalpractice; (b)clinicallyappropriate in termsoftype, frequency, extent,site, andduration;and (c)not primarily for the convenience ofthe patient,physician,or otherhealthcareprovider." (American Medical Association,January 14, 2011,"Statement ofthe American Medical Association to the InstituteofMedicine'sCommittee onDeterminationof EssentialHealth Benefits").

I find Respondent's peer review insufficient to meet Respondent's burden of persuasion with respect to lack of medical necessity defense because it failed to set forth a sufficient factual basis and medical rationale. The peer review lacked objective medical reasoning and citation to relevant medical authority. Although the peer review listed the positive findings in Dr. Gorum's 9/3/2019 initial examination report, Dr. Petroski ignored the same when rendering his analysis to deny the surgery. The peer review "did not set forth a factual basis and medical rationale sufficient to establish the absence of medical necessity". Dr. Petroski fails to cite to any medical literature or rationale to establish a standard of care for performing the surgery or establish that the standard of care was not met, which does not meet the Nir [1]standard. Dr. Petroski's reliance on the generic definition of medical necessity as defined by the AMA is not an appropriate standard for the surgery billed. In sum, I find the peer review by Dr. Petroski unpersuasive and conclusory. Respondent failed to "support its lack of medical necessity defense" and the

"burden of persuasion" did not therefore shift to Applicant. *See generally*, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

With respect to the alleged lack of causation, Respondent also failed to meet its burden to support its defense. The case law holds that for Respondent to establish that a patient's treated condition was unrelated to his or her automobile accident, the affidavit of its medical expert must be supported by the evidence and not be conclusory or speculative. E.g., New York & Presbyterian Hospital v. Selective Ins. Co. of America, 43 A.D.3d 1019, 842 N.Y.S.2d 63 (2d Dept. 2007). Respondent's peer fails to meet this standard. Applicant has submitted the MRI report, an examination by orthopedist Dr. Gorum, dated 9/3/2019, which established positive clinical objective findings, and operative findings, which correlate with the examination findings. Dr. Petroski fail to support the conclusion that the injuries were unrelated to the instant motor vehicle accident as no credible explanation, medical authority or analysis were rendered on the same. While Dr. Petroski indicates that the MRI findings showed no meniscal or ligament tear and conservative care failed to indicate the Assignor's condition was deteriorating, he fails to provide any further explanation or provide any citation for the position that the services were not causally related to the accident. Dr. Petroski failed to establish the services at issue were rendered for a condition that was completely unrelated to the accident. Moreover, if the Assignor did have a pre-existing condition Dr. Petroski failed to explain that the accident did not aggravate or exacerbate the Assignor's right knee condition.

I note that Dr. Petroski cited to the orthopedic IME of Dr. Salkin conducted on 8/15/2019, wherein the claimant was diagnosed with a "resolved right knee contusion" and Dr. Salkin noted "there was no need for surgery indicated at that time", in support of his position that the surgery was not medically necessary or causally related to the accident. However, Respondent did not submit this examination to the record for my review and I cannot therefore evaluate the probative value of the report. Dr. Gorum notes in the rebuttal that the peer is more of a supporting addendum to the IME report, rather than a peer report. He notes that Dr. Salkin's diagnosis was clearly incorrect based on the post-operative findings of a meniscal tear and could have led to significant additional tearing if the surgery was not performed based on his diagnosis.

Having considered the evidence presented, I find that the Respondent has failed to establish its prima facie burden of lack of medical necessity or lack of causal relationship of the injury to the motor vehicle accident of 5/26/2019. I am not persuaded by the peer review of Dr. Petroski in this matter. Dr. Petroski did not discuss whether the Assignor's referral for the surgery at the initial examination with Dr. Gorum was within the standard of care or whether the Assignor had the appropriate amount and type of conservative treatment prior to the surgery. Dr. Petroski also did not address whether it is the standard of care to list the name of the referring doctor in the examination report and whether the treating doctor should request and discuss the clinical findings of the Assignor's extrinsic examination findings and conservative treatment between the date of the accident on 5/26/2019 and the initial examination prior to referring a patient for

surgery. Dr. Petroski did not discuss the standard of care for referring a patient for surgery after the initial evaluation if the examination findings did not correlate with the MRI findings.

I find the Applicant's reliance on his treating doctor's initial examination 3.5 months after the accident to refer for surgery, without supporting narrative reports from other treating physicians to correlate the findings, troubling. This is especially true considering Dr. Gorum's clinical findings do not correlate with the MRI report, which indicates no ligament or meniscal tears. I note that there are no medical evaluations by a medical doctor or physical therapy progress notes provided for review by the peer doctor for dates of service prior to 9/3/2019, apart from a progress note and outcome assessment test on 6/24/2019 by Yakov Yakubov, PA/Viviane Etienne, M.D. and there is no indication that those records were requested by the peer doctor. Moreover, the only reference to physical therapy in the records reviewed by Dr. Petroski is a physical therapy prescription by Yakov Yakubov, PA/Viviane Etienne, M.D., dated 9/9/2019, eleven days prior to the accident, despite Dr. Gorum's indication that the Assignor failed conservative treatment. However, it is Respondent's initial burden to establish the lack of medical necessity of the surgery. Without Respondent establishing a standard of care that Applicant deviated from in referring and conducting the surgery, the burden has not shifted to the Applicant to establish the medical necessity of the surgery. For the foregoing reasons, I find that the Respondent's denial cannot be upheld. As such, after comparing the relevant evidence presented by both parties as against each other, I find for the Applicant.

Accordingly, Applicant's claim is granted in its amended entirety. This award is in full disposition of all No-Fault benefit claims submitted to this Arbitrator.

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
	W Joseph Gorum MD PC	09/20/19 - 09/20/19	$9,021.97	$3,766.57	Awarded: $3,766.57
Total			$9,021.97		Awarded: $3,766.57

B. The insurer shall also compute and pay the applicant interest set forth below. 05/15/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. *See generally*, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30-day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." *See*, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009). Based on the regulations, interest shall accrue from the date the applicant requested arbitration in this matter. *See*, 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

Applicant is entitled to an attorney's fee pursuant to Insurance Law §5106(a). After calculating the sum total of the first-party (No-Fault) benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, subject to the following limitations: In the event the above filing date was prior to Feb. 4, 2015, the attorney's fee is subject to a minimum of $60.00 and a maximum of $850.00, per 11 NYCRR 65-4.6(e). In the event the above filing date was on or after Feb. 4, 2015, the attorney's fee is subject to a maximum of $1,360.00, per 11 NYCRR 65-4.6(d). In the event the above filing date was on or after Feb. 4, 2015 and first-party (No-Fault) benefits are awarded to more than one Applicant herein, the

attorney's fee shall be calculated separately for each Applicant, each Applicant's attorney fee being subject to the $1,360.00 maximum.

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 Nassau

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

12/23/2020
(Dated)

Eileen Hennessy

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:
a6a8eeee2a0d4ca3eaba0056360ac5ce

Electronically Signed

Your name: Eileen Hennessy
Signed on: 12/23/2020