

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Advanced Orthopedics & Joint Preservation  
PC  
(Applicant)

- and -

Allstate Insurance Company  
(Respondent)

AAA Case No.	17-19-1144-9444
Applicant's File No.	SS-124504
Insurer's Claim File No.	0549509338
NAIC No.	19232

**ARBITRATION AWARD**

I, Bonnie Link, 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: the EIP

1. Hearing(s) held on 02/23/2021  
Declared closed by the arbitrator on 02/23/2021

Sabine Sciarotto, Esq. from Samandarov & Associates, P.C. participated for the Applicant

Jeffrey Winston, Esq. from Law Offices of John Trop participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 6,358.40**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount in dispute is reduced by the Applicant to \$5269.98.

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

3. Summary of Issues in Dispute

This arbitration arises out of treatment of a 50 year old female for injuries sustained in a motor vehicle accident that occurred on June 13, 2019. Applicant seeks reimbursement in the amount of \$5269.98 for the surgical fees (primary and assistant) for right knee

surgery conducted on August 15, 2019. Respondent timely denied the bills based upon a Peer Review by Regina Hillman, M.D., an orthopedist, dated September 12, 2019 that found that the treatment was not medically necessary.

A rebuttal dated October 16, 2019 by Dr. Stanislav Avshalumov, M.D., the surgeon, is submitted and reviewed.

In addition, the Respondent argues that the appropriate reimbursement for this surgery for both the surgeon and the assistant surgeon would be \$4296.56, per a further reduction for secondary procedures.

#### 4. Findings, Conclusions, and Basis Therefor

This matter is determined after reviewing the documents contained in the electronic case folder at the closing of the file and the presentations of both sides. The parties participated using the Zoom platform.

It is well settled that an applicant establishes its prima facie entitlement to payment by proving it submitted a claim setting forth the facts and the amount of the loss sustained and that payment of no fault benefits were overdue (see Insurance Law § 5106[a]; *Mary Immaculate Hospital v Allstate Ins. Co.* 5 A.D.3d. 742 Second Dep't 2004. A prima facie case has been established herein.

According to the submissions, the EIP was a restrained front seat passenger who was transported by ambulance to a local emergency room for complaints of pain in her neck and low back. She had a CT scan of her head and cervical spine, was otherwise evaluated and released.

She came under the care of private medical providers and was commenced on a regimen of physical therapy and acupuncture. She had an MRI of the right knee on July 7, 2019. It was positive for an irregular horizontal tear of the posterior horn of the medial meniscus extending to the inferior articulating surface, small joint effusion, and a 3 x 1 centimeter popliteal cyst.

EIP was examined by Dr. Avshalumov on July 29, 2019 complaining of right knee pain 8/10. His examination revealed tenderness over the anterior aspect and patella region as well as over the medial and lateral joint line. Her range of motion was decreased, she had a positive McMurray's and patellar apprehension test and her muscle strength 4/5. The diagnoses were right knee post-traumatic internal derangement, right knee post-traumatic contusion and right knee pain and he suggested right knee surgery. The EIP had the subject surgery on August 15, 2019. It consisted of an arthroscopic partial medial meniscectomy, right knee arthroscopic chondroplasty of the trochlea, right knee synovitis and synovectomy of two compartments and right knee intra-articular injections for postop pain control.

Dr. Hillsman reviewed the EIP's presurgical and surgical records and while she determined that the injuries were causally related to the accident, she stated that the

standard of care for surgery would have been rest, ice and medication as well as at least 6 to 12 weeks of physical therapy and acupuncture. She pointed out that the records show that the patient here had only eight sessions of physical therapy from June 24, 2019 to July 22, 2019 and that the sessions would have been inadequate to resolve her symptoms.

Essentially, Dr. Hillsman states that there was no "failure" of conservative care because there was insufficient presurgical conservative care.

An insurance carrier must at a minimum establish a detailed factual basis and a sufficient medical rationale for asserting lack of medical necessity, *Delta Diagnostic Radiology PC v. Progressive Casualty Ins. Co.*, 21 Misc. 3d. (142A) (App. Term 2d. Dep't, 2008), and "must set forth a factual basis sufficient to establish, prima facie, the absence of medical necessity." *Choicenet Chiropractic P.C. v. Allstate Ins. Co.*, 2003 N.Y. Slip Op. 50672[U], 2003 WL 1904296 (App. Term, 2d and 11th Jud. Dists. 2003) (emphasis supplied).

"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 11th ed])." *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006).

After a thorough review of the peer opinion, I find that it is inadequate to meet the Respondent's burden of proving the lack of medical necessity. Dr. Hillsman did not sufficiently comment about the results of the right knee MRI which was positive for an "irregular horizontal tear of the posterior horn of the medial meniscus extending to the inferior articulating surface" or whether this type of tear would have specifically responded to conservative treatment. Even if the peer review had shifted the burden of proof, the Applicant's rebuttal is sufficient to sustain that shift of the burden of proof.

Dr. Avashalumov states that based on the MRI findings and the pre-surgical orthopedic testing, there was no doubt that the patient had a meniscal tear that needed to be treated surgically to avoid potential severe complications. He stated that there is no global requirement for a particular type or amount of non-surgical treatment but notes that tears should be repaired because the success of the repair decreases over time due to cell death. He noted that the patient's pain was also due to chondromalacia and that chondroplasty or chondral shaving is used to decrease the mechanical symptoms by smoothing or removing regions of cartilage fibrillation or loose flaps and this was one of the procedures performed. He also performed a synovectomy in order to remove inflamed tissue. He states that injections would not have been beneficial or indicated in this case because they would not have repaired the tears and they also carry the risk of detrimental effects on the tendon and bone and decrease the potential for healing if a surgical repair is then found to be necessary. He states that Dr. Hillsman reliance on guidelines from the NIA is improper because the organization is part of a health insurance company and is not a neutral source.

The Applicant's rebuttal is sufficient to satisfy the shifted burden of proof. It is based on objective evidence of pathology that Dr. Avshalumov asserted would not have responded in any event to conservative treatment. Based on the foregoing, I find that the Respondent has ultimately not met its burden of proving the lack of medical necessity. I am swayed by the rebuttal.

Based on my review, the preponderance of the evidence establishes the medical necessity for the knee surgery. Accordingly, this claim is granted. Our attention must now shift to the quantum reimbursement.

The Respondent's argument that the Applicant is entitled to 100% of the first primary code and then 50% of each code thereafter is not supported by a coder affidavit or a medical affidavit that establishes that the procedures are in fact secondary, however, by the use of Modifier 51, the bills themselves indicate that the codes are secondary (as opposed to Modifier 59.)

Accordingly, the Applicant's claim in the amount of \$4296.56 (inclusive of both the surgeon and the assistant) is granted.

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
	Advanced Orthopedics & Joint Preservation PC	08/15/19 - 08/15/19	\$5,728.29	\$0.00	Awarded: \$0.00
	Advanced Orthopedics & Joint Preservation PC	08/15/19 - 08/15/19	\$630.11	\$0.00	Awarded: \$0.00
	Advanced Orthopedics & Joint Preservation PC	08/15/19 - 08/15/19	\$0.00	\$5,269.98	Awarded: \$4,296.56
<b>Total</b>			<b>\$6,358.40</b>		<b>Awarded: \$4,296.56</b>

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/17/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The denial in this matter being timely issued, the Respondent shall pay the Applicant interest on the amount of first-party benefits awarded, computed from date of filing, to the date payment is made at a rate of 2% per month, simple interest (i.e., not compounded) using a 30 day month, 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

As this matter was filed after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 11 NYCRR 65-4.6(d).

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

03/08/2021  
(Dated)

Bonnie Link

#### **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:**

5d2ab023ef410aa6e8d4a6b97e010058

### **Electronically Signed**

Your name: Bonnie Link  
Signed on: 03/08/2021