

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Wellness Diagnostic Imaging PC
(Applicant)

- and -

Hereford Insurance Company
(Respondent)

AAA Case No. 17-19-1143-9435

Applicant's File No. RFA19-260222

Insurer's Claim File No. 82203-02

NAIC No. 24309

ARBITRATION AWARD

I, Paul Keenan, 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 VE

1. Hearing(s) held on 04/07/2021
Declared closed by the arbitrator on 04/07/2021

Dara Goodman, Esq. from Russell Friedman & Associates LLP participated for the Applicant

David Tetlak, Esq. from Law Offices of Rubin & Nazarian participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,790.67**, was AMENDED and permitted by the arbitrator at the oral hearing.

Counsel for applicant amended the amount at issue to \$1,571.00 to conform to fee schedule

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

3. Summary of Issues in Dispute

Whether applicant is entitled to payment for lumbar MRI and knee MRI despite denial based on peer review.

4. Findings, Conclusions, and Basis Therefor

Submissions are available through ADR filings.

ASSIGNOR was injured as a driver in a motor vehicle accident February 3, 2019. He presented for medical evaluation five days later (2/8/19) with complaints of pain in his lower back, left shoulder, left leg/knee/ankle, chest with pins and needles in his left leg. Physical therapy was ordered as well as durable medical equipment; Lidocaine and Celebrex were ordered and consider MRI of the left shoulder, left knee and lumbar spine and dental evaluation. The evaluation report submitted does not have a signature from a physician.

Applicant billed for lumbar spine MRI and left knee MRI performed May 16, 2019. Respondent denied payment based on lack of medical necessity pursuant to IME by Eric S. Roth, M.D. Records reviewed by Dr. Roth included MRI reports, chiropractic and medical examinations, EMG/NCV reports and police report. Dr. Roth discussed medical and chiropractic submissions and wrote, in pertinent part:

The MRI referral signed by Dr. Koyen for the lumbar spine and left knee is dated 05/15/19, but there is no examination by Dr. Koyen documented...Physical examination demonstrated a positive straight leg raising sign on the left at 30 degrees...I do not believe this is a true straight leg raising sign because of the acute pain in the left knee...There was mild limitation of range of motion and a positive McMurray's sign...no documented clicking, locking or swelling in the knee...There was no medical necessity for the lumbar spine MRI because there were no true neurological symptoms and no positive findings on neurological examination. There was no reason to suspect acute disc herniation causing nerve root impingement that might require treatment with epidural injections or possible surgical intervention.

It is the Opinion of the Current Medical Diagnosis and Treatment, 50th Edition 2011, Low Back Pain, page 790 that MRI provides exquisite anatomical detail but it should be reserved for patients who are considering surgery or have evidence of systemic disease. MRI is needed urgently for any patient in whom an epidural mass or cauda equine tumor is suspected but not for a patient believed to have a routine disc herniation, since most will improve over 4-6 weeks of conservative treatment.

Dr. Roth refers to NYWCB, NY Mid and Low Back Injury Medical Treatment Guidelines, Second Edition, January 14, 2013, page 14-15: "Recommendations..." This section discusses back MRI not being recommended without six (6) weeks of conservative treatment.

Dr. Roth continued, in pertinent part, again referencing the NYWCB Guidelines:

...The usual indications for MRI of the knee are meniscal injury (presence of McMurray's, Apley's and Varus Stress signs⁰; failed conservative therapy with Drawer and Lachman's signs for 7-10 days and hemorrhagic effusion; severe injury with normal plain x-ray to r/o fracture; assess union of known fracture; r/o meniscus/ligament when non arthroscopic surgery is indicated;...and failed physical therapy (4 weeks physician or therapist directed).

The symptoms and physical findings as documented did not suggest a need for possible surgical intervention of the knee and therefore, treatment should continue on a conservative basis.

To establish entitlement to No-Fault benefits, applicant is required to submit proof that respondent timely received its properly completed claim forms and the claim was not paid. See *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D. 3d 742; 774 N.Y.S.2d 564; 2004 N.Y. App.Div. LEXIS 3597 (2nd Dept. 2004); *Amaze Medical Supply a/a/o Bermudez v. Eagle Insurance*, 2 Misc. 3d 128[A], 784 N.Y.S.2d 918 (2003)). The burden then shifts to respondent to present admissible evidence demonstrating the existence of material issue(s) of fact in support of its basis for denying payment.

In the matter of *Jacob Nir, M.D. v. Allstate*, Civil Court of the State of New York, Kings County, 796 N.Y.S.2d 857, the Court held that a peer review based on a doctor citing only a review of medical provider's medical reports as the basis for his peer review report and not physically examining the patient before writing the peer review report or citing medical authority, standard or generally accepted medical practice as a rationale for his findings, is a conclusory peer review and insufficient to refute applicant's prima facie documentation.

Where respondent insurer presents sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to provider to present its own evidence of medical necessity (See *Prince, Richardson on Evidence* §§ 3-104, 3-202 [Farrell 11 ed] 4th West Tremont Medical Diagnostic P.C. v *Geico Ins. Co.* 13Misc. 3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 WL2829826 (App. Term 2d & 11 Dists. Sept 29, 2006).

Applicant has submitted a rebuttal to the peer review by Oded Greenberg, MD. Dr. Greenberg discussed medical records and testing, noting constant aching, sharp shooting low back pain radiating to the left lower extremity, left knee pain, spasm and tenderness, restricted knee ranges of motion and tenderness, positive Kemp's and Lasegue's tests of the spine suggesting disc lesion, nerve root impingement or disc herniation, positive Kemp's test and positive McMurray's test indicating torn meniscus. Dr. Greenberg wrote, in pertinent part:

...these significant findings indicate possible nerve root involvement and radiculopathy, suggesting that this patient might need surgery...to repair any

herniated discs or...epidurals. See, *Medline Plus, Neurologic Deficit* (Citation Omitted)... See also, *ACR Appropriateness Criteria: Low Back Pain, American College of Radiology, last review date: 2011.*

The American Academy of Orthopaedic Surgeons' Clinical Guideline on the evaluation and treatment of knee injuries lists the following findings as associated with a meniscal tear: delayed swelling of the knee, twisting injury, painful popping and catching, effusion, joint line tenderness, positive McMurray's Test , and negative radiography.

As per the medical literature, the most sensitive signs for diagnosis of a menisci tear are positive Hyperflexion Test or McMurray's test, and Apley's Compression Test. (Warren Slater, MD, *The Knee, in PM&R Secrets, 1997, pages:291-295.*)

Dr. Greenberg has sufficiently discussed each of the factors that are the basis of the peer review. Dr. Greenberg has cited to authorities noting the use of spinal and knee MRIs. Much of Dr. Roth's opinion, with citation to authority, deals with a six week time period of conservative management prior to MRI. In the instant matter ASSIGNOR underwent well over six weeks of physical therapy and chiropractic.

Denial based on this peer review is not sustained.

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.

| | | Claim | Amount | |
|--|--|-------|--------|--|
|--|--|-------|--------|--|

| Medical | | From/To | Amount | Amended | Status |
|---------|--------------------------------|---------------------|------------|------------|---------------------|
| | Wellness Diagnostic Imaging PC | 05/16/19 - 05/16/19 | \$1,790.67 | \$1,571.00 | Awarded: \$1,571.00 |
| Total | | | \$1,790.67 | | Awarded: \$1,571.00 |

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

Where a claim is untimely denied, or not denied or paid, interest shall accrue as of the 30th day following the date the claim is presented by the claimant to the insurer for payment. Where a claim is timely denied, interest shall accrue as of the date an action is commenced or an arbitration requested within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant, 11 NYCRR 65-3-9c, LMK Psychological Services v. State Farm Mut. Auto Ins. Co., 12 N.Y.3d 217, 879 N.Y.S.2d 14 (2009); Hempstead General Hosp. v. Insurance Co. of North America, 208 A.D.2d 501, 617 N.Y.S.2d 478 (2nd Dept. 1994); Smithtown General Hospital v. State Farm Mut. Auto Ins. Co., 207 A.D. 2d 338, 615 N.Y.S.2d 426 (2nd Dept. 1994). The end date for calculation of interest shall be the date of payment of the claim. Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall pay the applicant, the amount of interest at the rate of 2% per month, simple, and ending with the date of payment of the award.

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

The insurer shall also pay the applicant for attorney's fees as set forth below. Respondent shall pay the attorney's fee in accordance with 11 NYCRR 65-4.6 (e). However, for all arbitration requests filed on or after April 5, 2002, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b). 11 NYCRR 65-4.6(b) If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of the first- party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, subject to a maximum fee of \$1,360.00.

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

04/14/2021
(Dated)

Paul Keenan

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:

3a9e297690d23232bf91e958884a8378

Electronically Signed

Your name: Paul Keenan
Signed on: 04/14/2021