

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Nexray Medical Imaging PC d/b/a Soul
Radiology
(Applicant)

- and -

AAA Case No.	17-19-1138-8074
Applicant's File No.	RFA19-254104
Insurer's Claim File No.	9SINV12046-01
NAIC No.	29742

Integon National Insurance Company
(Respondent)

ARBITRATION AWARD

I, Bryan Hiller, 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

1. Hearing(s) held on 07/21/2021
Declared closed by the arbitrator on 07/21/2021

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

John Rossillo, Esq. from Rossillo & Licata LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,988.40**, 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

Whether Applicant is entitled to reimbursement for the fees associated with cervical spine, lumbar spine, bilateral shoulder and right knee MRI examinations Assignor attended between January 21, 2019 and January 28, 2019 in connection with injuries sustained in a motor vehicle accident on December 20, 2018 in light of the Respondent's Peer Reviews performed by Dr. Jay Weiss dated February 25, 2019, February 26, 2019, February 28, 2019 and March 15, 2019 stating that the tests were not medically necessary?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement, along with interest and counsel fees, under the No-Fault Regulations, for the costs associated with cervical spine, lumbar spine, bilateral shoulder and right knee MRI examinations performed in connection with injuries sustained by Assignor in a motor vehicle accident on December 20, 2018. The MRI exams were denied following a review of the medical records and Peer Review reports by Dr. Jay Weiss at Respondent's behest after which payment for the MRIs were denied as not medically necessary. The denials were timely. This decision is based upon the written submissions of counsel for the respective parties as well as oral argument at the hearing conducted on July 21, 2021. I have reviewed the documents contained in the Record as of the date of the hearing. At the hearing, Respondent's representative stated that it was not pursuing a fee schedule issue, so I deem that defense abandoned.

Assignor, a then 60 year old male pedestrian, was struck by an automobile on December 20, 2018. According to the Record, Assignor was taken to the emergency room at Jamaica Hospital Medical Center where he was evaluated, treated and released the same day. Due to continued symptomology, Assignor came under the care of multiple conservative treatment providers including Dr Michael Jacobi at Epione Medical PC and Chiropractor Mostovoy. Following the initial examinations on January 7, 2019, Assignor was referred for the subject MRIs. The cervical spine MRI was performed on January 21, 2019 and the lumbar, bilateral shoulder and right knee MRIs at issue were performed on January 28, 2019 at Applicant Nexray medical Imaging PC's facility and the notes related to those tests are attached to the Record.

Applicant establishes its prima facie entitlement to no-fault benefits by proving the submission of statutory claim forms, setting forth the fact and the amount of the loss sustained, and that payment of no-fault benefits was overdue (see Insurance Law § 5106 [a]; *Mary Immaculate Hosp. v Allstate Ins. Co.*, 5 AD3d 742 [2d Dept 2004]). The documents merit out that the Applicant has established its prima facie entitlement to benefits based on the valid submission of the bills and that the Respondent preserved its defense by issuing a timely denial.

Upon proof of a prima facie case by the applicant, the burden shifts to the insurer to prove that the services were not medically necessary (see *A.B. Medical Services, PLLC v. Lumbermens Mutual Casualty Company*, 4 Misc.3d 86, 2004 N.Y. Slip Op. 24194 (App. Term 2d and 11th Jud. Dists. 2004)).

If an insurer asserts that the medical test, treatment, supply or other service was medically unnecessary, the burden is on the insurer to prove that assertion with competent evidence such as an independent medical examination, a peer review or other proof that sets forth a factual basis and a medical rationale for denying the claim (see *A.B. Medical Services, PLLC v. Geico Insurance Co.*, 2 Misc. 3d 26 [App Term 2nd & 11th Jud Dists 2003]).

When an insurer relies upon a peer review report to demonstrate that a particular service was not medically necessary, the peer reviewer's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory. As per the holding in Jacob Nir, M.D. v. Allstate Insurance Co., 7 Misc.3d 544 (2005) ("Nir"), the peer reviewer must establish a factual basis and medical rationale to support a finding that the services were not medically necessary, including setting forth generally accepted standards in the medical community. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden to prove that the services were not medically necessary (see CityWide Social Work & Psychological Services, PLLC v Travelers Indemnity Co., 3 Misc.3d 608, 777 N.Y.S.2d 241 (N.Y. Civ Ct. Kings Co. 2004)).

To support their position, the Respondent submitted a denial for each test based upon the peer review report of Dr. Jay Weiss. In Dr. Weiss' February 23, 2019 Peer Review report he opined that the cervical spine MRI on January 23, 2019 and lumbar spine MRI on January 28, 2019 were not medically necessary. Dr. Weiss noted that there were no red flags or evidence of severe neurological compromise on the January 7, 2019 that would necessitate expedited performance of the MRIs prior to the performance of a conservative care program. Dr. Weiss argued that the standard of care only called for MRIs of the spine within the first six weeks if there is evidence of neurologic compromise and the treatment will be significantly altered by the MRI results. In this case, Dr. Weiss noted that there were no red flag to warrant expedited ordering. Thus, Dr. Weiss opined that the cervical and lumbar MRIs were not medically necessary.

In his February 26, 2019 peer review with respect to the left shoulder MRI on January 23, 2019, Dr. Weiss argued that despite the Assignor's left shoulder pain and possible impingement, there was no clinical evidence or suspicion of rotator cuff tear. Dr. Weiss noted there were no limitations of range of motion or positive drop arm test. Dr. Weiss argued that if there was an urgent need for MRI of the shoulder, then therapy would not have been performed that could exacerbate ligamentous injury. Here, Dr. Weiss noted that the test was performed weeks later without an evaluation at the time noting the current condition of the shoulder.

With respect to the MRIs of the right shoulder and right knee on January 21, 2019, Respondent relied on the peer review of Dr. Weiss dated April 28, 2019. Dr. Weiss noted that while there was impingement and reduced ranges of motion there were no specifics with regard to the degree of deficit and no indications or evidence of suspicion of rotator cuff tear. Dr. Weiss continued that physical therapy was being started and if there were any red flags then MRIs would need to be performed immediately but they were not performed until two weeks later. Dr. Weiss noted that for similar reasons the right knee MRI was not medically necessary. Here, Dr. Weiss noted that there was no assessment of ligamentous stability or provocative testing for meniscal pathology and range of motion was normal. Again, if there was serious consideration of significant tear pathology, the MRI would be performed immediately and there would not be physical therapy performed. As such, Dr. Weiss argued that the shoulder and knee MRIs were not medically necessary.

In opposition, Applicant relied upon the rebuttals of Dr. Michael Dauria dated August 31, 2019 for the cervical and lumbar spines and Dr. Drora Hirsch dated August 31, 2019 for the shoulder and knee MRIs. Dr. Dauria argued that the Assignor had pain, stiffness, reduced ranges of motion and multiple positive orthopedic testing and there was a suspicion of disc displacement. Dr. Dauria argued that the MRIs were ordered to rule out suspected disc macro trauma and help determine the size, location and severity of the disc involvement and confirm if there was neuroforaminal encroachment causing nerve compression or spinal stenosis. Dr. Dauria argued that despite no contemporaneous reevaluation to the testing, the Assignor was under constant care and the red flags included positive findings and continued complaints of pain a month after the accident with radiation, numbness and paresthesia. As such, Dr. Dauria argued that the testing was medically warranted.

Further, Dr. Dauria and the Applicant's attorney argued that Dr. Weiss was an orthopedist and not in a position to challenge the necessity of testing ordered by a chiropractor. However, as both orthopedist and chiropractors are in position to order MRI testing of the cervical and lumbar spines, this argument carries little weight. If a chiropractor was discussing MRIs of the shoulder or knee that would be outside the scope of his treatment but not so for an orthopedist discussing the cervical and lumbar spines.

With respect to the knee and bilateral shoulder MRIs, Applicant pointed to the rebuttal of Dr. Drora Hirsch. Dr. Hirsch argued that pain with tenderness, restricted ranges of motion and positive Empty Can test were sufficient findings to warrant the need for shoulder MRIs. Dr. Hirsch argued that since there was radiating pain to the shoulders, MRIs were necessary to identify where the pain was due to the neck or bilateral shoulder injuries. Further, Dr. Hirsch noted that the Assignor had received two weeks of treatment before the tests were done and the MRI results revealed positive findings. With respect to the knee, Dr. Hirsch argued that there was noted instability, painful range of motion, tenderness and crepitus noted on the initial examination which were indicative of meniscal tears or ACL injuries. As such, Dr. Hirsch concluded that the MRIs were clearly medically warranted.

Respondent submitted the addendum of Dr. Weiss on October 7, 2020. Dr. Weiss just reiterated his opinion and noted that the timing issues were unrebutted. Specifically, the back MRIs were done prematurely without any major red flag or concern of serious injury as the standard of care calls for six to eight weeks of treatment. The limited findings on the initial examination without the opportunity for the course of care to be underway made the testing premature. With respect to the shoulders and knee, Dr. Weiss noted that the tests were ordered at the initial and then not performed for a few weeks. Again, he noted this was against the standard of care as if there was a concern for serious injury the MRIs would need to be performed immediately before a course of care that could exacerbate the injury was done or else there was no true consideration of serious ligamentous injury that would warrant expedited ordering and can be exacerbated by the physical therapy.

Comparing the relevant evidence presented by both parties against each other and the above referenced medical necessity standard, I find the Applicant is not entitled to

reimbursement for the MRIs as it has not established the medical necessity for the cervical spine, lumbar spine, bilateral shoulder and right knee MRIs. Peer reviewer Dr. Weiss' review of the ordering physician's records did not show any provocative findings or red flags that would necessitate an expedited performance of the MRIs. Dr. Weiss noted that there could be no progressive neurological deficit as the tests were ordered at the initial examination and before a course of conservative treatment. Further, the treating physician cannot have it both ways. He can either order immediately and have the test performed immediately due to red flags and concern for serious injury without the performance of conservative care that could exacerbate the injury or he can perform some conservative care and reevaluate to see how it is tolerated. In this case, the treating physician ordered both the conservative care and the MRIs but the MRIs were not performed immediately and there was no reevaluation prior to the performance of the MRIs clearly indicating the consideration was soft tissue injury where the standard of care called for conservative treatment and non-expedited ordering and performance. I find that Applicant, the treating physician of Assignor, has not established its own evidence of medical necessity for the MRI studies by a preponderance of the evidence as the medical documentation in the Record failed to rebut the findings of Respondent's peer review report. As such, medical necessity for the MRI studies has not been established and the Applicant's claim is denied in full.

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

07/25/2021
(Dated)

Bryan Hiller

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:
8a2b961ad4b571e25b8fe39c0efee065

Electronically Signed

Your name: Bryan Hiller
Signed on: 07/25/2021