

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Rye Ambulatory Surgery Center LLC
(Applicant)

- and -

Hereford Insurance Company
(Respondent)

AAA Case No.	17-21-1200-8665
Applicant's File No.	GTLXRY040821.001
Insurer's Claim File No.	8877002
NAIC No.	24309

ARBITRATION AWARD

I, Fred Lutzen, 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: EIP or "Assignor"

1. Hearing(s) held on 08/02/2022
Declared closed by the arbitrator on 08/02/2022

George T. Lewis, Esq., from Law Offices of George T. Lewis, Jr., PC participated for the Applicant

Natalie Caron, Esq., from Law Offices of Rubin & Nazarian participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$9,305.84**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended its claim to \$3,458.40, which is in agreement with Respondent's fee coder.

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

The parties stipulated that the amended amount is correct per the fee schedule.

3. Summary of Issues in Dispute

This male EIP (first initial "I") was 57-years-old when she was injured as the driver in an automobile accident on 12/18/19. He subsequently came under the care of Dr.

Michael Cushner, M.D., who performed left knee arthroscopic surgery on 3/11/2020 and right knee arthroscopic surgery on 6/10/2020.

Applicant facility seeks reimbursement for the unpaid anesthesia services (\$189.07, as amended) in connection with surgical procedure performed on 3/11/2020 and for the facility fees (\$3,269.33, as amended) in connection with the surgery performed on 6/10/2020.

Respondent denied the claim for 3/11/2020 on fee schedule grounds. The amendment and stipulation to \$189.07 resolves this claim.

Respondent denied the claim for 6/10/2020 asserting the surgery was not medically necessary based on a peer review report prepared by Dr. Julio V. Westerland, M.D., dated 11/17/2020.

The issue to be determined is whether the right knee surgery performed on 6/10/2020 was medically necessary.

4. Findings, Conclusions, and Basis Therefor

This case was decided based upon the written submissions of the parties to the American Arbitration Association, as contained in the MODRIA electronic file, and the oral arguments of the parties' representatives at the time of the hearing.

Counsel appeared at the hearing via Zoom video conference and there were no live witnesses.

Medical Necessity Defense

The burden is on the Respondent to demonstrate, *prima facie*, that the services lacked medical necessity. Respondent's denial for lack of medical necessity must be supported by a peer review or other competent medical evidence which sets forth a clear factual basis and medical rationale for denying the claim. Healing Hands Chiropractic, P.C. v. Nationwide Assurance Co., 5 Misc.3d 975, 787 N.Y.S.2d 645 (Civ. Ct. New York Co. 2004); CityWide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co., 3 Misc.3d 608, 609, 777 N.Y.S.2d 241, 242 (Civ. Ct. Kings Co. 2004). To successfully support its denial, the respondent's peer review must address all of the pertinent objective findings contained in the applicant's medical submissions. The peer review must set forth how and why the disputed services were inconsistent with generally accepted medical and/or professional practices. The conclusory opinions of the peer reviewer, standing alone and without support of medical authorities, will not be considered sufficient to establish the absence of medical necessity. (See, Citywide Social Work, et. al. v. Travelers Indemnity Co., *supra*; Amaze Medical Supply Inc. v. Eagle Ins. Co., 2 Misc.3d 128(A), 784 N.Y.S.2d 918 (Table), 2003 N.Y. Slip Op. 51701(U), 2003 WL 23310886 (App. Term 2d & 11th Dists. Dec. 24, 2003).

On 11/17/2020, Dr. Westerband reviewed numerous medical records, including the operative report, MRI reports, treatment records, and other records. Based on his review of the records, he opined that the right knee surgery performed on 6/10/2020 was not medically necessary.

Dr. Westerband noted that on 2/18/2020 the EIP had bilateral knee injections with Depo-Medrol and Lidocaine. On 4/6/2020, the EIP was examined and Dr. Cushner. The EIP had right knee pain. Examination revealed decreased range of motion, effusion, and crepitus. The EIP was assessed with knee arthritis and the plan consisted of right knee surgery. Dr. Westerband stated further, in relevant part:

As per the clinical evaluation by Dr. Cushner [], the physical examination revealed only mild effusion, decreased range of motion, crepitus. The claimant was then recommended to proceed with right knee arthroscopy on 04/6/2020. [] Dr. Cushner should have treated the claimant for a right knee sprain with physical therapy....

Dr. Westerband continued:

... only if the claimant failed to respond to adequate physical therapy including cortisone injections, further evaluation, testing, and appropriate treatment should have been considered. An adequate attempt at conservative care including physical therapy sessions for 3 to 6 months along with cortisone injections could have resolved most of the symptoms, nullifying the need for right knee arthroscopy. Therefore, the right knee arthroscopy was not medically necessary.

Cortisone injections were not provided to the claimant in the right knee, and Dr. Cushner rushed to proceed with the right knee arthroscopy.

"Cortisone shots are injections that may help relieve pain and inflammation in a specific area of your body. They're most commonly injected into joints - such as your ankle, elbow, hip, knee, shoulder, spine, and wrist. Even the small joints in your hands and feet might benefit from cortisone shots." (Cortisone shots, Mayo Clinic)

Moreover, the MRI of the right knee, dated 02/8/2020 revealed the following impression; "Increased signal within the posterior horn of the medial meniscus and anterior horn of the lateral. Meniscus without evidence of surface extension consistent with myxoid degeneration. 2. Mild Insertional quadriceps tendinosis. 3. Mild prepatellar/pretibial edema. 4. Small suprapatellar joint effusion." These findings do not necessitate surgery. MRI shows partial intrasubstance intrameniscal signal of posterior horn of the medial meniscus and the anterior horn of the lateral meniscus. These are non-surgical findings. It actually indicates a grade 2 intrameniscal signal signifying degeneration. The careful wording by the radiologist is definitely deceptive. Using the term, "Intrameniscal tear", can lead a reader to interpret this to mean there is actually a tear of the meniscus.

Arthroscopic surgery for the clinical picture depicted here along with findings in the MRI was not medically necessary. Such findings can be easily treated with physical therapy sessions along with cortisone injections.

Treatment in most cases is conservative. Grade I to II injuries are treated with a conservative approach. Non-steroidal anti-inflammatory drugs (NSAIDs) may be used to help control pain and swelling. A knee immobilizer and crutches may also be used short-term after injury, with gradually less reliance on these as pain and swelling subside, and the patient can participate adequately in physical therapy. Therapy exercises should include quadriceps strengthening, cycling, and progressive resistance exercises. Patients should gradually progress through a return-to-play protocol that involves increasing the difficulty of the exercise and sports-specific maneuvers." (Naqvi U, Sherman AI. Medial Collateral Ligament Knee Injuries; [Updated 2020 Aug 27]. In: StatPearls [Internet])

Given there was no physical therapy along with cortisone injections and no surgical findings on the knee MRI, Dr. Westerband opined that the surgery was not medically necessary.

Dr. Westerband's opinion relies on an accurate factual basis, provides a sound medical rationale, and is supported by cited authority within the peer report. Respondent has met its initial burden of proof. The burden shifts back to Applicant, who must prove medical necessity of the service by a preponderance of the evidence. *See, Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

Rebuttal Case

In rebuttal, Applicant relies on the submitted records and a Rebuttal to the Peer Review Denial, by Dr. Michael Cushner, M.D., dated 8/21/2021.

Dr. Cushner disagrees with Dr. Westerband. He stated that "[d]espite conservative treatment, [the EIP] found no relief in his complaints of right knee pain." He stated that on 2/18/2020, the EIP had an injection of Depo-Medrol and Lidocaine, which provided "relief for about 1 week" and then the EIP "continued with conservative treatment."

Dr. Cushner stated that on 5/22/2020, "[s]ince the patient had continued pain and discomfort, with limited improvement with injections, the patient was recommended right knee arthroscopy."

In response to Dr. Westerband's opinion that the MRI revealed nonsurgical findings, Dr. Cushner stated that "the decision of right knee arthroscopy was not solely based on reviews of the MRI report; it was also based on the positive clinical findings throughout the physical examination of the patient. The patient had a combination of subjective complaints and positive clinical findings, which demonstrated the need for surgical intervention."

I also reviewed the EIP's medical records.

On 3/19/2020, the EIP was examined by Massiel Grullon, Nurse Practitioner with Dr. Cushner's office. NP Grullon recommended the EIP "start PT of right knee" and "f/u in 6 weeks, virtual visit discuss right knee arthroscopy." The report was also signed by Dr. Cushner. On 4/6/2020, NP Grullon recommended the EIP "start PT of right knee" and "f/u in 6 weeks, virtual visit discuss right knee arthroscopy", which was also signed by Dr. Cushner.

On 4/24/2020, the EIP was examined by Dr. Cushner (APP Submission, p. 49 of 197). The diagnoses were cervical and lumbar strain and status post left knee arthroscopy. Dr. Cushner stated, "[t]he patient's knee is progressing well, continue with therapy exercises. With regards to shoulder, status post medications, injection and therapy, with continued pain and discomfort, I would recommend shoulder arthroscopy. Due to current medical conditions, elective surgery is not possible. He will reconsider and discuss further in 4 weeks. Risks, benefits and alternatives were discussed at length including but not limited to: Bleeding, infection, reaction to anesthesia, perioperative and postoperative medical complications, deep vein thrombosis, pulmonary embolism, artery, vein or nerve damage, continued pain or dysfunction and the need for repeat surgery." The chief complaints were to the left knee and right shoulder and "[t]he right knee has some minor pain." (APP Submission, p.54 of 197)

On 5/22/2020, the EIP was re-examined and had "continued right shoulder and right knee pain" and it was reported "[h]e has been through multiple treatments with continued pain and discomfort" and the EIP "is interested [in] operative treatment which has been discussed in the past with regards to right shoulder and right knee." (Id., p.58 of 197). Right knee arthroscopic surgery was recommended.

The surgery was then performed on 6/10/2020.

Within the MODRIA submissions by both parties, there are physical therapy records going many months prior to the right knee surgery on 6/10/2020. The EIP was undergoing physical therapy for the neck, left knee, and right shoulder.

There is no one visit with mention of any physical therapy for the right knee until after the surgery. The first note of physical therapy to the right knee was on 6/26/2020.

While Dr. Westerband opined that there must be some failure of conservative care including cortisone injections prior to proceeding with knee surgery, Dr. Cushner's counterargument is primarily that the EIP had undergone one steroid injection 4 months earlier.

Dr. Westerband reviewed Dr. Cushner's rebuttal report and Respondent submitted an Addendum by Dr. Westerband, dated 1/10/2022. Dr. Westerband stated that Dr. Cushner did "not explain why he ignored the MRI findings and proceeded with surgery. The note of 2/18/20 indicated a steroid injection was provided. At the next follow up visit on 3/3/2020, the doctor once again described negative McMurray test, diagnosed knee arthritis and recommended surgery. The examination was negative for post traumatic

meniscal surgical pathology. The diagnosis had nothing to do with the accident or any meniscal injury. Absent objective evidence of surgical pathology surgery was not justified at that time."

I am now tasked with weighing these competing reports to determine which is more persuasive on the issue of medical necessity.

It is unclear why the EIP did not undergo any physical therapy for the right knee, which was twice recommended by Dr. Cushner's office. The physical therapy records are clear. Even following the Dr. Cushner's recommendation for physical therapy, it was never done until after the surgery was performed. In addition, after the surgery was performed, the EIP then underwent cortisone injection as well in August 2020.

Dr. Cushner cited the intraoperative findings in his rebuttal report, and this point was argued as well by Applicant's counsel at the hearing, and noted there was a meniscal tear and other findings seen during the surgery. Counsel argued that this rebuts Dr. Westerband's opinion. However, Dr. Westerband's opinion focused on the lack of any physical therapy prior to surgery and cited sources the support months of physical therapy should be completed (and failed) prior to undergoing surgery. The operative findings do not rebut this contention.

Applicant's counsel also pointed out that this peer report was addressed in a prior arbitration proceeding. However, the prior case and prior award involved a claim for post-operative DME. The award was in favor of the Applicant as Respondent failed to cite authoritative support for the defense that post-operative DME is not medically necessary. The issue of medical necessity for the underlying surgery was not addressed. Even if the surgery was found unnecessary in the same case, the DME would still be awarded since the DME must be dealt with separately and the defense must survive on its own irrespective of the need, or lack of need, for the surgery.

I cannot consider the rebuttal report in a vacuum without reference to the actual treatment records. The rebuttal evidence is not sufficiently persuasive to rebut the sound and factually based medical rationale put forth by Dr. Westerband. Applicant failed to meet its shifted burden.

The ultimate burden of proof on issues of medical necessity lies with the plaintiff. Dayan v. Allstate Ins. Co., 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015). Once Respondent satisfied its burden of proof establishing a 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), 806 N.Y.S.2d 443 (Table), 2005 N.Y. Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005).

Conclusion

Having carefully considered the submissions of the parties, the relevant case law, and the arguments of respective counsel, I conclude that the preponderance of the credible evidence supports a finding in favor of the Respondent as to the lack of medical necessity.

The denials of the claims for DOS 6/10/2020 are sustained.

Applicant is awarded \$189.07, as stipulated, for DOS 3/11/2020.

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
	Rye Ambulatory Surgery Center LLC	03/11/20 - 03/11/20	\$784.00	\$189.07	Awarded: \$189.07
	Rye Ambulatory Surgery Center LLC	06/10/20 - 06/10/20	\$1,008.00	\$243.09	Denied

	Rye Ambulatory Surgery Center LLC	06/10/20 - 06/10/20	\$7,513.84	\$3,026.24	Denied
Total			\$9,305.84		Awarded: \$189.07

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/16/2021 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); and OGC Op. No. 10-09-05 (interest accrues from date Applicant "*actually requests arbitration*" or commences a lawsuit). The Superintendent and the New York Court of Appeals have interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. *See*, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$1360." *Id.*

- 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 Onondaga

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

08/25/2022
(Dated)

Fred Lutzen

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:
1625a0b0c1ecd65d693aebf63750ec76

Electronically Signed

Your name: Fred Lutzen
Signed on: 08/25/2022