

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

All City Family Healthcare Center
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-22-1263-5440

Applicant's File No. SS-224345

Insurer's Claim File No. 0482049130005

NAIC No. 36447

ARBITRATION AWARD

I, Theresa A. Kelly, 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, KD

1. Hearing(s) held on 05/11/2023
Declared closed by the arbitrator on 05/11/2023

Joseph Padrucco, Esq. from Samandarov & Associates, P.C. participated virtually for the Applicant

Denise Perugini, Esq. from LM General Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$11,416.86**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended its claim to \$10,437.08 in accordance with the applicable provisions of the workers' compensation fee schedule.

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

3. Summary of Issues in Dispute

Applicant is seeking as compensation \$10,437.08, which it billed for the facility fee for a left shoulder arthroscopy performed on Assignor, KD, a 25 year-old male, who was

injured as a passenger of a motor vehicle involved in an automobile accident on 1/17/2022. Respondent denied payment of the bills at issue based on a lack of medical necessity.

The issue is whether the services are medically necessary.

4. Findings, Conclusions, and Basis Therefor

The case was decided on the submissions of the Parties as contained in the electronic file maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

Assignor sustained multiple injuries, including his left shoulder. Respondent timely denied payment for the left shoulder arthroscopy and Applicant now seeks \$10,437.08 in reimbursement for the facility fee related to the surgery.

Since Respondent's denials were timely, it was within its rights to assert lack of medical necessity as a defense. Liberty Queens Medical, P.C. v. Liberty Mutual, 2002 WL 31108069 (App. Term 2d & 11th Dists. Insurance Co. June 27, 2002); cf. Country-Wide Insurance Co. v. Zablocki, 257 A.D.2d 506, 684 N.Y.S.2d 229 (1 Dept. 1999). 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), 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. 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).

In support of its defense that the surgery to the Assignor's left shoulder performed on 5/23/2022 was not medically necessary, Respondent submits the peer review report of Dr. Douglas Unis dated 6/21/2022. Dr. Unis bases his opinion on the medical records he reviewed and the citations to the generally accepted standard in the community. Dr. Unis opines that the left shoulder surgery was not medically necessary.

Dr. Unis noted that there was not a sufficient trial of conservative treatment performed to the Assignor prior to the surgery. A standard course of conservative care about 3-6 months includes physical therapy of 6 weeks in duration focused directly on the left shoulder, aggressive pharmacotherapy, and/or injections. He did not undergo any corticosteroid injection. Multiple studies in the orthopedic literature outline the benefits of corticosteroid injections. Given the above information, all nonsurgical treatment options are not exhausted.

The peer review, by Dr. Unis satisfies the burden of lack of medical necessity for the left shoulder surgery, thus shifting the burden of persuasion to Applicant.

"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). Thus, although Respondent must come forward with prima facie proof of lack of medical necessity, the burden will shift to Applicant to prove medical necessity by a preponderance of the credible evidence if Respondent meets its burden.

I previously found that Dr. Unis' peer review set forth a factual basis, as well as a medical rationale in the related surgeon's case AAA# 17-22-1263-3425. In that award, I found that Applicant's rebuttal from Dr. William L. King dated 3/28/2023 failed to refute the points made by Dr. Unis. Dr. King noted that injections would not have assisted the Assignor and it was ultimately the decision of the treating physician. I found this opinion failed to refute the peer review and upheld Respondent's denial for the surgery.

After having reviewed all of the documents and weighing all of the evidence and oral arguments, including my prior award, I must find hereto that Respondent's defense prevails. Accordingly, I find in favor of Respondent and uphold the denial of claim.

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 NY

SS :

County of Suffolk

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

06/12/2023

(Dated)

Theresa A. Kelly

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:
e3e9c449ce44f0f209d6740004204df6

Electronically Signed

Your name: Theresa A. Kelly
Signed on: 06/12/2023