American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

NYC Great Supply Inc. (Applicant)	AAA Case No.	17-22-1273-5975
	Applicant's File No.	BT22-201187
- and -	Insurer's Claim File No.	0324730710101080
	NAIC No.	35882
Geico Insurance Company (Respondent)		

ARBITRATION AWARD

I, Wendy Bishop, 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 (D.M.)

1. Hearing(s) held on 08/24/2023
   Declared closed by the arbitrator on 08/24/2023

   Erica Avella, Esq. from The Tadchiev Law Firm, P.C. participated virtually for the Applicant

   Michael Bluman, Esq. from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$2,037.00**, was NOT AMENDED at the oral hearing.
   Stipulations WERE made by the parties regarding the issues to be determined.

   The parties stipulated that Applicant established a prima facie case of entitlement to No-Fault compensation with respect to its bill. They also stipulated that Respondent's Form NF-10 denial of claim form was timely issued. The parties further stipulated that the only issues to be determined are: (1) whether Respondent sustained its defense of lack of medical necessity; and if not (2) the fee.

3. Summary of Issues in Dispute

   The Assignor is a 23-year-old male who was involved in a motor vehicle accident on March 31, 2022. Following the accident, the Assignor complained of pain to her neck,

shoulders, back, and right elbow. On dates of service from August 4, 2022 to August 31, 2022, the Assignor was provided with a cold compression unit. Respondent denied the claim based on a peer review by Gregg Jarit, M.D. performed on September 2, 2022. Respondent also raises a defense based on the Workers' Compensation fee schedule.

4. Findings, Conclusions, and Basis Therefor

This hearing was conducted using documents contained in the ADR CENTER. Any documents contained in the folder are hereby incorporated into this hearing. I have reviewed all relevant exhibits contained in the ADR CENTER maintained by the Ameri can Arbitration Association.

Peer

Applicant initially contends that Respondent's denial does not adequately apprise Applicant of the basis of the denial. However, the EOR identifies the basis of the denial as a peer review report by Dr. Jarit. I find that this is adequate to provide Applicant with notice of the basis of Respondent's denial. *See General Accident Ins. Group v. Cirucci,* 46 N.Y.2d 862, 864, 414 N.Y.S.2d 512, 514 (1979).Indeed, Applicant submits a rebuttal to Dr. Jarit's peer review report, and therefore had an adequate opportunity to evaluate the peer review report and respond therero.

In order to support a lack of medical necessity defense respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 20140. Respondent bears the burden of production in support of it lack of medical necessity defense, which if established shifts the burden of persuasion to applica nt. See, generally Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006). The Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medica l necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See, generally Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005); See also All Boro Psychological Servs. P.C. v. GEICO, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." Nir, supra.

Respondent submits the peer review report of Gregg Jarit, M.D. dated September 2, 2022 in support of its contention that the cold compression unit provided to the Assignor on dates of service from August 4, 2022 to August 31, 2022 was not medically necessary. Dr. Jarit discusses the Assignor's treatment. Dr. Jarit discusses the results of the MRI of the Assignor's right shoulder performed on June 30, 2022, which included a possible tear. Dr. Jarit discusses the surgery performed on the Assignor's right shoulder on July 31, 2022. Dr. Jarit speculates that the Assignor's shoulder injuries might not have been caused by the subject accident. However, Dr. Jarit fails to adequately support such a conclusion. Dr. Jarit asserts that the Assignor should have undergone a longer period of conservative treatment and a subacromial injection prior to the performance of the surgery. Dr. Jarit cites medical authorities that support his assertion. Dr. Jarit's peer review report thus meets Respondent's initial burden in support of its defense of lack of medical necessity. Dr. Jarit does not separately address the medical necessity of the cold compression unit provided to the Assignor following the surgery.

Therefore, the burden shifts to Applicant to demonstrate the medical necessity of the shoulder surgery and associated DME provided for post-surgical rehabilitation. Applicant submits the rebuttal affirmation of the Assignor's treating doctor, Peter Tomasello, D.O. dated July 10, 2023. Dr. Tomasello discusses the findings of the clinical examination of the Assignor performed on July 20, 2022. Dr. Tomasello discusses the results of the MRI of the Assignor's right shoulder performed on June 30, 2022, which included a tear. Dr. Tomasello cites medical authority that surgical referral is indicated where there is either a full thickness tear, sudden or severe weakness, or failure to improve after three months of well-designed and properly performed physical therapy, or symptoms worsen during the initial six weeks of physical therapy. While Dr. Tomasello asserts that the surgery herein thus was in accordance with the standard of care, none of these indications were present herein. Dr. Tomasello's own rebuttal affirmation states that the Assignor only underwent physical therapy from April 11, 2022 to April 13, 2022, and the submitted medical records only show two dates of service of physical therapy, as stated by Dr. Tomasello. In these circumstances, Dr. Tomasello's rebuttal affirmation fails to effectively rebut Dr. Jarit's peer review report, or to otherwise demonstrate the medical necessity of the shoulder surgery and associated rehabilitative DME.

Accordingly, Applicant's claim is denied.

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 Nassau

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

08/28/2023
(Dated)

Wendy Bishop

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:
5851a2d7cfe04238517b0820e018cef2

Electronically Signed

Your name: Wendy Bishop
Signed on: 08/28/2023