

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Wendell Joseph Gorum MD PC
(Applicant)

- and -

Affirmative Direct Insurance Company
(Respondent)

AAA Case No. 17-22-1279-4616

Applicant's File No. BT22-192832

Insurer's Claim File No. AD21121608

NAIC No. 10413

ARBITRATION AWARD

I, Nancy Kramer Avalone, 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 MW

1. Hearing(s) held on 10/17/2023
Declared closed by the arbitrator on 10/17/2023

Sabine Sciarrotto, Esq. from The Tadchiev Law Firm, P.C. participated virtually for the Applicant

Joshua Mak, Esq. from *Abrams Fensterman, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$9,148.68**, 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

This is one of seven (7) "linked" cases heard on the same date, involving a motor vehicle accident that occurred on December 1, 2021 involving Assignor MW.

The issue presented is whether the left knee arthroscopy was medically necessary.

Assignor MW was a 32-year old female involved in the subject accident as a rear-seated passenger. Applicant is seeking reimbursement for the services of an orthopedic surgeon and physician's assistant for performing left knee arthroscopy on Assignor MW on August 11, 2022.

The Respondent denied the services as not medically necessary, based upon the Independent Medical Examination ("IME") by Aruna Seneviratne, MD, Board Certified in Orthopedic Surgery. Based upon Dr. Seneviratne's report, all future No-fault orthopedic services and related services were terminated on April 14, 2022.

There were no issues raised with respect to the submission of the claims or issuance of the denial of claim forms. After reviewing the Record, I find that Applicant established its *prima facie* case of entitlement to No-Fault compensation, and Respondent issued timely denial form preserving all defenses contained therein.

4. Findings, Conclusions, and Basis Therefor

The instant matter was decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association (MODRIA), and the oral arguments of the parties' representatives. The hearing was held via a web-based video conferencing platform (ZOOM). I have reviewed the documents contained in the E-file, heard the arguments of the parties, and make my decision in reliance thereon.

Under Sec. 5102 of the New York Insurance Law (McKinney 1985), No-Fault first party benefits are reimbursable for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle.

Lack of medical necessity is a valid defense to an action to recover No-Fault benefits. *AJS Chiropractic, P.C. v Travelers Ins. Co.*, 25 Misc.3d 140(A) (App Term 2009).

The Respondent must, at a minimum, establish a detailed factual basis and a sufficient medical rationale for its asserted lack of medical necessity. *Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co.*, 21 Misc.3d 142A, 880 N.Y.S.2d 223 (2nd Dept. 2008). Additionally, it must be proven that said rationale is supported by evidence of the generally accepted medical/professional practices. *Nir v Allstate Ins. Co.*, 7 Misc.3d 544 (Civ Ct, Kings County 2005).

When the insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the Applicant/provider which must then present its own evidence of medical necessity. See generally, *W. Tremont Med. Diagnostic, P.C. v. Geico Ins. Co.*, 2006 NY Slip Op 51871(U), 13 Misc. 3d 131(A), 824 N.Y.S.2d 759 (App. Term).

Where the denial is predicated upon a peer review report, and the peer review report establishes *prima facie*, that there was no medical necessity for the services performed, the provider must refute the peer review doctor's determination. See *A Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co.*, 16 Misc. 3d 131(A), 841 N.Y.S.2d 824, 2007 NY Slip Op 51342(U), (App. Term 2007).

Similarly, where the insurer denies the claim based upon an Independent Medical Examination (IME) of the Assignor, and the IME establishes *prima facie* that there was no medical necessity for continued treatment, the Applicant/provider bears the burden of demonstrating that the treatment at issue was medically necessary by a preponderance of the credible evidence. See, *Amato v. State Farm Ins. Co.*, 40 Misc. 3d 129(A), 2013 NY Slip Op 51113(U), (App Term 2013).

To support their position, the Respondent submitted the IME report of Dr. Seneviratne, dated Mar. 21, 2022. The Assignor presented with complaints relative to the left knee, left hip, and left foot along with middle and lower back pain. The Assignor reported to be employed full-time in "maintenance" at the time of the accident and "missed work." She was not working at the time of the IME. A review of the report of the exam showed that the results were normal. The examining physician concluded that all injuries were satisfactorily resolved and that any further treatment or diagnostic testing was not needed, i.e., not medically necessary.

I find the IME report to be marginally sufficient to meet Respondent's *prima facie* burden. I am troubled by what is missing more than by what is present. The exam was performed less than 4 months post-accident. Dr. Seneviratne was provided with one report to review: the initial evaluation of Dr. Cathy Delorme-Pagan, MD, dated Dec. 14, 2021 and a "note" also dated Dec. 14, 2021, regarding durable medical equipment from Dr. Delorme-Pagan.

Thus the medical record(s) provided to the IME doctor were wholly insufficient: he was merely provided with an initial evaluation report dated two weeks-post accident and yet he stated that the Assignor commenced conservative treatment the day following the accident. Who prescribed this treatment? How was the Assignor responding to the treatment? Per the initial exam of Dr. Delorme-Pagan, which was allegedly reviewed by the IME examiner, the diagnoses included deranged left knee. MRI studies of the left knee were performed however, the examining orthopedist did not review the studies.

There was only one report provided to the IME doctor. None of the post-accident treatment provided to the Assignor was reviewed despite being acknowledged by the IME doctor. The lack of documentation raised more questions than it answered. Based on the Assignor's response to conservative treatment, MRI studies of the left knee were performed. The examining orthopedist did not review the treatment notes, re-exams or MRI studies. The Assignor's complaints of pain were not addressed in the IME report. Based on the foregoing, I cannot conclusively deduce that no further medical treatment was warranted in this case.

Moreover, I find that the medical documentation in the Record contradict the findings by Dr. Seneviratne. There were contemporaneous medical records that Record revealed that the Assignor was receiving physical therapy to the knee and received the continued diagnosis of derangement of the left knee. MRI studies were ordered on Feb. 22, 2022 which revealed a partial tear of the ligament in the ACL.

As such, I find that the evidence is sufficient to meet Applicant's shifted burden of establishing medical necessity for the surgery in issue.

The claim is awarded to the Applicant.

Fee Schedule.

An Applicant/provider may not be reimbursed for fees in excess of the applicable fee schedule. (*see* 11 NYCRR §65-65-3.8 [g] [1] [ii]). The undersigned arbitrator is permitted to take judicial notice of the Worker's Compensation fee schedule. *See* (*Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13 [2d Dept 2009]); (*Med. Socy. v Serio*, 100 NY2d 854 [2003]).

Applicant's bill consisted of three CPT Codes: CPT 29999 at \$3972.22; CPT 29871 at \$2065.71; CPT 29881 at \$2214.55. Pursuant to Ground Rule 5 of the Surgery Chapter of the NYS Workers' Compensation Medical Fee Schedule ("fee schedule") "when multiple procedures unrelated to the major procedure and adding significant time or complexity are provided at the same operative session, payment is for the procedure with the highest allowance plus half of the lesser procedures." Thus, the proper fee schedule amount is the sum of \$6,112.56.

Regarding the bill for the Physician's Assistant, Ground Rule 12F in the Surgery Chapter of the fee schedule states that "[P]hysician assistants will receive 10.7 percent of the total allowance for the surgical procedures". Based on this rule the proper reimbursement is \$654.04. *This award is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.*

Applicant is entitled to statutory interest, attorney fees and the filing fee, as set forth in Sections 6. B, C and D, below.

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	Status
	Wendell Joseph Gorum MD PC	08/11/22 - 08/11/22	\$8,252.79	Awarded: \$6,112.56
	Wendell Joseph Gorum MD PC	08/11/22 - 08/11/22	\$895.89	Awarded: \$654.04
Total			\$9,148.68	Awarded: \$6,766.60

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/20/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from the **date noted above** until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty-day month.

C. Attorney's Fees

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

Respondent shall pay the Applicant attorney's fees in accordance with 11 NYCRR §65-4.6(d). As this matter was filed **after 02/04/2015**, this case is subject to the provisions promulgated by the Dept. of Financial Services in the Sixth Amendment to 11 NYCRR §65-4 (Ins. Reg. 68-D).

- 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 NY

SS :

County of Nassau

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

11/08/2023

(Dated)

Nancy Kramer Avalone

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:
c589dd86cf80f23139c79592367df66e

Electronically Signed

Your name: Nancy Kramer Avalone
Signed on: 11/08/2023