

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

SimplePharm
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-22-1273-6244
Applicant's File No.	BT22-194142
Insurer's Claim File No.	0664061540000001
NAIC No.	22063

ARBITRATION AWARD

I, Diane Flood Taylor, 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 | 11/13/2023 |
| Declared closed by the arbitrator on | 11/13/2023 |

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

Heather Pliszak from Geico Insurance Company participated virtually for the Respondent

- The amount claimed in the Arbitration Request, **\$543.01**, was NOT AMENDED at the oral hearing.
Stipulations WERE NOT made by the parties regarding the issues to be determined.
- Summary of Issues in Dispute

Whether the Applicant is entitled to recover for pharmaceuticals, which the Respondent has denied as medically unnecessary predicated upon a peer review.

Applicant is seeking reimbursement in the amount of \$543.01 for pharmaceuticals in connection with the management of injuries sustained by the Assignor, TF, a then 27-year-old eligible injured person who, on 1/17/22, was involved in a collision with the insured motor vehicle.

Respondent denied reimbursement for the pharmaceuticals at issue premised on a peer review conducted by Howard A. Kiernan, MD, dated 9/16/22.

The decision below is based upon a review of the documents that have been submitted electronically, as well as the arguments of counsel and/or representatives appearing via video conference on behalf of the parties.

4. Findings, Conclusions, and Basis Therefor

In dispute in this Arbitration is a bill for oxycodone 325mg tablets, celecoxib 200mg capsules and cephalexin monohydrate 500mg capsules dispensed on 7/27/22.

Respondent raised no issue or argument concerning Applicant's submission of proof of claim.

Applicant establishes its prima facie entitlement to reimbursement with proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue. See Insurance Law § 5106(a); Viviane Etienne Med. Care v. Country-Wide Ins. Co., 25 N.Y.3d 498, 501 (2015); Mary Immaculate Hosp. v. Allstate Ins. Co., 5 A.D. 3d 742, 774 N.Y.S. 2d 564 (2nd Dept., 2004).

The burden shifts to the Respondent to demonstrate a lack of medical necessity for the disputed services. See, Citywide Social Work & Psychological Services, PLLC v. Allstate Ins. Co., 8 Misc 3d 1025 A (2005). A denial premised on a lack of medical necessity must be supported by competent evidence such as an independent medical examination, a peer review or other proof which sets forth a factual basis and a medical rationale for denying the claim. See, Healing Hands Chiropractic, P.C., v. Nationwide Assur. Co., 5 Misc., 3d 975, 787 N.Y.S. 2d 645 (Civ. Ct., New York County, 2004); King's Med. Supply Inc. v. Country Wide Ins. Co., 5 Misc 3d 767, 783 N.Y.S. 2d 448. The medical rationale should be supported by evidence of the generally accepted medical professional practice. See, Nir v. Allstate Ins. Co., 7 Misc. 3d 544 (2005).

Peer Review

Respondent timely denied reimbursement for the services at issue premised upon a peer review conducted on its behalf by Howard A. Kiernan, MD, who wrote in a report dated 9/16/22 in support of the recommendation against reimbursement, "the standard of care, in this case, was to provide the claimant with non-surgical modalities including adequate and continuous physical therapy sessions for three to six months to the concerned region along with cortisone injections. The treatment offered to the claimant is deviated from the standards of care in this case."

Dr. Kiernan stated, "post-operatively, the claimant was provided with Oxycodone/APAP Tablet 10-325mg, Celecoxib Capsule 200mg and Cephalexin Monohydrate Capsule 500mg."

Dr. Kiernan emphasized, "Oxycodone is an opioid pain medication and acetaminophen is a less potent pain reliever that increases the effects of oxycodone. Since the right knee arthroscopy was not medically necessary, the Oxycodone-Acetaminophen 10-325mg tablets provided to the claimant were also not medically necessary in this case."

In addition, Dr. Kiernan indicated, "Celecoxib is a non-steroidal anti-inflammatory drug used to treat mild to moderate pain and help relieve inflammation, swelling, stiffness and joint pain. Since the right knee arthroscopy was not medically necessary, the Celecoxib 200mg capsules provided to the claimant were also not medically necessary in this case."

Further, Dr. Kiernan opined, "the claimant was provided Cephalexin Monohydrate 500mg capsules. However, the claimant was not in need of this medication." The peer doctor found that the records did not support that the claimant suffered from a bacterial infection after the surgery.

The above referenced peer review sets forth a factual basis and medical rationale in support of Respondent's denial based on a lack of medical necessity for the disputed procedure. If the insurer presents sufficient evidence establishing a lack of medical necessity, then the burden shifts back to the Applicant to present its own evidence of medical necessity. See, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc. 3d 131A (2006). In order for the Applicant to prove that the disputed expense was medically necessary, it must meaningfully refer to, or rebut, the Respondent's evidence. See, Yklik, Inc. v. Geico Ins. Co., 28 Misc. 3d 133A (2010).

Rebuttal

David Gamburg, MD, authored a rebuttal dated 10/12/23 in which he argued, in relevant part, "Regarding the difference between the peer reviewer's suggested standard of care for the aforementioned pathologies and the treatment course that was enacted for this patient, I would like to make it clear that there are conflicting standards of care for traumatic knee injuries, and it is recommended that clinicians use their best judgement for surgical intervention. Regarding 'when knee arthroscopy is recommended' The American Academy of Orthopaedic Surgeons states the following: 'Your doctor may recommend knee arthroscopy if you have a painful condition that does not respond to nonsurgical treatment. Nonsurgical treatment includes rest, physical therapy, and medications or injections that can reduce inflammation.

Common arthroscopic procedures for the knee include:

- Partial meniscectomy (removal of the meniscus), repair of a torn meniscus, or meniscus transplantation
- Reconstruction of a torn anterior cruciate ligament or posterior cruciate ligament
- Removal of inflamed synovial tissue
- Trimming or reconstruction of damaged articular cartilage
- Removal of loose fragments of bone or cartilage, like those caused by synovial chondromatosis
- Treatment of patella (kneecap) problems
- Treatment of knee sepsis (infection)

Alaia, M. J., & Wilkerson, R. (n.d.). Knee arthroscopy. OrthoInfo. Retrieved August 23, 2022, from <https://orthoinfo.aaos.org/en/treatment/knee-arthroscopy/>

Dr. Kiernan denies the medical necessity of the knee arthroscopy and argues that the patient has undergone an inadequate treatment of conservative care, However, it should be noted that there is no recommended amount of time that conservative/nonsurgical treatment should be attempted. In fact, such a recommendation cannot even be found in the Clinical Practice Guidelines published by the American Physical Therapy Association. Logerstedt, D. S., Scalzitti, D. A., Bennell, K. L., Hinman, R. S., Silvers-Granelli, H., Ebert, J., Hambly, K., Carey, J. L., Snyder-Mackler, L., Axe, M. J., & McDonough, C. M. (2018). Knee pain and mobility impairments: Meniscal and articular cartilage lesions revision 2018. *Journal of Orthopaedic & Sports Physical Therapy*, 48(2). This is because the it has been established that 'The onus lies on the orthopedic surgeon to effectively correlate clinical information, radiological images, and his/her clinical expertise to devise an individualized management plan for the meniscal tear.' Bhan K. Meniscal Tears: Current Understanding, Diagnosis, and Management. *Cureus*. 2020 Jun 13;12(6):e8590. doi: 10.7759/cureus.8590. Thus surgical intervention was indicated."

Dr. Gamburg indicated "Due to the more-than-sufficient evidence suggesting the presence of the aforementioned pathologies, the knee arthroscopy was medically necessary in order to both assess the extent/character of the damage to the knee, as well as repair said damage. Arthroscopy is a minimally invasive procedure that allows the direct visualization of the extent of the damage to the knee, resulting in an accurate diagnosis of the pathologies that the patient is suffering from.

The ability to immediately repair the injuries with the appropriate surgical technique following their characterization is an invaluable aspect of the intervention."

Dr. Gamburg argued, further, "Dr. Kiernan denies the medical necessity of the post-operation medication and argues that 'The risk of bacterial infection following knee arthroscopy is very low.' I respectfully disagree with the peer reviewer's argument. Please see: 'Post-arthroscopic knee infections were more frequent among morbidly obese patients, tobacco users, patients undergoing relatively complex procedures, men, obese patients, diabetic patients, relatively young patients, and patients with increased comorbidity burdens in this study population.' R. Carter Clement, Kevin P. Haddix, R. Alexander Creighton, Jeffrey T. Spang, Joshua N. Tennant, Ganesh V. Kamath, Risk Factors for Infection After Knee Arthroscopy: Analysis of 595,083 Cases From 3 United States Databases, *Arthroscopy: The Journal of Arthroscopic & Related Surgery*, Volume 32, Issue 12, 2016, Pages 2556-2561, ISSN 0749-8063, <https://doi.org/10.1016/j.arthro.2016.04.026>. <https://www.sciencedirect.com/science/article/pii/S0749806316302341> Thus, the medication was provided in order to prevent post-operative infection due to the patient's higher inherent risk."

Pursuant to 11 NYCRR 65-4.5 (o) (Regulation 68-D) the arbitrator shall be the judge of the relevance and materiality of the evidence offered. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations. Arbitrators sit in equity and have the powers to enforce the spirit and intent of the No-fault law and regulations. See Bd. of Education, et. al. v. Bellmore-Merrick, 39 N.Y. 2d. 167 (1976).

"Although an arbitration panel may not overtly disregard the law, arbitrators are not strictly tethered to substantive and procedural laws and may do justice as they see it, provided that they do not violate a strong public policy, do not exceed a specifically enumerated limitation on their power and their decisions are not totally irrational [citations omitted]." Matter of Solow Building Co., LLC v. Morgan Guarantee Trust Co. of New York, 6 A.D.3d 356, 356, 776 N.Y.S.2d 547, 548 (1st Dept. 2004).

Findings

In careful consideration of the credible evidence submitted, and in weighing the opinions of the doctors as expressed in the peer review of Dr. Kiernan and the rebuttal of Dr. Gamburg, I find Dr. Gamburg's arguments more persuasive as to the medical necessity for the right knee arthroscopic surgery and the pharmaceuticals at issue.

Premised on the credible objective evidence, I find Applicant proved the medical necessity for the surgery and the pharmaceuticals at issue by a preponderance of the evidence.

Accordingly, after reviewing the entire record and after careful consideration of the parties' oral arguments, I find in favor of Applicant. Any further issues raised in the record are held to be moot and/or waived insofar as not raised at the time of the hearing. This decision is in full disposition of all claims for No- Fault benefits presently before this Arbitrator.

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
	SimplePharm	07/27/22 - 07/27/22	\$543.01	Awarded: \$543.01
Total			\$543.01	Awarded: \$543.01

- B. The insurer shall also compute and pay the applicant interest set forth below. 11/08/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest is awarded from the initiation date for this case until the date that payment is made at two percent (2%) 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 Applicant an attorney's fee equal to twenty percent (20%) of the total amount of first-party benefits awarded, plus interest thereon, as provided for in 11 NYCRR 65-4.6(d), subject to a maximum fee of \$1,360.00.

- 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 Westchester

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

11/15/2023
(Dated)

Diane Flood Taylor

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:
69292ae7ce3bdabb81e266d52c9d89d9

Electronically Signed

Your name: Diane Flood Taylor
Signed on: 11/15/2023