

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Sedation Vacation Perioperative Medicine
PLLC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-23-1294-1008
Applicant's File No. NF3734305
Insurer's Claim File No. 0592535740101021
NAIC No.

ARBITRATION AWARD

I, Nicholas Tafuri, 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 (TGB)

1. Hearing(s) held on 11/16/2023
Declared closed by the arbitrator on 11/16/2023

Clifford Ryan from The Law Office of Thomas Tona, PC participated virtually for the Applicant

Jaime Orlando from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,075.58**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that there are no fee schedule disputes.

3. Summary of Issues in Dispute

EIP (TGB), a 40-year old female, was involved in a motor vehicle accident on October 2, 2022. Following the accident, EIP sought medical treatment. On December 27, 2022, EIP underwent a right shoulder arthroscopy. In dispute is a reimbursement claim for the anesthesia fees associated with the arthroscopy.

Applicant's reimbursement claim is denied by Respondent based upon a peer review by Dr. Ronald Mann, dated February 2, 2023.

The issue presented: Whether Respondent's defense is sustainable?

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the ADR Center Record as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the Hearing. Pursuant to 11 NYCRR 65-4 (Regulation 68-D), §65-4.5 (o) (1), an Arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The case was decided on the submissions of the Parties as contained in the ADR Center Record maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses.

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Applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained, and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find Applicant establishes a prima facie case. The burden then shifts to the Respondent to prove that the bills in question were properly denied.

Applicant's reimbursement claim is denied by Respondent based upon a peer review by Dr. Ronald Mann, dated February 2, 2023.

Medical Necessity

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 [or examining physician'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 2d, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which, if established, shifts the burden of persuasion to applicant. See Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006.)

The Civil Courts have held that a defendant's peer review or report of medical examination must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review or medical examination 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 specifics as to the claim at issue, is conclusory or vague. See Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005); See also, All Boro Psychological Servs. P.C. v. GEICO, 2012 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.

Based on a review of medical records, Dr. Mann avers that EIP's right shoulder arthroscopy, and all derivative services, including pre- and post-operative services were not medically necessary. Dr. Mann states that there was no evidence that EIP completed a full proper course of conservative management prior to considering shoulder arthroscopy. EIP should have been provided with physical therapy for at least 3 to 6 months, and steroid injections, before considering alternative treatment options. Dr. Mann reports that in this case, less than 3 months of conservative care was documented before surgery was prescribed. Therefore, surgery was not an appropriate treatment option for EIP. Dr. Mann concludes that anesthesia was not medically necessary, as the surgery it was prescribed for was not medically necessary.

To refute the findings contained in Respondent's peer review report, Applicant relies on EIP's medical evaluation conducted on 12/9/22. The report reveals EIP with persistent bilateral shoulder pain. Tenderness is

noted in the right shoulder with positive orthopedic testing, including: Impingement sign, Neer's sign, Hawkins sign, Cross-arm test, Speed test, and O'Brien test. Restrictions in ranges of motion are reported. Based on the examination and MRI findings, EIP is diagnosed with bilateral shoulder rotator cuff tears, labral tears and traumatic impingement syndrome. EIP has failed conservative management which included physical therapy and medications. Right shoulder arthroscopy is discussed.

Upon a review of Respondent's peer review, it is noted that Dr. Mann fails to specifically discuss the reimbursement claim for the anesthesia services provided by Applicant in this case. Dr. Mann simply states that anesthesia was not medically necessary, as the surgery it was prescribed for was not medically necessary.

When presented with a similar fact pattern, Arbitrator Dinsmore Campbell in AAA Case No.: 17-18-1110-1696, found, in pertinent part, the following:

...The claimant, a 59 year-old male, was involved in a motor vehicle accident on 4/7/18, as a pedestrian. Thereafter, the claimant sought medical attention for the injuries sustained in the accident. This dispute arises from a claim for CPM and CTU services rendered 7/14/18 through 8/10/18, post right knee surgery. The respondent denied the claim on the basis of peer reviews by Thomas Nipper, M.D. dated 8/27/18 and 9/13/18. The issue to be decided is whether the respondent's lack of medical necessity defense can be sustained.

... In support of its contention that the services are not medically necessary, the respondent relies upon the peer reviews by Dr. Nipper. The respondent also submits that because Arbitrator Glen Weiner decided in its favor that the underlying right knee arthroscopic surgery lacks medical necessity in a linked matter, it should prevail. Please see, in the matter of All City Family Healthcare Center and Maya Insurance Company, AAA # 17-18-1108-7078, (11/14/19).

At the outset however, the applicant argues that despite the aforementioned determination in the respondent's favor by Arbitrator Weiner, Dr. Nipper peer reports are insufficient to sustain the respondent's burden as they do not specifically contemplate the postsurgical supplies - simply alluding to "derivative services" as not medically necessary is inadequate to foreclose the CPM and CTU services. Indeed, the applicant insists that the postsurgical supplies must be independently analyzed. In support of this position, the applicant relies on the analysis in an award by Master Arbitrator, Norman H Dachs, AAA case number: 412013161977. **The Master Arbitrator states in pertinent part:**

"The difficult question presented by this appeal is whether a conclusion that the surgery was not medically necessary, necessarily include a finding that an anesthesiologist who perform services at the request of the surgeon and who is not

called upon to evaluate whether the surgery is medically necessary, is foreclosed from recovering for services. In other words, if the surgeon wrongfully determines that surgery is medically necessary, does that prevent an anesthesiologist from recovering his fees, albeit that his services were rendered not because of surgery that was medically necessary, but because the need for anesthesia services are required whenever surgery is performed. It would be manifestly unfair to penalize an anesthesiologist for participating in surgery that is medically unnecessary when he or she played no part in the decision to perform the surgery...

Although not directly in point, AAAMG Leasing Corp., ... v. GEICO, AAA Case No.: 412013038824 is somewhat analogous. There the issue was whether reimbursement for treatment rendered following surgery that was deemed to have been medically unnecessary may be had. I there opined as follows:

"The Lower Arbitrator incorrectly focused his analysis on whether the arthroscopic surgery performed on Applicant's assignor's right shoulder was medically necessary rather than on whether the use of a CPM was medically necessary. Having concluded, based upon the insurer's examining physician's report, that the surgery was performed prematurely, the Lower Arbitrator thereupon determined that the use of a CPM machine was, therefore also medically unnecessary. As my colleague, Master Arbitrator Victor J. D'Ammora observed in AAAMG Leasing Corp. ... v. GEICO, AAA Case No. 412013011622, "Once the surgery is performed the necessity of any DME [here CPM] needed for postsurgical rehabilitation must be evaluated separately and on its own individual merits." See also AAAMG Leasing Corp. ..., Arbitrator Stacy E. Charkey, Esq., AAA Case No. 412012118410 ("Having previously found that the surgery was not medically necessary we are now faced with a different situation to wit: the surgery having been performed, was the subsequent treatment related to the surgery therefore, inevitably, also not medically necessary. These are really two distinct issues.")" I, therefore conclude that the lower arbitrator's award denying benefits in its entirety is legally incorrect."

The undersigned is inclined to defer to Master Arbitrator Dachs' analysis...

Because the respondent's evidence is insufficient to sustain its burden, the applicant's claim is granted...

I find I am persuaded by the analysis contained in the prior award by Arbitrator Campbell, as well as the award by Master Arbitrator Dachs.

Accordingly, after a careful review of the records and consideration of the parties' oral arguments, I find as a matter of fact that Applicant met its burden of establishing a prima facie case and Respondent failed to rebut it with evidence that the anesthesia services provided were not medically necessary.

Based on all of the foregoing, Applicant's claim is granted. For date of service 12/27/22, Applicant is awarded the total amount of \$1,075.58.

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
	Sedation Vacation Perioperative Medicine PLLC	12/27/22 - 12/27/22	\$1,075.58	Awarded: \$1,075.58
Total			\$1,075.58	Awarded: \$1,075.58

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/05/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Respondent shall compute and pay to Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

For cases filed on or after February 4, 2015, the attorney's fee shall be calculated as follows: 20% of the amount of first-party benefits awarded, plus interest thereon, subject to no minimum fee, and a maximum fee of \$1,360.00. 11 NYCRR 65-4.6(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, Nicholas Tafuri, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

11/20/2023
(Dated)

Nicholas Tafuri

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:
e677c9620d63e9b82a426ded981459a2

Electronically Signed

Your name: Nicholas Tafuri
Signed on: 11/20/2023