American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Red Medical Supply Inc. (Applicant)	AAA Case No.	17-23-1289-3185
	Applicant's File No.	174.705
- and -	Insurer's Claim File No.	1113840-02
	NAIC No.	16616
American Transit Insurance Company (Respondent)		

ARBITRATION AWARD

I, Anthony Kobets, 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 12/20/2023
   Declared closed by the arbitrator on 12/20/2023

   Allen Tsirelman, Esq. from Tsirelman Law Firm PLLC participated virtually for the Applicant

   Adam Walknine, Esq. from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$536.08**, 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

   In dispute is the Applicant's claim totaling $536.08 for a left knee orthosis provided to the patient (SA) on 9/13/22 as a result of injuries sustained in a motor vehicle accident on May 28, 2022.

   Respondent denied the claims based upon the peer review report by Richard Coven, M.D. dated 12/13/22. Was the Applicant entitled to reimbursement for the services provided to the EIP?

4. Findings, Conclusions, and Basis Therefor

At the hearing, the Parties' representatives agreed that medical necessity was the sole issue in dispute herein. The alleged EUO no show defense was not pursued in this matter due to insufficient evidence in support. This case is linked with AAA case no. 172212743209.

The EIP (SA) was a 54-year old female passenger who was involved in a motor vehicle accident on May 28, 2022. Thereafter on 9/13/22, she received a left knee orthosis from the Applicant. Applicant seeks no-fault reimbursement for these services.

Bill for date of service 9/13/22 in the amount of $536.08.

Respondent timely denied the knee orthosis based upon the peer review report of Dr. Richard Coven dated 12/13/22, wherein he stated, inter alia, that "[t]here was no indication of a forceful twisting or rotation of the knee which can lead to an acute torn meniscus or ligament. There was no postoperative ACL condition. There was no indication of inability to bear weight or significant edema to denote an acute event. Initial conservative treatment would include rest, cold modality, anti-inflammatory medication and therapy; hence, there was no medical necessity for the knee brace as being related to this incident. Note: there was no bruising, edema, ecchymosis or deformity noted to the knee which would be consistent with an acute cortical bone fracture to warrant the knee orthosis. If there was suspicion for extremity fracture, the standard of care would be to do serial x-rays as needed and to hold off physical therapy at the time." Respondent's counsel argued that the Respondent's proofs sufficiently demonstrated that the equipment was not medically necessary.

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 Misc3d 131A (2006). Once the insurer [Respondent] makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, "[Applicant] must rebut it or succumb." See, Bedford Park Med. Practice P.C. v American Transit Tr. Ins. Co., 8 Misc. 3d 1025 (A), 2005, 2005 NY Slip Op 51282 citing Bauman v Long Island Railroad, 110AD2d 739, 741, [2d Dept 1985]). Applicant's counsel argued that Dr. Coven's conclusion was contradicted by the patient's complaints and objective findings contained in the medical records.

Applicant also relied on a rebuttal report from Dr. Pervaiz Qureshi dated 6/2/23, wherein he stated, inter alia, that "[i]n this case, the knee orthosis was prescribed based on the severity of the clinical findings noted upon evaluation on 6/2/2022 such as left knee pain along with decreased range of motion with pain and decreased muscle strength…Knee braces are recommended for use to prevent further injuries to a previously injured knee, for acute knee ligament or growth plate injuries, or when required to perform activities of daily living… . It should be noted that the use of medical supplies for home use is supplemental to in-office treatment. Any treatment for the same problem that uses a different mechanism to alleviate the problem is usually considered complementary, not excessive. The use of medical devices along with office-based treatment creates additional benefits and speeds up the recovery process."

The evidence herein demonstrated that on 06/02/2022, the patient attended an initial evaluation and presented with complaints of neck pain, lower back pain and bilateral knee pain. Examination of the cervical spine revealed decreased range of motion. Examination of the lumbar spine revealed decreased range of motion. Neurological examination revealed decreased muscle strength at the bilateral knees and right ankle. The patient was diagnosed with cervical sprain, lumbar sprain and bilateral knees strains. The treatment plan included prescription medications and starting a course of physical therapy.

An MRI of the left knee performed on 6/17/2022 revealed marrow edema in the subchondral weight bearing lateral condyle compatible with bone contusion and trabecular microfractures, PCL sprain and at least a partial ACL tear, severe joint effusion with synovitis, and maceration of the menisci.

On 07/07/2022, the patient presented at New Angles Medical, P.C. for a follow-up evaluation of her injuries. At that time, she complained of neck pain and lower back pain. Examination of the cervical spine revealed decreased range of motion. Examination of the lumbosacral spine revealed decreased range of motion. The patient then continued the ongoing course of physical therapy.

On 07/14/2022, the patient presented at New Angles Medical, P.C. for a follow-up evaluation of her injuries. At that time, she complained of neck pain, lower back pain, bilateral knee pain and right ankle pain. Examination of the cervical spine revealed decreased range of motion in all the planes with pain, tenderness and muscle spasms. Examination of the lumbar spine revealed decreased range of motion in all the planes with pain, tenderness and positive Straight Leg Raising test at 60 degrees bilaterally. Examination of the bilateral knees revealed decreased range of motion in all the planes. Examination of the right ankle revealed decreased range of motion in all the planes. Neurological examination revealed decreased muscle strength at the bilateral knees and right ankle. Based on the patient's complaints and findings upon evaluation; the patient was diagnosed with sprain of joints and ligaments of other parts of neck, sprain of other parts of lumbar spine and pelvis, contusion of bilateral knees and contusion of right ankle. The patient was therefore recommended to continue the ongoing course of physical therapy. The patient was also referred for MRI studies and prescribed medications.

On 8/10/2022, Dr. Ross Fialkov prescribed the patient a left knee orthosis received on 9/13/22.

Based upon a review of the evidence herein and the arguments of counsel, I find that Respondent has not satisfactorily met its burden in this case with regard to the lack of medical necessity for the left knee orthosis provided on 9/13/22. Dr. Coven's peer review report did not provide a sufficient factual basis nor adequately explain the significance of the patient's symptomology including decreased ranges of motion,

marrow edema in the subchondral weight bearing lateral condyle compatible with bone contusion and trabecular microfractures, PCL sprain and at least a partial ACL tear, severe joint effusion with synovitis, and maceration of the menisci.

I find that Dr. Coven's peer report was unpersuasive and overly conclusory without a sufficient factual basis to support his conclusion that the orthosis was not medically necessary. A peer review which concludes there was no medical necessity due to the lack of sufficient information upon which the reviewer could make such a determination does not set forth a factual basis and medical rationale sufficient to establish the absence of medical necessity. Park Neurological Services P.C. v. GEICO Ins., 4 Misc.3d 95, 782 N.Y.S.2d 506 (App. Term 9th & 10th Dists. 2004).

I also find that the patient's medical records were more persuasive that the left knee orthosis was medically necessary to help treat the patient's ongoing condition that was not resolved. I was also persuaded by Dr. Qureshi's explanation that "[s]igns and symptoms of an ACL injury usually include: bruising, difficulty walking, hearing an audible pop at the time of injury, knee bruising, knee instability, knee pain, knee stiffness, limping, pain when standing, swollen knee, unsteady gait, and loss of range of motion. Hence, the prescription of the knee orthosis is justified in this patient's treatment plan." Where other reports in the insurer's papers contradict the conclusion of its peer reviewer that a service was not medically necessary, it has failed to make out a prima facie case in support of the defense of lack of medical necessity. Hillcrest Radiology Associates v. State Farm Mutual Automobile Ins. Co., 28 Misc.3d 138(A), 2010 N.Y. Slip Op. 51467(U), 2010 WL 3258144 (App. Term 2d, 11th & 13th Dists. Aug. 13, 2010).

A respondent defending a denial of first party benefits on the grounds that the subject medical services or testing were not medically necessary must show that the services were inconsistent with generally accepted medical practice, and here the Respondent has not. The opinion of the insurer's expert standing alone is insufficient to meet the *burden of proving that the services were not medically necessary (see Citywide Social* Work v. Travelers Indem. Co., 3 Misc 3d 608 (Civ Ct Kings County 2004). Where a peer review opinion rests upon conclusory assumptions and disputed or incorrect facts, the review is insufficient to prove the insurer's entitlement to judgment as a matter of law on its lack of medical necessity defense; in these circumstances, the absence of opposing expert proof from the claimant is immaterial. E.g., Novacare Medical P.C. v. Travelers Property Casualty Ins. Co., 31 Misc.3d 1205(A), 927 N.Y.S.2d 817 (Table), 2011 N.Y. Slip Op. 50500(U) at 5, 2011 WL 1226956 (Dist. Ct. Nassau Co., Michael A. Ciaffa, J., Apr. 1, 2011). **Based upon the aforementioned, I find that the Respondent has failed to sufficiently establish that the left knee orthosis was not medically necessary and grant Applicant's $536.08 claim for date of service 9/13/22.** This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of the hearing.

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**
	Red Medical Supply Inc.	**09/13/22 - 09/13/22**	**$536.08**	**Awarded: $536.08**
Total			**$536.08**	**Awarded: $536.08**

B. The insurer shall also compute and pay the applicant interest set forth below. 03/06/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

   Where a claim is timely denied, interest shall begin to accrue as of the date arbitration is commenced by the claimant, i.e., the date the claim is received by the American Arbitration Association, unless arbitration is commenced within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant. See generally, 11 NYCRR 65-3.9. Where a motor vehicle accident occurs after Apr. 5, 2002, interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the

receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009). Where no denial has been issued and no payment has been made, it is clear from the statute that the claim is overdue and interest runs from the thirty first day after the claim was presented to the carrier for payment. New York Presbyterian Hospital v. Allstate Insurance Company, 30 A.D.3d 492, 819 N.Y.S.2d 268, 2006 N.Y. Slip Op. 04815 (2nd Dep't 2006). Hempstead General Hospital v. Insurance Company of North America, 208 A.D.2d 501, 617 N.Y.S.2d 478 (2'd Dep't 1994).

C. Attorney's Fees

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

As this matter was filed **after** February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 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, Anthony Kobets, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

01/02/2024
(Dated)

Anthony Kobets

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:
88f1a2c772f10aa372acf0379da39a16

Electronically Signed

Your name: Anthony Kobets
Signed on: 01/02/2024