American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Hostin Orthopedics & Sports Medicine PC (Applicant)	AAA Case No.	17-23-1317-0106
	Applicant's File No.	TLD23-1036316
- and -	Insurer's Claim File No.	19268210
	NAIC No.	Self-Insured
Enterprise Rent A Car (Respondent)		

ARBITRATION AWARD

I, Stacey Erdheim, 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: Claimant

1. Hearing(s) held on 07/29/2024
   Declared closed by the arbitrator on 07/29/2024

   Kurt Lundgren from Thwaites, Lundgren & D'Arcy Esqs participated virtually for the Applicant

   Mark Douglas from McCormack, Mattei & Holler participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$6,630.57**, was AMENDED and permitted by the arbitrator at the oral hearing.

   This arbitration arises out of treatment of a 48 year old female (KL) for injuries sustained in a motor vehicle accident occurring on 1/4/23. Applicant seeks reimbursement for the right knee surgery and office visit 5/performed o4/23 and n 5/26/23 in the amended amount of $5561.00. Both sides agree that this is the proper fee schedule. With respect to date of service 5/4/23, Respondent timely denied the bill based on an IME by Pierce Ferriter on 4/19/23. With respect to date of service 5/26/23, Respondent timely denied the bill based upon a Peer Review by Howard Levy MD dated 6/22/23. Respondent has also raised a fee schedule argument.

   Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

This arbitration arises out of treatment of a 48 year old female (KL) for injuries sustained in a motor vehicle accident occurring on 1/4/23. Applicant seeks reimbursement for the right knee surgery and office visit 5/performed o4/23 and n 5/26/23 in the amended amount of $5561.00. Both sides agree that this is the proper fee schedule. With respect to date of service 5/4/23, Respondent timely denied the bill based on an IME by Pierce Ferriter on 4/19/23. With respect to date of service 5/26/23, Respondent timely denied the bill based upon a Peer Review by Howard Levy MD dated 6/22/23. Respondent has also raised a fee schedule argument.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the ADR Center 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.

The 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 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. 11 NYCRR 65-4.5(o)(1). (Regulation 68-D.)

This arbitration arises out of treatment of a 48 year old female (KL) for injuries sustained in a motor vehicle accident occurring on 1/4/23. Applicant seeks reimbursement for the right knee surgery and office visit 5/performed o4/23 and n 5/26/23 in the amended amount of $5561.00. Both sides agree that this is the proper fee schedule. With respect to date of service 5/4/23, Respondent timely denied the bill based on an IME by Pierce Ferriter on 4/19/23. With respect to date of service 5/26/23, Respondent timely denied the bill based upon a Peer Review by Howard Levy MD dated 6/22/23. Respondent has also raised a fee schedule argument.

It is Applicant's *prima facie*obligation to establish its entitlement to payment for each service for which reimbursement is sought. It is well settled that a health care provider establishes its *prima facie*entitlement to payment as a matter of law by 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; Mary Immaculate Hosp. v. Allstate Ins. Co., 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; Amaze Med. Supply v. Eagle Ins. Co., 2 Misc. 3d 128A, 784 N.Y.S. 2d 918, 2003 NY Slip Op 51701U [App Term, 2d & 11th Jud Dists]).*Applicant has met its Prima Facie burden in the case at hand.

The record reveals that Claimant was injured in a motor vehicle accident on1/4/23. Claimant was seen on 1/20/23 by Felix Almentero, M.D. Claimant presented with a complaint of right knee pain. Examination of the right knee revealed tenderness. Effusion was noted. The range of motion was decreased. McMurray's test was positive.

The diagnoses were right knee contusion with sprain/strain. An MRI of the right knee was ordered. Physical therapy was recommended. As per the initial physical therapy evaluation report dated 2/16/2023 by Lino Floresta, P.T., the claimant was recommended physical therapy. The MRI of the right knee dated 3/6/2023 revealed: Tears of posterior horns of medial and lateral menisci. Anterior cruciate ligament scarring. Medial collateral ligament scarring with a superimposed sprain. Medial and lateral retinacular sprains. Joint effusion with 7.1 cm Baker's cyst. Popliteus tenosynovitis. Patellofemoral chondromalacia. No appreciable interval change from 10/5/2022. Claimant was seen on 5/4/2023 by Emmanuel Hostin, M.D. Claimant had a complaint of right knee pain. The pain was aggravated by increased physical activity. Examination of the right knee revealed tenderness over the lateral and medial joints. Effusion was noted. The range of motion was decreased. Apley's test and Patellofemoral Compression test were positive. The diagnoses were right knee medial and lateral meniscal tears. Right knee surgery was recommended. On 5/26/2023, the claimant underwent surgical arthroscopy of the right knee with debridement of medial meniscus tear, debridement of lateral meniscus tear, abrasion chondroplasty of the patellofemoral chondral injury, major synovectomy, and lysis of adhesions under general LMA anesthesia care by Emmanuel Hostin, M.D. The assistant was Louis Guillaume, P.A. As per this report, the assistant was critical for the performance of the procedure. The pre-operative diagnoses were right knee meniscal tear and patellofemoral chondromalacia. The post-operative diagnoses were right knee medial meniscus tear, lateral meniscus tear, patellofemoral chondromalacia, chronic synovitis, and intra-articular adhesions.

If an insurer asserts that the medical test, treatment, supply or other service was medically unnecessary, the burden is on the insurer to prove that assertion with competent evidence such as an independent medical examination, a peer review or other proof that sets forth a factual basis and a medical rationale for denying the claim. (See *A.B. Medical Services, PLLC v. Geico Insurance Co.*,2 Misc. 3d 26 [App Term, 2nd & 11th Jud Dists 2003]; *Kings Medical Supply Inc. v. Country Wide Insurance Company,* 783 N.Y.S. 2d at 448 & 452; *Amaze Medical Supply, Inc. v. Eagle Insurance Company*,2 Misc. 3d 128 [App Term, 2nd and 11th Jud Dists 2003]).

In the event an insurer relies on a peer review report to demonstrate that a particular service was medically unnecessary, the peer reviewer's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory and should be supported by evidence of generally accepted medical/professional practice or standards. *James M. Ligouri Physician, PC v. State Farm Mut. Auto Ins. Co., 2007 N.Y. Slip Op 50465 (U) (N.Y. Dist. Ct. 2007); Jacob Nir v. Allstate Insurance Company,*2005 NY Slip Op 25090; 7 Misc.3d 544; 796 N.Y.S.2d 857; 2005 N.Y.Misc. LEXIS 419 and *Citywide Social Work & Psy. Serv. P.L.L.C. v. Travelers Indemnity Co.*,3 Misc. 3d 608; 777 N.Y.S.2d 241; 2004 NY Slip Op 24034.

In the event that an insurer's evidence rebuts the inference of medical necessity, by proof in admissible form, establishing that the services are not medically necessary and if such proof is not refuted by applicant such proof may entitle the insurer to a judgment in its favor. *Alfa Medical Supplies v. Geico General Ins. Co., 36 Misc.3d 156(A), 2012 N.Y.*

Slip Op. 51765(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); Delta Diagnostic Radiology, PC v. American Transit Insurance Co., 18 Misc.3d 128(A), 2007 N.Y. Slip Op. 52455(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2007); A. Khodadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 2007 N.Y. Slip Op. 51342(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2007).

With respect to date of service 5/4/23, Respondent timely denied the bill based on an IME by Pierce Ferriter on 4/19/23. On examination, Dr. Ferriter found a completely normal examination and diagnosed Claimant with a resolved cervical spine and lumbar spine sprain/strain and a resolved right shoulder sprain. He further concluded that there is no medical necessity for continued orthopedic care including physical therapy.

I have reviewed the available record and am not persuaded that Claimant's condition had resolved as of the date of IME performed. Applicant has an examination proximate in time with the IME to refute the findings of the IME doctor that Claimant's condition had resolved. Specifically, Claimant was seen on Claimant was seen on 5/4/2023 by Emmanuel Hostin, M.D. Claimant had a complaint of right knee pain. The pain was aggravated by increased physical activity. Examination of the right knee revealed tenderness over the lateral and medial joints. Effusion was noted. The range of motion was decreased. Apley's test and Patellofemoral Compression test were positive. The diagnoses were right knee medial and lateral meniscal tears. Right knee surgery was recommended. On 5/26/2023, the claimant underwent surgical arthroscopy of the right knee with debridement of medial meniscus tear, debridement of lateral meniscus tear, abrasion chondroplasty of the patellofemoral chondral injury, major synovectomy, and lysis of adhesions under general LMA anesthesia care by Emmanuel Hostin, M.D. The assistant was Louis Guillaume, P.A. As per this report, the assistant was critical for the performance of the procedure. The pre-operative diagnoses were right knee meniscal tear and patellofemoral chondromalacia. The post-operative diagnoses were right knee medial meniscus tear, lateral meniscus tear, patellofemoral chondromalacia, chronic synovitis, and intra-articular adhesions.

Based on the above, a defense based upon a lack of medical necessity was not established. I am persuaded by the treating physician's determination to continue treatment. I am not persuaded by the IME report that no further treatment was warranted. Accordingly, in light of the foregoing, based on the arguments of counsel and after a thorough review and consideration of all submissions, I find in favor of the Applicant.

Respondent timely denied the bill in dispute based upon a peer review by Howard Levy MD dated 6/22/23. Dr. Levy reviewed all the medical evidence and concluded that since the shoulder surgery was not medically necessary since Claimant did not undergo an adequate trial of conservative care. Specifically, he opined that The standard of care for the symptomatic knee would begin with a course of conservative treatment (including rest, ice, and medication). Most knee problems are greatly improved with physical

methods alone. When exercise programs are unable to increase strength and range of motion in the knee after more than a month, surgery should be considered. Link/Source: https://bjsm.bmj.com/content/bjsports/55/13/707.fuII.pdf In this clinical setting, the claimant was involved in the MVA dated 1/4/2023 and sustained an injury to the right knee. The right knee arthroscopy was performed on 5/26/2023. The standard of care for the symptomatic knee would begin with a course of conservative treatment (including rest, ice, and medication). Most knee problems are greatly improved with physical methods alone. When exercise programs are unable to increase strength and range of motion in the knee after more than a month, surgery should be considered. As per the available medical records, the claimant was engaged in conservative treatment in the form of physical therapy. There was no evidence that the claimant received an intra-articular steroid injection for right knee pain.

Once the peer review sets forth a reasonable factual basis and medical rationale for the

opinion regarding the medical necessity for the treatment in dispute, the trier-of-fact will look to the Applicant to rebut the evidence and conclusion reached by the peer reviewer. In the absence of such a rebuttal, the denial of the claim can be sustained. A. Khodadadi

Radiology, P.C. v. N.Y. Centr. Mut. Fire Ins. Co., 16 Misc.3d 131[A], 2007 NYS Slip Op

51342[U] [App. Term 2d & 11th Jud Dsts 2007]

Applicant argues that the Peer Reviewer has not met Respondent's burden in showing that performing the surgery deviated from generally accepted medical standards. To meet its burden of proving disputed services were not medically necessary, Respondent's expert must demonstrate the disputed treatment was inconsistent with generally accepted professional practice. Generally accepted practice is the range of practice that the profession will follow in the diagnosis and treatment of the patient in light of the standards and values that define it. City Wide Social Work & Psychological Services, P.L.L.C. v. Travelers Indemnity Co., 3 Misc. 3d 608 (Civ Ct Kings Co 2004).

I agree with Applicant and find that Respondent's Peer Review does meets the above burden. The reliance by The Peer Reviewer on the literature cited is insufficient to demonstrate that there was a breach of the standard of care by the treating provider. No where in the literature does the standard of care state there must be a certain amount of PT tried before surgical intervention. The records are clear that Claimant underwent a course of conservative care without benefit. I find that the Peer Review fails to meet its burden in proving That the treating provider deviated from generally accepted medical Standards. I am persuaded by the treating physician's determination to perform surgery.

Accordingly, in light of the foregoing, based on the arguments of counsel and after a thorough review and consideration of all submissions, I find in favor of the Applicant for $5561.00.

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**	**Amount Amended**	**Status**
	Hostin Orthopedics & Sports Medicine PC	**05/04/23 - 05/04/23**	**$324.69**		**Awarded: $324.69**
	Hostin Orthopedics & Sports Medicine PC	**05/26/23 - 05/26/23**	**$5,696.37**	**$4,730.18**	**Awarded: $4,730.18**
	Hostin Orthopedics & Sports Medicine PC	**05/26/23 - 05/26/23**	**$609.51**	**$506.13**	**Awarded: $506.13**
Total			**$6,630.57**		**Awarded: $5,561.00**

B. The insurer shall also compute and pay the applicant interest set forth below. 09/19/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim arose from an accident that occurred on or after April 5, 2002, interest shall be paid, at the rate of 2% per month, simple, from the arbitration filing date and ending with the date of payment of the award

C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee, in accordance with 11 NYCRR 65-4.6. However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6

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 Suffolk

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

07/31/2024
(Dated)

Stacey Erdheim

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:
76bc2c5de9bb73ad3d230dacd5c58772

Electronically Signed

Your name: Stacey Erdheim
Signed on: 07/31/2024