American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Metropolitan Medical and Surgical, P.C. (Applicant)	AAA Case No.	17-24-1336-8681
	Applicant's File No.	552090
- and -	Insurer's Claim File No.	IWN1535R002
	NAIC No.	38130
St. Paul Travelers Insurance Co. (Respondent)		

ARBITRATION AWARD

I, Carolynn Terrell-Nieves, 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 07/03/2024
   Declared closed by the arbitrator on 07/03/2024

   David Foreman,Esq., from Leon Kucherovsky Esq. participated virtually for the Applicant

   Medgine Bernadotte from Law Offices of Tina Newsome-Lee participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$142.62**, was AMENDED and permitted by the arbitrator at the oral hearing.

   The initial amount was amended at the hearing to $114.09.

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

3. Summary of Issues in Dispute

   Applicant contends that the initial OV performed was medically necessary, which Respondent refutes based upon an Independent Medical Examination performed at its request. The amount in dispute is $114.09.

At this matter's hearing, the parties stipulated to the following facts and/or legal issues:

The Applicant submitted the disputed overdue claim to the Respondent. As a result, it establishes its prima facie entitlement to an Award for said claim and the service is presumed to be medically necessary. See Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498 (2015); and

The Respondent's denial of claim was timely issued and preserved a defense of lack of medical necessity based on a physical examination conducted by Jay Eneman, M.D., on 09/07/23 , and the Independent Medical Examination ("IME") report of Jay Eneman, M.D., effective 9/29/2023.

The issue to be determined is whether the services are medically necessary?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement for the initial OV in the amended amount of $114,09. Claimant (LS) was allegedly injured in a motor vehicle accident on 5/25/23 as a restrained 57 year old male driver. This case was decided based upon the submissions of the Parties as contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives at the hearing held via Zoom. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

11 NYCRR 65-4.5 (o) (1) (Regulation 68-D), reads as follows: 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.

Legal Standards for Determining Medical Necessity

To support a lack of medical necessity defense, respondent must "set forth a factual basis and medical rationale for the peer reviewer'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 2nd, 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 generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006). The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S.2d 680 (2d Dept. 2009), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp., 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003). The appellate courts have not

clearly defined what satisfies the insurer's evidentiary standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 41 Misc.3d 133(A), 981 N.Y.S.2d 633 (Table), 2013 NY Slip Op 51800(U), 2013 WL 5861523 (App. Term 1st Dept. Oct. 30, 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity. The trial courts have held that a peer review 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 medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See generally Nir v. Allstate Ins. Co., 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); See also, All Boro Psychological Servs. P.C. v. GEICO, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

Where a Respondent meets its burden, it becomes incumbent on the claimant to rebut the peer review. Be Well Medical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 18 Misc.3d 139(A), 2008 WL 506180 (App. Term 2d & 11 Dists. Feb. 21, 2008); A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 2007 WL 1989432 (App. Term 2d & 11 Dists July 3, 2007. "[T]he insured/provider bears the burden of persuasion on the question of medical necessity. Specifically, once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, 'plaintiff must rebut it or succumb." Bedford Richichi Medical Practice, P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 2005 WL 1936346 at 3 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). "Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11 ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip. Op. 5187(U) at 2, 2006 WL 2829826 (App. Term 2d & 11 Dists. Sept. 29, 2006).

Application of Legal Standards

In support of its contention that initial office visit billed in relation to this matter conducted on 11/13/2023 was not medically necessary Respondent relies upon the orthopedic IME, effective 9/7/2023 of Jay Eneman, M.D.

A formal rebuttal was not submitted. Respondent has met its evidentiary burden. The failure to submit one is not an automatic bar to recovery. There may be instances when the information contained within the medical reports meaningfully addresses the points that are raised in the peer review. However, when the evidence does not speak to the issues that are voiced by the peer reviewer, the question of medical necessity will preponderate in the insurer's favor. Here, after comparing the relevant evidence presented by both parties against each other, I find for the Respondent. After careful review of the records, I find Respondent has set forth a factual basis and medical rationale for denying payment. The evidence submitted by the Applicant includes the

bill, the examination report by NP Artur Kaykov dated 11/13/2023 from Applicant Metropolitan Medical and Surgical P.C.

I find that, in this case Dr. Eneman's IME findings meet Respondent's initial burden. Specifically, the IME report sets forth a factual basis and medical rationale for the denial insofar as Dr. Eneman conducted a thorough examination of PK and reviewed PK pertinent history and found, in light of the foregoing, that no further treatment was medically necessary. In his IME report, Dr. Eneman details a full physical examination of claimant (LS) with negative findings. Dr. Eneman concludes that no further orthopedic treatment, including physical therapy, is medically indicated. Respondent's IME successfully shifted the burden of proving medical necessity to the Applicant. See West Tremont Med. Diagnostic, P.C. v. GEICO Ins. Co., 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (App. Term 2d & 11th Jud. Dists. 2006); Andrew Carothers, M.D., P.C. v GEICO Indem. Co., 20 Misc. 3d 1137(A), 867 N.Y.S.2d 372 (Civ. Ct. Kings Co. 2008). In response, Applicant has not submitted any contemporaneous medical records demonstrating deficits warranting continued orthopedic treatment, and, consequently, Applicant has not refuted the findings of Dr. Eneman.

As such, upon a preponderance of the evidence in the electronic case file and following consideration of the arguments raised at the hearing, I find that Respondent has established its defense on this record. Applicant's claim is, therefore, denied.

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 claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of NY
SS :
County of Nassau

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

08/02/2024
(Dated)

Carolynn Terrell-Nieves

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:
7d475c751fa7ef688828208a873c249a

Electronically Signed

Your name: Carolynn Terrell-Nieves
Signed on: 08/02/2024