

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Tri-Borough NY Medical Practice PC
(Applicant)

- and -

Avis Budget Group
(Respondent)

AAA Case No. 17-24-1334-4471

Applicant's File No. None

Insurer's Claim File No. 2391237492-006

NAIC No. Self-Insured

ARBITRATION AWARD

I, Paul Weidenbaum, 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: IP

1. Hearing(s) held on 08/01/2024
Declared closed by the arbitrator on 08/01/2024

Usman Nawaz from Law Offices of Hillary Blumenthal LLC (Hoboken) participated virtually for the Applicant

Michele Rita from Hollander Legal Group PC participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$7,704.32**, 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

This arbitration arises out of a right knee arthroscopic procedure undergone by the injured person, a 44 year old male, who was involved in a motor vehicle accident which occurred on 5/2/23.

Whether the right knee arthroscopy performed on 10/7/23 was medically necessary in light of the Independent Medical Examination [IME] performed by Dr. Walsh on 8/18/23?

4. Findings, Conclusions, and Basis Therefor

This arbitration arises out of a right knee arthroscopy undergone by the injured person, a 44 year old male, who was involved in a motor vehicle accident which occurred on 5/2/23. Applicant seeks reimbursement in the sum of \$7,704.32. Respondent timely denied reimbursement based upon the IME report of Dr. Walsh dated 8/18/23.

Applicant has established its *prima facie* case 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; *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]).

The burden shifts to the insurer to prove that the services were not medically necessary. 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]).

When an insurer relies upon a peer review report to demonstrate that a particular service was not medically necessary, the peer reviewer's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory. As per the holding in *Jacob Nir, M.D. v. Allstate Insurance Co.*, 7 Misc.3d 544 (2005), the peer reviewer must establish a factual basis and medical rationale to support a finding that the services were not medically necessary, including setting forth generally accepted standards in the medical community. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden to prove that the services were not medically necessary. *CityWide Social Work & Psychological Services, PLLC v. Travelers Indemnity Co.*, 3 Misc.3d 608, 777 N.Y.S.2d 241 (N.Y.Civ. Ct. Kings Co. 2004).

Dr. Walsh reported the following findings based upon the 8/18/23 examination:

Although Dr. Walsh examined the claimant's cervical and lumbar spine as well as his right knee, as the surgical procedure at issue relates solely to the right knee, the only part of Dr. Walsh's IME report which is necessary for a determination as to medical necessity is that portion of the IME report concerns the findings pertaining to the claimant's right knee.

In the right knee, there was no heat, swelling, effusion, erythema or crepitus noted. There was no tenderness to palpation. Range of motion was within normal limits. There were negative Lachman's, McMurray's, Apley's compression, and patella tracking tests. The knee was stable to varus and valgus stress testing. A diagnosis/impression was reported consisting of right knee sprain/strain, resolved.

Where the Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden then shifts to the Applicant which must then present its own evidence of medical necessity. [see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed.]), Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company, 2008 NY Slip Op 50456U, 18 Misc. 3d 1147A, 2008 N.Y. Misc. LEXIS 1121, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co. 13 Misc.3d 131, 824 N.Y.S.2d 759, 2006 NY Slip Op51871(U) (Sup. Ct. App. T. 2d Dep't 2006)].

Applicant submitted the rebuttal report of Dr. Shapiro dated 7/3/24, in which he asserts the following:

The MRI study of the claimant's right knee performed on 6/6/23 revealed joint effusion, soft tissue edema, sprain of the medial collateral ligament, and tearing of the posterior horn of the medial meniscus.

On 10/7/23, the patient presented to Dr. Drazic for a follow-up evaluation. At that time, the patient complained of 8/10/ pain in the right knee. Diagnoses consisted of right knee internal derangement and a medial meniscus tear. Therefore, the patient was recommended for a right knee arthroscopy, which was performed the same day.

Dr. Drazic performed right knee arthroscopic partial medial and lateral meniscectomies, major synovectomy, coblation arthroplasty of the patella, trochlea and lateral femoral condyle, in addition to lysis of adhesions. Post-operative diagnoses consisted of traumatic arthropathy of the right knee, tear of the posterior horn, body, and lateral horn of the medial meniscus, adhesions, tear of the body and posterior horn of the lateral meniscus, Grade II chondromalacia of the patella, Grade II-IV chondral lesion of the trochlea, internal derangement and synovitis.

Dr. Shapiro notes that the IME doctor himself acknowledged the presence of positive findings, including pain in the right knee. The post-IME evaluation performed on 9/14/23 noted positive findings which included 9/10 right knee pain. Examination of the right knee on 9/14/23 revealed medial and lateral joint line tenderness as well as tenderness over the patella facets, crepitus, a positive Apley's compression test and a positive McMurray's test. The patient was diagnosed with internal derangement of the right knee and a meniscus tear, which contradicts the IME doctor's conclusion that the condition of the claimant's right knee had resolved as of 8/18/23, the date when the IME was conducted.

Dr. Shapiro goes on to assert that meniscal tears should be surgically treated because if they are left untreated, such a tear may worsen with potentially severe complications due to increased contact pressure and stresses on the remaining meniscal tissue. Therefore, the 10723 right knee arthroscopy was medically necessary.

Respondent submitted an addendum dated 7/11/24, in which Dr. Walsh states that a thorough review of the additional medical records beyond the initial examination did not

reveal any new objective clinical findings which would cause him to alter the original assessment as to medical necessity for the right knee arthroscopy at issue as set forth in the IME report of 8/18/23.

Comparing the evidence presented by each party against the other, find that I am persuaded by the Applicant. I find that the injured person's right knee was still symptomatic well past the date of the IME performed by Dr. Walsh, and it is entirely likely based upon the history of the injured person's post-IME treatment that his symptoms had not resolved as of the date of the IME, and that further treatment, including the right knee arthroscopy of 10/7/23 was warranted.

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 post-IME right knee arthroscopy at issue was not medically necessary. I therefore find for the Applicant. Reimbursement in the sum of \$7,704.32 is due and owing herein. This decision is in full disposition of all claims for reimbursement of No-Fault benefits presently pending 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
	Tri-Borough NY Medical Practice PC	10/07/23 - 10/07/23	\$7,704.32	Awarded: \$7,704.32
Total			\$7,704.32	Awarded: \$7,704.32

- B. The insurer shall also compute and pay the applicant interest set forth below. 01/30/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from the filing date for this case, 1/30/24, until payment has been made at two percent 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

After calculating the sum total of the first party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of that sum total, subject to a minimum of \$60 and a maximum of \$850. See 11 NYCRR Section 65-4.6(c) and (e). However, if the benefits and interest awarded thereon are less than or equal to Respondent's written offer during the conciliation process, the attorney's fee shall be based upon the provisions of 11 NYCRR Section 65-4.6(b). For cases filed after February 4, 2015 there is no minimum fee and 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 NASSAU

I, Paul Weidenbaum, 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)

Paul Weidenbaum

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:
041cf6ab786a22b609664277e935f0ab

Electronically Signed

Your name: Paul Weidenbaum
Signed on: 08/02/2024