

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Rockaways ASC Development LLC d/b/a
ASC of Rockaway Beach
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No.	17-23-1328-6297
Applicant's File No.	TLD23-1052600
Insurer's Claim File No.	0697705200 2ES
NAIC No.	29688

ARBITRATION AWARD

I, Diane Flood Taylor, 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 08/01/2024
Declared closed by the arbitrator on 08/01/2024

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

Rosemary Krupp from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,224.45**, 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

Whether the Applicant is entitled to recover for a facility fee, which the Respondent has denied as medically unnecessary predicated upon a peer review.

Applicant is seeking reimbursement in the amount of \$2,224.45 for a facility fee in connection with the management of injuries sustained by the Assignor, JTS, a then 40-year-old eligible injured person who, on 12/25/22, was involved in a collision with the insured motor vehicle.

Respondent denied reimbursement premised on a peer review conducted by Julio V. Westerband, MD, dated 9/25/23.

The decision below is based upon a review of the documents that have been submitted electronically, as well as the arguments of counsel and/or representatives appearing via video conference on behalf of the parties.

4. Findings, Conclusions, and Basis Therefor

In dispute in this Arbitration is a bill for a facility fee for a carpal tunnel release surgery performed on 7/24/23.

Respondent raises no issue or argument concerning Applicant's submission of proof of claim.

Applicant establishes its prima facie entitlement to reimbursement 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); Viviane Etienne Med. Care v. Country-Wide Ins. Co., 25 N.Y.3d 498, 501 (2015); Mary Immaculate Hosp. v. Allstate Ins. Co., 5 A.D. 3d 742, 774 N.Y.S. 2d 564 (2nd Dept., 2004).

The burden shifts to the Respondent to demonstrate a lack of medical necessity for the disputed services. See, Citywide Social Work & Psychological Services, PLLC v. Allstate Ins. Co., 8 Misc 3d 1025 A (2005). A denial premised on a lack of medical necessity must be supported by competent evidence such as an independent medical examination, a peer review or other proof which sets forth a factual basis and a medical rationale for denying the claim. See, Healing Hands Chiropractic, P.C., v. Nationwide Assur. Co., 5 Misc., 3d 975, 787 N.Y.S. 2d 645 (Civ. Ct., New York County, 2004); King's Med. Supply Inc. v. Country Wide Ins. Co., 5 Misc 3d 767, 783 N.Y.S. 2d 448. The medical rationale should be supported by evidence of the generally accepted medical professional practice. See, Nir v. Allstate Ins. Co., 7 Misc. 3d 544 (2005).

Peer Review

Respondent timely denies reimbursement for the services at issue premised upon a peer review conducted on its behalf by Julio V. Westerband, MD, who wrote in a report dated 9/25/23 in support of the recommendation against reimbursement, "Based on the review of the available medical records, the left carpal tunnel syndrome release surgery performed on 07/24/2023 was not causally related and not medically necessary."

Dr. Westerband indicated, "As per the medical records and evaluation reports by Hank Ross, M.D., the claimant did not sustain any injury to her left wrist. Based

on these facts, it should be noted that the causative relationship of the left wrist injury to the motor vehicle accident of 12/25/2022 is implausible. Conservative symptomatic treatment was all that was required on a causally related basis. It is apparent that the treating physicians either overlooked/or misjudged the causative relationship of the left wrist injury to the motor vehicle accident of 12/25/2022.

Even if the claimant experienced exacerbated pain due to the motor vehicle accident of 12/25/2022, the initial treatment should have been conservative therapy.

There was no evidence that the claimant received at least three to six months of physical therapy sessions and injection therapy to the left wrist. This was an inadequate course of conservative. The claimant should have had at least three to six months of conservative treatment directed towards gaining a full range of motion which requires both stretching and strengthening to balance the musculature along with modalities. The claimant had no adequate treatment."

The above referenced peer review sets forth a factual basis and medical rationale in support of Respondent's denial based on a lack of medical necessity for the disputed procedure. 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 Misc. 3d 131A (2006). In order for the Applicant to prove that the disputed expense was medically necessary, it must meaningfully refer to, or rebut, the Respondent's evidence. See, Yklik, Inc. v. Geico Ins. Co., 28 Misc. 3d 133A (2010).

Rebuttal

Hank Ross, MD, authored a rebuttal dated 5/29/24 in which it is argued, in relevant part, "MRI report of left hand dated 04/28/2023 noted -No fracture. 3 mm traction cyst of radial collateral ligament insertion on third metacarpal with no collateral ligament tear.

EMG/NCV test report dated 04/28/2023 noted -Evidence of left median motor neuropathy and bilateral median sensory neuropathy. Evidence of left C5-C6 radiculopathy. Please correlate clinically with patient's history and symptomatology.

The evaluation report from Mobile Medical of NYC PC dated 01/09/2023, 02/20/2023,

03/28/2023 noted complaints of pain in left hand. Pain was also at finger of left hand. Pain was rated 8/10. Physical exam noted tenderness over 4th finger of left hand; increased pain with ROM. Diagnosis - left hand contusion. Plan - refer

to hand specialist for L4 finger as well; orthopedic referral; pain management referral.

The evaluation report from Barry M. Katzman, MD dated 03/21/2023 noted that patient injured the left hand. Participates in therapy three times a week. The current complaints were of left hand's ring finger pain. The report clearly notes that -patient has had no other problems with left hand prior to this accident. physical exam of left ring finger noted tenderness by the DIP joint. Diagnosis - left finger strain. Causality - the complaints are causally related to the above accident on 12/25/2022. Plan - MRI of left hand was recommended.

Evaluation report from NY Metro Chiropractic, PC dated 12/27/2022 noted severe bilateral wrist pain rated 9/10.

Physical therapy evaluation reports dated 01/26/2023, 03/01/2023, 04/03/2023, 05/09/2023,

06/16/2023, 07/19/2023 also noted complaints of bilateral wrist pain. Overall assessment noted muscle spasm/stiffness; tenderness; weakness.

On 07/24/2023 the patient underwent Left carpal tunnel release. The operative report and/or operative photos confirm the following surgical pathology: The pre and post operative diagnoses was -Left carpal tunnel syndrome.

These injuries would not have healed without surgical treatment."

Dr. Ross emphasized, "The proper standard of care in this case was surgery. The decision was guided by a history of trauma, severity of symptoms, and significant physical features which matched the diagnostic findings. There was severe pain. The condition remained severe and did not trend toward improvement despite, conservative care of almost 7 months. It is confirmed by the history of the patient describing the history of the injury, MRI, physical examinations, and intra-operative findings. The standard of care was surgery to prevent the wrist symptoms, and to facilitate symptoms of relief and function improvement."

Dr. Ross argued emphatically, "I would like to note that peer review in the history section of the peer review report dated 09/28/2023; itself has stated that. The claimant started receiving physical therapy sessions on 12/27/2022. However, peer review fails to see and/or note that the physical therapy SOAP notes from 'Be Active Movement Physical Therapy' also noted complaints of BILATERAL WRIST PAIN. The notes are dated from 12/27/2022 to 07/27/2023.

Here, peer review has provided no proofs to support lack of causation either by indicating that the patient did have any symptoms before the MVA or that there was an intervening cause for left wrist symptoms. The description of the MVA as provided by the patient to the physicians is not disputed by the reviewer.

It was also clearly noted in the evaluation report form Barry M. Katzman, MD dated 03/21/2023 that patient injured the left hand. Participated in therapy three times a week. The current complaints were of left hand's ring finger pain. The report clearly notes that - patient has had no other problems with left hand prior to this accident. physical exam of left ring finger noted tenderness by the DIP joint. Diagnosis - left finger strain. Causality - the complaints are causally related to the above accident on 12/25/2022.

Thus, the denial of the reviewer for lack of causation is baseless."

Dr. Ross elaborated, "I would also state that the MRI of the left hand was performed on 04/28/2023, 4months post the MVA due to the patient's wrist complaints following the MVA. As such the findings on the MRI of - 3 mm traction cyst of radial collateral ligament insertion on third metacarpal with no collateral ligament tear- is due to the trauma sustained in the subject MVA. So also, the MRI did reveal tear.

The operative report documents the post-operative diagnoses of Left carpal tunnel syndrome.

Peer review must be aware that if left untreated, a carpal tunnel syndrome would worsen over time and have a measurable impact on the life of the person.

Peer review's opinion "to continue conservative care if the injury is causally related" seems merely based upon the doctor's personal preference of an alternative path in which the patient is required to suffer through a longer period of conservative treatment that would not be beneficial.

Furthermore, offering an alternative treatment plan from the one suggested by Dr. Westerband, is merely a difference of professional judgment, not a deviation from the standard of care or lack of medical necessity.

It should also be noted that 'The cortisone injections do not cure the condition, but provide a window of symptom relief via inflammation reduction.'"

Pursuant to 11 NYCRR 65-4.5 (o) (Regulation 68-D) the arbitrator shall be the judge of the relevance and materiality of the evidence offered. 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. Arbitrators sit in equity and have the powers to enforce the spirit and intent of the No-fault law and regulations. See Bd. of Education, et. al. v. Bellmore-Merrick, 39 N.Y. 2d. 167 (1976).

"Although an arbitration panel may not overtly disregard the law, arbitrators are not strictly tethered to substantive and procedural laws and may do justice as they see it, provided that they do not violate a strong public policy, do not exceed a specifically enumerated limitation on their power and their decisions are not totally irrational [citations omitted]." Matter of Solow Building Co., LLC v. Morgan Guarantee Trust Co. of New York, 6 A.D.3d 356, 356, 776 N.Y.S.2d 547, 548 (1st Dept. 2004).

Findings

In careful consideration of the credible evidence submitted, and in weighing the opinions of the doctors as expressed in the peer review of Dr. Westerband and the rebuttal of Dr. Ross, I find Dr. Ross's arguments more persuasive as to the medical necessity for the carpal tunnel release surgery performed on 7/24/23 and I find the left wrist injury causally related.

I find Applicant's evidence rebuts the peer and establishes the medical necessity and causality of the left wrist injury which resulted in the carpal tunnel release surgery at issue.

Respondent offered no fee schedule evidence; therefore, the billed amount is awarded.

Accordingly, after reviewing the entire record and after careful consideration of the parties' oral arguments, I find in favor of Applicant. Any further issues raised in the record are held to be moot and/or waived insofar as not raised at the time of the hearing. 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
	Rockaways ASC Development LLC d/b/a ASC of Rockaway Beach	07/24/23 - 07/24/23	\$2,224.45	Awarded: \$2,224.45
Total			\$2,224.45	Awarded: \$2,224.45

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/13/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest is awarded from the initiation date for this case until the date that payment is made at two percent (2%) 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

Respondent shall pay Applicant an attorney's fee equal to twenty percent (20%) of the total amount of first-party benefits awarded, plus interest thereon, as provided for in 11 NYCRR 65-4.6(d), subject to 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 Westchester

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

08/06/2024

(Dated)

Diane Flood Taylor

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:

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Electronically Signed

Your name: Diane Flood Taylor
Signed on: 08/06/2024