

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

NYEEQASC, LLC d/b/a North Queens
Surgical Center
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No.	17-23-1324-9903
Applicant's File No.	BT23-264026
Insurer's Claim File No.	0521715790001
NAIC No.	36447

ARBITRATION AWARD

I, Farheen Sultan, 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 09/18/2024
Declared closed by the arbitrator on 09/18/2024

Heather Landeros, Esq. from The Tadchiev Law Firm, P.C. participated virtually for the Applicant

Kathleen Ready, Esq from LM General Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,125.04**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that Applicant established its prima facie case of entitlement to No-Fault benefits and that Respondent's NF-10/Denial of Claim form was timely issued. The parties further stipulated that there were no issues regarding the fee schedule in this matter.

3. Summary of Issues in Dispute

The Assignor, R.P., a 21 year old male, was a front seat passenger in a motor vehicle that was involved in an accident on 12/29/22. At issue in this case is \$2,125.04 for the

facility fee associated with arthroscopic surgery of the left wrist performed on date of service 7/18/23. Respondent denied the claim based on the peer review of Dr. Howard Kiernan dated 8/24/23. The issue to be determined is whether Respondent has established its medical necessity defense.

4. Findings, Conclusions, and Basis Therefor

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. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

In order to support of 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 1 Dept. 2006). The Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins.Co., 2013 NY Slip Op 51800(U) (App. Term 1 Dept. 2013). However, there are numerous civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. 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, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005); See also, All Boro Psychological Servs. P.C. v. GEICO, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." Nir, supra.

In this matter Respondent denied Applicant's claims based on the peer review of Dr. Howard Kiernan dated 8/24/23. In response Applicant submits the rebuttal of treating surgeon Dr. Milan Sen dated 8/7/24. In his peer report, Dr. Kiernan argues that his own Independent Medical Examination taken prior to the surgery on 7/13/23 yielded normal findings and was not indicative of an orthopedic disability of the left wrist. However, this contention is refuted by Dr. Sen's rebuttal which highlights that the Assignor

underwent a contemporaneous examination on 6/3/23 which demonstrated positive findings, including decreases range of motion, an evaluation that effectively rebuts the findings of the IME.

The peer reviewer further argues that the results of the Assignor's left wrist MRI did not warrant urgent surgical intervention and cites to literature which states that most ganglion cysts are harmless, and that many do not require treatment. However, in his rebuttal Dr. Sen cites to literature which notes that surgical treatment is effective and reduces the recurrence of ganglion cysts. He also persuasively cites to the U.S. National Library of Medicine National Institutes of Health which notes that wrist arthroscopy may be recommended for wrist pain and ganglion removal.

In his addendum report dated 9/4/24, Dr. Kiernan reiterates his position that the Assignor's complaints were completely resolved at the time of the surgery. He also presents further arguments and cites to literature to support his contention that surgical intervention was not warranted here. It is noted that arguments raised by Dr. Kiernan for the first time in the addendum were not considered in this matter.

Upon review and consideration of the submissions herein, I find that the rebuttal report adequately refutes the arguments raised in the peer. Dr. Sen effectively demonstrates that the Assignor was experiencing symptomatology indicative of painful ganglion cyst which warranted the arthroscopy procedure at issue. The rebuttal also persuasively cites to literature that indicates that the surgery was warranted based on the Assignor's symptomatology and clinical findings. Additionally, Respondent has not presented compelling evidence that the left wrist injury was not causally related to the subject accident. As such, I find that Respondent has not established its medical necessity defense herein.

Accordingly, Applicant's claim is granted.

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
	NYEEQASC, LLC d/b/a North Queens Surgical Center	07/18/23 - 07/18/23	\$2,125.04	Awarded: \$2,125.04
Total			\$2,125.04	Awarded: \$2,125.04

B. The insurer shall also compute and pay the applicant interest set forth below. 11/13/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. 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).

Based on the regulations, I find the date that interest shall accrue from is the date the Applicant requested arbitration in this matter. See, 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

The insurer shall also pay the applicant for attorney's fees as set forth below. This case is subject to the provisions as to attorney fee promulgated in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.6. The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(d). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first party benefits, plus interest thereon, for each applicant per arbitration or court proceeding, subject to a maximum fee of \$1,360." Id.

- 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 Queens

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

09/20/2024
(Dated)

Farheen Sultan

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:

ffae57d9042bab6f2387f532af6b7bff

Electronically Signed

Your name: Farheen Sultan
Signed on: 09/20/2024