

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Fifth Avenue Surgery Center LLC  
(Applicant)

- and -

Integon National Insurance Company  
(Respondent)

AAA Case No.	17-23-1324-9777
Applicant's File No.	BT23-263853
Insurer's Claim File No.	9WINY11205-01
NAIC No.	29742

**ARBITRATION AWARD**

I, Valerie D. Greaves, 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: Patient

1. Hearing(s) held on 09/10/2024  
Declared closed by the arbitrator on 09/10/2024

Krikor Ghazarian from The Tadchiev Law Firm, P.C. participated virtually for the Applicant

Joseph A. Licata III from Rossillo & Licata LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$5,971.14**, 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 Applicant is entitled to reimbursement in the sum of \$5971.14 for the facility fees associated with the right knee arthroscopic surgery performed on 3/10/2023, which Applicant contends was necessary in connection with injuries sustained by Patient (AGN a/k/a AN), a male then 56 years old, in a motor vehicle accident on 11/13/2022.

Respondent timely denied reimbursement contending lack of medical necessity based on peer review reports of Dorothy Scarpinato, MD, dated 4/24/2023 and 8/11/2023, and peer addendum dated 6/2/2024.

#### 4. Findings, Conclusions, and Basis Therefor

The decision below is based on the documents contained in the ADR Center as of the date of the hearing and the oral arguments of the parties. No witnesses testified at the hearing. All participants appeared remotely via Zoom. (The matters 17-23-1324-9777 and 17-23-1320-0136 were heard before this Arbitrator on the same hearing date, all documents in those matters are herein incorporated by reference.)

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)].

New York State Appellate Courts have determined that Applicant establishes a prima facie case of entitlement to reimbursement by submitting a completed proof of claim. Applicant herein submitted its bills as proof of claim in this case, thus a "facially valid claim" was submitted. Since Applicant has met this requirement, the burden of proof shifts to Respondent to prove its defense by a preponderance of the credible evidence.

Applicant is seeking reimbursement for the facility fees associated with the right knee arthroscopic surgery performed on 3/10/2023, which Applicant contends was necessary in connection with injuries sustained by Patient (AGN a/k/a AN), a male then 56 years old, in a motor vehicle accident on 11/13/2022. It is noted that the above medications were provided post-operatively following right knee surgery performed by Peter Tomasello, DO, on 3/10/2023. Reportedly, Patient was riding an electric bicycle when he became involved in the instant motor vehicle accident; he received immediate medical care in the emergency room of a local hospital, where he was evaluated, treated and released.

Respondent timely denied reimbursement contending lack of medical necessity based on peer review reports of Dorothy Scarpinato, MD, dated 4/24/2023 and 8/11/2023, and peer addendum dated 6/2/2024.

Respondent carries the initial burden of proof to timely raise and establish lack of medical necessity before the burden of proof shifts to the Applicant to establish that the disputed service(s) were medically necessary. If the insurer medical examination or peer review is not rebutted, the insurer is entitled to denial of the claim. *Khodadadi Radiology v. New York Central*, 16 Misc.3d 131(A), 841 N.Y.S.2d 824, (App. Term 2d & 11th Dists. (2007); *Dayan v. Allstate Ins. Co.*, 49 Misc. 3d 151 (A), 29 N.Y.S. 3d 846, 2015 NY Slip Op 51751 (U) (App. Term 2d, 11th & 13th Dists. 2015). "...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 Park Medical Practice P.C. v. American Transit Ins. Co.*, 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 N.Y. Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., (2005). Where a peer review or insurer medical examination findings provide a factual basis and medical rationale for the opinion that a particular service is not medically necessary and Applicant fails to present any evidence to refute that showing, the claim should be denied. *Delta Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co.*, 21 Misc.3d 142(A), 880 N.Y.S.2d 223 (Table), 2008 N.Y. Slip Op. 52450(U), 2008 WL 5146967 (App. Term 2d & 11th Dists. (2008).

Respondent's counsel maintains that the same rationale for denying this claim was upheld in my prior award decision filed under AAA Case nos.: 17-23-1319-6567 involving this Patient, same date of accident, same Respondent and the same contentions were asserted in the denial. In that matter, I previously held that the preponderance of credible evidence substantiated Respondent's contentions. My previous award decision follows in pertinent part below in italics:

*"A review of the submitted record reveals several contradictory medical and conservative care records pertaining to Patient's right knee. Patient presented to Cross Bay Orthopedic Surgery PC for an initial orthopedic evaluation on 2/15/2023 complaining of 8/10 right knee pain radiating to the right hip and right thigh, the pain worsens with movement, standing and walking and is "associated with popping, giving out and clicking". One day later the Summer*

*Physical Therapy PC "daily note" dated 2/16/2023, indicates that Patient was experiencing NO right knee pain on that date. Directly contradicting the aforementioned physical therapy treatment note is the Atlantic Medical and Diagnostic PC report also dated 2/16/2023 indicating that Patient reported 8/10 CONSTANT knee pain on that date, among other complaints. The report of the initial neurological/PM&R consultation dated 2/22/2023 indicates that on that date Patient had NO RIGHT KNEE COMPLAINTS and the examination revealed full normal right knee range of motion with no reported positive findings pertaining to the right knee. On 3/9/2023, Patient presented to Portal Medical PC for an interventional pain management evaluation, the subsequent report includes NO COMPLAINT of right knee pain and indicates that Patient reported that "his pain gets better by massage and physical therapy". However, my review of the physical therapy record reveals only one or two dates on which Patient had complained of right knee pain and received physical therapy treatment to the right knee.*

*Respondent's peer reviewer Dr. Scarpinato opined that the disputed medical equipment was not medically necessary in pertinent part because: "...In this case, the claimant was evaluated by the physical therapist on 11/29/22 and was noted to have right knee pain along with back and shoulder pain. Physical therapy treatment notes document the presence of right knee pain on 11/29/22 however the remainder of the office notes make no mention of knee pain or treatment to the knee prior to the surgery. It would stand to reason that if the claimant underwent an adequate trial of conservative care and such care failed to bring about resolution or significant improvement, then surgery might be a consideration. In this case, it was stated that the claimant failed conservative care, however the records do not reflect that the claimant completed a comprehensive rehabilitation program. The few office notes that were provided make mention of knee pain on one occasion. There is no indication that the claimant underwent an active rehabilitation program that involved resistance training, balance techniques, etc.*

*As such, based on the inconsistencies in the file, specifically statements by the surgeon that the claimant failed conservative care, this surgery would not be considered medically necessary as it was not causally related to the accident of record. Again, the claimant*

*was under the care of a physical therapist and reported knee pain on one occasion. This individual did not report knee pain throughout the course of physical therapy."*

*Applicant's undated peer rebuttal by Peter Tomasello, DO, maintains that the right knee surgery and post-operative equipment was medically necessary because: The right knee surgery was necessary based on the right knee MRI report dated 12/13/2022. The rebuttal does not dispute that Patient had attended only one or two physical therapy sessions over the course of approximately 4 months prior to the right knee surgery being performed, nor does it maintain that those one or two sessions were sufficient for a referral for right knee surgery. The rebuttal contends unpersuasively that 'in fact, there is no clear consensus regarding whether physical therapy should be performed for any particular time period. Surgical repair was medically necessary.' The rebuttal asserts an unsupported circular contention that the disputed equipment was medically necessary essentially because Dr. Tomasello had prescribed it.*

*I find that Respondent has established lack of medical necessity by a preponderance of credible evidence. I further find that Applicant's documentation is insufficient to credibly rebut lack of medical necessity."*

Applicant's peer rebuttal report dated 4/12/2024 fails to explain or rebut Dr. Scarpinato's main contentions that: (1) The medical record reveals that the initial neurological/PM&R consultation report dated 2/22/2023 indicates that on that date Patient had NO RIGHT KNEE COMPLAINTS and the examination revealed full normal right knee range of motion with no reported positive findings pertaining to the right knee. (2) Further, on 3/9/2023, Patient presented for an interventional pain management evaluation with NO COMPLAINT of right knee pain. (3) Dr. Scarpinato noted that her review of the physical therapy record revealed that Patient had mentioned knee pain on only one or two occasions and that he had received very little conservative treatment for the right knee. Dr. Scarpinato maintains that there is no indication that Patient had undergone an active rehabilitation program for the right knee that involved resistance training, balance techniques, etc.

I find that Applicant's peer rebuttal report is insufficient to credibly rebut Dr. Scarpinato's more persuasive and compelling peer review opinion.

While not technically collateral estoppel considering that this Applicant was not a party to the prior matter, both Applicant and Respondent submitted essentially the same evidence in this matter as in the prior matter including competing reports from the same peer review and peer rebuttal physicians.

The same analysis and findings in the previous matter are applicable to this matter.

My prior decision regarding the lack of credible documentation to support medical necessity for the right knee surgery is the law of the case.

I therefore find that Applicant's documentation is insufficient to credibly rebut Respondent's defense; therefore, my prior findings remain unchanged.

Respondent's denial is upheld.

Based on the foregoing, Applicant is not entitled to No-Fault benefits.

This decision is in full disposition of all claims for No-Fault benefits presented 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 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 New York

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

10/08/2024

(Dated)

Valerie D. Greaves

#### **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:**  
c3cd5a7ecf5d1df72b2ad7b432358a80

### **Electronically Signed**

Your name: Valerie D. Greaves  
Signed on: 10/08/2024