

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Fifth Avenue Surgery Center LLC
(Applicant)

- and -

Enterprise Rent A Car
(Respondent)

AAA Case No. 17-24-1341-1123

Applicant's File No. TLD24-1061897

Insurer's Claim File No. 19926999

NAIC No. Self-Insured

ARBITRATION AWARD

I, Richard Martino, 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/patient

1. Hearing(s) held on 10/23/2024
Declared closed by the arbitrator on 10/23/2024

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

Ayesha Syed Esq. from McCormack, Mattei & Holler participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$5,971.14**, was AMENDED and permitted by the arbitrator at the oral hearing.

Amount amended to \$3026.24 at the hearing of this action to reflect the respondent's fee schedule analysis.

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

3. Summary of Issues in Dispute

Applicant seeks reimbursement of charges for a right knee arthroscopic surgery performed on 10/30/23 following a 7/19/23 automobile accident.

Respondent issued a timely denial of the applicant's bill which was based upon the peer review of its medical consultant, Howard Kiernan M.D., dated 12/14/23.

The Assignor, a 30-year-old male, was involved in an automobile accident on 7/19/23.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing.

Amount amended to \$3026.24 at the hearing of this action to reflect the respondent's fee schedule analysis.

This is a claim for an arthroscopic surgical procedure under general anesthesia performed on the Assignor's right knee on 10/30/23.

The Assignor, a 30-year-old male, was involved in an automobile accident on 7/19/23.

He initially came under the care of Sanford Wert M.D., an orthopedic surgeon, on 10/17/23 due to complaints of pain in the right knee. The patient was attending physical therapy for the prior 3 months with no relief.

Right knee pain was rated 7/10, described as constant, intermittent, sharp, stabbing, dull, achy pain. The pain was worse with ambulation and slightly improved with rest. The patient has difficulty raising from a chair and walking up and down stairs. The patient also noted clicking, popping, buckling, and intermittent locking.

Physical examination of the Right knee noted pain to palpation and a positive McMurray test. The patient also exhibited a positive patellofemoral grinding test.

Range of motion was noted as 100/130 at flexion.

The patient was diagnosed with Internal derangement and a Medial meniscus tear.

The patient also underwent an MRI of the right knee which revealed a torn medial meniscus.

Due to the positive findings upon the patient's clinical examination, and the presence of the ligament tear confirmed by the MRI, arthroscopic surgery to the right knee was recommended.

On 10/30/23, the patient underwent arthroscopic surgery under general anesthesia performed by Azriel Benaroya M.D.

The operative report indicates an arthroscopy of the right knee was performed. It also indicates that the following procedures were performed during the surgery: a repair of the medial and lateral meniscus; and a chondroplasty.

The operative report describes the operative procedure in great detail.

The post-operative diagnosis revealed that the patient had sustained tears of the medial and lateral meniscus.

The respondent issued a denial of the bill submitted for services rendered based upon the peer review of Howard Kiernan M.D.

Dr. Kiernan also states that there was no evidence that the patient received adequate and proper physical therapy for his right knee prior to the surgery being performed.

He also states that cortisone injections should have been performed prior to decision to perform surgery.

He denies the medical necessity of the surgery due to the above stated reasons.

In a rebuttal to the above referenced peer review, Dr. Ashraf Salem, M.D. states that the findings upon the patient's medical examinations and the MRI findings warranted the surgery.

He also states that the surgery was the preferred course for this patient and that his tear could not be repaired by physical therapy.

He states the following:

"The arthroscopic surgery reduces the need to cut through muscles and tendons, patients often enjoy a shorter recovery time. That means getting back to daily routine as quickly as possible. The positive MRI and objective findings noted -Undersurface truncation of the posterior horn of the medial meniscus compatible with a meniscal tear. Anterior cruciate ligament scarring. Lateral retinacular sprain. Joint effusion with trace Baker's cyst. Prepatellar subcutaneous edema, compatible with adventitial bursitis- that needed to be surgically repaired and won't repair itself over time or through conservative care. Moreover, cortisone injections do not cure a meniscal tear."

I now address the claim for the surgery to the Right knee:

It is well settled that an applicant for no-fault benefits establishes its prima facie entitlement to payment by proving that it submitted a claim, set forth the fact and the amount of the loss sustained, and proof that the defendant had failed to pay or deny the claim within the requisite 30 day period, or that the defendant had issued a timely denial of the claim that was conclusory, vague, or without merit as a matter of law (see Insurance Law §5106[a]; Ave T MPC Corp v. Auto One Insurance Co., 32 Misc.3d 128 (A), 934 N.Y.S.2d 32; 2011 N.Y. Slip Op 51292 [U], 2011 WL 2712964 (App Term 2d & 11th and 13th Jud Dists. July 5, 2011). A "facially valid claim," is presented where it sets forth the name of the patient; date of accident; date of services; description of services rendered and the charges for those services. See, Vinings Spinal Diagnostic P.C. v. Liberty Mutual Insurance Company, 186 Misc.2d 287; 717 NYS2d 466 (1st Dist. Ct. Nass. Co.)

Proof that the benefits were "medically necessary" is not an element of the prima facie case. The defense that the benefits were not "medically necessary" is an affirmative defense borne by the insurer. If that defense is not raised in a timely denial of claim, the insurer is precluded from raising it at the time the claim is adjudicated. See Vinings, supra. In [Bonetti v Integon Natl. Ins. Co., 269 AD2d 413, 414](#) (2d Dept 2000), the Appellate Division definitively held that an insurer's claim that the treatment for which payment is sought is "medically excessive" is a defense subject to preclusion under Central Gen. Hosp. v. Chubb Group of Ins. Cos., 90 NY.2d 195; 659 N.Y.S.2d 246 (1997).

The evidence indicates that the medical examination of the patient revealed significant positive findings with regard to the right knee.

An MRI of the right knee revealed a torn medial meniscus.

The operative report details an extensive operation, performed under general anesthesia. The operation involved multiple incisions in the patient's right knee. Additionally, there were full repairs made to and within the patient's right knee.

Respondent asserts that the opinion of Dr. Kiernan who never examined the patient, should take precedence over the opinion of the orthopedic surgeon who felt this patient needed surgical intervention, and who performed the subject surgery.

Dr. Kiernan opines that the patient did not receive adequate and proper physical therapy for his right knee prior to the surgery being performed.

He also states that cortisone injections should have been performed prior to the decision to perform surgery.

However applicant's rebuttal clearly states that the patient's right knee needed to be surgically repaired and would not have repaired itself over time or through conservative care. Moreover, cortisone injections do not cure a meniscal tear.

Due to the foregoing reasons, I find that respondent's peer review and addendum have not met the initial burden of proving the surgery was not medically necessary to treat the subject patient.

I further defer to the orthopedic surgeon who performed the subject procedure.

Due to the foregoing reasons, I find the surgery to the right knee to have been medically necessary pursuant to 11NYCRR 65.1(d).

Therefore, the applicant is awarded the amended claim of \$3026.24.

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	Amount Amended	Status

	Fifth Avenue Surgery Center LLC	10/30/23 - 10/30/23	\$5,971.14	\$3,026.24	Awarded: \$3,026.24
Total			\$5,971.14		Awarded: \$3,026.24

- B. The insurer shall also compute and pay the applicant interest set forth below. 03/27/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim arose from an accident that occurred on or after April 5,2002 , interest

shall be paid , at the rate of 2% per month, simple,from the arbitration filing date , and ending with the date of payment of the award.

C. Attorney's Fees

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

Respondent shall pay the applicant an attorney fee , in accordance with 11 NYCRR 65-4.6 (d).

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

10/25/2024
(Dated)

Richard Martino

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:
fe733e53c954dbc29b365da56019951f

Electronically Signed

Your name: Richard Martino
Signed on: 10/25/2024