

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Right Choice Supply, Inc.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-24-1349-2012
Applicant's File No.	163935
Insurer's Claim File No.	0324081240000001
NAIC No.	22055

ARBITRATION AWARD

I, Teresa Girolamo, Esq., 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: J.A.

1. Hearing(s) held on 10/28/2024
Declared closed by the arbitrator on 10/28/2024

Robin Grumet, Esq. from Law Offices of Eitan Dagan (Woodhaven) participated virtually for the Applicant

Christa Verone from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$654.99**, 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 a bill in the amount of \$654.99 for a rental of a CPM device with dates of service of 2/15/2024 - 3/6/2024 was medically necessary as same was timely denied by Respondent based upon a peer report of Robert Mann, M.D. dated 4/3/2023? Applicant offers a Rebuttal by Christopher Durant, M.D. dated 7/8/2024.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing. Both Applicant and Respondent each submitted evidence in support of their contentions. This decision is based on my review of that file, as well as the arguments of the parties at the hearing. Each of the parties appeared via ZOOM.

Legal Analysis:

With respect to lack of medical necessity is an affirmative defense that is the Respondent's burden to prove. *See, Alliance Medical Office, P.C. v. Allstate*, 196 Misc.2d 268, 269, 764 N.Y.S.2d 341, 342 (Civil Ct., Kings Cty. 2003); *Choicenet Chiropractic, P.C. v. Allstate*, 2003 WL 1904296, 2003 N.Y. Slip Op. 50672U (App.Term 2 Dept. 2003). "At a minimum, [Respondent] must establish a factual basis and medical rationale for the lack of medical necessity of [Applicant's] services. *Nir v. Allstate*, 7 Misc.3d 544, 546-47, 796 N.Y.S.2d 857, 860 (Civil Court, Kings Cty. 2005).

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) at 3, 2005, WL 193646 (Civ. Ct. Kings Co. Jack M. Battaglia, J. August 12, 2005). The burden is on the insurer to show lack of medical necessity. *See, Expo Med. Supplies, Inc. v. Clarendon Ins. Co.*, 2006 N.Y. Slip Op. 50892U, 12 Misc. 3d 1154A, 2006 N.Y. Misc. LEXIS 1169 [Civ. Ct., Kings Co., 2006]. *See, also, A.R. Med. Art., P.C. v. State Farm Mut. Auto Ins. Co.*, 2006 N.Y. Slip Op. 50260U, 11 Misc. 3d 1057A, 815 NYS2d 493, 2006 N.Y. Misc. LEXIS 348 [Civ. Ct., Kings Co., 2006]; *Citywide Social Work & Psy. Serv. v. Travelers Indem. Co.*, 3 Misc. 3d 608, 777 NYS2d 241 [Civ. Ct, Kings Co., 2004]; *Elm Medical P.C. v. American Home Assurance Co.*, 2003 N.Y. Slip Op. 51357U, 2003 N.Y. Misc. LEXIS 1337 [Civ. Ct., Kings Co., 2003];

A treatment or service is medically necessary if it is "appropriate, suitable, proper and conducive to the end sought by the professional health service in consultation with the patient. It means more than merely convenient or useful treatment or services, but treatment or services that are reasonable in light of the patient's injury, subjective and objective evidence of the patient's complaints of pain, and the goals of evaluating and treating the patient." *Fifth Avenue Pain Control Center v. Allstate*, 196 Misc. 2d 801, 807-808 (Civ. Ct. Queens Cty. 2003). Medically necessary treatment or services must be "consistent with the patient's condition, circumstances and best interest of the patient with regard to the type of treatment or services rendered, the amount of treatment or services rendered, and the duration of the treatment or services rendered." *Id.*

Medical services are compensable where they serve a valid medical purpose. *Sunrise Medical Imaging PC v. Lumbermans Mutual* 2001 N.Y. Slip Op. 4009.

"A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards." *Id.* Similarly, "[a] peer review report's factual basis may be insufficient if it fails to provide specifics of the claim, is conclusory, or otherwise lacks a basis in the facts of the claim." *Id.*, citing, *Amazon Medical Supply v. Allstate*, 3 Misc.3d 43, 779 N.Y.S.2d 715 (App Term 2d and 11 Jud Dists 2004).

In order for Respondent to meet its burden of establishing the lack of medical necessity, a peer review should (1) set forth applicable accepted medical standards relevant to the services at issue; and (2) comment on whether the Applicant had followed or deviated from those standards in providing the disputed services. This does not necessarily require that the peer review quote or cite medical literature. The *Nir* decision clearly contemplates that a peer may cite "medical authority, standard, or generally accepted practice as a medical rationale for his findings". *Nir*, 7 Misc.3d at 548.

Only if Respondent can establish a *prima facie* defense does the burden of proof shift to Applicant to rebut the defense. See, *A. Khodadadi Radiology PC v. NY Central Mutual Fire Ins. Co.*, 2007 NY Slip Op 51342(U). In general, Applicant's "rebuttal" need not be in the form of an affidavit or other statement specifically created in response to the peer review; Applicant may rely on the existing medical records and reports already in evidence to counter the peer's arguments.

Facts:

In this case Applicant filed for Arbitration on 5/24/2024 seeking recovery of \$654.99 for dates of service of 2/15/2024 - 3/6/2024. According to the NF-3 Applicant billed for a CPM shoulder device under CPT Code E0936 RR Qty 21 for the total of \$654.99.

Applicant offers an Initial Orthopedic Consultation of 1/4/2024 at which time J. A. presented with complaints of right shoulder, right wrist and hand pain as a result of a motor vehicle accident on 10/20/2023.

This report states that J.A. began a course of physical therapy, under went diagnostic testing and only received temporary relief. J.A. advised that he continues to receive conservative treatment 3 times per week. Following a physical examination it was the opinion that J.A. had right shoulder derangement and should continue with physical therapy for 3 times a week for 8 weeks.

Yet the same report, states, that "*Based on the severity of the patient's complaints and the nature of the patient's increasing right shoulder pain, and limitations, the*

lack of improvement with conservative management, the clinical findings of the patient's right shoulder, diagnostic (MRI) findings, and orthopedic evaluation, I feel that surgical procedure of the right shoulder is indicated." The report is signed by Christopher S. Durant, M.D., with the name of Steve Mamanov NP typed above it.

A right shoulder arthroscopy was performed on 1/21/2024. There is a prescription for the DME with a surgery date of 1/21/2024 signed by Christopher S. Durant, M.D.

Respondent received the NF-3 on 3/13/2023 and submitted same along with the available medical records to Ronald Mann, M.D. for an opinion as to whether or not the DME now in dispute was medically necessary. On 4/3/2024 Ronald Mann, M.D. authored a peer report that the DME was not medically necessary. As such, on 4/5/2024 Respondent issued a timely denial of Benefits.

Peer Report: Ronald Mann, M.D. dated 4/3/2024

In this case the date of loss is 10/20/2023. According to the peer report the first report provided is an initial chiropractic report of 12/6/2023 as well as a 12/7/2023 initial PT report with Future Medical PC, with MRIs performed on 1/26/2023. The PT notes are from 12/7/2023 - 3/1/2024 which would encompass the initial date of evaluation of 1/4/2024 by Christopher S. Durant, MD.

As such the dates of physical therapy prior to 1/4/2024 would be from 12/7/2023 - 1/4/2024.

In this case Ronald Mann, M.D., opined that the CPM was not medically necessary as it does not help to acquire mobility, and would make him dependent on the device.

Ronald Mann, M.D., speculates, "***There is a chance that the claimant may experience pain due to forced passive motion, and in the absence of a doctor's supervision, the claimant may exaggerate the injury.***" (emphasis added)

In addition, Ronald Mann, M.D. states "*the literature does not support the use of CPM after arthroscopic surgery as the same clinical outcome is achieved through manual physical therapy sessions. CPM makes no difference in recovery and range of motion in the longer term. **CPM may slow down** recovery by keeping the claimant in bed and not getting more effective active therapy.*" [Again, I find speculative]

It was based upon this report that Respondent issued a Denial of Benefits.

Decision:

Having considered the arguments of the parties and having reviewed the evidence herein I find that Respondent has failed to establish its affirmative defense of lack of medical necessity. As such, Applicant's claim is granted. Therefore the rebuttal by Christopher Durant, M.D. dated 7/8/2024 is moot.

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
	Right Choice Supply, Inc.	02/15/24 - 03/06/24	\$654.99	Awarded: \$654.99
Total			\$654.99	Awarded: \$654.99

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/24/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest is payable from 5/24/2024 to date of payment.

C. Attorney's Fees

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

Respondent is directed to pay attorney fees in accordance with No Fault Regulations.

- 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 CT

SS :

County of Fairfield

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

10/29/2024
(Dated)

Teresa Girolamo, Esq.

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:
8c82ed70d2ca0905c68d03d4d178f963

Electronically Signed

Your name: Teresa Girolamo, Esq.
Signed on: 10/29/2024