

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

David T. Neuman MD
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-16-1031-7692

Applicant's File No. SS-24038

Insurer's Claim File No. 0375053915

NAIC No. 29688

ARBITRATION AWARD

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 04/07/2017
Declared closed by the arbitrator on 04/10/2017

Greg Intingen, Esq. from Samandarov and Associates, P.C. participated in person for the Applicant

Adam Kass, Esq. from Peter C. Merani Esq. participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 8,217.96**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant reduced the amount claimed to \$3,563.61 pursuant to fee schedule (\$3,182.31 for the surgeon's fee and \$381.30 for the physician's assistant fee).

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated and agreed that Applicant established a prima facie case of entitlement to No-Fault compensation with respect to its bill and to the timeliness of Respondent's denials.

3. Summary of Issues in Dispute

The claimant was the 66 year-old male restrained driver of a motor vehicle that was involved in an accident on 6/29/15. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. At issue are the surgeon and physician's assistant fees associated with an 8/27/15 right shoulder arthroscopy. Respondent denied reimbursement based on the 12/18/15 peer review by Harry Goldmark, M.D.

4. Findings, Conclusions, and Basis Therefor

THIS HEARING WAS CONDUCTED USING THE ELECTRONIC CASE FOLDER MAINTAINED BY THE AMERICAN ARBITRATION ASSOCIATION. ALL DOCUMENTS CONTAINED IN THAT FOLDER ARE MADE PART OF THE RECORD OF THIS HEARING.

THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED.

Based on a review of the documentary evidence, this claim is decided as follows:

The claimant was the 66 year-old male restrained driver of a motor vehicle that was involved in an accident on 6/29/15. The claimant reportedly injured his neck, bilateral shoulders, and low back. There was no reported loss of consciousness. There were no reported lacerations or fractures. Following the accident the claimant was transported to Elmhurst Hospital where he was evaluated, treated, and released the same day. It is noted the claimant had a prior 2012 MVA where he injured his neck, right shoulder, and low back. On 7/1/15 the claimant was initiated on chiropractic treatment. On 8/4/15 the claimant presented to David T. Neuman, M.D. (Applicant) where right shoulder arthroscopy was discussed and the claimant was initiated on physical therapy. On 8/17/15 the claimant was initiated on acupuncture. During the 8/19/15 follow-up examination the shoulder examination revealed "there is warmth and fullness to the right shoulder in contrast to the left shoulder upon palpation. Upon palpation, there is pain elicited over the anterior glenohumeral joint, posterior glenohumeral joint, superior aspect of the shoulder, AC joint, biceps tendon and lateral aspect of the arm on the right side. Active forward flexion is 140 degrees on the right side in contrast to 160 degrees on the left side. Active posterior extension 10 degrees on the right side in contrast to 25 degrees on the left side. Active abduction is to 140 degrees on the right side in contrast to 150 degrees on the left side. Active cross body adduction is to 10 degrees on the right side in contrast to 25 degrees on the left side. Active internal rotation is lacking 5 vertebral levels on the right side in contrast to the left side which can attain motion up to the L3 vertebral level. Active external rotation is to 1 degrees on the right side in contrast to 25 degrees on the left side. Forced abduction, elbow flexion test is positive on the right side in contrast to the left side. Hawkin's test is positive bilaterally. Neer's test is positive bilaterally. Speed's test is positive bilaterally. Biceps tendon strength testing in the left shoulder is 5-/5 with pain. Biceps tendon strength testing in the right

shoulder is 4+/5 with pain. Infraspinatus tendon strength testing in the left shoulder is 5-/5 with pain. Infraspinatus tendon strength testing in the right shoulder is 4+/5 with pain. Subscapularis tendon strength testing in the left shoulder is 5-/5 with pain. Subscapularis tendon strength testing in the right shoulder is 4+/5 with pain. Supraspinatus tendon strength testing in the left shoulder is 5-/5 with pain. Supraspinatus tendon strength testing in the right shoulder is 4+/5 with pain. Sensory examination to light touch is equal bilaterally. There are 2+ pulses to the radial arteries bilaterally. There is no evidence of a DVT." Dr. Neuman's diagnosis was labral tear, rotator cuff tear, synovitis, bursitis, and impingement. Dr. Neuman's treatment plan included "due to the length of time since the injury and that the patient has failed conservative measures, active physical therapy and time, surgical intervention is warranted for the right shoulder. This is arthroscopic surgery. The risks, benefits, alternatives and options have been discussed in detail with the patient. The risks include but are not limited to bleeding, infection, pain, stiffness, muscle injury, nerve injury, DVT, and recurrence. The postoperative discussion is held in detail with the patient. Questions were asked and answered. The patient desires surgery on Aug 27, 2015. The patient desires surgery but will call the office to schedule a surgical date." On 8/27/15 Dr. Neuman performed right shoulder arthroscopy consisting of subacromial decompression and partial release of the CA ligament, debridement of partial supraspinatus tendon tear, debridement of partial anterior and posterosuperior labral tears, and synovectomy. The associated surgeon and physician's assistant fees are at issue here.

The burden has shifted to the Respondent as they have raised a medical necessity defense. In order to support 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 2, 11th and 13th Jud. Dists. 20140). 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). As a general rule, reliance on rebuttal documentation will be weighed in light of the documentary proofs and the arguments presented at the arbitration. Moreover, the case law is clear that a provider must rebut the conclusions and determinations of the IME/peer doctor with his own facts. *Park Slope Medical and Surgical Supply, Inc. v. Travelers*, 37 Misc.3d 19 (2012).

Respondent denied the 8/27/15 right shoulder arthroscopy based on the 12/18/15 peer review by Harry Goldmark, M.D. Dr. Goldmark opines "the surgery of the right shoulder was performed by Dr. Neuman on 08/27/15. According to the available documentation, the claimant presented with a prior history of right shoulder injury in 2012 and was evaluated by Dr. Neuman on 08/04/15. At that time, physical examination of the right shoulder revealed pain and decreased active range of motion. Impingement signs and Speed's test were positive and motor strength was slightly decreased. No effusion, crepitus or instability was documented and there is no evidence that this claimants right shoulder was deteriorating despite a course of conservative treatment. In addition, MRI studies of the right shoulder performed on 11/09/12 and on 07/07/15 were not available for review. Based on the above, there is not sufficient medical indication to

justify the surgery in question. Therefore, the surgery of the right shoulder with associated services performed on 08/27/15 was not medically necessary or causally related to the accident of record." Dr. Goldmark cites the AMA definition of medical necessity without explaining how it was contravened here.

Where the Defendant insurer presents sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to the Plaintiff which must then present its own evidence of medical necessity (see Prince on Evidence section 3-104, 3-202). *West Tremont Medical Diagnostic PC v. Geico*, 13 Misc.3d 131, 824 N.Y.S. 2d 759.

Applicant submitted an undated peer rebuttal by David T. Neuman, M.D. (Applicant). Dr. Neuman asserts the right shoulder MRI revealed "an articular surface thickness tear involving the distal supraspinatus tendon, resulting in a 4mm defect, diffuse tendonitis involving the supraspinatus and infraspinatus tendon and mild to moderate impingement of the supraspinatus outlet." After reviewing the 8/4/15 and 8/19/15 examination results, Dr. Neuman opines "Dr. Goldmark overlooked the patient's continuity of symptoms as described in the reports. The patient reported exacerbated symptoms when carrying, performing exercises/overhead activities, lifting and reaching. Difficulty performing activities of daily living indicate instability. The peer goes on to state there was a lack of evidence that the patient's shoulder was deteriorating despite a course of conservative treatment. Well contrary to the peer, it would be contraindicated to wait for the patient's shoulder to deteriorate." After reviewing his preoperative diagnosis (labral tear, rotator cuff tear, synovitis, bursitis, and impingement), Dr. Neuman further opines "partial rotator cuff tears should be surgically treated because if left untreated, they will get worse with time. [s24] Journal of the American Academy of Orthopaedic Surgeons Partial-Thickness Rotator Cuff Tears. Andrew B. Wolff. MD et.al. There is a substantial body of evidence that most partial tears do not heal on their own. Patients may experience improving or deteriorating symptoms, but the clinical and biomechanical data suggest that most of these tears progress to become larger rather than smaller with time. Partial rotator cuff tears can be traumatically induced and are often more painful than complete tears due to the extreme strain on the remaining fibers. If a partial tear is untreated, it will likely progress and may become irreparable. [s2] Arthritis & Rheumatism Vol. 50, No. 12. December 2004, pp 3751-3761 Rotator Cuff Disorders Recognition and Management Among Patients With Shoulder Pain Andreas H. Gomoll. Jeffrey N. Katz. Jon J. P. Warner, and Peter J. Millett. A debridement (the procedure I performed) is the procedure of choice in treatment of partial tears. Based the positive Speed's test noted pre-operatively I suspected a labral tear. The speeds test is used to detect SLAP lesions of the glenoid labrum and has a sensitivity of up to 75% and specificity as high as 90% for a labral tear. Joo Han et al. "The evaluation of various physical examinations for the diagnosis of type superior labrum anterior and posterior lesion." The American journal of sports medicine 36.2 (2008): 353-9." Dr. Neuman concludes "Labral tears can be, and often are, traumatically induced, and an impact or tractive impulse such as one suffered in an accident can cause them. Labral tears can be very painful and debilitating. Surgical repairs are indicated because they are very effective with a high success rate. Surgical repair was proper for this patient. [s30] The Orthopaedic Journal at Harvard Medical School, Superior Labral Tears of the Shoulder: Surgical Repair, Conrad Wang MD. Edward Yian MD. Peter J. Millett MD MSc. Jon JP Warner MD. As a last point, the peer reviewer cited to no applicable medical studies.

The AMA standard is global and applicable to essentially all medicine. The only basis for the reviewer's assessment is his own personal opinion which is not a generally accepted medical standard, and again is insufficient."

Respondent submitted the 5/24/16 peer addendum by Harry Goldmark, M.D. who opines "a rebuttal letter was provided by Dr. Neuman regarding the above referenced surgery. However, the letter appears to be mostly general. Dr. Neuman noted tearing of the rotator cuff seen on the MRI of the right shoulder dated 06/07/15. Again, the claimant presented with a prior history of right shoulder injury in 2012 and the previous MRI study performed on 11/09/12 was not available for comparison. Therefore, the surgery of the right shoulder with associated services performed on 08/27/15 was medically necessary although not causally related to the accident of record. If the additional records, such as prior MRI of the right shoulder, become available and accessible, I will review such information and provide additional comments in regards to the causality for the service in question. The AMA (American Medical Association) defines medical necessity as, "Health care services or products that a prudent physician would provide to a patient for the purpose of preventing, diagnosing, or treating an illness, injury, disease or its symptoms in a manner that is (a) in accordance with generally accepted standards of medical practice; (b) clinically appropriate in terms of type, frequency, extent, site, and duration; and (c) not primarily for the convenience of the patient, physician, or other health care provider." (American Medical Association, January 14, 2011, "Statement of the American Medical Association to the Institute of Medicine's Committee on Determination of Essential Health Benefits")."

Upon consideration of the arguments of counsel and after a thorough review of all submissions I find that the peer rebuttal from Dr. Neuman specifically addresses the points set forth by Dr. Goldmark in his peer review and rebuts them with a contrary medical rationale. In his peer review Dr. Goldmark does not set forth a standard of care or explain how or in what manner there was a deviation from that standard of care here. Dr. Goldmark also fails to cite any medical authority besides the AMA definition of medical necessity to support his opinion. The opinion of the insurer's expert, standing alone, is insufficient to meet the insurer's burden of proving that the services were not "medically necessary" (see *Citywide Social Work & Psychological Servs. v. Travelers Indem. Co.*, 3 Misc 3d 608 (Civ. Ct. Kings County 2004)). Dr. Goldmark also concludes "the surgery of the right shoulder with associated services performed on 08/27/15 was medically necessary" in his 5/24/16 addendum.

In *Mt. Sinai Hospital v. Triboro Coach Inc.*, 263 A.D.2d 11, 699 N.Y.S.2d 77 (2d Dept. 1999), the Court stated that the insurer has the burden of coming forward with proof in an admissible form to establish the fact or evidentiary foundation for its belief that the patient's condition was unrelated to the motor vehicle accident. Moreover, the insurer must show that the injury was not related to the accident at all. It must show how, when and where the injury happened and that it was not aggravated or exacerbated by the accident. The insurer's proof may not be vague, conclusory, inconsistent or unsupported by records. In *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 2009 NY Slip Op. 00351 (App Div 2d Dept., Jan. 20, 2009) the Appellate Division, ruled that exacerbations of pre-existing conditions are covered by No-Fault, and that causation is presumed under the New York No-Fault law. Respondent has failed to meet this heavy

burden. After noting "the previous MRI study performed on 11/09/12 was not available for comparison" Dr. Goldmark concludes that causality hasn't been established. Dr. Goldmark also states "[i]f the additional records, such as prior MRI of the right shoulder, become available and accessible, I will review such information and provide additional comments in regards to the causality for the service in question." Respondent did not provide Dr. Goldmark with all of the claimant's medical records. Even if Respondent did not possess all the medical records necessary to properly evaluate the claim, it should have requested them. Indeed, the fact the reviewer lacked sufficient information does not, in and of itself, demonstrate the existence of a triable issue of fact, without showing that the Respondent sought to obtain such missing information by a request pursuant to the verification procedures (see *A.B. Medical Services PLLC v. American Manufacturers Mut. Ins.*, 6 Misc. 3d 95 133A [App. Term 2d & 11th Dist. 2005]). I also note that in his 8/4/15 initial examination Dr. Neuman noted the claimant "was involved in a motor vehicular accident 2012 injuring his right shoulder, cervical spine, and lumbar spine. However, the patient healed with surgical intervention. He has been performing full active duty prior to the present injury."

I am not persuaded that Dr. Goldmark established that the services at issue were not medically necessary or completely unrelated to the motor vehicle accident. Further, I note the treating physician rule which gives great deference to the determinations of the medical provider who is actually rendering care to the patient.

Accordingly, Applicant is awarded \$3,563.61.

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
	David T. Neuman MD	08/27/15 - 08/27/15	\$8,217.96	\$3,563.61	Awarded: \$3,563.61
Total			\$8,217.96		Awarded: \$3,563.61

- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 04/04/2016, which is a relevant date only to the extent set forth below.)

Interest runs from 4/4/16 (the filing date for this case) until the date that payment is made at two percent 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

Pursuant to 11 NYCRR §65-4.6 (d), ". . . 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 for arbitration or court proceeding, subject to a maximum fee of \$1,360."

- 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 New York

SS :

County of Nassau

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

05/09/2017
(Dated)

Charles Blattberg

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:
0a8371221cbc07b5d9f7379ec9669c6c

Electronically Signed

Your name: Charles Blattberg
Signed on: 05/09/2017