

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Beth Israel Medical Center
(Applicant)

- and -

Allstate Property and Casualty Insurance
Company
(Respondent)

AAA Case No. 17-15-1021-8188

Applicant's File No.

Insurer's Claim File No. 03341917562PV

NAIC No. 17230

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 10/05/2016, 04/12/2017, 08/09/2017
Declared closed by the arbitrator on 08/11/2017

Matthew Viverito, Esq. from Costella & Gordon LLP participated in person for the Applicant

Anna Pacca, Esq. from Tusa & Levin Attorneys at Law participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 22,566.55**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended the amount claimed to \$10,109.39 pursuant to fee schedule. This is the same amount set forth in the affidavit of Mercy Acuna, RN, BSN, CPC submitted by Respondent.

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

3. Summary of Issues in Dispute

The claimant was the 63 year-old male driver of a motor vehicle that was involved in an accident on 7/11/14. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. On 11/11/14 Vladimir Shur, M.D. performed right shoulder surgery. At issue is an 11/6/14 presurgical consult and bloodwork along with 11/11/14 hospital services associated with the right shoulder arthroscopy provided by Applicant. Respondent timely denied the services at issue based on a 12/24/14 peer review by Maury Harris, 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:

An applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

The burden of proof on the issue of whether a motor vehicle accident caused a medical condition for which a person was treated and the no-fault insurer was thereafter billed falls upon the insurer if the latter asserts a lack of nexus between the accident and the condition; the underlying purpose of the no-fault law would be undermined if the applicant health care provider were required to prove as a threshold matter that a patient's condition was caused by the accident and unrelated to his or her entire medical history. *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 2009 NY Slip Op. 00351 (App Div 2d Dept., Jan. 20, 2009). See also, *Bronx Radiology, PC v. New York Central Mutual Fire Insurance Company*, 17 Misc. Cd 97(1st Dept. 2007); *Mt. Sinai Hospital v. Triboro Coach Inc.*, 263 A.D.2d 11, 699 N.Y.S.2d 77 (2d Dept. 1999). Where the issue of whether an injured person is entitled to benefits is before the arbitrator, it is necessary to assess not only the nature of the injuries but whether the injured person's complaints of pain were related to the accident. *Matter of Kolesnik v. State Farm*, 266 AD 2d 630 (3d Dept.1999).

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 2009 NY Slip Op. 00351 (App Div 2d Dept., Jan. 20, 2009); *Channel Chiropractic, P.C. v. Country-Wide Ins. Co.*, 2007 Slip Op. 01973, 38 A.D.3d 294 (1st Dept. 2007); *Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 NY Slip Op. 27427, 17 Misc.3d 97 (App Term 1st Dept., 2007), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident. *Id.*

If the report is conclusory in nature and lacking a detailed basis and medical rationale, it is insufficient to sustain Respondent's evidentiary burden. See *Vladimir Zlatnick, M.D., P.C. v. Travelers Ins. Indemnity Co.*, 12 Misc. 3d 128(A) (App. Term 1st Dept. 2006); *East Coast Acupuncture Servs., P.C. v. American Tr. Ins. Co.*, 2007 NY Slip Op. 50213(U) (App. Term 1st Dept., Feb. 8, 2007); *Amaze Medical Supply v. Eagle Ins. Co.*, 2 Misc.3d 128(A), 2003 NY Slip Op. 51701(U) (App. Term 2d Dept., Dec. 24, 2003).

The 10/5/16 hearing was continued for Respondent to "submit a peer addendum/re-review by Dr. Maury Harris, if necessary. Applicant should provide an explanation of how the amended amount claimed (\$10,680.86) was calculated. Respondent could submit a response to this fee schedule explanation, if necessary. Applicant should also amend the AR-1 to reflect both dates of service at issue (11/6/14 and 11/11/14)." Applicant submitted an explanation of how the amended DRG amount was calculated and corrected the dates of service at issue. The 4/12/17 hearing was continued for both sides "to make additional submissions regarding the proper DRG reimbursement rates for the services at issue." Respondent submitted the affidavit of Mercy Acuna, RN, BSN, CPC.

The claimant was the 63 year-old male driver of a motor vehicle that was involved in an accident on 7/11/14. The claimant reportedly injured his neck, bilateral shoulders, right arm/wrist, upper back, and lower back. There was a reported several second loss of consciousness. There were no reported lacerations or fractures, but there was extensive bruising. Following the accident the claimant was transported by ambulance to St. John's Episcopal Hospital where he was evaluated, treated, and released. On 7/14/14 the claimant presented to Bella Zimilevich, M.D. of Gentle Medical, P.C. and the claimant was recommended for physical therapy. On 8/6/14 the claimant presented to Leonard Bleicher, M.D. of Ledo Medical Rehabilitation, PLLC and was recommended/initiated on physical therapy. On 8/24/14 the claimant underwent a cervical spine MRI and a left shoulder MRI. The 8/24/14 right shoulder MRI interpreted by Robert Diamond, M.D. produced an impression of: synovial fluid is seen in the glenohumeral joint. There is a full-thickness separated anterolateral tear of the distal supraspinatus. Proximal tendinosis/tendinopathy is seen in this region with additional prominent thinning/partial tear at the level of the acromioclavicular joint. There is hypertrophic change seen in the acromioclavicular joint impressing the remaining supraspinatus with small erosions affecting the distal clavicle and proximal acromion. A laterally downsloping acromion is noted extending to abut the supraspinatus. Proximal humeral marginal surface spurring and subcortical erosions are seen underlying the supraspinatus and subscapularis. Distal subscapularis anterolateral tendinosis/tendinopathy is present. Anterior labral

deficiency/tear is seen with anterior glenoid spurring identified. The proximal long head of the biceps tendon is not seen within the proximal bicipital groove with findings compatible with an osseous fragment also noted within the bicipital groove. On 9/12/14 the claimant underwent a lumbar spine MRI. On 9/19/14 Dr. Bleicher conducted upper extremities and lower extremities EMG/NCV testing that suggested evidence consistent with median nerve injury right wrist and moderate acute left L5 radiculopathy. On 9/22/14 the claimant presented to Vladimir Shur, M.D. for an orthopedic consultation in regard to his bilateral shoulders. Examination revealed "pain is rated 9 out of 10 on the right side, 3 out of 10 on the left side. Examination of both sides are similar. There is a positive drop arm test consistent with rotator cuff. Not much limitation in range of motion. Bilateral upper extremities are neurovascularly intact." Dr. Shur's impression was "bilateral rotator cuff tears." Dr. Shur's treatment plan was "The patient is right hand dominant and more painful on the right side, I recommend him to undergo right rotator cuff repair. All the questions were answered, rationales discussed, risks, benefits, and alternatives of the procedure were discussed with the patient in detail, the patient seemed to understand everything and agreed with the plan to undergo surgical treatment. A surgical request form was filed and the patient will be contacted by the surgical, coordinator shortly to be given a date for surgery and set up for presurgical testing. In the meanwhile, the patient will continue with conservative measures with physical therapy, NSAIDS, RICE measures, comfort and supportive care. We will see the patient on the day of surgery or as needed and upon request for further care." On 10/6/14 the claimant presented to Victor Katz, M.D. for an orthopedic consultation where right shoulder examination revealed "forward flexion is 0 to 90 degrees, normal is 0 to 180 degrees. He has positive impingement, positive Hawkins, and negative arm drop sign. External rotation is weak. It is 4+/5. Internal rotation is also limited due to pain." Dr. Katz's right shoulder diagnosis was impingement and rotator cuff tear. On 11/11/14 Vladimir Shur, M.D. performed right shoulder surgery consisting of "right mini open rotator cuff repair with a subacromial bursectomy with a subacromial decompression, repair of the massive rotator cuff, soft tissue rearrangements with layer closure, manipulation of the right shoulder under anesthesia, and biceps tenodesis in situ." The preoperative and postoperative diagnoses were "right massive rotator cuff tear, extreme subacromial bursitis, impingement, frozen shoulder, severe pain, and failed nonsurgical treatment." At issue is an 11/6/14 presurgical consult and bloodwork along with 11/11/14 hospital services associated with the right shoulder arthroscopy provided by Applicant.

Respondent timely denied the services at issue based on the 12/24/14 peer review by Maury Harris, M.D. Respondent uploaded two substantially similar peer reviews by Dr. Harris dated 12/24/14; one directed specifically to the associated hospital services provided by Applicant and one directed specifically to the 11/11/14 surgery by Vladimir Shur, M.D. While only the 12/24/14 peer review that addresses the associated hospital services is being specifically considered arguments from both are relevant to the underlying issue and included here. It also noted that neither peer review specifically addresses the services performed on 11/6/14 but they were related to the 11/11/14 surgery. After reviewing the claimant's history, treatment, and medical records, Dr. Harris opines "after reviewing the medical records cited herein, I find them sufficient for me to arrive at a conclusion, within a reasonable degree of medical certainty, that the right shoulder arthroscopic surgery (decompression, rotator cuff repair, adjacent tissue

transfer, and manipulation) performed on date of service 11/11/14 by provider Vladimir Shur, M.D. was not medically necessary." Dr. Harris further opines "the hospital services (room/board, pharmacy, drugs/other, sterile supply, supply/implants, lab, lab/chemistry, lab hematology, OR services, anesthesia, respiratory SVC, physical therapy/evaluation, recovery room, and EKG/EMG) provided on date of service 11/11/14 by provider Beth Israel Medical Center were not medically necessary." Dr. Harris asserts "the orthopedic evaluation dated 09/22/14 by Dr. Shur revealed neurovascularly intact bilateral upper extremities, mildly limited range of motion, and pain rated 9/10 for the right shoulder. Non-specific provocative testing of the right shoulder revealed a positive drop arm test consistent with rotator cuff. The subjective complaints were bilateral shoulder pain. His past medical history included benign prostate hypertrophy, OSA, and rib fracture from a prior MVA in 2007. Past surgical history included left hip repair post trauma bicycle vs. MVA in 1983, prostate surgery, and left femur fracture ORIF many years ago. He was employed as a food preparer at the time of the accident. He was recommended for right rotator cuff surgery and continued physical therapy." After reviewing the 10/6/14 examination by Dr. Katz (see above) and the 8/24/14 right shoulder MRI (see above), Dr. Harris opines "there was no medical necessity for the right shoulder arthroscopic surgery (decompression, rotator cuff repair, adjacent tissue transfer, and manipulation) performed on date of service 11/11/14. "Arthroscopic surgery may be recommended for these shoulder problems: 1) torn or damaged cartilage ring (labrum) or ligaments; 2) shoulder instability; 3) torn or damaged biceps tendon; 4) torn rotator cuff; 5) bone spur or inflammation around rotator cuff; 6) inflammation or damaged lining of the joint (eg. rheumatoid arthritis); 7) arthritis of the end of the clavicle; 8) loose tissue need to be removed; 9) shoulder impingement syndrome." ("Shoulder Arthroscopy, updated 2/9/2009, Dr B. Ma; Medline Plus; US National Library of Medicine; NIH National Institute of Health article; (<http://www.nlm.nih.gov/medlineplus/ency/article/007206.htm>)). This person did not meet the criteria for shoulder arthroscopy and it was not causally related to this incident; therefore, it was not medically necessary. The MRI report revealed chronic retracted full-thickness tear of the supraspinatus. Osteoarthritis of the acromioclavicular joint caused the impingement on the remaining supraspinatus. There was no evidence of an acute injury. The MRI report revealed all chronic findings without evidence of acute rotator cuff tear. The injury was not causally related to the MVA; therefore the surgery was not medically necessary." Dr. Harris explains "The standard of care for soft tissue (eg. sprain/strain) and/or musculoskeletal (contusion/strain) injury(ies) would include a comprehensive evaluation by the physician, ordering of plain radiographs (only if there is suspicion of fracture or a severe mechanism of injury that may involve instability), prescribing of anti-inflammatory medication, cold modality, rest and/or a formal conservative program (eg. physical therapy, acupuncture, etc.) for a period of 6 to 8 weeks. If after conservative treatment, there are progressive or worsening symptoms of the soft tissue and/or musculoskeletal condition, MRI may be indicated. At that point, pain management or surgical intervention may be warranted depending on the results of the MRI (eg. osteoarthritic changes are a chronic condition), the treatment response to conservative care, the progression of the condition and if the injury was causally related to the accident. The standard of care does not involve surgical intervention prior to a sustained course of conservative care especially if there are no fractures or overt instability."

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 a 9/1/16 peer rebuttal by Vladimir Shur, M.D. Dr. Shur asserts the claimant "had complaints of severe right shoulder pain immediately following the accident without resolution from conservative care, including acupuncture care, NSAIDS and physical therapy treatment. Moreover, he had positive objective findings and orthopedic deficits, including positive drop arm test consistent with rotator cuff, some limitation of ROM as well as an MRI of his right shoulder suggestive of full thickness rotator cuff TEAR, all causally-related to the above-referenced motor vehicle accident. My assessment/impression was traumatic right shoulder rotator cuff TEAR. Also, please note that my patient's right shoulder was asymptomatic prior to this accident, i.e. no prior pain and/or medical issues concerning his right shoulder. My patient's right shoulder condition had not improved with conservative measures and he continued to demonstrate signs of orthopedic deficits. Thus, pursuant to my examination and properly accepted orthopedic- medical practices, I advised the patient that in light of his refractory nature with conservative measures, positive MRI findings and history, he would benefit from arthroscopic shoulder surgery." Dr. Shur opines "I disagree with the peer review report of Dr. Harris, who simply slipped in his opinions against reimbursement into a laundry list rejection. The carrier's doctor not only incorrectly provided a completely precatory, semi-outdated, cherry-picked medical article, which I am well-acquainted with, and which also NEVER disputes my medical rationale for performing the surgery in dispute, but also the insurance carrier's doctor NEVER REVIEWED my patient's right shoulder MRI film; he merely reviewed the report only. Please be aware that not only did I review my patient's right shoulder MRI report AND film-images, but also I was the surgeon who performed the surgically-invasive procedure, and UNDER DIRECT VISUALIZATION, I confirmed and noted the causally-related and traumatically-induced injuries to my patient's right shoulder. Additionally; the one precatory, outdated article cited and relied upon by the insurance company's doctor, CONCURS with my approach in that it "recommends arthroscopic surgery" for patients "with shoulder pain if they have suspicion of a clinically significant tear." This was the exact medical scenario with which my patient and I were faced with concerning the patient's right shoulder. As such, the peer reviewer basically gave a conclusory opinion with a perfunctory reference. Moreover, the insurance company's doctor makes the egregious mistake of stating within his report that there was allegedly "no acute injury" to my patient's right shoulder. Respectfully, the peer reviewer's statements are completely false and medically unconscionable, and are most certainly bold words from a physician, who NEVER EXAMINED my patient and FAILED TO REVIEW the patient's MRI right shoulder film! Again, not only did my patient fail approximately 4 months of conservative care, and was asymptomatic prior to this accident, but also I personally reviewed my patient's right shoulder MRI report AND film-images, and I was the surgeon who performed the surgically-invasive procedure, and UNDER DIRECT VISUALIZATION, I confirmed and noted the causally-related and traumatically-induced injuries to my patient's right shoulder." Dr. Shur continues "furthermore, Dr. Harris also failed to examine how problems such as those presented by my patient might have been dealt with by the medical community as a whole. More

specifically, Dr. Harris neglects to specifically explain why there is allegedly no established causally-related medical necessity for the operative services for my patient, who not only had positive MRI findings, but also was asymptomatic prior to this accident. Moreover, the insurance company's doctor fails to indicate how I, the surgeon and treating health care professional, allegedly did not act in accordance with generally-accepted medical practice when the recommendation for surgery was made. The standard for determining medical necessity is NOT based upon the peer reviewer's personal opinion. The peer reviewer merely states general, outdated and precatory principles of orthopedic surgery without evaluating my treatment in terms of such standards or establishing how I allegedly deviated from them. The peer reviewer also failed to adequately evaluate either the history of the injury, the treatment, the positive MRI results or the prognosis. The so-called "peer review" report is essentially a boilerplate presentation that does not address my patient specifically and his continued complaints of right shoulder pain and orthopedic deficits. It clearly was the peer reviewer's opportunity to explain why in fact why my patient had deteriorated orthopedically, and why the MRI testing was positive, which he conveniently failed to do."

Dr. Harris' own citation lists "torn rotator cuff" as a "criteria for shoulder arthroscopy." Dr. Harris argues that the "full-thickness separated anterolateral tear of the distal supraspinatus" noted in the 8/24/14 right shoulder MRI was "chronic" and "there was no evidence of an acute injury" based on his assertion that "the MRI report revealed all chronic findings without evidence of acute rotator cuff tear. The injury was not causally related to the MVA." This conclusion by Dr. Harris is in conflict with the medical reports by Bella Zimilevich, M.D., Leonard Bleicher, M.D., Vladimir Shur, M.D., and Victor Katz, M.D.; all of whom impliedly attribute causation to the subject MVA. Nor does Dr. Harris establish that the subject MVA did not exacerbate any right shoulder chronic conditions existing at that time. 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. I am not persuaded that Dr. Harris established that the claimant's right shoulder injury was unrelated to the MVA and completely pre-existing. The medical records and the 9/1/16 peer rebuttal by Vladimir Shur, M.D. have successfully rebutted Respondent's peer review. 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 \$10,109.39.

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
	Beth Israel Medical Center	11/06/14 - 11/11/14	\$22,566.55	\$10,109.39	Awarded: \$10,109.39
Total			\$22,566.55		Awarded: \$10,109.39

- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 11/03/2015, which is a relevant date only to the extent set forth below.)

Interest runs from 11/3/15 (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.

09/08/2017
(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:
3832023b2109438526c6ef02abe5777d

Electronically Signed

Your name: Charles Blattberg
Signed on: 09/08/2017