

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Forest Hills Medical, PC
(Applicant)

- and -

State Farm Fire and Casualty Company
(Respondent)

AAA Case No. 17-16-1044-0511

Applicant's File No. A08481

Insurer's Claim File No. 38-785J-598

NAIC No. 25178

ARBITRATION AWARD

I, Elyse Balzer, 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: DD

1. Hearing(s) held on 08/23/2017
Declared closed by the arbitrator on 08/23/2017

Andrew Bruskin, Esq from Munawar & Andrews-Santillo LLP participated in person for the Applicant

John Rossillo, Esq from Rossillo & Licata LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 189.07**, 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

The accident happened on 12/15/15.

Two claims were heard & decided together:

AAA Case No 17 16 1044 0511, Forest Hills Medical PC ("Forest Hills") is a claim for anesthesia rendered during right shoulder surgery on 2/3/16.

AAA Case No 17 16 1044 5599, Harvey R. Manes, MD ("Dr. Manes") is a claim for assistant surgeon fees for performing the right shoulder surgery of 2/3/16.

The issue is whether respondent has proven lack of medical necessity of right shoulder surgery based on a peer review.

All the documents in the ADR /Modria record of the case maintained by the AAA at the time of the hearing were reviewed.

4. Findings, Conclusions, and Basis Therefor

On 12/15/15 the 56 year old female injured person DD was driving a car when it collided with a construction truck. DD was treated at Kingsbrook Jewish Medical Center's emergency room.

The proof shows:

On 12/17/15 DD was evaluated by Dr. Gideon J. Hedrych, MD.

His report indicates that DD had asthma; was involved in a MVA in 2000 & injured her right knee; was involved in a MVA in 2010 & injured her right shoulder for which she underwent surgery; sustained a right shoulder injury in January 2015 which "remains symptomatic"; was involved in a MVA in July 2015 & injured her back & left shoulder for which she was receiving physical therapy; was involved in the subject MVA on 12/15/15 in which "she struck her head on the headrest & jolted & injured her neck & upper back." DD was a smoker and was allergic to shrimp.

At this 12/17/15 evaluation, DD complained of injuries from the 12/15/15 MVA of headaches, neck pain & limitation, radiating to the left shoulder blade & down the left arm, with weakness, numbness & tingling of the left arm & hand, upper back pain & limitation, anxiety, depression & fear of trucks.

The 12/17/15 exam had multiple positive findings. Dr. Hedrych ordered cervical traction for home use, a follow up appointment, x rays of the cervical & thoracic spine, and referrals to a physiatrist, a neurologist & a psychologist.

On 12/29/15 DD had an initial acupuncture evaluation at Body Acupuncture PC. The report indicates that DD had injuries & pain to her head, neck, upper back, mid back & left knee.

DD received acupuncture treatment for her head, neck & back on 12/29 & 12/30/15, and acupuncture treatment for her neck & back on 12/31/15, and on 1/5, 1/7, 1/8, 1/11, 1/17, 1/21, 1/22, 1/27, 1/28 & 1/29/16.

On 1/11/16 DD was examined by Dr. Jose Quinones, MD at Rutland Medical PC.

At this exam DD complained of headaches & pain in her neck & upper back. The exam report indicates that DD had left hip and left shoulder complaints/disabilities prior to the

subject MVA. DD indicated that a 6/2/15 MVA injured her back & left shoulder. The exam report indicated that the cervical & thoracic spine were "globally limited d/t pain", and that the shoulder, elbow, wrist, thumb, hip, knee, ankle, foot/toes were "WNL."

Dr. Quinones ordered MRI testing, a physiatry consult, and range of motion & muscle testing.

Dr. Quinones signed a physical therapy prescription for treatment to the cervical & thoracic spine.

DD received physical therapy for her shoulders and low back on 1/14, 1/21, 1/22 & 1/29/16.

On 1/14/16 DD had an initial chiropractic exam at Rutland Medical with Dr. Ronald Diamant, DC. The pain diagram portion of the exam report indicates head, neck, shoulder & trapezius pain.

DD received chiropractic treatment for her cervical spine on 1/14, 1/15, 1/21, 1/22, 1/27, 1/28, 1/29, 2/1, 2/2, 2/4, 2/5, 2/10 & 2/11/16.

On 1/16/16 DD had MRIs of her cervical spine, lumbar spine, thoracic spine, left shoulder & right shoulder. All MRIs had positive findings.

On 1/28/16 DD was examined by applicant Dr. Manes. (Even though this report was characterized as a "followup" it is the only exam report submitted and there is no proof of any prior exam by Dr. Manes).

Dr. Manes' report indicates that DD injured both shoulders in the subject MVA and that she continued to have severe pain, stiffness, weakness & crackling of the right shoulder & moderate pain, stiffness, weakness & crackling of the left shoulder.

Dr. Manes' exam found tenderness, crepitation, 20% decreased range of motion and grade 3/5 muscle strength in the right shoulder, and tenderness, swelling, 10% decreased range of motion and grade 4/5 muscle test in the left shoulder.

Dr. Manes recommended surgery for the right shoulder & physical therapy for the left shoulder.

On 1/28/16 DD had an acupuncture re-evaluation. DD complained of pain in the head, neck, left knee, upper back, both shoulders & middle back.

On 2/3/16 Dr. Manes performed right shoulder surgery on DD. It was performed at Queens Surgi-Center. The assistant surgeon was Malak Helmy, PA. The anesthesiologist was Dr. Anna Kryuchkova MD of applicant Forest Hills. The surgery found a tear of the anterior aspect of the glenoid labrum, a small tear of the under surface of the rotator cuff and synovitis. These findings conformed to the MRI findings.

Respondent denied payment for both claims at issue based on a peer review, dated 3/10/16, by Dr. Dorothy Scarpinato, MD.

Dr. Scarpinato listed the medical records which were reviewed, and formulated an accurate factual analysis.

Dr. Scarpinato found that DD had only received 4 physical therapy treatments to her shoulders, which were insufficient to be considered an adequate trial of conservative management.

Dr. Scarpinato stated that the PT notes showed that DD was responding favorably to treatment and there was no failure to respond to treatment.

Dr. Scarpinato cited to the US Department of Health & Human Services Agency for Healthcare Research & Quality - National Guideline Clearinghouse to support her opinion that the 2/3/16 right shoulder surgery was unwarranted.

Dr. Scarpinato's peer review is based on a standard of care requiring an adequate trial of conservative treatment before shoulder surgery is performed. The records submitted, and reviewed above, conform DD's shoulder injury and also confirm Dr. Scarpinato's assertion that DD had only 4 physical therapy treatments to the shoulders.

After reviewing the evidence, which does not include a rebuttal or opinion from Dr. Manes, or from many other treating providers, regarding the right shoulder surgery, I am forced to rely on Dr. Scarpinato's expert opinion.

The respondent bears the burden of production and the burden of persuasion with respect to the lack of medical necessity of the treatment or testing for which payment is sought. Nir v. Allstate Insurance Company, 7 Misc 3d 544, 796 NYS2d 857 (Civ. Ct. Kings Co. 2005); Bajaj v. Progressive Insurance Company, 14 Misc 3d 1202(A), 2006 WL 3627946 (Civ. Ct. Queens Co. 2006); Elm Medical, P.C. v. American Home Assurance Company, 2003 NY Slip Op. 51357(U) (Civ. Ct. Kings Co. 2003); Expo Medical Supplies, Inc. v. Clarendon Insurance Company, 12 Misc 3d 1154(A), 819 NYS2d 209 (Civ. Ct. Kings Co. 2006); City Wide Social Work & Psy. Serv. P.L.L.C. v. Travelers Indemnity Company, 3 Misc 3d 608, 77 NYS2d 241 (Civ. Ct. Kings Co. 2004); Fifth Avenue Pain Control Center v. Allstate Insurance Company, 196 Misc 2d 801, 766 NYS2d 748 (Civ. Ct. Queens Co. 2003); A.R. Medical Art, P.C. v. State Farm Mutual Automobile Insurance Company, 11 Misc 3d 1057(A), 815 NYS2d 493 (Civ. Ct. Kings Co. 2006); Hellander, M.D., P.C. v. State Farm Insurance Company, 6 Misc 3d 579, 785 NYS2d 896 (Civ. Ct. Richmond Co. 2004); A.B. Medical Services, P.L.L.C. v. New York Central Mutual Fire Insurance Company, 7 Misc 3d 1018(A), 801 NYS2d 229 (Civ. Ct. Kings Co. 2005).

The Appellate Term, 2nd Department has held that an affirmed independent medical examination report, which sets forth a factual basis and medical rationale for the conclusion that there was a lack of medical necessity, establishes a prima facie case for defendant. Viviane Etienne Medical Care PC v. Geico General Ins. Co., 2010-2853 KC,

NYLJ 1202589474972 (App Tm, 2nd, 11th & 13th Dists, 2013). The Appellate Term, 1st Department has held that a sworn peer review report, which sets forth a factual basis and medical rationale, demonstrated a prima facie case for the defense. Innovative MR Imaging PC v. Praetorian Ins. Co., 2013 NY Slip Op 50264 (U) (2013). The peer review in this case set forth a factual basis and medical rationale for the conclusion that there was lack of medical necessity and established respondent's prima facie case.

Once a defendant makes out a prima facie case that services were not medically necessary the burden shifts to plaintiff to establish the existence of a triable issue of fact. See, I & B Surgical Supply aao Jean Elie v. NY Central Mut. Fire Ins. Co., 2007 NY Slip 27159, 16 Misc.3d 4 (App Term, 2nd & 11th Jud Dists, 2nd Dep't 2007).

I find that Dr. Scarpinato's opinion carries respondent's burden of proof and that there is no rebuttal, opinion, affidavit, testimony or other proof to rebut respondent's showing.

Based on the proof, and the above reasoning, applicants' claims are denied.

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 New York

SS :

County of Westchester

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

09/10/2017
(Dated)

Elyse Balzer

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:
54ee5a7b72c024150c47363093691306

Electronically Signed

Your name: Elyse Balzer
Signed on: 09/10/2017