

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

WestMed Medical Group, PC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-16-1046-8382
Applicant's File No.	201608160134344
Insurer's Claim File No.	0493057990101028
NAIC No.	35882

ARBITRATION AWARD

I, Heidi Obiajulu, 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: Injured Party

1. Hearing(s) held on 12/04/2017
Declared closed by the arbitrator on 12/04/2017

Asya Domashitsky, Esq. from Subin Associates LLP participated in person for the Applicant

Jasleen Kaur, Esq. from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 17,419.70**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended its claim to \$5930.38 to conform to the maximum allowances under the New York Workers' Compensation Medical fee schedule including the application of the Surgery Ground Rules.

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

3. Summary of Issues in Dispute

Were the disputed right shoulder MRI study performed on March 7, 2016, the cervical spine MRI study performed on March 21, 2016, and the right shoulder surgery performed on April 27, 2016 medically necessary? The then 50- year-old male driver

was involved in a motor vehicle accident occurring on February 13, 2016 and received treatment for injuries to his neck and right shoulder.

4. Findings, Conclusions, and Basis Therefor

I have reviewed all relevant documents included in the Modria ADR Center maintained by the American Arbitration Association (hereinafter referred to as AAA) consisting of the submissions made by the parties. The parties did not submit any additional documents at the time of the hearing.

In dispute in this arbitration is Applicant's claim in the aggregate amended amount of \$5930.38 for the disputed right shoulder MRI study on March 7, 2016, the cervical spine MRI study on March 21, 2016, and the right shoulder surgery performed on April 27, 2016.

This case arises out of a motor vehicle accident occurring on February 13, 2016, in which the Injured Party (MT), a then 50-year-old male, sustained multiple injuries including to his neck and right shoulder while driving the insured vehicle when it collided with the adverse vehicle.

On February 16, 2013, Nicole DiMarino, NP evaluated him and commenced him on physical therapy.

The Injured Party commenced physical therapy beginning February 24, 2016.

On March 1, 2016, Dr. Michael Cushner examined the Injured Party and reported that he presented with complaints of constant neck pain radiating to the right shoulder and constant right shoulder pain with numbness in the right hand. The right shoulder pain was reportedly aggravated when the Injured Party reached up and behind his back. Physical examination revealed muscle spasms in the cervical spine, decreased ranges of motion in all planes of the right shoulder, and a positive Impingement test. Dr. Cushner diagnosed right shoulder bursitis and cervical radiculopathy. He referred for MRI studies of the cervical spine and right shoulder. He administered a depo-Medrol injection to the right shoulder.

On March 7, 2016, a right shoulder MRI study was performed that revealed moderate degenerative arthritic changes of the acromioclavicular joint, degenerative changes of the superior labrum, posterior labral tear, supraspinatus tendinosis, tendinosis of the intra-articular segment of the long head of the biceps tendon, sub acromial/sub deltoid bursitis, lipoma interposed between the deltoid and coracobrachialis muscles.

On March 14, 2016, Dr. Cushner performed a follow-up exam and reported that the Injured Party stated that he only had minimal improvement with his shoulder condition. despite the injection He reported persisting complaints in the neck and right shoulder and that the shoulder pain worsened with lifting and overhead movements. Examination of the cervical spine revealed muscle spasms. Examination of the right shoulder revealed

decreased ranges of motion in the shoulder in all planes, positive Impingement and Apprehension tests, and diminished muscle strength and pain with resisted supraspinatus. Dr. Cushner diagnosed right shoulder impingement and cervical radiculopathy. He recommended ongoing physical therapy (for the neck) and discussed a possible repeat depo injection or possible shoulder arthroscopy. He also referred the Injured Party for a cervical MRI study based on his exam of the cervical spine.

On March 21, 2016, the cervical spine MRI study was performed and revealed an unremarkable study.

On April 04, 2016, Dr. Cushner re-evaluated the Injured Party and reported that he presented with persisting pain in the right shoulder. Examination of the right shoulder revealed decreased ranges of motion of the right shoulder in all planes, positive Impingement and Apprehension tests, and diminished muscle strength and pain with resisted supraspinatus. He diagnosed right shoulder impingement. He recommended the right shoulder arthroscopy based on the Injured Party non-responsiveness to conservative treatment including the injection.

On April 27, 2016, Dr. Cushner performed the right shoulder arthroscopy. He noted that the Injured Party's complaints and exam findings were consistent with the diagnosis of right shoulder superior labral tear, anterior and posterior, grade 4 with 80% biceps tear, right shoulder impingement syndrome, right shoulder acromioclavicular degenerative joint disease, and right shoulder superior labra tear, anterior and posterior with synovitis.

In his operative report for the right shoulder arthroscopy, Dr. Cushner listed the below intra-operative findings:

1. Near complete tear of the biceps tendon with a type 4 superior labral tear.
2. Glenohumeral synovitis.
3. Diffuse grade 2 to 3 cartilage injury glenoid and humerus.
4. Partial rotator cuff tear, 15%
5. Type 2 acromion with anterior lateral spurring.
6. Inferior spur distal clavicle with acromioclavicular degenerative joint disease.
7. Posterior labral fraying.

Applicant submitted its claim form to Respondent seeking the reimbursement of no-fault benefits.

Within 30-days of its receipt of the MRI studies, Respondent denied reimbursement based on the peer review reports by Dr. Kiernan.

Within 30-days of its receipt of Applicant's claim form for the right shoulder surgery, Respondent denied reimbursement on the grounds that the right shoulder surgery and related medical services were medically unnecessary based on the peer review report by Dr. Howard Kiernan.

After it received Respondent's denials, Applicant commenced this arbitration seeking reimbursement of its claim.

At the outset, I find that Applicant established its prima facie case with the submission of its claim forms and the copies of Respondent's denial of claim forms, which demonstrate that Respondent received Applicant's claim forms, that more than 30-days elapsed since its receipt of same, and that Respondent denied reimbursement of Applicant's claim, which shows that Applicant's claim is now due and owing. See Insurance Law section 5106 [a]; Viviane Etienne Medical Care, PC v. County-Wide Ins. Co. 25 N.Y.3d. 498, 35 N.E.3d 451, 14 N.Y.S. 3d. 283, 2015 N.Y. Slip Op 04787(NY, June 10, 2015), Westchester Medical Center v. Nationwide Mut. Ins. Co., 78 A.D.3d. 1168, 911 N.Y.S.2d. 907, 2010 N.Y. Slip Op.08933, (N.Y.A.D. 2nd Dept., November 30, 2010).

At issue is whether Respondent met its burden of proof in overcoming the presumption created by Applicant's claim forms that the disputed MRI studies and right shoulder surgery were medically necessary. If so, the issue is whether Applicant met its burden of proof in persuading that the disputed MRI studies and surgery were medically necessary.

Regarding its lack of medical necessity defense, Respondent relies on the peer review reports and addendum by Dr. Howard Kiernan (only relating to the surgery). To rebut that defense, Applicant relies on the rebuttal report (primarily relating to the surgery) by Dr. Michael Cushner.

Right Shoulder Surgery

In his peer review report regarding the surgery, Dr. Kiernan opined that the right shoulder surgery was medically unnecessary because the Injured Party "*did not receive an appropriate attempt of conservative treatment prior to proceeding with surgical intervention. On review of the physical therapy session notes, the claimant actually had only physical therapy for the cervical spine. There was no physical therapy at all for the shoulder.*" He contended that the surgery was performed inconsistent with the applicable standard of care because the New York Shoulder Injury Medical Treatment Guidelines, Third Edition, indicated that three to six months of conservative care should be performed prior to considering surgery. The guidelines indicate that continuous conservative care of three months is appropriate but six months was recommended if the care is intermittent. He also cited a second medical authority for the proposition that internal impingement of shoulder, which includes but is not limited to articular-sided rotator cuff tears, labral tears, bicipital tendinitis, anterior instability, internal rotation deficit, and scapular dysfunction should be treated with non-operative treatment first. He argued that the Injured Party did not receive such non-operative treatment prior to the surgery. Finally, he argued that conservative treatment should be physician-directed with

treatment being prescribed and monitored by the surgeon to confirm that such conservative care had been adequately attempted and was truly ineffective.

In his rebuttal, regarding the surgery, Dr. Cushner argued that the Injured Party was not prescribed physical therapy to the shoulder because:

"Based on the review of the [Injured Party's] records, it was clear that the patient had severe complaints of pain which worsened significantly with movements. Moreover, the MRI study of the right shoulder revealed evidence of labral tear which was correlated as near complete tear in the intra-operative findings which could have worsened with exercises. I therefore administered a Depo-Medrol injection to his right shoulder, however, the [Injured Party's] right shoulder symptoms failed to resolve. Hence, in my opinion, my decision to disregard option of physical therapy was appropriate."

Dr. Cushner also argued that he near complete labral tear and rotator cuff tear found during arthroscopy additionally warranted arthroscopic intervention. He listed the NIH Guidelines indications for arthroscopy (see the list in his rebuttal) and opined that the arthroscopy was performed consistent with that list based on the results of the pre-operative evaluation as well as intra-operative findings indicating a near complete labral tear, impingement, synovitis, and rotator cuff tear. He also argued that the Injured Party's injuries failed to respond to the injection he performed. Consequently, for the above reasons, he argued that the disputed shoulder arthroscopy was medically necessary.

In his addendum, Dr. Kiernan reviewed Dr. Cushner's rebuttal and maintained his position that the right shoulder surgery was medically unnecessary because the Injured Party did not receive an appropriate attempt at conservative treatment prior to receiving surgical intervention. He reiterated that the Injured Party only received physical therapy to the cervical spine but not the right shoulder. He cited the New York Shoulder Injury Medical Treatment Guidelines that indicates that three to six months of conservative care should be performed prior to considering surgery and that treatment should be directed toward gaining full range of motion. He also indicated that he read Dr. Cushner's rebuttal letter and indicated that it did not change his opinion. He further argued "Dr. Cushner is under the impression that anyone with a rotator cuff disorder requires surgery, there is no role for physical therapy and in this opinion he stands alone." He cited another medical authority that indicates that there are three levels of treatment for disorders of the rotator cuff, namely: (1) preventive; (2) conservative; and (3) surgical. He argued that preventive focuses on body mechanics, proper use and strengthening of core body and shoulder girdle musculature and avoiding aggravating activities. He argued that conservative therapy in the absence of a full thickness tear is rest, activity modification, gentle active and passive range of motion exercises; anti-inflammatory medication and periodic sub acromial corticosteroid injections. Finally, he argued that this approach was not followed in this case.

Reviewing the relevant evidence in the record and considering the oral arguments made by the parties, I find as follows:

In determining whether an insurer met its burden of proof in establishing its lack of medical necessity defense, the courts have found that an insurer must submit an IME report/peer review with a detailed basis and medical rationale for the denial of benefits in order to prevail. See Vladimir Zlatnick, M.D., P.C. v. Travelers Ins. Indemnity Co., 12 Misc. 3d 128A (App. Term 1st Dept. 2006) and Nir v. Allstate, 7 Misc.3d 544, 546-47, 796 N.Y.S.2d 57, 60 (Civ. Ct., Kings Cty. 2005 ("At a minimum, (Respondent) must establish a factual basis and medical rationale for the lack of medical necessity of (Applicant's) services"). Once Respondent submits an IME report or peer review that has a sufficient factual basis and medical rationale, then the courts have routinely found that Respondent has established its prima facie defense that the disputed medical service is medically unnecessary. A Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co., 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table, Text in WESTLAW), Unreported Disposition, 2007 WL 1989432, 2007 N.Y. Slip Op. 51342(U) (N.Y. Sup. App. Term Jul 03, 2007). See also, Dayan v. Allstate Ins. Co., 49 Misc.3d 151(A), 29 N.Y.S.3d 846, 2015 NY Slip Op 51751(U) (App. Term 2d, 11th & 13th Dists. 2015). Then, the burden of persuasion regarding the medical necessity of the medical services shift to the applicant to submit competent medical evidence to refute Respondent's prima facie defense that the disputed medical service/test was medically unnecessary. See Pan Chiropractic PC v. Mercury Ins. Co., 24 Misc.3d. 136 (A), 897 N.Y.S. 2d 671 (Table), 2009 NY Slip Op 51495 (U) (July 9, 2009).

Applying the above standard of care and considering the parties' oral arguments, I find in favor of Applicant regarding the surgery for two reasons. First, based on the application of the legal theories of collateral estoppel and res judicata, my linked decision for the disputed ambulatory surgical services and supplies associated with the surgery precludes a different outcome(See the decision in the case Rye Ambulatory Surgery Center LLC and GEICO, AAA Case No. 17-16-1046-8435, decided 12/05/17). Notably, the parties, issue (medical necessity of the surgery) and evidence are identical in both cases. Second, even if I didn't apply those legal principles, I still find in Applicant's favor because I am persuaded by Dr. Cushner's rebuttal that he attempted conservative care (rest and the depo-Medrol injection) and that there was minimal improvement in the shoulder. Also, he set forth a clear and persuasive rationale for his decision to not prescribe physical therapy to the shoulder, which is that there was a near complete biceps tendon (grade 4) with superior labral tear that would have been made worse with exercise. He explained that therefore he performed the depo-Medrol injection. He noted that the Injured Party's shoulder symptoms failed to resolve with the injection and that therefore he recommended the surgery. Notably, the peer reviewer never commented on Dr. Cushner's rationale but focused on the rotator cuff tear, ignoring the labral tear. A review of the cited WCB Shoulder Treatment Guidelines demonstrates that the treatment rendered depends on the pathology and severity in Grade of the tear under the SLAP lesion section of those guidelines. Dr. Kiernan did not discuss the findings regarding the biceps tendon tear (80%) and labral tear and therefore I am more persuaded by Dr. Cushner's rebuttal. Consequently, I afford greater evidentiary weight to Dr. Cushner's rebuttal and find that the right shoulder surgery and disputed related ambulatory surgical services and supplies were medically necessary. **Accordingly, I find in favor of Applicant in the amount of \$4312.92, as reimbursement of the services by the Physician Assistant's and primary surgeon.**

Cervical Spine and Right Shoulder MRIs

In his peer review report dated July 6, 2016, Dr. Kiernan opined that the cervical spine MRI study was medically unnecessary because the study was performed inconsistent with the applicable standard of care. He argued that the plain films of the neck were negative and his neurological exam was normal. He cited the NYS Workers Compensation New York Neck Injury Medical Treatment Guidelines as the standard of care, which provide that an MRI or CT scan is indicated when spinal cord injury is suspected. He argued that there was no suspicion of spinal injury. He expounded that the guidelines indicate a MRI may be warranted for "red flags", which included acute fractures, acute dislocations, infection, tumor, progressive neurological deficit, cauda equine syndrome, and extra spinal disorders. He argued that there were no such red flags.

In his peer review dated July 7, 2016, Dr. Kiernan opined that the right shoulder MRI study was medically unnecessary because it was ordered inconsistent with the applicable standard of care. He cited sections D.6d and D. 7d of the New York Shoulder Injury Medical Treatment guidelines, which state that plain films should first be obtained and then a shoulder MRI may be considered when the shoulder is refractory to four to six weeks of non-operative treatment (additionally for a rotator cuff injury, if the diagnosis is not readily identified by standard radiographic techniques). He argued that the Injured Party only had one week of physical therapy when the MRI was ordered. Therefore, he argued that the right shoulder MRI study was medically unnecessary.

Applicant's rebuttal evidence mainly discussed the right shoulder surgery and did not specifically address the right shoulder MRI study and definitely not the cervical spine MRI study. However, Applicant's attorney argued that Dr. Cushner provided useful information regarding the shoulder injury that should not be ignored, namely that the Injured Party had evidence of a labral tear/SLAP lesion. She argued that Dr. Cushner also indicated that there was a 80% tear in the biceps tendon discovered during the arthroscopy that should also not be ignored. Finally, she argued that Dr. Cushner ordered the shoulder MRI study because he contemplated possible surgery.

Reviewing the relevant evidence in the record and considering the parties' oral arguments, I find in favor of Respondent regarding the MRI studies for the following reasons. First, I find that Dr. Kiernan set forth a sufficient factual basis and medical rationale. He demonstrated that he had a sufficient factual basis based on his review of the cited medical records and his discussion of the Injured Party's history of treatment. I find that he demonstrated that he had a sufficient medical rationale because he cited the applicable standards of care for performing a shoulder MRI study when impingement and bursitis conditions (the conditions diagnosed by Dr. Cushner in his exams that led him to prescribe the studies) are suspected and for a cervical MRI study. Regarding the shoulder MRI study, the standard of care is that the provider would first order a plain film of the shoulder and then if the patient had a failed response to conservative care, then a MRI might be warranted. In this case, the MRI study was performed with a week or two after physical therapy was started (on 02/24/16). Moreover, according to Dr. Kiernan there was no physical therapy to the shoulder. Regarding the cervical MRI

study, the standard of care is that the Ipatient would undergo 4 to 6 weeks of conservative care with a failed response and if there is suspected nerve root compression, myelopathy, or for suspected disc herniation or cord contusion following severe neck injury, unless red flags were present. In this case, Dr. Kiernan opined that these criteria were not met.

Therefore, I find that Respondent established its prima facie defense that the cervical spine and shoulder MRI study were medically unnecessary.

Finally, although the right shoulder surgery showed SLAP lesions (labral tear and 80% biceps tear), these findings cannot be used to support the MRI study. The question is whether at the time the right shoulder MRI study was performed, was it medically necessary. Notably, Dr. Cushner only indicated he suspected impingement syndrome and bursitis. Consequently, I find that the standards of care cited by Dr. Kiernan were applicable and not the standard of care for SLAP lesions. Therefore, I find that Applicant did not rebut Respondent's defense. **Accordingly, for the above reasons, I find in favor of Respondent regarding the cervical spine and shoulder MRI studies.**

IN CONCLUSION: I FIND IN FAVOR OF APPLICANT IN THE AMOUNT OF \$4312.92, AS REIMBURESMENT OF THE SURGERY.

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
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	WestMed Medical Group, PC	03/07/16 - 04/27/16	\$17,419.70	\$5,930.38	Awarded: \$4,312.92
Total			\$17,419.70		Awarded: \$4,312.92

- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 10/24/2016, which is a relevant date only to the extent set forth below.)

Applicant's award in the amount of \$4312.92 shall bear interest at a rate of two percent per month, calculated on a pro rata basis using a 30-day month from 10/24/16, the date Applicant filed its AR form on AAA, to the date of the payment of the award.

C. Attorney's Fees

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

As this matter was filed **after** February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 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 New York
SS :
County of New York

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

12/05/2017

(Dated)

Heidi Obiajulu

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:
cb54038941a265a8655bc9b395ea1fa6

Electronically Signed

Your name: Heidi Obiajulu
Signed on: 12/05/2017