

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Aron Rovner MD PLLC
(Applicant)

- and -

MVAIC
(Respondent)

AAA Case No. 17-17-1078-3755

Applicant's File No. None

Insurer's Claim File No. 542916

NAIC No. Self-Insured

ARBITRATION AWARD

I, John Langell, 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: Assignor

1. Hearing(s) held on 07/17/2018
Declared closed by the arbitrator on 08/28/2018

Elke Mirabella, Esq. from Dino R. DiRienzo Esq. participated in person for the
Applicant

Jeffrey Kadushin, Esq. from Marshall & Marshall, Esqs. participated in person for the
Respondent

2. The amount claimed in the Arbitration Request, **\$ 5,982.53**, was AMENDED and permitted by the arbitrator at the oral hearing.
The amount in controversy was amended to 4,155.94, in accordance with the applicable fee schedule.

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

The parties stipulated that Applicant's claims were properly and timely submitted and that Respondent's Denials were timely.

3. Summary of Issues in Dispute

The Assignor is a 38 year old male who was injured in an automobile accident on 3/21/16. Assignor was a pedestrian. Assignor underwent left shoulder surgery on

9/18/17. Reimbursement for charges related to that surgery was denied by Respondent based on a peer review. Any potential fee schedule issues having been resolved by Applicant's amendment, the sole issue at this hearing is whether the disputed surgery was medically necessary.

4. Findings, Conclusions, and Basis Therefor

This hearing was conducted using documents contained in the ECF, and the oral arguments presented by the parties' representatives. Any documents contained in the folder are hereby incorporated into this hearing. I have reviewed all relevant exhibits contained in the ECF maintained by the American Arbitration Association.

The proper and timely submission of Applicant's claim having been established by way of stipulation, the burden of production initially lies with Respondent to establish a prima facie case of lack of medical necessity. Respondent's burden can be satisfied by a peer review report which sets forth both a factual basis and a medical rationale for the asserted denial. See, generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

To establish the defense of lack of medical necessity, Respondent relied on the peer review report of Dr. Howard Levin, an Orthopedist. Dr. Levin states that the disputed surgery and associated services were not medically necessary because Assignor was not evaluated for a left shoulder injury immediately following the accident, was subjected to an MRI which showed only age appropriate wear and tear, and furthermore because there was no evidence that Assignor's condition was deteriorating with respect to his left shoulder despite a course of conservative treatment. Dr. Levin states both that Assignor's left shoulder injury was not causally related to the accident and that the surgery at issue was medically unnecessary.

The underlying records show that the MRI referred to by Respondent's peer review showed, among other things, a partial tear of the distal supraspinatus tendon. The indication for the MRI was given as pain in the left shoulder. An initial evaluation at the Neighborhood Medical Health Clinic, a little more than a week following the accident, documents complaints of bilateral shoulder pain. A physical examination performed at that time showed tenderness and decreased range of motion with respect to both shoulders. A re evaluation the following month also shows, by way of history, that Assignor had injured both shoulders, and a repeat physical examination once again shows diminished range of motion in both shoulders. A subsequent evaluation by a Physiatrist shows decreased range of motion in the left shoulder, in particular, along with rotator cuff weakness on the left.

Applicant has submitted a formal rebuttal to Respondent's peer review report. Applicant's rebuttal report was authored by Dr. Aron Rovner, Assignor's treating Orthopedic surgeon. Dr. Rovner has reviewed the voluminous medical records that predated his surgery, and notes that his predecessors had repeatedly documented shoulder complaints while also opining as to the causal relationship between the accident and Assignor's injuries. Dr. Rovner himself opines that the shoulder injury was

causally related to Assignor's accident, stating that no other etiology has been posited for the injury in question. He states that a pre existing degenerative condition may be activated and worsened by trauma. He reviews his own initial encounter with Assignor, when he documented bilateral shoulder pain and decreased range of motion in both shoulders. Dr. Rovner diagnosed rotator cuff tears in both shoulders. He indicated that Assignor had failed all modalities of conservative treatment and that Assignor's left shoulder pain was particularly severe. Dr. Rovner indicates in his rebuttal that Assignor had in fact failed 17 months of conservative therapy prior to his shoulder surgery. He states that all orthopedic testing on the left shoulder was positive. He says that he recommended arthroscopic surgery on the left shoulder in view of the clinical exam, the MRI results, and the failed trial of conservative therapy. Dr. Rovner opines that the surgery was medically necessary, and cites to published medical authorities in support of this contention.

Dr. Levin has submitted an addendum to his original report, which was submitted with leave subsequent to the hearing in response to Applicant's tardily submitted Rebuttal report. Applicant's rebuttal had been accepted pursuant to the discretion granted to me by applicable rules and regulations in light of the filing of that report within 30 days of the hearing date. In Dr. Levin's addendum report he acknowledges having mistaken the date of the relevant shoulder MRI, but repeats the MRI findings without mentioning the supraspinatus tear explicitly referred to in the MRI report. Dr. Levin repeats his view that Assignor's shoulder injury was pre existing and degenerative in nature. He does not comment on the treatment records of other health care providers that explicitly refer to Assignor's shoulder complaints in the aftermath of the accident.

With particular reference to Dr. Levin's opinion on causation, I note that, in general, causation is presumed since "it would not be reasonable to insist that (an applicant) must prove as a threshold matter that (a) patient's condition was 'caused' by the automobile accident." Mount Sinai Hospital v. Triboro Coach, 263 A.D.2d 11, 20, 699 N.Y.S.2d 77 (2nd Dept. 1999). Thus, the burden is on the insurer to come forward with proof establishing by "fact or founded belief" its defense that the claimed injuries have no nexus to the accident. Mount Sinai Hospital v. Triboro Coach, 263 A.D.2d 11, 19 (2nd Dept. 199) (quoting Central Gen. Hosp. v. Chubb Group of Ins. Cos., 90 N.Y. 2d 195, 199 (1997)).

Moreover, the Appellate Courts have consistently held that the no-fault insurer must demonstrate not only a lack of causation, but that the accident did not exacerbate or aggravate any preexisting condition or injury. This issue was addressed in Kingsbrook, where the Appellate Division specifically stated that "[e]xacerbations of preexisting conditions are covered by the No Fault Law." Kingsbrook v. Allstate, 61 A.D.3d 13 at 23. As such, the question in that case was whether the patient's treatment was "wholly unrelated to his automobile accident or not exacerbated by the accident." *Id.* at 22.

Based on all the materials before me, and having carefully considered the reports and records submitted by both parties, I find that Dr. Levin's peer review is insufficient to establish a prima facie case either as to lack of medical necessity or as to lack of causation. Dr. Levin does not refer to the standard of care or to any medical authorities bearing on Assignor's shoulder complaints. He declines to discuss the actual MRI

findings showing a torn rotator cuff. He does not refer to the findings of other physicians and health care providers who both document Assignor's shoulder complaints and opine as to the causal relation between the accident and Assignor's injuries. Dr. Levin's opinions are substantially inconsistent with the underlying records in evidence. He offers no convincing explanation for his opinion that Assignor's injury pre dated the accident other than his own review of the intraoperative photographs, which he does not discuss in detail. For these reasons, I do not credit Dr Levin's conclusions.

I do credit the conclusions expressed by Assignor's treating surgeon in his rebuttal report. I find that those conclusions are corroborated by the underlying medical records in evidence. I find that, even if Respondent's peer review report had been sufficient to establish Respondent's prima facie case, Applicant's rebuttal report has adequately rebutted Respondent's peer review and so demonstrated both the medical necessity of the disputed surgery and the causal relation between Assignor's injury and the accident by a preponderance of the credible evidence.

Accordingly, the Applicant's claim is upheld.

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
	Aron Rovner MD PLLC	09/18/17 - 09/18/17	\$5,982.53	\$4,155.94	Awarded: \$4,155.94
Total			\$5,982.53		Awarded: \$4,155.94

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/26/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). In this case, Applicant requested arbitration on 11/7/17. The denial is dated 10/17/17. As Applicant acted in a timely manner and in accordance with the No Fault Regulations, interest shall accrue from 10/26/17, 30 days from the submission of Applicant's bill to Respondent on 9/26/17. See 11 NYCRR 65-4.4 (f)(3).

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay the applicant an attorney's fee equal to 20% of that total sum, subject to a maximum of \$1,360.00. See 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, John Langell, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

09/15/2018
(Dated)

John Langell

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:
73b366e506a82c33579ebbbb9a81dbd9

Electronically Signed

Your name: John Langell
Signed on: 09/15/2018