

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Fifth Avenue Surgery Center
(Applicant)

- and -

State Farm Fire & Casualty Company
(Respondent)

AAA Case No. 17-18-1091-0187

Applicant's File No. SS-71192

Insurer's Claim File No. 59-1292-W14

NAIC No. 25143

ARBITRATION AWARD

I, Philip Wolf, 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 03/01/2019
Declared closed by the arbitrator on 03/01/2019

Anthony Alton, Esq. from Samandarov & Associates, P.C. participated in person for the Applicant

Ryan Waxon, Esq. from Richard T. Lau & Associates participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,171.26**, was AMENDED and permitted by the arbitrator at the oral hearing.

Counsel for Applicant reduced the amount in dispute to \$341.96 in accordance with its calculation of fee schedule.

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

3. Summary of Issues in Dispute

Assignor, a 46 year-old male, was the driver of a motor vehicle which was involved in an accident on August 26, 2017. As a result of the accident Assignor sustained injuries to his lower back and right shoulder. On September 27, 2017, Assignor underwent a right shoulder arthroscopy. Applicant is seeking reimbursement for ultrasonic guidance

associated with the right shoulder arthroscopy. Respondent issued a timely denial predicated upon a peer review. The issue in dispute is whether Respondent has established its lack of medical necessity defense.

4. Findings, Conclusions, and Basis Therefor

Applicant is seeking \$10,095.12 for the ultrasonic guidance associated with Assignor undergoing a right shoulder arthroscopy on September 27, 2017. This award is rendered upon the oral arguments of the parties and upon the documentary evidence submitted by the parties. The documentary evidence submitted by the parties consists of the documents contained within the ADR Center for this matter as of March 30, 2019.

Applicants' Prima Facie Case

Assignor was the driver of motor vehicle which was involved in an accident on August 26, 2017. As a result of the accident Assignor sustained injuries to his low back and right shoulder. On September 1, 2017, Assignor underwent an MRI of the right shoulder which revealed supraspinatus and infraspinatus tears.

Assignor presented to Alexios Apazidis on September 8, 2017 with complaints of low back pain and right shoulder. Examination of the right shoulder revealed a positive Hawkins test and positive Neers test, painful range of motion, tenderness, edema, a positive Speed test and a positive O'Brien test. Examination of the lumbar spine revealed spasm, tenderness, and limited range of motion. After examination, Dr. Apazidos's impression was low back pain and unspecified injury of muscles and tendons of the rotator cuff. Doctor Apazidis recommended an MRI of the lumbar spine and a right shoulder arthroscopy "for this patient who has failed nonsurgical care."

On September 27, 2017, Assignor underwent a right shoulder arthroscopy performed at Applicant's surgical facility. Ultrasonic guidance was used during the arthroscopy. The arthroscopy was performed by Alexios Apazidis, M.D. and Gennadiy Shamalov, RPA-C. The postoperative diagnoses were right shoulder full thickness supraspiatus partial tear, type I SLAP tear, synovitis and Bankart lesion. Applicant has submitted a copy of the operative report.

After reviewing the evidence submitted by Applicant, I find that Applicant has submitted sufficient credible evidence to establish a prima facie case with respect to the ultrasonic guidance associated with Assignor undergoing the right shoulder arthroscopy on September 27, 2017. *See, Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 25 N.Y.3d. 498, 2015 NY Slip Op 04787, (2015).

Respondent's Peer Review Defense

Respondent issued a timely denial predicated upon a peer review conducted by Dorothy Scarpinato, M.D. Doctor Scarpinato opined that the right shoulder arthroscopy was not medically necessary. In reaching her opinion, Dr. Scarpinato does cite/reference to

medical authority in compliance with the requirements set forth in Jacob Nir, M.D. a/a/o Josaphat Etienne v. Allstate Ins. Co., 7 Misc. 3d 544, 796 N.Y.S.2d 857 (Civ. Ct. Kings Co. 2005) and CityWide Social Work & Psychological Services, P.L.L.C. a/a/o Tremayne Brow v. Travelers Indemnity Company, 3 Misc. 3d 608, 777 N.Y.S.2d 241 (Civ. Ct. Kings Co. 2004).

Doctor Scarpinato states that the arthroscopy was performed less than a month post accident and after Assignor had only undergone ten dates of physical therapy.

"ordinarily, individuals would undergo a least six to eight weeks of care at a frequency of two to three times a week with progression from passive therapies to more active forms of rehabilitation to help strength the cuff musculature/dynamic stabilizers of the shoulder. This individual did not have any red flags warranting surgery shortly after the initial consultation. In fact, the MRI was rather non-compelling and the physical therapy progress notes do not indicate that the claimant was failing to respond to the Course of care administered. There did not appear to be any suggestion of a sudden deterioration in the claimant's condition during the course of care."

"If a patient's condition has not improved in three months, then a surgical consultation should be considered. There is no evidence of better results from early rather than delayed surgery and many with partial tears and some with complete tears will respond to non-operative management."

In short, the records provided do not establish the need for surgical intervention this early on in the rehabilitation process. This individual should have been afforded an adequate course of care than encompassed at least six to eight weeks of rehabilitation before even considering surgical intervention. I would point out that the physical therapy approach was neither altered or enhanced during the course of the first ten visits."

Applicant's rebuttal

Applicant has submitted a rebuttal by Dr. Apazidis. In his rebuttal Dr. Apazidis states that the MRI findings establish the need for the arthroscopy. Doctor Apazidis further states that there is no standard requirement for a patient with an MRI confirmed rotator cuff tear to undergo any particular amount of physical therapy. "Partial rotator cuff tears should be surgically treated because if left untreated, they will get worse with time...There is a substantial body of evidence that most partial tears do not heal on their own." "If a partial tear is untreated, it will likely progress and may become irreparable." Doctor Apazidis also states that his exam also revealed evidence of a labral tear. Doctor Apazidis further states that surgical repair of labral tears has a high success rate. In addition, Dr. Apazidis states that injections would not be beneficial or indicated.

Determination of Medical Necessity

Where Respondent has presented sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to the Applicant, which must present its own evidence of medical necessity and/or rebuttal to Respondent's peer review. *See, A. Khodadadi Radiology, P.C. v. Central Mutual Fire Ins. Co.*, 2007 NY Slip Op 51342U, 16 Misc. 3d 131A (2nd Dept. 2007).

Doctor Aapazidis recommended the right shoulder arthroscopy at the time of his initial exam on September 8, 2017. Prior to the exam and recommendation for surgery, Assignor had only undergone five dates of physical therapy (08/30/17, 08/31/17, 09/01/17, 09/06/17, 09/08/17). The September 8, 2017 physical therapy progress note documents "slight improvement."

After reviewing the evidence, I am persuaded by the opinion of Dr. Scarpinato and her rationale for said opinion. I agree with Dr. Scarpinato that Applicant recommended the subject arthroscopy prematurely without allowing for an adequate period of conservative treatment. I agree with Dr. Scarpinato that the MRI findings, which did not reveal a full thickness tear, did not establish red flags warranting surgery shortly after the initial consultation.

Based upon the foregoing, and after reviewing all of the evidence, I find that Applicant has failed to submit sufficient credible evidence to rebut the peer review of Dr. Scarpinato. Accordingly, I find that Applicant has failed to establish the medical necessity for the ultrasonic guidance associated with Assignor undergoing the right shoulder arthroscopy on September 27, 2017. Applicant's claim is denied in its entirety.

DECISION: Based upon the foregoing, Applicant's claim is denied in its entirety. This award is in full disposition of all No-Fault benefit claims submitted to this Arbitrator.

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 Suffolk

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

03/30/2019
(Dated)

Philip Wolf

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:
8351a23beddd6225a9d75b1ef157e065

Electronically Signed

Your name: Philip Wolf
Signed on: 03/30/2019