American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Island Ambulatory Surgery Center (Applicant)	AAA Case No.	17-17-1071-4572
	Applicant's File No.	NA
- and -	Insurer's Claim File No.	0438352668 2AP
Allstate Insurance Company (Respondent)	NAIC No.	19232

ARBITRATION AWARD

I, Kihyun Kim, 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: the Assignor

1. Hearing(s) held on 04/05/2019
   Declared closed by the arbitrator on 04/05/2019

   Sasha Hochman, Esq. from Drachman Katz, LLP participated in person for the Applicant

   John Palatianos, Esq. from Allstate Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 4,539.35**, was NOT AMENDED at the oral hearing.
   Stipulations WERE made by the parties regarding the issues to be determined.

   The parties stipulated to Applicants' prima facie case and to Respondent's timely denial.

3. Summary of Issues in Dispute

   The issue presented is whether the left shoulder arthroscopy was medically necessary.

   The Assignor (JS) is a 57-year-old male who was a passenger in an automobile that was involved in an accident on December 5, 2016. Applicant seeks reimbursement in the amount of $4,539.35 for the facility fees related to a left shoulder arthroscopy provided to the Assignor on May 5, 2017.

4. Findings, Conclusions, and Basis Therefor

This arbitration was conducted using the documentary submissions of the parties contained in the ADR Center, maintained by the American Arbitration Association. I have reviewed the documents contained therein as of the close of the hearing, and such documents are hereby incorporated into the record of this hearing. Both parties appeared at the hearing by counsel, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

At the hearing, Respondent acknowledged receipt of the bill in question and the parties stipulated to Applicant's prima facie case and to Respondent's timely denial.

The Assignor is a 57-year-old male who was injured in an automobile accident on December 5, 2016. Following the accident, the Assignor was taken by ambulance to the hospital where he was evaluated, treated and released. Thereafter, he sought medical treatment for his injuries from various providers, including Applicant.

On April 14, 2017, the Assignor appeared for an orthopedic examination with Joseph Stubel, M.D., at the request of Respondent. Dr. Stubel examined the Assignor's cervical spine, lumbar spine, and both shoulders. Dr. Stubel determined that the Assignor exhibited a mild disability with reference to the right shoulder and that another six weeks of physical therapy twice per week was indicated. He also found that there was no medical indication for further diagnostic testing, household help, causally related prescription medication, medical supplies, transportation or surgery.

Subsequent to the examination, the Assignor underwent an arthroscopy of the left shoulder performed by Maxim Tyorkin, MD at Applicant's facility in Brooklyn NY. Applicant billed Respondent for such services and Respondent timely denied Applicant's claims based on the April 14, 2017 examination by Dr. Stubel, as well as an addendum report by Dr. Stubel dated May 31, 2017.

Applicant now in the amount of $4,539.35 for the facility fees related to a left shoulder arthroscopy provided to the Assignor on May 5, 2017.

Legal Framework - Medical Necessity - IME

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment (*Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13 [2d Dept. 2009]), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. *See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp.*, 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003). An insurance carrier may utilize an independent medical examination (IME) to determine whether an eligible injured person is entitled to further care and treatment or other first-party benefits. *See Rowe v. Wahnow*, 26 Misc.3d 8, 11-12 (App Term, 1st

Dept 2009, McKeon, P.J., dissenting). "An IME is a snapshot of the injured party's medical condition as of the date" it is conducted. *Amato v. State Farm Ins. Co.*, 2010 NY Slip Op. 20431 (Dist. Ct. Nassau Co., Fred J. Hirsh, J., Oct. 13, 2010).

An IME report can be the basis of a termination of benefits if ultimately found to be persuasive. An IME report must set forth a factual basis and medical rationale for the conclusion that further services are not medically necessary. *Ying Eastern Acupuncture, P.C. v. Global Liberty Ins.*, 20 Misc.3d 144(A), 873 N.Y.S.2d 238 (Table), 2008 N.Y. Slip Op. 51863(U), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008). The determination that an eligible injured person no longer needs treatment is generally based upon an examiner's findings that result in the conclusion that: (1) the patient has fully recovered from the injuries; (2) the patient has made as full a recovery as is possible taking into account the nature and extent of the injuries, the patient's age, pre-existing conditions or other factors; and/or (3) additional treatment or testing will not provide any medical benefit to the patient. *Amato v. State Farm Ins. Co.*, 2010 NY Slip Op. 20431 (Dist. Ct. Nassau Co., Fred J. Hirsh, J., Oct. 13, 2010). Whether an IME report is persuasive and meets the carrier's burden is a factual decision, which must be rendered on a case by case basis.

If the IME report provides a factual basis and medical rationale for an opinion that services were not medically necessary, the burden shifts back to the Applicant to refute the IME findings and prove the necessity of the disputed services. *See, CPT Med. Servs., P.C. v. New York Cent. Mut. Fire Ins. Co.*, 18 Misc.3d 87 (App. Term 1st Dept.); *Eden Med., P.C. v. Progressive Cas. Ins. Co.*, 19 Misc.3d 143(A) (App Term 2d & 11th Jud. Dists., 2008); *Be Well Med. Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 18 Misc. 3d. 139 (A) (App. Term 2d Dept., Feb. 21, 2008; *A. Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co*., 16 Misc. 3d. 131 (A) (App Term 2d Dept.); *West Tremont Med. Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc. 3d. 131 (A) (App Term 2d Dept., 2006). If the Applicant fails to present any evidence to refute Respondent's showing, the claim should be denied, as the ultimate burden of proof on the issue of medical necessity lies with the Applicant. *See* Insurance Law § 5102; *Wagner v. Baird*, 208 A.D.2d 1087 (3d Dept. 1994); *AJS Chiropractic, P.C. v. Mercury Ins. Co.*, 22 Misc.3d 133(A), (App. Term 2d & 11th Dist. Feb. 9, 2002). The case law is clear that a provider must rebut the conclusions and determinations of the IME doctor with his own facts. As the Appellate Term, 2d, 11th & 13th Dists., recently stated: "it is ultimately plaintiff who must prove, by a preponderance of the evidence, that the services or supplies were medically necessary." *Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co.*, 37 Misc.3d 19, 22 (App. Term 2d, 11th & 13th Dists. 2012).

An opinion letter issued by the Office of General Counsel on February 14, 2005, sets forth that pursuant to 11 NYCRR 65-3.8(a)(1), "[t]he earliest date that benefits may be cut off prospectively based on the findings of [an] IME is the date the denial is sent to the applicant for benefits." See Ops Gen Counsel NY DFS No. 05-05-21 (February 14, 2005). Thus, the earliest date the denial and determination contained therein can take effect is the date the insurer sent the timely denial to the eligible injured person with a copy to the affected providers.

Orthopedic IME - Joseph Stubel, M.D., April 14, 2017

Respondent relies upon the IME report of Joseph Stubel, M.D., April 14, 2017, and an addendum dated May 31, 2017, in asserting a lack of medical necessity for the office visit conducted on July 31, 2017. At the April 14, 2017 examination, Dr. Stubel obtained the Assignor's history, reviewed medical records and conducted a physical examination of the Assignor.

At the examination, the Assignor complained of neck, back and bilateral shoulder pain.

Examination of the cervical spine revealed a normal appearance with no surgical scars, swelling, erythema or ecchymosis. There was no tenderness or muscle spasm palpable. There were no trigger points palpable. Probing of the deep cervical nerve roots produced no symptoms down the arms bilaterally. Spurling maneuver and cervical compression tests were negative.

Ranges of motion (with goniometer) were within normal limits (flexion: 60º/60º; extension: 50º/50º; rotation: 80º/80º, bilaterally; lateral bending: 45º/45º bilaterally). The biceps, triceps and brachioradialis reflexes were bilaterally symmetrical and 2+. Pinprick sensation and motor strength were grossly normal in the upper extremities. Tinel's sign was negative at both cubital and carpal tunnels. Vascular examination of the upper extremities was grossly intact.

Examination of the lumbar spine revealed a normal appearance with no surgical scars, swelling, erythema or ecchymosis noted. There was no tenderness or muscle spasm palpable. Ranges of motion (with goniometer) were within normal limits (flexion: 60º/60º; extension: 25º/25º; lateral bending: 25º/25º, bilaterally).

Straight leg raising was to 80 degrees (normal 80) bilaterally. Reflexes at the Achilles and patella tendons were bilaterally symmetrical and 2+. Motor strength and sensation in the lower extremities were grossly normal. Vascular exam of the lower extremities was grossly normal.

Examination of the right shoulder revealed three well healed arthroscopy incisions. There was no swelling, erythema or ecchymosis. There was no reported tenderness or muscle spasm noted on palpation, Ranges of motion (with goniometer) showed some deficits (flexion: 90º/180º; internal rotation: 80º/80º; external rotation: 90º/90º; abduction: 90º/180º; adduction: 30º/30º; extension: 40º/40º). There was a normal sulcus sign, weakness on rotator cuff testing, negative apprehension test and negative impingement sign. There was also negative speed test and a negative Yergerson test.

Examination of the left shoulder revealed the appearance of the shoulder was normal with no swelling, erythema or ecchymosis. There was no reported tenderness or muscle spasm noted on palpation. Ranges of motion (with goniometer) were within normal limits (flexion: 180º/180º; internal rotation: 80º/80º; external rotation: 90º/90º; abduction: 180º/180º; adduction: 30º/30º; extension: 40º/40º). There was a normal sulcus sign, normal rotator cuff signs, negative apprehension test and negative impingement sign. There is a negative speed test and a negative Yergerson test.

Dr. Stubel's diagnoses were neck, back and left shoulder sprains; status post arthroscopic surgery right shoulder. Based on the findings at the time of the exam, Dr. Stubel determined that the Assignor exhibited a mild disability with reference to the right shoulder and that another six weeks of physical therapy twice per week was indicated. He also found that there was no medical indication for further diagnostic testing, household help, causally related prescription medication, medical supplies, transportation or surgery.

Addendum - Joseph Stubel, M.D., May 31, 2017

Upon receipt of Applicant's bill herein, Respondent requested that Dr. Stubel review his my original IME report dated April 14, 2017 and the operative report for surgery of the left shoulder dated May 5, 2017. Dr. Stubel stated:

> In my previous report, I had noted that this claimant had a normal exam of the left shoulder. His MRI only showed tendinosis and an interstitial partial tear, some acromioclavicular hypertrophy and tendinitis. His shoulder was asymptomatic at the time. Therefore at that time, I felt that there was no indication for any further treatment to the left shoulder. Therefore based upon my examination although he has some minor findings on his MRI he had a normal physical examination of the shoulder. Therefore, I cannot find medical necessity for the arthroscopic surgery done on 5/5/2017.

Analysis - Medical Necessity - Office/Acupuncture - DOS 6/9/14-3/9/17

After reviewing the relevant evidence and considering the oral arguments of the parties, I find the IME report insufficient to meet Respondent's burden of production on the issue of medical necessity. I do not find the April 14, 2017 IME report to be credible or persuasive as I find that Dr. Stubel's determination that there was no medical indication for further surgery unsupportable as Dr. Stubel never addressed the left shoulder MRI findings, which showed, among other things, an interstitial partial thickness tear of the superspinatus tendon, and never actually made a determination that the Assignor's injuries were resolved. The diagnoses from the examination were "neck, back and left shoulder sprains, status post arthroscopic surgery right shoulder." I also do not find that the May 31, 2017 addendum adequately addresses these deficiencies in the IME report. The addendum is also self-serving as Dr. Stubel's opinion and explanation of his IME findings should have been in his April 14, 2014 report and not offered a month and a half later after Applicant had already proceeded with surgery to repair injuries caused by the accident. I also note that the IME report and addendum say nothing about the medical standards implicated in this case or whether or not such standards were met herein.

I find that Respondent has failed to meet its burden of production. As a result, I need not review the evidence submitted by Applicant to rebut Respondent's position. I find that presumption of medical necessity attached to Applicant's prima facie case stands. Applicant is entitled to reimbursement in the amount of $4,539.35 for the facility fees related to a left shoulder arthroscopy provided to the Assignor on May 5, 2017.

Even assuming, *arguendo*, the April 14, 2017 IME report and addendum were sufficient to meet Respondent's burden of production, the defense would still fail as Applicant has submitted a persuasive and credible rebuttal and supporting medical documentation that rebuts the IME report and sustains Applicant's burden of proof regarding the medical necessity of the left knee arthroscopy and associated services. Among other things, the contemporaneous examination report by Dr. Tyorkin, dated April 25, 2017, revealed the Assignor's subjective complaints of severe (9/10), sharp pain in the bilateral shoulders with associated swelling, cracking and popping, corroborated with objective findings, including positive impingement sign in the left shoulder. The MRI of the left shoulder also revealed an interstitial partial thickness tear of the superspinatus tendon. Giving some deference to the treating physician, the rebuttal and Applicant's supporting medical documentation and arguments are also more credible and persuasive than the IME report and addendum.

A review of the submissions uploaded by the parties also does not appear to include a general denial or any other notice sent to the Assignor and/or the affected providers indicating that future orthopedic services to the left shoulder would be cut-off based on the April 14, 2014 examination. If Respondent intended for the April 14, 2014 IME to be proper basis for lack of medical necessity, it needed to have notified the Assignor and the known affected providers prior to the cut-off services being rendered. See Ops Gen Counsel NY DFS No. 05-05-21 (February 14, 2005).

Conclusion

For the reasons set forth herein, Applicant is awarded reimbursement in the total amount of $4,539.35, with attorney's fees, interest and the arbitration filing fee as set forth below. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

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**	**Status**
	Island Ambulatory Surgery Center	**05/05/17 - 05/05/17**	**$4,539.35**	**Awarded: $4,539.35**
Total			**$4,539.35**	**Awarded: $4,539.35**

B. The insurer shall also compute and pay the applicant interest set forth below. 08/25/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall be computed from August 25, 2017, the AR-1 filing date, at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

Respondent shall pay the Applicant's attorney's fees in accordance with 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 Nassau

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

05/05/2019
(Dated)

Kihyun Kim

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:
97a1f7fab505474c57ede68fc3229bb2

Electronically Signed

Your name: Kihyun Kim
Signed on: 05/05/2019