

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Health Plus Surgery Center, LLC
(Applicant)

- and -

State Farm Mutual Automobile Insurance
Company
(Respondent)

AAA Case No. 17-17-1077-4691

Applicant's File No. None

Insurer's Claim File No. 32-1409-8Z6

NAIC No. 25178

ARBITRATION AWARD

I, Burt Feilich, 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: Claimant

1. Hearing(s) held on 05/14/2019
Declared closed by the arbitrator on 05/14/2019

Jason Behar, Esq. from Drachman Katz, LLP participated in person for the Applicant

Chris Fingerhut, Esq. from Picciano & Scahill, P.C. participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 17,153.50**, was AMENDED and permitted by the arbitrator at the oral hearing.

Counsel for applicant agreed to reduce the amount in dispute to a total of \$15,075.68 for services rendered on July 10th, 2017.

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

3. Summary of Issues in Dispute

a. Whether the ambulatory surgery center facility services rendered by applicant were medically necessary and/or causally related for the care and treatment of injuries sustained by claimant in the accident; and, if so whether applicant billed in accordance with the fee schedule and the regulations.

4. Findings, Conclusions, and Basis Therefor

I have reviewed all documents included in the ADR system consisting of the submissions made by the parties. No other extra documentation was submitted by either party at the time of the hearing.

This dispute is in the newly revised amount of \$15,075.68 and involves the subject of ambulatory surgery center facility services rendered by applicant for the eligible injured person/assignor for the treatment of injuries sustained in an accident that occurred on April 24th, 2017. Respondent contends that the services claimed were not medically necessary and/or causally related to the accident on the basis of a peer review report. It also contends that the services were not properly billed in accordance with the fee schedule.

Initially, according to First Amendment to Regulation 68-D, 11 NYCRR 65-4.5, the arbitrator shall be the judge of the relevance and materiality of the evidence offered. The arbitrator may independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Insurance Department regulations.

I have carefully reviewed the medical evidence submitted by the parties pertaining to claimant, a 45-year old man who was a driver of a vehicle involved in the accident including the following: the initial orthopedic evaluation report by Dr. Ajoy K. Sinha of Sinha Orthopedics, PC, dated June 13th, 2017, and his followup progress reports from July 29th, August 26th, October 7th and December 30th, 2017; the operative report by Dr. Sinha for left shoulder arthroscopic surgery performed on July 10th, 2017 at Health Plus Surgery Center, LLC in New Jersey; all facility records, including an anesthesia report by Dr. Miguel Renato and a brachial plexus nerve block injection report of Dr. Ravi Naik of Citimed, PA, relating to the surgery; an initial neurological evaluation by Dr. Pradip Sedani of Nassau Queens Medical, PC, dated June 27th, 2017; an initial medical evaluation by Dr. Alexander Baldonado of St. Sebastian Medical, PC, dated May 10th, 2017, and his followup progress reports from June 14th and August 9th, 2017; an initial orthopedic evaluation by Dr. Mark Bursztyn, of New York Sports and Joints, dated November 30th, 2017, and his followup progress report; an initial evaluation by Dr. Tim Canty of Comprehensive Spine & Pain Center of New York, dated October 31st, 2017; procedure report by Dr. Canty for a left shoulder PRP injection on November 22nd, 2017; an initial NCV/EMG consultation evaluation dated August 21st, 2017 (provider name illegible); acupuncture evaluations by Pinecone Acupuncture, PC, dated August 11th and October 19th, 2017; the results of a left shoulder MRI taken on May 20th, 2017 and interpreted by Dr. John Rigney showing AC joint impingement,

subacromial impingement, supraspinatus tendinopathy, and subdeltoid and subacromial bursitis; results of a second left shoulder MRI taken on December 21st, 2017 and again interpreted by Dr. John Rigney and showing impingement of the AC joint, supraspinatus tendinopathy, a full thickness supraspinatus tendon tear, a tear of the superior glenoid labrum, and no comments whatsoever about either the previous MRI taken on May 20th, 2017 or the left shoulder surgery performed on July 10th, 2017; results of cervical and lumbar MRIs taken on June 3rd, 2017 showing herniated disc at L5-S1, bulging discs at C3-4, C6-7 and L3-4, retrolisthesis of C3 on C4 and spondylolisthesis of L4-5; results of x-rays taken on December 21st, 2017; results of lower extremity EMG/NCS testing from June 27th, 2017 showing a left L4-5 radiculopathy; results of range of motion and/or muscle strength testing from May 16th, June 7th and August 16th, 2017; results of Outcome Assessment testing from June 14th and September 8th, 2017; results of pain fiber sensory testing from May 16th, 2017; initial physical therapy evaluations from May 11th and June 30th, 2017; and daily physical therapy, chiropractic and acupuncture treatment records.

The Operative report by Dr. Ajoy Sinha for left shoulder arthroscopic surgery performed on July 10th, 2017 at Health Plus Surgery Center, LLC, had a pre-operative diagnosis of left shoulder pain, bursitis, joint derangements and impingement syndrome. The post-operative diagnosis was a left shoulder SLAP tear; impingement syndrome; bursitis; joint derangement; synovitis and tenosynovitis. The procedures performed included a left shoulder arthroscopy; a limited debridement; a major synovectomy; a subacromial major bursectomy and acromioplasty; and infiltration of Kenalog by injection.

In defense of the claim, respondent submits the peer review/surgical review report of Dr. Matthew Skolnick, an orthopedist, dated September 5th, 2017. He appears to have had all of the necessary records in order to prepare his review. Dr. Skolnick contends that there was neither medical necessity nor causal relation for the left shoulder surgery performed by Dr. Sinha on July 10th, 2017, and all ancillary services rendered in connection therewith, including the ambulatory surgery center facility services and the anesthesia services. The MRI of the shoulder found no evidence of a rotator cuff tear or a labral tear or any findings that would justify surgery. Dr. Sinha's clinical evaluation found no evidence of instability. There was also a lack of clinical evidence that claimant's shoulder was getting worse despite the physical therapy he had been receiving. According to Dr. Skolnick, rotator cuff impingement can be caused by a number of factors besides a trauma. The standard of care for rotator cuff impingement is an adequate trial of conservative treatment, including physical therapy, anti-inflammatory medication and exercises). Dr. Skolnick stated that some patients benefit from a steroid injection and few require surgery. Dr. Skolnick

cited to medical literature and professional guidelines to support his opinion regarding the lack of medical necessity and/or causation of the surgery performed as well as all ancillary services rendered in connection therewith.

On December 3rd, 2018, Dr. Sinha issued a rebuttal to the peer review by Dr. Skolnick. He reiterated the clinical findings he made on June 13th, 2017 and the MRI test results. He indicated that his own clinical examination and the MRI study found evidence of substantial injuries to the shoulder. Claimant had no previous history of any complaints regarding his shoulder prior to the accident so there was no basis for Dr. Skolnick's contention that the accident caused no injury to the shoulder. Furthermore, Dr. Skolnick did not rule out the possibility that the accident either aggravated or exacerbated an asymptomatic pre-existing condition of the shoulder. Dr. Sinha stresses that the post-operative findings included a SLAP tear of the labrum and that type of injury would ordinarily require surgery and would not resolve just from conservative treatments. Dr. Sinha stated that claimant had failed to improve despite a trial of physical therapy lasting nearly two months before he recommended surgery. The type of injuries sustained would not heal on their own and would get worse without surgery.

After having reviewed all of the medical evidence and hearing the arguments of the parties, I conclude that respondent has not met its burden that there was no medical necessity for the left shoulder surgery performed by Dr. Sinha on July 10th, 2017, or for any of the ancillary services rendered in connection therewith, including the ambulatory surgery center facility services rendered by applicant. Although Dr. Skolnick stated that all non-surgical treatment methods should be exhausted before a recommendation is made for surgery, it appears that claimant had approximately 2 months of conservative treatment before the surgery and according to Dr. Sinha he was not progressing. It is clear that despite the fact the MRI did not find evidence of tearing of the rotator cuff or labrum, the actual operative report found evidence of a SLAP tear, an injury that would normally require a surgical form of treatment. Claimant had also been asymptomatic regarding his left shoulder prior to the accident. Dr. Skolnick has also not really stated how Dr. Sinha was to properly treat claimant's continuing symptoms and pain. Thus, I agree with applicant and find that there was medical necessity and legal causation for the left shoulder arthroscopic surgery performed on July 10th, 2017, and for the ambulatory surgery center facility services rendered by applicant. Finally, I also believe that Dr. Sinha's rebuttal has adequately countered the criticisms raised in Dr. Skolnick's peer review. Consequently, I am awarding applicant for those services subject to fee schedule considerations.

Respondent has submitted a fee schedule analysis by Lori Ercolini, RN, CPC, dated February 27th, 2018. Applying several multiple related surgical procedure 50% reductions to the CPT codes billed, she calculated a proper billable total of \$15,075.68 for the ambulatory surgery center facility services rendered by applicant on July 10th, 2017. Counsel for applicant has now agreed to reduce the amount in dispute to the total recommended by Ms. Ercolini. Therefore, I am adopting the calculation prepared by respondent's fee schedule expert for the amount to be awarded to applicant in this case.

Therefore, my award is in favor of applicant in the total amount of \$15,075.68 for the services rendered on July 10th, 2017.

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
	Health Plus Surgery Center, LLC	07/10/17 - 07/10/17	\$17,153.50	\$15,075.68	Awarded: \$15,075.68

Total	\$17,153.50		Awarded: \$15,075.68
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- 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.

In accordance with 11 NYCRR 65-3.9(c), since applicant did not request arbitration within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations, interest shall not accumulate on the disputed claim or element of claim until the date arbitration was demanded by applicant, which was October 26th, 2017. See LMK Psychological Services v. State Farm Insurance, 2009 NY Slip Opinion 02481 (Court of Appeals, April 2nd, 2009); East Acupuncture, PC, 2009 NY Slip Opinion 01191, __ AD3d__, 873 NYS2d 335 (2d Dept., Appellate Division, February 17th, 2009).

The following awarded claims were timely denied, and are not subject to overdue late interest:

1. For the awarded claim of \$15,075.68 for services rendered on July 10th, 2017, interest is to accrue from October 26th, 2017.

C. Attorney's Fees

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

Pursuant to the decision in LMK Psychological Services v. State Farm Insurance, 2009 NY Slip Opinion 02481 (Court of Appeals, April 2nd, 2009), and the Opinion Letter of the NYS Insurance Department, Office of General Counsel, dated October 8th, 2003, the insurer shall pay the applicant an attorney's fee, in accordance with 11 NYCRR 65-4.6(d), upon each of the following awarded claims:

1. For the awarded claim of \$15,075.68 for services rendered on July 10th, 2017, an attorney's fee of \$1,360.00, is awarded.

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

05/16/2019

(Dated)

Burt Feilich

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:
d8d64628cf788b0e966e64f83588071e

Electronically Signed

Your name: Burt Feilich
Signed on: 05/16/2019