American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Pinnacle Orthopedic & Spine Specialists (Applicant)	AAA Case No.	17-18-1105-0027
	Applicant's File No.	18-15124
- and -	Insurer's Claim File No.	010930287432
	NAIC No.	16233
Erie Insurance Company Of New York (Respondent)		

ARBITRATION AWARD

I, Brian Bogner, 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: EIP

1. Hearing(s) held on 01/03/2020
   Declared closed by the arbitrator on 01/03/2020

   Nicole Jones, Esq. from The Morris Law Firm, P.C. participated in person for the Applicant

   Brendan Byrne, Esq. from Mura & Storm, PLLC participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 1,241.32**, was NOT AMENDED at the oral hearing.
   Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

   The eligible injured person (EIP) is a forty (40) year old who was involved in a motor vehicle accident on June 14, 2016. At issue is the medical necessity, causal relationship and proper reimbursement amount for physical therapy treatment provided from January 16, 2018 through May 24, 2018. The Respondent denied reimbursement based on the independent medical examination (IME) of James McGlowan, M.D. dated November 16, 2017. The Respondent also relies on an addendum dated April 13, 2018. The Respondent also contends that the amount billed is excessive.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents uploaded to the ADR Center maintained by the American Arbitration Association. This case was decided based upon the documents uploaded to the ADR Center and the oral arguments of the parties' representatives at the hearing.

This matter arises from a rear-end motor vehicle accident that occurred on June 14, 2016. The EIP was evaluated in the Emergency Department at Sister's Hospital the following day. He then began chiropractic treatment and consulted with Dr. Zair Fishkin, an orthopedic surgeon, for his spinal complaints.

On July 19, 2017, the EIP consulted with Dr. Marc Tetro, an orthopedic surgeon, for his left shoulder and elbow. He complained of pain over the posterolateral aspect of the shoulder, burning and tingling extending from the elbow into the hand and weakness of the hand. Physical examination revealed tenderness and limited range of motion of the left shoulder and elbow. It also revealed positive Neer's, Hawkin's, O'Brien's and cross-body adduction tests, diminished sensation of the ulnar nerve distribution and significantly positive Tinel's. He was diagnosed with a left shoulder and elbow sprain injury, left cubital tunnel syndrome, left shoulder rotator cuff tendinitis/impingement syndrome with AC joint arthrosis and cervical origin of pain. Dr. Tetro noted that an upper extremity EMG/NCS performed on September 16, 2016 demonstrates cubital tunnel syndrome and recommended an updated nerve conduction study to evaluate the ulnar nerve.

The left upper extremity EMG/NCS performed on August 18, 2017 was normal.

The EIP returned to Dr. Tetro on October 10, 2017. Dr. Tetro opined that the left upper extremity EMG/NCS did not show evidence of cervical radiculopathy or peripheral compressive neuropathy. He referred the EIP for a left shoulder MRI to rule out rotator cuff pathology.

The left shoulder MRI performed on October 24, 2017 revealed a small amount of fluid in the subacromial bursa consistent with bursitis and AC joint arthropathy with a small subacromial spur and mild impingement.

On November 1, 2017, Dr. Tetro opined that the left shoulder MRI revealed evidence of rotator cuff tendinitis/subacromial bursitis. He recommended and performed a left shoulder subacromial injection. The EIP reported relief of his shoulder pain, indicating that the EIP's shoulder is causing his symptoms.

The EIP returned to Dr. Tetro on December 13, 2017. He reported a decrease of his left shoulder pain following the injection on November 1, 2017 but not a complete resolution. Dr. Tetro recommended anti-inflammatory medications and physical therapy.

The EIP began physical therapy on January 16, 2018.

On February 21, 2018, the EIP was instructed to continue with physical therapy.

On April 4, 2018, the EIP reported that physical therapy has been beneficial but he was continuing to experience pain primarily with reaching overhead. He was again instructed to continue with physical therapy.

On June 12, 2018, the EIP reported that he had been unable to tolerate physical therapy due to an exacerbation of his back complaints. He was instructed to continue to follow up with Dr. Fishkin and pain management and to resume physical therapy for the left shoulder once his lumbar spine complaints are controlled.

The EIP was discharged from physical therapy on June 13, 2018.

At issue is the medical necessity, causal relationship and proper reimbursement amount for physical therapy treatment provided from January 16, 2018 through May 24, 2018. The Respondent denied reimbursement based on the independent medical examination (IME) of James McGlowan, M.D. dated November 16, 2017. Dates of service April 24, 2018 through May 24, 2018 were also denied based on Dr. McGlowan's Addendum dated April 13, 2018. The Respondent also contends that the amount billed is excessive.

Medical Necessity/Causal Relationship

The burden is on the insurer to prove that treatment was not medically necessary. Behavioral Diagnostics v. Allstate Ins. Co., 3 Misc. 3d 246, 248 (Civ. Ct., Kings Co. 2004); Fifth Ave. Pain Control Ctr. v. Allstate Ins. Co., 196 Misc.2d 801, 803 (Civ. Ct., Queens Co. 2003). The burden is also on the insurer to prove that treatment was not related to the accident. Mt. Sinai Hosp. v. Triboro Coach, Inc., 263 A.D.2d 11, 19-20 (2d Dept. 1999).

A denial claiming lack of medical necessity or lack of causation must be supported by a peer review, IME report or other competent medical evidence which sets forth a clear factual basis and medical rationale for denying the claim. Amaze Med. Supply, Inc. v.

Eagle Ins. Co., 2 Misc. 3d 128A (App. Term, 2nd & 11th Dists. 2003); Healing Hands Chiropractic, P.C. v. Nationwide Assurance Co., 5 Misc. 3d 975, 976 (Civ. Ct., NY Co. 2004).

The Respondent relies on the IME of Dr. James McGlowan dated November 16, 2017 in support of its defense based on lack of medical necessity. I find that Dr. McGlowan's IME is insufficient to establish that the treatment at issue was not medically necessary. The treatment at issue involves the left shoulder but Dr. McGlowan's examination of the left shoulder was limited to range of motion testing, which was positive. Dr. McGlowan also did not review the left shoulder MRI, which was performed a few weeks prior to his examination. In addition, Dr. McGlowan did not address the EIP's left shoulder in the diagnoses section of his report or opine that further treatment to the left shoulder was not medically necessary. Respondent's counsel argued at the hearing that Dr. McGlowan did not address the left shoulder because the EIP did not make any complaints to the left shoulder. However, the questionnaire filled out by the EIP prior to Dr. McGlowan's IME indicates otherwise. The EIP described his present problem as "pain in upper left shoulder/pain + weakness in my left arm." The EIP also reported that he was receiving cortisone injections in his left shoulder and the records Dr. McGlowan claims to have reviewed also make it clear that the EIP was seeking treatment for his left shoulder.

With respect to its defense based on lack of causation, the Respondent relies on Dr. McGlowan's peer review dated April 13, 2018. While only certain dates of service were timely denied based on Dr. McGlowan's peer review, a defense based on lack of causation can be raised at any time and is not waived if not raised in a timely denial. Central Gen. Hosp. v. Chubb Group of Ins. Cos., 90 N.Y.2d 195 (1997). As such, Dr. McGlowan's peer review may be considered for all of the dates of service.

I find that Dr. McGlowan's peer review is insufficient to establish that the EIP's left shoulder complaints were not causally related to the accident. Dr. McGlowan simply opined, in a conclusory fashion, that "[n]o diagnosis for shoulder or elbow conditions were made and I do not associate any shoulder or elbow condition with the injuries sustained on 06/14/2016." Dr. McGlowan did not point to another cause for the EIP's complaints and there is no indication in the records that the EIP had a prior issue with his left shoulder or that he injured his left shoulder in a subsequent accident. While the EIP did not treat for his left shoulder immediately after the accident, he was treating for neck pain with radicular symptoms down his left arm into his hand. A nerve conduction study performed in September of 2016 revealed abnormal conduction velocity in the left ulnar motor study across the elbow. At a certain point it was felt that his complaints in his left arm were stemming from his shoulder or elbow so he was appropriately referred to Dr. Tetro for evaluation, who then referred the EIP for physical therapy for his left shoulder. I am persuaded that the treatment to the left shoulder was causally related to the subject accident.

Fee Schedule

The Respondent bears the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. Robert Physical Therapy P.C. v. State Farm Mut. Auto. Ins. Co., 13 Misc.3d 172, 175 (Civil Ct., Kings Co. 2006). Judicial notice may also be taken of the Workers' Compensation Fee Schedule. Natural Acupuncture Health, P.C. v. Praetorian Ins. Co., 30 Misc.3d 132(A) (App. Term, 1 Dept. 2011).

The Respondent correctly contends that reimbursement is limited by Physical Medicine Ground Rule 11, which provides that the maximum number of relative value units when billing for physical medicine procedures and/or modalities is 8. I note that Physical Medicine Ground Rule 8 is also applicable, which provides that the maximum number of relative value units when billing for an initial evaluation is 13.5 and when billing for a re-evaluation is 11.

I have reviewed the bills and, after applying these Ground Rules, find that the proper reimbursement amount is $1,064.52.

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**
	Pinnacle	**01/16/18 -**		**Awarded:**

	Orthopedic & Spine Specialists	**05/24/18**	**$1,241.32**	**$1,064.52**
Total			**$1,241.32**	**Awarded: $1,064.52**

B. The insurer shall also compute and pay the applicant interest set forth below. 08/31/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Applicant is awarded interest pursuant to the no-fault regulations. *See* 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). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

Interest shall run from August 31, 2018, the date this proceeding was filed.

C. Attorney's Fees

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

The insurer shall pay the Applicant an attorney's fee in accordance with 11 NYCRR 65-4.6.

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 Erie

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

01/16/2020
(Dated)

Brian Bogner

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:
ae44fdb18ec031a6e5dc6a5cee308353

Electronically Signed

Your name: Brian Bogner
Signed on: 01/16/2020