

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

W Joseph Gorum MD PC
(Applicant)

- and -

American Family Connect Property and
Casualty Insurance Company f/k/a IDS
Property Casualty Ins.Co
(Respondent)

AAA Case No. 17-20-1167-2193

Applicant's File No. 1045244

Insurer's Claim File No. 2717677

NAIC No. 29068

ARBITRATION AWARD

I, Eileen Hennessy, 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-A.A.

1. Hearing(s) held on 11/24/2020
Declared closed by the arbitrator on 11/24/2020

Tricia Smith from The Law Office Of Cohen & Jaffe, LLP participated by telephone for the Applicant

Steven Levy from Callinan & Smith LLP participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 6,620.98**, was AMENDED and permitted by the arbitrator at the oral hearing.
Applicant amended the amount in dispute from the original amount of \$6,620.98 to \$3,219.96.

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

3. Summary of Issues in Dispute

The record reveals that Assignor-A.A., a61-year-oldfemale, claimed injuries as the driver of a motor vehicle involved in an accident that occurred on 7/25/2019. Applicant billed for the surgeon's fee for right shoulder arthroscopic surgery performed on 1/3/2020. Respondent denied this claim based on a lack of causal relationship and medical necessity as determined by the peer review report of Sean Lager, M.D., dated 3/12/2020. The issues to be determined are 1) whether the denial was timely, 2) whether

the services are causally related to the accident and therefore medically necessary, and if so 3) whether the services were billed in accordance with the applicable fee schedule?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement for surgeon's fee for right shoulder arthroscopic surgery. This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing.

In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations.

A provider of health care services demonstrates prima facie entitlement to reimbursement of assigned no-fault benefits by submitting proof that payment of no-fault benefits is overdue and its statutory billing form was mailed to and received by the Respondent. Mary Immaculate Hospital v. Allstate Ins. Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004). Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 114 A.D.3d 33, 977 N.Y.S.2d 292 (2d Dept. 2013), *aff'd* 25 NY 3d 498 (2015).

With limited exceptions, an insurer is required to pay or deny a claim for no-fault benefits within 30 days. Insurance Law §5106(a); 11 NYCRR 65- 3.8(a) (1). An insurer may extend the 30-day period in which it has to pay or deny a claim by making a request for additional verification of the claim within "15 business days of receipt of the prescribed verification form 11 NYCRR §65-3.5(b). If the verification is not provided 30 days after the original request, at a minimum... the insurer shall, within 10 calendar days, follow with the party from whom the verification was requested, either by telephone call properly documented in the file or by mail." 11 NYCRR §65-3.6(b). An insurer does not have to pay or deny a claim until it has received verification of all the relevant information requested. Montefiore Med Ctr. v Gov't Empls. Ins. Co., 34 AD 3d 771(2nd Dept. 2006); Mount Sinai Hosp. v Allstate Ins. Co., 25 AD 3d 673 (2d Dept. 2006) and the 30-day time period to pay or deny a claim does not begin to run until all outstanding verification requests are received. Central Suffolk Hospital v. NY Central Mut Fire Ins. Co., 24 A.D.3d 492, 807 N.Y.S.2d 382 (2nd Dept. 2005); Triangle R, Inc. v. Geico Insurance Company, 27 Misc.3d 137(A), 2010 N.Y. Slip Op. 50885(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2010). Furthermore, 11 NYCRR Section 65-3.5(c) provides that "the insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was requested."

In support of its claim, the Applicant provides their billing form. Respondent submits correspondence, dated 2/3/2020, 9 calendar days after receipt of the bill on 1/25/2020, which references the bill in dispute, and indicates that the bill is being delayed pending:

1) MRI films; right shoulder completed on 11/5/2019, 2) A copy of inter-operative report, inter-operative films, inter-operative photographs from right shoulder arthroscopy performed on 1/3/2020. The correspondence references the bill in dispute and was addressed to Applicant c/o Cohen & Jaffe and Assignor-A.A., and was CC'D to the treating surgeon, W. Joseph Gorum. Follow-up verification requests were timely issued on 3/5/2020. The denial indicates that the verification was received on 3/9/2020. The bill was timely denied on its face within 30 days of receipt of the verification. Therefore, Applicant established a prima facie case and Respondent established that the claim was timely and properly tolled pending the receipt of requested verification and subsequently timely denied within 30 days of receipt of the verification premised on lack of causal relationship.

Applicant has submitted no evidence to support its argument that the denial is untimely or that the verification was not received on 3/9/2020 as indicated on the denial.

CAUSATION

Under New York's Comprehensive Motor Vehicle Insurance Reparation Act (the "No-Fault Law"), an insurance carrier is obligated to reimburse an injured party (or his or her assignee), for all "reasonable and necessary expenses" and "medical expenses" arising from the use and operation of the insured vehicle. Unlike negligence actions where claimant must prove causation, claimants seeking No-Fault payments "bear no such initial burden, as causation is presumed." Kingsbrook Jewish Med. Center v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S.2d 680 (2nd Dept. 2009); Bronx Radiology, P.C. v. New York Central Mutual Fire Insurance Company, 17 Misc.3d 97, 2007 N.Y. Slip Op. 27427 (App. Term 1st Dept. 2007).

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)).

The case law holds that for respondent to show that a patient's treated condition was unrelated to his or her automobile accident, the affidavit of its medical expert must be supported by the evidence and not be conclusory or speculative. E.g., New York & Presbyterian Hospital v. Selective Ins. Co. of America, 43 A.D.3d 1019, 842 N.Y.S.2d 63 (2d Dept. 2007). Once Respondent provides proof that the condition was unrelated to the accident, the burden shifts to the Applicant to address such proof. Pommells v Perez, 4 NY3d 566, 577-578, 830 NE2d 278, 797 NYS2d 380 [2005]; *See also* Campbell v. Drammeh, 2018 NY Slip Op 03643 [161 AD3d 584] and Latus v Ishtarq, 2018 NY Slip Op 01417 (1st Dept. 2018) [Plaintiff's physician provided only a conclusory opinion that plaintiff's injuries were caused by the accident, without addressing the preexisting conditions documented in his own MRI, or explaining why plaintiff's current reported symptoms were not related to the preexisting conditions (*see Nakamura v Montalvo*, 137

AD3d 695, 696 [1st Dept 2016]; *Farmer v Ventkate Inc.*, 117 AD3d 562, 562 [1st Dept 2014]).]

"Exacerbations of preexisting conditions are covered by the No-Fault Law (see *Wolf v Holyoke Mut. Ins. Co.*, 3 AD3d 660, 660-661 [2004]; *Mount Sinai Hosp. v Triboro Coach*, 263 AD2d at 18), *Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 871 N.Y.S.2d 680, 61 AD3d 13, 2009 NY Slip Op 351 (N.Y. App. Div., 2009).

Neither a failure to disclaim nor the issuance of a denial untimely on its face, preclude the Respondent from resisting a claim and asserting that its policy did not contemplate coverage in the first instance. (See, *Cent. Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 N.Y.2d 195, 201 - 202 [N.Y. 1997]; see also, *Fair Price Med. Supply Corp. v. Travelers Indem. Co.*, 10 N.Y.3d 556 [N.Y. 2008]) *St. Vincent's Hospital & Medical Center v. Allstate Ins. Co.*, 69 A.D. 3d 923, 893 N.Y.S.2d 589 (2d Dept. 2010).

Application of Legal Standards

In support of its contention that the service was not causally related to the accident and therefore not medically necessary, Respondent relies upon the peer review of Sean Lager, M.D., dated 3/12/2020, and an addendum, dated 5/19/2020. Applicant submitted the formal rebuttal of treating surgeon W. Joseph Gorum, M.D., dated 5/16/2020.

Applicant argued that the addendum should not be considered. However, Applicant submitted a rebuttal, dated 5/16/2020, and I will therefore consider Respondent's addendum, dated 5/19/2020, in response to the rebuttal. All documents were timely submitted before the submission deadline.

Following his review, Dr. Lager concluded that the right shoulder injury was not causally related to the motor vehicle accident of 7/25/2019. Specifically, Dr. Lager stated in the 3/12/2020 peer in pertinent part:

History:

Based on the review of the provided documentation, the claimant was involved in a motor vehicle accident on July 25, 2019. On the date of accident, the claimant was the driver of a vehicle that fell into a sink hole. Claimant was transported via ambulance to Community Hospital of Brooklyn. She sought chiropractic treatment on September 19, 2019.

Discussion:

Per the ODG, Shoulder Online Chapter: surgery for impingement includes a cortisone injection. In this case, there were positive objective findings and diagnostic findings. Although the claimant underwent physical therapy, there was no evidence the claimant underwent a cortisone injection to address the impingement. As such, criteria has not been met. Medical necessity has not been established.

Furthermore, per the ODG, Pain Online Chapter: Causation: Recommended that causation determination be performed on an individual case-by-case basis utilizing accepted methodical processes, typically involving mechanism of injury, temporal relationship, and dose

effect. Based on the review of the provided documentation, the claimant was injured on July 25, 2019. Although she sought immediate medical attention, there was about a one month gap in treatment. MRIs of the cervical spine and lumbar spine were not performed until 3 months subsequent to this accident, and the MRI of the right shoulder was performed 4 months after this accident. There is no evidence the MRI findings were caused by this accident. Therefore, there is no evidence the operative findings of impingement syndrome of the right shoulder , partial tear of the right rotator cuff, and tear of the right glenoid labrum were caused by this accident. A direct causal relationship has not been established.

As such, preoperative testing from Hudson Regional Hospital with a Date of Service of December 27, 2019, Surgery performed on January 3, 2020 along with all associated bills from January 3, 2020 and all post-surgery follow ups, DME & therapy are not denied.

Applicant submitted a formal rebuttal by treating surgeon Dr. W. Joseph Gorum, dated 5/16/2020, in response to Dr. Lager's peer review, which relies on the MRI report of the right shoulder, dated 11/5/2019, evaluations by W. Joseph Gorum, M.D., dated 10/28/2019, 12/9/2019, 1/6/2020, and 1/27/2020, and the operative report, dated 1/3/2020. He noted that despite conservative treatment the pain worsened and was an 8/10 on the pain scale at the time of the surgery and the Assignor had difficulty with activities of daily living. He noted in pertinent part:

...
MRI study of the right shoulder performed on 11/5/2019 revealed supraspinatus musculotendinous junction tendinosis and glenohumeral joint space effusion.

...
Dr. Lager argued that in this case, there were positive objective findings and diagnostic findings. Although the patient underwent physical therapy, there was no evidence the patient underwent a cortisone injection to address the impingement. I would highlight that the patient was recommended corticosteroid injection, however, she refused (please see the evaluation performed on 12/9/2019). It should be noted that the clinical presentation of the patient also indicated presence of labral tear which was later confirmed intra-operatively. There was decreased range of motion with pain in the right shoulder, pseudo scapular winging, tenderness upon palpation anteriorly near the AC joint and biceps insertion, decreased muscle strength, positive Jobe test, Neer's Impingement sign, Hawkin's Impingement sign, Speed's test, and Yergason's test. These complaints of the patient persisted despite physical therapy. She was significantly affected due to the pain in her right shoulder. She had difficulty in grooming and dressing. She also had pain at night which interfered with her sleep. Considering the severity of her condition the patient was recommended right shoulder arthroscopy. Also, considering her age, the decision of performing surgical intervention was appropriate as older patients are less likely to bear the pain for an extended period.

Dr. Lager argued that there was no evidence that the operative findings of impingement syndrome of the right shoulder, partial tear of the right rotator cuff, and tear of the right glenoid labrum were caused by this accident. It should be noted that as a result of the accident that occurred on 7/25/2019, the patient presented to me for evaluation of her injuries. Ms Antoine had no history of any injury or complaints related to her right shoulder prior to the accident of 7/25/2019. There is no reason to believe that the right shoulder pain and injuries were caused by any trauma prior to or after the accident of 7/25/2019. I believe the 7/25/2019 accident was the only impact on this patient's right shoulder which could injure or exacerbate her right shoulder conditions. There is no way Dr. Lager could know the labral tear, impingement and other issues were caused by any condition other than trauma sustained in the 7/25/2019 accident.

Labral tears can be, and often are, traumatically induced, and an impact of tractive impulse such as one suffered by this patient in the car accident can cause them. Labral tears can be very painful and debilitating. Surgical treatment was proper for this patient. The Orthopedic Journal at Harvard Medical School, Superior Labral Tears of the Shoulder: Surgical Repair, Conrad Wang MD, Edward Yian MD, Peter J. Millett MD MSc, Jon JP Warner MD.

In the 5/19/2020 Addendum, Dr. Lager stated in pertinent part:

Discussion:

At the time of my 3/12/2020 peer review, I stated that "Per the ODG, Shoulder Online Chapter: surgery for impingement includes a cortisone injection. In this case, there were positive objective findings and diagnostic findings. Although the claimant underwent physical therapy, there was no evidence the claimant underwent a cortisone injection to address the impingement. As such, criteria has not been met. Medical necessity has not been established." Although the claimant underwent surgery despite not undergoing a cortisone injection, the surgery performed on January 3, 2020 would be an option for the current condition as there is evidence of tendinosis reported on the MRI of the right shoulder dated November 11, 2019. Therefore, the surgery in question is a surgery that could be performed to treat the injury. However, causal relation has not been established between the claimant's right shoulder pain and the motor vehicle accident that occurred on July 25, 2019. It was noted the claimant sought immediate medical attention. However, there was about a one-month gap in treatment. MRIs of the cervical spine and lumbar spine were not performed until 3 months subsequent to this accident, and the MRI of the right shoulder was performed 4 months after this accident. MRI report of the right shoulder dated November 5, 2019 revealed supraspinatus musculotendinous junction tendinosis. According to medical literature, "It is important that tendinopathy, tendinitis, and tendinosis are systematically defined, in order to ensure that healthcare providers are effectively communicating

regarding the condition to be treated. A tendinopathy is an overuse condition that manifests itself as pain in and around tendons and happens when the body fails to regenerate properly. This painful condition is associated with tendon disorganization and thickening that reduces its physical properties, which causes the tendon to fatigue, further exacerbating the painful condition with ultimate failure. Tendinitis, which is usually painful, is a generic term that has to do with overuse, irritation, strain, degeneration and poor mechanics. Degenerated and disorganized collagen that has increased vascularity and cellularity without obvious inflammatory cells is termed tendinosis. Tendinitis and tendinosis represent tendon pathology and are subsets of tendinopathy." David Factor, B. (2019). *CURRENT CONCEPTS OF ROTATOR CUFF TENDINOPATHY*. [online] PubMed Central (PMC). Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4004132/>. In this case, the claimant has degenerative changes found on the MRI report of the right shoulder dated November 5, 2019. Therefore, causal relation and medical necessity has not been established between the claimant's right shoulder complaints and the accident of July 25, 2019.

I would like to clarify my statement from my 3/12/2020 peer review in which I stated "As such, preoperative testing from Hudson Regional Hospital with a Date of Service of December 27, 2019, Surgery performed on January 3, 2020 along with all associated bills from January 3, 2020 and all post-surgery follow ups, DME & therapy are not denied." I would like to clarify that this should read that the treatment rendered is denied. As the request for surgery performed on 1/3/2020 was not causally related nor medically necessary, all derivative services are likewise not medically necessary. There was a gap in treatment which questions the legitimacy of her complaints. Based on the foregoing the following is denied.

As the defense is based on a lack of causal relationship the peer review must establish that the Assignor's "treated condition was unrelated to his or her automobile accident" by proof that is not "conclusory or speculative". See New York & Presbyterian Hospital v. Selective Ins. Co. of America, 43 A.D.3d 1019, 842 N.Y.S.2d 63 (2d Dept. 2007) Based upon a thorough review of the evidence, I find that Dr. Lager's conclusion that the service rendered was not causally related to the accident is supported by the evidence presented. Accordingly, the burden now shifts to Applicant, who bears the ultimate burden of persuasion. See, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

The ultimate burden of proof lies with the Applicant. Dayan v. Allstate Ins. Co., 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015). Once Respondent satisfied its burden of proof, "plaintiff must rebut it or succumb." Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 N.Y. Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005).

Dr. Gorum's rebuttal notes that the Assignor was in continuous right shoulder pain since the 7/25/2019 accident and the MRI on 11/5/2019 revealed supraspinatus musculotendinous junction tendinosis and glenohumeral joint space effusion. The Assignor had an "ongoing course of conservative treatment, however, she found no significant improvement" and continued to have clinical findings of "decreased range of motion with pain in the right shoulder, pseudo scapular winging, tenderness upon palpation anteriorly near the AC joint and biceps insertion, decreased muscle strength, positive Jobe test, Neer's Impingement sign, Hawkin's Impingement sign, Speed's test, and Yergason's test. The diagnoses were muscle weakness of right upper extremity and impingement syndrome of the right shoulder". Dr. Gorum cites to medical literature supporting the necessity for surgery for traumatic labral tears and indicates that "without surgery, the pain and restrictions would have continued and in all probability the shoulder would have continued to deteriorate as the tears expanded".

In this matter, I am faced with conflicting opinions concerning the causal relationship of the service provided to the accident herein. There are no legal issues to resolve. This dispute involves solely an issue of fact, that is, whether the service was causally related to the accident and therefore medically necessary. Resolution of that fact is determined by which opinion is accepted by the trier of fact.

Comparing the relevant evidence presented by both parties as against each other, I find for the Respondent. After careful review of the record, I find Respondent has set forth a factual basis and medical rationale for denying payment. Applicant has not successfully refuted Dr. Lager's peer review and his opinion based on his experience as a Board-certified orthopedic surgeon and his review of the medical records that the performance of the right shoulder arthroscopic surgery on 1/3/2020 was not causally related to the accident of 7/25/2019. While the Assignor was involved in an accident on 7/25/2019 and went to the emergency room after the accident for complaints of pain to the head and neck, the first indication of right shoulder complaints was at the 10/28/2019 initial examination with Dr. Gorum more than 3 months after the accident. The Assignor was examined by Hassan Elkhatib, DPT for an initial physical therapy evaluation, dated 11/8/2019, and Mohammed Elessawy, M.D., dated 11/29/2019, both of Walch Medical, P.C., for multiple complaints, including right shoulder pain. The Assignor was also examined by Ashraf M. Sakr, M.D. of Pain Medicine of NY, P.C., dated 11/20/2019 for complaints of pain in the neck, lower back, and bilateral knees, with no right shoulder complaints, and Syed Hussain, M.D. of Bright Care Medical, P.C., dated 12/13/2019, for complaints of pain in the head, neck, wrists, hands, fingers, and knees, with no right shoulder complaints. There are two physical therapy sign-in sheets from Walch medical, P.C., dated 11/8/2019 through 12/30/2019.

While the Assignor commenced chiropractic treatment with Kings Highway Chiropractic on 9/24/2019 for neck and back complaints, according to the peer review, the first reference to right shoulder complaints in the record is with Dr. Gorum on 10/28/2019. Moreover, the first reference to physical therapy for the right shoulder is the initial physical therapy evaluation on 11/8/2019 with Hassan Elkhatib, DPT.

Dr. Gorum notes in the rebuttal that the Assignor had persistent right shoulder complaints and continuous physical therapy to the area since the accident, which is not substantiated by the record. Specifically, the rebuttal indicates: "Following the accident, the patient was taken by an ambulance to the emergency room of Community Hospital where she was evaluated, treated, and referred for outpatient care. She then started attending therapy treatment sessions and started doing home exercises. She was also started on a course of muscle relaxant and over the counter medications". The rebuttal notes that following the 10/28/2019 examination: "The patient was advised to have an MRI study of the right shoulder. She was recommended to continue conservative treatment including use of medication- pain cream, and OTC as needed. She was also recommended a brace". However, the 10/28/2019 report indicates that the Assignor is there for an initial evaluation of the Assignor's complaints of pain in the neck, back, shoulders, and right thumb. The History section notes that the Assignor treated at the emergency room following the accident and was there for an evaluation. The report notes that the Assignor is taking pain medicine, muscle relaxants, and over the counter medication. She missed approximately four days of work. There is no indication the Assignor has attended physical therapy treatment prior to this evaluation. Dr. Gorum notes the Assignor was educated on a home exercise program and was referred for a right shoulder MRI and physical therapy, wherein the Assignor should be evaluated, and treatment should begin, as well as a brace.

The Assignor was referred for the surgery at the follow-up examination with Dr. Gorum on 12/9/2019, one month after commencing physical therapy on 11/8/2019. There are two physical therapy signs in sheets, which indicate that the Assignor attended therapy for approximately two months, from 11/8/2019 through 12/30/2019, before the surgery. However, there is no indication that Dr. Gorum reviewed any physical therapy notes or consulted with the physical therapist prior to the referral for the surgery. The only indication of the Assignor's progression with therapy is a marking of "Good, Fair, or Poor" on each date of service on the sign-in sheet. The Assignor's sessions were all marked as Fair Progress in the month of December.

Dr. Gorum does not address or rebut the peer review findings that there was more than a one-month gap in treatment when the Assignor began chiropractic treatment for the neck and back on 9/24/2019. Furthermore, the Assignor did not have the shoulder MRI until 3.5 months after the accident after seeking treatment for her right shoulder pain with Dr. Gorum on 10/28/2019. Dr. Lager notes that the "MRI report of the right shoulder dated November 5, 2019 revealed supraspinatus musculotendinous junction tendinosis". Dr. Lager notes in the 3/12/2020 peer: "There is no evidence the MRI findings were caused by this accident. Therefore, there is no evidence the operative findings of impingement syndrome of the right shoulder, partial tear of the right rotator cuff, and tear of the right glenoid labrum were caused by this accident". He continues in the addendum, citing to medical literature, which states: "A tendinopathy is an overuse condition that manifests itself as pain in and around tendons and happens when the body fails to regenerate properly. This painful condition is associated with tendon disorganization and thickening that reduces its physical properties, which causes the tendon to fatigue, further exacerbating the painful condition with ultimate failure. Tendinitis, which is usually painful, is a generic term that has to do with overuse, irritation, strain,

degeneration and poor mechanics. Degenerated and disorganized collagen that has increased vascularity and cellularity without obvious inflammatory cells is termed tendinosis. Tendinitis and tendinosis represent tendon pathology and are subsets of tendinopathy" (citations omitted). Dr. Lager concludes: "In this case, the claimant has degenerative changes found on the MRI report of the right shoulder dated November 5, 2019. Therefore, causal relation and medical necessity has not been established between the claimant's right shoulder complaints and the accident of July 25, 2019".

Dr. Gorum does not establish that the Assignor sought medical treatment for a right shoulder injury sustained in the accident within days or even weeks of the accident or explain the three-month gap between the accident and the first complaint of right shoulder pain on 10/28/2019 or the nearly 3.5-month gap between the accident and the first physical therapy session to the right shoulder on 11/8/2019. I am persuaded by the peer doctor that if the Assignor sustained trauma to the right shoulder in the accident, causing the injury outlined in the operative report, dated 1/3/2020, the claimant would have sought medical treatment prior to 3 months after the accident as established by the record. Dr. Gorum does not address the treatment gap in the rebuttal or examinations, but rather indicates that the Assignor started physical therapy to the right shoulder right after the accident, which is not substantiated by the record. As Dr. Gorum's rebuttal contains statements regarding the Assignor's complaints and treatment, which are not substantiated by the record, I do not find the rebuttal credible or persuasive.

The rebuttal references the necessity of repairing labral tears as a basis for the surgery. Notably the MRI did not reference a labral tear. Dr. Gorum notes that labral tears can be traumatically induced without addressing the MRI findings of degenerative changes of tendinosis. *See Latus v Ishtarq*, 2018 NY Slip Op 01417 (1st Dept. 2018) [Plaintiff's physician provided only a conclusory opinion that plaintiff's injuries were caused by the accident, without addressing the preexisting conditions documented in his own MRI, or explaining why plaintiff's current reported symptoms were not related to the preexisting conditions (*see Nakamura v Montalvo*, 137 AD3d 695, 696 [1st Dept 2016]; *Farmer v Ventkate Inc.*, 117 AD3d 562, 562 [1st Dept 2014]).] Moreover, Dr. Gorum indicates that the Assignor "had no history of any injury or complaints related to her right shoulder prior to the accident of 7/25/2019" and there is therefore no indication that the accident exacerbated a pre-existing shoulder condition.

Respondent's peer review sustained the burden of establishing the services were not causally related to the accident, shifting the burden to the Applicant to establish that the services were causally related to the accident. Applicant's rebuttal and medical documentation did not suffice to contradict Dr. Lager's peer review and establish that the right shoulder arthroscopic surgery conducted on 1/3/2020 was causally related to the 7/25/2019 accident. The credibility and persuasiveness of the evidence favors the Respondent.

Accordingly, 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 Nassau

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

12/24/2020
(Dated)

Eileen Hennessy

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:
2b09dec53a7e57b41d58d82428b45a2f

Electronically Signed

Your name: Eileen Hennessy
Signed on: 12/24/2020