

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

McCulloch Orthopaedic Surgical Services,
PLLC DBA NYSJ Orthopaedic Specialists
(Applicant)

- and -

Allstate Property and Casualty Insurance
Company
(Respondent)

AAA Case No. 17-19-1135-9725

Applicant's File No. SS-108815

Insurer's Claim File No. 0492722608
2AL

NAIC No. 17230

ARBITRATION AWARD

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 11/13/2020, 02/05/2021
Declared closed by the arbitrator on 02/12/2021

Greg Itingen, Esq. from Samandarov & Associates, P.C. participated by telephone for the Applicant

Peter Graziosi, Esq. from Law Offices Of Karen L. Lawrence participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 50.22**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

Applicant stipulated to the timeliness of Respondent's denial.

3. Summary of Issues in Dispute

The claimant was a 61 year-old male pedestrian who was involved in an accident with a motor vehicle on 2/14/18. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. Thereafter, the claimant was required to

appear at an Independent Medical Examination ("IME") where Richard Weiss, M.D. found further orthopedic treatment was not medically necessary. At issue is the medical necessity of a 3/7/19 follow-up examination performed after the IME cut-off.

4. Findings, Conclusions, and Basis Therefor

Based on a review of the documentary evidence, this claim is decided as follows:

An applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

Based on a review of the documentary evidence, this claim is decided as follows:

An applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

The hearing scheduled for 11/13/20 was administratively adjourned.

The claimant was a 61 year-old male pedestrian who was involved in an accident with a motor vehicle on 2/14/18. The claimant reportedly injured his neck, right shoulder, mid back, and low back. There was no reported loss of consciousness. There were no reported lacerations or fractures. Following the accident the claimant was transported to Queens Hospital Center where he was evaluated, treated, and released. Subsequently the claimant underwent conservative care including physical therapy, chiropractic treatment, acupuncture and cupping, massage therapy, imaging studies, electrodiagnostic testing, durable medical equipment and compounded medications. On 2/23/18 the claimant presented to Kenneth McCulloch, M.D. of McCulloch Orthopedic Surgical Services, PLLC (Applicant) for an orthopedic evaluation in regard to his right shoulder. Right shoulder examination revealed forward elevation was to 110/180, external rotation was 60/80, and internal rotation was to S1/T8. There was tenderness to palpation over the anterior humeral head of the right shoulder with a positive Neer, positive Hawkins, pain with resisted external rotation and weakness, positive supraspinatus stress test, and positive O'Brien's. Dr. McCulloch's assessment was "a 61-year-old male with right shoulder signs and symptoms consistent with acute traumatic rotator cuff and possible

SLAP tear. I have recommended high-quality MRI, anti-inflammatories, physical therapy, and have him follow up with me after the MRI at which point further treatment decisions will be decided upon." The 3/7/18 right shoulder MRI interpreted by Kenneth Durham, M.D. produced an impression of moderate rotator cuff insertional tendinopathy with superimposed irregular high-grade partial tearing involving the posterior supraspinatus anterior infraspinatus with apparent full- thickness perforation, but no large full-thickness or retracted component; mild acromioclavicular arthrosis, partial narrowing lateral supraspinatus outlet, and mild subacromial-subdeltoid bursitis; and mild muscle edema pattern within the infraspinatus, teres minor, and teres major suggesting manifestation of recent low-grade sprain, denervation change considered less likely. On 3/7/18 Dr. McCulloch conducted a follow-up examination and the treatment plan included "right shoulder arthroscopy with rotator cuff repair and possible arthroscopic biceps tenodesis." On 4/2/18 Dr. McCulloch performed right shoulder surgery consisting of arthroscopic rotator cuff repair, arthroscopic biceps tenodesis, subacromial decompression, lysis of adhesions and debridement. On 7/5/18 Dr. McCulloch conducted a post operative follow-up examination noting the claimant self-reported a 50% improvement. Examination revealed forward elevation actively 110/180°, passively 130/180°, external rotation 60/80°, and internal rotation posterosuperior iliac spine/T8. Still has significant pain and limitation with internal rotation. On 8/16/18 Dr. McCulloch conducted a post operative follow-up examination noting the claimant had increased pain due to aggressive physical therapy. Examination was substantially similar to that of 7/5/18. On 9/17/18 the claimant was required to present to Richard A. Weiss, M.D. for an independent orthopedic reexamination (IME) that was purportedly negative and Respondent determined "per the findings of the physical examination conducted by Dr. RICHARD WEISS MD ON 9/17/18, all Orthopaedic, Physical Therapy, Physical Medicine and Rehabilitation (PMR), Massage Therapy, Pain Management, prescription medication and related claims benefits were determined to be not medically necessary and were denied effective 10/12/18." On 9/25/18 Tim Canty, M.D. of Comprehensive Spine & Pain Center conducted a follow-up examination. The claimant presented with complaints of radiating lower back pain rated 8-9/10 with associated numbness and tingling in the right leg and foot, radiating neck pain rated 6/10 with associated numbness and tingling in the hands, and right shoulder pain rated 7/10 localized in the posterior/anterior shoulder and radiating to armpit and into the bicep. Lumbar examination revealed bilateral tenderness and muscle spasms. Lumbar range of motion was restricted: flexion 40/60, extension 10/25, and rotation 10/25. SLR was positive on the right at 80°. Lower extremities muscle strength was normal (5/5); except 4/5 right foot plantar flexion. Sensation was decreased right thigh and shin. Achilles reflex was decreased bilaterally. Cervical examination revealed bilateral tenderness and muscle spasms. Cervical range of motion was restricted: flexion 40/50, extension 40/60, and bilateral rotation 60/80. Sensation, deep tendon reflexes, and muscle strength was normal. Examination of the right shoulder revealed focal tenderness along the anterior, lateral and posterior shoulder capsules; and positive in AC joint, SC joint, and biceps tendon insertion. Impingement test was positive. Range of motion was restricted (quantified). The claimant was recommended for lumbar epidural steroid injections and "the patient was instructed to continue the course of physical and chiropractic therapy for ongoing benefit as it continues to be indicated. I think the manual nature of chiropractic treatment would be good given the clinical symptoms." On 9/27/18 Dr. McCulloch conducted a post operative follow-up examination noting the

claimant "continues to have pain. He is under the care of a pain management physician who is scheduling the patient for plasma-rich platelet injections for the right shoulder." Pain was rated 6-7/10. Examination was substantially similar to that of 7/5/18 and 8/16/18. On 11/8/18 Dr. McCulloch conducted a post operative follow-up examination noting the claimant "self-reports up to 50% to 60% improvement as compared to preoperatively." Examination revealed right shoulder forward elevation actively 110/180 degrees, passively 130/180 degrees, external rotation 60/80 degrees, and internal rotation improved to L4/T8. On 1/10/19 Dr. McCulloch conducted a post operative follow-up examination noting the claimant is "reporting increased pain in his right shoulder with weather changes particularly cold, damp weather. He attends physical therapy which is providing minimal relief. He feels a clicking in his shoulder and points to the area of the subacromial space. Examination results substantially similar to 11/8/18. On 3/7/19 Dr. McCulloch conducted a post operative follow-up examination noting the claimant "self reports up to 60% to 65% improvement as compared to preoperatively, but does not have pre-injury levels of strength and endurance in his right-hand-dominant shoulder. He has been unable to return to work in maintenance, but is seeking employment within his physical limitations. He uses topical transdermal pain cream and naproxen as needed." Examination revealed right shoulder forward elevation improved to 130-135/180 degrees, external rotation improved 65/80 degrees, and internal rotation improved to L1/T8. The claimant was continued on physical therapy. At issue is the 3/7/19 follow-up examination conducted by Applicant.

The burden has shifted to the Respondent as they have raised a medical necessity defense. In order to support a lack of medical necessity defense respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See, *Provvedere, Inc. v. Republic Western Ins. Co.*, 2014 NY Slip Op. 50219(U) (App. Term 2, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. See generally, *Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op. 52116 (App. Term 1 Dept. 2006). As a general rule, reliance on rebuttal documentation will be weighed in light of the documentary proofs and the arguments presented at the arbitration. Moreover, the case law is clear that a provider must rebut the conclusions and determinations of the IME/peer doctor with his own facts. *Park Slope Medical and Surgical Supply, Inc. v. Travelers*, 37 Misc.3d 19 (2012).

An IME report asserting that no further treatment is not medically necessary must be supported by a sufficiently detailed factual basis and medical rationale, which includes mention of the applicable generally accepted medical/professional standards. *Carle Place Chiropractic v. New York Central Mutual Fire Ins. Co.*, 19 Misc.3d 1139(A), 866 N.Y.S.2d 90 (Table), 2008 N.Y. Slip Op. 51065(U), 2008 WL 2228633 (Dist. Ct. Nassau Co., Andrew M. Engle, J., May 29, 2008).

Respondent timely denied the service at issue based on the 9/17/18 independent orthopedic reexamination (IME) conducted by Richard A. Weiss, M.D. Applicant submitted an abstract from the 1/10/21 update from the Department of Health regarding Dr. Weiss; "The physician is precluded from the practice of medicine in New York State or in any setting or jurisdiction where his practice is predicated upon his New York State

medical license except as an independent medical examiner, who provides opinions and/or testimony in civil and criminal litigation with the presence of a chaperone approved by the Director of the Office of Professional Medical Conduct. The physician is also restricted from prescribing, distributing, dispensing or administering controlled substances and shall not oversee, supervise or collaborate with any medical professional in manufacturing, prescribing, distributing, dispensing or administering of controlled substances. The physician shall not evaluate, diagnose, or treat patients for the purpose of affecting the patients state of health, or for any purpose other than litigation as described." This is not dispositive as this is both subsequent to the subject IME (when Dr. Weiss was likely fully licensed) and Dr. Weiss is still permitted to conduct IMEs. This may be considered in regard to weight of evidence/credibility. After reviewing the claimant's history, treatment, and medical records, Dr. Weiss conducts what appears to be a thorough examination. Dr. Weiss documents the claimant's then current complaints as pain in the right shoulder, pain in the neck that radiated to both arms, and low back pain that radiated to both legs. Cervical examination revealed no tenderness to palpation of the cervical paraspinal musculature. There was no tenderness to palpation of the trapezii. No muscle spasm was noted. Range of motion of the cervical spine revealed flexion 50/50°, extension 60/60°, bilateral rotation 80/80°, and bilateral lateral flexion 45/45°. On neurological examination, there were no sensory deficits in the upper extremities. Deep tendon reflexes of the biceps and triceps were present and equal bilaterally. Muscle strength in each range was 5/5. No atrophy of intrinsic muscles was noted. Cervical compression was negative with no radiation of pain to the back on axial bending. Lumbar examination revealed no spasm. There was no tenderness noted over the paraspinal musculature on palpation. Range of motion of the lumbar spine revealed flexion 60/60°, extension 25/25°, and bilateral lateral bending 25/25°. The claimant was able to tiptoe and heel walk. Neurological examination revealed patellar and Achilles reflexes to be 2+. Muscle strength of the lower extremities was graded at 5/5 bilaterally. Sensory examination of the lower extremities including the medial and lateral thighs, calves and feet were normal. There was no atrophy noted in the intrinsic muscles of the lower extremities. Right shoulder examination revealed no tenderness on palpation of the shoulder. There was no crepitus at the joints. Range of motion of the right shoulder revealed abduction 180/180°, forward flexion 180/180°, internal rotation 80/80°, and external rotation 90/90°. Impingement sign was negative. Speed's test was negative. Neer's Sign was negative. Hawkin's test was negative. O'Brien's test was negative. Drop Arm test was negative. Yergason's test was negative. Healed surgical scarring was noted. Dr. Weiss' diagnosis was status post cervical spine sprain/strain and contusion resolved, status post lumbar spine sprain/strain and contusion resolved, and status post right shoulder surgery healed. Dr. Weiss concluded "no future orthopedic intervention is indicated, and any such treatment would be considered excessive. There is no need for additional physical therapy, diagnostic testing, durable medical equipment, household help or special transportation. There is no need for massage therapy or prescription medication."

I find that the medical records [including the examination conducted by Tim Canty, M.D. (8 days post IME) and the examinations conducted by Kenneth McCulloch, M.D. of Applicant's office] relied on by Applicant show consistent complaints of pain with positive findings thereby warranting additional treatment. I am persuaded that the contemporaneous medical records indicate the claimant was benefiting from the

treatment at issue. I find Applicant has successfully rebutted the findings and recommendations of Respondent's IME report and established the need for the treatment at issue that was performed beyond the cut-off date. Accordingly, Applicant is awarded \$50.22.

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
	McCulloch Orthopaedic Surgical Services, PLLC	03/07/19 - 03/07/19	\$50.22	Awarded: \$50.22
Total			\$50.22	Awarded: \$50.22

- B. The insurer shall also compute and pay the applicant interest set forth below. 07/23/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from 7/23/19 (the date that arbitration was requested) until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty day month.

C. Attorney's Fees

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

Pursuant to 11 NYCRR §65-4.6 (d), ". . . the attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon for each applicant for arbitration or court proceeding, subject to a maximum fee of \$1,360.

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

03/08/2021
(Dated)

Charles Blattberg

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:
b26b71f66dc838c2ee446ba7c5526939

Electronically Signed

Your name: Charles Blattberg
Signed on: 03/08/2021