

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Advanced Comprehensive Laboratory LLC
d/b/a TopLab
(Applicant)

- and -

Country-Wide Insurance Company
(Respondent)

AAA Case No.	17-19-1128-2515
Applicant's File No.	00038057
Insurer's Claim File No.	000341220 001
NAIC No.	10839

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 02/17/2021
Declared closed by the arbitrator on 02/27/2021

Justin Rosenbaum, Esq. from Drachman Katz, LLP participated by telephone for the Applicant

Ellen Maisto, Esq. from Jaffe & Velazquez, LLP participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,783.22**, 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 claimant was the 26 year-old male restrained driver of a motor vehicle that was involved in an accident on 12/2/18. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. At issue is the medical necessity of a comprehensive urinalysis/drug screening performed by Applicant on 3/22/19 that Respondent timely denied reimbursement for based on the results of a 3/7/19 independent orthopedic examination (IME) conducted by John Vitolo, M.D.

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.

The claimant was the 26 year-old male restrained driver of a motor vehicle that was involved in an accident on 12/2/18. The claimant reportedly injured his neck, left shoulder and left hand. There was no reported loss of consciousness. There were no reported lacerations or fractures. There was no reported emergency treatment sought or received. On 12/12/18 the claimant presented to Olanrewaju Adeosun, M.D. of CitiMed with complaints of headaches rated 6/10, radiating neck pain rated 6/10, left shoulder pain rated 6/10, and left third digit pain rated 3/10. Cervical range of motion was flexion 40/60, extension 30/50, bilateral rotation 60/80, and bilateral lateral flexion 20/40. Palpation revealed moderate tenderness. Compression test was negative. Left shoulder range of motion was flexion 160/180, extension 40/50, abduction 160/180, adduction 40/50, internal rotation 50/70, and external rotation 70/90. Examination revealed no swelling and no crepitus. There was tenderness to palpation on the anterior-lateral aspect. Neer's sign and painful arc were positive while drop arm test was negative. Left hand examination revealed third digit mild swelling noted at the DTP joint, which was also tender to palpation. Gait, manual muscle strength, and sensation were normal. Dr. Adeosun's treatment plan included physical therapy, Ibuprofen 800 mg, left hand X-ray, cervical spine and left shoulder MRIs, orthopedic consultation, neurological consultation, and prescriptions for durable medical equipment (DME) consisting of an intermittent thermal compression and cold unit system and an ultrasound therapy system. The 12/17/18 left shoulder MRI interpreted by Priyesh Patel, M.D. produced an impression of tear of the anterior labrum from the 1:00 to 3:00 positions. On 3/7/19 the claimant was required to present to John Vitolo, M.D. for an independent orthopedic examination (IME) that was purportedly negative and Respondent determined "BASED ON THE RESULTS OF THE ORTHOPEDIC INDEPENDENT MEDICAL EXAM ATTENDED ON 03/07/19, WHICH INDICATED NO FURTHER MEDICAL TREATMENT OR OTHER RELATED SERVICES ARE MEDICALLY NECESSARY, ALL NO-FAULT BENEFITS ARE DENIED AS OF 3/13/19." On 3/14/19 Anam Azeem, M.D. of CitiMed conducted a follow-up examination. The claimant presented with complaints of headaches rated 5/10, radiating neck pain rated 5/10, and left shoulder pain rated 5/10. Cervical range of motion was flexion 60/60, extension 50/50, bilateral rotation 75/80, and bilateral lateral flexion 35/40. Palpation revealed left upper trapezius tenderness. Spurling's test and Lhermitte's Sign were negative. Left shoulder range of motion was flexion 175/180, extension 50/50,

abduction 175/180, adduction 45/50, internal rotation 65/70, and external rotation 85/90. Deep tendon reflexes, sensation, and manual muscle strength were normal. Dr. Azeem's treatment plan included physical therapy and consider bilateral C3/C4, C4/C5 facet joint injection vs. C7/T1 TLESI. Dr. Azeem noted the claimant is "scheduled for shoulder arthroscopy on 03/22/19." On 3/22/19 Advanced Comprehensive Laboratory, LLC (Applicant) conducted a comprehensive urinalysis/drug screening that is at issue here. The subject report or the prescription for same is not in evidence.

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 2nd, 11th and 13th Jud. Dists. 20140. 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 1st 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).

Respondent timely denied the testing at issue based on the 3/7/19 independent orthopedic examination (IME) conducted by John Vitolo, M.D. After reviewing the claimant's history, treatment, and medical records, Dr. Vitolo conducts what appears to be a thorough examination. Dr. Vitolo documents the claimant's then current complaints as pain in the neck and left shoulder. Evaluation of shoulders did not reveal any atrophy, edema or deformity. Active and passive shoulder range of motion was symmetrical (active forward flexion is 110° bilaterally). Evaluation of elbows did not reveal any atrophy, edema, or deformity. No point tenderness was noted bilaterally. There was symmetrical range of motion with full extension flexion, supination, and pronation. Evaluation of wrists and hands did not reveal any atrophy or swelling. Symmetrical range of motion with full dorsi flexion, palmar flexion, and ulnar/radial deviation Negative Phalen's and Tinel's test bilaterally. Cervical range of motion was flexion 45/45, extension 45/45, bilateral rotation **60**/80, and bilateral lateral flexion 45/40. There was no point tenderness over spinous process. No upper extremity atrophy noted (proximal biceps circumference was 26 cm bilaterally). Mild left grip **weakness**, but no atrophy with 5/5 strength of rotator cuff, deltoid, biceps, triceps, wrist flexors/extensors, and hand intrinsics bilaterally. There was negative Spurling's test bilaterally. The claimant was neurovascularly intact bilaterally with symmetrical triceps (1+), biceps (1+), and brachioradialis reflexes (1+). Thoracolumbar range of motion was flexion 90/90, extension **25**/30, bilateral rotation 30/30, and bilateral lateral flexion 30/30. There was no point tenderness over spinous process. There was 5/5 strength of his hip flexors, quadriceps, hamstrings, extensor hallucis longus, and gastrocnemius bilaterally. The claimant was able to perform two mini-squats during the examination, but complained of hamstring **pain** with straight leg raise test bilaterally at 70° in the supine position, but not in the sitting position to 90°. Heel and toe walk intact bilaterally, neurovascularly intact bilaterally, and symmetrical Patellar (1+) and Achilles (Trace) reflexes; and

sensation intact. Lower extremities examination was within normal range. Dr. Vitolo's diagnosis was "cervical sprain/strain and left shoulder strain." Dr. Vitolo concluded "It is my professional opinion that the above stated claimant has reached maximum medical improvement for the above injuries. Further conservative, interventional and surgical treatment is not indicated due to lack of objective physical examination findings."

Here the weight of evidence clearly favors Applicant. Dr. Vitolo's IME contains positive findings including restrictions in ranges of motion, weakness, and pain. Dr. Vitolo's assessment was "cervical sprain/strain and left shoulder strain," which apparently were not resolved. Respondent's defense relies solely on Dr. Vitolo's "professional opinion that the above stated claimant has reached maximum medical improvement." Said opinion being rebutted by the 3/14/19 examination and treatment plan by Dr. Azeem; as well as the 3/22/19 subject testing and purported left shoulder arthroscopy by an unnamed orthopedic surgeon.

Accordingly, Applicant is awarded \$2,783.22.

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
	Advanced Comprehensive Laboratory	03/22/19 - 03/22/19	\$2,783.22	Awarded: \$2,783.22

	LLC			
Total			\$2,783.22	Awarded: \$2,783.22

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/09/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from 5/9/19 (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.

03/19/2021
(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:

cc788a6075988cbbff5b897163f12cd8

Electronically Signed

Your name: Charles Blattberg
Signed on: 03/19/2021