

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Tomaino Orthopaedic Care  
(Applicant)

- and -

Plymouth Rock Assurance Preferred  
Corporation  
(Respondent)

AAA Case No.	17-20-1180-4263
Applicant's File No.	RFA20-289731
Insurer's Claim File No.	819201741292-004
NAIC No.	36587

**ARBITRATION AWARD**

I, Fred Lutzen, 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 or "Assignor"

1. Hearing(s) held on 08/03/2021  
Declared closed by the arbitrator on 08/03/2021

Alexander Mun, Esq., from Russell Friedman & Associates LLP participated for the Applicant

Tifani Cooke, Esq., from Law Office Of Leigh J. Katz & Associates participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 4,056.14**, was NOT AMENDED at the oral hearing.  
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that the amount sought does not exceed fee schedule allowances.

3. Summary of Issues in Dispute

This male EIP (first initial "I") was 51-years-old when he was injured as a passenger in an automobile accident on 11/25/19. He subsequently came under the care of Applicant, who seeks reimbursement of \$4,056.14 for right shoulder surgery performed on 7/6/2020.

Respondent denied reimbursement asserting a lack of medical necessity defense based on a peer review report completed by dr. Howard J. Levy, M.D., on 8/13/2020.

**The issue presented is whether the right shoulder surgery performed on 7/6/2020 was medically necessary.**

#### 4. Findings, Conclusions, and Basis Therefor

My decision is based on the arguments of representatives for both parties, and those documents contained in the MODRIA electronic case folder as of the date of this hearing.

Counsel appeared at the hearing via Zoom video conference and there were no live witnesses.

#### **Medical Necessity**

Since Applicant's claim arrives to this arbitration with a presumption of medical necessity, the burden is now on the Respondent to prove its defense that the surgery lacked medical necessity.

In order to sustain a 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. 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 the Applicant. See, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116(U), 13 Misc 3d 136(A), (App. Term 1st Dept. 2006). The Appellate Courts have not succinctly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). In that light, a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion.

To successfully support its denial, the respondent's peer review must address all the pertinent objective findings contained in the applicant's medical submissions.

The peer review must set forth how and why the disputed services were inconsistent with generally accepted medical and/or professional practices. CityWide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co., 3 Misc.3d 608, 609, 777 N.Y.S.2d 241, 242 (Civ. Ct. Kings Co. 2004).

Dr. Levy stated that the standard of care for "shoulder arthroscopy after [an MVA] would be a trial of conservative treatment with various modalities of physical therapy, and acupuncture, applied for several months (up to 3-6 months). In addition, if the claimant demonstrated persistent pain, which would be characterized as non-responsive

to different types of therapy, including painkillers and intensive physical therapy, acupuncture treatment and which may be followed by a steroid injection in order to avoid surgery, an operative procedure might be considered several months later."

Dr. Levy cited to NCBI, Exercise Therapy in the Non-Operative Treatment of Full-Thickness Rotator Cuff Tears: A Systematic Review, which states "[t]here is substantial evidence to support the use of exercise therapy as first line management, especially in individuals [greater than] 60 years of age with chronic, degenerative FTT [full-thickness tear]." Dr. Levy also cited to Orthopedics Summit Medial Group, Biceps Tenositis/Tenotomy, which states "[t]hese two procedures are for people who have already tried more conservative approaches-often including anti-inflammatories, corticosteroid injections and physical therapy-and still have pain."

Dr. Levy stated that "[t]here were no medical reports following the accident dated 11/25/19 until 05/01/2020, for a period of 5 months and that "[o]nly after the failure of the provided conservative treatment the surgical intervention would have been appropriate."

However, Dr. Levy reviewed records from February and March of 2020. On 2/17/2020, the EIP's chief complaint was right shoulder pain, with low back and left hip pain. As such, there was no 5-month gap in documented right shoulder injury. The MRI performed on 5/1/2020, per Dr. Tomaino, "demonstrates a recurrent tear with mild atrophy of the infraspinatus. The tear shows that the supraspinatus cable is intact and is again at the confluence of supraspinatus and infraspinatus [where] his previous revision repair was located."

The records reveal that the EIP had right shoulder surgery in 2011, and then a revision repair surgery on 6/3/19. Dr. Tomaino stated "it appears that his previous repair at the confluence of supraspinatus and infraspinatus is re-torn" and prior to the MVA of 11/25/19 "was doing well."

The operative report states the indication for surgery was that "[t]he patient had two previous rotator cuff repairs and had done well until a recent motor vehicle accident..."

The surgery at issue is a third right shoulder surgery, or 2<sup>nd</sup> revision/repair surgery as the "previous repair...[was] re-torn."

Dr. Levy did not discuss whether the standards of care are different for situations such as this. Dr. Levy mentioned that conservative treatment is the first line management to avoid surgery and that these surgical procedures are for people who already tried conservative approaches. However, this particular EIP had already had two prior surgeries after conservative approaches failed (which is documented in the records) for the same injury. The repair was re-torn and subsequently repaired again on 7/6/2020. Dr. Levy did not address the pertinent facts of this case or provide a sufficient medical to deny the revision surgery disputed herein.

While Dr. Levy also stated that the surgery was not causally-related, he relied on the mistaken fact that there were "no medical evaluation records following the accident []

until 04/30/2020", which was incorrect. The EIP reported right shoulder pain as his chief complaint on 2/17/2020, and on 9/25/19, before the accident, the EIP reported he was "90% recovered."

I find the peer report is insufficient to establish that Applicant deviated from accepted professional practice and standards of care for an injury re-torn for which prior surgery was performed after conservative care had failed. *See, Elmont Open MRI & Diagnostic Radiology, P.C. v. State Farm Mutual Automobile Ins. Co.*, 12 Misc.3d 1237(A), 910 N.Y.S.2d 761 (Table), 2010 N.Y. Slip Op. 51090(U), 2010 WL 2509937 (Dist. Ct. Nassau Co., Michael A. Ciaffa, J., June 4, 2010), and *Nir v. Allstate Ins. Co.*, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005); *See also, All Boro Psychological Servs. P.C. v. GEICO Gen. Ins. Co.*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

### **Conclusion**

Having carefully considered the submissions of the parties, the relevant case law, and the arguments of respective counsel, I conclude that based on a preponderance of the credible evidence, Respondent has failed to rebut the presumption of medical necessity and causality. Aggravation injuries are covered by no-fault.

There is no need to consider Applicant's rebuttal evidence, or lack thereof, as Applicant's claim arrived to this arbitration carrying a presumption of causality/medical necessity, which has not been rebutted by Respondent. *See, Millennium Radiology, P.C. v. New York Central Mutual Fire Ins. Co.*, 23 Misc.3d 1121(A), 886 N.Y.S.2d 71 (Table), 2009 N.Y. Slip Op. 50877(U), 2009 WL 1261666 (Civ. Ct. Richmond Co., Katherine A. Levine, J., Apr. 30, 2009).

**Applicant is awarded \$4,056.14.**

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
	<b>Tomaino Orthopaedic Care</b>	<b>07/06/20 - 07/06/20</b>	<b>\$4,056.14</b>	<b>Awarded: \$4,056.14</b>
<b>Total</b>			<b>\$4,056.14</b>	<b>Awarded: \$4,056.14</b>

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/01/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. *See generally*, 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); and OGC Op. No. 10-09-05 (interest accrues from date Applicant "*actually requests arbitration*" or commences a lawsuit). The Superintendent and the New York Court of Appeals have 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).

C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$1360." *Id.* However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

- 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 Onondaga

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

08/03/2021

(Dated)

Fred Lutzen

#### **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:**  
379d09aa366ecc1b23d9484831a39d52

### **Electronically Signed**

Your name: Fred Lutzen  
Signed on: 08/03/2021