

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Shahid Mian MD P.C.
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-21-1196-2169

Applicant's File No. SHM 022521002

Insurer's Claim File No. 103978701

NAIC No. 16616

ARBITRATION AWARD

I, Joseph Endzweig, 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: Claimant

1. Hearing(s) held on 09/07/2021, 09/10/2021
Declared closed by the arbitrator on 09/10/2021

Chris Economou, Esq. from Economou & Economou PC participated in person for the Applicant

Patrice Soberano, Esq. from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 21,142.42**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount was amended to \$5,822.19 to conform to the fee schedule.

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

3. Summary of Issues in Dispute

This arbitration arises out of treatment of a 65 year old male for injuries sustained in a motor vehicle accident occurring on 9/4/18. Applicant seeks reimbursement for a left shoulder arthroscopy performed on 4/24/19, billed at \$21,043.17, and an initial physical therapy evaluation performed on 4/29/19, billed at \$99.25. The total amount was

amended to \$5,822.19 to conform to the relevant fee schedules. Respondent denied reimbursement based on the peer review report of Dr. Matthew Skolnick.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the hearing.

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According to the records submitted by the parties, the claimant was a pedestrian struck by a motor vehicle. He sustained multiple injuries including injury to his left knee. He was taken by ambulance to Elmhurst Hospital emergency room. His complaint to EMS was pain in the left knee. Complaints in the hospital were headache, pain in the knees and pain in the right hip. There were no complaints to the EMS or the hospital regarding the left shoulder. He was treated and released. He was evaluated by Dr. Tyorkin (orthopedist) on 10/31/18 and 12/06/18. There were no complaints to Dr. Tyorkin regarding the left shoulder. The claimant presented to Dr. Mian on 1/21/19 for complaints of pain in the left knee and left shoulder. MRI of the left shoulder was performed on 2/19/19, more than five months after the accident. Left shoulder arthroscopy was performed on 4/24/19.

Medical Necessity

Respondent submits a peer review report from Dr. Matthew Skolnick. Dr. Skolnick concludes that the surgery of the left shoulder with associated services was not medically necessary or causally related to the accident of record. With respect to medical necessity Dr. Skolnick notes that the MRI of the left shoulder performed on 02/19/19 indicated a partial rotator cuff tear as well as labral tear. He states "... however, according to the radiology review of this study by Dr. Stavakis, no evidence of causally related findings was seen. Also, according to the review of the intra-operative photos by Dr. Levin, no traumatic tears were seen and there was no evidence of post traumatic injury noted." Dr. Skolnick concludes "Based on the above, there is not adequate medical indication to justify the surgery of the left shoulder. In addition, there is no evidence that this claimant's left shoulder was deteriorating despite conservative treatment."

Applicant submits a rebuttal from Dr. Shahid Mian.

It is Applicant's prima facie burden to establish its entitlement to payment for the subject services.

It is well settled that a health care provider establishes its prima facie entitlement to payment as a matter of law by proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see *Insurance Law* § 5106 a; *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; *Amaze Med. Supply v. Eagle Ins. Co.*, 2 Misc. 3d 128A, 784 N.Y.S. 2d 918, 2003 NY Slip Op 51701U [App Term, 2d & 11th Jud Dists]).

If an insurer asserts that the medical test, treatment, supply or other service was medically unnecessary the burden is on the insurer to prove that assertion with competent evidence such as an independent medical examination, a peer review or other proof that sets forth a factual basis and a medical rationale for denying the claim. (See *A.B. Medical Services, PLLC v. Geico Insurance Co.*, 2 Misc. 3d 26 [App Term, 2nd & 11th Jud Dists 2003]; *Kings Medical Supply Inc. v. Country Wide Insurance Company*, 783 N.Y.S. 2d at 448 & 452; *Amaze Medical Supply, Inc. v. Eagle Insurance Company*, 2 Misc. 3d 128 [App Term, 2nd and 11th Jud Dists 2003]).

Since Applicant submitted a timely and proper claim the burden is on the respondent to prove that the services were not medically necessary.

In the event an insurer relies on a peer review report to demonstrate that a particular service was medically unnecessary the peer reviewer's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory or may be supported by evidence of generally accepted medical/professional practice or standards. See *Nir v. Allstate Insurance Company*, 2005 NY Slip Op 25090; 7 Misc.3d 544; 796 N.Y.S.2d 857; 2005 N.Y.Misc. LEXIS 419 and *Citywide Social Work & Psy. Serv. P.L.L.C. v. Travelers Indemnity Co.*, 3 Misc. 3d 608; 777 N.Y.S.2d 241; 2004 NY Slip Op 24034.

A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards. For example, the medical rationale may be insufficient if not supported by evidence of the generally accepted medical professional practice." *Jacob Nir, M.D. a/o Josaphat Etienne v. Allstate Ins. Co.*, 7 Misc. 3d 544, 796 N.Y.S.2d 857 (Civ. Ct. Kings Co. 2005).

When an insurer interposes a timely denial of claim that sets forth a sufficiently detailed factual basis and adequate medical rationale for a claim's rejection, the presumption of medical necessity attached to the applicant's properly completed claim is rebutted and the burden shifts back to the claimant to refute the peer review and prove the necessity of the disputed services. *Id.* See, e.g., *CPT Med. Servs., P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 NY Slip Op 27526, 18 Misc.3d 87 (App. Term 1st Dept.); *Eden Med., P.C. v. Progressive Cas. Ins. Co.*, 2008 NY Slip Op 51098(U), 19 Misc.3d 143(A) (App Term 2d & 11th Jud Dists., 2008); *Bath Med. Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 2008 NY Slip Op 50347(U) (App. Term 2d Dept., Feb. 26, 2008)

(since the provider failed to rebut the peer review's showing of a lack of medical necessity, defendant was entitled to dismissal of complaint). Where Respondent has set forth a medical rationale and factual basis in support of its contention that the treatment was not medically necessary, the burden then shifts to Applicant, who bears the ultimate burden of persuasion.

Upon consideration of the arguments of counsel and after a thorough review of all submissions I find that Respondent has failed to meet its burden of demonstrating that the disputed services were not medically necessary. Respondent fails to set forth a factual basis and medical rationale for denying the claim on medical necessity grounds. The peer fails to cite to any relevant authoritative source to support his position that the disputed services were not medically necessary in this clinical setting. Moreover, the peer fails to adequately demonstrate what the generally accepted medical standards are for performing the disputed surgery. He further fails to demonstrate that performing this surgery in the within clinical setting was a departure from generally accepted medical standards.

Causal Relationship

An insurer seeking to deny no-fault benefits on the basis that a claimant's condition is not causally related to an accident "has the burden to come forward with proof in admissible form to establish the...evidentiary 'foundation for its belief' that the patient's treated condition was unrelated to his or her automobile accident." See *Mount Sinai Hosp. v Triboro Coach*, 263 AD2d 11, 19-20 (1999). However, the ultimate burden of proof on issues of medical necessity or causal relationship of injuries to the accident in question lies with the plaintiff. *Dayan v. Allstate Ins. Co.*, 49 Misc.3d 151(A) (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015).

Here, Dr. Skolnick relies on an MRI review by Dr. Costas Stavrakis. Dr. Stavrakis concludes:

In my opinion, the findings of "Moderate-high grade bursal and articular sided fraying of the supraspinatus and infraspinatus without a high grade partial or full thickness tear, moderate subscapularis tendinosis with moderate grade intrasubstance tearing, severe osteoarthritis of the glenohumeral joint with a reactive joint effusion with internal synovitis and chondral bodies, and old coracoid process fracture." are NOT causally related to the reported accident of 9/4/2018.

Dr. Skolnick further relies on Dr. Howard Levin's review of the intra-operative photos. Based on that review Dr. Levin concludes:

Based on my review of the intra-operative photos, degenerative rotator cuff tearing and severe erosion of the glenoid and humeral head cartilage are seen. None of the images demonstrate evidence of any post traumatic findings. There are no traumatic tears, injuries, or pathology noted. There are no findings that would indicate acute trauma to the shoulder. In my expert medical opinion, the surgery performed is not established as medically necessary or causally related.

In addition, Counsel for Respondent points out that the claimant did not make any complaints regarding his left shoulder until he presented to Dr. Mian on 1/21/19 (more than four months after the accident). It is noted that during an initial evaluation by Dr. Madhu Boppana on 10/19/18 the claimant complained of neck pain, right shoulder pain, and left knee pain. There were no complaints regarding the left shoulder. On 10/31/18 the claimant was examined by Dr. Maxim Tyorkin (orthopedist). Complaints at that time were pain in the neck, back, right shoulder, bilateral knees, bilateral ankles, and left elbow. Again, there were no complaints regarding the left shoulder. The claimant was again examined by Dr. Tyorkin on 12/6/18. Again, there were no complaints regarding the left shoulder. I note that the record contains physical therapy records which reflect treatment to the left knee. There are no records reflecting treatment to the left shoulder prior to the surgery. As noted above there were also no complaints regarding the left shoulder made to EMS or Elmhurst Hospital. I note that although the claimant's NF-2 mentions "Both Shoulder" (sic), I find this to be of no consequence in light of the above.

As noted above Applicant submits a rebuttal from Dr. Shahid Mian. Dr. Mian notes that on 1/21/2019 and 2/18/2019, the claimant presented to him for orthopedic consultations with complaints of left shoulder pain. (He fails to indicate who the referring physician was). He notes that despite physical therapy, the claimant found no relief in his left shoulder complaints. (I note that the record does not contain any evidence of physical therapy involving the left shoulder). He states that the complaints of shoulder pain were causally related to the motor vehicle accident on 9/4/2018. However, he fails to provide any cogent reasons or explanations for that conclusion, considering that the claimant did not complain of any left shoulder symptoms until more than four months after the accident.

I find Dr. Mian's rebuttal to be unpersuasive and lacking in credibility.

I find that Respondent has met its burden of demonstrating that the surgery in issue was not causally related to the accident of 9/4/18. I further find that Applicant has failed to satisfy its ultimate burden of demonstrating that the subject surgery was causally related to the accident of 9/4/18.

Having considered the evidence presented before me in this case as well as the arguments made by the parties during the arbitration hearing, I find, as a matter of fact, that the arthroscopic surgery involving the left shoulder was not causally related to the accident of 9/4/18.

Accordingly, Applicant's claim is denied in its entirety.

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

09/13/2021

(Dated)

Joseph Endzweig

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:
a99a1f9b509fa974a46281278aa0f853

Electronically Signed

Your name: Joseph Endzweig
Signed on: 09/13/2021