

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

W. Joseph Gorum MD PC
(Applicant)

- and -

Wausau Underwriters Insurance Company
(Respondent)

AAA Case No. 17-21-1207-3013

Applicant's File No. DK21-154113

Insurer's Claim File No. 0434073820003

NAIC No. 26042

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 06/29/2022
Declared closed by the arbitrator on 07/06/2022

Henry Guindi, Esq. from Korsunskiy Legal Group P.C. participated by telephone for the Applicant

Cristina Galang, Esq. from Martyn, Martyn, Smith, Murray & Yong participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$4,959.46**, 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 43 year-old female restrained driver of a motor vehicle that was involved in an accident on 7/30/20. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. At issue is the medical necessity of a left shoulder surgery performed by Wendell Joseph Gorum, M.D. on 1/14/21 that Respondent timely denied reimbursement for based on a 2/17/21 peer review by Dorothy Scarpinato, 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 43 year-old female restrained driver of a motor vehicle that was involved in an accident on 7/30/20. The claimant reportedly injured her neck, left shoulder, low back, left leg, and left foot. There was no reported loss of consciousness. There were no reported lacerations or fractures. There was no reported emergency treatment sought or received. On 8/2/20 the claimant presented to Youngsun Acupuncture, P.C. with complaints of lower back pain rated 8/10, left ankle pain rated 8/10, and left foot pain rated 8/10. The claimant presented with a pink tongue with a thin moist coating and a weak and thready pulse. The claimant was initiated on acupuncture and cupping. On 9/14/20 the claimant presented to Tong Li, M.D. At that time she complained of neck pain, low back pain, left shoulder and left leg pain, and left heel pain. Pain was rated 9/10. Examination of the cervical spine revealed severely decreased range of motion (unquantified), loss of lordosis, muscle spasm, stiffness, and trigger points at C2-T1. Examination of the lumbar spine revealed severely decreased range of motion (unquantified), muscle spasm, tenderness, trigger points at L1-S1, positive SLR, and positive Patrick's test. There was focal tenderness over right and left SI joint area. There was a focal tenderness over left greater trochanter area. Examination of the left shoulder revealed moderately decreased range of motion (unquantified), positive Apley's Scratch test, Empty Can test, and Neer's test. Thoracic examination revealed decreased range of motion (unquantified), muscle spasm, stiffness, trigger points at T9-T12. Examination of the left knee revealed tenderness, edema, positive McMurray's test, and positive Patellofemoral Grind test. Examination of the left ankle revealed focal tenderness. Dr. Li conducted ultrasonography (left hip, left knee, and left ankle) and performed lumbar trigger point injections under ultrasonic guidance. Dr. Li prescribed physical therapy, Diclofenac 3% gel, Lidothol patches, a cold compression DVT unit, a lumbar support, knee support, and an ankle support. On 9/14/20 the claimant presented to Vernon Rehab and Physical Therapy, P.C. and was initiated on physical therapy. On 9/22/20 the claimant presented to Pedro Torres-Jimenez, M.D. for an examination preliminary to upper extremities and lower extremities EMG/NCV testing performed the same day that suggested evidence consistent with bilateral C6 and L5-S1 radiculopathies. The claimant presented with complaints of neck pain radiating to the left shoulder rated 8/10 and low back pain rated 7/10. Cervical examination revealed tenderness, muscle spasm, trigger points, decreased range of motion (quantified), and positive Shoulder Distraction test. Lumbar examination revealed tenderness, muscle spasm, trigger points, decreased range of motion (quantified), and positive SLR test and Braggard's test. Muscle strength was decreased (4/5 bilaterally and symmetrically) in the

upper and lower extremities and sensation was decreased in C2-T1 and L1-S1. The 9/30/20 left shoulder MRI produced an impression of capsular thickening which can be seen adhesive capsulitis, biceps tenosynovitis, and AC joint hypertrophy with rotator cuff tendinopathy and fraying. On 10/6/20 the claimant presented to Gemini Chiropractic, P.C. with complaints of neck pain rated 7/10, mid back pain rated 8/10, low back pain rated 8/10, and left arm pain. The claimant was initiated on chiropractic treatment. On 10/6/20 the claimant presented to Journey Acupuncture, P.C. and was reinitiated on acupuncture and cupping. On 10/8/20 the claimant presented to DTM Physical Therapy, PLLC and was reinitiated on physical therapy. On 1/14/21 Wendell Joseph Gorum, M.D. (surgeon) and Oded Haidotov, P.A. (surgical assistant) performed left shoulder surgery consisting of synovectomy-complete, debridement-complete, and subacromial decompression. The preoperative diagnosis was impingement syndrome, adhesive capsulitis, and bicipital tendinitis. The post operative diagnosis was impingement syndrome, partial tear of left rotator cuff, and tear of left glenoid labrum. The intraoperative report indicates "Synovitis was present. The synovitis was affecting the labral and rotator cuff. A Synovectomy procedure was performed. The tissues were debrided using the shaver and arthocare wand was also utilized to smooth out the tissue...Labral tear was present. Partial tear of rotator cuff was present. The tears were non-repairable. A limited debridement procedure was performed on each of the torn tissues. The torn tissues were debrided using the shaver and arthroscopic wand were utilized to debride and smooth out the tissues... Impingement was present. Excessive inflammation, adhesions and bursitis contributed to the subacromial impingement. A subacromial decompression procedure was performed. A shaver and wand were used to excise and excessive inflamed tissue decompressing the subacromial space." Dr. Gorum prescribed the use of a continuous passive motion (CPM) unit and a cold therapy unit (CTU). At issue is the 1/14/21 surgeon's fee and surgical assistant's fee.

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. 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 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).

Respondent timely denied the surgery and associated fees and services based on the 2/17/21 peer review by Dorothy Scarpinato, M.D. After reviewing the claimant's history, treatment, and medical records, Dr. Scarpinato asserts "based on the documentation provided, a 43-year old female was involved in a motor vehicle accident on 7/30/20. The claimant was described as the driver at the time of the accident. [The claimant] did not seek immediate emergency medical attention following the accident. The claimant followed up with her medical doctor and was referred for physical therapy, acupuncture

and chiropractic care. On 12/8/20 she was examined by Dr. Gorum for complaints of pain to her neck, back, left shoulder and left ankle. She was evaluated and diagnosed with cervical pain, acute low back pain and paraspinal muscle spasm, left shoulder weakness and impingement syndrome and left ankle sprain. The claimant was referred for left shoulder surgery. On 1/14/21 left shoulder surgery was performed." Dr. Scarpinato opines "the left shoulder surgery performed on 1/14/21 was not medically necessary. Initially, had reviewed a physical therapy evaluation report which notes the presence of low back pain and pain into the left lower extremity including the left knee and left ankle. This report makes no mention of any injury to the shoulder complex. The diagnosis included pain in the foot, pain in the leg and low back pain. In another physical therapy evaluation report dated 10/8/20, the claimant now presented with left shoulder pain. In the ensuing physical therapy progress notes, the claimant complained of spinal pain on a consistent basis with sporadic bilateral shoulder pain. According to these records, the claimant had only received seven treatments to the shoulders during the five and half month period following the accident and leading up to the surgery. It is respectfully submitted that seven physical therapy treatments would not be considered an adequate trial of conservative rehabilitation especially if the claimant is not complaining of pain to the shoulder throughout the course of physical therapy." Dr. Scarpinato continues "I had then reviewed the left shoulder MRI which was rather non-compelling and revealed what appears to be age related findings. There was capsular thickening, chronic changes of the bicep tendon and AC joint hypertrophy with tendinopathy and fraying of the rotator cuff tissue. These conditions do not represent acute traumatic injury but rather those acquired through attrition. This presentation rarely if ever requires surgical intervention especially when there is no evidence of an adequate trial of active conservative rehabilitation. "The relationship between subacromial impingement and rotator cuff disease in the etiology of rotator cuff injury is a matter of debate. Extrinsic compression and intrinsic degeneration may play a role." (J Am Acad Orthop Surg. 2011 Nov;19(11):701-8.). In a more contemporaneous citation, it has been found that surgical and non-surgical treatment in four randomized controlled trials were studied in an effort to determine which treatment provided better outcomes. The authors concluded that in terms of pain and shoulder function, no evidence exists for differences in outcome between surgical and non-surgical treatment of shoulder impingement syndrome. "Non-surgical management of impingement syndrome continues to be successful in most patients." (J Am Acad Orthop Surg. 2011 Nov;19(11):701-8.)" Dr. Scarpinato concludes "with this knowledge, it is not clear why the claimant was not afforded additional rehabilitation directed towards the left shoulder prior to surgery. In short, the left shoulder surgery performed on 1/14/21 and all associated services were not medically necessary."

In AAA Case No.: 17-21-1209-4154 I found in favor of applicant for the facility fee associated with the services at issue (1/14/21 left shoulder surgery). There Respondent's defense was based on a different (albeit similar) peer review by Dorothy Scarpinato, M.D. There I found "*Respondent has failed to meet its burden of proof. Dr. Scarpinato's peer review did not demonstrate, prima facie, that the services were performed outside the standard of care or deviated from generally accepted practice. Here the medical reports in evidence and Dr. Gorum's peer rebuttal are more persuasive than Dr. Scarpinato's peer review. Dr. Scarpinato argues "I have yet to receive documentation suggesting this individual underwent an adequate trial of conservative management*

prior to surgical intervention;" this argument being undermined by the fact that the claimant underwent more than 5 months of conservative care that included physical therapy, acupuncture, cupping, chiropractic treatment, electrodiagnostic testing, and the use of durable medical equipment. I am also not persuaded that Dr. Scarpinato established that there was a lack of causality based on some of the MRI findings. Dr. Gorum is correct when he notes that "the existence of pre-existing changes is not dispositive on whether the accident caused or exacerbated [the claimant's] condition" because 11 NYCRR Regulation 68 Section 65-3.14(a) Scope of Coverage. states that exacerbations of preexisting injuries are specifically covered by the statute. While not always determinative, the treating physician's opinion is entitled to some deference. Oceanside Medical Healthcare, P.C. v. Progressive Ins., 2002 N.Y. Slip Op. 50188(U) at 5, 2002 WL 1013008 (Civ. Ct. Kings Co., Jack M. Battaglia, J., May 9, 2002). Having carefully considered the submissions of the parties, the relevant case law, and the arguments of respective counsel, I conclude that the preponderance of the credible evidence supports a finding in favor of Applicant." Having thoroughly reviewed the evidence submitted here which includes the same medical records my opinion remains the same that "Dr. Scarpinato's peer review did not demonstrate, prima facie, that the services were performed outside the standard of care or deviated from generally accepted practice." Respondent did not upload anything to support a fee schedule reduction of the bills at issue. Accordingly, Applicant is awarded \$4,959.46.

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
	W. Joseph Gorum MD PC	01/14/21 - 01/14/21	\$4,519.80	Awarded: \$4,519.80
	W. Joseph Gorum MD PC	01/14/21 - 01/14/21	\$439.66	Awarded: \$439.66
Total			\$4,959.46	Awarded: \$4,959.46

- B. The insurer shall also compute and pay the applicant interest set forth below. 06/10/2021 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from 6/10/21 (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.

07/29/2022
(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:
696cfecf454000535ba9d766a744d483

Electronically Signed

Your name: Charles Blattberg
Signed on: 07/29/2022