

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Stand Up MRI of East Elmhurst
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-21-1198-1707

Applicant's File No. 21-002416

Insurer's Claim File No. 0439539810001

NAIC No. 36447

ARBITRATION AWARD

I, Neal S Dobshinsky, 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: J Doe

1. Hearing(s) held on 08/10/2022
Declared closed by the arbitrator on 08/10/2022

Jared Mallimo from The Licatesi Law Group, LLP participated in person for the Applicant

Elizabeth Driscoll from Marshall Dennehey Warner Coleman & Goggin, P.C. participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$966.54**, 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

Applicant performed right shoulder MRI on J Doe. Applicant sought payment for the MRI.

Based on a report by its peer reviewer, Insurer denied payment for lack of medical necessity.

Was the MRI medically necessary?

4. Findings, Conclusions, and Basis Therefor

I have read and considered the materials in the AAA ADR case file and the authorities cited by the parties that could be located (and are not behind a paywall). I have heard and considered the arguments of counsel who appeared at the hearing virtually, via Zoom. I find as follows:

Background

On 10/15/20, J Doe, a female, then 49 years old, was the driver of a motor vehicle that was in an accident. The vehicle was insured by respondent (Insurer). Doe claims to have been injured. She then sought care and treatment.

On 10/23, Doe saw Steven Ross, DO, a physiatrist with Physical Medicine and Rehabilitation of New York, for an initial physiatric evaluation. Doe complained of neck pain with right upper extremity weakness; mid back pain; right shoulder pain; and post-traumatic headaches.

Ross examined Doe. Doe's cervical spine was tender. Motion was painful. Ross noted trigger points. Doe's thoracic spine was tender to palpation. Doe's right shoulder was tender to palpation. Motion was painful. There was positive impingement. There were other positive findings as well.

Ross' impression was cervical and thoracic myofascial derangement with possible disc involvement; right shoulder derangement; and post-traumatic headaches. Ross' plan was for Doe to begin physical therapy; to follow with a neurologist; to obtain a right shoulder MRI to evaluate for internal derangement, ligamentous pathology, rotator cuff pathology, or labral pathology; to take other MRIs; to take over-the-counter medication, as needed; and for Doe to take other steps.

On that day, Ross referred Doe for the MRI.

On 11/15, applicant Stand Up MRI of East Elmhurst performed the shoulder MRI, and on 11/16, Steven Winter, MD, addressed the MRI report to Ross.

Applicant's Claim and Insurer's Denial

Applicant, as Doe's assignee, timely submitted a claim for no-fault benefits to Insurer for payment for the shoulder MRI.

Based on a report by its peer reviewer, Insurer denied payment for the MRI for lack of medical necessity.

The only issue argued and submitted for determination was the medical necessity for the MRI. All other issues were waived.

Medical Necessity and the Burden of Proof

Medical necessity for services or supplies is established by proof of an applicant's properly submitted claim form. *All County Open MRI & Diagn. Radiology P.C. v Travelers Ins. Co.*, 11 Misc3d 131(A), 2006 NY Slip Op. 50318[U] [App Term, 2d Dept 9th & 10th Jud Dists 2006]. Applicant's evidence established the presumption of medical necessity for the MRI.

The insurer "bears both the burden of production and persuasion" as to its lack of medical necessity defense. *Nir v Allstate Ins. Co.*, 7 Misc3d 544, 546 [Civ Ct, Kings County 2005]. The defense must be supported by a peer review report or other evidence, such as an independent medical examination report. The report must set forth a sufficiently detailed factual basis and medical rationale for the denial. *Amaze Med. Supply v Eagle Ins. Co.*, 2 Misc3d 128(A), 2003 NY Slip Op 51701[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2003].

"[H]owever, it is the [applicant] who has the ultimate burden of proving, by a preponderance of the evidence, that the services at issue were necessary" (internal citations omitted). *Radiology Today, P.C. v Geico Ins. Co.*, 58 Misc3d 132(A), 2017 NY Slip Op 51768[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017].

The Peer Review and Insurer's Lack of Medical Necessity Defense

Insurer denied Applicant's claim on an affirmed peer review by Stuart Springer, MD. In his 12/7/20 report, Springer states that he has "the scope of licensure or certification that typically manages the medical condition, procedure, treatment, or issue in this case. I have current, relevant, knowledge and experience to render an opinion for this case Springer gives his reasons and opinions why the MRI was not medically necessary.

Springer lists the few records and reports he reviewed. These include the initial evaluation by Ross, 10/23; initial physical therapy evaluation by Emille Tenecio, PT, and progress notes, 10/23 to 11/6; MRI reports (cervical and thoracic, 10/31; right shoulder 11/15); and others.

Springer briefly mentions the accident, the evaluation by Ross on 10/23, and the physical therapy evaluation by Tenecio on 10/23. He briefly mentions the findings, the recommendation for physical therapy, and that Doe had four physical therapy sessions from 10/23 to 10/30. He mentions the positive findings on the MRI.

Springer contends that "[t]he standards of care of ordering the MRI of the shoulder joint after motor vehicle accident in the absence of fracture would consist of physical examination, evaluation, obtaining a diagnosis and establishing a plan of treatment which in most cases consists of alteration of activity, no overhead activity, stretching, appropriate analgesia (i.e., acetaminophen) and/or anti-inflammatory; if not significantly improved physical therapy should be recommended (gentle range of motion exercises plus exercises that strength the rotators and stabilize the scapula) along with home exercise training. If the patient fails to respond to a full course of conservative

management and there is no clear diagnosis on examination, considering the MRI of the shoulder would be reasonable."

Springer contends further that between 10/23 and 11/6, Doe had only 7 sessions of physical therapy for her right shoulder, which was inadequate under the guideline he cites (physical therapy of at least 4 weeks).

Springer cites reliable, but not binding, authority as to the standard of care and to support his opinion.

This peer review sets forth an adequate factual basis and medical rationale to support Insurer's denial of Applicant's claim. Insurer met its initial burden of production and persuasion. Insurer established its lack of medical necessity defense.

Applicant's Rebuttal

In reply to the peer review, Applicant submits a rebuttal from John Ventrudo, MD. In his 11/9/21 rebuttal, which is not affirmed or sworn to, Ventrudo states his reasons and opinion why the shoulder MRI was medically necessary.

Other than putting MD after his name, Ventrudo does not give any details regarding his licensure, education, training, medical specialty (if any), or experience. He does not state his relationship, if any, to the parties or the referring physician; or his interest, if any, in the outcome of this arbitration. He did not examine or treat Doe.

Ventrudo states that his rebuttal is based on the Springer peer review, Ross' 10/23 evaluation and the referral for MRIs (which he erroneously states was dated 11/15/20-it is the MRI report that is dated 11/15/2020-and physical therapy progress notes 10/28 to 11/6.

Ventrudo mentions the accident; Doe's evaluation by Ross on 10/23; and Ross' findings.

Ventrudo contends that Doe was "subjected to severe trauma in the subject MVA," but there is no evidence in the submissions as to the severity of the accident and Ventrudo does not point to any such evidence.

Ventrudo overlooks the timeline of the exam, referrals for physical therapy and MRIs, physical therapy sessions, MRI and report. Doe saw Ross on 10/23 and he ordered both the MRI and physical therapy for Doe on that same date. Doe started physical therapy on 10/23, but the shoulder MRI was not performed until 11/15 and the findings were not reported until 11/16. Yet Ventrudo states that it was "reasonable to get an MRI prior to actually beginning therapy as the possibility exists that this therapy could further injure the structures. I felt it appropriate considering the history of complaints and the severity of the trauma, to obtain the MRI at the outset of treatment rather than wait until there was either lack of improvement, or worse, possibly increasingly painful symptoms." The actual timeline of events cuts against Ventrudo's rationale for the performance of the MRI.

Ventrudo argues that the American College of Radiology ACR-SPR-SSR-Practice Parameter for the Performance and Interpretation of Magnetic Resonance Imaging of the Shoulder indicate that "acute shoulder trauma," and "limited or painful range of motion" are clinical scenarios in which MRIs may be useful or that the MRI may be indicated to "further clarify and stage conditions diagnosed clinically."

But the ACR appropriateness criteria for traumatic shoulder pain have variants and different recommended imaging modalities depending on the variant. What is usually appropriate as the initial imaging is radiography (x-ray) of the shoulder. And "trauma" is not always an indication for MRIs. Ventrudo fails to indicate what variant applies. Without specifying what practice parameter or guideline he is referring to and how it relates to Ross' exam findings, Ventrudo's argument is misleading.

Ventrudo discusses the usefulness and accuracy of MRIs, but that was never an issue. The rebuttal is so general as to be meaningless. He never shows that the standard Springer posited is wrong or does not apply. The rebuttal is not persuasive.

Conclusion

Insurer established its lack of medical necessity defense. Applicant did not overcome that showing.

Based on the parties' submissions, their arguments, the law, the regulations, and the weight of the credible evidence, I conclude that Applicant is not entitled to payment.

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 New York

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

09/08/2022
(Dated)

Neal S Dobshinsky

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:
7f2f063777985e87d6093fcd60f2a210

Electronically Signed

Your name: Neal S Dobshinsky
Signed on: 09/08/2022