

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Midwood Surgical Supplies Inc (Applicant)	AAA Case No.	17-21-1231-8223
- and -	Applicant's File No.	17782
	Insurer's Claim File No.	0600455398 2AM
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

ARBITRATION AWARD

I, Kent Benziger, 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: D.A.

1. Hearing(s) held on 11/07/2022
Declared closed by the arbitrator on 11/07/2022

Frank S. Patruno, Esq. from Frank S. Patruno Law Offices, P.C participated for the Applicant

Robert Quinn, Esq. from Law Offices of John Trop participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,427.50**, 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

On September 16, 2020, the Assignor/Eligible Injured party, a 68-year-old male, was, by history, involved in a motor vehicle accident. On January 20 2021, Dr. Pamela Levine performed a right shoulder arthroscopy. On the same day, Dr. Levine prescribed a shoulder orthosis immobilizer, a cold compression circulating pump and a segmental gradient pressure pneumatic appliance. In dispute is the subsequent prescription of a continuous passive motion exercise device for the right shoulder for 28 days and a synthetic sheepskin pad. The Applicant Midwood Surgical Supplies provided the equipment and billed the following: for the CPM pursuant to E0936 (\$86.00 x 28, \$2,408.00) and the synthetic pad (E0188, \$19.50). The Respondent denied reimbursement based on the peer review of Dr. Stuart Springer who contended that the arthroscopy was not medically necessary or causally related to the motor vehicle

accident. He also found that CPM unit, as well as not medically necessary. This arbitrator previously ruled as to whether the shoulder arthroscopy was causally related to the motor vehicle accident based on the same peer review in *New York Orthopaedic Hand Surgery PLLC v. Allstate*, AAA Case No. 17-21-1227-8272 (August 24, 2022).

This hearing was conducted using the electronic case folder maintained by the American Arbitration Association. All documents contained in that folder are made part of the records of this hearing. I have reviewed the documents contained in the electronic case folder as of the date of this award as well as any documents submitted upon continuance of the case. Any documents submitted after the hearing that have not been entered in the electronic case folder as of the date of this award will be listed immediately below and forwarded to the American Arbitration Association at the time this award is issued for inclusion in said case folder.

4. Findings, Conclusions, and Basis Therefor

On September 16, 2020, the Assignor/Eligible Injured party, a 68-year-old male, was, by history, involved in a motor vehicle accident. Following the accident, the Assignor reportedly was not treated at the emergency room.

On September 21, 2020, the Assignor was evaluated by Dr. Marc Parnes for complaints of head, neck, low back and left knee pain. Following an exam, the assessment was of head contusion, cervical and lumbar sprain/strain and left knee sprain.

Through an evaluation on October 16, 2020, the Assignor's complaints included numbness and tingling and weakness in his neck, lower back radiating into the upper and lower extremities. Physical therapy was prescribed. On October 19, 2020, an EMG/NCV study was performed and interpreted as revealing evidence of bilateral C5-6 cervical radiculopathy.

Through an evaluation on November 24, 2020, Dr. Parnes notes that the Assignor's complaints and stated: "HE HAS A RIGHT SHOULDER FROM THE ACCIDENT NOW AS WELL. HIS RIGHT SHOULDER SPRAIN/STAIN." The report does not contain the results of an examination. The physical therapy notes do not list any conservative care for the shoulder.

On November 27, 2020, an MRI of the right shoulder was performed with findings of supraspinatus tendinosis with 1.2 x .6 cm (AP by transverse) full thickness tear of anterior central supraspinatus tendon, contiguous with low-grade partial-thickness articular surface tear of the posterior supraspinatus tendon, subscapularis tendinosis with low-grade intrasubstance tear, 4 x 8 mm corticated focus of ossification associated with torn, retracted supraspinatus tendon fibers at superior aspect of humeral head, likely representing an old avulsion fracture, series 7 image 11 and series. A questionable

partial bicep tendon tear at superior aspect of bicipital groove (limited evaluation due to patient motion).

On November 30, 2021, the Assignor was evaluated by Dr. Barry Katzman. According to Dr. Levine's subsequent rebuttal, the exam revealed reduced range of motion, tenderness over the rotator cuff and biceps/labrum. The Neer's test and Hawkin's tests were positive for impingement.

Through an evaluation on January 8, 2021, Dr. Levine noted positive orthopedic findings as to the right shoulder and found the Assignor had sustained a traumatic injury and had failed conservative care.

On January 20, 2021, Dr. Levine performed a right shoulder arthroscopy including a synovectomy, debridement, lysis of adhesions, rotator cuff repair, and bicep tenotomy. The post-operative diagnosis was of a right rotator cuff tear with biceps tendon rupture.

On the same day, Dr. Levine prescribed a shoulder orthosis immobilizer, a cold compression circulating pump and a segmental gradient pressure pneumatic appliance. In dispute is the subsequent prescription of a continuous passive motion exercise device for the right shoulder for 28 days and a synthetic sheepskin pad. The Applicant Midwood Surgical Supplies provided the equipment and billed the following: for the CPM pursuant to E0936 (\$86.00 x 28, \$2,408.00) and the synthetic pad (E0188, \$19.50).

Denial/Peer Review. The Respondent issued a timely denial for the equipment based on a peer review from Dr. Stuart Springer. Through my prior decision in New York Orthopaedic Hand Surgery PLLC v. Allstate, AAA Case No. 17-21-1227-8272 (August 24, 2022), the arbitrator addressed the causality of the shoulder arthroscopy through the same peer review of Dr. Stuart Springer. As the equipment was prescribed due and following the arthroscopic surgery, my previous decision must be considered. The decision included the following:

Dr. Springer stated the standard of care following a motor vehicle accident would be a trial of conservative care with various conservative modalities for up to three months. If the patient demonstrated persistent pain and was not responsive to different types of therapy an operative procedure could be considered several months later. Dr. Springer then cited an extensive number of NIA Guidelines. The relevant citations included the following;

As per the article 2018 NIA Clinical Guidelines for Medical Necessity Review Shoulder Arthroscopy CLINICAL INDICATIONS: ROTATOR CUFF

REPAIR (RCR): "Surgical repair of a medium (I-3cm) or large (3-5cm), full-thickness torn rotator cuff may be necessary when ALL of the following criteria are met: "a) Reproducible "rotator cuff pain patterns" as evidence by:

i) Lateral arm, deltoid pain not radiating past the elbow, night pain, or pain with overhead motions; AND ii) Positive impingement signs and/or tests on the exam (reproducible pain when the arm is positioned overhead (above the plane of the shoulder) with the relief of pain when the arm is.

repositioned below the plane of the shoulder); AND/OR iii) Rotator cuff weakness on physical exam; AND iv) Functional loss (inability to do normal activities); AND

b) MRI showing medium (I-3cm) or large (3-5cm), full-thickness tear; (DR

c) Serial MRI demonstrates a progression in size, even if asymptomatic, OR

d) MRI demonstrates the presence of atrophy and/or fatty degeneration and/or Goutallier stage."

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As per the 2018-2019 NIA Clinical Guidelines for Medical Necessity Review MUSCULOSKELETAL AND SURGERY GUIDELINES Shoulder Arthroscopy Synovectomy: "Synovectomy as an isolated procedure is usually reserved for primary synovial disease or in cases where secondary hypertrophic synovitis is documented during arthroscopy (these include adhesive capsulitis, osteoarthritis, chronic rotator cuff tear)."

Dr. Springer cited Health Technology Assessment of Scheduled Procedures Shoulder arthroscopy July 2014 1.3 Surgical procedures, potential complications and alternative treatments, page 8, 9 that the complexity and range of diagnoses involving the shoulder joint have led to a multitude of diagnostic and treatment algorithms being proposed in the literature. Based on his review of the records, Dr. Springer contends none of the physical therapy sessions were for the right shoulder. He further notes that the Assignor's shoulder was not clinically

evaluated until November 30, 2020. Dr. Springer contends that the Assignor should have had the shoulder complaints initially addressed and treated with conservative care including corticosteroid injections for at least 12 weeks prior to the surgery which he concluded was not medically necessary. Dr. Springer then addressed the issue of causality. He stated:

As per the available medical records, the claimant's right shoulder was not clinically evaluated following the accident until 11/30/2020 for about 10 weeks. Also, the claimant was not engaged in any form of conservative care for his right shoulder from the date of the accident till the date of surgery. Further, an MRI of the right shoulder dated 11/27/2020 revealed, 4 x 8 x 3 mm corticated focus of ossification associated with the torn, retracted supraspinatus tendon fibers and mild osteoarthritis at the acromioclavicular joint. The diagnostic findings were indicative of a longstanding chronic condition related to the right shoulder. Thus, the causal relationship between the claimant's right shoulder symptoms and the MVA dated 09/1 could not be established. Therefore, within a degree of medical certainty, there was no causal relationship between the claimant's right shoulder symptoms and the MVA dated 09/16/2020.

Rebuttal. Dr. Levine has submitted a rebuttal to the peer review. She reviewed the positive orthopedic and neurological findings from Dr. Katzman and her examination. She cited sources that shoulder surgery is medically necessary if there is a tear when pain and weakness continue and do not prove with physiotherapy. She opined that merely undergoing conservative care will not repair the injury and surgery was necessary.

Analysis. A presumption of medical necessity attaches to a Respondent's admission of the Applicant's timely submission of proper claim forms. The Respondent then bears the burden to prove that the treatment was not medically necessary. *Kings Med. Supply Inc. v. Country-Wide Ins.*, 5 Misc.3d 767 (2004); *Behavioral Diagnostics v. Allstate Ins. Co.*, 3 Misc.3d 246 (2004); *A.B. Med. Servs v. Geico Ins.* 2 Misc.3d 16 (App. Term 2d Dept. 2003). In this case, the peer review must submit "objective testimony or evidence to establish that his

opinion is what is generally accepted in the medical profession." *Williamsbridge Radiology v. Travelers*, 14 Misc.3d 1231(a) (Civ. Ct Kings Co. 2007). When a carrier uses a peer review as basis for the denial, the report must contain evidence of the applicable generally accepted medical/professional standards as well as the provider's departure from those standards. *Acupuncture Prima Care v. State Farm Mut. Auto Ins. Co.* 17 Misc. 3d 1135 (Civ. Ct. Nassau, 12/03/07). The Respondent then bears the burden to prove that the treatment was not medically necessary or, in this instance, not causally related to the accident. *Kings Med. Supply Inc. v. Country-Wide Ins.*, 5 Misc.3d 767 (2004); *Behavioral Diagnostics v. Allstate Ins. Co.*, 3 Misc.3d 246 (2004); *A.B. Med. Servs v. Geico Ins.* 2 Misc.3d 16 (App. Term 2d Dept. 2003). A peer reviewer must thoroughly review the relevant medical records and give evidence as to lack of a causal relationship to the accident. *Elmont Open MRI & Diagnostic Radiology v. Progressive*, 23 Misc.3d 110(A) (Dist. Ct. Nassau Co., Fed J. Hirsch, J., Apr. 6, 2009).

As a finding of fact, the peer review is persuasive as to Dr. Springer's proof of lack of causation and the lack of the required period of conservative care to the right shoulder. Most importantly, Dr. Springer's review of the medical records is un rebutted. The Assignor did not go to an emergency room following the accident, and no medical record indicates any complaints as to the shoulder for months following the accident. The first notation was on November 24, 2020 in which Dr. Parnes notes in capital letters that the Assignor had a right shoulder injury "NOW AS WELL". The exchanged physical therapy records prior to that time fail to reveal any conservative care to his right shoulder, and the first noted orthopedic examination was on November 30, 2020 with Dr. Katzman. The arthroscopy was on January 20, 2021. In sum, Dr. Springer, the peer reviewer, correctly finds that the Assignor did not complain or treat for his shoulder for months following this accident. He further notes that the Assignor did not have sufficient or a failed course of conservative care prior to the arthroscopy. Finally, Dr. Springer found the diagnostic findings chronic and not related to the motor vehicle accidents. A close reading of Dr. Levine's rebuttal fails to directly address these issues. She fails to address the lack of physical therapy and the dated of the Assignor's first recorded shoulder symptoms and treatment. The ultimate burden of proof on issues of medical necessity lies with the plaintiff. *Dayan v. Allstate Ins. Co.*, 2015 N.Y. Slip Op. 51751(U), 2015 WL

7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015). Once Respondent satisfied its burden of proof establishing a lack of medical necessity, "plaintiff must rebut it or succumb." Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 N.Y. Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005).

In the prior decision, I ruled in favor of the Respondent. Although arguably the lack of causation as to the shoulder arthroscopy is sufficient to deny reimbursement for the subsequent arthroscopy, the peer review has added contentions as to the CPM unit in which he cited sources finding the unit not medically necessary and found:

In this case, the claimant had right shoulder pain following the MVA dated 9/16/20. The claimant underwent right shoulder surgery. He was prescribed a CPM device for post-operative use. As per the above guideline, "Less pain in stiff shoulders and improved mobility after total knee replacement - but the final report does not confirm greater benefit in rotator cuff tears/" This indicates that the clinical outcome of a CPM shoulder device for post-operative sue is less clear. Also, the right shoulder surgery was not medically necessary. Hence, basedon the above-cited guideline, the CPM device along with the synthetic sheepskin pad provided to the claimant was not medically necessary.

Dr. Springer found the arthroscopy not medically necessary nor causally related to the motor vehicle accident. He also cited specific guidelines that found the CPM unit in dispute not medically necessary. The peer review has not been rebutted.

As a finding of fact, the peer review is persuasive. The shoulder injury was not causally related to the motor vehicle accident, and the CPM unit does not have proven benefit according to the sources cited by the peer review. In sum, it would be inconsistent with good and accepted practice to prescribe the CPM unit. The ultimate burden of proof on issues of medical necessity lies with the plaintiff. Dayan v. Allstate Ins. Co., 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015). Once Respondent satisfied its burden of proof establishing a lack of medical necessity, "plaintiff must rebut it or succumb." Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 N.Y. Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). The Applicant has failed to rebut the peer review nor the cited authoritative sources. Applicant's claim is denied in its entirety.

Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), an arbitrator is the judge of the relevance and materiality of the evidence offered.

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 Orange

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

12/06/2022
(Dated)

Kent Benziger

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:
f826501dcedea3b846ecdc0ad25f223f

Electronically Signed

Your name: Kent Benziger
Signed on: 12/06/2022