

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Fifth Avenue Surgery Center LLC
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-22-1271-9772

Applicant's File No. BT22-200789

Insurer's Claim File No. 0645792698-01

NAIC No. 29688

ARBITRATION AWARD

I, Matthew J. Cavalier, 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: Assignor

1. Hearing(s) held on 11/22/2023
Declared closed by the arbitrator on 11/22/2023

Krikor Ghazarian, Esq from The Tadchiev Law Firm, P.C. participated virtually for the Applicant

Dana M. Nolan, Esq from Law Office Of Lawrence & Lawrence participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,321.74**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The Parties stipulated at the hearing that the date interest accrues if the Applicant prevails is October 25, 2022.

3. Summary of Issues in Dispute

Whether the Assignor, a 43-year-old male ("AR") on the date of the accident ("DOA") who is the eligible injured party ("EIP"), injured in a motor vehicle accident ("MVA")

on October 15, 2021, who received epidural injection w/ echo guidance during surgery medical services on date of service ("DOS") July 18, 2022, and whether these services were correctly billed in the sum of \$1321.74 and timely submitted by the Applicant,

Whether the Applicant has proven the medical necessity for medical services rendered on the aforementioned dates of service, and

Whether the Respondent can maintain the defense of not medically necessary medical services based upon the August 30, 2022, Peer Review of Dr. Dorothy F. Scarpinato, MD?

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the ADR Center 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. The Arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. 11 NYCRR 65-4.5(o)(1)(Regulation 68-D).

There is one bill for DOS July 18, 2022, Left Shoulder Surgery, with a total sum in dispute on the AR-1 of \$1321.74 for the medical services rendered. The Applicant timely forwarded these bills to the Respondent and the Respondent denied these claims for medical services as not medically necessary based on the peer review report of Dr. Scarpinato.

Fee Schedule

The Parties agreed at the Hearing that the Applicant correct billed CPT 64415 nerve block injection \$979.78 and CPT 76942 echo guidance \$341.96 for the disputed DOS July 18, 2022, thus \$1321.74 is the sum to be awarded if the Applicant prevails.

Standing

The Respondent's Counsel raised a standing defense at the Hearing arguing that in AAA No.: 17-22-1271-9757 settled the surgi-center claim for DOS July 18, 2022, for \$3026.24 as per the February 23, 2023, professional fee coder's audit of Carolyn Mallory, CPC, therefore there is no sum due and owing to the Applicant.

The Applicant's Attorney opined that:

1. the Mallory fee audit **DOES NOT** contain the billed CPT 64415 nerve block injection \$979.78 and CPT 76942 echo guidance \$341.96 in her calculations of the correct fee schedule,
2. the nerve blocked and echo guidance were submitted on a separate bill to the Respondent, and

3. the disputed services were performed by Dr. Charles H. Starke, MD, and not Dr. Peter A. Tomasello, DO, the surgeon for the settled claim, a different physician for the different services rendered to the Assignor.

The Applicant Attorney concluded that it is obvious that the disputed medical services that are the subject of this Hearing were not included in the previous settlement,

I agree with the Applicant Attorney's logic and reasoning and I find that the disputed CPT 64415 & 76942 were not previously settled by the Respondent's Claims Department on November 13, 2023, and these claims still remain in dispute.

Prima facie Case

Applicant establishes a *prima facie* showing of their entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received by Respondent and that payment of no-fault benefits were overdue." Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D. 3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004).

The Applicant has established a *prima facie* case of entitlement to reimbursement herein based upon the submissions and that the burden shifts to the Respondent to establish its defense to the medical treatment.

Medical Necessity

In Support of the medical necessity defense, the Respondent relied upon the peer review of Dr. Scarpinato who concluded that all surgical medical services for DOS July 18, 2022 were not medically necessary for the following reasons:

1. The underlying surgery was not medically necessary because there is insufficient proof of a physical injury directly caused by the MVA that requires surgical intervention to repair the damage, therefore any and all surgical medical services for the Left Shoulder surgery on July 18, 2022, are not necessary by extension for a full recovery by the Assignor.
2. There is no submitted medical evidence that the Assignor had failed traditional conservative treatments before the disputed surgery.
3. The standard of care for invasive surgery was not followed by the performing surgeon.
4. The July 1, 2022, IME of Dr. Scarpinato, MD when no negative orthopedic tests performed on the Left Shoulder were found and thus no indication or necessity for surgery, full ROM and no pain for the Assignor upon examination.

I deem the peer review report to be facially sound and therefore sufficient to sustain the Respondent's burden of proof with regard to the lack of medical necessity for the surgical medical services in dispute.

The burden thus shifts to the Applicant to meaningfully refute and/or rebut the peer review report.

In rebuttal to the peer review, the Applicant relied upon the submitted contemporaneous medical records, specifically the:

1. E/R records with CAT scans from the DOA October 15, 2021.
2. Initial chiro exam on October 22, 2021.
3. Initial P/T exam on November 30, 2021.
4. MRI of the C-spine conducted on February 4, 2022, revealing herniations at C2/3, C3/4, C4/5, and C6/7 with impingements.
5. Ortho exam on June 1, 2022.
6. The Cervical trigger points with exams on July 15 and August 3, 2022.
7. The Cervical Branch blocks with exams on June 22 and July 27, 2022.
8. The Left Shoulder MRI conducted on February 4, 2022, revealing internal derangement.
9. The May 7, 2022, Right Shoulder surgery.
10. The July 18, 2022, Left Shoulder surgery.
11. Post surgery exam on July 25, 2022.
12. The progress notes for the all the various disciplines documenting pain and restricted ROM.
13. The October 18, 2023, Rebuttal by Dr. Peter Tomasillo, DO, MD, the surgeon.

The Applicant's Attorney argued that these medical documents were available and listed on the peer review that went without comment or refutation by the Peer Review Doctor. Applicant also states that the Peer Review Doctor cites only guidelines and outdated medical treatise and thus fails to satisfy **NIR** and fails to establish a genuine standard care.

The Applicant's Attorney also argued that Dr. Scarpinato states the Assignor's injuries are not sufficiently traumatic in nature and are merely preexisting and merely degenerative, but 11 NYCRR Regulation 68 Section 65-3.14(a) The Scope of Coverage - specifically covers the aggravation of preexisting conditions as a covered and reimbursable medical expense, to further rebut the peer review doctor's conclusions as to the causation of the Assignor's injuries and the medical necessity of the disputed treatment.

The Applicant argued that the peer review report is rebutted by these facts and the totality of the medical documents. I do agree with the Applicant.

After reviewing the totality of the admissible and credible evidence, the Rebuttal, as well as hearing the arguments of the parties, I deem that the Applicant has successfully rebutted the peer review report in a meaningful way. The peer review report is not sufficient to sustain the Respondent's burden of proof with regard to the lack of medical necessity.

The Applicant prevails as to medical necessity and is awarded \$1321.74.

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
	Fifth Avenue Surgery Center LLC	07/18/22 - 07/18/22	\$1,321.74	Awarded: \$1,321.74
Total			\$1,321.74	Awarded: \$1,321.74

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/25/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Respondent shall compute and pay the Applicant the amount of interest computed from the date the AR-1 was deemed filed with the American Arbitration Association, at the rate of 2% per month, simple, and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

The Applicant's attorney is entitled to one attorney fee in accordance with 11 NYCRR 65-4.6.

- 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 NY

SS :

County of Queens

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

11/29/2023
(Dated)

Matthew J. Cavalier

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:
769f19570ead050f1589e169346fd2d3

Electronically Signed

Your name: Matthew J. Cavalier
Signed on: 11/29/2023