

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Surgery Center Of Queens (Applicant)	AAA Case No.	17-23-1292-3399
	Applicant's File No.	SS-239128
- and -	Insurer's Claim File No.	2021006166-5210088219
A. Central Insurance Company (Respondent)	NAIC No.	11105

ARBITRATION AWARD

I, Mary Anne Theiss, 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 11/29/2023
Declared closed by the arbitrator on 11/29/2023

Joseph Padrucco, Esq. from Samandarov & Associates, P.C. participated virtually for the Applicant

Christin Gullo, Esq. from Gullo & Associates, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$13,448.07**, was AMENDED and permitted by the arbitrator at the oral hearing.
The original amount claimed was \$13,448.07, it was amended by agreement of the parties to \$13,366.71. Of note, there's \$11,420.94 left on the policy.

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

3. Summary of Issues in Dispute
The Claimant, a twenty-eight-year-old female was a restrained driver of a vehicle that was struck in the rear by another car. Following the accident, the Claimant was seen at Vassar Brothers Medical Center. The accident was on September 30, 2021.

The Applicant New York Surgery Center of Queens is seeking \$1,366.71 reimbursement for surgery that was performed on December 21, 2022.

The denial is based upon an examination by Luc Perrier, M.D., an orthopedic surgeon. The examination was - a re-examination on July 20, 2022. There were also examinations on March 29, 2022, and January 25, 2022.

4. Findings, Conclusions, and Basis Therefor

The Claimant, a twenty-eight-year-old female was a restrained driver of a vehicle that was struck in the rear by another car. Following the accident, the Claimant was seen at Vassar Brothers Medical Center. The accident was on September 30, 2021.

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The Applicant has established a prima facie case of entitlement to benefits. Once an applicant has established a prima facie case of entitlement to No-Fault benefits, the burden then shifts to the insurer to prove that the disputed services were not medically necessary. To meet this burden, the insurer's denial(s) of the applicant's claim(s) must be based on a peer review, IME report, or other competent medical evidence that sets forth a clear factual basis and a medical rationale for the denial(s). *Amaze Medical Supply, Inc. v. Eagle Ins. Co.*, 2 Misc. 3d 128A (App. Term, 2nd Dept., 2003); *Tahir v. Progressive Cas. Ins. Co.*, 12 Misc. 3d 657 (N.Y.C. Civ. Ct., N.Y. Co., 2006); *Healing Hands Chiropractic, P.C. v. Nationwide Assurance Co.*, 5 Misc. 3d 975 (N.Y.C. Civ. Ct., N.Y. Co., 2004); *Millennium Radiology, P.C. v. New York Cent. Mut.*, 23 Misc. 3d 1121(A) (N.Y.C. Civ. Ct., Richmond Co., 2009); *Beal-Medea Prods., Inc. v. GEICO Gen. Ins. Co.*, 27 Misc. 3d 1218(A) (N.Y.C. Civ. Ct., Kings Co., 2010); *All Boro Psychological Servs., P.C. v. GEICO Gen. Ins. Co.*, 34 Misc. 3d 1219(A) (N.Y.C. Civ. Ct., Kings Co., 2012).

Dr. Perrier examined the Claimant on January 25, 2022, March 29, 2022, and July 20, 2022. During the examination on July 20, 2022, the Claimant stated that she was fine and that she was so much better. She stated "I want to put it all behind me" and she wanted to go back to work as an LPN. Dr. Perrier in his examination examined both shoulders and she had full range of motion. Hawkin's test was negative and she had no atrophy or weakness.

A review of the records indicates that an MRI that was performed on October 12, 2021, The findings on the MRI were intact rotator cuff tendon and trace amounts of fluid with subacromial/subdeltoid bursa, was non-specific and it was to be correlated with bursitis. There is no indication on that MRI that the Claimant had a SLAP tear.

An MRI arthrogram of the left shoulder with contrast was done on November 4, 2022, which now shows a SLAP type II tear, no rotator cuff tear. The previous examinations performed by Dr. Perrier were not provided.

In the January 20, 2022 examination, Dr. Perrier noted the Claimant had a facet block of the cervical spine at C-5, C-6. The Claimant stated that it helped a lot. The Claimant also had steroid injections in the subacromial space of the left shoulder. She also indicated

that helped. Dr. Perrier noted she was scheduled to have a lumbar facet infiltration the following day after the IME. He noted the Claimant returned to work on November 30, 2021, as an LPN without restrictions.

The payment log indicates that lost wages were not paid at all to the Claimant. Dr. Perrier also indicated the Claimant went back to work on November 30, 2021, without restrictions. She was working at Cedar Manor Nursing Home. Dr. Perrier's peer indicates that the Claimant fell in January of 2022. The examination by Dr. Perrier was normal on the left shoulder.

When an insurer, through a peer review or medical exam, presents sufficient evidence establishing a lack of medical necessity, the burden then shifts back to the applicant to present its own evidence of medical necessity. *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc. 3d 131(A) (App. Term, 2nd Dept., 2006); *Alfa Medical Supplies v. Geico General Ins. Co.*, 38 Misc. 3d 134(A) (App. Term, 2nd Dept., 2013).

Matthew Wert, M.D. offered a rebuttal signed but undated. He indicated that labral tears can be very painful and can easily be caused by a single traumatic event such as an accident. Such a traumatic event can easily cause tears and other injuries suffered by this Claimant as it did in this case. Dr. Wert doesn't mention the fact that the Claimant returned to work as an LPN without restrictions on November 30, 2021.

Dr. Wert stated that he clinically correlated the MRI findings with a positive O'Brien test and Speed's test. He stated these tests have a sensitivity of up to 75% and as high as 90%. He noted that a labral tear was noted on the MRI arthrogram and that this is quite accurate in detecting labral tears, however, he doesn't mention the MRI that was performed on October 12, 2021, one year before which did not show a SLAP tear. Dr. Wert also doesn't mention that the Claimant had a fall in January of 2022.

Dr. Wert noted that the Claimant started to suffer pain which was exacerbated by overhead motions and carrying heavy objects. Dr. Wert does not mention the fact that the Claimant has been working as an LPN since November 30, 2021, without restriction. This type of job would require heavy lifting. In contrast, Dr. Perrier found full range of motion in the shoulders. The right and left shoulder had an equal range of motion and was normal. Dr. Wert also noted that the Claimant had been attending physical therapy since the accident with mild improvement. There are no physical therapy notes to look at because they were not provided by either of the parties.

Documents signed by the Claimant at the time of the IME indicate she lost two weeks from work. She was working at the time of the examination. She indicated at the time of the accident her neck, head, back of the head, and lower back pain, headaches for about a week, and left arm and left shoulder pain. Her current complaints were minimal lower back pain. She indicated she had no numbness or tingling in any of her body parts. She also indicated that she discontinued physical therapy, chiropractic care, and acupuncture treatment in approximately May or June. This document was signed by the Claimant on July 20, 2022. On a Modified Intake Sheet the Claimant was asked what her physical limitations were and what she can no longer do since the accident and she stated she can't work too many hours or her body hurts and then in parentheses, she said her lower back. She never mentions her shoulders.

I find that Dr. Perrier's examination findings set forth a clear factual basis and a medical rationale for Respondent's denial of Applicant's claim for the continued orthopedic care and treatment in dispute. I find that Respondent has established a lack of medical necessity for continued orthopedic care and treatment.

It has been held that "For an expense to be considered medically necessary, the treatment, procedure, or service ordered by a qualified physician must be based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed with. Such treatment, procedure, or service must be warranted by the circumstances as verified by a preponderance of credible and reliable evidence and must be reasonable in light of the subjective and objective evidence of the patient's complaints." *Nir v. Progressive Ins. Co.*, 7 Misc.3d 1006(A), 2005 N.Y. Slip Op. 50466(U) (Civ. Ct. Kings Co., Nadelson, J., Apr. 7, 2005).

I disagree with Dr. Wert's rebuttal to the peer review. Therefore, I find Dr. Perrier's examination findings and the other details provided more credible and probative than Dr. Wert's rebuttal I find that the continued orthopedic care and treatment were not medically necessary. I sustain Respondent's defense to that effect. Said defense overcomes Applicant's prima facie case of entitlement to No-Fault compensation.

I want to thank the parties for taking the time to prepare their cases.

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 NY

SS :

County of NY

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

12/05/2023
(Dated)

Mary Anne Theiss

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:
a6bb67edbd55ede1f7a5f742f21b76a5

Electronically Signed

Your name: Mary Anne Theiss
Signed on: 12/05/2023