American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Introgen Inc. (Applicant)	AAA Case No.	17-22-1266-8868
	Applicant's File No.	BT21-161173
- and -	Insurer's Claim File No.	1102465-01
	NAIC No.	16616
American Transit Insurance Company (Respondent)		

ARBITRATION AWARD

I, Elyse Balzer, 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: EB

1. Hearing(s) held on 11/20/2023
   Declared closed by the arbitrator on 11/20/2023

   James di Carlo from The Tadchiev Law Firm, P.C. participated virtually for the Applicant

   Erisa Ahmedi from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$3,199.50**, 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

   This arbitration seeks payment for 30 days rental of a continuous passive motion (CPM) machine for the shoulder from 11/3/21 through 12/2/21 & the provision of a sheepskin pad to the 50 year old male eligible injured person EB for injuries sustained as a rear seat passenger in a vehicle involved in an accident on 8/16/21.

   The issues are:

Has respondent proven lack of causation between the accident of 8/16/21 and the post-surgery rental of DME?

Has respondent prove lack of medical necessity for the rental of a CPM & the provision of a sheepskin pad based on a peer review, dated 8/15/22, by Dr.

Respondent did not raise any issue of exhaustion and did not present any proof of exhaustion.

Respondent did not raise any issue of fee schedule to contradict applicant's fees and did not present any proof about fee schedule

All of the documents contained in the electronic case folder (ECF) for this case, maintained by Modria for the AAA, were reviewed.

The arbitration hearing was conducted via Zoom, as all arbitration hearings have been conducted telephonically since March 15, 2020 and via Zoom since February 2021 due to the COVID-19 pandemic.

4. Findings, Conclusions, and Basis Therefor

Applicant seeks payment for the rental of a shoulder CPM for the 30 day period of 11/3/21 through 12/2/21 & the provision of a sheepskin pad to EB.

The CPM had been prescribed (along with a CTU) by Dr. Edward Feliciano, MD following surgery on EB's right shoulder for a rotator cuff repair.

Dr. Feliciano's exam report of 10/4/21 noted that the right shoulder MRI showed impingement with a partial thickness rotator cuff tear, that EB had 2 months of non-operative treatment, and that EB continued to have pain, weakness & difficulty sleeping.

On 10/28/21 EB underwent right shoulder arthroscopic surgery with rotator cuff repair, labral repair, subacromial decompression with acromioplasty & synovectomy. Dr. Feliciano performed the surgery & was assisted by Maria Cambrain PA-C. The surgery was performed at Rockland & Bergen Surgery Center, LLC in Montvale, NJ,

Respondent denied applicant's claim for the rental of a shoulder CPM for the 30 day period of 11/3/21 through 12/2/21 & the provision of a sheepskin pad as follows:

> Surgery and surgically related services to the Right Shoulder are denied as not causally related to the accident of record based on attached peer review by Dr. Vito Loguidice, M.D. In addition, denied based on no medical necessity and no causal relationship between the accident and the Right Shoulder Surgery 10/28/21. No tears were sustained to the Right Shoulder in the accident of August 16, 2021.

Respondent presented Dr. Loguidice's peer review of 8/15/22.

This peer review reviewed Dr. Feliciano's surgical services, the anesthesia services, and the facility fees. No mention is made in the peer review about any CPM or sheepskin pad.

Respondent also presented the radiological review, dated 2/19/22 of Dr. Darren Fitzpatrick MD which was not listed in the denial to applicant and which Dr. Loguidice relied upon in forming his opinion about the right shoulder injury and surgery.

Applicant presented the rebuttal, dated 10/17/23, of its expert, Dr. David Gamburg, MD.

With regard to the defense of lack of causation, the respondent carrier has the burden of proof.

When the defense is lack of causation, the burden of proof rests on a carrier to prove that the injured person's injuries were unrelated to the subject accident. *Mount Sinai Hospital v. Triboro Coach Inc.*, 263 A.D.2d 11, 699 N.Y.S.2d 77 (2d Dep't 1999). See also *A.B. Med. Servs., PLLC v. Clarendon Natl. Ins. Co*., 25 Misc.3d 139(A) (App Term 9th & 10th Dists. 2009); *Capri Med., P.C. v. Progressive Cas. Ins. Co.*, 15 Misc.3d 143 (A) (App Term 2d & 11th Dists. 2007).

The burden of proof is upon the carrier to prove that the treated condition was unrelated to the automobile accident. *Central Gen. Hosp. v. Chubb*, supra; *Mount Sinai Hospital V. Triboro Coach, Inc.*, supra.

The question of whether the treated condition, and injuries, is causally related to the automobile accident is a factual issue. See, *Dumlao v. State Farm Ins. Co.*, 273 A.D.2d

517, 570 N.Y.S.2d 119 (App Div, 2d Dep't 1991); *In re Kolesnik v. State Farm Mutual Auto Ins. Co.*, 266 A.D.2d 630, 697 N.Y.S.2d 778 (App Div, 3rd Dep't 1999).

The court in *21st Century Sec. v. All*, 2018 NY Slip Op 30814(U) (Sup Ct NY Cty), aptly describes it as a "heavy burden."

The defense of lack of causation must be established by a preponderance of the evidence, *V.S. Med. Servs., P.C. v. Allstate Ins. Co*., 25 Misc.3d 39 (App Term 2d Dept. 2009).

An insurer's proof cannot be based solely upon "unsubstantiated hypotheses and suppositions," *A.B. Med. Services PLLC v. Eagle Ins. Co*., 3 Misc.3d 8, 9 (App Term 2d Dept. 2003); *Amstel Chiropractic P.C. v. Oni Indemnity Co.*, 2 Misc. 3d 129 (A) (App Term 2d & 11th Dists. 2004).

The court will examine the evidence and decide if it is sufficient to carry the carrier's burden of proof. See, e.g., *American Tr. Ins. Co. v. Intelligent Johnson*, 2021 NY Slip Op 30077(U) (Sup. Ct. NY Co. Jan. 12, 2021); cf, *Easy Care Acupuncture, P.C. v. Hartford Ins. Co*., 57 Misc.3d 147(A) (App Term 1st Dept. 2017).

The problem with Dr. Loguidice's opinion is that it is not entirely his own: he relies, for his lack of causation claim, on Dr. Fitzpatrick's opinion that the right shoulder MRI was "normal and there was no evidence of traumatic injury noted." Dr. Loguidice did not review the MRI film, although it is a standard practice for orthopedists such as himself to do so within their expertise.

Dr. Fitzpatrick's report and opinion was not listed in the denial to applicant and therefore cannot be evidence against applicant on the defense of lack of medical necessity.

Furthermore Dr. Fitzpatrick does not explain why he believed that the right shoulder MRI was "normal" without traumatic injury" and does not cite to any medical authority.

In addition, Dr. Fitzpatrick did not evaluated the other medical records relevant to EB's right shoulder injury, such as the physical therapy records commencing on 8/26/21. As such his opinion is not determinative of the full nature of the injury suffered, and/or aggravated, by the accident of 8/16/21.

It is clear that a carrier is responsible for No Fault benefits for "….losses caused by the accident, including those caused by aggravation of preexisting conditions." 11 NYCRR at 65-3.14.

The rebuttal accurately points out that EB was asymptomatic prior to the accident of 8/16/21 and only began to suffer from severe pain and limitation in the right shoulder after the accident.

Neither Dr. Loguidice nor Dr. Fitzpatrick address this salient point, that is, that an aggravation of preexisting conditions allows for no fault benefits and does not foreclose them.

After examining all of the proof, I find that respondent has failed to prove, by a fair preponderance of the credible evidence, the lack of causation.

With regard to the defense of lack of medical necessity, the respondent bears the burden of production and the burden of persuasion with respect to the lack of medical necessity of the treatment or testing for which payment is sought. *Nir v. Allstate Insurance Company*, 7 Misc 3d 544, 796 NYS2d 857 (Civ. Ct. Kings Co. 2005); *Bajaj v. Progressive Insurance Company*, 14 Misc 3d 1202(A), 2006 WL 3627946 (Civ. Ct. Queens Co. 2006); *Elm Medical, P.C. v. American Home Assurance Company*, 2003 NY Slip Op. 51357(U) (Civ. Ct. Kings Co. 2003); *Expo Medical Supplies, Inc. v. Clarendon Insurance Company*, 12 Misc 3d 1154(A), 819 NYS2d 209 (Civ. Ct. Kings Co. 2006); *City Wide Social Work & Psy. Serv. P.L.L.C. v. Travelers Indemnity Company*, 3 Misc 3d 608, 77 NYS2d 241 (Civ. Ct. Kings Co. 2004); *Fifth Avenue Pain Control Center v. Allstate Insurance Company*, 196 Misc 2d 801, 766 NYS2d 748 (Civ. Ct. Queens Co. 2003); *A.R. Medical Art, P.C. v. State Farm Mutual Automobile Insurance Company*, 11 Misc 3d 1057(A), 815 NYS2d 493 (Civ. Ct. Kings Co. 2006); *Hellander, M.D., P.C. v. State Farm Insurance Company*, 6 Misc 3d 579, 785 NYS2d 896 (Civ. Ct. Richmond Co. 2004); *A.B. Medical Services, P.L.L.C. v. New York Central Mutual Fire Insurance Company*, 7 Misc 3d 1018(A), 801 NYS2d 229 (Civ. Ct. Kings Co. 2005).

Dr. Loguidice's reasoning about lack of medical necessity is based on his claim that there was no evidence of deterioration in EB's right shoulder despite receiving a course of conservative treatment.

The treatment records, submitted by respondent, by physical therapists, acupuncturist and chiropractor, and the multiple exam reports, do not bear out Dr. Loguidice's opinion and show failure to improve and continued pain and limitation in the right shoulder.

In addition the rebuttal pointed out the continued positive exam findings, including a positive Hawkin's test for rotator cuff tear, proved the failure to improve. The rebuttal cited to numerous medical authorities to show that the right shoulder surgery, and

related services (including the CPM), were rightly prescribed and done so within the generally accepted standard of care.

In my opinion, the peer review is insufficient in factual basis and in showing any deviation from generally accepted standards of care and that the rebuttal full addressed and rebutted each point in the peer review and successfully proved the medical necessity of the disputed DME.

Respondent has not presented any proof or objection against applicant's fees.

Respondent has not presented any defenses other than those addressed above.

Based on the above applicant's claim is granted.

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**
	Introgen Inc.	**11/03/21 - 12/02/21**	**$3,199.50**	**Awarded: $3,199.50**

Total	**$3,199.50**	**Awarded: $3,199.50**

B. The insurer shall also compute and pay the applicant interest set forth below. 09/28/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

From 9/28/22 to date of payment of the award

C. Attorney's Fees

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

In cases filed before 2/4/15, the Respondent shall pay the Applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e)(effective April 5, 2002). For cases filed after 2/4/15, the respondent shall pay the Applicant an attorney's fee in accordance with newly promulgated 11 NYCRR 65-4.6 (d), as amended by the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D).

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 Westchester

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

12/20/2023
(Dated)

Elyse Balzer

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:
75c6c25b34de2bfdd95776bb1beff1e9

Electronically Signed

Your name: Elyse Balzer
Signed on: 12/20/2023