American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Sanford R Wert MD, PC (Applicant)	AAA Case No.	17-23-1310-5834
	Applicant's File No.	164476
- and -	Insurer's Claim File No.	4-220133-01
	NAIC No.	36030
Maya Assurance Company (Respondent)		

ARBITRATION AWARD

I, Darren Sheehan, 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 12/14/2023
   Declared closed by the arbitrator on 12/14/2023

   Emilia Rutigliano from Law Office of Emilia I. Rutigliano, P.C. participated virtually for the Applicant

   Bryan Visnius from De Martini & Yi, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$1,349.19**, 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 submitted a bill in the amount of $1,349.19 for date of service 4/14/2023. The bill relates to the physician assistant's charges associated with a right shoulder arthroscopic surgery performed for the claimant, a 69-year-old male involved in a motor vehicle accident on 6/4/2022. The bill was denied payment by respondent on the basis of a peer review prepared by Julio Westerband, M.D., dated 5/16/2023, who determined that the surgery, as well as any related charges, were not medically necessary.

4. Findings, Conclusions, and Basis Therefor

The insurer's expert must show that the services provided were inconsistent with the generally accepted medical/professional standards that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling. *Prime Psychological Services P.C. v. Progressive Casualty Ins. Co.*, 24 Misc 3d 1244(A), 2009 N.Y. Slip Op. 51868(U) at 3 (Civ. Ct. Richmond Co., Katherine A. Levine, J., Aug. 5, 2009).

"[T]here appears to be no basis in the law, and no basis in logic, for accepting an affirmed peer review doctor's opinion, *carte blanche*, without scrutinizing the report's content." Where a peer review opinion rests upon conclusory assumptions and/or disputed facts, the review is insufficient to prove the insurer's entitlement to judgment as a matter of law on its lack of medical necessity defense. *Novacare Medical P.C. v. Travelers Property Casualty Ins. Co.*,, 31 Misc. 3d 1205(A), 2011 N.Y. Slip Op. 50500(U) at 4 (Dist. Ct. Nassau Co., Michael A. Ciaffa, J., Apr. 1, 2011).

Dr. Westerband reported that the claimant was a restrained back seat passenger in a motor vehicle that was struck from the front in an accident occurring on 6/4/2022. The claimant sustained multiple injuries including relevant to our matter, his right shoulder.

Following the accident, the claimant was evaluated at the emergency room of St. Luke's Hospital wherein the words of the peer reviewer, he was "evaluated, treated and released". No further details were provided.

Dr. Westerband noted that our claimant had a prior right shoulder injury that resulted in arthroscopic surgery just one year earlier.

While as mentioned, the accident occurred on 6/4/2022, the first record though addressed by the peer reviewer is the 9/22/2022 evaluation report from Sanford Wert, M.D. Thus, the first 3 months following the accident were completely ignored by Dr. Westerband.

To this 9/22/2022 report, he offered the following abbreviated summarization:

> Examination of the right shoulder revealed tenderness over the muscles and soft tissues of the deltoid, rotator cuff tendon insertion, greater tuberosity, and trapezius and biceps tendon in groove along with decreased range of motion.

> MRI report of the right shoulder was reviewed. Assessment was of right shoulder traumatic re-tear of the rotator cuff. Treatment plan was of right shoulder injection.

Dr. Westerband made the point that the MRI report for the right shoulder, as reviewed by Dr. Wert, was not made available to him, but he nevertheless included the results as he found them in Dr. Wert's report. Those results are as follows:

> "1. Evidence for prior rotator cuff repair as described above. 2. Full-thickness, full width tearing of the supraspinatus and infraspinatus tendons at and adjacent to the footprint with medial retraction of tom tendon fibers up to 5.7cm and marked degeneration of the medially retracted infraspinatus tendon fibers. 3. Mild articular sided fraying of the mid fibers of the subscapularis tendon adjacent to the lesser tuberosity superimposed upon a background of moderate tendinosis. 4. Mild supraspinatus muscle atrophy. 5. Chronic postoperative changes of the acromioclavicular joint. 6. The intra-articular portion of the long head of the biceps tendon is not well-visualized, which may reflect tendon tearing or postoperative change 7. Sub optimal assessment of the long head of the biceps tendon within the bicipital groove owing to motion artifact on the axial images. 8. Possible fraying of the posterior and superior labrum as well as possible tearing of the anterior, anteroinferior, and posteroinferior labrum, suboptimally assessed owing to motion artifact. 9. Cartilage loss within the glenohumeral joint as described above. 10. Small to moderate-sized glenohumeral joint effusion. 11. Moderate amount of fluid within the subacromial/subdeltoid bursa, nonspecific in the setting of full-thickness rotator cuff tendon tearing."

From September 2022, our peer reviewer then skips over the next 6 months to 3/23/2023, the date an independent medical examination ("IME") was conducted of the claimant by Adam Soyer, D.O. To this IME, we receive yet another brief synopsis: "Examination of the right shoulder revealed mild limitation in range of motion. Diagnostic impression was of right shoulder sprain with aggravation of prior surgery, resolved. Treatment recommendation: No need for further treatment."

Afterwards, he only touched on the surgery records.

To put all this into perspective, Dr. Westerband reviewed only 1 treatment record prior to the surgery even though 10 months passed between the accident date and surgery date.

It is impossible to find any shred of credibility in Dr. Westerband's medical rationale and conclusion against the performing of this surgery when only a single record was considered by him.

His fallback argument that causal relationship was not established because the claimant suffered a similar injury resulting in the same surgery is pure speculation given he never reviewed any of the medical records concerning this prior injury. This point is moot since the doctor followed up this baseless comment with the contradictory admission that the accident of 6/4/2022 "appeared[ed] to have aggravated the previous right shoulder surgical changes." Thus, to say the recent accident contributed to aggravating a pre-existing injury is to say it is in fact causally related. Either way, it makes no difference still all of these claims are unsubstantiated due to the doctor's incomplete analysis.

As such, I award in favor of applicant.

Counsel for respondent objected to the billed amount arguing that it was not consistent with the New York State Workers' Compensation Fee Schedule ("fee schedule").

Since respondent raised the issue of a fee schedule defense, it is incumbent upon respondent to establish that the fees charged were excessive and not in accordance with the fee schedule. *Vincent Med. Servs. P.C. v. GEICO Ins. Co.*, 29 Misc.3d 141(A), 920 N.Y.S.245 (App. Term 2nd Dept. 2010); *Raz Acupuncture, P.C. v. Praetorian Ins. Co.*, 34 Misc.3d 152(A), 951 N.Y.S.2d 83, (App. Term 2nd Dept. 2012); *Rogy Medical, P.C. v. Mercury Cas. Co.*, 23 Misc3d 132(A) (App. Term 2nd 2009).

Therefore, respondent has the burden to come forward with "competent evidentiary proof supporting its fee schedule defense." *Robert Physical Therapy, P.C. v. State Farm Mutual Automobile Ins Co.*, 13 Misc.3d 172, 176, 822 N.Y.S.2d 378, 381 (Civ. Ct. Kings Co. 2006). Continuing, this Court held that defendant was not competent to opine on a particular fee schedule issue involving medical testing. "In the absence of any

testimony by a competent medical profession, this court cannot determine whether plaintiff's charges were medically appropriate. Since it was defendant's burden to make out its defense, the court finds that defendant has failed to carry its burden". See also, *Continental Med. P.C. v. Travelers Indem. Co.*, 11 Misc 3d 145(A), 819 N.Y.S.2d 847 (App. Term, 1st Dept. 2006); *Jamil M. Abraham, M.D. v. Country-Wide Ins. Co.*, 3 Misc.3d 130(A), 787 N.Y.S.2d 678 (App. Term, 2nd & 11th Jud. Dists., 2004).

In line with the above, Courts have discouraged taking judicial notice of the NYS Workers' Compensation Fee Schedule since the fee schedule, in and of itself, does not establish that the insurer properly utilized the codes set forth within it to calculate the amount which a health service provider was entitled to recover for each service rendered. *Acupuncture Healthcare Plaza 1, P.C. v. MetLife Auto & Home*, 54 Misc. 3d 142(A), 2017 N.Y. Slip Op. 50207(U) (App. Term 2d, 11th & 13th Dists. Feb. 8, 2017).

As to the question of what level of proof is required to demonstrate a fee schedule defense the courts have offered some guidance. For example, in the matter of *Gentle Acupuncture, P.C. v. tri-State Consumer Ins. Co.* 55 Misc. 3d 147(A), 2017 N.Y. Slip Op. 50706(U) (App. Term 9th & 10th Jud. Dists. May 23, 2017) it required "an expert's affidavit to explain its interpretation of the fee schedule at issue". While it is not required that this "expert" be certified (*see, Acupuncture Approach P.C. v. USAA General Indemnity Co.* 59 Misc. 3d 1231(A), 2018 N.Y. Slip Op. 50807(U) (Civ. Ct. New York Co., Mary V. Rosado, J., Apr. 24, 2018), this affidavit must articulately explain the affiant's analysis in a coherent manner and must provide not only the appropriate relative value units but also the conversion factor to support its position. *Tyorkin v. Garrison Property & Casualty Ins.. Co.*, 51 Misc. 3d 1227(A), 2016 N.Y. Slip Op. 50846(U) (Civ. Ct. Kings Co., Richard J. Montelione, J., May 20, 2016), *Renelique v. American Transit Ins. Co.* 57 Misc. 3dd 145(A), 2017 N.Y. Slip Op. 51450(U).

Besides raising the objection, respondent offered no argument or evidence to establish that applicant billed erroneously. Thus absent the required "competent evidentiary proof supporting its fee schedule defense," I award applicant the full amount in dispute.

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**
	Sanford R Wert MD, PC	**04/14/23 - 04/14/23**	**$1,349.19**	**Awarded: $1,349.19**
Total			**$1,349.19**	**Awarded: $1,349.19**

B. The insurer shall also compute and pay the applicant interest set forth below. 08/07/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from the filing date of this case, 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) (stay of interest).

C. Attorney's Fees

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

As this matter was filed after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 11 NYCRR 65-4.6(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 Suffolk

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

12/21/2023
(Dated)

Darren Sheehan

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:
1d72be67f30fd5c74c5a61805d39e156

Electronically Signed

Your name: Darren Sheehan
Signed on: 12/21/2023