

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Quality Orthopedics & Complete Joint Care, PC (Applicant)	AAA Case No.	17-23-1316-2319
	Applicant's File No.	LIP-30576
	Insurer's Claim File No.	1121668-012
- and -	NAIC No.	16616

American Transit Insurance Company
(Respondent)

ARBITRATION AWARD

I, Debbie Kotin Insdorf, 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 07/08/2024
Declared closed by the arbitrator on 07/08/2024

Robin Grumet, Esq. from Law Offices of Ilya E Parnas P.C. participated virtually for the Applicant

Adam Waknine, Esq. from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$13,439.74**, was AMENDED and permitted by the arbitrator at the oral hearing.

The Applicant's Attorney amended the amount in dispute to \$7,986.25 to be in accordance with the fee schedule.

Stipulations WERE made by the parties regarding the issues to be determined.

The amended amount is in accordance with the fee schedule.

3. Summary of Issues in Dispute

The Applicant is seeking reimbursement for left shoulder arthroscopic surgery performed 4/11/23, following a motor vehicle accident on 10/13/22, involving Assignor MA. The Respondent issued a timely denial based on the treated condition and injury not being causally related to the motor vehicle accident and based on the findings of an Independent Medical Examination performed by Dr. Eric Roth on 1/20/23.

4. Findings, Conclusions, and Basis Therefor

The Applicant's claim is for \$7,986.25 for left shoulder arthroscopic surgery performed on 4/11/23 by Surgeon Aleksandr Khaimov and Physician Assistant David Davydov.

The Respondent issued a timely denial stating, "Entire claim is denied based upon American Transit's investigation and on examination under oath of the claimant conducted on 06/23/2022. American Transit is asserting a lack of coverage, as it has established the "fact or founded belief" that the claimant's treated condition and alleged injuries were unrelated to the motor vehicle accident. Claim is denied based on a lack of causation as opinion based on the biomechanical science report of Zachary Merrill, PH.D. dated July 05, 2023. Future Physical Medicine and Rehabilitation - Acupuncture No-Fault benefits are denied based on the attached report from Dr. Eric S Roth conducted on 01/20/2023. No further treatment is needed. The effective date of this denial is 02/13/2023."

On 6/23/24, the Respondent submitted the Summons and Complaint filed on 9/21/23 in the Supreme Court, County of Kings concerning this motor vehicle accident alleging this was a staged incident and, therefore, this claim was not a covered event and would be excluded based on the insurance policy and the regulations. The Respondent conceded that no stay was issued. I found no basis to adjourn the hearing and proceeded accordingly.

On 6/20/24, this Arbitrator rendered an award in the Matter of the Arbitration between Dr. Offenbacher Medical Imaging PLLC and American Transit Insurance Company (17-23-1311-5664). Both that case and the one herein involve the same motor vehicle accident, same Assignor and same defense (the treated condition and injury were not causally related to the motor vehicle accident). The Applicant in the other case was seeking reimbursement for an MRI of the left knee performed 12/29/22.

This Arbitrator wrote in pertinent part, "The burden to prove whether the motor vehicle caused the medical condition for which the Assignor was treated remains on the no-fault carrier when they assert a lack of nexus between the accident and the condition. The Examination Under Oath of the Assignor was held on 6/23/23. The Respondent did not submit an outline or summation of what specifically was said by the Assignor to arrive at a conclusion that the injuries sustained were not causally related to the 10/13/22

motor vehicle accident. The following questions were asked and the Assignor answered: (page 19, lines 3-6). 'Q. I know you said that you were injured at the time of the accident. What parts of your body were hurting at that time? A. It was where the seat belt was right up on the top shoulder blades, my shoulder hurt bad. I was holding onto it. But I thought - - they thought I was having a heart attack. Q. So it was your left shoulder? A. It was my left shoulder.' When asked what parts of the body the Chiropractor was treating, the Assignor answered, 'Just for the back and the other guy for the shoulder and my neck' (pgs 24, 25; lines 23-25, line 2). When asked what parts of the body the physical therapist treated, the answer was back and my shoulder (pages 23, 24; lines 23-25 and 2-3). When asked if they were injections, the Assignor indicated there were injections for the neck and back (pages 23, lines 24-25). When asked if there was any surgery, the Assignor said there was surgery on the shoulder (pg 27, lines 4-5). The Assignor noted there were X-rays taken on knee, back, neck and shoulder (pg 28, lines 12-14). Otherwise there was no mention of the knee. There were no medical reports submitted by the Respondent. There was no investigative report submitted. The Applicant provided the referral for the MRI dated 12/22/22. However, the Biomechanical Analysis Report relied upon by Respondent to establish lack of causation noted the following, 'Based on her testimony and medical records, Assignor complained of injuries to her cervical and lumbar spines, left shoulder, and left knee, including multiple spine disc bulges and disc herniations, left shoulder supraspinatus tear, and left knee medial meniscal tear. Assignor's kinematics, however, provided no mechanism for substantial loading on her left shoulder or left knee. Assignor was seated at the time of the impact, and her knees were not bearing the weight of her body. The right rear shoulder harness crossed Assignor's right shoulder, applying no forces to her left shoulder, and during her initial forward motion, it was possible that Assignor's knees had contacted the vehicle interior structures in front of her. Nevertheless, based on the low acceleration of her body, any interactions between her left shoulder or left knee and the vehicle interior would have been associated with minimal joint loading, and below the threshold to cause acute, traumatic injury. These findings are consistent with Assignor's left shoulder and left knee MRI studies and MRI study reviews, in which no acute finding was identified but degenerative changes were noted.' In Mount Sinai v. Triboro Coach, 699 N.Y.S. 2d 77 (2d Dept. 1999), the Court was presented with a causation defense and found that where the injured party had complaints of injury shortly following a motor vehicle accident, that 'so far as could be ascertained from the record before it, the injury that F had sustained on the defendant's bus could qualify as an aggravation of a preexisting condition, which was covered by no-fault insurance.' In Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 AD. 3d 13, 871 N.Y.S. 2d 680 (2d Dept. 2009), citing Mount Sinai v. Triboro Coach the Court discussed the issue of causality, noting that 'Unlike negligence actions where plaintiffs must prove causation, plaintiffs seeking to recover first party no-fault payments bear no such initial burden, as causation is presumed.' The court went on to state that where an insurer presents the defense of causation, that they must set forth evidence of a 'fact or founded belief that the alleged injury does not arise out of an insured incident'. 'The question of whether such conditions were wholly unrelated to his automobile accident or not exacerbated by the accident cannot be resolved without recourse to the medical facts.' Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 AD. 3d 13, 871 N.Y.S. 2d 680 (2d Dept. 2009), citing Mount Sinai v. Triboro Coach, 699 N.Y.S. 2d 77 (2d Dept. 1999)."

This Arbitrator concluded, "After reviewing all of the documents on file in the ADR Center maintained by the American Arbitration Association and considering the arguments set forth by both sides, I find the Respondent's denial cannot be upheld. The evidence was insufficient to sustain the defense that the treated condition and injury was unrelated to the accident."

I concur with the analysis previously set forth with respect to causation.

On 1/20/23, an Independent PM&R and Acupuncture Examination was performed. Dr. Eric S. Roth wrote, "... states that on 10/13/22, she was the rear seat-passenger of an automobile that was involved in a motor vehicle accident. Assignor reports she was wearing a seatbelt. She denied any lacerations. She denied any loss of consciousness. She did go to a local hospital following the accident. She was given an arm sling and Tylenol. Assignor states she sought treatment for initial complaints of pain in the neck, low back and left shoulder. She was initiated on a regimen of physical therapy and chiropractic care, which she states included massage. She attended these treatments at an initial frequency of three times a week. She reports treatments have been helpful. She is currently continuing treatment three times a week. She states surgery was not performed. Additional tests were performed, which she states included MRIs of the neck, back, shoulder and knee."

The sixty six year old Assignor complained to Dr. Roth of neck pain which radiated to her arms and pain in the left shoulder.

Dr. Roth did not note any positive objective findings.

Dr. Roth's diagnoses were resolved cervical and lumbar spine sprains/strains; resolved left shoulder tendonitis; no evidence of Qi and blood stagnation in UB, DU and LI channels.

Dr. Roth concluded that the Assignor's subjective complaints were not correlated by objective findings. He concluded there was no medical necessity for further physical therapy, acupuncture or physiatry treatment to any of the areas examined.

In an action to recover assigned first-party no-fault benefits, an 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 [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue." Mary Immaculate Hospital v. Allstate Insurance Company, 5 AD3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004).

Once Applicant has established a prima facie case the burden is on the insurer to prove that the medical treatment was medically unnecessary. See, Citywide Social Work & Psychological Services, PLLC a/a/o Gloria Zhune v. Allstate Ins. Co., 8 Misc.3d 1025A, 806 N.Y.S.2d 444 (App Term 1st Dept 2005); A.B. Medical Services, PLLC v. Geico Ins. Co., 2 Misc 3d 26, 773 N.Y.S.2d 773 (App Term, 2nd & 11th Jud Dist 2003); Fifth

Ave. Pain Control Center a/a/o Gladys Quintero v. Allstate Ins. Co., 196 Misc.2d 801, 766 N.Y.S. 2d 748 (Civ. Ct. Queens Co. 2003). "A denial premised on lack of medical necessity must be supported by competent evidence such as an independent medical examination, peer review or other proof which sets forth a factual basis and medical rationale for denying the claim." Healing Hands Chiropractic, P.C. a/a/o Cleeford Franklin v. Nationwide Assurance Company, 5 Misc.3d 975, 787 N.Y.S. 645, (Civ. Ct NY Co. 2004). Restated, the evidence must at least show that the services were inconsistent with generally accepted medical/professional practice. Once the generally accepted medical practice (the medical rationale) is articulated, the expert must apply the facts of the case and only then may she properly conclude the services in issue were not medically necessary due to the provider's violation of the generally accepted medical standards.

On 3/01/23, Dr. Aleksandr Khaimov performed a follow-up orthopedic examination. He noted the Assignor still had pain in the left shoulder and left knee despite physical therapy treatments. Examination of the left shoulder revealed tenderness, decreased motor strength and positive testing (Hawkins, O'Brien, and Neer). Examination of the left knee revealed slight swelling, tenderness, pain elicited with varus and valgus stress and positive testing (McMurray, Apley and patellofemoral grind). There was decreased motor strength.

The diagnoses were traumatic rotator cuff tear, left shoulder; traumatic patellofemoral chondral injury, left knee. The treatment plan included left shoulder arthroscopic surgery.

After reviewing all of the documents on file in the ADR Center maintained by the American Arbitration Association and considering the arguments set forth by both sides, I find that Applicant's medical records and specifically the examination by Dr. Aleksandr Khaimov on 3/01/23 revealed the Assignor continued to be symptomatic and she required further treatment after the effective cut-off date. The Applicant's evidence was sufficient to refute the findings of Independent Medical Examiner Roth.

Accordingly, the Respondent's denial cannot be upheld. The Applicant is awarded \$7,986.25.

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	Amount Amended	Status
	Quality Orthopedic s & Complete Joint Care, PC	04/11/23 - 04/11/23	\$12,140.69	\$7,214.32	Awarded: \$7,214.32
	Quality Orthopedic s & Complete Joint Care, PC	04/11/23 - 04/11/23	\$1,299.05	\$771.93	Awarded: \$771.93
Total			\$13,439.74		Awarded: \$7,986.25

B. The insurer shall also compute and pay the applicant interest set forth below. 09/13/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the motor vehicle accident occurred after Apr.5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. 11 NYCRR 65-3.9(a). If an applicant does not request arbitration or institute a lawsuit within 30 days after receipt of a denial of claim form or from the payment of benefits, interest shall not accumulate on the disputed claim or element until such action is taken. 11 NYCRR 65-3.9(c). In accordance with 11 NYCRR 65-3.9 (c),

interest shall be paid on the claim (s), totaling \$7986.25 from 9/13/23, the date the arbitration was commenced.

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). The insurer shall pay the applicant an attorney's fee, in accordance with 65-4.6(d). This amendment takes into account that there is an attorney fee of 20% of benefits plus interest with no minimum fee and a maximum attorney fee of \$1360.00.

- 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 New York

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

07/17/2024
(Dated)

Debbie Kotin Insdorf

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:
ac3d309a98c984269c502cd55a6cb5f2

Electronically Signed

Your name: Debbie Kotin Insdorf
Signed on: 07/17/2024