American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Millard Fillmore Suburban Hospital (Applicant)	AAA Case No.	17-24-1332-8358
	Applicant's File No.	24-52751
- and -	Insurer's Claim File No.	636711-GO
	NAIC No.	25453
Nationwide Insurance Company Of America (Respondent)		

ARBITRATION AWARD

I, Kihyun Kim, 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: the Assignor

1. Hearing(s) held on 06/27/2024
   Declared closed by the arbitrator on 06/27/2024

   Nicole Jones, Esq. from The Morris Law Firm, P.C. participated virtually for the Applicant

   Gina Spiteri, Esq. from Law Offices of Brian Rayhill participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$50,896.08**, was AMENDED and permitted by the arbitrator at the oral hearing.

   The amount in dispute was amended to $5,888.37 to reduce Applicant's charges to an amount asserted to be consistent with the fee schedule.

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

   The parties stipulated to Applicant's prima facie case and to Respondent's timely denial.

3. Summary of Issues in Dispute

   The issue presented is whether the services were medically necessary.

The Assignor (DB) was a 63-year-old male who was the driver of an automobile that was involved in an accident on May 25, 2023. Applicant seeks reimbursement in the aggregate amount of $5,888.37 for the facility services provided to the Assignor related to the right reverse total shoulder arthroplasty procedure conducted on November 14, 2023. Reimbursement was denied based on a peer review by Howard A. Kiernan, M.D., dated December 20, 2023.

4. Findings, Conclusions, and Basis Therefor

This arbitration was conducted using the documentary submissions of the parties contained in the ADR Center, maintained by the American Arbitration Association. I have reviewed the documents contained therein as of the closing of the hearing, and such documents are hereby incorporated into the record of this hearing. The hearing was held by Zoom video conference. Both parties appeared at the hearing by representatives, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

At the hearing, Respondent acknowledged receipt of Applicant's bill in this matter and the parties stipulated to Applicant's prima facie case and to Respondent's timely denial. Respondent presented no evidence regarding Applicant's charges and the fee schedule at the hearing.

The Assignor was a 63-year-old male who was injured in an automobile accident on May 25, 2023. Following the accident, the Assignor went to the hospital where he was evaluated, treated and released without admission. The Assignor later sought treatment for his injuries from various providers, who started him on a course of conservative treatment including physical therapy and chiropractic care.

On November 14, 2023, the Assignor underwent a right reverse total shoulder arthroplasty procedure performed by Timothy McGrath, M.D., and assisted by Dr. Braunlich and Christina Fitzsimmons, RNFA, at a facility in Williamsville, New York. Applicant billed Respondent for the facility services related to the procedure, and Respondent timely denied Applicant's claims based upon the peer review, dated December 20, 2023, by Howard A. Kiernan, M.D., who found the surgery and all associated services to be medically unnecessary.

Applicant now seeks reimbursement in the aggregate amount of $5,888.37 for the facility services provided to the Assignor related to the right reverse total shoulder arthroplasty procedure conducted on November 14, 2023.

Legal Framework - Medical Necessity - Peer Review

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment (*Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13 [2d Dept. 2009]), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's

treatment. *See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp.*, 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

To support a lack of medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." *See Provvedere, Inc. v. Republic W. Ins. Co.*, 42 Misc 3d 141(A), 2014 NY Slip Op 50219(U) (App. Term 2d, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. *See generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 13 Misc 3d 136(A), 2006 NY Slip Op 52116 (App Term 1st Dept. 2006). The Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. *Amherst Med. Supply, LLC v. A. Cent. Ins. Co.*, 41 Misc 3d 133(A), 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet Respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. *See generally Nir v. Allstate Ins. Co.*, 7 Misc.3d 544, 547 (Civ. Ct. Kings Co. 2005). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Id.*, at 547 (*citing City Wide Social Work & Psychological Servs. v. Travelers Indem. Co.*, 3 Misc. 3d 608, 612 [Civ. Ct., Kings County 2004]).

To meet the burden of persuasion regarding medical necessity - in the absence of factually contradictory records - the applicant must submit a rebuttal which meaningfully refers to and rebuts the assertions set forth in the peer review report. *See generally, Pan Chiropractic, P.C. v Mercury Ins. Co.*, 24 Misc 3d 136[A], 2009 NY Slip Op 51495[U] (App Term, 2d, 11th & 13th Jud Dists 2009).

Legal Framework - Causation

With regard to causation of injuries in no fault matters, the courts have held that causation is presumed since "it would not be reasonable to insist that (an applicant) must prove as a threshold matter that (a) patient's condition was 'caused' by the automobile accident." *Mount Sinai Hosp. v. Triboro Coach*, 263 A.D.2d 11, 20 (2d Dept. 1999). Thus, the initial burden is on the insurer to come forward with proof establishing by "fact or founded belief" its defense that the claimed injuries have no nexus to the accident, *id.* at 19 (quoting *Central Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 N.Y.2d 195, 199), that is, that the conditions were not caused or exacerbated by the accident. S*ee Mount Sinai*, 263 A.D.2d 11, 18 - 19; *Kingsbrook Jewish Medical Center v. Allstate*

Ins. Co., 61 A.D. 3d 13, 871 N.Y.S.2d. 680 (2d Dept. 2009). Since No-Fault covers exacerbations of pre-existing conditions, *see Wolf v. Holyoke Mut. Ins. Co.*, 3 A.D.3d 660 (3d Dept. 2004), and if the insurer's own medical expert does not eliminate the possibility that the injured person sustained an exacerbation of a degenerative process, Respondent will be liable for coverage. *See Sanclemente v. MTA Bus Co.*, 2014 NY Slip Op 02280 (2d Dept., April 2, 2014); *Rodgers v. Duffy*, 95 A.D.3d 864 (2d Dept. 2012); *Pfeiffer v. New York Cent. Mut. Fire Ins. Co.*, 71 A.D.3d 971 (2nd Dept. 2010).

Peer review - Howard A. Kiernan, M.D., dated December 20, 2023

Respondent relies upon the peer review report by Dr. Howard A. Kiernan, dated December 20, 2023, in asserting lack of medical necessity for the facility services provided to the Assignor related to the right reverse total shoulder arthroplasty procedure conducted on November 14, 2023. At the outset, the peer report lists the various medical records that Dr. Kiernan reviewed and provides a brief medical history of the accident and the treatment that the Assignor received. Dr. Kiernan opined that based on review of the given medical records, the right shoulder surgery performed on November 14, 2023 was not medically necessary, and as the right shoulder surgery was not medically necessary, the pre and post-operative services including associated surgical facility services were also not medically necessary.

Dr. Kiernan explained that:

> The X-ray of the right shoulder revealed performed on 05/26/2023, revealed 'No acute abnormality the right shoulder. Chronic rotator Cuff tear with high riding humeral head and subacromial stenosis." The MRI of the right shoulder conducted on 06/22/2023, revealed "Sprain of the ac joint and the OS acromiale syndesmosis with contusion/edema and atrophy of the supraspinatus tendon, extensive full-thickness tear, and retraction of the infraspinatus tendon with superior migration of the humerus head and grade I - II slap tear. There is tendinitis of the long head of biceps tendon." The X-ray of the right shoulder revealed a chronic cuff tear and subacromial stenosis. The claimant was just a day post status post motor vehicle accident and the x-ray findings were of chronic tear. This indicates that the claimant had a history of injury prior to the MVA. The right shoulder injury was not causally related to the MVA of 05/25/2023. Hence, the right shoulder surgery was not casually related and not medically necessary.

Citing medical authority, Dr. Kiernan noted that: "The reverse shoulder replacement has revolutionized the treatment of many challenging and complex shoulder pathologies. Through alterations to the native shoulder biomechanics, the RTSA provides a stable shoulder in the absence of a functioning rotator cuff." Citing other medical authority, Dr. Kiernan also noted that Reverse total shoulder arthroplasty ". . . has revolutionized the treatment of shoulder disorders that previously had no easy or acceptable solution. Patient satisfaction with RTSA can be high, and most patients experience pain relief and improved function. Dr. Kiernan also explained that:

> In a conventional shoulder replacement, the damaged parts of the shoulder are removed and replaced with artificial components, prosthesis. A plastic cup is fitted into the shoulder socket and a metal ball is attached to the top of the upper arm bone. The prosthesis mimics the normal anatomy of the shoulder, using the rotator

cuff muscles to function properly. In a reverse total shoulder replacement, the socket and metal ball are switched. The metal ball is fixed to the socket and the plastic cup is fixed to the top of the upper arm bone. For patients with large rotator cuff tears or shoulder arthritis, arthropathy, reverse total shoulder replacement is a better option because the rotator cuff muscles no longer function. The reverse total shoulder replacement relies on the deltoid muscle, instead of the rotator cuff, to position and power the arm.

Dr. Kiernan asserted that the standard of care was to provide treatment to the injuries, which were causally related to the motor vehicle accident dated May 25, 2023. He found that as the right shoulder injuries were not causally related to the MVA dated May 25, 2023, the standard of care was deviated.

Analysis - Medical Necessity - Facility - DOS 11/14/23

After reviewing all of the submissions and taking into account the oral arguments of the parties, I find that Dr. Kelman's peer review fails to set forth a factual basis and medical rationale for his determination that the right shoulder surgery performed on November 14, 2023, as well as the pre- and post-operative services including associated surgical facility services, were not medically necessary. With respect to the alleged lack of causation, Respondent also failed to meet its burden to support its defense. I find the peer report to be conclusory and unpersuasive.

Without citing any specific medical authority, Dr. Kiernan sole basis for his opinion that the services herein were medically unnecessary was his assertion that the standard of care "was to provide treatment to the injuries, which were causally related to the motor vehicle accident 05/25/2023", and "[a]s the right shoulder injuries were not causally related to the MVA dated 05/25/2023, the standard of care was deviated." In effect, Dr. Kiernan attempts to equate lack of medical necessity with lack of causation. However, while lack of causation and lack of medical necessity may each relieve Respondent of any obligation to provide no fault benefits, lack of causation does not equate to lack of medical necessity. The peer report says nothing about the medical standards implicated in this case or whether or not such standards were met herein.

Moreover, the peer review does not even sufficiently establish that the Assignor's right shoulder injuries were not caused by the accident. Importantly, to establish a lack of causation in No-Fault, the insurance carrier must show that the condition or injuries are not related to the subject accident at all. See *Mount Sinai v. Triboro Coach*, 263 A.D.2d 11, 699 N.Y.S.2d 77 (2d Dep't 1999). The insurer must show how, when, and where the injuries were sustained and that there was no aggravation or exacerbation due to the covered accident. *Id.* Under the No-Fault Law causation is presumed and exacerbations of pre-existing injuries are covered. *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.,* 61 A.D.3d 13, 871 N.Y.S.2d 680 (2d Dep't 2009). Dr. Kiernan, however, never address the issue of exacerbation or aggravation. There is clear evidence in the record that the Assignor had at least some injury to his right shoulder following the accident. The objective findings of injury that were documented in the medical record were also confirmed by the surgical intervention, and Respondent effectively conceded as much in asserting that injuries were pre-existing and not acutely traumatic. However, Dr. Kiernan failed to address and rule out the possibility that the Assignor's injuries, even if

degenerative or pre-existing, were aggravated or exacerbated by the subject accident. I note the history documented at the initial orthopedic consultation by Lindsay Aldrich, RPA-C/A. Marc Tetro, M,D. on July 18, 2023, stated, among other things, that ". . . Immediately following the accident, [the Assignor's] initial symptoms/complaints included right shoulder pain as well as neck and back pain . . . Following the injury, [the Assignor] was then provided care . . . including x-ray and MRI. He was also given a cortisone injection by an outside orthopedic surgeon without any relief. He has no history of right shoulder pain or injury." The hospital records following the accident confirm such history, documenting among other things the complaints of right shoulder pain immediately following the accident, the x-rays and cortisone injection. There is also no evidence in the record to demonstrate that the Assignor's right shoulder was symptomatic before the subject accident and causation is presumed. A trauma can activate pre-existing asymptomatic diseases, and pain and function apparently can be greatly affected, even if there is little to no change in the structure and imaging remains largely normal. Respondent's peer reviewer does not address these issues. As noted previously, if the insurer's own medical expert does not eliminate the possibility that the injured person sustained an exacerbation of a degenerative process, Respondent will be liable for coverage. See *Sanclemente v. MTA Bus Co., supra*. Based on all of the foregoing, I find that Respondent failed to put forth sufficient credible evidence to support its lack of causation defense and has failed to meet its burden of production.

While peer report notes various positive findings from the Assignor's medical record, Dr. Kiernan provides no adequate explanation of his lack of medical necessity opinion or any meaningful discussion of the Assignor's medical history, the Assignor's symptomology, the clinical findings or the operative findings from the Assignor's medical record to support his opinion. The MRI evidence of the rotator cuff tears and possible labral tear alone could arguably support the clinical necessity of the surgery, particularly as the record also includes evidence of continued and arguably worsening pain and symptomology despite months of conservative care, and positive orthopedic testing and other objective findings in the medical records that appear consistent with the MRI findings. Dr. Kiernan provides no explanation why Dr. McGrath was not entitled to rely on the positive clinical and MRI findings in making his decision to proceed with the surgery. Dr. McGrath even documents in his August 10, 2023 report that while discussion was had with the Assignor regarding possible surgical intervention, the patient "understands this is reserved for if/when they fail conservative treatment." Surgery was conducted on November 14, 2023, more that thirteen weeks after the August 10, 2023 consult, and only after the Assignor's pain and other symptomology continued despite weeks of conservative care. In sum, Dr. McGrath reviewed the June 22, 2023 MRI which revealed multiple tears and other injuries in the right shoulder, and relying upon the MRI and other positive findings on physical examination which were consistent with the MRI findings, he ultimately elected to proceed with the right shoulder surgery after the conservative care had apparently failed to resolve Applicant's injuries and after discussing all the available options (including continued conservative care) with the Assignor. Dr. Kiernan failed to establish how Dr. McGrath acted in a manner that deviated from the standard of care. Additionally, Dr. Kiernan cited to no medical authority to support his opinion concerning the surgery, in fact, the medical authority cited arguably supported the utility and benefits of the surgery. The opinions offered by Dr. Kiernan were simply conclusory, without sufficient

explanation or support from the Assignor's medical record. Dr. Kiernan failed to adequately explain how the surgery and any associated or derivative services in this case were a deviation from the standard of care. Respondent failed to put forth sufficient credible proof to support its lack of medical necessity defense and has failed to meet its burden of production.

As Respondent has failed to meet its initial burden of production, I need not review the evidence submitted by Applicant to rebut Respondent's position. I find that presumption of medical necessity and causation attached to Applicant's prima facie case stands.

However, even assuming *arguendo* that the peer review was sufficient to meet Respondent's initial burden of production, Respondent's defense would still fail as Applicant's supporting medical records meaningfully addresses and adequately rebuts the assertions and opinions by Dr. Kiernan with respect to the medical necessity and causation of the surgery and associated services, including the facility services herein. Among other things, the Assignor's continued subjective complaints of pain and other symptomology despite a reasonable course of conservative care; the MRI findings (indicating rotator cuff tears and a possible labrum tear) relied on by the treating physician; and the persistent positive objective findings on examination adequately support the medical necessity and causation of surgery on the right shoulder, which was asymptomatic prior to the motor vehicle accident. Further, based on the circumstances and factual evidence presented, I find that some deference should be accorded to the treating provider, who actually performed examinations, established treatment and diagnostic plans, made diagnoses and performed medical services for the Assignor. Ultimately, I find Applicant's supporting medical records and arguments to be more credible and persuasive than the peer review.

Based on the totality of the evidence in the record, Applicant is entitled to reimbursement in the aggregate amount of $5,888.37 for the facility services provided to the Assignor related to the right reverse total shoulder arthroplasty procedure conducted on November 14, 2023.

Conclusion

For the reasons set forth above, Applicant is awarded reimbursement in the total amount of $5,888.37, with attorney's fees, interest and the arbitration filing fee as set forth below. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

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**
	Millard Fillmore Suburban Hospital	**11/14/23 - 11/14/23**	**$50,896.08**	**$5,888.37**	**Awarded: $5,888.37**
Total			**$50,896.08**		**Awarded: $5,888.37**

B. The insurer shall also compute and pay the applicant interest set forth below. 01/16/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall be computed from January 16, 2024, the AR-1 filing date, at the rate of 2% per month 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

Respondent shall pay the Applicant's attorney's fees in accordance with 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, Kihyun Kim, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

07/28/2024
(Dated)

Kihyun Kim

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
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Electronically Signed

Your name: Kihyun Kim
Signed on: 07/28/2024