

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

NYEEQASC, LLC d/b/a North Queens
Surgical Center
(Applicant)

- and -

Integon General Insurance Corporation
(Respondent)

AAA Case No.	17-23-1324-9754
Applicant's File No.	BT23-263855
Insurer's Claim File No.	230337704-002
NAIC No.	22780

ARBITRATION AWARD

I, Ioannis Gloumis, 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: EIP.

1. Hearing(s) held on 07/22/2024
Declared closed by the arbitrator on 07/22/2024

Sabine Sciarrotto, Esq. from The Tadchiev Law Firm, P.C. participated virtually for the Applicant

Michael Rago, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$16,818.59**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount of \$16,818.59 was amended by Applicant during the arbitration hearing to \$9,668.34.

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

3. Summary of Issues in Dispute

Applicant seeks reimbursement of charges for Ambulatory Surgery Center ("ASC") fees related to the right shoulder surgery that was performed on July 11, 2023, following a March 26, 2023 motor vehicle accident. Respondent defends the claim in dispute based

upon the defense of lack of medical necessity predicated upon the peer review report by Pierce Ferriter, M.D. dated August 11, 2023.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions contained in the American Arbitration Association's Electronic Case Folder in MODRIA, said submissions constituting the record in this case. This award is based upon the arguments that were presented by the parties during the arbitration hearing and the documentary evidence that has been submitted by the parties. There were no witnesses that testified during the arbitration hearing.

The EIP, then a 49-year-old female restrained passenger, was injured in a motor vehicle accident on March 26, 2023. Following the accident, the EIP went to the emergency department of Good Samaritan Hospital, where he was evaluated, treated, and later discharged. Thereafter, the EIP sought private medical attention for complaints of pain in the head, neck, bilateral shoulders, right hand, back, and left knee. Milan Sen, M.D. performed a right shoulder arthroscopy at Applicant's ASC on July 11, 2023.

Applicant billed Respondent \$16,818.59 for the ASC fees related to the right shoulder surgery. Respondent's claim specific denial dated August 1, 2023 states that Respondent received Applicant's bill for the claim in dispute on August 15, 2023. Therefore, Applicant has established its prima facie case. See *Amaze Med. Supply Inc. v. Allstate Ins. Co.*, 3 Misc.3d 133(A) (App Term, 2d & 11th Jud Dists 2004); *King's Med. Supply Inc. v. Country-Wide Ins. Co.*, 5 Misc.3d 767 (Civ Ct, NY County 2004).

Respondent timely denied the claim in dispute on August 15, 2023 based upon the defense of lack of medical necessity predicated upon the peer review report by Pierce Ferriter, M.D. dated August 11, 2023. Respondent also included the defense that Applicant's fees are not in accordance with the fee schedule.

In the August 11, 2023 peer review report, Dr. Ferriter opined that the right shoulder arthroscopy of August 8, 2023 was not medically necessary because the EIP did not receive any physical therapy sessions for the right shoulder before the recommendation of right shoulder arthroscopy on June 28, 2023 by Dr. Sen; and physical therapy could have resolved the symptoms. Dr. Ferriter opined that the EIP did not receive a cortisone injection to the right shoulder and the treating physician should have considered at least 3 cortisone injections in a span of one year before considering the right shoulder arthroscopy; and the MRI findings do not warrant an urgent surgical intervention as they can be easily treated with the progressively challenging plan of conservative treatment

and non-surgical modalities. Dr. Ferriter opined that the treatment offered to the EIP deviated from the standards of care.

Applicant presented a rebuttal from Milan Sen, M.D. dated May 23, 2024. Dr. Sen stated that the patient presented during the consultation on June 28, 2023 with right shoulder pain; the patient reported associated difficulty performing overhead activities, sleeping, and completing activities of daily living; the physical examination showed right shoulder with decreased range of motion; tenderness to palpation; and positive Neer's, Hawkins, Speed, Crossarm, and painful arc tests; the clinical impression at this time included full-thickness rotator cuff tear of the right shoulder; and the treatment plan included shoulder arthroscopy. Dr. Sen also discussed the findings of the June 20, 2023 MRI of the right shoulder, which included a full-thickness non retracted rim rent tear of the supraspinatus tendon from its anterior attachment site on the humerus with fluid decompressing into the subacromial bursa, a superimposed partial-thickness interstitial tearing and humeral surface tearing extending for an additional 1.2 cm from their non-retracted torn supraspinatus margin, underlying tendinosis/tendinopathy of the supraspinatus, and distal subscapularis tendinosis/tendinopathy. Dr. Sen stated that there are conflicting standards of care for rotator cuff injuries, and it is recommended that clinicians use their best judgement for surgical intervention. Dr. Sen cited literature and stated that it has been established that there is "significant variation in surgical decision-making and a lack of clinical agreement among orthopaedic surgeons about rotator cuff surgery." Dr. Sen opined that surgical intervention was medically necessary and in accordance with the standard of care considering that the patient suffered from an acute full-thickness traumatic tear. Dr. Sen indicated that such injuries are usually treated with immediate surgery, as delay can lead to significant muscle atrophy, tendon retraction, and poorer surgical results. Dr. Sen further stated that the claim that the treating physician should have to consider continuous physical therapy sessions for at least 3 to 6 months before the recommendation of right shoulder arthroscopy appears to solely represent to peer reviewer's personal opinion, as they fail to provide any of the aforementioned sources, and there is a plethora of peer reviewed literature that supports the treatment course that was enacted for this patient.

Furthermore, Dr. Sen cited literature and quoted same as stating that it has been established that there is "no benefit of subacromial steroid injection over NSAID," which had already failed to provide adequate pain relief to the patient; and "for patients with partial rotator cuff tear, corticosteroid plays a role in the short term but not in long-term pain reduction." Dr. Sen stated that steroid injections solely provide short-term pain relief and would not have healed the traumatic pathologies present in this patient; and the clinical course included persistent shoulder pain and impairment despite a sufficient trial of conservative management, and it was determined that the patient was an ideal candidate for surgical intervention. Additionally, Dr. Sen stated that the presence of full-thickness rotator cuff tear on MRI results of the shoulder confirmed the suspicion that the patient was suffering from an acute shoulder injury that necessitated surgical intervention, which was made evident by the fact that the presence of "SLAP tear" was confirmed intraoperatively during this patient's arthroscopic

procedure; and the shoulder arthroscopy was medically necessary in order to both assess the extent of the damage to the shoulder, as well as repair said damage.

In an addendum dated July 5, 2024, Dr. Ferriter stated that it was not necessary to perform an arthroscopy for helping the claimant return to pre-injury status; nothing was accomplished with the surgical procedure except providing symptomatic relief to the claimant; the surgery was performed because of the findings on the MRI only and the subjective complaints; and there was no repair done at the surgical procedure.

Furthermore, Dr. Ferriter stated that the statement by Dr. Sen clearly notes that the standard of care was not followed in this case as the claimant had not received adequate physical therapy treatment in presence of a trained therapist; there is no indication in the medical records that the claimant was provided adequate conservative management which would suffice the claimant's left shoulder pain; the outcome of any treatment procedure should be noted after providing it to the claimant; this claimant was not provided corticosteroid injections prior to the surgical intervention; this was not an adequate treatment management; and, based on the insufficient conservative management, the right shoulder arthroscopy was not medically necessary. Dr. Ferriter further stated that the treating surgeon did not provide the claimant with adequate conservative treatment prior to undergoing right shoulder arthroscopy; the cortisone shots were never attempted thus the surgeon could not predict the outcome of conservative care; the treating physician should have treated the claimant with injection therapy, including cortisone injections. there was no need to perform the surgery at this stage in the treatment process; and physical therapy and injection of any of the numerous available medications could have prevented the need for surgery.

Moreover, Dr. Ferriter stated that no case-specific explanation was provided which would explain the exact requirement for left shoulder arthroscopy; similar results can be easily achieved with the help of physical therapy and cortisone injections, which was not provided in this case; and there was a high probability that the left shoulder symptoms could have been resolved with further conservative treatment along with cortisone injections.

"At a no-fault trial involving a defense of lack of medical necessity, an insurer has an initial burden to rebut the presumption of medical necessity which attaches to a claim form." *Parkway Hospital, Inc. v. Integon National Ins. Co.*, 64 Misc.3d 139(A) (App. Term 2d, 11th & 13th Dists. July 19, 2019). See also *Dayan v Allstate Ins. Co.*, 49 Misc 3d 151[A] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]).

Furthermore, the Court in *King's Med. Supply Inc. v Country-Wide Ins. Co.*, 5 Misc 3d 767, 772 held the following, in relevant part:

"...a denial premised on lack of medical necessity must be supported by evidence such as an independent medical examination, peer review, or examination under oath "setting forth a sufficiently detailed factual basis and medical rationale for the claim's rejection" (*Amaze Med. Supply v Eagle Ins. Co.*, 2 Misc 3d 128[A], 2003 NY Slip Op 51701, *1 [App Term, 2d Dept 2003]; see also *Rockaway Blvd. Med. P.C. v Travelers Prop. Cas. Corp.*, 2003 NY Slip Op 50842[U] [App Term, 2d & 11th Dists 2003]; see also 11 NYCRR 65-3.8 [b] [4]; *Choicenet Chiropractic P.C. v Travelers Prop. Cas. Corp.*, 2003 NY Slip Op 50697[U] [App Term, 2d & 11th Jud Dists 2003]; *Rockaway Blvd. Med. P.C. v Allstate Ins. Co.*, 2003 NY Slip Op 50681[U] [App Term, 2d & 11th Jud Dists 2003])..."

Where the insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the applicant provider which must then present its own evidence of medical necessity. See *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc 3d 131(A) (2006).

While Dr. Ferriter opined that the shoulder surgery was performed prematurely before the EIP was treated with conservative treatments consisting of non-surgical modalities and cortisone injections, I am persuaded by Dr. Sen that the right shoulder surgery was medically necessary and in accordance with the standard of care in the medical profession. Dr. Sen has established that the EIP was clinically diagnosed with a full-thickness rotator cuff tear of the right shoulder and the shoulder arthroscopy was medically necessary in order to both assess the extent of the damage to the shoulder, as well as repair damage. Regarding the argument that the EIP did not receive sufficient physical therapy to the right shoulder, it remains unclear whether Dr. Ferriter had a complete clinical picture as the medical evaluation reports of April 10, 2023, May 8, 2023, and May 31, 2023 documented that the EIP was receiving physical therapy and was recommended to continue physical therapy, which was to include physical therapy treatment to the shoulders. Further, Dr. Sen stated that steroid injections solely provide short-term pain relief and would not have healed the traumatic pathologies present in this patient; and the clinical course included persistent shoulder pain and impairment despite a sufficient trial of conservative management, and it was determined that the patient was an ideal candidate for surgical intervention. Additionally, Dr. Sen documented that he performed subacromial decompression with anterior acromioplasty, rotator cuff repair using 4 anchors, debridement of the subscapularis tendon, SLAP tear, and anterior labrum, extensive debridement, major synovectomy, and lysis of adhesions. Dr. Sen further documented postoperative diagnoses of a complete rupture of the rotator cuff, a partial rotator cuff tear, a SLAP tear, a labrum tear, synovitis, impingement syndrome, and adhesive capsulitis. I am persuaded by Dr. Sen that the procedures that

were performed on July 11, 2023 were medically necessary and in accordance with the generally accepted standard of care in the medical profession.

Respondent presented the affidavit of Patricia M. Macy, RN, JD, PMP, CPC-P, CRC in support of its fee schedule defenses. Coder Macy opined that the total allowance for the services in dispute as per the New York EAPG is \$9,668.34. Applicant amended the amount in dispute to \$9,668.34.

Accordingly, Applicant's claim is hereby granted in the amount of \$9,668.34.

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
	NYEEQAS C, LLC d/b/a North Queens Surgical Center	07/11/23 - 07/11/23	\$16,818.5 9	\$9,668.34	Awarded: \$9,668.34

Total	\$16,818.59		Awarded: \$9,668.34
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B. The insurer shall also compute and pay the applicant interest set forth below. 11/13/2023 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 Applicant the amount of interest computed from the date of filing, 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

Respondent shall pay Applicant an attorney's fee in accordance with *11 NYCRR 4.6*.

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 Nassau

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

08/02/2024
 (Dated)

Ioannis Gloumis

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:
ec84f301ea7fec97a53780bba8688104

Electronically Signed

Your name: Ioannis Gloumis
Signed on: 08/02/2024