

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ambulatory Surgery Center of Western N.Y. (Applicant)	AAA Case No.	17-24-1332-2877
	Applicant's File No.	24-52662
- and -	Insurer's Claim File No.	8737390850000002
Geico Insurance Company (Respondent)	NAIC No.	22055

ARBITRATION AWARD

I, Kent Benziger, 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: R.C.

1. Hearing(s) held on 06/03/2024
Declared closed by the arbitrator on 07/29/2024

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

Philippa Tapada, Esq. from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$46,099.00**, 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

On January 20, 2022, the Assignor/Eligible Injured Party, a 66-year-old male, was involved in a motor vehicle accident. In dispute is the medical necessity and proper ambulatory fee schedule for right shoulder arthroscopy performed on June 16, 2023. The Respondent timely denied reimbursement for the arthroscopy based on the independent medical examination (hereinafter referred to as an IME) by Dr. David Feiner which terminated benefits as of July 1, 2022. Respondent's counsel contends the Applicant has failed to rebut Dr. Feiner's IME report with contemporaneous physical examinations and that the first significant findings as to a shoulder injury were months after the IME.

4. Findings, Conclusions, and Basis Therefor

On January 20, 2022, the Assignor/Eligible Injured Party, a 66-year -old male, was involved in a motor vehicle accident. Following the accident, the Assignor was evaluated at VA Hospital emergency room.

In dispute is the medical necessity and proper ambulatory fee schedule for right shoulder arthroscopy performed on June 16, 2023 including a rotator cuff repair, subpectoral bicep tenodesis, debridement, distal clavicle excision and subacromial decompression. The post-operative diagnoses included rotator cuff impingement, rotator cuff repair, SLAP lesion/glenoid labral repair, partial bicep partial tear and AC joint sprain with post-traumatic AC joint arthrosis.

Denial/IME. The Respondent timely denied reimbursement for the arthroscopy based on the independent medical examination (hereinafter referred to as an IME) by Dr. David Feiner which terminated benefits as of July 1, 2022.

On June 17, 2022, the Assignor was examined at the Respondent's request by Dr. David Feiner, an orthopedic. At the time of the IME, the Assignor complained of pain in the neck, mid-back, lower back, bilateral shoulders, left wrist, bilateral hip and left thumb. On examination, the Assignor had full range of motion in the cervical spine, thoracic spine, lumbar spine, both shoulders, both wrists and both hips. All orthopedic tests including those performed on the right shoulder were reported as negative. The Assignor was reported as having full muscle strength, no crepitus or any negative neurological findings. The impression included sprain of the cervical spine, thoracic spine, lumbar spine, bilateral shoulders, wrist contusions, hand/thumb contusions and hip pain - all resolved. Dr. Feiner noted the had pre-existing conditions including arthritis and injuries from a 2018 accident. He found no objective findings causally related to this motor vehicle accident. He found the finding of minimal lumbar spasm was related to the 2018 accident while findings of tenderness were subjective. Dr. Feiner found no necessity for further orthopedic or related treatment.

Treatment Records. Through consultation on March 28, 2022, April 26, 2022 and May 10, 2022, at Medical Care of Western New York at Buffalo the Assignor's complaints included pain in his head, neck, mid-back, low back and right hand/thumb. Following an examination, the diagnoses included cervical and lumbar sprain/strain and radiculopathy, possible herniations.

Analysis. A presumption of medical necessity attaches to a Respondent's admission of the Applicant's timely submission of proper claim forms, and the burden then switches

to the Respondent to demonstrate the lack of medical necessity. *Acupuncture Prime Care, P.C. v. State Farm Mutual Auto Ins.*, 2007 N.Y. Slip Op. 522273U; 2007 N.Y. Misc. LEXIS 7860 (Dist. Ct. Nassau Co. 12/3/2007); *A.B. Medical Services, PLLC v. N.Y. Central Mutual Fire Ins. Co.*, 7 Misc. 3d 1018(a), 801 N.Y.S.2d 229 (Civil Ct. Kings Co. 2005); *Citywide Social Work & Psychological Services v. Travelers Indemnity*, 3 Misc.3d 608, 609 (Civil Ct. Kings Co. 2004). Respondent thus bears "both the burden of production and burden of persuasion with respect to the medical necessity of the treatment or testing for which payment is sought". See: *Bajaj v. Progressive Ins. Co.* 14 Misc.3d 1202(A) (N.Y.C. Civ. Ct 2006). The quantum of proof necessary to meet Respondent's burden, at the bare minimum, is to "establish a factual basis and medical rationale for the lack of medical necessity of Applicant's services. *Id.* See also: *A.B. Medical Services*, supra.

As a finding of fact, Dr. Feiner's IME is persuasive. He conducted a thorough medical examination with no objective positive findings including no positive findings to the right shoulder. The Applicant has submitted no contemporaneous physical examinations to rebut Dr. Feiner's examination. Further, through the earlier treatment records of March 28, 2022, April 26, 2022 and May 10, 2022, the Assignor made no complaints as to injuries to his shoulders and there was no diagnosis of a shoulder injury. This arbitrator has reviewed the prior treatment and physical therapy records prior to the IME and has been unable to locate any complaints of a shoulder, injury, let alone positive findings or even a diagnosis of a shoulder injury.

The MRI of the right shoulder was administered on April 27, 202 - ten months after the IME. In this arbitration, the first report and as to significant complaints and an examination of the right shoulder are from a May 22, 2023 report. Therefore, the IME from June 17, 2022 is persuasive as to no positive findings in the right shoulder and no causal relationship.

The ultimate burden of proof on issues of medical necessity lies with the plaintiff. *Dayan v. Allstate Ins. Co.*, 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015). Once Respondent satisfied its burden of proof establishing a lack of medical necessity, "plaintiff must rebut it or succumb." *Bedford Park Medical Practice P.C. v. American Transit Ins. Co.*, 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 N.Y. Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). Applicant's claim is denied, and, therefore, the proper ambulatory fee schedule need not be discussed.

Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), an arbitrator is the judge of the relevance and materiality of the evidence offered.

APPLICANT'S CLAIM IS DENIED IN ITS ENTIRETY.

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 claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of NY

SS :

County of Orange

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

08/28/2024
(Dated)

Kent Benziger

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:
9ec8b54455858d10d1cb8aa55fb0633b

Electronically Signed

Your name: Kent Benziger
Signed on: 08/28/2024