

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Tri-Borough NY Medical Practice PC
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-23-1328-8735

Applicant's File No. n/a

Insurer's Claim File No. 0539480020002

NAIC No. 36447

ARBITRATION AWARD

I, Matthew Brew, 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: Injured Party or IP

1. Hearing(s) held on 08/12/2024
Declared closed by the arbitrator on 08/12/2024

Rajesh Barua, Esq. from Law Offices of Hillary Blumenthal LLC (Hoboken)
participated virtually for the Applicant

Lowell Handschu, Claims Specialist from LM General Insurance Company participated
virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$7,652.67**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated to Applicant's prima facie case and to the timeliness of Respondent's denial.

The parties further stipulated that should Applicant prevail, interest would accrue from the filing date of December 14, 2023.

3. Summary of Issues in Dispute

Applicants' assignor, hereinafter referred to as the Injured Party or "IP", is described as a then 42-yr-old female passenger of a motor vehicle involved in an accident on June 25,

2023. Subsequent to the loss, the IP sought various treatments in regard to injuries claimed to have resulted from the underlying MVA.

In this case, Applicant is seeking reimbursement in the amount of \$7652.67 in regard to its bill for right shoulder surgery and related services performed on October 5, 2023. Respondent received Applicant's bill on October 19 and denied same on October 26, 2023. Reimbursement was denied based in part upon a peer review by Dr. Stuart Springer, MD, dated October 26, 2023.

In response to the peer and in support of its claim, Applicant relies in part upon several rebuttals including one from Dr. Drazic who performed the surgery.

Respondent further argues that the amounts billed by Applicant exceed those provided by the applicable fee schedule.

Finally, I note that the parties stipulated to Applicant's prima facie case and to the timeliness of Respondent's denial.

Thus, the issues to be decided in this case are:

Whether Respondent established and sustained its lack of medical necessity defense in regard to Applicant's bill pertaining to the IP's right shoulder surgery performed on October 5, 2023?

If answered in the negative, whether Respondent established and sustained a viable fee schedule defense?

4. Findings, Conclusions, and Basis Therefor

In comparing all the relevant evidence submitted by the parties as contained in the electronic file maintained by the American Arbitration Association, and in consideration of the oral arguments presented by each party, ***I find in favor of Applicant in the amount of \$2594.21.***

Upon stipulating to the Applicant's prima facie case, the burden shifted to the Respondent to come forward with enough evidence to rebut the presumption of medical necessity that attached to the Applicant's bills. When raising a defense based upon a claimed lack of medical necessity, the insurer must, at a minimum, establish a detailed factual basis and a sufficient medical rationale in support of its position. Conclusions set forth in peer reviews may be insufficient if the peer review fails to provide specifics of the claim, is conclusory or otherwise lacks a basis in the facts of the claim.

When a Respondent carrier establishes a defense based on a lack of medical necessity the burden shifts back to the provider who then must come forward with its own evidence of medical necessity.

After reviewing applicable records and providing a history of the IP's condition and treatment, Dr. Springer determined that the shoulder surgery was not medically necessary.

In part, Dr. Springer noted that the IP had "13 sessions of physical therapy from 6/28/2023 to 9/25/2023 for the right shoulder". He maintains that he reviewed those reports.

Dr. Springer further referenced examination reports from July 10, 2023, an MRI from July 6, 2023, a prescription for medications dated July 12, 2023, and an orthopedic consultation with Dr. Drazic on August 8, 2023. Dr. Drazic performed the surgery.

Dr. Springer provided that:

As per the orthopedic consultation report dated 8/8/2023 by Robert Drazic, D.O., the claimant had a complaint of right shoulder pain rated as 7/10 on the pain scale. The pain was aggravated by overhead and daily living activities. Examination of the right shoulder revealed a restricted and painful range of motion. Hawkins test, Neer's test, and O'Brien's test were positive. The diagnoses were right shoulder pain, internal derangement, impingement, contusion, rotator cuff strain/tear, and labrum tear. Right shoulder arthroscopy was recommended.

As per the follow-up physical examination report dated 8/21/2023 by David Carmili, M.D., the claimant had a complaint of right shoulder pain rated as 8/10 on the pain scale. The pain was aggravated by daily physical activities. Examination of the right shoulder revealed tenderness. The range of motion was decreased. The diagnosis was right shoulder strain. Conservative treatment was advised...

On 10/5/2023 the claimant underwent bursectomy, lysis of adhesions, subacromial decompression with anterior acromioplasty, debridement of the supraspinatus tendon, subscapularis tendon, extensive debridement, major synovectomy, and PRP injection under deep IV sedation with interscalene block by Robert Drazic, D.O. The surgery was assisted by Shmuel Kaufman, P.A. As per the operative note, the presence of the physician assistant was essential due to the complexity of the procedure. The pre-operative diagnosis was right shoulder traumatic internal derangement. The post-operative diagnoses were labrum tear, SLAP tear, partial rotator cuff tear, synovitis, impingement syndrome, and bursitis.

Despite the foregoing, Dr. Springer argued that the disputed surgery was not medically necessary. He maintained that the standard of care would have included "at least 3 months" of conservative treatment prior to the referral for surgery.

Dr. Springer continued by providing:

In this clinical setting, the claimant was involved in the MVA on 6/25/2023 and sustained an injury to the right shoulder. On 10/5/2023, the claimant underwent right shoulder arthroscopy. The standard of care for a shoulder injury after a motor vehicle accident would be a trial of conservative treatment with various modalities of physical therapy, and acupuncture, applied for at least 3 months. As per the article, the doctor may offer surgery as an option for a torn rotator cuff if the pain does not improve with nonsurgical methods. Continued pain is the main indication of surgery. However, as per the available medical records, the claimant received only 13 sessions of conservative care in the form of physical therapy for the right shoulder complaints. Also, there was no evidence of contraindication of the conservative treatment. The conservative care received was inadequate to resolve the right shoulder pain. The claimant should have continued to receive conservative treatment in the form of physical therapy and should have initiated acupuncture treatment, and steroid injection before proceeding to the surgery. In cases of failure of the conservative treatment and steroid injection, surgery would have been appropriate. Hence, based on the above article, standard of care, and available medical records, the right shoulder surgery was not medically necessary.

I found the peer review sufficient in terms of establishing, at least *prima facie*, Respondent's lack of medical necessity defense. Dr. Springer's ultimate conclusion was supported by a "sufficiently detailed factual basis and medical rationale". Carle Place Chiropractic v. New York Central Mut. Fire Ins Co., 19 Misc.3d 1139(A), 866 N.Y.S.2d 90 (Table); Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance, 20 Misc.3d 144(A), 873 N.Y.S.2d 238 (Table). Further, the doctor's report provided specifics of the claim, referenced pertinent authority and did not appear conclusory.

Having established *prima facie* that the treatment was not medically necessary, the burden shifted to the Applicant to rebut the peer doctor's conclusions and to establish by a preponderance of the evidence the medical necessity for the disputed treatment. West Tremont Med. Diagnostic, PC v. Geico Ins. Co., 13 Misc.3d 131(A) (N.Y. App. Term 2006).

In response to the peer and in support of its claim, Applicant relies in part upon rebuttals from Shmuel Kaufman, PA dated November 20, 2023, Dr. Robert Drazic, DO, dated November 20, 2023 and Dr. Leonid Shapiro, MD, dated July 9, 2024. Dr. Drazic performed the surgery. Dr. Shapiro owns Tri-Borough NY Medical. Applicant also relied upon the submitted records and the arguments of counsel.

Each of the rebuttals provides a detailed history of the IP's condition and treatment. The rebuttals also discuss the peer and explain why each of the authors disagrees with Dr. Springer's conclusion regarding the lack of need for the surgery. Each also provides why, in their respective opinions, the disputed surgery was necessary.

Reference is made to all three rebuttals. Particular attention is called to Dr. Drazic's since he is a medical doctor and also the surgeon who actually performed the procedures at issue. In part, he provide that:

MRI of the right shoulder performed on 7/26/2023 revealed tear of the anterior superior labrum, partial tear of the bursal surface of the myotendinous supraspinatus, fluid in the subdeltoid bursa and joint capsule compatible with bursitis and tenosynovitis.

On 8/8/2023, the patient presented to Shmuel Kaufman, PA-C, supervised by me for an orthopedic evaluation. At that time, the patient complained of 7/10 right shoulder. The patient also reported pain exacerbation by bending or twisting, when reaching above shoulder level, lifting, or pulling. Examination of the right shoulder revealed decreased and painful range of motion in all planes, positive Neer Impingement test, O'Brien's test and Hawkins test. Based on the patient's complaints and findings upon evaluation, the diagnosis was: right shoulder pain, impingement, contusion, internal derangement, labrum tear and rotator cuff strain/tear. The patient was therefore recommended for right shoulder arthroscopy.

On 10/5/2023, the patient presented to me at Global Surgery Center for right shoulder arthroscopy. Upon examination, the pre-operative diagnosis was: right shoulder traumatic internal derangement. The intra-operative findings were: 1. partial rotator cuff tear, 2. SLAP tear, 3. Synovitis, 4. Labral tear, 5. Impingement syndrome and 9. Bursitis. I then performed bursectomy, lysis of adhesions, subacromial decompression with anterior acromioplasty, debridement of the supraspinatus tendon, subscapularis tendon, SLAP tear, anterior labrum, and posterior labrum, extensive debridement, major synovectomy and PRP injection. The post [I]operative diagnoses were: SLAP tear, impingement syndrome, synovitis, labral tear, partial rotator cuff tear and bursitis....

Dr. Springer stated that based on the cited article, standard of care, and available medical records, the right shoulder surgery was not medically necessary. In response to this, I would note that when the patient presented to me, at the time, the patient complained of 7/10 right shoulder. The patient also reported pain exacerbation by bending or twisting, when reaching above shoulder level, lifting, or pulling. Examination of the right shoulder revealed decreased and painful range of motion in all planes, positive Neer Impingement test, O'Brien's test and Hawkins test. Also, MRI of the right shoulder revealed tear of the anterior superior labrum, partial tear of the bursal surface of the myotendinous supraspinatus, fluid in the subdeltoid bursa and joint capsule compatible with bursitis and tenosynovitis. All these above findings warrant right shoulder arthroscopy.

Clearly, this matter involved conflicting expert opinions as to the need for the right shoulder surgery. Upon carefully reviewing the pertinent evidence submitted by both

sides, and in contemplation of the arguments presented by the parties during the hearing, I found Respondent established, prima facie, its lack of medical necessity defense. Thus, the burden shifted to Applicant rebut Respondent's showing, and to establish by a preponderance of the evidence the medical need for the disputed treatment.

Based on the evidence presented in this case, in my opinion, Applicant satisfied its burden. After reviewing the applicable documents including the peer, the rebuttals and the submitted records, I ultimately found Applicant's evidence and arguments more persuasive on the issue of medical necessity.

In part, given this IP's specific documented findings as noted in both the peer review and in the multiple rebuttals, I found Applicant's arguments regarding the need for the surgery to be more compelling.

Applicant is therefore entitled to reimbursement in regard to the right shoulder surgery performed on October 5, 2023.

Fee Schedule

Respondent's counsel argues that, even if the disputed surgery is deemed necessary, any amount awarded Applicant must be reduced to comply with the amounts allowed by the applicable fee schedule. In this case, that amount would total \$2594.21.

When denying or reducing a claim based upon the charged fees being in excess of the amount permitted by the applicable fee schedule, the Respondent bears the burden of coming forward with "competent evidentiary proof" supporting its defense. Robert Physical Therapy, P.C. v. State Farm Mut. Auto. Ins. Co., 13 Misc. 3d. 172(Civ. Ct. Kings Co. 2006). A lay person is not qualified to evaluate the CPT codes or to change the code utilized by a health provider. See Abraham v. Country-Wide Ins. Co., 3 Misc. 3d. 130A (App. Term 2d. Dept. 2004). The failure to provide such proof can be fatal to Respondent's fee schedule defense. Continental Medical, P.C. v. Travels Indemnity Co., 11 Misc. 3d.145A (App. Term 1st Dept. 2006). However, if an insurer presents sufficient evidence substantiating its denial or fee reduction pursuant to the applicable fee schedule, the burden shifts to the provider of services to rebut the carrier's fee schedule interpretation. Natural Acupuncture Health, P.C. v. Praetorian Ins. Co., 30 Misc. 3d 132A (App Term 1st Dep't 2011).

Further, pursuant to 11 NYCRR §65-4.5 (o) (Regulation 68-D) the arbitrator shall be the judge of the relevance and materiality of the evidence offered... The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations. Arbitrators sit in equity and have the powers to enforce the spirit and intent of the No-fault law and regulations. Bd. Of Education, et. al. v. Bellmore-Merrick, 39 N.Y. 2d. 167 (1976).

Moreover, it is well settled that an arbitrator may take judicial notice of the New York State Workers' Compensation Fee Schedule. Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13, 20 (2nd Dept. 2009).

In support of its fee schedule defense in this case, Respondent relies upon a very detailed EOB, an audit from Gina M. Ball, RN, CCM, CPC, and the arguments of counsel.

Reference is made to the entirety of Ms. Ball's analysis. In part, Ms. Ball provides that:

Per NJAC 11:3-29.4(g), providers and payers shall use NCCI edits. As per NCCI guidelines, CPT codes 29825-59 and 29821 are denied as included in primary procedure 29823. Use of modifier 59 not validated.

Service rendered under unlisted By Report code 29999 identified as bursectomy. Service included in arthroscopic debridement code billed 29823.

Thus, Ms. Ball allowed reimbursement for code 29823 as billed (\$2,065.91), 29826 as billed (\$496.32) and 0232T in the amount of \$31.98. Codes 29825, 29999, and 29821 were denied in full.

Based upon my review of the submitted evidence, and in contemplation of the arguments presented by both counsel during the hearing, I found Respondent established prima facie a viable fee schedule defense. Ms. Ball's audit was persuasive and enough to shift the burden onto Applicant in terms of substantiating its entitlement to payment in the amount being sought.

In this case, I found Applicant failed to satisfy its burden. Applicant did not provide any responsive analysis from any qualified individual or source which would refute Respondent's prima facie showing. Nor did Applicant persuasively argue any defect in Respondent's proofs. Further, Applicant did not submit any documentation which would demonstrate by a preponderance of the evidence its entitlement to reimbursement in the billed amount of \$7652.67.

Therefore, based on the foregoing, Applicant is awarded \$2594.21 with the remainder of its claim being denied in its entirety.

This decision is in full disposition of all claims for No-Fault benefits submitted 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 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	Status
	Tri-Borough NY Medical Practice PC	10/05/23 - 10/05/23	\$7,652.67	Awarded: \$2,594.21
Total			\$7,652.67	Awarded: \$2,594.21

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/14/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

December 14, 2023 is the date that the arbitration is deemed to have been commenced.

INTEREST: Pursuant to Insurance Law § 5106 (a), interest accrues on overdue no-fault insurance claims at a rate of 2% per month. A claim is overdue when it is not paid within 30 days after a proper demand is made for its payment (Insurance Law § 5106 [a]; 11 NYCRR 65.15 [g]). The Superintendent's regulation tolls the accumulation of interest if the claimant "does not request arbitration or institute a lawsuit within 30 days after receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations" (11 NYCRR 65-3.9 [c]). The Superintendent has interpreted this provision to mandate that the accrual of interest is tolled, regardless of whether the particular denial at issue was timely. That interpretation was upheld by the

Court of Appeals in LMK Psychological Servs, P.C. v. State Farm Mut. Auto. Ins. Co., 2009 NY Slip Op 02481 (April 2, 2009). Where no denial of claim is issued in response to a proper demand for payment, the insurer does not benefit from the tolling provision and interest will accrue from the date 30 days after the proper demand for payment is made. Interest that accrues when a denial of claim is not issued within 30 days after the proper demand for payment is made will be tolled upon the issuance of a denial of claim, although such denial is untimely, and the failure to request arbitration or institute a lawsuit within 30 days after receipt of that denial of claim form.

C. Attorney's Fees

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

For cases filed after February 4, 2015, the attorney's fee is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4. The attorney's fee shall be limited as follows: 20% of the total amount of first-party benefits and any addition first-party benefits, plus interest thereon, for each applicant per arbitration or court proceeding, subject to a maximum fee of \$1,360. If the nature of the dispute results in an attorney's fee that could be computed in accordance with the limitations prescribed in both subdivision (c) and this subdivision, the higher attorney's fee shall be payable.

- 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 FL

SS :

County of Hillsborough

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

09/08/2024
(Dated)

Matthew Brew

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:
37019cf02213afea78e39a481b64c74d

Electronically Signed

Your name: Matthew Brew
Signed on: 09/08/2024