

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Sedation Vacation Perioperative Medicine
PLLC
(Applicant)

- and -

MVAIC
(Respondent)

AAA Case No.	17-23-1325-0320
Applicant's File No.	NF3742309
Insurer's Claim File No.	666320
NAIC No.	Self-Insured

ARBITRATION AWARD

I, Tasha Dandridge-Richburg, 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 09/09/2024
Declared closed by the arbitrator on 09/09/2024

Vijay Gupta, Esq. from The Law Office of Thomas Tona, PC participated virtually for the Applicant

Jeffrey Kadushin, Esq. from Marshall & Marshall, Esqs. participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$534.78**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

It was STIPULATED, by and between the parties to this matter that the allowable amount for the treatment(s)/services(s) at issue herein pursuant to the Workers' Compensation Fee Schedule is **\$386.23**. Therefore, the amount Applicant seeks herein is **\$386.23**.

3. Summary of Issues in Dispute

The 58 year-old female EIP was a passenger on a bus when it was involved in a motor vehicle accident on October 22, 2021. At issue in this case is \$386.23 for the anesthesia for a right shoulder surgery performed on date of service March 31, 2023. The treatment/services were timely denied based upon a peer review prepared by Andrew Bazos, MD dated August 28, 2023.

4. Findings, Conclusions, and Basis Therefor

Pursuant to 11 NYCRR §65-4.5(o)(1), the Arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. 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. This Award is based upon a review of all of the documents contained within the ADR Center electronic case file as of the date of the Award, as well as upon any oral arguments by or on behalf of the parties and any testimony given during the hearing.

DR. BAZOS' PEER REVIEW

Dr. Bazos prepared an orthopedic surgical peer review dated August 28, 2023, of the appropriateness of the right shoulder surgical procedure and related treatment/services performed on date of service March 31, 2023. Following his review of records, Dr. Bazos concluded that the surgery was not medically necessary. Dr. Bazos writes:

Physical examination findings were consistent with that of possible impingement with no need for immediate surgical intervention. With no evidence of an exhausted course of conservative treatment including, but not limited to, physical therapy, oral medication, as well as a judicious course of corticosteroid injections, there was no justification nor indication for surgical intervention.

While the MRI did indicate the possibility of a tear of the supraspinatus in the form of an increased signal, there was no evidence of true rotator cuff tear. Upon review of the intraoperative photos, there was absolutely no evidence of any form of acute traumatic injury present within the shoulder. The MRI findings were consistent with those within the shoulder revealing age-appropriate normal changes within the shoulder with no evidence of acute ligamentous, rotator cuff, labral nor chondral injury. It did appear the claimant performed a minor ablation of the free edge of labrum with no apparent evidence of pathology noted of the labrum. Additionally, it appeared the claimant caused an iatrogenic rotator cuff tear while performing the ablation which was subsequently repaired.

As such, with no evidence of any form of acute traumatic injury present in the shoulder, and findings failing to indicate any evidence of need for surgical intervention, any and all charges related to the claimant's right shoulder arthroscopy has not been established. Therefore, all charges including, but not limited to, pre-surgical evaluation and testing, surgical charges, surgical assist services, facility charges, anesthesia charges and postoperative treatment including, but not limited to, physical therapy, oral medication, bracing, as well as durable medical goods such as CPM unit, cold therapy unit and/or DVT prevention device are not medically necessary, not justified and not recommended for payment.

Analysis

Once an applicant has established a prima facie case of entitlement to No-Fault benefits, the burden then shifts to the insurer to prove that the disputed services were not medically necessary. To meet this burden, the insurer's denial(s) of the applicant's claim(s) must be based on a peer review, IME report, or other competent medical evidence that sets forth a clear factual basis and a medical rationale for the denial(s). *Amaze Medical Supply, Inc. v. Eagle Ins. Co.*, 2 Misc. 3d 128A (App. Term, 2nd Dept., 2003); *Tahir v. Progressive Cas. Ins. Co.*, 12 Misc. 3d 657 (N.Y.C. Civ. Ct., N.Y. Co., 2006); *Healing Hands Chiropractic, P.C. v. Nationwide Assurance Co.*, 5 Misc. 3d 975 (N.Y.C. Civ. Ct., N.Y. Co., 2004); *Millennium Radiology, P.C. v. New York Cent. Mut.*, 23 Misc. 3d 1121(A) (N.Y.C. Civ. Ct., Richmond Co., 2009); *Beal-Medea Prods., Inc. v GEICO Gen. Ins. Co.*, 27 Misc. 3d 1218(A) (N.Y.C. Civ. Ct., Kings Co., 2010); *All Boro Psychological Servs., P.C. v GEICO Gen. Ins. Co.*, 34 Misc. 3d 1219(A) (N.Y.C. Civ. Ct., Kings Co., 2012).

I find that Dr. Bazos' peer review fails to set forth a clear factual basis and a medical rationale for Respondent's denial of Applicant's claim for the treatment/services in dispute herein and as such, I find that Respondent has failed to establish a lack of medical necessity for same. Dr. Bazos primarily argues that the rotator cuff tear repaired during the surgery was caused by Dr. Miller during the procedure. However, Dr. Bazos' peer review fails to adequately explain the basis for this opinion in his report. Significantly, Dr. Bazos acknowledges in his report that the MRI was suggestive of a tear of the supraspinatus in the form of an increased signal. This would support a conclusion that the tear was present before the surgical procedure. Therefore, Respondent's denial cannot be upheld.

Accordingly, I find for Applicant.

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
	Sedation Vacation Perioperative Medicine PLLC	03/31/23 - 03/31/23	\$534.78	Awarded: \$386.23
Total			\$534.78	Awarded: \$386.23

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.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217 (2009).

C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. *See*, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$1360." *Id.*

- 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 Erie

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

09/09/2024
(Dated)

Tasha Dandridge-Richburg

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:
d9b412dcea7e61d8b67be49abf878c89

Electronically Signed

Your name: Tasha Dandridge-Richburg
Signed on: 09/09/2024