

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Quality Orthopedics & Complete Joint Care, PC (Applicant)	AAA Case No.	17-23-1296-3099
	Applicant's File No.	LIP-26969
	Insurer's Claim File No.	220741521
- and -	NAIC No.	25712

Esurance Insurance Company
(Respondent)

ARBITRATION AWARD

I, Mary Anne Theiss, 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: Claimant

1. Hearing(s) held on 08/14/2024
Declared closed by the arbitrator on 08/14/2024

Lee-Ann Trupia, Esq. from Law Offices of Ilya E Parnas P.C. participated virtually for the Applicant

Linda Smith, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$7,889.67**, 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

The Claimant, a thirty-one-year-old male was involved in a motor vehicle accident on October 13, 2022, as a restrained back seat passenger of a vehicle that was rear-ended. The Claimant had injuries to his left shoulder. He was seen in the emergency room of Woodhull Medical Center where he was evaluated, treated, and discharged.

The Applicant, Quality Orthopedics & Complete Joint Care, PC is seeking reimbursement in the amount of \$7,889.67 for a surgical procedure that was performed on January 11, 2023.

The denial is based upon a peer review of Pierce Ferriter, M.D. dated March 16, 2023.

4. Findings, Conclusions, and Basis Therefor

The Claimant, a thirty-one-year-old male was involved in a motor vehicle accident on October 13, 2022, as a restrained back seat passenger of a vehicle that was rear-ended. The Claimant had injuries to his left shoulder. He was seen in the emergency room of Woodhull Medical Center where he was evaluated, treated, and discharged.

The Applicant, Quality Orthopedics & Complete Joint Care, PC is seeking reimbursement in the amount of \$7,889.67 for a surgical procedure that was performed on January 11, 2023.

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The Applicant has established a prima facie case of entitlement to benefits. 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).

Dr. Ferriter reviewed 34 records. He discussed the history of the accident. He noted that the Claimant presented to Aleksandr Khaimov, D.O. on October 17, 2022, with complaints of left shoulder pain. The Claimant had decreased range of motion, tenderness, positive Hawkins, O'Brien's, and Neer's tests. The Claimant was diagnosed with post traumatic impingement, bursitis, and tendonitis of the left shoulder. He was referred for an MRI. The Claimant started physical therapy on October 17, 2022. The symptoms continued when the Claimant saw Aleksandr Khaimov on November 28, 2022. On January 11, 2023, the Claimant had left shoulder arthroscopy, rotator cuff and labral debridement, lysis of adhesions, synovectomy, and bursectomy of the left shoulder.

Dr. Ferriter noted the Claimant received only 14 physical therapy sessions which is insufficient to determine the benefits the Claimant could have received from conservative care. Additionally, Dr. Khaimov failed to provide other non-surgical treatment modalities like cortisone injections. The Claimant should have been treated with adequate physical therapy and cortisone injections which are considered the most efficacious methods. Dr. Ferriter found that the shoulder surgery was not medically necessary.

When an insurer, through a peer review or medical exam, presents sufficient evidence establishing a lack of medical necessity, the burden then shifts back to the applicant to

present its own evidence of medical necessity. West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc. 3d 131(A) (App. Term, 2nd Dept., 2006); Alfa Medical Supplies v. Geico General Ins. Co., 38 Misc. 3d 134(A) (App. Term, 2nd Dept., 2013).

Dr. Khaimov, the treating physician, offered a rebuttal dated August 6, 2024. He went through the history of the medical treatment and the accident. He noted that the goal of conservative treatment is to reduce symptoms, not to heal the tear. Waiting for a response of more conservative care would have deteriorated the patient's left shoulder condition, therefore it was determined that the amount of physical therapy would heal the tear and would never bring the patient to a pre-accident state. Dr. Khaimov also indicated that waiting for a response to conservative care or for the physiological status to deteriorate in a patient who is already in immense pain due to traumatic injuries would ultimately be detrimental for the patient's recovery.

I find that Dr. Ferriter's peer review does not set forth a clear factual basis and a medical rationale for Respondent's denial of Applicant's claim for the arthroscopy surgery in dispute. I find that Respondent has not established a lack of medical necessity for the arthroscopy surgery.

It has been held that "For an expense to be considered medically necessary, the treatment, procedure, or service ordered by a qualified physician must be based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed with. Such treatment, procedure, or service must be warranted by the circumstances as verified by a preponderance of credible and reliable evidence and must be reasonable in light of the subjective and objective evidence of the patient's complaints." Nir v. Progressive Ins. Co., 7 Misc.3d 1006(A), 2005 N.Y. Slip Op. 50466(U) (Civ. Ct. Kings Co., Nadelson, J., Apr. 7, 2005).

I agree with Dr. Khaimov's rebuttal to the peer review. and I find the rebuttal more credible and probative than Dr. Ferriter's peer review. I find that the arthroscopy surgery was medically necessary, and I sustain the Applicant's claim to that effect. Said claim supports Applicant's prima facie case of entitlement to No-Fault compensation.

Addressing the fee schedule issue, the Carrier produced an affidavit from Stephanie Brown, CPC sworn to on June 13, 2023. Ms. Brown went through every code that was billed and indicated that the correct amount should be \$3,427.65. I accept this and that is the amount awarded.

I want to thank the parties for taking the time to prepare their cases.

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
	Quality Orthopedics & Complete Joint Care, PC	01/11/23 - 01/11/23	\$7,127.08	Awarded: \$3,427.65
	Quality Orthopedics & Complete Joint Care, PC	01/11/23 - 01/11/23	\$762.59	Denied
Total			\$7,889.67	Awarded: \$3,427.65

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/21/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The insurer shall compute and pay the applicant the amount of interest from the filing date of the request for arbitration, at a rate of two percent (2%) per month, simple interest (i.e., not compounded), using a 30-day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR §65-3.9(c). The filing date, pursuant to the American Arbitration Association records, is as noted above interest is paid from the date of filing.

C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(d). As this matter was filed after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(d). Subject to a maximum fee of \$1,360.00.

- 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 NY

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

09/11/2024
(Dated)

Mary Anne Theiss

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:
30584ed7cf607f4cadd105ff77f2c2dd

Electronically Signed

Your name: Mary Anne Theiss
Signed on: 09/11/2024