

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Tri-Borough NY Medical Practice PC
(Applicant)

- and -

Integon National Insurance Company
(Respondent)

AAA Case No. 17-23-1327-6296

Applicant's File No. N/A

Insurer's Claim File No. 9XINV03014-02

NAIC No. 29742

ARBITRATION AWARD

I, Philip Wolf, 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: Assignor

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

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

Melissa Berkman, Esq. from Rossillo & Licata LLP 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 NOT made by the parties regarding the issues to be determined.
3. Summary of Issues in Dispute

Assignor, a 39-year-old female, was the driver of a motor vehicle which was involved in an accident on March 9, 2023. As a result of the accident Assignor sustained injuries to her back, left shoulder, and left knee. Applicant is seeking reimbursement for the surgeon fee associated with Assignor undergoing a left shoulder arthroscopy on September 1, 2023. Respondent timely denied Applicant's claim based upon an October 12, 2023 peer review and addenda conducted by Howard Kiernan, M.D. The issue in dispute is whether Respondent has established its lack of medical necessity defense.

4. Findings, Conclusions, and Basis Therefor

Applicant is seeking \$7,652.67 for the surgeon fee associated with Assignor undergoing a left shoulder arthroscopy on September 1, 2023. This award is rendered upon the oral arguments of counsel for the parties and upon the documentary evidence submitted by the parties. The documentary evidence submitted by the parties consists of the documents contained within the ADR Center for this matter as of September 13, 2024.

Applicant's Prima Facie Case

Assignor was the driver of a motor vehicle which was involved in an accident on March 9, 2023. As a result of the accident Assignor sustained injuries to her back, left shoulder, and left knee. On April 29, 2023, Assignor underwent an MRI of the left shoulder which revealed mild to moderate rotator cuff tendinosis/strain and subacromial subdeltoid bursitis, no discrete rotator cuff tear and a SLAP tear. On June 29, 2023, Assignor presented to Applicant with complaints of left shoulder pain. Physical exam revealed positive objective findings with respect to the left shoulder and Dr. Drazic recommended a left shoulder arthroscopy. Follow-up exams were performed on August 2, 2023 and August 21, 2023. On September 1, 2023, Assignor underwent a left shoulder arthroscopy performed by Robert Drazic, D.O. and Shmuel Kaufman, PA. The postoperative diagnoses were labrum tear, SLAP tear, partial rotator cuff tear, synovitis, impingement syndrome, and bursitis.

After reviewing the evidence submitted by Applicant, I find that Applicant has submitted sufficient credible evidence to establish a prima facie case with respect to the surgeon fee associated with Assignor undergoing the left shoulder arthroscopy on September 1, 2023. *See, Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 2015 NY Slip Op 04787, (2015).

Respondent's Peer Review Defense

Respondent issued a timely denial predicated upon an October 12, 2023 peer review and addenda conducted by Howard Kiernan, M.D. Doctor Kiernan opined that the left shoulder arthroscopy was not medically necessary. In reaching his opinion, Dr. Kiernan does cite/reference to medical authority in compliance with the requirements set forth in Jacob Nir, M.D. a/a/o Josaphat Etienne v. Allstate Ins. Co., 7 Misc. 3d 544, 796 N.Y.S.2d 857 (Civ. Ct. Kings Co. 2005) and CityWide Social Work & Psychological Services, P.L.L.C. a/a/o Tremayne Brow v. Travelers Indemnity Company, 3 Misc. 3d 608, 777 N.Y.S.2d 241 (Civ. Ct. Kings Co. 2004).

Doctor Kiernan states "as per the medical records, the claimant received 14 physical therapy sessions when recommended for left shoulder arthroscopy on August 21, 2023. This is inadequate to assess the maximum possible benefit the claimant could have gained with continuation of conservative care. The treating physician should have considered continuous physical therapy sessions for at least 3 to 6 months prior to the recommendation of left shoulder arthroscopy. It was premature for the treating physician to proceed with surgery at this stage in the claimant's injury. The left shoulder

arthroscopy was performed without undertaking a complete course of physical therapy which could have resolved the symptoms. Most patient, even with very severe injuries, are often managed effectively without surgery."

Doctor Kiernan further states that "the treating physician should have explained the advantages of the cortisone administration in the left shoulder and further should have clarified why administering cortisone injections would provide benefits." "It was not appropriate on the treating physician's part to opt for left shoulder arthroscopy without considering the maximum potential benefit the claimant might have acquired in dealing with left shoulder symptoms with the help of cortisone injections."

Doctor Kiernan further notes that "these findings documented on the MRI 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. There were no significant findings noted in this case where urgent surgical intervention would have been helpful."

In his addenda, Dr. Kiernan states "I would like to note here that the need of any surgery depends on the claimant's clinical presentation, the MRI findings and the claimant's response to the adequate conservative management. The operative report can never be a criterion to judge the medical necessity of the same surgery." "I would like Dr. Drazic and PA Kaufman to go through the operative procedures performed on 09/01/2023 on this claimant. The procedures were only aimed at providing symptomatic relief to the claimant and no repair was performed as no repair was necessitated in this case. The claimant's condition necessitated masking of symptoms and hence, the procedures were also aimed at the same. This claimant had not received adequate conservative management hence the left shoulder arthroscopy was not medically necessary."

In his addenda, Dr. Kiernan further states "the conservative treatment mentioned by Dr. Shapiro is incomplete. If physical therapy was failing to yield results then the next step would be to administer at least 3 steroid injections over a span of year while providing aggressive physical therapy. This was not provided to the claimant." "Dr. Drazic did not perform any repair. He only performed procedures that would provide symptomatic relief. That said symptomatic relief could be achieved with the help of a steroid injection as well."

Applicant's Rebuttal

Where Respondent has presented sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to the Applicant, which must present its own evidence of medical necessity and/or rebuttal to Respondent's peer review. *See, A. Khodadadi Radiology, P.C. v. Central Mutual Fire Ins. Co.*, 2007 NY Slip Op 51342U, 16 Misc. 3d 131A (2nd Dept. 2007).

Applicant has submitted rebuttals Shmuel Kaufman, P.A., Robert Drazic, D.O, and Leonid Shapiro, M.D. The rebuttals of Shmuel Kaufman, P.A. and Robert Drazic, D.O and Leonid Shapiro, M.D. are essentially the same. Doctor Drazic reiterated his exam findings and the MRI findings. Doctor Drazic states "the patient's condition in this case

was consistent with the above indications such as labral tear, rotator cuff tear, synovitis, etc and therefore required the left shoulder surgery." "Labral tears can be, and often are, traumatically induced, and an impact or tractive impulse such as one suffered by this patient in the car accident can cause them. Labral tears can be very painful and debilitating. Surgical treatment is indicated and it is very effective with a high success rate. Surgical treatment was proper for this patient." "I would note that the patient underwent physical therapy and pain medications for more than 4 months. However, her conditions worsened. I therefore determined that, the patient's injuries would certainly not resolve by further physical therapy and would require surgical intervention. Additionally, the severity of the injuries can be determined by the intraoperative findings as well." "Further, Injections would not be beneficial or indicated for several reasons. One, they do not actually repair anything (especially tears) within the joint and only sometimes temporarily mask some of the symptoms. Furthermore, injections are not efficacious in providing reliable pain relief nor in improving range of motion."

Determination

I find that the rebuttals of Drs. Shapiro and Drazic and the rebuttal of PA Kaufman all fail to adequately address the issue raised by Dr. Kiernan that Assignor only underwent fourteen (14) session of physical therapy treatment prior to the recommendation and performance of the left shoulder arthroscopy. I agree with Dr. Kiernan that the left shoulder arthroscopy was preformed prematurely, prior to Assignor undergoing an adequate amount of conservative physical therapy. I also agree with Dr. Kiernan that there is no evidence indicating that Assignor was ever offered the option of undergoing cortisone injections prior to the recommendation for the arthroscopy. As also noted by Dr. Kiernan, Assignor did not have a rotator cuff tear and instead had a SLAP tear. Doctor Kiernan further established that the option of cortisone injections was appropriate since the arthroscopy "procedures were only aimed at providing symptomatic relief to the claimant and no repair was performed as no repair was necessitated in this case."

Based upon the foregoing, and after reviewing the evidence, I find that Applicant has failed to submit sufficient credible evidence to rebut the peer review of Dr. Kiernan. I am persuaded by the opinion of Dr. Kiernan and his rationale as set forth herein. Accordingly, I find that Applicant has failed to establish the medical necessity for the surgeon fee associated with Assignor undergoing the left shoulder arthroscopy on September 1, 2023. Applicant's claim is denied in its entirety.

DECISION: Based upon the foregoing, Applicant's claim is denied in its entirety. This award is in full disposition of all No-Fault benefit claims submitted to this Arbitrator.

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 Suffolk

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

09/13/2024

(Dated)

Philip Wolf

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:
39c887a6d9380ddeac070c3d0f0391a2

Electronically Signed

Your name: Philip Wolf
Signed on: 09/13/2024