

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Fifth Avenue Surgery Center LLC
(Applicant)

- and -

Avis Budget Group
(Respondent)

AAA Case No. 17-24-1348-6317

Applicant's File No. 161440

Insurer's Claim File No. 238028072-001

NAIC No. Self-Insured

ARBITRATION AWARD

I, Bryan Hiller, 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 10/01/2024
Declared closed by the arbitrator on 10/01/2024

John Faris Esq. from Law Offices of Eitan Dagan participated virtually for the Applicant

Justin Calabrese, Esq. from Hollander Legal Group PC participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$11,567.57**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount claimed in the Arbitration Request, \$11,567.67 was AMENDED at the oral hearing to \$10,095.12 based on the fee schedule and consent of the parties.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

Whether Applicant is entitled to reimbursement for the fees associated with facility fee for a right shoulder surgery provided to the Assignor on November 29, 2023 related to a motor vehicle accident on June 3, 2023 in light of the Respondent's Independent Medical Examination performed by Dr. Tanuj Palvia on October 23, 2023 with an effective cut-off date of November 4, 2023?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement, along with interest and counsel fees, under the No-Fault Regulations, for the costs associated with the facility fee for a right shoulder surgery in connection with injuries sustained by Assignor in a motor vehicle accident on June 3, 2023. The payment for the treatment at issue was denied based on the Independent Medical Examination done by Dr. Tanuj Palvia with an effective cut-off date of November 4, 2023. The denials were timely. This decision is based upon the written submissions of counsel for the respective parties as well as oral argument at the hearing conducted on October 1, 2024. I have reviewed the documents contained in the Record as of the date of the hearing. At the time of the hearing, Respondent noted that there were no further fee schedule issues so I deem this defense abandoned.

Assignor, a then 45 year old female restrained back seat passenger, was involved in an automobile accident on June 3, 2023. Following the accident, Assignor did not seek any immediate or emergent hospital care. Due to a persistence of symptomology related to the accident, Assignor came under the care of multiple conservative care providers. When symptoms persisted despite treatment, Assignor was referred to Dr. Peter Tomasello for an orthopedic surgery evaluation. Following the evaluation and review of the previously performed MRIs, Dr. Tomasello recommended the subject nerve block injection with guidance and right shoulder surgery. The right shoulder surgery at issue was performed by Dr. Tomasello at Applicant Fifth Avenue Surgery Center LLC's facility and November 29, 2023 and the notes related to those services are attached to the Record.

Applicant establishes its prima facie entitlement to no-fault benefits by proving the submission of statutory claim forms, setting forth the fact and the amount of the loss sustained, and that payment of no-fault benefits was overdue (see Insurance Law § 5106 [a]; *Mary Immaculate Hosp. v Allstate Ins. Co.*, 5 AD3d 742 [2d Dept 2004]). The documents merit out that the Applicant has established its prima facie entitlement to benefits based on the valid submission of the bill and that the Respondent preserved its defense by issuing a timely denial. Once plaintiff has established its prima facie case, the burden of proof shifts to Respondent to come forward with admissible evidence demonstrating the existence of a material issue of fact (see *Amaze Medical Supply Inc. v. Allstate Insurance Co*, 3 Misc 3d 133 (A) (App. Term 2d and 11th Jud. Dists, 2003)).

On October 23, 2023 Dr. Tanuj Palvia conducted an independent Interventional Pain Medicine examination at the request of Respondent. Thereafter, no fault benefits were terminated on November 4, 2023. Dr. Palvia reviewed Assignor's medical records including, evaluation reports, follow-up progress notes and diagnostic test results and did a physical examination. Assignor did not have any complaints at the time of the IME. On examination, Dr. Palvia noted no tenderness or spasm, normal ranges of motion and no positive orthopedic testing throughout the cervical, thoracic and lumbar spines. With respect to the extremities, Dr. Palvia noted no tenderness, effusion, crepitus, normal ranges of motion and negative orthopedic testing in the bilateral shoulders, bilateral elbows, bilateral wrist/hands, bilateral hips, bilateral knees and bilateral ankles/feet. Dr. Palvia's neurologic evaluation revealed no sensory deficits, present and equal bilateral deep tendon reflex function, and normal muscle strength in the upper and lower extremities. Following the examination and review of the available medical records, Dr. Palvia diagnosed thoracic spine sprain resolved and right shoulder/elbow sprain resolved and concluded that no further PMR treatment was medically necessary.

An IME report asserting that no further treatment is medically necessary must be supported by a sufficiently detailed factual basis and medical rationale, which includes mention of the applicable generally accepted

medical/professional standards (see *Carle Place Chiropractic v. New York Central Mut. Fire Ins Co.*, 19 Misc.3d 1139(A), 866 N.Y.S.2d 90 (Table), 2008 N.Y. Slip Op. 51065(U), 2008 WL 2228633 (Dist. Ct., Nassau Co., May 29, 2008, Andrew M. Engle, J.)).

An IME doctor must establish a factual basis and medical rationale for his asserted lack of medical necessity for future health care services (see *Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance*, 20 Misc.3d 144(A), (App. Term 2d & 11th Dists. Sept. 3, 2008)). Where an IME report provides a factual basis and medical rationale for an opinion that services were not medically necessary, and the claimant fails to present any evidence to refute that showing, the claim should be denied (see *AJS Chiropractic, P.C. v. Mercury Ins. Co.*, 22 Misc.3d 133(A), (App. Term 2d & 11th Dist. Feb. 9, 2002)), as the ultimate burden of proof on the issue of medical necessity lies with the claimant (see Insurance Law § 5102; *Wagner v. Baird*, 208 A.D.2d 1087 (3d Dept. 1994)).

If the insurer presents sufficient evidence establishing a lack of medical necessity, then the burden shifts back to the Applicant to present its own evidence of medical necessity (see *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc.3d 131A (2006)). Once the insurer [Respondent] makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, "[Applicant] must rebut it or succumb" (see *Bedford Park Med. Practice P.C. v. American Transit Tr. Ins. Co.*, 8 Misc. 3d 1025 (A), 2005, 2005 NY Slip Op 51282 citing *Bauman v Long Island Railroad*, 110AD2d 739, 741, [2d Dept 1985]). As a general rule, reliance on rebuttal documentation will be weighed in light of the documentary proofs and arguments presented at the arbitration. Moreover, the case law is clear that a provider must rebut the conclusions and determinations of the IME doctor with his own facts (see *Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co.*, 37 Misc.3d 19 (App. Term 2d, 11 & 13 Dists. 2012)).

Applicant did not submit a rebuttal directly addressing the findings of the IME but instead relied upon contemporaneous records including follow up examination on November 7, 2023, two weeks after the IME and three days after the effective cut-off date. At the time of this examination, Assignor had complaints of pain in the bilateral shoulders exacerbated by overheard activity, reaching out and lifting and left upper extremity weakness that had remained the same since the time of the accident. On examination, Dr. Tomasello and PC Yakov Shalamov noted reduced ranges of motion in the bilateral shoulders, AC joint and bicipital groove tenderness and positive Hawkins, Obrien's, Apprehension and Speed's tests bilaterally. Dr. Tomasello reviewed the bilateral shoulder MRIs performed on August 8, 0223 which indicated AC joint hypertrophy, tear of the superior labrum on the right side, capsular thickening anteriorly which can be seen with adhesive capsulitis bilaterally and trace joint effusion with fray and tear of the superior labrum on the right side. Following the evaluations, Assignor was diagnosed with bilateral shoulder internal derangement and labrum tears and Dr. Tomasello recommended an escalation including right shoulder arthroscopy and continued pain medication and physical therapy.

On the basis of my review of the medical evidence submitted by the parties and listening to the arguments of counsel, I find that the Applicant has met its burden of proving that there was medical necessity for the facility fee for a right shoulder surgery provided to the Assignor on November 29, 2023. Applicant's contemporaneous treatment records included findings including reduced ranges of motion, spasm, tenderness, positive orthopedic testing and sensory deficits leading to continued treatment, continued pain medications and escalation to injection therapy and surgery. These findings clearly outlined the significant need for additional treatment. Thus, comparing the relevant evidence presented by both parties and the above referenced medical necessity standard, I find in favor of the Applicant and award reimbursement in the full amended claim amount of \$10,095.12 in full disposition of this matter.

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 | Amount Amended | Status |
|--------------|--|----------------------------|--------------------|--------------------|-----------------------------|
| | Fifth Avenue Surgery Center LLC | 11/29/23 - 11/29/23 | \$11,567.57 | \$10,095.12 | Awarded: \$10,095.12 |
| Total | | | \$11,567.57 | | Awarded: \$10,095.12 |

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/21/2024 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 (see 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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of that sum total, subject to no minimum and a maximum of \$1360.00. However, if the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation process, the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6 (b).

- 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 Nassau

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

10/01/2024
(Dated)

Bryan Hiller

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:
38166ee6296c9aff766af67f0a0e1145

Electronically Signed

Your name: Bryan Hiller
Signed on: 10/01/2024