

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

McCulloch Orthopaedic Surgical Services,  
PLLC DBA NYSJ Orthopaedic Specialists  
(Applicant)

- and -

Maya Assurance Company  
(Respondent)

AAA Case No. 17-24-1343-2874

Applicant's File No. SS-260645,  
SS-263809

Insurer's Claim File No. 2-231832-N01

NAIC No. 36030

**ARBITRATION AWARD**

I, Nicholas Tafuri, 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 (AK)

1. Hearing(s) held on 10/31/2024  
Declared closed by the arbitrator on 10/31/2024

Greg Itingen, Esq. from Samandarov & Associates, P.C. participated virtually for the Applicant

Christine Lee, Esq. from De Martini & Yi, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$175.60**, was NOT AMENDED at the oral hearing.  
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that there are no fee schedule disputes.

3. Summary of Issues in Dispute

EIP (AK), a 20-year old female, was a pedestrian struck by a motor vehicle on March 1, 2023. Following the accident, EIP sought medical treatment. Health care services are provided by Applicant on dates of service 11/7/23 and 1/9/24.

Applicant's reimbursement claims are timely denied by Respondent based upon Independent Medical Examinations ("IMEs") by Douglas Unis, M.D., conducted on July 11, 2023, Gary Florio, M.D., conducted on August 25, 2023, and Neil Ganz, D.C., conducted on July 6, 2023.

The issue in dispute: Whether Applicant is entitled to no-fault reimbursement for health services provided, denied by Respondent based on IMEs?

#### 4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the ADR Center Record as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the Hearing. Pursuant to 11 NYCRR 65-4 (Regulation 68-D), §65-4.5 (o) (1), an 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 case was decided on the submissions of the Parties as contained in the ADR Center Record maintained by the American Arbitration Association, and the oral arguments of the parties' representatives.

EIP (AK), a 20-year old female, was a pedestrian struck by a motor vehicle on March 1, 2023. Following the accident, EIP sought medical treatment. Health care services are provided by Applicant on dates of service 11/7/23-1/9/24.

Applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document, documenting the facts and amounts of the losses sustained, and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find Applicant establishes a prima facie case for its reimbursement claims. The burden then shifts to the Respondent to prove its defenses.

Applicant's reimbursement claims, for office visits due to EIP's complaints of left shoulder pain, are timely denied by Respondent based upon

Independent Medical Examinations ("IMEs") by Douglas Unis, M.D., conducted on July 11, 2023, Gary Florio, M.D., conducted on August 25, 2023, and Neil Ganz, D.C., conducted on July 6, 2023.

### Medical Necessity

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment. Kingsborough Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D. 3d 13 (2d Dep't. 2009). See also Channel Chiropractic PC v. Country Wide Ins. Co., 38 AD 3d. 294 (1st Dep't. 2007). An insurance carrier must at a minimum establish a detailed factual basis and a sufficient medical rationale for asserting lack of medical necessity. See Delta Diagnostic Radiology PC v. Progressive Casualty Ins. Co., 21 Misc. 3d. (142A) (App. Term 2d Dep't. 2008).

An IME doctor must establish a factual basis and medical rationale for his asserted lack of medical necessity for future health care services. E.g., Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance, 20 Misc.3d 144(A), (App. Term 2d & 11th Dists. Sept. 3, 2008); Carle Place Chiropractic v. New York Central Mut. Fire Ins. Co., 19 Misc.3d 1139(A), (Dist. Ct., Nassau Co., Andrew M. Engle, J., May 29, 2008).

The examination of EIP, conducted by Dr. Douglas Unis, on July 11, 2023, resulted in the termination of health benefits effective July 25, 2023. At the time of his physical examination of EIP, Dr. Unis reports EIP with complaints of neck pain, back pain, and left shoulder pain. The report evidences no objective findings. All ranges of motion are normal. The exam of EIP's spine revealed no spasms, and no tenderness. Neurological examination of the bilateral upper and lower extremities is normal. Multiple orthopedic tests are negative. EIP's left shoulder exam revealed no tenderness, no crepitus, and normal ranges of motion. All orthopedic testing was reportedly negative. Dr. Unis diagnosed EIP with resolved strains/sprains of the cervical spine, thoracic spine, and left shoulder. Dr. Unis concludes that no further orthopedic treatment or physical therapy would be medically necessary.

I find the results of the examination by Dr. Unis presented a medical rationale as to why further orthopedic treatment benefits were terminated.

The examination of EIP, conducted by Dr. Gary Florio, on August 25, 2023, resulted in the termination of health benefits effective September 14, 2023. At the time of the exam, EIP presented with complaints of left shoulder pain. EIP underwent left shoulder arthroscopy surgery on 7/13/23.

The examination of EIP's cervical spine revealed tenderness, however, there were no spasms. Spurling's test was negative. Restrictions in range of motion was reported, however, Dr. Florio states this was due to suboptimal effort during the exam. Neurological examination of the upper extremities was normal. Ranges of motion of the lumbar spine and thoracic spine were normal. There was no tenderness and no spasms. Neurological exam of the lower extremities was normal. Straight leg raise test was negative. Examination of the left shoulder revealed operative scarring. Slight restrictions in range of motion are reported, however, there was no tenderness, no swelling, no crepitus, and no muscle atrophy. Empty can test and Cross-arm adduction test were negative. Dr. Florio diagnosis EIP with resolved sprains/strains of the cervical spine and left shoulder. Dr. Florio states that there was no positive objective evidence to indicate the need for further physical therapy or PM&R treatment.

I find the results of Dr. Florio's examination presented a medical rationale as to why further PM&R benefits were terminated.

The chiropractic exam by Neil Ganz, D.C., on 7/6/23, revealed no objective findings. However, its applicability is doubtful as the services provided in this case do not include any chiropractic treatment.

For Applicant to prove that the disputed treatment was medically necessary, it must demonstrate that "the treatment, procedure, or service (was) ordered by a qualified physician...based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed with". Nir v. Progressive Insurance, NYLJ, April 14, 2005, p.19, col. 1 (Civil Ct Kings County, J. Nadelson). Moreover, "(s)uch 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." Id.

To counter the IME review findings and conclusions, Applicant relies on submitted medical records/reports, including a follow up examination conducted by Gabriella Dutsar, PA and David Capiola, M.D. on 7/19/23. The report notes EIP, 21 years old, is status post left shoulder arthroscopy performed on 7/13/23, with extensive debridement of the rotator cuff and labrum, lysis of adhesions, complete synovectomy, and CA ligament release. The examination of 7/19/23, revealed EIP with well healed incisions, and crepitus with forward elevation. Sutures were removed, and incision sites cleaned. EIP to begin a course of physical therapy, continued activity modification, and NSAIDs on as needed basis. Dr. Capiola's

5/31/23 exam revealed EIP with continued left shoulder weakness, swelling, stiffness, and pain, despite a course of physical therapy commencing on 3/20/23. EIP possessed difficulty with lifting objects, overhead activities, difficulty sleeping, and difficulty with activities of daily living. Restrictions in ranges of motion are reported, as well as crepitus with forward elevation. Strength testing is diminished. Significantly positive Hawkin's sign, Neer, O'Brien's, Yergason's and Speed's test are also reported. MRI of the left shoulder suggests a posterior humeral dislocation, synovial effusion, and an anterior partial tear. Surgical arthroscopy is recommended, and it is performed on 7/13/23.

In addition to the foregoing, in my prior award, Case No.: 17-23-1315-8712, I found that EIP's left shoulder arthroscopy, performed on 7/13/23, was medically necessary.

After review of the medical records included in the ADR Center, and consideration of the arguments advanced by representatives for both parties, I find that Applicant has sustained its burden of proof, and rebutted the lack of medical necessity for further treatment established by Respondent. I am persuaded by EIP's contemporaneous medical records that EIP required continued treatment post-IME cutoff, based upon objective findings, along with subjective findings of persistent pain. Accordingly, based on EIP's continued complaints and positive findings upon multiple examinations, I find that the health services provided on 11/7/23-1/9/24, to be medically necessary.

This award is not inconsistent with my prior award in favor of Respondent in AAA Case No.: 17-24-1332-1092. The prior award involved EIP (AK), the subject accident, and Respondent's defense based on the IME conducted on 8/25/23, by Dr. Florio. The submissions in that case failed to contain any contemporaneous medical records to refute the IME findings. Such is not the case here.

Based on the foregoing, for dates of service 11/7/23-1/9/24, Applicant is awarded the amount of \$175.60.

This decision is in full disposition of all claims for no-fault benefits presently before 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 applicant is AWARDED the following:

A.

| Medical |  | From/To             | Claim Amount | Status            |
|---------|--|---------------------|--------------|-------------------|
|         | McCulloch Orthopaedic Surgical Services, PLLC DBA NYSJ Orthopaedic Specialists | 11/07/23 - 11/07/23 | \$87.80      | Awarded: \$87.80  |
|         | McCulloch Orthopaedic Surgical Services, PLLC DBA NYSJ Orthopaedic Specialists | 01/09/24 - 01/09/24 | \$87.80      | Awarded: \$87.80  |
| Total   |  |                     | \$175.60     | Awarded: \$175.60 |

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/08/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Respondent shall compute and pay to Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 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).

C. Attorney's Fees

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

For cases filed on or after February 4, 2015, the attorney's fee shall be calculated as follows: 20% of the amount of first-party benefits awarded, plus interest thereon, subject to no minimum fee, and a maximum fee of \$1,360.00. 11 NYCRR 65-4.6(d).

- 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 Putnam

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

11/02/2024  
(Dated)

Nicholas Tafuri

**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:**  
2c1522290e6cd66eaf19d9e7ad886f4b

### Electronically Signed

Your name: Nicholas Tafuri  
Signed on: 11/02/2024