

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Tri-Borough NY Medical Practice PC
(Applicant)

- and -

Esurance Insurance Company
(Respondent)

AAA Case No. 17-24-1347-9901

Applicant's File No. n/a

Insurer's Claim File No. 240035883-003

NAIC No. Self-Insured

ARBITRATION AWARD

I, Kihyun Kim, 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: the Assignor

1. Hearing(s) held on 12/20/2024
Declared closed by the arbitrator on 12/20/2024

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

James McNamara, Esq. from Law Offices of John Trop participated virtually for the
Respondent

2. The amount claimed in the Arbitration Request, **\$8,135.14**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated to Applicant's prima facie case and to Respondent's timely denial.

3. Summary of Issues in Dispute

The issue presented is whether Applicant's services were medically necessary.

The Assignor (ED) was a 39-year-old male who was a passenger in an automobile that was involved in an accident on January 12, 2024. Applicant seeks reimbursement in the aggregate amount of \$8,135.14 for the arthroscopy of the left shoulder of the Assignor conducted on February 14, 2024. Reimbursement was denied based on a peer review from Howard J. Levy, M.D., dated March 8, 2024.

4. Findings, Conclusions, and Basis Therefor

This arbitration was conducted using the documentary submissions of the parties contained in the ADR Center, maintained by the American Arbitration Association. I have reviewed the documents contained therein as of the closing of the hearing, and such documents are hereby incorporated into the record of this hearing. The hearing was held by Zoom video conference. Both parties appeared at the hearing by counsel, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

At the hearing, Respondent acknowledged receipt of the bill in question and the parties stipulated to Applicant's prima facie case and to Respondent's timely denial.

The Assignor is a 39-year-old male who was injured in an automobile accident on January 12, 2024. Following the accident, the Assignor sought medical treatment for his injuries from various providers, including Applicant.

On February 14, 2024, the Assignor underwent an arthroscopy of the left shoulder of the Assignor with nerve block injection conducted by Robert Drazic, D.O., and assisted by Tim Lopresti, P.A., at a facility in Oradell, New Jersey. Applicant billed Respondent for the facility services related to the surgery, and Respondent timely denied Applicant's claims based upon a peer review, dated March 8, 2024, by Howard J. Levy, M.D., who found the surgery and associated services to be medically unnecessary.

Applicant now seeks reimbursement in the aggregate amount of \$8,135.14 for the arthroscopy of the left shoulder of the Assignor conducted on February 14, 2024.

Legal Framework - Medical Necessity - Peer review

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment (*Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13 [2d Dept. 2009]), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. *See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp.*, 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

To support a lack of medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." *See Provvedere, Inc. v. Republic W. Ins. Co.*, 42 Misc 3d 141(A), 2014 NY Slip Op 50219(U) (App. Term 2d, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. *See generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 13 Misc 3d 136(A), 2006 NY Slip Op 52116 (App Term 1st Dept. 2006). The Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. *Amherst Med. Supply, LLC v. A. Cent. Ins. Co.*, 41 Misc 3d

133(A), 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet Respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. *See generally Nir v. Allstate Ins. Co.*, 7 Misc.3d 544, 547 (Civ. Ct. Kings Co. 2005). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Id.*, at 547 (*citing City Wide Social Work & Psychological Servs. v. Travelers Indem. Co.*, 3 Misc. 3d 608, 612 [Civ. Ct., Kings County 2004]).

To meet the burden of persuasion regarding medical necessity - in the absence of factually contradictory records - the applicant must submit a rebuttal which meaningfully refers to and rebuts the assertions set forth in the peer review report. *See generally, Pan Chiropractic, P.C. v Mercury Ins. Co.*, 24 Misc 3d 136[A], 2009 NY Slip Op 51495[U] (App Term, 2d, 11th & 13th Jud Dists 2009).

Peer - Howard J. Levy, M.D., dated March 8, 2024

Respondent relies principally upon the peer review report by Howard Levy, M.D., dated March 8, 2024, in asserting lack of medical necessity for the arthroscopy of the left shoulder of the Assignor conducted on February 14, 2024. The peer review discusses the medical necessity of services not at issue in this proceeding; only the portions of the peer review relevant to the surgeon services at issue are discussed herein. At the outset, the peer report lists the various medical records that Dr. Levy reviewed and provides a brief medical history of the accident and the treatment that the Assignor received. Dr. Levy opined based on the review of the provided documentation, medical guidelines for the service in question and his experience as Orthopedic Surgeon, that the arthroscopy of the left shoulder of the Assignor provided on February 14, 2024 by Applicant was not medically necessary.

In regards to the left shoulder surgery, Dr. Levy noted that:

The standard of care for the symptomatic shoulder after a motor vehicle accident would be a trial of conservative treatment with various modalities of physical therapy, and acupuncture applied for several months. In addition, if the claimant demonstrated persistent pain, which would be characterized as nonresponsive to different types of therapy, including painkillers and intensive physical therapy, an operative procedure might be considered several months later.

Dr. Levy cited medical authority that stated that "Your doctor may offer surgery as an option for a torn rotator cuff if your pain does not improve with nonsurgical methods."

He indicated that continued pain is the main indication of surgery. If you are very active and use your arms for overhead work or sports, your doctor may also suggest surgery. Dr. Levy asserted that other signs that surgery may be a good option, include: symptoms that have lasted 6 to 12 months; a large tear (more than 3 cm) and the quality of the surrounding tendon tissue is good; significant weakness and loss of function in the shoulder; and the tear was caused by a recent, acute injury.

Dr. Levy found that in this case, as per the available medical records, the left shoulder surgery was performed in almost 5 weeks after the MVA, which he asserted was premature in time. He noted that the Assignor was receiving physical therapy for pain management, and that there was no evidence that the physical therapy was aggravating the Assignor's complaints. He questioned why the physical therapy was not continued. He found that an MRI of the left shoulder did not reveal any tear, and maintained that the rationale behind performing the surgery was unclear due to a lack of definitive indications. Dr. Levy asserted that the Assignor "should have continued the physical therapy and initiated acupuncture treatment, strengthening exercises, and activity modifications followed by steroid injection as these modalities are proven to be effective in pain management. He concluded that based on the available medical records and the cited guidelines, left shoulder surgery was not medically necessary.

Rebuttal - Robert Drazic, D.O., dated April 30, 2024

To refute the March 8, 2024 peer review by Dr. Levy, Applicant relies principally upon a rebuttal, dated April 30, 2024, from Robert Drazic, D.O., the treating surgeon. Dr. Drazic respectfully disagreed with Dr. Levy's assessment and conclusions, and opined based on the history of accident, Assignor's treatment records, results of diagnostic test, his response to conservative treatment as well as pre-operative, intra-operative and post-operative findings, that the left shoulder arthroscopic surgery provided on February 14, 2024 was medically necessary for the Assignor.

Dr. Drazic first noted that while the MRI is generally accurate in detecting internal injuries of the shoulder, it is less accurate for labral tears. He asserted that no one test or combination of tests has been shown to have an acceptable sensitivity and specificity or positive predictive values for diagnosing SLAP (labral) tear. He indicated that in this case the tears were surgically confirmed later.

Citing medical authority, Dr. Drazic also noted that injections would not be beneficial or indicated for several reasons. He found that:

One, they do not actually repair anything (especially tears) within the joint and only sometimes temporarily mask some of the symptoms. Furthermore, injections are neither efficacious in providing reliable pain relief nor in improving range of motion. . . . Secondly, injections also carry the risk of detrimental effects on the tendon and bone and decreased potential for healing after repair if one is necessary. [citations omitted].

Dr. Drazic asserted that:

This patient had the classic presentation of post-traumatic impingement. He was asymptomatic before the accident. As a result of the car accident, a traumatic event, he started to suffer from pain which was exacerbated by overhead motion and carrying objects. Clearly not all people develop shoulder impingement with age. This patient started to suffer after the accident, indicating post-traumatic impingement. Further evidence of the traumatic nature of the impingement was the multiple tears in the shoulder. These tears, which were not meaningfully addressed by the peer, were certainly post traumatic. The surgery was necessary because of the severity of the injuries and the amount of time that passed with the patient experiencing debilitating shoulder pathologies despite physical therapy.

Dr. Drazic maintained that it was well within the standards of his profession to perform this surgery on the Assignor given the clinical presentation. He noted that per NIH Guidelines arthroscopy may be recommended for these shoulder problems: a torn or damaged cartilage ring (labrum) or ligaments; shoulder instability, where the shoulder joint is loose and slides around too much or becomes dislocated (slips out of the ball and socket joint); a torn or damaged biceps tendon; a torn rotator cuff; a bone spur or inflammation around the rotator cuff; inflammation or damaged lining of the joint. Often this is caused by an illness, such as rheumatoid arthritis. • Arthritis of the end of the clavicle (collarbone); loose tissue need to be removed; and shoulder impingement syndrome, to make more room for the shoulder to move around.

Dr. Drazic stated that as evident from the evaluation as well as intra-operative findings, the Assignor's condition in this case was consistent with the above indications such as left shoulder - bursitis, impingement syndrome, partial rotator cuff tear, SLAP tear, labrum tear and synovitis. He, therefore, concluded that the left shoulder arthroscopic surgery was warranted.

Analysis - Medical Necessity - Arthroscopy - DOS 2/14/24

After reviewing all of the submissions and taking into account the oral arguments of the parties, I find that Applicant failed to establish, by a preponderance of credible evidence, that the arthroscopy of the left shoulder of the Assignor conducted on February 14, 2024 was medically necessary. I find that the rebuttal and Applicant's supporting medical records failed to meaningfully and adequately address and rebut the arguments and opinions advanced in the peer review and establish the medical necessity of the services at issue. The surgery was recommended following the the Assignor initial orthopedic consultation with PA Jean Pierre Louis, P.A./Robert Drazic, D.O., on February 6, 2024, three and a half weeks after the accident, and the surgery was performed eight days later on February 14, 2024. Among other things, I found that Applicant failed to persuasively rebut the peer reviewer's main contention was that there was an inadequate attempt at conservative care (i.e, several months of physical therapy, medications, acupuncture, strengthening exercises, activity modifications etc. per the peer reviewer) prior to surgery. At the time of the recommendation, the Assignor had undergone approximately two and a half weeks of physical therapy, and as noted by the peer reviewer, there was no evidence that the physical therapy was aggravating the Assignor's complaints. The peer reviewer questioned why the physical therapy was not continued. He found that an MRI of the left shoulder did not reveal any tear, and maintained that the rationale behind performing the surgery was unclear due to a lack of definitive indications on

examination and in the MRI results. Though Dr. Drazic in the rebuttal contended that the surgery "was necessary because of the severity of the injuries and the amount of time that passed with the patient experiencing debilitating shoulder pathologies despite physical therapy," he appeared to rely solely on the post-operative findings of bursitis, impingement syndrome, partial rotator cuff tear, SLAP tear, labrum tear and synovitis to support his contentions. I do not believe that medical necessity may be determined retrospectively; medical necessity is determined prospectively based on the context in which the treatment was recommended or ordered. *See Complete Medical Care Services of NY, PC v. State Farm Mutual Automobile Ins Co.*, 21 Misc. 3d 736, 863 N.Y.S. 2d 551 (Civ. Ct., Queens Co. 2008). Dr. Drazic conceded that the MRI failed to reveal any tears, and failed to point to any examination findings that might have indicated a tear or other condition that may have warranted a more immediate need for surgery without undergoing additional physical therapy. My review of the initial consultation report reveals that only limited positive findings (e.g., pain and range of motion deficits) were documented. I also note that all orthopedic testing (Hawkins, Neer Impingement, O'Brien's, Yergason's, Gerber's left off tests) were negative. Further despite Applicant's contention that an adequate time that passed without resolution of the Assignor's injuries despite physical therapy, the medical records simply do not support that any reasonable course of conservative care to the shoulder was conducted, and/or failed, in this case. While I do believe that the indications of possible tears could justify early surgery in some circumstances, Dr. Drazic's rebuttal and the medical records herein simply failed to adequately explain, with reference to medical authority, when and if arthroscopy surgery to the shoulder was ever appropriate without conducting a reasonable course of conservative care, and whether such circumstances applied in this case. Ultimately, I find peer review to be more credible and persuasive than the rebuttal and Applicant's supporting medical records and arguments in this case. Based on the totality of the evidence in the record, Applicant has failed to rebut Respondent's defense and establish the medical necessity of the services at issue. As Applicant has failed to meet its burden of persuasion, Applicant's claims for reimbursement for the arthroscopy of the left shoulder of the Assignor conducted on February 14, 2024, are denied.

Conclusion

For the reasons set forth herein, Applicant's claims are denied in their entirety. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

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

01/21/2025

(Dated)

Kihyun Kim

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:
e2bb090609e20343034e10a124e75750

Electronically Signed

Your name: Kihyun Kim
Signed on: 01/21/2025