

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Midwood Surgical Supplies Inc
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-24-1353-6250

Applicant's File No. N/A

Insurer's Claim File No. 0558802130003

NAIC No. 36447

ARBITRATION AWARD

I, Robyn McAllister, 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 01/21/2025
Declared closed by the arbitrator on 01/21/2025

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

Jonathan Owens, Esq. from Freiberg, Peck and Kang, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,505.38**, 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

Whether Respondent properly denied Applicant's claim for providing a shoulder orthosis and joint stimulator following right shoulder surgery to Assignor (WD), a 34 year-old male passenger, in connection with treatment of injuries sustained in a motor vehicle accident on January 13, 2024, based on fraud and a peer review by Dr. Howard Kiernan.

4. Findings, Conclusions, and Basis Therefor

Applicant sought reimbursement in the amount of \$1505.38 for providing a shoulder orthosis and joint stimulator following right shoulder surgery on April 12, 2024 to Assignor (WD), a 34 year-old male passenger, in connection with treatment of injuries sustained in a motor vehicle accident on January 13, 2024. Respondent timely denied Applicant's claim based on a peer review dated May 1, 2024 by Dr. Howard Kiernan. Respondent also globally denied Assignor's entire claim based on fraud.

This decision is based on the oral arguments of counsel or other representative at the hearing and the documents submitted. I have reviewed the documents contained in the ADR Center as of the date of this award. Applicant established its prima facie case since Respondent's denial acknowledged receipt of Applicant's bill. *See Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y.3d 498 (2015); *AR Medical Rehabilitation v State-Wide Insurance Company*, 49 Misc.3d 919 (Civil Ct., Kings Co. 2015).

At the hearing, Respondent argued that it properly denied Assignor's entire claim since Assignor made material misrepresentations and/or the loss was staged. I disagree. It was Respondent's burden to demonstrate a "founded belief" that alleged injuries and subsequent treatment did not arise from a covered event. *See, Central General Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195 (1997); *V.S. Medical Services, P.C. v. Allstate Ins. Co.*, 11 Misc.3d 334 (Civ. Ct. Kings Co. 2006); *aff'd* 25 Misc.3d 39 (App. Term 2d, 11th & 13th Dists. 2009); *A.B. Medical Services PLLC v. State Farm Mutual Automobile Ins. Co.*, 7 Misc.3d 822 (Civ. Ct. Kings Co. 2005).

In the instant case, Respondent submitted a global denial dated June 26, 2024 but failed to submit any additional evidence to support its fraud defense. Respondent did not submit any EUO transcripts or a SIU affidavit and Respondent failed to explain the purported material misrepresentations or fraud. Thus, in the absence of any evidence to support Respondent's defense, I find that Respondent failed to demonstrate a founded belief that this was not a covered event.

Respondent further asserted that it properly denied Applicant's claim for the medical supplies since the surgery and associated supplies were not medically necessary. I disagree. I was not persuaded by the peer review report by Dr. Howard Kiernan, submitted by Respondent in support of its denial.

In order to support a defense of lack of medical necessity, the 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 Western Ins. Co.*, 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Dist. 2014). It is the respondent's burden to demonstrate lack of medical necessity, which, if established, shifts the burden of persuasion to the applicant. *See Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006); *A. Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co.*, 16 Misc.3d 131 (A), 2007 N.Y. Slip Op. 51342(U) (App. Term 2d & 11th Dist. 2007).

Furthermore, a respondent's peer review must set forth more than just a conclusory or basic recitation of the expert's opinion. It is well-settled that a peer review is deficient when it fails to set forth the generally accepted medical practice and how the provider deviated from those standards. *See Elmont Open MRI & Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co.*, 23 Misc.3d 1110(A)(Dist. Ct. Nassau Co. 2009); *Nir v. Allstate*, 7 Misc.3d 544 (Civ. Ct. Kings Co. 2005).

Respondent did not submit a peer review by Dr. Kiernan dated May 1, 2024. In his peer review dated May 2, 2024, Dr. Kiernan noted that following the accident, "The claimant started receiving physical therapy sessions on 01/17/2024. On 01/31/2024, an MRI of the Right shoulder was conducted by Daniel Shifteh, M.D., at DS Medical Diagnostics PC. Impression: 1. Supraspinatus tendon tear suspected. 2. Acromioclavicular arthropathy. 3. Subcoracoid minimal bursitis."

Dr. Kiernan further noted that "On 04/02/2024, the claimant presented to Robert Drazic, DO., at Tri-Borough NY Medical Practice PC., with complaints of pain in the right shoulder. The physical examination of the right shoulder revealed decreased range of motion, negative tenderness, Hawkin's test, Neer Impingement test, O'Brien's test, Yergason's test, and Gerber's Left off test. The MRI report of the right shoulder was reviewed during the visit. The claimant was diagnosed with pain, internal derangement, contusion, and rotator cuff strain/tear. The claimant was recommended for right shoulder arthroscopy." He added that the pre-operative report on 04/12/2024 revealed the same complaints and findings and surgery was performed.

Dr. Kiernan asserted that "As per the medical records, the claimant received only 12 physical therapy sessions on the right shoulder before the recommendation of right shoulder arthroscopy. Dr. Drazic, performed an arthroscopy of the right shoulder on a claimant who did not have an adequate course of conservative care therefore the surgery was not medically necessary and should be disallowed. There is no documentation that this claimant had an appropriate course of supervised physical therapy before the surgery. The claimant should have had at least three to six months of conservative treatment directed towards gaining a full range of motion which requires both stretching and strengthening to balance the musculature. The claimant had no such treatment."

He further asserted that the findings "documented on the MRI did not warrant an urgent surgical intervention as they can be easily treated with the progressively challenging plan of conservative treatment and nonsurgical modalities. There were no significant findings noted in this case where urgent surgical intervention would have been helpful."

Dr. Kiernan further argued that "the claimant did not receive any cortisone injection. Dr. Drazic should have explained the advantages of the cortisone administration in the right shoulder and should have clarified why administering cortisone injections would

provide benefits. It was not appropriate on Dr. Drazic's part to opt for right shoulder arthroscopy without considering the maximum potential benefit the claimant might have acquired in dealing with right shoulder symptoms with the help of cortisone injections."

Dr. Kiernan concluded that "The standard of care, in this case, was conservative care including 3 to 6 months of physical therapy and up to 3 cortisone injections" and that the standard of care was not followed in the instant case.

Dr. Kiernan did not mention the supplies at issue or the necessity for any post-operative supplies. Thus, I find that Dr. Kiernan's peer review was insufficient to support Respondent's defense of lack of medical necessity for the post-operative supplies.

In any event, even if I find that the peer review was sufficient, I find that Applicant satisfied its burden of rebutting Dr. Kiernan's assertions regarding the necessity for the right shoulder surgery. *See A. Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., supra.*

As I noted in the linked case heard on the same date involving the surgeon's fees for the right shoulder surgery, *Tri-Borough NY Medical Practice PC v. LM General Insurance Company*, 17-24-1356-3792:

In support of its claim, Applicant submitted the documents contained in the ADR Center including examination and operative reports and rebuttal to the peer review dated June 5, 2024 by Robert Drazic, D.O., rebuttal to the peer review dated June 5, 2024 by Shmuel Kaufman, PA, and MRI reports. Applicant also submitted a third rebuttal to the peer review dated December 6, 2024 by Dr. Leonid Shapiro. I was persuaded by the medical evidence that right shoulder surgery and associated assistant's fee were warranted.

Dr. Drazic asserted that "the patient do underwent physical therapy and pain medications for more than 2 months. However, his 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 intra-operative findings as well." He noted that the post-operative diagnoses included a SLAP tear, labral tear and partial rotator cuff tear.

He further asserted that "Labral tears can be, and often are, traumatically induced, and an impact or tractive impulse such as one suffered in an accident can cause them. Labral tears can be very painful and debilitating. Surgical repairs are indicated because they are very effective with a high success rate. Surgical repair was proper for this patient."

Dr. Drazic stated that Assignor's condition met the criteria for performing surgery under both the NY State Medical Treatment Guidelines and the NIH guidelines. He argued that contrary to Dr. Kiernan's contention, "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."

PA Kaufman's rebuttal was almost identical to Dr. Drazic's as was Dr Shapiro's. However, Dr. Shapiro's rebuttal added that "Partial rotator cuff tears can be traumatically induced and are often more painful than complete tears due to the extreme strain on the remaining fibers. If a partial tear is untreated, it will likely progress and may become irreparable."

I find that Dr. Drazic's rebuttal meaningfully referred to and rebutted the conclusions set forth in the peer review report. See High Quality Medical, P.C. v. Mercury Ins. Co., 26 Misc.3d 145(A) (App. Term 2d, 11th & 13th Dists. 2010).

Moreover, the treating physician's opinion should be afforded greater weight. See Oceanside Medical Healthcare, P.C. v. Progressive Ins., 2002 N.Y. Slip Op. 50188(U) (Civ. Ct. Kings Co. 2002). Therefore, I find that Applicant satisfied its burden and is entitled to reimbursement for the assistant's fees for the right shoulder surgery.

Likewise, in the instant case, Applicant submitted a rebuttal to the peer review dated December 10, 2024 by Dr. Shapiro. I was persuaded by the rebuttal that both the surgery and post-operative supplies were medically necessary.

Accordingly, Applicant is awarded \$1505.38, the entirety of its claim.

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
	Midwood Surgical Supplies Inc	04/12/24 - 04/12/24	\$1,505.38	Awarded: \$1,505.38
Total			\$1,505.38	Awarded: \$1,505.38

B. The insurer shall also compute and pay the applicant interest set forth below. 06/25/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall be computed and paid from June 25, 2024, the date of the request for arbitration, for the Claim awarded above at a rate of 2% per month, simple, ending with the date of payment of the award.

C. Attorney's Fees

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

The insurer shall pay an attorney's fee in accordance with 11 NYCRR 65-4.6.

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 Westchester

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

01/27/2025
(Dated)

Robyn McAllister

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:
680ad318a3b00a5560483759bf7713f8

Electronically Signed

Your name: Robyn McAllister
Signed on: 01/27/2025