

**American Arbitration Association
NO-FAULT ARBITRATION TRIBUNAL**

In the Matter of the Arbitration between

RANDALL V. EHRLICH MD A/A/O ,

Applicant

-and-

STATE FARM FIRE and CASUALTY COMPANY

Respondent

AAA CASE NO.

99-17-1052-7549

INSURER'S FILE NUMBER:



MASTER ARBITRATION AWARD

I, Robert Trestman, the undersigned MASTER ARBITRATOR, appointed by the Superintendent of Insurance and designated by the American Arbitration Association pursuant to regulations promulgated by the Superintendent of Insurance at 11 NYCRR 65-4.10, having been duly sworn, and having heard the proofs and allegations of the parties on June 30, 2018, make the following AWARD.

Part I. Summary of Issues in Dispute

Respondent denied applicant's claim for right shoulder surgery based upon its medical consultant's peer review which found that the surgery was medically unnecessary. The lower arbitrator found that the disputed surgery was medically unnecessary. Consequently, the arbitrator denied applicant's claim.

Part II. Findings, Conclusions, and Basis Therefor

Respondent denied applicant's claim for right shoulder surgery based upon its medical consultant's peer review which found that the surgery was medically unnecessary. The lower arbitrator found that the disputed surgery was medically unnecessary. Consequently, the arbitrator denied applicant's claim.

The arbitrator, in her award, discussed, in detail, the EIP's post-accident medical history, the salient points of the peer review and applicant's letter of medical necessity. The arbitrator noted that the right shoulder MRI revealed a normal study. The arbitrator found that the peer review set forth a factual basis and medical rationale supporting his opinion that the surgery was medically unnecessary. The arbitrator stated that she was persuaded by the peer review. The arbitrator stated that there was no explanation for the referring orthopedist's reported normal right shoulder exam on 6/8/16 and then, only 13 days later, the applicant-surgeon's reported positive right shoulder exam findings. The arbitrator noted that applicant's letter of medical necessity did not specifically respond to the peer review. The arbitrator found that, "Applicant failed to raise a triable issue of fact, as it failed to proffer an affidavit from a health care professional which meaningfully referred to, let alone rebutted, the conclusions set forth in" the peer review.

Applicant, on appeal, contends that the lower arbitrator was arbitrary and capricious and incorrect as a matter of law. Applicant contends that the arbitrator "irrationally" determined that the peer review sufficiently shifted the burden of proof as the peer did not review the treating surgeon's two pre-operative exam reports. Applicant thus argues that the peer lacked a factual basis as required by *Nir v Allstate*, 7 Misc. 3d 544 [NYC Civ. Ct. 2005]. Applicant notes that the surgeon's pre-operative exams formed the basis for the surgeon's decision to perform the surgery. Applicant notes that the peer stated in his report: "Surgery was done but it is not clear what actually lead to this decision." Applicant acknowledges that the arbitrator confirmed that the peer did not review the surgeon's pre-operative exams. Applicant claims that the surgeon's exam reports are "material evidence" and the arbitrator's analysis should have thus found that the peer was conclusory and without a factual basis

Respondent, on appeal, counters that the award was rational and supported by the record. Respondent notes that the arbitrator acknowledged that the peer did not review the treating surgeon's pre-operative exam reports yet the arbitrator was satisfied with the peer's review of the exam reports of the referring orthopedist and the right shoulder MRI which revealed a normal study.

I have carefully reviewed appellant's brief and the record on appeal, as provided by the parties. I certainly appreciate applicant's argument concerning the fact that the peer did not review the treating surgeon's two pre-operative exam reports. I understand that another trier of fact may have thus determined that the peer was insufficient in meeting/shifting respondent's burden of proof. The arbitrator acknowledged that the peer did not review the surgeon's pre-operative exam reports. Yet the arbitrator was still persuaded by the peer's analysis and opinion. The arbitrator noted, in detail, the patient's course of treatment, including the treating surgeon's exams. The arbitrator noted that the MRI revealed a normal study. The arbitrator noted that the referring orthopedist examined the EIP 13 days prior to the initial treating surgeon's exam and reported a normal shoulder exam and to "follow up as needed." The arbitrator noted that there was no explanation for the change in the patient's

exam findings in this 13 day interval. The arbitrator found that the treating surgeon's letter of medical necessity did not specifically respond to or meaningfully refute the peer. The arbitrator stated that she was persuaded by the peer review. The peer did review the MRI report and the multiple referring orthopedic exams, including the exam performed 13 days prior to the initial treating surgeon's exam.

Per 11 NYCRR 65-4.5[o][1], the arbitrator shall be the judge of the relevance and materiality of the evidence offered. Within my powers as a Master Arbitrator, I cannot conduct a de novo review of the case and I cannot substitute my interpretation or my view as to the weight or credibility of the evidence over that of the lower arbitrator. The arbitrator's determination appears to be rational and based on the evidentiary record, notwithstanding her finding that the peer did not review the treating surgeon's two pre-operative reports.

It is within the province of the lower arbitrator to determine what evidence to accept or reject and what inferences should be drawn based on the evidence. See *Mott v State Farm*, 55 NY2d 224. In *Petrofsky v Allstate*, 54 NY2d 207, the Court of Appeals held that a master's powers of review do not encompass a de novo review of the matter presented to the lower arbitrator nor do they authorize him to determine the weight or credibility of the evidence. Although another trier of fact may have reached a different conclusion, given this Master's scope of review, I cannot negate this lower arbitrator's factual determination based on the evidence presented and which I find neither erroneous as a matter of law nor arbitrary and capricious nor so irrational as to warrant vacatur.

Accordingly,

1. the request for review is hereby denied pursuant to 11 NYCRR 65-4.10 (c) (4)
2. the award reviewed is affirmed in its entirety
3. the award or part thereof in favor of applicant respondent hereby reviewed is vacated and
 remanded for a new hearing before the lower arbitrator before a new arbitrator
4. the award in favor of the applicant respondent hereby reviewed is vacated in its entirety
—or—
5. the award reviewed is modified to read as follows:
 - A. The respondent shall pay the applicant no-fault benefits in the sum of

Dollars (\$ _____), as follows:

Work/Wage Loss	\$ _____
Health Service Benefits	\$ _____
Other Reasonable and Necessary Expenses	\$ _____
Death Benefit	\$ _____
Total	\$ _____

B1. Since the claim(s) in question arose from an accident that occurred prior to April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from

_____ at the rate of 2% per month, compounded, and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c) (stay of interest).

B2. Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from

_____ at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c) (stay of interest).

C1. The respondent shall also pay the applicant _____ dollars (\$ _____) for attorney's fees computed in accordance with 11 NYCRR 65-4.6(d). *The computation is shown below* (attach additional sheets if necessary).

-or-

C2. The respondent shall also pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e). However, for all arbitration requests filed on or after April 5, 2002, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

C3. Since the charges by the applicant for benefits are for billings on or after April 5, 2002, and exceed the limitations contained in the schedules established pursuant to section 5108 of the Insurance Law, no attorney's fee shall be payable by the insurer. See 11 NYCRR 65-4.6(i).

- D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization for the arbitration below, unless the fee was previously returned pursuant to an earlier award

PART III. (Complete if applicable.) The applicant in the arbitration reviewed, having prevailed in this review,

- A. the respondent shall pay the applicant
----- dollars (\$----- for attorney's fees computed in accordance with 11 NYCRR 65-4.10 (j). The computation is shown below (attach additional sheets if necessary)


- B. If the applicant requested review, the respondent shall also pay the applicant SEVENTY-FIVE DOLLARS (\$75) to reimburse the applicant for the Master Arbitration filing fee.

This award determines all of the no-fault policy issues submitted to this master arbitrator pursuant to 11 NYCRR 65- 4.10

State of New York

County of San Diego__ SS:

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



Master Arbitrator's Signature

June 30, 2018

Date

IMPORTANT NOTICE

This award is payable within 21 calendar days of the date of mailing. A copy of this award has been sent to the Superintendent of Insurance.

This master arbitration award is final and binding except for CPLR Article 75 review or where the award, exclusive of interest and attorney's fees, exceeds \$5,000, in which case there may be court review de novo (11 NYCRR 65- 4.10(h)). A denial of review pursuant to 11 NYCRR 65-4.10 (c) (4) (Part II (1) above) shall not form the basis of an action de novo within the meaning of section 5106(c) of the Insurance Law. A party who intends to commence an Article 75 proceeding or an action to adjudicate a dispute de novo shall follow the applicable procedures as set forth in CPLR Article 75. If the party initiating such action is an insurer, payment of all amounts set forth in the master arbitration award which will not be subject of judicial action or review shall be made prior of the commencement of such action.

JUL - 3 2018

Date of mailing: _____

Medical		From/To	Claim Amount	Status
Heriberto Barahona Alvarado	Rockville Anesthesia Group	11/21/16 - 11/21/16	\$196.36	Awarded: \$196.36
Total			\$196.36	Awarded: \$196.36

B. The insurer shall also compute and pay the applicant interest set forth below. 08/28/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest is awarded from the date of filing, August 28, 2017, at the rate of two percent per month, not compounded, on a pro-rata basis.

C. Attorney's Fees

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

This case is subject to the provisions as to attorney fees promulgated in the Sixth Amendment to 11 NYCRR 65-4 (Insurance regulation 68-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 New York
 SS :
 County of Suffolk

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

08/03/2018
 (Dated)



Regina Anzalone Kurz

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:
54b900ae195aed977cfb8718e9261f5d

Electronically Signed

Your name: Regina Anzalone Kurz
Signed on: 08/03/2018 7:18:21 AM