

AMERICAN ARBITRATION ASSOCIATION
NEW YORK SUM ARBITRATOR TRIBUNAL

In the Matter of Arbitration between

(Claimant)	AAA Case No.	43-20-1500-0168
	Insurer's Claim File No.	1500175793004
-and-	Applicant File No.	

Hanover Insurance Company - SUM
(Respondent)

Issues in Dispute : SUM case

ARBITRATION AWARD

I, Emily Diamond Esq. , the undersigned **ARBITRATOR**, designated by the American Arbitration Association pursuant to the rules for New York Supplementary Uninsured Motorists 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**.

Claimant(s), in the above caption, hereinafter referred to as: Claimant

1. Preliminary Conference Call held on: 06/30/2015

Edward Lemmo and Enrique Guerrero participated for the Claimant(s).
Vincent Crisci participated for the Respondent.

2. Hearing(s) held on:

11/19/2015
and declared closed by the arbitrator on 01/19/2016.

Edward Lemmo and Howard M. Rosengarten participated in person for the Claimant(s).
Vincent P. Crisci participated in person for the Respondent.

3. Witness(es) for the Claimant(s):

Claimant

4. Witness(es) for the Respondent:

None

5. Exhibits submitted by the Claimant(s):

Police accident report; photographs; verdict/settlement summaries; records and reports of Shaid Mian, M.D.; C-4.3; Clara Maas Medical Center record; Interventional Physical Medicine & Rehabilitation P.C. records and reports; MRI reports; operative report; NY Ortho Sports Medicine and Trauma reports; records and reports of Matthew Grimm M.D.; records and reports of Richard Pearl;; report of Marc Hamet, M.D. with attachments; report of Chad L. Staller; reports and records of Dov J. Berkowitz, M.D.; W-2 forms; prior accident search; PJI tables; portions of EUO; portions of trial transcripts of A. Robert Tantleff, M.D.; radiology reports; IME Watchdog report; medical illustrations and articles; application for SUM arbitration; letter from State Insurance Fund.

6. Exhibits submitted by the Respondent:

Police Accident Report; transcript of Claimant EUO; photos; report of Timothy Henderson, M.D., report of A. Robert Tantleff, M.D.; report of Joseph Pessalano; Workers Compensation records; lien letter.

7. Identity of court reporter:

David P. Yuni of Jay Deitz Associates - Court Reporting Services

8. Identity of interpreter:

Tania Tryfonos, of Speakeasy Services

9. Summary of Issues in Dispute:

Liability, damages, and the serious injury threshold.

10. Findings, conclusions and basis therefor:

Insurance

This is an underinsured motorist claim in which the parties agree that there is \$1,000,000 in SUM coverage with a \$25,000 set off.

Testimony and Medical Evidence

Claimant, 58 years of age on the day of the accident, testified that on September 19, 2013 he was driving an SUV in the course of his employment as a supervisor at United Building Maintenance. Claimant testified that he was traveling north on Broadway at its intersection with 135th Street with the traffic light was green in his favor when the front of a black Nissan struck the driver's side doors of Claimant's vehicle. He testified that his car spun around and came to a stop facing in the opposite direction. The Police Accident Report stated, "at t/p/o V#1 [Claimant's vehicle] states that while driving N/B on B-way he was struck by V#2. V#2 states that after making a left turn onto W. 135th St. going E/B she collided with V#1. . . . No Injuries." There was no airbag deployment.

Claimant testified that the following morning his girlfriend took him to Clara Maas Hospital emergency room where he complained about his back, neck, and right shoulder. The emergency department record documented complaints of neck and upper back pain after a motor vehicle accident the previous night. The examination of the neck revealed mild paravertebral tenderness and full range of motion. The examination of the back revealed mild bilateral parathoracic tenderness. There was full range of motion of the extremities. The clinical impression was muscle strain. There was no mention of the shoulder or of any bruising or bandages.

Claimant submitted five photographs of his right upper arm/shoulder. They depicted severe bruising on the inner aspect of the upper arm. When asked about these photographs at the arbitration hearing and the EUO, Claimant testified that these bruises were due to the impact at the time of the accident. In one of the pictures there were bandages on Claimant's shoulder covering what appeared to be suture marks, and in three of the pictures there appeared to be healed incisions in the same areas. On direct examination by Claimant's attorney at the arbitration hearing, the following questions were asked:

Q. I have a few questions. Exhibit C, [a frontal photograph of the upper right arm and shoulder with what appeared to be two healed incisions of approximately ½ inch each on the right shoulder area with bruises on the lower inner aspect of the upper arm] Exhibit D [a photograph of upper right arm and shoulder with bandages covering what appeared to be incisions/suture marks with some bleeding or leaching of some other fluid through the bandage in the shape of the suture marks in the same area as the healed incisions in Exhibit C. There was bruising in the inner aspect of the upper arm which appeared to be higher, more concentrated, and less diffuse than the bruising in Exhibit C] and Exhibit A [a photograph depicting the same condition as Exhibit C from farther away] , what are these? And

also Exhibit B [same condition as Exhibits C and A], Hanover's. These are previously marked May 14, 2015. What are these pictures? What do they show?

A. These are the parts where the blood accumulated resulting from the hit, from the injury.

Q. After the accident did anyone that you know come to your assistance? . .

Ms. Diamond: Can I just interrupt?

Mr. Lemmo: Yes.

Ms. Diamond: On Exhibit D there seems to be little suture marks on the top of the shoulder.

Mr. Lemmo: Very good. Can I ask him about that because I totally forgot about that?

Ms. Diamond: Okay.

Q. Now Exhibit D, you see at the top of exhibit D there is some what appears to be bandages or some white marks on the top here. Can you tell us what those are?

A. I can't hear you.

Q. What are those marks? What are those bandages?

A. This must've been after they operated on my shoulder.

Q. Well, did you go to Clara Mass [sic] hospital after this accident?

A. Yes.

Q. Were you in the emergency room?

A. Yes.

Q. Were any types of bandages put on you at that time?

A. They also put bandages here.

Q. When you say here what are you referring to?

A. The shoulder due to the accident where I was injured.

Q. So can you tell us are the bandages that you received on Exhibit D, Hanover's D, were they given to you or administered to you at the emergency room at Clara Mass Hospital the day after the accident, or were they from your surgery, or from something else?

A. That was at Clara Mass Hospital. . . .

On cross-examination at the arbitration hearing Claimant testified he had bruising after the accident, and denied any bruising after his surgery.

At the arbitration hearing, I asked to see the scarring from the arthroscopic surgery which had eventually been performed on Claimant's arm, and observed healed scarring in the same areas as in the incisions in the photographs.

The medical records indicated that the next time Claimant was seen by a doctor after the emergency room was, over a month after the accident, on October 23, 2013, by Rafael Abramov, D.O. at Interventional Physical Medicine and Rehabilitation. Claimant had testified at his EUO that he had seen his own doctor who recommended therapy prior to seeing Dr. Abramov, but those records were not produced. Claimant complained to Dr. Abramov about headaches, and pain in the neck, lower back, and right and left shoulders. Dr. Abramov noted by way of history that the claimant was a supervisor and had reported back to work after three days. The examination revealed cervical and lumbar tenderness, and limited range of motion. The right and left shoulders were tender, painful, and with identical limited range of motion bilaterally. There was diminished manual muscle strength in the right deltoid. Therapy was to begin and the doctor indicated that the Claimant was working with a partial disability.

Claimant testified at the arbitration hearing that he received therapy for one year at Interventional Therapy. The records submitted, however, indicated that therapy continued regularly for only three months, through January 31, 2014.

On December 10, 2013, Yasha Magyar, D.O. of Interventional Physical Medicine re-examined Claimant. He complained of headaches and pain in the neck, low back, and right shoulder. The examination was similar to the previous one. Claimant was reportedly partially disabled.

An MRI of the right shoulder performed on January 10, 2014 revealed a partial tear of the infraspinatus tendon with no evidence of retraction; hypertrophic degenerative changes in the right AC joint; and fluid within the biceps tendon sheath.

An MRI of the cervical spine performed on January 10, 2014 revealed degenerative disease, multiple foci of disc bulges; and rule out right lateral disc

herniation at C6-C7.

An MRI of the lumbar spine performed on January 10, 2014 revealed mild uniform disc bulges at L3-L4 and L4-L5.

On March 24, 2014, Claimant was examined by Dov. J. Berkowitz, M.D. with regard to his shoulders. The examination revealed limited range of motion in the right and left shoulder and the impression was bilateral shoulder derangements. He discussed with the patient the different options of treatment including surgery. "The patient feels that he can tolerate his pain. He would like to stay only on a conservative basis and therefore he will continue his therapy. He is presently working."

The office notes of Shahid Mian, M.D. indicated that he first saw Claimant on June 17, 2014. He complained of a motor vehicle accident in which he injured his neck, low back, both shoulders, and left ankle. Claimant reported to Dr. Mian that he then came under the care of Interventional Physical Medicine and Rehabilitation where he received physical therapy for 4 to 5 months. As to his work history, Dr. Mian stated that Claimant, "used to work as a field supervisor for a cleaning company work 8-10 hrs/day, 5 days/wk. Had to drive 4-5 hours a day. Supervise workers. Stopped working on 09/22/2013. Full-time, regular duty 09/23/2013. Stopped working on 05/14/2014."

Dr. Mian's examination revealed, inter alia, tenderness and spasm and limited range of motion of the cervical and lumbar spine; tenderness, positive orthopedic tests, and limited range of motion of the bilateral shoulders; and tenderness and limited range of motion of the left ankle. His diagnosis was bulging cervical discs; LBS; tear of the rotator cuff, impingement syndrome both shoulders; and sprain of the left ankle. He prescribed Motrin, a back brace, and physical therapy. He discussed arthroscopic surgery of the right shoulder which Claimant elected to undergo. He reportedly had a temporary total disability.

On July 3, 2014 arthroscopic surgery of the right shoulder was performed at Oradell Ambulatory Surgery Center by Dr. Mian. The postoperative diagnosis was extensive tear of the subscapularis tendon; tear of the supraspinatus tendon; extensive tear of the proximal biceps tendon; tear of the superior glenoid labrum; impingement syndrome; and impingement of the acromioclavicular joint. Dr. Mian performed a repair of the rotator cuff subscapularis tendon; subacromial decompression; and debridement of the labral tear, rotator cuff tear, and biceps tendon tear. Osteophytes along the inferior surface of the distal clavicle and acromion were noted and were removed using a power burr and a distal clavicle resection was then performed.

Dr. Mian next saw Claimant on July 3, 2014. He was not working and still had a temporary total disability. Claimant testified that he had physical therapy for three months after the surgery and since then has not had any further therapy.

Claimant submitted a report of Richard E. Pearl, M.D. who reviewed the medical records and examined Claimant on April 7, 2015. At that time, he was complaining of severe pain and weakness in the right shoulder as well as pain in the cervical and lumbar spine. His examination revealed limited range of motion of the right shoulder. In the opinion of Dr. Pearl, Claimant had a 35% loss of use of the right shoulder and could not abduct against more than 5 pounds of resistance. He noted that "in addition, with regard to his lumbosacral spine, the MRI does not show any herniated disc and the straight leg raise is within normal limits. No neuropathy can be found on examination and normal sensation was found with regard to the right lower extremity and left lower extremity." With regard to the cervical spine, he noted radiculopathy and that the MRI clearly showed a disc herniation at C6-C7. In the opinion of Dr. Pearl, Claimant would require further medical treatment, and Claimant's injuries were permanent in nature. He noted permanent loss of range of motion to his right shoulder, most markedly internal rotation of only 15° out of a normal of 55°. He was also unable to abduct when force was applied to his right shoulder. In his opinion, Claimant was unable to engage in his usual occupation as a maintenance supervisor and the injuries were causally related to the accident.

On August 18, 2015, an MRI of the lumbar spine was performed at the request of Matthew Grimm, M.D. It revealed disc desiccation throughout, a broad-based posterior disc herniation at L5-S1; disc bulges at L2-3 through L4-5; an annular tear and disc herniation at L1-2 superimposed upon a posterior disc bulge; and a central posterior disc protrusion at T 12-L1.

On September 1, 2015, an EMG/NCV was performed by Dr. Grimm. It revealed evidence of bilateral S1 radiculopathy. On September 3, 2015, Dr. Grimm performed an epidurogram and a lumbar epidural steroid injection at L5-S1 and L3-L4.

Claimant submitted the report and Workers Compensation C4.3 of Shahid Mian, M.D. regarding an examination of October 22, 2015. The examination revealed, inter alia, cervical and lumbar tenderness, muscle spasm, and limited range of motion; and limited range of motion in the bilateral shoulders and left ankle. The diagnosis was herniation C6-C7; L4-L5; multiple lumbar and cervical bulges; tear rotator cuff, labrum, biceps, and impingement syndrome of the right shoulder; tear of the rotator cuff and impingement syndrome of the left shoulder; and a left ankle sprain. His disability status was "permanent".

Claimant submitted the report of Mark Hamet, M.D., a radiologist who reviewed the Claimant's MRIs. In his opinion the MRI of the cervical spine dated January 10, 2014 showed degenerative disc disease at C4-5, C5-6, and C6-7, findings which appeared to chronic in nature.

In the opinion of Dr. Hamet, the MRI of the right shoulder dated January 10, 2014 revealed supraspinatus tendon impingement, fluid below the coracoid process associated with injury to the subscapularis tendon; intrasubstance injury to

the supraspinatus tendon which was intact; the infraspinatus showed no retraction with a limited tendon insertion tear; there was fluid along the long head of the biceps tendon with a partial tendon tear at the insertion; there was an intrasubstance glenoid labrum tear.

In Dr. Hamet's opinion, the MRI of the lumbar spine dated January 10, 2014 showed disc bulge at L4-5 with a T2-weighted signal suggesting an acute nature. The follow-up MRI of the lumbar spine dated December 11, 2014 showed mild improvement in the L4-5 disc and no new lesions or processes.

In his opinion, based on the radiographic findings, there were traumatic injuries to the infraspinatus, subscapularis, and biceps tendon of the right shoulder. Furthermore, there were underlying degenerative changes which were exacerbated by additional injury involving the lumbar spine and right shoulder.

Claimant submitted a report of Chad L. Staller and James Markham of the Center for Forensic Economic Studies. They assumed to continuous worklife of 7.3 additional years to age 66, a statistical life expectancy to age 83.4, and a healthy life expectancy to age 77. To estimate his lost earning capacity, they utilized his 2013 earnings of \$50,000 as a base, and utilized Dr. Pearl's report that Claimant would be unable to engage in his usual occupation. Lost earnings totaled \$363,560 and lost household services totaled \$135,732, for a total economic loss of \$499,292.

Claimant submitted a letter regarding a lien from the State Insurance Fund indicating that they claimed a lien of \$82,685.31.

Respondent submitted the report of Timothy Henderson, M.D., an orthopedist who examined Claimant on June 12, 2015. The examination revealed tenderness and "His pain is mildly out of proportion to examination." He had 4/5 strength and "has displayed sub optimal effort during this portion of the examination." The examination of the cervical spine revealed quantified limited range of motion, limited range of motion of the bilateral shoulders, a positive Hawkins test, lumbar tenderness to palpation, and limited strength, with the claimant displaying "sub optimal effort throughout this portion of the examination." His examination revealed limited range of motion of the lumbar spine,. The examination of the left ankle revealed tenderness, sub optimal effort when testing strength, and full range of motion. Dr. Henderson concluded that the claimant "still has symptoms of right shoulder pain. Other than that, symptoms of neck sprain, lower back sprain, and left ankle sprain have resolved. The Claimant continues to improve following right shoulder rotator cuff repair surgery." He noted that the claimant had degenerative disease of the cervical spine with multiple disc bulges which "likely contributed to the symptoms following his neck injury. The claimant also had degenerative changes in his right shoulder, which more likely than not, contributed to his shoulder symptoms following his injury." He noted that Claimant made a full recovery in regards to the neck and back and would achieve a full recovery to the right shoulder one year following his shoulder surgery, which would be July 3,

2015.

Respondent submitted a review of the MRI studies performed by a Robert Tantleff, M.D., a radiologist. In the opinion of Dr. Tantleff, the MRI of the right shoulder revealed chronic wear and tear and overuse changes unrelated to the accident. He reviewed an x-ray of the cervical spine dated November 25, 2013 which revealed advanced discogenic changes most pronounced at C5-6 and C6-7. The MRI of the cervical spine dated January 10, 2014 revealed, in his opinion, degeneration and desiccation, most notably at C5-6 and C6-7. In his opinions the findings were chronic.

Dr. Tantleff opined that the lumbar MRI of December 11, 2014 was unchanged from the prior MRI examination of January 10, 2014. All findings were chronic and unrelated to the accident .

Respondent submitted a report by Joseph Pessalano, of Archer Consultants, Inc. regarding a vocational assessment. He indicated that assuming the "worst-case scenario", he only considered job titles that were sedentary to medium duty. He noted that Claimant utilized a straight cane to ambulate, both indoors and outdoors, which device had not been prescribed by any of his treating physicians. He also claimed he utilized a Velcro lumbar support prescribed by Dr. Mian on an almost daily basis but was not utilizing the support at the time of the intake. Mr. Pessalano specified numerous job titles with duties that Claimant could perform with salaries ranging from \$30,000 to \$49,000.

Respondent submitted a report of P. Leo Varriale, M.D., an orthopedist who examined Claimant on September 16, 2014 in Claimant's workers compensation case. His occupational status was reportedly, "he was working as a supervisor and building maintenance but was laid off on June 25, 2014 because the company is no longer in business. He is presently looking for a job." The examination of the neck and back was entirely normal. The examination of the right shoulder revealed limited range of motion and weakness of internal and external rotation. His diagnosis was resolved cervical and lumbosacral strain and healing surgery to the right shoulder. As to causal relationship he stated, "after performing a physical examination, taking a complete history from the Claimant and reviewing the medical records, I believe the injuries are partly related to the accident of September 19, 2013 and partly related to pre-existing degenerative disease of the cervical and lumbar spine." He recommended physical therapy to be continued twice a week for the right shoulder. In his opinion, there was no disability. He re-examined Claimant on July 21, 2015. The examination including the shoulder, neck and back was entirely normal. His diagnosis was resolved surgery to the right shoulder, and resolved cervical and lumbosacral strain. In his opinion there was no need for any further physical therapy or orthopedic treatment and there was no disability.

Respondent submitted a letter from the New York State Insurance Fund indicating that they were not claiming any rights of recovery against the SUM

claim.

Claimant testified that he returned to work on the Tuesday following the accident and worked until May, 2014. Claimant testified that he has been receiving Workers Compensation since June 2014, in the amount of \$1300 a month to the present time. Claimant testified that he had been employed as a supervisor at United Building Maintenance, an office cleaning and maintenance company. He had worked there for four years prior to leaving in May, 2014. He supervised the maintenance that was done for 4 to 5 Chase Banks per night, maintaining a level of cleanliness and training people that came to work. At his EUO he was asked "did your work as a supervisor involve any kind of heavy lifting?". He responded "no, my job was to inspect and to train people of what they had to do." He testified that subsequent to the accident of September 19, his work duties changed. They tried to keep him at the job, but could not because he was "not 100% anymore."

The job required him to drive 5 to 7 hours a day to travel from bank to bank and he could no longer drive for these long periods of time due to the pain. He also had difficulty training people how to use the machines, which were very heavy. Claimant was asked on cross examination whether United Maintenance was still in business. He responded,

A. I think so, yes. I believe that they wound up with less work, with less business.

Q. Did they go out of business?

A. No, they did not go out of business completely.

Q. Did they lay people off?

A. Not many."

Findings and Conclusions

I find that the underinsured driver was negligent and that his negligence was a substantial factor in causing the accident of September 19, 2013. I do not find that the claimant was comparatively negligent.

Claimant was not a believable witness. He offered post surgical photos showing arthroscopic incisions and post-surgical bruising, but claimed that the bruising was a result of the impact of the car accident. The photographs obviously depicted the condition of his arm after the arthroscopic surgery and Claimant's willingness to lie under oath to advance his litigation claims severely tainted his credibility. The purpose of these lies was to prove that Claimant sustained trauma to his right shoulder in the car accident, given that there were no shoulder complaints noted in the submitted medical records until over a month after the accident. In the words of Claimant's attorney in the arbitration memo, "color photographs of the claimant's body taken shortly after the accident showed

extensive bruising to his right arm. This is consistent with trauma to his right shoulder and arm from the impact." Claimant's attempts to use the photographs to deceive, on the particular issue of whether he sustained "trauma to his right shoulder and arm from the impact," led me to the opposite conclusion.

The medical reports asserted a connection between the accident and the shoulder injury. However, an opinion as to proximate cause is necessarily at least partially reliant on the history of the onset and nature of the symptomatology. The claimant being an exceptionally unreliable historian, I find that there was no causal connection between the accident and the injury to Claimant's shoulder. I further note that Claimant did not submit the records of his primary care physician whom he testified he saw the Monday following the accident, which records could have shed light on Claimant's complaints after the accident. In many other cases, I would not necessarily have drawn an inference that the document would not have supported the claimant on the issue, but in light of this particular Claimant's lack of credibility, I drew such an inference.

Such a material lie under oath warrants application of the principal *Falsus in Uno*. I did not believe Claimant's testimony about his complaints and disability immediately after the accident or at the present time. I did not believe the testimony about his inability to work. I did not believe his testimony that he was let go from work due to his physical condition. I did not believe that he accurately informed his treating doctors about his physical condition after the instant accident.

Based upon the foregoing, and all of the evidence, I find that Claimant has been adequately compensated by the \$25,000 previously received.

ACCORDINGLY,

1. As to Claimant, claimant has been adequately compensated.

This decision is in full disposition of all SUM benefit claims submitted to this arbitrator.

STATE OF NEW YORK }
 } SS:
COUNTY OF NEW YORK }

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

Emily Diamond

(Emily Diamond Esq.)

Date: 02/17/2016

For accidents covered under policies issued or renewed on or after October 1, 1993