

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Millennium Ambulatory Surgery Center
LLC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-16-1036-9128
Applicant's File No.	307981
Insurer's Claim File No.	0549491280101014
NAIC No.	22055

ARBITRATION AWARD

I, Gerry Wendrovsky, 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

1. Hearing(s) held on 08/09/2017
Declared closed by the arbitrator on 08/09/2017

Alan M. Elis from Super & Licatesi P.C. participated in person for the Applicant

Morgan Mackay from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 6,001.09**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended claim to \$1667.03

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The EIP, LA, a 38 year old male, was involved in a motor vehicle accident on 11/28/15. At issue is \$6,001.09, the facility fee for left shoulder surgery performed on 3/16/16. Respondent timely denied the claim based upon a peer review of Dr. Howard Kiernan, dated 4/18/16. The question presented is whether the surgery was medically necessary.

4. Findings, Conclusions, and Basis Therefor

This case has been decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses. I have reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon. This decision is in full disposition of the issues before me.

At the hearing, applicant amended its claim to \$1,667.03.

An applicant establishes its *prima facie* entitlement to judgment as a matter of law by proof that it submitted a claim, setting forth the fact and the amount of the loss sustained, and that payment of no-fault benefits was overdue. *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 AD 3d 742 (2004). Applicant has submitted sufficient credible evidence to establish its *prima facie* case.

A defense that services were not medically necessary may properly be established with a peer review [Jacob Nir, as assignee of John Doe and Allstate, 7 Misc. 3d 544, 547 (Civ. Ct. 2005)], which must "set forth a factual basis and medical rationale for the peer reviewer's determination" *Provvedere, Inc. v. Republic Western Ins. Co.*, 2014 NY Slip Op 50219(U) (App. Term 2014). A peer review's medical rationale will be insufficient to meet respondent's burden of proof if: 1) 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 for its findings; or 3) it fails to provide specifics as to the claim at issue, is conclusory or vague. *All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U)(Civ. Ct. 2012); Nir, *supra*.

For brevity and readability, references to the medical literature are stated as [Cite].

In contending the surgery was not medically necessary, respondent relied upon the peer review of Dr. Kiernan, an orthopedist [who had previously issued a report of an independent medical examination (IME) of the EIP, dated 3/7/16], who reported reviewing the EIP's multiple records, and in relevant part, noted in pertinent part:

*"(The EIP) started acupuncture, chiropractic and physical therapy treatments saw Dr. Vladimir Shur for orthopedic evaluation on 02/24/16. On examination of the left shoulder, described is abduction and forward flexion less than 90 degrees, internal rotation to 0 degrees, and **positive impingement sign**. Dr. Shur recommended surgery. Dr. Shur performed left shoulder arthroscopic surgery on 03/16/16, consisting of major synovectomy due to lysis of adhesions, debridement radiofrequency treatment of anterior glenoid labrum subacromial bursectomy with subacromial decompression, **debridement radiofrequency of the partially torn rotator cuff**, and manipulation of the left shoulder under anesthesia...."*

Dr. Kiernan then opined, in pertinent part, that the surgery was not medically necessary:

*"I had seen (the EIP) in an (IME) on 03/07/16. His gait and station were entirely normal. He had no trouble getting up and down from the bench in the waiting room, seat in the examination room or the examination table. On examination of the shoulders, range of motion was normal. **There were no signs of impingement or instability.** I reviewed the medical records, and based on his entirely normal physical examination, I noted that there was no need for further orthopedic treatment, including surgery. [Cite]- all operative interventions must be based upon positive correlation of clinical findings, clinical course and imaging and other diagnostic tests and that **there should be positive objective findings on clinical examination as an indication for surgery.** [Cite]- There are three arms of treatment for disorders of the rotator cuff: one is preventive, two is conservative, and three is surgical. Preventive focuses on body mechanics, proper use and strengthening of core body and shoulder girdle musculature, and avoiding aggravating activities. **When cuff symptoms develop in the absence of a full thickness tear (and this claimant did not have a full thickness tear), conservative therapy** including rest, activity modification, gentle, active and passive range of motion exercises, anti-inflammatory medication, and **periodic subacromial corticosteroid injections can provide relief.** This is the way (the EIP) was treated and his left shoulder had resolved...."*

Applicant submitted no formal rebuttal but relied on the medical records to refute the peer review, arguing at the hearing, the report of the MRI of the shoulder dated 2/16/16 revealed (as I observe), "impingement morphology" and "partial tear of the distal supraspinatus tendon"; Dr. Shaw's 2/24/16 report, noting impingement; and the uploaded pre-operative report dated 3/8/16 noted reduced ROM of the shoulder.

Respondent argued Dr. Shaw's report was unsigned.

I observe the relevant NF10 herein was based on the peer review and not on the IME report (issued 9 days prior to the subject surgery), wherein in pertinent part, Dr. Kiernan recorded the EIP's complaints of left shoulder pain, and documented a review of medical records; the physical examination was negative, and diagnosis was 'resolved sprain of the left shoulder'. Significantly, the IME report failed to include a review of the MRI.

I note Dr. Kiernan, having examined the EIP (in addition to having issued the peer review), that such an opportunity would ordinarily afford greater weight in my determination.

However, it is clear from a careful review, that the peer review failed to document a review of the shoulder MRI. For this reason, I find respondent has plainly not presented

a sufficient defense of lack of medical necessity so as to shift the burden back to applicant. The peer report, upon which respondent issued its denial, did not address the MRI findings of the EIP. *See*, All Boro Psychological Servs., *supra*; Nir, *supra*.

A peer review's medical rationale is insufficient if not in accordance with generally accepted practice [Forest Rehabilitation Medicine PC v. Allstate Ins. Co., 44 Misc. 3d 476, 481 (Civ. Ct. 2014)]; in this instance, it has not complied with the requirement that as a medical opinion, it address the specifics, herein, correlating the MRI's positive findings to a determination whether the surgery was medically necessary.

Applicant is awarded the sum of \$1,667.03.

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	Amount Amended	Status
	Millennium Ambulatory Surgery Center LLC	03/16/16 - 03/16/16	\$6,001.09	\$1,667.03	Awarded: \$1,667.03
Total			\$6,001.09		Awarded: \$1,667.03

- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 06/10/2016, which is a relevant date only to the extent set forth below.)

Simple interest on the above awarded amount shall be computed and paid at a rate of 2% per month, commencing on the date the claim was filed in arbitration and 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

Respondent shall pay the applicant an attorney's fee, in accordance with 11 NYCRR 65-4.6(e).

- 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 Nassau

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

08/12/2017
(Dated)

Gerry Wendrovsky

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:
356c6f99f816bf6885735436310124e2

Electronically Signed

Your name: Gerry Wendrovsky
Signed on: 08/12/2017