

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

DJO, LLC  
(Applicant)

- and -

Geico Insurance Company  
(Respondent)

AAA Case No. 17-16-1036-6048

Applicant's File No.

Insurer's Claim File No. 0288506580101037

NAIC No. 35882

**ARBITRATION AWARD**

I, Veronica K. O'Connor, 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 10/04/2017  
Declared closed by the arbitrator on 10/04/2017

Gregory M. Vinal, Esq. from Vinal & Vinal, P.C. participated by telephone for the Applicant

Jason A. Ciani, Esq. from Law Office Daniel R. Archilla participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 5,250.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

The Applicant reduced the amount in dispute from \$5,250.00 to \$3,300.00, based fee schedule calculations.

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

3. Summary of Issues in Dispute

Whether the Applicant is entitled to reimbursement for a bone stimulator dispensed as a result of injuries allegedly sustained by the Assignor in an accident that took place on November 24, 2014.

The Respondent denied the Applicant's claim based upon the results of a peer review.

4. Findings, Conclusions, and Basis Therefor

**Pursuant to 11 NYCRR 65-4 (Regulation 68-D), Section 65-4.5(o)(1), the arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations.**

**The decision below is based upon a review of all documents on file in the ADR Center maintained by the American Arbitration Association as of the date of this hearing, as well as any oral arguments of the parties and any testimony given during the hearing.**

The Assignor was involved in a motor vehicle accident on 11-24-14.

On 2-18-15, the Assignor presented cervical spine surgery.

On 3-27-15, Howard Kiernan, MD, at the request of the Respondent, reviewed records relating to the cervical spine surgery performed on 2-18-15. Dr. Kiernan concluded:

. . .She had x-rays of the cervical spine which showed cervical degenerative disease.

She was seen by Dr. Victor Katz on 1/15/15. On examination of the cervical spine, described is paraspinal muscle spasm and tenderness, diminished motion, and positive Spurling's maneuver. The neurologic exam was normal. MRI were ordered. Dr. Katz ordered physical therapy for the shoulder and knee.

She had MRI of the cervical spine on 01/16/15, which showed a broad-based disc herniation at C4/5 with central spinal stenosis, C3/4 midline posterior disc herniation with extrusion and central spinal stenosis, and C6/7 and C7/T1 focal subligamentous disc herniations.

She started physical therapy at Gotto Physical Therapy on 01/16/15. Physical therapy was focused entirely on the knee and the shoulder.

She then had cervical spine surgery on 02/18/15 by Dr. Victor Katz with Dr. Artem Vayman as co-surgeon, consisting of anterior cervical discectomy and fusion at C3-C4 and C4-C5 levels.

This cervical spine surgery was not medically necessary. . .this type of surgery is indicated when a significant or progressive neurological deficit exists in the presence of spinal canal compromise. . . .

There were no deficits on Dr. Katz's examination.

Furthermore, the claimant did not receive any physical therapy treatment for the neck prior to proceeding with surgery, and there was no urgent need for surgery based on his examination findings.

For these reasons, the cervical spine surgery performed by Dr. Victor Katz on 02/18/15, was not medically necessary and should be disallowed. . . .

On 3-5-15, the Applicant dispensed a bone stimulator to the Assignor, related to the cervical spine surgery performed on 2-18-15.

On 4-13-15, the Respondent issued a denial to the Applicant for the bone stimulator dispensed on 3-5-15. The denial indicated the following:

Based on the results of an independent peer review on 03/27/2015 by Dr. Howard Kiernan, it has been determined that the medical justification for the services provided by Victor Katz, MD at Gotto Medical Care, PC on 02/18/2015 has not been established. Accordingly, all billing related to these services are denied.

Based upon a thorough review of the evidence presented, the following has been determined:

Once an applicant has established a prima facie case of entitlement to No-Fault benefits, the burden then shifts to the insurer to prove that the disputed services were not medically necessary. To meet this burden, the insurer's denial(s) of the applicant's claim(s) must be based on a peer review, IME report, or other competent medical evidence that sets forth a clear factual basis and a medical rationale for the denial(s). *Amaze Medical Supply, Inc. v. Eagle Ins. Co.*, 2 Misc. 3d 128A (App. Term, 2nd Dept., 2003); *Tahir v. Progressive Cas. Ins. Co.*, 12 Misc. 3d 657 (N.Y.C. Civ. Ct., N.Y. Co., 2006); *Healing Hands Chiropractic, P.C. v. Nationwide Assurance Co.*, 5 Misc. 3d 975 (N.Y.C. Civ. Ct., N.Y. Co., 2004); *Millennium Radiology, P.C. v. New York Cent. Mut.*, 23 Misc. 3d 1121(A) (N.Y.C. Civ. Ct., Richmond Co., 2009); *Beal-Medea Prods., Inc. v. GEICO Gen. Ins. Co.*, 27 Misc. 3d 1218(A) (N.Y.C. Civ. Ct., Kings Co., 2010); *All Boro Psychological Servs., P.C. v. GEICO Gen. Ins. Co.*, 34 Misc. 3d 1219(A) (N.Y.C. Civ. Ct., Kings Co., 2012).

When an insurer, through a peer review, presents sufficient evidence establishing a lack of medical necessity, the burden then shifts back to the applicant to present its own evidence of medical necessity. *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc. 3d 131(A) (App. Term, 2nd Dept., 2006); *Alfa Medical Supplies v. Geico General Ins. Co.*, 38 Misc. 3d 134(A) (App. Term, 2nd Dept., 2013). If the applicant fails to sufficiently rebut the peer review, the applicant cannot prevail on its claim(s). *A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co.*, 16 Misc.3d 131(A) (App. Term, 2nd Dept., 2007); *Ave P Rehab & Medical Plaza, P.C. v. Geico Ins. Co.*, 34 Misc. 3d 129(A) (App. Term, 2nd Dept., 2011).

The insurer may rebut the inference of medical necessity through a peer review and, if the peer review is not rebutted, the insurer is entitled to denial of the claim. *E.g., A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co.*, 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table), 2007 N.Y. Slip Op. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. July 3, 2007).

I find that the Applicant has failed to establish that the bone stimulator dispensed subsequent to the cervical spine surgery was medically necessary. The evidence submitted fails to document findings that adequately refute the conclusions set forth in the peer review report prepared by Dr. Kiernan. As such, no reimbursement is warranted.

Accordingly, Applicant's claim is denied in its entirety.

(17-618)

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 New York  
SS :  
County of Clinton

I, Veronica K. O'Connor, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

11/03/2017  
(Dated)

Veronica K. O'Connor

### **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:**  
92e82c5c22306e33de68aa3a078df957

### **Electronically Signed**

Your name: Veronica K. O'Connor  
Signed on: 11/03/2017