

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Precision Imaging of New York  
(Applicant)

- and -

Geico Insurance Company  
(Respondent)

AAA Case No.	17-17-1061-7413
Applicant's File No.	1764213
Insurer's Claim File No.	0273805570101016
NAIC No.	14137

**ARBITRATION AWARD**

I, Elyse Balzer, 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: DB

1. Hearing(s) held on 04/11/2018  
Declared closed by the arbitrator on 04/11/2018

Bradly Marks, Esq. from The Marks Law Firm P.C. participated in person for the Applicant

Jasleen Kaur, Esq of Flecker & Goldstein from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 878.67**, 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

The accident happened on November 20, 2015.

The claim is for a left shoulder MRI performed on December 20, 2015.

The issue is whether respondent has proven the lack of medical necessity of MRI testing based on a peer review.

All the documents in the ADR Center record of the case maintained by the AAA at the time of the hearing were reviewed.

#### 4. Findings, Conclusions, and Basis Therefor

On November 20, 2015 the 54 year old female injured person DB was driving a vehicle when it was involved in an accident at East 94<sup>th</sup> Street & Flatlands Avenue in Brooklyn, NY.

DB also sought treatment from Beth Israel- Brooklyn Hospital.

On November 23, 2015 DB was examined at Jubilee Star Acupuncture PC. DB complained of headaches, neck pain, low back pain and left shoulder pain.

On December 2, 2015 DB was examined at Supreme Health Chiropractic PC. The report focused solely on back complaints.

On December 2, 2015 DB was treated by Dr. Shaikh Ahmed, MD at Ahmed Medical Care in Brooklyn, NY. DB's complaints were pain in the neck, thoracic spine, low back, left shoulder, with radiation to both shoulders. DB had diabetes and hypertension. Dr. Ahmed found, in part, limited range of motion and tenderness in the left shoulder. Dr. Ahmed recommended cervical & lumbar MRIs and a left shoulder MRI. Dr. Ahmed ordered DME< including a left shoulder support.

On December 3, 2015 DB had an initial physical therapy evaluation and commenced treatment. DB received physical therapy to the neck, lumbar spine and left shoulder.

On December 10, 2015 DB was examined by orthopedist Dr. Mark S. McMahon, MD.

At that visit DB had complained of cervical spine pain & stiffness, lumbar spine pain & stiffness and pain in her left shoulder.

The exam of the left shoulder revealed: tenderness to palpation; a positive Hawkins sign; a positive Neer sign; elevation to 100 degrees with pain (180 is normal); internal rotation to 60 degrees with pain and normal external rotation but with pain. Dr. McMahon recommended a left shoulder MRI.

The disputed left shoulder MRI was performed on December 20, 2015. It showed: anterior labral tear; reversed Hills-Sachs; partial tear of the inferior glenohumeral ligament; insertional tear of the subscapularis tendon; partial tear of the infraspinatus tendon; Bankart lesion.

On December 30, 2015 DB had an acupuncture re-evaluation. DB had the same complaints, i.e. headache, neck pain, low back pain and left shoulder pain.

On January 19, 2016 Dr. McMahon performed arthroscopic surgery on the left shoulder.

Respondent denied payment for the left shoulder MRI performed on December 20, 2015 based on a peer review, dated 2/3/16, by Dr. Julio Westerband, MD.

Applicant submitted a rebuttal, dated 3/14/18, from Dr. Thomas Kolb, MD, an owner-radiologist of applicant-provider.

Respondent submitted an addendum, dated 4/3/18, from Dr. Westerband.

What is so interesting about Dr. Westerband's opinion is that he expresses an opinion about DB's clinical presentation despite the fact that he never physically examined her.

Dr. Westerband claims that DB had "evidence of a shoulder sprain with minimal findings early after a traumatic incident." This flies in the face of the medical evidence which conclusively demonstrated that DB had clinical signs of full rotator cuff tears which were corroborated by the disputed MRI.

Clearly Dr. Westerband made this claim with the knowledge that should he agree that the clinical evidence gave rise to a reasonable suspicion of a full rotator cuff tear (which I find the case to be) he would have had to have found that the disputed MRI was warranted under the NY Workers Compensation Medical Treatment Guidelines, 3<sup>rd</sup> edition (September 15, 2014), Section D.7.d ii.

In my opinion, after carefully reviewing the medical records, I find that the peer review is misleading in its characterization of the clinical facts about DB prior to the disputed MRI.

At each exam by each provider DB complained of left shoulder pain. Both her primary physician Dr. Ahmed and the orthopedist Dr. McMahon found significant positive signs, on exam, of rotator cuff tear. Both of these physicians recommended the disputed MRI.

In addition, the rebuttal cited to the standards of the American College of Radiology (ACR) regarding the performance of shoulder MRIs - a citation which was conveniently ignored by Dr. Westerband in his addendum.

Respondent bears "both the burden of production and the burden of persuasion with respect to the medical necessity of the treatment or testing for which payment is sought." See, Bajaj v. Progressive Ins. Co., 14 Misc 3d 1202(A) (N.Y.C. Civ. Ct. 2006). The quantum of proof necessary to meet respondent's burden, at the bare minimum, is to "establish a factual basis and medical rationale for the lack of medical necessity of plaintiff's services." A.B. Medical Services, PLLC v. NY Central Mutual Fire Ins. Co., 7 Misc 3d 1018(A), 801 N.Y.S., 2d 229 (Civil Ct. Kings. Co. 2005).

Once a defendant makes out a prima facie case that services were not medically necessary the burden shifts to plaintiff to establish the existence of a triable issue of fact. See, I & B Surgical Supply aao Jean Elie v. NY Central Mut. Fire Ins. Co., 2007 NY Slip 27159, 16 Misc.3d 4 (App Term, 2<sup>nd</sup> & 11<sup>th</sup> Jud Dists, 2<sup>nd</sup> Dep't 2007).

Applicant has, in my opinion, successfully rebutted & refuted respondent's proof, and has done so by a fair preponderance of the evidence. See, c.f., Exclusive Med. Supply Inc. v. Mercury Ins. Group, 2009 NY Slip Op 52273(U), 25 Misc.3d 136 (A) (App Tm,

2nd Dep't 11/5/09); Delta Diagnostic Radiology P.C. v. American Tr. Ins. Co., 18 Misc.3d 128[A], 2007 N.Y. Slip Op 5255[U]; A.Khodadadi Radiology P.C. v. N.Y. Cent. Mut. Fire Ins. Co., 16 Misc.3d 14 [A], 2007 N.Y. Slip Op 51342[U] (App Tm, 2d & 11th Jud Dists 2007); Eagle Surgical Supply Inc. Progressive Cas.Ins. Co., 2008 NY Slip Op 50534(U), (App Tm, 2nd & 11th Jud Dists, 2008); West Tremont P.C. v. GEICO, 2006 N.Y. Slip Op 51871 (U), (App Tm, 2nd & 11th Jud Dists, 2006). See, also, I & B Surgical Supply aao Jean Elie v. NY Central Mut. Fire Ins. Co., 2007 NY Slip 27159, 16 Misc.3d 4, (App Term, 2nd & 11th Jud Dists, 2nd Dep't).

Applicant's claim is granted in its entirety.

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
	Precision Imaging of New York	12/20/15 - 12/20/15	\$878.67	Awarded: \$878.87
Total			\$878.67	Awarded: \$878.87

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/29/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

From 4/29/17 to 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

In cases filed before 2/4/15, the Respondent shall pay the Applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e)(effective April 5, 2002). For cases filed after 2/4/15, the respondent shall pay the Applicant an attorney's fee in accordance with newly promulgated 11 NYCRR 65-4.6 (d), as amended by 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 Westchester

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

05/06/2018

(Dated)

Elyse Balzer

**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:**  
78f022fb79f3155bda096287fd42a30e

### **Electronically Signed**

Your name: Elyse Balzer  
Signed on: 05/06/2018