

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Advanced Orthopedics & Joint Preservation  
PC  
(Applicant)

- and -

Wesco Insurance Company  
(Respondent)

AAA Case No.	17-17-1068-8253
Applicant's File No.	SS-49340
Insurer's Claim File No.	2529343-2
NAIC No.	25011

**ARBITRATION AWARD**

I, Frank Marotta, 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-NU

1. Hearing(s) held on 05/01/2018  
Declared closed by the arbitrator on 05/01/2018

Anthony Alton, Esq, from Samandarov & Associates, P.C. participated in person for the Applicant

Edward Ryan, Esq. from McDonnell Adels & Klestzick, PLLC participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 6,358.40**, was AMENDED and permitted by the arbitrator at the oral hearing.

The Applicant amended the amount in dispute to \$5,269.98 (\$4,760.60 for the Surgeon and \$509.38 for the Physician Assistant).

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulate and agree that the Respondent issued a timely denial.

3. Summary of Issues in Dispute

The record reveals that the EIP-NU, a then 53 year old female, reportedly sustained injuries in a pedestrian motor vehicle accident on March 9, 2017. The Applicant billed for a right knee surgery performed by Dr. Stanislav Avshalumov; assisted by Alex Wicker, PA on April 25, 2017. The Respondent denied the claim based on a peer review conducted by Dr. Dorothy Scarpinato dated June 12, 2017. In addition to a defense that the surgery was medically unnecessary, the Respondent asserts that the Applicant failed to present a proper claim form and seeks reimbursement above the amounts allowable under the applicable fee schedule.

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

The Applicant filed this claim in the amount of \$6,358.40, amended \$5,269.98, for disputed fees in connection with a right knee surgery performed by Dr. Stanislav Avshalumov and assisted by Alex Wicker, PA on April 25, 2017 following a motor vehicle accident that occurred on March 9, 2017.

This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing. In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations.

The first issue to be addressed is whether the bill submitted by the Applicant was sufficient to trigger the claims process. According the Respondent, the Applicant's generic claim form is a nullity, therefore, no claim has ever been submitted for the services. In support of its argument that a generic claim form alone is insufficient to establish a claim for no fault benefits the Respondent cites to Sound Shore Medical Center v. New York Central Mutual Fire Insurance Company, 106 A.D.3d 157, 963 N.Y.S.2d 282 (2nd Dept. 2013); Ortho Products & Equipments, Inc. a/a/o Cooper-Brown v. Eveready Ins. Co., 39 Misc.3d 146(A) (App. Term, 2013); Mount Sinai Hosp. v. Durst Transit, Inc., 117 A.D.3d 921 (2d Dept., 2014); Mount Sinai Hosp. v. New York Cent. Mut. Fire Ins. Co., 120 A.D.3d 561 (2d Dept., 2014), New York University Hosp.- Tisch Institute a/a/o Patel v. GEICO 117 A.D.3d 1012 (2d Dept. 2014) and Long Island Jewish Medical Center a/a/o EIP v. Allstate, 17-991-R-74935-13 (Mstr. Arb. Weisman, 2013).

After careful review of all of the evidence, including the cited case, and in consideration of the arguments made, I find that Applicant has established its prima facie burden with the claim form submitted.

Pursuant to 11 NYCRR §65-3.5(f):

*"An insurer must accept proof of claim submitted on a form other than a prescribed form if it contains substantially the same information as the prescribed form. An insurer, however, may require the submission of the prescribed application for motor vehicle no-fault benefits, the prescribed verification by attending physician or other provider of health service, and the prescribed hospital facility form."*

Notwithstanding the arguments made by the Respondent against the validity of the claim for utilized to establish a proof of claim, by failing to timely contest, at the claims stage, the adequacy of the claim form used by Applicant to establish proof of claim, Respondent waived its right to rely on any deficiencies in that form at the litigation stage. Nyack Hospital v. Allstate Ins. Co., 114 A.D.3d 650, 979 N.Y.S.2d 835 (App. Div., 2d Dept., Feb. 5, 2014); see also Nyack Hosp. v. Metropolitan Property & Casualty Ins. Co., 16 A.D.3d 564, 2005 NY Slip Op 02235 (App Div. 1st Dept., Mar. 21, 2005).

The Respondent received the Applicant's claim form and although they did seek additional information needed to verify the claim ( a complete office record from Lyudmilla Poretskya, MD, including the decision-making examination and letter of medical necessity for this procedure and a digital copy of the MRI imaging of the right knee performed on 3/31/17 and subsequent MRI imaging) it did not ask the Applicant to utilize the applicable prescribed billing form, which in the case of this Applicant would be the verification of treatment by an attending physician or other provider of health services (NF-3). Respondent went on to deny the claim based peer review conducted by Dr. Dorothy Scarpinato on June 12, 2017. As such, any argument against the adequacy of the claim form utilized is waived.

A provider of health care services demonstrates prima facie entitlement to reimbursement of assigned no-fault benefits by submitting proof that payment of no fault benefits are overdue and its statutory billing form was mailed to and received by the Respondent. Mary Immaculate Hospital v. Allstate Ins. Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004). Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 114 A.D.3d 33, 977 N.Y.S.2d 292 (2d Dept. 2013), aff'd 25 NY 3d 498 (2015). In support of its claim, the Applicant provides its billing form and both parties provide a copy of Respondent's denial acknowledging receipt of the Applicant's bill. Together the documents are sufficient for the Applicant to establish the submission and receipt of their claim for the purposes of establishing its prima facie burden of proof. Eagle Surgical Supply, Inc. v Allstate Insurance Company, 42 Misc. 3d 145(A), 2014 NY Slip Op 50343 (U) (App Term 2d 11th & 13th Jud. Dists 2014); Lopes v. Liberty Mutual Ins. Co., 24 Misc.3d 127 (A), 2009 N.Y. Slip Op. 51279(U), 2009 WL 1799812 (App. Term 2d, 11th & 13th Dists. Jan. 26, 2009).

Once a healthcare provider establishes prima facie entitlement to compensation for assigned no fault benefits the medical necessity for the service is presumed and the burden shifts to the Respondent who may rebut the prima facie showing with proof that the service was timely and properly paid Insurance Law §5106(a); 11NYCRR 65- 3.8(a) (1) or medically unnecessary by timely denying the claim; Presbyterian Hosp. v Maryland Cas. Co., 90 NY 2d 274, 660 NYS 2d 536 (2d Dept. 1997), based on a

medical examination (IME) AJS Chiropractic, P.C. v. Mercury Ins. Co., 22 Misc.3d 133(A), 880 N.Y.S.2d 871 (Table), 2009 N.Y. Slip Op. 50208(U), 2009 WL 323421 (App. Term 2d & 11th Dist. Feb. 9, 2009) or a peer review. 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).

In support of their denial the Respondent relies on a peer review conducted by Dr. Dorothy Scarpinato on June 12, 2017, the purpose of which was to determine the medical necessity for the services performed by the Applicant on April 25, 2017.

Dr. Scarpinato provides a history of the EIP as a 53-year old female involved in a pedestrian motor vehicle accident on 3/9/17. The claimant was struck by a car while crossing the street. She did not lose consciousness. She was taken to a local emergency room following the accident. She was evaluated, treated and released. The claimant reportedly sustained multiple injuries including those to her neck, low back and right knee. She followed up with several medical providers. She embarked on a course of chiropractic care, acupuncture and physical therapy. On 4/25/17, right knee arthroscopy was performed.

Dr. Scarpinato indicates that the records provided described an individual who was a pedestrian that was struck by a motor vehicle which resulted in neck and back symptoms along with knee symptoms. The claimant was followed by an orthopedist and had received physical therapy and acupuncture treatment. Dr. Scarpinato goes on to note that it should be emphasized that neither the acupuncturist or the physical therapist reported complaints of pain to the knee nor did these practitioners document conservative treatment to the knee before surgery was carried out. It would stand to reason that a conservative attempt of rehabilitation should have preceded surgical planning. According to Dr. Scarpinato, the standard of care for the rehabilitation of knee injuries call for a trial of conservative care including topical/passive therapies followed by active rehabilitation including stretching and strengthening exercises. Dr. Scarpinato did not identify any record that would suggest that the individual underwent any form of conservative treatment before the surgery was carried out. Additionally, the records do not corroborate the orthopedist's statements that this individual had episodes of instability with locking or clicking. The progress notes provided for review seem to be only with complaints of neck and back symptoms. Dr. Scarpinato cites to the US Department of Health & Human Services, Agency for Healthcare Research and Quality, National Guideline Clearinghouse; 1998 (revised 2014). NGC: 010659 which indicates;

*"The initial consultation is to reduce pain and make the patient feel more comfortable usual with non-prescription analgesics or prescribed pharmaceuticals if necessary. At home exercises such as bicycling and straight leg lifting or other retraining and weight bearing activities may aide in rehabilitation, although a physical therapist may be necessary depending on patient motivation and degree of pain. Exercise and movement have been shown to be more beneficial than total rest but care must be taken not to overload the knee during weight bearing exercise." "Immediate emergency surgery is usually unnecessary with knee injuries unless there is a need to drain acute effusions. Otherwise, most knee problems are greatly improved with physical methods alone. Only*

*when exercise programs are unable to increase strength and range of motion in the knee after more than a month should surgery be considered, and even then it may not be necessary."* (US Department of Health & Human Services, Agency for Healthcare Research and Quality, National Guideline Clearinghouse. 1998 (revised 2014). NGC: 010659.

Dr. Scarpinato also notes that the MRI of the right knee was rather non-compelling and more consistent with the claimant's age rather than any traumatic event, I had the opportunity of reviewing the MRI films which disclosed no tears or fractures. There was normal marrow edema and small joint effusion, Be that as it may, Dr. Scarpinato notes that there is no evidence that a conservative trial of rehabilitation directed towards any of the alleged injuries to the knee. It is for these reasons that the knee arthroscopy was not medically necessary.

In support of its claim the Applicant submits a rebuttal by Dr. Stanislav Avshalumov dated 7/12/17 in which he notes that he is the patient's treating physician who performed the surgery on the patient's right knee.

Dr. Avshalumov provides a history of the EIP as a patient who suffered injuries to the right knee as a direct result of a motor vehicle accident that occurred on 3/9/17 when the EIP experienced a sudden onset of pain. He notes he evaluated the patient on 4/10/17. At this point, the patient had experienced pain for approximately one month. The patient's was referred to his office due to post-accident related injuries. The quality of the pain was described as constant and sharp, associated with catching and locking while walking and muscle cramps. The pain was mainly localized to the joint line. The severity of the pain was rated as a 4 to 8 out of 10. The pain was made worse with increased activity, negotiating stairs, lifting, movement, and walking. The patient had been treated conservatively with physical therapy and Motrin. An examination of the knee revealed tenderness to palpation over the anterior aspect, patellar region, medial joint line and lateral joint line. There were positive McMurray's and Patellar Apprehension tests. The patient's range of motion was restricted and strength was reduced. He notes that he reviewed the right knee MRI which was positive for a focal free edge truncation and radial tearing of the medial meniscal body. On the basis of the patient's complaints, results of clinical examination with positive orthopedic findings and significant lack of improvement to conservative non-surgical treatment surgery was indicated.

In response to the peer review assessment Dr. Avshalumov notes that it would appear Dr. Scarpinato intentionally misread the MRI report as she makes a host of conclusory and unsupported assertions. Dr. Scarpinato maintains the patient's injuries were age related, however, he does not know how she determined this as degenerative injuries have a distinct appearance on an MRI and this patient's MRI did not note her injuries to be chronic in nature. Dr. Avshalumov further notes an MRI is not a study used to determine causation of existing injuries, rather it is used to establish the presence injuries and confirm a diagnosis. The patient's history is what determines origin of the injury. Here the patient was involved in a car accident and only started to suffer from the symptoms described after the accident. [K6] Pathologic Characteristics of the Torn

Human Meniscus Mena Mesiha, MD, David Zurakowski. PhD, et.al. Department of Orthopaedic Surgery, Children's Hospital Boston. Harvard Medical School, Department of Orthopaedic Surgery, Massachusetts General Hospital, Boston, Massachusetts.

According to Dr. Avshalumov, the MRI was positive for a tear of the medial meniscus. He notes an MRI is the gold standard for finding meniscal pathologies and is the study of choice for finding and differentiating knee problems. [K26] AJR: 181, September 2003, Patients with Suspected Meniscal Tears: Prevalence of Abnormalities Seen on MRI of 100 Symptomatic and 100 Contra lateral Asymptomatic Knees Marco Zanetti, Christian W. A. Pfirrmann, Marius R., Schmid, Jose Romero, Burkhardt Seifert Juerg Hadler, 635.

Dr. Avshalumov goes on to note that meniscal tears should be surgically treated. If a tear is not treated it may get worse with potentially severe complications due to increased contact pressures and stresses on the remaining meniscal tissue. Dr. Avshalumov further asserts that contrary to Dr. Scarpinato, there are no standard requirements for a patient to undergo any particular amount of physical therapy. In fact, there is no clear consensus regarding whether physical therapy should be performed for any particular time period. Surgical repair was medically necessary. [K.27]. Orthopedic Knowledge Update. 8 ed. Chapter 37, Knee and Leg Soft-Trauma. Eric C McCarty, MD. Kurt P. Spindler, MD and Reed Bartz, MD. American Academy of Orthopaedic Surgeons. Also, [K3] Biomechanical Consequences of a Tear of the Posterior Root of the Medial Meniscus, Robert Allaire, MD. Muturi Muriuki, PhD, Lars Gilbertson, MD and Christopher D. Harner. Tears should be repaired expeditiously because the odds of successful repair decrease as the time after injury increases due to cell death and reduced likelihood of healing. Pathologic Characteristics of the Torn Human Meniscus Mena Mesiha. MD, David Zurakowski, PhD, et.al. Department of Orthopaedic Surgery. Children's Hospital Boston, Harvard Medical School, Department of Orthopaedic Surgery, Massachusetts General Hospital. Boston, Massachusetts.

The finding in the EIP's knee was clinically correlated based on the patient's positive McMurray's and joint line tenderness evaluations. These evaluations are used to determine the presence of a meniscal tear. A positive McMurray test is the most helpful test to determine the presence or absence of meniscal injury. [K28] Evaluating the Patient with a Knee Injury, MARK H. EBELL, M.D. M.S. Am Fam Physician. 2005 Mar 15, 71(6):1169-1172. Dr. Avshalumov goes on to indicate that his preoperative diagnosis also suggested this patient's pain was due to chondromalacia or chondral damage. For chondral damage or chondromalacia, a chondral shaving or chondroplasty is used to decrease the mechanical symptoms by using a motorized shaver to smooth or remove regions of cartilage fibrillation or loose flaps and further notes that Synovitis is a painful state of traumatically inflamed synovium, therefore a synovectomy was performed to remove the inflamed tissue.

The fact that the patient's knee locked was suggestive of loose bodies, likely chondral fragments. According to The American Academy of Orthopaedic Surgeons, these fragments may be obscured by parts of the knee anatomy and may not always appear on an MRI. They must be surgically removed as there is no other method to remove a loose fragment from a joint. Continued physical therapy and use of the joint will likely cause

further damage to the interior of the joint. This was yet another indicator that surgical intervention was necessary.

Dr. Avshalumov believes that the peer report is confusing diagnostic arthroscopy with surgical/operative arthroscopy. Arthroscopy can be performed either to evaluate a joint with suspicious findings and/or an unclear MRI (diagnostic arthroscopy) or to treat a joint (surgical/operative arthroscopy). Arthroscopy is a minimally invasive procedure where a joint is either diagnosed or repaired with the aid of an arthroscope. The peer discusses and cites to the standard for diagnostic arthroscopy. That is inapplicable to this patient because the arthroscopy was a surgical one and performed to actually repair the tear and other injuries and treat the joint. The MRI was clear that there was a tear of the meniscus. This necessitated the surgery. Surgical intervention was medically indicated and necessary for this patient.

In an addendum to her initial peer review Dr. Scarpinato reports that she received the rebuttal letter from Dr. Avshalumov in which the doctor attempts to defend his position that the knee arthroscopy was medically necessary and related to the accident of record. Dr. Scarpinato indicates that the claimant reportedly experienced pain for a one month duration and was referred to his office. He described the pain as constant, sharp, and associated with catching and locking while walking, along with muscle cramps. The pain levels were rated as high as an 8/10. She reportedly experienced reduction in range of motion and reduced muscle strength about the knee and the doctor states that based on the claimant's complaints, results of clinical examination with positive orthopedic findings and significant lack of improvement to conservative non-surgical treatment, surgery was indicated.

According to Dr. Scarpinato, when she was provided the medical file on this claimant, she did not identify any record that suggested that the claimant complained of knee pain, locking, weakness, reduced range of motion etc. at the time of any physical therapy or acupuncture treatment. Dr. Scarpinato reports that there is simply no record of conservative care that supports the statements the surgeon made in his rebuttal letter. Adding to this, is the fact that the MRI was not compelling. She notes that she personally reviewed it and did not identify any evidence of acute tearing. The doctor goes on to state that the MRI did not suggest that the findings were age related yet he ignores the fact that there was generalized thinning of the patellofemoral articular surfaces and joint space narrowing; these are not imaging results that are consistent with an acute traumatic event. She goes on to note however that the most important fact about this particular case is the fact that the claimant never underwent a conservative course of rehabilitation directed to the knee before it was surgically treated. That is to say, the doctor's rebuttal letter which paints a rather compelling picture of the claimant's condition is not reflected in the fact that the claimant never complained of pain or dysfunction during the course of therapy. On multiple occasions, Dr. Avshalumov continues to reference the claimant's MRI findings as injuries. I once again would challenge that statement. For in fact, if these conditions were truly secondary to trauma, then I must question why the claimant was not complaining of these conditions to the therapist or more importantly receiving any form of active rehabilitation before the surgery was carried out.

Initially it is noted that unlike actions in negligence where a plaintiff must prove causation, a party seeking to recover first party no-fault payments bear no such initial burden, as causation is also presumed. Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 21, 871 N.Y.S.2d 680, 686 (2d Dept. 2009). Therefore, once the Applicant establishes its prima facie entitlement, the burden is on the Respondent to rebut Applicant's prima facie showing by establishing that the service provided were not only medically unnecessary but also unrelated to the motor vehicle accident. An insurer may rebut the presumption of causation by coming forward with proof to establish a factual basis for its good faith belief that the alleged injuries did not arise out of the accident and therefore are unrelated to the motor vehicle accident. Mount Sinai v. Triboro Coach, 263 A.D. 2d. 11, 699 N.Y.S. 2d 77 (Second Dep't, 1999). Since exacerbations of preexisting conditions are covered by no-fault the burden is on the Respondent to establish that the medical condition for which the EIP is being treated was not caused or exacerbated by the accident. Kingsbrook, supra; Mount Sinai Hosp., supra. Although Dr. Scarpinato asserts that the MRI reflects findings consistent with age related changes (thinning of the patellofemoral articular surfaces and joint space narrowing) nowhere in her peer review or addendum does she address exacerbation or aggravation of a pre-existing condition.

As to whether the surgery was medically necessary, after a thorough review of the proof provided and considering the various arguments made by the parties, I am persuaded by the assessment and opinion of the EIP's treating doctor. Dr. Avshalumov's rebuttal provides his medical rationale for performing the surgery given his 4/10/17 clinical findings which correlate with the imaging study. Dr. Scarpinato cites to authority indicating that the standard of care for the rehabilitation of knee injuries call for a trial of conservative care including topical/passive therapies followed by active rehabilitation including stretching and strengthening exercises. In response, Dr. Avshalumov cites to various authorities to support his assertion that there is no standard requirements for a patient to undergo any particular amount of physical therapy, nor is there a clear consensus regarding whether physical therapy should be performed for any particular time period. Based on the facts established by the medical records, I give greater deference to the treating provider's opinion that under the circumstances the surgery was medically necessary. While Dr. Scarpinato indicates when she was provided the medical file for review she did not identify any record that suggested that the claimant complained of knee pain, locking, weakness, reduced range of motion etc. at the time of any physical therapy or acupuncture treatment, the records actually indicates a contrary finding. When the EIP presented to the physical therapist for the initial evaluation on 3/17/17, her referring complaints included right knee pain. On examination the physical therapist reported mild effusion at the right knee as well as tenderness over the medial joint lines. At her initial evaluation with the acupuncturist on 3/13/17, the EIP also list her complaints to include right knee pain in the history section of the report as well as on accompanying pain diagram. There were findings documented and acupuncture treatment provided to the right knee. Additional reports in the record also reveal ongoing subjective complaints and objective clinical findings involving the EIP's right knee. On 3/13/2017 the EIP presented to Dr. Yvette Davidov at S&R Medical PC with chief complaints that included bilateral knee pain, mostly on the right. On examination, there was moderate to severe tenderness of the medial/lateral plateau, medial/lateral femoral condyle, tibial tuberosity, head of the fibula, patella of bilateral knees; mostly on the



right. Active and passive range of motion was moderate to severe restriction in flexion and extension; mostly on the right. McMurray's test was positive on the right and negative on the left. On 3/15/17 the EIP was examined by the Dr. Lennie Hobenson at Altair Medical PC presenting with chief complaints that included bilateral knee pain; more so the right. On examination there was right knee range of motion restrictions. The EIP was diagnosed with knee contusion. On 3/20/17 the EIP was also examined by Dr. Lyudmila Poretskaya at Art of Healing Medicine at which time the EIP reported, among other complaints, right knee pain. Dr. Poretskaya's examination of the EIP's right knee revealed positive orthopedic tests, including a positive McMurray's on right. The EIP was diagnosed with right knee contusion. On 3/27/17, the EIP was seen in follow up by Dr. Poretskaya with continued complaints of right knee pain. The EIP was referred for the orthopedic evaluation. On 4/3/17 the EIP was evaluated by Dr. Lyudmila Poretskaya at Art of Healing Medicine, PC for electrodiagnostic testing and the EIP again reported various complaints including bilateral knee pain. The examination revealed bilateral tenderness and positive orthopedic testing including McMurray's test on the right. The diagnosis included right knee-derangement/sprain/strain. On 4/10/17, the EIP was initially examined by Dr. Stan Avshalumov. His report reveals that the referring doctor was Dr. Poretskaya. Dr. Avshalumov reports that the EIP presented to him with complaints of right knee pain at the joint line with catching and locking while walking which is exacerbated by prolonged ambulation.

Given the history of the patient as being struck by vehicle and knocked to the ground falling on her right side, her consistent complaints of pain to the right side of her body, including her right knee, the imaging study, Dr. Avshalumov clinical assessment and medical rationale for the surgery as outlined in his rebuttal, I find that the EIP's right knee complaints were causally related to the motor vehicle accident and the surgery was medically necessary. There is, contrary to Dr. Scarpinato's assertion, a consistent history of right knee complaints by the EIP established by the record. The prescription for physical therapy called for sessions three times a week for four weeks and included within the EIP's plan her right knee. Dr. Scarpinato based her opinion on only four session notes. Upon consideration of the arguments made by both parties, I find the weight and persuasiveness of proof favors the treating provider and as such, I find the EIP'S complaints related to the accident and the surgery medically necessary. Orlin & Cohen Orthopedic Assoc. v Allstate Ins. Co., 2017 NY Slip Op 50937 (U) (App. Term 2d & 11th Dists. July 21, 2017); Dayan v. Allstate Ins. Co., 49 Misc.3d 151 (A), 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015).

The Respondent further asserts that if an award is made, the Applicant is only entitled to a reimbursement in the amount of \$3,268.23 and in support of its fee schedule number submits the a fee audit by Certified Professional Coder and Medical Auditor, Ms. Megan Deliberis. As noted the Applicant asserts that they are entitled to a reimbursement in the amount of \$5,269.98 and supports their fee assessment with the affirmation of Aaron Perretta, Esq., CPC. Both parties agree on the reimbursements for CPT Code 29811 and 29876. The difference of opinion comes with the codes G0289 and 20610. The Respondent does not allow for a reimbursement for G0289 and alleged it is not a valid for the New York Workers' Compensation Fee Schedule, effective 6/1/2012. Respondent further asserts that the utilization and application of code 20610 is

considered inclusive of the knee surgery and the rate of the physician assistant would be 10.7% of the total allowance.

An insurance carrier's timely asserted defense that bills submitted were not properly no fault rated or that fees charged were not in accordance with the Worker's Compensation Fee Schedule is sufficient, if proven, to justify a reduction in payment or denial of a claim. East Coast Acu., P.C. v. NY Cent. Mut., 18 Misc.3d 139 A, 859 N.Y.S.2d 894 (App. Term 2 & 11 Dists. 2008). Once the insurer makes a prima facie showing that the amounts charged by a provider were in excess of the fee schedule, the burden shifts to the provider to show that the charges involved a different interpretation of such schedule or an inadvertent miscalculation or error. Cornell Medical, P.C. v. Mercury Cas. Co., 24 Misc.3d 58, 884 N.Y.S.2d 558 (App Term 2d, 11 & 13 Dists. 2009).

According to Mr. Perretta, HCPCS Level II code G0289 is listed in the HCPCS Level II Code Book but is not listed in the fee schedule as promulgated by New York. Therefore, per Surgical Ground Rule 11, "Unlisted Services and Procedures" must have its value substantiated via the utilization of Surgery Ground Rule 10 involving By-Report items (a service to unusual or variable to be assigned a relative value and is determined By Report of the medical provider performing such service) which require the submission of a report detailing the nature and need for the service; the time and skill necessary to perform the procedure; any equipment utilized to perform the service; the diagnosis and history with pre-and post-operative findings; and the size, location and number of lesions, as applicable. Mr. Perretta goes on to indicate that G0289 is an "add-on" code and must be reimbursed at 100% of its full value regardless of whether it is the highest valued coded. Mr. Perretta goes on to state that Surgery Ground Rule "5" explicitly states that these add-on procedures are exempt from the multiple procedure calculation and therefore are not subject to the 50% reduction rule.

After review, I was persuaded by Applicant's coder affidavit as to the code G0289 only and find that the Applicant is entitled to reimbursement for this Code G0289. As such, the Applicant is awarded its surgeon's fee in the amount of \$4,731.97 and 10.7% of the surgeon's total for the physician's assistant in the amount of \$506.32 for a total reimbursement of \$5,238.29.

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
	<b>Advanced Orthopedics &amp; Joint Preservation PC</b>	<b>04/25/17 - 04/25/17</b>	<b>\$6,358.40</b>	<b>\$5,269.98</b>	<b>Awarded: \$5,238.29</b>
<b>Total</b>			<b>\$6,358.40</b>		<b>Awarded: \$5,238.29</b>

- B. The insurer shall also compute and pay the applicant interest set forth below. 08/11/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Respondent shall pay interest at a rate of 2% per month, calculated on a pro rata basis using 30 day month and in compliance with 11 NYCRR §65-3.9. Interest shall begin to accrue from the date of the initiation of the arbitration proceeding with the American Arbitration Association and end on the date the award is paid.

- C. Attorney's Fees

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

The Respondent shall also pay the Applicant an attorney fee in accordance with 11 NYCRR §65-4.6 (e). If, however, the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation period, then the attorney fee shall be based upon the provisions of 11 NYCRR §65-4.6 (b).

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

05/27/2018

(Dated)

Frank Marotta

### **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**

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### **Electronically Signed**

Your name: Frank Marotta  
Signed on: 05/27/2018