

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Thompson Medical PC  
(Applicant)

- and -

Enterprise Rent A Car  
(Respondent)

AAA Case No. 17-20-1161-8284

Applicant's File No. 39589

Insurer's Claim File No. 15049187

NAIC No. Self-Insured

**ARBITRATION AWARD**

I, Stacey Charkey, 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 01/19/2021  
Declared closed by the arbitrator on 01/19/2021

John Faris, Esq. from Law Offices of Eitan Dagan participated by telephone for the Applicant

Melanie Rosen, Esq. from McCormack, Mattei & Holler participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 8,177.18**, 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

Whether Applicant is entitled to reimbursement for the fees associated with a left shoulder arthroscopic procedure performed on 11/25/19 in connection with injuries purportedly sustained by assignor, a then 47 year old woman, in a motor vehicle accident occurring 9/15/19. The claim was denied based upon a peer review by Dr. Julio Westerband dated 1/6/20.

4. Findings, Conclusions, and Basis Therefor

The decision below is based on the documents on file in the Electronic Case Folder maintained by the American Arbitration Association as of the date of this hearing and on oral arguments of the parties. No witness testimony was produced at the hearing. Applicant seeks reimbursement, together with interest and counsel fees, under the No-Fault Regulations, for the fees associated with an arthroscopic procedure to the left shoulder.

The assignor, a 47-year-old female was involved in a motor vehicle accident on 9/15/19. The assignor claimed injury to her left shoulder. The assignor subsequently started with conservative treatment. MRI of the left shoulder was performed on 10/20/19. On 10/31/19 she was evaluated by Dr. Sean Thompson who noted tenderness on the acromioclavicular joints and scapula region. Cross Arm, Hawkins and Neer tests were positive. O'Brien and Kim tests were negative. Assignor was diagnosed clinically with a rotator cuff tear. Treatment plan was of left shoulder arthroscopy which was performed 11/25/19.

Respondent insured the motor vehicle involved in the automobile accident. Under New York's Comprehensive Motor Vehicle Insurance Reparation Act (the "No-Fault Law"), New York Ins. Law §§ 5101 et seq., Respondent was obligated to reimburse the injured party (or its assignee) for all "reasonable and necessary expenses" and "medical expenses" arising from the use and operation of the insured vehicle. However, Respondent denied Applicant's claims based upon a peer review performed by Julio Westerland, M.D. opining that the resulting surgery and all related surgical fees and post operative care was not medically necessary. All denials were timely issued.

Applicant establishes "a prima facie showing of their entitlement to judgment as matter of law by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue." *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004).

Once Applicant has established a prima facie case the burden is on the insurer to prove the treatment was medically unnecessary. See, *Citywide Social Work & Psychological Services, PLLC a/a/o Gloria Zhune v. Allstate Ins. Co.*, 8 Misc. 3d 1025A, 806 N.Y.S.2d 444 (App. Term 1st Dept. 2005); *A.B. Medical Services, PLLC v. Geico Ins. Co.*, 2 Misc. 3d 26, 773 N.Y.S.2d 773 (App Term 2nd & 11th Jud Dist 2003).

Neither the Insurance Law nor the Regulations provide a definition of "medical necessity." Over the years, various trial courts have struggled with the definition of "medical necessity." In 2001 the District Court in Nassau County defined "medical necessity" as serving a valid medical purpose. *Sunrise Medical Imaging, P.C. a/a/o Patricia Downie v. Liberty Mutual Ins. Co.* 2001 NY Slip op. 40091U, 2001 N.Y. Misc. Lexis 725 (Dist. Ct. Nassau Co. 2001).

"To find treatment or services are not medically necessary, it must first be reasonably shown by medical evidence, inconsideration of the patient's condition, circumstances, and best interest of the patient, that the treatment or services would be ineffective or that the insurer's preferred health care treatment or lack of treatment would lead to an equally good result." *Fifth Ave. Pain Control Center a/a/o Gladys Quintero v. Allstate Ins. Co.*, 196 Misc. 2d 801, 766 N.Y.S.2d 748 (Civ. Ct. Queens Co. 2003). "A necessary medical expense under the No-Fault Act is one incurred for treatment, procedure, or service ordered by a qualified physician based on the physician's objectively reasonable belief that it will further the patient's diagnosis and treatment. The use of the treatment, procedure, or service must be warranted by the circumstances and

its medical value be verified by credible and reliable evidence." Medical Expertise, P.C. a/a/o Irina oukha v. Trumbull Insurance Company, 196 Misc. 2d 389, 765 N.Y.S2d 171 (Civ. Ct. Queens Co. 2003). A similar approach was followed in Behavioral Diagnostics a/a/o Maria Arevalo v. Allstate Ins., 3 Misc3d 246, 246 N.Y.S.2d 178 (Civ. Ct. Kings Co. 2004)(Within the standard of care for accepted medical practice or the treating physician made a reasonable judgment the services would assist in formulating an accurate diagnosis and treatment plan.) Lastly, courts have used a standard for medical necessity based on "generally accepted medical/professional practice." Citywide Social Work & Psychological Services, PLLC a/a/o Tremayne Brow v. Travelers Indemnity Co., 3 Misc.3d 608, 777 N.Y.S.2d 241 (Civ. Ct. NY Co. 2004); See also, Expo Medical Supplies Inc. v. Clarendon Ins. Co., 12 Misc. 3d 1154A (Civ. Ct.Kings Co. 2006).

Respondent denied this service based upon the peer review of Dr. Julio Westerband. Dr. Westerband reviewed various records and determined it failed to meet the criteria for medical necessity as defined by the No-Fault Law and the medical community standards.

Based on Dr. Westerband's review of the submitted medical records, he opined that the left shoulder arthroscopy was not medically necessary.

1. It is undisputed that the Applicant has established a prima facie case of entitlement to first party benefits by demonstrating it submitted a timely claim setting forth the fact, amount of loss sustained and that payment of the claim has not been made. As stated above, the burden shifts to the Respondent to set forth a clear and factual basis in medical rationale to deny the claim. On behalf of the Respondent, Dr. Julio Westerband reviewed multiple medical records and stated in his opinion the shoulder arthroscopy, related pre and post-operative service were not medically necessary. More particularly, he stated that although the shoulder surgery was done, it is not clear what actually led to the decision. Reportedly the patient had shoulder pain with loss of range of motion. There was evidence on examination of rotator cuff pain with no shoulder instability and no neurological impairment of the upper extremity. The Assignor was only 2 months post-accident when surgery was done. Additional non-surgical modalities had not been offered to the patient. No steroid injections for the subacromial space was provided and/or offered. Additionally, there was no full thickness tear that required urgent repair as to the M.R.I. findings. He noted that had assignor failed to respond to adequate conservative treatment, including judicious use of steroid injections, then consideration for further evaluation might be provided. Dr. Westerband noted that "a recent survey of American Academy of Orthopedic Surgeons indicated considerable variations in practice patterns relating to the care of patients with rotator cuff tears. In the news, non-operative therapies are effective, including physical therapy, anti-inflammatory medication and cortisone injections. The fact is generally believed to effect outcome and therefore, the decision to perform elective rotator cuff repair, includes size of tear, duration of symptoms, the failure of non-operative treatment, duration of non-operative treatment, nocturnal pain, history of trauma and limitations of activities of daily living. Dr. Westerband opined any surgery can develop complications and that procedures should not be undertaken simply because the risk to the patient may not be that great

Dr. Thompson authored a rebuttal in response to Dr. Westerband's peer review in which he disputed Dr. Westerband's opinion and outlined why he believed that the arthroscopy was medically indicated. Dr. Thompson also stated that the Peer Reviewer suggests conservative care should include other than a full course of physical therapy, medication and activity modification. Once again, Dr. Thompson stated the Peer Reviewer has not provided an established medical standard to provide a basis for such claim. In his opinion, the Peer doctors claim it's simply an opinion of another physician and by no

means a description of the consistency with standard or guidelines. Dr. Thompson referenced the New York Shoulder Injury Medical Treatment Guidelines, Second Edition, Shoulder Re-Injury, wherein it is stated that exclusive use of passive modalities should be limited to the first 2-3 weeks during acute phase of shoulder discomfort and accompanied by active therapy as soon as they are appropriate. If no clinically significant increase in function for partial or full thickness tear is observed after an adequate participation, a surgical consultation is warranted. Additionally, M.R.I. findings and symptoms that have not resolved or improved with months of conservative measures such as physical therapy are indicated for surgery. He also stated that as per an article "Cortico Steroids Injections For Rotator Cuff Disorders" state that they may help relieve pain for a short time, but it is not clear that they work better than any other treatments. Also, with multiple injections, there's a risk of weakening tendons in the joint. Furthermore, the Worker's Compensation Board New York Shoulder Injury Medical Treatment Guidelines, Section D7 - Rotator Cuff Tears, 2014, recognize "partial or full thickness tears of the rotator cuff tendons, most often supraspinatus can be caused by vascular, traumatic or degenerative factors or a combination". In the instant case, as documented in medical reports, the patient had left shoulder pain associated with stiffness. Physical examination was replete with positive findings including cross arm adduction, Hawkins and Neer's. These symptoms of pain and positive orthopedic tests point to a clinical suspicion of a full thickness rotator cuff tear. Furthermore, the M.R.I. that was performed was replete with positive findings. During this examination, specific to the left shoulder and the tests, it is clear that the injuries resulted from the accident and that the operative procedure was medically necessary. More particularly, a New York Shoulder Injury Medical Treatment Guidelines, Second Edition, it is stated that "Early surgical intervention produces better surgical outcomes due to healthier tissues and also less limitation of movement prior to and after surgery. In conclusion, Dr. Thompson stated the shoulder arthroscopic surgery and associated services were medically necessary and within the standard of care.

After reviewing all the evidence, I give deference to the treating physician. I find the Respondent's peer Review Report did not establish a deviation from the standard accepted medical practice and that Dr. Thompson cited to medical authority to support his position. I agree that Dr. Westerband's peer review Rebuttal was "simply an opinion of another physician" and by no means is the description of inconsistency with standard of care and/or guidelines.

Applicant herein proved that it submitted proof of claim to Respondent. Therefore, I am constrained by the case law to conclude that a prima facie case has been established. I am not persuaded by Dr. Westerband's peer review that said arthroscopy was not medically necessary. The Applicant has established a prima facie case of entitlement to No-Fault compensation and Respondent has not proven any fraud or lack of coverage, the within claim is granted.

Turning to respondent's additional fee schedule defense, respondent relied on the affidavit by Jeffrey Futoran, CPC. The Applicant did not submit a rebuttal affidavit.

I am permitted to take judicial notice of, among other things, the workers' compensation fee schedule. See Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13, 20 (2d Dept. 2009); LVOV Acupuncture, P.C. v. Geico Ins. Co., 32 Misc.3d 144(A), 2011 NY Slip Op 51721(U) (App Term 2d, 11th & 13th Jud Dists. 2011); Natural Acupuncture Health, P.C. v. Praetorian Ins. Co., 30 Misc.3d 132(A), 2011 NY Slip

Op 50040(U) (App Term, 1st Dept. 2011). Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses (See, Robert Physical Therapy PC v State Farm Mutual Auto Ins. Co., 2006 NY Slip 26240, 12 Misc.3d 172, 8222 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006). If Respondent fails to demonstrate by competent evidentiary proof that an Applicant's claims were in excess of the appropriate fee schedules, Respondent's defense of non-compliance with the appropriate fee schedules cannot be sustained. See, Continental Medical PC v. Travelers Indemnity Co., 11 Misc.3d 145A, 819 N.Y.S.2d 847, 2006 NY Slip Op 50841U, 2006 N.Y. Misc. LEXIS 1109 (App. Term, 1st Dep't, per curiam, 2006).

In this matter, I find that the Respondent has come forward with competent evidentiary proof to support its fee schedule reductions. The Respondent relied on the fee coder affidavit of Jeffrey Futoran CPC.

I find that the respondent established its fee schedule defense by submitting Mr. Futoran's affidavit. No rebuttal evidence was submitted by Applicant and as such, Mr. Futoran's expert opinion stands essentially unchallenged.

As per my review of the fee schedule as well as the appropriate and controlling ground rules as laid out in Respondent's fee schedule affidavit of Jeffrey Futoran, CPC which has not been addressed or rebutted by Applicant, the amount awarded is \$5351.52.

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
	Thompson Medical PC	11/25/19 - 11/25/19	\$8,177.18	Awarded: \$5,351.52
Total			\$8,177.18	Awarded: \$5,351.52

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/09/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Where a claim is timely denied, interest shall begin to accrue as of the date the adjudication is commenced by the claimant, to wit: the date the application document was received by the American Arbitration Association, unless arbitration is commenced within 30 days as of the date the denial is received by the claimant. 11 NYCRR 65-3.9c. LMK Psychological Services P.C. v. State Farm Mut. Auto Ins. Co., 12 NY3d 217, 879 NYS2d 14 (2009). The end date for the calculation of the period of interest shall be the date of payment of the claim. In calculation the interest, the date of accrual shall be excluded from the calculation. Accordingly, at bar, unless specifically noted in the body of this award, the date the application document was received by AAA, shall be utilized as the date of accrual for the purpose of calculating interest. Where applicable, if noted within the body of this award, said date of accrual of interest shall be controlling.

#### C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicants an attorney's fee equal to 20 percent of that sum total, as provided for in 11 NYCRR 65-4.6 (as existing on the filing date of this arbitration), subject to a maximum fee of \$1,360.00.

- 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 Queens

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

02/09/2021  
(Dated)

Stacey Charkey

### **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:**  
8576205efc71154f2b0c1c5bb7946973

### Electronically Signed

Your name: Stacey Charkey  
Signed on: 02/09/2021