

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Advanced Orthopaedics PLLC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-19-1134-8695
Applicant's File No.	20/776
Insurer's Claim File No.	0620906950101020
NAIC No.	14138

ARBITRATION AWARD

I, Eylan Schulman, 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 03/30/2020, 02/22/2021
Declared closed by the arbitrator on 02/22/2021

Alan Elis, Esq., from Law Offices of Jonathan B. Seplowe, P.C. participated in person for the Applicant

Kathleen Coggins, Esq., from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 7,401.40**, 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 left shoulder surgery was medically necessary.

The EIP was a 60-year-old female who was the seat-belted driver of a vehicle involved in a driver's side collision on January 1, 2019. This is a claim for reimbursement for the surgical fee in connection with left shoulder surgery performed on April 1, 2019.

Respondent denied the claim based on lack of medical necessity. Specifically, Respondent denied the claim based on the peer review of orthopedic surgeon Julio Westerband, M.D., dated April 29, 2019.

4. Findings, Conclusions, and Basis Therefor

The findings herein are based on documentary evidence set forth in the ADR Center submitted by the parties prior to the date of hearing and oral argument at the hearing.

An Applicant establishes a *prima facie* showing of entitlement to No-Fault benefits under Article 51 of the Insurance Law by submitting proof that it submitted a claim setting forth the fact and the amount of the loss sustained and payment of No-Fault benefits was overdue. A.B. Med. Servs., PLLC v. Liberty Mutual Ins. Co., 39 A.D.3d 779 (2d Dep't 2007).

Once Applicant makes a *prima facie* showing, the burden shifts to Respondent. Respondent's denial for lack of medical necessity must be supported by competent medical evidence setting forth a clear factual basis and medical rationale for denying the claim. Citywide Social Work, & Psy. Serv. P.L.L.C. v. Travelers Indemnity Co., 3 Misc.3d 608 (Civ. Ct. Kings Co. 2004). To successfully support its denial, Respondent's peer review must address all pertinent objective findings contained in Applicant's medical submission and set forth how and why the disputed services were inconsistent with generally accepted medical practices. *Id.* Where a Respondent meets its burden, it becomes incumbent on the claimant to rebut the peer review. Be Well Medical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 18 Misc.3d 139(A), 2008 WL 506180 (App. Term 2d & 11th Dists. Feb. 21, 2008).

It is undisputed that Applicant established its *prima facie* case of entitlement to first-party no-fault benefits by demonstrating it submitted a timely claim setting forth the fact and the amount of the loss sustained and payment for the claim has not been made.

The burden shifts to Respondent to set forth a clear factual basis and medical rationale for denying the claim. Respondent attempts to meet its burden to establish lack of medical necessity through the peer review of orthopedic surgeon Julio Westerband, M.D., dated April 29, 2019. Dr. Westerband claims the surgery at issue was unnecessary because before the procedure was performed, there was no evidence of shoulder instability or upper extremity neurological impairment. Dr. Westerband takes issue with the fact that the EIP was "only four months post DOA" at the time of the surgery and additional nonsurgical modalities had not been offered to the EIP, including steroid injections, prior to the recommendation to perform the surgery. In actuality, the surgery was performed exactly three months post-accident. Additionally, Dr. Westerband argues the EIP demonstrated no symptoms of an unstable shoulder and the treating doctor did not perform maneuvers looking for instability.

In response, Applicant cites to a Rebuttal Report from Dr. Graeme Whyte, the EIP's treating orthopedic surgeon who performed the surgery at issue, demonstrating why the surgery was performed and addressing the arguments advanced by Dr. Westerband in his peer review. The report demonstrates the EIP sustained an objective left shoulder injury, causing the EIP continued pain and difficulties. Specifically, the EIP had positive

findings on MRI and persistent findings of reduced ranges of motion, positive Speed's and impingement tests, and limited rotational movements in evaluations before Dr. Whyte's recommendation that the surgery be performed.

Respondent submitted an Addendum by Dr. Westerband, dated April 2, 2020. After reviewing Dr. Whyte's rebuttal, Dr. Westerband maintained his position that the procedure at issue was unnecessary.

After review of the medical records included on the ADR Center and consideration of the arguments advanced by counsel for both parties, assuming *arguendo* that Respondent met its burden to establish lack of medical necessity for the surgery at issue, I find that Applicant met its burden in rebuttal. I am persuaded the surgery was necessary because it was performed three months after the accident, after the EIP failed a course of conservative treatment, was continuously symptomatic, and demonstrated an objective injury verified on MRI. Given Dr. Whyte's recommendation for the EIP to undergo the procedure, which is supported by objective medical findings and rationale, I defer to the EIP's treating provider's determination that the surgery was necessary for the EIP's rehabilitation following the accident.

Based on the foregoing, I find that Applicant is entitled to reimbursement for the services at issue and is awarded the claim, in the amount of \$7401.40, representing the amount the parties Stipulated to being the proper rate of reimbursement for the surgical fee at issue under the Fee Schedule.

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
	Advanced Orthopaedics PLLC	04/01/19 - 04/01/19	\$7,401.40	Awarded: \$7,401.40
Total			\$7,401.40	Awarded: \$7,401.40

- B. The insurer shall also compute and pay the applicant interest set forth below. 07/09/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Where a claim is untimely denied, or not denied or paid, interest shall accrue as of the 30th day following the date the claim is presented by the claimant to the insurer for payment. Where a claim is timely denied, interest shall accrue as of the date an action is commenced or an arbitration requested, unless an action is commenced or an arbitration requested within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant. (11 NYCRR 65-3.9(c)). The end date for the calculation of interest shall be the date of payment of the claim. In calculating interest, the date of accrual shall be excluded from the calculation. Where a motor vehicle accident occurs after April 5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. (11 NYCRR 65-3.9(a)).

C. Attorney's Fees

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

For cases filed prior to February 4, 2015, 20 percent of the amount of first party benefits awarded herein, plus interest thereon, subject to a minimum of \$60 and a maximum of \$850. For cases filed on or after February 4, 2015, 20 percent of the amount of first party benefits awarded herein, plus interest thereon, subject to no minimum and a maximum of \$1360. (11 NYCRR 65-4).

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

02/23/2021

(Dated)

Eylan Schulman

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:
c62cda018823244c92ddbbaee1f89bd4

Electronically Signed

Your name: Eylan Schulman
Signed on: 02/23/2021