

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Strac Medical LLC  
(Applicant)

- and -

Metropolitan Group Property and Casualty  
Insurance Company  
(Respondent)

AAA Case No. 17-20-1155-1636  
Applicant's File No. STRA-MP-BXNY-001  
Insurer's Claim File No. SLK98931 4J  
NAIC No. 34339

**ARBITRATION AWARD**

I, Bernadette 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 02/04/2021  
Declared closed by the arbitrator on 02/04/2021

David Quinones III, Esq. from Callagy Law, PC participated by telephone for the Applicant

Jonathan Draper, Esq. from Abamont & Associates participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,995.00**, 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 Assignor, a 41-year-old male, sustained injuries to the neck, back, and bilateral shoulders in a motor vehicle accident on October 20, 2018.

Applicant seeks reimbursement in the sum of \$2,995.00 for the rental of an intermittent limb compression device using code E0676 modifier RR provided to the Assignor on March 6, 2019, in connection with arthroscopic surgery of the left shoulder. Respondent

denied payment based on a report dated April 9, 2019 by Dorothy Scarpinato, M.D. Respondent also denied the claim on the ground that the amount billed exceeded the allowable amount pursuant to the Workers' Compensation fee schedule.

The issues presented are whether the DME provided to the Assignor herein was medically necessary and whether Applicant's billing exceeded the fee schedule.

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

I have carefully reviewed the submissions contained in the Modria ADR Center maintained by the American Arbitration Association. I have also considered the oral arguments of the parties presented at the hearing of this matter.

An arbitrator "shall be the judge of the relevance and the materiality of the evidence offered, strict conformity to the rules of evidence shall not be necessary. The arbitrator may question or examine any witness or party and independently raise any issue that arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations." 11 N.Y.C.R.R. 65-45 (o) (1). Additionally, as the trier of the facts and the law, an Arbitrator is authorized to review and take judicial notice of any rule, law, medical document or periodical or any other document which may impact and aid in making a decision, as long as it conforms to the Insurance laws and the New York State Insurance Department Regulations. *Matter of Medical Society v. Serio*, 100 NY2d 854, 768 NYS2d 423 (2003).

Dorothy Scarpinato, M.D., reviewed the medical records and concluded that the underlying surgery to the Assignor's left shoulder and all associated services were not medically necessary. She asserted that a conservative trial of rehabilitation did not precede the surgery. The Assignor did not complain of shoulder pain to the physical therapist or receive any treatment to the left shoulder prior to undergoing the surgery on March 6, 2019. The physical therapy progress notes only indicate neck and back pain. Dr. Scarpinato noted that the Assignor was diagnosed with left shoulder impingement and SLAP tear. She argued that "the mere presence of these entities does not necessarily require surgical repair especially if conservative treatment measures were never attempted."

In response to Dr. Scarpinato's report, Mark Gladstein, M.D., issued a rebuttal report dated January 11, 2021. Dr. Gladstein indicated that the decision to perform the surgery to the Assignor's left shoulder was based on the MRI study as well as the positive clinical findings found throughout the Assignor's physical examination. The Assignor's subjective complaints and positive clinical findings demonstrated the need for the surgery. Regarding Dr. Scarpinato's assertion that the Assignor did not complain of pain to the left shoulder prior to undergoing the surgical procedure on March 6, 2019, Dr. Gladstein noted that when the Assignor presented to Dr. Mian on January 7, 2019 and February 4, 2019, "it was too late to continue with the ongoing course of conservative care since the patient had persistent worsening complaints of left shoulder pain along with clicking, decreased range of motion with pain, and positive Impingement sign,

Apprehension test, Cross Arm test and O'Brien's test." Dr. Gladstein also noted that an MRI study revealed a labral tear. He explained that labral tears can be quite painful and debilitating and do not respond to conservative therapy. Therefore, further conservative treatment would not have been beneficial to the Assignor; orthopedic surgery was the best treatment option.

Dr. Gladstein further indicated that due to the type of surgery performed on March 6, 2019, the Assignor had a higher risk of developing deep venous thrombosis (DVT) and other risk factors associated with DVT, including pulmonary embolism (PE). Dr. Gladstein argued that DVT and PE can have "major complications associated with these surgeries, resulting in significant morbidity and mortality rates, as stated by the American College of Chest Physicians." He indicated that the intermittent limb compression device provided to the Assignor was medically necessary to decrease the complications and risk factors associated with the surgery.

### **Medical Necessity:**

Applicant has established a prima facie entitlement to judgment as a matter of law by proof that it submitted a claim, setting forth the fact and amount of the loss sustained, and that the payment of No-Fault benefits was overdue. See *Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 25 NY3d 498 (2015); *Westchester Med. Ctr. v. Progressive Cas. Ins. Co.*, 89 AD3d 1081, 933 NYS2d 719, 2011 NY Slip Op. 8747 (N.Y. App. Div. 2d Dept. 2011); *New York Hosp. Med. Ctr. of Queens v. QBE Ins. Corp.*, 114 AD3d 648, 979 NYS2d 694, 2014 NY Slip Op 639 (NY App. Div. 2d Dept. 2014).

Once Applicant establishes a prima facie case of medical necessity, the burden shifts to Respondent to produce a peer review or other competent medical evidence which sets forth a clear factual basis and medical rationale for denying the claim. *Healing Hands Chiropractic P.C. v. National Assurance Co.*, 5 Misc. 3d 975; *Citywide Social Work, et. al. v. Travelers Indemnity Co.*, 3 Misc. 3d 608.

A report relied upon by an insurer to defend its denial for No-Fault benefits must demonstrate that the services rendered were not in agreement with generally accepted medical/professional practice. *Jacob Nir, M.D. Assignee of Josaphat Etienne v. Allstate Insurance Co.*, 796 N.Y.S2 857. "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Citywide Social Work & Psy. Serv. P.L.L.C. v. Travelers Indemnity Co.*, 3 Misc. 3d. 608, 777 N.Y.S. 2d 241, 2004 NY Slip Op 20034 NY Slip Op 24034 [Civ. Ct. Kings County 2004].

I find that Dr. Scarpinato's report sets forth a sufficient factual basis and medical rationale to support her opinion that the intermittent limb compression device was not medically necessary. Therefore, Respondent has successfully rebutted Applicant's prima facie case of medical necessity for the DME. See, *Exclusive Med. Supply, Inc. v. Mercury Ins. Group*, 2009 52273 (U) (Appellant Term 2d Dept., Nov. 5, 2009); *Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co.*, 2008 Slip Op 52450 (U), 21 Misc. 3d 142 (A) (App Term 2d Dept., 2008).

The burden now shifts back to Applicant to refute Respondent's consultant's report and demonstrate the necessity of the intermittent limb compression device. *See CPT Med Services, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 New York Slip Op 27526, 18 Misc. 3d 87 (App Term 1<sup>st</sup> Dept.); *Eden Med., P.C. v. Progressive Cas. Ins. Co.*, 2008 NY Slip Op 51098 (U), 19 Misc.3d 143 (A) (App Term 2<sup>nd</sup> & 11<sup>th</sup> Jud Dists., 2008); *Bath Med. Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 2008 NY Slip Op 50347 (U) (App Term 2d Dept., Feb. 26, 2008; *Khodadadi Radiology v. New York Central*, 16 Misc. 3d 131 (A) (2007).

Applicant has met its shifted burden of proof. The rebuttal report by Dr. Gladstein addressed the issues Dr. Scarpinato raised in her report and demonstrated the medically necessity for the DME at issue. Dr. Gladstein explained that the item was provided to the Assignor to prevent certain complications and risk factors associated with performing the surgery to her shoulder.

### **Fee Schedule:**

In support of its fee schedule defense, Respondent submitted into evidence an affidavit by a certified professional coder, Marcy Acuna, CPC. Ms. Acuna opined that the proper fee for one unit of rental for the DME billed under code E0676 is \$9.98. Ms. Acuna noted the following regarding Applicant's billing:

1. The item billed is not listed in the New York Medicaid DME Fee Schedule and the provider did not use a modifier if this is a rental or a purchase item and only billed for one unit;
2. There is no invoice submitted as to the cost of the item. If the billed amount is the cost for the item = \$2,995.00. The monthly rental fee as per the above rule = \$299.50 (10% of \$2,995.00);
3. The provider billed one unit which indicates one day rental = \$9.98 (\$2,995.00 divided by 30 days)

Ms. Acuna stated that there was no documentation regarding the number of days the item was rented to the Assignor. She also indicated that if the item was used in the facility, no reimbursement is allowed as it is included in the facility fee. However, if any fee is allowed, it can be no more than \$9.98.

Arbitrator Aaron Maslow has addressed the issue of whether Applicant is entitled to reimbursement for the rental of this DME associated with surgery to the shoulder, and the amount payable to Applicant. Arbitrator Maslow wrote, in pertinent part:

*The fees set forth in the schedule for durable medical equipment, subchapter Appendix, Exhibit 5, are retail prices, of the Medicare Claims Processing Manual, updated periodically by CMh may include purchase prices for both new and used equipment, and/or monthly rentals. New equipment shall be distinguished with the use of modifier-NU, used equipment with modifier-UE and rental equipment with modifier-RR.*

1. *The insurer's total limit of liability for the rental of a single item of durable medical equipment set forth in the schedule is 15 times the monthly rental fee or the purchase price of the item, whichever is less.*
2. *For provisions and billing of durable medical equipment, payors shall follow the relevant provisions of Chapter 20 of the Medicare Claims Processing Manual, updated periodically by CMS and incorporated by reference, that were in effect at the time the service was provided (<http://www.cms.gov/manuals/downloads/clm104c20pdf>).*

Arbitrator Maslow indicated that Appendix, Exhibit 5 referred to in NJAC 11:3-29 4(c) (New Jersey's fee schedule for Durable Medical Equipment, Prosthetics, Orthopedic Supplies) does not list HCPCS Code E0676. Applicant is therefore required to show that the fee it billed is "a reasonable amount considering the fee schedule amount for similar services or equipment in the region where the service or equipment was provided."

In this matter, Ms. Acuna incorrectly states that Applicant did not use a modifier to show the DME was a rental. Applicant used the modifier RR, which shows the subject intermittent limb compression device was a rental. Applicant also submitted into evidence EOBs and proof of payment insurers have made on other claims for similar DME provided in Applicant's geographic location. New Jersey's Regulations allows reimbursement for rental of DME at 15 times the monthly rental or the purchase price, whichever is less. Ms. Acuna indicates that the fee for the intermittent limb compression device is \$2,995.00. Therefore,  $\$2,995.00 \times 15 = \$4,492.50$ , a sum greater than the amount Applicant billed for the DME.

Accordingly, Applicant is awarded the sum of \$2,995.00.

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.

<b>Medical</b>		<b>From/To</b>	<b>Claim Amount</b>	<b>Status</b>
	<b>Strac Medical LLC</b>	<b>03/06/19 - 03/06/19</b>	<b>\$2,995.00</b>	<b>Awarded: \$2,995.00</b>
<b>Total</b>			<b>\$2,995.00</b>	<b>Awarded: \$2,995.00</b>

- B. The insurer shall also compute and pay the applicant interest set forth below. 01/29/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall begin to accrue as of January 29, 2020, the date the claim is received by the American Arbitration Association, until payment is made. The interest shall be two percent per month, simple, not compounded, on a pro rata basis using a 30 day month.

C. Attorney's Fees

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

With respect to the claim for which compensation was awarded, Respondent shall pay Applicant an attorney's fee in accordance with 11 NYCRR 65-4.6 (e). Since the within arbitration request was filed on or after April 5, 2002, if the benefits and interest awarded thereon are equal to or less than Respondent's written offer during the conciliation process, then the attorney's 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 New York

I, Bernadette 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.

03/06/2021  
(Dated)

Bernadette 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:**  
7bcb0f46f1a72194e90b1a014ccb5eeb

### **Electronically Signed**

Your name: Bernadette Connor  
Signed on: 03/06/2021