

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Village Medical, P.C. D/B/A Branch  
Orthopaedics  
(Applicant)

- and -

Integon National Insurance Company  
(Respondent)

AAA Case No.	17-19-1136-5280
Applicant's File No.	128691
Insurer's Claim File No.	9SINY10346-02
NAIC No.	29742

**ARBITRATION AWARD**

I, James Hogan, 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 03/04/2021  
Declared closed by the arbitrator on 03/04/2021

Kevin Griffith from The Odierno Law Firm P.C. participated in person for the Applicant

Joseph Licata from Rossillo & Licata LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 6,406.72**, 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 EIP, a 34 year old woman, was injured in a collision on 10/26/18. This claim is for right shoulder surgery performed on 1/10/19 by the Applicant. Respondent denied the claim based upon a peer review by Dorothy Scarpinato, MD. Dr. Moros of the Applicant has filed a rebuttal and Dr. Scarpinato has filed an addendum.

4. Findings, Conclusions, and Basis Therefor

**This decision is based upon my review of the electronic file maintained by the American Arbitration Association, and the arguments of the parties set forth in the hearing.**

**Applicant's submission:**

Applicant is billing for services provided to the EIP as follows:

Shoulder arthroscopy billed under CPT code 29823 at \$1,878.13; tenotomy, billed under CPT code 23405 at \$1,200.17; synovectomy of the shoulder billed under CPT code 29821 at \$1,779.64; decompression of subacromial space billed under CPT code 29826 at \$251.21; orthotics management and training billed under CPT code 97760 at \$35.74, for billing totaling \$5,344.89 for DOS 1/10/19.

In addition, Applicant billed for shoulder arthroscopy billed under CPT code 29823-83 at \$375.63 tenotomy, billed under CPT code 23405-83 at \$240.03; synovectomy of the shoulder billed under CPT code 29821-83 at \$355.93; decompression of subacromial space billed under CPT code 29826-83 at \$90.24, for billing totaling \$1,061.83 for DOS 1/10/19. This billing is for services provided by Charles Rogan, PA.

**The total amount of the Applicant billing is \$6,406.72.**

**Applicant has provided a copy of its billing for the shoulder surgery.**

**On 11/26/18, the EIP had an initial evaluation at the Applicant.** She reported being involved in a motor vehicle accident. She presented with Current Complaints of bilateral shoulders, left elbow, left wrist/hand, both knees, both ankles/feet.

The examination of the right shoulder found tenderness to palpation, diffusely. Flexion and abduction were 120°; extension and rotation were 60°. Hawkins test was positive. Apprehension test was positive. O'Brien's test was positive. There was pain with resisted motions. Strength was 5/5.

The examination of the left shoulder found tenderness to palpation, diffusely. Flexion and abduction 130°; extension and rotation were 60°. Hawkins test was positive. Apprehension test was positive. O'Brien's test was positive. Neer's test was positive. There was pain with resisted motions. Strength was 5/5. The shoulder was grossly neurovascularly intact with soft compartments.

The report goes on to record the examination of the left elbow, left wrist/hand, bilateral knees and bilateral ankle/feet.

The Diagnosis was: 1) pain in the right shoulder; 2) pain in the left shoulder; 3) pain in left elbow; 4) pain in left wrist; 5) pain in left hand; 6) pain in right knee; 7) pain in left knee; 8) pain in the left ankle and joints of left foot; 9) sprain of all the ligaments of left ankle; 10) pain in right ankle and joints of right foot; 11) sprain above the ligaments of right ankle.

The Treatment Plan was for an MRI of the left shoulder. In addition, an MRI of the right shoulder, and right ankle were recommended. Furthermore, a right lace up ankle brace was recommended for stabilization and pain control. Also recommended was physical therapy.

**On 12/5/18, the EIP had an MRI of the right ankle. On the same day she also had an MRI of the right shoulder.**

**The EIP had a follow-up examination at the Applicant on 12/18/18.** The EIP had an MRI and the results were discussed. She had ongoing pain in the right shoulder.

The examination of the right shoulder found that the skin was intact; no signs of infection; tenderness to palpation; flexion and abduction 120°; extension and rotation 60°. Positive Hawkins test. Positive Apprehension test. Positive O'Brien's test. Pain with resisted motions. Normal strength. Motor and sensation were intact. Grossly neurovascularly intact with compartments soft.

The examination of the left shoulder found that the skin was intact with no signs of infection. Tenderness to palpation, diffusely. Flexion and abduction 110°. Extension and rotation 60°. Positive Hawkins test. Positive Apprehension test. Positive O'Brien's test. Positive Neer's test. There was pain with resisted motions. Strength was 5/5. Grossly, neurovascularly intact with compartments soft.

This report also records the examination of the left elbow, left wrist/hand, bilateral knees and bilateral feet and ankles.

The findings of the MRI the right shoulder are indicated as tendinitis, bursitis, multilobular spinoglenoid notch ganglion, and SLAP tear.

The findings of the MRI of the right ankle are also recorded.

The Impression included: 1) right shoulder tendinitis, SLAP tear; 2) left shoulder tendinitis, labral tearing; 3) right ankle sprain; 4) left ankle sprain, tendinitis; 5) left wrist/hand pain, sprain; 6) left knee pain, sprain; 7) right knee pain, sprain; 8) right ankle/foot sprain.

It is noted that an injection was administered to the left shoulder.

As to the Treatment Plan a discussion of various alternatives for treatment were discussed including arthroscopy of the right shoulder. After lengthy discussion, the EIP would like to proceed with the surgery.

**Applicant has provided a Report of Operation for the right shoulder surgery performed on 1/10/19.**

**Respondent's submission:**

The position of the Respondent is that the Applicant's claim was properly denied based upon a peer review done by Dorothy Scarpinato, MD, who opined that the surgery was not medically necessary.

Additionally, Respondent's counsel, in its cover letter dated 9/4/19, says that the Respondent had no record of receiving the billing for DOS 1/10/19 in the amount of \$1,061.83.

**Peer Review:**

Dorothy Scarpinato, MD, did a peer review on 4/11/19. The purpose of the peer review was to determine the medical necessity for a number of items. These include:

DOS 1/10/19 from Bay Orthopedic & Rehab Supply in the amount of \$171.07.

DOS 1/10/19 from Brian Slepian in the amount of \$297.11 and \$118.31.

DOS 1/10/19 from Strac Medical, LLC in the amount of \$2,995.00.

DOS 1/10/19 from North Shore Surgi-Center in the amount of \$5,971.10.

DOS 1/10/19 from Branch Orthopedics in the amount of \$5,344.89.

DOS 1/11 - 1/17/19 from Orthomotion Rehab DME, LLC., in the amount of \$1,174.50; DOS 1/18 - 1/24/19 in the amount of \$1,155.00; DOS 1/25 - 1/31/19 in the amount of \$1,155.00;

DOS 2/1 - 2/7/19 in the amount of \$1,155.00.

There is a list of records that were reviewed. These include the MRI report for the right shoulder done on 12/5/18. In addition, there are evaluations of the EIP by Dr. Moros dated 11/26 and 12/18/18.

Dr. Scarpinato summarized the EIP's accident history, noting that she went to the hospital after the accident.

Thereafter, on 11/8/18 she was evaluated by Dr. Anand, after she presented with complaints of pain to multiple areas of the body including the bilateral shoulders. She was examined and referred for physical therapy and advanced diagnostic imaging.

The EIP came under the care of Dr. Moros for her shoulder, elbow, wrist/hand, bilateral knees and bilateral ankles and feet and was referred for continued physical therapy and MRIs.

On 12/18/18, she was re-evaluated by Dr. Moros and diagnosed with right shoulder tendinitis and a SLAP tear, left shoulder tendinitis and labral tearing, right ankle sprain,

left ankle sprain and tendinitis, left wrist/hand pain and sprain, left knee sprain and pain, right knee sprain and pain and left ankle/foot sprain. An injection was administered to the shoulder and further treatment options were discussed and the patient was recommended for right shoulder arthroscopy.

The surgery was performed on 1/10/19.

The claimant was prescribed and provided a shoulder orthosis and pneumatic compression device.

The EIP was prescribed CPM and CT to use as a result of the surgery.

In her Conclusion, Dr. Scarpinato opines that the right shoulder surgery was not medically necessary as it relates to the accident of record. The surgery was initially performed for a pre-operative diagnosis of right shoulder labral tearing with internal derangement. The post-operative diagnosis included the labral tear along with right shoulder partial rotator cuff tear, synovitis, impingement and bursitis. Debridement of the labrum and the rotator cuff was performed along with synovectomy, bursectomy and acromioplasty.

She opined that the imaging studies and operative findings do not suggest an acute traumatic injury but rather chronic changes associated with the shoulder complex. The presence of labral tearing and impingement are common even in the asymptomatic population.

Additionally, she reviewed the right shoulder MRI film which revealed a ganglion cyst of the posterior scapula. There were no fractures or rotator cuff tears identified.

She then says "The relationship between subacromial impingement and rotator cuff disease in the etiology of rotator cup injury is a matter of debate. Extrinsic compression and intrinsic degeneration may play a role." She supports this statement with a reference to a 2011 article found in the Journal of the American Academy of Orthopedic Surgeons.

Referring to the same article, Dr. Scarpinato says in a more contemporaneous citation, it has been found that surgical and non-surgical treatment in 4 randomized controlled trials were studied in an effort to determine which treatment provided better outcomes. The authors concluded that in terms of pain and shoulder function, no evidence exists for differences in outcome between surgical and non-surgical treatment of shoulder impingement syndrome. "Non-surgical management of impingement syndrome continues to be successful in most patients."

She then refers to a 2005 article found in "Ann Rheum Dis" entitled "Exercises versus arthroscopic decompression in patients with subacromial impingement: a randomized controlled study in 90 cases with a one-year follow-up" the authors concluded that surgical treatment of rotator cuff syndrome with subacromial impingement was not superior to physiotherapy with training.

Additionally, the physical therapy progress notes do not document a lack of response to care. There was no evidence that the claimant failed to make therapeutic strides during the course of conservative rehabilitation.

"In short, the information presented for my review did not describe an individual with persistent clinical signs that would suggest labral tearing. Although it is identified on MRI this does not necessarily warrant the need for surgical intervention especially when conservative care did not appear to result in lack of therapeutic response."

She goes on to say that the right shoulder surgery performed on 1/10/19, and all associated services including DME were not medically necessary.

She then discusses some of the DME and refers to the AMA's definition of "Medical Necessity."

Dr. Scarpinato concluded that none of the services under review were medically necessary.

Respondent has provided a copy of the documents listed in the peer review report. However, there are no P/T treatment notes (page 104 of Respondent's submission) they are chiropractic treatment notes.

Also provided are copies of articles relied upon in the peer review report.

**On 4/22/19, Respondent issued an NF-10 re DOS 1/10/19 and billing in the amount of \$5,344.89. Respondent denied the claim.** The basis for the denial was an independent peer review wherein it was found that the services were not medically necessary.

**Applicant's rebuttal to peer review:**

Chris Moros, DO has filed a rebuttal to the peer review. He lists his examination findings of the EIP on 11/26/18, 12/18/18 as well as the MRI of the right shoulder which was done on 12/5/18. He notes that he performed surgery on 1/10/19 with a pre-operative diagnosis of right shoulder labral tear with internal derangement. The post-operative diagnosis was right shoulder labral tear with internal derangement; right shoulder partial rotator cuff tear; right shoulder impingement; right shoulder synovitis; right shoulder bursitis.

Dr. Moros refers to the peer review by Dr. Scarpinato and disagrees with her findings. He opines that she based her opinion on her own review of the right shoulder MRI images. It is noted that Dr. Scarpinato is not a radiologist. Additionally, as per Dr. Moros, Dr. Scarpinato did not present any evidence supporting a pre-existing right shoulder condition.

It appears that Dr. Scarpinato relied upon intraoperative findings to support her position. Those findings were not available prior to the provision of the services in question, and they should not enter into any discussion regarding the medical necessity for the surgery.

Dr. Moros opines that the surgery was medically necessary and that the peer review was insufficient.

**Addendum to peer review:**

Dr. Scarpinato has filed an addendum to her peer review. She has reviewed the rebuttal.

She notes that Dr. Moros contended that the operative services were directed towards accident related injuries. "I would direct the doctor to the physical therapy progress notes which do not document a lack of clinical response. There was no evidence once again that the claimant failed to make therapeutic strides during the course of this conservative rehabilitation program."

She also says that she has included various citations documenting consistent findings between many researchers concerning exercise versus arthroscopic surgery for subacromial impingement, rotator cuff disease, etc.

In short, the records submitted by this practitioner did not alter her opinions originally expressed. The right shoulder arthroscopic surgery performed on 1/10/19 and all associated services were not medically necessary.

**Respondent's fee audit:**

**Respondent has submitted a fee audit from Jennifer Comunale, CPC of Signet Claim Solutions, LLC.**

She lists the services provided by the physician and billed at \$5,344.89. She opines that CPT code 29823 is reimbursable as billed at \$1,878.13. Additionally, the shoulder decompression billed under CPT code 29826 was also reimbursable as billed at \$451.21. None of the other CPT codes are reimbursable. The total reimbursement for the surgeon, should the claim be awarded, is \$2,329.07.

She also reviews the billing for the PA in the amount of \$1,061.83. She opines that reimbursement under CPT code 29823 which was billed at \$375.63 should be \$200.96. There is no reimbursement for CPT code 23405 or 29821 which were billed at \$240.03 and \$355.93, respectively. Additionally, CPT code 29826 which was billed at \$90.24 should be reimbursed at \$48.28. The total amount of the reimbursement for the PA, should the claim be awarded, would be \$249.24, which is 10.7% of the fee allowable for the surgeon.

In support of her conclusions, Ms. Comunale refers to the Surgical Fee Schedule Guidelines, Ground Rule #12F referencing the 10.7% allowance for physician's assistance.

She then says: "As per the Complete Global Service Data for Orthopedic Surgery, 2018, CPT codes 29821 and 23406 are not to be reported when billing along with CPT code 29823 as it is considered to be inclusive to CPT code 29823. Therefore, reimbursement is \$0.00.

Additionally, as per Ms. Comunale, "CPT code 97760 has been reported in error by the provider. After a review of the operative report for patient [the EIP] on date of service 1/10/2019, there is no supporting documentation to allow CPT code 97760 (Orthotic(s) management and training (including assessment and fitting when otherwise reported), upper extremity(s), lower extremity(s) and/or trunk, each 15 minutes). Therefore, reimbursement is \$0.00.

She also opines that Modifier 59 was incorrectly used regarding CPT codes 23405, 29821, 29826 and 97760. She then sets forth the definition of Modifier 59, saying that the documentation must support a different session, different procedure or surgery, different site or organ system, separate incisions/excision, separate lesion or separate injury not ordinarily encountered or performed on the same day by the same individual.

The documentation submitted for the right shoulder surgery did not support a different session, different procedure or surgery, different site or organ system, separate incisions/excision, separate lesion or separate injury not ordinarily encountered or performed on the same day by the same individual. Therefore, modifier 59 should not be appended.

The affidavit was sworn to on 9/10/2020.

**At the hearing:**

At the hearing, Applicant was asked about proof of mailing and counsel referred to a fax cover page that was part of its submission. It indicated that the billing for \$1,061.83 was faxed to the Respondent on 1/21/19 for DOS 1/10/19.

Respondent's counsel could not stipulate that it received the billing, only that the fax telephone number was one registered to the Respondent.

Additionally, Applicant was asked if it had its own fee audit - it did not.

Applicant argued that the rebuttal successfully challenged the peer review as to why the procedure was performed and why the peer was insufficient.

Applicant opined that the peer reviewer did not present any evidence of a pre-existing condition.

Respondent argued that Dr. Scarpinato not only reviewed the MRI report but the film as well in coming to her conclusion.

Additionally, the surgery was performed just 3 months post-accident. There was no indication that the P/T was not helping the EIP. The P/T notes say that the therapy was well tolerated.

Counsel also argued that the rebuttal was devoid of any citations to support the contentions of Dr. Moros.

Further, 1 month before the surgery, the EIP was examined by Dr. Anand who recommended P/T for the shoulder.

### **FINDINGS:**

The Applicant has established its prima facie case.

Applicant is billing for services provided to the EIP as follows:

Shoulder arthroscopy billed under CPT code 29823 at \$1,878.13; tenotomy, billed under CPT code 23405 at \$1,200.17; synovectomy of the shoulder billed under CPT code 29821 at \$1,779.64; decompression of subacromial space billed under CPT code 29826 at \$251.21; orthotics management and training billed under CPT code 97760 at \$35.74, for billing totaling \$5,344.89 for DOS 1/10/19.

In addition, Applicant billed for shoulder arthroscopy billed under CPT code 29823-83 at \$375.63 tenotomy, billed under CPT code 23405-83 at \$240.03; synovectomy of the shoulder billed under CPT code 29821-83 at \$355.93; decompression of subacromial space billed under CPT code 29826-83 at \$90.24, for billing totaling \$1,061.83 for DOS 1/10/19. This billing is for services provided by Charles Rogan, PA.

**The total amount of the Applicant billing is \$6,406.72.**

**On 4/22/19, Respondent issued an NF-10 re DOS 1/10/19 and billing in the amount of \$5,344.89. Respondent denied the claim based upon a peer review.**

**Respondent contends that it did not receive the Applicant billing in the amount of \$1,061.83.** Proof of mailing has been demonstrated with the Fax cover page.

As to the denial, I note that Dr. Scarpinato not only in her original peer review but also in her addendum places a lot of weight on physical therapy progress notes saying that they do not document a lack of clinical response.

The peer review report indicates a physical therapy re-evaluation dated 12/6/18 from Jade Physical Therapy and Physical Therapy Treatment Notes from 12/3 through 12/29/18. I do find the physical therapy re-evaluation as part of Respondent submission.

However, the treatment notes that follow are chiropractic treatment notes and not physical therapy treatment notes. This is evidenced by the line that says "ADJ: C/T/L/S" which indicates which area of the spine was adjusted.

Generally, chiropractors do not include treatment to extremities in their notes.

I also note that in his rebuttal, Dr. Moros documents the physical examination of the EIP on 11/26/18 and 12/18/18. In both examinations, flexion and abduction were measured at 120°. Extension and rotation were each 60°. There were multiple provocative orthopedic tests administered on each DOS. Additionally, on each DOS physical therapy was recommended.

Respondent has not provided copies of physical therapy progress notes, notwithstanding the fact that it did provide a copy of physical therapy re-evaluation dated 12/6/18.

After reviewing the documentation contained in the file, I find that the position of the Respondent is not supported. The peer review by Dr. Scarpinato relies upon documentation in the form of physical therapy progress notes but those notes were not provided. Chiropractic progress notes were provided and they were not listed in the peer review. Those progress notes did not deal with the shoulder yet Dr. Scarpinato opines that the notes do not indicate that the EIP was not responding to treatment.

She is trying to prove a point by utilizing a double negative, and that treatment notes that reflect treatment to the shoulder do not reflect that the EIP was not responding to treatment.

I also note that Dr. Scarpinato said that she reviewed the MRI films, and has concluded that there was no tear. As pointed up by Dr. Moros, he would rather rely upon the reading of the films by a board certified radiologist.

The rebuttal indicates that the EIP was referred for physical therapy as a result of the 11/26/18 evaluation. The fact that there is a physical therapy re-evaluation by Jade Physical Therapy dated 12/6/18 indicates that the EIP was engaged in physical therapy prior to that date.

Additionally, Dr. Scarpinato opined that the imaging studies and operative findings do not suggest an acute traumatic injury but rather chronic changes associated with the shoulder complex. The presence of labral tearing and impingement are common even in the asymptomatic population. No-fault covers the exacerbation of pre-existing injuries.

I am not convinced that the services on the review were not medically necessary.

The claim is awarded.

As to the amount of the award, Applicant has not challenged the fee audit submitted by Respondent.

The claim is awarded in the amount of \$2,578.58.

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
	Village Medical, P.C. D/B/A Branch Orthopaedics	01/10/19 - 01/10/19	\$6,406.72	Awarded: \$2,578.58
Total			\$6,406.72	Awarded: \$2,578.58

- B. The insurer shall also compute and pay the applicant interest set forth below. 07/25/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

I find that the date for interest to accrue is the date of the filing of the arbitration, 7/25/19 as this is the date when the Applicant's filing was processed and notice of the arbitration sent to the Respondent. As per Insurance Regulation 65-3.9, interest is due until such amount is paid, and without demand therefor.

C. Attorney's Fees

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

The insurer shall pay the Applicant's attorney as per 11 NYCRR 65-4.6 (e). However, if the award and interest is equal to, or less than, Respondent's written offer during the conciliation process, then the attorney's fee shall be based upon 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 Suffolk

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

03/08/2021  
(Dated)

James Hogan

**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:**  
356eccb53b78b53ff6c34538bbb13af4

### **Electronically Signed**

Your name: James Hogan  
Signed on: 03/08/2021