

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Protechmed Inc.  
(Applicant)

- and -

American Transit Insurance Company  
(Respondent)

AAA Case No. 17-19-1150-5232

Applicant's File No. BT19-100913

Insurer's Claim File No. 1051422-02

NAIC No. 16616

**ARBITRATION AWARD**

I, Michael Galeno, 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 11/05/2020, 02/04/2021  
Declared closed by the arbitrator on 02/04/2021

Diana Usten, Esq., from The Tadchiev Law Firm, P.C. participated in person for the Applicant

Joseph Farrell, Esq., from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 620.62**, 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

On February 8, 2019, the Assignor, a 47-year-old male, was a passenger in a motor vehicle which was involved in an accident. The primary issue in this case concerns whether or not right shoulder surgery, performed on the Assignor on 04/15/2019, and related operative and post-operative services, were causally related to the subject accident. Respondent relies on a 05/01/2019 MRI review prepared by Dr. George Cavaliere, an 08/14/2019 peer review prepared by Dr. Matthew Skolnick, as well as the 08/09/2019 report of a "Biomechanical Engineering Consultant" - "Omid Komari, PH.D.", to set forth the asserted lack of causality defense.

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

The case was decided on the submissions of the parties as contained in the Electronic Case Folder maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the relevant documents contained in the ECF for both parties and make my decision in reliance thereon.

##### **Chronology of relevant events, services, reports, and denials -**

On February 8, 2019, the Assignor, a 47-year-old male, was a passenger in a motor vehicle which was involved in an accident.

On February 18, 2019, the Assignor had a right shoulder MRI taken. The reported impression was: "**There is a partial thickness tear of the anterior aspect of the supraspinatus tendon at the humeral insertion.** Clinical correlation is recommended."

On April 15, 2019, the Assignor underwent arthroscopic surgery on his right shoulder and was post-operatively provided with the subject pneumatic compression device by the Applicant.

On May 1, 2019, the 02/18/2019 right shoulder MRI was reviewed for Respondent by Dr. George Cavaliere. Dr. Cavaliere commented: "Review of MRI of the right shoulder reveals hypertrophic change of the acromioclavicular joint and subchondral cystic change in the humeral head. **These findings are degenerative in etiology.** The marrow edema in the humeral head is a non-specific finding. The thickening with increased signal intensity involving the supraspinatus tendon is consistent with tendinosis. In view of the associated findings, **the tear of the anterior margin of the supraspinatus tendon is degenerative in etiology as well.** The fluid in the subacromial-subdeltoid bursa is **consistent with bursitis and is a chronic finding.** There is no evidence of post traumatic change in this evaluation. **The tear of the supraspinatus tendon concurs with the evaluation of Dr. Chess.**"

On August 2, 2019, Respondent issued a general denial stating: "Entire claim is denied based upon the founded belief the alleged injuries **did not arise out of an insured event** and/or are not causally **related to a covered incident.**"

On August 9, 2019, a report was prepared by "Omid Komari, PH.D." a "Biomechanical Engineering Consultant". Dr. Komari stated, in relevant part: "This report is based upon my review of the Police Accident Report, the medical records review and examination report by Francisco Santiago, M.D., the MRI reviews performed by George Cavaliere, M.D., and the orthopedic consultation report by Tony Wanich, M.D. ... **Based on the available information**, including the fact that the Toyota was the third vehicle involved in a chain multi-vehicle accident, **it was concluded that the subject Toyota experienced a minor delta-V** as a result of the rear-end collision. This would have generated an **average inertial body acceleration and average inertial head**

**acceleration compatible with non-injurious daily living activities.** ... [ASSIGNOR'S] kinematics during the subject collision provided **no mechanism of substantial loading** on his upper extremities. ... [ASSIGNOR'S] medical records indicated that he was a restrained passenger; therefore, the shoulder harness crossed his right shoulder. However, **any interactions between his upper extremities and the seatbelt would have been minimal** and due to the low accelerations of his body relative to the vehicle and the direction of his initial movements, **below the threshold of force required to cause traumatic injury.** Hence **there does not appear to be a causal relationship** between this incident and [ASSIGNOR'S] shoulder or elbow complaints."

On August 14, 2019, a peer review was conducted by Dr. Matthew Skolnick "to determine and comment on the medical necessity and causality" of the 04/15/2019 right shoulder surgery and attendant services. Dr. Skolnick stated, in relevant part: "According to the provided medical records, the claimant was evaluated by Dr. Wanich for complaints of right shoulder pain. At that time, **physical examination of the right shoulder revealed tenderness and limited range of motion with slightly decreased motor strength. Drop arm and empty can tests and impingement signs were positive** and no effusion, crepitus or instability was reported. Surgery of the right shoulder was indicated by Dr. Wanich and the procedure was performed on 04/15/19. Furthermore, **the MRI of the right shoulder performed on 02/18/19 indicated a partial rotator cuff tear**; however, according to the radiology review of this study by Dr. Cavaliere, **there was no evidence of post-traumatic change** seen. Based on the above, **there is not adequate medical indication to justify the surgery of the right shoulder.** ... Also, since the right shoulder surgery was not medically necessary, the post-operative orthoses and compression unit are not allowed."

On August 19, 2019, Respondent issued a specific denial of the subject claim, referencing an "attached explanation of benefits and NF10 peer review by Dr. Matthew D Slotnick, M.D. attached".

#### **Findings and conclusions -**

Respondent's counsel argued that this case should be continued, for a second time, due to a pending declaratory judgment action. However, that action did not include a request to stay this case, or any other related arbitration proceedings.

"For an expense to be considered medically necessary, the treatment, procedure, or service ordered by a qualified physician, must be based upon an objectively reasonable belief that it will assist in the patient's diagnosis and treatment, and cannot be reasonably dispensed with. Such treatment, procedure, or service must be warranted by the circumstances as verified by a preponderance of credible and reliable evidence and must be reasonable in light of the subjective and objective evidence of the patient's complaints." Nir v. Progressive Ins. Co., 7 Misc.3d 1006 (A), 801 N.Y.S.2d 237, (Civ.Ct. Kings Co., Nadelson, J., Apr. 7, 2005).

With regard to the issues of causality and pre-existing conditions, the Appellate Division has provided guidance in the case of Mount Sinai Hospital v. Triboro Coach Inc., 263 A.D.2d 11, 699 N.Y.S.2d 77 (2<sup>nd</sup> Dept. 1999). The court held that it is the carrier's

burden to show that the treatment of the claimant was completely unrelated to the automobile accident. **It is incumbent upon the carrier to show factual evidence that the injuries had nothing whatsoever to do with the motor vehicle accident and could not qualify as an aggravation of a pre-existing condition, which is covered under no-fault insurance.**

The ECF contains a "Police Accident Report (NYC)" indicating that the Assignor was a passenger in a taxi which was struck from the rear while "slowing down for stopped traffic" in the vicinity of the Queens Midtown Tunnel Toll Plaza.

The ECF **does not contain any evidence** supporting a "founded belief" that the subject accident/event/incident was "staged", was not "an insured event", was not "a covered incident", or was the product of any type of fraud.

The ECF only contains evidence concerning Respondent's defense that the Assignor's alleged injuries were not "causally related" to the subject accident.

The MRI review of Dr. Cavaliere states that the Assignor had degenerative and/or chronic conditions and **a tear of the supraspinatus tendon concurring "with the evaluation of Dr. Chess."** Dr. Cavaliere does not state, let alone prove, that the Assignor's injuries and/or symptoms **could not qualify as an aggravation of a pre-existing condition**.

The report of Respondent's "Biomechanical Engineering Consultant" does not include a *curriculum vitae*. It does not contain any specifics concerning the vehicles or speeds involved in the "chain multi-vehicle accident". Dr. Komari conclusively states that there was "minor delta-V" which generated "average" inertia, which was "below the threshold of force required to cause traumatic injury". Dr. Komari does not state, let alone prove, that the forces generated by the subject accident **could not have aggravated the Assignor's pre-existing condition(s)**.

Dr. Skolnick's peer review cites Dr. Cavaliere's statement that **"there was no evidence of post-traumatic change"** in the Assignor's MRI. However the peer review does not state, let alone prove, that the Assignor's injuries and/or symptoms **could not qualify as an aggravation of a pre-existing condition**. Despite the fact that **"physical examination of the right shoulder revealed tenderness and limited range of motion with slightly decreased motor strength. Drop arm and empty can tests and impingement signs were positive"** and **"the MRI of the right shoulder performed on 02/18/19 indicated a partial rotator cuff tear"**, Dr. Skolnick opined that there was **"not adequate medical indication to justify the surgery of the right shoulder"**.

Respondent has not proven that the subject accident was "staged", was not "an insured event", was not "a covered incident", or was the product of any type of fraud.

Respondent has not proven that the Assignor's injuries and/or symptoms could not qualify as an aggravation of a pre-existing condition.

Respondent has not proven that the Assignor's right shoulder arthroscopy, and the subject post-operative pneumatic device, were not medically necessary.

I find in favor of Applicant.

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
	Protechmed Inc.	04/15/19 - 04/15/19	\$620.62	Awarded: \$620.62
Total			\$620.62	Awarded: \$620.62

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/14/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest is to accrue from the date arbitration was requested.

C. Attorney's Fees

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

As determined by applicable statute.

- 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 NY

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

03/09/2021

(Dated)

Michael Galeno

**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:**  
d7d5b08d7cb08216279da2bc8ec66dcc

### **Electronically Signed**

Your name: Michael Galeno  
Signed on: 03/09/2021