

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Advanced Shoulder Knee Orthopedics
(Applicant)

- and -

Allstate Property and Casualty Insurance
Company
(Respondent)

AAA Case No. 17-20-1158-9065

Applicant's File No. 3095935

Insurer's Claim File No. 0524657814
2QR

NAIC No. 17230

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 04/09/2021
Declared closed by the arbitrator on 04/09/2021

Melissa Scotti from Law Offices of Andrew J. Costella Jr., Esq. participated in person for the Applicant

Dana Nolan from Law Offices Of Karen L. Lawrence participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 29,965.68**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the hearing the Applicant amended the claim for \$4,125.50 which is in accordance with Respondent's fee audit and for an office visit on 7/20/19, which was denied based upon the negative IME.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The EIP, a 58 year old man, was injured in a collision on 10/21/18. This claim is for services provided to the EIP from 3/7 through 9/14/19 by Dr. Yoo of the Applicant

which includes surgery performed by Daniel J. Yoo, MD on 4/12 and 8/2/19 at Hackensack Surgery Center. DOS 4/12/19 was denied based upon a peer review by Dr. Westerband, who determined that the surgery was not medically necessary. DOS 8/2/19 was denied based upon an IME done by Dr. Westerband. This resulted in a denial of all orthopedic and related benefits effective 6/25/19. Dr. Yoo has filed a rebuttal to the peer review and the IME. Applicant has also uploaded an arbitration award from Hackensack Surgery Center, wherein the surgery performed on 8/2/19 was found to be medically necessary.

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.

Linked Case: 17-19-1136-3637, Hackensack Surgery Center, LLC, a/a/o this EIP and Respondent. This matter was heard on 7/13/2020 by Arbitrator Marcelle Brandes. The issue was the medical necessity of knee surgery performed at the Applicant on 8/2/19. Respondent denied the claim based upon an IME by Dr. Westerband. Daniel Yoo, MD, the EIP's surgeon filed a rebuttal. In reviewing the content of the file, Arbitrator Brandes reviewed the IME report by Dr. Westerband and his peer review. Also reviewed was a rebuttal by Dr. Yoo who noted that Dr. Westerband did not examine the MRI film and did not examine some of the re-examination reports one of which was prior to the 1st knee surgery. Additionally, they were contemporaneous medical reports prior to the 5/30/19 IME that had positive orthopedic findings and was sufficient to evince the need for continued treatment. After a careful review of all the records, the Arbitrator noted that the Applicant had successfully established the need for the bilateral knee surgeries which were formed more than 6 months after the conservative treatment failed to resolve the EIP's injuries. The claim was awarded.

In case number 17-19-1148-0424, Plus Drugs Inc., a/a/o this EIP and Respondent, also heard by Arbitrator Brandes on 7/13/2020, the claim was for prescription medication which was denied by the Respondent based upon the IME performed by Dr. Westerband on 5/30/2019. The Arbitrator referred to his prior decision in case number 17-19-1136-3637 and awarded the claim. As part of the decision the Arbitrator refers to the Applicant's submission of contemporaneous medical reports and to the May 30, 2019 IME that contain positive orthopedic findings which was sufficient to demonstrate the need for continued treatment. The claim was awarded.

Applicant's submission:

Applicant has provided a copy of its billing which includes an **initial evaluation of the EIP dated 3/7/19 under CPT code 99214 at \$92.98.**

There is billing for a **follow-up evaluation on 3/23/19 also billed under CPT code 99214 at \$92.98.**

Applicant is billing for **surgery administered to the EIP on 4/12/19** at Hackensack Surgery Center. The billing reflects the following:

CPT code 29870 - arthroscopy, knee, diagnostic with or without synovial biopsy, billed at \$904.70.

CPT code 29881 - arthroscopy, knee, surgical with meniscectomy, including debridement billed at \$2,013.26.

CPT code 29999 - an unlisted code, billed at \$5,000.00.

CPT code 29877 - arthroscopy, knee, surgical, debridement billed at \$1,628.47.

CPT code 29875 - arthroscopy, knee, surgical, synovectomy, billed at \$1,639.92.

The total amount of the Applicant's billing for DOS 4/12/19 was 11,186.35.

Applicant has also submitted forms reflecting follow-up evaluations on 4/13, 4/20, 5/11 and 6/15/19 but the amount billed was \$0.00. These were post-operative follow-up visits.

Applicant billed for follow-up evaluation under CPT code 99214 at \$92.98 for DOS 7/20/19.

Applicant has provided copies of billing for surgery administered to the EIP on 8/2/19 to the left knee as follows:

CPT code 29870 - arthroscopy, knee, diagnostic with or without synovial biopsy, billed at \$904.70.

CPT code 29881 - arthroscopy, knee, surgical with meniscectomy, including debridement billed at \$2,013.26.

CPT code 29999 - an unlisted code, billed at \$5,000.00.

CPT code 29877 - arthroscopy, knee, surgical, debridement billed at \$1,628.47.

CPT code 29875 - arthroscopy, knee, surgical, synovectomy, billed at \$1,639.92.

CPT code 0232T - injection of a platelet rich plasma billed at \$7,500.00.

The total billing for this DOS was \$18,686.35.

Applicant has also submitted forms reflecting follow-up evaluations on 8/3, 8/10, 8/24 and 9/14/19 but the amount billed was \$0.00. These were post-operative follow-up visits.

Applicant has provided a copy of the Report for the left knee surgery performed on the EIP on 8/2/19 at Hackensack Surgery Center.

Applicant has provided copies of evaluation reports of the EIP dated 3/7/19, 3/23/19, 4/13/19, 4/20/19, 5/11/19, 6/15/19, 7/20/19, 8/10/19, 8/24/19, and 9/14/19.

Also provided are copies of fax transmission sheets indicating that the aforementioned reports were sent to the Respondent.

I note that the left knee surgery was done on 8/2/19. Applicant's report dated 7/20/19 indicates that the EIP was now 3 months post right knee surgery and has been struggling with progressively severe left knee pain. That pain is frequently rated at 9-10/10, in intensity. It is located along the deep posteromedial and posterolateral aspects of the left knee. It is worsened with bending as well as planting and twisting. It is worse when getting up from a seated position. He reported weakness in the left knee. Notwithstanding extensive physical therapy, the EIP continues to struggle with progressively worsening and severe left knee pain.

The physical examination of the right knee found well healed portal sites. Tender medial joint line. Non-tender lateral joint line. Non-tender along the patellar tendon. Negative patellofemoral crepitus. Mildly positive but patellofemoral grind. McMurray sign was negative. Ligaments were stable.

The examination of the left knee found mild effusion. The medial joint line was tender. The lateral joint line was tender. Non-tender along the patellar tendon. McMurray sign was positive. The ligamentous examination was stable. Mildly positive patellofemoral grind. Negative patellofemoral crepitus.

The MRI of the left knee showed medial meniscus tear and lateral meniscus tear.

The Impression was that the EIP was making steady progress now over 3 months post surgery for the right knee arthroscopy, partial medial meniscectomy, ACL debridement, patellar chondroplasty and partial synovectomy. The patient has been struggling with left knee pain where he has medial and lateral meniscus tears.

The Plan calls for continued therapy for the right knee. As to the left knee, after a lengthy discussion about various treatment options, including both operative and nonoperative options, arthroscopic surgery to the left knee was discussed. The patient would like to proceed with the surgery.

The surgery was performed on 8/2/19. A review of the Report of Operation shows that the pre-operative diagnosis was left knee medial meniscus tear, lateral meniscus tear.

The post-operative diagnosis was left knee lateral meniscus tear, partial tear of anterior cruciate ligament (ACL), unstable chondral flap of the medial tibial condyle, unstable chondral flap of the trochlear chondral surface, synovitis in the intercondylar notch.

The Procedures performed were left knee arthroscopy, partial lateral meniscectomy, anterior cruciate ligament (ACL) debridement, trochlear chondroplasty, medial tibial chondroplasty and partial synovectomy.

The Applicant submission contains follow-up evaluations after the surgery.

Applicant is also provided a copy of the Report of Operation for the 4/12/19 right knee arthroscopy.

A copy of the right knee MRI report has been provided.

Applicant has provided a copy of a check issued to the Applicant referencing DOS 3/7/19. The amount of the check was \$92.98.

There is another check, this one referencing DOS 3/23/19, also in the amount of \$92.98.

Applicant has provided copies of Respondent NF-10s.

Respondent's submission:

The position of the Respondent is that the Applicant's claims for the surgery on 4/12/19 and 8/2/19 were denied based upon a peer review and an IME, respectively. Additionally, some of the follow-up office visits after the surgeries were not compensable based upon the fee schedule since they were surgical follow-ups. Respondent denied other follow-up visits based upon the negative IME.

On 5/21/19, Respondent issued an NF-10 to the Applicant re DOS 4/12/19 and billing in the amount of \$11,186.35. Respondent denied the Applicant's claim for knee surgery based upon a peer review by Dr. Westerband who opined that the surgery was not medically necessary.

The Respondent's submission contains copies of NF-10s and EOB, wherein the Respondent denied the Applicant's claims for DOS 4/13/19, 4/20/19, 5/11/19, 6/15/19, 8/3/19, 8/10/19, 8/14/19 and 9/14/19 asserting that these were surgery follow-up visits and not compensable. I note that the Applicant did not bill for these DOS.

On 8/5/19, Respondent issued an NF-10 to the Applicant referencing DOS 7/20/19 and billing in the amount of \$92.98. Respondent denied the Applicant's claim based upon the 5/30/19 IME by Dr. Westerband.

On 9/3/19, Respondent issued an NF-10 re DOS 8/2/19 and billing in the amount of 18,686.35. Respondent denied the Applicant's claim for the knee surgery based upon the IME performed on 5/30/19 by Dr. Westerband.

Peer review: Julio Westerband, MD, did a peer review on 5/17/19. The purpose of the peer review was to determine the medical necessity for a facility fee charged by Hackensack Surgery Center for services provided on 4/12/19 in the form of arthroscopic knee surgery; for anesthesia services provided by Allied Board-Certified Physicians on 4/12/19 for the surgery of the knee and arthroscopic knee surgery performed on 4/12/19 by Advanced to Shoulder, Knee, Orthopedics.

There is a list of medical records that were reviewed. These include an MRI report for the right shoulder that was dated 1/19/19. An examination of the EIP by Dr. Yoo dated 2/9/19. A copy of the MRI report for the EIP's left knee dated 1/26/19. A copy of the MRI report for the EIP's right knee dated 3/9/19. The operative report for right knee surgery performed by Dr. Yoo on 12/12/19.

Dr. Westerband summarizes the EIP's accident history. It is noted that after the accident, the EIP went to the hospital where he was evaluated, had x-rays taken, was treated and given medication then released. Subsequent to the hospital encounter, the EIP started on a course of physical therapy, chiropractic care and acupuncture treatment.

The initial examination report of Daniel Yoo, MD, was dated 2/9/19. This report indicates that the EIP presented with complaints of pain in the right shoulder rated 8/10. The physical examination of the right shoulder found painful shoulder abduction greater than 90°. Positive impingement signs of Neer and Hawkins. Positive painful arc sign. Tender bicipital groove. Tender Codman's triangle. Tender posterior joint line. Non-tender AC joint. Speed's test was mildly positive. O'Brien's test was positive. Cross body adduction test was negative. Rotator cuff strength assessment showed 4+ strength for supraspinatus, external rotation and internal rotation. The diagnostic impression included right shoulder impingement syndrome and partial-thickness tears of the rotator cuff in the region of subscapularis. There was likely an incidental finding of subcortical cyst in the proximal upper scapula. As part of the treatment plan, the claimant was referred for continued physical therapy.

The EIP had a follow-up evaluation with Dr. Yoo on 3/7/19. At that time he had complaints of pain in the neck, lower back, bilateral shoulder and bilateral knees. The physical examination findings are recited.

Also noted is that the EIP had an MRI of the right knee on 3/9/19 which revealed an impression of horizontal tear in the posterior body and posterior horn of the medial meniscus. The extensive mechanism, ACL, PCL and collateral ligaments were intact.

There was another follow-up evaluation of the EIP with Dr. Yoo on 3/23/19. He continues to complain of pain in the neck, low back, bilateral shoulders and bilateral knees. The physical examination findings are recited including a positive McMurray sign. The Diagnostic Impression included right knee medial meniscus tear. The

Treatment Plan indicated that the patient was referred for right knee arthroscopy, partial medial meniscectomy vs. repair, possible chondroplasty, possible partial synovectomy, possible partial lateral meniscectomy, and other indicated procedures.

"The claimant has undergone right knee medial meniscus tear, partial tear of the anterior cruciate ligament (ACL), unstable chondral flap of the patella, synovitis in the intercondylar notch" performed by Dr. Yoo. The pre-operative diagnosis was right knee medial meniscus tear. The post-operative diagnosis was right knee arthroscopy, partial media meniscectomy, anterior cruciate ligament (ACL) debridement, patella chondroplasty, partial synovectomy. The surgery was performed on 4/12/19 by Dr. Yoo.

In the Discussion section of his report, Dr. Westerband opined that based upon the submitted medical records, the right knee arthroscopic surgery and associated services were not medically necessary.

He said that the claimant was involved in an MVA on 10/21/18 which resulted in injuries to the neck, back, bilateral shoulders and bilateral knees. "The orthopedic findings on 3/23/19 do not match mine and were meant to justify the surgery that were performed." (Apparently, Dr. Westerband is referring to his IME examination report of the EIP on 3/29/19.)

He goes on to say that "It appears that the MRI findings were used to try to justify the surgical procedure. Absent my exam of this claimant, I may have believed the exam findings described by the surgeon."

He then refers to his examination of the EIP saying that the right knee examination was normal. He appears to have lifted part of his examination report and incorporated it into this peer review report as to the examination of the right knee.

He then refers to a 2010 article entitled "Knee Problems" by the US Department of Health & Human Services, online version updated May, 2010, "The menisci can be easily injured by the force of rotating the knee while bearing weight. A partial or total tear may occur when a person quickly twists or rotates the upper leg while the foot stays still (for example, when dribbling a basketball around an opponent or turn to hit a tennis ball). If a tear is tiny, the meniscus stays connected to the front and back of the knee; if the tear is large, the meniscus may be left hanging by a thread of cartilage. The seriousness of a tear depends on its location and extent."

He then refers to the NYS WCB Knee Injury Medical Treatment Guidelines, Section A.13 Surgical Interventions, saying that contemplation of surgery should be within the context of expected functional outcome. The concept of "cure" with respect to surgical treatment by itself is generally a misnomer. All operative interventions must be based upon positive correlation of clinical findings, clinical course and imaging and other diagnostic tests. A comprehensive assimilation of these factors must lead to a specific diagnosis with positive identification of pathologic condition(s). For surgery to be performed to treat severe pain, there should be clear correlation between the pain symptoms and objective evidence of its cause.

Dr. Westerband then opines that each of the services under review was not medically necessary.

Respondent has provided copies of the records/reports/billing referenced in the peer review report. This includes the hospital record which was generated after the EIP's accident.

Also provided is a copy of the 3/29/19 IME report by Dr. Westerband. This report reflects current complaints of the EIP as being pain in the neck, low back, bilateral knees, bilateral ankles, bilateral legs and calves. The physical examination notes decreased range of motion in the cervical spine in extension, bilateral flexion and bilateral rotation. There was also decreased range of motion in the lumbar spine in extension.

The examination of the right shoulder shows that the range of motion was quantified as normal and the provocative orthopedic testing was all negative.

The examination of the left shoulder shows that the range of motion was quantified as normal throughout and the provocative orthopedic testing was negative.

The range of motion for the bilateral elbows, the bilateral wrists, the bilateral hands, the bilateral hips were normal. As to the bilateral knees, the examination of each knee was completely normal. The provocative orthopedic testing was negative.

In his Impression Dr. Westerband opined that the EIP's cervical spine sprain/strain was resolving as well as his lumbar spine sprain/strain. His right rib fractures were healed; right shoulder sprain/strain, bilateral knee sprain/strain and bilateral ankle sprain/strain were resolved.

The recommendation was for continued physical therapy for the cervical and lumbar spine at 2 times per week for 6 weeks with one follow-up orthopedic evaluation.

I note that the Respondent has not provided copies of the articles relied upon by Dr. Westerband in his peer review report. While this is not a fatal error, it does have a negative impact upon the weight of the peer review report.

On 5/21/19, Respondent issued an NF-10 re DOS 4/12/19 and billing in the amount of \$3,375.00. Respondent denied the Applicant's claim based upon the peer review done by Dr. Westerband who determined that the services provided were not medically necessary.

IME:

Julio Westerband, MD, administered an orthopedic IME to the EIP on 5/30/19.

The EIP's accident history as provided by the claimant was reviewed. Following the accident, the EIP reported injuries to his neck, low back, bilateral knees, right ankle and ribs.

Dr. Westerband refers to his prior IME report which was dated 3/29/19. At that time the EIP reported injuries to his neck, low back, right shoulder, bilateral knees, bilateral ankles and right ribs.

It is noted that after the accident EIP was taken to the emergency room where he was examined and had x-rays and MRIs of multiple parts of the body. He was told he had sustained fractures to the ribs. He was admitted to the hospital for 2 days.

As per Dr. Westerband's prior IME report dated 3/29/19, the claimant reported that he was examined and had x-rays of the chest and CT scans of the head, neck, mid back, lower back, chest, abdomen and pelvis.

The EIP's treatment history after the accident is summarize. The treatment that he has received has been progressively improving his condition. He continues to receive treatment at the rate of 3 times per week. He has had additional diagnostic tests including MRIs and EMG/NCV studies.

The claimant reported using a back brace and the cane as a result of the accident. He had right knee arthroscopic surgery on 4/12/19. He denied any pending surgeries or injections.

Current Complaints were pain in the bilateral knees and right ankle.

The EIP was currently taking blood pressure medication.

There is a list of medical records that were reviewed which includes Dr. Westerband's prior examination of the EIP dated 3/29/19. There is also a copy of the MRI report of the right shoulder; a copy of the MRI report of the right knee which showed a horizontal tear in the posterior body and posterior horn of the medial meniscus; a copy of the operative report for right knee arthroscopic surgery done on 4/12/19; a copy of the MRI report for the left knee that showed an intra-meniscal tear in the body and posterior horn of the medial meniscus and posterior horn of the lateral meniscus.

The physical examination indicates that the EIP had a normal gait.

Ranges of motion were checked using a handheld goniometer.

The PX of the cervical spine did not find any muscle spasm upon palpation. There was no complaint of tenderness to palpation. The range of motion was quantified as normal in all planes. Jackson's test was negative. Soto-Hall test was negative.

The neurological examination of the bilateral upper extremities did not find any atrophy; muscle strength was intact; DTRs were within normal limits.

As to the thoracic spine, no muscle spasms were noted upon palpation and there was no complaint of tenderness upon palpation.

The examination of the lumbar spine did not find muscle spasms upon palpation. There was no complaint of tenderness upon palpation. The range of motion was quantified as normal in all planes. SLR was negative. Kemp's test was negative.

The neurological examination of the bilateral lower extremities did not find any atrophy; muscle strength was intact; DTRs were within normal limits; sensation to light touch was within normal limits. Heel-toe-walk was negative.

The examination of the right and left shoulders did not find any heat, swelling, effusion, erythema or crepitus in either shoulder. The range of motion in each shoulder was quantified as normal in all planes. In each shoulder Hawkins Impingement maneuver was negative; O'Brian's maneuver was negative. Jobe maneuver was negative and Yergason's maneuver was negative.

The examination of the right and left elbow was identical, indicating no heat, swelling, effusion, erythema or crepitus being appreciated. The range of motion was quantified as normal in flexion and extension and Tinel's sign was negative in each elbow.

The examination of the right and left wrist did not show any heat, swelling, effusion, erythema or crepitus in either wrist. The range of motion was quantified as normal in each wrist. Grip strength was 5/5. Tinel's, Phalen's and Finkelstein testing was negative in both wrists.

The examination of the right and left hand indicates that the range of motion was quantified as normal in all planes including the thumb and fingers.

The examination of the right hip and the left hip shows that there was no heat, swelling or redness appreciated in either hip. There was no complaint of tenderness upon palpation; the range of motion was quantified as normal in both hips. Trendelenburg's test was negative in each hip.

The examination of the right knee revealed portals. There was no heat, swelling, effusion, erythema or crepitus appreciated. There was a complaint of tenderness upon palpation of the medial and lateral aspect. Range of motion in flexion was 120/140; extension 10/0.

Lachman's test was negative. Patellar tracking was negative. The knee was stable to varus and valgus testing. McMurray was not performed. Anterior Drawer and Posterior Drawer were both negative. Patellar grind test was negative.

The examination of the left knee did not find any heat, swelling, effusion, erythema or crepitus. There was no complaint of tenderness upon palpation. The range of motion was quantified as normal in flexion and extension.

Lachman's test was negative. Patellar tracking was negative. The knee was stable to varus and valgus testing. McMurray was negative. Anterior Drawer and Posterior Drawer were both negative. Patellar grind test was negative.

The examination of the right ankle and foot and the left ankle and foot shows that there was no heat, swelling, effusion, erythema, crepitus, instability or atrophy appreciated in either. The range of motion was quantified as normal in both. Drawer test was negative in both.

There was residual bruising noted in the lateral aspect of the right ankle/foot.

The Impression was: 1) cervical spine sprain/strain - resolved; 2) lumbar spine sprain/strain - resolved; 3) status post right knee surgery on 4/12/2019 - was not medically necessary; 4) left knee sprain/strain - resolved; 5) right ankle/foot sprain/strain - resolved.

Dr. Westerband says that there was a causal relationship between the accident of record and the above diagnoses. As per his prior peer review the right knee surgery was nonmedically indicated and was not causally related.

He indicates that the EIP may engage in all of his ADLs and working without any restrictions.

"From a medical standpoint the fact that the claimant underwent right knee surgery he does require restrictions on and on causally related basis." (sic)

He opines that based upon today's physical examination, and within a reasonable degree of medical certainty, there was no medical necessity for any causally related orthopedic care including physical therapy.

He reiterates that from a medical standpoint the claimant does require for the care post right knee surgery however, this will not be causally related to the accident of record.

Based upon this evaluation, **on 6/18/19, Respondent issued a global NF-10 denying all future orthopedic, physical therapy and related benefits effective 6/25/19.**

On 9/16/19, Respondent issued an NF-10 re DOS 8/2/19 and billing in the amount of \$3,750.00. Respondent denied the Applicant's claim based upon the IME by Dr. Westerband on 5/30/19 which resulted in a denial of all orthopedic and related benefits effective 6/25/19.

Respondent has provided copies of the medical records/reports/test results referenced in the IME report.

Rebuttal to peer review and IME:

Daniel Yoo, MD, has filed a rebuttal to the peer review and the IME reports.

He notes that as to the peer review report, Dr. Westerband relied upon the NYS WCB Knee Injury Medical Treatment Guidelines which is a non-authoritative industry publication.

When he performed the knee surgery, there was a clear correlation between the pain symptoms and the objective evidence of its cause which was in conformity with the standard set forth in the aforementioned Medical Treatment Guidelines.

It is noted that the EIP was a pedestrian was struck by a car. Dr. Yoo pointed out that Dr. Westerband acknowledged that the EIP's knee injuries were related to the motor vehicle accident. And, as his surgeon, he corroborated and correlated the EIP's right knee traumatic injury to the accident of record.

Dr. Yoo also argues that Dr. Westerband neglected to review not only the patient's right knee MRI film but also several of his examination reports prior to the date of the surgery. He notes that he did review the MRI film and the report.

Dr. Yoo also notes that the EIP's complaints were worsening along the medial aspect with weakness following the accident without any resolution from physical therapy that he was attending on a regular basis. He struggled with severe right knee pain which was noted on Dr Yoo's 3/23/19 report. In addition, there were positive objective findings and orthopedic deficits noted in the reports.

It was clear that the EIP's condition in his right knee had not improved with conservative measures as he continued to demonstrate signs of orthopedic deficits. There came a time when a recommendation was made for arthroscopic surgery of the knee.

Dr. Yoo also argues that the EIP had exhausted conservative measures prior to surgery. He notes that the surgery was done 2 weeks after the 1st IME by Dr. Westerband. The EIP had complaints of tenderness upon palpation over the posterior aspect of the right knee. Dr. Westerband failed to review any of the prior orthopedic examinations or any of the examinations done subsequent to the surgery. The subsequent evaluation showed that the EIP was gradually improving as a result of the surgery.

He also argues that as the treating physician and based upon the Treating Physician Rule greater credibility and deference should be given to his opinion and his examination findings as well as the findings of the surgery than the peer review doctrine.

Fee Audit:

Respondent has submitted a fee audit from Kimberly Spahr, CPC with Signet Claim Solutions. She opines that the correct amount that should have been billed by this provider is a total of

\$4,026.52.

At the hearing:

Applicant relied upon the records and the linked cases.

Respondent relied upon the IME and the peer review, in addition to the fee audit.

FINDINGS:

The Applicant has established its prima facie case.

This claim is for services provided to the EIP from 3/7 through 9/14/19 by Dr. Yoo of the Applicant which includes surgery performed by Daniel J. Yoo, MD on 4/12 and 8/2/19 at Hackensack Surgery Center.

DOS 4/12/19 was denied based upon a peer review by Dr. Westerband, who determined that the surgery was not medically necessary.

DOS 8/2/19 was denied based upon an IME done by Dr. Westerband. This resulted in a denial of all orthopedic and related benefits effective 6/25/19.

Dr. Yoo has filed a rebuttal to the peer review and the IME.

Applicant has also uploaded an arbitration award from Hackensack Surgery Center, wherein the surgery performed on 8/2/19 was found to be medically necessary.

Applicant claims that *Res Judicata* applies since the medical necessity for the surgery has already been determined in the length case by Arbitrator Brandes.

Respondent has provided a copy of the peer review report by Dr. Westerband. In reviewing the report, he refers to his own physical examination of the EIP which was done on 3/29/19. That examination was completely normal.

In addition to referring to that examination as a basis for this conclusion, he also refers to a 2010 article from the US Department of HHS which was updated on May, 2010. As per Dr. Westerband, this article says that a meniscus can easily be injured and the seriousness of the tear depends upon its location and the extent of the tear.

The next article that he relies upon is from the NYS WCB Knee Injury Medical Treatment Guidelines which simply says that all operative interventions must be based upon positive correlation of clinical findings, clinical course and imaging and other diagnostic tests. A comprehensive assimilation of these factors must lead to a specific diagnosis with a positive identification of pathologic condition(s). For surgery to be performed to treat severe pain, this should be clear correlation between the pain symptoms and objective evidence of his cause.

He does not correlate the references indicated in the peer review report to the physical condition of the EIP or the examination findings of the EIP by Dr. Yoo. He is simply making unconnected statements and would have us believe that those individual statements were sufficient to demonstrate the lack of medical necessity for the services under review.

I have often held that reliance upon the NYS WCB Medical Treatment Guidelines were not proper authoritative sources when dealing with NY No-Fault. Therefore, this portion of the peer review is unsupported.

Respondent has not provided a copy of the other article relied upon by Dr. Westerband. The reference that he cites is not sufficient to overturn the presumption of medical necessity of the Applicant's claim.

It is not necessary to even comment on the peer review rebuttal by Dr. Yoo.

This portion of the claim is awarded.

As to DOS 8/2/19, Applicant's claim was denied based upon the IME by Dr. Westerband dated 5/30/19.

Respondent issued a global NF-10 on 6/18/19 based upon the negative by me. The effective date of the denial of orthopedic benefits and related services was effective 6/25/19.

As to DOS 8/2/19, the medical necessity for the surgery has already been decided in the linked case. I do not see anything in the file which could cause me to disagree with the prior determination by Arbitrator Brandes.

As to the amount of the award, the fee audit indicates that the reimbursement amount totals \$4,026.52. In addition, Respondent denied DOS 7/20/19 based upon the IME. This was for an office visit, billed at \$92.95. This portion of the claim is awarded.

The amount of the award is \$4,125.50.

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	Amount Amended	Status
	Advanced Shoulder Knee Orthopedics	03/07/19 - 09/14/19	\$29,965.68	\$4,125.50	Awarded: \$4,125.50
Total			\$29,965.68		Awarded: \$4,125.50

B. The insurer shall also compute and pay the applicant interest set forth below. 03/06/2020 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, 3/6/2020 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.

04/13/2021

(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:
2a9b15a592f83a43c8aefa3ff9858bda

Electronically Signed

Your name: James Hogan
Signed on: 04/13/2021