

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Passaic Orthopedic Group  
(Applicant)

- and -

Geico Insurance Company  
(Respondent)

AAA Case No.	17-19-1149-9950
Applicant's File No.	3093112
Insurer's Claim File No.	0308279020101076
NAIC No.	22055

**ARBITRATION AWARD**

I, Marina O'Leary, 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: KM

1. Hearing(s) held on 03/19/2021  
Declared closed by the arbitrator on 03/19/2021

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

Tara Hardinger from Geico Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 32,024.00**, 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

KM, a 49 year old male driver, was injured in a motor vehicle accident on July 28, 2019. He underwent a left shoulder arthroscopic surgery on October 7, 2019. Applicant billed \$32,024 for the surgeon and the physician assistant services. Respondent denied payment of applicant's claims based upon a lack of medical necessity. Respondent relies upon the peer review performed by Howard Kiernan, MD, dated 10/30/2019. Respondent submits the rebuttal opinion of Richard Seldes, the treating surgeon.

On the date of the hearing, Respondent also argues that this arbitrator has already determined that the peer review of Howard Kiernan, MD is sufficient to establish medical necessity and that *collateral estoppel* applies.

Thus, this issues to be determined are:

1. Whether *collateral estoppel* applies; if not
2. Whether the surgery was medically necessary

#### **THE PARTIES APPEARED REMOTELY VIA ZOOM HEARING**

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

The case was decided on the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses.

These findings and conclusions are based on my review of the records on the ADR Center maintained by the American Arbitration Association as of the date the hearing was declared closed and oral argument at the hearing. 11 NYCRR § 65-4.5(o)(1) provides that an arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to the legal rules of evidence shall not be necessary. The arbitrator may question or examine any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations.

#### **COLLATERAL ESTOPPEL**

The Doctrine of Collateral Estoppel precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. *Ryan v. New York Telephone*, 62 N.Y.2d 494, 478 N.Y.2d 823. Two requirements must be met before collateral estoppel can be invoked: There must be an identity of issues which has been decided in the prior action and is decisive in the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling. (See *Gilberg v. Barbieri*, 441 N.Y.S.2d 49.)

Further, the Court of Appeals has held that the Doctrine of Collateral Estoppel "is applicable to issues resolved by earlier arbitration." *Rembrandt Industries v. Hodges International*, 38 N.Y.2d 592, 381 N.Y.S.2d 383."

I note that there is a linked decision: *New Horizon Surgical Center, LLC a/a/o KM v. GEICO (AAA #17-20-1155-8051)* wherein this arbitrator found in Applicant's favor. Specifically, I found that the rebuttal by Richard Seldes, MD was sufficient to rebut the peer review and sustain Applicant's burden of proving medical necessity. Specifically, I noted as follows:

In response to Dr. Kiernan's peer review report, Applicant submits the opinion of Richard Seldes, MD, the patient's treating surgeon. Not surprisingly, Dr. Seldes disagrees with the conclusions by Dr. Kiernan. As an initial point, Dr. Seldes observes that Dr. Kiernan failed to review the left shoulder MRI film and several follow-up visits by Dr. Seldes. He specifically addresses the re-exam report, dated 9/30/2019 where he recommended surgery. Dr. Seldes urges that this omission renders the report meritless. I agree. I find that the weight of the evidence is clearly in Applicant's favor, not only because the treating surgeon cogently explains why he chose this course of medical treatment for his patient, but especially because the peer reviewing doctor did not have all the medical records to arrive at an educated conclusion. For these reasons, I find that Respondent's denial cannot be sustained. Applicant's claim is granted.

I note that the instant case involves the same motor vehicle accident of 7/28/2019, the same injured party and the same peer review by Dr. Kiernan, MD and the same rebuttal by Richard Seldes, MD. Thus, I find that *collateral estoppel* applies. Respondent has not submitted any additional evidence that would persuade me to disturb my prior decision.

Correspondingly, Respondent's denial is not sustained. Applicant's claim is granted.

#### **FEE SCHEDULE**

Respondent has preserved a fee schedule defense. It is the insurer's burden to prove that disputed fees exceed the applicable fee schedule. *East Coast Acupuncture, P.C. v. Hereford Ins. Co.*, 51 Misc.3d 441 (Civ Ct Kings County 2016); *Pavlova v. Allstate Ins. Co.*, 2016 NY Slip Op 26123 (Civ Ct Kings County 2016). If an insurer fails to demonstrate by competent evidentiary proof that a provider of health services billed more than the applicable fee schedule, its fee schedule defense cannot be sustained. *Continental Medical PC v. Travelers Indemnity Co.*, 11 Misc.3d 145(A) (App Term 1 Dept 2006).

Respondent argues that the bill is reimbursable as billed for the services at issue while the Respondent argues that the reimbursable amount is \$7,200.78. The parties agreed that NY Fee Schedule applies to the services at issue. The parties disagree about the reimbursement amount of the claim. Applicant submits an explanation of benefits in support of its fee schedule defense. Although I historically require an explanation from a certified professional coder or other competent individual, Respondent explains that a plain reading of the fee schedule satisfies its burden of the reimbursible amount payable. I take judicial notice of the New York fee schedule and acknowledge that a plain reading of the fee schedule in Region IV where the services are applicable. Thus, Applicant is awarded \$7,200.78.

I have been advised that this policy is approaching exhausting. Therefore, this award shall not be in excess of the policy limits.

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
	Passaic Orthopedic Group	10/07/19 - 10/07/19	\$32,024.00	Awarded: \$7,200.78
Total			\$32,024.00	Awarded: \$7,200.78

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/03/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30-day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance

Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

C. Attorney's Fees

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

Attorney's Fees The insurer shall also pay the applicant for attorney's fees as set forth below. As the claim was filed subsequent to the Sixth Amendment to 11 NYCRR §65-4.6 (Insurance Regulation 68-D) which took effect on February 4, 2015, Attorney's Fees shall be calculated pursuant to the amended terms, as follows: 20 percent of the amount of first-party benefits, plus interest thereon, subject to a maximum fee of \$1,360. [11 NYCRR §65-4.6]. There is no minimum fee.

- D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York

SS :

County of Nassau

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

04/30/2021

(Dated)

Marina O'Leary

**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:**

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### **Electronically Signed**

Your name: Marina O'Leary  
Signed on: 04/30/2021