

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

MF Surgery Center  
(Applicant)

- and -

Enterprise Rent A Car  
(Respondent)

AAA Case No. 17-20-1165-2201

Applicant's File No. 20-22408

Insurer's Claim File No. 14555874

NAIC No. Self-Insured

**ARBITRATION AWARD**

I, Michelle Murphy-Louden, 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 04/02/2021  
Declared closed by the arbitrator on 05/18/2021

Nicole Jones, Esq. from The Morris Law Firm, P.C. participated in person for the Applicant

Jamil Shukry, Esq. from McCormack, Mattei & Holler participated in person for the Respondent

2. The amount claimed in the Arbitration Request, \$ **14,732.74**, was AMENDED and permitted by the arbitrator at the oral hearing.

Per stipulation of Applicant, the amount in dispute was amended to \$8,134.59 to comport with its EAPG rate calculation.

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

3. Summary of Issues in Dispute

Whether Applicant is entitled to reimbursement for an ambulatory surgery facility fee in connection with a left shoulder arthroscopy performed on December 18, 2019, as the result of a May 27, 2019, motor vehicle accident.

Respondent denied reimbursement based upon a January 10, 2020, peer review of Julio Westerband, M.D.

Respondent also asserted the defense that Applicant's fee was in excess of that allowed pursuant to the Fee Schedule.

This Award is based upon a review of all of the documents contained within the ADR Center electronic case file as of the date of the Award, as well as upon any oral arguments of the parties and any testimony given during the hearing.

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

The 56 year old EIP was reportedly involved in a motor vehicle accident on May 27, 2019, when, while walking through a parking lot, a vehicle began moving towards her at which time she reached out her left arm in an attempt to stop the vehicle and pressure herself away from it.

According to the records, on July 23, 2019, the EIP presented for initial orthopedic evaluation with Peter Gambacorta, D.O., reportedly complaining of pain along the left shoulder and elbow with occasional radiation into the hand worse with certain range of motion, lifting, and sleeping. Dr. Gambacorta documented that past treatment consisted of rest, activity modification, and oral anti-inflammatories. Following examination, Dr. Gambacorta diagnosed the EIP with left shoulder pain, left elbow pain and strain, and left shoulder impingement syndrome and recommended beginning with conservative care, specifically, physical therapy and anti-inflammatories or Tylenol as needed for pain.

On September 18, 2019, the EIP underwent a left shoulder MRI which was with the impression of focal full-thickness rim rent tear of the distal attachment anterior fascicles of the supraspinatus tendon, additional inferior partial-thickness tear of the mid fascicles of the supraspinatus tendon, and partial tear of the long head of the biceps tendon with splitting.

On September 19, 2019, the EIP was seen in follow-up by Dr. Gambacorta reportedly complaining of continued left shoulder pain at night and difficulty lifting the arm against resistance. Following review of the MRI, Dr. Gambacorta additionally diagnosed the EIP with full-thickness rotator cuff tear. In the "Plan" section of his report Dr. Gambacorta stated in part that he and the EIP "[had a] discussion concerning...treatment options. We discussed conservative and surgical treatment." Dr. Gambacorta stated that the EIP opted for surgical intervention.

On December 18, 2019, the EIP underwent a left shoulder arthroscopy with rotator cuff repair and subacromial decompression.

### **RESPONDENT'S PEER REVIEW**

On January 10, 2020, Julio Westerband, M.D., performed a peer review of the left shoulder arthroscopy which he concluded was not medically necessary. Dr. Westerband opined:

MRI of the left shoulder revealed: "Focal full-thickness rim rent tear of the distal attachment anterior fascicles of the supraspinatus tendon. Additional inferior partial- thickness tear of the mid fascicles of the supraspinatus tendon. Partial tear of the long head of biceps tendon with splitting. Degenerative changes of the central region of the glenoid process scapular with adjacent hyaline cartilage abnormality. Intact glenoid labrum." These findings revealed the surgery was not necessitated.

Shoulder surgery was done but it is not clear what actually lead to this decision. The claimant had shoulder pain with loss of range of motion. There was evidence on examination of rotator cuff pain with no shoulder instability and no neurological impairment of the upper extremity. Patient was only few months post DOA when surgery was recommended because conservative care had supposedly failed. Additional non- surgical modalities had not even been offered to the patient. No steroid injections for the subacromial space were offered or provided. There was no full thickness tear requiring urgent repair. Please remember that a full thickness supraspinatus tear simply means that there is a full thickness tear of one of the four musculotendinous components of the rotator cuff. No reason is provided to justify this rush to surgical intervention. Doctor should have treated the patient for a shoulder sprain or for a partial thickness tear with pain and, if patient failed to respond to adequate conservative treatment, including judicious use of steroid injections, then consider further evaluation, testing and appropriate treatment.

"A recent survey of American Academy of Orthopaedic Surgeons indicated considerable variations in practice patterns relating to the care of patients with rotator cuff tears. Numerous nonoperative therapies are effective, including physical therapy, anti- inflammatory medications, and cortisone injections. Factors generally believed to affect outcome, and therefore the decision to perform elective rotator cuff repair, include size of the tear, duration of symptoms, failure of nonoperative treatment, duration of nonoperative treatment, nocturnal pain, history of trauma, and limitations of activities of daily living (ADL), not necessarily in that order. Without detailed knowledge of these factors before surgery, it is difficult to interpret the outcome of the operation."

Arthroscopic surgery of the shoulder is straightforward and rarely leads to complications. Still any surgery can develop complications and we should not undertake any procedure just because the risks to the patients may not be that great. Unnecessary surgery, large or small, simple or complex, is still unnecessary surgery. (Indications for Surgery in Clinical Outcome Studies of Rotator Cuff Repair. Marx RG, Koulouvaris P, Chu SK, Levy BA. Foster Center for Clinical Outcome Research, Hospital for Special Surgery, 535 E 70th St, New York, NY 10021, USA.)

Based upon Dr. Westerband's opinion, Respondent denied Applicant's claim.

### **DR. GAMBACORTA'S REBUTTAL**

On February 11, 2020, Dr. Gambacorta prepared a rebuttal to Dr. Westerband's peer review which was submitted to Respondent. In this rebuttal, Dr. Gambacorta stated in relevant part:

For two months since the accident, she was treating with activity modification, use oral medicine and home therapeutic exercises to help alleviate the symptoms in her shoulder. After my initial evaluation, I recommended physical therapy. She then followed up with me two months later in September 2019. Her left shoulder symptoms persisted in spite of physical therapy, use of oral medicines and activity modification. It is my medical opinion, that four months of conservative treatment consisting of physical therapy, oral medicine and activity modification were sufficient to require obtaining an MRI. After reviewing the MRI with [the EIP], it confirmed there was significant injury to the left shoulder caused by the motor vehicle accident including but not limited to the presence of a full-thickness rotator

cuff tear. I offered the patient corticosteroid injection which was declined and we discussed

further conservative treatment. It is my medical opinion is an orthopedic surgeon that 4 months of conservative management for full-thickness rotator cuff tear is sufficient before proceeding with surgical intervention. With a full-thickness rotator cuff tear there is zero chance the tear will heal with further conservative treatment or corticosteroid injection. As mentioned in the IME, rotator cuff tears do not cause neurologic symptoms or instability, so I would not expect those symptoms to be exhibited. She was exhibiting pain with activities of daily life, difficulty sleeping and weakness with range of motion. All symptoms exhibited are consistent with full-thickness rotator cuff tears. The next logical option for her was surgical. The surgical procedures I performed were all necessary and appropriate. The rotator cuff tear was described as a full-thickness tear on the MRI and the arthroscopic pictures clearly show the size and extent of the tear.

## **PEER REVIEW ADDENDUMS**

On January 28, 2020, Dr. Westerband performed a peer review Addendum addressing in part Applicant's claim. The language of the body of this Addendum is identical to that of Dr. Westerband's January 10, 2020, peer review, with the following additional comment:

Based on my opinion, that the surgery was not medically necessary, any derivative services related to as a result of the surgery should also be denied...

On May 4, 2020, Dr. Westerband performed a peer review Addendum in response to Dr. Gambacorta's rebuttal in which he stated in relevant part:

I reviewed the letter provided by Dr. Gambacorta. Dr. Gambacorta insists that there was a full thickness tear and the therapy had failed which necessitated the surgery. I would like to note that the diagnosis was not at the dispute. Dr. Gambacorta failed to establish why this particular 57-year-old patient required any surgery at all. Since the overwhelming majority of patients with full thickness rotator cuff tears never need surgery and their symptoms are easily resolved with conservative care along with cortisone injections, the need for surgery is still disputed. Dr. Gambacorta says that the claimant refused the steroid injection. Dr. Gambacorta should have convinced the patient for appropriate treatment. It was inappropriate to perform an unnecessary surgical procedure. Thus, my view remains the same.

..."Surgery is usually indicated if the patient's pain is not relieved by 3 to 6 months of nonoperative treatment, including activity modification - avoidance of overhead or pain provoking actions - NSAID use, physical therapy, strengthening, and subacromial or glenohumeral steroid injections." Reference: Partial rotator cuff tears: When is surgery indicated?

## **PRIOR ARBITRATION**

On February 16, 2021, I rendered my Award in linked AAA Case No. 17-20-1171-3136. This case involved in part Excelsior Orthopaedic's claims for surgeon's and assistant surgeon's fees in connection with the left shoulder arthroscopy which were also denied by Respondent on the basis of Dr. Westerband's peer review. In finding for Excelsior Orthopaedic, I held as follows:

Once an applicant has established a prima facie case of entitlement to No-Fault benefits, the burden then shifts to the insurer to prove that the disputed services

were not medically necessary. To meet this burden, the insurer's denial(s) of the applicant's claim(s) must be based on a peer review, IME report, or other competent medical evidence that sets forth a clear factual basis and a medical rationale for the denial(s). Amaze Medical Supply, Inc. v. Eagle Ins. Co., 2 Misc. 3d 128A (App. Term, 2<sup>nd</sup> Dept., 2003); Tahir v. Progressive Cas. Ins. Co., 12 Misc. 3d 657 (N.Y.C. Civ. Ct., N.Y. Co., 2006); Healing Hands Chiropractic, P.C. v. Nationwide Assurance Co., 5 Misc. 3d 975 (N.Y.C. Civ. Ct., N.Y. Co., 2004); Millennium Radiology, P.C. v. New York Cent. Mut., 23 Misc. 3d 1121(A) (N.Y.C. Civ. Ct., Richmond Co., 2009); Beal-Medea Prods., Inc. v GEICO Gen. Ins. Co., 27 Misc. 3d 1218(A) (N.Y.C. Civ. Ct., Kings Co., 2010); All Boro Psychological Servs., P.C. v GEICO Gen. Ins. Co., 34 Misc. 3d 1219(A) (N.Y.C. Civ. Ct., Kings Co., 2012).

I find that Dr. Westerband's peer review and peer review Addendum fail to set forth clear factual bases and medical rationales for Respondent's denials of Applicant's claims for the treatment in dispute herein and as such I find that Respondent has failed to establish a lack of medical necessity for same.

Dr. Westerband's biggest issue was the EIP's failure to undergo injection therapy which he felt Dr. Gambacorta should have convinced the EIP to do.

The EIP did participate in physical therapy and utilized anti-inflammatories.

While it is certainly possible that surgical intervention could have been avoided had the EIP undergone injection therapy the fact of the matter is, according to Dr. Gambacorta, the EIP refused the offer of cortisone injections. Regardless of whether Dr. Gambacorta agreed with the EIP's refusal or not the bottom line is that the EIP had the right to refuse any medical treatment offered. I do not agree with Dr. Westerband that Dr. Gambacorta should have attempted to convince the EIP to undergo cortisone injections once she refused them. Therefore, Respondent's denials cannot be upheld.

There is no evidence in the ADR Center electronic case file that Applicant sought Master Arbitration review of my prior Award, nor did Applicant contend same during the hearing in this matter.

### **ANALYSIS**

There are two elements that must be satisfied to invoke the doctrine of collateral estoppel:

1. The identical issue was decided in the prior action and is decisive in the present action; and
2. The party to be precluded from re-litigating the issue had a full and fair opportunity to contest the prior issue (Matter of Noble, 31 A.D.3d 643, App. Div., 2<sup>nd</sup> Dept., 2006).

I find that both elements of collateral estoppel have been met herein. Therefore, I find that my prior Award in AAA Case No. 17-20-1171-3136 operates as collateral estoppel and as such Applicant is entitled to reimbursement.

### **AMOUNT AWARDED**

In support of its defense that Applicant's fee was in excess of that allowed pursuant to the Fee Schedule, Respondent submitted herein the March 29, 2021, fee audit Affidavit of Jeffrey Futoran, CPC, in which he attested that the allowable EAPG reimbursement rate for the disputed facility fee was \$4,433.24.

Due to the fact that the parties were not in agreement as to the allowable EAPG rate, the undersigned requested evaluation by an independent fee coder through AAA.

In an April 19, 2021, report prepared by Susan Montana, President, Habanero Inc., it was determined that the allowable EAPG amount for the ambulatory facility fee in dispute herein is \$4,433.24. It is to be noted that a copy of Ms. Montana's complete report was provided to the parties prior to the issuance of the within Award and no objection was made thereto, and as such the report was made a part of the ADR Center electronic case file for this matter.

Therefore, based upon the independent fee coder calculation, I find Applicant entitled to reimbursement in the amount of \$4,433.24.

With respect to the amount of interest awarded Applicant herein, same is to be calculated in accordance with 11 N.Y.C.R.R. §65-3.9(c) as Applicant did not request arbitration within 30 days of receipt of the denial of claim form. The commencement date of the interest awarded shall be, per advisement of the Department of Financial Services, the date on which Applicant's request for arbitration was received by AAA. According to AAA's electronic case file Applicant's request for arbitration was received via e-mail by AAA on May 14, 2020. Therefore, Respondent shall pay Applicant interest commencing May 14, 2020, to the date of payment of this Award.

ACCORDINGLY, APPLICANT IS AWARDED THE AMOUNT OF \$4,433.24 TOGETHER WITH INTEREST, ATTORNEY'S FEE, AND FILING FEE AS SET FORTH BELOW. THE REMAINDER OF APPLICANT'S CLAIM IS DENIED IN ITS ENTIRETY.

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
	MF Surgery Center	12/18/19 - 12/18/19	\$14,732.74	\$8,134.59	Awarded: \$4,433.24
Total			\$14,732.74		Awarded: \$4,433.24

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/14/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Pursuant to 11 N.Y.C.R.R. §65-3.9(a), the insurer shall calculate interest at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month.

Pursuant to 11 N.Y.C.R.R. §65-3.9(c), if an applicant does not request arbitration or institute a lawsuit within 30 days after receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken.



Since Applicant herein did not request arbitration within 30 days of receipt of the denial of claim form, Respondent shall pay interest from the date the arbitration was commenced as set forth above to the date of payment of the Award in accordance with 11 N.Y.C.R.R. §65-3.9(c).

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 an attorney's fee in accordance with 11 N.Y.C.R.R. §65-4.6(d).

- 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 Erie

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

05/19/2021  
(Dated)

Michelle Murphy-Louden

**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:**  
47be9f9c6dcd30543480da43177221d6

### **Electronically Signed**

Your name: Michelle Murphy-Louden  
Signed on: 05/19/2021