

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Sedation Vacation Perioperative Medicine  
PLLC  
(Applicant)

- and -

Geico Insurance Company  
(Respondent)

AAA Case No.	17-22-1237-9984
Applicant's File No.	n/a
Insurer's Claim File No.	0676842240000001
NAIC No.	35882

### ARBITRATION AWARD

I, Mitchell Lustig, 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 03/13/2023  
Declared closed by the arbitrator on 03/13/2023

Dino DiRenzo, Esq from Dino R. DiRienzo Esq. participated virtually for the Applicant

Chad Meyers from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$351.39**, 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

In dispute is Applicant Sedation Vacation Perioperative Medicine, PLLC's claim as the assignee of a 21- year-old female injured in a motor vehicle accident on July 3, 2020, for reimbursement in sum of \$351.39 for anesthesia services performed by Dr. Dov Ginsburg in regard to left knee surgery performed by Dr. Peter Tomasello on December 6, 2020.

The Respondent denied the claim based upon a peer review by Dr. Andrew Bazos dated January 17, 2021 concluding that the underlying left knee surgery and the anesthesia services specifically in dispute herein were not medically necessary. Thus, the issue presented for my determination is whether the Respondent has proved that the services provided to the Assignor were not medically necessary

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

I have reviewed the documents contained in the ADR Center. This decision is based upon the submissions of the parties and the arguments made by the parties at the hearing.

It is well settled that a health care provider establishes its prima facie entitlement to No-Fault benefits as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of No-Fault benefits were overdue. Westchester Medical Center v. Lincoln General Insurance Company, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2<sup>nd</sup> Dept. 2009). I find that the Applicant has established a prima facie case.

Upon proof of a prima facie case by the applicant, the burden shifts to the insurer to prove that the services were not medically necessary. A.B. Medical Services, PLLC v. Lumbermens Mutual Casualty Company, 4 Misc.3d 86, 2004 N.Y. Slip Op. 24194 (App. Term 2d and 11<sup>th</sup> Jud. Dists. 2004).

Applicant's counsel argued that the peer review of Dr. Bazos is not credible since the medical records that he relied upon to make his determination were not submitted into evidence. Applicant's attorney further argued that in view of the holding in Wagman v. Bradshaw, 292 A.D.2d 84, 739 N.Y.S.2d 421 (2<sup>nd</sup> Dept. 2002), the peer review should not be considered.

The Appellate Division in Wagman held "an expert witness may testify that he or she relied upon specific inadmissible out of court material to formulate an opinion, provided (1) it is the of a kind accepted in the profession as reliable as a basis in forming a professional opinion and (2) there is evidence presented establishing the reliability of the out of court material referred to by the witness (see Hambusch v. New York City Transit Authority, 63 NY2d 723..."

Even though the Respondent did not submit the medical documentation that the peer review doctor relied upon, I will not preclude the peer review report for that reason. Rather, the Respondent's failure to provide said documentation goes to weight of the evidence and not to its admissibility. Since the burden is on the insurer to prove that the services were not medically necessary, the Respondent proceeds at its own risk if the relied upon documentation is not in evidence.

Specifically, Dr. Bazos relied upon medical reports by Dr. Peter Tomasello dated October 12, 2020 and an MRI of the left knee by Sky Radiology dated August 18, 2020 in making his determination that the underlying left knee surgery and the anesthesia services specifically in dispute herein were not medically necessary. Since copies of those medical reports were not submitted into evidence, it is impossible to ascertain the accuracy of the peer review doctor's statements as to the Assignor's clinical condition, and thus its probative value is seriously diminished. See *Sedation Vacation*

*Perioperative Medicine PLLC v. Geico Insurance Company, AAA Case No.: 17-22-1255-8820 (Arbitrator Ann Russo, 3/12023).*

After careful consideration of the evidence, I find that the Respondent has not submitted sufficient evidence to satisfy its burden of proof that the underlying left knee surgery and the anesthesia services specifically in dispute herein were not medically necessary.

Accordingly, the Respondent's denial predicated upon lack of medical necessity is vacated and I find in favor of the Applicant in the sum of \$351.39.

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
	<b>Sedation Vacation Perioperative Medicine PLLC</b>	<b>12/06/20 - 12/06/20</b>	<b>\$351.39</b>	<b>Awarded: \$351.39</b>
<b>Total</b>			<b>\$351.39</b>	<b>Awarded: \$351.39</b>

- B. The insurer shall also compute and pay the applicant interest set forth below. 02/07/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The insurer shall pay interest on the claim from February 7, 2022 the date that arbitration was requested, until such time as payment is made

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay the applicant an attorney's fee equal to 20% of that total sum, subject to a maximum of \$1,360.00. See 11 NYCRR 65-4.6(d). However, if the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation process, the attorney's fee shall be based upon the provisions of 11 NYCRR Section 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 NY

SS :

County of Nassau

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

03/15/2023  
(Dated)

Mitchell Lustig

**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:**  
cd0231f293cc528fa1e7607d16c32e57

**Electronically Signed**

Your name: Mitchell Lustig  
Signed on: 03/15/2023