

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bay Ridge Orthopedic Assoc. PC  
(Applicant)

- and -

American Transit Insurance Company  
(Respondent)

AAA Case No. 17-23-1293-9892

Applicant's File No. N/A

Insurer's Claim File No. 1094461-01

NAIC No. 16616

### ARBITRATION AWARD

I, Keith Tola, 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 11/27/2023  
Declared closed by the arbitrator on 11/27/2023

April Mittleman, Esq. from April Mittleman Esq. participated virtually for the Applicant

Jeffrey Siegel from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$13,747.19**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the hearing, the amount in dispute was amended to \$5086.80. The surgeon/assistant bills were amended, to total \$4999.00. Add to that, the unchanged charge for the October 12, 2022 office visit.

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

3. Summary of Issues in Dispute

This case stems from a New York motor vehicle accident which occurred on February 21, 2021, wherein the EIP allegedly sustained injuries. Applicant seeks compensation of its surgeon and assistant fees associated with the right shoulder surgery of April 23, 2021. Respondent denied for lack of causation and lack of medical necessity, based on

the August 19, 2021 Pee Review of Andrew Bazos, M.D. Applicant also seeks compensation for an office visit on October 12, 2022, which claim respondent neither paid nor denied. Rather, respondent maintains the claim is not ripe for arbitration due to outstanding verification.

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

This Award was issued upon consideration of the parties' arguments and upon review of the relevant evidence contained within the ADR Center files.

#### **Issue #1 - D/O/S - 4/23/21 - Right Shoulder Surgery - Medical Necessity**

#### **Peer Review - Dr. Bazos**

Dr. Bazos prefaced by noting his opinions were "based on all evidence submitted." He then confirmed the right shoulder MRI film "was not made available for review." As such, he deemed it "impossible" to clinically correlate the exam findings to the MRI report. He noted Dr. Baum, the surgeon, examined the EIP on March 18, 2021, at which time the EIP presented with complaints of right shoulder pain. Examination revealed decreased range of motion throughout the right shoulder, with some impingement symptoms. Neer's and Hawkins, as well as O'Brien's tests were positive. The EIP was diagnosed with right shoulder derangement "with labral tear according to the MRI..." Surgery was not recommended at that time. Instead, treatment recommendations included ongoing conservative care. The EIPO was examined again on April 15, 2021, at which time he complained of "clicking and popping," together with pain to the right shoulder. Examination revealed spasms, tenderness and guarding. MRI studies were reviewed and documented. The assessment was one that the EIP was behaving as a Bankart anterior component of a SLAP tear. Surgery was recommended at that time.

The right shoulder MRI was performed on March 4, 2021, and revealed bursal surface fraying of the supraspinatus tendon and tear of the anterior labrum.

Dr. Bazos relied on the report and opinions set forth by Daniel Cousin, M.D., who conducted an independent film review at the request of the respondent carrier. He noted that Dr. Cousin stated in his report that there is no evidence of any form of acute traumatic injury to the shoulder, and that the findings were reported by Dr. Cousin as indicative of a chronic degenerative attrition within the shoulder joint. Dr. Bazos then concluded:

"As such, based on all evidence submitted, there does not appear to be any evidence of acute traumatic injury to the shoulder to warrant or justify the need for surgical intervention. If Dr. Baum felt that surgical intervention was necessary based on physical exam and MRI findings, then said care should be billed to and paid for by the claimant's regular healthcare insurer as opposed to the motor vehicle carrier. Again, that is not to say that surgery may have not been warranted based on physical exam of MRI findings,

but the need for surgery was not the result of any trauma sustained in the accident of 2/21/21, and therefore the motor vehicle carrier is not responsible for the payment of any services related to the claimant's right shoulder care ..."

### **Respondent's Burden**

The report and opinions of Dr. Bazos are not only unpersuasive, but are altogether insufficient to carry respondent's burden. First and foremost, Dr. Bazos admitted he did not have possession of the MRI films, nor were hospital records submitted for his review. He based his opinions, therefore, on an incomplete medical record - which is mistake #1.

The fact the right shoulder MRI film was not made available to Dr. Bazos for his review was significant to him, in that he noted it was not possible to clinically correlate the exam findings to the MRI report. Of course, Dr. Bazos reviewed the medical records, and was keenly aware of the positive clinical findings, together with symptoms of "clicking and popping" and tests which were positive for impingement, and he also possessed the MRI film which revealed evidence of fraying and labral tear. He could easily have clinically correlated the exam findings with the positive findings on the MRI report. Instead, he relied entirely upon the report of another medical expert who was retained by the carrier to review the MRI film. In my view, it was patently improper for Dr. Bazos to rely on the report of another expert retained by respondent in order to reach a conclusion that runs contrary to the treatment history as noted within the MRI report and medical records. Dr. Bazos was retained to review the medical records of the treating providers and, based on same, to opine on the issue of medical necessity and causation. Reliance solely upon the independent film review of Dr. Cousins suggests impartiality, or the perception of same. Notably, respondent had every opportunity to identify Dr. Cousins and his Independent Film Review as a basis for denial, but did not do so. Again, I find it patently improper for Dr. Bazos to (1) ignore or overlook the results of the MRI as noted in the report, and to overlook the exam results; (2) claim it is impossible to clinically correlate the exam findings to the MRI report; and then (3) conveniently favor the independent film review of Dr. Cousins.

Notably, the report of Dr. Cousins was part of the respondent's record, and I have reviewed same. Significantly, Dr. Cousins did not entirely rule out trauma as the cause of the right shoulder injuries as reported on the MRI. He noted only that there is no "definite" signal characteristics to suggest any findings that is "definitively" related to the date of the accident.

Perhaps most significantly, neither Dr. Cousin nor Dr. Bazos discuss any evidence to show the EIP was symptomatic prior to the accident, nor have they identified any other cause of injury except to suggest the EIP was suffering from pre-existing degenerative conditions. That said, neither Dr. Bazos nor Dr. Cousins offered discussion as to whether the underlying motor vehicle accident could have exaggerated and/or exacerbated any such pre-existing condition(s), which still would have triggered respondent's obligation under the no-fault law.

In summary, I find the report and findings of Dr. Bazos insufficient to carry respondent's burden. In view of the foregoing, this portion of the applicant's claim is granted, as amended.

NOTE: Even had I shifted the burden, I would have found in favor of applicant on the issue of medical necessity. Indeed, applicant submitted the Rebuttal of the surgeon, Dr. Baum, which identified and adequately contested each position of Dr. Bazos.

### **Issue #2: D/O/S - 10/12/22 - Office Visit - Verification**

Upon receipt of the applicant's bill, on November 22, 2022, respondent sent an initial request for verification, dated December 14, 2022. Respondent requested applicant provide treatment notes/reports for services rendered. A follow-up verification request was sent to applicant on January 18, 2023. By affidavit of Cheryl Glaze, no-fault claims supervisor, the requested verification remains outstanding.

No response to verification on behalf of applicant has been submitted. In view of the foregoing, I find this portion of applicant's claim is not ripe for arbitration and must be dismissed without prejudice.

### **Summary**

Applicant's claim pertaining to the surgical fees of 4/23/21 are granted, as amended.

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
	<b>Bay Ridge Orthopedic Assoc. PC</b>	<b>04/23/21 - 10/12/22</b>	<b>\$13,747.19</b>	<b>\$5,086.80</b>	<b>Awarded: \$4,999.00</b>
<b>Total</b>			<b>\$13,747.19</b>		<b>Awarded: \$4,999.00</b>

B. The insurer shall also compute and pay the applicant interest set forth below. 04/05/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant commenced arbitration by filing on 4/5/23. Applicant filed beyond 30 days of receipt of the denial. As such, Respondent shall pay the applicant interest computed from the date of filing, 4/5/23, at the rate of 2% per month, simple, and ending with the date of payment of the award subject to the provisions of 11 NYCRR § 65-3.9(e).

C. Attorney's Fees

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

The insurer shall also pay the applicant for attorney's fees as set forth below Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR Section 65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR Section 65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$850.00" Id. The minimum attorney fee that shall be awarded is \$60.00. 11 NYCRR Section 65-4.5(c). However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR Section 65-4.6(i). For claims that fall under the Sixth Amendment to the regulation the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, subject to a maximum fee of \$1,360.00."

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

12/13/2023  
(Dated)

Keith Tola

#### **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:**  
b42cdbba6fae92d9aa677d16d7a8349e

**Electronically Signed**

Your name: Keith Tola  
Signed on: 12/13/2023