

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Global Surgery Center LLC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-23-1322-6806

Applicant's File No. SS-258682

Insurer's Claim File No. 8699925850000001

NAIC No.

ARBITRATION AWARD

I, Sandra Adelson, 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: the patient

1. Hearing(s) held on 05/16/2024
Declared closed by the arbitrator on 08/02/2024

Greg Itingen, Esq. from Samandarov & Associates, P.C. participated virtually for the Applicant

Naela Hasan, Esq. from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$18,250.83**, 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

The patient was a 37-year old male passenger in a motor vehicle which was involved in a motor vehicle accident on 4/26/23. The patient is alleged to have sustained injuries in accident and came under the care of applicant for the left shoulder. The left shoulder surgery was performed at applicant ambulatory service facility on 8/9/23, and applicant now seeks payment for performing said services.

Respondent issued a denial based on the peer review report of Dr. Stuart Springer, M.D. Respondent also submitted a fee schedule defense.

The parties were directed to submit a coder report/ EAPG data with regard to the fee schedule for the ambulatory surgery center as a post hearing submission.

4. Findings, Conclusions, and Basis Therefor

The record consisted of claimant's submission, respondent's submission, as well as documents not enumerated within this decision, but which are contained in the case file maintained by the American Arbitration Association. THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED pursuant to 11 NYCRR 65-4.5 (o) (1) (Regulation 68-D). The arbitrator may question 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. Based on a review of the documentary evidence, this claim is decided as follows:

Medical Necessity:

In order to meet this burden, the defendant must establish the treatment or tests in question were not in accordance with generally accepted medical/professional practice. *Delta Medical Supplies, Inc. v. NY Central Mutual Ins. Co.*, 14 Misc. 3d 1231[A], 836 N.Y.S.2d 492 (Civil Ct. Kings Co. 2007); and *CityWide Social Work & Psychological Servs. V. Travelers Indem. Co.*, 3 Misc 3d 608, 777 N.Y.S.2d 241 (Civil Ct. Kings Co. 2004).

The defendant must prove there is a factual basis and medical rationale for the opinion of the its expert. *Prime Psychological Services v. Progressive Cas. Ins. Co.*, 24 Misc 3d 1244[A], 901 N.Y.S.2d 902, 2009 NY Slip Op 51868[U] (Civil Ct. Richmond Co. 2009); and *Nir v. Allstate Ins. Co.*, 7 Misc 3d 544, 796 N.Y.S.2d 85 . Respondent relies on the peer review report of Dr. Stuart Springer, MD.

Prior Case AAA Case No. 17-23-1325-6109, Tri-Borough NY Medical Practice PC/the same patient and Geico Insurance Company is controlling:

"Res judicata and collateral estoppel are applicable to no-fault arbitration awards and bar relitigation of the same claim or issue. *A.B. Medical Services PLLC v New York Central Mutual Fire Ins. Co.*, 12 Misc.3d 500, 820 N.Y.S.2d 422 (Civ. Ct. Kings Co.2006), citing *Matter of Ranni*, 58 N.Y.2d 715, 458 N.Y.S.2d 910 (1982.)

A determination of the res judicata effect of a prior arbitration proceeding is for the arbitrator in a subsequent arbitration proceeding. *City School Dist. Of City of Tonawanda v. Tonawanda Educ. Ass'n.*, 63 N.Y.S.2d 846, 482 N.Y.S.2d 258 (1984.). It is well settled that any judgment, even judgments entered on default have res judicata or collateral estoppel effect. See *Eagle Surgical Supply, Inc. v. AIG Indem. Ins. Co.*, 40 Misc. 3d 139(A) (App. Term 2013) Further, the Appellate Term has held that "[t]he declaratory judgment is a conclusive final determination, notwithstanding that it was entered on default...." *Ava Acupuncture, P.C. v NY Central Mut. Fire Ins. Co.*, 34 Misc. 3d 149(A) (App. Term 2012.)

It should be noted that in a prior hearing held before this arbitrator in Case No. 17-23-1325-6109, Tri-Borough NY Medical Practice PC/the same patient and Geico Insurance Company , the relevant evidence was based on the same set of facts involving the patient and respondent. This arbitrator had decided that the left shoulder surgery was medically necessary.

I find that the prior arbitration award is res judicata on the issue of medical necessity. I am constrained to find that there is no relevant new or different evidence in the record in the case at issue which would lead to a contrary finding and conclusion.

The prior award of Tri-Borough NY Medical Practice, supra. held the following:

"Respondent relies on the peer review report of Dr. Stuart Springer, MD.

Dr. Springer in his peer review report noted the following: "As per the evaluation report dated 5/9/2023 by Kyungsook Bu, F.N.P.-C., the claimant had a complaint of left shoulder pain rated as 10/10 on the pain scale. The pain was sharp, shooting, dull, and aching in nature. The pain was aggravated by movements. Examination of the left shoulder revealed a decreased range of motion. The diagnosis was left shoulder sprain/strain. An MRI of the left shoulder was ordered. Pain medications and DMEs were prescribed. Conservative treatment was advised.

As per the initial physical therapy evaluation report dated 5/9/2023 by Kim Seongeun, D.P.T., the claimant was advised of physical therapy 3 times per week for 4-6 weeks.

The claimant received physical therapy from 5/9/2023 to 7/25/2023, in a total of 20 sessions for the spine, right shoulder, and bilateral knees. None of the sessions were received for the left shoulder. The reports were made available for my review.

As per the initial acupuncture evaluation report dated 5/9/2023 by Ling Zhang, L. Ac., the claimant was advised acupuncture treatment 3-4 times per week for 4 weeks.

The claimant received acupuncture treatment for the spine from 5/9/2023 to 7/17/2023 in a total of 20 sessions. None of the sessions were received for the left shoulder. The reports were made available for my review....

As per the re-evaluation report dated 6/19/2023 by Kyungsook Bu, F.N.P.-C., the claimant had a complaint of left shoulder pain rated as 10/10 on the pain scale. The pain was sharp, stabbing, and burning in nature. The pain was aggravated by movements. The claimant had a history of left shoulder surgery in 2016. Examination of the left shoulder revealed tenderness over the anterolateral aspect and bicipital groove. The range of motion was decreased and painful. Muscle strength was decreased. Hawkins test, Empty Can test, Neer's test, Passive Adduction test, and Impingement test were positive. The diagnosis was left shoulder derangement. An MRI of the left shoulder was reviewed.

Left shoulder arthroscopy was recommended....

The standard of care for a shoulder injury after a motor vehicle accident would begin with a trial of conservative treatment with various modalities of physical therapy, and acupuncture applied for several months. In addition, if the claimant demonstrated persistent pain, which would be characterized as non-responsive to different types of therapy, including painkillers and intensive physical therapy, an operative procedure might be considered several months later."

The significance of the aforementioned excerpt from the peer review report establishes that the left shoulder injury was documented shortly after the accident. With regard to physical therapy and acupuncture notes provided to Dr. Springer, he notes that the treatment did not involve the left shoulder. The significance of the foregoing conclusion of Dr. Springer that there was insufficient physical therapy administered to the left shoulder was conclusory. Dr. Springer assumes that the records provided to him were complete. However, Dr. Springer did not request that respondent obtain all records which Dr. Springer required including the treatment and therapy administered to the left shoulder.

In light of the foregoing, I find that if Dr. Springer required further information or justification for the surgery in the form of physical therapy and acupuncture administered to the left shoulder, he should have requested that respondent issue additional verification requests for said information. I therefore find that Dr. Springer rendered a peer review opinion based on having insufficient evidence. (A.B. Med. Serves. PLLC v American Mfrs. Mut. Ins. Co., 6 Misc 3d 133[A], 2005 NY Slip Op 50114[U], supra; Park Neurological Serves. P.C. v GEICO Ins., 4 Misc 3d 95, supra; cf. Amaze Med. Supply Inc. v Travelers Prop. Cas. Corp., 7 Misc 3d 128[A], 2005 NY Slip Op 50452[U]. I am constrained to find that there was an insufficient factual basis and medical rationale for this peer review opinion. I am constrained to find that the weight to be afforded to the reliability of this peer review report to be diminished.

Dr. Springer also stated that "However, based on the available medical records, the claimant did not receive any form of conservative treatment for the left shoulder pain. There was no documented evidence of contraindication for conservative treatment. The claimant should have received adequate conservative treatment in the form of physical therapy and acupuncture treatment, followed by steroid injections before proceeding to the surgery. In cases of failure of conservative treatment, surgery would be appropriate.

It was not clear why the surgery was performed without receiving conservative treatment and a steroid injection. Hence, based on the medical records and the above-cited article, the left shoulder arthroscopy with debridement performed was not medically necessary."

As noted, Dr. Springer assumed that there was no physical therapy or acupuncture to the left shoulder due to the fact that he relied on records provided by respondent. There was no credible evidence that the patient did not receive treatment to the left shoulder. As noted, Dr. Springer chose not to request respondent to obtain the relevant records he required. Additionally, he cited to his personal opinion that a steroid injection should be performed prior to surgery for the left shoulder. Steroid injection is a modality offered to patients, but it is not the only choice. Clearly, the treating physician should determine the treatment plan, not the peer review doctor.

Dr. Springer was of the opinion that because the left shoulder surgery performed on 8/9/2023 was not medically necessary, then the associated services of arthroscopy, shoulder, and surgical; repair of SLAP lesion, arthroscopy, shoulder, surgical; with lysis and resection of adhesions, with or without manipulation, unlisted procedure, arthroscopy, arthroscopy of the shoulder, surgical with extensive synovectomy, arthroscopy, shoulder, surgical; with the removal of the loose body or foreign body, arthroscopy shoulder, surgical decompression of subacromial space with partial acromioplasty, anesthesia for other procedures on top of the arm bone and shoulder joint, injection, anesthetic agent; cervical plexus, injection(s), anesthetic agent(s) and/or steroid, and ultrasonic guidance for needle placement (e.g., biopsy, aspiration, injection, localization device), imaging supervision, and interpretation were also not medically necessary.

Dr. Pearl in his rebuttal report stated

"Dr. Springer stated that based on the medical records and the cited article, the left shoulder arthroscopy with debridement performed was not medically necessary. In response to this, I would note that when the patient presented to me, at the time, the patient complained of 8/10 sharp, stabbing, burning and throbbing left shoulder pain, especially in the anterior aspect of the left shoulder joint. The patient reported difficulty dressing and especially when lifting heavy load. Examination of the left shoulder revealed tenderness to the anterolateral aspect of the left shoulder joint as well as bicipital groove, painful arc at 90/180 degrees in abduction, positive Impingement sign, positive Neer's test, positive Speed's test, positive Empty Can test, positive Hawkins test, decreased strength and decreased range of motion. Also, MRI of the left shoulder revealed moderate rotator cuff tendinopathy and bursitis with associated 2mm linear articular surface partial thickness mid-distal supraspinatus tendon tear with joint effusion. All these above findings warrant left shoulder arthroscopy.

Also, the NIH Guidelines lists indication for Arthroscopy as under: Arthroscopy may be recommended for these shoulder problems:

- A torn or damaged cartilage ring (labrum) or ligaments

- Shoulder instability, where the shoulder joint is loose and slides around too much or becomes dislocated (slips out of the ball and socket joint)
- A torn or damaged biceps tendon
- A torn rotator cuff
- A bone spur or inflammation around the rotator cuff
- Inflammation or damaged lining of the joint. Often this is caused by an illness, such as rheumatoid arthritis.
- Arthritis of the end of the clavicle (collarbone)
- Loose tissue need to be removed
- Shoulder impingement syndrome, to make more room for the shoulder to move around

(<http://www.nlm.nih.gov/medlineplus/ency/article/007206.htm>) (See Shoulder Arthroscopy in MedlinePlus-A service of the U.S. National Library of Medicine National Institutes of Health)

As evident from the pre-operative evaluation and operative report, the patient's condition in this case was consistent with the above indications such as labral tear, rotator cuff tear, synovitis, etc and therefore required the left shoulder surgery.

Further, the speeds test is used to detect SLAP lesions of the glenoid labrum and has a sensitivity of up to 75% and specificity as high as 90% for a labral tear. Joo Han et al. "The evaluation of various physical examinations for the diagnosis of type II superior labrum anterior and posterior lesion." The American journal of sports medicine 36.2 (2008): 353-9.

Further, the Empty Can test is a commonly used orthopedic examination for the integrity of the supraspinatus muscle and tendon. The empty can test is considered positive if there is significant pain and/or weakness. A positive test indicated a tear of the supraspinatus tendon or muscle and can also indicated a neuropathy of the suprascapular nerve. Magee DJ. Orthopedic Physical Assessment: 5th Edition. St. Louis, MO: Saunders Elsevier;2008.

Further, Surgery is indicated for a clinical presentation of a rotator cuff tear such as the one this patient had. There are no standard requirements for a patient with a suspected MRI-confirmed rotator cuff tear to undergo any particular amount of physical therapy. In fact there is no clear consensus regarding whether physical therapy should be performed for any particular time period. Clinical Orthopaedics and Related Research, Indications for Surgery in Clinical Outcome Studies of Rotator Cuff Repair Robert G. Marx MD, et al., Volume 467, Number 2, February 2009 467:450-456 The Association of Bone and Joint Surgeons. The article which reviewed numerous studies nowhere states or recommends any type, frequency or duration of conservative treatment before

surgery should be performed. Nearly half of the studies reviewed by the authors of the article did not mention any preoperative conservative 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.

When discussing surgery, the authors say that surgery is indicated "in a patient less than 60 years old with a debilitating tear that impairs function" American Family Physician. 1998 Feb 15;57(4):667-74, 680-2. Management of shoulder impingement syndrome and rotator cuff tears. Fongemie AE, Buss DD, Rolnick SJ. Pg 11. Indeed this patient was 37 years old and had tears which impaired his function. Surgery was the proper medically indicated treatment for this patient. Physical therapy is only recommended in "older" patients, defined as over 60. There is no requirement for a patient with these injuries and symptoms to have to undergo any particular type or duration of conservative treatment. I would also like to point out that that the article states that rest and non-steroidal pain medication is an important type of conservative treatment (which the patient was unresponsive to).

Partial rotator cuff tears should be surgically treated because if left untreated, they will get worse with time Journal of the American Academy of Orthopaedic Surgeons Partial-Thickness Rotator Cuff Tears, Andrew B. Wolff, MD et. al. There is a substantial body of evidence that most partial tears do not heal on their own. Patients may experience improving or deteriorating symptoms, but the clinical and biomechanical data suggest that most of these tears progress to become larger rather than smaller with time.

Partial rotator cuff tears can be traumatically induced and are often more painful than complete tears due to the extreme strain on the remaining fibers. If a partial tear is untreated, it will likely progress and may become irreparable. Arthritis & Rheumatism Vol. 50, No. 12, December 2004, pp 3751-3761 Rotator Cuff Disorders Recognition and Management Among Patients With Shoulder Pain Andreas H. Gomoll, Jeffrey N. Katz, Jon J. P. Warner, and Peter J. Millett. A debridement (the procedure I performed) is the procedure of choice in treatment of partial tears.

Based on the above evaluations and the MRI, surgery was proper and medically indicated."

Further, Dr. Springer stated that the claimant had an inadequate conservative treatment to assess the maximum possible benefit the claimant could have gained with the continuation of conservative care. Also, the claimant did not receive cortisone injections to the right shoulder. In response to this, I would note that the patient underwent conservative treatment and pain medications for more than 2 months. However, his conditions worsened. I therefore determined that, the patient's injuries would certainly not resolve by further physical therapy and would require surgical intervention."

Accordingly, I find that Dr. Pearl's rebuttal report explained why the surgery was medically indicated for this patient and therefore, effectively and credibly refuted the peer review report of Dr. Springer."

Accordingly, I find that due to the fact that the surgery was medically necessary, then the ambulatory surgery center fee was also necessary. The prior award establishes that the applicant's proof cogently refuted the same peer review arguments of Dr. Springer which respondent relied on in the prior case and the case in issue.

Fee Schedule Issue:

The claim in issue involves reimbursement for left shoulder surgery performed at an ambulatory surgery service at applicant facility. The parties were directed to submit a coder report and/or EAPG data with regard to the fee schedule for the ambulatory surgery center as a post hearing submission. The respondent responded to the post hearing directive; applicant did not.

Title 12 NYCRR Subpart 329-2 pertains to the New York Workers' Compensation Ambulatory Surgery Services Fee Schedule.

Under 12 NYCRR 329-2.1, it states:

Payment for ambulatory surgery services shall be made according to the ambulatory patient groups (APG) methodology, governing reimbursement for licensed freestanding ambulatory surgical centers and hospital-based ambulatory surgery services as set forth herein and subject to WCB specific adjustment. The effective date of this Subpart shall be October 1, 2015.

12 NYCRR 329-2.2 (h) defines the computer program which should be used to calculate reimbursement:

APG software system shall mean the New York State-specific version of the APG software developed and published by Minnesota Mining and Manufacturing Corporation (3M) to process CPT-4 and ICD-10 code information in order to assign patient visits to the appropriate APG category or categories and apply appropriate bundling, packaging and discounting to assign the appropriate final APG weight and associated reimbursement.

The Workers' Compensation Ambulatory Surgery Services Fee Schedule is referenced here because it is applicable to No-Fault claims. See NY Insurance Law § 5108; 11 NYCRR Part 68 [Regulation 83].

To support respondent's position pertaining to the fee schedule, respondent has submitted a report generated from the EAPG software program developed by 3M. The report provides a detailed analysis for each of the codes that are listed on the bill and according to its calculations, the compensable fee is \$8026.15. The applicant did not submit cogent proof to support its billing.

I find that the more credible and reliable proof is the 3M report submitted by respondent.

Accordingly, the claim is hereby granted in for \$8026.15.

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
	Global Surgery Center LLC	08/09/23 - 08/09/23	\$18,250.83	Awarded: \$8,026.15
Total			\$18,250.83	Awarded: \$8,026.15

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/26/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Respondent shall compute and pay the Applicant the amount of interest computed from the date set forth above 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(c).

C. Attorney's Fees

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

Applicable attorney fees on the amount awarded in accordance with 11 NYCRR 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 NY

SS :

County of Suffolk

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

08/05/2024

(Dated)

Sandra Adelson

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:
e5dab38435f1e1461d6a216d8cf5c4df

Electronically Signed

Your name: Sandra Adelson
Signed on: 08/05/2024