

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Leviathan Wellness PLLC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-24-1341-1289
Applicant's File No.	153473
Insurer's Claim File No.	0514774220101041
NAIC No.	35882

ARBITRATION AWARD

I, Natia Pavel, 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 (BA)

1. Hearing(s) held on 07/10/2024
Declared closed by the arbitrator on 07/10/2024

John Faris Esq., from Law Offices of Eitan Dagan participated virtually for the
Applicant

Marilyn Oppedisano Esq., from Geico Insurance Company participated virtually for the
Respondent

2. The amount claimed in the Arbitration Request, **\$996.12**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant is seeking reimbursement in the amended sum of \$631.21 representing the fee schedule rate for the anesthesia services related to a left shoulder surgery that was rendered to the EIP on 2/8/24.

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

3. Summary of Issues in Dispute

Applicant is seeking reimbursement in the amended sum of \$631.21 representing the anesthesia services related to a left shoulder surgery that was rendered to the EIP on 2/8/24. The EIP was a 55-year-old male who was involved in a motor vehicle accident

on 06/07/2023. The claimant sustained multiple alleged injuries, including an injury to the left shoulder. On 01/08/2024, the claimant presented to Dr. Milan Sen, for an evaluation with the complaint of left shoulder pain. The claimant was evaluated and left shoulder arthroscopy was recommended. The claimant underwent the left shoulder arthroscopy on 02/08/2024. The Applicant timely submitted this claim to the carrier seeking reimbursement. The Carrier timely denied this claim based on the peer review report authored by Dr. Julio Westerband MD dated 3/11/24. The Applicant relied on the medical reports and the formal rebuttal dated 4/30/24. The parties agreed that the sole issue is whether the surgery was medically necessary.

4. Findings, Conclusions, and Basis Therefor

This case was decided on the submissions of the parties as contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association and the oral arguments of the parties' representatives at the hearing. No witnesses testified at the hearing. I reviewed the documents contained in the ECF. The following is a brief overview of the evidence:

Applicant is seeking reimbursement in the amended sum of \$631.21 representing the anesthesia services related to a left shoulder surgery that was rendered to the EIP on 2/8/24. The EIP was a 55-year-old male who was involved in a motor vehicle accident on 06/07/2023. The claimant sustained multiple alleged injuries, including an injury to the left shoulder. On 01/08/2024, the claimant presented to Dr. Milan Sen, for an evaluation with the complaint of left shoulder pain. The claimant was evaluated and left shoulder arthroscopy was recommended. The claimant underwent the left shoulder arthroscopy on 02/08/2024. The Applicant timely submitted this claim to the carrier seeking reimbursement. The Carrier timely denied this claim based on the peer review report authored by Dr. Julio Westerband MD dated 3/11/24. The Applicant relied on the medical reports and the formal rebuttal dated 4/30/24. The parties agreed that the sole issue is whether the surgery was medically necessary.

Dr. Westerband reviewed the medical reports and argued that the left shoulder arthroscopy was not medically necessary. Dr. Westerband noted that the medical records document an individual with signs and symptoms of a shoulder sprain. The standard of care for the treatment for shoulder sprain-strain is to try the patient with conservative treatment modalities for at least three months and only upon a failure of all the applicable nonsurgical treatment, alternative treatment modalities can be explored. The patient should also undergo a trial of steroid injections prior to the referral for surgery. The peer reviewer concluded that the records do not support the need for surgery. "The claimant has shoulder pain with loss of range of motion. Shoulder surgery not indicated. Surgery was done but it is not clear what actually lead to this decision... There is evidence on exam of rotator cuff pain with no shoulder instability and no neurological impairment of the upper extremity. Surgery was recommended because conservative care had supposedly failed. However as per the medical records, the claimant received physical therapy sessions however the notes do not mention the body parts that received

therapy. Hence it is unclear if the claimant received physical therapy to the left shoulder. In addition, additional non-surgical modalities had not even been offered to the claimant. No steroid injections for the subacromial space were offered or provided. Management of shoulder pain primarily involves conservative treatment methods such as NSAIDs, rest, and exercise. The nonsurgical treatment, in this case, is effective, and therefore surgery performed was not medically necessary. Therefore, the criteria for arthroscopy are not met and shoulder arthroscopy is not medically necessary." The peer reviewer cited to medical literature to support his opinion in this matter.

A denial premised on lack of medical necessity must be supported by competent evidence such as an independent medical examination, peer review or other proof which sets forth a factual basis and medical rationale for denying the claim. See, *Healing Hands Chiropractic, P.C. v. Nationwide Assur. Co.*, 5 Misc. 3d 975 (2004). The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 2009 NY Slip Op 00351 (App Div. 2d Dep't., Jan. 20, 2009); *Channel Chiropractic, P.C. v. CountryWide Ins. Co.*, 2007 Slip Op 01973, 38 A.D.3d 294 (1st Dep't. 2007); *Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 NY Slip Op 27427, 17 Misc. 3d 97 (App Term 1st Dep't., 2007), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident. *Id.*

The trial courts have held that a peer review report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See generally, *Nir v. Allstate Ins. Co.*, 7 Misc. 3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); See also, *All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

In this case, I find the Respondent has met its initial burden of proof to deny this claim based on lack of medical necessity. The peer reviewer sets forth the standard of generally accepted medical practice and demonstrated how the treating provider deviated from that standard of care. Therefore, the burden now shifts to the Applicant to submit evidence that meaningfully addresses the peer review and demonstrates the medical necessity for the disputed services.

In this case, the Applicant has submitted a formal rebuttal by Dr. Milan Sen dated 4/30/24. In reviewing the medical reports and the formal rebuttal, I find that the Applicant has meaningfully rebutted the Respondent's evidence. I note the treating provider indicated that the MRI of the shoulder revealed a high grade partial tear of the supraspinatus tendon with pain that was graded a 8/10. The claimant also underwent seven months of conservative care.

Dr. Sen noted that "the decision of performing the surgery was not solely based on the MRI study, but it was based on complaints and positive findings. When the patient was

evaluated by me on 1/8/2024, he continued to suffer from 8/10 aching, sharp and stabbing pain in the anterolateral aspect of the left shoulder. It was worse with overhead activity, carrying heavy objects and sleeping at night time. There was tenderness upon palpation over anterolateral aspect of the joint, acromioclavicular joint, and bicipital groove, decreased range of motion, decreased muscle strength and positive painful arc at 130° in abduction, Impingement sign, Neer's sign, Hawkin's sign, Crossarm test as well as Speed's test. Therefore, waiting for more response to conservative care or for the physiological status to deteriorate in a patient who is already in immense pain due to the traumatic injuries suffered in the motor vehicle accident could ultimately be detrimental for the patient's recovery. This is especially important in traumatic cases such as this where a traumatic car accident was the known cause of the patient's pain pattern. Therefore, the left shoulder surgery was recommended as waiting for more response to conservative treatment would have worsened the patient's left shoulder condition." Finally, the treating doctor argued that it is common practice in the medical community to go for surgical intervention in older patients because they are less likely to respond conservative therapy and bear pain for an extended period. There are no standard requirements for a patient to undergo any particular amount of physical therapy. I also note the peer reviewer failed to sufficiently address this patient's examination findings. There were multiple positive orthopedic tests (such as the Hawkin's, Neer's, Crossman and a positive Impingement sign) the significance of which was not discussed by the peer reviewer. For all of the above-mentioned reasons, I find that the Respondent's denial is not sustained and the Applicant's claim is granted.

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
	Leviathan Wellness PLLC	01/08/24 - 02/08/24	\$996.12	\$631.21	Awarded: \$631.21
Total			\$996.12		Awarded: \$631.21

- B. The insurer shall also compute and pay the applicant interest set forth below. 03/21/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The interest rate shall be 2% per month, simple, on a pro rata basis using a 30 day month. The insurer shall compute and pay Applicant from the date set forth above, which is the date of the filing of the Ar-1 to the date of payment of the award.

C. Attorney's Fees

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

As this matter was filed after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, 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 Nassau

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

08/09/2024
(Dated)

Natia Pavel

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:
7b0828647f1803cac4fd27363ad3cdf3

Electronically Signed

Your name: Natia Pavel
Signed on: 08/09/2024