



## AAA® INSURANCE REPORTER

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### **Video Hearings Coming in 2021**

2020 was a year of great adversity for many. With the COVID pandemic forced upon us, we've been required to adjust how we conduct business and interact with one another.

AAA's no-fault arbitration program also went through a period of adjustments in response to COVID. Within a few weeks of the shutdown of New York City and the surrounding areas, all in-person hearings were suspended and replaced with phone hearings.

In 2021, the no-fault arbitration program will be entirely virtual; hearings will take place by video utilizing Zoom. We expect to begin scheduling video hearings starting in February 2021.

If you have questions or require additional information on video hearings, please contact Ben Carpenter by email at [CarpenterB@adr.org](mailto:CarpenterB@adr.org).

### **Case Statistics Dashboard for Parties**

We are pleased to introduce the new case statistics dashboard for parties. In the first quarter of 2021, we will roll out a new tool that will help parties view their data in a brand new way.

Currently, we use data visualization for our internal dashboards that allows us to manage our overall caseload, monitor metrics, evaluate productivity, make business decisions, and forecast trends in data.

Parties have relied on the AAA to provide them with data analytics on a weekly, monthly, or quarterly basis to help them make better business decisions. We do this routinely by sending data in an Excel format. The new dashboard will allow system users to view and download their own data at their convenience. This self-service portal will offer detailed dashboards with filters allowing parties to quickly reference cases in various stages.

*Stay tuned for more information as we get ready to roll out the new External Dashboard!*

If you are interested in providing feedback, receiving a demo, or if you have questions, please contact Zarah Monterrosa at [MonterrosaZ@adr.org](mailto:MonterrosaZ@adr.org).

### **Case Closed!**

We can't turn back the clock. It's done. It's over. The process is complete, and that is a good thing.

The AAA continues to look for and review better ways of moving the ever-increasing New York State no-fault caseload forward. Our goal is to provide parties with the most efficient platform for dispute resolution. Using the ADR Center



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Online Settlement Tool is an easy, contactless way for parties to come to an agreement on the principal amount, interest if applicable, and attorney and filing fees. It is a negotiated agreement that brings the case to closure.

Accuracy by the parties is vitally important when using the settlement tool. In the past, exceptions were made for reopening settled or withdrawn cases because of party error, parties changing their mind, or other reasons where parties agreed to a change. Unfortunately, these types of exceptions became the rule, and we no longer can accommodate them. Doing so causes issues in the integrity and accuracy of the case data. **We urge all system participants to ensure that all settlements to which they agree are accurate and error-free.**

Beginning January 4, 2021, the AAA will no longer reopen a closed case, *even if agreed to by all parties.*

As we move into 2021, the AAA looks forward to providing our customers with increased transparency into their data by making available more information to use to help drive business needs and resolutions.

### **DEVELOPMENTS IN NEW YORK NO-FAULT & SUM ARBITRATION**

#### **Recent Arbitration Awards**

The intent of this section is to provide a cross section of recent, well-reasoned arbitration awards that are consistent with current New York precedent and address commonly raised issues in no-fault and SUM arbitrations. The awards were objectively selected by an editorial board consisting of no-fault and SUM arbitrators with a view toward promoting discussion and analysis of relevant issues.

#### **List of Arbitrator Abstracts**

##### **ACUPUNCTURE & 8-UNIT RULE**

- *NYBK Chiropractic, PC & Allstate Ins. Co.*, AAA Case no. 17-18-1104-2979 (2/5/20) (Greta Vilar, Arb.)
- *Oriental Soothing Acupuncture, PC & Allstate Ins. Co.*, AAA Case no. 17-19-1133-0523 (2/23/20) (Victor Mortiz, Arb.)
- *Changhun Lee, PT & Geico Ins. Co.*, AAA Case no. 17-18-1094-9877 (1/22/20) (Cathryn Roberts, Arb.)
- *L.I. Acupuncture & Massage & Geico Ins. Co.*, AAA Case no. 17-19-1117-4207 (4/16/20) (Philip Wolf, Arb.)

##### **SURGERY & USE OF MODIFIER 59**

- *Surgicore of Jersey City, LLC & Geico Ins. Co.*, AAA Case no. 17-19-1124-5058 (7/24/20) (Tara Maher, Arb.)
- *Fifth Avenue Surgery Center, LLC & Geico Ins. Co.*, AAA Case no. 17-19-1131-6686 (9/10/20) (Nancy S. Linden, Arb.)



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- *Health Plus Surgery Center, LLC & State Farm Mut. Auto. Ins. Co.*, AAA Case no. 17-18-1106-8641 (9/8/20) (Ellen Weisman, Arb.)
- *Advanced Spine Surgery Center & Geico Ins. Co.*, AAA Case no. 17-19-1150-9424 (9/4/20) (Heidi Obiajulu, Arb.)
- *Andrew J. Dowd, M.D. & State Farm Mut. Auto. Ins. Co.*, AAA Case no. 17-19-1115-9855 (11/25/19) (Tali Philipson, Arb.)

### CAUSALITY REVIEW & INDEPENDENT RADIOLOGICAL REVIEW

- *Optimal Care Surgical Services, LLC & American Transit Ins. Co.*, AAA Case no. 17-19-1127-7716 (6/7/20) (Stephen Czuchman, Arb.)
- *Northeast Anesthesia & Pain Management & American Transit Ins. Co.*, AAA Case no. 17-19-1147-7689 (6/24/20) (Frank Marotta, Arb.)
- *CPM Medical Supply, Inc. & American Transit Ins. Co.*, AAA Case no. 17-18-1110-2915 (6/8/20) (Eileen Hennessy, Arb.)
- *Excell Clinical Lab & American Transit Ins. Co.*, AAA Case no. 17-18-1112-6624 (9/1/20) (Lucille DiGirolomo, Arb.)
- *Fifth Avenue Surgery Center, LLC & American Transit Ins. Co.*, AAA Case no. 17-19-1127-7988 (7/24/20) (John Langell, Arb.)

### CAUSALITY REVIEW & LACK OF MEDICAL NECESSITY

- *All City Family Healthcare Center & Integon National Ins. Co.*, AAA Case no. 17-19-1151-1773 (9/14/20) (Jennifer Zeidner, Arb.)
- *Mark S. McMahon, M.D. & State Farm Mut. Auto. Ins. Co.*, AAA Case no. 17-19-1137-6271 (10/1/20) (John Hyland, Arb.)
- *Cohen & Kramer, M.D., PC & American Transit Ins. Co.*, AAA Case no. 17-19-1140-6160 (10/5/20) (Stacy Presser, Arb.)
- *Premier Anesthesia Assoc., PA & Allstate Fire & Cas. Ins. Co.*, AAA Case no. 17-19-1126-6212 (10/10/20) (Nicholas Tafuri, Arb.)
- *North Shore LIJ Medical (NSUH) & Allstate Ins. Co.*, AAA Case no. 17-18-1113-4735 (10/13/20) (Eva Gaspari, Arb.)

### SUM AWARDS: FRACTURES

- *J.L. & Utica National Ins. Co. of Texas*, AAA Case no. 01-19-0002-9237 (Thomas P. Bogan, Arb.)
- *J.L. & Country-Wide Ins. Co.*, AAA Case no. 01-18-0003-8198 (Jodi Zagoory, Arb.)



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### Arbitrator Abstracts

#### ACUPUNCTURE & 8-UNIT RULE

*NYBK Chiropractic, PC & Allstate Ins. Co.*, AAA Case no. 17-18-1104-2979

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(2/5/20) (Greta Vilar, Arb.) Applicant sought reimbursement for chiropractic treatment performed. Upon receipt of the bills at issue, respondent issued partial reimbursement for the chiropractic treatment rendered. Respondent denied the balance of applicant's claims for chiropractic treatment based on respondent's application of the 8-unit rule, as 8 units of treatment had already been reimbursed to the claimant's physical therapist and acupuncturist for treatment performed on the same dates. Applicant argued that acupuncture treatment performed by an acupuncturist should not be utilized to reduce payments to a chiropractor or physical therapist since neither is necessarily licensed to perform acupuncture. For a majority of the dates of service, respondent failed to submit proof of reimbursement to other providers. Thus, respondent failed to sustain its burden with regard to its defense based on the 8-unit rule with regard to all but one date of service. However, with regard to that one date of service, respondent did provide an explanation of benefits, indicating that reimbursement had been issued to the treating acupuncturist. With regard to that date of service, the arbitrator cited to the recent case of *Ancient & Modern Acupuncture, PC v. MVAIC*, 66 Misc.3d 1207 (A) (Civ. Ct. New York Co., Sabrina B. Kraus, J. Jan 7, 2020), in which the Judge found that the 8-unit rule does not apply to acupuncturists and/or acupuncture treatment and as such acupuncture treatment cannot be used to reduce payment to either chiropractors and/or physical therapists under the 8-unit rule. The Judge reasoned that the purpose of the 8-unit rule is to limit the same types of treatment that could be performed on the same patient on the same dates of service; as acupuncture is not the same as chiropractic treatment, the patient can receive acupuncture treatment and chiropractic treatment on the same day without reduction based on the 8-unit rule. Thus, applicant was awarded reimbursement.

*Oriental Soothing Acupuncture, PC & Allstate Ins. Co.*, AAA Case no. 17-19-1133-0523

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(2/23/20) (Victor Moritz, Arb.) Applicant sought reimbursement for infrared treatment and cupping performed by a licensed acupuncturist. Respondent denied reimbursement for these specific acupuncture modalities based on respondent's application of the 8-unit defense, as treatment was also rendered on those same dates by the claimant's chiropractor. The arbitrator found that respondent was not entitled to offset chiropractic manipulation services provided on those dates since this was not a service that can be performed by a licensed acupuncturist. The arbitrator also found that cupping services provided by applicant were not subject to the 8-unit rule defense since this procedure was outside the scope of services provided by a licensed physical therapist or chiropractor. The arbitrator cited to *Ancient & Modern Acupuncture, PC v. MVAIC*, 66 Misc.3d 1207 (A) (Civ. Ct. New York Co., Sabrina B. Kraus, J. Jan 7, 2020), in which the Judge found that the 8-unit rule does not apply to acupuncturists and/or acupuncture treatment, and as such acupuncture treatment cannot be used to reduce payment to either



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chiropractors and/or physical therapists under the 8-unit rule. The Judge reasoned that the purpose of the 8-unit rule is to limit the same types of treatment that could be performed on the same patient on the same dates of service and since acupuncture is not the same as chiropractic treatment, the patient can receive acupuncture treatment and chiropractic treatment on the same day without reduction based on the 8-unit rule. Thus, applicant was awarded reimbursement.

*Changhun Lee, PT & Geico Ins. Co.*, AAA Case no. 17-18-1094-9877

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(1/22/20) (Cathryn Roberts, Arb.) Applicant billed for physical therapy services, and respondent denied the claim on the ground that payment was issued to an acupuncture provider for services performed on the same day. Respondent partially paid the claim and denied the balance on the ground that procedures may not exceed 8 relative value units (RVUs) per day. In support of its contention, respondent cited to Ground Rule 11 and Ground Rule 3 of the Physical Medicine Section of the New York State Workers' Compensation Medical Fee Schedule. Pursuant to both ground rules, when multiple physical medicine procedures and/or modalities are performed on the same day, reimbursement is limited to 8.0 RVUs or the amount billed, whichever is less. This limitation applies to specific codes delineated in the ground rules. In opposition, applicant cited to *Ancient & Modern Acupuncture, PC v. MVAIC*, 66 Misc.3d 1207 (A) (Civ. Ct. New York Co., Sabrina B. Kraus, J., Jan 7, 2020), in which the Judge found that reimbursement made to an acupuncturist should not be included within the available 8 RVUs because acupuncture is not included in the Worker's Compensation Fee Schedule and therefore is not subject to the ground rules. Based on the foregoing, the arbitrator issued an award in favor of applicant. Although applicant asserted that it was entitled to an additional \$157.54, the arbitrator took judicial notice of the fee schedule and reduced the award in accordance with the fee schedule on the ground that if the 2.5 units reimbursed to the acupuncture provider had not been included in the 8 RVUs available, the provider here would be entitled to 2.5 additional RVUs for the four dates of service for a total of \$50.82.

*L.I. Acupuncture & Massage & Geico Ins. Co.*, AAA Case no. 17-19-1117-4207

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(4/16/20) (Philip Wolf, Arb.) The arbitrator addressed whether respondent properly reimbursed applicant pursuant to the "8-unit rule." Respondent asserted it concurrently reimbursed another provider for physical therapy modalities set forth under Ground Rule 11, and therefore, applicant was not entitled to additional reimbursement. In opposition, applicant argued that the "8-unit rule" does not apply to acupuncturists, and therefore it was entitled to an additional \$102.53. In finding for applicant and allowing reimbursement, the arbitrator noted that it had been determined that the 8-unit rule does not apply to licensed acupuncturists. See, *Ancient & Modern Acupuncture, PC v. MVAIC*, 66 Misc.3d 1207 (A) (Civ. Ct. New York Co., Sabrina B. Kraus, J., Jan. 7, 2020). The authority allowing for the chiropractic fee schedule to be used exists because the Superintendent has not adopted a fee schedule applicable to licensed acupuncturists, not because the services performed by the professional are the same or overlap. Thus, applicant was awarded reimbursement.



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### **SURGERY & USE OF MODIFIER 59**

*Surgicore of Jersey City, LLC & Geico Ins. Co.*, AAA Case no. 17-19-1124-5058

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(7/24/20) (Tara Maher, Arb.) Applicant sought reimbursement for a facility fee associated with a left shoulder arthroscopy. After determining that the surgery was medically necessary, the arbitrator addressed whether the services were billed in accordance with fee schedule. Fee coder affidavits were submitted by both respondent and applicant. Both fee coders agreed on the correct reimbursement for CPT code 29806. However, with regard to CPT codes 29823 and 29821, the issue was whether modifier 59 was properly utilized by applicant. The arbitrator noted that regarding the use of modifier 59, documentation must support a different session, different procedure or surgery, different site or organ system, separate incision/excision, separate lesion, or separate injury not ordinarily encountered or performed on the same date by the same individual. The arbitrator found that pursuant to the operative report, separate portals were created with regard to the left shoulder, which indicated that several incisions were performed. The arbitrator also found that three separate procedures were performed. The arbitrator noted that respondent's fee coder failed to discuss the separate incisions. Thus, the arbitrator found that modifier 59 was properly utilized and awarded the claim consistent with applicant's fee calculation.

*Fifth Avenue Surgery Center, LLC & Geico Ins. Co.*, AAA Case no. 17-19-1131-6686

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(9/10/20) (Nancy S. Linden, Arb.) Applicant sought reimbursement for a facility fee associated with a right shoulder surgery. After determining that the surgery was medically necessary, the arbitrator addressed whether the services were billed in accordance with fee schedule. Fee coder affidavits were submitted by both respondent and applicant. According to respondent's fee coder, CPT codes 29825, 29821, and 29999 billed with modifier 59 were not supported. According to respondent's fee coder, since the procedures were all performed with regard to the right shoulder, the modifier was not properly used. Applicant's fee coder explained that since separate incisions were performed, modifier 59 was properly appended. Respondent submitted a response to applicant's fee coder's affidavit wherein the coder discussed different definitions for modifier 59 in the context of a facility fee versus a provider. Respondent's fee coder explained that since no additional services were performed in the context of a facility fee, it was appropriate for respondent to omit the modifier when calculating the fee in the appropriate software. The arbitrator found that respondent's fee coder's affidavit was persuasive and awarded a reduced fee pursuant to respondent's fee coder's calculation.

*Health Plus Surgery Center, LLC & State Farm Mut. Auto. Ins. Co.*, AAA Case no. 17-18-1106-8641

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(9/8/20) (Ellen Weisman, Arb.) Applicant sought reimbursement for a facility fee associated with a left shoulder arthroscopy. The issue was whether CPT code 29826 was billed in accordance with fee schedule. Fee coder affidavits were submitted by respondent and applicant. According to respondent's fee coder, modifier 59 was improperly



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appended to this code, as all the procedures performed were performed in the left shoulder, which was the same anatomical site. According to applicant's fee coder, a separate procedure was performed through a separate incision, and thus modifier 59 was properly utilized. The arbitrator found that applicant's fee coder's affidavit was more persuasive insofar as a separate procedure was performed in a distinct anatomical region of the left shoulder. The arbitrator awarded reimbursement pursuant to applicant's fee coder's analysis.

*Advanced Spine Surgery Center & Geico Ins. Co.*, AAA Case no. 17-19-1150-9424  
<https://aaa-nynf.modria.com/loadAwardSearchFilter>

(9/4/20) (Heidi Obiajulu, Arb.) Applicant sought reimbursement for ambulatory surgical services associated with a left shoulder arthroscopy. Respondent issued partial reimbursement and denied the balance on the ground that applicant billed the services in excess of the maximum allowance pursuant to the applicable fee schedule. Respondent submitted a fee coder's affidavit that set forth that CPT codes 29823-59 and 29821-59 were not reimbursable based upon the fee coder's review of the operative report and related documents. According to respondent's fee coder, modifier 59 should be appended to the CPT code for different anatomic sites during the same encounter only when procedures that are not ordinarily performed or encountered on the same day are performed on different organs or different anatomic regions or in limited situations on different, non-contiguous lesions in different anatomic regions of the same organ. Applicant did not submit a fee audit to rebut respondent's evidence. The arbitrator found that applicant improperly appended modifier 59 to CPT codes 29823 and 29821 and denied reimbursement for these codes.

*Andrew J. Dowd M.D. & State Farm Mut. Auto. Ins. Co.*, AAA Case no. 17-19-1115-9855  
<https://aaa-nynf.modria.com/loadAwardSearchFilter>

(11/25/19) (Tali Philipson, Arb.) Respondent issued partial reimbursement for a right knee arthroscopy. The issue was whether applicant properly appended modifier 59 to CPT Code 29877. Respondent submitted an affidavit from a Certified Professional Coder. According to respondent's fee coder, modifier 59 was appended incorrectly to CPT code 29877. Respondent's fee coder referenced that as per CPT Guidelines, modifier 59 is to be appended to a CPT code when a distinct procedural service is performed, and the documentation must support a different session, different procedure or surgery, different site or organ system, separate incision/excision, separate lesion, or separate injury not ordinarily encountered or performed on the same day by the same individual. Respondent's fee coder emphasized that the documentation of the procedures performed during the operative session did not support the use of modifier 59 with regard to CPT code 29877. According to applicant's fee coder's affidavit, the operative report reflected that there were multiple excisions/incisions made by the surgeon to the right knee during the arthroscopy. According to applicant's fee coder, an anterolateral portal and medial portal were made during the surgery, which supported the use of modifier 59. The arbitrator found that the description in the operative report was consistent with the proper use of modifier 59. The arbitrator noted that the operative report reflected that two separate incisions were made and thus modifier 59 was properly appended to CPT Code 29877. Accordingly, reimbursement was awarded pursuant to applicant's fee coder's calculation.



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### **CAUSALITY REVIEW & INDEPENDENT RADIOLOGICAL REVIEW**

*Optimal Care Surgical Services, LLC & American Transit Ins. Co.*, AAA Case no. 17-19-1127-7716  
<https://aaa-nynf.modria.com/loadAwardSearchFilter>

(6/7/20) (Stephen Czuchman, Arb.) Applicant's claim involved the physician assistant's charges in connection with a left ankle surgical procedure. Respondent denied the claim based on a lack of medical necessity and lack of causality defense pursuant to the results of a peer review. An MRI report of the left ankle by the reading radiologist revealed a Type III navicular bone, tenosynovitis, plantar fasciitis, plantar calcaneal spur, and partial tear and sprain of the ligament within the sinus tarsi. Respondent retained a radiological consultant to review the MRI films, who found that there was no evidence of any acute traumatic muscle or tendon injury. This opinion was relied upon by the peer review doctor, who found there was no indication in the patient's medical records of any acute traumatic injury to the left ankle that required surgery. Applicant argued that the peer review doctor failed to discuss the standard of care for ankle surgery or establish that the surgery was medically unnecessary. The arbitrator found that the peer review was sufficient to deny the applicant's claim, noting that the injured person failed to make complaints regarding the left ankle until nearly four months after the accident. Notwithstanding the conflicting interpretations, the arbitrator found that the peer review doctor was entitled to rely on respondent's radiological consultant's reading of the MRI films. Therefore, the arbitrator denied the claim.

*Northeast Anesthesia & Pain Management & American Transit Ins. Co.*, AAA Case no. 17-19-1147-7689  
<https://aaa-nynf.modria.com/loadAwardSearchFilter>

(6/24/20) (Frank Marotta, Arb.) Applicant sought reimbursement for anesthesia in connection with right shoulder surgery. Respondent denied the claim based on a lack of medical necessity and lack of causality defense pursuant to the results of a peer review. An MRI report of the right shoulder by the reading radiologist noted a partial rotator cuff tear. Respondent's radiological consultant reviewed the MRI films and found that there were no rotator cuff or labral tears or occult osseous injury and no evidence of a causally related soft tissue injury. The peer review doctor found that based on these radiological findings by the consultant, along with medical evaluations that failed to establish a deteriorating condition, the surgery was not necessary or causally related to the accident. The arbitrator noted that respondent also retained an orthopedist to conduct an IME and that there were IME findings of right shoulder tenderness and decreased range of motion. The IME doctor concluded that further treatment was not medically necessary as the patient had not responded well to conservative care. The IME doctor recommended that the patient be referred to a more appropriate specialist for further treatment options. Respondent also retained an expert to review intra-operative photos of the surgery, who found a traumatic tear of the labrum. Thus, the arbitrator found that the surgery performed was medically necessary and causally related to the accident. The arbitrator noted that the reports of the IME doctor and the expert retained to review the intraoperative photos clearly contradicted the opinion of the peer review doctor regarding the medical necessity and causation of the injuries. The arbitrator also noted that while the radiological consultant's review of the MRI films was provided to the peer review doctor, the IME and intraoperative photo review reports were not. Applicant was awarded reimbursement for anesthesia related to the surgical procedure.





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*CPM Medical Supply, Inc. & American Transit Ins. Co.*, AAA Case no. 17-18-1110-2915

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(6/8/20) (Eileen Hennessy, Arb.) Applicant sought reimbursement for the rental of a continuous passive motion machine ("CPM") and cold therapy unit ("CTU") dispensed to the injured person following right shoulder arthroscopic surgery. Respondent timely denied the claim based upon a peer review report by Richard Weiss, M.D., who concluded that the underlying injury, together with the prescription of the CPM and CTU at issue, was neither causally related to the underlying motor vehicle accident nor medically necessary. In his peer review, Dr. Weiss referred to an independent MRI review by Dr. Setton, which noted no acute traumatic rotator cuff tendon injury, no joint effusion, no labral tear, and no abnormal bone marrow signal to suggest dislocation. The arbitrator noted that there was no examination from the physician who referred the injured person for the MRI to explain the referral. The arbitrator also noted that in the independent MRI review, Dr. Setton found that the right shoulder MRI findings were not correlated to the accident with any records documenting clinical objective findings of trauma to the right shoulder. The arbitrator found that there was no indication that the accident exacerbated a pre-existing shoulder condition. In addition, the arbitrator found that applicant failed to establish that the injured person sought medical treatment for a right shoulder injury within a reasonable period of time following the motor vehicle accident, and also failed to provide any medical evidence explaining the 4 ½ month gap between the accident and the first complaints of right shoulder pain. The arbitrator found that the peer review was persuasive and sufficient to shift the burden to applicant to establish a causal connection between the accident and the shoulder injury, which applicant failed to do. Thus, the claim was denied in its entirety.

*Excell Clinical Lab & American Transit Ins. Co.*, AAA Case no. 17-18-1112-6624

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(9/1/20) (Lucille DiGirolomo, Arb.) Applicant sought reimbursement of its claim for pre-operative drug screening denied by respondent based upon a peer review report by Richard Weiss, M.D. The peer review doctor concluded that there was no causally related medical necessity for the left shoulder surgery giving rise to the claim at issue. The arbitrator found that the peer review was unpersuasive as the peer review doctor failed to make an independent determination that the injuries were not causally related to the motor vehicle accident. The peer review doctor relied upon an independent MRI review by Dr. Setton who, according to the peer review doctor, determined that there was "no evidence of any acute or traumatic injury, degenerative finding included [sic] mild hypertrophic AC joint degeneration and degenerative impingement." The arbitrator noted that the peer review doctor also relied upon a review of the intra-operative photographs by Gary Kelman, M.D., in which Dr. Kelman described the photographs as being of "fair quality, somewhat out-of-focus with glare." Dr. Kelman concluded that no degenerative changes were seen, no traumatic injuries were noted, and no tears were seen. The arbitrator found that respondent's evidence was insufficient to establish a lack of a causal connection between the accident and underlying left shoulder injury. The arbitrator reasoned that, while the peer review doctor reviewed the MRI of the left shoulder and the operative report, both of which indicated a tear, nowhere in the peer review report did the peer review doctor explain why he elected to rely upon the reports by Dr. Setton and Dr. Kelman rather than applicant's proofs. The arbitrator stated that the



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peer review doctor's failure to specifically discuss the drug screening was a fatal omission, and thus the claim for drug testing was awarded.

*Fifth Avenue Surgery Center, LLC & American Transit Ins. Co.*, AAA Case no. 17-19-1127-7988  
<https://aaa-nynf.modria.com/loadAwardSearchFilter>

(7/24/20) (John Langell, Arb.) Applicant sought reimbursement for the facility fee associated with right knee surgery performed July 11, 2017. Reimbursement for the facility fee was denied by respondent based upon a peer review report by Richard Weiss, M.D. Upon completion of his review of the records, the peer review doctor concluded that there was no causally related medical necessity for the underlying surgery that gave rise to the facility fee at issue. The arbitrator noted that, in support of his opinion, the peer review doctor relied predominantly upon an independent radiology review by Dr. Michael Setton. In his report, Dr. Setton opined that there was only "mild degeneration" of the medial meniscus, and that the degeneration was age related. He further stated that none of the observed radiological changes were related to trauma. The arbitrator found respondent's peer review insufficient to sustain its defense predicated upon a lack of a causal relationship between the underlying accident and the injured person's knee injury, as well as its defense predicated upon a lack of medical necessity. The arbitrator noted that the peer review doctor relied almost exclusively on the radiological review of Dr. Setton, which flatly contradicted, without explanation, the MRI findings that were documented at the time of the injured person's care and treatment. The arbitrator also noted that Dr. Setton did not refer to the original MRI findings in his report. Also of significance to the arbitrator was the fact that neither the peer review doctor nor Dr. Setton addressed the issue of whether the injured person may have aggravated an underlying "degenerative" condition at the time of the accident, particularly noting that the peer review doctor's explicit statement regarding the absence of a "direct" relationship between the accident and the injuries does not exclude the possibility that the accident had an indirect impact on those injuries. As a consequence, the arbitrator awarded applicant's claim.

### **CAUSALITY REVIEW & LACK OF MEDICAL NECESSITY**

*All City Family Healthcare Center & Integon National Ins. Co.*, AAA Case no. 17-19-1151-1773  
<https://aaa-nynf.modria.com/loadAwardSearchFilter>

(9/14/20) (Jennifer Zeidner, Arb.) Applicant sought reimbursement for right shoulder surgery. Respondent denied the claim based on the peer review report of Dr. Dorothy Scarpinato, who reviewed the injured person's medical records and determined that the surgery was medically unnecessary and causally unrelated to the motor vehicle accident. The peer review doctor opined that the injured person's right shoulder condition documented on MRI was preexisting and degenerative. The peer review doctor noted that the injured person first sought treatment for the right shoulder three months after the accident and that had there been a traumatic right shoulder injury, the injured person would have reported it proximate to the accident. The peer review doctor noted that there was no physical therapy to the right shoulder before surgery and stated that the injured person should have undergone some conservative treatment to the right shoulder before surgery. Applicant submitted a rebuttal by Dr. Gamburg, an independent consultant, and



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respondent submitted a peer review addendum by the peer review doctor. The arbitrator found that the peer review was insufficient to sustain the lack of causality defense, as the peer review doctor failed to rule out a covered exacerbation of a preexisting injury. However, the arbitrator found the peer review substantiated the lack of medical necessity defense and that the rebuttal failed to refute respondent's showing of a lack of medical necessity for the surgery. Accordingly, the arbitrator found in favor of the respondent and denied the claim.

*Mark S. McMahon M.D. & State Farm Mut. Auto. Ins. Co.*, AAA Case no. 17-19-1137-6271  
<https://aaa-nynf.modria.com/loadAwardSearchFilter>

(10/1/20) (John Hyland, Arb.) Applicant sought reimbursement for left shoulder surgery. Respondent denied the claim based on the peer review report of Dr. Dorothy Scarpinato, who reviewed the injured person's medical records and determined that the surgery was medically unnecessary and causally unrelated to the motor vehicle accident. Applicant submitted a rebuttal by the treating surgeon in opposition to the peer. Respondent submitted a peer review addendum by the peer review doctor, who reaffirmed her original opinion. The arbitrator found that the peer review report was factually insufficient to meet the burden of production with respect to the lack of medical necessity defense, as it was conclusory in nature. The peer review doctor acknowledged the left shoulder MRI findings of rotator cuff and labral tears but opined that the surgery was medically unnecessary because there was insufficient conservative care. The arbitrator found that the peer review failed to establish that the injured person's left shoulder condition was causally unrelated to the accident, as the peer review doctor failed to explain how she reached her conclusion, failed to suggest another cause of the left shoulder condition, and failed to discuss a potentially covered exacerbation of a preexisting injury. Accordingly, the arbitrator awarded the amount claimed.

*Cohen & Kramer M.D., PC & American Transit Ins. Co.*, AAA Case no. 17-19-1140-6160  
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(10/5/20) (Stacy Presser, Arb.) The arbitrator decided whether respondent established its lack of medical necessity defense. Respondent relied on a peer review report wherein the peer review doctor found that the left shoulder arthroscopy was neither medically indicated, causally related, nor performed in accordance with the generally accepted standard of care. In reviewing the respondent's evidence, the arbitrator found the peer review report, as well as the film review relied upon therein, to be conclusory in nature, and therefore unpersuasive. It was noted that there was no substantive discussion or analysis in either report underlying the determination that the claimant did not suffer a traumatic injury in the motor vehicle accident, and there was no analysis of the clinical record or treatment response. Consequently, the arbitrator concluded that the peer review report failed to set forth a sufficient factual basis and medical rationale to establish a prima facie case in support of respondent's causality and/or medical necessity defenses. Under the circumstances, the arbitrator found that the burden did not shift to applicant and applicant's claim was awarded.



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*Premier Anesthesia Assoc., PA & Allstate Fire & Cas. Ins. Co.*, AAA Case no. 17-19-1126-6212

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(10/10/20) (Nicholas Tafuri, Arb.) The arbitrator addressed whether applicant was entitled to no-fault reimbursement for health services denied based on an IME and a record review. Respondent relied on an IME report and addendum wherein the IME doctor concluded that there were no positive objective findings and that the MRI study of the right knee and the operative diagnoses were degenerative and chronic, which would pre-date the accident. Therefore, the right knee arthroscopy was not medically necessary or causally related to the motor vehicle accident. The arbitrator concluded that there was no valid basis to conclude that claimant's injury did not arise out of the car accident, noting that the medical reports failed to document any previous accidents and no previous surgeries, and at the very least, the claimant was asymptomatic. The arbitrator further found that even if there were a pre-existing injury, its exacerbation would be covered under No-Fault. Accordingly, the arbitrator found that respondent failed to meet its burden of proof and payment was due and owing.

*North Shore LIJ Medical (NSUH) & Allstate Ins. Co.*, AAA Case No. 17-18-1113-4735

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(10/13/20) (Eva Gaspari, Arb.) The arbitrator addressed whether the claimant's injuries were causally related to the subject accident. In support of its defense, respondent relied on a peer review. The peer review doctor noted that the claimant's past medical history included stroke, diabetes, and hypertension as well as anxiety and depression. The peer review doctor opined that the diagnostic testing conducted regarding a secondary underlying disease and possible stroke was not medically necessary in relation to a reported minor accident in which the claimant denied any injuries or any damage to his vehicle. In response, applicant argued that respondent did not sustain its burden of proof, having rested on unpersuasive and non-binding sources, and did not demonstrate that the accident did not exacerbate a pre-existing condition. The arbitrator noted that there was nothing in the hospital record to suggest that the injuries were a direct result from the accident or even the possibility of aggravation or exacerbation caused by the accident. To the contrary, it seemed clear that the accident was the result of stroke-like symptoms and that the assignor went to the hospital due to concerns that he had suffered a stroke. Therefore, the arbitrator determined that the treatment at issue was not causally related to the motor vehicle accident and denied the claim in its entirety.

### **SUM AWARDS: FRACTURES**

*J.L. & Utica National Ins. Co. of Texas*, AAA Case no. 01-19-0002-9237

[SUM Award Search](#)

(Thomas P. Bogan, Arb.) This was an underinsured motorist claim with \$300,000 in SUM coverage for this underinsured motorist claim, subject to a \$50,000 set-off for the policy payment made on behalf of the underinsured tortfeasor. Liability, comparative fault, and possible additional value of the claim were in dispute. In December 2018, claimant was driving a motor vehicle when the underinsured motorist's vehicle failed to stop at a red light and struck



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claimant's vehicle. Claimant was a 46-year-old male. The underinsured driver admitted to falling asleep at the wheel to the investigating officer. Claimant was performing his daily inspection of the roads for snow coverage, on behalf of a local town/municipality. He admitted to driving without his seatbelt. Witnesses stated that claimant was found upside-down on the passenger side of the vehicle when his small SUV vehicle came to a stop. Neither driver had a recollection of the accident. The underinsured driver received a citation for failure to obey a traffic safety control device. It is unclear whether claimant received a citation. Claimant was transported to a local hospital via ambulance. He complained of sharp left-wrist pain, and examination revealed an "obvious deformity" with swelling, which x-rays revealed to be a distal radius fracture with dorsal comminution. The first surgery, which consisted of a closed reduction of the fracture, was performed under local anesthetic. Claimant underwent a series of three complex surgeries to the left wrist and did not fully recover. Claimant testified at the hearing. He was employed at two jobs for the local municipality and county and had never missed a day of work with 22 years at the jobs. The arbitrator found the testimony to be credible and assigned no liability to claimant.

With respect to the status of the severe fracture sustained in the subject accident, the arbitrator found that there was strong evidence that claimant's pain would be permanent, and that he would possibly develop post-traumatic arthritis. The arbitrator determined that claimant sustained a causally related serious injury, (the wrist fracture), as a result of the underinsured tortfeasor, and valued the damages at \$225,000. In applying the offset of \$50,000, the full award was calculated at \$175,000.

*J.L. & Country-Wide Ins. Co., AAA Case no. 01-18-0003-8198*

(Jodi Zagoory, Arb.) This was an underinsured motorist claim with \$100,000 in SUM coverage, subject to a \$30,000 offset. The issues in dispute were liability and whether the injuries sustained by the claimant in the subject accident met the statutory threshold requirement. Claimant was a 34-year-old gasoline-tank truck driver. In April 2016, he was driving a 27-foot commercial truck transporting fuel, southbound along the right lane of Route 9 in New Jersey, when his vehicle was rear-ended by a truck. The underinsured driver/tortfeasor had not noticed that claimant's truck had stopped as a result of stopped traffic ahead. Claimant testified that the impact was hard and caused his body to move around the cab of the truck. He recalled that his face came into contact with something inside the truck. He had to quickly extricate himself from the truck because of a "potential gas explosion." Pursuant to the police accident report, the gas tank of claimant's truck "was damaged in the collision and the diesel fuel spilled onto Route 9." Photographs of claimant's truck depicted significant damage. As a result of the accident, claimant sustained injuries to the left mandible as well as broken teeth and temporomandibular joint ("TMJ"). Claimant also sustained injuries to the shoulder and cervical and lumbar spine. In July 2016, the Workers' Compensation Board found that claimant "had a work related injury to the neck and back" and that he was temporarily totally disabled. As of August 2018, the Workers' Compensation carrier had paid out the amount of \$56,339.27 (\$36,193.43 indemnity/\$20,145.84 medical). More than two years after the subject accident, claimant was re-evaluated by Dr. D. at DHD Medical, who opined that as a result of the injuries sustained in the accident, claimant continued to have difficulty bending, lifting, and carrying things and also had difficulty sitting and standing for long periods of time as well as difficulty sleeping. Claimant was unable to touch his toes. Claimant testified that he attempted to return to work as a truck driver in January 2017, but he was



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unable to do the work due to pain and weakness. He was unable to carry anything heavy or walk, stand, or sit for long periods of time. Claimant testified that he still suffered from low back pain constantly. As a result of not being able to work as a truck driver, his car was repossessed and he moved back in with his mother. The arbitrator found claimant's testimony to be credible. The Arbitrator concluded that the claimant sustained injuries to his neck, lower back, and jaw, as well as anxiety as a result of the accident, and that these injuries caused the claimant to suffer from a significant limitation. Thus, the arbitrator found that these injuries met the statutory threshold requirements. The arbitrator did not find that the evidence established that the claimant fractured two teeth in the subject accident. The arbitrator found that the now 36-year-old claimant was unable to return to his occupation of truck driver and continued to suffer from pain and disability. The full SUM coverage of \$100,000 was awarded, less the offset of \$30,000, for a net award of \$70,000.

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