

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

William L. King, M.D. P.C.  
(Applicant)

- and -

LM General Insurance Company  
(Respondent)

AAA Case No. 17-23-1283-1202

Applicant's File No. 127749

Insurer's Claim File No. 0508165570004

NAIC No. 26042

**ARBITRATION AWARD**

I, Michael Resko, 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: Claimant

1. Hearing(s) held on 11/15/2023  
Declared closed by the arbitrator on 11/15/2023

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

Kathleen Raedy Esq. from LM General Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$829.83**, was AMENDED and permitted by the arbitrator at the oral hearing.  
Applicant's counsel amended the amount in dispute to **\$443.00**. Applicant withdrew with prejudice its claims for dates of service 10/19/22 and 11/16/22 and reduced the amount of the remaining claim in accordance with Respondent's fee audit.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated and agreed that (i) Applicant has met its *prima facie* burden by submitting evidence that payment of no-fault benefits is overdue, and proof of its claim was mailed to and received by Respondent; (ii) Respondent's denial of the subject claim was timely issued; and (iii) the *amended* amount claimed does not exceed the maximum permissible charges under the fee schedule applicable to the disputed services.

### 3. Summary of Issues in Dispute

This case is one (1) of two (2) linked cases heard together on 11/15/23. Both cases were filed by the same Applicant provider for services rendered to the same EIP/Assignor, who is referred to herein as Claimant. Claimant is a 36-year-old male driver injured in a motor vehicle accident on 09/07/22.

In this case, Applicant seeks payment of a single claim for the services of the assisting PA in connection with a left shoulder arthroscopic surgery on date of service 12/02/22.

Respondent denied this claim based on a peer review report by Jay Eneman, MD (dated 11/17/22).

Applicant has submitted a rebuttal of the peer review report by William King, MD (dated 10/12/23).

The following evidence was submitted, reviewed, and considered: All documents contained in the ADR Center as of the date the hearing was declared closed.

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

As noted above, Claimant was injured in a motor vehicle accident on 09/07/22. Claimant was seen at Atlantic Medical & Diagnostic, P.C. (Joseph Martone, PA-C) on 09/13/22 for complaints including left shoulder pain (8/10 VAS). Left shoulder examination revealed restricted range of motion (ROM); positive Impingement sign; and tenderness to palpation of the AC joint, glenohumeral joint, bicipital groove, and rotator cuff.

Claimant was seen for an initial orthopedic evaluation on 10/19/22 at William L. King, MD PC (Steve Mamanov, NP) for complaints including 8/10 left shoulder pain. Tenderness was noted over the AC joint. The diagnosis was left shoulder derangement.

MRI study of Claimant's left shoulder on 11/04/22 revealed a partial tear of the supraspinatus tendon.

Claimant was seen for an orthopedic follow-up on 11/16/22 (Daniel Isakov, NP). Left shoulder examination revealed restricted ROM in all planes; tenderness on palpation of the AC joint and supraspinatus; 4/5 rotator cuff strength; crepitus; and positive Hawkin/Kennedy, Neer's, Cross Arm abduction, Drop Arm, O'Brien's, Painful Arc, and Lift Off tests. Claimant was recommended for left shoulder arthroscopy, which was performed by Dr. King on 12/02/22.

In a linked case, *Sedation Vacation Perioperative Medicine PLLC a/a/o [Claimant] and Wausau Underwriters Insurance Company*, 17-23-1288-5746 (10/18/23), I considered a provider's claim for anesthesia services rendered in connection with the same left

shoulder surgery at issue in this case. In the linked case, Respondent's denial was also based on a peer review by Dr. Eneman which reviewed medical necessity for the underlying surgery but not specifically the provider's claim for anesthesia services.

In my Award in the linked case, I noted that Dr. Eneman began his analysis with the following:

*The September 13, 2022 initial examination focused on range of motion and palpatory examination, which are subjective, entirely under the patient's control. PA Martone assessed cervical sprain/strain, and lumbar sprain, lumbar nerve root impingement, cervical and lumbar paraspinal muscle spasm, left knee derangement/bursitis and left shoulder derangement/impingement syndrome.*

*The left shoulder MRI performed on November 04, 2022 did not reveal findings of trauma such as bone contusion, marrow edema or significant effusion all indicative of acute injury. The rotator cuff was intact. There was a partial tear of the supraspinatus, which was firmly attached (no further description was provided). In the absence of MRI findings consistent with trauma the partial supraspinatus tear was related to wear and tear and chronic in nature.*

*Left shoulder arthroscopy was performed on December 2, 2022 (twelve weeks s/p minor motor vehicle accident). Findings purportedly visualized during diagnostic arthroscopy included a tear of the anterior labrum, subscapularis and supraspinatus; Grade III chondral lesion; and subacromial adhesions.*

I also noted that Dr. Eneman did not mention or discuss the initial or follow-up orthopedic examinations of Claimant on 10/19/22 and 11/16/22.

In his reports in the linked case and the present case, Dr. Eneman wrote the following regarding the MRI findings:

*Some findings can be interpreted as normal findings for age, like tendinosis but may also be interpreted as a "partial tear." It is an art and a science to diagnose a condition correctly. Findings on MRI are not always the cause of pain in a patient. Many MRIs may have multiple "abnormalities." The shoulder is a typical example where a report may read "rotator cuff tear," "labrum tear," and "biceps tendon" injury. Some, all, or none of these findings may explain a patient's symptoms. For Rotator Cuff tears, we look for several things on MRI to aid in the "aging" of a tear. It is not exact, but we know that tears don't follow the same timeline as symptoms. Tears that may be chronic (months - years) have several characteristics on MRI. Determining what kind of labrum tear is present on MRI is challenging. Often, signal changes in the labrum are called "tear" by a radiologist when, in fact, it is normal changes. Also, there are a fair amount of normal variants of the labrum*

*that mimic tears on MRI. (De Coninck, Ngai SS, Tafur M, et al. Imaging the glenoid labrum and labral tears. Radiographics 2016 Oct;36(6):1628-1647.)*

I found that "[w]hile the above passage may be 'correct', Dr. Eneman did not review the MRI films in this case, only the report. Therefore he had no 'firsthand', observed facts in which to characterize the images or their diagnostic significance."

Submission of a properly completed claim form is all that is required to establish, *prima facie*, that the services at issue were medically necessary. *Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co.*, 37 Misc.3d 19, 952 N.Y.S.2d 372 (App. Term 2d, 11th & 13th Dists. 2012).

Respondent must overcome the presumption of medical necessity by submitting competent evidence sufficient to "establish a factual basis and medical rationale for the lack of medical necessity of [Applicant's] services. *Nir v. Allstate*, 7 Misc.3d 544, 546-47, 796 N.Y.S.2d 857, 860 (Civil Court, Kings Cty. 2005).

In the linked case, I concluded: "[f]or the reasons set forth above, the peer review report is *insufficient* because it lacks a basis in the facts relevant to the claim. *Nir*, *supra*."; and I found the anesthesia administered to Claimant in connection with the left shoulder arthroscopic surgery on date of service 12/02/22 was medically necessary.

My prior finding that Dr. Eneman's peer review report was insufficient and that the surgery was medically necessary is *res judicata* in this case. Because Respondent's *prima facie* medical necessity defense stands or falls entirely on the sufficiency of the peer review reports, a finding that said reports do not meet Respondent's *prima facie* burden cannot be rehabilitated or cured by the introduction of different or additional evidence in any subsequent proceedings. To find otherwise would allow Respondent "multiple bites at the apple" and the opportunity to supplement or modify its evidence in order to cure any defects therein.

*Res judicata* and collateral estoppel are applicable to arbitration awards, including those rendered in disputes over no-fault benefits, and will 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); *Monroe v. Providence Washington Ins. Co.*, 126 A.D.2d 929, 511 N.Y.S.2d 449 (3d Dept. 1987). A determination of the *res judicata* effect of a prior arbitration proceeding is for the arbitrator in the subsequent arbitration proceeding. *City School Dist. of City of Tonawanda v. Tonawanda Educ. Ass'n*, 63 N.Y.2d 846, 482 N.Y.S.2d 258 (1984).

This Award is in full disposition of all claims and issues before me in this proceeding.

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
	William L. King, M.D. P.C.	10/19/22 - 12/02/22	\$829.83	\$443.00	Awarded: \$443.00
Total			\$829.83		Awarded: \$443.00

- B. The insurer shall also compute and pay the applicant interest set forth below. 01/19/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Pursuant to the Court of Appeals decision in LMK Psychological Services P.C. v. State Farm, 12 N.Y.3d 217, 879 N.Y.S.2d 14 (2009), interest is tolled until the filing date where the Applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations" (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

The insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e).

- 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 Westchester

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

11/22/2023

(Dated)

Michael Resko

#### **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:**  
6f68980c46df99b1bada007c18a11514

### Electronically Signed

Your name: Michael Resko  
Signed on: 11/22/2023