

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

McCulloch Orthopaedic Surgical Services,  
PLLC DBA NYSJ Orthopaedic Specialists  
(Applicant)

- and -

American Transit Insurance Company  
(Respondent)

AAA Case No.	17-24-1336-5587
Applicant's File No.	27/017
Insurer's Claim File No.	1126906-05
NAIC No.	16616

**ARBITRATION AWARD**

I, Fred Lutzen, 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 or "Assignor"

1. Hearing(s) held on 07/02/2024  
Declared closed by the arbitrator on 07/02/2024

Alan M. Elis, Esq., from Law Offices of Jonathan B. Seplowe, P.C. participated virtually for the Applicant

Lauren Sutton, Esq., from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$8,840.97**, 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

This male EIP (first initial "M") was 39-years-old when he was injured as a passenger in an automobile accident on 2/25/2023. He subsequently underwent right shoulder arthroscopic surgery on 7/13/2023. Applicant seeks reimbursement of \$8,840.97 for the surgery performed on 7/13/2023.

Respondent denied reimbursement asserting a lack of medical necessity and lack of causality defense based on a peer review report by Dr. Mukund Komanduri, M.D., dated 9/28/2023.

**The issues are (1) whether the disputed procedure was medically necessary, (2) whether it was causally-related to the MVA of 2/25/2023, and (3) whether the charges are within fee schedule allowances.**

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

This case was decided based on prevailing law, the submissions of the parties as contained in the electronic file ["MODRIA"] maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no live witnesses.

Unless the parties' agreement provides otherwise, an arbitrator need not apply the rules of evidence, is not bound by principles of substantive law, may do justice as he sees it, and may apply his own sense of law and equity to the facts as he finds them to be. Matter of New Century Acupuncture, P.C. v. Country Wide Ins. Co., 48 Misc.3d 1201(A), 18 N.Y.S.3d 580 (Table), 2015 N.Y. Slip Op. 50919(U) at 2, 2015 WL 3821534 (Dist. Ct. Suffolk Co., C. Stephen Hackeling, J., June 18, 2015); *see also*, Rules for Arbitration of No-Fault Disputes in the State of New York; Effective August 16, 2013, [p](1), "The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary." <https://nysinsurance.adr.org>

Respondent's denial/EOB states, "Surgery and surgically related services to the Right Shoulder are denied as [1] **not causally related** to the accident of record based on attached peer review by Dr. Mukund Komanduri M.D. In addition, denied based on [2] **no medical necessity** and no causal relationship between the accident and the Right Shoulder surgery 07/13/2023." [emphasis added]

In order to sustain a medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See, Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to the Applicant. See, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116(U), 13 Misc 3d 136(A), (App. Term 1st Dept. 2006).

The peer review must set forth how and why the disputed services were inconsistent with generally accepted medical and/or professional practices. CityWide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co., 3 Misc.3d 608, 609, 777 N.Y.S.2d 241, 242 (Civ. Ct. Kings Co. 2004).

Since causation is presumed in a no-fault case, Respondent has the burden to prove the treatment at issue was not related to the accident. Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 21, 871 N.Y.S.2d 680, 686 (2d Dept. 2009).

#### **Defense #1 - Lack of Causality**

As noted above, the denial is based on Dr. Komanduri's report.

Peer Review Report Summary Relevant to the Causality Defense

Dr. Komanduri reviewed numerous records, including the intraoperative photo review by Dr. Matthew D. Skolnick, M.D., dated 9/25/2023, the operative report of 7/13/2023, the MRI report for the right shoulder by Dr. Thomas Kold, M.D., PT progress notes from 3/17/2023 through 6/27/2023, 7/10/2023, and 8/8/2023, and other records.

Dr. Komanduri noted that on 2/25/2023 the EIP sustained injuries to the right shoulder, right hip, low back, and neck. On 2/26/2023, examination revealed tenderness to the right shoulder. Dr. Komanduri noted the EIP "started conservative care with PT from 03/17/2023 ... [and] ... continued to undergo PT until 08/08/2023 as per the medical records." Dr. Komanduri noted that on 3/17/2023, Dr. Toussaint examined the EIP and revealed, "positive for tenderness and decreased ROM with pain in the cervical spine, lumbar spine, right shoulder and right hip, positive Impingement Sign in the right shoulder. Diagnoses of status post motor vehicle accident, myofascial derangement of the cervical spine, myofascial derangement of the lumbar spine, right shoulder derangement and right hip derangement were made."

On re-examination by Dr. Toussaint on 4/19/2023, there was still tenderness, decreased ranges of motion, and positive impingement sign in the right shoulder. The diagnoses included right shoulder derangement and rotator cuff tears.

Dr. Komanduri noted that the record revealed MRI performed on 4/4/2023 without showed there is a 7-millimeter high-grade partial rotator cuff tear at the distal insertion of the supraspinatus tendon.

On 4/24/2023, Dr. Kenneth McCulloch, M.D., examined the EIP. The EIP's complaints included right shoulder pain. Examination findings were noted positive for tenderness and decreased ROM with pain in the ... right shoulder, positive Supraspinatus Stress test, O'Brien's test, Hawkins test and Neer's test in the right shoulder. Diagnoses of right shoulder high grade rotator cuff tear ..."

Physical therapy continued.

On 6/9/2023, Dr. Toussaint's examination revealed "positive for tenderness and decreased ROM with pain in the cervical spine, lumbar spine, right shoulder and right hip, positive Impingement Sign in the right shoulder." Diagnoses included right shoulder derangement with rotator cuff tears.

Dr. McCulloch examined the EIP on 6/21/2023 and noted "the claimant continues to complain of pain in the right shoulder and right hip. The examination findings included tenderness and decreased ROM with pain in the right hip and right shoulder. There were positive objective findings of the Supraspinatus Stress test, O'Brien's test, Hawkins test and Neer's test in the right shoulder. The claimant was advised to undergo right shoulder arthroscopy."

The EIP underwent right shoulder arthroscopic surgery on 7/13/2023.

Dr. Komanduri also noted that Dr. Skolnick reviewed the intraoperative photos and opined, "[T]here is no evidence of any form of acute pathology present upon intraoperative evaluation. Intraoperative photos failed to indicate any traumatic findings that would necessitate a need for surgical intervention for this claimant. In my expert medical opinion, the surgery performed is not established as medically necessary and causally related."

Dr. Komanduri opined, in relevant part, "The surgery performed was not corroborated by the images as post traumatic. The intra-operative photos failed to indicate evidence of biceps tear, rotator cuff and/or labral tears described in the operative report. Additionally, the pre-operative MRI study showed minimal findings and did not reveal any traumatic pathology which would clearly indicate the need for surgical intervention as a result of supposed injuries sustained in the motor vehicle accident of record. [] Therefore right shoulder complaints are not considered as causally related to MVA. Further based on the review there were no substantial findings that would have required the surgery. Therefore surgery is not considered causally related to MVA."

#### Rebuttal

Applicant submitted a rebuttal report by Dr. Kevin Wright, M.D., dated 2/15/2024. Dr. Wright made a persuasive point, which is "Rather than illustrating how or why the standard of care was not met, Dr. Komanduri merely defers to another physician hired by the carrier who alleges that surgery was not necessary based on review of an MRI report and intra-operative photos, apparently, without reviewing the treatment records or clinical examination results of the patient." I agree and find that the lack of causality defense fails for several reasons.

First, Dr. Komanduri relied primarily on Dr. Skolnick's opinion but Dr. Komanduri did not personally review the intraoperative photos.

"An insurer may [] submit the injured party's medical and other records to a third party physician, who reviews the records and renders an opinion on the medical necessity of the treatment at issue in a so-called peer review report." Sky Medical Supply Inc. v. SCS Support Claims Services, Inc., 17 F.Supp.3d 207, 214-215 (E.D.N.Y. 2014). However, when this is done, the peer reviewer should actually consider the injured party's medical records and not rely primarily on another expert's opinion, hired by Respondent, as if this was part of the EIP's medical record.

A determination made in a peer review report must be based on evidence in existence prior to the rendering of the service at issue. Complete Medical Care Svcs of NY, PC v. Government Employees Ins. Co., 2017 N.Y. Slip Op. 32203(U) (Civ. Ct. Bronx Co., Sabrina B. Kraus, J., Oct. 17, 2017). The intraoperative photo review was not part of the EIP's medical record but was created **at Respondent's request**. Although an expert offering an opinion may rely upon medical reports prepared by the Applicant as well as by other medical providers who treated the injured person, he/she may not reasonably rely on material that is not of the kind accepted in the profession as a basis in forming an

opinion. See PLP Acupuncture, P.C. v. Progressive Casualty Ins. Co., 22 Misc. 3d 142(A) (App. Term, 2d Dep't 2009) (citing Wagman v. Bradshaw, 292 A.D.2d 84, 85-86 (App. Dep't, 2d Dep't 2002)).

Second, neither Dr. Skolnick nor Dr. Komanduri discussed whether the right shoulder injury was an aggravated or exacerbated condition superimposed on a dormant or asymptomatic shoulder injury. Dr. Komanduri stated, "the pre-operative MRI study showed **minimal findings** and did not reveal any traumatic pathology which would **clearly indicate the need for surgical intervention as a result of supposed injuries sustained in the motor vehicle accident of record.**"

Relevant to this case, it is important to note that exacerbated pre-existing conditions are covered by the No-Fault Law. Kingsbrook v. Allstate, *supra*

Dr. Komanduri does not dispute that the EIP sustained a right shoulder injury in the accident. His opinion is that since Dr. Skolnick did not see traumatic findings in the operative photos, the surgery was not causally-related to the accident. However, neither Dr. Komanduri nor Dr. Skolnick clinically examined the EIP or considered whether the underlying shoulder condition was exacerbated to the extent that surgery was required and would be causally-related given the aggravation or exacerbation.

An arbitrator's award finding that a peer review is insufficient when it fails to rule out that the injured person exacerbated a pre-existing injury and relying on Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13 (2d Dept. 2009) for that finding, is rational and should be confirmed. Country-Wide Ins. Co. v. Fifth Avenue Surgery Center, 2020 N.Y. Slip Op. 33999(U) (Sup. Ct. New York Co., Carol R. Edmead, J., Dec. 1, 2020).

For the above reasons, I find that Respondent failed to establish its lack of causality defense. However, Respondent also raised a lack of medical necessity defense.

## **Defense #2 - Medical Necessity**

### **Peer Review Report Summary Relevant to the Medical Necessity Defense**

The treatment history is recited above. Dr. Komanduri stated, in relevant part, "The medical records presented for the peer review indicate that the standard of care was not met for right shoulder arthroscopic extensive synovectomy, biceps, labral and rotator cuff and bursal debridement, lysis of adhesions and lysis of CA ligament, nerve block injection to the brachial plexus, echo guidance for biopsy, anesthesia, shoulder orthosis, acromioclavicular, prefabricated, off-the-shelf, assistant services for right shoulder arthroscopic biceps, labral and rotator cuff and bursal debridement, lysis of adhesions, extensive synovectomy and lysis of CA ligament."

One study referenced by Dr. Komanduri noted, "The findings (which should be communicated to patients during the shared treatment decision-making process) question the value of this type of surgery for these indications, and might discourage some surgeons from offering decompression surgery and dissuade some patients from

undergoing the surgery." This suggests a reasonable difference of opinion in going ahead with surgery and stresses the importance of communication in the decision making process. It does not illustrate a deviation from the standard of care.

Dr. Komanduri stated that the literature shows a "divided opinion regarding surgical rotator cuff repair. While there are more randomized controlled trials that indicate surgical intervention has not proven to be effective in chronic rotator cuff tear. The standard of care for shoulder pain indicates that the surgical intervention should be considered for patients with persistent shoulder pain even after the trial of conservative care for at least 3-6 months. While intervention for interstitial rotator cuff tears do not have a measurable positive outcome and these should be treated conservatively."

In this case, the EIP had over 3 months of physical therapy and the examinations reveal persistent shoulder pain and positive clinical findings leading up to the surgery, which was performed just shy of 5-months post injury.

Dr. Komanduri stated, "This claimant suffered a right shoulder injury post MVA. There were complaints of pain and difficulty to move the shoulder. The physical examination was indicative of decreased ROM in all planes and positive impingement. There was a partial thickness supraspinatus tendon tear noted on MRI. The claimant **underwent about 3 months of physical therapy** prior to the surgery for the right shoulder pain. The standard of care for partial thickness rotator cuff tear indicates that **at least 3-6 months** of conservative care should be tried before surgery is considered."

It is unclear why Dr. Komanduri opined the surgery did not meet the standard of care. Dr. Komanduri acknowledged that the EIP underwent at least 3 months of physical therapy, the MRI showed a partial thickness tear, and the EIP had persistent complaints after the course of conservative treatment. It appears the surgery was performed within the standard of care recited by Dr. Komanduri.

Respondent failed to meet its initial burden of proof and did not demonstrate, prima facie, that the surgery was not medically necessary.

There is no need to consider Applicant's rebuttal evidence as Respondent failed to demonstrate, prima facie, that the procedure deviated from generally accepted practice.

### **Fee Schedule**

Pursuant to *11 NYCRR, Section 65-3.16*, Measurement of no-fault benefits, (a) Medical expenses, (1), "Payment for medical expenses shall be in accordance with fee schedules promulgated under section 5108 of the Insurance Law and contained in Part 68 of this Title (Regulation 83).

The Workers' Compensation fee schedule, which is required by law and incorporated by reference into the Insurance Department Regulations, is of such sufficient authenticity and reliability that it may be given judicial notice, and it need not be submitted to the court. *Z.A. Acupuncture, P.C. v. Geico Ins. Co.*, 33 Misc.3d 127(A), 939 N.Y.S.2d 745 (Table), 2011 N.Y. Slip Op. 51842(U), 2011 WL 4949646 (App. Term 2d, 11th & 13th

Dists. Oct. 11, 2011); Lvov Acupuncture, P.C. v. Geico Ins. Co., 32 Misc.3d 144(A), 939 N.Y.S.2d 741 (Table), 2011 N.Y. Slip Op. 51721(U), 2011 WL 4424472 (App. Term 2d, 11th & 13th Dists. Sept. 16, 2011).

As such, I take appropriate evidentiary notice of the NY WC Fee Schedules. If the fees can be determined from a straightforward reading of the fee schedule, a coding affidavit or fee audit is not required. Absent a straight-forward calculation confirming the correct rate, Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. *See, Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co.*, 2006 NY Slip 26240, 13 Misc.3d 172, 822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006).

Respondent did not offer an alternative rate of reimbursement or articulate any dispute with Applicant's calculations. I see no obvious miscalculations or errors in Applicant's billing. Therefore, fee schedule defenses cannot be sustained.

### **Conclusion**

Having carefully considered the submissions of the parties, the relevant case law, and the arguments of respective counsel, I conclude that the preponderance of the credible evidence supports a finding in favor of Applicant.

Applicant is awarded \$8,840.97.

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
	<b>McCulloch Orthopaedic Surgical Services, PLLC DBA NYSJ Orthopaedic Specialists</b>	<b>07/13/23 - 07/13/23</b>	<b>\$8,840.97</b>	<b>Awarded: \$8,840.97</b>
<b>Total</b>			<b>\$8,840.97</b>	<b>Awarded: \$8,840.97</b>

- B. The insurer shall also compute and pay the applicant interest set forth below. 02/15/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. *See generally*, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30-day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an 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." *See*, 11 NYCRR 65-3.9(c); and OGC Op. No. 10-09-05 (interest accrues from date Applicant "*actually requests arbitration*" or commences a lawsuit). The Superintendent and the New York Court of Appeals have interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009). Interest begins the first business day following a weekend arbitration request or due date.

#### C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. *See*, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$1360." *Id.*



- 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 Onondaga

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

07/26/2024  
(Dated)

Fred Lutzen

#### **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:**  
5dab8fc924d1e27f1a4aa9f30fde2829

### Electronically Signed

Your name: Fred Lutzen  
Signed on: 07/26/2024