

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

William Lackey, MD (Applicant)	AAA Case No.	17-24-1374-9134
- and -	Applicant's File No.	ZJ161715733
	Insurer's Claim File No.	01007047065
Permanent General Assurance Corporation (Respondent)	NAIC No.	37648

ARBITRATION AWARD

I, Richard Martino, 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: Assignor/patient

1. Hearing(s) held on 03/04/2025
Declared closed by the arbitrator on 03/04/2025

Mark Fenelon Esq. from Law Offices of Zara Javakov, Esq. P.C. participated virtually for the Applicant

Jonathan Owens Esq. from Freiberg, Peck and Kang, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$73,180.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

Amount amended to \$8366.93 at the hearing to reflect the respondent's fee schedule analysis.

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

3. Summary of Issues in Dispute

Applicant seeks reimbursement of charges for a Right knee arthroscopy performed on 4/12/24 and a Right shoulder surgery performed on 4/23/24 following a 12/20/23 automobile accident.

The Assignor, a 33-year-old female, was involved in an automobile accident that occurred on 12/20/23.

The Respondent has denied the medical necessity of the respective surgery's based upon the peer reviews rendered by Howard Levy M.D., dated 5/28/23.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing.

Amount amended to \$8366.93 at the hearing to reflect the respondent's fee schedule analysis.

This is a claim for a Right knee arthroscopy performed on 4/12/24 and a Right shoulder arthroscopy performed on 4/23/24, following a 12/20/23 automobile accident.

The evidence is as follows:

The Assignor, a 33-year-old female, was involved in an automobile accident that occurred on 12/20/23.

The patient presented to Timur Hanan M.D. for an evaluation on 1/25/24 with the pertinent complaint of right knee pain rated at 7/10.

Examination of the right knee revealed decreased range of motion and a positive McMurray's Test.

An MRI study of the right knee performed on 1/15/24 revealed a partial tear of the anterior cruciate ligament and joint effusion.

The diagnosis was Right knee internal derangement. The patient was recommended conservative treatment.

The patient was also subsequently recommended right knee arthroscopic surgery.

The patient also complained of right shoulder pain rated at 8/10 that was aggravated by movements. Examination of the right shoulder revealed tenderness, limited range of motion and positive Hawkins Test and Neer's Test.

MRI of the right shoulder performed on 1/15/24 revealed a tear of the anterior superior labrum with adjacent subcoracoid bursal effusion versus 3 cm paralabral

cyst and tear of the anterior inferior labrum with avulsion and thickening the anterior and inferior glenoid periosteum.

The diagnosis was joint derangements of the right shoulder and strain of muscle/tendon of the rotator cuff of the right shoulder. The patient was recommended conservative treatment.

The patient presented to Dr. Hanan for reevaluation on 3/7/24.

Examination of the right shoulder revealed tenderness, limited range of motion and positive Hawkins Test and Neer's Test.

The diagnosis was joint derangements of the right shoulder and strain of muscle/tendon of the rotator cuff of the right shoulder. The patient was recommended conservative treatment and prescribed pain medications.

The patient was subsequently recommended right shoulder arthroscopic surgery.

On 4/12/24 the patient underwent arthroscopic surgery of the Right knee performed by William Lackey M.D.

The operative report by Dr. Lackey dated 4/12/24 indicated arthroscopic ACL repair of the right knee. Pre-Operative and Post-Operative Diagnosis was: Partial ACL tear of the right knee.

On 4/23/24 the patient underwent arthroscopic surgery of the Right shoulder performed by William Lackey M.D.

Operative report by Dr. Lackey dated 4/23/24 indicated right shoulder arthroscopic SLAP repair, subacromial decompression and Mumford of right shoulder. Pre-Operative and Post-Operative Diagnosis was: Right shoulder SLAP tear, impingement and acromioclavicular arthropathy.

The Respondent has denied the medical necessity of the surgeries at issue based upon based upon a peer review rendered by Howard Levy dated 5/28/24.

Dr. Levy stated that the patient did not exhibit significant pathology in her right knee requiring surgery. He also states the patient did not receive a sufficient course of therapy before the surgery and therefore the surgery was not medically necessary.

Dr. Levy also stated that the patient did not exhibit significant pathology in her right shoulder requiring surgery.

He also states the patient did not receive sufficient therapy and therefore the surgery was not medically necessary.

Applicant has submitted a rebuttal by Vladimir Gressel, M.D., who explains why the right knee and right shoulder surgeries were medically necessary.

He states as follows: "Dr. Levy's conclusion is without any merit since in this case the patient had received sufficient conservative treatment for the right knee before the surgery was performed. The patient was involved in an accident on 12/20/23 after which she was started on a course of conservative treatment and the right knee surgery was performed on 4/12/24. Therefore, the patient received more than three months of conservative treatment before the surgery was performed. Moreover, it is common knowledge that when a patient is unresponsive to conservative management, the only measure to control the pain is surgical intervention."

"I disagree with Dr. Levy's conclusion that the right knee surgery was not medically necessary as the MRI report of the right knee did not reveal any complex tear that would warrant the need for surgery since in this case there were sufficient findings on the MRI as well as physical examination which warranted the performance of the right knee surgery. The patient presented for an examination on 1/25/24 with the complaint of right knee pain rated at 7/10. Examination of the right knee revealed decreased range of motion and positive McMurray's Test (which indicates meniscal tear). Importantly, MRI of the right knee performed on 1/15/2024 revealed partial tear of the anterior cruciate ligament and joint effusion. The patient was diagnosed with right knee internal derangement. In this case the presumptive diagnosis and treatment was based on the clinical history and physical findings with an MRI and there were sufficient findings on the examination and MRI that warranted the performance of the right knee surgery."

"I disagree with Dr. Levy's conclusion that the right shoulder surgery was not medically necessary as the MRI of the right shoulder did not reveal any evidence of a full complex tear or irreversible pathological changes to warrant the need for immediate surgery since in this case there were sufficient findings on the MRI as well as physical examination which warranted the performance of the right shoulder surgery. The patient presented for evaluation on 3/7/24 with the complaint of right shoulder pain rated at 7/10 that was aggravated by movements. Examination of the right shoulder revealed tenderness, limited range of motion and positive Hawkins Test (which indicates an impingement of all structures that are located between the greater tubercle of the humerus and the coracohumeral ligament) and Neer's Test (which indicates subacromial impingement or biceps tendonitis).

Importantly, MRI of the right shoulder performed on 1/15/24 revealed a tear of the anterior superior labrum with adjacent subcoracoid bursal effusion versus 3 cm paralabral cyst and tear of the anterior inferior labrum with avulsion and thickening the anterior and inferior glenoid periosteum. The patient was diagnosed with other specific joint derangements of the right shoulder and strain of muscle/tendon of the rotator cuff of the right shoulder. In this case the presumptive

diagnosis and treatment was based on the clinical history and physical findings with an MRI and there were sufficient findings on the examination and MRI that warranted the performance of the right shoulder surgery."

I now address the claim for the respective surgical procedures:

It is well settled that an applicant for no-fault benefits establishes its prima facie entitlement to payment by proving that it submitted a claim, set forth the fact and the amount of the loss sustained, and that payment of no-fault benefits was overdue (see Insurance Law §5106[a]; *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 A.D.3d 742; 774 N.Y.S.2d 564; 2004 N.Y. App. Div. LEXIS 3597 (2nd Dept. 2004); *Amaze Med. Supply v. Eagle Ins. Co.*, 2 Misc.3d 128[A], 2003 N.Y. Slip Op 51701 [U] (App Term 2d & 11th Jud Dists). A "facially valid claim," is presented where it sets forth the name of the patient; date of accident; date of services; description of services rendered and the charges for those services. See, *Vinings Spinal Diagnostic P.C. v. Liberty Mutual Insurance Company*, 186 Misc.2d 287; 717 NYS2d 466 (1st Dist. Ct. Nass. Co.)

Proof that the benefits were "medically necessary" is not an element of the prima facie case. The defense that the benefits were not "medically necessary" is an affirmative defense borne by the insurer. If that defense is not raised in a timely denial of claim, the insurer is precluded from raising it at the time the claim is adjudicated. See *Vinings*, supra. In [Bonetti v Integon Natl. Ins. Co.](#), 269 AD2d 413, 414 (2d Dept 2000), the Appellate Division definitively held that an insurer's claim that the treatment for which payment is sought is "medically excessive" is a defense subject to preclusion under *Central Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 NY.2d 195; 659 N.Y.S.2d 246 (1997).

I find that the respondent has not met its burden of proving that the surgeries were not medically necessary for the subject patient due to the following reasons:

Respondent asserts that the opinion of Dr. Levy, who never examined the patient, should take precedence over the opinion of the orthopedic surgeon who felt this patient needed surgical intervention, and who performed the right knee and right shoulder surgeries.

Respondent's peer reviewer initially states that the patient did not suffer significant shoulder and knee injuries in the subject accident when the medical evidence clearly contradicts this opinion.

The evidence reveals that the patient had sustained a torn labrum in her right shoulder as revealed by the results of the MRI and the surgical procedure.

An MRI of the Right knee clearly confirmed the presence of a torn anterior cruciate ligament.

I find that the medical evidence contradicts the peer reviewer's opinions.

For the foregoing reasons, I find that respondent has not met its initial burden of proving that the right knee surgery and the right shoulder surgery were not medically necessary for the subject patient.

I also defer to the orthopedic surgeon who performed the subject procedures and determined that these surgeries were necessary due to the tears in the patient's right shoulder and right knee.

I defer to both the MRI's and the medical and operative reports of the treating physician as to the surgeries medical necessity and the issue of causation.

Due to the foregoing reasons, I find the right knee surgery and the right shoulder surgery to have been medically necessary pursuant to 11NYCRR 65.1(d).

Due to the foregoing reasons, the amended claim is granted in its entirety.

Applicant is awarded \$8366.93.

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 Lackey, MD	04/12/24 - 04/12/24	\$21,910.00	\$4,479.49	Awarded: \$4,479.49
	William Lackey, MD	04/23/24 - 04/23/24	\$51,270.00	\$3,887.44	Awarded: \$3,887.44
Total			\$73,180.00		Awarded: \$8,366.93

- B. The insurer shall also compute and pay the applicant interest set forth below. 11/19/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim arose from an accident that occurred on or after April 5,2002 , interest

shall be paid , at the rate of 2% per month, simple,from the arbitration filing date , and ending with 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

Respondent shall pay the applicant an attorney 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, Richard Martino, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

04/03/2025
(Dated)

Richard Martino

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:
f7886a38da95311de5b8226839e693e4

Electronically Signed

Your name: Richard Martino
Signed on: 04/03/2025