

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Franco Cerabona MD
(Applicant)

- and -

Hereford Insurance Company
(Respondent)

AAA Case No. 17-22-1263-7831

Applicant's File No. N/A

Insurer's Claim File No. 94631-02

NAIC No. 24309

ARBITRATION AWARD

I, Marcelle Brandes, 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

1. Hearing(s) held on 04/04/2023
Declared closed by the arbitrator on 04/04/2023

Jeffrey Datikashvilli, Esq., from The Sigalov Firm PLLC participated virtually for the Applicant

Rosemary Repetto, Esq., from Law Offices of Rubin & Nazarian participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,172.90**, 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

Applicant's Assignor, a 54 year old male, was reportedly injured in a motor vehicle accident on July 15, 2021. At issue here, Applicant seeks No Fault benefits for services associated with anterior cervical interbody arthrodesis of C%, C6, C7 (cervical fusion), date of service December 22, 2021. Respondent denied payment based upon a peer review by Joseph Y Margulies, MD, dated June 27, 2022. Applicant submits a rebuttal by Assignor's surgeon, Andrew A Merola, MD. Respondent submits an addendum.

4. Findings, Conclusions, and Basis Therefor

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. The Arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations. NYCRR 65-4.5 (o) (1) (Regulation 68-D).

This decision is based upon the oral arguments and written submissions of the respective parties. No witnesses appeared or testified at the hearing. I have reviewed the documents submitted to the ADR Center as of the date the record was closed.

Applicant established a prima facie case by proof that it submitted its claim, setting forth the fact and the amounts of the losses sustained, and that payment of no-fault benefits was overdue (see Insurance Law § 5106[a]; *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 AD3d 742 [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]).

Respondent denied Applicant's claim based upon a peer review. A presumption of medical necessity attaches to an Applicant's timely submission of proper claim forms, and the burden then switches to the respondent to demonstrate the lack of medical necessity. *Acupuncture Prima Care, P.C. v. State Farm Mutual Auto Ins.*, 17 Misc 3d 1135[A], 851 N.Y.S.2d 67 (Dist. Ct., Nassau Co. 12/3/2007); *A.B. Medical Services, PLLC v. NY Central Mutual Fire Ins. Co.*, 7 Misc 3d 1018[A], 801 N.Y.S.2d 229 (Civil Ct. Kings. Co. 2005); *Citywide Social Work & Psychological Services v. Travelers Indemnity*, 3 Misc 3d 608, 609, 777 N.Y.S.2d 241 (Civil Ct., Kings Co. 2004). The insurer bears "both the burden of production and the burden of persuasion with respect to the medical necessity of the treatment or testing for which payment is sought." *See, Bajaj v. Progressive Ins. Co.*, 14 Misc 3d 1202[A], 831 N.Y.S.2d 358 (N.Y.C. Civ. Ct. 2006). "At a minimum, [Respondent] must 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). "A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards." *Id*

Dr. Margulies performed the peer review and opined the cervical fusion was not causally related to the motor vehicle accident.

Based on the diagnostic imaging results there was a pre-existing condition in the cervical spine unrelated to the motor vehicle accident. Spinal fusion is a surgical procedure used to correct problems with the small bones in the spine. The basic idea is to fuse together the painful vertebrae so that they heal into a single, solid bone. Spinal fusion is a treatment option when motion is the source of pain - the theory being that if the painful vertebrae do not move, they should not hurt. *** While it is acceptable that the

claimant did sustain soft tissue injuries to the cervical region as a result of the accident, the need for surgical intervention, was related to a pre-existing condition and not an acute traumatic injury. ** As noted in the provided documentation there appears to be a pre-existing condition without any signs of an acute injury as noted on the cervical MRI performed a month following the accident.

Applicant submits a rebuttal by Assignor's surgeon, Andrew A Merola, MD. Dr Merola states the surgery was causally related and medically necessary:

Based on the diagnostic imaging results there was a pre-existing condition in the cervical spine unrelated to the motor vehicle accident. In response to this, I would note that existence of degenerative changes is not dispositive on whether the accident caused or exacerbated [Assignor]'s condition to the point that surgery became necessary as a result of the accident, and there is no way for Dr. Margulies to be objectively certain that the trauma from the accident did not cause or exacerbate [Assignor]'s current condition. My impression, though, given the fact that [Assignor] was completely asymptomatic prior to the trauma, is that the accident is precisely the reason surgery became medically necessary. With a reasonable degree of medical certainty, it is my contention that [Assignor]'s dormant cervical spine condition was exacerbated by the trauma he sustained in his motor-vehicle accident on 7/15/2021 to the point that the surgery, I performed on 12/22/2021 had become medically necessary as a direct result of the accident.

Respondent submits an addendum by Dr Margulies, who reviewed Dr Merola's Rebuttal, and states:

There is no way to determine solitary that it was due to the accident or a natural degeneration. Exacerbation was possible again however, there was not enough time given to allow conservative treatment to work.

After careful consideration of the evidence submitted and arguments made, it is hereby determined that Respondent's peer review is found to be insufficient to deny this claim. Dr Margulies failed to discuss whether his finding of a degenerative spinal condition was in any way exacerbated by the motor vehicle accident. Additionally, Dr Margulies' addendum admits that the motor vehicle accident could have exacerbated a prior condition, but then argues for the first time that Assignor did not have enough conservative treatment. I further find that Dr Merola clearly and credibly established the causality and medical necessity of the disputed cervical spinal fusion.

Accordingly, Applicant's claim is granted.

5. Optional imposition of administrative costs on Applicant.
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

6. **I find as follows with regard to the policy issues before me:**

- The policy was not in force on the date of the accident
- The applicant was excluded under policy conditions or exclusions
- The applicant violated policy conditions, resulting in exclusion from coverage
- The applicant was not an "eligible injured person"
- The conditions for MVAIC eligibility were not met
- The injured person was not a "qualified person" (under the MVAIC)
- The applicant's injuries didn't arise out of the "use or operation" of a motor vehicle
- The respondent is not subject to the jurisdiction of the New York No-Fault arbitration forum

Accordingly, the applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	Franco Cerabona MD	12/22/21 - 12/22/21	\$2,172.90	Awarded: \$2,172.90
Total			\$2,172.90	Awarded: \$2,172.90

- B. The insurer shall also compute and pay the applicant interest set forth below. 08/25/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Respondent shall pay the Applicant the amount of interest computed from the date of filing (noted above) of the AR-1, at a rate of 2% per month, simple, and ending with the date of payment of the award subject to the provisions of 11 NYCRR 65-3.9(e).

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of that sum total, subject to a maximum fee of \$1,360. See, 11 NYCRR 65-4.6 (d). However, if the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation process, the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6 (b).

- 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 Bronx

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

05/02/2023
(Dated)

Marcelle Brandes

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:
5023c31d040c21bc67959379adb39bc7

Electronically Signed

Your name: Marcelle Brandes
Signed on: 05/02/2023