

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Jamaica Supplies 1 Inc  
(Applicant)

- and -

Enterprise Rent A Car  
(Respondent)

AAA Case No. 17-24-1342-4551

Applicant's File No. LIP-35368

Insurer's Claim File No. 20287366

NAIC No. Self-Insured

**ARBITRATION AWARD**

I, Marcie Glasser, 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 09/11/2024  
Declared closed by the arbitrator on 09/11/2024

Usman Nawaz, Esq. from Law Offices of Ilya E Parnas P.C. participated virtually for the Applicant

Johnny Ko, Esq. from McCormack, Mattei & Holler participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,241.27**, 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 arbitration stems from treatment of a 27 year-old female passenger who sustained injuries in a motor vehicle accident on October 20, 2023. The issues are whether Respondent has met its burden of proof that this was an intentional act, and therefore, not covered by No-Fault; and the medical necessity for items of durable medical equipment (DME) including lumbosacral orthosis (LSO), cervical traction unit (CTU), knee orthosis and shoulder/elbow/wrist/hand orthosis for which denial is timely based on the Peer Review Reports of Christopher Ferrante, D.C. dated March 12, 2024 and Robert Cristofaro, M.D. dated March 12, 2024.

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

This case was decided on the submissions of the Parties as contained in the electronic file maintained by the American Arbitration Association and the oral arguments of the parties' representatives. I reviewed the documents contained in the electronic file for both parties and make my decision in reliance thereon.

Applicant has established its prima facie entitlement to reimbursement based on submission of a properly completed claim form setting forth the amounts of the losses sustained and establishing that No-Fault payment is overdue. *Ave. T MPC Corp. v. Auto One Ins. Co.*, 32 Misc.3d 128(A) 934 N.Y.S.2d 32 (Table), 2011 N.Y. Slip Op. 41292(U), 2011 WL2712964 (App. Term 2d, 11th & 13th Dists., 7/5/2011); *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d; *Vista Surgical Supplies, Inc. v. Metropolitan Property and Casualty Ins. Co.*, 2005-1328 K C., 2006 N.Y. Slip Op. 51047(U), June 2, 2006.

#### **Lack of Coverage Defense**

Respondent denied the claim based on lack of coverage. Respondent's denial states that Respondent has determined the injuries did not result from an accidental loss, but rather resulted from an intentional act.

In No-Fault, an Applicant need not prove coverage as part of its prima facie case since there is a presumption of coverage. [See, *V.S. Medical Services, P.C.*, *supra*, citing *A.B. Med. Servs., P.L.L.C. v. State Farm Mut. Auto Ins. Co.*, 7 Misc. 3d at 825, 795 N.Y.S.2d 843 (Civ. Ct., Kings Co., 2005).] Rather, to prove lack of coverage, Respondent must set forth admissible evidence of a "fact or a founded belief that the alleged injury does not arise out of an insured incident." *Id.*, citing *Central General Hospital v. Chubb Group of Ins. Cos.*, 90 N.Y.2d 195, 681 N.E.2d 413, 659 N.Y.S.2d 246 (1997); *St. Luke's Roosevelt Hosp. v. Allstate Ins. Co.* 303 A.D.2d 743, 757 N.Y.S.2d 457 (2d Dept., 2003).

Respondent has not submitted any evidence to support the lack of coverage defense. Respondent has not submitted an SIU Report, EUO transcripts, insurance documentation or any evidence to establish its burden of proof that the injury did not arise out of an insured incident. The issue of medical necessity will be considered below.

#### **Lack of Medical Necessity Defense**

The defense of medical necessity is premised on Peer Review Reports of Christopher Ferrante, D.C. dated March 12, 2024 and Robert Cristofaro, M.D. dated March 12, 2024. Applicant submitted Rebuttal Reports of Trishana Yankannah, P.A. dated August 28, 2024 and Christopher Miglorisi, D.C. dated August 28, 2024.

A denial premised on lack of medical necessity must be supported by competent evidence such as an independent medical examination, peer review or other proof which sets forth a factual basis and medical rationale for denying the claim. *See, Healing Hands Chiropractic, P.C. v. Nationwide Assur. Co.*, 5 Misc3d 975 (2004). The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 2009 NY Slip Op 00351 (App Div. 2d Dept., Jan. 20, 2009); *Channel Chiropractic, P.C. v. Countrywide Ins. Co.*, 2007 Slip Op 01973, 38 A.D.3d 294 (1st Dept. 2007); *Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 NY Slip Op 27427, 17 Misc.3d 97 (App Term 1st Dept., 2007), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet Respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. *See generally Jacob Nir, M.D. v. Allstate*, 7 Misc.3d 544, 796 N.Y.S 2d 857 (Civ. Ct Kings Co. 2005) 7; *All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Nir, supra*.

An insurance carrier must, at a minimum, establish a detailed factual basis and a sufficient medical rationale for its asserted lack of medical necessity. *Vladimir Zlatnick, M.D., P.C. v. Travelers Indem. Co.*, 2006 NY Slip Op 50963(U) (App. Term, 1st Dep't 2006); *accord Delta Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co.*, 21 Misc. 3d 142(A), 2008 NY Slip Op 52450(U) (App. Term, 2d Dep't, 2nd & 11th Jud. Dists. 2008).

### **Respondent's Peer Review Reports**

Dr. Ferrante concluded that LSO and CTU were not medically necessary. LSO is designed to restrict spinal motion. This is contradictory to chiropractic manipulation that the Claimant was recommended. LSO is typically prescribed for spinal instability, fracture or post-surgical. There is no evidence of clinically significant instability. There is no indication of fracture or unstable spondylolisthesis. CTU was not noted as a component of the treatment program. Cervical traction is generally used in the office setting, and then moved to home setting if appropriate. The Claimant was in need of chiropractic care to resolve the symptoms. Comprehensive management was the standard of care.

Dr. Cristofaro concluded that the knee orthosis and shoulder/elbow/wrist/hand orthosis were not medically necessary. The Claimant had knee pain and the standard of care is conservative care with physical therapy to regain muscle strength and range of motion. There was no history of ligamentous disruption requiring external stabilization. Striking a balance between the protection of healing tissues and deleterious effects of immobilization is challenging. For most acute soft tissue knee injuries, if immobilization is used for pain and swelling, it should be of limited duration.

Shoulder/elbow/wrist/ hand orthosis for immobilization can lead to stiffness. The Claimant was already in a plan of conservative management to regain muscle strength and range of motion by mobilizing the injured areas, and the orthosis would counteract the benefit of conservative treatment.

### **Applicant's Rebuttal Reports**

Dr. Miglorisi disagreed with the Peer Review Report. The diagnoses were muscle spasm, strain of muscle fascicle tendon in the neck, cervical radiculopathy, and segmental and somatic dysfunction of the thoracic spine. Therefore, the patient was recommended conservative treatment. The patient started on a course of conservative treatment, including physical therapy and chiropractic treatment. MRI study of the cervical spine on 12/28/2023 revealed disc bulge at C3-C4, C4-C5 and C5-C6. MRI study of the lumbar spine on 12/28/2023 revealed disc bulge at L4-L5 and L5-S1. Based on the patient's complaints and findings upon evaluation and review of the results of the MRI studies, on 1/25/2024, Dr. Miglorisi prescribed LSO and CTU. While chiropractic treatment helps promote joint mobility, the LSO restricts involuntary movements and helps to maintain the improvement achieved during in-office chiropractic sessions. Any treatment for the same problem that uses a different mechanism to alleviate the problem is usually considered complementary. Orthotic devices are different from total immobilization. It allows a sufficient amount of movement. With regard to CTU, MRI study of the cervical spine revealed disc bulge. The patient had complaints of neck pain along with positive findings, including tenderness, muscle spasm, decreased range of motion with pain and positive Foraminal Compression test and Shoulder Distraction test. The clinical and diagnostic findings warranted the prescription of the cervical traction.

PA Yankannah disagreed with the Peer Review Report. The patient presented for an initial medical evaluation. She complained of pain in the left shoulder and left knee. Examination of the left shoulder revealed deltoid and supraspinatus atrophy, tenderness, decreased range of motion and positive Impingement test. Examination of the left knee revealed tenderness, decreased range of motion, effusion and positive Twitch Response. The diagnoses were left shoulder strain and left knee sprain. Therefore, the patient was recommended conservative treatment, prescribed medications and advised follow-up. The patient then started on a course of physical therapy and continued with the ongoing course of chiropractic treatment. MRI study of the left shoulder on 12/28/2023 revealed tendinosis of the supraspinatus and infraspinatus tendons and fluid in the subacromial-subdeltoid bursa. MRI study of the left knee on 12/28/2023 revealed sprain

or partial tear of the anterior cruciate ligament (ACL) and suprapatellar effusion. Based on the patient's complaints and findings upon evaluation and review of the results of the MRI studies, on 1/25/2024, PA Yankannah prescribed Knee Orthosis and Shoulder Elbow Wrist Hand Orthosis to use at home. Knee orthosis was recommended to prevent further injuries to the previously injured knee. The findings suggested ACL injury and the Claimant had chronic pain. The clinical and diagnostic findings were indicative of severe musculoskeletal pain; thereby warranting the prescription of the Shoulder Elbow Wrist Hand Orthosis to prevent aggravation of the shoulder injury and provide pain relief. The Shoulder Elbow Wrist Hand Orthosis is also helpful in reducing discomfort and improving shoulder injury and loss of range of motion. This device holds up the shoulder while still allowing the range of motion needed. The orthotic device is different from total mobilization and allows for sufficient movement.

### **Legal Analysis**

As noted above, Applicant has established its prima facie entitlement to reimbursement. Therefore, the burden then shifts to Respondent to establish lack of medical necessity for which warrants competent, expert proof in admissible form. *Citywide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co.*, 3 Misc. 3d 608, 777 N.Y.S. 2d 241, 2004 N.Y. Slip Op. 24034 (Civ Ct., Kings Co., 2004), aff'd., 8 Misc. 3d 1025 (2005).

I find that Respondent's Peer Review Report is sufficient to meet its burden of proof of lack of medical necessity and to rebut Applicant's prima facie evidence. Therefore, the burden shifts back to Applicant to present competent medical proof as to the issue of medical necessity by a preponderance of credible evidence. *West Tremont Medical Diagnostic, P.C. v. GEICO*, 13 Misc. 3d 131 [A], 824 N.Y.S. 2d 759 (Table), 2006 N.Y. Slip Op. 51871(U), 2006 WL 2829826 (App. Term 2d & 11 Jud. Dists. 9/29/06); *A. Khodadadi Radiology, P.C. v. N.Y. Central Fire Mutual Insurance Company*, 16 Misc. 3d 131 [A], 841 N.Y.S. 2d 824, 2007 WL 1989432 (App Term 2d & 11 Dists. 7/3/09). Ultimately, the burden of proof rests with the Applicant (See, Insurance Law Section 5102).

I find that Applicant's burden has been met based on the medical records, Rebuttal Report and evidence collectively. Dr. Miglorisi has convincingly stated that the LSO would facilitate the Claimant's healing process with support and relief of pain, allowing for the continuation of the current course of rehabilitation without complications. Dr. Miglorisi set forth a rational basis of the utilization of the LSO as to providing therapeutic benefit and refuted the peer reviewer's assertions, noting that the LSO allows for sufficient movement. Dr. Miglorisi demonstrated that the CTU was consistent with generally accepted medical practice for home use as an adjunct to office therapy. CTU was prescribed as a therapeutic tool to relieve pain, such as nerve pain from disc bulge. The Peer Review Report failed to adequately discuss the MRI findings of disc bulge. A Peer Review must incorporate, discuss and review the patient's medical history including all positive clinical and diagnostic findings. *Carle Place Chiropractic v. New York Central Mut. Fire Ins. Co.*, 19 Misc. 3d 1139 (A), (Dist. Ct. Nassau Co., Andrew M. Engle, J. May 29, 2008).

With regard to knee orthosis, PA Yankannah has convincingly stated that this was recommended to prevent further injuries to the previously injured knee. The findings suggested ACL injury and the Claimant had chronic pain. With regard to the shoulder/elbow/wrist/hand orthosis, PA Yankannah has convincingly stated that the orthosis was to prevent aggravation of the shoulder injury and provide pain relief. The Rebuttal Report noted that this device holds up the shoulder while still allowing the range of motion needed, and the orthotic device is different from total mobilization and allows for sufficient movement.

The Rebuttal Reports addressed the salient points in the Peer Review Reports and sufficiently articulated that the LSO, CTU and orthoses were medically necessary and within the standard of care. Applicant has presented competent medical proof as to the issue of medical necessity by a preponderance of credible evidence.

Respondent has not submitted a fee coder affidavit or any competent evidentiary proof that Applicant's claims exceeded the appropriate fee schedules. *See, Continental Medical PC v. Travelers Indemnity Co.*, 11 Misc. 3d 145 A, 819 N.Y.S. 2d 847, 2006 NY Slip Op 50841U, 2006 N.Y. Misc. LEXIS 1109 (App. Term, 1<sup>st</sup> Dep't, 2006).

Accordingly, in light of the foregoing, based on arguments of counsel and after thorough review and consideration of all submissions, I find in favor of Applicant.

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
	Jamaica Supplies 1 Inc	02/06/24 - 02/06/24	\$3,241.27	Awarded: \$3,241.27
Total			\$3,241.27	Awarded: \$3,241.27

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/01/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Based on the submission of timely denials, interest shall be paid from the date of filing for arbitration on the amount awarded of \$3,241.27 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

This case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay Applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(d) on the amount awarded of \$3,241.27.

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

09/14/2024  
(Dated)

Marcie Glasser

### **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:**  
67066ae3e226d1cc2d1c6fc0b7daa5a4

### Electronically Signed

Your name: Marcie Glasser  
Signed on: 09/14/2024