

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Alexandre DeMoura M.D. PC dba New York Spine Institute (Applicant)	AAA Case No.	17-24-1341-2876
	Applicant's File No.	3209691
	Insurer's Claim File No.	A00004556296
- and -	NAIC No.	16233

Erie Insurance Company Of New York
(Respondent)

ARBITRATION AWARD

I, Alana Barran, 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: Patient

1. Hearing(s) held on 08/30/2024
Declared closed by the arbitrator on 08/30/2024

Jessica Buscarino from Israel Purdy, LLP participated virtually for the Applicant

Robyn Brilliant from Robyn M. Brilliant, P.C. participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$16,823.09**, was AMENDED and permitted by the arbitrator at the oral hearing.

The Applicant amended the amount in dispute to \$13,163.68, and the parties stipulated that said amended amount is the proper amount under the fee schedule for the services at issue.

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

3. Summary of Issues in Dispute

The Patient, LR, is a 40-year-old male that was involved in an accident on 11/11/2022. This is a claim for surgeon and physician assistant bill related to

cervical spine fusion surgery performed on 2/14/2024. The claim was denied based on the peer review of Dr. Sean Lager. The only issue raised is whether the services at issue were medically necessary.

4. Findings, Conclusions, and Basis Therefor

My decision is based on the arguments of the representatives for both parties and those documents contained in the ADR Center for this case. The Applicant amended the amount in dispute to \$13,163.68, and the parties stipulated that said amended amount is the proper amount under the fee schedule for the services at issue.

The respondent relies on the peer review of Dr. Sean Lager conducted on 2/29/2024 and addendum dated 8/6/2024 in denying the bills at issue for lack of medical necessity and lack of causation. Dr. Lager states that "Based on the documentation provided, the claimant reported complaints of pain in the neck. There is no evidence the claimant had pain in the neck at the time of the motor vehicle accident that occurred on 11/12/22. However, the accident occurred over one year ago. There are no records in close proximity documenting similar complaints and symptomatology. There appears to be a gap in care from 12/19/22 through 7/6/23. Gap in care was not justified. Therefore, the medical documentation does not support a causal relationship between the claimed accident and the symptoms presented or injury(s) claimed... Based on the documentation provided, on 2/14/24 the claimant underwent anterior cervical discectomy C5-6, arthrodesis C5-6, anterior cervical instrumentation and structural allograft from C5-6. PreOperative Diagnosis cervical radiculopathy. PostOperative Diagnosis Same. According to medical literature, "Cervical radiculopathy is a common clinical scenario and typically presents with unilateral neck pain, arm pain, or both. Patients may also present with neurologic signs such as sensory or motor deficits. It is important to differentiate cervical radiculopathy from other items on the differential diagnosis including peripheral nerve entrapment syndromes and shoulder pathology. Most cases of cervical radiculopathy are self-limited and may be managed conservatively in the absence of progressive neurologic symptoms or other concerning symptoms such as osseous lesions, etc. There are several options for conservative management, but there is little evidence to suggest that any of these interventions substantially alter the natural history of the disease. While exact surgical indications have not yet been elucidated, surgery may be considered in patients that have not responded to conservative management at about 6 months. ACDF, CDA, and PCF have all been shown to be viable surgical options available to the surgeon based on the patient's pathology and the surgeon's preference." In this case, on 10/5/23 the claimant presented to Dr. Alexandre B. Demoura with complaints of neck pain. Examination of the cervical spine revealed range of motion flexion 30 degrees, extension 20 degrees, right rotation 20 degrees, left rotation 15 degrees, left lateral flexion 15 degrees and right lateral flexion 20 degrees. There was evidence of bilateral paraspinal musculature spasms. There was tenderness to palpation. Strength was 4 out of 5 for the muscle weakness of the left wrist dorsiflexion and decreased sensation to pinprick and light touch in the left C6 distribution. Absent left brachioradialis reflex. However, the

accident occurred over one year ago. There are no records in close proximity documenting similar complaints and symptomatology. There appears to be a gap in care from 12/19/22 through 7/6/23. Gap in care was not justified. Therefore, causal relation and medical necessity has not been established for the cervical fusion performed on 02/14/2024 in the amount of \$13619.74... Based on the documentation provided, I have been asked to comment on the allograft done on 2/14/24. This is an ancillary request to the cervical surgery done on 2/14/24. On 2/14/24 the claimant underwent anterior cervical discectomy C5-6, arthrodesis C5-6, anterior cervical instrumentation and structural allograft from C5-6. PreOperative Diagnosis cervical radiculopathy. PostOperative Diagnosis Same. According to medical literature, "Autograft, allograft, and bone graft substitutes all possess their own varying degrees of osteogenic, osteoconductive, and osteoinductive properties that make them better suited for different procedures. It is the purpose of this review to characterize these properties and present clinical evidence supporting their indications for use in the hopes of better elucidating treatment options for patients requiring bone grafting in an orthopedic trauma setting." In this case, medical necessity for cervical surgery has not been established. Therefore, causal relation and medical necessity has not been established for the DOS 2/14/24 in the amount of \$463.32.... The claimant may benefit from the physician assistant during operative procedures for better patient outcome. However, medical necessity for cervical surgery has not been established. Therefore, causal relation and medical necessity has not been established for the DOS 2/14/24 in the amount of \$2647.37.... In this case, medical necessity for cervical surgery has not been established. Therefore, causal relation and medical necessity has not been established for the DOS 2/14/24 in the amount of \$92.66." After review of the rebuttal by Dr. Alexandre DeMoura, the peer review findings in the addendum by Dr. Lager remain unchanged from his original findings. He concludes that the surgery was not medically necessary nor causally related to the subject accident based on the gap in treatment. I find Dr. Lager's peer review to be general, conclusory, unpersuasive and insufficient to meet the respondent's burden of proof to sustain its defense of lack of medical necessity and/or the lack of causal relationship between the injuries and the subject accident. Notably, the Applicant submits a peer review by Dr. Lager dated 3/6/2024 related to an MRI of the cervical spine where his opinions related to the operative procedures on 2/14/2024 remain unchanged from his 2/14/2024 opinion.

The records in submission include rebuttal by Dr. Alexandre DeMoura stating that "This patient was an appropriate candidate for the procedure at issue based on the MRI showing C5-C6 disc herniation with left foraminal stenosis, as well as symptoms and findings noted in my office including neck pain with associated numbness and tingling radiating down into the left shoulder, excessive discomfort, bilateral paraspinal musculature spasm, tenderness to palpation, decreased range of motion with pain, muscle weakness in the left upper extremity, sensory deficits in the left C6 distribution, and an absent left brachial radialis reflex. These symptoms were refractory to conservative care. Assessment included cervical disc herniation and radiculopathy, which was confirmed upon surgery... Furthermore, as noted by myself on July 6, 2023, "[t]o date, the patient has done conservative treatments of activity modification, physical therapy, chiropractic care, 3 ESI in the lower back from pain management as well as OTC meds. Overall the patient's symptoms have

remained the same... This causal argument is without merit. As noted on November 19, 2022, by Dr. Barnes and on July 6, 2023, by myself, the onset of symptoms was the accident. There was no history of significant neck pain or injury. There was no subsequent injury noted upon evaluation by myself. This clearly demonstrates a causal relationship between the motor vehicle accident and the need for surgery...;" operative report dated 2/14/2024 of the cervical fusion; progress notes. I find that the records in submission are persuasive and sufficient rebut the findings of the peer review doctor related to the cervical fusion surgery.

The applicant has established its initial entitlement to no fault benefits. The burden then shifts to the respondent. The respondent's denial for lack of medical necessity must be supported by a peer review or other competent medical evidence which sets forth a clear factual basis and medical rationale for denying the claim. Healing Hands Chiropractic, P.C. v. National Assurance Co., 5 Misc. 3d 975; Citywide Social Work, et. al v. Travelers Indemnity Co., 3 Misc. 3d 608. 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. Country-Wide 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). Here, the Respondent has failed to meet its burden of proof to sustain its defense of lack of medical necessity.

In order for an applicant to prove that the disputed expense was medically necessary, it must meaningfully refer to, or rebut, the conclusions set forth in the peer review. Yklik, Inc. v. Geico Ins. Co., 2010 NY Slip Op. 51336(U) (App Term 2d, 11th & 13th Dists. July 22, 2010); High Quality Medical, P.C. v. Mercury Ins. Co., 2010 N.Y. Slip Op. 50447(U) (App Term 2d, 11th & 13th Dists. Mar. 10, 2010); Pan Chiropractic, P.C. v. Mercury Ins. Co., 24 Misc.3d 136(A), 2009 N.Y. Slip Op. 51495(U) (App Term 2d, 11th & 13th Dists. July 9, 2009). Here, I find that the records in submission are persuasive and sufficient to rebut the findings of the peer review doctor.

Causation is presumed since "it would not be reasonable to insist that (an applicant) must prove as a threshold matter that (a) patient's condition was 'caused' by the automobile accident." Mount Sinai Hosp. v. Triboro Coach, 263 A.D.2d 11, 20 (2d Dept. 1999). Thus, the burden is on the insurer to come forward with proof establishing by "fact or founded belief" its defense that the claimed injuries have no nexus to the accident. Mount Sinai Hosp. v. Triboro Coach, 263 A.D.2d 11, 19 (2d Dept. 1999) (quoting Central Gen. Hosp. v. Chubb Group of Ins. Cos., 90 N.Y.2d 195, 199).

An insurer disclaiming coverage has the burden of establishing that "the medical condition for which the assignor was treated was not related to the accident at all", which means that the insurer must demonstrate that the conditions were not caused or exacerbated by the accident. Mount Sinai Hosp. v. Triboro Coach, 263 A.D.2d 11, 18 - 19 (2d Dept. 1999); Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 2009 NY

Slip Op 00351 (App Div 2d Dept., Jan. 20, 2009). Here, the Respondent has failed to sustain a lack of causation defense.

I find the peer review of Dr. Sean Lager has failed to set forth a sufficient factual basis and medical rationale for his opinion that the disputed services were not medically necessary and/or causally related to the subject accident therefore has not established, *prima facie*, a lack of medical necessity or causation for those services rendered by applicant. The burden has not shifted to the Applicant and has nevertheless been rebutted.

Comparing the relevant evidence presented by both parties against each other and the above referenced standards, based on the foregoing, I find in favor of the Applicant and the claim is awarded in the amended sum of \$13,163.68.

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
	Alexandre DeMoura M.D. PC dba New York Spine Institute	02/14/24 - 02/14/24	\$14,083.06	\$11,891.31	Awarded: \$11,891.31
	Alexandre DeMoura M.D. PC dba New York Spine Institute	02/14/24 - 02/14/24	\$2,740.03	\$1,272.37	Awarded: \$1,272.37
Total			\$16,823.09		Awarded: \$13,163.68

B. The insurer shall also compute and pay the applicant interest set forth below. 03/22/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Where a claim is untimely denied, or not denied or paid, interest shall accrue as of the 30th day following the date the claim is presented by the claimant to the insurer for payment. Where a claim is timely denied, interest shall accrue as of the date an action is commenced or an arbitration requested, unless an action is commenced or an arbitration requested within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant. (11 NYCRR 65-3.9(c)). The end date for the calculation of interest shall be the date of payment of the claim. In calculating interest, the date of accrual shall be excluded from the calculation. Where a motor vehicle accident occurs after April 5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. (11 NYCRR 65-3.9(a)). Where the claim is submitted electronically after the close of business or on the weekend, I find that the claim is deemed received on the next day of business following the electronic submission, and interest is awarded as of the next day of business following the electronic submission of the claim.

C. Attorney's Fees

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

For cases filed prior to February 4, 2015, 20 percent of the amount of first party benefits awarded herein, plus interest thereon, subject to a minimum of \$60 and a maximum of \$850. For cases filed on or after February 4, 2015, 20 percent of the amount of first party benefits awarded herein, plus interest thereon, subject to no minimum and a maximum of \$1360 (11NYCRR65-4).

- 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 NJ
SS :
County of Essex

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

09/30/2024
(Dated)

Alana Barran

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:
dd4f8ea72843423d7e87aecc6f35ca9b

Electronically Signed

Your name: Alana Barran
Signed on: 09/30/2024