

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

CitiMed Surgery Center, LLC  
(Applicant)

- and -

Integon National Insurance Company  
(Respondent)

AAA Case No. 17-24-1340-9624

Applicant's File No. n/a

Insurer's Claim File No. 9XINY07426-01

NAIC No. 29742

**ARBITRATION AWARD**

I, Frank Marotta, 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-GV

1. Hearing(s) held on 10/08/2024  
Declared closed by the arbitrator on 10/08/2024

Marc Schwartz, Esq. from Marc L. Schwartz P.C. participated virtually for the  
**Applicant**

John Rossillo, Esq. from Rossillo & Licata LLP participated virtually for the  
**Respondent**

2. The amount claimed in the Arbitration Request, **\$23,936.71**, was AMENDED and permitted by the arbitrator at the oral hearing.

The Applicant amended the amount in dispute to \$5,292.93 in accordance with the Respondent's fee schedule audit by Carolyn Mallory, CPC of Signet Claim Solutions, LLC.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulate and agree that the Applicant established its prima facie burden, the Respondent timely denied the claim in question and the amended amount in dispute does not exceed the permissible fee allowable under the applicable New York State Workers' Compensation Fee Schedule (WCFS) for the services provided.

### 3. Summary of Issues in Dispute

The record reveals that the Assignor-GV, an 18-year-old-male, sustained injuries in a motor vehicle accident on 7/31/23.

The Applicant seeks reimbursement for an ambulatory facility fee in connection with a cervical discography, percutaneous discectomy with decompression and percutaneous intradiscal electrothermal annuloplasty at C5-C6 and C6-C7 performed by Dr. Bryan Matthew Elzholz on 11/13/23.

The Respondent denied reimbursement based on a peer review by Dr. Jason Cohen dated 2/1/24.

The issue is whether the surgical services were medically necessary.

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

The Applicant filed this arbitration in the amount of \$23,936.71, amended to \$5,292.93, for a disputed ambulatory facility fee in connection with a cervical discography, percutaneous discectomy with decompression and percutaneous intradiscal electrothermal annuloplasty at C5-C6 and C6-C7 performed by Dr. Elzholz on 11/13/23.

This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing. In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations. The parties appeared and the hearing was conducted virtually via zoom.

In support of its defense Respondent relies on a peer review by Dr. Jason Cohen dated 2/1/24. The opinion expressed by Dr. Cohen in his 2/1/24 peer review is the same as the one expressed in his 1/4/24 peer review report used by the Respondent to deny the claim of Dr. Elzholz who performed the procedures at the Applicant's ambulatory facility on 11/13/23. In the linked matter

The Respondent provided Dr. Cohen's 1/4/24 peer review in the linked matter Bryan M Elzholz, M.D., P.C. a/a/o GV and Integon National Insurance Company, AAA Case No. 17-24-1333-0089 when they appeared before the undersigned on 7/25/24 in the

arbitration filed by Bryan M Elzholtz, M.D., P.C. seeking reimbursement for the procedures he performed. Comparing the two peer reviews I note that Dr. Cohen's 1/4/24 and 2/1/24 peer reviews are identical.

In my decision dated 8/16/24 I found for the Respondent noting

*"In support of its defense Respondent relies on a peer review by Dr. Jason Cohen dated 1/4/24. Dr. Cohen provides a history of the Assignor as an 18-year-old male who was involved in a motor vehicle accident on 7/31/23 as the restrained driver when the vehicle was rear-ended. Dr. Cohen reports that the Assignor initially sustained injuries to his neck, midback, and right shoulder. He was seen at a local hospital on the day of the hospital for evaluation and treatment.*

*Dr. Cohen reports that on the initial evaluation by Dr. Levinson on 8/7/23 the Assignor reported subjective complaints of pain in the neck, mid back, and right shoulder. His neck pain was reported to radiate to the upper extremities with numbness and tingling. The musculoskeletal examination revealed tenderness, decreased range of motion and a negative Spurling test. Neurological examination revealed reflexes 1+, sensation was reported to be intact and motor strength 4/5. The clinical impression included cervical spine sprain/strain. The claimant was recommended physical therapy, pain management, orthopedist, acupuncture, MRIs and a follow-up.*

*Dr. Cohen highlights the findings on the cervical spine MRI report of 8/19/23 noting reversal of the cervical lordosis centered at C3. The C3-C4 disc space revealed a far-left central disc herniation extending into the proximal portion of the intervertebral foramen on the left with foraminal narrowing on the left. Evaluation of the C4-C5 disc space demonstrated disc bulging. This flattening of the thecal sac with a small area of far-left central disc herniation narrowing the proximal portion of the intervertebral foramen on the left. Evaluation of the C5-C6 demonstrated a left lateral disc herniation with foraminal narrowing on the left. Broad based central disc herniation is seen at the C6-C7 level.*

*Dr. Cohen reports that the EMG/NCV/F testing of the upper extremities performed on 10/26/23 revealed no evidence of carpal tunnel syndrome or cervical radiculopathy.*

*The report of Dr. Elzholtz dated 11/13/23 reported subjective complaints of neck pain radiating to the upper extremities with numbness and tingling. It is noted that the Assignor underwent a cervical epidural steroid injection (CESI) on 10/2/23 with 50% improvement. Medication used was not documented. The musculoskeletal examination of the cervical spine revealed tenderness and decreased range of motion. Neurological examination revealed motor strength 3+/5. The clinical impression was radiculopathy, cervicothoracic region. The claimant was recommended cervical discectomy and follow-up. On 11/13/23 the claimant underwent cervical percutaneous discectomy at C5-6 and C6-7 performed by Dr. Elzholtz.*

*According to Dr. Cohen, based on the records reviewed there is no indication for cervical discectomy and all associated pre-and post-operative services. Dr. Cohen points out that the operative report by Dr. Elzholtz documents the placement of cannula*

*and dilator into the nucleus for manual extraction of C5-C6 and C6-C7 levels. It does not specify an exact placement of decompression at that level. Such inexact and generalized decompression cannot reasonably be expected to satisfactorily address the disc bulge and multilevel disc herniation with foraminal narrowing on the left identified on MRI. EMG studies revealed no radiculopathy. More concerning, Dr. Elzholz fails to indicate the medical necessity for his choice of decompression at the C5-C6 and C6-C7 levels despite multilevel pathology. Finally, the complicated pathology identified on MRI is best managed by a skilled spine surgeon.*

*Dr. Cohen cites authority noting that percutaneous discectomy is not the recommended choice of treatment for radiculopathy. See Alternative Forms of Discectomy for Cervical or Thoracic Radicular Pain Syndrome Hegmann et al ACOEM Guidelines for Cervical and Thoracic Spine Disorders - 2016). Dr. Cohen cites authority noting that since the main cause of the pain with cervical radiculopathy is inflammation the use of non-steroidal anti-inflammatory drugs can provide not only symptom relief but can also treat the proximate cause of the pain. See Cervical Radiculopathy by Warren Magnus, et al -2023). According to Dr. Cohen, the record of Dr. Elzholz fails to provide evidence of failed conservative therapeutic intervention including pharmacotherapy and steroid injection. Dr. Cohen further notes that the electrodiagnostic testing failed to identify cervical radiculopathy.*

*Dr. Cohen also raises the argument that clinical outcomes following percutaneous discectomy are often worse when compared with microdiscectomy. See Current Pain and Headache Reports 2008 Volume 12 Issue 1.*

*Dr. Cohen also asserts that in general, the diagnosis of discogenic pain due to IDD must meet the following criteria: Confirmed as IDD on CT discography, (2) reproducible pain identical or similar to evoked injection with contrast medium and (3) negative findings from stimulation of at least one other disc as a control. See Intradiscal Procedures in Chronic Spine Pain: A Narrative Review by Hongdum Park, et al International Journal of Pain 2022. According to Dr. Cohen, there is no objective evidence of internal disc disruption (IDD) and no clinical indication of discogenic pain. Dr. Cohen further notes that Intradiscal annuloplasty is considered experimental with no proven benefit verse placebo and cited literature notes inconsistent evidence as to the efficacy of annuloplasty.*

*Having reviewed the medical records of the treating healthcare provider and citing authority to support his conclusion that "In the clinical scenario of radiculopathy, physical therapy, pharmacotherapy including anti-inflammatories, gabapentinoids would have been the appropriate course of treatment. The standard of care for physical therapy is two to three times per week for a six-week duration which the claimant has completed. In case of failure of combined physical therapy and pharmacotherapy, the claimant should have undergone a trial of epidural steroid injection x 3 with outcome documented after each injection on follow up consultation. However, the accepted standard of practice has not been met to support the medical necessity for cervical discectomy and all associated pre- and post-operative services as the claimant has not completed epidural steroid injection x 3 nor have trialed any aggressive pharmacotherapy including gabapentinoids. In the event surgery is considered, the*

*claimant should have been referred to surgical consultant and/or neurological consultant for further course of treatment. The treating physician has not ruled out other mechanisms of pain like spasm."* Jacob Nir, M.D. v. Allstate Ins. Co., 7 Misc.3d 544, 546-47 (Civ. Ct. Kings Co. 2005)."

After a review of the documents contained in the ECF and in consideration of the arguments made by the parties at the hearing, I see no reason to alter my earlier finding that the Respondent met its prima facie burden establishing the procedures performed on 11/1/23 were not medically necessary and conversely the ambulatory facility services were also lacking in medical necessity. See New Horizon Surgical Center LLC v Allstate Ins. Co., 52 Misc. 3d 139 (A); 2016 NY Slip Op 51124 (U) (App. Term 2d, 11th & 13th Jud Dist. July 13, 2016).

In the linked matter Dr. Elzholtz submitted a peer review rebuttal which was considered along with the medical records of the Assignor's treating healthcare provider. Having considered the records and the rebuttal of Dr. Elzholtz I found for the Respondent noting

*"After a review of the documents contained in the ECF and in consideration of the arguments made by the parties at the hearing, I am more persuaded by the opinion of Dr. Cohen that the cervical spine surgery performed on 11/13/23 was not medically necessary. I do not find Dr. Elzholtz's rebuttal sufficiently addresses several issues raised by Dr. Cohen, most importantly to the undersigned is the failure on the part of the Applicant to produce evidence of nerve root compression on imaging studies or the fact that the electrodiagnostic study performed failed to reveal evidence of cervical radiculopathy. For an applicant to prove that the disputed expense was medically necessary, it must meaningfully rebut the conclusions set forth in the peer review. Jaga Med. Servs., P.C. v American Tr. Ins. Co., 2017 NY Slip Op 50954(U), 56 Misc. 3d 134(A) (2d, 11th & 13th Jud Dists July 21, 2017); Yklik, Inc. v. Geico Ins. Co., 2010 NY Slip Op. 51336(U) (App Term 2d, 11th & 13th Dists. July 22, 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). Having considered all the medical reports and the rebuttal by Dr. Elzholtz I find that the Applicant has not met this burden. Where the assertions of a peer reviewer setting forth a factual basis and medical rationale for his determination that there was a lack of medical necessity for services rendered are un rebutted by the provider, a judgment should be granted to the insurer. A. Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table), 2007 N.Y. Slip Op. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. July 3, 2007).*

*It is also noted that the Assignor was also under the care of an orthopedic surgeon, Dr. Sunil Kukreja at CitiMed. Dr. Kukreja reports of 9/12/23 and 10/24/23 also contradict the opinion of the Applicant noting that on these days the Assignor presented to Dr. Kukreja with complaints of mild tenderness in the cervical spine. On both days Dr. Kukreja reports Spurling sign was negative, and the Assignor was found to be neurologically intact. On 10/24/23 Dr. Kukreja reported the results of the cervical MRI and diagnosed the Assignor with cervical spine sprain/strain. Dr. Kukreja's treatment plan called for continued conservative care and follow-up as needed. Dr. Kukreja specifically notes in his 10/24/23 report that the Assignor is not a candidate for surgical*

*intervention. Based on the totality of the record, I find as a matter of fact that the 11/13/23 cervical spine procedure was not medically necessary and deny the Applicant's claim in its entirety."*

After a review of the documents contained in the ECF and in consideration of the arguments made by the parties at the hearing, I again find for the Respondent. The issue as to the medical necessity for the procedures has already been heard, considered and resolved in favor of the Respondent; therefore, I find the doctrine of collateral estoppel is applicable preventing the Applicant herein from asserting its claim for the ambulatory facility services in connection with the procedures. It has been held that if a medical service is not necessary, by extension there is a lack of medical necessity for a surgical facility fee for the service. See New Horizon Surgical Center LLC v Allstate Ins. Co., supra. The preclusive effect of a prior arbitration is within the Arbitrator's authority to determine. Matter of Falzone v. New York Central Mutual Fire Ins. Co., 64 A.D.3d 1149, 881 N.Y.S.2d 769 (4th Dept. 2009).

Even considering that the Applicant herein provides a peer review rebuttal by Bryan M. Elzholtz dated 6/3/24 which is somewhat different from the rebuttal uploaded in the linked matter I still find I am more persuaded by the opinion of Dr. Cohen that the medical evidence fails to reveal evidence of nerve root compression on imaging studies or the fact that the electrodiagnostic study performed failed to reveal evidence of cervical radiculopathy. Nor does it overcome the medical record and opinion of the orthopedic surgeon who was treating the Assignor who on Assignor's 9/12/23 and 10/24/23 also contradict the opinion of the Applicant noting that on these days the Assignor presented to him with complaints of mild tenderness in the cervical spine. On both days the reports of the orthopedic surgeon noted Spurling signs were negative, and the Assignor was found to be neurologically intact. The 10/24/23 report notes the results of the cervical MRI and diagnosed the Assignor with cervical spine sprain/strain. The treatment plan called for continued conservative care and follow-up as needed and specifically, it was noted on 10/24/23 report that the Assignor is not a candidate for surgical intervention. Therefore, based on the totality of the record, I find as a matter of fact that the Applicant's services were not medically necessary.

For the reasons noted above I find as a matter of fact that the Applicant's services were not medically necessary, and their claim should be denied in its entirety.

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 claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of NY

SS :

County of Suffolk

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

10/14/2024

(Dated)

Frank Marotta

#### **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:**  
75d9b77d5b0225a2ceef12912028d279

### Electronically Signed

Your name: Frank Marotta  
Signed on: 10/14/2024