

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Scientific Spine & Orthopedic Devices LLC (Applicant)	AAA Case No.	17-24-1364-6003
- and -	Applicant's File No.	24-60226
	Insurer's Claim File No.	23-6197077
Progressive Casualty Insurance Company (Respondent)	NAIC No.	32786

ARBITRATION AWARD

I, Anne Malone, 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: EIP

1. Hearing(s) held on 01/06/2025
Declared closed by the arbitrator on 01/06/2025

Nicole Jones, Esq. from The Morris Law Firm, P.C. participated virtually for the Applicant

Erin Ferrone from Progressive Casualty Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,824.55**, 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

The 69 year old EIP reported involvement in a motor vehicle accident on November 12, 2023; claimed related injury and received an electrical bone stimulator and osteogenic stimulator provided by the applicant on June 17, 2024.

The applicant submitted a claim for this durable medical equipment (DME), payment of which was timely denied by the respondent based upon a peer review by Robert Cristofaro, M.D. dated July 17, 2024.

The issue to be determined at the hearing is whether the respondent established that the DME provided by the applicant was not medically necessary.

4. Findings, Conclusions, and Basis Therefor

This hearing was held on Zoom and the decision is based upon the documents reviewed from the Modria File as well as the arguments made by counsel and/or representative at the arbitration hearing. Only the arguments presented at the hearing are preserved in this decision; all other arguments not presented at the hearing are considered waived.

To support a lack of medical necessity defense respondent must "set forth a factual basis and medical rationale for the peer reviewer's [or examining physician's] determination that there was a lack of medical necessity for the services rendered." Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term2d, 11th and 13th Jud. Dists. 2014.) Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to applicant. See Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006.)

The Civil Courts have held that a defendant's peer review or report of medical examination must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review or medical examination 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 specifics as to the claim at issue, is conclusory or vague. See Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005.)

To support its contention that the durable medical equipment provided by the applicant was not medically necessary, respondent relies upon the peer review by Dr. Cristofaro, who reviewed the medical records of the EIP, noted the injuries claimed and the treatment rendered to him. Dr. Cristofaro considered possible arguments and justification for the need for the durable medical equipment at issue and determined that it was not warranted under these circumstances.

Dr. Cristofaro submitted a cogent and comprehensive report in which he discussed the DME provided and his reasons for determining that the post-operative electrical bone stimulator and osteogenic stimulator were not medically necessary for this particular EIP.

He noted specifically that there was no evidence of any risk factors for delayed non-union after the surgery in this case which would warrant the need for electrical bone stimulation and no objective explanation to justify supplemental use of a bone growth stimulator.

Dr. Cristofaro discussed the standard of care for this particular EIP, which he determined was continued physical therapy which would suffice for him to reach the maximum possible improvement.

He supported, with relevant medical literature, his opinion that the DME provided to the EIP was not medically necessary.

Respondent has met its evidentiary burden. The peer review adequately sets forth the factual basis and medical rationale to support the conclusion that the durable medical equipment was not indicated for this EIP at the time it was provided. Therefore, pursuant to Bronx Expert Radiology, *supra* the burden shifts to the applicant, who bears the ultimate burden of persuasion to establish that the durable medical equipment at issue was medically necessary.

In opposition to the report of the peer review, the applicant did not submit a formal rebuttal. However, the applicant relies upon a letter from Dr. Capicotto, M.D. the EIP's treating surgeon, who provided a comprehensive report to explain his decision to perform the cervical discectomy on April 16, 2024. The letter includes mention of a bone growth stimulator, without any explanation of why this particular DME was necessary. There was no mention of an osteogenic stimulator in this letter.

The submissions also include a report dated November 12, 2023 of an ER visit by the EIP which documented a report of a motor vehicle accident with complaints of pain in the left shoulder, knee and ankle and diagnosis of a possible fractured of the left hand. The EIP did not stay for evaluation or treatment by an orthopedist.

The next medical records are the pre-operative report dated April 17 2024 and operative report dated April 26, 2024 which documented cervical discectomy performed on that date.

In this case, the submitted medical records do not meaningfully address the arguments that are raised in the peer review and do not establish that the durable medical equipment provided to the EIP was medically necessary.

Since the applicant did not provide a rebuttal, it did not respond to the respondent's argument in the peer review by Dr. Cristofaro that the DME provided to the EIP was a deviation from a reasonable medical standard of care. The medical records alone are not sufficient to rebut his/her conclusions.

Based on the foregoing, I find that the respondent has established that the DME issue was not medically necessary.

Accordingly, the claim is dismissed with prejudice.

Any further issues submitted in the record are held to be moot and/or waived insofar as they were not raised at the time of this hearing. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator.

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 CT

SS :

County of Fairfield

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

01/26/2025

(Dated)

Anne Malone

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:
8be4bc0ba9a5bcbcd79f7d7958ff1deb

Electronically Signed

Your name: Anne Malone
Signed on: 01/26/2025