

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Mercy Medical Center
(Applicant)

- and -

Enterprise Rent A Car
(Respondent)

AAA Case No. 17-24-1364-3712

Applicant's File No. ThomasI

Insurer's Claim File No. 20535270

NAIC No. Self-Insured

ARBITRATION AWARD

I, Evelina Miller, 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: IT

1. Hearing(s) held on 02/25/2025
Declared closed by the arbitrator on 02/25/2025

Michael Tomford Esq from Dash Law Firm, PC participated virtually for the Applicant

Aditi Pascual Esq from McCormack, Mattei & Holler participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$6,601.34**, 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 dispute arises from the underlying automobile accident on January 3, 2024, in which the Assignor (IT), a 69-year-old-male was involved. Thereafter, Assignor sought private medical attention and was eventually evaluated with complaints of pain in the neck, mid and lower back, bilateral shoulders, as well as pain in the right hip and bilateral knees. Eventually patient was recommended to undergo cervical fusion performed on 4/30/24. The claim in dispute is for fees associated with cervical fusion performed on 4/30/24. Respondent denied Applicant's bill for date of service of 4/30/24 based on the peer review of Dr. Robert Cristofaro M.D. performed on 6/12/24.

The issue presented at the hearing is whether Respondent made out a prima facie case of lack of medical necessity, and if so, whether Applicant rebutted it.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions contained in MODRIA which are maintained by the American Arbitration Association. These submissions are the record in this case. My decision is based on my review of that file, as well as the arguments of the parties at the hearing. All the parties at this hearing appeared via ZOOM.

I find that Applicant establishes its prima facie showing of entitlement to recover first-party no-fault benefits by submitting evidentiary proof that the prescribed statutory billing forms, setting forth the fact and amount of the loss sustained, had been mailed and received and that payment of no-fault benefits were overdue. See *Mary Immaculate Hospital v. Allstate Insurance Co.*, 5 A.D.3d 742, (2d Dept., 2004). Once an applicant establishes a prima facie case, the burden then shifts to the insurer to prove its defense. See *Citywide Social Work & Psy. Serv. P.L.L.C v. Travelers Indemnity Co.*, 3 Misc. 3d 608, 2004, NY Slip Op 24034 [Civ. Ct., Kings County 2004]).

Medical Necessity:

Respondent denied Applicant's bill for date of service of 4/30/24 based on the peer review of Dr. Robert Cristofaro M.D. performed on 6/12/24.

A denial premised on a lack of medical necessity must be supported by competent evidence such as an independent medical examination, a peer review or other proof which sets forth a factual basis and a medical rationale for denying the claim. *Healing Hands Chiropractic, P.C., v. Nationwide Assur. Co.*, 5 Misc., 3d 975, 787 N.Y.S. 2d 645 (Civ.Ct., New York County, 2004); *King's Med. Supply Inc. v. Country Wide Ins. Co.*, 5Misc. 3d 767, 783 N.Y.S. 2d 448.

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, *Nir v. Allstate*, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005); See also, *All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

I have previously addressed the medical necessity of the cervical fusion performed on 4/30/24 in AAA case #17-24-1353-6443.

In that case I held the following:

"PEER by Dr. Robert Cristofaro M.D.

Respondent submits a peer report by Dr. Robert Cristofaro M.D. performed on 4/30/24 addressing the medical necessity of cervical fusion performed on 4/30/24. Dr. Cristofaro reviewed medical records of the assignor and concluded that based on Assignor's medical history as well as recognized medical guidelines, medical necessity for the cervical fusion has not been established. Dr. Cristofaro reviewed the patient's medical history and stated that the patient received only 27 P.T. sessions prior to the recommendation of ACDF. This is inadequate to assess the maximum possible benefit the claimant could have gained with the continuation of conservative care. The treating physician should have considered continuous P.T. sessions for at let 3 to 6 months prior to the recommendation of anterior cervical discectomy and fusion. It was premature for the treating physician to proceed with surgery at this stage of the claimant's injury. The ACDF was performed without undertaking complete course of P.T., which could have resolved the symptoms. Most patients, even with very severe injuries, are often managed effectively without surgery.

Dr. Cristofaro reviewed the MRI findings of the cervical spine performed on 2/7/24. He concluded that the MRI findings of disc bulges call for conservative care. If conservative care does not provide relief, or if there is exacerbation of symptoms, ACDF may be considered. However, in this case, the claimant was provided with inadequate P.T. and there is no significant neurological impairment noted. No such findings were noted int eh MRI report of the cervical spine, which would justify the recommendation of anterior cervical discectomy and fusion. Hence, cervical spine surgery was not medically necessary in this case.

Once Respondent submits an IME report or peer review that has a sufficient factual basis and medical rationale, then the courts have routinely found that Respondent has established its prima facie defense that the disputed medical service is medically unnecessary. A Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co., 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table, Text in WESTLAW), Unreported Disposition, 2007 WL 1989432, 2007 N.Y. Slip Op. 51342(U) (N.Y. Sup. App. Term Jul 03, 2007). See also, Amaze Medical Supply Inc. v. Eagle Insurance Company, 2003NY Slip Op 51701 (U), 2 Misc.3d. 128 (App. Term 2d & 11 Dist.-2003).

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. 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).

Rebuttal by the Applicant

Applicant submits a rebuttal by Dr. Alexander de Moura M.D. to the peer review report of Dr. Cristofaro. Dr. de Moura stated that he disagreed with Dr. Cristofaro's opinion that cervical fusion was not medically necessary.

Specifically, he stated that this patient was an appropriate candidate for the procedure at issue based on the MRI showing C6-C7 disc herniation, as well as symptoms and findings noted in my office including neck pain radiating to the upper extremities, excessive discomfort, bilateral paraspinal musculature spasm, tenderness, decreased range of motion with pain, weakness in the left triceps, decreased sensation in the left C7 distribution, and an absent left triceps reflex. These symptoms were refractory to conservative care and injection. Assessment included cervical disc herniation and radiculopathy.

It is claimed that the conservative treatment provided was "inadequate" and further treatment "could have resolved the symptoms." However, as noted on April 4, 2024, the patient "completed extensive conservative treatment including activity modifications, physical therapy, chiropractor, epidural steroid injections, trigger point injections, ice, heat, stretching, OTC meds - all without significant relief of symptoms. The patient's symptoms remain unchanged following conservative treatment." Dr. Cristofaro fails to demonstrate how further application of modalities which had already proved ineffective would have resolved the patient's injuries.

Furthermore, Dr. Cristofaro claims that "there is no significant neurological impairment noted." However, as discussed above, the patient presented with persistent radicular neck pain, motor weakness, sensory deficits, and diminished deep tendon reflexes in the C7 distribution, consistent with the patient's MRI findings. Failure of conservative measures indicated surgical intervention.

Dr. de Moura cited to medical literature to support his opinion that the cervical fusion was not medically necessary.

Conclusion:

Upon reviewing all the relevant evidence in the record and considering the parties' oral arguments, I find the following. In support of its lack of medical necessity defense Respondent submits a peer report by Dr. Cristofaro performed on 6/3/24. Upon review I find that Respondent's peer review report presents factual basis and medical rationale that the cervical fusion is medically unnecessary.

Dr. Cristofaro stated that the patient received only 27 P.T. sessions prior to the recommendation of ACDF. This is inadequate to assess the maximum possible benefit the claimant could have gained with the continuation of conservative care. The treating physician should have considered continuous P.T. sessions for at least 3 to 6 months prior to the recommendation of anterior cervical discectomy and fusion. It was premature for the treating physician to proceed with surgery at this stage of the claimant's injury. The ACDF was performed without undertaking complete course of P.T., which could have resolved the symptoms. Dr. Cristofaro also reviewed the MRI findings of the cervical spine performed on 2/7/24. He concluded that the MRI findings of disc bulges call for conservative care.

Applicant submits a rebuttal by Dr. Alexander de Moura M.D. Dr. de Moura stated that this patient was an appropriate candidate for the procedure at issue

based on the MRI findings and examination findings. It is further noted on April 4, 2024, the patient "completed extensive conservative treatment including activity modifications, physical therapy, chiropractor, epidural steroid injections, trigger point injections, ice, heat, stretching, OTC meds - all without significant relief of symptoms. The patient's symptoms remain unchanged following conservative treatment." The patient presented with persistent radicular neck pain, motor weakness, sensory deficits, and diminished deep tendon reflexes in the C7 distribution, consistent with the patient's MRI findings. Failure of conservative measures indicated surgical intervention. Based on the above, I find that Applicant submitted sufficient evidence to rebut the findings of the peer doctor. The patient had undergone conservative treatment but remained symptomatic. As such, the cervical fusion was warranted."

Here, Respondent denied the services associated with the cervical fusion discussed above based on the peer review report of Dr. Robert Cristofaro M.D. performed on 6/12/24. Here, Dr. Cristofaro reiterates his discussion regarding the lack of medical necessity of the actual surgery. He then stated:

"Therefore, based on the reasons mentioned above, I have concluded that the cervical spine surgery and its pre and post-operative services including associated operating room services performed on 4/30/24 were not medically necessary."

Applicant submits a rebuttal by Dr. Demesmin M.D. who discussed the clinical presentation of the patient and noted that Dr. Cristofaro cited various articles to support his contention and stated, "The standard of care, in this case, was to provide adequate conservative treatment in the form of physical therapy sessions for three to six months to resolve the cervical spine pain." Dr. Cristofaro stated, "It was premature for the treating physician to proceed with surgery at this stage of the claimant's injury. The ACDF was performed without undertaking a complete course of physical therapy, which could have resolved the symptoms. Most patients, even with very severe injuries, are often managed effectively without surgery." Dr. Cristofaro discussed the cervical spine MRI findings and stated, "No such findings were noted in the MRI report of the cervical spine, which would justify recommendation of anterior cervical discectomy and fusion. Hence, cervical spine surgery was not medically necessary in this case." I would note, in this case, Mr. Thomas injured his neck in the motor vehicle accident that occurred on 1/3/2024 and developed complaints of pain. Therefore, he was started on a course of conservative care including physical therapy and chiropractic medications as an appropriate standard of care. The patient also received a cervical epidural steroid injection on 2/28/2024. Moreover, the MRI study of cervical spine also revealed disc herniation. When the patient presented to Dr. De Moura on 3/11/2024, (more than 2 months, post-accident), he complained of neck pain radiating to bilateral upper extremities along with positive finding such as decreased and painful range of motion, bilateral paraspinal musculator spasms and tenderness to palpation as well as decreased muscle strength of the left triceps, decreased sensation to pinprick and light touch in the

left C7 distribution and absent reflexes in the upper extremities. Also, when the patient was evaluated by Dr. De Moura on 3/21/2024 and 4/4/2024, he had continued complaints of neck pain radiating to bilateral upper extremities along with numerous positive findings such as decreased and painful range of motion, bilateral paraspinal musculator spasms and tenderness to palpation as well as decreased muscle strength of the left triceps, decreased sensation to pinprick and light touch in the left C7 distribution and absent reflexes in the upper extremities. Hence, it was believed that waiting for months for the conservative treatment plan to fail or for the physiological status to deteriorate in a patient who is already in immense pain due to the traumatic injuries suffered in the motor vehicle accident could ultimately be detrimental for the patient's recovery. This is especially important in traumatic cases such as this where a traumatic car accident was the known cause of the patient's pain pattern. As such, more aggressive treatment was appropriate, hence cervical discectomy was recommended in accordance with the generally accepted standard of medical practice.

Moreover, the MRI study of the cervical spine also revealed disc herniation. "A herniated disc is a condition affecting the spine in which the annulus fibrosus is damaged enabling the nucleus pulposus (which is normally located within the center of the disc) to herniate. This can compress the nerves or spinal cord causing pain and spinal cord dysfunction. Surgical procedures for a herniated disc include laminectomies with discectomies depending on the cervical or lumbar area.

Upon review, I find that I find that Applicant submitted sufficient evidence to rebut the findings of the peer doctor. The patient had undergone conservative treatment but remained symptomatic. As such, the cervical fusion was warranted. Since the surgery was warranted, all the associated services, including the ones at issue in this case were warranted as well. I find Applicant's evidence to be more persuasive.

Accordingly, Applicant's claim for reimbursement 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 |
|--------------|----------------------|---------------------|-------------------|----------------------------|
| | Mercy Medical Center | 04/30/24 - 04/30/24 | \$6,601.34 | Awarded: \$6,601.34 |
| Total | | | \$6,601.34 | Awarded: \$6,601.34 |

B. The insurer shall also compute and pay the applicant interest set forth below. 09/09/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the motor vehicle accident occurred 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). In accordance with 11 NYCRR 65-3.9c, interest shall be paid on the claims totaling \$6,601.24 from the date the arbitration was commenced.

C. Attorney's Fees

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

Respondent shall pay Applicant an attorney's fee upon the amount awarded plus the interest, as calculated in section "B" above, and in accordance with 11 NYCRR 65-4.6(e), i.e., 20 percent of the amount of first party benefits, plus interest thereon. The minimum attorney's fee payable shall be in accordance with 11 NYCRR 65-4.6c. For cases filed after February 4, 2015, there is no minimum attorney's fee but there is a maximum fee of \$1,360.00. However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then 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 Kings

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

03/27/2025

(Dated)

Evelina Miller

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:
3b6e4d499d91ee8020ac5bf72709830f

Electronically Signed

Your name: Evelina Miller
Signed on: 03/27/2025