American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Laxmidhar Diwan MD (Applicant)	AAA Case No.	17-16-1034-2410
	Applicant's File No.	SS-25420
- and -	Insurer's Claim File No.	0292952890101032
	NAIC No.	35882
Geico Insurance Company (Respondent)		

ARBITRATION AWARD

I, Alise Schor, 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 (JG)

1. Hearing(s) held on 03/14/2017
   Declared closed by the arbitrator on 03/14/2017

   Aaron Perretta, Esq. from Samandarov and Associates, P.C. participated by telephone for the Applicant

   Christa Varone, Claims from Geico Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 8,170.61**, was AMENDED and permitted by the arbitrator at the oral hearing.

   During the hearing, Applicant amended the amount in dispute to **$3,992.93** pursuant to the Fee Schedule. It should be noted that on this day, because there was a blizzard, all hearings were conducted telephonically.

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

   The parties stipulated that Applicant established a prima facie case of entitlement to No-Fault compensation with respect to its bill. They further stipulated that Respondent's Form NF-10 denial of claim forms were timely issued, i.e., within the 30-day deadline prescribed by Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1). Additionally, the parties stipulated that

should Applicant prevail, interest would accrue as of the filing date set forth in the American Arbitration Association in Part B of the conclusion of the award template. They further agreed that Applicant's amendment of the amount in dispute resolved Respondent's Fee Schedule issue.

3. Summary of Issues in Dispute

Whether Applicant is entitled to reimbursement for a left knee arthroscopy performed on Assignor (JG) on January 29, 2016 which was denied by Respondent on the basis of lack of causality as determined by Dr. Bazos in his Peer Review Report dated March 13, 2016. Applicant submits a Rebuttal Report.

4. Findings, Conclusions, and Basis Therefor

This arbitration stems from a claim for reimbursement for left knee arthroscopy performed by Applicant on Assignor (JG), a 58- year-old male, in connection with injuries he sustained as a pedestrian struck by a motor vehicle on December 1, 2015.

Respondent's Peer Review Report:

Respondent denied this claim on the basis of lack of causality as determined by Dr. Andrew Bazos in his Peer Review Report, dated March 13, 2016. Dr. Bazos lists 23 records he reviewed. Dr. Bazos very briefly discusses Assignor's pertinent history which includes positive findings in his bilateral knees. Dr. Bazos states that the causal relationship between the Assignor's presenting complaints of knee pain and the motor vehicle accident has been established, but there is no medical necessity for the surgery. He supports his opinion by stating that there the records reviewed do not document treatment to Assignor's left knee. He states that it "is not acceptable or medically prudent to perform surgical intervention without first attempting and exhausting all modes of conservative treatment". Furthermore, he states that the MRI findings are more indicative of a pre-existing condition.

Applicant's Rebuttal Report:

Dr. Diwan Assignor's treating surgeon submits a Rebuttal to the Peer. He discusses Assignor's presenting complaints and details the MRI findings. The MRI revealed partial tear of the quadriceps tendon and suprapatellar effusion. Post-operatively, Assignor was diagnosed with partial tear of the medial meniscus, chondrocalcinosis and tricompartmental synovitis. Dr. Diwan addresses Dr. Bazos' conclusion regarding a lack of documented conservative treatment by citing to medical authority which states that there is no standard requirement to undergo any particular amount of physical therapy.

Findings:

As it was stipulated that Applicant established its primae facie case, the burden therefore shifts to Respondent to establish lack of medical necessity for the surgery at issue, See Citywide Social Work & Psychological Services, PLLC v. Allstate Ins. Co., 8 Misc 3d 1025 A (2005). 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., 5 Misc. 3d 767, 783 N.Y.S. 2d 448. As Respondent's denial was timely (as stipulated by the parties), it was within its rights to assert lack of medical necessity as a defense. Liberty Queens Medical, P.C. v. Liberty Mutual Insurance Co., 2002 WL 31108069 (App. Term 2d & 11th Dists. June 27, 2002); cf. Country-Wide Insurance Co. v. Zablozki, 257 A.D.2d 506, 684 N.Y.S.2d 229 (1st Dept. 1999).

The insurer bears "both the burden of production and the burden of persuasion with respect to the medical necessity of the treatment or testing for which payment is sought." See, Bajaj v. Progressive Ins. Co., 14 Misc 3d 1202[A], 831 N.Y.S.2d 358 (N.Y.C. Civ. Ct. 2006). "At a minimum, [Respondent] must establish a factual basis and medical rationale for the lack of medical necessity of [Applicant's] services. Nir v. Allstate, 7 Misc.3d 544, 546-47, 796 N.Y.S.2d 857, 860 (Civil Court, Kings Cty. 2005). "A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards." Id. "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." Id. at 616, 248; accord, Prime Psychological Services, P.C. v. Progressive Casualty Ins. Co., supra; Millennium Radiology, P.C. v. New York Central Mutual Fire Ins. Co., 23 Misc.3d 1121(A), 2009 N.Y. Slip Op. 50877(U), 2009 WL 1261666 (Civ. Ct. Richmond Co., Katherine A. Levine, J., Apr. 30, 2009). Without a recitation to generally accepted medical practice, a peer reviewer's opinion is simply a different professional judgment which, in and of itself, does not establish that the disputed services were medically unnecessary to treat the injured person's condition.

Applicant contends that Respondent's Peer Review fails the Nir standard and I agree. I find that Dr. Bazos has failed to cite to sufficient medical authority as required in Jacob Nir, M.D. a/a/o Josapphat Etienne v. Allstate Ins. Co., 7 Misc. 3d 544, 796. N.Y.S.2d 857 (Civ. Ct. Kings Co. 2005) and CityWide Social Work & Psychological Services, P.L.L.C. a/a/o Tremayne Brow v. Travelers Indemnity Company, 3 Misc. 3d 608, 777 N.Y.S.2d 241 (Civ. Ct. Kings Co. 2004). Therefore, the burden does not shift to Applicant. However, even if Dr. Bazos' Peer Review was sufficient to support Respondent's defense of lack of medical necessity, I find that Applicant satisfied its burden of rebutting the Peer Reviewer's assertions. The Applicant's Rebuttal meaningfully refers to and rebuts the conclusions set forth in the peer review report. High Quality Medical, P.C. v. Mercury Ins. Co., 26 Misc.3d 145(A), 2010 N.Y. Slip Op. 50447(U) (Sup. Ct. App. Term 2d Dep't 2010).

Furthermore, I find that Dr. Bazos's findings are conclusory and unsupported by the evidence. With regard to his assertion that Assignor's injuries are pre-existing and not causally related, "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 initial 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), that is, that the conditions were not caused or exacerbated by the accident, see Mount Sinai, 263 A.D.2d 11, 18 - 19; Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 2009 NY Slip Op 00351 (App Div 2d Dept., Jan. 20, 2009). Since No-Fault covers exacerbations of pre-existing conditions, see Wolf v. Holyoke Mut. Ins. Co., 3 A.D.3d 660 (3d Dept. 2004), and since the insurer's own medical expert in no way eliminated the possibility that the injured person sustained an exacerbation of the degenerative process, Respondent is liable for coverage. See Sanclemente v. MTA Bus Co., 2014 NY Slip Op 02280 (2d Dept., April 2, 2014); Rodgers v. Duffy, 95 A.D.3d 864 (2d Dept. 2012);

Accordingly, in light of the foregoing, based on the arguments of counsel, and after thorough review and consideration of all submissions, I find in favor of the Applicant and award $3,992.93. This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator. Any additional issues raised in the hearing record are held to be moot and/or waived insofar as they were not raised at the time of the hearing.

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**	**Amount**	**Status**
Laxmidhar Diwan MD	**01/29/16 - 01/29/16**	**$8,170.61**	**Awarded: $3,992.93**
Total		**$8,170.61**	**Awarded: $3,992.93**

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 05/06/2016, which is a relevant date only to the extent set forth below.)

Interest runs from 05/06/2016 (the filing date for this case) until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty-day month

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of that sum total, subject to a maximum fee of $1,360. See 11 NYCRR §65-4.6(d). 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 New York
SS :
County of Nassau

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

03/18/2017
(Dated)

Alise Schor

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:
b9a07d4839b156051977ae48b56b5dc4

Electronically Signed

Your name: Alise Schor
Signed on: 03/18/2017