American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Action Chiropractic, PC (Applicant)	AAA Case No.	17-16-1033-9752
	Applicant's File No.	
- and -	Insurer's Claim File No.	30919200192
	NAIC No.	10839
Country-Wide Insurance Company (Respondent)		

ARBITRATION AWARD

I, Fred Lutzen, 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 or claimant

1. Hearing(s) held on 03/30/2017
   Declared closed by the arbitrator on 03/30/2017

   Jeffrey Datikashvili, Esq., from Gene Sigalov Esq. participated in person for the Applicant

   Joshua Shack, Esq. from Jaffe & Koumourdas LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 8,314.35**, 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

   This is a claim seeking reimbursement for three days of MUAs to the cervical, thoracic, lumbosacral spinal areas and the pelvis on 12/9/15, 12/10/15 and 12/15/15 rendered to the EIP, a 41 y/o male, following an automobile accident in which he was the driver, that occurred on 9/12/15. The charges include the fees for the physician and assistant.

   My decision is based on the arguments of representatives for both parties, and those documents contained in the electronic case folder as of the date of this hearing. No witnesses were called to testify at the hearing.

The respondent denied the claims based on a peer review report prepared by Robert A. Sohn, D.C. The issue is whether the aforementioned manipulations under anesthesia were medically necessary.

4. Findings, Conclusions, and Basis Therefor

No-Fault first party benefits are reimbursable for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle. It is now well-settled that a medical provider establishes a prima facie case of entitlement to payment of no-fault benefits upon the submission of a proper claim form setting forth the fact and amount of the losses sustained as well as the additional fact that that the payment of no-fault benefits was then overdue. Insurance Law 5106(a); Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742; Amaze Medical Supply, Inc. v. Eagle Insurance Co., 2 Misc. 3d 128(A).

Here, Applicant's initial burden was satisfied. Applicant has provided proof of claim, NF3s, and proof of mailing. Applicant responded to Respondent's requests for additional verification on 2/25/16, and Respondent issued its NF10 Denial Form on 3/15/16. The Respondent now has the burden to prove its medical necessity defenses.

In this case, Respondent relies on a peer review report by a physician who reviewed the EIP's medical records, including pre-MUA records, and rendered an opinion on medical necessity. An insurer may submit the injured party's medical and other records to a third-party physician, who "reviews the records and renders an opinion on the medical necessity of the treatment at issue in a so-called peer review report." Sky Medical Supply Inc. v. SCS Support Claims Services, Inc., 17 F.Supp.3d 207, 214-215 (E.D.N.Y. 2014) (internal quotation marks omitted). That said, 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.

To successfully support its denial, the respondent's peer review must address all of the pertinent objective findings contained in the applicant's medical submissions. The peer review must set forth how and why the disputed services were inconsistent with generally accepted medical and/or professional practices. The conclusory opinions of the peer reviewer, standing alone and without support of medical authorities, will not be considered sufficient to establish the absence of medical necessity. (See, Citywide Social Work, et. al. v. Travelers Indemnity Co., *supra*; Amaze Medical Supply, Inc. v. Eagle Insurance Co., *supra*.). Specifically, a chiropractor's peer review explaining in some detail that MUA services were not medically necessary according to the standards of protocol followed by the National Academy of MUA Physicians suffices to make a showing of entitlement to judgment for an insurer. E.g., Synergy Medical v. Praetorian

Ins. Co., 40 Misc.3d 127(A), 975 N.Y.S.2d 370 (Table), 2013 N.Y. Slip Op. 51047(U), 2013 WL 3357847 (App. Term 1st Dept. July 2, 2013). For the purposes of this arbitration, such evidence may be sufficient to meet Respondent's burden.

Dr. Sohn provided a peer review report, dated 3/11/16, wherein he opined that the MUAs performed from 12/9/15-12/15/15 of the cervical spine, lumbar spine and pelvis were not medically necessary. He noted that the EIP was first evaluated by Apple Chiropractic, and complaints included neck pain, right shoulder pain, lower back pain and right knee pain. The initial impression was cervical radiculopathy, whiplash, right shoulder injury and pain, right knee, injury, cervical, thoracic and lumbar subluxation, lumbar sprain/strain, and pain in the thoracic spine. Chiropractic manipulative therapy was recommended. He noted there was "no indication of what particular manipulative therapy technique will be administered. No indication of any range of motion to be administered."

Dr. Sohn's detailed reporting on his review of the medical records indicated that he reviewed 22 items (or sets) of medical records and reports for this EIP, which included multiple chiropractic treatment notes throughout the month of September 2015 where the claimant was receiving treatment to the neck, mid, and lower back. "No indication of any treatment rendered to the area of the sacroiliac joint or the pelvic region….Continuation of chiropractic treatment throughout the month of October 2015….No indication of any specific manipulative technique such as the diversified technique or any form of physical therapy modalities to include range of motion…. Follow-up chiropractic evaluation, 11/11/15, from Apple Chiropractic [with little change to the impression]… No diagnosis to the sacroiliac region or the pelvic region." Dr. Sohn noted the continued restrictions and positive orthopedic testing, and that the recommendation was to continue chiropractic manipulative therapy. "No indication that any form of range of motion was to be administered. No indication in the follow-up examination of how the claimant was responding to the present course of chiropractic treatment and clearly no indication of any specific manipulative technique to have been altered from the initial of chiropractic treatment. He noted range of motion and muscle testing was completed on 10/5/15, 11/9/15, and 12/14/15. Dr. Sohn also reported "[t]here clearly was no indication of any treatment or injury as it relates to the area of the pelvic ring or the sacroiliac area. However, there was still manipulation performed to the pelvic region."

Dr. Sohn cites to The National Academy of Manipulation Under Anesthesia Physicians, "Establishing Medical Necessity", which provides:

> "[e]very condition treated must be diagnosed and justified by clinical documentation in order to establish medical necessity. Documentation of the patient's progress and the patient's response to treatment are combined to confirm the working diagnosis."

Dr. Sohn states that it "is also necessary as part of any healthcare professional that the documentation must be specific in detail. This is a standard protocol in the field of chiropractic. Medical records are essential in treatment not only for MUAs, but the

actual treatment by the providing chiropractor. It should be clear and precise in the chiropractic treatment notes in regards to the type of manipulative technique that was being administered on a routine basis or any alternative treatment that was provided to this claimant in regards to manipulative techniques." He states further that it "is the obligation of that consultant for the MUA to review all medical records such as treatment notes by the treating chiropractic, physical therapy treatment notes by the physical therapist as well as acupuncture notes. The consultative report by Dr. Bromberg had failed to indicate any evidence of reviewing the medical records. There is no indication by the consultant of the type of treatment that was being rendered by the treating chiropractor as well as failing to indicate any specific form of treatment provided by the physical therapist."

Dr. Sohn concludes by also stating:

"[t]he chiropractor had failed to indicate if there was any cavitation administered as part of the in-office chiropractic treatment program or if the claimant was even able to comply with the manipulation that was being administered. There clearly was no indication of any range of motion attempted as part of the in-office non-anesthetic treatment program. The consultant did not indicate that they reviewed any medical records…[t]herefore, it is the opinion of this examiner that the manipulation under anesthesia performed to the cervical, lumbar spine and pelvic region has not been established as a chiropractic or medical necessity."

Both Dr. Sohn and Dr. Bruce Bromberg, D.C., make repeated reference to and rely on "The National Academy of Manipulation Under Anesthesia Physicians" in support of their contrary medical rationale. In reliance thereon, as well as other sources, Dr. Sohn provides a standard of care for use of MUAs in his peer report, and states that the standard outlined was not followed. He provided a well-reasoned peer opinion and set forth a satisfactory factual basis to reach his opinion. Based on the opinion set forth by Dr. Sohn, I find that Respondent satisfied its burden by coming forward with evidence to support its denial for lack of medical necessity as to the MUA services.

For these MUA services, the burden shifts back to Applicant, who must prove medical necessity for the MUA services by a preponderance of the evidence. *See,* Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

Applicant relies on the initial evaluation report dated 12/6/15 and the rebuttal affidavit by Dr. Bromberg dated 4/7/16. There are no other pre-MUA treatment records submitted for my review, and no specific treatment records were cited to by Dr. Bromberg in his rebuttal affidavit, although he does refer to spinal MRIs, but no pelvic MRI. Dr. Bromberg disagrees with Dr. Sohn, and also cites to the NAMUAP guidelines in support of medical necessity for the disputed treatment and procedures.

It should be noted again that there are no records from any other provider showing that the EIP was responding to pre-MUA conservative care *or was not* responding to such care - for my review. We do have the benefit, however, of having a completed questionnaire by the EIP dated 12/6/15, the date of the MUA consultation visit with the

Applicant provider. The EIP stated that his prior conservative treatment has offered him no improvement, "none." Dr. Bromberg also noted on 12/6/15 in his check-box initial consultation report that there has been "no" symptomatic improvement from prior and ongoing chiropractic, physical therapy or acupuncture treatments.

However, in citing to the guidelines provided by the NAMUAP, Dr. Bromberg states that the EIP is indicated for MUA procedure(s) under four of the listed criteria. First, Dr. Bromberg states that he has "*responded favorably* to conservative, non-invasive chiropractic and medical treatments, but continues to experience intractable pain and/or biomechanical dysfunction." He then states that he is also indicated for MUA under guideline #6, "Patients whereby manipulation of the spine or other articulations is the treatment of choice, however, due to the extent of the injury mechanism, conservative manipulation has been minimally effective in 2-6 weeks of care and a greater degree of movement of the affected joint(s) is needed." These statements severely lack credibility as the EIP himself states there has been no improvement, there is no indication that this was his treatment of choice, and Dr. Bromberg also stated there was no symptomatic improvement from his prior manipulation treatments. The statements are not consistent with the records provided in this case and I find them to lack credibility and probative value.

Moreover, there are no pre-MUA records, other than the 12/6/15 evaluation a few days before the MUAs commenced, showing that the EIP could not tolerate the adjustments while awake. In fact, he had been recommended to continue such treatments by one of his other treating chiropractors in mid-November 2015. The NAMUAP guidelines cited by both sides state that the prior records "are required to be present in the history and physical documentation." Applicant did not provide these records or refer to any specific prior treatment record.

In addition, the MUA services for the pelvic region were billed under CPT Code 27194. This code is used for closed fractures and is designated for the hip and pelvic area. It is described as "treatment of pelvic ring fracture, dislocation, diastasis or subluxation; with manipulation, requiring more than local anesthesia." Willets Point Chiropractic P.C. v Allstate Ins., 2012 NY Slip Op 51614(U) (Civ. Ct. Richmond Co. 2012). Applicant's evidence is equally deficient with respect to medical necessity of MUAs to the pelvic area.

I have reviewed Dr. Bromberg's entire rebuttal affidavit, as well as his initial evaluation and MUA reports. I am not persuaded by this rebuttal evidence and I determine that is has failed to rebut the well-reasoned and supported opinion by Dr. Sohn. Dr. Bromberg reports that he reviewed "the patient's conservative treatment records", but none were specifically cited or relied upon for him to conclude that the EIP "responded favorably" to that prior treatment. Again, this directly contradicts the EIP's own description of his prior treatment.If the EIP was not responding to chiropractic treatment, with no improvement at all to his symptoms, it is difficult to understand why one would believe that manipulations under anesthesia would be necessary or offer him any relief. Dr. Bromberg fails to explain this in his rebuttal.At the time of the hearing, it was confirmed by Applicant's counsel that no other medical evidence or pre-MUA treatment records or reports were submitted or available for my review. On the contrary, Dr. Sohn

specifically cited to many portions of the medical records to establish his opinion's factual basis.

Having carefully considered the submissions of the parties, the relevant case law and the arguments of respective counsel, I conclude that the preponderance of the credible evidence supports a finding in favor of the Respondent as to the lack of medical necessity for the MUA services rendered to the EIP from 12/9/15-12/15-15.

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 New York
SS :
County of Suffolk

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

04/27/2017
(Dated)

Fred Lutzen

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:
4e0465b5e3c77dffdf1e633ed571b864

Electronically Signed

Your name: Fred Lutzen
Signed on: 04/27/2017