American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Stand Up MRI of Bensonhurst PC (Applicant)	AAA Case No.	17-16-1044-4805
	Applicant's File No.	
- and -	Insurer's Claim File No.	0392815700 2RC
Allstate Insurance Company (Respondent)	NAIC No.	19232

ARBITRATION AWARD

I, Phyllis Saxe, 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(LB)

1. Hearing(s) held on 05/30/2017
   Declared closed by the arbitrator on 05/30/2017

   Jan Chow, Esq. from Dash Law Firm, P.C. participated in person for the Applicant

   Karen Stulgiatis , Esq. from the Law Offices of Karen Lawrence from Allstate Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 1,571.80**, was NOT AMENDED at the oral hearing.
   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 and that Respondent's Form NF-10 denial of claim was timely issued. Additionally, they stipulated that there was no fee schedule in dispute.

3. Summary of Issues in Dispute

   Assignor (LB), an 84-year-old male, sustained injuries on November 13, 2015 as a result of a motor vehicle accident. On November 18, 2015, Assignor presented to Dr. Goldshteyn's office for chiropractic care (EMIS Chiropractic P.C.). On December 7, 2015, Assignor had a lumbar and cervical MRI performed and the

bills for those services was denied by Respondent based on a peer review report by Kevin Portnoy, D.C. The issue in dispute is whether the 2 (two) MRIs were medically necessary.

4. Findings, Conclusions, and Basis Therefor

This award is rendered after my thorough review and considerations of the parties' evidence submitted to and maintained by the American Arbitration Association's electronic case filing system "MODRIA", and oral arguments presented by both parties during the hearing.

This dispute arises from a motor vehicle accident on November 13, 2015, in which Assignor, as 84 year old male sustained injuries to his neck and lower back. The record reveals that the patient presented to Dr. Goldshteyn's office on November 18, 2015 for a chiropractic evaluation. He reported his neck and back pain to be 7/10.

The Applicant established its prima facie case by proof that the prescribed statutory billing forms had been received and that payment of no-fault benefits was not forthcoming. (See, New York & Presbyt. Hosp. v. Countrywide Ins. Co., 44 A.D.3d 729 [N.Y. App. Div. 2d Dep't 2007]). Proof of the receipt of the Applicant's billing is implicit in the timely denial issued by the insurer. Accordingly, it now falls to the Respondent who is obliged to demonstrate the validity of its defense.

Before focusing on the peer review, I note that "[a]s part of its prima facie showing, the [patient or, as here, the provider, as assignee] is not required to show that the contents of the statutory no-fault forms themselves are accurate or that the medical services documented therein were actually rendered or necessary. Stated another way, the [patient`s assignee] is not required to establish the merits of the claim to meet its prima facie burden." (Viviane Etienne Med. Care, P.C. v Country-Wide Ins. CO., 114 A.D. 3d 33, 45, aff`d 25 NY 3d 498). On the contrary, "[m]edical necessity is presumed upon timely submission of a no-fault claim (see All Country Open MRI & Diagn. Radiology P.C. v. Travelers Ins. Co., 11 Misc. #d 131[A], 815 N.Y. S.2d 493, 2006 NY Slip Op 50318[U] App Term, 9th & 10th Jud Dists. 2006]). Thus, ordinarily it falls to the defense to establish that the billed-for services were not medically necessary." (Park Slope Med. & Surgical Supply, Inc. v. Progressive Ins. Co., 34 Misc. 3d 154 [A] [N.Y. App. Term 2012] [concurring opinion, Golia, J.]; see, also, Kings Med. Supply Inc. v. Country -Wide Ins. Co., 5 Misc. 3d 767, 771 [N.Y. Civ. Ct. 2004 ["It is by now firmly established that the burden is on the insurer to prove that the medical services or supplies in question were medically unnecessary {citation omitted}").

The carrier, to establish the validity of its defense on a prima facie level and put the Applicant to its proof, must, at a minimum, demonstrate both a factual predicate and medical rationale for the asserted absence of medical justification for the specific service provided to the patient, and must premise its contention upon uncontroverted evidence of generally, accepted medical standards of care. (See, Nir v. Allstate Ins. Co., 7 Misc. 3d 544, 547 [N.Y. Civ. Ct, 2005]).

The initial focus then is on the Portnoy peer review.

Relevant portions of the peer review state as follows :"Advanced diagnostic imaging should be reserved for claimant's who have not shown significant improvement over the course of six (6) to eight (8) weeks of conservative therapy. It is clear that there was not enough time given for any conservative treatment to control the claimant's symptoms or for the acute symptoms to resolve. At such an early stage management of the claimant's condition in the clinical context should be conservative in nature. Surgical referral and invasive pain management procedures would not be treatment options during the acute stage of trauma. Furthermore, ordering the MRI would not alter or impact the course of chiropractic treatment in any significant way.

Furthermore, **"The use of advanced imaging should not be guided be the guided by the occurrence for an injury but rather by specific clinical signs and symptoms resulting from an injury."** Mark Adrian, M.D. FRCPC Vol. 47 No. 7 Sep. 2005 BC. Medical Journal.

In addition, an article titled Disc Pathology After Whiplash Injury. **"suggests it may be unnecessary to examine whiplash patients in the acute phase with MRI. The Article goes on to state that MRI is indicated later in th course of treatment in patients with persistent arm pain, neurologic deficits, or clinical signs of nerve root compression to diagnose disc herniations requiring surgery"**

Where, as here, a peer review provides a factual basis and medical rationale for the opinion stated, the burden shifts to the provider to refute the carrier's showing with sufficient contrary proof which, if it is to prevail, tends to establish the medical necessity for the service provided. (See, Pan Chiropractic, P.C. v. Mercury Ins. Co., 24 Misc. 3d 136 [A] [N.Y. Civ. Ct. 2008]).

To successfully refute a peer review report which meets the carrier's burden of proof, the Applicant must also meaningfully refer to, or rebut, the conclusions articulated by the peer (See, Pan Chiropractic, P.C. v. Mercury Ins. Co., supra), and in the absence of persuasive medical evidence which tends to rebut insurer's prima facie showing of a lack of medical necessity, the carrier's position must be sustained (See, Hong Tao Acupuncture, P.C. v. Praetorian Ins. Co., 35 Misc. 3d 131 [A] [App Term 2nd Dept. April 10, 2012]).

In response to the peer report Applicant submits the rebuttal by Dr. Brian Goldberg, dated August 16, 2016. Dr. Goldberg states that Portnoy's analysis fails to subscribe significance to objective clinical abnormalities that the patient had such as muscle weakness at the lower extremities. Moreover, the rebuttal review points out that Portnoy overlooks a "host of positive orthopedic findings contained in Goldshteyn's report indicative of nerve root involvement". The Rebuttal points to medical literature which state that when patients, similar to this 84 year-old male presents with symptoms suggesting of neurological compromise, an MRI is needed to provide guidance for the performance of epidural injections for pain management. (See, ACR Appropriateness Criteria; Low Back Pain, American College of Radiology, (2011). As to the issue of performing the MRI prematurely, Dr. Goldberg notes medical support to perform an MRI when, as here, the patient is an 84 year old man, suffering from acute spinal trauma-… an MRI is appropriate to evaluate a patient of this advanced age who presents clinical evidence of conditions which may affect the safety and appropriateness of chiropractic procedures". Jose Mena, MD, et al 22 Radiculopathy: Physical Medicine, Rehabilitation Clinics of North America 144 (Saunders 2011).

Accordingly, I find the Rebuttal peer review to meaningfully overcome the carrier's burden of proof and therefore award Applicant $1571.80.

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
	Stand Up MRI of Bensonhurst PC	**12/07/15 - 12/07/15**	**$1,571.80**	**Awarded: $1,571.80**
Total			**$1,571.80**	**Awarded: $1,571.80**

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 09/26/2016, which is a relevant date only to the extent set forth below.)

Interest runs fromSeptember 26, 2016, until the date that payment is made at two percent per month, simple interest, on 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, the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6.

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

06/27/2017
(Dated)

Phyllis Saxe

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:
8841a9a1810347d453f649c70b27564c

Electronically Signed

Your name: Phyllis Saxe
Signed on: 06/27/2017