American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Walden-Bailey Chiropractic Center (Applicant)	AAA Case No.	17-15-1021-2837
	Applicant's File No.	15-2369
- and -	Insurer's Claim File No.	0112014660101128
	NAIC No.	19232
Allstate Insurance Company (Respondent)		

ARBITRATION AWARD

I, Kent Benziger, 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: R.L.

1. Hearing(s) held on 10/20/2017
   Declared closed by the arbitrator on 10/20/2017

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

   Roger Sisser, Esq. from Allstate Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 448.56**, 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

   1) Whether the Applicant, Walden-Bailey Chiropractic Center, has properly fee scheduled a physical performance test on August 9, 2014 and has made a prima facie showing of necessity for treatment from January 23, 2015 to May 8, 2015; 2) Whether the Respondent properly reimbursed the physical performance test; and, 3) Whether the Respondent has established lack of medical necessity for the treatment based on the accompanying peer review of Dr. Gefaller.

   This hearing was conducted using the electronic case folder maintained by the American Arbitration Association. All documents contained in that folder are made part of the

records of this hearing. I have reviewed the documents contained in the electronic case folder as of the date of this award as well as any documents submitted upon continuance of the case. Any documents submitted after the hearing that have not been entered in the electronic case folder as of the date of this award will be listed immediately below and forwarded to the American Arbitration Association at the time this award is issued for inclusion in said case folder.

4. Findings, Conclusions, and Basis Therefor

On July 27, 2014, the Assignor/Eligible Injured Party, a 43-year-old female, was, by history, involved in a motor vehicle accident. Following the accident, the Assignor was taken to St. Elizabeth Hospital in Covington, Kentucky was she was evaluated and released for numerous complaints including lower back and bilateral wrist and leg pain. Upon returning to the Buffalo area, the Assignor treated with Immediate Care. She received treatment from Dr. Strut and from Dr. Ward.

On August 20, 2014, a lumbar MRI was performed which was interpreted as revelaing small to moderate left paracentral disc herniation compression the theca sac and encroaching the left lateral recess with mild bilateral foraminal stenosis. On August 6, 2014, a cervical MRI was performed with a C2-3 pinpoint central protrusion, a C3-4 small central protrusion minimally effacing the anterior subarachnoid spade and a C4-5 broad-based posterior subligamentous protrusion partially effacing the anterior subarachnoid space with right posterior spurring and subligamentous protrusion encroaching on the right lateral recess with associated hypertrophy, C5-6 mid disc space narrowing and C6-7 right paracentral right posterior subligamentous protrusion minimally effacing the anterior subarachnoid space.

DOS: 9/15/14

On the above dates, the Applicant performed physical performance testing. The treatment was billed at $150.96 pursuant to four units of CPT 97750 (Physical performance tests with written report, each 15 minutes). The Respondent reimbursed $100.64 on the basis that this fee reimbursement was properly calculated according to the Workers Compensation Fee Schedule. The Explanation of Benefits also noted that the Applicant previously billed for this same service on an August 4, 2014 at $100.64 which the Respondent reimbursed.

Pursuant to the Fourth Amendment effective April 1, 2013 to 11 NYCRR 65-3.8(g)(1), the Applicant fees cannot exceed the charges permitted pursuant to the Insurance Law 5108 which would incorporate the Workers Compensation Fee Schedule.As a finding of fact, the Respondent properly reimbursed for the Physical Performance test. This is not a

matter of interpretation, but a straight-forward application of the fee schedule. The Relative Value for the service is 5.41 which is multiplied by the conversion factor in Region II of 4.65. The Respondent paid the proper reimbursement of $100.64.

DOS: 1/23/15- 5/8/15

The above dates of service were for chiropractic treatment. Prior to the period in dispute through a September 3, 2014 SOAP Note, the records stated the Assignor entered with Neck, Mid and Low Back Pain. The pain was rated at 7/10 with objective findings of PSMS, trigger points, ROM, hypertonicity, SLR compression. The stated diagnoses is listed as cervical disc syndrome, lumbar disc syndrome, thoracic disc syndrome and migraine. The treatment consists of joint manipulation to the cervical, thoracic and lumbar spine with hot moist pad The assessment stated that the Assignor responded with slow improvement.

In October and November of 2014, the subjective complaints of pain raised to 8 and 9 out of ten. However, from December 2014 through March 21, 2015 - for 21 chiropractic sessions, the subjective rating of pain remained 7 out of 10. Then for four sessions to May 8, 2015, the SOAP notes listed subjective complaints of pain of six out of ten. During the period in disputeall of the SOAP NOTES are exactly identical as to objective findings and diagnoses and all contain the same phrase that the "Assignor has responded with slow improvement".

IME On December 17, 2014, the Assignor was evaluated at the Respondent's request by Dr. Ronald Gefaller, D.C. At the time of the exam, the Assignor stated her complaints had improved. She described lower back pain with radiation into the right leg. On examination, the Assignor completed Oswestry and Neck Disability indices that revelaed moderate disability with an improvement from the prior test. Orthopedic testing revealed lower back pain with Adam's test at 25 degrees. Orthopedic tests were also positive in the cervical spine. Segmental stiffness and swelling was noted as was hypertonia. Range of motion was normal except for a 10 percent reduction in right rotation. The diagnostic impression was of chronic cervical sprain/strain associated with disc injury - unresolved, chronic sacro-iliac sprain/strain associated with disc injury - unresolved, chronic frontal/suboccipital headaches - unresolved, thoracic sprain/strains - resolved, chronic thoracic segmental fixation - unresolved and probable left TMD - unresolved Although the Assignor stated her complaints have improved since the last evaluation, she continued to rate her pain 7/10.

Based on his examination, Dr. Gefaller found that continued chiropractic was not recommended after a significant trial of chiropractic treatment for four months. He noted positive findings and the injuries casually related. He found the Assignor had been given a multi-mode stimulator and a lower back brace.

Through an addendum that appears to be erroneously dated January 6, 2014, Dr. Gefaller noted that in his IME report of December 18, 2014, he found that additional chiropractic treatment was not recommended. He noted the Assignor had approximately five months of chiropractic treatment with massage therapy and pain management. He noted that although the Assignor reported improvement with care, she continued to have symptomology and that findings had not significantly changes since her previous IME. Dr. Gefaller concluded that based on these facts and the duration of her symptoms, her condition should be considered chronic and unlikely to significantly improve or resolve with additional chiropractic treatment. Based on the reports, the Respondent terminated chiropractic and related benefits effective January 22, 2015.

Analysis. A presumption of medical necessity attaches to a Respondent's admission of the Applicant's timely submission of proper claim forms, and the burden then switches to the Respondent to demonstrate the lack of medical necessity. Acupuncture Prime Care, P.C. v. State Farm Mutual Auto Ins., 2007 N.Y. Slip Op. 522273U; 2007 N.Y. Misc. LEXIS 7860 (Dist. Ct. Nassau Co. 12/3/2007); A.B. Medical Services, PLLC v. N.Y. Central Mutual Fire Ins. Co., 7 Misc. 3d 1018(a), 801 N.Y.S.2d 229 (Civil Ct. Kings Co. 2005); Citywide Social Work & Psychological Services v. Travelers Indemnity, 3 Misc.3d 608, 609 (Civil Ct. Kings Co. 2004). Respondent thus bears "both the burden of production and 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) (N.Y.C. Civ. Ct 2006). The quantum of proof necessary to meet Respondent's burden, at the bare minimum, is to "establish a factual basis and medical rationale for the lack of medical necessity of Applicant's services. Id. See also: A.B. Medical Services, supra. As to treatment including chiropractic care, the Respondent must document that the treatment was no longer benefiting the claimant and was not providing curative or significant and quantifiable palliative benefits. Hobby v. CNA Ins. Co., 267 A.D.2d 1084, (4 Dept., 1999).

As a finding of fact. Dr. Gefaller's examination is persuasive. He conducted two thorough examinations and submitted addendums. Although the Assignor had positive findings, Dr. Gefaller found no curative of palliative benefits for the treatment for a five-month period. It is significant that where certain treatment is not providing any "curative" or "palliative" benefits, it may no longer be medically necessary within the meaning of the no-fault endorsement. See: Ray Gaul and Commercial Union Ins. Co., 268 A.D.2d 816, 701 N.Y.S.2d 643 (3 Dept., 2000). Through Dr. Gefaller's report, the Respondent has sustained its burden of proof as to lack of medical necessity. He noted that the Assignor's subjective complaints of pain had not improved, and there was findings of significant palliative benefits. The Applicant's SOAP notes fail to rebut the finding of lack of medical necessity. Khodadadi Radiology v. Gomez, 16 Misc.3d 131 (2007). For over 20 sessions, the reports list the same subjective pain level and are essentially identical. The final four reports list a subjective pain level of six out of ten instead of seven out of ten. However, besides the listing of subjective pain levels - which could in some instances be considered self-serving by the provider, the SOAP notes have no additional objective information. The identical structure and wording of the SOAP notes diminishes the credibility of the records. The Applicant would have been

better served with re-evaluations and non-boilerplate information to rebut the in-depth examinations of Dr. Gefaller. Applicant is denied reimbursement for the treatment in dispute.

APPLICANT IS DENIED REIMBURSEMENT FOR THE TREATMENT IN DISPUTE.

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 Erie

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

11/12/2017
(Dated)

Kent Benziger

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:
fad9052eb96c3bd67105a9217a0974c0

Electronically Signed

Your name: Kent Benziger
Signed on: 11/12/2017