American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New Horizon Surgical Center LLC (Applicant)	AAA Case No.	17-17-1054-1404
	Applicant's File No.	STLG16-28777
- and -	Insurer's Claim File No.	0409998737
	NAIC No.	19232
Allstate Insurance Company (Respondent)		

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: MO

1. Hearing(s) held on 01/09/2018
   Declared closed by the arbitrator on 01/09/2018

   Coleen Terry Esq from Law Office Of Stephen A. Strauss, PC participated in person for the Applicant

   David Bendik Esq from Short & Billy PC participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 19,646.13**, 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

   Whether Applicant established entitlement to No-Fault compensation for services facility fees associated with right shoulder arthroscopy performed on Assignor

   Whether Respondent made out a prima facie case of lack of medical necessity, and if so, whether Applicant rebutted it.

   Whether Respondent' defense is precluded even though it did not issue a denial

   Whether an action in no-fault Arbitration is the appropriate remedy for the alleged violation of New Jersey health law

4. Findings, Conclusions, and Basis Therefor

Applicant was represented by Coleen Terry Esq., who presented oral arguments and relied upon documentary submissions. David Bendik Esq., appeared on behalf of Respondent and presented oral arguments and relied upon documentary submissions. I have reviewed the submissions contained in MODRIA. These submissions are the record in this case.

The dispute arise from the underlying automobile accident of June 5, 2016, in which the Assignor (AS), a 48-year-old-male was a restrained driver. Thereafter patient sought private medical attention and was eventually evaluated by Dr. McCulloch M.D.. Patient presented with injuries to the cervical spine, bilateral shoulders, thoracic spine and lumbar spine. Patient was recommended to undergo conservative care. Eventually patient was recommended to undergo right shoulder arthroscopy. The bills in dispute are for facility fees associated with right shoulder arthroscopy performed on the patient on 7/21/16.

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)*. Applicant's proof is also in Respondent's denials, which acknowledged receipt of the bill.

Applicant's proof is also in Respondent's denials, which acknowledged receipt of the bill. Since Applicant establishes its prima facie showing of entitlement to recover first-party no-fault benefits, the burden then shifts to the Respondent to demonstrate a lack of medical necessity for the items at issue. See, *Citywide Social Work & Psychological Services, PLLC v. Allstate Ins. Co., 8 Misc 3d 1025 A (2005)*.

On 9/29/16, Respondent issued timely denial for facility fees associated with Right Shoulder Arthroscopy performed on Assignor on 7/21/16, based on a Peer Review by Dr. Thomas Nipper M.D performed on 9/28/16. Upon his review of the medical records, Dr. Nipper determined that there was no medical necessity for the right shoulder Arthroscopy performed on the patient on 7/21/16.

Medical Necessity:

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).*

PEER by Dr. Thomas Nipper M.D.

On September 28, 2016, Dr. Thomas Nipper M.D. issued a peer review on behalf of Respondent regarding the medical necessity of right shoulder arthroscopy performed on Assignor on 7/21/16. Dr. Nipper 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 right shoulder Arthroscopy and any services associated therewith has not been established.

Dr. Nipper notes that past medical history is notable for shoulder surgery 16 years ago, which the patient responded very well to. He further states that the MRI revealed evidence of rotator cuff tear. However, there were no clinical objective finding to suggest causality for the operative services related to the accident. The findings at surgery were inconsistent and incompatible with the mechanism of injury. The rotator cuff tear documented in the MRI is pre-existing and not causally related to the accident.

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 Applicant

Applicant submits a rebuttal by Dr. Kenneth McCulloch M.D.. He states that Dr. Nipper's conclusion that the rotator cuff tear was pre-existing is without merit, as he noted in his examination that the patient was asymptomatic prior to the accident. The

patient was recommended right shoulder arthroscopy given the positive findings on history, examination, MRI, lack of response to conservative measure over an extended period of time and acute changes in function associated with MVA. It is common knowledge that when a patient is unresponsive to conservative management, the only measure to control the pain is surgical intervention. He cites to medical authority to support his opinion.

Addendum by Dr. Nipper

Dr. Nipper issued an addendum in response to Applicant's rebuttal. In his addendum Dr. Nipper restates his opinion expressed in the original peer report dated September 28, 2016.

Conclusion:

After careful consideration of both parties' submissions, as well as oral arguments presented at hearing, I find the following.

In *Mount Sinai Hospital v. Triboro Coach Incorporated, 263 AD2d 11 (App. Div., 2nd Dept, 1999),* the court stated that 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."

Accordingly, the burden is on the insurer to come forward with proof in admissible form to establish the "fact or founded belief" that the patient's treated condition was unrelated to his or her automobile accident. Id., citing to *Central General Hospital v. Chubb Group of Ins. Cos., 90 N.Y.2d 195 at 199, 659 N.Y.S.2d 246 (Court of Appeals, 1997).*

This calls for evidence by a medical expert qualified to render an opinion on causality. *Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 22, 871 N.Y.S. 2d 680 (App. Div., 2nd Dept., 2009).*

An insurer fails to meet this burden where the affidavit of its medical expert is "conclusory, speculative, and unsupported by the evidence." *New York & Presbyterian Hospital v. Selective Ins. Co. of America, 43 A.D.3d 1019, 842 N.Y.S.2d 63 (App. Div., 2 nd Dept., 2007).*

Moreover, even if there was a pre-existing injury, its exacerbation would be covered under No-Fault. *Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S. 2d 680 (App. Div., 2nd Dept., 2009).*

The crux of Dr. Nipper's peer report is that the patient's condition was pre-exiting, and not causally related to the accident at issue. This argument is unavailing. As Dr. McCulloch noted, at the time of the evaluation patient stated that she was asymptomatic prior to the accident.

Moreover, had the patient had a pre-existing condition, the surgery would still be considered medically necessary if the damage to the shoulder became aggravated as a result of the accident. Even if there was a pre-existing injury, its exacerbation would be covered under No-Fault. *Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S. 2d 680 (App. Div., 2nd Dept., 2009).*

Furthermore, Dr. Nipper makes a comment that the findings at surgery were inconsistent and incompatible with the mechanism of injury. However, Dr. Nipper does not qualify himself to render an opinion on causality. *Kingsbrook Jewish Medical Center v. Allstate Ins. Co. Id.* He doesn't discuss the mechanics of the accident, nor is he qualified to render that opinion. I find Dr. Nipper's opinion to be conclusory.

In light of the foregoing, I find that Respondent has failed to establish its defense. The presumption of medical necessity which attaches to Applicant's claim has not been successfully challenged.

Accordingly Applicant's claim to reimbursement is granted.

Self-referral by the Provider:

At the time of the hearing Applicant raised the issue of Dr. McCulloch referring the patient to himself as part owner of New Horizon Surgical Center LLC. Specifically, Respondent contends that Applicant is in violation of Section 2 of P.L. 1989 c.19 (C. 45:9-22.5) of the New Jersey law which states the following:

a. A practitioner shall not refer a patient or direct an employee of the practitioner to refer a patient to a health care service in which the practitioner, or the practitioner's immediate family, or the practitioner in combination with the practitioner's immediate family who had the significant beneficial interest; except that, in the case of a practitioner, or the practitioner's immediate family or in combination with the practitioner's immediate family who had the significant beneficial interest prior to the effective date pf P.L. 1991, c. 187 (C.26:2H-18.24 et al.), and in the case of a significant beneficial interest in a health care service that provides lithotripsy or radiation therapy pursuant to n oncological protocol that was held prior to the effective date of this section of P.L. (pending before the Legislature as this bill), the practitioner may continue to refer a patient or direct an employee to do so if that practitioner discloses the significant beneficial interest to the patient.

b. If a practitioner is permitted to refer a patient to a health care service pursuant to (subsection a. of) this section, the practitioner shall provide the patient with a written disclosure form, prepared pursuant to section 3 of P.L. 1989, c. 19 (C.45:9-22:6), and post a copy of this disclosure form in a conspicuous public place in the practitioner's office.

Respondent alleges that the "practitioner", in this case Dr. McCulloch self-referred the patient to New Horizon Surgical Center, LLC partially owned by him without disclosing to the patient that he is self-referring to his own facility for surgery. Respondent refers to

the EUO of Dr. McCulloch where he spoke regarding the issue of putting patient's notice of his self-referral. Specifically, he stated on page 28: "We do not tell the patients individually." The Applicant repeated this admission in a response to verification submitted by its counsel stating: "Please note that written disclosure is not provided to patients by New Horizon Surgical Center."

The issue of self-referral precludable?

Initially, Applicant argued that Respondent is precluded from raising this issue, as it was not initially raised in the denial. Respondent contends that the issue at hand is a non-precludable defense. Respondent cites to *Fair Price Med. Supply Corp. v. ELRAC, 12 Misc.3d 119, 820 N.Y.S.2d 679 (App. Term 2d & 11th Dists. 2006); Ozone Park Medical Diagnostic Associates v. Allstate Ins. Co., 180 Misc.2d 105, 689 N.Y.S.2d 616 (App Term 2d Dept. 1999); Stand-Up MRI of Bronx v. General Assurance Ins. Co., 10 Misc.3d 551, 809 N.Y.S.2d 419 (Dist. Ct. Suffolk Co. 2005)*. In that case the court held that Notwithstanding a late denial, an insurer may raise as a defense to a claim the fact that the doctor who referred an injured party to an imaging service had an impermissible financial interest therein.

However, Applicant argues that the Court of Appeals has repeatedly restricted and narrowed the meaning of a "no coverage" defense in a no-fault action. The Court has repeatedly held that a non-precludable "no-coverage" defense can only be raised when there is no policy if insurance and/or requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed. The Court has repeatedly refuse to extend the "no-coverage" defense to include allegations of fraud or wrongdoing by a medical provider or EIP. *Fair Price v. Elrac, Hospital for joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 NYS 3d 312 (2007); Central Gen. Hosp v. ChubbGroup of Ins. Cos. (90 NY2d 195 [1997]). Further, the Court of Appeals State Farm Auto Ins. Co., v. Malella 4NY3d 313 92005)* also narrowed its holding to medical providers engaged in conduct tantamount to fraud and nothing more.

Based on the above I find that the issue of self-referral raised by the Respondent is not a precludable defense pursuant to *Fair Price Med. Supply Corp. v. ELRAC*. *Id*. The issue here raised by the respondent is not one of fraud. Rather it is the financial interest in self-referring the patient to his own facility that is alleged.

Whether Applicant is in violation of New Jersey statute N.J.S.A. 45:9-22.5.

The statue is cited above. Respondent contends that Applicant was in violation of this statute by failing to disclose his part ownership of New Horizon Surgical Center LLC. to the patients prior to referring them for surgery at this facility.

In response to Respondent's contention Applicant cites to the exception to N.J.S.A. 45:9-22.5 which clearly states in (c) of this section:

"The restrictions on referral of patients established in this section shall not apply to:

3. Ambulatory surgery or procedures requiring anesthesia performed at a surgical practice registered with the Department of Health and Senior Services pursuant to subsection g. of section 12 of P.L. 1971, c. 136 (C26:2H-12) or at an ambulatory care facility licensed by the Department of Health and Senior Services to perform surgical and related services."

Respondent argues that the exception has conditions that must be met, one of which states:

"d. disclosure of the referring practitioner's significant beneficial interest in the practice or facility is made to the patient in writing, at or prior to the time that the referral is made, consistent with the provisions of section 3 of P.L. 1989, c. 19 (C.45.9-22.6)."

Respondent states that this is the situation in this case. Dr. McCulluch has an interest in New Horizon Medical and therefore should have provided proper disclosure to its Assignor.

In response to this, Applicant contends that section 3 of P.L. 1989, c. 19 (C.45.9-22.6) referenced above, states that it applies to a physician, not a facility, which is what New Horizon Surgical Center is. section 3 of P.L. 1989, c. 19 (C.45.9-22.6) states:

"Public law of the State of New Jersey mandates that a physician, chiropractor or podiatrist inform his patient of any significant financial interest he may have in a health care service."

Applicant further argues that there is no New Jersey statute or regulation requiring a Licensed Ambulatory Surgery Center to notify its patients of its owners. Rather that is a requirement under the federal Medicare Medicaid program, under which Applicant is not seeking reimbursement. Furthermore, Applicant goes on to say that Applicant is indeed in compliance with Medicaid/Medicare requirements that the Ambulatory Surgery Center post its Owners in writing in a conspicuous space common to all patients. Applicant attaches the display in its submission. Applicant also puts patients on notice on its website.

Referral is not a defense to a no-fault action

Finally, Applicant argues that Allegations of a violation of Professional Conduct does not constitute a defense to no-fault action. It is solely a matter for the appropriate state licensing board. *Allstate Prop & Cas. Ins. Co. v. New Way Massage Therapy P.C., 134 A.D.3d 495, 19 N.Y.S.3d 897 (N.Y. App. Div. 2015), leave to appeal denied, 28 N.Y.3d 909 (2016); H & H Chiropractic Servs. P.C. v. Metropolitan Prop & Cas. Ins. Co. 47 Misc.3d 1075(Cty. Civ. Qns. Cty. 2015).*

Conclusion:

Based on my review of the evidence submitted, as well as arguments presented at the hearing, I find the following. Initially I find that Applicant does fall under the exception, as it is a facility and not a physician in this case pursuant to section 3 of the N.J.S.A.

45:9-22.5, with the condition (d) being met. Therefore, I find that Applicant is not in violation of the statute. Furthermore, since Applicant asserts to have a posting listing its owners in writing in a conspicuous place for all patients to see in the office, and on its website, Applicant is actually in compliance with the statute. As such I find that Applicant is not in violation of the statute N.J.S.A. 45:9-22.5 as asserted by Respondent. All that being said, I also agree with Applicant, and find that this is not a matter for no-fault Arbitration. This is a matter for the appropriate state licensing board. *Allstate Prop & Cas. Ins. Co. v. New Way Massage Therapy P.C. Id.*
Arbitrator Jay Skelton in Avanguard Medical Group v. Geico AAA Case # 41-20-124-0772 held in a matter similar to the issue in this case the following:

"The Public Health Law is governed by the Department of Health. Respondent has not clearly articulated or established a violation of the Public Health Law in this case. It is clear that the penalties for violation of the Public Health Law are governed by the Department of Health. For violation of the Public Health Law, the Department of Health can seek enforcement of all penalties and can enforce these awards in courts of competent jurisdiction throughout the State of New York."

In *Haar Orthopedics & Sports Medicine P.C. v. Allstate Ins. Co., AAA Case #: 17-16-1027-9694*, Arbitrator Victor Moritz held the following:

"Further, if the respondent believes the applicant has violated the Public Health Law or the Health Care Practitioners Referrals Act, it has its remedies other than to try and raise it at arbitration hearings. There is no proof submitted by respondent which would establish that any action has been undertaken against the applicant or that any penalty has been imposed by the Department of Health.

I note that even if the applicant was in violation of Section 238 of the Public Health Law, I do not believe this violation would affect the applicant's standing to pursue this claim. Other remedies including reporting the applicant to the Department of Health for further investigation can be undertaken."

Based on the well-reasoned awards of my colleagues, I find that even if there was a violation of N.J.S.A. 45:9-22.5, it appears that the more appropriate remedy for a violation of this section would be disciplinary action by the Department of Health in the State of New Jersey or the appropriate licensing authority.

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**
	New Horizon Surgical CTR	**07/21/16 - 07/21/16**	**$19,646.13**	**Awarded: $19,646.13**
Total			**$19,646.13**	**Awarded: $19,646.13**

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 01/30/2017, which 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 $19,646.13 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 New York
SS :
County of Nassau

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.

02/11/2018
(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:
15b637233812c2bad07dd49d06b7231e

Electronically Signed

Your name: Evelina Miller
Signed on: 02/11/2018