American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Alpha Imaging Consultants PLLC (Applicant)	AAA Case No.	17-18-1086-2440
	Applicant's File No.	CF13001640
- and -	Insurer's Claim File No.	A000659NY17
	NAIC No.	10226
Unitrin Direct Insurance Company (Respondent)		

ARBITRATION AWARD

I, Nada Saxon, 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

1. Hearing(s) held on 06/26/2018
   Declared closed by the arbitrator on 06/26/2018

   Tina Marie Franzoni from Choudhry & Franzoni, PLLC participated in person for the Applicant

   Catherine Gretschel from De Martini & Yi, LLP participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 878.67**, 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 benefits and to the timeliness of the Respondent's denials.

3. Summary of Issues in Dispute

   Whether Respondent established its defense based upon a lack of medical necessity.

4. Findings, Conclusions, and Basis Therefor

This case was conducted using the documents submitted by the parties in the ADR Center, maintained by the American Arbitration Association, and the oral arguments of the parties. Any documents in the ADR Center are hereby incorporated into this hearing. I have reviewed all the relevant documents. No witnesses testified at this hearing.

The Assignor (DK) was a 29-year-old male who was the driver of a vehicle involved in an accident on 1/29/17. This claim involves a MRI of the left knee on 1/19/18. Respondent denied Applicant's claim based upon the examination by Dr. Robert Drazic on 4/20/17, who determined that no further orthopedic treatment was medically necessary.

IME Defense

An IME report must set forth a factual basis and medical rationale for the conclusion that further services are not medically necessary. Ying Eastern Acupuncture, P.C. v. Global Liberty Ins., 20 Misc.3d 144(A), 873 N.Y.S.2d 238 (Table), 2008 N.Y. Slip Op. 51863(U), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008). If the IME report provides a factual basis and medical rationale for an opinion that services were not medically necessary, and the claimant fails to present any evidence to refute that showing, the claim should be denied, AJS Chiropractic, P.C. v. Mercury Ins. Co., 22 Misc.3d 133(A), (App. Term 2d & 11th Dist. Feb. 9, 2002), as the ultimate burden of proof on the issue of medical necessity lies with the claimant. See Insurance Law § 5102; Wagner v. Baird, 208 A.D.2d 1087 (3d Dept. 1994).

Where the IME report submitted by the insurer sets forth a factual basis and medical rationale for the conclusion that the assignor's injuries were resolved and that the treatment which is the subject of the claim lacked medical necessity, the report submitted in opposition must meaningfully refer to and rebut the IME findings. E.g., Premier Health Choice Chiropractic, P.C. v. Praetorian Ins. Co., 41 Misc.3d 133(A), 981 N.Y.S.2d 638 (Table), 2013 N.Y. Slip Op. 51802(U), 2013 WL 5861532 (App. Term 1st Dept. Oct. 30, 2013).

In my prior linked award, McCulloch Orthopaedic Surgical Services (same Assignor) v. Kemper Insurance Company, Case No: 17-17-1071-9660 (4/30/18) and New Horizon Surgical Center (same Assignor) v. Kemper Insurance Company, Case No: 17-17-1073-8290 (4/30/18), I reasoned as follows:

> *Respondent denied this claim based upon the IME report of Dr. Robert Drazic, D.O. dated 4/20/17. Dr. Drazic notes the Assignor's was receiving physical therapy treatment to his neck, left shoulder, low back and left knee with minimal relief. Dr. Drazic examined Assignor's left knee and noted reduced range of motion with regards to flexion. Dr. Drazic found a negative McMurray's test, as well as other testing that was negative. Among other findings, Dr. Drazic found Assignor's left knee strain was resolved. Based on this exam, Dr. Drazic concluded, despite Assignor's subjective complaints, there was no need for further treatment, including surgery.*

I find Dr. Drazic's IME report sufficient to establish Respondent's lack of medical necessity defense. The burden now shifts to the Applicant as it is the Applicant's burden, ultimately, to establish the medical necessity of the services at issue. See Insurance Law § 5102; Shtarkman v. Allstate Insurance Co., 2002 NY Slip Op 50568(U), 2002 WL 32001277 (App. Term 9th & 10th Jud. Dists. 2002) (burden of establishing whether a medical test performed by a medical provider was medically necessary is on the latter, not the insurance company). The insured or the provider bears the burden of persuasion on the question of medical necessity. Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 NY Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005).

Where the IME report submitted by the insurer sets forth a factual basis and medical rationale for the conclusion that the assignor's injuries were resolved and that the treatment which is the subject of the claim lacked medical necessity, the report submitted in opposition must meaningfully refer to and rebut the IME findings. E.g., Premier Health Choice Chiropractic, P.C. v. Praetorian Ins. Co., 41 Misc.3d 133(A), 981 N.Y.S.2d 638 (Table), 2013 N.Y. Slip Op. 51802(U), 2013 WL 5861532 (App. Term 1st Dept. Oct. 30, 2013).

In opposition, Applicant relies upon the Assignor's medical records and the rebuttal by Dr. Robert McCulloch, M.D., which is undated. Dr. McCulloch notes Assignor first reported to his office on 5/3/17 and was seen by Russell Higley, P.A. On this date, he reported knee pain. Dr. McCulloch evaluated Assignor on 5/24/17 and noted Assignor reported continued knee pain. He found restricted range of motion and a positive McMurray's test. Dr. McCulloch further notes in his rebuttal report that he reviewed Assignor's left knee MRI dated 5/17/17, which demonstrated tears of the lateral meniscus. He set forth that based on the finding of the MRI, the need for surgery was established.
Also contained in Respondent's submission is an ED Note dated 1/29/17 wherein it is reported Assignor complained of injury to his left knee, as well as an initial examination report performed by Flatlands Chiropractic Wellness, P.C., dated 2/2/17, which notes Assignor complained of left knee pain.

In opposition to Applicant's rebuttal report, Dr. Drazic prepared an addendum to his IME report dated 10/23/17. In this report, Dr. Drazic notes he reviewed a rebuttal report by Dr. Robert McCulloch, M.D., as well as an operative report dated 6/15/17. Dr. Drazic concludes the MRI results of 5/16/17 revealed pre-existing degenerative pathology rather than acute traumatic pathology. He also states that during his examination on 4/20/17, Assignor did not exhibit any clinical signs or instability regarding his left knee. He states that there was either pre-existing degenerative pathology or new injury/pathology after the MRI, thereby concluding that neither pathology or injury would have been casually related to the accident of 1/29/17.

Regarding the issue of the causal relationship between the Assignor's injury and/or condition and the underlying automobile accident, the Appellate Division, Second Department in Mount Sinai Hospital v. Triboro Coach Inc. 263 A.D.2d 11,

699 N.Y.S.2d 77 (2nd Dept. 1999) held Respondent "has the burden to come forward with proof in admissible form to establish 'the fact' or the evidentiary 'foundation for its belief' that the patient's treated condition was unrelated to his or her automobile accident." Dr. Drazic's finding that neither the pathology or injury were casually related to the accident is conclusory and he does not address why Assignor's condition could not have been exacerbated and/or aggravated by this accident. As such, I find that Dr. Drazic's reports are insufficient to meet the heavy burden set forth in Mount Sinai Hospital v. Triboro Coach Inc. 263 A.D.2d 11, 699 N.Y.S.2d 77 (2nd Dept. 1999).

Based on the foregoing, I find Applicant has met its burden of proof in rebuttal. I am persuaded by Assignor's medical records and the rebuttal report of Dr. McCulloch. The records demonstrate the Assignor initially reported injury to his left knee subsequent to the accident and continued to complain of left knee pain. Further, the IME report of Dr. Drazic on 4/20/17 noted reduced range of motion in the left knee and the MRI report dated 5/17/17 of Assignor's left knee contained positive findings. As such, I find the evidence submitted more persuasive to support the medical necessity of the left knee surgery on 6/15/17.

"Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against it in a prior proceeding where it had a full and fair opportunity to litigate the issue (*see D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659 [1990]). 'The two elements that must be satisfied to invoke the doctrine of estoppel are that (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue (*see Kaufman v. Lilly Co.* [65 N.Y.2d 449, 455 (1985)])' (*Luscher v. Arrua*, 21 AD3d 1005, 1007 [2005]). 'The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate' (*D'Arata*, 76 N.Y.2d at 664; *see also Kaufman*, 65 N.Y.2d at 456)." Uptodate Medical Service, P.C. v. State Farm Mutual Automobile Ins. Co., 22 Misc.3d 128(A), 880 N.Y.S.2d 227 (Table), 2009 N.Y. Slip Op. 50046(U) at 2, 2009 WL 78376 (App. Term 2d & 11th Dists. Jan. 9, 2009).

It is within the arbitrator's authority to determine the preclusive effect of a prior arbitration. Matter of Falzone v. New York Central Mutual Fire Ins. Co., 15 N.Y.3d 530, 914 N.Y.S.2d 67 (2010), aff'g, 64 A.D.3d 1149, 881 N.Y.S.2d 769 (4th Dept. 2009).

Applicant is this matter is different than in the related matter cited above and does not submit the same proofs in support. However, Respondent's defense in both cases is predicated upon the same IME report and the issue concerning whether post-IME treatment to the left knee was medical necessary is the same. As such, Respondent had a full and fair opportunity to litigate and contest the issue in the prior matter. Therefore, I apply the doctrine of collateral estoppel to this matter.

Based on the foregoing, Applicant's claim 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**
	Alpha Imaging Consultants PLLC	**01/19/18 - 01/19/18**	**$878.67**	**Awarded: $878.67**
Total			**$878.67**	**Awarded: $878.67**

B. The insurer shall also compute and pay the applicant interest set forth below. 01/31/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

   Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim

becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

Furthermore, should an applicant request arbitration within 30 days of receipt of the denial of claim form, interest should accrue from the overdue date, not the arbitration request date. See Insurance Law 5106 (a) and 11 NYCRR 65-4.5(s)(3). Here, Applicant requested arbitration on 2/8/18, within 30 days of receipt of Respondent's denial, dated 1/31/18. As such, pursuant to Insurance Law 5106 (a) and 11 NYCRR 65-4.5(s)(3), interest on the awarded amount should accrue from the overdue date. See, 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

This case is subject to the provisions as to attorney fee promulgated in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.6. The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(d). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first party benefits, plus interest thereon, for each applicant per arbitration or court proceeding, subject to a maximum fee of $1,360." Id.

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

06/29/2018
(Dated)

Nada Saxon

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:
44495f910cc728dbcf8aa391f8cc5a20

Electronically Signed

Your name: Nada Saxon
Signed on: 06/29/2018