American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Optimus Plus Products Corp (Applicant)	AAA Case No.	17-17-1067-9150
	Applicant's File No.	133533
- and -	Insurer's Claim File No.	0448028910
	NAIC No.	19232
Allstate Insurance Company (Respondent)		

ARBITRATION AWARD

I, Preeti Priya, 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 [KW]

1. Hearing(s) held on 10/24/2018
   Declared closed by the arbitrator on 10/24/2018

   John Gallagher Esq., from The Law Offices of John Gallagher, PLLC participated in person for the Applicant

   Joe Palmerson, Esq., from Allstate Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 1,652.63**, 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 supplies provided to Assignor;

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

4. Findings, Conclusions, and Basis Therefor

Applicant was represented by John Gallagher Esq., who presented oral arguments and relied upon documentary submissions. Joe Palmerson, Esq., appearing on behalf of Respondent, presented oral arguments and relied upon documentary submissions. I have reviewed the submissions contained in the American Arbitration Association's ADR Center. These submissions are the record in this case.

The disputes arise from the underlying automobile accident of March 3, 2017 in which the Assignor, a 56-year-old male, was a passenger. Thereafter, Assignor sought private medical attention and was evaluated at Seo Han Medical, PC on March 7, 2017. She received conservative care including physical therapy and chiropractic treatment. She also underwent diagnostic tests. In dispute are the LSO with APL control custom fitted supply provided on May 16, 2017 and a cervical traction on June 8, 2017. Applicant submitted the claims to Respondent and payment was denied for the LSO. Applicant's counsel withdrew with prejudice the claims for the cervical traction.

After reviewing the records, I find that Applicant established its prima facie case of entitlement to No-Fault compensation. See Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). The burden now shifts to the Respondent to demonstrate lack of medical necessity (Alvarez v. Prospect Hosp., 68 N.Y.S.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d [1986]; A.B.Medical Services v. Geico Ins. Co., 2 Misc 3d 26 [App Term 2d and 11th Jud Dists, 2003]).

On June 7, 2017, Marina Royzman, MD, performed a peer review at Respondent's request regarding the medical necessity of the LSO. Dr. Royzman reviewed records, which included diagnostic test results, progress notes and medical reports. She then outlined the treatment of the Assignor.

The No-Fault carrier may rebut the inference of medical necessity by providing proof that the claimed healthcare benefits were not medically necessary. A. Khodadadi Radiology, P.C. v. New York Central Mutual Fire Ins Co., 16 Misc 3d 131(A), 841 N.Y.S.2d 824, 2007 N.Y. Slip Op 51342(U) (App Term, 2nd Dept - 2007); Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co., 21 Misc 3d 142(A), 2008 NY Slip Op 52450(U) (App Term, 2nd Dept - 2008); Delta Diagnostic Radiology, P.C. v. Integon Natl. Ins. Co., 2009 NY Slip Op 51502(U) (App Term, 2nd Dept - 2009). Where the No-Fault carrier's proof consists of a peer review report, that report must be predicated upon a sufficient factual basis and medical rationale. AJS Chiropractic, P.C. v. Mercury Ins. Co., 2009 NY Slip Op 50208(U), 22 Misc 3d 133(A) (App Term, 2nd Dept - 2009).

Dr. Royzman based upon her review of the available records and her 16 years of experience as an Internal Medicine physician, she came "to the following conclusion: LSO APL control custom fitted dispensed 05/16/17 by Optimus Plus Products Corp

was not medically necessary." She noted "The physical examination findings in this case do not justify the prescription of this supply. This claimant was involved into the motor vehicle accident on 03/03/17 and diagnosed with lumbar spine sprain and strain. The standard of care of these injuries would be physical therapy and chiropractic treatments." She stated "LSO is a restrictive device. Use of it contradicts goals of physical therapy,

which are to increase mobility of the patient. Therefore, the use of the LSO would not be appropriate in this case. Although herniation of L4-L5 and L5-L6 and annular tear of L5-S1 noted on MRI are important anatomical findings, the claimant did not show any clinical signs of spinal instability, such as "catch" or locking feeling of sudden sharp pain, which happens when one is mid-way through standing upright from a seated position, or such as neurological deficit due to cord, cauda equine, or nerve root compression." The peer review report is predicated upon sufficient factual basis and medical rationale. See AJS Chiropractic and Alur Med, supra.

"[T]he insured / provider bears the burden of persuasion on the question of medical necessity. Specifically, once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, 'plaintiff must rebut it or succumb.'" Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 WL 1936346 at 3 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). In A.B Med Servs., P.L.L.C. v. State Farm Mut Auto Ins Co., 7 Misc. 3d 822, 795 N.Y.S 2d 843(App Term, 2ndDept - 2005) citing Baumann v. Long Is. R.R., 110 A.D.2d 739, 741 487 N.Y.S.2d 833 (AppDiv., 2nd Dept - 1985) the Court held that a plaintiff continues to bear the "burden of persuasion" and, if the carrier has satisfied the burden of coming forward, a "plaintiff Must rebut it or succumb". Also see); Crotona Hgts. Med., P.C. v. Geico Ins. Co., 25 Misc 3d142(A), 2009 NY Slip Op 52466(U) (AppTerm, 2nd Dept - 2009); AJS Chiropractic, P.C. v.Travelers Inc. Co., 25 Misc 3d 140(A),2009 NY Slip Op 52446(U) (App Term, 2nd Dept -2009).

Applicant did not submit a rebuttal addressing the Peer Review report. Applicant's counsel maintained that there was instability and impingement noted in the MRI report which was not addressed by the Peer Review report. However, in reviewing the lumbar MRI report, I did not find any listing of instability or impingement. I am persuaded by Dr. Royzman. Applicant has not rebutted Respondent's defense and has not sustained Applicant's burden of proof by a preponderance of credible evidence.

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 New York

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

11/04/2018
(Dated)

Preeti Priya

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:
86a32825aaef5b7bb429937ae44bb317

Electronically Signed

Your name: Preeti Priya
Signed on: 11/04/2018