American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Sufficient Chiropractic Care PC (Applicant)	AAA Case No.	17-18-1093-1951
	Applicant's File No.	GTLSU022118.106
- and -	Insurer's Claim File No.	60002955457
	NAIC No.	19976
Amica Mutual Insurance Company (Respondent)		

ARBITRATION AWARD

I, Eileen Hennessy, 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-T.F.

1. Hearing(s) held on 02/19/2019, 05/21/2019
   Declared closed by the arbitrator on 05/21/2019

   Ralph Ciao from Law Offices of George T. Lewis, Jr., PC participated in person for the Applicant

   Larry Rojak from Lawrence N. Rogak LLC participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 623.65**, was NOT AMENDED at the oral hearing.
   Stipulations WERE made by the parties regarding the issues to be determined.

   The parties stipulated and agreed that (i) Applicant has met its prima facie burden by submitting evidence that payment of no-fault benefits is overdue, and proof of its claim was mailed to and received by Respondent and (ii) Respondent's denials of the subject claims were timely issued.

   The parties stipulated that a linked decision would be issued for the four cases.

3. Summary of Issues in Dispute

   The record reveals that the Assignor-T.F., a 26-year-old male, claimed injuries as a driver involved in a motor vehicle accident on 9/27/2017. Applicant billed for the

co-chiropractor fees of Harris Moore, D.C. and Robert Albano, D.C.for MUA of the cervical and lumbar spine and left shoulder conducted on 11/30/2017, 1/7/2018, and 1/11/2018. Respondent denied these claims based on a lack of medical necessity as determined by peer review report of Paul Priolo, D.C.

There are four linked cases before me today. The same service, MUA, was conducted on three days of 11/30/2017, 1/7/2018, and 1/11/2018. The co-chiropractor's fees for MUA for the three dates of service are in dispute. The parties, the Assignor and the attorneys are the same. The MUA and attendant services were denied based on the peer reviews of Paul Priolo, D.C., dated 1/31/2018 and 2/23/2018, which were based on the same medical records. As the legal issues and surrounding facts are identical a linked decision is appropriate. The following matters are determined by this decision:

AAA Case No.: 17-17-1096-8309 in the amount of $1,247.30 ($623.65 for each date of service) for the co-chiropractor's fee for MUA by Harris Moore, D.C. on dates of service 1/7/2018 and 1/11/2018.

AAA Case No.: 17-18-1096-6980 in the amount of $1,247.30 ($623.65 for each date of service) for the co-chiropractor's fee for MUA by Robert Albano, D.C. on dates of service 1/7/2018 and 1/11/2018.

AAA Case No.: 17-18-1094-0473 in the amount of $623.65 for the co-chiropractor's fee for MUA by Harris Moore, D.C. on date of service 11/30/2017.

AAA Case No.: 17-18-1093-1951 in the amount of $623.65 for the co-chiropractor's fee for MUA by Robert Albano, D.C. on date of service 11/30/2017.

The issues to be determined are 1) whether the services are medically necessary and if so, 2) whether the services were billed in accordance with the applicable fee schedule?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement for the co-chiropractor's fee forMUA of the cervical and lumbar spine and left shoulder, conducted on 11/30/2017, 1/7/2018, and 1/11/2018. This hearing was conducted using the documents contained in the Electronic Case Folders (ECF) for the four linked cases maintained by the American Arbitration Association. All documents contained in the ECFs are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECFs as well as the arguments presented by the parties during the hearing.

In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations.

Legal Standards for Determining Medical Necessity

To support a lack of medical necessity defense, respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." *See* Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to applicant. *See generally*, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S.2d 680 (2d Dept. 2009), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. *See* Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp., 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003). The appellate courts have not clearly defined what satisfies the insurer's evidentiary standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 41 Misc.3d 133(A), 981 N.Y.S.2d 633 (Table), 2013 NY Slip Op 51800(U), 2013 WL 5861523 (App. Term 1st Dept. Oct. 30, 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity. 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 Ins. Co., 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); *See also*, All Boro Psychological Servs. P.C. v. GEICO, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

Where a respondent meets its burden, it becomes incumbent on the claimant to rebut the peer review. Be Well Medical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 18 Misc.3d 139(A), 2008 WL 506180 (App. Term 2d & 11 Dists. Feb. 21, 2008); A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 2007 WL 1989432 (App. Term 2d & 11 Dists July 3, 2007. "[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), 2005 WL 1936346 at 3 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). "Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (*see* Prince, Richardson on Evidence §§ 3-104, 3-202

[Farrell 11 ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip. Op. 5187(U) at 2, 2006 WL 2829826 (App. Term 2d & 11 Dists. Sept. 29, 2006).

Application of Legal Standards

In support of its contention that the services conducted on 11/30/2017 were not medically necessary, Respondent relies upon the peer review of Paul Priolo, D.C., dated 1/31/2018. In support of its contention that the services conducted on 1/7/2018 and 1/11/2018were not medically necessary, Respondent relies upon the peer review of Paul Priolo, D.C., dated 2/23/2018. He notes Assignor-T.F.'s involvement in the underlying accident on 9/27/2017, and that he came under the care of chiropractor Edwin Emerson, D.C. on 10/5/2017 for complaints of neck, mid back, and lower back pain. The Assignor commenced physical therapy, chiropractic treatment, and acupuncture. He was referred for MRIs of the cervical and lumbar spine and EMG/NCVs. He came under the care Anthony Riotto, D.C. of Applicant on 11/16/2017, and was recommended for MUA "to increase range of motion, improve muscle weakness, and eliminate pain". MUA of the cervical and lumbar spine and left shoulder was conducted by Harris Moore, D.C. and Robert Albano, D.C. on 11/30/2017, 1/7/2018, and 1/11/2018.

Dr. Priolo reviewed the available extensive medical records and outlined the history of the accident and the Assignor's pre-MUA treatment in significant detail. Dr. Priolo cites the National Academy of Manipulations Under Anesthesia (NAMUA), practical guidelines, 8/28/09.

Dr. Priolo states that there is nothing to indicate that the patient responded sub-optimally to conservative chiropractic treatment or medical co-management, nor evidence of fibrous adhesions. He adds that the physical therapy progress notes show that the claimant tolerated the treatment well, and that the records show that the claimant had physical therapy and chiropractic treatments until the MUAs at issue. Dr. Priolo opines that the patient would not be able to tolerate these chiropractic manipulations or physical therapy treatments if there was intractable pain. Also, the fact that the patient had received these chiropractic manipulations sessions and physical therapy sessions shows that the patient was tolerating the treatments and responding satisfactorily to the manipulations and chiropractic treatment, otherwise there would be no medical reason to perform all of these sessions over this long period of time. According to Dr. Priolo there was no evidence the Assignor exhausted treatment options including trigger point injections or epidural injections or was a candidate for spinal surgery.

The peer review also lists the standard of care for MUA consideration, including: claimant's pain threshold inhibits the effectiveness of conservative manipulation, conservative treatment has been minimally effective during a minimum of six weeks of care, manipulation of the spine without anesthesia is the treatment of choice, but due to chronicity of the problems and adhesions present, MUA is the next option, an alternative to spinal disc surgery, and lastly, no better treatment options are available. In addition to the practical guidelines established for MUA, Dr. Priolo refers to New York State

Worker's Compensation Neck Treatment Guidelines and other relevant sources for the determination of whether a patient is a candidate for MUA. Dr. Priolo concludes that the Assignor did not meet the relevant criteria.

Dr. Priolo concluded that the medical necessity for MUA and associated services conducted on 11/30/2017, 1/7/2018, and 1/11/2018has not been established. In this instance, I find the reports of Dr. Priolo sufficient to support Respondent's denials based upon a lack of medical necessity as it maintains a factual basis and medically cogent rationale to support his opinion that the service at issue was not medically necessary. Where the Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden then shifts to the Applicant which must then present its own evidence of medical necessity. Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company, 2008 NY Slip Op. 50456U, 18 Misc.3d 1147A, 2008; West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131, 824 N.Y.S.2d 759 (App. Term 2 Dept. 2006).

A formal written rebuttal was not submitted by Applicant. Dr. Diana Vavikova provided sworn testimony on behalf of Applicant at the hearing. Dr. Vavikova is a chiropractor, who is certified to perform MUA and conducts MUAs, and her qualifications as an expert in the field of chiropractic treatment and MUA was not challenged. It is noted that Dr. Vavikova did not perform any of the services in dispute in this arbitration. Dr. Vavikova testified that she is the owner of Applicant and that her duties include performing MUAs as well as testifying on behalf of this Applicant at arbitrations. As Dr. Vavikova was not a treating practitioner in this case, her testimony will serve as a counter-opinion to the peer reviews of Dr. Priolo.

Applicant submits an undated letter of medical necessity for MUA from Dr. Emerson of Alignment Chiropractic, P.C., aninitial chiropractic examination by Dr. Emerson, dated 10/6/2016, an initial and follow-up examination by Lily Zarhin, M.D., PMR, from PMR Medical & Diagnostic, P.C. dated 10/10/2017, and 11/7/2017, the pre-procedure and procedure reports for the MUA conducted on 11/30/2017, 1/7/2018, and 1/11/2018, chiropractic treatment notes from 10/6/2017 through 10/25/2017, physical therapy and acupuncture initial evaluations and treatment notes, MRI reports of the cervical and lumbar spine, EMG/NCV report of the upper and lower extremities, dated 11/21/2017, and range of motion/manual muscle testing. Respondent submitted the records reviewed by the peer doctor.

Dr. Emerson's initial examination referenced complaints of neck, mid back, and lower back pain. There were no shoulder complaints referenced. The chiropractic treatment notes indicated the Assignor tolerated the treatment well and felt better after the treatment. The physical therapy notes also indicated the Assignor tolerated the treatment well.

According to the letter of medical necessity, Dr. Emerson recommended three consecutive days of MUA. He notes the Assignor had difficulty with activities of daily living. He diagnosed the Assignor with cervical and lumbar radiculopathy and left shoulder pain based on the MRI reports and physical examination. He does not refer to any specific examination results. Dr. Emerson discusses the generic purpose of MUA

for patients who have chronic nonspecific mechanical pain who have been minimally responsive to conservative treatment. Dr. Vavikova testified that the criteria for MUA had been met. Specifically, the Assignor had symptoms of radiculopathy and had plateaued with chiropractic treatment. She also testified that the left shoulder needed to be adjusted in depth. The Assignor had a short-term positive result to the MUA on 11/30/2017. Applicant waited five weeks to conduct the second and third MUA. Dr. Vavikova testified that MUA is much safer than pain management treatment. Dr. Vavikova pointed out that the peer doctor relied on the 2009 MUA Guidelines, rather than the 2011 Guidelines, which were updated.

I am faced with conflicting opinions concerning the medical necessity for the disputed services herein. There are no legal issues to resolve. This dispute involves solely an issue of fact, that is, whether the services were medically necessary. Resolution of that fact is determined by which opinion is accepted by the trier of fact.

In weighing Dr. Priolo's opinion as demonstrated in his peer review reports against Applicant's testimony of Dr. Vavikova and medical records, including Dr. Emerson's letter of medical necessity, I am more persuaded by Dr. Priolo's opinion and consider it more cogent. I find that Applicant failed to prove medical necessity of the MUA by a preponderance of the credible evidence. Rather, Respondent proved lack of medical necessity of the MUA procedures in dispute herein.

Initially, I find that the initial evaluation records, as contained in Respondent's submission, are check-off forms which are of limited probative value. Although Dr. Vavikova contends that all criteria for MUA were met, I am persuaded by the peer review doctor that there was insufficient evidence of fibrous adhesions, lack of evidence of functional disability, and indications that there were better treatment options available. Turning next to the MUA pre-procedure and procedure reports submitted by Applicant, I find that same, while clearly depicting, inter alia, symptoms and positive findings, nevertheless are pro forma, particularly the procedure reports. The "Referral for MUA Medical Necessity", which has an illegible signature" states in one of the sections "conservative manipulation has not been effective for ____ weeks of care and a greater degree of movement to affected joint is need to be effective ("Mercy", 1993)" The 11/16/2017 examination by Dr. Riotto, wherein the Assignor was referred for MUA, is barely legible with several areas of the report left blank. The Assignor's occupation is illegible.

While Dr. Vavikova's testimony was generally credible, she relied on a letter of medical necessity, which was generic and did not reference specific examination reports or specific clinical findings. Her testimony failed to indicate that the MUA criteria was met. She testified that the Assignor plateaued with chiropractic treatment but did not point to any chiropractic progress notes, which indicate that. According to the notes, the EIP was tolerating the conservative treatment well. Moreover, the Assignor was referred for the MUA by Dr. Riotto on 11/16/2017, five weeks after the accident, without reviewing the Assignor's response to conservative treatment. Her testimony regarding the MUA to the shoulder was not supported by the record, which showed no shoulder complaints at the initial examination with Dr. Emerson or chiropractic progress notes. There is nothing to show that chiropractic and other treatment options could not be

tolerated. The procedure reports did not indicate the percentage of improvement from the first and second MUAs as required by the Guidelines, only that there was improvement. Dr. Vavikova took issue with the fact that Dr. Priolo relied on the 2009 MUA Guidelines but could not state with any specificity what the differences in the Guidelines were or how they were relevant to this case. There is no date on the MUA Treatment Guidelines submitted by the Applicant.

Comparing the relevant credible evidence presented by both parties against each other, and the above-referenced standards, I find that the Applicant has failed to meet its burden of persuasion in rebuttal. The peer review is sufficient to sustain the defense of lack of medical necessity for the MUA and attendant services conducted on 11/30/2017, 1/7/2018, and 1/11/2018.

Accordingly, Applicant's claims are denied in its entirety. This decision is in full disposition of all claims for No-Fault benefits presently before this arbitrator.

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 Nassau

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

06/23/2019 Eileen Hennessy
(Dated)

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:
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Electronically Signed

Your name: Eileen Hennessy
Signed on: 06/23/2019