American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Spine Specialists (Applicant)	AAA Case No.	17-18-1100-7540
	Applicant's File No.	2128159
- and -	Insurer's Claim File No.	0443806799 SAP
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

ARBITRATION AWARD

I, Marcelo Vera, 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: EIP

1. Hearing(s) held on 10/30/2019
   Declared closed by the arbitrator on 10/30/2019

   Stacy Mandel Kaplan, Esq. from Israel, Israel & Purdy, LLP (Great Neck) participated in person for the Applicant

   Inna vilig, Esq. from Law Offices Of Karen L Lawrence participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 92.98**, 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

   The arbitration arises out of treatment to the EIP, GPR a 58-year-old female, involved in a motor vehicle accident on January 17, 2017. Applicant seeks reimbursement in the amount of $92.94 for services performed June 1, 2018. Respondent has denied the claim based upon the independent medical examination performed by Thomas Nipper, M.D., F.A.C.S. on November 20, 2017.

   The issue presented is whether the services post IME are medically necessary.

4. Findings, Conclusions, and Basis Therefor

My decision is based on the arguments of representatives for each party as well as those documents contained in the electronic file maintained by the American Arbitration Association. I have reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

It is Applicant's *prima facie*obligation to establish its entitlement to payment for each service for which reimbursement is sought. It is well settled that a health care provider establishes its *prima facie*entitlement to payment as a matter of law by proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see *Insurance Law § 5106 a; Mary Immaculate Hosp. v. Allstate Ins. Co., 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; Amaze Med. Supply v. Eagle Ins. Co., 2 Misc. 3d 128A, 784 N.Y.S. 2d 918, 2003 NY Slip Op 51701U [App Term, 2d & 11th Jud Dists]).* Herein, applicant established its prima facie entitlement to first party no-fault benefits by proof that it submitted a claim setting forth the fact and amount of the loss sustained and that payment of no-fault benefits was overdue.

If an insurer asserts that the medical test, treatment, supply or other service was medically unnecessary, the burden is on the insurer to prove that assertion with competent evidence such as an independent medical examination, a peer review or other proof that sets forth a factual basis and a medical rationale for denying the claim. (See *A.B. Medical Services, PLLC v. Geico Insurance Co.*, 2 Misc. 3d 26 [App Term, 2nd & 11th Jud Dists 2003]; *Kings Medical Supply Inc. v. Country Wide Insurance Company*, 783 N.Y.S. 2d at 448 & 452; *Amaze Medical Supply, Inc. v. Eagle Insurance Company*, 2 Misc. 3d 128 [App Term, 2nd and 11 Jud Dists 2003]).

Respondent asserts that the treatments post IME were timely denied based upon the independent medical examination performed by Thomas Nipper, M.D. F.A.C.S. An IME report asserting no further treatment is medically necessary must be supported by a sufficiently detailed factual basis and medical rationale, which includes mention of the applicable generally accepted medical/professional standards. *Carle Place Chiropractic v. New York Central Mut. Fire Ins Co.*, 19 Misc.3d 1139(A), 866 N.Y.S.2d 90 (Table), 2008 N.Y. Slip Op. 51065(U), 2008 WL 2228633 (Dist. Ct., Nassau Co., May 29, 2008, Andrew M. Engle, J.). An IME report must set forth a factual basis and medical rationale for the conclusion that further services are not medically necessary. E.g., *Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance*, 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). The Case law states that the 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. *Bronx Expert Radiology, P.C. v Travelers Ins. Co.*, 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

In support of its contention further treatment was not medically necessary, respondent relies upon the IME examination performed by Thomas Nipper, M.D. F.A.C.S. on November 20, 2017. Dr. Nipper's report details the history relating to the accident and EIP's treatment to date as related by the claimant. The physical examination report

indicates all findings were objectively negative and unremarkable. Range of motion was within normal limits and orthopedic test performed were negative. Dr. Nipper's diagnosis indicated the cervical, lumbar sprains resolved, left shoulder sprain resolved and resolved left knee sprain. Dr. Nipper concluded by indicating no further orthopedic treatment including physical therapy or massage therapy is indicated…No further treatment is indicated.

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. [see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed]), *Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company*, 2008 NY Slip Op 50456U, 18 Misc. 3d 1147A, 2008 N.Y. Misc. LEXIS 1121, *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co*. 13 Misc.3d 131, 824 N.Y.S.2d 759, 2006 NY Slip Op51871(U) (Sup. Ct.

I find that Respondent's IME report meets the above burden and I will look to Applicant to refute the conclusions reached by the IME doctors After reading all the submissions including the medical records and the IME report, I find that Applicant has set forth sufficient evidence to refute the conclusion reached by Dr. Nipper.

Applicant argues the evidence demonstrate the EIP was still experiencing discomfort associated with injuries initially sustained in the motor vehicle accident of January 17, 2017 at the time of the IME. Applicant's proof consists of medical records that are contemporaneous to the IME, specifically the follow up report by zDr. Mikelis, dated November 10, 2017. Dr. Mikelis notes reduced ranges of motion and positive orthopedic test, the diagnosis is cervical radiculopathy lumbar radiculopathy and herniated cervical disc conservative treatment (physical therapy) is indicated as well as epidural steroid injections for pain management. The post injection report prepared by Dr. Geraci, dated 11/15/2017 noting the EIP had good relief from prior injections, EIP was getting temporary relief from Cervical Trigger point injections a cervical epidural steroid injection was discussed. Applicant further provides the report by Dr. Geraci dated 1/31/2018 relating the EIP's ongoing treatment. The evidence demonstrates the EIP's condition is ongoing supporting the contention that the EIP's condition had not resolved and the ongoing treatment was medically necessary at the time the EIP underwent the IME.

As per the evidence before me, I find the Applicant's proof is sufficient to overcome the showing made by the IME doctor I feel bound to defer to the opinion of the Applicant, as treating provider rather than the opinion of the Respondent's IME consultant. I find Applicant's assessment of the EIP's condition regarding treatment to be credible and convincing.

Accordingly, in light of the foregoing, based on the arguments of counsel and after a thorough review and consideration of all submissions, I find in favor of the Applicant and grant Applicant's claim

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**	**Total**	**Status**
	New York Spine Specialists LLP	**06/01/18 - 06/01/18**	**$92.98**	**$ 92.98**	**Awarded: $92.98**
Total			**$92.98**	**Awarded: $92.98**	

B. The insurer shall also compute and pay the applicant interest set forth below. 07/16/2018 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).

C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(d) This matter was filed **after** February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 11 NYCRR 65-4.6(d). This amendment takes into account that the maximum attorney fee has been raised from $850.00 to $1,360.00.

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

11/01/2019
(Dated)

Marcelo Vera

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:
629f52df012dafdd13fcb408f008c592

Electronically Signed

Your name: Marcelo Vera
Signed on: 11/01/2019