American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Spine Specialists (Applicant)	AAA Case No.	17-18-1096-4865
	Applicant's File No.	2115189
- and -	Insurer's Claim File No.	0502273520101011
	NAIC No.	22055
Geico Insurance Company (Respondent)		

ARBITRATION AWARD

I, Eva Gaspari, 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: E.I.P. and/or N.J.F.

1. Hearing(s) held on 11/14/2019
   Declared closed by the arbitrator on 11/14/2019

   Justin Skaferowsky from Israel, Israel & Purdy, LLP (Great Neck) participated in person for the Applicant

   Diane Phillips from Geico Insurance Company 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

   This arbitration dispute arises from an automobile accident which occurred on November 26, 2016 in which the Assignor (N.J.F.), a 43-year-old female, was a driver. Following the accident, the assignor received care, which included an office examination on April 26, 2018. Applicant submitted billing totaling $92.98. Respondent denied the claim based upon the October 3, 2017 IME by Dr. Pierce J. Ferriter, M.D. with an effective cut-off date of October 14, 2017. The question presented is whether the respondent properly denied the treatment pursuant to Dr. Ferriter's October 3, 2017 examination.

4. Findings, Conclusions, and Basis Therefor

This matter was decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association, as well as upon the oral arguments of the parties at the time of the hearing. All documents contained in the ADR folder are hereby incorporated into this hearing and in reaching my findings I have reviewed all relevant exhibits contained in the ADR Center. Only submissions which were uploaded into the ADR Center at the time of the hearing were considered in making the instant determination. All matters raised on oral argument at the time of the hearing have been addressed herein. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

As an initial matter, I find that Applicant has submitted sufficient credible evidence to establish a prima facie case of medical necessity for the sessions in dispute. (a medical provider establishes a prima facie showing of their entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of no fault benefits was overdue.) *See*, Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept.2004); *See also*: Viviane Etienne Med. Care v Country-Wide Ins. Co. 2015 NY Slip Op 04787 (proof of mailing is satisfied by an insurer's admission of receipt of bills.) Similarly, I find that the Respondent has proffered timely denials which preserve the defense of fee schedule and medical necessity, pursuant to an independent medical examination.

MEDICAL NECESSITY

Applicant, having established its prima facie case, the burden now shifts to the Respondent to demonstrate its defense of 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]). Respondent bears the burden of production in support of a 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 1 Dept. 2006).

A treatment or service is medically necessary if it is "appropriate, suitable, proper and conducive to the end sought by the professional health service in consultation with the patient. It means more than merely convenient or useful treatment or services, but treatment or services that are reasonable in light of the patient's injury, subjective and objective evidence of the patient's complaints of pain, and the goals of evaluating and treating the patient." Fifth Avenue Pain Control Center v. Allstate, 196 Misc. 2d 801, 807-808 (Civ. Ct. Queens Cty. 2003). Medically necessary treatment or services must be "consistent with the patient's condition, circumstances and best interest of the patient with regard to the type of treatment or services rendered, the amount of treatment or services rendered, and the duration of the treatment or services rendered." Id. Medical services are compensable where they serve a valid medical purpose. Sunrise Medical Imaging PC v. Lumbermans Mutual, 2001 N.Y. Slip Op. 4009. Respondent bears the burden of production and persuasion with respect to medical necessity of the treatment for which payment is sought. See Bajaj v. Progressive, 14 Misc 3d 1202(A) (N.Y.C. Civ Ct 2006). 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 11thJud Dists 2003]. An IME report asserting that 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.).

In support of its defense Respondent points to the October 3, 2017 examination by Dr. Pierce J. Ferriter, M.D., in which Dr. Ferriter examined the EIPs cervical spine, lumbar spine, left shoulder and right knee and found no objective evidence of injury. The examination of the cervical spine finds ranges of motion within normal limits, no findings of muscle spasm or tenderness; with negative Spurling's, Hoffman's, Soto Hall, Compression and Jackson Compression tests. Neurological exam of the upper extremities revealed reflexes 2+ equal and symmetrical, muscle strength of the upper

extremities 5/5 throughout, and normal sensation. Examination of the lumbar spine finds ranges of motion within normal limits, no findings of spasm or tenderness; straight leg raise test was 80/80 in the sitting and supine position; and Kemps Clonus and Faber tests were all negative. Neurological examination of the lower extremities found 5/5 motor strength, reflexes 2+ equal and symmetrical, with normal sensation. Examination of the left shoulder revealed no swelling, discoloration or deformity, no winging of the scapula, no atrophy in the deltoid or trapezius muscles and the joints were non-tender. Muscle bulk appeared normal, motor strength was 5/5, and impingement sign, Hawkins, Drop arm test, apprehension test, and O'Brien's test were negative. Examination of the right knee showed healed surgical scars. There was no pain on palpation to the medial, lateral or patellofemoral joints, alignment was normal, and no varus or valgus deformity is noted. Ranges of motion were within normal limits; McMurray, Apley's, Anterior Drawer, Posterior Drawer and Lachman's testing was all negative. Medial and lateral collateral ligaments were found to be stable and Patella Ballottement was negative. Dr. Ferriter concluded that the patient's injuries were objectively resolved and that there is no need for further treatment from an orthopedic perspective.

In rebuttal the Applicant points to the underlying medical records including diagnostic findings as well as to the April 26, 2018 examination findings. I have reviewed the entire medical file, including those contained in Respondent's submissions. At the April 26, 2018 exam, which is the most contemporaneous examination to the IME by Dr. Ferriter, the EIP presented with complaints of low back pain, right and left arm pain, and right and left leg pain. The record notes that the EIP is considering lumbar surgery, but does not contain additional specifics concerning the basis for considering surgery or what type of surgery is being contemplated. On examination the cervical spine showed tenderness and spasm, ranges of motion were restricted, and reflexes in the biceps and triceps are 1+ bilaterally. Examination of the lumbar spine showed tenderness and spasm, ranges of motion restricted, and reflexes on knee jerk are noted to be 0/+1 and on ankle jerk are noted to be +1 bilaterally. Neurological examination of the upper and lower extremities the exam is not within normal limits with altered sensation and motor strength of 4/5 reported.

Based on a thorough review of the evidence herein I find that the Respondent has set forth sufficient evidence to support its medical necessity defense, having demonstrated a comprehensive examination which provides a credible and persuasive position that the patient did not have an objective need for continued care based upon the findings of the

October 3, 2017 examination. In reviewing the evidence offered in rebuttal I find as a matter of fact, that the Applicant has not set forth sufficient contemporaneous evidence to demonstrate that the EIP presented on or about the time of the IME with objective evidence of injury, so as to rebut the peer review. Particularly there are no contemporaneous treatment records which indicate an objective evidence of a need for continued care, nor are there contemporaneous treatment records which indicate that the EIP presented on or around the time of the IME with objective evidence of an unresolved injury. While the April 26, 2018 examination by Dr. Ferriter contains evidence of objective measures of injury, these findings are approximately six months after the IME and do not constitute evidence that the EIP had unresolved injuries at the time of Dr. Ferriter's examination. After a careful review of all of the evidence contained within the record, and upon carefully weighing the arguments presented, I find that the Respondent has set forth a persuasive case on the issue of medical necessity which has not been credibly rebutted. Accordingly, I find in favor of Respondent and Applicant's claim is denied.

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

11/19/2019
(Dated)

Eva Gaspari

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:
f9e7d35979afe1c46daad25a0c1f0cae

Electronically Signed

Your name: Eva Gaspari
Signed on: 11/19/2019