

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

American Diagnostic Imaging (Applicant)	AAA Case No.	17-19-1134-8971
	Applicant's File No.	A21880
- and -	Insurer's Claim File No.	1024185-02
American Transit Insurance Company (Respondent)	NAIC No.	16616

ARBITRATION AWARD

I, Aaron Maslow, 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 ["AP"]

1. Hearing(s) held on 05/01/2020
Declared closed by the arbitrator on 05/01/2020

Ashley Andrews-Santillo, Esq., from Munawar & Hashmat LLP participated by telephone for the Applicant

Jack Hessel, Esq., from Daniel J. Tucker, P.C. participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 6,398.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant reduced the amount in dispute to \$2,889.80, the amount Respondent claimed was the proper fee.

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 compensation with respect to its bills. They also stipulated that Respondent's Form NF-10 denial of claim forms were timely issued, i.e., within the 30-day deadline prescribed by Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1). Additionally, they stipulated that should Applicant prevail, interest would accrue as of the date that the American Arbitration Association received Applicant's arbitration request.

3. Summary of Issues in Dispute

- Whether Applicant established entitlement to No-Fault insurance compensation for cervical spine, lumbar spine, right knee, and right shoulder MRIs performed on Assignor
- Whether Respondent made out a prima facie case of lack of medical necessity and, if so, whether Applicant rebutted it
- Whether statements contained within documents bearing facsimile, rubber-stamped, or computer-generated signatures should be accepted as probative in No-Fault arbitrations

4. Findings, Conclusions, and Basis Therefor

Appearances

For Applicant:

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New York, NY 10170
By: Ashley Andrews-Santillo, Esq.

For Respondent:

Daniel J. Tucker, P.C.
One Metro Tech Center
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Brooklyn, NY 11201
By: Jack Hessel, Esq.

Applicant commenced this New York No-Fault insurance arbitration, seeking as compensation \$6,398.00 which it billed for performing cervical spine, lumbar spine, right knee, and right shoulder MRIs on April 2, 2018, on Assignor, a 27-year-old male who was injured in a motor vehicle accident on March 16, 2018. Respondent denied payment on two grounds: (1) an attached peer review, and (2) fees not in accordance with fee schedule. At the hearing, Applicant reduced the amount in dispute to \$2,889.80, the amount Respondent claimed was the proper fee. Respondent then stated that the only issue being pursued was that raised by the submitted peer review -- that there was a lack of medical necessity for the MRIs.

This arbitration was organized by the American Arbitration Association, which has been designated by the New York State Department of Financial Services to coordinate the mandatory arbitration provisions of Insurance Law § 5106(b), which provides:

Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party ["No-Fault insurance"] benefits, or additional first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of this section to arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent.

Both parties appeared at the hearing by counsel, who presented oral argument and relied upon documentary submissions. I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center as of the date of the hearing, said submissions constituting the record in this case. This includes any late submissions. I exercise my discretion pursuant to 11 NYCRR 65-4.2(b)(3)(iv) to include in the record those documents which otherwise would be excluded therefrom as being submitted late by virtue of 11 NYCRR 65-4.2(b)(3)(i)-(iii).

The parties stipulated that Applicant established a prima facie case of entitlement to No-Fault compensation with respect to its bill. They also stipulated that Respondent's Form NF-10 denial of claim form was timely issued, i.e., within the 30-day deadline prescribed by Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1).

Since Respondent's denial was timely, it was within its rights to assert lack of medical necessity as a defense. Liberty Queens Medical, P.C. v. Liberty Mutual Insurance Co., 2002 WL 31108069 (App. Term 2d & 11th Dists. June 27, 2002); cf. Country-Wide Insurance Co. v. Zablozki, 257 A.D.2d 506 (1st Dept. 1999). "The no-fault law defines 'basic economic loss,' for which accident victims are entitled to reimbursement up to \$50,000, as '[a]ll necessary expenses incurred for: (i) medical, hospital ... surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services' (Insurance Law § 5102[a][1] [emphasis added]). Like the statute, the regulations promulgated thereunder expressly state that reimbursable medical expenses consist of 'necessary expenses' (11 NYCRR 65-1-1 [emphasis added])." Long Island Radiology v. Allstate Ins. Co., 36 A.D.3d 763, 765 (2d Dept. 2007).

A peer reviewer must establish a factual basis and medical rationale for his asserted lack of medical necessity of the health care provider's services. See Amaze Medical Supply Inc. v. Allstate Ins. Co., 12 Misc.3d 142(A), 2006 N.Y. Slip Op. 51412(U) (App. Term 2d & 11th Dists. July 12, 2006); Prime Psychological Services, P.C. v. Progressive Casualty Ins. Co., 24 Misc.3d 1244(A), 2009 N.Y. Slip Op. 51868(U) at 3 (Civ. Ct. Richmond Co., Katherine A. Levine, J., Aug. 5, 2009); A.M. Medical Services, P.C. v. Deerbrook Ins. Co., 18 Misc.3d 1139(A), 2008 N.Y. Slip Op. 50368(U) (Civ. Ct. Kings Co., Sylvia G. Ash, J., Feb. 25, 2008).

If the peer review satisfies these standards, it becomes incumbent on the claimant to rebut the peer review. See Be Well Medical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 18 Misc3d 139(A), 2008 N.Y. Slip Op. 50346(U) (App. Term 2d & 11th Dists. Feb. 21, 2008); A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 2007 N.Y. Slip Op. 51342(U) (App. Term 2d & 11th Dists. July 3, 2007), because the ultimate burden of proof on the issue of medical necessity lies with the claimant. Dayan v. Allstate Ins. Co., 49 Misc.3d 151(A), 2015 N.Y. Slip Op. 51751(U) (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015); Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co., 37 Misc.3d 19, 22 n. (App. Term 2d, 11th & 13th Dists. 2012).

"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 11th ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip Op. 51871(U) at 2 (App. Term 2d & 11th Dists. Sept. 29, 2006). Thus, although Respondent must come forward with prima facie proof of lack of medical necessity, the burden will shift to Applicant to prove medical necessity by a preponderance of the credible evidence if Respondent meets its burden.

Respondent's defense of lack of medical necessity was based upon a peer review ostensibly prepared by Dr. Richard Coven. Applicant submitted another peer review containing the identical signature in an effort to prove that the signature on the submitted peer review was a facsimile one. Applicant's counsel argued that this proved that the signature on the submitted peer review was a facsimile one. Based on my comparison of the peer review submitted by Respondent and the other one submitted by Applicant, I find that they are identical. The signature is the same facsimile one affixed in a computer-generated manner by someone. It has been my position consistently that medical reports, narratives, and peer reviews which do not bear authentic signatures, but rather facsimiles, should not be accorded probative value for their contents, such as findings and opinions, unless authenticated.

The entire process for No-Fault arbitrations was designed to enable the parties to resolve disputes over No-Fault compensation in an expeditious manner, without the formalities attendant to court actions. This lack of formality enables the parties in arbitration to submit written documents prepared by physicians and others -- in lieu of personally testifying -- in support of their positions. This would not be permitted in a regular court action, where the rules of evidence apply. Allowing this entails risks, however, that documents not really prepared or authorized by the signatories might be submitted. Documents bearing rubber-stamped, computer-generated, or other facsimile signatures fall into this category. Were I to give credence to such documents, I would be encouraging their submission, thus leading to the possibility of the introduction into the arbitration process of fraudulent materials -- materials prepared by others bearing the signatures of the physicians who have no idea that they are being submitted.

So while I am in favor of adjudicating disputed issues on the basis of written submissions, which are hearsay, instead of compelling treating doctors, peer reviewers, and IME examiners to testify in person, I cannot permit suspect documents to taint the process. Where it is clear to me that medical reports, narratives, letters of medical necessity, peer reviews, IME reports, or other documents are rubber-stamped with signatures, bear computer-generated signatures, or contain facsimile signatures, and I am not assured of their genuineness from other sources, I accord the contents no credence.

This reasoning was set forth by me early on, in an award in the arbitration of Matter of Arbitration of Park Avenue South Chiropractic, P.C. a/a/o "P.G." v. Country-Wide Insurance Co., AAA Case No. 17-991-69775-1, Dec. 15, 2002. In affirming the award, Master Arbitrator Victor J. Hershdorfer, stated:

An arbitrator has broad powers and discretion in the manner in which hearings are conducted. It is he alone who determines what evidence is material and relevant, and the arbitrator is not obligated to conform strictly to the legal rules of evidence. 11 N.Y.C.R.R. 65.17(B)(5)(xx) permits the arbitrator to exercise broad discretion, largely free of substantive and procedural limitations. Matter of Petrofsky v. Allstate, 54 N.Y.2d 207. The arbitrator has in this case actually set forth a rational basis for his determination that rubber-stamped medical reports should be given little credence. But even had he not, the weight to be given to such reports would be solely within the discretion of the arbitrator and beyond the scope of a master arbitrator's jurisdiction to review.

Matter of Arbitration of Park Avenue South Chiropractic, P.C. a/a/o "P.G." v. Country-Wide Insurance Co., AAA Case No. 17-R-991-90843-2, Feb. 25, 2003.

In another case, Matter of Arbitration of Sports Medicine & Orthopaedic Rehabilitation a/a/o "I.B." v. Country-Wide Insurance Co., AAA Case No. 17-R-991-14272-3, Master Arbitrator Peter J. Merani stated:

The Applicant argues that the arbitrator below incorrectly chose to give a negative inference of fraud to the submitted documents that were rubber stamped. The arbitrator below is the trier of the facts and must evaluate and weigh the evidence presented at the hearing in arriving at his decision. The arbitrator, in weighing the evidence, has broad powers and discretion in determining what evidence is relevant and material. The arbitrator is in the best position to evaluate the evidence and decide on the credibility of the submitted documents. In this matter, the arbitrator below received into evidence the documents and gave them the weight he determined they were entitled to based on the fact that they were rubber stamped. While the rules of evidence are relaxed in the arbitration forum and written documents are accepted into evidence, it is still up to the arbitrator to evaluate the evidence and determine the weight to be given to submitted

documents. In this case the arbitrator below stated his reasons in the award, which had a rational basis, for his finding that the rubber stamped documents should not be given any credence in arriving at this decision.

In Matter of Arbitration of 76th Street Medical P.C. a/a/o "G.Q." v. St. Paul Travelers Insurance Co., AAA Case No. 17-R-991-11516-6, my determination, resting upon a rejection of a peer review bearing a computer-generated signature, was affirmed by Master Arbitrator William F. Laffan, Jr.:

The lower arbitrator, Aaron D. Maslow, Esq., awarded the health provider the sum of \$390.00 on the ground that he did not accept the insurer's peer review because of the lack of a signature by the examining physician and only contained a signature which was not the product of a rubber stamp but rather one which had been scanned and reproduced by means of a computer.

The NFA explained in detail his findings which he supported with reference to the awards of Master Arbitrators who took the same position with respect to medical reports which did not contain the physician's hand written signature but rather one which relied upon other means such as stamped and computer generated signatures. Those cited decisions reinforced the power of the hearing arbitrator to accept or reject medical reports on the basis of the signature of the physician. The NFA then went on to conclude that he gave no credence to the peer review which contained the computer generated signature of Dr. Ross.

On appeal, the insurer-respondent primarily relies upon the fact that Arbitrator Maslow did not raise an issue with respect to the validity of Dr. Ross' signature on the peer review submitted by the insurer and that this constituted an arbitrary and capricious determination.

The NFA's determination of refusing to accept the submitted signature does not rise to the level of an issue between the parties, as such, but rather is simply an evaluation of the signature from the standpoint of the credibility to be accorded to it. In short, this is purely an evidentiary question. The NFA's conclusion was to the effect that the signature was not creditable and on that basis he rejected it as evidence in support of the respondent's position.

Master Arbitrator Victor Hershendorfer again affirmed an award by me, in Matter of Bronx Medical & Diagnostic P.C. a/a/o "SS" v. GEICO Ins. Co., AAA Case No. 99-16-1027-3809, July 11, 2017, where I made a finding not to accord probative value to a peer review and an addendum bearing facsimile signatures:

The arbitrator found that the "signatures" by the peer reviewer were facsimiles and that the signatures had not been authenticated.

The arbitrator recognized that ". . . strict conformity to legal rules of evidence shall not be necessary . . ." 11 N.Y.C.R.R. 65-4.5(o)(1) and thus was prepared to admit written submissions "instead . . . of compelling treating doctors, peer reviewers, and IME examiners to testify in person. . ." (hearsay) but he drew the line at accepting documents which may not have been read by the "signatory". By giving credence to ". . . documents bearing rubber-stamped, computer-generated or other facsimile signatures. . ." he ". . . would be encouraging their submission, thus leading to the possibility of the introduction into the arbitration process of fraudulent materials -- materials prepared by others bearing the signatures of the physicians who have no idea they are being submitted.

As a result, the arbitrator gave no credence to the contents of the peer review.

On this appeal, it is argued that the refusals of the arbitrator to give credence to a peer report with a facsimile signature should be considered arbitrary, capricious and/or incorrect as a matter of law.

The arbitrator is the judge of the relevance and materiality of the evidence offered. 11 N.Y.C.R.R. 65-4.5(o)(1)

In Matter of Pierre v. General Insurance, 100 AD2d 705 (3d Dept., 1984), an arbitrator's acceptance of an unsworn letter from the cardiologist was upheld, the court stating that the admission of evidence that might well be precluded in a court of law is not sufficient cause for vitiating an award unless the mistake or error is so gross or palpable as to amount to fraud or misconduct.

The appellant argues the converse should not be true, i.e., that the failure to consider evidence should be considered arbitrary, capricious and/or incorrect as a matter of law.

The appellant references two Appellate Division cases in support of its position. In Martin v. Portexit Corp., 98 A.D.3d 63 (1st Dept. 2012) the First Department held that a physician's affirmation containing an electronic signature complied with CPLR 2106 and that the requiring of additional evidence imported a requirement not contemplated by the statute.

In Auto One Ins. Co. v. Hillside Chiropractic, P.C., 126 A.D.3d 423 (1st Dept., 2015) the Appellate Division held that the no-fault arbitrator should not have adhered to strict conformity to the legal rules of evidence by failing to give weight to a chiropractor's IME which was not notarized.

The arbitrator in his erudite opinion has referenced Appellate Term opinions which have also looked askance at facsimile opinions including Vista Surgical Supplies, Inc. v. Travelers Ins. Co., 14 Misc.3d 128(A), 836 N.Y.S.2d 491 (Table), 2006 WL 3858395 (App. Term 2d & 11th Dec. 2006). This case is especially of note because the peer review was held not to be admissible where there was nothing in the record to indicate that the doctor himself authorized it and because even more importantly, the Appellate Division affirmed the result at 50 A.D.3d 778 (2d Dept., 2008).

In this case, the arbitrator recognized that he was not limited to strict conformity with the rules of evidence. He made a determination as to the credibility to be given to the peer report and held for the applicant.

Another no-fault arbitrator might well have held for the respondent by finding the peer report credible but that is not the test.

The arbitrator has set forth a rational basis as to his finding. It was not arbitrary, capricious and/or incorrect as a matter of law.

A second issue has come up on this appeal. The appellant has sought to enlarge the record by adding an affirmation that was not part of the record in the arbitration. A master arbitrator does not have the authority to enlarge the record to add evidence. In Re Metropolitan Property & Liability v. Mendelsohn, 251 A.D.2d 666 (2d Dept., 1998)

In Matter of Arbitration of Gerritsen Medicare Inc. a/a/o "ST" v. GEICO Ins. Co., AAA Case No. 99-17-1068-5556, Aug. 16, 2018, Master Arbitrator Marilyn Felenstein wrote:

Respondent now seeks vacatur of the award arguing that the lower arbitrator arbitrarily and capriciously refused to consider Geico's peer reviews based on his determination that the peer reviews all included facsimile signatures rather than original signatures. Respondent argues and cites to case law for the premise that Arbitrator Maslow improperly applied a standard for admissibility of evidence that was improper in the arbitration forum. It is argued that the Insurance Department Regulations do not prescribe a format for a peer review report and that it is only when a peer review is being submitted in support of or in opposition to a motion that it must be properly sworn or affirmed. Respondent cites to cases that have held that a physician's affirmation containing an electronic signature is acceptable and probative. Also cited is General Obligations Law sec. 5-703 for the premise that the terms "writing" and "subscribed" should include electronic signatures.

Respondent cited to the award of Master Arbitrator Anne L. Powers who vacated a previous award of Arbitrator Maslow that was based on the same grounds as those relied on by the arbitrator in this matter. It is argued that the technical rules of admissibility for motion practice should not be applied at arbitrations. Respondent seeks the remand of this matter for a determination of medical necessity without reference to the signature of the peer reviewer.

Applicant counters that Arbitrator Maslow's award had a rational basis as the arbitrator cited to and relied on cases that have adopted his position in regard to facsimile signatures. There is a body of cases that have held that a peer review containing a stamped facsimile of the doctor's signature is not admissible where there is nothing in the record to indicate that the doctor himself stamped it. It is argued, therefore, that the decision to refuse to accept the peer reviews was well within the purview of the authority granted to the arbitrators.

It is well established that it is within the sole discretion of the arbitrator to determine the relevance and weight to be given to evidence submitted. It was well within the authority of the lower arbitrator to decide whether or not to allow a subsequent submission under these circumstances even if it meant that Respondent's [] peer review would not be considered. Arbitrator Maslow explained in detail why he elected to preclude the peer reviews. He explained his decision in a rational way.

A lower arbitrator's award may only be vacated where the arbitrator's decision is arbitrary and capricious or irrational. It is the role of the master arbitrator to determine whether or not the decision of the lower arbitrator was reached in a rational manner and whether the decision was arbitrary and capricious. It does not include the power to review, de novo, the matter originally presented to the arbitrator. The master arbitrator exceeds his statutory power by making his own factual determination, by reviewing factual and procedural errors committed during the arbitration, by weighing the evidence, or by resolving issues such as credibility of witnesses.

It is, therefore, the determination of the Master Arbitrator that the lower arbitrator had a rational basis for his award based on the evidence presented. The award is affirmed in its entirety.

Master Arbitrator Robert Trestman, in Matter of Arbitration of Bronx Med. & Diagnostic PC a/a/o "JM" v. GEICO Ins. Co., AAA Case No. 99-16-1045-6689, Aug. 23, 2018, after summarizing the parties' positions, wrote:

I have carefully reviewed the parties' briefs, the record on appeal to the extent it has been furnished by the parties and the pertinent regulations and case law. I certainly appreciate appellant's position

and I understand that many other arbitrators would have accepted respondent's peer reviews containing an electronic signature. My role and duties as Master Arbitrator are not to independently determine the evidentiary and credibility issues decided herein but, instead, determine whether the award was arbitrary, legally incorrect, irrational or violative of due process. I cannot conduct a de novo review of the case and I cannot substitute my interpretation or my view as to the weight or credibility of the evidence over that of the lower arbitrator, as long as the lower arbitrator's determination appears to be rational, legally correct and based on the evidentiary record. It is within the province of the lower arbitrator to determine what evidence to accept or reject and what inferences should be drawn based on the evidence. See *Mott v State Farm*, 55 NY2d 224. In *Petrofsky v Allstate*, 54 NY2d 207, the Court of Appeals held that a master's powers of review do not encompass a de novo review of the matter presented to the lower arbitrator nor do they authorize him to determine the weight or credibility of the evidence. I acknowledge that, per 65-4.5[o][1], an arbitrator is not obligated to "strict conformity to legal rules of evidence." I note that there are court cases, arbitration awards and master arbitration awards offering contrasting holdings pertinent to the subject issue. I note that respondent was apparently aware of this arbitrator's predilection concerning the subject evidentiary issue. Again, although another trier of fact may have reached a different conclusion, given this Master's scope of review, I can-not negate this lower arbitrator's factual, evidentiary and credibility determination based on the evidence presented and which I find neither erroneous as a matter of law nor arbitrary and capricious nor so irrational as to warrant vacatur. Moreover, I do not find any violation of due process.

In Matter of Arbitration of Surgicare of Brooklyn a/a/o "LB" v. GEICO Ins. Co., AAA Case No. 99-17-1074-7372, Jan. 18, 2019, Master Arbitrator Anne L. Powers wrote:

The issue that was determined was whether Respondent made out a prima facie case of lack of medical necessity and if so whether Applicant rebutted it; and whether statements contained within documents bearing facsimile or computer-generated signature should be accepted as probative in No-Fault arbitrations.

The award indicated that the arbitrator in his reasoning recognized that he was not limited to strict conformity with the rules of evidence. He decided the credibility to be given to the peer review and he held for the Applicant. The arbitrator set forth a rational basis as to his findings. He cited to and relied upon cases that have adopted his position in rejecting facsimile signatures. He noted there is a body of cases that have held that a peer review containing a stamped facsimile of a doctor's signature is not admissible where there is nothing in the

record to indicate that the doctor himself stamped it. It was argued that the decision to refuse to accept the peer reviews was well within the purview of the authority granted to the arbitrators.

In his analysis the arbitrator noted in his discussion of the peer review that he was especially concerned because the peer review and the addendum bear inconsistent internal dates. It was noted the peer review had a date of 9/11/2017 set forth at the top of the page, yet the signature date was 9/12/17. The addendum had a date of 10/5/18 on the opening page and next to the signature 10/5/17. This highlighted the question of who wrote the peer review and the addendum and who affixed the facsimile signatures. The arbitrator concluded he gave no credence to the peer review. Applicant was awarded \$4,240.55 in settlement of this claim.

Respondent/ Appellant; in the instant appeal is arguing that the Arbitrator was arbitrary and capricious by refusing to consider Geico's peer review based on his determination that the peer reviews all included facsimile signatures rather than original signatures. Respondent argues for the premise that the arbitrator improperly applied a standard for admissibility of evidence that is improper in the arbitration forum as it violates due process. Respondent argues the Insurance Department's Regulation 11 N.Y.C.R.R. Section 65-4.5(o)(1) which prescribes that "strict conformity to legal rules of evidence shall not be necessary. Respondent claims courts have determined that the Insurance Department's Regulations do not prescribe a format for a peer review report and that it is only when a peer review is being submitted in support of or in opposition to a motion that it must be properly sworn or affirmed. Respondent cited cases that have held that that a physician's affirmation containing an electronic signature is acceptable and probative. Respondent also cited General Obligation Law sec. sec. 5-703 for the premise that the terms "writing" and "subscribed" should include electronic signatures.

Lastly Respondent admits that in the past this arbitrator has permitted Geico to submit affidavits and/or affirmations from the peer physicians to authenticate his/her signature however, not in this claim. As such Respondent was deprived of its opportunity to have this case determined on the merits. Unfortunately, Respondent's arguments on appeal are outside the scope of a Master review as it appears that the arbitrator in his award clearly addressed and discussed his rationale for each of these arguments at the hearing. It is the Arbitrator, who is the trier of fact and in this claim, he clearly stated that he reviewed the record to make his decision to award benefits to the Applicant. Perhaps the best practice for Respondent is to secure affirmations from their medical experts who utilize computer generated signatures at the time the document is signed.

Based on the foregoing, I find lower arbitrator decided this claim based upon his review and evaluation of the record as well as case law. Based on the foregoing, I find the award below was cogently thought out; clearly articulated and had a rational and plausible basis in the evidence. As such the award was not irrational, arbitrary and capricious or incorrect as a matter of law. Therefore I see no reason to disturb the arbitrator's decision. The award is therefore affirmed in its entirety.

In the latest master arbitrator award affirming my hearing award where there was an issue of facsimile signatures, Matter of Arbitration of Sigma Med Care Inc. a/a/ "BJ" v. Amerprise Ins. Co., AAA Case No. 99-18-1087-2705, March 16, 2019, Master Arbitrator Steven Rickman wrote:

Appellant argues that other than an unqualified perception, Arbitrator Maslow had no basis to conclude that the signatures were electronically affixed. Whether right or wrong on this point, Arbitrator Maslow, nevertheless, did make a factual determination that said signatures were electronically affixed. Pursuant to the Petrofsky standard of review, this factual determination cannot be disturbed. Similarly, the weight, credibility, persuasiveness and admissibility of the evidence is exclusively within the province of the lower arbitrator. Here, Arbitrator Maslow afforded no probative value to the peer reviews and addendums for reasons detailed in his award.

An arbitrator is not required to justify his/her award. It must merely be evident that there exists a rational basis for it upon a reading of the record. Dahn v. Luchs, 92 A.D.2d 537 (1983). Upon a reading of the record I am satisfied that there was sufficient evidence presented wherein the arbitrator could rationally conclude that the carrier's evidence did not establish lack of medical necessity on a prima facie level.

I find that the arbitrator's determination was not irrational, arbitrary, capricious or incorrect as a matter of law.

A peer review containing a stamped facsimile of the doctor's signature is not admissible where there is nothing in the record to indicate that the doctor himself authorized it. Vista Surgical Supplies, Inc. v. Travelers Ins. Co., 50 A.D.3d 778 (2d Dept. 2008), aff'g, 14 Misc.3d 128(A), 2006 N.Y. Slip Op. 52502(U) (App. Term 2d & 11th Dists. Dec. 15, 2006); Support Billing & Management Co. v. Allstate Ins. Co., 15 Misc.3d 126(A), 2007 N.Y. Slip Op. 50496(U) (App. Term 2d & 11th Dists. Mar. 12, 2007). This holding should apply likewise in arbitration -- not because the admission of such documents would violate the rules of evidence (which do not govern arbitrations), but because such documents lack probative value. If the only evidence in support of lack of medical necessity is a peer review bearing a facsimile

signature, the insurer has failed to raise a triable issue of fact on that issue. See Orthotic Surgical & Medical Supply, Inc. v. GEICO Ins. Co., 20 Misc.3d 137(A), 2008 N.Y. Slip Op. 51540(U) (App. Term 2d & 11th Dists. July 10, 2008).

An affidavit from the peer reviewer in which she states that she personally applied the signature on the peer review report suffices to rebut a claim that the peer review report contained a stamped facsimile signature. Eden Medical, P.C. v. Eveready Ins. Co., 26 Misc.3d 140(A), 2010 N.Y. Slip Op. 50265(U) (App. Term 2d, 11th & 13th Dists. Feb. 19, 2010). None was submitted by Respondent here.

In the case at bar, I give no credence to the aforesaid peer review which Respondent submitted, allegedly prepared by Dr. Coven and bearing his facsimile signature. I am not persuaded that it was genuinely prepared or approved by him. In the absence of a genuine signature of Dr. Coven or an affidavit or affirmation authenticating the facsimile signature, there is no assurance that he, and not someone else, wrote the peer review.

I am especially concerned about who had access to the peer review -- who had the opportunity to affix the signature? I note that the peer review is addressed to Comprehensive Medical Reviews, so others had access to it.

I also note that there is presently pending an action in the United States District Court for the Eastern District of New York captioned Sky Medical Supply, Inc. v. SCS Support Claims Services, Inc., Docket No. 12-CV-6383, in which the plaintiffs claim, among other things, that electronic signatures of doctors were affixed to peer reviews when the doctors did not prepare them. This evidences that there is a wider concern about peer reviews containing facsimile signatures being used to deny services for persons covered by No-Fault insurance.

Nothing else in the record confirms the accuracy of the contents of the peer review or the opinions expressed therein. When one submits a report, letter, or other document authenticated with a rubber-stamped, computer-generated, or other facsimile signature instead of a genuine one, for the purpose of asserting the truth of the contents therein, the evidence is of no probative value -- it is equivalent to submitting no evidence.

After discounting the peer review the record lacks any other expert evidence from Respondent in support of its defense of lack of medical justification/necessity. Thus, I conclude that Respondent has failed to submit prima facie evidence. Therefore, while the ultimate burden of proof was on Applicant to prove medical necessity by a preponderance of the credible evidence, see Dayan v. Allstate Ins. Co., supra, Applicant did not have to assume that burden in this case because Respondent failed to meet the initial burden of having to come forward with credible evidence in support of its defense to payment.

Applicant's prima facie case of entitlement to No-Fault compensation stands. The within arbitration claim is granted. Applicant is awarded \$2,889.80 in health service benefits.

Interest: The parties stipulated that should Applicant prevail, interest would accrue as of the date that Applicant's arbitration request was received by the American Arbitration Association. Per the latter's electronic case folder, that date was July 9, 2019. The end date for the calculation of the period of interest shall be the date of payment of the claim. In calculating interest, the date of accrual shall be excluded from the calculation. General Construction Law § 20 ("The day from which any specified period of time is reckoned shall be excluded in making the reckoning.") Where a motor vehicle accident occurs after Apr. 5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. 11 NYCRR 65-3.9(a); Gokey v. Blue Ridge Ins. Co., 22 Misc.3d 1129(A), 2009 N.Y. Slip Op. 50361(U) (Sup. Ct. Ulster Co., Henry F. Zwack, J., Jan. 21, 2009).

Attorney's Fee: After calculating the sum total of the first-party benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, as provided for in 11 NYCRR 65-4.6(d) (as existing on the filing date of this arbitration), subject to a maximum fee of \$1,360.00.

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	Amount Amended	Status
	American Diagnostic Imaging	04/02/18 - 04/02/18	\$6,398.00	\$2,889.80	Awarded: \$2,889.80
Total			\$6,398.00		Awarded: \$2,889.80

- B. The insurer shall also compute and pay the applicant interest set forth below. 07/09/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Respondent shall pay Applicant interest on the total first-party benefits awarded herein, computed from July 9, 2019 to the date of payment of the award, but excluding July 9, 2019 from being counted within the period of interest. The interest rate shall be two percent per month, simple (i.e., not compounded), on a pro rata basis using a 30-day month.

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, as provided for in 11 NYCRR 65-4.6(d) (as existing on the filing date of this arbitration), subject to a maximum fee of \$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 Kings

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

05/02/2020
(Dated)

Aaron Maslow

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:
dda1dd7004ea23d0102748d89f5d55d5

Electronically Signed

Your name: Aaron Maslow
Signed on: 05/02/2020