American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Linden West Medical PC (Applicant)	AAA Case No.	17-19-1142-3695
	Applicant's File No.	N/A
- and -	Insurer's Claim File No.	0589238020101015
	NAIC No.	35882
Geico Insurance Company (Respondent)		

ARBITRATION AWARD

I, Henry Sawits, 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: the patient.

1. Hearing(s) held on 09/22/2020
   Declared closed by the arbitrator on 09/22/2020

   John Faris, Esq. from Law Offices of Eitan Dagan (Elmhurst) participated by telephone for the Applicant

   Frank Randazzo from Geico Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 2,636.44**, 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 arises out of treatment of a thirty-one-year old female for injuries sustained in a motor vehicle accident occurring on March 23, 2017.

   Applicant seeks reimbursement, in the amount of $2,636.44, for NCV testing performed on May 31, 2017.

   Respondent issued a timely denial denying reimbursement based on the peer review report of Terence McAlarney, M.D.

The issue in this arbitration is whether the NCV testing performed on May 31, 2017 was medically necessary?

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the Hearing.

This arbitration arises out of treatment of a thirty-one-year old female for injuries sustained in a motor vehicle accident occurring on March 23, 2017.

Applicant seeks reimbursement, in the amount of $2,636.44, for NCV testing performed on May 31, 2017.

Respondent issued a timely denial denying reimbursement based on the peer review report of Terence McAlarney, M.D.

The patient was injured in an automobile accident on March 23, 2017 and thereafter came under the care and treatment of Bernard Osei Tutu, M.D. who examined the patient on April 18, 2017. At that time the patient complained of headaches, pain and stiffness in the neck and pain and stiffness of the mid back and pain and stiffness of the right knee. Ranges of motion of the cervical spine were mildly restricted and ranges of motion of the lumbar spine were moderately restricted. There was tenderness and spasm in the cervical and lumbar spine. MRIs of the cervical and thoracic spine were recommended as was a consultation with an orthopedist. The "Diagnostic Impression" was post traumatic headaches, post traumatic stress, cervical paraspinal muscle and ligament sprains/strains, thoracic paraspinal muscle and ligament sprains/strains, right knee sprain/strain and right knee meniscus tear.

The NCV testing at issue was performed on May 31, 2017.

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])*.

It is *Respondent's* obligation to object to *any deficiencies* in Applicant's submissions by either formally objecting to any error or omission or seeking additional verification.

Since Respondent failed to timely object to the completeness of the forms submitted by Applicant or seek verification of same as required by *11 NYCRR 65-3.5*, Respondent waived any defenses based thereon (see *Hospital for Joint Diseases v. Allstate Ins. Co., 21 AD 3d 348, 800 N.Y.S. 2d 190 [2005]; Nyack Hosp. v. Metropolitan Prop. & Cas. Ins. Co., 16 AD 3d 564, 791 N.Y.S. 2d 658 [2005]; New York Hosp. Med. Ctr. Of Queens v. New York Cent. Mut. Fire Ins. Co., 8 AD 3d 640, 779 N.Y.S. 2d 548 [2004]).*

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 11th Jud Dists 2003]).

In the event an insurer relies on a peer review report to demonstrate that a particular service was medically unnecessary the peer reviewer's opinion must be supported by sufficient factual evidence or proof, and cannot simply be conclusory, or may be supported by evidence of generally accepted medical and/or professional practice or standards. See *Nir v. Allstate Insurance Company,* 2005 NY Slip Op 25090; 7 Misc.3d 544; 796 N.Y.S.2d 857; 2005 N.Y. Misc. LEXIS 419 and *Citywide Social Work & Psy. Serv. P.L.L.C. v. Travelers Indemnity Co.,* 3 Misc. 3d 608; 777 N.Y.S.2d 241; 2004 NY Slip Op 24034.

In the event an insurer's evidence rebuts the inference of medical necessity, by proof in admissible form, establishing that the services were not medically necessary and if such evidence is not refuted by the Applicant such proof may entitle the insurer to judgment in its favor. See *A. Khodadadi Radiology, P.C. v. NY Central Mutual Fire Insurance Co.,* Supreme Court, Appellate Term 2nd and 11th Judicial Districts, 2007 NY Slip Op 51342 (U); 16 Misc.3d 131 (A).

11 N.Y.C.R.R. § 65-4.5 (o) (1) provides, in part, as follows:

> "(o) *Evidence.* (1) The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The arbitrator may question any witness or party and *independently raise any issue that the arbitrator deems relevant to making an award* that is consistent with the Insurance Law and department regulations". (Emphasis Added).

In his peer review report Terence McAlarney, M.D. stated that, in his opinion, the EMG/NCV testing performed on May 31, 2017 was not medically necessary. Dr. McAlarney reviewed the patient's medical records and noted that there was no radiating neck pain. There was radiating low back pain with weakness and numbness in the legs. He noted the examination findings of reduced motor strength, diminished sensation and reflexes graded at 2+. He stated that the patient had a clinically obvious lumbar radiculopathy with radiating lumbar pain and dermatomal sensory deficits and lumbar

spine musculoskeletal findings. He stated that the most appropriate level of service if there was no improvement or worsening of the lumbar radiculopathy after a trial of therapy would be an MRI of the lumbar spine to evaluate for compression of neural tissue. He added that the MRI could be obtained without this testing. He also noted that only NCV testing was performed and EMG testing was not performed. He stated that NCS testing without EMG testing is quite limited. With regard to the upper limbs he stated that there was no medical necessity for this testing because there were no symptoms in the upper limbs to investigate because there was no radiating pain.

When a peer review provides a factual basis and medical rationale for the reviewer's opinion that a service is not medically necessary, it is the Applicant's obligation to come forward with evidence sufficient to refute that showing. See *Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co.,* 21 Misc. 3d 142 (A), 880 N.Y.S.2d 223 (Table), 2008 N.Y. Slip Op. 52450(U), 2008 WL 5146967 (App. Term 2d and 11th Dists. Dec.3, 2008).

I find that the report of Terence McAlarney, M.D. provides a sufficient factual basis and medical rationale for the opinion that the services billed were not medically necessary and therefore the burden shifts to the Applicant to refute the opinion that these services were not medically necessary. See *Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co.,* 21 Misc.3d 142A (App Term 2d & 11th Jud Dist 2008); *Crossbridge Diagnostic Radiology, PC v. Progressive Casualty Ins. Co.,* 20 Misc.3d 143A (App Term 2d & 11th Jud Dist. 2008).

In a Rebuttal to the peer review, Bernard Osei-Tutu, M.D. reviewed the patient's history and his clinical findings at the time of his initial examination on March 23, 2017. He noted his clinical findings at the time of his April 18, 2017 examination of the patient and the MRI findings related to the patient's cervical spine and thoracic spine. He stated that despite conservative treatment the patient's condition did not improve. He stated that the clinician's examination is often not adequate to decide whether there is a lesion, the severity of the lesion or the location of the lesion. He stated that neck pain and lower back pain are indicative of cervical radiculopathy, brachial plexopathy, focal neuropathy and lumbosacral radiculopathy or plexopathy. He also stated that needle EDX is particularly helpful because of false positives in MRIs. It is noted, however, that needle EDX was not performed as stated by Dr. McAlarney. Dr. Osei-Tutu stated that electrodiagnostic studies are not a substitute for MRIs but should be performed in addition to MRI.

Upon consideration of the arguments of counsel and after a thorough review of all submissions I find that Respondent has submitted sufficient evidence to meet its burden of demonstrating that the services at issue were not medically necessary and to justify its denial of reimbursement for these services. I also find that Applicant's evidence is insufficient to rebut Respondent's evidence. Dr. Osei-Tutu did not address Dr. McAlarney's statement that performing NCV studies alone, without EMG studies, is "quite limited". Indeed Dr. Osei-Tutu stated in his Rebuttal that "Needle EDX is particularly helpful" because of the false positive rates of MRI. Dr. Osei-Tutu did not explain, however, why he didn't perform needle EMG testing nor did he express any

disagreement with Dr. McAlarney's statement that performing NCV studies alone, without needle EMG, is "quite limited". Furthermore Dr. Osei-Tutu did not adequately explain why the upper extremity testing was performed in the absence of any complaint by the patient of radiating neck pain. In view of all of the foregoing, I find that Applicant's claim for reimbursement should be 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 Suffolk

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

09/24/2020
(Dated)

Henry Sawits

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:
f6c56afd88e932d85d57a9febb3d0523

Electronically Signed

Your name: Henry Sawits
Signed on: 09/24/2020