American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

RIU Chiropractic PC (Applicant)	AAA Case No.	17-20-1163-7034
	Applicant's File No.	00079
- and -	Insurer's Claim File No.	0524955887
	NAIC No.	29688
Allstate Insurance Company (Respondent)		

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 ["FH"]

1. Hearing(s) held on 02/16/2021
   Declared closed by the arbitrator on 02/16/2021

   Ratsenberg & Associates, P.C. from Ratsenberg & Associates, P.C. participated by written submission for the Applicant

   Law Offices of John Trop from Law Offices of John Trop participated by written submission for the Respondent

2. The amount claimed in the Arbitration Request, **$ 246.24**, 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

   - Whether Applicant established entitlement to No-Fault insurance compensation for chiropractic services provided to Assignor.
   - Whether Respondent made out a prima facie case of lack of medical necessity based on an IME report and, if so, whether Applicant rebutted it.

4. Findings, Conclusions, and Basis Therefor

Appearances

For Applicant:

Ratsenberg & Associates, P.C.
2579 East 17th Street
Unit 51
Brooklyn, NY 11235

For Respondent:

Law Offices of John Trop
120 White Plains Road
Suite 200
Tarrytown, NY 10591

Applicant commenced this New York No-Fault insurance arbitration, seeking as compensation $246.24 which it billed for performing chiropractic services from April 15, 2019 to May 17, 2019, for Assignor, a 50-year-old male who was injured in a motor vehicle accident on Nov. 15, 2018. Three bills are at issue. The first was partially paid and the other two were denied completely. Respondent denied payment on two grounds: (1) lack of medical necessity based on an IME cutoff, and (2) excessive fees.

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.

This arbitration was scheduled for a hearing to take place on Feb. 16, 2021. Rule a of the Rules for Arbitration of No-Fault Disputes in the State of New York, promulgated by the American Arbitration Association (AAA), and 11 NYCRR 65-4.5(a) in the New York No-Fault Regulations both provide: "At the arbitrator's discretion, if the dispute involves an amount less than $2,000, the parties shall be notified that the dispute shall be resolved on the basis of written submissions of the parties." On Jan. 4, 2021, the undersigned arbitrator entered a determination in this case's Electronic Case Folder that the instant dispute would be resolved on the basis of the written submissions of the parties. This was subsequently conveyed to the parties by AAA, who informed them that no live hearing would be conducted.

I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center as of Feb. 10, 2021, said submissions constituting the record in this case. This date was set as the cutoff date for any late submissions in the Jan. 4, 2021 determination. Any late submissions on or prior to Feb. 10, 2021 have been considered. Any submitted afterwards have not. This is pursuant to 11 NYCRR 65-4.2(b)(3)(iv), which vests discretion in the arbitrator to determine whether documents which otherwise would be excluded from the record due to lateness by virtue of 11 NYCRR 65-4.2(b)(3)(i)-(iii) should be considered.

"[A] plaintiff demonstrates prima facie entitlement to summary judgment by submitting evidence that payment of no-fault benefits are overdue, and proof of its claim, using the statutory billing form, was mailed to and received by the defendant insurer." Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 501 (2015). "The court may, in its discretion, rely on defendant's documentary submissions establishing defendant's receipt of plaintiff's claims [citation omitted]." Lenox Hill Radiology MIA, P.C. v. American Transit Ins. Co., 19 Misc.3d 358, 363 (Civ. Ct. New York Co. 2008). An insurer's denial of claim form indicating the date on which it was received adequately establishes that the claimant sent, and that the defendant received, the claim. Ultra Diagnostics Imaging v. Liberty Mutual Ins. Co., 9 Misc.3d 97 (App. Term 9th & 10th Dists. 2005). Respondent's NF-10 denial of claim forms acknowledged receipt of Applicant's proofs of claim and proved nonpayment or partial payment of the bills embodied therein. Hence, I find that Applicant established a prima facie case of entitlement to No-Fault compensation.

Since Respondent's denials were timely, having been issued within the 30-day deadline prescribed by Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1), it was within its rights to assert lack of medical necessity for further treatment 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).

An IME doctor must establish a factual basis and medical rationale for his asserted lack of medical necessity of further health care services. E.g., Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance, 20 Misc.3d 144(A), 2008 N.Y. Slip Op. 51863(U) (App. Term 2d & 11th Dists. Sept. 3, 2008). If he does so, it becomes incumbent on the claimant to rebut the IME review, see AJS Chiropractic, P.C. v. Mercury Ins. Co., 2009 WL 323421 (App. Term 2d & 11th Dist. Feb. 9, 2002), because the ultimate burden of proof on the issue of medical necessity lies with the claimant. Amato v. State Farm Ins. Co., 40 Misc.3d 129(A), 2013 N.Y. Slip Op. 51113(U) (App. Term 2d, 11th & 13th Dists. July 3, 2013), rev'g, 30 Misc.3d 238 (Dist. Ct. Nassau Co. 2010) (district court held that IME cannot form basis for denying benefits unless post-IME records are reviewed); see also 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).

In asserting lack of medical necessity, Respondent's denials referred to an IME report of Dr. Corey Stein, D.C., who had examined Assignor on April 2, 2019. The cutoff of further benefits for chiropractic treatment was imposed effective April 22, 2019.

In Respondent's submission, in addition to the April 2, 2019 IME report of Dr. Stein there is also a Feb. 28, 2019 IME report of Dr. Adam S. Mednick, M.D. I notice that the norms for range of motion testing are different in the two IME reports:

Movement	Dr. Mednick	Dr. Stein
Cervical flexion	50	60
Cervical extension	60	50
Cervical right lateral flexion	45	40
Cervical left lateral flexion	45	40
Cervical right rotation	80	80
Cervical left rotation	80	80
Lumbar flexion	60	90
Lumbar extension	25	30
Lumbar right lateral flexion	25	30
Lumbar left lateral bending	25	30
Lumbar right rotation	30	Not performed

Lumbar left rotation	30	Not performed

While it is true that the two IME exams took place a little over a month apart, that should not be a factor in terms of how many degrees a human being can achieve rotation in the cervical and lumbar spine areas. There are inconsistent numbers for eight movements. I find that these deviations in normal ranges of motion in the spine are too many to ignore. In each instance the respective doctor recorded movement as far as the normal number of degrees. If one were to accept Dr. Mednick's normal for cervical right lateral flexion, cervical left lateral flexion, it means that Dr. Stein's recordation of fewer degrees revealed decreased range of motion. Ultimately, however, the trier of facts is entitled to rely on a set of norms for the purpose of determining whether indeed the injured person had recovered from the trauma of a motor vehicle accident. There being conflicting range of motion norms compels a finding that one cannot rely on Dr. Stein's norms, ergo, there is a deficient medical rationale. Moreover, Dr. Mednick's performance of range of motion testing for right and left rotation of the lumbar rotation but Dr. Stein's failure to perform such testing indicates a lack of a complete factual basis on the part of the latter's report. Without an accurate medical rationale and with an insufficient factual basis, Dr. Stein's IME report fails to make out a prima facie case in support of the defense of lack of medical necessity for further services.

Where other reports in the insurer's papers contradict the conclusion of its peer reviewer that a service was not medically necessary, it has failed to make out a prima facie case in support of the defense of lack of medical necessity. Hillcrest Radiology Associates v. State Farm Mutual Automobile Ins. Co., 28 Misc.3d 138(A), 2010 N.Y. Slip Op. 51467(U), 2010 WL 3258144 (App. Term 2d, 11th & 13th Dists. Aug. 13, 2010). Likewise, when an insurer's IME reports contradict each other on critical standards, they fail to make out a prima facie case in support of the defense of lack of medical necessity.

There is one other defense asserted in Respondent's denial of claim forms: excessive fees. Applicant billed only CPT Code 98942, which is assigned a maximum permissible charge of $41.04 in Region IV, where the services were performed. That is what Applicant charged. Hence, I reject Respondent's defense of excessive fees.

Applicant's prima facie case of entitlement to No-Fault compensation stands. The within arbitration claim is granted in its entirety.

Interest: Where a claim is timely denied, interest shall begin to accrue as of the date arbitration is requested by the claimant, i.e., the date the American Arbitration Association (AAA) receives the applicant's arbitration request, unless arbitration is commenced within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the 30th day after proof of claim was received by

the insurer. 11 NYCRR 65-4.5(s)(3), 65-3.9(c); Canarsie Medical Health, P.C. v. National Grange Mut. Ins. Co., 21 Misc.3d 791, 797 (Sup. Ct. New York Co. 2008) ("The regulation provides that where the insurer timely denies, then the applicant is to seek redress within 30 days, after which interest will accrue.") The plaintiff health care provider in Canarsie Medical Health, P.C. argued that where a timely issued denial is later found to have been improper, the interest should not be stayed merely because the provider did not seek arbitration within 30 days after having received the denial. The court rejected this argument, finding that the regulation concerning interest was properly promulgated; this includes the provision staying interest until arbitration is commenced where the claimant not does promptly take such action. Applicant presumptively received Respondent's denials a few days after they were issued on May 31, 2019; June 14, 2019; and June 25, 2019. Applicant's arbitration request was received by the AAA on April 29, 2020, which was certainly more than 30 days later. Thus, interest must accrue from that date, not from the 30th day after proof of claim was received by Respondent. 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	Status
	RIU Chiropractic PC	**04/15/19 - 04/25/19**	**$41.04**	**Awarded: $41.04**
	RIU Chiropractic PC	**04/29/19 - 05/07/19**	**$123.12**	**Awarded: $123.12**
	RIU Chiropractic PC	**05/13/19 - 05/17/19**	**$82.08**	**Awarded: $82.08**
Total			**$246.24**	**Awarded: $246.24**

B. The insurer shall also compute and pay the applicant interest set forth below. 04/29/2020 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 April 29, 2020 to the date of payment of the award, but excluding April 29, 2020 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 State of Florida, County of Palm Beach

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.

02/16/2021
(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:
575cb8e1d601fabc4f53b5df504f2a54

Electronically Signed

Your name: Aaron Maslow
Signed on: 02/16/2021