American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

ASC of Rockaway Beach (Applicant)	AAA Case No.	17-20-1172-2706
	Applicant's File No.	ASCF 379.03
- and -	Insurer's Claim File No.	1065816-01
	NAIC No.	16616
American Transit Insurance Company (Respondent)		

ARBITRATION AWARD

I, Glen Wiener, 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

1. Hearing(s) held on 04/20/2021
   Declared closed by the arbitrator on 04/20/2021

   Michael Lamond, Esq. from Akiva Ofshtein PC participated for the Applicant

   Ethan Rothchild, Esq. from American Transit Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **$ 5,625.80**, 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

   Assignor O.G. a 26-year-old male was a passenger in a vehicle involved in an automobile accident on August 6, 2019. He did not seek any immediate emergency medical attention. On August 8, 2019 complaining of radiating neck, radiating back, right shoulder, and right knee pains, Assignor presented to Riverside Medical Services and was referred for physical therapy. The next day Assignor consulted a physical therapist and chiropractor and commenced treatments.

On October 28, 2019, still complaining of radiating neck, radiating back, and right shoulder pains along with bilateral sacroiliac pain, Assignor presented to David Israel, M.D. and was referred for manipulation under anesthesia of his cervical spine, lumbar spine, sacrum, shoulders, hips, and pelvis.

On December 7, 2019, January 12, 2020, and January 17, 2020 manipulation under anesthesia was performed on Assignor by physicians from Applicant Olga Gibbons M.D. d/b/a Astro Medical Services at Applicant ASC of Rockaway Beach. Respondent American Transit Insurance Company denied Applicants' requests for reimbursement based on a peer review performed by physiatrist Ayman Hadhoud, M.D. dated June 17, 2020.

The questions presented herein is whether the MUAs on December 7, 2019 and January 17, 2020 were medically necessary.

4. Findings, Conclusions, and Basis Therefor

The decision below is based on the documents on file in the Electronic Case Folder maintained by the American Arbitration Association as of the date of this hearing and on oral arguments of the parties. No witness testimony was produced at the hearing.

Applicants Olga Gibbons M.D. d/b/a Astro Medical Services and ASC Rockaway Beach ASC as assignees of O.G. seek reimbursement, with interest and counsel fees, under the No-Fault Regulations, for professional services and facility fees incurred during the manipulation under anesthesia [MUA] performed on Assignor on December 7, 2019 and January 17, 2020.

Respondent American Transit Insurance Company insured the motor vehicle involved in the automobile accident. Under New York's Comprehensive Motor Vehicle Insurance Reparation Act (the "No-Fault Law"), New York Ins. Law §§ 5101 et seq., Respondent was obligated to reimburse the injured party (or his assignee) for all "reasonable and necessary" medical expenses arising from the use or operation of the insured vehicle.

The following three claims involving the same accident, same injured party, and same issues of fact were properly consolidated by American Arbitration Association pursuant to 11 NYCRR §65-4.5(c) which states: "The designated organization shall, except where impracticable, consolidate disputes for which a request for arbitration has been received if the claims involved arise out of the same accident and involve common issues of fact.

> *Olga Gibbons d/b/a Astro Medical Services v. American Transit Ins. Co.*, 17-20-1172-2704 (DOS 1/17/20) ($3,364.02)

ASC of Rockaway Beach v. American Transit Ins. Co., 17-20-1172-2706 (DOS 1/14/19) ($5,625.80)

Olga Gibbons d/b/a Astro Medical Services v. American Transit Ins. Co., 17-20-1172-3291 (DOS 12/7/19) ($3,364.02)

Assignor O.G. a 26-year-old male was a passenger in a vehicle involved in an automobile accident on August 6, 2019. He did not seek any immediate emergency medical attention. On August 8, 2019 complaining of radiating neck, radiating back, right shoulder, and right knee pains, Assignor presented to Riverside Medical Services and was referred for physical therapy. The next day Assignor consulted a physical therapist and chiropractor and commenced treatments.

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On December 7, 2019, January 12, 2020, and January 17, 2020 manipulation under anesthesia was performed on Assignor by Alford A. Smith, M.D., Richard Apple, M.D, Natalia Hershkowitz, M.D., physicians from Applicant Olga Gibbons M.D. d/b/a Astro Medical Services at Applicant ASC of Rockaway Beach.

Respondent denied Applicants' requests for reimbursement based on a peer review performed by physiatrist Ayman Hadhoud, M.D. dated June 17, 2020.

Applicants established a prima facie case by submitting evidence that payment of no-fault benefits are overdue, and proof of its claims, using the statutory billing forms, were mailed to, and received by Respondent. *Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 N.Y.3d 498, 501 (2015).The proof Applicants mailed the claim form to Respondent is embodied in the latter's denials, which reference receipt of the proofs of claim. *See Ultra Diagnostic Imaging v. Liberty Mutual Insurance Co*., 9 Misc.3d 97, 804 N.Y.S. 2d 532 (App. Term 9th and 10th Jud. Dist. 2005).

Once Applicants established a prima facie case the burden shifted to Respondent to prove the manipulation under anesthesia in question were not medically necessary. *See Citywide Social Work & Psychological Services, PLLC v. Allstate Ins. Co.,* 8 Misc.3d 1025(A), 806 N.Y.S.2d 444 (App. Term 1st Dept. 2005); *A.B. Medical Services, PLLC v. Geico Ins. Co.,* 2 Misc.3d 26, 773 N.Y.S.2d 773 (App. Term 2d & 11th Jud. Dist. 2003). Lack of medical necessity must be supported by competent evidence such as an independent medical examination, peer review or other proof which sets forth a factual basis and

medical rationale for denying the claim. *Healing Hands Chiropractic, P.C. v. Nationwide Assurance Company,* 5 Misc.3d 975, 787 N.Y.S. 645 (Civ. Ct. N.Y. Co. 2004)

"A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards. For example, the medical rationale may be insufficient if not supported by evidence of the generally accepted medical professional practice." *Jacob Nir, M.D. v. Allstate Ins. Co.,*7 Misc.3d 544, 796 N.Y.S.2d 857 (Civ. Ct. Kings Co. 2005).

"Generally accepted practice is that range of practice that the professional will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Citywide Social Work & Psychological Services, PLLC v. Travelers Indemnity Co.,* 3 Misc.3d 608, 777 N.Y.S.2d 241 (Civ. Ct. N.Y. Co. 2004) This is the standard that will be applied herein.

In opining the MUAs were not medically necessary the peer reviewer, Dr. Hadhoud, cited to the guidelines proffered by both National Academy of Manipulation Under Anesthesia (NAMUA) and the American Association of MUA Providers (AAMUAP) and indicating these Guidelines were not followed.

The NAMUAP Guidelines were promoted and relied on in the 1990s and early 2000's in determining eligibility for MUA. In 2012, a revised version of these standards was offered and adopted by the AAMUAP.

The NAMUAP Guidelines were prepared by small group of MUA practitioners, mainly chiropractors, led by Robert Francis, D.C. a professor at a chiropractic college in Texas in the 1990's.

In contrast the AAMUAP Guidelines were developed in 2012 by a multidisciplinary panel of MUA experts, including MUA practitioners as well as experts who were not MUA practitioners.

The main distinctions between the two Guidelines are the length of time and type of conservative care required prior to resorting to MUA. The AAMUAP Guidelines require a period of 4 to 8 weeks of physical medicine while the NAMUAP mandate 2 to 6 weeks of manipulation.

The more contemporary Guidelines of the AAMUAP, approved by a diverse panel of experts, is deemed more trustworthy and persuasive.

The AAMUAP Guidelines require:

> *The patient has undergone an adequate trial of appropriate care, usually including spinal manipulation by a chiropractor, and often with medical co-management, and continues to experience intractable pain, interference to activities of daily living, and/or biomechanical dysfunction.*

Sufficient care has been rendered prior to recommending MUA. A sufficient time period is usually considered a minimum of 4-8 weeks, but exceptions may apply depending on the patient's individual needs. Most patients selected for MUA procedures have had longer courses of care, but those with more severe symptoms and little or no response to conservative management are best considered sooner than later to avoid unnecessary additional costs and increased suffering.

Physical medicine procedures have been utilized in a clinical setting during the 6-8 week period prior to recommending MUA.

The patient's level of reproduced pain interferes with activities of daily living or causes disability (that is, the inability to fully participate in work and other activities).

Diagnosed conditions must fall within the recognized categories of conditions responsive to MUA. The following disorders are classified as acceptable conditions for utilization of MUA:

1) Patients for whom manipulation of the spine or other articulations is the treatment of choice; however, the patient's pain threshold inhibits the effectiveness of conservative manipulation.

2) Patients for whom manipulation of the spine or other articulations is the treatment of choice; however, due to the extent of the injury mechanism, conservative manipulation has been minimally effective during a minimum of 4-8 weeks of care and a greater degree of movement of the affected joint(s) is needed to obtain patient progress.

3) Patients for whom manipulation of the spine or other articulations is the treatment of choice by the doctor; however, due to the chronicity of the problem and/or the fibrous tissue adhesions present, in-office manipulation has been incomplete and the plateau in the patient's improvement is unsatisfactory.

4) When the patient is considered for surgical intervention, MUA is an alternative and/or an interim treatment and may be used as a therapeutic and/or diagnostic tool in the overall consideration of the patient's condition.

5) When there are no better treatment options available for the patient in the opinions of the treating doctor and patient and in consideration of the cause of the patient's related pain, impairment, and/or disability.

In response Applicant submitted a Peer Rebuttal from Alford A. Smith, M.D., on March 29, 2021, just 22 days before the hearing on this matter and it is not being considered herein. 11 NYCRR Sec. 65-4.2 (b) (3), (effective March 1, 2002) commonly known as "Rocket Docket" specifically states that:

> *(i)* ***The applicant shall submit all documents supporting the applicant's position along with their request for arbitration.*** *All such documents shall also be simultaneously submitted to the respondent. Following this original submission of documents, no additional documents may be submitted by the applicant other than bills or claims for ongoing benefits.*
>
> *(ii) The designated organization shall no later than five business days after receipt of the arbitration request, advise the respondent of such receipt. The respondent shall, within 30 calendar days after the mailing of such advice, provide all documents supporting its position on the disputed matter. Such documents shall be submitted to the applicant at the same time. The respondent may, in writing, request that the designated organization provide an additional 30 calendar days to respond based upon reasonable circumstances that prevent it from complying.*
>
> ***(iii) The written record shall be closed upon receipt of the respondent's submission or the expiration of the period for receipt of the respondent's submission.***
>
> ***(iv) Any additional written submissions may be made only at the request or with the approval of the arbitrator.***

For over fifteen years the undersigned has followed a liberal policy of allowing both Applicants and Respondents the opportunity to submit additional documents up to the time of the original scheduled hearing. No additional submissions were allowed after the date of the original scheduled hearing.

Recent developments have forced a modification of this policy. Due to the extreme back log of cases, AAA and DFS (as well as the users of this program) have expressed concerns over the delays in hearing and deciding cases. In the past, if papers were submitted up to the day of hearing, the case was administratively adjourned for the opposing party to review the materials submitted and to submit a reply. Unfortunately, this lenient policy cannot continue.

While the undersigned seeks to allow the parties some leeway in presenting their evidence so the case may be heard on the merits, it cannot frustrate the principles and intent of "Rocket Docket" which is to hear these cases at the

appointed time. As it stands now, parties wait about seven to nine months for a hearing. Allowing a liberal policy for adjournments to submit additional evidence would increase that wait by clogging the calendar with cases improperly prepared and filed. Striving to not delay the process and to accommodate the parties, late submissions will only be accepted if submitted at least a month prior to the hearing date.

This arbitration was filed on July 17, 2020. Respondent submitted its papers including the peer review on August 21, 2020. Applicant had more than sufficient time to prepare and file the rebuttal. Hence, the peer rebuttal filed 22 days before the hearing is precluded.

As noted above, Respondent's position is predicated solely on Dr. Hadhoud's peer review indicating the MUA procedures were not medically necessary based on the protocols promulgated by the both the NAMUA and AAMUAP.

Specifically, Dr. Hadhoud contends:

> *In this case, I do not see that this patient had responded sub-optimally to conservative chiropractic treatment or medical co-management such as physical therapy. None of the progress notes showed that this patient had intractable pain in the first place.*
>
> *The treatment notes reveal no restrictions in the daily living activities or inability to work because of the injuries the patient sustained as a result of the motor accident of 08/06/19.*
>
> *In this case, the submitted records showed that the claimant had received physical therapy and chiropractic treatment sessions from 08/06/19 till the MUA. The fact that the patient had received all these chiropractic manipulations and physical therapy sessions, shows that the patient was tolerating the treatments and responding satisfactorily to the manipulations and chiropractic treatments, otherwise there would be no medical reason to perform all these sessions over that long period of time unless the patient was responding well to treatment.*

Spinal MUA is utilized for patients who suffer from chronic spine-related pain which has been minimally responsive to conservative therapy.

The AAMUAP protocols suggest, in relevant part, that MUA procedures are clinically justifiable when a patient has engaged in an "adequate trial" of appropriate conservative care and continues to experience intractable (i.e., hard to control) pain that interferes with his activities or lifestyle.

The protocols further recommend that manipulative procedures be utilized in a clinical setting for 4-6 weeks prior to recommending the procedure.

Finally, the protocols require the diagnosed condition fall within one of the categories responsive to MUA.

A detailed and careful review of Assignor's records leading up to the first MUA on December 7, 2019, satisfies these considerations.

Assignor commenced physical therapy and chiropractic manipulative treatments on August 9, 2019, approximately 4 months prior to the first MUA. Dr. Hadhoud's claim Assignor "*was tolerating the treatments and responding satisfactorily to the manipulations and chiropractic treatments"* contradicts the facts and records submitted.

According to the physical therapy notes from November 11, 21, and 22, 2019 Assignor noted "little" improvement. Similar findings were recorded in the chiropractic notes submitted. The progress notes from November 4, 8, 11, and 18, 2019 indicate Assignor's condition as about the same. While progress notes from November 21, 22, 25, 26, 2019 note there was a change in Assignor's condition.

While experiencing some improvement, Assignor still experienced significant pain. When Assignor was first evaluated by the chiropractor on August 9, 2019 his neck pain was reported as 8/9 and lumbar pain was 6/10. When he was evaluated by Dr. Smith on December 7, 2019 his neck pain was still rated at 8/9 and lumbar pain recorded as 9/10. Dr. Hadhoud's assertion "*None of the progress notes showed that this patient had intractable pain in the first place"* is refuted by the record.

Moreover, the medical report dated October 28, 2019 recommending MUA, indicates Assignor was **not** working as a camera installer and had difficulty lifting and climbing ladders. Dr. Hadoud's statement "*The treatment notes reveal no restrictions in the daily living activities or inability to work because of the injuries the patient sustained as a result of the motor accident"* is also unsupported by the record.

Clearly, conservative manipulation was minimally effective and a greater degree of movement was needed to obtain patient progress.

The first MUA procedure involved manipulation of Assignor's cervical spine, lumbar spine, shoulders, and pelvis. After the first MUAs Assignor's neck pain was reduced to 5/10 and back pain to 6/10, there was improved ranges of motion, and he found it easier to claim stairs and sleep better.

The second MUA procedure also involved manipulation of Assignor's cervical spine, lumbar spine, shoulders, and pelvis. After the second MUAs Assignor's neck pain was reduced to 4/10 and back pain to 5/10, and there were improved ranges of motion.

Based on the guidelines cited by the peer reviewer, it is determined the manipulation under anesthesia performed on Assignor was medically necessary.

Accordingly, Respondent's denials are vacated and Applicants' requests for reimbursement are granted. This award is in full disposition of all No-Fault benefit claims submitted to this arbitrator.

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**
	ASC of Rockaway Beach	**12/07/19 - 12/07/19**	**$5,625.80**	**Awarded: $5,625.80**
Total			**$5,625.80**	**Awarded: $5,625.80**

B. The insurer shall also compute and pay the applicant interest set forth below. 07/17/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the motor vehicle accident occurred 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). If an applicant does not request arbitration or institute a lawsuit within 30 days after receipt of a denial of claim form or from the payment of benefits, interest shall not accumulate on the disputed claim or element of claim until such action is taken. 11 NYCRR §65-3.9 (c).

In accordance with 11 NYCRR §65-3.9(c), interest shall be paid on the claim from above noted date, which according to the timeline in the ECF is the date the arbitration was filed with the American Arbitration Association.

C. Attorney's Fees

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

In accordance with 11 NYCRR §65-4.6(d), the insurer shall pay Applicant an attorney's fee equal to 20% of the total amount awarded in this proceeding plus interest, with NO MINIMUM FEE and the maximum fee capped at $1,360.

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 New York

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

04/21/2021
(Dated)

Glen Wiener

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:
6be6847a8d9e2852dbf41ae274d961ff

Electronically Signed

Your name: Glen Wiener
Signed on: 04/21/2021