

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

MJG Medical Services PC
(Applicant)

- and -

Hereford Insurance Company
(Respondent)

AAA Case No. 17-21-1227-4796

Applicant's File No. OS-56692

Insurer's Claim File No. 9404502

NAIC No. 24309

ARBITRATION AWARD

I, Kihyun Kim, 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 Assignor

1. Hearing(s) held on 01/12/2023
Declared closed by the arbitrator on 01/12/2023

Olga Sklyut, Esq. from Law Office of Olga Sklyut P.C participated virtually for the Applicant

Mark Zemcik, Esq. from Law Offices of Rubin & Nazarian participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$6,874.73**, 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

The issues presented are (1) whether Applicant established its prima facie case with respect to certain claims for reimbursement, and (2) whether Applicant's services were medically necessary.

The Assignor (DE) was a 30-year-old male pedestrian who was struck by an automobile on May 19, 2021. Applicant seeks reimbursement in the amount of \$6,874.73 for four dates of shockwave therapy baseline/progress (computerized ROM) services and four dates of extracorporeal shockwave therapy plus supplies provided to the Assignor from

May 5, 2021 to May 27, 2021. Reimbursement was denied based on three separate peer reviews by Harold Schechter, M.D., dated August 24, 2021, September 3, 2021 and September 20, 2021, respectively.

4. Findings, Conclusions, and Basis Therefor

This arbitration was conducted using the documentary submissions of the parties contained in the ADR Center, maintained by the American Arbitration Association. I have reviewed the documents contained therein as of the closing of the hearing, and such documents are hereby incorporated into the record of this hearing. The hearing was held by Zoom video conference. Both parties appeared at the hearing by counsel, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

The Assignor was a 30-year-old male who was injured in an automobile accident on May 19, 2021. Following the accident, the Assignor was taken by ambulance to the hospital where he was evaluated, treated and released without admission. X-rays and CT scans were taken but no acute fractures or subluxations were noted. The Assignor later sought medical treatment and testing for his injuries from various providers, who started him on a course of conservative care including physical therapy.

On June 10, 2021, Applicant provided one date of shockwave therapy baseline/progress (computerized ROM) services and one date of extracorporeal shockwave therapy (right shoulder) to the Assignor. On June 11, 2021, Applicant provided one date of shockwave therapy baseline/progress (computerized ROM) services and one date of extracorporeal shockwave therapy (lumbar spine, right knee) to the Assignor. Applicant asserts that it billed Respondent separately for each service. There are no denials for the shockwave therapy to the right shoulder on June 10, 2021 and to the right knee on June 11, 2021, and for the shockwave therapy baseline/progress (computerized ROM) services on June 11, 2021. Respondent timely denied Applicant's other claims based upon the peer review, dated August 24, 2021, by Harold Schechter, M.D., who found the services to be medically unnecessary.

On June 30, 2021, Applicant provided one date of shockwave therapy baseline/progress (computerized ROM) services and one date of extracorporeal shockwave therapy (cervical spine, left shoulder) to the Assignor. Applicant billed Respondent for its services, and Respondent timely denied Applicant's claims based upon the peer review, dated September 3, 2021, by Harold Schechter, M.D., who found the services to be medically unnecessary.

On July 9, 2021, Applicant provided one date of shockwave therapy baseline/progress (computerized ROM) services and one date of extracorporeal shockwave therapy (lumbar spine, right knee) to the Assignor. Applicant asserts that it billed Respondent separately for each service. There are no denials for the shockwave therapy to the right knee on July 9, 2021, and for the shockwave therapy baseline/progress (computerized ROM) services. Respondent timely denied Applicant's other claims based upon the peer review, dated September 20, 2021, by Harold Schechter, M.D., who found the services to be medically unnecessary.

Applicant now seeks reimbursement in the amount of \$6,874.73 for four dates of shockwave therapy baseline/progress (computerized ROM) services and four dates of extracorporeal shockwave therapy plus supplies provided to the Assignor from May 5, 2021 to May 27, 2021.

Analysis - Prima facie case - Shockwave/Baseline - DOS 6/10/21-7/09/21

An applicant demonstrates prima facie entitlement to No-Fault benefits under Article 51 of the Insurance Law 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 Med. Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 14 N.Y.S. 3d 283 (Court of Appeals, 2015).

In the present case, Applicant uploaded to the ADR Center a copy of a bill, dated July 22, 2021, in the amount of \$700.39 for one date of extracorporeal shockwave therapy (right shoulder) provided to the Assignor on June 10, 2021; a bill, dated July 23, 2021, in the amount of \$493.00 for one date of shockwave therapy baseline/progress (computerized ROM) services provided to the Assignor on June 11, 2021; a bill, dated July 23, 2021, in the amount of \$700.39 for one date of extracorporeal shockwave therapy (right knee) provided to the Assignor on June 11, 2021; a bill, dated August 18, 2021, in the amount of \$493.00 for one date of shockwave therapy baseline/progress (computerized ROM) services provided to the Assignor on July 9, 2021; and a bill, dated August 18, 2021, in the amount of \$700.39 for one date of extracorporeal shockwave therapy (right knee) provided to the Assignor on July 9, 2021.

There are no denials in record for any of the five bills.

At the hearing, Respondent's counsel requested time to upload any missing denials. Applicant's counsel objected to any late submissions as prejudicial, asserting that Respondent had approximately fourteen months prior to the hearing to submit its defense to the claims herein and that it would not have a fair opportunity to review any new submissions. As per 11 NYCRR Section 65-4.2(b)(3)(iii), often referred to as the "Rocket Docket," the written record is deemed closed upon receipt of the Respondent's submissions or the expiration of the time period set forth for same, 30 calendar days. However, pursuant to the Regulations [see 11 NYCRR 65-4.2(b)(3)(iv)], it is within the arbitrator's discretion to allow and consider late submissions. I generally believe cases should be decided on the merits, but rather than accepting any and all documents, I find it necessary and prudent to determine the issue on a case by case basis considering the particular circumstances of the late filing. Some of the factors considered include, but are not limited to, the reason for the late submission, how late the evidence was submitted, the volume of the submission, the consent of the other party, and the prejudice to the other party. After discussion with the parties at the hearing, I determined that no time would be allowed to make any additional submissions and Respondent's request was denied. Respondent's counsel provided no reason at the hearing to explain why Respondent failed to upload all of the relevant denials to the record prior to the hearing. I note that the cover letter to Respondent's original submission indicates that

only six bills were received and denied, despite the fact that its submission also included copies of all eleven bills included in Applicant's AR-1 with date stamps showing the date the received by Respondent.

Applicant uploaded to the ADR Center sufficient proof of mailing to establish that each of the bills at issue were mailed to and received by Respondent. Applicant's evidence provided the relevant billing information including, among other things, the Assignor's name, dates of service, and the name and address of Respondent, to show that the bills at issue were mailed to Respondent. Also, as noted above, Respondent submission included copies of each of the bills with date stamps showing the date the received. Accordingly, the evidence in the record is sufficient to establish Applicant's prima facie case.

As there is no proof in the record to establish that such claims were timely denied within 30 days of receipt, Applicant is entitled to reimbursement for two dates of shockwave therapy baseline/progress (computerized ROM) services and two dates of extracorporeal shockwave therapy (right knee, right knee) provided to the Assignor from June 10, 2021 to July 9, 2021. [**Note:** The appropriate amount of reimbursement for these services is discussed later in this award.]

Legal Framework - Medical Necessity - Peer Review

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment (*Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13 [2d Dept. 2009]), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. *See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp.*, 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

To support a lack of medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." *See Provvedere, Inc. v. Republic W. Ins. Co.*, 42 Misc 3d 141(A), 2014 NY Slip Op 50219(U) (App. Term 2d, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. *See generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 13 Misc 3d 136(A), 2006 NY Slip Op 52116 (App Term 1st Dept. 2006). The Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. *Amherst Med. Supply, LLC v. A. Cent. Ins. Co.*, 41 Misc 3d 133(A), 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet Respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails

to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. *See generally Nir v. Allstate Ins. Co.*, 7 Misc.3d 544, 547 (Civ. Ct. Kings Co. 2005). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Id.*, at 547 (*citing City Wide Social Work & Psychological Servs. v. Travelers Indem. Co.*, 3 Misc. 3d 608, 612 [Civ. Ct., Kings County 2004]).

To meet the burden of persuasion regarding medical necessity - in the absence of factually contradictory records - the applicant must submit a rebuttal which meaningfully refers to and rebuts the assertions set forth in the peer review report. *See generally, Pan Chiropractic, P.C. v Mercury Ins. Co.*, 24 Misc 3d 136[A], 2009 NY Slip Op 51495[U] (App Term, 2d, 11th & 13th Jud Dists 2009).

Peer Review - Harold Schechter, M.D., dated August 24, 2021

Respondent relies principally upon the peer review report by Harold Schechter, M.D., dated August 24, 2021, in asserting lack of medical necessity for one date of shockwave therapy baseline/progress (computerized ROM) services provided to the Assignor on June 10, 2021 and one date of extracorporeal shockwave therapy (lumbar spine) provided to the Assignor on June 11, 2021. At the outset, the peer report lists the various medical records that Dr. Schechter reviewed and provides a brief medical history of the accident and the treatment that the Assignor received. Dr. Schechter opined, based on review of the medical records, that there was no medical necessity for the shockwave treatments with their associated range of motion testing.

Dr. Schechter asserted that it was not standard medical practice to use these shockwave treatments for treatment of the Assignor's musculoskeletal injuries. Rather, he stated that the standard medical practice "would be to treat such injuries with physical therapy, analgesics/anti-inflammatory medications, and if necessary standard orthopedic/pain management interventions."

Dr. Schechter further noted that there was no mention in Dr. Oganosov's May 20, 2021 evaluation regarding the need for any shockwave treatment. Dr. Schechter also "indicated that there were no procedural details given regarding the shockwave treatments and such information would be needed to determine if these shockwave treatments were appropriately rendered in order to be even considered for medical necessity." In addition, Dr. Schechter found there was no mention in shockwave therapy notes of June 10, 2021 and June 11, 2021 regarding the efficacy of prior shockwave treatments, which Dr. Schechter asserted was necessary to determine if shockwave treatment should be continued.

Dr. Schechter noted that it was cited in a Medicare Guideline entitled Extracorporeal Shockwave Treatment (with approval date of February 8, 2017), that shockwave therapy "is considered investigational as treatment of musculoskeletal conditions" and that the safety and/or effectiveness of the shockwave treatment cannot be established based on

the available published peer review literature. Citing other guidelines, Dr. Schechter asserted that shockwave therapy for low back conditions is not recommended due to lack of supportive evidence.

Finally, Dr. Schechter found that medical necessity cannot be established for the COVID-19 disinfection services billed as supplies/equipment and staff time during the public health emergency, as there were no details given regarding these services. He noted that there was no mention regarding the performance of these services in the actual shockwave therapy treatment notes.

Peer Review - Harold Schechter, M.D., dated September 3, 2021

Respondent relies principally upon the peer review report by Harold Schechter, M.D., dated September 3, 2021, in asserting lack of medical necessity for one date of shockwave therapy baseline/progress (computerized ROM) services and one date of extracorporeal shockwave therapy (cervical spine, left shoulder) provided to the Assignor on June 30, 2021. At the outset, the peer report lists the various medical records that Dr. Schechter reviewed and provides a brief medical history of the accident and the treatment that the Assignor received. Dr. Schechter opined, based on review of the medical record, that there was no medical necessity for these shockwave treatments, performed on June 30, 2021, with their associated range of motion testing. The substance of the peer review tracks the findings and rationale summarized above with respect to the August 24, 2021 peer review, and will not be repeated herein.

Peer Review - Harold Schechter, M.D., dated September 20, 2021

Respondent relies principally upon the peer review report by Harold Schechter, M.D., dated September 20, 2021, in asserting lack of medical necessity for one date of extracorporeal shockwave therapy (lumbar spine) provided to the Assignor on July 9, 2021. At the outset, the peer report lists the various medical records that Dr. Schechter reviewed and provides a brief medical history of the accident and the treatment that the Assignor received. Dr. Schechter opined, based on review of the medical records, that there would be no medical necessity for the shockwave treatments rendered on July 9, 2021 with associated range of motion testing.

Dr. Schechter asserted that it was not standard medical practice to use such treatments for the Assignor's sprain/strain injuries. He stated that the standard medical practice "would be to treat such injuries with physical therapy, use of analgesics/anti-inflammatory medications, and if needed, standard pain management/orthopedic interventions."

Dr. Schechter noted that a Medicare Guideline entitled Extracorporeal Shockwave Treatment (with approval date of February 8, 2017) indicated that that shockwave therapy "is considered investigational as treatment of musculoskeletal conditions" and that the safety and/or effectiveness of the shockwave treatment cannot be established based on the available published peer review literature.

Citing other medical authority, Dr. Schechter found that shockwave therapy may be indicated for patellar tendinopathy, which he noted was not documented in this case. He

also advised that the article made no mention regarding its use for back injuries. In addition, Dr. Schechter noted that clinical evidence-based medical guidelines entitled Low Back Disorders as well as Knee Disorders (from the American College of Occupational and Environmental Medicine in 2011) made no mention regarding the use of shockwave treatment.

Dr. Schechter also pointed out that shockwave therapy note of July 9, 2021 made no mention regarding the performance/efficacy of prior shockwave treatments. Dr. Schechter maintained that such information would be needed to determine if such treatment should be continued.

Dr. Schechter further noted that there were also no procedural details given regarding the shockwave treatments of July 9, 2021, which he found would be needed to verify that these treatments were appropriately rendered.

Finally, Dr. Schechter found that medical necessity could not be established for the services billed as supplies/equipment and staff time during the public health emergency (i.e., the disinfection procedures to prevent transmission of COVID-19), as there was no mention regarding these services in the shockwave treatment note of July 9, 2021

Rebuttal - Max Jean-Gilles, M.D., dated March 3, 2022

To refute the August 24, 2021, September 3, 2021, and September 20, 2021 peer reviews by Dr. Schechter, Applicant relies principally upon a rebuttal affirmation, dated March 3, 2022, from Max Jean-Gilles, M.D., the treating and referring physician. At the outset, the rebuttal provides a brief medical history of the accident and the treatment that the Assignor received. Dr. Jean-Gilles respectfully disagreed with the conclusions of the peer reviewer and opined, based upon a review of documents, taking into consideration the Assignor's history, the history of the injury, the Assignor's complaints, the clinical findings and a review of the medical history, and in accordance with the generally accepted standards of care in the relevant medical community, that the services provided on June 10, 2021, June 11, 2021, June 30, 2021, and July 9, 2021 were medically necessary, within a reasonable degree of medical certainty.

Dr. Jean-Gilles noted that indeed, in this case, the Assignor was started on a course of physical therapy. He asserted that the ESWT was provided to enhance the healing process considering the severity of the patient's condition. He maintained that ESWT is a part of conservative treatment and is an effective and safe therapy for musculoskeletal injuries.

Dr. Jean-Gilles found that based on the review of the examination reports, the Assignor's neck, bilateral shoulders, lower back, and right knee sustained significant trauma due to the motor vehicle accident. He indicated that the Assignor was experiencing pain, decreased range of motion, muscle spasm, tenderness, and crepitus in these areas and the symptoms persisted despite conservative treatment. Dr. Jean-Gilles stated that it was his assessment that the Assignor's neck, bilateral shoulders, lower back, and right knee were not functioning normally resulting in a significant limitation of function. He maintained that this necessitated the need for extracorporeal shockwave therapy.

Dr. Jean-Gilles further found that the MRI study of the right shoulder revealed a labral tear, an MRI study of the left shoulder revealed acromial impingement, and the MRI studies of the cervical and lumbar spine revealed disc herniation. He asserted that considering the Assignor's poor response to non-operative measures and the diagnostic test results; the Assignor was recommended for further extracorporeal shockwave therapy to decrease pain.

Dr. Jean-Gilles explained that:

Shockwave therapy is a multidisciplinary device used in orthopedics, physiotherapy, sports medicine, urology, and veterinary medicine. Its main assets are fast pain relief and mobility restoration. Together with being a non-surgical therapy with no need for painkillers makes it an ideal therapy to speed up recovery and cure various indications causing acute or chronic pain.

Dr. Jean-Gilles maintained that there are no specific guidelines delineating the absolute structured path for treatment to be universally prescribed to all patients. Accordingly, he asserted that great deference should be given to the treating provider charged with the responsibility to examine, diagnose, and treat a patient who presents with symptoms and positive clinical findings.

Dr. Jean-Gilles also noted that patellar tendinopathy is not the only indication for extracorporeal shockwave therapy. Dr. Jean-Gilles noted that:

Shock wave therapy is a non-invasive method that uses pressure waves to treat various musculoskeletal conditions. High-energy acoustic waves (shock waves) deliver a mechanical force to the body's tissues. Shockwave is an acoustic wave that carries high energy to painful spots and myoskeletal tissues with subacute, subchronic, and chronic conditions. The energy promotes regeneration and reparative processes of the bones, tendons, and other soft tissues. . . . Acoustic waves with high energy peak used in Shockwave therapy interact with tissue causing overall medical effects of accelerated tissue repair and cell growth, analgesia, and mobility restoration.

Dr. Jean-Gilles cited to and summarized various articles that he found supported the medical necessity of ESWT in this case. He noted articles that found, among other things, that "consecutive ESWT was effective in treating neck and shoulder pain syndrome with functional improvement and pain reduction. Regarding simultaneous pain and tenderness reduction, receiving ESWT two times per week was effective." Other articles concluded that "preliminary results suggest a good applicability of shockwave therapy in the treatment of LBP (low back pain), in accordance with the anti-inflammatory, antalgic, decontracting effects and remodeling of the nerve fiber damage . . . , " and that "ESWT exerts an overall effect on the TSR (treatment success rate), pain reduction, and ROM restoration in patients with KSTDs (knee soft tissue disorders)" Another study found that extracorporeal shockwave therapy "proved to be efficient and safe in the treatment of shoulder pathologies, improving pain, range of motion and functional scores in all groups of patients evaluated in the study." Citing

medical authority, Dr. Jean-Gilles further found ESWT to be effective in the treatment of impingement syndrome both for pain and functional outcome in the early period regardless of acromion morphology.

Dr. Jean-Gilles asserted that it is clear from the data presented that there is evidence for the benefit of F-ESWT (focused extracorporeal shockwave therapy) and of RPT (radial pulse therapy) in a number of soft tissue musculoskeletal conditions, and that both treatment modalities are safe. Dr. Jean-Gilles maintained that "[e]xtracorporeal shockwave therapy (ESWT) is a popular non-invasive therapeutic modality in the medical field for the treatment of numerous musculoskeletal disorders," and, citing medical authority, continued to explain that, "[s]hockwaves can generate interstitial and extracellular responses, producing many beneficial effects such as: pain relief, vascularization, protein biosynthesis, cell proliferation, neuro and chondroprotection, and destruction of calcium deposits in musculoskeletal structures." He asserted that the combination of these effects can lead to tissue regeneration and significant alleviation of pain, improving functional outcomes in injured tissue.

With respect to the other related services, Dr. Jean-Gilles contended that since the extracorporeal shockwave therapy was medically necessary, the shockwave therapy baseline and progress by range of motion testing along with supplies, equipment, and staff time during the public health emergency provided on June 10, 2021, June 11, 2021, June 30, 2021, and July 9, 2021 was also medically necessary. He maintained that a computerized range of motion testing is a tool used to evaluate an impaired patient's physical performance compared to the physical performance of a patient without any impairment, and that the results help to establish a baseline that provides a more accurate assessment of the potential impairment level of the patient and how the patient is progressing throughout his/her care.

Dr. Jean-Gilles concluded that it was his opinion given the Assignor's complaints, findings, and nature of the injuries, that the shockwave therapy baseline and progress by range of motion testing along with supplies, equipment, and staff time during the public health emergency and extracorporeal shockwave therapy provided on June 10, 2021, June 11, 2021, June 30, 2021, and July 9, 2021 were medically necessary for the treatment of this patient. He further asserted that in providing these services, there was no deviation from any standard of medical care as the services were within the scope of accepted medical practice.

Analysis - Medical Necessity - Baseline/Shockwave Therapy - DOS 6/10/21-7/9/21

After reviewing all of the submissions and taking into account the oral arguments of the parties, I find that Applicant establish, by a preponderance of credible evidence, that the two dates of shockwave therapy baseline/progress (computerized ROM) services and three dates of extracorporeal shockwave therapy provided to the Assignor from June 10, 2021 to July 9, 2021, were medically necessary. While I have concerns with both the peer reviews and Applicant's rebuttal, overall, I find that the rebuttal and Applicant's supporting medical records meaningfully address and adequately rebut the arguments and opinion set forth in the peer reviews and establish the medical necessity for the services at issue. The testing and therapy was initially recommended and provided shortly after the initial examination by Dr. Oganessov on May 20, 2021, one day after the

accident. The services at issue herein were provided three to seven weeks after the initial evaluation from June 10, 2021 to July 9, 2021. Physical therapy and other conservative measures, which the peer reviewer asserted was the standard of care, were recommended following the initial evaluation as part of the treatment plan. The initial evaluation report made no specific mention of the need for shockwave therapy and the examination report provided no specific rationale or explanation for such therapy. While I am still somewhat skeptical regarding the actual necessity of the services, I do not believe that Respondent has adequately established that the prescription and provision of the shockwave therapy services were a deviation from the standard of care. Though the peer reviewer questioned the use of, the lack of proven benefit and efficacy of the shockwave therapy for musculoskeletal disorders, other than perhaps for patellar tendinopathy (which was not applicable here), and labeled such treatment as investigational, Dr. Jean-Gilles in the rebuttal indicated, with citation to medical authority, that ESWT is a popular non-invasive therapeutic modality for the treatment of numerous musculoskeletal disorders, including shoulder pain, knee pain, back pain, and neck pain, all of which were at issue herein. While I am not convinced that extracorporeal shockwave therapy should be viewed as just another conservative treatment modality, I am also not convinced on this record that the addition of such treatment as a supplement to the physical therapy and other conservative measures (that were, in fact, recommended and provided) was a deviation from the standard of care. As such, I find it appropriate under the factual circumstances presented to give some deference to the treating physician in this case. When faced with two inconsistent, but arguably credible opinions, deference would be accorded to the treating provider, who actually performed examinations, established treatment and diagnostic plans, made diagnoses and performed medical services for the Assignor. Ultimately, I find the rebuttal and Applicant's supporting medical records and arguments to be more persuasive and more credible than the peer review with respect to the therapy at issue. Based on the totality of credible evidence in the record, Applicant has rebutted the Respondent's defense and established the medical necessity of the services at issue. As Applicant has met its burden of persuasion, Applicant is entitled to reimbursement for the two dates of shockwave therapy baseline/progress (computerized ROM) services and three dates of extracorporeal shockwave therapy provided to the Assignor from June 10, 2021 to July 9, 2021.

Analysis - Fee Schedule - Baseline/Shockwave Therapy - DOS 6/10/21-7/9/21

Regarding the appropriate amount of reimbursement, Respondent's counsel asserted at the hearing that Applicant's charges for the services rendered were in excess of the amount permitted under the fee schedule. More specifically, Respondent asserted that the total reimbursable amount for the service rendered was limited to a total of \$2,861.56, based on a fee schedule/coder affidavit, dated December 11, 2022, by John L. Cerf, DC, CPC. In sum, Dr. Cerf asserted that Applicant improperly billed for multiple units (per day) under CPT code 0101T for the extracorporeal shockwave therapy; improperly billed for range of motion testing under CPT code 97799 by representing such testing as "Shockwave Therapy Baseline and Progress" and overbilled the usual and customary fee for the additional supplies during a Public Health Emergency under CPT code 97799.

The case law is clear that Respondent has the initial burden to come forward with competent evidentiary proof to support its fee schedule defenses. *Robert Physical Therapy, P.C. v. State Farm Mut. Auto. Ins. Co.*, 13 Misc. 3d. 172 (Civ. Ct. Kings Co. 2006). In the absence of such proof, a defense of noncompliance with the appropriate fee schedule cannot be sustained. *Continental Medical, P.C. v. Travelers Indemnity Company*, 11 Misc. 3d 145(A), 2006 N.Y. Slip Op. 50841(U) (App. Term 1st Dept. 2006). A lay person is not qualified to evaluate the CPT codes or to change if the code is used by a health provider in its bills. See *Abraham v. Country-Wide Ins. Co.*, 3 Misc. 3d. 130A (App. Term 2d. Dept. 2004). Once the insurer makes a prima facie showing that the amounts charged by a provider were in excess of the fee schedule, the burden shifts to the provider to show that the charges involved a different interpretation of such schedule or an inadvertent miscalculation or error. *Cornell Medical, P.C. v. Mercury Casualty Co.*, 24 Misc. 3d 58, 884 N.Y.S.3d 558 (App. Term 2d, 11th & 13th Dists. 2009).

With respect to the shockwave therapy, Dr. Cerf noted that Applicant billed for the shockwave therapy under Category III code 0101T, listed in the New York Medical Fee Schedule with the AMA CPT code book definition "Extracorporeal shock wave involving musculoskeletal system, not otherwise specified, high-energy." Applying the appropriate conversion factor and the assigned RVU for such code, Dr. Cerf indicate that the allowable fee for such code is \$700.39 [\$250.94 x 2.78 RVU].

Dr. Cerf asserted that Applicant incorrectly billed for additional units of code 0101T. Dr. Cerf noted that CPT code 0101T is defined as, "Extracorporeal shock wave involving musculoskeletal system, not otherwise specified, high energy," directing treatment to the musculoskeletal system.

Dr. Cerf asserts that CPT code 0101T encompasses the entire musculoskeletal system, as the AMA CPT codebook uses the language, "each area," when a code is intended to be billed more than once, i.e., for multiple areas. He finds that because the code 0101T definition describes the service as being provided to the "musculoskeletal system," the AMA CPT codebook is directing that code 0101T be billed only once for the musculoskeletal system.

Dr. Cerf maintained that billing more than one unit of CPT code 0101T is unbundling of the code. He asserts that the allowable fee for the additional units of CPT code 0101T is \$0.00.

With respect to the "Shockwave therapy baseline and progress," Dr. Cerf stated that Applicant incorrectly represented range of motion testing, by labeling the report, "Shockwave Therapy Baseline and Progress" report and representing the recorded range of motion measurements with code 97799. Dr. Cerf noted that CPT code 97799 is defined as, "Unlisted physical medicine/rehabilitation service or procedure," and asserts that it is improper to represent a service with a CPT code that represents an unlisted service when a CPT code exists for the service. He indicates that range of motion examination measurements and report is represented by CPT code 95851, which is defined as, "Range of motion measurements and report (separate procedure); each extremity (excluding hand) or each trunk section (spine)."

Dr. Cerf notes that The New York Workers' Compensation Medical Fee Schedule lists code 95851 with a 0.00 RVU resulting in a \$0.00 compensation for range of motion studies. He explains that labeling a range of motion report as, "Extracorporeal shock wave therapy baseline evaluation" and representing range of motion with code 97799 serves only to circumvent proper coding to obtain compensation for a service the New York Workers' Compensation Medical Fee Schedule does not intend to compensate. He asserted that the allowable fee for billed code 97799 under the correct code 95851 is \$0.00.

With respect to the additional supplies, materials, and clinical staff time, Dr. Cerf stated that Applicant billed using code 99072 representing, "Additional supplies, materials, and clinical staff time over and above those usually included in an office visit or other non-facility service(s), when performed during a Public Health Emergency, as defined by law, due to respiratory-transmitted infectious disease." He noted that Applicant billed \$18.00 for code 99072.

Dr. Cerf stated that the carrier determined that \$15.00 is the reasonable and customary fee for code 99072. He asserted that Applicant did not use the opportunity, of the initial bill or the arbitration submission, to provide invoices or documentation of additional supplies, materials, and clinical staff time over and above those usually included in an office visit, to support any greater fee. He asserted that the allowable fee for CPT code 99072 fee is \$15.00.

While I find Dr. Cerf's analysis to be sufficient to make a prima facie showing that the amounts charged by Applicant for the shockwave therapy billed under CPT code 0101T and the shockwave therapy baseline and progress billed under CPT code 97799 were in excess of the fee schedule, his analysis with respect to the "Additional supplies, materials, and clinical staff time . . ." under CPT code 99072 is conclusory and insufficient to meet Respondent's initial fee schedule burden. He simply concludes that, "the carrier determined that \$15.00 is the reasonable and customary fee" without any meaningful discussion or any adequate explanation. As Respondent has met its initial burden to come forward with competent evidentiary proof to support its fee schedule defenses with respect to the shockwave therapy billed under CPT code 0101T and the shockwave therapy baseline and progress billed under CPT code 97799, the burden shifts to Applicant to show that the charges involved a different interpretation of such schedule or an inadvertent miscalculation or error. *See, Cornell Medical, supra.*

In opposition, Applicant did not upload a fee schedule/coder affidavit but did upload a copy of an inquiry response, dated May 17, 2022 (CPT Electronic Inquiry #13736) by the American Medical Association to a CPT question regarding Category III codes. Specifically, Applicant asked: "Code description is "EXTRACORPOREAL SHOCK WAVE INVOLVING MUSCULOSKELETAL SYSTEM, NOT OTHERWISE SPECIFIED" Can the code be used more than once per visit if the procedure is performed on distinct body areas (i.e knee and neck, etc)?"

The response from CPT Education and Information Services stated as follows:

. . . This is written in response to your Electronic Inquiry (EI) #13736. From a CPT coding perspective and based solely on the information provided in your inquiry, it

may be appropriate to report code 0101T, Extracorporeal shock wave involving musculoskeletal system, not otherwise specified, with modifier 59, Distinct procedural services. If the procedure is performed on separate anatomical body regions/areas in the musculoskeletal system (eg, knee and neck) that require the efforts to be repeated on separate body regions in the course of the procedure, that require separate effort and work, it may be appropriate to report the code 0101T with modifier 59. Since code 0101T does not specify distinct levels, including the spine, if the entire spine is treated with extracorporeal shock wave therapy at one session, only one unit of 0101T may be reported. As with most Category III codes, reimbursement policies vary amongst third party payer. Therefore, you may wish to check with your local third-party payers, as they may have additional information and requirements for reporting this code. Eligibility for payment, as well as coverage policy, is determined by each individual insurer or third-party payer. Thank you for your inquiry, and we hope this information is of assistance to you. Cordially, CPT Education and Information Services

Applicant also submitted multiple awards from arbitrators that allowed CPT code 0101T to be reported more than once per visit, depending upon the services rendered.

Consistent with this guidance, Applicant's counsel asserted at the hearing that while Applicant did bill for multiple units of shockwave therapy on certain dates of service, in each instance the additional unit was for a distinct and separate area of the body. No evidence was presented with respect to Applicant's billing for the Shockwave therapy baseline and progress services under CPT code 97799.

After reviewing all of the submissions and taking into account the oral arguments of the parties, I find Applicant's fee schedule arguments to be persuasive with respect to the additional units of shockwave therapy. While Dr. Cerf's affidavit is sufficient to make a prima facie showing that the amounts charged by Applicant for the shockwave therapy were in excess of the fee schedule, I find that the position set forth by the American Medical Association, is logical, well reasoned and in line with a common sense interpretation of the code and the existing fee schedules. In weighing the competing positions, I ultimately find that the Applicant has rebutted the Respondent's evidence by a preponderance of the evidence. Consistent with such guidance, I find that 7 units of extracorporeal shockwave therapy under CPT code 0101T at \$700.39 per unit are appropriate in this case. In each instance where additional units were billed, the services were provided to distinct and separate areas of the body (DOS 6/10/21: right shoulder only; DOS 6/11/21: lumbar spine, right knee; DOS 5/30/21: cervical spine, left shoulder; and DOS 7/9/21: lumbar spine; right knee).

With respect to the "Shockwave therapy baseline and progress" billed under CPT code 97799, Applicant presented no evidence to show that the charges involved a different interpretation of such schedule or an inadvertent miscalculation or error. I therefore find on this record that the appropriate reimbursement for such services to be \$0.00.

With respect to the Additional supplies, materials, and clinical staff time . . ." billed under CPT code 99072, I find, as noted above, that Respondent failed to meet its initial

burden to come forward with competent evidentiary proof to support its fee schedule defenses. Dr. Cerf's analysis is conclusory and inadequately explained with respect to these charges.

Based on the totality of the credible evidence in the record, I find that Applicant is entitled to reimbursement in the amount of \$4,974.73 for the four dates of extracorporeal shockwave therapy plus supplies provided to the Assignor from May 5, 2021 to May 27, 2021

Conclusion

For the reasons set forth herein, Applicant is awarded reimbursement in the total amount of \$4,974.73, with attorney's fees, interest and the arbitration filing fee as set forth below. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

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
	MJG Medical Services PC	06/10/21 - 06/10/21	\$493.00	Awarded: \$18.00
	MJG Medical Services PC	06/10/21 - 06/10/21	\$700.39	Awarded: \$700.39
	MJG Medical Services PC	06/11/21 - 06/11/21	\$493.00	Awarded: \$18.00
	MJG Medical Services PC	06/11/21 - 06/11/21	\$700.39	Awarded: \$700.39
	MJG Medical Services PC	06/11/21 - 06/11/21	\$700.39	Awarded: \$700.39
	MJG Medical Services PC	06/30/21 - 06/30/21	\$493.00	Awarded: \$18.00
	MJG Medical Services PC	06/30/21 - 06/30/21	\$700.39	Awarded: \$700.39
	MJG Medical Services PC	06/30/21 - 06/30/21	\$700.39	Awarded: \$700.39
	MJG Medical Services PC	07/09/21 - 07/09/21	\$493.00	Awarded: \$18.00
	MJG Medical Services PC	07/09/21 - 07/09/21	\$700.39	Awarded: \$700.39
	MJG Medical Services PC	07/09/21 - 07/09/21	\$700.39	Awarded: \$700.39
Total			\$6,874.73	Awarded: \$4,974.73

- B. The insurer shall also compute and pay the applicant interest set forth below. 11/17/2021 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall be computed from November 17, 2021, the AR-1 filing date, at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

Respondent shall pay the Applicant attorney's fees in accordance with 11 NYCRR 65-4.6(d).

- 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 NY

SS :

County of Suffolk

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

02/12/2023
(Dated)

Kihyun Kim

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:
277c73722d59c37ff8deaf5decdfcd

Electronically Signed

Your name: Kihyun Kim
Signed on: 02/12/2023