American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ideal Care Pharmacy Inc. (Applicant)	AAA Case No.	17-22-1238-0867
	Applicant's File No.	DK21-178294
- and -	Insurer's Claim File No.	1100817-003
	NAIC No.	16616
American Transit Insurance Company (Respondent)		

ARBITRATION AWARD

I, Melissa Abraham-LoFurno, 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: JR

1. Hearing(s) held on 07/17/2023
   Declared closed by the arbitrator on 07/20/2023

   Henry Guindi, Esq. from Korsunskiy Legal Group P.C. participated virtually for the Applicant

   Erisa Ahmedi, Esq. from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$2,615.32**, was NOT AMENDED at the oral hearing.
   Stipulations WERE made by the parties regarding the issues to be determined.

   The Parties stipulated to Fee Schedule.

3. Summary of Issues in Dispute

   The within award is based upon this arbitrator's review of the record as well as oral argument at the time of the hearing of this matter.

   The claimant in this case is a 20-year old female hereinafter "JR", who was a passenger involved in an accident that occurred on 07/11/21. Following the accident JR suffered

injuries which resulted in the claimant seeking treatment. JR came under the care of Applicant who provided JR with topical lidocaine ointment and Celecoxibon 07/26/21. Respondent denied the medications based on (1) IME NO-Show and (2) the peer review report of Dr. Peter Chiu that found the medication to be medically unnecessary.

ISSUES:

Whether Respondent's denial based on IME No-Show can be sustained?

Whether the medications at issue were medically necessary?

4. Findings, Conclusions, and Basis Therefor

IME NO-SHOW

In order to support a defense based upon an assignor's alleged failure to appear for an IME or an EUO in the Second Department the burden is on respondent to demonstrate such defense has been preserved in a timely denial of claim form. See generally, Westchester Med. Center v. Lincoln Gen. Ins. Co., 60 A.D.2d 11 (2nd Dept. 2009). However, the Appellate Division First Department rejected this tenet of law and ruled such defense survives preclusion. Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.2d 559 (1st Dept. 2011). Since there is a split between the First and Second Department the first question is whether an arbitrator is bound to follow the precedent of the department in which the arbitrator conducts hearings. The powers and structure of the New York state court system are outlined in Article VI of the state Constitution, which specifies the organization and authority of the courts,including their administrative supervision. The districts and departments are part of the New York State Unified Court System (hereinafter referred to as "UCS") and were established for "administrative purposes" for judicial matters. See, The New York State Courts: An Introductory Guide. Retrieved April 1, 2014 from http://www.nycourts.gov/reports/ctstrct99.pdf. The American Arbitration Association is not part of the UCS, and therefore, arbitrators are not bound to a particular judicial department. This is not to say that arbitrators should not follow the highest level of authority available. Rather, in the event of a split in authority it is up to the arbitrator to decide which precedent to follow based upon their interpretation of the lawuntil a higher court settles the issue. To date, the New York Court of Appeals has failed to consider the issue. Accordingly, the decision to follow Westchester or Unitrin shall not be based upon the location of the hearing, but rather, a rational interpretation of the facts and law.

I am inclined to follow Westchester in that the Respondent must preserve the defense of EUO/IME no-show in a timely denial. Based on my review, I find that the denial is this case to be timely.

In order to support a defense based upon an assignor's alleged failure to appear for an Independent Medical Examination (hereinafter referred to as "IME"), the burden is on respondent to demonstrate prima facie: 1) The IME requests were actually mailed; and

2) the assignor failed to appear for the scheduled IMEs. See generally, Stephen Fogel Pychological, P.C. v. Progressive Cas, Ins. Co., 35 A.D.2d 720 (2 Dept. 2006).

Respondent's IME vendor, Exam Works, on 09/15/21 issued a request for the Assignor to appear at an IME scheduled for 10/19/21. Said letter was mailed to the Assignor and copied to the Assignor's attorneys. Based on my review of the NF-2 and letter of representation from the Assignor's attorneys, the letters were mailed to the correct addresses for both the Assignor and his attorneys. As the Assignor failed to appear for the IME, again on 10/27/21 another letter from Exam Works, was mailed to the Assignor and copied to the Assignor's attorney requesting that the Assignor attend an IME now scheduled for 11/16/21. Again, the letters were mailed to the correct addresses. Following the non-appearance of the Assignor at the IMEs, Respondent issued a denial of claim denying the services at issue based on the breach of policy condition precedent to coverage. I find the denial in this case to be timely issued despite the arguments of Applicant that the denial is untimely on its face.

Respondent provides the affidavit of Ms. Tracy Simpson, supervisor of Exam Works., to support the mailing of the IME notices to the Assignor and his attorneys.

In addition to the affidavit of Ms. Simpson, Respondent also submits affidavits signed by Dr. Eric Roth, stating at what location the examinations were to be held and more importantly, that the Assignor failed to appear for the IMEs on the aforementioned dates.

Contrary to Applicant's arguments, I find that Respondent has sustained its burden with regard to (1) the mailing of the IME notices and that (2) the Assignor failed to appear for the properly scheduled IMEs and as such breached a condition precedent to coverage. As Applicant stands in the shoes of the Assignor, Applicant's claim in hereby dismissed with prejudice based on policy violation.

Accordingly, Applicant's claim is denied.

MEDICAL NECESSITY

In order 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 Western Ins. Co.*, 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 20140. Respondent bears the burden of production in support of it 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.*, 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 Medical Supply, LLC v. A Central Ins. Co.*, 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*, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005); See also, *All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012). "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." Nir, *supra*. The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 2009 NY Slip Op 00351 (App Div 2d Dept., Jan. 20, 2009); *Channel Chiropractic, P.C. v. Country-Wide Ins. Co.*, 2007 Slip Op 01973, 38 A.D.3d 294 (1st Dept. 2007); *Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 NY Slip Op 27427, 17 Misc.3d 97 (App Term 1st Dept., 2007), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident. Id.

In support of its contention that the prescribed medications was/were not medically necessary, Respondent relies on the peer review report of Dr. Peter Chiudated 12/08/21. Dr. Chiulists the medical records reviewed and details JR's relevant medical history. He contends that the medicationsat issue were not medically necessary. Dr. Chiu states in his peer review report the following:

"The medications were not medically necessary."

In the instant case, Respondent has factually demonstrated the services rendered were not medically necessary. Accordingly, the burden now shifts to applicant, who bears the ultimate burden of persuasion. See, Bronx Expert, *supra*.

In rebuttal, Applicant provides numerous medical records including a formal rebuttal letter from Dr. Hong Pak. In the rebuttal, Dr. Pak states:

"*The medications prescribed were medically necessary."*

Comparing all the evidence presented by both parties against each other, I find for Respondent. The medical records fail to establish that the claimant required the medications herein. I find that Applicant has failed to meet its burden of persuasion in rebuttal and as such Applicant's claim is denied.

Accordingly, Applicant's claim is 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 NY
SS :
County of Suffolk

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

08/16/2023
(Dated)

Melissa Abraham-LoFurno

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:
3aeb386348bd28889bc865c8280c36a8

Electronically Signed

Your name: Melissa Abraham-LoFurno
Signed on: 08/16/2023