American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Astoria Wellness Acupuncture PC (Applicant)	AAA Case No.	17-22-1257-4932
	Applicant's File No.	RB-138-294453
- and -	Insurer's Claim File No.	0574625299
	NAIC No.	19232
Allstate Fire & Casualty Insurance Company (Respondent)		

ARBITRATION AWARD

I, Deepak Sohi, 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: EIP

1. Hearing(s) held on 11/22/2023
   Declared closed by the arbitrator on 11/22/2023

   Elyse Ulino from Baker & Narkolayeva Law P.C. participated virtually for the Applicant

   Rosemary Krupp from Law Office Of Lawrence & Lawrence participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$582.60**, was AMENDED and permitted by the arbitrator at the oral hearing.

   The amount claimed was amended to $363.49 to reflect previous payment pursuant to and to comport with the New York State Workers' Compensation Board Acupuncture Fee Schedule (WCFS).

   Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

   This arbitration arises out of acupuncture treatment provided to the EIP, a 19-year-old female, who was involved in a motor vehicle accident on

1/10/2020. Applicant is seeking reimbursement for the acupuncture treatment provided to the EIP on dates of service 12/31/2020 through 3/13/2021. Respondent denied reimbursement for the acupuncture treatment provided to the EIP on dates of service 12/31/2022 through 1/14/2021 based on late submission of the bill pursuant to the 45-day rule. Respondent partially reimbursed and partially denied reimbursement for the acupuncture treatment provided to the EIP on date of service 1/28/2021 based on a PPO contract.Respondent denied reimbursement of the acupuncture treatment provided to the EIP on dates of service 2/11/2021 through 3/13/2021 based on an Independent Medical Examination (IME) by Dr. Thomas McLaughlin, DC, dated 12/29/2020.

4. Findings, Conclusions, and Basis Therefor

This case was decided on the submissions of the parties as contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association and the oral arguments of the parties' representatives at the hearing. No witnesses testified at the hearing. I reviewed the documents contained in the ECF for both parties and make my decision in reliance thereon.

45-DAY RULE

ACUPUNCTURE TREATMENT

DATES OF SERVICE 12/31/2020 - 1/14/2021

The No-Fault Regulations Mandatory Personal Injury Protection Endorsement states:

> Proof of Claim; Medical, Work Loss, and Other Necessary Expenses. In the case of a claim for health service expenses, the eligible injured person or that person's assignee or representative shall submit written proof of claim to the Company, including full particulars of the nature and extent of the injuries and treatment received and contemplated, as soon as reasonably practicable but, in no event later than 45 days after the date services are rendered. The eligible injured person or that person's representative shall submit written proof of claim for work loss benefits and for other necessary expenses to the

> Company as soon as reasonably practicable but, in no event, later than 90 days after the work loss is incurred or the other necessary services are rendered. The foregoing time limitations for the submission of proof of claim shall apply unless the eligible injured person or that person's representative submits written proof providing clear and reasonable justification for the failure to comply with such time limitation.

The Regulations afford an Applicant the opportunity to submit a reasonable justification for any late notice. See: 11 NYCRR § 65-3.3 (a), and must establish procedures to "ensure due consideration of denial of claims based upon late filings" and give "appropriate consideration for situations where the claimant has difficulty ascertaining the insurer's identity or inadvertently submits a claim to the incorrect insurer". See: Matter of Medical Society of the State of New York v. Serio, 298 A.D.2d 255, (1st Dept. 2002), affd. 100 N.Y.2d 854, (2003); Bronx Expert Radiology v. Clarendon Natl. Ins. Co., 2009 NY Slip Op 50747(U), 23 Misc.3d 133(A) (App Term 1st Dept., April 20, 2009).

Furthermore, it is incumbent upon the Applicant to provide the insurer with written justification for its untimely submission in order for it to be excused or the insurer should be granted judgment. See: AAA Chiropractic, P.C. and MVAIC, 2010 NY Slip Op 51896(U) (App Term 2d, 11th & 13th Jud. Dists., Nov. 8, 2010); AR Med. Rehabilitation, P.C. v. MVAIC, 27 Misc.3d 135(A), 910 N.Y.S.2d 760 (Table), 2010 N.Y. Slip Op. 50828(U), 2010 WL 1910908 (App. Term 2d, 11th & 13th Dists. May 10, 2010).

Applicant submitted a bill for acupuncture treatment which was clearly received by the Respondent more than 45-days from the dates of service. The bills are for dates of service 12/31/2020 through 1/14/2021 and was received by the Respondent on 3/29/2021. Respondent denied these bills stating:

> Pursuant to Reg. 68, claims must be submitted 45 days from the date of treatment or 45 days from the date written notice is submitted to the insurer. Therefore, dates of service rendered 45 days prior to receipt of filing are denied. This rule applies to policies effective 4/26/02 (Revised Reg 68, effective 4/5/02).
>
> Claim denied for failure to submit written proof of claim to the company. Written proof must be submitted as soon as reasonably

practicable, but in no event more than 45 days after the date services are rendered, unless the eip, assignee or rep submits proof providing clear & reasonable justification for failure to comply with such time limitation.

I find that the Respondent timely and properly denied the bill at issue and included the requisite statutory language in their denial.

Applicant failed to submit a proof of mailing, such as a mailing ledger or certificate of mailing, for the subject bill or an affidavit from anyone with personal knowledge or with sufficient knowledge of the Applicant's office practices and procedures with regard to the mailing of the Applicant's bill.

It is undisputed that Applicant was required to submit its proof of claim to Respondent within 45 days of the medical services provided, 11 NYCRR Sec. 65-1.1, and I find that Applicant failed to do so. Respondent's denial, which was based upon the untimely submission, also informed Applicant that it could excuse the delay if Applicant provided reasonable justification for the delay. 11 NYCRR Sec. 65-3.3. See also, Radiology Today, P.C. v. Citi-wide Auto Leasing, Inc., N.Y. Slip Op. 27111 (App. Term 2d 2007); SZ Medical P.C. v. Country-Wide Ins. Co., 12 Misc3d 52 (App. Term 2d 2006). In the absence of proof of mailing of the original bill, Applicant did not provide reasonable justification for the delay.

Accordingly, in light of the foregoing, based on the arguments of counsel, and after thorough review and consideration of all submissions, I sustain the defense that written proof of claim was provided more than 45 days after the dates of service. Therefore, I find in favor of the Respondent. Consequently, the Applicant's claim for the acupuncture treatment provided for on dates of service 12/31/2020 through 1/14/2021 is hereby denied with prejudice.

PPO AGREEMENT

ACUPUNCTURE TREATMENT

DATE OF SERVICE 1/28/2021

Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. See, Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co., 2006 NY Slip 26240, 13 Misc.3d 172,

822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006). See also, Power Acupuncture PC v. State Farm Mutual Automobile Ins. Co., 11 Misc.3d 1065A, 816 N.Y.S.2d 700, 2006 NY Slip Op 50393U, 2006 N.Y. Misc. LEXIS 514 (Civil Ct, Kings Co. 2006).

For date of service 1/28/2021, Applicant billed for acupuncture treatment. Respondent partially reimbursed and denied reimbursement based on a Preferred Provider Organization (PPO) agreement pursuant to the Applicant's PPO contract with Coventry/Aetna. Applicant seeks $60.26 for the balance of the acupuncture treatment rendered to EIP on date of service 1/28/2021. Respondent denied this portion of Applicant's claim pursuant to a PPO agreement. In its denial, the Respondent stated:

> The allowance for this service was calculated in accordance with your Coventry auto provider contract. For questions regarding this allowance, please call Coventry at (800) 937-6824. Note to KY providers ONLY: Pursuant to contractual arrangements with provider networks, any re-pricing of charges constitutes a reduction by negotiation in conjunction with KY Revised Statutes Sec. 304.39-245 and 250.

With regard to the legal sufficiency of Preferred Provider Organization agreements ("PPO agreements"), on February 2, 2009, the New York State Insurance Department (currently the New York State Department of Financial Services) issued an opinion letter stating that healthcare providers may enter into a PPO agreement which stipulates that the healthcare provider will accept fees set forth in the PPO agreement in lieu of fees set forth in the New York State Worker's Compensation fee schedule for no fault claims. Consequently, the fees set forth in the Coventry PPO agreement entered into by the Applicant, if lower than the New York State Worker's Compensation fee schedule, are nonetheless sufficient payment for the Applicant's medical services.

In support of its defense, Respondent submitted a copy of the Provider Agreement between Applicant and Aetna Network Services, LLC as well as the Sub-Client Implementation Agreement between the Respondent and Coventry. Respondent also submitted a copy of the Auto Service and Rate schedule and affidavits from Ms. Jessica Williams, a Director of Network Management, responsible for maintaining and managing certain contracts on Coventry's auto network businesses, which includes Aetna and Ms. Shelly McCarthy, vice-president of Workers' Compensation Account Management for Coventry.

After a thorough review of the Provider Agreement with Addendums and the affidavits noted above, I find that Respondent was properly reimbursed for its services pursuant to the PPO Agreement and that no additional fees are due and owing on this bill.

Accordingly, in light of the foregoing, based on the arguments of counsel, and after thorough review and consideration of all submissions and comparing the relevant evidence presented by both parties against each other and the above referenced standards, I find in favor of the Respondent. Consequently, the Applicant's claim for the balance of the acupuncture treatment provided for on date of service 1/28/2021 is hereby denied.

MEDICAL NECESSITY

ACUPUNCTURE TREATMENT

DATES OF SERVICE 2/11/2021 - 3/13/2021

If an insurer asserts that a medical test, treatment, supply or other service was not medically necessary, the burden is on the insurer to prove that assertion with competent evidence such as an independent medical examination, a peer review or other proof that sets forth a factual basis and a medical rationale for denying the claim. (See A.B. Medical Services, PLLC v. Geico Insurance Co., 2 Misc. 3d 26 [App Term, 2nd & 11th Jud. Dists. 2003]; Kings Medical Supply Inc. v. Country Wide Insurance Company, 783 N.Y.S. 2d at 448 & 452; Amaze Medical Supply, Inc. v. Eagle Insurance Company, 2 Misc. 3d 128 [App Term, 2nd & 11th Jud. Dists. 2003]).

In support of its denial, Respondent submits an IME report of Dr. Thomas McLaughlin, DC, dated 12/29/2020. Dr. McLaughlin's report was based upon his examination of the EIP and a review of the available medical records. Dr. McLaughlin determined that the EIP had a cervical, thoracic and lumbar spine sprains/strains as well as right shoulder, bilateral legs, and bilateral knee sprains/strains, which had all been resolved at the time of the IME. Dr. McLaughlin found the EIP to exhibit normal ranges of motion in the cervical, thoracic, and lumbar spine as well as in the upper and lower extremities. Dr. McLaughlin details a full physical examination including Traditional Chinese Medicine examination of the EIP with all negative findings. Dr. McLaughlin concludes that EIP's injuries have resolved and

that there is no need for further related chiropractic and acupuncture care including massage therapy. Dr. McLaughlin further states that there is no necessity for further durable medical equipment, household assistance, medical transportation, or diagnostic testing. I find that Dr. McLaughlin has stated a factual basis and medical rationale for his determination that any further acupuncture treatment was not medically necessary. Thus, the burden has shifted to the Applicant, who bears the ultimate burden of persuasion.

An IME doctor must establish a factual basis and medical rationale for his asserted lack of medical necessity of further health care services. See, Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance, 20 Misc.3d 144(A), 2008 NY Slip Op 51863(U), 2008 WL 4222084 (App. Term 2nd & 11th Dists. Sept. 3, 2008). Where the No-Fault carrier's proof consists of an IME report, that report must be predicated upon a sufficient factual basis and medical rationale. AJS Chiropractic, P.C. v. Mercury Ins. Co., 2009 NY Slip Op 50208(U), 22 Misc. 3d 133(A) (App Term, 2d Dep't 2009) and Alur Med Supply, Inc. v. Countrywide Ins. Co., 2008 NY Slip Op 51234(U), 20 Misc. 3d 126(A) (App Term, 2d Dep't 2008).

This IME report is sufficient to meet the burden of production in regard to the Respondent's lack of medical necessity defense. Respondent has factually demonstrated the services rendered were not medically necessary. Where the Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden then shifts to the Applicant which must then present its own evidence of medical necessity. [see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed]), Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company, 2008 NY Slip Op 50456U, 18 Misc. 3d 1147 [A], 2008 N.Y. Misc. LEXIS 1121, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co. 13 Misc.3d 131 [A], 824 N.Y.S.2d 759, 2006 NY Slip Op 51871 (U) 2006 WL 2829826 (App. Term 2d & 11th Jud. Dists. 9/29/06)].

Applicant has not submitted a formal rebuttal in this case, therefore to rebut the Respondent's IME report Applicant relies principally upon the medical records in evidence including an follow-up acupuncture evaluation report from the Applicant, dated 1/28/2022 and acupuncture treatment notes from the Applicant, dated 12/31/2021 through 3/13/2021. A review of Applicant's submission reveals that it has failed to factually meet the burden of persuasion in rebuttal. The records presented are factually insufficient to rebut the negative findings of Dr. McLaughlin. The medical records do not

present a cogent medical rationale or substantive objective findings contradicting the examination submitted by Respondent.

After reviewing the totality of the credible and admissible evidence, and hearing the arguments of the parties, I find that the Respondent has met its burden in this case. The IME was thorough and noted normal findings from an acupuncturist's point of view. A review of Applicant's submission reveals that it has failed to factually meet the burden of persuasion in rebuttal. The follow-up acupuncture evaluation report does not contain any objective findings. The records presented are factually insufficient to rebut the negative findings of Dr. McLaughlin.

The detailed IME report, which noted the lack of any objective evidence of injury, is more persuasive than the follow-up acupuncture evaluation report and treatment notes with their cursory "fill-in-the-blanks findings." See Synergy Med. v. Praetorian Ins. Co., 2013 NY Slip Op 51047(U) (App Term 1st Dept., July 2, 2013).

After careful consideration of both parties' medical evidence, I find that, after Respondent made its showing that the services in question were not medically necessary, Applicant failed to meet it burden of demonstrating, by a preponderance of the credible evidence, that the services at issue were, in fact, medically necessary. See Friedman v. Allstate Ins. Co., 2016 NY Slip Op 50390(U) (App Term 2d, 11th & 13th Jud Dists. March 18, 2016).

Accordingly, in light of the foregoing, based on the arguments of counsel, and after thorough review and consideration of all submissions, I find in favor of the Respondent as the Applicant has not met its burden of persuasion. Consequently, the Applicant's claims for acupuncture treatment provided for on dates of service 2/11/2021 through 3/13/2021 are hereby denied with prejudice.

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 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 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 Nassau

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

11/24/2023
(Dated)

Deepak Sohi

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:
5a6200fee19b37aab723c266afa2f89d

Electronically Signed

Your name: Deepak Sohi
Signed on: 11/24/2023