American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

NYS Medical Care PC (Applicant)	AAA Case No.	17-22-1261-3380
	Applicant's File No.	RB-240-283435
- and -	Insurer's Claim File No.	668667
	NAIC No.	Self-Insured
MVAIC (Respondent)		

ARBITRATION AWARD

I, Cathryn Ann Cohen, 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 11/29/2023
   Declared closed by the arbitrator on 11/29/2023

   Alex Samaroo, Esq. from Baker & Narkolayeva Law P.C. participated virtually for the Applicant

   Tracy Bader Pollak, Esq. from Marshall & Marshall, Esqs. participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$2,602.20**, 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

   Applicant seeks $2,602.20 reimbursement of charges for extracorporeal shock wave treatment (ESWT) code 0101T with ultrasound guidance performed on March 15, 2022 ($867.40), March 29, 2022 ($867.40) and April 12, 2022 ($867.40) on the musculoskeletal system of Assignor a 46-year-old male bicyclist involved in a motor vehicle accident on December 9, 2021.

Respondent timely denied reimbursement based on peer reviews by Kenneth Marici, M.D., the first peer dated April 24, 2022, directed to services provided on March 15 and 29, 2022, and the second dated May 26, 2022, directed to services provided on April 12, 2022, opining the services were not medically necessary.

4. Findings, Conclusions, and Basis Therefor

Applicant seeks $2,602.20 reimbursement of charges for extracorporeal shock wave treatment (ESWT) code 0101T with ultrasound guidance performed on March 15, 2022 ($867.40), March 29, 2022 ($867.40) and April 12, 2022 ($867.40) on the musculoskeletal system of Assignor a 46-year-old male bicyclist involved in a motor vehicle accident on December 9, 2021. Respondent timely denied reimbursement based on peer reviews by Kenneth Marici, M.D., the first peer dated April 24, 2022, directed to services provided on March 15 and 29, 2022, and the second dated May 26, 2022, directed to services provided on April 12, 2022, opining the services were not medically necessary. I have reviewed the documents in the ADR Center record of the case maintained by the AAA as of the date of the hearing.

It is well settled that a health care provider establishes a prima facie case of entitlement to recover first-party no-fault benefits by submitting proof that the prescribed statutory billing forms, setting forth the fact and the amount of the loss sustained, had been mailed and received and that payment of no-fault benefits was overdue. (*see, Insurance Law Sec.5106[a]; Mary Immaculate Hosp v. Allstate Ins. Co.,* 5 AD3d 742 [2004]). Respondent's denial(s) indicating receipt of the proof of claim shows that Applicant mailed the proof of claim form(s) to the Respondent (*see, Ultra Diagnostic Imaging v. Liberty Mutual Insurance Co.*, 9 Misc.3d 97). The evidence is sufficient to make out a prima facie case of entitlement to recovery of Applicant's bills.

Once Applicant has established a prima facie case the burden shifts to the insurer to prove that the medical treatment was not medically necessary (*see Citywide Social Work & Psychological Services v Allstate Ins. Co.*, 8 Misc3d 1025A; *A.B. Medical* Services, *v Geico Ins. Co.*, 2 Misc3d 26). Neither the Insurance Law nor the Regulations define "medical necessity." A review of case law reveals that most courts have evaluated medical necessity based on whether or not services provided were in accord with the generally accepted medical practices. Therefore, to prove that the services were not medically necessary, at a minimum, lack of necessity must be supported by competent evidence such as an IME or peer review or other proof which sets forth a factual basis and medical rationale for denying the claim. A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards (*see Nir v. Allstate Insurance Company* 7 Misc3d 544).

Upon a showing of lack of medical necessity through a peer review, an Applicant is required to rebut same (*see A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co.*, 16 Misc.3d 131(A).

The peer states that Assignor was involved in a motor vehicle accident on December 9, 2021, as a bicyclist struck by a taxi on the right side causing him to fall over towards the left side. Assignor was seen by Dr. Fuzaylova on March 15, 2022 with complaints of injuries to the neck, mid-back, low back, left shoulder, left knee and left ankle. He enrolled in a conservative care program including chiropractic care and physical therapy. Physical examination revealed restriction in range of motion in the cervical spine, lumbar spine, left shoulder, left knee, and left ankle. Neurological examination was normal. Hawkin's test was positive on the left. SLR was positive on the left. Orthopedic testing of the knee was negative. Treatment recommendations including ongoing conservative care and ESWT.

The peer asserts that the medical record is devoid of any evidence which would warrant nor justify the need for ESWT. Assignor sustained mild self-limited injuries which would resolve within weeks based on the conservative care program without the need of ESWT. Quoting from a medical source, the peer note that indications for ESWT include: nonunion, delayed bone healing, osteochondritis dissecans, osteonecrosis, bone marrow edema, plantar fascitis, Achilles tendinopathy and epicondylitis. The peer states that none of the above diagnoses were present. Hence, the ESWT provided to Assignor was not medically necessary. The peer also bases his opinion on there being a lack of evidence to support the effectiveness of ESWT in treating pain. Therefore, in the absence of such evidence the clinical use of ESWT is not justified and should be discouraged.

Respondent's evidence fails to set forth sufficient factual basis and medical rationale to establish lack of medical necessity for the ESWT provided to Assignor which it is Respondent's burden to show. It is not the burden of Applicant/provider to establish medical necessity for the ESWT provided to Assignor. The peer wrongly shifts the burden of proof to the Applicant/provider. This is incorrect. Medical necessity is presumed. It is Respondent'a burden to show that in providing this treatment Applicant deviated from generally accepted standard of care. Lack of proven efficacy does not establish lack of medical necessity as experts differ on the clinical utility of ESWT to reduce pain and inflammation for treatment of soft tissue injuries. Moreover, Applicant submits a rebuttal from Svetlana Fuzaylova, M.D., Assignor's treating physician which meaningfully addresses the peer's opinion and credibly points out, in pertinent part, that ESWT has been used for various musculoskeletal conditions, including sprain/strain injuries and has been shown to be effective in the treatment of these injuries by promoting the healing process. The rebuttal notes that ESWT works by increasing blood flow to to injured areas, which in turn promotes the growth of new blood vessels and the formation of new tissue. The shock waves also stimulate the production of collagen, a protein that is essential for tissue repair.

The opinion of the treating physician who actually examined the patient is more informed and thus carries greater weight than the opinion of the peer which is a

generic discussion. As such the rebuttal is sufficient to refute the peer review. In reply to the rebuttal, Respondent submits an addendum from the peer which merely reiterates the peer's original opinion and as such fails to overcome the rebuttal.

Accordingly, Applicant's request for reimbursement is granted.

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**
	NYS Medical Care PC	**03/15/22 - 03/15/22**	**$867.40**	**Awarded: $867.40**
	NYS Medical Care PC	**03/29/22 - 03/29/22**	**$867.40**	**Awarded: $867.40**
	NYS Medical Care PC	**04/12/22 - 04/12/22**	**$867.40**	**Awarded: $867.40**
Total			**$2,602.20**	**Awarded: $2,602.20**

B. The insurer shall also compute and pay the applicant interest set forth below. 08/08/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

In accordance with 11 NYCRR 65-3.9(c) interest shall be paid on the claim awarded in the amount of $2,602.20 from August 8, 2022 the date the arbitration request was received by the AAA.

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 on the claim awarded in the amount of $2,602.20.

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 New York

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

12/16/2023
(Dated)

Cathryn Ann Cohen

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:
a0a102dddf7122c87d0e09649e9ec2ec

Electronically Signed

Your name: Cathryn Ann Cohen
Signed on: 12/16/2023