American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Flatbush Medworks Inc. (Applicant)	AAA Case No.	17-23-1313-4631
	Applicant's File No.	163971
- and -	Insurer's Claim File No.	230348916-006
	NAIC No.	22780
Integon General Insurance Corporation (Respondent)		

ARBITRATION AWARD

I, Stephen Czuchman, 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 patient, JI.

1. Hearing(s) held on 05/17/2024
   Declared closed by the arbitrator on 05/17/2024

   John Gallagher, Esq. from The Law Offices of John Gallagher, PLLC participated virtually for the Applicant

   Michael Rago, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$920.78**, 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 patient (JI), a then 34-year-old male, was allegedly injured in a motor vehicle accident on 4/23/23 as the restrained front seat passenger of an automobile involved in a collision with another motor vehicle. Applicant seeks to recover assigned first-party no-fault benefits consisting of fees for medical supplies furnished to the patient from 6/29/23 through 7/12/23. Respondent timely denied the claim, alleging a lack of medical necessity based on an 8/9/23 peer review report by Dr. Pierce Ferriter and that the billed fees were not in accordance with the applicable fee schedule.

The issues in dispute are whether the supplies were medically necessary and, if so, whether respondent has substantiated the fee schedule defense.

4. Findings, Conclusions, and Basis Therefor

Applicant has established a prima facie case of entitlement to reimbursement of its claim by submitting evidence that the prescribed statutory billing forms were mailed and received by the respondent and payment of No-Fault benefits was overdue. See Insurance Law § 5106(a); *Viviane Etienne Med. Care v. Country-Wide Ins. Co*., 25 NY3d 498 (2015). Once an applicant health services provider makes out a prima facie case, the burden shifts to the respondent insurer to timely request verification, deny or pay the claim. *Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co*., 9 NY3d 312 (2007). 11 NYCRR § 65-3.8 provides that a no-fault insurer has thirty days from the date of receipt of a health services provider's proof of claim to pay or deny that claim in whole or in part. Most defenses unrelated to coverage are precluded if not preserved in a timely denial of claim. *Cent. Gen. Hosp. v. Chubb Group of Ins. Cos*., 90 NY2d 195 (1997).

Applicant billed respondent $920.78 for a Sustained Acoustic Medicine (SAM) Pro device rented to the patient from 6/29/23 through 7/12/23, according to a prescription from Chadae Haffendon-Morrison, N.P. Respondent timely denied the bill, alleging a lack of medical necessity based on an 8/9/23 peer review report by Pierce J. Ferriter, M.D., and that the billed fees were not in accordance with the applicable fee schedule.

Lack of medical necessity is a valid defense to an action to recover no-fault benefits. See *A.B. Med. Servs., PLLC v. Liberty Mut. Ins. Co.*, 39 AD3d 779 (2d Dept 2007). Under Insurance Law § 5102, New York's Comprehensive Motor Vehicle Insurance Reparation Act, first-party no-fault benefits are reimbursable to an injured party or his or her assignee for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle. The Mandatory Personal Injury Protection Endorsement set forth at 11 NYCRR § 65-1.1 provides that the insurer shall pay first-party benefits to reimburse for basic economic loss, including (a) medical expense, defined as necessary expenses for "medical, hospital (including services rendered in compliance with Article 41 of the Public Health Law, whether or not such services are rendered directly by a hospital), surgical, nursing, dental, ambulance, X-ray, prescription drug and prosthetic services; (b) psychiatric, physical and occupational therapy and rehabilitation; (c) any nonmedical remedial care and treatment rendered in accordance with a religious method of healing recognized by the laws of New York; and (d) any other professional health services." Treatment for an exacerbation of a preexisting injury is a covered expense under no-fault. 11 NYCRR § 65-3.14 (a). See *Kingsbrook Jewish Medical Center v. Allstate Insurance Co.*, 61 AD3d 13 (2d Dept. 2009); The question of whether disputed health services were medically unnecessary cannot be resolved without resorting to meaningful medical assessment, such as by a qualified medical expert conducting a peer review of an injured party's medical records. Id. A peer review must set forth a factual basis and a medical rationale for denying a claim for a lack of

medical necessity. *Amaze Medical Supply Inc., v. Allstate Ins. Co.*, 12 Misc.3d 142(A) (App Term 2d Dept 2006).

If an insurer interposes a timely denial of claim based on a peer review that sets forth a detailed factual basis and medical rationale for the claim's rejection, the presumption of medical necessity and causality attached to the applicant's claim is rebutted and the burden shifts back to the applicant to refute the peer review and prove the necessity of the disputed services and the causal relationship between the injuries and the accident. *CPT Med. Servs., P.C. v. New York Cent. Mut. Fire Ins. Co*., 18 Misc.3d 87 (App Term 1st Dept 2007); *Eden Med., P.C. v. Progressive Cas. Ins. Co.*, 19 Misc.3d 143(A) (App Term 2d Dept 2008).

Dr. Ferriter, a board-certified orthopedic surgeon, concludes that the SAM device rental was medically unnecessary in his 8/9/23 peer review report. He summarizes the patient's 4/23/23 motor vehicle accident history and basic medical facts. The patient sustained injuries to the neck, mid-back, right shoulder, right knee, and right toe. He was seen in the emergency room of Mt. Sinai Hospital following the accident, where he was evaluated, treated, and released. He presented to N.P. Haffendon-Morrison on 5/4/23 with complaints of pain in the neck, mid-back, right shoulder, right knee, and right toe. On physical examination, there was tenderness, trigger points, and decreased range of motion in the cervical spine, tenderness in the thoracic spine, tenderness and swelling in the right shoulder, and tenderness in the right knee. The patient was diagnosed with cervical muscle strain, thoracic sprain, right shoulder contusion, and knee and toe pain. N.P. Haffendon-Morrison recommended conservative treatment and prescribed a SAM pro unit.

Dr. Ferriter states that the patient presented to N.P. Haffendon-Morrison with soft tissue injuries to the spine and joints, which would be expected to respond to conservative treatment, including analgesics and physical therapy. Dr. Ferriter states that the patient was appropriately recommended for physical therapy. He states that a SAM device is a type of home ultrasound unit. Dr. Ferriter states that there was no need to supplement the patient's in-office physical therapy with a home ultrasound unit and that prescribing a SAM unit was redundant and excessive. Dr. Ferriter states that ultrasound treatments should be administered by a licensed physical therapist, not at home with no supervision. He states that the SAM unit provided no medical benefit to the patient, as the effectiveness of ultrasound has not been proven, and ultrasound has shown to have no additional effects over physical therapy. Dr. Ferriter cites and quotes medical literature in support of his opinion that the supplies were medically necessary.

Applicant relies on a 4/3/24 peer review rebuttal letter by N.P. Haffendon-Morrison in opposition to the peer review. After summarizing the patient's 4/23/23 motor vehicle accident history and medical facts, she states that she prescribed the SAM unit to the patient,

> which is an FDA cleared wearable Ultrasound for multi-hour treatment to reduce pain and accelerate the natural healing cascade for musculoskeletal related injuries. Sam has been clinically shown to increase

Collagen Laydown, increase Oxygenated Hemoglobin in the muscle and increase Blood-flow to accelerate the recovery and reduction of pain for the associated injury. SAM can be used as an adjunct therapy with Physical Therapy and exercise. I certify that the SAM unit is medically indicated and in my opinion is reasonable and necessary to treat this patient's condition.

After carefully reviewing the written submissions on the ADR Center and considering the oral argument of counsel at the hearing, I resolve the question of fact regarding the medical necessity of the SAM unit rental in respondent's favor. The peer review meets respondent's prima facie burden, shifting the burden of persuasion to the applicant. I am not persuaded by N.P. Haffendon-Morrison that is the standard of care in the medical community to routinely prescribe a SAM device for in-home use in the patient's setting of posttraumatic with soft tissue injuries to the spine and joints following a motor vehicle accident. Rather, I remain convinced by Dr. Ferriter that the SAM unit provided no medical benefit to the patient.

Accordingly, based on a fair preponderance of the credible evidence, respondent's denial of claim is sustained.

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

06/12/2024
(Dated)

Stephen Czuchman

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:
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Electronically Signed

Your name: Stephen Czuchman
Signed on: 06/12/2024