American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:	
	AAA Case No. AAA Assessment No. Applicant's File No.
- and -	
Geico Insurance Company (Respondent)	Insurer's Claim File No.

ARBITRATION AWARD

I, Aladar G. Gyimesi, Esq., 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
☐01/18/13
and declared closed by the arbitrator on 1/18/13.

Naomi Cohn, Esq., participated in person for the Applicant.
Robert Zerrenner, Claim's Representative, participated in person for the Respondent.

2. The amount claimed in the Arbitration Request, **$2,465.00**, 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

In dispute are Applicant's bills regarding the rental cost of a continuous passive motion unit provided to Applicant's Assignor in connection with the treatment of injuries allegedly sustained by the Assignor as a result of a motor vehicle accident on March 4, 2011.

4. Findings, Conclusions, and Basis Therefor

The Assignor, a fifty year old male passenger, was allegedly involved in a motor vehicle accident on March 4, 2011 and thereafter came under the care of Dr. Stanley Liebowitz who prescribed the continuous passive motion (hereinafter CPM) unit in issue herein. Such therapy was to be provided to the Assignor's left shoulder. Applicant sought reimbursement

for the rental cost of the CPM unit, at a rate of $85.00 per day, corresponding the period of time from November 11 to December 9, 2011. Consequently, the total compensation sought by the Applicant equaled the sum of $2,465.00. Following orthopedic, chiropractic and acupuncture IMEs apparently conducted on May 13, 2011, on May 16, 2011 Respondent issued a global denial whereby "further orthopedic, chiropractic, acupuncture, physical therapy, massage therapy, supplies…" No-Fault benefits were denied effective as of May 18, 2011. It does not appear that Applicant was provided with a copy of said denial at the time of its issuance. However, this is of no consequence relative to the determination to be made herein since there has also been no evidence produced that Respondent was aware of Applicant's healthcare provider status at the time it issued its global denial. As a result, Respondent was under no duty to place the Applicant on notice that the EIP's No-Fault benefits were being terminated. In response to Applicant's reimbursement requests, Respondent issued three, timely, denials whereby such No-Fault benefits were again denied "based on the results of a health service examination by Dr(s). Kramer, Sollazzo and Smits…". The entire amount initially sought by the Applicant remains in dispute herein. I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing. This Award is based upon the oral argument, if any, of counsel and an analysis of the timely submission(s) of the respective parties hereto.

The EIP apparently appeared, at Respondent's request, for orthopedic, acupuncture and chiropractic IMEs on May 10, 2011. However, only the resultant orthopedic IME report has been provided herein. It is noted that a health care provider will initially establish a prima facie claim of medical necessity by its submission to the No-Fault carrier of an NF-3 form. Westchester Med. Ctr v. AIG, Inc., 36 A.D.3d 900, 829 N.Y.S.2d 180 (App Div, 2nd Dept-2007); Mt. Sinai Hospital v. Joan Serv. Corp., 22 A.D.3d 649, 803 N.Y.S.2d 102 (App Div, 2nd Dept – 2005); Nyack Hospital v. Metropolitan Prop & Cas Ins Co., 16 A.D.3d 564, 791 N.Y.S.2d 658 (App Div, 2nd Dept – 2005), and; Mary Immaculate Hospital v. Allstate Ins. Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (App Div, 2nd Dept – 2004). The No-Fault carrier, however, may rebut the inference of medical necessity by providing proof that the claimed healthcare benefits were not medically necessary. A. Khodadadi Radiology, P.C. v. New York Central Mutual Fire Ins Co., 16 Misc 3d 131(A), 841 N.Y.S.2d 824, 2007 N.Y. Slip Op 51342(U) (App Term, 2nd Dept - 2007); Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co., 21 Misc 3d 142(A), 2008 NY Slip Op 52450(U) (App Term, 2nd Dept – 2008); Delta Diagnostic Radiology, P.C. v. Integon Natl. Ins. Co., 2009 NY Slip Op 51502(U) (App Term, 2nd Dept – 2009). Where the No-Fault carrier's proof consists of a peer review, same must be predicated upon a sufficient factual basis and medical rationale in order to potentially validate the denial of first-party benefits. Elmont Open MRI & Diagnostic Radiology, P.C. v. Geico Ins. Co., 2006 NY Slip Op 51185(U) (App Term, 2nd Dept - 2006) citing Park Neurological Servs. P.C. v. Geico Ins., 4 Misc 3d 95 (App Term, 2nd Dept - 2004); A.B.Med Servs. PLLC v. American Mfrs. Mut. Ins. Co., 6 Misc 3d 133(A), 2005 NY Slip Op 50114(U) (App Term, 2nd Dept - 2005); *cf* Amaze Med. Supply Inc. v. Travelers Prop. Cas. Corp., 7 Misc 3d 128(U), 2005 NY Slip Op 50452(U) (App Term, 2nd Dept - 2005), and; East Coast Acupuncture Servs., P.C. v. American Tr. Ins. Co., 2007 NY Slip Op 50213(U) (App Term, 1st Dept - 2007). Where the No-Fault carrier's proof consists of an IME report, same also 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, 2nd Dept – 2009) and Alur Med Supply, Inc. v. Countrywide Ins. Co., 2008 NY Slip Op 51234(U), 20 Misc 3d 126(A) (App Term, 2nd Dept – 2008).

A carrier must "stand or fall upon the defense upon which it based its refusal to pay". General Accident Ins. Group v. Cirucci, 46 N.Y.2d 862, 414 N.Y.S.2d 512 (1979); Todaro v. Geico Gen Ins. Co, 46 A.D.3d 1086, 2007 NY Slip Op 09863 (App Div, 3rd Dept - 2007) (additional citations omitted). In this matter Respondent denied No-Fault benefits based not only upon the results of an orthopedic IME, as embodied within a resultant report tendered herein, but also upon the IME reports of an examining chiropractor and acupuncturist. Counsel for Applicant is correct, in my judgment, that the report(s) of the Respondent's designated acupuncturist and/or chiropractor might contain findings inconsistent with those reported by Respondent's orthopedic examiner. As such, the credibility of the orthopedic examiner might be impeached. Applicant's counsel further maintains that the Applicant herein should not suffer a denial of No-Fault benefits based upon a claim not fully proved or subjected to fair scrutiny. Notwithstanding the aforementioned, Applicant's counsel also contends that a certificate of medical necessity, submitted herein, rebuts the allegedly negative findings of Respondent's orthopedic examiner.

It is parenthetically noted that if Respondent had not couched its denial of benefits upon the results of multi-specialty IMEs this Arbitrator would have rejected, absent Applicant's pre-arbitration request to obtain the acupuncture and chiropractic IME reports, Applicant's argument as aforesaid. Furthermore although Applicant's prejudice claims are correct, after due deliberation, I adopt a more technical conclusion, to wit, that Respondent's claim specific denials are invalid as a result of Respondent's failure to support the denial of No-Fault benefits with all IME reports upon which the denials were predicated. It is well settled that where there is an insufficient factual predicate or medical rationale, a denial based upon a deficient IME report is invalid. AJS Chiropractic and Alur Med Supply, supra. In the same vein, where a denial is predicated upon multiple IME reports that have not been provided, such a denial is also invalid. It is no different in my judgment than a denial based upon a single deficient IME report. In each situation the denial of benefits is not fully supported by a sufficient factual predicate or medical rationale. A.B. Medical Services PLLC v. Liberty Mutual Insurance Company, 10 Misc. 3d 128(A), 809 N.Y.S.2d 480 (App. Term, 2nd Dept - 2005); Chi-Ti Acupuncture PC v. Hartford Accident & Indemnity Company, 10 Misc. 3d 146(A), 2006 N.Y. Slip Op 50148(U) (App. Term, 2nd Dept - 2006). In view of all of the aforementioned, and after careful consideration, I conclude that Respondent's claim specific denials, relative to all services in controversy herein, are invalid as a matter of law. Nyack Hospital, etc. v. State Farm Mutual Automobile Insurance Company, 11 A.D. 3d 664, 784 N.Y.S.2d, 136 (2nd Dep't. – 2004). As a consequence, in order to prevail herein, Applicant must only establish its prima facie claim.

In order to do so, Applicant needs only to submit proof that a statutory billing form, i.e., an NF-3 or its equivalent (see, e.g., Rockaway Boulevard Medical v. Progressive, 9 Misc 3d 52, 802 N.Y.S.2d 302 [2005]), was mailed and received by the carrier and that payment relative thereto has not been made. Westchester Med. Ctr v. AIG, Inc., 36 A.D.3d 900, 829 N.Y.S.2d 180 (App Div, 2nd Dept - 2007); Mt. Sinai Hospital v. Joan Serv. Corp, 22 A.D.3d 649, 803 N.Y.S.2d 102 (App Div, 2nd Dept - 2005); Nyack Hospital v. Metropolitan Prop & Cas Ins Co., 16 A.D.3d 564, 791 N.Y.S.2d 658 (App Div, 2nd Dept - 2005), and; Mary Immaculate Hospital et al v. Allstate Insurance Co., 5 AD2d 742, 774 N.Y.S.2d 564 (App Div, 2nd Dept - 2004). In the instant matter Respondent has acknowledged, as set forth in Respondent's subsequently issued denials, receipt of Applicant's reimbursement request(s) regarding the CPM in dispute. This is sufficient to establish Applicant's submission, and Respondent's receipt, of Applicant's NF-3s relative thereto. VA Acutherapy Acupuncture,

P.C. v. State Farm Ins. Co., 2007 N.Y. Slip Op 51217(U), 16 Misc 3d 126(A) (App Term, 2nd Dept - 2007); Ultra Diagnostic Imaging v. Liberty Mutual Insurance Co., 9 Misc 3d 97, 804 N.Y.S. 2d 532 (App Term, 2nd Dept - 2005), and; Lopes v. Liberty Mutual Ins. Co., 2009 WJL 1799812 (App Term, 2nd Dept. – 2009). In view of all the aforementioned, I therefore must find that Applicant has sustained its burden of proof, on a prima facie basis, with regard to the CPM in controversy herein. I award Applicant the total requested sum of $2,465.00 in connection therewith.

In the instant matter, Respondent issued denials and Applicant did not commence this Arbitration proceeding within thirty days after its receipt of the subject denial(s). As a result, interest on the sum(s) awarded herein shall be calculated as of the commencement date of the within arbitration. Lastly, the attorney's fee shall be calculated based upon the total, aggregate, Award. LMK Psychological Servs. P.C. v. State Farm Mutual Ins. Co., 12 NY3d 212, 879 N.Y.S.2d 14 (2009); Office of General Counsel, State of New York Insurance Department, opinion letters dated November 30, 2009 and September 14, 2010.

Accordingly, after a careful review of all the evidence and due regard for the argument of counsel, my Award is in favor of the Applicant. I find that Applicant has sustained its burden of proof, on a prima facie basis, with regard to all services in issue. Consequently, I award Applicant the total requested sum of $2,465.00 in full satisfaction of its claim.

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.

Accordingly, the applicant is AWARDED the following:

A.

Benefits	Amount Claimed	Amount Awarded
Health Service Benefits	2,465.00	2,465.00
Totals:	$2,465.00	$2,465.00

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 08/10/2012, which is a relevant date only to the extent set forth below.)

Pursuant to No-fault Regulation 65-3.9(a), where the underlying motor vehicle accident occurred after Apr. 5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month.

The end date for the calculation of the period of interest shall be the date of Respondent's payment to the Applicant of the Award herein. In calculating the interest, pursuant to General Construction Law §20, the date of accrual shall be excluded from the calculation. Absent any credible proof as to Respondent's actual receipt of an NF-3 or its practical equivalent, or of Applicant's actual receipt of Respondent's denial, pursuant to CPLR §2103(b)(2) it is presumed that Respondent received Applicant's NF-3 or its practical equivalent, and/or that Applicant received Respondent's denial, five days after same was mailed and the "submission" date or "received" date, as hereinafter set forth, reflect such computations.

As to the date that Applicant's interest claim accrued, pursuant to LMK Psychological, supra, I find as follows:

Pursuant to No-fault Regulation 65-3.9(c), interest shall be paid, on the total sum of $2,465.00 from 08/10/2012, the date the arbitration was commenced.

Pursuant to No-fault Regulation 65-3.9(c), since the arbitration was commenced by Applicant within 30 days after receipt of Respondent's denial, interest shall be paid, on the total sum of $_____ from _____, the date Respondent's denial was "received" by Applicant.

Pursuant to No-fault Regulation 65-3.9(a), interest shall be paid on overdue claim(s), in the total sum of $_____ from _____, which date is the 30th day following Applicant's "submission" of its claim to the Respondent.

C. Attorney's Fees

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

Pursuant to LMK Psychological Services P.C., P.C. v. State Farm Mutual

Ins. Co., 12 NY3d 212, 879 N.Y.S2d 14 (2009), opinion letter of the Office of General Counsel of the State of New York Insurance Department dated October 8, 2003 and No-fault Regulation §65-4.6(e), I find that Respondent is obligated to pay Applicant an attorney's fee as set forth below:
Twenty percent of the total Award of $2,465.00, plus interest. Such a fee is not to exceed, under ordinary circumstances, the sum of $850 nor be less than a minimum fee of $60.

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 New York
SS :
County of New York.

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

1/29/13
(Dated) (Aladar G. Gyimesi, Esq.)

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.