American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:		
Day-Op Center of Long Island Inc / **Applicant_ 1** (Applicant)	AAA Case No. AAA Assessment No. Applicant's File No.	412010021134 17 991 15427 10
- and -		
Fiduciary Insurance Company of America (Respondent)	Insurer's Claim File No.	20091350

ARBITRATION AWARD

I, Lucille S. DiGirolomo, 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: Assignor

1. Hearing(s) held on
☒08/09/10
and declared closed by the arbitrator on 8/9/10.

Jennifer Howard, Esq. from the Law Office of Israel, Israel & Purdy LLP participated in person for the Applicant.
Robert Yenchman, Esq. from the Law Office of Skenderis & Cornacchia, P.C. participated by telephone for the Respondent.

2. The amount claimed in the Arbitration Request, **$2,152.95**, 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 is Applicant's billing totaling $2,152.95 as a facility fee for left shoulder arthroscopic surgery.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the Electronic Case Folder (ECF) as of the date of the hearing in this matter and have considered all pertinent documents contained therein

for the purpose of rendering this award. The parties did not make any additional submissions on the hearing date.

Assignor was a passenger in a motor vehicle involved in an accident on September 15, 2009. She came under the care of Dov Berkowitz, M.D. on October 8, 2009, complaining of pain going down her left shoulder with numbness and tingling into her arm, lower back pain traveling down the leg with numbness and tingling and "significant pain" in the left shoulder and left knee pain. The physical examination revealed decreased range of motion in the left shoulder with "significant pain and limitation of rotational movements".

Left shoulder arthroscopic surgery was performed on December 22, 2009. Applicant billed $2,152.95 as a facility fee for the procedure. Respondent timely denied this billing based on a peer review report by Marvin Winell, M.D. dated January 13, 2010.

Dr. Winell determined that the services were not medically necessary "on a causally related basis. He stated that the "mechanism of injury would have preclude the claimant from having sustained any intraarticular surgical lesion". He stated that the condition was "one of a chronic nature that preceded the motor vehicle accident by many months or even years due to a congenital or developmental condition". He went on to opine that the Assignor did not require surgery "at all even for this condition in compliance with medical standards". Dr. Winell stated that the "most important thing to note is that this claimant was essentially asymptomatic in November when she was examined by a board certified orthopedist who found her shoulder to be normal and noted a diagnostic impression of a sprain/strain, resolved".

Applicant's counsel notes that a demand was made for all medical reports submitted to the peer reviewer and copies of all medical treatise relied upon by the peer reviewer in rendering his determination. Counsel argues that, since the materials were not submitted the peer review should be precluded. Respondent's written submissions claim that this request is excessive and akin to a discovery demand in litigation that should not be allowed in arbitration. I disagree.

In the instant matter, Dr. Winell makes it clear that he is relying heavily in an orthopedic report in November that showed Assignor's condition had resolved. Both the Applicant and this arbitrator should have the ability to review this report which was so essential to the peer reviewer's determination. The failure to provide this report impacts the credibility of the peer review. As to Respondent's contention that it would be prejudiced by having to comply with this demand in an abbreviated arbitration time line, I note there are carriers who submit all documents relied upon by the peer reviewer with their submissions to the American Arbitration Association. Therefore, it can be done in the time allowed for Respondent to submit its papers and is not prejudicial.

The law is well settled that the burden is on the insurer to prove that medical treatment performed was not medically necessary. (See A.B. Medical Services PLLC v. Geico Insurance, 2 Misc.3d 26, 773 N.Y.S.2d 773 [App. Term, 2nd & 11th Jud. Dists. 2003]; King's Medical Supply Inc. v. Country-Wide Insurance Company, 783 N.Y.S.2d at 448). I do not find the peer review as submitted sufficient to meet this burden. As stated above, the peer reviewer relied on a document that is not in evidence, even after its production was requested. This goes to the credibility of the peer review. I also note that the peer reviewer

states the condition was not causally related to the accident and was chronic in nature but does not sufficiently explain this position.

Accordingly, Applicant is awarded $2,152.95 in full satisfaction of this 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	2,152.95	2152.95
Totals:	$2,152.95	$2,152.95

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 05/05/2010, which is a relevant date only to the extent set forth below.)

The insurer shall compute interest and pay the Applicant the amount of interest computed from the filing date as indicated above at the rate of 2% per month, simple, not compounded, calculated on a pro rata basis using a thirty day month, and ending with the date of payment of the award.

C. Attorney's Fees

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

The Respondent shall pay the Applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e). Since the request for arbitration was filed after April 5, 2002, if the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation process, then the attorney's fee shall be based on the provisions of 11 NYCRR 65-4.6(b).

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 Queens.

I, Lucille S. DiGirolomo, 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.

8/10/10
(Dated) (Lucille S. DiGirolomo, 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.