

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Milabo Acupuncture PC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-17-1066-6794
Applicant's File No.	BS-10661-1775904
Insurer's Claim File No.	0138768020101116
NAIC No.	22063

ARBITRATION AWARD

I, Nicholas Tafuri, 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 (LF)

1. Hearing(s) held on 03/22/2018
Declared closed by the arbitrator on 03/22/2018

Joaquin Lopez, Esq. from Baker Sanders, LLC participated by telephone for the Applicant

Nicole Harrison, Claims Representative from Geico Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,072.42**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount claimed was amended, on consent of both parties, pursuant to the fee schedule, to **\$ 966.74**.

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

3. Summary of Issues in Dispute

The EIP, LF, a 54-year old male, was the driver of a motor vehicle involved in an accident on October 22, 2014. As a result, EIP sought medical treatment for reported injuries. In dispute is reimbursement for acupuncture

services provided by Applicant on dates of service: 4/1/15-1/12/16. Respondent's denial is based on an acupuncture evaluation by Alexa Weitzman, L.Ac. held on 2/17/15.

The issue presented is whether Applicant is entitled to no-fault reimbursement for health services denied based on Respondent's acupuncture evaluation?

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the ADR Center Record as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the Hearing. Pursuant to 11 NYCRR 65-4 (Regulation 68-D), §65-4.5 (o) (1), an Arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The Arbitrator may question any witness or party, and independently raise any issue that the Arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations. The case was decided on the submissions of the Parties as contained in the ADR Center Record maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses.

It is well settled that an applicant establishes its *prima facie* showing of entitlement to No-Fault benefits by submitting evidentiary proof that the prescribed statutory billing forms had been mailed, received by the respondent, and that payment of no fault benefits were overdue. Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D. 3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004). I find Applicant establishes a *prima facie* case of entitlement to No-Fault compensation for its claim. The burden shifts to the Respondent to prove that the bills in question were properly denied. I find Respondent's denials to be timely.

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Medical Necessity

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment. Kingsborough Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D. 3d 13 (2d Dep't. 2009). See also Channel Chiropractic PC v. Country Wide Ins. Co., 38 AD 3d. 294 (1st Dep't. 2007). An insurance carrier must at a minimum establish a detailed factual basis and a sufficient medical rationale for asserting lack of medical necessity. See Delta Diagnostic Radiology PC v. Progressive Casualty Ins. Co., 21 Misc. 3d. (142A) (App. Term 2d Dep't. 2008).

Where an IME report provides a factual basis and medical rationale for an opinion that services were not medically necessary, and the claimant fails to present any evidence to refute that showing, the claim should be denied, AJS Chiropractic, P.C. v. Mercury Ins. Co., 22 Misc.3d 133(A), (App. Term 2d & 11th Dist. Feb. 9, 2002), as the ultimate burden of proof on the issue of medical necessity lies with the claimant. See Insurance Law § 5102; Wagner v. Baird, 208 A.D.2d 1087 (3d Dept. 1994).

Respondent denied all acupuncture-based benefits pursuant to the results of an acupuncture evaluation performed by Alexa Weitzman, L.Ac. on February 17, 2015. The examination revealed normal ranges of motion of EIP's cervical and lumbosacral spine. Upon palpation, there were no areas of Qi or blood stagnation along the channels of the neck and low back. EIP denies tingling sensations. There is no visible swelling or contusions. Muscle tone and strength is normal and the skin is neither hot nor cold along the meridians of the neck, upper and lower back. Ms. Weitzman diagnosed resolved strain of the cervical and lumbar spine; post traumatic Qi and blood stagnation in the channels, resolved. Based on her findings at the time of the evaluation, Ms. Weitzman determined that no further acupuncture treatment was necessary.

Respondent's representative pointed out that the medical necessity for further acupuncture treatment was previously decided by my respected colleague, Arbitrator Athena Buchanan, in AAA Case Nos.

17-16-1034-8182 and 17-16-1027-3901. The matters involved the same applicant, assignor, and acupuncture evaluation. Arbitrator Buchanan found that the acupuncture evaluation by Alexa Weitzman, L.Ac. was persuasive. Arbitrator Buchanan wrote:

*The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 2009 NY Slip Op 00351 (App Div 2d Dep't., Jan. 20, 2009); Channel Chiropractic, P.C. v. CountryWide Ins. Co., 2007 Slip Op 01973, 38 A.D.3d 294 (1st Dep't. 2007); Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co., 2007 NY Slip Op 27427, 17 Misc.3d 97 (App Term 1st Dep't., 2007), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident. *Id.**

During the hearing, it was noted that the undersigned previously made a determination with respect to Respondent's lack medical necessity defense based upon the same IME report by Alexa Weitzman, MS, Lac, dated February 17, 2015, under AAA Case No. 17-16-1027-3901. In the related case, which involved the same Applicant, I found the following:

"In the present case, Respondent denied the within treatment based on the independent acupuncture examination performed by Alexa Weitzman, MS, Lac, on February 17, 2015. The cervical spine examination revealed normal ranges of motion with areas of Qi or blood stagnation. The lumbar spine examination revealed ranges of motion within normal limits. There were no areas of Qi and blood stagnation, no visible swelling or contusions and muscle tone was normal. Based on the examination, Dr. Weitzman diagnosed the claimant with resolved conditions and recommended no further acupuncture treatment.

I find that Respondent has factually demonstrated that the acupuncture treatment rendered was not medically necessary. Accordingly, the burden now shifts to Applicant, who bears the ultimate burden of persuasion. See, Dayan v. Allstate Ins. Co., ___ Misc.3d ___(A), ___ N.Y.S.3d ___ (Table), 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015).

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, Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company, 2008 NY Slip Op 50456U, 18 Misc. 3d 1147A, 2008 N.Y. Misc. LEXIS 1121, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co. 13 Misc.3d 131, 824 N.Y.S.2d 759, 2006 NY Slip Op 51871(U) (Sup. Ct. App. T. 2d Dep't 2006)].

In opposition to Respondent's IME report, Applicant relied on treatment notes. However, the treatment notes fail to offer any substantive evidence relating to the claimant's symptoms or physical status. I find that the record is absent of any medical documentation or a rebuttal that would serve to contradict Dr. Weitzman's examination findings or explain the need for treatment beyond the IME."

In opposition, Applicant proffered additional rebuttal evidence in the form of a Rebuttal by Aleksey Milin, LAc. However, the Rebuttal merely summarizes the acupuncture treatment notes and fails to offer any additional evidence to establish medical necessity. Accordingly, I see no reason to deviate from the previous award.

Applicant's claim is denied in its entirety.

As such, I find the doctrine of collateral estoppel applicable in this case. Two requirements must be met before collateral estoppel can be invoked: 1) there must be an identity of issues which has been decided in the prior action which is decisive in the present action, and 2) there must have been a full and fair opportunity to contest the decision now said to be controlling. Gilberg v. Barbieri, 441 NYS2d 49 (Ct App 1981). The Court of Appeals has held that the doctrine of collateral estoppel "is applicable to issues resolved by earlier arbitration." Rembrandt Industries v. Hodges International, 38 NY2d 502 (Ct App 1976).

I find that the doctrine of collateral estoppel is controlling herein, as the issues are the same as the those resolved in the prior arbitrations. The issue in those arbitrations involved the same EIP and acupuncture evaluation, which was found to be persuasive. I find that the Applicant had a full and

fair opportunity to contest the determination. As such, I find, based upon my review of the record in this case, (that contains acupuncture office notes that are insufficient to establish medical necessity), and the prior arbitration decisions rendered by Arbitrator Buchanan, that Respondent's defense has been sustained in the instant matter.

Accordingly, Applicant's claim is denied.

This decision is in full disposition of all claims for no-fault benefits presently before this arbitrator.

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 New York
SS :
County of Nassau

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

04/04/2018
(Dated)

Nicholas Tafuri

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:
dd3c5bc8936a056fd178e907aa9f9824

Electronically Signed

Your name: Nicholas Tafuri
Signed on: 04/04/2018