

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Maple Gate Anesthesia  
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company  
(Respondent)

AAA Case No. 17-18-1097-2978

Applicant's File No. 18-14223

Insurer's Claim File No. 0487799362 2AJ

NAIC No. 29688

**ARBITRATION AWARD**

I, Mona Bargnesi, 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 ["JG"]

1. Hearing(s) held on 09/03/2019, 09/06/2019  
Declared closed by the arbitrator on 09/06/2019

Nicole D. Jones, Esq. from The Morris Law Firm, P.C. participated in person for the Applicant

Tiffany D'Angelo, Esq. from Law Offices of John Trop participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 369.07**, 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

Whether Applicant is entitled to reimbursement for lumbar surgery performed on January 26, 2018.

Respondent denied reimbursement based on a peer review dated February 20, 2018.

Whether collateral estoppel applies.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions contained in the American Arbitration Association's ADR Center as of the date of the hearing. These submissions are the record in this case.

This case arises out of a motor vehicle collision which occurred on January 7, 2018. The 38 year-old restrained driver allegedly injured his back, right hip and right leg.

Zair Fishkin, MD, performed the disputed surgery on January 26, 2018. Applicant administered the anesthesia.

I previously rendered a decision in *Matter of the Arbitration between Zair Fishkin, MD and Allstate Ins. Co.*, AAA #17-18-1090-9558 (01/24/2019). In that case, Respondent's denial was upheld based on the same peer review. This decision was upheld by Master Arbitrator Frank Godson on May 21, 2019.

For a more detailed recitation of the facts, please refer to the aforementioned case. The findings of that case are hereby adopted and incorporated as follows:

I find that Dr. Hillsman's peer review contains a sufficient factual basis and medical rationale to demonstrate that the surgery in question was not medically necessary at this time. Assignor's chronic back symptoms remained unchanged following the collision. Although Dr. Fishkin stated that Assignor has not made progress "despite 6 months of conservative care", the conservative care related to the collision of record involved only one visit to Dr. Fishkin. In fact, Dr. Fishkin's January 17, 2018 report lists the June 17, 2017 collision as the "D/A", and only references the January 26, 2018 collision when he requests the updated MRI.

On January 25, Dr. Fishkin stated that the January 22 MRI "is more consistent with his current symptoms", but did not explain why this finding would result in the imminent need for surgery.

The discussion of surgery occurred only eighteen days after the collision, and the surgery was performed just one day after that. This would not be consistent with the standard of three months of conservative care suggested by Dr. Hillsman.

As noted by Dr. Hillsman, an epidural steroid injection was administered on December 13, 2017; however, this was also prior to the collision of record.

Dr. Hillsman's point that Assignor did not stop smoking prior to the surgery is also well-taken, as the risks of surgery were increased. While not related to the need for surgical intervention itself, it does tend to support Dr. Hillsman's opinion that the surgery was performed prematurely.

A factual finding made in an arbitration award constitutes collateral estoppel against the party

who commenced the arbitration where that party had a full and fair opportunity to litigate the

factual issue determined. Clemens v. Apple, 65 N.Y.2d 746, 492 N.Y.S.2d 20 (1985).

Due to the fact that Applicant and counsel in the earlier case were different from those herein, Applicant has not had a full and fair opportunity to litigate the factual issue. Therefore, collateral estoppel is technically inapplicable.

Nevertheless, I see no reason to depart from my earlier findings, particularly since they were affirmed by the master arbitrator.

Based on the foregoing, Respondent's denial is upheld.

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 Erie

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

10/01/2019  
(Dated)

Mona Bargnesi

### **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:**  
52dc0e4f3966cb261f7d4bff76008e1f

### **Electronically Signed**

Your name: Mona Bargnesi  
Signed on: 10/01/2019