

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Spine Specialists (Applicant)	AAA Case No.	17-17-1082-3174
- and -	Applicant's File No.	2046413
	Insurer's Claim File No.	0409076510 2AL
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

ARBITRATION AWARD

I, Rebecca Novak, 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 ["RO"]

1. Hearing(s) held on 10/02/2019
Declared closed by the arbitrator on 10/02/2019

Gary Pustel, Esq. from Israel, Israel & Purdy, LLP (Great Neck) participated in person for the Applicant

Inna Vilig, Esq. from Allstate Fire & Casualty Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 92.94**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that Applicant established a prima facie case of entitlement to No-Fault compensation with respect to its bill and to the timeliness of Respondent's denial. They stipulated that Applicant's fees were correct.

3. Summary of Issues in Dispute

Whether Applicant established entitlement to No-Fault insurance compensation for a follow-up office visit, provided on October 30, 2017, to treat Assignor, a 57-year-old male, subsequent to being injured in a motor vehicle accident on March 26, 2016.

Whether Respondent's timely denial for a follow-up office visit, based upon an independent medical exam ("IME") conducted by Dr. Regina Hillsman on June 30, 2016 with a cutoff date of July 21, 2016 should be sustained.

Whether to apply collateral estoppel against Respondent.

4. Findings, Conclusions, and Basis Therefor

In this No-Fault insurance arbitration, Applicant is seeking as compensation \$92.94 for a follow-up office visit on October 30, 2017, to treat Assignor, a 57-year-old male, subsequent to being injured in a motor vehicle accident on March 26, 2016. Respondent denied the bill on the ground of lack of medical necessity based on an IME cutoff effective July 21, 2016.

Both parties appeared at the hearing by counsel, who presented oral argument and relied upon documentary submissions. I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center as of the date of the hearing, said submissions constituting the record in this case.

Stipulations were entered into at the hearing, amongst which were that Applicant established a prima facie case of entitlement to No-Fault compensation for the amount it sought and that Applicant's bill was timely denied by Respondent.

Assignor, a 57-year-old male, was a restrained driver injured in a motor vehicle accident on March 26, 2016. The records reflect that he reportedly sustained injuries to the neck, mid back, lower back and right hip. There was loss of consciousness but Assignor presented to Jacobi Hospital emergency room the next day, where he had radiology testing performed of the neck, back and chest, was treated with medication and released the same day with medication, a neck collar and cane. Assignor followed up with his private physician and was referred for physical therapy, acupuncture and chiropractic treatment. On October 30, 2017, Assignor presented for a follow-up office visit.

Respondent timely denied Applicant's bill based on an independent medical exam ("IME") conducted by Dr. Regina Hillsman on June 30, 2016 with a cutoff date of July 21, 2016.

At the hearing, Applicant noted that reimbursement of medical services including injections and office visits performed for the same Assignor had previously been denied by Respondent based on the same IME of Dr. Hillsman dated June 30, 2016. Counsel asserted that based on that IME, an award had been rendered in Applicant's favor and the doctrine of collateral estoppel should be applied.

"Collateral estoppel is a specific form of res judicata which bars 'a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same' (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]).

'In order to invoke the doctrine, the identical issue must necessarily have been decided in the prior action or proceeding and be decisive of the present action or proceeding, and the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination' (Comprehensive Med. Care of NY, P.C. v Hausknecht, 55 AD3d 777, 778 [2008]; see Buechel v Bain, 97 NY2d 295, 303-304 [2001]; Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 349 [1999]). Furthermore, the party seeking to rely on collateral estoppel has the burden of establishing that the issue actually litigated and determined in the prior action is identical to the issue on which preclusion is sought (see Forcino v Miele, 122 AD2d 191, 193 [1986]; Concord Delivery Serv., Inc. v Syossot Props., LLC, 19 Misc 3d 40, 43 [App Term, 9th & 10th Jud Dists 2008]). The party attempting to defeat the application of collateral estoppel has the burden of establishing the absence of a full and fair opportunity to litigate (see D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]; Uptodate Med. Servs., P.C. v State Farm Mut. Auto. Ins. Co., 23 Misc 3d 42, 44 [App Term, 2d, 11th & 13th Jud Dists 2009])." Triboro Quality Medical Supply, Inc. v. State Farm Mutual Automobile Ins. Co., 36 Misc.3d 131(A), 954 N.Y.S.2d 762 (Table), 2012 N.Y. Slip Op.

The issue of medical necessity in this case is the same issue as was decided by Arbitrator Sandra Adelson in several awards, including the arbitration award of Matter of Arbitration of New York Spine Specialists LLP v. Allstate Fire & Casualty Insurance Company, AAA Case No. 17-17-1082-3174 (April 21, 2018). After a thorough review of the evidence, Arbitrator Adelson found that the services in dispute were medically necessary, and she awarded compensation to Applicant. In that award, Arbitrator Adelson stated that:

The existence of multiple disc herniations in the cervical and lumbar spine combined with the positive examination findings documented within the reports of the treating physician does not support a credible finding that this patient would have ceased having problems related to the cervical and lumbar spine. In fact, applicant's 6/26/17 report establishes the continuity of problems relating the cervical and lumbar spine for the accident related back and neck injury. In light of the foregoing, I am constrained to find that the portrayal of the patient having resolved cervical and lumbar spine conditions was not credible as depicted by Dr. Hillsman.

In light of the foregoing, I am constrained to find that Dr. Hillsman failed to accurately document the patient's physical condition as it related to the cervical and lumbar spine on the date of the IME examination.

It is within the arbitrator's authority to determine the preclusive effect of a prior arbitration. Matter of Falzone v. New York Central Mutual Fire Ins. Co., 15 N.Y.3d 530, 914 N.Y.S.2d 67 (2010), aff'g, 64 A.D.3d 1149, 881 N.Y.S.2d 769 (4th Dept. 2009).

It was clear from the award that the Respondent was represented at the prior hearing and had a full and fair opportunity to be heard. The earlier case involved the same accident and injured party and a claim made by the same Applicant in which the same defenses as those raised here were propounded. The issue of whether to sustain the IME cutoff was present in the previous arbitration case. It was decided in favor of Applicant, who had sought to overcome the IME cutoff which is the same one as present in the case at bar.

As Respondent had a full and fair opportunity to litigate the IME cutoff in the prior case and it was decided against it, I conclude that Respondent is barred from relitigating the issue.

Therefore, I again deny the IME cutoff as a defense. Applicant's prima facie case for reimbursement stands.

Accordingly, the within arbitration claim is granted in its entirety.

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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Total	Status
	New York Spine Specialists LLP	10/30/17 - 10/30/17	\$92.94	\$ 92.94	Awarded: \$92.94
Total			\$92.94	Awarded: \$92.94	

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/13/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant argued that the date set forth above is the date when interest shall accrue. This was not rebutted by Respondent, who offered no alternative date. Thus, interest shall accrue as of said date. The end date for the period of interest shall be the date of payment of the claim. Interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. See 11 NYCRR 65-3.9, 65-4.5(s)(3).

C. Attorney's Fees

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

Applicant is entitled to an attorney's fee pursuant to Insurance Law §5106(a). After calculating the sum total of the first-party (No-Fault) benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, subject to the following limitations: In the event the above filing date was prior to Feb. 4, 2015, the attorney's fee is subject to a minimum of \$60.00 and a maximum of \$850.00, per 11 NYCRR 65-4.6(e). In the event the above filing date was on or after Feb. 4, 2015, the attorney's fee is subject to a maximum of \$1,360.00, per 11 NYCRR 65-4.6(d). In the event the above filing date was on or after Feb. 4, 2015 and first-party (No-Fault) benefits are awarded to more than one Applicant herein, the attorney's fee shall be calculated separately for each Applicant, each Applicant's attorney fee being subject to the \$1,360.00 maximum.

- 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 Nassau

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

10/16/2019
(Dated)

Rebecca Novak

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:
aeb83b901ff435c2d3069ac5860653fb

Electronically Signed

Your name: Rebecca Novak
Signed on: 10/16/2019