American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Spine Specialists (Applicant)	AAA Case No.	17-18-1092-5325
	Applicant's File No.	2090741
- and -	Insurer's Claim File No.	0429836363 ATL
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

ARBITRATION AWARD

I, Gerry Wendrovsky, 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 11/14/2019
   Declared closed by the arbitrator on 11/14/2019

   Koenig Pierre from Israel, Israel & Purdy, LLP (Great Neck) participated in person for the Applicant

   James McNamara from Law Offices Of Karen L Lawrence participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 185.92**, 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

   The EIP, ST, a 74 year old male, was involved in a motor vehicle accident on 9/12/16. This is one of two linked matters. At issue is $185.92 for services rendered 2/28/18 - 4/9/18. Respondent timely denied the claim based upon the report of the independent medical exam (IME) of Dr. Raghava R. Polavarapu, dated 1/26/17; the effective date of the IME denial was 2/21/17. The questions presented are whether the services were medically necessary; and the effect of prior awards which addressed the IME report.

4. Findings, Conclusions, and Basis Therefor

This case has been decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses. I have reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon. This decision is in full disposition of the issues before me.

Pursuant to 11 NYCRR 65 4.5 (o)(1), an arbitrator shall be the judge of the relevance and materiality of the evidence offered. In exercising that discretion, I advised the parties at the commencement of the hearing of the linked cases, that I would address these matters collectively. See, Matter of Sobel v. Charles Schwab & Co., Inc., 37 A.D. 3d 877, 878 (3rd Dept., 2007).

An applicant establishes its prima facie entitlement to judgment as a matter of law by proof that it submitted a claim, setting forth the fact and the amount of the loss sustained, and that payment of no-fault benefits was overdue. Mary Immaculate Hosp. v. Allstate Ins. Co., 5 A.D. 3d 742 (2nd Dept.,2004). Applicant has submitted sufficient credible evidence to establish its prima facie case.

IME Report

A defense premised upon the results of an IME requires a factual basis and medical rationale be demonstrated for the conclusion that further services are not medically necessary. AJS Chiropractic, PC v. Mercury Ins Co, 22 Misc. 3d 133 (A)(App Term 2009); Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance, 20 Misc. 3d 144(A) (App. Term 2008).

In the IME report, Dr. Polavarapu,, an orthopedist, documented the EIP's complaints (HA, neck radiating to right hand, low back radiating to right foot, right/left shoulder), and a review of medical records. It was a completely normal exam with no objective findings; diagnosis was '*resolved cervical, cervical/lumbar spine sprains and bilateral shoulder sprains'*.

I find the IME report is sufficient for respondent to meet its burden of proof on the issue of lack of medical necessity. A. Khodadadi Radiology PC v. NY Central Mutual Fire Ins. Co., 2007 NY Slip Op 51342(U). Applicant now must meaningfully refer to, or rebut, the conclusions set forth in the IME report. Ortho-Med Surgical Supply, Inc. v. Progressive Cas. Ins. Co., 2012 NY Slip Op 50149(U) (App Term 2012); Yklik, Inc. v. Geico Ins. Co., 2010 NY Slip Op. 51336(U) (App Term 2010).

Prior Awards

Pursuant to 11 NYCRR 65 4.5 (o)(1), an arbitrator shall be the judge of the relevance and materiality of the evidence offered. It is within my authority to determine the preclusive effect of a prior arbitration [See, Matter of Falzone v. New York Central Mutual Fire Ins. Co., 15 N.Y. 3d 530 (2010)], or dispositive effect of same.

At the hearing, the parties argued the dispositive (but opposite) effect of two awards, both issued by Arbitrator O'Grady on 8/1/19 and concerning the applicant (represented by present counsel) and the IME report.

Respondent

Respondent pointed to an award (AAA# 17-18-1083-9974), **which addressed DOS 11/30/17**. Of significance, in finding for respondent, the Arbitrator found, in pertinent part:

> *"…. Dr. Polavarapu examined the cervical spine, lumbar spine and both shoulders. He measured range of motion, and quantified them as equal to normal so that there was no reduction in range of motion in any plane. There were no motor or sensory deficits in the arms or legs. Muscle strength was full. There was no radiating pain and no atrophy noted. Deep tendon reflexes were without abnormality. The examination of the shoulders revealed no crepitus or impingement sign and Dr. Polavarapu concluded that all cervical and lumbar spine sprains were resolved and bilateral shoulder sprains were resolved, and that no further treatment was necessary….*
>
> *T**he proof in favor the applicant includes the report of October, 2016 MRI exam** of the cervical spine which revealed a number of abnormalities including disc herniations at four levels, and **an MRI exam of the lumbosacral spine performed at about the same time** which also revealed a number of abnormalities including disc herniations at multiple levels.*
>
> ***In January, 2017 the assignor presented to the applicant**with complaints of pain in the neck and low back and shoulders. Ranges of motion were restricted in the neck and low back. Muscle strength was reduced and sensation was abnormal in multiple locations. The patient elected to proceed with conservative therapy, chiropractic care and physical therapy and lumbar spine epidural injections. **A month later the assignor returned with similar complaints and findings.** The assignor again proceed with physical therapy and injections. **On June 1, 2017, the patient returned to the applicant** in the report of that exam reveals that he was attending physical therapy twice a week. Range of motion remained restricted in the cervical spine and lumbar spine and muscle strength remained reduced in the hip flexor and tibialis on the right side. Sensation was altered at the right L4 and L5 dermatomes. Reflexes were abnormal in the low back. **On July 19, 2017 the patient returned**. Cervical spine range of motion remained reduced. Similar restrictions are noted in the lower back. Muscle strength and sensation is noted to be abnormal. On **October 11, 2017 the assignor again returned to the applicant.** Range of motion remained reduced in the neck and low back. Muscle strength loss is noted on the right deltoid and sensation was altered in multiple dermatomes in the neck. In the low back motor strength was "not within normal limits on inspection" and motor strength was reduced in the right hip flexor and right tibialis. Motor strength was reduced. **On November 30, 2017, the assignor returned to the applicant***

> ***….****examination findings on that date are identical to the examination findings at the time of the October 11, 2017 exam and…. at the time of the July 19, 2017 exam….*
>
> ***While applicant's proof is sufficient to establish that there was some persistent injury and the need for further treatment and examinations through July, 2017, the proof of ongoing injury beyond that date is not credible****…. between January, 2017 and November, 2017, a total of six reports, the language detailing abnormality is virtually identical in each exam report….* ***applicant fails to demonstrate the need for any examinations or treatment after July 31, 2017****…."*

Applicant

Applicant pointed to an award (AAA# 17-17-1075-7745), **which addressed DOS 6/1/17- 7/19/17.** Of significance, in finding for applicant, the Arbitrator found, in pertinent part:

> *"…. (repeated IME findings and applicant's proof)…. The applicant's proof is sufficient to overcome (the IME report).* ***Applicant's proof demonstrates, by way of multiple examinations by the applicant, between January and July, 2017****, that the (EIP) injured his neck, low back and shoulders and that during the course of treatment, which included physical therapy and some chiropractic care, the injuries persisted. Applicant adequately quantifies the injuries in terms of range of motion loss, muscle strength loss, sensation deficits and reflex abnormalities. In all, applicant's proof is sufficient to demonstrate an ongoing injury to the (EIP) justifying the additional examinations that are in issue here…."*

Discussion

At the hearing, applicant argued that the award in its favor was premised upon said arbitrator's determination that the treatment was necessary at 'that time' (6/1/17-7/19/17); and the other award was without a rational basis.

Respondent argued the award in its favor was premised upon the converse (as of DOS 11/30/17).

Upon review, although the awards arrived at a different conclusion, each was based upon the same analysis, namely that applicant failed to "**demonstrate the need for any examinations or treatment after July 31, 2017."**

In the context of this tribunal, collateral estoppel is a specific form of res judicata which bars a party from relitigating an issue raised in a prior proceeding and decided against that party. Ryan v. New York Tel. Co., 62 N.Y. 2d 494 (1984). To invoke the doctrine, the identical issue must be determinative in both matters, and the party affected must have been afforded a full and fair opportunity to contest the prior determination. Comprehensive Med. Care of NY v. Hausknecht, 55 A.D. 3d 777 (2nd Dept.,2008).

Issues resolved by earlier arbitration are subject to the doctrine. Rembrandt Industries, Inc. v. Hodges International, Inc., 38 N.Y. 2d 502 (1976).

Plainly, the doctrine, premised upon the findings of fact, is applicable.

Herein, no evidence has been presented that would controvert the detailed findings of fact set forth in the prior awards.

Applicant's claim is denied.

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

11/18/2019
(Dated)

Gerry Wendrovsky

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:
94c2d6435b6d4a8f14d436587cb3fa94

Electronically Signed

Your name: Gerry Wendrovsky
Signed on: 11/18/2019