American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Spine Specialists (Applicant)	AAA Case No.	17-18-1103-5875
	Applicant's File No.	2137990
- and -	Insurer's Claim File No.	0358926178 2EX
Allstate Property and Casualty Insurance Company (Respondent)	NAIC No.	29688

ARBITRATION AWARD

I, Yael Aspir, 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 11/25/2019
   Declared closed by the arbitrator on 11/25/2019

   Helen Mann Ruzhy from Israel, Israel & Purdy, LLP (Great Neck) participated in person for the Applicant

   Megan McDonough from Law Offices of John Trop participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 96.28**, 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, KA, a 34 year old female driver, was injured by a motor vehicle involved in an accident on 02/22/15.

   In dispute are the Applicant's claims for $96.28, for services provided to the EIP on 06/27/18. Respondent timely denied the claim based on the 05/28/15 IME of Dr. Dorothy Scarpinato.

   Accordingly, the issue to be determined is the medical necessity of the services provided.

4. Findings, Conclusions, and Basis Therefor

The case was decided on the submissions of the Parties as contained in the Electronic Case Folder maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in Modria for both parties and make my decision in reliance thereon.

It is well settled that a health care provider establishes its prima facie entitlement to payment as a matter of law by proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see Insurance Law § 5106 a; Mary Immaculate Hosp. v. Allstate Ins. Co., 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; Amaze Med. Supply v. Eagle Ins. Co., 2 Misc. 3d 128A, 784 N.Y.S. 2d 918, 2003 NY Slip Op 51701U [App Term, 2d & 11th Jud Dists]). As Applicant has established its prima facie case, the burden shifts to the insurer to prove that the services were not medically necessary.

Since Respondent's denial was timely, it was within its rights to assert lack of medical necessity as a defense. Liberty Queens Medical, P.C. v. Liberty Mutual Insurance Co., 2002 WL 31108069 (App. Term 2d & 11th Dists. June 27, 2002); cf. Country-Wide Insurance Co. v. Zablozki, 257 A.D.2d 506, 684 N.Y.S.2d 229 (1st Dept. 1999).

An IME doctor must establish a factual basis and medical rationale for his asserted lack of medical necessity of further health care services. E.g., Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance, 20 Misc.3d 144(A), 2008 NY Slip Op 51863(U), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008). If he does so, it becomes incumbent on the claimant to rebut the IME review, see AJS Chiropractic, P.C. v. Mercury Ins. Co., 2009 WL 323421 (App. Term 2d & 11th Dist. Feb. 9, 2002), because 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, 617 N.Y.S.2d 919 (3d Dept. 1994); Shtarkman v. Allstate Insurance Co., 2002 WL 32001277 (App. Term 9th & 10th Jud. Dists. 2002) (burden of establishing whether a medical test performed by a medical provider was medically necessary is on the latter, not the insurance company). The insured or the provider bears the burden of persuasion on the question of medical necessity. Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 WL 1936346 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). This burden of proof is properly placed on a claimant health care provider because presumably it is in possession of the injured party's medical records.

Respondent denied payment of services based on an IME cut-off effective 06/18/15. Respondent's evidence established that the claim was timely denied on an IME of Dr. Dorothy Scarpinato, who examined the EIP on 05/28/15. The EIP presented with complaints of complaints of pain to her neck, back and left shoulder. Dr. Scarpinato indicated a completely normal exam with no evidence of muscle spasm or tenderness, all tested range of motion within normal limitations, and no positive objective findings.

Her report concluded that all sprains/strains were resolved and no further treatment was necessary.

The issue involving post IME treatment provided to the EIP by this Applicant was previously addressed in *New York Spine Specialists, LLP and Allstate Insurance Company, AAA # 17-16-1038-0362*. In that matter, Arbitrator Wendy Bishop reviewed the IME and Applicant's uploaded medical records and found as follows:

> *In support of its defense that the orthopedic consultation performed on April 22, 2016, and the follow-up orthopedic consultation performed on June 30, 2016, were not medically necessary, Respondent submits the report of the IME performed by Dorothy Scarpinato, M.D. on May 28, 2015. In AAA Case No. 17-16-1029-5174, I issued a decision in which I found that Dr. Scarpinato's IME met Respondent's initial burden in support of its defense of lack of medical necessity. As that case involved the same IME of the same Assignor, I adopt my finding from my prior decision herein.*
>
> *However, the case in which I issued the prior decision involved a different medical provider than Applicant herein. The medical provider in the prior case failed to submit any contemporaneous medical records to rebut Dr. Scarpinato's IME. Having not been a party to the prior case, I will permit Applicant herein an opportunity to rebut the findings of Dr. Scarpinato's IME. However, Applicant herein has failed to submit contemporaneous records to rebut Dr. Scarpinato's IME report. Therefore, Applicant has failed to demonstrate the medical necessity of the treatment at issue. Accordingly, Applicant's claim is denied.*

The Doctrine of Collateral Estoppel precludes a party from re-litigating in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. Ryan v. New York Telephone, 62 N.Y.2d 494, 478 N.Y.2d 823. Two requirements must be met before collateral estoppel can be invoked: There must be an identity of issues which has been decided in the prior action and is decisive in the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling. (See Gilberg v. Barbieri, 441 N.Y.S.2d 49.) Further, 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 N.Y.2d 592, 381 N.Y.S.2d 383."

After review of the record before me, I find that insofar as the issue in this case is the same as that determined in the above-referenced case, and given that the parties had a full and fair opportunity to be heard, the doctrine of collateral estoppel is properly invoked.

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

11/26/2019
(Dated)

Yael Aspir

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:
e184daa04ee501c570ea954f9ccdb893

Electronically Signed

Your name: Yael Aspir
Signed on: 11/26/2019