

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Raymond Cecora PT d/b/a Park Physical  
Therapy  
(Applicant)

- and -

Allstate Insurance Company  
(Respondent)

AAA Case No.	17-19-1133-6958
Applicant's File No.	127284
Insurer's Claim File No.	05067055242EM
NAIC No.	29688

### **ARBITRATION AWARD**

I, Neal S. Dobshinsky, 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: J Doe

1. Hearing(s) held on 09/16/2020  
Declared closed by the arbitrator on 09/16/2020

Kevin Griffiths from The Odierno Law Firm P.C. participated by telephone for the Applicant

Peter Graziosi from Law Offices Of Karen L. Lawrence participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 495.03**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount claimed was amended to \$184.80 to conform to the fee schedule.

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

3. Summary of Issues in Dispute

Applicant started treating Doe with physical therapy on 6/25/18 and continued to treat her during the period in dispute, from 2/26/19 to 3/5/19. Applicant sought payment for its services.

On 10/4/18, Insurer had had Doe examined on its behalf by an orthopedic surgeon who opined that Doe had no need for any further causally related orthopedic treatment including physical therapy. Based on the results and report of that orthopedic IME, Insurer cutoff and denied all further no-fault benefits for physical therapy effective 10/23/18 as not medically necessary.

Was the physical therapy during the period at issue medically necessary?

#### 4. Findings, Conclusions, and Basis Therefor

I have read and considered the materials in the American Arbitration Association's ADR Center case file and heard and considered the parties' oral arguments. I find as follows:

##### *Preliminary Note Regarding Related Cases*

Eleven arbitrations, this one and ten others, were all heard by me on the same day. The cases involve common issues of fact and law-the same accident, injured person, insurer, provider/applicant, IME, and substantially the same evidence. The only noteworthy differences among the cases are the dates of treatment. To avoid inconsistent results, the cases have been considered and decided together. AAA Case nos. 17-19-1128-0244; 17-19-1133-2116; 17-19-1133-2327; 17-19-1133-2458; 17-19-1133-6958; 17-19-1137-1986; 17-19-1137-1987; 17-19-1137-1999; 17-19-1138-9503; 17-19-1138-9545; 17-20-1155-6329.

##### *Background*

On 6/20/18, J Doe, a female, then 35 years old, was the driver of a motor vehicle that was in an accident. Doe claims that she was injured. After the accident, Doe was seen at a local hospital emergency room. X-rays of Doe's cervical spine were taken. They showed straightening of the normal cervical lordosis, but no fracture or subluxation. Doe's neck muscles were tender. She was prescribed a pain medication and muscle relaxer; she was discharged. Doe then sought further care and treatment.

On 6/21, Doe saw Donna Forker, a physician assistant, or Elizabeth M. Morrison, MD, (both names are on the record). Doe presented with complaints of cervical pain, which radiates into her left shoulder with numbness and tingling in her left hand. Doe was examined. There were positive findings at Doe's cervical spine: mild torticollis, tenderness, muscle spasm, and restricted ranges of motion. Doe's thoracic spine was normal. Cervical x-rays showed decreased lordotic curvature, arthritic changes, and decreased disc space. The diagnoses were cervical strain/sprain with radiculopathy. Doe was referred for cervical MRI to evaluate for herniated nucleus pulposus. She was prescribed medication, referred for physical therapy, and told to return following the MRI.

Cervical MRIs were performed on 6/23, which revealed reversal of the cervical lordosis, multilevel disc desiccation, right paracentral protrusion at C4-C5 and posterior protrusion at C5-C6 without fracture, cord impingement, or exiting nerve root impingement.

On 6/25, Doe saw Travis Tennie, a physical therapist with applicant Raymond Cecora PT d/b/a Park Physical Therapy, for an initial examination. Doe complained of neck pain and stiffness, left hand numbness, pain radiating into the shoulder blades, difficulty with child care, etc. The therapist examined Doe and measured cervical and shoulder ranges of motion and muscle strength. The assessment/diagnosis was that Doe "present[ed] with signs/symptoms consistent with cervical radiculopathy secondary to whiplash injury limiting overall function." The treatment plan was for therapy 2-3 times per week for 8 weeks. There was one specified short term goal (4 weeks), to decrease pain 2-3 levels on the visual analog scale during performance of ADLs; and six specified long term goals (one to be met in 6 weeks and the others in 8 weeks).

Doe started physical therapy treatment with Applicant.

#### *Medical Examination at the Request of the Insurer*

On 10/4/18, at the request of Insurer, Dorothy Scarpinato, MD, a board certified orthopedic surgeon, performed an orthopedic examination (IME) of Doe. Dr. Scarpinato submitted a report of her examination findings, opinions, and recommendations.

Scarpinato listed the medical records and reports she reviewed. These included: evaluations by Dr. Morrison dated 6/21 and 6/23/18; evaluations by Dr. Alejo dated 7/3 and 8/8/18; physical therapy evaluation dated 6/25 and notes through 8/21/18; hospital record dated 6/20/18; report of the cervical spine MRI dated 6/23/18; and peer reviews by a Dr. Springer dated 7/24/18 and by a Dr. Hadhoud dated 9/28/18.

Scarpinato noted the history of the accident, Doe's past medical history, her visit to the hospital emergency room; her complaint that she injured her neck; her follow-up with the doctor; and her physical therapy.

At the IME, Doe complained of neck pain. The doctor examined Doe's cervical spine. The findings were all normal. The diagnosis was cervical strain, resolved.

Scarpinato noted that Doe had subjective complaints of tenderness with no positive objective findings. She opined that "there is no need for any further causally related orthopedic treatment including physical therapy."

#### *Doe Is Notified of the Results of the Medical Exam and Further Benefit Cut-Off*

Based on the results of the Scarpinato IME, on 10/16/18, Insurer issued a global denial of claims. Insurer notified Doe that "all further orthopedic, physical therapy . . . benefits are not medically necessary, and will be denied effective 10/23/18." It appears that Applicant and other providers were copied on this denial.

### *Doe Continues with Treatment*

Despite Insurer's global denial and further benefit cut-off, Doe continued treatment with Applicant. On 2/26/19, Doe had her 77th visit with Applicant. By that time, Doe had met the initial short term (4 week) goal. But, none of the long term (6-8 week) goals had been met. She was rated as having achieved only 55% of the 6 weeks' goal, 65% of only one of the 8 weeks' goals and lesser percentages for the other goals. Doe continued treating with Applicant until 3/5/19, her 79th visit, with no further improvement.

### *Applicant's Claims and Insurer's Denials*

Applicant, as assignee of Doe's rights to no-fault benefits for health care services, timely submitted its bills to Insurer for payment for the physical therapy during the period at issue: 2/26 to 3/5/19.

Insurer timely denied each of Applicant's claims for lack of medical necessity based on the Scarpinato IME and its own global denial of benefits for physical therapy as of 10/23/18. Applicant seeks payment on the bills.

At the oral hearing, Insurer argued that the lack of medical necessity for the continuing physical therapy had been determined in its favor at a prior arbitration and that Applicant's claims are barred by collateral estoppel.

The only the issues argued and submitted by the parties were the medical necessity for the physical therapy and whether the prior award should be given collateral estoppel effect to bar Applicant's claims here. All other issues were waived.

### *Medical Necessity and the Burden of Proof Under No-Fault*

Medical necessity for services or supplies is established by proof of an applicant's properly submitted claim form. *All County Open MRI & Diagn. Radiology P.C. v Travelers Ins. Co.*, 11 Misc3d 131(A), 2006 NY Slip Op. 50318[U] [App Term, 2d Dept 9th & 10th Jud Dists 2006]. Here, Applicant's submission of its claims establishes the medical necessity for the physical therapy.

The insurer "bears both the burden of production and persuasion" as to its lack of medical necessity defense. *Nir v Allstate Ins. Co.*, 7 Misc3d 544, 546 [Civ Ct, Kings County 2005]. The defense must be supported by a peer review report or other evidence, such as an independent medical examination report. The report must set forth a sufficiently detailed factual basis and medical rationale for the denial. *Amaze Med. Supply v Eagle Ins. Co.*, 2 Misc3d 128(A), 2003 NY Slip Op 51701[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2003].

"[H]owever, it is the [applicant] who has the ultimate burden of proving, by a preponderance of the evidence, that the services at issue were medically necessary (citations omitted)." *Radiology Today, P.C. v Geico Ins. Co.*, 58 Misc3d 132(A), 2017 NY Slip Op 51768[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017].

*The IME and Insurer's Lack of Medical Necessity Defense; Collateral Estoppel*

In *Matter of Raymond Cecora PT and Allstate Insurance Company*, AAA Case no. 17-19-1119-7726 [7/17/20, Arbitrator Dobshinsky], the issue before me was the medical necessity for the continuing physical therapy during the period 10/24-12/6/18. There, Insurer argued that the negative IME by Scarpinato properly resulted in the termination of all of Doe's no-fault benefits for physical therapy effective as of 10/23/18. Based on the Scarpinato IME report and Applicant's own treatment records, I found that Insurer sustained its burden of proof to show that further physical therapy was not medically necessary. I denied Applicant's claim for payment.

The equitable doctrine of collateral estoppel is applicable in arbitration proceedings, including those rendered in disputes over no-fault benefits, and bars re-litigation of the same claim or issue. See *Martin v. Geico Direct Insurance*, 31 AD3d 505, 506 [2d Dept. 2006].

Collateral estoppel, or issue preclusion, bars a party from re-litigating in a subsequent action or proceeding, an issue raised in a prior action or proceeding and decided against that party or those in privity. The policies underlying collateral estoppel are to avoid relitigation of a decided issue and the possibility of inconsistent results. *Buechel v. Bain*, 97 NY2d 295, 303 [2001] (internal citations omitted); *Comprehensive Med. Care of N.Y., PC v. Hausknecht*, 55 AD3d 777 [2d Dept 2008].

Application of collateral estoppel depends upon two factors: (i) "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action;" and (ii) "a full and fair opportunity to contest the decision now said to be controlling." The burden of establishing the first of these factors is upon the party seeking to impose collateral estoppel; the second is to be disproven by the opponent. *Forcino v Miele*, 122 AD2d 191, 193 [2d Dept 1986] (internal citations omitted); *Triboro Quality Med. Supply, Inc. v State Farm Mut. Auto Ins. Co.*, 36 Misc 3d 131[A], 2012 NY Slip Op 51289[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2012].

In both this arbitration and the earlier one, Insurer contended that treatment rendered to Doe by Applicant after the 10/23/18 benefit cut-off was not medically necessary. The issue of whether payment for the continuing physical therapy treatments at issue should be denied based on the Scarpinato IME is the same here as in the earlier arbitration. The identity of issue factor has been established.

The burden is on Applicant to show that it did not have a full and fair opportunity to contest the issue now said to be controlling. "A determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of 'the `realities of the [prior] litigation', including the context and other

circumstances which \* \* \* may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him." Among the specific factors to be considered are the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation." *Ryan v. New York Tel. Co.*, 62 NY2d 494, 501 [1984] (internal citations omitted).

The forum is the same. The parties are the same. The continuing treatment is the same. The material facts are the same. There is no contention that Applicant did not have a full and fair opportunity to rebut Insurer's showing. Applicant does not contend that the applicable law has changed or that there is any new, previously unavailable evidence to show that the earlier determination was incorrect. Applicant has not submitted any evidence to show why Scarpinato's IME report and her conclusions should not continue to apply.

Insurer has established the factor necessary to show that collateral estoppel effect should be given to the earlier determination. Applicant has not offered anything to show that it should not. Applying these principles, the prior arbitration decision, that determined that Insurer's denial on medical necessity grounds had been sustained, precludes the relitigation of that issue here.

Here, whether based on collateral estoppel principles or consideration of the additional treatment records-which I have done-the conclusion remains the same. Insurer has demonstrated that the continuing physical therapy treatments at issue were not medically necessary, and Applicant has not overcome that showing.

### *Conclusion*

Based on the parties' submissions, their arguments, the law, the regulations, and the weight of the evidence, I conclude that Insurer has established its lack of medical necessity defense. Applicant is not entitled to payment on its claims.

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

10/15/2020  
(Dated)

Neal S. Dobshinsky

#### **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:**  
2670da905b02ebd5ffbac0b74e8de1a1

**Electronically Signed**

Your name: Neal S. Dobshinsky  
Signed on: 10/15/2020