American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Right Choice Supply, Inc. (Applicant)	AAA Case No.	17-20-1180-9192
	Applicant's File No.	none
- and -	Insurer's Claim File No.	1032858-02
	NAIC No.	16616
American Transit Insurance Company (Respondent)		

ARBITRATION AWARD

I, Glen Cacchioli, 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

1. Hearing(s) held on 05/11/2021
   Declared closed by the arbitrator on 05/11/2021

   Jeffrey Datikashvilli, Esq. from The Sigalov Firm PLLC participated for the Applicant

   Adam Kass, Esq. from American Transit Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **$ 3,425.00**, 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 Assignor is a 25-year-old female who was involved in a motor vehicle accident on July 7, 2018. Following the accident and subsequent surgery Assignor was prescribed and issued a CPM and CTU. Applicant billed Respondent for the rental of the units. Respondent denied the claim based on the peer review and addendum of Dr. Skolnick who opined that there was no medical necessity for the surgery. Respondent also contends, based on an examination under oath (EUO) of the Assignor, that the injuries were not causally related to the accident. As such, the issues presented are medical necessity and causation.

4. Findings, Conclusions, and Basis Therefor

The case was decided on the documents contained in the ADR center and the oral arguments of counsel. There were no witnesses.

On July 7, 2018 Assignor was involved in a motor vehicle accident. She was taken to Lincoln Hospital where she was treated and released. X-rays were taken of her left shoulder and cervical spine.

On July 18, 2018 Assignor presented to Dr. Berkowitz due to complaints of left shoulder pain and bilateral knee pain. Examination of the left shoulder revealed decreased range of motion, weakness, pain, positive Hawkins and O'Brien sign. Examination of the left knee revealed decreased range of motion, medial and joint line tenderness, effusion, positive McMurray's sign and positive Anterior drawer sign. Examination of the right knee revealed decreased range of motion, mild joint line tenderness, mild effusion, positive McMurray's sign. Impression included left shoulder derangement, possibly labral tearing of left shoulder, bilateral knee derangement, possibly meniscal tearing to both knees and possible re-tear of the ACL in left knee. Treatment plan included MRIs to both knees and left shoulder to rule out any internal derangement and continued physical therapy to left shoulder and both knees.

On August 15, 2018 Assignor was reevaluated by Dr. Berkowitz due to continuing complaints of left shoulder pain as well as bilateral knee pain. Report noted patient was not improving with physical therapy. Report further noted that MRI of the right knee was consistent with suprapatellar knee effusion and partially ruptured popliteral cyst. Examination of the right knee revealed decreased range of motion, joint line tenderness, mild effusion, positive McMurray's sign. Impression included bilateral knee derangement, possibly occult meniscal tear inside both knees. Recommendations included continued therapy to both knees.

On September 26, 2018 and October 10, 2018 Assignor was reevaluated by Dr. Berkowitz due to continuing complaints of left shoulder pain and bilateral knee pain. Examination and findings with respect to the bilateral knees was similar to that of prior examinations. Recommendation following the October 10, 2018 examination was left shoulder surgery and right knee surgery.

Following the surgery Assignor was prescribed and issued a CPM and CTU. Applicant billed respondent $3425.00 for the rental of the equipment from November 19, 2018 through December 16, 2018. Respondent initially denied reimbursement contending lack of medical necessity based on the peer review of Dr. Skolnick. Subsequently respondent denied reimbursement contending the injuries were not causally related to the motor vehicle accident.

Initially, it should be mentioned that the respondent referenced a declaratory judgment action pending in Supreme Court, Kings County (filed June 8, 2020), however, there is no final disposition. Nevertheless, Respondent requests an adjournment of the arbitration pending an Order from the Supreme Court on the Declaratory Judgement.

In light of the fact that there is no final Order on the Declaratory Judgement action and the issues have already been decided and upheld by a Master Arbitrator and most importantly that there is no stay in place the Arbitration should proceed as scheduled despite Respondent's request for an adjournment.

CAUSATION/MEDICAL NECESSITY

Respondent contends that the injuries were not caused by the accident. In support Respondent submitted a copy of the examination under oath (EUO) and an affidavit from its SIU Investigator, Mr. Patrick Carr.

Respondent also contends that the services in dispute were not medically necessary based on the peer review and addendum of Dr. Skolnick.

It should be noted that the issue of medical necessity for the surgery as well as the issue of causation based on the same evidence as this case was heard and decided by this Arbitrator in the cases of AAA Case No. 17-19-1131-1633; 17-19-1136-1681:17-19-1131-1532 EIP and American Transit Ins. Co. I granted reimbursement. Specifically, with respect to causation I found that "respondent has failed to sustain its burden of proof. I find the affidavit from Mr. Carr to be self-serving and filled with conjecture. As for the EUO there was nothing submitted by respondent that established the injuries were not related to the accident. As such, I find that respondent has failed to establish by expert proof or competent factual proof that Assignor's injuries were not caused or exacerbated by the motor vehicle accident. The proof was vague, conclusory and unsupported by the records." With respect to medical necessity, I found there was medical necessity for the surgery.

I note that under the doctrine of the "law of the case" I may be compelled to follow the priordecision. The "doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding (see Bellavia v. Allied Elec. Motor Serv., 46 AD2d 807 [1974]). The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision (see Guy v. Farella, 5 AD2d 540 [2004]). The doctrine made be ignored in extraordinary circumstances such as a change in law or a showing of new evidence (see Foley v. Roche, 86 AD2d 887 [1982])" Brownrigg v, New York City Hous. Auth., 29 AD 3d, 721, 722 [2006]. Furthermore, the doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges . . . are concerned;" stated differently, "the doctrine applies only to legal determinations that were necessarily resolved on the merits in the prior decision." Oyster Bay Assocs. Ltd. Partnership v. Town Bd. Of Town of Oyster bay, 21 AD3d 964, 966, 801 NYS2d 612 (2d Dept. 2005). See also Shatzkin v. Village of Croton-on-Hudson, 51 AD3d 903, 858 NYS2d 362 (2d Dept. 2008).

Res judicata and collateral estoppel are applicable to arbitration awards, including those rendered in disputes over no-fault benefits, and will bar relitigation of the same claim or

issue. *A.B. Medical Services PLLC v. New York Central Mutual Fire Ins. Co.*, 12 Misc.3d 500, 820 N.Y.S.2d 422 (Civ. Ct. Kings Co. 2006), *citing Matter of Ranni,* 58 N.Y.2d 715, 458 N.Y.S.2d 910 (1982); *Monroe v. Providence Washington Ins. Co.*, 126 A.D.2d 929, 511 N.Y.S.2d 449 (3d Dept. 1987). A determination of the *res judicata* effect of a prior arbitration proceeding is for the arbitrator in the subsequent arbitration proceeding. *CitySchool Dist. of City of Tonawanda v. Tonawanda Educ. Ass'n***,** 63 N.Y.2d 846, 482 N.Y.S.2d 258 (1984).

From a review of the evidence and case law I find that I am compelled to abide by the priordecision which found that the Respondent failed to sustain its burden of proof. The prior case involved the same issues and was based on the same medicals and evidence (peer review, addendum, EUO and affidavit from Mr. Carr) as this case. A complete hearing was held and in that time, the identical issues were necessarily determined. Both parties were afforded the opportunity to present evidence concerning this issue. The decision reached a legal finding that was resolved on the merits. In this case no new facts, new evidence or a change in the law was submitted which could justify ignoring the prior decision.

Moreover, in a Master Arbitration award by Master Arbitrator D'Ammora (AAA No. 99-19-1131-1633; Iconin Wellness Surgical Services and American Transit Ins. Co. dated September 4, 2020); the Master upheld a decision by this Arbitrator on the issues of causation and medical necessity. Master Arbitrator D'Ammora specially held that "Arbitrator Cacchioli's conclusions and findings regarding medical necessity and causal relationship were in his discretion and interpretation of the evidence. It cannot be regarded as reversible error within this Master Arbitrator's purview. Arbitrator Cacchioli's determination is rational and supported by the record."

In light of the above, Applicant's claim is granted in the amount of $3425.00.

DECISION: AWARD IN FAVOR OF THE APPLICANT

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**	**Status**
	Right Choice Supply, Inc.	**11/19/18 - 12/16/18**	**$1,839.50**	**Awarded: $1,839.50**
	Right Choice Supply, Inc.	**11/19/18 - 12/02/18**	**$985.04**	**Awarded: $985.04**
	Right Choice Supply, Inc.	**11/19/18 - 12/02/18**	**$600.46**	**Awarded: $600.46**
Total			**$3,425.00**	**Awarded: $3,425.00**

B. The insurer shall also compute and pay the applicant interest set forth below. 10/06/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest is to be calculated from the date of filing of the AR-1 (10/6/20). The end for the calculation of the period of interest shall be excluded from the calculation. In calculating interest, the date of accrual shall be excluded from the calculation (General Construction Law Section 20). Where a motor vehicle accident occurs after April 5, 2002, interest shall be calculated at the rate of two percent per month, simple interest, calculated on a pro rate basis using a 30 day month. 11 NYCRR 65-3.9(a).

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay the applicant an attorney's fee equal to 20% of that total sum, subject to a maximum of $1,360.00. See 11 NYCRR 65-4.6(d).

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

05/17/2021
(Dated)

Glen Cacchioli

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:
428a731fe900f52cb7d65a5917687450

Electronically Signed

Your name: Glen Cacchioli
Signed on: 05/17/2021