American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Alexios Apazidis, MD, PC (Applicant)	AAA Case No.	17-20-1157-2288
	Applicant's File No.	SS-131197
- and -	Insurer's Claim File No.	0545409591 2PC
	NAIC No.	19232
Allstate Insurance Company (Respondent)		

ARBITRATION AWARD

I, Tracy Morgan, 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: injured person-assignor

1. Hearing(s) held on 04/28/2021
   Declared closed by the arbitrator on 04/28/2021

   Gregory Itingen, Esq. from Samandarov & Associates, P.C. participated for the Applicant

   Adam Kass, Esq. from Peter C. Merani Esq. participated for the Respondent

2. The amount claimed in the Arbitration Request, **$ 7,786.43**, was AMENDED and permitted by the arbitrator at the oral hearing.

   Applicant amended the amount in dispute to $5,261.11 representing $4,752.58 for the surgeon's bill and $508.53 for the physician's assistant's bill.

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

3. Summary of Issues in Dispute

   The Applicant is the assignee of no-fault benefits from injured person-assignor (SB-L), a 28 year old male passenger who was involved in a motor vehicle accident on May 14, 2019. Following the accident, the injured person-assignor sought medical

treatment and underwent right knee arthroscopy performed by Applicant on October 4, 2019. Respondent denied Applicant's claim for reimbursement contending a lack of medical necessity based upon the Independent Medical Examination by Dorothy Scarpinato, M.D. performed on August 1, 2019 and the peer review report by Regina Hillsman, M.D. dated November 18, 2019.

The issue presented on this arbitration is whether the services in dispute were medically necessary?

4. Findings, Conclusions, and Basis Therefor

This hearing was conducted using documents contained in ADR Center. Any documents contained in the folder are hereby incorporated into this hearing. I have reviewed the relevant exhibits contained in the electronic file maintained by the American Arbitration Association and have considered all of the stipulations and arguments presented by both parties at the hearing of this matter. No witnesses appeared or testified.

A health care provider establishes its prima facie entitlement to no-fault benefits by submitting evidentiary proof that the prescribed statutory billing forms were mailed to and received by the insurer and that payment of no-fault benefits is overdue *See Insurance Law § 5106 [a]; 11 NYCRR 65.15 [g]; Viviane Etienne Medical Care, P.C. v Country-Wide Ins. Co.,* 25 NY3d 498 (2015).

I find that Applicant established its prima facie entitlement to No-fault benefits as proof of claim was mailed to and received by the insurer and payment of No-Fault benefits is overdue.

Pursuant to both the Insurance Law and the Regulations promulgated by the Superintendent of Insurance, an insurer must either pay or deny a claim for no-fault benefits within 30 days from the date an applicant supplies proof of claim *See, Insurance Law §5106[a]; 11 NYCRR 65.15[g]; Presbyterian Hosp.in City of N.Y. v Maryland Cas. Co*., 90 NY2d 274, 278 (1997).

Respondent timely denied Applicant's claim contending that the right knee surgery was not medically necessary based upon the Independent Medical Examination by Dorothy Scarpinato, M.D. performed on August 1, 2019 and the peer review report by Regina Hillsman, M.D. dated November 18, 2019.

A denial of medical expenses based upon a lack of medical necessity must be supported by competent evidence such as an independent medical examination report which sets forth a factual basis and medical rational for an opinion that services were not medically necessary *AJS Chiropractic PC v Mercury Ins. Co*., 22 Misc3d 133 (A) 2009 NY Slip Op. 50208(U) (App Term 2d & 11 Dists); *Nir v Allstate Ins. Co*., 7 Misc3d 544 (2005).

Where respondent's IME report includes a factual basis and medical rationale for the opinion that further medical treatment is not medically necessary, the burden shifts to the applicant. 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 Misc3d 1025(A), (Civ. Ct. Kings Co., 2005).

To support its denial of reimbursement, Respondent relies upon the Independent Medical Examination (IME) by Dorothy Scarpinato, M.D. performed on August 1, 2019. Dr. Scarpinato took a history and noted that the injured person-assignor presented to the IME with current complaints of neck pain, back pain, bilateral knee and ankle pain. Dr. Scarpinato's examination of the cervical and thoracolumbar regions revealed complaints of tenderness in the thoracolumbar region. There was no spasm and ranges of motion were within normal limits. Motor strength was normal, reflexes were equal and sensation was noted to be intact throughout. Straight leg raising was negative. There were no complaints of tenderness for the shoulders and ranges of motion were normal. Impingement tests were negative. Rotator cuff strength was 5/5. The examination of the bilateral knees was also unremarkable as ranges of motion were normal, anterior drawer and posterior drawer signs were negative and there was no instability. The examination of the ankles and feet yielded no tenderness, no swelling and ranges of motion were normal. Dr. Scarpinato diagnosed the injured person-assignor with resolved strains and sprains of the affected areas and concluded by stating that no further orthopedic treatment was medically necessary.

Respondent additionally relied upon the peer review report by Regina Hillsman, M.D. dated November 18, 2019. Therein, Dr. Hillsman noted that the x-rays of the right knee from the emergency room records on the date of the accident were unremarkable. The next week, the injured person-assignor presented to Dr. Barbash with right knee complaints. He found tenderness over the joint line and painful range of motion. He recommended physical therapy and medications. The June 20, 2019 MRI of the right knee revealed a lateral meniscal tear and ACL injury. On July 18, 2019, Dr. Pearl examined the injured person-assignor and documented complaints of right knee pain, medial and lateral joint line tenderness, decreased range of motion, positive McMurray's and Patellar Grind tests and recommended conservative care and right knee arthroscopy. Independent Medical Examinations by Dr. Scarpinato and Dr. Cilio were performed July 29, 2019 and August 1, 2019 wherein the injured person-assignor complained of right knee pain but both examinations indicated that the right knee condition was resolved. On September 25, 2019, Dr. Apazidis evaluated the injured person-assignor and noted complaints of right knee pain and locking and found right knee effusion, tenderness over

the medial joint line and painful range of motion. McMurray's was positive and muscle strength was diminished. Dr. Apazidis recommended right knee arthroscopy. On October 4, 2019, the right knee arthroscopy was performed and the post-operative diagnoses included right knee medial and lateral partial tears, synovitis and partial ACL tear. Dr. Hillsman found a causal connection between the right knee complaints and the accident of May 14, 2019 but opined that the surgery and associated services were not medically necessary since the IME by Dr. Scarpinato on August 1, 2019 found that the right knee condition had resolved and that there were no positive objective findings. Further, there is no evidence demonstrating that the injured person-assignor underwent conservative care for the right knee before surgery was performed. Dr. Hillsman reviewed the physical therapy records from June 26, 2019-August 6, 2019 and the records did not indicate any therapy for the right knee. Moreover, Dr. Hillsman averred, there is no evidence that the injured person-assignor received steroid injections before surgery. She concluded that there should have been 6 weeks of conservative care before proceeding with surgery.

Applicant argued that Dr. Hillsman's peer was insufficient to meet Respondent's burden since she focused mainly on the anesthesia services for the surgery.

I disagree with Applicant's contention and find that Dr. Hillsman set forth a standard of care for the surgery in that she opined that the injured person-assignor should have undergone conservative treatment for at least 6 weeks and should have attempted steroid injections before proceeding with the surgery.

Dr. Scarpinato's IME and the peer review report by Dr. Hillsman provides a sufficient factual basis and medical rationale for the contention that that the services billed were not medically necessary and therefore the burden shifts to Applicant, who bears the ultimate burden of persuasion *See Delta Diagnostic Radiology, PC v. Progressive Casualty Ins. Co*., 21 Misc. 3d 142A (App Term 2d & 11th Jud Dist 2008); *Crossbridge Diagnostic Radiology, PC v. Progressive Casualty Ins. Co*., 20 Misc. 3d 143A (App Term 2d & 11th Jud Dist. 2008).

Applicant relies upon the undated rebuttal by Alexios Apazidis, M.D. as well as the medical records in evidence. Applicant additionally argued that the issue of medical necessity based upon Dr. Scarpinato's IME was already decided in a prior arbitration award in Applicant's favor and as such, Respondent is precluded from re-litigating this issue.

The doctrine of collateral estoppel mandates that a party may not reassert an issue that has been determined in a prior arbitration, whether or not the tribunals or causes of action are the same *See Ryan v New York Telephone*, 42 NY2d 494, 478 NYS2d 823, 467 NE2d 487 (1984). Further, the Court of Appeals has held that issues resolved by earlier arbitration are subject to the doctrine of collateral estoppel

Rembrandt Industries, Inc. v. Hodges International, Inc., 38 NY2d 502, 381 NYS2d 451 (1976).

Linked to this matter is an arbitration matter with an award by me in *JSJ Anesthesia & Pain Management and Allstate Insurance Company* AAA Case Number 17-20-1161-0369. Respondent was a party in this linked matter and had the opportunity to fully litigate the issue. In this linked matter, I found that Dr. Scarpinato's IME presented a medical rationale and factual basis to support its defense of lack of medical necessity but that Applicant has met its burden with contemporaneous examinations documenting objective positive findings.

"The two elements that must be satisfied to invoke the doctrine of [collateral] estoppel are that (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue" *Kaufman v Lilly Co*., 65 NY2d 449, 455 (1985). "The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate" *D'Arata v New York Cent. Mut. Fire Ins. Co*., 76 NY2d 659, 664 (1990).

Here, medical services are in dispute for the same injured person-assignor and denied upon the same IME of Dr. Scarpinato. I find that the doctrine of collateral estoppel is applicable herein. I note that the linked matter concerned anesthesia services in connection with a lumbar epidural steroid injection on October 30, 2019. I was persuaded by the contemporaneous evaluations of Dr. Kotkes on July 15, 2019 and Dr. Lerman on September 30, 2019 which demonstrated persistent complaints of pain and positive objective findings.

Notwithstanding, I find that Dr. Apazidis' rebuttal and the medical records contemporaneous with the IME are sufficient to rebut Dr. Scarpinato's and Dr. Hillsman's conclusions. The Record includes Dr. Lerman's September 30, 2019 evaluation. Dr. Vadim Lerman evaluated the injured person-assignor and noted subjective complaints of radiating neck and low back pain. He documented that the injured person-assignor underwent two months of physical therapy and reported that his neck and back pain were getting worse. Lumbar tenderness, spasms and diminished range of motion was noted. Straight leg raises were positive. Muscle strength in the lower extremities was decreased and there was hypoesthesia in the L5 and S1 distribution. He diagnosed the injured person-assignor with lumbar radiculopathy and recommended a lumbar epidural steroid injection. Also included in the Record is Dr. Pearl's August 7, 2019 operative report indicating a post-operative diagnosis of left knee medial and lateral meniscal tears. Additionally, Dr. Apazidis documented that on September 25, 2019, the injured person-assignor presented to him with right knee pain, difficulty walking and climbing stairs and experienced the knee locking. Dr. Apazidis found right knee effusion, tenderness over the medial joint line and pain upon flexion. McMurray's was positive and muscle strength was diminished. Dr. Apazidis noted that the injured person-assignor failed conservative treatment and that the right knee condition was not improving. Together with the MRI findings of meniscal tear, he recommended the right knee arthroscopy. The October 4, 2019 assessment revealed the same findings with diminished range of motion. Since the signs and symptoms were

consistent with a meniscal tear, they agreed to proceed with the surgery. Dr. Scarpinato, in her assessment of the right knee did not perform sufficient orthopedic testing including a McMurray's test. As to Dr. Hillsman's contention that the injured person-assignor did not undergo conservative care for the right knee prior to surgery, I am not persuaded that Dr. Hillsman reviewed all of the medical records.On May 22, 2019, Dr. Barbash recommended physical therapy for the right knee. Dr. Tamburo also recommended physical therapy and on his referral of May 29, 2019 included the right knee. Dr. Scarpinato's IME report as well as the chiropractic IME report by Philip Cilio, D.C. dated July 29, 2019 listed under records reviewed, physical therapy treatment notes of May 29, 2019 - June 19, 2019.Dr. Hillsman only mentioned reviewing physical therapy records starting June 26, 2019. Moreover, the injured person-assignor underwent a right knee MRI on June 20, 2019. Dr. Apazidis additionally indicated that injections would not help since injections cannot repair tears and they carry a risk of detrimental effects on tendons and bone and decreases the potential for healing. Regardless, Dr. Hillsman does not reference any medical guidelines establishing a minimum amount of non-surgical treatment prior to undergoing a knee arthroscopy.

I am persuaded by the records contemporaneous with Dr. Scarpinato's IME and Dr. Apazidis' opinions and find that the conclusions of Respondent's experts were sufficiently rebutted and that meniscectomy was medically necessary.

Based on the above, Applicant's claim is awarded. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of the hearing.

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	Amount Amended	Status
	Alexios Apazidis, MD, PC	**10/04/19 - 10/04/19**	**$7,033.82**	**$4,752.58**	**Awarded: $4,752.58**
	Alexios Apazidis, MD, PC	**10/04/19 - 10/04/19**	**$752.61**	**$508.53**	**Awarded: $508.53**
Total			**$7,786.43**		**Awarded: $5,261.11**

B. The insurer shall also compute and pay the applicant interest set forth below. 02/18/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 NY3d 217 (2009).

C. Attorney's Fees

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

As this matter was filed on or after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 11 NYCRR 65-4.6(d) For claims that fall under the Sixth Amendment to the regulation, the

following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved dispute, subject to a maximum fee of $1,360.00."

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, Tracy Morgan, 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)

Tracy Morgan

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:
28937c91f99925d095a066565fb9c976

Electronically Signed

Your name: Tracy Morgan
Signed on: 05/17/2021