American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

North American Partners In Anesthesia LLP (Applicant)	AAA Case No.	17-20-1154-9846
	Applicant's File No.	133325
- and -	Insurer's Claim File No.	9SINY10425
	NAIC No.	29742
Integon National Insurance Company (Respondent)		

ARBITRATION AWARD

I, Valerie D. Greaves, 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: Patient

1. Hearing(s) held on 06/30/2021
   Declared closed by the arbitrator on 06/30/2021

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

   Maureen Knodel from Law Offices of Moira A. Doherty participated for the Respondent

2. The amount claimed in the Arbitration Request, **$ 756.28**, 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

   Is Applicant entitled to reimbursement in the sum of $756.28 for anesthesia services performed in conjunction with a surgical procedure on 4/4/2019**,** allegedly in connection with injuries sustained by Patient (OZ), a male then 31 years old, in a motor vehicle accident on 10/24/2018.

   Respondent timely denied reimbursement contending that Patient violated a policy condition by failing to attend chiropractic/acupuncture insurer medical examinations scheduled to be conducted on 3/13/2019 and 4/10/2019.

4. Findings, Conclusions, and Basis Therefor

The decision below is based on the documents contained in the ADR Center as of the date of the hearing and the oral arguments of the parties. No witnesses testified at the hearing. All participants appeared remotely via Zoom.

The Arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The Arbitrator may question any witness or party and independently raise any issue that the Arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations [11 NYCRR 65-4.5 (o) (1) (Regulation 68-D].

The Appellate Division, Second Department held that applicant "made a prima facie showing of their entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of no-fault benefits were overdue." (Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004). A "facially valid claim" is presented when it sets forth the name of the facility and/or health provider, date of the accident, the name of the patient, description of the services rendered, date of service(s) and the fees charged for those services. (Vinings Spinal Diagnostic P.C. v. Liberty Mutual Insurance Company, 186 Misc.2d 287; 717 NYS2d 466 (1st Dist. Ct. Nass. Co.). Applicant herein has established a prima facie case of entitlement to reimbursement by submission of completed proof of claim, documenting the fact of the loss and the amount due.

Applicant is seeking reimbursement for anesthesia services performed in conjunction with a surgical procedure on 4/4/2019**,** allegedly in connection with injuries sustained by Patient (OZ), a male then 31 years old, in a motor vehicle accident on 10/24/2018.

Respondent timely denied reimbursement contending that Patient violated a policy condition by failing to attend chiropractic/acupuncture insurer medical examinations (IMEs) scheduled to be conducted on 3/13/2019 and 4/10/2019.

Respondent's attorney asserts that the issue of Patient's failure to appear for scheduled IMEs was previously determined in award decisions written by my colleague Arbitrator Teresa Kelly in matched matters AAA Case numbers 17-19-1123-3385, 17-19-1141-2146 and 17-19-1123-6842. It is noted that in those matters Arbitrator Kelly considered the same documentation before rendering her decisions.

My colleague Arbitrator Kelly's decision is in pertinent part in italics below:

> *"In this case, the affidavits clearly state that the doctor had personal knowledge of the Assignor's failure to appear. The affidavits, signed on the dates the examinations were to take place, indicate that the doctor was personally present in the office on the dates of the two examinations and the Assignor failed to appear. The IME letters were concededly sent to both the Assignor as well as to the Assignor's counsel. However, there is no evidence that anyone on behalf of the Assignor contacted Respondent regarding the scheduled IME exams. I find that the Respondent has established the failure to appear by proof in admissible form given the specific facts of this case, the pertinent time frames and the language contained in the doctor's affidavits. As a result, the Respondent's defense of a breach of policy can be sustained."*
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> *According to Respondent, Applicant's failure to appear at the two IMEs is a breach of a condition precedent to coverage and that such a defense need not be preserved in a timely denial. Indeed, I have previously applied the Court's holding in Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, that the failure to appear for IMEs or EUOs requested by the insurer when and as often as it may reasonably require is a breach of a condition precedent to coverage under the No-Fault policy, and therefore fits squarely within the exception to the preclusion doctrine, as set forth in Central General Hospital v. Chubb Group of Ins. Cos. In that regard, an insurer has the right to deny all claims retroactively to the date of loss on the basis of the IME or EUO no-show, regardless of whether the denials are timely issued and whether previous denials deny the claim based upon a different defense. (See Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC A.D.3d 559, 918 N.Y.S.2d 473 [1st Dept. 2011].) Respondent has submitted IME notices which were timely and properly addressed and mailed, and contained the requisite*

statutory reimbursement notice. Proofs of mailing for these notices have been uploaded to MODRIA. Respondent has also submitted proof in the form of an affidavit that Applicant failed to appear for the scheduled IME.

Therefore, after careful consideration of the totality of the evidence, I find that Respondent's defense premised upon the Assignor's lack of appearance at scheduled IME examinations should be sustained."

A factual finding made in an arbitration award constitutes collateral estoppel against the party who commenced the arbitration where that party had a full and fair opportunity to litigate the factual issue determined. Clemens v. Apple, 65 N.Y.2d 746, 492 N.Y.S.2d 20 (1985).

"Under the doctrine of collateral estoppel/res judicata, a party is precluded from relitigating an issue which has been previously decided against it in a prior proceeding where it had a full and fair opportunity to litigate the issue (see D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659 [1990]). 'The two elements that must be satisfied to invoke the doctrine of 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 N.Y.2d 449, 455 (1985)])' (Luscher v. Arrua, 21 AD3d 1005, 1007 [2005]). '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, 76 N.Y.2d at 664; see also Kaufman, 65 N.Y.2d at 456)." Uptodate Medical Service, P.C. v. State Farm Mutual Automobile Ins. Co., 22 Misc.3d 128(A), 880 N.Y.S.2d 227 (Table), 2009 N.Y. Slip Op. 50046(U) at 2, 2009 WL 78376 (App. Term 2d & 11th Dists. Jan. 9, 2009).

The party attempting to defeat the application of collateral estoppel/res judicata has the burden of establishing the absence of a full and fair opportunity to litigate (see D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]; Uptodate Med. Servs., P.C. v State Farm Mut. Auto. Ins. Co., 23 Misc 3d 42, 44 [App Term, 2d, 11th & 13th Jud Dists 2009])." Triboro Quality Medical Supply, Inc. v. State Farm Mutual Automobile Ins. Co., 36 Misc.3d131(A), 954 N.Y.S.2d 762 (Table), 2012 N.Y. Slip Op. 51289(U) at 1-2, 2012 WL 2877833 (App. Term 2d, 11th & 13th Dists. June 28, 2012).

Applicant's counsel offered no credited defense against the application of collateral estoppel/res judicata in this matter.

Under the doctrines of collateral estoppel/res judicata, the previous determination on the issue of Patient's failure to appear for scheduled insurer medical examinations must be followed and cannot be re-litigated here.

Based on the foregoing, Applicant is not entitled to No-Fault benefits.

This decision is in full disposition of all claims for No-Fault benefits presented before this Arbitrator.

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 New York

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

07/19/2021 Valerie D. Greaves
(Dated)

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:
6dd3744a6cf17c0a8d84117b90f311cd

Electronically Signed

Your name: Valerie D. Greaves
Signed on: 07/19/2021