

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Herschel Kotkes MD, PC
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-20-1153-7806

Applicant's File No. 2351898

Insurer's Claim File No. 0487280158

NAIC No. 19232

ARBITRATION AWARD

I, James Hogan, 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 08/27/2021
Declared closed by the arbitrator on 08/27/2021

Marcy Cohen from Israel, Israel & Purdy, LLP (Great Neck) participated in person for the Applicant

Dana Nolan from Law Offices Of Karen L. Lawrence participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 104.08**, 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, a 54 year old woman, was injured in a collision on 1/3/19. This claim is for an initial evaluation of the EIP on 10/28/19 billed at \$104.08. The Respondent denied payment for the Applicant's claim based upon an IME administered to the EIP on 4/12/18 by Dana Mannor, MD. As a result of that examination, all future orthopedic, physical therapy, PMR and related benefits were denied effective 5/8/18.

4. Findings, Conclusions, and Basis Therefor

This decision is based upon my review of the electronic file maintained by the American Arbitration Association, and the arguments of the parties set forth in the hearing.

Linked Cases: 17-19-1119-8800 Basem Mansour PT, PC a/a/o this EIP and Respondent, heard on 7/7/2020 by Arbitrator Glen Weiner. The issue is the medical necessity for physical therapy services administered to the EIP from 5/15 through 7/26/18. Respondent denied the claim based upon an IME administered to the EIP on 4/12/18 by Lisa Nason, MD, which resulted in a denial of orthopedic benefits, including physical therapy, effective 5/8/18. After reviewing the documentation submitted, the Arbitrator found in favor of the Respondent. In his decision he notes that the Applicant did not submit any contemporaneous records to dispute the findings of Dr. Nason. All that was submitted or physical therapy progress notes which were insufficient to overcome the IME report. The claim was denied. I note that in the last portion of this report, Arbitrator Weiner refers to the IME doctor as Dr. Mannor, not Dr. Nason.

Applicant's submission:

Applicant is billing for an initial evaluation of the EIP performed by the Applicant on 10/28/19 and billed under CPT code 99203 at \$104.08.

On 10/28/19, the EIP had an initial evaluation at the Applicant which was administered by Robert Robenov, PA. The EIP presented with complaints of pain in the neck, mid back and low back. Apparently, this was a result of a motor vehicle accident. The date of the accident was 1/3/18.

The EIP's neck pain was described as constant and aching. It radiated to the bilateral shoulders. On average, it was rated at 8/10. She was also experienced tingling. In the past she has tried anti-inflammatory medication. She has also had physical therapy.

Her mid back pain started as a result of the accident. The pain was constant, aching and cramping. It radiated to the bilateral shoulders and on average, was rated at 8/10.

The EIP's low back pain started with the accident. It was described as constant and rated at 8/10. It radiated to the left lower extremity.

The report indicates that the EIP was a driver in a vehicle that had 2 impacts, one to the front and one to the left side. She denied any loss of consciousness. She was seen in the emergency room and then was discharged to home. She denied any back problems prior to the accident.

The EIP has a surgical history of a cervical fusion at C4, C5 and C6. The date of this procedure is not indicated.

The Review of Systems was, generally, unremarkable.

The examination of the cervical spine did not find any signs of inflammation. The normal curvature of the cervical spine was maintained. There was tenderness to palpation from C3 through C7, bilaterally. Anterior flexion was measured at 40/60; extension was 45/75; left lateral rotation was 60/80. Left lateral flexion was 30/45. Right lateral rotation was 60/80; right lateral flexion was 30/45. There was pain noted on all movements.

Palpable trigger points were noted in the muscles of the head and neck.

Cervical Compression and Spurling's Test were positive.

It was noted that the EIP had a scar on the left side of the neck as a result of the prior fusion.

The examination of the lumbar spine did not find any signs of inflammation. Palpation of the lumbar facets found pain, bilaterally, from L3 through S1. SLR was positive, bilaterally.

Anterior flexion was measured at 60/90; extension was 20/30; left lateral flexion was 15/25; right lateral flexion was 15/25. There was pain noted in all planes.

The neurological examination shows that muscle strength was recorded at 4/5 for the bilateral upper and lower extremities.

The sensory examination was normal, bilaterally.

DTRs were measured at "2" in the right biceps and bilateral patella. Babinski sign was negative, bilaterally.

There is a list of records that were reviewed including MRIs of the lumbar spine and cervical spine.

There are a number of diagnoses which include cervicalgia, cervical radiculopathy, myalgia, lumbar radiculopathy, cervical and lumbar intervertebral disc displacement.

The Plan says that the history and physical examination findings correlate with the diagnostic testing results for this injury. Conservative treatment to date has not resulted in a return to pre-injury status. MMI has not been reached. Therefore, the following interventional pain management procedures would be expected to improve functional capacity, ADLs, and work related activities. The procedures listed were: 1) lumbar discectomy and annuloplasty, percutaneous; 2) cervical discectomy and annuloplasty, percutaneous; 3) epidural injections; 4) trigger point injections.

The EIP's prognosis was guarded.

She was advised to restrict pain provoking activities, bending, reaching, prolonged sitting, standing, walking and heavy lifting.

It is noted that the EIP was currently unemployed.

The report says that based upon the history, physical examination, review of diagnostic testing and the available medical records, the patient's injuries, limitations, restrictions, disability and impairment, to a reasonable degree of medical certainty, were causally related to the accident of 01/03/2018.

The ICD codes listed were mid back pain and low back pain.

This report was cosigned by Dr. Kotkes.

The Applicant has provided a copy of a prescription for an MRI of the cervical spine, lumbar spine and left shoulder which is dated 1/8/18 from Dr. Clarke. A copy of the referral to South Brooklyn Radiology, PLLC has been provided.

Copies of MRI reports for the EIP's left shoulder, cervical spine and lumbar spine have been provided.

Respondent's submission:

Respondent's position is that the EIP had an orthopedic IME on 4/12/18 with Dana Mannor, MD. As a result of that IME, all orthopedic, physical therapy, PMR and related benefits were denied effective 5/8/18.

Respondent issued an NF-10 to the Applicant on 12/19/19, denying the Applicant's claim based upon the negative IME.

IME:

Dana Mannor, MD, an orthopedic surgeon, administered an orthopedic IME to the EIP on 4/12/18.

She summarizes the EIP's accident history, noting that the EIP was transported by ambulance to the emergency room from the accident scene. She was discharged later the same day with a prescription for pain medication.

The EIP's treatment history is summarized.

Current Complaints were pain in the neck, low back, bilateral shoulders and left hip.

The report indicates that the EIP reported neck, shoulder and hip surgeries in the past but no details were provided. Additionally, she had a brain aneurysm surgery in June, 2017.

As to medication, the EIP was taking Atenolol, as well as a low dose aspirin and folic acid. She denied taking any pain medication today prior to the examination.

The EIP did not disclose any details regarding allergies.

As to ADL capability, she reported that she could walk for one block. She can stand for 20 minutes before she has to sit. She can sit for 10-30 minutes before she has to change positions.

As to her employment status, she was not employed at the time of the accident and was not employed at the time of the examination.

There is a list of medical records that were reviewed. These include the MRI report for the lumbar spine; the MRI report for the cervical spine and the MRI report for the left shoulder.

The physical examination indicates that the range of motion was measured with a handheld goniometer.

The cervical spine examination found a well-healed left anterior surgical scar from an unrelated surgery in 2017. There was no muscle spasm noted. The cervical spine was non-tender to palpation.

Cervical flexion was measured at 40/50; extension was 15/60; right rotation was 5/80; left rotation was 5/80. Passive range of motion was the same as active and consistent with prior surgery. There was no atrophy, deformity or soft tissue swelling noted.

Spurling's test was negative.

The EIP was grossly neurovascularly intact. Motor strength was 5/5 in all muscle groups tested. DTRs were 2+ and symmetric in the bilateral upper extremities.

The examination of the lumbar spine notes that there was no muscle spasm present. It was non-tender to palpation. The range of motion was quantified as normal in all planes. SLR was negative, bilaterally. Passive range of motion was full. There was no atrophy, deformity or soft tissue swelling noted.

The EIP was grossly neurovascularly intact. DTRs were 2+ and symmetric, Motor strength was 5/5 in all muscle groups tested. DTRs were 2+ and symmetric in the bilateral lower extremities. Heel-toe-walk was normal.

The examination of the bilateral shoulders indicates no visible surgical scars in either shoulder. There was no heat, swelling, effusion, erythema, atrophy, deformity or crepitus noted in either shoulder. Each shoulder was non-tender to palpation.

The range of motion for each shoulder was quantified as normal in all planes. Passive range of motion in the shoulder was full.

There is a list of provocative orthopedic testing for each shoulder which was negative. These tests included Neer, Drop-arm, Hawkins, Apprehension, O'Brien's and Cross-Adduction.

Muscle strength was 5/5 in all muscle groups tested in each shoulder. The claimant was grossly neurovascularly intact in each shoulder.

The examination of the bilateral hips did not find any visible surgical scars in either hip. There was no heat, swelling, effusion, erythema, atrophy, deformity or crepitus noted in either hip. The range of motion for each hip was quantified as normal in all planes. Passive range of motion was full in each hip. Trendelenburg's test was negative, bilaterally and the EIP was grossly neurovascularly intact. Muscle strength was 5/5 in all muscle groups tested.

The Impression was: 1) cervical spine sprain/strain - resolved; 2) lumbar spine sprain/strain - resolved; 3) bilateral shoulder sprain/strain - resolved; 4) left hip sprain/strain - resolved.

As to Treatment Dr. Mannor says that based upon today's physical examination, and within a reasonable degree of medical certainty, there was no medical necessity for continued orthopedic care including physical therapy. The decrease ranges of motion in the cervical spinal were considered subjective in light of negative objective correlative findings.

In addition, there was no medical necessity for prescription medication, household help, ambulette/ambulance services or DME.

She relates the EIP's injuries to the accident of record.

She also opines that the EIP was capable of working and performing her ADLs without restriction.

Dr. Mannor also notes that there was evidence of a contributing pre-existing condition to the cervical spine with ACDF (cervical disc fusion) that impacted on the current injury.

Based upon this evaluation, on 5/1/18 the Respondent issued a global NF-10 denying all future orthopedic, physical therapy, massage therapy, PMR, pain management and prescription medication effective 5/8/18.

The Respondent has provided copies of the documents that were listed in the IME report.

Rebuttal to IME:

Herschel Kotkes, MD, has filed a rebuttal to the IME.

He summarizes the EIP's accident history and her resulting injuries.

He then refers to the IME report by Dr. Mannor and disagrees with her conclusions.

It is noted that the IME report indicates decreased ranges of motion and notwithstanding the EIP's complaints at the time of the IME and the positive findings, Dr. Mannor still concluded that the EIP's injuries had resolved and that no further treatment was needed.

Dr. Kotkes notes that the IME was performed on 4/12/18. The EIP had an MRI of the left shoulder on 1/16/18 that had positive findings, including impingement.

On 1/13/18, the EIP had an MRI of the cervical spine which showed multiple bulging discs impinging upon the thecal sac.

The 2/13/18 MRI of the lumbar spine showed desiccation and anterior bulging of L3-4 and L4-5.

As per Dr. Kotkes, the diagnosis by Dr. Mannor of resolved sprain/strain injuries did not accurately reflect the severity of the EIP's injuries.

In a Supplemental Submission, Respondent has provided additional medical reports.

On 5/13/19, the EIP had an evaluation with Colin Clarke, MD. She reported being involved in an MVA on 5/10/19. She was a rear seat passenger in a taxi that was hit in the rear or the vehicle was stopped at a traffic light.

The EIP complained of headaches. The examination of the head was normal.

She also complained of pain in the neck. The cervical paraspinal muscles were tender and in spasm. The ranges of motion of the cervical spine was limited, secondary to pain, but not quantified. The trachea was midline and the thyroid gland was not palpable. There was no evidence of cervical adenopathy.

The EIP's chest examination shows that her lungs were clear to auscultation.

The examination of the EIP's abdomen was normal.

As to her back, lumbar paraspinal musculature was tender and in spasm. There was significant straightening of the normal lumbar lordosis and there was no costovertebral angle tenderness noted. Scoliosis was not detected.

There was no clubbing, cyanosis or edema of the extremities.

The Impression was cervical sprain, lumbar sprain, thoracic spine sprain, post-concussion headache.

The Plan included DME for home use by the EIP.

As to treatment, physical therapy, chiropractic and acupuncture.

MRIs would also be ordered if the patient failed to respond to conservative treatment.

Lidocaine patches were prescribed with directions to apply them daily, as needed.

Diclofenac gel has also been prescribed

The EIP should return to the office in 2 weeks for a re-evaluation.

On 6/3/19, the EIP had a follow-up evaluation with Colin Clarke, MD.

She continues to experience symptoms of injuries sustained in the accident. Diagnostic imaging results were pending. Physical therapy was ongoing for treatment of accident related injuries. DME has been prescribed for home use.

The EIP's chief complaint was neck pain. She also complained of pain in the low back, mid back and headaches.

The review of systems was noncontributory.

The physical examination showed that the cervical paraspinal muscles were tender and in spasm. Flexion, extension, rotation and lateral flexion were limited, secondary to pain.

Lumbar paraspinal musculature was tender and in spasm. Significant straightening of the normal lumbar lordosis was noted. There was no clubbing, cyanosis or edema.

The Impression was cervical sprain; thoracic spine sprain; lumbar sprain; post-concussion headache.

The Plan indicates awaiting diagnostic imaging results.

The patient should continue with lidocaine patches and diclofenac gel.

She was prescribed an EMS unit with belt, handheld massager, infrared heat for home use.

She should continue with physical therapy and continue taking medication.

Dr. Clarke has filed an addendum which is dated 6/10/19. In this report he discusses the findings of the MRI of the cervical spine. He also says that he has reviewed the visit notes and that the findings were consistent with a history of cervical fusion, the mechanism of injury, physical findings and clinical course.

The Plan was to provide a copy of the MRI report to the EIP's neurosurgeon.

There is a copy of an MRI report for the cervical spine which is dated 6/1/19.

There is a copy of an MRI report for the thoracic spine which is dated 6/15/19.

There is a copy of an x-ray report of the cervical spine which is dated 7/1/19.

There is a copy of an MRI report of the lumbar spine which is dated 7/1/19.

The EIP had an evaluation with Peter Hollis, MD on 7/11/19. Dr. Hollis is from Northwell Health Physician Partners.

This examination indicates that the EIP was following up as a result of her cervical spinal fusion which was done 5 years ago. She was involved in an MVA on 5/10/19 as a passenger in the back of a taxi. She complained of neck stiffness and lumbar pain. She's had 6 weeks of physical therapy and recent MRIs of the cervical spine and lumbar spine.

It is noted that since the accident the EIP had neck pain with numbness and tingling in her hands. Recent flexion-extension x-rays showed no movement to the index levels of a previous C4-C6 fusion. The MRI scan of the cervical spine showed no significant stenosis. The MRI of the thoracic spine did not show any significant stenosis or cord impingement. The MRI of the lumbar spine shows non-compressive degenerative changes.

Active Problems are listed as: goiter; lumbago; pain in neck; radiculopathy, cervical region.

The EIP has a past medical history of diabetes and hypertension.

Her current medications are indicated.

The physical examination indicates muscle strength was normal in all 4 extremities. Sensory examination to light touch was intact and the EIP had a normal gait.

The Assessment was pain in the neck and radiculopathy, cervical region.

Soft tissue strain and exacerbation of pre-existing cervical radiculopathy. Physical therapy is recommended. No need for any surgical intervention at the present time.

The Plan indicates a follow-up visit in 6 weeks.

The Respondent has provided a copy of Vasomotor reactivity testing of the EIP which is dated 10/22/19. The Conclusion says that the study confirms the patency of the major basal intracranial arteries in the Circle of Willis.

The testing showed normal vasodilator reactivity in the right MCA. It also showed decreased blood flow velocity but there are also some aspects in which the blood flow was normal. There was no evidence of emboli detection throughout the monitoring period. This test is not sensitive for tumors, aneurysms and small AVMs.

There is also a prescription for a Sustained Acoustic Medicine (SAM) therapy unit which was signed by Colin Clarke, MD and dated 5/13/19.

There is a receipt signed by the EIP indicating that the SAM unit was delivered to the EIP on 5/31/19. She has been instructed in its use on a daily basis of up to 4 hours per day.

Also provided were 80 coupling patches.

At the hearing:

Applicant argued that the Respondent's denials indicate that the EIP's injuries were the result of a different accident. However, the Respondent has not demonstrated that position.

Additionally, the IME had positive findings which include reduced ranges of motion. Therefore, reliance upon the IME report is misplaced.

Applicant also relied upon the rebuttal by Dr. Kotkes.

Respondent relied upon the linked case and noted that the arbitrator referred to Dr. Nason in the decision but at the end of the decision he refers to Dr. Mannor, saying that the Applicant did not refute the findings of the IME report. He denied the claim based upon the negative IME.

FINDINGS:

The Applicant has established its prima facie case.

This claim is for an initial evaluation of the EIP on 10/28/19 billed at \$104.08.

The Respondent denied payment for the Applicant claim based upon an IME administered to the EIP on 4/12/18 by Dana Mannor, MD. As a result of that examination, all future orthopedic, physical therapy, PMR and related benefits were denied effective 5/8/18.

In reviewing the Applicant's submission, it has provided a copy of the evaluation of the EIP dated 10/28/19.

Also provided are copies of MRI reports for the EIP's left shoulder which is dated 1/16/18; the EIP cervical spine which was dated 1/30/18; the EIP's lumbar spine which was dated 2/13/18.

The Applicant has not provided any documentation regarding the EIP's condition at about the time of the IME, 4/12/18.

A review of the Respondent's submission shows that the EIP was involved in a subsequent accident on 5/10/19. This was 5 months prior to the Applicant's evaluation of the EIP.

The Applicant's evaluation does not mention the 5/10/19 motor vehicle accident.

After reviewing the documentation contained in the file and listening to the arguments of the parties at the hearing, I have concluded that the Respondent has sustained its denial of the Applicant claim. The basis for my decision is that the EIP had a subsequent accident 5 months prior to the evaluation at issue. This subsequent accident was not mentioned in the Applicant's examination report.

Additionally, the Applicant has not provided any documentation indicating any treatment administered from the time of the denial based upon the negative IME, until the time of the subsequent accident.

The 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 Suffolk

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

08/28/2021

(Dated)

James Hogan

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:
2e82cdc2ac33a7aa172eeeedba9f3652

Electronically Signed

Your name: James Hogan
Signed on: 08/28/2021