

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

ESM Rehab PT, PC
(Applicant)

- and -

Country-Wide Insurance Company
(Respondent)

AAA Case No. 17-21-1214-2403

Applicant's File No. FDNY21-46968

Insurer's Claim File No. 000345612 001

NAIC No. 10839

ARBITRATION AWARD

I, Tasha Dandridge-Richburg, 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 07/18/2022
Declared closed by the arbitrator on 07/18/2022

Melissa Pirillo, Esq. from Fass & D'Agostino, P.C. participated in person for the Applicant

Edilaine D'Arce, Esq. from Jaffe & Velazquez, LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$984.70**, 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 29 year-old EIP was the driver of a motor vehicle that was involved in an accident on July 7, 2019. At issue in this case is \$984.70 for treatment including physical therapy, range of motion testing, muscle testing, and physical performance testing on dates of service from October 15, 2019 to November 11, 2019. Respondent denied the claims upon the ground that the EIP failed to attend an independent medical examination (IME). Applicant makes a collateral estoppel argument with respect to Respondent's "IME no show" defense.

4. Findings, Conclusions, and Basis Therefor

Pursuant to 11 NYCRR §65-4.5(o)(1), 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. This Award is based upon a review of all of the documents contained within the ADR Center electronic case file as of the date of the Award, as well as upon any oral arguments by or on behalf of the parties and any testimony given during the hearing.

COLLATERAL ESTOPPEL

At least one other arbitration was instituted against Respondent wherein Respondent's denials were based upon the EIP's failure to appear for IMEs with Glenn Berman, DC; Joseph Marguiles, MD; and Martin Lacascio, MD, scheduled for October 23, 2019 and November 21, 2019. That arbitration was: ***WalleGood Inc. v. Country-wide Ins. Co., AAA Case No. 17-20-1177-5887***. In the prior matter, I found that based upon a preponderance of the credible evidence, Respondent failed to establish that the EIP failed to appear for two duly scheduled IME appointments.

Respondent's denials for the dates of service at issue herein are also based upon the EIP's failure to appear for IMEs with Glenn Berman, DC; Joseph Marguiles, MD; and Martin Lacascio, MD, scheduled for October 23, 2019 and November 21, 2019

Analysis

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 re-litigating the issue had a full and fair opportunity to contest the prior issue. *See Kaufman v. Lilly Co.*, 65 N.Y.2d 449, 455 (1985); *Luscsher v. Arrua*, 21 AD3d 1005, 1007 (2d Dept. 2005).

Both elements of collateral estoppel have been met herein. Although the dates of service at issue differ from those addressed in the earlier award, the parties are identical, as Applicant stands in the shoes of the EIP and the defense relied by Respondent is identical. "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." *See D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 664 (1990).

Upon information and belief, the prior award was not appealed.

Based on the foregoing, I find that the ruling in the prior case operates as collateral estoppel in this matter. As such, Respondent's denials cannot be upheld.

Accordingly, I find for 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
	ESM Rehab PT, PC	10/15/19 - 11/11/19	\$984.70	Awarded: \$984.70
Total			\$984.70	Awarded: \$984.70

- B. The insurer shall also compute and pay the applicant interest set forth below. 08/05/2021 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 N.Y.3d 217 (2009).

C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$1360." *Id.* However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

- 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 Erie

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

07/18/2022
(Dated)

Tasha Dandridge-Richburg

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:
d44b0d5ae3c94f5b46daef6f8f8d3e0

Electronically Signed

Your name: Tasha Dandridge-Richburg
Signed on: 07/18/2022