

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Joseph A Raia MD PC (Applicant)	AAA Case No.	17-23-1286-3856
- and -	Applicant's File No.	N/A
	Insurer's Claim File No.	0657906442 2HB
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

ARBITRATION AWARD

I, Michael Resko, 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: Claimant

1. Hearing(s) held on 10/26/2023
Declared closed by the arbitrator on 10/26/2023

Walter Pisary Esq. from Law Offices of Hillary Blumenthal LLC (Hoboken)
participated virtually for the Applicant

John Palatianos Esq. from Law Office Of Lawrence & Lawrence participated virtually
for the Respondent

2. The amount claimed in the Arbitration Request, **\$495.41**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated and agreed that (i) Applicant has met its *prima facie* burden by submitting evidence that payment of no-fault benefits is overdue, and proof of its claim was mailed to and received by Respondent; (ii) Respondent's denial of the subject claim was timely issued; and (iii) the amount claimed does not exceed the maximum permissible charges under the fee schedule applicable to the disputed services.

3. Summary of Issues in Dispute

The EIP/Assignor is referred to herein as Claimant. Claimant is a 49-year-old male pedestrian injured in a motor vehicle accident on 01/17/22.

Applicant seeks payment of a single claim for an office examination of Claimant, and trigger point injections (TPI) administered to Claimant on date of service 11/17/22.

Respondent denied this claim based on an independent medical examination (IME) of Claimant by Jeffrey Passick, MD (orthopedics) held 06/14/22.

The following evidence was submitted, reviewed, and considered: All documents contained in the ADR Center as of the date the hearing was declared closed.

4. Findings, Conclusions, and Basis Therefor

Respondent denied the subject claim herein based on an orthopedic IME of Claimant held 06/14/22.

To establish a *prima facie* medical necessity defense, an IME report - like a peer review report - must set forth a factual basis and medical rationale for the conclusion that further services are not medically necessary. See, e.g., *Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance*, 20 Misc.3d 144(A), 873 N.Y.S.2d 238 (Table), 2008 N.Y. Slip Op. 51863(U), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008).

If the report is found sufficient, the burden of proof shifts to the provider to rebut the IME-based medical necessity defense. See, *A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co.*, 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table), 2007 N.Y. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. July 3, 2007). Applicant must present evidence as to why the subject post-IME treatment was needed whether because the Claimant's condition had changed after the IME or because the IME doctor's opinion following the IME was erroneous. See, *New Horizon Surgical Center, L.L.C. v. Allstate Ins. Co.*, 52 Misc.3d 139(A), 2016 N.Y. Slip Op. 51124(U) (App. Term 2d, 11th & 13th Dists. July 13, 2016).

There is a linked case in the ADR Center filed by this Applicant seeking payment of a claim for an office examination of Claimant on date of service 08/10/22. Respondent's denial of that claim was based on the same IME report on which Respondent relies in the present case. Regarding Respondent's IME report, Arbitrator Eva Gaspari found, in relevant parts:

Having reviewed the findings which are included within Dr. Passick's June 14, 2022 examination, I note that the examination includes multiple positive findings. Particularly, the examination reveals reduced range of motion throughout the cervical spine, reduced range of motion in the right shoulder on abduction, as well as findings of tenderness on evaluation of the cervical spine, and right shoulder. While Dr. Passick reaches the opinion that the assignor's diagnosis of cervical and right shoulder sprain/strain has objectively resolved and the conclusion that the findings of decreased range of motion and tenderness were subjective

*in nature, I find this opinion conclusory, unsupported by medical source citation, and lacking a sufficient factual foundation, as Dr. Passick fails to address the relevant diagnostic records which he states he has reviewed when reaching his opinion regarding the need for continued care. Considering the positive findings revealed on evaluation, to the extent that Dr. Passick fails to address the diagnostic test findings which include the MRI of the right knee, MRI of the right shoulder dated February 13, 2022, MRI of the cervical spine dated February 22, 2022, I find that his proposed diagnosis of a simple sprain/strain as well as his opinion that there was no objective evidence of an unresolved injury to be unpersuasive. * * **

In evaluating the opinion offered by Dr. Passick, I have assessed the expert opinion presented, which I find to be unpersuasive and lacking in credibility. After careful deliberation, I find that the Respondent has failed to present sufficient evidence to establish a defense based on the lack of medical necessity. Accordingly, I find in favor of the Applicant and its claim is granted.

Joseph A. Raia MD PC a/a/o [Claimant] and Allstate Fire & Casualty Insurance Company, 17-22-1271-2104 (Arbitrator Eva Gaspari; 09/14/23).

Arbitrator Gaspari's finding that the IME report was insufficient is *res judicata* in this case. Because Respondent's *prima facie* medical necessity defense stands or falls entirely on the sufficiency of the IME report, a finding that that report does not meet Respondent's *prima facie* burden cannot be rehabilitated or cured by the introduction of different or additional evidence in any subsequent proceedings. To find otherwise would allow Respondent "multiple bites at the apple" and the opportunity to supplement or modify its evidence in order to cure any defects therein.

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. *City School Dist. of City of Tonawanda v. Tonawanda Educ. Ass'n*, 63 N.Y.2d 846, 482 N.Y.S.2d 258 (1984).

Accordingly, I find the post-IME services at issue in this case were medically necessary. Applicant is awarded **\$495.41**. This Award is in full disposition of all claims and issues before me in this case.

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
	Joseph A Raia MD PC	11/17/22 - 11/17/22	\$495.41	Awarded: \$495.41
Total			\$495.41	Awarded: \$495.41

B. The insurer shall also compute and pay the applicant interest set forth below. 02/13/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Pursuant to the Court of Appeals decision in LMK Psychological Services P.C. v. State Farm, 12 N.Y.3d 217, 879 N.Y.S.2d 14 (2009), interest is tolled until the filing date where the 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" (11 NYCRR 65-3.9[c]).

C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e).

- 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 NY

SS :

County of Westchester

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

11/02/2023

(Dated)

Michael Resko

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:

a9030c1fba7d28ce5519cab2a7391ff4

Electronically Signed

Your name: Michael Resko
Signed on: 11/02/2023