

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Wizard Computer Services Inc  
(Applicant)

- and -

American Transit Insurance Company  
(Respondent)

AAA Case No. 17-22-1247-5540

Applicant's File No. DK21-206075

Insurer's Claim File No. 1104671-2

NAIC No. 16616

**ARBITRATION AWARD**

I, Nicholas Tafuri, 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 (PM)

1. Hearing(s) held on 11/02/2023  
Declared closed by the arbitrator on 11/02/2023

Jennifer Raheb, Esq. from Korsunskiy Legal Group P.C. participated virtually for the Applicant

Helen Cohen, Esq. from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,155.24**, was NOT AMENDED at the oral hearing.  
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that there are no fee schedule disputes.

3. Summary of Issues in Dispute

EIP (PM), a 36-year old male, was a passenger in a motor vehicle when an accident occurred on October 25, 2021. Following the accident, EIP sought medical treatment. Health studies are provided by Applicant on November 16, 2021.

Applicant's reimbursement claim is denied by Respondent based upon a peer review by Dr. David Trimboli, D.C. dated April 13, 2022. In addition, Applicant's reimbursement claim, is denied by Respondent based on its investigation and an Examination Under Oath ("EUO") of EIP on 3/23/22: Respondent has "a founded belief that the motor vehicle accident did not cause the alleged injuries and that the claimant is exaggerating the injuries in an opportunistic fashion". Finally, Respondent denied the claim based on a lack of causation as opined by the biomechanical science expert report of Zachary Merrill, Ph.D., dated 4/15/22.

The issues in dispute: Whether Respondent's defenses are sustainable?  
Whether collateral estoppel is applicable?

#### 4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the ADR Center Record as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the Hearing. Pursuant to 11 NYCRR 65-4 (Regulation 68-D), §65-4.5 (o) (1), an 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 case was decided on the submissions of the Parties as contained in the ADR Center Record maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses.

EIP (PM), a 36-year old male, was a passenger in a motor vehicle when an accident occurred on October 25, 2021. Following the accident, EIP sought medical treatment. Health studies are provided by Applicant on November 16, 2021.

Applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received, and that payment of no-fault benefits were overdue. See, Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find Applicant establishes a prima facie case. I find Respondent's denial is timely.

Applicant's reimbursement claim is denied by Respondent based upon a peer review by Dr. David Trimboli, D.C. dated April 13, 2022. In addition, Applicant's reimbursement claim, is denied by Respondent based on its investigation and an Examination Under Oath ("EUO") of EIP on 3/23/22: Respondent has "a founded belief that the motor vehicle accident did not cause the alleged injuries and that the claimant is exaggerating the injuries in an opportunistic fashion". Finally, Respondent denied the claim based on a lack of causation as opined by the biomechanical science expert report of Zachary Merrill, Ph.D., dated 4/15/22.

#### Lack of Causation Defense

With respect to that portion of Respondent's defense based on an investigation/EUO of EIP on 3/23/22; and a lack of causation based on biomechanical science expert report of Zachary Merrill, Ph.D., dated 4/15/22, I note my two previous awards involving EIP (PM), the subject date of accident, and the exact same defense by Respondent: AAA Case Nos.: 17-22-1252-5648 and 17-22-1269-3397. Both cases have been affirmed by the Master Arbitrator.

In Case No.: 17-22-1252-5648, I found, in pertinent part, the following:

...EIP (PM), a 36-year old male, was a passenger in a motor vehicle when an accident occurred on October 25, 2021. Following the accident, EIP sought medical treatment. On November 29, 2021, a cervical discectomy is performed...

...Applicant's reimbursement claim is denied by Respondent based upon a peer review by Dr. Vito Loguidice, dated April 12, 2022, and the fee schedule. In addition, Applicant's reimbursement claim, is denied by Respondent based on its investigation and an Examination Under Oath ("EUO") of EIP on 3/23/22: Respondent has "a founded belief that the motor vehicle accident did not cause the alleged injuries and that the claimant is exaggerating the injuries in an opportunistic fashion". Finally, Respondent denied the claim based on a lack of causation as opined by the biomechanical science expert report of Zachary Merrill, Ph.D., dated 4/15/22...

...With respect to that portion of Respondent's defense based on an investigation and an Examination Under Oath ("EUO") of EIP on 3/23/22, upon a review of the transcript, I find EIP's testimony to be entirely credible. Prior to the subject accident, EIP testified that was not involved in any prior accidents or underwent any surgeries. On October 25, 2021, EIP was a rear seat passenger in an Uber, when the vehicle was rear ended. As a result of the severe impact, EIP's body "jerked forward", and he struck the front seat. EIP began experiencing pain in his neck, shoulder and back, and he was transported from the scene by ambulance to Jacobi Hospital. Thereafter, EIP commenced medical treatment including physical therapy, massages, and chiropractic. EIP was also examined by a neurologist, and underwent MRI testing. Cervical spine surgery was

performed. and treatment continued. EIP further testified to persistent physical complaints, and that shoulder surgery is scheduled.

Upon a detailed review of the EUO transcript, I find no evidence elicited from the testimony that would support a defense that the EIP's injuries were not causally related to the motor vehicle accident. No written brief is submitted by Respondent detailing those portions of the EUO transcript that purportedly supports its causality defense, and I am not persuaded by the arguments presented by Respondent's representative at the hearing.

In addition to the foregoing, Respondent relies on a report, dated April 15, 2022, by Zachary Merrill, Ph.D., a biomechanical engineering consultant. In his report, Dr. Merrill discusses bioengineering and mechanical engineering in general. Dr. Merrill then reports that based on his review of the accident reports (noting minor damage to the rear of the host vehicle), certain medical records, and EIP's EUO testimony, EIP experienced a minor change in velocity as a result of the subject incident, and this accident provided no mechanism to exceed the natural physiological range of motion of his spine. Therefore, Dr. Merrill states "it *appears* that his incident would have generated *average* inertial body accelerations and average inertial head accelerations compatible with non-injurious daily living activities, and there does not *appear* to be a causal relationship between the subject incident and any objective traumatic spinal injuries...These findings are also in agreement with [EIP's] spine MRI studies, in which no traumatic injury was identified but degenerative changes were noted".

Upon a review of the report, I find that it is insufficient to establish Respondent's defense of lack of causality. Dr. Merrill essentially provided a general overview of "Newton's Laws of Motion" and an analysis of the dynamic conditions that the vehicles and their occupants experienced in the subject vehicular incident. I find his opinions to be wholly conclusory and vague. Dr. Merrill did not inspect the damage sustained to the subject motor vehicle, and at the very least, he did not review any photographs depicting the damage sustained by the vehicles involved. Moreover, Dr. Merrill is not a physician, and his conclusion that the MRI studies identified no traumatic injury, to be speculative. Even assuming the MRI studies identified degenerative changes, there is no discussion of the potential exacerbation of these purported degenerative conditions as a result of the accident. It is well-established that exacerbations of pre-existing conditions are covered by the No-Fault Law. See, Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 22, 871 N.Y.S. 2d 680 (A.D. 2d Dept. 2009). Further, 11 NYCRR §65-3.14(a) states that an insurer is required to pay for injuries "caused by the aggravation of preexisting conditions."

I note that in Mount Sinai Hospital v. Triboro Coach Incorporated, 263 A.D.2d 11 (2d Dept. 1999), the court stated that causation is presumed since "it would not be reasonable to insist that (an applicant) must prove as a threshold matter that a patient's condition was 'caused' by the automobile accident." Accordingly, the burden is on the insurer to come forward with proof in admissible form to establish the "fact or founded belief" that the patient's treated condition was unrelated to his or her automobile accident. *Id.*, citing to Central General Hospital v. Chubb Group of Ins. Cos., 90 N.Y.2d 195 at 199, 659 N.Y.S.2d 246 (Court of Appeals, 1997).

This calls for evidence by a medical expert qualified to render an opinion on causality. Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 22, 871 N.Y.S. 2d 680 (A.D. 2d Dept. 2009). An insurer fails to meet this burden where the affidavit of its medical expert is "conclusory, speculative, and unsupported by the evidence." New York & Presbyterian Hospital v. Selective Ins. Co. of America, 43 A.D.3d 1019, 842 N.Y.S.2d 63 (A.D. 2d Dept. 2007). As noted previously, I find Dr. Loguidice's peer review lacks credibility and is wholly conclusory.

I find that there is no valid basis to conclude that EIP's injury did not arise out of the motor vehicle accident of 10/25/21. EIP is 36 years old. There is no documentary evidence to dispute EIP's EUO testimony regarding the lack of previous accidents and no surgical history. At the very least, EIP was asymptomatic. Further, as noted above, even if there was a pre-existing injury, its exacerbation would be covered under No-Fault. Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S. 2d 680 (App. Div., 2nd Dept., 2009). Accordingly, based on all of the foregoing, I find Respondent's defense is factually insufficient to sustain...

It is well settled that *res judicata* and collateral estoppel are applicable to arbitration awards, including those rendered in disputes over no-fault benefits, and will bar re-litigation of the same claim or issue. Collateral estoppel bars a party from litigating again in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity. See, Buechel v. Bain, 97 N.Y.2d 295, 303 (2001). Two requirements must be met before collateral estoppel can be invoked: (1) There must be an identity of issue, which has necessarily been decided in the prior action and is decisive of the present action; and (2) there must have been a full and fair opportunity to contest the decision now said to be controlling. *Id.* at 303-304, Comprehensive Med. Care of NY v. Hausknecht, 55AD3d 777(2008). The party invoking collateral estoppel has the burden of establishing that the issue litigated is identical to the issue on which preclusion is sought. See Concord Delivery Service, Inc. v. Syosset Props, 19 Misc3d 40 (App Term, 9 & 10 Jud Dists 2008).

With respect to this portion of Respondent's denial, I am persuaded that the doctrine of collateral estoppel is applicable herein. It 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 N.Y.2d 494, 478 N.Y.S.2d 823, 467 N.E.2d 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 N.Y.2d 502, 381 N.Y.S.2d 451 (1976).

I find that the doctrine of collateral estoppel is controlling herein, as the issues are the same as the those resolved in the prior arbitrations (AAA Case Nos.: 17-22-1252-5648 and 17-22-1269-3397). The issue in the prior arbitrations involved the same EIP, subject accident, and the same causation defense by Respondent. I find that Respondent had a full and fair opportunity to contest the determination. As such, I find, based upon my review of the record in this case, and the prior arbitration decision noted above, that Respondent's defense based on the EUO of EIP, and lack of causation based on biomechanical science expert report of Zachary Merrill, Ph.D., is not sustainable.

Even if the doctrine of collateral estoppel was inapplicable to the facts of this case, based on the record before me, I find, based on the well-reasoned analysis detailed above in the prior award, which I adopt here, that Respondent's causation defense is not sustainable.

#### Medical Necessity

In order to support a lack of medical necessity defense, respondent must "set forth a factual basis and medical rationale for the peer reviewer's [or examining physician's] determination that there was a lack of medical necessity for the services rendered." See Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term 2d, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which, if established, shifts the burden of persuasion to applicant. See Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

The Civil Courts have held that a defendant's peer review or report of medical examination must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review or medical examination report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted specifics as to the claim at issue, is conclusory or vague. See Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005); See also, All Boro Psychological Servs. P.C. v. GEICO, 2012 Slip Op 50137(U) (N.Y. City Civ. Ct. 2012.) "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." Nir, supra.

In support of its contention that there was no medical necessity for the transcranial doppler studies, emboli detection, and vasoreactivity study, conducted on 11/16/21, Respondent relies on a peer review by David Trimboli, D.C., dated 4/13/22. Since EIP was referred by a chiropractor (Jonghim Kim, D.C.) for these studies, I find that the peer reviewer-Dr. Trimboli, is qualified to render an opinion as to medical necessity. Dr. Trimboli notes that EIP's initial evaluation by Jonghwi Kim, D.C. on 10/25/21, revealed a normal motor, sensory and reflex exam. There was no cranial nerve exam. There were no complaints of dizziness, nausea, vomiting, photophobia, loss of consciousness or significant head trauma noted. The subjective complaints were headaches, neck, mid back, and low back pain. There was no significant past medical or surgical history noted. Dr. Trimboli avers that EIP's subjective complaints and exam findings were consistent with a sprain/strain injury of the spine, and no true brain pathology. EIP was recommended for chiropractic care. Citing medical authority, Dr. Trimboli reports that transcranial doppler ultrasound (TCD) is a non-invasive ultrasound method used to examine the blood circulation within the brain. The standard of care for mild traumatic headaches (i.e. from a whiplash, contusion, etc...) is conservative treatment. The standard of care would include 1. Comprehensive history including: exacerbating and remitting factors; blurry vision; duration of symptoms; dizziness; nausea; vomiting, etc..., and 2. Full neurological examination, including: cranial nerve exam; slurred speech; facial asymmetry; motor and sensory exam, etc... If there are red flag findings (weakness, slurred speech, worse headache), the patient should be referred to the emergency room, for imaging studies to rule out a cranial injury. Otherwise, basic treatment may include rest, anti-inflammatory medication, cessation of conservative care for a short duration, and referral to a neurologist. Dr. Trimboli explains that transcranial doppler measures the velocity of blood flow through the brain's blood vessels by measuring the echoes of ultrasound waves moving transcranially. Dr. Trimboli concludes that in this case, based on the foregoing, the standard of care would not include transcranial doppler testing for EIP's mild traumatic headache due to whiplash and/or contusion.

Despite Applicant's arguments to the contrary, I find that Respondent has factually demonstrated that the testing provided was not medically necessary. Accordingly, the burden shifts to Applicant, who bears the ultimate burden of persuasion, pursuant to Bronx Expert Radiology, PC, supra.

In response to the peer review, Applicant relies on submitted medical records.

Upon consideration of the arguments of counsel and after a thorough review of all submissions, I find that in this case, Dr. Trimboli's peer review established a sufficient factual basis and medical rationale to support Respondent's lack of medical necessity defense. It is noted that the transcranial doppler study was prescribed by Jonghwi Kim, D.C., at EIP's initial chiropractic evaluation. Dr. Trimboli reviewed the initial evaluation, and concluded that it demonstrated no findings to warrant a consideration for the transcranial doppler study. I am persuaded by the Respondent's proof that the study performed on 11/16/21, was not medically necessary, and I find the weight of the evidence favors the Respondent.

Accordingly, Applicant's claim for reimbursement, for date of service 11/16/21, is denied.

This decision is in full disposition of all claims for no-fault benefits presently 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 NY  
SS :  
County of Nassau

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

11/07/2023  
(Dated)

Nicholas Tafuri

### **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:**  
da6904ffb080d0e5e26f33febbb46410

### **Electronically Signed**

Your name: Nicholas Tafuri  
Signed on: 11/07/2023