American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Susan J Polino PhD (Applicant)	AAA Case No.	17-22-1256-8510
	Applicant's File No.	DK22-221611
- and -	Insurer's Claim File No.	1104671-01
	NAIC No.	16616
American Transit Insurance Company (Respondent)		

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 (DF)

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, **$2,432.74**, 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

   EIP (DF), a 34-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 services are provided by Applicant on January 11, 2022.

   Applicant's reimbursement claim is denied by Respondent based on a peer review by Yakov Burstein, Ph.D., dated 6/28/22, and the fee schedule. In addition, Respondent's defense is based on an Examination Under Oath ("EUO") of EIP on 6/10/22, 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".

The issues presented: 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 (DF), a 34-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 services are provided by Applicant on January 11, 2022.

It is well settled that an applicant establishes its *prima facie* showing of entitlement to No-Fault benefits by submitting evidentiary proof that the prescribed statutory billing forms had been mailed, received by the respondent and that payment of no fault benefits were overdue. Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D. 3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004). I find that applicant established its *prima facie* case of entitlement to No-Fault compensation for its claim. The burden then shifts to the respondent to prove that the bill in question was properly denied.

Applicant's reimbursement claim is denied by Respondent based on the peer review by Yakov Burstein, Ph.D., dated 6/28/22, and the fee schedule. In addition, Respondent's defense is based on an Examination Under Oath ("EUO") of EIP on 6/10/22, 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".

Lack of Causation Defense

With respect to that portion of Respondent's defense based on an investigation/EUO of EIP on 6/10/22, I note my two previous awards involving EIP (DF), the subject date of accident, and the exact same defense by Respondent: AAA Case Nos.: 17-22-1258-1900 (Affirmed by the Master Arbitrator in Case No.: 99-22-1258-1900), and 17-22-1263-7544.

In Case No.: 17-22-1258-1900, I found, in pertinent part, the following:

…EIP (DF), a 34-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 December 17, 2021, EIP underwent a right shoulder arthroscopy…

… Applicant's reimbursement claim for the facility fee, is denied by Respondent based upon a peer review by Dr. Vito Loguidice, dated May 17, 2022, and the fee schedule. In addition, in a Global Denial dated 7/6/22, based on an Examination Under Oath ("EUO") of EIP on 6/10/22, 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".

With respect to Respondent's defense in its Global Denial, dated 7/6/22, Respondent relies on a purported investigation, and an examination under oath of EIP conducted on 6/10/22.

An allegation by defendant that the accident at issue was the result of a staged loss or material misrepresentation must be supported by more than just unsubstantiated hypothesis and supposition. See generally, A.B. Medical Services, P.C. v. Eagle Ins. Co. , 3 Misc.3d 8 (App. Term 2nd Dept. 2003); Great Wall Acupuncture v. Utica Mutual Ins. Co., 14 Misc.3d 144(A) (App. Term 2nd and 11th Jud. Dists. 2007); Comprehensive Mental v. Allstate Ins. Co., 14 Misc.3d 130(A) (App. Term 9th and 10th Jud. Dists. 2007). See, A.B. Medical Services, P.C. v. Utica Mutual Ins. Co., 10 Misc.3d 50 (App. Term 2nd Dept. 2005); Webster Diagnostic Medicine, P.C. v. State Farm Ins. Co. 2007 N.Y. Slip. Op. 27134 (App. Term 2nd Dept. 2007); Comprehensive Mental Assessment & Med. Care, P.C. v. State Farm Mut. Auto Ins. Co., 2007 N.Y. Slip. Op. 50691(U) (App. Term 2nd Dept. 2007). Indeed, defendant's defense must fall if such defense is based upon "unsupported hypotheses and supposition." See generally, Oleg Barshay, D.C., P.C. v. State Farm Ina. Co., 14 Misc.3d 74 (App. Term 2nd and 11th Jud. Dists. 2006).

In the Global Denial, the basis for Respondent's denial of claim is an apparent investigation it conducted into the subject accident. Respondent relies upon an EUO transcript of EIP in support of its defense. However, upon a review of the transcript, despite Respondent's arguments to the contrary, I find the transcript is factually insufficient to establish that the subject motor vehicle accident did not cause EIP's injuries. EIP's testimony was credible. EIP was treated at the scene, an ambulance

transported him to Jacobi Hospital, and several days later, EIP commenced physical therapy treatment to the shoulder, neck and back. MRIs were performed. EIP further testified that surgical procedures were performed to his neck and shoulder. I am not persuaded by Respondent's argument that the impact was minor and the fact that EIP did not sustain any visible injuries, sufficiently establishes its defense. Significantly, the police report lists EIP (DF) as having sustained injuries in the subject accident.

Respondent's submission is devoid of an affidavit from an SIU investigator or a claims representative, or an expert witness, to support its defense, and I find the EUO transcript alone is factually insufficient to establish Respondent's defense.

In addition, I note that the Court in Mount Sinai Hospital v. Triboro Coach Incorporated, 263 A.D.2d 11 (2d Dept. 1999), 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).

Here, no such affidavit is submitted. Accordingly, I find Respondent's Global Denial 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, 55 AD3d 777 (2008). The party invoking collateral estopped 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).

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.: 17-22-1258-1900 and 17-22-1263-7544). 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, 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 analysis detailed above in the prior award, which I adopt here, that Respondent's causation defense is not sustainable.

Medical Necessity

Respondent based its medical necessity defense on a peer review by Yakov Burstein, Ph.D., dated June 28, 2022.

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 Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013.) However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

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.*

Based on his review of the medical records, Dr. Yakov Burstein, a Psychologist, in the peer review report dated 6/28/22, reports that EIP was a passenger in a motor vehicle when an accident occurred on 10/25/21. EIP exhibited pain symptoms, and was referred to a psychologist for services. On January 11, 2022, EIP was seen for an initial visit, as well as a psychological assessment. Applicant's bill included the following codes and charges 90791-1B-Psychiatric diagnostic evaluation; 96101-1B-Psychlogical testing; and 90885-1B-psychiatric evaluation of hospital/medical records. Susan J. Polino, PH.D., provided a diagnosis of pain. Dr. Burstein avers that assuming the allegations are accurate, it would be appropriate to perform an initial intake (90791-1B) to assist with the diagnosis. However, the necessity for extensive psychological testing is not necessary given the event description. Dr. Burstein avers that formal testing is necessary only if a diagnosis cannot be ascertained in any other manner. It is noted that no psychological report listing tests or results were included in the medical records reviewed. In addition, Dr. Burstein notes that there is no listing of any medical records that were integrated into the psychological report. Code 90885-1B is utilized when a claimant is not expected to be seen for an in-person interview, which is not the case here. Based on the foregoing, Dr. Burstein concludes that medical necessity is only documented for CPT 90791-1B.

Despite Applicant's arguments to the contrary, regarding codes 96101-1B and 90885-1B, I find that Respondent has factually demonstrated that the psychological testing and evaluation of medical records, were 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 a rebuttal by Drora Hirsch, M.D., dated 9/26/23. The rebuttal is authored, not by a psychologist, but a medical doctor. There is no documentation establishing the qualifications of Dr. Hirsch in the field of psychology. In disagreeing with the peer review, Dr. Hirsch avers that the tests performed on EIP, together with the face-to-face evaluation, and mental status exam, provides a more accurate picture of the patient's overall psychological condition, which, in turn, enables the treating psychologist to properly treat the patient, and help him/her cope with emotions, thoughts, concerns and fears.

Upon consideration of the arguments of counsel and after a thorough review of all submissions, I find that in this case, Dr. Burstein's peer review established a sufficient factual basis and medical rationale to support Respondent's lack of medical necessity defense for codes 96101-1B and 90885-1B. Dr. Burstein reviewed EIP's treatment records, and concluded that it demonstrated no findings to warrant the services provided for these codes. I afford no weight to the rebuttal by a medical doctor who fails to establish her qualifications in the field of psychology. I am more persuaded by the Respondent's proof that codes 96101-1B and 90885-1B, were not medically necessary, and I find the weight of the evidence favors the Respondent.

Based on the foregoing, Applicant's reimbursement claim is only granted for code 90791-1B.

I am permitted to take judicial notice of the Worker's Compensation fee schedule. Kingsbrook Jewish Medical Center v. Allstate Insurance Company, 61 AD 3d 13 (2d Dept. 2009); LVOV Acupuncture PC v. Geico Insurance Company, 32 Misc. 3d 144 (A) (App. Term 2d, 11th and 13th Jud. Dists. 2011). Natural Acupuncture Health PC v. Praetorian Insurance Company, 30 Misc. 3d 132 (A), 2011 NY Slip Op 50040 (U), (App. Term 1st Dept. 2011).

Based on all of the foregoing, Applicant's reimbursement claim for a psychiatric diagnostic evaluation, conducted on 1/11/22, is granted. Pursuant to the applicable fee schedule, Applicant is awarded the amount of $254.78. The reimbursement claims for codes 90885 - 1B and 96101 - 1B are 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 applicant is AWARDED the following:

A.

Medical		**From/To**	**Claim Amount**	**Status**
	Susan J Polino PhD	**01/11/22 - 01/11/22**	**$2,432.74**	**Awarded: $254.78**
Total			**$2,432.74**	**Awarded: $254.78**

B. The insurer shall also compute and pay the applicant interest set forth below. 07/05/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Respondent shall compute and pay to Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month,

simple interest (i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 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

For cases filed on or after February 4, 2015, the attorney's fee shall be calculated as follows: 20% of the amount of first-party benefits awarded, plus interest thereon, subject to no minimum fee, and a maximum fee of $1,360.00. 11 NYCRR 65-4.6(d).

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 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:
9ee9337e0fd08a2900d571250b80985e

Electronically Signed

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