

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

JPB Todt Hill Medical Care PC
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-23-1291-7481

Applicant's File No. ST. 20292.22

Insurer's Claim File No. 0650861859

NAIC No. 29688

ARBITRATION AWARD

I, Eylan Schulman, 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 12/06/2023
Declared closed by the arbitrator on 12/06/2023

Michael Lamond, Esq., from Michael J. Lamond PC participated virtually for the
Applicant

Linda Smith, Esq., from Law Offices of John Trop participated virtually for the
Respondent

2. The amount claimed in the Arbitration Request, **\$2,238.82**, 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

A. Whether shockwave therapy was medically necessary.

B. Whether Respondent met its burden in support of its Fee Schedule defenses for the shockwave therapy at issue.

The EIP was a 29-year-old male who was the seat-belted driver of a vehicle involved in an automobile accident on November 10, 2021. This is a claim for reimbursement for shockwave therapy provided on September 7, 2022, and September 21, 2022.

Respondent denied the claims based on lack of medical necessity. Specifically, Respondent denied the claims based on the IME report of orthopedic surgeon Stuart Hershon, M.D., dated March 22, 2022. Based on the findings in the examination, additional medical treatment was disallowed effective April 13, 2022.

There is also a dispute about the proper amount of reimbursement for the shockwave therapy at issue under the Fee Schedule.

4. Findings, Conclusions, and Basis Therefor

The findings herein are based on documentary evidence set forth in the ADR Center submitted by the parties prior to the date of hearing and oral argument at the hearing.

In AAA No. 17-22-1260-3538, Arbitrator Christopher Persaud issued a decision related to the viability of Respondent's denial based on the IME report by Dr. Stuart Hershon, dated March 22, 2022. Arbitrator Persaud found in Applicant's favor because Applicant provided a rebuttal to the IME report by citing medical records contemporaneous with the IME and treatment at issue, showing additional medical treatment after the IME cut-off was warranted. After review of the evidence in this matter, I conclude it is appropriate to find consistent with Arbitrator Persaud's determination.

It is undisputed that Applicant established its *prima facie* case of entitlement to first-party no-fault benefits by demonstrating it submitted timely claims setting forth the fact and amount of loss sustained and payment for the claims has not been made.

Respondent attempts to meet its burden to establish lack of medical necessity for the shockwave therapy at issue through the IME report of orthopedic surgeon Stuart Hershon, M.D., dated March 22, 2022. As indicated above, in AAA No. 17-22-1260-3538, Arbitrator Christopher Persaud issued a decision related to the viability of Respondent's denial based on the IME report of Dr. Hershon, dated March 22, 2022. Arbitrator Persaud found as follows:

Independent Medical Exam

The respondent cut off medical benefits based on the result of an Independent Medical Examination (IMEs) of the claimant by Stuart Hershon, M.D. on March 22, 2022.

The Doctor listed the medical records submitted for review and discussed the EIP's history. The EIP's current complaints were noted to be, "...*headaches and radiating neck pain. He has pai in the mid back, low back, right shoulder and right knee.*"

The examination revealed normal ranges of motion (Cervical, Thoracic, and Lumbar spine, bilateral shoulders, bilateral elbows, bilateral wrists/hands,

bilateral knees, bilateral hips, bilateral ankle/feet). Orthopedic testing was negative. Neurological examination was normal.

The diagnosis/impression was noted to be, "*Status post cervical spine sprain/strain, resolved; Status post Thoracic spine sprain/strain, resolved; Status post Lumbar spine sprain/strain, resolved; Status post right shoulder sprain/strain, resolved; Status post right elbow sprain/strain, resolved; Status post right knee sprain/strain, resolved.*"

I find the IME report sets forth an adequate factual basis and medical rationale for the rejection of the disputed claim and thus is sufficient to rebut the presumption of medical necessity attached to it. See *East Coast Acupuncture Servs. P.C. v. American Tr. Ins. Co.*, 2007 NY Slip Op 50213(U) (App. Term 1 Dept., Feb. 8, 2007); *st Vladimir Zlatnick, M.D., P.C. v. Travelers Ins. Indemnity Co.*, 12 Misc. 3d 128A (App. Term 1 Dept. 2006).

Rebuttal

Applicant relies upon the medical records submitted, to rebut the conclusions of the IME. Applicant has provided sufficient, **CONTEMPERANIOUS, FULL** examinations which rebut the findings of the IME. Specifically, the April 11, 2022, Progress notes indicates that the claimant had reduced range of motion in the right shoulder, as well as positive orthopedic testing.

Accordingly, this portion of Respondent's defense, fails.

Since the evidence related to the IME report by Dr. Hershon and medical records in the instant matter and the prior hearing are essentially the same, I am bound by Arbitrator Persaud's prior determination. The Doctrine of Collateral Estoppel precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. Ryan v. New York Telephone, 62 N.Y.2d 494 (1984). The following two requirements must be met before Collateral Estoppel can be invoked: There must be an identity of issues which has been decided in the prior action and is decisive in the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling. See Gilberg v. Barbieri, 53 N.Y.2d 285, 291 (1981). Further, the Court of Appeals has held that the Doctrine of Collateral Estoppel "is applicable to issues resolved by earlier arbitration." Rembrandt Industries v. Hodges International, 38 N.Y.2d502 (1976)."

The standard for Collateral Estoppel is met in this case. There is an identity of issues between the cases, namely, the viability of Respondent's denials based on the IME report of Stuart Herson, M.D. In light of Arbitrator Persaud's determination, it would be inconsistent for me to find Respondent's denial in this case proper - essentially, based on the same evidence. Respondent had a full and fair opportunity to contest the decision at the prior hearing, defended the denial based on the IME cut-off on the merits and a decision was made on the merits.

Accordingly, Applicant will be awarded the claim for the shockwave therapy at issue. As a secondary issue, there is a dispute about the proper rate of reimbursement for the shockwave therapy under the Fee Schedule.

Respondent has the burden to come forward with competent evidentiary proof to support its Fee Schedule defenses. Robert Physical Therapy, P.C. v. State Farm Mut. Auto. Ins. Co., 13 Misc.3d 172 (Civ. Ct. Kings. Co. 2006). When Respondent fails to demonstrate by competent evidentiary proof that Applicant's claim was in excess of the appropriate Fee Schedule, Respondent's defense of noncompliance with the Fee Schedule cannot be sustained. Continental Medical, P.C. v. Travelers Indemnity Co., 11 Misc.3d 145A (App. Term 1st Dep't 2006).

With respect to the shockwave therapy at issue, Respondent persuasively demonstrated that \$769.21 should be billed for each date of service at issue, for a total of \$1538.42. Applicant submitted no evidence refuting Respondent's showing or demonstrating Respondent is incorrect in its position. In the absence of evidence from Applicant and after consideration of Respondent's argument and evidence, I conclude that \$769.21 is reimbursable for each date of service at issue, for a total of \$1538.42. Based on the foregoing, Applicant is awarded \$1538.42, in full resolution of the claim.

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

	JPB Todt Hill Medical Care PC	09/07/22 - 09/07/22	\$1,119.41	Awarded: \$769.21
	JPB Todt Hill Medical Care PC	09/21/22 - 09/21/22	\$1,119.41	Awarded: \$769.21
Total			\$2,238.82	Awarded: \$1,538.42

- B. The insurer shall also compute and pay the applicant interest set forth below. 03/22/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Where a claim is untimely denied, or not denied or paid, interest shall accrue as of the 30th day following the date the claim is presented by the claimant to the insurer for payment. Where a claim is timely denied, interest shall accrue as of the date an action is commenced or an arbitration requested, unless an action is commenced or an arbitration requested within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant. (11 NYCRR 65-3.9(c)). The end date for the calculation of interest shall be the date of payment of the claim. In calculating interest, the date of accrual shall be excluded from the calculation. Where a motor vehicle accident occurs after April 5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. (11 NYCRR 65-3.9(a)).

C. Attorney's Fees

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

For cases filed prior to February 4, 2015, 20 percent of the amount of first party benefits awarded herein, plus interest thereon, subject to a minimum of \$60 and a maximum of \$850. For cases filed on or after February 4, 2015, 20 percent of the amount of first party benefits awarded herein, plus interest thereon, subject to no minimum and a maximum of \$1360. (11 NYCRR 65-4).

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

12/17/2023

(Dated)

Eylan Schulman

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:
78554529a4635b5ca74baa640a13c176

Electronically Signed

Your name: Eylan Schulman
Signed on: 12/17/2023