

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Cross Bay Orthopedic Surgery PC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-22-1277-5990

Applicant's File No. BT22-179468

Insurer's Claim File No. 1105847-01

NAIC No. 16616

ARBITRATION AWARD

I, Elyse Balzer, 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: RH

1. Hearing(s) held on 11/29/2023
Declared closed by the arbitrator on 11/29/2023

Heather Landeros, Esq from The Tadchiev Law Firm, P.C. participated virtually for the Applicant

David Fair, Esq of Larkin & Farrell, of counsel from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,031.12**, 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

This arbitration seeks payment for physician assistant fees for assisting at left shoulder surgery performed on 5/1/22 on the 57 year-old female eligible injured person RH for injuries sustained as a back seat passenger in a vehicle involved in an accident on 11/1/21.

The issues are:

Does collateral estoppel apply against respondent on the defenses of causation and staged accident?

Has respondent proven lack of medical necessity and/or lack of causation based on a peer review, dated 10/21/22, by Dr. Vito Loguidice, MD?

Respondent did not raise any issue of exhaustion and did not present any proof of exhaustion.

All of the documents contained in the electronic case folder (ECF) for this case, maintained by Modria for the AAA, were reviewed.

The arbitration hearing was conducted via Zoom, as all arbitration hearings have been conducted telephonically since March 15, 2020 and via Zoom since February 2021 due to the COVID-19 pandemic.

4. Findings, Conclusions, and Basis Therefor

Lack of causation based on EUO

In multiple cases heard on the same hearing day respondent raised the defense of lack of causation based on EUO testimony, and that the accident was a staged loss, based on RH's EUO testimony and investigation.

These defenses were previously considered by me in a case where the same proof was presented by respondent.

In this case, respondent presented: a specific denial to this claim; a "Global" denial to RH, care of her attorneys, dated 10/12/22, with copies to multiple providers, based on the above two defenses; investigation requests (delaying the processing of the claim pending the EUO of RH); Notices of EUO for RH with certificates of mailing; transcript of EUO of RH held on 9/28/22, 42 pages.

In the previous case the proof from respondent was the same.

In that case, APA Supply aao RH & American Transit Insurance Company, AAA Case No. 17-23-1282-6834 (award 6/30/23) I wrote:

This arbitration seeks payment for two bills for durable medical equipment (DME) dispensed on 12/20/21 to the 57 year-old female eligible injured person RH for injuries sustained as a back seat passenger in a vehicle involved in an accident on 11/1/21.

The issues are:

Has respondent proven lack of causation?

Has respondent proven that the accident of 11/1/21 was a staged accident?

The parties agreed that the above issues were the only issues in contention.

Respondent did not raise any issue of exhaustion.

All of the documents contained in the electronic case folder (ECF) for this case, maintained by Modria for the AAA, were reviewed.

The arbitration hearing was conducted via ZOOM, as all arbitration hearings have been conducted telephonically or via ZOOM since March 15, 2020 due to the COVID-19 pandemic.

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On 12/20/21 applicant issued two bills for the following DME dispensed to RH:

General use wheelchair back cushion

Bed board

Cervical collar, semi rigid (sic)

Lumbar orthosis, sagittal control

Mattress, foam rubber

Infrared heat lamp

Percussor - electric or pneum

EMS belt

EMS unit

On 10/20/22 respondent issued denials to the two bills for DME dispensed on 12/20/21.

The denials claimed receipt on 1/31/22, that final verification was requested on 3/25/11 and that final verification was received on 9/28/22.

The basis of the denials was:

Entire claim is denied based upon American Transit's investigation and examination under oath held 09/28/22, American Transit is asserting a lack of coverage, as it has established the "fact or founded belief" that the claimant's treated condition was unrelated to the motor vehicle accident. Entire claim is denied based upon the founded belief that the alleged injuries did not arise out of an insured event and/or are the result of an intentionally staged occurrence.

FEES NOT IN ACCORDANCE WITH FEE SCHEDULES

Respondent presented its delay letters dated 2/18/22 and 3/25/22.

Respondent presented its letter dated 4/25/22 to applicant. This letter acknowledged applicant's verification response received 4/20/22. This letter stated that the entire claim was delayed pending an EUO of the claimant (RH).

Respondent presented its letter dated 5/31/22 to applicant. It repeated the statements contained in respondent's letter of 4/25/22.

Respondent presented its "1st Notice of Examination under Oath" dated 4/20/22 addressed to a law firm, with a copy to RH. It demanded that RH appear for a virtual EUO on 7/5/22.

Respondent presented its "Examination under oath appointment certificate mailing list, postmarked 4/20/22.

Respondent presented its "2nd Notice of Examination under Oath" dated 7/12/22 addressed to a law firm, with a copy to RH. It demanded that RH appear for a virtual EUO on 8/3/22.

Respondent presented its "Examination under oath appointment certificate mailing list, postmarked 7/12/22.

Respondent presented its "Rescheduled Notice of Examination under Oath" dated 8/11/22, addressed to a law firm, with a copy to RH. It demanded that RH appear for a virtual EUO on 8/31/22.

Respondent presented its "Examination under oath appointment certificate mailing list, postmarked 8/11/22.

Respondent presented its "Rescheduled Notice of Examination under Oath" dated 9/15/22, addressed to a law firm, with a copy to RH. It demanded that RH appear for a virtual EUO on 9/28/22.

Respondent presented its "Examination under oath appointment certificate mailing list, postmarked 9/15/22.

Respondent presented the transcript of the examination under oath (EUO) taken of RH on 9/28/22.(42 pages)

Respondent presented its denial, dated 10/12/22, addressed to RH care of attorneys, on the same basis as the denials to applicant (see supra), and indicating that copies of the denial were sent to multiple providers, including applicant herein

Respondent presented the MV-104(51), signed by RH, which reads: "I have no idea what happen. I was riding in the back seat when bump from the side." This MV-104(51) shows the vehicle in which RH was a passenger had NY License plate number T637057C, shows that RH was a passenger and that Miah Md Ambia was the driver.

Respondent presented the Notice of Appearance, dated 11/29/21, from Francisco Castillo Law PC.

Respondent presented RH's signed No Fault application, dated 11/19/21.

Respondent has not presented any statement from the driver, Mr. Ambia, of the vehicle in which RH was a passenger at the time of the accident on 11/1/21.

Respondent has not presented Mr. Ambia's written report, if any, on the subject accident.

Respondent has not presented any investigation report, photographs, diagrams or investigator affidavit to support its defense.

Respondent has not presented any proof that respondent conducted any investigation into the subject accident.

Respondent has not presented any witness statements.

Respondent has not presented any expert opinion, such as a medical opinion, to support its claimed defenses.

Respondent has not presented any medical records, received from any of the multiple providers listed in its denial of 10/12/22, which support its defense.

Respondent has not presented any proof to indicate that the accident of 11/1/21 was "an intentionally staged occurrence."

In short, the only proof respondent' presents to support its defense that RH, a back seat passenger in a vehicle, and her "treated condition was unrelated to the motor vehicle accident" is RH's own testimony at her EUO.

Respondent does not even point out where (page, line) in RH's EUO transcript is the testimony which supposedly caused respondent to raise its defense.

RH's testimony was that she and her friend entered Mr. Ambia's vehicle, the vehicle drove two blocks and stopped at a light, and while stopped there was a "big" boom in the back of the car, RH's head hit the back of the front seat passenger, RH turned around and the other vehicle spun around and took off. Mr. Ambia exited the vehicle and looked for witnesses. None were found. RH's head and neck & back were hurting. RH wanted to go to Lincoln Hospital, and Mr. Ambia took her there. RH waited a long time at the ER and finally left. A week later she sought medical care. RH testified to the care she received. RH testified to the DME which she received.

Ms. RH's testimony and the presented proof prove, by a fair preponderance of the credible evidence, that there was causation between the accident of 11/1/21 and the "treated conditions" and the disputed DME.

None of the proof shows that the accident of 11/1/21 was a staged accident or was intentionally staged in any way.

The defense of fraud based upon "staged accidents" or intentional collisions are considered defenses premised on lack of coverage and have been found not subject to the rigorous 30-day rule because there was, in fact, no "accident." See, Matter of Allstate Ins. Co v Massre, 14 AD3d 610 (2nd Dept. 2005); State Farm Mutual Automobile Ins. Co. v Laguerre, 305 AD2d 490 (2nd Dept. 2003); Metro Medical Diagnostics, P.C. v Eagle Ins. Co., 293 AD2d 751 (2nd Dept. 2002); see also, VA Acupuncture Acupuncture, P.C. v State Farm Ins. Co., 16 Misc 3d 126(A)(App Term, 2nd & 11th Jud Dists 2007) and Vista Surgical Supplies Inc v State Farm Ins. Co., 14 Misc 3d 135(A)(App Term, 2nd & 11th Jud Dists 2007).

With regard to the defense of lack of causation, the respondent carrier has the burden of proof.

When the defense lack of causation, the burden of proof rests on a carrier to prove that the injured person's injuries were unrelated to the subject accident. Mount Sinai Hospital v. Triboro Coach Inc., 263 A.D.2d 11, 699 N.Y.S.2d 77 (2d Dep't 1999). See also A.B. Med. Servs., PLLC v. Clarendon Natl. Ins. Co., 25 Misc.3d 139(A) (App Term 9th & 10th Dists. 2009); Capri Med., P.C. v. Progressive Cas. Ins. Co., 15 Misc.3d 143 (A) (App Term 2d & 11th Dists. 2007).

The burden of proof is upon the carrier to prove that the treated condition was unrelated to the automobile accident. Central Gen. Hosp. v. Chubb, supra; Mount Sinai Hospital V. Triboro Coach, Inc., supra. The question of whether the treated condition, and injuries, is causally related to the automobile accident is a factual issue. See, Dunlao v. State Farm Ins. Co., 273 A.D.2d 517, 570 N.Y.S.2d 119

(App Div, 2d Dep't 1991); In re Kolesnik v. State Farm Mutual Auto Ins. Co., 266 A.D.2d 630, 697 N.Y.S.2d 778 (App Div, 3rd Dep't 1999).

The court in 21st Century Sec. v. All, 2018 NY Slip Op 30814(U) (Sup Ct NY Cty), aptly describes it as a "heavy burden." The defense of lack of causation must be established by a preponderance of the evidence, V.S. Med. Servs., P.C. v. Allstate Ins. Co., 25 Misc.3d 39 (App Term 2d Dept. 2009).

An insurer's proof cannot be based solely upon "unsubstantiated hypotheses and suppositions," A.B. Med. Services PLLC v. Eagle Ins. Co., 3 Misc.3d 8, 9 (App Term 2d Dept. 2003); Amstel Chiropractic P.C. v. Oni Indemnity Co., 2 Misc. 3d 129 (A) (App Term 2d & 11th Dists. 2004).

The court will examine the evidence and decide if it is sufficient to carry the carrier's burden of proof. See, e.g., American Tr. Ins. Co. v. Intelligent Johnson, 2021 NY Slip Op 30077(U) (Sup. Ct. NY Co. Jan. 12, 2021); cf, Easy Care Acupuncture, P.C. v. Hartford Ins. Co., 57 Misc.3d 147(A) (App Term 1st Dept. 2017).

After examining all of the proof, I find that respondent has failed to prove, by a fair preponderance of the credible evidence, the lack of causation.

In addition, I find that respondent has failed to prove, by a fair preponderance of the credible evidence, that the accident of 11/1/21 was a staged accident or was the result of an intentionally staged occurrence.

Respondent has not presented any other defense which may be considered in the absence of a timely denial.

Respondent has not presented any denial, asserting any basis other than the defenses of lack of causation and staged accident.

Respondent has not presented any objection to or proof against applicant's fees.

Based on the above, applicant's claim is granted.

"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 or those in privity . . . Only two elements need be

established; first, that the identical issue was necessarily decided in the prior action and is decisive in the present one, and, second, that the party to be precluded had a full and fair opportunity to contest the prior determination." Mulverhill v. State, 257 AD 2d 735, 682 NYS2d 478 (3rd Dep't 1999).

Arbitrator Heidi Obiajulu wrote about collateral estoppel in Barnert Surgical Center LLC & Allstate Fire & Casualty Insurance Company, AAA Case No. 17-17-1056-4381 (award 4/14/18) as follows:

The legal principle of collateral estoppel is invoked if the following criteria are met: the issue must be identical to that which was previously litigated; it must be decisive of the instant action; and it requires that the parties had a full and fair opportunity to contest the decision. See, Gilberg v. Barbieri, 53 NY2d 285, 441 N.Y.S.2d 49 (Ct. of Appeals 1981); Electrodiagnostic & Physical Med. PC. V. Maya Assur.Co., 45 Misc.3d 1028 (A), 3 N.Y.S.3d 284 (Table), 2014 N.Y. Slip Op. 51500 (Dist. Ct. 10/17/14). The doctrine of collateral estoppel is fully applicable to arbitration proceedings. American Ins. Co. v. Messinger, 43 N.Y.2d 184, 401 N.Y.S.2d 36 (1997). Notably, the preclusive effect, if any, to be afforded to an earlier decision in a subsequent arbitration proceeding is for the arbitrator of the second proceeding to determine. City School Dist. v. Tonawanda Education Assoc., 63 N.Y.2d 846, 482 N.Y.S.2d 258 (1984). Finally, 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 or those in privity, whether or not the tribunals or the causes of action are the same (Ripley v. Storer, 309 NY 506, 517)" (Ryan v New York Tel. Co., 62 NY2d 494, 500 [1984][citations omitted]).

In a no-fault action, a detailed explanation of collateral estoppel was given by the court in Downtown Acupuncture PC v. State Wide Ins. Co., 2015 NY Slip Op 25371, 50 Misc.3d 461 (Civil Court, Kings County, J. Katherine Levine, 10/22/15):

It is well settled that a party may invoke the common law doctrine of collateral estoppel to preclude another party from relitigating in a subsequent proceeding an issue clearly raised in a prior action and decided against that party or those in privity, whether or not the causes of action are the same. LaDeCurtis v. Ferrandina, 533 B.R. 11, 2015 Bankr. LEXIS 1482 (Bank Ct., E.D.N.Y 2015); Ryan v. N.Y. Telephone Co., 62 N.Y.2d 494, 500 (1984); Lavian v. Bleier, 2010 N.Y. Slip 31542(U); 2010 N.Y. Misc. LEXIS 3109 (Sup Ct., N.Y. Co. 2010). See, Abrahams v. Commonwealth Land Tit. Ins. Co., 120 A.D.3d 1165 (2d Dept. 2014). The issue must have been essential to the decision rendered in the first action and must be the point to be decided in the second action such that "a different judgment in the second would destroy or impair rights or interests

established in the first." Psychology YM P.C. v. Travelers Prop. Cas. Ins. Co., 2011 N.Y. Slip Op. 51744(U), 33 Misc. 3d 1201(A) (2011) (citing Ryan, supra at 501).

Collateral estoppel bars relitigation of an issue when "(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 relitigating the issue had a full and fair opportunity to contest the prior issue." Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455 (1985). See also, Evans v. Ottinol, 469 F. 3d 278, 281 (2d Cir. 2006); Gramatan Home Invs. Corp. v. Lopez, 46 N.Y.2d 481, 485 (1979). The proponent of collateral estoppel must demonstrate the identity of the issues whereas the party seeking "to defeat its application has the burden of establishing the "absence of a full and fair opportunity to contest the prior determination." Buechel v. Bain, 97 N.Y. 2d 295, 304 (2001); Kaufman, supra 65 N.Y. 2d at 456. See, Jeffreys v. Griffin, 1 N.Y.3d 34, 39 (2003); Morrow v. Gallagher, 113 A.D.3d 827, 828-829 (2d Dept. 2014); Nappy v. Nappy, 100 AD3d 943, 845 (2d Dept. 2012); Windowizards, Inc. v. S & S Improvements, Inc., 2006 N.Y. Slip Op. 50310(U) at *2, 11 Misc.3d 130(A) (App. Term 2nd & 11th Jud. Dists. 2006)

As to the first prong, preclusive effect will only be given where the particular issue was "actually litigated, squarely addressed and specifically decided". Crystal Clear Development, LLC v. Devon Architects of New York, P.C., 97 A.D.3d 716 (2d Dept. 2012). To satisfy the "actually litigated" prong of this test, it "must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding." Evans v. Ottinol, supra, 469 F., 3d at 282 citing D'Arata v. N.Y. Cent. Mut. Fire Ins. Co., 76 N.Y. 2d 659, 667 (1990); Mtr of Abady, 22 A.D. 3d 71, 81 (1st dept. 2005).

For an identity of issues to exist, the issues presented must involve substantially identical legal theories and causes of action, and have no significant factual differences. Kaufman, supra, 65 N.Y.2d at 455. See also Restatement (Second) of Judgments §27 comment c (1982) (court should consider whether there is substantial overlap between the evidence or argument, whether the new evidence or argument involves application of the same rule of law, whether pretrial preparation and discovery relating to the matter presented in the first action could be reasonably expected to have embraced the matter sought to be presented in the second, and how closely related the claims involved in the two proceedings are).

As to the second prong, a determination as to whether a full and fair opportunity was provided requires consideration of the "realities of the prior litigation" including the importance of the claim in the prior litigation, the forum and extent of the litigation, the incentive and initiative to litigate, the competence and expertise of counsel and the foreseeability of future litigation. Psychology YM,

supra at 5-6 citing to Ryan, supra at 501. Gilberg v. Barbieri, 53 NY2d 285, 292 (1981). See, SZ Medical, P.C., Life Chiropractic, P.C. v. Erie Ins. Co., 2009 NY Slip Op 51222(U), 24 Misc. 3d 126(A) (App. Term, 2d, 11th & 13th Jud. Dists., 2009). An issue is not actually litigated if "there has been a default, a confession of liability, a failure to provide discovery, a failure to place a matter in issue by proper pleading or even because of a stipulation". Kaufman, supra at 456, 457; Mtr of Abady, supra at 83 (1st Dept. 2005), and therefore a dismissal on these grounds will not usually be on the merits so as to bar a subsequent identical action. Choicenet Chiropractic, P.C. v. Clarendon Ins. Co., 2009 N.Y. Slip Op 51472(U), 24 Misc. 3d 1216(A) (Civ. Ct. Richmond Co. 2009).

A limited exception applies "where the party against whom collateral estoppel is sought to be invoked has appeared in the prior action or proceeding and has, by deliberate action, refused to defend or litigate the charge or allegation that is the subject of the preclusion request." Mtr. Of Abady, supra at 83-84. See, Kalinka v. St. Francis Hospital, 34 A.D.3d 742, 744 (2d Dept. 2006) (res judicata applies where dismissal in prior action was upon the grant of an order of preclusion after court determined that Kalinka willfully and contumaciously failed to comply with disclosure); Kanat v. Ochsner, 301 A.D. 2d 456 (1st Dept. 2003)(Collateral estoppel applies to judgment obtained upon default where defendants appeared and answered in prior action and engaged in extensive motion practice caused in large part by their "wilful and contumacious pattern of selective, partial responses to pretrial discovery demands." They therefore had a full and fair opportunity to fully litigate the underlying merits of the prior action "but affirmatively chose not to by their own failure to comply with court orders."); Mtr. Of Latimore, 252 A.D. 2d 217 (1st Dept. 1999) (Collateral estoppel applies where respondent had ample opportunity to contest allegations in prior action yet allowed a default judgment to be entered against her and then failed to persuade the court to vacate said default). To that end, a judgment issued as a result of preclusion after a party has refused to comply with discovery "is in fact a judgment on the merits" and must be given collateral effect. Lavian v. Bleier, supra at 6. See, Strange v. Montifiore Hosp. and Med. Ctr. 59 N.Y. 2d 737 (1983).

Collateral estoppel may be invoked offensively as a sword in subsequent litigation by a non-party to the prior litigation, provided that the party seeking to apply collateral estoppel can show that his opponent participated in the prior litigation and had a full opportunity to litigate the action on its merits. B.R. De Witt v. Hall, 19 N.Y. 2d 141, 147-48 (1967). See also, 11 Misc.3d 130(A) (App. Term 2nd & 11th Jud. Dists. 2006); Klein v. Gutman 2012 N.Y. Slip Op. 52427(U), 38 Misc.3d 1211(A) (Sup. Ct., Kings Co. 2012); Uptodate Med. Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 23 Misc.3d 42 (App. Term 2d Dept. 2009) (where insurer offensively utilized collateral estoppel based on prior declaratory action finding the provider was fraudulently incorporated); Windowizards, Inc. supra, 2006 N.Y. Slip Op. 50310(U) at *6.. Again, the proponent of collateral estoppel must show that the decisive issue was

necessarily decided in the prior action against the party opposing collateral estoppel must show the absence of a full and fair opportunity to litigate the issue at hand. Windowizards, supra at *4 citing Buechel v. Bain, supra 97 N.Y. 2d at 304.

It is clear that it is within the arbitrator's authority to determine the preclusive effect of a prior arbitration. Matter of Falzone v. New York Central Mutual Fire Insurance Company, 15 N.Y.3d 530, 914 N.Y.S.2d 67 (2010) aff'g 64 A.D.3d 1149, 881 N.Y.S.2d 769 (4th Dep't 2009).

Given the fact that respondent had a full and fair opportunity to be heard, respondent is collaterally estopped from relitigating the issues of the defenses of lack of causation and that the accident of 11/1/21 was a staged loss based on EUO testimony (See Rembrandt Industries v. Hodges International, 38 N.Y.2d 592, 381 N.Y.S.2d 383, wherein the Court of Appeals held the doctrine of collateral estoppel applicable to issues resolved by earlier arbitrations.)

Lack of causation and lack of medical necessity based on peer review

In this case respondent also raised the defenses of lack of medical necessity and causation based on a medical opinion, dated 10/21/22, by peer reviewer Dr. Vito Loguidice, MD.

However Dr. Loguidice's opinion is based on the hearsay opinions of two other physicians who reviewed intra operative photos (report of 10/12/22 of Dr. Matthew D. Skolnick, MD) and the MRI report of left shoulder (report of 10/13/22 of Dr. Jeffrey Warhit MD; it is unclear if Dr. Warhit reviewed the actual films/digital images of the MRI since such review was not specified in his report).

Respondent's denial, dated 10/26/22, to this particular claim did not name either Dr. Skolnick's report or Dr. Warhit's report as being the basis/bases of the denial.

Dr. Loguidice actually noted that "the MRI of the left shoulder performed on 03/09/22 indicated a partial rotator cuff tear as well as a labral tear."

However Dr. Loguidice decided to rely instead on Dr. Warhit's opinion about the impression of this MRI rather than that of the radiologist who issued the 3/9/22 report. There is no stated reasoning behind this choice by Dr. Loguidice.

The same applies to Dr. Loguidice's choice to rely on the opinion of Dr. Skolnick in concluding that "there was no evidence of traumatic injury noted" on the intra operative photos. There is no stated reasoning for this choice.

Based on these two outside, hearsay opinions, and without any factual or medical reasoning of his own, Dr. Loguidice found that the disputed surgery was not causally related to the subject accident and not medically necessary.

Dr. Loguidice's opinion is entirely devoid of clear medical rationales, does not contain a sufficient factual analysis, lacks an analysis of the exact reasoning why causality and medical necessity were lacking and is bereft of any medical citations, authority or standards of care.

It is clear that a carrier is responsible for No Fault benefits for "...losses caused by the accident, including those caused by aggravation of preexisting conditions." 11 NYCRR at 65-3.14.

Neither Dr. Loguidice nor Dr. Warhit nor Dr. Skolnick address this salient point, that is, that an aggravation of preexisting conditions allows for no fault benefits and does not foreclose them.

In addition applicant presented the rebuttal, dated 10/20/23, from Dr. Peter Tomasello, DO who performed the left shoulder surgery of 5/1/22.

This rebuttal fully addresses all of the points raised in Dr. Loguidice's peer review and effectively and completely refutes and rebuts them.

Dr. Tomasello relies on specific clinical and medical facts about RH, including the significant fact that RH was asymptomatic prior to the subject accident and only began to suffer from severe pain after the subject accident.

Dr. Tomasello cites to multiple accepted medical authorities to support the need for surgery.

In addition Dr. Tomasello's factually and medically supported opinion proves that there was causation between the accident of 11/1/21 and the surgery of 5/1/22.

Based on my review of the proof I find that respondent has failed to prove the lack of causation between the accident of 11/1/21 and the left shoulder surgery of 5/1/22.

In addition I find that respondent has failed to prove the lack of medical necessity of said left shoulder surgery.

Respondent presented a fee coding affidavit indicating that the correct fee is \$626.09. Applicant has not presented any opinion or authority to contradict the fee coding analysis of respondent.

Applicant is awarded \$626.09. The remainder of the claim is denied.

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
	Cross Bay Orthopedic Surgery PC	05/01/22 - 05/01/22	\$1,031.12	Awarded: \$626.09
Total			\$1,031.12	Awarded: \$626.09

B. The insurer shall also compute and pay the applicant interest set forth below. 12/15/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

From 12/15/22 to date of payment of the award

C. Attorney's Fees

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

In cases filed before 2/4/15, the Respondent shall pay the Applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e)(effective April 5, 2002). For cases filed after

2/4/15, the respondent shall pay the Applicant an attorney's fee in accordance with newly promulgated 11 NYCRR 65-4.6 (d), as amended by the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-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 Westchester

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

12/29/2023

(Dated)

Elyse Balzer

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:
25047a91d5b3cd5aa590e7c02a9e93d4

Electronically Signed

Your name: Elyse Balzer
Signed on: 12/29/2023