

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Right Choice Supply, Inc.
(Applicant)

- and -

MVAIC
(Respondent)

AAA Case No. 17-23-1307-2303

Applicant's File No. LIP-28650

Insurer's Claim File No. 693672

NAIC No. Self-Insured

ARBITRATION AWARD

I, Mary Anne Theiss, 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 08/14/2024
Declared closed by the arbitrator on 08/14/2024

Lee-Ann Trupia, Esq. from Law Offices of Ilya E Parnas P.C. participated virtually for the Applicant

David Gierasch, Esq. from Marshall & Marshall, Esqs. participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,802.16**, 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

The Claimant, a forty-eight-year-old female was involved in a motor vehicle accident on February 19, 2023. The Claimant started a course of acupuncture, chiropractic, and physical therapy. The Claimant also underwent a shoulder arthroscopy.

The Right Choice Supply INC is seeking \$3,802.16 reimbursement for the date of service April 7, 2023.

The denial is based upon a peer review of Andrew Bazos, M.D. dated May 31, 2023. There are also collateral estoppel issues.

4. Findings, Conclusions, and Basis Therefor

The Claimant, a forty-eight-year-old female was involved in a motor vehicle accident on February 19, 2023. The Claimant started a course of acupuncture, chiropractic, and physical therapy. The Claimant also underwent a shoulder arthroscopy.

The Right Choice Supply INC is seeking \$3,802.16 reimbursement for the date of service April 7, 2023, through May 28, 2023. The supplies are related to a surgery performed on April 7, 2023.

The denial is based upon a peer review of Andrew Bazos, M.D. dated May 31, 2023. There are also collateral estoppel issues.

The Applicant has established a prima facie case of entitlement to benefits. Once an applicant has established a prima facie case of entitlement to No-Fault benefits, the burden then shifts to the insurer to prove that the disputed services were not medically necessary. To meet this burden, the insurer's denial(s) of the applicant's claim(s) must be based on a peer review, IME report, or other competent medical evidence that sets forth a clear factual basis and a medical rationale for the denial(s). *Amaze Medical Supply, Inc. v. Eagle Ins. Co.*, 2 Misc. 3d 128A (App. Term, 2nd Dept., 2003); *Tahir v. Progressive Cas. Ins. Co.*, 12 Misc. 3d 657 (N.Y.C. Civ. Ct., N.Y. Co., 2006); *Healing Hands Chiropractic, P.C. v. Nationwide Assurance Co.*, 5 Misc. 3d 975 (N.Y.C. Civ. Ct., N.Y. Co., 2004); *Millennium Radiology, P.C. v. New York Cent. Mut.*, 23 Misc. 3d 1121(A) (N.Y.C. Civ. Ct., Richmond Co., 2009); *Beal-Medea Prods., Inc. v GEICO Gen. Ins. Co.*, 27 Misc. 3d 1218(A) (N.Y.C. Civ. Ct., Kings Co., 2010); *All Boro Psychological Servs., P.C. v GEICO Gen. Ins. Co.*, 34 Misc. 3d 1219(A) (N.Y.C. Civ. Ct., Kings Co., 2012).

In AAA case #17-23-1308-8958 related to the facility fee I found the following:

Dr. Bazos did a peer review dated May 31, 2023. Dr. Bazos went through the history of the accident and the medical records and also testified at the hearing.

Dr. Bazos stated the following:

It is also interesting that the claimant had nearly identical finding between the left and right shoulder upon MRI evaluation yet there is no evidence of any trauma to the right shoulder as a result of the accident in question. This calls the validity of the MRI read itself. It should be noted upon review of the intraoperative photos, there is no evidence of any form of acute traumatic injury. Intraoperative photos failed to indicate any evidence of rotator cuff, biceps tendon, labral nor chondral injury whatsoever. This is in correlation with the emergency room record which failed to indicate any evidence of acute traumatic injury present to the left shoulder. As such, with total lack of evidence of any form of acute traumatic injury to the left shoulder beyond

questionable findings by Dr. King and MRI evaluation, there is no need or justification for surgical intervention for this individual. It should be noted there is complete lack of clinical correlation between the MRI findings, operative report submitted by Dr. Clarke and actual review of the intraoperative photos again calling into question the validity of both the MRI read and Dr. King's alleged findings upon surgical intervention.

Therefore, any and all charges including but not limited to pre-surgical evaluation and testing, surgical charges, surgical assist services, facility charges, anesthesia charges and postoperative treatment including but not limited to physical therapy, oral medication, bracing and durable medical goods such as CPM unit, cold therapy unit and/or DVT prevention device are not medically necessary, not justified, and not recommended for payment.

When an insurer, through a peer review or medical exam, presents sufficient evidence establishing a lack of medical necessity, the burden then shifts back to the applicant to present its own evidence of medical necessity. *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc. 3d 131(A) (App. Term, 2nd Dept., 2006); *Alfa Medical Supplies v. Geico General Ins. Co.*, 38 Misc. 3d 134(A) (App. Term, 2nd Dept., 2013).

William King, M.D. offered a rebuttal dated September 7, 2023. He went through the Claimant's history and the history of the accident. He noted that in spite of physical therapy the Claimant's left shoulder failed to improve. On March 28, 2023 she complained of 9/10 constant and sharp left shoulder pain exacerbated in the morning and with movement, lifting and carrying. The Claimant had a surgical procedure on April 7, 2023. The pre-operative diagnosis was left shoulder internal derangement.

Dr. King stated that the peer reviewer did not review the medical records carefully and not cherry-pick complaints and findings that fits into his agenda. He noted the Claimant had subjective complaints and positive clinical findings which warranted the need for surgery. There was a positive O'Brien's test and a potential labral (SLAP lesion) or acromioclavicular lesions that caused her shoulder pain. There was a positive Drop Arm which indicates rotator cuff tears.

As Arbitrator I ordered an IHC report. Jeffrey Richmond, M.D., an orthopedic surgeon, did the IHC report dated December 18, 2023. Dr. Richmond reviewed records submitted by the parties. He stated that the Claimant was evaluated three days after the accident by Dr. Benaroya, a non-board certified orthopedic surgeon on March 14, 2023 and four days later by Dr. William King, a non-board certified orthopedic surgeon. He noted that Dr. King's note is a carbon copy of Dr. Benaroya's note.

The Claimant had seven physical therapy sessions before being referred for a shoulder arthroscopy. The arthroscopy was performed on April 7, 2023. Dr. Richmond stated that a review of the arthroscopy photos demonstrates no

evidence whatsoever of any synovitis, no evidence of any significant labral tearing along with the morphology of a labrum appears to be discoid, and no evidence of any rotator cuff tear. Dr. Richmond noted that shoulder arthroscopy is indicated in the presence of significant structural pathology with concordant symptoms after an appropriate level of non-surgical care.

The Claimant had seven physical therapy sessions, Dr. Richmond indicated this was grossly inadequate non-operative treatment. Dr. Richmond strongly disagrees with the operating surgeon's characterization of the operative findings. Specifically, there was no evidence of any synovitis on the photographs, no evidence of rotator cuff tearing and no evidence of labral tearing. There was no significant pathology on the arthroscopy photos let alone anything that could be attributed to the subject accident.

Dr. Richmond stated that the indication for surgery was inappropriate given the lack of adequate non-surgical treatment and the description of arthroscopic findings and operative report do not correlate with the photographs submitted for review.

I find that Dr. Bazos' peer review sets forth a clear factual basis and a medical rationale. I find that Dr. Bazos' peer review sets forth a clear factual basis and a medical rationale for Respondent's denial of Applicant's claim for the left shoulder arthroscopy and the related services in dispute.

I find that Respondent has established a lack of medical necessity for the left shoulder arthroscopy and the related services.

It has been held that "For an expense to be considered medically necessary, the treatment, procedure, or service ordered by a qualified physician must be based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed with. Such treatment, procedure, or service must be warranted by the circumstances as verified by a preponderance of credible and reliable evidence and must be reasonable in light of the subjective and objective evidence of the patient's complaints." *Nir v. Progressive Ins. Co.*, 7 Misc.3d 1006(A), 2005 N.Y. Slip Op. 50466(U) (Civ. Ct. Kings Co., Nadelson, J., Apr. 7, 2005).

I disagree with Dr. King's rebuttal to the peer review.

I find the IHC report of Dr. Richmond and the peer review of Dr. Bazos more credible and probative than Dr. King's rebuttal. I find that the left shoulder arthroscopy and the related services were not medically necessary. I sustain Respondent's defense to that effect. Said defense overcomes Applicant's prima facie case of entitlement to No-Fault compensation.

I find the same in this case. If the surgery was not necessary it follows that the supplies provided in relationship to the surgery is also not necessary.

There are two elements that must be satisfied to invoke the doctrine of collateral estoppel: The identical issue was decided in the prior action and is decisive in the present action; and the party to be precluded from re-litigating the issue had a full and fair opportunity to contest the prior issue (Matter of Noble, 31 A.D.3d 643, App. Div., 2 Dept., 2006).

"Collateral estoppel is a specific form of res judicata which bars a party from relitigating 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 causes of action are the same' (Ryan v New York Tel. Co., 62 NY2d 494, 500 [1984]). 'In order to invoke the doctrine, the identical issue must necessarily have been decided in the prior action or proceeding and be decisive of the present action or proceeding, and the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination' (Comprehensive Med. Care of NY, P.C. v Hausknecht, 55 AD3d 777, 778 [2008]; see Buechel v Bain, 97 NY2d 295, 303-304 [2001]; Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 349 [1999]). Furthermore, the party seeking to rely on collateral estoppel has the burden of establishing that the issue actually litigated and determined in the prior action is identical to the issue on which preclusion is sought (See Forcino v Miele, 122 AD2d 191, 193 [1986]; Concord Delivery Serv., Inc. v Syossot Props., LLC, 19 Misc 3d 40, 43 [App Term, 9th & 10th Jud Dists 2008]). The party attempting to defeat the application of collateral estoppel has the burden of establishing the absence of a full and fair opportunity to litigate (see D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]; Uptodate Med. Servs., P.C. v State Farm Mut. Auto. Ins. Co., 23 Misc 3d 42, 44 [App Term, 2d, 11th & 13th Jud Dists 2009])." Triboro Quality Medical Supply, Inc. v. State Farm Mutual Automobile Ins. Co., 36 Misc.3d 131(A), 2012 N.Y. Slip Op. 51289(U) at 1-2 (App. Term 2d, 11th & 13th Dists. June 28, 2012).

The elements have been met.

I want to thank the parties for taking the time to prepare their cases.

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 NY

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

08/16/2024
(Dated)

Mary Anne Theiss

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:
b3e18beedd4795eab5b3d6d9178acd23

Electronically Signed

Your name: Mary Anne Theiss
Signed on: 08/16/2024