

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

RES Physical Medicine & Rehab Services
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-24-1337-9195

Applicant's File No. 24-54121

Insurer's Claim File No. 1117154-02

NAIC No. 16616

ARBITRATION AWARD

I, Kent Benziger, 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: M.K.

1. Hearing(s) held on 08/19/2024
Declared closed by the arbitrator on 08/19/2024

The Morris Law Firm from The Morris Law Firm, P.C. failed to appear for the Applicant

Luke Rosenberg, Esq. from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$596.56**, 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

On August 7, 2022, the Assignor/Eligible Injured Party, a 33-year-old male, was involved in a motor vehicle accident. In dispute are two bills. The first claim was for sensory pain fiber nerve conduction studies (95913 \$525.96) administered on March 2, 2023. Following receipt of the claim, the Carrier issued timely initial and follow-up verification requests for the proper tax identification number, a completed NF-3 form, the W-9 form and the name of the owners. The Applicant did not raise non-receipt of the requests and has not issued a response.

The second claim was for an evaluation (99213 \$70.60) performed on September 6, 2023. The Carrier issued a timely denial based on the independent medical examination

(hereinafter referred to as an IME) by Dr. E. Mills which terminated orthopedic and related benefits as of June 10, 2023. This arbitrator has already issued a prior decision rejecting that defense in RES Physical Medicine & Rehab Services, Case No. 17-23-13229-0929 (17-23-1329-0929 (May 27, 2024).

4. Findings, Conclusions, and Basis Therefor

On August 7, 2022, the Assignor/Eligible Injured Party, a 33-year-old male, was involved in a motor vehicle accident.

In dispute are two bills. The first is for sensory pain fiber nerve conduction studies (95913 \$525.96) administered on March 2, 2023. The second is for an evaluation (99213 \$70.60) performed on September 6, 2023.

DOS: 3/2/23 (\$525.96) Upon receipt of the claim, the Carrier issued a verification request dated March 30, 2023 for the following:

Under the same tax id number we have received claims under Mikhail Strut, MD., and Res Physical Medicine. Please provide the completed NF3 form and the completed W9 form. Also, provide names of owners.

A second request for the same information was dated Mary 4, 2023.

Analysis. Pursuant to 11 NYCRR 65.15(d)(a), a Respondent can request additional records or verification from an Applicant before acting on a claim.). Pursuant to 11 NYCRR 65-3.5(b), verification shall be requested within 15 days of receipt of the claim. If after the requested verification is not supplied to the Insurer within 30 days after the original request, the Carrier shall, within 10 calendar days, follow-up with that party by either by a phone call properly documented or by mail with a further request. 11 NYCRR-3.6(b). Section 11 NYCRR 65.15(g)(1)(i) finds that No-Fault benefits are overdue only after the Insurer "receives verification of all relevant information requested". An insurer is not obligated to pay or deny a claim for no-fault benefits until it has received verification of the information requested. (see 11 NYCRR 65-3.8(b)(3); Hospital for Joint Diseases v. New York Central Mutual, 44 A.D.3 903 (2007); Nyack Hospital v. State Farm Mut. Fire Ins. Co.,19 A.D.3d 569 (2005).

As a finding of fact, the claim is not ripe for the Applicant's failure to respond to the verification requests. The Applicant has not raised the issue of non-receipt and has failed to submit a response

The Applicant is responsible to communicate with the insurer and answer the verification requests and if the Applicant is unable to comply with the request it is required to inform the insurer. However to ignore or fail to respond defeats the purpose for having the verification requests. The case law has resolved this issue by placing the burden on the provider by establishing that "any confusion on the part of the Plaintiff as

too what was being sought should have been addressed by further communication, not inaction". (Westchester County Medical Center v. New York Central Mutual, 262 AD2d 553, 692 NYS2d 665 A.D. 2nd Dept. 1999). Applicant's claim for this date of service is dismissed without prejudice for failure to respond to the verification requests.

DOS: 9/6/23 (\$70.60). Following receipt of the claim for this date of service, the Carrier issued a timely denial based on the orthopedic exam of Dr. E. Mills which terminated orthopedic and related benefits as of June 10, 2023.

Applicant's counsel correctly contends that this arbitrator's prior decision in RES Physical Medicine & Rehab Services, Case No. 17-23-13229-0929 (17-23-1329-0929 (May 27, 2024) constitutes collateral estoppel. In that decision, I summarized the evidence and found as follows:

IME On May 22, 2023, the Assignor was examined at the Respondent's request by Dr. Edward Mills. At the time of the evaluation, the Assignor complained of pain in the neck, low back, left shoulder and left hip. On examination, the Assignor noted the following cervical range of motion: flexion -30/50, extension -30/60, lateral flexion -30/45, right rotation 60/80 and left rotation -30/80. The Assignor complained of cervical tenderness upon palpation. Range of motion was decreased in the thoracic spine: flexion -30/45, lateral bending -20/45. In the lumbar spine flexion was 30/60, extension 20/25 and lateral bending 20/25. Tenderness was noted on palpation. The Assignor complained of shoulder pain referred from cervical pain. Left hip/thigh range of motion was decreased with flexion -80/100, external rotation 20/50 and internal rotation -20/40. The Assignor complained of tenderness and the left knee pain was referred from the lumbar spine. The diagnoses was of cervical, thoracic and lumbar spine sprains were all resolved, left hip sprain resolved, left shoulder, left knee and left foot pain were all referred from the neck or back. Dr. Mills noted no objective evidence of an orthopedic disability. Dr. Mills noted the decreased ranges of motion are "considered subjective in nature as a joint/spine is put through range of motion only to the extent allowed by claimant". Based on the IME, the Respondent denied reimbursement for these three dates of treatment.

Treatment Records. Through an evaluation on June 8, 2022, The Assignor complained of neck pain. A study noted ligamentous laxity at C5-6 while pain fibers studies were interpreted as demonstrating cervical radiculopathy involving the right C3 nerve root. A left shoulder MRI study demonstrated degenerative changes. A lumbar MRI demonstrated retrolisthesis at L5-S1, disc bulging shallow

right paracentral disc herniation/protrusion abutting/tapering the thecal sac and emerging S1 nerve roots, mild bilateral foraminal stenosis at L4-5, L5-S1 with posterior facet arthrosis. A pain fiber nerve conduction study was interpreted as demonstrating lumbar radiculopathy involving the left L3 nerve root and bilateral S1 nerve root.

A June 15, 2023 exam revealed restricted ranges of motion in the left shoulder, cervical and lumbar spine. Motor strength was decreased in the rotator cuff on the left and left lower extremity. Tenderness was noted in specific muscle groups as well as myospasms. A positive Neer's impingement Hawkins test on the left was noted.

Analysis. A presumption of medical necessity attaches to a Respondent's admission of the Applicant's timely submission of proper claim forms, and the burden then switches to the Respondent to demonstrate the lack of medical necessity. *Acupuncture Prime Care, P.C. v. State Farm Mutual Auto Ins.*, 2007 N.Y. Slip Op. 522273U; 2007 N.Y. Misc. LEXIS 7860 (Dist. Ct. Nassau Co. 12/3/2007); *A.B. Medical Services, PLLC v. N.Y. Central Mutual Fire Ins. Co.*, 7 Misc. 3d 1018(a), 801 N.Y.S.2d 229 (Civil Ct. Kings Co. 2005); *Citywide Social Work & Psychological Services v. Travelers Indemnity*, 3 Misc.3d 608, 609 (Civil Ct. Kings Co. 2004). Respondent thus bears "both the burden of production and burden of persuasion with respect to the medical necessity of the treatment or testing for which payment is sought". See: *Bajaj v. Progressive Ins. Co.* 14 Misc.3d 1202(A) (N.Y.C. Civ. Ct 2006). The quantum of proof necessary to meet Respondent's burden, at the bare minimum, is to "establish a factual basis and medical rationale for the lack of medical necessity of Applicant's services. *Id.* See also: *A.B. Medical Services*, supra.

As a finding of fact, Dr. Mills IME is not persuasive. He found significantly decreased ranges of motion as well as tenderness. Similar findings were also noted in the roughly contemporaneous treatment records. In addition, the treatment records noted positive orthopedic findings in the left shoulder as well as findings of decreased strength in specific muscle groups. The treating providers also reviewed the positive findings in MRI studies and pain fiber nerve conduction studies. These positive diagnostic findings were not adequately discussed by Dr. Mills. The reports from an independent medical examination must contain not only the results of a physical examination, but also incorporate, discuss and review the patient's medical history including all positive clinical and diagnostic

findings. Carle Place Chiropractic v. New York Central Mut. Fire Ins. Co., 19 Misc.3d 1139(A), (Dist. Ct. Nassau Co., Andrew M. Engle, J., May 29, 2008). In addition, the degenerative findings on the lumbar MRI study must be considered. Exacerbation of pre-existing conditions are covered by the No-Fault law. Kingsbrook Jewish Medical Center v. Allstate Insurance Co., 61 A.D.3d 13 (2d Dept. 2009). In sum, the findings of the contemporaneous treatments are more thorough and credible than the IME. The Respondent has failed to sustain its burden of proof of lack of medical necessity. Nir v. Allstate Insurance Company, 7 Misc.3d 544, 546, 547 (2005). Applicant is awarded reimbursement for the treatment in dispute.

This arbitrator comes to the same determination in the present proceeding. The doctrine of collateral estoppel precludes a party from re-litigating in this subsequent action an issue that was raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. See, Ryan v. New York Telephone, 62 N.Y.2d 494, 478 N.Y.2d 823 (1984). The doctrines of res judicata and collateral estoppel are fully applicable to arbitration proceedings. American Ins. Co., v. Messinger, 43 N.Y.2d 184, 401 N.Y.S.2d 36 (1977); Clemens v. Apple; 65 N.Y.2d 746, 492 N.Y.S.2d 20 (1985); County of Rockland v. Aetna Casualty & Surety Co., 129 A.D.2d 606, 514 N.Y.S.2d 102 (2 Dept. 1987). 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 Ins. Co., 15 N.Y.3d 530 aff'd, 64 A.D.3d 1149 (4th Dept. 2009). Applicant is awarded reimbursement.

Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), an arbitrator is the judge of the relevance and materiality of the evidence offered.

Interest. The insurer shall compute and pay to the 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).

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(d)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.00 See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

APPLICANT IS AWARDED REIMBURSEMENT OF \$70.60 FOR THE SEPTEMBER 6, 2023 DATE OF SERVICE, TOGETHER WITH INTEREST AND

ATTORNEYS' FEES. APPLICANT'S CLAIM FOR THE MARCH 2, 2023 TREATMENT DATE (\$525.96) IS DISMISSED WITHOUT PREJUDICE.

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
	RES Physical Medicine & Rehab Services	03/02/23 - 09/06/23	\$596.56	Awarded: \$70.60
Total			\$596.56	Awarded: \$70.60

- B. The insurer shall also compute and pay the applicant interest set forth below. 02/26/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest. The insurer shall compute and pay to the 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

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(d)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.00 See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

- 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 Orange

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

09/16/2024
(Dated)

Kent Benziger

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:
856b65948508b57b23eb7cd4e3e2b347

Electronically Signed

Your name: Kent Benziger
Signed on: 09/16/2024