American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Prompt Medical Spine Care, PLLC (Applicant)	AAA Case No.	17-24-1346-1429
	Applicant's File No.	3236042
- and -	Insurer's Claim File No.	200731-03
	NAIC No.	36030
Maya Assurance Company (Respondent)		

ARBITRATION AWARD

I, Rhonda Barry, 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 09/24/2024
   Declared closed by the arbitrator on 09/24/2024

   Stacy Mandel Kaplan, Esq. from Israel Purdy, LLP participated virtually for the Applicant

   Arthur DeMartini, Esq. from De Martini & Yi, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$599.99**, was NOT AMENDED at the oral hearing.
   Stipulations WERE made by the parties regarding the issues to be determined.

   The parties stipulated that the denials are timely. If applicable, interest accrues in accordance with 11 NYCRR§65-3.9.

3. Summary of Issues in Dispute

   The EIP, "NG" is a 41 year old male injured as an unrestrained rear seat passenger in a motor vehicle accident on 7/14/20. There was no loss of consciousness. The EIP was subsequently evaluated at a hospital, treated, and released. Applicant seeks $599.99 injections and office visits on DOS 2/26/24-3/12/24. Respondent terminated all no fault benefits effective 10/22/20, 1/12/21 and 4/2/21 pursuant to the IME findings of Glenn

Berman, DC, Martin LoCasio, L.Ac, Anna Krol, MD and Joseph Margulies, MD, respectively, and denied all subsequent treatment based upon lack of medical necessity.

4. Findings, Conclusions, and Basis Therefor

I considered the efficacy respondent's IME reports in Prompt Medical Spine v. Maya, AAA #s17-22-1251-8874 (9/26/22), 17-22 1259 6647 (5/11/23), 17-22-1270-7085 (5/11/23) and 17-24-1339-1778 (7/18/24) and determined that ongoing medical management was unnecessary. Respondent argues collateral estoppel is applicable. 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 NY3d 530, 914 NYS 2d 67, affirming, 64 A.D. 3rd 1149 (4th Dep. 2009). I agree with the respondent.

"Collateral estoppel is a specific form of res judicata which bars "a party from relitigating in a subsequent action or proceeding in issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or courses of action on the same." Ryan v. New York Telephone Company, 62 NY2d 494 (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 Medical Care of New York PC v. Hausknecht, 55 AD 3d 777 (2008); See Buechel v. Bain, 97 NY2d 295 (2001); Parker v. Blauvelt Volunteer Fire Company, 93 NY 2d 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 one which preclusion is sought (See, Forcino v. Miele, 122 A.D. 2d 191 (1986); Concorde Delivery Service Inc. v. Syosset 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 Central Fire Mutual Insurance Company, 76 NY2d 659 (1990); Uptodate Medical Services PC v. State Farm Mutual Automobile Insurance Company, 23 Misc. 3d 42 (App. Term 2d, 11th and 13th Jud Dists. 2009)." Triboro Quality Medical Supply Inc. v. State Farm Automobile Insurance Company, 36 Misc. 3d 131 (A) 954 NYS 2d 762 (App. Term 2d and 11th and 13th Jud Dists. 2012).

The parties and the issues are the same; the only difference is the date of services. Applicant has not offered any additional evidence to sustain its arguments. For the reasons set forth below, I again find for respondent.

I have completely reviewed all timely submitted documents contained in the ADR Center record maintained by the American Arbitration Association and considered all oral arguments. No additional documents were submitted by either party at hearing. No witnesses testified at the hearing.

ANALYSIS

Applicant has established its prima facie entitlement to reimbursement for no fault benefits based upon the submission of a properly completed claim form setting forth the amount of the loss sustained, and that payment is overdue. Mary Immaculate Hospital v. Allstate Insurance Company, 5 AD 3d 742, (2nd Dept. 2004). Westchester Medical Center v. Lincoln General Ins. Co, 60 AD 3d 1045 (2nd Dept. 2009).

The burden now shifts to respondent to establish a lack of medical necessity with competent medical evidence which sets forth a clear factual basis (specifics of the claim) and medical rationale for denying the claim. Citywide Social Work and Psych Services, PLLC v. Allstate, 8 Misc. 3d 1025A (2005); Healing Hands Chiropractic v. Nationwide Assurance Co., 5 Misc. 3d 975 (2004). Respondent must offer sufficient and credible medical evidence that addresses the standards in the applicable medical community for the services and treatment in issue; explains when such services and treatment would be medically appropriate, preferably with understandable objective criteria; and why it was not medically necessary in the instance at issue.

Respondent's IME reports are objectively unremarkable. The EIP advised each expert that he initially injured his neck, lower back, and right shoulder. He started on a course of conservative care with physical therapy. A right shoulder arthroscopy was performed on 8/27/20. He does not take pain medication. Current complaints included non-radiating pain to the lower back and right shoulder pain. He has not returned to work as a home health aide. All 4 experts utilized a goniometer to measure range of motion.

The EIP advised Dr. Berman that he never consulted or treated with a chiropractor. Examination of the cervical spine revealed no deformities, redness, ecchymosis or swelling. There was no tenderness or subluxation. The EIP was neurologically intact; reflexes, sensation and motor testing were normal. Range of motion was normal, and all objective orthopedic tests were negative. Diagnosis was lumbar strain resolved.

Mr. LoCasio's acupuncture examination revealed normal range of motion to the cervical and lumbar spine was without spasm or tenderness. The EIP was neurologically intact. However, muscle strength to the right shoulder was diminished by 20% (4/5) range of motion to the right shoulder was significantly decreased and the Apply's scratch test was positive. Examination of the lower extremities was unremarkable. Despite the positive findings, Mr. LoCasio determined that Qi and blood stagnation had resolved.

Dr. Krol's examination was essentially normal. Dr. Krol examined the EIP on 12/10/20 and determined that a lumbar sprain had resolved and a right shoulder contusion, status post arthroscopic surgery had resolved. Her examination of the right shoulder documented decreased range of motion by 5° on forward and backward elevation. A

minor, mild, or slight limitation of use should be classified as insignificant within the meaning of the no fault statute. See, Licari v. Elliot, 57 NY 2d 230 (1982); Gaddy v. Eyler,582 NYS 2d 990 (1992).

The orthopedic IME by Dr. Margulies was performed on 3/11/21. Current complaints included pain in the right shoulder. The EIP had not returned to work. Examination of the cervical and lumbar spine was normal. There was no tenderness or spasm. Reflexes and sensitivity were normal as was range of motion. Examination of the right shoulder (and left) indicated normal range of motion with no areas of tenderness, heat, swelling, erythema, or effusion. Impingement sign was negative as was the apprehension test. Healed portals were noted. Diagnosis was right shoulder, status post arthroscopic resolved.

Applicant argues that respondent cannot sustain its burden of proof as Mr. LoCasio and Dr. Krol's reports have positive findings and its doctors' reports are contradictory. Generally, where other reports in the insurer's papers contradict the conclusion of its peer review or that the service was not medically necessary, it has failed to make out a prima facie case in support of the defense of lack of medical necessity. Hillcrest Radiology Associates v. State Farm Mutual Automobile Insurance Company, 28 Misc3d 13 8(A), 200 NY Slip op. 51467 (U) 2010 WL 3258144 (App Term 2nd, 11th, and 13th Dists. 2010).

However, in this case there are certain distinctions that must be considered. Mr. LoCasio and Dr. Berman's IMEs were performed nearly 6 months prior to Dr. Margulies. Further, the findings by Dr. Krol (5° difference in range of motion to the right shoulder) are not significant. More importantly, applicant's office visit was more than a year after each of respondent's examinations. There must be an adequate explanation for the gap in treatment. Delorbe v. Perez, 59 A.D. 3d 491, 873 NYS 2d 198 (2d Dept. 2009).

Applicant failed to submit any medical evidence or contemporaneous medical records sufficient to establish the need for ongoing treatment or testing rebut Respondent's showing of lack of medical necessity. I am mindful of the EIP's subjective complaints and the positive findings on diagnostic testing. However, without objective clinical correlation, MRI findings and subjective complaints are insufficient to sustain respondent's burden of proof. The ultimate burden of proof on issues of medical necessity a causal relationship of injuries to the accident in question lies with the plaintiff. Dayan v. Allstate Insurance Company, 2015 NY Slip Op 51751 (U) (App. Term 2d, 11th and 13th Dists. 2015)

Applicant's 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 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 Nassau

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

09/25/2024
(Dated)

Rhonda Barry

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:
4f8dc535fcbc34784e01fb862c9a7d10

Electronically Signed

Your name: Rhonda Barry
Signed on: 09/25/2024