American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Marc Agulnick MD LLC (Applicant)	AAA Case No. 17-24-1366-7105 Applicant's File No. NF-818610-1601214 Insurer's Claim File No. 21124001036 NAIC No. 10914
- and -	
Kemper/Lumbermans/Kemper A Unitrin Business (Respondent)	

ARBITRATION AWARD

I, Pauline Molesso, 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: Assignor

1. Hearing(s) held on 01/31/2025
   Declared closed by the arbitrator on 01/31/2025

   Malgorzata Rafalko from Sanders Grossman Aronova PLLC participated virtually for the Applicant

   Steve Choe from De Martini & Yi, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$999.54**, 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 Assignor was a 45 year old female who was the driver of a motor vehicle involved in an accident on 12/24/21. Thereafter, the Assignor sought medical treatment. Applicant seeks reimbursement for office visits and injection treatment, performed on 3/25/24 and 4/15/24, totaling $999.54 in dispute. Respondent denied the claim based upon a lack of medical necessity, relying on the IME reports by Dr. Sidhwani, dated 8/23/22 and Dr. Skolnick, dated 8/24/22.

4. Findings, Conclusions, and Basis Therefor

This case was conducted using the documents submitted by the parties in the ADR Center, maintained by the American Arbitration Association, and the oral arguments of the parties. Any documents in the ADR Center are hereby incorporated into this hearing. I have reviewed all the relevant documents. No witnesses testified at this hearing.

An IME report must set forth a factual basis and medical rationale for the conclusion that further services are not medically necessary. Ying Eastern Acupuncture, P.C. v. Global Liberty Ins., 20 Misc.3d 144(A), 873 N.Y.S.2d 238 (Table), 2008 N.Y. Slip Op. 51863(U), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008). If the IME report provides a factual basis and medical rationale for an opinion that services were not medically necessary, and the claimant fails to present any evidence to refute that showing, the claim should be denied, AJS Chiropractic, P.C. v. Mercury Ins. Co., 22 Misc.3d 133(A), (App. Term 2d & 11th Dist. Feb. 9, 2002), as the ultimate burden of proof on the issue of medical necessity lies with the claimant. See Insurance Law § 5102; Wagner v. Baird, 208 A.D.2d 1087 (3d Dept. 1994).

Respondent relies on the IME reports of Dr. Sidhwani, held 8/23/22 and Dr. Skolnick, held 8/24/22. At the time of the IMEs, the Assignor complained of pain to the neck and lower back. There was minimal tenderness noted on Dr. Skolnick's exam. Upon examination, range of motion was normal and orthopedic testing was negative. Dr. Sidhwani and Dr. Skolnick diagnosed all injuries as resolved and opined further treatment was not necessary.

In opposition, Applicant contends there was no global denial submitted in relation to Dr. Skolick's IME and therefore, proper notice was not given. I agree. In reviewing the submission, there is only a global denial for Dr. Sidhwani's report. Moreover, Applicant notes the prior decision in AAA case no. 17-23-1323 wherein Arbitrator Kelleher determined the following, in relevant part:

> *Dr. Sidhwani examined the claimant on 8/23/22. The claimant presented with pain in her neck and lower back. The examination was within normal limits. All ranges of motion were full. All orthopedic testing was negative. The claimant was diagnosed with resolved cervical and lumbar sprain/strains. The IME is sufficient to rebut the presumption of medical necessity. Where the Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden then shifts to the Applicant which must then present its own evidence of medical necessity. Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company, 2008 NY Slip Op 50456U, 18 Misc. 3d 1147A, 2008 N.Y. Misc. LEXIS 1121, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co. 13 Misc.3d 131, 824 N.Y.S.2d 759, 2006 NY Slip Op51871(U) (Sup. Ct. App. T. 2d Dep't 2006)]. Applicant's evidence rebuts the conclusions set forth in the IME report. Pan Chiropractic P.C. v. Mercury Ins. Co., 24 Misc. 3d 136A (App Term, 2d, 11th & 13th Jud Dists 2009). See also Flushing Traditional Acupuncture, P.C. a/a/o AK v. GEICO Ins. Co., 36 Misc. 3d 156A, (App Term 2d Dept 2012). It is ultimately Applicant who must prove, by a preponderance of the evidence, the post-IME services in question were medically necessary. Dayan v. Allstate*

Ins. Co., 39 Misc.3d 151(A) (App. Term 2d, 11th & 13th Dists. 2015); Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co., 37 Misc.3d 19, 952 N.Y.S.2d 372. (App. Term 2d, 11th & 13th Dists. 2012). This was done herein. Applicant submits a report from 12/1/22. Said report is sparce but notes the claimant received trigger points as there was positive trigger points and pain noted during that examination. Further, in the related matter heard on this date, Applicant submitted over 700 pages of medical records. The 8/24/22 report notes reduced range of motion in the lumbar and cervical spine. There were noted trigger points, tenderness, and hypertonicity. These reports were repeated over multiple months following the IME. Therefore, there are sufficient medical records to support medical necessity of post IME treatment. The claim is granted. To the extent I found that in favor of Respondent relating to this IME in AAA # 17-23-1283-7557, this decision is not contrary to said decision as there were no medical records provided to rebut the IME in the prior matter. Here, medical records were submitted. Further, the prior decision is not collateral estoppel as Applicant was not a party to said matter. Due process and fundamental fairness require that the applicant herein be given its day in court (or arbitration). Schwartz v. Public Administrator of County of Bronx, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1982). The applicant herein must be afforded a full and fair opportunity to litigate its claim. To preclude Applicant's litigation based upon a decision from another matter, by a different Applicant/plaintiff, deprives the applicant of a full and fair opportunity to litigate. See Alev Med. Supply, Inc. v. Allstate Prop. & Cas. Ins. Co., 36 Misc. 3d 132(A), 132A (App Term 2 Dept. 2012) ("the doctrine of collateral estoppel applies only against nd those who were either a party, or in privity with a party, to a prior proceeding…") The claim is granted.

"Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against it in a prior proceeding where it had a full and fair opportunity to litigate the issue (see D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659 [1990]). 'The two elements that must be satisfied to invoke the doctrine of estoppel are that (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 (see Kaufman v. Lilly Co. [65 N.Y.2d 449, 455 (1985)])' (Luscher v. Arrua, 21 AD3d 1005, 1007 [2005]). 'The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate' (D'Arata, 76 N.Y.2d at 664; see also Kaufman, 65 N.Y.2d at 456)." Uptodate Medical Service, P.C. v. State Farm Mutual Automobile Ins. Co., 22 Misc.3d 128(A), 880 N.Y.S.2d 227 (Table), 2009 N.Y. Slip Op. 50046(U) at 2, 2009 WL 78376 (App. Term 2d & 11th Dists. Jan. 9, 2009).

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, 914 N.Y.S.2d 67 (2010), aff'g, 64 A.D.3d 1149, 881 N.Y.S.2d 769 (4th Dept. 2009).

Respondent had a full and fair opportunity to litigate the issue. I see no reason to disturb the prior finding. As such, the claim is granted. No evidence was presented regarding the fee schedule.

Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of hearing.

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**
	Marc Agulnick MD LLC	**03/25/24 - 03/25/24**	**$571.08**	**Awarded: $571.08**
	Marc Agulnick MD LLC	**04/15/24 - 04/15/24**	**$428.46**	**Awarded: $428.46**
Total			**$999.54**	**Awarded: $999.54**

B. The insurer shall also compute and pay the applicant interest set forth below. 09/25/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).
Based on the regulations, the date that interest shall accrue from is the date the Applicant requested arbitration (the date the AR-1 is received). See, 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

The insurer shall pay the applicant an attorney's fee, in accordance with 11 NYCRR 65-4.6(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 Nassau

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

02/02/2025
(Dated)

Pauline Molesso

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:
31e040b7530e7f6084af85b8cbd40b22

Electronically Signed

Your name: Pauline Molesso
Signed on: 02/02/2025