American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

| | | |
|---|---|---|
| Uptown Healthcare Management Inc d/b/a ETM- ASC Ambulatory Surgery Center of East Tremont , Uptown Healthcare Management Inc d/b/a East Tremont Medical Center<br>(Applicant) | AAA Case No. | 17-24-1376-7723 |
| | Applicant's File No. | TLD24-1087664 |
| | Insurer's Claim File No. | 0659040400000001 |
| | NAIC No. | 35882 |

- and -

Geico Insurance Company
(Respondent)

**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: JC

1. Hearing(s) held on 11/26/2025
   Declared closed by the arbitrator on 11/26/2025

   Kurt Lundgren from Thwaites, Lundgren & D'Arcy Esqs participated virtually for the Applicant

   Justin Addison from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$16,621.77**, was AMENDED and permitted by the arbitrator at the oral hearing.

   At the hearing applicant amended the claim to $6405.68, representing $5677.77 for facility fees and $727.91 for anesthesia in accord with EAPG guidelines.

   Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

This arbitration seeks payment for facility fees and anesthesia administered during left shoulder surgery performed on 9/27/24 on the 62 year old male eligible injured person JC for injuries sustained as a driver involved in an accident on 1/23/24.

The issue is whether collateral estoppel applies against respondent on the issue of medical necessity.

The parties agreed that the above issue was the only issue in contention.

Respondent did not raise any issue of exhaustion, but did state that the remaining balance on the policy for No Fault benefits was $10,463.47.

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

Applicant's claim for facility fees and anesthesia administered during left shoulder surgery of 9/27/24 was denied by respondent based upon an IME conducted on 8/19/24 by Dr. Aruna Seneviratne, MD

Applicant asserts that collateral estoppel applies against respondent on the issue of whether lack of medical necessity for the 9/27/24 procedures is proven by Dr. Seneviratne's IME.

Respondent claims that collateral estoppel does not apply.

I previously considered the same issue in AAA Case No. 17-25-1382-6006, ***Right Choice Supply Inc aao JC***, award 9/26/25.

In the prior award I wrote:

> Applicant seeks payment for the following DME supplied, by sale or rental, to JC on the following dates:
>
> 9/27/24 Shoulder immobilizer

9/27/24 DVT device

10/2/24 Cold therapy unit

10/2-10/22/24 rental of continuous passive motion (CPM) for the shoulder

10/23-11/12/24 rental of CPM for the shoulder

On 9/27/24, at the Ambulatory Surgery Center of East Tremont Medical Center in the Bronx, Dr. Danilo Sotelo performed left shoulder surgery on JC.

After the surgery, Dr. Sotelo prescribed the sale and rental of the disputed items of DME.

Respondent denied payment for all of the disputed items of DME based upon an orthopedic IME held on 8/19/24 by Dr. Aruna Seneviratne. Benefits were denied effective 8/31/24.

Dr. Seneviratne's IME of 8/19/24 was actually a follow-up IME. The original orthopedic IME was performed on 6/24/24 by Dr. Ernesto Seldman, MD.

At the initial IME of 6/24/24, as reflected in the IME report, JC had multiple complaints, including complaints of pain in the neck, mid back, low back and both shoulders.

Dr. Seldman's 6/24/24 IME exam of the left shoulder found tenderness on palpation of the shoulder, reduced abduction, reduced forward flexion, reduced internal rotation, and reduced external rotation. The clinical orthopedic tests of the left shoulder were positive Neer's impingement; O'Brien; Yergason tests).

Dr. Seldman's 6/24/24 IME report noted the results of the left shoulder MRI performed on 2/27/24 as showing a partial bursal surface tear of the supraspinatus tendon with associated sub acromial/sub deltoid bursitis, rotator cuff tendinosis, blunting and signal abnormality of the superior posterior labium, compatible with labral tear, and gleno-humeral joint space narrowing with sub coracoid/sub scapulars bursitis.

Dr. Seldman believed that JC had had, with regards to the left shoulder, a "sprain/strain, resolving".

Dr. Seldman stated "there is evidence of a moderate orthopedic disability to the left shoulder. The claimant has not reached pre accident status. The claimant is able to work and can perform all normal activities of daily living with restrictions that include heavy lifting, pushing and pulling."

Dr. Seldman found there was a need for continued physical therapy for the left shoulder.

Dr. Seneviratne's exam of 8/19/24 found, with regard to the left shoulder, tenderness on palpation, reduced range of motion in abduction, forward flexion, internal rotation and external rotation. Dr. Seneviratne's clinical orthopedic tests of the left shoulder were negative.

Dr. Seneviratne's IME report shows that he reviewed the left shoulder MRI of 2/27/24, and noted the multiple positive findings.

However Dr. Seneviratne did not comment about any of the test reports, which had positive findings (sensory nerve conduction studies of the upper extremities held 3/27/34 were positive) and claimed that there was a normal examination of the left shoulder.

Dr. Seneviratne's lack of any comment on the positive findings of the left shoulder MRI convinces me that his exam was incomplete and not credible.

It is clear that JC had ongoing decreased range of motion in his left shoulder, which showed that his left shoulder injury was not resolved.

Dr. Seneviratne had multiple medical records, which he did not review or take into consideration during his exam, which renders his physical exam and opinion incomplete and insufficient to sustain respondent's burden of proof to show that JC's orthopedic injuries were resolved as of the date of the IME on 8/19/24.

Based on the proof I find that respondent has failed to establish the lack of medical necessity of the disputed DME due to the lack of credibility and lack of probative value of Dr. Seneviratne's exam and the medical records, including the prior IME, which contradicts Dr. Seneviratne's opinion.

With regard to fee, respondent presented a fee billing agreement with applicant regarding the sale of DME. Applicant agreed that that agreement limited reimbursement to 92 percent for the items which were sold. Respondent had no objection to the rental fees for the CPM.

> Applicant is awarded $102.18 for the shoulder immobilizer, $556.44 for the DVT device, $299.07 for the cold therapy unit, and $1,309.98 for the rental of the CPM, for a total award of $2,267.67.

"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. 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 forseeability 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 identity of issues and parties and the fact that respondent had a full and fair opportunity to be heard, respondent is collaterally estopped from relitigating the issue of medical necessity of the procedures of 9/27/24 based upon the IME of Dr. Seneviratne. (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.)

Respondent did not present any proof, other than Dr. Seneviratne's IME, on the issue of medical necessity.

Applicant's claim is granted.

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 | Amount Amended | Status |
|---|---|---|---|---|---|
| | **Uptown Healthcare Management Inc d/b/a ETM- ASC Ambulatory Surgery Center of East Tremont** | **09/27/24 - 09/27/24** | **$15,893.86** | **$5,677.77** | **Awarded: $5,677.77** |
| | **Uptown Healthcare Management Inc d/b/a East Tremont Medical Center** | **09/27/24 - 09/27/24** | **$727.91** | **$727.91** | **Awarded: $727.91** |
| **Total** | | | **$16,621.77** | | **Awarded: $6,405.68** |

B. The insurer shall also compute and pay the applicant interest set forth below. 12/11/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

From 12/11/24 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.

11/26/2025
(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:**
43aa6ab0c2169685c9779ab95a811007

**Electronically Signed**

Your name: Elyse Balzer
Signed on: 11/26/2025