AMERICAN ARBITRATION ASSOCIATION
NEW YORK SUM ARBITRATOR TRIBUNAL

In the Matter of Arbitration between
Azriel Benaroya
(Claimant)
-and-

AAA Case No. 01-19-0000-6010
Insurer's Claim File No. 4859276F
Applicant File No.

Nationwide Insurance Company - SUM
(Respondent)

Issues in Dispute : Damages for aggravation of pre-existing condition

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ARBITRATION AWARD

I, Philip J De Bellis Esq., the undersigned **ARBITRATOR,** designated by the American Arbitration Association pursuant to the rules for New York Supplementary Uninsured Motorists Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Department of Financial Services, having been duly sworn, and having heard the proofs and allegations of the parties, make the following **AWARD**.

Claimant(s), in the above caption, hereinafter referred to as: AB

1. **Preliminary Conference Call** held on: 11/12/2019

   Krause & Glassmith, LLP by Paul Maiorana, Esq. participated for the Claimant(s).
   Hollander Legal Group, PC by Allan S. Hollander, Esq. participated for the Respondent.

2. **Hearing(s) held on:**
   01/24/2020
   and declared closed by the arbitrator on 01/24/2020.

   Krause & Glassmith, LLP by Josh Pollack, Esq. participated for the Claimant(s).
   Hollander Legal Group, PC by Allan S. Hollander, Esq. participated for the Respondent.

3. **Witness(es) for the Claimant(s):**
   Claimant
   Hal S. Gutstein, M.D.

4. **Witness(es) for the Respondent:**

   Rene Elkin, M.D.

5. **Exhibits submitted by the Claimant(s):**

Records, Steven Flanagan, MD, 3/2/11-5/16/12
Records, Mary Hibbard, PhD, 12/18/13-5/4/17
Record, Alan M. Freedman, MD, 6/20/15
Police Accident Report, 6/7/17
ER Record, New York Hospital Queens, 6/7/17
Records, Booth Medical Services, PC, 6/8/17-9/13/17
Records, Shan Nagendra, MD, 6/14/17-12/13/17
Records, Steven Flanagan, MD. 6/21/17
MRI/DTI Report, Karl L. Hussman, MD, 6/25/17
Records, Mary Hibbard, PhD, 7/6/17-5/3/18
Record, Bradley D. Fullerton, MD, 7/16/17
Records, Neera Kapoor, MD, 8/8/17-12/19/18
Report, Mary Hibbard, PhD, 12/15/18
Record, Dan Levy, MD, 7/7/18
Records, Alan M Freedman, MD, 6/20/18
Operative Note, Dr. Freedman, 7/11/18
Report, Hal S. Gutstein, MD, 8/9/19

6. **Exhibits submitted by the Respondent:**

Police Accident Report, 12/4/11
Police AccidentReport, 12/28/12
Police Accident Report, 6/7/17
Photographs (3) of vehicle
Verified Bill of Particulars, 9/6/12
Verified Bill of Particulars, 4/9/14
Verified Bill of Particulars, 9/6/18
Transcript, Examination Under Oath of Claimant, 12/14/17
Transcript, Deposition of Claimant, 1/16/19
Transcript, Deposition of Claimant, 3/21/19
Records, Alpha 3T MRI &Diagnostic Imaging, 11/19/12-6/25/17
Records, Alan M. Freedman, MD, 6/30/15-8/7/18
Records, Dany Levy, MD, 9/1/15 and 6/7/18
Records, Steven R. Flanagan, MD, 7/22/13-5/9/18
Record, Bradley Fullerton, MD, 7/16/17
Booth Medical Services, PC, 8/21/17-9/1/3/17
Report, Dina K. Miller, MD, 8/9/17
Report, Rene Elkin, MD, 9/15/19
Report, Jeffrey A. Brown, MD, 8/23/19

7. **Identity of court reporter:**

N/A

8. **Identity of interpreter:**

N/A

9. Summary of Issues in Dispute:

The parties agree that a policy limit of $500,000 applies to this claim for SUM benefits, subject to a setoff of $25,000 for recovery already had. The value of the causally related injuries is at issue.

10. Findings, conclusions and basis therefor:

The parties agree that a policy limit of $500,000 applies to this claim for SUM benefits, subject to a setoff of $25,000 for recovery already had. The value of the causally related injuries is at issue.

AB is a 73-year-old man who resides in Queens.

The accident on which the claim is predicated occurred on June 7, 2017, when an SUV operated by AB was struck in the rear by another vehicle while AB was stopped for a red light.

When he met with the accident of June 7, 2017, AB, a practicing physician, had a history of complaints of and treatment for cognitive deficits due to traumatic brain injury following prior motor vehicle accidents on July 27, 2010, December 4, 2011, and December 28, 2012. As a result of the June 7, 2017 accident, AB claims a marked increase in his cognitive deficits as well as an aggravation of prior cervical and left shoulder injuries.

While liability is not explicitly contested, respondent calls attention to the fact that the police accident report reflects a claim by the adverse operator that AB stopped short and respondent further notes that each of the three prior accidents listed above also involved a vehicle operated by AB being struck in the rear. The suggestion is that AB might have intended to trigger the collision. I decline the invitation to so speculate. On the proof presented, responsibility for the happening of the accident rests entirely against the adverse operator.

A post-accident photograph of AB's vehicle shows minimal damage, i.e. a barely discernible dent to the SUV's bumper. AB testified that although restrained by the vehicle's safety harness he was thrown forward and backward upon impact. He further relates that at some point while still at the scene he blacked out for an indeterminate period.

AB was transported from the scene of the accident by ambulance to New York Hospital Queens where he received emergency room treatment for complaints of neck pain, dizziness, and nausea.

The day following the accident, AB came under the care of Jay Komerath, MD of Booth Medical Services, PC for complaints of neck pain radiating to the upper left arm with associated tingling, stiffness and weakness. Positive physical examination findings included cervical paravertebral muscle spasms and restrictions in cervical and left shoulder range of motion. AB was referred for diagnostic testing, physical therapy, orthopedic and neurological evaluation.

The records of Booth Medical Services submitted in support of the claim include physical therapy and acupuncture records reflecting 13 distinct dates of service over the period 6/8/17 to 9/13/17.

On 6/14/17, Shan Ngendra, MD saw AB for neurological consultation for complaints of neck and back pain as well as double vision on the right side, dizziness and balance problems. Dr. Nagendra notes that "Patient was involved in previous accidents and had head trauma. Had dizziness which was treated with specialized rehabilitations and he improved. The diplopia is a new complaint which did not exist before."AB himself testified that the double vision complaint was new. Dr. Nagendra reported a diagnostic impression of cervical myofascial pain, cervical neuropraxia, headache, dizziness and nausea, unsteady gait, myofascial left upper back pain, left shoulder contusion and diplopia. AB was advised to undergo optical evaluation, balance therapy, MRI of the brain and physical therapy.

On 6/21/17, Physiatrist Steven R Flanagan, MD saw claimant "with a chief complaint of TBI follow up." Dr. Flangan states that "[AB] reports he has new onset of diplopia occurring immediately after a recent concussion...Balance is reportedly worse and he will begin balance therapy soon. No other complaints." Musculoskeletal exam findings included "normal range of motion." The submissions reflect that before the 6/17/17 accident AB had last been seen by Dr. Flanagan on 12/14/16, at which time Dr. Flanagan reported, "Since last seen he has been receiving physical therapy for balance. He fell once, but could not provide a clear reason. He sustained no injury. He also recently strained his right wrist when picking up his 1-year old son." A month earlier (11/9/16), Dr. Flanagan had reported:

> [AB] is a 69 y.o. Male who presents with a chief complaint of impaired cognition. He was last seen approximately 2 ½ years ago. Since then he continues to complain of cognitive difficulties. Despite this he has attempted to return to work part-time seeing patients in a physical therapy office 2 half days per week. He reports his work is slow, particularly with documentation. He continues to receive cognitive therapy with Dr. Hibbard. He has fallen several times since last seen but without injury. He is unsure why he falls.

Neuroradiologist Karl L. Hussman, MD reported that MRI with diffusion tensor imaging (DTI) of the brain on 6/25/17 demonstrated (a) no appreciable change from a previous study of 11/19/12 vis a vis few punctate foci of abnormal T2/FLAIR signal within the white matter of both cerebral hemispheres, (b) significant FA reduction within the centrum semiovale and (c) significant cortical atrophy within the left lateral orbitofrontal region, left inferior temporal lobe, and of the left globus pallidus, which "may be due to traumatic brain injury or less likely, statistical variation."

On 7/6/17, Clinical Psychologist Mary R. Hibbard, Ph.D saw claimant for "routine follow-up psychotherapy session," further noting, that AB "reports he had a fourth MVA on 6/7/17, when alone in his car. He was again hit in the rear end by a car at a stop sign near his home. Minimal physical damage was done to the car but the patient experienced a marked increase in his now chronic concussive symptoms. The patient reported a brief 'black out' suggesting a momentary LOC, followed by nausea and diplopia. " On a self-reporting assessment form (SCAT-3) AB indicated complaints of severe blurred vision, balance problems, new onset of left-sided weakness, sensitivity to light and noise, difficulty falling asleep and cognitive complaints including difficulty with concentration, memory, fatigue and confusion as well as increased emotionality, irritability, anxiety and depression.

On 7/16/17, Bradley L. Fullerton, MD saw AB for consultation concerning his complaints of left shoulder pain, said to have been first noticed after his first accident (2010), but "manageable until the recent accident of 6/7/17." No mention is made of what was described in a note from the treating Psychologist Mary Hibbard dated 3/2/17, three months before the subject accident:"He also reported new pain in his left shoulder that he attributed to overzealous physical exercise prescribed by his personal trainer. He was seen by Dr. Flanagan..." Dr. Fullerton administered a platelet-rich plasma injection to the left shoulder.

A follow-up visit report from Dr. Komerath dated 7/27/17 indicates continued signs and symptoms of the cervical and left shoulder injuries with some clinical improvement. There are no further reports or records from Dr. Komerath included in the submissions. Although in his initial report by way of past medical history, Dr. Komerath noted "MVA (2010, 2011, 2012)" there is no comment by him in the records submitted concerning the status of the prior injuries as of the date of the fourth accident or even any indication that Dr. Komerath himself had in fact participated in AB's care dating back to 2010. None of the records of prior treatment by Dr. Komerath were offered.

On 8/3/17, Dr. Hibbard saw AB for psychotherapy follow up. The record for that visit notes:

> Symptoms of his newest concussion remain unchanged. He reports increased irritability as night approaches, a likely outcome of his being cognitively and physically exhausted compounded by poor sleep. At best he is able to sleep 4-5 hours per night, and wakes up unrefreshed. He is attempting to take brief naps as often as possible to recharge himself during the day. He continues to travel to two different offices to continue seeing patents under supervision;both settings have provided assistants for him to help expeditie his services. He is avoiding any complicated procedures at either site. [AB] reports increasing tension in his marriage due to his exhaustion and inability to help his wife care for their 2 year old son in the evening. His wife was brought into the session to review symptoms of TBI, and help her understand the unusual evening irritability post-concussion in her husband. His wife was taught approaches to cueing the patient to seek quiet space when she sees her husband getting irritated.

On 8/8/17, AB saw Neera Kapoor, OD for neuro-optometric evaluation of his complaints of recent new diplopia (said to be particularly associated with right gaze), exacerbation of light sensitivity and reduced ability to read for prolonged periods of time. Relevant prior ocular history of bilateral dry eye, floaters (right>left) and a retinal hole (right eye) is noted in the record. Dr. Kapoor recommended a course of home exercises to address the diplopia as well as various techniques to ameliorate the other vision complaints, such as tinted glasses for the light sensitivity and scheduled breaks when reading. On a follow-up visit of 11/22/17 Dr. Kapoor noted that AB reported, "performing home vision rehabilitation 'religiously' and very rarely (if at all) experiences double vision now. Patient is very pleased with reduction/elimination of double vision." AB continued to follow with Dr. Kapoor through 12/14/18 with the records documenting continuing complaints of the occasional (rare) diplopia, light sensitivity and diminished reading speed.

On 8/21/17, Hadassah Orenstein, MD, a physiatrist associated with Booth Medical Services saw AB and reported, in addition to neck pain and stiffness with radiation to the left shoulder, patient complaints referable to the lower back as well as physical examination findings that included lumbar spine tenderness, paraspinal muscle spasm and restricted lumbar range of motion. Incongruously, neither the emergency room record nor the reports of Dr. Orenstein's colleagues at Booth Medical, Dr. Komerath, and the treating acupuncturist at Booth Medical, mention any low back complaint. Indeed, both of Dr. Komerath's reports specify physical exam findings for the lumbosacral spine of normal range of motion and no tenderness.

As noted above, the submissions document that physiotherapy and acupuncture continued at Booth Medical to 9/13/17 (the records showing 13 distinct dates of service over the three month course of treatment).

On 10/5/17, 11/16/17, 3/5/18 and 5/3/18, Dr. Hibbard saw AB for follow-up psychotherapy sessions. The psychologist's records document continuing complaints of difficulty sleeping, fatigue and difficulty concentrating, as well as vision, balance and coordination issues and depression. As of the last of these visits (5/3/18), the psychologist notes, "The patient was seen following a six week hiatus. He appears fatigued, stressed, and despondent...The patient remains extremely concerned about his ongoing loss of financial security since the accidents."

On 12/13/17, Dr. Nagendra saw AB for a neurology follow-up, the record of which is virtually unchanged from that concerning his initial visit one week post-accident except insofar as updated to incorporate the brain MRI findings of 6/2/5/17, merely parroting the language from the interpreting radiologist's report, i.e. "Two regions of significant cortical atrophy with significant atrophy of the left globus pallidus may be due to traumatic brain injury or less likely statistical variation."

On 6/7/18, Ophthalmologist Dan Levy, MD saw AB for chief complaint described in his record as "Chronic brow strain, Constricted visual fields and recent bumping into corners." He was

referred to Alan Freedman, MD, plastic surgeon for bilateral upper lid Ptosis repair (eyebrow lift), which was carried out on 7/11/18.

On 10/4/18, Dr. Hibbard saw AB for repeat neuropsychological evaluation, noting in her subsequent report (erroneously dated 1/10/18) that she had performed three previous neuropsychological assessments, one following each of the three prior motor vehicle accidents. The reports of these prior assessments were not included in the submissions offered in support of the claim. However, an appended table set forth report data from all test results for comparison. The comparative data values would appear to indicate improvement in certain areas, e.g. verbal memory, said by the psychologist to "possibly reflect a practice effect in that the test materials were identical at each evaluation." Other of the values indicate worsening, e.g. naming and verbal fluency "skills have further declined into the low average range, supporting his self-report of declines in his language fluency skills post his fourth MTBI." In areas where test values remained essentially unchanged, e.g. complex organizational skills, the stated conclusion is of "ongoing cognitive impairment."

In the summary review of the medical records, Dr. Hibbard states that:

> He has been consistently diagnosed (Flanagan, 8/13/10;12/05/1/1;6/21/17;Komerath, 6/08/17;Orenstein, 8/21/17) with repeat Mild TBI/Concussion with increased intensity or scope of Post Concussive Symptoms experienced post each repeat MTBI. The patient has undergone numerous MRIs with DTIs (Hussman, 7/31/10, 12/14/11;11/19/13, 7/10/13; 6/25/17) which document increasing damage to the brain following each subsequent MTBI.

On self-report checklists, increased apathy, disinhibition and marked increase in executive functioning difficulties are indicated, on the basis of which the psychologist reports that "Findings point to further decline in [AB]'s frontal lobe functions post his most recent MTB."

The psychologist concludes that "In my professional opinion, [AB] has experienced additional functional decline after his four MTBI. His drive to maintain his identity as a physician is obvious and overrides his continued struggles to overcome his repeated setbacks after each repeat MTBI."

In his arbitration hearing testimony, AB explained that the cycle of injury, recovery and setback repeated in the series of four (4) rear end collisions had a cumulative effect such that the post-concussion symptoms he experienced progressively increased. He self-rated his symptom severity at all relevant junctures on a scale of 1 to 10.

AB testified that he was occupied as an orthopedic surgeon on a full-time basis until the 2010 auto accident. He has not resumed performing surgery since the 2010 accident. As of the date when he met with the subject accident, 6/7/17, AB was working (in non-surgical capacity) in three medical clinics on a part time basis. He testified that ultimately he was fired from two of these positions as a result of the injuries from the 6/7/17 accident which further impaired his performance. No employment record or proof in any other form was offered to corroborate this testimony.

AB's direct attribution of the loss of his clinic employment positions to the subject accident appears doubtful. In the record of a follow-up visit of 5/4/17 - a month before the subject accident - the Psychologist, Dr. Hibbard, wrote that, "In the past month, [AB] continued to slowly catch up on prior overdue medical documentation, but is now behind due to further slowness in his typing due to his recent fall and chronic fatigue post TBI. Today's session focused on [AB]'s adjustment to working in a clinical work setting in the Bronx. He expressed dismay at routines in the office: overbooking patients, long wait times for each patient to be seen and high patient volume expectations. He remains distressed at the overall disorganization of the office and feels his requests are being ignored." In the record of the follow-up the preceding month, on 4/6/17, the psychologist notes that AB reported that he had already stopped working at one (of the two) clinics located in Flushing.

There were other aspects of AB's testimony that struck me as improbable. For instance, AB testified in an examination under oath, referring to the subject accident, "I have double vision on the spot and I was really scared." (Transcript, 12/14/17, p. 42) Nonetheless, AB elected to check himself out of the emergency room against medical advice and before appropriate testing, a CT scan which the attending personnel proposed to do, could be performed.

Overall, AB's testimony lacked credibility. His recall appeared selective. He resisted giving direct answers to questions at certain critical points. He impressed me as focused more on weaving his answers into his own narrative rather than on simply conveying accurate information. The following excerpt from testimony AB gave at an examination under oath on 12/14/17 (6 months after the subject accident) illustrates the point:

Q. So at the time of the 2011 incident, you were still treating for the 2010 incident?

A. I don't know. I don't remember. But I was getting better… (Transcript, 12/14/17, p. 13)

Hal S. Gutstein, MD, a board certified Neurologist, testified at the arbitration hearing as an expert witness on behalf of claimant. Dr. Gutstein reviewed extensive records of AB's care dating back to 2010 and he examined AB on 8/9/19. Dr. Gutstein testified,consistent with his written report that he "concurs with [AB]'s treating doctors that [AB] is suffering from the well recognized sequelae of a form of traumatic brain injury (TBI) known as Post Concussion Syndrome. (PCS)." He opined further that while most who sustain post concussion syndrome recover within two to three months, in AB's case his initial post concussion syndrome was prolonged by the series of subsequent concussions, each of which may be expected to increase the risk of traumatic brain injury threefold. Dr. Gutstein concludes that the patient's complaints, the clinicians' records and the diagnostic test reports, most particularly the reported results of the 6/25/17 MRI with DTI, evidence that the fourth rear-end auto collision exacerbated AB's post concussion syndrome symptoms, which he concludes are permanent in nature.

Rene Elkin, MD, a board certified Neurologist, testified at the arbitration hearing as an expert witness on behalf of the respondent. Dr. Elkin also reviewed extensive treatment records, including the reports and images of the various MRI studies of the brain and cervical spine performed over the period from 2010 to 2017, and she examined AB on 9/9/19. The imaging films and reports reviewed by Dr. Elkin included MRI of the brain with diffusion tensor imaging performed on 6/25/17, 4/24/14, 7/10/13/ 11/19/12, 12/14/11 and 7/31/10;MRI of the cervical spine on 3/26/14, 2/15/13 and MRI of the lumbar spine on 3/26/14 and 12/21/11.

Dr. Elkin described the neurological examination that she performed as unremarkable. The opinions to which she testified were summarized in her report as follows:

> There are no objective findings for any structural neurological injury attributable to the subject accident. There are no objective findings for any neurological injury that would explain the persistence of his symptoms and his reported limitations. There is no accident-related neurological basis for his ocular symptoms. There is a long history of multiple accidents with multiple symptoms of cognitive impairments and nonspecific symptoms that are of uncertain relationship to the subject accident. The radiological studies provided for my review...reveal nonspecific white matter signals that, in my opinion, have no causal relationship to the subject accident. C-existent hypertension and diabetes mellitus may

result in the presence of T2 signal abnormality on the brain MRI. It is clear that these findings long predate the subject accident.

In her testimony, Dr. Elkin utilized the brain study images in explaining the pertinent findings.

While Dr. Gutstein, pointing to the left sided signal abnormalities, i.e. fractional anisotropy (FA) reduction on the 2017 MRI films as reported by the interpreting radiologist, opined that the asymmetry itself evidenced trauma, Dr. Elkin's position is that all brains are asymmetrical, and that reliance upon such FA findings in the manner that Dr. Gutstein suggests has not been scientifically established and therefore lacks clinical relevance.

There are two broad areas of concern with Dr. Gutstein's analysis:(1) the extent to which it relies upon AB's accuracy as a historian, and (2) the questionable scientific acceptance of Diffusion Tensor Imaging findings in the manner applied by claimant's expert, Dr. Gutstein, in this case. Given my view of AB's overall credibility as a witness, AB's reliability as a historian must be viewed with skepticism. As to the latter point, Dr. Elkin opined, "At the present time there is insufficient evidence supporting the routine clinical use of these advanced neuroimaging techniques for the diagnosis and/or prognostication at the individual patient level with regard to traumatic brain injury." This opinion comports with the holding in Brouard v. Convery, 59 Misc.3d 233, 70 N.Y.S. 3rd 820 (Supreme Suffolk, 2018). While legal authority for the opposite conclusion may also be cited and while I would not view the matter as settled law on the strength of this one trial court decision, I do view Judge Hudson's considered exposition on the issue most persuasive and as offering apt guidance here. I therefore accept Dr. Elkin's opinion as meriting superior evidentiary weight.

So too, on careful review, the assessments reported by the treating psychologist, Dr. Hibbard, essentially rest upon self-reports and psychological tests as to which inherently the results are largely driven by subjective input. Given my unfavorable assessment of this claimant's credibility, I do not view these as persuasive here.

The records of the treating neuro optometrist, Dr. Kapoor, do not include any explicit medical opinion that AB's vision complaints or eye condition worsened or was causally related to the subject accident. As to the surgery to correct Ptosis, AB previously had undergone such surgery in 2007 for drooping of both eyes. He attributed the condition at that time to age and states that no functional impairment resulted, only that the appearance was odd.

Respondent's submissions include the report of a neuropsychiatric evaluation performed by Jefrey Brown, MD, on 6/6/19, 7/7/19, 6/10/19/ 6/14/19/ 6/18/19, 6/25/19 and 8/6/19. In connection with his evaluation, Dr. Brown reviewed extensive records, including medical treatment reports and records dating back to the initial (2010) vehicular accident. Included as Item #1 of the material reviewed is a copy of a press release pertaining to AB's arrest for auto insurance fraud years more than 15 years ago. A news account of a mere arrest of this nature is unduly prejudicial and does not merit evidentiary consideration. Indeed, the separate offer of the news article as an evidentiary submission by respondent was rejected. In my view the reference to such material taints Dr. Brown' s report in the entirety and for that reason I exclude it from consideration.

This claimant has the burden to come forward with objective medical evidence distinguishing his preexisting condition from the injuries claimed to have been caused by this accident. See Pommells v. Perez, 4 N.Y.3d 566, 580, 797 N.Y.S.2d 380 (2005). He has failed to so. To the extent that AB may be understood to have demonstrated that the subject accident resulted in any serious injury within the meaning of threshold statute he has been adequately compensated by the $25,000 already recovered.

ACCORDINGLY,

1. As to AB, claimant has been adequately compensated.

This decision is in full disposition of all SUM benefit claims submitted to this arbitrator.

STATE OF NEW YORK }
}
COUNTY OF QUEENS } SS:

I, Philip J De Bellis Esq., do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

(Philip J De Bellis Esq.)

Date: 02/23/2020

For accidents covered under policies issued or renewed on or after October 1, 1993