

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

East Flatbush Medical PC
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-16-1048-8364

Applicant's File No.

Insurer's Claim File No. 0388862666 2AJ

NAIC No. 29688

ARBITRATION AWARD

I, Michelle Entin, 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 01/04/2018
Declared closed by the arbitrator on 01/04/2018

Michael Krigsfeld, Esq., from The Geller Law Group PC participated by telephone for the Applicant

Nada Saxon, Esq., from Allstate Fire & Casualty Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,044.02**, 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

Whether Applicant is entitled to reimbursement of \$3,044.02 for medical services/diagnostic testing provided to the injured party/Assignor, a 46 year old male, on November 19, 2015, in connection with injuries allegedly sustained in an automobile accident of October 16, 2015.

Respondent has denied this claim based upon its consultant's peer review report. Respondent also contends that the Assignor failed to appear for Independent Medical Examinations.

4. Findings, Conclusions, and Basis Therefor

This decision is based upon the written submissions and oral arguments of the parties.

The Arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. The Arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations. NYCRR 65-4.5 (o) (1) (Regulation 68-D).

I have reviewed the relevant documents submitted to the Electronic Case Folder as of the date of this hearing and for the reasons as set forth below I find that Applicant is not entitled to reimbursement for the medical services at issue.

Assignor, a 46 year old male, was involved in an automobile accident on October 15, 2015, and began treating with East Flatbush Medical, P.C., on October 26, 2015. A copy of the initial consultation report of Brij K. Mittal, M.D., has been provided, and notes chief complaints of neck, mid back and low back pain with radiation of the neck and lower back pain. On November 19, 2015, Assignor was seen by Jean-Baptiste Simeon, M.D., in initial evaluation and the report of same notes complaints of neck and lower back pain with recommended NCV/EMG of the upper and lower extremities. On this date, Assignor underwent EMG/NCV studies of the upper and lower extremities and a copy of the report of testing has been provided.

Applicant now seeks reimbursement for the testing conducted.

Applicant has established its prima facie showing of entitlement to reimbursement by submitting evidentiary proof that it submitted a claim setting forth the fact and amount of the loss sustained and that payment of no-fault benefits were overdue. See *Mary Immaculate Hospital v. Allstate Insurance Co.*, 5 A.D.3d 742, (2d Dept., 2004). The burden then shifts to the Respondent to demonstrate lack of medical necessity for the services at issue. See *Citywide Social Work & Psychological Services, PLLC v. Allstate Ins. Co.*, 8 Misc 3d 1025 A (2005).

Respondent's denial is based upon the peer review report of Stuart Stauber, M.D., which stated that the neurological examination did not reveal any significant findings to indicate a need for the testing. Further, the only positive findings noted was sensory deficit which is subjective in nature. Also noted was the lack of a diagnostic dilemma, and the fact that the diagnosis of radiculopathy is generally clinical in nature. Finally, Dr. Stauber noted the lack of progressive deficits and no change in the treatment plan. Applicant submits a rebuttal to the peer by Dr. Simeon which notes the findings on examination of October 26, 2015, and November 19, 2015, and disagrees with the peer noting that both exams indicated neurological deficits including numbness and tingling and positive testing, reflecting not merely soft tissue injuries. Further noted was that there was a diagnostic dilemma as the testing was ordered to rule out radiculopathy, entrapment/peripheral neuropathy, plexopathy and myopathy.

It is noted, however, that Respondent also submits a general denial based upon the failure of the Assignor to appear for an Independent Medical Examination on January 14, 2016, and February 11, 2016. The two IME's were scheduled with Teresa Habacker, M.D., in orthopedic surgery specialty.

11 NYCRR 65-1.1, Conditions, mandates that, No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage. The eligible injured person shall permit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonable require. The failure to attend an IME constitutes a breach of a condition precedent to coverage under the No-Fault policy, warranting the insurer's denial of claims retroactively to the date of loss. *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 918 N.Y.S.2d 473 (1st Dept. 2011). It is irrelevant if a denial embodying an IME no-show defense is not timely issued, i.e., within the 30-day deadline prescribed by Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1). *Id.*

The appearance at an IME is a condition precedent to the insured liability on the policy, and an insurer may deny a claim retroactively to the date of loss for a claimant's failure to attend IMEs, "when, and as often as, the [insurer] may reasonably require". *Stephen Fogel Psychological, P.C., v. Progressive Cas. Ins. Co.*, 35 AD3d 720 (2nd Dept., 2006).

Respondent submitted copies of the IME scheduling notices which contain the requisite language. Further, Respondent submits proof of the non-appearance by affidavit of Dr. Habacker, and proof of mailing of the letters.

It is uncontroverted that the Assignor did not appear for the IME's as scheduled, and Applicant has submitted no evidence to the contrary. Further, this issue has already been decided in favor of the Respondent in the linked matter of *New Age Acupuncture PC v. Allstate Insurance Company*, AAA 17-16-1034-7450, by Arbitrator Ann Lorraine Russo, which found that Assignor had violated a condition precedent. Moreover, Arbitrator Russo stated that the affidavits by the Respondent's medical providers provided personal knowledge of the failure of the patient to appear for the independent medical examinations.

Based upon the foregoing, and the facts herein, I find that there has been a violation of the policy conditions and the denial of Respondent is sustained.

This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.

DECISION: AWARD IN FAVOR OF RESPONDENT. APPLICANT'S CLAIM IS DENIED IN ITS ENTIRETY.

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 New York
SS :
County of New York

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

02/17/2018
(Dated)

Michelle Entin

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:
2b708450320facbb4753842429e7b6f5

Electronically Signed

Your name: Michelle Entin
Signed on: 02/17/2018