

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Hector Melgar PT PC
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-17-1054-0459

Applicant's File No. 1941714

Insurer's Claim File No. 0433126315

NAIC No. 19232

ARBITRATION AWARD

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 07/06/2018
Declared closed by the arbitrator on 07/09/2018

Justin Skaferowsky, Esq. from Israel, Israel & Purdy, LLP participated in person for the Applicant

Lindbergh Hmung, Esq. from Smith & Brink, PC participated in person for the Respondent

2. The amount claimed in the Arbitration Request, \$ **1,328.25**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

Applicant stipulated that Respondent's NF-10/Denial of Claim forms were timely issued in accordance with 11 NYCRR 65-3.8(a)(1).

3. Summary of Issues in Dispute

The claimant was the 47 year-old female restrained driver of a motor vehicle that was involved in an accident on 10/19/16. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. At issue are physical therapy services provided by Applicant 10/24/16-11/25/16. Respondent timely denied payment

based on the assignor's failure to appear for scheduled Independent Medical Examination (IME) appointments.

4. Findings, Conclusions, and Basis Therefor

THIS HEARING WAS CONDUCTED USING THE ELECTRONIC CASE FOLDER MAINTAINED BY THE AMERICAN ARBITRATION ASSOCIATION. ALL DOCUMENTS CONTAINED IN THAT FOLDER ARE MADE PART OF THE RECORD OF THIS HEARING.

THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED.

Based on a review of the documentary evidence, this claim is decided as follows:

An applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

The claimant was the 47 year-old female restrained driver of a motor vehicle that was involved in an accident on 10/19/16. The claimant reportedly injured her neck, right shoulder, upper back, lower back, and right knee. There was no reported loss of consciousness. There were no reported lacerations or fractures. Following the accident the claimant was transported to Plainview Hospital where she was evaluated, treated, and released. On 10/21/16 the claimant presented to Patrick Hannan, D.C. of Huntington Regional Chiropractic and was initiated on chiropractic treatment. On 10/24/16 the claimant presented to Hector Melgar, PT (Applicant) and was initiated on physical therapy. On 10/28/16 the claimant presented to Alexios Apazidis, M.D. with complaints of neck, low back, and right knee pain. Examination revealed "right knee has MCL and pes bursa tenderness, pain with valgus stress, and limited ROM. Severely swollen bursa with ecchymosis. Cervical: moderate spasm and tenderness, with normal range of motion in flexion, extension, side-bending, and left and right lateral rotation, negative Spurling test. 5/5 strength testing, intact sensation and 2+ Deep Tendon Reflex testing symmetrical bilaterally." Dr. Apazidis prescribed Amrix 15mg, Nalfon 400mg, and DME (consisting of a TENS unit and a lumbar support corset). The claimant was recommended for physical therapy, computerized range of motion study, a MSKUS test for affected peripheral joints to rule out capsular, ligamentous, and tendinous tissue injury and monitor treatment. Dr. Apazidis conducted a right knee Musculoskeletal Ultra Sound (MSKUS) Test producing an impression of sonographic evidence of abnormal indicative of a localized sub-acute inflammatory process and tendinopathic process and evidence of abnormal indicative a localized sub-acute edematous process or possible

fiber tear. Dr. Apazidis also conducted computerized range of motion and manual muscle testing (ROM/MMT). On 11/9/16 Dr. Apazidis conducted a follow-up examination that was substantially similar to that of 10/28/16. The 11/13/16 right knee MRI interpreted by Mark Decker, M.D. produced an impression of horizontal tear posterior horn medial meniscus with underlying meniscal degeneration, lateral subluxation patella with thickened medial plica with cartilage fissure and softening lateral of the patellar apex, and incompletely evaluated soft tissue lesion over the anterior medial proximal tibia; MRI of the tibia and fibula suggested. The 11/20/16 cervical spine MRI interpreted by Marc Katzman, M.D. produced an impression of straightening of the normal cervical lordosis is evidence of reflex muscle spasm, C2/3 subligamentous disc bulging, C3/4 focal central subligamentous disc herniation superimposed on peripheral disc bulging with abutment of the ventral cord, C4/5 subligamentous disc bulge approaching the ventral cord, C5/6 broad central subligamentous disc herniation impressing on the ventral cord, and C6/7 subligamentous disc bulging abutting the ventral cord. The 11/20/16 lumbar spine MRI interpreted by Marc Katzman, M.D. produced an impression of levoscoliotic curvature of the lumbar spine, straightening of the normal lumbar lordosis, L3/4 broad-based central/left paracentral disc herniation superimposed on peripheral disc bulging with impression on the ventral thecal sac, L4/5 focal central disc herniation with annular tear impressing on the ventral thecal sac and with abutment of both traversing L5 nerve roots within the lateral recesses, L5/S1 focal central disc herniation with annular fissure abutting the ventral thecal sac, and left sided foraminal stenosis due to a left foraminal disc herniation impinging the undersurface of the exiting left L5 nerve root. On 11/23/16 Dr. Apazidis conducted a follow-up examination and performed cervical trigger point injections. On 11/30/16 the claimant presented to Richard M. Seldes, M.D. of Deer Park Orthopedics for an orthopedic consultation in regard to her right knee. Dr. Seldes determined "with respect to the knee, given the fact she has persistent symptoms and failed therapy next step would be injection or surgery. She states she is interested in try an injection. She will continue with therapy and try an injection. She will follow up in one month. If symptoms persist despite therapy and injection, the last step would be arthroscopy of the right knee." On 12/7/16 Dr. Apazidis conducted a follow-up examination and performed a right knee steroid injection under ultrasonic guidance. On 12/21/16 Dr. Apazidis conducted a follow-up examination and performed L4-L5 interlaminar epidural steroid injections under ultrasonic guidance. On 1/18/17 the claimant underwent lower extremities EMG/NCV testing, the resultant impression not being in evidence. On 2/7/17 the claimant was required to present to Michael N. Berke, D.C. for an independent chiropractic examination that was purportedly negative and Respondent terminated chiropractic and massage benefits as of 2/27/17. On 4/24/17 the claimant presented to Timothy Mosomillo, D.O. of Pavilion Medical, P.C. for an examination and the claimant was recommended for upper extremities and lower extremities EMG/NCV; the upper was performed the same day by Hector Melgar, PT, that suggested evidence consistent with "an abnormal study. There is electrophysiologic evidence suggestive of acute and sub-acute axonal pathology affecting C6 nerve root level on the right side. There is also electrophysiologic evidence suggestive of a mild sensory demyelinating neuropathic process affecting the bilateral median nerve at or about the wrist (Carpal Tunnel). There is no electrophysiologic evidence suggestive of any polyneuropathic or myopathic process." On 6/12/17 Dr. Mosomillo conducted a follow-up examination. On 7/10/17 Dr. Mosomillo conducted a follow-up examination

and the claimant was recommended for a pain management consultation. At issue are physical therapy services provided by Applicant 10/24/16-11/25/16.

Respondent timely denied the bills (in light of verification that was requested and received) at issue based on the assignor's failure to appear for properly scheduled Acupuncture IMEs on two days, on 5/27/17 and 6/10/17. Respondent submitted a letter dated 5/18/17 for the assignor to appear at an IME to be conducted by Martin P. Locasio, L.Ac. on 5/27/17. After the assignor did not appear for the IME on 5/27/17, Respondent sent a letter dated 5/31/17 to reschedule the IME to be conducted by Martin P. Locasio, L.Ac. for 6/10/17.

The mandatory personal injury endorsement (11 NYCRR 65.1.1) provides that the eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the insurance company when and as often as the insurer may reasonably require. The appearance of an insured or eligible injured party for an IME at any time is a condition precedent to the insurer's liability on the policy and the failure to do so may be the basis for the denial of benefits.

The assignor is provided two opportunities to appear for a medical examination upon its initial scheduling and upon a rescheduling. That interpretation is derived from the regulations of the New York State Insurance department at 11 NYCRR 65.15. The scheduling of a medical examination is specifically identified as a verification request, in sec. 65.15(d)(3). By scheduling a physical examination, the carrier is seeking verification as to the patient's physical condition. When the patient fails to comply with the original request for the examination, sec. 65.15(e)(2) requires that, within a certain time frame, the insurance carrier must "follow up with the party from whom the verification was originally requested, either by a telephone call properly documented in the file, or by mail."

A defense that an assignor failed to appear at an IME requires proof of such. See, *Careplus Medical Supply, Inc. v. AutoOne Ins. Co.*, 24 Misc.3d 132(A), 2009 N.Y. Slip Op. 6 51372(U), 2009 WL 1926843 (App. Term 9th & 10th Dists. June 29, 2009); *Daras v. GEICO Ins. Co.*, 22 Misc.3d 141(A), 881 N.Y.S.2d 362 (Table), 2009 N.Y. Slip Op. 50438(U), 2009 WL 679491 (App. Term 2d, 11th & 13th Dists. Mar. 10, 2009). In *Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 35 AD3d 720, the Appellate Division held that there is a two part test that insurers must pass in order to establish, *prima facie*, that an assignor or a provider as an insured's assignee, failed to appear. The insurer must show that it mailed the schedule notices and that the requested party failed to appear.

Respondent can establish mailing by submission of proof of mailing or an affidavit credibly stating that notices were mailed to assignor; or submission of an affidavit describing in detail a mailing procedure that ensures that notices are mailed (see *New York & Presbyt Hosp. v. Allstate Ins. Co.*, 29 AD2d 547. Additionally, non-appearance is established through an affidavit of a person with knowledge of the non-appearance. In *W & Z Acupuncture, P.C. v. Amex Assur Co.*, 24 Misc 3d 142(A), the court reversed the

trial court and granted summary judgment dismissing an action based on a claimant's failure to attend scheduled EUOs, holding that an affidavit from the attorney retained to conduct the EUO was sufficient to establish the non-appearance.

Respondent submitted the sworn affidavit of Jean Rony Pressoir (Administrator for D&D Associates who was retained by Respondent to schedule and arrange for the IMEs at issue). Ms. Pressoir sets forth the mailing procedures of D&D Associates that ensures that the IME scheduling notices were mailed. This affidavit establishes that the IME scheduling letters were properly mailed. It appears that the scheduling letters were correctly addressed. The IME scheduling letters contained all the requisite information (the date, time, place of the examination, and that loss of earnings and expenses would be reimbursed). I am persuaded that Respondent submitted credible proof the IMEs were scheduled. Both IME scheduling letters were sent to the assignor and her counsel (Edelman, Krasin & Jaye). Respondent also submitted two sworn statements signed by Martin P. Locasio, L.Ac. as proof of the assignor's failure to appear on both scheduled dates.

Applicant's counsel argued that the first IME appointment was inconveniently scheduled for 5/27/17 which was the Saturday before Memorial Day. While this is a compelling argument I do not find it persuasive. For the year 2017, May 27 was not a federal or state holiday observed in New York. If the claimant was unavailable that weekend she could have contacted D&D Associates at the number provided (516-326-8800) to reschedule the appointment as the IME scheduling letter advised. Applicant's counsel also argued that mailing of the second IME scheduling letter on 5/31/17 could have provided short notice of the second IME appointment on 6/10/17. According to Ms. Pressoir's affidavit the 5/31/17 scheduling letter was mailed ten days before the 6/10/17 IME appointment, I do not find that insufficient notice was provided for the 6/10/17 IME. Applicant's counsel also argued that there was no proof submitted that the claimant had received acupuncture treatment; I find this proof was not necessary here to establish the defense that the assignor failed to appear at an IME. Applicant's counsel also argued that Martin P. Locasio, L.Ac.'s sworn statements were not notarized as required by CPLR 2106. I note the relaxed rules of evidence that befits arbitration. I also note that on March 3, 2015 the Appellate Division, First Department issued a decision in *Auto One Ins. Co. v. Hillside Chiropractic, P.C.*, 2015 NY Slip Op. 01750 (1d Dept. 2015). The Appellate Division, First Department ruled that "the no-fault arbitrator's decision to adhere, with strict conformity, to the evidentiary rule set forth in CPLR 2106, although such conformity is not required (see 11 NYCRR § 65-4.5[o] [1] ["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."], was arbitrary. Accordingly, the award must be vacated (see *In re Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 211 [1981])."

I am persuaded that Respondent's evidence establishes that the Respondent complied with the requirements of the case law. *Daras v. Geico Insurance Company*, 22 Misc 3d 141(A), 2009 NY Slip Op. 50438 (U) required a Respondent to establish by proof in admissible form that the IME requests were timely mailed to the assignor and that the assignor failed to appear. I am persuaded that Respondent has established that a condition precedent to coverage was not satisfied.

Accordingly, the 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 Nassau

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

08/06/2018

(Dated)

Charles Blattberg

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:
9fe0f8814b02bf09b4c7c621a44a9bed

Electronically Signed

Your name: Charles Blattberg
Signed on: 08/06/2018