

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

LN Medical Diagnostic PC  
(Applicant)

- and -

American Transit Insurance Company  
(Respondent)

AAA Case No. 17-17-1080-0297

Applicant's File No. n/a

Insurer's Claim File No. 669840-02

NAIC No. 16616

**ARBITRATION AWARD**

I, Bryan Hiller, 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 07/09/2019  
Declared closed by the arbitrator on 07/09/2019

Melissa Scotti, Esq. from Costella & Gordon LLP participated in person for the  
**Applicant**

Erisa Ahmed, Esq. from American Transit Insurance Company participated in person for  
the **Respondent**

2. The amount claimed in the Arbitration Request, **\$ 1,900.00**, 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 the Assignor failed to appear for two scheduled Independent Medical Examinations (IMEs) thereby vitiating the obligation of the Respondent to provide no fault benefits?

4. Findings, Conclusions, and Basis Therefor

This arbitration arises out of medical treatment for the Assignor, a then 51 year old male driver, related to injuries sustained in a motor vehicle accident that occurred on July 22,

216. Applicant seeks reimbursement for pf-NCS testing performed on the Assignor on September 14, 2016. Respondent timely denied payment of the services claiming that the Assignor violated the conditions of the insurance policy by failing to appear for scheduled IMEs.

Applicant has established its prima facie case with proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see Insurance Law § 5106 a; *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; *Amaze Med. Supply v. Eagle Ins. Co.*, 2 Misc. 3d 128A, 784 N.Y.S. 2d 918, 2003 NY Slip Op 51701U [App Term, 2d & 11th Jud Dists]). The burden shifts to the insurer to prove that the services were not medically necessary.

It is well settled that the appearance of the eligible injured person or his or her assignee at an IME is a condition precedent to an insurer's liability on a policy (see *Mega Billing, Inc. v. State Farm Fire & Casualty Company*, 35 Misc.3d 145(A), 2012 N.Y. Slip Op. 51014(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); *Viviane Etienne Medical Care, P.C v. State Farm Mutual Automobile Ins. Co.*, 35 Misc.3d 127(A), 2012 N.Y. Slip Op. 50589(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012)).

Thus, it follows that if an Assignor fails to comply with an insurer's timely and valid request for an IME, so long as the request strictly complies with the governing regulations, the insurer is entitled to dismissal of an action seeking no-fault benefits (see *Dover Acupuncture, P.C. v. State Farm Mutual Auto Ins. Co.*, 28 Misc.3d 140(A), 2010 N.Y. Slip Op. 51605(U) (App. Term 1st Dept. 2010); *Great Wall Acupuncture, P.C. v. New York Central Mutual Fire Insurance Company*, 22 Misc.3d 136(A), 2009 N.Y. Slip Op. 50294(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2009)).

In order for Respondent to make a prima facie showing of its defense based upon a assignor's failure to appear at scheduled IMEs, it has to demonstrate that its initial and follow-up requests for verification were timely issued pursuant to 11 NYCRR Section 65-3.5(b) and 65-3.6(b) and establish that the assignor failed to appear at the IMEs (see *Essential Acupuncture Services, P.C. v. Ameriprise Auto & Home Ins. Co.*, 2012 N.Y. Slip Op. 52404(U) (App. Term 2nd, 11th and 13<sup>th</sup> Jud. Dists. 2012); *Urban Radiology, P.C. v. Clarendon National Insurance Company*, 31 Misc.3d 132(A), 2011 N.Y. Slip Op. 50601(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2011); *Advanced Medical, P.C. v. Utica Mutual Insurance Company*, 23 Misc.3d 141(A), 2009 N.Y. Slip Op. 51023(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2009)).

Initially, Applicant argues that the substantive argument of this claim has already been decided, and the doctrine of collateral estoppel applies.

The doctrines of res judicata and collateral estoppel are fully applicable to arbitration proceedings (see *American Ins. Co., v. Messinger*, 43 N.Y.2d 184, 401 N.Y.S.2d 36 (1977); *Clemens v. Apple*, 65 N.Y.2d 746, 492 N.Y.S.2d 20 (1985)). Collateral estoppel is a rule of justice and fairness which mandates that issues once tried should not be

re-litigated by a party in a subsequent proceeding who had been afforded a full and fair opportunity to contest the issues raised in a prior proceeding (see *Commissioners of State Ins. Fund v. Low*, 3 N.Y.2d 590, 595, 170 N.Y.S.2d 795, 800 (1958)).

In order for the doctrine to apply, however, it must be first shown that the party against whom collateral estoppel is sought had a full and fair opportunity to contest the determination said to be dispositive of the instant controversy. Moreover, the issue in the prior action must be identical, and thus decisive, to the issue in the action for which application of the doctrine is sought (see *Gilberg v. Barbieri*, 53 N.Y. 2d 285, 441 N.Y.S. 2d 49 (1981); *Schwartz v. Public Administrator of County of Bronx*, 24 N.Y.2d 65, 68, 298 N.Y.S.2d 955, 958 (1969)). One of the primary purposes of the doctrine of *res judicata* is grounded in public policy concerns intended to insure finality, prevent vexatious litigation and promote judicial economy (see *Matter of Hodes v. Axelrod*, 70 N.Y.2d 364 (1987); *Matter of Reilly v. Reid*, 45 N.Y.2d 24 (1978)). The principles of *res judicata* require that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (see *O'Brien v. City of Syracuse*, 54 N.Y.2d 353 (1981)). 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 (see *City School Dist. V. Tonawanda Education Assoc.*, 63 N.Y.2d 846, 482 N.Y.S.2d 258 (1984); *Board of Education v. Patchogue-Medford Congress of Teachers*, 48 N.Y.2d 812, 424 N.Y.S.2d 122 (1979); *Matter of Springs Cotton Mills [Buster Boy Suit Co.]*, 275 App. Div. 196, 88 N.Y.S.2d 295 (App. Div., 1st Dept - 1949) *affd.* without opinion. 300 N.Y. 586, 89 N.E.2d 877 (1949); *Melendez v. Budget Rent-A-Car*, 7 Misc. 3d 585, 588, 794 N.Y.S.2d 830 (2005)).

Under AAA case #17-17-1064-9356, this Arbitrator determined that the Assignor's failure to appear for the properly scheduled IMEs was supported by the proper documentary evidence and Applicant failed to offer any evidence to refute the Respondent's assertions that the Assignor failed to appear. This Arbitrator denied Applicant's claim in its entirety based on the Assignor's policy violation. In relevant parts, this Arbitrator said:

"In support of its denial and defense, the Respondent has submitted evidence that on November 14, 2016, vendor for the Respondent, ExamWorks Inc., sent a letter to the Assignor at the address as listed on the NF-2 form and Assignment of Benefit as well as to his attorney. The letter allegedly was to notify the Assignor of chiropractic IME with Robert Snitkoff DC on November 29, 2016 at 3:15 PM at his office located at 2114 Williamsbridge Road, Bronx, NY 10461. A second letter was sent by ExamWorks Inc. on December 1, 2016 to the Assignor and his attorney to notify the Assignor that the chiropractic IME was being rescheduled for December 22, 2016 at 3:45 PM with Brian Wolin DC at his office located at 2114 Williamsbridge Road, Bronx, NY 10461. Again, Respondent alleged the Assignor failed to appear and Respondent denied the Assignor's No-fault benefits as of the date of loss, based upon his failure to appear for the examinations.

To establish proof of mailing of the scheduling letters, Respondent submitted the Affidavit of ExamWorks Inc. supervisor, Tracy Simpson, establishing the process for mailing the letters and personal knowledge of the mailing of the letters. It discusses personal knowledge of the mailing of each letter. Additionally, Respondent submitted the Affidavit of Clerical Quality Assurance Coordinator Manager for ExamWorks Mike Ficalora who also discussed personal knowledge of the mailing of the scheduling letters.

To establish the failure to appear, Respondent submitted the signed affidavits of Robert Snitkoff DC and Brian Wolin DC noting that they were respectively present on November 29, 2016 and December 22, 2016 and were personally aware of the Assignor's failure to appear.

I find that the Assignor's failure to appear for two properly scheduled IMEs violated a "condition of coverage". Applicant has not done anything to substantiate their claim that the scheduling letter was not received as the Respondent provided valid proof of mailing of the letter and the other letters were confirmed received by the Assignor. As such, this claim is denied in its entirety."

That case discussed the same Independent Medical Examinations by Dr. Snitkoff and Dr. Wolin and the same defense. The Respondent and attorneys were the same for that case. Applicant's records had a full and fair opportunity to contest the determination said to be dispositive of the instant controversy. The seminal issue presented herein is identical to the issue(s) considered by this Arbitrator under AAA Case #17-17-1064-9356. While the services at issue are different, the defense is fully the same. No additional evidence was provided by the Applicant to support the fact that there was not an actual no-show.

Therefore, I must conclude that the Assignor's failure to appear for two properly scheduled IMEs violated a "condition of coverage". As such, this 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, Bryan Hiller, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

07/09/2019  
(Dated)

Bryan Hiller

#### **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:**  
bdc1adb62b1f6108a603f0dbe7ae5a9f

### **Electronically Signed**

Your name: Bryan Hiller  
Signed on: 07/09/2019