

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Garden State Neuro Stimulation, PLLC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-18-1108-4060
Applicant's File No.	18-003471
Insurer's Claim File No.	0476515460101092
NAIC No.	35882

ARBITRATION AWARD

I, Nada Saxon, 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 09/11/2019
Declared closed by the arbitrator on 09/11/2019

Steven Super from Super & Licatesi P.C. participated in person for the Applicant

Naela Hasan from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,523.48**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that Applicant established a prima facie case of entitlement to No-Fault benefits and to the timeliness of the Respondent's denials.

3. Summary of Issues in Dispute

The Assignor (RE) was a 75-year-old male involved in an accident on 12/2/17. Applicant seeks reimbursement for treatment provided from 2/26/18-4/16/18.

Respondent timely denied the claims pursuant to Assignor's alleged failure to appear for IMEs on 2/20/18 and 3/27/18.

The issue is whether Respondent established its defense of IME No-Show.

4. Findings, Conclusions, and Basis Therefor

This case was conducted using the documents submitted by the parties in the ADR Center, maintained by the American Arbitration Association, and the oral arguments of the parties. Any documents in the ADR Center are hereby incorporated into this hearing. I have reviewed all the relevant documents. No witnesses testified at this hearing.

11 NYCRR 65-4.5 (o) (1) (Regulation 68-D), reads as follows: 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.

Once arbitration gets underway, its conduct is not governed by the substantive or evidentiary rules which commonly prevail in courts of law; rather, the constraints on the arbitral authority are those measured by the bounds of rationality. Matter of Board of Education of Norwood-Norfolk Central School District v. Hess, 49 N.Y.2d 145, 152, 424 N.Y.S.2d 389, 391 (1979).

Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

This case is one of two matters heard before me on 9/11/19 (17-18-1107-6023 and 17-18-1108-4060), involving the same Assignor and same defense. The evidence in both matters will be considered as a whole.

IME No-Show

The insurer is entitled to judgment where it proves that two separate requests for an IME were duly mailed to the assignor and the latter failed to appear on either of the dates. Apollo Chiropractic Care, P.C. v. Praetorian Ins. Co., 27 Misc.3d 139(A), 932 N.Y.S.2d 420 (Table), 2010 N.Y. Slip Op. 50911(U), 2010 WL 2026636 (App. Term 1st Dept. May 24, 2010).

Where a health care provider's assignor failed to attend IMEs, dismissal of the provider's claim is appropriate. Vega Chiropractic, P.C. v. Clarendon National Ins. Co., 25 Misc.3d 144(A), 906 N.Y.S.2d 776 (Table), 2009 N.Y. Slip Op. 52536(U), 2009 WL 4840230 (App. Term 2d, 11th & 13th Dists. Aug. 31, 2009). A defense that an assignor failed to appear at an IME requires proof of such. E.g., Careplus Medical Supply, Inc. v. AutoOne Ins. Co., 24 Misc.3d 132(A), 890 N.Y.S.2d 368 (Table), 2009 N.Y. Slip Op. 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).

It is incumbent upon the insurer to establish that the scheduling letters were properly and timely addressed and mailed, see SK Prime Medical Supply, Inc. v. Hertz Claim Management Corp., 37 Misc.3d 138(A), 2012 N.Y. Slip Op. 52192(U) (App. Term 1st Dept. 2012); Ortech Express Corp. v. MVAIC, 37 Misc.3d 128(A), 2012 N.Y. Slip Op. 51913(U) (App. Term 1st Dept. 2012); Perfect Point Acupuncture, P.C. v. Auto One Insurance Company, 36 Misc.3d 140(A), 2012 N.Y. Slip Op. 51486(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012), and contained the required notice regarding reimbursement of travel expenses and lost wages, see Matter of Venditti (General Acc. Ins.), 236 A.D.2d 759 (3rd Dept. 1997) (IME requests were "null and void" in that they failed to advise petitioner that he would be reimbursed for loss earnings and transportation expenses in complying therewith).

In addition, an insurer can meet its burden proving that the injured person failed to attend IMEs by an Affidavit or statement from the medical professional who was to perform the IME. See By MD, P.C. v. New York Central Mutual Fire Ins. Co., 2014 N.Y. Slip Op. 51232(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014); East 75th Street Diagnostic Imaging v. New York Central Mutual Fire Ins. Co., 35 Misc.3d 126(A), 2012 N.Y. Slip Op. 50564(U) (App. Term 9th and 10th Jud.Dists. 2012); Shoreline Healing Acupuncture Group v. American Transit Insurance Company, 32 Misc.3d 137(A), 2011 N.Y. Slip Op. 51531(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2011), Radiology Today, P.C. v. Geico, 25 Misc.3d 133(A), 2009 N.Y. Slip Op. 52208(U) (App. Term 2nd, 11th and 13th Jud.Dists. 2009).

"While plaintiff argues that defendant did not mail its IME scheduling letters to the correct address, defendant sufficiently demonstrated that it addressed the letters to plaintiff's assignor, defendant's insured, at the address provided to it by its insured. In addition, defendant demonstrated that copies of the IME scheduling letters had been addressed to, and received by, plaintiff's assignor's attorney" See Rainbow Supply of N.Y., Inc. v Progressive Northeastern Ins. Co., 2013 NY Slip Op 51729(U)(App. Term 2^d Dept. 2013).

Respondent has submitted persuasive proof in support of its IME No-Show defense. Respondent submits copies of letters sent to Assignor requesting he appear for an IME on 2/20/18 and 3/27/18.

Applicant argues the letters were sent to the incorrect address. The letters were address to Assignor at P.O. Box 200, Marlboro, NY 12542. Applicant argues Assignor's NF-2 indicates his address is *P.O. Box 200, 566 Lattintown Road, Marlboro, NY 12542*.

Assignor's NF-2, box 3, lists the address P.O. Box 200, Marlboro, NY 12542, with 566 Lattintown Road added directly underneath. The general name and address section of

Assignor's NF-2 is blank. Assignor's NF-1A lists P.O. Box 200, 566 Lattintown Road, Marlboro, NY 12542 under the general name and address section, but lists only P.O. Box 200, Marlboro, NY 12542 under the policyholder section of form NF-1A. I note that Assignor is also the policyholder.

The Court in *Sunlight Med. Care, P.C. v Esurance Ins. Co.*, 49 Misc 3d 130[A], 2015 NY Slip Op 51410[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]), held:

Plaintiff's sole argument on appeal is that Esurance mailed the EUO scheduling letters to the wrong address, and therefore that plaintiff's motion should have been granted and Esurance's cross motion denied. However, the record demonstrates conclusively that Esurance mailed the letters to the address provided by plaintiff on its bills and by plaintiff's assignor on both her prescribed application for no-fault benefits (NF-2) and her signed assignment of benefits. Thus, plaintiff has not demonstrated that Esurance did not give the assignor proper notice of the EUOs. Consequently, the branch of plaintiff's motion seeking summary judgment against Esurance was properly denied and Esurance's cross motion for summary judgment dismissing so much of the complaint as was asserted against it was properly granted.

Citing to *Sunlight Med. Care* in the recent case of *Brand Med. Supply Inc. V. Repwest Ins. Co.* 2019 NY Slip Op 51183(U) [64 Misc 3d 138(A)] (App. Term 2d Dept. 2019), the Court held:

Plaintiff's sole argument on appeal is that defendant mailed the IME scheduling letters to the assignor's address without using an apartment number, and that, therefore, that defendant's motion should have been denied. However, the record demonstrates conclusively that the address to which defendant mailed the letters matched the address provided by plaintiff on its bill and by plaintiff's assignor on the assignor's application for no-fault benefits (NF-2). Thus, plaintiff has not demonstrated that defendant did not give the assignor proper notice of the IMEs (See *Sunlight Med. Care, P.C. v Esurance Ins. Co.*, 49 Misc 3d 130[A], 2015 NY Slip Op 51410[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]).

I disagree with Applicant's contention that Respondent should have sent the letters to P.O. Box 200, 566 Lattintown Road, Marlboro, NY 12542, as this appears to be a combination of two separate addresses, rather than one correct address.

Additional evidence indicates Assignor's address is P.O. Box 200, Marlboro, NY 12542. This includes the envelope in which Assignor sent his NF-1A and NF-2 forms, which lists the return address on the outside as P.O. Box 200, Marlboro, NY 12542. Applicant's bills also list Assignor's address as P.O. Box 200, Marlboro, NY 12542. The assignment of benefits form, signed by Assignor and dated 12/15/17, also lists Assignor's address as P.O. Box 200, Marlboro, NY 12542.

Furthermore, a google map search of the address *P.O. Box 200, 566 Lattintown Road, Marlboro, NY 12542* does not reveal a correct physical address; whereas google map searches of P.O. Box 200, Marlboro, NY 12542 and 566 Lattintown Road, Marlboro, NY 12542, separately, reveal two different physical addresses. As such, judicial notice is taken that these are two separate addresses.

Based on the totality of the credible evidence, I find that Respondent correctly addressed the IME letters to Assignor at P.O. Box 200, Marlboro, NY 12542.

I reject Applicant's contention that Respondent should have written the address exactly as it was written by Assignor in box 3 of his NF-2. Respondent should not be required to mail the notice to an incorrect address because Assignor wrote it incorrectly, or simply shortened the way he reported two separate addresses. Such a finding would negate the central issue, which is adequate notice.

Furthermore, I reject Applicant's alternative contention that Respondent was required to send the notice to both addresses. I do not find such a requirement in the regulations or the controlling case law. The letters were properly sent to Assignor pursuant to the address on his NF-2, Applicant's bill, and Assignment of Benefits form.

Respondent also submits proof of mailing corresponding to each letter, with USPS stamped postage corresponding to the date of each letter (1/30/18 and 2/22/18), demonstrating sufficient proof of mailing of the IME notices. As such, I find Respondent gave Assignor proper notice of the IME.

Respondent also submits affirmations from Dr. Edward Mills, who was scheduled to perform the IMEs on each date, attesting that Assignor failed to appear on the designated date, time and place. I find Dr. Mill's affirmations sufficient to establish Assignor failed to appear.

Therefore, I find Respondent has persuasively established its IME No-Show defense. Applicant has not submitted proof in rebuttal of Respondent's defense.

Based on the foregoing, Applicant's claims are denied.

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

09/13/2019

(Dated)

Nada Saxon

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:
73e1bb9d0fde3a85979aa947e8566a88

Electronically Signed

Your name: Nada Saxon
Signed on: 09/13/2019