

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Spine Specialists
(Applicant)

- and -

MTA Bus Company
(Respondent)

AAA Case No. 17-18-1098-3379
Applicant's File No. 2115273
Insurer's Claim File No. 14-0011680-002-
NAIC No. Self-Insured

ARBITRATION AWARD

I, Henry Sawits, 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: the patient.

1. Hearing(s) held on 11/19/2019
Declared closed by the arbitrator on 11/24/2019

Gary Pustel, Esq. from Israel, Israel & Purdy, LLP (Great Neck) participated in person for the Applicant

Myrna Archer from MTA Bus Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 185.92**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant also is seeking \$2.74 in interest and attorney's fees relating to Respondent's late payment of \$274.08 as reimbursement for Applicant's claims for reimbursement for dates of service October 16, 2014 and March 26, 2015.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties agreed that the amount of interest that Applicant is entitled to receive as a result of Respondent's late payment of \$274.08 as reimbursement for dates of service October 16, 2014 and March 26, 2015, is in the amount of \$2.74.

3. Summary of Issues in Dispute

The issues in this arbitration are (1) whether Respondent's late payment of \$274.08 for Applicant's claims for reimbursement, in the total amount of \$274.08, for dates of service October 16, 2014 and March 26, 2015, entitles Applicant to interest and the award of attorney's fees and (2) whether Applicant's claims for reimbursement, in the total amount of \$185.92, for office consultations on dates of service January 18, 2018 and March 29, 2018 were properly denied based on the patient's failure to appear for independent medical examinations?

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the Hearing.

This arbitration arises out of treatment of a thirty-six-year old female for injuries sustained in a motor vehicle accident occurring on May 6, 2014. Applicant seeks reimbursement of interest and attorney's fees for the late payment made by Respondent, in the amount of \$274.08, for dates of service October 16, 2014 and March 26, 2015. In this regard, the Respondent actually reimbursed the Applicant in full for these services in the amount of \$274.08. However that payment was made two weeks overdue. Both parties agreed that Applicant was entitled to 1/2 month's interest of \$2.74. However, Applicant asserted that according to 11 N.Y.C.R.R. § 65-3.10(a) it was entitled to attorney's fees of 20% of the amount paid plus interest (\$274.08 + \$2.74) because of the late payment. Respondent disagreed with Applicant's assertion.

11 N.Y.C.R.R. § 65-3.10 (a) provides the following:

"An applicant or an assignee shall be entitled to recover their attorney's fees, for services necessarily performed in connection with securing payment, if a valid claim or portion thereof was denied or overdue. If such a claim was initially denied and subsequently paid by the insurer, the attorney's fee shall be \$80. **If such a claim was overdue but not denied, the attorney's fee shall be equal to 20 percent of the amount of the first-party benefits and any additional first-party benefits plus interest payable pursuant to section 65-3.9 of this Subpart, subject to a maximum fee of \$60.**" (Emphasis Added).

In view of the fact that this claim was overdue and not initially denied I find that Applicant is entitled to an Award of interest of \$2.74 (as the parties have agreed that this is the appropriate amount of interest) and attorney's fees of 20% of \$276.82 (\$274.08 + \$2.74) or \$55.36.

Applicant also seeks reimbursement, in the total amount of \$185.92, for office consultations on January 18, 2018 (billed at \$92.94) and March 29, 2018 (billed at \$92.98).

Respondent issued timely denials denying reimbursement based on the assertion that the patient failed to appear at properly scheduled independent medical examinations.

The patient was injured in an automobile accident on May 6, 2014 and thereafter came under the care and treatment of Applicant.

It is Applicant's *prima facie* obligation to establish its entitlement to payment for each service for which reimbursement is sought.

It is well settled that a health care provider establishes its *prima facie* entitlement to payment as a matter of law by 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]).

11 N.Y.C.R.R. § 65-4.5 (o) (1) provides, in part, as follows:

"(o) *Evidence.* (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. 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". (Emphasis Added).

11 N.Y.C.R.R. § 65-1.1 provides, in pertinent part, as follows:

"Conditions

Action Against Company. 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 legal term "condition precedent" is defined in Black's Law Dictionary as follows:

"An act or event, other than a lapse of time, that must exist or occur before a *duty to perform* something promised arises. If the condition does not occur and is not excused, *the promised performance need not be rendered*". (Emphasis added).

11 N.Y.C.R.R. § 65-1.1 also provides, in pertinent part, as follows:

"The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonably require".

11 N.Y.C.R.R. § 65-3.5 entitled "**Claim procedure.**" Provides, in pertinent part, as follows:

"(d) If the *additional verification* required by the insurer is a *medical examination*, the insurer shall schedule the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms. (Emphasis Added).

"(e) All examinations under oath and medical examinations requested by the insurer shall be held at a place and time reasonably convenient to the applicant and medical examinations shall be conducted in a facility properly equipped for the performance of the medical examination. The insurer shall inform the applicant at the time the examination is scheduled that the applicant will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with the request. When an insurer requires an examination under oath of an applicant to establish proof of claim, such requirement must be based upon the application of objective standards so that there is specific objective justification supporting the use of such examination. Insurer standards shall be available for review by department examiners".

Finally, it is axiomatic that an assignee "stands in the shoes of its assignor" with no greater rights and/or liabilities.

From the foregoing it is clear that an insurer has the absolute right to require the eligible injured claimant to submit to medical examinations conducted by physicians appointed by the insurer "when, and as often as, the [insurer] may reasonably require". A failure to comply with a proper request by an insurer will result in a lack of coverage because a condition precedent to coverage has not been fulfilled. Furthermore, in accordance with the Supreme Court, Appellate Division, Second Department case of *Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Company*, 35 A.D.3d 720, 827 N.Y.S.2d 217 [2d Dept. 2006] in the event this condition precedent is not fulfilled by the patient the insurer may deny all claims *retroactively to the date of the accident*.

On February 5, 2016 the Respondent wrote to the patient requesting that the patient appear for an independent medical examination with Robert Simon, M.D. on March 24, 2016. When the Applicant did not appear for this appointment the Respondent sent a second written request to the patient dated April 4, 2016, requesting the patient to appear for an independent medical examination with Robert Simon, M.D. on April 21, 2016. The patient did not appear for this appointment as well. There is no evidence in the Record to suggest that the patient did not receive each of these written requests or that the patient, or anyone on her behalf, objected, in any way, to either of these requests to appear for independent medical examinations. There is no evidence in the Record to suggest that the patient had a reasonable excuse for not appearing at either of these appointments and/or actually appeared at either of these appointments.

The Respondent has submitted sufficient proof of mailing of the notices with the Affidavit of Aria Zaferiou and sufficient proof of the non-appearance of the patient at the appointments.

Under these circumstances it was appropriate for the Respondent to deny Applicant's claims for reimbursement based on the failure of the patient to comply with a condition precedent to coverage by failing to appear for multiple duly noticed independent medical examinations. See *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*,

2011 NY Slip Op 01948 [82 AD3d 559] (Appellate Division, First Department, March 17, 2011).

Applicant urged that there were prior Arbitration Awards that disallowed this defense. However, a review of those prior Arbitration Awards reveals that other Arbitrators found that there was a defect in the "Global Denial" in that one of the dates of the alleged missed appointments was incorrect (Arbitrator Eileen Casey, AAA Case No. 17-16-1039-2894). In another Award the Arbitrator found that there was no evidence to demonstrate that the provider was put on notice of Respondent's defense (Arbitrator Natia Pavel, AAA Case No. 17-16-1029-9749). Another Arbitrator followed the decision of one of the above prior Awards on the basis of collateral estoppel following the Arbitration Award of Eileen Casey noted above (Arbitrator Veronica K. O'Connor, AA Case No. 17-17-1082-3178). Yet another Award was based on the finding that the specific missed dates of the appointments were not inserted in the specific denials (Arbitrator Eileen Casey, AAA Case Nos. 17-17-1055-6895 & 17-16-1050-3845). However, these Awards are not binding in this arbitration since no "Global Denial" is at issue in this Arbitration and the Respondent issued specific denials, relating to these two dates of service, that were correct and accurate citing March 24, 2016 and April 21, 2016 as the missed appointments. The denials at issue before me, therefore, provided the Applicant with all of the appropriate information and notice it was entitled to receive.

Applicant's claims for reimbursement, totaling \$185.92, for dates of service January 18, 2018 and March 29, 2018 are, therefore, denied as the patient failed to comply with a condition precedent to coverage.

Applicant is awarded the total sum of \$2.74 as interest for the late payment of \$274.08 for dates of service October 16, 2014 and March 26, 2015.

Applicant is also awarded the total sum of \$55.36 as attorney's fees (20% of \$276.82) relating to the payment by Respondent of \$276.82 (\$274.08 [reimbursement already paid by Respondent for two dates of service, October 16, 2014 and March 26, 2015] plus \$2.74 [interest awarded in this Arbitration Award on the above amount due of \$274.08]).

All other claims for reimbursement are denied. Applicant is also entitled to reimbursement of the filing fee but is not entitled to any additional awards of interest or attorneys' fees.

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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Amount Amended	Status
	New York Spine Specialists LLP	10/16/14 - 03/26/15	\$0.00	\$58.10	Awarded: \$58.10
	New York Spine Specialists LLP	01/18/18 - 01/18/18	\$92.94		Denied
	New York Spine Specialists LLP	03/29/18 - 03/29/18	\$92.98		Denied
Total			\$185.92		Awarded: \$58.10

B. The insurer shall also compute and pay the applicant interest set forth below. 06/19/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded the total sum of \$2.74 as interest on the late payment of \$274.08 made by Respondent as reimbursement for dates of service October 16, 2014 and March 26, 2015. No further interest is due to Applicant.

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

Attorney's fees are to be paid by Respondent in the total amount of \$55.36 all of which relates to Respondent's late payment of \$274.08 as reimbursement for dates of service October 16, 2014 and March 26, 2015. No further attorney's fees are due.

The total award of \$58.10 is comprised of \$2.74 of interest and \$55.36 as attorney's fees. No further interest or attorney's fees are due.

- D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York

SS :

County of Suffolk

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

11/24/2019
(Dated)

Henry Sawits

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:
d965de31ec3e668dbe672beddd28ec44

Electronically Signed

Your name: Henry Sawits
Signed on: 11/24/2019