

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

P & D Merchandise Corp
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-18-1113-9488

Applicant's File No. 112.067

Insurer's Claim File No. 100045503

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 05/05/2020
Declared closed by the arbitrator on 05/05/2020

Vincent Ku, Esq. from Tsirelman Law Firm PLLC participated in person for the Applicant

Mustafa Nouri, Esq. from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 502.63**, 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 36 year old female, related to injuries sustained in a motor vehicle accident that occurred on June

13, 2017. Applicant seeks reimbursement for a CTU provided to the Assignor on July 26, 2017 in connection with the injuries related to the accident. Respondent alleges they timely denied payment of the services claiming that the Assignor violated the conditions of the insurance policy by failing to appear for validly scheduled IMEs. A hearing was held on May 5, 2020 and all documents were reviewed. At the time of the hearing, Respondent stated it was not pursuing a fee schedule defense so I deem that defense abandoned.

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 13th 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, Respondent argued that collateral estoppel should apply as the Supreme Court has issued a declaratory judgment that an insurer has no duty to provide coverage for claims for No Fault benefits made by or on behalf of the medical provider or the patient in connection with the accident at issue, the doctrine of res judicata bars the medical

provider from recovering assigned, first-party No-Fault benefits for medical services rendered to the assignor-patient, notwithstanding the fact that the declaratory judgment was entered upon default.

With the Declaratory Judgment making a determination that IME no show was a valid defense, the no show was almost three months after the services at issue. Respondent argued that the Assignor failed to attend an IME and therefore violated a condition precedent to coverage and argued the policy is void ab initio citing to Unitrin Advantage Insurance Company v Bayshore Physical Therapy, PLLC , 82 A.D.3d 559; 918 N.Y.S.2d 473 (1st Dep't 2011).

The case law is clear that an insurer "must 'stand or fall upon the defense upon which it bases its refusal to pay (see *State Farm v. Dormitor*, 266 A.D.2d 219, 697 N.Y.S.2d 348 (2'd Dep't 1999)).

With regards to the issue of requiring a timely denial based upon a claimant's failure to attend an IME, there are two conflicting cases. In Unitrin Advantage Insurance Company v Bayshore Physical Therapy, PLLC, supra, the Court determined that the insurance company had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued and even went so far as to say that a Patient's failure to attend an IME would void the policy ab initio.

In Westchester Medical Center v. Lincoln General Insurance Company, 2009 NY Slip Op 2598, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2'd Dep't 2009) the Court held that where an insurers denial of liability was based upon a claimant's failure to appear at an examination under oath, such an alleged breach does not serve to vitiate the medical provider's right to recover no fault benefits or to toll the 30-day statutory period (see *Mount Sinai Hosp. v Triboro Coach*, 263 AD2d 11, 17, 699 NYS2d 77 [1999]). Rather, such denial was subject to the preclusion remedy. (see *Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d at 199; *Zappone v Home Ins. Co.*, 55 NY2d 131, 136-137, 432 NE2d 783, 447 NYS2d 911 [1982]; cf. *Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co.*, 90 NY2d 274, 279-280, 683 NE2d 1, 660 NYS2d 536 [1997])).

The question then becomes if Respondent's general denial can be applied retroactively to now deny the specific claim at issue herein. This, of course hinges on whether one applies Unitrin or Westchester. Since this arbitration takes place in the Second Department and the Westchester decision came from the Appellate Division in the Second Department, this arbitrator chooses to apply Westchester and holds that the Respondent's defense of failure to appear for IMEs is subject to the preclusion rule and, since it was not raised in a timely denial for this specific claim, Respondent cannot prevail on that issue.

Without the specific denial for date of service July 26, 2017 CTU, Respondent's denial based on the IME no show cannot be upheld. Applicant's claim is granted in the full claim amount of \$502.63 in full disposition of this matter.

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	Status
	P & D Merchandise Corp	07/26/17 - 07/26/17	\$502.63	Awarded: \$502.63
Total			\$502.63	Awarded: \$502.63

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/02/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the

particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$850." Id. The minimum attorney fee that shall be awarded is \$60. 11 NYCRR §65-4.5(c). However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR §65-4.6(i). For claims that fall under the Sixth Amendment to the regulation the following shall apply " If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to applicant is AWARDED the following:. 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, subject to a maximum fee of \$1,360."

- 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 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.

05/08/2020
(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:
15154355c19997370649fef94683cf69

Electronically Signed

Your name: Bryan Hiller
Signed on: 05/08/2020