American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Big Apple Med Equipment Inc. (Applicant)	AAA Case No.	17-19-1150-6458
	Applicant's File No.	n/a
- and -	Insurer's Claim File No.	19-2449369
	NAIC No.	24260
Progressive Casualty Insurance Company (Respondent)		

ARBITRATION AWARD

I, Tali Philipson, 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 04/14/2021
   Declared closed by the arbitrator on 04/14/2021

   Jeffrey Datikashvili, Esq. from The Sigalov Firm PLLC participated in person for the Applicant

   Danielle Mazzola from Progressive Casualty Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 1,346.76**, 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

   The Assignor LC, a 35 year old male, was injured as the driver of an automobile involved in an accident on July 20, 2019. In dispute is the Applicant's claim for an LSO and CTU provided to the Assignor on September 17, 2019.

   Respondent denied the claim on the ground that the Assignor failed to attend two Independent Medical Examinations (IMEs).

4. Findings, Conclusions, and Basis Therefor

The case was decided on the submissions of the Parties as contained in the Electronic Case Folder maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in the ECF for both parties and make my decision in reliance thereon.

In support of its position, Applicant submitted a claim totaling $1,346.76 for the LSO and CTU, an assignment of benefits form and contemporaneous medical documentation. Thus, a review of the competent evidence in the record reveals that Applicant established a prima facie case of entitlement to reimbursement of its claim, by submitting evidence that the prescribed statutory billing form was mailed and received, and that the Respondent failed to either pay or deny the claim within the requisite 30-day period. Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004).

Pursuant to 11 NYCRR 65-1.1, Conditions, "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". Further, the Regulations state "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."

The appearance at an IME is a condition precedent to the insured liability on the policy, and an insurer may deny a claim retroactively to the date of loss for a claimant's failure to attend IMEs, "when, and as often as, the [insurer] may reasonably require". Stephen Fogel Psychological, P.C., v. Progressive Cas. Ins. Co., 35 AD3d 720 (2nd Dept., 2006).

To establish its defense, an insurer must demonstrate that two separate requests for the IME were timely and properly mailed to the Assignor and the Assignor failed to appear for both of the IMEs. The insurer must also establish that the scheduling letters were properly addressed and contained the requisite language regarding reimbursement of travel expenses and lost wages.

Respondent's submission included an initial IME scheduling letter, dated August 26, 2019, scheduling an IME with Dr. Andrew Miller, for September 11, 2019. The Assignor's attorney called on his behalf to cancel that IME and request that it be rescheduled. As such, in a letter dated September 12, 2019, Respondent re-scheduled the IME with Dr. Miller for September 25, 2019. The Assignor failed to appear, and a third scheduling letter dated October 1, 2019 was sent re-schedule the IME with Dr. Miller for October 16, 2019. The letters were properly addressed to the Assignor (and counsel for the Assignor) and contained the requisite reimbursement language. I find that the IME scheduling letters were proper in all respects.

Respondent also submitted an affidavit by Georgiana Michios, the Litigation Manager at Exam Works, Inc., the third party administrator responsible for scheduling and mailing the IME notices. Ms. Michios attested to her firsthand knowledge of the business practice and policies of Exam Works, Inc. with regards to the scheduling and mailing of the IME notices. She further maintained that those practices were complied with as to the letters described above and therefore a proper mailing took place. Finally, Respondent also submitted affidavits by Dr. Miller, stating that the Assignor failed to attend the IMEs on September 25, 2019 and October 16, 2019. I find the Respondent's evidence sufficient to sustain its burden of proof as to its IME No Show defense.

Accordingly, after careful review of the record, I find upon the evidence provided that Respondent set forth sufficient evidence to sustain its burden of proof as to its IME No Show defense. I uphold the defense asserted in the denial. Applicant's claim is 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, Tali Philipson, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

04/14/2021

(Dated) Tali Philipson

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:
069a71400416e5187d766d01553e028d

Electronically Signed

Your name: Tali Philipson
Signed on: 04/14/2021