

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Physio Health NY PT PC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-20-1180-8318

Applicant's File No. 312822

Insurer's Claim File No. 1070422-03

NAIC No. 16616

ARBITRATION AWARD

I, Sandra Adelson, 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 08/19/2021
Declared closed by the arbitrator on 08/19/2021

Neil Menashe, Esq. from Neil Menashe Attorney At Law P.C. participated for the Applicant

Marc Attias, Esq. from American Transit Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,058.08**, was AMENDED and permitted by the arbitrator at the oral hearing.

The applicant amended this claim to \$935.32. This amendment was a fee schedule correction.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The applicant seeks payment for physical therapy services rendered to the patient DP, a then 18-year-old female passenger who was involved in a 9/30/19 motor vehicle accident. The disputed claim is for physical therapy services provided to the patient from 12/5/19 to 2/6/20.

Respondent denied the claims in issue based on the patient's failure to attend IME examination with Dr. Brian Wolin, D.C. on 1/9/20 and 1/28/20 and with Dr. Eric Roth, MD (physical medicine and acupuncture) on 12/12/19 and 1/28/20.

4. Findings, Conclusions, and Basis Therefor

The record consisted of claimant's submission, respondent's submission, as well as documents not enumerated within this decision, but which are contained in the case file maintained by the American Arbitration Association. THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED pursuant to 11 NYCRR 65-4.5 (o) (1) (Regulation 68-D). 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. Based on a review of the documentary evidence, this claim is decided as follows:

A presumption of medical necessity attaches to a timely submitted no fault claim. All County Open MRI & Diagnostic Radiology, P.C. v. Travelers Ins. Co., 11 Misc. 3d 131[A], 815 N.Y.S.2d 493 (App.Term 9th & 10th Jud. Dists. 2006). The burden then shifts to the defendant to rebut the presumption of medical necessity. A.B. Medical Services PLLC v. Utica Mut. Ins. Co., 10 Misc 3d 50, 809 N.Y.S.2d 765 (App.Term 2nd & 11th Jud. Dists. 2005); and A Plus Medical, P.C. v. Government Employees Ins. Co., 21 Misc 3d 799, 870 N.Y.S.2d 858 (Civil Ct. Kings Co. 2008). Respondent alleges that the patient failed to show for the aforementioned IME examinations.

11 NYCRR §65-1.1 states that "[u]pon request by the Company, ... 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."

Appearance by an injured person at a duly requested IME is a condition precedent to coverage. Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Co., 35 AD3d 720 (2d Dept 2006). The defense of an assignor's failure to appear at scheduled IME must be preserved in a timely denial to avoid preclusion. Westchester Medical Center v. Lincoln, General Insurance Company, 60 A.D.3d 1045, 877 NYS 2d 340 (App. Div. 2nd Dept 2009).

To establish the defense, the insurer must prove that two separate requests for an IME were duly mailed to the assignor and that the latter failed to appear at the scheduled dates. Apollo Chiropractic Care, P.C. v. Praetorian Ins. Co., 27 Misc.3d 139(A), 2010 N.Y. Slip Op. 50911(U)(App. Term 1st Dept., 2010). The IME scheduling letters must be correctly addressed and contain the required notice regarding reimbursement of travel expenses and lost wages pursuant to 11 NYCRR §65-3.5 (e). In order to establish the

assignor's failure to appear, the insurer must submit proof by someone with personal knowledge of the non-appearance. *Alleviation Med. Servs., P.C. v. Hertz Co.*, 51 Misc.3d 130(A), 2016 NY Slip Op 50399(U) (App Term, 2nd Dept., 2016). Once the defense has been substantiated, the burden shifts to the claimant to demonstrate a valid excuse for the non-appearance, or that the IME requests were unreasonable. *A.B. Med. Servs. PLLC v. USAA Gen. Indem. Co.*, 9 Misc. 3d 19, 2005 NY Slip Op 25297 (App Term, 2nd Dept., 2005).

In support of the IME no-show defense, Respondent submitted copies of the IME notices scheduling IMEs with Dr. Brian Wolin, D.C for 1/9/20 and 1/28/20 as well as IME notice scheduling IME examinations with Dr. Eric Roth, MD for 12/12/19 and 1/28/20.

Upon a review of the evidence submitted to the arbitration record, the aforementioned notices were properly addressed to the patient at the address provided on applicant's bills. Respondent submitted affidavits of mailing of said IME scheduling letters from the individual who actually mailed said letters-Walter Distler, an employee of respondent's vendor who scheduled the IME examinations in issue. The record also contains affidavits from both Dr. Roth and Dr. Wolin, D.C. which cogently and credibly attest to the patient's failure to appear for the IME examinations in issue.

Upon a review of the evidence submitted and weighing of both parties' evidence and arguments, I am constrained to find that the respondent provided sufficient evidence to sustain its IME no-show defense. As to proof of mailing, I am further constrained to find that the copies of the IME notices coupled with the contents of the mailing affidavit to be sufficient in establishing the mailing of these IME notices. Applicant failed to present any credible evidence in rebuttal.

Accordingly, this claim must be denied and respondent's IME no show defense is sustained.

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 Suffolk

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

08/23/2021
(Dated)

Sandra Adelson

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:
6f7373e8f5d7c5d6f011774af753a460

Electronically Signed

Your name: Sandra Adelson
Signed on: 08/23/2021