

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Rockaway Complete Chiropractic PC  
(Applicant)

- and -

American Transit Insurance Company  
(Respondent)

AAA Case No. 17-21-1190-2353

Applicant's File No. None

Insurer's Claim File No. 1039633-01

NAIC No. 16616

**ARBITRATION AWARD**

I, Glen Wiener, 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 09/14/2021  
Declared closed by the arbitrator on 09/14/2021

April Mittleman, Esq. from April Mittleman Esq. participated for the Applicant

Chris Fingerhut, Esq. from American Transit Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,916.21**, 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

Assignor S.N. an 18-year-old female was injured in an automobile accident on September 30, 2018. From October 1, 2018 through May 10, 2019 Applicant Rockaway Complete Chiropractic, P.C. provided services to Assignor. Respondent American Transit Insurance Company denied most of Applicant's requests for reimbursement based on Assignor's failure to appear for a scheduled and rescheduled orthopedic physical examination. The remaining claims were denied based on a peer review and on a chiropractic examination performed by Kevin Portnoy, D.C.

The sole question presented herein is whether Assignor's failure to attend the scheduled and rescheduled orthopedic examination should result in a denial of all of Applicant's claims.

#### 4. Findings, Conclusions, and Basis Therefor

The decision below is based on the documents on file in the Electronic Case Folder maintained by the American Arbitration Association as of the date of this hearing and on oral arguments of the parties. No witness testimony was produced at the hearing.

Assignor S.N. an 18-year-old female was injured in an automobile accident on September 30, 2018. Applicant Rockaway Complete Chiropractic, P.C. as assignee of S.N. seeks \$3,916.21 reimbursement, with interest and counsel fees under the No-Fault Regulations for services provided to Assignor from October 1, 2018 through May 10, 2019.

Respondent American Transit Insurance Company insured the motor vehicle involved in the automobile accident. Under New York's Comprehensive Motor Vehicle Insurance Reparation Act (the "No-Fault Law"), New York Ins. Law §§ 5101 et seq., Respondent was obligated to reimburse the injured party (or her assignee) for all reasonable and necessary medical expenses arising from the use or operation of the insured vehicle.

Respondent denied seven of Applicant's eleven disputed claims based on Assignor's failure to appear for duly scheduled orthopedic examinations ["IME"] on the originally scheduled date and on the rescheduled date in violation of the insurance agreement. Two other claims were denied based on a peer review and two claims were denied based a chiropractic examination performed by Kevin Portnoy, D.C.

The primary question presented herein is whether Assignor's failure to attend the scheduled and rescheduled orthopedic examinations should result in a denial of all of Applicant's claims.

Respondent first must establish it complied with the regulatory timeliness requirements for the processing of no-fault insurance claims. See, *American Transit Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 841 (1st Dept 2015) Under the regulations, the insurer must request an IME within 15 business days of receipt of the proof of claim that requires verification, and the IME must be scheduled to be held within 30 calendar days of receipt. See 11 NYCRR 65-3.5[b], [d].

Respondent need not establish when it received the *first* bill from a given provider, nor that it requested an IME within 15 business days of the very first bill received from *any* provider. Rather, for timeliness purposes it is sufficient for the insurer to establish it requested an IME within 15 business days of receipt "of a medical provider claim (NF-3)." *Unitrin Direct Ins. Co. v Beckles*, 188 AD3d 620, 620 (1st Dept. 2020)

Respondent submitted copies of the notices addressed to Assignor and her attorneys Cherny & Podolsky, PLLC scheduling the orthopedic physical examinations.

Respondent received Applicant's bill for the services performed from March 8 through April 9, 2019 on April 15, 2019. Fourteen business days later, on May 3, 2019 Respondent requested Assignor attend a physical examination with orthopedist, Dr. Jay Eneman, on May 23, 2019. Assignor failed to attend this examination and on May 28, 2019 a second notice was sent to Assignor and her attorneys requesting attendance at a rescheduled examination with Dr. Eneman on June 20, 2019.

After Assignor failed to attend the rescheduled examination Respondent terminated Assignor's benefits and denied seven of Applicant's claims.

An assignee can have no better rights than the assignor. Assignor's breach cuts off the assignee's rights. The requirement that a patient attend a medical examination by a physician selected by the insurance carrier is set forth in both the regulations [11 NYCRR §65-1.1(d)], and in the contract of insurance under the Mandatory Personal Injury Protection Endorsement. The section of that Endorsement that is headed "Conditions," begins as follows:

*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 third paragraph thereafter, under the same section states:

*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.*

"In any case of a claim for the treatment of an alleged personal injury it is difficult to see how a medical examination is not appropriate if the insurer wishes it. It is not for the claimant or the arbitrator to determine that the examination will be futile or that it will not disclose information of value to the insurer in determining whether to pay or defend against the claim." *Insurance Co. of America v. Franck*, 102 Misc.2d 998, 424 N.Y.S.2d 816 (Sup. Ct. N.Y. Co. 1979).

The Appellate Division has held that "the appearance of the insured at IMEs at any time is a condition precedent to the insured liability on the policy." *Stephen Fogel Psychological PC v. Progressive Insurance Company*, 35 A.D.3d 720, 827 N.Y.S.2d 217 (2d Dept. 2006). Moreover, the Court stated "Consequently, an insurer may deny a claim retroactively to the date of loss for a claimant's failure to attend IME's 'when and as often as the [insurer] may reasonably require."

Once Assignor failed to appear for the requested exams, Respondent even had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued [*American Tr. Ins. Co. v Lucas*, 111 A.D.3d 423, 974 N.Y.S.2d 388 (1st Dept. 2013)], **and even though Respondent initially denied the claims on different grounds.** *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 [2011], *lv denied* 17 N.Y.3d 705 [2011]) See also *Healthy Way Acupuncture, P.C. v. Allstate Ins. Co.*, 43 Misc.3d 141(A), 993 N.Y.S.2d 644(App. Term 1st Dept. 2014).

The First Department has made it clear this coverage defense applies to any claim and is not determined on a bill-by-bill basis. *Unitrin Advantage Ins. Co. v Dowd*, 194 A.D.3d 507, 143 N.Y.S.3d 543 (1st Dept. 2021)

Respondent's submissions established prima facie that it properly scheduled Assignor for the examinations and that Assignor failed to appear, by submitting the notices sent Assignor and her attorney notifying them about the date, time, and location of the scheduled and follow-up IMEs along with affidavits of service for these notices. Respondent also submitted affidavits from the healthcare professional assigned to conduct the scheduled IMEs, indicating they were present in their office at the date and time of the scheduled IMEs and Assignor failed to appear. See, *Hereford Ins. Co. v Lida's Med. Supply, Inc.*, 2018 NY Slip Op 03226 (May 3, 2018 App. Div. 1st Dept.)

"In opposition, [Applicant] did not specifically deny the assignor's nonappearance or otherwise raise a triable issue with respect thereto, or as to the mailing or reasonableness of the underlying notices." *MDJ Med., P.C. v. Praetorian Ins. Co.*, 43 Misc.3d 145(A), 993 N.Y.S.2d 644 (App. Term 1st Dept. 2014) citing *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 560 (2011), *lv denied* 17 N.Y.3d 705 (2011).

It appears Assignor simply ignored Respondent's requests and accordingly such inaction results in a waiver of any defects or violations. See, *Flatlands Medical, PC v. State Farm Mut. Auto Ins. Co.*, 38 Misc.2d 135(A) 966 N.Y.S.2d 345 (App. Term 2d, 11th, and 13th Jud. Dist. 2013); *Crescent Radiology, PLLC v. American Transit Ins. Co.*, 31 Misc.3d 134(A), 927 N.Y.S.2d 815 (App. Term 9th & 10th Dists. 2011).

Significantly, the First Department has vacated an arbitrator's award for failing to hold an assignor's failure to attend duly scheduled IMEs voided the contract *ab*

*initio. Matter of Global Liberty Ins. Co. of New York v. Top Q. Inc.*, 175 A.D.3d 1131, 2019 N.Y. Slip Op. 06445 (1st Dept. 2019), *vacating Matter of Arbitration of Top Q Inc v. Global Liberty Ins. Co. of New York*, AAA Case No. 99-16-1051-4359 (Robyn D. Weisman, Master Arb., May 9, 2018), *aff'g*, AAA Case No. 17-16-1051-4359 (Burt Feilich, Arb., Feb. 28, 2018).

Accordingly, all of Applicant claims are denied based on Assignor's failure to appear for the scheduled and rescheduled physical examinations. This award is in full disposition of all No-Fault benefit claims submitted to this arbitrator.

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 New York

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

09/14/2021  
(Dated)

Glen Wiener

**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:**  
753473cd76adaa5472f6f227d2d29e31

### **Electronically Signed**

Your name: Glen Wiener  
Signed on: 09/14/2021