

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Rockaway Park Medical, P.C. , Silver Needle Acupuncture, PC , IA Chiropractic PLLC (Applicant)	AAA Case No.	17-22-1273-0364
- and -	Applicant's File No.	487017, 493740, 488555, 493169, 489613, 492980
Liberty Mutual Fire Insurance Company (Respondent)	Insurer's Claim File No.	048429061
	NAIC No.	23035

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 03/07/2023
Declared closed by the arbitrator on 03/07/2023

David Forman, Esq. from Leon Kucherovsky Esq. participated virtually for the Applicant

Elvira Messina, Esq. from Callinan & Smith LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,400.77**, 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 Applicant is entitled to reimbursement for date of service June 22, 2022 for Applicant Silver Needle Acupuncture, PC based on Respondent's claim that the bills were never received?

Whether Respondent's denial based on non cooperation is valid?

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

Applicant seeks reimbursement, along with interest and counsel fees, under the No-Fault Regulations, for the costs associated with physical therapy treatment, chiropractic treatment and acupuncture treatment performed on the Assignor between May 10, 2022 and August 12, 2022. For date of service June 22, 2022, Respondent never denied the claim for this treatment as it claimed that it never received the bills for this date of service. The remainder of the treatment was denied based on Assignor's failure to appear for validly scheduled IMEs and the Assignor's non-cooperation with post-EUO verification requests. This decision is based upon the written submissions of counsel for the respective parties as well as oral argument at the hearing conducted on March 7, 2023. I have reviewed the documents contained in the Record as of the date of the hearing. There are no fee schedule issues in this matter.

Assignor, a then 29 year old male restrained back seat passenger, was involved in a passenger side automobile accident on February 2, 2022. There were no records related to the Assignor's immediate post-accident care. Ultimately, Assignor came under the care of multiple conservative treatment providers including Applicants Rockaway Park Medical, P.C., Silver Need Acupuncture, PC and IA Chiropractic PLLC. The physical therapy treatment, chiropractic treatment and acupuncture treatment at issue was provided to the Assignor on between May 10, 2022 and August 12, 2022 at Applicants' Rockaway Park Medical, P.C., Silver Need Acupuncture, PC and IA Chiropractic PLLC facilities and the notes related to that treatment are attached to the Record.

With respect to date of service June 22, 2022 at Applicant Silver Needle Acupuncture, PC, Respondent stated that the bills were never received. In support of its position, Applicant submitted a claim for \$70.04 for the services specified above made up of bill from June 22, 2022, an assignment of benefits form and contemporaneous medical documentation. 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 with the exception of the treatment provided on November 14, 2015 (see *Mary Immaculate Hospital v. Allstate Insurance Co.*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004)). Respondent argued that the bills for these dates of service were not received till the AR-1 was received and thus the claims were never denied.

Applicant has provided proof of mailing in the form of the signed letter accompanying the bill and the stamped mailing long from the USPS indicating mailing on July 1, 2021. The proof of mailing includes the specific date of the service, indication that the service

was for acupuncture, the exact price of the service, the Assignor's name and a valid mailing address for the Respondent and is sufficient to establish the valid mailing of the bill, especially when the attached envelope also included the address and client name.

Thus, Applicant's claims for the acupuncture treatment on June 22, 2022 in the amount of \$70.04 is due and owing and granted in full.

With respect to the treatment denied based on non-compliance, Respondent issued a denial for this bill which states:

"We have no duty to provide coverage under this policy unless there has been full compliance with the following duties: Part E - Duties after an Accident or Loss B. A person seeking any coverage must: 1. Cooperate with us in the investigation, settlement or defense of any claim or suit. 2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss. 3. Submit, as often as we reasonably require: a. to physical exams by physicians we select. We will pay for these exams. b. to examination under oath and subscribe the same. 4. Authorize us to obtain: a. medical reports, and b. other pertinent records. 5. Submit a proof of loss when required by us. You have failed to provide requested documentation for your proof of claim. You have not cooperated with numerous communication attempts by mail to you and your attorney. In accordance with the policy from which you seek coverage, your claim is denied for non-cooperation."

There is no such defense in no-fault as a "non-cooperation" defense. A claim can be denied based upon a failure to appear for an Examination Under Oath (EUO), which is not the case here, as the Assignor appeared for an EUO on April 27, 2022. A claim can also be denied based upon the failure to appear at an independent medical examination (IME), which is not being asserted. Or pursuant to 11 NYCRR §65-3.8(b)(3), "an insurer may issue a denial if, more than 120 calendar days after the initial request for verification, the applicant has not submitted all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply... This subdivision shall apply, with respect to claims for medical services, to any treatment or service rendered on or after April 1, 2013 and with respect to claims for lost earnings and reasonable and necessary expenses, to any accident occurring on or after April 1, 2013."

However, it is clear that Respondent did not follow the proper claim handling procedures in order to assert a 120-day defense. There is no evidence that this bill was delayed for additional verification. Assuming, arguendo, the bill was properly delayed for additional verification the bill was denied less than 120 days after the bill was timely. Accordingly, the defense stated on the NF-10 of "non-cooperation" fails. Respondent also asserts that the Applicant/Provider failed to appear for examinations under oath (EUO's). It is undisputed that Respondent failed to timely deny the bill at issue based upon this defense.

I follow the Second Department case of *Westchester Medical Center v. Lincoln General Insurance Company*, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (App. Div., 2nd Dept. 2009) which holds that where an insurer denies liability based upon an alleged breach of a policy condition, 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. This defense is subject to the preclusion remedy. *Id.* Citing to *Central General Hospital v. Chubb Group of Ins. Cos.*, 90 N.Y.2d 195, 659 N.Y.S.2d 246 (Court of Appeals, 1997). I do not follow the First Department case of *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 559, 918 N.Y.S.2d 473 (App. Div. 1st Dept., Mar. 17, 2011), which states that Respondent may assert this defense even though it was not set forth in a claim specific denial. As the holding in *Unitrin* directly conflicts with the well settled precedent of The New York Court of Appeals in *Chubb* - the decision in *Westchester* shall be applied in the instant case. Since it is undisputed that Respondent failed to timely deny this bill based upon the defense of a failure to appear at EUO's, this defense is precluded. Accordingly, I find that Respondent fails to assert a valid defense for this bill, and an award shall be issued in favor of Applicant.

With respect to the remainder of the treatment, Respondent denied based on Assignor's IME no show to July 15, 2022 and July 29, 2022 IMEs with Dr. Unis.

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 an 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)).

In support of this denial, Respondent submitted letters dated June 20, 2022 and July 18, 2022 advising the Assignor and the Assignor's attorney that independent medical examinations had been scheduled for July 15, 2022 and July 29, 2022, respectively. The letters were properly addressed to the Assignor, pursuant to his NF-2, and his attorney, pursuant to a letter of representation.

Additionally, Respondent submitted the affidavit of employee for the Respondent Elke Barghoorn who explained her familiarity with the mailing procedures for the office and personal knowledge of the timing mailing of the scheduling letters. Further, Respondent submits the affidavits of IME Dr. Douglas Uris stating personal knowledge of the Assignor's non-appearance of the IMEs.

A review of the record indicates that the bills were mailed timely and that the physician established personal knowledge that the patient did not appear by indicating that they were present and working on dates of the IMEs and had personal knowledge confirmed by business records.

I find that the Assignor's failure to appear for two properly scheduled IMEs violated a "condition of coverage". Applicant has not argued that the scheduling letters were improperly sent or that there was an issue related to the appearance. The only argument was related to the personal knowledge of the non-appearance but the affidavit submitted provided convincing personal knowledge of the mailings and no-shows. As such, these claims are 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	Rockaway Park Medical, P.C.	05/10/22 - 05/10/22	\$127.41	Awarded: \$127.41
	Rockaway Park Medical, P.C.	07/11/22 - 07/11/22	\$280.12	Denied
	Silver Needle Acupuncture, PC	06/22/22 - 06/22/22	\$70.04	Awarded: \$70.04
	Silver Needle Acupuncture, PC	08/01/22 - 08/12/22	\$350.20	Denied
	IA Chiropractic PLLC	06/02/22 - 06/30/22	\$458.40	Awarded: \$458.40
	IA Chiropractic PLLC	07/01/22 - 07/08/22	\$114.60	Denied
Total			\$1,400.77	Awarded: \$655.85

B. The insurer shall also compute and pay the applicant interest set forth below. 11/02/2022 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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of that sum total, subject to no minimum and a maximum of \$1360.00. However, if the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation process, the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6 (b).

- 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 NY

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.

03/10/2023

(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:
9c50f573eb49c65c445151614d96ce89

Electronically Signed

Your name: Bryan Hiller
Signed on: 03/10/2023