

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

APT Physical Therapy, P.C.  
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company  
(Respondent)

AAA Case No. 17-22-1261-8894

Applicant's File No. n/a

Insurer's Claim File No. 0553851825 2N1

NAIC No. 29688

### ARBITRATION AWARD

I, Eylan Schulman, 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: EIP

1. Hearing(s) held on 03/02/2023  
Declared closed by the arbitrator on 03/02/2023

Mark Fenelon, Esq., from Law Offices of Hillary Blumenthal LLC (Hoboken) participated virtually for the Applicant

Sofya Petrukhin, Esq., from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$294.50**, 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 Respondent was justified in denying the claim based on the EIP's failure to attend independent medical examinations (IME's).

This is a claim for reimbursement for physical therapy provided between November 19, 2019 and December 13, 2019, following an automobile accident which occurred on July 18, 2019.

Respondent denied the claim based on the EIP's failure to appear at scheduled IME's on November 12, 2019 and December 4, 2019.

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

The findings herein are based on documentary evidence set forth in the ADR Center submitted by the parties prior to the date of hearing and oral argument at the hearing.

In a prior hearing, AAA No. 17-20-1155-6268, Arbitrator Tracy Morgan found Respondent's denial for a different claim proper due to the EIP's failure to appear at the same IME's. Since the EIP failed to appear for the examinations, Arbitrator Morgan found the EIP breached a condition precedent to its right to benefit under the policy and denied the claim. After review of the evidence included on the ADR Center for the instant matter, I conclude it is appropriate to find consistently with Arbitrator Morgan's prior determination.

An Applicant establishes a *prima facie* showing of entitlement to No-Fault benefits under Article 51 of the Insurance Law by submitting proof that it submitted a claim setting forth the fact and the amount of the loss sustained and payment of No-Fault benefits was overdue. A.B. Med. Servs., PLLC v. Liberty Mutual Ins. Co., 39 A.D.3d 779 (2d Dep't 2007); Nyack Hosp. v. Metro. Prop. & Cas. Ins. Co., 16 A.D.3d 564 (2d Dep't 2005); Mary Immaculate Hospital v. Allstate Insurance Co., 5 AD3d 742 (2d Dep't 2004).

It is undisputed that Applicant established its *prima facie* case of entitlement to first-party no-fault benefits for the claims by demonstrating it submitted a timely claim setting forth the fact and the amount of the loss sustained and payment for the claim has not been made.

For an insurer to submit a defense based on an injured party's failure to appear for an IME, it must prove that it sent both original and follow up requests [scheduling the IME's] and the injured party failed to appear for each scheduled examination. Prime Psychological Services, P.C. v. ELRAC, Inc., 25 Misc.3d 1244(A), 906 N.Y.S.2d 782 (Table) (Civ. Ct. Richmond Co., Katherine A. Levine, J., Dec. 4, 2009).

As indicated above, in AAA No. 17-20-1155-6268, Arbitrator Tracy Morgan found Respondent's denial for a different claim proper following the EIP's failure to appear at the same IME's which served as the basis to deny the instant claim. Specifically, Arbitrator Morgan found as follows:

The letters by Julio Westerband and Jeffrey Passaic are each affirmed and they are dated on the date that the scheduled IME was noticed to occur. Both Dr. Westerband and Dr. Passaic established the foundation for their knowledge by affirming that they were physically present at the time, date and location of the IMEs and have personal knowledge of the no-show. I accept these affirmations as credible and conclusive proof that the injured person-assignor did not appear for IME on both of the scheduled dates.

I find that Respondent has proven by a preponderance of the credible evidence that the injured person-assignor failed to attend the duly scheduled and noticed IMEs. The Respondent demonstrated that the IMEs were properly and timely scheduled and that the injured person-assignor failed to appear. It remains uncontroverted that the injured person-assignor did not appear for the IMEs as scheduled. Further, Applicant has not set forth a valid reason why the IME notices were not complied with, nor has Applicant set forth any evidence that the notices were not received. Accordingly, based upon the facts of this matter, I find that there has been a violation of the policy conditions, and deny Applicant's claim. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of the hearing.

Since the evidence related to the EIP's failure to appear for the IME's in the instant matter and the prior hearing is essentially the same, I am bound by Arbitrator Morgan's prior determination. The Doctrine of Collateral Estoppel precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. Ryan v. New York Telephone, 62 N.Y.2d 494 (1984). The following two requirements must be met before Collateral Estoppel can be invoked: There must be an identity of issues which has been decided in the prior action and is decisive in the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling. *See Gilberg v. Barbieri*, 53 N.Y.2d 285, 291 (1981). Further, the Court of Appeals has held that the Doctrine of Collateral Estoppel "is applicable to issues resolved by earlier arbitration." Rembrandt Industries v. Hodges International, 38 N.Y.2d 502 (1976)."

The standard for Collateral Estoppel is met in this case. There is an identity of issues, namely, whether Respondent's denials based on the EIP's failure to appear at the IME's was proper. The issue was already argued on the merits and a determination related to denials issued following the IME no-shows was decided on the merits.

Based on the application of Collateral Estoppel and for the foregoing reasons, I find that the EIP breached a condition precedent to its right to payment of the subject claim and accordingly, I am constrained to deny the claim.

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 NY  
SS :  
County of Nassau

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

03/25/2023  
(Dated)

Eylan Schulman

#### **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:**  
2004e606d5e74dd6ccf4b3e200f133ce

**Electronically Signed**

Your name: Eylan Schulman  
Signed on: 03/25/2023