

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bowen MD PLLC  
(Applicant)

- and -

Avis Budget Group  
(Respondent)

AAA Case No. 17-22-1276-5436

Applicant's File No. 126356

Insurer's Claim File No. 228025649

NAIC No. Self-Insured

**ARBITRATION AWARD**

I, Debbie Kotin Insdorf, 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 10/02/2023  
Declared closed by the arbitrator on 10/02/2023

Edilaine D'Arce from Law Offices of Eitan Dagan participated virtually for the Applicant

Ivanna Chiow from Avis Budget Group participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,364.79**, was NOT AMENDED at the oral hearing.  
Stipulations WERE made by the parties regarding the issues to be determined.

The billed amount is in accordance with the fee schedule.

3. Summary of Issues in Dispute

The Applicant is seeking reimbursement for injections, epidurography and ultrasonic guidance performed 9/28/22, following a motor vehicle accident on 7/07/22 involving Assignor DA. The Respondent issued a timely denial based on the Assignor's failure to appear for Independent Medical Examinations on 10/17/21 and 11/07/22 with Chiropractor Brian Wolin, Dr. Aruna Seneviratne and Dr. David Essig. Was there a violation of a policy condition, thus resulting in exclusion from coverage?

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

The Applicant's claim is for \$1,364.79 for injections, epidurography and ultrasonic guidance performed 9/28/22.

The Respondent issued a timely denial based on the Assignor's failure to appear for Independent Medical Examinations scheduled for 10/17/21 and 11/07/22.

The Respondent submitted letters dated 9/09/22 from MedSource (the scheduler) to the Assignor and his Attorneys notifying them that an Independent Medical Examination with Chiropractor Brian Wolin was scheduled for 9/26/22.

The Respondent submitted a letter dated 9/27/22 from MedSource to the Assignor's Attorneys and carbon copied to the Assignor notifying them that an Independent Medical Examination with Chiropractor Brian Wolin was rescheduled for 10/17/22.

The Respondent submitted a letter dated 10/21/22 from MedSource to the Assignor's Attorneys and carbon copied to the Assignor notifying them that an Independent Medical Examination with Chiropractor Brian Wolin was rescheduled for 11/07/22.

The Respondent submitted a letter dated 9/27/22 from MedSource to the Assignor's Attorneys and carbon copied to the Assignor notifying them that an Independent Medical Examination with Dr. Anna Seneviratne was scheduled for 10/17/22.

The Respondent submitted a letter dated 10/21/22 to the Assignor's Attorneys and carbon copied to the Assignor notifying them that the Independent Medical Examination was rescheduled for 11/07/22 with Dr. David Essig.

11 NYCRR 65-1.1 provides as follows: "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 of the claimant for an IME at anytime is a condition precedent to the insurer's liability under the policy. An insurer may deny a claim retroactively to the date of loss for a claimant's failure to attend an IME. See, Stephen Fogel Psychological, PC v Progressive Casualty Insurance Co., 35 AD3d 720, 827 N.Y.S. 2d217 (2nd Dept. 2006).

The failure to appear for a physical examination requested by the insurance carrier is a breach of the policy conditions and voids the obligation of the carrier to provide no-fault benefits. The Applicant has not offered any valid excuse for the Assignor's failure to appear for the Independent Medical Examinations.

The Appellate Division has held that, "The appearance of the insured at IMEs at any time is a condition precedent to the insurer's liability under the policy." See, Stephen Fogel Psychological, PC v Progressive Casualty Insurance Co., 35 AD3d 720, 827 N.Y.S. 2d217 (2nd 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 IMEs

when and as often as the insurer may reasonably require." Furthermore, The First Department has recently ruled that besides being able to deny retroactively, claims may be denied "even though the [insurer] initially denied the claims on the ground of lack of medical necessity" and "regardless of whether the denials were timely issued. It is of no moment that the retroactive denial premised on an Assignor's failure to attend IMEs were embodied in blanket denial forms." Unitrin Advantage Ins. Co., v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559, 918 N.Y.S. 2d 473, (1<sup>st</sup> Dept. 2011).

The case of Daras v. Geico Insurance Company, 22 Misc 3d 141 (A), 881 N.Y.S.2d 362 (Table), 2009 NY Slip Op. 50438(U), 2009 WL 679491 (App Term2d, 11<sup>th</sup> & 13<sup>th</sup> Dists. Mar. 10, 2009) required a Respondent to establish by proof in admissible form that the IME requests were timely mailed to the Assignor and that the Assignor failed to appear.

The Respondent submitted Affidavits by David Coscio, V-P of MedSource National. He wrote " In accordance with regular office and mailing procedures, all IME notices are created via computer. On the same day they are created, the documents are printed in paper form. They are prepared for mailing by being placed inside a window envelope. Postage is affixed in the office via a postage meter. The letters are then brought to and placed within an official United States Postal Service collection box located in the lobby of 595 Stewart Ave. in Garden City, NY 11530." Mr. Coscio also wrote that the Assignor was sent notices for the 10/17/22 and 11/07/22 Independent Medical Examinations.

A list noting claim numbers, claimant and address, names of the Independent Medical Examination doctor, date of Independent Medical Examination and date of mailing was submitted. At the end, David Coscio, being duly sworn said that he served the above claimant (Assignor's name and his Attorneys were included) with an Independent Medical Examination scheduling letter. This was done on 9/27/22 and 10/21/22.

The Respondent submitted Affirmations from Chiropractor Wolin, Dr. Seneviratne and Dr. Essig, noting that they were physically present in their offices on the day of the scheduled Independent Medical Examination, and the Assignor failed to appear.

After reviewing all of the documents on file in the ADR Center maintained by the American Arbitration Association and considering the arguments set forth by both sides, I find there was a violation of a policy condition thus resulting in exclusion from coverage. The Assignor having failed to appear for Independent Medical Examinations, properly noticed by the Respondent, breached a policy condition, avoiding the policy ab initio. The Respondent's denial is upheld.

Accordingly, the 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 NY

SS :

County of New York

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

10/14/2023

(Dated)

Debbie Kotin Insdorf

**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:**  
0846ffcfc492712b59b1ec9f0bb58049

### **Electronically Signed**

Your name: Debbie Kotin Insdorf  
Signed on: 10/14/2023