

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New Sense Acupuncture PC  
(Applicant)

- and -

Progressive Casualty Insurance Company  
(Respondent)

AAA Case No. 17-22-1275-8388

Applicant's File No. N/A

Insurer's Claim File No. 21-6265572

NAIC No. 24260

### ARBITRATION AWARD

I, Philip Wolf, 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 11/15/2023  
Declared closed by the arbitrator on 11/15/2023

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

Liz Peabody from Progressive Casualty Insurance Company participated virtually for  
the Respondent

2. The amount claimed in the Arbitration Request, **\$1,749.92**, 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, a 38-year-old female, was a passenger in a motor vehicle which was involved in an accident on February 26, 2021. As a result of the accident Assignor sustained injuries to her neck, left shoulder, lower back, and left knee. Applicant is seeking reimbursement for acupuncture treatment performed during the period from April 16, 2021 through June 15, 2021. Respondent issued timely denials predicated upon Assignor's alleged failure to appear for a scheduled and reschedule IME. The issue in dispute is whether Respondent has established its defense predicated upon Assignor's failure to appear for an IME.

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

Applicant is seeking a total of \$1,749.92 for acupuncture treatment performed during the period from April 16, 2021 through June 15, 2021. This award is rendered upon the oral arguments of both parties and upon the documentary evidence submitted by both parties. The documentary evidence submitted by the parties consists of the documents contained within the ADR Center for this matter as of December 4, 2023.

##### **Applicant's Prima Facie Case**

Assignor was a passenger in a motor vehicle which was involved in an accident on February 26, 2021. As a result of the accident Assignor sustained injuries to her neck, left shoulder, lower back, and left knee. Assignor subsequently presented to Applicant and was prescribed a course of acupuncture treatment. Applicant rendered acupuncture treatment to Assignor on the dates of service in dispute. Respondent has acknowledged receipt of Applicant's bills.

After reviewing the evidence submitted by Applicant, I find that Applicant has submitted sufficient credible evidence to establish a prima facie case with respect to the acupuncture treatment performed during the period from April 16, 201 through June 15, 2021.. *See, Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 25 N.Y.3d. 498, 2015 NY Slip Op 04787, (2015).

##### **Respondent's IME No-Show Defense**

Respondent issued a timely denial predicated upon Assignor's failure to appear for an IME on April 29, 2021 and a rescheduled IME on May 21, 2021.

In support of its defense, Respondent has submitted IME scheduling notices dated April 8, 2021 and May 6, 2021.

Respondent has submitted an affidavit from John L. Xethalis, M.D. setting forth that he was hired to conduct an IME on April 29, 2021 and Assignor failed to appear for said IME. Respondent has submitted an affidavit from William J. Walsh, M.D. setting forth that he was hired to conduct an IME on May 21, 2021 and Assignor failed to appear for said IME.

Respondent has also submitted an affidavit from Tracy Simpson, the Manager at ExaWorks, Inc., the company Respondent hired to conduct the IME of Assignor. Ms. Simpson sets for the standard office procedure for requesting an IME, drafting the IME scheduling letters, mailing the IME scheduling letters, and documenting appearances at IMEs. Ms. Simpson states that the standard office procedure was followed with respect to the subject claim, and Assignor failed to appear for a scheduled and rescheduled IME.

An assignee can have no better right than the assignor. An assignor's breach cuts off the assignee's rights. The No-Fault Regulation, in the Mandatory Personal Injury Protection Endorsement (11 NYCRR 65-1.1), sets forth:

*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 failure to attend a scheduled and rescheduled IME constitutes a violation of a condition precedent to a claim. The breach of a condition precedent cuts off claims even for services performed prior to the date of the missed IME. *See, Stephen Fogel Psychological, PC v. Progressive Car. Ins. Co.*, 35 A.D.3d 720, 827 N.Y.S.2d 217 (2<sup>nd</sup> Dept. 2006.)

Additionally, pursuant to 11 NYCRR 65-3.5(d) of the No-Fault Regulation, a medical examination is among items of relevant information which may be requested as a means of verification of a claim. If an assignor fails to comply with a verification request, then benefits are not overdue. *See*, 11 NYCRR 65-3.8.

Respondent scheduled and rescheduled the IME. The scheduling letters contain the requisite reimbursement language set forth in 11 NYCRR 65-3.5(e) and were sent to the Assignor's address as well as her attorney. I find that the affidavit of Ms. Simpson establishes that the IME scheduling letters were timely and properly mailed to Assignor and her attorney.

I find that the affidavits of Drs. Xethalis and Walsh are sufficient to establish Assignor's failure to appear for the scheduled and rescheduled IME. *See, New Capital Supply Inc. v. State Farm Mutual Automobile Ins. Co.*, N.Y. Slip Op 24277 (Civil Ct. City of NY, NY County 08/14/14) *See, Stephen Fogel Psychological, PC v. Progressive Car. Ins. Co.*, 35 A.D.3d 720, 827 N.Y.S.2d 217 (2<sup>nd</sup> Dept. 2006.).

It is noted that Applicant has failed to submit any evidence to refute Assignor's IME no-show defense and Applicant/Assignor has failed to establish a credible explanation for Assignor's failure to appear for the scheduled and rescheduled IME.

It is further noted that Arbitrator Mortiz and Arbitrator Felber previously rendered awards involving the same Assignor, Respondent, and IME no-show defense and determined that Assignor failed to appear for a scheduled and rescheduled IME. *See, Tri-Borough NY Medical Practice PC and Progressive Casualty Insurance Company*, AAA Case No. 17-21-1211-2392 (Arbitrator Moritz 07/26/2022) and *DDE Rapid Supply Inc. and Progressive Casualty Insurance Company*, AAA Case No. 17-21-1218-0991 (Arbitrator Felber 06/15/22)

Accordingly, I find that Respondent made reasonable requests for the IME and Assignor failed to appear for the scheduled and rescheduled IME without providing sufficient explanation for doing so. Assignor's failure to appear for the scheduled and rescheduled IME was a breach of a condition precedent and constitutes grounds for the denial of the

subject bills. *See*, 11 NYCRR 65-1.1. Accordingly, Applicant's claim is denied in its entirety.

**DECISION:** Based upon the foregoing, Applicant's claim is denied in its entirety. 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 NY  
SS :  
County of Suffolk

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

12/04/2023  
(Dated)

Philip Wolf

**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:**  
aeadd367844a32f909fc2cbe9cd79a34

**Electronically Signed**

Your name: Philip Wolf  
Signed on: 12/04/2023