

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ridgewood Diagnostic Laboratory
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

| | |
|--------------------------|-----------------|
| AAA Case No. | 17-23-1288-8076 |
| Applicant's File No. | NF-28126-556253 |
| Insurer's Claim File No. | 1100994-02 |
| NAIC No. | 16616 |

ARBITRATION AWARD

I, Matthew J. Cavalier, 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 12/05/2023
Declared closed by the arbitrator on 12/05/2023

Steven Neuwirth, Esq from Sanders Grossman Aronova PLLC participated virtually for the Applicant

Ed Marion, Esq from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$4,931.46**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The Parties stipulated at the hearing that the date interest accrues if the Applicant prevails is March 2, 2023.

3. Summary of Issues in Dispute

Whether the Assignor, a 26-year-old male ("MW") on the date of accident ("DOA") who is the eligible injured party ("EIP") injured in a motor vehicle accident ("MVA") on July

26, 2021, and who on date of service ("DOS") October 19, 2021, received drug testing medical services and whether they were correctly billed in the sum of \$4931.46, and timely submitted by the Applicant, and

Whether the Respondent can maintain its defense of policy violation based upon the Assignor's failure to appear for two ("2") properly scheduled Independent Medical Examinations ("IMEs") of the Applicant on November 8 & 29, 2021, by the Respondent?

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the ADR Center Case Folder as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the Hearing. 11 NYCRR 65-4.5(o)(1)(Regulation 68-D).

There are various bills for DOS October 19, 2021, with a disputed sum of \$4931.46 on the AR-1. These bills were timely submitted by the Applicant to the Respondent and Respondent initially delayed payment in search of additional verification and subsequently denied payment of these bills based upon the Assignor's failure to appear for properly scheduled IMEs on November 8 and 29, 2021, and the Respondent issued a specific NF-10s, as well as a global NF-10 dated December 23, 2021, for the IME no-show, denying any and all claims back to the date of the accident, July 26, 2021, citing Unitrin.

Prima facie Case

Applicant establishes *prima facie* showing of their entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received by Respondent and that payment of no-fault benefits were overdue." Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D. 3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004).

No-show Defense

The insurer is entitled to judgment where it proves that two separate requests for a EUO (IME) were duly mailed to the assignor and the latter failed to appear on either of the dates. Apollo Chiropractic Care, P.C. v. Praetorian Ins. Co., 27 Misc.3d 139(A), 932 N.Y.S.2d 420 (Table), 2010 N.Y. Slip Op. 50911(U), 2010 WL 2026636 (App. Term 1st Dept. May 24, 2010).

The proofs submitted by the Respondent include:

1. the two ("2") IME scheduling letters dated October 25 and November 9, 2021.

2. the Proof of Mailing of those letters in the form of an affidavit of mailing dated December 6, 2021, by Charles Campanelli, employee of Signet Claims Solutions, the scheduling TPA, confirming the scheduling letters were mailed to same address as listed upon the NF-2 submitted for this MVA by the Assignor,

3. the Affidavits of Non-appearance by a person with firsthand knowledge of the non-appearance dated December 30, 2021, for the November 8 and 29, 2021, IMEs to be conducted by Dr. Magda Fahmy, MD by Dr. Magda Fahmy, MD, who was to perform the IMEs if the Assignor appeared, as proof of Assignor's failure to appear for the timely scheduled examinations.

The Applicant's Attorney opined that since **Unitrin** is an extreme and drastic remedy afforded to the Respondent that all of proof must be accurate, timely, and submitted in support of their defense, and I agree with the Applicant. The Applicant's Attorney then argued that the IMEs must be scheduled within 30 days of the receipt of the NF-3s and that the Non-appearance affidavit was dated almost two ("2") months after the first scheduled IME and not contemporaneous, therefore this defense must fail.

The Respondent's Counsel argued that the submitted proofs in support of the IME No Show Defense are accurate, substantial, and more than persuasive proof of the Assignor's policy breach for interpreting the statute to require a separate IME for each bill received is a contortion of the intent of the Regulation, an undue burden to impose on the Respondents, and a misapplication of this 30 day time limit, and these are IMEs were timely scheduled within 30 days of the receipt of bills from various providers who treated the Assignor and received the same Assignment of Benefits and the accompanying duties and responsibilities under the no-fault insurance contract, from the sole Assignor, therefore any proven breach of conditions precedent to coverage under **Unitrin** applies to any and all unpaid claims back to the DOA.

Respondent's Counsel also argued that if two ("2") was legitimately too soon a period of time to have elapsed to remember specific events from the past, it would be impossible for anyone to pass the Bar Exam or Medical Boards, thus the Applicant's Attorney arguemnt is specious and logically unsustainable, and Respondent has succesfully proven breach of conditions precedent to coverage under **Unitrin** applies to any and all unpaid claims back to the DOA.

Based upon the foregoing, I find, as a question of fact, that the Respondent sent the letters to the appropriate address. I further find that the Respondent has established the proper mailing of the scheduling letters. Finally, I also find that the Respondent has sufficiently established the failure of the patient to appear at the IMEs by way of the contemporaneous, detailed, and notarized if necessary, Affidavit from the Doctor scheduled to conduct and at the location of the IMEs on November 8 and 29, 2021, respectively.

The Applicant has neither offered persuasive arguments to discredit the proofs put forth by the Respondent, nor have they offered any excuse for the Applicant's failure to appear or any evidence as to subsequent compliance with the IMEs after November 29,

2021. As a result, I find that based upon the proofs submitted, the Respondent has established the failure of the Applicant to appear for four duly scheduled IMEs which constitutes a breach of a condition precedent to coverage under the policy and the Respondent's IME no-show defense must be sustained, the Respondent prevails, any and all claims are denied back to the date of the accident, July 26, 2021, citing Unitrin.

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 Queens

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

12/05/2023
(Dated)

Matthew J. Cavalier

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:
5f93442f27b45acaa8ae8c1628399bde

Electronically Signed

Your name: Matthew J. Cavalier
Signed on: 12/05/2023