American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

RCK Medical Services PC (Applicant)	AAA Case No.	17-24-1336-6623
	Applicant's File No.	44523-487719
- and -	Insurer's Claim File No.	0631899720000002
	NAIC No.	22055
Geico Insurance Company (Respondent)		

ARBITRATION AWARD

I, Joseph Endzweig, 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: Claimant

1. Hearing(s) held on 10/08/2024
   Declared closed by the arbitrator on 10/08/2024

   Joaquin Lopez, Esq. from Barshay, Rizzo & Lopez, PLLC. participated virtually for the Applicant

   Jerry Marino, Esq. from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$491.51**, 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

   This arbitration arises out of treatment of a 45 year old female for injuries sustained in a motor vehicle accident occurring on 12/3/22. Applicant seeks reimbursement for a Disability Examination performed on 5/22/23 and billed at $491.51. Respondent denied reimbursement based on the failure of the assignor to appear for scheduled IME's.

4. Findings, Conclusions, and Basis Therefor

I have reviewed all of the documentation contained in the Electronic Case Folder which is maintained by the American Arbitration Association.

This arbitration arises out of treatment of a 45 year old female for injuries sustained in a motor vehicle accident occurring on 12/3/22. Applicant seeks reimbursement for a Disability Examination performed on 5/22/23 and billed at $491.51. Respondent denied reimbursement based on the failure of the assignor to appear for scheduled IME's.

The proof submitted by the respondent demonstrates that the respondent scheduled two separate independent medical examinations. The Respondent submitted copies of the scheduling letters as well as proof of mailing for the letters. The scheduling letters dated 2/14/23 and 3/6/23 advised of examinations scheduled for 3/1/23 and 3/20/23, respectively. The Assignor failed to appear for either of the scheduled examinations. Respondent submits affirmations from the doctor assigned to perform the IME's, attesting to the Assignor's nonappearance on the two scheduled dates. Applicant does not dispute that the Assignor failed to appear for the scheduled IME's.

The prescribed No-Fault endorsement in New York, N.Y. Comp. Codes R. & Regs. Tit. 11, Section 65-1 (Regulation 68) (2002) titled "Conditions" states that: "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 insurer is given the right, as a policy condition, to conduct medical examinations when, and as often as, the Company may reasonably require, so that the insurer has the opportunity to physically examine the patient in order to evaluate the medical necessity of the treatment performed.

The "Conditions" provision of the No-Fault prescribed endorsement in Section 65-1.1, the section titled "Action Against Company" states that "No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage."

Therefore, since attendance at a medical examination is a condition of coverage, an eligible injured person's failure to comply with the request precludes an action against an insurer in support of payment for the submitted health service claims, and no coverage is available for subsequent health service claims. See Adams v. Allstate, 210 A.D.2d 319 (2d Dept. 1994).

In Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559, 918 N.Y.S.2d 473 (1st Dept. 2011), the Appellate Division First Department stated in pertinent part:

> The motion court properly determined that plaintiff insurer may retroactively deny claims on the basis of defendants' assignors' failure to appear for independent medical examinations (IMEs) requested by plaintiff, even though plaintiff initially denied the claims on the ground of lack of medical necessity (see Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co., 35 AD3d 720, 721-722 [2006]). The failure to appear for IMEs requested by the insurer "when, and as often as, [it] may reasonably require" (Insurance Department

> Regulations [11 NYCRR] § 65-1.1) is a breach of a condition precedent to coverage under the no-fault policy, and therefore fits squarely within the exception to the preclusion doctrine, as set forth in Central Gen. Hosp. v Chubb Group of Ins. Cos. (90 NY2d 195 [1997]). Accordingly, when defendants' assignors failed to appear for the requested IMEs, plaintiff had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued (see Insurance Department Regulations [11 NYCRR] § 65-3.8 [c]; Stephen Fogel Psychological, 35 AD3d at 721-722).

In Park Avenue Medical Care Care P.C. v. Repwest Insurance Company, AAA Case No. 412011080814 Arbitrator Aaron Maslow states:

> As for Unitrin, I construe it to hold that no denial is required in order for an insurer to assert in litigation that an injured person-assignor's failure to attend scheduled IMEs bars recovery by a health care provider-assignee. That is because the reasoning underlying Unitrin is that a failure to attend IMEs constitutes a violation of a condition precedent to coverage by the insurance policy and the policy is void ab initio. If there is no coverage, then no denial is necessary -- timely, untimely, or none at all. See Central General Hospital v. Chubb Group, 90 N.Y.2d 195, 659 N.Y.S.2d 246 (1997).

Once it is decided that the assignor failed to attend properly noticed and scheduled IME's, this constitutes a breach of a condition precedent to coverage, voiding the insurance policy ab initio. There is no coverage for that assignor and therefore for his assignees. See Unitrin, supra. I note that it was determined in a previous arbitration that the assignor herein failed to attend properly noticed and scheduled IME's and therefore violated a policy condition. (See AAA Case No. 17-23-1309-4110).

In Unitrin Advantage Ins. Co. v. Dowd, ___ A.D.3d ___, 2021 N.Y. Slip Op. 03012 (1st Dept. May 21, 2021) the Appellate Division, First Department held:

> If a request for an examination is timely as to one claim, a failure to appear warrants the insurer's denial of all claims submitted with respect to the same injured person in the same accident; the failure to appear for an EUO requested in a timely fashion by the insurer is a breach of a condition precedent to coverage and voids the policy ab initio, and this coverage defense applies to any claim and is not determined on a bill by bill basis.

The failure to appear for properly scheduled EUOs or IMEs should equally result in the voiding of policies ab initio. Neomy Med., P.C. v American Tr. Ins. Co., 31 Misc. 3d 1208(A)*2 n 1 (N.Y. Civ. Ct. 2011), Ridgewood Medical PC v. National General Insurance Company, 412010055698 (July 12, 2011).

I find that the failure of the Assignor to attend the scheduled IME's provides Respondent with a complete defense against Applicant's arbitration claim.

Accordingly, Applicant's claim is denied in its entirety.

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 Westchester

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

10/09/2024
(Dated)

Joseph Endzweig

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:
b2cd5b3f74369952213e814a4b81f9a5

Electronically Signed

Your name: Joseph Endzweig
Signed on: 10/09/2024