

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

AV Chemist LLC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-23-1311-1052
Applicant's File No.	RFA23-320588
Insurer's Claim File No.	0374230110101013
NAIC No.	35882

ARBITRATION AWARD

I, Alina Shafranov, 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 08/06/2024, 10/16/2024
Declared closed by the arbitrator on 10/16/2024

Phillip Kim, Esq. from Horn Wright, LLP participated virtually for the Applicant

Christine DiGregorio, Esq. from Rivkin & Radler LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$4,540.02**, 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

The Assignor, "TL", a 57-year-old male was involved in a motor vehicle accident as a driver on November 13, 2022. The Assignor sought medical treatment for his injuries and eventually was prescribed medication consisting of Cyclobenzaprine and Naproxen, which was dispensed on 11/18/22-12/30/22, for which the Applicant seeks reimbursement. Respondent timely denied the claims based on Assignor's failure to appear at Independent Medical Examinations (IMEs) on January 12, 2023, and February 6, 2023. Respondent did not assert a fee schedule defense, therefore, the only issue to be decided is whether Respondent has established its defense based on the Assignor's failure to appear for IMEs.

4. Findings, Conclusions, and Basis Therefor

This case was decided on the submissions of the Parties as contained in ADR Center maintained by the American Arbitration Association and the oral arguments of the parties' representatives. This hearing was conducted remotely on the Zoom platform. There were no witnesses present at the hearing. I reviewed the documents contained in the ADR Center for both parties and make my decision in reliance thereon.

Applicant has established a prima facie case of entitlement to reimbursement of this claim. See, Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). Respondent's denials are found to be timely.

11 NYCRR 65-1.1, (d) (Conditions) mandates 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". "The eligible injured person shall permit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonable require."

The Appellate Division also set forth a two-part test that an insurer must pass in order to establish, prima facie, that the claimant failed to appear for IME. The insurer must show that it mailed the scheduling notices to the Assignor and that the Assignor failed to appear. With regard to the mailing, this can be met in one of two ways. The insurer can submit actual proof of mailing of the notices or an affidavit by someone with personal knowledge of actual mailing of the scheduling notices or submit an affidavit describing in detail a mailing procedure that ensures the IME scheduling notices were mailed (see New York Presbyt Hosp v Allstate 29 AD3d 547). Non-appearance can be established by affidavit of the physician designated to perform the IME.

Notice is taken that Respondent has issued timely denials based on the Assignor's failure to appear at two scheduled IMEs on January 12, 2023, and February 6, 2023. Respondent has submitted letters to the Assignor dated December 30, 2022, scheduling the IME for January 12, 2023, and another letter dated January 24, 2023, re-scheduling the IME for February 6, 2023. Respondent has submitted the Affidavits of Howard Kiernan, M.D. and Pierce Ferriter, M.D. the healthcare providers scheduled to perform the IMEs, who stated that the Assignor failed to appear for the IME on both dates.

Applicant's counsel argued that Respondent has failed to meet its burden of proof as there is insufficient evidence of the Assignor's purported non-appearance at these IMEs as Respondent failed to proffer an Affidavit attesting to the mailing of the IME scheduling letters, and, as a consequence, Respondent has failed to sustain its burden of establishing that the IME scheduling letters were timely and properly mailed and that the Assignor failed to appear at the scheduled IMEs, thus nullifying its denials.

Respondent's counsel argued that the defense should be sustained as Respondent has proffered adequate proof of non-appearance via Affidavits from the doctors, and that therefore, the defense is sufficiently supported.

After careful review of the evidence, I find that Respondent has failed to establish its defense premised on the Assignor's non-appearance at the scheduled IMEs. Without a statement with respect to the mailing of the letters by someone with personal knowledge, the assertion that the IME request letters were timely and properly mailed is unsupported. Although the rules of evidence in the arbitration forum are relaxed, Respondent's submission is devoid of even marginal information with respect to the mailing of the IME letters. Under the case of Daras v. Geico Insurance Company, 2009 NY Slip Op 50438(U), 22 Misc. 3d 141(A) (App. Term, 2d Dept., 3/10/09), Respondent must show that a) the IME and/or EUO request were timely mailed and b) that the injured party nonetheless failed to appear. Although Respondent has provided Affidavits from the doctors, it has failed to submit evidence of timely mailing of the IME letters. I find that the proof submitted to establish that Assignor failed to appear at the IMEs is lacking. Respondent has failed to proffer sufficient evidence in support of its defense, and therefore has failed to meet its burden.

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 in favor of the Applicant.

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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	AV Chemist LLC	11/18/22 - 11/18/22	\$2,270.01	Awarded: \$2,270.01
	AV Chemist LLC	12/30/22 - 12/30/22	\$2,270.01	Awarded: \$22,701.01
Total			\$4,540.02	Awarded: \$24,971.02

- B. The insurer shall also compute and pay the applicant interest set forth below. 08/10/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Based on the submission of a timely denial, interest shall be paid from the above date, until the date that payment is made at a rate of 2% per month.

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

As this matter was filed **after** February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 11 NYCRR 65-4.6(d).

- D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

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

10/21/2024
(Dated)

Alina Shafranov

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:
c2e05b469513a67744cfb80a8a91199b

Electronically Signed

Your name: Alina Shafranov
Signed on: 10/21/2024