

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Accelerate Radiology PC d/b/a Precision  
Accelerad , ElectroDiagnostic & Physical Med  
PC  
(Applicant)

- and -

Affirmative Direct Insurance Company  
(Respondent)

AAA Case No.	17-24-1365-0719
Applicant's File No.	3327592
Insurer's Claim File No.	AD24020106
NAIC No.	10413

### **ARBITRATION AWARD**

I, Anne Malone, 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: EIP

1. Hearing(s) held on 01/13/2025  
Declared closed by the arbitrator on 01/13/2025

Stacy Mandel Kaplan, Esq. from Israel Purdy, LLP participated virtually for the Applicant

Rawhan Mobin, Esq. from \*Abrams Fensterman, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,710.21**, 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 claim involves two different providers. The 68 year old EIP reported involvement in a motor vehicle accident on January 24, 2024; claimed related injury and underwent MRI studies of the right knee provided by applicant Accelerate Radiology on July 18, 2024 and an office visit on July 10, 2024 and physical therapy treatment provided by applicant Electrodiagnostic and Physical Medicine, PC from June 21, 2024 to July 13, 2024.

The applicant submitted a claim for these medical services. The respondent timely denied payment for the MRI studies provided by applicant Accelerate Radiology based on its finding that benefits are not payable as the EIP failed to comply with the policy terms by failing to appear for two scheduled independent medical examinations (IMEs.)

The respondent made payment of \$1,082.27 for the office visit and physical therapy treatment provided by applicant ElectroDiagnostic. However, the payment was late.

**The issues to be determined at the hearing are:**

**Accelerate Radiology**

**Whether the respondent established that the EIP violated a condition precedent to coverage.**

**Whether the respondent's denial based on the EIP's failure to appear for an IME can be sustained.**

**ElectroDiagnostic & Physical Medicine**

**Whether the applicant is entitled to interest and attorneys' fees for the services rendered from June 21, 2024 to July 13, 2024.**

4. Findings, Conclusions, and Basis Therefor

This hearing was held on Zoom and the decision is based upon the documents reviewed in the Modria File as well as the arguments made by counsel and/or representative at the arbitration hearing. Only the arguments presented at the hearing are preserved in this decision; all other arguments not presented at the hearing are considered waived.

It is the respondent's burden to prove that the bill in question was properly denied. Under 11 NYCRR 65-1.1, which prescribes the No-Fault Mandatory Personal Injury Protection Endorsement which must be included in all owners policies of motor vehicle liability insurance issued in New York, the "Conditions" section of the endorsement contains a "Proof of Claim" provision (d) which states in pertinent part that "Upon request by the Company, the eligible injured person or that person's assignee or representative shall:(d) "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."

Under the regulations claims practice provisions, Section 65-3.5(d) states in pertinent part that: : "[a]ll examinations under oath and medical examinations requested by the insurer shall be held at a place and time reasonably convenient to the applicant and medical examinations shall be conducted in a facility properly equipped for the performance of the medical examination. The insurer shall inform the applicant at the time the examination is scheduled that the applicant will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with the request."

The respondent submitted copies of letters with proof of mailing scheduling IMEs with Dr. Ferrante and Dr. Walsh dated August 1, 2024 and September 17, 2024 for IMEs scheduled on August 19, 2024 and October 8, 2024, respectively.

The respondent submitted an affidavit by someone with personal knowledge of the business practices and the file for this claim, to establish that the scheduling letters were properly mailed and that the EIP did not appear for two scheduled IMEs. Also submitted were affidavits from Dr. Ferrante and R. Walsh to establish their personal knowledge that the EIP failed to appear for two scheduled independent medical examinations.

The policy breach in this case was instituted by the EIP. It was his/her failure to appear at the two scheduled independent medical examinations that caused the denial of the claims. The EIP's failure to appear for the examinations breached a condition precedent to coverage. See Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559, 560 (N.Y. App. Div. 1<sup>st</sup> Dept. 2011), which held that when an EIP "failed to appear for the requested IMEs, [the insurer] had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued...A denial premised on breach of a condition precedent to coverage voids the policy ab initio and, in such case, the insurer cannot be precluded from asserting a defense premised on no coverage."

The applicant objected at the hearing to the late submission by the respondent of the affidavits by Dr. Ferrante and Dr. Walsh and other proofs of mailing and evidence that the EIP failed to appear for the IMEs scheduled on August 19, 2024 and October 8, 2024.

However, the applicant submitted no evidence that the EIP did not receive the letters scheduling the independent medical examinations or to refute the proof that he did not attend the examinations on August 19, 2024 and October 8, 2024.

Under these circumstances, based on the proofs presented, I have considered the late submissions over the applicant's objection and find that the respondent established that the EIP violated a condition precedent to coverage and that its denial can be sustained.

**Therefore, the claim for services rendered by Accelerate Radiology is dismissed with prejudice.**

Interest and Attorneys' Fees for applicant ElectroDiagnostic and Physical Medicine

The applicant submitted bills for physical therapy services provided from June 21, 2024 to July 13, 2024. The respondent paid the bills pursuant to the New York Workers' Compensation Medical Fee Schedule and submitted sufficient proof of payment.

However, the payment was not received until after the applicant had filed for arbitration on September 12, 2024.

Based on the foregoing, the respondent is entitled to interest and attorneys' fees for the three bills submitted by the applicant.

Interest and attorneys' fees are awarded as follows:

Dates of Service Interest Attorneys' Fees

06/21/24 - 07/01/2024 from 08/14/24 - 09/18/24 - \$6.48 \$49.86

07/01/224 - 07/08/24 from 08/17/24 - 09/18/24 - \$5.21\$42.18

07/10/24 - 07/13/24 from 08/29/24 - 09/18/24 - \$5.21 \$60.06

**Therefore, the applicant is awarded interest in the total amount of \$16.90 and attorneys' fees in the amount of \$152.10.**

**Accordingly, the claim for applicant Accelerate Radiology is dismissed with prejudice. Applicant ElectroDiagnostic & Physical Med is awarded interest and attorneys' fees as stated above. The remainder of the claim is dismissed with prejudice.**

Any further issues raised in the record are held to be moot and/or waived insofar as they were not raised at the time of this hearing. This decision is in full disposition of all claims for no-fault benefits presently before 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	<b>Accelerate Radiology PC d/b/a Precision Accelerad</b>	<b>07/18/24 - 07/18/24</b>	<b>\$966.54</b>	<b>Denied</b>
	<b>ElectroDiagnostic &amp; Physical Med PC</b>	<b>06/21/24 - 07/01/24</b>	<b>\$242.83</b>	<b>Awarded (interest only)</b>
	<b>ElectroDiagnostic &amp; Physical Med PC</b>	<b>07/01/24 - 07/08/24</b>	<b>\$205.68</b>	<b>Awarded (interest only)</b>
	<b>ElectroDiagnostic &amp; Physical Med PC</b>	<b>07/10/24 - 07/13/24</b>	<b>\$295.16</b>	<b>Awarded (non-monetary)</b>
<b>Total</b>			<b>\$1,710.21</b>	<b>Awarded: \$0.00</b>

B. The insurer shall also compute and pay the applicant interest set forth below. 08/14/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a *pro rata* basis using a 30 day month." See 11 NYCRR §64-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits" calculated pursuant to Insurance Department regulations. Where a claim is untimely denied, or not denied or paid, interest shall accrue as of the 30<sup>th</sup> day following the date the claim is presented by the claimant to the insurer for payment. Where a claim is timely denied, interest shall accrue as of the date an action is commenced or an arbitration requested, unless an action is commenced or an arbitration requested within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant. See, 11 NYCRR §65-3.9(c.) The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial was timely. LMK Psychological Servs. P.C. v. State Farm Mut. Auto. Ins. Co., 12 NY3d 217 (2009.)

The applicant is entitled to interest in the total amount of \$16.90.

C. Attorney's Fees

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

Applicant is awarded statutory attorney's fees pursuant to the no fault regulations. For cases filed after February 4, 2015 the attorney's fee shall be calculated as follows: 20% of the amount of first-party benefits awarded, plus interest thereon subject to no minimum fee and a maximum of \$1,360.00. See 11 NYCRR §65-4.6(d.)

The applicant is entitled to attorneys' fees in the total amount of \$152.10.

- 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 CT

SS :

County of Fairfield

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

02/01/2025  
(Dated)

Anne Malone

**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:**  
4ef3de733ed0403b0781b9d10f0051ef

**Electronically Signed**

Your name: Anne Malone  
Signed on: 02/01/2025