

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Brooklyn Medical Practice, PC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-24-1362-8114

Applicant's File No. AR24-24582

Insurer's Claim File No. 1016403-01

NAIC No. 16616

ARBITRATION AWARD

I, Brian Bogner, 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 02/25/2025
Declared closed by the arbitrator on 02/25/2025

Alek Beynenson, Esq. from The Beynenson Law Firm, PC participated virtually for the Applicant

Jeffrey Siegel, Esq. from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$4,797.56**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant's counsel amended the amount in dispute to \$4,379.84 after reducing the amount claimed for the range of motion testing and manual muscle testing performed on November 7, 2018, July 11, 2019 and September 26, 2019 to \$492.26 per date of service.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The eligible injured person (EIP) is a thirty-five year old male driver of a vehicle that was involved in a motor vehicle accident on January 3, 2018. At issue is reimbursement for physical therapy treatment, follow up office visits, range of motion testing and

manual muscle testing performed from September 7, 2018 through January 10, 2020. The Respondent denied reimbursement based on the EIP's failure to appear for examinations under oath (EUOs) on July 26, 2018 and August 24, 2018. Some of the dates of service were also denied based on the EIP's failure to appear for independent medical examinations (IMEs) on April 24, 2018 and May 22, 2018.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents uploaded to the ADR Center maintained by the American Arbitration Association. This case was decided based upon the documents uploaded to the ADR Center and the oral arguments of the parties' representatives at the hearing.

This matter arises from a motor vehicle accident that occurred on January 3, 2018. The EIP was a driver of a parked vehicle that was struck by another vehicle. He did not seek any emergency medical treatment but consulted with the Applicant a few days later with complaints to his neck, left shoulder, back and left knee.

At issue is reimbursement for physical therapy treatment, follow up office visits, range of motion testing and manual muscle testing performed from September 7, 2018 through January 10, 2020. The Respondent denied reimbursement based on the EIP's failure to appear for EUOs on July 26, 2018 and August 24, 2018.

The appearance of the EIP or his or her assignee at an EUO is a condition precedent to an insurer's liability on a policy. Viviane Etienne Med. Care, P.C v. State Farm Mut. Auto. Ins. Co., 35 Misc.3d 127(A) (App. Term 2nd, 11th and 13th Jud. Dists. 2012). An insurer is entitled to judgment dismissing a claim where there is a failure to appear for scheduled EUOs. Dover Acupuncture, P.C. v. State Farm Mut. Auto. Ins. Co., 28 Misc.3d 140(A) (App. Term 1st Dept. 2010). In order for the Respondent to meet its burden with respect to its defense based upon the failure to appear for scheduled EUOs, it must demonstrate that its initial and follow-up requests for verification were timely issued pursuant to 11 NYCRR 65-3.5(b) and 65-3.6(b) and establish that the EIP or assignee failed to appear for the EUOs. Essential Acupuncture Services, P.C. v. Ameriprise Auto & Home Ins. Co., 2012 N.Y. Slip Op. 52404(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012).

The Respondent did not upload any EUO scheduling letters or proof of mailing for the same and, therefore, failed to establish its defense based on the EIP's failure to appear for EUOs.

Some of the dates of service were also denied based on the EIP's failure to appear for IMEs on April 24, 2018 and May 22, 2018.

An EIP is required to submit to medical examinations by physicians selected by, or acceptable to, the insurer, when, and as often as, the insurer may reasonably require. 11 NYCRR 65-1.1(d). The failure by an EIP to attend two (2) separate IMEs requires dismissal of a provider's claim for no-fault compensation. Apollo Chiropractic Care, P.C. v. Praetorian Ins. Co., 27 Misc.3d 139(A) (App. Term, 1st Dept. 2010); Vega Chiropractic, P.C. v. Clarendon Nat'l Ins. Co., 25 Misc.3d 144(A) (App. Term, 2nd Dept. 2009). In order to establish its defense based on an EIP's failure to appear for IMEs, the insurer must prove that the IME notices were properly mailed and that the EIP failed to appear. Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co., 35 A.D.3d 720, 722 (2d Dept. 2006).

The Respondent did not submit any evidence establishing that it sent IME notices to the EIP or that the EIP failed to appear and, therefore, failed to establish its defense based on the EIP's failure to appear for IMEs.

The Applicant is awarded the amended amount claimed.

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	Amount Amended	Status

	Brooklyn Medical Practice, PC	09/07/18 - 09/28/18	\$411.56		Awarded: \$411.56
	Brooklyn Medical Practice, PC	10/02/18 - 10/31/18	\$603.74		Awarded: \$603.74
	Brooklyn Medical Practice, PC	11/06/18 - 11/20/18	\$297.57		Awarded: \$297.57
	Brooklyn Medical Practice, PC	11/07/18 - 11/07/18	\$631.50	\$492.26	Awarded: \$492.26
	Brooklyn Medical Practice, PC	12/04/18 - 12/28/18	\$369.05		Awarded: \$369.05
	Brooklyn Medical Practice, PC	01/04/19 - 01/30/19	\$156.50		Awarded: \$156.50
	Brooklyn Medical Practice, PC	04/01/19 - 04/02/19	\$156.50		Awarded: \$156.50
	Brooklyn Medical Practice, PC	05/17/19 - 05/29/19	\$127.53		Awarded: \$127.53
	Brooklyn Medical Practice, PC	06/17/19 - 06/17/19	\$42.51		Awarded: \$42.51

	Brooklyn Medical Practice, PC	07/02/19 - 07/24/19	\$170.04		Awarded: \$170.04
	Brooklyn Medical Practice, PC	07/11/19 - 07/11/19	\$631.50	\$492.26	Awarded: \$492.26
	Brooklyn Medical Practice, PC	09/10/19 - 09/26/19	\$284.03		Awarded: \$284.03
	Brooklyn Medical Practice, PC	09/26/19 - 09/26/19	\$631.50	\$492.26	Awarded: \$492.26
	Brooklyn Medical Practice, PC	10/03/19 - 10/30/19	\$170.04		Awarded: \$170.04
	Brooklyn Medical Practice, PC	11/04/19 - 11/04/19	\$71.48		Awarded: \$71.48
	Brooklyn Medical Practice, PC	01/10/20 - 01/10/20	\$42.51		Awarded: \$42.51
Total			\$4,797.56		Awarded: \$4,379.84

- B. The insurer shall also compute and pay the applicant interest set forth below. 08/28/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Applicant is awarded interest pursuant to the no-fault regulations. *See* 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." 11 NYCRR 65-3.9(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." *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 at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

Interest shall run from August 28, 2024, the date this proceeding was filed.

C. Attorney's Fees

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

The insurer shall pay the Applicant an attorney's fee in accordance with 11 NYCRR 65-4.6.

- 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 Erie

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

02/26/2025

(Dated)

Brian Bogner

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:
c3aa0671977a0b5757ec5c3d6a10bc99

Electronically Signed

Your name: Brian Bogner
Signed on: 02/26/2025