

Part II. Findings, Conclusions, and Basis Therefor (Continued)

It is argued by the carrier that Unitrin Advantage Ins. Co. v. Bay Shore Physical Therapy, 82 A.D.3d 559, 918 N.Y.S.2d 473 (1st Dept., 2011) establishes the principle that even if the denial was deemed untimely, the failure by the EIP to attend duly scheduled IMEs constituted a policy violation which would negate the untimely denial.

The case of Westchester Medical Center as assignee of Bartolo Reyes v. Lincoln General Insurance Company, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2d Dept., 2009) holds that the defense of a failure to attend an EUO or IME is subject to the preclusion rules if the denial encompassing the defense is not timely issued.

Other arbitrators, in addition to the one at bar, have reached similar conclusions. The Unitrin Court did not discuss (or distinguish) the Westchester decision, so it is not clear how those two decisions which on their face appear to be directly contradictory can be meshed.

The issue is not settled. The determination by the no-fault arbitrator to require a timely denial, even where the defense is based upon a failure to appear for IMEs is not incorrect as a matter of law.

Accordingly,

1. the request for review is hereby denied pursuant to 11 NYCRR 65-4.10 (c) (4)
2. the award reviewed is affirmed in its entirety
3. the award or part thereof in favor of applicant hereby reviewed is vacated and
 respondent
remanded for a new hearing before the lower arbitrator
 before a new arbitrator
4. the award in favor of the applicant hereby reviewed is vacated in its entirety
 respondent

—or—

5. the award reviewed is modified to read as follows:

A. The respondent shall pay the applicant no-fault benefits in the sum of

_____ Dollars (\$ _____), as follows:

Work/Wage Loss	\$ _____
Health Service Benefits	\$ _____
Other Reasonable and Necessary Expenses	\$ _____
Death Benefit	\$ _____
Total	\$ _____

B1. Since the claim(s) in question arose from an accident that occurred prior to April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from _____ at the rate of 2% per month, compounded, and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c) (stay of interest).

B2. Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from _____ at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c) (stay of interest).

C1. The respondent shall also pay the applicant _____ dollars (\$ _____) for attorney's fees computed in accordance with 11 NYCRR 65-4.6(d). *The computation is shown below* (attach additional sheets if necessary).

-or-

- C2. The respondent shall also pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e). However, for all arbitration requests filed on or after April 5, 2002, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).
- C3. Since the charges by the applicant for benefits are for billings on or after April 5, 2002, and exceed the limitations contained in the schedules established pursuant to section 5108 of the Insurance Law, no attorney's fee shall be payable by the insurer. See 11 NYCRR 65-4.6(i).
- D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization for the arbitration below, unless the fee was previously returned pursuant to an earlier award

PART III. (Complete if applicable.) The applicant in the arbitration reviewed, having prevailed in this review,



- A. The respondent shall pay the applicant ONE HUNDRED THIRTY and 00/100 DOLLARS (\$130.00) Dollars for attorney's fees computed in accordance with 11 NYCRR 65-4.10 (j). The computation is as follows: two (2) hours at \$65 per hour.
- B. If the applicant requested review, the respondent shall also pay the applicant SEVENTY-FIVE DOLLARS (\$75) to reimburse the applicant for the Master Arbitration filing fee.

