American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Sean Thompson MD (Applicant)	AAA Case No.	17-16-1032-7355
	Applicant's File No.	SS-25236
- and -	Insurer's Claim File No.	306958002
	NAIC No.	10839
Country-Wide Insurance Company (Respondent)		

ARBITRATION AWARD

I, Tara Maher, 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 03/07/2017
   Declared closed by the arbitrator on 03/07/2017

   Walter Pisari, Esq. from The Law Offices of Hillary Blumenthal P.C. participated in person for the Applicant

   Alex Garriga, Esq. from Jaffe & Koumourdas LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 13,433.37**, 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

   Whether applicant is entitled to no fault benefits for a left knee arthroscopic surgery provided to the EIP on 8/28/15 following involvement in a motor vehicle accident on 6/20/15.

4. Findings, Conclusions, and Basis Therefor

   The subject claim seeks reimbursement for left knee arthroscopic surgery, provided to the EIP, a female involved in a motor vehicle accident on 6/20/15. The services at issue

were performed by applicant in New Jersey. The Respondent denied the Applicant's bills based upon the Assignor's failure to appear for Psychological Independent Medical Examinations with Dr. Rock scheduled for 10/28/15 and 11/18/15.

It is well settled that a heath care provider establishes its prima facie entitlement to No-Fault benefits as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of No-Fault benefits were overdue. Westchester Medical Center v. Lincoln General Insurance Company, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2 Dept. 2009); Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2 Dept. 2004). I find that the Applicant has established a prima facie case.

WHETHER THE RESPONDENT HAS PROVEN THAT THE APPLICANT'S ASSIGNOR BREACHED A CONDITION PRECEDENT TO COVERGE UNDER THE POLICY BY FAILING TO APPEAR FOR IMEs.

The mandatory Personal Injury Protection Endorsement provides that the eligible injured person shall submit to an independent medical examination (IME) by physicians selected by the insurance company as the company may reasonably require. 11 NYCRR Section 65-1-1.

The request for an examination constitutes a request for verification whether it is made before a claim is submitted, or after the submission of a claim as additional verification, and as such, is subject to the follow-up provisions of 11 NYCRR Section 65-3.6(b). See NY Ins. Gen Counsel Op No.: 5-2-21 (2005).

Appearance at a duly requested IME is a condition precedent to an insurer's liability on a policy. Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Company, 35 A.D.3d 720, 827 N.Y.S.2d 217 (2 Dept. 2006).

To meet its prima facie burden, an insurer must establish that it requested IME's in accordance with the procedures and time frames set forth in the No-Fault regulations, and that the injured person failed to appear. American Transit Insurance Company v. Longevity Medical Supply, 131 A.D.3d 841, 17 N.Y.S.3d 1 (1 Dept. 2015); American Transit Insurance Company v. Clark, 131 A.D.3d 840, 16 N.Y.S.3d 456 (1 Dept. 2015); Acupuncture Approach P.C. v. Allstate Insurance Company, 46 Misc.3d 151(A), 2015 N.Y. Slip Op. 50318(U) (App. Term 1 Dept. 2015).

In addition, 11 NYCRR Section 65-3.5(d) provides that if the additional verification requested by the insurer is a medical examination, the insurer "shall schedule the **examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms**."

Applying these requirements to the circumstances hereunder, the Respondent has failed to show that it complied with the governing regulations with respect to the scheduling of the IMEs with regard to the Applicant's bill in the sum of $13, 433.37 for the left knee arthroscopic surgery performed on 8/28/15. The record in the within matter indicates that the Respondent received the Applicant's bill on 9/22/15. However, the Respondent did not schedule the first IME with Dr. Rock **to take place** until 10/28/15. Since this was outside the 30-calendar day time frame for the holding of IMEs, I find that the Respondent did not establish, prima facie, that it was entitled to deny the bill because the Assignor failed to appear for IMEs. See. See W.H.O. Acupuncture, PC v. Travelers Home and Marine Ins. Co., 36 Misc.3d 152(A), 2012 N.Y. Slip Op. 51707(U) (App. Term 2 Dept., 2d, 11th & 13th Jud Dists 2012) (denying an insurer's motion for summary judgment where the first IME was not scheduled to be held within 30 days of the insurer's receipt of the claims); American Transit Insurance Company v. Longevity Medical Supply, 131 A.D. 3d 841, 17 N.Y.S.3d 631 (1st Dept. 2015) ; American Transit Insurance Company v. Vance, 131 A.D. 3d 849, 17 N.Y.S.3d 631 (1st Dept. 2015).

Fee Schedule

In Surgicare Surgical Assoc. v. National Interstate Ins. Co., 50 Misc.3d 85, 2015 NY Slip Op 25338 (App Div, 1 Dep't 10/8/15). The Appellate Term of the First Department, Appellate Division, found that "where a reimbursable health care service is performed outside the State of New York in a jurisdiction that has enacted a medical fee schedule prescribing the permissible charge for the service rendered, an insurer may properly rely on such fee schedule to establish the 'prevailing fee' within the meaning of 11 NYCRR 68.6, and demonstrate compliance therewith by payment in accordance with that fee schedule." The Appellate Term found that the permissible rate was that of New Jersey's fee schedule, and that since the services were rendered after April 1, 2013, "the defense of excessive fees is not subject to preclusion (see 11 NYCRR 65-3.8[g][eff Apr. 1, 2013). I have reviewed the arguments presented and the proof and I find that respondent's interpretation of the New Jersey fee schedule, to be correct.

I take judicial notice of the New Jersey fee schedule and find that it constitutes credible evidence of the prevailing fees in the geographic area or of the applicant. See also, Kingsbrook Jewish Medical Center the Allstate Insurance Company, 61 AD 3d 13 (2d Dept. 2009); LVOV Acupuncture PC v. Geico Insurance Company, 32 Misc. 3d 144 (A) (App. Term 2d, 11th and 13th Jud. Dists. 2011). Natural Acupuncture Health PC v. Praetorian Insurance Company.

According to NJAC 11:3-29.4(f), when multiple surgical procedures are performed in the same operative session at an ASC, the procedure with the highest payment is reimbursed at 100% and reimbursement of any additional procedures furnished in the same session is 50% of the applicable fee. Applicant billed Codes 29880, 29870, 29876, 29877, 20610. As per the New Jersey Fee Schedule applicant is entitled to 100 percent of Code 29880 = 3774.79, 50 percent of Code 29870 (2543.44 divided by 2=1271.72),

50 percent of Code 29876 (3584.57 divided by 2=1792.29), 50 percent of Code 29877(3398.38 divided by 2=1699.19), Code 20610=$84.10 for a total of $8622.09.

I have reviewed the arguments presented and the proof and I find that respondent's interpretation of the New Jersey fee schedule, to be correct. Applicant is therefore awarded 8622.09.

This decision is in full and final settlement of all claims presently pending 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**	**Amount**	**Status**
	Sean Thompson MD	**08/28/15 - 08/28/15**	**$13,433.37**	**Awarded: $8,622.09**
Total			**$13,433.37**	**Awarded: $8,622.09**

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 04/14/2016, which is a relevant date only to the extent set forth below.)

Interest is awarded from the date of filing for all timely denied claims and from the 30th day of presentment of the bill to the carrier for all claims not processed within the statutory 30-day time period. Interest on all awarded claims is to be paid at the rate of two percent per month, not compounded, on a pro-rata basis.

C. Attorney's Fees

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

Having been filed **on or 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 New York
SS :
County of Nassau

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

03/12/2017
(Dated)

Tara Maher

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:
a2dab3559ec58634f2493cc42d2abc5c

Electronically Signed

Your name: Tara Maher
Signed on: 03/12/2017