American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

BMJ Chiropractic PC (Applicant)	AAA Case No.	17-15-1025-1288
	Applicant's File No.	
- and -	Insurer's Claim File No.	02907772261NW
	NAIC No.	17230
Allstate Property and Casualty Insurance Company (Respondent)		

ARBITRATION AWARD

I, Mitchell Lustig, 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 09/26/2016, 03/06/2017
   Declared closed by the arbitrator on 05/11/2017

   Robert Bott, Esq. from Super Associates P.C. participated in person for the Applicant

   Jasmine Garcia-Viuex, Esq. from Smith & Brink, PC participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 2,913.38**, was AMENDED and permitted by the arbitrator at the oral hearing.

   At the hearing, the Applicant's counsel amended the amount of the claim to the sum of $2,763.38

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

3. Summary of Issues in Dispute

   Whether the Respondent established that the Applicant provider breached a condition precedent to coveraage by failing to appear for an Examination Under Oath?

4. Findings, Conclusions, and Basis Therefor

In dispute is Applicant BMJ Chiropractic, PC's claim as the assignee of a 37- year-old female injured in an automobile accident on June 24, 2013, for reimbursement in the revised sum of $2,763.38 for sensory nerve testing of the upper and lower extremities performed by Diane Benyin, D.C. on August 14, 2013.

The Respondent denied the claim alleging that the Applicant provider breached a condition precedent to coverage under the policy by failing to appear for examinations under oath (EUOs) scheduled for October 4, 2013, November 6, 2013 and November 21, 2013.

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 (2nd Dept. 2009); Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that the Applicant has established a prima facie case.

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

The current insurance regulations provide for the scheduling of an examination under oath as additional verification if such a request is reasonably required. 11 NYCRR Section 65-1.1(b).

The request for an examination under oath 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).

The appearance of the eligible injured person or his or her assignee is a condition precedent to an insurer's liability on a policy. See Mega Billing, Inc. v. State Farm

Fire & Casualty Company, 35 Misc.3d 145(A), 2012 N.Y. Slip Op. 51014(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); Viviane Etienne Medical Care, P.C v. State Farm Mutual Automobile Ins. Co., 35 Misc.3d 127(A), 2012 N.Y. Slip Op. 50589(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012).

Thus, it follows that if a provider fails to comply with an insurer's timely and valid request for an EUO, so long as the request strictly complies with the governing

regulations, the insurer is entitled to dismissal of an action seeking no-fault benefits. See Dover Acupuncture, P.C. v. State Farm Mutual Auto Ins. Co., 28 Misc.3d 140(A), 2010 N.Y. Slip Op. 51605(U) (App. Term 1st Dept. 2010); Great Wall Acupuncture, P.C. v. New York Central Mutual Fire Insurance Company, 22 Misc.3d 136(A), 2009 N.Y. Slip Op. 50294(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

In order for Respondent to make a prima facie showing of its defense based upon a provider's to appear at scheduled EUOs, it has to demonstrate that its initial and follow-up requests for verification were timely issued pursuant to11 NYCRR Section 65-3.5(b) and 65-3.6(b) and establish that the provider failed to appear at 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); Urban Radiology, P.C. v. Clarendon National Insurance Company, 31 Misc.3d 132(A), 2011 N.Y. Slip Op. 50601(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2011); Advanced Medical, P.C. v. Utica Mutual Insurance Company, 23 Misc.3d 141(A), 2009 N.Y. Slip Op. 51023(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

A review of the record reveals that on September 19, 2013, Respondent's attorneys sent a letter to the Applicant provider requesting that the Applicant appear for an EUO at the offices of the Applicant's counsel on October 4, 2013. The Applicant failed to appear.

On October 22, 2013, more than **10 days** after the Applicant failed to appear, the Respondent's attorney sent a follow-up letter rescheduling the EUO to November 6, 2013. Again the Applicant failed to appear.

The Applicant's counsel argued that the second EUO scheduling letter was untimely and therefore precluded the Respondent's defense because it was not sent within ten days of the first missed EUO on October 4, 2013. I agree with the Applicant's counsel and find that the Respondent's defense predicated upon the failure of the Applicant to appear for an EUO is precluded.

Pursuant to 11 NYCRR Section 65-3.6(b), upon Applicant's failure to appear for the EUO on February 20, 2013, the Respondent was required to send a follow up verification request (a second rescheduling letter) within 10 days after Applicant's non-compliance. Thus, the Applicant was obligated to send its follow-up request by October 14 2013. Herein, the Respondent waited until October 22**,** 2013 to send the rescheduling letter.

It should be noted that EUO and IME verification requests are **not** open ended where the regulations require the Respondent to wait 30 days before sending a follow-up request. With EUO and IME verifications, it has been held that the follow-up period runs from the **date of non-compliance, to wit, the date of the first missed EUO.** See Brooklyn Heights Therapy, P.C. v. New York Central Mutual Fire Insurance Company, 36 Misc.3d 134(A), 2012 N.Y. Slip Op. 51337(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); Arco Medical New York, P.C. v. Lancer, Insurance Company, 34 Misc.3d 134(A), 2011 N.Y. Slip Op. 52382(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2011);

Kings Medical Supply, Inc. v. Kemper Auto & Home Ins. Co., 7 Misc.3d 128(A), 2005 N.Y. Slip Op. 50450(U) (App. Term 2nd and 11th Jud.Dists. 2005); A.B. Medical Services, PLLC v. Utica Mutual Insurance Company, 10 Misc.3d 50, 2005 N.Y. Slip Op. 25456 (App. Term Second Dept. 2005); Imperium Insurance Company v. Gutierrez, 2015 WL 9254197 (N.Y. Sup Ct. New York County) (second EUO scheduling letter sent 13 days after the first missed EUO is untimely). This interpretation is also in accord with the Opinion Letter of the New York State Department of Insurance, dated December 22, 2006, which states as follows:

> "When an EUO is required and the party required to appear fails to attend a scheduled EUO, the insurer must meet its obligation under {11 NYCRR Section 65-3.6(b)} and within **10 calendar days,** contact the party from whom verification (the EUO) has been requested and not provided, i.e. non-attendance at the scheduled EUO, in order to afford the party a second opportunity to attend an EUO."

I note that my decision is in accord with the recent decision in Lotus Acupuncture v. State Farm Mutual Automobile Insurance Company, 39 Misc.3d 829, 2013 N.Y. Slip Op. 23098 (N.Y. Civ. Ct. Queens Co. 2013). In the latter case, involving an insurer's defense predicated upon a medical provider's failure to appear for duly scheduled EUOs, the Court was presented with the following question that goes to the heart of the dispute herein, to wit, whether an insurer is required to send a follow-up letter for a missed EUO "within 10 calendar days of a defaulted examination under oath or from the expiration of 30 days from the original requests irrespective of the date the examination under oath appearance was scheduled." The Court, citing an opinion letter from the Superintendent of Insurance dated December 22, 2006, held that "the 10 day calendar day deadline for sending a follow-up verification request is measured from the date the initial EUO is missed."

Since the record in the within matter indicates that the Respondent's second EUO scheduling letter was not sent within 10 days after the first missed EUO on October 4, 2013, I find that Respondent's denial is defective and late and therefore the Respondent is precluded from asserting its defense that the Applicant breached a condition precedent to coverage by failing to appear for duly scheduled EUOs. See Avicenna Medical Arts, PLLC v. Unitrin Advantage Insurance Company, 47 Misc.3d 130(A), 2015 N.Y. Slip Op. 50382(U) (App. Term 2nd, 11th and a13th Jud. Dists. 2015); Concourse Chiropractic, PLCC v. Fiduciary Insurance Company of America, 35 Misc.3d 146(A), 2012 N.Y. Slip Op. 51058(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); Kemper Independence v. Acupuncture Approach., P.C., 2016 WL 3855469 (N.Y. Sup. Ct. New York County, 2016).

Finally, the Fourth Amendment to Revised Regulation 68 does not save the Respondent's defective denial. While the latter Amendment, applicable to services performed after April 1, 2013, added language to 11 NYCRR Section 65-3.8 providing that with respect to a verification request "an insurer's non-substantive technical or

immaterial defect or omission, **as well as an insurer's failure to comply with a prescribed time frame,** shall not negate an applicant's obligation to comply with the request or notice," see 11 NYCRR Section 65-3.5 (p), I find that the failure of the Respondent to send the second EUO scheduling letter within 10 days of the first missed EUO is **not** a "non- substantive technical or immaterial defect or omission" within the intent of the Regulation. Moreover, with regard to that portion of the regulation which states that "**an insurer's failure to comply with a prescribed time frame shall not negate an applicant's obligation to comply with the request or notice,** I find that the revised Amendment does not take precedence over the case law cited in the preceding paragraph which specifically holds that an insurer's denial is defective where it fails to send the letter scheduling the follow-up EUO within 10 days of the first missed EUO.

By way of a post-hearing submission, the Respondent's counsel argues that the Respondent was excused from complying with the requirement that it send the second EUO scheduling letter within 10-days of the first missed EUO on October 4, 2013 because there was correspondence between the parties regarding the scheduling of the Applicant's EUO. Specifically, the Respondent's counsel asserted that on October 2, 2013 and on October 10, 2013, the Applicant's counsel, Super Associates, PC, sent correspondence to the Respondent which advised as follows: "I will coordinate with the provider to provide alternative dates for the EUO to be rescheduled." Thus, the Respondent's counsel further noted as follows: "The Respondent was in a very tricky situation in trying to both accommodate the Applicant and its attorney, as well as abide by the No-Fault Regulations."

While I appreciate the fact that there was ongoing correspondence between the parties, I nevertheless find that this does **not** excuse the Respondent from complying with the no-fault regulations and case law which expressly mandates that the second EUO scheduling letter must be sent within 10 days of the first missed EUO. Notwithstanding the correspondence from the Applicant's counsel, there is no reason why the Respondent could not send its second EUO scheduling letter to the Applicant within 10 days of the first missed EUO on October 4, 2013. Instead, the Respondent waited until October 22, 2013 to send its second scheduling letter.

Based upon the foregoing, I find in favor of the Applicant in the sum of $2,763.38.

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**
	BMJ Chiropractic PC	**08/14/13 - 08/14/13**	**$2,763.38**	**$2,763.38**	**Awarded: $2,763.38**
Total			**$2,913.38**		**Awarded: $2,763.38**

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 12/24/2015, which is a relevant date only to the extent set forth below.)

The insurer shall pay interest at the rate of 2% per month, simple (not compounded), on a pro rata basis using a 30-day calendar month. Interest shall be computed from December 24, 2015 to the date of payment.

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay the applicant an attorney's fee equal to 20% of that total sum, subject to a maximum of $1,360.00. See 11 NYCRR 65-4.6(d). However, if the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation process, the attorney's fee shall be based upon the provisions of 11 NYCRR Section 65-4.6(b).

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

05/11/2017
(Dated)

Mitchell Lustig

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:
39f6646801a591dfde7268e7194a6427

Electronically Signed

Your name: Mitchell Lustig
Signed on: 05/11/2017