

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

21st Century Pharmacy Inc
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-16-1034-0518

Applicant's File No. RFA16-189548

Insurer's Claim File No. 0391164571
3WC

NAIC No. 19232

ARBITRATION AWARD

I, Alison Berdnik, 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: Claimant

1. Hearing(s) held on 05/04/2017
Declared closed by the arbitrator on 05/13/2017

Emily Bennett, Esq. from Russell Friedman & Associates LLP participated in person for the Applicant

Victor Ivanoff, Esq. from Smith & Brink, PC participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 273.01**, 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

The Claimant, DR, a 29-year-old male, was the operator of a motor vehicle involved in an accident November 11, 2015. At issue in this case is an aggregate sum of \$273.01 for prescription medication dispensed November 24, 2015. Respondent has not paid or denied Applicant's claim, asserting that verification was timely requested and remains outstanding and, therefore, Applicant's claim is not ripe for adjudication.

The issues requiring determination are:

- 1) Whether the Applicant's claim for the disputed services is ripe for adjudication due to outstanding verification requests dated January 19, 2016 and February 24, 2016; and,

2) Whether Applicant's charges conform to the appropriate fee schedule.

4. Findings, Conclusions, and Basis Therefor

An Applicant establishes its prima facie showing of an entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed, received by the Respondent and that payment of no-fault benefits is overdue. *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.2d 742, 774 N.Y.S.2d 564 (2nd Dept. 2005). A facially valid claim has been defined as one that sets forth the name of the patient, date of accident, date of service, description of services rendered and the charges for those services. *See, Vining's Spinal Diagnostic P.C. v. Liberty Mutual Insurance Company*, 186 Misc. 2d 128(A), 784 N.Y.S.2d 918 (2003).

In this instance, Applicant has met its prima facie burden. The bill has not been paid or denied as Respondent asserts that Applicant failed to respond to an outstanding verification request.

An Arbitrator "shall be the judge of the relevance and the materiality of the evidence offered, strict conformity to the rules of evidence shall not be necessary. The arbitrator may question or examine any witness or party and independently raise any issue that arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations." 11 NYCRR 65-45(0)(1). Additionally, as the trier of the facts and the law, an Arbitrator is authorized to review and take judicial notice of any rule, law, medical document or periodical or any other document which may impact and aid in making a decision, as long as it conforms with the Insurance Laws and the New York State Insurance Department Regulations. *Matter of Medical Society v. Serio*, 100 N.Y.2d 854, 768 N.Y.S.2d 423 (2003).

The Applicant has established proper submission of its bills for the disputed prescription medication, and the Respondent has taken the position that the claim is not ripe for adjudication due to outstanding verification requests.

Respondent is requesting that the matter be dismissed without prejudice based on the Applicant's failure to provide the verification materials which were reasonably requested in a timely fashion and, according to Respondent, are critical to determining whether Respondent is responsible for the No-Fault benefits at issue. Courts have held that an insurer is not obligated to pay or deny a claim until it has received verification of all relevant information requested. *Nyack Hospital v. State Farm*, 19 A.D.3d 569, 796 N.Y.S.2d 538 (2nd Dept. 2005); *St. Vincent's Hospital v. American Transit Ins. Co.*, 299 A.D.2d 338, 750 N.Y.S.2d 98 (2nd Dept. 2002); *Doshi Diagnostic Imaging Service v. State Farm Insurance Co.*, 16 Misc.3d 42, 842 N.Y.S.2d 153 (App. Term 9th & 10th Jud. Dists. 2007).

Pursuant to 11 NYCRR §65-3.8 (1), No-Fault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of claim, which shall include verification

of all of the relevant information requested pursuant to section 65-3.5 of the Regulations.

11 NYCRR §65-3.5(b) sets forth the claims procedure the Respondent is to follow. It states:

Subsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms.

At 11 NYCRR §65-3.6, the Regulations go on to state:

(b) Verification requests. At a minimum, if any requested verifications has not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested, either by telephone call, properly documented in the file, or by mail. At the same time the insurer shall inform the applicant and such person's attorney of the reasons(s) why the claim is delayed by identifying in writing the missing verification and the party from whom it was requested.

Where the insurer establishes that it timely mailed its verification request and follow-up request to the claimant, and the claimant fails to prove that it provided the requested verification prior to the commencement of the action, the action is premature, and should be dismissed without prejudice as the 30-day period within which the insurer was required to pay or deny the claim has not yet expired. *Triangle R. Inc v. GEICO Ins. Co.*, 27 Misc. 3d 137(A), 922 N.Y.S.2d 696 (Table) 2010 N.Y. Slip Op. 50885(U), 2010 WL 2010158 (App. Term 2nd, 11th & 13th Jud. Dists. May 13, 2010).

Respondent's verification requests seek thirteen (13) items that Respondent deems necessary to make a determination as to whether Respondent is responsible for the no-fault benefits at issue. However, Respondent disputes that it has not received only three (3) of the requested pieces of information: a letter of medical necessity; evidence/proof that conservative treatment and/or FDA approved alternatives were provided to the patient prior to dispensing compounded medications; and a complete, legible copy of the lease agreement for the rental space where Applicant maintains its place of business.

The record includes correspondence from Applicant's counsel dated March 4, 2016 purporting to provide the requested items, except counsel objected to Respondent's request for proof that conservative treatment and/or FDA approved alternatives were provided to each patient prior to Applicant dispensing the disputed medications.

The record also includes a 22-page facsimile dated January 28, 2016, with confirmation of its transmission to Respondent directly from Applicant. Relevant to the items claimed by Respondent to not have been received, Applicant has faxed only the first page of the

lease agreement, together with the last page of what appears to be a Guaranty of the lease, and does not include a letter of medical necessity for the disputed prescriptions or any information relevant to "evidence/proof" of conservative treatment and/or FDA approved alternatives.

With respect to the lease agreement supplied by Applicant, Respondent's counsel claims the copy received directly from Applicant is incomplete, and the copy received from Applicant's counsel appears complete, but is illegible.

However, Respondent's counsel also argued that Respondent never received the correspondence dated March 4, 2016 from Applicant's counsel because it was mailed to the incorrect address. Respondent's verification requests instruct Applicant to mail the requested information to Respondent's office located at 4 Metro Tech Center, Suite 2001, Brooklyn, New York 11201. However, Applicant's correspondence is addressed to Respondent at Brooklyn Metro MCO, P.O. Box 2874, Clinton, Iowa 52733.

The Clinton, Iowa address may not be the address to which Respondent instructed Applicant to send the verification materials, however, the Clinton, Iowa address, according to Respondent's letterhead, is a viable address for Respondent. Moreover, Respondent's counsel argued that its client never received Applicant counsel's correspondence, but, alternatively argued that the copy of the lease agreement supplied by Applicant's counsel, which is annexed to counsel's March 4, 2016 correspondence, is illegible. Thus, the evidence suggests that Applicant's March 4, 2016 correspondence was, in fact, received by Respondent.

Moreover, I find Respondent's requests for "evidence/proof that conservative treatment and/or FDA approved alternatives were provided to the patient prior to dispensing compounded medications" to be invalid. This request goes to the necessity of the services rendered. Applicant counsel's correspondence dated March 4, 2016 purports to attach a "letter of medical necessity and/or records from the prescribing physician", together with the prescriptions for the disputed medications, lease agreement, W-9 form, Certificate of Incorporation, pharmacist licensing, and various information relating to the incorporation of Applicant. A review of the record reveals that Applicant has furnished a copy of the initial evaluation report prepared by the prescribing physician. However, a letter of medical necessity is not included in the record below.

Insofar as Respondent only claims to be missing 4 of the 13 items requested in its verification requests, the evidence suggests that Respondent obviously received *some* of the information requested, whether directly from Applicant or Applicant's counsel. However, Respondent has not submitted any evidence that it communicated with Applicant or Applicant's counsel following receipt of Applicant's facsimile and/or Applicant's counsel's correspondence notifying Applicant of the items which remained outstanding.

Moreover, it is *Respondent's counsel* that alleges to have not received the items Respondent claims are outstanding. The record is void of an affidavit, or any written documentation from Respondent, identifying the items purportedly missing, or attesting to the fact that the Applicant's facsimile dated January 28, 2016 was not received by

Respondent. The evidence in the record below reveals that Applicant's facsimile was directed to Respondent, not Respondent's counsel. Therefore, I find Respondent counsel's assertion that the missing items were never received by *their office* insufficient to establish non-receipt of the items by *Respondent*.

The regulations envision "communication, not inaction" from both parties with respect to requests for additional verification. *See, e.g., Westchester County Med. Ctr. v. New York Cent. Mut. Fire Ins. Co.*, 262 A.D.2d 553, 262 A.D.2d 553, 692 N.Y.S.2d 665 (2nd Dept. 1999); *Mary Immaculate Hosp. v. New York Cent. Mut. Fire Ins. Co.*, 2008 NY Slip Op 52046(U), 21 Misc.3d 130(A) (App Term 2nd Dept., Oct. 9, 2008).

I find that Applicant has adequately responded to Respondent's verification requests. If Respondent deemed a more legible copy of the lease agreement and a letter of medical necessity vital to making a determination regarding payment of Applicant's claim, upon receipt of Applicant's January 28, 2016 facsimile, and/or Applicant's counsel's March 4, 2016 correspondence, it was incumbent upon Respondent to communicate its concern to Applicant, which Respondent neglected to do.

Based upon the foregoing, I further find that Respondent was obligated to pay or deny Applicant's claim, or request further verification, no later than April 3, 2016. Therefore, interest shall be awarded commencing April 4, 2016, until such time as payment of the claim is made by Respondent.

Finally, Respondent argued that the correct charge for Meloxicam in accordance with the Fee Schedule is \$116.28, and that the correct charge for the Zanaflex (Tizanidine) is \$29.32. However, Respondent has failed to submit any explanation supporting its calculations for the amount it claims is due Applicant. Thus, Respondent has failed to submit any persuasive evidence that the charges submitted by Applicant are not in accordance with the appropriate fee schedule.

Accordingly, Applicant is awarded \$273.01, in full satisfaction of its claim.

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
	21st Century Pharmacy Inc	11/24/15 - 11/24/15	\$273.01	Awarded: \$273.01
Total			\$273.01	Awarded: \$273.01

- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 05/26/2016, which is a relevant date only to the extent set forth below.)

Applicant's bill became overdue April 4, 2016, thirty-one (31) days from the day Respondent received Applicant's claim. Thus, Applicant is awarded \$273.01, plus applicable interest computed from April 4, 2016, until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty day month.

C. Attorney's Fees

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

As this matter was filed 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 the 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 Suffolk

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

05/15/2017

(Dated)

Alison Berdnik

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:
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Electronically Signed

Your name: Alison Berdnik
Signed on: 05/15/2017