American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Colin Clarke MD PC (Applicant)	AAA Case No.	17-16-1033-1855
	Applicant's File No.	
- and -	Insurer's Claim File No.	ALH75992
	NAIC No.	40169
Met Life Auto & Home Insurance Co. (Respondent)		

ARBITRATION AWARD

I, Rhonda Barry, 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 05/12/2017
   Declared closed by the arbitrator on 05/12/2017

   Roman Kulik, Esq. from Kulik Law Firm, PC participated by telephone for the Applicant

   Christopher Volpe, Esq. from Bruno Gerbino & Soriano LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 1,920.32**, 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

   Did the respondent validly and timely deny Applicant's claims based upon Applicant's failure to attend an examination under oath?

4. Findings, Conclusions, and Basis Therefor

   The EIP is a 52 year old male injured as a driver in a motor vehicle accident on 5/13/15. Applicant seeks $1,920.32 for injections and office visits on DOS 5/21/15-9/24/15. Upon receipt of applicant's claim, respondent sought additional verification, specifically

the EUO of the EIP. This was completed on 6/23/15. Respondent thereafter demanded the EUO of applicant. When applicant did not appear, respondent reschedule the EUO. Subsequently, respondent learned that applicant had retained counsel; counsel advised that applicant intended to comply with the request but need to reschedule to a different date and different location. Respondent agreed and the EUO was rescheduled 3 more times. Applicant did not appear. Respondent denied applicant's claims based upon failure to appear for EUO.

I have completely reviewed all timely submitted documents contained in the ADR Center record maintained by the American Arbitration Association and considered all oral arguments. No additional documents were submitted by either party at hearing. No witnesses testified at hearing.

ANALYSIS

Applicant has established its prima facie entitlement to reimbursement for no fault benefits based upon the submission of a properly completed claim form setting forth the amount of the loss sustained and that payment is overdue. Mary Immaculate Hospital v. Allstate Insurance Company, 5 AD 3d 742, (2nd Dept. 2004). Westchester Medical Center v. Lincoln General Ins Co, 60 AD 3d 1045 (2nd Dept. 2009). The burden of production and persuasion now shifts to respondent. Citywide Social Work and Psych Services, PLLC v. Allstate, 8 Misc. 3d 1025A (2005); Healing Hands Chiropractic v. Nationwide Assurance Co., 5 Misc. 3d 975 (2004).

11 NYCRR section 65 - 1.1 provides that, "no action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage". Further, "upon request by the company, the eligible injured person or that person's assignee or representative shall: (a) execute a written proof of claim under oath; (b) as may reasonably be required submit to examinations under oath by any person named by the company and subscribed the same."

In Unitrin Advantage Insurance Company v. Physical Therapy, PLLC, 82 AD 3d 559 (1st Dept. 2011), the court determined that an insurer could retroactively deny a claim based upon a claimant's failure to appear for an IME retroactively to the date of loss regardless of whether the denials were timely issued. Further, the failure to appear for an IME is a breach of a condition precedent to coverage and voids the policy ab initio and in such case, the insurer cannot be precluded from asserting a defense premised on no coverage. Nonetheless, the court specifically held that, "[the insurer] satisfied its prima facie burden on summary judgment of establishing that it requested IMEs *in accordance with the procedures and time frame*s set forth in the no-fault implementing regulations and that the … assignor did not appear." (Emphasis added).

The First Department emphasized compliance with the procedures and time frames of the regulations ([11 NYCRR § 65 - 3.5[b]) in American Transit Insurance Company v.

Longevity Medical Supply, Inc., 131 AD 3d 841 (1st Dept. 9/15/15) and National Liability and Fire Insurance Company v. Tam Medical Supply Corp., 131 AD 3d 851 (1st Dept. 9/15/15).

I agree with the holding in Unitrin, supra that the failure to appear for an EUO or IME is a breach of condition precedent to coverage. However, if the EUO is utilized as a request for additional verification and demanded in response to receipt of claims, the insurer must establish compliance with the verification protocols mandated by the regulations to sustain its defense. "The fundamental goal of the no-fault regulatory scheme is to promote prompt payment of legitimate claims." Nyack Hospital v. General Motors Acceptance Corp., 8 NY 3d 294 (2007). A duty of reasonableness and cooperation must be imposed on both parties in the verification process, including in scheduling and conducting IMEs and EUOs. See, Canarsie Chiropractic, PC v. State Farm Mutual Automobile Insurance Company, 27 Misc. 3d 1228 (Civil Ct. Kings County 2010).

For an insurer to be entitled to defend its nonpayment based upon the failure to appear at scheduled EUOs, must first demonstrate that its initial and follow-up request for verification were timely made pursuant to 11 NYCRR 65 - 3.5 (b) an 11 NYCRR 65 - 3 .6 (b) respectively. The defense of missed EUOs is precluded if untimely. Advanced medical PC v Union Mutual Insurance Company, 2009 NY Slip op 51023 (U), 23 Misc. 3d 141 (A) (App. Term 2nd Dept. 2009); Ocean Diagnostic Imaging PC v New York Central Mutual Fire Insurance Company, 10 Misc. 3d 138 (A), 2005 NY Slip Op 51745 (U) (App. Term 2nd Dept.).

It has been held that letters to a health care provider merely stating that the insurer was waiting for the results of an investigation by its special investigation unit as well as the scheduling of an EUO are delay letters not constituting verification requests, and they do not toll the statutory time period within which a claim must be paid or denied. Points of Health Acupuncture, PC v. Lancer Insurance Company, 28 Misc. 3d 133 (A), 2010 NY Slip op 51338 (U), (App. Term 2d, 11th and 13th Dists., July 22, 2010).

While the delay letters do not necessarily extend Respondent's ability to toll the time within which to pay or deny, I find that the EUO scheduling letters were all timely and scheduled within 30 days of receipt of applicant's claim. In order to toll the 30 day deadline, an initial EUO request must be sent within 30 days after receipt of the bill. Tsatskis v. State Farm Fire and Casualty Company, 36 Misc. 3d 129 (A), 954 NYS 2d 762 (App. Term 9th and 10th Dist. 2012).

For *DOS 5/21/15 ($554.91)*, the claim was *received on 5/28/15*. Respondent's first request for an EUO of applicant is *dated 6/24/15* and is timely. When the applicant did not appear the EUO was promptly rescheduled on 7/14/15 (to be held on 8/5/15). In the interim, respondent received correspondence from applicant's attorney dated 7/21/15 with reference to a different claimant injured in the 5/13/15 accident. Counsel advised that applicant's intended to comply with the EUO but the date and location were inconvenient. By letter dated 7/24/15 respondent's counsel agreed to accommodate

applicant and by letter dated 8/4/15 rescheduled the EUO for 8/20/15. Although the letter scheduled the EUO for Melville, New York, the 7/24/15 letter specifically stated that respondent would travel to Brooklyn once the EUO was confirmed. Applicant did not appear and the EUO was rescheduled twice more by letter dated 8/27/15 (to take place on 9/16/15) and by letter dated 9/23/15, (to take place on 10/7/15). Applicant never appeared.

For *DOS 7/23/15 ($410.95) and DOS 7/30/15 ($565.00),* the claims were received on 8/17/15. The first 3 EUO letters (6/24/15, 7/14/15 and 8/4/15) were pre-claim, and as such the detailed and narrowly construed verification procedures contained in 11 NYCRR 65 - 1.1 (d) and 65 - 3.5 (d) governing IME's and EUOs that are requested after receipt of a claim do not apply. However, when applicant did not appear for the 8/20/15 EUO respondent timely mailed another request on 8/27/15. Likewise, the last EUO request on 9/23/15 was timely.

For DOS 9/24/15 ($389.46), all EUO requests were pre-claim and as such the detailed and narrowly construed verification procedures contained in 11 NYCRR 65 - 1.1 (d) and 65 - 3.5 (d) governing EUOs that are requested after receipt of a claim do not apply.

In order to establish a defense based upon policy violation, the insurer of must provide credible evidence that it mailed the EUO notices and that the party failed to appear. See, Stephen Fogel Psychological v Progressive Casualty Insurance Company, 7 Misc. 3d 18, 793 NYS 2d 661 (App. Term 2dand 11th Dist. 2004, reversed on other grounds, 35 AD 2d 720, 827 NYS 2d 217 (2d Dept. 2006). Generally, proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee. New York and Presbyterian Hospital v. Allstate Insurance Company, 29 A.D. 3d 547 (2nd Dept. 2006)**,** quoting, Matter of Rodriguez v Wing, 251 AD2d 335 (2d Dept. 1998). "The presumption may be created by either proof of actual mailing or proof of the standard office practice or procedure designed to ensure that items are properly addressed and mailed" New York and Presbyterian Hospital v. Allstate Insurance Company, 29 AD 3d 547 quoting Residential Holding Corp. Scottsdale Insurance Company, 286 AD 2d 679 (2nd Dept. 2001). Such "office practice must be geared so as to ensure the likelihood that the [the correspondence] is always properly addressed and mailed", Nassau Insurance Company v. Murray, 46 NY 2d 828 (1978).

Respondent has established that the EUO letters were properly mailed. For each date of service applicant provides both actual proof of mailing from the USPS that the applicant was notified of each requested appearance at EUO. As soon as respondent learned of counsel, counsel was properly notified that an EUO was required. Respondent also submits a credible affidavit from Richard C. Aitken, Esq. detailing mailing procedures.

Mr. Aitkin's affidavit also credibly establishes that the EIP failed to appear. Further, respondent includes transcripts affirmatively establishing that the applicant did not appear as scheduled. An EUO transcript certified by the transcriber is admissible

although neither signed her verified by the deponent. See, Manhattan medical imaging PC V. State Farm Mutual Automobile Insurance Company, 20 Misc. 3d 1144 (A), 873 NYS 2d 235 (Civil Ct. Kings County 2008).

There is nothing in either submission indicating that applicant objected to the EUO as unreasonable. When there is no response in any way to an insurer's request for an EUO of the health service provider, the provider's objections regarding the EUO requests will not be heard. Viviane Etienne Medical Care PC v. State Farm Mutual Automobile Insurance Company, 35 Misc. 3d 127 (A) (App. Term 2d, 11th and 13th Districts 2012). Even assuming I find that there is no reasonable basis for the request for examination under oath or that the request was not specific to the bill at issue, the applicant's failure to communicate with respondent is unacceptable.

Giving the applicant the benefit of every possible doubt, assuming that respondent's request was unreasonable , not specifically related to the claim at issue, and serving no purpose but to improperly delay no-fault payments without sufficient cause, it would have been proper the applicant to have objected it would have been proper the applicant to have objected. See, Gergerson v. State Farm Insurance Company, 2010 NY Slip Op 50604(U) (Dist. Ct Nassau, 2010). The failure to object shifts the balance back in respondent's favor. See also, Media Neurology PC v. Countrywide Insurance Company, 21 Misc. 3d 1101 (Civil Ct. Kings County 2008) wherein the court noted that neither party made no communications from the other without risking their chances to prevail on the matter, citing All Health Medical Care PC v. Geico Insurance Company, 2 Misc. 3d 907 (Civ. Ct. Qns County 2004). In Westchester County Medical Center v. New York Central Mutual Fire Insurance Company , 262 AD 2d 553 (2nd Dept. 1999), the court noted that if the provider objects to a verification request it must at least make its objections known.

At hearing, applicant's counsel opined that applicant did willfully fail to cooperate. There is no requirement that an insurer establish willful noncompliance with an EUO request. Arco Medical New York, PC v. Lancer Ins. Co., 37 Misc. 3d 90, 955 NYS 2d 711 (App. Term 2d, 11th & 13th Dists. 2012).

If a provider fails to comply with an insurer is timely invalid request for an EUO the insurer is entitled to dismissal, so long as the request complies with the governing regulations. See, Great Wall Acupuncture PC v. New York Central Mutual Fire Insurance Company, 22 Misc. 3d 136(A) (App Term 2d Dept. 2009); Inwood Hill Medical PC v. General Assurance Company, 10 Misc. 3d 18 (App. Term 1st Dept. 2005); Stephen Fogel Psychological PC v. Progressive Insurance Company, 7 Misc. 3d 18 (2d Dept. 2006).

I find in favor of respondent and the claim is denied in its entirety.

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 claim is DENIED in its entirety

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

05/17/2017
(Dated)

Rhonda Barry

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:
75c768bb0d3867ad8c41b2beff7c1dd2

Electronically Signed

Your name: Rhonda Barry
Signed on: 05/17/2017