American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Community Medical Imaging P.C. (Applicant)	AAA Case No.	17-16-1026-2418
	Applicant's File No.	83119
- and -	Insurer's Claim File No.	19034405804
	NAIC No.	12504
Ameriprise Insurance Company (Respondent)		

ARBITRATION AWARD

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 08/31/2016, 03/29/2017, 06/02/2017
   Declared closed by the arbitrator on 06/26/2017

   Naomi Cohn, Esq. from of counsel to Ursulova Law Offices P.C. participated in person for the Applicant

   Steven Daniel Levy, Esq. from Bruno Gerbino & Soriano LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 912.00**, 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 was the 56 year-old female driver of a motor vehicle that was involved in an accident on 11/29/14. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. At issue is a lumbar spine MRI performed by Applicant on 12/29/14. The issue to be determined is whether Respondent established that Applicant violated a policy condition for failing to submit to requests for an Examination Under Oath (EUO).

4. Findings, Conclusions, and Basis Therefor

THIS HEARING WAS CONDUCTED USING THE ELECTRONIC CASE FOLDER MAINTAINED BY THE AMERICAN ARBITRATION ASSOCIATION. ALL DOCUMENTS CONTAINED IN THAT FOLDER ARE MADE PART OF THE RECORD OF THIS HEARING.

THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED.

Based on a review of the documentary evidence, this claim is decided as follows:

An applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

The 8/31/16 hearing was continued for Respondent "to submit a short brief referencing the specific pages and line numbers of the "inconsistencies" in the submitted EUO transcript of the Applicant that formed the basis of the second EUO request. Respondent should also specifically indicate what if any requested documents remain outstanding. Respondent could also address the 420 pages that were uploaded by Applicant on 8/30/16 involving other EUOs of Applicant. Respondent could also submit cases/arbitration decisions involving the same/similar denial language." Applicant also had the opportunity to submit a reply. Respondent made a post hearing submission. The 3/29/17 hearing was held open for Applicant "to submit cases/arbitration decisions that apply the holdings of *Neptune Med. Care, P.C. v. Ameriprise Auto & Home Ins.*, 2015 NY Slip Op. 51220(U) (App. Term 2d, 11th & 13th Dists. 2015) and/or *American Tr. Ins. Co. v. Longevity Med. Supply, Inc.*, 2015 NY Slip Op. 06761 (App. Div. 1st Dept. 2015) to a further EUO." Applicant uploaded a voluminous post hearing submission that was not requested to demonstrate "that all information requested after EUO was provided." Arbitrator Support Services was asked to find out Respondent's position regarding this post hearing submission (whether they acknowledged that all documents were provided, whether some were not previously provided, etc.). After receiving briefs addressing several arguments from Respondent via e-mail Arbitrator Support Services indicated that another hearing should be scheduled. Respondent's e-mails were subsequently uploaded. The 6/2/17 hearing was held open for both sides "to submit cases/arbitration awards that found there was/was not a reasonable basis for a further EUO of Applicant or otherwise support their respective positions. No other submissions will be considered." No post hearing submissions were made.

The claimant was the 56 year-old female driver of a motor vehicle that was involved in an accident on 11/29/14. The claimant reportedly injured her neck and low back. There was no reported loss of consciousness. There were no reported lacerations or fractures.

Following the accident the claimant was transported to Jamaica Hospital where she was evaluated, treated, and released. On 12/1/14 the claimant presented to Feeling Well Chiropractic Care, P.C. and was initiated on chiropractic treatment. On 12/1/14 the claimant was initiated on acupuncture. On 12/1/14 the claimant presented to Bakir Altai, M.D. of VS Sunrise Medical, P.C. who initiated the claimant on physical therapy and ordered a cervical spine MRI and a lumbar spine MRI. The12/4/14 cervical spine MRI produced an impression of muscle spasm and multilevel disc bulge and hypertrophic changes encroaching on the anterior thecal sac involving C3-C4, C4-C5, C5-C6 and C6-C7. On 12/4/14 the claimant underwent range of motion and manual muscle testing. On 12/8/14 the claimant underwent physical capacity testing. The 12/29/14 lumbar spine MRI produced an impression of multilevel disc herniations at L3-L4, L4-L5 and L5-S1 levels, muscle spasm, and probable fibroid uterus. The 12/29/14 lumbar spine MRI is at issue here.

Pursuant to Insurance Law § 5106(a) and the Insurance regulations, an insurer must either pay or deny a claim for motor vehicle no-fault benefits, in whole or in part, within 30 days after an applicant's proof of claim is received (*see*Insurance Law § 5106[a]; 11 NYCRR 65-3.8[c]; *see also*11 NYCRR 65-3.5). *Infinity Health Products, Ltd. v. Eveready Ins. Co.*, 67 A.D.3d 862, 864, 890 N.Y.S.2d 545, 547 (2d Dept. 2009). The 30-day period in which to either pay or deny a claim is extended where the insurer makes a request for additional verification within the requisite 15-[business] day time period (*see Montefiore Med. Ctr. v Government Empls. Ins. Co.*, 34 AD3d 771; *New York & Presbyt. Hosp. v. Allstate Ins. Co.*,31 AD3d 512). *Kingsbrook Jewish Medical Center v. Allstate Insurance Co.*, 61 A.D.3d 13, 17-18, 871 N.Y.S.2d 680, 683 (2d Dept. 2009). If the requested verification is not received within 30 days, the insurer must send a follow-up letter within 10 days thereafter (see 11 NYCRR 65.15[e][2]). *New York & Presbyterian Hospital v. American Transit Insurance Co.*, 287 A.D.2d 699, 700, 733 N.Y.S.2d 80, 81-82 (2d Dept. 2001). Thus, a timely additional verification request tolls the insurer's time within which to pay or deny a claim (*see Fair Price Med. Supply Corp. v. Travelers Indem. Co.*, 10 NY3d at 563; *New York & Presbyt. Hosp. v. Countrywide Ins. Co.*,44 AD3d 729, 730)." *Kingsbrook Jewish Medical Center v. Allstate Insurance Co.*, supra at 18, 871 N.Y.S.2d at 683 (2d Dept. 2009).

On 12/8/15 Respondent issued a denial of Applicant's claim which states, in relevant part: "Your bill for purported medical treatment is denied, in its entirety, based upon your intentional and willful failure to provide proper proof of claim, requesting verification and to appear for an examination under oath to support the necessity of the services allegedly rendered and to establish your eligibility to receive No-Fault reimbursements." Respondent's counsel explained that the dates in the comments section of the Explanation of Benefits reflect the dates of verification requests for documents and delay letters for the EUO at issue. Respondent contends that Applicant failed to appear for properly scheduled EUOs on 10/22/15 and 11/24/15. Respondent submitted a letter dated 9/28/15 for the Applicant to appear at an EUO on 10/22/15. After the Applicant did not appear for the EUO on 10/22/15, Respondent sent a letter dated 11/2/15 to reschedule the EUO for 11/24/15. Again the Applicant failed to appear. The letters were properly addressed and contained the required notice regarding reimbursement of travel expenses and loss of earnings.

An insurer makes its prima facie showing by demonstrating that two (2) separate requests for EUO (and/or IME) were duly mailed to the assignor or provider and that the assignor or provider failed to appear for the EUO (or IME) on either of the dates scheduled pursuant to the Regulations, *Apollo Chiropractic Care, P.C. v. Praetorian Ins.Co.*, 27 Misc 3d 139 (A) 2010 NY Slip Op. 50911(U) (App Term 1st Dept). In *Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 35 AD3d 720, the Appellate Division held that there is a two part test that insurers must pass in order to establish, prima facie, that an assignor or a provider as an insured's assignee, failed to appear. The insurer must show that it mailed the schedule notices and that the requested party failed to appear.

Respondent can establish mailing by submission of proof of mailing or an affidavit credibly stating that the EUO notices were mailed to the assignor or provider; or submission of an affidavit describing in detail a mailing procedure that ensures that EUO notices are mailed (see *New York & Presbyt Hosp. v. Allstate Ins. Co.*, 29 AD3d 547. Additionally, non-appearance is established through an affidavit of a person with knowledge of the non-appearanceIn *W&Z Acupuncture, P.C. v. Amex Assur Co.*,24Misc 3d 142(A), the court reversed the trial court and granted summary judgment dismissing an action based on a claimant's failure to attend scheduled EUOs, holding that an affidavit from the attorney retained to conduct the EUO was sufficient to establish the non-appearance.

To confirm Applicant's non-appearance at the EUOs Respondent submitted the 10/22/15 statement on the record by Michael A. Callinan, Esq. of Bruno, Gerbino & Soriano, LLP, the 11/24/15 statement on the record by Richard C. Aitken, Esq. of Bruno, Gerbino & Soriano, LLP, an affidavit by Mr. Aitken (in which he states that he has personal knowledge of Applicant's failure to appear for the EUO on 11/24/15) and an affidavit by Mr. Callinan (in which he states that he has personal knowledge of Applicant's failure to appear for the EUO scheduled on 10/22/15). Mr. Callinan also sets forth the mailing procedures of Bruno, Gerbino & Soriano, LLP that ensures that the EUO scheduling letters were mailed. This affidavit establishes that the EUO scheduling letters sent by Bruno, Gerbino & Soriano, LLP were properly mailed. I am persuaded that Respondent has established that a condition precedent to coverage was not satisfied.

Attendance by the assignor or that persons assignees at an examination under oath is a mandatory policy endorsement (11 NYCRR Section 65-1.1) which states that "No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of coverage." Subsection ii lists five obligations that are conditions precedent to coverage, one of which is an examination under oath. Respondent's counsel argued that Respondent's evidence establishes that the EUO requests were timely made, properly addressed and followed up, and that the provider's principal failed to appear. Therefore, he contended, the failure to attend the EUO, in breach of the condition precedent to coverage under the policy and Regulation 68, justified Respondent's denial of the claim.

Applicant's counsel argued that the requests for a further EUO were not reasonable, were excessive and that Respondent treated Applicant as an adversary. She pointed out that an insurance carrier's right to seek additional verification is not absolute, and cited

to established claims practice principles that prohibit "treat(ing) the applicant as an adversary." See 11 NYCRR § 65- 3.2 (b).

Applicant's counsel also noted that this is not an instance where Applicant did nothing in response to the disputed EUO requests. Rather, via correspondence dated 10/20/15, Applicant's counsel objected to the EUO at issue. This objection states in part: "please note that I and my client consider second EUO to be unreasonable and excessive. Alleged in your letter discrepancies in my client's testimony may be explained via less intrusive manner than EUO. This explanation will be provided to you in writing within prescribed period of time of 120 days from the date of your letters which is September 28, 2015. Therefore, we will not be attending scheduled by you SECOND EUO but will be presenting all explanations in writing shortly. Respondent's counsel's 10/29/15 response states in part: "In your most recent correspondence, dated August 20, 2015, you had advised this office that you are of the opinion that the second EUO of your client was unreasonable and excessive. You further advised that you will provide an explanation as to the inconstancies in your client's testimony by written correspondence. In light of the drastic inconsistencies when comparing the testimony provided by Community Medical Imaging, P.C. to the documents provided in connection with Ameriprise's request for additional verification, Ameriprise is of the opinion that a second examination under oath of Community Medical Imaging, P.C. is the only viable way to address the inconsistences. Although it was not required, the correspondence issued on behalf of Ameriprise on September 28, 2015, specifically highlighted the discrepancies and inconsistencies when comparing the testimony provided by Community Medical Imaging, P.C. to the documents provided. Rather than deny your client's claims outright based upon the inconsistencies uncovered, Ameriprise afforded your client an additional opportunity to explain the discrepancies highlighted in this office's correspondence, dated September 28, 2015, as well as other additional discrepancies uncovered when comparing the testimony provided by your client to the documents provided. At this point in time, we do not see any other viable alternative other than having your client appear for a second examination under oath with respect to this matter." There is no indication of a further objection by Applicant. There is also no indication that a written explanation was provided by Applicant within 120 days of 9/28/15 (1/26/16), however this claim was denied on 12/8/15.

Since Applicant's attorney's office previously advised the insurer that it objected to the EUO of the Applicant, I find that Applicant has preserved its objection to the EUO and is permitted to complain now that the request was unreasonable. *Jamaica Medical Supply, Inc. v. Encompass Indemnity Company*, 36 Misc. 3d 160(A), 2012 N.Y. Slip Op. 51825(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); *Crescent Radiology, PLLC v. American Transit Insurance Company*, 31 Misc. 3d 134(A), 2011 N.Y. Slip Op. 50622(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2011). In *Rutland Medical PC v. State Farm Insurance Company*, 2014 NYS Slip Op. 24298, the court held that if "plaintiff offers evidence of a timely and specific objection to the reasonableness of defendant's EUO requests and, as such, is not precluded from raising that objection … the matter shall proceed to trial on the issues of plaintiff's prima facie case and the reasonableness of defendant's EUO requests."

It is well settled that an insurer must demonstrate a reasonable basis for conducting an EUO of an applicant for benefits. *American Transit Insurance Company v. Jaga Medical Services*, 128 A.D.3d 441, 6 N.Y.S.3d 480 (1st Dept. 2015); *American Transit Insurance Company v. Curry*, 45 Misc.3d 171, 993 N.Y.S.2d 439 (Sup Ct. New York Co. 2013); *Westchester Medical Center v. Government Employees Insurance Company*, 2009 N.Y. Slip Op. 30914(U) (Sup Ct. Nassau Co. 2009); *Progressive Northeastern Insurance Co. v. Arguelles Medical, P.C.*, 2009 N.Y. Slip Op. 32353(U) (Sup Ct. N.Y. Co. 2009); *Unitrin Advantage Insurance Company v. Andrew Carothers, M.D.*, 17 Misc.3d 1121(A), 2007 N.Y. Slip Op. 52100(U) (Sup Ct. N.Y. Co. 2007); *Andrew Gergerson, DPM v. State Farm Insurance Company*, 27 Misc.3d 1207(A), 2010 N.Y. Slip Op. 50604(U) (N.Y. Dist. Ct. Nassau Co. 2010).

In *Avalon Radiology v. Ameriprise Insurance Company*, 52 Misc.3d 836, 2016 N.Y. Slip Op. 26182 (N.Y. Dist. Ct. Third Dist. 2016), the court held that "[b]ecause the defendant insurer failed to provide the requisite "specific objective justification supporting the use of such examination" in response to the plaintiff's timely demand for same, the initial and subsequent EUO requests were noncompliant with the regulations." Similarly, in *Victory Medical Diagnostics, P.C. v. Nationwide Property and Casualty Ins. Co.*, 36 Misc.3d 568, 576, 949 N.Y.S.2d 855, 862 (Dist. Ct. Nassau Co. 2012), the court held that, where a provider communicated its objection to the request for verification to the insurer, then the issue was preserved and became a question of fact for the court to decide. "If the insurer can establish it had a reasonable, good faith, factual basis for requesting the verification, then the failure of the claimant provider to furnish the material will result in the dismissal of the action. If the insurer cannot establish a reasonable, good faith, factual basis for requesting the verification, then the insurer will be required to pay the claim."

On 7/27/15 Andrew J. McDonnell, M.D. appeared at appeared at a scheduled EUO on behalf of Applicant. It is noted that several documents including his 7/27/15 EUO transcript inaccurately refer to him as Andrew J. McDonald, M.D. On 8/4/15 Respondent requested additional documentation in connection with the 7/27/15 EUO which was provided by Applicant in correspondence dated 8/14/15. On 8/25/15 requested further documentation in connection with the 7/27/15 EUO which was provided by Applicant in correspondence dated 9/16/15. It is noted that Applicant submitted copies of documents that were exchanged in relation to this and other claims. Respondent conceded at the hearing that all requested documentation was provided. It is Respondent's position that a further EUO of Applicant was necessary to address purported inconsistencies between the 7/27/15 EUO testimony and the documentation provided.

Respondent's counsel submitted several briefs in which they indicate what the purported inconsistencies were that formed the basis for the request for the further EUO of Applicant. During the 7/27/15 EUO Dr. McDonnell testified that he purchased the facility for $90,000.00 with zero money down and had not made any payments towards the purchase price (p. 33, lines 9-23). During the 7/27/15 EUO Dr. McDonnell testified that he retained Gregory Vaynshteyn who served as the manager of the P.C. (p. 47, lines 18-24), that Mr. Vaynshteyn was paid a salary of $5,000.00 biweekly (p.

47, line 25; p. 48, lines 2-4) which was the same as Dr. McDonnell's salary (p. 59, lines 22-25). During the 7/27/15 EUO Dr. McDonnell testified that he believed in 2014 there was "maybe one payment" to Pro Net (an entity purportedly owned by Mr. Vaynshteyn) (p. 69, lines 7-11) for a "low figure", "for lunches" (p. 69, lines 12-16). Respondent contends that the documents provided subsequent to the EUO which include tax returns indicate $27,000.00 in marketing payments were made, payments totaling $33,500.00 were made to Pro Net and payments totaling $22,500.00 were made to Marking Consulting (a company believed to be owned by Mr. Vaynshteyn). During the 7/27/15 EUO Dr. McDonnell testified that he was unaware of Marking Consulting (p. 69, lines 4-6). Respondent's counsel states in its 9/22/16 brief "that is highly questionable that the manager of the Medical P.C. is making the same salary as its alleged owner. It is further questionable as to why the Medical P.C. has paid in excess of $56,000.00 to marketing companies owned by the office manager of the P.C. This is further troubling that Dr. McDonnell was unaware of a company to which his P.C. had paid in excess of $22,000.00." Respondent also noted that the subsequent documentation provided by Applicant indicates that the "reading radiologist are not paid by the numbers of MRIs read, but by the hours of reading performed without regard to the number of MRIs read within these hours" which contradicts Dr. McDonnell's 7/27/15 EUO testimony that each radiologist was paid $50.00 per MRI read and $10.00 per X-ray read (p. 54, lines 6-18). According to Respondent's counsel this raised "legitimate concerns as to whether the individuals are actually employees or independent contractors." Respondent also noted that Dr. McDonnell testified that he is a full-time reading radiologist at the VA in Bath, New York (p. 17, lines 10-14) and reads for other entities. Respondent's counsel also referenced a Declaratory Judgment action pending in the Supreme Court, New York County. Respondent submitted a copy of the Complaint which involves Professional Health Radiology, P.C. (the predecessor of Applicant) owned by Stewart Roy Bakst, M.D. and Quality Health Management, LLC (which is at the same location as Applicant) owned by Mr. Vaynshteyn. It is Respondent's contention in the Complaint that Mr. Vaynshteyn and other individuals were the actual owners of the professional health care providers including Professional Health Radiology, P.C. and Applicant.

Based upon the totality of the extensive and credible evidence submitted by Respondent including Dr. McDonnell's EUO transcript and the post EUO documentation provided, I find as a matter of fact that Respondent has demonstrated a reasonable basis and good cause for the EUO requested. Respondent has established that there are issues which require further verification.

Accordingly, the claim is denied in the 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, Charles Blattberg, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

07/26/2017
(Dated)

Charles Blattberg

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:
bdc8aecdd09b5321d6d4fbfaf40cd86c

Electronically Signed

Your name: Charles Blattberg
Signed on: 07/26/2017