

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Lexington Medical Diagnostic Services PC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.

17-16-1044-9142

Applicant's File No.

Insurer's Claim File No. 0538107520101019

NAIC No.

35882

ARBITRATION AWARD

I, Jeffrey Silber, 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 01/24/2018
Declared closed by the arbitrator on 01/24/2018

Elvira Messina, Esq. from Costella & Gordon LLP participated in person for the
Applicant

Robert LoFurno from Geico Insurance Company participated in person for the
Respondent

2. The amount claimed in the Arbitration Request, **\$ 540.08**, 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 the Respondent established that the Applicant breached a condition precedent to coverage by failing to appear for an Examination Under Oath?

4. Findings, Conclusions, and Basis Therefor

The case was decided on the submissions of the Parties as contained in the ADR Center maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses present at the hearing. I reviewed the

documents contained in the ADR Center for both parties and make my decision in reliance thereon.

The EIP, GS, a 34 year old female was involved in a motor vehicle accident on February 26, 2016. The EIP sought medical treatment for her injuries sustained in the MVA. Applicant submitted claims for reimbursement for ROM and Manual Muscle Testing. Respondent denied reimbursement for the claims based upon the Applicant's failure to attend scheduled EUOs.

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.

Applicant's Failure to appear for an EUO

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 at an EUO 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).

In order for Respondent to make a prima facie showing of its defense based upon a provider's failure to appear at scheduled EUOs, it has to demonstrate that its initial and follow-up requests for verification were timely issued pursuant to 11 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).

Respondent through its NF-10 and attached Explanation of Benefits forms avers that the Applicant failed to submit and appear for a scheduled EUO on 4/19/16, 5/17/16 and again for the 2nd claim on 6/20/16 and 7/14/16.

In *Natural Therapy Acu PC v. State Farm NY Slip Op 51935 (U)*, (Nov. 21, 2013, Civ. Ct., Kings Co. Feinman, J.) said "In order to establish that the claimant failed to appear

for the scheduled EUOs, the defendant is required to establish that the EUO scheduled letters were mailed.) There are three distinct methods to demonstrate proof of mailing: (1) provide an affidavit from an individual with personal knowledge of the actual mailing (2) acknowledgment by the adverse party that it received the subject document and (3) where the party provides proof of a standard office procedure, which ensures that documents are properly, addressed and mailed. Respondent submitted the affidavit of Michele Youhouse of Respondent's Special Investigations Unit (SIU) which sets forth Respondent's basis for requesting the EUO of the Applicant. Respondent submitted the affirmation of Caryn Goldstein, Esq. of the Law Office of Printz & Goldstein, Staff Counsel for Respondent to establish the Applicant's non-appearance for the scheduled EUOs at issue on 6/20/16 and 7/14/16. Respondent submitted the affidavit of Claims Examiner Anuj Kundnani to establish mailing of the EUO scheduling letters.

Upon review of the record, it is clear that the Applicant failed to respond or object to Respondent's EUO scheduling letters in any manner prior to the filing of this Arbitration. While the no-fault regulations provide that a request for an EUO must be reasonable as well as objectively justified, see 11 NYCRR Section 65-3.5(e) and 11 NYCRR Section 65-3.2, there is no provision in the no-fault regulations which grants a claimant or no-fault insurer the right to ignore a verification request. *Westchester County Medical Center v. New York Central Fire Insurance Company*, 262 A.D.2d 553, 692 N.Y.S.2d 665 (2nd Dept. 1999); *Media Neurology, P.C. v. Countrywide Insurance Company*, 21 Misc.3d 1101(A), 2008 N.Y. Slip Op. 51902(U) (N.Y. Civ. Ct. Kings Co. 2008); *All Health Medical Care, P.C. v. Government Employees Insurance Company*, 2 Misc.2d 907, 2004 N.Y. Slip Op. 2408 (N.Y. Civ. Ct. Queens Co. 2004). Since the Applicant did not object to Respondent's request for an EUO, the Applicant "will not be heard to complain that there was no reasonable basis for the EUO request." *Crescent Radiology, PLLC v. American Transit Insurance Company*, 31 Misc.3d 134(A), 2011 N.Y. Slip Op. 50622(U) (App. Term 9th and 10th Jud. Dists. 2011). See also *Canarsie Chiropractic, P.C. v. State Farm Mutual Automobile Ins. Co.*, 27 Misc.3d 1228(A), 2010 N.Y. Slip Op. 50950(U) (N.Y. Civ. Ct. Kings Co. 2010).

As a result, Applicant has waived its right to challenge the reasonableness of the EUO request at this hearing, and the denial based upon the failure of the Applicant to attend EUO's was proper.

The claim is denied.

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

02/01/2018
(Dated)

Jeffrey Silber

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:
a2dd2b15295734b1a9fa898cf888d3ab

Electronically Signed

Your name: Jeffrey Silber
Signed on: 02/01/2018