American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:		
Integrated Neurological Associates, PLLC (Applicant)	AAA Case No.	17-16-1045-2655
	Applicant's File No.	309347
- and -	Insurer's Claim File No.	0401917372 1NW
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

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 11/28/2017, 02/16/2018
   Declared closed by the arbitrator on 02/16/2018

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

   Richard Montanna, Esq. from Morrison Mahoney, LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 1,623.42**, 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 75 year old male injured as a restrained driver in a rear end motor vehicle accident on 2/13/16. Applicant seeks $1,623.42 for an office visit and EMG/NCV on DOS 4/13/16. Respondent denied applicant's claims based upon applicant's failure to appear for EUO.

The parties have submitted extensive submissions documenting applicant's appearance at EUO on 12/13/13. A 283 page transcript reveals that Dr. Neil Lifshutz testified for five hours. However, the EUO was meant to encompass a review of 8 specific claims but Dr. Lifshutz testified to only one. There were significant objections and colloquy between the parties counsel. The EUO terminated to accommodate Dr. Lifshutz's schedule. Respondent's counsel stated on the record that its right for complete inquiry was continued and the EUO was kept open. Further, during the course of the EUO respondent ascertained additional information relative to applicant's licensing and eligibility for no-fault reimbursement was needed and opined that a continued EUO is reasonable and necessary. Further, respondent requested post EUO verification and a complete response is outstanding.

In 2014 respondent attempted a further EUO. Applicant opined (in multiple letters dated 1/28/14, 1/29/14, and 2/6/14) that in light of Dr. Lifshutz's extensive testimony it has fully complied with all reasonable EUO demands. Accordingly applicant would not appear for a "second global and abusive EUO" unless respondent was able to provide compelling justification why another open-ended appearance of Dr. Lifshutz was required.

With respect to the claim presented in this matter, applicant objected on 6/3/16 stating that, "it is transparent that Allstate's EUO demands are not claim specific but part of the same ongoing global verification." Applicant objected to the demand for additional documents and the second EUO.

This matter is linked with AAA #s 17-16-1039-0158. Documents in each ADR Center record are considered in each matter and for each decision. The cases were heard the same day. The applicants were represented by the same attorney. The respondent was represented by the same attorney/claims representative.

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). Respondent's denial establishes the applicant's prima facie case. AR Medical Rehabilitation v. Statewide Insurance Co, 99710/06, NYLJ 1202737691469 (Civ. Ct Kings Cty. 8/12/15).

Pursuant to Insurance Law §5106(a) and the Insurance Regulations 11 NYCRR 65 - 3.8 (c), 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. As an initial finding I note that the respondent's denials are timely and therefore its defenses are preserved.

Respondent's verification requests also acknowledge receipt of the bills and establish that the provider did in fact submit them timely and properly. See, A.B. medical services PLLC v. Prudential Property Casualty Insurance Company, 7 Misc. 3d 14, 792 NYS 2d 761 (App. Term 2d and 11th Dists. 2005).

11 NYCRR §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."

An insurer is entitled to judgment dismissing a claim with a health care provider has failed to attend scheduled EUOs. Dover Acupuncture PC v State Farm Mutual Automobile Insurance Company, 28 Misc. 3d 140 (A), 2010 NY Slip Op 51605 (U) (App. Term 1st Dept. 2010). A healthcare provider's failure to appear for EUO breaches a condition precedent to its right to its payment of the subject claim and by itself provides a complete defense to the instant action. Dynamic Medical Imaging, P. C. v State Farm Mutual Automobile Insurance Company, 26 Misc. 3d 776, 894 NYS 2d 833 (Dist. Ct. Nassau Cty. 2009). Since the appearance of the health care provider at an EUO is a condition precedent to the insurer's liability on policy, judgment should be granted to the insurer where it has proven that the EUO notices were mailed and there was a failure to appear at EUOs. Points of Health Acupuncture PC v. Lancer Insurance Company, 28 Misc. 3d 137 (A), 2010 NY Slip Op 51455 (U), (App. Term 2nd, 11th, 13th Dists. 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) and 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.).

The timeliness of the letters is irrelevant as the EUOs were scheduled prior to receipt of the claim on 6/3/16. The detailed and narrowly construed verification procedures contained in 11 NYCRR §§65 - 3.5 (d) and 65 - 3.6 (d) governing IME's and EUOs that are requested after receipt of a claim do not apply to IME scheduled prior to the submission of a claim form. Stephen Fogel Psychological v Progressive Casualty Insurance Company, 7 Misc. 3d 18, 793 NYS 2d 661 (App. Term 2d and 11th Dist. 2004, reversed on other grounds, 35 AD 2d 720, 827 NYS 2d 217 (2d Dept. 2006). This

is because the right to an IME or an EUO prior to an insurer's receipt of the claim is not afforded by the verification procedures and timetables but rather by the mandatory personal injury protection which is independent of the verification procedures. Id.

It is incumbent upon the insurer to establish that the letters scheduling the EUOs were properly addressed and mailed to "the addresses provided by" the examinee. Inwood Hill Medical PC v. Gen. Assur. Co., 10 Misc. 3d 18 (App. Term 1st Dept.); Acupuncture Approach PC v. MVIAC 2013 NY Slip op 51676 (U) (App. Term 1st Dept. October 15, 2013); SK Prime Med Supply Inc. v. Hertz Claim Mgmt Corp., 2012 NY Slip op 52192 (U) (App. Term 1st Dept. 2012).

Respondent has established that the letters were properly addressed and mailed. Respondent provides proof of actual mailing from the USPS.

Since the appearance of a health care provider at an EUO is a condition precedent to the insurer's liability on the policy, the insurer will prevail where it has proven that there was a failure to appear. Points of Health Acupuncture PC v. Lancer Insurance Company, 28 Misc. 3d 137 (A) (App. Term 2d, 11th and 13th Districts 2010). Respondent submitted transcripts of statements on the record for 5/24/16 and 6/7/16 which establish that applicant failed to appear for two duly scheduled EUOs. See, All Boro Psychological Services PC v. State Farm Mutual Automobile Insurance Company, 2012 New York Slip Op 51346 (U) (App. Term 2nd Dept. 2012); Stephen Fogel Psychological PC v. Progressive Casualty Insurance Company, 35 A.D. 3rd 720 (2006); W & Z Acupuncture PC v. AMEX Assurance Company, 24 Misc. 3d 142 (App. Term Second and 11th and 13th Jud. Dists. 2009).

I find that the respondent has complied with the no fault regulations and the requests for EUO were properly and timely made.

Applicant objected to appearing for EUO by letter dated 6/3/16. The courts have consistently held that a medical provider may preserve its right to challenge the reasonableness of the EUO request at the litigation (or arbitration) stage if it objects to or requested EUO at the time it receives the notice. See, Eagle Surgical Supply, Inc. v. AIG Insurance Company, 2012 NY Slip Op 51711 (U) 36 Misc. 3d 153 (A) (App. Term 2d Dept. 2012); All Boro Psychological Services, PC v. State Farm Mutual Automobile Insurance Company, 2012 NY Slip Op 51346 (U), 36 Misc. 3d 135 (A) (App. Term 2d Dept. 2012); LK Healthcare Products Inc. v. Geico General Insurance Company, 2013 NY Slip Op 5081 (U). In fact, where a provider fails to respond to the defendant EUO requests it will not be heard to complain that there was no reasonable basis. See, Crescent Radiology, PLLC v. American Transit Ins Co., 314 Misc. 3d 134, 927 NYS 2d 815 (App Term 9th and 10th Dist. 2011). Respondent acknowledged this objection by letter dated 6/15/16 reiterating its consistent position that a continued EUO was necessary.

"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]), limit cost to consumers and alleviating unnecessary burdens on the courts. "To fulfill the intent of the no-fault statute and the insurance regulations, claimants,

providers and carriers must each act in good faith to address each claim in an expeditious manner" (Five Boro Psychological and Licensed Master Social Work Services, PLLC v. GEICO General Insurance Company, 30 Misc. 3d 354 [Civil Ct. Kings County 2012]). Thus, a duty of reasonableness and cooperation must be imposed on both parties in the verification process, including the scheduling and conducting of EUOs. Any questions concerning a communication should be addressed by further communication not inaction. See, Diagnostic Radiographic Imaging PC v. Geico, 42 Misc. 3d 1205 (A), 984 NYS 2d 631 (Civil Ct. Kings County 2013). Specifically, 11 NYCRR §65-3.2 (c) and (e) provide that an insurer should not demand verification of facts unless there are good reasons to do so and clearly inform the applicant of the insurer's position regarding any disputed matter.

In its 1/28/14 letter (and all subsequent objection letters) applicant opined that it would not appear for a second global and abusive EUO unless respondent provided compelling justification as to why another open ended appearance was required.

Neither NYCRR 11 § 65-3.5(e) or other provision of No-Fault Regulation 68 requires an insurer's notice scheduling an EUO to specify the reason(s) why the insurer is requiring the EUO. When an insurer requires an examination under oath of an applicant to establish proof of claim, such requirement must be based upon the application of objective standards so there is specific objective justification supporting the use of such examination. Insurer standard shall be available for review by Department examiners.

The State of New York Insurance Department office of General Counsel issued an opinion letter on December 22, 2006 wherein it specifically provide that, " … with respect to whether an insurer must include language stating the reasons for requiring the EUO, the regulation contains no such requirement."

As determined in Barakat Medical Care, PC v. Nationwide Insurance Company, 49 Misc. 3d 147 (App. Term 2d, 11th and 13th Dists. 2015), the insurer need not set forth the objective reasons for the requested EUO as part of its prima facie showing of entitlement to judgment as a matter of law.

In consideration of all the no-fault regulations, the opinions General Counsel to the New York State Department of Financial Services and all applicable case law, I conclude that a provider's timely objection to a requested EUO preserves its right to challenge the reasonableness of respondent's EUO request *at the time of an adversarial hearing*. By objecting to an EUO and refusing to appear the applicant risks an adverse decision.

Respondent relies on the detailed and compelling affidavit of Richard D'Amato. Supported by Dr. Lifshutz's transcript, Mr. D'Amato explains that respondent was unable to complete the verification of billed for services, specifically electro diagnostic testing relating to even one of the eight claims that were to be the subject of the previous EUO. Further, the EIP in this matter is completely separate and distinct from the claims at issue in the previous EUO. Mr. D'Amato cogently explains based upon his extensive experience, that there were suspicious irregularities in NCV studies including mathematical errors and flaws in the data recorded by applicant regarding the motor nerve amplitude values in nearly every nerve conduction velocity report. The flaws

included the presence of "conduction blocks" which is potentially a very serious medical problem. He opined that they were conduction blocks reflected in the data relating to different patients coupled with contradictory conclusions that the NCV results were normal. He deemed the suspicious. Therefore, the verification demanded in connection with Dr. Lifshutz's 12/13/13 EUO is unrelated to the subject claim herein and specific testimony is necessary with respect to this EIP. Furthermore, the EUO testimony raised questions regarding the applicants corporate structure, licensing and business practices sufficient to suggest that the professional corporations may have been owned, operated and controlled by laypersons.

Respondent also submits a detailed and cogent affidavit from Randall L. Braddom, MD dated November 3, 2016 that specifically cites to numerous EDX studies (including the one at issue herein) as well as sections of Dr. Lifschutz's EUO testimony. He concluded Dr. Lifschutz failed to perform the EDX in accordance with generally accepted medical care; there was billing misrepresentation as well. Specifically, Dr. Lifscutz failed to sample a sufficient number of limb muscles, used no standard terminology, performed excessive nerve conduction studies and failed to perform a sufficient number of F wave stimulations.

Respondent has successfully established its reasonable basis for requesting the EUO. See, Lenox Neuropsychiatry Medical PC v. State Farm Insurance Company, 2 Misc. 3d 1118(A), 2009 NY Slip op 50178U (Civ. Ct. Richmond County 2009). Applicant cannot rely on its 6/3/16 objection letter as the reason for its failure to appear for EUO. Contrary to applicant's arguments I do not believe Dr. Lifshutz was harassed at EUO. Further, applicant has offered no evidence admissible or otherwise to support its position that time limitations on a further appearance are proper.

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).

Applicant failed to appear for EUO and as such violated a condition precedent to coverage.

I find for the respondent and the claims are 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, 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.

02/20/2018
(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:
be5fc42e0fd1fd90fbb233b0027abfb1

Electronically Signed

Your name: Rhonda Barry
Signed on: 02/20/2018