

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Metro Pharmacy
(Applicant)

- and -

Progressive Casualty Insurance Company
(Respondent)

AAA Case No. 17-17-1055-4420

Applicant's File No. 1939809

Insurer's Claim File No. 16-1238652

NAIC No. 24260

ARBITRATION AWARD

I, Ioannis Gloumis, 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 09/12/2018
Declared closed by the arbitrator on 09/12/2018

Gary Pustel, Esq. from Israel, Israel & Purdy, LLP participated in person for the Applicant

Regina Wilcox, Claims Representative, from Law Offices of Rachel Perry participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 690.52**, 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

According to the documentary evidence contained in the electronic case folder for this matter in the ADR Center, the subject of this dispute arises from the underlying automobile accident of July 19, 2016. According to the evidence presented, the EIP, then a 37-year-old female driver, was reportedly injured in a collision. Following the occurrence, the EIP sought private medical attention. The EIP reported injuries to the cervical spine, lumbar spine and the right knee from the accident. The Applicant provided a compound topical pain cream medication and Terocin patches that were prescribed by the treating provider.

Applicant seeks no-fault reimbursement in the amount of \$690.52, representing the balance of \$287.02 for the compound cream topical pain medication provided on August 16, 2016 and \$403.50 for the Terocin patches provided on August 26, 2016. The evidence shows that the Respondent received the Applicant's bills for the medications in dispute, partially paid the Applicant the amount of \$1,174.45 for the compound cream and denied the balance of \$287.02 based upon a fee schedule defense. The Terocin patches were denied based upon the EIP's failure to appear for independent medical examinations ("IMEs"). The medical necessity of the cream and patches is not in dispute in this matter. Therefore, the issues to be determined are whether the Respondent's denial of the services based upon the failure of the EIP to appear for IMEs and fee schedule should be upheld.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions documents contained in the American Arbitration Association's Electronic Case Folder, said submissions constituting the record in this case. This award is rendered upon the oral arguments of the parties at the arbitration hearing date and the documentary evidence submitted by the parties. There were no witnesses that testified at the arbitration hearing.

RESPONDENT'S DEFENSE OF FAILURE BY THE EIP TO APPEAR FOR IMES - DATE OF SERVICE AUGUST 26, 2016

The insurer is entitled to judgment where it proves that two separate requests for an IME were duly mailed to the EIP and the latter failed to appear on either of the dates. *Apollo Chiropractic Care, P.C. v. Praetorian Ins. Co.*, 27 Misc.3d 139(A), 932 N.Y.S.2d 420, 2010 WL 2026636 (App. Term 1st Dept. May 24, 2010).

An Assignee can have no better right than the EIP. An EIP's breach cuts off the Assignee's rights. The No-Fault Regulation, in the Mandatory Personal Injury Protection Endorsement (*11 NYCRR 65-1.1*), sets forth:

The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonably require.

The failure to attend a scheduled and rescheduled IME constitutes a violation of a condition precedent to a claim. The breach of a condition precedent cuts off claims even for services performed prior to the date of the missed IME. See, *Stephen Fogel Psychological, PC v. Progressive Car. Ins. Co.*, 35 A.D.3d 720, 827 N.Y.S.2d 217 (2nd Dept. 2006.)

Additionally, pursuant to *11 NYCRR 65-3.5(d)* of the No-Fault Regulation, a medical examination is among items of relevant information which may be requested as a means of verification of a claim. If an EIP fails to comply with a verification request, then benefits are not overdue. See, *11 NYCRR 65-3.8*.

The Respondent has established that it mailed and scheduled the following IMEs via scheduling letters:

October 27, 2016 letters scheduling the Acupuncture IME with Dr. Handelsman on November 8, 2016;

November 23, 2016 letters scheduling the Orthopedic IME with Dr. Ferriter on December 12, 2016; and,

December 13, 2016 letters scheduling the Acupuncture IME with Dr. Handelsman on January 6, 2017.

The Respondent issued a global denial dated December 20, 2016 and then issued a specific denial dated December 22, 2016, denying reimbursement for the Terocin patches based upon the EIP's failure to appear for scheduled medical examinations.

The Respondent has presented an affidavit from Georgianna Michios in support of the scheduling letters and failure by the EIP to appear. There are affidavits from Drs. Handelsman and Ferriter that the EIP failed to appear on each of the three scheduled dates. The scheduling letters copied the EIP's bodily injury attorney and included the requisite language regarding reimbursement for lost wages and reasonable transportation expenses.

Relying on the Appellate Division, First Department's decision in *Unitrin Advantage Ins. Co. v. All of NY, Inc.*, 158 AD3d 449 (1st Dept 2018, Decided February 6, 2018), the Applicant argued at the hearing that the failure by the Respondent to include the missed IME dates is defective and fails to sufficiently apprise the Applicant of the basis of the denial with a high degree of specificity.

In the case before the Court in *Unitrin*, the Respondent failed to include one of the two dates on its denial of the claim. In the case before this Arbitrator, the Respondent's denial fails to include any of the missed IME dates and specifically states the following:

"...Explanation Code:

6848 -Failure to submit to multiple requests for Medical Examinations is a violation of both this policy's contractual Duties and Conditions under Proof of Claim that precede coverage under Reg. 68, Section 65-1. No Fault benefits under this policy are denied... "

I agree with the Applicant's argument and find the Court's decision in *Unitrin* to be applicable in that the Respondent's denial fails to sufficiently apprise the Applicant of the basis for the denial with a high degree of specificity. Moreover, the Respondent issued a follow-up scheduling letter dated December 13, 2016, scheduling a second IME date for the Acupuncture IME with Dr. Handelsman for January 6, 2017. This second scheduling letter predates the dates of the global denial and specific denial and was mailed to the EIP and the EIP's attorney scheduling the second IME date. The Respondent's evidence has established that the Respondent generated and mailed the December 13, 2016 correspondence. The Respondent cannot use the missed IME date of November 8, 2016 with Dr. Handelsman once it issued and mailed correspondence advising the EIP and her attorney that the Respondent scheduled a second date for the acupuncture IME.

For the foregoing reasons, I find that the Respondent's denial of the claim for the Terocin patches relating to date of service August 26, 2016 cannot be upheld. The Applicant is awarded the amount of \$403.50 for this claim.

RESPONDENT'S FEE SCHEDULE DEFENSES

It is Respondent's burden to come forward with competent evidentiary proof to support its fee schedule defenses. See *Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co.*, 13 Misc.3d 172, 822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006). See also, *Power Acupuncture PC v. State Farm Mutual Automobile Ins. Co.*, 11 Misc.3d 1065A, 816 N.Y.S.2d 700, 2006 N.Y. Misc. LEXIS 514 (Civil Ct, Kings Co. 2006).

If Respondent fails to demonstrate by competent evidentiary proof that a plaintiff's claims were in excess of the appropriate fee schedules, defendant's defense of noncompliance with the appropriate fee schedules cannot be sustained. See *Continental Medical PC v. Travelers Indemnity Co.*, 11 Misc.3d 145A, 819 N.Y.S.2d 847, 2006 N.Y. Misc. LEXIS 1109 (App. Term, 1st Dep't, per curiam, 2006). A Respondent may interpose a defense in a timely denial that the claim exceeds the fees permitted by the Workers' Compensation schedules, but Respondent must, at minimum, establish, by evidentiary proof, that the charges exceeded that permitted by law. *Abraham v. Country-Wide Ins. Co.*, 3 Misc.3d 130A, 787 N.Y.S.2d 678, 2004 N.Y. Misc. LEXIS 544 (App. Term, 2d Dept. 2004).

Furthermore, I take judicial notice of the New York State Workers' Compensation fee schedule. See, *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 20 (2d

Dept. 2009); *LVOV Acupuncture, P.C. v. Geico Ins. Co.*, 32 Misc.3d 144(A) (App Term 2d, 11th & 13th Jud Dists. 2011); *Natural Acupuncture Health, P.C. v. Praetorian Ins. Co.*, 30 Misc.3d 132(A) (App Term, 1st Dept. 2011).

The Respondent's denial for the balance of \$287.02 pertaining to the compound cream topical pain medication states as follows:

"...Procedure Code/National Drug Code (Proc Cd/NDC):

J0000 -Pharmaceutical/prescription drug (non-injectables) (The Procedure Code is provided as a reference number due to no available, correlating CPT/HCPCS codes to describe this service. This Procedure Code was developed by Mitchell Medical)

S9430 -Pharmacy compounding and dispensing services

Modifier/Package (Mod/Pkg): Explanation Code:

5614 -In accordance to New York No-Fault Law, Regulation 68, •Compounded medications shall be reimbursed at the ingredient level, with each ingredient identified using the applicable NDC of the drug product, and the corresponding quantity. Ingredients with no NDC are not separately reimbursable. Each ingredient is reimbursed at the Redbook Average Wholesale Price minus 20% for generic prescription drugs or medicines calculated according to the New York Workers Compensation Board Pharmacy Fee Schedule. Payment shall be based upon a sum of the allowable fee for each ingredient plus a single dispensing fee per compound, pursuant to Regulation 83 and Chapter V of Title 12 NYCRR; Subchapter M; Section 440.5..."

The Respondent argues that the disputed charge for the compound pain cream for date of service August 6, 2016 was paid in accordance with *12 NYCRR Part 440* and *442* (Pharmacy and Durable Medical Goods Fee Schedules and Appendices). The Respondent argues that the Regulation directs the insurer to reimburse according to the Average Wholesale Price (AWP) listed in Red Book or Medi-Span Master Drug Database (see *12 NYCRR Part 440.2* and *440.5*); that Progressive Insurance utilized Red Book for its reimbursement rates; and that pursuant to the Regulation:

- The maximum reimbursement for brand name drugs is the Average Wholesale Price minus twelve percent plus a dispensing fee of \$4.00.

- The maximum reimbursement for generic drugs is the Average Wholesale Price minus twenty percent plus a dispensing fee of \$5.00.

With respect to the charge for Terocin (DOS August 26, 2016), Respondent argues that it was billed over the allowable reimbursement rate and that the correct remaining allowable rate for the Terocin is \$354.68. The Respondent argues that no further reimbursement is due.

I find that the Respondent has failed to set forth sufficient evidence to establish its determination of brand drug versus generic drug ingredients used, the final calculations for each ingredient and the final determination in obtaining the proper reimbursable amount for the compound and Terocin patches. There is no explanation set forth from a certified professional coder or medical professional. This arbitrator cannot identify the final determination by simply reviewing the fee schedule. For this reason, the Respondent's fee schedule defense cannot be sustained.

Accordingly, the Applicant's claim is hereby granted 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 applicant is AWARDED the following:

A.

		Claim	
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Medical		From/To	Amount	Status
	Metro Pharmacy	08/16/16 - 08/26/16	\$690.52	Awarded: \$690.52
Total			\$690.52	Awarded: \$690.52

B. The insurer shall also compute and pay the applicant interest set forth below. 02/11/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the Applicant the amount of interest computed from the date of filing, at the rate of 2% per month, simple, and ending with the date of payment of the award, subject to the provisions of *11 NYCRR 65-3.9(c)*(stay of interest).

C. Attorney's Fees

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

The Respondent shall also pay the Applicant an attorney's fee in accordance with *11 NYCRR 4.6*.

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 Nassau

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

09/17/2018
(Dated)

Ioannis Gloumis

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:
4c128fcd08a71edaef3ce744f8398f3

Electronically Signed

Your name: Ioannis Gloumis
Signed on: 09/17/2018