American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Avangard Supply Inc (Applicant)	AAA Case No.	17-18-1092-0143
	Applicant's File No.	SS-64607
- and -	Insurer's Claim File No.	32-00M8-67R
	NAIC No.	25143
State Farm Fire & Casualty Company (Respondent)		

ARBITRATION AWARD

I, Sandra Adelson, 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: the patient/insured

1. Hearing(s) held on 03/14/2019
   Declared closed by the arbitrator on 03/14/2019

   Aaron Perretta, Esq. from Samandarov & Associates, P.C. participated in person for the Applicant

   Alisa Burns, Esq. from McDonnell Adels & Klestzick, PLLC participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 2,418.00**, 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 applicant seeks payment for the rental of a cold compression DVT medical supply (12/6/17 to 1/5/18).

   Respondent issued denials dated 2/12/18 which stated that "you were requested to provide supporting documentation. Your claim for No-Fault benefits is denied, in its entirety, as pursuant to Regulation 68, Section 65-3.5(o): An applicant from whom verification is requested shall within 120 days from the date of the initial request for verification, submit all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply."

4. Findings, Conclusions, and Basis Therefor

The record consisted of claimant's submission, respondent's submission, as well as documents not enumerated within this decision, but which are contained in the electronic case file maintained by the American Arbitration Association. THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED

11 NYCRR 65-4.5 (o) (1) (Regulation 68-D), reads as follows:

The arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations.

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

(It should be noted that redactions are made within this claim for purpose of privacy reasons, as this award is a public record. Reference to the town where "NW" resides is noted to be "Txxx")

The patient/insured was female driver of a 2011 Kia when a bus rear ended her vehicle on 6/13/17. The accident took place at about 6:30 am and the patient was driving her daughter to school that day. They were coming from their Txxx address. As a result of the accident, she sustained physical injuries. The applicant seeks payment for the rental of a cold compression DVT medical supply (12/6/17 to 1/5/18).

Respondent issued denials dated 2/12/18 which stated that "you were requested to provide supporting documentation. Your claim for No-Fault benefits is denied, in its entirety, as pursuant to Regulation 68, Section 65-3.5(o): An applicant from whom verification is requested shall within 120 days from the date of the initial request for verification, submit all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply."

The respondent submitted requests for additional verification dated 9/29/17, 11/1/17 and 2/7/18.

<u>EUO Testimony of "NW"</u>

The arbitration record established that the patient "NW" appeared at an EUO with counsel from the Law Office of Evans Prieston, P.C. on 9/14/17. In reviewing the EUO

testimony of "NW" she testified that she had lived at 411 Txxx Street in Txxx, New York. This address was her mother's and stepfather's apartment. She stayed there for about a year and then moved with her mother, stepfather, god sister, and 12-year old daughter to Fxxx Street in Txxx, New York about a couple of months prior to the EUO. She testified that she lived at Txxx Street in Txxx full time. She also testified that she worked for the Board of Education as a teacher's assistant who would travel to different schools. She had been a teacher's assistant for six or seven years. Her assignments would be given the day before in the morning or evening. They would call from 5 to 10:30 at night with an assignment or at 5 am the day of the assignment. The latest they would call would be 7:50 am. She would also get her assignments online. "NW" also testified that her daughter attended a charter school in Harlem since November 2016. The patient also testified that her daughter lived with her in Txxx full time. After the accident, she was not able to drive to New York City and her daughter would stay with her sister and grandmother at an apartment on Laconia Avenue in the Bronx, New York. "NW" also testified that she had formerly lived at that address where her grandmother raised her.

Respondent's counsel went into detail in questioning about where the patient lived her entire life. She testified that she lived with her step dad in the Bronx on Clay Avenue. She then lived on East 212th Street in the Bronx, in Mt. Vernon, in Albany at her cousin's house, and then she returned to the Bronx. **The patient also testified that "I was going different places. And then I wound up going to the shelter and my mother made me-we left because I was in the domestic violence relationship and the guy was threating to kill me and my daughter. That is why I wound up moving in with my mother because nobody knows where my mother lives."**

The patient also testified that when she was living in the shelter, she lived there with her daughter. The shelter was in the Bronx. **The patient responded to respondent's question that "so you moved to Txxx to get away from that situation? Yes (page 23, EUO). She also explained that her mother did not raise her, her grandmother raised her but I had a chance to go with my mother to be safe, and my daughter's safety."**

She also testified that with regard to residing at the shelter, "the guy found out where I was at and like I told the police he had friend with police officers and nothing I could really do. He has connections where he'll find me." She moved to Txxx in 2016 to live with her mom and commuted to the Bronx and her job even though she testified the trip was over 2 hours. The patient also testified that her mother had rented both apartments in Txxx, and that she had no information with regard to the landlord as she did not deal with the landlord.

The patient testified that she and her daughter shared a bedroom at her mother's apartment. The patient did not pay rent to her mother or have any utilities in her name. Respondent questioned about her phone number having a "646" area code and the phone was not in her name. She reimbursed a friend, who put her on his/her plan. She would reimburse her friend for her mobile phone use on this plan.

The arbitrator reviewed and summarized the aforenoted EUO testimony which respondent also discussed in its brief. In reviewing the patient's testimony, I found the testimony to be open, direct, and credible. Respondent's EUO questions appear to be tailored to "insinuate" a material misrepresentation defense as to her living elsewhere than Txxx, New York. However, I do not find that there was any material misrepresentation made by this patient with regard to the residence in Txxx, New York. It was clear that she and her daughter were living in Txxx, New York with her mother, stepfather and god sister, in order to be safe from domestic violence. Additionally, respondent did not submit a copy of the applicable application for automobile insurance to support any allegation of wrong doing by "NW".

Respondent's marshalling of the evidence attempted to suggest that her testimony was untruthful. For example, why would she drive over two hours to work from Txxx, New York to various schools in New York City for work. The patient's EUO testimony clearly established that safety from domestic violence was the reason. In fact, she testified that they drove from Txxx to New York City on the morning of the accident and she was driving her daughter to the school she attended at 6:30 am. The foregoing testimony was credible.

It made sense for this patient to live in Txxx, New York after having had to live in a domestic violence shelter for women in the Bronx. "NW", from her EUO testimony, established that she did not have the resources to live in safe residence close to work due to her fear of violence from her former partner. Her mother's apartment in Txxx, away from New York City, provided this refuge. It is apparent from the record. Additionally, commonsense indicates that a two-hour commute to work in New York City in the Tristate area is note unusual considering the fact that the workforce on Long Island, New Jersey and Connecticut make similar commutes to New York City by public transportation (trains, buses) as well as car.

The respondent's statement that she worked for a councilman in the Bronx prior to the accident was incorrect. She testified on page 28 of her EUO that she worked "since the accident…. I just recently helped on of the councilman for his election." The fact, that she worked for a councilman after the accident, has no bearing on her residence prior to the accident. The fact that she chose to vote in the Bronx and file her tax return from her grandmother's address does not detract from the fact that her primary physical residence and the consequent garaging of her vehicle, was in Txxx, New York.

Additional Verification Requests:

The Court of Appeals of New York in People v. O'Hara, (2001) 96 N.Y.2d 378 stated that "New York courts have recognized that in this modern and mobile society, an individual can maintain more than one bona fide residence(see, e.g., Matter of Gallagher v Dinkins, 41 AD2d 946, affd32 NY2d 839; Matter of Gladwin v Power, 21 AD2d 665, affd14 NY2d 771; Matter of Chance v Power, 14 AD2d 595, affd10 NY2d 792)." Therefore, the fact that the patient might have associated her child hood home as the address to use for a tax return is not dispositive for this arbitration in establishing the she garaged her car in the Bronx. Staying with "NW"'s grandmother does not equate with

her actually living there. The EUO record establishes that "NW" was taking precautions to not list her actual residence.

Additionally, having a cell phone with an area code distinct from where one lives is a common occurrence and comports with what happens in a mobile society. In fact, cell phone numbers are discoverable on the internet. Sadly, having a friend provide her with access to a cell phone account with a different county is wise choice considering her history of having lived in a shelter for battered women in order to protect access to her from her former partner. Furthermore, respondent's suggestion that she had a "646" area code for her phone suggested that she lived in New York City is simply not dispositive of the patient's actual residence. Furthermore, the area code for the Bronx is "718". The fact that she did not know the amount of rent her mother paid was due to the fact that she testified that her mother did not ask her for rent money. Perhaps, if respondent considered the unique circumstances the patient detailed in her testimony, the marshalling of the evidence would not have been solely aimed at suggesting her testimony as not credible due to a statement that she mistakenly overestimated the mileage she traveled from her mother's apartment to work.

Respondent's attempt to use the EUO to set up an unsubstantiated claim for material misrepresentation as to her address and garaging of the vehicle were clearly adversarial and failed to accurately portray this patient's EUO testimony. The EUO of "NW" was 140 pages. "NW" cooperated with respondent's EUO examination questions. However, the requests for additional verification amounted to what could only be described as a fishing expedition.

The requests for additional verification were dated 9/29/17, 11/1/17, and 2/7/18. Each letter addressed to applicant's counsel Evans D. Prieston, P.C. requested the following items (which have been redacted for privacy reasons as this decision will be a public record):

1. "Copies of all documentation regarding the purchase of the 2011 Kia Optima, including but not limited to the Certificate of Title, Bill of Sale, and financing agreement.

2. Copies of all records regarding maintenance and/or repair of the 2011 Kia Optima since its purchase.

3. Photograph of the current odometer reading on the 2011 Kia Optima.

4.4. Duly executed authorization to obtain employment records from the New York City Board of Education (for dates worked) from January 1, 2016 to June 30, 2017.

5.5.Duly executed authorization from (friend) to obtain from Sprint the cellular phone call records for cellular phone number (646) xxx-xxxx.

6. Copy of lease for xxx Fxxx Street, Txxx, New York.

7. Copy of lease for xxx 3x Street, Txxx, New York.

8. Duly executed authorization to obtain the non-privileged portions of the legal file for the 2015 automobile accident from Andrew Hirschhorn."

The respondent's additional verification requests were far reaching. Respondent had no reasonable basis for requesting an authorization for a prior automobile accident from 2015 as this No-Fault claim arose from a motor vehicle accident which took place on 6/13/17. Furthermore, this present claim involves coverage for first party benefits. Respondent is requesting information pertaining to a bodily injured claim as if its insured was the adversary.

Leases from "NW"'s mother had nothing to do with this claim. If respondent, performed a reverse listing search, they could find "NW"'s mother and stepfather's name on the internet in order to verify her testimony as to where she resided in Txxx, New York. The current reading of her odometer many months after the accident as requested on 9/29/17, 11/1/17 and 2/7/18-were too removed to time to establish anything on a used car with regard to first party No Fault coverage. An authorization to obtain cell phone records from her friend was clearly a document that would be unavailable and amounted to a far-reaching request. See D & R Med. Supply v. Progressive Ins. Co., (2009) 24 Misc. 3d 521.

It is not reasonable to expect that a non-party would provide such personal information for another's person's No-Fault Claim. Furthermore, employment records from her job were not relevant since respondent failed to establish there was a loss of earnings No Fault claim. This clearly was not the issue here. Respondent has approached this No Fault claim as if respondent was litigating a third-party bodily injury claim and their insured was the adversary. This clearly is not acceptable. Furthermore, after a reading and review of the 140 pages of EUO testimony, respondent had decided to deny No-Fault benefits by formulating an unsubstantiated hypothesis that the patient resided in the Bronx and issue far reaching additional verification requests stemming from this unsubstantiated hypothesis.

Although the patient "NW" might have had connections in the Bronx, but for her safety from a former violent partner, it was clearly more important that she reside outside of New York City in Txxx, New York. She testified to this fact. It might not be credible to respondent that she would choose to drive hours to work and drive her daughter at extremely early hours, but for NW", it was her choice-in order to be safe. As hard as it might be for some to believe, not all people have the blessing of having comfortable, privileged lives with easy commutes.

Unsubstantiated hypotheses and suppositions are insufficient to raise a triable issue of an assignor's fraud, and summary judgment should be granted if the medical provider

evidences properly submitted claims. (A.B. Medical Servs. PLLC v Eagle Ins. Co., 3 Misc. 3d 8, 776 N.Y.S.2d 434 [App Term, 2d Dept 2003].) See Star Med. Servs., P.C. v. Allstate Ins. Co.,(2004) 5 Misc. 3d 785

Regulations-Good Claims Practice Principles:

The No Fault regulation state at "**65-3.2 Claim practice principles to be followed by all insurers.**

(a) Have as your basic goal the prompt and fair payment to all automobile accident victims.

(b) Assist the applicant in the processing of a claim. Do not treat the applicant as an adversary.

(c) Do not demand verification of facts unless there are good reasons to do so. When verification of facts is necessary, it should be done as expeditiously as possible.

(d) Hasten the processing of a claim through the use of a telephone whenever it is possible to do so.

(e) Clearly inform the applicant of the insurer's position regarding any disputed matter.

(f) Respond promptly, when a response is indicated, to all communications from insureds, applicants, attorneys and any other interested persons…."

On the evidence presented to this arbitration, respondent issued additional verification requests which clearly established that they were treating this patient as if she, their insured, was the 'adversary'. The demand for documents requests which clearly were not in her possession or control amounted an improper demand which respondent knew that "NW" would have difficulty in providing. For example she testified that she only lived with her mother and did not have access to her mother's leases for two apartments, her cell phone was on the account of a friend and that friend's cell phone account information would not be available to her, photographs of her car's odometer months after the accident, repair record for her car since its purchase and an authorization for an unrelated prior accident amount to requests for irrelevant and unnecessary documents. From the documents and evidence submitted, respondent never provided patient or her attorney with respondent's position regarding a disputed matter. (See 65-3.2(e)).

Furthermore, respondent's proof failed to show that it responded to the patient's counsel's email of 2/1/18.

Additional Verification Demands dated 9/29/17, 11/1/17 and 2/7/18 - improper fishing expedition:

In light of the foregoing, reference must be made to Pro-Align Chiropractic, P.C. v Travelers Prop. Cas. Ins. Co., (2017)58 Misc. 3d 857 which establishes that verification requests which failed to show a link with plaintiff, are abusive discovery demands absent any explanation or reasons, and are part of an improper "fishing expedition" by respondent.

The Judge James Matthews stated in Pro-Align, supra:

"Plaintiff contends in its opposition papers that the delay verification demands from defendant were sensitive "Mallela" type corporate information, which were imposed without any explanation or reason. Plaintiff points to defendant's verification demands, where it requests

"a copy of the lease, sublease and/or financial agreement between Joseph Quashie MD and Devonshire Surgical Facility LLC . . . verification of employment of Dipti Patel DC (W-2 or 1099 and/or current paystub) by Pro-Align Chiropractic . . . copy of lease, sublease and or financial agreement between Pro-Align Chiropractic and Devonshire Surgical Facility . . . copy of the lease, sublease and/or financial agreement between Total Chiropractic PC and NYS Diagnostic Medicine PC . . . copy of the lease, sublease and/or financial agreement between Total Chiropractic PC and Life Circles Healthcare Medical PC . . . copy of the lease, sublease and/or financial agreement between Pro-Align Chiropractic PC and NYS Diagnostic Medicine PC . . . verification of employment (W-2 or 1099 and/or current paystub) for Sarl Ramzan DC with Total Chiropractic PC."

Plaintiff asserts these verification requests failed to show a link with plaintiff, are abusive discovery demands absent any explanation or reasons, and are part of an improper "fishing expedition" by defendant.

Plaintiff also points to the lack of any SIU affidavit from defendant in support of its verification demands, or in answer to plaintiff's "objection" letters, which it implies would link an ongoing insurance investigation with a plaintiff medical provider which is a fraudulently incorporated enterprise (see State Farm Mut. Auto. Ins. Co. v Mallela at 319).

The court notes that defendant does not address plaintiff's claims of "Mallela" type verification requests in any responsive letters to plaintiff, or in any opposition papers. Therefore, the court accepts these circumstances as an admission by defendant."

Additionally, Island Chiropractic Testing, P.C. v Nationwide Ins. Co., (2012)35 Misc. 3d 1235(A) held: "Permitting an insurer to obtain written documents such as tax returns, incorporation agreements or leases regarding a potential fraudulent incorporation "Malella" defense as part of the verification process defeats the stated policy and purpose of the no-fault law and carries with it the potential for abuse. See, *State Farm*

Mut. Auto. Ins. Co. v. Mallela, 4 N.Y.3d 313, 827 N.E.2d 758, 794 N.Y.S.2d 700 (NY 2003) which establishes the parameters of challenging a no-fault claim premised upon violations of NY Bus. Corp. Law Secs. 1507 and 1508 and NY Educ. Law Sec 6507 (4)(c) and NYCRR 65-3.16 (a)(12). The defendant should not be able to defeat no-fault claims by making onerous and improper non claim related document demands by way of verification.

The Court concurs with its sister Nassau County District Court determinations that "verification" demands as defined by 11NYCRR Sec. 65-3.5(c) are limited to "verifying the claim". *Concourse Chiropractic v. State Farm Ins. Co*. cite supra., Judge Hirsch in the Concourse and Dynamic Med. Imaging decisions determined that couching Malella defense discovery in the form of an examination under oath is insufficient to invoke the "verification toll" which would require dismissal of the insurer complaint as premature. Extending this reasoning, Mallela discovery is also inappropriate, even in the absence of an EUO demand, or even if it only involves document production."

Furthermore, the Court in Nexray Medical Imaging PC a/a/o STEVEN OLIVARES, Plaintiff(s), against Allstate Insurance Company, Defendant(s), 39 Misc 3d 1237 (A), 972 N.Y.S. 2d 144, 2013 N.Y. Misc. Lexis 2363, 2013 N.Y. Slip. Op. 50910 (U) held that the scope of verification is not unlimited. This holding is applicable to the present arbitration due to respondent's insinuation that there were issues of material misrepresentation. Judge Hirsh held the following in his discussion that, even in cases where some limited *Mallela* discovery is warranted, trial court judges have emphasized that the scope of discovery into *Mallela* issues "is not unlimited. The tenor of respondent's EUO requests suggest that the scope of verification is however unlimited.

Therefore, I am constrained to abide by the Court's decision in Nexray, supra. as set forth below:

> "Trial court decisions from Civil Court judges generally follow a similar approach. In a series of well-reasoned opinions, Judge Katherine Levine draws a
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> distinction between cases where the insurer "has articulated a founded belief' that plaintiff is actually controlled by a non-licensed professional," and cases where the insurer has submitted nothing more than "unsupported conclusions" and "unsubstantiated hypotheses and suppositions." *Compare Lenox Neuropsychiatry Med., PC v State Farm Ins. Co.*, 22 Misc. 3d 1118[A], 880 N.Y.S.2d 874, 2009 NY Slip Op 50178[U] (Civ Ct Richmond , with *Bay Plaza Chiropractic v State Farm Mut. Auto. Ins. Co.*, 3d 1102[A], 873 N.Y.S.2d 231, 2008 NY Slip Op 51925[U] (Civ Ct Richmond Co.).
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> Moreover, even in cases where some limited *Mallela* discovery is warranted, **trial court judges have emphasized that the scope of discovery into *Mallela* issues "is not unlimited."** *See Cambridge Medical, PC v Nationwide Prop. & Cas. Ins. Co.*, 19 Misc. 3d 1110[A], 859 N.Y.S.2d 901, 2008 NY Slip Op 50629[U] (Civ Ct Richmond Co., Levine, J), *quoting Carothers v Insurance Companies Represented by Bruno, Gerbino & Soriano, LLP*, 13 Misc 3d 970, 974, 825 N.Y.S.2d 632 (Civ Ct Richmond Co., Sweeney, J). "**Since the amount in dispute**

in most no-fault matters is small," a trial court "should not hesitate to exercise its protective powers" under CPLR 3103(a) to curtail "overburdening" requests or "to prevent the proverbial fishing expedition." *Cambridge Medical, PC v Nationwide Prop. & Cas. Ins. Co., supra; accord, Carothers v Insurance Companies Represented by Bruno, Gerbino & Soriano, LLP, supra* (protective orders should "be freely issued to limit discovery in no-fault actions where the amount in dispute is small")." (emphasis added)

2/1/18 Verification Response from "NW"'s Lawyer

Respondent's submission included a response from "NW" s attorney. The submission included only an email cover page dated 2/1/18 and document production. There is no way to actually know if this was a complete response from Evans Prieston, P.C. Respondent only included a copy of the email cover sheet, no letter from counsel and a copy of "NW"'s Certificate of Title for her car, as well as the signed four-page lease issued to her mother and step father for her current address in Txxx, New York. Furthermore, with regard to the parties present for this arbitration, only respondent would have possession of correspondence from "NW"'s lawyer. Counsel for applicant medical supply company would have no access to an objection letter and/or verification response from "NW"'s lawyer. Therefore, the importance of having respondent submit the entire body of correspondence from "NW"'s lawyer with regard to issues pertaining to the verification requests were extremely relevant to this arbitration.

Respondent, however, chose not to include correspondence and communications from Evans Prieston, P.C. Therefore, respondent's submission clearly opened the door to questions concerning the reliability of the limited submission of documents from "NW"'s counsel. It is further noteworthy that respondent admitted to receipt of said email dated 2/1/18 as proof that "NW"'s counsel had received their requests. However, the significance of the email from "NW"s counsel- is that on its face, it fails to include a cover letter from "NW" counsel and fails to establish who received this document at respondent's place of business.

In New York, documents are relevant if they have "any bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Osowski v. AMEC Constr. Mgt., Inc.*, 69 A.D.3d 99, 106, 887 N.Y.S.2d 11 (1st Dep't 2009) (quoting *Allen v. Crowell-Collier Publ'g Co.*, 21 NY2d 403, 406, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968)).

Therefore, the submission from "NW"'s counsel in the form of the verification response information from "NW" s counsel must be addressed as it relates to respondent's issue that neither "NW" or her counsel responded to the verification requests. The evidence within respondent's submission clearly establishes that counsel from "NW" complied with the requests with some documents. The record is silent as to what was said with regard to objections or the inability to obtain requested documents by counsel for "NW". Notably absent from respondent's submission was an affidavit that the documents from "NW" were the only pages received by respondent. However, respondent also failed to respond to the 2/1/18 email from "NW"'s lawyer.

There is no way of knowing what the insured lawyer's wrote to respondent and what other documents were included. The absence of this letter from Evans D. Prieston, P.C. to the record is concerning since only respondent had control over what documents would be submitted to the arbitration record. The respondent failed to include the actual letter which was emailed with the documents in issue. There is no way of knowing if "NW"'s lawyer sent a letter, but it is not credible that an attorney would email an additional verification response with highly personal information without a cover letter. This is especially relevant since counsel for "NW" is trying to protect his client's No-Fault benefits and establish compliance with respondent's demands and defenses to the verification demands. As his client is the survivor of domestic violence, it would be prudent to make sure that the lease where she lived and particulars about her car and residence were received by the correct party(s) at respondent. In light of the fact that respondent had sole possession and control over the documents associated with this "emailed" response, I am constrained to find that respondent's submission of what was provided by counsel for "NW" on 2/1/18 did establish that the "NW" did definitively respond the respondent's first two additional verification letters.

Therefore, respondent's denials establish that respondent failed to acknowledge or discuss

the information it received from applicant in its follow up additional verification letter dated 2/7/18. In short, the evidence established that respondent essentially ignored receipt of the patient's 2/1/18 verification response when it issued the same additional verification request on 2/7/18 and its denials dated 2/12/18.

The case of All Health Med. Care v. Government Empls. Ins. Co., 2004 NY Slip Op

24008, 2 Misc. 3d 907, Civil Court of the City of New York, Queens County stands for

the proposition that once plaintiff submitted a response, defendant had a duty to pay, deny

or request further verification. Since defendant failed to act in All Health, supra. case, it

was precluded from presenting any defenses to plaintiff's claim:

"The sole issue at trial was whether defendant had any duty to act after receiving

plaintiff's response to defendant's verification requests. Defendant contends that it did

not have to pay or deny plaintiff's claim because plaintiff failed to comply with its

timely verification requests. Defendant argues that it requested specific information

regarding the acupuncture services plaintiff performed and that plaintiff's response was late and insufficient. As plaintiff did not sufficiently comply with defendant's verification request, defendant's time to pay or deny plaintiff's claim is not overdue and plaintiff is not entitled to compensation.

Plaintiff contends that defendant must pay its claim due to defendant's failure to act after receiving plaintiff's response. Plaintiff argues that it did provide a sufficient response to defendant's verification request, and that it has no time frame under the no-fault regulations upon which to submit its response….

The court holds that defendant was derelict in failing to act upon receipt of plaintiff's response to defendant's verification request, and therefore plaintiff is entitled to payment. As long as plaintiff's documentation is arguably responsive to defendant's verification request, defendant must act within 30 days of receipt of plaintiff's response, or will be precluded from presenting any noncoverage affirmative defenses. While the law is clear that defendant's time to pay or deny is tolled pending receipt of some form of verification, once it has received verification, its time is no longer tolled and it has a duty to act. There is nothing in the no-fault regulations or case law that allows defendant to remain silent in the face of plaintiff's response to its verification request. Defendant's position defies the spirit and purpose of the No-Fault Law in promoting prompt resolution of matters….*Based upon the purpose of the No-Fault Law and controlling case law, though, it seems clear that the insurance company must affirmatively act once it receives a response to its verification requests*."

It is, therefore, clear that with regard to the additional verification requests issued by respondent, the respondent remained silent as to applicant's responses to its verification. Respondent never commented on "NW"'s attorney's verification response dated 2/1/18. It was unreasonable to allow an insurer to ignore information from a claimant which was submitted in good faith without informing the claimant of its deficiencies. Respondent

also issued its denials dated 2/12/18 after receiving a response from applicant's counsel on 2/1/18.

Therefore, respondent's argument that verification is outstanding is not established and the respondent's denial cannot be sustained. The 2/7/18 verification request was identical to the first two requests for additional verification dated 9/29/17 and 11/1/17. Respondent by the issuance of the denials dated 2/12/18 failed to acknowledge receipt of the documents noted herein and erroneously represented that no documents were sent by "NW" despite the fact that its own submission included an email cover sheet from counsel, a copy of the certificate of Title to "NW"'s car and her parent's lease for the apartment she lived in.

While the law is clear that defendant's time to pay or deny is tolled pending receipt of some form

of verification, once it has received verification, its time is no longer tolled and it has a

duty to act. There is nothing in the no-fault regulations or case law that allows defendant to remain silent in the face of plaintiff's response to its verification request. (see also Pro-Align Chiropractic, P.C. v Travelers Prop. Cas. Ins. Co., (2017)58 Misc. 3d 857). Here, defendant remained silent in the face of "NW"'s counsel's verification response, and failed to demonstrate "good reason" to support its continued verification requests, as required by 11 NYCRR 65-3.2[c]). Lenox Hill Radiology v Global Liberty Ins. Co. of N.Y.,2017 N.Y. Misc. LEXIS 2911.

Notice to applicant with regard to additional verification demands:

The arbitration record established that respondent had received applicant's bills for medical supplies in January of 2018. The denials dated 2/12/18 stated that "Previously you were requested to provide supporting documentation. Your claim for No-Fault benefits is denied, in its entirety pursuant to Regulation 68, Section 65-3.5(o); An applicant from whom verification is requested shall within 120 days from the date of the initial request for verification submit all such verification under the applicant's control and possession or written proof providing reasonable justification for the failure to comply." The arbitration record did not show that applicant was forwarded a copy of the demand requests sent to insured's counsel.

"Pursuant to 11 NYCRR 65-3.6 (b), upon sending a second examination under oath (EUO) scheduling letter to plaintiff's assignor, defendant was required to send plaintiff a delay letter (see *Doshi*Diagnostic Imaging Servs. v State Farm Ins. Co., 16 Misc 3d 42, 842 N.Y.S.2d153 [App Term, 2d Dept, 9th & 10th Jud Dist 2007]; **see also Advantage Radiology, P.C. v Nationwide Mut. Ins. Co., 55 Misc 3d 91, 53 N.Y.S.3d 452 [App**

Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017]). However, it failed to do so. Consequently, defendant failed to demonstrate that it had properly tolled the time to pay or deny plaintiff's claims and, as a result, it is precluded from raising its proferred defense that plaintiff's assignor had failed to appear for duly scheduled EUOs (see Westchester Med. Ctr. v Lincoln Gen. Ins. Co., 60 AD3d 1045, 877 N.Y.S.2d 340 [2009])." A & F Med., P.C. v Global Liberty Ins. Co. of N.Y.(App Term, 2nd Dept 2018) 2018 N.Y. Misc. LEXIS 5983

Respondent only submitted a letter dated 1/24/18 which stated that we are waiting for additional documents that were requested from the patient at the time of the EUO. However, the basis of the denial dated 2/12/18 was misleading due to the fact that as of 2/1/18, the patient's counsel had forwarded a response (as discussed) to the additional verification demands. Furthermore, the basis for the denial in issue had nothing to do with the provider. A denial must apprise the applicant with a high degree of specificity the ground on which the denial was predicated. The denial in the claim at bar discussed this applicant's failure to provide documents.

In **Nyack Hospital, Appellant, v. State Farm Mutual Automobile Insurance Company, Respondent.,** SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, 11 A.D.3d 664; 784 N.Y.S.2d 136 (2004), the Appellate Division held the following"

"Pursuant to 11 NYCRR 65-3.8 (c), the defendant was required either to pay or deny the plaintiff's claims "within 30 calendar days after proof of claim [was] received." A proper denial of claim must include the information called for in the prescribed denial of claim form (*see* 11 NYCRR 65-3.4 [c] [11]) and must "promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated" (*General Acc. Ins. Group v Cirucci*, 46 N.Y.2d 862, 864, 387 N.E.2d 223, 414 N.Y.S.2d 512 [1979]; *accord Halali v Evanston Ins. Co.*, 8 A.D.3d 431, 779 N.Y.S.2d 119 [2004]; *Hereford Ins. Co. v Mohammod*, 7 A.D.3d 490, 776 N.Y.S.2d 87 [2004]). "An insurer which fails to properly deny a claim within 30 days as required by these statutory provisions may be precluded from interposing a defense to the plaintiff's lawsuit" (*Mount Sinai*

***Hosp. v Triboro Coach*, 263 A.D.2d 11, 16, 699 N.Y.S.2d 77 [1999]; *see e.g.* *Presbyterian Hosp. in City of NY v Maryland Cas. Co.*, 90 N.Y.2d 274, 283, 683 N.E.2d 1, 660 N.Y.S.2d 536 [1997] [hereinafter *Presbyterian I*]; *New York Hosp. Med. Ctr. of Queens v Country-Wide Ins. Co.*, 295 A.D.2d 583, 584, 744 N.Y.S.2d 201 [2002]; *New York and Presbyt. Hosp. v Empire Ins. Co.*, 286 A.D.2d 322, 728 N.Y.S.2d 684 [2001]; *Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co.*, 226 A.D.2d 613, 641 N.Y.S.2d 395 [1996] [hereinafter *Presbyterian II*]). Moreover, "[a] timely denial alone does not avoid preclusion where said denial is factually insufficient, conclusory, vague or otherwise involves a defense which has no merit as a matter of law" (*Amaze Med. Supply v Allstate Ins. Co.*, 3 Misc 3d 43, 44, 779 N.Y.S.2d 715 [2004]).**

Fee Schedule:

The respondent's letter of 1/24/18 and the denials indicated a fee schedule defense. However, this letter was inadequate to sustain its defense. Robert Physical Therapy PC v. State Farm Mut. Auto Ins. Co., (2006), 13 Misc. 3d 172, is also controlling for the instant arbitration. The Court held that the respondent must present competent evidentiary proof supporting its fee schedule defenses: "Defendant's counsel is not competent to opine on whether range of motion and muscle testing is generally included in an office evaluation by a physical therapist. Defendant opted not to commission a peer review and move thereupon for summary judgment, or to proceed to a live trial at which it could present witnesses and evidence. Instead, counsel proceeded only on briefs. In the absence of any testimony by a competent medical professional, this court cannot determine whether plaintiff's charges were medically appropriate. Since it was defendant's burden to make out its defense, the court finds that defendant has failed to carry its burden. (emphasis added)."

Conclusion:

The respondent's denial cannot be sustained. The claim is granted.

*It is requested that either party send a copy of this arbitration award as a courtesy to counsel for "NW".

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.

Medical		From/To	Claim Amount	Status
	Avangard Supply Inc	**12/06/17 - 12/25/17**	**$1,560.00**	**Awarded: $1,560.00**
	Avangard Supply Inc	**12/26/17 - 01/05/18**	**$858.00**	**Awarded: $858.00**
Total			**$2,418.00**	**Awarded: $2,418.00**

B. The insurer shall also compute and pay the applicant interest set forth below. 04/13/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

> The Respondent shall compute and pay the Applicant the amount of interest computed from the date set forth above 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).

C. Attorney's Fees

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

Applicable attorney fees on the amount awarded in accordance with 11 NYCRR 65-4.6(d).

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 Suffolk

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

04/07/2019
(Dated)

Sandra Adelson

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:
2869a85ab4fedee07c418d819fe31b7a

Electronically Signed

Your name: Sandra Adelson
Signed on: 04/07/2019