

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

	AAA Case No.	17-18-1103-2369
Rutland Medical, PC (Applicant)		363161, 363162,363163,
- and -	Applicant's File No.	363164, 363165,, 363166, 363167, 363168
Allstate Fire & Casualty Insurance Company (Respondent)	Insurer's Claim File No.	0460334451 2DN
	NAIC No.	29688

**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 08/21/2019  
Declared closed by the arbitrator on 08/21/2019

Steven Palumbo, Esq. from Leon Kuchеровsky Esq. participated in person for the Applicant

Thomas Cooke, Esq. from Law Offices of John Trop participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,024.82**, 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 provided sufficient proof to prove the EUO no-show of the EIP?

4. Findings, Conclusions, and Basis Therefor

The case was decided on the submissions of the Parties as contained in ADR Center maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in the ADR Center for both parties and make my decision in reliance thereon.

The EIP, MM, a 27 year old male was involved in a motor vehicle accident on May 22, 2017. The EIP sought medical treatment for the injuries sustained in the accident. Applicant is seeking reimbursement medical treatment provided to the EIP. The Respondent denied the claim based on the EIP's failure to appear for examinations under oath (hereinafter referred to as 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.

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 opposition, Applicant's counsel argued that the EUO scheduling notices were invalid as the IP's street address was misspelled ON ALL FOUR notices. Counsel for Respondent argued that the spelling errors were "diminimus" and did not render the notices invalid.

In order to establish prima facie its defense based on the IP's failure to appear for an EUO, Respondent is required to demonstrate that: (1) the EUO scheduling letters were timely and properly mailed, (2) the date and place of the EUO was not unreasonable, and (3) that the assignor failed to appear... See *Electrodiagnostic & Physical Med PC v. Maya Assurance Co.*, 3 NYS3d 284 (Table), 2014 N.Y. Slip Op. 51500(U). Precedent also provides that at least two separate requests for the assignor's appearance must be made regarding post claim EUOs prior to a carrier denying on the grounds of non-appearance. *Apollo Chiropractic Care, P.C. v. Praetorian Ins. Co.*, 27 Misc.3d 139(A), 2010 NY Slip Op 50911(U) (App Term 1st Dept.).

Respondent forwarded FOUR scheduling notices to the IP. The notices were dated August 2, August 22, September 12 and October 4, 2017. The EIP's NF-2, Applicant's

NF-3, and the EIP's assignment of benefits all provide the IP's address as: XXX Courtland Avenue #-F, The Bronx, NY 10451. However, the August 2 and August 22 scheduling letters were addressed to the IP at: XXX **Cordlant** Ave., Apt. - F, Bronx, NY 10451.

Respondent's counsel provides affidavits of service from paralegals April Gumbs and Erica Martinez. Both Ms. Gumbs and Ms. Martinez aver that the scheduling notices were sent to the EIP at the "Cordlant" address via "FedEx overnight mail and by depositing same securely enclosed in a post-paid wrapper in a Post Office Box". Although it appears a FedEx tracking number was assigned, no proof of actual delivery or receipt was provided. Nor did either Ms. Gumbs or Ms. Martinez attest to the fact that either notice was never returned as "undelivered". In essence, there is no actual proof that the letters were ever actual received by the EIP.

To demonstrate the actual no show, Respondent provided two EUO bust statements via an EUO transcript, each corresponding to the EUO scheduled dates of August 14 and September 1, 2017. The August 14 bust statement was produced by Thomas Cooke, th Esq., from The Law Offices of John Trop. At page 3, lines 17-22, Mr. Cooke states that "The letter was mailed to [the EIP] at the address of XXX Courtlandt Avenue, apartment -F, Bronx, New York 10451, which is the address given to Allstate for his claim for benefits". This contradicts the address on the actual notice and further contradicts the April Gumbs affidavit of service as indicated above.

The September 1, 2017 bust statement was produced by Brendan Brophy, Esq., from The Law Office of John Trop. At page 3 lines 24 - 25 and continuing on page 4 at lines 1-4, Mr. Brophy also states that "This letter was mailed to [the IP] at XXX Courtlandt Avenue, Apartment -F, Bronx, New York, 10451, which is the address given to Allstate for his claim for benefits". This contradicts the address on the actual notice and the affidavit of Erica Martinez as indicated above.

Further, the August 22nd scheduling letter advised the EIP to appear at 1pm at "Deitz Court Reporting, 880 River Avenue, Lower Level Ste 10, Bronx, NY 10452. Apparently, the EUO was actually scheduled to take place at Diamond Court Reporting, not Dietz. In his "statement on the record", Mr. Cooke acknowledged the mix up and claimed that he "went next door to Dietz Court Reporting, checked in there and had them refer anyone, namely, the EIP, over to the Diamond Reporting offices". So, not only was the EIP's address wrong, but so was the address of where he was to appear for his EUO.

Further, the September 12 and October 4 scheduling letters were addressed to the EIP at: XXX **Courtlandt** Ave., Apt. - F, Bronx, NY 10451. This address is again different than the address on the EIP's NF-2, Applicant's NF-3, the IP's assignment of benefits, and the two prior scheduling letters issued by Respondent.

In summary, all four of Respondent's scheduling letters contained the EIP's wrong address. Two of the letters misspelled the address one way, and the remaining two letters misspelled it a different way. Further, two "statements on the record" provided by Respondent's counsel contradict the address indicated on the face of the first two

scheduling letters and the corresponding affidavits of service. Additionally, one of the "statements" also acknowledges that the EIP was not even properly advised where to appear for his EUO on one of the scheduled dates. Moreover, Respondent failed to provide any substantive explanation as to why it could not accurately correlate the EIP's address as found on the EIP's NF-2 to any of the four scheduling letters. Nor did it explain how the two different address became "associated with the EIP's claim for No-Fault benefits" despite the correct information as contained on the EIP's no fault application.

The misspelling the IP's address **FOUR** times is not "diminimus" in any way as Respondent argues. The scheduling letters were to advise the IP that his cooperation was required under specific terms of the applicable policy of insurance, and that his failure to cooperate could have severe ramifications in terms of his insurance coverage. There is no way to know if the letters ever reached the EIP. There can be no assumptions in No-Fault. Given the facts of this case, I ultimately find the argument unpersuasive. Especially in consideration of the fact that all four of the letters appear to have been assigned a tracking number from FedEx, yet no actual proof of receipt was submitted. Nor was an affidavit from anyone with personal knowledge submitted establishing that none of the scheduling letters was ever returned as undeliverable.

Based on the submitted documentation, I find that Respondent failed to establish, prima facie, its defense based on the EIP's claimed failure to appear for an examination under oath. Respondent failed to demonstrate through the submission of clear and competent evidence that the EIP was duly noticed to appear for his examination.

The claim is therefore granted.

This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator.

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	Total	Status
	Rutland Medical, PC	10/18/17 - 10/18/17	\$76.06	\$ 1,024.82	Awarded: \$76.06
	Rutland Medical, PC	10/24/17 - 10/24/17	\$92.98	\$ 1,024.82	Awarded: \$92.98
	Rutland Medical, PC	10/24/17 - 10/24/17	\$338.89	\$ 1,024.82	Awarded: \$338.89
	Rutland Medical, PC	11/08/17 - 11/08/17	\$174.40	\$ 1,024.82	Awarded: \$174.40
	Rutland Medical, PC	11/08/17 - 11/08/17	\$76.06	\$ 1,024.82	Awarded: \$76.06
	Rutland Medical, PC	11/14/17 - 11/14/17	\$64.65	\$ 1,024.82	Awarded: \$64.65
	Rutland Medical, PC	11/22/17 - 11/22/17	\$64.65	\$ 1,024.82	Awarded: \$64.65
	Rutland Medical, PC	11/22/17 - 11/22/17	\$137.13	\$ 1,024.82	Awarded: \$137.13
Total			\$1,024.82	Awarded: \$1,024.82	

- B. The insurer shall also compute and pay the applicant interest set forth below. 08/15/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from 8/15/18 (the filing date for this case) until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty-day month.

C. Attorney's Fees

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

This case is subject to the provisions as to attorney fee promulgated in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D): There is an attorney fee of 20% of benefits plus interest, with no minimum fee and a new maximum fee of \$1360.00.

- 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, 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.

09/07/2019

(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:**  
a979841364702295cd65244e161bede2

### **Electronically Signed**

Your name: Jeffrey Silber  
Signed on: 09/07/2019