

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

DV Chiropractic Care PC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-18-1091-5939
Applicant's File No. 102947
Insurer's Claim File No. 0420352890101063
NAIC No. 22055

ARBITRATION AWARD

I, Nada Saxon, 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: Assignor

1. Hearing(s) held on 09/24/2019
Declared closed by the arbitrator on 09/24/2019

Naomi Cohn from Ursulova Law Offices P.C. participated in person for the Applicant

Diane Phillips from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 92.48**, 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 Assignor (WE) was a 19-year-old female involved in an accident on 11/29/17. Applicant seeks reimbursement for chiropractic treatment provided from 2/16/18-2/26/18.

Respondent timely denied the claims pursuant to Assignor's alleged failure to appear for IMEs on 2/14/18 and 3/6/18.

The issue is whether Respondent established its defense of IME No-Show.

4. Findings, Conclusions, and Basis Therefor

This case was conducted using the documents submitted by the parties in the ADR Center, maintained by the American Arbitration Association, and the oral arguments of the parties. Any documents in the ADR Center are hereby incorporated into this hearing. I have reviewed all the relevant documents. No witnesses testified at this hearing.

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.

Once arbitration gets underway, its conduct is not governed by the substantive or evidentiary rules which commonly prevail in courts of law; rather, the constraints on the arbitral authority are those measured by the bounds of rationality. Matter of Board of Education of Norwood-Norfolk Central School District v. Hess, 49 N.Y.2d 145, 152, 424 N.Y.S.2d 389, 391 (1979).

Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

IME No-Show

The insurer is entitled to judgment where it proves that two separate requests for an IME were duly mailed to the assignor 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 (Table), 2010 N.Y. Slip Op. 50911(U), 2010 WL 2026636 (App. Term 1st Dept. May 24, 2010).

It is incumbent upon the insurer to establish that the scheduling letters were properly and timely addressed and mailed, see SK Prime Medical Supply, Inc. v. Hertz Claim Management Corp., 37 Misc.3d 138(A), 2012 N.Y. Slip Op. 52192(U) (App. Term 1st Dept. 2012); Ortech Express Corp. v. MVAIC, 37 Misc.3d 128(A), 2012 N.Y. Slip Op. 51913(U) (App. Term 1st Dept. 2012); Perfect Point Acupuncture, P.C. v. Auto One Insurance Company, 36 Misc.3d 140(A), 2012 N.Y. Slip Op. 51486(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012), and contained the required notice regarding reimbursement of travel expenses and lost wages, see Matter of Venditti (General Acc. Ins.), 236 A.D.2d 759 (3rd Dept. 1997) (IME requests were "null and void" in that they failed to advise petitioner that he would be reimbursed for loss earnings and transportation expenses in complying therewith).

"While plaintiff argues that defendant did not mail its IME scheduling letters to the correct address, defendant sufficiently demonstrated that it addressed the letters to plaintiff's assignor, defendant's insured, at the address provided to it by its insured. In addition, defendant demonstrated that copies of the IME scheduling letters had been addressed to, and received by, plaintiff's assignor's attorney" See Rainbow Supply of N.Y., Inc. v Progressive Northeastern Ins. Co., 2013 NY Slip Op 51729(U)(App. Term 2d Dept. 2013).

The Court in *Sunlight Med. Care, P.C. v Esurance Ins. Co.*, 49 Misc 3d 130[A], 2015 NY Slip Op 51410[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]), held:

Plaintiff's sole argument on appeal is that Esurance mailed the EUO scheduling letters to the wrong address, and therefore that plaintiff's motion should have been granted and Esurance's cross motion denied. However, the record demonstrates conclusively that Esurance mailed the letters to the address provided by plaintiff on its bills and by plaintiff's assignor on both her prescribed application for no-fault benefits (NF-2) and her signed assignment of benefits. Thus, plaintiff has not demonstrated that Esurance did not give the assignor proper notice of the EUOs. Consequently, the branch of plaintiff's motion seeking summary judgment against Esurance was properly denied and Esurance's cross motion for summary judgment dismissing so much of the complaint as was asserted against it was properly granted.

Respondent submits copies of letters sent to Assignor requesting she appear for an IME on 2/14/18 and 3/6/18.

However, Applicant argues the letters were sent to the incorrect address. The letters were addressed to Assignor at 2525 Church Ave, Brooklyn, NY 11226, whereas Assignor's NF-2 indicates her address includes an apartment number: E10. The apartment number is noted more than once on Assignor's NF-2 and also on Applicant's claim document, and assignment of benefits.

I note that a google map search of the address 2525 Church Ave, Brooklyn, NY 11226, reveals it is a building with multiple residential units.

Based on the foregoing, Respondent fails to demonstrate it mailed the letters to Assignor's proper address, as reported on her NF-2, Applicant's claim document and assignment of benefits form.

Nonetheless, Respondent argues that the letters were also sent to Assignor's attorney, pursuant to a letter of representation dated 12/19/17.

While different facts may warrant a finding that notice to assignor's attorney alone is sufficient pursuant to the holdings in *Pierre J. Renelique, M.D., P.C., v. Park Ins. Co.* 2018 NY Slip Op 50780(U), 59 Misc. 3d 147(A) (App Term, 2d Dept., 2018) and *Global Liberty Ins. Co., v. New Century Acupuncture, P.C.* 2018 NY Slip Op 03444, 161 AD 3d 498 (App. Div. 1st Dept. 2018); the evidence does not support such a finding here.

Firstly, the letters were addressed to Assignor's attorney at 171 Westwood Avenue, Staten Island, NY 10314, whereas the letter of representation indicates the address includes: 1st Floor. Therefore, there is a question as to whether the attorney received noticed as well.

Secondly, Tom Dooley's mailing affidavit raises further questions as to whether notice was proper. In paragraph 6 he indicates the letters were mailed to the addresses, inclusive of the apartment number and floor numbers, in accordance with the mailing procedures. However, paragraph 4(h) states that the mailing department checks all appointment letters for accuracy and then places said letters into window envelopes with the outgoing address clearly visible.

Being that the letters themselves omit the apartment/floor numbers, I find Respondent's affidavit insufficient to establish proof of mailing.

Based on the totality of the credible evidence, Respondent does not establish Assignor was provided notice of the IME. I find Respondent has failed to establish its IME No-Show defense.

No evidence was presented establishing that the bills in dispute were in excess of the applicable fee schedule.

Based on the foregoing, Applicant's claims are granted.

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
	DV Chiropractic Care PC	02/16/18 - 02/26/18	\$92.48	\$ 92.48	Awarded: \$92.48
Total			\$92.48	Awarded: \$92.48	

B. The insurer shall also compute and pay the applicant interest set forth below. 04/09/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

Based on the regulations, I find the date that interest shall accrue from is the date the Applicant requested arbitration in this matter. See, 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

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). Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.6. The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(d). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first party benefits, plus interest thereon, for each applicant per arbitration or court proceeding, subject to a maximum fee of \$1,360." Id.

- 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 New York

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

09/27/2019
(Dated)

Nada Saxon

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:
2b82b73c256d185b61057f0bf441c9fa

Electronically Signed

Your name: Nada Saxon
Signed on: 09/27/2019