American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Vital Meridian Acupuncture PC (Applicant)	AAA Case No.	17-19-1117-7032
	Applicant's File No.	280268
- and -	Insurer's Claim File No.	0507982190101037
	NAIC No.	22063
Geico Insurance Company (Respondent)		

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 07/21/2020
   Declared closed by the arbitrator on 07/21/2020

   Neil Menashe, Esq. from Neil Menashe Attorney At Law P.C. participated by telephone for the Applicant

   Ilyana Meyer, Esq. from Geico Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 1,985.22**, was AMENDED and permitted by the arbitrator at the oral hearing.

   At the hearing, the applicant's counsel amended the amount in dispute from $1,985.22 to $651.07 based upon the applicable fee schedule for medical services in this case and withdrawal of all claims except DOS 9/26/16-10/14/16 ($235.39) and DOS 10/17/16-11/11/16 ($412.68).

   Stipulations WERE made by the parties regarding the issues to be determined.

   The parties stipulated that the denials are timely. If applicable, interest accrues in accordance with 11 NYCRR§65-3.9.

3. Summary of Issues in Dispute

The EIP is a 26 year old male injured as a driver in a motor vehicle accident on 9/26/16. Applicant seeks $651.07 for acupuncture treatments on DOS 9/26/16-1111/16. Respondent denied applicant's claim for DOS 10/17/16-11/16/16 ($415.68) based upon the applicant's failure to appear for EUO. Upon receipt of all other claims, respondent recalculated the amount due, made partial payment and denied the balance based upon the NYS Workers Compensation fee Schedule

4. Findings, Conclusions, and Basis Therefor

The failure to appear for IMEs or EUOs requested by the insurer when and as often as it may reasonably require is a breach of a condition precedent to coverage under the no-fault endorsement to the policy of insurance and therefore fits squarely within the exception to the preclusion doctrine as set forth in Central General Hospital v. Chubb Group of Insurance Cos., 90 NY 2d 195, 659 NYS 2d 246 (1997); an insurer has the right to deny all claims retroactively to the date of loss on the basis of the IME no-show, regardless of whether the denials are timely issued. Unitrin Advantage Insurance Company, supra.

I am aware that many of my fellow arbitrators do not follow the holding set forth in Unitrin Advantage Insurance Company, supra, and require respondent to present a timely and valid denial to sustain its defense. I respectfully disagree. Failure to appear for an IME (or EUO) is in fact a hybrid defense; if used as a means to verify a claim the insurer is obligated to comply with the verification protocols set forth in 11 NYCRR §§ 65 - 3.5 (b) and 65 - 3.6(b). The 1st Department emphasized compliance with the procedures and time frames of the regulations in American Transit Insurance Company v. Longevity Medical Supply, Inc., 131 AD 3d 841 (1st Dept. 9/15/15) and National Liability and Fire Insurance Company v. Tam Medical Supply Corp., 131 AD3d 851 (1st Dept. 9/15/15).

Assuming compliance with the verification requirements and/or a pre-claim request for IME the EIP's failure to appear as reasonably requested is a breach of a condition precedent to coverage and a non-precludable defense.

In applying Unitrin Advantage v. Bayshore Physical Therapy, PLLC, 82 AD3d 559, 918 NYS 2d 473 (1st Department 2011), Arbitrator Aaron Maslow (Best Choice Medical Supply, Inc. v. Kemper Auto Ins. Co, AAA # 412013071840, 1/7/14, aff'd, Master Arbitrator D'Ammora, 3/7/14)held that "... [i]t is legally irrelevant whether a denial was ever issued embodying a defense of failure to appear. My reasoning is that Unitrin treats failures to appear as breaches of conditions precedent such that there is a lack of coverage. When there is a lack of coverage of matters not that a denial was ever issued. Hence, that the failure to attend EUOs may not have been mentioned in the denial appurtenant to the bill for providing supplies is it is legally irrelevant. This holding of mine is contrary to Westchester Medical Center v Lincoln General Insurance Company, 60 AD3d 1045, 877 NYS 2d 340 (2d Dept. 2009) which is in conflict with Unitrin.

However, an arbitrator may follow either Unitrin or Westchester Medical Center. See, Matter of Pomona Pain Management PC v. Praetorian Insurance Company, 2012 NY Slip op 30525 (U), 2012 WL 761323 (Sup. Ct. Nassau County F Dana Winslow, J. January 31, 2012).

I agree with Arbitrator Maslow's analysis and find the 1st Department's decision in Unitrin, supra, to be more persuasive. As such, a denial need not be specific, timely or even issued so long as the insurer establishes the requests were proper and timely and the EIP failed to appear. The efficacy of any denial that may have been generated is irrelevant.

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 denials establish the applicant's prima facie case. AR Medical Rehabilitation v. Statewide Insurance Co, 99710/06, NYLJ 1202737691469 (Civ. Ct Kings Cty. 8/12/15). The burden of production and persuasion now shifts to respondent. Citywide Social Work and Psych Services, PLLC v. Allstate, 8 Misc. 3d 1025A (2005); Healing Hands Chiropractic v. Nationwide Assurance Co., 5 Misc. 3d 975 (2004).

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.).

Respondent requested applicant appear for EUO by letter dated 12/29/16. The EUO was scheduled for 1/26/17 and the applicant did not appear. The EUO was rescheduled by letter dated 1/30/17 for 2/27/17. The applicant did not appear.

For DOS 10/17/16 - 11/11/16 ($845.52) applicants claim was received on 12/2/16. The EUO requests are timely.

In order to establish a defense based upon policy violation, the insurer must provide credible evidence that it mailed the EUO notices and that the injured person failed to appear. See, Stephen Fogel Psychological v Progressive Casualty Insurance Company, 7 Misc. 3d 18, 793 NYS 2d 661 (App. Term 2dand 11th Dist. 2004, reversed on other grounds, 35 AD 2d 720, 827 NYS 2d 217 (2d Dept. 2006). It is incumbent upon the insurer to establish that the letters scheduling the EUOs were properly addressed and mailed to "address provided by" the examinee. Inwood Hill Medical, PC v. Gen. Assur. Co., 10 Misc. 3d 18 (App. Term 1stt 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 Department 2012).

Generally, proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee. New York and Presbyterian Hospital v. Allstate Insurance Company, 29 AD3d 547 (2nd Dept. 2006), quoting, Matter of Rodriguez v Wing, 251 AD2d 335 (2d Dept. 1998). "The presumption may be created by either proof of actual mailing or proof of the standard office practice or procedure designed to ensure that items are properly addressed and mailed." New York and Presbyterian Hospital v. Allstate Insurance Company, 29 AD 3d 547 quoting Residential Holding Corp. Scottsdale Insurance Company, 286 AD 2d 679 (2nd Dept. 2001). Such "office practice must be geared so as to ensure the likelihood that the [the correspondence] is always properly addressed and mailed." Nassau Insurance Company v. Murray, 46 NY 2d 828 (1978). Respondent submits an affidavit from Anuj Kundnani, claims associate which credibly establish that the request for EUOs were properly and timely mailed.

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 submits an affirmation from Megan Dimiceli, Esq. which sufficiently establishes that applicant failed to appear for any of the duly scheduled EUO. 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).

There is nothing in either submission indicating that applicant objected to the EUO as unreasonable. When there is no response in any way to an insurer's request for an EUO of the health service provider, the provider's objections regarding the EUO requests will not be heard. Viviane Etienne Medical Care PC v. State Farm Mutual Automobile Insurance Company, 35 Misc. 3d 127 (A) (App. Term 2d, 11th and 13th Districts 2012).

If the applicant believed the basis for the EUO was unreasonable it should have advised the respondent. See, Crescent Radiology, PLLC v. American Transit Ins. Co., 314 Misc. 3d 134, 927 NYS 2d 815 (App. Term 9th and 10th Dist. 2011). The failure to object shifts the balance back in respondent's favor. See also, Media Neurology PC v. Countrywide Insurance Company, 21 Misc. 3d 1101 (Civil Ct. Kings County 2008) wherein the court noted that neither party made no communications from the other without risking their chances to prevail on the matter, citing All Health Medical Care PC v. Geico Insurance Company, 2 Misc. 3d 907 (Civ. Ct. Qns County 2004). In Westchester County Medical Center v. New York Central Mutual Fire Insurance Company, 262 AD 2d 553 (2nd Dept. 1999), the court noted that if the provider objects to a verification request it must at least make its objections known.

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).

I find for respondent.

Fee schedule

The insurer has the burden of proving that the fees charged were excessive and not in accordance with the Worker's Compensation fee schedule. St. Vincent Medical Care PC v. Countrywide Insurance Company, 26 Misc. 3d 146 (A), 907 NYS 2d 441 (App. Term 2d, 11th and 13th Dists. 2010). If the insurer fails to demonstrate, by competent evidentiary proof, that the claims were excess of the appropriate fee schedule, the defense of noncompliance cannot be sustained. See, Continental Medical PC v Travelers Indemnity Company, 11 Misc.3d 145(a), 819 NYS 2d 847 (App Term 1st Dept. 2006).

I am permitted to take judicial notice of the Worker's Compensation fee schedule. Kingsbrook Jewish Medical Center v. Allstate Insurance Company, 61 AD 3d 13 (2d Dept. 2009); LVOV Acupuncture PC v. Geico Insurance Company, 32 Misc. 3d 144 (A) (App. Term 2d, 11th and 13th Jud. Dists. 2011). Natural Acupuncture Health PC v. Praetorian Insurance Company, 30 Misc. 3d 132 (A), 2011 N Y slip op 50040 (U), (App. Term 1st Dept. 2011).

In Great Wall Acupuncture v. Geico General insurance Company, 16 Misc. 3d 23 (App. Term 2dd Department 2007), the court held that licensed acupuncturists and chiropractors who wish to practice acupuncture are subject to similar training and educational requirements. Therefore, as a matter of law an insurer may use the chiropractic fee schedule to pay acupuncturists for their services. Apple Tree Acupuncture PC v. Progressive Northeastern Insurance Company, 36 Misc. 3d 153 (A), 2012 NY Slip op 51710 (U) (App. Term 2d, 11th, 13th Dists. August 31, 2012), citing, Great Wall Acupuncture PC v. Geico Insurance Company, 16 Misc. 3d 23, 842 NYS 2d 131 (App Term 2d and 11th Dist. 2007); Sung Bok Lee v. Metropolitan Property and Casualty Company, 30 Misc. 3d 135 (A), 924 NYS 2d 312 (App. Term 2d, 11th and 13th Districts 2011).

Applicant has offered no evidence that the services were in fact performed by a physician licensed to practice acupuncture. As such and in accordance with Great Wall, the chiropractic fee schedule is proper and respondent's reactions for CPT 97810 and 97811 are sustained.

Respondent provided a copy of the subject policy of insurance. According to the New York No Fault benefits section, there is a $200 deductible. The denial specifically indicates that this deductible was applied to applicant's bill for this date of service. Where the insurer demonstrates that the applicable insurance policy contained a $200 deductible, and that it timely denied $200 of the claim at issue due to said deductible, it is appropriate to grant judgment to the insurer dismissing the complaint with respect to the bills totaling $200 Innovative Chiropractic, PC v. Progressive Ins. Co., 26 Misc. 3d 135(A), 917 NYS 2d 100 (App. Term 2d, 11th & 13th Dists. 2010). Respondent correctly applied the deductible.

However, for DOS 9/26/16 applicant billed CPT 99203 for an office visit. Respondent denied applicant's claim noting that, "there is no allowance for this procedure in the New York State Workers Compensation Fee Schedule under the provider specialty."

According to 11 NYCRR 68.5(b), "if the superintendent has not adopted or established a fee schedule applicable to the provider, then the permissible charge for such service

shall be the prevailing fee in the geographic location of the provider subject to review by the insurer for consistency with charges permissible for similar procedures under schedules already adopted or established by the superintendent."

In Robert Physical Therapy PC v. State Farm Mutual Automobile Insurance Company, 2006 NY Slip op 26240, 13 Misc. 3d 172 (Civil Ct. Kings Cty. 2006), the court determined that the entire New York State Workers Compensation fee schedule is open to use by various medical professionals as well as physical and massage therapists… The introduction to the medical fee schedule volume explains that "the schedule is divided into sections the structural purposes only. Physicians are to use the sections that contain the procedures they perform or the services they render." (See Official New York Workers Compensation medical fee schedule, Introduction and General Guideline at 1). Clearly the division of medical services into different sections is not to establish a bill for particular service but to organize those services in a logical format so that providers can easily locate the information they need." Therefore, the applicant is permitted to bill for office visits. *Therefore, in accordance with the chiropractic fee schedule for CPT 99203, applicant is awarded $54.74.*

Interest: Applicant is awarded interest in accordance with 11 NYCRR§65 - 3.9 (a)-(f). Accordingly, interest is calculated at a rate of 2% per month, calculated on a pro rata basis using the 30-day month. A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. If 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 Department of Financial Services Regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken. 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 Services PC v. State Farm Mutual Automobile Insurance Company, 12 NY 3d 217 (2009).

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**	**Amount Amended**	**Status**
	Vital Meridian Acupuncture PC	**09/26/16 - 01/17/17**	**$1,985.22**	**$651.07**	**Awarded: $54.74**
Total			**$1,985.22**		**Awarded: $54.74**

B. The insurer shall also compute and pay the applicant interest set forth below. 01/24/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Based on the submission of a timely denial, interest shall be paid from 1/24/19, the date of filing, on the amount awarded of $54.74 at a 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 (e).

C. Attorney's Fees

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

As this matter was filed **after**February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 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 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.

07/24/2020
(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:
ac146849ac9960f8795e59d2a7887b82

Electronically Signed

Your name: Rhonda Barry
Signed on: 07/24/2020