

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Gerard Avenue Medical PC
(Applicant)

- and -

21st Century Advantage Insurance Company
(Respondent)

AAA Case No. 17-19-1122-0987

Applicant's File No. NA

Insurer's Claim File No. 3004993211-1-4

NAIC No. 12963

ARBITRATION AWARD

I, Marcelo Vera, 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 01/20/2021
Declared closed by the arbitrator on 01/20/2021

Dino R. DiRienzo, Esq. from Dino R. DiRienzo Esq. participated by telephone for the Applicant

Kostantinos Tsirkas, Esq. from Law Offices Of Buratti, Rothenberg, & Burns participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 4,301.12**, 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 arbitration arises out of treatment to the EIP, JT, a male born in 1991 involved in a motor vehicle accident on November 30, 2015. Applicant seeks reimbursement in the amount of \$4,301.12 representing services provided on December 02, 2015 through January 15, 2016. Respondent denies the claim based upon the alleged failure to respond to Respondent's Demands for an EUO, violating a condition precedent to coverage.

The issues presented is whether the Respondent has established a defense based on the EIP's breach of a condition precedent to coverage, by failing to appear for EUO's.

4. Findings, Conclusions, and Basis Therefor

My decision is based on the arguments of representatives for each party as well as a review of those documents contained in the electronic file maintained by the American Arbitration Association. I have reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

It is Applicant's *prima facie* obligation to establish its entitlement to payment for each service for which reimbursement is sought. It is well settled that a health care provider establishes its *prima facie* entitlement to payment as a matter of law by proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see *Insurance Law* § 5106 a; *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; *Amaze Med. Supply v. Eagle Ins. Co.*, 2 Misc. 3d 128A, 784 N.Y.S. 2d 918, 2003 NY Slip Op 51701U [App Term, 2d & 11th Jud Dists]). Herein, applicant established its *prima facie* entitlement to first party no-fault benefits by proof that it submitted a claim setting forth the fact and amount of the loss sustained and that payment of no-fault benefits was overdue.

It is Respondent's obligation to object to any deficiencies in Applicant's submissions by either formally objecting to any error or omission or seeking additional verification. A request for verification should only be made where "there are good reasons to do so" and must be made within 15 business days of receipt of the claim. See, 11 NYCRR § 65-3.2(c), 65-3.5(b). Where the requested verification has not been supplied to the insurer 30 calendar days after the original request, follow-up verification requests shall be sent within 10 calendar days. 11 NYCRR § 65-3.6 (b). When an insurance company fails to comply with its duty to act expeditiously in processing No-Fault claims, it will be precluded from raising most defenses See, **Presbyterian Hospital v. Aetna Cas. & Sur. Co.**, 233 AD2d 431, 432 (2d Dept. 1996) *lv to app. den'd*, 90 NY2d 802 (1997), *cf.*, **General Hospital v. Chubb Insurance Companies**, 90 N.Y. 2d 195; 695 N.Y.S.2d 246.

It is well settled that 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).

Thus, it follows that if the EIP fails to comply with an insurer's timely and valid request for an EUO, so long as the request strictly complies with the governing regulations, the insurer is entitled to dismissal of an action seeking no-fault benefits. See *Dover Acupuncture, P.C. v. State Farm Mutual Auto Ins. Co.*, 28 Misc.3d 140(A), 2010 N.Y.

Slip Op. 51605(U) (App. Term 1st Dept. 2010); Great Wall Acupuncture, P.C. v. New York Central Mutual Fire Insurance Company, 22 Misc.3d 136(A), 2009 N.Y. Slip Op. 50294(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

In order for Respondent to make a prima facie showing of its defense based upon a failure to appear at scheduled EUOs, it has to demonstrate that its initial and follow-up requests for verification were timely issued pursuant to 11 NYCRR Section 65-3.5(b) and 65-3.6(b) and establish that the assignor failed to appear at the EUOs. Essential Acupuncture Services, P.C. v. Ameriprise Auto & Home Ins. Co., 2012 N.Y. Slip Op. 52404(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); Urban Radiology, P.C. v. Clarendon National Insurance Company, 31 Misc.3d 132(A), 2011 N.Y. Slip Op. 50601(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2011); Advanced Medical, P.C. v. Utica Mutual Insurance Company, 23 Misc.3d 141(A), 2009 N.Y. Slip Op. 51023(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

Respondents denial states as follows:

"Your claim is denied in its entirety as you have failed to appear for examination under oath on 02/10/2016, 03/10/2016 and 04/18/2016. This is a violation of the policy of insurance and NYS Regulations. Therefore, this claim is denied in its entirety."

In support of its denial and defense, the Respondent has submitted EUO scheduling letters addressed to the EIP. Requesting that the EIP appear for an examination under oath at Diamond Court Reporting located at 880 River Avenue, Bronx NY. The scheduling letters are as follows: the 1st request is dated January 18, 2016 scheduling the EUO for February 10, 2016, Subsequent to a call from claimant's attorney the EUO was re-scheduled for March 10, 2016 via correspondence dated February 09, 2016. Since claimant failed to appear a third request dated March 31, 2016 scheduling the EUO on April 18, 2016. Respondent further submits the affidavit of Keith Walpole Paralegal at Respondent's Attorney's office, attesting to the above chronology and to the mailing of the letters. I find the evidence presented is sufficient to establish the mailing of the letters.

Respondent also includes the EUO transcripts dated March 10, 2016 and April 18, 2016 noting Argyria A.N. Kehagias, Esq. an attorney at Respondent's counsels office appeared on both EUO dates and notes that the EIP failed to appear for the EUO's scheduled on the above dates, indicating the EIP's counsel appeared but EIP failed to appear.

I find that the EIP's failure to appear for two properly scheduled EUOs violated a "condition of coverage". I am not persuaded by Applicant's argument that the request for the EUO was not reasonable. Further, Applicant has not set forth any reason why the EUO notices were not complied with, nor has Applicant set forth any evidence that the notices were not received. Since the Applicant neither offered a valid excuse for the EIP's nonappearance and the EUO scheduling letters were timely issued and the claim was timely denied, I find that the Respondent has met its burden of proving that the EIP failed to attend EUOs and breached a condition precedent to coverage so as to warrant

denial of the claim. See *Morris Med, P.C. v Amex Assur. Co.*, 2012 N.Y. Slip Op. 52260(U) (App. Term 2 , 11 nd and 13 Jud. Dists. 2012).Accordingly.

In light of the foregoing, based on the arguments of counsel and after a thorough review and consideration of all submissions, I find in favor of the Respondent as Respondent established that Applicant was not entitled to reimbursement because of the EIP's failure to comply with a condition precedent to coverage, Applicant's claim is hereby denied.

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 claim is DENIED in its entirety

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

02/03/2021
(Dated)

Marcelo Vera

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:
2370fce081591f5fb0d6d73a907dcfcc

Electronically Signed

Your name: Marcelo Vera
Signed on: 02/03/2021