

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Starrett City Medical PC
(Applicant)

- and -

Country-Wide Insurance Company
(Respondent)

AAA Case No. 17-19-1119-6946

Applicant's File No. DK19-67355

Insurer's Claim File No. 310677

NAIC No. 10839

ARBITRATION AWARD

I, Gary Peters, 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 11/13/2020, 02/05/2021
Declared closed by the arbitrator on 02/05/2021

Arthur Finkel from Korsunskiy Legal Group P.C. participated in person for the Applicant

Ellen Maisto from Jaffe & Velazquez, LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,628.47**, 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 was a 46 year old restrained passenger of a motor vehicle involved in an accident on 10/28/15. Applicant is seeking reimbursement for medical services provided from 11/12/15 through 1/27/15, wherein the claim was denied by the Respondent for failure of the Assignor to appear and attend the Examination Under Oath.

4. Findings, Conclusions, and Basis Therefor

This hearing was conducted using the Electronic Case Folder maintained by the American Arbitration Association. All documents contained in that folder are made part of the record of the hearing and I have reviewed the documents contained therein. Any documents submitted after the hearing or at the hearing that have not been entered in the Electronic Case Folder as of the date of this award, will be listed immediately below this language and forwarded to the American Arbitration Association at the time this award is issued for inclusion.

As stated above, the Respondent disclaimed coverage on the grounds that the Assignor breached the condition precedent to coverage by failing to appear for an Examination Under Oath on 5/11/16 and 5/27/16.

The insurance regulations make provision for the scheduling of an examination under oath (EUO) as additional verification if such a request is reasonably required. 11 NYCRR § 65-1.1 (b).

The request for an examination constitutes a request for verification, whether the requests are made before a claim is submitted, or, as here, after the submission of a claim. NY Ins Gen Counsel Op No. 05-02-21 (2005), 2005 NY Insurance GC Opinions LEXIS 31. See Mapfre Ins. Co. of N.Y. v. Manoo, 2016 NY Slip Op 04446 (1st Dept. June 9, 2016); National Med. & Surgical Supply, Inc. v. ELRAC, Inc., 2017 NY Slip Op 50028(U)(App Term 2d, 11th & 13th Jud Dists. Jan. 5, 2017).

Appearance at a duly requested examination is also a condition precedent to an insurer's liability on a policy. 11 NYCRR § 65-1.1. See Hertz Corp. v. Active Care Med. Supply Corp., 2015 NY Slip Op 00212 (App Div 1st Dept., Jan. 6, 2015); Allstate Ins. Co. v. Pierre, 2014 NY Slip Op. 08921 (1st Dept. Dec. 23, 2014); Flow Chiropractic, P.C. v. Travelers Home & Mar. Ins. Co., 2014 NY Slip Op 51142(U) (App Term 9th & 10th Jud Dists., July 7, 2014); Essential Acupuncture Servs., P.C. v. Ameriprise Auto & Home Ins., 2012 NY Slip Op 52404(U) (App Term 2d, 11th & 13th Jud Dists., Dec. 21, 2012); Parsons Med. Supply, In. v. Utica Mut. Ins. Co., 2012 NY Slip Op 52397(U) (App Term 2d, 11th & 13th Jud Dists., Dec. 21, 2012); Morris Med., P.C. v. Amex Assurance Co., 2012 NY Slip Op 52260(U) (App Term 2d, 11th & 13th Jud Dists., Dec. 7, 2012); Arco Med. N.Y., P.C. v. Lancer Ins. Co., 2012 NY Slip Op 22278 (App Term 2d, 11th & 13th Jud Dists., Sept. 19, 2012); All Boro Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 2012 NY Slip 51346(U) (2d, 11th & 13th Jud Dists., July 13, 2012); Mega Supplies Billing, Inc. v. State Farm Fire & Cas. Co., 2012 NY Slip Op 51014(U) (App Term 2d, 11th & 13th Jud Dists., May 14, 2012); Viviane Etienne Med. Care, P.C. v. State Farm Mut. Auto. Ins. Co., 2012 NY Slip Op 50579(U) (App Term 2d, 11th & 13th Jud Dists., April 2, 2012); Arco Med. N.Y., P.C. v. Lancer Ins. Co., 2011 NY Slip Op 52382(U) (App Term 2d, 11th & 13th Jud Dists., Dec. 23, 2011); Dover Acupuncture, P.C. v. State Farm Mut. Auto. Ins. Co., 28 Misc.3d 140(A), 2010 N.Y. Slip Op. 51605(U) (App Term 1st Dept. Sept. 17,

2010); Great Wall Acupuncture, P.C. v. New York Cent. Mut. Fire Ins. Co., 2009 NY Slip Op 50294(U), 22 Misc. 3d 136(A) (App. Term 2d Dept., Feb. 20, 2009).

A denial premised on breach of a condition precedent to coverage voids the No-Fault policy *ab initio*. Even when a claim is initially (and timely) denied on other grounds, where an applicant fails to appear for requested examinations, the insurer has "the right to deny all claims retroactively to the date of loss". Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559 (1st Dept. 2011), lv denied 17

N.Y.3d 705 (2011).

While there is "no requirement to demonstrate that the claims were timely disclaimed since the failure to attend ... exams (is) an absolute coverage defense", American Tr. Ins. v. Lucas, 111 A.D.3d 423 (1st Dept. 2013), Respondent, in order to make a *prima*

facie showing of its defense based on a provider's assignor's failure to appear at

scheduled examinations, must establish that it requested the EUO in accordance with the procedures and time frames set forth in the No-Fault regulations, and that the injured person did not appear on two separate dates. See 11 NYCRR § 65-3.5 (b); 65-3.6 (b); National Liab. & Fire Ins. Co. v. Tam Medical Supply Corp., 131 A.D.3d 851 (1st Dept. 2015); MDJ Med. P.C. v. Delos Ins. Co., 2016 NY Slip Op 50604(U) (App Term 1st Dept. April 18, 2016).

Pursuant to the No-Fault Regulations, "any additional verification required by the

insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms." 11 NYCRR § 65-3.5 (b) (emphasis added).

This rule applies to requests for examinations. See, e.g., Great Health Care Chiropractic, P.C. v. Travelers Ins. Co., 49 Misc.3d 145(A), 2015 NY Slip Op 51665(U) (App Term 2d, 11th & 13th Jud Dists. Nov. 12, 2015); O & M Medical, P.C. v. Travelers Indemnity Ins. Co., 47 Misc.3d 134(A), 2015 NY Slip Op 50476(U) (App Term 2d, 11th & 13th Jud Dists. 2015); Longevity Medical Supply, Inc. v. IDS Property & Cas. Ins. Co., 44 Misc.3d 137(A), 2014 NY Slip Op 51244(U) (App Term 2d, 11th & 13th Jud Dists. 2014).

Although an EUO need not be scheduled to take place within 30 days of the receipt of the claim forms, see Optimal Well-Being Chiropractic, P.C. v. Ameriprise Auto & Home, 40 Misc.3d 129(A), 2013 NY Slip Op 51106(U) (App Term 2d, 11th & 13th Jud Dists. 2013); Dover Acupuncture, P.C. v. State Farm Mut. Auto. Ins. Co., 28 Misc.3d 140(A), 2010 NY Slip Op 51605(U) (App Term 1st Dept., Sept. 17, 2010); St. Vincent Med. Care, P.C. v. Travelers Ins. Co., 26 Misc.3d 144(A), 2010 NY Slip Op 50446(U) (App Term 2d Dept., March 10, 2010); Great Wall Acupuncture, P.C. v.

New York Cent. Mut. Fire Ins. Co., 22 Misc.3d 136(A), 2009 NY Slip Op 50294(U) (App Term 2d

Dept., Feb. 20, 2009); Eagle Surgical Supply, Inc. v. Progressive Cas. Ins. Co., 21

Misc.3d 49, 2008 NY Slip Op 28342 (App Term 2d Dept., Sept. 10, 2008), the insurance carrier must still request the EUOs within the applicable time frames set forth in the No-Fault regulations, see National Liab. & Fire Ins. Co. v. Tam Medical Supply Corp., 131 A.D.3d 851 (1st Dept. 2015); MDJ Med. P.C. v. Delos Ins. Co., 2016 NY

Slip Op 50604(U) (App Term 1st Dept. April 18, 2016).

An initial EUO request made well beyond the requisite 15-day time period for additional verification, outside the 30-day claims determination period, is a "nullity". See O & M Medical, P.C. v. Travelers Indemnity Ins. Co., 47 Misc.3d 134(A), 2015 NY Slip Op 50476(U) (App Term 2d, 11th & 13th Jud Dists. March 26, 2015); Neptune Med. Care, P.C. v. Ameriprise Auto & Home Ins., 48 Misc.3d 139(A), 2015 NY Slip Op (App Term 2d, 11th & 13th Jud Dists. 2015). See also Okslen Acupuncture, P.C. v. Lancer Ins. Co., 2013 NY Slip Op. 50821(U) (App Term 1st Dept., May 21, 2013); Quality Psychological Servs., P.C. v. Utica Mut. Ins. Co., 2013 NY Slip Op 50148(U) (App Term 1st Dept., Feb. 1, 2013), Optimal Well-Being Chiropractic, P.C. v. Ameriprise Auto & Home, 40 Misc.3d 129(A), 2013 NY Slip Op 51106(U) (App Term 2d, 11th & 13th Jud Dists. 2013) (EUO letter sent more than 70 days after receipt of bills was untimely); Tsatskis v. State Farm Fire & Cas. Co., 2012 NY Slip Op 51268 (App Term 2d Dept., June 27, 2012) (EUO request sent more than 30 days after receipt of claim did not toll statutory period); St. Vincent Med. Care, P.C. v. Travelers Ins. Co., 26 Misc.3d 144(A), 2010 NY Slip Op 50446(U) (App Term 2d Dept.) (EUO letters mailed 52 days after receipt of bills were untimely). See also William Jones, M.D. and Ameriprise Auto Home Ins. Co., AAA Case No. 412013081313, AAA Assessment No. 17 991 60360 13 (arb. Andrew M. Horn, April 14, 2014), aff'd 17 991 R 38783 14 (master arb. NormanH. Dachs, Aug. 26, 2014).

Respondent's evidence reflects that its first letter scheduling the EUO was mailed on April 26, 2016, more than three months after the insurer had received the claim, thus rendering the letter a nullity. O & M Medical, P.C. v. Travelers Indemnity Ins. Co., 47 Misc.3d 134(A), 2015 NY Slip Op 50476(U) (App Term 2d, 11th & 13th Jud Dists.

March 26, 2015); Neptune Med. Care, P.C. v. Ameriprise Auto & Home Ins., 48

Misc.3d 139(A), 2015 NY Slip Op (App Term 2d, 11th & 13th Jud Dists. 2015).

139(A), 2015 NY Slip Op (App Term 2d, 11th & 13th Jud Dists. 2015).

Even assuming that the EUO had been requested in accordance with the verification protocol, proof by someone with personal knowledge attesting to assignor's

nonappearance on the scheduled dates is also necessary in order to justify dismissal of the health provider's claim. See, e.g., Vladenn Medical Supply, Corp. v. American Commerce Ins. Co., 51 Misc.3d 147(A), 2016 NY Slip Op 50775(U) (App Term 1st Dept. May 17, 2016); Alleviation Medical Services, P.C. v. Hertz Co., 51 Misc.3d 128(A), 2016 NY Slip Op 50371(U) (App Term 2d, 11th & 13th Jud Dists. March 16, 2016); GL Acupuncture, P.C. v. Ameriprise Auto & Home, 51 Misc.3d 128(A), 2016 NY Slip Op 50377(U) (App Term 2d, 11th & 13th Jud Dists. March 16, 2016).

While the attorney who was assigned by the insurer to conduct the examination, see Hertz Corp. v. Active Care Med. Supply Corp., 124 A.D.3d 411 (1st Dept. 2015); First Class Med., P.C. v. State Farm Mut. Auto. Ins. Co., 2017 NY Slip Op 50593(U) (App Term 9th & 10th Jud Dists. April 27, 2017); A.O.T. Chiropractic, P.C. v. State Farm Mut. Auto. Ins. Co., 2017 NY Slip Op 50288(U) (App Term 9th & 10th Jud Dists. Feb. 27, 2017); MDJ Med. P.C. v. Delos Ins. Co., 2016 NY Slip Op 50604(U) (App Term 1st Dept. April 18, 2016), or the receptionists who were present on the dates when the examinations were scheduled, see National Med. & Surgical Supply, Inc. v. ELRAC, Inc., 2017 NY Slip Op 50028(U) (App Term 2d, 11th & 13th Jud Dists. Jan. 5, 2017), are in a position to state, based upon personal knowledge, that assignor did not appear in the law office office on the dates and times indicated, an affirmation of an attorney may be insufficient when he lacks personal knowledge of the nonappearance at the EUOs, fails to describe or demonstrate personal knowledge of the office procedures when a claimant fails to appear, and does not allege that he was assigned to the file and would have conducted the EUO had assignor appeared, see EMA Acupuncture, P.C. v. Travelers Ins. Co., 50 Misc.3d 140 (A), 2016 NY Slip Op 50173(U) (App Term 1st Dept. Feb. 18, 2016).

Finally, Arbitrator Horn presided over A.A.A. Case No. 17-16-1043-8746 and determined according to the EUO transcript dated May 27, 2016, Kimberly Juszczak, the attorney who was to conduct the examination on said date, had been present at 1:30 p.m., when the examination was scheduled to take place, and that assignor was not present at that time to be examined. However, while the transcript dated May 11, 2016 establishes that Keesha Banks, the attorney who was examine assignor on said date at 11 a.m., was present at 3:42 p.m. at which time assignor was not present, it does not suffice to establish assignor's nonappearance at the relevant time. See Meridian Psychological Servs., P.C. v. Allstate Ins. Co., 2016 NY Slip Op 50375(U) (App Term 2d, 11th & 13th Jud Dists. March 16, 2016).

I agree with Arbitrator Horn in that Respondent failed to demonstrate that it was entitled to deny the claim based upon Applicant's assignor's failure to comply with a condition precedent to coverage. See Great Health Care Chiropractic, P.C. v. Travelers Ins. Co., 49 Misc.3d 145(A), 2015 NY Slip Op 51665(U) (App Term 2d, 11th & 13th Jud Dists. Nov. 12, 2015); O & M Medical, P.C. v. Travelers Indemnity Ins. Co., 47 Misc.3d 134(A), 2015 NY Slip Op 50476(U) (App Term 2d, 11th &

13th Jud Dists. March 26, 2015); Neptune Med. Care, P.C. v. Ameriprise Auto & Home Ins., 48 Misc.3d 139(A), 2015 NY Slip Op (App Term 2d, 11th & 13th Jud Dists. 2015).

Accordingly, Respondent's denial is invalid and Applicant's claim is granted in its entirety in the sum of \$1,628.47.

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
	Starrett City Medical PC	11/12/15 - 11/12/15	\$319.97	Awarded: \$319.97
	Starrett City Medical PC	12/17/15 - 12/17/15	\$64.64	Awarded: \$64.64
	Starrett City Medical PC	12/21/15 - 12/29/15	\$193.92	Awarded: \$193.92
	Starrett City Medical PC	01/05/16 - 01/15/16	\$387.84	Awarded: \$387.84

	Starrett City Medical PC	01/07/16 - 01/07/16	\$274.26	Awarded: \$274.26
	Starrett City Medical PC	01/18/16 - 01/27/16	\$387.84	Awarded: \$387.84
Total			\$1,628.47	Awarded: \$1,628.47

- B. The insurer shall also compute and pay the applicant interest set forth below. 02/15/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest to be 2% per month simple, not compounded on a pro rata basis using a 30 day month. Respondent shall compute and pay Applicant interest from the day of filing of arbitration to the date of payment of the award.

C. Attorney's Fees

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

The insurer shall pay th Applicant an attorney fee in accordance with 11 NYCRR 65-4.6(d) or "As this matter was filed on or after February 4, 2015, this case is subject to the provisions promulgated bt the Departmenet of Financial Services in the Sixth Amendment to 11NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the the Applicant an attorney fee in accordance with the newly promulgated 11 NYCRR 65-4.6(d). This amendment takes into acccount that the the maximim attorney fee has been raised from \$850.00 to \$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, Gary Peters, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

03/06/2021
(Dated)

Gary Peters

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:
18f411199a8bf298c517f1b9fbf2017f

Electronically Signed

Your name: Gary Peters
Signed on: 03/06/2021