

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Best Hands on Physical Therapy, PC
(Applicant)

- and -

Nationwide Affinity Insurance Company Of
America
(Respondent)

AAA Case No. 17-20-1153-4817

Applicant's File No. 58170

Insurer's Claim File No. 702783

NAIC No. 26093

ARBITRATION AWARD

I, Rebecca Novak, 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 ["ML"]

1. Hearing(s) held on 04/06/2021
Declared closed by the arbitrator on 04/06/2021

Victoria Tarasova, Esq. from Law Offices of Zara Javakov, Esq. P.C. participated for the Applicant

Brian Kaufman, Esq. from Hollander Legal Group PC participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 579.46**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended the amount in dispute to \$342.88 to conform to fee schedule.

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

The parties stipulated that Applicant's fees as amended were correct.

3. Summary of Issues in Dispute

Whether Applicant established entitlement to No-Fault insurance compensation for range of motion and manual muscle testing (ROM-MMT), performed to treat Assignor, a 72-year-old male, on April 17, 2019, subsequent to being injured in a motor vehicle accident on March 3, 2019.

Whether to deny compensation on the basis of Applicant's failure to attend scheduled EUOs.

Whether an insurer's denial asserting a health service provider EUO no-show must be issued within 30 days after the second no-show.

4. Findings, Conclusions, and Basis Therefor

In this No-Fault insurance arbitration, Applicant is seeking as compensation \$342.88 for performing range of motion and manual muscle testing (ROM-MMT) on April 17, 2019, to treat Assignor, a 72-year-old male, who was injured in a motor vehicle accident on March 3, 2019. This amount sought by Applicant reflects a reduction from the original amount sought when the arbitration was commenced. Respondent denied payment of the bills at issue based on a failure of Applicant to appear for scheduled examinations under oath (EUOs).

Both parties appeared at the hearing via Zoom by counsel, who presented oral argument and relied upon documentary submissions. I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center as of the date of the hearing, said submissions constituting the record in this case. This includes both Applicant's and Respondent's late submissions.

Just as an arbitrator acts within her discretion in refusing to entertain late submissions, Matter of Global Liberty Ins. Co. v. Coastal Anesthesia Services, LLC, 145 A.D.3d 644, 42 N.Y.S.3d 803 (1st Dept. 2016); Matter of Mercury Casualty Co. v. Healthmakers Medical Group, P.C., 67 A.D.3d 1017, 888 N.Y.S.2d 762 (2d Dept. 2009), so too may an arbitrator include them in the record.

I find that Applicant did establish a prima facie case. "[A] plaintiff demonstrates prima facie entitlement to summary judgment by submitting evidence that payment of no-fault benefits are overdue, and proof of its claim, using the statutory billing form, was mailed to and received by the defendant insurer." Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 501, 14 N.Y.S.3d 283, 286 (2015). I find that based on Respondent's denials, Applicant did mail the bills and they were received by Respondent who did deny the claim. Therefore, I find that a prima facie case has been established.

It is well settled that the failure to comply with the standard policy provision requiring submission to an examination under oath, as often as may be reasonably required, as a condition precedent to performance of the promise to indemnify, constitutes a material

breach of the policy, precluding recovery of the policy proceeds. IDS Property Casualty Ins. Co. v. Stracar Medical Services, 116 A.D.3d 1005, 985 N.Y.S.2d 116 (2d Dept. 2014). Where a health service provider fails to respond in any way to EUO scheduling letters sent by the insurer, the latter is entitled to judgment. Concourse Chiropractic, PLLC v. State Farm Mutual Ins. Co., 42 Misc.3d 131(A), 983 N.Y.S.2d 202 (Table), 2013 N.Y. Slip Op. 52225(U), 2013 WL 6840321 (App. Term 9th & 10th Dists. Dec. 20, 2013).

The decision in Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, 82 A.D.3d 559, 918 N.Y.S.2d 473 (1st Dept. 2011), holding that the failure to submit to requested independent medical examinations (IMEs) constitutes a breach of a condition precedent to coverage under a No-Fault policy and voids coverage regardless of the timeliness of the denial of coverage, applies likewise to scheduled examinations under oath (EUOs) of the assignor. Allstate Ins. Co. v. Pierre, 123 A.D.3d 618, 999 N.Y.S.2d 402 (1st Dept. 2014). So too does it apply to EUOs of the health service provider-assignee.

In order for Respondent to make a prima facie showing of its defense based upon an Assignor's failure to appear at scheduled EUOs, it has to demonstrate that its initial and follow-up requests were issued and that the assignor failed to appear at the EUOs. See 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).

The record establishes that Respondent sent multiple requests to Applicant to attend EUOs on more than two dates. More specifically, Respondent scheduled Applicant for EUOs on June 28, 2019; July 26, 2019; August 23, 2019; and September 20, 2019. Applicant did not contest that the EUO scheduling letters were mailed and that it failed to appear. Neither did Applicant at the hearing offer any objection to the basis for seeking EUOs. Rather, Applicant focuses on the fact that Respondent's denial of claim was not issued within 30 days after the *second* no-show. In other words, Applicant contends that the denial was late and that Respondent acted improperly to continue to schedule EUOs past the second no-show for each respective health provider. This is an issue of law.

The requirement that an insurer issue a denial within 30 days stems from Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1). These provisions are to the effect that a No-Fault claim is overdue if not paid within 30 days after receipt of proof of claim. Presbyterian Hospital v. Maryland Casualty Company, 90 N.Y.2d 274, 660 N.Y.S.2d 536 (1997), construed this provision so that an insurer is precluded from asserting the defenses in a denial not issued within the 30-day period. Central General Hospital v. Chubb Group, 90 N.Y.2d 195, 659 N.Y.S.2d 246 (1997), carved out an except for where there is a lack of coverage.

In the context of failures to appear at scheduled examinations, Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, cited above, held that it is immaterial whether the denial asserting the failure to appear was issued timely. This decision of the Appellate

Division, First Department, is contrary to that of the Appellate Division, Second Department, in Westchester Medical Center v. Lincoln General Ins. Co., 60 A.D.3d 1045, 1046-1047, 877 N.Y.S.2d 340, 342 (2d Dept. 2009). An arbitrator may follow either decision. Matter of Pomona Pain Management, P.C. v. Praetorian Ins. Co., 2012 N.Y. Slip Op. 30525(U), 2012 N.Y. Slip Op. 30525(U) (Sup. Ct. Nassau Co., F. Dana Winslow, J., Jan. 31, 2012).

An arbitrator's award which irrationally ignores controlling law that the No-Fault policy issued by the insurer is void ab initio due to the assignor's failure to attend duly scheduled IMEs is arbitrary. Matter of Global Liberty Ins. Co. of New York v. Top Q. Inc., 175 A.D.3d 1131 (1st Dept. 2019). The essence of this decision is that an arbitrator must follow Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy. I have consistently followed the holding of the Appellate Division, First Department, in Unitrin Advantage Ins. Co. I find its reasoning persuasive.

Applicant cited several cases for its argument that a denial asserting an EUO no-show must be issued within 30 days after the second no-show -- that no more EUOs may be scheduled by the insurer. Several of them reference untimely denials but they do not mention that more than two examinations were scheduled, as is the situation in this arbitration case. One case, Chapa Products Corp. v. MVAIC, 66 Misc.3d 16 (App. Term 2d, 11th & 13th Dists. 2019) (2-1 decision), does not even deal with examinations. It held that denials asserting the failure to provide additional verification must be issued within 30 days after the 120-day period for responding to the insurer's initial verification request; clearly this case is irrelevant to EUO no-shows.

One case cited to by Applicant which covers the facts -- more than two examinations and the denial was issued after the last no-show -- provides a conclusion of law: Quality Health Supply Corp. v. Nationwide Insurance, 69 Misc.3d 133(A), 2020 N.Y. Slip Op. 51226(U) (App. Ter, 2d, 11th & 13th Dists. Oct. 16, 2020). It held that "the 30-day period for an insurer to pay or deny a claim (*see* 11 NYCRR 65-3.8 [a] [1]) based upon a failure to appear for an EUO begins to run on the date of the second EUO nonappearance...." In this decision, the court wrote, "As defendant did not deny the claims until November 14, 2016, which was more than 30 days after the second failure to appear, for the EUO scheduled for October 4, 2016, defendant is not entitled to summary judgment dismissing the complaint...." Therefore, the defendant-insurer was precluded from raising the no-show as a defense.

The decision in Quality Health Supply Corp. v. Nationwide Insurance is obviously at variance with that in Unitrin Advantage Ins. Co., which treats a no-show as "a breach of a condition precedent to coverage under the no-fault policy, and therefore fits squarely within the exception to the preclusion doctrine...." Since I follow the holding of Unitrin Advantage Ins. Co., I do not find Quality Health Supply Corp.'s holding as controlling.

Moreover, penalizing a No-Fault insurer from assiduously attempting to obtain an EUO of a health service provider by offering more than two opportunities to show up is contrary to public policy. There is nothing in the No-Fault Regulations which limits an insurer to two attempts to seek an EUO (or IME). In fact, in holding that an insurer need not wait a full 30 days before sending out a follow-up request for additional verification,

the court in Infinity Health Products, Ltd. v. Eveready Ins. Co., 67 A.D.3d 862, 865, 890 N.Y.S.2d 545, 547-548 (2d Dept. 2009), wrote, "Indeed, in light of the particular factual circumstances herein, it would be incongruous to conclude that the Insurance regulation regarding follow-up verification, or any other statute or rule, warrants a result which would, in effect, penalize an insurer who diligently attempts to obtain the information necessary to make a determination of a claim, and concomitantly, rewards a plaintiff who makes no attempt to even comply with the insurer's requests. Such a result is not contemplated by the 'no-fault law' or its regulations...."

Finally, there is a trial court decision which approved scheduling more than two EUOs: Country-Wide Ins. Co. v. St. Michelle, 2019 N.Y. Slip Op. 31923(U) (Sup. Ct. New York Co., Anthony Cannataro, J., July 8, 2019).

Allan Hollander, the attorney who wrote affirmations attesting to the scheduling of the EUOs and Applicant's failures to appear, mentioned that there were objections made to the EUOs by Applicant's initial counsel, as well as responses to those objections by Respondent's counsel - such objections and responses included in Respondent's exhibits to its submission. At the hearing Respondent explained that these exhibits were included "Because of the objections and the back and forth with the responses to the EUO notices, [Respondent] in good faith decided to notice the EUO for a third time" and then a fourth time... "and in an effort to afford applicant every opportunity to appear at a noticed EUO..."

I note that at the hearing Applicant did not assert any objections to the basis or scheduling of the EUOs; just that the denial was issued more than 30 days after the *second* no-show.

Based on the analysis of the case law above, I reject Applicant's argument that Respondent was precluded from raising the EUO no-show. I conclude that a No-Fault insurer may schedule more than two examinations and may delay issuing a denial until after the last no-show.

I sustain Respondent's EUO no-show defense asserted in its denial of claim. This prevails over Applicants' prima facie case of entitlement to No-Fault compensation.

Accordingly, the within arbitration claim is denied in its entirety.

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

04/18/2021
(Dated)

Rebecca Novak

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:

c03c5ca2a139f9c711f5f2d868032d0d

Electronically Signed

Your name: Rebecca Novak
Signed on: 04/18/2021