

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Triborough Orthopedics P.C.
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-20-1163-0448

Applicant's File No. TRO041020014

Insurer's Claim File No. 1059333-02

NAIC No. 16616

ARBITRATION AWARD

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 06/09/2021
Declared closed by the arbitrator on 06/09/2021

Chris Economou, Esq. from Economou & Economou PC participated by telephone for the Applicant

Jacob Lamar, Esq. from Daniel J. Tucker, P.C. participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 4,064.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant reduced the total amount in dispute to \$3,864.00 pursuant to fee schedule (eliminating the delivery/set-up fee).

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The claimant was a 24 year-old male restrained front seat passenger of a motor vehicle that was involved in an accident on 4/29/19. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. At issue is the

7/17/19-8/28/19 rental of a CPM and CTU provided by Applicant that Respondent denied reimbursement for based on a 3/4/20 peer review by Matthew D. Skolnick, M.D. and based on the claimant's failure to appear for scheduled Examinations Under Oath (EUOs).

4. Findings, Conclusions, and Basis Therefor

Based on a review of the documentary evidence, this claim is decided as follows:

An applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

The claimant was a 24 year-old male restrained front seat passenger of a motor vehicle that was involved in an accident on 4/29/19. The claimant reportedly injured his neck, right shoulder, low back, and left knee. There was no reported loss of consciousness. There were no reported lacerations or fractures. There was no reported emergency treatment sought or received. During the 5/29/19 examination by Jordan Fersel, M.D. the claimant's complaints included right shoulder pain rated 8-10. Right shoulder examination revealed tenderness over the acromioclavicular joint. Examination was negative for swelling, ecchymosis, crepitus, deformity, atrophy, labral testing, impingement, O'Brian's test, and Popeye sign. Right shoulder diagnosis was "shoulder pain." The 6/10/19 right shoulder MRI ordered by Robert Rook, D.C. and interpreted by Mark Lodesporto, M.D. of Bronx Medical Diagnostic, P.C. produced an impression of evidence supporting rotator cuff tendinitis and partial tear, associated bursitis, and no gross bony derangement suspected. On 6/20/19 the claimant presented to Andrew J. Dowd, M.D. (Applicant) with complaints of right shoulder pain. "Examination of the right shoulder revealed full range of motion; however, pain was noted above 90 degrees of elevation and abduction. Impingement signs were positive. Palm up elevation was painful. Resisted thumb-down abduction. Internal rotation was limited to the lower sacral elements. Focal tenderness was noted over the anterior rotator cuff. Some weakness of external rotation and abduction were noted. Apprehension sign is positive." The claimant was scheduled for diagnostic arthroscopy of the right shoulder. On 7/17/19 Dr. Dowd performed right shoulder surgery consisting of arthroscopic debridement of partial rotator cuff tear, arthroscopic debridement of labral tear, arthroscopic synovectomy, arthroscopic lysis of subacromial adhesions and arthroscopic subacromial decompression. The operative report documents "a frayed labrum superiorly, anteriorly and inferiorly. Synovitis was seen anteriorly in the rotator interval and under the supraspinatus tendon. A partial tear of the supraspinatus tendon insertion point was

seen." Dr. Dowd prescribed the use of a continuous passive motion (CPM) unit and a cold therapy unit (CTU) provided by Triborough Orthopedics, P.C. (Applicant). At issue is the 7/17/19-8/28/19 rental of the CPM and CTU.

If an insurer requires any additional information to evaluate the proof of claim, such request for verification must be made within 15 business days of the receipt of the bill in order to toll the 30-day period to pay or deny the claim. See generally, 11 NYCRR 65-3.5(b); See also, *New York Hosp. Med. Ctr. of Queens v. Allstate Ins. Co.*, 2014 NY Slip Op. 00640 (2 Dept. 2014). Where there is a timely original request for verification, but no response to the request for verification is received within 30 calendar days thereafter, or the response to the original request for verification is incomplete, then the insurer, within 10 calendar days after the expiration of that 30-day period, must follow up with a second request for verification. *Id.* If there is no response to the second, or follow-up, request for verification, the time in which the insurer must decide whether to pay or deny the claim is indefinitely tolled. *Id.*

Applicant argued that the bill at issue was untimely denied. Respondent submitted a letter dated 7/31/19 for the claimant to appear at an Examination Under Oath (EUO) on 8/14/19. After the claimant did not appear for the EUO on 8/14/19, Respondent sent a letter dated 8/22/19 to reschedule the EUO for 9/27/19. The bill was received on 8/30/19. On 9/6/19 and 10/11/19 Respondent timely requested verification from Applicant (seeking "*1 Claim is delayed pending results of examination under oath of claimant, scheduled to verify claim 2 THIS BILL AND ALL SURGERY RELATED BILLS ARE PENDING THE FOLLOWING: 1. Please provide copies of the MRI film(s) of the RIGHT SHOULDER (requested from Bronx Medical Diagnostic) 2. Provide the intra-operative color photos of the surgical procedure performed (RIGHT SHOULDER SURGERY) 3. Please submit all medical reports, progress notes, office notes, treatment records/notes, diagnostic test reports and medical records referrals for which surgery/procedure was found to be necessary and letter of medical necessity to show causal relationship to the accident of record. 3 Submit manufacturer's invoice and cancelled checks.*"). The 9/27/19 EUO was rescheduled by the claimant's counsel and Respondent submitted a letter dated 10/14/19 for the claimant to appear at an EUO on 10/21/19. Again on 10/21/19 the claimant failed to appear for the EUO. It is noted that the EUO scheduling letters contained the required notice regarding reimbursement of travel expenses and loss of earnings. The EUO scheduling letters were mailed to the claimant and his attorney (Cannon & Acosta LLP). On 2/24/20 Respondent received the remaining outstanding verification from Applicant which included a letter of medical necessity, 6/20/19 examination report, 6/10/19 right shoulder MRI report, 7/17/19 operative report, 8/9/19 follow-up examination report and intra-operative color photos of the 7/17/19 right shoulder surgery. On 3/10/20 Respondent timely denied the bill at issue based on the 3/4/20 peer review by Matthew D. Skolnick, M.D. and based on "THE CLAIMANT'S FAILURE TO APPEAR FOR SCHEDULED EXAMINATION UNDER OATH APPOINTMENTS ON 09/27/2019 AND 10/21/2019."

As a complete proof of claim is a prerequisite to receiving no fault benefits, a claim need not be paid or denied until all demanded verification is provided (see, 11 NYCRR 65-3.5[c]; *Montefiore Med. Ctr. NY Central Mutual Fire Ins. Co.*, 9 A.D.3d 354, 780 N.Y.S.2d 161 (2nd Dep't 2004); *NY & Presbyterian Hosp. v. American Transit Ins. Co.*,

287 A.D.2d 699, 733 N.Y.S.2d 80 (2nd Dep't 2001); *Hosp. for Joint Diseases v. Elrac, Inc.*, 11 A.D.3d 432, 783 N.Y.S.2d 612 (2 Dep't 2004). The obligation to pay or deny a claim is not triggered until the insurer has received all of the relevant information that was requested (see *Hospital for Joint Diseases v. State Farm Mut. Auto. Ins. Co.*, 8 AD3d 533, 2004 NY Slip Op. 05413 (App. Div., 2 Dept., 2004)). If an insurer receives one type of verification, it may request additional verification in another form if it does so within 15 business days thereafter. See *Quality Health Products, Inc. v. Auto One Ins. Co.*, 20 Misc.3d 136(A), 867 N.Y.S.2d 377 (Table), 2008 N.Y. Slip Op. 51530(U), 2008 WL 2814820 (App. Term 2d & 11th Dists. July 10, 2008). The EUO scheduling letters were not issued more than 15 business days after receipt of the bill or more than 30 calendar days after its receipt so *Neptune Medical Care, P.C. v. Ameriprise Auto & Home Ins.*, 48 Misc.3d 139(A), 2015 N.Y. Slip Op. 51220(U), 2015 WL 4939009 (App. Term 2d, 11th & 13th Dists. Aug. 5, 2015) cited by Applicant does not apply here. Arguably Applicant was no longer required to respond to the verification requests after receipt of the 10/28/19 general denial based on EUO no show in light of *State Farm v. Domotor*, 266 AD2d 219, 697 NYS2d 348 (2 Dept. 1999) but Applicant did respond.

An insurer makes its prima facie showing by demonstrating that two (2) separate requests for EUO (and/or IME) were duly mailed to the assignor or provider and that the assignor or provider failed to appear for the EUO (or IME) on either of the dates scheduled pursuant to the Regulations, *Apollo Chiropractic Care, P.C. v. Praetorian Ins.Co.*, 27 Misc 3d 139 (A) 2010 NY Slip Op. 50911(U) (App Term 1st Dept). In *Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 35 AD3d 720, the Appellate Division held that there is a two part test that insurers must pass in order to establish, prima facie, that an assignor or a provider as an insured's assignee, failed to appear. The insurer must show that it mailed the schedule notices and that the requested party failed to appear.

Respondent can establish mailing by submission of proof of mailing or an affidavit credibly stating that the EUO notices were mailed to the assignor or provider; or submission of an affidavit describing in detail a mailing procedure that ensures that EUO notices are mailed (see *New York & Presbyt Hosp. v. Allstate Ins. Co.*, 29 AD3d 547. Additionally, non-appearance is established through an affidavit of a person with knowledge of the non-appearance. In *W & Z Acupuncture, P.C. v. Amex Assur Co.*, 24 Misc3d 142(A), the court reversed the trial court and granted summary judgment dismissing an action based on a claimant's failure to attend scheduled EUOs, holding that an affidavit from the attorney retained to conduct the EUO was sufficient to establish the non-appearance.

Respondent submitted Certificates of Mailing (PS Form 3877) date stamped by the USPS to establish mailing of the EUO scheduling letters. Respondent also submitted a 9/27/19 statement on the record by Investigator Kelley Minogue and a 10/21/19 statement on the record by Investigator Timothy F. McNellis to confirm the claimant's failure to appear on those dates. I am persuaded that Respondent has established that a condition precedent to coverage was not satisfied. I am persuaded that Respondent has submitted sufficient evidence to support a defense premised on the claimant's failure to

appear for an EUO. Respondent's defense based on the 3/4/20 peer review by Matthew D. Skolnick, M.D. need not be addressed. Accordingly, the 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, Charles Blattberg, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

07/09/2021
(Dated)

Charles Blattberg

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:
10146b4408d257d1953eb5e534930345

Electronically Signed

Your name: Charles Blattberg
Signed on: 07/09/2021