American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Joke I. Bamgbopa, NP (Applicant)	AAA Case No.	17-20-1160-4839
	Applicant's File No.	61954
- and -	Insurer's Claim File No.	202430647A137099
Progressive Casualty Insurance Company (Respondent)	NAIC No.	24260

ARBITRATION AWARD

I, Aladar Gyimesi, 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 09/09/2021
   Declared closed by the arbitrator on 09/09/2021

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

   Zan Sheikh, Esq. from McCormack, Mattei & Holler participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 1,136.94**, was AMENDED and permitted by the arbitrator at the oral hearing.

   At the hearing, counsel for Applicant reduced Applicant's demand in connection with the disputed needling from $900.00 to $720.00. As a result, a total sum of $956.94 is in issue.

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

3. Summary of Issues in Dispute

   In contention are Applicant's bills relative to an initial consultation office visit, and needling, rendered on January 22, 2020 to a 26 year old female EIP of undetermined status who was involved in a motor vehicle accident on January 2, 2020. As amended,

Applicant sought reimbursement in the respective sums of $236.94 and $720.00 relative thereto. No denial was issued by the Respondent in connection with Applicant's needling bill. Respondent maintains however that payment thereof is not "overdue", and Applicant has no standing to proceed herein in such a regard, as a result of Applicant's failure to submit its billing to the Respondent prior to the initiation of the within arbitration proceeding. Upon receipt of Applicant's compensatory demand in connection with the office visit in question, Respondent issued a timely on its face denial predicated upon the Applicant's failure to appear "for duly requested Examinations Under Oath…" The entire amended amount sought by the Applicant, in the total sum of $956.94, is in dispute. The issues presented are Applicant's standing and the validity of Respondent's "EUO no-show" defense.

4. Findings, Conclusions, and Basis Therefor

At the hearing, and as set forth in its submission dated September 1, 2021, Respondent's counsel also argued that the within arbitration proceeding should be held in abeyance pending a determination of a Declaratory Judgment action recently commenced in Supreme Court, Nassau County. It is noted, however, that no stay of any arbitration proceeding was obtained by Respondent's counsel contemporaneous to the initiation of the aforementioned action. Additionally, and significantly, an Answer has also been interposed in connection with the above by the Applicant herein. In this Arbitrator's experience, many months if not longer are required in order for a No-Fault carrier to obtain a favorable Declaratory Judgment *on default*. Considerable additional time will elapse, in my judgment, where a matter is being actively litigated. Such a delay is contrary to a fundamental goal of the arbitration system, to wit, a prompt determination of disputes. In light of counsel for Respondent's failure to obtain a stay, and in view of the aforementioned considerations, Respondent's request to hold this matter in abeyance is denied in the exercise of my discretion.

Respondent also maintained that Applicant's bill, in connection with the disputed needling, was only provided to the Respondent as part of Applicant's submission in the within arbitration proceeding. In opposition to Respondent's claim, Applicant has herein tendered a copy of the front of an envelope bearing, inter alia, Respondent's name and address. The EIP's identity, as well as a date of service consistent with the instant claim, are handwritten on the envelope. The envelope bears a USPS postmark of February 4, 2020. Unfortunately for the Applicant, while the envelope may identify the EIP and a relevant date of service, it does not reveal what precisely is contained therein. It is noted, as set forth in Respondent's submission, that Applicant's NF-3 relative to the office visit in dispute was received by the Respondent, as per its date stamp, on February 7, 2020. This is, in my view, consistent with mailing of Applicant's NF-3 in such a regard on February 4, 2020. There is inadequate proof, however, that Applicant's NF-3 in connection with the disputed needling was also placed in the envelope bearing the February 4, 2020 postmark. In light of Applicant's failure to submit an affidavit of service or other documentation to support its customary business practice(s), relative to the mailing of the reimbursement request in connection with the disputed needling at any time prior to the initiation of the within arbitration proceeding, after due deliberation

I find Respondent's lack of standing defense to be meritorious. Following a careful consideration of the conflicting positions of the parties herein, I conclude Applicant has failed to satisfy its prima facie burden of proof, by a fair preponderance of the credible evidence, in support of its assertion that its reimbursement request in such a regard was submitted to the Respondent. Countrywide Ins. Co. v. 563 Grand Medical, P.C., 50 A.D. 3d 313, 855 N.Y.S. 2d 439 (App. Div., 1st Dept. - 2008); LMK Psychological Services, P.C. v. Liberty Mutual Ins. Co., 30 A.D. 3d 727, 816 N.Y.S. 2d 587 (App. Div., 3rd Dept. - 2006), and; Sunshine Imaging Association/WNY MRI v. Government Employees Ins. Co., 66 A.D. 3d 1419, 885 N.Y.S. 2d 557 (App. Div., 4th Dept. - 2009). Applicant's reimbursement request, relative to the needling provided to the within EIP on January 22, 2020, is therefore denied.

In accord with an Opinion Letter from the Office of General Counsel of the New York State Insurance Department, dated December 22, 2006, there are two sources within the No-Fault Regulations which authorize a carrier to request an EUO.

The Prescribed Mandatory Personal Injury Protection Endorsement, set forth in No-Fault Regulation 65-1.1, provides, inter alia, as follows:

Conditions:

Action Against Company. 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.

Proof of Claim; Medical, Work, Loss, and Other Necessary Expenses.

…Upon request by the Company, the eligible injured person or that person's assignee or

representative shall:

(b) as may reasonably be required submit to examinations under oath by any person

named by the Company and subscribe the same;

Further, No-Fault Regulation 65-3.5 (e) permits a No-Fault carrier to request an EUO of an applicant "as additional verification to establish proof of claim".

The procedural and substantive requirements in order for a No-Fault carrier to validly deny No-Fault benefits, as a result of an Applicant's failure to appear for an EUO, are in the undersigned's view identical or at least analogous to that of an EIP's failure to appear for an IME. As with an IME, an insurer is required to inform the Applicant that the Applicant will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with its request to appear for an EUO (No-Fault Regulation 65-3.5(e)). In order to support a denial predicated upon the EIP's alleged non-appearance at a scheduled IME, a carrier must provide evidence as to two proper

IME requests. A.B. Med Servs. PLLC v. Peerless Ins Co., 2006 NY Slip Op 26318 (App Term, 2nd Dept. - 2006). A carrier must also submit credible evidence as to the EIP's failure to appear for such IMEs in order to substantiate any denials subsequently issued. Post Traumatic Med Care, P.C. v. Progressive Cas. Ins. Co., 2008 NY Slip Op 51954(U) (App Term, 2nd Dept. - 2008); MidIsland Med. PLLC v. NY Cent. Mut. Ins. Co., 2007 NY Slip Op 51983(U), 17 Misc 3d 130(A) (App Term, 2nd Dept. - 2007); Vista Surgical Supplies, Inc. v. AutoOne Ins. Co., 2008 NY Slip Op 51460(U), 20 Misc 3d 133(A) (App Term, 2nd Dept. - 2008), and; Quality Health Prods., P.C. v. Progressive Ins. Co., 2008 NY Slip Op 51757(U) 20, Misc 3d 143(A) (App Term, 2nd Dept. - 2008). A No-Fault carrier bears the burden of persuasion insofar as demonstrating that an EIP failed to comply with reasonable and proper IME requests. Bedford Park Medical Practice PC v. American Transit Ins Co., 8 Misc 3d 1025(A), 806 N.Y.S.2d 443 (2005) and Amaze Med Supply Inc. v. State Farm Mut Auto Ins Co., 8 Misc 3d 139(A), 806 N.Y.S.2d 443 (App Term, 2nd Dept - 2005).

It has also been held that the same requirements vis-à-vis due notice to the EIP, and the necessary proofs required, apply with respect to the validity of a No-Fault carrier's denials which were predicated upon an EIP's alleged failure to appear for an EUO. Advanced Med., P.C. v. Utica Mut Ins Co., 2009 NY Slip Op 51023(U), 23 Misc 3d 141(A) (App Term, 2nd Dept - 2009); Inwood Hill Med., P.C. v. Progressive Cas. Ins. Co., 2009 NY Slip Op 51397(U), 24 Misc 3d 134(A) (App Term, 2nd Dept - 2009). In view of all of the aforementioned, after careful consideration, I conclude the expressed requirements set forth in the aforementioned case law, relative to an IME "no show", are in all regards equally applicable to where a No-Fault carrier's defense is predicated upon an EIP/Applicant's alleged failure to appear for an EUO.

At the hearing, counsel for Applicant did not contest that Respondent's proof conformed to the requirements set forth within the above case law. She argued however that Respondent's denial was invalid in light of the Appellate Division, First Department, decision rendered in Unitrin Advantage Ins. Co., v. All of NY, Inc., 158 A.D. 3d 449 (App. Div, 1st Dept - 2018). This matter involved an appeal by the health care provider from an Order granting the No-Fault carrier summary judgment where the health care provider allegedly failed to appear for EUOs. The Appellate Division reversed the granting of summary judgment with regard to three of the dates of service considered by the lower court. As to the services rendered on May 15 and 22, 2013, the Court ruled that insufficient evidence was provided to determine whether the EUO notices were timely served upon the healthcare provider. In such a regard it appears that this determination related, in part, to the sufficiency of evidence presented relative to the mailing thereof. The Court further concluded, even if properly mailed, that the No-Fault carrier's EUO scheduling letter relative to these dates of service was not timely. As to the services rendered on May 31, 2013, the Court observed that "the reasons for denial on the NF-10 denial of claim form were stated solely as a failure to appear for an EUO scheduled on July 29, 2013. The second examination date, August 12, 2013, is not mentioned, and therefore did not sufficiently apprise the provider as to the reason for denial (see Nyack Hosp. v. State Farm Mut. Ins. Co., 11 AD 3d 664, 664-665 [2d Dept 2004])".

Applicant's counsel asserted that the denial of the Respondent herein is similarly invalid in view of its failure to set forth *any* dates upon which Applicant failed to appear for EUOs. As to the claimed defect with respect to the basis of Respondent's denial, and as contained in Respondent's brief, the Second Department, Appellate Term, holds a contrary view. As set forth by the Court in Quality Psychological Services, PC v. Avis Rent- a- Car Systems, LLC, 47 Misc. 3d 129 (A, 2015 NY Slip Op 50378 (U), (App. Term, 2nd Dept-2015), the failure to set forth the dates of the scheduled examinations [under oath] in the denial of claim form does not render the denial conclusory, vague, or without merit as a matter of law (cf. A.B. Med Servs., PLLC v. Liberty Mut. Ins. Co., 39 AD3d 779 [2007])".
The denial issued to the Applicant herein asserts that "[Y]our billing is denied because you, as the assigned Applicant for Benefits for the insured injured party listed on the NF-10, failed to respond to multiple requests for additional verification relating to your Assignor by failing to appear for duly requested Examinations Under Oath and to provide pertinent information that will assist us in determining the amounts due and payable. This violates the policies contractual duties and the proof of claim conditions that precede coverage under Regulation 68, section 65-1, 1(b) and Regulation 68A, section 65-1.1..."
It is appreciated that the Appellate Division, First Department, has greater precedental value than the Appellate Term, Second Department. This Arbitrator also sits in the First Department and after careful reflection feels constrained, pursuant to the principle of stare decisis, to follow the Unitrin decision until there is a contrary decision by a court of greater authority. It is also noteworthy, in this Arbitrator's judgment, that the Unitrin Court cited Nyack Hosp, supra, as the basis for its determination relative to the invalidity of the No-Fault carrier's denial. Thus, in my judgment it is a failure to provide the health care provider with sufficient specificity as to the basis of Respondent's denial, as distinguished from misleading the health care provider that the denial is predicated upon only the failure to appear for one EUO date, that is at the essence of the Court's rationale. It is additionally appreciated that the Applicant was "noticed" to appear for EUOs on multiple occasions and as such it is also not unreasonable to assume Applicant might not have any specific knowledge as to the particular dates upon which Respondent's EUO "no-show" defense is predicated. Lastly, it is additionally recognized that Applicant's counsel has also tendered herein multiple Awards wherein Respondent's denials, which similarly failed to include the EUO dates, were determined to be fatally flawed and therefore invalid. I find the reasoning contained therein, respectfully incorporated herein, to be valid and in accord with this Arbitrator's conclusion as set forth above. See, for example, the Award rendered by Arbitrator Sandra Adelson in the matter of Jules Parisian M.D. and Progressive Casualty Insurance Company. (AAA Case No. 17-19-1128-5749). After due deliberation I find Respondent's pertinent denial, in accord with the Unitrin Court's rationale, to be invalid as a matter of law.

After due reflection, I conclude Applicant has sustained its prima facie burden of proof relative to the initial consultation office visit rendered to the within EIP on January 22, 2020. Countrywide Ins. Co., LMK Psychological Services, and Sunshine Imaging Association, supra;VA Acutherapy Acupuncture, P.C. v. State Farm Ins. Co., 2007 N.Y.

Slip Op 51217(U), 16 Misc 3d 126(A) (App Term, 2nd Dept - 2007); Ultra Diagnostic Imaging v. Liberty Mutual Insurance Co., 9 Misc 3d 97, 804 N.Y.S. 2d 532 (App Term, 2nd Dept - 2005); Lopes v. Liberty Mutual Ins. Co., 2009 WJL 1799812 (App Term, 2nd Dept. - 2009). In view of all of the above, I award Applicant the total amended requested sum of $236.94 in connection therewith.

In the instant matter, Respondent issued a denial(s) and Applicant did not commence this Arbitration proceeding within thirty days after its receipt of the subject denial(s). As a result, interest on the sum(s) awarded herein shall accrue as of the commencement date of the within arbitration. Lastly, attorney's fees shall be calculated against the total, "aggregate", Award. LMK Psychological Servs. P.C. v. State Farm Mutual Ins. Co., 12 NY3d 212, 879 N.Y.S.2d 14 (2009); Office of General Counsel, State of New York Insurance Department, Opinion Letters dated November 30, 2009 and September 14, 2010.

Accordingly, after a careful review of all the evidence and due regard for the argument of counsel, my Award is in favor of the Applicant to the following extent. As heretofore set forth, following due deliberation, I find Respondent's denial on multiple grounds to be invalid and ineffective relative to Applicant's reimbursement request in regards to the office visit in controversy. I award Applicant the total amended requested sum of $236.94 in connection therewith. The balance of Applicant's 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Amount Amended	Status
	Joke I. Bamgbopa, NP	**01/22/20 - 01/22/20**	**$236.94**	**$236.94**	**Awarded: $236.94**
	Joke I. Bamgbopa, NP	**01/22/20 - 01/22/20**	**$900.00**	**$720.00**	**Denied**
Total			**$1,136.94**		**Awarded: $236.94**

B. The insurer shall also compute and pay the applicant interest set forth below. 03/24/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Pursuant to No-fault Regulation 65-3.9(a), where the underlying motor vehicle accident occurred after Apr. 5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month.

The end date for the calculation of the period of interest shall be the date of Respondent's payment to the Applicant of the Award herein. In calculating the interest, pursuant to General Construction Law §20, the date of accrual shall be excluded from the calculation. Absent any credible proof as to Respondent's actual receipt of an NF-3 or its practical equivalent, or of Applicant's actual receipt of Respondent's denial, pursuant to CPLR §2103(b)(2) it is presumed that Respondent received Applicant's NF-3 or its practical equivalent, and/or that Applicant received Respondent's denial, five days after same was mailed and the "submission" date or "received" date, as hereinafter set forth, reflect such computations.

As to the date that Applicant's interest claim accrued, pursuant to LMK Psychological, supra, I find as follows:

Pursuant to No-fault Regulation 65-3.9(c), interest shall be paid, on the total sum of $236.94 from 3/24/20, the date the arbitration was commenced.

C. Attorney's Fees

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

Pursuant to LMK Psychological Services P.C., P.C. v. State Farm Mutual Ins. Co., 12 NY3d 212, 879 N.Y.S2d 14 (2009), Opinion Letter of the Office of General Counsel of the State of New York Insurance Department dated October 8, 2003 and No-fault Regulation §65-4.6, I find that Respondent is obligated to pay Applicant an attorney's fee as set forth below:

Twenty percent of the total Award of $236.94, plus interest. Such a fee is not to exceed, under ordinary circumstances, the sum of $850 nor be less than a minimum fee of $60 if the instant claim was submitted to the AAA prior to 2/4/15. If the subject claim was submitted to the AAA subsequent to the aforementioned date, the attorney's fee shall be twenty percent of the total Award, plus interest, with no minimum fee and a maximum fee of $1,360.

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 New York

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

10/05/2021
(Dated)

Aladar Gyimesi

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:
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Electronically Signed

Your name: Aladar Gyimesi
Signed on: 10/05/2021