

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Forest Hills Healthcare Physician PC  
(Applicant)

- and -

Maya Assurance Company  
(Respondent)

AAA Case No. 17-20-1154-7893

Applicant's File No. 113603

Insurer's Claim File No. 19046201

NAIC No. 36030

**ARBITRATION AWARD**

I, John Langell, 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 09/21/2021  
Declared closed by the arbitrator on 10/06/2021

Naomi Cohn, Esq. from Ursulova Law Offices P.C. participated in person for the  
**Applicant**

Christine Lee, Esq. from De Martini & Yi, LLP participated in person for the  
**Respondent**

2. The amount claimed in the Arbitration Request, **\$ 6,014.07**, 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 is a then 38 year old male who was injured in an automobile accident on 6/6/19. Assignor underwent physical therapy and electrodiagnostic testing from 6/13/19 to 10/30/19. Reimbursement for certain portions of that treatment was partially paid and partially denied based solely on fee schedule considerations. Otherwise, no fee schedule issues have been raised for consideration herein. Reimbursement for an EMG/NCV conducted on 7/9/19 and an SSEP conducted on 7/16/19 was timely denied based on a peer review. Reimbursement for a single date of treatment on 10/3/19 was never paid or denied based on the Respondent's claim that the bill for that treatment was never received. Reimbursement for the remaining treatment at issue was timely denied by the Respondent on the grounds that the provider failed to appear for two scheduled EUO's.

The issues for resolution at this hearing are whether the Respondent's partial fee schedule payments were appropriate, whether the Applicant can establish a prima facie case with respect to the single bill that was never paid or denied, whether the electrodiagnostic testing at issue was medically necessary, and whether Respondent's no show denials may be sustained.

#### 4. Findings, Conclusions, and Basis Therefor

This hearing was conducted using documents contained in the ECF, and the oral arguments presented by the parties' representatives. Any documents contained in the folder are hereby incorporated into this hearing. I have reviewed all relevant exhibits contained in the ECF maintained by the American Arbitration Association.

With respect to the single bill that was never paid or denied, I note that the bill in question was in the amount of 92.97 for an office visit conducted on 10/3/19. Applicant has submitted a certificate of mailing postmarked 10/19/19 that identifies the bill in question. I credit the Applicant's evidence of mailing, and so find that the Applicant's bill was submitted to and received by the Respondent. Accordingly, I find that the Applicant has demonstrated a prima facie case of entitlement to payment of its bill for the services rendered on 10/3/19. See, Viviane Etienne Med. Care, P.C. v. Country Wide Ins. Co., 2013 NY Slip Op. 08430 (2nd Dept. 2013). In the absence of any denial, or any claim that payment or denial was appropriately delayed pursuant to the applicable no fault rules and regulations, I find in favor of the Applicant in the amount of 92.97. I note with respect to those bills that were partially paid by the Respondent, that the Respondent has now acknowledged that the amounts paid were incorrectly calculated using an inappropriate conversion factor. Accordingly, I find in favor of the Applicant with respect to the unpaid balances of 60.00, 48.00, and 66.00, as set forth in the Applicant's AR-1.

Based on the materials submitted for my review, I find that the Applicant's remaining claims were submitted to and received by Respondent, and therefore that Applicant has demonstrated a prima facie case of entitlement to the disputed no fault benefits. See, Viviane Etienne Med. Care, P.C. v. Country Wide Ins. Co., supra.

I note with respect to the aforementioned bills, and the additional bills that were denied by the Respondent solely on the basis of medical necessity, that I have uniformly adhered to the holding in the Second Department case of Westchester Med. Center v. Lincoln Gen. Ins. Co., 60 A.D.2d 11 (2nd Dept. 2009), which unambiguously states that an alleged breach of a policy condition, such as a failure to appear for an Examination Under Oath, "does not serve to vitiate the medical provider's right to recover no fault benefits or to toll the 30-day statutory period (see Mount Sinai Hosp. v. Triboro Coach, 263 AD2d 11, 17, 699 NYS2d 77 [1999]). Rather, such denial was subject to the preclusion remedy." I recognize that the holding of the Westchester Court stands in contrast to the holding of the First Department in Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, 82 A.D. 3d 559 (2011). Nevertheless, I remain in agreement with the large number of Arbitrators who have determined that the Westchester decision more accurately reflects the reasoning of the Court of Appeals in Central General

Hospital v. Chubb Group of Ins. Cos., 90 N.Y.2d 195, 659 N.Y.S.2d 246 (1997). Accordingly, I will consider Respondent's no show defense only in relation to those claims as to which that defense was preserved in a timely specific denial.

With respect to the issue of medical necessity, I note that the burden of production initially lies with the Respondent to establish a prima facie case of lack of medical necessity. Respondent's burden can be satisfied by a peer review report which sets forth both a factual basis and medical rationale for the asserted denial. See, generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

To establish the defense of lack of medical necessity, Respondent relied on the peer review reports of Dr. Debra Ann Pollack, a Neurologist. Dr. Pollack has submitted three reports, all of which are dated 8/6/19. One report addresses the medical necessity of the SSEP (Somatosensory Evoked Potentials) testing performed on 7/16/19, and the other two reports address the medical necessity of the upper and lower EMG/NCV testing performed on 7/9/19. With respect to the SSEP testing, Dr. Pollack states that such testing is only indicated for certain conditions, including brain stem and spinal cord disorders, multiple sclerosis, and certain disorders of the dorsal roots and peripheral nervous system. Dr. Pollack asserts that no such indications were applicable to the present Assignor. She says that SSEP testing is not generally useful in acute radiculopathies, as it provides no more information that could be obtained by means of a careful examination.

With respect to the disputed EMG/NCV testing, Dr. Pollack states that the testing in question was recommended "routinely" only four weeks following the Assignor's soft tissue injuries. She says that the Assignor's clinical history did not include clinical findings suggestive of a focal neurological deficit. She says that the testing was conducted prematurely, before the Assignor had an adequate time to respond to conservative treatment. She says that there was no invasive treatment under consideration that might have otherwise indicated the need for the disputed testing. She says that there was no diagnostic dilemma to be resolved by means of the disputed testing.

I find that Respondent's peer review reports have satisfied the applicable burden of production, and that the ultimate burden of persuasion regarding the medical necessity of the disputed treatment lies once again with Applicant. See, again, generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., supra.

Applicant has submitted a formal rebuttal to Respondent's peer review report. Applicant's rebuttal report was authored by Dr. Eyad Hijazin, one of the Assignor's treating physicians. Dr. Hijazin states that the Assignor first presented to him on 6/13/19, at which time the Assignor complained of radiating neck and back pain. He says that he recommended a course of conservative treatment, along with the now disputed SSEP testing, at that time. He notes that the SSEP testing results were normal. He says that another provider recommended the now disputed EMG/NCV testing on 7/9/19, based on findings that included abnormal reflexes and decreased sensation. Dr.

Hijazin states with respect to the disputed SSEP testing that radiculopathy is one of the indications for the performance of such testing. With respect to the disputed EMG/NCV testing, Dr. Hijazin states that the Assignor received "almost four weeks" of conservative treatment prior to undergoing that testing. He says that a differential diagnosis was presented by the Assignor's complaints.

Dr. Pollack has submitted an addendum to her original reports. In her addendum, Dr. Pollack states that the disputed testing was performed during the acute phase of treatment. She repeats that the tests were routinely ordered. She says that those tests were excessive under the circumstances. She says that the Assignor's symptoms could have been expected to resolve following an appropriate period of conservative treatment.

The underlying records available for my independent review include the 6/13/19 record of the Assignor's initial clinical evaluation. That record indicates that the Assignor did not receive ER treatment on the day of the accident. The record contains a pre-printed section regarding a neurological examination. It is notable that there are no notations with respect to any objective neurological findings, such as abnormal sensation or reflexes, contained within the 6/13/19 record. As acknowledged by Dr. Hijazin, the disputed SSEP testing, along with a Neurology consultation, was recommended at the time of the initial 6/13/19 office visit. I note that four MRI's were also ordered at that time. I note that the record of the 7/9/19 Neurological consultation confirms that the Assignor had not received emergency room treatment on the day of the accident. "Moderate" tenderness of the cervical and lumbar spine is noted in the 7/9/19 record. "Zero" deep tendon reflexes were purportedly elicited on neurological examination. I note that the presently disputed EMG/NCV testing was ordered at the conclusion of the 7/9/19 examination.

Based on all the materials before me, and having carefully considered the reports submitted by both parties, I find that Applicant has failed to credibly rebut the findings and conclusions of the Respondent's peer reviewer. I note that the presently disputed SSEP testing was ordered on the occasion of the Assignor's initial clinical evaluation, one week following the accident and prior to the institution of conservative treatment. I note that the EMG/NCV testing was ordered after the Assignor had completed less than four weeks of conservative treatment. I note that there is no indication that the Assignor had started a course of conservative treatment prior to 6/13/19. There is no indication in the 6/13/19 record of any objective neurological findings. I note that the absence of any such findings on 6/13/19 is inconsistent with the findings reported in the later, 7/9/19 record. Under the circumstances presented, I find that Dr. Pollack's characterization of the 7/9/19 reflex findings as stereotypical for the provider in question to be persuasive. I am also persuaded by Dr. Pollack's description of the disputed testing as having been routinely and prematurely ordered. Under all the facts and circumstances of this case, I am more persuaded by the Respondent's peer review reports than by the Applicant's rebuttal report. Accordingly, I find that the Applicant has failed to prove the medical necessity of the presently disputed electrodiagnostic testing by a preponderance of the credible evidence. I note that the total amount billed by the Applicant for the disputed electrodiagnostic testing is 3,723.68. Applicant's claim in that amount will therefore be denied.

The remainder of the Respondent's denials rely solely on the claim that the provider failed to attend two scheduled EUO's. The burden with respect to a no show defense falls on Respondent to demonstrate prima facie that: 1) The IME notification letters were actually mailed; and 2) plaintiff's assignor failed to appear for the scheduled IMEs. See, generally, Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co., 35 A.D.2d 720 (2nd Dept. 2006). Respondent must prove that it sent both an original and follow up request and that the injured party failed to appear for both scheduled IMEs." Prime Psychological Services, P.C. v. ELRAC, Inc., 25 Misc.3d 1244(A), 2009 N.Y. Slip Op. 52579(U) at 3, (Civ. Ct. Richmond Co., Katherine A. Levine, J., Dec. 4, 2009). It is clear that these requirements also apply in the context of an EUO. "In order to make a prima facie showing based upon the failure to appear for an EUO, an insurer is required to show that: (1) the EUO scheduling letters were timely mailed, (2) the date and place of the EUO was not unreasonable, and (3) the assignor failed to appear. . . ." Electrodiagnostic & Physical Med PC v. Maya Assurance Co., 45 Misc.3d 1208(A), 3 N.Y.S.2d 284 (Table), 2014 N.Y. Slip Op. 51500(U), 2014 WL 5289460 (Dist. Ct. Nassau Co., Scott Fairgrieve, J., Oct. 17, 2014).

The two EUO's upon which Respondent presently relies were scheduled to be held on 07/26/2019 and 09/09/2019. I note that all of the bills remaining in question were received by the Respondent following those dates. Thus, the EUO's themselves represent pre-claim investigations with respect to the Applicant's bills, and the notice requirements of 11 NYCRR §§ 65-3.5 and 65-3.6 are inapplicable. Detailed verification procedures are not amenable to application at a stage prior to the submission of the claim form. Prime Psychological Services PC v. Elrac, supra. In any event, no claim has been raised that Respondent's IME scheduling letters were untimely with respect to the bills presently at issue. No issue has been raised regarding the mailing and receipt of the EUO notices, copies of which have been submitted herein. No issue has been raised concerning the Applicant's failure to appear, which in any event has been confirmed by copies of the relevant EUO transcripts. The sole issue raised by the Applicant in opposition to the Respondent's no show defense pertains to certain contemporaneous objections interposed by the Applicant in regard to the scheduling of the EUO's in question.

In relation to that issue, the Respondent has submitted an affirmation authored by its attorney. Respondent's affirmation states, with reference to the first EUO scheduled on 7/26/19, that the initial scheduling EUO scheduling letter was mailed on 7/17/19. Following the Applicant's failure to appear on 7/26/19, another scheduling letter was issued on 8/8/19, indicating that the Applicant should appear for an EUO on 8/23/19. According to the affirmation submitted by the Respondent, a letter was received from a representative of the Applicant on 8/15/19, indicating that the Applicant itself was unable to appear on 8/23/19. The 8/23/19 EUO was thereupon cancelled, and another scheduling letter was issued on 8/28/19. That letter scheduled the Applicant's EUO for 9/9/19, the second of the two dates upon which Respondent presently relies. I note that the initial scheduling letter was mailed solely to the Applicant, and that the follow up scheduling letters were also mailed to the Applicant's attorney. It is notable, finally, that

the Respondent's scheduling letters involved three different Applicants, one of whom was the present Applicant, and all of whom were scheduled for EUO's on the same dates at 15 minute intervals.

In support of the Applicant's position, the Applicant's attorney has submitted copies of correspondence sent to the Respondent concerning the scheduling of the EUO's in question. The submitted evidence includes a letter dated 7/25/19, in which Applicant's attorney objected to the scheduled EUO on 7/26/19 as unreasonable "unless you can provide me with the good faith, objective reason for requesting this EUO." Applicant's letter added that the EUO's were unreasonable "because you give extremely short notice (i.e. 5-6 days) for the EUO. " Finally, the Applicant's attorney advised the Respondent that "neither I nor my clients are available on this day", and offered to "discuss a date, time, and location that is convenient to all parties." I note that the Applicant's letter dated 7/25/19 is accompanied by a Fax cover sheet confirming transmission at 3:46 PM on 7/25/19. The submitted evidence also includes a faxed letter dated 8/8/19, in which the Applicant's attorney indicated that she was attempting to coordinate a date when an attorney and all three of her clients would be able to appear. A subsequent letter dated 8/15/19 advised the Respondent that Applicant's attorney would not be available on 8/23/19, and requested that the EUO of the present Applicant be rescheduled for 9/26/19, 9/27/19, or 9/30/19. In addition, Applicant's attorney requested that each provider be compensated in the amount of 750.00 for their appearances.

I note that the submitted evidence separately includes copies of certain correspondence issued on behalf of the Respondent. In that connection, it is notable that there is no indication that the Respondent ever replied to the Applicant's letter dated 8/15/19, requesting the aforementioned dates of 9/26/19, etc. A letter from the Respondent dated 7/31/19, however, acknowledges receipt of what would appear to be Applicant's letter dated 7/25/19, and undertakes to explain the purpose of the scheduled EUO. Respondent's letter indicates that the "purpose of the EUO is to verify the treatment that your client rendered to the Assignor as a result of the motor vehicle accident". The letter explains that "we would require that your client produce all sign in sheets, medical records and reports for each date of service". The letter assures Applicant's attorney that "the EUO will be limited to the above noted issues and will not be used to investigate the corporate structure of your client." It is notable that the aforementioned letter from Applicant's attorney dated 8/8/19 acknowledged receipt of the Respondent's 7/31/19 letter, and conspicuously omitted any further objection to conducting the now disputed EUO on the grounds that the Respondent had failed to enunciate a reasonable basis for the same. It is also notable that the submitted evidence does not include any indication that the Applicant ever responded to the Respondent's scheduling notice dated 8/28/19, which, notwithstanding the dates requested by Applicant, rescheduled the Applicant's EUO for 9/9/19. I note that the submission and receipt of all of the correspondence referenced herein is presently undisputed by both parties.

At the conclusion of the within hearing, both parties were requested to upload copies of legal authorities in support of their respective positions with regard to the Applicant's failure to appear. Respondent has uploaded a number of authorities in support of the proposition that an insurer is not required to provide the reason for its EUO demand in response to an objection from a provider. Applicant has uploaded a short statement to

the effect that its objection letter was timely faxed over to the Respondent's attorney, and clearly indicated that neither the Applicant's attorney nor the Applicant itself were available on the scheduled date.

11 NYCRR 65-3.5 (e) provides that all EUO's shall be held at a place and time "reasonably convenient" to the Applicant. In the case of Eagle Surgical Supply Inc. v. Progressive Cas. Ins. Co., 21 Misc 3d 49, 871 NYS2d 580 (App.Term 2nd Dept. 2008), the Court noted that an insurer may not "schedule EUOs in an unreasonable manner." Generally, if an insurer refuses a timely and proper request to reschedule EUOs of a medical provider, then an issue of fact arises as to whether the EUOs were scheduled in conformance with the applicable regulations. See, Parisien v. Travelers Ins. Co., 71 Misc.3d 1217(A), 2021 N.Y. Slip Op. 50396(U) (Civ. Ct. Kings Co., Richard Tsai, J., Apr. 30, 2021). In the present case, the behavior of both parties at certain points leading up to the presently disputed EUO's may be fairly characterized as unreasonable. With respect to the EUO scheduled for 9/9/19, for example, the Respondent ignored without any explanation the Applicant's request for multiple alternative dates, including 9/26/19, 9/27/19, and 9/30/19. I note that the Respondent did not offer any explanation at the hearing of this matter concerning its apparent failure to make any attempt to accommodate the Applicant's attorney's scheduling request. On the other hand, it also appears that the Applicant's attorney failed to respond in any manner to the Respondent's scheduling letter dated 8/28/19. Instead, the Applicant unilaterally decided not to appear on 9/9/19 in the absence of any further communication with the Respondent.

I also note that the Respondent is correct in asserting that an insurer is not required to provide objective reasons for requesting an EUO in response to an Applicant's objection. See, Sayed DC, P.C. v. Ameriprise Ins. Co., 71 Misc.3d 1208(A), 2021 N.Y. Slip Op. 50311(U) (Civ. Ct. Queens Co., Wendy Changyong Li., J., Apr. 13, 2021). In any event, I note that the Applicant's attorney appears to have relinquished her objection based on a claimed failure to provide objective reasons for conducting the EUO in her correspondence dated 8/8/19, and that the Applicant did not argue otherwise at the time of the hearing of this matter. With respect to the Applicant's demand for payment, I note that there is no authority for the proposition that an insurer must reimburse a provider in advance of an EUO. Thus, the Applicant in this case was not privileged to condition its appearance either on the prior payment of 750.00, or upon a prior response to its attorney's request for objective reasons in support of the scheduled EUO.

With particular respect to the initial EUO scheduled for 7/26/19, however, I conclude, under all of the facts and circumstances of the present case, that the Respondent failed to comply with the applicable regulations concerning the scheduling of EUO's. I note that the first scheduling letter was mailed on 7/17/19. Allowing five days for mailing, that letter could not have been expected to be received by the Applicant prior to 7/22/19, four days before the scheduled EUO. I note that the Respondent sent three identical letters to three different providers, scheduling each of their EUO's on the same date at 15 minute intervals. I note that the initial scheduling letters were mailed solely to the Applicants themselves, indicating that no attorney had as yet appeared on their behalf. I note that an attorney appeared on behalf of all three Applicant's, including the present Applicant, on 7/25/19, when the aforementioned letter bearing that date was faxed to the Respondent. I note that the Respondent's receipt of that letter is undisputed, and that in

fact the Respondent itself acknowledged on 7/31/19 that it had "received your letter of representation in regard to the above noted claim." I note that Applicant's 7/25/19 letter objected to proceeding with the scheduled EUO's on the grounds of the "extremely short notice" given, as well as on the grounds that "neither I nor my clients are available on this day". I note that Applicant's letter indicated a willingness to "discuss a date, time, and location that is convenient to all parties." I note that Respondent failed to reply in any manner to the scheduling concerns raised by the Applicant's attorney. In that connection, I note that if a medical provider requests to reschedule an EUO and receives no response, then the insurer is not entitled to judgment dismissing the complaint as a matter of law. See, Parisien v. Travelers Ins. Co., supra. In the present case, I do not conclude that the Respondent was obligated to have any particular response to the Applicant's letter of 7/25/19. I do conclude, however, that where, as here, the Respondent had provided minimal notice for three EUO's scheduled on the same day, some response to the scheduling concerns raised by Applicant's attorney was required. In the absence of any such response, I find as a matter of fact that the conduct of the Respondent in unilaterally proceeding with the EUO scheduled for 7/26/19 was unreasonable. Since the Respondent must prove that the Applicant failed to appear for two EUO's scheduled in accordance with the applicable regulations, I am unable to sustain the no show denials at issue.

Any additional issues not referred to hereinabove are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

Accordingly, the Applicant's claim is upheld in the amount of 2,290.39, calculated by subtracting the aforementioned amount of 3,723.68 from the total amount in controversy.

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
	Forest Hills Healthcare Physician PC	06/13/19 - 10/30/19	\$6,014.07	Awarded: \$2,290.39
Total			\$6,014.07	Awarded: \$2,290.39

- B. The insurer shall also compute and pay the applicant interest set forth below. 01/24/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Consistent with applicable regulations of the New York State Insurance Department, including 11 NYCRR 65-3.9 (c) and 11 NYCRR 65-4.2 (b), I find that Arbitration was requested on 1/24/20, and so find that interest shall accumulate from that date at the simple rate of 2 percent per month, calculated on a pro rata basis using a 30 day month.

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay the applicant an attorney's fee equal to 20% of that total sum, subject to a maximum of \$1,360.00. See 11 NYCRR 65-4.6(d).

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

11/04/2021  
(Dated)

John Langell

### **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:**  
d7589a21db8890c049c33acd7c8472fc

### **Electronically Signed**

Your name: John Langell  
Signed on: 11/04/2021