

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Sedation Vacation Perioperative Medicine
PLLC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-21-1199-6908
Applicant's File No.	none
Insurer's Claim File No.	0557884900101020
NAIC No.	22055

ARBITRATION AWARD

I, Kihyun Kim, 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: the Assignor

1. Hearing(s) held on 01/21/2022
Declared closed by the arbitrator on 02/07/2022

Dino DiRienzo, Esq from Dino R. DiRienzo Esq. participated for the Applicant

Jaime Orlando from Geico Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$381.10**, 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 issue presented is whether Respondent established its policy violation defense of "EUO no show."

The Assignor (AB) was a 23-year-old male who was a passenger in an automobile that was involved in an accident on December 10, 2019. Applicant seeks reimbursement in the aggregate amount of \$381.10 for the anesthesia services related to an arthroscopy of the right knee of the Assignor provided on February 20, 2020.

4. Findings, Conclusions, and Basis Therefor

This arbitration was conducted using the documentary submissions of the parties contained in the ADR Center, maintained by the American Arbitration Association. I have reviewed the documents contained therein as of the closing of the hearing, and such documents are hereby incorporated into the record of this hearing. The hearing was held by Zoom video conference. Both parties appeared at the hearing by representatives, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

The Assignor was a 23-year-old male who was involved in an automobile accident on December 10, 2019. Following the accident, the Assignor sought treatment for his injuries from various providers, including Applicant.

On February 20, 2020, the Assignor underwent an arthroscopy of the right knee performed by Paul Ackerman, M.D., at a facility in Brooklyn New York. Applicant thereafter billed Respondent for the anesthesia services related to the surgery, and Respondent timely denied Applicant's claims based on the Assignor's failure to appear for examinations under oath on March 11, 2020 and July 20, 2020 in breach of a condition of coverage.

Applicant now seeks reimbursement in the aggregate amount of \$381.10 for the anesthesia services related to an arthroscopy of the right knee of the Assignor provided on February 20, 2020.

Legal Framework - Tolling of claims/Verification

The general rule regarding payment of claims is set forth in 11 NYCRR §65-3.8(c), which states that "within 30 calendar days after proof of claim is received, the insurer shall either pay or deny the claim in whole or in part." No-Fault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of claim, which shall include verification of all of the relevant information requested pursuant to 11 NYCRR §65-3.5. *See* 11 NYCRR §65-3.8(a). As such, a claim need not be paid or denied until all demanded verification is provided. *See Nyack Hospital v. General Motors Acceptance Corp.*, 27 A.D.3d 96, 808 N.Y.S.2d 399 (2d Dept. 2005), *mod'd on other grounds*, 8 N.Y.3d 294, 832 N.Y.S.2d 880 (2007).

Verification

11 NYCRR §65-3.5 (c) mandates that the insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was requested. The insurer has 15 business days from the date it receives the prescribed verification forms to seek additional verification from an Applicant. *See* 11 NYCRR §65-3.5 (b). Thereafter, "at a minimum, if any requested verification has not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested, either by telephone call, properly documented in the file, or by mail. At the same time the insurer shall inform the applicant and such person's attorney of the reason(s) why the claim is delayed by identifying in writing the missing verification and the party from whom it was requested." *See* 11 NYCRR §65-3.6 (b). If the additional verification required by the insurer is a medical examination, the insurer shall schedule

the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms. 11 NYCRR §65-3.5 (d)

Further, 11 NYCRR §65-3.8(l) states:

For the purposes of counting the 30 calendar days after proof of claim, wherein the claim becomes overdue pursuant to section 5106 of the Insurance Law, with the exception of section 65-3.6 of this subpart, any deviation from the rules set out in this section shall reduce the 30 calendar days allowed.

Thus, a request for additional verification pursuant to 11 NYCRR §65-3.5(b) that is sent beyond the 15 business days is still valid so long as it is issued within 30 days from receipt of the claim; such a deviation will simply reduce the insurer's time to pay or deny by the same number of days. 11 NYCRR §65-3.8(l). *See Nyack Hosp. v. General Motors Acceptance Corp.*, 8 NY3d 294, 2007 NY Slip Op 02439 (Court of Appeals, 2007).

Legal Framework - EUO no show

The Mandatory Personal Injury Endorsement, outlined in 11 NYCRR §65-1.1 confers upon the insurer the right to request the eligible injured person or that person's assignee or representative to submit to examinations under oath as may reasonably be required.

11 NYCRR 65-3.5(c) states "The insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was requested."

11 NYCRR 65-3.5(e) states:

All examinations under oath and medical examinations requested by the insurer shall be held at a place and time reasonably convenient to the applicant and medical examinations shall be conducted in a facility properly equipped for the performance of the medical examination. The insurer shall inform the applicant at the time the examination is scheduled that the applicant will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with the request. When an insurer requires an examination under oath of an applicant to establish proof of claim, such requirement must be based upon the application of objective standards so that there is specific objective justification supporting the use of such examination. Insurer standards shall be available for review by Department examiners.

An insurer may deny claims based on the failure to appear for an EUO as it constitutes a breach of a condition precedent to coverage. *See Mega Billing, Inc. v. State Farm Fire & Casualty Company*, 35 Misc.3d 145(A), 2012 N.Y. Slip Op. 51014(U) (App Term, 2 , 11 and 13 Jud. Dists. 2012).

To sustain the defense of a breach of a condition precedent, to wit, the failure to appear for an EUO, the insurer must demonstrate as a matter of law that it twice duly demanded an examination under oath, that the party twice failed to appear and that the insurer issued a timely denial. *Interboro Ins. Co. v. Clennon*, 113 A.D.3d 596, 979 N.Y.S.2d 83 (App. Div., 2 Dept, 2014). Respondent must demonstrate that the initial and follow-up requests for verification were timely issued pursuant to 11 NYCRR 65-3.5 (b) and

65-3.6(b) and establish the failure to appear for the EUOs. *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). To establish the failure of the party to appear for duly scheduled EUOs, it is incumbent upon the insurer to submit proof by someone with personal knowledge of the non-appearance. *Alrof, Inc. v. Safeco Natl. Ins. Co.*, 39 Misc.3d 130(A), 2013 N.Y. Slip Op. 50458(U)(App Term, 2nd , 11th and 13th Jud. Dists., 2013). An insurer is entitled to judgment dismissing a claim where the health care provider has failed to attend scheduled EUOs. *Dover Acupuncture, P.C. v. State Farm Mutual Automobile Ins. Co.*, 28 Misc.3d 140(A), 2010 N.Y. Slip Op. 51605(U), 2010 WL 3604424 (App. Term 1st Dept. Sept. 17, 2010).

Analysis - EUO no show - Anesthesia - DOS 2/20/20

In support of its EUO no show defense, Respondent uploaded to the ADR Center copies of the denial, dated July 22, 2020; the bill and supporting medical records with date stamp showing receipt by Respondent on March 23, 2020; a letter of representation from the Assignor's counsel; the Assignor's NF-2; the police report; verification request/delay letters, dated April 7, 2020 and May 11, 2020, addressed to Applicant and cc'd to the Assignor and the Assignor's counsel advising that Applicant's claims are delayed pending the examination under oath of the Assignor; EUO scheduling letters, dated February 6, 2020, February 24, 2020, and June 29, 2020, addressed to the Assignor's counsel and cc'd to the Assignor counsel, scheduling the examination under oath of the Assignor for February 18, 2020, March 11, 2020, July 20, 2020 with unsigned affidavits of service; the transcript of a Statement on the Record, dated March 11, 2020, by Charise Jones, regarding the non-appearance by the Assignor at the scheduled EUO on March 11, 2020; and the transcript of a Statement on the Record, dated July 20, 2020, by Charise Jones, regarding the non-appearance by the Assignor at the scheduled EUO on July 20, 2020.

At the hearing, Applicant's counsel noted that the affidavits of mailing that were attached to the EUO scheduling letters were not signed and not notarized raising questions regarding the timely and proper mailing of the EUO scheduling letters. It was also noted that the two EUO scheduling letters in the record at the time of the hearing, dated February 24, 2020, and June 29, 2020, did not appear to properly toll Applicant's claims. The bill at issue was received on March 23, 2020. While there were delay letters to Applicant in the record, no EUO of the Assignor appeared to be pending at the time the bill was received, and no new examination under oath was scheduled by Respondent until the June 29, 2020 letter to the Assignor scheduled the examination under oath of the Assignor for July 20, 2020. This letter was well after the 30 day time period to pay or deny Applicant's claims would have expired without a toll. The February 24, 2020 letter that was in the record scheduled an examination under oath of the Assignor for March 11, 2020, which was twelve days prior to receipt of the bill.

After discussion with the parties, the hearing was held open for two weeks to allow Respondent to upload signed affidavits of service, and an asserted "second" EUO scheduling letter that could fill in the time gap between the first allegedly missed EUO on March 11, 2020 and the June 29, 2020 letter that scheduled the EUO for July 20, 2020. While I may not have held the hearing open for new submissions under typical circumstances, the discussion at the hearing revealed that the parties recognized the

shutdown due to the COVID-19 pandemic was just starting during the relevant time frame. Within the time prescribed, Respondent did upload an EUO scheduling letter, dated February 6, 2020, addressed to the Assignor's counsel and cc'd to the Assignor counsel, scheduling an examination under oath of the Assignor for February 18, 2020 (with an unsigned affidavit of mailing), but no EUO scheduling letter during the time period between the first allegedly missed EUO on March 11, 2020 and the June 29, 2020 scheduling letter was uploaded. No signed affidavits of mailing were uploaded. The hearing was closed after the prescribed two week period expired.

After reviewing all of the submissions and taking into account the oral arguments of the parties, I find that Respondent failed to establish its EUO no show defense. Among other things, Respondent failed to establish that Applicant's claim was properly tolled. While the record established that Respondent did send timely and proper delay letters, dated April 7, 2020 and May 11, 2020, following receipt of Applicant's bill on March 23, 2020, the case law is clear that that "delay letters" to a medical provider that fail to actually request any verification but rather simply notify the provider that the insurer is delaying the claim are "insufficient to toll the 30-day statutory time period within which a claim must be paid or denied." *Hillside Open MRI v. Allstate*, 44 Misc.3d 132(A) (2d Dep't App. Term 9 and 10 Dists.) (citing *Nyack Hosp. V. Encompass Ins. Co.*, 23 A.D.3d 535 (2d Dep't 2005)). The record also established that no examination under oath of the Assignor was pending at the time the bill was received, and no new examination under oath was scheduled by Respondent until the June 29, 2020 EUO scheduling letter scheduled the examination under oath of the Assignor for July 20, 2020. At that point, the time to seek additional verification had long expired, and the claim herein was already overdue (as the bill was not paid or denied within 30 days from receipt). See 11 NYCRR §65-3.8(c). Respondent provided no affidavit or other evidence to specifically explain or excuse its failure to timely request the examination under oath of the Assignor. I also note that even if the claim had been properly tolled for verification, I find the Assignor's non-appearance at the March 11, 2020 examination under oath to be excused. Respondent uploaded the transcript of the Statement on the Record, dated March 11, 2020, which explained, regarding the non-appearance by the Assignor at the scheduled EUO, that the Assignor's "attorney did contact our office and state that they would be shutting down for two weeks and the client could not attend this EUO." While the transcript did not explicitly state that counsel's office was being closed due to the COVID-19 pandemic, I find this to be a reasonable assumption given the timing of such action. Based on the totality of evidence in the record, I find that Respondent has failed to establish its EUO no show defense. Accordingly, I find that Applicant is entitled to reimbursement in the aggregate amount of \$381.10 for the anesthesia services related to an arthroscopy of the right knee of the Assignor provided on February 20, 2020.

Conclusion

For the reasons set forth herein, Applicant is awarded reimbursement in the total amount of \$381.10, with attorney's fees, interest and the arbitration filing fee as set forth below. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

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
	Sedation Vacation Periop Med PLLC	02/20/20 - 02/20/20	\$381.10	Awarded: \$381.10
Total			\$381.10	Awarded: \$381.10

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/06/2021 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall be computed from April 6, 2021, the AR-1 filing date, at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

Respondent shall pay the Applicant's attorney's fees in accordance with 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 Suffolk

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

03/09/2022

(Dated)

Kihyun Kim

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:
040d1bfd180d3f1e4a69da0f96e45ebd

Electronically Signed

Your name: Kihyun Kim
Signed on: 03/09/2022