American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Time to Care Pharmacy Inc. (Applicant)	AAA Case No.	17-20-1187-8116
	Applicant's File No.	DK20-124000
- and -	Insurer's Claim File No.	1078184-03
	NAIC No.	16616
American Transit Insurance Company (Respondent)		

ARBITRATION AWARD

I, Aaron Maslow, 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 ["SG"]

1. Hearing(s) held on 07/11/2022
   Declared closed by the arbitrator on 07/11/2022

   Korsunskiy Legal Group P.C. from Korsunskiy Legal Group P.C. participated by written submission for the Applicant

   American Transit Insurance Company from American Transit Insurance Company participated by written submission for the Respondent

2. The amount claimed in the Arbitration Request, **$1,816.68**, 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

   Applicant commenced this New York No-Fault insurance arbitration, seeking as compensation $1,816.68 which it billed for dispensing Diclofenac sodium gel 3% on March 9, 2020 to Assignor, a 28-year-old female who was injured in a motor vehicle accident on March 9, 2020. Respondent denied payment on two grounds: (1) fees not in accordance with fee schedule; (2) Assignor failed to attend IMEs scheduled for May 28, 2020 and July 16, 2020.

- Whether Applicant established entitlement to No-Fault insurance compensation for Diclofenac sodium gel 3% dispensed to Assignor.
- Whether to deny compensation on the ground that Assignor failed to attend scheduled IMEs.
- Whether fees were not in accordance with fee schedule.

4. Findings, Conclusions, and Basis Therefor

Appearances

For Applicant:

Korsunskiy Legal Group P.C.
3237 Long Beach Road
Suite 110
Oceanside, NY 11572

For Respondent:

American Transit Insurance Company
One Metro Tech Center
7th Floor
Brooklyn, NY 11201

Applicant commenced this New York No-Fault insurance arbitration, seeking as compensation $1,816.68 which it billed for dispensing Diclofenac sodium gel 3% on March 9, 2020 to Assignor, a 28-year-old female who was injured in a motor vehicle accident on March 9, 2020. Respondent denied payment on two grounds: (1) fees not in accordance with fee schedule; (2) Assignor failed to attend IMEs scheduled for May 28, 2020 and July 16, 2020.

This arbitration was organized by the American Arbitration Association, which has been designated by the New York State Department of Financial Services to coordinate the mandatory arbitration provisions of Insurance Law § 5106(b), which provides:

> Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party ["No-Fault insurance"] benefits, or additional first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of this section to arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent.

This arbitration was scheduled for a hearing to take place on July 11, 2022. Rule a of the Rules for Arbitration of No-Fault Disputes in the State of New York, promulgated by the American Arbitration Association (AAA), and 11 NYCRR 65-4.5(a) in the New York No-Fault Regulations both provide: "At the arbitrator's

discretion, if the dispute involves an amount less than $2,000, the parties shall be notified that the dispute shall be resolved on the basis of written submissions of the parties." On May 21, 2022 the undersigned arbitrator entered a determination in this case's Electronic Case Folder that the instant dispute would be resolved on the basis of the written submissions of the parties. This was subsequently conveyed to the parties by AAA, who informed them that no live hearing would be conducted.

I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center as of July 9, 2022, said submissions constituting the record in this case. This is pursuant to 11 NYCRR 65-4.2(b)(3)(iv), which vests discretion in the arbitrator to determine whether documents which otherwise would be excluded from the record due to lateness by virtue of 11 NYCRR 65-4.2(b)(3)(i)-(iii) should be considered.

"[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 (2015). "The court may, in its discretion, rely on defendant's documentary submissions establishing defendant's receipt of plaintiff's claims [citation omitted]." Lenox Hill Radiology MIA, P.C. v. American Transit Ins. Co., 19 Misc.3d 358, 363 (Civ. Ct. New York Co. 2008). An insurer's denial of claim form indicating the date on which it was received adequately establishes that the claimant sent, and that the defendant received, the claim. Ultra Diagnostics Imaging v. Liberty Mutual Ins. Co., 9 Misc.3d 97 (App. Term 9th & 10th Dists. 2005). Respondent's denial of claim acknowledged receipt of Applicant's proof of claim and proved nonpayment of the bill embodied therein. Hence, I find that Applicant established a prima facie case of entitlement to No-Fault compensation.

An IME no-show defense may be asserted regardless of whether the appurtenant denial of claim is timely or not. Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559 (1st Dept. 2011).

Respondent's denial of claim asserted that Assignor failed to attend IMEs scheduled for May 28, 2020 and July 16, 2020. An insurer fails to demonstrate that it is entitled to judgment on the ground that the assignor failed to attend IMEs where its papers fail to establish that the assignor failed to appear for such examinations. Canarsie Family Medical Practice, PLLC v. American Transit Ins. Co., 26 Misc.3d 132(A), 2010 N.Y. Slip Op. 50070(U) (App. Term 2d, 11th & 13th Dists. Jan. 12, 2010). In the instant case, not only did Respondent not submit proof of Assignor not appearing at the IMEs, it did not even submit proof that the notices were mailed. I reject the IME no-show defense.

It is true that copies of IME notices were included in Respondent's submission. However, mere inclusion does not prove mailing. Where the rights of a person injured in a motor vehicle accident are contingent upon compliance with conditions precedent to coverage, it would contravene public policy to deny

compensation on the basis of a failure to comply with such condition precedent based solely upon a copy of a notice demanding compliance without some evidence of the notice being sent out.

As for the defense that the fee charged was not in accordance with fee schedule, I note that Respondent did not include in its submission any fee coder affidavit or other fee analysis. An arbitrator's award rejecting an argument that the amount billed exceeds the fee schedule is properly sustained where the arbitrator noted that the insurer failed to submit the requisite affidavit to support its argument. Country-Wide Ins. Co. v. Excel Surgery Center, LLC, 2018 N.Y. Slip Op. 33260(U) (Sup. Ct. New York Co., William Franc Perry, J., Dec. 12, 2018). An insurer fails to establish the existence of an issue of fact with respect to a defense that fees charged were excessive and not in accordance with the Workers' Compensation fee schedule in the absence of proof establishing the defense. St. Vincent Medical Care, P.C. v. Country Wide Ins. Co., 26 Misc.3d 146(A), 2010 N.Y. Slip Op. 50488(U) (App. Term 2d, 11th & 13th Dists. Mar. 19, 2010). An insurer's argument that it is entitled to judgment on the ground that the fees sought exceeded the amount permitted by the fee schedule is devoid of merit where the insurer offers zero evidence to support such a defense. Metro Pain Specialist, P.C. v. Hertz Co., 66 Misc.3d 129(A), 2019 N.Y. Slip Op. 52047(U) (App. Term 2d, 11th & 13th Dists. Dec. 13, 2019). I reject the defense that fees were not in accordance with fee schedule.

Applicant's prima facie case of entitlement to No-Fault compensation stands. The within arbitration claim is granted in its entirety. Applicant is awarded $1,816.68 in health service benefits.

Interest: Where a claim is timely denied, as it was here, interest shall begin to accrue as of the date arbitration is requested by the claimant, i.e., the date the American Arbitration Association (AAA) receives the applicant's arbitration request, unless arbitration is commenced within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the 30th day after proof of claim was received by the insurer. 11 NYCRR 65-4.5(s)(3), 65-3.9(c); Canarsie Medical Health, P.C. v. National Grange Mut. Ins. Co., 21 Misc.3d 791, 797 (Sup. Ct. New York Co. 2008) ("The regulation provides that where the insurer timely denies, then the applicant is to seek redress within 30 days, after which interest will accrue.") The plaintiff health care provider in Canarsie Medical Health, P.C. argued that where a timely issued denial is later found to have been improper, the interest should not be stayed merely because the provider did not seek arbitration within 30 days after having received the denial. The court rejected this argument, finding that the regulation concerning interest was properly promulgated; this includes the provision staying interest until arbitration is commenced where the claimant does not promptly take such action. Applicant presumptively received Respondent's denial a few days after Aug. 5, 2020, when it was issued. Applicant's arbitration request was received by the AAA on Dec. 12, 2020, which was certainly more than 30 days later. Thus, interest must accrue from that date, not from the 30th day after proof of claim was received by Respondent. The end date for the calculation of the period of interest

shall be the date of payment of the claim. In calculating interest, the date of accrual shall be excluded from the calculation. General Construction Law § 20 ("The day from which any specified period of time is reckoned shall be excluded in making the reckoning."). Where a motor vehicle accident occurs 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. 11 NYCRR 65-3.9(a); Gokey v. Blue Ridge Ins. Co., 22 Misc.3d 1129(A), 2009 N.Y. Slip Op. 50361(U) (Sup. Ct. Ulster Co., Henry F. Zwack, J., Jan. 21, 2009).

Attorney's Fee: After calculating the sum total of the first-party benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, as provided for in 11 NYCRR 65-4.6(d) (as existing on the filing date of this arbitration), subject to a maximum fee of $1,360.00.

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**
	Time to Care Pharmacy Inc.	**03/09/20 - 03/09/20**	**$1,816.68**	**Awarded: $1,816.68**
Total			**$1,816.68**	**Awarded: $1,816.68**

B. The insurer shall also compute and pay the applicant interest set forth below. 12/12/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Respondent shall pay Applicant interest on the total first-party benefits awarded herein, computed from Dec. 12, 2020 to the date of payment of the award, but excluding Dec. 12, 2020 from being counted within the period of interest. The interest rate shall be two percent per month, simple (i.e., not compounded), 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 interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, as provided for in 11 NYCRR 65-4.6(d) (as existing on the filing date of this arbitration), subject to a maximum fee of $1,360.00.

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 Kings

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

07/11/2022
(Dated)

Aaron Maslow

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:
82c298636fdadeebf8d913da94de45d0

Electronically Signed

Your name: Aaron Maslow
Signed on: 07/11/2022