

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Lee Acupuncture PC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-20-1188-8255

Applicant's File No. DK20-100025

Insurer's Claim File No. 1045603-02

NAIC No. 16616

ARBITRATION AWARD

I, Mitchell Lustig, 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 08/01/2022
Declared closed by the arbitrator on 08/01/2022

Arthur Finkel, Esq. from Korsunskiy Legal Group P.C. participated in person for the Applicant

Racquel Williams, Esq. from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$5,107.83**, 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

In dispute is Applicant Lee Acupuncture PC's claim as the assignee of a 33-year-old male injured in a motor vehicle accident on November 28, 2018, for reimbursement in the sum of \$5,107.83 for acupuncture treatments, including cupping, performed by its licensed acupuncturist for the period of December 11, 2018 to May 21, 2019.

Respondent denied the claim based upon the grounds that the Assignor breached a condition precedent to coverage under the policy by failing to appear for examinations under oath (EUOs) scheduled for July 2, 2019 and September 4, 2019.

4. Findings, Conclusions, and Basis Therefor

It is well settled that a health care provider establishes its prima facie entitlement to No-Fault benefits as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of No-Fault benefits were overdue. Westchester Medical Center v. Lincoln General Insurance Company, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2nd Dept. 2009). I find that the Applicant has established a prima facie case.

WHETHER THE RESPONDENT HAS PROVEN THAT THE APPLICANT'S ASSIGNOR BREACHED A CONDITION PRECEDENT TO COVERGE UNDER THE POLICY BY FAILING TO APPEAR FOR EUOS.

The current insurance regulations provide for the scheduling of an examination under oath as additional verification if such a request is reasonably required. 11 NYCRR Section 65-1.1(b).

The request for an examination under oath constitutes a request for verification, whether it is made before a claim is submitted or after the submission of a claim as additional verification, and as such, is subject to the follow-up provisions of 11 NYCRR Section 65-3.6(b). See NY Ins. Gen Counsel Op No.: 5-2-21 (2005).

The appearance of the eligible injured person or his or her assignee is a condition precedent to an insurer's liability on a policy. See Mega Billing, Inc. v. State Farm

Fire & Casualty Company, 35 Misc.3d 145(A), 2012 N.Y. Slip Op. 51014(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); Viviane Etienne Medical Care, P.C v. State Farm Mutual Automobile Ins. Co., 35 Misc.3d 127(A), 2012 N.Y. Slip Op. 50589(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012).

Thus, it follows that if a provider's assignor fails to comply with an insurer's timely and valid request for an EUO, so long as the request strictly complies with the governing regulations, the insurer is entitled to dismissal of an action seeking no-fault benefits. See Dover Acupuncture, P.C. v. State Farm Mutual Auto Ins. Co., 28 Misc.3d 140(A), 2010 N.Y. Slip Op. 51605(U) (App. Term 1st Dept. 2010); Great Wall Acupuncture, P.C. v. New York Central Mutual Fire Insurance Company, 22 Misc.3d 136(A), 2009 N.Y. Slip Op. 50294(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

In order for Respondent to make a prima facie showing of its defense based upon an assignor's failure to appear at scheduled EUOs, it has to demonstrate that its initial and follow-up requests for verification were timely issued pursuant to 11 NYCRR Section 65-3.5(b) and 65-3.6(b) and establish that the assignor failed to appear at 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); Urban Radiology, P.C. v. Clarendon National Insurance Company, 31 Misc.3d 132(A), 2011 N.Y. Slip Op. 50601(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2011); Advanced Medical, P.C. v. Utica Mutual Insurance Company, 23 Misc.3d 141(A), 2009 N.Y. Slip Op. 51023(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

In the instant case, the record establishes that on February 14, 2019, either prior to or within 15 to 30 days after the Respondent's receipt of the bills in dispute, the Respondent wrote to the Assignor at the address listed on the Assignor's NF-3, and requested that he appear for an examination under oath scheduled for March 22, 2019 at the offices of American Transit Insurance Company, One Metro Tech Center, Brooklyn, New York on March 22, 2019.

The Appointment was mutually rescheduled by the parties.

Accordingly, on March 26, 2019, the Respondent's counsel wrote to the Assignor again rescheduling the EUO to May 8, 2019

The appointment was mutually rescheduled by the parties.

On May 14, 2019, the Respondent wrote to the Assignor again rescheduling the EUO to July 2, 2019, at which time the Assignor failed to appear.

On July 9, 2019, the Respondent wrote to the Assignor one final time rescheduling the EUO to September 4, 2019, at which time the Assignor once again failed to appear.

The EUO scheduling letters advised the Assignor that he would be reimbursed for any loss of earnings and reasonable travel expenses incurred and that his failure to appear for the EUOs could result in the denial of his claim.

In addition, the Respondent submitted Certificates of Mailing stamped by the USPS confirming that the EUO scheduling letters were properly addressed and mailed to the Assignor.

The Respondent has also submitted Statements on the Record dated July 2, 2019 and September 4, 2019, from its SIU Investigators, Lasil Williams and Kelley Minogue, attesting to the fact that the Assignor did not appear for the EUO's scheduled for July 2, 2019 and September 4, 2019.

I also find that the Respondent's denials with the exception of the Applicant's bill in the sum of \$139.99 for date of service May 21, 2019 were timely since they were issued on October 1, 2019, within 30-days after the Assignor's second no-show on September 4, 2019.

The Respondent's attorney maintained that the insurer's evidence established that the EUO requests were timely made, properly addressed and followed-up. Therefore, he contended that the Assignor's failure to attend the EUOs, in breach of a condition precedent to coverage, justified the denial of the claim. I agree with the Respondent's attorney with the exception of the Applicant's bill for date of service May 21, 2019 in the sum of \$139.99.

Since the applicant neither offered a valid excuse for its assignor's nonappearance and the EUO scheduling letters were timely issued and the claim was timely denied, I find that with the exception of the Applicant's bill in the sum of \$139.99 for date of service May 21, 2019, the Respondent has met its burden of proving that the Assignor failed to attend EUOs and breached a condition precedent to coverage so as to warrant denial of the claim. See Art of Healing Medicine, P.C. v. Utica Mutual Insurance Company, 2016 N.Y. Slip Op. 51610(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2016); Excel Imaging, P.C. v. Infinity Select Ins. Co., 46 Misc.3d 128(A), 2014 N.Y. Slip Op. 51796(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014); Morris Med, P.C. v Amex Assur. Co., 2012 N.Y. Slip Op. 52260(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012). See New Imaging Chiropractic PC v. American Transit Insurance Company, AAA Case No.: 17-20-1161-8125 (Arbitrator Antoinetta Russo, 9/11/2021); Allmed Merchandise & Trading Inc. v. American Transit Insurance Company, AAA Case No.: 17-20-1160-4534 (Arbitrator Antoinetta Russo, 6/12/2021).

However, with regard to the Applicant's bill in the sum of \$139.99 for date of service May 21, 2019, the record indicates that the Respondent received the Applicant's bill on June 20, 2019 but did not deny same until May 1, 2020. Since this is more than 30 days after the Respondent's receipt of the bill and more than 30 days after the second EUO no-show on September 4, 2019, I find that the Respondent's denial is untimely and thus, the Respondent is precluded from asserting its defense that the Assignor breached a condition precedent to coverage by failing to appear for duly scheduled EUOs. See Parsons Medical Supply, Inc. v. Utica Mutual Ins. Co., 38 Misc.3d 129(A), 2012 N.Y. Slip Op. 52397(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); Essential Acupuncture Services v. Amex Assurance Co., 37 Misc.3d 140(A), 2012 N.Y. Slip Op. 52259(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); Superior Oxygen & Ortho Supplies, Ltd. v. Auto One Ins. Co., 34 Misc.3d 154(A), 2012 N.Y. Slip Op. 50348(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); Arco Medical NY, P.C. v Lancer Insurance Company, 34 Misc.3d 134(A), 2011 N.Y. Slip Op. 52383(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2011).

However, I find that the correct fee schedule rate for date of service May 21, 2019 is \$111.56. (\$22.48 + \$19.54 + \$19.54 + \$50.00 = \$111.56). Accordingly, the Applicant is awarded the sum of \$111.56 for date of service May 21, 2019.

Based upon the foregoing, I find in favor of the Applicant in the sum of \$111.56.

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
	Lee Acupuncture PC	12/11/18 - 12/27/18	\$925.30	Denied
	Lee Acupuncture PC	01/03/19 - 01/09/19	\$528.30	Denied
	Lee Acupuncture PC	01/14/19 - 01/25/19	\$738.57	Denied
	Lee	02/20/19 -		

	Acupuncture PC	02/20/19	\$178.61	Denied
	Lee Acupuncture PC	02/27/19 - 03/06/19	\$559.96	Denied
	Lee Acupuncture PC	03/12/19 - 03/22/19	\$559.96	Denied
	Lee Acupuncture PC	03/27/19 - 04/03/19	\$458.59	Denied
	Lee Acupuncture PC	04/08/19 - 04/15/19	\$419.97	Denied
	Lee Acupuncture PC	04/23/19 - 04/23/19	\$139.99	Denied
	Lee Acupuncture PC	05/07/19 - 05/07/19	\$178.61	Denied
	Lee Acupuncture PC	05/10/19 - 05/13/19	\$279.98	Denied
	Lee Acupuncture PC	05/21/19 - 05/21/19	\$139.99	Awarded: \$111.56
Total			\$5,107.83	Awarded: \$111.56

B. The insurer shall also compute and pay the applicant interest set forth below. 12/22/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The insurer shall pay interest on the claim from December 22, 2020 the date that arbitration was requested, until such time as payment is made.

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). However, if the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation process, the attorney's fee shall be based upon the provisions of 11 NYCRR Section 65-4.6(b).

- 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 Nassau

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

08/03/2022
(Dated)

Mitchell Lustig

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:
74977513efa52f9c7014dfed23851f27

Electronically Signed

Your name: Mitchell Lustig
Signed on: 08/03/2022