American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Care Touch PT, PC (Applicant)	AAA Case No.	17-21-1213-8643
	Applicant's File No.	None
- and -	Insurer's Claim File No.	0605897510 2JH
	NAIC No.	19240
Allstate Indemnity Company (Respondent)		

ARBITRATION AWARD

I, Neal S Dobshinsky, 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: J Doe

1. Hearing(s) held on 08/10/2022
   Declared closed by the arbitrator on 08/10/2022

   Walter Pisary from The Law Offices of Hillary Blumenthal P.C. (Melville) participated in person for the Applicant

   Jamin Koo from Law Offices of John Trop participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$186.51**, 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

   On 11/30/20, J Doe saw a physical therapist at Applicant for an initial evaluation and treatment. Applicant sought payment for the services.

   Insurer denied Applicant's claim on the ground that Doe twice failed to appear for a properly noticed and scheduled examination under oath-on 3/3 and 4/12/21-which is a violation of the terms of the insurance policy and the applicable regulations.

   Was the denial of claim timely? Did Insurer establish its EUO no-show defense?

4. Findings, Conclusions, and Basis Therefor

I have read and considered the materials in the AAA ADR case file. I have heard and considered the arguments of counsel who appeared at the hearing virtually, via Zoom. I find as follows:

Background

It is claimed that on 11/5/20, J Doe, a male, then 27 years old, was injured in an accident involving a motor vehicle covered by a policy issued by Insurer. Doe sought care and treatment.

On 11/30/20, Doe saw Aboalyazid Ramadan, PT, a physical therapist with and owner of applicant Care Touch PT, for an initial evaluation. Doe complained of neck pain and back pain.

Ramadan examined Doe and diagnosed him with post traumatic injury. Ramadan's plan was to treat Doe 4 times per week for 4 to 6 weeks.

On that day, Ramadan treated Doe with electrical stimulation, hot/cold packs, massage therapy, and manual therapy.

Applicant's Claim and Insurer's Denial

Applicant, as Doe's assignee, contends that it timely submitted a claim to Insurer for no-fault benefits for payment for the 11/30/20 initial evaluation and treatment. Applicant's bill for those services totaled $186.51; it was dated 12/2/20.

Applicant's submission includes a 5/6/20 facsimile transmission report and cover letter to Insurer and supporting documents. According to the cover letter, Applicant originally submitted the claim to Insurer by mail timely, but Insurer had informed Applicant that the bill was not in Insurer's system.

Applicant's evidence that it timely mailed the bill to Insurer on 12/3/20 consists of a certificate of mailing (PS Form 3665), a priority mail label with USPS tracking number, a printout regarding the tracking of the package, and confirmation of delivery and pick up at a postal facility in Clinton, Iowa on 12/8/20.

A certificate of mailing by itself does not establish what, if anything, was in an envelope regardless of what may be written on the certificate. A certificate of mailing merely "provide[s] evidence that individual mailpieces have been presented to the USPS for mailing" on the postmarked date appearing on the certificate, but it is not evidence of what was mailed. See, Domestic Mail Manual, 503 Extra Services, 5.1.1 Certificates of Mailing. The certificate Applicant submitted, alone, is not proof of what, in fact, was mailed to Insurer.

"Generally, proof of proper mailing gives rise to a presumption that the item was received by the addressee. The presumption may be created by either proof of actual mailing (an affidavit) or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (internal citations omitted). *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 [2d Dept 2001].

Applicant has not submitted an affidavit of mailing or proof of a standard office practice or procedure designed to ensure that the bill was mailed to Insurer. Applicant has not raised the presumption that it timely mailed the bill to Insurer.

Nevertheless, Insurer considered Applicant's 5/6/20 submission without raising a timeliness defense. And on 5/17/21, Insurer timely denied the claim on the ground that Doe twice failed to appear for a properly noticed and scheduled examination under oath-on 3/3 and 4/12/21-which is a violation of the terms of the insurance policy and the applicable regulations.

At the hearing, Applicant argued that the denial of claim was untimely.

The only issues argued and submitted for determination were: Was the denial timely? Did Insurer establish its EUO no show defense? All other issues were waived.

Applicant's Prima Facie Case and the Timeliness of the Denial of Claim

An applicant for no-fault benefits establishes its prima facie case by submitting evidentiary proof that the prescribed statutory billing forms were received by the insurer, and that payment of all or a portion of the benefits is overdue. Insurance Law §5106 [a]; *Mary Immaculate Hosp. v Allstate Ins. Co.*, 5 AD3d 742, 743 [2d Dept 2004]; *Viviane Etienne Med. Care v Country-Wide Ins. Co.*, 25 NY3d 498, 507 [2015].

The regulations provide that "[w]ithin 30 calendar days after proof of claim is received, the insurer shall either pay or deny the claim in whole or in part." 11 NYCRR 65-3.8 (c). The 30-day period may be extended by the insurer's timely demand for further verification of the claim. 11 NYCRR 65-3.5 (b); 65-3.6 (b). Such demand must be made within 15 business days of receipt of the prescribed verification forms. 11 NYCRR 65-3.5 (b).

A no-fault insurer that "fails to pay or deny a claim within the requisite 30 days . . . is subject to 'substantial consequences,' namely, preclusion 'from asserting a defense against payment of the claim." *Viviane Etienne Med. Care v Country-Wide Ins. Co.*, 25 NY3d 498, 506 [2015].

Applicant argues that its evidence shows that Insurer received the subject bill on 12/8/20; that Insurer had 30 days to pay or deny it, and Insurer failed to do so. Accordingly, any defense is precluded.

However, for the reasons stated above, Applicant did not establish that Insurer received the bill on 12/8/20. So, the denial dated 5/17/21, based on receipt of the bill on 5/6/21, was timely.

No-Fault and Examinations Under Oath

Under the regulations, an insurer is entitled to receive all items necessary to verify a claim directly from the parties from whom such verification is requested. EUOs are one of the ways an insurer can obtain verification. An insurer has the right to require the eligible injured person or that person's assignee or representative to submit to EUOs as may reasonably be required. 11 NYCRR §65-1.1, 11 NYCRR 65-3.5.

The Consequences to Applicant of Doe's Failure to Appear

In the no-fault context, medical providers derive their interests entirely from the Assignment of Benefits executed by the injured person (the assignor). A provider/ applicant for payment is the assignee of the assignor. As such, the provider "stands in the shoes" of the injured person and acquires no greater rights than the injured person has. *Long Island Radiology v Allstate Ins. Co.*, 36 AD3d 763, 765 [2d Dept 2007]. If Doe failed to appear twice as Insurer contends, claims by or on behalf of Doe must be denied.

Insurer's Efforts to Take the Examination of Doe Under Oath and Insurer's Defense

Insurer contends that by letter dated 2/2/21 its counsel notified Doe that Insurer required Doe to attend an EUO that would be conducted remotely on 3/3/21 at 1:00pm. Doe was asked to mail various documents to counsel before 3/2/21, including the police accident report, medical records and reports, and others. Doe was warned that failure to submit to the EUO will be considered a breach of the policy of insurance and may result in the denial of all claims. Doe was advised that he would be reimbursed for any provable lost earnings and reasonable transportation expenses. Counsel added that the request for the EUO should not be construed as an admission of liability under the policy nor a waiver of any of its conditions or terms, which Insurer reserved.

On 3/9/21, Insurer's counsel notified Doe that he had not appeared for the EUO scheduled for 3/3, and that the EUO is rescheduled for 4/12/21 at 1:00pm. The rest of the letter was otherwise substantially the same as the 2/2 letter.

To establish that it gave notice of the EUO to Doe, Insurer submits certificates of mailing, one postmarked 2/3/21 and the other postmarked 3/9/21. But Insurer does not submit proof of actual mailing (an affidavit) or proof of a standard office practice or procedure designed to ensure that such EUO scheduling notices are properly addressed and mailed.

Without sufficient credible evidence that Insurer properly noticed the EUO, Insurer cannot and has not established its EUO no-show defense.

That Insurer has submitted two certified statements on the record by its counsel attesting to Doe's failure to appear for the EUO on 3/3 and 4/12/21 is of no moment.

Conclusion

Insurer failed to establish its EUO no-show defense.

Based on the parties' submissions, their arguments, the law, the regulations, and the weight of the credible evidence, I conclude that Applicant is entitled to payment.

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**
	Care Touch PT, PC	**11/30/20 - 11/30/20**	**$186.51**	**Awarded: $186.51**
Total			**$186.51**	**Awarded: $186.51**

B. The insurer shall also compute and pay the applicant interest set forth below. 08/03/2021 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Insurer shall compute and pay interest from the accrual date noted above-the date on which Applicant requested arbitration by filing with the AAA-at a rate of 2% per month, simple interest, calculated on a pro-rata basis using a 30-day month and ending with the date of payment subject to the provisions of 11 NYCRR 65-3.9.

C. Attorney's Fees

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

Insurer shall pay Applicant's attorney a fee in an amount equal to 20% of the total amount of the benefits plus the interest awarded in this arbitration, subject to the provisions of 11 NYCRR 65-4.6.

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

09/09/2022
(Dated)

Neal S Dobshinsky

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:
b48113b0e578fa5a3dc559969838808f

Electronically Signed

Your name: Neal S Dobshinsky
Signed on: 09/09/2022