

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Pristine Rx Corp
(Applicant)

- and -

State Farm Fire & Casualty Company
(Respondent)

AAA Case No. 17-22-1247-3177

Applicant's File No. 154.877

Insurer's Claim File No. 52-25N3-76P

NAIC No. 25143

ARBITRATION AWARD

I, Nada Saxon, 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 05/23/2023
Declared closed by the arbitrator on 05/23/2023

George Malonoukos from Tsirelman Law Firm PLLC participated virtually for the Applicant

Barbara Litcher-Butler from Bruno Gerbino & Soriano LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,183.20**, 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 (VR) was a 30-year-old male involved in a motor vehicle accident on 10/1/21.

Applicant seeks payment for Lidocaine, and Cyclobenzaprine provided on 1/20/22.

Respondent timely denied payment based its assertion Assignor breached a condition precedent to coverage by failing to appear for an examination under oath (EUO) on 12/10/21 and 1/18/22.

The issue is whether Respondent has established its EUO No-Show defense.

4. Findings, Conclusions, and Basis Therefor

This case was conducted using the documents submitted by the parties in the ADR Center, maintained by the American Arbitration Association, and the oral arguments of the parties. Any documents in the ADR Center are hereby incorporated into this hearing. I have reviewed all the relevant documents. No witnesses testified under oath at the hearing.

11 NYCRR 65-4.5 (o) (1) (Regulation 68-D), reads as follows: The arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations.

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.

EUO No-Show

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

In order for Respondent to make a showing of its defense based upon a failure to appear for scheduled EUOs, Respondent must demonstrate that its initial and follow-up EUO scheduling letters were timely mailed (see Insurance Department Regulations [11 NYCRR] §§ 65-3.5 [b]; 65-3.6 [b]) and establish, through an affidavit by one with personal knowledge, that the Applicant/ Provider failed to appear for the EUOs. See Essential Acupuncture Services, P.C. v. Ameriprise Auto & Home Ins. Co., 2012 N.Y. Slip Op. 52404(U) (App. Term 2nd, 11th and 13 Jud. Dists. 2012).

Respondent cites to my prior award addressing the same defense, (Big Apple Medical Services PC v. State Farm Mutual Automobile Insurance Company, AAA: 17-22-1239-7481, 1/18/23):

In support of its defense, Respondent submits copies of its EUO scheduling letters dated 11/16/21, requesting Assignor appear for an EUO on 12/10/21, and

12/13/21, requesting Assignor appear for an EUO on 1/18/22. Both EUO request letters contain the requisite reimbursement language and are addressed to Assignor and his attorney, and are timely in relation to this claim.

Furthermore, Respondent submits an affidavit of mailing by Richard Aitken, dated 4/6/22, establishing proof the scheduling letters were mailed based on standard business procedure. Respondent also submits transcripts of the proceedings establishing Assignor did not appear for the EUO at the designated date, time and place on 12/10/21 and 1/18/22. Mr. Aitken was present for the EUOs and indicated his office had attempted to confirm the EUO with Assignor and her attorney the prior business day to no avail. Nonetheless, Respondent was prepared to proceed on the scheduled date/time and Assignor did not appear. Respondent's evidence is sufficient to establish its initial and follow-up EUO scheduling letters were timely mailed and the Assignor failed to appear for the EUOs.

In addition to the scheduling letters, Respondent submits letters dated 12/2/21 and 1/5/22 issued to Applicant and its attorney in response to this claim advising Applicant the claim was delayed pending Assignor's EUO. Applicant argues Respondent does not establish these letters were mailed to Applicant, as such, its defense should fail. I am not persuaded by Applicant's argument. See 11 NYCRR 65-4.5 (o) (1). This argument alone does not negate Respondent's defense the claim was timely tolled for an EUO, and Assignor failed to appear for that EUO. Respondent presents these letters directed to Applicant, and its attorney, within Respondent's original defense packet putting Applicant on notice of its defense to this claim. Applicant fails to submit any evidence the requests were not received and/or otherwise refuting Respondent's EUO No-Show defense.

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Respondent submits the same evidence in this matter. I continue to find the evidence sufficient to meet Respondent's burden. Respondent has established its EUO no-show defense. Applicant does not submit evidence sufficient to refute Respondent's defense.

Accordingly, Applicant's claims are denied.

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 claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of CA

SS :

County of San Diego

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

05/30/2023
(Dated)

Nada Saxon

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:

1a581b3df1844215292b1b3058b630d4

Electronically Signed

Your name: Nada Saxon
Signed on: 05/30/2023