

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Far Rockaway Medical PC
(Applicant)

- and -

State Farm Mutual Automobile Insurance
Company
(Respondent)

AAA Case No. 17-22-1278-5869

Applicant's File No. 170.610

Insurer's Claim File No. 4036V084D

NAIC No. 25178

ARBITRATION AWARD

I,Carolynn Terrell-Nieves, 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: Claimant

1. Hearing(s) held on 08/02/2023
Declared closed by the arbitrator on 08/02/2023

Vincent Ku,Esq., from Tsirelman Law Firm PLLC participated virtually for the Applicant

Christine Digregorio,Esq., from Rivkin & Radler LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$483.88**, 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 properly denied Applicant's claims for reimbursement based on lack of verification under the "120 day rule." Respondent contends that Applicant's claims should be denied due to its failure to fully comply with State Farm's requests for post-examination under oath ("EUO") verification, pursuant to 11 N.Y.C.R.R. § 65-3.5(o). Specifically, Applicant failed to provide all the requested verification under its control or possession within 120-days of State Farm's original request or provide a reasonable justification for its failure to provide the information. See 11 N.Y.C.R.R. § 65-3.5(o). The remainder of Applicant's claims should be denied

because Applicant failed to timely submit its claims and the time to submit such proof has expired pursuant to 11 N.Y.C.R.R. Section 65-4.2(3). This matter arises out of an accident that is alleged to have occurred on July 16th, 2022. Applicant seeks reimbursement in the aggregate amount of \$483.88 for DOS 8/18/22. Treatment was denied on the 120 day rule.

Applicant billed Respondent for its services and Respondent made initial and follow-up requests for additional verification. Ultimately, Respondent denied Applicant's claims more than 120 days after the initial requests, asserting that Applicant failed to provide all the requested verification under its control or possession within 120 days.

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 counsel, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

4. Findings, Conclusions, and Basis Therefor

Legal Framework

Verification/120 day rule 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).

The Fourth Amendment to 11 NYCRR 65-3, which is applicable to claims for medical services rendered on or after April 1, 2013, introduced the following provision, articulated under §65-3.5(o):

An Applicant from whom verification is requested shall, within 120 calendar days from the date of the initial request for verification, submit all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply. The insurer shall advise the applicant in the verification request that the insurer may deny the claim if the applicant does not provide within 120 calendar

days from the date of the initial request either all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply.

11 NYCRR §65-3.5(o). In relation to this new provision, 11 NYCRR §65-3.8(b)(3) was amended so as to confer upon the insurer the right to deny a claim for non-compliance with §65-3.5(o). In pertinent part, the amendment to §65-3.8(b)(3) states the following:

[A]n insurer may issue a denial if, more than 120 calendar days after the initial request for verification, the applicant has not submitted all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply, provided that the verification request so advised the applicant as required in section 65-3.5(o).

The parties' obligations are centered on good faith and common sense. Any questions concerning a communication should be addressed by further communication, not inaction. *Dilon Medical Supply Corp. v. Travelers Ins. Co.*, 7 Misc3d 927, 796 N.Y.S.2d 872 (Civ. Ct. Kings Co. 2005). Upon receipt of a verification request, it is incumbent upon the Applicant to respond. (*Dilon Medical Supply Corp v. Travelers Insurance Company* , 7 Misc. 3d 927, 796 N.Y.S.2d 872 (N.Y. Civ Ct. Kings County 2005); *Westchester County Medical Center v. N.Y. Central Mutual Fire Ins. Co.*, 262 A.D.2d 553, 692 N.Y.S.2d 665 (2nd Dep't1999); *Canarsie Chiropractic, P.C. v. State Farm Mutual Automobile Ins. Co.*, 27 Misc. 3d 1228(A), 2010 NY Slip Op 50950(U) (N.Y. Civ Ct. Kings County 2010)). On the other hand, it has been held that a response to a verification request that is "arguably responsive" places the burden to take further action upon the respondent. See *All Health Medical Care, P.C. v. Gov't Empls. Ins, Co.*, 2 Misc.3d 907 (N.Y. City Civ. Ct. 2004); see also, *Media Neurology, P.C. v. Countrywide Ins. Co.*, 21 Misc.3d 1101 (N.Y. City Civ. Ct. 2005). The Court, in *Canarsie Chiropractic, P.C. v. State Farm Mut. Auto. Ins. Co.*, 911 N.Y.S.2d 691 (Table), 27 Misc. 3d 1228(A)(Civ. Ct. Kings Cty. 2010), expressed, "[N]either party may ignore communications from the other without risking its chance to prevail in the matter." *Id.*

It should also be noted that "[i]f the provider objects to the request for verification, then the issue of whether the requested verification material and the objection were proper are preserved become questions of fact for the trier of fact. If the insurer can establish it had a reasonable, good faith, factual basis for requesting the verification, then the failure of the claimant-provider to furnish the material will result in the dismissal of the action. If the insurer cannot establish a reasonable, good faith, factual basis for requesting the verification, then the insurer will be required to pay the claim." *Victory Medical Diagnostics, PC v. Nationwide Property and Casualty Ins. Co.*, 36 Misc.3d 568, 576, 949 N.Y.S.2d 855, 862 (Dist. Ct., Nassau Co., 2012).

Analysis -

Verification/120 day rule DOS 8/18/22 in the amount of \$483.88. Denied by Respondent based on Pursuant to 11 NYCRR 65-3.5(o) FAR ROCKAWAY MEDICAL PC has failed to submit verification documentation requested on February 7th, 2022 March 15th, 2022 and June 20th, 2022 for the referenced claims within the prescribed

120 day period, therefore, benefits are denied. Unless otherwise noted, all fees should be in accordance with the medical fee schedule as per the rules and regulations authorized by the State of New York, Department of Insurance, 28.

Jean Pierre-Barakat, M.D. ("Barakat") testified at the EUO on behalf of Far Rockaway, but his testimony did not alleviate State Farm's concerns and instead only reinforced the notion that State Farm had a reasonable basis to request the EUO.

After the EUO, based on the numerous concerns raised by the EUO testimony and in order to confirm whether Far Rockaway is in compliance with New York law, State Farm sought verification in the form of certain documents in order to address the above-referenced concerns. The additional verification was necessary based upon the testimony of Barakat, in order to confirm Barakat's testimony, and/or to resolve any questions which Barakat was not able to answer with sufficient detail during his testimony. verification in the form of certain documents in order to address the above-referenced concerns. The additional verification was necessary based upon the testimony of Barakat, in order to confirm Barakat's testimony, and/or to resolve any questions which Barakat was not able to answer with sufficient detail during his testimony.

Specifically, by letters dated February 7, 2022, and March 15, 2022, and June 20th, 2022 State Farm, via it's counsel Rivkin Radler, LLP ("Rivkin Radler"), sought post-EUO verification from Far Rockaway. Specifically, Rivkin Radler requested:

- i. Each lease agreement, including any schedules, attachments, and exhibits thereto, and each proof of payment made thereunder, under which Far Rockaway was permitted to operate at the following clinic locations during the time period of January 1, 2021 through the present: 4014A Boston Road, Bronx, New York; 1 Fulton Avenue, Hempstead, New York; 332 East 149th Street, Bronx, New York; and 62-69 99th Street, Rego Park, New York.
- ii. Documents relating to the income and expenses of Far Rockaway, including bank statements, cancelled checks (front and back of checks), deposit records, electronic transfer records, and the excel spreadsheet Dr. Barakat testified that he keeps of all Far Rockaway's financial transactions for the period of January 1, 2021 through the present;
- iii. Far Rockaway's quarterly payroll tax returns (IRS Form 941 and NYS Form 45), including all attachments and schedules for the time period of January 1, 2021 through the present;
- iv. All 1099, W2 and/or K-1 forms that were issued to any individual or entity who performed work for, on behalf of, or for the benefit of Far Rockaway during the time period of January 1, 2021 through the present, including all such documents issued by Far Rockaway and/or any other entity owned by Dr. Barakat, including, but not limited to, Bronx County Medical Care, P.C.;
- v. v. Dr. Barakat's curriculum vitae;

- vi. All agreements, contracts, and corresponding invoices and/or lists of receivables for the time period of January 1, 2021 through the present, regarding each company that provided funding, financing, or factoring services to Far Rockaway (i.e., a company that provided monies and/or any other financial benefit to Far Rockaway in exchange for a percentage of Far Rockaway's receivables and/or collections);
- vii. All agreements, invoices, and proof of each payments made thereunder (including front and back of canceled checks) for the time period of January 1, 2021 through the present, regarding each billing company that rendered services on Far Rockaway's behalf, including but not limited to "Advanced Collections";
- viii. All agreements, invoices, and proof of each payments made thereunder (including front and back of canceled checks) for the time period of January 1, 2021 through the present, regarding each transportation company that rendered services for the benefit of Far Rockaway's patients, including the transportation company that provided services to Far Rockaway's patients at 4014A Boston Road, Bronx, New York and which was paid by another entity owned by Dr. Barakat, Bronx County Medical Care, P.C.;
- ix. All publications, articles, studies or other materials that support the view that topical lidocaine 5% is more effective at treating the conditions for which it is prescribed than NSAIDs or topical lidocaine at lower concentrations; and
- x. All publications, articles, studies or other materials that Dr. Barakat reviewed regarding the clinical efficacy of the following durable medical equipment devices before prescribing them to patients: (i) Pain Away Home Care Laser Device; and (ii) Ultralux.

To date, Applicant has not provided all of the verification that was timely demanded in connection with its post-EUO review and analysis of the claim at issue as required by 11 N.Y.C.R.R. § 65-1.1 and § 65-3.5. Specifically, Far Rockaway Medical has refused to provide the verification outlines above. State Farm requested the additional verification to fully and completely verify the claim. Since the EUO testimony supported State Farm's initial concerns, and in fact, raised numerous further concerns, the verification was necessary to verify the veracity of the claim at issue.

Respondent contends that Applicant's claims should be dismissed as Applicant has failed to provide State Farm with all post EUO verification requested. In this regard, State Farm acknowledges Applicant appeared for an EUO on January 28, 2022. Thereafter, State Farm timely issued post-EUO requests. State Farm acknowledges that Far Rockaway provided some of the documents requested but failed to provide others. Applicant failed to provide all the requested post-EUO verification. I find State Farm timely and properly denied the bills. Applicants claim is hereby 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 NY

SS :

County of Nassau

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

08/28/2023

(Dated)

Carolynn Terrell-Nieves

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:
b2762ea257797a007b8e0fc173a76ade

Electronically Signed

Your name: Carolynn Terrell-Nieves
Signed on: 08/28/2023