

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Rockaways ASC Development LLC d/b/a
ASC of Rockaway Beach
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No.	17-23-1287-9076
Applicant's File No.	TLD23-1020098
Insurer's Claim File No.	0670099406 2SJ
NAIC No.	29688

ARBITRATION AWARD

I, Anthony Kobets, 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 10/04/2023
Declared closed by the arbitrator on 10/04/2023

Jodi Ann Chambers, Esq. from Thwaites, Lundgren & D'Arcy Esqs participated virtually for the Applicant

Jasmin Koo, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,027.71**, 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 the Applicant's bill totaling \$1027.71 for a pain management injection performed on the patient (LM) on 9/16/22 by the Applicant as a result of injuries sustained in a motor vehicle accident on May 18, 2022.

Respondent denied the claims based on the grounds that the Assignor failed to appear for two scheduled Examinations Under Oath (EUOs). Was the Applicant entitled to reimbursement for the services provided to the EIP?

4. Findings, Conclusions, and Basis Therefor

At the hearing, the parties' representatives agreed that the EUO no show was the sole issue in dispute herein.

The EIP (LM) was a 34-year old female passenger who was involved in a motor vehicle accident on May 18, 2022. Thereafter on 9/16/22, the patient underwent a pain management injection administered by the Applicant. Applicant seeks no-fault reimbursement for these services.

The record indicated that the bill in dispute herein was timely denied by the Respondent based on the Assignor's alleged failure to appear at the EUOs scheduled for 9/27/22 and 10/18/22.

"Pursuant to the statutory and regulatory framework governing the payment of no-fault automobile benefits, insurance companies are required to either pay or deny a claim for benefits within 30 days of receipt of the claim (see Insurance Law § 5106[a]; 11 NYCRR 65-3.8[c]). However, the 30-day period may be extended where the insurer makes a request for additional information within 15 business days of its receipt of the claim (see 11 NYCRR 65-3.5[b]; Nyack Hosp. v. General Motors Acceptance Corp., 27 A.D.3d 96, 100, 808 N.Y.S.2d 399; Hospital for Joint Diseases v. ELRAC, Inc., 11 A.D.3d 432, 434, 783 N.Y.S.2d 612; New York & Presbyt. Hosp. v. Progressive Cas. Ins. Co., 5 A.D.3d 568, 569-570, 774 N.Y.S.2d 72), and an insurer is not obligated to pay or deny a claim until all demanded verification is provided (see, Nyack Hosp. v. General Motors Acceptance Corp., supra at 100-101, 808 N.Y.S.2d 399; Central Suffolk Hosp. v. New York Cent. Mut. Fire Ins. Co., 24 A.D.3d 492, 493, 807 N.Y.S.2d 382, lv. denied 7 N.Y.3d 704, 819 N.Y.S.2d 871, 853 N.E.2d 242 [Jun. 29, 2006])." New York and Presbyterian Hosp. v. Allstate Ins. Co., 31 A.D.3d 512, 513, 818 N.Y.S.2d 583, 584 (2d Dept. 2006).

11 NYCRR §65-3.5 of the Regulations Implementing the Comprehensive Motor Vehicle Insurance Reparations Act, sets forth, in relevant part, as follows:

(a) Within 10 business days after receipt of the completed application for motor vehicle no-fault benefits (NYS Form N-F 2) or other substantially equivalent written notice, the insurer shall forward, to the parties required to complete them, those prescribed verification forms it will require prior to payment of the initial claim.

(b) Subsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms. Any requests by an insurer for additional verification need not be made on any prescribed or particular form. If a claim is received by an insurer at an address other than the proper claims processing office, the 15 business day period for requesting additional verification shall commence on the date the claim is received at the proper claims

processing office. In such event, the date deemed to constitute receipt of claim at the proper claim processing office shall not exceed 10 business days after receipt at the incorrect office.

(c) The insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was requested.

(d) If the additional verification required by the insurer is a medical examination, the insurer shall schedule the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms.

(e) All examinations under oath and medical examinations requested by the insurer shall be held at a place and time reasonably convenient to the applicant and medical examinations shall be conducted in a facility properly equipped for the performance of the medical examination. The insurer shall inform the applicant at the time the examination is scheduled that the applicant will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with the request. When an insurer requires an examination under oath of an applicant to establish proof of claim, such requirement must be based upon the application of objective standards so that there is specific objective justification supporting the use of such examination. Insurer standards shall be available for review by Department examiners.

New York State Regulation 68A, §65-1.1, Conditions, Proof of Claim, in relevant part, states that "[u]pon request by the Company, the eligible injured person, that person's assignee or that person's representative shall: (a) Execute a written proof of claim under oath; (b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same...; and (d) Provide any other pertinent information that may assist the company in determining the amount due and payable".

Furthermore, the insurance regulations make provisions for the scheduling of an EUO as additional verification if such a request is reasonably required, see 11 NYCRR 65- 1.1 (b), and examination requests are not limited solely to the injured party but may also include providers. See Unitrin Advantage Ins. Co. v. Carothers, 17 Misc.3d 1121(A), (Sup. Ct. N.Y. Co. ,2007); V.S. Medical P.C. v. State Farm Ins. Co., Index No. 26604/2002 (Sup Ct, Queens Co, 2003).

The evidence herein demonstrated that the Respondent forwarded EUO scheduling letters to the Assignor scheduling an EUO for 9/27/22 and 10/18/22. In support, Respondent has submitted the EUO scheduling letters; an Affirmation from Christopher O'Dell, Esq. memorializing the EUO no shows; and Affidavits of service by mail establishing the mailing of the scheduling letters. Applicant's counsel argued that the Respondent failed to meet their burden regarding the Assignor's failure to appear for the scheduled EUOs.

In order to support a defense based upon an assignor's alleged failure to appear for an Examination Under Oath ("EUO"), the burden is on respondent to demonstrate *prima facie*: 1) The EUO requests were actually mailed; and 2) the assignor failed to

appear for the scheduled EUOs. See generally, Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co., 35 A.D.2d 720 (2nd Dept. 2006).

11 NYCRR 65-3.5 (c) states in no uncertain terms 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 verification can be in the form of an Independent Medical Examination (IME) or an Examination Under Oath (EUO)."

11 NYCRR 65-3.5 (e) Claim procedure mandates the following "All examinations under oath and medical examinations requested by the insurer shall be held at a place and time reasonably convenient to the applicant... The insurer shall inform the applicant at the time the examination is scheduled that the applicant will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with the request. When an insurer requires an examination under oath of an applicant as an additional verification to establish proof of claim, such requirement must be based upon the application of objective standards so that there is a specific objective justification supporting the use of such examination. Insurer standards shall be available for review by Department examiners." See, NY Ins Gen Counsel Op No. 05-02-215 (2005).

Attendance at an EUO is a condition precedent to coverage. A New York no-fault insurance policy, issued after 2002 includes a mandatory policy endorsement (11 NYCRR Section 65-1.1) which states that "No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage." Subsection ii lists five obligations that are conditions precedent, one of which is an examination under oath. The requirement to attend an EUO was reinforced by the court in the Appellate Division 2d Department holding in the matter of Stephen Fogel Psychological PC v. Progressive Ins. Co., *infra*.

The failure by an assignor to attend EUOs constitutes a failure to comply with a condition precedent to coverage, mandating denial of a claim for no-fault compensation by an assignee-medical provider. Inwood Hill Medical, P.C. v. General Assurance Co., 10 Misc.3d 18, 805 N.Y.S.2d 772 (App. Term 1st Dept. 2005). A medical provider's claim should be rejected where its assignor has failed to attend an EUO scheduled as a verification request. Ocean Diagnostic Imaging, P.C. v. Nationwide Mut. Ins. Co., 11 Misc.3d 135(A), 816 N.Y.S.2d 698, 2006 N.Y. Slip Op. 50477(U). Where an assignor fails to attend an EUO scheduled after submission of a claim, the claim is properly denied by the insurer. Ocean Diagnostic Imaging P.C. v. State Farm Mutual Automobile Ins. Co., 5 Misc.3d 563, 785 N.Y.S.2d 652 (Civ. Ct. Kings Co. 2004).

Accordingly, after reviewing the entire record and after careful consideration of the parties' arguments, I sustain the EUO no show defense asserted in the denial and deny Applicant's \$1027.71 claim for date of service 9/16/22. This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of the hearing.

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

10/26/2023
(Dated)

Anthony Kobets

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:
af0152676bca08baa757e19566bdca8e

Electronically Signed

Your name: Anthony Kobets
Signed on: 10/26/2023