

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Glenmore Medical PC
(Applicant)

- and -

Ace American Insurance Company
(Respondent)

AAA Case No.	17-23-1286-3079
Applicant's File No.	BT22-187907
Insurer's Claim File No.	1M01M012362998A
NAIC No.	22667

ARBITRATION AWARD

I, Nancy Kramer Avalone, 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 HDO

1. Hearing(s) held on 10/31/2023
Declared closed by the arbitrator on 10/31/2023

Erica Avella, Esq. from The Tadchiev Law Firm, P.C. participated virtually for the Applicant

Tori Buttrum, Esq. from Robyn M. Brilliant, P.C. participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$8,620.77**, 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 instant dispute arose from a motor vehicle accident that occurred on 03/24/2022 involving Assignor HDO, a 48-year old male, as a passenger. Applicant seeks reimbursement for arthroscopic surgery provided to Assignor HDO on 06/18/2022. Respondent asserted that the claim was properly denied as Assignor HDO failed to appear at Independent Medical Examinations ("IMEs") scheduled for 05/25/2022 and 09/22/2022, a policy violation. A general denial was submitted. Applicant asserted that the IMEs were untimely scheduled and therefore the denial of claim forms were nullities.

Additionally, Respondent submitted a specific denial form alleging that the Applicant had not responded to verification requests within 120-days of the issuance of the initial request.

The issues presented are (1) whether the Respondent established that the Assignor failed to appear at properly scheduled IMEs; (2) whether the Respondent established that the Applicant failed to respond to verification requests within 120-days of the issuance of the initial request.

4. Findings, Conclusions, and Basis Therefor

The instant matter was decided based upon the submissions of the parties as contained in the electronic file ("E-file") maintained by the American Arbitration Association (MODRIA), and the oral arguments of the parties' representatives. The hearing was held via a web-based video conferencing platform (ZOOM). I have reviewed the documents contained in the E-file, heard the arguments of the parties, and make my decision in reliance thereon.

Pursuant to 11 NYCRR § 65-4.5(o)(1), an arbitrator shall be the judge of the relevance and materiality of the evidence offered. 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.

An Applicant establishes its *prima facie* entitlement to reimbursement by proof that it submitted its claim, setting forth the fact and amounts of the losses sustained, and that payment of no-fault benefits was overdue. Insurance Law § 5106(a); (*Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 A.D.3d 742, 774 N.Y.S.2d 564 [App. Div. 2004]); (*Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 2015 NY Slip Op 04787, 25 N.Y.3d 498, 14 N.Y.S.3d 283, 35 N.E.3d 451 [2015]). After reviewing the Records, including the bills with proof of mailing, I find that Applicant established its *prima facie* case of entitlement to No-Fault compensation.

Applicant submitted a copy of the bill, medical records, operative report, interoperative photos, proof of mailing and W-9 form.

The Respondent submitted the NF-2 application for benefits, a general denial of claim form dated 12/06/2022, IME request letters, verification request letters, and affidavit.

Legal Analysis: Non-Appearance at Independent Medical Examination.

Pursuant to both the Insurance Law and the Regulations promulgated by the Superintendent of Insurance, an insurer is required to either pay or deny a claim for no-fault automobile insurance benefits within 30 days from the date an applicant supplies proof of claim (*see*, Insurance Law § 5106[a]; 11 NYCRR §65.15[g][3]). Failure to pay benefits within the 30-day requirement renders benefits "overdue."

11 NYCRR §65-3.5(d) states that "[I]f 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.

Regulation 11 NYCRR § 65-3.8(b) (1) unequivocally states that the Respondent is not permitted to interrupt payment of benefits pending the conduct of a medical examination. Accordingly, I find the verification requests were improper. Respondent's time to pay or deny the claim is not extended by Respondent seeking to conduct a medical examination.

As stated in 11 NYCRR § 65-3.8 (b) (1):

An insurer may not interrupt the payment of benefits for any element of basic or extended economic loss pending the administering of a medical examination, unless the applicant or the applicant's attorney is responsible for the delay or inability to schedule the examination, in which case any denial of payment shall be made only in accordance with policy provisions on a prescribed denial of claim form (NYS Form N-F 10).

See also, (W.H.O. Acupuncture, P.C. v Travelers Home & Mar. Ins. Co., 36 Misc 3d 152[A], 2012 NY Slip Op 51707[U] [App Term 2012]); (Am. Tr. Ins. Co. v Jorge, 2014 NY Slip Op 30720[U] [Sup Ct, NY County 2014]).

Findings of Fact:

The Applicant established proof of mailing the claims on July 13, 2022. Applicant submitted a mailing log from the law firm's office for the claim on July 13, 2022..*See, (Residential Holding Corp. v Scottsdale Ins. Co., 286 AD2d 679 [2001])* (holding that a provider may demonstrate that it timely mailed the item(s) at issue based upon its standard office practice or procedure designed to ensure that items are properly addressed and mailed.)

Per Respondent's submission, the received Applicant's claim on 07/18/2022. The first IME notice was dated 08/05/2022 and scheduled the IME for 08/25/2022, which is more than thirty days (30) after the claims were received.

Pursuant to both the Insurance Law and the Regulations promulgated by the Superintendent of Insurance, an insurer is required to either pay or deny a claim for no-fault automobile insurance benefits within 30 days from the date an applicant supplies proof of claim (see, Insurance Law § 5106[a]; 11 NYCRR §65.15[g][3]). Failure to pay benefits within the 30-day requirement renders benefits "overdue."

The Respondent may not interrupt the payment of benefits pending the administering of a medical examination. [(11 NYCRR § 65-3.8(b)(1)]. The claim was received on 09/10/15, but an IME notice was not sent to the Assignor until 01/19/16for an IME

scheduled for 02/03/16, which is way beyond 30 days after the receipt of the claim. A denial of claim was issued on 02/19/16, more than 30 days after the claim was received, and after the first IME was scheduled.

Accordingly, I find the verification/IME requests were improper. Respondent's time to pay or deny the claim is not extended by Respondent seeking to conduct a medical examination. This defense fails.

Verification Issue.

Respondent denied the claim stating that it had not received verification responses from the Applicant, and it was more than 120-calendar days since the initial request pursuant to 11 NYCRR §65-3.8 (b) (3).

The No-Fault regulations contained specific parameters for the issuance of verification requests. The initial request shall be made within 15 business days of receipt of receipt of the prescribed verification form. (See 11 NYCRR § 65-3.5[b]). When no response to the original request for verification is received within 30 days, or the response to the verification request is incomplete, then the insurer, within 10 calendar days after the expiration of that 30-day period, must follow up with a second request for verification. (See 11 NYCRR §65-3.5; see also 11 NYCRR §65-3.6 [b]).

If there is no response to the second or follow up request for verification, the time in which the insurer must decide whether to pay or deny the claim is indefinitely tolled. *Id.* Therefore, when a no-fault medical service provider fails to respond to the requests for verification the claim is premature and should be denied without prejudice.

As stated, an 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.

Where a No-Fault insurer is relying on the defense that an action is premature because verification is outstanding, it is the insurer's prima facie burden at trial to demonstrate (1) that verification requests were timely mailed and (2) that it did not receive the requested verification; if the insurer establishes that it did not receive the requested verification, then the burden shifts to the claimant to prove that it had provided responses. (*Is. Life Chiropractic, P.C. v Travelers Ins. Co.*, 64 Misc 3d 143[A], 2019 NY Slip Op 51273[U] [App Term 2019]) he same would apply when an insurer issues a 120-day denial of claim for non-receipt of requested verification.

Findings of fact.

The Respondent has submitted the affidavit of Shirleyn Lieu, No-Fault Claims Examiner for Respondent who averred that verification responses were not received. In addition, the affidavit advised of the standard office procedure for mailing verification requests on

07/20/2022 and 08/22/2022. Thus, I find that the Respondent has met its burden of proof with respect to this defense. No objections were raised with respect to the timing of the verification requests.

As there were no verification responses submitted nor a reasonable explanation for the failure to provide responses, the Respondent's denial is sustained, and the claim is denied. *This award is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.*

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

11/11/2023
(Dated)

Nancy Kramer Avalone

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:
8ad71af14385675f9416f204ebc8170c

Electronically Signed

Your name: Nancy Kramer Avalone
Signed on: 11/11/2023