

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Donald C Wallerson MD PLLC
(Applicant)

- and -

Nationwide General Insurance Company
(Respondent)

AAA Case No. 17-22-1269-1499

Applicant's File No. MB-88624,
MB-88623

Insurer's Claim File No. 700498-GM

NAIC No. 23760

ARBITRATION AWARD

I, Inez Beyrer, 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: patient/driver and patient/passenger

1. Hearing(s) held on 10/17/2023
Declared closed by the arbitrator on 10/17/2023

Mark Bratkovsky, Esq. from Law Offices of Mark Bratkovsky PC. participated virtually for the Applicant

Brian Kaufman, Esq. from Hollander Legal Group PC participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$13,281.00**, 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

There are two patients here; the first was a 25-year-old male driver of a motor vehicle and the second was a 21-year-old female passenger in that vehicle, who were involved in an accident on December 4, 2021.

Applicant seeks reimbursement for shockwave treatment performed on six separate dates for the driver, and three dates of shockwave treatment for the passenger.

Respondent argues that the bills for the patient/driver were denied based on the failure of the patient to attend an Examination under Oath (EUO) on two occasions.

Respondent provides a denial for the 2/15/22 date of service for the patient/passenger; there are no denials provided for the 2/1/22 or 2/8/22 dates of service.

Respondent argues that the bills for both the patient/driver and for the patient/passenger were not in line with the fee schedule.

The issue is whether Respondent may establish its defenses.

4. Findings, Conclusions, and Basis Therefor

This case was decided based upon the submissions of the Parties as contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and made my decision in reliance thereon.

It is well settled that the appearance of the eligible injured person or his or her assignee at an EUO is a condition precedent to an insurer's liability on a policy. See Mega Billing, Inc. v. State Farm Fire & Casualty Company, 35 Misc.3d 145(A), 2012 N.Y. Slip Op. 51014(U) (App. Term 2nd, 11th, and 13th Jud. Dists. 2012); Viviane Etienne Medical Care, P.C. v. State Farm Mutual Automobile Ins. Co., 35 Misc.3d 127(A), 2012 N.Y. Slip Op. 50589(U) (App. Term 2nd, 11th, and 13th, Jud. Dists. 2012).

Thus, it follows that if an eligible injured person (IP/assignor) fails to comply with an insurer's timely and valid request for an EUO, so long as the request strictly complies with the governing regulations, the insurer is entitled to dismissal of an action seeking no-fault benefits. See Dover Acupuncture, P.C. v. State Farm Mutual Auto Ins. Co., 28 Misc.3d 140(A), 2010 N.Y. Slip Op. 51605(U) (App. Term 1st Dept. 2010); Great Wall Acupuncture, P.C. v. New York Central Mutual Fire Insurance Company, 22 Misc.3d 136(A), 2009 N.Y. Slip Op. 50294(U) (App. Term 2nd, 11th, and 13th Jud. Dists. 2009).

In order for Respondent to make prima facie showing of its defense based upon an assignor's failure to appear at scheduled EUOs, it has to demonstrate that its initial and follow-up requests for verification were timely issued pursuant to 11 NYCRR Section 65-3.5(b) and 65-3.6(b) and establish that the assignor failed to appear at the EUOs. Essential Acupuncture Services, P.C. v. Ameriprise Auto & Home Ins. Co., 2012 N.Y. Slip Op. 52404(U) (App. Term 2nd, 11th, and 13th Jud. Dists. 2012); Urban Radiology, P.C. v. Clarendon National Insurance Company, 31 Misc.3d 132(A), 2011 N.Y. Slip Op.

50601(U) (App. Term 2nd, 11th, and 13th Jud. Dists. 2011); Advanced Medical, P.C. v. Utica Mutual Insurance Company, 23 Misc.3d 141(A), 2009 N.Y. Slip Op. 51023(U) (App. Term 2nd, 11th, and 13th Jud. Dists. 2009).

Here, Respondent has submitted the affidavit of an attorney who outlines the procedure for sending out the scheduling letters for the EUOs and the facts in this case based on his personal knowledge. There are transcripts of the EUOs, to show that the patient failed to appear. Copies of the letters sent were also submitted.

Applicant has not provided any explanation for the nonappearance of the patient/driver.

I find that Respondent has established this defense. I am constrained to find for Respondent and the claim is denied. I so found in AAA#17-22-1273-3890 (May 11, 2023) and AAA# 17-22=1249-7542 (July 31, 2023).

As such, I do not reach the issue of fee schedule.

As to the patient/passenger, I note that scheduling letters for an EUO addressed to the patient/passenger are not provided. There is one denial for date of service 2/15/23, and without the supporting documentation, that denial cannot be sustained.

To the extent that that the claim involves the failure of the provider to attend an EUO, I note that the supporting documentation to establish that defense is also missing.

The issue of fee schedule is preserved, however.

Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. See, Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co., 2006 NY Slip 26240, 13 Misc.3d 172, 822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006). See also, Power Acupuncture PC v. State Farm Mutual Automobile Ins. Co., 11 Misc.3d 1065A, 816 N.Y.S.2d 700, 2006 NY Slip Op 50393U, 2006 N.Y. Misc. LEXIS 514 (Civil Ct, Kings Co. 2006). If Respondent fails to demonstrate by competent evidentiary proof that an Applicant's claims were in excess of the appropriate fee schedules, Respondent's defense of noncompliance with the appropriate fee schedules cannot be sustained. See, Continental Medical PC v. Travelers Indemnity Co., 11 Misc.3d 145A, 819 N.Y.S.2d 847, 2006 NY Slip Op 50841U, 2006 N.Y. Misc. LEXIS 1109 (App. Term, 1st Dept., per curiam, 2006).

Respondent has provided an affidavit from a certified professional coder, who explains that multiple units of extracorporeal shockwave treatment are not allowed, since one unit of the code 0101T covers all of the treatment for the entire musculoskeletal system.

Applicant has not provided any fee schedule evidence to support a contrary position.

I find that Respondent has established its fee schedule defense by use of this coder affidavit, which explains the billing process at issue.

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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	Donald C Wallerson MD PLLC	02/15/22 - 02/15/22	\$1,398.00	Denied
	Donald C Wallerson MD PLLC	02/22/22 - 02/22/22	\$1,398.00	Denied
	Donald C Wallerson MD PLLC	03/03/22 - 03/03/22	\$1,398.00	Denied
	Donald C Wallerson MD PLLC	03/10/22 - 03/10/22	\$1,398.00	Denied
	Donald C Wallerson MD PLLC	03/17/22 - 03/17/22	\$1,398.00	Denied
	Donald C Wallerson MD PLLC	03/24/22 - 03/24/22	\$2,097.00	Denied
	Donald C Wallerson MD PLLC	02/01/22 - 02/01/22	\$1,398.00	Awarded: \$700.39
	Donald C Wallerson MD PLLC	02/08/22 - 02/08/22	\$1,398.00	Awarded: \$700.39
	Donald C Wallerson MD PLLC	02/15/22 - 02/15/22	\$1,398.00	Awarded: \$700.39
Total			\$13,281.00	Awarded: \$2,101.17

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/06/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Respondent shall compute and pay Applicant the amount of interest computed from the date of the AR-1 was deemed filed with the American Arbitration Association, at the rate of 2% per month, simple, and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9 (c).

C. Attorney's Fees

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

Applicant is entitled to one attorney fee in accordance with 11 NYCRR 65-4.6(d).

- 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 NY

SS :

County of Nassau

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

11/16/2023

(Dated)

Inez Beyrer

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:
4e467cf242ad22a50d9136658752834f

Electronically Signed

Your name: Inez Beyrer
Signed on: 11/16/2023