

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Triborough ASC
(Applicant)

- and -

Progressive Casualty Insurance Company
(Respondent)

AAA Case No. 17-22-1271-0812

Applicant's File No. 00104839

Insurer's Claim File No. 21-9419989

NAIC No. 24260

ARBITRATION AWARD

I, Eileen Hennessy, 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-R.B.

1. Hearing(s) held on 10/03/2023
Declared closed by the arbitrator on 11/07/2023

Mikhail Guseyenov from Drachman Katz, LLP participated virtually for the Applicant

Lance Faustin from Progressive Casualty Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,103.64**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended the amount in dispute from the original amount of \$2,103.64 to \$1,785.59.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The record reveals that the Assignor-R.B., a 27-year-old male, claimed injuries as the result of a motor vehicle accident that occurred on 3/9/2021. Applicant seeks reimbursement for the facility fee billed in relation to a lumbar epidural steroid injection (LESI), trigger point injections, and epidurography conducted on 7/26/2021. Respondent denied the bill based on the 45-day rule. The issues to be determined are 1) whether

Respondent's denial premised on the 45-day rule can be sustained and, if so, 2) whether Applicant billed in accordance with the applicable fee schedule?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement for the facility fee billed in relation to a LESI, trigger point injections, and epidurography. This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing held via Zoom.

In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations.

45-Day Rule

Respondent indicates in the denial that the bill for date of service 7/26/2021 (\$1,785.59) was received on 4/19/2022. The bill was timely denied premised on the 45-day rule. The denial indicates that late notice will be excused if the Applicant can provide clear and reasonable justification for late submission of the bill.

Applicant establishes prima facie showing of entitlement to No-Fault benefits under Article 51 of the Insurance Law by "submitting evidence that payment of no-fault benefits are overdue, and proof of its claim, using the statutory billing form, was mailed to and received by the defendant insurer." Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 14 N.Y.S. 3d 283 (Court of Appeals, 2015).

Within 30 calendar days after proof of claim is received, the insurer shall either pay or deny the claim in whole or in part. 11 NYCRR §65-3.8(c).

A Denial of Claim form (NF-10) is sufficient to demonstrate receipt. Eagle Surgical Supply, Inc. v. Allstate Ins. Co., 42 Misc 3d 145(A), 2014 NY Slip Op 50343(U)(App. Term, 2 Dept, 2 , 11 & 13 Jud Dists., 2014).

Once Applicant establishes its prima facie case, the burden of proof shifts to Respondent to come forward with admissible evidence demonstrating the existence of a material issue of fact. Amaze Medical Supply Inc. v. Eagle Ins. Co., 2 Misc.3d 128(A), 2003 N.Y. Slip Op. 51701(U)(App. Term, 2 Dept, 2 & nd nd 11 Jud Dists., 2003).

Pursuant to the Mandatory Personal Injury Protection Endorsement contained in 11 NYCRR§65-1.1, one of the conditions for establishing eligibility for No-Fault benefits is the submission of written proof of claim within 45 days after the date of service. Specifically, it states:

Proof of Claim; Medical, Work Loss, and Other Necessary Expenses. In the case of a claim for health service expenses, the eligible injured person or that person's assignee or representative shall submit written proof of claim to the Company, including full particulars of the nature and extent of the injuries and treatment received and contemplated, as soon as reasonably practicable but, in no event later than 45 days after the date of services are rendered. The eligible injured person or that person's representative shall submit written proof of claim for work loss benefits and for other necessary expenses to the Company as soon as reasonably practicable but, in no event, later than 90 days after the work loss is incurred or the other necessary services are rendered. The foregoing time limitations for the submission of proof of claim shall apply unless the eligible injured person or that person's representative submits written proof providing clear and reasonable justification for the failure to comply with such time limitation.

As required by 11 NYCRR§65-3.3(e):

When an insurer denies a claim based upon the failure to provide timely written notice of claim or timely submission of proof of claim by the applicant, such denial must advise the applicant that late notice will be excused where the applicant can provide reasonable justification of the failure to give timely notice.

When a claim is submitted beyond the statutorily prescribed time frame, it is incumbent upon the claimant to provide the insurer with written justification for the untimely submission for it to be excused. Bajaj v. MVAIC, 49 Misc.3d 145(A), 2015 NY Slip Op 51661(U)(App. Term, 2 Dept., 2 , 11 & 13 Jud. Dists., Nov. 12, 2015).

The reason provided for the untimely submission must be adequately detailed. Unelaborated assertions will not suffice. Synergy First Med. PLLC v. Elrac, Inc., 26 Misc.3d 131(A), 2010 NY Slip Op 50048 (App. Term, 1 Dept., Jan. 14, 2010).

Applicant submits a certificate of mailing for the bill for date of service 7/26/2021, which lists Applicant as the sender, Respondent as the addressee at P.O. Box 54527, Los Angeles, CA 90099, the Assignor's name, and the date of service. The certificate of mailing has a postage paid stamp, dated 8/11/2021, is postmarked by the United States Postal Service (USPS), dated 8/11/2021, and is signed for as received by an employee of the USPS.

Along with the certificate of mailing Applicant also submits a document labeled, "Claim History", which is dated 4/10/2022, and lists the Assignor's name, Claim Number, date

of service, amount in dispute, billing provider's name, billing provider's Tax ID number, and claim history of the bill. According to the source labeled, "Waystar", the claim was "loaded for processing" on 7/27/2021 and was rejected due to a missing accident date. The claim was edited, resubmitted, and sent to an intermediary on 8/13/2021 according to the same source. On 8/13/2021 the claim was received by the intermediary and was labeled as "Warning", with a note stating, "Attachment rules require additional information/documentation", with instructions on how to upload the required documentation. On 8/19/2021 the claim remained labeled as "Warning", with a note that the claim is still pending receipt of an attachment. The claim was thereafter rejected by the intermediary on 8/30/2021. According to the "Waystar" source, the claim was resubmitted on 9/14/2021 to an intermediary. The claim was labeled as "Warning", with a note stating, "Attachment rules require additional information/documentation" with instructions on how to upload the required documentation. On 9/15/2021 the intermediary forwarded the claim to another entity.

Upon review of the credible evidence, I find Applicant has not demonstrated having satisfied its mailing obligation of the subject bill within 45 days; accordingly, a presumption does not arise the NF-3 was timely received by the insurer. *See, Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y. 3d 498, 508-509 (2015).

"The presumption that an addressee received an item by mail may be created by either proof of actual mailing or a standard office practice or procedure designated to ensure that items are properly addresses and mailed." *Amaze Medical Supply Inc. v. Allstate Ins. Co.*, 3 Misc.3d 133A, 787 N.Y.S.2d 675 (App. Term 2d Dept. 2004). "It is a well-established rule that letters properly addressed, stamped and mailed are presumed received by the addressee." *In the Matter or the Arbitration between Allstate Ins. Co and Jennifer Patrylo*, 144 A.D.2d 243, 533 N.Y.S.2d 436 (1 Dept. 1998).

Applicant's bill, certificate of mailing, and "Claim Notes" fail to create a presumption that Respondent timely received its proof of claim as Applicant failed to credibly establish proof of actual mailing or a standard office practice or procedure designated to ensure that items are properly addressed and mailed. *See Amaze Medical Supply Inc. v. Allstate Ins. Co.*, *supra*. The certificate of mailing indicates the claim was mailed to Respondent at a Los Angeles, CA address on 8/11/2021, yet the "Claim Notes", which have no letterhead or indication of the source of the referenced information, apart from source notations labeled "Waystar" and "Intermediary", contradict the certificate of mailing and indicate the claim was rejected for missing documentation and resubmitted for processing to an intermediary on 8/13/2021 and 9/14/2021. The Claim Notes have no indication that the claim was ever submitted to Respondent. The last notation is dated 9/15/2021 and indicates the intermediary sent the claim to "another entity", without naming the entity. There is no indication of what happened after 9/15/2021. There is no proof of mailing submitted by Applicant for the bill to PO Box 2930, Clinton, IA 52733, yet Respondent submits the envelope the claim was received in, which is addressed to that address and postmarked by the USPS on 4/15/2022. According to the denial Respondent received the claim on 4/19/2022. There is no explanation of why the address listed on the certificate of mailing, dated 8/11/2021, differs from the address listed on the envelope the bill was received by Respondent in, dated 4/15/2022. Moreover, Applicant does not offer justification for its late submission of the bill.

As Applicant's certificate of mailing and supporting documentation fails to provide proof of actual mailing or a standard office procedure, which was followed in this case, I do not find it credible. As the trier of fact, I find that the certificate of mailing and supporting documentation raises more questions than it answers. As the Applicant failed to establish a presumption of mailing the burden does not shift to the Respondent to overcome the burden and establish nonreceipt.

Comparing the relevant evidence presented by the parties, I accept Respondent's argument and find that Applicant has not met its prima facie burden as to the timely mailing of the bill within 45 days for date of service 7/26/2021 (\$1,785.59). Therefore, Applicant's proofs were insufficient to shift the burden to Respondent.

Upon review of the credible evidence, I find Applicant has not demonstrated having satisfied its timely mailing obligation of the subject bill within 45 days of the date of service; accordingly, a presumption does not arise the NF-3 was timely received by the insurer. *See, Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y. 3d 498, 508-509 (2015).

CONCLUSION

Accordingly, Applicant's claim for date of service 7/26/2021 (\$1,785.59) is denied. This decision 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, Eileen Hennessy, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

12/07/2023
(Dated)

Eileen Hennessy

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:
d958959d26e21b03fa1dc2a4ed2dee87

Electronically Signed

Your name: Eileen Hennessy
Signed on: 12/07/2023