

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Brighton Custom Supply Inc
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.

17-23-1299-3074

Applicant's File No.

GM22-561546,
GM23-589672

Insurer's Claim File No.

0167369540101045

NAIC No.

35882

ARBITRATION AWARD

I, Gerry Wendrovsky, 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: EIP

1. Hearing(s) held on 11/29/2023
Declared closed by the arbitrator on 11/29/2023

John Fagan from Law Offices of Gabriel & Moroff, P.C. participated virtually for the Applicant

Domenick Pesce from Rivkin & Radler LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,629.16**, 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 EIP, AK, a 61-year-old female was involved in a motor vehicle accident on 9/27/22. At issue is \$1,629.16 for durable medical equipment (DME) issued 11/22/22 - 2/9/23. There are two bills/DOS. Respondent denied part of the claim pursuant to the '120-day rule', asserting applicant failed to provide requested verification information. The questions presented are whether said defense is sustained and the effect of prior awards.

4. Findings, Conclusions, and Basis Therefor

This case has been 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. The hearing was conducted via Zoom. There were no witnesses. I have reviewed the documents contained in MODRIA for both parties and made my decision in reliance thereon, which is in full disposition of the issues before me.

The applicant established its prima facie entitlement to judgment as a matter of law by proof that it submitted a claim, setting forth the fact and the amount of the loss sustained, and that payment of no-fault benefits was overdue. *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 A.D. 3d 742 (2nd Dept., 2004).

Applicant, by its principal, Artur Avetisyan, appeared for an examination under oath (EUO) on 2/3/23; thereafter, respondent sought verification (Post-EUO Requests).

DOS 11/22/22

The applicant submitted proof of mailing for this bill (\$871.91) consisting of a certificate of bulk mailing dated 12/13/22; the submission does not indicate a denial for this DOS was issued.

At the hearing, it was ascertained that verification of said bill was neither requested nor responses provided.

The applicant asserted that as concerned this bill, respondent was not entitled to seek verification via the Post-EUO Requests, and the time to pay/deny same was not tolled. *Neptune Medical Care, P.C. v. Ameriprise Auto & Home Insurance*, 48 Misc. 3d 139(A) (App Term 2015) [*regulations do not provide that verification requests grant a carrier additional opportunities or toll the time to make otherwise untimely requests for verification*].

Respondent argued this bill should be treated the same as the other (DOS 2/9/23), that it was ascertained, was subject to the Post-EUO Requests.

I observe the submission does not reflect respondent's request for an EUO (dated 1/19/23) as having referenced the instant bill, nor does it indicate the date upon which respondent received same. Accordingly, the subject bill could not logically be 'denied' based upon the failure to provide post-EUO requests for verification.

Based upon the foregoing, as concerns this bill, notwithstanding the further findings (*infra*), I am constrained to find the defense of outstanding verification is not sustained.

The applicant is reimbursed the sum of \$871.91.

Verification (DOS 2/9/23)

No fault benefits are overdue if not paid within 30 calendar days after respondent receives proof of claim, including verification of all relevant information requested. 11 NYCRR 65-3.8(c). A respondent that fails to properly deny a claim within 30 days may be precluded from interposing a defense to the claim. A respondent may toll the 30-day period for the purpose of obtaining verification, by seeking additional verification within 15 business days of receipt of the prescribed verification forms. 11 NYCRR 65-3.5(b). If a requested verification has not been supplied within 30 calendar days after the original request, the respondent shall, within 10 calendar days, follow up with and shall applicant of the reasons why the claim was delayed, identifying in writing the missing verification. 11 NYCRR 65-3.6(b).

Pursuant to 11 NYCRR 65-3.5(o),

"[a]n 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...."

Pursuant to 11 NYCRR 65-3.8(b)(3):

"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, provided that the verification request so advised the applicant as required in section 65-3.5(o) of this Subpart."

Respondent issued a 120-day denial, dated 7/12/23, asserting applicant failed to respond to post-EUO requests.

The submissions include an affidavit of a SIU investigator, Kimberly Lobasso, dated 7/18/23, which provided a detailed synopsis of the EUO testimony, which was no less than alarming, in its summations of the applicant's practices and procedures.

Prior Awards

It is within my authority to determine the preclusive effect of a prior arbitration [*See*, *Matter of Falzone v. New York Central Mutual Fire Ins. Co.*, 15 N.Y. 3d 530 (2010)], or dispositive effect of same.

I observe awards have been issued by different arbitrators concerning the instant dispute, inclusive of those by Arbitrator McAllister (AAA# 17-23-1296-7114), Arbitrator Hyland (AAA# 17-23-1295-9368), and Arbitrator Hiller (AAA# 17-23-1303-0773). I observe in pertinent part:

AAA# 17-23-1296-7114

".... Respondent denied Applicant's claim predicated on Applicant's failure to adequately respond to post-Examination Under Oath ("EUO") requests for verification within 120 days an EUO of Applicant's owner Artur Avetisyan was held on February 3, 2023 respondent sought additional verification for the following items:

1. Documentation regarding the durable medical equipment or orthotic equipment (collectively "DME") purportedly provided to GEICO's Insureds identified in BRIGHTON CUSTOM SUPPLY INC [20230209-0048]. This request includes: (i) names of the manufacturers, wholesalers, stores or websites, along with the make, model and specifications for each DME obtained from each manufacturers, wholesalers, stores or websites; (ii) purchase invoices issued by manufacturers, wholesalers, stores or websites, including the cost of items; (iii) proofs of payment by the Provider, such as cancelled checks or credit card receipts; (iv) a copy of the stickers identifying the HCPCS codes to bill for each DME purchased; and (v) all documents evidencing the proper HCPCS code for each DME purchased;

2. The original prescriptions for each of the Insureds identified in BRIGHTON CUSTOM SUPPLY INC [20230209-0048], and other documentation that justify your dispensation of the equipment, including original signed delivery receipts;

3. Copies of all certificates that you, or anyone performing services on behalf of Brighton, have received regarding the training, dispensing, and fitting of DME;

4. Photographs depicting the various types of equipment provided by you to the GEICO Insureds identified in BRIGHTON CUSTOM SUPPLY INC [20230209-0048];

5. Documents and/or proof of payment of any payments taken by Avetisyan evidencing wages for services performed on behalf of Brighton. This request includes W-2s, 1099s, and/or K-1 s, and other proofs of payment such as a general ledger for cash transactions;

6. The firm name, contracts, invoices and proof of payment by the Provider to the alleged accountant, Bob Palmieri;

7. Documents relating to the income and expenses of the Provider, including but not limited to corporate tax returns, payroll tax returns, financial statements, bank statements, and general ledgers, for the past twenty-four months;

8. All lease agreements and proof of payment by the Provider for the leased premises located at 422 Ocean View Ave, Apt 301, Brooklyn, NY 11235 from 2018 to present; and

9. A copy of Brighton's license Dealer in Products license issued by NYC Department of Consumer and Worker Protection, application and proof of payment.

.... By letter dated March 9, 2023, Applicant responded objecting to any post-EUO verification request as improper. Nonetheless, Applicant provided some of the items requested and refused to provide information relating to items 4 and 7.

1. Documentation regarding the durable medical equipment or orthotic equipment (collectively "DME") purportedly provided to GEICO's Insureds identified in Appendix "A". This request includes: (i) names of the manufacturers, wholesalers, stores or websites, along with the make, model and specifications for each DME obtained from each manufacturers, wholesalers, stores or websites; (ii) purchase invoices issued by manufacturers, wholesalers, stores or websites, including the cost of items; (iii) proofs of payment by the Provider, such as cancelled checks or credit card receipts; (iv) a copy of the stickers identifying the HCPCS codes to bill for each DME purchased; and (v) all documents evidencing the proper HCPCS code for each DME purchased;

While GEICO acknowledges that a selection of invoices were produced, those invoices fail to satisfy the above verification. At the outset, the invoices produced fail to identify the make, model or manufacturer of any of the DME. Additionally, and specifically for items that are not listed in the DME Fee Schedule, GEICO is entitled to verify the amounts paid by the provider to determine proper reimbursement. Lastly, the provider failed to produce any documentation evidencing the proper HCPCS code for the DME allegedly provided to GEICO's insureds.

2. Photographs depicting the various types of equipment provided by you to the GEICO Insureds identified in Appendix "A;"

3. Documents and/or proof of payment of any payments taken by Avetisyan evidencing wages for services performed on behalf of Brighton. This request includes W-2s, 1099s,

and/or K-1s, and other proofs of payment such as a general ledger for cash transactions; and

- 4. Documents relating to the income and expenses of the Provider, including but not limited to corporate tax returns, payroll tax returns, financial statements, bank statements, and general ledgers, for the past twenty-four months....*

I was persuaded by the evidence submitted that Applicant's verification response was incomplete and inadequate for Respondent to verify the claim at issue. Ms. Lobasso's affidavit set forth the troubling testimony by Mr. Avetisyan at the EUO, which prompted the post-EUO verification requests: [page/line numbers omitted]:

Brighton operates entirely out of Avetisyan's personal apartment and does not have a storefront; The rent for Avetisyan's apartment is paid from a Brighton bank account though there are no shelving racks or storage for Brighton supplies; Avetisyan isn't a certified orthotist and isn't familiar with the Board of Certification and Accreditation of Orthosis Fitters or the American Board for Certification in Orthosis and Prosthetics; Brighton has no employees (p. 31 lines 19-20); Avetisyan isn't W-2 for Brighton and testified that he just "take[s] money when [he] need[s]." Brighton does not maintain a stock of DME and has to order each item from a wholesaler after a prescription is issued and it would take up to 10 days to acquire; Avetisyan testified that he personally drove around handing out flyers to acquire business, yet wasn't familiar with a facility located on Rockaway Boulevard, Queens, New York, despite 40% of prescriptions coming from this facility; Avetisyan stated that he does nothing in the form of bending, cutting or molding for the alleged custom DME dispensed to GEICO's insureds; Avetisyan has no formal fee schedule training yet does all billing for Brighton; When Avetisyan bills L0627 for an LSO he isn't fitting it to the patient or manipulating the supply in any manner; Brighton has no formal business hours; he randomly stops by clinics on a weekly basis to pick up prescriptions."

I find that Respondent set forth a valid basis for requesting the information sought based on Mr. Avetisyan's EUO testimony after a review of the hundreds of pages of documents submitted, I find that Applicant's response did not amount to "substantial compliance" I find Applicant's response was wholly inadequate. Setting aside all of the financial information requested, the wholesale invoices, alone, failed to provide the information necessary for Respondent to verify the claim.

As noted in the SIU affidavit, Mr. Avetisyan works alone, out of his home, and orders the supplies as he obtains prescriptions. He had a history of repeatedly billing for the most expensive type of supply (e.g. custom-fitted LSO), and it was questionable whether the injured persons were receiving the type of supplies billed for. An easy way for Applicant to verify that the items billed were the items delivered was to produce the wholesale invoices. However, Applicant's invoices were devoid of any useful information. There were no make and model numbers of any of the items listed. Thus, it was impossible to determine what type of supplies were purchased by Mr. Avetisyan or delivered to the injured persons. This could also have been rectified by providing the requested photographs of the items purchased and delivered but yet Applicant failed to provide that as well. I was not persuaded by Applicant's assertion at the hearing that because all of the items billed were listed in the DME Fee Schedule, Respondent did not need the invoices to verify the claim. Respondent was not raising a Fee Schedule argument but rather, was asserting that Applicant's billing was fraudulent

since Respondent properly delayed Applicant's claim for the EUO and timely requested the post-EUO verification in accordance with 11 NYCRR 65-3.5 and 65-3.6 and Applicant failed to adequately respond to Respondent's verification requests, I find that Respondent properly denied Applicant's claim"

AAA# 17-23-1295-9368

".... Respondent alleges that despite receiving some of the items that were initially requested as verification, items which still remain outstanding are: wholesale invoices, photographs of the DME being provided to the public, financial documents, cash ledgers, etc. Denials were then issued for the subject billing based on the 120-day rule.

Applicant argues that Respondent's verification requests were overbroad, burdensome, and unreasonable, and that such demands exceeded the bounds of permissible requests under the Regulations that voluminous responses have been previously provided that the remaining items have been objected to as improper

Arbitrator McAllister's award for AAA case # 17-23-1296-7114 involves the same parties and I concur with her focus on the EUO of Mr. Avetisyan. I concur with Arbitrator McAllister's analysis. Accordingly, Respondent's denials are sustained"

AAA# 17-23-1303-0773

".... Artur Avetisyan, owner of Applicant-Provider, attended an Examination Under Oath ("EUO") on February 3, 2023. Respondent argues that following the EUOs, it issued verification requests to Applicant which remained outstanding

.... wholesale invoices, photographs of the DME being provided to the public, financial documents, cash ledgers, etc. Denials were then issued for the subject billing based on the 120-day rule

Arbitrator McAllister's award for AAA case # 17-23-1296-7114 involves the same parties and I concur with her focus on the EUO of Mr. Avetisyan (quoted portion omitted herein) Arbitrator McAllister also addressed the argument that Applicant "substantially complied" with the verification requests.

I was not persuaded by Applicant's assertion at the hearing that because all of the items billed were listed in the DME Fee Schedule, Respondent did not need the invoices to verify the claim. Respondent was not raising a Fee Schedule argument but rather, was asserting that Applicant's billing was fraudulent. Therefore, since Respondent properly delayed Applicant's claim for the EUO and timely requested the post-EUO verification in accordance with 11 NYCRR 65-3.5 and 65-3.6 and Applicant failed to adequately respond to Respondent's verification requests, I find that Respondent properly denied Applicant's claim." "

Discussion

Ordinarily, with respect to compliance with a verification request, both parties must exercise good faith and common sense- where an applicant deems a verification request defective or unreasonable, it was obligated to advise respondent of same. *Canarsie Chiropractic, P.C. v. State Farm Mutual Automobile Ins. Co.*, 27 Misc. 3d 1228(A) (2010). Communication, not inaction, is the proper response. *Urban Radiology, P.C. v. Tri-State Consumer Ins. Co.*, 27 Misc. 3d 140(A) (App. Term, 2010). A countervailing requirement is that in good faith, neither party treat the other as an adversary [11 N.Y.C.R.R. 65-3.2(b)], and that verification should not be requested unless there is a good reason for requesting same. *See, Brownsville Advanced Medical, P.C. v. Countrywide Ins. Co.*, 33 Misc. 3d 1236(A) (Dist. Ct. 2011) [*purpose of no-fault law "not served" when carrier repeatedly requested the same verification documentation it had previously been provided*].

An affidavit of an SIU investigator (with personal knowledge of a subject investigation), and documentary evidence (establishing a 'nexus' between a provider and alleged fraud), is sufficient for affording additional discovery [*Lenox Neuropsychiatry Med., P.C. v. State Farm Ins. Co.*, 22 Misc. 3d 1118(A) (Civ. Ct 2009); *See, Nexray Medical Imaging, PC v. Allstate Insurance Company*, 39 Misc. 3d 1237(A) (Dist. Ct. 2013) [*Mallela discovery requests must be supported by "specific allegations"*]; *Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.*, 33 N.Y. 3d 389 (2019)[*to justify an insurer's withholding of payments, a prior finding of fraud, fraudulent intent, or conduct tantamount to fraud was not required*].

Upon review, I sustain the denial premised upon outstanding verification. 11 NYCRR 65-3.8(b)(3).

Conclusion

The applicant is awarded the sum of \$871.91.

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
	Brighton Custom Supply Inc	11/22/22 - 11/22/22	\$871.91	Awarded: \$871.91
	Brighton Custom Supply Inc	02/09/23 - 02/09/23	\$757.25	Denied
Total			\$1,629.16	Awarded: \$871.91

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/12/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Simple interest on the above awarded amount shall be computed and paid at a rate of 2% per month, commencing 30 days after 12/13/22, when the claim was submitted to the insurer, and ending with the date of payment of the award. *Belt Parkway Imaging, P.C. v. State Wide Ins. Co.*, 2010 N.Y. Slip Op. 52229(U) (App. Term 2010), citing *Hempstead General Hospital v. Ins. Co. of North America*, 208 A.D. 2d 501 (2nd Dept., 1994) [*where insurer fails to establish that it ever sent a denial of claim form to the provider, accrual of interest was never tolled*].

C. Attorney's Fees

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

Respondent shall pay the applicant an attorney's fee, in accordance with 11 NYCRR 65-4.6.

- 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 NY

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

12/10/2023
(Dated)

Gerry Wendrovsky

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:
71e7c5cb718f014c879d4f8781494058

Electronically Signed

Your name: Gerry Wendrovsky
Signed on: 12/10/2023