American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Terrace Medical Care, PC (Applicant)	AAA Case No.	17-23-1285-0141
	Applicant's File No.	TMC-0013
- and -	Insurer's Claim File No.	99330-02
	NAIC No.	24309
Hereford Insurance Company (Respondent)		

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-M.P.

1. Hearing(s) held on 10/31/2023
   Declared closed by the arbitrator on 11/14/2023

   Gill S. Schapira from The Law Office of Gill S. Schapira, P.C participated virtually for the Applicant

   Elina Amiryan from Hereford Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$2,317.65**, was NOT AMENDED at the oral hearing.
   Stipulations WERE made by the parties regarding the issues to be determined.

   The parties stipulated and agreed that (i) Applicant has met its prima facie burden by submitting evidence that payment of no-fault benefits is overdue, and proof of its claims were mailed to and received by Respondent and (ii) Respondent's denials of the subject claims were timely issued.

3. Summary of Issues in Dispute

   The record reveals that the Assignor-M.P., a 28-year-old male, claimed injuries as the passenger of a motor vehicle involved in an accident that occurred on 7/9/2022. Applicant is seeking reimbursement for EMG/NCV testing of the upper and lower extremities conducted on 9/20/2022 and 12/6/2022. Respondent denied the claim based

on the Assignor's failure to attend two duly scheduled Examinations under Oath (EUO). The issue to be determined is whether the Respondent properly denied the claim based on the Assignor's failure to appear for two EUOs?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement forEMG/NCV testing of the upper and lower extremities . 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.

Legal Framework - Tolling of claims

The general rule regarding payment of claims is set forth in 11 NYCRR §65-3.8(c), which states that "within 30 calendar days after proof of claim is received, the insurer shall either pay or deny the claim in whole or in part." No-Fault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of claim, which shall include verification of all of the relevant information requested pursuant to 11 NYCRR §65-3.5. 11 NYCRR §65-3.8(a). As such, a claim need not be paid or denied until all demanded verification is provided. *See* Nyack Hospital v. General Motors Acceptance Corp., 27 A.D.3d 96, 808 N.Y.S.2d 399 (2d Dept. 2005), *mod'd on other*, 8 N.Y.3d 294, 832 N.Y.S.2d 880 (2007).

OUTSTANDING VERIFICATION

Legal Standard

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 & 11 Jud Dists., 2003).

11 NYCRR §65-3.5(b), Claim procedure states: "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."

11 NYCRR §65-3.6(b), Verification requests states:"At a minimum, if any requested verifications has not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested, either by telephone call, properly documented in the file, or by mail. At the same time the insurer shall inform the applicant and such person's attorney of the reason(s) why the claim is delayed by identifying in writing the missing verification and the party from whom it was requested".

NYCRR §65-3.5(c) mandates 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 insurer has 15 business days from the date it receives the prescribed verification forms to seek additional verification from an Applicant.

Further, 11 NYCRR §65-3.8(l) states:

> For the purposes of counting the 30 calendar days after proof of claim, wherein the claim becomes overdue pursuant to section 5106 of the Insurance Law, with the exception of section 65-3.6 of this subpart, any deviation from the rules set out in this section shall reduce the 30 calendar days allowed.

Thus, a request for additional verification pursuant to 11 NYCRR §65-3.5(b) that is sent beyond the 15 business days is still valid so long as it is issued within 30 days from receipt of the claim; such a deviation will simply reduce the insurer's time to pay or deny by the same number of days. 11 NYCRR §65-3.8(l). *See* Nyack Hosp. v. General Motors Acceptance Corp., 8 NY3d 294, 2007 NY Slip Op 02439 (Court of Appeals, 2007).

The obligation to pay or deny a claim is not triggered until the insurer has received all of the relevant information that was requested. Hospital for Joint Diseases v. State Farm Mut. Auto. Ins. Co., 8 AD3d 533, 2004 NY Slip Op 05413 (App. Div., 2 Dept., 2004).

In addition to the above, the Fourth Amendment to 11 NYCRR 65-3, which is applicable to claims for medical services rendered on or after April 1, 2013, introduced a provision ([§65-3.5(o)] that sets a time frame for an applicant to respond to an insurer's verification request(s). In pertinent part, the provision states the following:

> An 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. The insurer shall advise the applicant in the verification request that the insurer may deny the claim if the applicant does not provide within 120 calendar days from the date of the initial request either all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply. 11 NYCRR §65-3.5(o).

In relation to this new provision, 11 NYCRR §65-3.8(b)(3) was amended so as to confer upon the insurer the right to deny a claim for non-compliance with §65-3.5(o). In pertinent part, the amendment to §65-3.8(b)(3) states the following:

> [A]n 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)…

EUO NO-SHOW

Respondent denied the claim based on the Assignor's failure to appear for two duly scheduled EUOs. Under 11 NYCRR § 65-1.1 which prescribes the No-Fault Mandatory Personal Injury Protection (PIP) Endorsement, which must be included in all owners' policies of motor vehicle liability insurance issued in New York, the "Conditions" section of the endorsement contains a "Proof of Claim" provision, which states that:

> …Upon request by the Company, the eligible injured person or that person's assignee or representative shall: …(b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same…

11 NYCRR § 65-1.1 (Conditions) states "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"

The appearance of a claimant at an EUO is a condition precedent to the insurer's liability on the policy. Stephen Fogel Psychological PC v. Progressive Insurance Company, 35, A.D.3d 720; 827 N.Y.S.2d 217 (App. Div. 2ndDept. 2006); Crotona Heights Medical, P.C. v. Farm Family Casualty Ins. Co., 27 Misc.3d 134(A), 910 N.Y.S.2d 404 (Table), 2010 N.Y. Slip Op. 50716(U), 2010 WL 1632086 (App. Term 2d, 11th &13th Dists. Apr. 16, 2010). To establish their defense an insurer must present proof that the EUO scheduling letters were mailed and that the Assignor failed to appear. *See* Fogel, *supra.*

To sustain the defense of a breach of a condition precedent, to wit, the failure to appear for an EUO, the insurer must demonstrate as a matter of law that it twice duly demanded an EUO, that the party twice failed to appear, and that the insurer issued a timely denial. Interboro Ins. Co. v. Clennon, 113 A.D.3d 596, 979 N.Y.S.2d 83 (App. Div., 2 Dept, 2014).

The Court in Prime Psychological v. Nationwide Prop, 24 Misc. 3d 230, 236 (N.Y. Civ. Ct. 2009) addressed thescheduling of EUOs, prior to the receipt of claims:

> In *Stephen Fogel Psychological* (7 Misc 3d 18), the Appellate Term found that an insurer had the right to conduct an IME prior to its receipt of the statutory claim form or its statutory equivalent which, "under the

> regulations, triggers the verification process." (*Id.* at 20.) The insurance regulations first mention the right of an insurer to request an IME (and EUO) in the mandatory personal injury protection endorsement, "which is independent of the verification protocols," and, in light of the broad language authorizing IMEs, the court found there "to be no reason to preclude an insurer from requesting an IME prior to its receipt of the statutory claim form" (*id.* at 20). The reviewing court stated that such an interpretation furthers "the policies underlying no-fault insurance, including . . . the expeditious processing of claims" (*Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 35 AD3d 720, 722).
> The Appellate Term then found that the right to an IME "at this juncture is not afforded by the verification procedures and timetables" because 11 NYCRR 65-1.1 (d) "is not, on its face or contextually, a `verification' provision, and because the detailed and narrowly construed verification protocols are not amenable to application at a stage prior to submission of the claim form." (7 Misc 3d at 21.) In *All-Boro Med. Supplies, Inc. v Progressive Northeastern Ins. Co.* (20 Misc 3d 554 [Civ Ct, Kings County 2008]), Judge Sweeney extended this reasoning to EUOs, finding that an insurance company acted within its rights under the endorsement by scheduling an EUO before it had received the claim…
> …
> …Since the appearance of an insured at IMEs (and EUOs) was a condition precedent to the insurer's liability on the policy, an insurer could retroactively deny a claim to the date of loss for a claimant's failure to attend IMEs. (*See also All-Boro v Progressive*, 20 Misc 3d at 556 [where Judge Sweeney opined that a failure to appear for a preclaim EUO was a "valid ground for denying the claim `retroactively to the date of loss'"].) However, once an insurer received a claim, it was "required to adhere to the statutory and regulatory scheme for the processing of no-fault claims" and it therefore had to pay or deny the claim within 30 days of its receipt. (*Id.*)

To establish the failure of the party to appear for duly scheduled EUOs, it is incumbent upon the insurer to submit proof by someone with personal knowledge of the non-appearance. Alrof, Inc. v. Safeco Natl. Ins. Co., 39 Misc.3d 130(A), 2013 N.Y. Slip Op. 50458(U)(App Term, 2 , 11 and 13 Jud. Dists., 2013).

Pursuant to NYCRR §65-3.5, however, it is additionally incumbent upon Respondent to have a good faith basis to request an EUO of a provider with "specific objective justification" to support the use of such examination. *See* Gegerson v. State Farm Insurance Co., 27 Misc.3d 1207(A), Slip Copy, 2010 WL 1428050 (Table) N.Y. Dist. Ct., 2010, wherein the court held that before an EUO default may be found, the insurer must establish its "specific objective justification supporting the use of such examination." The court in Gegerson cited two other cases in support of its holding: Progressive Northeastern Insurance Co. v. Arguelles Med. P.C., 2009 N.Y. Slip Op 32353 (Sup Ct. N.Y. Co.); and Westchester Medical Center v. GEICO, 2009 N.Y. Slip Op 30914 (Sup Ct. Nassau Co.)

The Regulations require the Respondent to have a good faith basis, but the Regulations do not require the Respondent to share that with the claimant. 11 NYCRR 65-3.5(e); Ins. Dept. Opinion Letters (10/15/02 and 10/22/06).

Analysis

Respondent's scheduling letters establish that the EUOs were scheduled for 10/27/2022 and 11/22/2022 and contain the requisite language required by the regulations. The appearance at an EUO is a condition precedent to coverage, and a claimant's inaction to an insurer's timely notifications vitiates the claim. Back to Back Chiropractor, P.C. v. State Farm Mut. Ins. Co., 35 Misc. 3d. 1241(A). The Courts have held that where there is a failure to submit to an EUO, No-Fault benefits can properly be denied retroactively to the date of loss. A.B. Medical Services, P.C. v. American Transit Ins. Co., 25 Misc. 3d 128A (2009).

In support of this defense, the Respondent has submitted the EUO scheduling letters, which were mailed via regular mail and Certified Mail/ Certified Mail Return Receipt requested, certified transcripts of Statements on the Record by the attorney scheduled to conduct the EUOs on 10/27/2022 and 11/22/2022, and a claim specific denial. There was no issue raised regarding the timeliness of the EUO scheduling letters.

I find that the initial and follow-up EUO scheduling letters are properly addressed and mailed to the Assignor. There is proof of actual mailing of the EUO scheduling letters through the United States Postal Service (USPS) tracking numbers listed on the letters, which are trackablee through an internet search. Applicant argued that the USPS tracking numbers do not establish that the letters were mailed. I disagree. My search of the USPS website, utilizing the valid tracking numbers listed on the EUO scheduling letters, confirm that the letters were delivered to an individual at the address listed on the letters. Further, any such certified mailing was duplicated by mailing an identical notice via regular mail. There is a presumption of mailing for regular mail which is deemed mailed as soon as it is placed in the custody of the USPS. No such mailing was returned. Generally, proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee. New York and Presbyterian Hospital v. Allstate Insurance Company, 29 AD3d 547 (2nd Dept. 2006), *quoting*, Matter of Rodriguez v Wing, 251 AD2d 335 (2d Dept. 1998). "The presumption may be created by either proof of actual mailing or proof of the standard office practice or procedure designed to ensure that items are properly addressed and mailed." New York and Presbyterian Hospital v. Allstate Insurance Company, 29 AD 3d 547 *quoting* Residential Holding Corp. Scottsdale Insurance Company, 286 AD 2d 679 (2nd Dept. 2001).

Whether or not proof of mailing is required is far from a settled issue in the arbitration forum. The rules of evidence applicable to actions at law in court do not apply in arbitration. 11 NYCRR 65-4.5(o)(1). It is within the discretion of the arbitrator to determine whether the submitted evidence supports a fact. Moreover, pursuant to 11 NYCRR 65-4.4(e), "The arbitrator shall be the judge of the relevancy and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary".Applicant is proposing the imposition of evidentiary burdens that exist in the context of summary judgment motion practice for matters that are brought before the

courts. I agree with Arbitrator John O'Grady's reasoning in *Yzg Medical, P.C. and Geico Insurance Company*, AAA Case No. 17-16-1026-0754:

> Whether or not certain proof is admissible in a no-fault arbitration proceeding is a matter of discretion of the arbitrator. The nature of an arbitration proceeding is to facilitate rapid disposition of claims with less burden imposed upon the parties than would be imposed by a lawsuit. For that reason, proof is typically permitted without the need for the evidentiary foundation required in court. The laxity permitted for purposes of expediency must be weighed against the potential harm to the party against whom entry of the evidence is permitted. For items of proof that are usual in the no-fault arbitration forum, like medical reports and forms prescribed by regulation, the potential harm is small enough to permit those items to be routinely admitted into evidence and considered. The applicant contends that the scheduling letter in each instance should be precluded because the respondent has not submitted proof of mailing of those letters. Such proof will not be required here, in the absence of a contention that the applicant did not receive the letters, supported by a sworn statement to that effect by someone with knowledge. In the absence of such showing by the applicant, the letters will not be precluded. I conclude that the submission of the letters is sufficient in this forum to establish the assertion that the letters were mailed.

Although proof of mailing was submitted in this case, specific proof of mailing of a document is not required unless there was some admissible proof by the adversary that a particular document that was alleged to have been mailed was not actually received, which is not the case here. I find that the initial and follow-up EUO scheduling letters are properly addressed and mailed to the claimant at the address listed on the NF-2.

It is within the broad powers of the arbitrator to consider and weigh the factual evidence. Moreover, an award is not arbitrary capricious if the arbitrator reviews all the evidence and is not "clearly violative of strong public policy","totally irrational", and does not "manifestly exceed a specific enumerated limitation on the arbitrator's power". *See* Matter of Erin Constr & Dev. Co., Inc., v. Meltzer, 58 Ad.3d 729. *See* AAA Case No.: 17-22-1263-2745.

The EUOs were held at the times and locations listed on the EUO scheduling letters. Assignor-M.P. failed to appear for both scheduled EUOs. Respondent issued a claim specific denial based on the failure of the Assignor to appear for the EUOs.

Furthermore, the bust statements indicated that Respondent's attorney was present via video teleconference as indicated on the EUO scheduling letters for the EUOs he was scheduled to conduct on 10/27/2022 and 11/22/2022 and would have conducted the respective EUOs if Assignor-M.P. appeared. These bust statements are sufficient to establish the non-appearance of the Assignor at the scheduled EUOs via video teleconference on 10/27/2022 and 11/22/2022. I note there is no transcript of the Assignor's EUO submitted by either party.

In order to establish a defense that an insured or his/her assignee breached a condition precedent to coverage by failing to attend an EUO as required by the mandatory PIP endorsement, an insurer must prove: (1) the EUOs were scheduled pursuant to N.Y. Comp. Codes R. & Regs. tit. 11, § 65-3.5(b) (2002); and (2) the requested witness failed to appear on at least two (2) occasions.

Applicant has not argued that the EUO scheduling letters were not received, that the EUO requests were unreasonable, that the Assignor appeared for the EUOs, or that the Assignor objected to the EUO requests upon receipt.

Based upon the proof presented, I find that Respondent has established by a preponderance of the evidence that it properly requested EUOs, that the Assignor failed to appear for those EUOs, and, in so failing, failed to meet a condition precedent to coverage, and has therefore sustained its defense. The burden has shifted to the Applicant and has not been rebutted. Therefore, I find in favor of the Respondent.

Applicant's claim for dates of service 9/20/2022 and 12/6/2022 ($2,317.65), denied premised upon the defense of EUO no-show, is denied.

CONCLUSION

Accordingly, in light of the foregoing, based on the arguments of counsels, and after thorough review and consideration of all submissions, Applicant's claim is denied. This award is in full disposition of all No-Fault benefit claims submitted to 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.

12/13/2023
(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
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Electronically Signed

Your name: Eileen Hennessy
Signed on: 12/13/2023