American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Rockaways ASC Development LLC d/b/a ASC of Rockaway Beach (Applicant)	AAA Case No.	17-22-1275-7181
	Applicant's File No.	NA
	Insurer's Claim File No.	1M01M012162952
- and -	NAIC No.	22667
Ace American 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-T.R.

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

   Usman Nawaz from Law Offices of Hillary Blumenthal LLC (Hoboken) participated virtually for the Applicant

   Desiree Ortiz from Robyn M. Brilliant, P.C. participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$1,555.03**, 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 record reveals that the Assignor-T.R., a 58-year-old male, claimed injuries as the result of a motor vehicle accident that occurred on 11/9/2021. Applicant seeks reimbursement for the facility fee billed in relation to a lumbar epidural steroid injection (LESI) and trigger point injections (TPIs) under ultrasonic guidance conducted on 12/20/2021,denied based on the Assignor's failure to attend multiple duly scheduled Independent Medical Examinations (IME) and the 45-day rule. The issues to be determined are 1) whether the Respondent properly denied the claim based on the Assignor's failure to appear for multiple IMEs and, if not, 2) whether Respondent's 45-day rule defense can be sustained?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement for the facility fee billed in relation to a LESI and TPIs under ultrasonic guidance. 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)…

IME NO-SHOW

Legal Standards

The mandatory No-Fault endorsement in motor vehicle liability insurance policies provides:

> 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 same endorsement provides also: "The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonably require." 11 NYCRR 65-1.1(d) ("Conditions"). "Under New York's no-fault automobile insurance scheme, an insurer can deny an insured's claim for medical treatment if the treatment is not medically necessary.

"To verify a treatment's medical necessity, an insurer may require the claimant to submit to medical examination by physicians selected by, or acceptable to, the [insurer], when, and as often as, the [insurer] may reasonably require. These examinations are referred to as independent medical examinations (IMEs)." Sky Medical Supply Inc. v. SCS Support Claims Services, Inc., 17 F.Supp.3d 207, 214-215 (E.D.N.Y. 2014) (internal quotation marks omitted). While Insurance Department Regulations [11 NYCRR 65-3.5(e)] state that a No-Fault insurer must base its request for an examination under oath upon "the application of objective standards so that there is specific objective justification supporting the use of such examination," it does not impose such a standard on a request for an IME. All County, LLC v. Unitrin Advantage Ins. Co., 31 Misc.3d 134(A), 927 N.Y.S.2d 814 (Table), 2011 N.Y. Slip Op. 50621(U), 2011 WL 1448124 (App. Term 9th & 10th Dists. Apr. 6, 2011).

The purpose of an IME is to permit the insurer to verify the person's injuries, to determine the injured party's condition and to determine if the injured party needs any additional treatment or testing for those conditions and injuries. [citation omitted] In no-fault cases, the purpose of the IME is to assist the carrier in determining the extent of the injured party's disability and that person's need for additional and continued benefits." Boulevard Multispec. Medical, P.C. v. Tri-State Consumer Ins. Co., 43 Misc.3d 802, 805, 982 N.Y.S.2d 864, 867 (Dist. Ct. Nassau Co. 2014). A defense that an assignor failed to appear at an IME requires proof of such. *E.g.*, Careplus Medical Supply, Inc. v. AutoOne Ins. Co., 24 Misc.3d 132(A), 890 N.Y.S.2d 368 (Table), 2009 N.Y. Slip Op. 51372(U), 2009 WL 1926843 (App. Term 9th & 10th Dists. June 29, 2009); Daras v. GEICO Ins. Co., 22 Misc.3d 141(A), 881 N.Y.S.2d 362 (Table), 2009

N.Y. Slip Op. 50438(U), 2009 WL 679491 (App. Term 2d, 11th & 13th Dists. Mar. 10, 2009).

The appearance at an IME is a condition precedent to the insured's liability on the policy, and an insurer may deny a claim retroactively to the date of loss for a claimant's failure to attend IMEs, "when, and as often as, the [insurer] may reasonably require." Stephen Fogel Psychological, P.C. v. Progressive Casualty 4. Ins. Co., 35 A.D.3d 720, 827 N.Y.S.2d 217 (App. Div, 2 Dept, 2006) (citing to 11 NYCRR §65-1.1 wherein it states: "The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the Company when, and as often as, the Company may reasonably require."). An insurer may deny a claim on the basis that the injured person-assignor failed to attend IMEs even if the IMEs were in a different medical specialty from that which underlies the claim. Id. *See also* Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559, 918 N.Y.S.2d 473 (1st Dept. 2011).

Appearance at an IME is required whether the insurance company demands it before a claim form is submitted or after the claim form is submitted. An assignee of all the rights, privileges, and remedies to which a motor vehicle accident victim is entitled under the No-Fault Law stands in the shoes of the victim and acquires no greater rights than he had. New York and Presbyterian Hospital v. Country Wide Ins. Co., 17 N.Y.3d 586, 592, 934 N.Y.S.2d 54, 59 (2011). Hence, the failure by an assignor-injured person to attend scheduled IMEs inures to the detriment of a medical provider who has taken an assignment of benefits from the assignor-injured person.

To establish the defense, an insurer must demonstrate that two separate requests for the IME were properly mailed to the assignor, and that the assignor failed to appear for the examination on either of the scheduled dates. Apollo Chiropractic Care, PC v. Praetorian Ins. Co., 27 Misc 3d 139(A), 2010 NY Slip Op 50911(App. Term, 1 Dept., 2010).

The affirmations and affidavits of the medical professionals who were to perform the IMEs can establish that a health care provider's assignor failed to appear for said IMEs. *E.g.*, Tri-Mount Acupuncture, P.C. v. NY Central Mutual Fire Ins. Co., 30 Misc.3d 144(A), 924 N.Y.S.2d 312 (Table), 2011 N.Y. Slip Op. 50335(U), 2011 WL 830762 (App. Term 2d, 11th & 13th Dists. Mar. 2, 2011); Radiology Today, P.C. v. GEICO Ins. Co., 25 Misc.3d 133(A), 901 N.Y.S.2d 910 (Table), 2009 N.Y. Slip Op. 52208(U), 2009 WL 3645541 (App. Term 2d, 11th & 13th Dists. Oct. 23, 2009). Alleviation Med. Servs., P.C. v. Hertz Co., 2016 NY Slip Op 50399(U) (App Term, 2 Dept., 2nd, 11th, & 13th, Jud. Dists, Mar. 23, 2016). As the rules of evidence do not apply to No-Fault arbitrations, 11 NYCRR 65-4.5(o)(1), a signed statement rather than an affirmation or affidavit from the doctor who was to perform the IME also suffices, and there are other ways of proving an IME no-show.

Application of Legal Standards

Respondent has come forward with sufficient evidence to demonstrate the mailing of the IME letters, the timeliness of its denial, and the Assignor's failure to appear for multiple scheduled IMEs. Specifically, Respondent has submitted IME notices scheduled for 3/2/2022 and 3/21/2022 with Aruna Seneviratne, M.D. and scheduled for 3/7/2022 and

3/28/2022 with Brian Wolin, D.C., properly addressed to the Assignor and the Assignor's attorney, along with proof of mailing in the form of affidavit of mailing by Tracy Simpson of Examworks, Respondent's IME vendor. A presumption of receipt by the Assignor of the IME notices exists by virtue of the notices having been properly mailed to the Assignor and the Assignor's attorney at their respective addresses. An affidavit and an affirmation from the providers attested to the failure of the Assignor to appear for the IMEs. Respondent's claim specific denial and global denial asserted the failure of the Assignor to attend IMEs. Respondent submitted the affidavit of Shirleyn Liew, No-Fault Claims Examiner, dated 1/6/2023, in support of Respondent's denials.

Applicant did not raise any arguments at the hearing regarding the sufficiency or the timeliness of the IME scheduling letters. Rather, Applicant argued that the denial was untimely as the bill for date of service 12/20/2021 was submitted on 2/1/2022, according to the proof of mailing, and was not denied until 7/15/2022. However, there is correspondence in the record from Applicant, dated 6/9/2022, requesting Respondent to reconsider their corrected claim and not deny the claim based on the 45-day rule. Applicant originally submitted the bill to the wrong entity. Specifically, the original bill was submitted to ESIS at PO Box 6566, Scranton, PA 18505, which is the Workers Compensation carrier according to Respondent. The corrected claim is dated 6/9/2022 and is addressed to Sedgwick Insurance-PIP, PO Box 6562, Scranton, PA 18505, the no-fault carrier. Applicant's own submission acknowledges that the corrected claim was not submitted until at least 6/9/2022, the date of the corrected bill. According to Respondent's denial the bill was received on 6/20/2022 and was timely denied on 7/15/2022. Therefore, based on the record before me, the claim was timely denied.

Although applicant's counsel raised issues regarding the sufficiency of respondent's documentary evidence in support of its defense, pursuant to 11 NYCRR 65-4.5 (o) (1) (Regulation 68-D), the arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. This provision of the no-fault regulations also provides that an arbitrator may independently raise any issue that he or she deems relevant to making an award. See, 11 NYCRR 65-4.5(o)(1).

In 536 Grand Medical, PC v. New York State Ins. Department, 24 AD3d 413, 805 NYS2d 643 (2d Dept. 2005), the Appellate Division, Second Department found that the foregoing provision comports with procedural due process. The court also noted that there is a strong governmental interest in according the arbitrator discretion in the prompt resolution of claims. *See*, 536 Grand Medical PC v. New York State Ins. Department, supra.

Accordingly, this arbitrator finds that pursuant to 11 NYCRR 65-4.5 (o)(1), the arbitrator is not bound by the rules of evidence and has broad discretion in determining the admissibility of evidence and the weight to be afforded that evidence.

Applicant did not submit any evidence tending to show that Assignor did not receive the IME notices. Neither did it submit any evidence to show that Assignor did attend the

IMEs or that there was a valid reason for not attending the IMEs. Thus, I am convinced that this patient ignored these IME letters at his own peril as he failed to attend the IMEs on both dates. Having done so, he has negated his right to benefits under this policy.

The insurer is entitled to judgment where it proves that two separate requests for an IME were duly mailed to the Assignor and the latter failed to appear on either of the dates. Apollo Chiropractic Care, P.C. v. Praetorian Ins. Co., 27 Misc.3d 139(A), 932 N.Y.S.2d 420 (Table), 2010 N.Y. Slip Op. 50911(U), 2010 WL 2026636 (App. Term 1st Dept. May 24, 2010).

Based upon the proof presented, I find that Respondent has established by a preponderance of the evidence the failure of the Assignor to appear at multiple properly scheduled IMEs and has therefore sustained its defense. The burden has shifted to the Applicant and has not been rebutted. *See*, Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co., 35 AD3d 720, 827 NYS2d 217 (2d Dept. 2006).

CONCLUSION

Accordingly, Applicant's claim is denied in its entirety. 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.

12/14/2023
(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:
0ed3aa2eac75fc01d69af4bff47f176e

Electronically Signed

Your name: Eileen Hennessy
Signed on: 12/14/2023