

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Mazal Pharmacy Inc d/b/a Mirage Pharmacy (Applicant)	AAA Case No.	17-22-1252-2047
- and -	Applicant's File No.	DK22-243670
	Insurer's Claim File No.	NYA0214476
Esurance Insurance Company (Respondent)	NAIC No.	25712

ARBITRATION AWARD

I, Drew M. Gewuerz, Esq., CPC, 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: JB

1. Hearing(s) held on 12/28/2023
Declared closed by the arbitrator on 12/28/2023

Artur Finkel, Esq., from Korsunskiy Legal Group P.C. participated virtually for the Applicant

Marie-Ann Inguanti, Esq., from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,581.90**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

See Section 3, *infra*.

3. Summary of Issues in Dispute

This arbitration to recover allegedly overdue PIP benefits involves a male Assignor, D.O.B. 1998, who was involved in a motor vehicle collision on 09/17/21, as a passenger. Following the collision, the Applicant supplied the Assignor with a prescription of lidocaine and ibuprofen on 02/10/22. The Applicant now seeks reimbursement for the fee associated with said service.

At this matter's hearing, the parties stipulated to the following facts and/or legal issues:

1. The Applicant submitted the disputed overdue claim to the Respondent. As a result, it establishes its prima facie entitlement to an Award for said claim. *See Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y.3d 498 (2015); and
2. The Respondent's denial of claim was timely issued and preserved a defense based on the Applicant's claim having been submitted more than 45 days from the date that the service was rendered.

As per the parties' stipulations, the issues to be decided are:

1. Whether the Applicant failed to submit its claim within 45 days from the date that the service was rendered or had reasonable justification for failing to do so; and
2. If not mooted by the first inquiry, whether the Applicant's claim charges excessive fees.

4. Findings, Conclusions, and Basis Therefor

This Award is rendered after diligent review and consideration of the parties' evidence submitted to and maintained by the American Arbitration Association's electronic case filing system, "MODRIA," as well as the parties' oral arguments and any testimony presented at this matter's hearing. Evidence that was submitted after this matter's "closing" and without this Arbitrator's authorization was not considered.

All citations in this Award to the Applicant's "Application Document" submission and Respondent's "Defense" submission shall be denoted as "(AXX)" and "(RXX)," respectively. Citation to the parties' supplemental submissions shall be denoted by the selected page out of the submissions' total pages, ("AXX/XX") and ("RXX/XX"), respectively.

The Respondent's denial of claim is vacated, and the Applicant's claim is awarded as it is overdue. The Applicant's claim was timely submitted to the Respondent via the U.S. Postal Service.

Pursuant to N.Y. Comp. Codes R. & Regs. tit. 11, § 65-2.4(c) (2002), in a case of a claim for health service expenses, the eligible injured person or that person's assignee or legal representative shall submit written proof of claim to the insurer no later than 45 days after the date services are rendered. The 45-day period for mailing written proof of claim begins the day after the services are rendered. *See* N.Y. Ins. Dep't Informal Op. No. 03-06-30 (June 30, 2003).

An insurer must pay or deny a claim in whole or in part within 30 calendar days after proof of claim is received. N.Y. Comp. Codes R. & Regs. tit. 11, § 65-3.8(c) (2002). No-Fault benefits are overdue if not paid within 30 calendar days after the insurer

receives proof of claim including verification requested under § 65-3.5. *Id.* § 65-3.8(a)(1).

It is unambiguous that a defense that a claim was submitted beyond the 45-day statutory deadline must be preserved in a timely denial. A denial of claim based untimely submission must advise applicants in their denials that late notice will be excused where the applicant can provide reasonable justification for the failure to give timely notice. *See* N.Y. Comp. Codes R. & Regs. tit. 11, § 65-3.3(e) (2002).

The Applicant proves submission of its claim to the Respondent on 03/25/22 via the United States Postal Service as per the Applicant's mailing ledger and affidavit of mailing. *But see N.Y. & Presbyterian Hosp. v. Allstate Ins. Co.*, 29 A.D.3d 547, 548 (App. Div., 2d Dep't 2006). The ledger identifies the Assignor, generally identifies the claim, and further shows that the package was addressed to the Respondent at an undisputed address. Submission upon the carrier was accomplished prior to the actual date of receipt, 03/31/22, when the parcel was placed in the custody and control of the United States Postal Service. Service by mail is "complete upon deposit of a properly stamped and addressed letter in a depository under the exclusive care and custody of the United States Post Office (CPLR 2103, subd [b], par 2; subd [c])." *Engel v. Lichterman*, 95 A.D.2d 536, 543 (App. Div., 2d Dep't 1983) (quoting *Grinan v. Santaella*, 89 A.D.2d 866 (App. Div., 2d Dep't 1982)).

Accordingly, the Respondent's denial ground is vacated, and the claim is awarded.

As to this Award's amount, the Respondent contends that the Applicant's claim exceeds the statutorily set maximum permissible amount. The law is clear that the Respondent must "conclusively demonstrate" the proper fee schedule rate of payment for the services rendered in a "coherent manner." *Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 2013 NY Slip Op. 50199(U) (App. Term, 2d Dep't 2013) ("Defendant was not entitled to the dismissal . . . because 'defendant failed to conclusively establishes its stated defense[] that the fee charged exceeded the amounts set forth in the workers' compensation fee schedule[.]'"); *Tyorkin v. Garrison Prop. & Cas. Ins. Co.*, 2016 NY Slip Op. 50846(U) (Civ. Ct., Kings Cty., 2016) ("Upon review of the [defendant's affidavit from a certified professional coder], the Court finds that Ms. Moreno did not explain the exact amounts allowable in a coherent manner.").

Pertaining to pharmaceutical payments, "conclusively demonstrating" in a "coherent manner" the proper rate of payment means establishing the average wholesale price (AWP) of the drug on the date that it was dispensed by sufficient evidence, i.e., more than a conclusory statement. The New York State Workers' Compensation Board promulgated a Pharmacy Fee Schedule under N.Y. Comp. Codes R. & Regs. tit. 12, § 440, which mandates reimbursement for prescription drugs at the "Average Wholesale Price" ("AWP") "on the day it was dispensed." *Id.* at 440.5(a)(1). Section 440.2(a) authorizes the use of "the Red Book published by Thomson Reuters or Medi-Span Master Drug Database by Wolters Kluwer Health or any successor publisher . . . or other nationally recognized drug pricing index adopted by the Chair or Chair's designee" to determine the AWP. Section 440.5(a)(1) governs the reimbursement formula, stating, "The maximum reimbursement or payment for prescription drugs or medicines in

uncontroverted cases, including all brand name and generic prescription drugs or medicines, shall be the Average Wholesale Price for the national drug code for the prescription drug or medicine on the day it was dispensed minus 12 percent of the Average Wholesale price plus a dispensing fee of \$4 for brand name drugs or medicines or minus 20 percent of the Average Wholesale Price plus a dispensing fee of \$5 for generic drugs or medicines."

Despite the Respondent's contention, the Record does not contain any substantive evidence regarding its defense. As a result, the Respondent's defense fails, and the amount awarded to the Applicant is that which is in dispute.

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
	Mazal Pharmacy Inc d/b/a Mirage Pharmacy	02/10/22 - 02/10/22	\$1,581.90	Awarded: \$1,581.90
Total			\$1,581.90	Awarded: \$1,581.90

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/31/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Pursuant to N.Y. Comp. Codes R. & Regs. tit. 11, § 65-4.4(f)(3) (2002), "[i]n an award of interest, the arbitrator shall compute the amount due for each element of first-party benefits in dispute, commencing 30 days after proof of claim therefor was received by the insurer and ending with the day of payment of the award, subject to the provisions of subdivisions (c) and (d) of section 65-3.9 of this Part (stay of interest)."

Pursuant to N.Y. Comp. Codes R. & Regs. tit. 11, § 65-3.9 (2002), "[i]nterest on overdue payments," the Respondent shall pay interest to the Applicant on the awarded overdue PIP benefit at a rate of two percent (2%) per month calculated on a pro rata basis using a thirty (30) day month. As applied to the claim(s) herein, interest accrues from the date of this matter's initiation through the date of payment of the awarded overdue PIP benefit where arbitration was not initiated within 30 days after receipt of a denial(s) of claim(s), or from the date that the claim(s) was(were) overdue where no denial was issued through the date of payment of the awarded overdue PIP benefits.

Initiation occurs, pursuant to N.Y. Comp. Codes R. & Regs. tit. 11, § 65-4.2(b) (2002), when an applicant mails the requisite statutory forms, *see* § 65-4.2(b)(1)(i), (ii), along with the applicable filing fee, *see id.* at (b)(1)(iii), to the designated organization with a copy to the insurer. Where the date of mailing is unascertainable from the evidentiary submissions, the date of actual receipt shall control.

The parties stipulated that interest shall run from the date that the American Arbitration Association received the Applicant's requisite statutory forms for this matter except as specifically delineated in § 4, *supra*.

C. Attorney's Fees

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

As this arbitration was filed after February 4, 2015, it is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to N.Y. Comp. Codes R. & Regs. tit. 11, § 65-4 (2002) (Insurance Regulation 68-D). Accordingly, the Respondent shall pay the Applicant an attorneys' fee according to § 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, Drew M. Gewuerz, Esq., CPC, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

12/28/2023

(Dated)

Drew M. Gewuerz, Esq., CPC

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:

dc4fb7192b1799a9ae0b981632a1d1e2

Electronically Signed

Your name: Drew M. Gewuerz, Esq., CPC
Signed on: 12/28/2023