American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Allen Rothpearl MD P.C. DBA Jericho Specialty Imaging (Applicant)	AAA Case No.	17-24-1336-9657
	Applicant's File No.	RFA23-325483
- and -	Insurer's Claim File No.	1126150-01
	NAIC No.	16616
American Transit Insurance Company (Respondent)		

ARBITRATION AWARD

I, Mitchell Lustig, 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

1. Hearing(s) held on 07/22/2024
   Declared closed by the arbitrator on 07/22/2024

   Sheeta Paul, Esq. from The Russell Friedman Law Group LLP participated virtually for the Applicant

   Mehgan Harris, Esq/ from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$1,691.44**, 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

   In dispute is Applicant Jericho Specialty Imaging, P.C.'s claim as the assignee of a 62-year-old male injured in a motor vehicle accident on February 17, 2023, for reimbursement in the sum of $1,691.44 for MRIs of the left knee and right knee performed on March 27, 2023.

   The Respondent did not pay or deny the claim but rather maintained that the Applicant's claim was premature since the Applicant did not respond to its requests for additional verification. Thus, the issue presented for my determination is whether the Applicant's claim is premature in view of outstanding requests for additional verification.

4. Findings, Conclusions, and Basis Therefor

I have reviewed all the documents in the ADR Center. This decision is based upon the submissions of the parties and the arguments made by the parties at the hearing.

It is well settled that a heath care provider establishes its prima facie entitlement to No-Fault benefits as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of No-Fault benefits were overdue. Westchester Medical Center v. Lincoln General Insurance Company, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2nd Dept. 2009),

The submission of the Respondent's verification requests issued in response to the Applicant's bill, which acknowledged receipt of the bill, establishes prima facie that the insurer received the bill and that the insurer did not pay for same. See SpineAmerica Medical, P.C. v. State Farm Mutual Automobile Insurance Company, 13 Misc.3d 135(A), 2006 N.Y. Slip Op. 52035(U) (App. Term 9th and 10th Jud.Dists. 2006).

I find that the Applicant provider has established a prima facie case.

Pursuant to Insurance Law § 5106 (a) and 11 NYCRR § 65-3.5, an insurer is required to either pay or deny, in whole or in part, a claim for No-Fault benefits within thirty (30) calendar days after proof of claim is received.

The 30-day statutory period in which an insurer must pay or deny a claim may be extended by a request by the insurance company for additional verification of the claim. 11 NYCRR § 65-3.8; 11 NYCRR § 65-3.5 (b). See Mount Sinai Hospital v. Triboro Coach, 263 A.D.2d 11, 699 N.Y.S.2d 77 (2nd Dept. 1999).

When a health care provider, as assignee of a No-Fault claimant, fails to respond to a verification request, including any follow-up request, "the 30-day period in which to pay or deny the claim does not begin to run, and any claim for payment by the hospital is premature." Mount Sinai Hosp. v. Chubb Group of Ins. Cos., 43 A.D.3d 889, 890 (2007).

To establish the defense that an action is premature because verification is outstanding, it is the insurer's prima facie burden to demonstrate that its requests were timely mailed and that it did not receive the requested verification. See Island Chiropractic, P.C. v. Travelers Ins. Co., 64 Misc.3d 143(A) (App Term 2d, 11th & 13th Dists. 2019).

After receiving the Applicant's claim, Respondent purportedly wrote to the provider on April 20, 2023 and May 25, 2023 requesting as additional verification a complete social security number and copies of the MRI films of the right and left knees.

Even assuming arguendo that, in the absence of any proof of mailing, Respondent demonstrated that it had timely sent its initial and follow-up requests for verification, it did not demonstrate, prima facie, that it had not received the requested verification. See Tam Medical Supply Corp. v. Lancer Ins. Co., 48 Misc.3d 136(A) (App Term 2d, 11th & 13th Dists. 2015).

An insurer fails to establish that a claim should be dismissed due to the non-provision of verification where it fails to prove that the health care provider did not provide it. See Eagle Surgical Supply, Inc. v. Travelers Indemnity Co., 28 Misc.3d 137(A) (App Term 2d, 11th & 13th Dists. 2010).

To the extent that Respondent suggests that it is Applicant's burden to demonstrate that it complied with the verification requests and that the provider supplied no evidence that it had done so, where there is no evidence from either party on the issue, it is improper to find that the provider failed to demonstrate that it had provided the requested verification since it is the insurer's initial burden to present evidence to demonstrate that it had not received the additional verification before the burden shifts to the provider to prove that it had responded. See T & S Medical Supply Corp. v. MVAIC, 69 Misc.3d 139(A) (App Term 2d, 11th & 13th Dists. 2020); Island Chiropractic, P.C. v. Travelers Ins. Co., 64 Misc.3d 143(A) (App Term 2d, 11th & 13th Dists. 2019). See also *Ricarte Lgsay. MD v. Allstate Insurance Company, AAA Case No.: 17-22-1249-5490 (Arbitrator Andrew Horn, 6/29/2023); Adagio Chiropractic P.C. v. American Transit Insurance Company, AAA Case No.: 17-22-1268-8248 (Arbitrator Andrew Horn, 6/1/2023).*

Thus, the Respondent cannot sustain its prima facie burden that the Applicant's claim is premature. See *Kolb Radiology PC v. American Transit Insurance Company, AAA Case No.: 17-21-1208-4550 (Arbitrator Glen Weiner, 3/9/2022); Accelerate Radiology PC v. American Transit Insurance Company, AAA Case No.: 17-21-1205-1078 (Arbitrator Glen Weiner, 2/9/2022); Surgicare of Brooklyn LLC v. St. Paul Insurance Company, AAA Case No.: 17-19-1121-4213 (Arbitrator Glen Weiner, 6/2/2020) aff'd on appeal by Arbitrator Robert Trestman, 99-19-1121-4213).*

Consequently, as Respondent failed to demonstrate either that it timely mailed its verification requests or that any outstanding verification in the possession or under the control of Applicant had not been provided, I find the Applicant's claim is overdue.

Finally, the Respondent's counsel argued that based upon the fact that the Assignor breached a condition precedent to coverage by failing to appear for two Independent Medical Examinations with Dr. Ernesto Seldman on October 16, 2023 and November 1, 2023 that I should deny the Applicant's entire claim retroactive to the date of loss herein of February 17, 2023.

In this regard, the Respondent's attorney argues that on November 17, 2023, the Respondent issued a General Denial terminating all no-fault benefits based upon the Assignor's failure to appear at the aforesaid IMEs. In addition, the Respondent has submitted IME scheduling letters addressed to the Assignor as well as an Affidavit from the Dr. Seldman confirming that the Assignor failed to appear for the IMEs scheduled

for October 16, 2023 and November 1, 2023. However, I do not find that the issuance of a General Denial is sufficient to preserve the Respondent's IME no-show defense.

While I am aware that in Unitrin Advantage Insurance Company v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559, 918 N.Y.S.2d 473 (1st Dept. 2011), the Appellate Division, First Department held that a defense predicated upon an Assignor's failure to appear for IMEs was a lack of coverage defense not precluded by an untimely denial and did sustain the insurer's defense where it only issued a General Denial, I find that the holding in Unitrin is **inconsistent and contrary** to the decision of the Appellate Division, Second Department in Westchester Medical Center v. Lincoln General Insurance Company, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2nd Dept. 2009). In the latter case, the Second Department held that the failure of the assignor to appear for an EUO (like an IME, also a breach of a policy condition) did "not serve to vitiate the medical provider's right to recover no-fault benefits or to toll the 30 day statutory period." Rather, the Court noted that such a denial **"was subject to the preclusion remedy."**

Moreover, I find that the holding in Unitrin is inconsistent with Central General Hospital v. Chubb Group of Insurance Companies, 90 N.Y.2d 195, 659 N.Y.S.2d 246 (1997). In Chubb, the Court of Appeals reiterated the distinction, first articulated in Zappone v. Home Insurance Company, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982), between disclaimers of coverage based upon a policy exclusion or **breach of a policy condition,** which are precluded if not timely made, and disclaimers premised upon a lack of coverage in the first instance (e.g., where there is no contractual relationship or where the injuries did not arise out of the insured incident), which may be asserted at any time. As noted by the Court in Chubb: "The denial of liability based upon a lack of coverage within the insurance agreement as framed in part by the litigation strategy and the nature of the dispute, is **distinguishable from disclaimer attempts based upon a breach of a policy condition."** 90 N.Y. 2d at 199, 659 N.Y. S.2d at 248. See also Pomona Management, P.C. v. Praetorian, 2012 N.Y. Slip Op. 30525(U) (Sup Ct. Nassau Co. 2012, Winslow J.) where the Court, in upholding a decision by a Master Arbitrator that rejected an insurer's argument that the decision in Unitrin did not preclude a late denial of claim based upon the failure of the assignor to appear for IMEs, stated as follows: **"The Court notes… that Chubb does not fully support the holding in Unitrin."**

Since an insurer's defense based upon a breach of a condition precedent to coverage is **"subject to the preclusion remedy,"** it logically follows that an insurer must issue a timely specific denial of claim and cannot rely upon a general denial. Since the Respondent did not issue a timely **specific denial** in the within matter, I find that it is precluded from asserting its defense that the Assignor breached a condition precedent to coverage by failing to appear for IMEs. See Clinton Place Medical, P.C. v. New York Central Mutual Fire Insurance Company, 2014 N.Y. Slip Op. 50954(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014); Compas Medical, P.C. v. New York Central Mutual Fire Insurance Company, 39 Misc.3d 142(A), 2013 N.Y. Slip Op. 50762(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2013); Art of Healing Medicine, P.C. v. New York Central Mutual Fire Insurance Company, 39 Misc.3d 142(A), 2013 N.Y. Slip Op. 50766(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2013); Brooklyn Heights Physical Therapy,

P.C. v. New York Central Mutual Fire Insurance Company, 36 Misc.3d 134(A), 2012 N.Y. Slip Op. 51337(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012).

I also find that there is no merit to the argument of the Respondent's counsel that based upon my prior decision in *Rafael Yaakabov Family Health NP PC v. American Transit Insurance Company , AAA Case No.: 17-24-338-9376 (7/11/2023,* in which I found that the Respondent's proof was sufficient to establish that the within Assignor failed to appear for the IMEs on October 16, 2023 and November 1, 2023, that the doctrine of collateral estoppel bars the Applicant from recovery in the within matter. I note that my prior decision involved a different **medical provider** than is in dispute herein. Since there is no showing that there was any **privity** between the Applicant provider in my prior decision and the within Applicant provider, I find that the doctrine of collateral estoppel is not applicable. See Alev Medical Supply, Inc. v. Allstate Property & Casualty Insurance Co., 36 Misc.3d 132(A), 2012 N.Y. Slip Op. 51294(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); Jamaica Medical Supply, Inc. v. N.Y. Central Mutual Fire Ins. Co., 34 Misc.3d 21, 2011 N.Y. Slip. Op. 21359 (App. Term 2nd, 11th and 13th Jud. Dists. 2011).

Accordingly, I find that the Respondent cannot sustain its disclaimer of coverage and I find in favor of the Applicant in the sum of $1,691.44.

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**

	Allen Rothpearl MD P.C. DBA Jericho Specialty Imaging	**03/27/23 - 03/27/23**	**$1,691.44**	**Awarded: $1,691.44**
Total			**$1,691.44**	**Awarded: $1,691.44**

B. The insurer shall also compute and pay the applicant interest set forth below. 02/19/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

   The insurer shall pay interest from February 19, 2024, the date that arbitration was requested, to the date of payment.

C. Attorney's Fees

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

   After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay the applicant an attorney's fee equal to 20% of that total sum, subject to a maximum of $1,360.00. See 11 NYCRR 65-4.6(d). However, if the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation process, the attorney's fee shall be based upon the provisions of 11 NYCRR Section 65-4.6(b).

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

07/23/2024
(Dated)

Mitchell Lustig

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:
c8bf353a59739e131aaa96d11b0ffcec

Electronically Signed

Your name: Mitchell Lustig
Signed on: 07/23/2024