

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Global Surgery Center LLC
(Applicant)

- and -

State Farm Mutual Automobile Insurance
Company
(Respondent)

AAA Case No. 17-24-1338-3350

Applicant's File No. SS-264887

Insurer's Claim File No. 52-56D1-38D

NAIC No. 25178

ARBITRATION AWARD

I, Pauline Molesso, 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 07/30/2024
Declared closed by the arbitrator on 07/30/2024

Greg Itingen from Samandarov & Associates, P.C. participated virtually for the
Applicant

Dianne Galluzzo from Bruno Gerbino & Soriano LLP participated virtually for the
Respondent

2. The amount claimed in the Arbitration Request, **\$14,521.33**, 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 Assignor was a 28 year old male who was involved in a motor vehicle accident on 9/13/23. Thereafter, the Assignor sought medical treatment. Applicant seeks reimbursement for the facility fee for left shoulder arthroscopy, performed on 10/21/23, totaling \$14,541.33 in dispute. Respondent denied the claim based upon an EUO no show defense.

4. Findings, Conclusions, and Basis Therefor

This case was conducted using the documents submitted by the parties in the ADR Center, maintained by the American Arbitration Association, and the oral arguments of the parties. Any documents in the ADR Center are hereby incorporated into this hearing. I have reviewed all the relevant documents. No witnesses testified at this hearing.

11 NYCRR 65-3.5(c) states "The insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was requested."

In order to make a prima facie showing of this defense, Respondent must demonstrate that the initial and follow-up requests for verification were timely issued pursuant to 11 NYCRR 65-3.5 (b) and 65-3.6(b) and establish the failure to appear for the EUOs. Essential Acupuncture Services, P.C. v. Ameriprise Auto & Home Ins. Co., 2012 N.Y. Slip Op. 52404(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012).

Since the appearance of the health care provider at an EUO is a condition precedent to the insurer's liability on the policy, judgment should be granted to the insurer where it has proven that the EUO notices were mailed and there was a failure to appear at the EUOs. Points of Health Acupuncture, P.C. v. Lancer Ins. Co., 28 Misc.3d 137(A), 2010 NY Slip Op. 51455(U), 2010 WL 3257917 (App. Term 2d, 11th & 13th Dists. Aug. 12, 2010). An insurer is entitled to judgment dismissing a claim where the health care provider has failed to attend scheduled EUOs. Dover Acupuncture, P.C. v. State Farm Mutual Automobile Ins. Co., 28 Misc.3d 140(A), 2010 N.Y. Slip Op. 51605(U), 2010 WL 3604424 (App. Term 1st Dept. Sept. 17, 2010).

In support of its position, Respondent submitted the EUO scheduling letters, affirmation of Richard Aitken, Esq., and statements on the record.

In opposition, Applicant contends the EUO requests were not made timely. Specifically, the second EUO scheduling letter was sent more than 10 days subsequent to the first missed EUO.

The request for an EUO constitutes a request for verification, whether it is made before a claim is submitted or after the submission of a claim as additional verification, and as such, is subject to the follow-up provisions of 11 NYCRR § 65-3.6 (b). See NY Ins Gen Counsel Op No. 05-02-21 (2005), 2005 NY Insurance GC Opinions LEXIS 31. 11 NYCRR 65-3.6 (b) establishes the follow-up requirements, stating that "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." If the first request for verification is made in an untimely manner, the late verification would merely reduce the time in which the Respondent must pay or deny the claim. (See Nyack Hospital v. General Motors Acceptance Corp. 8 N.Y.3d 294, 832 N.Y.S.2d 880 (2007) and Liberty Queens Medical P.C. v. Tri-State Consumer Insurance, 188 Misc.2d 835, 729 N.Y.S.2d 882 (District Ct. Nassau Co, 2001). However, this is not the case if the follow-up request is untimely sent. In the case of an IME (herein EUO), a follow up request must be sent within ten

days after the non appearance. See, Lotus Acupuncture, PC v. State Farm Mutual Automobile Ins. Co., 39 Misc.3d 829, 965 N.Y.S.2d 807 (Civ. Ct. Queens Co. Mar. 28, 2013). Based on the foregoing, as the second scheduling letter was sent more than 10 days after the first missed EUO, the EUO was not properly scheduled.

Applicant also contends the EUO letters are improperly addressed. I agree. The EUO scheduling letters are addressed to the Assignor at a Jamaica, NY address, however the NF-2 has a Buffalo, NY address. In Lenox Hill Radiology, P.C. v. American Tr. Inc. Co. 2008 NY Slip Op 50330(U)[18 Misc 3d 1136(A)] (Civ. Ct. NY County February 25, 2008), the Court held "the NF-2 satisfied the requirements of reliability. The person completing the NF-2 has a duty to fill out the application accurately. Clearly, defendant insurance company must be able to rely on the information contained in the NF-2 in order to process the application for no-fault benefits." The NF-2 is signed by the Assignor. Although the MV-104 contains the Jamaica, NY address, this document is not signed by the Assignor.

Based on the foregoing, I find Applicant's arguments persuasive and as the EUO was not properly scheduled and the letters not properly addressed to the Assignor, Respondent has not met their burden and the claim is granted. No evidence was presented regarding the fee schedule.

Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of hearing.

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
	Global Surgery Center LLC	10/21/23 - 10/21/23	\$14,521.33	Awarded: \$14,521.33
Total			\$14,521.33	Awarded: \$14,521.33

- B. The insurer shall also compute and pay the applicant interest set forth below. 02/28/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

- C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee, in accordance with 11 NYCRR 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, Pauline Molesso, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

07/31/2024

(Dated)

Pauline Molesso

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:
218fd3b54565afd00cdc7f35181503e8

Electronically Signed

Your name: Pauline Molesso
Signed on: 07/31/2024