

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

PMK Acupuncture PC
(Applicant)

- and -

Nationwide Affinity Insurance Company Of
America
(Respondent)

AAA Case No. 17-24-1335-0717

Applicant's File No. 393276

Insurer's Claim File No. 091616GN

NAIC No. 26093

ARBITRATION AWARD

I, Heidi Obiajulu, 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: Injured Party

1. Hearing(s) held on 09/04/2024
Declared closed by the arbitrator on 09/04/2024

Neil Menashe, Esq. from Neil Menashe Attorney at Law P.C. participated virtually for the Applicant

Brian Kaufman, Esq. from Hollander Legal Group PC participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,457.04**, was AMENDED and permitted by the arbitrator at the oral hearing.

The applicant amended its claim to \$1833.04 to conform to the maximum allowances under the applicable fee schedule and based on the withdrawal of its charges for COVID cleaning/PPE [which is not reimbursable].

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The applicant seeks reimbursement of charges for acupuncture services performed from 04/05/22 through 11/08/22, following a motor vehicle accident on 03/25/22. The

respondent denied reimbursement of the applicant's claim because it alleged the applicant failed to comply with its verification requests within 120 calendar days of the initial verification requests and provided no written reasonable justification for its failure to comply.

4. Findings, Conclusions, and Basis Therefor

The decision is based on the documents in the Electronic Case folder maintained by the American Arbitration Association (hereafter referred to as AAA) as of the date of this hearing.

The applicant, as assignee of the Injured Party, seeks reimbursement, with interest and counsel fees, under the No-Fault Regulations, for acupuncture services performed from 04/05/22 through 11/08/22, in the amended amount of \$1833.04.

The respondent insured the motor vehicle involved in the automobile accident. Under New York's Comprehensive Motor Vehicle Insurance Reparation Act (the "No-Fault Law"), New York Ins. Law §§ 5101 et seq., the respondent was obligated to reimburse the Injured Party (or assignee) for all reasonable and necessary medical expenses arising from the use and operation of the insured vehicle.

This case arises out of a motor vehicle accident occurring on March 25, 2022, in which the Injured Party (WYC), a then 28-year-old female sustained multiple injuries including to the neck, shoulders, and lower back.

The applicant performed the disputed acupuncture and submitted its claim forms to the respondent seeking reimbursement of no-fault benefits.

The respondent submitted an affirmation by Lisa Noll, the respondent's claims specialist, to show when it received the applicant's claim forms and to demonstrate that verification requests were sent to the applicant per the verification protocols of the No-fault law.

On 07/25/22, regarding the disputed dates 04/05/22-07/06/22, the respondent sent the applicant a verification request seeking to obtain Mallela-type corporate records, information regarding the identity of the person who signed the billing agreement, and copies of invoices corresponding to payments to the billing company. The verification request contained the requisite notification language of 11 NYCRR section 65-3.5(o).

On 08/26/22, the respondent sent a follow-up verification request to the applicant seeking the same information sought in the initial verification request. The verification request contained the requisite notification language of 11 NYCRR section 65-3.5(o).

The respondent sent similar verification requests regarding the remaining bills. For the exact dates of the verification requests see Ms. Noll's affirmation.

Notably, the verification request regarding the date of service 06/22/22, has a defect. The verification request lists an incorrect date of service. It lists "06/20/22." The respondent's attorney argued that this is a non-substantive immaterial defect [like that referenced in 11 NYCRR section 65-3.5(p)], which is not fatal to the respondent's defense. The applicant's attorney disagreed and argued it was a material defect that failed to toll the respondent's 30-day period to pay or deny that part of the applicant's claim. Therefore, he argued that the claim-specific denial pertaining to the acupuncture performed on 06/22/22 is late and the 120-day defense is precluded.

The respondent's attorney contends the respondent never received a response to its verification requests and relies on the affirmation by Lisa Noll.

Consequently, the respondent denied reimbursement of the applicant's claim based on its alleged failure to comply with its verification requests within 120 calendar days of the initial verification requests.

After it received the respondent's denials, the applicant commenced this arbitration seeking reimbursement of its claim.

At the outset, I find that the applicant established its prima facie case with the submission of its claim forms and the copies of the respondent's denial of claim forms, which demonstrate that the respondent received the applicant's claim forms, that more than 30-days elapsed since its receipt of same, and that the respondent denied reimbursement of the applicant's claim, which shows that the applicant's claim is now due and owing. See Insurance Law section 5106 [a]; Viviane Etienne Medical Care, PC v. County-Wide Ins. Co 25 N.Y.3d. 498, (NY, June 10, 2015), Westchester Medical Center v. Nationwide Mut. Ins. Co., 78 A.D.3d. 1168, (N.Y.A.D. 2nd Dept., November 30, 2010).

Once an applicant establishes a prima facie case, the burden shifts to the insurer to prove its defense.

However, even before determining whether the respondent met its burden of proof, it must first be determined whether the respondent's defense survives preclusion.

I find the respondent's 120-day defense is preserved based on the uncontested timely and legally sufficient denials asserting that defense.

Therefore, the issue is whether the respondent met its burden of proof in establishing its defense.

The respondent's attorney argued that the respondent established its 120-day defense with the submitted copies of the verification requests, the affirmation by Lisa Noll, the affidavit by Matthew Mclendon, the Operations Manager of the respondent's agent [Auto Injury Solutions, Inc. ("AIS")], and the affirmation of Lind Arnold.

The applicant's attorney argued that the respondent failed to establish its defense because the verification requests were not sent to the attorneys who represented the applicant in the EUO [held 05/21/20]. The verification requests sought Mallela-type documents post-EUO [apparently based on EUO testimony]. Therefore, he argued the attorneys representing Paul Kim, L.Ac. should have received copies of the verification requests. Since it's undisputed the attorneys representing Paul Kim, L.Ac. at the EUO did not receive copies of the verification requests, the applicant's attorney contended the respondent failed to establish its defense.

The respondent's attorney retorted that there was no obligation to send the verification requests to the attorneys who appeared with the applicant [Paul Kim, L.Ac.] at the EUO held almost two years earlier because they were not representing the applicant regarding this claim **and** there was no written request that those attorneys receive copies of the verification requests. Therefore, he argued that the respondent was solely required to send the verification requests to the applicant, which it did. Since Ms. Noll affirmed that the respondent received no response to its verification requests within 120 calendar days of the initial verification requests after presumably receiving copies of those verification requests, he argued that the respondent established its defense.

Reviewing the relevant evidence in the record and considering the oral arguments made by the parties, I find as follows:

11 NYCRR section 65-3.5(o) provides: *"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. This subdivision shall not apply to a prescribed form (NF-Form) as set forth in Appendix 13 of this Title, medical examination request, or examination under oath request. This subdivision shall apply, with respect to claims for medical services, to any treatment or service rendered on or after April 1, 2013, and with respect to claims for lost earnings and reasonable and necessary expenses, to an accident occurring on or after April 1, 2013."*

11 NYCRR section 65-3.8(b) (3) provides:

"Except as provided in subdivision (e) of this section, an insurer shall not issue a denial of claim form (NYS Form N-F 10) prior to its receipt of verification of all of the relevant information requested pursuant to sections 65-3.5 and 65-3.6 of this Subpart (e.g., medical reports, wage verification, etc.). However, an 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) of this Subpart. This subdivision shall not apply to a prescribed form (NF-Form) as set forth in

Appendix 13 of this Title, medical examination request, or examination under oath request. This paragraph shall apply, with respect to claims for medical services, to any treatment or service rendered on or after April 1, 2013, and with respect to claims for lost earnings and reasonable and necessary expenses, to an accident occurring on or after April 1, 2013."

Applying the above regulations and the regulations outlining the verification protocol to the evidence in the record, I find the respondent's verification requests [except the one for 06/22/22] were valid [seeking information the respondent was entitled to receive] and complied with the verification protocols in terms of timeliness and follow-up. Although the applicant strenuously argued the verification requests should have been sent to the attorneys representing Paul Kim, L.Ac. in the EUO, I am not persuaded. Instead, I am persuaded by the respondent's attorney that those attorneys did not represent the applicant regarding this claim and there were no instructions to send verification requests to them. Therefore, I find the respondent was not obligated to send copies of the verification requests to Paul Kim's attorneys [for the EUO almost two years earlier]. I further find the verification requests were sent to the applicant's proper address and per the respondent's [and its agent's]standard office practices and procedures for mailing verification requests. Also, the respondent established that the applicant did not comply with those verification requests based on the credible and legally sufficient affirmation by Lisa Noll. Consequently, I find that the respondent met its burden of proof in establishing its 120-day defense regarding all dates of service except 06/22/22.

The applicant did not refute the respondent's evidence or defense.

Finally, regarding the verification request for the acupuncture services performed on 06/22/22, I agree with the applicant's attorney that the reference to the incorrect date of service in the verification request was a material defect because the only information that identified the bill in the verification request was the date of service. [There is also a defect in the denial which arguably is immaterial] Also, it's problematic that Ms. Noll did not pick up on the defect in the verification request in her affirmation. Her statements do not match the evidence. Therefore, I find the respondent failed to toll its 30-day period to pay or deny that bill to 07/25/22 [the date of the initial verification request]. Consequently, I find the respondent's 120-day defense is precluded regarding that bill. The bill became due and owing 30 days from 07/18/22 [the date of receipt of the claim.].

Accordingly, for the above reasons, I find in favor of the applicant in the amount of \$49.88 [the amended amount] for the acupuncture performed on 06/22/22. The remainder of the applicant's claim is denied in its entirety.

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	Amount Amended	Status
	PMK Acupuncture PC	04/05/22 - 11/08/22	\$2,457.04	\$1,833.04	Awarded: \$49.88
Total			\$2,457.04		Awarded: \$49.88

B. The insurer shall also compute and pay the applicant interest set forth below. 08/18/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The applicant's award of \$49.88 shall bear interest at a rate of two percent per month, calculated on a pro-rata basis using a 30-day month from 08/18/22, when the bill became due, to 11/29/22, the date of the denial and then from 02/02/24, the date the applicant initiated arbitration, to the date of the payment of the award, under 11 NYCRR 65-3.9 (a) and LMK Psychological Servs. P.C. v. State Farm Mut. Auto Ins. Co., 12 N.Y.3d 217, (N.Y., April 02, 2009) since Applicant did not commence this Arbitration proceeding within 30 days after receiving the subject denial(s). Interest is tolled from 11/29/22, the date of the denial, to 02/02/24, the date the applicant filed for arbitration.

C. Attorney's Fees

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

As this matter was filed **after** February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, under 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 NJ
SS :
County of Union

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

09/06/2024
(Dated)

Heidi Obiajulu

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:
6b75ca9a09efb4098079c7a14242a96a

Electronically Signed

Your name: Heidi Obiajulu
Signed on: 09/06/2024