American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Uptown Healthcare Management Inc d/b/a East Tremont Medical Center (Applicant)	AAA Case No.	17-23-1291-2904
	Applicant's File No.	TLD23-1019403
- and -	Insurer's Claim File No.	228236071
	NAIC No.	32786
Progressive Casualty Insurance Company (Respondent)		

ARBITRATION AWARD

I, Kent Benziger, 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: M.R.

1. Hearing(s) held on 08/19/2024
   Declared closed by the arbitrator on 08/19/2024

   Kurt Lundgren, Esq. from Thwaites, Lundgren & D'Arcy Esqs participated virtually for the Applicant

   Iris Ganijan, Esq. from McCormack, Mattei & Holler participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$1,816.00**, 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

   On May 9, 2022, the Assignor/Eligible Injured Party, a 32-year-old male, was involved in a motor vehicle accident. On November 22, 2022, a right shoulder arthroscopy was performed. In dispute are two bills related to the arthroscopy. The first is for nerve blocks (64415 $171.32) and anesthesia (01630 $237.68); while the second was for equipment utilized in the procedure including: Microaptor Knotless Regensorb Suture Anchor (E1399 $599.00), Acupass Direct XL (E1399 $350.00), (6) Minitape (Cobraid Blue) 39.5 (E1399 $107.00), 8.5 mm x 72 mm Threaded Cannula (E1399 $42.00), Microraptor Knotless Drill 2.2 mm (E1399 $309.00).

The Applicant denied both claims based on the Assignor's failure to appear for examinations under oath. This arbitrator has previously upheld this defense in the linked arbitration including Healthy Elite v. Progressive, AAA Case No. 17-23-1289-8632 (June 2, 2024).

4. Findings, Conclusions, and Basis Therefor

On May 9, 2022, the Assignor/Eligible Injured Party, a 32-year-old male, was involved in a motor vehicle accident. On May 10, 2022, Dr. Carlotta Ross-Distin, RPA-C evaluated the Assignor and administered trigger point injections. The diagnoses included myofascial pain syndrome and lumbar post-traumatic sprain/strains.

On November 22, 2022s a right shoulder arthroscopy was performed consisting of a bursectomy, lysis of adhesions, subacromial decompression with anterior acromioplasty, Bankart repair, debridement of supraspinatus tendon, subscapularis tendon, SLAP tear, posterior labrum, biceps tendon and glenoid, extensive debridement, coblation and synovectomy. The post-operative diagnosis was a Labrum tear, Grade 3 chondral lesion of the glenoid, SLAP tear, partial rotator cuff tear, subscapularis tendon tear, biceps tendon tear, synovitis, subacromial adhesions, adhesive capsulitis, bursitis.

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Denials. The Respondent issued timely denials based on the Assignor's failure to respond to multiple requests to appear for Examinations Under Oath

This arbitrator has ruled on this same issue in the linked proceedings including Atlantic Medical & Diagnostic PC v. Progressive Casualty, AAA Case No. 17-23-1306-1954 (7/16/24) as well as in

Healthy Elite v. Progressive, AAA Case No. 17-23-1289-8632 (June 2, 2024) where I held as follows:

> EUO Notices. Through a notice dated July 7, 2022, the Respondent scheduled the Assignor for an examination under oath (hereinafter referred to as an EUO) on July 22, 2022. Through a notice dated July 22, 2022, the Respondent then scheduled the Assignor for an EUO on August 10, 2022. Through a notice dated August 10, 2022, the Respondent then scheduled an EUO on September 7, 2022. Through a notice dated September 8, 2022, the Respondent then scheduled an EUO on September 26, 2022. Through a notice dated September 23, 2022, the

Respondent then scheduled an EUO on October 26, 2022. Through a notice dated October 26, 2022, the Respondent then scheduled an EUO on November 30, 2022. The notices were addressed to both the Assignor and Assignor's counsel.

Address Issue. Applicant contends the address on the scheduling letters may be incorrect. The scheduling notices include "Apartment 5E" next to the street address, and Applicant's counsel notes that all documents initially submitted such as the NF-2, NF-3 and assignment of benefits which can be the basis of the Assignor's address fail to include an apartment number. Therefore, without substantiation that the apartment number is correct, Applicant's counsel contends the scheduling notices are defective.

As this issue was first raised at the hearing, Respondent was directed to document the basis of listing an apartment number. The Respondent then submitted a second NF-2 dated May 27, 2022 which is handwritten and far more thorough than the initial NF-2 dated May 10, 2022. This May 27, 2022 NF-2 lists apartment number "5 E". Applicant was given time to reply to this post-hearing document, but has submitted no opposition.

Proof of Mailing/Non-Appearance. The Respondent has also included an affidavit from Michele Bove who was employed as an EUO coordinator for the law office of McCormack & Mattie, P.C. Based on her training, Ms. Bove had personal knowledge of the practices and procedures for scheduling of EUOs, preparation and mailing of the scheduling notices and determining whether the Assignor appeared. The affidavit states that scheduling letters were prepared and sent to the Assignor as well as his counsel's office. The affidavit states that the notices are mailed the same day as prepared and is picked up the same day by the U.S. Postal Service mail carrier. If the person scheduled for the EUO does appear at the office, the principals of the firm as well as the assigned attorney are notified by the receptionist. She states that some of the above dates were rescheduled. She also stated from her personal knowledge that the Assignor failed to appear for EUOs on September 7, 2022 and November 30, 2022. In one portion of the lengthy affidavit, Ms. Bove erroneously refers to the September 7, 2022 date twice instead of referring to the November 30, 2022 date. However, in numerous other portions of the affidavit she correctly refers to both dates. Further, the EUO transcripts correctly refer to the proper dates.

As noted, the Respondent has also included transcripts from the September 7, 2022 and November 30, 2022 EUO dates in which Respondent's counsel placed statements on the records that neither the Assignor nor his counsel appeared.

Analysis. The requirement that an Assignor/Injured Party attend an examination under oath at a carrier's request is set forth in 11 NYCRR. 65.3.5. A claimant is entitled to two opportunities to appear at said examination (an "EUO"), and the scheduling of an exam is referred to as a verification request. 11 NYCRR 65.3.5(d). When the claimant - in this instance the Assignor failed to comply with the original request, 11 NYCRR 65.3.5(e)(2) requires that the carrier follow-up by either telephone or by mail to schedule a second exam. The Respondent must document compliance with the No-Fault regulations requiring the scheduling of such examination, and, if there is a failure, the burden switches to the claimant to demonstrate a valid excuse reasonable basis for non-attendance or that the EUO request was unreasonable and, thus, not authorized by 11 N YCRR 65-1.1 ; A.B. Med. Servs. v. USAA Gen. Indem. Co., 9 Misc. 3d 19 (2005). Therefore, this arbitrator needs to determine whether the Respondent has sustained its burden of proof as to 1) submission of proper scheduling notices; 2) proof of mailing of the scheduling notices; and, 3) proof that the Applicant/Provider's failure to appear at the EUOs.

As a finding of fact, the Respondent has established compliance with the No-Fault regulations regarding the scheduling and mailing of EUO scheduling notices. Ms. Bove's affidavit establishes the practices and procedures for mailing of the scheduling notices. The determination of whether or not a party has provided sufficient proof of mailing in a particular instance is a question of fact for an arbitrator or the court. Informal Opinion, State Insurance Department's Office of General Counsel (June 30, 2003). The Respondent has also submitted transcripts from the EUO dates in which statements were placed on the record that the Assignor failed to appear. In sum, the Respondent has complied with the No-Fault regulations, and the Applicant/Provider has failed to demonstrate a reasonable excuse for the Assignor's non-attendance.

Applicant counsel's contention that the specific dates of the missed EUOs are not listed in the NF-10 is without merit. Caselaw has established that a denial which asserts a failure by the assignor to attend EUOs or IMEs is not conclusory, vague, or without merit as a matter of law because of a failure to set forth the specific dates. Quality

Psychological Services, P.C. v. Avis Rent-A-Car Systems, LLC, 47 Misc.3d 129(A), (App. Term 2d, 11th & 13th Dists. Mar. 12, 2015). A denial stating that the claim is denied due to the injured party's failure to appear at a scheduled independent medical examination or examination under oath is sufficiently specific. Lumbermen's Mutual Casualty Co. v. Inwood Hill Medical, P.C., 8 Misc.3d 1014(A), (Sup. Ct. New York Co., Charles Edwin Ramos, J., July 12, 2005). Again, Applicant's claim is denied in its entirety.
In addition, the above proof is further established by the filing of a Declaratory Judgment action in Supreme Court County of Nassau County which names both this Assignor and the other occupant of the motor vehicle who both failed to appear for EUOs as well as this Applicant/Provider and numerous other Providers. The action seeks a decree that this Carrier has no obligation to pay any present or future No-Fault claims for the Defendants. In a linked arbitration Diana Beynin, D.C. v. Progressive, AAA Case No. 17-23-1296-0585 (August 19, 2023) involving, the other occupant of the motor vehicle (D.J.) whose claims also were denied based on the failure to appear for EUOs, Arbitrator Gary Peters found the proof submitted through the Declaratory Judgment action persuasive.

It is within the arbitrator's authority to determine the preclusive effect of a prior arbitration. Matter of Falzone v. New York Central Mutual Fire Ins. Co., 15 N.Y.3d 530 aff'd, 64 A.D.3d 1149 (4th Dept. 2009). The Applicant in this proceeding has raised no new issues for this arbitrator to diverge from my prior determination. Applicant's claim is denied in its entirety.

Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), an arbitrator is the judge of the relevance and materiality of the evidence offered.

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 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 Orange

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

09/11/2024
(Dated)

Kent Benziger

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:
e3c2622f8d05553a67694a4c72833f5c

Electronically Signed

Your name: Kent Benziger
Signed on: 09/11/2024