

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Jongwhan Cha, LAC
(Applicant)

- and -

State National Insurance Company
(Respondent)

AAA Case No.	17-24-1343-6633
Applicant's File No.	NF-28046-1508314
Insurer's Claim File No.	AMS765502
NAIC No.	Self-Insured

ARBITRATION AWARD

I, Fred Lutzen, 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: EIP or "Assignor"

1. Hearing(s) held on 08/20/2024
Declared closed by the arbitrator on 08/20/2024

Jeremy Davis, Esq., from Sanders Grossman Aronova PLLC participated virtually for the Applicant

Robert Becker, Esq., from Ginsberg, Becker & Weaver, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$246.99**, 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 male IP/Assignor (first initial "M") was 32-years-old when he was injured as the driver in an automobile accident on 8/21/2020. He subsequently came under the care of Applicant, who seeks reimbursement of \$246.99 for acupuncture services provided from 11/30/2022 through 2/8/2024. There are six (6) bills. Respondent denied five of six bills asserting the IP/Assignor failed to appear for duly scheduled "IME" physical examinations on 2/23/2022 and 3/30/2022. Respondent contends the 6th bill (for DOS 2/8/2024: \$42.20) was not received until the AR-1 was filed.

The issues to be determined are (1) whether Respondent properly denied Applicant's claims for DOS 11/30/2023-2/1/2024) based upon the IP/Assignor's

purported failure to appear for two scheduled IME examinations, (2) whether Applicant established prima facie entitlement to coverage for DOS 2/8/2024, and (3) whether the charges are within fee schedule allowances.

4. Findings, Conclusions, and Basis Therefor

This case was decided based on prevailing law, the submissions of the parties as contained in the electronic file ["MODRIA"] maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no live witnesses.

Unless the parties' agreement provides otherwise, an arbitrator need not apply the rules of evidence, is not bound by principles of substantive law, may do justice as he sees it, and may apply his own sense of law and equity to the facts as he finds them to be. Matter of New Century Acupuncture, P.C. v. Country Wide Ins. Co., 48 Misc.3d 1201(A), 18 N.Y.S.3d 580 (Table), 2015 N.Y. Slip Op. 50919(U) at 2, 2015 WL 3821534 (Dist. Ct. Suffolk Co., C. Stephen Hackeling, J., June 18, 2015); see also, *Rules for Arbitration of No-Fault Disputes in the State of New York*; Effective August 16, 2013, [p](1), "The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary." <https://nysinsurance.adr.org>

IME 'No-Show' Defenses

Respondent denied five bills for DOS 11/30/2023-2/1/2024 (\$204.79) based on the 'no-show' defense.

Timing/Mailing

All claims were received after the purported no-shows and denied within 30-days of receiving the bills.

Respondent mailed the initial IME scheduling letter on 1/24/2022 setting the IME for 2/23/2022. It was mailed to the IP/Assignor and his attorneys at the correct addresses. Respondent submitted USPS tracking information proving delivery occurred on 1/27/2022. Respondent mailed a second IME scheduling letter on 3/1/2022 setting the IME for 3/30/2022. It was mailed to the IP/Assignor and his attorneys at the correct addresses. Respondent submitted USPS tracking information proving delivery occurred on 3/4/2022. Both IMEs were scheduled with Dr. Debra Pollack, Neurologist.

Respondent also submitted an affirmation by Dr. Pollack, dated 4/6/2022. Dr. Pollack described her engagement by Respondent's vendor to conduct the IMEs, that she was physically present to conduct the IMEs at the time and location they were scheduled. Dr. Pollack explained that she would have conducted the IMEs if the IP/Assignor appeared as scheduled but that the IP/Assignor did not appear on 2/23/2022 or 3/30/2022.

Where prior to receiving bills an insurer schedules IMEs which the assignor fails to attend, the insurer may deny the bills based upon the assignor's failure to attend the IMEs. Ortho Passive Motion, Inc. v. New York Central Mutual Fire Ins. Co., 53 Misc.3d 130(A), 2016 N.Y. Slip Op. 51364(U) (App. Term 2d, 11th & 13th Dists. Sept. 19, 2016).

The insurer is entitled to judgment where it proves that two separate requests for an IME were duly mailed to the assignor and the latter failed to appear on either of the dates. Apollo Chiropractic Care, P.C. v. Praetorian Ins. Co., 27 Misc.3d 139(A), 2010 N.Y. Slip Op. 50911(U) (App. Term 1st Dept. May 24, 2010). To substantiate an IME no-show defense, an insurer must first demonstrate that two separate IME requests were duly mailed to the patient. *See*, Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Co., 35 AD3d 720 (2nd Dept. 2006). Failure to appear must also be demonstrated.

Where an insurer establishes that the letters scheduling IMEs were timely sent and that the assignor failed to appear at the scheduled IMEs, the claim must be dismissed. RIU Chiropractic, P.C. v. AutoOne Ins. Co., 27 Misc.3d 131(A), 2010 N.Y. Slip Op. 50653(U) (App. Term 2d, 11th & 13th Dists. Apr. 9, 2010).

There is no evidence supporting a non-receipt of the appointment letters and no dispute that the IP/Assignor failed to appear.

Therefore, Respondent has proven by the preponderance of credible evidence that the IP/Assignor failed to appear for the duly scheduled IMEs on 2/23/2022 and 3/30/2022.

These claims are denied.

Prima Facie

It is now well-settled that a medical provider establishes a prima facie case of entitlement to payment of no-fault benefits upon the submission of a proper claim form setting forth the fact and amount of the losses sustained as well as the additional fact that that the payment of no-fault benefits was then overdue. Insurance Law 5106(a); Mary Immaculate Hospital v. Allstate Ins. Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004); Amaze Medical Supply, Inc. v. Eagle Ins. Co., 2 Misc.3d 128(A), 784 N.Y.S.2d 918 (Table), 2003 N.Y. Slip Op. 51701(U), 2003 WL 23310886 (App. Term 2d & 11th Dists. Dec. 24, 2003).

Applicant may also rely on a Respondent's admission of receipt of claim(s) to establish its prima facie case. This does not apply herein, as Respondent did not admit receipt or issue a denial.

In support of its contention that the claim was timely submitted to Respondent, Applicant submitted an affirmation of mailing by Jordan Jones, dated 2/12/2024. Mr. Jones stated he "affirms under penalties of perjury, pursuant to CPLR R 2106, that on 2-12-2024 the claim forms listed on this mailing log were mailed to the insurers listed therein, by depositing a true copy thereof enclosed in post-paid wrappers, addressed to

the insurer(s) at the address(es) listed in the far right column and delivering same to the U.S. Postal Service." The mailing list notes that this claim for DOS 2/8/2024 for \$42.20 was mailed to Respondent at its correct address on 2/12/2024.

Respondent's counsel pointed out that unlike other proofs for claims in 2023, this one wasn't notarized. However, as of 1/1/2024, CPLR 2106 was amended to permit affirmations as well as affidavits, and they can be used in court or arbitrations.

Respondent's counsel also noted that other proofs include a postage stamp. However, these were merely Pitney Bowes stamps, not USPS stamps, and the absence of either doesn't diminish the probative value or persuasiveness of the affirmation by Jordan Jones herein.

Applicant's proof of mailing was included in its original arbitration submission, dated 4/11/2024, and Respondent did not submit an affidavit or affirmation from someone with personal knowledge of the claims receiving process or incoming mail procedures that denied receipt of the claim - aside from counsel's cogent arguments.

"Generally, 'proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee' (*Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 114 A.D.3d 33, 46, 977 N.Y.S.2d 292 [internal quotation marks omitted]; see *Matter of Rodriguez v. Wing*, 251 A.D.2d 335, 336, 673 N.Y.S.2d 734). 'The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed' (*New York & Presbyt. Hosp. v. Allstate Ins. Co.*, 29 A.D.3d 547, 547, 814 N.Y.S.2d 687, quoting *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679, 680, 729 N.Y.S.2d 776). However, in order for the presumption to arise, office practice must be geared so as to ensure the likelihood that a denial of claim is always properly addressed and mailed (see *Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 830, 414 N.Y.S.2d 117, 386 N.E.2d 1085). 'Denial of receipt by the insured[], standing alone, is insufficient to rebut the presumption' (*id.* at 832-830, 414 N.Y.S.2d 117, 386 N.E.2d 1085)." *Progressive Casualty Ins. Co. v. Infinite Ortho Products, Inc.*, 127 A.D.3d 1050, 1051 (2d Dept. 2015).

Applicant's evidence demonstrates the bill was submitted to Respondent on 2/12/2024. When allowing 5-days for mailing consistent with C.P.L.R. §2103, it would have been received by Respondent on 2/17/2024. As such, Applicant has demonstrated prima facie entitlement to no-fault benefits with respect to this claim.

Fee Schedule

Pursuant to *11 NYCRR, Section 65-3.16*, Measurement of no-fault benefits, (a) Medical expenses, (1), "Payment for medical expenses shall be in accordance with fee schedules promulgated under section 5108 of the Insurance Law and contained in Part 68 of this Title (Regulation 83).

The Workers' Compensation fee schedule, which is required by law and incorporated by reference into the Insurance Department Regulations, is of such sufficient authenticity

and reliability that it may be given judicial notice, and it need not be submitted to the court. Z.A. Acupuncture, P.C. v. Geico Ins. Co., 33 Misc.3d 127(A), 939 N.Y.S.2d 745 (Table), 2011 N.Y. Slip Op. 51842(U), 2011 WL 4949646 (App. Term 2d, 11th & 13th Dists. Oct. 11, 2011); Lvov Acupuncture, P.C. v. Geico Ins. Co., 32 Misc.3d 144(A), 939 N.Y.S.2d 741 (Table), 2011 N.Y. Slip Op. 51721(U), 2011 WL 4424472 (App. Term 2d, 11th & 13th Dists. Sept. 16, 2011).

As such, I take appropriate evidentiary notice of the NY WC Fee Schedule, which includes consideration and reference to any submitted CPT Assistant and/or CPT Code Book consistent with the holding in Global Liberty Ins. v. McMahon, 2019 NY Slip Op 03692 (App. Div. 1st Dept. 2019).

Respondent did not articulate any particular dispute with Applicant's charges and I do not see any obvious miscalculations or errors in Applicant's billing.

Conclusion

Based upon a preponderance of credible evidence, I find that Respondent has satisfied its burden and proven by the preponderance of credible evidence that three (3) claims were timely denied, IMEs were duly scheduled, and IP/Assignor failed to appear for the scheduled IMEs. However, as to the claim for DOS 2/8/2024 (\$42.20), no denial was issued and Applicant established prima facie entitlement to no-fault benefits for this claim.

Applicant is awarded \$42.20. The denials are sustained.

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
	Jongwhan Cha, LAC	11/30/23 - 11/30/23	\$40.13	Denied
	Jongwhan Cha, LAC	12/07/23 - 12/07/23	\$40.13	Denied
	Jongwhan Cha, LAC	12/21/23 - 12/21/23	\$40.13	Denied
	Jongwhan Cha, LAC	01/18/24 - 01/18/24	\$42.20	Denied
	Jongwhan Cha, LAC	02/01/24 - 02/01/24	\$42.20	Denied
	Jongwhan Cha, LAC	02/08/24 - 02/08/24	\$42.20	Awarded: \$42.20
Total			\$246.99	Awarded: \$42.20

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.

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); and OGC Op. No. 10-09-05 (interest accrues from date Applicant "*actually requests arbitration*" or commences a lawsuit). The Superintendent and the New York Court of Appeals have 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). **Interest begins the first business day following a weekend arbitration request or due date.**

C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$1360." *Id.*

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 Onondaga

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

09/13/2024
(Dated)

Fred Lutzen

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:
2742bc906f87f1900b8ddd13ee507756

Electronically Signed

Your name: Fred Lutzen
Signed on: 09/13/2024