

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

BVH Diagnostics Inc.
(Applicant)

- and -

American Family Connect Insurance Company
f/k/a Ameriprise Insurance Company
(Respondent)

AAA Case No. 17-23-1296-6142

Applicant's File No. DK23-338394

Insurer's Claim File No. 01005674716

NAIC No. 12504

ARBITRATION AWARD

I, Amanda R. Kronin, 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: JA

1. Hearing(s) held on 09/24/2024
Declared closed by the arbitrator on 09/24/2024

Jennifer Raheb, Esq from Korsunskiy Legal Group P.C. participated virtually for the Applicant

Elvira Messina, Esq from Callinan & Smith LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$275.18**, 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, JA, a 25 year-old male, was injured as the driver of an automobile involved in an accident on 01/12/23. In dispute are two Applicant's claim for treatment provided to the Assignor on 01/18/23. Applicant submitted bills for the treatment totaling \$275.18. Respondent denied the claim on the ground that the Applicant failed to attend two Examinations Under Oath (EUOs).

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4. Findings, Conclusions, and Basis Therefor

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The case was decided on the submissions of the Parties as contained in the electronic file maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in the electronic file for both parties and make my decision in reliance thereon.

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A review of the competent evidence in the record reveals that Applicant established a prima facie case of entitlement to reimbursement of its claim, by submitting evidence that the prescribed statutory billing form was mailed and received and that the Respondent failed to either pay or deny the claim within the requisite 30-day period. Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004).

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Respondent denied claim based upon the Applicant's failure to attend two EUOs. While an EUO does not have to be scheduled to be held within 30 days after the insurer's receipt of the claim form, see St. Vincent Medical Care, P.C. v. Travelers Insurance Company, 26 Misc.3d 144(A), 2010 N.Y. Slip Op. 50446(U) (App. Term 2, 11 and 13 Jud. Dists. 2010); Eagle Surgical Supply, Inc. v. Progressive Casualty Insurance Co., 21 Misc.3d 49, 2008 N.Y. Slip Op. 28432 (App. Term Second Dept. 2008), the EUO scheduling letter must comport with the time restrictions set forth in the verification protocols, to wit, they must be sent within 15 days from the insurer's receipt of the claim form. See, National Liability & Fire Insurance Company v. Tam Medical Supply Corp., 131 A.D.3d 851, 16 N.Y.S.3d 457 (1 Dept. 2015); Quality Psychological Services, P.C. v. Utica Mutual Insurance Company, 38 Misc.3d 136(A), 2013 N.Y. Slip Op. 50148(U) (App. Term 1 Dept. 2013); Optimal Well-Being Chiropractic, P.C. v. Ameriprise Auto & Home, 40 Misc.3d 129(A), 2013 N.Y. Slip Op. 51106(U) (App. Term 2, 11 and 13 Jud. Dists. 2013); Boris Tsatskis, M.D.

v. State Farm Fire and Casualty Company, 36 Misc.3d 129(A), 2012 N.Y. Slip Op. 51268(U) (App. Term 2, 11 and 13 Jud. Dists. 2012); Arco Medical New York, P.C v. Lancer Insurance Company, 34 Misc.3d 134(A), 2011 N.Y. Slip Op. 52382(U) (App. Term 2, 11 and 13 Jud. Dists. 2011).

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It is well settled that the appearance of the eligible injured person or his or her assignee at an EUO is a condition precedent to an insurer's liability on a policy.â Viviane Etienne Medical Care, P.C v. State Farm Mutual Automobile Ins. Co., 35 Misc.3d 127(A), 2012 N.Y. Slip Op. 50589(U) (App. Term 2nd, 11th and 13th Jud.âDists. 2012).â

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Thus, it follows thatâan insurer is entitled to judgment dismissing a claim where the health care providerâhas failed to attend scheduled EUOs.â 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 1stâDept. Sept. 17, 2010).â

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In order for Respondent to make a prima facie showing of its defense based upon a failure to appear at scheduled EUOs, Respondent must demonstrate that its initial and follow-up EUO scheduling letters were timely mailed (see Insurance Department Regulations [11 NYCRR] §§ 65-3.5 [b]; 65-3.6 [b]) and establish, through an affidavit by one with personal knowledge, that the Assignor failed 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).

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In support of its defense, Respondent submitted copies of its EUO scheduling letters which were both timely and proper as to content, proof of mailing as to both letters, which were mailed to the Applicant and the Applicant's attorney. On 02/20/23, an EUO scheduling letter was issued and mailed, scheduling an EUO of the Applicant for 3/18/23. The Applicant failed to appear at the examination and neither the Applicant nor his attorney of record, attempted to make contact to either confirm the appearance or request an adjournment.

Thereafter on 3/21/23, a second EUO scheduling letter was issued and mailed scheduling an EUO on 4/13/23. The Applicant failed to appear at the examination and neither the Applicant nor its attorney of record, attempted to make contact to either confirm the appearance or request an adjournment.

Respondent submitted proof of mailing of the EUO notices. Respondent has submitted copies of the EUO scheduling letters. The letters are correctly addressed.

I find that the proof of mailing shows prima facie that the Applicant was given notice of the examination under oath. Admissible evidence in the form of an affidavit of an employee with knowledge of the (insurance company's) standard office practices or procedures designed to ensure that items were addressed and mailed may be used to establish the mailing of the required documents. St. Vincent Hosp. of Richmond v. Govt. Employees Ins. Co., 50 A.D. 3d at 1124, citing New York & Presbyt. Hosp. v. Allstate Ins. Co., 29 A.D. 3d 547 (2d Dept. 2006). I further find that the Affidavit of no show by Michael Callinan, Esq. demonstrates the Applicant's failure to appear is sufficient to establish the nonappearance of the Applicant at an Examination Under Oath. NY Rehab Pain Management & Medical Services, P.C. v. State Farm Auto Ins. Co., 51 Misc. 3d 1226(A), 2016 N.Y. Slip Op 50821(U)(Sup. Ct. Nassau Co., Randy Sue Marber, J., May 24, 2016 The content of the schedule letters show that the proper notices were given in the scheduling letter and are in accordance with the regulations. 11 NYCRR 65-3.5(e) .

Further, the Respondent sets forth in its letters the reasons for conducting an examination under oath of the Applicant. A health care provider's failure to appear for an EUO breaches a condition precedent to its right to payment of the subject claim, and by itself provides a complete defense to the instant action. Dynamic Medical Imaging, P.C. v. State Farm Mutual Automobile Ins. Co. 26 Misc. 3d 776, 894 N.Y. S. 2d 833 (Dist. Ct. Nassau Co. 2009) The Respondent's defense is sustained. The claim is denied.

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 Suffolk

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

09/26/2024
(Dated)

Amanda R. Kronin

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:
9a4eccab366e0440638fc091dfac6dfc

Electronically Signed

Your name: Amanda R. Kronin
Signed on: 09/26/2024