

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Everhealth Pharmacy Inc.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

| | |
|--------------------------|------------------|
| AAA Case No. | 17-23-1299-4603 |
| Applicant's File No. | 173.294 |
| Insurer's Claim File No. | 8740328690000002 |
| NAIC No. | 35882 |

ARBITRATION AWARD

I, Maureen Callahan, 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

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

A Tsirelman from Tsirelman Law Firm PLLC participated virtually for the Applicant

C. Degregorio from Rivkin & Radler LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,042.00**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that Applicant established a prima facie case of entitlement to No-Fault compensation with respect to its bills. They also stipulated that Respondent's Form NF-10 denial of claim forms was timely issued, within the 30-day deadline prescribed by Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1).

3. Summary of Issues in Dispute

CASE SUMMARY

The accident occurred on 6/24/22. The eligible injured party (EIP) is a 24-year-old female driver involved in the accident. The applicant, an assignee of the eligible injured

party, seeks reimbursement for pharmaceuticals provided on 10/1/22. The claim was denied based upon the failure of the provider to appear at a scheduled examination under oath. The issue is whether or not this defense is substantiated.

4. Findings, Conclusions, and Basis Therefor

The accident occurred on 6/24/22. I have reviewed all of the relevant exhibits contained in the electronic file center maintained by the American Arbitration Association. The hearing was held via ZOOM. This decision is rendered upon consideration of the oral arguments and representations made by the parties at the hearing and upon a review of the evidence contained in the case folder as of the date of this hearing.

According to 11 NYCRR 65-4.5(o)(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. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations.

Direct the records contained in the electronic case folder indicate the injured party is a 24-year-old female driver involved in this accident in Kings County, New York on 6/24/22. There was no evidence of emergent care. Thereafter she commenced a course of conservative care. On 10/1/22, the EIP was prescribed lidocaine, cyclobenzaprine, and naproxen. These 3 pharmaceuticals are the subject of this dispute.

A prima facie showing of entitlement to judgment as a matter of law is made out by submitting evidentiary proof that the prescribed statutory billing forms have been mailed and received, and that payment of No-Fault benefits was overdue. *LMK Psychological Services, P.C. v. Liberty Mut. Ins. Co.*, 30 A.D.3d 727, 816 N.Y.S.2d 587 (3d Dept. 2006) (claimant submitted signed return receipt cards); *Mary Immaculate Hospital v. Allstate Insurance Co.*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004). If an insurer presents evidence substantiating a lack of medical necessity defense, the burden shifts to the applicant health services provider to then present its own evidence of medical necessity. *West Tremont Med. Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc.3d 131(A) (App Term 2d Dept 2006). If the applicant fails to present any evidence to refute respondent's prima facie showing of a lack of medical necessity for post-IME health services, the claim should be denied, as the ultimate burden of proof on the issue of medical necessity lies with the applicant. *AJS Chiropractic, P.C. v. Mercury Ins. Co.*, 22 Misc.3d 133(A) (2d Dept 2002). See Insurance Law § 5102; *Wagner v. Baird*, 208 AD2d 1087 (3d Dept 1994). The burden then becomes respondent's to show otherwise.

No fault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of claim, which shall include verification of all of the relevant information requested pursuant to section 65-3.5. It is well settled that an insurer must pay or deny a claim within thirty days of receiving proof of claim. Insurance Law § 5106 [a]; 11 NYCRR 65-3.8(a). *Presbyterian Hosp. in City of N.Y. v. Maryland Cas. Co.*, 90 NY2d 274 (1997). An insurer may extend the thirty-day period through the verification procedures set forth in 11 NYCRR 65-3.5. Failure to comply with or extend

the thirty-day period results in the preclusion of most defenses, including medical necessity. *Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co.*; *Vista Surgical Supplies v. State Farm Mut. Ins. Co.*, 14 Misc. 3d 135(A) (App Term, 2 and 11 Jud. Dists. 2007). The narrow exceptions to the preclusion rule apply and the to lack of coverage and fraud defenses. See *Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195(1997); *Matter of Metro Med. Diagnostics v Eagle Ins. Co.*, 293 AD2d 751 (2002).

This bill was received by respondent on 11/9/22. Respondent chose to verify this claim by calling for an examination under oath of the provider. The No-Fault program "stresses the justifying of claims." *Nyack Hosp. v. General Motors Acceptance Corp.*, 8 N.Y.3d 294, 300, 832 N.Y.S.2d 880, 884 (2007).

A letter was dispatched on 11/29/22, requesting that the provider appear for an examination under oath on 12/29/22. The provider did not appear. A 2nd letter was dispatched on 1/6/23, requesting that the provider appear for examination on 2/14/23. Again, the provider did not appear. Respondent timely denied the claim on 2/23/23, based upon the failure of the provider to appear at regularly scheduled examination under oath. To support this defense, respondent presents an affidavit from Amy Weidman dated 6/28/23, attesting to the providers nonappearance on 12/29/22. Respondent also presents an affidavit from Ryan Goldman of 6/28/23, attesting to the provider's failure to appear at the examination under oath scheduled for 2/14/23.

A health care provider's failure to appear for examination under oath breaches a condition precedent to its right to payment of the subject claim and by itself provides a complete defense to the action. *Dynamic medical imaging, PC v. State Farm mutual automobile Ins. C.*, 26 Misc.3d 776 (Dist. Ct. Nassau Co. 2009).

Where an assignor fails to attend an EUO scheduled after submission of a claim, the claim is properly denied by the insurer. *Ocean Diagnostic Imaging P.C. v. State Farm Mutual Automobile Insurance Co.*, 5 Misc.3d 563, 785 N.Y.S.2d 652 (Civ. Ct. Kings Co. 2004).

The respondent has met their burden. Although applicant argues that the supporting affidavits are not contemporaneous to the missed EUO, I do not find this argument to be dispositive. The provider failed to appear as scheduled examination under oath, a condition precedent to coverage.

Where Attendance at an EUO is a condition precedent to coverage. A New York no-fault insurance policy, issued after 2002 includes a mandatory policy endorsement (11 NYCRR Section 65-1.1) which states that "No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage." Subsection ii lists five obligations that are conditions precedent, one of which is an examination under oath. In order to establish its defense based upon a policy violation, the insurer is required to establish, prima facie, that it mailed the notices of the EUOs and that the injured person (or the provider) failed to appear for EUOs. See, *Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 2006 NY Slip Op 09604.

The respondent has met his burden. This claim is therefore 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 NY

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

10/03/2024
(Dated)

Maureen Callahan

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:
0e8f6c71b0bc151333e324272f5d1624

Electronically Signed

Your name: Maureen Callahan
Signed on: 10/03/2024