

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Triborough ASC
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-24-1346-8750

Applicant's File No. 00132774

Insurer's Claim File No. 0549172540003

NAIC No. 36447

ARBITRATION AWARD

I, Aladar Gyimesi, 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: alleged EIP

1. Hearing(s) held on 10/11/2024
Declared closed by the arbitrator on 10/11/2024

Mikhail Guseynov, Esq. from Drachman Katz, LLP 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, **\$1,259.33**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the hearing, counsel for Applicant amended its claim to be in ostensible accord with the compensation properly available in furtherance of the Fee Schedule. As a result, the total amount in dispute was reduced to \$1,213.07.

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

3. Summary of Issues in Dispute

In contention is Applicant's bill in the total amended sum of \$1,213.07, with respect to facility fees incurred in connection with cervical epidural steroid injections (hereinafter CESI) and trigger point injections provided by Dr. Mary Perdue on December 20, 2023

at Applicant's New York facility, relative to a 31 year old male operator alleged EIP (hereinafter EIP) who was involved in a purported motor vehicle accident on September 6, 2023. On April 2, 2024, following the EIP's claimed failure to appear for at least EUOs scheduled on December 20, 2023 and March 27, 2024, Respondent issued its global denial. Pursuant thereto, all No-Fault benefits were denied effective as of the date of the purported underlying motor vehicle accident. Upon receipt of the reimbursement requests of Applicant in controversy, Respondent issued a timely on its face denial predicated upon an identical basis and a general Fee Schedule defense. It is acknowledged Respondent also maintains the EIP was not involved in a true motor vehicle accident, but rather an intentional collision in furtherance of an insurance fraud scheme. The entire amended amount sought by the Applicant is in dispute. The issues presented are the validity of Respondent's EUO "no-show" and fraud defenses.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the pertinent documentation contained within the ADR Center as of the date of the hearing. Any issues contained in the record, not specifically raised at the time of the hearing, are considered by this Arbitrator to be moot and/or waived by the parties. This Award is based upon the oral argument, if any, of counsel and an analysis of the timely submission(s) of the respective parties hereto.

In accord with an Opinion Letter from the Office of General Counsel of the New York State Insurance Department, dated December 22, 2006, there are two sources within the No-Fault Regulations which authorize a carrier to request an EUO.

The Prescribed Mandatory Personal Injury Protection Endorsement, set forth in No-Fault Regulation 65-1.1, provides, inter alia, as follows:

Conditions:

Action Against Company. 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.

Proof of Claim; Medical, Work, Loss, and Other Necessary Expenses.

...Upon request by the Company, the eligible injured person or that person's assignee or

representative shall:

(b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same;

Further, No-Fault Regulation 65-3.5 (e) permits a No-Fault carrier to request an EUO of an applicant "as additional verification to establish proof of claim".

The procedural and substantive requirements in order for a No-Fault carrier to validly deny No-Fault benefits, as a result of an EIP/Applicant's failure to appear for an EUO, are in the undersigned's view identical or at least analogous to that of an EIP's failure to appear for an IME. As with an IME, an insurer is required to inform the EIP/Applicant that he or she will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with its request to appear for an EUO (No-Fault Regulation 65-3.5(e)). In order to support a denial predicated upon the EIP's alleged non-appearance at a scheduled IME, a carrier must provide evidence as to two proper IME requests. A.B. Med Servs. PLLC v. Peerless Ins Co., 2006 NY Slip Op 26318 (App Term, 2nd Dept. - 2006). A carrier must also submit credible evidence as to the EIP's failure to appear for such IMEs in order to substantiate any denials subsequently issued. Post Traumatic Med Care, P.C. v. Progressive Cas. Ins. Co., 2008 NY Slip Op 51954(U) (App Term, 2nd Dept. - 2008); MidIsland Med. PLLC v. NY Cent. Mut. Ins. Co., 2007 NY Slip Op 51983(U), 17 Misc 3d 130(A) (App Term, 2nd Dept. - 2007); Vista Surgical Supplies, Inc. v. AutoOne Ins. Co., 2008 NY Slip Op 51460(U), 20 Misc 3d 133(A) (App Term, 2nd Dept. - 2008), and; Quality Health Prods., P.C. v. Progressive Ins. Co., 2008 NY Slip Op 51757(U) 20, Misc 3d 143(A) (App Term, 2nd Dept. - 2008). A No-Fault carrier bears the burden of persuasion insofar as demonstrating that an EIP failed to comply with reasonable and proper IME requests. Bedford Park Medical Practice PC v. American Transit Ins Co., 8 Misc 3d 1025(A), 806 N.Y.S.2d 443 (2005) and Amaze Med Supply Inc. v. State Farm Mut Auto Ins Co., 8 Misc 3d 139(A), 806 N.Y.S.2d 443 (App Term, 2nd Dept - 2005).

It has also been held that the same requirements vis-à-vis due notice to the EIP, and the necessary proofs required, apply with respect to the validity of a No-Fault carrier's denials predicated upon an EIP's alleged failure to appear for an EUO. Advanced Med., P.C. v. Utica Mut Ins Co., 2009 NY Slip Op 51023(U), 23 Misc 3d 141(A) (App Term, 2nd Dept - 2009); Inwood Hill Med., P.C. v. Progressive Cas. Ins. Co., 2009 NY Slip Op 51397(U), 24 Misc 3d 134(A) (App Term, 2nd Dept - 2009). In view of all of the aforementioned, after careful consideration, I conclude the expressed requirements set forth in the aforementioned case law, relative to an IME "no show", are in all regards equally applicable to where a No-Fault carrier's defense is predicated upon an EIP/Applicant's alleged failure to appear for an EUO.

In the instant matter Respondent has produced EUO appointment letters, dated October 30, 2023, December 21, 2023 and February 9, 2024, respectively scheduling the EIP for EUOs on December 20, 2023, February 7, 2024 and March 27, 2024. It is observed the letters weredirected to the EIP at a resident address consistent with that set forth by the EIP, in his NF-2 as tendered to the Respondent. It is appreciated the February 7, 2024 EUO was adjourned, apparently as a result of the EIP retaining counsel, and that the February 9, 2024 EUO scheduling letter was forwarded to both the EIP and his attorney. It is further acknowledged Respondent has submitted affidavits in support of the mailing

of its EUO scheduling letters to the EIP and his counsel. The EUO scheduling letters contain the requisite lost earnings and transportation reimbursement language. The EUO locations are reasonable, as the EIP was to appear virtually. It would further appear the EIP was afforded ample prior notice, vis-à-vis the scheduled EUO dates, of Respondent's desire to conduct such EUOs. Respondent has additionally tendered "statements on the record", by the attorneys who were to conduct the EUOs, confirming the EIP's failure to appear on the December 20, 2023 and March 27, 2024 EUO dates. It is lastly recognized Applicant has offered no excuse whatsoever relative to the EIP's failure to appear.

After carefully considering the evidence presented herein I find Respondent has sustained its burden of proof, in accord with the aforementioned statutory and case law requirements, insofar as demonstrating the EIP unreasonably failed to appear for EUOs. I conclude Respondent's EUO "no-show" defense is valid and effective with respect to the CESI and trigger point injections provided to the within EIP on December 20, 2023 and, by extension, the facility fees in issue. Applicant's reimbursement requests, in such a regard, are denied. In light of my aforementioned determination, I need not also consider the merits of Respondent's fraud defense.

Accordingly, after a careful review of all the evidence and due regard for the argument of counsel, my Award is in favor of the Respondent. Consistent with the body hereof, 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 NY

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

10/30/2024
(Dated)

Aladar Gyimesi

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:
5309223d5a669fcb297413d634e50eff

Electronically Signed

Your name: Aladar Gyimesi
Signed on: 10/30/2024