

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Total Anesthesia Provider, P.C. f/k/a  
Advanced Anesthesiology of NY, PC  
(Applicant)

- and -

Country-Wide Insurance Company  
(Respondent)

AAA Case No. 17-24-1359-2073

Applicant's File No. N/A

Insurer's Claim File No. 000366270 001

NAIC No. 10839

**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 01/07/2025  
Declared closed by the arbitrator on 01/07/2025

Michael Galeno from Dino R. DiRienzo Esq. participated virtually for the Applicant

Brian Korman from Jaffe & Velazquez, LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$957.18**, 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

**CASE SUMMARY**

The accident occurred on 10/30/23. The eligible injured party (EIP) is a 44 year old male involved in this accident. The applicant, an assignee of the eligible injured party, seeks reimbursement for lumbar epidural steroid injections performed on 1/14/24. The claim was denied based upon the injured party's failure to appear at examination under oath. The issue is whether or not applicant breached this condition precedent to coverage by their failure to appear.

#### 4. Findings, Conclusions, and Basis Therefor

The accident occurred on 10/30/23. 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 at the hearing and upon a review of the evidence contained in the case folder as of the date of this hearing.

This accident occurred on 10/30/23. On 1/14/24, the EIP underwent lumbar epidural steroid injections by Dr. Shabtian. Records indicate that after the failure of the course of conservative management and continued lumbar radiculitis, the EIP elected to proceed with the procedure. The claim herein seeks reimbursement for the lumbar epidural steroid injections of 1/14/24.

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; 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).

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.

The respondent chose to verify this claim. They are entitled to do so. 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). They called for an examination under oath of the provider. This bill was concededly timely denied on 2/22/24 based upon the injured party's failure to appear at examination under oath.

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.

Attendance at an EUO is a condition precedent to coverage. The failure of an EIP to attend EUOs constitutes a failure to comply with a condition precedent to coverage, mandating denial of a claim for no-fault compensation by an assignee-medical provider. *Inwood Hill Medical, P.C. v. General Assurance Co.*, 10 Misc.3d 18, 805 N.Y.S.2d 772 (App. Term 1st Dept. 2005). In, *Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Co.*, 35 A.D.3d 720, 827 N.Y.S.2d 217 (2d Dept. 2006), rev'g, 7 Misc.3d 18, 793 N.Y.S.2d 661 (App. Term 2d & 11th Dists. 2004), the court held that an insurer may deny a no-fault claim retroactively to the date of the loss based on an eligible injured person's failure to attend IMEs when and as often as the insurer reasonably desires. A medical provider's claim should be rejected where its assignor has failed to attend an EUO scheduled as a verification request. *Ocean Diagnostic Imaging, P.C. v. Nationwide Mut. Ins. Co.*, 11 Misc.3d 135(A), 816 N.Y.S.2d 698 (Table), 2006 N.Y. Slip Op. 50477(U), 2006 WL 796973 (App. Term 2d & 11th Dists. Mar. 27, 2006).

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).

In order to establish its defense based upon a policy violation, the insurer was required to establish, prima facie, that it mailed the notices of the EUOs and that the injured person failed to appear for two properly noticed and scheduled EUOs. See, *Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 2006 NY Slip Op 09604. It is incumbent upon the insurer to establish that the scheduling letters were properly and timely addressed and mailed, see *SK Prime Medical Supply, Inc. v. Hertz Claim Management Corp.*, 37 Misc.3d 138(A), 2012 N.Y. Slip Op. 52192(U) (App. Term 1st Dept. 2012); *Ortech Express Corp. v. MVAIC*, 37 Misc.3d 128(A), 2012 N.Y. Slip Op. 51913(U) (App. Term 1st Dept. 2012); *Perfect Point Acupuncture, P.C. v. Auto One Insurance Company*, 36 Misc.3d 140(A), 2012 N.Y. Slip Op. 51486(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012), and contained the required notice regarding reimbursement of travel expenses and lost wages, see *Matter of Venditti* (General Acc.

Ins.), 236 A.D.2d 759 (3rd Dept. 1997) (IME requests were "null and void" in that they failed to advise petitioner that he would be reimbursed for loss earnings and transportation expenses in complying therewith).

Pursuant to the applicable Regulations, an insured is required to submit to an examination under oath when requested by the insurer, as a condition precedent to payment of a claim. *Alrof Inc. v Safeco National Insurance Company*, 39 Misc. 3d 130(A), 971 N.Y.S. 2d 69 (App Term 2d Dept., 11th & 13th Jud Dists., March 21, 2013); *Points of Health Acupuncture PC v. Lancer Insurance Company*, 28 Misc. 3d 137 (A), 2010 NY Slip Op 51455 (U), (App. Term 2nd, 11th, 13th Dists. 2010); *Fogel Psychological P.C. v Progressive Cas. Ins. Co.*, 35 AD 3d 720; 827 N.Y.S. 2d 217 (App Div. 2nd Dept. 2006). Noncompliance, however, must be established with evidence in admissible form. *Alrof*, *Supra*. For the Respondent to be entitled to defend its nonpayment based upon the failure of the Applicant to appear for scheduled EUOs, it must first demonstrate that its initial and follow-up request for verification were timely made pursuant to 11 NYCRR §65-3.5 (b) and 11 NYCRR§ 65-3.6 (b) and must establish proper proof of mailing of the scheduling letters and evidence from someone with personal knowledge that the party failed to appear for the EUO.

Respondent advises that an EUO scheduling letter was dispatched on 12/11/23, requesting that the EIP appear for an examination under oath on 1/4/24. They present a copy of the transcript of this examination documenting the injured party's failure to appear. Another letter was dispatched on 1/31/24, requesting that the EIP appear for an examination under oath on 2/20/24. Again, the EIP did not appear. Respondent presents a copy of the transcript documenting the missed examination. Respondent also proffers an affidavit of Annie Persaud dated 9/16/24 she is an employee of respondent carrier with personal knowledge of this matter based upon her capacity as an EUO clerk. She testified as to the procedures regarding the scheduling letters, and documenting the appearance, or that lack thereof, of parties when called for examination under oath. She affirms that the EIP failed to appear. Respondent timely denied the claim on 2/22/24 based upon the injured party's failure to appear.

Respondent argues they were within their rights to deny payment of the claim based upon the providers failure to appear at regularly scheduled examination under oath. It is conceded that the proofs are timely. Applicant presents nothing to the contrary. 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. This has not been overcome. 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.

01/14/2025

(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:**  
b2b8443d6f61d23f154af56f787bcb13

### **Electronically Signed**

Your name: Maureen Callahan  
Signed on: 01/14/2025