American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Brooklyn Medical Practice, PC (Applicant)	AAA Case No.	17-24-1364-4670
	Applicant's File No.	AR24-25694
- and -	Insurer's Claim File No.	32-51Q0- 28Z
	NAIC No.	25143
State Farm Fire & Casualty Company (Respondent)		

ARBITRATION AWARD

I, Stacey Charkey, 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: Assignor

1. Hearing(s) held on 01/28/2025
   Declared closed by the arbitrator on 01/28/2025

   Alec Beynenson, Esq. from The Beynenson Law Firm, PC participated virtually for the Applicant

   Shelly Heffez, Esq. from Abrams, Cohen & Associates, PC participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$2,992.76**, 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

   Applicant seeks reimbursement for physical therapy performed 06/13/2023 - 07/31/2024 in connection with injuries sustained by assignor, a then 28-year-old male, in a motor vehicle accident occurring 06/06/2023. Respondent issued denials based upon Assignor's failure to appear at EUOs.

4. Findings, Conclusions, and Basis Therefor

   I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing and this Award is based upon my review of the Record and the arguments

made by the representatives of the parties at the Hearing. The hearing was conducted via ZOOM. There were no witnesses.

This arbitration arises out of treatment of assignor in connection with injuries sustained in a motor vehicle accident. Applicant seeks reimbursement for medical services performed in connection with said injuries. Respondent issued a denial claiming that Assignor had failed to appear for Examinations Under Oath on two occasions.

The documents contained in the ADR Center were reviewed prior to/at the time of the hearing for this matter. In this regard, Respondent issued denials for the subject treatment based upon Applicant provider's failure to appear at EUOs. In this regard, the prescribed Mandatory Personal Injury Protection Endorsement, set forth in 11 NYCRR 65-1, provides in the section titled "Conditions":

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;…. The insurer, therefore, has the right under the Regulations to make a reasonable request for an EUO of an eligible injured person or that person's assignee or representative.

What procedures must an insurer follow, then, in scheduling an EUO with sufficient notice and opportunity to comply by the applicant, so that failure to appear for such exam should result in loss of policy benefits?

When an eligible injured person or his assignee fails to attend a scheduled examination, it is a question of fact, to be determined under all the specific circumstances of each case, whether the insurer's request was reasonable, and as a corollary, that the proposed examinee's failure to attend was unreasonable, in order to ultimately determine whether the policy condition was met. The condition in the prescribed endorsement that an eligible injured person or his assignee attend a reasonably requested EUO must be read in tandem with the regulation's follow-up provision, to ensure that the person has had sufficient notice and a reasonable opportunity to attend, which is achieved through the scheduling of a follow-up examination.

The scheduling of a second examination is of significant importance since the failure of an eligible injured person or his assignee to attend an EUO on two occasions may result in a breach of the policy condition on EUO attendance, which is a condition precedent to payment of claims and which may result in a loss of coverage for the eligible injured person.

Respondent has shown that it scheduled this examination on two occasions. In this regard, Respondent contends that it initially scheduled examinations of the Assignor who failed, on two occasions, to appear, prompting a denial of all benefits based upon Assignor's policy violation. The EUO was scheduled for 11/13/23, and upon Applicant's failure to appear or object to the EUO, the EUO was rescheduled for 11/30/23 and again upon Applicant's failure to appear or object to the EUO, the EUO was rescheduled for 12/22/2023 at which time Assignor again failed to appear. Applicant has not offered any documentation suggesting assignor (1) did not receive the scheduling letters or (2) appeared on either of the scheduled date.

In this regard, respondent submits EUO "bust" statements in which Julia Okin, Esq., Ziqi Guan, Esq. and Jules Toraby, Esq. each stated that they were present to conduct the EUO on one of the 3 scheduled dates and assignor failed to appear. Respondent also submits proof of mailing od the scheduling letters.

The denial is premised upon the 11/13/2023, 22/30/2023 and 12/22/2023 nonappearances.

An insurer has the absolute right to require the eligible injured claimant or its assignee to submit to examinations under oath. A failure to comply with a proper request by an insurer will result in a lack of coverage because a condition precedent to coverage has not been fulfilled. Furthermore, in accordance with the Supreme Court, Appellate Division, Second Department case of Stephen Fogel Psychological, P.C. v. Progressive Casualty Insurance Company, 35 A.D.3d 720, 827 N.Y.S.2d 217 [2d Dept. 2006] in the event this condition precedent is not fulfilled by the patient the insurer may deny all claims retroactively to the date of the accident.

My review of the scheduling letters at bar demonstrates that the notices scheduling the EUOs contained the required regulatory language regarding reimbursement of any lost earnings and reasonable transportation expenses. Applicant does not claim that either the time or location of the examinations was improper. See Unitrin Advantage Insurance Company v. PLLC DDS, 2011 NY Slip Op 01948; 82 AD3d 559, where the Supreme Court, Appellate Division, First Department, found that the failure of a patient to appear at an Independent Medical Examination impacted coverage and that an insurer could deny all claims retroactively to the date of loss, based on that failure, regardless of whether such denials were timely or untimely and regardless of whether previous denials based on other defenses had been issued. The Appellate Division, First Department found that a breach of a condition precedent to coverage fits squarely within the exception to the preclusion doctrine as enunciated in Central General Hospital v. Chubb Group of Insurance Companies, 90 N.Y.2d 195 [1997] and that such a defense could be raised at any time whether in a timely or untimely manner.

At bar, Respondent has submitted copies of the examination notices that were properly sent to the assignor and counsel. The notices were properly addressed to Assignor. It is clear that upon receipt of the notices, rather than state an objection thereto. It is well settled that a claimant "cannot simply rest on its laurels and ignore a verification request…Since the plaintiff desires to be paid, the onus is on it to ensure that the

defendant has all of the required information to verify and pay the claim. Plaintiff completely ignored this burden and commenced this action prematurely." D & R Medical Supply v. Clarendon Nat. Ins. Co. 22 Misc 3d 1127 (A). Simply stated whether Assignor believes the verification request to be reasonable or otherwise, it cannot simply stand mute and ignore an IME or EUO request. Some response is required by Assignor or its retained counsel. None was sent in response to the notices.

In Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, the court ruled that, "when … assignors failed to appear for the requested IMEs, (the insurer) had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued . The court held that the timeliness of the denial was "no moment" since, citing Chubb, 90 N.Y.2d at 199, "(a) denial premised on breach of a condition precedent to coverage voids the policy ab initio".

An insurer makes its prima facie showing by demonstrating that two separate requests for the EUO were duly mailed to the Applicant or his assignor and that either the Applicant or the assignor failed to appear for the examination on either of the dates scheduled pursuant to the requests. Apollo Chiropractic Care, P.C. v. Praetorian Ins. Co., 27 Misc.3d 139(A), 2010 NY Slip Op 50911(U) (App Term 1st Dept.).

The failure to attend scheduled IMEs or EUOs by either the assignor or the applicant health care provider constitutes a breach of a condition precedent to coverage, voiding the insurance policy ab initio. Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559, 918 N.Y.S.2d 473 (1st Dept. 2011) ("Unitrin").

An arbitrator possesses powers "as unrestrained as that employed by a chancellor in equity." Board of Education v. Hess, 49 N.Y.2d 145, 152, 424 N.Y.S.2d 389, 391 (1979). Arbitrators may do justice. Rochester City School District v. Rochester Teachers Association, 41 N.Y.2d 578, 582, 394 N.Y.S.2d 179, 182 (1977). The failure by an applicant health care provider to attend EUOs constitutes a failure to comply with a condition precedent to coverage, (under the policy of insurance upon which it wants to be paid) mandating dismissal of a claim for No-Fault compensation by said 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).

Applicant was aware that all claims were being denied retroactively to the date of the loss. Having found that Assignor did indeed fail to attend the EUOs after having been given proper notice, it is my conclusion of law that Assignor's failure to attend the EUOs inured to its own detriment as well as to the detriment of its assignees who stand in assignor's "shoes". The assignor breached the terms of the policy under which applicant now seeks benefits. Assignor's breach voided the policy ab initio.

The evidence relating to the scheduling of the examinations demonstrates compliance with the applicable Insurance Department Regulations and Applicant has come forward with nothing to demonstrate or imply that the notice process to Assignor or counsel was faulty. Accordingly I find Respondent's denial of benefits proper. No objection was raised as to the reasonableness of the request. I submit that if Assignor or his counsel objected to the notices it was its obligation to take some affirmative action rather than sit

mute and simply ignore the requests. Indeed, there is an affirmative duty to respond to requests for additional verification and these requests cannot simply be ignored. See, e.g. Dilon Medical supply Corp. v. Travelers Insurance Co., 7 Misc.3d 927, 796 N.Y.S.2d 872 (2005).

The Insurance Regulations provide that examinations under oath and IMEs are permissible verification requests. Indeed, at the very best, Assignor failed to comply with a properly served verification request and the subject claim is not ripe for arbitration. It is well settled that no action shall lie against an insurer unless as a condition precedent thereto, there shall have been full compliance with the terms of the insurance coverage. 11 NYCRR 65-1.1 provides: "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." The statute does not differentiate between the type of benefits or for services rendered before or after the violation of the condition precedent.

Compliance with the terms of coverage must be precedent to any action against the insurance company and not merely precedent to the provision of services. Failure to appear for Examinations Under Oath and/or IMEs not only deprives insurers of their right of relevant verification, but is also a breach of the contract of insurance which vitiates entitlement to no-fault benefits. By accepting an assignment of benefits, Applicant stands in the shoes of the Assignor.

For these reasons, respondent has shown that the assignor failed to respond to a proper request for an examination under oath, a condition precedent to coverage, and the claims for which denials were issued based upon the failure to appear at EUOs 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 Queens

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

01/29/2025
(Dated)

Stacey Charkey

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:
42d39688b5e258230161b533217d1bc6

Electronically Signed

Your name: Stacey Charkey
Signed on: 01/29/2025