

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Comprehensive Diagnostics & Imaging PC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-24-1336-1810
Applicant's File No. DK23-419956
Insurer's Claim File No. 0101220530101152
NAIC No. 35882

ARBITRATION AWARD

I, Kent Benziger, 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: K.M.

1. Hearing(s) held on 04/28/2025
Declared closed by the arbitrator on 04/28/2025

Evan Polansky from Korsunskiy Legal Group, P.C. participated virtually for the Applicant

Christa Varone from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$145.59**, 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

On May 23, 2023, the Assignor/Eligible Injured Party a 49-year-old female, was involved in a motor vehicle accident. In dispute is ultrasound therapy of the cervical spine (76800-26 \$145.59) administered on October 11, 2023. The Respondent denied the claim based on the Applicant/Provider's failure to appear for examinations under oath (hereinafter referred to as EUOs) on November 29, 2023 and January 4, 2024. Respondent contends that it has complied with the No-Fault regulations for this breach of a policy condition and has cited caselaw and authoritative sources as to the sufficiency of the affirmation of non-appearance.

4. Findings, Conclusions, and Basis Therefor

On May 23, 2023, the Assignor/Eligible Injured Party a 49-year-old female, was involved in a motor vehicle accident. In dispute is ultrasound therapy of the cervical spine (76800-26 \$145.59) administered on October 11, 2023.

Denial. The Respondent received the claim in dispute on November 6, 2023.. The NF-10 lists final verification as requested on January 4, 2024 with no verification received. The NF-10 is dated January 11, 2024 denying the claim on the basis of the Applicant/Provider's failure to appear for examinations under oath (hereinafter referred to as EUOs) on November 29, 2023 and January 4, 2024.

EUO Notices. The Respondent has a submitted notice dated November 14, 2023 scheduling the Applicant/Provider for an EUO on November 29, 2023. The notice was in regard to the treatment of this Assignor as well as five other patients. The Applicant/Provider failed to appear. The Respondent sent a second notice dated December 8, 2023 scheduling an EUO for January 4, 2024. Again, the Applicant/Provider failed to appear.

Proof of Mailing. The Respondent has submitted an affidavit from Anjelica Walsh, a Geico Claim Supervisor who states she is familiar with business practices and procedures including the mailing of NY PIP mail which utilized the ATLAS Claim System) ("ATLAS"). As of November 14, 2022 the printing and mailing was handled through the Fredericksburg, Virginia Center and Ms. Walsh described the practice and procedures at that facility which includes the mail being picked by Pitney Bowes Presort Services (PBPS) and placed in the custody of the USPS the same date.

In addition, The Respondent has submitted an affidavit from Paul Clay, the general manager of Pitney Bowes Presort Services who states the entity's practices and procedures for receipt of the mail from the Geico facility in Virginia . The stated procedure is as follows:

Each business day at the GEICO pick up location, a PBPS employee confirms all trays have been accounted for, and then the mail is transported to the above-mentioned PBPS Facility in Ashland, VA.

Upon arrival at the PBPS Facility, GEICO's mail is placed in a queue for production. During the production process a machine reads the address, sprays on the bar codes (if not pre-barcoded), and then sorts the mail.

During the sorting process, mail for certain zip codes, are separated and transported by PBPS to the PBPS facility located closest to the mail final destination. The Virginia PBPS Facility participates in this mail exchange with

another PBPS Facility in Reading as well as PBPS Facility locations in New Jersey, Charlotte, Richmond, and Hartford.

Having been sorted by zip code (and other factors), then placed in trays, the mail is sent to the Dispatch department, where it is quality checked, labeled, and palletized for final distribution to the USPS or another PBPS Facility. Regardless of which PBPS Facility finalizes the mail, all mail is received, processed, and submitted to the USPS using the same procedures as in the Virginia PBPS Facility. The USPS on-site clerk is available to accept certified mailings when needed.

Each business day the USPS picks up the finalized mail at each PBPS Facility. When the mail is staged as described above for the USPS to pick up at each PBPS Facility, at that time, the mail is in the care, custody, and control of the USPS.

GEICO's mail is processed by PBPS and placed in the custody of the USPS as described above on the same business day as when it is received from GEICO, regardless of which PBPS Facility finalizes the mail.

"No Show" affirmations have been submitted by Jonathan Marconi and Michael Bluman, attorneys from the law firm of Goldstein & Hopkins who were authorized to conduct the examinations under oath scheduled for November 29, 2023 and January 4, 2024. The affirmations state they were both present in the office on the respective days and would have conducted the EUOs or assigned another attorney to conduct the examination.

Analysis. The requirement that a claimant - in this proceeding the Applicant/Provider attend an examination under oath at a carrier's request is set forth in 11 NYCRR. 65.3.5. A claimant is entitled to two opportunities to appear at said examination (an "EUO"), and the scheduling of an exam is referred to as a verification request. 11 NYCRR 65.3.5(d). When the claimant fails to comply with the original request, Section 65.3.5(e)(2) requires that the carrier follow-up by either telephone or by mail to schedule a second exam. The Respondent must document compliance with the No-Fault regulations requiring the scheduling of such examination, and, if there is a failure, the burden switches to the claimant to demonstrate a valid excuse reasonable basis for non-attendance or that the EUO request was unreasonable and, thus, not authorized by 11 NYCRR 65-1.1 ; A.B. Med. Servs. v. USAA Gen. Indem. Co., 9 Misc. 3d 19 (2005). Therefore, this arbitrator needs to determine whether the Respondent has sustained its burden of proof as to 1) submission of proper scheduling notices; 2) proof of mailing of the scheduling notices; and, 3) proof that the Applicant/Provider failed to appear at the EUOs.

As a finding of fact, the Respondent has established compliance with the No-Fault regulations regarding the scheduling and mailing EUO notices and proof of the Applicant/Provider's failure to appear. The determination of whether or not a party has

provided sufficient proof of mailing in a particular instance is a question of fact for an arbitrator or the court. Informal Opinion, State Insurance Department's Office of General Counsel (June 30, 2003). In this instance, the Respondent has detailed the practices and procedures of Geico in preparation and transfer of the notices to the Pitney Bowes entity. The Respondent has also exchanged affidavits from representatives at both Geico and Pitney Bowes Presort Services that state in detail the preparation, collection and mailing of the notices to the U.S. Postal Service. This is more than sufficient especially as the Applicant has failed to produce any proof of non-receipt. See: *Rockman v. Clarendon National Ins. Co.*, 21 Misc. 3d 1118A (Civil Court, Richmond County 2008). In addition, the Respondent has submitted transcript with statements placed on the records of the Applicant/Provider's failure to appear.

In addition, Arbitrator Michelle Murphy-Louden has ruled on the content of non-appearance affirmations from the same law firm in *Comprehensive Diagnostic & Imaging PC v. Geico*, AAA Case No. 17-23-1328-7731 (April 23 2025). Arbitrator Murphy-Louden addresses of the issues raised by the Applicant:

Applicant argued that Ms. DiMiceli's and Mr. Marconi's Affirmations were insufficient to prove that Applicant failed to appear for the EUO's because they did not affirm that they would have conducted Applicant's EUO and because they were not contemporaneously executed. Applicant again relied upon Arbitrator Jakubowitz's Award in AAA Case No. 17-22-1260-8325 in which he held as follows regarding the EUO no-show Affidavit of Respondent's attorney:

...[T]here is also a 6 months lapse between the date on the affidavits and the dates of non-appearance. In actuality, it is difficult to discern if Mr. Mackay actually was the attorney in charge of handling the EUO, as he states, " If Applicant had appeared for the scheduled EUO, I would have conducted the EUO of Applicant or assigned one of the other attorneys responsible for conducting EUOs to conduct the EUO of Applicant." ...Respondent failed to demonstrate that the Applicant did not appear for the EUOs.

In *Sanford Chiropractic, P.C. v. State Farm Mutual Automobile Ins. Co.*, 75 Misc.3d 138(A) (App. Term 2 Dept., 2022), the court held that an attorney's affirmation that nd EUOs were scheduled to take place at certain times in his firm's offices on specified dates, that he was "present in the office" on those dates, that no one affiliated with the plaintiff appeared for either scheduled EUO, and that if someone had appeared, he "would have conducted the EUO of the Plaintiff or assigned one of the other attorneys authorized to conduct EUOs to conduct the EUO of the Plaintiff" sufficed to demonstrate, prima facie, that the plaintiff failed to appear for the EUOs.

In *SVP Med Supply, Inc. v. GEICO*, 76 Misc. 3d 134(A) (App. Term, 2 Dept., 2022), nd the lower court had found that found that Respondent

had not made a prima facie showing of the plaintiff's failure to appear for the scheduled EUO's due to the amount of time between the scheduled EUO's and the date on which the affirmation was executed by the attorney who was present to conduct such EUOs, and the affiant's failure to establish the basis for her recollection of plaintiff's failure to appear. In reversing the lower court's ruling, the Appellate Term held:

Contrary to the determination of the Civil Court, the affirmation submitted by the attorney who was to conduct the scheduled EUOs was sufficient to establish that plaintiff had failed to appear. As the attorney who was to conduct such EUOs, Megan Dimicelli, Esq., stated that she was present at the location of the scheduled EUOs and that she would have conducted the EUOs if plaintiff had appeared, she possessed personal knowledge that plaintiff had failed to appear (see *Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411, 1 N.Y.S.3d 43 [2015]; *T & J Chiropractic, P.C. v. State Farm Mut. Auto. Ins. Co.*, 47 Misc 3d 130[A], 13 N.Y.S.3d 853, 2015 NY Slip Op 50406[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]; *Natural Therapy Acupuncture, P.C. v. State Farm Mut. Auto. Ins. Co.*, 44 Misc 3d 141[A], 997 N.Y.S.2d 669, 2014 NY Slip Op 51310[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014]). To the extent the Civil Court stated that an issue existed with respect to DiMicelli's recollection of plaintiff's failure to appear, such a determination was not warranted, as, on its face, DiMicelli's affirmation was not unworthy of belief (see e.g. *Joseph-Felix v Hersh*, ___ AD3d ___, 2022 NY Slip Op 04905, 2022 N.Y. App. Div. LEXIS 4767 [2d Dept 2022]; cf. *Metro 8 Med. Equip., Inc. v. ELRAC, Inc.*, 50 Misc. 3d 140[A], 31 N.Y.S.3d 922, 2016 NY Slip Op 50174[U]). In opposition to defendant's motion, plaintiff could have demonstrated the existence of a material issue of fact by submitting an affidavit stating that plaintiff had appeared for an EUO, but plaintiff failed to do so. As plaintiff did not otherwise challenge the implicit CPLR 3212 (g) findings in defendant's favor, defendant is entitled to summary judgment dismissing the complaint. Id.

Based upon the rulings in *Sanford Chiropractic* and *SVP Med Supply*, I find Ms. DiMiceli's and Mr. Marconi's Affirmations sufficient to meet Respondent's burden of establishing that Applicant failed to appear for the November 15, 2023, and January 4, 2024, EUO's.

....

Based upon the rulings in *Sanford Chiropractic* and *SVP Med Supply*, I find Ms. DiMiceli's and Mr. Marconi's Affirmations sufficient to meet

Respondent's burden of establishing that Applicant failed to appear for the November 15, 2023, and January 4, 2024, EUO's.

...

Because attendance at an EUO is a condition precedent to coverage, an insurer may deny a No-Fault claim retroactively to the date of loss based on a noticed party's failure to attend EUO's when and as often as the insurer reasonably requires. *Prime Psychological Servs., P.C. v. Nationwide Prop. & Cas. Ins. Co.*, 24 Misc. 3d 230 (N.Y.C. Civ. Ct., Richmond Co., 2009). See also *American Transit Ins. Co., v. Johnson*, 2012 NY Slip Op 32004(U) (Sup. Ct., N.Y. Co.). Therefore, Respondent's denial is upheld

As a finding of fact, the content of the affirmations in the proceeding are similar and the above caselaw and analysis is persuasive. Further, it is within an arbitrator's authority to determine the preclusive effect of a prior arbitration. *Matter of Falzone v. New York Central Mutual Fire Ins. Co.*, 15 N.Y.3d 530 aff'd, 64 A.D.3d 1149 (4th Dept. 2009). Applicant's claim is denied in its entirety.

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 Orange

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

05/21/2025
(Dated)

Kent Benziger

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:
48a3f9fb85d974d51270196b5801e23d

Electronically Signed

Your name: Kent Benziger
Signed on: 05/21/2025