American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Lense Supply Inc. (Applicant)	AAA Case No.	17-24-1370-4722
	Applicant's File No.	190710
- and -	Insurer's Claim File No.	8810251650000001
	NAIC No.	35882
Geico Insurance Company (Respondent)		

ARBITRATION AWARD

I, Anne Malone, 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 06/09/2025
   Declared closed by the arbitrator on 06/09/2025

   John Gallagher, Esq. from The Law Offices of John Gallagher, PLLC participated virtually for the Applicant

   Joseph Costa-Cappucci from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$502.63**, 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

   The 42 year old EIP reported involvement in a motor vehicle accident on May 21, 20247, 2024; claimed related injury and received a cervical traction device provided by the applicant on July 30, 2024.

   The applicant submitted a claim for this durable medical equipment (DME), payment of which was denied by the respondent based on its finding that benefits are not payable as the applicant failed to comply with the policy terms by failing to appear for two scheduled examinations under oath.

   The issues to be determined at the hearing are:

Whether the respondent established that the applicant violated a condition precedent to coverage.

Whether the respondent's denial based on the applicant's failure to appear for an EUO can be sustained.

4. Findings, Conclusions, and Basis Therefor

This hearing was held on Zoom and the decision is based upon the documents reviewed in the Modria File as well as the arguments made by counsel and/or representative at the arbitration hearing. Only the arguments presented at the hearing are preserved in this decision; all other arguments not presented at the hearing are considered waived.

It is the respondent's burden to prove that the bills in question were properly denied. Under 11 NYCRR 65-1.1, which prescribes the No-Fault Mandatory Personal Injury Protection Endorsement which must be included in all owners polices of motor vehicle liability insurance issued in New York, the "Conditions" section of the endorsement contains a "Proof of Claim" provision which states in pertinent part that "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…"

If the respondent requires an EUO of the applicant it has 15 business days after receipt of proof of claim in which to send correspondence requesting the examination under oath. If the party fails to attend, within 10 calendar days of the no-show the insurer must contact the party from whom the EUO is requested to give the party a second opportunity to attend.

If the party fails to appear at the rescheduled EUO, an insurer may issue a denial of pending claims based upon the failure to meet the condition for coverage in not submitting to the requested EUO, as required under the prescribed endorsement. There is no requirement in the regulation that the denial must state the specific reason(s) why the insurer required the EUO.

The respondent alleges to have attempted to schedule the EUO of the applicant, who failed to appear.

The respondent submitted copies of letters which were sent to the applicant dated 9/9/24 and 10/2/24 for EUOs scheduled on 9/25/24 and 10/31/24, respectively.

The scheduling letters were proper as to form and there is no evidence submitted to establish that the letters were improper in any way, or that they were sent to an improper address. Based upon the policy violation, a timely denial was issued.

The respondent submitted affidavits to support the scheduling of the EUOs and mailing of the scheduling letters. In addition, the respondent provided an affidavit dated January 31, 2025 to support its contention that a witness on behalf of the applicant failed to appear for the two scheduled examinations under oath.

The applicant objected to the attorney's affidavit related to the no show of a witness on behalf of the applicant, based on its determination that it was insufficient to establish that the applicant did not appear for the two scheduled EUO. This objection was based on the fact that the affidavit was dated more than four months after the applicant failed to appear for the EUOs.

The respondent's submissions include summaries of the following case law and Master Arbitration awards to support the sufficiency of the subject affidavit:

Palafox PT, P.C. as assignee of Katherine Fermin v. State Farm Mutual Automobile Ins. Co., 49 Misc. 3d 144(A), in which the Appellate Term upheld the dismissal of the complaint and found that "the affirmation submitted by defendant's attorney, who was present in his office to conduct the EUO of plaintiff on the scheduled dates, was sufficient to establish that plaintiff had failed to appear." The no-show affirmation submitted with the summary judgment motion in Palafox, *supra* is virtually the same as the affirmation submitted by GEICO in the instant case.

The same issue was recently decided by Master Arbitrators Peter J. Merani (AAA Case No. 99-16-1027-9617) and Victor J. D'Ammora (AAA Case No. 99-16-1047-9370).

In his award for case 99-16-1037-2074, Master Arbitrator Merani vacated the lower arbitration award in favor of Applicant and found that "the lower arbitrator's determination that Respondent attorney's affirmation was insufficient to establish the Applicant non-appearance at the schedule EUOs is contrary to the case law and is arbitrary and capricious and incorrect as a matter of law."

Master Arbitrator Merani specifically addressed the issue of personal knowledge and explained that the lower arbitrator "adds the requirement that the attorney needed to state how the record of non-appearance was reviewed when the attorney who made the affirmation was the attorney who was present at the scheduled EUOs."

In his award for case 99-16-1047-9370, Master Arbitrator Victor J. D'Ammora vacated the lower arbitration award in favor of Applicant and found that "the mere fact that the affidavit was prepared and dated nearly two years later does not negate its sufficiency to establish the Applicant's no show at the EUOs."

There are no requirements that require the affirmation to go into more detail than what it currently states. And, the carriers should not be penalized because an applicant waits to file litigation.

Although the applicant objected to the affirmation in support of its failure to appear for two scheduled EUOs, it did not provide any support for its objection to the respondent's arguments.

The policy breach in this case was instituted by the applicant. It was its failure to have someone appear at the two scheduled examinations under oath that caused the denial of the claim. The applicant's failure to appear for the examinations under oath breached a condition precedent to coverage. Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559, 560 (N.Y. App. Div. 1st Dept. 2011) held that:

When an EIP or applicant "failed to appear for the requested IMEs,

[EUOs] [the insurer] had the right to deny all claims

retroactively to the date of loss, regardless of whether the denials

were timely issued…A denial premised on breach of a condition

precedent to coverage voids the policy ab initio and, in such case,

the insurer cannot be precluded from asserting a defense premised

on no coverage.

The applicant presented no evidence that it did not receive the letters scheduling the examinations under oath or to refute the proof that someone on its behalf did not appear for the examinations under oath on September 25, 2024 and October 31, 2024.

Based upon the proof presented, I find that the respondent established that the applicant violated a condition precedent to coverage and that its denial can be sustained.

Accordingly, the claim is dismissed with prejudice.

Any further issues submitted in the record are held to be moot and/or waived insofar as they were not raised at the time of this hearing. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator.

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 CT
SS :
County of Fairfield

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

07/02/2025
(Dated)

Anne Malone

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:
264ae9fa882b380b1a2112d5325ff4d1

Electronically Signed

Your name: Anne Malone
Signed on: 07/02/2025