American Arbitration Association

NO-FAULT ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

[redacted] *Applicant*

–and–

Unitrin Direct Insurance *Respondent*

AAA ASSESSMENT NO.: [redacted] INSURER'S FILE NUMBER: [redacted]

AAA CASE NUMBER: 412012024847

MASTER ARBITRATION AWARD

I, Frank G. Godson , the undersigned MASTER ARBITRATOR, appointed by the Superintendent of Insurance and designated by the American Arbitration Association pursuant to regulations promulgated by the Superintendent of Insurance at 11 NYCRR 65-4.10, having been duly sworn, and having heard the proofs and allegations of the parties on _____ , make the following AWARD.

Part I. Summary of Issues in Dispute

1. Whether the no-fault arbitrator acted in an arbitrary, capricious or irrational manner or contrary to law in failing to delay the proceedings in this matter to await the determination of a pending declaratory judgment action filed in Supreme Court, New York County.

2. Whether the issues in this arbitration are barred by the doctrine of collateral estoppel because of the finding in a prior proceeding involving the same assignor, and the same issues, but a different health care provider, that respondent could not sustain its denial based on the failure of the assignor to comply with requests for IME's because it had failed to prove the assignor's failure to appear.

3. Whether respondent's failure to either pay or deny applicant's claim within the thirty-day period provided by the regulation precludes the defense of failure to comply with requests for an IME as a ground for denial, or whether the right to an IME, being a condition of coverage under the policy, avoids the preclusive effect of the violation of the time limit.

Part II. Findings, Conclusions, and Basis Therefor

Applicant's assignor was allegedly a pedestrian involved in a motor vehicle accident with respondent's insured on 9/23/09, and the present claim is one of three before me involving care given to the same assignor by different health care providers. Respondent denied each of the claims on the basis that the assignor had breached the insurance policy by failing to appear for IME's on 12/30/09 and 1/15/09, and on the further basis that the fees charged were not in accordance with the Workers' Compensation fee schedule.

The no-fault arbitrator found that the denials were indeed late, and because of that fact the insurer is precluded from denying the claims on the basis of excessive fees.

Respondent's attorney argued that even if the denials were untimely, respondent was not precluded from raising its failure to appear defense, pursuant to the Appellate Division's decision in Unitrin Advantage Insurance Co. v. Bayshore Physical Therapy PLLC, 82 AD3d 559 (First Department, 2011).

In Unitrin the focus on the Appellate Division decision is on the following language at page 82 AD3d 560:

> "The failure to appear for IMEs requested by the insurer 'when and as often as, [it] may reasonably require' (Insurance Department Regulations [11 NYCRR § 65-1.1) is a breach of a condition precedent to coverage under the no-fault policy, and therefore fits squarely within the exception to the preclusion doctrine, as set forth in *Central Gen. Hosp. v. Chubb Group of Ins. Cos.* (90 NY2d 195 [1997]). Accordingly, when defendants' assignors failed to appear for the requested IME's, plaintiff had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued (*see* Insurance Department Regulations [11 BYCRR § 65-3.8[c]; *Stephen Fogel Psychological*, 35 AD3d at 721-722)."

An examination of the lower court decision (2010 NY Slip Opinion 31936 (U) 2510) shows that it involved two EIP's injured in the same accident, both of whom were scheduled and rescheduled for IME's, and for both of whom Unitrin had paid some claims and denied others on the basis of peer reviews which found the treatments to have been medically unnecessary or not causally related to the collision. Upon receiving notice that the EIP's had missed some of the scheduled IME's, Unitrin sent general denials notifying them that all future no-fault claims would be denied for failure to appear for the IME's and that past claims were being retroactively denied for the same reason. The lower court held that the insurer may retroactively deny a claim on the basis of an insured's failure to appear for an IME, although the insurer has earlier either paid the claim, or denied it for a different reason. The court also stated:

> "Unitrin has provided undisputed evidence that it sent general denials, within 30 days of having received notice that, first, Majano, and then, Gomez, had failed to appear for their first four scheduled IMEs, and that it had timely complied with the follow-up requirements set forth at 11 NYCRR 65-3.6(b)."

Therefore, it is clear that the insurer's duty to pay or deny within thirty days of being notified of a policy violation was not an issue in the Unitrin case, and the Appellate Division's reference to the insurer's right to deny all claims "regardless of whether the denials were timely issued" was in reference to the effect of the earlier denials for other reasons.

Before a claim is made, the insurer's right to medical examinations is governed by the standard policy provision. Once an EIP or health care provider initiates the claims procedure, the regulation prescribes time limits for actions to prevent either side from foot dragging. I believe this is the philosophy guiding the opinion letter issued by the Insurance Department on 2/14/05 which states:

"An insurer's request for an IME of an eligible injured person made prior to the receipt of a claim is a verification request which required that the insurer afford a second opportunity for the person to appear under the applicable follow-up procedures contained in Section 65-3.6(b)."

In Fogel PC v. Progressive Insurance Co., 7 Misc.3d 18 (Appellate Term, Second Department, 2004) the court held, in effect, that upon receipt of a notice of claim, whether orally or in writing, the procedures and timetables of the regulation regarding "verification" come into effect. See 7 Misc.3d pages 19-21. In this case it is clear from the IME scheduling letters that respondent had opened a claim file prior to the sending of the letters, although it does not appear that this particular applicant had submitted any claims. However the time limit for respondent to pay or deny did not start running until it received applicant's claims. Although respondent's denial forms state that the claims were received on 6/14/11, the no-fault arbitrator found, based on documents generated by the U.S. Postal Service, that the bills were sent on 5/17/11 and received by respondent on 5/20/11. Therefore, the denials of 6/23/11 were untimely.

Since I find respondent's denials in this case to be barred on the basis of untimeliness, the question of whether the doctrine of collateral estoppel applies with respect to a prior arbitration decision involving a different health care provider becomes moot.

The final issue is whether there should have been a delay in this proceeding because of the pendency of a declaratory judgment action brought by Response Worldwide Direct Auto Insurance Company (apparently the same company as respondent) against a number of health care providers, including the three who are applicants in the cases before me. Although the demand for relief in that case requests that all no-fault lawsuits and arbitrations brought by defendants relating to the 9/23/09 collision be stayed, there is no evidence that such a stay was ever requested of or granted by the court, and no evidence that the no-fault arbitrator in this case was asked to delay the matter.

Accordingly,

1. ☐ the request for review is hereby denied pursuant to 11 NYCRR 65-4.10 (c) (4)

2. X the award reviewed is affirmed in its entirety

3. ☐ the award or part thereof in favor of ☐ applicant
hereby reviewed is vacated and
☐ respondent

remanded for a new hearing ☐ before the lower arbitrator

☐ before a new arbitrator

4. ☐ the award in favor of the ☐ applicant
hereby reviewed is vacated in its entirety
☐ respondent

—or—

5. ☐ the award reviewed is modified to read as follows:

A. The respondent shall pay the applicant no-fault benefits in the sum of

_____ Dollars ($_____), as follows:

Work/Wage Loss	$_____
Health Service Benefits	$_____
Other Reasonable and Necessary Expenses	$_____
Death Benefit	$_____
Total	$_____

B1. ☐ Since the claim(s) in question arose from an accident that occurred prior to April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from _____ at the rate of 2% per month, compounded, and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c) (stay of interest).

B2. ☐ Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from _____ at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c) (stay of interest).

C1. ☐ The respondent shall also pay the applicant _____ dollars ($_____) for attorney's fees computed in accordance with 11 NYCRR 65-4.6(d). ***The computation is shown below*** (attach additional sheets if necessary).

-or-

C2. ☐ The respondent shall also pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e). However, for all arbitration requests filed on or after April 5, 2002, if the benefits and interest awarded thereon is equal to or less than the re-

spondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

C3. ☐ Since the charges by the applicant for benefits are for billings on or after April 5, 2002, and exceed the limitations contained in the schedules established pursuant to section 5108 of the Insurance Law, no attorney's fee shall be payable by the insurer. See 11 NYCRR 65-4.6(i).

D. ☐ The respondent shall also pay the applicant forty dollars ($40) to reimburse the applicant for the fee paid to the Designated Organization for the arbitration below, unless the fee was previously returned pursuant to an earlier award

PART III. (Complete if applicable.) The applicant in the arbitration reviewed, having prevailed in this review,

A. the respondent shall pay the applicant ----------
dollars ($) for attorney's fees computed in accordance with 11 NYCRR 65-4.10 (j). The computation is shown below (attach additional sheets if necessary)

B. If the applicant requested review, the respondent shall also pay the applicant SEVENTY-FIVE DOLLARS ($75) to reimburse the applicant for the Master Arbitration filing fee.

This award determines all of the no-fault policy issues submitted to this master arbitrator pursuant to 11 NYCRR 65- 4.10

State of New York

County of Erie . ☐ SS:

I, Frank G. Godson, Esq., do hereby affirm upon my oath as master arbitrator that I am the individual described in and who executed this instrument, which is my award.

11/9/12
Date

Frank G. Godson
Master Arbitrator's Signature

IMPORTANT NOTICE

This award is payable within 21 calendar days of the date of mailing. A copy of this award has been sent to the Superintendent of Insurance.

This master arbitration award is final and binding except for CPLR Article 75 review or where the award, exclusive of interest and attorney's fees, exceeds $5,000, in which case there may be court review de novo (11 NYCRR 65- 4.10(h)). A denial of review pursuant to 11 NYCRR 65- 4.10 (c) (4) (Part II (1) above) shall not form the basis of an action de novo within the meaning of section 5106(c) of the Insurance Law. A party who intends to commence an Article 75 proceeding or an action to adjudicate a dispute de novo shall follow the applicable procedures as set forth in CPLR Article 75. If the party initiating such action is an insurer, payment of all amounts set forth in the master arbitration award which will not be subject of judicial action or review shall be made prior of the commencement of such action.

Date of mailing: NOV 14 2012