



**STATE OF NEW YORK
INSURANCE DEPARTMENT**
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NEW YORK, NEW YORK 10004

George E. Pataki
Governor

Howard Mills
Acting Superintendent

The Office of General Counsel issued the following opinion on February 14, 2005, representing the position of the New York State Insurance Department.

RE: No-Fault Benefits Cutoff Date After Negative IME Finding

Questions Presented:

- 1) When a No-Fault insurer requests that an eligible injured person attend an insurer medical examination ("IME") as an additional verification request in order to determine the medical necessity of health services rendered, and the eligible injured person fails to attend the scheduled examination, may the insurer issue a denial that denies payment for all future benefits and contains language informing the eligible injured person that the denial will be rescinded if the person reschedules the IME and attends the second scheduled IME?
- 2) If the eligible injured person attends the second scheduled IME and the insurer thereafter issues a denial for all future health benefits based upon negative examination findings, may the insurer use the date of the first scheduled IME (which the person did not attend) as the cutoff date for payment of benefits?
- 3) If an insurer requests a medical examination of the eligible injured person for reasonable cause as specified under the Conditions clause of the prescribed endorsement, prior to receipt of a claim rather than as a request for additional verification, may the insurer deny the claim based solely on the failure of the person to attend one scheduled examination?

Conclusions:

- 1) No. Section 5106 of the Insurance Law does not permit an insurer to issue a conditional denial which is contingent upon the happening of a future event. Within 30 days from receipt of verification requested to establish proof of claim, an insurer must pay or deny a claim, or make partial payment of any undisputed claim. Rather than issue a denial, since the insurer requested the medical examination as a request for additional verification of claim pursuant to N.Y. Comp. Codes R. & Reg. § 65-3.5(d) (Department Regulation 68-C), an insurer has an obligation to attempt to contact the eligible injured person in order to reschedule the IME after the person failed to attend the first scheduled examination pursuant to N.Y. Comp. Codes R. & Reg. § 65-3.6(b) (Regulation 68-C).

2) No. Pursuant to Section 65-3.8(a)(1) of Regulation 68-C, with respect to the payment or denial of claim rule (30 day rule), the date that an IME is performed is deemed as the date that verification is received by the company and the insurer must pay or deny the claim within 30 days after receipt of all requested verification. The earliest date that benefits may be cutoff prospectively based on the findings of the IME is the date that the denial is sent to the applicant for benefits.

3) No. 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 requires 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).

Facts:

In a letter to the Department, the inquirer described the claims practices of his insurance company (the "insurer") with respect to issuing denials of health care benefits based upon the failure of the eligible injured person to attend an IME requested as additional verification by the insurer, in order to determine whether proof of claim has been established and is therefore reimbursable under No-Fault. The inquirer stated that it is the insurer's practice to issue a denial on the Department's prescribed NF-10 denial form based upon the person's non-attendance, with an explanation that the IME was (or would be) rescheduled and that the insurer would be willing to rescind the denial if the person attended a rescheduled IME which reported that further medical treatment was medically necessary. The inquirer also indicated that "We are not mandated by Regulation 68 to give the claimant a "second opportunity" to attend the IME, but we do so as a courtesy to the claimant". The inquirer referred to a previous opinion issued by this office on February 11, 2003 in support of this proposition. In the specific case that the inquirer referred to in his letter, it is not totally clear as to whether multiple IMEs for different specialty health providers were scheduled for the same day, but it was specifically stated that the scheduled examination(s) were made as requests for additional verification.

Analysis:

Pursuant to N.Y. Ins. Law § 5106(a) (McKinney 2000), "Payments of first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied." Claims for health service benefits must be medically necessary in order to be reimbursable as required by N.Y. Ins. Law § 5102(a) (McKinney Supp. 2002). The claim may take the form of either the prescribed verification form NYS Form N-F 3, Verification of Treatment by Attending Physician or Other Provider of Health Service or, as alternately provided under Section 65-3.5(f), a non-prescribed form submitted in lieu of the N-F 3 Form, which contains substantially the same information as the N-F 3. This is also true with respect to N-F forms 4 and 5, which provides verification of treatment from hospitals and hospital facilities.

Under the No-Fault claims procedures established under Regulation 68, N.Y. Comp. Codes R. & Regs. tit. 11, § 65-3.5(b) provides that an insurer has the right to request "any additional verification required by the insurer to establish proof of claim", within 15 business days of receipt of the bill for services. Pursuant to Section 65-3.5(d), when the request for additional verification is an IME, the insurer shall schedule the examination within 30 calendar days from the date of receipt of the prescribed or equivalent verification form. The prescribed No-Fault endorsement in New York, N.Y. Comp. Codes R. & Regs. tit. 11, § 65-1 (Regulation 68-A) (2002) entitled "Conditions" states that "The eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the Company, when, and as often as, the Company may reasonably require."

With respect to the specific questions raised:

1) When an insurer schedules an IME of an eligible injured person after receipt of a claim, as a request for additional verification pursuant to N.Y. Comp. Codes R. & Regs. & Regs. tit 11, § 65-3.5(d), and the person does not appear, an insurer is obligated to follow-up with the person about the requested additional verification that has not been provided under N.Y. Comp. Codes R. & Regs. tit. 11 § 65-3.6(b). In the case of a missed IME by an eligible injured person, "the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested, either by telephone call, properly documented in the file, or by mail..." In this instance, the insurer is required to contact the person in order to afford the person a second reasonable opportunity to attend an IME.

Under the claims practices of the insurer described above, the insurer would have generated a denial after the first missed IME, rather than affording a second opportunity to attend a rescheduled IME. This would violate the follow-up requirements of N.Y. Comp. Codes R. & Reg. § 3.6(b) for additional verification requests. Moreover, the "denial" the inquirer refers to is not, in fact, a denial at all, as contemplated under the No-Fault statute and regulation. It is a denial which remains conditional and contingent upon the happening of a future event, which is not permissible under the No-Fault regulation.

It should be noted that Pursuant to N.Y. Comp. Codes R. & Regs. tit. 11 § 65-3.5(e) (2002) "...medical examinations requested by the insurer shall be held at a place and time reasonably convenient to the applicant and medical examinations shall be conducted in a facility property equipped for the performance of the medical examination. The insurer shall inform the applicant at the time the examination is scheduled that the applicant will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with the request..." If an insurer schedules multiple IMEs for different health specialty areas and the eligible injured person fails to attend some or all of them, each non-attended IME would require a second scheduled follow-up examination pursuant to Section 65-3.6(b).

2) Pursuant to N.Y. Comp. Codes R. & Regs. tit. 11 § 3.8(a)(1) (2002):

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 of this Subpart. In the case of an examination under oath or a medical examination, the verification is deemed to have been received by the insurer on the day the examination was performed.

Since the date that the IME was performed is deemed to be the date that the insurer receives verification, regardless of the contents or findings of the IME report, the insurer must then make a determination whether to pay or deny the related claims within 30 days of the IME. The date of significance is when the insurer issues a denial after verification receipt. When an insurer issues a timely denial (i.e. within 30 days after the IME is performed), including the situation when it issues a prospective denial of treatment benefits based upon the negative findings of an IME, the earliest date the denial and determination contained therein could take effect is the date that the insurer sends the timely denial to the eligible injured person, with a copy to affected providers. The date that the IME is performed is relevant solely to the date from which the 30-day pay or deny rule runs. Please be aware that the date that the person did not appear for the first scheduled examination has no relevance in determining a cutoff date when the person attends a rescheduled IME. The only date that verification can be deemed received is the date that the person subsequently appears for a rescheduled examination.

3) This office has previously opined that, where an insurer has actual knowledge of injuries sustained by an eligible person prior to the insurer's receipt of a claim for services rendered by a health provider, it may require such person to submit to an IME "...when and as often as, the company may reasonably require." (No-Fault prescribed endorsement, Section 65.1 entitled "Conditions", Regulation 68-A (2002)). Requesting an IME is simply a request for verification by an insurer, whether it is requested before a claim is submitted, under these pre-claim circumstances above, or whether it is requested after a claim, as additional verification. In either situation, it would be subject to the follow-up provision of Section 65-3.6(b), referred to above, which requires an insurer to "...follow up with the party from whom verification is requested..." (emphasis added). It should be noted that there is no prescribed form for an IME request, other than that the request should contain the information required by Section 65-3.5(e) (reimbursement for loss of earnings, transportation expenses, etc.)

It is the inquirer's company's contention that the No-Fault regulation does not require that the claimant receive a second opportunity to attend the IME. As explained above, the regulation does contain that requirement. It is the inquirer's company's further contention that the Department's opinion letter of February 11, 2003 supports the inquirer's legal theory that a single non-attendance at an IME may serve as the basis for a denial. In particular, the inquirer refers to a conclusion contained in that opinion which stated that "When an eligible injured person fails to comply with a reasonable request for a medical examination, that person has failed to meet a condition precedent for No-Fault coverage under the prescribed No-Fault endorsement..., and therefore, any pending claim submitted for services rendered may be denied by the insurer due to the policy breach and resulting lack of coverage." The opinion the inquirer refers to did not address the question of whether follow-up IMEs were required, but nothing contained in that opinion was intended to in any way to suggest or infer that follow-up IMEs were not required.

To the contrary, that opinion also stated that "When an eligible injured person 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 injured person's failure to attend was unreasonable, in order to ultimately determine whether the policy condition was met." As has been stated, the regulation requires that another opportunity be afforded by the insurer for the person to attend a rescheduled examination. The condition in the prescribed endorsement that an eligible injured person attend a reasonably requested IME 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 to attend an IME on two occasions may result in a breach of the policy condition on IME attendance, which is a condition precedent to payment of claims and which may result in a loss of coverage for the eligible injured person

Additionally, nothing in this opinion should be construed to support the conclusion that the scheduling of an IME and follow-up examination, in which the eligible injured person does not attend either, automatically justifies a denial in and of itself when the eligible injured person has offered a reasonable excuse for not attending follow-up examinations and is attempting to establish, in cooperation with the No-Fault insurer, a reasonable convenient time to attend. What constitutes a reasonable excuse for failure to attend a medical examination is a question of fact to be determined by the particulars of each individual case.

For further information you may contact Supervising Attorney Lawrence M. Fuchsberg at the New York City Office.