OFFICE OF THE INSURANCE COMMISSIONER
MARYLAND INSURANCE ADMINISTRATION

J.D.[1],	*	
Plaintiff,	*	
v.	*	**Case No. 27-1001-22-00073**
Erie Insurance Exchange,	*	
Defendant.	*	

* * * * * * * * * * * * * *

DECISION

J.D. ("Plaintiff") has alleged that Erie Insurance Exchange ("Defendant") breached its contractual duties by failing to pay Plaintiff's first-party claim for damages under the terms of the auto insurance policy ("Policy") in connection with a traffic accident on April 28, 2018 (the "Claim") which occurred in Caroline County, MD. Pursuant to Section 27-1001 of the Insurance Article of the Annotated Code of Maryland ("Section 27-1001"), the Maryland Insurance Administration (the "Administration") concludes that Plaintiff has failed to demonstrate that Defendant breached any duties owed to Plaintiff or otherwise failed to act in good faith in connection with Plaintiff's claim.

I. STANDARD OF REVIEW

Section 3-1701 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland ("Section 3-1701") authorizes the award to an insured of certain statutory remedies if the insured demonstrates that the insurer failed to act in good faith in denying, in whole or in part, a first-party property insurance or disability insurance claim. However, before the insured

[1] The Maryland Insurance Administration uses initials to protect the plaintiff's and other individuals' privacy.

may file an action pursuant to 3-1701, Section 27-1001 requires that the insured first submit a complaint to the Administration.

Section 27-1001 defines "good faith" as "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insured made the claim." The Administration in rendering a decision on the complaint is required by Section 27-1001(e)(1)(i) to focus on five issues:

> 1. Whether the insurer is required under the applicable policy to cover the underlying claim;
>
> 2. The amount the insured was entitled to receive from the insurer;
>
> 3. Whether the insurer breached its obligation to cover and pay the claim;
>
> 4. Whether an insurer that breached its obligation failed to act in good faith; and
>
> 5. If there was a breach and the insurer did not act in good faith, the amount of damages, expenses, litigation costs and interest.

A plaintiff has the burden of proof and must meet this burden by a preponderance of the evidence. *See* Md. Code Ann., State Gov't, § 10-217 (2020 Repl. Vol.); *Md. Bd. Of Physicians v. Elliott,* 170 Md. App. 369, 435, *cert denied,* 396 Md. 12 (2006).

II. PROCEDURAL BACKGROUND

On October 20, 2022, the Administration received Complaint No. 27-1001-22-00073 (the "Complaint") stating a cause of action in accordance with Section 27-1001. In the Complaint, Plaintiff alleged Defendant breached its obligations under the Policy by incorrectly calculating the remaining payment under the underinsured motorist ("UIM") coverage. Plaintiff also contends that Defendant failed to timely provide an explanation of the UIM coverage calculations. Furthermore, Plaintiff asserts that Defendant did not provide updates on the claim in accordance with Maryland Law. As required by Section 27-1001(d)(3), the Administration

forwarded the Complaint and accompanying documents to Defendant on October 26, 2022. Defendant provided a timely response to the Complaint and accompanying documents as required by Section 27-1001(d)(4) on November 22, 2022, and acknowledged the obligation to provide coverage on the claim.

III. FINDINGS

Based on a complete and thorough review of the written materials submitted by the Parties, and by a preponderance of the evidence, the Administration finds that Plaintiff has failed to establish that she is entitled to UIM coverage for the Claim under the Policy.

On April 28, 2018, Plaintiff was involved in a head-on collision in Caroline County, MD. Plaintiff was on duty in an unmarked Maryland State Police vehicle traveling south when the other driver ("J.F.") crossed the center lane and crashed into Plaintiff's vehicle. Plaintiff was taken to the hospital and treated for her injuries. As a result of this accident, Plaintiff suffered permanent injuries that required surgeries and incurred medical expenses

At the time of the accident, J.F. was insured by Nationwide Affinity Insurance Company of America ("Nationwide") and had a policy limit of $100,000 per person/$300,000 per accident. Additionally, Plaintiff was insured by Defendant with UIM limits of $250,000 per person/$500,000 per accident.

With respect to the coverage protection limitations under the Policy:

LIMIT OF PROTECTION

Limitations of Payment

> If coverage is purchased on a "Split Limits" basis, the "**Declarations**" will show a PER PERSON and PER ACCIDENT limit for Uninsured/Underinsured Motorists Bodily Injury and a PER ACCIDENT limit for Uninsured/Underinsured Motorists Property Damage. The PER PERSON limit for Bodily Injury for one

"**auto**" is the most "**we**" will pay for damages arising out of bodily injury or death to one person in any one accident. The PER ACCIDENT limit for Bodily Injury for one "**auto**" is the most "**we**" will pay for damages arising out of bodily injury or death to all persons resulting from any one accident, subject to the PER PERSON limit. The PER ACCIDENT limit for Property Damage is the most "**we**" will pay for all property damage caused by any one accident.

If coverage is purchased on a "Single Limit" basis, the "**Declarations**" will show a PER ACCIDENT limit for Uninsured/Underinsured Motorists Bodily Injury and Property Damage. The PER ACCIDENT limit for one "**auto**" is the most "**we**" will pay for all damages arising out of bodily injury and property damage resulting from any one accident.

"**We**" will pay no more than the Uninsured/Underinsured Motorists Coverage limits shown on the "**Declarations**" for the "**auto**" involved in the accident, regardless of the number of persons "**we**" protect, "**autos we insure,**" premiums paid, claims made or "**autos**" involved in the accident.

****

On April 30, 2018, Plaintiff had a follow up visit with Eastern Shore Chiropractic Center ("Eastern Shore") in Easton, MD. During this visit, Plaintiff complained of painful injuries to her neck, back, hips, and ankles. The evaluation revealed a spinal spasm, tenderness, and diminished range of motion along the spine. Plaintiff was also diagnosed with hip and ankle contusions. Thus, Eastern Shore instructed Plaintiff to follow up with them regularly over the next few weeks. Plaintiff underwent nine physical therapy visits with Eastern Shore until May 31, 2018, at which time she was discharged with instructions to keep stretching at home and to return if symptoms worsened.

On May 9, 2018, Plaintiff sought care from Multi-Specialty HealthCare ("Multi-Specialty") for ongoing orthopedic issues. Plaintiff's main complaints included pain in her neck,

right shoulder, right ankle, both knees, and hips. After the examination, Plaintiff was diagnosed lumbar sprains, shoulder impingements, knee contusions, trochanteric bursitis, and joint arthralgia. Plaintiff was advised to continue treatment at Multi-Specialty and limit strenuous activities.

Per Multi-Specialty's instructions, Plaintiff had multiple follow up visits. On May 30, 2018, though Plaintiff was making progress, her hip pain seemed to worsen so she received a bursal injection to the hip. On July 6, 2018, Plaintiff had another follow up with Multi-Specialty where she was exhibiting improvements with physical therapy. However, Plaintiff's hip was still persistently painful, thus an MRI was ordered. Plaintiff also went to a routine follow up appointment at Multi-Specialty on September 5, 2018.

On August 29, 2018, Plaintiff went to Chesapeake Medical Imaging ("Chesapeake") for an MRI of her left hip. The scan showed evidence of a labral tear and atrophy. Therefore, Plaintiff was advised to get an arthroscopic hip procedure and to follow up with Multi-Specialty in three weeks.

On September 25, 2018, Plaintiff followed up with Eastern Shore. Plaintiff complained of pain in her hip and feeling a pop. The examination showed a tear in the left hip joint and Plaintiff was advised to receive a steroid injection. Plaintiff received the injection on October 1, 2018.

On October 12, 2018, Plaintiff followed up with Multi-Specialty. Plaintiff reported that the injection helped the hip pain for a few days but her symptoms returned and remained unchanged since. Plaintiff received another bursal injection and was told to do a trial of aquatic therapy in conjunction with regular physical therapy.

On October 30, 2018, Plaintiff returned to Eastern Shore and reported that the injection helped for a few days but symptoms and pain returned. The examination showed no change in Plaintiff's condition. Plaintiff was again advised about an arthroscopy procedure for her hip.

On November 19, 2018, Plaintiff followed up with Multi-Specialty regarding her continuous hip pain. Her condition was again found to be unchanged. However, Plaintiff was advised that she no longer needed physical therapy since it was no longer effective and to follow up if her symptoms returned.

On December 3, 2018, Plaintiff underwent an arthroscopy surgery at The Surgery Center of Easton for the tear in her left hip. The surgery had no complications and Plaintiff was discharged the same day with post-surgery care instructions.

On December 19, 2018, Plaintiff followed up with Eastern Shore regarding her hip. During this visit, Plaintiff had an X-ray of her left hip that showed there was no longer a tear. Plaintiff was told to limit physical activities and start strengthening physical therapy.

On January 8, 2019, Plaintiff returned to Eastern Shore to discuss therapy plans and goals. Plaintiff was also given instructions for at home exercises. From January 15, 2019 to February 7, 2019, Plaintiff completed 9 sessions of physical therapy at Eastern Shore. However, Plaintiff noted that she was still experiencing pain, soreness, and lack of some strength. Therefore, Plaintiff was not cleared to resume full prior activities.

On February 13, 2019, Plaintiff followed up with Eastern Shore for a 10-week post-surgery examination. Plaintiff noted that she still had some aches and popping in the hip. Plaintiff was discharged from physical therapy and given an at home program, which included gradually reincorporating regular activities.

On February 22, 2019, Plaintiff returned to Multi-Specialty with complaints of shoulder tenderness. Plaintiff was diagnosed with a shoulder sprain and scheduled for an MRI of both shoulders. On March 7, 2019, Plaintiff underwent the MRI of both shoulders at Chesapeake. The findings showed tears in the rotator cuff and some degenerative tears. Plaintiff was advised to continue at home exercises and to follow up in a few weeks.

On March 15, 2019, Plaintiff followed up with Multi-Specialty regarding the shoulder pain. Because of the increasing pain, Plaintiff received a steroid injection and was advised to follow up in a few weeks.

On March 26, 2019, Plaintiff again followed up with Eastern Shore where she complained of still experiencing pains and cramping in her hip. Plaintiff was told to continue her at home exercises and gradually resume normal activities.

On April 12, 2019, Nationwide sent Plaintiff's counsel a letter that stated J.F.'s policy had a bodily injury limit of $100,000 per person/$300,000 per a loss. This letter also requested an update on Plaintiff's medical treatment, including records, reports, and bills.

On April 16, 2019, Plaintiff returned to Eastern Shore for her shoulder pain. During this visit, an X-ray was performed, which showed tearing and a cyst in the shoulder. Plaintiff was given a steroid injection and told to follow up as needed.

On April 29, 2019, Plaintiff followed up with Eastern Shore for evaluation and X-rays of her ankles. Plaintiff was told to continue her activities normally and follow up if needed.

Later, on January 28, 2020, Plaintiff returned to Eastern Shore and requested an injection for her hip. She received the injection and was told to limit activity to only light stretching for 48 to 72 hours.

On February 10, 2020, Plaintiff, through counsel, advised Defendant of a possible UIM claim. Additionally, this letter requested disclosure of policy limits available under UIM coverage.

In response, on February 21, 2020, Defendant, through its Claim Adjuster Sean Fitzpatrick ("Adjuster Fitzpatrick"), sent a letter to Plaintiff's counsel stating that the Policy bodily injury limit is $250,000 per person and $500,000 per an occurrence. This letter also requested that Plaintiff send her special damages with copies of medical bills, medical reports, and verification of lost earnings for evaluation.

To follow up, Adjuster Fitzpatrick called Plaintiff's counsel on March 5, 2020, and March 17, 2020 to discuss the claim. There was no answer both times and Adjuster Fitzpatrick left messages.

On April 3, 2020, having not received any requested documents, Adjuster Fitzpatrick sent a letter to Plaintiff's counsel requesting the special damages and supporting documents.

On May 7, 2020, Plaintiff had a hearing with the Workers' Compensation Commission (the "WCC"). In an award dated, May 8, 2020, the WCC noted Plaintiff received sick leave in lieu of temporary total from April 29, 2018-May 1, 2018, December 25, 2018-January 1, 2019, and January 4, 2019-January 10, 2019. Plaintiff was also awarded permanent partial disability.

The following month, Adjuster Fitzpatrick called Plaintiff to discuss the claim on June 6, 2020, July 8, 2020, and July 13, 2020. All three times he left a message for Plaintiff. In response, on July 15, 2020, Plaintiff's counsel emailed Defendant indicating that Plaintiff would be sending a demand letter since there is no settlement offer.

On October 27, 2020, Plaintiff had a follow up visit with Eastern Shore. The examination showed evidence of multiple pain trigger points that were still causing hip pain. Plaintiff was

advised to get an MRI and follow up. On November 23, 2020, Plaintiff underwent an MRI at Chesapeake which showed a tear in the hip.

On December 15, 2020, Plaintiff returned to Eastern Shore for a follow up regarding her hip. Plaintiff reported that she was having constant pain in her hip, especially when she was working. The doctor discussed treatment options of more steroid injections or another arthroscopy procedure. However, the doctor told Plaintiff that neither treatments would fully cure the issue.

On February 19, 2021, after not hearing from Plaintiff, Defendant contacted Nationwide to determine the status of its claim with Plaintiff. Nationwide advised Defendant that it had not gotten a response from Plaintiff in months and that it never received requested documentation.

On March 9, 2021, per her doctor's recommendation, Plaintiff received a PRP injection into her left hip. Plaintiff reported no pain relief following the injection.

On April 3, 2021, having not been in contact with Plaintiff, Adjuster Fitzpatrick sent a letter to Plaintiff's counsel asking them to contact him to discuss the claim.

On April 14, 2021, Nationwide sent Defendant an update email on the claim. Nationwide stated that it was in the discovery portion of litigation but still had not received the special damages documentation that it requested from Plaintiff's counsel.

A few months later, on June 21, 2021, Nationwide sent a settlement offer to Plaintiff on behalf its client, J.F. The offer was the policy limit of $250,000 as a settlement in full.

On July 6, 2021, Plaintiff's attorney advised Defendant that Nationwide offered its policy limits as a settlement offer and asked for Defendant's permission to accept. Also included in this letter was a copy of Plaintiff's medical records and bills for the UIM policy with Defendant.

Next, on July 13, 2021, Adjuster Fitzpatrick acknowledged receipt of the offer from Nationwide and advised Plaintiff that it would respond within 60 days.

In response, on August 3, 2021, Defendant gave Plaintiff permission to accept the offer from Nationwide and waived subrogation against J.F.

On August 17, 2021, Plaintiff accepted Nationwide's offer of policy limits and signed a Release of All Claims. Also on this day, Adjuster Fitzpatrick offered Plaintiff an additional $5,000 from Plaintiff's UIM coverage. However, Plaintiff's counsel claimed that Defendant erred in its calculation for the remaining amount of UIM benefits available by deducting the full amount of workers' compensation that was paid.

In the meantime, Defendant sent Plaintiff two update letters every 45 days on September 9, 2021 and October 22, 2021.

On December 2, 2021, Adjuster Fitzpatrick sent an email to Plaintiff's counsel inquiring about the causal relationship of a September 2, 2020 doctor's visit to the collision. Plaintiff's counsel responded that there was no link and provided the correct medical documents in support. Additionally, Plaintiff's counsel requested defendant disclose how it calculated the rest of the UIM coverage amount.

On December 6, 2021, Defendant sent another update letter to Plaintiff.

Next, on December 14, 2021, Adjuster Fitzpatrick responded to Plaintiff's counsel that he used policy language that sets forth the statutory calculation of UIM benefits after payment of workers' compensation. The Policy provided as follows regarding UIM coverage limitations:

Reductions

> The limit of protection is the amount shown on the "**Declarations,**" less the amount paid to "**anyone we protect,**" that exhausts any applicable liability insurance policies, bonds, and securities on behalf of any person

who may be held liable for bodily injury or death of "**anyone we protect.**"

The limits of protection available under this Uninsured/Underinsured Motorists Coverage will be reduced by:
1. the amounts paid or payable by or for those liable for bodily injury or property damage to "**anyone we protect.**"
2. the amounts paid or payable under any workers' compensation, disability benefits or similar law.
3. the sum of the limits of any liability insurance policies, bonds, and securities applicable to the bodily injury or death of "**anyone we protect**." This includes all sums paid under the Liability Coverage of this policy.

****

On the other hand, on January 6, 2022, Plaintiff's counsel contacted Defendant and asserted that Defendant's calculations were incorrect and that $150,000 should be available under the UIM coverage. In response, on January 20, 2022, Defendant increased its offer to $7,500.

Thereafter, Defendant sent 45-day status letters on January 21, 2022, March 7, 2022, April 21, 2022, June 6, 2022, July 20, 2022, September 6, 2022, and October 18, 2022.

Lastly, on October 20, 2022, Plaintiff filed the subject Section 27-1001 Complaint with the MIA.

IV. DISCUSSION

Plaintiff asserts that Defendant breached its duty under the Policy by incorrectly paying the amount of damages claimed by Plaintiff and failing to appropriately communicate with Plaintiff. Specifically, Plaintiff asserts that Defendant violated Maryland law when calculating UIM benefits after the repayment of workers' compensation benefits. Additionally, Plaintiff also asserts that Defendant has acted in bad faith by not timely responding to Plaintiff's UIM

calculation request and for failing to provide 45-day updates. I find, however, that Plaintiff did not prove that Plaintiff is entitled to additional damages under the Policy, as Plaintiff has produced insufficient evidence in support of her claim that he is entitled to the remaining policy limit of $150,000.

First, I find that Defendant did not breach its obligations under the Policy in calculating the UIM benefits policy limit. Here, Plaintiff argues that Defendant incorrectly calculated UIM coverage by deducting what Plaintiff received from workers' compensation. Specifically, Plaintiff contends that Defendant is required under Maryland law to not include workers' compensation benefits that have been reimbursed when calculating UIM coverage. In this case, Plaintiff never offered Defendant any documentation to demonstrate that the workers' compensation benefits were actually reimbursed. Instead, Plaintiff only told Defendant that the workers' compensation would eventually be reimbursed. Since the workers' compensation had not been reimbursed at the time of Defendant's UIM calculations, it was not required to exclude the workers' compensation benefits from the UIM calculations. Therefore, Plaintiff has not demonstrated that Defendant acted in bad faith by including workers' compensation benefits in its UIM coverage calculations.

Second, I find Defendant made appropriate efforts to notify Plaintiff of its methods used in calculating the UIM coverage. Here, Plaintiff asserts that Defendant failed to respond to inquiries regarding the UIM calculation methods. However, in this case, the record shows that Defendant did respond to Plaintiff's questions to the UIM coverage calculations. Specifically, Plaintiff first questioned Defendant's UIM coverage calculations on December 2, 2021 by asking for an explanation on how the UIM coverage was calculated. Defendant timely responded on December 14, 2021, and advised Plaintiff that it used policy language that sets forth the statutory

calculation of UIM benefits after payment of workers' compensation. Additionally, on January 6, 2022, Plaintiff again asserted that the UIM coverage calculations were incorrect. In a timely response on January 20, 2022, Defendant again asserted that the UIM coverage calculations were correct, but still increased the offer to Plaintiff. Despite this, Plaintiff never responded to Defendant again regarding the UIM coverage calculations. Given the record, Plaintiff has not shown that Defendant acted in bad faith in its response to Plaintiff's inquiries regarding the methods used to calculate the UIM coverage.

Finally, I find that the record demonstrates that Defendant made diligent efforts to notify Plaintiff of 45-day update notices. Here, Plaintiff contends that she has not received any 45-day updates from Defendant even though such updates are required under Maryland law. However, the evidence in this case demonstrates the opposite. Specifically, Defendant first sent a 45-day update letter to Plaintiff on September 9, 2021. Furthermore, Defendant continued to send updates to Plaintiff every 45 days from October 22, 2021 until October 18, 2022. Thus, Defendant had sent a total of ten updates to Plaintiff through the course of over a year. Additionally, Plaintiff asserts that she has generally not received any communication with Defendant since July 13, 2021. Again, the record shows that Defendant has at least contacted Plaintiff every 45 days with an update on the claim from September 9, 2021 to October 18, 2022. Therefore, Plaintiff has not demonstrated that Defendant failed to act in good faith by failing to engage in required communication regarding the claim.

Plaintiff has not demonstrated that Defendant breached its obligations under the Policy or failed to act in good faith. Instead, based on the evidence in this case, the dispute between the Parties is based solely on a disagreement as to the Parties' valuation of the Claim. Accordingly, I

find that Plaintiff has not demonstrated that Defendant breached its obligations under the Policy or failed to act in good faith in connection with the Claim.

V. CONCLUSIONS OF LAW

In accordance with Section 27-1001, the Administration concludes:

1. Plaintiff established by a preponderance of the evidence that Defendant issued to Plaintiff an auto coverage policy obligating Defendant to pay a claim for injuries caused by a traffic accident on April 28, 2018.

2. Plaintiff did not establish by a preponderance of the evidence that Defendant failed to provide the coverage required under the policy.

3. Plaintiff did not establish by a preponderance of the evidence that she is entitled to additional damages as a result of the claim.

4. Plaintiff did not establish by a preponderance of the evidence that Defendant breached its obligation under the policy to cover and pay the claim.

5. Since a breach is a necessary element of a failure to act in good faith, Plaintiff did not establish a failure by Defendant to act in good faith.

6. Plaintiff is not entitled to expenses and litigation costs.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED on this 3rd day of February 2023, that Defendant did not violate Section 27-1001 of the Insurance Article of the Maryland Annotated Code; and it is further

ORDERED that pursuant to Section 27-1001(f)(3), this Final Order shall take effect if no administrative hearing is requested in accordance with Section 27-1001(f)(1).

KATHLEEN A. BIRRANE
Insurance Commissioner

/S/ Tammy Longan
Tammy R.J. Longan
Acting Deputy Commissioner

APPEAL RIGHTS

If a party receives an adverse decision, the party shall have thirty (30) days after the date of service (the date the decision is mailed) of the Administration's decision to request a hearing, which will be referred to the Office of Administrative Hearings for a final decision under Title 10, Subtitle 2 of the State Government Article of the Annotated Code of Maryland. MD. CODE ANN., INS. ART., §27-1001(f).