

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

(Applicant)	AAA Case No.	17-15-1021-8978
	Applicant's File No.	
- and -		
State Farm Fire and Casualty Company	Insurer's Claim File No.	52-682B200
(Respondent)	NAIC No.	25143

ARBITRATION AWARD

I, Gary Peters, 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: Assignor

1. Hearing(s) held on 03/18/2016
Declared closed by the arbitrator on 03/18/2016

Matthew Viverito from Costella & Gordon LLP participated in person for the Applicant

Jeffrey Siegel from Bruno Gerbino & Soriano LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 14,480.00**, was AMENDED and permitted by the arbitrator at the oral hearing.
 1. The amount claimed in the Arbitration Request, \$14,480.00 was AMENDED at the oral hearing. The Applicant has amended its claim and is seeking the reduced sum of \$12,037.92.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The issues in dispute are the Applicant's unpaid bills for lost wages, denied by the Respondent claiming that the Respondent's investigative findings indicated a "material misrepresentation" in procuring the policy.

4. Findings, Conclusions, and Basis Therefor

This hearing was conducted using the Electronic Case Folder maintained by the American Arbitration Association. All documents contained in that folder are made part of the record of the hearing and I have reviewed the documents contained therein. Any documents submitted after the hearing or at the hearing that have not been entered in the Electronic Case Folder as of the date of this award, will be listed immediately below this language and forwarded to the American Arbitration Association at the time this award is issued for inclusion.

By history, the Assignor was involved in a motor vehicle accident on June 19, 2015 and sustained multiple bodily injuries. He received medical attention at the scene and was then transported by ambulance to the Allen Pavillion Hospital where he was examined, given medication and discharged to home. The Assignor came under the care of various medical providers wherein he presented with complaints of neck pain radiating to the left arm, low back pain radiating to the bilateral posterior thighs, mid-back pain and stiffness, left hip pain and headaches sustained in the accident. M.R.I. studies revealed disc herniations at C3-C5 and L4-5 disc bulge.

The parties have stipulated that the amount in dispute for lost wages is \$12,037.92 if I find in favor of the Applicant.

The Applicant testified in his own behalf that he was involved in an automobile accident on June 19, 2015. He went to the emergency room and sustained multiple bodily injuries. At the time of the accident he worked for Rocky's Pizzeria and earned approximately \$800 per week, was out of work for a period of time in excess of 18 weeks and returned to work on November 15, 2015. The Assignor testified that on the date of loss he resided at 55 Halley Street in Yonkers, New York. He was the operator of a motor vehicle that was registered to his wife at the same address. The witness testified that he also resided at 3015 Roberts Avenue in the Bronx, New York, "off and on" due to marital difficulties. He resided at the Roberts Avenue address prior to moving to Halley Street; it was sometime in the year 2013 that "we (the witness and his wife) moved to Halley Street". He testified that he was married on December 19, 2012 and he and his wife lived at the Roberts Avenue address for approximately 1 month. His sister-in-law owned a condominium apartment on Halley Street and he and his wife moved in to that address sometime at the end of February, 2013.

The Applicant testified that he never represented to the Respondent (Insurance Company) the location where the vehicle was kept in order to get cheaper rates. His wife moved to live with her sister at least 6-7 months prior to the accident at 6 Rustic Street, Mayopac, New York. She left the marital residence at Halley Street and took the vehicle with her in order to be able to transport her children. Lastly, the witness stated that he did not return to live in the Bronx.

Upon cross-examination, the witness recalled testifying at an Examination Under Oath, wherein he stated that "I stayed in the Bronx as I worked in a Pizzeria on 34th Street between 8th Avenue & 9th Avenue". To clarify, it was his understanding that what he meant to say at the EUO was that he stayed in the Bronx from "time to time" depending upon the hours and dates that he worked. As his wife had the motor vehicle, he had to take the train to work so he stayed with his brother "off and on". The witness admitted that he filed a tax return for the year 2014 with his address as 3015 Roberts Avenue, Bronx, New York. As he had an immigration case pending and stated that he was told not to keep changing his address as it would slow the immigration process. It was for that reason he retained the address in the Bronx and utilized it for his tax return. The witness was directed to his EUO testimony on page 13 wherein he stated that he and his wife had marital problems and that he went to live with his brother and that his wife went to live with her sister. He did not recall giving that answer and stated that he did not review the EUO transcript with his personal injury lawyer. He also stated that at the EUO he may have testified that he lived at 55 Halley Avenue for a couple of months and went back to the apartment in the Bronx in 2014, however, maybe that was a mistake".

The witness was directed to page 16 of the EUO transcript wherein he testified that he did not receive bills at the Mayopac address and that his wife simply resided there with his children; he recalled visiting there at least 3 days a week. The witness was directed to Page 17 of the EUO transcript wherein he stated that he sometimes stayed in his apartment in the Bronx, for 7-8 months and drove to work. At the instant hearing, he stated that perhaps at the EUO he was in a lot of pain "I do not know" and that's why his answers may have been incorrect. His bank accounts were kept in a branch in the Bronx near his brother's apartment; his credit card statements were also mailed and sent to the Roberts Avenue address for the same reasons as stated above. His EZ Pass was sent to Roberts Avenue as he "did not have a chance to change it".

Upon further cross examination of the witness, he stated that prior to the accident, sometime in November, 2014, the auto policy was changed to indicate that the vehicle was kept in Mayopac. He believes his wife called to change the address once she moved in with her sister. The witness, changed his testimony and seemed confused as to when he took the train to work or drove to work and believed that he took the car from the Mayopac address on occasion.

Upon re-direct examination, the witness testified that subsequent to the Examination Under Oath, the Respondent never requested additional verification to prove or disprove any of its allegations. He stated that the Roberts Avenue lease was in his name as his brother did not have immigration status. Furthermore, his marital problems caused him to live "here and there and everywhere". The witness testified that although his Application for No-Fault Benefits indicated that he lived on Roberts Avenue, he told his personal injury lawyer that he lived on Halley Street. He did not know who prepared his no-fault application and stated that he did not read it when he signed it.

The Electronic Case Folder contained the Application for insurance benefits wherein it indicated that the policy went into effect on October 30, 2013 for a 2008 Honda Accord. Additionally the Assignment of Benefit form for medical benefits had the Roberts Avenue address in the Bronx. The Police Report indicated that the vehicle was registered to the Applicant's wife at 55 Halley Street, Yonkers, New York.

The Examination Under Oath was conducted on August 12, 2015 wherein the Assignor stated that he has 2 children that reside with him and his wife. Furthermore, he stated that he lives with his wife at 6 Rustic Road, Mayopac, New York, and that he lives in the Bronx 2 or 3 days a week. He thereafter stated that he lived at 3015 Roberts Avenue in an apartment in the Bronx and has lived there for 3 ½ years. His brother also resides in the apartment and all telephone bills, utility bills including electric and gas are in his name and sent to the Roberts Avenue address in the Bronx. He stated at the EUO that his tax returns were filed in 2013 and 2014 wherein he listed his residence as 3015 Roberts Avenue, Bronx, New York and that he had to pay New York City taxes.

The witness further testified that he lived at 55 Halley Street, Yonkers, New York shortly after he got married; however, due to marital problems, he moved back with his brother in the old apartment and thereafter she moved to her sister's home in Mayopac, New York. He also reiterated that there were no bills that went to the Mayopac address and that his wife and children reside there. He indicated he goes back and forth and visits with them at least 3 days a week.

At the EUO, he stated that at or about November, 2014, the insured's policy was changed to 6 Rustic Road, Mayopac, New York. He stated that he moved there and stayed there for a little bit and "we were thinking to move there for all the time". Due to ongoing marital problems, he moved back and forth, however, he continued to visit his wife and children and stayed in Mayopac.

Upon further questioning of the witness, he stated that once he left the Halley Street residence in early 2014, he would park the Honda in the Street at the Roberts Avenue address. When he was not driving the vehicle, his wife kept it in Mayopac and from time to time his brother-in-law would drive him as well.

The witness also testified at the EUO that his insurance broker "Angela" told him that he should wait and finish the 6 month billing period prior to changing his address. He was uncertain if his insurance premium rates changes as his wife takes care of the bills.

After reviewing all the evidence, I find that the witness had difficulty answering questions and seemed confused about the sequence of events concerning his addresses.

Clearly, he had multiple residences wherein he lived in the Bronx, Yonkers and Mayopac off and on for different periods of time. He believed that the vehicle was kept primarily in Mayopac and that he would utilize the car a few days a week to travel back and forth to work. It does not appear that there was "intentional material misrepresentation" concerning the facts surrounding this loss.

Although the Respondent maintained that there was fraud and that the Applicant has knowingly concealed or misrepresented a material fact of circumstance relating to coverage, I fail to agree that facts were concealed or intentionally misrepresented.

Insurance Law Section 3105 governs material misrepresentation and fraudulent procurement of insurance contracts. That section provides "A representation is a statement as to past or present fact made by the insurer by, or by the authority of the Applicant for insurance at or before the making of the insurance contract as an inducement to the making thereof. A misrepresentation is a false representation and the facts misrepresented are those facts which make the representation false. Although the Applicant was confused, I do not believe it rose to the level of misrepresentation as opposed to confusion wherein he often changed residences due to work schedule and marital difficulty.

Clearly, an insurance company has the right to rescind an insurance policy, however, must show that the insured made a material misrepresentation when he or she secured the policy or during the policy period. A misrepresentation is considered to be material only if the insurer would not have issued the policy had it known the facts misrepresented. Interboro 89 A.D.2d 994, Citing Insurance Law Section 3105. "To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practice such as underwriting manuals, rules pertaining to similar risks". That Chubb would not have issued the same policy if the correct information had been disclosed to the Applicant. (Interboro 89 A.D.3d 994, quoting Schimer v. Penkert, 41 A.D.3d 690-691).

The Respondent provided an Affidavit from Cathy Pardi, an employee of State Farm Mutual Insurance Company in the Underwriting Department. She maintained that the records are kept in the ordinary course of business and include the Applicant's application for insurance. A review of the policy indicated the Honda Accord was insured at a residence of 55 Halley Street, Yonkers, New York. She stated she was informed that an investigation of the claim indicated that the Applicant was not residing at the Halley Street address or the Mayopac address which was provided and that the insured vehicle was principally garaged in the Bronx. Had State Farm been aware of the false information, they would not have issued the subject policy.

I believe that there was no intentional false misrepresentation and that the Applicant did in fact reside at 3 different locations and that his wife principally used the vehicle to care

for his children's needs. Accordingly, the Respondent's denial was invalid and Applicant is awarded reimbursement for his lost wages in the sum of \$12,037.92.

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 applicant is AWARDED the following:

A.

	Amount Claimed	Amount Amended	Amount Awarded
Loss of Earnings	\$ 14,480.00	\$ 12,037.92	\$ 12,037.92
TOTAL	\$ 14,480.00	\$ 12,037.92	\$ 12,037.92

- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 11/05/2015, which is a relevant date only to the extent set forth below.)

Interest to be 2% per month simple, not compounded on a pro rata basis using a 30 day month. Respondent shall compute and pay Applicant interest from the day of filing of arbitration to the date of payment of the award.

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

With respect to this claim for which compensation was awarded, Respondent shall pay Applicant an attorney's fee, in accordance with 11 NYCRR 65-4.6 (e) since the within arbitration request was filed on or after April 5, 2002, if the benefits and interest awarded thereon is equal to or less than Respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 55.4.6(b); for cases filed on or after 2/4/15, attorney's fees shall be governed by the sixth amendment to 11 NYCRR 65-4 (Insurance Regulation

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

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York

SS :

County of Nassau

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

04/15/2016

(Dated)

Gary Peters

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:
90700e09473166cb0e2b6931ac0892f7

Electronically Signed

Your name: Gary Peters
Signed on: 04/15/2016