

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Community Hospital
(Applicant)

AAA Case No. 17-15-1016-6707
Applicant's File No.

- and -

Utica National Insurance Co.
(Respondent)

Insurer's Claim File No. 10007772
NAIC No. 43478

ARBITRATION AWARD

I, Rhonda Barry, 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 04/15/2016
Declared closed by the arbitrator on 04/15/2016

Rachel Drachman, Esq. from Revaz Chachanashvili Law Group participated in person for the Applicant

Mark Scopinich, Esq. from Dodge & Monroy P.C. participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 107.24**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that the denial was timely.

3. Summary of Issues in Dispute

Did Respondent satisfy its burden of proof that the policy in question was fraudulently procured?

4. Findings, Conclusions, and Basis Therefor

The EIP is a 38 year old male injured in a motor vehicle accident on 11/13/14. Applicant seeks \$107.24 for pre-operative testing (for a knee arthroscopy) on 4/17/15. Based upon an EUO of the EIP and SIU investigation, respondent determined that the subject insurance policy was fraudulently procured in that the EIP/insured misrepresented his place of residence and the location where the insured vehicle would be garaged to obtain insurance at reduced premiums. Respondent opines that when applying for insurance the EIP listed Rochester NY as his place of residence when in fact he resided in Brooklyn, where the insured vehicle was principally garaged. I note that the EIP's address on applicant's claims is Brooklyn, NY.

I have completely reviewed all timely submitted documents contained in the ADR Center record maintained by the American Arbitration Association and considered all oral arguments. No additional documents were submitted by either party at hearing. No witnesses testified at hearing.

ANALYSIS

Applicant has established its prima facie entitlement to reimbursement for no fault benefits based upon the submission of a properly completed claim form setting forth the amount of the loss sustained and that payment is overdue. Mary Immaculate Hospital v. Allstate Insurance Company, 5 AD 3d 742, (2nd Dept. 2004). Westchester Medical Center v. Lincoln General Ins Co, 60 AD 3d 1045 (2nd Dept. 2009).

In Westchester Medical Center v. GMAC Insurance Company Online Inc., 80 AD 3d 603, 915 NYS 2d 115 (2d Dept. 2011), the court determined that as a result of an untimely denial of claim, an insurer is precluded from asserting the defense that the assignor misrepresented his state of residence in connection with the issuance of the subject insurance policy. See, Great Health Chiropractic, PC v. Hanover Insurance Company, 2014 NY Slip Op. 50359(U) (App. Term 2d Dept. 2014). Pursuant to Insurance law §5106 (a) and the insurance regulations, an insurer must either pay or deny a claim for motor vehicle no-fault benefits, in whole or in part, within 30 days after an applicant's proof of claim is received (See Insurance Law §5106 (A); 11 NYCRR 65 - 3.8 (c). As an initial finding I note that the respondent's denials are timely and therefore its defenses are preserved.

VTL § 313(1) (a) "supplants an insurance carriers common law right to cancel a contract of insurance retroactively on the grounds of fraud or misrepresentation and mandates that the cancellation of the contract pursuant to the provisions may only be effective prospectively." Liberty Mutual Insurance Company v. McClellan, 127 AD 2d 767 (2d Dept. 1987). This section "places the burden on the insurer to discover any fraud before issuing the policy, or as soon as possible thereafter." Matter of Insurance Company of North America v Kaplun 274 AD 2d 293 (2d Dept. 2000).

While an automobile insurance policy may not be canceled retroactively, thus protecting innocent injured third parties, the insurance carrier may assert the fraudulent procurement of the policy by the assignor in an action by a health care provider -

assignee for no-fault benefits. A.B. Medical Services PLLC v. Commercial Mutual Insurance Company, 12 Misc. 3d 8, 820 NYS 2d 378 (App. Term 2d and 11th District 2006); Golden Age Medical Supply Inc. v. Clarendon National Insurance Company, 29 Misc. 3d 136 (A) 918 NYS 2d 397 (App. Term, 2d, 11th and 13th Districts 2010). To sustain its defense the insurer must prove that the subject insurance policy was procured through material misrepresentation. See, Insurance Law § 3105. A misrepresentation is material only if the insurer would not have issued the policy had it known the facts misrepresented. Interboro Insurance Company v. Fatmir, 89 AD 3d 993 (2d Dept. 2001).

Respondent provide substantial evidence that amply justifies its determination that the EIP misrepresented his address at the time the policy was procured. The EIP testified at an EUO on 1/29/15. A copy of the signed transcript is included in respondent's submission. Although the EIP testified that he lived in Rochester from 1/2014 through the date of accident, 11/13/14, he has no bills, receipts, canceled checks or other documentation that he was living in Rochester (page 49). He purportedly paid rent in cash to a friend at the Rochester address (page 44). He also testified that he paid rent to his friend in Rochester for the last six months of 2013, even though he traveled back and forth between Rochester and Brooklyn. He could not adequately state how much time he spent in either location during the last six months of 2013 (page 40-41). He could not adequately describe the Rochester house. According to the EIP the house had no other rooms apart from three bedrooms (page 46- 48). After an off the record conversation with his attorney the EIP acknowledged a kitchen and living room (page 48). The EIP acknowledged that his friend at the Rochester address had a wife and six daughters all living at the same house (page 151). Sometimes his friend's children stayed with the EIP in his bedroom (page 153). The EIP was out of the country between 8/14 and 10/14 but continue to pay his friend \$250 per month rent, apparently in cash (page 44, 54). There is no documentation to support this claim. The EIP testified that he worked for an HVAC company in Rochester part time, 9 AM to 3 PM six days per week (page 22 - 23). He worked "off the books" and had no proof of employment. He could not recall the name of the company (page 23) or its location (page 23). He testified he was laid off one month before the accident (page 25), yet he was out of the country between 8/14 and 10/14.

The accident in question occurred on I-95 in Connecticut (page 7). The police were not called to the scene (page 80). The EIP presented to Coney Island Hospital emergency room (Brooklyn) immediately following the accident (page 89 - 90). All of the EIP's medical providers were in Brooklyn (page 93, 95, 109, 110), yet he testified he went back to Rochester one week after the accident (page 107). He traveled back and forth between Rochester and Brooklyn but could not specify how much time he spent in either location (page 108).

The no-fault application provides a Brooklyn address. The EIP has a New York State commercial driver's license that was issued in 2010 and expires in 2018. He provides a Brooklyn address.

Respondent also submits an investigative report from Frank Sardino. Mr. Scardino spoke with the landlord of the premises in Rochester where the EIP purportedly resided.

The landlord did not know the EIP but said many people lived at the residence. The tenant, Mr. Altaram had six daughters and two sons living with him. The investigator traveled to the residence and spoke with one of Mr. Al yaram's daughters who advised that the EIP had stayed at the house on occasion and did receive occasional mail at the house. However he did not live there and visited once a month or every other month. Neither Mr. Altaram's wife nor daughter believed that the EIP had a job in Rochester.

Respondent provides the affidavit of Karen Urtz, personal lines account underwriter who avers that the EIP listed a Rochester New York address as his place of residence in the location where the insured vehicle would be garaged when in fact he resided in Brooklyn, where the insured vehicle was principally garaged. This was done to save on policy premiums. The cost of the policy premiums for a vehicle to be listed as principally garaged in Rochester New York as opposed to Brooklyn New York is significantly less. Respondent would not have issued the policy to the EIP at the same rate had the insured provide truthful information. Lastly, I note that the effective date of the policy was approximately 3 weeks prior to the accident.

In AA Acupuncture Services PC V. Safeco Insurance Company of America, 25 Misc. 3d 30 (App. Term 1st Dep.t 2009), the court held that, "although Vehicle and Traffic Law §313 does not permitted insured to cancel an automobile policy retroactively on the grounds of fraud or misrepresentation... An insurer may assert misrepresentation or fraud as an affirmative defense in an action by an insured to recover benefits under the policy." Further, for an insurer to sustain its burden of proof that the policy is fraudulently procured, the insurer must establish that there was an intentional misrepresentation of the insured's address in order to obtain reduced premiums and that the misrepresentation was material so that the insurer would not have issued the policy under the same terms added known the truth.

At hearing applicant's counsel vigorously argued that respondent failed to sustain its burden of proof by a preponderance of the evidence. Counsel opined that the EIP's application for insurance listed Rochester as a mailing address. Further, the broker was in Rochester. The EIP did sleep at the Rochester address enough for him to believe he was living there at the time he requested coverage. Individually, the EIP's actions may seem innocuous; however, as they amass together, there is a storm of evidence sufficiently credible to successfully challenge the EIP's claim that he lived and garaged his vehicle in Rochester when the policy was procured.

The standard for determining residency for purposes of insurance coverage "requires something more than temporary or physical presence and requires at least some degree of permanence and intention to remain." GEICO v. Paolicelli, 303 AD2d 633 (2d Dept. 2003); Allstate Insurance Company v. Wrap, 7 AD3d 302 (1st Dept. 2004). The issue of residency is a question of fact to be determined at hearing. GEICO v. Paolicelli, supra. Progressive Orthopedics, PLLC v. MVAIC, AAA # 17 991 R 40968 14(Master Arbitrator Godsen).

As a matter of fact I find that respondent has sustained its burden of proof with sufficiently credible evidence that the insured misrepresented his address to obtain

insurance at reduced premiums. The sum and substance of the EIP's testimony was questionable at best. His answers to basic questions were conspicuously dubious, contradictory and far-fetched. His refusal to answer many questions that went to the heart of the issue leads me to conclude a complete lack of credibility.

With the affidavit of Karen Urtz, respondent has credibly established that its assessment of the risk would have resulted in a significantly higher premium had respondent known exactly where the vehicle was principally garaged. Respondent proof that the misrepresentation was material and the subject policy would not have been issued had it known the truth.

While the insurer is responsible for any innocent third parties injured in the accident regardless of the insureds misrepresentations, in no-fault matters, medical providers who treat patients through an assignment of benefits are not innocent third parties. A.B. Medical Services PLLC v. Commercial Mutual Insurance Company, 12 Misc. 3d 8 (App. Term 2d Dept. 2006).

After consideration of all the evidence presented and arguments at hearing I find for the respondent and the claim is denied.

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 New York

SS :

County of Nassau

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

04/21/2016
(Dated)

Rhonda Barry

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:
922b664f193b6ac46a18437caeae3214

Electronically Signed

Your name: Rhonda Barry
Signed on: 04/21/2016