American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

North Shore University Hospital (NSUH) (Applicant)	AAA Case No.	17-14-9021-7730
	Applicant's File No.	RFA13161880
- and -		
Hertz Rent A Car (Respondent)	Insurer's Claim File No.	0220138869
	NAIC No.	

ARBITRATION AWARD

I, Greta Vilar, 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: Patient

1. Hearing(s) held on 05/29/2015, 11/13/2015, 03/29/2016
   Declared closed by the arbitrator on 10/27/2016

   Alexander Munn, Esq. from Russell Friedman & Associates LLP participated in person for the Applicant

   Robyn Brilliant, Esq. from Robyn M. Brilliant Esq. participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 44,132.55**, was AMENDED and permitted by the arbitrator at the oral hearing.

   The applicant amended the amount in dispute to $42,561.50 to reflect a partial payment made by the respondent.

   Stipulations WERE made by the parties regarding the issues to be determined.

   The parties stipulate and agree that the issues to be determined are whether the respondent was entitled to reduce payment to the applicant based upon the fact that the patient was operating a vehicle in an intoxicated condition at the time of the accident, and if so, what portion of the care rendered to the patient constituted emergent care performed for the purpose of stabilizing the patient.

3. Summary of Issues in Dispute

The patient in this case is a 56-year-old female who was the driver of a motor vehicle involved in an accident on March 29, 2013. The services at issue are various hospital services provided to the patient from March 29, 2013 through April 17, 2013. The respondent denied applicant's claim based upon the fact that the patient was found to be under the influence of cocaine at the time of the accident.

4. Findings, Conclusions, and Basis Therefor

The record in this case consisted of claimant's submission and respondent's submission, as well as documents not enumerated within this decision but which are contained in the electronic case file maintained by the American Arbitration Association.

11 NYCRR 65-4.5 (o) (1) (Regulation 68-D), reads as follows: The arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations.

Based on a review of the documentary evidence submitted to the ECF, this claim is decided as follows:

The respondent acknowledged receipt of the applicant's claim and issued a partial denial based upon a determination by a medical reviewer that the patient was under the influence of cocaine at the time of the accident. The applicant submits a report by Amy Blitz dated July 25, 2013 which points out that the patient's toxicology screen performed upon the patient's arrival in the emergency room was positive for cocaine. Based upon that, the report recommended reimbursement for only the initial emergency services, and recommended denial of the remainder of the claim. The respondent argues that in light of the patient's intoxicated condition, the only services for which it may be liable are services performed on an emergent basis for the purpose of stabilizing the patient. Pursuant to insurance law §5103(b)(2) and 11 NYCRR §5-1.1, an insurer may exclude from coverage of person was injured as a result of operating a motor vehicle in an intoxicated condition. However, as of January 26, 2011, no-fault insurers must pay for necessary emergency health services notwithstanding the fact that a person may have been intoxicated at the time of an accident.

The applicant argues that it is insufficient for the respondent to simply show that the patient was under the influence of drugs or alcohol at the time of the accident. The applicant argues that in order to sustain its denial, the respondent must show not only that the patient was under the influence at the time of the accident, but also that said intoxication was the proximate cause of the accident. See 11 NYCRR §65-2.3(j) and Insurance Law §5103(b). The applicant argues that while the medical records show that

the patient tested positive for cocaine, there is no evidence establishing that this was the proximate cause of the accident. Therefore, the applicant concludes that it is entitled to full reimbursement.

In this case, the only evidence of the patient's intoxication submitted by the respondent is the hospital record which indicates that she tested positive for cocaine and appeared to be in an intoxicated state when seen in hospital. The respondent also points out that according to hospital records, the patient collided with a tree at high speed. The respondent argues that these are indicative of the fact that the patient's intoxication was the proximate cause of the accident. The respondent submits an affidavit of Amy Blitz, a registered nurse who opined that the accident was caused by the patient's use of cocaine. In turn, the applicant argues that in the absence of any other evidence, the respondent has failed to meet its burden of proof on the issue of causation.

I note that even a certificate of disposition on a charge of driving while intoxicated does not establish as a matter of law that intoxication was the cause of an accident and resultant injuries, such that No-Fault benefits may be denied. Westchester Medical Center v. Progressive Casualty Ins. Co., 51 A.D.3d 1012, 858 N.Y.S.2d 767 (2d Dept. 2008). In addition, it has been held that it is not irrational for an arbitrator to conclude that a conviction or plea or charge of driving while intoxicated is required for an injured person to be excluded from No-Fault benefits under the Insurance Law provision that an insurer may exclude from coverage one who is injured as a result of operating a motor vehicle in an intoxicated condition. Garcia v. Federal Ins. Co., 46 N.Y.2d 1040, 416 N.Y.S.2d 544 (1979). No evidence of any such conviction or investigation is before me in the instant case.

Furthermore, where the insurer fails to submit any evidence whatsoever from which the circumstances of the accident could be ascertained, its evidence concerning intoxication is insufficient to raise a triable issue of fact as to whether the assignor was injured as a result of operating a motor vehicle while in an intoxicated condition. Westchester Medical Center v. Government Employees Ins. Co., 77 A.D.3d 737, 909 N.Y.S.2d 112 (2d Dept. 2010).

Having thoroughly reviewed the record before me I find that the respondent has failed to meet its burden of proof on the issue of causation. It is clear from the case law applicable to this case that the mere fact that the patient was operating a vehicle while impaired by a substance is insufficient by itself to exclude the applicant's bills from reimbursement. There is no presumption of causation that attaches to the patient's alleged intoxication, and it is the respondent's burden to prove causality. Respondent has submitted insufficient evidence to meet its burden. The mere fact that the hospital record described the accident as occurring when the patient's vehicle struck a tree at high speed does not conclusively establish that the patient's intoxication was the cause of the crash. In addition, the patient's disorientation when seen in the emergency room does not necessarily lead to the conclusion that her use of cocaine was the cause of the accident. According to the same hospital record, the patient had multiple underlying medical conditions including hypertension, diabetes and COPD as well as a fractured acetabulum, all of which could arguably have contributed to her perceived disoriented condition when brought to the emergency room.

Admittedly, the burden placed upon the respondent in this case is a high one. However, it is the burden placed upon the respondent by the statutory framework applicable to this case. Having determined that the respondent has failed to meet its burden of proof, I do not reach the additional issues raised at the hearing of this matter including what portion of the treatments provided to the patient constituted emergent care prior to stabilization (an issue upon which an IHC's opinion was sought). This issue would only be relevant in the event that the respondent proved that the patient was intoxicated, and that the intoxication was the cause the accident. In light of my holding, the argument is moot. I find in favor of the applicant.

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**
Medical	$ 44,132.55	$ 42,561.50	$ 42,561.50
TOTAL	$ 44,132.55	$ 42,561.50	$ 42,561.50

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 08/07/2014, which is a relevant date only to the extent set forth below.)

   Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month,

calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of $1360." Id.

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 Suffolk

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

11/28/2016
(Dated)

Greta Vilar

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:
3254c5b8f84c80fe9b86c53b8fa699bb

Electronically Signed

Your name: Greta Vilar
Signed on: 11/28/2016