American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Isurply LLC (Applicant)	AAA Case No. Applicant's File No.	17-16-1026-4904
- and -		
State Farm Mutual Automobile Insurance Company (Respondent)	Insurer's Claim File No. NAIC No.	52-6L56-433 25178

ARBITRATION AWARD

I, Jeffrey Silber, 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 11/30/2016
   Declared closed by the arbitrator on 11/30/2016

   Karen Wagner, Esq. from Dash Law Firm, P.C. participated in person for the Applicant

   Matthew Gray, Esq. from Bruno Gerbino & Soriano LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 607.55**, was NOT AMENDED at the oral hearing.
   Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

   Whether the Respondent has substantiated its defense to the claim based on a material misrepresentation concerning the facts surrounding the procurement of the policy?

4. Findings, Conclusions, and Basis Therefor

   The case was decided on the submissions of the Parties as contained in the ADR Center maintained by the American Arbitration Association and the oral arguments of the

parties' representatives. There were no witnesses present at the hearing. I reviewed the documents contained in the ADR Center for both parties and make my decision in reliance thereon.

The EIP, LC, a 38 year old female was involved in a motor vehicle accident on May 27, 2015. The EIP sought medical treatment for her injuries sustained in the MVA. Applicant submitted a claim for reimbursement for a knee orthosis provided to the EIP on 7/16/15. Respondent denied reimbursement for the claims based upon material misrepresentation concerning the facts surrounding the procurement of the insurance policy through the EUO of the EIP.

Applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case.

Material Misrepresentation

It is the carrier's burden to establish that a claim is fraudulent based upon a preponderance of the evidence. See V.S. Medical Servs., P.C. v. Allstate Ins. Co., 25 Misc.3d 39, 41, 889 N.Y.S.2d 360 (App. Term 2d. Dept. July 20, 2009). To establish same, the carrier must adduce proof; an insurer's assertion of fraud cannot be based upon "unsubstantiated hypotheses and suppositions." A.B. Med. Servs. PLLC v. Eagle Ins. Co., 3 Misc.3d 8, 9, 776 N.Y.S.2d 434 (App Term 2d Dept. 2003).

Vehicle and Traffic Law § 313

Although VTL §313 does not permit an insurer to cancel an automobile insurance policy retroactively on the grounds of fraud or misrepresentation (see Liberty Mut. Ins. Co. v. McClellan, 127 A.D.2d 767, App. Div., 2nd Dept., 1987; Insurance Co. of N. Am. v. Kaplun, 274 A.D.2d 293, App. Div., 2nd Dept., 2000), an insurer is entitled to raise the affirmative defense of fraudulent procurement of the policy in an action to recover benefits thereunder. The affirmative defense of fraudulent procurement of the policy is not available as against innocent third parties injured in the accident. However, a health care provider that obtains an assignment of the insured's no-fault benefits is not deemed "an innocent third party" and is therefore subject to the same defenses as the assignor-insured (see A.B. Medical Servs. PLLC v. Commercial Mut. Ins. Co., 12 Misc 3d 8, App Term, 2nd Dept., 2006; Liberty Mut. Ins. Co. v. Colot, 2012 NY Slip Op 33500(U), Sup. Ct., N.Y. Co.).

Misrepresenting residency status for the purpose of rate evasion, if proven, constitutes a material misrepresentation which precludes recovery under the policy (see AA Acupuncture Serv., P.C. v. Safeco Ins. Co. of America, 25 Misc. 3d 30, App. Term, 1st Dept., 2009; New Millennium Psychological Servs., P.C. v Commerce Ins. Co., 34 Misc. 3d 127(A), App. Term, 2nd Dept., 2011; Liberty Mut. Ins. Co. v. Colot, supra).

Respondent asserts that the EIP did appear for an EUO on October 13, 2015. The EIP never returned the signed EUO. Respondent outlined a list of 18 discrepancies noted throughout the EUO in which they determined that the EIP actually lived in Brooklyn and not Port Jervis. Based upon this argument, the Respondent argued that the EIP made intentional and material misrepresentations in the application for this insurance policy. Therefore, Respondent correctly denied reimbursement for all claims under the policy.

I have reviewed Respondents brief as to what was determined and considered "material misrepresentation" from the EIP's EUO and find that I do not agree with the Respondent. The EIP testified that she works in Brooklyn, where the accident occurred, and live in Port Jervis. Her testimony that she travels for 1 and half hours every day to work is not a misrepresentation, there are plenty of people throughout this great state who travel that amount of time to work and maybe even longer. She testified that she is registered to vote in Port Jervis and all of her mail is delivered to the policy address. She admitted that her children attend school in Brooklyn and that she had stayed at her grandmother's house in Brooklyn the night before and after the accident. She admitted to treating at a Brooklyn medical facility and that her primary care physician was in Brooklyn.

Apparently the EIP had previously lived in Brooklyn before moving to Port Jervis, that is not a crime. She works in Brooklyn so it would make sense that she is treating at a Brooklyn facility and that her primary physician could be located in Brooklyn. There is nothing within Respondent's brief that outlines when she moved to Port Jervis. Not having an EZ-Pass or not knowing your neighbors or how much the toll is at the bridge, does not amount to material misrepresentation.

Based upon the facts herein and the evidence provided, I find that Respondent has not met their burden of establishing sufficient material misrepresentation on the record and award the Applicant's claim

This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.

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 Awarded
Medical	$ 607.55	$ 607.55
TOTAL	$ 607.55	$ 607.55

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 01/13/2016, which is a relevant date only to the extent set forth below.)

Interest runs from 01/13/16 (the filing date for this case) until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty day month.

C. Attorney's Fees

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

This case is subject to the provisions as to attorney fee promulgated in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D): There is an attorney fee of 20%of benefits plus interest, with no minimum fee and a new maximum fee of $1360.00.

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

12/09/2016
(Dated)

Jeffrey Silber

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:
a21ffffeb30d8fa4f7947a1ab301d464

Electronically Signed

Your name: Jeffrey Silber
Signed on: 12/09/2016