

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Empi Inc  
(Applicant)

- and -

Geico Insurance Company  
(Respondent)

AAA Case No. 17-15-1005-3134  
Applicant's File No.  
Insurer's Claim File No. 0307161360101026  
NAIC No.

**ARBITRATION AWARD**

I, Gillian Brown, 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 02/03/2016, 02/08/2017  
Declared closed by the arbitrator on 03/05/2017

Gregory Vinal, Esq., from Vinal & Vinal, P.C. participated in person for the Applicant

Jason Ciani, Esq., from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 984.12**, 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

In this and several other matters pending before me involving the same claimant, respondent, service (i.e., provision of an item or items of durable medical equipment) and issue, the specific facts of each case are not relevant at this juncture. In each case, an EIP was involved in a motor vehicle accident, and subsequently provided an item or items of durable medical equipment. In each case, reimbursement was initially denied on grounds that the item or items were not medically necessary. In each case, at the arbitration hearing, for the first time respondent raised as a defense the facts that the EIP is a resident of one of the five boroughs of New York City, and that the claimant is not licensed to sell or distribute durable medical equipment in that municipality. Respondent contends the lack of the appropriate license requires dismissal of the claim. Claimant contends that Respondent has an obligation to provide a significantly more complete

offer of proof before its defense of lack of standing can even be considered. In addition, claimant contends that even if no further offer of proof is required, the statute in question does not apply to claimant and its lack of licensing should not act as a bar to reimbursement.

#### 4. Findings, Conclusions, and Basis Therefor

Pursuant to 11 NYCRR §65-4.5(o)(1), 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. This hearing was conducted using documents contained in the ADR Center. Any documents contained in the ADR Center folder for this matter are hereby incorporated into this hearing. I have reviewed all relevant exhibits contained in the ADR Center maintained by the American Arbitration Association.

In this and several other matters pending before me involving the same claimant, respondent, service (i.e., provision of an item or items of durable medical equipment) and threshold issues, the specific facts of each case are not relevant at this juncture. In each case, an EIP was involved in a motor vehicle accident, and subsequently provided an item or items of durable medical equipment. In each case, reimbursement was initially denied on grounds that the item or items were not medically necessary. In each case, at the arbitration hearing, for the first time respondent raised as a defense the facts that the EIP is a resident of one of the five boroughs of New York City, and that the claimant is not licensed to sell or distribute durable medical equipment in that municipality. Respondent contends the lack of the appropriate license requires dismissal of the claim. Claimant contends that Respondent has an obligation to provide a significantly more complete offer of proof before its defense of lack of standing can even be considered. In addition, claimant contends that even if no further offer of proof is required, the statute in question does not apply to claimant and its lack of licensing should not act as a bar to reimbursement.

Both parties have submitted post-hearing briefs, which I have read and considered in the writing of this award.

#### Respondent's Offer of Proof

In these matters, claimant contends that respondent has not provided sufficient proof of the lack of licensing. Claimant argues that since respondent has not proven that respondent is not so licensed, its defense of lack of standing must fail. For the reasons below, I disagree.

The New York City statute in question provides that, "it shall be unlawful for any dealer to engage in the selling, renting, fitting, repairing or servicing of, or making adjustments to, products for the disabled without a license thereof." NYC Administrative Code Section 20-426.

Respondent raised this issue for the first time at the commencement of the hearing in this matter. Claimant has not denied its lack of a license. It contends, however, that respondent bears the burden of proving the lack of a license before it may prevail. Respondent has submitted a screenshot from the New York City municipal government website. It purports to show the results of a search for licenses held in the name of the claimant. The results of the search are shown as, "Your search returned no results."

In AAA # 17-14-1003-8917, Arbitrator Michelle Murphy-Louden wrote on this aspect of the issue before me today. She wrote,

Applicant argued as an initial matter that licensing is an affirmative defense for which Respondent bears the burden of proof, proof which Respondent did not proffer.

To begin, Respondent's licensing argument is properly considered herein even though it was not asserted as a basis for Respondent's denial as this argument is not subject to preclusion. Lexington Acupuncture, P.C. v. State Farm Ins. Co., 12 Misc. 3d 90 (App. Term, 2nd Dept., 2006); Multiquest, P.L.L.C. v. Allstate Ins. Co., 17 Misc. 3d 37 (App. Term, 2nd Dept., 2007). *Also* Crossbay Acupuncture, P.C. v. State Farm Mut. Auto. Ins. Co., 15 Misc. 3d 110 (App. Term, 2nd Dept., 2006).

The proper licensing of a provider is a condition precedent to the payment of No-Fault benefits. Valley Physical Med. & Rehab. P.C. v. N.Y. Cent. Mut. Ins. Co., 193 Misc. 2d 675 (App. Term, 2nd Dept., 2002); Multiquest, PLLC v. Allstate Ins. Co., 9 Misc. 3d 1031 (N.Y.C. Civ. Ct., Queens Co., 2005); Montgomery Med., P.C. v. State Farm Ins. Co., 12 Misc. 3d 1169(A) (Dist. Ct., 1st Dist., Nassau Co., 2007); Multiquest, P.L.L.C. v. Allstate Ins. Co., 16 Misc. 3d 1141(A) (Dist. Ct., 1st Dist., Nassau Co., 2007); 563 Grand Med., P.C. v. Allstate Ins. Co., 6 Misc. 3d 1019(A) (N.Y.C. Civ. Ct., Kings Co., 2005).

The party seeking to enforce a contractual obligation generally bears the burden of proof with respect to a condition precedent. Curtis Props. Corp. v. Greif Cos., 212 A.D.2d 259 (App. Div., 1st Dept., 1995); FPTK, LLC v. Paradise Pillows, Inc., 9 Misc. 3d 1125(A) (N.Y.C. Civil Court, Kings Co., 2005); WorldCo Petroleum NY Corp. v. Keshtgar, 33 Misc. 3d 1224(A) (Sup. Ct., Nassau Co., 2011).

As set forth above, licensing is a condition precedent to the payment of No-Fault benefits and the burden of proof with respect to this condition precedent is Applicant's to bear. Applicant has never denied the allegation that it was not licensed under the N.Y.C. Administrative Code

to sell and distribute its products in the five boroughs of New York City, but rather, has asserted that it does not fall within the provisions of that Code and thus is not required to possess said license.

Even if Respondent bore the burden of proof on the issue of licensing, respondent's counsel submitted evidence of his search of the online records of the N.Y.C. Department of Consumer Affairs, the body tasked with distributing licenses to those business required to possess same under the N.Y.C. Administrative Code, indicating that there is no record of a license ever being issued to Applicant. And, as noted above, Applicant has never denied Respondent's allegation that it was not licensed under the N.Y.C. Administrative Code to sell and distribute its products in the five boroughs of New York City.

Claimant correctly notes in its submission that each arbitration must be decided on a case-by-case basis. However, that does not mean - nor should it, in my opinion - that each and every time the identical issue is raised in a particular case, the parties must set forth with identical specificity the nature of the issue. Claimant's counsel is well aware what the phrase, "NYC EIP" means in the context of an arbitration hearing and counsel cannot now claim that respondent is getting some unfair advantage by not being pressed to identify each and every time what specific statute is at issue. Counsel for both parties have argued this issue before this arbitrator and others literally dozens of times. In my view it is disingenuous at best to consistently make reference to claimant's supposed inability to "discern" what statute is being discussed, or to write that it is "inexplicable" that no arbitrator has required respondent to "set forth the basis of its defense." Claimant's assertion that it is being forced into "...hunting in the dark as to what they are asserting we are not in compliance with, guessing as to what is being asserted," is without merit. Respondent has been required to set forth the basis of its defense, and has done so repeatedly.

Further, even assuming *arguendo* that respondent bears the burden of showing that claimant is not licensed, I find that by proffering the information which showed that no license currently exists respondent has shifted the burden to the claimant to show that it is indeed licensed. As in the case decided by Arbitrator Murphy-Louden, *supra*, claimant has never claimed to be licensed. It has asserted other defenses relating to the applicability of the licensing requirement.

#### The Applicability of the NYC Statute to the Claimant

I, and other arbitrators, have written on the applicability of the New York City Administrative Code's DME licensing requirement in many previous cases. See, e.g., AAA # 17-14-1002-1970; AAA # 17-14-1003-8917. In a master arbitration decision on this issue involving different parties, Master Arbitrator Victor J. Hershdorfer found that the failure of a medical products company to be licensed in the City of New York did not need to be raised in the insurer's denial. He wrote, "Proper licensing is required for payment under 'basic economic loss.' In order to establish a prima facie case, the applicant must be properly licensed." WJW Medical Products a/a/o Victor Casado v. GEICO, AAA # 99-14-9050-8955. In addition, Master Arbitrator Hershdorfer cited to an

opinion letter dated 8/1/03 from the NYS Department of Insurance, which stated, "If a locality requires licensing (such as in New York City, where the Department of Consumer Affairs requires sellers of durable medical supplies to be licensed) the assignee must be licensed in that jurisdiction in order to be reimbursed for services provided."

On October 6, 2016, I issued the award in AAA # 17-14-1002-1970 (Empi, Inc. a/a/o [Assignee] v. Liberty Mutual Fire Insurance Company). In that matter, the applicability of this exact NYC statute, and claimant's arguments concerning its applicability were discussed at length. I wrote,

The New York City statute in question provides that, "it shall be unlawful for any dealer to engage in the selling, renting, fitting, repairing or servicing of, or making adjustments to, products for the disabled without a license thereof." NYC Administrative Code Section 20-426. Counsel contends that the statute does not apply to claimant. Claimant argues that the people to whom it sells its devices are not "disabled" within the meaning of the statute.

Claimant further argues that the NYC Administrative Code is pre-empted in this case by a federal statute, 21 USCA 360k. Claimant also cites 21 CFR 808.1(b) in support of its argument that federal law preempts New York City's Administrative Code. Finally, claimant argues that the NYC Administrative Code section in question does not apply to it, as it is a manufacturer otherwise licensed by state or federal law.

As to claimant's argument that its clients are not "disabled" within the meaning of the statute, I note that the NYC Administrative Code defines "disabled" in part as a person who has a physical or medical impairment resulting from anatomical or physiological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques. NYC Administrative Code Section 20-425(a). Although the statute does not specifically refer to victims of automobile accidents, or to any specific source or type of disability, it appears clear that this definition is sufficiently broad to encompass people for whom, e.g., an interferential simulator to relieve pain and muscle weakness caused by an auto accident is prescribed and provided. Further, Section 20-425 (b) defines a product for the disabled as any instrument or device either represented as an aid for or designed specifically or substantially for the disabled.

Claimant argues that they are selling a device which is already licensed by federal law. The NYC Administrative Code specifically states that it shall not apply to "any product, instrument or device the manufacturing, retailing or distribution of which is licensed by any other state or local law." Claimant argues that this statute somehow means that if the manufacturing of the devices in question is regulated by federal law, the NYC statute is preempted. However, the NYC statute does not even mention federal law, and further, claimant has provided no proof that it is

"licensed" by any other law, other than its conclusory statement in its brief that, "the claimant herein, as a manufacturer and supplier of EMS products, does not fall within the scope of the NYS DCA licensing provisions relative to products for the disabled."

Claimant's reliance on 21 CFR 808.1(b) in support of its argument that federal law preempts NYC's Administrative Code is incorrect. Section (6)(i) of that same regulation states in part that it "does not preempt State or local requirements respecting general enforcement, e.g., ... licensing requirements for manufacturers and others".

In the WJW/Casado matter discussed above, Master Arbitrator Hershdorfer noted that the NYC statute in question was specifically passed "for the protection of the health and safety of the people of New York City." Claimant has provided no support for its contention that the statute - which clearly encompasses the sale and distribution of products such as those involved in the instant matter - is preempted by any federal law.

Finally, it is instructive to note that in Progressive Casualty Insurance Company, et al., v. Active Care Medical Supply Company (Supreme Court, Nassau County, Marber, J; Index No. 015972/11), the court wrote in granting plaintiff's motion for summary judgment,

In his Reply Affirmation, the Plaintiffs' counsel points out that the Complaint specifically claims that the Defendant failed to satisfy conditions precedent to coverage. He argues that the requirement of having a license issued by the New York City Department of Consumer Affairs is a condition precedent, the failure of which disqualifies the Defendant from being reimbursed for the sale of durable medical equipment. As aforementioned, the Defendant has failed to establish it possessed a license issued by the New York City Department of Consumer Affairs to sell durable medical equipment. Furthermore, the Defendant has not disputed that the New York Insurance Law as well as the No-Fault Regulations mandate compliance with such laws requiring a license. Given these uncontroverted facts, the Defendant is barred, as a matter of law, from seeking recovery for the Subject Claims for failing to satisfy a condition precedent to coverage, specifically, possessing a license issued by the New York City Department of Consumer Affairs to sell durable medical equipment.

I therefore find as follows. First, I find that the lack of a NYC license did not need to be raised by respondent in its initial denial, as proof of proper licensing, where applicable, is necessary for the establishment of a prima facie case. I further find that the NYC Administrative Code section requiring licenses for sellers of products for the disabled clearly applies to the claimant in this instance, and the claimant is not so licensed. I further find that the relevant municipal statute is not preempted in this

instance by any other state or federal law. I further find that claimant has provided no proof that it is exempt from this requirement for any of the other reasons put forth in its submissions. I therefore find that claimant is not entitled to reimbursement, in this matter, and therefore need not rule on the question of medical necessity.

In AAA # 17-14-1003-8917 (Empi, Inc., a/a/o [Applicant] v. GEICO Ins. Co.), Arbitrator Murphy-Louden also addressed this issue in a thorough and comprehensive discussion. She, too, found that the statute in question does indeed apply to the claimant. Inasmuch as Arbitrator Murphy-Louden addressed arguments which I have not addressed herein, I hereby adopt her reasoning and conclusions as well.

I therefore find that claimant is not entitled to reimbursement for the product or products at issue in this matter, as it was not properly licensed to dispense same to the EIP.

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 Erie

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

03/21/2017  
(Dated)

Gillian Brown

### **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  
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### **Electronically Signed**

Your name: Gillian Brown  
Signed on: 03/21/2017