

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Complete Medical Care Services of NY PC (Applicant)	AAA Case No.	17-16-1050-5166
	Applicant's File No.	1895534
- and -	Insurer's Claim File No.	539651 , FLPA-0006721
MVAIC / Mercury Casualty Company (Respondent)	NAIC No.	Self-Insured, 11908

ARBITRATION AWARD

I, Matthew J. Cavalier, 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: 55 year old female Assignor on date of the accident.

1. Hearing(s) held on 09/24/2018, 11/26/2018, 05/06/2019
Declared closed by the arbitrator on 05/06/2019

Marcy Cohen, Esq from Israel, Israel & Purdy, LLP (Great Neck) participated in person for the Applicant

Tracy Bader Pollack, Esq from Marshall & Marshall, Esqs. participated in person for the Respondent

Ava Lucks from Law Office of Patrick Neglia participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, \$ **3,273.24**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated to, timely denials, pursuant to New York Insurance Law Section 5106(a) and 11 NYCRR 65-3.8(a)(1).

The parties further stipulated that a prima facie case had been established for the claim denied by the Respondent's asserting a defense based upon the Driver's Examination Under Oath (EUO) testimony as taken by the Respondent on January 26, 2016 and the Respondent's revocation of the automobile liability policy thereafter, that the fees, if

Amended for the claim, are now in accordance with the fee schedule, that if the Applicant prevails then interest is awarded from the date of the "Application documents" as maintained in the Electronic Case File (ECF) by AAA, and neither party objects to the late submission of documents to the ECF, if so found.

3. Summary of Issues in Dispute

Whether the 55 year old female EIP injured in MVA on December 19, 2015, and received neurological medical services from December 22, 2015 through March 17, 2016, was correctly billed and timely submitted by the Applicant,

Whether the Respondent can maintain its defense of Driver's EUO testimony taken by the Respondent on January 26, 2016 and proper revocation of the automobile liability policy thereafter, and noticed in a global NF-10 dated March 1, 2016?

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the ADR Center Case Folder as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the Hearing. 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. 11 NYCRR 65-4.5(o)(1) (Regulation 68-D).

The dispute arises from the underlying motor vehicle accident ("MVA") of December 19, 2015, wherein Assignor, a 55 year old female, was injured as a restrained passenger and the record is silent as to whether she sought immediate emergency medical treatment on the date of the accident. Later, she presented to various local medical providers where she complained of neck and back pain and restricted range of motion ("ROM") and pain in her upper and lower extremities. Subsequently the Assignor began a conservative course of treatment including physical therapy, acupuncture, massage therapy, and chiropractic adjustments, medications, and diagnostic neurological and radiological testing, all in an attempt to return to her pre-accident physical condition.

Applicant is seeking to be reimbursed the sum of \$ 3273.24 for dates of service December 22, 2015 through March 17, 2016, for neurological medical services. The Applicant timely billed the Respondent and the Respondent timely denied the bills based upon the Driver's EUO testimony taken by the Respondent on January 26, 2016, voiding the policy of insurance, and denying all claims back to the date of the accident, December 22, 2015, in a global NF-10 dated March 1, 2016 and subsequent specific NF-10s.

Applicant establishes prima facie showing of their entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received by Respondent and that payment of no-fault benefits were overdue." *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D. 3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004).

Previously in AAA No.: 17-16-1045-2795, Arbitrator Susan Mandiberg decided as follows when presented with the same arguments, evidence, Assignor and Respondent's:

"This case involves billing for the physical therapy and evaluations performed from 12/28/15 through 3/9/16, respectively. The billing was generated following a motor vehicle accident that occurred on 12/19/15. There are two Respondents in this Arbitration. Respondent, MVAIC, contends, among other things, that the Injured Party is not "qualified" for MVAIC benefits. Respondent, Mercury Insurance Company (hereinafter "Mercury") contends that policy covering this accident should be voided ab initio due to the purported material misrepresentations of its insured (whose vehicle was being driven by her father at the time of the accident and whose mother was the passenger/Injured Party herein). Respondent, Mercury, also contends that the Injured Party failed to appear at two scheduled Examinations Under Oath, thereby violating a condition precedent. The case was decided after consideration of the arguments of counsel and after a thorough review of the numerous submissions and documents contained in the electronic case folder maintained by the American Arbitration Association, which are incorporated by reference herein. After the Hearing, there was a request to submit additional documents/evidence. However, given that this case was initiated (and notice was sent to the parties) on 9/29/16 and all evidence was due on/before 10/31/16, this request was respectfully denied.

Pursuant to 11 NYCRR 65-4 (Regulation 68-D), §65-4.5, an Arbitrator shall be the judge of the relevance and materiality of the evidence offered...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. In addition, Master Arbitrator Peter J. Merani, in the case of *Sports Medicine & Orthopedic Rehabilitation a/a/o "I.B." v. Country-Wide Insurance Co.*, AAA Case No.

17-R-991-14272-3, stated, in relevant part, that "the Arbitrator below is the trier of facts and must evaluate and weigh the evidence presented at the hearing in arrive at [his/her] decision. The Arbitrator, in weighing the evidence, has broad powers and discretion in determining what evidence is relevant and material. The Arbitrator is in the best position to evaluate the evidence and decide on the credibility of the submitted documents".

As an initial matter, I find that Respondent, MVAIC, is not a proper party to this Arbitration and that its denials should be upheld. Furthermore, I find that pursuant to Article 52 of the Insurance law, Section 5221 (b) (2), Respondent, MVAIC has credibly established its defense that the Injured Party is not "qualified person" for MVAIC coverage. I therefore find that Respondent,

MVAIC, has sufficiently established its defense and that the evidence demonstrates that the conditions precedent for coverage with MVAIC have not been met in this case.

Accordingly, this claim as against Respondent, MVAIC is denied in its entirety.

With respect to Respondent, Mercury Casualty Company's defenses:

The NF-10 in evidence cites a number of bases of the denial. More specifically, the denial states that PIP benefits to the Injured Party were denied because Respondent "voided the policy ab initio to the policy Inception date of September 1, 2015, based on the results of our Investigation which reveal that material misrepresentations were made by [its insured] at the inception of [the corresponding Florida policy number]". The denial cited the Examination Under Oath of its insured taken on 1/26/16, wherein she indicated that she lived in Jamaica, New York at the time of the policy inception and that the vehicles on her policy were garaged there as well (including the vehicle involved in the instant accident).

The denial also states that there were letters to the Injured Party herein and to her husband (i.e. driver of the vehicle) on 1/6/16 and on 2/27/16 that requested - pursuant to "Florida No Fault Law (F.S. 627,736)" cooperation with its request for an examination under oath as a condition precedent to receiving PIP benefits. The document references letters to the Injured Party (and to her husband) dated 1/9/16 and 1/27/16 purportedly sent via regular mail and "delivery confirmation". However, there is no such "delivery confirmation" in evidence, nor is there any 1/9/16 scheduling letter in evidence (though there is one letter dated 1/6/16, which is discussed in further detail below).

The denial also makes reference to the Florida Private Passenger Automobile Policy language (which is cited, in part, on the denial).

MATERIAL MISREPRESENTATION DEFENSE:

As an initial matter - and as noted above - the Assignor/Injured Party herein was a passenger in Respondent's insured's vehicle at the time of the accident. The vehicle was being driven by the insured's father (who is also the Injured Party's husband). In this matter, Respondent has submitted no proof that the Injured Party was involved in any way in the application for insurance for its insured's Florida policy. Indeed, Respondent has failed to provide the application for insurance into evidence. Also absent from evidence is any investigation report or affidavit (or similar such evidence) by anyone from Respondent's SIU Department (who counsel referenced at the time of the Hearing), nor any evidence from any underwriter employed by Respondent with regard to this policy. Instead, counsel for Respondent, Mercury, asserts that its defense can be established by gleaned information from the EUO transcripts in evidence.

Since the Injured Party is merely a passenger in [Respondent's insured's] vehicle and since there is no proof submitted that the Injured Party was involved in the application for insurance, she would be considered an innocent third party as she made no representations regarding the application in the procurement of the insurance policy. Therefore, the Injured Party is protected even if there was material misrepresentation in the procurement of the policy, as Respondent alleges.

Despite the foregoing, at the time of the Hearing, Respondent's counsel cited portions of the Injured Party's transcript that indicated that its insured (i.e. the Injured Party's daughter) lived in New York with her parents and not in Florida, where the policy was issued. The injured Party stated that her daughter was going to get a job in Florida and that she was "sending applications" there (page 17, EUO transcript). The EUO had testimony regarding the Respondent's insured's contacts in New York. The Injured Party stated that the vehicle was insured in Florida because the family had a home there (page 17 of the transcript) and that her daughter, Respondent's insured, was going to get a job there, which is why it was insured in Florida (page 19). Reference was made to a recorded statement of the Injured Party's husband allegedly taken on 12/22/15; however, the transcript of that statement was not submitted into evidence. There was no testimony regarding any participation of the Injured Party in obtaining the policy with Respondent, nor any indication, in my opinion that the Injured Party was in any way complicit with the insured to obtain insurance in Florida, rather than in New York. While Respondent may well have valid allegations as against its insured, there is simply no proof that the Injured Party herein (who was a merely a passenger in the insured's vehicle) made any material misrepresentations in the procurement of the policy in effect on the date of this accident.

As an additional matter, although Respondent's counsel argues that the policy was voided; questions remain about whether the proper actions were taken pursuant to Florida law. More specifically, it is undisputed that the accident herein occurred in New York. However, Respondent contends that the relevant insurance policy was negotiated and entered into in Florida, by its insured who claimed to live in Florida, for a vehicle which was registered in Florida, and allegedly garaged in Florida. As such, conflict exists between New York law and Florida law with respect to the issues raised herein. Respondent cites relevant Florida law in its denial but has also failed to submit the relevant sections of Florida law regarding coverage/the issues raised herein. Indeed, the New York Courts have repeatedly held that the law of the state in which an insurance policy is written controls. In *Government Employees Insurance Company v. Nichols*, 8 AD3d 564 (2nd Dept. 2004), the Appellate Division, Second Department ruled that the law of Florida, rather than that of New York, applied, and that a retroactive disclaimer of automobile insurance coverage after an accident was permissible on the ground of the motorist's material misrepresentation. Under New York's conflict of law rules, Florida law governed. *Id.* at 565-566. See also *W.H.O. Acupuncture, P.C. v. Infinity Prop.*

& Cas. Co., 36 Misc.3d 4, 947 N.Y.S.2d 758 (N.Y. Sup. App.Term 2d Dep t: 2d, 11th & 13th Jud. Dists. 2012); *Craig v. Infinity Select Ins. Co.* 960 N.Y.S.2d 849, 2013 N.Y. Slip Op. 23014 (N.Y. Sup. App.Term 2d Dep t: 2d, 11th & 13th Jud. Dists. 2013); *In the matter of Eagle Ins. Co. v Singletary*, 279 A.D.2d 56, 717 N.Y.S.2d 351 (2d Dept 2000); *American Centennial Ins. Co. v Sinkler*, 903 F Supp 408 (EDNY 1995)(Weinstein, J.); and *Motor Vehicle Acc. Indem. Corp. v. Physical Medicine & Rehab of NY, PC*, 31 Misc.3d 1225(A) (NY Sup., Kings County 2011); all of which applied the grouping of contacts analysis to find that the laws in the state that the policy was written controls over the conflicting laws of New York.

Even in light of any such issue, given that the Injured Party is not a party to the policy, coverage as to her is unaffected. Indeed, a claimant's prima facie showing establishes a presumption of coverage, and the burden of going forward on the issue of coverage falls upon the insurer; once the insurer comes forward with proof for its belief that the claimed loss was a staged accident (or material misrepresentation) the burden shifts to the claimant to prove coverage by a preponderance of the evidence. *New York Massage Therapy P.C. v. State Farm Mutual Ins. Co.*, 14 Misc.3d 1231(A), 836 N.Y.S.2d 494 (Table), 2006 N.Y. Slip Op. 52573(U), 2006 WL 4057169 (Civ. Ct., Kings Co., Sylvia G. Ash, J., Dec. 22, 2006). An allegation by defendant that the accident at issue was the result of a staged loss or material misrepresentation must be supported by more than just unsubstantiated hypothesis and supposition. See: *A.B. Medical Services, P.C. v. Eagle Ins. Co.*, 3 Misc.3d 8 (App. Term 2nd Dept. 2003); *Great Wall Acupuncture v. Utica Mutual Ins. Co.*, 14 Misc.3d 144(A) (App. Term 2nd and 11th Jud. Dists. 2007); *Comprehensive Mental v. Allstate Ins. Co.*, 14 Misc.3d 130(A) (App. Term 9th and 10th Jud. Dists. 2007). See also: *A.B. Medical Services, P.C. v. Utica Mutual Ins. Co.*, 10 Misc.3d 50 (App. Term 2nd Dept. 2005); *Webster Diagnostic Medicine, P.C. v. State Farm Ins. Co.* N.Y. Slip. Op. 27134 (App. Term 2nd Dept. 2007); *Comprehensive Mental Assessment & Med. Care, P.C. v. State Farm Mut. Auto Ins. Co.*, 2007 N.Y. Slip. Op. 50691(U).

Insurance Law §3105 provides that an insurer may avoid an insurance contract if the insured made a false statement of fact to induce the insurer to enter into a contract and the misrepresentation was material. Specifically, Insurance Law §3105(b)(1) states: "No misrepresentation shall avoid a contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract". While the general rule allows a policy of insurance to be voided if the insured fraudulently concealed a material fact in applying for insurance coverage, Vehicle and Traffic Law §313 supplants an insurance carrier's common-law right to cancel an automobile insurance contract retroactively on the grounds of fraud or misrepresentation. See: *Liberty Mutual Ins. Co. v. McClellan*, 127 A.D. 2d 767 (2d Dept. 1988). However, "when the insured (or the insured assignee) brings an action to recover benefits under a policy (of insurance), the insurance carrier may assert as an affirmative defense that the

insured's misrepresentations and/or fraud in obtaining the policy precludes recovery by the insured." *Ins. Co. of North America v. Kaplun*, 274 A.D.2d 293, 713 N.Y.S.2d 214 (2d Dept. 2000) citing *DiDonna v. State Farm Mut. Auto. Ins. Co.*, 259 A.D.2d 727, 687 N.Y.S.2d 175 (2d Dept. 1999). "Just as the public interest is not disserved by a suit brought by the insurer against its insured who fraudulently procured the policy, neither is it disadvantaged if the insurer is relieved of a claim asserted against it by such an insured. If it is established... that plaintiff acquired his policy by fraudulent means, denying plaintiff the right to recover would not impinge in any way upon the protection the policy accords innocent victims, would not subvert the statutory proscription against retroactive cancellation and would comport with elementary fairness." See *Kaplun*, 274 A.D.2d at 299.

To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when securing the policy. *128 Hester LLC v New York Mar. & Gen. Ins. Co.*, 126 AD3d 447 (2015); *Lema v Tower Ins. Co. of N.Y.*, 119 AD3d 657 (2014). "A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented" (*Interboro Ins. Co. v Fatmir*, 89 AD3d 993, 994 (2011)); See: Insurance Law §3105 [b] [1]; *Novick v Middlesex Mut. Assur. Co.*, 84 AD3d 1330 (2011). "To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application" *Interboro*, quoting *Schirmer v Penkert*, 41 AD3d 688, 690-69 (2007); *Lema v Tower Ins. Co. of N.Y.*, *infra*. Respondent, Mercury, however, has not submitted any underwriting affidavit demonstrating that the policy at issue would not have been written had Respondent known that the Florida address was not the primary garaging location of the policyholder's motor vehicle which had been operated by the insurer's father on the date of loss. On the contrary, on the eve of the Hearing, counsel submitted a transcript of a telephonic statement of its insured, wherein she stated that she did, in fact, live in Florida. Furthermore, since the policy issued to Respondent's insured was secured in Florida, I find that Respondent failed to demonstrate, *prima facie*, that it validly rescinded the policy in accordance with Florida law. See *Delta Diagnostic Radiology, P.C. v. Infinite Group*, 43 Misc.3d 130(A), 2014 NY Slip Op 50602(U) (App Term 2d, 11th & 13th Jud Dists. 2014).

Accordingly, this defense is found to be unsubstantiated.

EUO NO SHOW DEFENSE:

New York State Regulation 68A, §65-1.1, Conditions, Proof of Claim, in relevant part, states that "Upon request by the Company, the eligible injured person, that person's assignee or that person's representative shall: (A) Execute a written proof of claim under oath; (B) as may reasonably be required submit to examinations under oath by any person named by the Company and

subscribe the same...; and (C) Provide any other pertinent information that may assist the company in determining the amount due and payable". As such, Respondent alleges that Applicant failed to comply with its obligation to present a proper proof of claim pursuant to 11 N.Y.C.R.R. §65-1.1 by failing to provide the verification (i.e. the EUO) that was requested. Insurance Regulation 68, §65.1-1 states that "No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage." Furthermore, failure to attend an EUO constitutes a breach of the contract of insurance and may result in no duty to provide coverage for a loss. See: *Rosetti v. U.S. Fidelity and Guarantee Company*, 633 N.Y.S.2d 355, 219 A.D.2d 819; *Inwood Hill Medical a/a/o Rainey-Williams v. General Assurance Co.*, 10 Misc.3d 18, 805 N.Y.S.2d 772 (App. Term 2005).

I find that Respondent had an obligation to notify both the Injured Party as well as her counsel regarding all EUO notices, which Respondent failed to do. In the instant matter, Respondent, Mercury, asserts that it appropriately denied reimbursement for the billing in dispute because of the Injured Party's failure to appear at scheduled EUO's. Moreover, 11 NYCRR §65-3.5 of the Regulations Implementing the Comprehensive Motor Vehicle Insurance Reparations Act, sets forth, in relevant part, as follows:

"(e) All examinations under oath and medical examinations requested by the insurer shall be held at a place and time reasonably convenient to the applicant and medical examinations shall be conducted in a facility properly equipped for the performance of the medical examination. The insurer shall inform the applicant at the time the examination is scheduled that the applicant will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with the request. When an insurer requires an examination under oath of an applicant as additional verification to establish proof of claim, such requirement must be based upon the application of objective standards so that there is specific objective justification supporting the use of such examination. Insurer standards shall be available for review by Department examiners."

When an initial EUO is requested by an insurer and the party fails to appear at the first EUO the insurer must follow the mandate promulgated in 11 NYCRR 65-3.6 (b) of the No-Fault Regulations which states:

Verification requests. At a minimum, if any requested verifications has not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested, either by telephone call, properly documented in the file, or by mail. At the same time the insurer shall inform the ***Applicant and such person's attorney*** of the reason(s) why the claim is delayed by identifying in writing the missing verification and the party from whom it was requested. (Emphasis added).

Respondent, Mercury, submitted two EUO scheduling letters into evidence; dated 1/6/16 (which was sent to the Injured Party only) and dated 1/27/16 (which was sent to both the Injured Party and to her attorney), respectively. Both of these letters indicated that they were sent by Regular Mail and by Certified Mail, Return Receipt Requested. There is no proof of receipt for either of these letters in evidence, nor proof of mailing by such means. Furthermore, as discussed at the time of the Hearing, the evidence is silent with regard to when Respondent, Mercury, had notice of counsel for the Injured Party. As such, I note that a plain reading of the Regulation requires notice to both the Injured Party/Applicant and notice to that person's attorney. In this case, only the second EUO notice was not sent to the Applicant's attorney. As an additional matter, the EUO "no show" transcripts submitted into evidence regarding the Injured Party make reference to purported notice to the Injured Party's attorney via regular mail and by a mailing on 1/9/16 sent by Certified Mail, Return Receipt Requested. Not only is there no scheduling letter to counsel or the Injured Party dated 1/9/16 in evidence, but there is also no proof of receipt or for the mailing of this letter via certified mail. Also of note is that the EUO "no show" transcript dated 1/26/16 makes reference to counsel for the Injured Party contacting Respondent to reschedule the EUO for an office located in Queens (where the Injured Party and her husband reside). However, Respondent could not accommodate this request, according to the transcript, due to difficulties in schedule because of President's Day. Irrespective of this attempt to reschedule, I find that Respondent's Notices of the EUO's vis-à-vis the Injured Party herein were insufficient under the Regulations. Moreover, the No-Fault Law is in derogation of the common law and so must be strictly construed. *Presbyterian Hospital in the City of New York v. Atlanta Casualty Co.*, 210 A.D.2d 210, 211, 619 N.Y.S.2d 337, 338 (2d Dept. 1994). I am therefore constrained to find that there was insufficient Notice for these EUO's and that as a result; Respondent's denial on that basis should not be reasonably sustained.

In sum, after careful review of the totality of the credible evidence presented, I find Respondent, MVAIC is not a proper party to this Arbitration and that its denials should be sustained. I further find that Respondent, Mercury, has failed to meet its evidentiary burden with regard to the Injured Party herein and has not provided sufficient evidence to support its allegations. The circumstantial evidence does not demonstrate that the discrepancies among the testimony of the parties involved sufficiently warrants a denial based upon material misrepresentation vis-à-vis the Injured Party herein. Although there are inconsistencies in the EUO transcripts, I do not find such inconsistencies sufficient to establish collusion. Further I note that there is no evidence in the form of an SIU affidavit supporting the allegations made by the Respondent and although fraud may be proven via circumstantial evidence, I find that the evidence before me in this matter is not sufficient to make such a determination, particularly with respect to the innocent passenger (i.e. the Injured Party herein). As a final matter, I find that Respondent's EUO notices were defective and that this portion of Respondent's defense must similarly fail. As a final matter, although Respondent has raised Fee Schedule issues

with the billing, I find such arguments unsupported. Based upon the foregoing, and after careful consideration of the totality of the credible evidence,

I find Respondent, Mercury's denials for the services rendered to the Injured Party herein cannot be reasonably sustained.

Accordingly, this claim is granted."

At the hearing, Respondent Mercury's counsel argued for an adjournment for they have filed an Article 75 under Index Number 0713073-2018 and is awaiting the Judge's decision on the Motion before the Court. Applicant's attorney argued that Respondent Mercury did not file for Master arbitration prior to commencing the Article 75 and that no stay of subsequent legal proceedings was requested by the Respondent Mercury in their Article 75 Petition therefore one was not granted by the Judge, so this arbitration must go forward to a decision. I agree and will render a decision.

Respondent Mercury's counsel then opined that no collateral estoppel attaches to this new action for the Applicant is not the same and Respondent Mercury has submitted new evidence. Applicant's attorney argued that collateral estoppel does attach for it is the same Assignor and Respondent Mercury Insurance, the evidence is the same that was initially submitted for Arbitration before Arbitrator Mandiberg on June 6, 2018, and that the "new" evidence in question are affidavits from Respondent Mercury's employees in the Claims, SIU, and Underwriting Departments that support and prove Respondent Mercury's defense of revocation of the automobile liability policy in question, but these affiants were employed then and those affidavits could have and should have been submitted prior to the deadline for submission of evidence in the prior arbitration, or that these witness could have testified in Queens Supreme Court in the Article 75 proceeding at the latest, and that the Respondent Mercury had a full and fair opportunity to present a defense and that the Respondent's "oversight" in submitting all of its available evidence does not afford them an excuse for a second bite at the apple in Court or in Arbitration.

Respondent Mercury's counsel concluded that Respondent MVAIC was not prejudiced by their affirmative defense of lack of coverage and Respondent MVAIC's counsel argued collateral estoppel and the prior decision of Arbitrator Mandiberg. Applicant's attorney concluded by stating that Respondent Mercury's counsel's concluding that Arbitrator Mandiberg would have ruled in their favor if she was presented with the "new" evidence is specious and speculative and that law office or Respondent Mercury's administrative failure to obtain or submit these affidavits in the prior arbitration is no a rational basis to ignore collateral estoppel.

I agree with Applicant's attorney that the "new" evidence is not new and was available prior to the arbitration decided by Arbitrator Mandiberg and the Article 75 in Queens Supreme Court and that collateral estoppel applies for Respondent Mercury Insurance was afforded a full and fair hearing at the prior arbitration, thus I join in the logic and reasoning of Arbitrator Mandiberg and affirm her decision.

Therefore, the Applicant prevails.

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.

Medical		From/To	Claim Amount	Status
	Complete medical Care Service	12/22/15 - 03/17/16	\$3,273.24	Awarded: \$3,273.24
Total			\$3,273.24	Awarded: \$3,273.24

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/08/2016 is the date that interest shall accrue from. This 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

The 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 \$850." Id. The minimum attorney fee that shall be awarded is \$60. 11 NYCRR §65-4.5(c). However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR §65-4.6(i). For claims that fall under the Sixth Amendment to the regulation the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, subject to a maximum fee of \$1,360." 11 NYCRR 65-4.6(d).

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

06/01/2019
(Dated)

Matthew J. Cavalier

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:
a17b078b27d20b15c366f0ecaa84c10d

Electronically Signed

Your name: Matthew J. Cavalier
Signed on: 06/01/2019