

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Spine Specialists
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-17-1075-8762

Applicant's File No. 2029817

Insurer's Claim File No. 790681-02

NAIC No. 16616

ARBITRATION AWARD

I, Melissa Abraham-LoFurno, 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: RS

1. Hearing(s) held on 08/05/2019
Declared closed by the arbitrator on 08/07/2019

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

Robert Rehr, Esq. from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 701.53**, 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

Is there a question of fact as to whether or not the assignor was in the course of her employment at the time of the accident thus warranting determination by the Worker's Compensation Board?

4. Findings, Conclusions, and Basis Therefor

The within award is based upon this arbitrator's review of the record as well as oral argument at the time of the hearing of this matter.

The claimant in this case is a 63-year old male hereinafter "RS", who was the driver of a 2016 Toyota license plate number T687236C at the time of the accident that is alleged to have occurred on 07/31/16. Following the accident, RS came under the care of the Applicant for injuries sustained in the aforementioned motor vehicle accident. Respondent denied the subject claim stating on its denial that this matter should be submitted to the Worker's Compensation Board for a hearing regarding this claim.

Respondent as part of its submission into the Electronic Case File, Modria, submitted a copy of the DEC page of the insurance policy that lists RS as a driver of the 2016 Toyota insured under American United Transportation Inc. (the insured) and an affidavit from the Underwriting Manager of the American Transit Insurance Company which states that RS was driving a "for hire" vehicle with a Taxi and Limousine license Plate number.

The applicant has not produced any evidence to rebut the presumption that RS was not in the course of his employment at the time accident occurred.

The Respondent contends that given the circumstances noted above, that this case should be referred to the Worker's Compensation board for a hearing as to whether the assignor was in fact in the course of employment when the accident occurred. The primacy of Workers Compensation for coverage of injuries that occur when the injured party is in the course of employment has been established. *Arvatz v. Empire Mutual Insurance Company*, 171 AD2d 262, 575 NYS2d 836 (1 Dept. st 1991). That court said: "Where the availability of workers compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law, the plaintiff may not choose the courts as the forum for the resolution of such questions. The Legislature has placed the responsibility for these determinations with the Workers Compensation Board and there it must remain. *O'Rourke v. Long*, 41 NY2d 219, 228. The Board has "primary jurisdiction" to resolve the question of coverage and a "plaintiff has no choice but to litigate this issue before the Board." *Liss v. Trans Auto Systems, Inc.*, 68 NY2d 15, 21. The court went on to say that "the no-fault insurer is obligated to pay first-party benefits only if the workers compensation carrier "denies liability for payment of benefits, in whole or in part."....As between no-fault and workers compensation, the latter is "primary" and an injured party may not "elect" between workers compensation benefits and no-fault benefits." *Carlo Service Corp. v. Rachmani*, 64 AD2d 579, 580, quoting *Grello v. Daszykowski*, 58 AD2d 412, 415, n2, revd on other grounds 44 NY2d 894. Moreover, Insurance Law Sec. 5102(b)(2) expressly provides that workers compensation benefits serve as an offset against 1st-party benefits payable under no-fault as compensation for "basic economic loss."

In the instant case, RS may have been in the course of employment as a taxi driver at the time of the subject accident. Given the totality of the circumstances where, as here, there is a question as to whether the injured party was in the course of employment at the time that the accident occurred, the claim must be denied, without

prejudice, to allow a determination of that question by the Workers Compensation Board.

Therefore, Applicant's claim is denied in its entirety and dismissed without prejudice.

All other defenses are not discussed as they are deemed moot.

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 DISMISSED without prejudice

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

08/29/2019
(Dated)

Melissa Abraham-LoFurno

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:
405c06861ed8ce427a0a42872e639beb

Electronically Signed

Your name: Melissa Abraham-LoFurno
Signed on: 08/29/2019