American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

(Applicant)

- and -

Hereford Insurance Company
(Respondent)

AAA Case No.	17-20-1155-8082
Applicant's File No.	n/a
Insurer's Claim File No.	68797-02
NAIC No.	24309

ARBITRATION AWARD

I, Eileen Casey, 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: Applicant

1. Hearing(s) held on 07/09/2020, 09/03/2020
   Declared closed by the arbitrator on 09/03/2020

   Dayva Zaccaria, Esq. from Newman, Anzalone & Newman, LLP. participated by telephone for the Applicant

   Andrew Schiavone, Esq. from Law Offices of Rubin & Nazarian participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 52,732.44**, was AMENDED and permitted by the arbitrator at the oral hearing.

   The original amount claimed was $52,732.44 for lost wages from October 17, 2017 through April 25, 2019. Respondent provided the policy declarations page establishing that the maximum monthly work loss benefit is $2,000.00. As such, Applicant's counsel amended the amount claim to $39,000 for lost wages from July 11, 2017 through April 25, 2019 ($2,000 a month x 19.5 months).

   Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

Applicant (MI), a 35-year-old male, was injured in a motor vehicle accident on July 10, 2017. The amount claimed, as amended, is $39,000 for lost wages from July 11, 2017 through April 25, 2019 ($2,000 a month x 19.5 months). Respondent denied the claim for lost earnings as the claim had not been substantiated. The issue is whether Respondent established a defense.

4. Findings, Conclusions, and Basis Therefor

This decision is based upon the oral arguments and a review of the documents contained in the ADR Center maintained by the American Arbitration Association. The original amount claimed was $52,732.44 for lost wages from October 17, 2017 through April 25, 2019. Respondent provided the policy declarations page establishing that the maximum monthly work loss benefit is $2,000.00. As such, Applicant's counsel amended the amount claim to $39,000 for lost wages from July 11, 2017 through April 25, 2019 ($2,000 a month x 19.5 months).

The evidence demonstrates that the EIP (MI), a 35-year-old male, was injured in a motor vehicle accident on July 10, 2017.

Applicant's Prima Facie Case

I find that Applicant established a prima facie case of entitlement to lost earnings. On his NF-2 Application for No-Fault benefits, dated July 12, 2017, Applicant wrote that he lost time from work starting July 10, 2017 and had not returned to work. He also wrote that his gross average earnings were $280 to $300 a week. A fully executed and signed Form NF-2 suffices to apprise the No-Fault insurer of the intent to seek lost wages. *Gokey v. Blue Ridge Ins. Co*., 22 Misc.3d 1129(A), 2009 N.Y. Slip Op. 50361(U) (Sup. Ct. Ulster Co., Henry F. Zwack, J., Jan. 21, 2009).

Respondent's Requests for Verification

The evidence showed that Respondent sent an initial request for verification, dated January 10, 2019, and a follow-up request, dated February 13, 2019, asking for an Employer's Wage Verification and Disability Note from Treating Physician for every 30 days of disability, and noting that Respondent was in receipt of a letter from Junior Car services but the claim was delayed for completed NF6 and enclosed NF7 forms, last two federal Tax returns 2015 and 2016 including schedule C form.

Respondent also submitted a March 25, 2019 letter concerning missing/incomplete information. The letter noted that Respondent received a 2/4/18 letter from Junior's Express Inc, Completed NF7, 2017 tax return w/schedule C, 2014 tax return, and Dr. Hanan's initial report dated 1/29/18 but in order to properly evaluate the claim,

Respondent was awaiting a completed NF6 form, last two federal Tax returns 2015 and 2016 including schedule C and a disability note from treating physician for every 30 days of disability.

Respondent submitted a further request for verification, dated September 6, 2019, and a follow-up request, dated October 7, 2019, noting that the claim had been referred to a Certified Public accountant and per their letter, dated August 29, 2019, additional verification was required in order to expedite the claim. The letter stated please see attached and that when Respondent receives the information, they will be able to give Applicant's claim further consideration. A copy of the August 29, 2019 letter from the CPA was not submitted.

Denial

The evidence demonstrated that Respondent issued an NF-10 denial on November 4, 2019 stating "Your claim for lost earnings has not been substantiated therefore your claim for lost earnings is denied. If there is any additional information you wish to submit, we may reconsider our position."

Respondent wrote Applicant's counsel on December 17, 2019, in response to a request for reconsideration of the denial, that the documents submitted did not contain substantial proof of Applicant's loss wage claim and as such cannot be accepted. The letter also stated that, based on an assessment of the file and the CPA David Glodstein, Respondent stood by the denial issued on November 4, 2019.

Lost Wages Evidence

Applicant submitted an affidavit, dated July 22, 2020, from Applicant. In his affidavit, Applicant stated that he did not file income taxes for 2015 and 2016 and that he told Respondent's representative that he did not file taxes for those years. He also stated that he was providing a letter signed by his employer. Applicant also stated that he submitted doctor's notes to Respondent showing that he was unable to work from the date of accident until April 25, 2019. He stated that he was out of work since July 10, 2017, the date of accident, and the claim start date of October 17, 2017, noted in the AR-1 was a typographical error. He provided e-mails to his attorney noting the incorrect start date shown in the AR-1.

Applicant submitted a letter, dated February 4, 2018 on the letterhead of Junior's Express Inc. with an illegible signature stating that Applicant worked for Junior Express as an independent driver from April 3, 2017 to July 10, 20017 and grossed about $1,800 weekly. The letter also states that Applicant's base fee was $100 weekly and expenses about $100 so his net income was about $1,600.

Applicant also submitted Applicant's 2017 Federal Income Tax Form, signed and dated February 14, 2018, showing net income of $25,132 and adjusted gross income of $23,356. Applicant also submitted his 2014 tax returns showing income of $2,707.

Applicant's NF-6 Employer's Wage Verification Form, dated January 19, 2019 and signed by Applicant, noted that he was employed as a taxi driver making $270 a day, $1,600 net weekly, for 12 hours a day and 72 hours a week. He wrote that his first day absent from work was July 10, 2017 and that he returned to work on October 15, 2018 until January 18, 2019 and then was sent home because he could not work due to pain.

Respondent submitted an NF-6 Employer's Wage Verification Form, dated February 19, 2019 and signed by a representative's of Junior's, noting that Applicant was employed as a taxi driver making $270 a day, $1,600 net weekly, for 12 hours a day and 72 hours a week. He wrote that his first day absent from work was July 10, 2017 and returned to work on January 18, 2019.

Applicant's NF-7 Verification of Self-Employment Income Form, dated January 19, 2019 and signed by Applicant, noted that he was employed as a taxi driver making $270 a day, $1,600 net weekly, for 12 hours a day and 72 hours a week and Applicant was unable to work from July 10, 2017 through October 15, 2018 to January 18, 2019.

Applicant also submitted monthly reports from Dr. Timor Hanan, M.D. dated from July 13, 2017 through March 28, 2019 noting that Applicant was disabled and unable to work.

Respondent's Expert Report

Respondent submitted a report from David Glodstein CPA. Mr. Glodstein listed the documents that he reviewed. He stated that on August 29, 2019, his office wrote to Applicant's attorney's office, Rosenbaum & Rosenbaum, P.C., and provided a detailed list of records required in connection with his investigation of Applicant's lost earnings claim. Additionally, the letter requested that Applicant sign enclosed release forms so that they could obtain verification of non-filing of Applicant's personal income tax returns (Forms 1040) for the years 2015 and 2016, as well as transcripts of the Applicant's personal income tax returns (Forms 1040) for the years 2017 and 2018 directly from the Internal Revenue Service. Mr. Glodstein stated that he requested that Applicant execute the forms and return them to his office with two (2) forms of signature identification as required by the IRS. He noted that a copy of this letter was sent to Applicant at that time.

Mr. Glodstein added that, in an attempt to independently quantify the gross receipts and business expenses in the periods prior to and subsequent to the date of the accident, his office requested all monthly bank statements and canceled checks for all bank accounts that reflect business income and expense transactions as well as information showing the source of all funds deposited into the accounts for the period covering January 1, 2015 through the claimed loss period. Mr. Glodstein said that this information was never received. He added that his office requested copies of Applicant's 1099 forms, the general ledger of the business, invoices, contracts, cash receipts journals, and sales and billings journals to independently quantify the gross receipts of the Claimant's business. He stated that these items were also never received. He explained that absent these returns he been unable to independently verify if Applicant had another source of

earnings in the periods preceding or subsequent to the date of the accident. He opined that Applicant's 2015, 2016, and 2018 returns are essential to his review considering the fact that the accident occurred on July 10, 2017. He added that, in the absence of these returns, he was unable to quantify Applicant's reported net business income (loss) in the periods preceding and subsequent to the date of the accident.

Mr. Glodstein said that, during the course of this investigation, he was provided with a copy of New York Motor Vehicle No-Fault Insurance Law Employer's Wage Verification Report (Form NF-6) signed by "Junior" and dated February 19, 2019. He noted that Junior specified that Applicant's occupation was "Taxi Driver" and the dates of his employment were April 3, 2017 through July 10, 2017. Mr. Glodstein said that the form did not quantify Applicant's gross earnings during the 52-week period prior to the accident. He added that Junior wrote that his wage or salary as of the date of the accident was $270 per day and $1,600 net per week. Junior also indicated that Applicant worked twelve (12) hours per day and six (6) days per week and the first day Applicant was absent from work was July 10, 2017, and he returned to work on January 18, 2019. Mr. Glodstein added that there is a discrepancy as Junior specified that Applicant's absence from work began on July 10, 2017 while Applicant's TLC trip records specify that there were six (6) trips on July 11, 2017, and eight (8) trips on July 12, 2017. He said that he had not been provided with an explanation for this inconsistency.

Procedural History

A hearing on this matter was first scheduled for July 9, 2020. By e-mail, dated July 2, 2020, Respondent's counsel requested an adjournment of the July 9, 2020 for an in-person hearing and for witness testimony. I denied the adjournment request and scheduled a telephonic conference for July 9, 2020. On July 9, 2020, the matter was conferenced via telephone with attorneys for the parties. I rescheduled for the hearing for September 3, 2020 and directed Respondent to submit DEC sheet to establish the PIP policy limits and if OBEL or Additional PIP coverage exist, the payment log indicating the PIP limits available, and an expert report on the lost earnings claim by July 30, 2020. Respondent's counsel was also directed to advise by July 30, 2020 if Respondent will proceed with expert report alone or if expert will testify by LoopUp on September 3, 2020. Applicant was permitted to respond to Respondent's post-hearing submission by August 13, 2020.

Respondent submitted the applicable PIP information by July 30, 2020 but failed to provide an expert report on the lost earnings claim by July 30, 2020. Respondent's counsel also failed to advise by July 30, 2020 if Respondent would proceed with expert report alone or if expert will testify by LoopUp on September 3, 2020.

On August 13, 2020, Applicant's counsel advised by e-mail that Respondent was requesting a video hearing on September 3, 2020 and David Glodstein CPA would testify. Respondent proved an Expert Witness Disclosure but no copy of the expert's report. Applicant's counsel objected to the witness testimony based on untimely notice and failure to submit an expert's report. I permitted the submission of an expert report

but denied Respondent's request for witness testimony. The expert report was submitted on August 17, 2020.

Insurance Coverage

It is undisputed that the insurance policy in question has mandatory PIP coverage limits of $50,000 and additional Personal Injury Protection of $150,000 for total PIP coverage of $200,000 and that reimbursement for lost earnings is limited to $2,000 per month. Respondent submitted a payment log showing medical payments of $34,627.75.

Arguments/Analysis

Respondent's counsel argues that this arbitration is premature due to outstanding verification. Applicant's counsel argues that all requested verification was provided, and further verification was waived by the issuance of a denial.

I find that the defense of failure to respond to documentary verification was waived by Respondent issuance of a denial of the claim for lost wages. Moreover, Respondent's September 6, 2019 and October 7, 2019 verification requests did not detail the verification requested but instead, noted that the claim had been referred to a Certified Public accountant and per their letter, dated August 29, 2019, additional verification was required in order to expedite the claim. However, a copy of the August 29, 2019 letter from the CPA was not submitted and therefore there is no evidence that the information requested was outstanding.

11 NYCRR 65-3.8(b)(3) provides that, "an insurer shall not issue a denial of claim form prior to its receipt of verification of all the relevant information requested pursuant to section 65-3.5 and 65-3.6 of this Subpart (*e.g.*,medical reports, wage verification, etc.)." However, once the claim specific denial is issued the insurer is precluded from asserting as an alternative defense noncompliance with verification. See, *Triangle R Inc. v. Praetorian Insurance Company*, 29 Misc. 3d 138 (A), 920 NYS 2d 245 (App. Term 1st Dept. 2010); *Huntington Hospital v. New York Central Mutual Fire Insurance Company* , 2012 NY Slip Op 52274 (U) (App. Term 9th and 10th District 2012).

Applicant's counsel also asserted that the time to pay or deny the claim was not properly tolled after the filing of the NF-2 and the denial was late. Respondent's counsel contended that the denial was timely based on the submissions of the NF-6 and NF-7.

Pursuant to the statutory and regulatory framework governing the payment of no-fault automobile benefits, insurance companies are required to either pay or deny a claim for benefits within 30 days of receipt of proof of claim (see Insurance Law § 5106[a]; 11 NYCRR 65-3.8[c]). However, the 30-day period may be extended where the insurer makes a request for additional information within 15 business days of its receipt of the claim (see 11 NYCRR 65-3.5[b].

The proof of claim of lost wages is an NF-6, Employer's Wage Verification Form, or NF-7 Verification of Self-Employment Income Form. I find that Respondent timely and properly tolled the 30-day deadline and the denial was timely.

However, a timely denial alone does not avoid preclusion where said denial is factually insufficient, conclusory, vague or otherwise involves a defense which has no merit as a matter of law. *Nyack Hospital v. Metropolitan Property & Casualty Ins. Co.,* 16 A.D.3d 564, 791 N.Y.S.2d 658 (2d Dept. 2005). Respondent's denial stated that Applicant's lost earnings claim had not been substantiated therefore the claim for lost earnings was denied. This defense has no merit as a matter of law. The regulations allow for a denial based on the failure to provide requested verification pursuant to the 120-day rule set forth in 11 NYCRR 65-3.8 (b)(3) which provides in pertinent part that "an insurer may issue a denial if, more than 120 calendar days after the initial request for verification, the applicant has not submitted all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply, provided that the verification request so advised the applicant as required in section 65-3.5(o) of this Subpart. Having not sought to avail itself of a denial based on the 120-day rule, Respondent's denial based on the failure to substantiate the claim cannot be sustained.

The next issue is the lost wages established by Applicant.

As held by the Court of Appeals in the case of *Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co.*, 25 NY 3d 498 (2015), an applicant establishes a prima facie showing of entitlement to No-Fault benefits by submitting evidentiary proof that the prescribed statutory billing forms setting forth proof of the fact and amount of loss sustained were mailed and received by the insurer and that No-Fault benefits are overdue.

With concern to a claim for loss of earnings the issue presented is to what extent an injury has resulted in "loss of earnings from work which the person would have performed had he not been injured." See, NYS Ins. Law § 5102 (b) (2) With concern to the respective burdens of proof in a claim for loss of earnings, it is first incumbent upon the Applicant to demonstrate either loss of earnings from work as demonstrated by the applicant's level of earnings at the time of the accident or based upon demonstrated future earnings reasonably projected. 11 NYCRR 65-3.16 (b) (3) In this regard, the initial burden of demonstrating the fact and the amount of the loss sustained rests upon the Applicant.

With regard to a claim for medical services, this amount is demonstrated by virtue of the submission of a bill. See, *St. Luke's Roosevelt Hospital*, etc., *et al., respondents, v. New York Central Mutual Fire Ins. Co*., 8 A.D.3d 640, 779 N.Y.S.2d 548 (NY Sup. Ct. App Div. 2 Dept., 2004) (holding: prima facie case is demonstrated by proof "that they mailed and the appellant received the hospital facility forms for the related claims demonstrating the amounts of loss sustained" emphasis added). As is the case for other no-fault benefits, this can be accomplished by submission of a statutory form, such as an

NF-2, NF-6 or NF-7, or through a document which contains substantially equivalent information. (See, *Amaze Med. Supply v. Eagle Ins. Co.,* 2 Misc.3d 128(A), 784 N.Y.S.2d 918, 2003 WL 23310886 [App. Term, 2d & 11th Jud. Dists.]; see also *Damadian MRI in Elmhurst v. Liberty Mut. Ins. Co*., 2 Misc.3d 128(A), 784 N.Y.S.2d 919, 2003 WL 23310887 [App. Term, 9th & 10th Jud. Dists.] (proof of a properly submitted statutory claim form, or its substantial equivalent, establishes a prima facie case of medical necessity). Based on the aforementioned body of case law, I hold that as part of its prima facie case an applicant for benefits for loss of earnings must demonstrate that it has submitted a loss of earnings claim for a demonstrable loss sustained, be it in a statutory form or its substantial equivalent.

In *State Farm Ins. Co. v. Domotor*, 266 A.D.2d 219 (App. Div., 2nd Dept., 1999), the court held that following the insurer's issuance of a general denial the applicant for No-Fault benefits was excused from further compliance with the condition precedent that he must submit proof of claim for medical expenses within 45 days of the incurrence of said expenses.

However, when an applicant does not submit proof of claim for medical expenses following the issuance of a general denial no presumption of medical necessity attaches to the claim and as such the applicant bears the burden in the first instance of establishing medical necessity (see *Dugo v. Allstate Ins. Co*., 26 Misc.3d 1215(A), N.Y.C. Civ. Ct., Richmond Co., 2010).

I find that a claim for lost wages should be treated in the same manner as a claim for medical expenses. Thus, a presumption of disability attaches to an applicant's timely submitted claim which then shifts the burden to the insurer to rebut the presumption via competent evidence. However, in not continuing to submit claims for loss of earnings after the issuance of a general denial the presumption of disability will not attach to a subsequently arbitrated or litigated claim for post-denial lost wages and as such with respect to such claim the applicant will bear the burden in the first instance of establishing disability.

Findings

Based on the forgoing, I find that that Applicant's evidence demonstrated that he lost earnings from July 11, 2017 through October 14, 2018 and he is entitled to lost wages for that time period. His disability is supported by records from his doctor. However, I find that the evidence did not support an award of lost wages from October 15, 2018 through April 25, 2019. Applicant's NF-6 and NF-7 stated that Applicant returned to work on October 15, 2018. Although Applicant's NF-6 stated that Applicant returned to work on October 15, 2018 until January 18, 2019 and then was sent home because he could not work due to pain, the NF-6 was dated January 19, 2019 and did not report continuing loss of work. There was no subsequent proof of claim submitted. Additionally, in his affidavit, Applicant did not adequately address his return to work but merely stated that he submitted to Hereford notes from the doctor indicating that he was unable to work from the date of accident to April 25, 2019. Applicant seeks the maximum $2,000 a month reimbursement permitted by statute and Applicant's evidence

supports this amount. I did not find Mr. Glodstein's report to be convincing. Mr. Glodstein opined that Applicant's 2015, 2016, and 2018 returns were essential to his review considering the fact that the accident occurred on July 10, 2017. He added that, in the absence of these returns, he was unable to quantify Applicant's reported net business income (loss) in the periods preceding and subsequent to the date of the accident. However, as set forth above, Respondent waived its right to further verification by issuing a general denial of lost earnings and I find Applicant's evidence sufficient to establish the lost wages. Additionally, Mr. Glodstein challenged Applicant's credibility by stating that Applicant's TLC trip records specify that there were six (6) trips on July 11, 2017, and eight (8) trips on July 12, 2017, but these records were not provided for my review. Accordingly, Applicant is awarded $30,200.01 (15 months x $2,000 + 3 days x $66.67).

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.

Loss Of Earnings	**From/To**	**Claim Amount**	**Amount Amended**	**Status**
	10/17/17 - 04/25/19	**$52,732.44**	**$39,000.00**	**Awarded: $30,200.01**
Total		**$52,732.44**		**Awarded: $30,200.01**

B. The insurer shall also compute and pay the applicant interest set forth below. 02/05/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from the above date, which is the date that arbitration was requested, at the rate of 2% per month, simple, and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9 (c).

C. Attorney's Fees

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

Respondent shall pay Applicant an attorney's fee, in accordance with 11 NYCRR § 65-4.6(d). Therefore, the insurer shall pay the applicant an attorney's fee of 20% of benefits plus interest, with no minimum fee and a maximum fee of $1,360. 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(b).

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

10/04/2020
(Dated)

Eileen Casey

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:
ad2e06b6adeced724b8a05a626b53216

Electronically Signed

Your name: Eileen Casey
Signed on: 10/04/2020