

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Silver Needle Acupuncture, PC , Rockaway
Park Medical, P.C.
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No.	17-19-1140-9822
Applicant's File No.	324649
Insurer's Claim File No.	100398402
NAIC No.	16616

ARBITRATION AWARD

I, Victor Moritz, 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: IP

1. Hearing(s) held on 10/22/2020
Declared closed by the arbitrator on 10/22/2020

David Foreman, Esq. from Leon Kucherovsky Esq. participated by telephone for the Applicant

Erisa Ahmedi, Esq. from American Transit Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,152.09**, 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

The applicant Silver Needle Acupuncture (Silver Needle) seeks reimbursement for acupuncture services provided to the IP (J.C. 58 year old male) from August 21 through October 23, 2017 in the sum of \$1,469.08. The applicant, Rockaway Park Medical PC (Rockaway Park) seeks reimbursement for medical services provided to the IP from September 5 through October 12, 2017 in the sum of \$683.01. The respondent's defenses include that the IP was in the course of employment at the time of the incident and therefore workers' compensation insurance is primary. This matter is determined after reviewing the submissions and presentations of both sides. I have reviewed the documents contained in the electronic case folder as of the closing of the file.

4. Findings, Conclusions, and Basis Therefor

I find for the respondent and deny this claim without prejudice.

Legal Principles

The Workers' Compensation Board is the exclusive forum to determine whether an individual was in the course of his employment at the time of a motor vehicle accident. Arvatz v. Empire Mutual Insurance Company, 71 A.D.2d 262, (1st Dept. 1991). Further, the Workers' Compensation Board has primary jurisdiction to determine factual issues concerning coverage under the Workers' Compensation Law. AR Medical Rehabilitation, P.C. v. American Transit Ins. Co., 27 Misc.3d 133(A), 2010 N.Y. Slip Op. 50708(U), (App. Term 2d, 11th & 13th Dists. Apr. 13, 2010). It is also well established that it is within the sole jurisdiction of the Workers' Compensation Board to determine whether claimed injuries occurred while in the course of employment Liss v. Trans Auto Systems, Inc., 68 N.Y.2d 15 (1986), O'Rourke v. Long, 41 N.Y.2d 219 (1976). Where the evidence is sufficient to raise a question of fact as to whether the eligible injured person was acting as an employee at the time of the accident, the issue must be resolved by the Workers' Compensation Board. A.B. Medical Services, PLLC v. American Transit Ins. Co., 24 Misc.3d 75, 885 N.Y.S.2d 154 (App. Term 9th & 10th Dists. June 18, 2009). In Response Equipment, Inc. v. American Transit Ins. Co., 15 Misc.3d 145(A), 007 NY Slip Op. 51176(U), (App. Term 2d. Dep't., June 8, 2007), the court noted the defendant's proof, including a police report, was sufficient to raise a question of fact as to whether assignor was acting as an employee at the time of the accident, which issue must be resolved by the Workers' Compensation Board. As long as there is "at least minimal proof of the indicia of employment from which an inference could be drawn to support the defense" that the assignor is covered by the Workers' Compensation Law (*Master No-Fault Award, M.C. and The State Farm Mutual Insurance Company, NF 2907, New York State No-Fault/SUM Arbitration Reporter, Vol. 25, No. 3 and 4, Sept & Dec 2000*), the claim must be denied without prejudice, pending the determination of the issue of employment by the Board.

Underlying Facts

In this instance, the parties acknowledge *Arbitrator Marcelle Brandes* in multiple matters including *Comprehensive Intervention Pain Management PC v The American Transit Insurance Company, AAA, Case 17â18â1090â7956*; *Middletown Intervention Pain Management v. American Transit Insurance Company, AAA Case 17â18â1083â3729*; and *Life Equipment v. American Transit Insurance Company, AAA Case 17â18â1083â8687* has determined that workers' compensation is primary in this incident. In pertinent part, Arbitrator Brandes noted as follows.

Respondent has come forward with sufficient evidence to raise such a question of fact. In support of its defense Respondent rests upon the police report that establishes Assignor was a driver of a vehicle with a T license plate.

Analysis

While I believe it is arguable that collateral estoppel would apply since Arbitrator Brandes decision involves the same issues that were fully litigated; I acknowledge it is questionable whether the doctrine applies in New York No-Fault arbitration.

Regardless, I do believe "the doctrine of the law of the case" applies under these circumstances.

I note the decision by **Arbitrator Sandra Adelson Sound Chiropractic PC v. GEICO Insurance Company AAA 412013073449 (September 11, 2014):**

"The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding (see Bellavia v Allied Elec. Motor Serv., 46 AD2d 807 [1974]). The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision (see Gay v Farella, 5 AD3d 540 [2004]). The doctrine may be ignored in extraordinary circumstances such as a change in law or a showing of new evidence (see Foley v Roche, 86 AD2d 887 [1982])" Brownrigg v. New York City Hous.Auth., 29 AD 3d, 721, 722[2006].

Furthermore, The doctrine of the law of the case "is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges . . . are concerned;" stated differently, "[t]he doctrine " applies only to legal determinations that were necessarily resolved on the merits in the prior decision.'" Oyster Bay Assocs. Ltd. Partnership v. Town Bd. of Town of Oyster Bay, 21 AD3d 964, 966, 801 NYS2d 612 (2d Dept. 2005) (citations omitted) (emphasis added). See also Shatzkin v. Village of Croton-on- Hudson, 51 AD3d 903, 858 NYS2d 362 (2d Dept. 2008).

Finally, I note that even if this was a case of first impression, I fully agree with the assessment made by Arbitrator Brandes.

For the foregoing reasons, the claim is denied without prejudice.

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 Westchester

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

10/23/2020
(Dated)

Victor Moritz

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:
0349d47b5be0915cd64e39609d040dd1

Electronically Signed

Your name: Victor Moritz
Signed on: 10/23/2020