

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

(Applicant)	AAA Case No.	17-20-1178-9315
	Applicant's File No.	n/a
- and -	Insurer's Claim File No.	1052062-01
American Transit Insurance Company (Respondent)	NAIC No.	16616

### ARBITRATION AWARD

I, Gary Peters, 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: assignor

1. Hearing(s) held on 01/08/2021  
Declared closed by the arbitrator on 01/08/2021

Alan Elis from Law Offices of Jonathan B. Seplowe, P.C. participated in person for the Applicant

Jeffrey siegel from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 4,864.00**, 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 was a 48 year old female who was involved in a motor vehicle accident while a passenger in a taxi on 7/12/19. She sustained multiple bodily injuries, and underwent medical treatment including a surgical procedure to the right wrist and multiple bodily injuries to the cervical/lumbar spine, right knee and right shoulder.**

**Applicant is seeking reimbursement for lost wages in the sum of \$4,864.00 wherein she maintained that she was unable to work from 7/12/19 through 11/18/19.**

**Respondent delayed payment of the claim, seeking additional verification.**

4. Findings, Conclusions, and Basis Therefor

**This hearing was conducted using the Electronic Case Folder maintained by the American Arbitration Association. All documents contained in that folder are made part of the record of the hearing and I have reviewed the documents contained therein. Any documents submitted after the hearing or at the hearing that have not been entered in the Electronic Case Folder as of the date of this award, will be listed immediately below this language and forwarded to the American Arbitration Association at the time this award is issued for inclusion.**

As stated above, the Assignor was a 48 year old female who was involved in a motor vehicle accident on 7/12/19 while a passenger in a taxi.

The Applicant submitted an affidavit and stated that on July 12, 2019 she was injured in a motor vehicle accident in New York while she was a passenger in a taxi. She had multiple bodily injuries including her right wrist.

She is a Home Health Aide, employed by Attentive Home Care Agency Inc. and that as a result of the injuries sustained in the motor vehicle accident, she lost time from work. The affiant stated that her usual work week is from Friday to Monday, 12 hours per day, four days per week at a salary of \$15.00 per hour. This was confirmed by the NF-6 form filled out by Attentive Home Care Agency. She was out of work from Friday, July 12, 2019 through Saturday, September 14, 2019 and returned to work on Sunday, September 15, 2019. She was also absent from work from Friday, November 15, 2019 through Monday, November 18, 2019 following right wrist surgery on November 14, 2019.

The NF-6 does not include her absence from November 15, 2019 through November 18, 2019. The affiant believed that since the NF-6 is dated November 19, 2019 that her Manager might not have known at that time that her absence for the surgery was related to the accident. Additionally, Attentive Home Care Agency paid her sick leave for two weeks, which is 8 work days; she is entitled to 8 sick days per year. Her absence from work after the accident used up all her sick days for 2019. Attentive Home Care Agency did not provide her with other sick days for the remainder of 2019. Accordingly, she seeks reimbursement of her sick days.

Abu Ahmed, an attorney duly licensed to practice in the State of New York submitted an Affirmation; he stated that he is an Associate of Ahmed Law Firm, P.C., the attorneys for Applicant in her personal injury action.

He stated that on July 23, 2019, he sent an Applicant for No-Fault Benefits to American Transit, along with the police report, her tax returns from 2017 and 2018. He mailed the letter to American Transit at its office at 5 Broadway, Freeport, New York, 11520. He also faxed the July 23, 2019 submission to American Transit on behalf of Applicant and sent the fax to fax number (212) 857-8279. The fax record sheet shows that 31 pages were transmitted to American Transit. The breakdown of the number of pages is as follows:

Fax cover sheet - 1 page;

Cover Letter - 1 page;

Police report - 3 pages;

NF-2 form - 3 pages;

Tax returns for 2017 and 2018 - 23 pages.

On August 20, 2019, American Transit issued a verification request for a certification of disability (unable to work) from the treating physician. The verification request was issued by Jennifer Vega from American Transport's Freeport office. On August 28, 2019, he mailed and faxed a response to American Transit for the Applicant. The Ahmed Law Firm does not have a record of a cover letter being sent. The fax included a copy of the verification request for Applicant; six pages of bank statements, showing deposits shortly before the accident; three pages of disability notes, including a duplicate copy of the July 26, 2019 note.

The fax record sheet shows that 16 pages were transmitted to American Transit at fax number (212) 857-8248, one of the fax numbers specified in the verification request.

To date, neither the Applicant nor the Ahmed Law Firm have received a reply to the August 28, 2019 verification response.

Ms. Vega issued a second verification request on September 24, 2019 that failed to recognize the August 28, 2019 submission. Ms. Vega repeated the request of August

20, 2019 for a certification of disability (unable to work) from the treating physician. Affiant mentioned that he already sent the requested document to Ms. Vega on August 28, 2019.

As stated above, Applicant is seeking lost wages due to her accident. American Transit made a verification request for the certificates of disability. On August 28, 2019, Applicant's personal injury attorneys, the Ahmed Law Firm, P.C. responded by mail and fax to American Transit at 5 Broadway, Freeport, New York 11520. The response was sent to the same office of American Transit that sent the verification request and to the same fax number listed on the verification request. The fax record raised the presumption of receipt (Bright Med. Supply Co. v. Nationwide Ins. Co. of Am., 58 Misc. 3d 126[A], 2017 NY Slip Op 51700[U], \*1 [App term, 1<sup>st</sup> Dept. 2017]; Triangle R. Inc. v. Tri-State Consumer Ins. Co., 38 Misc 3d 143[A], 2013 NY Slip Op 50256[U], \*1 [App. Term, 2d Dept. 1023]).

To date, American Transit has neither paid nor denied Applicant's claim, nor has it specified any deficiencies in Applicant's response to the verification requests. It never questioned the medical necessity for her lost time from work. Therefore, Applicant's counsel maintained that the claim is overdue. "[A]n insurer is required to respond to a response to a verification request, regardless of whether it feels the response is sufficient". (Custom Orthotics v. Govt. Empls. Ins. Co., 25 Misc. 3d 545, 549 [Civ Ct, Queens County 2009]; Accord MVAIC v. Sand-Up MRI of Manhattan, P.C., 32 Misc. 3d 1205(A), 2011 NY Slip Op 51187[U], \*4 [Sup. Ct., Queens County]; Pro-Align Chiropractic, P.C. v. Travelers Prop. Cas. Ins. Co., 58 Misc. 3d 857, 860 [Suffolk County Dist. Ct. 2017]; Media Neurology PC v. Country-Wide Ins. Co., 21 Misc. 3d 1101[A], 2008 NY Slip Op 51902[U], \*1 [Civ. Ct., Kings County]; All Health Med. Care v. Govt. Empls. Ins. Co., 2 Misc 3d 907, 909 [Civ. Ct., Queens County 2004]). When an insurer remains silent after receiving a verification response, "this inaction constitutes a waiver of all defenses" (Pro-Align, 58 Misc. 3d at 860; Back to Back, 2012 NY Slip Op 51088[U], \*4; Media Neurology, 2008 NY Slip Op 51902[U]; Custom Orthotics, 25 Misc. 3d 545, 549; All Health, 2 Misc. 3d at 909).

American Transit issued a follow-up verification request after Applicant's counsel responded to the first verification request. The follow-up request is invalid since it requested information that American Transit already possessed (St Vincent's Hosp. & Med. Ctr. v. Am. Trans. Ins. Co., 29 Misc. 3d 139 [A], 2010 NY Slip Op 52063[U], \*1 [App. Term, 2d Dept]; Brownsville Advance Med., P.C. v. Country-Wide Ins. Co., 33 Misc 3d 1236[A], 2011 NY Slip Op 52255[U], \*3 [Nassau County Dist. Ct.]; Sehagal v. Am. Trans. Ins. Co., 178 Misc. 2d 407, 408 [Civ. Ct., Queens County 1998]).

#### Calculation of Lost Earnings Claim

As stated above, Applicant works for Attentive Home Care Agency Inc. Her usual work week is from Friday to Monday. After the July 12, 2019 accident she missed work from Friday, July 12, 2019 through Saturday, September 14, 2019. After surgery on Thursday, November 14, 2019 she missed four (4) days of work from Friday, November 15, 2019 to Monday, November 18, 2019.

The NF-6 states that Attentive Home Care Agency paid Applicant sick leave and checked that she did not lose "accumulated sick leave credits" . Applicant asserts that she receives eight days of sick time per year (which is two weeks) and she used all her sick leave for 2019 after the accident (Affidavit). Therefore, she is entitled to no-fault lost wage benefits for the reimbursement of the two weeks sick time. "In determining loss of earnings from work benefits from other sources shall not be considered as an offset against or a deduction from loss of earnings". (11 NYCRR §65-3.16 [b][1]). "[I]nsurers shall not take a deducton...when accumulated sick leave time is used (id., at [b][1][i].

Sick leave is deducted from No-Fault benefits for only when the payment received is for "unused vacation time and sick leave [that results] in a reduction in [her] level of future benefits in the event he suffered a subsequent injury or illness" (Cady v. Aetna Life & Cas. Co., 113 Misc. 2d 1080, 1082 [Sup. Ct., Broome County 1982], modified on other grounds, 69 AD2d 967, 969 [3d Dept. 1983], affd. 61 NY2d 594 [1984]. The only part of the Supreme Court decision that the Third Department modified concerned Worker's Compensation offsets (see 69 AD3d at 969). The Court of Appeals then let the decision regarding sick leave stand (see 61 NY2d at 596). Since Applicant did not have any sick time available for any other absence in the last three months of 2019, it constituted just such "reduction in [her] level of future benefits" (Cady, 113 Misc. 2d at 1082).

Using the work hours and rates from the NF-6, Applicant's net pay exceeded the \$2,000.00 monthly net pay cap.

Hourly rate \$15.00

Hours worked per day -12

Days worked per week- 4

Daily gross wage = \$180.00

Weekly gross - \$720.00

Monthly gross - \$720 \* 52/12 - \$3,120.00

Monthly net - \$3,120.00 \*80% - \$2,496.00.

Using the \$31,066.00 income from the 2018 tax return, Applicant's average monthly net earnings were still over the \$2,000.00 cap.

Average weekly gross rate =  $\$31,066.00/52 = \$597.42$

Average monthly gross rate -  $\$31,066.00/12 = \$2,588.83$

Average monthly net rate =  $\$2,588.83 *80\% = \$2,071.07$

The regulations impose a maximum of \$2,000.00 monthly first party benefits for lost earnings (see 11 NYCRR §65-3.12 [b] [12]). "The monthly limitation on the aggregate of work loss and substitute services shall not be prorated in the event that one is unable to work or is required to obtain substitute services for a period less than one month" (11 NYCRR §65-3.12 [b] [1]). Therefore, Applicant is entitled to her full lost earnings for September 10, 2019 through September 14, 2019 and for November 15, 2019 through November 18, 2019.

The monthly earnings are as follows:

Average Average Amount of Claim; The Lesser

Number of Monthly Net Pay of the Regulatory Maximum

Period Workdays Gross Pay Per Period or the Average net pay

7/12/19 - 8/10/19 18 \$3,240.00 \$2,592.20 \$2,000.00

8/11/19 - 9/9/19 18 \$3,240.00 \$2,592.20 \$2,000.00

9/10/19- 9/14/19 2 \$360.00 \$288.00 \$288.00

11/15/19-11/18/19 4 \$720.00 \$576.00 \$576.00

TOTALS: 42 \$7,560.00 \$6,048.00 \$4,864.00

I find as follows:

As stated above, the Respondent delayed payment of the claim requesting a Certificate of Disability from the treating physician which indicated that the Applicant is not able to work.

As stated above, Respondent maintained that it did not receive a response to its request for additional verification. In support of its position, the Respondent provided an affidavit from Jennifer Vega who stated that she received a lost wages claim from the Applicant and sent requests for additional verification to the Applicant and counsel. Respondent requested a Certificate of Disability from the treating physician and an NF-6 from the Applicant's employer.

Applicant's counsel has established that all requested information was supplied to the Respondent.

Lastly, the Respondent maintained that it did not receive a letter of disability for lost wages from 11/15/18 through 11/18/18, and stated that the sum of \$576.00 representing wages for the above dates should be deducted. Applicant's counsel maintains that the operative report was sent and it should establish the seriousness of the injuries and proof that Applicant was not able to work.

After reviewing all the evidence, I find that Applicant is entitled to be paid in the sum of \$4,864.00 less \$576.00 for the reasons as stated above in that there was no disability letter provided.

Accordingly, Applicant is awarded the sum of \$4,288.00.

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	Status
	07/12/19 - 11/18/19	\$4,864.00	Awarded: \$4,288.00
<b>Total</b>		<b>\$4,864.00</b>	<b>Awarded: \$4,288.00</b>

B. The insurer shall also compute and pay the applicant interest set forth below. 09/17/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

**Interest to be 2% per month simple, not compounded on a pro rata basis using a 30 day month. Respondent shall compute and pay Applicant interest from the day of filing of arbitration to the date of payment of the award.**

C. Attorney's Fees

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

**The insurer shall pay th Applicant an attorney fee in accordance with 11 NYCRR 65-4.6(d) or "As this matter was filed on or after February 4, 2015, this case is subject to the provisions promulgated bt the Departemenet of Financial Services in the Sixth Amendment to 11NYCRR 65-4 (Insurance Regulation 68-D).**

**Accordingly, the insurer shall pay the the Applicant an attorney fee in accordance with the newly promulgated 11 NYCRR 65-4.6(d). This amendment takes into account that the the maximim attorney fee has been raised from \$850.00 to \$1360.00**

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

02/03/2021  
(Dated)

Gary Peters

#### **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:**  
34851865daff828dec9da87e324da846

**Electronically Signed**

Your name: Gary Peters  
Signed on: 02/03/2021