American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Hudson Pro Ortho and Sports Medicine (Applicant)	AAA Case No.	17-19-1126-8056
	Applicant's File No.	AS-AMT-BXNY-004
- and -	Insurer's Claim File No.	792923-03
	NAIC No.	16616
American Transit Insurance Company (Respondent)		

ARBITRATION AWARD

I, Sandra Adelson, 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: the patient

1. Hearing(s) held on 02/18/2021
   Declared closed by the arbitrator on 02/18/2021

   David Quinones, Esq from Callagy Law, PC participated for the Applicant

   Dmitriy Dykman, Esq. from American Transit Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **$ 912.29**, 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 seeks payment for the physician's fee associated with left shoulder surgery performed on 6/8/17.

   This arbitration arises out of an appeal and directive by Master Arbitrator Richard Ancowitz' in his Master Arbitration Award dated 12/14/20. The Master Arbitration award requires that this arbitrator ascertain whether respondent's exhaustion defense has merit.

4. Findings, Conclusions, and Basis Therefor

The record consisted of claimant's submission, respondent's submission, as well as documents not enumerated within this decision, but which are contained in the case file maintained by the American Arbitration Association. THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED pursuant to 11 NYCRR 65-4.5 (o) (1) (Regulation 68-D). 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. Based on a review of the documentary evidence, this claim is decided as follows:

History and Directive:

By the directive of Master Arbitrator Richard Ancowitz' in his Master Arbitration Award dated 12/14/20, this arbitrator is required to ascertain whether respondent had established the defense that the No-Fault policy CAP 610297 associated with this claim was exhausted. It is notable that respondent had argued that the Basic and Mandatory PIP benefits associated with automobile policy CAP 610297 was exhausted. However, respondent's defense appears to argue that only Basic No Fault benefits in the amount of $50,000.00 had been exhausted. The respondent's counsel at the arbitration hearing failed to discuss the fact that there was an Endorsement under the aforenoted policy which provided for additional benefits under the No Fault policy denominated "Additional Personal Injury Protection" in the amount of $150,000.00. This issue was extremely relevant to the outcome of this arbitration.

In fact, evidence of the "Additional Personal Injury Protection" in the amount of $150,000.00 was discussed in respondent's appeal brief submitted to Master Arbitrator Ancowitz.

The initial arbitration claim was heard on 8/21/20 before Arbitrator Aladar Gyimesi. This arbitration hearing sought reimbursement for the physician's fee associated with left shoulder surgery performed on 6/8/17. At the hearing before Arbitrator Gyimesi, counsel for the applicant and respondent were present and presented their arguments The patient was a then 62-year-old female passenger who was involved in a motor vehicle accident on 11/8/16. She sustained bodily injuries and was required to undergo left shoulder surgery on 6/8/17. The underlying issue in the arbitration before Arbitrator Gyimesi involved whether the left shoulder surgery was medically necessary. Respondent had initially denied this claim based on Dr. Gary Kelman's peer review report. Arbitrator Gyimesi held in applicant's favor. Respondent however appealed this claim.

The appeal was decided by the Master Arbitration Award of Arbitrator Richard Ancowitz. It is crucial to note that respondent argued that the issue of policy exhaustion was not decided by Arbitrator Gyimesi. Master Arbitrator Ancowitz

noted that the issue of policy exhaustion was not presented before Arbitrator Gyimesi. Master Arbitrator Ancowitz specifically stated that "there is no indication here that any exhaustion defense had been submitted to the arbitrator. Thus, it cannot be said that the arbitrator erred in failing to consider evidence of policy exhaustion."

Nevertheless, Master Arbitrator Ancowitz found that the new hearing on the issue of whether respondent's exhaustion defense has merit. The Master Arbitration Award, AAA Case No. 17-19-1126-8056 stated the following:

> **"The arbitrator issued an award in favor of applicant in the amount of $912.29, representing requested reimbursement for care rendered relative to a left shoulder surgery. As per the award, the claim had been denied based upon another arbitrator's award which rejected respondent's defense of lack of medical necessity (AAA # 17-17-1073-8661).**
> The arbitrator here held that the doctrine of collateral estoppel warranted application of said award to the instant matter. As a result, the arbitrator found that applicant was entitled to reimbursement in the above amount.

Respondent presently contends that the award should be vacated because of their policy exhaustion defense. Respondent points to this master arbitrator's vacating of an award in a related matter (AAA # 99-19-1130-1857) concerning this policy and this Eligible Injured Person, which was remanded for a consideration of respondent's exhaustion defense and whether there was any APIP which could have applied to the claims in said matter.

As was the case with AAA # 99-19-1130-1857, applicant has submitted a brief which does not address respondent's contention that the award should be vacated on the ground of policy exhaustion, but generally contends that the award was not infirm as to the lack of medical necessity defense not being credited by the arbitrator.

The award under review is different from the prior award I had reviewed in that there is no indication here that any exhaustion defense had been submitted to the arbitrator. Thus, it cannot be said that the arbitrator erred in failing to consider evidence of policy exhaustion.

However, 11 NYCRR 65-4.10 (a)(2) does afford the possibility of review of the award, nevertheless, especially given that such a defense may be raised regardless of the 30-day time to denial prescribed by Insurance Law Sec. 5106. See, *Matter of Brijmohan v. State Farm Ins. Co*., 92 N.Y.2d 821 (1998).

As a result, I hold that the award herein should be vacated as per CPLR 7511 (b) (1) (iii) and 11 NYCRR 65-4.10 (a)(2) for consideration of respondent's exhaustion defense.

The award is vacated and remanded for a new hearing on the issue of whether respondent's exhaustion defense has merit. If respondent is found on remand to have carried their burden in demonstrating that their exhaustion defense is meritorious, the claim shall be denied. See, generally, *Nyack Hosp. v. GMAC*, 8 NY3d 294 (2007) and 11 NYCRR 65-3.15. If the exhaustion defense is found to be lacking in merit, an award should be entered for applicant in the amount sought, given there is no need to relitigate issues of medical necessity, which were settled by the arbitrator herein previously, and by this master arbitrator previously as well.

In sum, the award is vacated and remanded for consideration of respondent's exhaustion defense."

Whether Exhaustion of Policy Defense Has Merits:

This arbitration award has reviewed the submissions made to the 2/18/21 hearing in order to ascertain whether respondent's exhaustion defense has merit. The issue of medical necessity will not be relitigated as directed by the Master Arbitrator.

Upon a review of the arbitration record, respondent's supplemental submission to this hearing and the appeal submission established that there was $50,000 in basic mandatory personal injury protection benefits. Respondent's submitted evidence that there was $50,000 in personal injury protection. Respondent submitted a PIP (personal injury protection) Ledger establishing that it had spent $50,000.00 with regard to the **basic mandatory** PIP benefits. Respondent issued a denial dated 9/8/20 that the "The **basic policy limits** had been exhausted. No further payments will be allowed."

Additional Personal Injury Protection:

However, respondent included evidence that there was **another $150,000 in "Additional Personal Injury Protection"** PIP benefits **.** The first suggestion that there was $150,000 in Additional Personal Injury Protection appeared in the Appeal Brief submitted by respondent which stated:

---"By the time the matter was adjudicated, as updated as of the date of this brief, the subject policy was exhausted. (No Fault Payment Sheet by Claim,).

The policy also affords Additional PIP in the amount of $150,000.00. (Declaration Automobile Insurance Page). 11 NYCRR 65-3.5 (h) states, "When benefits are claimed under an additional personal injury protection endorsement, the insurer may require that the applicant execute a prescribed subrogation agreement (NYS Form N-F 11) prior to the payment of any benefits. If the insurer shall impose the above requirement, it shall deliver the prescribed agreement to the applicant as soon as it is known that the claim is payable under an additional personal injury protection endorsement. The Respondent timely mailed an NF-11 form to the claimant for the claimant to complete, sign and submit to the Respondent and timely mailed a follow up request for same. To date, the claimant has not submitted a completed NF-11."

and

----"In the instant matter as well, the Respondent initially denied the claim based on a medical necessity on a fee schedule grounds However, by the time the matter was adjudicated the policy was exhausted. **Additionally, to the extent that the Applicant is entitled to recover from APIP endorsement, the claim should be denied without prejudice to resubmit a completed NF-11."**

The foregoing statement appeared in Respondent's Appeal Brief which was submitted to Master Arbitrator Ancowitz. This statement amounts to a concession that the patient was entitled to an additional benefit under the aforenoted policy. Respondent did not define the APIP endorsement and failed to explain what the NF-11 was. However, the APIP benefit is "Additional Personal Injury Protection". Respondent's statement, that the instant arbitration should be denied without prejudice so that the patient could submit a completed NF11, is an admission that respondent was fully aware that there was additional No Fault coverage available under the aforenoted policy.

***It must be emphasized that neither counsel for respondent nor applicant mentioned this determinative issue*of Additional Personal Injury Protection available to this patient**. Neither side discussed nor introduced this existence of another $150,000 in additional personal injury protection. No arguments were made by either party about this issue.

Respondent did include in its submission an NF-Form 11 dated 8/22/20 entitled "Additional PIP Subrogation Agreement" and an NF Form 11 dated 9/28/20 entitled "Additional PIP Subrogation Agreement". Neither agreement was signed. It is notable that both forms indicated that these NF-11 forms were addressed to the patient's attorney and the patient.

Pursuant to 11 NYCRR 65-3.5(h): "When benefits are claimed under an additional personal injury protection endorsement, the insurer **may** require that the applicant execute a prescribed subrogation agreement (NYS Form N-F 11) prior to the

payment of any benefits. If the insurer **shall** impose the above requirement, it shall deliver the prescribed agreement to the applicant as soon as it is known that the claim is payable under an additional personal injury protection endorsement."

Respondent submitted an affidavit from a No-Fault Claims Manager, Ms. Cheryl Glaze which argues that respondent never received either NF-11 form signed by the patient. The NF 11 form is an agreement 1) requiring the patient to sign it so that the carrier is subrogated to the extent of any payment for additional first party benefits to the rights of the applicant, 2) requires the patient to cooperate with the carrier and assist in the conduct of suits and in enforcing the company's right of subrogation for additional protection benefits and 3) require the patient and his legal representative to notify the carrier in writing prior to the commencement of legal proceedings against any person responsible for the patient's bodily injury. Therefore, it is clear from Ms. Glaze's affidavit that respondent contends that the $150,000 in additional coverage was not available because respondent did receive to the date of the appeal the NF-11 form from the patient.

However, the wording of 11 NYCRR 65-3.5(h) states that if the insurer *shall impose the above requirement, it shall deliver the prescribed agreement to the applicant as soon as it is known that the claim is payable under an additional personal injury protection endorsement.* There is no proof in respondent's submission that the respondent timely and actually "delivered" the NF-11 forms to the patient.

There was no credible proof as when respondent knew that the claim would be payable under the additional personal injury protection. Additionally, the wording of 11 NYCRR 65-3.5(h regulations does not state that an NF-11 form must be signed. This respondent required the form to be signed by the patient. Therefore, the record shows that respondent failed to establish that the NF-11 forms were ever mailed to this patient.

Upon a review of respondent's submission, the respondent did not submit proof of mailing of either NF-11 form dated 9/28/20 and 8/22/20. Respondent relies on the affidavit of Cheryl Glaze, a No-Fault Claims supervisor. In reviewing her affidavit, I was not convinced that she had cogent, reliable knowledge that the NF-11forms were mailed. Her affidavit speaks in extremely general terms as to what an examiner allegedly did without citing a persuasive basis for her statement. It is crucial to note that Ms. Glaze does not even identify who the claims examiner was. There was no credible proof as to what she based actual knowledge on that the examiner printed documents, examined them and placed them into envelopes in the mailroom. This affidavit was extremely general and failed to provide any specific and convincing information as to how she concluded if the NF 11 forms were mailed, when the forms were mailed or if they were mailed. Her discussion of mailing practices by respondent did not provide any proof as to how she concluded that the letters were actually mailed. This affidavit was not found to be a reliable and credible basis for establishing mailing of the NF-11 forms.

Although Rettner v. CM Life Ins. Co., Inc., 2014 NY Slip Op 30273(U) involves the cancellation of a life insurance policy, the Court's discussion as to acceptable proof of mailing is applicable to the case at bar: "Moreover, CM's reply submissions do not satisfy the essential element of mailing. "While [Hastings'] affidavit . . . has established the manner in which ... notices were generated, printed, reviewed, forwarded to the mail room, assembled in the mail room, enveloped and posted, she has failed to establish their mailing. . . 'Mailing is the deposit of a paper enclosed in a first-class postpaid wrapper [duly addressed]. . . in a post office or official depository under the exclusive care and custody of the United States Postal Service within the State' (*Zwelsky v North American Company for Life and Health Insurance of New York*, n.o.r., 2011 N.Y. Misc. LEXIS 2765, 2011 WL 2447587 [Sup Ct, NY Co,2011] [internal citation omitted]). Hastings stated that the trays of sorted notices were left in a Mass Mutual facility until the Post Office sent someone to pick them up. In contrast, Stebbins averred that the notices were driven to the Post Office. Neither affiant states that the notices were actually mailed and CM has not furnished the affidavit of a postal worker stating that the notices were regularly picked up or accepted by postal employees. Since CM's evidence "establish[es] that the various notices were generated by defendant's computer system ... [but not] that the notices were actually mailed to [plaintiff, CM] .... fails to establish the presumption that the notices generated . . . were in fact delivered to [plaintiff], and as such, the delivery of the notices remains a genuine issue of fact" (*Maharan v Berkshire Life Insurance* Co., 110 F Supp 2d 217, 221 [WDNY 2000], citing *Caprinov Nationwide Mutual Insurance Co., supra*, 34 AD2d 522). "[W]here cancellation or surrender of the policy is an issue, it is the province of the court to determine all questions of law, and questions of fact ordinarily are to be determined by the jury. Thus, whether an insurance policy provision has been cancelled is a question of fact for the jury, where the party to receive the notice denies that it was ever delivered" and the insurer has not established its entitlement to the presumption of receipt as a matter of law (45 C.J.S. Insurance § 825)." In light of the foregoing, the conclusory and general wording of Ms. Glaze's affidavit fails to establish mailing of the NF 11 forms dated 9/28/20 and 8/22/20. I am constrained to find that the Glaze affidavit lacked credibility and reliability as a whole.

It is also of concern that respondent submitted an unsigned affidavit from Ms. Glaze which was included in the Appeal Brief exhibits (302 pages submitted to the Arbitration Record). The unsigned affidavit from Ms. Glaze dated 7/16/20 also stated that "on 7/16/20, the examiner sent a copy of the 'New York Motor Vehicle No-Fault Insurance Additional PIP Subrogation Agreement' form, also known as the NF-11, the claimant under the care of his attorney to be completed and returned to ATIC." However, respondent did not submit a copy of the alleged NF-11 form dated 7/16/20. There was no credible proof that this unverified NF-11 form was ever mailed to the patient. A copy of this 7/16/20 form was not submitted to the record.

It is also notable that Ms. Glaze stated in her affidavit dated 2/16/21 that the examiner properly issued verification requests. However, 11 NYCRR 65-3.5 (b) states subsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms. Further, the follow-up provisions of 11 NYCRR 65-3.6 (b) states at a minimum, if any requested verification has not been supplied to the insurer 30 calendar days after the

original request, the insurer shall, within ten calendar days, *follow-up with the party from whom the verification was originally requested, either by a 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.*

The foregoing requirement to follow up by telephone call or mail with the patient or their attorney when the requested information is not supplied was not established by respondent's submission. Ms. Glaze's signed affidavit was silent as to whether respondent informed the patient and her attorney as to the reason why the patient's claims were "delayed" or "denied" by identifying in writing what information respondent required. Further, there is no evidence that respondent issued a denial for Additional Personal Injury Protection benefits.

It is clear from Ms. Glaze's affidavit that respondent did not advise applicant or her attorney that she was entitled to an additional $150,000.00 in benefits, or that NF-11 forms were mailed to her which were dated 7/16/20, 8/22/20 or 9/28/20. There was also no proof that respondent ever advised the patient by mail or phone that there was to $150,000 in Additional Personal Injury Protection for her. The NF-11 form failed to disclose to this patient-passenger that there was additional coverage in the amount of $150,000. It is also **inconceivable** that a patient would refuse an additional $150,000 in benefits, and it is inconceivable that her attorney would advise her to not sign the NF-11 form.

There is simply no proof that respondent had ever advised patient that her medical claims would be denied or delayed or not paid since she did not return the NF-11 forms. In fact, no denial for the Additional Personal Injury Protection was submitted to the record, and the credible evidence overwhelmingly establishes that the NF-11 forms were **not timely and properly mailed in accordance with the regulations.** The only party who would benefit by the patient not signing the NF-11 form was the respondent.

Furthermore, if respondent alleges that the signed NF-11 form was not returned to respondent, the No Fault regulations requires respondent to reach out to the patient or her attorney. Therefore, reference to this relevant regulation is necessary. I am constrained to find that respondent has not complied with Claim Practice Principles to be followed by all insurers. The applicable regulation is set forth below:

65-3.2 Claim practice principles to be followed by all insurers.

"Have as your basic goal the prompt and fair payment to all automobile accident victims.

Assist the applicant in the processing of a claim.

Do not treat the applicant as an adversary.

Do not demand verification of facts unless there are good reasons to do so. When verification of facts is necessary, it should be done as expeditiously as possible.

Hasten the processing of a claim through the use of a telephone whenever it is possible to do so.

Clearly inform the applicant of the insurer's position regarding any disputed matter.

Respond promptly, when a response is indicated, to all communications from insureds, applicants, attorneys and any other interested persons."

From a review of the arbitration record, I am constrained to find that this respondent has treated this patient as an adversary and did not use the telephone or mail to find out if the patient had received the NF-11 form. By contacting the patient, the respondent would be "hastening the processing of claims". However, respondent chose not to contact this patient and issued a denial dated 9/8/20 alleging that basic No Fault benefits had been exhausted.

Additionally, the respondent never advised the patient of the respondent's position that that the availability of additional coverage in the amount of $150,000 was contingent on her signing the NF 11 and sending it back to respondent.

If respondent's claims examiner had actually issued the NF 11 form dated 9/28/20, then logic follows, that the denial alleging exhaustion of basic No Fault benefits should not have been issued on 9/8/20. Therefore, it is also concerning that **respondent prematurely issued the general denial dated 9/8/20.**Benefits under said policy were available under Additional Personal Injury Protection coverage, therefore the policy in issue was not exhausted.

Assuming that respondent had mailed the NF 11 form dated 9/28/20, respondent's denial dated 9/8/20 was prematurely issued. This denial was theoretically issued at least 30 days prematurely- allowing for 20 days between the date of the NF 11 form dated 9/28/20 allowing five days for mailing to the patient and five days for mailing back from the patient. (This arbitrator still maintains that there was no credible proof of mailing.)

The denial dated 9/8/20 is also misleading because it suggests that no additional benefits were available after Basic PIP was exhausted. However, the policy was not exhausted because the aforenoted policy provided an additional $150,000.00 in Additional Personal Injury Protection as PIP benefits.

However, the respondent's appeal confirmed that additional insurance was available. The brief stated:

"Additionally, to the extent that the Applicant is entitled to recover from the APIP endorsement, the claim should be denied without prejudice to resubmit with a completed NF-11."

Further, the Master Arbitrator directed that there be a determination as to whether the aforenoted policy benefits were exhausted-this encompasses all No- Fault Benefits-both Basic and Additional Personal Injury Protection.

The respondent knew that if there was no signed NF-11 from the patient, then the respondent would have been liable for only $50,000 in coverage and not an additional $150,000. However, if the N-11 forms were returned, respondent would be required to provide $150,000 in additional personal injury protection.

On the proof submitted, I am constrained to find that the denial dated 9/8/20 cannot be sustained due to the fact the denial was issued when additional personal injury protection was available. Respondent issued this denial without allowing for the NF-11 form dated 9/28/20 (assuming it was actually mailed to the patient) to be "sent" to the patient.

Waiver of defense:

Therefore, the basis for the denial was erroneous because the patient was entitled to an additional $150,000 in PIP benefits and coverage. The record fails to establish proof of mailing of the NF 11 forms from respondent to the patient. Therefore I am constrained to find that respondent has waived its right to require a signed NF 11 form from the patient and cannot deny the patient's entitlement to receiving additional personal injury protection in the amount of $150,000.00. In Hosp. for Joint Diseases v Allstate Ins. Co., 21 AD3d 348, 348 [2d Dept 2005] held that "…, the defendant's failure to assert this statutory-exclusion defense within 30 days of the receipt of the no-fault claim constituted a waiver (*see Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co.*, 90 NY2d 274, 286, 683 NE2d 1, 660 NYS2d 536 [1997];*Westchester Med. Ctr. v American Tr. Ins. Co.*, 17 AD3d 581, 793 NYS2d 489 [2005]). Accordingly the plaintiff was entitled to summary judgment on the first cause of action."

Further in N.Y. & Presbyterian Hosp. v. Am. Transit Ins. Co., (App Div, 2nd Dept 2001) 287 A.D. 2d 699, the court held also found that a respondent had waived the right to object to the adequacy of the claims forms within 10 days of receipts was a waiver of any defenses: "With respect to the defendant's remaining arguments, we find that its failure to object to the adequacy of the respondent's claim forms within 10 days of receipt constituted a waiver of any defenses based thereon (*see*, 11 NYCRR 65.15 [d];*Mount Sinai Hosp. v Triboro Coach, supra; Presbyterian Hosp. v Aetna Cas. & Sur. Co.*,233 AD2d 431, 433;*St. Clare's Hosp. v Allcity Ins. Co.*,201 AD2d 718, 720)."

A carrier is not mandated to request a signed NF-11 form. In this claim, the credible evidence establishes that respondent failed to establish mailing of the NF-11 forms. Therefore this respondent has failed to establish that it properly and timely complied with 11 NYCRR 65-3.5(h). The respondent failed to establish that it "deliver(ed) the prescribed agreement [NF-11] to the patient as soon as it is known the claim is payable under an additional personal injury protection endorsement." Due to the fact there is no credible proof of mailing of any of the so-called NF-11 forms, the respondent has waived its right to assert this defense. The respondent has waived this defense.

Therefore, if the NF-11 forms were not shown to have been timely and actually mailed as of the date of the hearing conducted before this arbitration on 2/18/21, then respondent cannot assert a defense the patient did not return the signed NF-11 since there is no credible evidence that the patient received the NF-11 form. If she did not receive the form, commonsense supports the concept that the patient could not sign the form. The respondent cannot assert this defense months after the first hearing, and the defense that the signed NF-11 form was not returned amounts to a waiver of this defense. Respondent failed to successfully establish this defense and failed to even discuss this defense at the hearing which took place on 2/18/21.

The prematurely issued denial dated 9/8/20 which stated that there was exhaustion of **basic** policy limits cannot be sustained because additional benefits under the policy and endorsements existed. This denial was issued **prior** to the existence of the NF 11 form dated 9/28/20.

Additionally, this issue had previously been ruled on by Master Arbitrator Joseph O'Brien in Lam Quan MD PC, Best Care Physical Therapy P.C., Promise Healing Acupuncture/Injured party and American Transit Insurance Company, AAA Assessment No. 99-19-1150-2698, AAA Case No. 17-19-1150-2698. Master Arbitrator O'Brien held

> "On the issue of whether the arbitrator erred as a matter of law in awarding the subject claim despite respondent's argument that the underlying no-fault insurance policy limit was exhausted, the arbitrator noted respondent's argument ". . . that reimbursement cannot be awarded under the additional personal injury protection endorsement 'as the claimant failed to submit a completed Additional PIP Subrogation Agreement (NF-11)'."

The arbitrator then quoted the Regulation at 11 NYCRR 65-3.5(h) as follows:

> When benefits are claimed under an additional personal injury protection endorsement, the insurer may require that the applicant execute a prescribed subrogation agreement (NYS form NF-11) prior to the payment of any benefits. If the insurer shall impose the above requirement, it shall deliver the prescribed agreement to the applicant as soon as it is known that the claim is payable under an additional personal injury protection endorsement.

The arbitrator went on to explain in detail,

> Respondent's "Exhibit J" shows the NF-11 was sent to Assignor "c/o Law Offices of Costas M. Elides, P.C." on October 24, 2019 and December 2, 2019. However, according to Respondent's "Exhibit N" the law firm Ginarte, O'Dwyer, Gonzalez, Gallardo &

> Winograd, LLP actually represented Assignor. Thus, based on the evidence submitted Respondent failed to establish it delivered the prescribed agreement to Assignor or his attorney as mandated by the Regulations. Therefore, all additional PIP benefits are due and owing regardless of the fact a signed NF-11 has not been received.

On appeal, respondent does not explain any failing in the above explanation but, instead, cites to its Exhibit 1, which respondent also does not explain. Submission of an exhibit without explaining its relevance to respondent's position is of no value. (We cannot make an argument on behalf of respondent's exhibit.)

Additionally, applicant's counsel states, "Appellant/Respondent subsequently filed this appeal. Appellant/Respondent has noticeably included the very letter from Costas M. Eliades, PC that Arbitrator Wiener precluded." Of course, we agree with applicant's counsel that ". . . it is outside the scope of a Master Arbitrator to review new evidence

that was not made available to the lower arbitrator." *See, Matter of*

Aleman, supra. For the foregoing reasons, we find that the arbitrator

did not err in holding:

> Thus, based on the evidence submitted Respondent failed to establish it delivered the prescribed agreement to Assignor or his attorney as mandated by the Regulations.
> Therefore, all additional PIP benefits are due and owing regardless of the fact a signed NF-11 has not been received.

Accordingly, we find that the arbitrator's award was not irrational and was not in error as a matter of law."

Directive of Master Arbitrator Award

Master Arbitrator Richard Ancowitz directed in the aforenoted Master Arbitration award that this new hearing be conducted in order to ascertain if respondent's exhaustion defense had merit. I do not find that respondent has carried their burden in demonstrating that their exhaustion defense has merit. The defense as to exhaustion has no merit.

The denial dated 9/8/20 was misleading and specifically stated that "The basic policy limits on this claim have been exhausted. No further payments will be allowed".

Additionally, respondent by its claim examiner set forth a misleading basis for the denial due to the fact that additional PIP coverage in the form of additional personal injury protection in the amount of $150,000 existed and was available for this patient when the 9/8/20 denial was issued. Respondent has failed to show that the patient did not receive the NF-11 forms. The denial failed to acknowledge that additional personal injury protection in the amount of $150,000.00 was available. The denial issued on 9/8/20 was "deceptive" and failed to also state if the additional personal injury protection was available or denied. The denial was misleading because it referred to only basic PIP coverage and failed to acknowledge that as of 9/8/20, the patient had $150,000 in additional personal injury protection available. This fact is disturbing because respondent represents that it had mailed the NF-11 form prior to the denial. Therefore, this claims examiner should have fairly and accurately advised the patient as to the actual coverage available because she was not the insured but a passenger in respondent's vehicle.

Commonsense:

Common sense also dictates that if the patient actually received the NF-11 form or her attorney received this form, someone would have found out about that there was $150,000 in additional benefits, and

Common sense also suggests that if the patient actually knew about the availability of $150, 000.00 in non-taxable PIP benefits, the patient would have signed the NF-11 form.

The general denial dated 9/8/20 cannot be sustained.

Further, the same claim examiner who issued the denial dated 9/8/20 is alleged to have produced the NF-11 forms dated 8/22/20 and 9/28/20 which required the patient to sign in order to obtain additional no fault coverage. Clearly, if the general denial dated 9/8/20 [based on basic policy exhaustion] was knowingly issued prior to the 9/28/20 NF-11 form, then this claim examiner erroneously and prematurely issued a defective denial which was based on a lack of disclosure and prior to the 'alleged' mailing of the second NF-11 form. By issuing the 9/8/20 respondent sent a misleading and confusing denial which suggested there were no additional benefits.

It is crucial to note that respondent failed to disclose the foregoing set of facts at the first hearing with Arbitrator Gyimesi. The first acknowledgement of this issue of additional benefits were suggested in the respondent's appeal submission to the master arbitration.

In accordance with the directive of the Master Arbitrator Award of Richard Ancowitz I am constrained to find that respondent has not carried their burden in demonstrating that their exhaustion defense has merit. The defense as to exhaustion has no merit.

Therefore if the exhaustion of policy defense is found to be lacking in merit, an award must be entered for applicant in the amount sought, given there is no need to relitigate issues of medical necessity, which were settled by the arbitrator herein previously.

The claim is granted for $912.29.

Furthermore, I am constrained to find that respondent has submitted evidence which establishes that it failed to show the patient did not return the NF-11 forms because respondent failed to establish credible mailing of said forms in the first instance. Therefore it is also not necessary to require the patient to file for a new arbitration for No- fault benefits pursuant to the Additional Personal Injury Protection endorsement. The evidence established that respondent had waived the requriement for a signed NF-11 (as noted herein). This issue was included within the directive to ascertain the issue of exhaustion. The subject policy is not exhausted because there remains $150,000 in additional PIP.

Respondent placed the issue of policy exhaustion before the Master Arbitrator. However, policy exhaustion for this case includes Basic PIP and Additional PIP. The defense of policy exhaustion was not sustained by the evidence due to the fact that the patient was entitled to Additional Personal Injury Protection benefits as set forth in respondent's policy endorsement. Additionally, the evidence establishes that respondent failed to credibly prove mailing of the NF-11 forms to the patient and attorney. Therefore I am constrained to find at this point in time after the first hearing before Arbitrator Gyimesi, respondent has waived the defense of requiring a signed NF-11 form. Therefore the patient is entitled to Additional Personal Injury Protection provided by the subject policy.

In accordance with good claims practice required by the No Fault regulation, tt is also directed and requested that the parties advise the patient and her 'accident' attorney by mail with a copy of this award as to the entitlement of PIP coverage under the Additional Personal Injury Protection endorsement.

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**
	Hudson Pro Ortho and Sports Medicine	**06/08/17 - 06/08/17**	**$912.29**	**Awarded: $912.29**
Total			**$912.29**	**Awarded: $912.29**

B. The insurer shall also compute and pay the applicant interest set forth below. 04/25/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Respondent shall compute and pay the Applicant the amount of interest computed from the date set forth above 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

Applicable attorney fees on the amount awarded in accordance with 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, Sandra Adelson, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

02/20/2021
(Dated)

Sandra Adelson

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:
15508b32320298eeaf1dd94ba7fd7276

Electronically Signed

Your name: Sandra Adelson
Signed on: 02/20/2021