

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Speedy Recovery Equipment & Supplies INC (Applicant)	AAA Case No.	17-19-1134-4725
	Applicant's File No.	00041300
- and -	Insurer's Claim File No.	1029382-01
American Transit Insurance Company (Respondent)	NAIC No.	16616

ARBITRATION AWARD

I, Pauline Molesso, 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 03/23/2021
Declared closed by the arbitrator on 03/23/2021

Sasha Hochman from Drachman Katz, LLP participated for the Applicant

Helen Cohen from American Transit Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,089.04**, 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 Assignor was 33 year old female who was the driver of a motor vehicle involved in an accident on 5/23/18. Thereafter, the Assignor sought medical treatment. Applicant seeks reimbursement for medical equipment, dispensed on 11/5/18, totaling \$1,089.04 in dispute. Respondent denied the claim based on workers compensation being primary and a lack of medical necessity, relying on the IME of Dr. Roth, held 9/12/18.

4. Findings, Conclusions, and Basis Therefor

This case was conducted using the documents submitted by the parties in the ADR Center, maintained by the American Arbitration Association, and the oral arguments of the parties. Any documents in the ADR Center are hereby incorporated into this hearing. I have reviewed all the relevant documents. No witnesses testified at this hearing.

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), 910 N.Y.S.2d 403 (Table), 2010 N.Y. Slip Op. 50708(U), 2010 WL 1630124 (App. Term 2d, 11th & 13th Dists. Apr. 13, 2010). 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); Response Equipment, Inc. v. American Transit Ins. Co., 15 Misc.3d 145(A), 841 N.Y.S.2d 823 (Table), 2007 N.Y. Slip Op. 51176(U), 2007 WL 1662679 (App. Term 2d & 11th Dists. June 8, 2007). The Appellate Courts have held that the burden of proof is quite low in determining whether workers' compensation is primary. *See e.g.* Parkway Mgmt., PLLC v. American Transit Ins. Co., 39 Misc.3d 133 (App. Term 2 Dept. 2013).

It has also been held that where a person is injured while driving a for-hire vehicle with "TC" plates which is owned by a livery company and insured under a livery policy, the insurer has met its burden of raising a question of fact as to whether the injured person was injured in the course of employment, a question best suited for determination by the Workers' Compensation Board. RX Warehouse Pharmacy, Inc. v. American Transit Ins. Co., Index No. 51265/13 (Civ. Ct. Kings Co., Richard J. Montelione, J., Nov. 13, 2015).

In support of their position, Respondent submitted the police report, which indicates the vehicle had "TC" plates, the affidavit of Dudley Mclean, Underwriting Manager, stating the policy at issue was issued to a "for hire" vehicle, the insurance documents, letter from the base, copy of the TLC driver's license, and the NF-2, in which box 16 which asks whether in the course of employment at the time of the accident is checked off "yes." Respondent also notes the linked award, AAA case no. 17-19-1124-0287, which upheld this defense.

In Compas Medical, P.C. v. American Transit Ins. Co. 2015 NY Slip Op 51675 (U) (App. Term. 2nd Dept Nov. 13, 2015), the Court held, in relevant part:

Indeed, the application for no-fault benefits form, which was signed by plaintiff's assignor under penalty of perjury, states that the assignor was in the course of his employment when he was injured, an admission that is sufficient to raise a question of fact as to whether the assignor was acting as an employee at the time of the accident.

Based on the totality of the evidence and the parties' arguments, I find in favor of the Respondent. The question in a case such as this is not whether the Assignor was in the course of employment, but rather, whether Respondent submitted sufficient evidence to raise a question of fact. In this instance, Respondent has met that burden. The Appellate Courts have held that the burden of proof is quite low in determining whether worker's compensation is primary. In Parkway Mgmt., PLLC v. American Transit Ins. Co., 39 Misc. 3d 133 (App Terms 2nd Dept. 2013), the Court held "We find that defendant's proof, including the police accident report, was sufficient to raise a question of fact as to whether plaintiff's assignor had been acting as an employee at the time of the accident, which issue must be resolved by the Workers' Compensation Board." Therefore, based on the foregoing, the claim will be dismissed without prejudice pending a decision from the Workers Compensation Board as to whether the Assignor was in the course of his employment at the time of the accident.

Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of hearing.

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 Nassau

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

03/23/2021
(Dated)

Pauline Molesso

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:
cc0d9ffb43c45a1ebef982135bfe9dc5

Electronically Signed

Your name: Pauline Molesso
Signed on: 03/23/2021