

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Paramount Medical Services PC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-19-1143-4645

Applicant's File No. 19-005856

Insurer's Claim File No. 1042125-04

NAIC No. 16616

ARBITRATION AWARD

I, Anthony Kobets, 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 03/04/2021
Declared closed by the arbitrator on 03/04/2021

Robert Bott, Esq. from The Licatesi Law Group, LLP participated in person for the Applicant

Greg Etienne, Esq. from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,880.21**, 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

In dispute is the Applicant's bill totaling \$1880.21 for a medical evaluation, outcome assessment testing and a pain management injection with guidance performed on the patient (GR) on 1/28/19 as a result of injuries sustained in a motor vehicle accident on October 10, 2018.

Respondent denied the claims based, inter alia, upon the grounds that the Claimant is eligible for workers' compensation as Claimant was in the course of employment at the time of the accident. The issue is whether this matter is ripe for arbitration and if so, whether or not the Applicant is entitled to No-fault benefits.

4. Findings, Conclusions, and Basis Therefor

The Patient (GR) was a 22 year old male driver who was involved in an automobile accident on October 10, 2018. Thereafter on 1/28/19, the patient underwent a medical evaluation, outcome assessment testing and a pain management injection with guidance performed by the Applicant. Applicant seeks no-fault reimbursement for these services.

Respondent timely denied the bill in dispute herein indicating, inter alia, that Claimant is eligible for Workers' Comp., as Claimant was in the course of employment at the time of the accident. As a result, all medicals should be submitted to the worker's compensation carrier ATIC is requesting that we be placed on notice regarding any workers' compensation hearing.

Respondent's counsel argued that Workers' Compensation was primary because the evidence demonstrated that the Assignor was in the course of his employment at the time of the accident. In support of the case herein, Respondent submitted the police accident report, a Certificate of Liability Insurance with a Declarations page, and an Affidavit from Dudley McLean, Respondent's Underwriting Manager. Question #16 on the NF-2 form was also left blank regarding whether the diver was in the course of employment at the time for the accident.

It is well settled that, when an individual is injured in an automobile accident during the course of his employment, the individual's employer's Workers Compensation insurance is primary to the no-fault automobile insurance associated with the automobile accident. First, Insurance Law section 5102 (b) (2) provides in pertinent part as follows: (b) "First party benefits" means payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, less: (2) Amounts recovered or recoverable on account of such injury under state or federal laws providing social security disability benefits, or workers' compensation benefits, or disability benefits under article nine of the workers' compensation law, or Medicare benefits, other than lifetime reserve days and provided further that the Medicare benefits utilized herein do not result in a reduction of such person's Medicare benefits for a subsequent illness or injury.

11 NYCRR 65-3.16 (a) (9) provides: Pursuant to section 5102(b)(2) of the Insurance Law, when the applicant is entitled to workers' compensation benefits due to the same accident, the workers' compensation carrier shall be the sole source of reimbursement for medical expenses. In addition, the Appellate Division, First Department in Arvatz v. Empire Mut. Ins. Co., 171 A.D.2d 262, 575 N.Y.S.2d 836 (1st Dept. 1991) stated: "A reading of the applicable Insurance Department regulation (11 NYCRR § 65-3.19), however, reveals that the no-fault insurer is obligated to pay first-party benefits only if the workers' compensation carrier "denies liability for payment of benefits, in whole or in part." Importantly, there has been no such denial by the Worker's Compensation Board in the case herein. Only if the Workers' Compensation Board, denies liability would plaintiff be entitled to collect no-fault benefits while pursuing his claim with the Workers' Compensation Board. As between no-fault and workers' compensation, the

latter is "primary" and an injured party may not "'elect' between work[ers'] compensation benefits and no-fault benefits." See, Carlo Service Corp. v. Rachmani, 64 A.D.2d 579, 580, 407 N.Y.S.2d 700.

Furthermore, 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). An insurer's contention that recovery of No-Fault benefits is barred pursuant to Workers' Compensation Law § 11 should not be entertained, but rather the claims must be referred to the Workers' Compensation Board for a determination as to whether the plaintiffs have a valid cause of action to recover No-Fault benefits or whether they are relegated to benefits under the Workers' Compensation Law, as said Board has primary jurisdiction to determine factual issues concerning coverage under the Workers' Compensation Law. LMK Psychological Services, P.C. v. American Transit Ins. Co., 64 A.D.3d 752, 882 N.Y.S.2d 719 (2d Dept. 2009). Primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board and it is therefore inappropriate for the courts to express views with respect thereto pending determination by the board; thus, where there are factual questions as to the injured person's status as an independent contractor or an employee, resolution is best suited for determination by the board, and the court should refer the matter to the board for a hearing and determination as to whether the injured person is relegated to benefits under the Workers' Compensation Law. Dunn v. American Transit Ins. Co., 71 A.D.3d 629, 894 N.Y.S.2d 895 (2d Dept. 2010).

A defendant or insurer must show only that "there is potential merit to its claim that the assignor was employed at the time of the accident so as to trigger a determination by the Workers Compensation Board", Lenox Hill Radiology v. American Transit Insurance Company, 19 Misc. 3d 358, 851 NYS 2nd 861 (NY City Civil Court 2009). In Lenox Hill, the court held that a police accident report indicating that "the assignor is a taxicab driver who was injured while driving a taxicab," is sufficient to establish that the assignor was injured in the course of his daily employment. The court dismissed that complaint, without prejudice, holding that there must be a determination by the Workers Compensation Board to determine coverage.

Based upon a review of the evidence herein and the arguments of counsel, I find that the Respondent has presented sufficient evidence to raise the issue of whether Worker's Compensation is applicable herein. Where an insurer raises a defense that the insured was injured in the course of employment, primary jurisdiction over the claim lies with the Workers Compensation Board. Arvatz v. Empire Mutual Ins. Co., 171 A.D.2d 262,

575 N.Y.S.2d 836 (1st Dept. 1991). **Therefore, this case awaits determination from the Workers Compensation Board first and the remaining issues are therefore deemed moot. Accordingly, Applicant's \$1880.21 claim for date of service 1/28/19 is dismissed without prejudice.** This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of the 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, Anthony Kobets, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

04/04/2021
(Dated)

Anthony Kobets

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:
80d57d28490d0e9319cfed116392dcdbd

Electronically Signed

Your name: Anthony Kobets
Signed on: 04/04/2021