

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Handy Physical Therapy PC
(Applicant)

- and -

New South Insurance Company
(Respondent)

AAA Case No. 17-19-1147-9058

Applicant's File No. 3092590

Insurer's Claim File No. 3036278

NAIC No. 12130

ARBITRATION AWARD

I, Gregory Watford, 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 (JGH)

1. Hearing(s) held on 03/09/2021
Declared closed by the arbitrator on 03/09/2021

Elvira Messina from Law Offices of Andrew J. Costella Jr., Esq. participated for the Applicant

Angela Venetsanos from Law Offices of Bobbi J. Vilacha participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 5,385.46**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended the amount in dispute to \$4,928.00 in compliance with the fee schedule.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that the amended amount in dispute (\$4,928.00) is consistent with the fee schedule.

3. Summary of Issues in Dispute

The dispute arises from the underlying automobile accident of September 28, 2017, in which the Assignor, a 40-year-old female, was a passenger. At issue in this matter are the fees associated with physical therapy treatment services provided to Assignor from 6/26/18 through 11/25/19. Applicant submitted the bills to Respondent for payment. Respondent timely denied the bills on the grounds that Assignor's claims are eligible for Worker's Compensation benefits and argued the instant matter should be dismissed without prejudice.

The issues to be decided in this case are:

Whether Applicant established entitlement to No-Fault compensation physical therapy treatment services provided to Assignor.

Whether Assignor was working within the scope of her employment when the accident occurred.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions and documents contained in the American Arbitration Association's ADR Center Electronic Case File (ECF). These submissions constitute the record in this case. This case was decided on the submissions of the parties as contained in the ECF and the oral arguments of the parties' representatives. There were no witnesses.

Pursuant to Insurance Law § 5106(a) and the Insurance regulations, an insurer must either pay or deny a claim for motor vehicle no-fault benefits, in whole or in part, within 30 days after an applicant's proof of claim is received (*see* Insurance Law § 5106[a]; 11 NYCRR 65-3.8[c]; *see also* 11 NYCRR 65-3.5). Infinity Health Products, Ltd. v. Eveready Ins. Co., 67 A.D.3d 862, 864, 890 N.Y.S.2d 545, 547 (2d Dept. 2009). A claimant's prima facie proof of claim for no-fault benefits must demonstrate that the prescribed claim forms were mailed to and received by the insurer and are overdue. Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 506, 14 N.Y.S.3d 283, 290 (2015). Applicant's proof is also in Respondent's denials, which acknowledged receipt of the bills.

After reviewing the record and evidence presented, I find that Applicant established a prima facie case of entitlement to reimbursement of its claim. Viviane Etienne Med Care, PC v. Countrywide Ins. Co., *Id.* Once an applicant establishes a prima facie case, the burden then shifts to the insurer to prove its defense. *See Citywide Social Work & Psych. Serv. P.L.L.C v. Travelers Indemnity Co.*, 3 Misc. 3d 608, 2004, NY Slip Op 24034 (Civ. Ct., Kings County 2004).

Respondent denied all bills on the ground that Assignor was working at the time of the accident and therefore, all medical services related to her related injuries should be covered under Worker's Compensation and not no-fault. Respondent's representative maintained that the matter should be referred to the Workers' Compensation Board for determination as to whether the Assignor was in the course of his employment at the time of the underlying accident.

The issue before this arbitrator is whether there is any potential merit to Respondent's claim that there is a question of fact for consideration by the Workers' Compensation Board. If Assignor was working within the scope of his employment when the accident occurred, the claim should go to the Workers' Compensation Board first, for a determination as to that issue. If it is determined the accident did not occur within the scope of the Assignor's employment, and the accident involved a motor vehicle such that no-fault insurance would apply, then it should be decided by a no-fault arbitrator.

Where the availability of workers compensation hinges upon the resolution of questions of fact or upon mix questions of fact and law, the plaintiff may not choose the courts is the forum for resolution of such questions. The legislature has placed the responsibility for these determinations with the Worker's Compensation board. Arvatz v. Empire Mutual Insurance Company, 171 A.D. 2d 262 (1st Dept. 1991). The board has "primary an exclusive jurisdiction" to resolve the question of coverage and plaintiff has no choice but to litigate the issue before the board. Liss v. Trans Auto System, Inc., 69 N.Y.2d 15. An injured person may not elect between Worker's Compensation benefits and no-fault benefits. Carlo Service Corp. v Rachmani, 64 A.D. 2d 579 (1st Dept. 1978). The Worker's Compensation board has primary jurisdiction to determine factual issues concerning coverage under the Worker's Compensation law. AR Medical Rehabilitation PC v. American Transit Insurance Company, 27 Misc. 3d 133 (A), 92 NYS 2d 403 (App. Term 2d, 11th and 13th District 2010).

The Arvatz court went on to say 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."....As between no-fault and workers compensation, the latter is "primary" and an injured party may not "elect' between workers compensation benefits and no-fault benefits." (Carlo Service Corp. v. Rachmani, 64 AD2d 579, 580, quoting Grello v. Daszykowski, 58 AD2d 412, 415, n2, rev'd on other grounds 44 NY2d 894.) Moreover, Insurance Law Sec. 5102(b)(2) expressly provides that workers compensation benefits serve as an offset against 1st-party benefits payable under no-fault as compensation for "basic economic loss."

In support of its argument, Respondent produced the Global denial dated 12/20/17 asserting that Assignor is eligible for Worker's Compensation. Respondent also provided copy of the MV-104 accident report which indicated that Assignor was a passenger in a 2013 Ford Van owned by PCC Cleaning Services, Inc and was occupied by a total of five (5) individuals.

Respondent also produced a copy of the NY Commercial Vehicle Declaration page which listed the van make, model and VIN# of the 2013 Ford Van listed in the accident report and that Respondent issued the commercial policy to PCC Cleaning Services, Inc. with the policy number.

Respondent also provided a copy of LexisNexis search which listed the information related to the accident including the date of the accident, the accident report number and the names of the drivers which matched the names listed on the accident report.

Respondent also provided the ISO Claimsearch Match Report Summary. A review of the report listed the names of all occupants of the van occupied by Assignor which was owned by PCC Cleaning Services which were the same as the names listed on the accident report. The report also listed the claim number that is identical to the claim number that is listed on all of the NF-10s, the date of the accident in question and the location of the accident. The report listed that the policy related to the instant claim is a commercial automobile policy and the claims made on the policy were for bodily injury and related medical payments from Respondent's policy.

The ISO report also listed a matching claim for the same vehicle, same drivers, same occupants, same date, and same vehicle. The matching claim listed the policy for the matching claim as a Workers Compensation policy. More importantly there is a notation that indicated the injured occupants of the van owned by PCC Cleaning Services, Inc. were employees riding in a work van when struck by another vehicle.

Applicant's counsel did not submit any evidence that demonstrated that the information provided by Respondent was not accurate or not credible. Moreover, Applicant did not provide any documents indicating that the claim was previously rejected by the Worker's Compensation Board.

Based upon the evidence and arguments submitted by the parties and applying the aforementioned principles of law to the facts of the instant matter, I find there is a sufficient question of fact as to whether or not the Assignor was injured during the course of employment so as to require a determination by the Worker's Compensation Board. It is not incumbent on the Respondent to prove that the Assignor was actually working. Respondent need only establish that there is potential merit to the claim that the Assignor may have been working on the date of loss. Liss v. Trans. Auto Systems, 68 NY2d 15, 505 NYS2d 831 (1981); Arvatz v. Empire Mutual Ins. Co. 171 AD2d 262, 575 NYS2d 836 (1st Dept 1991)). Lenox Hill Radiology, PC v. American Transit, 18 Misc. 3d 1136 (A) (Civ. Ct. NY 2008); AB Medical Services, PLLC v. American Transit Insurance Company, 8 Misc. 3d 127A, 801 NYS 2d 776 (App. Term 2d Dept. 2005).

I find that Respondent has met that burden. As stated above, ISO report provided by Respondent sufficiently raised an issue of fact that must be decided by the Worker's Compensation Board.

Accordingly, Applicant's claim 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, without merit, 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 Westchester

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

04/08/2021
(Dated)

Gregory Watford

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:
a9f7439ff2955d4db1793f9ad1f492c2

Electronically Signed

Your name: Gregory Watford
Signed on: 04/08/2021