

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

P & D Merchandise Corp
(Applicant)

- and -

Ace American Insurance Company
(Respondent)

AAA Case No. 17-19-1136-2261

Applicant's File No. 114.130

Insurer's Claim File No. 8B57869459488

NAIC No. 22667

ARBITRATION AWARD

I, Eileen Hennessy, 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-T.C.

1. Hearing(s) held on 06/29/2021, 08/10/2021
Declared closed by the arbitrator on 08/10/2021

Douglas Mace from Tsirelman Law Firm PLLC participated in person for the Applicant

Desiree Ortiz from Robyn M. Brilliant, P.C. participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,937.13**, 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 record reveals that the Assignor-T.C., a 20-year-old female, claimed injuries as the passenger of a motor vehicle involved in an accident that occurred on 1/30/2018. Applicant billed for multiple pieces of durable medical equipment ("DME") provided on 2/12/2018 and 2/23/2018. Respondent indicated that the bills, which contained no claim number and the incorrect policy number, were received for the first time with the AR-1. The issue to be determined is whether Applicant has established a prima facie case of entitlement to reimbursement?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement for multiple pieces of DME. This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing held via Zoom.

In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations.

BILLS NOT RECEIVED

Applicant claimed that the bills for dates of service 2/12/2018 (\$983.00 and \$110.00) and 2/23/2018 (\$844.13) were received for the first time with the AR-1 and are therefore premature. The evidence herein demonstrated that the Respondent did not issue any payments or claim specific denials for these bills.

An Applicant establishes prima facie showing of entitlement to No-Fault benefits under Article 51 of the Insurance Law by "submitting evidence that payment of no-fault benefits is overdue, and proof of its claim, using the statutory billing form, was mailed to and received by the defendant insurer." Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 14 N.Y.S. 3d 283 (Court of Appeals, 2015).

Within 30 calendar days after proof of claim is received, the insurer shall either pay or deny the claim in whole or in part. 11 NYCRR §65-3.8(c).

A Denial of Claim form (NF-10) is sufficient to demonstrate receipt. Eagle Surgical Supply, Inc. v. Allstate Ins. Co., 42 Misc 3d 145(A), 2014 NY Slip Op 50343(U)(App. Term, 2 Dept, 2 , 11 & 13 Jud Dists., 2014).

Once Applicant establishes its prima facie case, the burden of proof shifts to Respondent to come forward with admissible evidence demonstrating the existence of a material issue of fact. Amaze Medical Supply Inc. v. Eagle Ins. Co., 2 Misc.3d 128(A), 2003 N.Y. Slip Op. 51701(U)(App. Term, 2 Dept, 2 & 11 Jud Dists., 2003).

At the hearing Respondent's counsel argued that Respondent did not receive the bills from Applicant prior to the commencement of the within arbitration. Furthermore, Respondent's No-Fault Adjuster, Shirley Liew, in an affidavit dated 10/18/19, indicated that the bills at issue for dates of service 2/12/2018 (\$983.00 and \$110.00) and 2/23/2018 (\$844.13) were never received by ESIS, for medical services allegedly provided to Assignor, prior to receipt of the AR-1.

Applicant has submitted three bills and proofs of mailing in the form of United States Postal Service (USPS) Form 3877, certificates of mailing, postmark dated 3/8/2018 for the bills for date of service 2/12/2018, and postmark dated 3/15/2018 for the bill for date

of service 2/23/2018. The certificates of mailing list Applicant as the sender and Hertz Claim Management, P.O. Box 719, Park Ridge NJ 07656 as the addressee, Assignor-T.C.'s name, the date of service, the DME in dispute, and the amount of the bill.

"The presumption that an addressee received an item by mail may be created by either proof of actual mailing or a standard office practice or procedure designated to ensure that items are properly addresses and mailed." Amaze Medical Supply Inc. v. Allstate Ins. Co., 3 Misc.3d 133A, 787 N.Y.S.2d 675 (App. Term 2d Dept. 2004). "It is a well-established rule that letters properly addressed, stamped and mailed are presumed received by the addressee." *In the Matter of the Arbitration between Allstate Ins. Co and Jennifer Patrylo*, 144 A.D.2d 243, 533 N.Y.S.2d 436 (1 Dept. 1998).

"The burden then falls upon the addressee to present evidence sufficient to overcome the presumption and establish nonreceipt." Vita v. Heller, 97 A.D.2d at 464, 467 N.Y.S.2d 652 (2d Dept. 1983). The "rebuttal may be in the form of contesting the mailing or the delivery." Vita v. Heller, 97 A.D.2d at 465. A mere denial of receipt is insufficient to overcome the presumption such mailing occurred. Engel v. Licherman, 62 NY2d 943, 479 N.Y.S.2d 188 (1984).

Respondent has submitted an affidavit from Shirleyn Liew, a No-Fault adjuster employed by ESIS, Respondent's third-party claims administrator, dated 10/18/2019, which attests that Respondent received the bills in dispute for the first time with the AR-1.

Specifically, Ms. Liew notes in paragraph 12, "ESIS, and not *Hertz Claim Management*, is the third-party administrator for Ace American Insurance Company, the insurer for HERTZ in this matter". Ms. Liew further notes that the proper mailing address for ESIS, the proper third-party administrator is P.O. Box 6562, Scranton, PA 18505.

Ms. Liew also explained in paragraph 14 that her review of the now submitted bills demonstrates that "the bills do not indicate a claim number and contain an incorrect policy number relating to this no-fault claim. The correct claim number is IM01M010I00617".

Ms. Liew concluded in paragraph 15 stating, "Based upon the above procedures, as well as a careful and thorough review of this claim and no-fault file, the bills at issue for date of service 02/12/18 in the amount of \$983.00; date of service 02/12/18 in the amount of \$110.00; and date of service 02/23/18 in the amount of \$844.13 were never received by ESIS for medical services allegedly provided to [Assignor-T.C.]".

MISSING CLAIM NUMBER AND INCORRECT POLICY NUMBER

The proofs of claim submitted by Applicant contain no claim number and incorrectly list the policy number.

Arbitrator Glen Weiner addressed this issue in *New Way Medical Supply, Corp. and United Services Automobile Association*, AAA Case No.: 17-15-1024-3998, issued on 6/28/2017. Arbitrator Weiner determined in pertinent part:

Summary of Issues in Dispute

Assignor T.F. was involved in an automobile accident on February 10, 2011. On February 11 and March 21, 2011 Applicant New Way Medical Supply, Corp. located in Brooklyn, New York, provided durable medical equipment and supplies to Assignor. The proofs of claim submitted either contain no claim number or incorrectly list the claim number.

Two questions are presented herein:

Whether Applicant established a prima facie case; and

Whether a prior decision declaring that Applicant New Way Medical Supply Corp., was not a properly licensed entity entitled to reimbursement under the New York No-Fault Regulations should apply herein.

Findings, Conclusions, and Basis Therefor

...

Applicant New Way Medical Supply, Corp. as assignee of T.F. seeks \$3,807.53 reimbursement, with interest and counsel fees, under the No-Fault Regulations, for durable medical equipment and supplies provided to Assignor on February 11 and March 21, 2011.

Respondent United States Automobile Association insured the motor vehicle involved in the automobile accident. Under New York's Comprehensive Motor Vehicle Insurance Reparation Act (the "No-Fault Law"), New York Ins. Law §§ 5101 et seq., Respondent was obligated to reimburse the injured party (or his assignee) for all "reasonable and necessary" medical expenses arising from the use or operation of the insured vehicle.

[1] Respondent avers Applicant failed to establish a prima facie case. The proofs of claim submitted by Applicant either contain no claim number or incorrectly list the claim number. When this matter was first heard on December 5, 2016, both parties were directed to submit briefs addressing whether the lack of a proper claim number invalidates the proofs of claim. On February 6, 2017, Respondent submitted its brief. To date Applicant has failed to submit any brief as requested.

A written proof of claim, "including full particulars of the nature and extent of the injuries and treatment received and contemplated" must be submitted "as soon as reasonably practicable, but in no event later than 45 days after the date services are rendered." 11 NYCRR 65-1.1. Such proof of claim may be submitted on the prescribed forms, or another form that contains substantially the same information as the prescribed form. 11 NYCRR 65-3.2(f).

The submission of a claim form that does not include all of the statutory information is insufficient to trigger the carrier's obligation to pay or deny the claim. See Sound Shore Medical Center v. New York Central Mut. Fire Ins. Co., 106 A.D.3d 157 (2d Dept., 2013); Ortho Products &

Equipment, Inc. v. Eveready Ins. Co., 39 Misc.3d 146(A) (App. Term, 2013); Mount Sinai Hosp. v. Durst Transit, Inc., 117 A.D.3d 921 (2d Dept., 2014); Mount Sinai Hosp. v. New York Cent. Mut. Fire Ins. Co., 120 A.D.3d 561 (2d Dept., 2014).

In Sound Shore Medical the Second Department found that a claim form missing the policy number and other information was not the "functional equivalent" of the statutory form. Thus, it is logical to conclude that a statutory form missing the same information is likewise invalid.

Similarly, several my colleagues have concluded that proofs of claim lacking the proper claim number are a nullity, as it does not allow the carrier an opportunity to identify and process the claim. See Matter of Eastern Suffolk Chiropractic, PC, and GEICO Ins. Co., AAA No.: 17-15-1011-2699 (Arb. McAllister 2016) (A bill submitted with a cover-letter identifying the wrong claim number was not properly submitted); Matter of SMG Mediquip, LLC, and American Transit Ins. Co., AAA No.: 17-15-1024-0788 (Arb. Brandes 2016) (Bill submitted with the wrong claim number is defective). Matter of Harmony Psychological, PC and Country-Wide Ins. Co., AAA No.: 17-911-06394-13 (Arb. Greaves 2013) (Applicant fails to establish their prima facie burden where the submitted bill contains the wrong claim number, rendering it impossible for the carrier to identify even if mailing had been established.); Matter of Zwanger & Persiri Radiology Group, LLP, and Geico Ins. Co., AAA No.: 17-15-1008-7684 (Arb. Summa 2016) (Bill submitted with wrong claim number failed to provide the carrier with "sufficient information to identify" the claim.)

On this ground alone Applicant's request for reimbursement must fail.

...

Accordingly, Applicant's request for reimbursement is denied.

I concur with and adopt Arbitrator Weiner's reasoning. Applicant failed to establish a prima facie case when they failed to include the proper claim number and proper policy number on the bills. As the bills contained incorrect and missing information, there was insufficient information to identify and process the claims and determine whether the claims were properly submitted. Therefore, Applicant's claims for dates of service 2/12/2018 (\$983.00 and \$110.00) and 2/23/2018 (\$844.13) are denied.

MAILING OF THE BILLS

Having sufficiently described its procedures for the receipt of mail and stating that it has no record of having received a particular claim, an insurer may rebut the presumption of receipt established by the claimant. Compas Medical, P.C. v. Nationwide Ins., 46 Misc.3d 131(A), ___ N.Y.S.2d ___ (Table), 2014 N.Y. Slip Op. 51824(U), 2014 WL 7266256 (App. Term 2d, 11th & 13th Dists. Dec. 17, 2014). An affidavit of an insurer's No-Fault examiner may suffice to overcome the presumption that a proper mailing had occurred. E.g., Broad Street Acupuncture, P.C. v. American Transit Ins. Co., 39 Misc.3d 129(A), 971 N.Y.S.2d 69 (Table), 2013 N.Y. Slip Op. 50453(U), 2013 WL 1320436 (App. Term 2d, 11th & 13th Dists. Mar. 20, 2013). Where an affidavit of an insurer's claims representative suffices to establish that the insurer did not receive a claim form,

but the affidavit from the health service provider demonstrates that the claim form had been mailed to the insurer, an issue of fact exists whether the insurer's time to pay or deny the claim ever began to run. Compas Medical, P.C. v. 21st Century Ins. Co., 47 Misc.3d 128(A), ___ N.Y.S.3d ___ (Table), 2015 N.Y. Slip Op. 50388, 2015 WL 1422122 (App. Term 2d, 11th & 13th Dists. Mar. 16, 2015).

Comparing the relevant evidence presented by the parties, I accept Respondent's argument and find that Applicant has not met its prima facie burden as to the bills for dates of service 2/12/2018 (\$983.00 and \$110.00) and 2/23/2018 (\$844.13). Applicant relies on USPS Forms 3877, mailing certificates postmarked and signed by an employee of the USPS, that demonstrate that articles were mailed to Hertz Management Company at P.O. Box 719, Park Ridge NJ 07656 on 3/8/2018 and 3/15/2018. Applicant has failed to indicate where and how it obtained the incorrect name and address of mailing for the third-party administrator. As set forth above, the mailing of the no-fault claims to Hertz Management Company at P.O. Box 719, Park Ridge NJ 07656 was improper as ESIS is the proper third-party administrator for Respondent. Respondent has submitted an affidavit from an individual with personal knowledge indicating that they reviewed Respondent's records and the bills in dispute were not received prior to receipt of the AR-1. Applicant's documents establish that the bills were not properly mailed to Respondent. Furthermore, Applicant does not submit an affidavit from an individual with personal knowledge regarding the mailing of the bills in response to Respondent's proof. Therefore, Respondent has rebutted the presumption of mailing that attached to Applicant's proofs of claim.

Upon review of the credible evidence, I find Applicant has not demonstrated having satisfied its mailing obligation of the subject bills; accordingly, a presumption does not arise the NF-3s were received by the insurer. *See, Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y. 3d 498, 508-509 (2015). I find that the Applicant's claims were fatally sent to the wrong third-party administrator and address, utilizing an incorrect policy number and a missing claim number. I am more persuaded by the Respondent's evidence herein demonstrating the non-receipt of the disputed bills compared to the Applicant's proofs, which demonstrate that mailing of the subject bills was to the incorrect third-party administrator. Given the circumstances, I find that the Applicant has not demonstrated that the claims were timely presented to the Respondent.

CONCLUSION

Applicant's claim is denied in its entirety. This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.

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 DENIED in its entirety

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

09/08/2021

(Dated)

Eileen Hennessy

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:
0cbd18742147c54120c916d54336689d

Electronically Signed

Your name: Eileen Hennessy
Signed on: 09/08/2021