American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

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| Prisca John-Ogam PA , Dorrett Bryan NP (Applicant) | AAA Case No. | 17-22-1236-8222 |
| | Applicant's File No. | 86952, 86625 |
| - and - | Insurer's Claim File No. | 0666169510000002 |
| | NAIC No. | 22055 |
| Geico Insurance Company (Respondent) | | |

**ARBITRATION AWARD**

I, Aaron Maslow, 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 ["KW"]

1. Hearing(s) held on 07/05/2022
   Declared closed by the arbitrator on 07/05/2022

   Law Offices of Mark Bratkovsky P.C. from Law Offices of Mark Bratkovsky P.C. participated by written submission for the Applicant

   Jon Marconi, Esq., from Law Office of Goldstein, Flecker & Hopkins participated for the Respondent

2. The amount claimed in the Arbitration Request, **$955.68**, 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

Applicants commenced this New York No-Fault insurance arbitration, seeking as compensation $955.68 additional for performing an office visit or consultation and dry needling for Assignor, a 45-year-old female who was injured in a motor vehicle accident on Oct. 18, 2021. Applicant Prisca John-Ogam PA billed $324.69 for an "office visit" (Code 99244 assigned to consultation) and $950.00 for dry needling on Oct. 27, 2021. Respondent paid $259.76 for Code 99244, applying 80% per Ground Rule 11. It paid $525.00 for the dry needling, applying a reduction for multiple procedures. Applicant Dorrett Bryan NP billed $203.76 for an office visit and $950.00 for dry needling on Nov. 17, 2021. Respondent paid $163.01 for

the office visit, applying 80% per Ground Rule 11. It paid $525.00 for the dry needling, applying a reduction for multiple procedures. In a general denial dated March 23, 2022, Respondent asserted that the $50,000 in No-Fault coverage had been exhausted.

- Whether Applicants established entitlement to additional No-Fault insurance compensation for a consultation or office visit and dry needling performed for Assignor.

- Whether to sustain Respondent's fee defenses.

- Whether to sustain Respondent's proffered defense, asserted in a general denial, that the $50,000 available in No-Fault benefits has been exhausted.

4. Findings, Conclusions, and Basis Therefor

Appearances

For Applicant:

Law Offices of Mark Bratkovsky P.C. (elected to rely on submission)
1225 Franklin Avenue
Suite 325
Garden City, NY 11530

For Respondent:

Law Office of Goldstein, Flecker & Hopkins
2 Huntington Quadrangle
Melville, NY 11747
By: Jon Marconi, Esq.

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needling, applying a reduction for multiple procedures. In a general denial dated March 23, 2022, Respondent asserted that the $50,000 in No-Fault coverage had been exhausted.

This arbitration was organized by the American Arbitration Association, which has been designated by the New York State Department of Financial Services to coordinate the mandatory arbitration provisions of Insurance Law § 5106(b), which provides:

> Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party ["No-Fault insurance"] benefits, or additional first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of this section to arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent.

Both parties appeared at the videoconference hearing by counsel, who presented oral argument and relied upon documentary submissions. I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center as of the date of the hearing, said submissions constituting the record in this case.

Applicants elected to rely on its submission. Respondent appeared at the videoconference hearing by an employee, who presented oral argument and relied upon documentary submissions. I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center as of the date of the hearing, said submissions constituting the record in this case.

"[A] plaintiff demonstrates prima facie entitlement to summary judgment by submitting evidence that payment of no-fault benefits are overdue, and proof of its claim, using the statutory billing form, was mailed to and received by the defendant insurer." Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 501 (2015). "The court may, in its discretion, rely on defendant's documentary submissions establishing defendant's receipt of plaintiff's claims [citation omitted]." Lenox Hill Radiology MIA, P.C. v. American Transit Ins. Co., 19 Misc.3d 358, 363 (Civ. Ct. New York Co. 2008). An insurer's denial of claim form indicating the date on which it was received adequately establishes that the claimant sent, and that the defendant received, the claim. Ultra Diagnostics Imaging v. Liberty Mutual Ins. Co., 9 Misc.3d 97 (App. Term 9th & 10th Dists. 2005). Respondent's NF-10 denial of claim forms acknowledged receipt of Applicant's proofs of claim and proved partial payment of the bills embodied therein. Hence, I find that Applicant established a prima facie case of entitlement to No-Fault compensation.

An insurer is not required to pay a claim where the policy limits have been exhausted; its duties under the insurance contract cease where it has paid the full monetary limits. Hospital for Joint Diseases v. State Farm Mutual Automobile Ins. Co., 8 A.D.3d 533 (2d Dept. 2004). That coverage limits have been exhausted may

be asserted despite it not having been asserted in a timely denial of claim, as is the situation herein. New York and Presbyterian Hospital v. Allstate Ins. Co., 12 A.D.3d 579 (2d Dept. 2004).

Subsequent to timely denial of a claim on the ground of lack of medical necessity, a No-Fault insurer may pay uncontested claims and satisfy arbitration awards, such that if by the time the former claim is litigated the governing policy's coverage limits have been exhausted, the insurer may assert that fact as a defense. Harmonic Physical Therapy, P.C. v. Praetorian Ins. Co., 47 Misc.3d 137(A), 2015 N.Y. Slip Op. 50525(U) (App. Term 1st Dept. Apr. 14, 2015).

Harmonic Physical Therapy, P.C. was in conflict with Alleviation Medical Services, P.C. v. Allstate Ins. Co., 55 Misc.3d 44, 45 (App. Term 2d, 11th & 13th Dists. 2017), wherein the Appellate Term stated, "As we read *Nyack Hosp.* to hold that fully verified claims are payable in the order they are received (*see* 11 NYCRR 65-3.8 [b] [3]; 65-3.15; *Nyack Hosp.*, 8 NY3d 294), defendant's argument-that it need not pay the claim at issue because defendant paid other claims after it had denied the instant claim, which subsequent payments exhausted the available coverage-lacks merit (*see* 11 NYCRR 65-3.15; *cf. Nyack Hosp.*, 8 NY3d 294; *but see Harmonic Physical Therapy, P.C. v Praetorian Ins. Co.*, 47 Misc 3d 137[A], 2015 NY Slip Op 50525[U] [App Term, 1st Dept 2015])." I find that the reasoning in Harmonic Physical Therapy, P.C. is more persuasive than that of the Appellate Term in Alleviation Medical Services, P.C. I decline to follow the holding in the latter case. "Where as here, both the arbitrator and the master arbitrator cited and considered the split between the First and Second Departments on the issue of policy exhaustion and priority of payment (compare Harmonic Physical Therapy, P.C. v Praetorian Ins. Co.,47 Misc 3d 137(A) [App Term 1st Dept [2015]; Alleviation Med. Servs., P.C. v. Allstate Ins. Co., 55 Misc 3d 44 [App Term 2d Dept [2017]), ultimately following the rationale of *Harmonic*, the master arbitrator's award cannot be found to be irrational." Matter of Spartan Medical Supply v. Liberty Mutual Ins. Co., 63 Misc.3d 1233(A), 2019 N.Y. Slip Op. 50862(U) (Dist. Ct. Nassau Co., Ignatius L. Muscarella, J., June 3, 2019).

In any event, the holding of the Appellate Term in Alleviation Medical Services, P.C. is no longer valid law because the Appellate Division affirmed on other grounds. 191 A.D.3d 934 (2d Dept. 2021). The affirmance by the Appellate Division on other grounds was discussed by Civil Court Judge Patria Frias-Colón in Quality Health Supply Corp. v. Amica Mutual Ins. Co., 73 Misc.3d 1231(A), 2021 N.Y. Slip Op. 51187(U) (Civ. Ct. Kings Co., Patria Frias-Colón, J., Oct. 29, 2021), wherein she wrote:

> [T]he Appellate Division's affirmance on "other grounds" in *Alleviation Med. Servs.* requires this Court to recognize that Court's reasoning. *See* 191 AD3d at 934. What the Appellate Division decided in *Alleviation Med. Servs.* was that Allstate's motion for summary judgment on policy-exhaustion grounds could have been granted but for the fact that it was "bereft of any specific information regarding [the] claim" *See* 191 AD3d at 935. Under those

> circumstances, the Appellate Division could not find that Allstate was entitled to summary judgment as a matter of law as there were issues of fact remaining as to when the claim was denied, and the basis and efficacy of the denial" *See id*. Accordingly, the Appellate Division in *Alleviation Med. Servs.* said "we affirm, albeit on different grounds than those relied upon by the Civil Court or the Appellate Term"). 191 AD3d at 934.

Therefore, the ultimate holding from the Alleviation Medical Services, P.C. case is not that an exhaustion defense is not available to an insurer who receives a fully verified claim and timely denies it, and then pays subsequently received claims up to the policy limit. The ultimate holding is that an insurer must present sufficient evidence to support a defense that the policy was subsequently exhausted.

Judge Frias-Colón did ultimately award compensation to the plaintiff after the trial she conducted concluded. However, she did so because the insurer failed to prove that it timely denied the claims at issue. As such, the claims became overdue prior to other claims which were eventually paid. Per Nyack Hospital v. General Motors Acceptance Corp., 8 N.Y.3d 294 (2007), *if a claim is not timely denied or paid* it becomes overdue. Payment will be ordered even if payments made on other claims subsequent to the overdue date of the bill at issue were made later on and eventually exhausted the policy. That situation does not exist in the case at bar. Here, Respondent issued a timely denial, i.e., within the 30-day deadline prescribed by Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1). As such, pursuant to Harmonic Physical Therapy, P.C., supra, Respondent's defense of subsequent policy exhaustion must be sustained even though bills which were received subsequent to Applicant's were paid; Respondent's specific denial of claim was timely issued.

The evidence submitted by Respondent -- a copy of its PIP payment register and the declarations page -- proved that the $50,000 in basic economic loss No-Fault coverage was exhausted. Respondent's evidence is found credible. Applicant has not refuted Respondent's factual argument that the policy was exhausted.

I also note the following case law:

- A master arbitration award denying a claim of No-Fault policy exhaustion must be vacated where the evidence establishes that the policy limits were exhausted at the time of the lower arbitration, despite the issue not having been raised before the lower arbitrator. Ameriprise Ins. Co. v. Electrodiagnostic & Physical Medicine, P.C., 2020 N.Y. Slip Op. 33246(U) (Sup. Ct. New York Co., Melissa A. Crane, J., Oct. 2, 2020) (vacating Robert Trestman, Master Arb.).

- An arbitrator's award which is in excess of the policy limit exceeds his authority and requires vacatur. Country-Wide Ins. Co. v. Essential Acupuncture PC, 2020 N.Y. Slip Op. 32805(U) (Sup. Ct. New York Co., Melissa A. Crane, J., Aug. 26, 2020) (arbitrator cited to Alleviation Medical Services, P.C.). The

Supreme Court vacated the award in AAA Case No. 17-17-1079-0298 (Hersh Jakubowitz, Arb., Mar. 30, 2019, relying on Alleviation Medical Services, P.C.; Vic D'Ammora, Master Arb., July 8, 2019).

· An arbitration award denying a claim, on the basis that the No-Fault coverage had been exhausted at the time the last bill had been received, and therefore, under the no-fault regulations (11 NYCRR 65-4.10(a)(2)), it would exceed her authority to award reimbursement in excess of the contractual limits of the policy, has evidentiary support and a rational basis; it is not for the court to decide whether the arbitrator erred in applying the applicable law. Matter of Acuhealth Acupuncture, P.C. v. New York City Transit Authority, 167 A.D.3d 869 (2d Dept. 2018), aff'g, 50 Misc.3d 1228(A), 2016 N.Y. Slip Op. 50297(U) (Lara J. Genovesi, J., Mar. 1, 2016).

Therefore, although policy exhaustion was not an asserted defense in the specific denials of claim issued in response to receipt of Applicants' bills, I conclude as a matter of fact and law in this particular case that Respondent need not pay any further No-Fault benefits to Applicants, as assignee of Assignor. The policy exhaustion defense overcomes Applicant's prima facie case of entitlement to No-Fault compensation.

Respondent's fee defenses are academic. Accordingly, the within arbitration claim is denied in its entirety.

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 Kings

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

07/05/2022
(Dated)

Aaron Maslow

**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:**
6cd4318b3c237d875ce47d3a736e02f7

**Electronically Signed**

Your name: Aaron Maslow
Signed on: 07/05/2022