

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

McCulloch Orthopaedic Surgical Services,
PLLC DBA NYSJ Orthopaedic Specialists
(Applicant)

- and -

Kemper Independence Insurance Company
(Respondent)

AAA Case No.	17-22-1238-2065
Applicant's File No.	2654018
Insurer's Claim File No.	C022104NY20
NAIC No.	10914

ARBITRATION AWARD

I, Kihyun Kim, 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: the Assignor

1. Hearing(s) held on 12/30/2022
Declared closed by the arbitrator on 12/30/2022

Stacy Mandel Kaplan, Esq. from Israel, Israel & Purdy, LLP participated for the Applicant

Cristina Mazzella, Esq. from Gullo & Associates, LLP participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$248.34**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated to Applicant's prima facie case and to Respondent's timely denial.

The parties also stipulated that Applicant's billing is consistent with the fee schedule.

3. Summary of Issues in Dispute

The issue presented is whether Respondent established its lack of coverage defense that Assignor is not eligible for no-fault benefits as an operator of a limited use motorcycle.

The Assignor (PC) was a 45-year-old female who was the operator of a scooter/electric moped that was involved in an accident on June 15, 2020. Applicant seeks

reimbursement in the amount of \$248.34 for an office evaluation of the Assignor conducted on September 9, 2021.

4. Findings, Conclusions, and Basis Therefor

This arbitration was conducted using the documentary submissions of the parties contained in the ADR Center, maintained by the American Arbitration Association. I have reviewed the documents contained therein as of the closing of the hearing, and such documents are hereby incorporated into the record of this hearing. The hearing was held by Zoom video conference. Both parties appeared at the hearing by counsel, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

At the hearing, Respondent acknowledged receipt of the bill in question and the parties stipulated to Applicant's prima facie case and to Respondent's timely denial. The parties also stipulated that Applicant's billing is consistent with the fee schedule.

The Assignor was a 45-year-old female who was injured in an automobile accident on June 15, 2020. Following the accident, the Assignor sought treatment for her injuries from various providers, including Applicant.

On September 9, 2021, the Assignor presented to Luke Carey Office, P.A./Kenneth McCulloch, M.D., for an initial orthopedic consultation. Applicant thereafter billed Respondent for its services, and Respondent denied Applicant's claims asserting a lack of coverage defense stating in the denial/EOB, in pertinent part, that: "There is no coverage for any person while occupying a motorcycle pursuant to Exclusion (e) of the Mandatory Personal Injury Protection Endorsement of the auto policy and the Mandatory Personal Injury Protection Endorsement (New York) of Regulation 68, Section 1, Exclusion (e). The entire claims denied."

Applicant now seeks reimbursement in the amount of \$248.34 for an office evaluation of the Assignor conducted on September 9, 2021.

Legal Framework - No-Fault Motorcycle Coverage

A motorcycle is defined in NY Ins. Law 5102(m) as "any motorcycle as defined in [Vehicle and Traffic Law §123], and which is required to carry financial security pursuant to article six, eight or forty-eight A of the Vehicle and Traffic Law."

Vehicle and Traffic Law §123 defines "motorcycle" as "(e)very motor vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding a tractor." Article 6 requires financial security if the motor vehicle must be registered. Article 8 applies to vehicles for hire. Article 48-A requires the registration of "limited use vehicles."

Vehicle and Traffic Law §121-b defines a limited use motorcycle as:

A limited use vehicle having only two or three wheels, with a seat or saddle for the operator. A limited use motorcycle having a maximum performance speed of more than thirty miles per hour but not more than forty miles per hour shall be a class A limited use motorcycle. A limited use motorcycle having a maximum performance speed of more than twenty miles per hour but not more than thirty miles per hour, shall be a class B limited use motorcycle. A limited use motorcycle having a maximum performance speed of not more than twenty miles per hour shall be a class C limited use motorcycle.

Class C limited use motorcycles do not need to carry financial security pursuant to VTL§2265.

New York State's Vehicle & Traffic Law Article 48-A indicates that if a limited use motorcycle/scooter has the ability to travel over 20 miles per hour, it is required to carry insurance. Pursuant to the VTL, class C motorcycles, which have a maximum speed of 20 miles per hour, are not required to carry insurance (see, VTL 12-b, 2265[3]).

Pursuant to Section 1 of the New York State Mandatory Personal Injury Endorsement, each policy of insurance written in the State of New York is required to contain the following language:

The company will pay first-party benefits to reimburse for basic economic loss sustained by an eligible injured person on account of personal injuries caused by an accident arising out of the use or operation of a motor vehicle or a motorcycle during the policy period and within the United States of America, its territories or possessions, or Canada.

11 NYCRR §65-1.1(d).

11 NYCRR §65-1.1(d) defines an "Eligible Injured Person" under the New York State Mandatory Personal Injury Endorsement as:

Subject to the exclusions and conditions set forth below, an eligible injured person is:

- (a) the named insured and any relative who sustains personal injury arising out of the use or operation of any motor vehicle;
- (b) the named insured and any relative who sustains personal injury arising out of the use or operation of any motorcycle, while not occupying a motorcycle;
- (c) any other person who sustains personal injury arising out of the use or operation of the insured motor vehicle in the State of New York while not occupying another motor vehicle; or
- (d) any New York State resident who sustains personal injury arising out of the use or operation of the insured motor vehicle outside of New York while not occupying another motor vehicle.

11 NYCRR §65-1.1 also includes "Exclusions" to the Mandatory Personal Injury Protection Endorsement, which states, in pertinent part, as follows:

This coverage does not apply to personal injury sustained by:

...

(e) any person while occupying a motorcycle

11 NYCRR §65-1.1(e) defines an "Eligible Injured Person" under the New York State Mandatory Personal Injury Endorsement - Motorcycles (New York) as:

An eligible injured person is any person who sustains a personal injury arising out of the use or operation of the insured motorcycle while not occupying the insured motorcycle, any other motorcycle or a motor vehicle.

In short, an occupant of a motorcycle is not covered under no-fault insurance, but if a non-occupant of a motorcycle sustains personal injury arising out of the use or operation of a motorcycle, that injured party might enjoy no-fault coverage. 11 NYCRR Section 65-3.12 sets forth that in New York, no-fault benefits are not available to the occupants of the motorcycle but are available to others who might be injured by a motorcycle.

Analysis - Lack of coverage - Office - DOS 9/9/21

In the present case, Applicant billed Respondent in the amount of \$248.34 for an office evaluation of the Assignor conducted on September 9, 2021. The bill was received on September 24, 2021. Respondent thereafter timely denied Applicant's claims stating, in pertinent part, in the EOB/denial that:

There is no coverage for any person while occupying a motorcycle pursuant to Exclusion (e) of the Mandatory Personal Injury Protection Endorsement of the auto policy and the Mandatory Personal Injury Protection Endorsement (New York) of Regulation 68, Section 1, Exclusion (e). The entire claims denied.

To support its defense, Respondent uploaded emails between Hartford and Respondent concerning the Assignor's claim (claim Number C022104NY20) with Respondent; Hartford's general denial, dated July 8, 2020, denying the Assignor's No-Fault claim with Hartford, noting, among other things, that the policy "does not cover injuries sustained while occupying the insured motorcycle, this policy does not cover you for no-fault medical coverage;" the Revel Rental Agreement for the scooter/electric moped rented by the Assignor; Applicant's bill and supporting documents, with date stamps showing date received; the Assignor's NF-2; a letter of representation from the Assignor's counsel; the Assignor's Notice of Intention to make a claim against Respondent, dated July 16, 2020; Respondent's general denial, dated September 24, 2020, to the Assignor stating that: "PIP coverage does not apply to an occupant of a motorcycle therefore PIP coverage has been denied;" and Respondent's insured's declarations page for a Kansas Automobile Policy; Applicant's bill with supporting medical records.

Respondent noted that the Assignor was not the policy holder, insured, driver, or occupant of the vehicle insured by Respondent. Respondent explained that the Assignor was on an electric scooter owned by Revel Transit Inc., a company that operates a shareable electric moped company within New York City, when she was struck by a vehicle insured by Respondent and driven by Respondent's insured. The policy at issue is a Kansas Automobile Policy and was issued in Kansas as Respondent's insured is a

resident of Kansas. Respondent asserted that No-Fault coverage under the Mandatory Personal Injury Protection Endorsement excludes coverage for an operator or a passenger of a motorcycle, which by definition includes the Class B limited use motorcycle driven by the Assignor.

Apparently, prior to applying for No-Fault benefits from Respondent under its insured's policy, the Assignor sought No-Fault benefits from Hartford under Revel Transit Inc.'s commercial automobile/motorcycle policy with Hartford. Hartford's general denial of the Assignor's No-Fault claim explains the pertinent facts and circumstances as follows:

Please be advised that we have completed our investigation into the coverage aspect of your New York No-Fault Claim and believe we have sufficient information at this time to make a decision regarding your claim.

This letter will acknowledge receipt of an injury claim which occurred on 06/15/2020. It has been reported that the loss occurred in Brooklyn, New York. You were injured while operating a motorized scooter owned by our Insured, Revel Transit Inc, policy number 02YQ3OH8066, effective dates 11/16/2019-11/16/2020, which due to the size of the engine would be considered a Limited Use Motorcycle.

We refer you to Revel Transit, Inc. policy number 5 02YQ3OH8066, effective dates 11/16/2019-11/16/2020, New York Mandatory Personal Injury Protection Endorsement - Motorcycles, endorsement CA22481113, Section I, which states:

Mandatory Personal Injury Protection The company will pay first-party benefits to reimburse for basic economic loss sustained by an eligible injured person on account of personal injuries caused by an accident arising out of the use or operation of the insured motorcycle. This coverage applies only to motorcycle accidents which occur during the policy period and within the State of New York Eligible Injured Person.

An eligible injured person is any person who sustains a personal injury arising out of the use or operation of the insured motorcycle while not occupying the insured motorcycle, any other motorcycle or a motor vehicle.

As this policy does not cover injuries sustained while occupying the insured motorcycle, this policy does not cover you for no-fault medical coverage.

In addition to the specific explanation in the general denial, the simple fact that Revel Transit, Inc. insured the electric scooter/moped driven by the Assignor under a motorcycle policy, which included the New York Mandatory Personal Injury Protection Endorsement - Motorcycles supports the fact that such electric scooter/moped was a Class B limited use motorcycle (which is required to carry insurance), making the Assignor (as the operator of such motorcycle) ineligible for No-fault benefits. In addition, the definition of "Moped" or "Revel Moped" in the Revel Rental Agreement provided further support to Respondent's defense, defining the rented scooter as "the

low-speed limited use two wheel vehicle provided by Revel to a Member as part of the Services . . . , and which does not exceed an operating speed of more than 30 miles per hour."

After reviewing all of the submissions and taking into account the oral arguments of the parties, I find that the totality of the evidence in the record favors Respondent. Based upon the above referenced laws, and applying the facts and evidence of this arbitration into those laws, Respondent has demonstrated, prima facie, that the Assignor is not eligible for No-Fault Benefits as against Respondent. Pursuant to 11 NYCRR65-4.5(o)(1), the arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The record includes sufficient credible evidence that the Assignor was the operator of a Class B limited use motorcycle at the time she was struck by the subject automobile driven by Respondent's insured. Applicant did not offer any evidence to rebut Respondent's prima facie showing. I also note that I previously ruled in favor of Respondent in *Alexandre DeMoura M.D. PC dba New York Spine Institute and Unitrin Safeguard Insurance Company*, AAA Case No.: 17-21-1223-3279 (January 22, 2023), finding that the Assignor is not entitled to No-Fault benefits as against Respondent with respect to the same policy and accident at issue herein. I find my prior award to be persuasive as to the coverage issues in this proceeding, and I adopt the findings of fact and rationale therein to support my award herein. Applicant has not presented any argument or evidence that persuades me to rule differently in this proceeding. Based on the totality of the evidence in the record, I find that the Assignor is not eligible for No-Fault Benefits as against Respondent. Accordingly, Applicant's claims for reimbursement for the office evaluation of the Assignor conducted on September 9, 2021, are denied.

Conclusion

For the reasons set forth herein, Applicant's claims are denied in their entirety. 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 specifically 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 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 Suffolk

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

01/29/2023

(Dated)

Kihyun Kim

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:
3e1788953ca85cfb8e396fd06e3aa867

Electronically Signed

Your name: Kihyun Kim
Signed on: 01/29/2023