

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

TMVQS Corp d/b/a Trinity Pharmacy
(Applicant)

- and -

Esurance Property and Casualty Insurance
Company
(Respondent)

AAA Case No. 17-21-1219-4583

Applicant's File No. 106503

Insurer's Claim File No. NYA-0204913

NAIC No. 25712

ARBITRATION AWARD

I, Evelina Miller, 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: CS

1. Hearing(s) held on 02/07/2023
Declared closed by the arbitrator on 02/07/2023

Aleksey Selipanov Esq from The Law Offices of John Gallagher, PLLC participated virtually for the Applicant

Rosemary Krup Esq from Law Office Of Lawrence & Lawrence participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$723.32**, 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 dispute arises from the underlying automobile accident of April 10, 2021, in which the Assignor (CS), a 41-year-old-male was involved. Thereafter, Assignor sought private medical attention and was eventually evaluated by Metro Pain Specialist P.C. with complaints of pain in the neck, mid back, lower back, and the right knee. Eventually patient was prescribed Somnicin caps for pain which were received by the patient on 6/16/21. The bill in dispute is Somnicin caps for pain which were received by the patient on 6/16/21. Respondent argues that the relevant policy was not in effect at the time of the accident on 6/16/21. Respondent further contends that Applicant is not

entitled to reimbursement for the medication at issue pursuant to the New York Workers' Compensation Fee Schedule.

The issue presented at the hearing is whether there was coverage at the time of the motor vehicle accident.

The second issue presented at the hearing is whether Respondent was able to establish its burden in coming forward with competent evidentiary proof to support its fee schedule defenses

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions contained in MODRIA which are maintained by the American Arbitration Association. These submissions are the record in this case. My decision is based on my review of that file, as well as the arguments of the parties at the hearing. All the parties at this hearing appeared via ZOOM.

Prima Facie:

Respondent has not issued a denial for Applicant's bill for date of service of 6/16/21.

Applicant contends that it submitted the bill for date of service of 6/16/21 to the Respondent on 6/30/21. In support of its contention that the bill was timely and properly mailed to the Respondent, Applicant submits a mailing log indicating that the bill at issue was mailed to the insurer on 6/30/21. The mailing log contains the name of the injured party, the name of applicant, the amount of the bill and the name and address of the insurer. The mailing log is stamped, signed, and dated by the United States Postal Service. Based on my review of the evidence I find the proof of mailing of the bill at issue to be sufficient.

As such, I find that Applicant establishes its prima facie showing of entitlement to recover first-party no-fault benefits by submitting evidentiary proof that the prescribed statutory billing forms, setting forth the fact and amount of the loss sustained, had been mailed and received and that payment of no-fault benefits were overdue. See *Mary Immaculate Hospital v. Allstate Insurance Co.*, 5 A.D.3d 742, (2d Dept., 2004). Once an applicant establishes a prima facie case, the burden then shifts to the insurer to prove its defense. See *Citywide Social Work & Psy. Serv. P.L.L.C v. Travelers Indemnity Co.*, 3 Misc. 3d 608, 2004, NY Slip Op 24034 [Civ. Ct., Kings County 2004]).

Policy not in effect:

At the time of the hearing Respondent's attorney raised another defense. Specifically, Respondent argued that Applicant is not entitled to the remaining amount in dispute due to the fact that the policy was not in effect at the time of the accident on 4/10/21. Rather Respondent argued that the relevant policy terminated on 9/1/19.

This issue was previously decided by this Arbitrator in AAA case #17-20-1227-3822, Q Pharmacy Rx, INC v. Esurance Property and Casualty Insurance Company, which involved the same accident as is at issue in this case. The Applicant in this case is not the same as in the prior case, however the issue of coverage is the same in both cases. In that case I held that Respondent was under an obligation to comply with VAT §313, 2(a) by filing a notice of cancellation with the Department of Motor Vehicles, which it failed to do. As such, I found that coverage was not properly cancelled and therefore the cancellation of policy was not in effect.

In this case the issue of proper cancellation of coverage is the same as in the prior case.

As a general rule, a defense not raised in a timely defense is precluded. See Nyack Hosp., supra. The exception to this rule is a defense to coverage. See Presbyt. Hosp. in the City of New York v Maryland Cas. Co., 90 N.Y.2d 274, 286 (1997); Central General Hosp. v. Chubb Group of Ins. Cos., 90 N.Y.2d 195, 201-02 (1997).

"The only exception to preclusion recognized by this Court arises where an insurer raises lack of coverage as a defense (*see id.*; *Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co.*, 9 NY3d at 318; *Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 199 [1997])." *Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 506, 14 N.Y.S.3d 283, 289 (2015).

Since Respondent's defense is lack of coverage at the time of the accident, it is not subject to preclusion rule.

Respondent submits Policy Declaration Page which note that the relevant policy became effective on 6/7/19 and was to expire on 9/1/19.

In support of its position of lack of coverage, Respondent submits a cancellation notice issued to the Assignor on 8/11/19, which states that the policy will be cancelled for non-payment if the premium is not paid prior to 9/1/19. The notice states:

"Cancellation: You are hereby notified in accordance with the terms and conditions of the above-mentioned policy, and in accordance with the law, that your insurance will cease at and from the hour and date mentioned due to nonpayment of premium, unless or before such date the premium is paid to this company, or to an agent authorized to receive such payments. If payment is not received, a bill for the premium earned to the time of cancellation will be forwarded in due course."

Respondent also submits proof of mailing of said notice in a form of a mailing log.

On 5/12/21 Respondent issued a letter stating that Respondent conducted an investigation which revealed that the relevant policy was cancelled on 9/1/19 prior to the accident at issue due to non-payment. Notification of this cancellation was forwarded to the Assignor on 8/11/19. As such, the insurer was unable to extend coverage.

Respondent contends that the insured did not submit proof of payment indicating that the policy has become renewed and was in effect at the time of the accident.

Applicant does not contend the numerous contentions raised by the Respondent which are discussed above. However, Applicant does raise the issue that the Department of Motor Vehicles was not put on proper notice of cancellation of policy pursuant to VTL-VAT §313 1(a), 2(a) and 3 and as such, the cancellation of said policy was not in effect.

New York Consolidated Laws, Vehicle and Traffic Law - VAT § 313. Notice of termination

1 (a) No contract of insurance for which a certificate of insurance has been filed with the commissioner shall be terminated by cancellation by the insurer until at least twenty days after mailing to the named insured at the address shown on the policy a notice of termination by regular mail, with a certificate of mailing, properly endorsed by the postal service to be obtained, except where the cancellation is for non-payment of premium in which case fifteen days-notice of cancellation by the insurer shall be sufficient.

2. (a) Upon the termination of an owner's policy of liability insurance by cancellation by the insurer, the insurer shall file a notice of termination with reference to such policy, as opposed to any insured vehicle or vehicles under such policy, with the commissioner not later than thirty days following the effective date of such cancellation or other termination, in accordance with the regulations required by paragraph (c) of this subdivision. An insurer shall not file a notice of termination with the commissioner except as required by this subdivision.

3. A cancellation or termination for which notice is required to be filed with the commissioner pursuant to subdivision two of this section shall not be effective

with respect to persons other than the named insured and members of the insured's household until the insurer has filed a notice thereof with the commissioner or until another insurance policy covering the same risk has been procured, except that a notice filed with the commissioner, in the format prescribed by the commissioner, within the period prescribed in subdivision two of this section shall be effective as of the date certified therein, regardless of whether a suspension order is issued pursuant to section three hundred eighteen of this article. A receipt from the department stating that a notice of termination has been filed shall be deemed conclusive evidence of such filing. An insurer shall cooperate with the commissioner in attempting to identify persons not in compliance with this article in cases where the information reported by the insurer does not correspond with records maintained by the department.

In Matter of *Progressive Classic Ins. Co. v Kitchen*, 46 AD3d 333 (2007), the First Department held that the insurer's "failure to show that it had timely filed the notice of cancellation renders the **cancellation ineffective as against persons other than the named insured and members of the latter's household** (*Vehicle and Traffic Law § 313(3)*"); citing, *Matter of Progressive Northeastern Ins. Co. v Barnes*, 30 AD3d 523 (1 Dep't, st 2006) [Concur-Lippman, P.J., Mazzairelli, Marlow, Buckley and Malone, JJ.]

"Failure to strictly comply with this provision results in invalid termination of coverage as to third parties (see Vehicle and Traffic Law §313[3]." *Matter of Progressive Northeastern Ins. Co. v Barnes, supra.*

The injured party in this case is not the insured, but rather a third party. As such, I agree with Applicant. Respondent was under an obligation to comply with VAT §313, 2(a) by filing a notice of cancelation with the Department of Motor Vehicles.

Respondent does not submit any evidence indicating that VTL-VAT §313 1(a), and 2(a) has been complied with and the cancellation of the policy was in effect.

Conclusion:

Based on the records submitted and the arguments presented at the hearing I find that Respondent failed to reach its burden of proving that the policy at issue has been in fact cancelled. There is no proof submitted that the Department of Motor Vehicles has been put on proper notice pursuant to that VTL-VAT §313 1(a), and 2(a), and the policy has been properly cancelled. The Assignor was a third party and not the insured in this case.

As such, I find that coverage was not properly cancelled and therefore the cancellation of policy was not in effect.

Fee schedule:

Respondent further argued that Applicant is not entitled to reimbursement for the Somnicin Caps since Applicant billed for over-the-counter medication which is not reimbursable under No-Fault.

Under NYS Insurance Law 5102(a)(1) an over the counter (OTC) drug as per the opinion letter of the Office of General Counsel dated June 11, 2001, OTC drugs are non-reimbursable as a matter of law, for with respect to drugs, N.Y. Ins. Law § 5102 (McKinney 2000) limits reimbursement under No-Fault to prescription drugs only, not the \$723.32 for the OTC items as billed by the Applicant. Therefore, OTC drugs and products which may be purchased without a prescription are not covered expenses.

I take judicial notice of the New York State Workers' Compensation Fee Schedule in this case. See Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13, 20 (2d Dept. 2009); LVOV Acupuncture, P.C. v. Geico Ins. Co., 32 Misc.3d 144(A), 2011 NY Slip Op 51721(U) (App Term 2d, 11th & 13th Jud Dists. 2011); Natural Acupuncture Health, P.C. v. Praetorian Ins. Co., 30 Misc.3d 132(A), 2011 NY Slip Op 50040(U) (App Term, 1st Dept. 2011). As per Red Book the product details for Somnicin indicates "DEA Class: OTC." I find that Applicant is not entitled to reimbursement for the services billed since the medication is classified as PTC item.

Respondent argues that Somnicin is an over-the-counter drug and is therefore not reimbursable. Arbitrator Aaron Maslow addressed this issue in his award for AAA Case No. 17-18-1102-2127. Arbitrator Maslow determined the following:

"I find that Respondent proved that Somnicin caplets are over the counter, and not prescription drugs. I note that in delineating health care services which are compensable under the No-Fault system, Insurance Law § 5102(a)(1) contains the adjective "prescription" before the word "drug," evidencing that it was the intent of the Legislature to provide that only prescription drugs are covered. Over-the-counter ones are not, at least, not in terms of health care services. I note that in the arbitration request form, Applicant sought compensation for the Somnicin caplets under the category of "Doctor, hospital or other health provider." New York Insurance Department Opinion 01-06-07, dated June 11, 2001 opines that over-the-counter pharmaceuticals ("non-prescription drugs") are not compensable health services. The opinion cited to Insurance Law § 5102(a). Therefore, I conclude as a matter of law that the subject Somnicin caplets are not compensable under No-Fault. I sustain Respondent's defense asserted in its timely-issued denial of claim. Said defense overcomes Applicant's prima facie case of entitlement to No-Fault compensation. Accordingly, the within arbitration claim is denied in its entirety."

Applicant does not submit any evidence in the form of a coder affidavit or an affidavit from anyone with expert knowledge of the fee schedule to support its position that it is entitled to reimbursement for the OTC items received by the patient on 6/16/21.

I agree with the analysis presented by Arbitrator Maslow and find that Applicant is not entitled to reimbursement because Somnicin capsules are over the counter and not reimbursable under No-Fault. Respondent has met its burden and sustained its fee schedule defense. See, Continental Medical PC v. Travelers Indemnity Co., 11 Misc.3d 145A, 819 N.Y.S.2d 847, 2000.

In the instant case, Applicant is seeking reimbursement for Somnicin which is classified as an "over-the-counter" medication. Based upon the limits for reimbursement under the No-Fault law such items are not covered expenses. There is no coverage for this medication, and therefore the defense that it is not reimbursable is not required in a timely denial, nor is it precluded.

Accordingly, Applicant's claim for reimbursement for Somnicin Caps is denied.

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 NY

SS :

County of Kings

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

03/08/2023

(Dated)

Evelina Miller

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:
735e1151a57a3c302ffe7cfa6405e2ce

Electronically Signed

Your name: Evelina Miller
Signed on: 03/08/2023