

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Right Choice Supply, Inc.
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-22-1244-5805

Applicant's File No. LIP-17303

Insurer's Claim File No. 108820401

NAIC No. 16616

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: MM

1. Hearing(s) held on 03/07/2023
Declared closed by the arbitrator on 03/07/2023

Mark Fenelon Esq from Law Office of Ilya E. Parnas participated virtually for the Applicant

Helen Cohen Esq from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$499.12**, 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 September 1, 2020, in which the Assignor (MM), a 49-year-old-male was involved. Thereafter, Assignor sought private medical attention and was eventually evaluated by Applicant with complaints of headaches, pain in the neck, mid and lower back, bilateral shoulders, and pain in the bilateral knees. Eventually patient was recommended to undergo shoulder surgery which was performed on the patient on 9/10/21. Thereafter patient was prescribed a shoulder orthosis which was received by the patient on 9/10/21. The bill in dispute is for shoulder orthosis which was received by the patient on 9/10/21.

Respondent argues that the accident arose out of and in the course of employment and therefore that the primary insurance is through his workers' compensation carrier.

The issue presented at the hearing is whether Respondent has met its burden in demonstrating that Worker's Compensation may be primary in this matter.

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 parties at this hearing appeared via ZOOM.

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]).

Initially, the issue is whether there is any question of fact for consideration by the Workers' Compensation Board. If there is a question as to whether 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.

The primacy of Workers Compensation for coverage of injuries that occur when the injured party is in the course of employment has been established. *Arvatz v. Empire Mutual Insurance Company*, 171 AD2d 262, 575 NYS2d 836 (1st Dept. 1991). The court in *Arvatz, Id.* stated as follows:

"Where the availability of workers compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law, the plaintiff may not choose the courts as the forum for the resolution of such questions. The Legislature has placed the responsibility for these determinations with the Workers Compensation Board and there it must remain. (*O'Rourke v. Long*, 41 NY2d 219, 228.) The Board has "primary jurisdiction" to resolve the question of coverage and a "plaintiff has no choice but to litigate this issue before the Board." (*Liss v. Trans Auto Systems, Inc.*, 68 NY2d 15, 21.) 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 position, Respondent submits a police report which states that Applicant was driving a vehicle with TLC plates, and the injured party was the driver of that vehicle at the time of the accident. Respondent also submits an insurance declarations page which states that a commercial policy was issued in the name of the injured party.

Respondent also submits an affidavit by Rena Lambert who is the Underwriting Department Manager for American Transit Insurance Company. She notes that the policy is a taxi policy issued to the Assignor. It is issued to a "for hire" vehicle bearing New York State issued Taxi Limousine Commission license plate.... This vehicle is affiliate with black car base. The assignor was the registered owner and the drive of the vehicle on the dates of the accident.

Applicant contends that Respondent did not submit sufficient evidence to raise the quest of fact of whether the injured party was in the course of his employment at the time of the accident which occurred on 9/1/20.

Applicant refers to the NF-2 which has box 16 left blank. Furthermore, Applicant argued that the police report noted that there were no passengers in the vehicle driven by the Assignor. Based on the foregoing Applicant contends that there is no question of fact in this case and the Assignor was not in the course of his employment at the time of the accident.

11 NYCRR 65-3.16 (a) (9) provides: Pursuant to section 5102(b)(2) of the Insurance Law, when the applicant is entitled to workers' compensation benefits due to the same accident, the workers' compensation carrier shall be the sole source of reimbursement for medical expenses. In addition, the Appellate Division, First Department in Arvatz v. Empire Mut. Ins. Co., 171 A.D.2d 262, 575 N.Y.S.2d 836 (1st Dept. 1991) stated: "A reading of the applicable Insurance Department regulation (11 NYCRR § 65-3.19), however, reveals 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." Importantly, there has been no such denial by the Worker's Compensation Board in the case herein. Only if the Workers' Compensation Board, denies liability would plaintiff be entitled to collect no-fault benefits while pursuing his claim with the Workers' Compensation Board. As between no-fault and workers' compensation, the

latter is "primary" and an injured party may not "'elect' between work[ers'] compensation benefits and no-fault benefits." See, Carlo Service Corp. v. Rachmani, 64 A.D.2d 579, 580, 407 N.Y.S.2d 700.

Furthermore, the Workers' Compensation Board has primary jurisdiction to determine factual issues concerning coverage under the Workers' Compensation Law. AR Medical Rehabilitation, P.C. v. American Transit Ins. Co., 27 Misc.3d 133(A), 910 N.Y.S.2d 403 (Table), 2010 N.Y. Slip Op. 50708(U), 2010 WL 1630124 (App. Term 2d, 11th & 13th Dists. Apr. 13, 2010). Where the evidence is sufficient to raise a question of fact as to whether the eligible injured person was acting as an employee at the time of the accident, the issue must be resolved by the Workers' Compensation Board. A.B. Medical Services, PLLC v. American Transit Ins. Co., 24 Misc.3d 75, 885 N.Y.S.2d 154 (App. Term 9th & 10th Dists. June 18, 2009); Response Equipment, Inc. v. American Transit Ins. Co., 15 Misc.3d 145(A), 841 N.Y.S.2d 823 (Table), 2007 N.Y. Slip Op. 51176(U), 2007 WL 1662679 (App. Term 2d & 11th Dists. June 8, 2007).

An insurer's contention that recovery of No-Fault benefits is barred pursuant to Workers' Compensation Law § 11 should not be entertained, but rather the claims must be referred to the Workers' Compensation Board for a determination as to whether the plaintiffs have a valid cause of action to recover No-Fault benefits or whether they are relegated to benefits under the Workers' Compensation Law, as said Board has primary jurisdiction to determine factual issues concerning coverage under the Workers' Compensation Law. LMK Psychological Services, P.C. v. American Transit Ins. Co., 64 A.D.3d 752, 882 N.Y.S.2d 719 (2d Dept. 2009). Primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board and it is therefore inappropriate for the courts to express views with respect thereto pending determination by the board; thus, where there are factual questions as to the injured person's status as an independent contractor or an employee, resolution is best suited for determination by the board, and the court should refer the matter to the board for a hearing and determination as to whether the injured person is relegated to benefits under the Workers Compensation Law. Dunn v. American Transit Ins. Co., 71 A.D.3d 629, 894 N.Y.S.2d 895 (2d Dept. 2010).

A defendant or insurer must show only that "there is potential merit to its claim that the assignor was employed at the time of the accident so as to trigger a determination by the Workers Compensation Board", Lenox Hill Radiology v. American Transit Insurance Company, 19 Misc. 3d 358, 851 NYS 2nd 861 (NY City Civil Court 2009). In Lenox Hill, the court held that a police accident report indicating that "the assignor is a taxicab driver who was injured while driving a taxicab," is sufficient to establish that the assignor was injured in the course of his daily employment. The court dismissed that complaint, without prejudice, holding that there must be a determination by the Workers Compensation Board to determine coverage.

After a careful review of the credible relevant evidence presented before me and the arguments raised at the hearing by respective counsel, I find Respondent failed to submit sufficient evidence raising questions of fact or law that lies within the Workers' Compensation Board's jurisdiction. The NF2 submitted by the Respondent is left blank.

Furthermore, Respondent submits an underwriter's affidavit indicating that the policy at issue was issued for a for-hire vehicle. The police report indicates that the injured party/insured was driving the insured vehicle with a TLC license plate at the time of the accident.

Case law requires that carrier establish a question of fact that the claimant was in the course of his/her employment at the time of the accident. I find that there is a question of fact established by the Respondent in this case.

Based on the evidence presented I find that Respondent presented sufficient evidence to raise an issue of fact as aforesaid, whether workers compensation insurance is primary.

As such, based upon a preponderance of the evidence in the electronic case file and following consideration of the arguments raised at the hearing, I find that Respondent has established its defense on this record.

Accordingly, Applicant's claim is dismissed without prejudice.

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 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.

04/06/2023

(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:
8908c79165c707a69142ab3135b95c7e

Electronically Signed

Your name: Evelina Miller
Signed on: 04/06/2023