

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

(Applicant)	AAA Case No.	17-23-1283-6097
- and -	Applicant's File No.	N/A
American Transit Insurance Company	Insurer's Claim File No.	1100164-01
(Respondent)	NAIC No.	16616

ARBITRATION AWARD

I, Brian Bogner, 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: EIP

1. Hearing(s) held on 08/25/2023
Declared closed by the arbitrator on 08/25/2023

Gregory Vinal, Esq. from Vinal & Vinal, P.C. participated virtually for the Applicant

Jeffrey Siegel, Esq. from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$19,500.03**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant's counsel amended the amount in dispute to \$11,200.00 to conform with its lost wage calculations and after withdrawing, without prejudice, the claims from November 1, 2022 through January 19, 2023.

Stipulations WERE made by the parties regarding the issues to be determined.

Applicant's counsel stipulated that, should an award be made, interest shall run from January 23, 2023, the date this proceeding was filed.

3. Summary of Issues in Dispute

The eligible injured person (EIP) is a forty-four year old passenger of a vehicle that was involved in a motor vehicle accident on July 2, 2021. At issue is reimbursement for lost wages from April 19, 2022 through October 31, 2022. The Respondent contends that the EIP's injuries and disability are not related to the subject accident.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents uploaded to the ADR Center maintained by the American Arbitration Association. This case was decided based upon the documents uploaded to the ADR Center and the oral arguments of the parties' representatives at the hearing.

This matter arises from a motor vehicle accident that occurred on July 2, 2021. The EIP was a passenger of a vehicle that was struck by another vehicle that was attempting to make a left hand turn. He was transported from the scene via ambulance and evaluated in the Emergency Department at Erie County Medical Center. He then came under the care of Dr. Michael Calabrese and began a course of conservative care involving physical therapy, chiropractic and acupuncture. He also sought treatment with a pain management specialist and consulted with orthopedic surgeons.

At issue is reimbursement for lost wages from April 19, 2022 through October 31, 2022. The Respondent denied reimbursement for all lost wages on March 9, 2022 stating that:

Entire claim is denied based upon American Transit's investigation and on examination under oath of the claimant conducted on 02/24/2022. American Transit is asserting lack of coverage, as it has established the 'fact or founded belief' that the claimant's treated condition was unrelated to the motor vehicle accident.

Causation in a no-fault case is presumed. Bronx Radiology v. N.Y. Cent. Mut. Fire Ins. Co., 17 Misc.3d 97, 99 (App. Term, 1st Dept. 2007). The burden is on the respondent to prove that the treatment at issue is not related to the accident. Mt. Sinai Hosp. v. Triboro Coach, Inc., 263 A.D.2d 11, 19-20 (2d Dept. 1999). The respondent's burden includes establishing that the treatment is not related to exacerbations of any pre-existing conditions, which are covered under the No-Fault Law. Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13, 23 (2d Dept. 2009).

A defense based on lack of causation must be "premised on the fact or founded belief that the alleged injury does not arise out of the insured incident." Cent. Gen. Hosp. v. Chubb Group of Ins., 90 N.Y.2d 195, 199 (1997). The insurer must "come forward with proof in admissible form to establish 'the fact' or the evidentiary 'foundation for its

belief' that the patient's treated condition was unrelated to his or her automobile accident." Mt. Sinai Hosp., *supra*. Whether a claimed injury is related to the subject accident "cannot be resolved without recourse to the medical facts." Id. at 19. An opinion from an expert "will usually be necessary to effectively establish the basis of an insurer's founded belief" because only an expert can give "the proper guidance in such specialized scientific matters, and can provide, in the majority of instances, a proper factual foundation for an insurer's good faith belief that 'the alleged injury does not arise out of an insured incident'." Id. at 20. However, "there are rare but recognized instances where medical issues can be resolved by a trier of fact without resort to expert opinion." Kingsbrook, *supra* at 22.

In AAA Case No.: 17-22-1246-7975, dealing with lost wages from July 2, 2021 through April 18, 2022, I decided that:

The Respondent failed to submit evidence sufficient to establish the fact or founded belief that the EIP's injuries and disability are unrelated to the motor vehicle accident. The Respondent did not submit an opinion from an expert to support its causation defense. The Respondent relies on the EIP's EUO testimony but did not identify any specific testimony and my review of the EIP's EUO testimony does not support the causation defense.

As for the reimbursement amount, the parties submitted lost wage calculation sheets in support of their positions. Both parties agree that the Applicant's daily gross wage is \$100.00. They disagree with respect to the disability period and the applicable offsets. The Respondent only calculated lost wages through January 2, 2022, while the Applicant calculated lost wages through April 18, 2022. With respect to the offsets, the Respondent applied offsets for New York State Disability Benefits, while the Applicant applied a twenty percent offset.

I find the Applicant's lost wage calculations to be more persuasive. The Applicant uploaded disability notes supporting its claims and the Respondent failed to provide any explanation as to why the Applicant is only entitled to lost wages through January 2, 2022. With respect to the offsets, the Applicant properly applied the twenty percent offset set forth in the Mandatory Personal Injury Protection endorsement and the Respondent failed to establish that the EIP, who was self-employed, was eligible for New York State Disability Benefits.

My decision in AAA Case No.: 17-22-1246-7975 was affirmed by Master Arbitrator Victor Hershdorfer.

For the same reasons, I find that the Respondent failed to submit evidence sufficient to establish the fact or founded belief that the EIP's injuries and disability are unrelated to the motor vehicle accident.

I am also persuaded by the Applicant's unrebutted lost wage calculations and award the Applicant the amended amount claimed.

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 applicant is AWARDED the following:

A.

Loss Of Earnings	From/To	Claim Amount	Amount Amended	Status
	04/19/22 - 01/19/23	\$19,500.03	\$11,200.00	Awarded: \$11,200.00
Total		\$19,500.03		Awarded: \$11,200.00

- B. The insurer shall also compute and pay the applicant interest set forth below. 01/23/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Applicant is awarded interest pursuant to the no-fault regulations. *See* 11 NYCRR 65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR 65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." *See* 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

Interest shall run from January 23, 2023.

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

The insurer shall pay the Applicant an attorney's fee in accordance with 11 NYCRR 65-4.6.

- D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of NY
SS :
County of Erie

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

08/28/2023
(Dated)

Brian Bogner

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:
c67603bf433907718023a2cee3c92b66

Electronically Signed

Your name: Brian Bogner
Signed on: 08/28/2023