

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Island Ambulatory Surgery Center LLC  
(Applicant)

- and -

Liberty Mutual Insurance Company  
(Respondent)

AAA Case No. 17-22-1278-0252

Applicant's File No. 00107046

Insurer's Claim File No. 047484134

NAIC No. 36447

### ARBITRATION AWARD

I, Diane Flood Taylor, 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

1. Hearing(s) held on 10/19/2023  
Declared closed by the arbitrator on 10/19/2023

Mikhail Guseynov from Drachman Katz, LLP participated virtually for the Applicant

Joseph Champion from Liberty Mutual Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$976.38**, 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

Whether Respondent has established its defense of material misrepresentation and fraud thus permitting denial of coverage and precluding payment of the subject claim.

In addition, whether Applicant is entitled to recover for a facility fee, which the Respondent has denied as medically unnecessary predicated on an independent medical examination.

Applicant is seeking reimbursement in the amount of \$976.38 for a facility fee in connection with the management of injuries sustained by the Assignor, KCE, a

then 61-year-old injured person who, on 10/7/21, was involved in a collision with the insured motor vehicle.

Respondent denied the claim premised on the results of an independent medical examination performed by Cyrus Kao, MD, on 12/21/21.

Subsequently, Respondent issued a global denial premised on an assertion of material misrepresentation in the procurement of the policy.

The decision below is based upon a review of the documents that have been submitted electronically, as well as the arguments of counsel and/or representatives appearing via video conference on behalf of the parties.

#### 4. Findings, Conclusions, and Basis Therefor

In dispute in this arbitration is a bill for a facility fee associated with lumbar epidural steroid injections administered on 2/9/22.

Applicant establishes its prima facie entitlement to reimbursement with proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue. See Insurance Law § 5106(a); Viviane Etienne Med. Care v. Country-Wide Ins. Co., 25 N.Y.3d 498, 501 (2015); Mary Immaculate Hosp. v. Allstate Ins. Co., 5 A.D. 3d 742, 774 N.Y.S. 2d 564 (2nd Dept., 2004).

Once an Applicant has established its prima facie case, the burden shifts to the insurer to establish that it timely and properly denied the claim, and the basis of its denial.

#### **Denial**

Respondent issued a denial dated 2/21/22 and stated in relevant part, "Based upon Pain Management/PM&R Independent Medical Examination conducted by Cyrus Kao, M.D., of Kenneth Esdaile on December 21, 2021, Dr. Kao determined further pain management/PM&R treatment or any associated treatment is not medically necessary. Therefore further pain management/PM&R treatment including physical therapy, massage therapy, shock therapy, lost wages, household help, special transportation, diagnostic testing, durable medical equipment/supplies, prescription medications and injections are denied effective 1/23/22."

Respondent issued a Global Denial dated 3/3/22 and stated, in pertinent part, "State reason for denial, fully and explicitly (attach extra sheets if needed): Based on our review of this claim, currently known facts and the terms of the Automobile Policy held by (claimant's name redacted), we have determined that the allegations of the claim do not create a potential of first-party coverage

under the policy. As a result, we will not investigate, settle or otherwise handle this matter on behalf of (claimant's name redacted). Our information indicates that you misrepresented the location of your residence and the location where the insured vehicle would be garaged. Specifically, you stated that you live at and garage the insured vehicle at the Fairport, NY address when you actually live at and garage the vehicle at the Brooklyn, NY address. Accordingly, Liberty Mutual is disclaiming any claims for first-party coverage due to material misrepresentations on your policy application. Under N.Y. Comp. Codes R. & Regs. tit. 11, 65- 1.1, upon request by the Company, the eligible injured person or that person's assignee or representative shall submit to examinations under oath. By refusing to complete the February 18, 2022 examination under oath, you demonstrated an attitude of willful and avowed obstruction towards Liberty Mutual's efforts to verify under no-fault regulation and related case law the medical/diagnostic bills subject to that examination under oath. In accordance with the policy from which you seek coverage, your claim is denied for non-cooperation. While we have attempted to address all coverage, considerations related to this matter, Liberty Mutual reserves all of its rights under applicable law and the underlying insurance policy. This letter should in no way be construed as a waiver or estoppel of any possible coverage defenses afforded by the policy or applicable law."

An insured may be denied no-fault benefits where an insurer submits evidence in admissible form showing that the insured had fraudulently procured the insurance policy. See Jamaica Dedicated Medical Care, P.C. v. Praetorian Ins. Co., 47 Misc.3d 147(A), \_\_\_ N.Y.S.3d \_\_\_ (Table), 2015 Slip Op. 50756(U), 2015 WL 3367934 (App. Term 2d, 11th & 13th Dists. May 6, 2015).

"It is well settled that to establish the right to rescind an insurance policy an insurer must show that the insured made a material misrepresentation when he or she secured the policy (Interboro Ins. Co. v Fatmir, 89 AD3d 993 [2d Dept 2011], citing see Novick v Middlesex Mut. Assur. Co., 84 AD3d 1330 [2011]; Varshavskaya v Metropolitan Life Ins. Co., 68 AD3d 855, 856 [2009]; Schirmer v Penkert, 41 AD3d 688, 690 [2007]; Zilkha v Mutual Life Ins. Co. of NY, 287 AD2d 713, 714 [2001]). A misrepresentation is considered to be material only if the insurer would not have issued the policy had it known the facts misrepresented (Interboro, 89 AD2d at 994, citing see Insurance Law §3105[b][1]; Novick, 84 AD3d at 1330; Varshavskaya, 68 AD3d at 856). 'To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show it would not have issued the same policy if the correct information had been disclosed in the application' (Interboro, 89 AD3d at 994, quoting Schirmer v Penkert, 41 AD3d at 690-691)." SS Medical Care, PC v. USAA General Indemnity Co., 48 Misc.3d 1212(A), \_\_\_ N.Y.S.3d\_\_\_ (Table), 2015 N.Y. Slip Op. 51094(U) at 2-3, 2015 WL 4394198 (Civ. Ct. Kings Co., Reginald A. Boddie, J., July 17, 2015).

## Evidence

In support of its defense, Respondent, Respondent submitted the testimony of the Assignor taken at an Examination Under Oath (EUO) on February 18, 2022.

It is noted that the Assignor was represented by counsel at the EUO.

In testimony given at the EUO, the Assignor stated, in relevant part:

Page 4, starting on line 18:

Q. State your address for the record, please.

A. 583 St. Marks Avenue, Brooklyn, New York 11216

Page 12, starting on line 13:

Q. Did there come a time that you called Liberty Mutual and requested to change the address that you lived at on this car's insurance policy?

A. On this policy?

Q. Yes, on the insurance policy that you have on this Nissan, did there come a time that you communicated to Liberty Mutual that you needed to change your residential address?

A. No.

Q. Did you say no?

A. Yes.

Q. Have you ever been to 370 Jefferson Avenue, Fairport, New York?

A. Yeah, but that was a long time ago.

Q. How long would you say?

A. I don't remember.

Q. When you say you went there a long time ago, what were the circumstances under which you went there; in terms of why you were there?

A. That address is my family's address.

Q. When you say your family, who in your family lives there?

A. That's just a person.

Q. What?

A. A person.

Q. I know it's a person that lives there. I didn't think it was something other than a person, but who in your family lives there; in terms of what's their relationship to you?

A. That's just a cousin.

Q. Do you know the cousin's name?

A. Terrance.

Q. That's the person, your cousin's first name?

A. Yes.

Q. Do you know your cousin's last name?

A. No, just the first name.

Q. When you say it was a long time ago that you went there, was it more than five years ago?

A. Yes.

Q. You haven't been there in over five years?

A. No.

Q. When you went there, was that the first time you have been there when you went there more than five years ago?

A. Yes.

Q. You've been at that address only once?

A. Yeah.

Q. Do you remember ever calling Liberty Mutual and telling someone at Liberty Mutual that you had moved to that address?

A. No, I don't remember.

Starting on Page 15, line 17:

Q. I don't know that you answered the question. My question is, did you ask another person to call Liberty Mutual and tell Liberty Mutual that you had moved to 370 Jefferson Avenue in Fairport, New York?

A. Long time ago, I asked to change my insurance.

Q. When you say a long time, I asked and I didn't get the answer, who did you ask to do your insurance a long time ago?

A. It was a friend that I asked, I don't know.

Q. What did you ask your friend?

A. It was - I'm trying to remember. I don't remember.

Q. My question is, did you ask somebody that you know, you asked to call Liberty Mutual and tell Liberty Mutual that you had moved to 370 Jefferson Avenue?'A. I didn't tell them that I moved. I was telling that to the insurance, to take care of the insurance.

Q. You have said that you asked a friend to call Liberty Mutual; is that right?

A. Yes.

Q. Do you remember that friend's name?

A. No.

Q. Do you remember when you asked that friend to call Liberty Mutual?

A. No.

In further support of its defense, Respondent submitted an affidavit from Randall Lawrence-Hurt, an employee of Liberty Mutual Insurance Company, lead compliance analyst familiar with Liberty's rating and underwriting practices. Mr. Lawrence-Hurt, in his affidavit, stated, in relevant part, "The policy address given to us by (name redacted) was 370 Jefferson Avenue, Unit 14- 10, Fairport, New York."

Further, Mr. Lawrence-Hurt stated:

"Upon information and belief, (name redacted) is an individual residing at 583 St. Marks Avenue, #2, Brooklyn, New York. Upon discovery of (name redacted) correct address, a Brooklyn, New York policy quoted for the operator and vehicle rated on the policy had a premium difference of \$1,701.00. The policy

premium using the Fairport, New York address is \$1,187.00. The policy premium using the Brooklyn, New York address is \$2,888.00. Our company would not have written the policy for the Fairport, New York address with a premium of only \$1,187.00 had we known that the true address was in Brooklyn, New York. A New York policy quoted for the operator and vehicle rated on the current policy with the Brooklyn, New York address would have been approximately \$1,701.00 more for the same vehicle for duration of the policy."

The police report in evidence shows the vehicle registered as of 10/7/2021, the date of accident, at 583 Saint Mark Avenue Brooklyn, NY 11216 and that the claimant's license, as recorded by the police, reflected that same address.

Respondent submitted a total of ten (10) pages of "insurance policy documentation" which consisted of the following:

A letter from counsel representing Respondent;

Five (5) pages of undated Policy Declarations addressed to the Assignor at the Brooklyn address, which reflected Assignor's name, policy number, and a policy period of 06/10/2021 to 06/10/2022; the mailing address is clearly stated as 583 Saint Marks Ave Apt 2 Brooklyn, NY 11216;

Form A, New York Personal Automobile Policy Application, LM General Insurance Company, dated 6/9/2013 which reflected the Assignor's name, Brooklyn address and a policy period of 6/10/2013 to 6/10/2014; Form A, a total of three (3) pages, ending with Assignor's signature, dated 6/14/13;

A blank page.

## **Discussion**

It is noted that on the date of accident, the police report showed Assignor's vehicle registered at the Brooklyn address and Assignor's license reflected the Brooklyn address.

This information is consistent with the Assignor's sworn EUO testimony.

It is noted that the insurance policy documents submitted by Respondent reflect automobile policies issued for 6/10/2013-6/10/2014 and 6/10/21-6/10/22, which would cover the date of accident, 10/7/2021. These policies were issued for the insured vehicle to the Assignor at the Brooklyn address.

It is further noted that the Fairport, NY address is strikingly absent in the insurance policy documentation submitted by Respondent.

## **Findings**

I find the credible evidence in this record supports that the Assignor resided at, obtained a New York State driver's license and vehicle registration at, and sought and was issued automobile insurance for the insured vehicle at 583 Saint Marks Ave Apt 2 Brooklyn, NY 11216 for policy periods 6/10/2013-6/10/2014 and 6/10/2021-6/10/2022.

Respondent failed to submit evidence which reflected that Assignor sought or was issued an automobile policy at an address in Fairport, NY.

Premised on the credible evidence in the record, I find Respondent has failed to sustain its burden of proving material misrepresentation in the procurement of the policy.

### **IME Defense**

The burden shifts to the Respondent to demonstrate a lack of medical necessity for the disputed services. See, Citywide Social Work & Psychological Services, PLLC v. Allstate Ins. Co., 8 Misc3d 1025 A (2005). A denial premised on a lack of medical necessity must be supported by competent evidence such as an independent medical examination, a peer review or other proof which sets forth a factual basis and a medical rationale for denying the claim. See, Healing Hands Chiropractic, P.C., v. Nationwide Assur. Co., 5 Misc., 3d 975, 787 N.Y.S. 2d 645 (Civ. Ct., New York County, 2004); King's Med. Supply Inc. v. Country Wide Ins. Co., 5 Misc 3d 767, 783 N.Y.S. 2d 448. The medical rationale should be supported by evidence of the generally accepted medical professional practice. See, Nir v. Allstate Ins. Co., 7 Misc. 3d 544 (2005).

### **IME Report**

Respondent denied reimbursement of portions of Applicant's bills based upon an independent medical examination (IME) by Cyrus Kao, MD, performed on 9/28/22. Following the examination of Assignor, Dr. Kao stated, in relevant part, "lumbar strain, resolved; right hip contusion/strain, resolved; left hip contusion/strain, resolved."

Upon examination, Dr. Kao found normal range of motion, no evidence of muscle spasm, no motor or sensory deficits were noted, no tenderness to palpation was found, no swelling, and the examiner indicated there were negative results on provocative tests administered.

The doctor noted no objective findings on examination. Premised on Dr. Kao's clinical findings, Respondent denied further pain management intervention, effective 1/23/22.

The IME report sets forth a factual basis and medical rationale for the examiner's conclusion that there was a lack of medical necessity for further

treatment. Where the Respondent has established a lack of medical necessity, it becomes incumbent on the Applicant to submit rebuttal evidence. See, Be Well Medical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 18 Misc 3d 139 (A), 2008 WL 506180 (App Term 2d & 11th Dists. Feb. 21, 2008.) Thus, the burden shifts to the Applicant to prove medical necessity by a preponderance of the credible evidence.

### **Applicant's Evidence**

Applicant submitted a "rebuttal to the IME" prepared by claimant's treating doctor, Vitaliy Zhivotenko, D.O., who argued, in relevant part, "I respectfully request that my patient's positive 11/6/21 lumbar spine MRI findings of multiple disc bulges, herniations, annular tear, neural foraminal narrowing and nerve root impingement to be considered contemporaneous with Dr. Kao's IME, being that the MRI was conducted less than 7 weeks prior to the IME and clearly revealed ongoing acute traumatic findings, despite ongoing extensive conservative care.

Additionally, please consider my patient's intermittent, dull, aching, sharp, shooting, burning lower back pain radiating to the buttocks corroborated with physical examination findings of tenderness, muscle spasm and limited range of motion in the lumbar region, decreased motor strength in the lower extremities and positive Lumbar Facet Loading and Straight Leg Raise tests at the 2/9/22 examination at our clinic as contemporaneous with that of Dr. Kao's, being that this examination took place just over 7 weeks subsequent to the IME.

It is also significant to note that although Dr. Kao stated in his IME determination that pain management was no longer necessary, nowhere in his IME did he detail any treatment plan to address the patient's continued pain and impairment noted at the IME.

In fact, Dr. Kao's IME was essentially a positive evaluation.

Here, the patient presented with continued multiple pains and exhibited impairment at the IME.

Specifically, Dr. Kao documented, 'current complaints are pain in the lower back.' Further, upon physical examination, Dr. Kao documented tenderness to palpation and limited range of motion of the lumbar spine. Moreover, Dr. Kao documented that as a result of the accident, 'the claimant has had acupuncture, chiropractic and physical therapy.'

In addition, the doctor noted, "I would also like to point out that Dr. Kao's IME is merely a snapshot of the patient's condition on that day. An injured person's condition can 'wax and wane' after a car accident."

### **Findings**

I find Dr. Zhivotenko's rebuttal more persuasive than Dr. Kao's IME.

Premised on the credible objective evidence in the record, I find that Respondent failed to prove a lack of medical necessity for the post-IME treatment at issue.

Respondent failed to submit fee schedule evidence, or argue for a fee schedule reduction, therefore, the amount in dispute is awarded.

Accordingly, after reviewing the entire record and after careful consideration of the parties' oral arguments, I find in favor of Applicant. Any further issues raised in the record are held to be moot and/or waived insofar as not raised at the time of the hearing. This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.

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.

Medical		From/To	Claim Amount	Status
	<b>Island Ambulatory Surgery Center LLC</b>	<b>02/09/22 - 02/09/22</b>	<b>\$976.38</b>	<b>Awarded: \$976.38</b>
<b>Total</b>			<b>\$976.38</b>	<b>Awarded: \$976.38</b>

B. The insurer shall also compute and pay the applicant interest set forth below. 12/09/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest is awarded from the initiation date for this case until the date that payment is made at two percent (2%) per month, simple interest, on a pro rata basis using a thirty-day month.

C. Attorney's Fees

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

Respondent shall pay Applicant an attorney's fee equal to twenty percent (20%) of the total amount of first-party benefits awarded, plus interest thereon, as provided for in 11 NYCRR 65-4.6(d), subject to a maximum fee of \$1,360.00.

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 Westchester

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

11/01/2023  
(Dated)

Diane Flood Taylor

### **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:**  
86701c56e266500471b7b541abf70060

**Electronically Signed**

Your name: Diane Flood Taylor  
Signed on: 11/01/2023