American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Premier Anesthesia Associates PA (Applicant)	AAA Case No.	17-22-1243-9874
	Applicant's File No.	RFA19-263741
- and -	Insurer's Claim File No.	1053183-01
	NAIC No.	16616
American Transit Insurance Company (Respondent)		

ARBITRATION AWARD

I, Deepak Sohi, 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 11/02/2023
   Declared closed by the arbitrator on 11/02/2023

   Ryan Woodworth from The Russell Friedman Law Group LLP participated virtually for the Applicant

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

2. The amount claimed in the Arbitration Request, **$340.32**, was AMENDED and permitted by the arbitrator at the oral hearing.

   The amount claimed was amended to $324.12 to comport with the New York State Workers' Compensation Board Medical Fee Schedule (WCFS).

   Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

   This arbitration arises out of anesthesia services for injections provided to the EIP, a29-year-old male, who was involved in a motor vehicle accident as a driver on2/17/2019. Applicant is seeking reimbursement for the

anesthesia services provided to the EIP on dates of service6/18/2019 and 7/16/2019. Respondent denied reimbursement for the anesthesia services provided to the EIP on date of service 6/18/2019 based on its contention that the EIP is eligible for Workers' Compensation benefits as the EIP was in the course and scope of his employment when the motor vehicle accident herein occurred, and as a result this claim must be submitted to the employer's Workers' Compensation carrier. Respondent denied reimbursement for theanesthesia servicesprovided to the EIP on date of service7/16/2019based on the late submission of the bill pursuant to the 45-day rule.

4. Findings, Conclusions, and Basis Therefor

This case was decided on the submissions of the parties as contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association and the oral arguments of the parties' representatives at the hearing. No witnesses testified at the hearing. I reviewed the documents contained in the ECF for both parties and make my decision in reliance thereon.

WORKERS' COMPENSATION BOARD DEFENSE

ANESTHESIA SERVICES

DATES OF SERVICE 6/18/2019

The Respondent denied reimbursement for the anesthesia services provided to the EIP on date of service 6/18/2019 based upon its contention that the EIP was eligible for Workers' Compensation benefits and therefore not eligible to recover No-Fault benefits. In its denials, the Respondent stated: " CLAIMANT IS ELIGIBLE FOR WORKERS' COMP, AS CLAIMANT WAS IN THE COURSE OF EMPLOYMENT. AS A RESULT THIS CLAIM MUST BE SUBMITTED TO THE EMPLOYER'S WORKERS' COMPENSATION CARRIER."

Once Applicant makes a prima facie showing, the burden shifts to Respondent to substantiate its defense. Respondent argues the accident occurred during the course of the EIP's employment and accordingly, the

primary source of recovery should be the EIP's employers' worker's compensation carrier.

If there is a question of fact regarding whether the EIP was working within the scope of employment when an accident occurred, the claim should go to the Workers' Compensation Board for a determination on the issue. Only if the Workers' Compensation Board determines the accident did not occur within the scope of employment, could a matter related to a motor vehicle accident be decided by a No-Fault Arbitrator.

The Workers' Compensation Board is the exclusive forum to determine whether an individual was in the course of his employment at the time of a motor vehicle accident. Arvatz v. Empire Mutual Insurance Company, 71 A.D.2d 262, 575 N.Y.S.2d 836 (1st Dept. 1991). As long as there is "at least minimal proof of the indicia of employment from which an inference could be drawn to support the defense" that the EIP is covered by the Workers' Compensation Law (Master No-Fault Award, M.C. and The State Farm Mutual Insurance Company, NF 2907, New York State No-Fault/SUM Arbitration Reporter, Vol. 25, No. 3 and 4, Sept & Dec 2000), the claim must be denied without prejudice, pending the determination of the issue of employment by the Board. If, however, the insurer's contention that the EIP acted in the course of his employment at the time of the accident is "mere speculation" that fails to establish that the defense's "potential merit" so as to warrant the Board's review of the facts, the issue need not be resolved by the Board. A.B. Medical Services, PLLC v. American Transit Insurance Company, 8 Misc.3d 127(A), 2005 N.Y. Slip Op. 50959(U) (App. Term 2d 11th & 13th Jud. Dists. 2005).

This issue was addressed by my colleague Arbitrator Viverito in AAA Case No. 17-20-1153-9844 which involved the same Applicant, EIP, Respondent, and defense(s). In his award, Arbitrator Viverito stated:

> As indicated above, on 10/18/19, respondent initially denied payment based on the allegation that the EIP was in the course of his employment at the time of the motor vehicle accident.

In support of its defense, respondent provided a police report and an affidavit dated 9/23/19 by Dudley Mclean, Underwriting Manager.

The fact that the EIP was driving a livery vehicle at the time of the accident is undisputed. It is also undisputed, however, that the EIP was the only person in the vehicle.

In rebuttal, applicant produced a letter from the Workers' Compensation Board regarding a hearing held on 9/5/19. At the hearing, Judge Barry Greenberg determined the following:

> Based on the claimant's credible testimony, he was not working at the time of his motor vehicle accident on 2/17/19. Therefore, he did not have an accident arising out of and in the course of employment. The case is closed.

Therefore, I find that respondent has not sustained its "worker's compensation" defense. As indicated above, on 2/13/20, respondent subsequently denied payment based on a peer review report dated 2/7/20 by Peter Chiu, M.D.

At the hearing, applicant argued that respondent's second denial of claim (issued on 2/13/20) was untimely as it was denied more than 30 days after the Workers' Compensation Board made its determination that the EIP was not in the course of employment at the time of the subject motor vehicle accident. Applicant further argued that respondent may not rescind its original denial based on Workers' Compensation and re-start the processing of the within claim.

Respondent argued that its second denial of claim based on lack of medical necessity should be permitted and the within matter should move forward on the merits of such defense.

However, there is nothing in the No-fault regulations which permits re-starting the processing of claim and therefore I find that

> respondent is bound to the four corners of its original denial. Respondent has not presented persuasive support for its position that it may withdraw or retract a denial based on Workers' Compensation and re-start its time to pay or deny a claim.
>
> Accordingly, I find that respondent's second denial of claim based on lack of medical necessity is unsustainable.

Where an insurer raises a defense that the EIP was injured in the course of employment, primary jurisdiction over the claim lies with the Workers Compensation Board. The No-Fault carrier is obligated to pay first-party benefits only if the workers compensation carrier denied liability for payment of benefits in whole or in part. Arvatz v. Empire Mutual Ins. Co., 171 A.D.2d 262 (1st Dept. 1991) (emphasis added).

The facts in Arbitrator Viverito's case noted above are very similar, if not identical those in the instant matter. Firstly, according to Arbitrator Viverito and confirmed in the hearing before this Arbitrator, the Workers' Compensation Board had previously issued a decision on this issue for this EIP, as a result the Respondent's denial, dated 8/16/2019, predicated on this workers' compensation board defense cannot be sustained. Secondly, in both Arbitrator Viverito's case and in the instant matter, the Respondent issued a second denial, dated 2/13/2020 for the same bill, in this case for anesthesia services provided on 6/18/2019, this time based on a lack of medical necessity predicated on the Independent Medical Peer Review by Dr. Peter Chiu, MD, dated 2/7/2020 as in Arbitrator Viverito's case.

According to Arbitrator Viverito, "there is nothing in the No-fault regulations which permits re-starting the processing of claim and therefore I find that respondent is bound to the four corners of its original denial. Respondent has not presented persuasive support for its position that it may withdraw or retract a denial based on Workers' Compensation and re-start its time to pay or deny a claim." I agree. Respondent would have been well within its rights to simply delay the claim pending the decision from the Workers' Compensation Board, however Respondent chose to deny the claim herein. Furthermore, Respondent's second denial, dated 2/13/2020, is untimely as it was denied more than thirty (30) days after the Workers' Compensation Board made its determination that the EIP was not in the

course of employment at the time of the subject motor vehicle accident. I find Arbitrator Viverito's award, noted above, highly persuasive and incorporate same in this award.

Accordingly, in light of the foregoing, based on the arguments of counsel and after a careful review of the records, I find for the Applicant. Consequently, the Applicant's claim is granted in the amount of $162.06 for the anesthesia services provided to the EIP on date of service 6/18/2019.

45-DAY RULE

ANESTHESIA SERVICES

DATE OF SERVICE 7/16/2019

The No-Fault Regulations Mandatory Personal Injury Protection Endorsement states:

> Proof of Claim; Medical, Work Loss, and Other Necessary Expenses. In the case of a claim for health service expenses, the eligible injured person or that person's assignee or representative shall submit written proof of claim to the Company, including full particulars of the nature and extent of the injuries and treatment received and contemplated, as soon as reasonably practicable but, in no event later than 45 days after the date services are rendered. The eligible injured person or that person's representative shall submit written proof of claim for work loss benefits and for other necessary expenses to the Company as soon as reasonably practicable but, in no event, later than 90 days after the work loss is incurred or the other necessary services are rendered. The foregoing time limitations for the submission of proof of claim shall apply unless the eligible injured person or that person's representative submits written proof providing clear and reasonable justification for the failure to comply with such time limitation.

The Regulations afford an Applicant the opportunity to submit a reasonable justification for any late notice. See: 11 NYCRR § 65-3.3 (a), and must establish procedures to "ensure due consideration of denial of claims based

upon late filings" and give "appropriate consideration for situations where the claimant has difficulty ascertaining the insurer's identity or inadvertently submits a claim to the incorrect insurer". See: Matter of Medical Society of the State of New York v. Serio, 298 A.D.2d 255, (1st Dept. 2002), affd. 100 N.Y.2d 854, (2003); Bronx Expert Radiology v. Clarendon Natl. Ins. Co., 2009 NY Slip Op 50747(U), 23 Misc.3d 133(A) (App Term 1st Dept., April 20, 2009).

Furthermore, it is incumbent upon the Applicant to provide the insurer with written justification for its untimely submission in order for it to be excused or the insurer should be granted judgment. See: AAA Chiropractic, P.C. and MVAIC, 2010 NY Slip Op 51896(U) (App Term 2d, 11th & 13th Jud. Dists., Nov. 8, 2010); AR Med. Rehabilitation, P.C. v. MVAIC, 27 Misc.3d 135(A), 910 N.Y.S.2d 760 (Table), 2010 N.Y. Slip Op. 50828(U), 2010 WL 1910908 (App. Term 2d, 11th & 13th Dists. May 10, 2010).

11 NYCRR § 65-3.5 (l) requires the insurer to conduct the proper review and supervisor review regarding purpose of reasonable justification. The section goes on to state as follows:

> The insurer shall establish standards for reviews of its determination that applicants have provided late notice of claim or late proof of claim. … In the case of proof of claim, such standards should include but not limited to appropriate consideration for emergency care providers, demonstrated difficulty in ascertaining the identity of the insurer and inadvertent submission to the incorrect insurer. The insurer shall establish procedures based upon objective criteria, to ensure due consideration of denial of claims based upon late notice or late submission of proof of claim, including supervisory review of all such determinations...

Applicant submitted a bill for anesthesia services which was clearly received by the Respondent more than 45-days from the date of service. The bill is for date of service 7/16/2019 and was received by the Respondent on 4/5/2022. Respondent denied this bill stating:

THIS PROCEDURE CODE IS BEING DENIED AS IT WAS SUBMITTED TO THIS CARRIER BEYOND 45 DAYS FROM THE DATE OF SERVICE. LATE NOTICE WILL BE EXCUSED WHERE THE APPLICANT CAN PROVIDE REASONABLE JUSTIFICATION OF THE FAILURE TO GIVE TIMELY NOTICE. FORWARD ALL DOCUMENTATION THAT MAYBE HELPFUL IN REEVALUATION OF YOUR CLAIM.

However, I find that the Respondent denied the bill at issue late and the untimeliness of the denial renders it void.

Respondent received Applicant's bill on 4/5/2022, thereafter the Respondent issued its denial on 5/7/2022. Respondent's denial was based on the late submission of the bill pursuant to the 45-day rule. This denial is late.

Accordingly, in light of the foregoing, based on the arguments of counsel, and after thorough review and consideration of all submissions, I find in favor of the Applicant. Consequently, the Applicant's claim is granted in the amended amount of $162.06 for the anesthesia services provided to the EIP on date of service 7/16/2019.

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 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Amount Amended	Status
	Premier Anesthesia Associates PA	**06/18/19 - 06/18/19**	**$162.06**		**Awarded: $162.06**
	Premier Anesthesia Associates PA	**07/16/19 - 07/16/19**	**$178.26**	**$162.06**	**Awarded: $162.06**
Total			**$340.32**		**Awarded: $324.12**

B. The insurer shall also compute and pay the applicant interest set forth below. 03/29/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from the filing date for this case until the date that payment is made at two percent 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

After calculating the sum total of the first-party benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an

attorney's fee equal to 20 percent of that sum total, 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 Nassau

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

11/04/2023
(Dated)

Deepak Sohi

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:
03d98812d6cf2bd955ca689d73f9675e

Electronically Signed

Your name: Deepak Sohi
Signed on: 11/04/2023