

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Rockaways ASC Development LLC d/b/a
ASC of Rockaway Beach
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No.	17-23-1288-9937
Applicant's File No.	SS-239216
Insurer's Claim File No.	0491087440001
NAIC No.	36447

ARBITRATION AWARD

I, Nicole J. Simmons, 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: IP

1. Hearing(s) held on 11/02/2023
Declared closed by the arbitrator on 11/02/2023

Greg Itingen, Esq. from Samandarov & Associates, P.C. participated virtually for the Applicant

Danielle Alicea from LM General Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,265.31**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant has amended the amount in dispute to **\$3,213.98** in accordance with its interpretation of the applicable fee schedule provisions.

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

3. Summary of Issues in Dispute

Whether Respondent's policy exhaustion defense is sustainable.

The IP (GR), a 23-year-old male driver, was involved in a motor vehicle accident on 4/5/22. Thereafter, he began a course of conservative care including acupuncture, chiropractic treatment, and physical therapy for complaints including neck and back pain. The instant claim is for cervical spine medial branch block and trigger point injections. Respondent initially denied the claim based upon medical necessity and fee schedule defenses. Respondent now contends that the applicable no-fault policy has been exhausted.

4. Findings, Conclusions, and Basis Therefor

I have reviewed and considered all pertinent documents contained in the American Arbitration Association's ADR Center. The case was decided based upon the submissions of the parties and the oral arguments of the parties' representatives made at the arbitration hearing. There were no witnesses.

The Arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The Arbitrator may question any witness or party and independently raise any issue that the Arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations. 11 NYCRR 65-4.5(o)(1). (Regulation 68-D.)

Applicant has established its prima facie case as Applicant has met the requirements enunciated in Ave T MPC Corp. v Auto One Ins. Co., 32 Misc3d 128[A], 2011 NY Slip Op 51292[U] [App Term, 2d, 11th & 13th JudDists2011]). The Court held that "A no-fault provider establishes its prima facie entitlement to summary judgment by proof of the submission to the defendant of a claim form, proof of the fact and the amount of the loss sustained, and proof that the defendant either failed to pay or deny the claim within the requisite 30-day period, or issued a timely denial of claim that was conclusory, vague or without merit as a matter of law," (see Insurance Law § 5106 [a]; Westchester Med. Ctr. v Nationwide Mut. Ins. Co., 78 AD3d 1168 [2010]; see also New York & Presbyterian Hosp v. Allstate, 31 AD3d 512 [2006]).

An insurer is not required to pay a claim where the policy limits have been exhausted; its duties under the insurance contract cease where it has paid the full monetary limits. Hospital for Joint Diseases v. State Farm Mutual Automobile Ins. Co., 8 A.D.3d 533, 779 N.Y.S.2d 534 (2d Dept. 2004). The insurer's failure to issue a denial of the claim within 30 days does not preclude a defense that the coverage limits of the subject policy have been exhausted. New York and Presbyterian Hospital v. Allstate Ins. Co., 12 A.D.3d 579, 786 N.Y.S.2d 68 (2d Dept. 2004). A defense of no coverage due to the exhaustion of an insurance policy's limit may be asserted by an insurer despite its failure to issue an NF-10 denial of claim form within the requisite 30-day period. Flushing Traditional Acupuncture, P.C. v. Infinity Group, N.Y. Slip Op. 22345, 2012 WL 5974095 (App. Term 2d, 11th & 13th Dists. Nov. 26, 2012).

Where a Respondent "has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease" (Presbyterian Hosp. in the City of New York v.

Liberty Mut. Ins. Co., 216 A.D.2d 448, 628 N.Y.S.2d 396; see also, Champagne v. State Farm Mut. Auto. Ins. Co., 185 A.D.2d 835, 837, 586 N.Y.S.2d 813). Additionally, "the failure to disclaim coverage does not create coverage which the policy was not written to provide" (Zappone v. Home Ins. Co., 55 N.Y.2d 131, 134, 447 N.Y.S.2d 911, 432 N.E.2d 783), "since that defense is never waived by a failure to assert it in a notice of disclaimer" Schiff Assocs. v. Flack, 51 N.Y.2d 692, 700, 435 N.Y.S.2d 972, 417 N.E.2d 84.

Respondent included policy documentation in the form of the Declarations Page which confirms that the Basic PIP limit was \$50,000.00 and there was no additional PIP or Optional Basic Economic Loss Coverage purchased. Also included is a copy of the Payment Ledger showing that the Respondent paid up to the \$50,000 policy limits. Case law dictates that an insurer is not required to pay a claim where the policy limits have been exhausted, Mount Sinai Hospital v. Zurich American Insurance Co., 15 A.D.3d 55, 790 N.Y.S.2d 216 (2d Dept. 2005). In addition, when an insurer "has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease", See Presbyterian Hosp. in the City of New York v. Liberty Mut. Ins. Co., 216 A.D.2d 448, 628 N.Y.S.2d 396 (2d Dept. 1995).

Furthermore, pursuant to 11 NYCRR 65-3.15:

When claims aggregate to more than \$50,000, payments for basic economic loss shall be made to the applicant and/or an assignee in the order in which each service was rendered or each expense was incurred, provided claims therefor were made to the insurer prior to the exhaustion of the \$50,000. If the insurer pays the \$50,000 before receiving claims for services rendered prior in time to those which were paid, the insurer will not be liable to pay such late claims. If the insurer receives claims of a number of providers of services, at the same time, the payments shall be made in the order of rendition of services.

In the instant case, Respondent maintains that the applicable Personal Injury Protection (PIP) benefits under the policy have been exhausted. In support of this contention Respondent submitted payment log/ PIP ledger and documentation confirming insurance policy information and terms of the underlying insurance policy. I note that the policy was exhausted by the award in the linked case AAA Case No. 17-22-1280-7260.

The policy exhaustion precludes the Applicant from collecting on this claim. Coverage does not exist beyond the policy limits. Once the limits are exhausted, it is as if no policy was ever in effect. The insured, or the insured's assignees, have received the full benefit of the policy. Respondent has demonstrated that the applicable policy has been exhausted in the instant matter and the exhaustion defense is sustained.

Accordingly, Respondent's denial is sustained.

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 Nassau

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

12/04/2023

(Dated)

Nicole J. Simmons

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:
950a06ef34310a84ca334e0fde46fa1a

Electronically Signed

Your name: Nicole J. Simmons
Signed on: 12/04/2023