

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Express Recovery Inc
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-22-1236-4270

Applicant's File No. FL21-52603

Insurer's Claim File No. 1094106-01

NAIC No. 16616

ARBITRATION AWARD

I, Eileen Hennessy, 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-T.A.

1. Hearing(s) held on 11/08/2023
Declared closed by the arbitrator on 11/08/2023

Nancy Orłowski from Field Law Group, P.C. participated virtually for the Applicant

Taylor Grogan from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,240.00**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated and agreed that (i) Applicant has met its prima facie burden by submitting evidence that payment of no-fault benefits is overdue, and proof of its claim was mailed to and received by Respondent and (ii) Respondent's denial of the subject claim was timely issued.

3. Summary of Issues in Dispute

The record reveals that Assignor-T.A., a 40-year-old male, claimed injuries as a driver of a motor vehicle involved in an accident that occurred on 2/11/2021. Applicant billed for the rental of a intermittent limb compression device provided from 5/20/2021 through 6/16/2021. Respondent denied this claim based on the claimant was in the

course of his employment at the time of the accident and Worker's Compensation benefits are primary. The issue to be determined is whether Respondent has sustained its defense that Worker's Compensation benefits are primary?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement for the rental of a intermittent limb compression device. This case was decided \based upon the submissions of the Parties as contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives at the hearing via Zoom. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

11 NYCRR 65-4.5 (o) (1) (Regulation 68-D), reads as follows: 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.

WORKER'S COMPENSATION

Respondent's counsel argues that there is sufficient evidence the Assignor was acting in the course of his employment as the claimant checked "Yes" on Box #16 of the NF-2, dated 2/17/2021, admitting he was in the course of his employment at the time of the accident, mandating dismissal of this claim pending referral to the Worker's Compensation Board (WCB), which has primary jurisdiction over such matters. Applicant argues there is insufficient evidence that the claimant was in the course of his employment at the time of the accident.

Respondent timely the denied the bill as Assignor-T.A. was in the course of his employment at the time of the accident and is eligible for Worker's Compensation Benefits. Respondent submits a Letter of Representation from claimant's attorney Jason M. Zemsky, Esq., dated 2/17/2021, which references the submitted NF-2, No-Fault Application for Benefits, signed by the claimant, and dated 2/17/2021, which confirms the claimant was in the course of his employment as an Uber driver in Box #16 and Box #20. Respondent further submits the affidavit of Underwriting Director Michael Duignan, which indicates that the taxi policy was issued to Assignor-T.A. for a "for hire" vehicle bearing a Taxi and Limousine Commission (TLC) license plate. He indicates Assignor-T.A. was the driver on the date of the accident 2/11/2021 and provides the claim number and policy number. The commercial livery insurance policy endorsement, issued by NYC Guardian Brokerage, Inc. effective from 3/1/2020 through 3/1/2021, is submitted. Respondent also submits Assignor-T.A.'s New York State Driver's License and TLC License. Respondent submits correspondence, dated 1/24/2020, from Grun-NY-LLC, which indicates that Assignor-T.A. is actively associated with the Black Car Base licensed by the TLC under the base number license B02765, which is confirmed by Michael Duignan's underwriting affidavit. The correspondence advises that in order to accept new vehicles to be affiliated and be

compliant with the TLC regulations, Grun-NY-LLC and the TLC require that the vehicle carry minimum coverage of \$100,000 per person, \$300,000 per occurrence, and \$200,000 PIP, which is the coverage listed on the policy. Respondent submits documentation that Grun-NY-LLC is affiliated with the Black Car Fund, which provide Worker's Compensation insurance and related benefits for the black car bases and livery car drivers associated with the fund, which is also confirmed by Michael Duignan.

The insurer must proffer competent evidence in admissible form of the alleged facts giving rise to its contention that Workers' Compensation benefits are available. Westchester Medical Center v. American Transit Ins. Co., 60 A.D.3d 848, 875 N.Y.S.2d 246 (2d Dept. 2009).

The Appellate Courts have held that the burden of proof is quite low in determining whether worker's compensation is primary. In Parkway Mgmt., PLLC v. American Transit Ins. Co., 39 Misc. 3d 133 (App Terms 2nd Dept. 2013), the Court held "We find that defendant's proof, including the police accident report, was sufficient to raise a question of fact as to whether plaintiff's assignor had been acting as an employee at the time of the accident, which issue must be resolved by the Workers' Compensation Board."

Based upon the evidence submitted, I find that this matter may not proceed forward. The case law is clear that Worker's Compensation benefits are primary. There is a legislative mandate that the WCB has the primary jurisdiction to make this determination, especially so in a case such as this, wherein Assignor-T.A. himself admits that he was in the course of his employment at the time of the accident. In Compas Med., P.C. v American Tr. Ins. Co., 2015 NY Slip Op 51675(U), Decided on November 13, 2015 Appellate Term, Second Department, a case directly on point, the Appellate Term determined in pertinent part:

We agree with the Civil Court that defendant proffered sufficient evidence to support its contention that there was an issue as to whether plaintiff's assignor had been acting in the course of his employment at the time of the accident and that, therefore, workers' compensation benefits might be available (citations omitted). Indeed, the application for no-fault benefits form, which was signed by plaintiff's assignor under penalty of perjury, states that the assignor was in the course of his employment when he was injured, an admission that is sufficient to raise a question of fact as to whether the assignor was acting as an employee at the time of the accident. "Since primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board,' it is inappropriate for the courts to express views with respect thereto pending determination by the board' " (Monteiro v Rasraj Foods & Catering, Inc., 79 AD3d 827, 829 [2010], quoting Botwinick v Ogden, 59 NY2d 909, 911 [1983]). Consequently, the issue of whether plaintiff's assignor was acting as an employee at the time of the accident must be resolved by the Workers' Compensation Board (citations omitted).

The determination here is not whether the individual was in the course of his employment, which is an issue that must be resolved by the WCB, but whether there is enough proof in Respondent's submission to raise this question. Here Respondent has presented evidence that meets its burden. I find that there is sufficient evidence to raise a question of fact as to whether the eligible injured person was acting in the course of his employment at the time of the accident. Therefore, the issue must be resolved by the WCB. *See* Compas Med., P.C. v American Tr. Ins. Co., Id.

This matter is dismissed without prejudice. 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 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 Nassau

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

12/08/2023
(Dated)

Eileen Hennessy

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:
3694329271f2c97ff2016d453a35b6f6

Electronically Signed

Your name: Eileen Hennessy
Signed on: 12/08/2023