

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Colin Clarke MD PC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-22-1277-3594

Applicant's File No. 3117227

Insurer's Claim File No. 1108413-01

NAIC No. 16616

ARBITRATION AWARD

I, Matthew J. Cavalier, 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 12/13/2023
Declared closed by the arbitrator on 12/13/2023

Melissa Scotti, Esq from Law Offices of Andrew J. Costella Jr., Esq. participated virtually for the Applicant

Fontini Lambrianidis, Esq from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$535.02**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The Parties stipulated at the hearing that the date interest accrues if the Applicant prevails is December 5, 2022.

3. Summary of Issues in Dispute

Whether the Assignor, a 54-year-old male ("AI") on the date of the accident ("DOA") who is the eligible injured party ("EIP") who was injured in a motor vehicle accident

("MVA") on January 8, 2022, and received trigger point medical services on date of service ("DOS") February 28, 2022, was correctly billed in the sum of \$535.02, and timely submitted by the Applicant,

Whether the Respondent can maintain its defense of Worker's Compensation being the primary insurance for the medical services in question?

4. Findings, Conclusions, and Basis Therefor

This matter falls under the First Amendment to Regulation 68D and, as such, only the documents submitted by the Applicant at the time of filing and by the Respondent during the conciliation will be considered. Therefore, all documents contained in the ADR Center at the time of the Hearing have been considered.

An Arbitrator "shall be the judge of the relevance and the materiality of the evidence offered, strict conformity to the rules of evidence shall not be necessary. The arbitrator may question or examine any witness or party and independently raise any issue that arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations." 11 NYCRR 65-45(0)(1).

Additionally, as the trier of the facts and the law, an Arbitrator is authorized to review and take judicial notice of any rule, law, medical document or periodical or any other document which may impact and aid in making a decision, as long as it conforms with the Insurance Laws and the New York State Insurance Department Regulations. ***Matter of Medical Society v. Serio***, 100 N.Y.2d 854, 768 N.Y.S.2d 423 (2003).

The dispute arises from the underlying ("MVA") of January 8, 2022, wherein the Assignor suffered injuries in the MVA.

The Applicant is seeking to be reimbursed the sum of \$535.02 for DOS February 28, 2022, for trigger point injection medical services rendered to the Assignor. The Applicant timely billed the Respondent and the Respondent timely denied based upon a defense of Worker's Compensation being the primary insurance coverage for the medical services rendered to the Assignor.

Workers' Compensation

In support of this denial, Respondent has submitted the following:

1. The NF-2 by the Assignor dated January 27, 2022, swearing to being the driver of the vehicle owned by Silo Cab Corp. insured by livery policy MR73LR-C102101 with NYS livery Plate Y200817C and answering "Yes" to the question in Box 16, "At the time of the accident were you in the course of your employment?"

2. The January 13, 2023, Underwriting Affidavit of Respondent sworn to by the Director of Underwriting, Michael Duignan, who swears to the SILO CAB CORP policy being in full force and effect on the DOA, the Assignor/Driver is listed on the policy as is the vehicle involved in the MVA on January 8, 2022.
3. The Global NF-10 dated March 25, 2022, and the specific NF-10 dated May 9, 2022, denying this claim based upon Workers' Compensation being the primary insurance.

The law in New York is clear on this issue. 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, 575 N.Y.S.2d 836 (1st Dept. 1991). The Workers' Compensation Board has primary jurisdiction to determine factual issues concerning coverage under the Workers' Compensation Law. *AR Medical Rehabilitation, P.C. v. American Transit Ins. Co.*, 27 Misc.3d 133(A), 910 N.Y.S.2d 403 (Table), 2010 N.Y. Slip Op. 50708(U), 2010 WL 1630124 (App. Term 2d, 11th & 13th Dists. Apr. 13, 2010).

Where an insurer raises a defense that the insured was injured in the course of employment, primary jurisdiction over the claim lies with the Workers Compensation Board. *Arvatz v. Empire Mutual Ins. Co.*, 171 A.D.2d 262, 575 N.Y.S.2d 836 (1st Dept). Where the evidence is sufficient to raise a question of fact as to whether the eligible injured person was acting as an employee at the time of the accident, the issue must be resolved by the Workers' Compensation Board. *A.B. Medical Services, PLLC v. American Transit Ins. Co.*, 24 Misc.3d 75, 885 N.Y.S.2d 154 (App. Term 9th & 10th Dists. June 18, 2009); *Response Equipment, Inc. v. American Transit Ins. Co.*, 15 Misc.3d 145(A), 841 N.Y.S.2d 823 (Table), 2007 N.Y. Slip Op. 51176(U), 2007 WL 1662679 (App. Term 2d & 11th Dists. June 8, 2007).

Additionally, the Appellate Courts have held that the burden of proof is quite low in determining whether workers' compensation is primary. In *Parkway Mgmt., PLLC v. American Transit Ins. Co.*, 39 Misc.3d 133 (App. Term 2 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."

It has also been held that where a person is injured while driving a for-hire vehicle with "TC" plates which is owned by a livery company and insured under a livery policy, the insurer has met its burden of raising a question of fact as to whether the injured person was injured in the course of employment, a question best suited for determination by the Workers' Compensation Board. *RX Warehouse Pharmacy, Inc. v. American Transit Ins. Co.*, Index No. 51265/13 (Civ. Ct. Kings Co., Richard J. Montelione, J., Nov. 13, 2015). Further, it is not incumbent on the Respondent to prove that the Claimant was actually working. Respondent need only establish that there is potential merit to the claim that the Claimant may have been working on the date of loss. *Lenox Hill Radiology, PC v. American Transit*, 18 Misc.3d 1136 (A) (Civ. Ct. NY 2008).

Here, there is clearly sufficient evidence to raise a factual question as to whether the Assignor was acting as an employee at the time of the accident. Thus, the issue must be resolved in the first instance by the Workers' Compensation Board. Although the Applicant argued that the assignor was not in the course of his employment since he was alone in the vehicle at the time of the accident, but Respondent's counsel argued that there is conclusive proof that the Assignor was not in the course of their employment.

Also, Respondent's Counsel argued that the Applicant did not submit an affidavit from the driver/owner of the vehicle or the dispatcher for the date of the MVA that states that the Assignor was not in the course of his employment, nor did they submit a sworn statement from the Assignor, swearing they were not in their course of employment, therefore the oral arguments and submitted records are not dispositive of the issue of employment at the time of the accident.

In so ruling, I concur with my fellow Arbitrators who have ruled similarly. *See, e.g.* Arbitrator Andreotta, 17-17-1081-8506; Arbitrator Link, 17-17-1061-0147; Arbitrator Bishop, 17-18-1099-6490; Arbitrator Martino, 17-17-1062-3234; Arbitrator Vera, 17-18-1083-8692; Arbitrator Shor, 17-17-1052-9004.

Having decided that there is a question of fact for the Workers' Compensation Board, I need not address the medical necessity and fee schedule issues raised in the denial.

This case is dismissed without prejudice to renew.

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 Queens

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

12/18/2023
(Dated)

Matthew J. Cavalier

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:
2731bd6d01eeb37b2fc6ffc70f80e2e6

Electronically Signed

Your name: Matthew J. Cavalier
Signed on: 12/18/2023