

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Leonaum Pharmacy Inc d/b/a Advantage
Pharmacy
(Applicant)

- and -

Everest National Insurance Company
(Respondent)

AAA Case No.	17-23-1299-8149
Applicant's File No.	BT23-232484
Insurer's Claim File No.	4A21093FA25-0002
NAIC No.	10120

ARBITRATION AWARD

I, Debbie Thomas, 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 07/31/2024
Declared closed by the arbitrator on 07/31/2024

Heather Landeros from The Tadchiev Law Firm, P.C. participated virtually for the Applicant

A representative from Sedgwick Claims Mgmt. Services failed to appear for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,528.72**, 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

Applicant seeks reimbursement in the amount of \$1,528.72 for prescription medication dispensed on September 10, 2022 to Assignor R.C., a 77-year-old female who was involved in a motor vehicle accident on September 22, 2021. Respondent denied the claim based on its investigation which revealed that the insured vehicle did not strike or otherwise make any contact with Assignor.

4. Findings, Conclusions, and Basis Therefor

The within award is based upon this arbitrator's review of the record as well as oral argument at the time of the hearing of this matter.

Under Sec. 5102 of the New York Insurance Law (McKinney 1985), No-Fault first party benefits are reimbursement for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle.

It is well settled that a healthcare provider establishes its *prima facie* entitlement to No-Fault benefits as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of No-Fault benefits were overdue. *Westchester Medical Center v. Lincoln General Insurance Company*, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2 Dept. 2009); *see also Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). Respondent's denial indicating receipt of the proof of claim shows that Applicant mailed the proof of claim forms to the Respondent (*see, Ultra Diagnostic Imaging v. Liberty Mutual Insurance Co.*, 9 Misc.3d 97). The evidence is sufficient to make out a *prima facie* case of entitlement to recovery of Applicant's bill

Once Applicant has made out a *prima facie* case, the burden shifts to Respondent to timely request additional verification, deny, or pay the claim. *Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co.*, 9 NY3d 312 (2007).

Respondent sent a letter by Certified Mail to Assignor's personal injury attorneys providing the following explanation for its denial:

- No credible evidence has been presented of the involvement of Respondent's insured vehicle in the alleged accident.
- Assignor claimed to be an eligible injured person for benefits under Respondent's insured commercial automotive liability policy.
- The basis of the claim was the allegation that a motor vehicle owned and operated by Respondent's insured was involved in a single motor vehicle accident with Assignor.
- Respondent investigated the alleged accident and determined it to be unsubstantiated. There was no evidence of an accident between the insured and Assignor.
- Respondent's insured denied that any accident occurred with Assignor.
- In the police report, Assignor stated that the vehicle was attempting a left turn, onto Westchester Avenue from Trinity Avenue, when it reversed and struck her.
- Assignor underwent an examination under oath conducted on March 15, 2022.

- She testified that the accident occurred on September 22, 2021 in the morning.
- At the time, she was a pedestrian returning home on Westchester Avenue accompanied by a friend, Mercedes.
- Upon reaching the intersection where Trinity Avenue, a one-way roadway, intersects and enters Westchester Avenue, Assignor and Mercedes crossed Trinity Avenue in the crosswalk.
- A vehicle was stopped on Trinity Avenue, situated partially past the same crosswalk, facing the direction of Westchester Avenue.
- Assignor vaguely described the vehicle as white in color, van-like, without windows in the rear, and with unspecified green advertising on the side.
- The vehicle did not have any signal lights operating.
- She described the driver as a light skinned male without detail.
- Assignor crossed Trinity Avenue and passed behind the vehicle, which she observed to her left, when the same vehicle suddenly moved in reverse and came into contact with her and Mercedes.
- Assignor was struck on her right shoulder by the rear driver's side corner of the vehicle, which caused her to fall to the ground and onto her left knee and back.
- Initially, she denied seeing the vehicle hit her then asserted that she saw the vehicle hit her on the right shoulder.
- Assignor also testified that she fell on top of Mercedes who was also hit by the vehicle. However, she did not actually see the vehicle hit Mercedes.
- Assignor was asked how much time passed between first observing the vehicle moving in reverse and the time that she was hit by the same. However, she refused to answer on the advice of her counsel.
- Assignor and her attorney were advised, multiples times, that refusal to answer could be grounds for the denial of no-fault coverage. Assignor was given multiples opportunities to answer but did not.

An eligible injured person is defined, subject to exclusion and condition, in relevant part as:

- (a) The named insured and any relative who sustains personal injury arising out of the use or operation of any motor vehicle;
- (b) The named insured and any relative who sustains personal injury arising out of the use or operation of an any motorcycle, while not occupying a motorcycle;

- (c) Any other person who sustains personal injury arising out of use or operation of the insured motor vehicle in the State of New York while not occupying another motor vehicle; or
- (d) Any New York State resident who sustains personal injury arising out of the use or operation of the insured motor vehicle outside of New York State while not occupying another motor vehicle.

Based on the investigation, Respondent determined that there was no evidence of an accident between its insured vehicle and Assignor. Respondent's insured denied any accident with Assignor. Assignor failed to identify the vehicle's plate number or the driver with any specificity. Assignor's testimony strained credibility, especially where she described having observed the vehicle, to her left side, moving in reverse and hitting her on her right side, causing her to fall onto her knee and back. Additionally, Assignor initially denied seeing the contact with her body and then asserted otherwise. Also, she testified that she fell on top of Mercedes, who she asserted was also hit by the vehicle. However, she admittedly did not see the vehicle come into contact with Mercedes. Assignor's recount of the incident to the police indicated that the vehicle was attempting to make a left turn, while she testified that she observed the vehicle stopped without any signal lights operating before it suddenly reversed. Assignor refused to answer a question regarding the timeframe between observing the vehicle reversing and the impact to her. The basis of identification of the vehicle was not based on any actual credible knowledge by Assignor. Furthermore, the refusal to answer questions at an EUO is a basis of denial of no-fault coverage. In all, nothing objective has been presented that corroborates the involvement of the insured. Respondent's insured's vehicle was not involved in the alleged accident and as such no coverage exists.

Respondent also submits the transcript of Assignor's EUO testimony and the affidavit of Steve Turner.

Respondent's lack of coverage defense was previously addressed by Arbitrator Michael Rosenberger in AAA Case No. 17-23-1282-9140. Arbitrator Rosenberger's decision states, in relevant part:

An allegation by defendant that the accident at issue was the result of a staged loss or the treatment was unrelated to the motor vehicle accident, or services were not provided must be supported by more than just unsubstantiated hypothesis and supposition. See generally, *A.B. Medical Services, P.C. v. Eagle Ins. Co.*, 3 Misc.3d 8 (App. Term 2 Dept. 2003); , 14 Misc.3d 144(A) *Great Wall Acupuncture v. Utica Mutual Ins. Co.* (App. Term 2nd and 11th Jud. Dists. 2007); , *Comprehensive Mental v. Allstate Ins. Co.* 14 Misc.3d 130(A) (App. Term 9 and 10 Jud. Dists. 2007). , See *A.B. Medical Services, P.C. v. Utica Mutual Ins. Co.*, 10 Misc.3d 50 (App. Term 2 Dept. 2005); *Webster Diagnostic Medicine, P.C. v. State Farm Ins. Co.*, 2007 N.Y. Slip. Op. 27134 (App. Term 2 Dept. 2007); *Comprehensive Mental Assessment & Med. Care, P.C. v.*

State Farm Mut. Auto Ins. Co., 2007 N.Y. Slip. Op. 50691(U) (App. Term 2nd Dept. 2007). Indeed, defendant's defense must fall if such defense is based upon "unsupported hypotheses and supposition." See generally, Oleg Barshay, D.C., P.C. v. State Farm Ina. Co., 14 Misc.3d 74 (App. Term 2 and 11 Jud. Dists. 2006).

Respondent asserts the instant accident did not take place as alleged. Respondent's primary contention is that their insured vehicle was not involved in the accident. In support of this contention, respondent relies upon EUO testimony of the claimant. The owner of the vehicle denied the accident and asserts he did not strike the claimant. The EUO testimony presents significant inconsistencies particularly related to an inaccurate identification of the purported driver of the vehicle. These two pieces of evidence are factually sufficient to meet the burden of production that the accident did not occur as alleged. Applicant has failed to come forward with any evidence in rebuttal.

Therefore, the claim is denied.

Counsel for Applicant argues that Respondent did not issue either a specific or global denial of benefits; therefore, there was no notice to the provider of the basis for Respondent's denial of all claims.

Based on the record before, including the transcript of Assignor's EUO testimony and the affidavit of Steve Turner, I see no reason to depart from Arbitrator Rosenberg's finding that Respondent met its burden of production that the accident did not occur as alleged which was not rebutted by Applicant.

A defense of lack of coverage is not precludable even if not preserved in a timely denial of claim. See *Central General Hospital v. Chubb Group*, 90 N.Y.2d 195, 659 N.Y.S.2d 246 (1997). Indeed, where coverage is nonexistent, the insurer is not even under an obligation to issue a denial of claim form for such a loss. "When a claim is denied based on noncoverage, the claim is not within the ambit of the policy and, therefore, mandating coverage on the basis of an insurer's failure to serve a timely notice of disclaimer would be to create coverage where none previously existed." Couch on Insurance, Section 198:59. Further, a court or arbitrator cannot create insurance coverage where it would not otherwise exist. See *White v. Aron Kaufman & Co., Inc.* 243 A.D.2d 255 (1st Dept. 1997); *The Travelers Indem. Co. of Connecticut v. Conroy*, 2011 WL 3898072 (N.Y.Sup. 2011). Accordingly, Applicant's claim for reimbursement is denied.

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

08/12/2024

(Dated)

Debbie Thomas

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:
ab75d6bea1a11af42efb4927be665f93

Electronically Signed

Your name: Debbie Thomas
Signed on: 08/12/2024