

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Cross Bay Orthopedic Surgery PC
(Applicant)

- and -

American States Insurance Company
(Respondent)

AAA Case No. 17-23-1326-0599

Applicant's File No. BT23-259592

Insurer's Claim File No. 0547152160001

NAIC No. 19704

ARBITRATION AWARD

I, Josh Youngman, 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 09/06/2024
Declared closed by the arbitrator on 09/06/2024

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

Justine Vandenberghe, Esq. from American States Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$203.76**, 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

This dispute involves a claim for PIP benefits brought by the applicant as an assignee of a 45-year old male (S.Y.) who was injured on September 5, 2023 when the motor vehicle he was driving was involved in an accident. The evidence also shows after the accident the IP sought treatment and had an office visit on September 11, 2023. The evidence further shows the applicant's bill seeking reimbursement in the amount of \$203.76 was denied based on an allegation that the IP made material misrepresentations in the submission of their claim.

The issues to be decided are whether the applicant submitted sufficient evidence to make out a prima facie case for the disputed claim, and if so, whether the respondent submitted sufficient evidence to sustain their material misrepresentation defense.

4. Findings, Conclusions, and Basis Therefor

This Award is rendered after diligent review and consideration of the parties' evidence submitted to and maintained by the American Arbitration Association's electronic case filing system, "MODRIA," as well as the parties' oral arguments and any testimony presented at this matter's hearing. Evidence that was submitted after this matter's "closing" and without this Arbitrator's authorization was not considered.

An applicant establishes its prima facie entitlement to reimbursement with proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue. See Insurance Law § 5106a; Viviane Etienne Med. Care v. Country-Wide Ins. Co., 25 N.Y.3d 498 (2015); Mary Immaculate Hosp. v. Allstate Ins. Co., 5 A.D. 3d 742 (App. Div. 2d Dept. 2004). Once an applicant has established its prima facie case, the burden shifts to the insurer to establish that it timely and properly denied the claim(s), and to submit evidence to sustain the basis of its denial(s).

I find that the applicant has submitted sufficient evidence to establish a prima facie case for the claim at issue. Further, I find the respondent submitted sufficient evidence to show the claim was timely denied and the defense of material misrepresentation in the presentation of the claim was properly persevered.

Generally, misrepresentation by an insured in the procurement of an insurance policy shall not void such contract unless such misrepresentation is proven to be "material." See generally, N.Y. Ins. Law §3105(b); See also, Joseph v. Interboro Ins. Co., 2016 NY Slip Op 08050 (App. Div. 1st Dept. 2016); Renelique v. National Liab. & Fire Ins. Co., 2016 NY Slip Op 51615(U) (App. Term 2d Dept. 2016); Compas Med., P.C. v. Praetorian Ins. Co., 2016 NY Slip Op 51000(U) (App. Term 2d Dept. 2016); Zilkha v. Mutual Life Insurance Company of New York, 287 A.D.2d 713 (App. Div. 2d Dept. 2001).

In Joseph v. Interboro, the Court faced a situation where an insured made a material misrepresentation when procuring a homeowners' insurance policy. When a claim was filed and the insurer discovered the misrepresentation, they denied the claim. The Appellate Division of the First Department stated:

The Supreme Court properly granted Interboro's motion for summary judgment dismissing the complaint insofar as asserted against it. "To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she secured the policy" (*Interboro Ins. Co. v. Fatmir*, 89 AD3d 993, 993-994 [2011]; see *Novick v Middlesex Mut.*

Assur. Co., 84 AD3d 1330, 1330 [2011]; *Varshavskaya v Metropolitan Life Ins. Co.*, 68 AD3d 855, 856 [2009]; *Zilkha v Mutual Life Ins. Co. of N.Y.*, 287 AD2d 713, 714 [2001]). "A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof" (Insurance Law §3105 [a]; *see Morales v Castlepoint Ins. Co.*, 125 AD3d 947, 948 [2015]). "A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented" (*Interboro Ins. Co. v Fatmir*, 89 AD3d at 994; *see* Insurance Law §3105 [b]; *Novick v Middlesex Mut. Assur. Co.*, 84 AD3d at 1330; *Varshavskaya v Metropolitan Life Ins. Co.*, 68 AD3d at 856). To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices that show that it would not have issued the policy if the correct information had been disclosed in the application (*see Interboro Ins. Co. v Fatmir*, 89 AD3d at 994; *Schirmer v Penkert*, 41 AD3d 688, 690-691 [2007]).

Here, Interboro established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the plaintiffs' application for insurance contained a misrepresentation regarding whether the premises would be owner occupied and that it would not have issued the subject policy if the application had disclosed that the subject premises would not be owner occupied (*see Morales v Castlepoint Ins. Co.*, 125 AD3d at 948; *James v Tower Ins. Co. of N.Y.*, 112 AD3d 786, 787 [2013]; *Interboro Ins. Co. v Fatmir*, 89 AD3d at 993-994).

The Appellate Term of the Second Department applied similar reasoning to a no-fault dispute in Renelique v. National Liab., supra, where they stated:

Defendant's cross motion was based upon the ground that plaintiff's assignor had procured the insurance policy in question by making a material misrepresentation as to his place of residence. As plaintiff argues, defendant failed to establish as a matter of law that the misrepresentation by plaintiff's assignor was material (*see Interboro Ins. Co. v Fatmir*, 89 AD3d 993 [2011]). Consequently, defendant's cross motion should have been denied.

An identical result occurred in Compas v. Praetorian, supra, where the Appellate Term of the Second Department stated:

Moreover, defendant failed to establish as a matter of law that the misrepresentation by plaintiff's assignor as to his place of residence was material (*see Interboro Ins. Co. v Fatmir*, 89 AD3d 993 [2011]). For the foregoing reasons, the branches of defendant's cross motion seeking summary judgment dismissing the first through third causes of action should have been denied.

Further, in order to establish that a misrepresentation was material, the courts have held that the insurer must produce evidence that shows they would not have issued the policy had the misrepresentation not occurred. *Zilkha v. Mutual Life Insurance Company of New York*, 287 A.D.2d 713 (App. Div. 2d Dept. 2001).

In Zilkha v. Mutual, the plaintiff sought to recover benefits pursuant to a disability insurance policy. The defendant moved for summary judgment seeking rescission of the insurance contract on the ground that plaintiff made material misrepresentations in the procurement of the policy. The lower court denied the defendant's motion and the defendant appealed. In affirming the decision of the lower court, the Appellate Division held:

In order to establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation. A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented (see, *Penn Mut. Life Ins. Co. v. Remling*, 268 A.D.2d 572, 573, 702 N.Y.S.2d 375; Insurance Law § 3105[b]). Ordinarily, the issue of materiality is a question of fact for the jury (see, *Process Plants Corp. v. Beneficial Nat. Life Ins. Co.*, 53 A.D.2d 214, 216, 385 N.Y.S.2d 308, *aff'd*, 42 N.Y.2d 928, 397 N.Y.S.2d 1007, 366 N.E.2d 1361). Here, there are issues of fact as to whether the plaintiff was, in fact, treated for certain medical conditions which she failed to disclose and whether any such alleged misrepresentations were material. Consequently, the defendant's motion for summary judgment was properly denied.

See also Joseph v. Interboro, *supra* ["To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices that show that it would not have issued the policy if the correct information had been disclosed in the application."].

Prior to a review of the evidence, I note I previously sustained the respondent's defense in the matter of Pranevicius Medical, PC v. American States Ins. Co., AAA Case No.: 17-23-1327-0020 (2024). In that matter, after my review of the evidence, I stated:

In the instant matter, the respondent submitted the transcript of an Examination Under Oath (EUO) of the IP that occurred on October 10, 2023.

During the EUO, the IP testified his home address is in Poughquag, NY. The IP stated he was present in the Bronx, NY at the time of the EUO. Further, the IP's driver's license, which was issued in 2017 and was valid until 2025, listed the Bronx, NY address.

The IP further testified the Poughquag, NY house was his "vacation home" and that his "main residence" was the home in the Bronx, NY. The IP also testified he was at his vacation home every weekend. When asked if he owns the vacation home, however, the IP testified it was purchased by a "family member" and then stated it was owned by friends "Evelyn and Maxwell". The IP did not know their last names.

The IP also testified he helped around the house and provided groceries but did not pay rent at the vacation home or have any written agreement with Evelyn and Maxwell.

The IP further testified he garages the insured vehicle in the Bronx, NY while working at the Bronx Lebanon Hospital for five (5) days per week.

The IP also stated he has a lease for the home in the Bronx, NY and pays rent. The IP also stated his employer has the Bronx, NY address

The respondent further submits affidavits executed by Jonathan Jeffrey, who is employed by the respondent in the Special Investigations Unit (SIU) and by Laura Risher, who is employed by the respondent as in their US Retail Markets Division, Product Management - Regulatory Compliance Department as a Manager of Cos, Manager in Personal Lines Underwriting.

Mr. Jeffrey summarizes the reasons the respondent asserts the IP misrepresented his address and states the IP's NF-2 submitted for the September 5, 2023 accident contained the Bronx, NY address. Mr. Jeffrey also states the IP had two (2) prior losses in which his address was listed as the Bronx, NY address. Mr. Jeffrey also states a "vehicle locator report" showed the vehicle only in the Bronx, NY during the day and night (other than one (1) sighting in New Jersey).

Further, Ms. Risher establishes the IP's misrepresentations are material.

I find the unrebutted evidence supports the respondent's defense. The IP clearly used an address that was not his residence and the misrepresentation was material.

Further, I do not find the respondent must submit the insurance application in order to substantiate their defense. The unrebutted evidence is sufficient to show the IP used an address that he did not reside at during the presentation of the instant claim.

Thus, the respondent's defense is sustained and the claim is denied.

I have reviewed the evidence submitted herein and see no reason to disturb my prior determination. Thus, the disputed claim is denied.

Further, as stated by the Supreme Court of the State of New York, County of New York in the matter of Country-Wide Ins. Co. v. Sayed Physical Therapy, P.C., 2022 NY Slip Op 31874(U) (Sup. Ct. NY County 2022):

It is not the duty of the arbiter, be it an arbitrator or Court, to parse [through] hundreds of pages of exhibits to make a out a claim or defense for a party (*see e.g. Barsella v. City of New York*, 82 A.D.2d 747, 748 [1st Dept 1981]); such duty belongs to counsel, as advocate. Failing to elucidate evidence in support of a party's claim is not error of the arbitrator but is rather error of counsel, and such failure does not render an arbitrator's award arbitrary and capricious (*see Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 35 A.D.3d 720, 721 [2d 2006]).

Thus, any issues not referenced above are held to be moot and/or waived insofar as they were not sufficiently 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 claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of CA

SS :

County of San Diego

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

09/10/2024
(Dated)

Josh Youngman

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:
a170c3f8d82abc310f361b34b9677424

Electronically Signed

Your name: Josh Youngman
Signed on: 09/10/2024