

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Comfort Therapy Solutions Inc.
(Applicant)

- and -

State Farm Fire & Casualty Company
(Respondent)

AAA Case No. 17-24-1346-2946

Applicant's File No. 3043820

Insurer's Claim File No. 32-50G9-54R

NAIC No.

ARBITRATION AWARD

I, Daniel Felber, 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: LJ

1. Hearing(s) held on 09/03/2024
Declared closed by the arbitrator on 09/03/2024

Justin Skaferowsky, Esq. from Israel Purdy, LLP participated virtually for the Applicant

Joshua Shack, Esq. from Gallo Vitucci Klar, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,335.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended the total amount in dispute to \$2,250.00 to conform with the DME Fee Schedule.

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

3. Summary of Issues in Dispute

Assignor LJ, a 49-year-old male, was the driver of a motor vehicle involved in an accident on May 15, 2023. Assignor suffered injuries to his bilateral shoulders and back, for which he received medical treatment. In dispute is Applicant's claim for a cold

compression unit provided to Assignor on June 26, 2023. Respondent denied the claim based upon Applicant's material misrepresentations with regard to the procurement of the policy in question, rendering the policy and ensuing coverage null and void. The issue to be determined in this arbitration is whether Respondent sustained its burden of proving that Assignor violated a condition of the insurance policy, precluding him and her assignee from receiving first-party benefits under that policy.

4. Findings, Conclusions, and Basis Therefor

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. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

Applicant made out a *prima facie* showing of entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms were mailed and received, and that payment of no-fault benefits was overdue (*see* Insurance Law § 5106 [a]; 11 NYCRR 65.15 [g] [3]; *Mary Immaculate Hosp. v Allstate Ins. Co.*, 5 A.D.3d 742 (2d Dept. 2004).

LACK OF COVERAGE - MATERIAL MISREPRESENTATION TO PROCURE POLICY

An insurer asserting a lack of coverage based upon a defense of fraud must come forward with "the facts" or a "foundation for its belief" that the incident was the result of a fraudulent event. *See, Mount Sinai Hosp. v. Triboro Coach*, 263 A.D. 2d 11, 19-20 (2d Dept., 1999), *citing, Central General Hospital v. Chubb Group of Ins., Co.'s*, 90 N.Y. 2d 195 (1997). An insurer's "founded belief" must be established by a preponderance of the evidence. *V.S. Medical Services, P.C., v. Allstate*, 25 Misc. 3d 39 (App. Term 2d Dept. 2009).

An insurer asserting a lack of coverage based upon a defense of fraudulent procurement of the insurance policy must produce sufficient evidence to demonstrate that the

misrepresentation was material, that is, the carrier would not have issued or re-issued the policy if the correct information were known. *See*, N.Y. Insurance Law Section 3105(b); *Restorative Chiropractic Solutions v. State Farm Ins. Co.*, 70 Misc.3d 1224(A), 2021 NY Slip Op. 50209(U) (Civ. Ct. Kings Co. 2021).

Respondent alleges that the insurance policy as issue is based upon the representation that Assignor (the insured) was a Flushing, New York resident when, in fact, the insured motor vehicle was principally garaged in Brooklyn, New York.

In support of its defense Respondent submitted the insurance policy, Assignor's EUO transcript, and counsel's brief averring that Assignor misrepresented the primary garaging location of the vehicle and that the premium for the proper location would be greater than the premium charged based upon Assignor's designated location. Notably, however, Respondent did not submit an affidavit from an underwriter attesting that, if the policy had been correctly rated with a Brooklyn address, the premium would have been higher than for the Flushing address. Moreover, there is no proof that, had Respondent been aware of this misrepresentation at inception of the policy, it would not have issued or renewed the policy at the same rate.

At the hearing, Applicant argued that Respondent's evidence is insufficient to prove materiality because the only proof of materiality derives from counsel's hearsay allegation regarding the purported premium differential and not from an underwriter possessing sufficient knowledge and experience upon which to base this conclusion. In addition, the record does not contain evidence to support the contention that Respondent would not have issued or renewed the policy at the same rate. I agree.

Based upon the foregoing, I find that on this record Respondent has not demonstrated by a preponderance of the evidence that the within policy was procured by a material misrepresentation.

I am also persuaded by my prior Award finding that Respondent failed to sustain its procurement fraud defense in AAA Case. Nos. 17-23-1319-3168 and 17-23-1326-4174.

As such, Applicant's amended claim is granted.

Any further issues raised in the hearing record are held to be moot and/or waived insofar as not 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Amount Amended	Status
	Comfort Therapy Solutions Inc.	06/26/23 - 06/26/23	\$2,335.00	\$2,250.00	Awarded: \$2,250.00
Total			\$2,335.00		Awarded: \$2,250.00

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/02/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30-day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217 (2009).

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

As this matter was filed on or after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 11 NYCRR 65-4.6(d) For claims that fall under the Sixth Amendment to the regulation, the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved dispute, subject to a maximum fee of \$1,360.

- D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

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

State of NY

SS :

County of Westchester

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

09/11/2024

(Dated)

Daniel Felber

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:
d9bf57bdb64cf1fb1d3ae2c0b39f9805

Electronically Signed

Your name: Daniel Felber
Signed on: 09/11/2024