

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Metro Healthcare Partners
(Applicant)

- and -

New York City Transit Authority
(Respondent)

AAA Case No. 17-24-1340-9555
Applicant's File No. 3207171
Insurer's Claim File No. BU2211170037001
NAIC No. Self-Insured

ARBITRATION AWARD

I, Tracy Morgan, 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: injured person-assignor

1. Hearing(s) held on 09/11/2024
Declared closed by the arbitrator on 09/11/2024

Ryan Berry, Esq. from Israel Purdy, LLP participated virtually for the Applicant

Lura Weiss, Esq. from Foley, Smit, O'Boyle & Weisman participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$827.82**, 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

The Applicant is the assignee of no-fault benefits from injured person-assignor (AH), a 61 year old female who reported she was injured while boarding a NYC bus on November 17, 2022. Following the incident, the injured person-assignor sought medical assistance and underwent office visits and physical therapy services performed by Applicant December 5, 2023-January 23, 2024. Respondent maintains that there is no coverage as the injuries did not arise out of the use or operation of the NYC bus.

The issue presented on this arbitration is whether Respondent proved that the alleged injuries were not sustained as a result of the use or operation of the NYC bus?

4. Findings, Conclusions, and Basis Therefor

This hearing was conducted using documents contained in ADR Center. Any documents contained in the folder are hereby incorporated into this hearing. I have reviewed the relevant exhibits contained in the electronic file maintained by the American Arbitration Association and have considered all of the stipulations and arguments presented by both parties at the hearing of this matter. No witnesses appeared or testified.

A health care provider establishes its prima facie entitlement to no-fault benefits by submitting evidentiary proof that the prescribed statutory billing forms were mailed to and received by the insurer and that payment of no-fault benefits is overdue See Insurance Law § 5106 [a]; 11 NYCRR 65.15 [g]; *Viviane Etienne Medical Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498 (2015).

Applicant submitted certificates of mailing and affidavits attesting to the mailing of the bills at issue. I find that Applicant established its prima facie entitlement to No-fault benefits as proofs of claim were mailed to and received by Respondent and payment of No-Fault benefits is overdue.

Respondent maintains that the alleged injuries did not arise out of the use or operation of their motor vehicle.

The Insurance Law provides that a person is entitled to first-party benefits from the insurer of a vehicle "for loss arising out of the use or operation * * * of such motor vehicle" (Insurance Law § 5103 [a] [1]).

In order to prevail in arbitration on its lack of coverage defense, the insurer must produce by a preponderance of the evidence "facts and circumstances leading a trier of fact to conclude that more likely than not, the circumstances of the collision are not covered by no-fault. If this threshold is reached, the burden shifts to the [applicant] to rebut the [respondent's] case." *See, Universal Open MRI of the Bronx, PC V. State Farm Mutual Automobile Insurance Company*, 2006 NY Slip Op 50853 (U) (Civil Ct. Bronx County 2006).

The facts on this Record are undisputed. As reflected by the injured person-assignor's own NF-2 and consistent with the bus operator's written statement, the operator of "the B9 bus", closed the doors of said bus as the injured person-assignor was boarding and as a consequence of the doors being closed upon her, she was injured.

Counsel for Respondent argued that use of the bus in its inherent nature did not cause the injury, but that the bus driver's negligence was responsible. As Respondent in the instant matter is a self-insurer, the coverage in this case is defined by statute and as such, No-Fault benefits do not apply here.

In *Walton v. Lumbermens Mutual Casualty Co.*, 88 NY2d 211, 644 NYS2d 133, 666 NE2d 1046 (1996), the Court of Appeals stated "first-party no-fault insurance benefits are available only when a motor vehicle, by its use or operation, is the actual instrumentality which produces the injuries." The Court explained that the "mere fortuity that plaintiff's injury occurred while he was engaged in unloading the truck does not support a claim for no-fault benefits because the vehicle itself was not a cause of the damage. The vehicle must be a proximate cause of the injury before the absolute liability imposed by the statute arises. Any other rule would permit recovery for claims based on back strains, slip-and-fall injuries, and other similar injuries occurring while the vehicle is being used but which are wholly unrelated to its use."

In *Matter of Manhattan & Bronx Surface Transit Operation Authority v. Gholson*, 71 AD2d 1004, 420 NYS2d 298 (2d Dept, 1979), the Second Department held that No-Fault insurance coverage is afforded when the accident arose out of the inherent nature of the automobile; within the natural territorial limits of an automobile, where the accidental use, loading or unloading had not yet terminated; and it did not merely contribute to cause the condition which produced the injury, but must itself, have produced the injury. Therein, the bus operator was assaulted by a passenger and sustained injuries. It was found that the injury neither arose from the intrinsic nature of the bus, as such, nor did the bus, itself, produce the injury. The Court went further and noted that regardless of whether injuries arise out of the performance of one's duties as an operator of a motor vehicle, first-party no-fault insurance benefits are available only when a motor vehicle, by its use or operation, is the actual instrumentality which produces the injuries and that first-party no-fault insurance benefits are available only when a motor vehicle, by its use or operation, is the actual instrumentality which produces the injuries. This requirement, that the vehicle itself actually produces injury, reflects the limitation of no-fault insurance to automobile torts as distinguished from the other types of tort. Here the injury resulted from a knife-wielding passenger and the appellant's operation of the bus was largely incidental. The assault may not be characterized as a motor vehicle tort as contemplated by the no-fault insurance law.

More recently, in *Cividanes v. City of New York*, 20 NY3d 925 (2012), the Court of Appeals found that plaintiff injured her left ankle when she "stepped off the last step

into a hole and fell" as she exited the rear of a bus owned and operated by defendants New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority. The Court determined that the Appellate Division properly held that the No-Fault Insurance Law is inapplicable because plaintiff's injury did not arise out of the "use or operation" of a motor vehicle (Insurance Law § 5104 [a]). The "use or operation" of the bus was neither a "proximate cause" nor an "instrumentality" that produced plaintiff's injury.

The decision by the Court of Appeals in *Cividanes* is clear that there is no no-fault coverage where a person sustains injuries while boarding or alighting from a bus and especially in this matter where it is uncontroverted that the injuries arose from the bus driver's actions in closing the doors upon her. It is determined that the injuries did not arise out of the use or operation of the Respondent's bus and therefore, there is no coverage and No-Fault benefits do not apply. Respondent's lack of coverage defense is upheld and Applicant's claim is denied. In light of this determination, Respondent's additional contentions and defenses need not be determined as they are rendered moot.

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

09/25/2024
(Dated)

Tracy Morgan

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:
bd3bf778c77e7a8cd416f2c1050e8495

Electronically Signed

Your name: Tracy Morgan
Signed on: 09/25/2024