

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Brooklyn Medical Practice, PC
(Applicant)

- and -

Nationwide General Insurance Company
(Respondent)

AAA Case No. 17-23-1294-5706

Applicant's File No. 153.951

Insurer's Claim File No. 036343-GM

NAIC No. 23760

ARBITRATION AWARD

I, Antonietta Russo, 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 08/29/2024
Declared closed by the arbitrator on 08/29/2024

Allen Tsirelman from Tsirelman Law Firm PLLC participated virtually for the
Applicant

Brian Kaufman from Hollander Legal Group PC participated virtually for the
Respondent

2. The amount claimed in the Arbitration Request, **\$1,393.10**, 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

In dispute are the Applicant's bills for massage therapy and durable medical during the period of June 8, 2021 through November 22, 2021. Applicant is seeking reimbursement for these services; however, Respondent issued a timely denial based on a no coverage/material misrepresentation defense. The issue presented at the hearing was:

- 1.) Whether Respondent properly denied the claims due to material misrepresentations by the Assignor?

4. Findings, Conclusions, and Basis Therefor

The Applicant and the Respondent submitted documentary evidence in support of their respective positions. All such evidence is contained within MODRIA maintained by the American Arbitration Association, as of the date of the hearing. The below noted decision is based upon my review of the submitted evidence, along with the oral argument of the representatives present at the hearing.

As an initial matter, I find that Applicant has submitted sufficient credible evidence to establish their prima facie case. A medical provider establishes a prima facie showing of their entitlement to judgment 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 was overdue. See, Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept.2004) Similarly, I find that the Respondent has proffered timely denials which preserve their defense.

The Assignor, a 38-year male, was reportedly involved in a motor vehicle accident on June 7, 2021. Therein, he sustained injuries for which treatment was rendered to him. Thereafter, the Applicant presented the claims to the Respondent seeking reimbursement for said services and the Respondent denied the claim based on a material misrepresentation/ no coverage defense.

An insurer's assertion that the insurance policy was obtained by fraud and/or material misrepresentation is a permissible affirmative defense that, if proven, precludes any recovery by the insured or a health care provider who accepts an assignment of the insured's no-fault benefits. Golden Age Medical Supply Inc. v. Clarendon National Ins. Co., 29 Misc.3d 136(A), 918 N.Y.S.2d 397 (Table), 2010 N.Y. Slip Op. 52010(U), 2010 WL 4751752 (App. Term 2d, 11th & 13th Dists. Nov 19, 2010). Respondent asserts misrepresentation in the procurement of the Assignor's insurance policy.

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, Courtney v. Dollar Savings Bank of the City of New York, 54 A.D.2d 868 (1 Dept. 1976); Zilkha v. Mutual Life Insurance Company of New York, 287 A.D.2d 713 (2 Dept. 2001); Parmar v. Hermitage Insurance Company, 21 A.D.2d 538 (2 Dept. 2005); Curanovic v. New York Central Mutual Fire Insurance Company, 307 A.D.2d 435 (3 Dept. 2003).

Respondent further argues that this issue has been determined in a prior award by fellow arbitrator Tara Maher. Specifically, Arbitrator Weisman found in Primecare Drug & Surgicals Corp a/o XXX v. Nationwide in AAA. No. 17-21-1221-6283 in pertinent part:

The respondent denied the claims in each matter per the EOBS attached to the NF-10s ": The claimant does not meet the criteria for an eligible injured person pursuant to the Mandatory Personal Injury Protection Endorsement (New York) of Regulation 68, Section 65-1.1, Therefore this claim is denied. The claimant's injuries did not arise out of the use and operation of a motor vehicle insured with Nationwide, therefore there is no coverage for this non-eligible injured person, pursuant to 11 NYCRR (Regulation 68-A), Mandatory Personal Injury Protection Endorsement. The 2007 Infiniti that claimant was occupying at the time of the accident is not an insured vehicle under the Nationwide policy.

In support of its coverage defense, respondent has uploaded the policy documentation, NF-2s, affidavit of claim representative Lynn Ellis, police report and EUO transcript of passenger, VF. The police report documents that at the time of the subject motor vehicle accident which occurred on 6/7/21, assignor VF was a passenger in a vehicle VP was operating which was a 2007 infinity sedan bearing license plate number KME3252 and the police report lists the policy as 6631J137949. The Affidavit of Claims Manager Ellis establishes personal knowledge of the following: The insured's policy (deg page is attached at Exhibit "F") at the time of the loss at issue covered four (4) motor vehicles, a 2009 Acura TL, 2008 Mazda Cx-9, 2009 Nissan Murano, and a 2007 Honda Odyssey. 15. Pursuant to the Police report the vehicle involved in the loss as a 2007 Infiniti Sedan, NY License Plate Number KME3252. 16. The police report also indicates that a ticket was issued for operating a motor vehicle without being registered (section 5 on report, violation is VTL 401-1a) and additionally does not have a VIN number listed. Showing an unregistered Infiniti with no VIN number and NY License Plate Number KME3252. 17. Additionally, the No-Fault Application for Victor Ferreria (Exhibit C) confirms the vehicle involved in the loss as a 2007 Infiniti. 18. Vehicle Identification Number Searches Show that New York License Plate Number KME3252 is associated with the insured's White Nissan Murano. 19. Vehicle License Plate searches show that New York License Plate Number KME3252 has been on multiple different vehicles prior to and after the loss in question, including a Nissan Murano, which is a vehicle listed on the policy. This leads Nationwide to believe the plate is being taken off and put on different vehicles. 20. In an attempt to obtain further information from the insured regarding the vehicle involved in the loss, Nationwide noticed Mr. AC, the insured for an EUO, however, he did not appear at two noticed EUOs. VP also did not appear for two EUOs and his claims were denied both for not appearing and also because Nationwide's

investigation determined that an insured vehicle was not involved in the loss. Respondent has also uploaded the VIN record expansion abstract which support respondent's position.

Applicant has submitted no evidence to refute respondent's lack of coverage defense.

The insurer "has the burden to come forward with proof in admissible form to establish the fact or the evidentiary foundation for its beliefs that there is no coverage. (Mount Sinai Hospital v. Triboro Coach, 263 A.D. 2d.11[2d Dept.1999] quoting Central General Hospital v. Chubb Group of Ins.Cos., 90 N.Y.2d at 199. If the insurer can show, in admissible form, evidence that there may not be coverage due to the fact that the claimant is not a covered person then the insured can prevail even in the face of an untimely (or absent) denial. A defense that no policy of insurance was in effect covering the injured party on the date of the accident may be raised despite a failure to prove that a denial was mailed within the 30-day deadline, as this raises an issue of lack of coverage. Hospital for Joint Diseases v. Allstate Ins. Co., 21 A.D.3d 348, 800 N.Y.S.2d 190 (2d Dept. 2005).

The preponderance of the credible evidence favors respondent as a matter of fact. I find based upon a careful review of the evidentiary record before me that respondent has sustained its burden of proof as to lack of coverage. Respondent submitted sufficient proof that the Assignor was allegedly injured in a motor vehicle that the respondent did not insure. This was confirmed by the respondent's litigation representative (see affidavit), police report, VIN record expansion, policy documentation as well as the EUO transcript of the Assignor VF wherein he stated that he was a passenger in an Infinity at the time of the loss. As such, I uphold respondent's denial. Accordingly, applicants claim is denied in its entirety.

The doctrines of res judicata and collateral estoppel are fully applicable to arbitration proceedings. *American Ins. Co., v. Messinger*, 43 N.Y.2d 184, 401 N.Y.S.2d 36 (1977). Collateral estoppel is a rule of justice and fairness which mandates that issues once tried should not be re-litigated by a party in a subsequent proceeding who had been afforded a full and fair opportunity to contest the issues raised in a prior proceeding. *Commissioners of State Ins. Fund v. Low*, 3 N.Y.2d 590, 595, 170 N.Y.S.2d 795, 800 (1958).

Collateral estoppel is a specific form of res judicata which bars a party from relitigating in a subsequent action an issue raised in a prior action and decided against that party, whether or not the cause of action is the same. *Ryan v. New York Tel. Co.*, 62 NY2d 494(1984). In order to invoke the doctrine, the

identical issue must have been decided in the prior action and be determinative of the present action, and the party to be precluded from relitigating the issue must have been afforded a full and fair opportunity to contest the prior determination. Comprehensive Med. Care of NY v. Hausknecht, 55AD3d 777(2008). The doctrine of collateral estoppel applies only against those who were either a party, or in privity with a party, to a prior proceeding. Alev Medical Supply, Inc. v. Allstate Property & Casualty Ins. Co., 36 Misc.3d 132(A), 957 N.Y.S.2d 263 (Table), 2012 N.Y. Slip Op. 51294(U) at 2, 2012 WL 2887931 (App. Term 2d, 11th & 13th Dists. June 28, 2012). The party invoking collateral estoppel has the burden of establishing that the issue litigated is identical to the issue on which preclusion is sought. Concord Delivery Service, Inc. v. Syosset Props, 19 Misc3d 40 (App Term, 9 & 10th Jud Dists 2008).

Based on this prior decision which is referenced and incorporated in this decision, I find it appropriate to apply collateral estoppel. Respondent has proven its defense. The Applicant stands in the shoes of its Assignor.

Accordingly, I find in favor of Respondent and deny the entire claim.

Any further issues raised in the record are held to be moot and/or waived insofar as not raised at the time of the hearing. This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.

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, Antonietta Russo, 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)

Antonietta Russo

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:
62bb6fe07a60f15857760678fa777955

Electronically Signed

Your name: Antonietta Russo
Signed on: 09/25/2024