

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Metro Chemists Pharmacy Inc
(Applicant)

- and -

Progressive Casualty Insurance Company
(Respondent)

AAA Case No. 17-23-1319-5911

Applicant's File No. 166173

Insurer's Claim File No. 23-2954948

NAIC No. 14800

ARBITRATION AWARD

I, Keith Tola, 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: EIP

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

John Gallagher, Esq. from The Law Offices of John Gallagher, PLLC participated virtually for the Applicant

Christine Laliwala, Esq. from Bruno Gerbino & Soriano LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,172.80**, 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 case stems from a New York motor vehicle accident which occurred on January 19, 2023, wherein the EIP allegedly sustained injuries. Applicant seeks compensation for the August 17, 2023 provision of pharmaceuticals, (Naproxen; Lidocaine 5% Ointment; Cyclobenzaprine). Respondent denied this claim based on the EIP's material misrepresentation in the procurement of the insurance policy.

4. Findings, Conclusions, and Basis Therefor

This Award was issued upon consideration of the parties' arguments and upon review of the relevant evidence contained within the ADR Center files.

Respondent's EOB indicates, in relevant part:

"Our investigation determined the policy was issued based on misrepresentations made in the application for coverage. This policy would not have been issued had all material facts been reported as required on the application. We are therefore denying this claim."

MISREPRESENTATION IN PROCUREMENT OF POLICY

An insurer's assertion that the subject insurance policy was obtained by fraud and/or material misrepresentation is a permissible affirmative defense that, if proved, precludes any recovery. *Golden Age Medial Supply v. Clarendon National Ins. Co.*, 29 Misc.3d 136(A), 918 N.Y.S.2d 397 (App. Term2d, 11 & 13 Dists., November 19, 2010).

Indeed, the defense of fraudulent procurement of an insurance policy, which is non-waivable and hence exempt from the 30 day preclusion rule, may even be asserted against medical providers seeking to recover assigned No-Fault benefits. *A.B. Medical Services v. Commercial Mutual Ins. Co.*, 12 Misc.3d 8, 820 N.Y.S.2d 378(App. Term 2nd & 11 Dists. 2006).

A healthcare provider cannot receive No-Fault benefits as an assignee of a person who fraudulently misrepresented her residence. *MZ Medical Care v. Selective Ins. Co. of America*, 23 Misc.3d 1134(A), 889 N.Y.S.2d 506 (Civ. Ct. Kings Cty., Genine D. Edwards, J., June 3, 2009).

An insurer is not required to show that the insurance policy had actually been cancelled in order to establish its defense that the policy was procured by the assignor on the basis of fraud and misrepresentation. *AA Acupuncture Services v. Safeco Ins. Co. of America*, 25 Misc.3d 30, 887 N.Y.S.2d 739 (App. Term 1 Dept. 2009).

RESPONDENT'S SUPPORTING EVIDENCE

Respondent submitted the affidavit of its SIU investigator, Dijamant Cane. Therein, Mr. Cane indicated, in relevant part:

"... Progressive's investigation into the no-fault claims revealed that AS fraudulently misrepresented the policy address in Clifton, New Jersey.

Progressive issued an insurance policy to AS covering a 2022 Honda Civic ... with an effective date of May 31, 2022, under policy number 958536273...

Based on the fact that the loss occurred in the State of New York, AS retained New York counsel and was treated for her injuries in the State of New York, Progressive conducted an investigation to determine her residence and the garaging address of the insured vehicle.

At the time of the alleged loss, AS had a New York State driver's license which was issued on February 7, 2022, reflecting the suspected address of 641 Georgia Avenue ... Brooklyn, New York 11207...

Progressive ran an Accurint report on March 7, 2023, which reflects only the suspected policy address of ... Georgia Avenue ... Brooklyn, New York 11207. There are no hits in the Accurint report to the policy address, or any address in the State of New Jersey ...

A plate locator search conducted by Progressive reflect a total of twenty sightings from March 2, 2022 through February 22, 2023. All of the sightings were in New York. There were no sightings in the State of New Jersey. The vehicle was sighted at the following addresses:

- 1.... Jamaica, New York;
- 2.Jamaica, New York;
3. Queens, New York;
4. Queens, New York,
5. South Ozone Park, New York;
6. Queens, New York;
7. South Ozone Park, New York;
8. Queens, New York;
- 9.Richmond Hill, New York;
10. Queens, New York;
11. Queens, New York.

There are no hits to the State of New Jersey, despite the representation that the vehicle was parked in the street at the policy address.

AS was working two jobs at the date of her accident. One was at a diner as a server and the second was at Charter Communications. Both of these jobs were in New York...

On the date of loss, AS provided a recorded statement:

1. AS confirmed she has a New York Driver's License;

2. AS' roommate at the policy address is Ryon Rawlins (Please note, in the EUO transcript roommate is referred to as Ryan Roland), they share a bedroom divided in two using a divider.
3. AS is not listed on lease she sublets because her credit is not good;
4. The cable bill at the policy address is reportedly in her name;
5. She pays \$700 in cash for rent plus \$39.00 for the cable bill.
6. She is a server at Atlantic Diner in Jersey City, Friday-Saturday ...;
7. She is also employed at Charter Communications (Spectrum), the address is 109-15 14 Avenue, Queens, New York ... She makes own hours anytime th from 1pm to 7 or 8 pm, Monday-Friday;
8. When commuting to New York she takes Route 9 using Waze so she can avoid tolls. (There is no route to New York that avoids tolls);
9. She was unable to identify the bridge she travels over to drive to New York.
10. All mail is still received at the suspected New York address. She advised that she lets it accumulate and then picks it up.
11. Her paystubs and W-2 statement reflect her New York address.
12. She advised that she parks overnight in New York when she works at the diner because Jersey City is still in New York. When advised that it is not in New York, she said she stil parks it overnight on Dumont Avenue at her aunt's residence.

Progressive's SIU Investigator ... conducted the examination under oath of AS on May 5, 2023. At the time of the examination ... was represented by counsel ... At the time of this opinion we are not in possession of the transcript. A review of the claim notes reveals the following information was obtained:

1. AS provided a copy of her New York State driver's license ... that document identifies her address as ... Georgia Avenue, Brooklyn, New York...
2. AS provided her cell phone number ... whose area code reflects that it is a New York State area code exchange ...
- 3.... she has been residing at ... Sayreville, New Jersey for a year and a couple of months, with her roommate RR...
4. AS's roommate RR rents the policy address.

5. AS is not named on the lease, nor is she identified on any of the utilities except for the cable bill for the Sayreville, New Jersey address.
6. AS pays rent to her roommate in cash.
7. AS confirmed her prior address was the suspected address of ... Georgia Avenue, Brooklyn, New York and she moved to the New Jersey more than a year ago in April.
- 8... she has one child who lives with her aunt and attends school in Brooklyn. AS also stays with her aunt Friday through Sunday.
9. AS is employed at Charter Communications in Queens, New York. She testified that she takes Route 440 to the Verrazano Bridge and the Belt parkway to job. In her recorded statement though she states that she took Route 9 and used Waze to avoid tolls. There is no route which avoids tolls.
10. She has a second job which she works at on Fridays and Saturdays. This job is at the Atlantic Diner in Queens. In her recorded statement AS stated that the Atlantic Diner was in Jersey City. When asked about the discrepancies during the EUO her attorney objected to the question.
11. When advised of the 62 hits in NY and no hits in New Jersey, AS had no explanation.
12. When advised that the nmileage increase is not what it should be if she was commuting from New Jersey to New York five days a week, AS's attorney did not allow her to respond.
13. The New Jersey rental office for the policy address, Winding Wood Management does not have AS listed as a resident at the Sayreville, New Jersey address. She had no explanation for this.
14. AS files her taxes in New York at the suspected address. The suspected address is also where her pay stubs are sent.

On March 23, 2023, SIU investigator ... traveled to the policy address for a site inspection and was unable to confirm the insured's residence.

The SIU investigator called AS's roommate RR. He answered stating that he was unable to talk at the moment but would call back. RR never called back.

' Mileage calculation - Progressive determined by reviewing the mileage on the Carfax report and comparing it to the mileage when the estimate for repairs was performed:

- Per Carfax mileage on May 31, 2022 was 5,378;

- Photos of the insured vehicle from date of loss of January 1, 2023 is 10,777;
- Increase in mileage from May 31, 2022 to January 19, 2023 is only 5,399 miles.

This mileage does not support the commute from the policy address in New Jersey to her places of employment in Queens, New York.

To date, AS has not provided Progressive with any reliable proof of garaging at the Sayreville, New Jersey policy address such as receipts for rent, or gas, electric, cable bills even credit card statements with her name on them.

Accordingly, this affidavit it is being submitted in support of Respondent's arbitration contention."

The respondent also submitted copies of the Accurint search, TLO search, DMV search, etc.

Respondent submitted the affidavit of its Litigation Underwriting Specialist II, Janeen Copic. Ms. Copic indicated, in relevant part:

"The named insured ... AS, procured a policy of automobile insurance through Progressive Garden State Insurance Company on May 31, 2022, for a 2022 Honda Civic, VIN JHMFE1F73NX006006, Policy Number 958536273.

Within Progressive's policy application for automobile insurance is a section entitled "Application Agreement: Verification of content" in which the applicant declares "that the statements contained herein are true to the best of [their] knowledge and belief" and that as the applicant, "[They] understand that this policy may be rescinded and declared void if this application contains any false information or if any information that would alter the Company's exposure is omitted or misrepresented."

Within AS's application for a policy of automobile insurance, AS represented that she was residing at .. Windingwood Drive... Sayreville, New Jersey 08872, and said address was the primary garaging location of the insured 2022 Honda Civic.

Based upon AS's representation at the time she inquired for a policy of automobile insurance, Progressive issued AS a New Jersey policy of automobile insurance.

During its investigation ... for an accident occurring on March 13, 2023, involving the 2022 Honda Civic, Progressive discovered that the 2022 Honda Civic was actually being garaged at ... Georgia Avenue ... Brooklyn, New York 11207.

Had Progressive known that AS committed a material misrepresentation in failing to disclose the actual garaging address of the vehicle she requested that

Progressive insure in her May 31, 2022, Declaration page for a policy of automobile insurance, Progressive would not have issued said policy.

A material misrepresentation would be categorized as any false information on the application for a policy of automobile insurance. In particular, the garaging address is considered material information. As a Litigation Underwriting Specialist, I have been trained in Progressive's underwriting practices and procedures and can attest that AS's failure to disclose the actual garaging address of his vehicle constituted a material misrepresentation..."

DETERMINATION

The evidence submitted by Respondent overwhelmingly substantiates respondent's "misrepresentation in the procurement of the policy" defense. The evidence confirms that the policy is a New Jersey policy which required the vehicle to be garaged in the State of New Jersey, that the EIP listed her resident address as Sayreville, New Jersey whereas the evidence submitted confirms she resided in Brooklyn, New York at the time of the accident.

In addition to the evidence that supports respondent's defense, respondent has also come forward with sufficient evidence to establish the misrepresentation was material. The affidavit of Ms. Copic confirmed that had respondent understood the EIP was garaging the vehicle in the Brooklyn, New York, it would never have issued the New Jersey policy.

I find respondent has submitted ample evidence to show not only the fact that the misrepresentation was made in the procurement of the policy but also, that the misrepresentation does rise to the level of "material."

In view of the foregoing, I sustain respondent's denial of this claim, and every other claim submitted by or on behalf of the EIP.

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

09/26/2024
(Dated)

Keith Tola

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:
0c04ebe9f76f6d199c4e40a39d8f5be9

Electronically Signed

Your name: Keith Tola
Signed on: 09/26/2024