

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Right Choice Supply, Inc.
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-23-1316-0880

Applicant's File No. LIP-30459

Insurer's Claim File No. 0429312330007

NAIC No. 36447

ARBITRATION AWARD

I, Alana Barran, 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: Patient

1. Hearing(s) held on 09/20/2024
Declared closed by the arbitrator on 09/20/2024

Usman Nawaz from Law Offices of Ilya E Parnas P.C. participated virtually for the Applicant

Dianne Galluzzo from Bruno Gerbino & Soriano LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$548.08**, 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 patient, CS, was involved in an accident on 6/18/2020. This is a claim for durable medical equipment provided on 12/17/2020. The Respondent denied the claim based on lack of coverage. The issue raised is whether the patient is entitled to no-fault benefits.

4. Findings, Conclusions, and Basis Therefor

My decision is based on the arguments of the representatives for both parties and those documents contained in the ADR Center for this case. No fee schedule issues were raised related to the amount in dispute.

The Respondent issued a general denial and a specific denial stating that "All No-Fault benefits for the above-mentioned claimant have been denied. Libertys investigation of the above loss included, but was not limited to, a review of statements made in support of your claim including Examinations under Oath, a review of the police report, witness statements and doctors reports. The investigation has revealed false information submitted in support of the above claimants claim. After a thorough review, it has been determined that this was an intentionally caused accident. According to Part F of the policy, 'General Provisions- Fraud' 'We do not provide coverage for any person who has concealed or misrepresented any material fact or circumstance or made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy.' Accordingly the claim is denied in its entirety." Respondent relies on the affirmation of Alfred C. Polidore, Esq. dated 6/21/2021, the affidavit of Karen Kuitwaard dated 6/14/2021, affidavit of Dianne Galluzzo, Esq. dated 6/18/2021, affidavit of Richard Aitken, Esq. dated 6/18/2021, EUO transcripts, police report which were made part of a declaratory judgment action under Index # 503743/2021, which has not been determined by the court nor a stay order issued.

In a related arbitration case involving the same patient, respondent and the issue of whether the respondent has met its burden of proof to sustain its defense that the patient is not entitled to no-fault benefits based on a founded belief of fraud was previously decided by Arb. Elyse Balzer in Affinity Rx v. LM General Insurance Company, AAA Case No.: 17-20-1184-1457, (930/2021). After a hearing, Arb. Balzer found in AAA Case No.: 17-20-1184-1457 that the patient was entitled to no-fault benefits in this accident.

Here, the Respondent relies on evidence including its denials, police report, EUO transcript of the patient. Both the instant case and the related case under AAA Case No.: 17-20-1184-1457 involve the same patient, respondent, and the same issue; and issue was fully litigated before Arb. Balzer.

I find that the issues raised here were fully litigated and decided under AAA Case No.: 17-20-1184-1457 and that the parties had a full and fair opportunity to litigate the issue of no-fault coverage based on fraud. *See* Ryan v. New York Tel. Co., 62 NY2d 494 (1984); Bell v. Alden Owners, 299 AD2d 207, 208 (1st Dept. 2002); Buechel v. Bain, 97 NY2d 295, 303 [2001]

In order to invoke the doctrine, the identical issue must necessarily have been decided in the prior action or proceeding and be decisive of the present action or proceeding, and the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination. *See* Comprehensive Med. Care of N.Y., PC v. Hausknect, 55 AD3d 777, 865 NYS2d 692 (2nd Dept. 2008) citing Buechel v Bain, 97 NY2d at 303-304; Parker v Blauvelt Volunteer Fire

Co., 93 NY2d at 349; D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]).

The party attempting to defeat the application of collateral estoppel has the burden of establishing the absence of a full and fair opportunity to litigate. *See Triboro Quality Medical Supply, Inc. v. State Farm Mutual Automobile Ins. Co.*, 2013 NY Slip Op 51289(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012). Here, the Respondent has failed to establish the absence of a full and fair opportunity to litigate the issue of non-entitlement to no-fault coverage based on fraud.

Again, as Arb. Balzer found in AAA Case No.: 17-20-1184-1457 as follows, and I agree as there is no contrary evidence here:

Fraud

On 11/18/2020 issued a denial to CS claiming that respondent's investigation revealed false information and that the accident was "intentionally caused."

Respondent's denial referenced Part F of the policy "General Provisions - Fraud" which allegedly provides no coverage for any person who has concealed or misrepresented any material fact or circumstance or made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought."

Respondent's denial shows that it was served on several providers, but not on applicant provider.

Respondent's arbitration brief did not specify the type of alleged fraud or the exact nature of the alleged fraud.

Respondent's denial did not contain this information.

No where in respondent's arbitration submission is there any detail of what, if any type of "false information" was found by respondent's investigation which led respondent to claim that the accident was intentionally caused.

Respondent submitted the police report which shows that CS was a rear seat passenger in the insured vehicle.

The police report has CS as a passenger in Vehicle 1 and contains this description of the accident:

At TPO P1 in V states was in the car when it was struck suddenly by V2 pushing V1 into V3. V1 fled location. Did not see V1. P2 in V1 states was in rear of V1 when it was struck by V2 and pushed into V3. P2 did not see V1. EMS treated P1 and P2 on scene and both RMA. Driver of V2 left loc. Shortly after EMS arrived not wishing to make report. V3 was parked unattended and owner removed license plate prior to PD arrival.

While this description is confusing and caused much head scratching, it does not prove fraud or any of the other allegations contained in respondent's denial.

There is no proof that respondent's investigator interviewed the police officer who wrote this confusing account of the MVA to clear up the confusion.

Respondent did not present any photos, diagrams, etc of the accident scene.

Respondent did not present any CIB index reports or other background reports on CS.

Respondent did not submit any investigation reports (alleged in its denial), any statements, any EUO transcripts, any witness statements, any proof that respondent contacted its own insured (listed on the police report as the driver of the insured motor vehicle) about the details of the subject MVA, any proof that respondent contacted and interviewed CS, or any proof whatsoever which would even raise any issue of "false information", "intentional causation" or "fraud."

Respondent has not specified exactly what type of fraud was suspected.

A court will evaluate the probity of the evidence to determine if a carrier has proven the fact or founded belief of fraudulent conduct or a staged accident. See, In re Allstate Ins. Co. v. Ganesh, 8 Misc.3d 922, 799 N.Y.S.2d 365 (Supreme Court, Bronx County, 2005); In re National Grange Mutual Ins. Co. v. Vitebskaya, 1 Misc. 3d 774, 766 N.Y.S.2d 320 (Supreme Court, Kings County, 2003).

In a court proceeding, if a carrier raises a defense of fraud or staged accident, the carrier must submit proof in admissible form to support its allegation. Careplus Medical Supply Inc. v. Statewide Ins. Co., 2005 NY Slip Op 25545 (App. Tm, 2d Dep't, 2005); A.B. Medical Services PLLC et al. v. State Farm Mutual Ins. Co., 3 Misc.3d 130A, 787 N.Y.S.2d 675 (App. Tm, 2d Dep't, 2004); S & M Supply Inc. v. State Farm Mutual Ins. Co., 4 Misc.3d 130A, 791 N.Y.S.2d 873 (App. Tm, 2d Dep't, 2004).

An arbitrator in a no fault hearing "shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations." 11 N.Y.C.R.R. 65-4.5 (o)(1).

Based on the proof I find that respondent has not proven, by a fair preponderance of the credible evidence, its defense of fraud and that defense has not been shown to have been raised in good faith.

Comparing the relevant evidence presented by both parties against each other and the above referenced standards, I find that the patient CS is entitled to no-fault benefits under the policy of insurance at issue as the Respondent's proof is insufficient to establish its lack of coverage defense based on fraud. Therefore, I find in favor of the Applicant and the claim is awarded.

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	Status
	Right Choice Supply, Inc.	12/17/20 - 12/17/20	\$548.08	Awarded: \$548.08
Total			\$548.08	Awarded: \$548.08

- B. The insurer shall also compute and pay the applicant interest set forth below. 09/13/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Where a claim is untimely denied, or not denied or paid, interest shall accrue as of the 30th day following the date the claim is presented by the claimant to the insurer for payment. Where a claim is timely denied, interest shall accrue as of the date an action is commenced or an arbitration requested, unless an action is commenced or an arbitration requested within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant. (11 NYCRR 65-3.9(c)). The end date for the calculation of interest shall be the date of payment of the claim. In calculating interest, the date of accrual shall be excluded from the calculation. Where a motor vehicle accident occurs after April 5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month.

(11 NYCRR 65-3.9(a)). Where the claim is submitted electronically after the close of business or on the weekend, I find that the claim is deemed received on the next day of business following the electronic submission, and interest is awarded as of the next day of business following the electronic submission of the claim.

C. Attorney's Fees

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

For cases filed prior to February 4, 2015, 20 percent of the amount of first party benefits awarded herein, plus interest thereon, subject to a minimum of \$60 and a maximum of \$850. For cases filed on or after February 4, 2015, 20 percent of the amount of first party benefits awarded herein, plus interest thereon, subject to no minimum and a maximum of \$1360 (11NYCRR65-4).

- 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 NJ

SS :

County of Essex

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

10/14/2024
(Dated)

Alana Barran

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:
d8871f29fd532ba7cc927a19cb2f8d84

Electronically Signed

Your name: Alana Barran
Signed on: 10/14/2024