

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Island Ambulatory Surgery Center LLC
(Applicant)

- and -

The General Automobile Insurance Company,
Inc
(Respondent)

AAA Case No. 17-24-1334-3115

Applicant's File No. 00128467

Insurer's Claim File No. 0100646733702

NAIC No. 37648

ARBITRATION AWARD

I, Donna Ferrara, 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 AMR.

1. Hearing(s) held on 11/19/2024
Declared closed by the arbitrator on 11/19/2024

Mikhail Guseynov, Esq. from Drachman Katz, LLP participated virtually for the Applicant

Matthew Patrick Smith, Esq. from Callinan & Smith LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,259.33**, 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 dispute arises from the underlying motor vehicle accident of 7/17/23, wherein a 33 year old man was injured. Applicant submitted the bill for the facility fee for lumbar epidural injections for the injured person on date of service 11/15/23, to Respondent and Respondent denied payment based on the defense that a material misrepresentation was made in the procurement of the policy of insurance.

Accordingly, the issue to be determined is whether Respondent's defense of material misrepresentation was made in the procurement of the policy of insurance should be sustained.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the file regarding this matter contained in the Modria Center record of the case maintained by the American Arbitration Association. This decision is based on my review of that file, as well as the arguments of the parties at the hearing.

"[A] plaintiff demonstrates prima facie entitlement to summary judgment by submitting evidence that payment of no-fault benefits are overdue, and proof of its claim, using the statutory billing form, was mailed to and received by the defendant insurer." Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 501, 14 N.Y.S.3d 283, 286 (2015).

An Examination Under Oath (EUO) of the injured person was held on 11/14/23.

Q: Can you please state your current address for the record. (p.6)

A: Yes, 170-18 Liberty, Jamaica.

Q: I will note for the record that the individual noted on the NYS driver's license is here for the EUO and it bears the aforementioned address in Jamaica, Queens. (p. 8)

Q: So I'm asking you, can you give me a specific month and year that you were at the address in Jamaica Queens until the point that you moved to Virginia? (p.11)

A: I don't remember. The truth, I don't remember.

Q: Now what year was it that you moved back to Virginia? (p.11)

A: I didn't move. It's not that I moved there. I moved there because I had a problem with my partner. Then I stayed there with an acquaintance. He sold me his car and I came back here. It was in May.

Q: The first week of May you left Jamaica and then moved down to Virginia? (p.12)

A: Yes, I was there like around 22 days.

A: So when did you return back to New York?

A: In the first week of June, in the beginning.

Q: So the first week of May to the first week of June, that seems to be one month or so?

A: Yes, it was a short time that I was there.

Q: So May of this year, last year another year?

A: Of this year.

Q: What is the address that you were staying in Virginia?

A: Truthfully I don't remember. I forget it. I forget it.

Q: So do you know the city that it was in?

A: It's Virginia. Virginia, yes. (p. 13)

Q: Who was it that sold you his car? (p.19)

A: Amos.

Q:What car was it that he sold you?

A: 2010 Ford Fusion.

Q: Where was the purchase made?

A: It was four days after I arrive here from New York and it was parked there until we obtained the insurance.

Q:So you bought the vehicle in New York?

A: In Virginia. (p.20)

Q:Do you recall what day in May or June that the transaction was made?(p.26)

A: I have too many problems then and I don't remember.

Q: Do you know the county where you were living? (p.21)

A; No. Like I said, the time was short. I was not able to learn much. It was a short time.

Q:Do you know the name of the main street of the town that you were living in?

A: No.

Q: Where in the state of Virginia were you living: Do you know if it was the northern part, southern, eastern by the ocean, western towards West Virginia?

A: The truth I am unable to say because I don't remember. I don't know it. I don't know it.

Q: The license plate you provided is a Virginia license plate? (p.31)

A: Yes.

Q: You got that license plate after you came back to New York?

A: While I was in Virginia.

Q: When was it that you got that license plate?

A: The truth is, I don't remember. I don't remember because they gave it to me very quickly.

Q: Do you recall what insurance company you utilized for insurance on the car? (p.33)

A: I don't remember.

Q: How many credit cards do you have? (p. 36)

A: One

Q: What is the banking institution for that debit card?

A: Bank of American

Q: What is the address for that Bank of America account?

A: 170-80 Liberty Ave. Jamaica

Q: What mail were you were receiving when you were living in Virginia?

A: None. All of my mail and letters come to New York.

Q: Do you have a cell phone?(p.46)

A: Now. Yes.

Q. what company provided service?

A: Metro.

Q. What address does Metro have for your account?

A: 170-18 Liberty Avenue, Jamaica.

Q: Do you have anything whatsoever in your possession that would tie you to the address in Virginia? (p.48)

A: No.

Q: Did you take out the policy on 6/10/23? (p.57)

A: I don't remember.

Q: That's the date you took out the policy. Where were you living on 6/10/23?

A: Virginia.

Q: You testified you came back to New York in the first week of June. Were you living in New York or Virginia? (p.58)

A: Virginia.

Q: Mind you, the license plate reader has you in New York.

Respondent submits an SIU affirmation of SIU investigator Mary Gilette. She stated, "the subject policy of insurance (policy number VA6305909) was procured on or about June 10, 2023, by the injured person to insure the subject 2010 Ford Fusion, with a policy address of 306 Lyde Avenue, Louisa, Virginia 20093. The subject policy of insurance was effective from June 10, 2023, through June 10, 2023, and subject to laws and regulations of the State of Virginia. The injured person's testimony regarding the move to Virginia in May 2023 and the subject vehicle not being in New York prior to June 2023 is directly contradicted by the Vehicle Sighting/Detection Report inasmuch the report consistently placed Ford Fusion bearing license plate Virginia TRK2701 at 170-20 Liberty Avenue, Queens, New York 11433 on May 7th, 9th, 14th, 22nd, 23rd, 25th, 30th, as well as the following months. Based on the totality of the investigation, Respondent formed a reasonable belief that the injured person fraudulently procured the subject policy of insurance, inasmuch the injured person never resided and/or garaged the subject vehicle in the State of Virginia, which is a material misrepresentation that voids the policy of insurance at inception.

Respondent submits an affirmation by Dawn Dale, Senior Manager for Respondent. She stated based on the totality of the investigation, Respondent formed a reasonable belief that the injured person never resided nor garaged the subject vehicle at the policy address, inasmuch the address, 306 Lyde Avenue, Louisa, VA 23093, does not exist and that the insured vehicle is primarily garaged at 170-18 Liberty Avenue, Jamaica, New York 11433. See the affirmation of SIU Senior Investigator annexed to Respondent's arbitration submission as Exhibit "L". 2 10. Had Respondent's underwriting department been aware that an insured vehicle was going to be principally garaged in Queens, New York, and not Louisa, Virginia, then Respondent would not

have issued the subject Virginia policy of insurance under the same terms or would have canceled the policy that was covering the insured vehicle at the time of the July 17, 2023, loss. A copy of Respondent's underwriting criteria is annexed to the Respondent's arbitration submission as Exhibit "B". As noted therein, "[v]ehicles must be garaged at named insured's permanent residence". 11. The misrepresentations were and are material inasmuch as the insured misrepresented the risk associated with the insured vehicle being principally garaged in Queens, New York, as opposed to Louisa, Virginia, rendering the policy of insurance void at inception, resulting in the issuance of policy premium payments refund.

I find that Respondent has proven that there was a fraudulent procurement of policy for purposes of defrauding Respondent. Applicant failed to sustain its burden to controvert Respondent's defense that the injured person materially misrepresented his residential address in the procurement of his insurance policy. These facts, taken together, suffice to establish a prima facie case that the insured in collusion with the injured person committed a material misrepresentation in applying for insurance from Respondent. (See Starr Indem. & Liab. Co. v Monte Carlo, LLC, 190 AD3d 441, 441-442 [1st Dept 2021] ["A misrepresentation in an insurance application is material . . . if, had the true facts been known, either the insurer would not have issued the policy or would have charged a higher premium."]; cf. Dyno v Rose, 260 AD2d 694, 698 [3d Dept 1999] [noting that the "affidavit of facts" supporting a default-judgment motion for default judgment must "establish a prima facie case" for relief].) This material misrepresentation, in turn, is a proper basis to deny claims for benefits brought by the injured person. (See Matter of Insurance Co. of N. Am. v Kaplun, 274 AD2d 293, 298-299 [2d Dept 2000].)

Applicant did not provide any evidence to refute the misrepresentation defense.

The record clearly demonstrates that the injured person represented to Respondent that he would be the insured/driver of the vehicle and it would be garaged in Virginia, for the purpose of procuring insurance but rather he garaged the vehicle in Jamaica, where he lived.

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. Term2d, 11th & 13th Dists. Nov 19, 2010).

It is well settled that to establish the right to rescind an insurance policy an insurer must show that the insured made a material misrepresentation when he or she secured the policy (Interboro Ins. Co. v Fatmir, 89 AD3d 993 [2d Dept 2011], citing see Novick v Middlesex Mut. Assur. Co., 84 AD3d 1330 [2011]; Varshavskaya v Metropolitan Life Ins. Co., 68 AD3d 855, 856 [2009]; Schirmer v Penkert, 41 AD3d 688, 690 [2007]; Zilkha v Mutual Life Ins. Co. of NY, 287 AD2d 713, 714 [2001]). A misrepresentation

is considered to be material only if the insurer would not have issued the policy had it known the facts misrepresented (Interboro, 89 AD2d at 994, citing see Insurance Law § 3105[b][1]; Novick, 84 AD3d at 1330; Varshavskaya, 68 AD3d at 856).

I find that based on the insured's EUO testimony, wherein he did not answer many questions and was evasive, and the totality of the evidence submitted by Respondent including the SIU affidavit and affidavit by Dawn Dale, and the license plate reader finding the injured person in New York which contradicted his testimony that he was in Virginia, it has been established as a matter of law that the insured made material misrepresentations in order to obtain insurance in Virginia.

I find that Respondent has proven that there was a fraudulent procurement of policy for purposes of defrauding Respondent. Respondent's defense of misrepresentation and fraudulent procurement of policy overcome Applicant's prima facie case of entitlement to No fault compensation.

In AAA decision number 17-24-1351-1927 (10/15/24) this arbitrator found fraud in the procurement of the auto insurance policy involving the same injured person, the same Respondent and the same motor vehicle accident.

While a motor vehicle accident victim may assign his or her No-Fault claim to a medical provider who has provided a medical service, 11 NYCRR 65-3.11, the medical provider-assignee "stands in the shoes" of an assignor and thus acquires no greater rights than its assignor. Long Island Radiology v. Allstate Ins. Co., 36 A.D.3d 763, 830 N.Y.S.2d 192 (2d Dept. 2007). The No-Fault insurance endorsement clearly states: "No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage." 11 NYCRR 65-1.1(d) ("Conditions"). Since the insured and the injured person could not commence an action due to their non-compliance, so too Applicant cannot commence an action.

I find that the insured procured this policy by fraudulent misrepresentation resulting in exclusion from coverage.

Accordingly, this arbitration is denied in its entirety.

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 Suffolk

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

11/20/2024
(Dated)

Donna Ferrara

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:
b2011808429e0985fe599581bd177de4

Electronically Signed

Your name: Donna Ferrara
Signed on: 11/20/2024