American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Surgicore Of Jersey City, LLC (Applicant)	AAA Case No.	17-24-1357-7159
	Applicant's File No.	SS-273107
- and -	Insurer's Claim File No.	0492733820001
	NAIC No.	36447
LM General Insurance Company (Respondent)		

ARBITRATION AWARD

I, Thomas Eck, 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 01/14/2025
   Declared closed by the arbitrator on 01/14/2025

   James McNamara from Samandarov & Associates, P.C. participated virtually for the Applicant

   Caroline Dennin from LM General Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$554.76**, 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 arbitration arises out of medical treatment for the 50-year-old Assignor (CF) related to injuries sustained in a motor vehicle accident that occurred on 4/13/2022. Applicant seeks reimbursement for facility services provided to the Assignor on 3/14/2024-3/14/2024. Respondent argues this claim should be denied as the policy has been exhausted.

4. Findings, Conclusions, and Basis Therefor

This case was decided on the submissions of the parties as contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association and the oral arguments of the parties' representatives at the hearing. No witnesses testified at the hearing. I reviewed the documents contained in the ECF for both parties and make this decision in reliance thereon.

POLICY EXHAUSTION

Respondent argued that the Assignor had utilized all the funds available for no-fault benefits. The threshold issue is whether the policy limit of $50,000.00 has been exhausted. In Hospital for Joint Diseases v. Hertz Corp., 22 AD3d 724, 2005 NY Slip Op 07932 (App Div., 2nd Dept.), the Court held "when an insurer has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease." Additionally, policy exhaustion may be proven by submitting a payment log or payment register establishing when and to whom payments made totaling the policy limits. See St. Vincent's Hospital & Medical Center, etc. v. Allstate Insurance Company, 294 AD2d 425, 742 N.Y.S.2d 350 (2002).

Respondent maintains that the Assignor's Personal Injury Protection (PIP) benefits under the policy have been exhausted. In the instant matter, the Assignor was entitled to $50,000.00 of PIP benefits. Respondent submitted the declarations page and payment log/PIP ledger demonstrating that $50,000.00 in no-fault benefits has been utilized. Respondent has provided appropriate documentation to demonstrate that the $50,000.00 in coverage available to the Assignor has in fact been paid and there remains no further coverage for the requested services herein.

In opposition to Respondent's contention regarding the exhaustion of the subject insurance policy, Applicant's counsel proffered the "priority of payment" argument. Applicant's argument is that since the subject insurance policy was not exhausted at the time the Applicant's bills were received by Respondent that Applicant's bills should have been paid ahead of any bills subsequently received by Respondent. Consequently, Applicant contends that its bills should be reimbursed without regard for the exhaustion of the subject insurance policy. Applicant cites Nyack Hosp. v Gen. Motors Acceptance Corp., 8 NY3d 294, 301[2007]; Alleviation Medical Services, P.C. v. Allstate Ins. Co., 55 Misc. 3d 44, 49 NYS3d 814 [App. Term, 2nd Dept., 2d, 11th & 13th Jud. Dists., 2017]); 11 N.Y.C.R.R. § 65-3.15.

Applicant argues that Respondent is still obligated to make payment of the claim because the claim was denied prior to the policy being exhausted.

I decline to follow the decision in Alleviation. Rather, I agree with the First Department's holding Harmonic Physical Therapy, P.C. v Praetorian Ins. Co., 47 Misc 3d 137(A)(App. Term 1st Dept. 2017) which provides that:

> Contrary to plaintiff's contention, defendant was not precluded by 11 NYCRR 65-3.15 from paying other providers' legitimate claims subsequent to the denial of plaintiff's claims. Adopting plaintiff's position, which would require defendant to delay payment on uncontested claims, or, as here, on binding arbitration awards - pending resolution of plaintiff's disputed claim - "runs counter to the no-fault regulatory scheme, which is designed to promote prompt payment of legitimate claims"(Nyack Hosp. v General Motors Accept. Corp., 8 NY3d at 300).

After reviewing the evidence and arguments made by the parties at the hearing, I find that once the policy limits have been exhausted, the Respondent's obligation to pay first party benefits no longer exists. I have reviewed the cases and regulations cited by both parties. I have also reviewed Master Arbitrator decisions not submitted for review. I agree with Master Arbitrator Anne Powers decision that once the policy has been exhausted, an arbitrator's decision that no further benefits are due is not irrational, incorrect as a matter of law, or arbitrary and capricious. *See* Galaxy Rx Inc v. Allstate Insurance Company - 99-21-1225-5298 *affirming* 17-21-1225-5298. I also agree with Master Arbitrator Richard Ancowitz decision that while he may have ruled differently, the Master Arbitrator can only apply certain narrowly circumscribed grounds in evaluating Applicant's request for vacatur. *See* New York Spine & Pain Care PC v. Geico Insurance Company - 99-22-1265-8110 *affirming* 17-22-1265-8110.

Master Arbitrator Power's decision in part:

> Applicant/Appellant in the instant appeal is arguing that the evidence which the Arbitrator foundto be credible and based his decision was an abuse of his authority. Here as in all other claims the determination of facts, the weight and credibility of the evidence, and the light in which theevidence is viewed, are purely discretionary matters for the arbitrator to determine. Appellant is reminded that the arbitrator clearly stated that "The Applicant is

seeking payment based on thepriority of payment rule. The Respondent's position is that there is no coverage left on thepolicy and this arbitration proceeding should be dismissed. The two principles in play here(policy exhaustion and the priority of payment rule) cannot be reconciled. If the claim is awarded, the contractual policy limit is breached. If the claim is dismissed, the priority of payment rule is violated. Lower courts, arbitrators, and master arbitrators are all over the map on this issue. The Court of Appeals has not weighed in on this matter, nor has the Department of Financial Services issued an opinion on how to resolve this dilemma. I find that policy exhaustion outweighs the priority of payment rule. The general denial is sustained.

Pursuant to 11 NYCRR 65-4.5 (o) (Regulation 68-D) the arbitrator shall be the judge of therelevance and materiality of the evidence offered. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an awardthat is consistent with the Insurance Law and Department regulations. Moreover, Arbitrators sitin equity and have the power to enforce the spirit and intent of the No-fault law and regulations. see Bd. of Education, et. al. v. Bellmore-Merrick, 39 N.Y. 2d. 167 (1976). "Although anarbitration panel may not overtly disregard the law, arbitrators are not strictly tethered to substantive and procedural laws and may do justice as they see it, provided that they do notviolate a strong public policy, do not exceed a specifically enumerated limitation on their power and their decisions are not totally irrational [citations omitted]." *See*, Matter of Solow Building Co., LLC v. Morgan Guarantee Trust Co. of New York, 6 A.D.3d 356, 356, 776 N.Y.S.2d 547, 548 (1st Dept. 2004). The Master Arbitrator cannot conduct a de novo review of the issuesdecided by arbitrator below. Since the claims raised by Applicant/Appellant in their appeal wereaddressed and decided by the hearing arbitrator and formed the basis of his decision; Respondent/Appellant's arguments are outside the scope of a Master review therefore denied.Moreover, it is beyond a master review for a master arbitrator to make her own factualdetermination, of the facts in evidence reviewed by the lower arbitrator or procedural errors committed by the lower arbitrator or to determine the weight

of the evidence.Mott v. StateFarm Ins, Co.77 A.D. 2d 488. Applicant/Appellant's argument is outside the scope of a Master review therefore is denied."

Based on the foregoing, I find lower arbitrator decided this claim based upon his review and evaluation of the record as well as case law. Based on the foregoing, I find the award below wascogently thought out; clearly articulated and had a rational and plausible basis in the evidence. The award is affirmed in its entirety.

I also note Master Arbitrator Richard Ancowitz decision in part. *See* New York Spine & Pain Care PC v New York Spine & Pain Care PC - 99-22-1265-8110 affirming 17-22-1265-8110.

Upon review of the briefing submitted by the parties, I first must note that I agree with applicant insofar as I do not find the Appellate Division, First Department's holding in *DTR* to be dispositive of this matter in respondent's favor. In that case, the Court specifically took notice of and cited the priority of payment rule in their holding.

Still, on the law, I find I find this to be a close case. If I were sitting as a lower arbitrator, I might well have decided the matter in applicant's favor. However, I sit as a master arbitrator, and can only apply certain narrowly circumscribed grounds in evaluating applicant's request for vacatur. *See*, generally, 11 NYCRR 65-4.10 and CPLR 7511. In this case, upon further review, I simply cannot find that this award was irrational, lacked a plausible basis, or was otherwise infirm.

Indeed, I agree with applicant that the Court of Appeals holding in Nyack Hosp. v. GeneralMotors Acceptance Corp., 8 N.Y.3d 294 (2007) must be respected. Applicant contends thatthe arbitrator erred in failing to consider *Nyack*, but that Court of Appeals holding was indeed cited by the arbitrator. Applicant further contends that the Court failed to consider theapplicable regulation, 11 NYCRR 65-3.15, but that regulation was indeed considered by theCourt in *Nyack*. I do find, as demonstrated in the award, that the arbitrator did consider theappropriate authorities, albeit different courts and different arbitrators have come to differentconclusions about the applicability of these authorities to any given set of facts.

Thus, given the split of authority which presently exists, I see no basis to disturb the awardas per 11 NYCRR 65-4.10 (a) or CPLR 7511. Certainly, I find that the award was not irrational and had a rational basis. *See*, Matter of Acuhealth Acupuncture, P.C. v Country-WideIns. Co., 149 A.D.3d 828 (2nd Dept 2017).

Finding no reason to disturb the award, I find that same should be affirmed.

An insurer is not required to pay a claim where the policy limits have been exhausted. *See* Mount Sinai Hospital v. Zurich American Insurance Co., 15 A.D.3d 550, 790 N.Y.S.2d 216 (2d Dept. 2005).

When an insurance carrier ". . . has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease", *See* Presbyterian Hosp. in the City of New York v. Liberty Mut Ins Co., 216 A.D.2d 448, 628 N.Y.S.2d 396 (2d Dept. 1995).

A policy exhaustion defense is not precluded where a claim was improperly denied or where the Denial of Claim (NF-10) form is not issued within 30 days. *See*New York and Presbyterian Hospital v. Allstate Ins. Co., 12 A.D.3d 579, 786 N.Y.S.2d 68 (2d Dept. 2004); Crossbridge Diagnostic Radiology v. Encompass Insurance, 24 Misc. 3d 134(A), 2009 NY Slip Op 51415(U), 2009 WL 1911909 (App. Term 2d, 11th & 13th Dists. June 23, 2009).

As stated above, after reviewing the evidence and arguments made by the parties at the hearing, I find that once the policy limits have been exhausted the Respondent's obligation to pay first party benefits no longer exists. I have reviewed the cases and regulations cited by both parties. I find Respondent has demonstrated that there is no remaining coverage available for this claim as the policy has been exhausted. I find that policy exhaustion outweighs the priority of payment rule.Therefore, Applicant's claim must be denied. 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 Queens

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

01/14/2025
(Dated)

Thomas Eck

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:
ae46d1e0fd10f388099498b81bc382d0

Electronically Signed

Your name: Thomas Eck
Signed on: 01/14/2025