

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

BSD OS LLC  
(Applicant)

- and -

American Transit Insurance Company  
(Respondent)

AAA Case No. 17-23-1322-5884

Applicant's File No. DK23-385555

Insurer's Claim File No. 1131480-01

NAIC No. 16616

**ARBITRATION AWARD**

I, Anne Malone, 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 03/31/2025  
Declared closed by the arbitrator on 03/31/2025

Evan Polansky, Esq. from Korsunskiy Legal Group, P.C. participated virtually for the Applicant

Derek Lynch, Esq. from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,826.70**, 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 49 year old EIP reported involvement in a motor vehicle accident on May 13, 2023 in a vehicle which was listed on the police report as a livery vehicle with a passenger; claimed related injury and received a pneumatic compression device provided by the applicant on July 14, 2023.

The applicant submitted a claim for this durable medical equipment, payment of which was denied based on the fact that the EIP is eligible for Workers' Compensation benefits.

**The issue to be determined at the hearing is whether the applicant has standing to proceed with this case in this forum.**

#### 4. Findings, Conclusions, and Basis Therefor

This hearing was held on Zoom and the decision is based upon the documents reviewed in the Modria File as well as the arguments made by counsel and/or representative at the arbitration hearing. Only the arguments presented at the hearing are preserved in this decision; all other arguments not presented at the hearing are considered waived.

The respondent denied payment for the aforementioned durable medical equipment on the ground that the EIP is eligible for Workers' Compensation benefits as he was in the course of employment at the time of the accident.

The police report indicates that the EIP was operating a livery vehicle, with a passenger when he was involved in an accident on May 13, 2023. As long as there is a question of fact as to whether the assignor was working within the scope of his/her employment when an accident occurs, the claim should go to the Workers' Compensation Board first for a determination of that issue. If it is determined that the accident did not occur within the scope of the assignor's employment and the accident involved a motor vehicle such that no-fault insurance would apply, then it should be decided by a no-fault arbitrator.

The primacy of Workers' Compensation for coverage for treatment of injuries that occur when the injured party is in the course of employment has been established. In Arvatz v. Empire Mutual Insurance Company, 171 AD2d 262, 575 NYS2d 836 (1 Dept. 1991), the Court stated in pertinent part: "Where the availability of workers compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law, the plaintiff may not choose the courts as the forum for the resolution of such questions. The Legislature has placed the responsibility for these determinations with the Workers' Compensation Board and there it must remain."

In the instant case, respondent has come forward with a police accident report which demonstrates that a livery vehicle with a passenger was being driven at the time of the subject accident.

To support its contention that Workers' Compensation benefits are primary in this case the respondent has also submitted an affidavit from Michael Duignan, Director of Underwriting for the respondent, in which he attests to the fact that a taxi policy was issued to the EIP for the motor vehicle which he was operating at

the time of the subject accident. The issue here is whether there is enough proof in respondent's submissions to raise the question whether the EIP was in the course of his employment at the time of the subject accident.

The Appellate Courts have held that the burden of proof is quite low in determining whether Workers' Compensation is primary. In Parkway Mgmt., PLLC v. American Transit Ins. Co., 39 Misc.3d 133 (App. Term 2d Dept. 2013) the court held: "[w]e find that defendant's proof, including the police accident report was sufficient to raise a question of fact as to whether plaintiff's assignor had been acting as an employee at the time of the accident, which issue must be resolved by the Workers' Compensation Board."

This decision is not that the claimant was in the course of his employment at the time of accident, but simply that there is enough proof in the respondent's submissions to raise this question. The evidence submitted in this case is not sufficient to make this determination. This issue must be resolved by the Workers' Compensation Board for the reasons set forth above.

The applicant has not submitted any evidence to establish that Workers' Compensation benefits should not be primary in this instance.

Based upon the police report, the type of vehicle, the presence of a passenger, the affidavit of Mr. Duignan and the finding in Parkway Mgmt., supra, the applicant has not met its burden to establish that it has standing to proceed with this case in this forum.

**Accordingly, the claim is dismissed without prejudice.**

Any further issues submitted in the record are held to be moot and/or waived insofar as they were not raised at the time of this 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 DISMISSED without prejudice

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of CT

SS :

County of Fairfield

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

04/07/2025

(Dated)

Anne Malone

### **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:**  
cda195d37b505e795c3e121135a998b6

### Electronically Signed

Your name: Anne Malone  
Signed on: 04/07/2025