

# American Arbitration Association

## NO-FAULT ARBITRATION TRIBUNAL

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In the Matter of the Arbitration between

**Lincoln Medical & Mental Health Center**

*Applicant*

-and-

**American Transit Insurance Company**

*Respondent*

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AAA ASSESSMENT NO.:

INSURER'S FILE NUMBER: 1093433-01

AAA CASE NUMBER: 99-22-1264-0219

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### MASTER ARBITRATION AWARD

I, Richard B. Ancowitz, the undersigned MASTER ARBITRATOR, appointed by the Superintendent of Insurance and designated by the American Arbitration Association pursuant to regulations promulgated by the Superintendent of Insurance at 11 NYCRR 65-4.10, having been duly sworn, and having heard the proofs and allegations of the parties on N/A, make the following AWARD.

#### **Part I. Summary of Issues in Dispute**

Should the award be vacated as irrational, arbitrary and capricious, or incorrect as a matter of law due to policy exhaustion? Likewise, did the arbitrator err in not crediting respondent's lack of verification and 45 day submission defenses?

#### **Part II. Findings, Conclusions, and Basis Therefor**

The arbitrator issued an award in favor of applicant in the amount of \$86,670.31, rejecting various defenses interposed by respondent, including policy exhaustion, failure of verification, and failure to submit within 45 days.

The arbitrator held, *inter alia*:

*"After review of the evidence presented, I find that since Respondent acknowledged Applicant's "resubmission" received on May 3, 2021 and did not reiterate its 45 day defense, I find that by noting only that the claim was delayed for pending verification, the 45 day denial was reconsidered based on Applicant's correspondence. Therefore, I find that Respondent's 45 day defense is without merit.*

*Furthermore, Applicant demonstrated that it responded to Respondent's requests for additional verification and provided a breakdown of the bill for the charges only related to the motor vehicle accident. Indeed, Respondent submitted a coder affidavit that noted that Applicant was entitled to reimbursement more than the amount claimed.*

*Thus, even if Respondent initially properly delayed Applicant's claim in accordance with 11 NYCRR 65-3.5 and 65-3.6, its failure to respond to Applicant's emails from October 8, 2021 to March 23, 2022 was improper. Since Respondent failed to respond to or acknowledge Applicant's emails within 30 days, it failed to properly toll its time to pay or deny the claim. See *All Health Medical Care, P.C. v. Government Employees Insurance Co.*, 2 Misc.3d 907 (Civ. Ct. Queens Co. 2004). Therefore, I find that Applicant is entitled to reimbursement for the hospital services in the amount of \$86,670.31.*

*Finally, the insurance policy at issue notes that there is additional personal injury protection (APIP) in the amount of \$150,000. Although Respondent's attorney argued at the hearing that the NF-11 was not received, there was no evidence presented that the NF-11 was sent out by Respondent. Therefore, based on the insurance policy submitted, I find that there is sufficient benefits available and this award is not in excess of the policy limits.*

*Accordingly, Applicant is awarded \$86,670.31, the entirety of its claim.”*

Respondent presently contends that the award should be vacated as irrational, arbitrary and capricious, and incorrect as a matter of law” in rejecting their defenses, and in particular, in awarding an amount over the policy limit. Respondent contends that the policy in question was exhausted, and that only \$41,098.84 remained available on it given that an NF-11 had not been returned to it.

Respondent cites to 11 NYCRR 65-4.10 (a) (2) as one of the grounds for seeking master arbitrator review:

*“(2) that the award required the insurer to pay amounts in excess of the policy limitations for any element of first-party benefits, provided that, as a condition precedent to review by a master arbitrator, the insurer shall pay all other amounts set forth in the award which will not be the subject of the appeal, as provided for in section 65-4.4 or section 65-4.5 of this Subpart.”*

Respondent further contends that the arbitrator’s power was exceeded and that an imperfect award was rendered in rejecting their various defenses.

Applicant has submitted a brief which contends that it was respondent’s burden to demonstrate an exhaustion of coverage defense, and that they failed to carry that burden. Applicant also notes that there was no infirmity in the arbitrator’s rejection of respondent’s other defenses as well.

Clearly, the general rule is that claims made against a policy need not be paid where a policy has been exhausted, e.g. *Allstate Prop. & Cas. Ins. Co. v. Northeast Anesthesia & Pain Mgt.* 2016 Slip Op 50828 (U), 51 Misc. 3d 149 (A) [App Term 1<sup>st</sup> Dept].

However, exhaustion defenses are not absolute, and must be properly set forth. E.g. *Mount Sinai Hosp. v. Dust Tr. Inc.*, 104 A.D.3d 823 (2nd Dept 2013), where the Court held that where insufficient evidence of compliance with 11 NYCRR 65-3.15, the priority of payment regulation, was provided, and thus an exhaustion defense need not be credited.

At the outset, it should be noted that respondent provides no indication that it had complied with the very regulation it cited, 11 NYCRR 65-4.10 (a)(2), which required payment of the remaining monies left on the policy as a condition precedent to seeking master arbitrator review. Further, in this case there existed a factual issue, resolved by the arbitrator in applicant's favor, as to whether an NF-11 was provided by respondent. Notably, respondent does not directly challenge this factual finding that there was indeed an additional \$150,000 in APIP available. Thus, there was insufficient evidence before the arbitrator to sustain an exhaustion defense, and there is likewise insufficient evidence of same before this master arbitrator. See, *Adv. Radiology PC v. MVAIC*, 2023 NY Slip Op 50139 (App Term 1<sup>st</sup> Dept).

Likewise, concerning respondent's other defenses, I find that findings of fact were made by the arbitrator which are largely beyond the power of a master arbitrator to review, absent irrationality or an arbitrary and capricious award, which I do not find to be the case here. E.g. *Matter of Jasser v. Allstate Ins. Co.*, 77 A.D. 3d 751 (2nd Dept 2010). See also, 11 NYCRR 65-4.5 (o)(1).

Thus, I will not disturb the arbitrator's evidentiary findings since the award clearly has a plausible basis. Simply stated, no cognizable basis in law has been presented which would warrant vacating the award, and I see no reason to do so.

The award is affirmed.

**Accordingly,**

1.  the request for review is hereby denied pursuant to 11 NYCRR 65-4.10 (c) (4)
2.  the award reviewed is affirmed in its entirety
3.  the award or part thereof in favor of  applicant  
hereby reviewed is vacated and  
 respondent  
  
remanded for a new hearing  before the lower arbitrator  
 before a new arbitrator
4.  the award in favor of the  applicant

hereby reviewed is vacated in its entirety  
 respondent

—or—

5.  the award reviewed is modified to read as follows:

A. The respondent shall pay the applicant no-fault benefits in the sum of

\_\_\_\_\_ Dollars (\$ \_\_\_\_\_ ), as follows:

|   |          |
|---|----------|
| Work/Wage Loss                          | \$ _____ |
| Health Service Benefits                 | \$ _____ |
| Other Reasonable and Necessary Expenses | \$ _____ |
| Death Benefit                           | \$ _____ |
| Total                                   | \$ _____ |

B1.  Since the claim(s) in question arose from an accident that occurred prior to April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from \_\_\_\_\_ at the rate of 2% per month, compounded, and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c) (stay of interest).

B2.  Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the applicant the amount of interest computed from \_\_\_\_\_ at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c) (stay of interest).

C1.  The respondent shall also pay the applicant \_\_\_\_\_ dollars (\$ \_\_\_\_\_ ) for attorney's fees computed in accordance with 11 NYCRR 65-4.6(d). *The computation is shown below* (attach additional sheets if necessary).

—or—

- C2.  The respondent shall also pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e). However, for all arbitration requests filed on or after April 5, 2002, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).
- C3.  Since the charges by the applicant for benefits are for billings on or after April 5, 2002, and exceed the limitations contained in the schedules established pursuant to section 5108 of the Insurance Law, no attorney's fee shall be payable by the insurer. See 11 NYCRR 65-4.6(i).
- D.  The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization for the arbitration below, unless the fee was previously returned pursuant to an earlier award

PART III. (Complete if applicable.)

- A. The applicant in the arbitration reviewed, having prevailed in this review, the respondent shall pay the applicant \$N/A- for attorney's fees computed in accordance with 11 NYCRR 65-4.10 (j). The computation is shown below (attach additional sheets if necessary). None requested.
- B. If the applicant requested review, the respondent shall also pay the applicant SEVENTY-FIVE DOLLARS (\$75) to reimburse the applicant for the Master Arbitration filing fee.

This award determines all of the no-fault policy issues submitted to this master arbitrator pursuant to 11 NYCRR 65- 4.10.

State of New York

County of Albany  SS:

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

July 25, 2023  
Date

Master Arbitrator's Signature

**IMPORTANT NOTICE**

*This award is payable within 21 calendar days of the date of mailing. A copy of this award has been sent to the Superintendent of Insurance.*

*This master arbitration award is final and binding except for CPLR Article 75 review or where the award, exclusive of interest and attorney's fees, exceeds \$5,000, in which case there may be court review de novo (11 NYCRR 65- 4.10(h)). A denial of review pursuant to 11 NYCRR 65- 4.10 (c) (4) (Part II (1) above) shall not form the basis of an action de novo within the meaning of section 5106(c) of the Insurance Law. A party who intends to commence an Article 75 proceeding or an action to adjudicate a dispute de novo shall follow the applicable procedures as set forth in CPLR Article 75. If the party initiating such action is an insurer, payment of all amounts set forth in the master arbitration award which will not be subject of judicial action or review shall be made prior of the commencement of such action.*

Date of mailing: \_\_\_\_\_