American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:		
Applicant_ 1	AAA Case No.	412009043130
(Applicant)	AAA Assessment No.	17 991 21836 09
- and -	Applicant's File No.	
Allstate Insurance Company		
(Respondent)	Insurer's Claim File No.	3635165925AT

ARBITRATION AWARD

I, Kent L. Benziger, Esq., 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: E.A.

1. Hearing(s) held on
☒07/27/10
☒06/16/10
☒04/21/10
and declared closed by the arbitrator on 7/27/10.

Mitchell Schecter cteh participated in person for the Applicant.
Bill Larkin participated in person for the Respondent.

2. The amount claimed in the Arbitration Request, **$90,289.89**, was AMENDED and permitted by the arbitrator at the oral hearing. (Amendments, if any, set forth below).

All parties have stipulated that the claim for medical bills is withdrawn without prejudice. The Applicant claim is for lost wages which totals $80,000.00.

STIPULATIONS were not made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

1) Whether the Respondent was required to send notice of a follow-up verification request for a physical examination ("IME") to Applicant's counsel after being placed on notice that Applicant was represented and counsel demanded all communication; and, 2) Whether the Respondent has established the "potential merit" of a defense that workers' compensation has primary jurisdiction.

Applicant has submitted the following documents:
1. AR-1;
2. Applicant's Contentions;
3. Bills, Nazzari Sportscare Physical Therapy, Barry Sloan, Nyack Hospital, Emergency Medical Association of NY Northeastern Pain Management, Hudson Valley Radiology;
4. Payroll Printout, Compensation Statements;
5. Post Hearing Submissions;
6. Disability Notes

Respondent has submitted the following documents:
1. Respondent's Contentions;
2. Scheduling Letters;
3. NF-2, NF-6, Accident Report;
4. Assignments, Affidavits;
5. Respondent's Post Hearing Submission;
6. Insurance Policy

This hearing was conducted using the electronic case folder maintained by the American Arbitration Association. All documents contained in that folder are made part of the records of this hearing. I have reviewed the documents contained in the electronic case folder as of the date of this award as well as any documents submitted upon continuance of the case. Any documents submitted after the hearing that have not been entered in the electronic case folder as of the date of this award will be listed immediately below and forwarded to the American Arbitration Association at the time this award is issued for inclusion in said case folder.

4. Findings, Conclusions, and Basis Therefor

In this proceeding, the Applicant/Eligible Injured Party is seeking reimbursement for lost wages. The claimed lost wage amount of $80,000 far exceeds the policy limits, but, as is noted below, the amount is incorrect.

The Respondent contends that: 1) the Applicant breached a condition precedent to coverage by failing to appear at an independent medical examination; and, 2) that workers' compensation has primary jurisdiction for this dispute. The Respondent also alleged that the Applicant did not have standing for reimbursement of medical expenses. However, all parties have now stipulated to permit the Applicant to withdraw all claims for medical expenses without prejudice.

On June 8, 2006, the Applicant was, by history, involved in a motor vehicle accident. In the No-Fault application, the Applicant stated that her vehicle was rear-ended and body ached injuring her feet, head, shoulder and neck. Following the accident, she received treatment at the emergency room of Nyack Hospital.

The No-Fault application on line 16 states "At the time of the accident were you in the course of your employment". The Applicant initially put a notation under "No" in response to the question. This answer was then crossed out, and the "Yes" box was checked. The Applicant then checked that due to the accident, she was not eligible for workers' compensation.

A Wage Verification Request has been exchanged. The form is filled out by a payroll coordinator at Northern Manor where the Applicant was employed as a housekeeper. The form states the Applicant initially missed six work days following the accident. She earned $19, 603.37 in the 52 weeks prior to the accident. Her hourly earnings were $15.33, and she worked 7 ½ hours a day, three days per week. The coordinator checked that it was undetermined whether the Applicant was entitled to receive workers compensation benefits as a result of the accident.

After the initial period following the accident, the Applicant was then out-of-work from September 27, 2008 through the filing date of the Request for Arbitration. She received disability benefits into April of 2009.

Denial

The Respondent/Carrier terminated all No-Fault benefits effective September 19, 2006, for the claimed failure to appear at two scheduled physical examinations.

As noted in the affidavit of the claims analyst, the Respondent/Carrier contacted a third-party vendor on August 18, 2006 to schedule a physical examination. On August 21, 2006, the Carrier received a letter of representation from Applicant's counsel directing that all communication regarding the accident be sent to his office. On August 30, 2006, the third-party vendor send the Applicant notice of a physical examination scheduled with an orthopedic in New City, New York for September 16, 2006. The Applicant failed to appear at the examination.

Through a letter dated September 21, 2006, the Applicant was notified of a second examination scheduled for October 3, 2006. The Applicant failed to appear at said examination, and the Respondent issued the aforesaid denial. The Respondent has included two affidavits from both the claims representative and a representative of the third-party vendor as to the practices and procedures and notations in the No-Fault file.

IME No Show

The requirement that a patient attend a physical examination at a carrier's request is set forth in 11 NYCRR. 65.3.5. A claimant is entitled to two opportunities to appear at said examination (an "IME"), and the scheduling of an exam is referred to as a verification request. 11 NYCRR 65.3.5(d). When the claimant fails to comply with the original request, Section 65.3.5(e)(2) requires that the carrier follow-up by either telephone or by mail to schedule a second exam.

In this case, the issue is whether the Respondent was required to also place Applicant's counsel on notice of the scheduling of the second physical examination. Such requirement has been in Prime Psychological Services, P.C. v. Nationwide, 24 Misc.3d 230, 234-235 (Civ. Court 2009):

> If the "requested verification has not been supplied to the insurer 30 calendar days after the original receipt, the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested., either by a telephone call or by mail. **At the same time the insurer shall inform the applicant and such person's attorney of the reason(s) why the claim is delayed by identifying in writing the missing verification and the party from whom it was requested**." 11 NYCRR Section 65-3.6(b).

In Prime Psychological Services, P.C. v. Nationwide, supra, the facts involved a pre-claim EUO, and the Court required that counsel be notified only if a claim been filed. However, in this case, a claim for lost wages had been filed and the Respondent had received verification in the form of the NF-6 wage verification form. Therefore, I find that Applicant's counsel was required to have been forwarded notice of the second physical examination, especially when the attorney specifically requested such communication.

Workers Compensation

The Respondent raised the defense that workers' compensation is primary and that jurisdiction over the claims resides with the Workers' Compensation Board. Arvatz v. Empire Mutual Insurance Co., 171 A.D.2d 262, 575 N.Y.S.2d 836 (1st Dept. 1991). Where the evidence is sufficient to raise a question of fact as to whether the eligible injured person was acting as an employee at the time of the accident, the issue must be resolved by the Workers' Compensation Board. Response Equipment, Inc. v. American Transit Ins. Co., 15 Misc.3d 145(A), 841 N.Y.S.2d 823, 2007 N.Y. Slip Op. 51176(U), 2007 WL 1662679 (App. Term 2d & 11th Dists. June 8, 2007).

The issue is whether the Respondent has established "potential merit" in its defense that the accident occurred during the course of the Assignor's employment so as to warrant the Workers Compensation Board's review of the facts. Lanpont v. Savvas Cab Corp., 244 A.D.2d 208 (1997). The Respondent's claim can not rest on "mere speculation". Anarumo v. Terminal Constr. Corp., 143 A.D.2d 616 (1988). However, if sufficient facts appear to demonstrate the potential merit of the defense, or if issues of fact exist, the matter must be submitted to the Board. Lanpont v. Savvas Cab Corp, supra, 244 A.D.2d at 210; See Mattaldi v. Beth Israel Medical Center, 297 A.D.2d 234 (1rst Dept. 2002).

In this case, the Respondent has not met the burden of potential burden. This Applicant worked as a housekeeper. In June of 2006, she was injured in a motor vehicle accident in another town from where her employer is located. The Respondent never raised any claim of workers' compensation having primary jurisdiction until a telephone hearing almost four years after the accident. The basis of Respondent's contention is that the Applicant crossed out one answer on a Non-Fault application and checked a box that the accident occurred during the scope of her employment. However, in the same document, the Applicant stated she was not eligible for workers' compensation. Following receipt, the claims analyst received numerous documents from the Applicant's employer and never raised this defense. In the four years following the accident, there has been no proof that the Applicant ever made or was eligible for workers' compensation. It was never raised in any of the Respondent's denials. Through an affidavit, the Applicant stated that she did not understand the form which she thought was asking if she had a job at the time of the accident. The Applicant

stated she went into a plaza to get a bagel for breakfast prior to work. As a finding of fact, the allegations raised by Respondent's counsel almost four years post accident do not have potential merit.

Lost Wages

The next issue is the amount of the lost wages. Here, the Applicant has presented conflicting information. The AR-1 states the Applicant made $2000.00 per month and was out of work since the date of the accident. These claims do not appear to be supported by the evidence. In the Wage Verification Report, the Applicant's employer states she was out-of-work for approximately six days following the accident. The employer listed her gross earnings for the 52 weeks prior to the accident at $19,603.37. The Applicant has then submitted compensation report forms from Northern Manor documenting that she worked during 2007 and earned $20,785.00. Although the Applicant did not work the entire year in 2008, she earned $18,517.87. The report documents that the Applicant's hourly salary was supplemented by numerous benefits.

As noted, the Applicant was out of work from September 27, 2008. The Applicant has submitted a disability note from Dr. Jeffrey Schnapper that this second lost wage period was related to the motor vehicle accident.

An Applicant can only claim lost wages for a maximum period of three years from the date of accident or, in this case, until June 6, 2009. 11 NYCRR 65-1. After a review of the compensation reports, I find that Applicant earned $20,785.00 year. Based on the complex salary arrangement with benefits and dues, the yearly salary is more accurate than an hourly wage. However, the Applicant is only entitled to 80 percent of said lost wages up to a maximum of $2,000 per month. 11 NYCRR 65-1.1. Further, an offset must be taken New York State Disability which was paid for 26 weeks from October 2008 through April of 2009 up to a maximum of $170.00 per week. Therefore the final amount must be further reduced or offset by $4,420.00. 11 NYCRR 65-1.1. Applicant clearly received disability, and the Applicant has the burden of proof that he or she received less than the maximum.

As a finding of fact, the Applicant is entitled to reimbursement for 37 weeks of lost wages. The Applicant is entitled to 80 percent of this amount or $14,789.33 which is then offset by $4,420.00 in disability. 11 NYCRR 65-1.1. The Applicant is therefore awarded reimbursement of $7,411.46.

Neither party in this proceeding provided any material assistance in regard to a relevant calculation of the employee's wages, the periods in disputes, and the correct amount in dispute with offsets pursuant to the No-Fault regulations. Applicant's counsel's claim that his client was entitled to lost wages from the date of the accident was certainly suspect since records documented employment during 2007 and the majority of 2008.

Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), an arbitrator is the judge of the relevance and materiality of the evidence offered.

Attorney's Fees and Interest

The insurer shall compute and pay to the Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not componded)

using a 30 day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(c)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, plus interest thereon with a minimum of $60.00 and a maximum of $850.00 per claim which is the total amount awarded one Applicant in one action from one provider. See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 12 N.Y.3d 217 Court of Appeals, 2009).

APPLICANT IS AWARDED REIMBURSEMENT OF $7,411.46 FOR LOST WAGES, TOGETHER WITH INTEREST AND ATTORNEY'S FEES.

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.

Accordingly, the applicant is AWARDED the following:

A.

Benefits	Amount Claimed	Amount Awarded
Work/Wage Loss	80,000.00	7411.46

Totals:	$80,000.00	$7,411.46

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 10/27/2009, which is a relevant date only to the extent set forth below.)

The Respondent shall compute and pay to the Applicant the amount of interest from aforesaid filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not componded) using a 30 day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

Pursuant to 11 NYCRR 65-4.6(c)(e), the Applicant is awarded 20 percent of the amount of the total first party-benefits, plus interest thereon with a minimum of $60.00 and a maximum of $850.00 per claim which is the total amount awarded one Applicant in one action per one provider See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 2009 NY Slip Op 02481 (Court of Appeals, 2009).

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 New York
SS :
County of Orange .

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

Kent L. Benziger

8/11/10
(Dated) (Kent L. Benziger, Esq.)

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.