American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bruce Burgos (Applicant)	AAA Case No.	17-16-1048-0611
	Applicant's File No.	
- and -	Insurer's Claim File No.	52-737X-349
	NAIC No.	25178
State Farm Mutual Automobile Insurance Company (Respondent)		

ARBITRATION AWARD

I, Heidi Obiajulu, 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 Party

1. Hearing(s) held on 04/03/2017
   Declared closed by the arbitrator on 04/03/2017

   William Thymius, Esq. from Law Office of Christopher P. Di Giulio, PC participated in person for the Applicant

   Chris Fingerhut, Esq. from Picciano & Scahill, P.C. participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 40,000.00**, 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 stems from the treatment of a then 48-year-old male patient who sustained injuries as a driver of a motor vehicle involved in an accident occurring on September 30, 2015. There are several issues in this arbitration. First, there's an issue whether Respondent properly reimbursed Applicant for his lost earnings for the period 09/30/15 through 05/13/16. Second, there's an issue whether Applicant is due to be reimbursed any no-fault PIP lost earnings for the period 05/14/16 through 11/03/16 [the balance of Applicant's claim]; Respondent's attorney contends that Respondent properly

tolled its 30-day period to pay or deny Applicant's claim for lost earnings for that period based on its issuances of verification requests (also that he was unaware if any payments were made for that period).

4. Findings, Conclusions, and Basis Therefor

I have reviewed all relevant documents included in the Modria ADR Center maintained by the American Arbitration Association (hereinafter referred to as AAA) consisting of the submissions made by the parties. No other documentation was submitted by either party at the time of the hearing. **However, Respondent submitted post-hearing submissions as directed, consisting of a legal brief, documentation regarding payments of lost earnings beyond 05/13/16, and a copy of correspondence by Applicant's attorneys notifying Respondent that he represented Applicant.**

In dispute in this arbitration is Applicant's claim in the amount of $40,000.00 for the disputed lost earnings from 09/30/15 through 11/03/16 and continuing. (Applicant admits receiving partial reimbursements for the period 09/30/15 through 05/13/16).

This case arises out of a motor vehicle accident occurring on September 30, 2015, in which Applicant (BB), a then 48-year-old male, sustained multiple injuries including to his back and right knee while driving the insured vehicle when it was rear-ended by the adverse vehicle.

It's undisputed that Applicant lost time from his job as a 1099 (self-employed) correction counselor for the New York City Department of Mental Health and Hygiene from the time of the accident. He claims lost earnings for the period 09/30/15 through 11/03/16 and apparently continuing (based on Respondent's written brief).

In his submitted affidavit, Applicant indicated that at the time of the accident he was self-employed as an independent contractor earning a rate of nineteen dollars ($19) an hour and that he worked approximately 35 hours a week as a correction counselor, resulting in monthly earnings of approximately $2660.00. Applicant's DB-450 also indicates such information. However, as pointed out by Respondent's attorney during the arbitration, Applicant also indicated that he earned $800.00 a week, which would equal $3200.00 a month in his submitted AR-1 form.

It's undisputed that Applicant submitted a NYS No-fault Application (NYS NF-2 form) to Respondent seeking the reimbursement of no-fault benefits for the lost earnings. That form indicates he began losing time from work "09/30, 10/2, 10/6, 10/7, 10/8 to continue[d] being off." The form bears a date-stamp of 11/02/15, apparently indicating the date of receipt by Respondent. (This point was not raised during the hearing)

The submitted checks in the file demonstrate that Respondent reimbursed Applicant $326.40 for the periods 11/16/15-12/15/15, 12/16/15-01/14/16, 01/15/16-02/13/16, 02/14/16-03/14/16, 03/15/16-04/13/16, and 04/14/16-05/13/16. Those payment were made on July 18, 2016.

At the outset, I find that Applicant established its prima facie case for his claim for lost earnings for the period 09/30/15 -05/13/16 (the period partially reimbursed) with the submission of its NYS NF-2 form, invoices, affidavit and the copies of checks issued by Respondent reimbursing Applicant's lost earnings, which demonstrate that Respondent received Applicant's claim, that more than 30-days elapsed since its receipt of same, and that Respondent denied reimbursement of Applicant's claim, which shows that Applicant's claim is now due and owing. See Insurance Law section 5106 [a]; Viviane Etienne Medical Care, PC v. County-Wide Ins. Co 25 N.Y.3d. 498, 35 N.E.3d 451, 14 N.Y.S. 3d. 283, 2015 N.Y. Slip Op 04787(NY, June 10, 2015), Westchester Medical Center v. Nationwide Mut. Ins. Co., 78 A.D.3d. 1168, 911 N.Y.S.2d. 907, 2010 N.Y. Slip Op.08933, (N.Y.A.D. 2nd Dept., November 30, 2010).

Notably, Respondent submitted copies of verification requests sent to Applicant seeking proof of disability to support any ongoing claim for lost earnings. The first verification request is dated April 25, 2016. The follow-up verification request is dated June 02, 2016. There are also follow-up verifications dated July 14, 2016, August 15, 2016, and October 10, 2016. The verification requests were sent to Applicant at his address listed in his NYS NF-2 form. Only the October 10, 2016 verification request was also sent to Applicant's attorney.

Although the record does not contain copies of all of Respondent's verifications/communications with Applicant, the evidence demonstrates that Respondent sent Applicant a copy of a NF-6 and requested documentation regarding his lost earnings. The completed NF-6 is dated 04/30/16 which was faxed to Respondent on 05/05/16 based on the fax cover sheet.

Applicant's attorney argued that he was in communications with Respondent before October 10, 2016 and that therefore Respondent's follow-up verifications are legally insufficient in that they failed to comply with the follow-up requirements of 11NYCRR section 65-3.6(b) which require that the insurer inform the applicant and his attorney of the reasons why the claim is delayed. Consequently, he argued that Respondent's 30-day period to deny Applicant's claim was not properly tolled and that therefore Applicant is entitled to be reimbursed its claim despite a lack of medical evidence.

Additionally, Applicant's attorney argued that Respondent failed to properly calculate Applicant's lost earnings. He contended that the evidence in the record demonstrates that Applicant made $19.00 an hour and worked 35 hours and therefore was entitled to be reimbursed $2000.00 per month. Alternatively, he argued that if Applicant was bound by the information set forth in his 2015 tax return, then the gross income figure should be used which would equal $1055.00 per month. He strongly argued that Respondent failed to demonstrate that Applicant's income of $3657.00 for 2015 should be used when that figure takes into account business expenses.

Respondent's attorney argued that Applicant failed to submit competent evidence to support his claim for higher lost earnings or any lost earnings beyond 05/13/16. Most vehemently he argued that there is absolutely no competent or credible evidence to support Applicant's claim of lost earnings of $40,000.00. He noted that Respondent sent Applicant's tax returns for the years 2012 through 2015 to a forensic accounting firm, BST, who determined that Applicant's highest earnings occurred in 2015 (which represents 9 months of earnings) and that the gross earnings amounted to $9467.00, which would give a monthly earnings of $1055.00. However, Respondent's attorney further noted that BST determined that Applicant's 2015 tax return reflected expenses of $5810.00, which led to a 61.37% reduction in gross earnings. Hence, BST determined that Applicant's actual monthly earnings was $408.00, which equaled a daily earnings of $13.60. Based on that figure, Respondent's attorney argued that Respondent applied the statutory 20% offset, resulting in a monthly reimbursement rate of $326.40. He noted that Respondent reimbursed Applicant that rate for the period 09/30/15 through 05/13/16. He was not certain if any additional reimbursements were made to Applicant. However, he argued that Respondent properly reimbursed Applicant lost earnings for the period 09/30/15 through 05/13/16 and noted that Applicant failed to submit medical evidence to support any additional lost earnings.

In light of the outstanding issues, the parties were directed to submit post-hearing submission regarding the date that Respondent was notified of the legal representation of Applicant by the Law Offices of Christopher P. DiGiulio and regarding whether any additional lost earnings were paid to Applicant for the period 05/14/16 through 11/03/16. Also, I requested any submitted up-to-date medical records.The parties were directed to submit such evidence by April 10, 2016.

Respondent submitted a copy of a letter by Applicant's attorneys, dated August 23, 2016, advising that they were retained to represent Applicant. Respondent also submitted copies of its wage loss calculation worksheets showing that it made additional reimbursements for the period 05/14/16 through 06/12/16, 06/13/16 through 07/12/16, 07/13/16 through 08/11/16, and 08/12/16 through 09/10/16. No post-hearing submission was submitted by Applicant.

Reviewing the relevant evidence in the record and considering the oral arguments made by the parties, I find as follows:

Notably, in a Forensic Services Report dated June 20, 2016, BST opined that that Applicant's lost net earnings were $408.00 per month beginning September 30, 2015 and continuing. BST went on to note that the application of the Regulation 68 statutory offset (of 20%) amounted to a reimbursement rate of $326.00 per month subject to the policy limits and maximum three year period from the date of the accident. Attached to that report are three schedules: (1) loss summary; (2) earnings analysis; and (3) tax return analysis. BST based its conclusions on Applicant's 2014 and 2015 personal income tax returns, Applicant 's 2012, 2013, 2014 and 2015 IR Tax Return Transcripts (Form 4506-T), Applicant's submitted NYS forms NF-7 and NF-2 forms, and written and verbal communications with Applicant.

I find that Respondent established that Applicant's lost earnings reimbursement rate is $326.40 per month with the report and attached documentation by its consulting forensic accounting firm, BST. I find BST's conclusions and calculations to be sound and based on a sufficient factual basis because it considered all of the available information regarding Applicant's earnings at the time of the accident. Compare Mills v. Government Empls Ins. Co, 21 Misc. 3d 1122 (A), 873 N.Y.S. 2d 513, 2008 N.Y. Slip Op. 52141 (NY Sup, October 01, 2008).

"Claims for lost earnings must be ascertainable with a reasonable degree of certainty and may not be based on conjecture." (Glaser v County of Orange, 54 AD3d 997, 998 [2d Dept. 2008], Schiller v New York City Tr. Auth., 300 AD2d 296, 296-97 [2d Dept. 2002]; Davis v City of New York, 264 AD2d 379 [2d Dept. 1999].)

It is the claimant's burden to establish damages for past [and future] lost earnings with reasonable certainty, such as by submitting tax returns or other relevant documentation. See State Farm Mut. Auto. Ins. Co. v. Stack 55 A.D.3d 594, 869 N.Y.S. 2d. 536, 2008 NY Slip Op 07651 (NY App. Div. , 2nd Dept., October 07, 2008).

Although Applicant's attorney argued that Applicant is entitled to be reimbursed at a higher reimbursement rate than that used by Respondent, I find that he failed to submit any competent and credible evidence to refute the calculations by Respondent's accounting firm, BST.

Consequently, I find that Applicant was properly reimbursed for the period 09/30/15 through 05/13/16 at the rate of $326.40 per month with the report by BST, Respondent's submitted wage loss calculation worksheets, and Applicant's admissions of receipt of same. I further find that Respondent submitted sufficient evidence to demonstrate that it properly reimbursed Applicant for the period 05/14/16 through 09/10/16 with its submitted wage loss calculation worksheets.

Finally, I find that Applicant's claim (if any) for lost earnings for the period 09/11/16 to 11/03/16 [and beyond] and/or for any late reimbursements is **dismissed without prejudice** because Applicant did not submit evidence to demonstrate that such claim is currently due and owing (I don't know when Applicant's claim for the disputed period was submitted and therefore cannot determine if Respondent's 30-day period was tolled by the submitted verifications requests seeking medical evidence or if that amount is due and owing). Notably, 11 NYCRR section 65-3.8(d) indicated that voluntary payments are made without prejudice.

Accordingly, I find in favor of Respondent. Applicant's claim is denied.

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 New York
SS :
County of New York

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

04/17/2017
(Dated)

Heidi L. Obiajulu

Heidi Obiajulu

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
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Electronically Signed

Your name: Heidi Obiajulu
Signed on: 04/17/2017 11:59:14 AM