

AMERICAN ARBITRATION ASSOCIATION  
NEW YORK SUM ARBITRATOR TRIBUNAL

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In the Matter of Arbitration between

(Claimant)	AAA Case No.	01-20-0010-8118
	Insurer's Claim File No.	151123386
-and-	Applicant File No.	

Preferred Mutual Insurance Company - SUM  
(Respondent)

Issues in Dispute : Cause of injuries, Comparative negligence, Credibility of medical evidence or witness, Future pain and suffering, Permanence of injuries, Significant limitation of use, Use or operation of automobile

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**ARBITRATION AWARD**

I, Alan H Krystal Esq., the undersigned **ARBITRATOR**, designated by the American Arbitration Association pursuant to the rules for New York Supplementary Uninsured Motorists Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Department of Financial Services, having been duly sworn, and having heard the proofs and allegations of the parties, make the following **AWARD**.

Claimant(s), in the above caption, hereinafter referred to as: Claimant

**1. Preliminary Conference Call** held on: 01/22/2024

Peter Saghir , Esq. participated for the Claimant(s).  
Gregory Day, Esq. participated for the Respondent.

**2. Hearing(s) held on:**

03/08/2024

and declared closed by the arbitrator on 03/22/2024.

Ben Rubinowitz, Esq participated for the Claimant(s).  
Gregory Day, Esq. participated for the Respondent.

**3. Witness(es) for the Claimant(s):**

Claimant, Jeffrey Goldstein, M.D. and Liability witness RB

**4. Witness(es) for the Respondent:**

Jeffery Casdan, M.D. and Douglas Morr, P.S.

**5. Exhibits submitted by the Claimant(s):**

Operative report of Jeffrey Goldstein, M.D. dated 4-29-15.

Operative report of Otis Alton Barron, M.D. dated 11-29-17.

Police report of the subject accident dated 4-21-15.

Ambulance Call report dated 4-21-15.

Bellevue Hospital Center record dated 4-21-15.

Records of Claude Hillel, P.T. dated 5-11-15 to 1-6-16.

Records of NYU Langone dated 4-28-15.

Records of Seaview Orthopedics dated 4-27-15 to 9-9-15.

Photograph of stop sign at accident scene.

Order of Adam Silvera, J.S.C. dated 4-13-18.

Statement of Witness RB dated 5-8-15.

Three photographs of Claimant.

Five photographs depicting bike, taxicab, and accident scene.

Three aerial photographs of accident scene.

Two videos depicting taxicab prior to accident.

Record of Charles Kim, M.D. dated 2-27-24.

Transcript of Claimant's Examination Under Oath dated 6-27-23.

Transcript of Claimant's Examination Before Trial dated 9-20-16.

**6. Exhibits submitted by the Respondent:**

Report of orthopedic examination by Andrew Casden, M.D dated 1-2-23.

Curriculum Vitae of Douglas Morr, P.E.

Curriculum Vitae of Lauren Eichaker, Pd.D.

Police report of the subject accident dated 4-21-15.

Medical records of Wayne Winnick, M.D. dated 5-2-06 to 4-2-10.

Animations of accident prepared by Douglas Morr, P.E.

**7. Identity of court reporter:**

Not applicable

**8. Identity of interpreter:**

Not applicable

**9. Summary of Issues in Dispute:**

Claimant, age 63, alleges injuries to his neck which he sustained as a result of a motor

vehicle accident which occurred on April 21, 2015 when his Citi Bike was struck by a taxicab. The parties stipulated that there is \$500,000 in SUM coverage by Respondent Preferred Mutual Insurance Company (Case number 1-20-0010-8118) applicable to the within underinsured motorist claim subject to a \$100,000 set-off, as well as a \$1,000,000 umbrella policy by Respondent United States Insurance Company (Case number 01-22-0004-8715). The issues dispute are liability, comparative negligence, causation, and whether Claimant is entitled to more than the \$100,000 which he has received from the tortfeasor's carrier. The claims against each of the Respondents were filed separately but were heard jointly at the arbitration hearing which was conducted on March 8, 2024 via Zoom videoconference.

#### **10. Findings, conclusions and basis therefor:**

##### LIABILITY OF THE UNDERINSURED VEHICLE

The subject accident occurred on April 21, 2015, at approximately 4:55 p.m. Claimant, age 54, who was operating a rented Citi Bike eastbound on Grove Street. As he started to cross Grove Street on his bicycle, Claimant stated he was struck when a yellow taxicab drove through a double stop sign at the intersection of Waverly Place and Grove Street.

According to the police report, "Driver and passenger of Veh 1 state that Veh 1 was making a left from Waverly Pl onto Grove St, which is a one lane W/B street when bicyclist traveling E/B on Grove St. collided into Veh 1. Bicyclist and witnesses confirmed bicyclist was traveling E/B." The report listed bicyclist confusion and traffic control disregard as apparent contributing factors and further stated that a large van was parked on the southwest corner obstructing Veh 1's view.

A witness (RB) testified on behalf of the Claimant. He stated that he was crossing Waverly and had noticed the cab coming in from his left. He started crossing Waverly based on the assumption that the taxicab would stop. The witness stated the cab did not stop and in fact did not even slow down for the stop sign. He saw the cab speed through the stop sign. The witness was shown a video of a vehicle going through the stop sign which the witness identified as the taxicab. He also identified himself as present in the crosswalk. The witness raised his arm to get the taxicab to stop but the taxicab proceeded to make the left turn. He next observed the cab and saw Claimant partially under the cab bleeding from the right side of his head. The witness stated that he told the police what he observed but was not contacted by the police. The witness also stated that when he saw the cab there was a spider crack in the windshield.

Respondent United States Liability Insurance Company offered the testimony of Douglas

R. Morr, P.E., an accident reconstructionist. His testimony was based upon an illustrative animation of the accident, based upon Claimant's deposition testimony, photographic exhibits from his depositions, the subject police report, and photographs and measurements taken at the subject intersection. Mr. Morr concluded that Claimant's decision to operate the bicycle in the wrong direction solely created a dangerous unexpected situation for other motorists to have to perceive and react to the accident, and Claimant's injuries, would not have occurred had Claimant not chosen to operate the bicycle in the wrong direction. However, he also admitted on cross-examination that the taxicab's failure to stop did contribute to the happening of the accident.

The driver of the taxicab did not testify at the hearing. In the plenary action, said driver failed to appear for a deposition, which resulted in a court order stating that said driver was precluded from testifying at trial or offering evidence on his behalf.

With respect to the issue of liability, there appears to be no dispute that the operator of the taxicab went through a double stop sign; this is established through the testimony of the witnesses as well as the videos submitted by Claimant.

§1142 of the New York State Vehicle and Traffic Law states that a vehicle entering a stop or yield intersection. (a) Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection. In addition, §1141 New York State Vehicle and Traffic Law states that a driver of a vehicle intending to turn left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.

Moreover, PJI 2:80 states, "in applying this provision of the statute, you must first decide whether the defendant actually stopped as required. If you decide that the defendant failed to stop as required, defendant was negligent."

With respect to the Claimant's action, there is no dispute that his Citi Bike was traveling east in a west bound lane. However, the question remains as to whether this created a dangerous unexpected situation for other motorists to have to perceive and react to the accident, and that Claimant's injuries, would not have occurred he not chosen to operate the bicycle in the wrong direction.

Under the emergency doctrine, "those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably

causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency." (Bello v Transit Auth. of N.Y. City, 12 AD3d 58, 60, 783 NYS2d 648 [2004]; see Parastatidis v Holbrook Rental Ctr., Inc., 95 AD3d 975, 976, 943 NYS2d 625 [2012]).

In the instant case, the circumstance causing the accident was the taxicab's failure to stop at the stop sign and there is no credible proof that Claimant's actions were the proximate cause of the accident.

Therefore, I conclude that the taxicab's failure to stop at the stop sign was the sole cause of the accident. This negligence was clearly established by the videos and the testimony of Claimant and the witness. I found Mr. Morr's testimony to be unpersuasive. His conclusion that the operator of the taxicab was "as attentive as he could be is at odds with the preponderance of the credible evidence. Had the he driver of the taxicab stopped at the stop sign as required by law for four seconds, the accident would not have occurred because as a matter of physics, as Claimant would have finished crossing the street.

Based upon the foregoing, I conclude that Claimant's injury was due wholly and solely by the negligence of the taxicab driver who failed to stop at a double stop sign.

#### CLAIMANT'S DAMAGES

Claimant stated that he saw the cab "careening down the corner, accelerating through the turn." The impact caused his body to be catapulted onto the taxicab with the right side of his face striking the windshield. He was bounced off the cab and onto the sidewalk. Claimant was taken by ambulance to Bellevue Hospital. The ambulance call report stated "54 y/o male found fully immobilized by FDNY Engine c/o tingling down both upper extremities. Pt states was struck riding bicycle, thrown up on hood and spidered windshield."

The hospital record stated "Pt was admitted to the trauma team in stable condition. Labs all normal, Pan CT showed concerning changes in cervical spine. NSGY consulted. Cervical Spine MRI obtained overnight was read as follows: No evidence of ligamentous injury. No fractures. Disc osteophyte C5-6 with spinal cord compression. NSY reviewed the study and cleared c-spine, removing the collar. They noted that given disc ridge at C5-6 causing canal stenosis, patient will likely need surgery in a delayed, non-emergent fashion. Patient stated he would prefer to follow up with Anthony Frempong-Boadu at NYU, who will be notified about the patient."

On April 27, 2015, Claimant was seen by Jeffrey Goldstein, M.D. He noted "the patient complains of numbness and tingling along the ulnar aspect of his forearms bilaterally with hyperesthesia along the ulnar aspect of his hand...the patient has difficulty with fine motor coordination in using his hands." The examination of the upper extremities demonstrated no gross sensorimotor deficits. Claimant was hypereflexic in the lower extremities, with a bilateral Hoffmann.

Based upon his review of the CT scan and MRI studies, Dr. Goldstein's impression was "a large cervical disc herniation at C5-6 with myelopathy and cervical spondylosis C5-6 and C6-7." He stated that he and Claimant "discussed the role of nonoperative treatment and surgical intervention. Surgery is recommended as an attempt to prevent progression. The patient is an eye surgeon. We cannot now operate because of symptomatology related to his myelopathy. He understands that even following surgery that this may persist. We discussed the role of surgery is an attempt to prevent progression. We discussed surgery at C5-6 as well as C6-7 in addition. We discussed use of instrumentation and bone grafting options."

On April 29, 2015, Dr. Goldstein performed anterior cervical discectomy, fusion and instrumentation at C5-6 and C6-C7 at NYU Hospital Center. The procedure involved anterior cervical fusion at C5-6 and C6-7 and anterior plating a C5-C7 with Medtronic Atlantic vision elite plate and six 15 mm screws.

Dr. Goldstein re-examined Claimant on May 6, 2015. Claimant stated he was feeling much better after the surgery, but did relate symptoms of confusion and headache off and on. Dr. Goldstein noted "wound is clean and dry and is healing well. There are no signs of any infection. There is minimal swelling noticed around the incision site. There is no erythema or discharge from the wound noticed... neurovascular status is grossly intact.

On June 5, 2015, Dr. Goldstein reported Claimant had no motor deficits in the upper extremities. X-rays of the cervical spine noted satisfactory anterior and cervical graft and implant placement for fusion C5 to C7. Dr. Goldstein's impression was "status post anterior cervical decompression and fusion 04/28/15 for myelopathy. The patient is progressing appropriately. He did hold on physical therapy because of discomfort but is now restarting. He will follow up for EMG nerve conduction studies at the Neurology Service. I have asked him to see me for reevaluation in 3 months at which time new x-rays of the cervical spine 4 views will be obtained or sooner if needed."

Dr. Goldstein testified that the initial findings of cord compression were consistent with trauma. Although Claimant had a history of neck issues, there was never any finding of cord compression. He stated that Claimant's spinal cord was not receiving the blood flow that was needed and could lead to paralysis if not appropriately treated. Dr. Goldstein testified that the nature of the impact was consistent with the findings of an acute injury

and the cause of his severe disc herniation. He stated that surgery was needed because of cord compression and difficulty with fine motor skills that were acute and did not pre-exist the accident. Based upon the MRI study and the lack of any history of disc herniation, Dr. Goldstein concluded that the disc herniation and cord compression were acute and required an operative procedure. He also concluded that as a consequence of the surgery, Claimant would have limited cervical range of motion for the rest of his life. Dr. Goldstein also stated the cervical spine injury was permanent, as two active discs were replaced by cages, screws and a bone graft that can't be reversed. He further opined there was at least 25 % a chance that he requires additional surgery. Dr. Goldstein concluded that Claimant's neck pain will not get better and will likely get worse.

Claimant received physical therapy from Claude Hillel, P.T. The therapy commenced on May 11, 2015. At the time of the initial examination, the following range of motion findings were reported:

Cervical Spine Active Range of Motion: Flexion 25 (normal 45), extension 15 (45), lateral flexion 15 (45), left rotation 15 (80), right rotation 30 (80).

Cervical Spine Active Range of Motion: Flexion 20 (50), extension 35 (30), lateral flexion 20 (50), left rotation 25 (85), right rotation 35 (85).

The therapy consisted of heat, manual therapy, neuro-muscular re-education, and therapeutic exercises. Claimant received therapy through January 6, 2016.

Respondent called Jeffery Casdan, M.D., an orthopedist, as a witness. Dr. Casdan first examined Claimant on September 30, 2022. His examination reported a well-healed anterior cervical discectomy, fusion, and instrumentation scar. Range of motion of the lumbar spine revealed flexion of 90 degrees (normal 80-90 degrees), and extension of 20 degrees (normal 20 degrees). Cervical flexion was 50 degrees (normal 80-90 degrees), extension 20 degrees (normal 70 degrees), and left and right rotation 20 degrees (normal 90 degrees). He did not detect any long tract findings including clonus, Hoffmann, Babinski, and straight leg raise. There was subjective tenderness to palpation in the cervical spine.

Dr. Casdan opined that "the claimant, was involved in an incident on April 21, 2015. He did have a history of previous cervical spine complaints as noted by Dr. Goldstein in his report of April 27, 2015. Dr. Goldstein notes that he had been seen by a neurologist with nonoperative treatments recommended. Dr. Goldstein further notes that when he would hyperextend with activities, he noted difficulties. He would note dysesthesias when he hyperextended his neck. Clearly, this would suggest preexisting spinal cord compression. The presence of dysesthesias with hyperextension of the neck is consistent with preexisting spinal cord compression. The x-rays and MRI scans clearly do demonstrate degenerative



disease as a component of the stenosis at C5-C6 and C6-C7. Clearly, there is a component of preexisting degenerative disease that existed and did cause symptoms requiring evaluation."

On January 23, 2023, Dr. Casdan reviewed a CT scan cervical spine dated April 22, 2016, which demonstrated prior anterior cervical discectomy and fusion at the levels of C5-C6 and C6-C7. His review of an MRI of the cervical spine dated November 14, 2017, was reviewed which revealed postoperative changes, C5-C7. Dr. Casdan concluded "in summary, my conclusions in the report dated January 2, 2023, are unchanged. These are postoperative studies and do not influence my previous conclusions. MRI scan of the cervical spine is most suggestive of preexisting compression and not traumatic in nature. The conclusions of my previous study remain unchanged after review of additional radiologic information."

Dr. Casdan testified at the hearing that it was possible that if subject accident had not occurred, if the degenerative nature of the Claimant's cervical spine could have eventually required surgery as it is a condition that continues to progress.

Upon cross-examination, Dr. Casdan stated he was not aware that the cab went through a stop sign or that the impact caused the windshield to be shattered. He stated that such an accident could cause an acute cervical spine injury. He also testified that ischemia presented "an additional concern from an orthopedic standpoint" because of the dangers that arise from the lack of blood flow to the spinal cord in that oxygen and nutrients would no longer provide nourishment to that area of the cord. Upon further questioning, Dr. Casdan conceded that as the operating surgeon Dr. Goldstein was in a far better position than he to know the extent and acute nature of the trauma and cervical injury.

Claimant had additional surgery on November 29, 2017, after developing left cubital tunnel syndrome at the left elbow that was not responding to nonoperative treatment. Claimant underwent a procedure which was performed by Otis Alton Barrett, M.D. During his testimony, Dr. Goldstein opined that the left cubital tunnel syndrome and resulting surgery was causally related to the subject accident.

On February 27, 2024, Claimant was seen via telemedicine by Charles Kim, M.D. for complaints of neck pain radiating to the left arm from elbow to medial hand with paresthesias as well as limited range of motion. The examination noted tender and taut bands over the bilateral occipitus, splenius capitus, and upper trapezius muscles. There was more deep tenderness above the level of fusion. Dr. Kim recommended a medial nerve branch injection.

Claimant did have a history of prior neck pain. The records of Wayne Winnick, M.D. note Claimant was treated for pre-existing "combination cervical and ulnar nerve issues" as far

back as 2007. On May 5, 2008, Dr. Winnick reported that Claimant injured his neck while on vacation and had numbness in the hypothenar areas in both hands. On July 16, 2008, Claimant reported that his bilateral hand sensation had been restored.

Claimant is an ophthalmologist and is part of a practice in New York City. He performs eye surgery that includes laser procedures and ocular surgery. Claimant testified that he missed one month from work after the accident. Since his surgery, he has not been able to see as many patients and has delegated intakes and other aspects of examinations to his staff. Claimant reports that he can only perform standing examinations and still experiences limitation of movement.

At the time of the accident, Claimant was active in a variety of sports such as golf, tennis, surfing, running, biking, and rock-climbing which he can no longer perform. Claimant also testified that he experiences neck pain when praying in temple and experiences occasional pain and numbness in his left thumb and fingers. Claimant is presently married with two daughters. He testified that his neck pain and limited movement has interfered with his intimate relations.

Based upon the evidence presented, I find that the Claimant sustained disc herniation and spinal cord compression. Dr. Goldstein testified that these conditions were causally related, necessitated the anterior cervical discectomy, fusion and instrumentation at C5-6 and C6-7. Dr. Goldstein further stated that Claimant has permanent restriction of motion limitations and may require future surgery. Although Dr. Casdam stated that surgery may have been required even if the accident had not occurred, he conceded that Dr. Goldstein, who performed the surgery, was in a better position than he to know the extent and acute nature of the trauma and cervical injury.

Although Claimant was able to resume his duties as an ophthalmologist after one month, the accident and resulting surgery has significantly impacted his lifestyle and prevented him from participating in the many athletic pursuits he enjoyed before the accident. It was clear from Claimant's testimony that sports were an important part of his life that has been significantly affected by the accident. In the case of *McLeod v Metropolitan Transp. Auth.*, 2015 N.Y. Misc. LEXIS 15 (Supreme Court, New York County, 2015) the Court stated "a claim for loss of enjoyment of life is not a separate item of recoverable damages, but rather part of the damages recoverable for pain and suffering; it includes not only the suffering from the physical pain caused by injuries, but also encompasses the frustration and anguish caused by the inability to participate in activities that once brought pleasure." (*McDougald v Garber*, 73 NY2d 246, 257 [1989].)"

Based upon the testimony and evidence, it is clear that Claimant's injury has had a significant negative impact upon his enjoyment of his life.

Based upon the evidence presented I find that the value of Claimant's injuries as well as past and future pain and suffering merits an award of the full underinsured policy of \$500,000 (minus a \$100,000 setoff) from Respondent Preferred Mutual Insurance Company and the umbrellas policy limit of \$1,000,000 from Respondent United States Liability Insurance Co..

Accordingly, Claimant is awarded the total sum of \$1,400,000 as compensation for his accident-related injuries.

**ACCORDINGLY,**

1. As to Claimant, claimant is awarded prior to set-off amounts \$500,000.00  
minus \$0.00 for claimant's comparative negligence  
minus a setoff amount of : \$100,000.00  
AWARDED( net of set-off amounts and reductions for comparative negligence):  
\$400,000.00

**Filing Fee**

In addition, Claimant(s) having been awarded the maximum available recovery, is also entitled to the return of the AAA filing fee, which Respondent is hereby directed to reimburse.

This decision is in full disposition of all SUM benefit claims submitted to this arbitrator.

STATE OF NEW YORK            }  
  }        SS:  
COUNTY OF SUFFOLK        }

I, Alan H Krystal 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.

A handwritten signature in black ink, appearing to read "Alan H Krystal". The signature is fluid and cursive, with a distinct dot at the end of the last word.

(Alan H Krystal Esq.)

Date: 04/22/2024

**For accidents covered under policies issued or renewed on or after October 1, 1993**