American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Recovery PT PC (Applicant)	AAA Case No.	17-18-1110-7389
	Applicant's File No.	OS-39594
- and -	Insurer's Claim File No.	10092903
	NAIC No.	16616
American Transit Insurance Company (Respondent)		

ARBITRATION AWARD

I, Aaron Maslow, 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: Assignor ["RN"]

1. Hearing(s) held on 05/08/2020
   Declared closed by the arbitrator on 05/08/2020

   Olga Sklyut, Esq., from Law Office of Olga Sklyut P.C. participated by telephone for the Applicant

   Jack Hessel, Esq., from Daniel J. Tucker, P.C. participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 2,019.72**, was NOT AMENDED at the oral hearing.
   Stipulations WERE made by the parties regarding the issues to be determined.

   The parties stipulated that Applicant established a prima facie case of entitlement to No-Fault compensation with respect to its bills. They also stipulated that Respondent's Form NF-10 denial of claim forms were timely issued, i.e., within the 30-day deadline prescribed by Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1). Additionally, they stipulated that should Applicant prevail, interest would accrue as of the date that the American Arbitration Association received Applicant's arbitration request.

3. Summary of Issues in Dispute

- Whether Applicant established entitlement to No-Fault insurance compensation for physical therapy services provided to Assignor.

- Whether to sustain Respondent's defenses that based upon the results of an EUO and its investigation, the loss was not an accident, Assignor did not meet the definition of an eligible injured person, she was involved in a staged accident, and the alleged injuries did not arise out of a covered accident.

4. Findings, Conclusions, and Basis Therefor

Appearances

For Applicant:

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710 Avenue U
2d floor
Brooklyn, NY 11223
By: Olga Sklyut, Esq.

For Respondent:

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7th floor
Brooklyn, NY 11201
By: Jack Hessel, Esq.

Applicant commenced this New York No-Fault insurance arbitration, seeking as compensation $2,019.72 which it billed for performing physical therapy services from Oct. 13, 2017 to Jan. 11, 2018, for Assignor, a 27-year-old female who allegedly was injured in a motor vehicle accident on Oct. 9, 2017. Eight bills are at issue. Respondent denied payment on the ground that fees were not in accordance with fee schedule. Its denials also asserted: "Based upon the results of an Examination under Oath and American Transit's investigation, the loss was not an accident. In addition, claimant does not meet the definition of an eligible injured person under the Mandatory Personally Injury Protection Endorsement, as she was involved in a staged accident. The alleged injuries did not arise out of a covered accident."

This arbitration was organized by the American Arbitration Association, which has been designated by the New York State Department of Financial Services to coordinate the mandatory arbitration provisions of Insurance Law § 5106(b), which provides:

> Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party ["No-Fault insurance"] benefits, or additional first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of this section to arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent.

Both parties appeared at the telephone hearing by counsel, who presented oral argument and relied upon documentary submissions. I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center as of the date of the hearing, said submissions constituting the record in this case. I also include in the record the submissions from linked cases where health service providers sought compensation for treating CC and RN, both claiming to have been injured in a collision on Oct. 9, 2017. The cases bear AAA Case Nos. 17-18-1110-7387, 17-18-1110-7389, 17-18-1111-8063, 17-18-1111-8072,, and 17-18-1119-4253.

The parties stipulated that Applicant established a prima facie case of entitlement to No-Fault compensation with respect to its bills. They also stipulated that Respondent's Form NF-10 denial of claim forms were timely issued, i.e., within the 30-day deadline prescribed by Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1). Since the denials were timely issued, Respondent was within its rights to raise at the issues all issued preserved in its denials of claim.

At the hearing, Respondent stated that it was not pursuing any fee issues. The only defenses it was pursuing were as follows: "Based upon the results of an Examination under Oath and American Transit's investigation, the loss was not an accident. In addition, claimant does not meet the definition of an eligible injured person under the Mandatory Personally Injury Protection Endorsement, as she was involved in a staged accident. The alleged injuries did not arise out of a covered accident."

These defenses are in the nature of an allegation of a staged accident which would not be a covered event under the subject insurance policy. In support of these defenses, Respondent argued at the hearing as follows: There were inconsistencies in the EUOs of the persons filing claims. There were three in the vehicle who were barhopping, according to the EUO testimony. They did not know each other's last names. They could not describe the other vehicle or whether the other vehicle's driver was a male or female.

Unlike negligence actions where plaintiffs must prove causation, claimants seeking to recover first party no-fault payments bear no such initial burden, as causation is presumed. Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 21 (2d Dept. 2009). The parties' stipulation here that Applicant

established a prima facie case of entitlement to No-Fault compensation therefore includes a presumption that Assignor was injured as a result of the subject collision. This arose from the submission of the proof of claim to Respondent.

A collision caused in the furtherance of an insurance fraud scheme is not a covered accident under a policy of insurance. Matter of Eagle Ins. Co. v. Davis, 22 A.D.3d 846 (2d Dept. 2005). The insurer must demonstrate that it has a founded basis for believing that the collision was intentionally caused but the burden of persuasion remains on the claimant, who must prove its case by a fair preponderance of the credible evidence; if the evidence weighs against the claimant or it is so evenly balanced that it is impossible to determine the matter, then judgment must be given for the insurer. V.S. Medical Services, P.C. v. Allstate Ins. Co., 11 Misc.3d 334, 342-343 (Civ. Ct. Kings Co. 2006), aff'd, 25 Misc.3d 39 (App. Term 2d, 11th & 13th Dists. 2009) ("defendant's proof, which plaintiff failed to rebut, established by a preponderance of the evidence its defense of lack of coverage"). Unsupported conclusions and suspicions, as well as unsubstantiated hypotheses and suppositions are insufficient to raise a triable issue of alleged fraud. A.B. Medical Services PLLC v. Eagle Ins. Co., 3 Misc.3d 8 (App. Term 9th & 10th Dists. 2002).

Where a vehicle was involved in several collisions within a short period of time after the insurer issued an insurance policy, this may satisfy the need for a founded belief necessary to support a denial grounded in asserted fraud. State Farm Mutual Automobile Ins. Co. v. Laguerre, 305 A.D.2d 490 (2d Dept. 2003).

Where a driver rear ends another vehicle two days after taking out insurance, and again less than sixty days after the first collision, and his written and recorded statements contain discrepancies, this constitutes compelling circumstantial evidence that there was an intentional collision staged for the purpose of insurance fraud. National Grange Mutual Ins. Co. v. Vitebskaya, 1 Misc.3d 774, 766 N.Y.S.2d 320 (Sup. Ct. Kings Co. 2003).

An insurer has met its burden of coming forward with a founded belief that a collision was staged where the policy was obtained approximately one month before the collision, the policy was cancelled one month after the collision for nonpayment of the premium, two persons in the struck vehicle had relationships with people involved in a similarly situated collision, two persons in the struck vehicle were involved in another collision approximately one year earlier, and three persons in the struck vehicle purported to withdraw their claims at EUOs; where this evidence is not rebutted by the testimony of the persons in the struck vehicle, there is no showing that said persons were unavailable, and no explanation is offered for their not having been subpoenaed, the applicant has failed to prove that the collision was a covered accident under the subject insurance policy. A.B. Medical Services PLLC v. State Farm Mutual Automobile Ins. Co., 7 Misc.3d 822 (Civ. Ct. Kings Co. 2005).

Where the insurer presents credible evidence that the subject vehicle was an older model, that the collision took place shortly after insurance was procured, that insurance on the vehicle was cancelled after the subject collision and once before after a collision, that there were several passengers in the vehicle, that no occupant

underwent emergency room treatment, that there were material discrepancies in EUO testimony among the occupants as to the number and gender of people in the vehicle, where they were going, and whether the driver knew the vehicle owner, and that the vehicle sustained only a small scratch, the insurer has shown a founded belief that injuries did not arise from a covered accident, i.e., that the collision was staged because at least one driver intended to make contact, and the burden shifts to the claimant; if the claimant fails to produce the alleged injured persons or any witnesses to the collision, it has failed to carry its burden of proving that the collision was a covered accident. V.S. Medical Services, P.C. v. Allstate Ins. Co., supra ("defendant's proof, which plaintiff failed to rebut, established by a preponderance of the evidence its defense of lack of coverage").

In determining whether an insurer had a factual basis or a founded belief that a collision involved a staged accident, "the court must consider factors such as whether there were multiple accidents involving the same vehicle or vehicles shortly after the policy was issued; whether the policy was cancelled for failure to pay premiums shortly after the accident occurred; were the parties involved in a 'ring' that stages accidents to defraud insurers; was the claim reported by an attorney rather than the claimant; did the same claimants make multiple no-fault claims for similar injuries arising from different accidents; the age and condition of the vehicles involved in the accident; the manner in which the accidents occurred; the damage to the vehicles involved in the accident; was the damage to the vehicles consistent with the speed and directions of the vehicles; did statements taken from those involved in the accident contain significant inconsistent or significant differences or do they contain only minor inconsistencies; were the parties uncooperative in the investigation of the matter; did all the claimants receive the same or similar medical treatment for the same injuries from the same medical provider or providers; the lapse in time between the date of the accident and the date the claimant first seeks treatment; are the injuries for which treatment was obtained consistent with the type of incident and the speed and directions of the vehicles at the time of impact; was the treatment excessive taking into account the nature and extent of the injuries." Tarnoff Chiropractic, P.C. v. GEICO Ins. Co., 35 Misc.3d 1213(A), 2012 N.Y. Slip Op. 50670(U) at 6 (Dist. Ct. Nassau Co., Fred J. Hirsh, J., Apr. 12, 2012).

A founded belief that multiple collisions involving the same vehicle were not covered events and that alleged injuries and treatment are not compensable exists when the evidence consists of the following: (1) individuals admitted that the insured vehicle was never garaged in or driven to the policy address, (2) the insured vehicle never had the same occupants in any of the collisions, (3) each loss followed the same pattern of minor collisions with livery vehicles, (4) the alleged occupants of the insured vehicle all allegedly received virtually identical treatment from the same medical providers, (5) individuals were involved in a potential staged loss in a prior year also fitting the same fact pattern, and (6) most of the parties requested to submit to EUOs failed to appear, while the parties that did appear offered testimony that was not credible. Kemper Independence Ins. Co. v. Best Touch PT, P.C., 2018 N.Y. Slip Op. 31241(U) (Sup. Ct. New York Co., Nancy M. Bannon, J., June 19, 2018).

The evidence establishes an intentional or staged collision where it proves (1) the individual claimants could not have sustained injuries as serious as those claimed, (2) in spite of the individual claimants receiving over $72,000.00 worth of medical treatment for injuries allegedly arising from the collision, the damage to vehicle was minor and the vehicle was drivable after the collision, requiring only minor repair (3) an individual claimant was not listed on the police report as a person injured in the subject accident, (4) the accident involved a "phantom" vehicle, and (5) the individual claimants received excessive and mirror treatment from the same medical facilities. Ace American Ins. Co. v. Lapaix, 2018 N.Y. Slip Op. 32257(U) (Sup. Ct. New York Co., Nancy M. Bannon, J., Sept. 12, 2018).

An insurer establishes that an incident was not a covered event, but rather a staged and intentional act, through presenting evidence that the individual claimants were unrelated occupants who received treatment at the same multi-specialty facility, that the loss occurred late at night when few people were present, that the incident occurred within 16 days from the policy's inception, that the vehicle was an old one, that there existed common addresses, phone numbers, and emails, and that the claim was linked to multiple staged losses and at least four declaratory judgment actions. 21st Century Ins./21st Century Advantage Ins. Co./21st Century National Insurance Co. v. Baptisye, 2019 N.Y. Slip Op. 30781(U) (Sup. Ct. New York Co., Tanya R. Kennedy, J., Mar. 29, 2019).

An insurer establishes facts constituting a claim that there is a founded belief that a collision was the product of fraud under the following: the policyholder obtained the policy just ten days before the collision; after the collision, the check he sent to pay the premium bounced; he did not have a valid driver's license at the time of the accident; neither of the other claimed occupants appeared to have been injured following the collision; and when the policyholder appeared for an EUO after three requests for her to do so, she testified that (1) she could not remember the type of car she was driving at the time of the accident, which was suspicious given that she had purchased the vehicle less than eight months before; (2) she did not have a driver's license when she purchased the vehicle; (3) she paid the policy premium via an automatic bank withdrawal, despite the fact that the only premium payment made on the policy was by a check, which bounced; (4) her passengers at the time of the collision were named Eric and Cece, despite the fact that the police report indicates that the two passengers were Richardson and White; and (5) her memory of the event was poor because the vehicle's air bags deployed, despite the fact that the police report reflects that the air bags did not deploy. State Farm Fire & Casualty Co. v. All County, LLC, 2019 N.Y. Slip Op. 33306(U) (Sup. Ct. New York Co., Kathryn E. Freed, Nov. 6, 2019).

An insurer raises an issue of fact in support of its defense of a staged accident by *submitting an analysis of inconsistencies* between the EUO statements of the driver and the passengers and the EUO transcripts themselves certified by the

transcriber, although unsworn and unsigned. Manhattan Medical Imaging, P.C. v. State Farm Mutual Automobile Ins. Co., 20 Misc.3d 1144(A), 2008 N.Y. Slip Op. 51844(U) (Civ. Ct. Kings Co., Katherine A. Levine, J., Sept. 4, 2008).

In the case at bar the issue is whether Respondent possessed a founded basis for believing that the collision was intentionally caused. Notably there was no affidavit of an SIU investigator reviewing the known facts. Respondent submitted the EUO transcripts of CC and RN. However, no analysis of inconsistent EUO testimony was submitted. At the hearing, Respondent offered a brief argument, asserting merely that there were inconsistencies in the testimonies. None were specifically pointed out. Then it was argued that they didn't know the last names of the others. (There were three claimants.) The other vehicle or its driver couldn't be described. These arguments alone do not make out a prima facie case of a founded basis for believing that the collision was intentionally caused.

None of the following indicia adverted to by the courts in determining a claim of a staged collision -- as discussed above -- are present here:

- There were several collisions within a short period of time after the insurer issued an insurance policy.
- The collision occurred a short time after the policy was taken out.
- The policy was cancelled a month after having been issued.
- The occupants made other claims from other collisions.
- Claims were withdrawn at an EUO.
- No occupant underwent emergency room treatment
- The vehicle sustained minimal damage.
- The parties were members of an insurance ring.
- The parties were uncooperative in the investigation of the matter.
- Most of the parties failed to attend EUOs. (Here two out of three attended.)
- A claimant was not on the police report.
- There was a "phantom" vehicle.
- Names of claimants different from those on the police report.

As noted, EUO transcripts are in the record. However, no brief or SIU affidavit directed this arbitrator to particular pages and lines of testimony. Neither

did Respondent at the hearing point to specific pages and lines in the transcripts which would support the arguments made. And, "The mere fact that claimant-defendants provided conflicting testimony as to where and how they met does not imply that the collision was not accidental." Unitrin Advantage ins. Co. v. Advanced Orthopedics and Joint Preservation P.C., 2018 N.Y. Slip Op. 33296(U) at 7 (Sup. Ct. New York Co., Carmen Victoria St. George, J., Dec. 20, 2018).

"While plaintiff [insurer] submits the transcripts of the claimants' EUOs, it does not cite to any line or page of the claimants' testimony to support such claims. The Court should not have to undertake the toilsome task of reading through pages and pages of testimony in order to ascertain which portions support plaintiffs supposed contentions" that there exists a founded belief that the alleged injuries did not arise from a covered accident. Unitrin Advantage ins. Co. v. Advanced Orthopedics and Joint Preservation P.C., 2018 N.Y. Slip Op. 33296(U) at 6-7 (Sup. Ct. New York Co., Carmen Victoria St. George, J., Dec. 20, 2018).

Therefore, I find that Respondent failed to make out a prima facie of a founded basis for believing that the collision was intentionally caused and there was a lack of coverage for the claims. I reject the defenses asserted in the denials: "Based upon the results of an Examination under Oath and American Transit's investigation, the loss was not an accident. In addition, claimant does not meet the definition of an eligible injured person under the Mandatory Personally Injury Protection Endorsement, as she was involved in a staged accident. The alleged injuries did not arise out of a covered accident."

The burden of proof did not shift to Applicant to prove that the claims resulted from a covered event. Applicant's prima facie case of entitlement to No-Fault compensation stands.

Accordingly, the within arbitration claim is granted in its entirety. Applicant is awarded $2,019.72 in health service benefits.

Interest: The parties stipulated that should Applicant prevail, interest would accrue as of the date that Applicant's arbitration request was received by the American Arbitration Association. Per the latter's electronic case folder, that date was Nov. 6, 2018. The end date for the calculation of the period of interest shall be the date of payment of the claim. In calculating interest, the date of accrual shall be excluded from the calculation. General Construction Law § 20 ("The day from which any specified period of time is reckoned shall be excluded in making the reckoning.") Where a motor vehicle accident occurs after Apr. 5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. 11 NYCRR 65-3.9(a); Gokey v. Blue Ridge Ins. Co., 22 Misc.3d 1129(A), 2009 N.Y. Slip Op. 50361(U) (Sup. Ct. Ulster Co., Henry F. Zwack, J., Jan. 21, 2009).

Attorney's Fee: After calculating the sum total of the first-party benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, as provided for in 11 NYCRR

65-4.6(d) (as existing on the filing date of this arbitration), subject to a maximum fee of $1,360.00.

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 applicant is AWARDED the following:

A.

Medical		**From/To**	**Claim Amount**	**Status**
	New York Recovery PT PC	**10/13/17 - 11/01/17**	**$503.40**	**Awarded: $503.40**
	New York Recovery PT PC	**11/06/17 - 11/14/17**	**$246.40**	**Awarded: $246.40**
	New York Recovery PT PC	**11/14/17 - 11/14/17**	**$249.96**	**Awarded: $249.96**
	New York Recovery PT PC	**11/22/17 - 11/22/17**	**$61.60**	**Awarded: $61.60**
	New York Recovery PT	**12/04/17 -**	**$308.00**	**Awarded:**

	PC	**12/14/17**		**$308.00**
	New York Recovery PT PC	**12/26/17 - 12/29/17**	**$215.60**	**Awarded: $215.60**
	New York Recovery PT PC	**12/29/17 - 12/29/17**	**$249.96**	**Awarded: $249.96**
	New York Recovery PT PC	**01/08/18 - 01/11/18**	**$184.80**	**Awarded: $184.80**
Total			**$2,019.72**	**Awarded: $2,019.72**

B. The insurer shall also compute and pay the applicant interest set forth below. 11/06/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Respondent shall pay Applicant interest on the total first-party benefits awarded herein, computed from Nov. 6, 2018 to the date of payment of the award, but excluding Nov. 6, 2018 from being counted within the period of interest. The interest rate shall be two percent per month, simple (i.e., not compounded), on a pro rata basis using a 30-day month.

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, as provided for in 11 NYCRR 65-4.6(d) (as existing on the filing date of this arbitration), subject to a maximum fee of $1,360.00.

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 Kings

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

05/08/2020
(Dated)

Aaron Maslow

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:
c28b5c6978a64e0bb94aaa023ec06595

Electronically Signed

Your name: Aaron Maslow
Signed on: 05/08/2020