

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Paragas Multi Services, Inc.  
(Applicant)

- and -

State Farm Mutual Automobile Insurance  
Company  
(Respondent)

AAA Case No. 17-22-1242-5291

Applicant's File No. GM21-393401

Insurer's Claim File No. 3227W788P

NAIC No. 25143

**ARBITRATION AWARD**

I, Bonnie Link, 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: the Assignor

1. Hearing(s) held on 01/03/2023  
Declared closed by the arbitrator on 01/03/2023

Matt Sledzinski, Esq. from Law Offices of Gabriel & Moroff, P.C. participated in person for the Applicant

Kyeko Stewart, Esq. from Rubin, Fiorella, Friedman & Mercante LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$815.03**, 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 arises out of treatment of a 52-year-old male for injuries he allegedly sustained when he claims that on November 25, 2021, the Respondent's insured's motor vehicle struck him when he was riding a scooter. The Applicant seeks reimbursement in the amount of \$815.00 for several pieces of durable medical equipment dispensed on December 1, 2021. The claim has not been paid or denied. The Respondent argues that the matter is unripe for arbitration because the claimant did not sign his EUO transcript.

Respondent also contends that the claimant is not an eligible injured party because its insured testified that only the Assignor/Claimant's electric scooter entered the

intersection and hit the right side of his vehicle and that there was no contact between the insured's vehicle and the claimant's body. It further argues and alleges that there is evidence that the claim is not legitimate because the Assignor/Claimant's testimony lacks credibility and is contradictory. Also, there is no police report for the loss and the claimant hired counsel immediately after the alleged collision.

#### 4. Findings, Conclusions, and Basis Therefor

This matter is determined after reviewing the documents contained in the electronic case folder at the closing of the file and the presentations of the parties' representatives. There were no witnesses. I reviewed the documents contained in the ECF for both parties and make my decision in reliance thereon. To the extent that the issues determined herein were not raised by the parties, "the arbitrator may . . . independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations." 11 NYCRR 65- 4.5(o)(1).

The hearing was conducted via Zoom and all parties appeared.

It is well settled that an applicant establishes its prima facie entitlement to payment by proving that it submitted a claim setting forth the facts and the amount of the loss sustained and that payment of no fault benefits were overdue (see Insurance Law § 5106[a]; *Mary Immaculate Hospital v Allstate Ins. Co.* 5 A.D.3d. 742 Second Dep't 2004. A prima facie case has been established herein.

This arbitration arises from an intersection accident between the Respondent's insured vehicle and the Assignor/Claimant's electric scooter. The Respondent's insured gave a statement and then testified under oath that the scooter was unmanned at the time of the collision and hit his vehicle on the passenger side. He testified that his vehicle never came in contact with the Assignor/Claimant's body. The insured stated that the claimant was not on the scooter at the time that the scooter impacted the insured's vehicle.

The Respondent's brief states that it took a recorded statement of its insured and that the insured stated that

*The Insured was driving the insured vehicle on Kingsbridge Road heading home from work. [Claimant] was riding a motor scooter on the sidewalk. The motor scooter was traveling very fast toward the intersection through which the insured vehicle was traveling. The insured vehicle had the green light and [Claimant] had a red light. All other pedestrians on that sidewalk were stopped at the red light. [Claimant] let go of the motor scooter before it entered the intersection. The motor scooter then continued into the intersection and struck the right passenger door of the insured vehicle. It then jumped up and broke the glass. The Insured called the police because he wanted [Claimant] to pay him for the damage, but [Claimant] refused. [Claimant] did not report any injuries at the scene. The police did not write a report and told [Claimant] and the Insured that if they wanted a report, they would have to go to the precinct. The Insured did not file a report because he decided to fix the glass himself;*

The Respondent's attorney's brief continued:

*These factors raised a strong possibility that the loss was not a covered event, that the injuries of the Claimant did not arise from an insured incident, or that the treatment submitted by the Applicant and other medical providers was not causally related to the November 24, 2021, collision, all of which would be considered non-covered events under the No-Fault Regulations.*

The Respondent attorney took Examinations Under Oath of both the insured and the Claimant. He stated that the Claimant's "testimony contained many inaccuracies and inconsistencies that led State Farm to conclude that the underlying loss was not an insured event." According to the Respondent's attorney's synopsis of the Claimant's testimony, the Claimant failed to provide a single coherent narrative regarding how the loss allegedly occurred. In particular, he was unable to state with clarity what street he was on, he testified that traffic was heavy, but also testified that there were no moving vehicles other than insured vehicle. The brief states that the Claimant provided several versions of the collision, stating first that the middle of the insured vehicle struck him, then that it was the front of the insured vehicle, and then that it was the rear of the insured vehicle that struck him, a version that is described as not credible or plausible. According to the Respondent's attorney, the Assignor/Claimant's testimony about his injuries and the aftermath of the collision also vacillated.

The Respondent maintains that its insured's statements and EUO testimony were consistent that his vehicle never struck the Claimant and that the Claimant was not on the scooter when the scooter struck and damaged the insured vehicle.

The Respondent's brief incorrectly states that it denied the claim based on its founded belief that Assignor/Claimant's alleged injuries were not causally related to the accident. As stated above, the Respondent did not deny the claim but, instead, seeks verification in the form of a signed EUO transcript from the Assignor/Claimant.

On the issue of fraud and coverage, the Respondent's attorney's argues that

*For an insurer to establish a lack of coverage defense, it must set forth admissible evidence of the fact or [a] founded belief that the alleged injury does not arise out of an insured incident. This means that the insurer need not prove fraud. Id. Instead, the larger issue is that of coverage. Evidence of fraud can serve as circumstantial evidence that a collision was not a covered incident. In the absence of a mea culpa from one of the participants, the insurer, and ultimately the court, must examine the facts and circumstances of the incident to determine whether they give rise to an inference of lack of coverage. Circumstantial evidence is sufficient if a party's conduct "may be reasonably inferred based upon logical inferences to be drawn from the evidence." Id. As such, it is clear that from a totality of the evidence presented and in light of the above burden of proof in this context, respondent has sufficiently proven that the collision in this instance was not an insurable event.*

Upon receipt of the Applicant's bill, the Respondent issued a verification/"delay" letter, dated December 28, 2021, advising the Applicant that it was seeking an EUO of the Assignor/Claimant. A follow up letter was sent on February 1, 2022.

The EUO took place via video teleconference on January 24, 2022. The Claimant was represented by Donna Fafinski, Esq. The transcript is in the Respondent's submission.

On February 3, 2022, the Respondent's attorneys. Rubin, Fiorella, Friedman and Mercante LLP, forwarded the Claimant's transcript to his attorneys, Macaluso & Fafinski, P.C. by Certified Mail/Return Receipt Requested and via Regular Mail. A follow up letter (without the enclosure) was sent on March 4, 2022. Both letters referred to the 4th Amendment to 11 NYCRR 65-3.8(b) which allows a carrier to deny a claim if verification is not sent within 120 days of the first request. It is clear that the Assignor/Claimant was represented by counsel to so advise him.

The Respondent argues that to date, the transcript has not been returned, and also to date, it has not denied the Applicant's claim based on any of its defenses. As state, the Respondent's argument is only partially based on the issue of the unsigned transcript, however, it also states that it seeks a denial of the current claim based on the proof that the insured's vehicle did not come into contact with the Assignor/Claimant's body and did not cause bodily injury.

The Applicant argues that the Respondent has not submitted reliable and unbiased proof that the transcript was not signed returned and therefore did not sustain its burden of proof on the issue. It also argues that there is insufficient evidence that the accident was either staged, a fraud or that there was a lack of contact between the insured vehicle and the Assignor/Claimant, who is considered a pedestrian.

Parenthetically, the evidence shows that the Respondent has apparently filed an Action for Declaratory Judgment naming the Assignor/Claimant and his medical providers, including the Applicant, as defendant's which seeks a permanent stay of any obligation it may have had to pay the Assignor/Claimant's medical providers based on his failure to return the transcript signed. A decision or Order by the Court has not been submitted to date.

The Respondent submitted an affidavit by Kyeko Stewart, dated December 30, 2022 wherein she attests that to date, the transcript has not been returned.

Pursuant to the prescribed Mandatory Personal Injury Protection Endorsement, set forth in 11 NYCRR 65-1, provides in the section titled "Conditions":

*Action Against Company. No action shall lie against the Company unless, as a condition*

*precedent thereto, there shall have been full compliance with the terms of this coverage.*

...

*Proof of Claim; Medical, Work Loss, and Other Necessary Expenses. ....Upon request*

*by the Company, the eligible injured person or that person's assignee or representative*

*shall:*

...

*(b) as may reasonably be required submit to examinations under oath by any person*

*named by the Company and subscribe the same; the No-Fault regulations, "Upon request by the Company, the eligible injured person or that person's assignee or representative shall: (b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same."*

I find that the Respondent's proof that it has not received back the EUO transcript signed by the Assignor/Claimant satisfactory and unrebutted.

Arbitrators, including Master Arbitrators are split on the issue of whether failing to return the transcript is ground for a denial and/or a dismissal of a claim without prejudice. In Nassau Univ Medical Center/Nassau Healthcare Corp and AmTrust North America, AAA Case No. 17-21-1191-7662, Arb. Susan Mandiberg found that the existence of CPLR Sec. 3116 obviates the entitlement to a signed transcript.

CPLR 3116 (a) provides that "If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed" and most No-Fault arbitrators agree that because of the existence of CPLR Sec. 3116(a), the regulation should not be interpreted as requiring that the EUO must be subscribed as a condition precedent to coverage.

In Diamond Chiropractic PC and Kemper/Lumbermans/Kemper A Unitrin Business, AAA Assessment NO.: 99-15-1016-2465, Master Arb. Joseph J. O'Brien agreed, finding

*...that the CPLR "does not impose such harsh remedies for a party's failure to sign or execute and return the transcript" and quoted CPLR 3116: If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness or examination.*

*The No-Fault Arbitrator buttressed this reasoning with reliance on the holding of No-Fault Arbitrator Ellen Weisman in NJ Pain Treatment, P.C. v. Unitrin Advantage Insurance Company, AAA Case No. 17-15-1013-4232, decided November 4, 2016. Arbitrator Weisman stated, in part, that the Regulation states*

*that the transcript should be subscribed but does not impose a remedy tantamount to non-compliance based on the failure of the witness to sign the transcript. The imposition of such a harsh measure particularly in light of the fact that there was essential compliance as the witness appeared to testify would be draconian.*

In *Product Direct Supply v Unitrin*, AAA Assessment No. 992112306299 (11/21/22), however, Master Arb. Victor J. Hershdorfer, citing two Appellate Division cases, found that the NFA's reliance on 3116(a) "would be equitably correct but it flies in the face of several Appellate Division opinions." He noted that the NFA stated that no indications in the record of comments between the insurer and the Assignor/Claimant requesting that the transcript be reviewed, signed, and returned.

stated that

*In Hertz Vehicles v. GEJO, 161 A.D.3d 549 (1st Dept. 2018) the Court stated "the failure by Jonathan Smart, the driver of the vehicle to subscribe and return the transcript of his Examination Under Oath violated a condition precedent to coverage and warranted denial of the claim."*

*The Court in Kemper Independence v. Cornerstone Chiropractic v. J.S. Medical, 185 A.D.3d 468 (1st Dept. 2020) stated "the claimant's failure to subscribe and return the transcripts of their Examination Under Oath (EUOs) violated a condition precedent to coverage and warranted denial of the claims.... This is so notwithstanding plaintiff's failure to present proof of proper delivery of the denials."*

*See also Hereford Ins. Co. v Forest Hills Med., P.C., 172 A.D.3d 567, 568 (1st Dept. 2019).*

*These decisions are based upon 11 NYCRR 65-1.1 which provides "upon request by the Company, the eligible injured person or that person's assignee or representative shall: (small B) as may reasonably be required to submit to examinations under oath by any person named by the Company and subscribe the same." (Emphasis added).*

*The regulation is clear. There is a major distinction between the use of the examination before trial and the EUO. The latter is primarily used as tools to determine the veracity of the claims.*

In a rather comprehensive analysis of arbitration awards on this issue, Arb. Alice Schor provided the findings of numerous arbitrators in *Rutland Medical, PC and Unitrin Direct Insurance Company*, AAA Case No. 17-16-1034-5541 (12/25/18) and she ultimately found that the failure to sign and return an EUO transcript should not cut off coverage.

In the case of *DTG Operations, Inc, d/b/a Dollar Rent a Car v. Park Radiology, P.C., et al.*, 2011 Slip Op. 32467 (U). Supreme Court, New York City (September 6, 2011), the Court granted the Plaintiff insurer's cause of action, holding that it could disclaim coverage on the basis that claimants failed to subscribe copies of their EUO transcripts.

In Dahu Acupuncture, P.C., and Avis Budget Group, AAA Case No. 17-19-1126-9963, Arbitrator Marcia Glasser (November 19, 2019), citing AAA case No.17-17-1076-5440, Arbitrator Donna Ferrara, and AAA Case No. 17-18-1097-1435, Arbitrator Nicholas Tafuri found that the failure of Assignor/Claimant to return a signed transcript was a violation of a condition precedent to coverage. Both Awards cited Hertz supra.

The Appellate Division, First Department's holding in Hertz was cited in an even more recent decision, in which the court unambiguously stated that "the failure by the occupants of the vehicle to subscribe and return the transcripts of their examinations under oath violated a condition precedent to coverage and warranted denial of the claims." (Hereford Ins. Co. v. Forest Hills Med., PC, 172 AD3d 567, 568 [1 Dept. 2019].)

I am swayed by the arguments that the CPLR Sec. 3116(a) does not apply to Examinations Under Oath which are very different than a deposition conducted during litigation. An EUO is a fact-finding tool in an insurer's investigatory process and will not necessarily be "broadcast" publicly at a trial where it would theoretically be used by both parties and where the deponent would then be subject to cross examination. The insurer is entitled to rely on the transcript for a potential disclaimer, as this would possibly be the only occasion that it would be able to secure testimony under oath.

I find that the Respondent's proof that it has not received the EUO transcript back signed by the Assignor/Claimant satisfactory and unrebutted. Until this transcript is returned, signed by the Assignor/Claimant, despite the language in CPLR 3116(a), the Respondent cannot rely on the testimony or be assured that it will not be changed or disputed. The Regulation is clear that this is a condition precedent to coverage. Any other interpretation imposes a different standard than the language in the Regulation. As the No-Fault Law is in derogation of the common law, it must be strictly construed. *Presbyterian Hospital in the City of New York v. Atlanta Casualty Co.*, 210 A.D.2d 210, 211, 619 N.Y.S.2d 337, 338 (2d Dept. 1994).

The Court in *Hertz Vehicles, LLC*, supra, cited *Pogo Holding Corp. v New York Prop. Ins. Underwriting Assn.*, 73 A.D.2d 605, 422 N.Y.S.2d 123 (1979), wherein the Court addressed the harshness of a dismissal of a case (with prejudice.) In *Pogo Holding Corp.*, the Appellate Division, Second Department, in an action brought to recover for loss due to fire under two policies of insurance issued by the defendant to the plaintiff, the Court, in interpreting a policy that mirrored the language of the current no-fault statute, specifically stated that it was "reluctant to exact the extreme penalty of the dismissal of the action, without affording the plaintiff the last opportunity to perform in accordance with the policies' provisions (see *Mortgagee Affiliates Corp. v Commercial Union Ins. Co. of N.Y.*, supra, p 122; cf. *C-Suzanne Beauty Salon v. General Ins. Co. of Amer.*, 574 F.2d 106)." It afforded the Plaintiff 30 days from the entry of its Order to fulfill its obligation under the policy.

A denial of a claim is not necessarily draconian because a dismissal without prejudice can be an appropriate finding under these circumstances. Accordingly, the matter is dismissed without prejudice. A defense based on fraud is not ripe until such time as the EUO is signed and returned.

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 DISMISSED without prejudice

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York

SS :

County of Nassau

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

02/01/2023

(Dated)

Bonnie Link

**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:**  
d4a386daddde6d3b18e3e2fa42c8c937

### Electronically Signed

Your name: Bonnie Link  
Signed on: 02/01/2023