

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Metropolitan Medical and Surgical, P.C.  
(Applicant)

- and -

American Transit Insurance Company  
(Respondent)

AAA Case No. 17-23-1288-9056

Applicant's File No. 23-001324

Insurer's Claim File No. 1091083-06

NAIC No. 16616

**ARBITRATION AWARD**

I, Deepak Sohi, 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: EIP

1. Hearing(s) held on 11/22/2023  
Declared closed by the arbitrator on 11/22/2023

Jared Mallimo from The Licatesi Law Group, LLP participated virtually for the Applicant

Michelle Rozenblyum from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$305.12**, 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 bill. The parties also stipulated that Respondent's NF-10 denial of claim form was timely issued.

3. Summary of Issues in Dispute

This arbitration arises out of an office visit and personal protective equipment (PPE)/covid cleaning and/or disinfection provided to the EIP, a

16-year-old male, who was involved in a motor vehicle accident as a passenger on 11/8/2020. Applicant is seeking reimbursement for the office visit and PPE/covid cleaning and/or disinfection provided to the EIP on date of service 1/21/2021. Respondent denied reimbursement for the office visit and PPE/covid cleaning and/or disinfection based upon Respondent's investigation and examination under oath conducted on 3/11/2022, Respondent is asserting a lack of coverage, as it has established the "fact or founded belief" that the EIP's treated condition was unrelated to the motor vehicle accident. The eligible injured person failed to establish that the alleged injuries were causally related to the motor vehicle accident.

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

This case was decided on the submissions of the parties as contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association and the oral arguments of the parties' representatives at the hearing. No witnesses testified at the hearing. I reviewed the documents contained in the ECF for both parties and make my decision in reliance thereon.

#### **LACK OF COVERAGE**

#### **OFFICE VISIT & PPE-COVID CLEANING**

#### **DATE OF SERVICE 1/21/2022**

The Arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The Arbitrator may question any witness or party and 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). (Regulation 68-D.)

The Respondent's denial herein is based upon the founded belief the alleged injuries did not arise out of an insured event and/or are not causally related to a covered incident. In its denial, Respondent stated:

Entire claim is denied based upon American Transit's investigation and on examination under oath of the claimant conducted on 03/11/2022. American Transit is asserting a lack of coverage, as it has established the "fact or founded belief" that the claimant's treated condition was unrelated to the motor vehicle accident.

An insurer's "founded belief" cannot be based upon "unsubstantiated hypotheses and suppositions" A.B. Med. Services, PLLC v. Eagle Ins. Co., 3 Misc3d 8, 9 (App Term 2d Dept. 2003); and must be established by a preponderance of the evidence, V.S. Medical Services, P.C. v. Allstate Ins. Co., 25 Misc3d 39, 2009 NY Slip Op 29310 (App Term 2d Dept. 2009).

To support this defense, the Respondent submits the EUO transcript of the EIP, dated 3/11/2022, the police report, and NF-2 (application for no-fault benefits). I have reviewed the EUO transcript. The EIP was asked about his residence, the circumstances surrounding the subject motor vehicle accident, injuries, durable medical equipment received, and subsequent medical treatment. It must be noted that Respondent did not discuss what exactly was stated by the EIP in his EUO testimony that would support this defense.

It is not the duty of the arbiter, be it an Arbitrator or Court, to parse through hundreds of pages of exhibits to make out a claim or defense for a party (see e.g. Barsella v. City of New York, 82 AD2d 747, 748[1st Dept. 1981]); such duty belongs to counsel, as advocate. Failing to elucidate evidence in support of a party's claim is no error of the Arbitrator but rather error of counsel, and such failure does not render an Arbitrator's award arbitrary and capricious (see Stephen Fogel Psychological PC v. Progressive Cas. Ins. Co., 35 AD3d 720, 721 [2d 2006]).

While the Respondent relies upon the 38-page transcript of the EIP's EUO testimony, it does not cite to any line or page and/or submit a summary of the testimony to support its defense. This arbitrator should not have to undertake the toilsome task of reading through the pages and pages of testimony in order to ascertain which portions support the Respondent's assertions and defense. See Unitrin Advantage Ins. Co. v. Advanced Orthopedics and Joint Preservation P.C., 2018 N.Y. Slip Op 33296 (U) (Sup. Ct. New York Co. Carmen Victoria St. George, J., Dec. 20, 2018).

Once the Injured Party establishes its prima facie case, there is a presumption of coverage and the burden of proof falls on the insurer to prove that it had a founded belief that there was a staged accident/uncovered incident. See Mount Sinai Hosp. v. Triboro, 263 A.D.2d 11, 699 N.Y.S.2d 77 (2nd Dept. 1999).

A defense premised on the fact or founded belief that the alleged injury does not arise out of an insured incident is a lack of coverage defense which is not precluded by an untimely denial. See Central General Hospital v. Chubb Group of Insurance Companies, 90 N.Y.2d 195, 199, 681 N.E.2d 413, 659 N.Y.S.2d 246 (1997). When a carrier alleges that a "staged" accident has occurred, it is raising a defense of fraud based on lack of coverage. See, Metro Medical Diagnostics v. Allstate Ins. Co., 6 Misc3d 1037A, 800 N.Y.S.2d 350 (Civil Court, Kings County, 2005). A deliberate collision caused in furtherance of an insurance fraud scheme is not a covered accident. In re Metro Medical Diagnostics v. Eagle Ins. Co., 293 A.D.2d 751, 741 N.Y.S.2d 284 (2d Dep't 2002).

I note that Respondent has not submitted any report(s) from its special investigations unit (SIU) or statement from any of the adverse driver(s) or statements from any other passengers involved or results of any investigation to substantiate the allegation that the accident was not an insured event. Further, after a thorough review of the transcript of the EIP, I do not find sufficient evidence to establish fraud or Respondent's founded belief that the treated condition and injuries alleged were not causally related to the accident. The EUO testimony is relatively consistent with the police report as to the circumstances surrounding the accident.

Here, the evidence is not sufficient to sustain Respondent's burden. In the absence of an affidavit from an SIU investigator sequencing the occurrences which inform the Respondent's beliefs, the undersigned is left to blindly speculate on an outcome amenable to the Respondent.

Respondent contends that the evidence reveals inconsistencies which lead Respondent to the founded belief that the alleged injuries were not related to an insured incident. I find that the evidence on this record is insufficient to establish that this accident was not an insured accident. Respondent has

not demonstrated by a preponderance of the evidence that the motor vehicle accident herein was illegitimate, staged, or did not occur as reported. Respondent further failed to submit any evidence that the injuries alleged did not arise out of the accident of 11/8/2020.

If Respondent is contending that the injuries were not caused by the accident: as such, a lack of causation defense, I note that the burden of proof on whether the motor vehicle accident caused the medical condition for which the EIP was treated remains on the no-fault carrier when they assert a lack of nexus between the accident and the condition. In Mount Sinai v. Triboro Coach, 263 A.D. 2d. 11 (Second Dep't, 1999), the Court stated that the insurer has the burden of coming forward with proof in an admissible form to establish the fact or evidentiary foundation for its belief that the patient's condition was unrelated to the motor vehicle accident. Moreover, the insurer must show that the injury was not related to the accident at all. It must show how, when and where the injury happened and that it was not aggravated or exacerbated by the accident. The insurer's proof may not be vague, conclusory, inconsistent or unsupported by records. In Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, (A.D. 2d. Dep't, 2009) the Appellate Division, ruled that exacerbations of pre-existing conditions are covered by No-Fault, and that causation is presumed under the New York No-Fault law.

Once the affirmative defense is raised that an injury is not related to the motor vehicle accident, the Respondent is bound by the following guidelines. The Respondent has the burden of coming forward with proof in admissible form to establish the fact or evidentiary foundation for its belief that the patient's condition for which he was treated was unrelated to the motor vehicle accident. Further, Respondent must show the injury was not related to the accident at all. They must show how, when and where the injury happened and that it was not aggravated or exacerbated by the automobile accident.

The patient does not have to prove the condition was related after the defense is raised. The Appellate Division specifically stated, "It would be unreasonable to insist that a plaintiff prove as a threshold matter that his patient's condition was caused by the motor vehicle accident." The burden is on the Respondent to prove the condition was not caused by the motor vehicle accident.

This is a heavy burden for the Respondent to bear and would require affidavit(s) and/or witness testimony from a biomechanical engineer and/or accident reconstructionist or some other relevant professional that could not only pinpoint when the EIP's injury occurred, perhaps with the use of an EUO transcript for instance, but more importantly explain and support the contention that the EIP's injuries were not aggravated or exacerbated by the subject motor vehicle accident. In this case the Respondent does not present any evidence to support its position. Accordingly, this defense fails.

After careful review of the evidence before me, I find that Respondent failed to meet its burden of proof. Here, Respondent submitted an EUO transcript of the EIP, the Police Report, and NF-2 without indicating what about that examination testimony merits denial of first-party benefits under No-fault law. See, Mega Supply & Billing, Inc. v. American Transit Ins. Co., 9 Misc.3d 1116(A) (N.Y. Civ. Ct. 2005). Absent credible evidence to contradict the EUO testimony or an affidavit setting forth its conclusions/findings based on the EUO and/or its investigation, I find that Respondent's defense is unsubstantiated and cannot be sustained.

### **FEE SCHEDULE**

### **INITIAL OFFICE VISIT**

### **DATE OF SERVICE 1/21/2022**

Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. See, Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co., 2006 NY Slip 26240, 13 Misc.3d 172, 822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006). See also, Power Acupuncture PC v. State Farm Mutual Automobile Ins. Co., 11 Misc.3d 1065A, 816 N.Y.S.2d 700, 2006 NY Slip Op 50393U, 2006 N.Y. Misc. LEXIS 514 (Civil Ct, Kings Co. 2006).

Applicant submitted a bill for an initial office visit and PPE/covid cleaning and/or disinfection provided to the EIP on date of service 1/21/2022. Applicant billed \$305.12 for the initial office visit and PPE/covid cleaning and/or disinfection herein. Applicant billed \$275.00 for the initial office

visit utilizing CPT code 99205 and \$30.12 for the PPE/covid cleaning and/or disinfection utilizing CPT code 99072. Respondent denied reimbursement for the follow-up office visit and PPE/covid cleaning and/or disinfection, which is addressed above, however in its denial also stated that the "FEES NOT IN ACCORDANCE WITH FEE SCHEDULES."

Pursuant to the New York State Workers' Compensation Board Medical Fee Schedule (WCFS), General Ground Rule 11, entitled "Ground Rules for Physician Assistants (PA) and Nurse Practitioners (NP)" states, "bills shall be payable at 80 percent of the fee available to physicians for such treatment code." The Applicant's bill notes that the services at issue herein were performed by a physician assistant. Therefore, the correct amount of reimbursement for CPT code 99205 performed by a PA, as billed herein, is  $RVU\ 18.26 \times 15.06 = \$275.00 \times 80\% = \$220.00$ .

I find that the proper amount of reimbursement for the initial office visit billed utilizing CPT code 99205 performed by a PA within Region IV is \$220.00. Applicant is not due, under any circumstances, any amount over and above that set forth within the WCFS. Applicant has not submitted any evidence from a certified professional coder or medical expert or from anyone supporting its billing and/or refuting the plain reading and calculation set forth in the New York State Workers' Compensation Board Medical Fee Schedule.

## **FEE SCHEDULE**

### **PPE/COVID CLEANING**

### **DATE OF SERVICE 1/21/2022**

An insurance carrier's timely asserted defense that the bills submitted were not properly No-Fault rated or that the fees charged were in excess of the Workers' Compensation fee schedule is sufficient, if proven, to justify a reduction in payment or denial of a claim. See New York Hosp. Med. Ctr. of Queens v. Country-Wide Ins. Co., 295 A.D.2d 583, 586 (2002); East Coast Acupuncture, P.C. v. New York Cent. Mut. Ins., 2008 NY Slip Op 50344(U) (App. Term 2d Dep't., Feb. 21, 2008); A.B. Med. Servs., PLLC v. American Tr. Ins. Co., 15 Misc.3d 132(A), 2007 NY Slip Op 50680(U)

(App. Term, 2nd & 11th Jud Dists. 2007); Rigid Medical of Flatbush, P.C. v. New York Cent. Mut. Fire Ins. Co., 11 Misc.3d 139(A), 816 N.Y.S.2d 700, 2006 NY Op 50582 (U) (App. Term 2nd & 11th Jud Dists. 2006); Ultra Diagnostics Imaging v. Liberty Mut. Ins. Co., 9 Misc.3d 97, 98, 804 N.Y.S.2d 532, 2005 N.Y. Slip Op. 25402 (App Term, 2d Dep't.); Capio Med., P.C. v Progressive Cas. Ins. Co., 7 Misc. 3d 129[A], 2005 NY Slip Op 50526 (U) (2005); Triboro Chiropractic & Acupuncture, PLLC v New York Cent. Mut. Fire Ins. Co., 6 Misc.3d 132 (A), 2005 NY Slip Op 50110 (U) (App Term, 2nd & 11th Jud Dists. 2005).

In this case, Applicant billed \$30.12 for PPE/covid cleaning/disinfection provided for on date of service 1/21/2022, utilizing one (1) unit (\$30.12/unit) of CPT code 99072.

As to CPT code 99072 I find, based on guidance from the New York State Department of Financial Services (NYSDFS), No-Fault law does not contemplate payment for COVID cleaning/disinfection or PPE. The NYSDFS issued Opinion Letter #14 on 8/5/2020, stating that insureds are not to be charged fees for covered services that go beyond the insureds' financial responsibility as described in the insureds' policies or contracts, insureds' may not be charged additional fees beyond the services performed, including increased costs for personal protective equipment necessitated by the COVID-pandemic billed pursuant to CPT code 99072.

I also find that COVID supplies and/or cleaning/disinfection is not reimbursable in No-Fault as CPT code 99072 does not appear in the New York State Workers' Compensation Board Medical Fee Schedule (WCFS). This CPT code was established during the COVID-19 pandemic by the American Medical Association (AMA) as a new expense code due to the public health emergency but it has not been adopted by either the NYSDFS or the New York State Workers' Compensation Board whose fee schedule is applicable within No-Fault. I am aware the AMA created the new code, CPT code 99072, effective 9/8/2020, but Medicare issued a decision that CPT code 99072 has zero relative units, meaning it is not payable. While this is not itself controlling in No-Fault, I find it persuasive in light of the NYSDFS Opinion Letter dated 8/5/2020. As a result, I am convinced that this service, billed utilizing CPT code 99072, is non-reimbursable as it is not separately covered, and it constitutes unbundling as it is part of the standard protocol of a safe medical establishment. As a result, the



Applicant's claim for the personal protective equipment/covid cleaning/disinfection provided for on date of service 1/21/2022 is hereby denied with prejudice.

Accordingly, in light of the foregoing, based on the arguments of counsel, and after thorough review and consideration of all submissions, I find in favor of the Applicant. Consequently, the Applicant's claim is granted in the amount of \$220.00 for the initial office visit provided for on date of service 1/21/2022. Applicant's claim for the PPE/covid cleaning and/or disinfection is hereby denied with prejudice.

This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of the hearing.

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
	Metropolitan Medical and Surgical, P.C.	01/21/21 - 01/21/21	\$305.12	Awarded: \$220.00
Total			\$305.12	Awarded: \$220.00

- B. The insurer shall also compute and pay the applicant interest set forth below. 03/02/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from the filing date for this case until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty-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), 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 NY

SS :

County of Nassau

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

11/22/2023  
(Dated)

Deepak Sohi

### **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:**

f01849c6c7ba3f25afec85392bb20779

### **Electronically Signed**

Your name: Deepak Sohi  
Signed on: 11/22/2023