

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Chai Diagnostics LLC , BLK Diagnostics LLC (Applicant)	AAA Case No.	17-23-1284-3289
- and -	Applicant's File No.	171.021,171.357
LM General Insurance Company (Respondent)	Insurer's Claim File No.	0507268050001
	NAIC No.	36447

ARBITRATION AWARD

I, Michael Resko, 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: Claimant

1. Hearing(s) held on 12/06/2023
Declared closed by the arbitrator on 12/06/2023

Constance Roland Esq. from Tsirelman Law Firm PLLC participated virtually for the Applicant

Joseph Champion Esq. from LM General Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,707.40**, 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

The EIP/Assignor is referred to herein as Claimant. Claimant is a 34-year-old male driver injured in a motor vehicle accident on 08/16/22.

This case was filed on behalf of two (2) different providers: Chai Diagnostics LLC ("Chai") and BLK Diagnostics LLC ("BLK") seeking payment of claims for the technical component (TC) and professional component (PC) of Transcranial Doppler imaging and VsNG testing performed on date of service 10/26/22.

Respondent timely denied these claims based on a peer review report by Anna N. Krol, MD (dated 11/23/22). Respondent has also raised and preserved a fee schedule/excessive billing defense.

Applicant has submitted a rebuttal of the peer review report by Sergey Zhivotenko, MD (dated 05/31/23).

Respondent has also submitted a "global denial" (dated 12/10/22) based on Claimant's failure to attend an Independent Medical Examination (IME) and a second "global denial" (dated 12/20/22) with the following explanation:

Liberty's investigation of the above loss included, but was not limited to, a review of statements and an examination under oath of the injured party, a review of the police report, witness statements and doctor's reports. The investigation has revealed false information submitted in support of the above claimant's claim. According to Part F of the policy, General Provisions, Fraud "We do not provide coverage for any person who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy". Liberty's investigation has revealed misrepresentations of material facts regarding events leading up to the motor vehicle accident, as well as the motor vehicle accident itself.

The following evidence was submitted, reviewed, and considered: All documents contained in the ADR Center as of the date the hearing was declared closed.

4. Findings, Conclusions, and Basis Therefor

As noted above, Respondent has raised four (4) different defenses to the subject claims: lack of medical necessity; excessive billing; IME no-show; and "fraud". Only the medical necessity defense was raised and preserved in timely issued denials specific to the subject claims, so I will consider that defense first.

Medical Necessity - Peer Review

Claimant was referred for the testing at issue by Jordan Fersel, MD. Dr. Fersel initially examined Claimant on 08/16/22, for complaints of pain in the neck and low back.

Physical examination of the cervical spine revealed pain on palpation in C3 - C7 region on the right side and tenderness. Ranges of motion (ROM) were reported as 50 degrees anterior flexion (normal 0-50 degrees); 60 degrees in extension (normal 0-60 degrees); 80 degrees left lateral rotation (normal 0-80 degrees); 45 degrees left lateral flexion (normal 0-45 degrees); 70 degrees right lateral rotation (normal 0-80 degrees) with pain; and 45 degrees right lateral flexion (normal 0-45 degrees).

Lumbar spine examination revealed pain on palpation at L3-S1 bilaterally. Pain on palpation of the SI joints bilaterally. Reported ROM were 60 degrees anterior flexion (normal 0-60 degrees) with pain; 25 degrees extension (normal 0 - 25 degrees) with pain; 20 degrees left lateral flexion (normal 0-25 degrees) with pain; and 20 degrees right lateral flexion (normal 0-25 degrees) with pain .

The working diagnoses included cervical spine sprain, lumbar spine sprain, and SI ligament sprain.

Respondent's peer review report is by Anna N. Krol, MD. Dr. Krol reviewed the clinical examination findings in detail and concluded that the subject testing was not medically necessary for the following reasons:

Transcranial Doppler studies are is [sic] not medically necessary. There was no documentation of an abnormality in claimant's physical examination or specific symptoms which would medically justify the performance of these studies. As per records, claimant presented with headache and neck pain. There is no evidence that the claimant sustained head injury and no evidence of head trauma or loss of consciousness after the accident. There is no evidence of any neurological deficits. Therefore, I find no medical necessity for these studies.

"Current applications of TCD in adults and children include vasospasm in sickle cell disease, subarachnoid haemorrhage (SAH), intra- and extracranial arterial stenosis and occlusion, brain stem death, head injury, raised intracranial pressure (ICP), intraoperative monitoring, impaired vasomotor function, and cerebral microembolism in right to left cardiac shunts." (Naqvi J, Yap KH, Ahmad G, Ghosh J. Transcranial Doppler ultrasound: a review of the physical principles and major applications in critical care. Int J Vasc Med. 2013;2013:629378. doi:10.1155/2013/629378).

The video ENG studies are not medically necessary. As per records, claimant was evaluated for headache and dizziness. Vestibular complaints are not clarified, and no additional attempts were made to evaluate vertigo clinically. No bedside vestibular exam such as Hallpike and Fukuda were done. Through a careful history and physical examination, the basis for the patient's symptoms and signs can generally be determined. The differential diagnosis of dizziness can be narrowed with easy-to-perform physical examination tests, including evaluation for nystagmus, the Dix-Hallpike maneuver, and orthostatic blood pressure testing. There was no medical basis to perform this study.

"Dizziness: A Diagnostic Approach" by Robert E. Post, M.D., Lori M. Dickerson, PharmD., American Academy of Family Physicians, 2010;82(4):361-368.

Applicant has submitted a rebuttal of the peer review report by Dr. Zhivotenko. Dr. Zhivotenko wrote, in relevant parts that TCD was indicated for patients with "symptoms

consistent with vertebrobasilar insufficiency, such as dizziness/vertigo, fainting (syncope) or near syncope, and/or visual disturbances associated with head movements" (emphasis in original). None of those indications/symptoms were reported in the records before me.

Dr. Zhivotenko also wrote that VNG testing "addresses the functionality of each ear and if a vestibular deficit may be the cause of dizziness or transient visual obscuration". Again, there is no mention of dizziness or disturbance in Claimant's vision in the record before me.

Based on the record before me, the testing at issue was not medically necessary.

IME No-Show Defense

Respondent's IME no-show defense is precluded as it was not raised and preserved in a timely issued denial. See, e.g., *Westchester Medical Center v. Lincoln General Ins. Co.*, 60 A.D.3d 1045, 1046-47, 877 N.Y.S.2d 340, 342 (2d Dept. 2009). I acknowledge, but decline to follow, the First Department rule first announced in *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, [82 AD3d 559](#) (1st Dept. 2011) that a defense founded on a breach of a policy condition - such as an IME or EUO no-show - is not subject to preclusion.

The case law on this issue is not clear or "well settled". In *Matter of Pomona Pain Management, P.C. v. Praetorian Ins. Co.*, 2012 N.Y. Slip Op. 30525(U), 2012 WL 761323 (Sup. Ct. Nassau Co., F. Dana Winslow, J., Jan. 31, 2012), Supreme Court, Nassau County held that because there exists a split in authority as to whether a failure to attend an IME or EUO - a breach in a condition precedent - is a defense surviving the preclusion doctrine for late denials, a master arbitration award not applying *Unitrin, supra*, was not "irrational or arbitrary". If it is not irrational or arbitrary for a Master Arbitrator to choose the rule of law in *Westchester Medical Center* over *Unitrin*, then I believe I may also make the same choice.

"Fraud" Defense

In a global denial not specific to this claim, Respondent raised a "fraud" defense with the following explanation:

Liberty's investigation of the above loss included, but was not limited to, a review of statements and an examination under oath of the injured party, a review of the police report, witness statements and doctor's reports. The investigation has revealed false information submitted in support of the above claimant's claim. According to Part F of the policy, General Provisions, Fraud "We do not provide coverage for any person who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy". Liberty's investigation has revealed misrepresentations of material facts regarding events leading up to the motor vehicle accident, as well as the motor vehicle accident itself.

Whether this defense is precluded because it was not raised in a timely denial specific to the subject claim depends on the "type" of false statements and misrepresentations involved.

Respondent has submitted the affidavit of Brian Sweet, its SIU investigator, in support of its global denial. Mr. Sweet described the object of his investigation as follows:

I am an investigator in the Special Investigations Unit for Liberty Mutual Insurance Company ("Liberty Mutual") and have been so employed by Liberty Mutual during all relevant times involved herein. I was assigned to the Special Investigations Unit, which investigates, amongst other things, circumstances where the facts of loss need to be investigated as there are concerns of that the reported incident was a possible staged loss with fraudulent reports submitted by claimants alleged to have been possible "jump ins" at the time of the incident. Additionally, the assignment was to investigate circumstances of policy holders who may have misrepresented their policy address in order to obtain insurance at a cheaper premium than they otherwise should have paid. This matter falls into these categories.

If Respondent's defense as to the subject claim/loss is misrepresentation as to the policy address, that defense must be raised in a timely denial specific to the claim or else it is precluded. See, e.g., *Liberty Mutual Insurance Co. v. Brutus*, 76 Misc.3d 1201(A), 2022 N.Y. Slip Op. 50799(U) (Sup. Ct. New York Co., Aug. 16, 2022).

If Respondent's defense is that the underlying event was a "staged loss", that defense need not be raised and preserved in a timely issued denial. See, e.g., *A.B. Medical Services PLLC v. State Farm Mutual Automobile Ins. Co.*, 4 Misc.3d 143(A), 2004 N.Y. Slip Op. 51104(U) (App. Term 2nd & 11th Dists. Sept. 29, 2004).

Claimant appeared and testified at an Examination Under Oath (EUO) on 10/12/22. Mr. Sweet summarized Claimant's EUO testimony as follows:

[Claimant] testified that he was injured as a result of a car accident on 08/16/22. He claims that he was the driver of a vehicle owned by a woman he could only describe as [M]. He denies knowing her last name. He describes her as a family friend of two to three years. He was unable to recall what type of vehicle he was driving on 08/16/22. He denies driving it prior to this date. He could not recall the day of the week when the accident occurred.

On 08/16/22 at approximately 7:00 a.m., his cousin, [LR] (who currently lives in North Carolina) told him [M] required a driver of her vehicle so that she could attend a medical appointment in Brooklyn. He stated he knows [M] from the general area where he lives. Prior to 08/16/22, he helped [M] on a few occasions in her house however, he was unable to provide her address, other than stating that he knows how to get there.

[Claimant] could not describe [M]. He denies knowing her approximate age, her height, her complexion. He was only able to say that she is not an old woman and does not have to walk with a "stick." He denied knowing if [M] ever lived in Rochester or if she ever lived at 9230 Glenwood Rd. Brooklyn, NY. He denies knowing [MW].

On 08/16/22, [M] arrived at the corner of Hegeman Ave. & Pennsylvania Ave. in Brooklyn. (two blocks from his home) in a four-door sedan. As he was stopped at the light at Van Siclen Ave. & Linden Blvd. he was struck in the rear by a vehicle that he could only describe as a van that was black or blue (investigation revealed it to be a silver Toyota Highlander). He denies recalling anything of the opposing driver, aside from the driver being dark skin. He took a photo of the driver's license and registration, which he gave to [M]. He also took a photo of the license plate of the van but lost the photo as they were contained in a previous phone. He states that the only photo still in his possession is the license plate.

The police were not called because he took "the information" from the driver. After exchanging information with the other driver, he and [M] proceeded to the medical appointment. He said [M] was seated in the front passenger seat as they drove from the accident. They arrived at the medical appointment and he parked outside of the location as [M] went inside. He described the damage to our insured's vehicle as a dent to the rear bumper (where our investigation obtained photos of the vehicle with no such damage). When she was done with her appointment, they drove back to Hegeman & Pennsylvania. At the end of his Examination Under Oath, [Claimant] then indicated that he was accompanied by an individual that he identified as "Ky-Ky" from Brooklyn who he met 15 minutes before meeting [M].

Mr. Sweet continued:

Due to the "vagueness" and inconsistencies provided by [Claimant] during his Examination Under Oath, a further inquiry was made into [Claimant]. At his EUO he presented a NY State Driver's License (Immigrant License) where his name, [Claimant] appeared with date of birth, [redacted] and address of [redacted]. Numerous database queries failed to verify [Claimant's] identity. An ISO query revealed 1 prior loss under the above name and address but the date of birth provided was [redacted] not [redacted]. The phone number provided by [Claimant] on his No Fault application revealed it to be associated to a [VW] of [redacted] Palmyra, PA & [DJ] of [redacted], New York. An ISO query by name located another [Claimant] with the date of birth provided by [Claimant] located at [redacted]. A search using his social security number revealed him to be associated with [PEP] of [redacted] (which may be the individual referenced in his EUO testimony as [LR]). An ISO query of [PEP] located a NICB referral from 4/30/13 Geico

#0377884680101047 for faked/exaggerated injury, prior injuries, staged/caused accident, fictitious loss, lack of cooperation. Also, for a date of loss on 7/9/97 in claim #78911011 referred to NICB for inflated loss, organized group/ ring activity, faked/ exaggerated injury [PEP] was identified as a physical therapy assistant out of [redacted] New York, NY.

I have reviewed the remained of Mr. Sweet's affidavit and conclude the information set forth is not sufficient to demonstrate that the underlying event was a staged loss or otherwise intentional by the preponderance of the evidence. See, e.g., *Repwest Ins. Co. v. Sasan Family Chiropractic, PC*, 2016 N.Y. Slip Op. 31413(U) (Sup. Ct. New York Co., July 21, 2016). While Claimant's EUO testimony did lack certain specifics, it did not indicate any fraudulent conduct in the underlying occurrence. Further, that Claimant "might" be associated directly with 1 prior loss/claim does not support a conclusion that the underlying event in this case was fraudulent. Finally, there is no evidence linking Claimant directly to any individual involved in prior fraudulent conduct or to any prior fraudulent claim(s). Respondent has not met its burden in this case.

The claims are denied because the testing services were not medically necessary. This Award is in full disposition of all claims and issues before me in this proceeding.

5. Optional imposition of administrative costs on Applicant.
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

6. **I find as follows with regard to the policy issues before me:**
- The policy was not in force on the date of the accident
 - The applicant was excluded under policy conditions or exclusions
 - The applicant violated policy conditions, resulting in exclusion from coverage
 - The applicant was not an "eligible injured person"
 - The conditions for MVAIC eligibility were not met
 - The injured person was not a "qualified person" (under the MVAIC)
 - The applicant's injuries didn't arise out of the "use or operation" of a motor vehicle
 - The respondent is not subject to the jurisdiction of the New York No-Fault arbitration forum

Accordingly, the claim is DENIED in its entirety

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

State of NY
SS :
County of Westchester

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

12/15/2023
(Dated)

Michael Resko

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:
eafcb84e7dc1b2ab70429bac0de491d4

Electronically Signed

Your name: Michael Resko
Signed on: 12/15/2023