

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Chai Diagnostics LLC
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-23-1283-8648

Applicant's File No. 169.975

Insurer's Claim File No. 0507268050008

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, **\$1,388.46**, 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 an 18-year-old male passenger injured in a motor vehicle accident on 08/16/22.

Applicant seeks payment of a single claim for the technical component (TC) of Transcranial Doppler imaging and VsNG testing performed on date of service 09/14/22.

Respondent timely denied this claim based on a peer review report by Cyrus Kao, MD (dated 11/01/22). 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) 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. In addition, In accordance with Regulation 68, 65-1.1 Proof of Claim, the Eligible Injured Person, [Claimant], was scheduled to attend a minimum of two examinations under oath on 11/21/22 and 12/14/22. The EIP's failure to attend the EUOs has prejudiced the company's right and ability to verify coverage, investigate causal relationship and determine the medical necessity of treatment. The failure to appear for these examinations is a breach of a policy condition and, therefore, your claim is denied retroactively to the date of loss. In addition, any past claims submitted to this Company, even if previously denied, are further and also denied based upon the breach of a policy condition for failure to appear. Accordingly, the claim is denied in its entirety.

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 claim: lack of medical necessity; excessive billing; EUO no-show; and "fraud". Only the medical necessity defense was raised and preserved in a timely issued denial specific to the subject claim, 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 "Cervical Spine Pain, Thoracic Pain, Lumbar Spine Pain, Shoulder Pain, [and] Knee Pain". The working diagnoses following

the clinical examination were cervical spine sprain, lumbar spine sprain, bilateral knee sprain(s), shoulder sprain, SI ligament sprain, sprain thoracic region, and occipital neuralgia.

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

According to medical standard of care and guidelines, transcranial dopplers and ultrasound are appropriate in the evaluation of vessel occlusion in the head.

This is cited in Antipova D, et.al: "Portable transcranial ultrasound has emerged as a potential method for rapidly assessing intracranial circulation and brain structures in the pre- hospital and early hospital phase."

This is cited in Jaiswal SK, et.al: "Moderate agreement of anterior circulation stenosis and fair agreement for posterior circulation stenosis was found between TCD and MRA in the evaluation of ICAS. In anterior circulation, the diagnostic accuracy of TCD is higher compared with the posterior circulation."

*In this claimant, there was no clinical indication for the usage of transcranial dopplers. There was not suggestive clinical examination of hemorrhage or vessel occlusion. As such, the performed transcranial doppler was not medically necessary and not according to the medical standard of care. * * **

According to medical standard of care and guidelines, vestibular studies assess the function of the vestibular portion of the inner ear for patients who are experiencing symptoms of vertigo, unsteadiness, dizziness, and other balance disorders. Patients with mild traumatic brain injury (TBI) often complain of dizziness. However, these problems may be detected by a clinical exam. Balance was tested using computerized dynamic posturography (CDP). These objective measurement techniques should be used to assess the clinical complaints of imbalance from patients with TBI.

This is cited in Kattah JC, et.al: "The introduction of the video-HIT added greater understanding of the complex interaction between the primary vestibular afferents, brainstem and cerebellum. In addition, it permits evaluation of the angular vestibulo-ocular reflex in the plane of all six semicircular canals, with accurate peripheral versus central lesion localisation often corroborated by brain imaging."

According to Lim EC, et.al: "Diagnosis of benign paroxysmal positional vertigo (BPPV) depends on the accurate interpretation of nystagmus induced by positional tests. However, difficulties in interpreting eye

movement often can arise in primary care practice or emergency room. We hypothesized that the use of machine learning would be helpful for the interpretation."

In this particular case, the claimant does not exhibit indications of traumatic brain injury. Additionally, clinical presentation does not reflect that the claimant has symptoms of vertigo related to traumatic brain injury etiology. As such, the video nystagmus testing is excessive, and in this case being used inappropriately as a screening tool. As such, the performed video nystagmus testing is deemed not medically necessary or according to medical standard of practices.

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 "is used to determine if a vestibular (inner ear) disease may be causing a balance or dizziness problem" and "is a series of tests designed to document a person's ability to follow visual objects with their eyes and how well the eyes respond to information from the vestibular system". 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.

EUO No-Show Defense

Respondent's EUO 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 an unspecified "fraud" defense based on alleged "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).

I have reviewed the remainder 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). Respondent has not met its burden in this case.

It seems that Respondent's investigation was hampered or limited by Claimant's - and others' - failure to appear for EUOs but that failure itself is a viable defense to the subject claim so long as it is raised in a timely denial.

The claim is 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:
ec2a3b640c15790f7ae89d494330e3fa

Electronically Signed

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