

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Island Ambulatory Surgery Center LLC
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-24-1342-4199

Applicant's File No. 00128511

Insurer's Claim File No. 0551655890002

NAIC No. 36447

ARBITRATION AWARD

I, Thomas Eck, 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

1. Hearing(s) held on 09/09/2024
Declared closed by the arbitrator on 09/09/2024

Justin Rosenbaum from Drachman Katz, LLP participated virtually for the Applicant

Jason Corrar from Callinan & Smith LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,259.33**, 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 medical treatment for the 47-year-old Assignor (GRG) who was involved in a motor vehicle on 10/18/2023. The Assignor came under the care of the Applicant who is now seeking reimbursement for facility services provided to the Assignor on dates of service 11/28/2023-11/28/2023. Respondent contends that the underlying occurrence was an intentional event, rather than an accident, for which there is no coverage.

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 this decision in reliance thereon.

**NO COVERAGE - MATERIAL MISREPRESENTATIONS - FRAUD
- STAGED LOSS**

Respondent issued a blanket denial stating:

All No-Fault benefits for the above-mentioned claimant have been denied. Liberty Mutual's investigation of the above loss included, but was not limited to, a review of statements made in support of your claim, 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. This policy was issued in reliance upon the information provided on your insurance application. We may cancel this policy and deny coverage under this policy at any time, including after the occurrence of an accident or loss if you: Made incorrect statements or representations to us with regards to any material fact or circumstance; Concealed or misrepresented any material fact or circumstance; or Engaged in fraudulent conduct; at the time of application of at any time during the policy period, or in connections with the presentation or settlement of a claim. Pursuant to Regulation 68, 65-1.1, Exclusions, This coverage does not apply to personal injury sustained by: (f) any person who intentionally causes his or her own personal injury. The injured party intentionally caused their injury. Accordingly, the claim is denied in its entirety.

In support of its denial and defense defense, Respondent's counsel submitted EUO transcripts, police accident report, EDR Data Recovery Analysis Report, and the underlying policy. Respondent also submitted an Affidavit by James Wagner, a SIU Field Investigator with Special Investigative Unit ("SIU").

Investigator Wagner stated:

That I am employed as a Senior Investigator with Liberty Mutual Group, an entity that does business as the underwriting companies, Liberty Mutual Insurance Company, Liberty Mutual Fire Insurance Company, Liberty Insurance Corporation, The First Liberty Insurance Corporation, LM Insurance Corporation, Liberty Mutual Mid-Atlantic Insurance Company, Liberty County Mutual Insurance Company, LM Property and Casualty Insurance Company, LM General Insurance Company, Wausau Underwriters Insurance Company, Safeco Company of Indiana, and American States Insurance Company, (collectively referred to as "Liberty Mutual") as a Special Investigative Unit ("SIU") Special Investigator at all times relevant to this matter.

I am currently assigned to the unit that investigates suspected insurance fraud claims to determine if a specific incident was the product of a covered event. This affirmation is being offered in support of the Respondent's defense of the subject matter. I am fully familiar with the investigation into the underlying alleged incident of October 18, 2023 (claim number 055165589), as I was the SIU investigator assigned to investigate this matter. I base this affidavit on personal knowledge and upon my review of the file maintained by Liberty Mutual. The claim was made under Liberty Mutual policy number AOS-221-699133- 40.

On or about May 28, 2023, [VRC] procured an annual policy of automobile insurance to insure two vehicles, a 2020 Ford Edge and a 2016 Ford Escape, with a policy address of 4242 Ithaca Street, 6H, Elmhurst, New York 11373. At inception, [VRC] ([VRC]) added an additional driver, [NNP], and elected collision coverage for the 202 Ford Edge but foregone collision coverage for the 2016 Ford Edge. See Exhibit "1".

On or about October 4, 2023, [VRC] amended the policy to add collision coverage for the 2016 Ford Escape and removed collision coverage from the 2020 Ford Edge. See Exhibit "2"

On October 18, 2023, the insured 2016 Ford Escape, operated by an unlisted driver, [JRL] (hereafter [JRL]), and containing passengers [GRG] (hereafter [GRG]) and [JRL] (hereafter [JRL]), was involved in a rear-end collision with a commercial vehicle operated by [AB]

([AB]) while traveling Westbound on Long Island Expressway (I-495). On scene, [AB] reported that [JRL] cut in front of the truck and braked abruptly. See Exhibit "3".

On or about November 18, 2023, [VRC] amended the policy to add [JRL] as an authorized driver. See Exhibit "4".

On October 31, 2023, all occupants of the insured vehicle retained the same counsel, Law Office of Eli Shmulik, P.C., filed a No-Fault Benefits application and sought medical treatment for injuries allegedly sustained as a result of the incident. See Exhibit "5".

Liberty Mutual began an investigation due to several factors: i. The incident involves the insured vehicle stopping short in front of a commercial vehicle on the LIE, the maneuver consistent with a "swoop and squat" insurance fraud scheme. (See Exhibit "3"). ii. The policy was amended shortly before and after the incident. (Exhibit "2" and "4") iii. The same attorney represents all three claimants. (See Exhibit "5") iv. An ISO query of the Law Office of Eli Shmulik P.C. revealed several incidents referred to NICB for fraudulent/staged incidents and excessive treatment. (See Exhibit "6").

Additionally, as part of the investigation, Liberty Mutual obtained an Event Data Recorder (EDR) Report from the insured vehicle. The report's findings are that: At -1.0 seconds, the vehicle was traveling 41.1 MPH when the "service brake" was applied abruptly, causing the vehicle to slow down to a speed of 24.7 MPH in one (1.0) second. The vehicle was then struck in the rear at zero (0.0) seconds, the time of the event. The Pre-Crash Data (First Record) from the original self-generated report and a brief explanation of how it was determined to be a harsh braking event can be seen below. It was determined that the vehicle slowing down so abruptly in such a short amount of time is equivalent to emergency braking. See Exhibit "7".

Based on the foregoing, Respondent assigned its counsel to schedule and conduct the examination under oath ("EUO") of [JRL], [GRG], [JRL], and [VRC]. See Exhibits "8" through "11".

[GRG] appeared for his EUO on March 13, 2024, and provided the following testimony: i. [GRG] testified that he is a citizen of

Colombia and has lived in the United States for five months. He is not a resident of the United States.¹ ii. [GRG] testified that he lived in Florida with his friend Mauricio Cardenas when he first moved to the United States. ² iii. [GRG] testified that he came to New York to visit [JRL] and [JRL] in October 2023 and planned to stay until November or December.³ iv. [GRG] testified that he was staying with [JRL] in New Jersey at 239 Union Street, 2B, Elizabeth, New Jersey, and he initially met [JRL] in Colombia.⁴ v. [GRG] testified that he initially came to the United States for vacation and planned to stay for three to four months.⁵ vi. [GRG] testified that [JRL] and [JRL] work as drivers and that [JRL] lives in Bloomfield, New Jersey.⁶ vii. [GRG] testified that he found his counsel via Google.⁷ viii. [GRG] said that [VRC] lent [JRL] the insured vehicle because he didn't have one.⁸ ix. [GRG] testified that they (him, [JRL], and [JRL]) were traveling from New Jersey to [VRC]'s house in Queens when the incident occurred on the Long Island Expressway (LIE).⁹ This is impossible as the incident occurred on the Westbound side of the LIE. If they had traveled from New Jersey to Queens, they would have been on the eastbound side of the LIE. x. [GRG] testified that [JRL] bought a car after the incident but could not identify when he got it. [JRL] picked up [VRC]'s car the day of the accident and drove back to New Jersey to pick him up just to drive him back to [VRC]'s.¹⁰ xi. [GRG] testified that [JRL] did not own a car before the incident but owns one now.¹¹ xii. [GRG] testified that there was a lot of traffic on the LIE at the time of the incident.¹² xiii. [GRG] testified that [JRL] did not use his brakes moments prior to the impact.¹³ This assertion is contradicted by the EDR report, which indicates that brakes were engaged and the car's speed decreased significantly immediately before the impact. xiv. [GRG] testified that he took an ambulance to Elmhurst Hospital, where he was given medicine and got x-rays, but could not remember the medication he was given or the result of the x-rays.¹⁴ xv. [GRG] testified that he took an Uber back to New Jersey from the hospital. ¹⁵ xvi. [GRG] testified that he sought treatment in Elmhurst, an hour away from his home.¹⁶ xvii. [GRG] initially testified that [JRL] gave him a ride to the medical office in Elmhurst but then changed his testimony when questioned on how [JRL] acquired his own car so quickly.¹⁷ xviii. Additionally, [GRG] listed an alternate address of 81-12 Roosevelt Avenue, 141, Elmhurst, New York 11373 on certain medical records, and he testified that he uses it as a PO Box to receive mail.¹⁸ It is

unlikely that a physical address could be used as a PO Box.

[JRL] appeared for his EUO on March 26, 2024, and provided the following testimony: i. [JRL] testified that he arrived in the United States in April of 2022 and lived with his sister in Elmurst until he moved to Valentine Road in December 2023.¹⁹ This directly contradicts [GRG]'s testimony that he lived in Bloomfield, New Jersey. ii. [JRL] testified that he currently sells vehicles for work, keeps the cars in Elizabeth, New Jersey, and has no other source of income. He only uses his sister's car to transport people sporadically.²⁰ This directly contradicts [GRG]'s that he works as a livery service driver. iii. [JRL] testified that [GRG] would help him clean the cars that he was selling for money.²¹ This testimony is concerning as [GRG] failed to mention that he worked with [JRL] by helping him wash the cars he was selling. iv. [JRL] testified that he owned three cars since coming to the United States but provided conflicting testimony as to how long he owned each vehicle. However, he testified that he was not a car owner when the incident occurred while driving his sister's car, which he was borrowing.²² v. [JRL] testified that he has not owned a vehicle since the subject incident.²³ This directly contradicts [GRG]'s testimony that he owned a vehicle after the incident. vi. [JRL] testified that he "mostly" uses his sister [VRC]'s car.²⁴ vii. [JRL] testified that the traffic was light at the time of the incident.²⁵ This directly contradicts [GRG]'s testimony that traffic was heavy at the time of the incident. viii. [JRL] testified that he uses his sister's E-Z Pass when he needs to pay tolls.²⁶ ix. [JRL] testified that he did not use his brakes prior to the impact.²⁷ Notably, this directly contradicts the EDR Report, which shows that the brakes were engaged moments before the incident occurred. x. [JRL] testified that he saw a lawyer before seeking medical treatment.²⁸

[VRC] appeared for her EUO on May 7, 2023, and provided the following testimony: i. [VRC] testified that the insured vehicle involved in this incident was purchased for her brother [JRL] to use.²⁹ ii. [VRC] testified that [JRL] lived with her and left in December 2023.³⁰ This testimony is inaccurate, as [JRL]'s lease agreement is dated August 5th, 2023. See Exhibit "16". iii. [VRC] testified that she does not have an E-Z Pass.³¹ This directly contradicts [JRL]'s testimony that he borrows [VRC]'s E-Z Pass.

[JRL] appeared for his EUO on June 11, 2024, and provided the following testimony: i. [JRL] testified that he had not been employed for a year, but he was working with a friend painting houses prior to that.³² This directly contradicts [GRG]'s testimony that he was a livery driver. ii. [JRL] testified that he had never seen anyone else drive the insured vehicle besides [JRL].³³ xi. [JRL] testified that [JRL] did not apply the brakes moments before the accident.³⁴ Notably, this directly contradicts the EDR Report, which shows that the brakes were engaged moments before the incident occurred.

Based upon the totality of the investigation set forth above, Liberty Mutual formed a founded belief that the policyholder misrepresented material facts about actual drivers of the insured vehicles and that the incident was a product of an intentional act consistent with the "swoop and squat" - "swooping" merging in front of a vehicle and "squatting" braking abruptly fraudulent insurance scheme for which no coverage exists.

***Please note the affidavit of Investigator Wagner could not be formatted properly. Please see affidavit of Investigator Wagner for any clarification needed.

Regarding the Respondent's denial and defense, Attorney Vanessa Hlinka stated:

On October 18, 2023, the insured 2016 Ford Escape, operated by an unlisted driver, [JL] (hereafter [JL]), and containing passengers [GRG] (hereafter [GRG]) and [JRL] (hereafter [JRL]), was involved in a rear-end collision with a commercial vehicle operated by [AB] ([AB]) while traveling Westbound on Long Island Expressway (I-495). On scene, [AB] reported that [JL] cut in front of the truck and braked abruptly.

On or about May 28, 2023, [VRC] procured an annual policy of automobile insurance to insure two vehicles, a 2020 Ford Edge and a 2016 Ford Escape, with a policy address of 4242 Ithaca Street, 6H, Elmhurst, New York 11373. At inception, [VRC] ([VRC]) added an additional driver, [NNP], and elected collision coverage for the 2020 Ford Edge but foregone collision coverage for the 2016 Ford Edge.

On or about October 4, 2023, [VNC] amended the policy to add collision coverage for the 2016 Ford Escape and removed collision coverage from the 2020 Ford Edge.

On October 18, 2023, the insured 2016 Ford Escape, operated by an unlisted driver, [JL] (hereafter [JL]), and containing passengers [GRG] (hereafter [GRG]) and [JRL] (hereafter [JRL]), was involved in a rear-end collision with a commercial vehicle operated by [AB] ([AB]) while traveling Westbound on Long Island Expressway (I-495). On scene, [AB] reported that [JL] cut in front of the truck and braked abruptly.

On or about November 18, 2023, [VRC] amended the policy to add [JL] as an authorized driver.

On October 31, 2023, all occupants of the insured vehicle retained the same counsel, Law Office of Eli Shmulik, P.C., filed a No-Fault Benefits application and sought medical treatment for injuries allegedly sustained as a result of the incident.

Liberty Mutual began an investigation due to several factors:

- i. The incident involves the insured vehicle stopping short in front of a commercial vehicle on the LIE, the maneuver consistent with a "swoop and squat" insurance fraud scheme.
- ii. The policy was amended shortly before and after the incident.
- iii. The same attorney represents all three claimants.
- iv. An ISO query of the Law Office of Eli Shmulik P.C. revealed several incidents referred to NICB for fraudulent/staged incidents and excessive treatment.

Additionally, as part of the investigation, Liberty Mutual obtained an Event Data Recorder (EDR) Report from the insured vehicle. The report's findings are:

Additionally, as part of the investigation, Liberty Mutual obtained an Event Data Recorder (EDR) Report from the insured vehicle. The report's findings are:

At -1.0 seconds, the vehicle was traveling 41.1 MPH when the "service brake" was applied abruptly, causing the vehicle to slow down to a speed of 24.7 MPH in one (1.0) second. The vehicle was then struck in the rear at zero (0.0) seconds, the time of the event. The Pre-Crash Data (First Record) from the original self-generated report and a brief explanation of how it was determined to be a harsh braking event can be seen below. It was determined that the vehicle slowing down so abruptly in such a short amount of time is equivalent to emergency braking.

Based on the foregoing, Respondent assigned its counsel to schedule and conduct the examination under oath ("EUO") of [JL], [GRG], [JRL], and [VRC].

The EUO testimonies of the above-mentioned claimants revealed that [VRC] acquired the insured vehicle for [JL]'s sole use. In addition to several inconsistencies in the testimony, [JL], [GRG], and [VRC] all provided testimony that [JL] did not apply the brakes moments before the incident, which the EDR Report directly contradicts.

Based upon the totality of the investigation set forth above, Liberty Mutual formed a founded belief that the policyholder misrepresented material facts about actual drivers of the insured vehicles and that the incident was a product of an intentional act consistent with the "swoop and squat" - "swooping" merging in front of a vehicle and "squatting" braking abruptly fraudulent insurance scheme for which no coverage exists.

***Please note the affidavit of Attorney Hlinka could not be fully formatted properly. Please see affidavit of Attorney Hlinka for any clarification needed.

With regard to fraud, the general standard the insurer must assert for a lack of coverage or fraud defense is one "premised on the fact or founded belief that the alleged injury does not arise out of an insured incident" but was a deliberate event staged in furtherance of a scheme to defraud the insurer." See Central General Hospital v Chubb Group of Ins. Cos., 90 NY2d at 199 In V.S. Medical Services, P.C. v. Allstate Ins. Co., 11 Misc.3d 334, 811 N.Y.S. 2d 886 (Civ. Ct. Kings Co. 2006), aff'd. 25 Misc.3d 39, 889 N.Y.S.2d 360 (App. Term 2d, 11th & 13th Dists.2009) the court clearly stated that evidence supporting this defense does not require proof of fraud since, it is irrelevant whether the collision was staged in furtherance or an insurance fraud scheme or was deliberately caused under some other circumstances. The defense is that the occurrence was not an "accident" and therefore coverage does not arise since coverage is afforded only to injuries caused by an "accident". Proof of fraud is not a required element of the defense although the existence of fraud may often be demonstrated by the very same evidence and the nature of the circumstances underlying the happening of the incident. The court noted that evidence establishing proof of a "staged accident" is often circumstantial since it is the rare occasion when a participant in such an event actually admits that the collision was intentional. The court stated that circumstantial evidence of a staged accident submitted by the Respondent is sufficient "if a party's conduct may be reasonably inferred based upon logical inferences to be drawn from the evidence". A material misrepresentation by the Assignor would also preclude any recovery by the provider who accepts an assignment of the Assignor's No-Fault benefits. Golden Age Medical Supply, Inc. v. Clarendon National Ins. Co., 918 N.Y.S.2d 397 (Table), 2010 N.Y. Slip Op. 52010(U), 2010 WL 4751752 (App. Term 2d, 11th & 13th Dists. Nov. 19, 2010). In addition, the strength of inferences of fraud must be measured by common sense and the logic of common experience itself. A.B. Medical Services PLLC v. State Farm Mutual Automobile Ins.Co., 7 Misc.3d 822, 831, 795 N.Y.S.2d 843, 851 (Civ. Ct. Kings Co. 2005) (citing, Schneider v. Kings Highway Hospital Center, Inc., 67 N.Y.2d 743, 744-745 (1986). "Although an insurer's 'founded belief' that a collision was 'staged' cannot be based upon 'unsubstantiated hypotheses and supposition', of necessity in most cases it will be established by circumstantial evidence." A.B. Medical, supra.

After careful review of the evidence and arguments made by the parties at the hearing, I find Respondent's defense is supported by facts necessary to establish a well-founded belief that the accident was an intentionally staged

event. Respondent's evidence is detailed, outlining the incidents happening on the westbound side of the Long Island Expressway (495) and the accident specifics. I agree with Investigator Wagner who stated: "the policyholder misrepresented material facts about actual drivers of the insured vehicles and that the incident was a product of an intentional act consistent with the "swoop and squat" - "swooping" merging in front of a vehicle and "squatting" braking abruptly fraudulent insurance scheme for which no coverage exists." I have reviewed the EUO testimonies and evidence offered in this matter and find there are discrepancies between the occupants of the vehicle where the Assignor was a passenger. Investigator Wagner and Attorney Hlinka explained in detail why the Assignor is not being covered under the insurance policy. Therefore, based on a preponderance of the evidence, Applicant's claim is hereby denied.

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 Queens

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

09/09/2024
(Dated)

Thomas Eck

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:
821d89161a76a56bd0d7112979a6b6f1

Electronically Signed

Your name: Thomas Eck
Signed on: 09/09/2024