American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Metropolitan Medical & Surgical, P.C. (Applicant)	AAA Case No.	17-24-1355-5259
	Applicant's File No.	568823
- and -	Insurer's Claim File No.	1M01M013484624
	NAIC No.	Self-Insured
Hertz Vehicles, LLC (Respondent)		

ARBITRATION AWARD

I, Alana Barran, 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: Patient

1. Hearing(s) held on 01/08/2025
   Declared closed by the arbitrator on 01/08/2025

   Steven Palumbo from Leon Kucherovsky Esq. participated virtually for the Applicant

   Joshua Shack from Gallo Vitucci Klar, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$696.15**, 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 Patient, ER, was involved in an accident on 1/24/2024. This is a claim for office visits and injections performed on 4/10/2024. The Respondent denied the claim based on lack of coverage. The issue raised is whether the Respondent has sustained its lack of coverage defense.

4. Findings, Conclusions, and Basis Therefor

   My decision is based on the arguments of the representatives for both parties and those documents contained in the ADR Center for this case. No fee schedule issues were raised related to the amount in dispute.

The Respondent issued a denial on 5/29/2024 stating that "The claims are denied on the basis Hertz Vehicles, LLC maintains a founded belief that the alleged injuries of the claimants [ERRRG, JARP, and HRG], did not arise from an insured incident."

Respondent argues that the claim must be denied based on the founded belief that the accident was fraudulently staged as not occurring as described and therefore coverage is not afforded based on the MV104 report, EUO transcripts of the patient ER as driver of the insured vehicle, passenger JARP, passenger HRG and a Summons and Complaint in a Declaratory Judgment action filed 7/22/2024; and an affidavit by Aimee Corum dated 8/12/2024. However, based on the evidence presented as well as that there is no judgment, order or resolution related to the declaratory judgment filed, I find that the evidence presented here is insufficient to establish the Respondent's defense of a founded belief of a fraudulent accident. The MV104 report describes the accident and lists the patient ER as the driver DC, and passenger JARP and passenger HRG as occupants of the vehicle, and states that the insured vehicle (Veh1) was traveling straight when the other vehicle made a sudden turn into Veh1 and impacted its right side.

The affidavit of Aimee Corum dated 8/12/2024, a no-fault claims representative, which explains:

> "The investigation led to the conclusion that the loss did not occur as alleged, based on the following: - The claim follows a common fraudulent fact pattern where a vehicle is rented for no credible reason, and then is involved in a suspicious loss with a commercial vehicle with high policy limits; - The adverse vehicle is a commercial tractor trailer truck with high liability policy limits. Hertz spoke to Progressive, who previously insured the truck. The Progressive policy was not in effect at the time of the loss and the claim was originally mistakenly reported to Progressive. The Progressive claim representative noted that their insured stated that the loss was "a scam." However, since their policy was not in effect, Progressive did not investigate further. The correct insurance carrier, Universal Casualty Risk Retention Group, stated that their insured strongly denied any liability or responsibility for the loss and stated that the Hertz vehicle came into his lane and struck him; - The vehicle was rented on January 22, 2024, and due to be returned on January 25, 2024. The EUO testimony of the Claimants was vague and suspicious regarding the purpose of the rental, as follows: o The renter, Enma, testified that she rented the car because her own personal vehicle needed routine service. However, she did not actually get her vehicle serviced during the rental period. She then testified that her vehicle could not be driven at all. She then again stated that her vehicle just needed "routine maintenance." She then stated almost immediately thereafter that it was not routine maintenance, and the car could not even be moved, and she needed to rent a vehicle because she had to take her son to school, and had shopping to do that could not be re-scheduled. She then immediately changed her story again and testified that she rented the

vehicle because they were taking a family trip to Washington D.C., with Pena, her son, and Harrytruma. She did not want to use her own vehicle for the trip; o Harrytruma testified that he did not know why Enma rented the vehicle, and that he vaguely recalls her saying something about the rental, but he did not remember what she said. He then testified immediately thereafter that he thinks maybe she rented it because she was going on a trip to Washington D.C. He then testified that he was actually going on the trip to Washington, D.C. too; o Pena testified that Enma rented the car because her own personal vehicle, which was in fine working order, needed some routine maintenance, and she didn't want to drive it with the maintenance pending; o Enma and Pena both testified that they were planning to drive down to Washington D.C., on January 25, 2024, the same day that the vehicle was scheduled to be returned. When questioned as to why they would rent a vehicle on January 22, but not leave until the day that the vehicle was supposed to be returned, they both testified that they were planning to leave very early in the morning on January 25th, drive four hours to Washington, D.C., drive around the area for about an hour, and then drive back to New York to return the car. They both specifically stated that they were going to Washington, D.C. to "see how the city moves" and to see "what the environment is like." They were not visiting anybody or going to a specific destination; o Harrytruma testified that he did not go on the trip to Washington, D.C. for personal reasons, but that Enma, Pena, and their son did go on the trip, and came back prior to January 24th. He was riding in the car after they had returned from Washington D.C. To the contrary, Enma and Pena testified that they never went to Washington, D.C., because the accident happened the night prior to when they were supposed to go; o Pena testified that the trip to Washington D.C. was always just going to be him and Enma. Enma testified that the trip was supposed to include her, Pena, and Harrytruma. Harrytruma testified that the trip was supposed to include himself, Enma, Pena, and Enma and Pena's son; - The testimony regarding where the Claimants were going at the time of the accident was vague, contradictory, and not credible, as follows: o Enma testified that they were going to look at a car that her brother wanted to purchase, somewhere in the Bronx. She testified that Pena came with them because he knew the area very well, and she did not know where they were going. To the contrary, Pena testified that he went with them only because Enma, his partner, was going. He knew nothing about where they were going and was "not the one making decisions" and was "just along for the ride;" o Harrytruma originally testified that the purpose of the trip was to go out and get something to eat. They did not have a specific destination in mind, and they did not make any plans in advance. He then changed his story completely and testified that they were going to look at a vehicle he wanted to purchase that he found on Facebook Marketplace, and that his sister was going along to look at the car with him, for an extra set of eyes. He then stated that they were going to look at the car, and get something to eat, but the accident happened, and they never saw the car, or got food. He never wound up purchasing a car at all; Pena testified that

> they were driving around aimlessly and were "looking around" to see if they could find a car that Harrytruma wanted to purchase. He does not know where the car was located, he was "just with them." They drove around for a while, but never found the car. He then changed his story and testified that when the accident happened, they were looking for a place to get food. He does not know if they were going to "continue to look" for the car afterwards, as he was just along for the ride; - The testimony regarding the facts of the loss was vague. Harrytruma testified that they were hit by a truck, but that the truck was parked at the time. When asked for clarification, he stated that the truck hit them, so he guesses it must have been moving. He could not describe the truck at all, or how the loss occurred. Enma and Pena testified vaguely that the truck came into their lane and hit them. The adverse driver as denied any responsibility for the loss; - The alleged injuries of Enma and Pena are identical, suffering the same injuries to their necks and backs. Both have undergone nearly identical treatment, consisting of boilerplate physical therapy, and have undergone multiple rounds of injections to their necks and backs; - There was no police report for the loss, only an MV-104, completed by Enma which was not dated; and To date, Hertz has received in excess of $50,000 in medical bills for the Claimants. In addition, Hertz maintains a founded belief that the alleged injuries of the Claimants did not arise from an insured incident. Hertz has duly denied the claims of the defendants on this basis."

The transcripts in submission include that of HTR held on 4/18/2024, of JARP held on 5/10/2024, and of patient ER held on 4/18/2024 and which are consistent with the contents of the affidavit of Aimee Corum dated 8/12/2024.

Respondent's counsel submits a brief noting that "Respondent maintains a fraud defense, which resulted from our coverage investigation of the claim, which is explained in detail below… Hertz investigated the claim and noted, without limitation, as follows: 1. There was minor damage to the vehicle; 2. There was no police report for the loss, only an MV-104, completed by Enma, which is not dated; 3. The adverse vehicle is a commercial tractor trailer truck with high liability policy limits. The Company spoke to Progressive, who previously insured the truck. The Progressive policy was not in effect at the time of the loss and the claim was originally mistakenly reported to Progressive. The Progressive claim representative noted that their insured stated that the loss was "a scam." However, since their policy was not in effect, Progressive did not investigate further. The correct insurance carrier, Universal Casualty Risk Retention Group, stated that their insured strongly denied any liability or responsibility for the loss and stated that the Hertz vehicle came into his lane and struck him; and 4. To date, the Company has received in excess of $50,000 in medical bills for the Claimants. Based upon these factors, Hertz, pursuant to its rights under the No-Fault regulations, duly and properly sought examinations under oath ("EUOs") of the Claimants and the Insured to confirm the legitimacy of this loss and the necessity of any alleged treatments and referrals. The Claimants appeared for their EUOs. However, their testimony, along with the rest of Hertz's investigation, led to the conclusion that the loss was not a covered event, the

injuries of the Claimants did not arise from an insured incident, and that the loss was intentionally caused…" and re-iterates the statements found in the affidavit of Aimee Corum dated 8/12/2024.

Here, I am not persuaded that the subject occurrence/accident on 1/24/2024 has been proven to be a staged accident and/or that fraud has occurred and/or that the injuries and treatment are not related to the underlying collision based on the EUO testimonies, the MV104 report and the affidavit of Aimee Corum. I find unsupported and insufficient the evidence to sustain the Respondent's basis for denial of coverage as unpersuasive including that the contradictions in testimony related to the destination of the occupants of the insured vehicle, an observation that the accident occurred just prior to return of the rental vehicle, that the accident involved a commercial vehicle; and differences in the description of how the accident occurred. Despite the statements that the adverse vehicle denied any responsibility for the loss and/or that it was a staged accident, that there is insufficient evidence to support the allegations. Therefore, I find that the Respondent has failed to sustain its defense of non-coverage based on a founded belief that the accident was fraudulently staged and/or that the injuries and treatment are not related to the underlying collision on 1/24/2024.

I find the Respondent's arguments related to the subscription of the EUO transcript to be unpersuasive as the defect could be corrected, it was not raised in the denial, and the policy of insurance stating that coverage could be denied for failure to sign the transcript is not in submission to support the defense.
A defense that a claimant failed to sign the EUO transcript must be timely asserted in a denial of claim. *See* Unitrin Advantage Inx. Co. v.James Acupuncture Health Care PC, 2019 NY Slip Op. 32196(U) (Sup. Ct. New York Co., Arlene Bluth, J., July 26, 2019).

The failure to subscribe an EUO transcript, standing alone, is not a breach of a condition precedent to coverage violating the policy ab initio; at worst, a claimant's failure to subscribe the transcript of sworn EUO testimony is an irregularity that could be corrected later. *See* Ace American Ins. Co. v. Dr. Watson Chiropractic, PC, 2018 NY Slip Op. 30867 (U) at 11 (Sup. Ct. New York Co., Robert Kalish, J., May 9, 2018).
Absent evidence that the subject insurance policy contained a term entitling the insurance company to deny a claim if a signed EUO transcript is not submitted within 120 days of initial demand, a claim cannot be dismissed upon the basis that the assignor failed to so execute the transcript. *See* Precise Physical Therapy Solutions v. State Farm Mutual Auto Ins. Co., 69 Misc3d 939 (Civ. Ct. Queens Co. 2020).
Of necessity an insurer's founded belief that a collision was staged will be established by circumstantial evidence. A.B. Medical Services PLLC v. State Farm Mutual Automobile Ins. Co., 7 Misc.3d 822, 795 N.Y.S.2d 843 (Civ. Ct. Kings Co. 2005).
"An insurer may assert at any time that the accident arises from an insurance fraud scheme or that the alleged injury was not caused by an insured incident and is therefore not covered under [the subject] policy." Vital Points Acupuncture, P.C. v.

New York Central Mutual Fire Ins. Co., 6 Misc.3d 1031(A), 800 N.Y.S.2d 358 (Table), 2005 N.Y. Slip Op. 50267(U), 2005 WL 515601 (Civ. Ct. Kings Co., Bluth, J., Mar. 3, 2005).

A claim of fraud premised upon an allegation of excessive billing or lack of medical necessity is subject to the 30-day preclusion rule. Dilon Medical Supply Corp. v. State Farm Ins. Co., 13 Misc.3d 141(A), 831 N.Y.S.2d 358 (Table), 2006 N.Y. Slip Op. 52266(U), 2006 WL 3437826 (App. Term 2d & 11th Dists. Nov. 17, 2006).

Unsubstantiated hypotheses and suppositions are insufficient to raise a triable issue of the assignor's fraud. Ocean Acupuncture, P.C. v. State Farm Mutual Automobile Ins. Co., 23 Misc.3d 1104(A), 885 N.Y.S.2d 712 (Table), 2009 N.Y. Slip Op. 50565(U), 2009 WL 884645 (Civ. Ct. New York Co., Manuel J. Mendez, J., Apr. 2, 2009).

An expert's affirmation is needed to provide a factual foundation for an insurance carrier's good faith belief that an alleged injury did not arise out of an insured accident; speculation or wishful thinking does not suffice. Mt. Sinai Hospital v. Triboro Coach Inc., 263 A.D.2d 11, 699 N.Y.S.2d 77 (2d Dept. 1999). Here, no such expert affirmation has been provided and I find the affidavit of Aimee Corum be insufficient.

A low-impact study may constitute the basis for a founded belief that alleged injuries did not arise out of an insured accident. A.B. Medical Services PLLC v. New York Central Mutual Fire Ins. Co., 12 Misc.3d 140(A), 824 N.Y.S.2d 760 (Table), 2006 N.Y. Slip Op. 51347(U), 2006 WL 1892355 (App. Term 2d & 11th Dists. June 22, 2006). Here, a data recorder is not in submission.

An insurer fails to come forward with proof in admissible form to demonstrate the fact or the evidentiary foundation for its belief that the patient's treated condition was unrelated to his or her automobile accident where the affidavit of its medical expert is conclusory, speculative, and unsupported by the evidence. E.g., New York & Presbyterian Hospital v. Selective Ins. Co. of America, 43 A.D.3d 1019, 842 N.Y.S.2d 63 (2d Dept. 2007).

Comparing the relevant evidence presented by both parties against each other and the above referenced standards, based on the foregoing, I find in favor of the Applicant and the claim is awarded.

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.	**04/10/24 - 04/10/24**	**$696.15**	**Awarded: $696.15**
Total			**$696.15**	**Awarded: $696.15**

B. The insurer shall also compute and pay the applicant interest set forth below. 07/10/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Where a claim is untimely denied, or not denied or paid, interest shall accrue as of the 30th day following the date the claim is presented by the claimant to the insurer for payment. Where a claim is timely denied, interest shall accrue as of the date an action is commenced or an arbitration requested, unless an action is commenced or an arbitration requested within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant. (11 NYCRR 65-3.9(c)). The end date for the calculation of interest shall be the date of payment of the claim. In calculating interest, the date of accrual shall be excluded from the calculation. Where a motor vehicle accident occurs after April 5, 2002, interest shall/be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. (11 NYCRR 65-3.9(a)). Where the claim is submitted electronically after the close of business or on the weekend, I find that the claim is deemed received on the next day of business following the electronic submission, and interest is awarded as of the next day of business following the electronic submission of the claim.

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

For cases filed prior to February 4, 2015, 20 percent of the amount of first party benefits awarded herein, plus interest thereon, subject to a minimum of $60 and a maximum of $850. For cases filed on or after February 4, 2015, 20 percent of the amount of first party benefits awarded herein, plus interest thereon, subject to no minimum and a maximum of $1360 (11NYCRR65-4).

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 NJ
SS :
County of Essex

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

02/07/2025
(Dated)

Alana Barran

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:
51257cfa2c5b19e5a84b9545c882ccd4

Electronically Signed

Your name: Alana Barran
Signed on: 02/07/2025