

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Sun Chiropractic Services P.C.
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-16-1037-0499

Applicant's File No.

Insurer's Claim File No. 659522-06

NAIC No. 16616

ARBITRATION AWARD

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 03/22/2017
Declared closed by the arbitrator on 04/24/2017

Matthew Viverito, Esq. from Costella & Gordon LLP participated in person for the Applicant

Robert Horn, Esq. from of counsel to Daniel J. Tucker, P.C. participated in person for the Respondent

2. The amount claimed in the Arbitration Request, \$ **2,330.56**, 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 claimant was a 55 year-old female rear seat passenger of a motor vehicle that was involved in an accident on 3/11/15. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. At issue is 8/4/15 upper and lower pf-NCS testing performed by Applicant. Respondent timely denied reimbursement based on the 1/21/16 peer review by Peter Chiu, M.D.

4. Findings, Conclusions, and Basis Therefor

THIS HEARING WAS CONDUCTED USING THE ELECTRONIC CASE FOLDER MAINTAINED BY THE AMERICAN ARBITRATION ASSOCIATION. ALL DOCUMENTS CONTAINED IN THAT FOLDER ARE MADE PART OF THE RECORD OF THIS HEARING.

THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED.

Based on a review of the documentary evidence, this claim is decided as follows:

An applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

The burden has shifted to the Respondent as they have raised a medical necessity defense. In order to support a lack of medical necessity defense respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See, *Provvedere, Inc. v. Republic Western Ins. Co.*, 2014 NY Slip Op. 50219(U) (App. Term 2, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. See generally, *Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op. 52116 (App. Term 1 Dept. 2006). As a general rule, reliance on rebuttal documentation will be weighed in light of the documentary proofs and the arguments presented at the arbitration. Moreover, the case law is clear that a provider must rebut the conclusions and determinations of the IME/peer doctor with his own facts. *Park Slope Medical and Surgical Supply, Inc. v. Travelers*, 37 Misc.3d 19 (2012).

The medical necessity of a diagnostic test must be proven to justify payment for it. The patient must make subjective complaints consistent with the information sought by the testing. Physical examination must demonstrate measurable objective findings of abnormalities of the same body part or system. The medical provider must state the purpose of the diagnostic test clearly before the test is done. The results sought by the test must be of the type that would be considered when evaluating further treatment of the patient and must actually be considered.

Four hearings (AAA Case No.: 17-15-1022-6656, 17-15-1022-6658, 17-15-1022-6666, and 17-16-1037-0499) were scheduled and heard at 10:00 AM on 3/22/17. Respondent's submissions for these four matters included a summons and complaint for a Declaratory Judgment (DJ) action initiated in the Supreme Court of the State of New York, County of Bronx, Index No.: 304109/15. It was decided at the hearing that these matters would be continued and added to the calendar in approximately two months so that Respondent

could confirm the status of the DJ action and follow-up for a possible order. Respondent's post hearing submissions the day after the hearings confirmed that "there is no Declaratory Judgment order obtained" and "Respondent will not be going forward with the Declaratory Judgment." As the main reason for continuing these four hearings was the DJ action it was determined that these matters would be marked closed instead. Additional submissions from both sides regarding Respondent's fee schedule defense was specifically discussed at the hearing for this matter. The AAA made several attempts to find out if either side planned on making additional submissions (unrelated to the DJ action) prior to the next scheduled hearings and if they did, time would have been provided to upload them. Neither side responded so these matters were marked closed.

The claimant was a 55 year-old female rear seat passenger of a motor vehicle that was involved in an accident on 3/11/15. The claimant reportedly injured her neck, bilateral shoulders, low back, and bilateral knees. There may have been a 3 minute reported loss of consciousness. There were no reported lacerations or fractures. Following the accident the claimant was transported to Lincoln Hospital where she was X-rayed, evaluated, treated, and released. On 3/19/15 the claimant presented to Anthony P. Siano Jr., D.C. of APS Chiropractic Services who ordered cervical spine and lumbar spine MRIs; recommended the claimant for Functional Capacity testing, ROM/MMT testing, upper extremities and lower extremities EMG/NCV testing, orthopedic consultation, and physiatric consultation; prescribed durable medical equipment consisting of a cervical collar, lumbar cushion, cervical pillow, LSO, bedboard and mattress, and a thermophore; and the claimant was initiated on chiropractic treatment. On 3/25/15 the claimant presented to Brij Mittal, M.D. who initiated the claimant on physical therapy; recommended the claimant for chiropractic treatment, computerized ROM/MMT testing, V-sNCT testing, Kinesio taping, Physical Capacity Testing, neurological consultation, orthopedic consultation, acupuncture treatment; prescribed a water circulating pump with pad; and referred the claimant for MRIs of the brain, cervical spine, lumbar spine, bilateral shoulders, and bilateral knees. On 3/31/15 the claimant underwent Current Perception Threshold (CPT) testing. On 4/3/15 the claimant underwent a brain MRI. On 4/3/15 and 4/7/15 the claimant underwent MRIs of the left shoulder. On 4/7/15 the claimant underwent a left knee MRI. On 4/22/15 the claimant underwent a cervical spine MRI and a lumbar spine MRI. On 5/14/15 the claimant presented to Abdalla I. Adam, M.D. for a physiatric consultation who recommended the claimant for upper extremities and lower extremities EMG/NCV testing. On 8/4/15 the claimant underwent upper and lower pf-NCS testing ordered by Dr. Mittal. At issue here is the 8/4/15 upper and lower pf-NCS testing performed by Applicant.

During the 3/25/15 initial examination conducted by Brij Mittal, M.D. the claimant presented with headaches and pain in the neck, bilateral shoulders, low back, and bilateral knees. Examination of the cervical spine revealed tenderness and decreased range of motion (unquantified). Foraminal Compression and Valsalva's were negative. Examination of the bilateral shoulders revealed decreased range of motion (unquantified). Examination of the left knee revealed decreased range of motion (unquantified). Examination of the lumbosacral spine revealed tenderness, hypertonicity, and decreased range of motion (unquantified). Straight leg raise was negative bilaterally. Sensation, gait, muscle strength, coordination, and deep tendon reflexes appear to have

been normal. The claimant was able to toe and heel walk. During the 4/15/15 follow-up examination conducted by Dr. Mittal the claimant presented with complaints of constant neck pain radiating to the bilateral shoulders, constant non-radiating back pain, bilateral shoulder pain, and bilateral knee pain. Pain was rated 8/10. Examination of the neck revealed decreased range of motion (unquantified). Examination of the bilateral shoulders revealed decreased range of motion (unquantified). Examination of the bilateral knees revealed decreased range of motion (unquantified). Gait was normal. Motor muscle strength was normal. Sensation was intact. Dr. Mittal recommended computerized ROM/MMT, Physical Capacity testing, Vs-NCT, orthopedic evaluation, neurological evaluation, and Kinesio taping. Dr. Mittal prescribed an EMS unit and belt, electric massager, orthopedic knee support (left), infrared heat lamp, and a whirlpool. The 5/20/15 follow-up examination conducted by Dr. Mittal was substantially similar to the 4/15/15 examination. Contemporaneously or subsequently Dr. Mittal ordered upper and lower pf-NCS testing (the pf-NCS referral form signed by Dr. Mittal is undated).

Applicant submitted a 12/18/15 letter of medical necessity by Brij Mittal, M.D. Dr. Mittal asserts: "[*the claimant*] was examined in our office on 03/25/2015 and has been exhibiting clinical signs of spinal nerve root radiculopathy/neuropathy since his/her accident on 03/11/2015. [*The claimant*] has been complaining of symptoms radiating into his/her bilateral/upper/lower extremities. The clinical impression is consistent with suspected bilateral spinal nerve root radiculopathy and/or neuropath secondary to trauma. I feel that further diagnostic testing is therefore medically necessary to better isolate the cause of his/her condition. Since sensory nerves are more vulnerable to injury than motor nerves, I have referred [*the claimant*] for V-SNCT testing which can detect and isolate nerve dysfunction in a non-invasive manner early; before chronic nerve degeneration or pathology sets in. It is for this reason that I have referred my patient for V-SNCT testing to detect the presence of these early changes and, if present, direct treatment to the specific causative spinal lesions resulting in improved clinical outcome. (This test provides nerve root specific information in order to help direct treatment to the isolated areas of suspected vertebral unit dysfunction). It is therefore in the best interest of the patient that this test is performed in order to define and focus his treatment plan. This evaluation is a painless, non-invasive sensory test. In the event that this test reveals nerve impairment, this test provides nerve root specific information in order to help direct treatment to the isolated areas of suspected vertebral unit dysfunction. Injured somatosensory nerves can regenerate with appropriate therapeutic intervention. If this test does reveal nerve impairment, further standard testing (NCV and EMG) will be ordered to determine whether chronic or permanent nerve damage has occurred to the larger nerve fibers. My professional clinical opinion is that this test is a medical necessity in this case to objectively substantiate and document my clinical findings. Additionally, these measures assist in establishing an optional treatment protocol for [*the claimant*] and document the outcome of the therapeutic intervention. When abnormal, the patient may respond to nerve blocks as a therapeutic intervention."

Respondent timely denied (in light of verification that was requested and received) the electrodiagnostic testing at issue based on the 1/21/16 peer review by Peter Chiu, M.D. After reviewing the claimant's history and medical records, Dr. Chiu asserts the initial evaluation dated 3/25/15 by Dr. Mittal revealed a normal motor and sensory exam and no reflex exam. The subjective complaints included neck, low back and bilateral

shoulder pain. History and physical examination finds were consistent with a sprain/strain injury of the spine which would not warrant nerve testing at this time. The follow-up evaluation dated 4/15/15 by Dr. Mittal revealed a normal motor and sensory exam and no reflex exam. The evaluation dated 05/14/15 by Dr. Adam revealed a normal reflex exam and non-specific motor (4/5 right hand grip) and sensory (decreased right C7-8 and L5- S1) changes. She was recommended for physical therapy and nerve testing. It was unclear how nerve testing of the upper and lower extremities would alter the treatment plan as there was no indication the claimant was a candidate for surgery or epidural injection at this time. Dr. Chiu opines "[t]here was no medical necessity for the Vs-NCT testing performed on date of service 08/04/15. Quantitative sensory testing is a potentially useful tool for measuring sensory impairment for clinical and research studies. However, quantitative sensory testing results should not be the sole criteria used to diagnose pathology. Because malingering and other non-organic factors can influence the test results, quantitative sensory testing is not currently useful for the purpose of resolving medicolegal matters. The American Academy of Neurology and the American Association of Electrodiagnostic Medicine have both concluded that quantitative sensory threshold testing standards need to be developed and that there is as yet insufficient evidence to validate the usage of current perception threshold testing [Citation omitted]. Dr. Chiu explains the centers for Medicare and Medicaid Services concludes that the use of any type of sNCT device (eg. current perception threshold (CPT), pain perception threshold (PPT), or "voltage input" type device used for voltage-nerve conduction threshold (Vs-NCT) to diagnose sensory neuropathies or radiculopathies is not reasonable or necessary [Citation omitted]. There is no medical necessity for sNCT testing especially in sprain/strain injuries or even if there was a suspicion of radicular pathology as sNCT testing would not be used in these conditions. In addition, sNCT testing would not alter the treatment plan, would not provide valuable medical information, and there was no casual relationship or medical necessity for sNCT testing.

Where the Defendant insurer presents sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to the Plaintiff which must then present its own evidence of medical necessity (see Prince on Evidence section 3-104, 3-202). *West Tremont Medical Diagnostic PC v. Geico*, 13 Misc.3d 131, 824 N.Y.S. 2d 759.

Applicant submitted a 7/27/16 peer rebuttal by Jeremy Whitefield, D.C. of Applicant's office. Dr. Whitefield asserts "first, it should be noted that in this case the test performed is Pf-NCS and not Vs-NCT. Pf-NCS is a prototype of Vs-NCT. Pf-NCS is different and distinctive from Quantitative Sensory Testing (QST), which employs naturally occurring stimuli that are innate to humans, such as temperature, pressure or vibration. Also, QST requires the patient to judge a change in stimulus intensity. In comparison, pf-NCS employs an electrical stimulus, which is not innate to humans, and does not require the patient to judge a change in stimulus intensity, such as feeling colder or warmer, etc. In the pf-NCS even without measurement of the action potential, no subjective judgment of the intensity is required. (AASEM Practice Policy Guidelines, January 2010, Volume 26 Para #54). Also, a common misstatement by third-party payers is that pf-NCS is the same as "sNCT - Sensory Nerve Conduction Threshold using Current Perception Threshold" for which CMS issued a non-coverage NCD 160.23, April 1, 2004. The NCD states "sNCT is a psychophysical assessment. . . perception test". It then states

"This test (sNCT) is separate and distinct from tests measuring amplitude. All pf-NCS devices measure the amplitude of the action potential." Dr. Whitefield opines "the peer review quotes Medicare newsletter statement about the device used in the test. However, this article discusses VsNCT studies not pf-NCS. The device used in pf-NCS is different than the VsNCT device. Moreover, what must be understood is the value of this screening, whether validated as of yet by the Centers for Medicare and Medicaid or not pf-NCS is a method of testing to detect pre-ganglionic dorsal nerve-root pathology earlier than other nerve conduction studies in order to allow a better and earlier positive outcome for the patient." Dr. Whitefield further opines "Dr. Chiu stated that there were insufficient clinical findings to justify need of the pf-NCS studies in this case. However, the following literature support use of pf-NCS studies in identifying nerve root pathology. April 2002 AMA EDX Guidelines page 1 indicates that pf-NCS aids in locating lesions causing sensory symptoms in one or more peripheral nerves, nerve roots, predorsal nerve-root ganglionic fibers, spinal cord, brain stem or brain. Further, page 4 of AMA Guidelines notes that following an initial pf-NCS, differentiation of the lesion site is possible by testing above and below the suspected site of entrapment, and/or testing the contralateral side for comparison. The pf-NCS testing 1) essentially effects patient's treatment care as a study on 151 people shows that: results of pf-NCS results that changed the treatment given to patient. (56% of the tests #84 tests.) 2) pf-NCS results that confirmed what the clinical findings suggested should be done. (35% of the tests - #53.) 3.) NCS results that did not influence the treatment given to a patient. (9% of the tests #14.) (Pain Fiber NERVE CONDUCTION STUDIES (pf-NCS) Significantly Improve the Diagnostic Accuracy and Effectiveness of Treatment for Spinal Pain Peter M Carney M.D.)." Dr. Whitefield continues "further, the peer reviewer further stated that there was no indication that the claimant would require more aggressive treatment such as epidural steroid injections or surgery as a result of this test. Surgery or epidural injections are not the only but two of the twelve indications listed by the AANEM for the performance of electrodiagnostic testing. See AANEM guidelines, page 4. The purpose, among other reasons, for the electrodiagnostic testing is 1) to distinguish between differential diagnoses 2) to help determine the extent of an abnormal function 3) to help determine and guide treatment options, prognosis, and level of recovery (See AANEM Guidelines page 4, items 1-12)." Dr. Whitefield opines "it is virtually impossible to foresee or plan how the result of a diagnostic will be used prior to the inspection and interpretation of the results of this test. Once results have been analyzed, they are then used in conjunction with other collected data such as exams and treatment notes as well as other diagnostic testing to explore whether continuation, modification or termination of treatment is required." Dr. Whitefield concludes "based upon the findings above, it is my opinion that given patient's complaints, neurological findings, and nature of the injury Pain Fiber Nerve Conduction Studies performed on 8/4/2015 was medically necessary and positive findings further confirm and reinforce my opinion. The patient's clinical presentation demanded a neurological investigation beyond the capabilities of physical examination for prescription of care plan. The results of the testing were used to determine the future care plan for the patient."

As to the 8/4/15 pf-NCS testing of the upper and lower extremities, I find that the peer review is facially insufficient to carry Respondent's burden of proof. Dr. Chiu evaluated the wrong testing (Vs-NCT) in his peer review which employs equipment and techniques that were not used by Applicant. To the extent that this may be explained by

Dr. Mittal's reference to Vs-NCT testing in his letter of medical necessity, I am persuaded that Dr. Whitefield's peer rebuttal sufficiently rebutted the peer review. Dr. Whitefield explained that the claimant's complaints and neurological findings required a neurological investigation beyond the capabilities of physical examination to determine a future care plan. Accordingly, the claim is granted.

Respondent submitted a Signet Claim Solutions, L.L.C. fee audit by Joanne Silverman-Ungar, BSN, RN, LNCC. Ms. Ungar states that "CPT Code 0110T most closely represents the services performed - Quantitative sensory testing (QST), testing and interpretation per extremity, using other stimuli to assess sensation." Ms. Ungar notes that CPT Code 0110T has "BR" as a relative value unit. Per Ground Rule # 3 of the fee schedule, any procedure where the unit value is listed as "BR", the physician shall establish a unit value consistent in relativity with other unit values shown in the schedule. Ms. Ungar states that here "CPT Code 95904 nerve conduction, amplitude and latency/velocity study: sensory was used to determine reimbursement." Ms. Ungar explains that "CPT code 95904 was not used to identify procedure as not all components of code were met." Ms. Ungar explains that "CPT code 0110T is a by extremity reimbursement, chiropractic conversion factor was used 5.78 X relative value 12.60 = 72.83 X 2 extremities - 145.66." So for the four extremities tested here the total would be 12.6 multiplied by \$5.78 equals \$72.83 x 4 or \$291.32.

Based upon the foregoing, and after reviewing all of the evidence, I find that Applicant has not met its burden and has failed to submit anything to rebut the fee schedule calculation set forth by Respondent. As noted above, the AAA made several attempts to find out if either side wanted to make additional submissions regarding Respondent's fee schedule defense and received no response. I am persuaded by Ms. Ungar's calculation for the pf-NCS testing. I find that she set forth a breakdown and rationale for the determination that Applicant did not bill the pf-NCS testing correctly. I am convinced by Respondent's evidentiary submissions that these services are properly billed under the Category III code 0110T. These codes are billed per extremity tested; in this case that is 4 extremities at \$72.83 per extremity for a total of \$291.32. I note that numerous other arbitrators have made similar determinations. See for example AAA Case No.: 17-14-9023-6089 (Arbitrator Burt Feilich), AAA Case No.: 17-14-9023-6089 (Arbitrator Philip Wolf), AAA Case No.: 412011053021 (Arbitrator Vincent Esposito), AAA Case No.: 41011053019 (Arbitrator Gary Peters), AAA Case No.: 41011061502 (Arbitrator Melissa Melis), AAA Case No.: 412010042797 (Arbitrator Richard Horowitz) and AAA Case No.: 412013124961 (Arbitrator Susan Haskel).

Accordingly, Applicant is awarded \$291.32.

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
	Sun Chiropractic Services P.C.	08/04/15 - 08/04/15	\$2,330.56	Awarded: \$291.32
Total			\$2,330.56	Awarded: \$291.32

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 06/15/2016, which is a relevant date only to the extent set forth below.)

Interest runs from 6/15/16 (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

Pursuant to 11 NYCRR §65-4.6 (d), ". . . the attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon for each applicant for arbitration or court proceeding, subject to a maximum fee of \$1,360."

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 New York
SS :
County of Nassau

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

05/22/2017
(Dated)

Charles Blattberg

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:
f5772103e90dcffd13a2d57053776ea6

Electronically Signed

Your name: Charles Blattberg
Signed on: 05/22/2017