

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

East Flatbush Medical PC
(Applicant)

- and -

Liberty Mutual Insurance Company
(Respondent)

AAA Case No.	17-17-1059-8312
Applicant's File No.	N/A
Insurer's Claim File No.	LA000-03305416-04
NAIC No.	36447

ARBITRATION AWARD

I, Glen Wiener, 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 03/06/2018, 05/01/2018
Declared closed by the arbitrator on 05/01/2018

Mark Fenelon, Esq. from The Geller Law Group PC participated in person for the Applicant

Joseph Kuroly, Esq. from Liberty Mutual Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,073.43**, 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

Assignor S.G. a 53-year-old female was involved in an automobile accident on November 27, 2015. The next day complaining of intermittent low back pain and radiating neck pains she presented to Brij K. Mittal, M.D. at Applicant East Flatbush Medical, P.C. Diagnosed with cervical and lumbar sprains she was referred for physical therapy, chiropractic care, acupuncture, physical capacity testing, range of motion studies, PF-NCS studies, Kinesio taping, medical supplies and a neurological evaluation.

On March 10, 2016 complaining of radiating neck and back pains Assignor presented to Jean-Baptiste Simeon, M.D. a neurologist at Applicant. The neurological evaluation revealed decreased muscle strength and decreased sensation. Electrodiagnostic studies

were then conducted on Assignor's upper and lower extremities. Applicant sought reimbursement from Respondent who denied the claim based on a peer review. The sole question presented herein is whether the electrodiagnostic studies were medically necessary.

4. Findings, Conclusions, and Basis Therefor

The decision below is based on the documents on file in the Electronic Case Folder maintained by the American Arbitration Association as of the date of this hearing and on oral arguments of the parties. No witness testimony was produced at the hearing.

Applicant East Flatbush Medical, P.C. as assignee of S.G. seeks \$3,073.43 reimbursement, with interest and counsel fees, under the No-Fault Regulations, for electromyographic and nerve conduction velocity [EMG/NCV] studies performed on Assignor's upper and lower extremities on March 10, 2016.

Respondent Liberty Mutual Insurance Company insured the motor vehicle involved in the automobile accident. Under New York's Comprehensive Motor Vehicle Insurance Reparation Act (the "No-Fault Law"), New York Ins. Law §§ 5101 et seq., Respondent was obligated to reimburse the injured party (or her assignee) for all "reasonable and necessary" medical expenses arising from the use or operation of the insured vehicle. Respondent denied Applicant's claim based upon a peer review and addendum conducted by internist Stuart Stauber, M.D. concluding the EMG/NCV studies were not medically necessary.

Applicant established a prima facie case by submitting evidence that payment of no-fault benefits was overdue, and proof of its claim, using the statutory billing form, was mailed to and received by Respondent. *Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 N.Y.3d 498, 501 (2015). The proof that Applicant mailed the claim form to Respondent is embodied in the latter's denial, which references receipt of the proof of claim. *See Ultra Diagnostic Imaging v. Liberty Mutual Insurance Co.*, 9 Misc.3d 97, 804 N.Y.S. 2d 532 (App Term 9th and 10th Jud. Dist. 2005).

Once Applicant established a prima facie case the burden shifted to Respondent to prove the electrodiagnostic studies in question were not medically necessary. *See Citywide Social Work & Psychological Services, PLLC a/a/o Gloria Zhune v. Allstate Ins. Co.*, 8 Misc.3d 1025A, 806 N.Y.S.2d 444 (App. Term 1st Dep't 2005); *A.B. Medical Services, PLLC v. Geico Ins. Co.*, 2 Misc.3d 26, 773 N.Y.S.2d 773 (App. Term 2d & 11th Jud Dist. 2003). Lack of medical necessity must be supported by competent evidence such as an independent medical examination, peer review or other proof which sets forth a *factual basis and medical rationale* for denying the claim. *Healing Hands Chiropractic, P.C. a/a/o Cleeford Franklin v. Nationwide Assurance Company*, 5 Misc.3d 975, 787 N.Y.S. 645, (Civ. Ct. N.Y. Co. 2004)

"A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards. For example, the medical rationale may be insufficient if not supported by evidence of the generally accepted medical

professional practice." *Jacob Nir, M.D. a/a/o Josaphat Etienne v. Allstate Ins. Co.*, 7 Misc.3d 544, 796 N.Y.S.2d 857 (Civ. Ct. Kings Co. 2005).

"Generally accepted practice is that range of practice that the professional will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Citywide Social Work & Psychological Services, PLLC a/a/o Tremayne Brow v. Travelers Indemnity Co.*, 3 Misc.3d 608, 777 N.Y.S.2d 241 (Civ. Ct. N.Y. Co. 2004) This is the standard that will be applied herein.

Assignor S.G. a 53-year-old female was involved in an automobile accident on November 27, 2015. The next day complaining of intermittent low back pain and radiating neck pains she presented to Brij K. Mittal, M.D. at Applicant East Flatbush Medical, P.C. Diagnosed with cervical and lumbar sprains she was referred for physical therapy, chiropractic care, acupuncture, physical capacity testing, range of motion studies, PF-NCS studies, Kinesio taping, medical supplies and a neurological evaluation.

On March 10, 2016 complaining of radiating neck and back pains Assignor presented to Jean-Baptiste Simeon, M.D. a neurologist at Applicant. The neurological evaluation revealed decreased muscle strength and decreased sensation. Electrodiagnostic studies were then conducted on Assignor's upper and lower extremities. Applicant sought reimbursement from Respondent who denied the claim based on the peer review of Dr. Stauber. In opining the EMG/NCV studies performed on Assignor's upper and lower extremities were not medically necessary Dr. Stauber stated:

In this case, since there was no progressive deficits and no diagnostic dilemma, the Electrodiagnostic testing was not medically necessary.

The above quoted statement sets forth a sufficient factual basis and medical rationale for the opinion the electrodiagnostic studies provided were not medically necessary and therefore established *prima facie* the electrodiagnostic studies billed for were not medically necessary. See *Delta Diagnostic Radiology, PC v. Progressive Casualty Ins. Co.*, 21 Misc.3d 142A (App. Term 2d and 11th Jud. Dist. 2008); *Crossbridge Diagnostic Radiology, PC v. Progressive Casualty Ins. Co.*, 20 Misc.3d 143A (App. Term 2d and 11th Jud. Dist. 2008).

In response Applicant submitted a rebuttal from Jean-Baptiste Simeon, M.D. wherein he noted he initially examined Assignor March 10, 2016.

Dr. Stauber's conclusion that EMG / NCV studies were not necessary as there was no progressive deficits and that the accident resulted in soft tissue injury and did not result in neuropathic condition is false and misleading since the examination performed by Dr. Mittal on 11/28/2015 and by my office on 3/10/2016 revealed progressive neurological deficits . . .

I disagree with Dr. Stauber's conclusion that there was no genuine diagnostic dilemma in this case that would have medically justified an EMG/NCV study as my evaluation report dated 3/10/2016 clearly indicated the patient was recommended EMG/NCV studies of the upper and lower extremities to clarify the differential diagnosis and rule

out radiculopathy, entrapment/peripheral neuropathy, plexopathy, and myopathy in view of the patient's complaints, physical findings and working diagnosis.

In this case, EMG/NCV testing was ordered 1) to clarify the differential diagnosis and rule in/out radiculopathy, entrapment /peripheral neuropathy, myopathy and plexopathy in view of the patient's complaints, physical findings and working diagnosis 2) to definitively diagnose the patient's condition and determine the extent of injury thereby assisting in directing the delivery of care to patient's needs and administering appropriate therapy 3) to evaluate nerve and muscle function to better predict prognosis for recovery and possible residual neurological deficit.

Then citing to *The Workers' Compensation Board New York Neck and Back Injury Medical Treatment Guidelines* ["*Medical Treatment Guidelines*"], Dr. Simeon stated he followed proper protocols.

The *Medical Treatment Guidelines* were developed by representatives from the Insurance Department, the Workers' Compensation Board, the Department of Labor, and most importantly "highly qualified and respected medical professionals selected by labor, business, and the Insurance Department" and are codified and contained in the New York Codes, Rules, and Regulations at 12 NYCRR Part 324. With respect to workers' compensation claims, the *Medical Treatment Guidelines* are the mandatory standards of care for back, neck, shoulder, and knee injuries, effective for dates of service, on or after December 1, 2010.

Even though these *Medical Treatment Guidelines* are not dispositive in no-fault cases they are highly persuasive as to what the generally accepted medical practices are for treatment of neck, back and knee injuries in the State Of New York. Both workers' compensation claims and no-fault claims are similar in that they both involve trauma and injuries to individuals who then require treatment. So, while additional standards may have been referred to and proffered by both experts, they are not as compelling as the *Medical Treatment Guidelines* more fully described below.

With respect to EMG/NCV studies of the lower extremities the *New York Mid and Low Back Injury Medical Treatment Guidelines* state:

C.2.a.i EDS are not recommended for patients with acute, subacute, or chronic back pain who do not have significant leg pain or numbness.

C.2.a.ii EDS (must include needle EMG and NCS) are recommended where a CT or MRI is equivocal and there are ongoing complaints of pain, weakness, and/or numbness/parasthesias that raise questions about whether there may be a neurological compromise that may be identifiable. This means leg symptoms consistent with radiculopathy, spinal stenosis, peripheral neuropathy, etc.

Nerve conduction studies are done in addition to the needle EMG both to rule out other potential causes for the symptoms (co-morbidity or alternate diagnosis involving peripheral nerves, e.g. compression neuropathies) and to confirm radiculopathy, but the testing must include needle EMG.

C.2.a.iii *EDS is recommended where there is failure of suspected radicular pain to resolve or plateau after waiting 4 to 6 weeks (to provide for sufficient time to develop EMG abnormalities as well as time for conservative treatment to resolve the problems), equivocal imaging findings, e.g. on CT or MRI studies, and suspicion by history and physical examination that a neurologic condition other than radiculopathy may be present instead of or in addition to radiculopathy.*

Even though the *Mid and Low Back Guidelines* were quoted by Dr. Simeon he never fully explains or discusses their application to the facts herein. Specifically, he never even mentions the lumbar MRI that was conducted on March 24, 2016 which revealed L2/3 subligamentous disc herniation with thecal sac impression and disc bulges at L3/4 and L4/5 also with thecal sac impressions.

Electrodiagnostic studies are only indicated when the patient has significant leg pain or numbness and either 1. The MRI is equivocal and there are ongoing complaints of pain, weakness, and/or numbness/parasthesias that are suggestive of a neurological compromise or 2. The radicular pain failed to resolve or plateau after 4 to 6 weeks, there are equivocal imaging findings, and suspicion that a neurologic condition other than radiculopathy may be present.

Reviewing the evidence presented shows the testing was in accordance with the *New York State Workers' Compensation Treatment Guidelines*. The evidence establishes Assignor reported leg pain with numbness, that failed to resolve after 4 to 6 weeks and Dr. Simeon suspected that a condition other than radiculopathy may have been present. Moreover, the multiple bulging discs and herniation made it difficult to ascertain the level of the injury. [Oddly, the peer reviewer Dr. Stauber notes in his addendum that he was never provided with copies of the MRIs.]

Hence, Applicant's request for reimbursement for the EMG/NCV performed on Assignor's lower extremities is granted.

With respect to upper extremities EMG/NCV studies the *New York Neck Injury Medical Treatment Guidelines* state:

C.2.a Electrodiagnostic Testing (includes Needle EMG)

EDS include needle EMG (Electromyogram), peripheral nerve conduction studies (NCS) and motor and sensory evoked potentials. Needle EMG can substantiate the diagnosis of radiculopathy or spinal stenosis in patients with neck pain and/or radiculopathy problems. Needle EMG can help determine if radiculopathy is acute or chronic. NCS are done in addition to needle EMG to rule out other potential causes for the symptoms, (co-morbidity or alternate diagnosis involving peripheral nerves) and to confirm radiculopathy. It is recommended and preferred that EDS in the out-patient setting be performed and interpreted by physicians board-certified in Neurology or Physical Medicine and Rehabilitation.

In general, electrodiagnostic studies are complementary to imaging procedures such as CT, MRI, and/or myelography. Whereas X-ray, CT and MRI reflect structural changes, electrodiagnostic studies reflect neurologic functional status.

If significant radiating arm symptoms are present for greater than 4-6 weeks after the onset of injury and no obvious level of nerve root dysfunction is evident on examination, electrodiagnostic studies may be indicated. Electrodiagnostic studies may also be useful to determine the extent of injury in patients with an established level of injury

These standards appear to be much less restrictive than those for the lower extremities. Herein the *New York Neck Injury Medical Treatment Guidelines* specifically note that electrodiagnostic diagnostic studies of the upper extremities are complementary to imaging procedures. The *New York Neck Injury Medical Treatment Guidelines* go on to note that electrodiagnostic studies of the upper extremities are indicated when (1.) Radiating arm symptoms are present for more than four weeks and (2.) no obvious level of nerve root dysfunction is evident on examination.

In his rebuttal Dr. Simeon addresses these factors:

The patient had radicular neck pain and low back pain with numbness and tingling for over three months and as stated in the guideline above this clearly warranted the testing.

Hence, Applicant's request for reimbursement for the EMG/NCV performed on Assignor's upper extremities is granted.

Accordingly, based upon the *New York State Workers' Compensation Board Guidelines* cited by Applicant, Applicant's request for \$3,073.43 reimbursement is granted. This award is in full disposition of all No-Fault benefit claims submitted to this arbitrator.

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
	East Flatbush Medical PC	03/10/16 - 03/10/16	\$3,073.43	Awarded: \$3,073.43
Total			\$3,073.43	Awarded: \$3,073.43

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/13/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the motor vehicle accident occurred after Apr. 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). If an applicant does not request arbitration or institute a lawsuit within 30 days after receipt of a denial of claim form or from the payment of benefits, interest shall not accumulate on the disputed claim or element of claim until such action is taken. 11 NYCRR §65-3.9 (c).

In accordance with 11 NYCRR §65-3.9(c), interest shall be paid on the claim(s) totaling \$3,073.43 from the date the arbitration was commenced.

C. Attorney's Fees

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

In accordance with 11 NYCRR §65-4.6(d), the insurer shall pay Applicant an attorney's fee equal to 20% of the total amount awarded in this proceeding plus interest, with NO MINIMUM FEE and the maximum fee capped at \$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 New York

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

05/02/2018
(Dated)

Glen Wiener

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:
8798326982d97b782deaec82b847d248

Electronically Signed

Your name: Glen Wiener
Signed on: 05/02/2018