

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Sunil Butani Physicians PC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-17-1056-4888
Applicant's File No.	213818
Insurer's Claim File No.	0493311840101054
NAIC No.	35882

ARBITRATION AWARD

I, Kent Benziger, 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: R.M.

1. Hearing(s) held on 06/15/2018
Declared closed by the arbitrator on 06/15/2018

Kurt Lundgren, Esq. from Thwaites, Lundgren & D'Arcy Esqs participated by telephone for the Applicant

Jason Ciani, Esq. from Geico Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,586.82**, 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

1) Whether the Applicant /Provider, Sunil Butani Physicians PC, has made a prima facie showing of necessity for upper and lower extremity EMG/NCV studies; 2) Whether the Respondent has established lack of medical necessity for the studies based on the accompanying peer review of Dr. Alan Wolf, M.D.

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 records of this hearing. I have reviewed the documents contained in the electronic case folder as of the date of this award as well as any documents submitted upon continuance

of the case. Any documents submitted after the hearing that have not been entered in the electronic case folder as of the date of this award will be listed immediately below and forwarded to the American Arbitration Association at the time this award is issued for inclusion in said case folder.

4. Findings, Conclusions, and Basis Therefor

In this proceeding, the Applicant/Provider, Sunil Butani Physicians PC, is seeking reimbursement for upper and lower extremity EMG/NCV studies. On May 9, 2016, the Assignor/Eligible Injured Party, a 38-year-old female, was, by history, involved in a motor vehicle accident. Following the accident, the Assignor was evaluated at Winthrop University Hospital.

On May 14, 2016, the Assignor was evaluated at Action Sports Medicine & Pain Management for complaints of right and left sided neck pain that radiated bilaterally to the trapezius and up to the occipital head. She denied paresthesia. The Assignor also complained of back pain with mid back pain radiating to the anterior chest but the lower back pain did not radiate. On examination the Assignor had decreased range of motion in the cervical and lumbar spine. The Spurling's test was positive as was the Patrick/Faber's maneuver. Straight leg raise was positive bilaterally at less than 45 degrees. The assessment was of radiculopathy in the cervical, thoracic and lumbar region. The initial treatment recommendation was for physical therapy. On June 11, 2016, the Assignor was again evaluated by Dr. Butani of Action Sports Medicine for complaints of neck and lower back pain of 6/10. Cervical and lumbar range of motion was still decreased. Deep tendon reflexes were +1 on bilateral upper extremities, Spurling's test, Slump's test, Patrick/Faber's test and Straight Leg Raising were still positive and a mild antalgic gait was noted. Dr. Butani interpreted a lumbar MRI as revealing evidence of a central disc herniation at L5-S1. A cervical MRI revealed a C3-4 posterior disc bulge approaching the ventral cord and C5-C6 left paracentral disc herniation impinging on the spinal cord and narrowing the left lateral process.

On July 26, 2016, EMG/NCV studies of the upper and lower extremities were performed which revealed no evidence of cervical and lumbar radiculopathy.

The Respondent issued a denial for the upper and lower studies based on the accompanying peer review of Dr. Alan Wolf. From his review of the medical records, Dr. Wolf opined that the studies were premature and the Assignor had not had at least the required treatment period of physical therapy. He found that radiculopathy is a clinical diagnoses and that there no other neurological entities which needed to be differentiated. He opined there was no index of suspicion for peripheral nerve entrapment as no positive peripheral nerve entrapment signs were reported. Peripheral polyneuropathy is a systemic diagnosis and can be associated with diabetes mellitus. Myopathy is also a systemic diagnosis and would not be related to a motor vehicle

accident. Dr. Wolf found no such evidence of red flags or progressive neurological deficits. Further the type of exercises for such diagnoses would not be dependent on the results of electrodiagnostic studies.

He found the standard of care for EMG/NCV studies following a motor vehicle accident would be conservative care of at least six weeks. He cited Muscle & Nerve, Sup. 8, 1999 S107, "Electrodiagnostic studies should not be obtained if the information would not potentially enhance the patient's care. He cited the following:

According to National Guideline Clearinghouse, Neck and Upper Back (acute & chronic), 2008, "An EMG is not necessary for the diagnosis of intervertebral disc disease with radiculopathy; rather, its value lies in differentiating other types of neuritis, neuropathy, or muscle abnormalities from radicular neuropathy and for cases where the etiology of the pain is not clear."

Dr. Butani has submitted a rebuttal to the peer review. He first noted that the Assignor had undergone two months of physical therapy. He also cited sources that there is no specific guidelines for performing the studies as they are an extension of the neurological exam. He referred to the AANEM's Model Policy for Needle Electromyography and Nerve Conduction Studies, which noted: "EDX testing is indicated for the following scenarios such as symptom-based presentations such as "pain in limb", weakness, disturbance in skin sensation or "paranesthesia" and radiculopathy."

From his examinations, he found that the Assignor's symptoms were worsening. He also found that a main reason to perform the study was to exclude other conditions that could mimic radiculopathy. See: <http://neupsykey.com/radiculopathy-2/> He further cited a study by England et al. that concluded that physical examination findings including loss of reflex, sensory abnormality or weakness, are strong reasons for performing EDX test and not to find a reason to avoid EMG, which can localize the problem. In addition, Dr. Butani cited additional reasons from performing the study.

Management of the spinal injuries can range from appropriate pharmacological regimen in conjunction with therapy, to pain management and surgical intervention, and in order to establish how aggressive the treatment plan so the patient can achieve maximum medical recovery. It is medically necessary to determine precise localization, extent of nervous tissue damage, etiology of neurological deficit, and acute or chronic nature of it. In this case, depending on the EMG/NCV result, treatment can be

changed to conservative therapy to pain management with paraspinal block or epidural injections depending on the severity of the injury . Need for neurosurgical consult or change in modalities in therapy may be needed.

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Because of the variability of different nerve injuries, a standard rule on the timing of EDX testing cannot easily be established and the AANEM does not have specific recommendations in this regard. Additionally, a study by MJ Kothari, et al., was conducted to determine how frequently the results of EMG/NCS change the clinical management of the patient. They concluded EMG/NCS are useful, informative, and diagnostic in the management of various neurologic disorders.

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Also, the electrodiagnostic test is part of the patient's evaluation process and algorithm especially in cases of spinal injury. The test delineate a variety of pathologic changes that may otherwise escape detection and help examine atrophic, deeply situated or paretic muscles, which tend to defy clinical evaluation. "Electrodiagnostic (EDX) testing is the extension of a comprehensive history and neurological (and neuromuscular) examination. It is used to establish an accurate diagnosis for patients with symptoms suggestive of a neuromuscular disorder." Utilization Management Policy. Electrodiagnostic Testing. Approved 4/21/16.

(<https://www.myoptumhealthphysicalhealth.com/ClinicalPolicies/359.pdf>)

Analysis. A prima facie case of entitlement to No-Fault compensation is made out where the evidence proves that a claimant submitted proof of claim and that the billed amount was not paid within 30 days. Westchester Medical Center v. Clarendon National Ins. Co., 57 A.D.3d 659, 868 N.Y.S.2d 759 (2d Dept. 2008).. The Respondent then bears the burden to prove that the treatment was not medically necessary Kings Med. Supply Inc. v. Country-Wide Ins., 5 Misc.3d 767 (2004); Behavioral Diagnostics v. Allstate Ins. Co., 3 Misc.3d 246 (2004); A.B. Med. Servs v. Geico Ins. 2 Misc.3d 16 (App. Term 2d Dept. 2003). In this case, the peer review must submit "objective testimony or evidence to establish that his opinion is what is generally accepted in the medical profession." Williamsbridge Radiology v. Travelers, 14 Misc.3d 1231(a) (Civ. Ct Kings Co. 2007). When a carrier uses a peer review as basis for the denial, the report must contain evidence of the applicable generally accepted medical/professional standards as well as the provider's departure from those standards. Acupuncture Prima Care v. State Farm Mut. Auto Ins. Co. 17 Misc. 3d 1135 (Civ. Ct. Nassau, 12/03/07). Therefore, a peer reviewer must thoroughly review the relevant medical records and give evidence of generally accepted medical standards. Then, through careful analysis, the peer reviewer must apply those standards to the facts to document that the treatment in question was

not medically necessary. See: CityWide Social Work & Psychological Services v. Travelers Idem. Co., 3 Misc.3d 608, 609 (Civil Ct. Kings Co. 2004).

As a finding of fact, the peer review is not persuasive. Dr. Butani's rebuttal to the peer review is more persuasive. Dr. Butani found from his clinical examination that the Assignor's neurological condition was worsening despite approximately two months of conservative care. Based on these factors the Applicant met the requirement of medical necessity for the studies based on the cited authoritative sources. Dr. Butani also cited a study which concluded that the positive neurological findings in his exam were strong reasons for performing the exam. In addition, he noted sources that the found studies necessary since there are conditions that can mimic radiculopathy and the precise location of lesions can assist in formulating a better treating plan. The peer review failed to adequately discuss the positive clinical findings. See: Carle Place Chiropractic v. New York Central Mut. Fire Ins. Co., 19 Misc.3d 1139(A), (Dist. Ct. Nassau Co., Andrew M. Engle, J., May 29, 2008). Through the rebuttal, Dr. Butani has cited additional authoritative sources - which have not been rebutted by the peer review - which find the studies medically necessary. Nir v. Allstate Insurance Company, 7 Misc.3d 544, 546, 547 (2005). Applicant is awarded reimbursement for the studies.

Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), an arbitrator is the judge of the relevance and materiality of the evidence offered.

Interest. The insurer shall compute and pay to the Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(c)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.00 which is the total amount awarded one Applicant in one action from one provider. See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

APPLICANT IS AWARDED REIMBURSEMENT OF \$3,586.82, TOGETHER WITH INTEREST AND ATTORNEYS' FEES.

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
	Sunil Butani Physicians PC	07/26/16 - 07/26/16	\$3,586.82	Awarded: \$3,586.82
Total			\$3,586.82	Awarded: \$3,586.82

- B. The insurer shall also compute and pay the applicant interest set forth below. 02/25/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest. The insurer shall compute and pay to the Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(c)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.00 which is the total amount awarded one Applicant in one action from one provider. See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

- 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 Orange

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

06/30/2018
(Dated)

Kent Benziger

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:
e85548669506ee8bdc3bfd80fed928d1

Electronically Signed

Your name: Kent Benziger
Signed on: 06/30/2018