

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

BNT AMS Corp (Applicant)	AAA Case No.	17-23-1325-5500
- and -	Applicant's File No.	MB-90663, MB-90662
American Transit Insurance Company (Respondent)	Insurer's Claim File No.	1118149-04; 1118149-02
	NAIC No.	16616

ARBITRATION AWARD

I, Philip Wolf, 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 07/03/2024
Declared closed by the arbitrator on 07/03/2024

Mark Bratkovsky, Esq. from Law Offices of Mark Bratkovsky PC. participated virtually for the **Applicant**

Jeffrey Siegel, Esq. from American Transit Insurance Company participated virtually for the **Respondent**

2. The amount claimed in the Arbitration Request, **\$6,602.20**, 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 IC, a 56-year-old male, was a passenger in a motor vehicle which was involved in an accident on August 3, 2022. As a result of the accident, Assignor sustained injuries to his neck, mid-back, lower back, shoulders, and knees. Applicant is seeking reimbursement for an osteogen stimulator and tape delivered to Assignor on September 16, 2022. Respondent issued a timely denial based upon a lack of causation defense. The issue in dispute is whether Respondent has established its causation defense.

Assignor CC, a 43-year-old female, was a passenger in a motor vehicle which was involved in an accident on August 3, 2022. As a result of the accident, Assignor

sustained injuries to her neck, mid-back, lower back, right shoulder, and right knee. Applicant is seeking reimbursement for an osteogeny stimulator and tape delivered to Assignor on September 22, 2022. Respondent issued a timely denial based upon a lack of causation defense and upon a June 22, 2023 peer review and addendum conducted by Peter Chiu, M.D. The issue in dispute is whether Respondent has established its causation defense and lack of medical necessity defense.

4. Findings, Conclusions, and Basis Therefor

Claim for Assignor IC

Applicant IC is seeking reimbursement in the amount of \$3,301.10 for an osteogen stimulator and tape delivered to Assignor on September 16, 2022. This award is rendered upon the oral arguments of both parties and upon the documentary evidence submitted by both parties. The documentary evidence submitted by the parties consists of the documents contained within the ADR Center for this matter as of August 1, 2024.

Assignor was a passenger in a motor vehicle which was involved in an accident on August 3, 2022. As a result of the accident, Assignor sustained injuries to his neck, mid-back, lower back, shoulders, knees. On September 8, 2022, Assignor's treating physician, Hong Pak, M.D. prescribed the use of an osteogen stimulator. Applicant delivered the osteogeny stimulator and tape to Assignor on September 16, 2022. Respondent has acknowledged receipt of Applicant's bill.

After reviewing the evidence submitted by Applicant, I find that Applicant has submitted sufficient credible evidence to establish a prima facie case with respect to the osteogen stimulator and taped delivered on September 16, 2022. *See, Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 2015 NY Slip Op 04787 (2015).

Respondent issued a timely denial asserting:

Entire claim is denied based upon American Transit is investigation and examination under oath held 08/09/2023. American Transit is asserting a lack of coverage, as it has established the "fact or founded belief" that the claimant is treated condition was unrelated to the motor vehicle accident and entire claim is denied based upon the founded belief the alleged injuries did not arise out of an insured event and/or are not casually related to a covered accident.

With respect to causation, the burden is on the Respondent to come forward with proof establishing by "fact or founded belief" its defense that the claimed injuries have no nexus to the accident. *See, Bronx Radiology, P.C. v. New York Central Mutual Fire Ins. Co.*, 847 N.Y.S.2d 313, 17 Misc. 3d 97 (1st Dept. 2007); *Central Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 N.Y.S.2d 195, 659 N.Y.S.2d 246 (1999). Respondent

must demonstrate not only a lack of causation, but that the accident did not exacerbate or aggravate any preexisting condition or injury. See, Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S.2d 680 (2nd Dept. 2009).

In support of its defense, Respondent relies solely on the August 9, 2023 EUO transcript of Assignor. Respondent has not submitted an SIU investigation report and/or any other evidence in support of its lack of causation defense.

A review of the EUO transcript reveals that Assignor testified that he was a rear seat passenger in a cab that was struck with a heavy impact by a motor vehicle while stopped at a light. Assignor testified that as a result of the accident his right knee hit the seat. Assignor testified that after the accident he had pain in the back, right knee, neck, right ankle as well as "nerve problems."

After reviewing the EUO transcript, I find that it substantiates that Assignor was involved in a motor vehicle accident on August 3, 2022 and that as a result of the accident he sustained bodily injuries. Accordingly, I find that Respondent has failed to establish its lack of causation defense. It is noted that I previously rendered an award involving the same Assignor and causation defense and found that Respondent had failed to establish its causation defense. Said award was affirmed by a Master Arbitrator. See, Manamim MS, Inc. and American Transit Insurance Company, AAA Case NO. 99-23-1320-8744 (Master Arbitrator Weisman 07/15/2024) Applicant's claim for Assignor IC is granted in its entirety.

Claim for Assignor CC

Applicant IC is seeking reimbursement in the amount of \$3,301.10 for an osteogen stimulator and tape delivered to Assignor on September 22, 2022. This award is rendered upon the oral arguments of both parties and upon the documentary evidence submitted by both parties. The documentary evidence submitted by the parties consists of the documents contained within the ADR Center for this matter as of August 1, 2024.

Assignor was a passenger in a motor vehicle which was involved in an accident on August 3, 2022. As a result of the accident, Assignor sustained injuries to her neck, mid-back, lower back, right shoulder, and right knee. On September 8, 2022, Assignor's treating physician, Hong Pak, M.D. prescribed the use of an osteogen stimulator. Applicant delivered the osteogeny stimulator and tape to Assignor on September 22, 2022. Respondent has acknowledged receipt of Applicant's bill.

After reviewing the evidence submitted by Applicant, I find that Applicant has submitted sufficient credible evidence to establish a prima facie case with respect to the osteogen stimulator and taped delivered on September 22, 2022. See, Viviane Etienne Med. Care v. Country-Wide Ins. Co., 25 N.Y.3d. 498, 2015 NY Slip Op 04787 (2015).

Respondent issued a timely denial asserting:

Entire claim is denied based upon American Transit is investigation and examination under oath held 05/24/2023. American Transit is

asserting a lack of coverage, as it has established the "fact or founded belief" that the claimant's treated condition was unrelated to the motor vehicle accident and entire claim is denied based upon the founded belief the alleged injuries did not arise out of an insured event and/or are not casually related to a covered accident.

With respect to causation, the burden is on the Respondent to come forward with proof establishing by "fact or founded belief" its defense that the claimed injuries have no nexus to the accident. *See, Bronx Radiology, P.C. v. New York Central Mutual Fire Ins. Co.*, 847 N.Y.S.2d 313, 17 Misc. 3d 97 (1st Dept. 2007); *Central Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 N.Y.S.2d 195, 659 N.Y.S.2d 246 (1999). Respondent must demonstrate not only a lack of causation, but that the accident did not exacerbate or aggravate any preexisting condition or injury. *See, Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 871 N.Y.S.2d 680 (2nd Dept. 2009).

In support of its defense, Respondent relies solely on the May 24, 2023 EUO transcript of Assignor. Respondent has not submitted an SIU investigation report and/or any other evidence in support of its lack of causation defense.

A review of the EUO transcript reveals that Assignor testified that she was a rear seat passenger in a cab that was struck with a heavy impact by a truck while stopped at a light. Assignor testified that the airbags were deployed in the cab. Assignor testified that after the accident she had pain in the right shoulder, right knee, and whole back. Assignor also testified that she was not experiencing pain in any part of her body prior to the subject motor vehicle accident.

After reviewing the EUO transcript, I find that it substantiates that Assignor was involved in a motor vehicle accident on August 3, 2022 and that as a result of the accident she sustained injuries to her right shoulder, right knee, and back. Accordingly, I find that Respondent has failed to establish its lack of causation defense.

Respondent's defense is also based upon a June 22, 2023 peer review conducted by Peter Chiu, M.D. and June 21, 2024 addendum. Doctor Chiu opined that the osteogen stimulator was not medically necessary/casually related. In reaching his opinion, Dr. Chiu does cite/reference to medical authority in compliance with the requirements set forth in *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) and *CityWide Social Work & Psychological Services, P.L.L.C. a/a/o Tremayne Brow v. Travelers Indemnity Company*, 3 Misc. 3d 608, 777 N.Y.S.2d 241 (Civ. Ct. Kings Co. 2004).

Doctor Chiu citing authority states "PEMF therapy is safe in patients with chronic non-specific neck pain. However, it does not provide further improvement in pain and functionality when applied in addition to a conventional physical therapy." Doctor Chiu states that there was no literature specifically on MVA related sprain/strain injuries.

In his June 21, 2024 addendum, Dr. Chiu states that the osteogen stimulator "was provided without any indication of its benefit while in physical therapy or for home

use." "Acute and sub-acute injuries would not require excessive durable medical equipment." "There was no treating providers' medical evaluation to indicate any progressive neurological deficits, progressive joint internal derangement, red flags or treatment response to conservative care to warrant the DME." Doctor Chiu reiterates that the osteogen stimulator is not standard of care for sprain/strain and contusion/strain injuries.

Where Respondent has presented sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to the Applicant, which must present its own evidence of medical necessity and/or rebuttal to Respondent's peer review. *See, A. Khodadadi Radiology, P.C. v. Central Mutual Fire Ins. Co.*, 2007 NY Slip Op 51342U, 16 Misc. 3d 131A (2nd Dept. 2007).

Applicant has submitted a rebuttal by Drora Hirsch, M.D. states that there is literature supporting the use of osteogen stimulators for patients dealing with musculoskeletal injury and suffering from chronic pain, as was the case for this patient. PEMF is a wearable noninvasive PEMF (Pulsed Electromagnetic Field) Device intended to relieve pain anywhere on the body, safely and effectively without risks of addiction or harmful side effects, PEMF offers a cost-effective treatment option as it is a one-time purchase with no need to purchase batteries or electrodes. PEMF repolarizes the electrical field of damaged or injured tissue which allows ineffective cells to return to normal function. It should be understood that this device is supplementary to office based physical therapy treatment. The goal of prescribing this device was to facilitate the healing process quicker and allow other therapeutic modalities to work.

Doctor Chiu stated that PEMF is safe for patients with chronic pain but that there was no use for it with respect to acute and sub-acute injuries. In her rebuttal, Dr. Hirsch specifically stated " there is literature supporting the use of osteogen stimulators for patients dealing with musculoskeletal injury and suffering from chronic pain, as was the case for this patient." A review of the records relieved that the osteogen stimulator was prescribed on September 8, 2022, a little over a month post-accident. At the time of the prescription, Assignor's injuries clearly could not be considered "chronic."

Based upon the foregoing, and after reviewing the evidence, I find that Applicant has failed to establish the medical necessity for the osteogen stimulator delivered on September 22, 2022. I am persuaded by the opinion of Dr. Chiu, and his rationale as set forth herein. Accordingly, Applicant's claim is denied with respect to the osteogen stimulator delivered to Assignor CC on September 22, 2022.

DECISION: Based upon the foregoing, Applicant is awarded \$3,301.10. 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
	BNT AMS Corp	09/16/22 - 09/16/22	\$3,301.10	Awarded: \$3,301.10
	BNT AMS Corp	09/22/22 - 09/22/22	\$3,301.10	Denied
Total			\$6,602.20	Awarded: \$3,301.10

B. The insurer shall also compute and pay the applicant interest set forth below. 11/16/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the applicant the amount of interest at the rate of 2% per month, simple, and ending with the date of payment of the award. Respondent timely denied the subject bill and arbitration was not commenced within 30 days after receipt of denial. Accordingly, interest shall begin to accrue as of the date adjudication was commenced by the claimant, i.e., the date the claim was received by the AAA (**11/16/23**). *See, LMK Psychological Services, P.C. v. State Farm Mut. Auto. Ins. Co., 2009 NY Slip Op 02481 (2009).*

C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(d).

- 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 NY

SS :

County of Suffolk

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

08/01/2024
(Dated)

Philip Wolf

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:
554b77cba8e2fd0dbc721189af32edc4

Electronically Signed

Your name: Philip Wolf
Signed on: 08/01/2024