

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ahmed Elfiky MD
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-18-1085-8950

Applicant's File No. None

Insurer's Claim File No. 0263196601

NAIC No. 19232

ARBITRATION AWARD

I, Paul Israelson, 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: injured person.

1. Hearing(s) held on 07/24/2018
Declared closed by the arbitrator on 07/24/2018

April Mittleman Esq. from April Mittleman Esq. participated in person for the Applicant

Marcia Brin Esq. from Law Offices of Karen L Lawrence participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,666.22**, 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

Was the subject EMG NCV test of the injured person's lower extremities medically necessary?

4. Findings, Conclusions, and Basis Therefor

On July 24, 2018, the hearing for the within arbitration matter was conducted and closed.

At the hearing, the applicant did not raise any argument as to the timeliness of the respondent's denial of the applicant's claim.

At the hearing, the respondent did not articulate any argument as to the propriety or accuracy of the applicant's calculation of its requested fee.

The date of the subject automobile accident was October 15, 2012.

The applicant made a claim in the amount of \$1,666.22 for the January 25, 2013 EMG NCV test of the injured person's lower extremities. The respondent denied the applicant's claim on the basis that the subject EMG NCV test was not medically necessary.

As to the medical necessity for the subject EMG NCV testing of the injured person's lower extremities, "Medical necessity is presumed upon the timely submission of a no-fault claim (see *All County Open MRI & Diagn. Radiology P.C. v. Travelers Ins. Co.*, 11 Misc.3d 131[A], 2006 N.Y. Slip Op 50318[U] [App Term, 9th & 10th Jud Dists 2006]). Thus, ordinarily it falls to the defense to establish that the billed-for services were not medically necessary.", *Park Slope Medical and Surgical Supply, Inc. v. Progressive Ins. Co.* 34 Misc.3d 154(A), 950 N.Y.S.2d 609 (App. Term, 2nd, 11th and 13th Dists. 2012). In this case there is no question of fact that the applicant timely submitted its proof of claim for the subject EMG NCV testing, and therefore, the applicant may employ this same presumption of medical necessity for that same testing.

Additionally concerning the respondent's challenge to the medical necessity for the subject EMG NCV testing of the injured person's lower extremities, "For an expense to be considered medically necessary, the treatment, procedure, or service ordered by a qualified physician must be based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed with. Such treatment, procedure, or service must be warranted by the circumstances as verified by a preponderance of credible and reliable evidence, and must be reasonable in light of the subjective and objective evidence of the patient's complaints." *Nir v. Progressive Insurance Co.*, 7 Misc.3d 1006(A), 801 N.Y.S.2d 237 (Table), 2005 N.Y. Slip Op. 50466(U), 2005 WL 782806 (Civ. Ct. Kings Co., Nadelson, J., Apr. 7, 2005).

As well, "A no-fault insurer defending a denial of first-party benefits on the ground that the billed for services were not 'medically necessary' must at least show that the services were inconsistent with generally accepted medical/professional practices. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden of proving that the services were not 'medically necessary', (*Citywide Social Work & Psy, Serv. v. Travelers Indem. Co.*, 3 Misc.3d 608, 609 supra.). 'Generally accepted practice' is that range of practice that the profession will follow in the diagnosis and treatment of

patients in light of the standards and value that define its calling (A.B. Med. Ser. v. New York Central Mut. Fire Ins. Co., 7 Misc.3d 1018[A][Civ. Ct. Kings Co.2005]; Citywide Social Work & Psy Serv. v. Travelers Indemnity Co., supra).", A.R. Medical Art, P.C. v. State Farm Mut. Auto. Ins. Co., 11 Misc.3d 1057(A), 815 N.Y.S.2d 493 (Civ. Ct. Kings Cty. 2006).

The respondent provided the April 3, 2013 by Dr. Daniel Feuer M.D. in support of the respondent's argument that the subject EMG NCV testing of the injured person's lower extremities was not medically necessary. Dr. Feuer reviewed the records concerning the injured person's relevant medical history and condition, and noted:

"Based on the medical records presented for my review, the claimant is a forty three year old female who was involved in a motor vehicle accident on October 15, 2012. The claimant was referred for medical evaluation, diagnostic testing and therapy treatments.

MRI testing of the lumbar spine failed to document focal nerve root impingement to support a diagnosis of radiculopathy.

A clinical evaluation by Dr. Elfiky on January 25, 2013, reported subjective complaints referable to the neck and lower back. The clinical examination was remarkable for muscle spasm of the lumbar spine as well as exact symmetrical motor deficits of the lower extremities and questionable exact symmetrical sensory deficits in the lower extremities.

On January 25, 2013, Dr. Elfiky performed EMG/NCV of the lower extremities including needle EMG testing of the lumbar paraspinal muscles at multiple levels, which reported normal findings."

Dr. Feuer argued that there was no focal motor, reflex or sensory deficits of the lower extremities, nor was there a differential neurologic diagnosis to be resolved by EMG NCV testing, where he stated, ""Sensation should be tested in the signature zones of the major roots. The status of knee and ankle reflexes reflects the integrity of the L3-L4 and S1 roots, respectively." (deJong's The Neurologic Examination, William Campbell; Lippincott Williams & Wilkins. 2005, pg. 574). The medical record presented for review fails to document focal motor, reflex and sensory deficits of the lower extremities to support the medical necessity for EMG/NCV testing of the lower extremities.

Indications for performing electrodiagnostic testing include defining the distribution of abnormal nerve function in order to aid in selecting appropriate treatment options. A

comprehensive neurological examination including a differential diagnosis should accompany the testing."

Dr. Feuer reiterated his argument that the injured person did not present with a differential neurologic diagnosis to be resolved by EMG NCV testing, where he stated, "In the event that radiculopathy was suspected, there was no presentation of a differential diagnosis that warrants performing invasive electrodiagnostic testing. There was no mention that there was a plan to use the results of the study to pursue more aggressive treatment on the claimant or how the anticipated test results would guide the management of the claimant's treatment program. In order for neurodiagnostic testing to be medically justified, it must at least have an impact upon the course of the therapy a patient is receiving. This is not evident upon reviewing the medical records, as the records do not show that the performance of the neurodiagnostic studies had significantly impacted the therapy and/or delivery of care to this individual. Based on the records, the results of the studies, regardless of the findings, would not alter or impact the course of treatment or patient's outcome at that stage of the claimant's injuries, therefore they were not medically necessary.

In the patient with classic localizable symptoms of radiculopathy, focal neurologic deficits, and appropriately positioned structural abnormalities on neuroimaging studies, clinical decisions can be made without the confirmatory findings provided by the EMG examination."

Dr. Feuer also questioned the accuracy of the treatment records for the injured person and/or the results of the subject EMG NCV testing, in that the treatment records indicated muscle spasm and restricted range of motion of the paraspinal musculature, however, EMG NCV testing is conducted under circumstances where the patient's muscles are at rest, as opposed to tense with spasms, and indeed, if the subject EMG NCV testing was conducted under circumstances where the injured person's paraspinal muscles were tense with spasms, the results of the subject EMG NCV testing would be flawed, where he stated, "The medical record presented for my review documents spasm and restricted range of motion of the paraspinal musculature. However, the claimant was able to tolerate needle EMG testing of these same muscles. "The muscle is evaluated at rest, that is, with the needle stationary in a relaxed muscle (spontaneous activity)." (Electrodiagnosis in Diseases of Nerve and Muscle: Principles and Practice; Jun Kimura, MD, pg 237)

Spasm is defined as involuntary muscle contraction. The rigid nature of this clinical finding makes it technically difficult to insert needles. The muscle contraction produced as a result of spasm obscures the audio and visual component of the needle testing rendering this study unreliable. There is no discussion or explanation within the medical record as to how this testing was performed or tolerated.

The performance of EMG/NCV testing should be based on reliable and consistent clinical data, which would support the medical necessity for such testing. A clinical examination reporting significant tenderness or spasms of a particular muscle group would preclude needle EMG of these muscles. If such testing was performed and tolerated then the original clinical evaluation was flawed and this clinical evaluation should not serve as the basis for EMG/NCV testing.

The medical records presented for review documents subjective complaints, focal neurological deficits and imaging findings on MRI testing, which do not correlate and therefore failed to support the medical necessity for EMG/NCV testing."

As such, pursuant to the above cited authorities, Dr. Feuer's April 3, 2013 peer review report sustained the respondent's burden of demonstrating that the subject EMG NCV testing of the injured person's lower extremities was not medically necessary.

The applicant provided the April 25, 2013 peer review rebuttal by Dr. Ahmed Elfiky M.D. in support of the applicant's claim for the subject EMG NCV test of the injured person's lower extremities. Dr. Elfiky reviewed the injured person's relevant medical history and condition, and noted:

"My patient, [the injured person] was referred to me by his treating physician, Dr. Bae on November 30, 2012. His main complaint was radicular lower back pain associated with a heavy sensation of the bilateral legs and intermittent muscle cramps at the calf, which occurred after he was involved in an MVA on October 15, 2012. At the time of his exam, he was receiving chiropractic care 3-4x weekly. He was taking NSAIDs around the clock. His neurological evaluation was significant for positive SLR and muscular spasm from L2 through S1. He was given a prescription to start PT as an adjunct to the current chiropractic care to promote and expedite recovery. He was given Flexeril as a muscle relaxant to be taken at night.

On January 25, 2013 [the injured person] presented for a follow-up neurological evaluation. He had complaints of persistent radicular lower back pain and new symptoms of developing an electric-like shock sensation going from his back to his bilateral feet, mainly when he would sneeze or cough. He was concerned about his radicular lower back pain, which was interfering with his daily activities, sitting, standing or walking over 10-15 minutes. He brought in his MRI study performed in December 2012 which revealed L5-S1 disc herniation creating central canal stenosis and encroachment of the bilateral neural foramina, as well as L4-L5 diffuse disc bulge, associated with encroachment of the neural foramina. [The injured person]'s neurological evaluation had revealed developing weakness on bilateral hip flexion/extension and leg extension, 4/5, which was not present on his initial exam. He also had hypoesthesia at the bilateral L5

dermatome. An EMG/NCV study for the lower extremities was performed to clarify the possibility of nerve root injuries due to his worsening condition and developing an electric-like shock sensation."

Dr. Elfiky argued that his November 30, 2012 and January 25, 2013 examinations of the injured person indicated that the injured person's symptoms had become worse, the injured person developed an electric-like shock sensation traveling to both legs and feet when he sneezed or coughed, the injured person's MRI of the lumbar spine disclosed a disc herniation at the L5-S1 level creating a central canal stenosis and encroachment of the bilateral neural foramina, and the injured person developed weakness on the bilateral hip flexion/extension and leg extension, where he stated, "It was very clear in both of my reports, November 30, 2012 and January 25, 2013 that my patient had worsening of his symptoms and developed an electric-like shock sensation going to his bilateral legs and feet when he would sneeze or cough. His MRI of the lumbar spine was significant for L5-S1 intervertebral disc herniation creating central canal stenosis and encroachment of the bilateral neural foramina, as well as L4-L5 diffuse disc bulges, associated with encroachment of the bilateral neural foramina. My patient, [the injured person] had developed weakness on bilateral hip flexion/extension and leg extension, which was not present on his exam dated November 30, 2012, as well as developing hypoesthesia at the bilateral L5 dermatome."

Dr. Elfiky argued that, in the event the subject EMG NCV testing was positive for radiculopathy then he would refer to the injured person to a spinal neurosurgeon to discuss the possibility of a lumbar laminectomy, where he stated, "There was clearly a plan to be set in place on my report dated January 25, 2013. If the EMG/NCV study was positive for radiculopathy I would send my patient to a spine/neurosurgeon for the possibility of undergoing lumbar laminectomy surgery otherwise, he would have been sent to pain management to undergo a series of 3 lumbar epidural steroid injections."

In conclusion, the EMG/NCV study for the lower extremities was performed to rule in or rule out positive nerve root injuries, radiculopathy as my patient had significant findings on his lumbar spine MRI. This study assisted me with educating my patient to his future prognosis and a plan to either send him to a spine/neurosurgeon if the study was positive for radiculopathy or to send him to pain management for a series of 3 lumbar epidural steroid injections."

Overall, Dr. Elfiky's April 25, 2013 peer review rebuttal set forth a convincing argument for the medical necessity of the January 25, 2013 EMG NCV testing the injured person's lower extremities.

I have reviewed and considered all other arguments, contentions and evidence from both the applicant and the respondent, and find them to be without merit.

Consequently, the applicant's claim in the amount of \$1,666.22 for the January 25, 2013 EMG NCV testing of the injured person's lower extremities 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
	Ahmed Elfiky MD	01/25/13 - 01/25/13	\$1,666.22	Awarded: \$1,666.22
Total			\$1,666.22	Awarded: \$1,666.22

- B. The insurer shall also compute and pay the applicant interest set forth below. 02/05/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest will run from the filing date to the date of payment.

C. Attorney's Fees

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

If this matter was filed prior to February 4, 2015, the insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6 (e). If this matter was filed on or after February 4, 2015, the insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(d); and in such same event, if the benefits and interest awarded thereon are equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

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

07/28/2018

(Dated)

Paul Israelson

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:
74b4629f72828340faea82106f0b167a

Electronically Signed

Your name: Paul Israelson
Signed on: 07/28/2018