

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Hudson Valley Chiro & Rehab, PC  
(Applicant)

- and -

Hereford Insurance Company  
(Respondent)

AAA Case No. 17-17-1072-0374

Applicant's File No.

Insurer's Claim File No. 66223-01

NAIC No. 24309

**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: J.R.

1. Hearing(s) held on 04/19/2018, 08/24/2018  
Declared closed by the arbitrator on 08/24/2018

Jeffrey Datikashvili, Esq. from Gene Sigalov Esq. participated by telephone for the Applicant

Andrew Schiavone, Esq. from Law Offices of Rubin & Nazarian participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,279.44**, 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, Hudson Valley Chiropractic and Radiology, P.C., has made a prima facie showing of necessity for upper and lower EMG/NCV studies; 2) Whether the Respondent has sustained its burden of proof that the studies were not medically necessary based on accompanying peer reviews from Dr. Kevin Portnoy, D.C.

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, Hudson Valley Chiropractic & Rehabilitation, P.C., is seeking reimbursement for upper and lower extremity EMG/NCV studies. On March 9, 2017, the Assignor/Eligible Injured Party, a 22-year-old female, was, by history, involved in a motor vehicle accident. The Assignor was reportedly transported to the emergency room of Mt. Sinai Hospital where CT scans were performed. The Assignor then followed up with Dr. Peter Morgan for neck and low back injuries. Dr. Morgan recommended conservative care for four weeks.

On April 21, 2017, the Assignor was evaluated by Dr. Drag for lower back pain radiating into the bilateral buttocks, bilateral leg pain, left worse than right and neck pain radiating into both arms, left worse than right. On examination, cervical and lumbar range of motion was diminished. Muscle strength was weak in the left hip flexor and plantar flexor, left grip, bicep, deltoid and wrist extensors. Deep tendon reflexes in the patella's and Achilles were sluggish and in the biceps on the left. Abnormal sensation was noted in the left and right arm and both legs in no dermatomal distribution. An upper extremity EMG/NCV was performed which was interpreted as revealing moderate bilateral carpal tunnel syndrome (median nerve entrapment at the wrist and moderate acute C5 and C6 radiculopathy. The lower extremity study revealed evidence of peripheral neuropathy of the bilateral lower extremities and mild acute S1 radiculopathy on the left.

The Respondent issued a denial for the studies based on the accompanying peer review from Dr. Kevin Portnoy. Dr. Portnoy found that that referring provider failed to indicate how the study was necessary and would aid in the enhancing the clinical progress of the patient.

The peer review then discussed how NCV and EMG studies work and can assist in differentiating between an injury to the nerve axon and an injury to the myelin sheath. He noted that such distinctions assist in determining the proper course of treatment and the necessity of diagnosing injuries to the peripheral nerves. Dr. Portnoy noted that NCV/EMG testing may be helpful in determining the functional significance of known or suspected compression lesions of the nervous system when a patient is considered for de-compressive surgery. From his review of the records, Dr. Portnoy found no such evidence that the Assignor was a pre-surgical or electrodiagnostic candidate. He found no indication that the Assignor's condition was worsening and the study was not

necessary for the continuation of conservative chiropractic care. Further, no alternative or invasive procedure were being considered. The peer review also opined that the studies would not be necessary to continue chiropractic care. He further stated:

According to the "Guidelines for Ethical Behavior Relating to Clinical Practice Issues in Neuromuscular & Electro diagnostic Medicine - Muscle Nerve, 42:480-486, 2010), "The physician should perform a sufficient comprehensive neuromuscular evaluation and/or EDX study that can address the issues necessary to determine or evaluate a reasonable differential diagnosis." Therefore, in light of the above, based upon clinical findings in this case, there was no differential diagnosis that would necessitate the performance of the study causally related to the accident.

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According to an online article published and updated 10/8/15 on Medscape written by Gerard Malanga, MD., "The primary use of EMG is to confirm nerve root dysfunction when the diagnosis is uncertain or to distinguish a cervical radiculopathy from other lesions when the physical examination findings are unclear

The standard of care would have been a trial of conservative therapy. If the clamant failed to respond and clinical evidence of progressive neurological or orthopedic deficits than an MRI might be indicated. The peer review found that Dr. Moran failed to indicate any positive neurological findings to warrant the study.

Rebuttal. Dr. Drag has submitted a rebuttal to the peer review. Through a review of Dr. Morgan's report as well as his own findings, Dr. Drag noted the Assignor's history and the positive clinical findings. His diagnoses included radiculopathy, plexopathy, neuropathy, sciatic neuropathy, nerve root compression, carpal tunnel compression of median nerve, paresthesia. He recommended the EMG/NCV studies to evaluate for radiculopathy and isolate neurological dysfunction, to evaluate entrapment syndrome, differentiate between radiculopathy vs myelopathy vs peripheral neuropathy vs plexopathy, to evaluate for a surgical referral.

Contrary to the peer review, Dr. Drag found the Assignor had not improved with conservative care. Dr. Drag found that the Assignor did have a deteriorating condition and progressive worsening deficits that even met Dr. Portnoy's requirement for EMG/NCV studies. He opined that EMG/NCV studies in combination with MRI studies produce higher diagnostic accuracy. He then cited authoritative sources supporting the benefits of performing both studies.

Dr. Drag noted that surgery and injections are but two of twelve indications listed by AANEM for performing electrodiagnostic studies. He noted the purpose of the testing can also 1) distinguish between differential diagnosis, 2) help determine the extent of abnormal function, and 3) help determine and guide treatment options, prognosis and the level of recovery (SEE AANEM Guidelines page 4, items 1-12).

The peer review then took issue with Dr. Portnoy's contention there was no differential diagnosis.

The patient's examination revealed radicular pain, numbness and weakness. U.S. National Library of Medicine states that clinical manifestation for diagnosis of both radiculopathy and neuropathy includes radicular pain, numbness, sensory loss, and weakness.

<http://www.nlm.nih.gov/cgi/mesh/2011/MB.CGI?mode=&term=Radiculopathy>

<http://www.nlm.nih.gov/medlinesplus/peripheralnervedisorders.html>

He then cited additional sources as to benefits and accuracy of EMG/NCV studies and its role in formulating treatment options

Addendum. Dr. Portnoy then issued an addendum. He maintained that it was Dr. Morgan's responsibility - not Dr. Drag to order document the necessity fo the test. He again noted there was no diagnostic dilemma or invasive change necessary following course of six to eight weeks of physical therapy. He cited ODG Integrated Treatment/Disability Duration Guidelines that NCS may not be necessary if the EMG clearly establishes radiculopathy. electrodiagnostic studies are not necessary.

Analysis. Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), A prima facie case of entitlement to No-Fault compensation is made out where the evidence proves that a clamant submitted proof of claim and that the billed amount was not paid within 30 days. Westchester Medical Center v. Lincoln General Ins. Co., 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2d Dept. 2009); 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 as to the both extremity studies. Dr. Portnoy has failed to thoroughly discuss the extensive positive findings on Dr. Drag's clinical examination which included positive findings of decreased motor strength, diminished reflexes and positive orthopedic tests. In addition, Dr. Portnoy failed to discuss the findings of the EMG/NCV studies which revealed evidence of not only radiculopathy, but also peripheral neuropathy and median nerve entrapment. In sum, the study confirmed Dr. Drag's necessity for the study which included a differential diagnosis. A peer review must incorporate, discuss and review the patient's medical history including all positive clinical and diagnostic findings.. 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). In addition, Dr. Drag cited authoritative sources that the patient's clinical findings could be a basis for differential diagnosis of both radiculopathy and neuropathy. The treating provider's rebuttal has cited an extremely extensive number of medical sources and studies that have found EMG/NCV studies necessary under the facts of this case. Dr. Drag has established that the Assignor's symptoms persisted despite conservative care and there were significant clinical findings and question as to a deteriorating or progressive neurological deficits. In sum, the Respondent has failed to sustain its burden of proof of lack of medical necessity. Nir v. Allstate Insurance Company, 7 Misc.3d 544, 546, 547 (2005). Applicant is awarded reimbursement for both studies.

Fee Schedule. Pursuant to the Fourth Amendment effective April 1, 2013 to 11 NYCRR 65-3.8(g)(1), the Applicant's fees cannot exceed the charges permitted pursuant to the Insurance Law 5108 which would incorporate the Workers Compensation Fee Schedule. If there is a dispute that requires an application or interpretation of the fee schedule, the Respondent has the burden to come forward with competent evidentiary proof to support its defenses. Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co., 13 Misc.3d 172 (Civil Ct, Kings Co. 2006).

The Respondent has submitted an Explanation of Review supported by a Med Source Statement. The Respondent states that the actual EMG study billed pursuant CPT 95861 should have re-coded to CPT 95864. However, as this issue involves an interpretation of the fee schedule and the Carrier has failed to submit a peer review or an affidavit from a certified coder establishing that it properly reimbursed for the services. Custis v. Travelers Property Casualty Ins. Co., 27 Misc.3d 928, 899 N.Y.S.2d 578 (Dist. Ct. Suffolk Co. 2010). The peer reviewer's contention that an EMG study without performing NCV studies was sufficient is without merit. However, the Respondent also

contends that the Applicant failed to properly bill pursuant to the chiropractic rate for the services performed using the proper chiropractic conversion factor for Region Two. This does not involve an interpretation but rather a straight forward application fo the fee schedule. Therefore the proper amount billed for the upper and lower extremity studies totals \$1833.82,

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 \$1,833.82, 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              |
|---------|---------------------------------|---------------------|--------------|---------------------|
|         | Hudson Valley Chiro & Rehab, PC | 04/21/17 - 04/21/17 | \$1,057.65   | Awarded: \$850.88   |
|         | Hudson Valley Chiro & Rehab, PC | 04/21/17 - 04/21/17 | \$1,221.79   | Awarded: \$982.94   |
| Total   |                                 |                     | \$2,279.44   | Awarded: \$1,833.82 |

- B. The insurer shall also compute and pay the applicant interest set forth below. 08/16/2017 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.

09/18/2018

(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:**  
4478407dd0777233a03c27efc718647f

### **Electronically Signed**

Your name: Kent Benziger  
Signed on: 09/18/2018