

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Scott A Croce DC, PC / Erie County  
Chiropractic  
(Applicant)

- and -

Preferred Mutual Insurance Company  
(Respondent)

AAA Case No.	17-18-1100-8750
Applicant's File No.	004-18-061
Insurer's Claim File No.	17110401
NAIC No.	15024

**ARBITRATION AWARD**

I, Fred Lutzen, 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: EIP/claimant/patient

1. Hearing(s) held on 03/06/2019  
Declared closed by the arbitrator on 03/06/2019

Pasquale V. Bochiechio, Esq., from Pasquale V. Bochiechio, P.C. participated in person for the Applicant

Ryan Mura, Esq., from Mura & Storm, PLLC participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 834.88**, 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

Applicant seeks reimbursement in the amount of \$834.88 for lower EMG/NCV testing performed on 9/7/17.

The female IP/Assignor (initials "YB") was 63-years-old when she was driving and involved in an automobile accident 5/18/17. She subsequently came under the care of Applicant, who performed the disputed EDX testing. Respondent initially denied this claim asserting a lack of medical necessity defense, based on a peer report by Craig Horner, D.C., and then issued a coverage denial asserting that the claimed injuries did not arise out of the use or operation of a motor vehicle.

The peer-based denial was issued beyond 30-days from receipt of the claim, but was nevertheless issued timely after the parties engaged in the verification process.

The issues to be determined are (1) whether Respondent's defense, that the injuries did not arise out of the use or operation of a motor vehicle, has been demonstrated by the preponderance of credible evidence and, if not, (2) whether the EMG/NCV testing was medically necessary.

#### 4. Findings, Conclusions, and Basis Therefor

This case was decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association, the oral arguments of the parties' representatives, and prevailing law. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon. No witnesses testified at the hearing.

Unless the parties' agreement provides otherwise, an arbitrator need not apply the rules of evidence, is not bound by principles of substantive law, may do justice as he sees it, and may apply his own sense of law and equity to the facts as he finds them to be. Matter of New Century Acupuncture, P.C. v. Country Wide Ins. Co., 48 Misc.3d 1201(A), 18 N.Y.S.3d 580 (Table), 2015 N.Y. Slip Op. 50919(U) at 2, 2015 WL 3821534 (Dist. Ct. Suffolk Co., C. Stephen Hackeling, J., June 18, 2015).

An insurer can assert in a no-timely denial situation a lack of coverage defense premised on the fact or founded belief that the alleged injury does not arise out of an insured accident. Central General Hospital v. Chubb Group of Ins. Cos., 90 N.Y.2d 195, 659 N.Y.S.2d 246 (1997).

Respondent's subsequent denial, dated 12/13/18, states in relevant part:

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Based upon the attached Biomechanical Injury Causation Analysis report conducted by Dr. Jacqueline M. Lewis, Ph.D. dated November 14, 2018, "a causal relationship between the subject incident and the claimed cervical spine[,] ... thoracic spine[,] ... lumbar spine ... and bilateral knee injuries cannot be made." Dr. Lewis concluded that "[t]here is no injury mechanism present in the subject incident to account for [the IP/Assignor]'s claimed ... injuries." Accordingly, [the IP/Assignor] is not an "eligible injured person" under the Mandatory Personal Injury Protection Endorsement because the alleged injuries were not "caused by an accident arising out of the use or operation of a motor vehicle".  
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Effective immediately, and dating back to the May 18, 2017 subject motor vehicle incident, all past, present and future claims for treatment to [the IP]'s cervical spine, thoracic spine, lumbar spine and bilateral knees will be denied in their entirety.

Respondent's counsel argued at the hearing, and in writing that "[t]his arbitration stems from a motor vehicle accident that is reported to have occurred on May 18, 2017. According to the police accident report, Claimant's vehicle was backed into by another vehicle as they backed out of parking spot in Walgreens parking lot. Neither an ambulance nor first responders were dispatched to the scene of the subject accident. Attached hereto and made a part of as Exhibit A is a true and correct copy of the police accident report and pictures of damage to the Claimant's vehicle. Police report indicates no injury reported and no visible injury seen."

In support of its contention that the purported injuries did not arise out of the use or operation of a motor vehicle, Respondent also submitted a 14-page expert opinion by Jacqueline M. Lewis, Ph.D., Senior Biomechanist, dated 11/14/18. Dr. Lewis stated, in relevant part:

The opinions given in this report are based on my analysis of the materials available and the claimed injuries of [the IP/Assignor], using scientific and engineering methodologies generally accepted in the biomechanical engineering community and automotive industry.<sup>1•2•3</sup> The opinions are also based on my education, background, knowledge, and experience in the fields of human kinematics and kinetics, biomedical engineering, biomechanics, anatomy, and physics. I obtained a Doctor of Philosophy degree in Biomedical Engineering from The Ohio State University, a Master of Science degree in Biomedical Engineering from The Ohio State University, and a Bachelor of Science degree in Mechanical Engineering concentrating on Biomechanics from the University of Kansas. I am a member of the American Society of Biomechanics.

I have designed and executed experimental protocols to investigate the kinematics and kinetics of the body during common activities of daily living and athletic activities. My scientific investigations have focused on human injury causation, injury prevention, and injury rehabilitation strategies while examining the full body biomechanical adaptations and compensations of populations with injuries or pathologies. Additionally, my doctoral dissertation and scientific publications have investigated biomechanical gait and muscle activation patterns, surgical technique, and biomechanical gait retraining in order to improve mobility, activities of daily living, and quality of life after injuries and surgery. My training in physics and engineering in conjunction with human anatomy and physiology provides an understanding of the theory and application of human tolerance and loading patterns of the human body, as well as the

techniques and processes for evaluating human kinematics, kinetics, and injury potential. I have also participated in crash testing with anthropomorphic test devices, and therefore am familiar with inertial and impact loading sequences.

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It is important to note that the peer-reviewed and generally accepted technical articles cited throughout this report are included as support for the conclusions of my independent analysis pertaining to the subject incident and [the IP/Assignor]'s claimed injuries. The results of these scientific studies were not simply extrapolated to the subject incident and used in isolation to provide general opinions regarding the likelihood of an occupant being injured in a motor vehicle incident. Rather, my evaluation regarding the lack of a causal relationship between the claimed injuries of [the IP/Assignor], and the subject incident incorporated thorough analyses of the incident severity, occupant response, and injury mechanisms, using peer-reviewed and generally accepted methodologies. Based upon a reasonable degree of scientific and biomechanical certainty, I conclude the following:

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1. On May 18, 2017, [IP/Assignor] was the driver of a 2011 Buick LaCrosse that was traveling in the Walgreens parking lot (3288 Main Street), in Buffalo, New York, when contact occurred between the rear of a 2001 Ford Focus and the front of her vehicle.
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2. The subject incident is consistent with a Delta-V of less than 6.4 miles per hour, and more comparable to 2.5 miles per hour with an average acceleration of less than 1.7g, and more comparable to 0.65g for the subject Buick in which [IP/Assignor] was seated.
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3. The accelerations experienced by [IP/Assignor] were within the limits of human tolerance, and were comparable to those experienced during various daily activities.
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4. Had the subject incident been sufficient to initiate occupant motion, [IP/Assignor] would have moved primarily forward relative to the subject Buick's interior.
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5. There is no injury mechanism present in the subject incident to account for [IP/Assignor]'s claimed cervical spine injuries. As such, a causal relationship between the subject incident and the claimed cervical spine injuries cannot be made.
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6. There is no injury mechanism present in the subject incident to account for [IP/Assignor]'s claimed thoracic spine injury. As such, a causal relationship between the subject incident and the claimed thoracic spine injury cannot be made.

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7. There is no injury mechanism present in the subject incident to account for [IP/Assignor]'s claimed lumbar spine injuries. As such, a causal relationship between the subject incident and the claimed lumbar spine injuries cannot be made.

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8. There is no injury mechanism present in the subject incident to account for [IP/Assignor]'s claimed bilateral knee injuries. As such, a causal relationship between the subject incident and the claimed bilateral knee injuries cannot be made.  
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I find that Respondent's expert has sufficient scientific and technical knowledge, and is competent based on her credentials and experience to provide the aforementioned opinion. The report appears to be based on sufficient facts or data, is the product of reliable principles and methods, and Dr. Smith has applied the principles and methods reliably to the facts of this case (see, FRE 702).

The 14-page report provides an extremely detailed analysis, which includes calculating the IP/Assignor's weight, speed of the vehicle, vehicle damages, and other relevant factors. Dr. Smith concludes that the vehicle was traveling approximately 2.5 mph, and that any impact would have produced acceleration that was comparable to or less than typical activities of daily living. She concludes that the reported injuries were not caused by the accident.

Applicant's counsel argued that the medical records and reports establish a causal connection between the disputed treatment and the accident. I have reviewed all of the evidence submitted. Without additional evidence, like the IP/Assignor's own statement adequately explaining the injury onset and causality, Dr. Smith's accepted opinion is not sufficiently rebutted. The records alone are not sufficiently persuasive to overcome the extremely detailed, comprehensive, and convincing expert opinion by Dr. Smith.

I find that the preponderance of credible evidence presented in this case supports that the IP/Assignor's EMG/NCV testing performed on 9/7/17 was unrelated to the accident that occurred on 5/18/17, and that the purported injuries did not arise out of the use or operation of a motor vehicle.

As such, this claim is denied and all other issues are deemed moot and/or waived as not raised at the time of the hearing.

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 claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York

SS :

County of Erie

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

03/28/2019

(Dated)

Fred Lutzen

### **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:**  
326a20787cff663eef4b175041aff9ae

### **Electronically Signed**

Your name: Fred Lutzen  
Signed on: 03/28/2019