

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Hudson Valley Chiro & Rehab, PC
(Applicant)

- and -

St. Paul Travelers Insurance Co.
(Respondent)

AAA Case No. 17-20-1156-3666

Applicant's File No. n/a

Insurer's Claim File No. IAN6734

NAIC No. 38130

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: L.G.

1. Hearing(s) held on 09/11/2020
Declared closed by the arbitrator on 09/11/2020

Jeffrey Datikashvili, Esq. from The Sigalov Firm PLLC participated by telephone for the Applicant

Bill Kleen, Esq. from Law Office Of Aloy O. Ibuzor participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,570.76**, 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

On June 20, 2019, the Assignor/Eligible Injured Party, a 55-year-old male, was, by history involved in a motor vehicle accident. Following the accident, the Assignor was not evaluated at an emergency room. The Applicant is seeking reimbursement for upper and lower EMG/NCV studies performed on September 10, 2019. The Respondent denied reimbursement based on a peer review of Dr. Bonnie Corey.

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

On June 20, 2019, the Assignor/Eligible Injured Party, a 55-year-old male, was, by history involved in a motor vehicle accident. Following the accident, the Assignor was not evaluated at an emergency room. The Assignor then came under the care of Dr. Michael Carducci for neck and lower back pain and commenced conservative care.

On September 10, 2019, the Assignor was evaluated by Dr. Thomas Drag for both radiating neck and pain radiating into the cervicothoracic junction, bilateral shoulders, right arm and hand. On examination, the Assignor had decreased range of motion. Muscle weakness was as was abnormal sensation over the right C6, C7, c8 dermatomes and median nerve distributions. Paresthesia was noted over the distal arm and right triceps area. A cervical MRI was interpreted as revealing multiple acute disc herniations with cord impingement. The impression included neuropathy, cervical radiculopathy, brachial plexopathy, ulnar nerve neuropathy, thoracic outlet, peripheral neuropathy, cervical disc and myelopathy. An upper extremity study was recommended due to the differential diagnoses. The upper extremity study was performed and interpreted as revealing mild acute C6 radiculopathy on the right. Dr. Drag found the Assignor could benefit from a trial of cervical spine decompression.

As to the lower extremity, the Assignor complained of moderate to severe lower back pain radiating through the buttocks, legs t the knee. On examination, the Assignor had reduced range of motion. Straight leg raising was positive on the right at 50 degrees. Muscle weakness was noted . Abnormal sensation was noted over the feet and lower legs. Various orthopedic tests were noted, and deep tendon reflexes were graded +1 bilaterally in the Achilles and patella. A lower extremity MRI revealed disc herniations with thecal sac compression. The diagnoses included lumbar radiculopathy, lumbar plexopathy, sciatic neuropathy, peripheral neuropathy and lumbar disc. The study was to evaluate the numerous differential diagnoses. A lower extremity study revealed evidence of mild acute L4 radiculopathy on the right. Dr. Drag recommended a trial of lumbar decompression.

Denial/Peer Review. The Respondent issued denials for the EMG/NCV studies based on The Respondent issued a denial for the studies based on the accompanying peer review of Dr. Bonnie Corey. From her review of the medical records, Dr. Corey found no progressive neurological decline and that the study was not necessary to make a diagnosis of nerve root compression or radiculopathy. She found no unexplained

peripheral neuropathy with pain of a neuropathy pattern. She found no documentation of four to six weeks of failed conservative therapy and an etiology of unexplained radicular symptoms. She cited AANEM Guidelines as not supporting the use of routine EMG/NCV screening and that the results must potentially enhance the patient's care. She cited the following:

As per an article titled: "Electrodiagnostic studies in the management and prognosis of neuromuscular disorders by James M. Gilchrist, MD, it was noted with regards to radiculopathy there was none EMG studies that tracked spontaneous activity in paraspinal and limb muscles in cases of cervical radiculopathy failed to show any correlation between symptom duration and the occurrence of fibrillation potentials or positive waves. With this in mind, it is not surprising that the other studies have found EMG of little help in predicting symptomatic outcome in radiculopathy.

In this instance, the Assignor was not a pre-surgical candidate and the diagnosis of radiculopathy was obvious with no differential diagnosis.

Rebuttal. Dr. Drag has submitted a rebuttal to the peer review. Through the rebuttal, he reviewed the Assignor's symptoms, his positive findings and his extensive differential diagnoses which provided his basis, in part, for performing the electrodiagnostic studies. He also reviewed the MRI studies. He noted that the Assignor had a positive compression test, and that a positive evaluation with EMG/NCV testing can better locate the level of nerve damage and whether peripheral nerve impingement is significant enough to warrant conservative therapy. Similarly, a positive straight leg raising test can be an indication for performing lower extremity EMG/NCV studies. He noted the following:

Dr. Corey stated that this test was not needed to a diagnosis of nerve root compression or radiculopathy or radiculitis, which can be made clinically. A positive physical examination finding is always associated with a much higher probability of having a positive EDX test. This indicates that a physical examination finding such as loss of reflex, sensory abnormality or weakness is a strong reason to perform an EDX test and not to find a reason to avoid EMG, which can localize the problem. The AANEM guidelines specifically state that peroneal motor and sural sensory tests are the best means of identifying distal symmetric polyneuropathy.

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 Dr. Drag found even met Dr. Corey'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 also took issue with the contention that there was no diagnostic dilemma.

Indeed, there was a diagnostic dilemma. The patient had complaints of radiating pain, weakness, numbness and abnormal sensation which raised suspicion of both radiculopathy and neuropathy. U.S. National library of Medicine, the clinical manifestation for diagnosis of both radiculopathy and neuropathy includes radicular pain, numbness and weakness.

He then cited numerous authoritative sources as to the necessity of the studies:

Routine EMG/NCV examination should be performed in all patients who have suspected cervical or lumbar radiculopathy." (Neurol Clinic 25 (2007) 473-494: page 475, page 482: The Electrodiagnosis of Cervical and Lumbosacral Radiculopathy Bryan Tsao, MD, Department of Neurology, Loma Linda University, 11175 Campus Street, Loma Linda, CA 92354, USA)

The most useful modalities in the evaluation of lumbosacral radiculopathy are MRI, CT, electromyography (EMG) and nerve conduction studies (NCS)...EMG and NCS have a high diagnostic accuracy for radiculopathy when neurologic weakness is present for at least three weeks. UpToDate

Electrodiagnosis plays a critical role in the assessment of patients with symptoms and signs of radiculopathy. The electrodiagnostic study can aid in clarifying the presumed diagnosis of radiculopathy and is critical in identifying other possible non root-level causes of neurologic dysfunction. (Electrodiagnosis of Cervical Radiculopathy Kevin Hakimi, MD, David Spanier, MD).

EDX testing effectively excludes other conditions that mimic radiculopathy such as polyneuropathy or entrapment neuropathy. (Evaluating the Patient With Suspected Radiculopathy Timothy R. Dillingham, MD, MS.

Dr. Drag finally further noted that the Assignor had 4-6 weeks of failed conservative therapy, and he disputed the peer reviewer's contention that the Assignor did not require more aggressive treatment as a result of the EMG/NCV testing:

It should be noted that surgery is not the one, but one of twelve indications listed by the ANEM for the

performance of electrodiagnostic testing, is 1) to distinguish between differential diagnoses 2) to help determine the extent of an abnormal function 3) to help determine and guide options, prognosis, and level of recovery (See AANEM Guidelines page 4, items 1-12)

Analysis. A presumption of medical necessity attaches to a Respondent's admission of the Applicant's timely submission of proper claim forms. 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 EMG/NCV studies of the upper and lower extremities. Dr. Corey has failed to thoroughly discuss the extensive positive findings of Dr. Drag's clinical examination which included positive findings of decreased motor strength, diminished reflexes and positive orthopedic tests which Dr. Drag noted was a form of neuropathy and was a basis for a differential diagnosis. Dr. Drag clarified that positive findings on orthopedic tests such as Straight Leg Raising and the Cervical Compression test can be indicative of both neuropathy and radiculopathy.

Dr. Corey also failed to adequately discuss the extensive positive findings including bulging and herniated discs which Dr. Drag considered in initially considering the differential diagnoses. 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). The treating provider's rebuttal has cited an 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 deteriorating or progressive neurological deficits. The treating provider and peer review have cited conflicting authoritative sources as to numerous issues including the sensitivity of EMG/NCV studies in diagnosing radiculopathy and suspected nerve involvement. Further, Dr. Corey acknowledged that the studies can be necessary when suspected lesions are suspected and when there is the

prospect of surgery. Dr. Drag cited extensive sources listing broad criteria for performing including radiculopathy. 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 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(d)(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 \$2,570.76 FOR THE UPPER AND LOWER EXTREMITY EMG/NCV STUDIES. 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	09/10/19 - 09/10/19	\$1,203.31	Awarded: \$1,203.31
	Hudson Valley Chiro & Rehab , PC	09/24/19 - 09/24/19	\$1,367.45	Awarded: \$1,367.45
Total			\$2,570.76	Awarded: \$2,570.76

B. The insurer shall also compute and pay the applicant interest set forth below. 02/10/2020 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(d)(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.

10/04/2020

(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:

bf811a80d5e66fcf71384fe6a2fdce56

Electronically Signed

Your name: Kent Benziger
Signed on: 10/04/2020