

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Mauro Chiropractic, PC  
(Applicant)

- and -

Liberty Mutual Insurance Company  
(Respondent)

AAA Case No. 17-19-1132-9046

Applicant's File No. MC-0515

Insurer's Claim File No. 038173031-05

NAIC No. 33600

### **ARBITRATION AWARD**

I, Ellen Weisman, 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: Patient

1. Hearing(s) held on 11/10/2020  
Declared closed by the arbitrator on 11/10/2020

Gill S. Schapira, Esq. from The Law Office of Gill S. Schapira, P.C participated by telephone for the Applicant

Mr. Herman Buchanan, Claims Representative from Liberty Mutual Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,374.26**, was NOT AMENDED at the oral hearing.  
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that Respondent issued a timely denial.

3. Summary of Issues in Dispute

This arbitration stems from treatment of an 18 year-old female passenger, "KC," who sustained injuries in a motor vehicle accident on September 7, 2018. The issue is whether upper and lower extremity EMG/NCV testing on November 2, 2018, was medically necessary. Respondent relied on the Peer Review Report of Kevin S. Portnoy, D.C. in support of its defense.

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

The defense of lack of medical necessity for upper and lower extremity EMG/NCV testing is based on the Peer Review Report of Dr. Portnoy dated December 4, 2018 and sworn on December 7, 2018. Applicant submitted a Rebuttal Report of Dean Mauro, D.C. dated January 7, 2019, after which Respondent submitted an Addendum of Dr. Portnoy dated July 24, 2019 and sworn on July 26, 2019. All submissions will be considered.

##### **Applicant's Medical Records:**

An Initial Examination Report of Jeff M. Rosenberg, D.C. dated September 11, 2018, reflects that the patient presented complaining of cervical and lumbar pain, along with right knee pain. (Of note, the portion of the history concerning radiating cervical and lumbar pain states "N/A.") Based on positive examination findings, including reduced spinal range of motion and clinical orthopedic tests, she was diagnosed with cervical, lumbar and sacral dysfunction and spasms. X-rays and MRI studies were advised, along with chiropractic treatment to the cervical spine, lumbar spine and sacrum/pelvis. Also, an EMG and PFNCS evaluations were noted to be "possibly warranted." Cervical and lumbar MRI reports dated October 8, 2018, reflect disc bulges at C5-C6 and L4-L5 with spasm. A Physical Therapy Initial Evaluation Report of the same date reflects that the patient complained of neck, upper back, mid-back, lower back, right elbow and right knee pain.

Dr. Rosenberg re-evaluated the patient on October 23, 2018, at which time she complained of cervical and lumbar pain which was not radicular in nature, along with right knee pain. The clinical examination findings included decreased range of motion and positive clinical orthopedic tests. Her progress in treatment was noted to be "good," and there were no changes to the diagnoses.

An NCV/EMG Consultation and Initial Evaluation Report of Dr. Mauro dated November 2, 2018, reflects that the patient presented complaining of persistent radiating neck and lower back pain, along with right knee pain. On examination, there was evidence of cervical and lumbar tenderness, spasm, guarding, taut bands, hypo-lordosis, trigger points, weakness, diminished sensation, decreased reflexes, and positive clinical orthopedic tests. The diagnoses included cervical and lumbar segmental/somatic dysfunction, displacement, radiculopathy and sprains/strains, as well as cervicalgia. The recommendations included continued physical therapy and chiropractic care, as well as a pain management consultation. In addition upper and lower extremity EMG/NCV testing was recommended to diagnose radiculopathy and to rule out peripheral neuropathy.

Dr. Mauro performed the testing that day which revealed evidence of right C5-C6 radiculitis and bilateral S1-2 radiculopathy without evidence of peripheral neuropathy. As a result, Dr. Mauro recommended continued physical therapy, massage and chiropractic manipulation. He also stated that if the patient's symptoms persist, then neuro-interventional pain management techniques should be considered including invasive non-surgical treatment such as epidural steroid injections or a pain management specialist.

**Respondent's Peer Review Report:**

Dr. Portnoy concluded that upper and lower extremity EMG/NCV testing was not medically necessary. He stated that there were no signs of rapid neurological deterioration throughout the course of treatment nor was there evidence of spinal instability which required immediate surgical assessment. Further, chiropractic care was not dependent upon the test results, and there was no description of alternative invasive procedures which were under consideration and which required the information which would be obtained from this testing. Testing has no role in the treatment of back pain.

NCV/EMG testing is used if there is a diagnostic dilemma and if invasive treatment options, such as surgery, are under consideration. There were no invasive procedures contemplated for this patient. All treatment decisions regarding chiropractic care could have been made without these test results. Most symptoms of radiculopathy resolve with conservative care without the need for surgery. NCV/EMG testing would not be used to rule out radiculopathy or peripheral neuropathy.

Also, Dr. Portnoy stated that it is not uncommon for a patient who has sustained soft tissue injuries to present with radicular neurological complaints due to the proximity of the spinal nerve roots to the injured spinal regions. This can occur due to the body's reaction to an inflammatory process secondary to trauma. Electro-diagnostic test results do not provide the treating chiropractor with useful information to detect or correct vertebral subluxation complex as chiropractors are guided by other information and clinical findings.

Further, he stated that the patient's condition was not worsening, nor is there any indication that she was not responding to conservative treatment or that she was a surgical candidate. Therefore, it was not necessary to determine the functional significance of any known or suspected compression lesions of the nervous system. There were no clinical differential diagnoses such as peripheral neuropathic/myopathic lesion versus a root lesion for which testing was necessary.

**Applicant's Rebuttal Report:**

Dr. Mauro disagreed with the peer doctor and concluded that upper and lower extremity EMG/NCV testing was medically necessary. He stated that there was a differential diagnosis as evidenced by the fact that he recommended EMG/NCV testing to confirm the diagnosis of radiculopathy and to rule out potential peripheral neuropathy. He noted that the neurological deficits from which this patient suffered have overlapping symptoms of radiculopathy and neuropathy. Therefore, testing was ordered to diagnose cervical radiculopathy, and to determine the location and extent of peripheral nerve or nerve root damage. He explained further that neuropathy cannot be diagnosed clinically.

He stated further that this patient had not responded successfully to conservative treatment for seven weeks. The clinical examination revealed muscle weakness, diminished reflexes, and impaired sensation. He reiterated that these clinical findings can have overlapping symptoms of radiculopathy and neuropathy. Since this patient had symptoms of both conditions, testing was medically necessary.

Further, Dr. Mauro stated that the potential impact of the test results on future treatment is not determinative of whether testing was medically necessary. Testing was not recommended to impact chiropractic treatment but to confirm the diagnosis for other practitioners who were monitoring her condition. These test results would have been incorporated into her future treatment protocol and therefore would potentially enhance her care. Due to the patient's persistent subjective complaints as well as positive neurological findings, EMG/NCV studies of the upper and lower extremities were recommended to better predict her prognosis for recovery and possible residual neurological deficits.

**Respondent's Addendum:**

Dr. Portnoy reiterated his conclusion that upper and lower extremity EMG/NCV testing was not medically necessary. He noted that the treating chiropractor who evaluated the patient several times each week did not indicate that testing was needed. Dr. Mauro only examined the patient once when he made the decision to perform testing despite the fact that his findings differ from those of the treating chiropractor who had evaluated the patient regularly. Dr. Mauro dismissed the findings of the treating chiropractor whose notes do not indicate that the patient's condition was worsening or that she was not responding to treatment.

Further, the records do not indicate how the performance of this testing would have aided in altering the treatment plan or in reducing the number of chiropractic visits. There was no evidence of rapid neurological deterioration throughout the course of

treatment. Also, there were no invasive treatment procedures, such as surgery, under consideration. Continued optimal chiropractic care was not dependent on the test results and there was no diagnostic dilemma.

Additionally, Dr. Portnoy stated that Dr. Mauro relied on outdated literature from 1994 to support his conclusion, while a more recent resource indicates that non-physician providers, including chiropractors, do not have the appropriate training and knowledge to perform and interpret EMG and NCS. Patients with soft tissue trauma often have radicular neurological complaints due to the proximity of the spinal nerve roots to the injured spinal regions as a result of an inflammatory process. Chiropractors should be guided by their clinical findings in their treatment of a patient.

**Findings:**

Applicant has established its prima facie entitlement to reimbursement for upper and lower extremity EMG/NCV testing based on submission of a properly completed claim form setting forth the amounts of the losses sustained and establishing that No-Fault payment is overdue. The denial is found to be sufficient as a matter of law. Therefore, Applicant's burden is also established by submission of sufficient medical records. *Ave. T MPC Corp. v. Auto One Ins. Co.*, 32 Misc.3d 128(A) 934 N.Y.S.2d 32 (Table), 2011 N.Y. Slip Op. 41292(U), 2011 WL2712964 (App. Term 2d, 11th & 13th Dists., 7/5/2011); *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 782, 774 N.Y.S.2d 564 (2d Dept., 2004), *Vista Surgical Supplies, Inc. v. Metropolitan Property and Casualty Ins. Co.*, 2005-1328 K C., 2006 N.Y. Slip Op. 51047(U), June 2, 2006.

The burden then shifts to Respondent to establish lack of medical necessity for upper and lower extremity EMG/NCV testing which warrants competent, expert proof in admissible form. *Citywide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co.*, 3 Misc.3d 608, 777 N.Y.S. 2d 241, 2004 N.Y. Slip Op. 24034 (Civ. Ct., Kings Co., 2004), aff'd., 8 Misc. 3d 1025 (2005). I find that Respondent's Peer Review Report and Addendum are sufficient to meet its burden of proof of lack of medical necessity and to rebut Applicant's evidence.

Thereafter, the burden shifts back to Applicant to present competent medical proof as to the medical necessity for the electro-diagnostic testing at issue by a preponderance of the credible evidence. *West Tremont Medical Diagnostic, P.C. v. GEICO*, 13 Misc.3d 131[A], 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U), 2006 WL 2829826 (App. Term 2d & 11<sup>th</sup> Jud. Dists. 9/29/06), *A. Khodadadi Radiology, P.C. v. N.Y. Central Fire Mutual Insurance Company*, 16 Misc. 3d 131[A], 841 N.Y.S.2d 824, 2007 WL 1989432 (App. Term 2d & 11<sup>th</sup> Dists. 7/3/08). Ultimately, the burden of proof rests with the Applicant (*See*, Insurance Law Section 5102).

I find further that this burden has not been met by Applicant's medical records, the Rebuttal Report of Dr. Mauro, or the evidence collectively. Rather, I am convinced by the thorough and credible Peer Review Report and Addendum of Dr. Portnoy that this patient did not require upper and lower extremity EMG/NCV testing as she was doing well in conservative care, and there was no indication of progressive or worsening neurological deficits. In fact, the re-evaluation report of Dr. Rosenberg confirms that her condition was noted to be "good." Also, she was not a candidate for more invasive treatment such as surgery, and as there was no apparent differential diagnosis rendered. Further, based on the documentation in evidence, I concur with the statement of Dr. Portnoy that Dr. Mauro ignored the clinical findings rendered by the treating chiropractor which discredits his conclusion that testing was necessary.

Moreover, the initial and re-evaluation reports of Dr. Rosenberg both confirm that there was no radiating component to her complaint of neck and back pain as he documented "N/A" in that portion of his pre-printed exam reports. The absence of a history of radiating pain discredits the need for testing as that complaint was not persistent in nature. Since she was responding to conservative treatment and she did not have a history of radiating pain which was recalcitrant to conservative care, the need for electro-diagnostic testing of the upper and lower extremities has not been established. Further, as stated by Dr. Portnoy, electro-diagnostic testing would not have altered the course of conservative care which the patient was undergoing. Thus, I find that under the circumstances, this testing would not have offered this patient any diagnostic or therapeutic benefit, and thus it is found to have been medically unnecessary.

Accordingly, in light of the foregoing, based on the arguments of the parties' representatives, and after thorough review and consideration of all submissions, I find in favor of Respondent and deny this claim in its entirety with prejudice.

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 Nassau

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

11/14/2020  
(Dated)

Ellen Weisman

#### **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:**  
2ecdb607c8200041e87fc04b05c88b91

**Electronically Signed**

Your name: Ellen Weisman  
Signed on: 11/14/2020