

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. 17-20-1174-2052

Applicant's File No. N/A

Insurer's Claim File No. IEI5015

NAIC No. Self-Insured

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: M.P.

1. Hearing(s) held on 02/05/2021
Declared closed by the arbitrator on 02/05/2021

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

Liz Souza, Esq. from Law Offices Of Tina Newsome-Lee f/k/a Aloy O. Ibuzor participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,317.56**, 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 February 14, 2020, the Assignor/Eligible Injured Party, a 56-year-old female, was, by history, involved in a motor vehicle accident. In dispute are upper and lower EMG/NCV studies totaling \$3,317.56 performed on May 12, 2020. The Respondent denied reimbursement based the peer review of Dr. Michael Dudick. The Applicant has submitted a rebuttal from Dr. Michael McKeown, D.C. , while Dr. Dudick has submitted an addendum.

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 February 14, 2020, the Assignor/Eligible Injured Party, a 56-year-old female, was, by history, involved in a motor vehicle accident. Later the same day as the accident, the Assignor was evaluated at a local Urgent Care facility. A few days following the accident, the Assignor was evaluated by Dr. Bruce Kamins for radiating neck and low back pain. The Assignor commenced conservative care.

On May 12, 2020, , the Assignor was evaluated by Dr. Michael McKeown, D.C. of Hudson Valley Chiropractic and Rehabilitation, P.C. for complaints of radiating neck and back pain. As to the upper extremity the Assignor complained of severe neck pain radiating to the right scapula, right shoulder, right arm and right hand. On examination, the Assignor had decreased range of motion. The Shoulder Depression test was positive on the right. Muscle weakness was noted on the upper extremity and abnormal sensation was noted at C5-6 and C6-7 bilaterally. Upper extremity reflex changes were noted at C5 level. A cervical MRI performed on March 23, 2020 was interpreted as revealing a reversal of cervical lordosis consistent with spasm, focal left posterolateral herniation of the C3-4 disc flattening the thecal sac without neuroforaminal stenosis and posterior bulging of C5-6 and 6-7 which caused mild flattening of the thecal sac without cord impingement. The impression was of neuropathy, cervical radiculopathy, brachial plexopathy, nerve root compression and cervical disc. An EMG/NCV study was performed due to the differential diagnoses. The upper extremity EMG/NCV revealed evidence of moderate acute C5 radiculopathy on the right.

On the same date, the Assignor complained of severe lower back pain radiating into the left leg, left knee and left foot. On examination, range of motion was decreased. Straight leg raising was positive bilaterally at 25 degrees. Muscle weakness was noted as was abnormal sensation along the L4-L5 and L5-S1. A lower extremity reflex change was on the right at L4 and S1. A lumbar MRI revealed diffuse disc herniations at L3-4, L4-5 and L5-S1 with thecal sac compression and bilateral neural narrowing along with facet arthrosis. The impression was of lumbar radiculopathy, lumbar plexopathy, neuropathy, sciatic neuropathy. An EMG/NCV was ordered due to the differential diagnoses. The lower extremity EMG/NCV study revealed evidence of moderate acute L5 radiculopathy on the left.

Denial/Peer Review. The Respondent issued a denial for the studies based on the accompanying peer review from Dr. Michael Dudick. From his review of the medical evidence, he found a "lack of projected reduction in treatment plan, or projected discharge date, or a measurable response to treatment". He cited sources that the treatment should not be performed if it will not potentially enhance the Assignor's care. He opined that the Assignor's level of functioning did not clearly indicate the necessity of the testing, and that F-waves are not useful for screening for nonspecific radiculopathies. Rivner MH (1998) F-Wave Studies: Limitations. Muscle & Nerve (8) 1101-1104 who found that "if F waves studies are to be used for radiculopathy, their sensitivity must be improved". He also cited a source that recording F-waves is of no benefit for claimants whose condition were already confirmed by other electrodiagnostic testing. He questioned the need for 10 units of testing and criticized the treating provider's lack positive grading of neurological testing.

Rebuttal. Dr. McKeown has submitted a rebuttal to the peer review. He cited the extensive positive findings, and he restated the differential diagnoses. He recommended the studies to evaluate for radiculopathy, brachio-plexopathy and entrapment syndrome in the upper extremity and in the lumbar region to evaluate for radiculopathy, entrapment syndrome and isolate neurological dysfunction, Contrary to the peer review, Dr. McKeown found the Assignor had not improved following months of conservative care. Dr. McKeown found that the Assignor did have a deteriorating condition and progressive worsening deficits that met the requirements for EMG/NCV testing.

Dr. McKeown cited AANEM guidelines and authoritative source that physical examination findings such as loss of reflex, sensory abnormalities or weakness are a strong reason to perform EDX test and not avoid them. He further, noted that positive findings on certain orthopedic tests are a basis for performing electrodiagnostic studies.

A cervical Compression test is a very specific, but not sensitive physical examination maneuver in diagnosing acute cervical (neck) radiculopathy. If positive, evaluation with EMG/NCV testing can better locate the level of nerve damage and whether peripheral nerve impingement is considered significant enough to warrant more conservative therapy than the patient is currently receiving.

He opined that EMG/NCV studies in combination with MRI studies produce higher diagnostic accuracy. He then sources that found a confirmation of radiculopathy through diagnostic testing affects treatment.

The results of a research study show a promise for chiropractic and manual therapy techniques such as

flexion distraction, as well as demonstrating that other, larger research studies must be performed for cervical radiculopathy." (Cervical radiculopathy treated with chiropractic flexion distraction manipulation: a retrospective study in a private practice setting. Journal of Manipulative and Physiological Therapeutics Volume 26, Issue 9, Pages 592-596, November 2003)

He then cited sources that found a suspected diagnosis of radiculopathy is sufficient to perform the studies which he found to be very accurate.

"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).

Electrodiagnostic studies such as EMG/NCS testing have been cited as being highly sensitive for diagnosing cervical and/or lumbar radiculopathies reaching a 70-80% accuracy rate. (Radiculopathies. Timothy R. Dillingham, Physical Medicine & Rehabilitation Secrets, Second Edition. Bryan Young, Mark Young, Steven Stiens., p. 132-136).

Dr. McKeown's rebuttal took issue with Dr. Portnoy's contention there was no differential diagnosis. Dr. McKeown found there was suspicion of cervical and lumbar radiculopathy, peripheral neuropathy, myelopathy brachial and lumbar plexopathy: He further states:

Indeed, there was a diagnostic dilemma in this case. If my examination report dated 11/13/2019 is read carefully, it clearly shows that the patient's complaints and findings raised suspicion of peripheral neuropathy as well as radiculopathy. U.S. National library of Medicine states that clinical manifestation for diagnosis of both radiculopathy and neuropathy includes radicular pain, numbness, and weakness. (<http://www.nlm.nih.gov/cgi/jmesh/2011/MB.cgi?mode=&term=Radiculopathy> and <http://www.nlm.nih.gov/medlineplus/peripheralnervedisorders.html>).

Finally, Dr. McKeown cited articles disputing the peer reviewer's contentions regarding the accuracies of the EMG/NCV studies and that only physicians should perform the studies.

Addendum. In response to a rebuttal, Dr. Dudick questioned where the Assignor was complaint with the treating provider plan of care. He again questioned the thoroughness of the treating provider's medical records.

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 which this arbitrator finds to be conclusory. Contrary to the report's assertion, Dr. McKeown's examination was thorough with specific findings as to the muscle testing, sensation and reflexes. The peer review found the Assignor was compliant with conservative care, but failed to substantiate this conclusion. Further, if certain reports were not thorough, the Respondent can request additional verification. Similarly, Dr. Dudick's failed to cite sources that would definitively hold that the performance of F-waves and ten units of testing was not medically necessary; while Dr. McKeown's rebuttal addressed the necessity of such studies for further chiropractic treatment. . Further, Dr. Dudick failed to discuss the Assignor's extensive positive clinical and diagnostic findings including decreased sensation in specific dermatomes, decreased muscle strength and reflexes as well as numerous disc herniations.

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). Dr. McKeown 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 stated broad grounds for when EMG/NCV studies can be conducted. Dr. McKeown has established that the Assignor's symptoms persisted and there were significant clinical findings. 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.

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 \$3,317.56 FOR THE UPPER AND LOWER EXTREMITY EMG/NCV STUDY.

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	05/12/20 - 05/12/20	\$1,740.85	Awarded: \$1,740.85
	Hudson Valley Chiro & Rehab , PC	05/12/20 - 05/12/20	\$1,576.71	Awarded: \$1,576.71
Total			\$3,317.56	Awarded: \$3,317.56

- B. The insurer shall also compute and pay the applicant interest set forth below. 06/06/2020 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.

02/09/2021

(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:
42e5c3b8ceb3a983325f5ee97b45ee5e

Electronically Signed

Your name: Kent Benziger
Signed on: 02/09/2021