

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ross A Fialkov DC, PC  
(Applicant)

- and -

Allstate Insurance Company  
(Respondent)

AAA Case No. 17-19-1134-5150

Applicant's File No. DK19-72379

Insurer's Claim File No. 0499981487  
2HV

NAIC No. 19232

**ARBITRATION AWARD**

I, Debbie Thomas, 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: Assignor

1. Hearing(s) held on 03/02/2021  
Declared closed by the arbitrator on 03/02/2021

Evan Polansky from Korsunskiy Legal Group P.C. participated in person for the Applicant

Jeff Winston from Law Offices of John Trop participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,330.56**, 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

Applicant seeks reimbursement in the amount of \$2,330.56 for Pain Fiber Nerve Conduction Studies ("pf-NCS") of the upper and lower extremities performed on May 16, 2018 on Assignor N.R., a 58-year-old male who was involved in a motor vehicle accident on April 26, 2018. Respondent denied the claim based on a peer review report which found the testing was not medically necessary. The issue presented is whether the pf-NCS testing performed by Applicant was medically necessary.

4. Findings, Conclusions, and Basis Therefor

The within award is based upon this arbitrator's review of the record as well as oral argument at the time of the hearing of this matter.

Under Sec. 5102 of the New York Insurance Law (McKinney 1985), No-Fault first party benefits are reimbursement for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle.

It is well settled that a healthcare provider establishes its *prima facie* entitlement to No-Fault benefits as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of No-Fault benefits were overdue. *Westchester Medical Center v. Lincoln General Insurance Company*, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2 Dept. 2009); *see also Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). Respondent's denial indicating receipt of the proof of claim shows that Applicant mailed the proof of claim forms to the Respondent (*see, Ultra Diagnostic Imaging v. Liberty Mutual Insurance Co.*, 9 Misc.3d 97). The evidence is sufficient to make out a *prima facie* case of entitlement to recovery of Applicant's bill.

The burden then shifted to the insurer to come forward with sufficient evidence to rebut the presumption of medical necessity which attached to the providers' claim forms. *See, West Tremont Med. Diagnostic, PC v. Geico Ins. Co.*, 13 Misc.3d 131(A) (N.Y. App. Term 2006).

When an insurer relies upon a peer review report to demonstrate that a particular service was not medically necessary, the peer reviewer's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory. As per the holding in *Jacob Nir, M.D. v. Allstate Insurance Co.*, 7 Misc.3d 544 (2005), the peer reviewer must establish a factual basis and medical rationale to support a finding that the services were not medically necessary, including setting forth generally accepted standards in the medical community. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden to prove that the services were not medically necessary. *See CityWide Social Work & Psychological Services, PLLC v. Travelers Indemnity Co.*, 3 Misc.3d 608, 777 N.Y.S.2d 241 (N.Y.Civ. Ct. Kings Co. 2004).

Once Respondent meets this burden of proof then the burden shifts back to Applicant to present competent medical proof as to the medical necessity for the disputed billing 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 WL 2829826 (App. Term 2d & 11th 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 & 11th Dists. 7/3/08). Ultimately, the burden of proof rests with the Applicant (See: Insurance Law §5102). *See Be Well Medical Supply, Inc. v. New York*

*Cent. Mut. Fire Ins. Co.*, 18 Misc3d 139(A) (App. Term 2d & 11th Dists. Feb. 21, 2008).

In support of its contention that pf-NCS testing was not medically necessary, Respondent relies upon the peer review report of Kevin S. Portnoy, D.C. Dr. Portnoy notes that Assignor is a 58-year-old male who came under the care of BKC Chiropractic, P.C. for neck pain and low back pain, as a result of a motor vehicle accident on April 26, 2018. Assignor was also receiving physical therapy and acupuncture therapy.

Dr. Portnoy opines that pf-NCS testing was not medically necessary in that BKC Chiropractic, P.C. fails to indicate any positive neurological findings upon physical examination so as to warrant the performance of advanced diagnostic testing. There are no indications as to what the precipitating clinical factors were which led BKC Chiropractic, P.C. to perform the tests, or any indications that the treatment plan was altered after the performance of the tests.

BKC Chiropractic, P.C. fails to indicate how the performance of the tests 20 days after the motor vehicle accident, would aide in devising, altering, reducing the number of visits to his office or enhancing Assignor's clinical prognosis. In addition, Assignor's treatment consisted of chiropractic care and this is not an intervention dependent on the results of the tests. There was no description of any alternative invasive or surgical procedures under consideration by BKC Chiropractic, P.C. to which the information obtained from the tests would have been necessary to providing optimal chiropractic treatment to Assignor. Decisions regarding Assignor's chiropractic care can be made in the absence of the tests. BKC Chiropractic, P.C. does not provide any progress notes to delineate Assignor's progress, or lack thereof, prior to the tests. The tests have no role in the treatment of back pain. The modalities of therapy that may be given by the chiropractor will be based on clinical judgment of the chiropractor and will not be based on the findings of the tests.

The standard of care for a cervical plexus pain fiber NCS and a lumbar plexus pain fiber NCS of the musculoskeletal system after a motor vehicle accident would begin with a reasonable trial of conservative treatment. If Assignor did not respond to the therapy and had clinical evidence of a progressive neurological or orthopedic deficit, MRI might be indicated. In this case, Assignor sustained soft tissue injury. The standard of care for these types of injuries would be evaluation by a chiropractor, ordering of plain radiographs (only if there is suspicion of fracture or a severe mechanism of injury), rest and/or conservative therapy. If after this conservative treatment, there is deterioration in the condition or progressive, worsening neurological deficits a cervical plexus pain fiber NCS and a lumbar plexus pain fiber NCS may be indicated at that point in time. At that point, interventional pain management or surgery may be indicated depending upon the results of the advanced imaging or the progression of the condition. However, the standard of care in chiropractic does not involve the routine prescribing of a cervical plexus pain fiber NCS and a lumbar plexus pain fiber NCS in soft tissue injuries.

BKC Chiropractic, P.C. fails to provide a differential diagnosis or any indication of a diagnostic dilemma to warrant the referral for the tests or to establish a causal relationship between the tests and the motor vehicle accident on April 26, 2018.

Pf-NCS is a subjective test, totally dependent on the response of the subject being examined. This type of testing cannot provide any information about the location or age of a lesion in the sensory peripheral pathways. A comprehensive neurological evaluation provides the same information regarding sensory findings and is used in the clinical management of claimants. Assignor was started on a course of chiropractic care, which included chiropractic manipulation. If the treating chiropractor was concerned with a neurological pathology that required surgery, he would not be performing chiropractic manipulation. Quantitative sensory tests (QST) are techniques employed to measure the intensity of stimuli needed to produce specific sensory perceptions. They are used to evaluate the sensory detection threshold or other sensory response from supra-threshold stimulation. The common physical stimuli are touch, pressure, vibration, coolness, warmth/cold pain and heat. Abnormal or elevated QST measurements are not specific in the diagnosis of any particular type of neuropathy, and in fact do not necessarily indicate any form or peripheral neuropathy.

The standard of care of a cervical plexus pain fiber NCS and a lumbar plexus pain fiber NCS is that it is customarily performed for patients exhibiting signs and symptomatology consistent with small fiber neuropathy. Small fiber neuropathy is secondary to an immune or toxic metabolic etiology. A cervical plexus pain fiber NCS and a lumbar plexus pain fiber NCS is for identifying sensory fiber function which is usually dysfunctional in metabolic as well as inherited neuropathies such as diabetic neuropathy and is not related to traumatic etiology. There is no quantitative diagnostic information obtained by performing this testing that would significantly expedite or impact Assignor's chiropractic treatment plan, work status or clinical outcome.

Clinical sensory testing on routine neurologic examination is considered satisfactory to determine the extent of sensory dysfunction if a radiculopathy is present. The tests did nothing to advance Assignor's diagnosis or treatment and provided no benefit. A clinical examination using multiple modalities over numerous skin sites provided a more comprehensive assessment of sensory pathways than the assessment of threshold to electrical stimulation at a limited number of skin sites.

Symptoms including back pain are commonplace after a car accident of this nature and are successfully treated by observation and manual spinal manipulation therapy. There is no quantitative diagnostic information obtained by performing this testing that would significantly expedite or impact the treatment plan, work status or clinical outcome. Be that as it may, a cervical plexus pain fiber NCS and a lumbar plexus pain fiber NCS

does not provide the chiropractor with useful information regarding the detection and correction of the vertebral subluxation complex. Chiropractors are guided by manual range of motion, imaging studies, static and motion palpation findings, imaging findings, orthopedic testing, and the performance of deep tendon reflexes, sensory and motor testing when determining the regions of the spine to adjust. There is no indication in the records that Assignor's condition was worsening or not responding to the recommended treatment and that the current chiropractic treatment plan was dependent on the results of the tests. The tests were not necessary to provide conservative management for the minor soft tissue injuries that were sustained.

Decision Memo for Electrodiagnostic Sensory Nerve Conduction Threshold states "Based on the evidence as a whole, CMS concludes that the use of any type of s-NCT device (e.g., "current output" type device used to perform CPT, PPT, or PTT testing or "voltage input" type device used for v-NCT testing) to diagnose sensory neuropathies or radiculopathies in Medicare beneficiaries is not reasonable and necessary. Therefore, CMS intends to maintain its national non coverage policy for sensory-Nerve Conduction Threshold testing."

Aetna considers quantitative sensory testing also known as pressure- specified sensory device testing, experimental and investigational for the evaluation of musculoskeletal pain, the management of individuals with neuropathy, prediction of the response to opioid treatment or any other diagnosis because its diagnostic value has not been established. Quantitative sensory testing are techniques employed to measure the intensity of stimuli needed to produce specific sensory perceptions. They are used to evaluate a sensory detection threshold or other sensory responses from supra threshold stimulation. The common physical stimuli are touch - pressure vibration, coolness, warmth, cold pain and heat. In QST the subject must be able to comprehend what is being asked by the test, be alert and not taking mind altering medications, and not biased to the certain test outcome. Abnormal or elevated QST measurements are not specific in the diagnosis of any particular type of neuropathy, and in fact do not necessarily indicate and form of peripheral neuropathy. There are no prospective clinical studies demonstrating that quantitative tests of sensation improve the management and clinical outcomes of patients over standard qualitative methods of sensory testing. The pain Assignor was experiencing was a direct result of the motor vehicle accident. There were no indications the treating doctor had any questions as to what was causing Assignor's complaints. The submitted documents did not show that the treating doctor had any suspicion that Assignor's pain was being caused by any other condition. It is clear that Assignor's pain originated from the motor vehicle collision. If the treating doctor suspected a neurological condition affecting Assignor's treatment progress an appropriate referral could be made without the need for the Tests. The records do not indicate how the Tests will impact Assignor's chiropractic care.

Finally, electrodiagnostic studies should not be obtained if the information will not potentially enhance the patient's care. A treatment plan consisting of chiropractic manipulative treatment is not dependent upon the results of this electro-diagnostic

testing. There is no discussion as to how performing this electro-diagnostic testing altered the future course of the chiropractic treatment options.

Applicant submits a rebuttal to the peer review report by Ross A. Fialkov, D.C. I note that the rebuttal was uploaded to the electronic file maintained by the American Arbitration Association on February 10, 2021, whereas the hearing for this matter was held on March 2, 2021.

Pursuant to 11 NYCRR § 65-4.2 (b) (3) (i), which addresses submission of documents, the applicant shall submit all documents supporting the applicant's position along with their request for arbitration. All such documents shall be simultaneously submitted to the respondent. Following this original submission, no additional documents may be submitted by the applicant other than bills or claims for ongoing benefits. 11 NYCRR § 65-4.2 (b) (3) (iii) indicates that the written record shall be closed upon receipt of the respondent's submission or the expiration of the period for receipt of the respondent's submission. 11 NYCRR § 65-4.2 (b) (3) (iv) states that any additional written submissions may be made only at the request or with the approval of the arbitrator. Lastly, 11 NYCRR § 65-4.5 (o) (1) states that the arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations.

Based on the foregoing and the holding in *Matter of Mercury Cas. Co.* (67 A.D.3d 1017, 888 N.Y.S.2d 762 [2d Dep't 2009]), an arbitrator has the discretionary authority to preclude late submissions from a party and refuse to entertain them.

In this instance, Respondent's peer review report was uploaded to the electronic file maintained by the American Arbitration Association on August 13, 2019, over a year and a half prior to the date of this hearing. As such, Applicant had ample opportunity to submit a rebuttal to the peer review within a reasonable time thereafter. Applicant presents no persuasive excuse for the late filing of the rebuttal. Accordingly, the rebuttal of Dr. Fialkov is precluded under the Rocket Docket rules of this forum and will not be considered.

After careful consideration of the documents submitted and the parties' oral arguments at the hearing, I find in favor of Respondent. I am persuaded by the peer review report of Dr. Portnoy that pf-NCS testing of the upper and lower extremities was not medically necessary. Dr. Portnoy sets forth a standard of care that these tests should not be rendered in the absence of neurological findings and a reasonable trial of conservative treatment. In this instance, the testing was rendered three weeks after the motor vehicle accident. The medical records fail to demonstrate evidence of a progressive neurological or orthopedic deficit and there is no showing of a trial of conservative treatment that

Assignor was not responding to. It is ultimately Applicant who must prove, by a preponderance of the evidence, the pf-NCS testing in question was medically necessary. *Dayan v. Allstate Ins. Co.*, 39 Misc.3d 151(A) (App. Term 2d, 11th & 13th Dists. 2015); *Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co.*, 37 Misc.3d 19, 952 N.Y.S.2d 372. (App. Term 2d, 11th & 13th Dists. 2012). Accordingly, Applicant's claim for reimbursement is denied. In light of this decision, Respondent's fee schedule defense need not be addressed.

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

03/08/2021

(Dated)

Debbie Thomas

**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:**  
c3e6af63c4e4dedb36c10ef99f03467d

### **Electronically Signed**

Your name: Debbie Thomas  
Signed on: 03/08/2021