

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Manetto Hill Chiropractic & Rehabilitation
(Applicant)

- and -

National General Insurance Online, Inc.
(Respondent)

AAA Case No. 17-19-1141-4174

Applicant's File No. FDNY19-36828

Insurer's Claim File No. 3217326-002

NAIC No. 11044

ARBITRATION AWARD

I, Marcie Glasser, 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: Claimant

1. Hearing(s) held on 07/21/2021
Declared closed by the arbitrator on 07/21/2021

Todd Fass, Esq. from Fass & D'Agostino, P.C. participated for the Applicant

Peter Pagones, Esq. from Law Offices of Bobbi J. Vilacha participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,297.98**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the hearing, Applicant's counsel reduced the total amount claimed to \$2,225.82 so that the bills are in accordance with the New York Workers' Compensation Medical Fee Schedule ("fee schedule"). The Demand for Arbitration is hereby amended accordingly.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

This arbitration stems from treatment of a 70 year-old female who sustained injuries as a driver of a motor vehicle involved in an accident on March 8, 2018. The issue is the medical necessity EMG/NCV studies performed on May 14, 2018. Denial is timely based on the Peer Review Report of Kevin Portnoy, D.C. dated July 11, 2018.

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 and the oral arguments of the parties' representatives. I reviewed the documents contained in MODRIA for both parties and make a decision in reliance thereon.

The defense of medical necessity is premised on a Peer Review Report of Kevin Portnoy, D.C. dated July 11, 2018. Applicant submitted a Rebuttal Report of Nestor Nicolaides, D.C. dated July 30, 2019. No evidence was presented establishing that the bills in dispute were in excess of the applicable fee schedule.

Respondent's Peer Review Report

Dr. Portnoy concluded that the EMG/NCV tests were not medically necessary. The records do not indicate how the tests will aid in devising, altering reducing the number of visits or enhancing the prognosis. There was no rapid neurological deterioration throughout the course of treatment or evidence of spinal instability that required immediate surgical assessment of the cervical or lumbar spine or the upper or lower extremities. The Claimant's treatment consisted of chiropractic care, and this is not an intervention dependent of the results of the tests. Decision regarding the chiropractic care of Claimant can be made in the absence of the tests. The tests have no role in the treatment of back pain. The NCV/EMG is used if there is a diagnostic dilemma, an invasive change to the current treatment is necessary and surgery is being considered after a course of conservative care .

If the history and clinical evaluation reveal a radiculopathy or peripheral neuropathy the Claimant can be conservatively treated with chiropractic care without the need for tests. Most radiculopathy symptoms resolve without the need for surgery by means of chiropractic care, physical therapy or acupuncture therapy. Therefore, NCV/EMG tests would not simply be used to rule out radiculopathy or neuropathy. The records note Claimant has upper and lower extremity radicular neurological complaints; however, it is not uncommon for patients that sustain soft tissue injuries to present with positive neurological findings. This is due to the proximity of the spinal nerve roots to the injured spinal regions. After a soft tissue injury, the body's first reaction to the trauma is an inflammatory process, which can irritate the spinal nerve roots and cause radicular and neurological complaints. This type of condition would not require surgery or further diagnostic evaluation to continue conservative chiropract care.

EMG/NCV studies do not provide useful information regarding the detection and correction of the vertebral subluxation complex. Chiropractors are guided by active and passive ranges of motion, imaging studies, static and motion palpation findings, imaging findings, orthopedic testing , 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 the Claimant's condition was worsening or not responding to the recommended treatment and that the 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. There is no quantitative diagnostic information obtained from the testing that would significantly expedite or impact the treatment plan, work status or clinical outcome.

NCV/EMG studies are only performed when they would alter the clinical management. There was no indication that the Claimant would require more aggressive treatment such as epidural steroid injections, selective nerve root blocks or surgery as a result of the NCV/EMG study. There was no diagnostic dilemma to warrant the performance of the tests. Chiropractic justification has not been established for the NCV/EMG of the upper and lower extremities.

Unless there is a clinical differential diagnosis including a peripheral neuropathic/myopathic lesion vs. a root lesion that cannot be resolved with the history, neurologic examination, imaging studies, there is limited evidence to support the use of EMG/NCV in the evaluation, treatment or prognosis of patients with spine trauma with radicular symptoms.

The standard of care for NCV/EMG testing after a motor vehicle accident would begin with a reasonable trial of conservative treatment. If the Claimant did not respond to the therapy and had clinical evidence of a progressive neurological orthopedic deficit, MRI might be indicated. In this case, the Claimant 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 suspicion of fracture or a severe mechanism of injury), rest and/or conservative therapy. If there is deterioration in the condition or progressive, worsening deficits, NCV/EMG testing 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 NCV/EMG testing in soft tissue injuries.

Applicant's Rebuttal Report

Dr. Nicolaidis concluded that the EMG/NCV tests were medically necessary. The Claimant's physical examination and history demonstrated possible radiculopathies, plexopathies and neuropathies for which electrodiagnostic testing is useful to confirm or rule out. Positive findings in the history and exam pointed to neurological deficits that needed more evaluation to identify normal and abnormal nerve, muscle, or sensory neurons, localize the area of abnormal function, define the type of abnormal function and determine the extent/distribution and severity of the abnormal areas. The Claimant had complained of pain in the neck, middle and lower back pain that radiated into the left leg along with restricted range of motion, paresthesia, weakness, positive orthopedic /neurological testing, all suggestive of nerve root injury at different levels. The findings

suggest the need to rule out radiculopathy, neuropathy, polyneuropathies or myelopathy. The Claimant was progressing slower than expected and testing was needed to aid in future treatment plan.

Legal Analysis

Applicant has established its *prima facie* entitlement to reimbursement 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.S 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 (2nd Dep't., 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 the 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 is sufficient to meet its burden of proof of lack of medical necessity.

Therefore, the burden shifts back to Applicant to present competent medical proof as to the issue of medical necessity by a preponderance of 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 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 Dists. 7/3/09). Ultimately, the burden of proof rests with the Applicant (*See*, Insurance Law Section 5102).

I find that Applicant's burden has been met by the medical records, the Rebuttal Report of Dr. Nicolaides, and the evidence collectively. I am convinced that the Peer Review Report of Dr. Portnoy has been adequately refuted in that the medical records, as confirmed by the Rebuttal Report, document that the Claimant remained symptomatic with causally related subjective complaints despite having undergone an adequate course of conservative treatment. The neurological examination was positive for paresthesia and weakness. Therefore, it appears that the complaints and neurological deficit persisted despite an attempted a course of conservative care utilizing multiple therapeutic modalities. Dr. Nicolaides credibly noted that the Claimant may have had a neuropathy which had to be ruled out. Therefore, I am convinced that there was sufficient evidence of a differential diagnosis including radiculopathy and suspected neuropathy for which EMG/NCV testing was reasonable and medically necessary under

the circumstances of this Claimant to clarify the diagnosis and guide the treatment plan. I find that Applicant has presented competent medical proof as to the issue of medical necessity by a preponderance of credible evidence.

Accordingly, in light of the foregoing, based on arguments of counsel and after thorough review and consideration of all submissions, I find in favor of Applicant.

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	Amount Amended	Status
	Manetto Hill Chiropractic & Rehabilitation	05/14/18 - 05/14/18	\$2,297.98	\$2,225.82	Awarded: \$2,225.82
Total			\$2,297.98		Awarded: \$2,225.82

- B. The insurer shall also compute and pay the applicant interest set forth below. 09/12/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Based on the submission of timely denials, interest shall be paid from the date of filing for arbitration on the amount awarded of \$2,225.82 at a rate of 2% per month, simple, and ending with the date of payment of the Award, subject to the provisions of 11 NYCRR 65-3.9(e).

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

As this matter was filed after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay Applicant an attorney's fee in accordance with newly promulgated 11 NYCRR 65-4.6(d) on the amount awarded of \$2,225.82 at a rate of 2% per month, simple and ending with the date of payment of the Award.

- 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 Nassau

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

07/22/2021
(Dated)

Marcie Glasser

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:
76a3144559130217ab5061c07918c74b

Electronically Signed

Your name: Marcie Glasser
Signed on: 07/22/2021