

In 2003, the Florida legislature enacted a law that authorized the Florida Department of Health to “adopt, by rule, a list of diagnostic tests deemed not to be medically necessary for use in the treatment of persons sustaining bodily injury covered by personal injury protection benefits. . . . based on lack of demonstrated medical value and a level of general acceptance by the relevant provider community and shall not be dependent for results entirely upon subjective patient response.”

In early 2004, the Florida Department of Health adopted a rule that included surface electromyography as one of four diagnostic tests “deemed not to be medically necessary for use in the treatment of persons sustaining bodily injury covered by personal injury protection benefits,” thus relieving insurance companies of the obligation of reimbursing for the costs of the procedure under PIP. Dr. Richard Merritt, a licensed Florida chiropractor who used SEMG in his practice, challenged the rule.

The case went to a full evidentiary hearing, consisting of two days of testimony and the introduction of thousands of pages of documents. In general, the Department of Health and the insurance industry relied on journal articles, the newest of which was more than ten years old, and the testimony of an expert who admitted the efficacy of SEMG as a treatment technique, but disagreed as to its value in diagnosing injury. Dr. Merritt introduced numerous recent peer reviewed journal articles, including one issued within a month of the hearing, confirming the advances in SEMG, and offered his own expert testimony as a long time chiropractic practitioner and user of SEMG, and that of David Marcarian, who developed and marketed one of the leading brands of SEMG equipment.

The Administrative Law Judge (ALJ) reviewed and weighed all of the evidence presented by the Department of Health, the insurance industry, and Dr. Merritt, and concluded that SEMG should not have been included in the rule. Among her findings of fact were the following:

Overall, SEMG has advanced as a clinical tool from its earliest, more experimental uses . . . to today, when advances in technology and understanding have resulted in the elimination of problems of electrical interference, bandwidth filtering and electrode placement, and have resulted in a higher threshold of sensitivity.

The evidence in this case demonstrates that SEMG has medical value for use in the treatment of persons sustaining bodily injury covered by personal injury protection benefits. . . . it is clear that SEMG has a degree

of demonstrated medical value. Therefore, its inclusion on the list of medically unnecessary tests is arbitrary and capricious; has exceeded the Department's grant of rulemaking authority; and has enlarged, modified, or contravened the specific provisions of law implemented.

The evidence also demonstrated that SEMG is generally accepted in the relevant provider community.

Upon her review and independent assessment of the evidence as a whole, and based on her findings regarding the credibility of the witnesses and the weight of the evidence introduced by all parties, the ALJ concluded that "SEMG has demonstrated medical value . . . [and] that SEMG has achieved a level of medical acceptance as a valuable diagnostic tool for injuries of the spine and upper and lower back."

Unhappy with the outcome of the case, the Department of Health and the insurance industry appealed the decision to the Florida First District Court of Appeal. The parties briefed issues, including the sufficiency and quality of the evidence that supported the ALJ's Final Order. On January 5, 2006, the Court affirmed the Final Order, and held that:

the final order clearly set forth the finding that surface EMG testing has significant medical value as a diagnostic tool with respect to the treatment of a patient suffering from injuries like those arising out of a motor vehicle accident. This finding is supported by competent substantial evidence and demonstrates that surface EMG diagnostic testing failed to satisfy the statutory requirement, even under the broader reading suggested by the Department, and thus should not have been included on the list.

The Merritt case has answered the question of the validity of SEMG as a valuable tool for diagnosing injury. The Final Order and appellate decision should be viewed as persuasive evidence in other jurisdictions nationwide.