American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Optimus Plus Products Corp (Applicant)	AAA Case No.	17-18-1084-1716
	Applicant's File No.	137824
- and -	Insurer's Claim File No.	0603170760101016
	NAIC No.	22055
Geico Insurance Company (Respondent)		

ARBITRATION AWARD

I, Elyse Balzer, 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: KG

1. Hearing(s) held on 08/05/2019
   Declared closed by the arbitrator on 08/05/2019

   J. Gallagher, Esq from The Law Offices of John Gallagher, PLLC participated in person for the Applicant

   D. Gonzalez from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 4,713.30**, 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

   This arbitration arises out of durable medical equipment (DME) dispensed on 9/20/17, 9/28/17 and 10/18/17 to the 33 year old female injured person KG for injuries sustained as a front seat passenger in a vehicle involved in an accident on 8/19/17.

   The issue is:

   Whether respondent has proven the lack of medical necessity of DME based on peer reviews by Dr. Stuart Stauber, MD.

   Respondent did not raise any issue regarding the exhaustion of policy for no fault benefits.

All the documents in the electronic case file (ECF) for this case maintained in the Modria-AAA website were reviewed.

4. Findings, Conclusions, and Basis Therefor

On 8/24/17 KG was examined at Healthway Medical Care in the Bronx by Dr. Maria Ciechorska, MD, an internist. KG commenced a course of physical therapy at this facility. Dr. Ciechorska ordered DME consisting of : orthopedic pillow, thermophore, LSO, lumbar cushion, orthopedic bed board, egg crate mattress, orthopedic shoulder support for right shoulder. These items were delivered to KG on 8/29/17 by applicant; they are not the subject of this arbitration.

On 8/24/17 KG was examined at Acupuncture PC and commenced acupuncture treatment.

KG received chiropractic treatment at SB Chiropractic Care PC

On 9/13/17 Dr. Maria Ciechorska MD conducted a follow exam on KG and ordered these DME for KG: EMS unit & kit; EMS placement belt; electric massager; infrared heat lamp; hydrotherapy whirlpool.

On 9/13/17 KG underwent a lumbar MRI at Bronx Medical Diagnostic PC.

On 9/20/17 applicant dispensed to KG: a TENs unit belt ($82.50, E0731); a TENs unit system ($535.26, E0762); an infrared lamp ($202.45, E0200); a massager ($197.95, E1399); and a whirlpool ($498.22, E1300).

On 9/19/17 Dr. Ciechorska ordered a "LSO custom L spine."

On 9/26/17 KG underwent a right shoulder MRI at Bronx Medical Diagnostic PC

On 9/28/17 applicant dispensed to KG a "LSO appl control custom fitted" billed at $1150 under CPT L0632.

On 10/3/17 Dr. Ciechorska ordered a "LSO custom."

On 10/12/17 Dr. Ciechorska ordered a custom shoulder support - R shoulder.

On 10/18/17 applicant dispensed to KG a "LSO appl control custom fitted" billed at $1150, under CPT L0632, and a shoulder orthosis, billed at $896.92 under CPT L3674.

Respondent denied payment for the DME of 9/20/17 and 9/28/17 based on a peer review, dated 10/24/17, by Dr. Stuart Stauber, MD.

Basically Dr. Stauber believed that no DME for home use are necessary if a patient is "already engaged in an office based course of physical therapy for which these modalities of treatment were already being provided..."

Dr. Stauber claimed that there was no medical evidence that supported the use of TENS "for either pain management or improving recovering time...."

Dr. Stauber claimed that the home use of an infrared lamp "by an untrained professional...could pose a risk or could result in harm...." Dr. Stauber claimed that there was no support "in the literature" that heat lamps improve recovery time or provide any therapeutic benefit.

Dr. Stauber claimed that a massager is "a convenience item rather than a medically necessary item." Dr. Stauber cited studies to show that the efficacy of massage (not a massager) for low back pain or neck pain was uncertain.

Dr. Stauber claimed that hydrotherapy whirlpool was not necessary because there was no benefit to it.

Dr. Stauber actually conducted a complete factual analysis regarding the need for the custom fitted LSO following a positive lumbar MRI. Dr. Stauber pointed out that there was no evidence of acute discopathy.

Respondent denied payment for the DME of 10/18/17 based on a peer review, dated 11/13/17, by Dr. Stuart Stauber, MD.

Dr. Stauber claimed that the dispensing of the LSO control was not medically necessary as: the claimant had soft tissue injury & there was no need for this device; there is little evidence that lumbar supports provide any meaningfully therapeutic benefit.

Dr. Stauber claimed that the shoulder orthosis was unnecessary because "despite there being some pain & tenderness to the shoulder there is no indication as the nature or severity of this condition and because "research evidence indicating the use of a shoulder support is considered weak."

Respondent submitted: a medical literature review from the Work Loss Data Institute (WLDI), Guideline Summary NGC-10124, "Neck and upper back (acute & chronic)": an article entitled "Hydrotherapy" by Dr. Martin & a health care analyst, May 2004, from "WorkSafe Program Design Division"; an article entitled "Massage for low back pain [Review]" by Furlan AD et al, from The Cochrane Library 2010, Issue 6; an article entitled "Massage for mechanical neck disorders [Review]" by Patel KC et al from The Cochrane Library 2010, Issue 9; an article entitled "lumbar supports for prevention & treatment of low back pain [Review]" by van Duijvenbode ICD et al from The Cochrane Library 2008, Issue 3; a one page excerpt from NYS Workers Compensation Board NY Mid & Low Back Injury Medical Treatment Guidelines D.2b-D2e; a "guideline" from the national Guideline Clearinghouse re shoulder complaints; an article entitled "A Controlled Trial of Transcutaneous Electrical Nerve Stimulation (TENS) and Exercise

for Chronic Low Back Pain" by Deyo, MD et al, from NEJM, 1900: 322; 1627-1634, June 7, 1990.

In reviewing the proof I note that Dr. Stauber reviewed the right shoulder MRI of 9/26/17, which showed "evidence for rotator cuff tendinitis and partial tear" and "additional labral injury", but still claimed that "there is no indication as the nature or severity of this condition." This claim is directly contradicted by the shoulder MRI and discredits Dr. Stauber's probity.

I also note that the articles submitted by respondent, cited by Dr. Stauber, with the exception of the NYS Workers Compensation Medical Treatment Guidelines, are

arcane and do not contain or represent the generally accepted standards of care for prescribing the various items of DME in dispute.

I also note that Dr. Stauber's standard for whether DME are medically necessary is his own opinion about when the DME are effective.

Efficacy is not the standard of medical necessity in no fault disputes.

This peer fails to meet the burden of proof imposed on a carrier to prove medical necessity.

A no-fault insurer defending a denial of first party benefits on the ground that the billed for services were not medically necessary must show that the services provided were inconsistent with generally accepted medical/professional standards." *Citywide Social Work & Psy Serv PLLC v. Allstate Ins. Co.*, 20 Misc.3d 1124(A), 2008 NY Slip Op 51601(U),*7/1/08, District Court, Nassau County, J. Robert A. Bruno.*

In *Choicenet Chiropractic P.C. v. Allstate Ins. Co.*, 2003 NY Slip Op 50672U, 2003 N.Y. Misc. LEXIS 314 (2003), the Appellate Term, 2nd Department, stated what was required for a peer review to be sufficient to withstand a motion for summary judgment in a no fault case. The Appellate Term held:

> . . . . a peer review report must set forth a factual basis sufficient to establish, prima facie, the absence of medical necessity (cf. Liberty Queens Medical P.C. v. Liberty Mutual Ins. Co., NYLJ, Nov. 4, 2002 [App Tm, 2d & 11th Jud Dists.]). Here, the report, consisting of the bare conclusory assertion that certain procedures were medically unnecessary, failed to create a triable issue of the treatment's medical
> necessity.

In this case it is my opinion that Dr. Stauber's peer reviews show that the custom LSOs were prescribed in deviation from generally accepted standards of care but that his peer reviews do not serve to prove any deviation from generally accepted standards of care for the other items of DME in dispute.

Accordingly, based on the proof I find that respondent has proven, by a fair preponderance of the credible evidence, the lack of medical necessity of the two duplicate custom LSOs, but that respondent has failed to prove the lack of medical necessity of the TENs unit belt ($82.50, E0731); TENs unit system ($535.26, E0762); infrared lamp ($202.45, E0200); massager ($197.95, E1399); whirlpool ($498.22, E1300) and shoulder orthosis ($896.92, L3674).

Applicant is awarded $2413.30. The remainder of the claim is denied.

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**	**Total**	**Status**
	Optimus Plus Products Corp	**09/28/17 - 09/28/17**	**$1,150.00**	**$ 2,413.30**	**Denied**
	Optimus Plus Products Corp	**09/20/17 - 09/20/17**	**$1,516.38**	**$ 2,413.30**	**Awarded: $1,516.38**
	Optimus				

	Plus Products Corp	**10/18/17 - 10/18/17**	**$2,046.92**	**$ 2,413.30**	**Awarded: $896.92**
Total			**$4,713.30**	**Awarded: $2,413.30**	

B. The insurer shall also compute and pay the applicant interest set forth below. 01/23/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

From 1/23/18 to date of payment of the award

C. Attorney's Fees

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

In cases filed before 2/4/15, the Respondent shall pay the Applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e)(effective April 5, 2002). For cases filed after 2/4/15, the respondent shall pay the Applicant an attorney's fee in accordance with newly promulgated 11 NYCRR 65-4.6 (d), as amended by the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D).

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 Westchester

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

08/07/2019
(Dated)

Elyse Balzer

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:
90aa989546cd1e29f701da58d7ec1af0

Electronically Signed

Your name: Elyse Balzer
Signed on: 08/07/2019