

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Supplies Made Easy Inc
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-23-1289-9141

Applicant's File No. n/a

Insurer's Claim File No. 0674081716 2SF

NAIC No. 29688

ARBITRATION AWARD

I, Gerry Wendrovsky, 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: EIP

1. Hearing(s) held on 10/12/2023
Declared closed by the arbitrator on 10/12/2023

Ian Besso from The Sigalov Firm PLLC participated virtually for the Applicant

Linda Smith from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,913.65**, 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

The EIP, SR, a 36-year-old male was involved in a motor vehicle accident on 6/19/22. At issue is \$3,913.65 for durable medical equipment (DME) issued 7/14/22 - 9/20/22. There are two bills/DOS. Respondent denied the claim based upon the peer reviews of Dr. Stuart Springer, dated 8/23/22 and 10/25/22. The question presented is whether the DME was medically necessary.

4. Findings, Conclusions, and Basis Therefor

This case has been 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. The hearing was conducted via Zoom. There were no witnesses. I have reviewed the documents contained in MODRIA for both parties and made my decision in reliance thereon, which is in full disposition of the issues before me.

An applicant establishes its prima facie entitlement to reimbursement as a matter of law by proof that it submitted a claim, setting forth the fact and the amount of the loss sustained, and that payment of no-fault benefits was overdue. *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 A.D. 3d 742 (2nd Dept.,2004). The applicant has submitted sufficient credible evidence to establish its prima facie case.

Peer Reviews

A defense that DME was not medically necessary may properly be established with a peer review [Jacob Nir, as assignee of John Doe and Allstate, 7 Misc. 3d 544, 547 (Civ. Ct. 2005)], which must "*set forth a factual basis and medical rationale for the peer reviewer's determination*" *Provvedere, Inc. v. Republic Western Ins. Co.*, 2014 NY Slip Op 50219(U) (App. Term 2014). A peer review's medical rationale will be insufficient to meet respondent's burden of proof if: 1) not supported by evidence of a deviation from "*generally accepted medical*" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice for its findings; or 3) it fails to provide specifics as to the claim at issue, is conclusory or vague. *All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U) (Civ. Ct. 2012); Nir, *supra*.

For brevity and readability, references to citations stated as [*Cite*].

In contending the DME- cervical collar, Positioning cervical pillow, Car seat (orthopedic) support, Lumbar-sacral support (LSO), Lumbar cushion, Bed-Board, Mattress foam, Infrared Heating, Massager (Percussor), EMS Unit (Four leads), EMS-TENS Belt, Whirlpool- was not medically necessary, respondent relied on the peer reviews of Dr. Springer, who reviewed the EIP's medical records, and collectively asserted in pertinent part:

".... On 6/29/2022, the (EIP) was evaluated by Hiram Emmanuel Luigi-Martinez, M.D., Examination of the cervical spine revealed tenderness and trigger points. There was a decreased range of motion. Examination of the lumbar spine revealed tenderness over the L3-L4 paraspinal region and intervertebral disc spaces. Straight Leg Raise test was positive. Examination of the right shoulder revealed tenderness over the anterior acromioclavicular joint, and deltoid muscles. There was a decreased range of motion. Impingement test was positive. The diagnoses

were lumbar paraspinal muscle spasms, lumbar myofascial strain, cervical sprain, lower back sprain, and contusion of the right shoulder. Pain medications were prescribed....

On 6/29/2022, the (EIP) underwent bilateral paralumbar and bilateral spinal musculature trigger point injections by Aleksandr Kopach, P.A., under local anesthesia diagnoses were myofascial pain syndrome. **Prescriptions dated 6/29/2022 by Aleksandr Kopach, P.A., (DME)**

As per the evaluation report dated 6/29/2022 by Hiram Emmanuel Luigi-Martinez, M.D. Examination of the cervical spine revealed tenderness. Trigger points were noted. The range of motion was decreased. Examination of the lumbar spine revealed tenderness at the L3-L4 paraspinal region. The range of motion was decreased. Straight Leg Raise test was positive. Examination of the right shoulder revealed tenderness over the right anterior acromioclavicular joint, deltoid muscle insertion, and posterior deltoid muscle. The range of motion was decreased. Impingement test was positive. The diagnoses were lumbar paraspinal muscle spasm, acute lumbar myofascial strain, acute cervical sprain, lumbar back sprain, and contusion of the right shoulder the (EIP) underwent a trigger point injection over the bilateral paralumbar and bilateral spinal musculature, by Aleksandr Kopach, P.A. diagnoses were myofascial pain syndrome

The (EIP) received physical therapy from 6/29/2022 to 8/31/2022 for the cervical spine, lumbar spine, and right shoulder, in a total of 26 sessions**The (EIP) received acupuncture treatment from 7/1/2022 to 8/30/2022** for the cervical spine, lumbar spine, and right shoulder, in a total of 17 sessions

The MRI report of the cervical spine dated 7/20/2022, revealed: 1 mm posterior subluxation of C5 upon C6. Possible mild arthropathic changes at the C7-T1 level bilaterally. Focal central and slightly right central disc herniation at C3-C4 level flattening the cervical cord with canal stenosis measuring 9 mm. Central disc herniation at the C4-C5 level flattens the ventral portion of the cervical cord. Disc bulging at the C5-C6 disc space flattening the thecal sac. **The MRI report of the lumbar spine dated 7/20/2022, revealed:** Disc bulging at the L3-L4 and L4-L5 disc spaces, more prominent at the L4-L5 level with flattening of the thecal sac. Bilateral foraminal encroachment is seen mainly at the L3-L4 interspace. Disc bulging at the L5-S1 disc space with a superimposed broad-based central disc herniation associated with an annular tear with a mild to moderate canal stenosis seen closer to mild in degree. **The MRI report of the right shoulder dated 7/26/2022, revealed:** Diffuse-tendinitis involving the supraspinatus and infraspinatus tendons. Mild to moderate impingement of the supraspinatus outlet. Subacromial/subdeltoid bursitis, intraosseous ganglion cyst within the humeral head measuring 2.6 cm.

.... **follow-up evaluation report dated 7/27/2022** by Hiram Emmanuel Luigi-Martinez, M.D., (EIP) underwent trigger point injection over the bilateral erector spinae muscles, bilateral lumbar multifidus muscles, bilateral paralumbar, and bilateral spinal musculature, by Aleksandr Kopach, P.A. diagnoses were myofascial pain syndrome.

A prescription dated 7/27/2022 by Aleksandr Kopach, P.A., for an infrared heating lamp with stand, massager (percussor), EMS unit (four leads), EMS-TENS belt, and the whirlpool....

.... **the initial evaluation report dated 7/28/2022 by Ketan Vora, D.O.**
.... **the evaluation report dated 8/16/2022 by Jasoda Dhupan, N.P.,**
Examination of the cervical spine and lumbar spine revealed tenderness. Examination of the right shoulder revealed tenderness. The diagnoses were cervicalgia (neck pain), lower back pain (lumbago), and right shoulder pain. Pain medications were prescribed....

As per the evaluation report dated 8/25/2022 by Ketan Vora, D.O.,....
Examination of the cervical spine revealed tenderness at C2-C7 levels. Trigger points were noted. The range of motion was decreased. Examination of the lumbar spine revealed tenderness at the L1-S1 levels. Trigger points were noted. The range of motion was decreased. Examination of the right shoulder revealed tenderness. Neer's test and Hawkins test were positive. The diagnoses were cervical disc bulge at C5-C6, cervical disc herniation at C3-C4, C4-C5, cervicalgia (neck pain), sprain of ligaments of the cervical spine (whiplash), a strain of muscle, fascia, tendons (cervical), lumbar disc bulge at L3-L4, L4-L5, L5-S1, lumbar disc herniation at L5-S1, annular tear at L5-S1, lower back pain (lumbago), spasm of back muscles, lumbar sprain /strain, and right shoulder sprain/strain.

On 8/25/2022, the (EIP) underwent extracorporeal shockwave therapy for the lumbar spine....

the evaluation report dated 8/29/2022 by William King, M.D.,
Examination of the lumbar spine revealed tenderness over the paralumbar muscles. Examination of the right shoulder revealed tenderness over the acromioclavicular joint and supraspinatus. The range of motion was decreased. The diagnoses were lumbar sprain /strain, right shoulder derangement, and right shoulder tendinitis

.... **the re-evaluation report dated 8/31/2022** by Hiram Emmanuel Luigi-Martinez, M.D., Examination of the lumbar spine revealed tenderness at the L1-S1 paraspinal region. The range of motion was decreased. Straight Leg Raise test was positive. Examination of the right shoulder revealed tenderness over the right anterior acromioclavicular joint, deltoid muscle insertion, and posterior deltoid muscle. The range of motion was decreased. Impingement test was positive. The diagnoses were lumbar paraspinal muscle spasm, acute lumbar myofascial strain, acute cervical sprain, lumbar back sprain, and contusion of the right

shoulder. MRIs of the cervical spine, lumbar spine, and right shoulder were ordered (again?) DMEs were prescribed.

On 8/31/2022, the (EIP) underwent a trigger point injection over the bilateral iliocostalis lumborum muscle, and quadratus lumborum musculature, by Aleksandr Kopach, P.A. diagnoses were myofascial pain syndrome.

On 9/13/2022, the (EIP) underwent extracorporeal shockwave therapy for the cervical spine"

Dr. Springer then opined as to the lack of medical necessity of the DME in pertinent part:

*".... (cervical pillow) [Cite] may affect neck extensor muscle endurance and CV angle in patients with cervical spondylosis, although **further studies are needed before any recommendations** limited studies have examined the effectiveness of pillows The (EIP) should have continued receiving conservative treatment, as it has better clinical outcomes. Hence, the cervical pillow provided to the (EIP) was not medically necessary...."*

(cervical collar) [Cite] "Recommendation: For patients with acute neck pain with movement coordination impairments (including WAD): Clinicians should provide the following: Education of the patient to Return to normal, nonprovocative pre-accident activities as soon as possible. Minimize use of a cervical collar. Perform postural and mobility exercises to decrease pain and increase ROM."

(orthopedic car seat, back cushion) [Cite] "Pressure ulcers are a frequent complication in patients having limited activity and mobility (e.g., elderly people, spinal cord injury patients, people with disabilities, etc.)"

(egg crate mattress, bed board) [Cite] these mattress overlays are more effective in preventing Pus compared with a standard mattress or a pressure-reducing foam mattress in nursing homes and intensive care settings.... [Cite]

(LSO) [Cite] have been developed to provide relief from pinched nerves or disc or spinal cord compression. These devices claim to axially decompress the spine but lack clinical or experimental evidence to support their efficacy. Although many different orthoses exist for treating lower back problems, we are not aware of any that provide the benefits of therapeutic exercise or enable independent living and return to active work. Such a device would well serve individuals suffering from disc degeneration, recovering from an injury, limited by weakness, and the elderly with several degenerative conditions.... The (EIP) started receiving physical therapy for the lower back. There was no evidence that the physical therapy was not helpful....

(massager) [Cite] "Several randomized controlled trials and prospective studies indicate that massage therapy has positive results with respect to osteoarthritis and rheumatoid arthritis, including less pain and stiffness, and enhanced function "A vibration massage therapy may not be an appropriate solution in all cases of injuries and pains because of the intensity of these therapies. Too high intensity could be dangerous and may worsen conditions

(infrared heating lamp) [Cite] "There are insufficient data to either support or refute the effectiveness of LLLT for the treatment of LBP." there was no documentation suggestive of the indications of this device. There was no treatment plan regarding the use of this device. The reason why the Infrared heating lamp with a stand was prescribed is not clearly understood. The (EIP) should have continued receiving non-invasive conservative care in the form of physical therapy and acupuncture treatment and should initiate with chiropractic treatment for better clinical outcomes

(EMS unit) [Cite] is more commonly administered in the clinical setting externally via transcutaneous electrodes placed over specific treatment areas. The body serves as a conductor and allows current to flow between the electrodes, accessing the peripheral nerves and muscles. Several electrical stimulation treatment parameters may uniquely address different impairments. The electrophysiologic effects vary depending on the type of current applied and its dosage. Electrical stimulation for the purpose of pain modulation is primarily used in the acute recovery phase of rehabilitation. The subsequent phases of rehabilitation incorporate electrical stimulation for the purpose of strengthening targeted muscle groups....

(whirlpool) [Cite] Most recommendations for the use of cold therapy are based on anecdotal experience, with limited scientific evidence to support the efficacy of specific cold modalities. Thermotherapy refers to heating modalities that increase tissue temperature for a variety of therapeutic goals the evidence to support the use of heat or cold for the management of low back pain is limited and that higher-quality randomized controlled trials are needed"

I am constrained to find that respondent did not establish the lack of medical necessity as concerned the cervical pillow (\$22.04), cervical collar (\$322.50), orthopedic car seat (\$280.30), back cushion (\$309.97), egg crate mattress (\$160.18), bed board (\$159.61); and the massager (\$355.56) and EMS unit/belt (\$850.49 + \$231.94). Plainly, as concerned the majority of the DME, the peer reviews were neither supported by evidence of a deviation from "generally accepted medical" standards, nor cited to relevant medical authority, standard, or generally accepted medical practice for their findings. All Boro Psychological Servs., *supra*; Nir, *supra*.

The applicant is reimbursed the combined sum of \$2,692.59.

Respondent presented a marginally sufficient defense of lack of medical necessity solely as concerned the LSO, infrared lamp, and whirlpool; as to these items of DME, the burden then shifts back to applicant to present its own evidence of medical necessity [West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc. 3d 131A (App. Term 2006)], by meaningfully referring to, or rebutting respondent's evidence. Yklik, Inc. v. Geico Ins. Co., 28 Misc. 3d 133A (App. Term 2010).

Rebuttal/Addendum

Applicant submitted the rebuttal dated 6/6/23 of Aleksandr Kopach, P.A., dated 1/12/22, which addressed the medical necessity of the (remaining items of) DME in pertinent part:

*".... the prescription of DME is a part of the conservative management
....*

(LSO) was prescribed to support and stabilize the lumbar spine and prevent further damage to the lumbar spine to reduce pain and improve mobility. This device is ordered to facilitate healing following an injury by limiting improper mobility and muscular activity in the lumbar region. Lumbar Support is meant to provide even, gentle support for distracted lumbar vertebrae, paraspinal muscles, and ligaments, to alleviate pain and prevent compression on intervertebral nerve roots, muscle spasm, and stiffness its short-term use is known to improve pain and disability during the treatment period without significant adverse effects. (Effectiveness of orthoses for treatment in patients with spinal pain [Cite] [Cites]

(Infrared Heating Lamp) facilitates the treatment goal of early mobilization for neck and back pain sufferers can improve the healing of skin wounds, photo prevention, relieve pain, stiffness, fatigue of rheumatoid arthritis, ankylosing spondylitis, potentiate photodynamic therapy, treat ophthalmic, neurological, and psychiatric disorders, and stimulate the proliferation of mesenchymal and cardiac stem cells [Cites]

(Whirlpool) used to help manage inflammation and swelling in the injured body part. [Cite] "Manipulation of circulation, inflammation, and pain neurology with temperature are the most common goals of hydrotherapy...."

Respondent submitted an addendum dated 2/21/23, wherein Dr. Springer cited additional selections of the medical literature; however, in my discretion, I reject such belated support for his initial opinion, having not been originally contained within the peer reviews.

Discussion

I note that the rebuttal was authored by a non-physician is of significance- to provide an expert opinion addressing the necessity of medical services, rebutting that of a

physician, requires the proponent possess the "*requisite skill, training, education, knowledge, or experience from which it can be assumed that the information imparted or the opinion rendered is reliable*". Elmont Open MRI & Diag. Radiology, P.C. v. State Farm Ins. Co., 26 Misc. 3d 1211(A) (Dist. Ct. 2010). While mindful of the professional distinction, the opinion of a P.A. does go to '*the weight and not to the admissibility of the evidence*'. Mathews v Allstate Ins., 52 Misc. 3d 141(A) (App Term 2016); Metropolitan Diagnostic Med. Care, P.C. v Erie Ins. Co. of N.Y., 54 Misc. 3d 129(A) (App Term 2016).

Pursuant to 11 NYCRR 65-4.5 (o)(1), an arbitrator shall be the judge of the relevance and materiality of the evidence offered. As the trier of fact and the law, I am authorized to take judicial notice of material derived from reliable official government websites. Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D. 3d 13, 20 (2nd Dept., 2009).

According to <http://www.op.nysed.gov/prof/med/article131-b.htm>, Education Law 6540, 6541 provides, in pertinent part:

"1. To qualify for a license as a physician assistant has satisfactorily completed an approved program for the training of physician assistants a physician assistant may perform medical services, but only when under the supervision of a physician and only when such acts and duties as are assigned to him or her are within the scope of practice of such supervising physician"

Further, pursuant to https://www.health.ny.gov/professionals/doctors/conduct/physician_assistant.htm, the NYS Department of Health Reference Information, in pertinent part:

".... In an outpatient setting, the PA may prescribe all medications"

For the DME to be medically necessary, it must be "*reasonable in light of the (EIP's) injury, subjective and objective evidence of the patient's complaints of pain, and the goals of evaluating and treating the patient.*" Fifth Avenue Pain Control Center v. Allstate, 196 Misc. 2d 801, 807-808 (Civ. Ct. 2003).

Upon review, as concerns the LSO and infrared lamp, I am persuaded by the respective peer review; applicant has sufficiently set forth the medical necessity of the whirlpool (\$526.43).

Conclusion

The applicant is awarded the combined sum of \$3,219.02 (\$2,692.59 + \$526.43).

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
	Supplies Made Easy Inc	07/14/22 - 07/14/22	\$1,652.96	Awarded: \$1,254.60
	Supplies Made Easy Inc	09/20/22 - 09/20/22	\$2,260.69	Awarded: \$1,964.42
Total			\$3,913.65	Awarded: \$3,219.02

B. The insurer shall also compute and pay the applicant interest set forth below. 03/09/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Simple interest on the above awarded amount shall be computed and paid at a rate of 2% per month, commencing on the date the claim was filed in arbitration and ending with the 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

Respondent shall pay the applicant an attorney's fee, in accordance with 11 NYCRR 65-4.6.

- 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 NY

SS :

County of NY

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

11/06/2023
(Dated)

Gerry Wendrovsky

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:
ed16249df184c7c53d966a0864775bb2

Electronically Signed

Your name: Gerry Wendrovsky
Signed on: 11/06/2023