

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Myrtle Avenue Trading LLC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-23-1284-2400

Applicant's File No. 171.406

Insurer's Claim File No. 1024979-02

NAIC No. 16616

ARBITRATION AWARD

I, Paul Weidenbaum, 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: IP

1. Hearing(s) held on 12/26/2023
Declared closed by the arbitrator on 12/26/2023

Allen Tsirelman from Tsirelman Law Firm PLLC participated virtually for the Applicant

Helen Cohen from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,357.96**, 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 the dispensation of durable medical equipment to the injured person, a 30 year old female, who was involved in a motor vehicle accident which occurred on 4/7/18.

Whether the dispensation of the various items of durable medical equipment to the claimant on 4/23/18 was medically necessary in light of the Respondent's peer review report of Dr. Chiu dated 8/31/18?

4. Findings, Conclusions, and Basis Therefor

This arbitration arises out of the dispensation of durable medical equipment in the form of an LSO, massager, mattress and bed board, water circulating heat pad, lumbar cushion, and a cervical pillow to the injured person, a 30 year old female, related to injuries sustained in a motor vehicle accident that occurred on 4/17/18. Applicant seeks reimbursement in the amount of \$1,357.96. Respondent timely denied payment of the disputed balance based upon the peer review reports of Dr. Chiu dated 8/31/18.

Applicant has established its prima facie case with proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see Insurance Law § 5106 a; *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; *Amaze Med. Supply v. Eagle Ins. Co.*, 2 Misc. 3d 128A, 784 N.Y.S. 2d 918, 2003 NY Slip Op 51701U [App Term, 2d & 11th Jud Dists]).

The burden shifts to the insurer to prove that the services were not medically necessary. If an insurer asserts that the medical test, treatment, supply or other service was medically unnecessary, the burden is on the insurer to prove that assertion with competent evidence such as an independent medical examination, a peer review or other proof that sets forth a factual basis and a medical rationale for denying the claim. (See *A.B. Medical Services, PLLC v. Geico Insurance Co.*, 2 Misc. 3d 26 [App Term, 2nd & Page 3/9 4. 11th Jud Dists 2003]; *Kings Medical Supply Inc. v. Country Wide Insurance Company*, 783 N.Y.S. 2d at 448 & 452; *Amaze Medical Supply, Inc. v. Eagle Insurance Company*, 2 Misc. 3d 128 [App Term, 2nd and 11th Jud Dists 2003]). An IME report asserting that no further treatment is medically necessary must be supported by a sufficiently detailed factual basis and medical rationale, which includes mention of the applicable generally accepted medical/professional standards. *Carle Place Chiropractic v. New York Central Mut. Fire Ins Co.*, 19 Misc.3d 1139(A), 866 N.Y.S.2d 90 (Table), 2008 N.Y. Slip Op. 51065(U), 2008 WL 2228633 (Dist. Ct., Nassau Co., May 29, 2008, Andrew M. Engle, J.). An IME report must set forth a factual basis and medical rationale for the conclusion that further services are not medically necessary. E.g., *Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance*, 20 Misc.3d 144(A), 873 N.Y.S.2d 238 (Table), 2008 N.Y. Slip Op. 51863(U), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008).

Dr. Chiu asserted the following in his 8/31/18 peer review report:

Cervical Pillow: "most therapeutic pillows are not durable and not primarily medical in nature. In the treatment of disease or injury, they are not mainly used. The patient can use a rolled up towel which will have the same therapeutic effect. Some investigators have advocated the use of short-term immobilization...with either a hard or soft collar to aid in apin control. Use of a cervical pillow during sleep has also been recommended. However, data are needed to assess the benefits of these approaches." Cervical Radiculopathy, *New England Journal of Medicine* Volume 353: 392-399, July 28, 2005, No.4. There is no conclusive evidence that a cervical pillow provides any significant

benefit to the patient with regard to reduction of pain or recovery time. In one study, it was found that a water-based pillow was superior to a cervical pillow and/or the standard pillow. The use of a cervical pillow did not provide any advantages to the subjects of the study with regard to pain reduction and sleep time. It is noted in the article that "the duration of sleep was significantly shorter for the roll pillow." It is further concluded that there is little research regarding the utility of cervical pillows to reduce pain and improve sleep. See Archives of Physical Medicine & Rehabilitation 1997, 78: 193-198; Cervical Pain: A comparison of three pillows.

LSO: Lumbar supports do not have statistically significant effect on rotation. There is also no evidence lumbar supports reduce the electromyographic activity of erector spinae muscles or increase intra-abdominal pressure. Therefore, the authors conclude the hypothesis that lumbar supports decrease the back muscle force by means of a decrease in electromyogram of back muscles or an increase intra-abdominal pressure is not supported by the available evidence. See Spine 2000; 25(16): 2103-2113. In fact, the evidence suggests there is harm associated with prolonged lumbar support, which decreases strength, trunk musculature and leads to a false sense of security. A review of 5 randomized clinical trials involving over 1,200 people identified no difference between acute and chronic pain using the assistive devices such as lumbar support, LSO and back cushion. See Lumbar support for prevention and treatment of low back pain; Cochrane Review, 2008, Issue 3, pp. 1-23. "There was little or no difference between individuals with low back pain who used supports and those who received no treatment or education on lifting techniques in back pain prevention or reduction of sick leave... There was little or no difference between patients with acute or chronic back pain who used back supports and those who received no treatment in short-term pain reduction or overall improvement."

Thermophore: "A Cochrane review of randomized trials of various exercises for persistent low back pain, including strengthening, general stretching, the McKenzie method of passive end range stretching exercises, and conventional physical therapy... showed that these strategies appeared equivalent and seemed to be more effective than the usual care by a general practitioner." Persistent Low Back Pain, New England Journal of Medicine Volume 352: 1891-1898, May 5, 2005, No. 18. There is no conclusive evidence that the use by a patient of an electric moist heat pad provides any significant benefit with regard to reduction of pain or recovery time. There is also a risk involved in a patient using heating devices at home. "At-home application of heat or cold are given a 'D' rating in terms of medical evidence supporting its use, which means that panel interpretations of information not meeting inclusion criteria for research-based evidence." See National Guidelines Clearinghouse: Neck and upper back complaints, U.S. Department of Health and Human Services, pp. 1-11. There is no conclusive evidence that this device would provide any significant benefit to the patient not obtained through an office-based physical therapy program.

Egg Crate Mattress: "Given current evidence, using support surfaces, repositioning the patient, optimizing nutritional status, and moisturizing sacral skin are appropriate strategies to prevent pressure ulcers. Although a number of randomized controlled trials have evaluated preventive strategies for pressure ulcers, many of them have important methodological limitations. There is a need for well-designed randomized controlled

trials that follow standard criteria for reporting non-pharmacological interventions and that provide data on cost-effectiveness for these interventions." See *Journal of the American Medical Association (JAMA)* 2006 August 23; 296(8): 974-984. Dr. Chiu asserts that these studies support the use of an egg crate mattress for the prevention of pressure ulcers. The claimant herein, however, does not meet the relevant criteria.

Bed Board: "This is a device that one puts under the mattress to make the mattress firmer. It also keeps the mattress from sagging. A bed board is considered not medically necessary as it is not primarily medical in nature." See *Medicare National Coverage Determinations Manual*, page 9. Dr. Chiu states that receiving both an egg crate mattress and a bed board is contradictory in nature since one device makes for a softer mattress and the other one makes for a harder mattress.

Lumbar Positioning Cushion: "The benefit derived from a contoured lower back support must be weighed against the comfort supplied by a simple car cushion. Neither has any permanent effect on the spine; neither can accelerate or retard the natural aging process responsible for most low back pain. The choice should be made solely on the basis of cost, comfort and convenience." *Canada Family Physician* June 1984; Volume 30, 1353-1360. There is no need for the lumbar cushion or car seat. The treating chiropractor did not indicate the patient had difficulty sitting or getting up from a seated position, or driving in a car. Lumbar cushions may be used to maintain normal lordotic posture if pain is present with prolonged sitting, but they are not therapeutic and are for a patient's comfort only.

Massager: With respect to the massager, Dr. Chiu cites *Manipulation, Traction and Massage; Physical Medicine and Rehabilitation*, Braddom, R. 2016, Fifth Edition, pages 361-365. A massager prescribed for home use affects mainly the superficial muscles and does little to treat the deeper, more involved muscles. The massager device is unlike treatment received from a licensed massage therapist. A literature search did not reveal any significant studies on the beneficial effects of a home use massager on these types of injuries.

Where the Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden then shifts to the Applicant which must then present its own evidence of medical necessity. [see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed.], Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company, 2008 NY Slip Op 50456U, 18 Misc. 3d 1147A, 2008 N.Y. Misc. LEXIS 1121, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co. 13 Misc.3d 131, 824 N.Y.S.2d 759, 2006 NY Slip Op 51871(U) (Sup. Ct. App. T. 2d Dep't 2006)].

Applicant submitted neither a rebuttal to Dr. Chiu's peer review report, nor contemporaneous treatment records. The only medical treatment record provided by Applicant is the report of a 5/3/18 CT scan of the claimant's brain, which revealed punctate cavum septum pellucidum, and benign hyperostosis frontal interna.

Rather, the Applicant argued during the 12/26/23 arbitration hearing that the Respondent's denial was untimely issued as the Respondent's denial notes that final verification was received by the Respondent in the form of a letter of medical necessity

for the DME on 8/13/18; however, there is nothing presented by way of proof to establish the letter of medical necessity was actually received on 8/13/18, and therefore there is no way to confirm the denial predicated on the Dr. Chiu peer review report of 8/31/18 was timely issued. I find this argument to be without merit as Dr. Chiu makes reference in his 8/31/18 report to a letter of medical necessity.

Comparing the evidence submitted by each of the parties against the other, I find that I am more persuaded by the Respondent. I find the peer review report of Dr. Chiu sets forth a factual basis and a medical rationale to support his determination of a lack of medical necessity for the various items of DME dispensed a mere sixteen (16) days post motor vehicle accident, and the Applicant has not refuted this contention of the peer reviewer by a preponderance of the credible evidence.

Accordingly, I find in favor of the Respondent, and the Applicant's claim for reimbursement of No-Fault benefits is hereby denied in its entirety. This decision is in full disposition of all claims for reimbursement of No-Fault benefits presently pending before this arbitrator.

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 NY

SS :

County of NASSAU

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

12/26/2023
(Dated)

Paul Weidenbaum

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:
b20cc3c59e8d6b291ada565041b00e6c

Electronically Signed

Your name: Paul Weidenbaum
Signed on: 12/26/2023