

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

EM Medical Supplies Corp.  
(Applicant)

- and -

American Transit Insurance Company  
(Respondent)

AAA Case No. 17-23-1307-1063

Applicant's File No. 99128

Insurer's Claim File No. 1123723-03

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

Ilya Murafa from Law Offices of Zara Javakov, Esq. P.C. 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, **\$3,176.24**, 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 12/16/22.

Whether the dispensation of the DME at issue to the claimant between 1/16/23 and 2/27/23 was medically necessary in light of the peer review report of dr. Coven dated 2/16/23?

Whether the Respondent's denial of the Applicant's claim for reimbursement of No-Fault benefits based on the "fact or founded belief" that the treated conditions did not arise out of the the motor vehicle accident of 12/16/22 can be sustained?

#### 4. Findings, Conclusions, and Basis Therefor

This arbitration arises out of the dispensation of durable medical equipment in the form of an LSO, cervical collar, cervical pillow, massager, lumbar cushion, and egg crate mattress and bed board. massager, mattress and bed board to the injured person, a 23 year old female, related to injuries sustained in a motor vehicle accident that occurred on 12/16/22. Applicant seeks reimbursement in the amount of \$3,176.24. Respondent timely denied payment of the disputed balance based upon the peer review reports of Dr. Coven dated 2/16/23.

Additionally, the Respondent denied reimbursement based upon the Respondent's "founded belief" that the treated conditions did not arise out of the motor vehicle accident of 12/16/22. In support of this defense, the Respondent relies upon the 5/25/23 biomechanical science expert report of Zachary Merrill, PhD.

The entire claim is denied based on the fact or founded belief that the motor vehicle accident did not cause the alleged injuries and that the claimant is exaggerating injuries in an opportunistic fashion, and lack of causation as opinion based on the biomechanical science expert report of Zachary Merrill, PhD dated 5/25/23.

I will first address that branch of Respondent's defense which rests upon the biomechanical expert report of Zachary Merrill, PhD.

The burden of proof on the issue of whether a motor vehicle accident caused a medical condition for which a person was treated and the No-Fault insurer was thereafter billed falls upon the insurer if the latter asserts a lack of nexus between the accident and the condition; the underlying purpose of the No-Fault Law would be undermined if a claimant health care provider were required to prove as a threshold matter that a patient's condition was caused by the accident and unrelated to his or her entire medical history. *Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13, 18-19, 871 N.Y.S.2d 680, 684 (2d Dept. 2009). In support of their defense that the Assignor's treated condition and alleged injuries were not causally related to the motor vehicle accident, Respondent submitted the biomechanical science report of Zachary Merrill, PhD dated 5/25/23.

Mr. Merrill's report summarized his qualifications, detailed an incident summary, discussed biomechanics and Newton's laws of motion, and provided an accident and injury analysis which concluded that the MRI studies showed no evidence of traumatic injuries and were degenerative in nature, and that the the loads and mechanisms required to cause acute traumatic injuries to Assignor's spine, shoulders and knees, with the exceptions of strains or sprains, were not present in the incident of 12/16/22. I have

reviewed Mr. Merrill's report and find that it does not establish that the Assignor's injuries were not casually related to the loss. Mr. Merrill provides a description of the accident based on his review of the police report, and the medical records.

However, notably missing is an inspection of the vehicles involved in the accident to support the conclusion "that the subject accident was a minor to moderate offset rear end collision". Logic dictates that to assess the severity of a collision, at the very least an inspection of the vehicles would be paramount. In this instance, Mr. Merrill did not physically inspect the vehicles involved in the accident, nor did he review photos of the vehicles depicting the condition of the vehicles after the accident occurred, nor did he review itemized estimates of damages for the vehicles involved in the accident. Without a review of such documentation the report is of limited probative value in assessing the severity of the collision and the potential causality of injuries caused by the crash event.

In addition, there is no report from a medical expert to reconcile Mr. Merrill's conclusory assertions that the MRI studies revealed no evidence of traumatic injuries but rather were degenerative in nature. Moreover, there is no discussion of the exacerbation of pre-existing conditions. It is well-established that exacerbations of pre-existing conditions are covered by the No-Fault Law. See, *Kingsbrook*. Further, 11 NYCRR §65-3.14(a) states that an insurer is required to pay for injuries "caused by the aggravation of preexisting conditions."

Finally, Mr. Merrill never examined the Assignor. Coverage extends to injuries that arise from the use or operation of an insured motor vehicle and injuries will vary depending on the condition of the Assignor.

The biomechanical report lacks a credible factual basis to substantiate the lack of causality defense. Therefore, Respondent's defense is unavailing. Accordingly, the defense advanced by the Respondent which relies upon the Merrill biomechanical science expert report cannot be sustained.

I now turn to a consideration of the Respondent's medical necessity defense predicated upon the peer review report of Dr. Coven dated 2/16/23.

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 & 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. Coven asserted the following in his 2/16/23 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."

Cervical Collar: "Several studies suggest that hard cervical collars may play a role in the conservative management of cervical radiculopathy. However, sufficient evidence is lacking to advocate its routine usage. Further studies are needed for patients with non-traumatic axial neck pain and radicular pain with or without trauma to understand the role that cervical collars may play in their management." See *When should a cervical collar be used to treat neck pain? Curr Rev Musculoskelet Med* 2008 Jun; 1(2): 114-119.

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. Coven 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. Coven 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.

Electric Heat Pad: "There is moderate evidence that heat wrap therapy reduces pain and disability for patients with back pain that lasts for less than three months. The relief has only been shown to occur for a short time and the effect is relatively small...There is still not enough evidence about the effect of application of cold for low back pain of any duration, or for heat for low back pain that lasts longer than three months." See *Superficial heat or cold for low back pain. Cochrane.org* 1/25/2006.

Dr. Coven states there was no indication for the use of a home heating device while the patient was still actively receiving conservative in-office care.

Dr. Coven also cites *Physical Agent Modalities, Physical Medicine and Rehabilitation, Braddom, R. 2016, Fifth Edition, pages 275-286*. Dr. Chiu states there was no indication of a comprehensive instruction/review on the use of the electrical heat pad or how it was medically necessary while the patient was actively receiving conservative treatment.

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 Op51871(U) (Sup. Ct. App. T. 2d Dep't 2006)].

Applicant submitted the 7/4/23 rebuttal of Dr. Hirsch, in which she asserts the following in relevant part:

Dr. Hirsch states that the egg crate mattress with bed board is used in acute care settings to provide even and strong support to the joints and spine. See Effectiveness of a selected bedding system on quality of sleep, low back pain, shoulder pain, and spine stiffness. J Manipulative Physiol Ther 2002 Feb; 25(2): 88-92, which states: "Results suggest that subjects obtain significant improvement in shoulder and back pain, back stiffness, and quality of sleep after 28 days of prescribed bedding system use as compared with 28 days of personal bedding use."

The cervical collar is used in the setting of soft tissue injury because immobilization by a collar during the acute stage reduces pain and muscle spasm. Therefore, usage of a cervical collar was indicated in relation to the cervical strain symptom such as was present in this patient. See Indications of Philadelphia collar in the treatment of upper cervical injuries Eur J Emerg Med 2001 Mar; 8(1):33-37, in which the authors state: "It is our belief that, in the absence of both neurological abnormalities and compression to neural structures observed in CT/MRI, treatment with the Philadelphia collar alone is safe, cost-effective and easily applicable for many cases of upper cervical injury."

With respect to the LSO, that the device was prescribed to the patient because the lumbar support stabilizes the lumbar region, reduces pain and facilitates flexion movements without causing pain. In the study entitled Effectiveness of a lumbar belt in subacute low back pain: an open, multicentric, and randomized clinical study; Spine 2009 Feb 1; 34(3): 215-220, the authors state: "Lumbar belt wearing is consequent in subacute low back pain to improve significantly the functional status, the pain level, and the pharmacologic consumption."

Dr. Hirsch further notes that the LSO does not completely immobilize the lumbar spine. When a patient is receiving conservative physical therapy treatment, ranges of motion are slowly initiated over the course of the entire treatment plan until full range of motion

is achieved. The use of the LSO is intended to limit painful motion of the lumbar spine during the healing process. While the LSO device somewhat restricts range of motion in some directions of the lower back, it mostly provides support of the musculature of the lumbar spine column. See Effectiveness of lumbar orthoses in low back pain: Review of the literature and our results-Orthop Rev (Pavia) 2018 Dec 6; 10(4):77-91. See also Regarding the controversy of lumbosacral supports and braces-an update-J Back Musculoskelet Rehabil 1993 Jan 1; 3(3):21-30.

The cervical pillow, asserts Dr. Hirsch, helps correct the patient's resting position so that the head and neck are at optimal angles to the torso and the resting surface. This relieves cervical tension, the top of the head is lifted, the back of the head is depressed, and the neck portion of the pillow is lifted to support the curvature of the neck. See Neck support pillows: a comparative study. J Manipulative Physiol Ther 1998 May; 21(4): 237-240, in which the authors state: "A neck pillow with good shape and consistency and with firm support for cervical lordosis can be recommended as a part of treatment for neck pain."

The egg crate mattress with bed board is used in acute care settings to provide even and strong support to the joints and spine. See Effectiveness of a selected bedding system on quality of sleep, low back pain, shoulder pain, and spine stiffness. J Manipulative Physiol Ther 2002 Feb; 25(2): 88-92, which states: "Results suggest that subjects obtain significant improvement in shoulder and back pain, back stiffness, and quality of sleep after 28 days of prescribed bedding system use as compared with 28 days of personal bedding use." The patient was prescribed a lumbar cushion as it provides relief from low back pain by unloading of the intervertebral discs and transmitting pressure to soft tissue regions. See The Practice Treatment of Backache and sciatica by John Barrett and Douglas Noel Golding, p. 87, where it is stated: "Some patients need lumbar supports for temporary use in acute backache, or to stabilize 'weak' areas, or to prevent back injury where there is exposure to strain."

Comparing the evidence submitted by each of the parties against the other, I find that I am more persuaded by the Applicant. I find the peer review report of Dr. Coven has not set 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 to the claimant, and the Applicant has refuted this contention of the peer reviewer by a preponderance of the credible evidence. Accordingly, I find in favor of the Applicant, and reimbursement of No-Fault benefits as requested is due and owing. 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 applicant is AWARDED the following:

A.

| Medical |                           | From/To             | Claim Amount | Status              |
|---------|---------------------------|---------------------|--------------|---------------------|
|         | EM Medical Supplies Corp. | 01/06/23 - 01/06/23 | \$1,418.69   | Awarded: \$1,418.69 |
|         | EM Medical Supplies Corp. | 02/06/23 - 02/06/23 | \$607.55     | Awarded: \$607.55   |
|         | EM Medical Supplies Corp. | 02/27/23 - 02/27/23 | \$1,150.00   | Awarded: \$1,150.00 |
| Total   |                           |                     | \$3,176.24   | Awarded: \$3,176.24 |

- B. The insurer shall also compute and pay the applicant interest set forth below. 07/15/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from the filing date for this case, 7/15/23, until payment has been made at two percent per month, simple interest, on a pro rata basis using a thirty day month.

C. Attorney's Fees

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



After calculating the sum total of the first party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of that sum total, subject to a minimum of \$60 and a maximum of \$850. See 11 NYCRR Section 65-4.6(c) and (e). However, if the benefits and interest awarded thereon are less than or equal to Respondent's written offer during the conciliation process, the attorney's fee shall be based upon the provisions of 11 NYCRR Section 65-4.6(b). For cases filed after February 4, 2015 there is no minimum fee and a maximum fee of \$1,360.00.

- 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 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:**  
02ecb4e0d8f5e9b024471b4217c3d910

### **Electronically Signed**

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