American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

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| Westend Equipment Inc.<br>(Applicant) | AAA Case No. | 17-24-1342-2933 |
| | Applicant's File No. | SS-260895 |
| - and - | Insurer's Claim File No. | 7006574198-1-1 |
| | NAIC No. | 21687 |
| Mid-Century Insurance Company<br>(Respondent) | | |

**ARBITRATION AWARD**

I, Donald MacKenzie, 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 08/02/2024
   Declared closed by the arbitrator on 08/02/2024

   Joseph Padrucco from Samandarov & Associates, P.C. participated virtually for the Applicant

   David Trompeter from Law Offices of Rothenberg & Romanek participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$1,222.05**, 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, RAB, a 21 year old male was involved in a motor vehicle accident on 9/14/23. The amount in dispute is the fee of $1,222,05 for DME with a date of service of 11/10/23. Respondent denied the claim based upon the peer review of Howard Kiernan, M.D. dated 1/2/24. The issue presented is whether the services were medically necessary.

4. Findings, Conclusions, and Basis Therefor

This case was 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. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

In order to support a lack of medical necessity defense, respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See, Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term 2nd , 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of it lack of medical necessity defense, which if established shifts the burden of persuasion to applicant. See generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

The trial courts have held that a peer review report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is 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 as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See generally, Nir v. Allstate Ins. Co., 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); See also, All Boro Psychological Servs. P.C. v. GEICO, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

In support of the contention that the services were not medically necessary, Respondent denied based on the peer review of Howard Kiernan, M.D. dated 1/2/23. Based on the review of the submitted medical records, I have come to the conclusion that the DME viz: Shoulder orthosis - Abduct; Whirlpool Hydrotherapy; TLSO, Triplanar control; Cervical traction unit; TENS Unit; TENS Belt; Massager; Infrared lamp; Personal massager; Traid 3LT Infrared Heating pad; Transcutaneous electrical joint stimulation device system; TENS/EMS Replacement belt; Whirlpool; Cold therapy system and Lumbar compression wraps, trunk was also not medically necessary.

Regarding, Massager/Personal massager: The claimant was provided a massager that would be more accurately termed a hand-held vibrating device, and it does not provide real massage to the claimant. If massage therapy treatment was desired, it could have been provided as part of the conservative program. The claimant would receive massage therapy in the prescribed physical therapy sessions. There was no need to supplement the plan with such a DME. True massage is performed by a licensed Physical Therapist or Massage Therapist. Moreover, a professional therapist's massage would be far superior compared to that of this DME. Home massage provided by such DME does not contribute to the healing process significantly. Furthermore, no literature supports the contention that such devices benefit in any manner. "Like most complementary and alternative treatments, high-quality research on the efficacy of massage therapy for spinal cord injury is limited." "It's difficult to measure the effects of massage therapy because you can't set up a placebo. Therefore, the results are subject to what the patient

perceives. Another downside to massage therapy is that its effects are temporary. Individually, the sessions may not seem too costly, but when added up, massage therapy sessions may not be the most affordable long-term option." (Massage Therapy for Spinal Cord Injury Benefits and Risks -Medically reviewed by Courtney Maher, OTR/L - written by Flint Rehab. Last updated on December 3, 2019) https://www.flintrehab.com/spinal-cord-injury-massage-therapy/ Page No. 4

Regarding Infrared Lamp and Traid 3LT Infrared Heating pad: The claimant was provided with an infrared heating lamp for home use. This DME was not medically necessary for this claimant. The purpose of the lamp is to generate low-level heat which then is used as a superficial heat modality; with the overall purpose of vasodilatation and increasing metabolic changes to the applied area. Since the lamp is considered a superficial heat modality there is no difference between it and a warm patch, a moist heat pad, or a menthol cream; which are very common modalities used by a chiropractor or a physical therapist. The claimant would receive this heat pack in the prescribed physical therapy sessions. There was no need to supplement the plan with such a DME. Moreover, a professional therapist's heat pack treatment would be far superior compared to that of this DME. Home heat packs provided by such DME do not contribute to the healing process significantly. There is no relevant literature available in support of such DME for home use in acute musculoskeletal injuries. Infrared heating should be utilized under the supervision of the treating physical therapist or chiropractor due to the risk of possible skin burns with improper use. Infrared therapy is not recommended over other heat therapies. Where deep heating is desirable, providers may consider a limited trial of infrared therapy for the treatment of acute LBP, but only if used as an adjunct to a program of evidence-based conservative care (exercise). "Thermal or heat injuries can happen, depending on the wavelength of the infrared light. Thermal injury can occur even without pain. Though infrared therapy promises many health benefits, its study is far from complete. At present, therefore, it should be considered an adjunct to medical treatment, and other regimens should be continued as prescribed." (Infrared Therapy: Health Benefits and Risks; By Angela Betsaida B. Laguipo, BSN Reviewed by Dr. Liji Thomas, MD; Last Updated: Jan 9, 2019) https://www.newsmedical.net/health/Infrared-Therapy-Health-Benefits-and-Risks.aspx

Regarding Cervical Traction Unit: The Cervical Traction Unit provided to the claimant was not medically necessary in this case. Traction devices use a traction force to separate two or more vertebrae and put a stretch on the tissues connecting those two parts. There were no findings in the evaluation that would necessitate the need for such a device. It is not therapeutic in this case to employ a cervical traction unit since it is not beneficial, therapeutic, or medically advised. It can even be detrimental. "The research is inconclusive when determining if traction offers long-term relief, and more studies need to be done on cervical traction to determine this. (Cervical Traction: Exercises and Benefits for Neck Pain; By Brett Sears, PT Laura Campedelli, PT, DPT Medically reviewed by Oluseun Olufade, MD Updated on August 03, 2022, Pg. no 4 https://www.verywellhealth.com/cervical-traction-for-neck-pain-2696178). "Cervical traction is a non-invasive procedure used to provide symptomatic relief for a variety of cervical pathologies. Though it can lead to temporary symptomatic relief, there is limited data on its long-term safety and therapeutic efficacy. Cervical traction has been used in a variety of cervical pathologies: Cervical disc disease, Cervical spine fracture,

Facet joint dislocation, Atlantoaxial subluxation, Occipitocervical synopsis, Spondylosis, Radiculopathy, Foraminal Stenosis, Myofascial tightness" (Abi-Aad KR, Derian A. Cervical Traction. [Updated 2022 Aug 8]. In: StatPearls [Internet]. Treasure Island (FL): StatPearls Publishing; 2023 Jan-. Available from: https://www.ncbi.nlm.nih.gov/books/NBK470412/) Page No. 1 & 2

Regarding Transcutaneous electrical joint stimulation device system with TENS/EMS Replacement belt/T.E.N.S. Unit with belt: The electric muscle stimulator unit is inferior to manual therapy. There were no clinically important or statistically significant differences in any outcome between the subjects receiving true TENS and those receiving sham TENS, and TENS is no more effective than treatment with a placebo, and TENS adds no apparent benefit to that of exercise alone. A longer period of exercise therapy may provide more substantial benefits, but it will require ongoing efforts to maintain compliance. The claimant had minimal findings which would be treated with conservative treatment and prescribing such an expensive device would not be beneficial in this claimant's care. The submitted records show that the claimant sustained soft tissue injuries and the appropriate treatment was physical therapy. These minor soft tissue acute traumatic strains/sprains would essentially resolve after an adequate course of physical therapy combined with medications. Medical studies have shown that home use of TENS/EMS is not effective in the treatment of musculoskeletal pain. Additionally, it was found that TENS/EMS use can cause adverse effects such as skin irritation. There was no documentation in the medical records reviewed that instruction was given to the claimant about the use of a home TENS/EMS unit, and there was no documentation that risks of potential adverse effects were discussed with the claimant. Medical studies have shown that home use of TENS/EMS is not effective in the treatment of musculoskeletal pain. Additionally, it was found that TENS/EMS use can cause adverse effects such as skin irritation. There was no documentation in the medical records reviewed that instruction was given to the claimant about the use of a home TENS/EMS unit, and there was no documentation that risks of potential adverse effects were discussed with the claimant. "Furthermore, there have been some complications with impacting transdermal drug delivery systems if drug application is close to the TENS electrodes. There have been documented dermatologic complications from using TENS units - most of these cases relate to either allergic reactions to the electrode pads or contact dermatitis. Special hypoallergenic electrode pads are available for this population. Additionally, syncope and nausea have both been documented as complications of transcutaneous electrical nerve stimulation. There is no universal consensus concerning the efficacy of TENS in managing pain. One characteristic that has universal agreement, however, is that if TENS does provide results, those are short-term in nature and rapid in onset and offset. TENS is not a cure for pain conditions or syndromes." (StatPearls, Transcutaneous Electrical Nerve Stimulation; Updated: October 31, 2022. https://www.ncbi.nlm.nih.gov/books/NBK537188/)

Regarding Whirlpool: There was no indication for the Whirlpool. Whirlpool Hydrotherapy is mostly prescribed in the debridement of necrotic tissue and isn't generally remedial. Hydrotherapy can likewise put the danger of a hypersensitive response known as contact dermatitis for certain patients utilizing fundamental spices and oils in their shower water. Overheating is the most probable symptom of hydrotherapy, which can be extremely unsafe. Thus, this DME was not medically

necessary in this case. "However, with water immersion, involving partial or complete immersion of the body, its effect has not been clearly explained due to the difficulties in application and limitations associated with possible adverse effects, the cost burden, and the physical environment. In particular, cold water immersion may have greater perceived physical discomfort and physical adverse effects than warm water immersion. Thus, water immersion may have side effects such as skin maceration, skin softening, edema, hyperthermia or hypothermia, and excessive vasodilatation or vasoconstriction. Especially, hot water immersion of 45 to 50 â¦C or more may cause damage to cells due to protein denaturation and the sudden immersion into cold water may cause vasoconstriction. Therefore, to ensure safety during water immersion, it is important to determine the possible side effects by monitoring physical indicators and subjective discomfort." (An J, Lee I, Yi Y. The Thermal Effects of Water Immersion on Health Outcomes: An Integrative Review. Int J Environ Res Public Health. 2019;16(7):1280. Published 2019 Apr 10. doi:10.3390/ijerph16071280).

Regarding, Thoracic-lumbar-sacral orthosis (TLSO) tri-planar control and Lumbar compression wraps, trunk : The claimant was provided TLSO and lumbar compression wraps, trunk. Regarding the DME such as TLSO Lumbar compression wraps, trunk in question, the generally accepted standard is to order the equipment that would benefit the claimant in some way. In this case, the TLSO and lumbar compression wraps could actually hinder the claimant's recovery. Wearing these restrictive braces could cause relative weakening and stiffening of the injured area. Lumbar compression wraps, trunk & TLSO are typically prescribed for spinal instability, fracture, dislocation, or post-surgically. As per the medical records, there is no evidence of clinically significant instability in this patient. There is also no indication of fracture in the thoracic and lumbar spine. The use of the TLSO and lumbar compression wraps support is therefore counter-productive to the goals of the Physical Therapy program in this case. The medical literature does not support the use of these DME. These DME were unlikely to be of any medical benefit to this claimant. On the contrary, the TLSO and lumbar compression wraps may have hindered this claimant's recovery instead of benefitting him. Also, there is no indication of how the use of the TLSO/ lumbar compression wraps would decrease the treatment frequency the claimant was currently receiving. Therefore the TLSO and lumbar compression wraps provided to the claimant were not medically necessary in this case. "Though most people believe a back brace could work, there is no sufficient evidence that indicates that these back braces, actually work." "Using back braces continuously may cause your supportive muscles to atrophy. Because these supportive muscles are no longer in use, they begin to get weakened and cause you to become indefinitely reliant on the back brace. Ultimately, the brace may not be able to provide your weak muscles with the support it actually requires and there may be an occurrence of injury." "As the back and abdominal muscles continue to atrophy, the spine becomes vulnerable and at a greater risk of injury." (Do Back Braces Really Work? Written, Edited, or Reviewed By: Pramod Kerkar, M.D., FFARCSI, DA Pain Assist Inc. Last Modified On: June 25, 2019, https://www.epainassist.com/back-pain/do-back-braces-really-work Page No. 2 & 5.

Regarding Shoulder orthosis - Abduct: The Shoulder orthosis acromoclavicular (canvas and webbing type) prefabricated off-the shelf was not medically necessary. There was no evidence of fractures, dislocations, or neurologic deficits of the upper extremity

noted upon evaluation by Wei Hong Xu, NP. and Hiram Emmanuel Luigi-Martinez, M.D., which would justify the use of immobilization in any form. This claimant presented with sprain and strain injuries of the right shoulder joint. There was no evidence of an AC separation or of any AC separation repair. There was no massive rotator cuff tear requiring mobilization of soft tissues or flaps or grafts requiring abduction for protection. A shoulder sprain/contusion is not an indication of an orthosis or shoulder support. The standard of care for the treatment of such soft tissue sprain strain injuries is to send the claimant for physical therapy, which focuses on strengthening and mobilizing the joint rather than immobilizing the joint. Therefore, no orthosis was indicated. "At present, for prosthetic and orthotic interventions, the scientific literature does not provide sufficient high-quality research to allow strong conclusions on their effectiveness and cost-effectiveness." (A systematic review of randomized controlled trials assessing the effectiveness of prosthetic and orthotic interventions; PLoS One. 2018; 13(3): e0192094. Published online 2018 Mar 14. Doi: 10.1371/journal.pone.0192094;
http://www.ncbi.nlm.nih.gov/pmc/articles/PMC5851539/, page no 2

Regarding Cold therapy system: The Cold therapy system provided to the claimant was not medically necessary. If cold therapy treatment was desired, it could have been provided as part of the conservative program. The claimant would receive the cold pack in the physical therapy sessions itself. There was no need to supplement the plan with such a DME. Moreover, a professional therapist's cold pack treatment would be far superior compared to that of this DME. The home cold pack provided by such DME does not contribute to the healing process significantly. Many people use home cooling devices as comfort items. There is no relevant literature available in support of such DME for home use. Cooling devices, both passive and active pump-controlled devices, that provide cooling and compression have no additional clinical utility or impact on health outcomes than the use of ice. A cooling pad or a bag of ice would have been sufficient for the topical application of cold. Also, the clinical application of cold therapy is not clear. The evidence-based decision is not well-guided regarding the beneficial use of cold compression therapy. The prescribed Cold therapy system is doubtful when it comes to providing relief and there is no substantial evidence supporting the benefit of its use which is revealed in the following articles. "Most injured patients report that cold therapy makes them "feel less painful". However, this subjective impression of symptomatic pain relief is only experienced in the short term, and the actual impact of immediate icing on the mid-to-long-term healing process may not remain the same. Moreover, although cold therapy has been widely and empirically used in practice, the way we clinically treat those injuries must continually change based on the most up-to-date and evidence-based research. However, the evidence for the use of cryotherapy is relatively low. In summary, when considering a cryotherapy protocol for treating soft-tissue injuries, variables such as its forms, local or whole-body, physical agents, cooling temperature, and time duration must be well-designed and controlled. The existing knowledge gaps have contributed to the persistent difficulty in clarifying the clinical usefulness of cold therapy in clinical healthcare." (Wang ZR, Ni GX. Is it time to put traditional cold therapy in the rehabilitation of soft-tissue injuries out to pasture? Pg. no 3 & 5 World J Clin Cases. 2021 Jun 16; 9(17):4116-4122. doi: 10.12998/wjcc.v9.i17.4116. PMID: 34141774; PMCID: PMC8173427.) "Most recommendations for the use of heat and cold therapy are based on empirical

experience, with limited evidence to support the efficacy of specific modalities." (Mechanisms and efficacy of heat and cold therapies for musculoskeletal injury - PubMed, Gerard A Malanga 1, Ning Yan, Jill Stark, Epub 2014 Dec 15. Page No. 1; https://pubmed.ncbi.nlm.nih.gov/25526231/) The effectiveness of this method of pain relief is still doubtful, there is not enough scientific evidence supporting the use of this device, moreover, if the cryotherapy method is actually effective, then similar effects can be obtained with the help of ice as well. According to MedicalNewsToday, "What are the benefits of cryotherapy? Last reviewed Thu 19 October 2017, By ZawnVillines, Reviewed by Natalie Olsen, RD, LD, ACSM EP-C" the author suggests that "Until further research can support these claims, however, it is impossible to determine accurately how effective cryotherapy is as a treatment." https://www.medicalnewstoday.com/articles/319740.php, pg no. 6

STANDARD OF CARE: The standard of care for this claimant was continued conservative treatment including physical therapy and chiropractic care in a professional setting which would suffice the claimant to reach the maximum possible improvement and the use of these devices in question would not be of any added value to the claimant's rehabilitation program. Conclusion: Therefore, based on the aforementioned reasons, I have come to the conclusion that the DME viz: Shoulder orthosis - Abduct; Whirlpool Hydrotherapy; TLSO, Triplanar control; Cervical traction unit; TENS Unit; TENS Belt; Massager; Infrared lamp; Traid 3LT Infrared Heating pad; Transcutaneous electrical joint stimulation device system; TENS/EMS Replacement belt; Whirlpool Cold therapy system and Lumbar compression wraps, the trunk was also not medically necessary.

I find that Applicant fails to rebut the peer review or demonstrate that the prescription of the DME was within generally accepted medical standards. A review of Applicant's submission reveals it has failed to submit a formal rebuttal to the peer report. Applicant also submits limited medical records, which I find are not sufficient to establish that the services were medically necessary. Accordingly, Applicant's case 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 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, Donald MacKenzie, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

08/22/2024
(Dated)

Donald MacKenzie

**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:**
b301d231cb7fb0a4ccebc33d4370ee0d

**Electronically Signed**

Your name: Donald MacKenzie
Signed on: 08/22/2024