

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Dove Supply Inc.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-23-1323-2988
Applicant's File No.	166061
Insurer's Claim File No.	8695983210000006
NAIC No.	35882

ARBITRATION AWARD

I, Frank Marotta, 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: Assignor-JLG

1. Hearing(s) held on 09/19/2024
Declared closed by the arbitrator on 09/19/2024

Dimitry Joffe, Esq. from The Law Offices of John Gallagher, PLLC participated virtually for the Applicant

Jason Ciani, Esq. from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,482.65**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulate and agree that the Applicant established its prima facie burden, and the Respondent timely denied the claims in question.

3. Summary of Issues in Dispute

The record reveals that the Assignor-JR, a 36-year-old-male, sustained injuries in a motor vehicle accident on 6/22/23.

The Applicant seeks reimbursement for a custom LSO, an infrared heat lamp, whirlpool and EMS unit with belt on 8/15/23.

The Respondent denied reimbursement based on peer reviews by Dr. Jeffry Beer dated 10/2/23.

The issue is whether the medical supplies were medically necessary and if so, what fees is the Applicant entitled to receive.

4. Findings, Conclusions, and Basis Therefor

The Applicant filed this arbitration in the amount of \$2,482.65 for disputed fees in connection with a custom LSO, an infrared heat lamp, whirlpool and EMS unit with belt prescribed by Nurse Practitioner Kyungsook Bu on 8/8/23 and 8/9/23.

This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing. In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations. The parties appeared and the hearing was conducted virtually via zoom.

The Respondent denied reimbursement asserting the supplies dispensed were not medically necessary. To deny a claim based on a lack of medical necessity the insurer must present medical evidence which sets forth with sufficient particularity the factual basis and medical rationale underlying that determination. Elmont Open MRI & Diagnostic Radiology, P.C. v. Geico Ins. Co., 12 Misc. 3d 133(A), 2006 NY Slip Op 51185(U) (App Term 2d Dept. 9th and 10th Jud Dist. June 8, 2006). See also A. B. Med. Servs. PLLC v Liberty Mut. Ins. Co., 10 Misc 3d 128(A), 2005 NY Slip Op 51902 (U) (App Term, 2d & 11th Jud Dists); Amaze Med. Supply v Allstate Ins. Co., 2004 NY Slip Op 24119, 3 Misc3d 43, 44 [App Term, 2d & 11th Jud Dists 2004]. Such evidence can take the form of a "*peer review or any other proof, such as an independent medical examination, setting forth a sufficiently detailed factual basis and medical rationale for the claim's rejection, e.g. Choicenet Chiropractic P.C. v Allstate Ins. Co.*, NYLJ, Mar. 7, 2003 (App Term, 2d & 11th Jud Dists)" Amaze Med. Supply, Inc. v. Eagle Ins. Co., 2003 NY Slip Op 51701(U) (NY App. Term 2003); see also Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp., 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

In support of its defense Respondent relies on peer review by Dr. Jeffry Beer dated 10/2/23.

With respect to the LSO Dr. Beer provides a history of the Assignor as a 35-year-old male who was involved in an automobile accident on 6/22/23 reporting cervical, thoracic and lumbar pain. The pain was rated as high as 9/10 on visual analog scale. Physical examination performed on 7/26/23 revealed tenderness with palpation of the cervical paraspinal and trapezius muscles. Tenderness was noted with palpation of the thoracic paraspinal muscles. No motor, sensory or reflex deficits were noted in the upper extremities. Cervical and thoracic motion was limited and painful.

Dr. Beer notes that based upon a review of the available documentation and consideration of the pertinent medical literature, he has determined that medical necessity has not been established for the LSO dispensed on 9/15/23. Dr. Beer indicates that the standard of care in the treatment of acute musculoskeletal injuries after a motor vehicle accident based upon current evidence-based literature supports the use of plain radiographs and/or conservative modalities of treatment such as relative rest, activity modification, therapeutic exercise, and appropriate analgesic medications. The treatment rendered in this case represents a deviation from standard of care. The claimant in this case is not presenting with a history of a more overt lumbar spinal trauma, spinal fracture, or postoperative spinal condition supporting a lumbar orthosis.

Dr. Beer cites a review in Resnick DK, Choudhri TF, Dailey AT, Groff MW, Khoo L, Matz PG, Mummanen P, Watters WC 3rd, Wang J, Walters BC, Hadley MN. Guidelines for the performance of fusion procedures for degenerative disease of the lumbar spine. Part 14: brace therapy as an adjunct to or substitute for lumbar fusion. J Neurosurg Spine. 2005 Jun;2(6):716-24 noting "*There is strong and consistent evidence that lumbar supports are not effective in preventing back pain.*" In Hall, Hamilton, and Greg McIntosh. "Low back pain (acute)." BMJ Clinical Evidence 2008 (2008), in treatment of nonspecific LBP, compared with no lumbar support, an elastic lumbar belt may be more effective than no belt at improving pain (measured by visual analogue scale) and at improving functional capacity (measured by EIFEL score) at 30 and 90 days in people with subacute low back pain lasting 1 to 3 months. However, the evidence was weak (very low-quality evidence).

In addition, there are no radiographs revealing true spinal instability as set out in Leone, A, et al. Radiology. Lumbar Intervertebral Instability: A Review. 2007; 245 noting instability can be demonstrated through flexion and extension radiographs of the spine. When these postures are compared with neutral positioning, instability would be revealed through translation or movement of one vertebral body relative to an adjacent body of 4mm or more, or through significant change in angulation, (i.e. 9 degrees when the lumbar spine is considered at the L1-L5 levels). Finally, as is seen in Steffens, D., et al. "Prevention of low back pain: a systematic review and meta-analysis. JAMA Intern Med. 2016; 176: 199-208." (2015), a total of 23 studies involving 30,850 participants evaluated six different prevention strategies: exercise, education, exercise combined with education, back belts, shoe insoles, and other strategies. Exercise combined with education reduces the risk for a LBP episode at short-term (12 months) follow up (RR:

0.55). Exercise alone reduces the use of sick leave in the long term (RR: 0.22). Other interventions, including education alone (RR: 1.03), back belts (RR: 1.01), and shoe insoles (RR: 1.01), did not appear to be associated with the prevention of LBP.

As to the infrared heat lamp, EMS unit, EMS belt and whirlpool dispensed on 8/15/23, Dr. Beer provide a similar history going on to find, no evidence of medical necessity for the infrared heat lamp, EMS unit, EMS belt and whirlpool in the medical record. The standard of care in the treatment of acute musculoskeletal injuries after a motor vehicle accident based upon current evidence-based literature supports the use of plain radiographs and/or conservative modalities of treatment such as relative rest, activity modification, therapeutic exercise, and appropriate analgesic medications. The treatment rendered in this case represents a deviation from standard of care.

There is no necessity in this case for the introduction of a stimulation or TENS type unit. The literature is not supportive of such a modality for patients presenting with ongoing spinal pain. As noted in: Qaseem, Amir, et al. "Noninvasive treatments for acute, subacute, and chronic low back pain: a clinical practice guideline from the American College of Physicians." *Annals of internal medicine* 166.7 (2017): 514-530, evidence was insufficient to determine the effectiveness of transcutaneous electrical nerve stimulation (TENS), short-wave diathermy, traction, superficial cold, motor control exercise, Pilates, tai chi, yoga, psychological therapies, multidisciplinary rehabilitation, ultrasound and taping. Furthermore, as noted in the guidelines of the North American Spine Society, *Diagnosis and treatment of low back pain*, 2020, there is conflicting evidence that transcutaneous electrical nerve stimulation (TENS) results in improvement in pain at short to medium-term follow-up. It received an "I" rating indicating insufficient or conflicting evidence. There may be a role for neurostimulation in the treatment of chronic neuropathic pain associated with diabetic neuropathy or post-herpetic neuralgia. This is documented in Chong MS, Bajwa ZH. *Diagnosis and treatment of neuropathic pain*. *J Pain Symptom Manage*. 2003 May;25(5 Suppl): S4-S11. However, a diagnosis of such a condition is not apparent in this case.

As for the infrared heat lamp, Dr. Beer notes that as illustrated in Kinkade S. *Evaluation and treatment of acute low back pain*. *Am Fam Physician*. 2007;75(8):1181-1188, heat therapy has been found to be helpful for pain reduction and return to normal function. However, there is no indication in this study that a specialized heating device is any more effective than normal heating pads or hot water bottles. In Garra, Gregory, et al. "Heat or cold packs for neck and back strain: a randomized controlled trial of efficacy." *Academic Emergency Medicine* 17.5 (2010): 484-489, a randomized controlled trial (n=60) of emergency room application of either 30 minutes of a heating pad or cold pack, in addition to ibuprofen, for acute neck and back strains resulted in mild and similar improvement of pain severity with both. The authors suggested considering patient and physician preference.

Furthermore, as noted in; van Middelkoop M, Rubinstein SM, Kuijpers T, Verhagen AP, Ostelo R, Koes BW, van Tulder MW. *A systematic review on the effectiveness of physical and rehabilitation interventions for chronic non-specific low back pain*. *Eur Spine J*. 2011 Jan;20(1):19-39, there is insufficient data to draw firm conclusion on the clinical effect of back schools, low-level laser therapy, patient education, massage,

traction, superficial heat/cold, and lumbar supports for chronic LBP. The use of heating as a modality can be included within such rehabilitation efforts without necessity for the patient to be provided with a home heating unit or supplies. There is no evidence to support the use of a home heating device such as an infrared heating lamp.

Regarding the whirlpool, Dr. Beer notes that hot and cold whirlpool therapy in a physical therapy setting has been shown to be beneficial in the treatment of muscle soreness. This is reviewed in: Kuligowski L, Lephart S, Giannantonio F. et al Effect of whirlpool therapy on the signs and symptoms of delayed onset muscle soreness. J Athletic Train 1998;33:222-228. Furthermore, as noted in Im, Sang Hee, and Eun Young Han. "Improvement in anxiety and pain after whole body whirlpool hydrotherapy among patients with myofascial pain syndrome." Annals of rehabilitation medicine 37.4 (2013): 534-540, hydrotherapy may be effective in the treatment of myofascial pain. However, such devices can be readily utilized during physical therapy sessions. There is no documentation as to the need for a specialized whirlpool device for home use.

After a review of the documents contained in the ECF and in consideration of the arguments made by the parties at the hearing, I am not persuaded by Dr. Beer's peer review that providing the Assignor with a whirlpool and infrared heat lamp deviated from acceptable medical standards. Therefore, I find his peer review insufficient to support Respondent's defense that the whirlpool and infrared heat lamp should be viewed as medically unnecessary. Dr. Beer does not appear to dispute the fact that heat and cold therapy have been found to be helpful for pain reduction and return to normal function and have been shown to be beneficial in the treatment of muscle soreness. His reasons for finding the whirlpool and heat lamp lacking in medical necessity is the method by which they provide heat and cold therapy. Dr. Beer opines that such therapy can be provided by less specialized devices than those prescribed, but provides no authority support this opinion. As such, I find his peer review insufficient to support a denial of the whirlpool and heat lamp.

As to the EMS unit, EMS belt and LSO, I find Dr. Beer's peer review sufficient to refute the medical necessity for these items. Having reviewed the medical record and citing medical authority in support of his opinion I find that the Respondent has met its prima facie burden with the peer reviews by Dr. Beer. According to Dr. Beer, there is no radiographic evidence revealing a spinal instability which would necessitate such a device, nor is there any evidence in the record of an overt lumbar spinal trauma, spinal fracture, or postoperative spinal condition supporting a lumbar orthosis. Further, Dr. Beer maintains that there may be a role for TENS in the treatment of chronic neuropathic pain associated with diabetic neuropathy or post-herpetic neuralgia; however, a diagnosis of such a condition is not noted in this case. I find Dr. Beer has provided a sufficient factual basis and medical rationale in support of its opinion that the LSO, EMS and EMS belt were not medically necessary. Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219 (U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014); Jacob Nir, M.D. v. Allstate Ins. Co., 7 Misc.3d 544, 546-47 (Civ. Ct. Kings Co. 2005).

When a Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the Applicant who must then present its own

evidence of medical necessity. See West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip Op. 51871(U) at 2 (App. Term 2d & 11th Dists. Sept. 29, 2006); Lynbrook Medical of New York, PC v Praetorian Ins. Co., 48 Misc. 3d 139(A); 2015 NY Slip Op 51226(U) (App. Term, 2d, 11th and 13th Jud Dists 2015); Alfa Medical Supplies v. Geico General Ins. Co., 2013 NY Slip Op 50064(U), 38 Misc. 3d 134(A) (App. Term, 2d, 11th and 13th Jud Dists 2013).

The Applicant has not provided a formal rebuttal to Dr. Beer's peer reviews. Although one is not required, the medical records relied on must meaningfully refute the conclusions set forth in the peer review. Jaga Med. Servs., P.C. v American Tr. Ins. Co., 2017 NY Slip Op 50954(U), 56 Misc. 3d 134(A) (2d, 11th & 13th Jud Dists July 21, 2017); Yklik, Inc. v. Geico Ins. Co., 2010 NY Slip Op. 51336(U) (App Term 2d, 11th & 13th Dists. July 22, 2010); Pan Chiropractic, P.C. v. Mercury Ins. Co., 24 Misc.3d 136(A), 2009 N.Y. Slip Op. 51495(U) (App Term 2d, 11th & 13th Dists. July 9, 2009). After a review of the documents contained in the ECF and in consideration of the arguments made by the parties at the hearing, I find that there was nothing in the record that refutes Dr. Beer's opinion. In the absence of any contrary evidence to a peer review setting forth a factual basis and medical rationale for its determination that there was a lack of medical necessity for service rendered the peer is unrebutted and finding should be made in Respondent's favor. A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table), 2007 N.Y. Slip Op. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. July 3, 2007). Since no such contrary evidence has been provided by Applicant their claim for the LSO, EMS and EMS belt must be denied. Lynbrook Medical of New York, PC v Praetorian Ins. Co., supra; Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co., 21 Misc.3d 142(A), 880 N.Y.S.2d 223, 2008 NY Slip Op. 50208 (U) (App. Term 2d & 11th Dist. Feb. 9, 2009).

For the reasons noted and since the Respondent provided no fee audit by a certified professional coder sufficient to challenge the Applicant's billing which is their burden to do, Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co., 2013 NY Slip Op. 50199(U) (App. Term 2d, 11th and 13th Jud Dist 2013), citing to Rogy Med., P.C. v Mercury Cas. Co., 23 Misc 3d 132 (A), 2009 NY Slip Op 50732 (U) (App Term, 2d, 11th & 13th Jud Dists 2009); I find for the Applicant in the amount of \$809.47.

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
	Dove Supply Inc.	08/15/23 - 08/15/23	\$1,150.00	Denied
	Dove Supply Inc.	08/15/23 - 08/15/23	\$1,332.65	Awarded: \$809.47
Total			\$2,482.65	Awarded: \$809.47

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/31/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Respondent shall pay interest at a rate of 2% per month, calculated on a pro rata basis using 30-day month and in compliance with 11 NYCRR §65-3.9. Interest shall begin to accrue from the date of filing with the American Arbitration Association and end on the date the award is paid.

C. Attorney's Fees

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

The insurer shall also pay the applicant for attorney's fees as set forth below Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$850." Id. The minimum attorney fee that shall be awarded is \$60. 11 NYCRR §65-4.5(c). However, if the benefits and interest awarded

thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR §65-4.6 (i). For claims that fall under the Sixth Amendment to the regulation the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, subject to a maximum fee of \$1,360." 11 NYCRR 65-4.6(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 NY

SS :

County of Suffolk

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

09/28/2024
(Dated)

Frank Marotta

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:
f246bae54006d60a7fa6035f38f54781

Electronically Signed

Your name: Frank Marotta
Signed on: 09/28/2024