

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Pik Medical SLP Corp (Applicant)	AAA Case No.	17-24-1363-3348
	Applicant's File No.	198773
- and -	Insurer's Claim File No.	0734110117 JCO
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

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 04/01/2025
Declared closed by the arbitrator on 04/01/2025

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

John Palatianos from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,655.71**, 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 in the form of a cervical positioning cushion, a cervical collar, a thermophore, an LSO, an infrared heating lamp, a neuromuscular stimulator, a cervical traction unit, and a percussor electric pneumatic to the injured person, a 30 year old male, who was involved in a motor vehicle accident which occurred on 10/28/23.

Whether the dispensation of the various items of durable medical equipment, at a cost of \$2,655.71, was medically necessary in light of the Respondent's peer review reports of Dr. Merson dated 12/18/23 and 2/12/24?

4. Findings, Conclusions, and Basis Therefor

This arbitration arises out of the dispensation of durable medical equipment in the form of a cervical positioning cushion, a cervical collar, a thermophore, an LSO, an infrared heating lamp, a neuromuscular stimulator, a cervical traction unit, and a percussor electric pneumatic to the injured person, a 30 year old male, who was involved in a motor vehicle accident which occurred on 10/28/23. Applicant seeks reimbursement in the sum of \$2,655.71. Respondent timely denied reimbursement based on the peer review reports of Dr. Merson dated 12/18/23 and 2/12/24, respectively.

I have carefully reviewed the submissions contained in the Modria ADR Center maintained by the American Arbitration Association. I have also considered the oral arguments of the parties presented at the hearing of this matter. An arbitrator "shall be the judge of the relevance and the materiality of the evidence offered, strict conformity to the rules of evidence shall not be necessary. The arbitrator may question or examine any witness or party and independently raise any issue that arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations." 11 N.Y.C.R.R. 65-45 (o) (1).

Additionally, as the trier of the facts and the law, an Arbitrator is authorized to review and take judicial notice of any rule, law, medical document or periodical or any other document which may impact and aid in making a decision, as long as it conforms to the Insurance laws and the New York State Insurance Department Regulations. *Matter of Medical Society v. Serio*, 100 NY2d 854, 768 NYS2d 423 (2003).

Dr. Merson's Peer Review Reports

Dr. Merson reviewed the medical records and concluded that the supplies provided to the Assignor on 11/7/23 and 12/19/23 were not medically necessary. He argued that there was no indication how the supplies would affect the Assignor's treatment plan or reduce the number of office visits.

Dr. Merson indicated that the supplies were not medically necessary for the following reasons: there was no evidence of spinal instability, fracture, or dislocation that would necessitate the LSO; the cervical cushion is considered a personal comfort item; providing the cervical collar was contraindicated since the Assignor was receiving physical therapy to increase range of motion and the cervical collar would restrict the cervical spine.

With respect to the electric heat pad/thermophore, Dr. Merson cites the following: "A 2006 systematic review...found moderate evidence that a heat wrap may reduce pain and disability for patients with pain of less than three months' duration, although the benefit was small and short-lived." See *Treatment of Acute Low Back Pain*, UpToDate, November 18, 2019. The claimant in this case would not require this additional temperature operating treatment for a short-term relief of pain when similar modality was available for her in the office. "Diathermy is not recommended for treatment of any

back pain related conditions." See New York State Workers' Compensation Board Mid and Low Back Injury Medical Treatment Guidelines, third Edition, Revised December 2020, Section D.8.1, page 50.

With respect to the infrared heat lamp, Dr. Merson cited the following: "Diathermy is not recommended for treatment of any back pain related conditions." See New York State Workers' Compensation Board Mid and Low Back Injury Medical Treatment Guidelines, third Edition, Revised December 2020, Section D.8.1, page 50.

Dr. Merson refers to the AMA's definition of "medical necessity" and provides that definition. He refers to an article entitled Treatment of Acute Low Back Pain, in UpToDate, literature review which was current through June, 2023. Dr. Merson opined that the claimant was receiving physical therapy in the office and therefore did not require the additional DME.

Referring to the NYS WCB Mid and Low Back Injury Medical Treatment Guidelines, diathermy is not recommended for the treatment of any back pain related conditions. "The standard of care for the injury sustained in this case, we recommend physical examination and assessment of potential injuries by the attending physician, appropriate imaging tests (if fractures or acute osseous abnormalities are suspected), rest, medication and initiation of a course of rehabilitation including physical therapy. The standard of care would not include continuation of similar modalities (aqua massage, mechanical massage or moist heat) at home after the completion of the course of therapy or simultaneously with the course. However, in this case, the device in question was prescribed and provided after several months of therapy. Therefore, the standard of care was not met in this regard."

Dr. Merson comments on the timeframe of the dispensation of the DME at issue [11/7/23 and 12/18/23] as it relates to the accident date and onset of injury [10/28/23], and refers to another article found in UpToDate, this one entitled "Musculoskeletal Injury in Children and Skeletally Immature Adolescents; Overview of Rehabilitation for Nonoperative Injuries." "We suggest that heat therapy be avoided during the inflammatory phase of rehabilitation. Heat increases local swelling, inflammation, vasodilation and blood flow, all of which are detrimental in the inflammatory phase.

Dr. Merson continues by saying there was no necessity for heat, cold or massage therapy in this case. The claimant has been receiving adequate similar therapy in the office. It would not require this additional temperature operating aqua treatment for short-term relief of pain after prolonged therapy, when a similar modality was available of him in the office.

Dr. Merson then discusses the medical necessity for the percussor electric massager provided on 12/19/23. He reiterates his comment that physical therapy had commenced, and each physical therapy session was to include manual mechanical massage. The diagnosis did not warrant the additional prescription of this modality for home use when the claimant was receiving it in the office.

He refers to an article entitled "Treatment and Prognosis of Cervical Radiculopathy" saying that the standard of care following an MVA for patients with cervical radiculopathy who have clear radicular pain and symptoms of paresthesia, numbness or non-progressive neurological deficits, we suggest conservative therapy, as initial treatment. We typically start treatment with oral analgesics and avoidance of provocative activities and a short course of oral prednisone if pain is severe. Once the pain is tolerable, we initiate physical therapy and exercising gradual mobilization."

Dr. Merson refers to another article that says there is limited evidence to support the long-term efficacy of massage therapy in the treatment of chronic low back pain. As per a systematic review which included twenty-five (25) trials, patients receiving massage therapy had only short-term improvement in pain and function.

As per Dr. Merson, in this case since the claimant was undergoing physical therapy which included massage, this would be sufficient to treat the claimant's condition. The physical therapy did not require additional self treatment at home. Therefore, the electric massager was not medically necessary or justified.

He then refers to the medical necessity for the EMS unit and notes that physical therapy includes electrostimulation which was part of the patient's treatment regimen. The registered diagnosis did not warrant an additional prescription of a similar modality for use at home since the modality was available with the physical therapist. He refers to an authoritative source for an article published in 2019 entitled "Transcutaneous Electrical Nerve Stimulation," "Generally, TENS provides initial relief of pain and 70-80% of patients, but the success rate decreases after a few months or longer to around 20-30%. To exclude a false-negative response, a trial of TENS for at least one hour should be given to confirm potential benefit from subsequent continuous use." Dr. Merson says that there is no information in this case indicating that the device in question was provided after a period of trial. Besides, there is no need to apply devices with decreasing rate effectiveness after course of treatment with several modalities or during this treatment for longer application at home.

Dr. Merson refers to 2018 article entitled "Therapeutic Effectiveness of Neuromuscular Electrostimulation for Treating Patients with Chronic Low Back Pain." The primary outcome of the study was pain intensity measured by numerical pain rating scale showed that after four (4) weeks the group that had the neuromuscular electrostimulation did not show better effectiveness in pain intensity relief and disability improvement when compared to patients in the control group.

Dr. Merson reiterates the standard of care for the injuries in this case and opined that the providing of the EMS unit, which is an electrostimulation device, after several months of similar therapy, was not within the standard of care in this case. He goes on to refer to the NYS WCB Mid and Low Back Injury Medical Treatment Guidelines which say that a TENS unit should be tried prior to purchase the demonstrated efficacy and increased function. Two (2) or three (3) visits with the therapist may be necessary to instruct the patient in the application and use of the unit and to determine the most effective electrode placement and current parameters. He also says that the medical literature

suggests that a meta-analysis of nine (9) trials which compared TENS with sham TENS, placebo or pharmacologic therapy, did not find any improvement in low back pain scores. He concluded that the EMS unit was not medically necessary.

He then discusses the medical necessity for the infrared heat lamp which was also provided on 12/19/23. "Heat is often applied with the rationale that it may reduce muscle spasm. A 2006 systematic review including 6 studies of low back pain found moderate evidence that a heat wrap may reduce pain and disability for patients with pain of less than 3 months duration, although the benefit was small and short-lived. "The claimant in this case would not require this additional temperature operating treatment for short-term relief of pain when a similar modality was available for him in the office."

Dr. Merson concludes that the dispensation of a cervical traction unit on 12/19/23 was not medically necessary to provide for traction modalities to the cervical spine to be conducted at home in this case when the claimant was receiving physical therapy in office.

He goes on to discuss the standard of care for the injuries sustained and notes that it does not include the use of the DME at issue. He also refers to other authoritative sources to support his contention. Dr. Merson opined that none of the items under review were medically necessary.

Where the Respondent presents sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to the Applicant which must then present its own evidence of medical necessity. [see Prince, Richardson on Evidence Sections 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 51871U (Sup. Ct. App. T. 2nd Dept. 2006).

Applicant has not submitted a rebuttal to Dr. Merson's peer review report. Rather, the Applicant has submitted the 11/1/23 report from Igor Zilberman, R.N.P. of Integrative Family Health, N.P., which noted a number of positive findings.

After carefully reviewing the evidence presented, I find that Applicant has not met its burden of persuasion. The 11/1/23 nurse practitioner's evaluation report does not meaningfully address the issues Dr. Merson raised in his peer review report, nor has the Applicant submitted evidence which demonstrates that the supplies provided to the Assignor herein were medically necessary.

I therefore find that the medical supplies provided to the Assignor on 11/7/23 and 12/19/23 were not medically necessary. Therefore, Applicant is not entitled to reimbursement of No-Fault benefits and the instant claim 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.

04/02/2025
(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:
299983894f9caef58005894fba4fb737

Electronically Signed

Your name: Paul Weidenbaum
Signed on: 04/02/2025