

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Mt. Sinai Medical Supply Inc.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-17-1079-1494
Applicant's File No.	None
Insurer's Claim File No.	0301337710101025
NAIC No.	35882

ARBITRATION AWARD

I, Meryem Toksoy, 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 (DC)

1. Hearing(s) held on 01/30/2019
Declared closed by the arbitrator on 01/30/2019

Jeffrey Datikashvili, Esq. from The Sigalov Firm PLLC participated in person for the Applicant

Mr. Mark Graziano from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,178.38**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant's counsel adjusted that portion of the claim which refers to a TENS device. This item, including related accessories, was billed in the aggregate amount of \$651.34 under codes E0747 and E0730. During the hearing, the balance was reduced to \$409.25. Based on this adjustment, the amount in dispute was amended to \$1936.29.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

In dispute is a claim by the Applicant, Mt. Sinai Medical Supply, Inc., as the assignee of a 43-year-old female who was injured as a driver in a motor vehicle accident on 07-03-17.

This case involves **durable medical equipment (DME)** which was delivered to the assignor on 08-03-17 pursuant to prescriptions written by Ruben Oganegov, MD and Martin Miller, DC.

In the aggregate, Applicant seeks to be reimbursed **\$1936.29** for the supplies.

With regard to the claim, Respondent asserts the **defense of lack of medical necessity** and relies upon the **peer reviews** of Mitchell Ehrlich, MD and Dominick Garofalo, DC to uphold its denials.

In opposition, Applicant has submitted a rebuttal statement by the prescribing doctors.

By way of reply, Respondent has included an addendum by both of the peer reviewers.

During the hearing, no arguments were presented with respect to the fee schedule, Applicant's prima facie case, or the timeliness and/or propriety of Respondent's denials.

The parties agreed that the only issue for me to resolve is medical necessity.

Any and all issues not raised during the hearing are deemed unpreserved for review.

4. Findings, Conclusions, and Basis Therefor

OVERVIEW:

DME PRESCRIBED BY RUBEN OGANESOV, MD:

ITEM	AMOUNT	DEFENSE/ISSUE
Knee Orthosis	\$607.55	Medical Necessity: Peer Review by Mitchell Ehrlich, MD.
TOTAL:	\$607.55	

DME PRESCRIBED BY MARTIN MILLER, DC:

ITEM	AMOUNT	DEFENSE/ISSUE
Back Massager	\$283.50	Medical Necessity: Peer Review by Dominick Garofalo, DC.
Whirlpool	\$479.99	
TENS unit & accessories	\$409.25	
Infrared Lamp	\$156.00	
TOTAL:	\$1328.74	

LEGAL FRAMEWORK:

A presumption of medical necessity attaches to an applicant's properly-submitted claim form and upon its receipt, the burden shifts to the respondent to demonstrate lack of medical necessity. Amaze Med. Supply v. Eagle Ins. Co., 2 Misc.3d 128(A), 2003 NY Slip Op 51701(U)(App Term, 2nd Dept, 2nd and 11th Jud Dists., 2003).

To succeed on this defense, the insurer is required to "set forth with sufficient particularity the factual basis and medical rationale underlying that determination." Elmont Open MRI & Diagnostic Radiology, P.C. v. Geico Ins. Co., 2006 NY Slip Op 51185(U)(App Term, 2nd Dept, 9th and 10th Jud Dists., 2006).

Further, defending a denial of first-party benefits on the ground that the billed-for services were not medically necessary requires the insurer to establish that the services were "inconsistent with generally accepted medical/professional practice[s]." CityWide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co., 3 Misc.3d 608 at 609, 777 N.Y.S.2d 241 Civ. Ct. Kings Co. 2004).

If the insurer can establish that the services were not medically necessary, "the burden shifts to the plaintiff which must then present its own evidence of medical necessity." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip Op. 5187(U) (App Term, 2nd Dept, 2nd & 11th Jud Dists., 2006).

To prevail on this issue, the claimant must put forward evidence that meaningfully refers to and rebuts the conclusion(s) set forth in the peer review report. High Quality Medical, P.C. v. Mercury Ins. Co., 26 Misc.3d 145(A), 2010 N.Y. Slip Op.50447(U)(App. Term, 2nd Dept, 2nd, 11th & 13th Jud. Dists, 2010).

DECISION:

Respondent has met its evidentiary burden. The peer reviews authored by Mitchell Ehrlich, MD and Dominick Garofalo, DC adequately set forth the factual basis and medical rationale to support the conclusion that the prescribed equipment was not medically necessary. That being so, the burden shifts to the Applicant to counter Respondent's showing.

Having carefully considered the evidence, I find that Applicant is entitled to be paid for the knee orthosis (\$607.55) and the massager (\$283.50). This is because the rebuttal statements by Ruben Oganessov, MD and Martin Miller, DC meaningfully address the arguments raised in the peer reviews and they lead me to conclude that both of these items were indicated for the assignor. I note that I have read the addendums by Dr. Ehrlich and Dr. Garofalo, DC and they do not serve to change my determination.

As for the remaining durable medical equipment, I find that the more credible evidence resides with the Respondent. My decision accounts for the rebuttal statements, all of the medical records incorporated into the electronic file, and the addendums.

In view of the foregoing, the claim is partially granted in the amount of \$891.05.

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	Amount Amended	Status
	Mount Sinai Medical Supply Inc.	08/03/17 - 08/03/17	\$607.55	\$607.55	Awarded: \$607.55
	Mount Sinai Medical Supply Inc.	08/03/17 - 08/03/17	\$1,570.83	\$1,328.74	Awarded: \$283.50
Total			\$2,178.38		Awarded: \$891.05

- B. The insurer shall also compute and pay the applicant interest set forth below. 11/06/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the No-Fault regulations. See generally, 11 NYCRR §65-3.9.

With respect to the interest accrual date (when arbitration was requested), see specifically, 11 NYCRR §65-3.9(c).

Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30-day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. "If an applicant does not request arbitration or institute a lawsuit within 30 days after receipt of a denial of claim form or payment of benefits calculated pursuant to Department of Financial Services regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken." 11 NYCRR §65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

C. Attorney's Fees

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

As the claim was filed subsequent to the Sixth Amendment to 11 NYCRR §65-4 (Insurance Regulation 68-D) which took effect on February 4, 2015, Attorney's Fees shall be calculated pursuant to the amended terms, as follows:

20 percent of the amount of first-party benefits, plus interest thereon, subject to a maximum fee of \$1,360. [11 NYCRR §65-4.6(d)]. There is no minimum fee.

- 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 New York

SS :

County of Nassau

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

02/28/2019

(Dated)

Meryem Toksoy

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:
89e6069d559561b756da08ef5886e95e

Electronically Signed

Your name: Meryem Toksoy
Signed on: 02/28/2019