

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

AAAMG Leasing Corp.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-19-1139-1692
Applicant's File No.	none
Insurer's Claim File No.	0606381490101013
NAIC No.	35882

ARBITRATION AWARD

I, Kevin R. Glynn, 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

1. Hearing(s) held on 12/30/2020
Declared closed by the arbitrator on 12/30/2020

Keisha Alleyne, Esq. from Law Offices of Eitan Dagan (Elmhurst) participated in person for the Applicant

Jerry Marino from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 920.78**, 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 Assignor, ZZ, is a 56yo male driver who was injured in a motor vehicle accident on 2/20/18. ZZ suffered injuries which resulted in his seeking treatment. In dispute is the Applicant's claim for a fourteen day rental of Sustained Acoustic Medicine (E1399RR) provided from 5/22/18-6/4/18, in the total amount of \$920.78. The claim was denied pursuant to a peer review report by Dr. Eric Littman, D.C., dated 7/19/18. Therefore, the medical necessity of the claim is an issue to be determined, and if necessary, the proper amount of reimbursement pursuant to the applicable fee schedule.

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. Only the arguments presented at the hearing are preserved in this decision; all other arguments not presented at the hearing are considered waived.

I find that Applicant established a prima facie case of entitlement to reimbursement for its claim. Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I also find that Respondent timely denied the claim.

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 2, 11 and 13 Jud. Dists. 2014). Respondent bears the burden of production in support of its 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 Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). To meet the burden of persuasion regarding medical necessity - in the absence of factually contradictory records - the applicant must submit a rebuttal which meaningfully refers to and rebuts the assertions set forth in the peer review report. See generally, Pan Chiropractic, P.C. v Mercury Ins. Co., 24 Misc 3d 136[A], 2009 NY Slip Op 51495[U] [App Term, 2d, 11th & 13th Jud Dists 2009].

Respondent's evidence established that the claim was timely denied pursuant to a peer review report by Dr. Eric Littman, D.C., dated 7/19/18. Dr. Littman states:

... This claimant was involved in a motor vehicle accident on 2/20/18. The claimant has a date of birth of 4/10/61. The claimant was the seat-belted driver of the vehicle at the time of the accident. There were injuries to the neck and back. The claimant had use of a sustained acoustic medicine device between 5/22/18 and 6/4/18. The device was a rental unit. It was ordered by Joseph Brogna, D.C. After reviewing the available medical records, I am unable to establish medical necessity for this piece of durable medical equipment. The claimant did have neck and back pain. The reports from Dr. Brogna indicate that there were multiple positive orthopedic findings. The claimant had hypoesthesia of the left C6 dermatome along with decreased strength in the left biceps and quadriceps musculature. The claimant was receiving chiropractic care. There was no evidence that the claimant undergoing any therapeutic ultrasound. The sustained acoustic medicine device is a type of wearable therapeutic ultrasound. If Dr. Brogna wanted the claimant to utilize ultrasound, it should have been done in the office under appropriate

supervision. I would note that the claimant had previous use of this device which had also been ordered by Dr. Brogna. There is no evidence in the records as to how the claimant was improving with the device. There was nothing to indicate that the claimant was properly instructed how to use the device. These types of devices are not typical of chiropractic practice. The clinical utility of this type of device would not have been established. This is due to the fact that the clinical utility of therapeutic ultrasound has not been fully established. According to the following guidelines, "the available evidence does not support the effectiveness of ultrasound or shock wave for treating low back pain". Please see Dagenais S, Haldeman S. Chiropractic. Prim Care. 2002;29(2):419- According to the next set of guidelines, "Current evidence does not support the use of EMS, ultrasound and other passive modalities for acute or chronic low back pain". Please see Hurwitz, Eric L., et al. "Second prize. The effectiveness of physical modalities among patients with low back pain randomized to chiropractic care: Findings from the UCLA Low Back Pain Study." Journal of manipulative and physiological therapeutics 25.1 (2002): 10-20. For all of these reasons, medical necessity for the sustained acoustic medicine device was not established. I am recommending against reimbursement ...

Respondent has presented a medical rationale and factual basis to support its defense of lack of medical necessity. Accordingly, the burden now shifts to Applicant, who bears the ultimate burden of persuasion. See, Bronx Expert, supra.

Applicant relies upon the rebuttal report dated by Dr. John Dimitri, D.C., dated 10/30/19. Dr. Dimitri responds to Dr. Littman, stating:

... In the peer review, dated 7/19/2018, Dr. Eric Littman denied reimbursement of the SAM device.

Dr. Littman stated that there was no evidence that the claimant undergoing any therapeutic ultrasound. The sustained acoustic medicine device is a type of wearable therapeutic ultrasound. If Dr. Brogna wanted the claimant to utilize ultrasound, it should have been done in the office under appropriate supervision. Dr. Littman also stated that there was nothing to indicate that the claimant was properly instructed how to use the device. It should be noted that SAM device is safe enough to use at home without supervision. Also, the patient was given oral instructions about the use of the device by the treating doctor and the provider technician as well. Also, this device has an instruction manual which notes all the instructions regarding safety measures. Additionally, regarding frequency and time to use the device; the patient

was instructed time to time based on his response to chiropractic treatment. Also, the patient was prescribed the device based on the severity of the complaints and findings noted in the evaluation and the results of the diagnostic studies. As stated above, the examination performed on 3/6/2018 revealed pain in the neck, mid back, lower back, and left hip pain radiating to the left leg, articular fixations, tenderness, positive Cervical Compression test, Cervical Distraction test, Soto Hall test, Kemp's test, SLR test, Ely's test, diminished reflexes and muscle strength in the left upper extremities and diminished sensations in the left C6 dermatome. Also, the EMG/NCV studies of the upper and lower extremities revealed evidence of left C6 and L3 radiculopathy.

All these findings indicate that the patient was in pain due to the injuries he sustained in the accident and were sufficient enough to warrant the use of the SAM device. Hence, it was appropriate for the treating physician to prescribe SAM device to the patient for a speedy recovery.

Ultrasound therapy is commonly employed in the treatment and management of soft tissue pain. A study was performed to investigate the effectiveness of ultrasound therapy in cervical myofascial pain syndrome (MPS). (Effectiveness of Ultrasound Therapy in Cervical Myofascial Pain Syndrome: A Double Blind, Placebo-Control[ed Study; Issue: Volume 25 - Issue 3 September 2010, Page: 1 10-1 15, DOI: 10.5152/tjr.2010.13)

A SAM Professional device accelerates the injury recovery and provides rapid pain reduction without the use of Opioid. Most injuries are healed in 4-6 weeks. It can be worn back at work or for at home treatment. It can be used in conjunction with Physical Therapy and Rehab. The primary benefits of the device are getting the patient back to work faster and eliminating the dependence and cost of Opioid based pain medication.

Hence, to achieve improvements in the patient's condition, and to relieve his pain he was prescribed the SAM device for home use.

Dr. Littman stated that the clinical utility of SAM device would not have been established. Also, Dr. Littman noted from a guideline that the available evidence does not support the effectiveness of ultrasound or shock wave for treating low back pain. I would note that there are substantial literatures which support the use of SAM device in musculoskeletal injuries. In support of my contention, I submit the following:

SAM@ Sport is an FDA-cleared bio-regenerative medical device that reduces the pain associated with tendon, ligament or muscle injuries and also accelerates the natural healing cascade. (<http://www.samrecover.com/faq>. What is sam@ Sport?)

SAM Professional is the first, and only FDA approved wearable ultrasound device delivering multi-hour sustained acoustic medicine for accelerated healing and pain reduction. SAM Professional device provides continuous ultrasonic waves that penetrate up to 5-CIT) into the tissue and approximately the diameter of a baseball: 3MHz and 0.65 Watts/ Applicator (Energy Density 0.132 Watts/ cm² per applicator).

Dr. Claude T. Moorman of Duke University remarked on the low-risk and cost-effectiveness of sam@ Sport, "Traditionally, a patient has to fail nonsteroidal anti-inflammatory injections and physical therapy to ever get approved for surgical treatment." "A medical device like sam@ Sport that effectively treats pain and accelerates recovery of injured tissues early in the care pathway saves both patients and providers from needless frustration and more efficiently arrive at improved outcomes for the patient." (National-sports-medicine-experts-discuss-samsport-Lewis-jr-ph-d-).

Further, a SAM Professional device is commonly prescribed in the following conditions:

Chronic Tendinitis: Elbow, Bicep, Quad, Triceps, Shoulder

Shoulder/Rotator Cuff Injuries and Post-Op Labrum Recovery

Knee: Osteoarthritis, MCL Sprain & Meniscus Tear

Back Pain and Spasms (present in this case)

Ankle Injuries: Sprain, Frayed Achilles & Post-Op Achilles

Hip: Abductor Muscles & Post-Op Labrum Tear

Hamstring Strain or Tears

Carpal Tunnel Syndrome

Groin Pull or Strain

Plantar Fasciitis

In this case, the patient had back pain and spasm which is consistent with the above criteria required for the prescription of the SAM Unit.

Also, it should be noted that, the device was prescribed so that it can contribute to the claimant's plan of care and aid in the early recovery of this claimant. Hence, the prescription of the SAM device is medically indicated in this case.

Dr. Littman further noted from a guideline that "Current evidence does not support the use of EMS, ultrasound and other passive modalities for acute or chronic low back pain". I would note that indeed the active SAM treatment showed a 505 point improvement versus a 266 point

change for placebo. Range of motion and muscle strength measurements favored Active SAM treatment by over 5 times. Single blind randomized controlled clinical trial on chronic low back pain secondary to herniated discs, 8-weeks of daily SAM treatment to the lower back. Active (n=55), placebo (n=10).

I, therefore, find that the SAM device was indeed used for the medical purpose for treatment of this patient's traumatic injuries. This medical device was prescribed to this claimant due to the injuries he sustained in the motor vehicle accident on 2/20/2018. The device was prescribed so that it can contribute to the claimant's plan of care and aid in the early recovery of this claimant...

I find that Dr. Dimitri's report meaningfully rebutted the opinion presented by Dr. Portnoy in his Peer Report. I find that by a preponderance of the evidence has established the medical necessity of the claim, Applicant is awarded reimbursement of these claims.

Fee Schedule

Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. See Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co., 2006 NY Slip Op 26240, 12 Misc.3d 172, 822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006). If Respondent fails to demonstrate by competent evidentiary proof that an Applicant's claims were in excess of the appropriate fee schedule, Respondent's defense of noncompliance with the appropriate fee schedule cannot be sustained. See, Continental Medical PC v. Travelers Indemnity Co., 11 Misc.3d 145A, 819 N.Y.S.2d 847, 2006 NY Slip Op 50841U, 2006 N.Y. Misc. LEXIS 1109 (App. Term, 1st Dep't, per curiam, 2006).

Respondent submits an Supreme Court of the State of New York, County of Nassau, Order by Hon. Thomas Feinman, J.S.C., entered on January 17, 2020, under Index No. 616953/2018, in which it was Ordered that the Respondent herein was entitled to a

declaratory judgment declaring that: (i) The durable medical equipment medical equipment ("DME") rental rules contained in the policy guidelines to the New York State Medicaid program's DME fee schedule (the "DMEFS") apply to New York no-fault claims billed under Healthcare Common Procedure Coding System ("HCPCS") Code E1399; (ii) Under the DMEFS rental rules, the maximum monthly amount of no-fault reimbursement for DME rented on or after July 1, 2016 and billed under HCPCS Code E1399 is 10% of the provider's acquisition cost; (iii) Because Miisupply LLC acquired the SAM device for \$3400.00 and the subject claims concern SAM device rentals made after July 1, 2016 and billed under HCPCS Code E1399, GEICO properly paid Miisupply LLC for such rentals at a rate of \$11.33 per day; and (iv) GEICO is not legally obligated to pay Miisupply LLC's billing for rentals of SAM device that is in excess of \$11.33 per day, because such billing exceeds the maximum monthly reimbursement amount permitted under the DMEFS. Respondent also submits Invoices from Client Care to Applicant, dated 2/23/18, which establishes that Applicant paid \$3,400.00, for each of the SAM Pro Units. Applicant's counsel argues that the DMEFS should not apply to these rental claims and that Respondent had failed to sustain its fee schedule defense. I disagree. I find the declaratory judgment order persuasive and I find that Respondent has submitted competent evidentiary proof to support its defense that proper amount of reimbursement for the rental of these SAM Pro Units is \$11.33 per day. Therefore, Applicant is awarded \$158.62.

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

	AAAMG Leasing Corp.	05/22/18 - 06/04/19	\$920.78	Awarded: \$158.62
Total			\$920.78	Awarded: \$158.62

- B. The insurer shall also compute and pay the applicant interest set forth below. 08/20/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

In the instant matter Applicant is awarded interest pursuant to the no-fault regulations. 11 NYCRR 65-3.9 (a) provides that Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." Pursuant to 11 NYCRR 65-3.9 (c), "if an applicant does not request arbitration or institute a lawsuit within 30 days after the 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." Applicant submitted its claim for arbitration on 8/20/19, more than thirty days after receipt of the denial of claim. Therefore, interest shall run effective 8/20/19.

C. Attorney's Fees

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

An attorney's fee of 20% shall be paid on the sum of the awarded claim plus interest, subject to a maximum 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 New York

SS :

County of Nassau

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

01/09/2021
(Dated)

Kevin R. Glynn

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:
4a231da02d46f5b4c5ff4b1f503933f7

Electronically Signed

Your name: Kevin R. Glynn
Signed on: 01/09/2021