American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

OrthoMotion Rehab DME Inc., LLC (Applicant)	AAA Case No.	17-23-1296-1740
	Applicant's File No.	GM22-555172,GM22-555173,GM22-559979,GM22-564880,GM22
- and -	Insurer's Claim File No.	0670149530000001
Geico Insurance Company (Respondent)	NAIC No.	22055

ARBITRATION AWARD

I, Fred Lutzen, 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 or "Assignor"

1. Hearing(s) held on 09/22/2023
   Declared closed by the arbitrator on 09/22/2023

   Helen Cohen, Esq., from Law Offices of Gabriel & Moroff, P.C. 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, **$5,115.79**, 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 female EIP (first initial "B") was 59-years-old when she was injured as the driver in an automobile accident on 11/3/2022. She was subsequently prescribed and provided durable medical equipment. Applicant seeks reimbursement of $5,115.79 for (1) rental of a VascuTherm 5 Device from 11/19/2022 through 12/16/2022 (28 days @ 80.00/day = 2,240.00), with accessory back wrap ($56.04); rental of a SAM unit from 12/24/2022

through 2/3/2023 (42 days @ 63.00/day = $2,646.00, with accessory patches ($555.00). The initial total was $5,497.04. Respondent paid $381.25 towards the SAM unit claims, which leaves an unpaid balance of $5,115.79.

Respondent denied the claims for the VascuTherm 5 rental beginning 11/22/2022 asserting a lack of medical necessity defense in reliance on a peer review report prepared by Kevin S. Portnoy, D.C., dated 12/16/2022.

The charges for DOS 11/19/2022-11/21/2022 were denied with deductible and fee schedule defenses.

The bill for DOS 12/24/2022-12/27/2022 (4-day VascuTherm 5 with patches) was not denied and receipt of the bill is disputed.

Respondent partially paid and partially denied the claims for DOS 12/28/2022-2/3/2023, for the SAM unit with patches.

The issues are (1) whether Applicant established prima facie entitlement to no-fault benefits for DOS 12/24/2022-12/27/2022, (2) whether Respondent's deductible defense is supported by sufficient evidence, (3) whether the VascuTherm 5 device was medically necessary, and (4) whether all of the charges are within fee schedule allowances and/or properly paid.

4. Findings, Conclusions, and Basis Therefor

This case was decided based on prevailing law, the submissions of the parties as contained in the electronic file ["MODRIA"] maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no live witnesses.

Unless the parties' agreement provides otherwise, an arbitrator need not apply the rules of evidence, is not bound by principles of substantive law, may do justice as he sees it, and may apply his own sense of law and equity to the facts as he finds them to be. Matter of New Century Acupuncture, P.C. v. Country Wide Ins. Co., 48 Misc.3d 1201(A), 18 N.Y.S.3d 580 (Table), 2015 N.Y. Slip Op. 50919(U) at 2, 2015 WL 3821534 (Dist. Ct. Suffolk Co., C. Stephen Hackeling, J., June 18, 2015); see also, *Rules for Arbitration of No-Fault Disputes in the State of New York*; Effective August 16, 2013, [p](1), "The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary." https://nysinsurance.adr.org.

The claims at issue are broken down as follows:

DOS	Billed	Paid	RESP's Fee	A R - 1 Claimed:	Denied for:

11/19-11/21/22	296.04	0.00	81.03	296.04	$200 Deductible
11/22-11/28/22	560.00	0.00	58.31	560.00	Peer Review / 10% Rental
11/29-12/5/22	560.00	0.00	58.31	560.00	Peer Review / 10% Rental
12/6-12/16/22	880.00	0.00	91.63	880.00	Peer Review / 10% Rental
12/24-12/27/22	807.00	0.00	40.13+555.00 = 595.13	807.00	No Denial / 10% Rental
12/28-1/3/23	441.00	70.23	70.23	370.77	10% Rental
1/04-1/9/23	378.00	60.20	60.20	317.80	10% Rental
1/10-1/16/23	441.00	70.23	70.23	370.77	10% Rental
1/17-1/23/23	441.00	70.23	70.23	370.77	10% Rental
1/24-1/30/23	441.00	70.23	70.23	370.77	10% Rental
1/31-2/3/23	252.00	40.13	40.13	211.87	10% Rental
Totals:	**$5,497.04**	**$381.25**	**$1,265.66**	**$5,115.79**	

Prima Facie

The disputed bill is for DOS 12/24/2022-12/27/2022 in the amount of $807.00.

It is now well-settled that a medical provider establishes a prima facie case of entitlement to payment of no-fault benefits upon the submission of a proper claim form setting forth the fact and amount of the losses sustained as well as the additional fact that that the payment of no-fault benefits was then overdue. Insurance Law 5106(a); Mary Immaculate Hospital v. Allstate Ins. Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004); Amaze Medical Supply, Inc. v. Eagle Ins. Co., 2 Misc.3d 128(A), 784 N.Y.S.2d 918 (Table), 2003 N.Y. Slip Op. 51701(U), 2003 WL 23310886 (App. Term 2d & 11th Dists. Dec. 24, 2003).

Applicant may also rely on a Respondent's admission of receipt of claim(s) to establish its prima facie case. This does not apply herein, as Respondent did not admit receipt of the bill nor issue a denial of claim.

Applicant's original arbitration submission, submitted to 'MODRIA' on 4/21/2023, includes the bill at issue and a post-marked mailing ledger with Affidavit of Mailing by Paola R. Aracena, dated 1/3/2023, notarized by Sally Azeez. The mailing ledger displays the amount of the bill, the EIP's name, the dates of service, and the name and address of Respondent, along with a Tracking #9405509105156004674214. The mailing ledger indicates the bill was sent by Applicant's counsel to Respondent on 12/29/2022.

The No-Fault system "was supposed to be an expeditious and simplified process for the payment of medical costs for injuries sustained in motor vehicle accidents (*see Walton v Lumbermans Mutual*, 88 NY2d 211, 214 [1996]). Too often, lawsuits with a value akin to a small claims action become bogged down by an insistence by one party or another that mailing of routine forms be established with scientific precision, asking judges, already burdened to the breaking point with the veritable legion of no-fault cases overflowing from our court dockets (while very able arbitrators remain underutilized), to require multiple witnesses to be summoned to the courthouse, merely to establish a presumption of mailing, even in the absence of an express denial of receipt of the disputed correspondence. Unfortunately, this class of cases has spawned a body of 'gotcha' jurisprudence, marked by a near manic preoccupation with form over substance." Lenox Hill Radiology, PC v. Tri-State Consumer Ins. Co., 31 Misc.3d 13, 15 (App. Term 1st Dept. 2010).

In this case, Respondent made no written objection to the sufficiency of the proof of mailing, did not deny the claim, and did not expressly deny receipt of the bill despite the timely submission to 'MODRIA' of the mailing affidavit.

After considering the evidence submitted, the preponderance of credible evidence warrants a finding in favor of Applicant. Applicant's proof demonstrates the bill was mailed to Respondent on 12/29/2022. Allowing 5-days for mailing, consistent with CPLR 2103, the claim is deemed received by Respondent on 1/3/2023. As such, Applicant has established prima facie entitlement to no-fault benefits for this bill.

Deductible Defense

The disputed charge is for DOS 11/19/2022-11/21/2022 in the amount of 296.04. This is for 3-days of renting the VascuTherm 5 device ($80 x 3) and the accessory/back wrap ($56.04).

Respondent reduced the rental allowance to $8.33 per day, in its view of fee schedule limits, and allocated $81.03 to the policy deductible of $200.00 (leaving $118.97 of the deductible to be applied elsewhere). Respondent submitted a copy of the policy Declarations Page, which shows there is Basic PIP Coverage with a $200.00 deductible.

Therefore, Respondent permissibly reduced Applicant's reimbursement by $81.03.

Medical Necessity

The claims for 11/22/2022-12/16/2022 (28-day rental) for the VascuTherm 5 device were denied for lack of medical necessity based on the peer review report by Kevin S. Portnoy, D.C., dated 12/16/2022. There are three separate bills that total up to 28-days. Although the peer review report specifies only DOS 11/22/2022 through 11/28/2022, the referral is for 28-days and this was reviewed by Dr. Portnoy.

Respondent's denial for lack of medical necessity must be supported by a peer review or other competent medical evidence which sets forth a clear factual basis and medical rationale for denying the claim. Healing Hands Chiropractic, P.C. v. Nationwide Assurance Co., 5 Misc.3d 975, 787 N.Y.S.2d 645 (Civ. Ct. New York Co. 2004); CityWide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co., 3 Misc.3d 608, 609, 777 N.Y.S.2d 241, 242 (Civ. Ct. Kings Co. 2004).

The peer review must set forth how and why the disputed services were inconsistent with generally accepted medical and/or professional practices. The conclusory opinions of the peer reviewer, standing alone and without support of medical authorities, will not be considered sufficient to establish the absence of medical necessity. (See, Citywide Social Work, et. al. v. Travelers Indemnity Co., *supra*; and Amaze Medical Supply Inc. v. Allstate Ins. Co., 12 Misc.3d 142(A), 824 N.Y.S.2d 760 (Table), 2006 N.Y. Slip Op. 51412(U), 2006 WL 2035559 (App. Term 2d & 11th Dists. July 12, 2006).

Defense

Dr. Portnoy reviewed the EIP's medical records, including the prescription/letter of medical necessity by Dr. Honor for 28-day rental of the VascuTherm 5 device (which was for cold compression), Dr. Honor's report of 11/9/2022, police report, and No-Fault Application.

Dr. Portnoy noted that Dr. Honor described soft-tissue injuries while "the standard of care in chiropractic does not involve the routine prescribing of [DME] in soft tissue injuries." Dr. Portnoy referenced an article on use of superficial heat and quoted, "Heating modalities are particularly useful when applied prior to other procedures, such as massage, stretching, exercise, and adjusting/manipulating. By stretching the tissue during or immediately after heat treatment, the muscle fibrosis, contracted joint capsule, or scar can increase in extensibility. Heat alone does not have this effect." [*citing*, New York Chiropractic College, Chapter 4-Physiologiqal Therapeutics, 2 Superficial Heat, INDICATIONS FOR USE:] Dr. Portnoy concluded, "The claimant received a vascutherm. As per the above-mentioned citation *heating modalities are particularly useful when applied prior to other procedures, such as massage, stretching, exercise, and adjusting/manipulating*. Therefore, as per the available medical records and above-mentioned citation, heat therapy in the form of a vascutherm was not medically necessary at that time."

However, the prescription/letter of medical necessity by Dr. Honor, dated 11/9/2022, which was reviewed by Dr. Portnoy, clearly indicates this device was prescribed for *cold*

application and not for heat, although the device does appear to perform both applications. Given the device was prescribed for its *cold* application/function, the peer review report does not provide a standard of care or any authoritative support for Dr. Portnoy's opinion that "*heat therapy* … was not medically necessary." Therefore, the rationale is flawed and insufficient to meet Respondent's burden.

There is no need to consider Applicant's rebuttal evidence as to the VascuTherm 5 device as Respondent failed to rebut the presumption of medical necessity that attached to Applicant's claim submission.

Fee Schedule

Respondent contends the VascuTherm 5 device warrants $8.33 per day (Applicant seeks $80 per day) and the SAM unit warrants $10.03 per day (Applicant seeks $63 per day), which is based on 10% of invoiced acquisition cost per month rate.

Pursuant to *11 NYCRR, Section 65-3.16,* Measurement of no-fault benefits, (a) Medical expenses, (1), "Payment for medical expenses shall be in accordance with fee schedules promulgated under section 5108 of the Insurance Law and contained in Part 68 of this Title (Regulation 83).

The Workers' Compensation fee schedule, which is required by law and incorporated by reference into the Insurance Department Regulations, is of such sufficient authenticity and reliability that it may be given judicial notice, and it need not be submitted to the court. Z.A. Acupuncture, P.C. v. Geico Ins. Co., 33 Misc.3d 127(A), 939 N.Y.S.2d 745 (Table), 2011 N.Y. Slip Op. 51842(U), 2011 WL 4949646 (App. Term 2d, 11th & 13th Dists. Oct. 11, 2011); Lvov Acupuncture, P.C. v. Geico Ins. Co., 32 Misc.3d 144(A), 939 N.Y.S.2d 741 (Table), 2011 N.Y. Slip Op. 51721(U), 2011 WL 4424472 (App. Term 2d, 11th & 13th Dists. Sept. 16, 2011).

As such, I take appropriate evidentiary notice of the NY WC Fee Schedule and its ground rules. This includes the DME Fee Schedule.

If the fees can be determined from a straightforward reading of the fee schedule, no coder affidavit or fee audit is required. Absent a straight-forward reading confirming the correct rate, 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 26240, 13 Misc.3d 172, 822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006).

The new '2022' DME Fee Schedule was not yet in effect on the relevant dates of service. On 2/15/2023, the Department of Financial Services amended Part 68 (Regulation 83) and Appendix 17-C of Title 11 NYCRR. The NYS Register [2/15/2023] states, in relevant part, "***Text of the final rule***: Section 68.1(b)(1) is amended … [and] A new Part E of Appendix 17-C is added to read as follows: *Part E. [DME] fee schedule*…(d)(1) *On and after June 1, 2023, the maximum permissible monthly rental charge for such*

durable medical equipment shall be ***one-tenth of the acquisition cost*** *to the provider. Rental charges for less than one month shall be calculated on a pro-rata basis using a 30-day month*." [emphasis added]

See, https://dos.ny.gov/system/files/documents/2023/02/021523.pdf

However, the Department's intent of the new regulation is memorialized in the comment/response section for *Assessment of Public Comment* therein. The Department noted, "There has been an emergency regulation in place since last year regarding the maximum permissible purchase charge or total accumulated rental charge. However, the Department acknowledges that the monthly rental charge was not in the emergency rule and was new in the proposed rule. Therefore, the Department amended the rule so that the maximum permissible rental charge takes effect on and after June 1, 2023 to give DME providers time to update their invoices, intake, and billing processes. ***The Department does not consider this a substantive change***." [emphasis added]

The Department stated, "The maximum permissible monthly rental of DME is tied to acquisition cost and the maximum purchase charge, and total accumulated rental charge is tied to acquisition cost and the usual and customary price DME providers charge. The rule defines "acquisition cost" in relevant part as to the line-item cost to the provider from the manufacturer or wholesaler. … [and] … The Department does not agree that the maximum permissible rental charge is too low because as stated above, the **maximum charge mirrors the Medicaid DME Fee Schedule, which DME providers authorized under Medicaid already are using for reimbursement**. In addition, many of the items DME providers rent out would have an established fee under the Workers' Compensation DME Fee Schedule and this rule would be limited only to DME not captured by the Workers' Compensation DME Fee Schedule. Finally, Insurance Regulation 83 already permits an insurer, arbitrator, or court to pay a fee exceeding the scheduled fee if the insurer, arbitrator, or court finds that an unusual procedure or unique circumstance justifies the charge. The Department disagrees that the maximum monthly rental charge should consider denied claims. The purpose of the fee schedule is to set reasonable reimbursement rates for DME that is medically necessary, and not for claims that have been denied as not reimbursable under no-fault. Additionally, the monthly rental charge already takes into account expenses such as delivery and repair costs." [emphasis added]

Evidentiary notice is also taken of 12 NYCRR 442.2(a)(2)(b), which provides, "The maximum permissible monthly rental charge for such equipment, supplies and services provided on a rental basis shall not exceed the lower of the monthly rental charge to the general public or the price determined by the New York State Department of Health area office. The total accumulated monthly rental charges shall not exceed the fee amount allowed under the Medicaid fee schedule."

The NYSDOH has not established a rental price for the 'SAM' device or the 'VascuTherm 5' cold/heat compression device.

The Appellate Division, First Department, stated, "It is true that the Medicaid DME fee schedule, which listed certain codes for DMEs, some of which had a MRA [Maximum

Reimbursement Amount] and some of which did not, established that for those that did not have a MRA, the monthly rate of 1/6th of the equipment provider's acquisition cost would apply. And it is also true that, pursuant to 12 NYCRR § 442.2(b), "the total accumulated monthly charges shall not exceed the fee amount allowed under the Medicaid fee schedule." Matter of Global Liberty Ins. Co. v. ISurply, LLC, 163 A.D.3d 418 (1st Dept. 2018). Therefore, while the Department's new addition to the Regulation concerning daily rental rates was not 'codified' as effective until 6/1/2023, this only establishes that there may have been arguable or plausible disputes on the maximum rental rates prior to 6/1/2023. The new rule effective 6/1/2023 simply removes all doubt. In fact, the Department repeatedly states throughout the comment/response portion of the *Assessment of Public Comment* that "The Department does not consider this a substantive change."

The weight of legal authority supports the 1/10th or 10 percent limitation. For these reasons, I agree that according to the facts herein, the one-tenth fee limitation set forth in the New York State Medicaid Program Durable Medical Equipment Manual Policy Guidelines applies to the no-fault fee calculation for the device at issue.

Neither party submitted an invoice for these items.

Unfortunately for Respondent, without an invoice or ***some evidence from Respondent that demonstrates the acquisition cost***, Respondent is unable to substantiate its calculations.

DFS stated on 2/15/2023 that "acquisition cost is a factor used in the Medicaid DME Fee Schedule already for rentals and has been for many years. In addition, an insurer can verify acquisition cost through the verification process…" *See*, https://dos.ny.gov/system/files/documents/2023/02/021523.pdf

Conclusion

Having carefully considered the submissions of the parties, the relevant case law, and the arguments of respective counsel, I conclude that the preponderance of the credible evidence supports the following:

A finding in favor of Respondent that $81.03 shall be applied to the deductible for DOS 11/19/2022-11/21/2022.

A finding in favor of Applicant on the issue of medical necessity for the VascuTherm 5 device.

A finding that Applicant established prima facie entitlement to no-fault benefits for DOS 12/24/2022-12/27/2022.

A finding in favor of Applicant on the fee schedule issues as Respondent failed to submit sufficient credible evidence to demonstrate billing over fee schedule allowances.

Applicant is awarded $5,034.76.

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**
	OrthoMotion Rehab DME Inc., LLC	**11/19/22 - 11/21/22**	**$296.04**	**Awarded: $215.01**
	OrthoMotion Rehab DME Inc., LLC	**11/22/22 - 11/28/22**	**$560.00**	**Awarded: $560.00**
	OrthoMotion Rehab DME Inc., LLC	**11/29/22 - 12/05/22**	**$560.00**	**Awarded: $560.00**
	OrthoMotion Rehab DME Inc., LLC	**12/06/22 - 12/16/22**	**$880.00**	**Awarded: $880.00**
	OrthoMotion Rehab DME Inc., LLC	**12/24/22 - 12/27/22**	**$807.00**	**Awarded: $807.00**

	OrthoMotion Rehab DME Inc., LLC	**12/28/22 - 01/03/23**	**$370.77**	**Awarded: $370.77**
	OrthoMotion Rehab DME Inc., LLC	**01/04/23 - 01/09/23**	**$317.80**	**Awarded: $317.80**
	OrthoMotion Rehab DME Inc., LLC	**01/10/23 - 01/16/23**	**$370.77**	**Awarded: $370.77**
	OrthoMotion Rehab DME Inc., LLC	**01/17/23 - 01/23/23**	**$370.77**	**Awarded: $370.77**
	OrthoMotion Rehab DME Inc., LLC	**01/24/23 - 01/30/23**	**$370.77**	**Awarded: $370.77**
	OrthoMotion Rehab DME Inc., LLC	**01/31/23 - 02/03/23**	**$211.87**	**Awarded: $211.87**
Total			**$5,115.79**	**Awarded: $5,034.76**

B. The insurer shall also compute and pay the applicant interest set forth below. 04/21/2023 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. 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. However, the regulations toll the accrual of interest when 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 Insurance Department regulations." *See*, 11 NYCRR 65-3.9(c); and OGC Op. No. 10-09-05 (interest accrues from date Applicant "*actually requests arbitration*" or commences a lawsuit). The Superintendent and the New York Court of Appeals have 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). Interest begins the first business day following a weekend arbitration request or due date.

C. Attorney's Fees

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 $1360." *Id*.

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 Onondaga

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

09/28/2023
(Dated)

Fred Lutzen

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:
6d439cc20357607edb92856e43ffb7d5

Electronically Signed

Your name: Fred Lutzen
Signed on: 09/28/2023