

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

CPM Medical Supply Inc
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-23-1286-2535
Applicant's File No. 00110002
Insurer's Claim File No. 0349795860101020
NAIC No. 22055

ARBITRATION AWARD

I, Lori Ehrlich, 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: Claimant

1. Hearing(s) held on 11/07/2023
Declared closed by the arbitrator on 11/07/2023

Justin Rosenbaum, Esq. from Drachman Katz, LLP participated virtually for the Applicant

Tara Hardinger, Esq. from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$754.99**, 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

In dispute is Applicant's claim in the sum of \$754.99 for a continuous passive motion device (CPM) furnished to Applicant's assignor, M.H., a fifty-eight-year-old male, said claim arising from an automobile accident on April 28, 2022.

Respondent has denied this claim based on the peer review of Dr. Robert Cristofaro dated January 9, 2023, and Applicant relies on a rebuttal from Dr. Victor Katz dated September 27, 2023. The issue presented is one of medical necessity.

The parties appeared via Zoom.

I have reviewed the documents entered into the ADR by November 7, 2023.

4. Findings, Conclusions, and Basis Therefor

At issue is a CPM device furnished to the Claimant from November 28, 2022 to December 18, 2022. Applicant has set forth a prima facie case for the claims at issue by the submission of a completed health claim form documenting the fact and amount of the loss sustained (Amaze Medical Supply v. Eagle Ins. Co., 2 misc. 3d 128A, 784NYS 2d 918, 2003 NY Slip Op.517014 [App Term, 2d & 11th Jud. Dusts.]) Given that Applicant has set forth a prima facie case the burden now shifts to the insurer to prove that the services at issue were not medically necessary. (see Citywide Social Work & Psy. Serv. P.L.L.C v. Travelers Indemnity Co., 3 Misc. 3d 608, 2004 NY Slip Op 24034 [Civ. Ct., Kings County 2004]).

In his peer review Dr. Cristofaro notes that the Claimant initially consulted Dr. Katz on July 29, 2022, with complaints of left shoulder pain, at which time based on the Claimant's complaints and examination findings conservative treatment was recommended and the Claimant was referred for an MRI of the left shoulder. The Claimant was re-evaluated by Dr. Katz on August 11, 2022, with continued complaints of left shoulder pain, and on August 14, 2022, an MRI of the left shoulder was conducted, and positive findings were documented. On October 17, 2022, the Claimant underwent left shoulder arthroscopy by Dr. Katz and postoperatively, the Claimant was provided with CPM device with associated supplies from November 28, 2022 through 12/18/2022.

Dr. Cristofaro opined that the standard of care for the Claimant was continued physical therapy modalities in a professional setting, which would have been sufficient for the Claimant to reach the maximum possible improvement.

Dr. Cristofaro states, "The claimant was provided a CPM device for the left shoulder. CPM device does not help the claimant to acquire his own mobility, whereas it will make him dependent on external support. This device is automated and it can cause adverse effects if not used properly. There are chances the claimant may experience pain due to forced passive motion, and in absence of a doctor's supervision, the claimant may exaggerate the injury. This was a routine shoulder arthroscopy and did not have any complications during or after the surgery. Therefore the CPM device provided to the claimant was not medically necessary in this case." He further contends that the literature does not support the use of CPM after arthroscopic surgery as the same clinical outcome is achieved through manual physical therapy sessions.

In his rebuttal, Dr. Katz, Claimant's treating surgeon, details the Claimant's medical history, as well as the medical necessity of the surgery and post operative CPM at issue. Dr. Katz states, "The primary goal of post-surgical rehabilitation following rotator cuff repair is to control pain, protect repaired tissue during the healing process, restore function, improve range-of-motion, restore strength and prevent a recurrence of symptoms. During the initial healing phase

following surgery, six weeks of passive range of motion is performed to protect the surgical site. Active and active-assisted exercise that result in a muscle contraction are not performed during the initial healing stage in order to protect the integrity of the repair. The amount of protection that is needed for healing is determined by the size or quality of the tear and the type of procedure used for the repair. Protecting tissue does not mean avoiding motion. Passive range of motion is utilized to prevent adhesions, prevent the detrimental effects of immobilization, reduce pain, reduce edema, reduce inflammation and stimulate soft tissue healing. **For a growing number of surgeons continuous passive motion (CPM) has become the Gold Standard for passive motion therapy during this six week period. CPM has demonstrated enhanced tendon healing that is statistically superior to intermittent motion and counters the harmful effects of immobilization.**" (*Clinical Guidelines for CPM following Rotator Cuff Repair : Synchronized or Isolated Protocol. 2007*)"

Upon careful review of the evidence presented I find the rebuttal more persuasive than the peer review. Accordingly, I defer to the opinion of the treating surgeon in determining the proper course of post operative care, as well as the medical necessity of the CPM unit. Accordingly, Applicant is awarded \$754.99.

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 |
|--------------|------------------------|---------------------|-----------------|--------------------------|
| | CPM Medical Supply Inc | 11/28/22 - 12/18/22 | \$754.99 | Awarded: \$754.99 |
| Total | | | \$754.99 | Awarded: \$754.99 |

B. The insurer shall also compute and pay the applicant interest set forth below. 02/10/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Insurer shall pay interest at the rate of 2% per month, simple (not compounded), on a pro rata basis using a 30-day month. Interest shall be computed from February 10, 2023 to the date of payment.

C. Attorney's Fees

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

This case is subject to the provisions as to attorney fee promulgated in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D): There is an attorney fee of 20% of benefits plus interest, with no minimum fee and a new maximum fee of \$1360.00. However, for all arbitration requests filed on or after April 5, 2002, 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(b).

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 Westchestser

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

12/03/2023
(Dated)

Lori Ehrlich

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:
ee0cf2f121a156203dba2e699ac2fb19

Electronically Signed

Your name: Lori Ehrlich
Signed on: 12/03/2023