

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ortho Sports Supply Inc.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-23-1285-7270
Applicant's File No. LIP-25469
Insurer's Claim File No. 8715005260000001
NAIC No. 35882

ARBITRATION AWARD

I, Mary Anne Theiss, 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 12/15/2023
Declared closed by the arbitrator on 12/15/2023

Lee-Ann Trupia, Esq. from Law Offices of Ilya E Parnas P.C. participated virtually for the Applicant

Jamie Orlando, Esq. from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,170.00**, 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 Claimant, a seventy-eight-year-old male was the restrained front seat passenger of a vehicle that was rear-ended on October 24, 2022. The Claimant sustained injuries to his bilateral shoulders and bilateral hips. He was seen in the emergency room of Brookdale Hospital where he was treated and released.

The Applicant Ortho Sports Supply Inc. is seeking \$1,170.00 reimbursement for a SAM Unit that was provided for rental from November 30, 2022, through December 13, 2022. There are also companion cases, AAA Case No. 17-23-1285-7513 where the rental was from December 28, 2022, through January 10, 2023, for \$1,170.00, and AAA Case No. 17-23-1286-6039 for \$1,170.00 where the rental was from December 14, 2022 through December 27, 2022.

The denials are based upon a peer review of Howard Kiernan, M.D. There is also an issue of billing under code E1399 Miscellaneous By-Report coding.

4. Findings, Conclusions, and Basis Therefor

The Claimant, a seventy-eight-year-old male was the restrained front seat passenger of a vehicle that was rear-ended on October 24, 2022. The Claimant sustained injuries to his bilateral shoulders and bilateral hips. He was seen in the emergency room of Brookdale Hospital where he was treated and released.

The Applicant Ortho Sports Supply Inc. is seeking \$1,170.00 reimbursement for a SAM Unit that was provided for rental from November 30, 2022, through December 13, 2022. There are also companion cases, AAA Case No. 17-23-1285-7513 where the rental was from December 28, 2022, through January 10, 2023, for \$1,170.00, and AAA Case No. 17-23-1286-6039 for \$1,170.00 where the rental was from December 14, 2022, through December 27, 2022.

The denials are based upon a peer review of Howard Kiernan, M.D. There is also an issue of billing under code E1399 Miscellaneous By-Report coding.

The Applicant has established a prima facie case of entitlement to benefits. Once an applicant has established a prima facie case of entitlement to No-Fault benefits, the burden then shifts to the insurer to prove that the disputed services were not medically necessary. To meet this burden, the insurer's denial(s) of the applicant's claim(s) must be based on a peer review, IME report, or other competent medical evidence that sets forth a clear factual basis and a medical rationale for the denial(s). *Amaze Medical Supply, Inc. v. Eagle Ins. Co.*, 2 Misc. 3d 128A (App. Term, 2nd Dept., 2003); *Tahir v. Progressive Cas. Ins. Co.*, 12 Misc. 3d 657 (N.Y.C. Civ. Ct., N.Y. Co., 2006); *Healing Hands Chiropractic, P.C. v. Nationwide Assurance Co.*, 5 Misc. 3d 975 (N.Y.C. Civ. Ct., N.Y. Co., 2004); *Millennium Radiology, P.C. v. New York Cent. Mut.*, 23 Misc. 3d 1121(A) (N.Y.C. Civ. Ct., Richmond Co., 2009); *Beal-Medea Prods., Inc. v GEICO Gen. Ins. Co.*, 27 Misc. 3d 1218(A) (N.Y.C. Civ. Ct., Kings Co., 2010); *All Boro Psychological Servs., P.C. v GEICO Gen. Ins. Co.*, 34 Misc. 3d 1219(A) (N.Y.C. Civ. Ct., Kings Co., 2012).

Dr. Kiernan reviewed 42 records. He went through the history of the accident. He noted on the progress notes dated November 23, 2023, by Wei Hong Xu, N.P. the Claimant presented with complaints of headaches, neck, mid-back, lower back, bilateral shoulders, bilateral hips, bilateral knees, and right rib pain. On November 28, 2022, the Claimant was prescribed a Sustained Acoustic Medicine Unit (SAM) and coupling patches for the bilateral shoulders and bilateral hip pain by Nurse Practitioner, Xu.

Dr. Kiernan indicated that ultrasound treatment should be done under the proper guidance of a trained licensed physical therapist. That during the treatment the therapist will move the transducer head over and around selected areas. Dr. Kiernan noted that the standard of care is continued physical therapy modalities in a professional setting. He stated that the SAM Unit was not medically necessary and there was no medical necessity for any future use of the SAM Unit. Dr. Kiernan noted there's little evidence for the effectiveness of ultrasound device.

When an insurer, through a peer review or medical exam, presents sufficient evidence establishing a lack of medical necessity, the burden then shifts back to the applicant to present its evidence of medical necessity. *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc. 3d 131(A) (App. Term, 2nd Dept., 2006); *Alfa Medical Supplies v. Geico General Ins. Co.*, 38 Misc. 3d 134(A) (App. Term, 2nd Dept., 2013).

Wei Hong Xu, N.P. offered a rebuttal to the peer review dated February 2, 2023. Ms. Xu noted that on November 2, 2022, the Claimant presented with pain 6-7/10 in the shoulders and 7- 8/10 in the bilateral hips. The Claimant reported difficulty sleeping. The diagnosis was bilateral shoulder tendinopathy and bilateral hip bursitis. Therefore, the Claimant was recommended for physical therapy, referred for diagnostic testing, prescribed medical supplies and medications, and advised to follow up in four weeks.

On November 28, 2022, Ms. Xu indicated that based on the patient's complaints of pain the SAM Unit with the patches to use at home for the bilateral shoulders and bilateral hips was prescribed. She noted the SAM Unit as ultrasound therapy is commonly employed for the treatment of soft tissue injury. The primary function of the SAM Unit is for multi-hour use in a home setting for accelerated pain reduction and rapid healing. She noted the SAM Unit relieves pain by delivering ultrasound waves through wearable patches that penetrate up to five centimeters into the affected areas for treatment.

In rebuttal to Dr. Kiernan, she stated that the SAM Unit was prescribed in conjunction with office-based treatment and that the prescription of durable medical equipment is part of conservative management of injuries. The SAM Unit is safe to use at home. The advantage of the SAM Unit is that a professional does not have to administer it.

The review of the medical records indicates on November 2, 2022, Ms. Xu's pain management plan was chiropractic physical therapy, acupuncture, trigger point injections, and aroma and massage therapy. The Claimant was prescribed diclofenac gel, lidocaine ointment, vivmov, cyclobenzaprine, an MRI of the lumbar spine, an MRI of the left shoulder, right rib, functional capacity testing, a SAM Unit, a VascuTherm, cervical collar, cervical pillow, lumbosacral support, lumbar cushion, bed board, egg crate mattress, and orthopedic car seat. This plan was also outlined in her initial visit on November 2, 2022.

There is no mention of the SAM Unit and whether it's effective, if the Claimant was using it at home, or if it was offering any benefit.

I find that Dr. Kiernan's peer review sets forth a clear factual basis and a medical rationale for Respondent's denial of Applicant's claim for the SAM Unit in dispute. I find that Respondent has established a lack of medical necessity for the SAM Unit.

It has been held that "For an expense to be considered medically necessary, the treatment, procedure, or service ordered by a qualified physician must be based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed with. Such treatment, procedure, or service must be warranted by the circumstances as verified by a preponderance of credible and reliable evidence and must be reasonable in light of the subjective and objective evidence of the patient's complaints." *Nir v. Progressive Ins. Co.*, 7 Misc.3d 1006(A), 2005 N.Y. Slip Op. 50466(U) (Civ. Ct. Kings Co., Nadelson, J., Apr. 7, 2005).

I disagree with Nurse Practitioner Xu's rebuttal to the peer review. Therefore, I find Dr. Kiernan's peer review more credible and probative than Nurse Practitioner Xu's rebuttal. I find that the SAM Unit was not medically necessary. I sustain Respondent's defense to that effect. Said defense overcomes Applicant's prima facie case of entitlement to No-Fault compensation.

I want to thank the parties for taking the time to prepare their cases.

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 NY

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

12/18/2023
(Dated)

Mary Anne Theiss

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:
3a2ec4f51d55cf5762916b973adab64b

Electronically Signed

Your name: Mary Anne Theiss
Signed on: 12/18/2023