

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.	17-23-1300-4278
- and -	Applicant's File No.	GM23-590258, GM23-592632, GM23-595657
Geico Insurance Company (Respondent)	Insurer's Claim File No.	8698612560000001
	NAIC No.	22055

### ARBITRATION AWARD

I, Neal S Dobshinsky, 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: J Doe

1. Hearing(s) held on 11/29/2023  
Declared closed by the arbitrator on 11/29/2023

Matthew Sledzinski from Law Offices of Gabriel & Moroff, P.C. participated virtually for the Applicant

Kelly E Armstrong from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,185.54**, 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

On 2/6/23, J Doe underwent arthroscopic surgery on his right knee. The surgeon prescribed that Doe use both a continuous passive motion (CPM) device and a cold therapy unit (CTU) for 3 weeks post-surgery. Applicant furnished Doe with the CPM, a sheepskin pad, a vascultherm, and a vascultherm knee wrap. Applicant sought payment for the pad, the wrap and the rental fees for the two devices. Applicant submitted three separate claims.

Based on a report by its peer reviewer, Insurer denied Applicant's claims for lack of medical necessity, and on the further ground that the fees sought were excessive and not in accordance with the fee schedules.

Did Insurer establish its lack of medical necessity defense? If not, how much is due Applicant?

#### 4. Findings, Conclusions, and Basis Therefor

I have read and considered the materials in the AAA ADR case file and the authorities cited by the parties that could be located and are not behind a paywall or in the submissions. I have heard and considered the arguments of counsel. I find as follows:

##### **Background**

On 10/22/22, J Doe, then 25 years old, was the driver of a motor vehicle that was in an accident. The vehicle was insured for no-fault benefits by respondent Insurer. Doe claimed he was injured. He sought care and treatment.

On referral from John McGee, MD, a physician board certified in physical medicine & rehabilitation, who was treating Doe, on 12/7/22 MRI of Doe's right knee was performed. The MRI revealed (i) edema along the myofascial planes of the partially imaged medial head of the gastrocnemius muscle consistent with myofascial strain; and (ii) suprapatellar fat pad impingement.

On 1/16/23, Doe saw Jeffrey Cohen, MD, a physician with Cohen & Kramer, orthopedic surgeons, for a symptomatic right knee and left shoulder. Doe was taking symptomatic medication. Cohen notes that there was an MRI, but he does not specifically comment on the findings.

Cohen examined Doe. The examination of the right knee revealed painful medial joint line, moderate swelling, joint effusion, restricted range of motion 0 to 110 degrees, and a positive McMurray's sign. Examination of the left shoulder revealed forward flexion to 120 degrees and abduction to 110 degrees, and a positive impingement sign. The plan was for Doe to have diagnostic arthroscopy for the symptomatic right knee and PRP injection to the symptomatic left shoulder.

On 2/6/23, Mark Kramer, MD, performed arthroscopic surgery on Doe's right knee.

Cohen signed a durable medical equipment and medical device prescription order form, dated 2/9/23, for a knee CPM for 3 weeks use and for an iceless cold device (compression) for 3 weeks use.

On 2/14/23, Applicant OrthoMotion Rehab DME furnished Doe with a knee CPM, a sheepskin pad, a vascultherm (CTU), and a vascultherm knee wrap.

### **Applicant's Claims and Insurer's Denials**

Applicant, as Doe's assignee, timely submitted three separate claims to Insurer for no-fault benefits for payment for the equipment.

On 2/20, Applicant billed a total of \$801.22: \$19.50 for a sheepskin pad, code E0188 NU; \$89.56 for a vascultherm shoulder wrap, code E0666 NU; \$18.88 per day (7 days from 2/14 to 2/20) for rental fees for the knee CPM, code E0935 RR; and \$80.00 per day (7 days) for rental fees for the vascultherm, code E1399 RR.

On 2/27, Applicant billed a total of \$692.16 for 7 days' rental fees for the CPM and the vascultherm from 2/21 to 2/27.

On 3/6, Applicant again billed a total of \$692.16 for 7 days' rental fees for the CPM and the vascultherm from 2/14 to 2/20.

Based on a report by its peer reviewer, Insurer timely denied Applicant's claims for lack of medical necessity, and on the further ground that the fees sought were excessive and not in accordance with the fee schedules.

The only issues argued and submitted for decision are: Did Insurer establish its lack of medical necessity defense? If not, how much is due Applicant? All other issues were waived.

### **Medical Necessity and the Burden of Proof**

Medical necessity for services or supplies is established by proof of an applicant's properly submitted claim form. *All County Open MRI & Diagn. Radiology P.C. v Travelers Ins. Co.*, 11 Misc3d 131(A), 2006 NY Slip Op. 50318[U] [App Term, 2d Dept 9th & 10th Jud Dists 2006]. Applicant's evidence establishes the presumption of medical necessity for all the equipment at issue.

The insurer "bears both the burden of production and persuasion" as to its lack of medical necessity defense. *Nir v Allstate Ins. Co.*, 7 Misc3d 544, 546 [Civ Ct, Kings County 2005]. The defense must be supported by a peer review report or other evidence, such as an independent medical examination report. The report must set forth a sufficiently detailed factual basis and medical rationale for the denial. *Amaze Med. Supply v Eagle Ins. Co.*, 2 Misc3d 128(A), 2003 NY Slip Op 51701[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2003].

"[H]owever, it is the [applicant] who has the ultimate burden of proving, by a preponderance of the evidence, that the services at issue were medically necessary" (citations omitted). *Radiology Today, P.C. v Geico Ins. Co.*, 58 Misc3d 132(A), 2017 NY Slip Op 51768[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017].

## **The Peer Review and Insurer's Lack of Medical Necessity Defense**

Insurer denied Applicant's claims based on an affirmed peer review by Robert Cristofaro, MD, a physician board certified in orthopedic surgery. In his 3/8/23 report, Cristofaro gives his reasons and opinions why the equipment was not medically necessary.

Cristofaro lists the records and reports he reviewed, 20 bullet point items. These include various records from Yellowstone Medical Rehabilitation (McGee), and physical therapy records; acupuncture records; evaluation by Cohen, 1/16/23; MRI reports (including 12/5/22 right knee MRI); anesthesia reports; operative report by Kramer; DME order form for the equipment at issue; and a few other records and reports.

Cristofaro mentions the accident and that Doe allegedly sustained multiple injuries including an injury to his right knee. He mentions the findings on the 12/7 right knee MRI and that Doe was seen by Cohen on 1/16/23. He mentions the findings regarding the right knee and the recommendation for right knee arthroscopy. On 2/6/23, Doe underwent arthroscopy for a tear of the anterior horn of the medial meniscus and middle third of the lateral meniscus, chondromalacia of the medial patellar facet, medial plica, and synovitis. He mentions that post-operatively, Doe was provided with the CPM, pad, vascultherm, and vascultherm wrap.

Cristofaro contends that "[Doe] did not have an adequate course of physical therapy prior to the surgery. The treating provider should have given time for three to six months of continuous conservative treatment to respond, and then the arthroscopy should have been performed. However, in this case, knee arthroscopy was performed without giving adequate conservative treatment to the right knee."

Cristofaro contends that the use of the devices was not medically necessary.

Cristofaro states that "[t]he standard of care for postoperative DME was continued physical therapy modalities in a professional setting, which would suffice for the claimant to reach the maximum possible improvement following the surgery, and the use of these devices would not be of any added value to the claimant's rehabilitation program.

He continues that the CPM "is usually provided to claimants after they undergo complicated surgeries with severe risks. Knee arthroscopy is a simple, routine surgery, and there was no requirement of an additional device after the surgery that did not include complicated procedures. The use of a CPM device for the knee is felt to be unnecessary in the care of this claimant."

Regarding the vascultherm, Cristofaro states that "[c]old treatment systems are a superficial cold methodology giving constant cryotherapy to a variety of indications. Cooling devices, both passive and active pump-controlled devices, that provide cooling and compression have no additional clinical utility or impact on health outcomes than

the use of ice or compression wraps. A pack of ice is adequate for effective application of cold. There were no uncommon conditions in this case that require much else confounded than effective ice or cold 15 minutes 3 to 4 times each day as needed for basic pain relief and discomfort."

Cristofaro cites articles to support his opinions. The articles he cites regarding the CPM are from reliable authorities. The article he cites regarding the vascultherm is not from a peer reviewed journal. It appeared on the medicalnewstoday.com website. The article was written by Zawn Villines, a freelance medical and legal writer. <https://www.zawnvillines.com/about-me> (last visited 12/27/23), and was reviewed for publication by Natalie Olsen, a registered dietician and exercise physiologist who specializes in diseased management and prevention.

This peer review sets forth an adequate factual basis and medical rationale to support Insurer's denial of Applicant's claim for the CPM and the sheepskin pad, but not for the vascultherm and the wrap. Insurer established its lack of medical necessity defense as to the CPM and pad only.

### **Applicant's Rebuttal as to Medical Necessity**

To rebut Cristofaro's peer review, Applicant submits a rebuttal from Arun Agrawal, MD. The rebuttal is not sworn to nor affirmed. In his 4/12/23 rebuttal, Agrawal gives his reasons and opinions why the vascultherm, the knee wrap, the CPM, and the sheepskin pad were medically necessary. (Because Insurer did not meet its initial evidentiary burden regarding lack of medical necessity for the vascultherm and the wrap, the rebuttal was considered regarding the medical necessity for the CPM and pad only).

Agrawal does not state, but, from the brief cv attached to his rebuttal, it appears that he is a thoracic surgeon. He does not disclose any relationship to the surgeons or Applicant; or an interest, if any, in the outcome of the matter. He did not examine or treat Doe.

Agrawal mentions the accident. He mentions the peer review, the right knee MRI, the exam by Cohen on 1/16/23, and the prescription for the devices at issue.

Regarding the CPM, Agrawal describes what it is and what it does. He asserts that Aetna considers a CPM to be medically necessary. He cites no authority to support his opinion.

The rest of Agrawal's rebuttal is general and not persuasive.

Applicant failed to overcome Insurer's showing that the CPM and the pad were not medically necessary.

### **Insurer's Fee Schedule Defense**

Insurer contends that the fees sought by Applicant are not in accordance with the fee schedules.

An insurer is only required to reimburse a claimant in accordance with the regulations and applicable fee schedule. 11 NYCRR 65-3.8 (g) (1) (ii). An insurer is not even required to establish that it had timely denied the claim to preserve its fee schedule defense. *Oleg's Acupuncture, P.C. v Hereford Ins. Co.*, 58 Misc3d 151[A] [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2018], 2018 NY Slip Op 50095[U]. Here, Insurer checked box 18 on the denials of claim. Applicant was on notice that its fees were disputed.

It is an insurer's burden to come forward with competent evidentiary proof to support the defense. *Robert Physical Therapy, P.C. v State Farm Mut. Auto Ins. Co.*, 13 Misc3d 172 [Civ Ct Kings Co 2006] [internal citations omitted]. The defense may be established through the parties' submissions which may include references to and excerpts from the fee schedule. See *Natural Acupuncture Health, P.C. v Praetorian Ins. Co.*, 30 Misc3d 132[A], 2011 NY Slip Op 50040(U) [App Term 1st Dept 2011]. An arbitrator may take judicial notice of the fee schedule, CPLR 4511(b); see *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 21 [2d Dept 2009]), In an appropriate case, reference to the fee schedule and the other papers submitted by the parties may establish the defense as a matter of law. *Jing Luo Acupuncture, P.C. v NY City Tr. Auth.*, 60 Misc3d 136[A] [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2018], 2018 NY Slip Op 51083(U).

If an insurer shows that the amount charged by applicant for a particular service exceeds the fee schedule amount, the burden shifts to the applicant to show that the amount billed reflects a different interpretation of such schedule or an inadvertent miscalculation or error. *Cornell Med., P.C. v Mercury Cas. Co.*, 24 Misc3d 58, 61 [App Term, 2d Dept, 2, 11 & 13 Jud Dists 2009].

Applicant billed for the vascutherm under HCPCS code E1399 at \$80.00 per day.

Insurer contends that the proper rate of payment for rental of the vascutherm is based on 10% of the acquisition cost of the device.

The invoice to Applicant for acquisition of the vascutherm is \$2,499.00 per unit.

Insurer persuasively shows that the correct rental fee for the vascutherm is \$249.99 per month or \$8.33 per day ( $\$249.99 \div 30\text{da} = \$8.33/\text{da}$ ). Applicant has no countervailing evidence.

The fee for the wrap is correct.

## **Conclusion**

Insurer established its lack of medical necessity defense as to the CPM device and sheepskin pad only. Applicant failed to overcome that showing. Insurer established its fee schedule defense as to the vascutherm in part. Applicant failed to overcome that showing.

Based on the parties' submissions, their arguments, the law, the regulations, and the weight of the credible evidence, I conclude that Applicant is entitled to payment in accordance with the foregoing.

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
	<b>OrthoMotion Rehab DME Inc., LLC</b>	<b>02/14/23 - 02/20/23</b>	<b>\$801.22</b>	<b>Awarded: \$147.87</b>
	<b>OrthoMotion Rehab DME Inc., LLC</b>	<b>02/21/23 - 02/27/23</b>	<b>\$692.16</b>	<b>Awarded: \$58.31</b>
	<b>OrthoMotion Rehab DME Inc., LLC</b>	<b>02/28/23 - 03/06/23</b>	<b>\$692.16</b>	<b>Awarded: \$58.31</b>

<b>Total</b>	<b>\$2,185.54</b>	<b>Awarded: \$264.49</b>
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B. The insurer shall also compute and pay the applicant interest set forth below. 05/22/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Insurer shall compute and pay interest from the accrual date noted above-the date on which Applicant requested arbitration by filing with the AAA-at a rate of 2% per month, simple interest, calculated on a pro-rata basis using a 30-day month and ending with the date of payment subject to the provisions of 11 NYCRR 65-3.9.

C. Attorney's Fees

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

Insurer shall pay Applicant's attorney a fee in an amount equal to 20% of the total amount of the benefits plus interest awarded in this arbitration, subject to the provisions of 11 NYCRR 65-4.6.

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 NJ  
 SS :  
 County of Monmouth

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

12/28/2023  
 (Dated)

Neal S Dobshinsky

**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:**  
503959c686d230d957fb99952c285bd4

**Electronically Signed**

Your name: Neal S Dobshinsky  
Signed on: 12/28/2023