

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.	17-24-1339-6994
- and -	Applicant's File No.	GM23-621644, GM23-624011, GM23-627947, GM23-631169, GM23-634939
Geico Insurance Company (Respondent)	Insurer's Claim File No.	0284797040101067
	NAIC No.	35882

**ARBITRATION AWARD**

I, Mitchell Lustig, 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 07/22/2024  
Declared closed by the arbitrator on 07/22/2024

Helen Cohen, Esq from Law Offices of Gabriel & Moroff, P.C. participated virtually for the Applicant

Dustn Mule, Esq. from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,646.76**, 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 OrthoMotion Rehab DME Inc.'s claim as the assignee of a 54-year-old-male injured in a motor vehicle accident on February 6, 2023, for reimbursement in the sum of \$2,646.76 for the rental of pneumatic compression device for 36 days for the period of April 25, 2023 to May 30, 2023.

The Applicant billed for the cold compression therapy unit utilizing CPT Code E1399.

The Applicant's claim represents the difference between the amount of its claim (\$2,880.00) and the amount reimbursed by the Respondent (\$233.24).

With the exception of the Applicant's bill for dates of service May 23, 2023 to May 30, 2023, the Respondent partially denied the remainder of the claim based upon the grounds that the Applicant billed in excess of the fee schedule.

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

##### WHETHER THE INSURER HAS PROVEN THAT THE APPLICANT'S BILLS WERE IN EXCESS OF THE FEE SCHEDULE

An insurance carrier's timely asserted defense that the bills submitted were not properly no-fault rated or that the fees charged were in excess of the Workers' Compensation Fee Schedule is sufficient, if proven, to justify a reduction in payment or denial of claim. New York Hosp. Med. Ctr. Of Queens v. Country-Wide Insurance Company, 295 A.D.2d 583, 744 N.Y.S.2d 201 (2<sup>nd</sup> Dept. 2002); East Coast Acupuncture, P.C. v. New York Central Mutual Insurance, 18 Misc.3d 139(A), 2008 N.Y. Slip Op. 50344(U) (App. Term 2<sup>nd</sup> and 11<sup>th</sup> Jud. Dists. 2008); A.B. Medical Services, PLLC v. American Transit Insurance Company, 15 Misc.3d 132(A), 2007 N.Y. Slip Op. 50680(U) (App. Term 2<sup>nd</sup> and 11<sup>th</sup> Jud. Dists. 2007).

The insurer has the burden of coming forward with competent evidentiary proof to support its fee schedule reduction or denial. See, e.g., Roberts Physical Therapy, P.C. v. State Farm Mutual Automobile Insurance Company, 13 Misc.3d 172, 3006 N.Y. Slip Op. 26240 (N.Y. Civ. Ct. Kings Co. 2006).

In the absence of such proof, a defense of noncompliance with the appropriate fee schedule cannot be sustained. Continental Medical, P.C. v. Travelers Indemnity Company, 11 Misc.3d 145(A), 2006 N.Y. Slip Op. 50841(U) (App. Term 1<sup>st</sup> Dept. 2006).

The record in the within matter indicates that upon receipt of the Applicant's bills in the sum of \$2,224.00 for the rental of the pneumatic compression device for dates of service April 25, 2023 to May 22, 2023, the Respondent reimbursed the Applicant in the sum of \$233.24 and denied the remaining sum of \$2,006.76 as being in excess of the fee schedule. Specifically, the Respondent's denials provided as follows: **"For Medical equipment and supplies billed under E1399, the maximum permissible charge is 10% of the acquisition cost."**

After careful consideration of the evidence, I find that the Respondent has not submitted "competent evidentiary proof" in support of its fee schedule reduction.

It appears that it in issuing its denials, the Respondent was relying upon a recent amendment to the DME fee schedule which provides that **on or after June 1, 2023**, "the maximum permissible monthly **rental charge** for durable medical equipment shall be one-tenth of the acquisition cost of the provider."

However, since the pneumatic compression device herein was rented **prior** to June 1, 2023, the latter amendment is **not** applicable.

Rather, this matter is governed by the Thirty-Sixth Amendment to 11 NYCRR 68, effective as of April 4, 2022, which provides that the "maximum permissible purchase charge or the total accumulated rental charge" for DME not listed in the fee schedule or that is listed but for which no fee has been assigned "**shall be the lesser of the ... acquisition cost plus 50%; or ... usual and customary price charged by durable medical equipment providers to the general public.**"

In the within matter, the Respondent submitted an invoice establishing that the acquisition cost of the pneumatic compression devise is \$2,499.00. Since the total rental charge hereunder does not exceed 150% of that amount, I find that the Respondent cannot sustain its denials based upon the grounds that the Applicant billed in excess of the fee schedule for dates of service April 25, 2023 to May 22, 2023. (The insurer did not submit any evidence as to the usual and customary price to the public).

I also find no merit to the argument of the Respondent's representative that notwithstanding that the pneumatic compression device was rented **prior** to June 1, 2023, that I should still sustain the Respondent's fee schedule defense.

Accordingly, the Applicant is awarded the sum of. \$2,006.76 for the rental of the pneumatic compression device for the period of April 25, 2023 to May 22, 2023.

The Respondent denied the Applicant's bill in the sum of \$640.00 for 8 dates of service for the period of May 23, 2023 to May 30, 2023 based upon the grounds that it did not receive the Applicant's bill within 45 days after the pneumatic compressor was furnished to the Assignor. In support thereof, the Respondent submitted an Affirmation dated April 2, 2024 from its Claims Examiner, Jessica Fisher, asserting that the Respondent did not receive the Applicant's bill until March 18, 2024.

However, the Applicant has submitted an Affidavit of Mailing from Paula Aracena, sworn to on January 1, 2024, asserting that the bill for the latter dates of service was mailed to the Respondent on June 2, 2023, well within 45 days after the pneumatic compressor was furnished to the Assignor. Thus, I find that the Respondent cannot sustain its denial predicated upon the 45-day rule. Accordingly, the Applicant is awarded the sum of \$640.00 for dates of service May 23, 2023 to May 30, 2023.

Based upon the foregoing, I find in favor of the Applicant in the sum of \$2,646.76.

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	04/25/23 - 05/01/23	\$501.69	Awarded: \$501.69
	OrthoMotion Rehab DME Inc., LLC	05/02/23 - 05/08/23	\$501.69	Awarded: \$501.69
	OrthoMotion Rehab DME Inc., LLC	05/09/23 - 05/15/23	\$501.69	Awarded: \$501.69
	OrthoMotion Rehab DME Inc., LLC	05/16/23 - 05/22/23	\$501.69	Awarded: \$501.69
	OrthoMotion Rehab DME Inc., LLC	05/23/23 - 05/30/23	\$640.00	Awarded: \$640.00

<b>Total</b>	<b>\$2,646.76</b>	<b>Awarded: \$2,646.76</b>
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- B. The insurer shall also compute and pay the applicant interest set forth below. 03/11/2024 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 from March 11, 2024, the date that arbitration was requested, to the date of payment.

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay the applicant an attorney's fee equal to 20% of that total sum, subject to a maximum of \$1,360.00. See 11 NYCRR 65-4.6(d). However, if the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation process, the attorney's fee shall be based upon the provisions of 11 NYCRR Section 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 Nassau

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

07/23/2024  
(Dated)

Mitchell Lustig

**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:**  
4eab89deb7a09b634f051e5500c5b7f6

### Electronically Signed

Your name: Mitchell Lustig  
Signed on: 07/23/2024