American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Electromeg Supply Corp (Applicant)	AAA Case No.	17-24-1335-9714
	Applicant's File No.	N/A
- and -	Insurer's Claim File No.	20230413A60
	NAIC No.	Self-Insured
Electric Insurance Company (Respondent)		

ARBITRATION AWARD

I, Thomas Eck, 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 07/31/2024
   Declared closed by the arbitrator on 07/31/2024

   Roman Kulik from Kulik Law Firm, PC participated virtually for the Applicant

   Todd Hyman from Carman, Callahan & Ingham, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$3,301.10**, was NOT AMENDED at the oral hearing.
   Stipulations WERE made by the parties regarding the issues to be determined.

   The parties stipulated that Applicant established a prima facie case of entitlement to No-Fault compensation with respect to its bills. The parties also stipulated that Respondent's NF-10 denial of claim forms were timely issued.

3. Summary of Issues in Dispute

   This arbitration arises out of medical treatment for the 40-year-old Assignor (BF) related to injuries sustained in a motor vehicle accident that occurred on 4/13/2023. Applicant seeks reimbursement for an Osteogenesis

Electrical Stimulator provided to the Assignor on 5/16/2023-5/16/2023. Respondent denied these services based on the peer review conducted by Dr. Stuart Stauber, MD, dated 7/17/2023. Applicant has submitted a Rebuttal by Dr. Ruben Oganesov, MD, dated 2/5/2024.

4. Findings, Conclusions, and Basis Therefor

This case was decided on the submissions of the parties as contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association and the oral arguments of the parties' representatives at the hearing. No witnesses testified at the hearing. I reviewed the documents contained in the ECF for both parties and make this decision in reliance thereon.

MEDICAL NECESSITY

Applicant has established its prima facie case with proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see Insurance Law § 5106 a; Mary Immaculate Hosp. v. Allstate Ins. Co., 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; Amaze Med. Supply v. Eagle Ins. Co., 2 Misc. 3d 128A, 784 N.Y.S. 2d 918, 2003 NY Slip Op 51701U [App Term, 2d & 11th Jud Dists]). The burden shifts to the insurer to prove that the services were not medically necessary.

Where the Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden then shifts to the Applicant which must then present its own evidence of medical necessity. [see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed]), Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company, 2008 NY Slip Op 50456U, 18 Misc. 3d 1147A, 2008 N.Y. Misc. LEXIS 1121, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co. 13 Misc.3d 131, 824 N.Y.S.2d 759, 2006 NY Slip Op51871(U) (Sup. Ct. App. T. 2d Dep't 2006)].

In the instant matter, Dr. Stauber asserts that the Osteogenesis Electrical Stimulator provided to the Assignor was not medically necessary. Based on a review of the medical records, Dr. Stauber provided a summary of the Assignor's history and an analysis of the lack of medical necessity.

Applicant relies on the Rebuttal by Dr. Oganesov, documents in its submission, and Respondent's records.

In considering competing opinions, I am more persuaded by Dr. Oganesov's Rebuttal. I find that Dr. Oganesov disputes the salient points in the peer review, that the doctor independently justifies medical necessity for the device prescribed, and that the doctor makes compelling points undermining the peer review. I cannot agree with Respondent that the Osteogenesis Electrical Stimulator was provided contrary to the standard of care. I find the Applicant's Rebuttal is more persuasive and credible than the peer review. Dr. Oganesov cites various medical literature supporting the use of the device. Additionally, Dr. Oganesov provided a medical rationale and factual basis for the prescription of the at home unit and has rebutted the peer reviewer's main contention that the device does not work for the injuries sustained. I also note the peer reviewer never discussed the 5/10/2023 evaluation discussed by the rebuttal doctor. As such, the Applicant established a medical reason and rationale why the device was prescribed. Therefore, based on a preponderance of evidence, the Applicant's claim is hereby granted.

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 a claim. East Coast Acupuncture, P.C. v. New York Cent. Mut. Ins., 2008 NY Slip Op 50344(U) (App. Term 2d Dep't., Feb. 21, 2008).

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. If Respondent fails to demonstrate by competent evidentiary proof that an Applicant's claims were in excess of the appropriate fee schedules, Respondent's defense of noncompliance with the appropriate fee schedules cannot be sustained. See, Continental Medical PC v. Travelers Indemnity Co., 11 Misc.3d 145A, 819 N.Y.S.2d 847, 2006 NY Slip Op 50841U, 2006 N.Y. Misc. LEXIS 1109 (App. Term, 1st Dep't, per curium, 2006).

Defenses based on the fee schedule can be raised at any time as per the Fourth Amendment to 11 NYCRR 65-3/Insurance Regulation 68-C). The new sections apply to any treatment or service rendered on or after April 1, 2013. Based on 11 NYCRR 3.8(g)(1)(ii). "The purpose of the [no-fault] statute and the fee schedules promulgated thereunder is to significantly reduce the amount paid by insurers for medical services, and thereby help contain the no-fault premium." Saddle Brook Surgicenter, LLC v. All State Ins. Co., 48 Misc.3d 336, 8 N.Y.S.3d 875 (Civ. Ct. Bronx Co. 2015).

Judicial notice of the New York State Medicaid Durable Medical Equipment Fee Schedule is taken. See Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13, (2nd Dept. 2009); LVOV Acupuncture, P.C. v. Geico Ins. Co., 32 Misc.3d 144(A), 2011 NY Slip Op 51721(U) (App Term 2d, 11th & 13th Jud Dists. 2011); Natural Acupuncture Health, P.C. v. Praetorian Ins. Co., 30 Misc.3d 132(A), 2011 NY Slip Op 50040(U) (App Term, 1st Dept. 2011).

The Osteogenesis Electrical Stimulation unit was billed utilizing CPT code E0747, which does have a Maximum Reimbursement Amount (MRA) under the NYS Medicaid DME Fee Schedule of $3300.00. Applicant seeks full reimbursement for the item prescribed. However, a review of the prescription clearly indicates that this item was only to be dispensed (rented) for a maximum of 4 weeks. There is nothing in the record to suggest that the item was rented for more than 4 weeks. Applicant is clearly billing in excess of the amount allowed under the fee schedule. The maximum reimbursement due to the Applicant is 10% of the purchase rate listed in the fee schedule for the 4 weeks the item was rented.

Reimbursement for a 28-day rental of the Osteogenesis Electrical Stimulation unit is $11.79 per day for a total reimbursement of $330.12 calculated as follows: $3300.00 x 10% / 28 = $11.79. Applicant is billing $117.86 per for each day the item was rented ($3300.00 / 28).

12 NYCRR §442.2(b). 12 NYCRR §442.2 (b) sets forth, in pertinent part, that the maximum permissible charge for rental of equipment shall be the lesser of the monthly rental charge to the general public or the price determined by the New York State Department of Health ("DOH") area office. The total accumulated monthly rental charge shall not exceed the fee amount allowed under the Medicaid Fee Schedule.

As stated above, this item was billed under CPT code E0747 does have a Maximum Reimbursement Amount ("MRA") under the Medicaid Fee Schedule of $3300.00. Since, the DOH has not established a price for the rental of the device, the cost of the device should be calculated based upon the monthly rental charge to the general public, 10% of the listed MRA, or 10% of the acquisition cost if no MRA listed. The basis of this argument derives from New York State's Medicaid Program, Durable Medical Equipment Manual Policy Guidelines. The latest version (July 1, 2016) of the New York State Medicaid Program Durable Medical Equipment Manual Policy Guidelines expressly provides that for DME items that have been assigned an MRA, the rental fee is 10% of the listed MRA. For DME items that do not have an MRA, the rental fee is calculated at 10% of the equipment provider's acquisition cost. The total accumulated rental charges may not exceed the actual purchase price of the item. If the item is eventually purchased, all accumulated monthly rental payments including Medicare payments and other third-party payments, will be applied to the total purchase price of the item.

The Department of Financial Services issued a Statement of the Reasons for the Emergency Measure, Thirty-Sixth Amendment to 11 NYCRR 68 (Insurance Regulation 83), effective April 4, 2022, wherein it was stated that the total accumulated rental charge for the unlisted DME is capped at the purchase price of the DME. DFS noted that the absence of a cost control measure in place for DME used in the No-Fault system would result in the unwarranted depletion of patients' $50,000.00 no-fault insurance benefits as a result of unlimited rental charges that could far exceed the purchase price of the DME. In order to mitigate the problems to the No-Fault system DFS capped the purchase and total accumulated rental of DME for which either no price has been established in the DME fee schedule or for DME not listed in the DME fee schedule to provide a consistent reimbursement methodology for both listed and unlisted DME. See, GEICO. v. Li-Elle Service, Inc., 2103 WL 829302 at 5 (E.D.N.Y. 2013).

The 2018 New York Workers' Compensation Fee Schedule, General Ground Rule 4, states: "The Durable Medical Equipment Fee Schedule adopted is still the Medicaid Fee Schedule." The current New York State Medicaid Program Durable Medical Equipment, Prosthetic, Orthotic, And Supply Manual Policy Guidelines states: "For DME items that have been

assigned a Maximum Reimbursement Amount (MRA), the rental fee is 10% of the listed MRA. For DME items that do not have a MRA, the rental fee is calculated at 10% of the equipment provider's acquisition cost.

I do note that the Applicant argued that the item was given to the Assignor and not a rental. However, it is clear from the prescription that item was to be rented for 4 weeks. Nowhere in the prescription or medical records was it indicated the item was to be used for more than 10 months and needed to be given to the Assignor and not rented. A DME provider cannot just decide to give an item to an Assignor when it is clear that was not the intent of the prescribing doctor. Furthermore, $3300.00 for a 4 week rental far exceeds the amount contemplated under the fee schedule.

NYCRR § 65-3.8(g)

> (1) Proof of the fact and amount of loss sustained pursuant to Insurance Law section 5106(a) shall not be deemed supplied by an applicant to an insurer and no payment shall be due for such claimed medical services under any circumstances:
>
> (i) when the claimed medical services were not provided to an injured party; or
>
> (ii) for those claimed medical service fees that exceed the charges permissible pursuant to Insurance Law section 5108(a) and (b) and the regulations promulgated thereunder for services rendered by medical providers.

Arbitrators sit in equity and have the powers to enforce the spirit and intent of the No-fault law and regulations Bd. of Education, et al. v. Bellmore-Merrick, 39 N.Y. 2d. 167 (1976). An arbitrator need not adhere with strict conformity to the evidentiary rules set forth in CPLR 2016 see Auto One Ins. Co., v Hillside Chiropractic P.C., 126 A.D. 3d. 423 (1st Dep't, 2015) citing 11 NYCRR 65-4.5 (o) the arbitrator shall be the judge of the relevance and materiality of the evidence offered.

An Arbitrator "shall be the judge of the relevance and the materiality of the evidence offered, strict conformity to the rules of evidence shall not be necessary. The arbitrator may question or examine any witness or party and independently raise any issue that arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department

regulations." 11 NYCRR 65-45(0)(1). Additionally, as the trier of the facts and the law, an Arbitrator is authorized to review and take judicial notice of any rule, law, medical document or periodical or any other document which may impact and aid in making a decision, as long as it conforms with the Insurance Laws and the New York State Insurance Department Regulations. Matter of Medical Society v. Serio, 100 N.Y.2d 854, 768 N.Y.S.2d 423 (2003).

After careful review of the evidence and arguments made by the parties at the hearing, I find the amount due to the Applicant is $331.22 ($330.12 + $1.10) based on the plain reading of the fee schedule and regulations. Respondent did not need to provide an expert's affidavit on the issue as the plain reading of the fee schedule and regulations requires no expert interpretation. Furthermore, I find the Applicant cannot, on its own initiative, dispense/sell/give any item that was clearly meant to be used/rented for 28 days. As such, Applicant is hereby awarded $331.22.

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**

	Electromeg Supply Corp	**05/16/23 - 05/16/23**	**$3,301.10**	**Awarded: $331.22**
Total			**$3,301.10**	**Awarded: $331.22**

B. The insurer shall also compute and pay the applicant interest set forth below. 02/14/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall accrue from the initiation date for this case until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty-day month.

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 interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, as provided for in 11 NYCRR 65-4.6(d), subject to a maximum fee of $1,360.00.

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 Queens

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

08/30/2024
(Dated)

Thomas Eck

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:
2dd6276adbd8acb26012473077fc5304

Electronically Signed

Your name: Thomas Eck
Signed on: 08/30/2024