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.	17-24-1340-4024
- and -	Applicant's File No.	GM23-584728, GM23-584730, GM23-584731, GM23-587128
Geico Insurance Company (Respondent)	Insurer's Claim File No.	0534868170000001
	NAIC No.	35882

ARBITRATION AWARD

I, Ioannis Gloumis, 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: EIP.

1. Hearing(s) held on 08/27/2024
   Declared closed by the arbitrator on 08/27/2024

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

   Kevin Smith, Claims Representative from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$2,199.33**, 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

   Applicant seeks reimbursement of charges for sustained acoustic medicine ("SAM") and Vascutherm cold compression therapy ("CCTU") units that were dispensed from January 27, 2023 through February 13, 2023, following a December 15, 2022 motor vehicle accident. Respondent denied the claim related to dates of service February 7, 2023 through February 13, 2023 for the CCTUbased upon the defense of lack of medical necessity predicated upon the peer review report by Robert Sohn, D.C. dated March 9, 2023. Respondent denied the remaining charges in dispute based upon the defense that Applicant's charges are not in accordance with the fee schedule.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions contained in the American Arbitration Association's Electronic Case Folder in MODRIA, said submissions constituting the record in this case. This award is based upon the arguments that were presented by the parties during the arbitration hearing and the documentary evidence that has been submitted by the parties. There were no witnesses that testified during the arbitration hearing.

The EIP, then a 59-year-old female pedestrian, was injured in a motor vehicle accident on December 15, 2022. Following the accident, the EIP went to the emergency department of Jamaica Hospital, where she was evaluated, treated, and later discharged. Thereafter, the EIP sought private medical attention for injuries to the neck, mid back, lower back, knee, right shoulder, and right hip. The EIP came under the care of multiple providers and underwent conservative care. Based upon prescriptions by Jennifer Honor, D.C., Applicant dispensed SAM and CCTU units from February 7, 2023 through February 13, 2023.

Applicant billed Respondent $2,368.00 for the SAM and CCTU units that were dispensed from February 7, 2023 through February 13, 2023. Respondent's claim specific denials demonstrate that Respondent received the bills for the claims in dispute. Thus, Applicant has established its prima facie case. See *Amaze Med. Supply Inc. v. Allstate Ins. Co*., 3 Misc 3d 133(A) (App Term, 2d & 11th Jud Dists 2004); *King's Med. Supply Inc. v. Country-Wide Ins. Co.*, 5 Misc 3d 767 (Civ Ct, NY County 2004); *Ultra Diagnostics Imaging v. Liberty Mutual Ins. Co*., 9 Misc.3d 97 (App. Term 9th & 10th Dists. 2005).

Moreover, Respondent timely denied the claim related to dates of service February 7, 2023 through February 13, 2023 for the CCTUbased upon the defense of lack of medical necessity predicated upon the peer review report by Robert Sohn, D.C. dated March 9, 2023. Respondent denied the remaining charges in dispute based upon the defense that Applicant's charges are not in accordance with the fee schedule.

Dr. Sohn opined that the VascuTherm CCTU unit is not a chiropractic/medical necessity and should not be allowed for payment. Dr. Sohn stated that the impression on January 12, 2023 was cervical, thoracic and lumbar dysfunction, and lumbar radiculopathy; and a recommendation was made for MRI scans of the cervical and lumbar spine and a continued course of chiropractic treatment. Dr. Sohn stated that the standard of care for chiropractic treatment of a soft tissue injury of the spine is to begin with a complete and detailed physical examination, form a primary or differential diagnosis, and begin

conservative management consisting of spinal manipulation, physical therapy modalities, therapeutic exercises, if necessary, for at least a period of four to six weeks until a follow-up examination is performed. Dr. Sohn further stated that no evidence exists of any form of cryotherapy with compression as part of the in-office supervised chiropractic treatment program; and if the chiropractor did not feel it was essential for a chiropractic/medical necessity to perform in-office supervised cryotherapy with compression or moist heat with compression as part of the chiropractic supervised treatment program in combination with manipulation then clearly it is not a chiropractic/medical necessity to have been prescribed for home care. Dr. Sohn opined that the chiropractor deviates from the standard chiropractic treatment by performing and prescribing the VascuTherm water circulation device when clearly no indication exists of any form of cryotherapy to be administered as part of the in-office supervised chiropractic treatment program.

Applicant presented a rebuttal from Arun Agrawal, M.D. dated April 3, 2024. Dr. Agrawal discussed the complaints, examination, and diagnoses of the January 12, 2023 chiropractic examination and opined that the Vascutherm device provided from February 7, 2023 through February 13, 2023 was medically necessary, within a reasonable degree of medical certainty. Dr. Agrawal stated that the EIP presented with complaints of pain in the neck, mid back, and lower back, with radiating pain, decreased range of motion, and positive orthopedic tests; cold compression therapy directly addresses swelling, inflammation, and pain associated with these injuries, and the modality has been extended to the post-operative pain management of a variety of orthopedic procedures where surgically induced tissue damage results from injury, overuse, or surgical intervention, causes an inflammatory response; and a few of the essential benefits when using a Vascutherm device include reduction of edema, reduction of pressure, faster healing, and reduction of pain. Dr. Agrawal cited the letter of medical necessity of Jennifer Honor, D.C., the prescribing chiropractor, and a study regarding the efficacy of Thermotherapy and Cryotherapy on pain relief in patients with acute low back pain.

Applicant also provided the prescriptions and letters of medical necessity for the SAM and CCTU units. Dr. Honor prescribed the DME for treatment of the cervical and lumbar spine.

"At a no-fault trial involving a defense of lack of medical necessity, an insurer has an initial burden to rebut the presumption of medical necessity which attaches to a claim form." *Parkway Hospital, Inc. v. Integon National Ins. Co*., 64 Misc.3d 139(A) (App. Term 2d, 11th & 13th Dists. July 19, 2019). See also *Dayan v. Allstate Ins. Co*., 49 Misc 3d 151[A] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]).

Furthermore, the Court in *King's Med. Supply Inc. v. Country-Wide Ins. Co*., 5 Misc 3d 767, 772 held the following, in relevant part:

> "*…a denial premised on lack of medical necessity must be supported by evidence such as an independent medical examination, peer review, or examination under oath "setting forth a sufficiently detailed factual basis and medical rationale for the claim's rejection" (Amaze Med. Supply v Eagle Ins. Co., 2 Misc 3d 128[A], 2003 NY Slip Op 51701, *1 [App Term, 2d Dept 2003]; see also Rockaway Blvd. Med. P.C. v Travelers Prop. Cas. Corp., 2003 NY Slip Op 50842[U] [App Term, 2d & 11th Dists 2003]; see also 11 NYCRR 65-3.8 [b] [4]; Choicenet Chiropractic P.C. v Travelers Prop. Cas. Corp., 2003 NY Slip Op 50697[U] [App Term, 2d & 11th Jud Dists 2003]; Rockaway Blvd. Med. P.C. v Allstate Ins. Co., 2003 NY Slip Op 50681[U] [App Term, 2d & 11th Jud Dists 2003])…*"

Where the insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the applicant provider which must then present its own evidence of medical necessity. See *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc 3d 131(A) (2006).

Following a complete review of the evidence presented, I find in favor of Applicant. I am not persuaded by Dr. Sohn that the CCTU unit was not medically necessary because there is no evidence that cold compression therapy was performed in the office setting before prescribing the item for home use. Dr. Agrawal explained that the CCTU was prescribed in conjunction with the in-office treatments, which included physical therapy, acupuncture, and chiropractic spinal manipulative treatments, and the items were prescribed to directly address swelling, inflammation, and pain associated with the injuries, and that a few of the essential benefits when using a Vascutherm device include the reduction of edema, the reduction of pressure, faster healing, and the reduction of pain. The prescription and letter of medical necessity from the prescribing chiropractor provides the purpose of the DME as part of the treatment of the EIP's spinal injuries in conjunction with the in-office conservative modalities. I am not persuaded by the peer review report of Dr. Sohn that the CCTU in dispute was not medically necessary or that it was a deviation of the generally accepted standard of care.

Respondent also defends the charges in dispute based upon the defense that Applicant's charges are not in accordance with the fee schedule. Respondent's representative argued that the CCTU and SAM units were billed incorrectly and should be reimbursed based upon the calculation of 10% of the acquisition cost from the manufacturer. Respondent provided a position statement for unlisted and miscellaneous DME codes with arbitration awards in support of its fee schedule defense. Respondent's position statement also includes the argument that Applicant fails to establish its prima facie case

of entitlement to reimbursement as specific fees are not listed in the applicable Fee Schedule. Respondent did not present a claim specific fee audit or an affidavit from a certified professional coder or medical billing expert in support of its fee schedule defense.

The New York Workers' Compensation Durable Medical Equipment Fee Schedule effective April 4, 2022 does not include a specific CPT Code for a SAM unit or a Vascutherm compression and cold therapy system. CPT Code E0218, which has a weekly rental allowance of $5.48 in the New York Workers' Compensation Durable Medical Equipment Fee Schedule, is defined as "Fluid circulating cold pad with pump, any type." CPT Code E0676, which is listed in the New York Workers' Compensation Durable Medical Equipment Fee Schedule without a weekly rental allowance, is defined as "Intermittent limb compression device (includes all accessories), not otherwise specified." The definition of CPT Code E0218 does not include the compression component of the device that was dispensed by Applicant. Respondent did not present sufficient competent evidence to establish that CPT Code E0218 is the correct CPT Code under the New York Workers' Compensation Durable Medical Equipment Fee Schedule for the compression and cold therapy system related to treatment of the neck or lower back. Based upon a plain reading of the New York Workers' Compensation Durable Medical Equipment Fee Schedule, it appears that CPT Code E0218 is related to one component of the prescribed device that is in dispute. Respondent also failed to establish that other similar codes in the New York Workers' Compensation Durable Medical Equipment Fee Schedule apply to the compression and cold therapy system that is in dispute.

Additionally, CPT Code E1399, which is defined as "Durable medical equipment, miscellaneous," does not have an assigned weekly rental fee.

In *AAA Case Number 17-22-1279-3258*, Arbitrator Drew M. Gewuerz, Esq., CPC held the following, in relevant part:

> "…Initially, the Respondent contends that the charged HCPCS code, E1399, should be reassigned to code E0218, a listed code with a weekly reimbursement value of $5.48. But, the Respondent fails to present proof that its selected code accurately describes the entire prescribed device. Facially, it seems that the selected code only accounts for one component of the device. The Respondent also fails to distinguish similar codes, such as E0236, Pump for water circulating pad, E0650, Pneumatic Compressor, nonsegmental home model, E0651, Pneumatic compressor, segmental home model without calibrated gradient

pressure, E0652, Pneumatic compressor, segmental home model with calibrated gradient pressure, and the billed E1399, Durable medical equipment, miscellaneous.

Assuming that the billed code, E1399, is the correct one, for the reasons set forth at length in AAA Case No. 17-16-1037-4998, under current law, the Applicant is entitled to bill the Respondent for the unrestricted rental charge to the general public, as exorbitant as it may be, when the charge is for a HCPCS code not listed in the Medicaid DME fee schedule or one that is listed without a "Maximum reimbursable Medicaid fee" a/k/a "Maximum Reimbursement Amount (MRA)." Without a viable method for the application of the Policy Guidelines to No-Fault claims, the Respondent's one-tenth of the acquisition cost reimbursement method is inapplicable to the reimbursement of the disputed claim.

Contrary to the Respondent's position, § 442.2(b)'s direction that "[t]he total accumulated monthly rental charges shall not exceed the fee amount allowed under the Medicaid fee schedule," is not conduit for circumvention of § 442.2(g) which excludes the use of the Medicaid Durable Medical Equipment, Orthotics, Prosthetics and Supplies Policy Guidelines ("Policy Guidelines") for workers' compensation claims, and by adoption, No-Fault claims. It merely reins in the rental charge where none is listed in the appropriate column of the Medicaid DME fee schedule (Column D) but where the listed HCPCS code has a listed MRA (Column C). For example, codes E0910 through E0940 all have a "Fee" listed in Column C and a "Rental Fee" that is 1/10 the "Fee" in Column D, while codes E0950 through E0986 only have "Fee" in Column C. For those codes, E0950 through E0986, the total accumulated monthly rental charge could not exceed the "Fee" in Column C pursuant to § 442.2(b).

The billed charge, E1399 "Durable Medical Equipment, Misc," although listed in the Medicaid DME Services Fee Schedule, does not have set amounts listed in Columns C and D. Section 442.2(g) prohibits the creation of a Column D "Rental Fee" via the creation of Column C "Fee" based on the product's acquisition cost (by invoice to the provider).

Accordingly, the Respondent's defense fails, and the Applicant's claim is awarded…"

I find that Applicant is entitled to bill Respondent for the rental charge to the general public because the charges are for a CPT Code that is not listed in the New York DME

Fee Schedule or is one that is listed without a maximum reimbursement amount ("MRA"). In *AAA Case Number 17-16-1036-6837*, this arbitrator previously made a finding that *12 NYCRR 442.2(g)* specifically prohibited the application of the Medicaid Provider Manual or Policy Guidelines; that the method of reimbursement using calculations based upon a percentage of the acquisition cost of the item has been abandoned since 2004; and, that an Applicant should be reimbursed at the usual and customary price charged to the general public for the rental of DME items that do not have an assigned MRA. Respondent has failed to provide sufficient evidence to establish that Applicant's rental charges for the SAM and CCTU units are not the usual and customary rental prices charged to the general public for dates of service January 27, 2023 through February 13, 2023.

Accordingly, Applicant's claims are hereby granted in their entirety.

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	**01/27/23 - 01/30/23**	**$766.87**	**Awarded: $766.87**
	OrthoMotion Rehab DME Inc., LLC	**01/31/23 - 02/06/23**	**$501.69**	**Awarded: $501.69**
	OrthoMotion Rehab DME Inc., LLC	**01/31/23 - 02/06/23**	**$370.77**	**Awarded: $370.77**
	OrthoMotion Rehab DME Inc., LLC	**02/07/23 - 02/13/23**	**$560.00**	**Awarded: $560.00**
Total			**$2,199.33**	**Awarded: $2,199.33**

B. The insurer shall also compute and pay the applicant interest set forth below. 03/15/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay Applicant the amount of interest computed from the date of filing, at the rate of 2% per month, simple, and ending with the date of payment of the award, subject to the provisions of *11 NYCRR 65-3.9(c)* (stay of interest).

C. Attorney's Fees

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

Respondent shall pay Applicant an attorney's fee in accordance with *11 NYCRR 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 NY
SS :
County of Nassau

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

09/25/2024
(Dated)

Ioannis Gloumis

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:
e9a347fa051a9c5e6fc0c7486c158634

Electronically Signed

Your name: Ioannis Gloumis
Signed on: 09/25/2024