American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

CPM Medical Supply Inc. DBA CityDME (Applicant)	AAA Case No.	17-23-1329-1710
	Applicant's File No.	00125219
- and -	Insurer's Claim File No.	8772510050000003
	NAIC No.	
Geico Insurance Company (Respondent)		

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 08/28/2024
   Declared closed by the arbitrator on 08/28/2024

   Justin Rosenbaum from Drachman Katz, LLP participated virtually for the Applicant

   Naela Hasan from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$1,237.54**, 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

   J Doe underwent arthroscopic surgery on his right knee. Following the surgery, Applicant furnished Doe with a continuous passive motion device (CPM), a cold-water therapy unit (CTU), and a synthetic sheepskin pad for Doe to use post-operatively. Applicant sought payment for the equipment.

   Based on a report by its peer reviewer, Insurer denied payment on the ground that the underlying arthroscopy was not medically necessary, therefore, the associated post-operative equipment was not medically necessary.

   Did Insurer establish its lack of medical necessity defense?

4. Findings, Conclusions, and Basis Therefor

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

Background

On 7/10/23, J Doe, then 26 years old, was a passenger in a motor vehicle that was in an accident. Doe claims he was injured. He then sought medical care and treatment. Respondent insurer is obligated to provide Doe with no-fault insurance benefits.

On 7/13/23, Doe saw Andrew Glyptis, MD, for an initial consultation. Doe complained of headaches, neck pain and stiffness, lower back pain, and right knee pain.

Glyptis examined Doe. The diagnoses included post-traumatic headaches, neck pain, lower back pain, and unspecified superficial injury of the right knee. The treatment plan included physical therapy 3 to 4 times per week, the use of prescribed medical equipment/supplies, cervical, lumbar, and right knee MRIs, chiropractic consult, and follow-up in 3 to 4 weeks.

On 7/26/23, on referral from Glyptis, MRI of Doe's right knee was performed at RadCiti Imaging. The MRI revealed anterior cruciate ligament sprain sequelae and significant edema in the prepatellar region compatible with trauma sequelae.

On 8/17/23, Doe saw Glyptis for a follow-up visit. Doe continued to complain about neck pain, lower back pain, and right knee pain. Doe rated the knee pain as 10/10. Glyptis noted the findings on the knee MRI as an ACL sprain and prepatellar edema.

Glyptis examined Doe. He recommended that Doe continue physical therapy and that he see an orthopedist.

On 8/21/23, Doe saw Ronald A. Daly, MD, an orthopedic surgeon, for an initial consultation for complaints of constant right knee pain, buckling, giving way, and so on. Doe reported that he was undergoing physical therapy and has been treated 2 to 3 times per week for 4 weeks. Daly reviewed the 7/26 knee MRI.

Daly examined Doe's knee. Daly found flexion to be restricted. He found pain with range of motion, tenderness over the patella, and tenderness of the suprapatellar aspect. Daly's assessment was right knee internal derangement. He discussed treatment options with Doe including NSAIDs, physical therapy, injections, and surgery. He noted that because Doe has failed conservative management, Doe was indicated for surgery. Doe opted to consider surgery and was advised to continue physical therapy 2 to 3 times per week in the interim.

On 9/5/23, Doe saw Daly for a bedside pre-op evaluation. Doe continued to complain of right knee pain rated at 8/10. Daly noted that the right knee examination was unchanged. His impression was unchanged.

On the same day, 9/5/23, Daly performed arthroscopic surgery on Doe's right knee at a facility in New Jersey. The surgery included partial medial and lateral meniscectomies, coblation arthroplasty of the medial femoral condyle, major synovectomy, and lysis of adhesions.

Daly prescribed both a continuous passive motion (CPM) device and a cold compression therapy (CTU) device for Doe to use for 42 days following the surgery.

On 9/7/23, applicant CPM Medical Supply furnished Doe with the CPM device, a PC cube (a CTU) device, and a synthetic sheepskin pad.

Applicant's Claims and Insurer's Denials

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

Applicant billed $841.06 that included three charges of $132.16 per week for rental of the CPM for 3 weeks from 9/7 to 9/13, 9/14 to 9/20, and 9/21 to 9/27/23, HCPCS code E0935; $325.08 for a water circulating pump, code E0236; $19.50 for the synthetic pad, code E0188; and $100.00 for a delivery fee, code A9901.

Applicant separately billed another $396.48 that included another three charges of $132.16 per week for rental of the CPM from 9/28 to 10/4, 10/5 to 10/22, and 10/12 to 10/18/23.

Based on a report by its peer reviewer, Insurer timely denied Applicant's claims on the ground that the underlying arthroscopy was not medically necessary, therefore, the associated post-operative equipment was not medically necessary.

The only issue argued and submitted for determination was whether Insurer established its lack of medical necessity defense. 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]. Here, Applicant's submission established the presumption of medical necessity for the equipment.

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 based on evidence that furnishes 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]. The same applies to the defense when asserted by MVAIC.

"[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 necessary" (internal 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 Julio Westerband, MD, a board-certified orthopedic surgeon. In his 10/12/23 report, Westerband states his reasons and opinions why the underlying surgery and, therefore, the equipment was not medically necessary. He also states why other services and supplies were not medically necessary.

Westerband lists the records and reports he reviewed, more than 25 bullet point items. These included an initial chiropractic evaluation and chiropractic visit notes, 7/11 to 8/31/23; initial consultation with Glyptis, 7/13/23, and prescriptions and referrals; initial physical therapy evaluation, 7/14/23 and physical therapy progress notes, 7/14 to 8/31/23; right knee MRI report, 7/26/23; follow up with Glyptis, 8/17/23; initial orthopedic evaluation by Daly, 8/21/23, pre-op evaluation by Daly, 9/5/23, operative report by Daly, 9/5/23; intraoperative images; DME prescription and letter of medical necessary by Daly; and a few other records and reports.

Westerband mentions the accident and the Doe was a 26-year-old restrained passenger. Doe claimed to have sustained multiple injuries including injuries to his right knee. Doe started on a course of physical therapy on 7/14/23. Westerband mentions the 8/21/23 evaluation by Daly, Doe's complaints, the examination findings, and the recommendation for right knee arthroscopy. He mentions that Doe underwent the arthroscopy on 9/5/23.

Westerband contends that "the right knee arthroscopy performed on 09/05/2023 was not medically necessary. As the right knee arthroscopy was not medically necessary, the associated anesthesia services, assistant services, and post-operative DME viz., CPM for the knee with Synthetic Sheepskin Pad and Cold Compression Therapy System were also not medically necessary."

Regarding the arthroscopy, Westerband states that Deo "received only 9 physical therapy sessions for the right knee before the recommendation of right knee arthroscopy on 08/21/2023. This is inadequate to assess the maximum possible benefit the claimant could have gained with the continuation of conservative care. The treating physician should consider continuous physical therapy sessions for at least 3 to 6 months before the recommendation of right knee arthroscopy. It was premature for the treating physician to proceed with the surgery at this stage of the claimant's injury. The right knee arthroscopy was performed without undertaking a complete course of physical therapy which could have resolved the symptoms." He continues that "[t]he MRI revealed no evidence of post-traumatic intra-articular surgical pathology. These MRI

findings should have been treated conservatively. Arthroscopic surgery for the clinical picture depicted here along with findings in the MRI was not medically necessary. Such findings can be easily treated with physical therapy sessions along with cortisone injections."

Westerband concludes that "[t]here is no evidence that the claimant completed a full proper course of conservative management before considering the right knee arthroscopy. The treating physician should have considered an adequate attempt at non-operative treatment to improve the functionality and quality of life of the claimant and if there were no improvements with adequate conservative treatment, then the right knee arthroscopy should have been considered. Thus, the right knee arthroscopy was not medically necessary in this case."

Regarding the CPM and the synthetic sheepskin pad, Westerband contends that the "device is not indicated after a routine arthroscopic knee surgery. Following knee arthroscopic surgeries, the patient can almost immediately start bearing weight on the operated joint which means that they can attend physical therapy sessions for rehabilitation without any risks." The pad is a component of the CPM and was not necessary.

Regarding the CTU, Westerband contends that it is not indicated as part of the treatment for knee injuries; ice therapy is sufficient. "post-operative rehabilitation following routine arthroscopic surgeries does not require the use of specialized home use DME."

Regarding the standards of care, Westerband contends: "With regards to knee arthroscopy and associated services: The standard of care, in this case, was to provide the claimant with non-surgical modalities including adequate and continuous physical therapy sessions for three to six months in the concerned region along with cortisone injections. The treatment offered to the claimant deviated from the standards of care in this case." "With regards to post-operative DME: The standard of care, for this claimant was, continued physical therapy modalities in a professional setting which would suffice for the claimant to reach the maximum possible improvement, and the use of the devices in question would not be of any added value to the claimant's rehabilitation program."

To support some of his opinions, Westerband references journal articles. There is no reference to any article that states the standards of care he offers. Regarding the arthroscopy, a careful reading of the articles shows that they do not fully support and may even contradict Westerband's categorical opinions.

For example, Westerband cites LaPrade, Robert F., et al. *Knee arthroscopy: evidence for a targeted approach*. British journal of sports medicine 55.13 (2021): 707-708 (https://drrobertlaprademd.com/wp-content/uploads/2021/06/Knee-arthroscopy-evidence-f last visited 9/26/24) to support his contention that the arthroscopy was unnecessary or at least prematurely performed. Not only does Westerband misstate the title of the article, but he also misquotes the article. Without specifying any minimum period of non-operative measures, the authors conclude that "clinicians . . . should be guided by

critical analysis of emerging scientific data that influence shared decision-making between clinicians and patients. As outlined here, knee arthroscopy has a role in the management of targeted lesions and in certain situations where non-operative measures have proved unsuccessful."

Similarly, Westerband cites Paterno MV. *Non-operative Care of the Patient with an ACL-Deficient Knee*. Curr Rev Musculoskelet Med. 2017;10(3):322-327. doi:10.1007/s12178-017-9431-6; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5577432/pdf/12178_2017_Article_9431.pdf (last visited 9/26/24). That author concludes that "[a]lthough ACL reconstruction is the most prevalent treatment for ACL deficiency, a subset of the population may benefit from a non-operative course of care."

Additionally, Westerband cites Bogunovic, L., & Matava, M. J. (2013). *Operative and Nonoperative Treatment Options for ACL Tears in the Adult Patient: A Conceptual Review*. The Physician and Sportsmedicine, *41*(4), 33-40. https://doi.org/10.3810/psm.2013.11.2034. According to the abstract, which is not behind a paywall, "[i]njury to the anterior cruciate ligament (ACL) is common among athletic individuals. Both non-operative and operative treatment options exist. The optimal treatment of an adult with an ACL tear depends on several patient-specific factors, including age, occupation, and desired activity level. In less active patients with sedentary jobs, nonoperative management, consisting of physical therapy, bracing, and activity modification can yield successful results. In active patients who want to resume participation in jumping, cutting, or pivoting sports, patients who have physically demanding occupations, or patients who fail a trial of nonoperative management, ACL reconstruction is recommended." "The optimal treatment in adult patients with ACL tears should be based on careful consideration of the patient's goals for return to activity, knee-specific comorbidities, such as coexistent meniscal pathology or osteoarthritis, and his or her willingness to follow a detailed rehabilitation regimen."

The bottom line is that there is a difference of opinion between the peer reviewer and the treating surgeon whether the arthroscopy was medically necessary when it was performed.

Westerband's opinions alone as to the lack of medical necessity for the underlying surgery and the equipment at issue, without additional persuasive support, are insufficient to sustain Insurer's initial evidentiary burden.

I find that there is not an adequate factual basis or medical rationale for Insurer's denial of Applicant's claims. Without an adequate factual basis and medical rationale, Insurer did not meet its initial evidentiary burden and failed to establish its lack of medical necessity defense.

Where an insurer fails to meet its initial evidentiary burden, no rebuttal is required. Nevertheless, Applicant submitted a rebuttal by Daly dated 6/20/24. Because Insurer did not meet its initial burden, the rebuttal was not considered.

Conclusion

Insurer failed to establish its lack of medical necessity defense.

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

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**
	CPM Medical Supply Inc	**09/07/23 - 09/07/23**	**$19.50**	**Awarded: $19.50**
	CPM Medical Supply Inc	**09/07/23 - 09/27/23**	**$396.48**	**Awarded: $396.48**
	CPM Medical Supply Inc	**09/07/23 - 09/07/23**	**$325.08**	**Awarded: $325.08**
	CPM Medical Supply Inc	**09/07/23 - 09/07/23**	**$100.00**	**Awarded: $100.00**
	CPM Medical Supply Inc	**09/28/23 - 10/18/23**	**$396.48**	**Awarded: $396.48**

Total	**$1,237.54**	**Awarded: $1,237.54**

B. The insurer shall also compute and pay the applicant interest set forth below. 12/15/2023 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.

09/26/2024
(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:
a18d46a51001912c8fae663eb2e4e960

Electronically Signed

Your name: Neal S Dobshinsky
Signed on: 09/26/2024