

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ace Med Supplies Inc. , Viotek Med Supplies Inc (Applicant)	AAA Case No.	17-24-1341-4616
	Applicant's File No.	3209590
	Insurer's Claim File No.	23-5695702
- and -	NAIC No.	37834

Progressive Casualty Insurance Company  
(Respondent)

**ARBITRATION AWARD**

I, Heidi Obiajulu, 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: Injured Party

1. Hearing(s) held on 09/27/2024  
Declared closed by the arbitrator on 09/27/2024

Gary Pustel, Esq. from Israel Purdy, LLP participated virtually for the Applicant

Ayesha Syed, Esq. from McCormack, Mattei & Holler participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$988.78**, 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

The applicants seek reimbursement of charges for the VenaFlow Elite System [DVT, CPT code E0650]] with the VenaFlow Elite Cuff [CPT code E0666] and the cold compression unit [E1399] with the cold therapy wrap for the knee [E0655] and cane [E0105] dispensed on 01/16/24, following a motor vehicle accident occurring on 05/05/23. The respondent contends the applicant [Viotek's] claim should be dismissed as commenced prematurely because there was a pending examination under oath. Regarding Ace Medical's claim, the respondent contended that the items are not reimbursable because they are billed as part of the charges by the ambulatory surgical services.

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

The decision is based on the documents in the Electronic Case folder maintained by the American Arbitration Association (hereafter referred to as AAA) as of the hearing.

The applicants, as assignees of the Injured Party, seek reimbursement, with interest and counsel fees, under the No-Fault Regulations, for the VenaFlow Elite System [DVT, CPT code E0650]] with the VenaFlow Elite Cuff [CPT code E0666] and the cold compression unit [E1399] with the cold therapy wrap for the knee [E0655] and cane [E0105] dispensed on 01/16/24, for \$988.78.

The respondent insured the motor vehicle involved in the automobile accident. Under New York's Comprehensive Motor Vehicle Insurance Reparation Act (the "No-Fault Law"), New York Ins. Law §§ 5101 et seq., the respondent was obligated to reimburse the Injured Party (or assignee) for all reasonable and necessary medical expenses arising from the use and operation of the insured vehicle.

This case arises out of a motor vehicle accident occurring on May 05, 2023, in which the Injured Party (SK), a then 29-year-old male sustained multiple injuries including to the left knee.

After the accident, the Injured Party commenced conservative care. Dr. Robert Haar, MD also evaluated the Injured Party.

Apparently, on or about 01/16/24, Dr. Haar performed surgery and prescribed the use of the disputed DME for post-operative use.

On 01/16/24, the applicants dispensed the disputed DME to the Injured Party.

Thereafter, the applicants submitted their claim forms to the respondent seeking reimbursement of no-fault benefits.

#### **Viotek's claim**

The respondent submitted evidence to show that it received the applicant's claim for the cold compression unit, cold therapy wrap, and cane on 02/21/24.

On 03/06/24, the respondent sent the applicant a verification request for an examination under oath of the provider and documents regarding corporate structure, incorporation, billing practices, operation and management, and whether the charges constitute basic economic loss.

On 03/22/24, the applicant commenced this arbitration before responding to the initial verification request and prior to receipt of the follow-up verification request.

On 04/08/24, the respondent sent a follow-up verification request to the applicant seeking the EUO of the provider and the same documentation sought in the initial verification request.

At the arbitration, the respondent's attorney strongly argued that the entire claim should be dismissed [including the claim by Ace Medical] because the EUO of the provider is outstanding.

**Although I agree that Viotek commenced this arbitration prematurely, before it complied with the outstanding verification and before the EUO of the provider, I find Ace Medical Supplies did not commence this arbitration prematurely because the respondent issued a denial asserting a fee schedule defense.**

**Accordingly, for the above reasons, I find Viotek's claim is dismissed without prejudice because it commenced this arbitration prematurely.**

Therefore, the sole remaining issue is whether the respondent established its fee schedule defense regarding the claim by Ace Medical.

#### **Ace Medical Supplies' claim**

The respondent's attorney argued that I should find the respondent met its burden of proof in establishing its fee schedule defense because the disputed VenaFlow Elite System and VenaFlow Elite Cuff dispensed on 01/16/24 were dispensed by the ambulatory surgical center and therefore included in the charges by the ambulatory surgical center under the EAPG fee schedule. The attorney cited NYCRR section 65-3.11 to support her position and an unnamed source that allegedly indicated that DME provided by an ambulatory surgical center is not reimbursable. The name of the source was not provided.

The applicant's attorney argued the respondent failed to establish its fee schedule defense because it did not submit a fee audit and did not establish that those items are not reimbursable based on the plain reading of the EAPG fee schedule or other authority. He also argued the cited regulation does not support the respondent's argument and noted that the respondent did not submit or cite another authority to support its defense.

Reviewing the relevant evidence in the record and considering the oral arguments made by the parties, I find as follows:

New York Insurance Law section 5108(a) limits a healthcare provider to being reimbursed the maximum allowance under the schedules prepared and established by the chairperson of the Workers Compensation Board and adopted by the superintendent of the NYS Department of Financial Services under rules and regulations promulgated by him.

Further, it is well-settled that an insurer has the burden of proof in establishing its fee schedule defense. See Rogy Med., P.C. v Mercury Cas. Co., 23 Misc. 3d 132[A], [App Term, 2d Dept., 2d, 11th & 13th Jud Dists 2009]).

Although the respondent's attorney argued the disputed DME dispensed by Ace Medical Supplies on 01/16/24 was not reimbursable because they were provided by the ambulatory surgical center [ASC], the respondent failed to submit any evidence to support that argument including evidence that the ASC dispensed the disputed DME during the operative session. Notably, the operative session is not in the record or any other evidence to support such an argument. Instead, the record contains a delivery receipt by Ace Med. Supplies that contradicts the respondent's argument. Further, the respondent did not cite any authority, including a fee schedule, EAPG fee schedule, or CPT Assistant to support its fee schedule defense. The bottom line is that the respondent failed to show that the disputed DME dispensed by Ace Medical was not reimbursable based on the plain reading of the applicable EAPG fee schedule or other authority. Consequently, I find the respondent failed to establish its fee schedule defense. Since Ace Medical Supplies established its prima facie case, I find in its favor.

**Accordingly, for the above reasons, I find in favor of Ace Medical Supplies in the amount of \$620.62. However, I find that Viotek's claim is dismissed without prejudice because it was commenced prematurely.**

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.

		<b>Claim</b>	
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Medical		From/To	Amount	Status
	Ace Med Supplies Inc.	01/16/24 - 01/16/24	\$620.62	Awarded: \$620.62
	Viotek Med Supplies Inc	01/16/24 - 01/16/24	\$368.16	Dismissed without prejudice
Total			\$988.78	Awarded: \$620.62

- B. The insurer shall also compute and pay the applicant interest set forth below. 03/22/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The applicant's award of \$620.62 shall bear interest at a rate of two percent per month, calculated on a pro-rata basis using a 30-day month from 03/22/24, the date Ace Medical Supplies initiated this arbitration, to the date of the payment of the award, under 11 NYCRR 65-3.9 (a) and LMK Psychological Servs. P.C. v. State Farm Mut. Auto Ins. Co., 12 N.Y.3d 217, (N.Y., April 02, 2009) since Applicant did not commence this Arbitration proceeding within 30 days after receiving the subject denial(s).

C. Attorney's Fees

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

As this matter was filed **after** February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, under 11 NYCRR 65-4.6(d).

- 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 Union

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

09/27/2024  
(Dated)

Heidi Obiajulu

### **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:**  
ba0d5f9eef1768b3ae24295fa378ffde

### Electronically Signed

Your name: Heidi Obiajulu  
Signed on: 09/27/2024