

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Orthocare Supplies Inc.
(Applicant)

- and -

Enterprise Rent A Car
(Respondent)

AAA Case No. 17-24-1361-9692

Applicant's File No. GM24-841112

Insurer's Claim File No. 20134061

NAIC No. Self-Insured

ARBITRATION AWARD

I, Anne Malone, 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 01/31/2025
Declared closed by the arbitrator on 01/31/2025

John Fagan, Esq. from Law Offices of Gabriel & Moroff, P.C. 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, **\$1,085.27**, 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 30 year old EIP reported involvement in a motor vehicle accident on September 11, 2023; claimed related injury and received rental of a vascutherm with back wrap provided by the applicant from March 27, 2024 to April 9, 2024.

The applicant submitted a claim for this durable medical equipment (DME), payment of which was timely denied by the respondent based upon a peer review by Mitchell Ehrlich, M.D. dated April 18, 2024. In response, the applicant submitted a rebuttal dated August 12, 2024 by Erica David-Park, M.D. who was not one of the EIP's treating medical providers.

The issue to be determined at the hearing is whether the respondent established that the DME provided by the applicant was not medically necessary.

4. Findings, Conclusions, and Basis Therefor

This hearing was held on Zoom and the decision is based upon the documents reviewed from the Modria File as well as the arguments made by counsel and/or representative at the arbitration hearing. Only the arguments presented at the hearing are preserved in this decision; all other arguments not presented at the hearing are considered waived.

To support a lack of medical necessity defense respondent must "set forth a factual basis and medical rationale for the peer reviewer's [or examining physician's] determination that there was a lack of medical necessity for the services rendered." Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term2d, 11th and 13th Jud. Dists. 2014.) Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to applicant. See Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006.)

The Civil Courts have held that a defendant's peer review or report of medical examination must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review or medical examination report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted specifics as to the claim at issue, is conclusory or vague. See Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005.)

To support its contention that the durable medical equipment provided by the applicant was not medically necessary, respondent relies upon the peer review by Dr. Ehrlich, who reviewed the medical records of the EIP, noted the injuries claimed and the treatment rendered to him. Dr. Ehrlich considered possible arguments and justification for the need for the durable medical equipment at issue and determined that it was not warranted under these circumstances.

Dr. Ehrlich submitted a report in which he discussed the vascutherm device provided and his reasons for determining that it was not medically necessary for this EIP. Dr. Ehrlich discussed the standard of care for this DME and determined that the EIP did not meet these criteria. It was his opinion that cold compression therapy is part of protocol used to reduce inflammation in the acute and early sub-acute phase of injury. In this instance, the device was prescribed six months

post-accident. He supported, with relevant medical literature, his opinion that the vascutherm compression therapy unit was not medically necessary at the time it was provided or for any further refills.

Respondent has met its evidentiary burden. The peer review adequately sets forth the factual basis and medical rationale to support the conclusion that the durable medical equipment was not indicated for this EIP at the time it was provided. Therefore, pursuant to Bronx Expert Radiology, *supra* the burden shifts to the applicant, who bears the ultimate burden of persuasion to establish that the durable medical equipment at issue was medically necessary.

In opposition to the peer review, the applicant presented a rebuttal by Dr. David-Park, reviewed the submissions, disagreed with the conclusions reached by Dr. Ehrlich and explained the rationale for her determination that the vascutherm device was necessary at the time it was provided.

She described in detail the injuries claimed by the EIP, the treatment rendered to him related to the September 11, 2023 accident. According to the rebuttal, he was first treated on October 4, 2023 and began a course of physical therapy. He was next evaluated by Dr. Rosarian on February 5, 2024 and conservative care was again recommended. MRI studies of the lumbar spine and left shoulder were performed on October 16, 2023.

Five months later, based upon the EIP's clinical condition and the positive results of the MRI studies, Dr. Vora prescribed an LSO and vascutherm device and the EIP started a course of conservative care, including chiropractic treatment acupuncture and physical therapy.

Dr. David-Park discussed the opinions by Dr. Ehrlich and her reasons for finding that this device was necessary due to the EIP's pain and tenderness in the low back and unspecified decreased range of motion. She also discussed the general benefits of this device, including reduction of edema associated with burns, postoperative edema, medical and/or surgical conditions which she determined were present in this case, decreasing the risk of DVT and other issue not related to this EIP.

Dr. David-Park cited medical literature to support the general benefits of cold compression in treating pain, continuous low-level heat therapy and cryotherapy.

Although Dr. David-Park mentioned the argument by Dr. Ehrlich that this device may have been necessary in the acute and sub-acute injury phases, she did not sufficiently explain the specific conditions related to this particular EIP which made this particular equipment necessary for him at the time it was provided.

Based on the foregoing, I find that the respondent has established that the durable medical equipment at issue was not medically necessary for this particular EIP at the time it was provided.

Accordingly, the claim is dismissed with prejudice.

Any further issues submitted in the record are held to be moot and/or waived insofar as they were not raised at the time of this hearing. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator.

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 claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of CT

SS :

County of Fairfield

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

02/09/2025
(Dated)

Anne Malone

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:
25da8467ac18fba90528e785f8932ae7

Electronically Signed

Your name: Anne Malone
Signed on: 02/09/2025