American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Shemesh Med Pro Corp. (Applicant)	AAA Case No.	17-24-1356-8876
	Applicant's File No.	GM24-825558
- and -	Insurer's Claim File No.	8797061170000001
	NAIC No.	22055
Geico Insurance Company (Respondent)		

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 02/10/2025
   Declared closed by the arbitrator on 02/10/2025

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

   Elba Iris Cornier from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$3,306.77**, 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 33 year old EIP reported involvement in a motor vehicle accident on December 15, 2023; claimed related injury and received a massager, TENS unit with belt, infrared lamp, LSO and shoulder and knee orthoses provided by the applicant on February 19, 2024.

   The applicant submitted a claim for this durable medical equipment (DME), payment of which was timely denied by the respondent based upon peer reviews by Nilesh Vyas, M.D. dated April 19, 2024. In response, the applicant submitted a rebuttal dated September 9, 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. Vyas, who reviewed the medical records of the EIP, noted the injuries claimed and the treatment rendered to him. Dr. Vyas 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. Vyas submitted a comprehensive report in which he discussed each item of equipment provided and his reasons for determining that each one was not medically necessary for this EIP.

Dr. Vyas discussed the standard of care for the treatment of the injuries sustained by this EIP and stated that they did not meet these criteria. He stated that conservative treatment modalities including massage therapy and/or hot/cold modalities can be recommended in conjunction with recommended exercise programs, but mechanical devises such as massagers and infrared heating lamps are not recommended for home use due to a lack of quality studies.

Dr. Vyas also determined that TENS and EMS are not indicated for acute musculoskeletal pain symptoms, back pain or acute radicular pain syndromes because although this DME may be a long-standing accepted standard of care by some medical practitioners, studies remain inconclusive.

Dr. Vyas concluded, due to the lack of supportive evidence of its efficacy, that the TENS unit and belt were not medically necessary in this case.

Regarding the LSO, it was Dr. Vyas' opinion that the use of lumbar supports is not endorsed due to consistent empirical data indicating their ineffectiveness in averting neck and back discomfort. He noted that, in accordance with the medical standard of care, LSO can be a viable option for some conditions, the evidence is of very low quality however, lumbar support may still be deemed a conservative alternative.

However, he concluded that this particular EIP did not meet the standard of care based on the fact that he only suffers from lower back pain with tenderness and reduced range of motion. Therefore, the medical necessity for the LSO has not been conclusively established.

Finally, Dr. Vyas concluded that the shoulder orthosis provided to this EIP was not medically necessary because it is not recommended as a primary treatment except following dislocation, potentially unstable fractures, reconstructive shoulder surgery or very temporary pain control. In this matter, there is no documentation that the EIP had recent shoulder surgery or has had a stroke which would indicate the need for this DME, therefore it was not medically necessary for this EIP.

In the three peer reviews provided in this matter, Dr. Vyas did not discuss the medical necessity, or lack thereof, for the knee orthosis provided to the EIP. Therefore, the respondent did not establish a defense of lack of medical necessity for this particular DME.

I find that the peer review is conclusory and factually insufficient to meet the burden of rebutting the applicant's presumption of medical necessity. The respondent did not provide an adequate response to the recommendations made by the EIP's treating medical providers to establish that the DME at issue was not medically necessary. Under these circumstances, pursuant to Provvedere, Inc., *supra* the burden did not shift to the applicant since respondent did not meet its burden to establish lack of medical necessity.

Although it was not necessary under these circumstances, the applicant submitted a rebuttal by Dr. David-Park.

Based on the foregoing, the respondent has failed to establish that the durable medical equipment at issue was not medically necessary.

Accordingly, the applicant is awarded $3,306.77 in disposition of this claim.

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 applicant is AWARDED the following:

A.

Medical		**From/To**	**Claim Amount**	**Status**
	Shemesh Med Pro Corp.	**02/19/24 - 02/19/24**	**$607.55**	**Awarded: $607.55**
	Shemesh Med Pro Corp.	**02/19/24 - 02/19/24**	**$1,150.00**	**Awarded: $1,150.00**
	Shemesh Med Pro Corp.	**02/19/24 - 02/19/24**	**$896.92**	**Awarded: $896.92**

	Shemesh Med Pro Corp.	**02/19/24 - 02/19/24**	**$652.30**	**Awarded: $652.30**
Total			**$3,306.77**	**Awarded: $3,306.77**

B. The insurer shall also compute and pay the applicant interest set forth below. 07/18/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a *pro rata* basis using a 30 day month." See 11 NYCRR §64-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits" calculated pursuant to Insurance Department regulations. Where a claim is untimely denied, or not denied or paid, interest shall accrue as of the 30th day following the date the claim is presented by the claimant to the insurer for payment. Where a claim is timely denied, interest shall accrue as of the date an action is commenced or an arbitration requested, unless an action is commenced or an arbitration requested within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant. See, 11 NYCRR §65-3.9(c.) The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial was timely. LMK Psychological Servs. P.C. v. State Farm Mut. Auto. Ins. Co., 12 NY3d 217 (2009.)

C. Attorney's Fees

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

Applicant is awarded statutory attorney's fees pursuant to the no fault regulations. For cases filed after February 4, 2015 the attorney's fee shall be calculated as follows: 20% of the amount of first-party benefits awarded, plus interest thereon subject to no minimum fee and a maximum of $1,360.00. See 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 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.

02/12/2025
(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:
8e65c73022884dd838a4ea61a47bbd23

Electronically Signed

Your name: Anne Malone
Signed on: 02/12/2025