

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Healthway Med Equipment Inc  
(Applicant)

- and -

St. Paul Travelers Insurance Co.  
(Respondent)

AAA Case No. 17-24-1371-0362

Applicant's File No. N/A

Insurer's Claim File No. IWN9518-004

NAIC No. 19070

**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 03/11/2025  
Declared closed by the arbitrator on 03/11/2025

John Faris, Esq. from Jakubowitz Law Firm PC participated virtually for the Applicant

Anne Marlow Moran, Esq. from Law Offices of Tina Newsome-Lee participated  
virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,165.58**, 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 52 year old EIP reported involvement in a motor vehicle accident on March 22, 2024; claimed related injury and received rental of a shoulder CPM with pad and compression cryotherapy provided by the applicant from July 23, 2024 to August 20, 2024.

The applicant submitted a claim for the CPM with pad, payment of which was timely denied by the respondent based upon a peer review by Mitchell Goldstein, M.D. dated September 17, 2024. In response, the applicant submitted a rebuttal dated January 31, 2025 by Mark McMahon, M.D. one of the EIP's treating medical providers.

The respondent asserts a fee schedule defense for the compressive cryotherapy.

**The issues to be determined at the hearing are:**

**Whether the respondent established that the CPM with pad provided by the applicant was not medically necessary.**

**Whether the respondent established its fee schedule defense.**

#### 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.

##### Medical Necessity

##### CPM

The respondent denied payment for the aforementioned CPM for a lack of medical necessity.

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, 11<sup>th</sup> and 13<sup>th</sup> 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 1<sup>st</sup> 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 shoulder CPM and pad provided by the applicant was not medically necessary, respondent relies upon the peer review by Dr. Goldstein, who reviewed the medical records of the EIP, noted the injuries claimed and the treatment rendered to her. Dr. Goldstein considered possible arguments and justification for the need for this durable medical equipment at issue and determined that it was not warranted under these circumstances.

Dr. Goldstein submitted a report in which he discussed in detail the uses of the CPM unit and noted that it is used post-surgery as part of rehabilitation for patient who are not able to participate in a standard physical therapy regimen. He noted that the EIP was able to participate in conventional physical therapy, which she did.

It was his opinion that shoulder CPM units are not shown to be effective conventional physical therapy methods.

He supported, with relevant medical literature, his opinion that the CPM provided to the EIP was not medically necessary.

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.

Respondent has factually demonstrated that the durable medical equipment at issue was not medically necessary. Accordingly, the burden now shifts to the applicant, who bears the ultimate burden of persuasion, pursuant to Bronx Expert Radiology, P.C., *supra*.

In opposition to the peer review, the applicant presented a rebuttal by Dr. McMahon, who disagreed with the conclusions reached by Dr. Goldstein and explained the rationale for his determination that the CPM was necessary. He described in detail the injuries claimed by the EIP and the treatment rendered to her and the general uses and benefits of CPM and compressive cryotherapy and his experience that patients recover faster, better and with less pain using CPM and compressive cryotherapy in conjunction with physiotherapy than those who do not.

However, Dr. McMahon did not sufficiently explain the specific conditions related to this particular EIP which made this particular equipment necessary for her.

Dr. McMahon supported, with relevant medical citations, his opinion that the CPM medical equipment provided to the EIP was medically necessary.

In opposition to the peer review report the applicant did not submit a rebuttal which meaningfully rebuts the findings of Dr. Goldstein as it relates to this particular EIP and the medical records submitted do not contradict the assertions made by him.

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

Under these circumstances, the fee schedule issue is moot.

**Therefore, the claim for CPM with pad is dismissed with prejudice.**

#### Fee Schedule

The applicant billed \$241.57 under CPT code E1399 for the compressive cryotherapy at issue. The respondent made partial payment of \$224.17 for this DME, leaving a balance of \$17.40.

In order to prevail in its fee schedule defense, the respondent must demonstrate by competent evidentiary proof that the applicant's claims are in excess of the appropriate fee schedule. If the respondent fails to do so, its defense of noncompliance with the New York Workers' Compensation Medical Fee Schedule cannot be sustained. See Continental Medical, P.C. v Travelers Indemnity Co., 11 Misc. 3d 145A (App. Term 1<sup>st</sup> Dept. 2006.)

A fee schedule defense does not always require expert proof. There are two fee schedule scenarios. The first involves the basic application of the fee codes and simple arithmetic. The second scenario involves interpretation of the codes and often requires testimony and evidence beyond that of a lay individual. I find that the claim at issue is analogous to the second scenario and requires expert testimony.

The respondent asserted a fee schedule defense for the DME at issue under CPT code E1399.

The respondent supported its fee schedule defense by submitting the affidavit of Jeffrey Wagner, CPC, a certified professional fee coder who determined that the correct reimbursable amount for rental of the DME at issue is \$224.17.

The applicant did not submit an affidavit from a certified professional fee coder, medical professional or other expert to refute the respondent's expert.

Based on the foregoing, I find that the respondent has established its fee schedule defense.

**Therefore, the claim for compressive cryotherapy is dismissed with prejudice.**

**Accordingly, the entire 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.

03/12/2025  
(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:**  
e497013b6cd1cb3f676495ab025b41aa

### **Electronically Signed**

Your name: Anne Malone  
Signed on: 03/12/2025