

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

21st Century Pharmacy Inc
(Applicant)

- and -

Progressive Insurance Company
(Respondent)

AAA Case No. 17-16-1026-0627

Applicant's File No. RXPB-16-4792

Insurer's Claim File No. 14-5454587

NAIC No. 24260

ARBITRATION AWARD

I, Rebecca Novak, 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: Assignor [FK"]

1. Hearing(s) held on 12/14/2016, 05/24/2017
Declared closed by the arbitrator on 05/24/2017

Naomie Jean-Philippe, Esq. from Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf LLP participated in person for the Applicant

Lance Faustin, Esq. from Law Offices of Rachel Perry participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,779.88**, was AMENDED and permitted by the arbitrator at the oral hearing.
Applicant amended the amount in dispute to \$3028.89 to conform to fee schedule.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that Applicant established a prima facie case of entitlement to No-Fault compensation with respect to its bill and to the timeliness of Respondent's denial. They stipulated that Applicant's fees as amended were correct. Additionally, they stipulated that should Applicant prevail, interest would accrue as of the filing date set forth by the American Arbitration Association in Part B of the conclusion of the award template.

3. Summary of Issues in Dispute

Whether Applicant established entitlement to No-Fault insurance compensation for compound medication provided to Assignor, a 44-year-old female, on May 22, 2015, subsequent to being injured in a motor vehicle accident on November 13, 2014.

Whether to deny compensation on the basis of lack of medical necessity based on a peer review.

4. Findings, Conclusions, and Basis Therefor

In this No-Fault insurance arbitration, Applicant is seeking as compensation \$3028.89, which it billed for providing a multi-ingredient topical compound pain cream to Assignor, a 44-year-old female, who was injured in a motor vehicle accident on November 13, 2014. Respondent denied payment of the bill based on an independent medical exam ("IME") by Dr. Christopher Burrei on July 8, 2015.

Both parties appeared at the hearing by counsel, who presented oral argument and relied upon documentary submissions. I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center as of the date of the hearing, said submissions constituting the record in this case.

The records reflect that Assignor was a driver of a motor vehicle involved in an accident on November 13, 2014. She came under the care of a variety of physicians, there were multiple reported injuries, and ultimately, Assignor underwent a left knee arthroscopy on March 2015. Assignor was treated with physical therapy and home exercises as well as pain medication. She was prescribed the compound cream at issue on May 20, 2015 and it was dispensed by Applicant on May 22, 2015. Applicant timely denied reimbursement for the cream based on a peer review report by Dr. Christopher Burrei dated July 8, 2015.

When an insurer relies upon a peer review report to demonstrate that a particular service was not medically necessary, the peer reviewer's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory. As per the holding in Jacob Nir, M.D. v. Allstate Insurance Co., 7 Misc.3d 544 (2005), the peer reviewer must establish a factual basis and medical rationale to support a finding that the services were not medically necessary, including setting forth generally accepted standards in the medical community.

"Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006). Thus, although Respondent must come forward with prima facie proof of lack of medical necessity, the burden will

shift to Applicant to prove medical necessity by a preponderance of the credible evidence if Respondent meets its burden.

In his peer review, Dr. Burrei began by listing the various medical records which he reviewed. He asserted that there was no well-respected peer reviewed literature that suggest that compound pain cream is of equal or superior efficacy to oral medications. He stated that Assignor was utilizing oral medications with success and was utilizing injection, physical therapy and chiropractic care, all with success and control of symptomology. There would be no indication to dispense an additional compound pain cream containing the same medication as Assignor was utilizing orally. Dr. Burrei cited to New York State Medical Treatment Guidelines 2010, asserting that they do not recommend the use of this medication for injuries described in the records. Having reviewed the examination of Dr. Varriale and Dr. Cardinale, Dr. Burrei maintained that Dr. Varriale noted multiple resolved diagnosis and the diagnosis of malingering, and that Assignor had a positive response to a variety of oral medications which she was on. Furthermore, he stated that Dr. Cardinale did not document exact rational for utilizing the compound pain cream and made no mention in his examination on which region of the body it would be used or at what dosage. For the foregoing reasons, Dr. Burrei opined that there was no medical necessity for the compound cream dispensed to Assignor.

I find that Dr. Burrei's report set forth a factual basis and medical rationale to support Respondent's denial in reimbursement of the medication at issue. He advanced reasonable arguments and medical literature in support of the position that the medication was unnecessary.

Respondent submitted a rebuttal by Dr. Sady Ribeiro in support of its position and to counter the peer review. He described in detail the history of Assignor's evaluations and treatment and disagreed with Dr. Burrei's statement that topical compounded pain creams should be prescribed when traditional oral medications have failed. Dr. Ribeiro countered that this statement is not an indication that the topical compound medications are ineffective or not recommended, but that it should be carefully prescribed. Dr. Ribeiro cited to medical literature as well in his assertion that the main advantages of topical pain medicine application were improved localization, decreased side effects and the speed of relief.

Dr. Ribeiro maintained that considering the patient's allergies, current medications, and age factor, the prescription of topical compound pain cream would be more effective and less harmful as compared to oral medications and that these medications were prescribed in an effort to offer the patient a form of pain management. He then enumerated the uses and purposes of several of the prescribed ingredients and concluded that the medication was necessary for post-accident care of Assignor.

In his addendum dated January 9, 2017, Dr. Burrei stated that his opinion was unaltered, adding that "the medical standards are indeed clear in regard to utilizing a medication on a claimant. There is certainly no indication for a prescription medication to be utilized on a claimant who does not have any significant findings and certainly no indication to use topical pain creams in the absence of a medical contraindication to oral medication

as well as in the absence of a failed response to both oral medication and conservative care". He concluded his report stating that the well-respected peer review literature does not contain any literature documenting safety or efficacy of this particular formulation of medications and that the medical necessity cannot be established for compound pain cream distributed to this particular Assignor.

After a careful review of the records and consideration of the parties' oral arguments, I am not persuaded by Applicant's submission nor by Assignor's medical records. I find that the record was devoid of any evidence showing that this Assignor had any contraindications to traditional oral pain medications and therefore had no choice but to utilize a topical cream. Applicant has not rebutted Respondent's defense and has not sustained Applicant's burden of proof by a preponderance of credible evidence regarding the medical necessity of the compound cream.

Since Dr. Burrei's peer review presented sufficient evidence to establish Respondent's defense of lack of medical necessity and I find that Applicant failed to satisfy its burden to demonstrate lack of medical necessity, I find that Respondent properly denied Applicant's claim. I sustain Respondent's defense and it prevails over Applicant's initial prima facie case.

Accordingly, I deny the claim in its entirety.

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 New York
SS :
County of Nassau

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

06/02/2017
(Dated)

Rebecca Novak

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:
4bc10fc69c8d48b7ba4bc07d25fa1b76

Electronically Signed

Your name: Rebecca Novak
Signed on: 06/02/2017