

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

21st Century Pharmacy Inc  
(Applicant)

- and -

Allstate Insurance Company  
(Respondent)

AAA Case No.

Applicant's File No.

Insurer's Claim File No.

NAIC No.

17-16-1034-0568

RFA16-189527

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**ARBITRATION AWARD**

I, Paul Israelson, 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 person.

1. Hearing(s) held on 06/19/2017  
Declared closed by the arbitrator on 06/19/2017

Alexander Mun Esq. from Russell Friedman & Associates LLP participated in person for the Applicant

Said Ibrahim Esq. from Smith & Brink, PC participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 4,330.95**, was AMENDED and permitted by the arbitrator at the oral hearing.

The applicant withdrew the portion of the applicant's claim in the amount of \$2,556.00 for the subject terocin and left remaining's claim in the amount of \$1,774.95 for the subject compound cream.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

Did the respondent stay its 30 day period to pay or deny a portion of the applicant's claim on the basis that the applicant failed to provide requested additional verification?

Did the respondent properly reduce the applicant's claim in accordance with the New York Worker's Compensation Fee Schedule ("fee schedule")?

4. Findings, Conclusions, and Basis Therefor

On June 19, 2017, the hearing for the within arbitration matter was conducted and closed.

The date of the subject automobile accident was July 23, 2015.

The applicant made a claim in the amount of \$1,774.95 for the compound cream provided to the injured person on August 4, 2015.

The respondent has neither paid nor denied the applicant's claim, and is defending against the applicant's claim on the basis that the applicant failed to provide requested additional verification, as more fully set forth below.

VERIFICATION DEFENSE:

On September 14, 2015, the respondent received the applicant's claim.

On October 6, 2015 and again on November 10, 2015, the respondent corresponded with the applicant requesting that the applicant provide the following additional verification:

1. The name and license of all owners of the applicant.
2. The name and license of the supervising pharmacist.
3. The name and license of the pharmacist who performed and/or supervised the issuance of the subject pharmaceuticals.
4. The W-2 and/or 1099 form for each individual at the applicant who issued the subject compound cream.

5. A copy of all prescriptions issued to the injured person as they relate to the subject pharmaceuticals.

6. All documentation regarding the formation and purchase or transfer of ownership for the applicant/corporation (21<sup>st</sup> Century Pharmacy Inc.).

7. The names and addresses of all individuals and entities with whom the applicant has entered into agreements for the purchase, lease, repair and/or maintenance of equipment and/or the lease or rental of space, and provide a copy of said agreements.

8. The names and addresses of all individuals and entities with whom the applicant has entered into agreements for the supplying of administrative, management, consulting, accounting, billing and collection services, and provide a copy of said agreements.

On March 4, 2016, the applicant's attorney corresponded with the respondent, providing the following requested additional verification:

1. The certificate of incorporation for the applicant.

2. The W-9 form for the applicant.

3. The name of the owner of the applicant, to wit: Albert Alishayev.

4. The name of the supervising pharmacist for the applicant, to wit: Mosi Bragg, and a copy of his license.

5. As to the respondent's request for documentation concerning the proof of employment status for each individual issuing the subject pharmaceutical services, the applicant provided paystub for Mosi Bragg.

6. Information indicating that Mosi Bragg is both the supervising pharmacist and the pharmacist responsible for dispensing the subject pharmaceuticals.

7. The Registered Pharmacy Certificate effective October 2, 2013 through September 13, 2016 indicating that Mosi Bragg is the supervising pharmacist for the applicant.

8. The lease agreement between the applicant and 57<sup>th</sup> Avenue Associates, dated January 15, 2013, including the rider and Guaranty for said lease.

9. Information indicating that the applicant does not have a written agreement for management, marketing or billing services.

10. The name and address of the pharmaceutical suppliers, including manufacturers and wholesale providers, from whom the applicant obtained the ingredients for the subject pharmaceuticals is: Medisca Inc., 661 Route 3, Unit C, Plattsburgh, NY 12901.

11. A letter of medical necessity and the prescription for the subject pharmaceuticals for the injured person.

Consequently, it appears that, as of the applicant's March 4, 2016 submission to the respondent, the applicant has substantially complied with the respondent's October 6, 2015 and November 10, 2015 requests for additional verification.

It has been held in the context of litigating a no-fault claim (as opposed to litigating a claim under a different form of insurance) that an insured's or applicant's substantial compliance with a condition precedent to coverage such as a verification request will not void coverage. In this regard, the Appellate Division, First Department in *Raymond v. Allstate Ins. Co.*, 94 A.D.2d 301, 464 N.Y.S.2d 155 (1st Dept. 1983) stated:

"Generally, the non-compliance by the insured with a condition amounting to a technical failure or an immaterial omission will not furnish the insurer with a valid ground to void the policy. Substantial compliance by the insured relative to the submission to an examination under oath or the furnishing of proofs prior to institution of suit is all that is required (see *Happy Hank Co. v. Insurance Co.*, 1 N.Y.2d 534, 154 N.Y.S.2d 870, 136 N.E.2d 842; *Porter v. Traders' Ins. Co.*, 164 N.Y. 504, 58 N.E. 641)."

*Raymond v. Allstate Ins. Co.*, 94 A.D.2d at 305.

As demonstrated above, the applicant has substantially complied with the respondent's October 6, 2015 and November 10, 2015 verification requests. Therefore, pursuant to *Raymond v. Allstate Ins. Co.*, *supra*, the respondent may not deny or toll the payment of the applicant's claims as described above on the basis that the applicant has failed to comply with the respondent's verification requests. Consequently, payment of the subject claim is awarded.

The next issue to be determined is the amount be paid to the applicant for the subject compound cream.

#### FEE SCHEDULE ANALYSIS:

Pursuant to 12 NYCRR 440.5 (a) (b) and (e), the "Average Wholesale Price" for the subject compound cream is a necessary item of information to correctly calculate the applicant's fee.

12 NYCRR 440.5 (a) (b) and (e) reads in pertinent part as follows:

#### §440.5 Fee Schedule

a)

1. The maximum reimbursement or payment for prescription drugs or medicines in uncontroverted cases, including all brand name and generic prescription drugs or medicines, shall be the Average Wholesale Price for the national drug code for the prescription drug or medicine on the day it was dispensed minus twelve percent of the Average Wholesale Price plus a dispensing fee of four dollars for brand name drugs or medicines or minus twenty percent of The Average Wholesale Price plus a dispensing fee of five dollars for generic drugs or medicines.
2. The maximum reimbursement for prescription drugs or medicines in controverted cases during the period the case is controverted, including all brand name and generic prescription drugs or medicines, shall be twenty-five percent more than the maximum reimbursement at the time the prescription drugs or medicines are provided if the case was uncontroverted, plus a dispensing fee of seven dollars and fifty cents for generic prescription drugs or medicines and six dollars for brand-name prescription drugs or medicines.
3. Nothing in this section shall bar a self-insured employer or insurance carrier from providing a lower reimbursement rate or dispensing fee pursuant to a written agreement with any independent pharmacy, pharmacy chain; or pharmacy benefit manager.

4. The maximum reimbursements or payments for prescription drugs or medicines set forth in this subdivision shall be the maximum payment any individual or entity may receive from any claimant, individual, entity, self-insured employer, insurance carrier, or third-party in connection with a claim for workers' compensation benefits.

b) Compounded medications shall be reimbursed at the ingredient level, with each ingredient identified using the applicable NDC of the drug product, and the corresponding quantity. Ingredients with no NDC are not separately reimbursable. Payment shall be based upon a sum of the allowable fee for such ingredient plus a single dispensing fee per compound.

e) The fee schedule created by this section shall not apply to prescription drugs or medicines provided as part of treatment governed by the medical and hospital fee schedule issued pursuant to Workers' Compensation Law Section 13.

12 NYCRR 440.5 (e) makes reference to Workers Compensation Law section 13.

Workers Compensation Law section 13 reads in pertinent part as follows:

§13. Treatment and care of injured employees

a) The employer shall promptly provide for an injured employee such medical, dental, surgical, optometric or other attendance or treatment, nurse and hospital service, medicine, optometric services, crutches, eye-glasses, false teeth, artificial eyes, orthotics, prosthetic devices, functional assistive and adaptive devices and apparatus for such period as the nature of the injury or the process of recovery may require. The employer shall be liable for the payment of the expenses of medical, dental, surgical, optometric or other attendance or treatment, nurse and hospital service, medicine, optometric services, crutches, eye-glasses, false teeth, artificial eyes, orthotics, prosthetic devices, functional assistive and adaptive devices and apparatus, as well as artificial members of the body or other devices or appliances necessary in the first instance to replace, support or relieve a portion or part of the body resulting from and necessitated by the injury of an employee, for such period as the nature of the injury or the process of recovery may require, and the employer shall also be liable for replacements or repairs of such artificial members of the body or such other devices, eye-glasses, false teeth, artificial eyes, orthotics, prosthetic devices, functional assistive and adaptive devices or appliances necessitated by ordinary wear or loss or damage to a prosthesis, with or without bodily injury to the employee. Damage to or loss of a prosthetic device shall be deemed an injury

except that no disability benefits shall be payable with respect to such injury under section fifteen of this article. Such a replacement or repair of artificial members of the body or such other devices, eye-glasses, false teeth, artificial eyes, orthotics, prosthetic devices, functional assistive and adaptive devices or appliances or the providing of medical treatment and care as defined herein shall not constitute the payment of compensation under section twenty-five-a of this article. All fees and other charges for such treatment and services shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living.

A plain reading of 12 NYCRR 440.5 (a) (b) and (e) and Workers Compensation Law section 13 leads me to conclude that the Average Wholesale Price and the NDC for the subject compound cream are relevant items of information to a proper calculation of the applicant's fee.

The respondent received the Average Wholesale Price and NDC for the component parts of the subject compound cream and utilized this information to calculate a fee in the amount of \$1,497.24 for the subject compound cream. I have reviewed the respondent's calculation in this regard and find the respondent's calculation of the applicant's claim to be correct. The applicant has not provided any evidence to rebut respondent's calculation of the applicant's claim.

Consequently, the applicant is awarded \$1,497.24 for the subject compound cream.

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	Amount Amended	Status
	21st Century Pharmacy Inc	08/04/15 - 08/04/15	\$4,330.95	\$1,774.95	Awarded: \$1,497.24
Total			\$4,330.95		Awarded: \$1,497.24

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 05/26/2016, which is a relevant date only to the extent set forth below.)

If a No-Fault claim was neither paid nor denied within 30 days after it was presented to the insurer, interest must be calculated commencing 30 days after the claim was presented to the insurer for payment until the date the claim is paid, *Hempstead General Hospital v. Insurance Co. of North America*, 208 A.D.2d 501 (2d Dept. 1994). As such, interest is due from 30 days after this claim was presented to the insurer for payment up until the date the claim is paid.

C. Attorney's Fees

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

If this matter was filed prior to February 4, 2015, the insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6 (e). If this matter was filed on or after February 4, 2015, the insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(d); and in such same event, if the benefits and interest awarded thereon are equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).



- 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 New York

SS :

County of Nassau

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

06/23/2017

(Dated)

Paul Israelson

#### **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:**

777117ac0c83ccc68eee4d8d3bb1db45

### **Electronically Signed**

Your name: Paul Israelson  
Signed on: 06/23/2017