

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

21st Century Pharmacy Inc  
(Applicant)

- and -

Progressive Casualty Insurance Company  
(Respondent)

AAA Case No. 17-16-1044-3039

Applicant's File No. 22-351

Insurer's Claim File No. 15-5936492

NAIC No. 11851

**ARBITRATION AWARD**

I, Nicholas Tafuri, 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 (ED)

1. Hearing(s) held on 09/14/2017  
Declared closed by the arbitrator on 09/14/2017

Rima Nayberg, Esq. from Law Offices of Rima Nayberg P.C participated in person for the Applicant

Danielle Mazzola, Esq. from Law Offices of Rachel Perry participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,774.95**, was NOT AMENDED at the oral hearing.  
Stipulations WERE made by the parties regarding the issues to be determined.

Respondent stipulated to Applicant's prima facie case.

Applicant stipulated to the timeliness of Respondent's denials.

3. Summary of Issues in Dispute

EIP, ED, a 46-year old female was a passenger in a motor vehicle involved in an accident on July 31, 2015. As a result, EIP sought medical treatment with Dr. Timothy Morley on September 4, 2015, with complaints of pain to

the head, neck, middle and lower back, right knee and right shoulder. Physical therapy, chiropractic, and acupuncture was recommended, and a compound cream prescribed.

Applicant seeks reimbursement for a compound cream prescribed by Dr. Morley on 9/4/15, dispensed by Applicant on 9/13/15, denied by Respondent based on the peer review of Dr. Christopher Burrei.

The issues presented are: (1) Whether Applicant is entitled to no-fault reimbursement for health services denied based on a peer review? (2) Whether Respondent's fee schedule defense is sustainable?

#### 4. Findings, Conclusions, and Basis Therefor

Both parties appeared at the hearing by counsel, presented oral argument, and relied upon documentary submissions. I have reviewed the submissions of 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 with the exception that the additional submission by Applicant on September 7, 2017 is precluded. Per the No-Fault Regulations, at 11 NYCRR 65-4.5(o)(iii)(2), I determined whether the parties provided and exchanged documents in accordance with the requirements of the "Rocket Docket" rule (11 NYCRR 65-4.2(b)(3)), which requires that an applicant submit and serve its evidentiary documents upon submitting and serving the arbitration request form, and that a respondent submit and file its evidentiary documents within 30 days of being advised by the designated arbitration association of the applicant's submission. I noted at the hearing that this additional submission (Applicant's rebuttal) was late.

The 46-year old female EIP, ED, was a passenger in a motor vehicle involved in an accident on 7/31/15, and thereafter, on September 4, 2015, sought medical treatment for injuries allegedly sustained to multiple parts of the body. A compound cream was prescribed by EIP's treating doctor, and it was dispensed by Applicant on September 13, 2015. Applicant's request for reimbursement was denied by Respondent based on a peer review by Dr. Christopher Burrei.

Applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). With Applicant establishing a prima facie case of entitlement to No-Fault compensation for its claim, the burden then shifts to the Respondent to prove that the bill in question was properly denied.

Applicant's September 7, 2017, submission of a rebuttal, 1 week prior to the arbitration hearing, was late. There must be finality to the submission of documents. I find no extraordinary reason to accept this late submission. No justifiable reason for the late submission was provided by Applicant's counsel. The late submission is violative of the "Rocket Docket" rule embodied in the regulations promulgated by the State Insurance Department (now the Financial Services Department). A No-Fault arbitrator acts within his/her discretion in refusing to entertain late submissions. E.g., Matter of Mercury Casualty Co. v. Healthmakers Medical Group, P.C., 67 A.D.3d 1017, 888 N.Y.S.2d 762 (2d Dept. 2009) (27 days late, per briefs).

### Medical Necessity

In order 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." See Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term 2d, 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 Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 2013 NY Slip Op 51800(U) (App. Term

1st Dept. 2013.) However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

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); See also, All Boro Psychological Servs. P.C. v. GEICO, 2012 Slip Op 50137(U) (N.Y. City Civ. Ct. 2012.) "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." Nir, *supra*.

In support of its contention that the compound cream prescribed, was not medically necessary, Respondent relies on a peer review by Dr. Christopher Burrei, dated March 4, 2016. Based on his review of the medical records, and consideration of the pertinent medical literature, Dr. Burrei opined that the compound cream provided by Applicant was not medically necessary. Initially, Dr. Burrei states that the records do not document any difficulty with oral medication, and they do not document any trial of oral medication. EIP did not have any medical contraindications to oral medication, did not have an appropriate trial of oral medications, and did not have any type of chronic pain issue at the time of the onset of this medication as the motor vehicle accident was only two months earlier. Dr. Burrei further comments that no specific or appropriate instructions were given to EIP. EIP had complaints in both shoulders, both knees and the entire spine. Dr. Burrei avers that it would not be appropriate to utilize the compound pain cream in the entire region on a repeated basis. The New York State Medical Treatment Guidelines, Non-Acute Pain, 2014, do not recommend compound pain cream for the neck, mid and low back injuries or extremity injuries; "Topical, oral and/or systemic compound medications are not recommended." Dr. Burrei states that there is no well-respected peer-reviewed literature that document equal or superior efficacy of the pain creams to oral

medications. In rare instances when compound pain cream may be medically necessary, it is generally reserved for use on chronic pain, refractory to treatment that is a small localized area of the body. EIP did not have a chronic pain diagnosis, did not have a focal issue, did not have a trial of oral medication, and did not have contraindication to oral medications. As such, Dr. Burrei concludes that the compound pain cream was not medically necessary.

Based on the peer review report, I find that Respondent has provided sufficient evidence of a lack of medical necessity.

"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), 2006 N.Y. Slip. Op. 5187(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006).

Having carefully considered the submissions of the parties, and the arguments of respective counsel, I am persuaded by Dr. Burrei's peer review. Applicant has not successfully refuted Dr. Burrei's peer review or established the need for the prescribed pain cream compound. I find that the peer review established a sufficient factual basis and medical rationale to support Respondent's lack of medical necessity defense as to the compound pain cream.

Therefore, I conclude that the preponderance of the evidence supports a finding in favor of the Respondent. Accordingly, Applicant's claim is denied.

Any and all remaining defenses by Respondent are deemed moot in light of the foregoing.

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 New York

SS :

County of Nassau

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

10/08/2017  
(Dated)

Nicholas Tafuri

**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:**  
faac9820b0a6051af2ab8ff9907b97cf

### **Electronically Signed**

Your name: Nicholas Tafuri  
Signed on: 10/08/2017