

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Good Care Pharmacy Inc.
(Applicant)

- and -

Progressive Casualty Insurance Company
(Respondent)

AAA Case No. 17-17-1053-6804

Applicant's File No. 1314-496 ARB

Insurer's Claim File No. 161326823

NAIC No. 24260

ARBITRATION AWARD

I, Robyn McAllister, 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

1. Hearing(s) held on 10/31/2017
Declared closed by the arbitrator on 10/31/2017

KELLIANNE JONES, ESQ. from Lewin & Baglio LLP participated in person for the Applicant

REGINA WILCOX, HEARING SPECIALIST from Law Offices of Rachel Perry participated in person for the Respondent

2. The amount claimed in the Arbitration Request, \$ **2,978.02**, 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

Whether Respondent properly denied Applicant's claim for providing a refill of a compound pain cream to Assignor, a 34 year-old female driver, in connection with treatment of injuries allegedly sustained in a motor vehicle accident on May 27, 2016, based on a peer review by Dr. Christopher Burrei.

4. Findings, Conclusions, and Basis Therefor

Applicant sought reimbursement in the amount of \$2978.02 for providing a refill of a compound pain cream consisting of Flurbiprofen, Baclofen, Cyclobenzaprine, Gabapentin, Bupivacaine, Propylene Glycol, Ethyl Alcohol and versatile cream base on October 2, 2016 for Assignor, a 34 year-old female driver, in connection with treatment of injuries allegedly sustained in a motor vehicle accident on May 27, 2016. Respondent timely denied Applicant's claim predicated on a peer review.

This decision is based on the oral arguments of counsel or other representative at the hearing and the documents submitted. I have reviewed the documents contained in the ADR Center as of the date of this award. At the hearing, Respondent argued that it properly denied Applicant's claim since the compound cream was not medically necessary. I agree. I was persuaded by the peer review report by Dr. Christopher Burrei, submitted by Respondent in support of its denial. Dr. Burrei stated that "I would initially note that the fee for this medication is excessive." He further stated that "this claimant had no medical contraindication to oral pharmacotherapy, and did not have a documented poor response to oral pharmacotherapy. I would also note that the practitioner evaluating the claimant failed to document any use of prescription medication, and certainly which would be appropriate prior to considering compound pain cream." Dr. Burrei asserted that "when compound pain cream is used on rare instances, it is utilized for small localized areas that have been refractory to treatment. In this instance, the physician has submitted vague and generalized directions to apply as needed 2 to 4 times per day. This prescription is not referred to any exact body region, does not document any sound medical rationale for utilizing this claim, and documents no positive or even adverse response to trials of oral medication, which would be appropriate and the standard of care." Dr. Burrei further noted that the New York Workers' Compensation Board Mid and Low Back and Neck Injury Treatment Guidelines "do not recommend the use of compound pain creams for the injuries described in the records." Dr. Burrei further asserted that "the physician has submitted a compound pain cream and two muscle relaxers, neuroleptic medication, and an anti-inflammatory. Certainly, the appropriate muscle relaxer can and should be used orally as well as a nonsteroidal medication." He added that "there is no well-respected peer-reviewed literature to suggest the use of compound pain creams including Gabapentin, Baclofen, Cyclobenzaprine, or Flurbiprofen offer equal or superior efficacy to oral pharmacotherapy. The use of this medication is excessive and outside the standard of care." Dr. Burrei concluded that "prior to refilling any type of prescription medication, it should be documented if there is a positive response to the medication. In this instance, the medication distributed in early August 2016, Dr. Lerner does not document the use of the medication one week after the distribution and Dr. Chughtai has not submitted any follow-up records suggesting that the compound pain medication is offering any benefit to the claimant."

In support of its claim, Applicant submitted the documents contained in the ADR Center including prescription by Dr. Hasan Chughtai. Applicant also submitted a rebuttal by Dr. Michael Tamburo. The rebuttal was submitted on October 6, 2017, less than 30 days before the hearing. However, Respondent submitted an addendum to Dr. Burrei's peer review in response, which also was late. In the interests of justice and deciding the case on the merits, I have considered both the late rebuttal and late addendum since neither party is prejudiced. Respondent also submitted an initial and follow-up report by Dr. Chughtai and additional records. I was not persuaded by the medical evidence that the compound pain cream was warranted. Dr. Tamburo was not a treating doctor and his claim that Dr. Chughtai prescribed the pain cream to avoid addiction or other side effects of oral medication is pure speculation. Dr. Chughtai's report of August 1, 2016 simply notes that he prescribed a "topical pain cream for pain relief." However, as pointed out by Dr. Burrei, Dr. Chughtai did not specify where the cream should be applied or why he chose a topical cream instead of oral medication. Dr. Tamburo's discussion as to the efficacy of topical applications of individual medications did not address the efficacy of a compounded cream. Moreover, Dr. Tamburo did not address the fact that there was no mention in the medical records from other treating physicians that Assignor was using the compound cream. Furthermore, I was persuaded by Dr. Burrei's citation to the Workers' Compensation medical treatment guidelines that do not recommend compound creams. Thus, I find that Applicant failed to credibly rebut Dr. Burrei's assertions. Since Dr. Burrei's peer review presented sufficient evidence to establish Respondent's defense of lack of medical necessity, the burden shifted to Applicant to demonstrate medical necessity. *See A. Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co.*, 16 Misc.3d 131 (A), 2007 N.Y. Slip Op. 51342(U) (App. Term 2d & 11th Dist. 2007); *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc.3d 131 (A), 2006 N.Y. Slip Op. 51871(U) (App. Term 2d & 11th Dist. 2006). I find that Applicant failed to satisfy its burden. Therefore, I find that Respondent properly denied Applicant's claim.

Finally, although there is no need to reach the issue, as I concluded in the linked AAA Case No.: 17-16-1052-2781 involving the same prescription, I was persuaded by Respondent's fee audit that the proper fee schedule amount in accordance with the Red Book should be \$1168.82.

Accordingly, Applicant's claim is denied 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, Robyn McAllister, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

11/30/2017
(Dated)

Robyn McAllister

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:
7b97ee5eef35005397c6d91b683cc200

Electronically Signed

Your name: Robyn McAllister
Signed on: 11/30/2017