

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

M & D Elite Pharmacy LLC
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-19-1123-2128

Applicant's File No. None

Insurer's Claim File No. 0528262686

NAIC No. 29688

ARBITRATION AWARD

I, Keith Tola, 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 07/13/2020
Declared closed by the arbitrator on 07/13/2020

Tiffany Bogosian, Esq. from Law Offices of Zara Javakov, Esq. P.C. participated in person for the Applicant

John Palatianos, Esq. from Law Offices Of Karen L. Lawrence participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 212.15**, 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

This case stems from a New York motor vehicle accident which occurred on 12/12/18, wherein the EIP allegedly sustained injuries. Applicant seeks compensation, beyond the partial payment made, for provision of Lidocaine 5% Patches on 12/27/18. Respondent defends on fee schedule grounds.

4. Findings, Conclusions, and Basis Therefor

This Award was issued upon consideration of the parties' arguments and upon review of the relevant evidence contained within the ADR Center files.

Applicant billed \$224.64 for the Lidocaine 5% Patches and \$5.00 for a dispensing fee. Respondent paid the dispensing fee, together with \$17.49 for the Lidocaine Patches, for a total of \$22.49. Applicant seeks the outstanding balance for the Lidocaine - \$212.15.

Respondent's Denial indicates:

"In Accordance to New York No-Fault Law, Regulation 68, the maximum reimbursement for generic prescription drugs or medicines using Redbook is calculated according to the New York Workers' Compensation Board Pharmacy Fee Schedule, pursuant to Regulation 83 and Chapter V of Title 12 NYCRR Subchapter M; Section 440.5."

Pertaining to pharmaceutical payments, "conclusively demonstrating" in a "coherent manner" the proper rate of payment means establishing the average wholesale price (AWP) of the drug on the date that it was dispensed by sufficient evidence, i.e., more than a conclusory statement. The New York State Workers' Compensation Board promulgated a Pharmacy Fee Schedule under N.Y. Comp. Codes R. & Regs. tit. 12, § 440, which mandates reimbursement for prescription drugs at the "Average Wholesale Price" ("AWP") "on the day it was dispensed." Id. at 440.5(a)(1). Section 440.2(a) authorizes the use of "the Red Book published by Thomson Reuters or Medi-Span Master Drug Database by Wolters Kluwer Health or any successor publisher . . . or other nationally recognized drug pricing index adopted by the Chair or Chair's designee" to determine the AWP. Section 440.5(a)(1) governs the reimbursement formula, stating:

"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 12 percent of the Average Wholesale price plus a dispensing fee of \$4 for brand name drugs or medicines or minus 20 percent of the Average Wholesale Price plus a dispensing fee of \$5 for generic drugs or medicines."

Here, respondent has submitted no expert fee schedule evidence, nor any evidence to show the Average Wholesale Price for the Lidocaine Patches at issue. On that basis alone, respondent has failed to substantiate its fee schedule defense.

Notably, applicant has provided its cost in the form of a bill, in the amount of \$280.00, reduced by 20% as required.

I find respondent has failed to substantiate its fee schedule defense, applicant has come forward with some evidence to establish AWP and, accordingly, this claim is granted.

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	Status
	M & D Elite Pharmacy LLC	12/27/18 - 12/27/18	\$212.15	Awarded: \$212.15
Total			\$212.15	Awarded: \$212.15

- B. The insurer shall also compute and pay the applicant interest set forth below. 03/04/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant commenced arbitration by filing on 3/19/19. Applicant filed within 30 days from receipt of the denial. As such, Respondent shall pay the applicant interest computed from the date the claim became overdue, 3/4/19, at the rate of 2% per month, simple, and ending with the date of payment of the award subject to the provisions of 11 NYCRR § 65-3.9(e).

C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR Section 65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR Section 65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$850.00" Id. The minimum attorney fee that shall be awarded is \$60.00. 11 NYCRR Section 65-4.5(c). However, if the benefits and interest awarded thereon is 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 Section 65-4.6(i). For claims that fall under the Sixth Amendment to the regulation the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, subject to a maximum fee of \$1,360.00."

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

08/11/2020
(Dated)

Keith Tola

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:
150c5559cf8292739316e2db780296ae

Electronically Signed

Your name: Keith Tola
Signed on: 08/11/2020