

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ard Rx. Inc.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

| | |
|--------------------------|------------------|
| AAA Case No. | 17-19-1152-3266 |
| Applicant's File No. | n/a |
| Insurer's Claim File No. | 0435389420101092 |
| NAIC No. | 35882 |

ARBITRATION AWARD

I, Valerie D. Greaves, 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: Patient/Claimant

1. Hearing(s) held on 07/21/2020, 09/30/2020
Declared closed by the arbitrator on 09/30/2020

Vladimir Tamayeff, Esq. from Law Office of Tamayeff, P.C. participated by telephone for the Applicant

Crystal Russo, Claims Representative from Geico Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,269.06**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant's counsel amended the claim by withdrawing the dispensing fee for the disputed medication.

The amount in dispute is now \$2264.56.

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

3. Summary of Issues in Dispute

Whether Applicant is entitled to reimbursement in the sum of \$2264.56 for Diclofenac topical gel 3% provided on 11/18/2019, allegedly in connection with the treatment of injuries sustained by Patient in a motor vehicle accident on 9/5/2019.

Respondent timely denied reimbursement based on its interpretation of the applicable fee schedule and the peer review analysis of Zubin Tharayil, MD dated 12/17/2019.

4. Findings, Conclusions, and Basis Therefor

The decision below is based on the documents contained in the ADR Center as of the date of the hearing and the oral arguments of the parties. No witnesses testified at the hearing.

The Arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The Arbitrator may question any witness or party and independently raise any issue that the Arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations [11 NYCRR 65-4.5 (o) (1) (Regulation 68-D)].

The Appellate Division, Second Department held that applicant "made a prima facie showing of their entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of no-fault benefits were overdue." (Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004)). A facially valid claim is presented when it sets forth the name of the facility and/or health provider, date of the accident, the name of the patient, description of the services rendered, date of service(s) and the fees charged for those services. See, Citywide Social Work & Psychological Services, PLLC a/a/o Gloria Zhune v. Allstate Ins. Co., 8 Misc.3d 1025A, 806 N.Y.S.2d 444 (App. Term 1st Dept. 2005); A.B. Medical Services, PLLC v. GEICO Ins. Co., 2 Misc 3d 26, 773 N.Y.S.2d 773 (App Term 2nd & 11th Jud Dist 2003). Applicant has established a prima facie case of entitlement to reimbursement by submission of completed proof of claim, documenting the fact of the loss and the amount due.

Applicant is seeking reimbursement for Diclofenac topical gel 3% provided on 11/18/2019, allegedly in connection with the treatment of injuries sustained by Patient in a motor vehicle accident on 9/5/2019. Reportedly, Patient a male then 37 years old, was operating a motor vehicle when the instant accident occurred causing pain in his neck, upper back, middle back, lower back and bilateral shoulders; notably, he did not lose consciousness and did not receive any immediate post-accident medical treatment. Patient initially presented to Inamulhaque M. Saboor, MD, on 9/17/2019 with complaints of pain in the neck, upper back, middle back, lower back and bilateral shoulders. Examination of the cervical spine reveals muscle tenderness and spasms; decreased range of motion secondary to pain; bilaterally positive Spurling test. Examination of the thoracic spine reveals tenderness and muscle spasms along with limited range of motion. Examination of the lumbar spine reveals muscle tenderness and spasms; decreased range of motion secondary to pain and a positive straight leg raise test. Examination of the bilateral shoulders reveals pain and tenderness to palpation along with limited range of motion. Examination of the left knee reveals tenderness along with limited range of motion. The deep tendon reflexes and sensory examination are documented as normal. The diagnostic impression included cervical spine sprain/strain, thoracic spine sprain/strain, rule out cervical radiculopathy, rule out lumbar radiculopathy, right/left shoulder contusion, sprain, rule out tear of the supraspinatus muscle, and left knee contusion. The treatment plan included diagnostic imaging, physical therapy, neurology evaluation, psychiatric evaluation, acupuncture, chiropractic, and Diclofenac gel 3%.

It is noted that the prescription written by Dr. Saboor for the disputed Diclofenac gel 3% is dated 10/23/2019, approximately 4 weeks after Dr. Saboor's initial examination of Patient. The disputed Diclofenac topical gel 3% was provided to Patient about 3½ weeks later on 11/18/2016 (approximately 7 ½ weeks after Dr. Saboor's initial examination).

Respondent timely denied reimbursement based on its interpretation of the applicable fee schedule and the peer review analysis of Zubin Tharayil, MD dated 12/17/2019. A persuasive peer review must contain a cogent basis for its opinion that Applicant deviated from medical community standards for the service under review or establish that the service was not medically necessary under the circumstances or demonstrate that the service was not causally related to the accident.

When the issue in contention involves the fee schedule, Respondent must first demonstrate that it has credibly established the basis of its denial(s) before the burden of proof shifts to Applicant to establish that Respondent's interpretation was contrary to No-Fault regulations and/or the applicable fee schedule. After Respondent meets this burden, Applicant must establish a prima facie case of entitlement to reimbursement by demonstrating credible evidence that Respondent's fee schedule contention(s) are incorrect. (See, Continental Medical PC v. Travelers Indemnity Company, 11 Misc. 3d 145(A), 2006 N.Y. Slip Op. 50841 (U) (App. Term 1st Dept. 2006); Westchester Medical Center v. Nationwide Mut. Ins. Co., 78 A.D.3d 1168, 911 N.Y.S.2d 907 (2d Dept. 2010).

Respondent requested that the fee schedule audit submitted in matter AAA case #17-19-1151-9849 be accepted as evidence in two other matters held before me on the same date: AAA case #17-19-1151-7516 and AAA case #17-17-19-1152-3266. It is noted that all three matters were heard before this Arbitrator on the same hearing date and concerned the same Applicant, same Respondent, same prescribed medication in dispute (billed in the same amount in all three matters) and the parties were represented by the same Applicant's counsel and same Respondent claims representative in all three matters. Respondent's request was granted over Applicant's objection; the fee schedule audit submitted in AAA case #17-19-1151-9849 is hereby incorporated by reference in matters AAA case #17-19-1151-7516 and AAA case #17-17-19-1152-3266.

Respondent carries the initial burden of proof to timely raise and establish lack of medical necessity before the burden of proof shifts to the Applicant to establish that the disputed service(s) were medically necessary. If the insurer medical examination or peer review is not rebutted, the insurer is entitled to denial of the claim. Khodadadi Radiology v. New York Central, 16 Misc.3d 131(A), 841 N.Y.S.2d 824, (App. Term 2d & 11th Dists. (2007); Dayan v. Allstate Ins. Co., 49 Misc. 3d 151 (A), 29 N.Y.S. 3d 846, 2015 NY Slip Op 51751 (U) (App. Term 2d, 11th & 13th Dists. 2015). "...Once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, 'plaintiff must rebut it or succumb'." Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 N.Y. Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., (2005). Where a peer review or insurer medical examination findings provide a factual basis and medical rationale for the opinion that a particular service is not

medically necessary and Applicant fails to present any evidence to refute that showing, the claim should be denied. Delta Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co., 21 Misc.3d 142(A), 880 N.Y.S.2d 223 (Table), 2008 N.Y. Slip Op. 52450(U), 2008 WL 5146967 (App. Term 2d & 11th Dists. (2008).

Respondent's peer reviewer, Dr. Tharyil, advised that the Diclofenac gel 3% was not medically necessary in pertinent part based on the following:

"The claimant was involved in a motor vehicle accident and afterward reported injuries to the neck, back and bilateral shoulders along with the left knee. Based on the examination documented by Dr. Saboor, the injuries are musculoskeletal in nature. The appropriate management for acute musculoskeletal pain is physical therapy, analgesics such as NSAIDs, and the application of superficial heat. Although Diclofenac is an NSAID, the only approved indication for Diclofenac sodium 3% gel is for the treatment of actinic keratosis. Because the claimant did not obtain the condition of actinic keratosis as a result of this motor vehicle accident, this medication is not medically indicated for the management of this claimant's musculoskeletal pain. Furthermore, please note that there is no documented contraindication for the use of oral NSAIDs, such as naproxen, in the management of this claimant's musculoskeletal complaints... Patients who can tolerate the potential sedating effects of these medications may benefit from the addition of a nonbenzodiazepine muscle relaxant to initial pharmacotherapy with NSAIDs or acetaminophen... Muscle relaxants provide symptomatic relief for patients with acute low back pain."

Dr. Saboor's undated peer rebuttal maintains that the Diclofenac gel was medically necessary in pertinent part because the frequency and dosage of NSAIDs cannot safely be provided via traditional oral NSAIDs. Maintaining that "traditional oral NSAIDs can only be prescribed for so long before the risks outweigh the benefits, and the frequency and dosage of NSAIDs needed for the multitude of herniated and near herniated discs could not be safely provided orally. Topical NSAIDs can be safely taken for longer periods and I higher or more frequent dosages due to the low systemic absorption... Because of this difference in absorption, topical NSAIDs are also far safer for chronic use. Most notably, the rebuttal does not rebut the peer reviewer's contention that that *"the only approved indication for Diclofenac sodium 3% gel is for the treatment of actinic keratosis"* a condition which Patient did not sustain due to the motor vehicle

accident. There is also no documentation in the record of Patient's response to oral pain medication, the necessary dosage and frequency required for pain relief, efficacy of conservative treatment etc.

Dr. Tharayil's peer addendum dated 12/20/2019, written in response to the peer rebuttal reiterates that Patient's injuries were musculoskeletal in nature and asserted that:

"As I mentioned in my previous review, the appropriate management for acute musculoskeletal pain is physical therapy, analgesics and NSAIDS, and the application of superficial heat. Dr. Saboor state that Diclofenac gel, topical NSAID, is appropriate for use in the management of this patient. I disagree with him on multiple fronts...First, it is important for physicians to prescribe medications for conditions that meet indications. Dr. Saboor prescribed Diclofenac 3% gel for the management of this patient's musculoskeletal injuries. The only approved indication for Diclofenac 3% gel is for the treatment of actinic keratosis which is a dermatological condition...Given this [medication was prescribed] for an un-indicated reason, the Diclofenac sodium 3% gel is not appropriate for the management of this patient.

Furthermore, Dr. Saboor states that topical agents may be advantageous in studies where systemic administration of NSAIDs is relatively contraindicated; he cites examples such as hypertension, cardiac failure, peptic ulcer disease and renal insufficiency. Please note that there is no documentation in [patient's] past medical history that states that he has any of those conditions..."

Additionally, Applicant's counsel submitted an undated Attorney "Affirmation re: Defective Peer Review" in which he maintains that Respondent surreptitiously directs, and perhaps writes the content of its peer review reports, which are then submitted by various medical professionals as their independent opinion. A review of Applicant's Attorney Affirmation reveals that it implies wrongdoing without reference to any specific evidence of wrongdoing by either Dr. Jackson or Respondent in this instant matter.

Respondent's submission includes an undated rebuttal Attorney "Affirmation re: Defective Peer Review" from Anthony A. Flecker, Esq., to rebut the content of Applicant's Attorney Affirmation. Respondent maintains that the contentions in Applicant's attorney affirmation are

untrue, and replete with unsupported suppositions and conjectures based on presumptions made by Applicant counsel with no evidence pertaining to Respondent or the peer review doctor.

When Applicant's counsel was asked how he knew the content of his affirmation to be true, he stated that there was a court case in which the presiding judge had held that an insurer's peer review report(s) were pre-determined and directed by the insurer. Applicant's counsel was asked *"was the insurer or peer review doctor in that Court matter, the same insurer or medical doctor in this matter"*, and he answered "no". When asked how he could affirm that the insurer in this matter had conspired with the medical doctor by directing and pre-determining the outcome of the peer review report, he offered no evidence whatsoever and had no answer.

Applicant's Attorney Affirmation implies wrongdoing based solely on his imaginings extracted from the aforementioned Court matter, even though, that Court matter did not involve any of the parties in this matter.

I find Applicant's Attorney Affirmation to be without merit and incredulous, on its face, lacking any reference to any actual facts or evidence pertaining to the parties before me.

I further find that Respondent has established lack of medical necessity by a preponderance of the credible evidence; Applicant's documentation is insufficient to credibly rebut lack of medical necessity.

Under the circumstances, there is no reason to consider the correct fee schedule rate for the disputed service.

Based on the foregoing, Applicant is not entitled to No-Fault benefits.

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 New York

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

10/19/2020
(Dated)

Valerie D. Greaves

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:
b826e63fccddb78c59cbbf8fc02375d

Electronically Signed

Your name: Valerie D. Greaves
Signed on: 10/19/2020