

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Wellmart Rx, Inc.
(Applicant)

- and -

Integon National Insurance Company
(Respondent)

AAA Case No. 17-19-1146-9633

Applicant's File No. 130.127

Insurer's Claim File No. 9SINY03435-04

NAIC No. 29742

ARBITRATION AWARD

I, Neal S. Dobshinsky, 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: J Doe

1. Hearing(s) held on 09/24/2020
Declared closed by the arbitrator on 09/24/2020

Vincent Ku from Tsirelman Law Firm PLLC participated by telephone for the Applicant

John Rossillo from Rossillo & Licata LLP participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,456.80**, 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

On 3/30/18, Applicant dispensed cyclobenzaprine tablets, ibuprofen tablets, diclofenac gel 3%, tizanidine tablets, and meloxicam tablets to J Doe as prescribed for him. Applicant sought payment for the medications and dispensing fees.

Based on the report of its peer reviewer, Insurer paid Applicant's claim for the tizanidine and the meloxicam and the dispensing fees, and it denied the rest of the claim for lack of medical necessity.

Were any or all of the denied medications medically necessary? If so, how much is Applicant entitled to?

4. Findings, Conclusions, and Basis Therefor

I have read and considered the materials in the American Arbitration Association's ADR Center case file and heard and considered the parties' arguments. I find as follows:

Background

On 3/21/18, J Doe, a male, then 31 years old, was a passenger in a motor vehicle that was in an accident. Doe claims to have been injured. He then sought medical care.

On 3/26/18, Doe saw Robert Robenov, PA, a physician assistant with Paramount Medical Services. The progress note states that Doe presented with chief complaints of cervical and lumbar spine pain, and right knee pain. Doe's cervical pain was bilateral, right greater than left. The pain radiated to his thoracic and lumbar spines. His lumbar pain was bilateral. It radiated to his right hip; his right knee pain radiated to his right leg and ankle. Doe reported that he tried treatment with acupuncture, chiropractic and physical therapy for the cervical and lumbar spine pains. Past treatment for the knee included surgery, but there is no indication of when that was.

Robenov examined Doe. He found cervical tenderness, limitations of motion, pain, muscle spasm; and a positive compression test. Examination of Doe's lumbar spine revealed signs of inflammation; pain; limitations of motion; muscle spasms; positive Kemp's test on the right; and positive straight leg raising test on the right. Doe's right knee was non-tender to palpation; no swelling; and no ecchymosis. Robenov states both that the right knee range of motion was not tested and that there was decreased range of motion secondary to pain in the right knee. Right knee ligament testing was normal, but there was a positive McMurray sign.

Robenov diagnosed Doe with cervical spine pain; lumbar spine pain; and knee pain. He referred Doe for physical therapy. He prescribed Mobic, 15 mg tablets, 1 tablet per day for 20 days; and tizanidine, 2 mg tablets; 1 tablet twice per day for 20 days. Doe was to avoid strenuous activity; follow-up with his private medical doctor; and follow-up in 4 weeks if pain persists. The progress note was reviewed and countersigned by Jonathan Landow, MD.

Three days later, on 3/29/18, Doe saw Angela Duque, MD, a physician with Paramount Medical Services. The chief complaints portion of the progress note is virtually identical to the same portion of the 3/26 Robenov progress note. Duque added that Doe was taking Mobic and tizanidine.

Duque examined Doe and found cervical tenderness and spasm; restricted ranges of motion of the cervical spine; tightness and spasms in the lumbar spine; and positive straight leg raise test bilaterally. The doctor diagnosed Doe with lumbar spine pain, cervical spine pain, and knee pain; cervical spine sprain, rule out herniations; lumbar radiculopathy; rule out right knee internal derangement. The doctor recommended that

Doe start physical therapy; have MRIs; that he take oral medications (acute phase) as needed; a pain management referral, and a follow-up in four weeks.

Duque prescribed cyclobenzaprine, 5 mg tablets, 1 to 2 tablets at night as needed for muscle tension; ibuprofen, 600 mg tablets, 1 tablet every 6 hours if needed for pain; and diclofenac 3% topical gel, apply every 8 hours as need for sore muscles or joints.

On 3/30/18, applicant Wellmart Rx, dispensed all five of the medications-the two prescribed by Robenov and the three prescribed by Duque-to Doe.

Applicant's Claim and Insurer's Denial

Applicant, as assignee of Doe's rights to no-fault benefits for health care services, timely submitted its bill to Insurer for payment for the five medications and dispensing fees. Applicant billed \$36.12 for the cyclobenzaprine; \$43.68 for the ibuprofen; \$2,358.00 for the diclofenac gel 3%; \$48.80 for the tizanidine; \$96.80 for the meloxicam; and \$25.00 (5 x \$5.00) for the dispensing fees.

Based on the report of its peer reviewer, Insurer paid Applicant's claim for the tizanidine and the meloxicam and the dispensing fees, and it denied the rest of the claim for lack of medical necessity.

The only issue argued and submitted by the parties at the oral hearing was whether any or all of the denied medications (cyclobenzaprine, ibuprofen, and diclofenac gel 3%) were medically necessary? If so, how much is Applicant entitled to? All other issues were waived.

Medical Necessity and the Burden of Proof Under No-Fault

Medical necessity for services or supplies is established by proof of an applicant's properly submitted claim form. *All County Open MRI & Diagn. Radiology P.C. v Travelers Ins. Co.*, 11 Misc3d 131(A), 2006 NY Slip Op. 50318[U] [App Term, 2d Dept 9th & 10th Jud Dists 2006]. Here, Applicant's submission of its claim establishes medical necessity for the medications, in the first instance.

The insurer "bears both the burden of production and persuasion" as to its lack of medical necessity defense. *Nir v Allstate Ins. Co.*, 7 Misc3d 544, 546 [Civ Ct, Kings County 2005]. The defense must be supported by a peer review report or other evidence, such as an independent medical examination report. The report must set forth a sufficiently detailed factual basis and medical rationale for the denial. *Amaze Med. Supply v Eagle Ins. Co.*, 2 Misc3d 128(A), 2003 NY Slip Op 51701[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2003].

"[H]owever, it is the [applicant] who has the ultimate burden of proving, by a preponderance of the evidence, that the services at issue were medically necessary (citations omitted)." *Radiology Today, P.C. v Geico Ins. Co.*, 58 Misc3d 132(A), 2017 NY Slip Op 51768[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017].

The Peer Review and Insurer's Lack of Medical Necessity Defense

Insurer based its denial of Applicant's claim on the affirmed peer review of Jay M. Weiss, MD, a physician board certified in physical medicine & rehabilitation and in pain medicine. He attaches a copy of his CV. In his 6/8/18 report, the doctor states his reasons and opinions why the meloxicam (Mobic) and the tizanidine were both medically necessary, but that the cyclobenzaprine, the ibuprofen, and the diclofenac 3% gel were not medically necessary.

Weiss lists the records and reports he reviewed. These include: the record by Robenov, 3/26/18; record by Duque, 3/29/18; prescriptions for ibuprofen, cyclobenzaprine, Mobic, tizanidine, and diclofenac 3% gel; report of the MRIs of Doe's lumbar spine; progress note by Robenov; and other records and reports.

The peer reviewer briefly mentions the history of the accident; Doe's complaints; the exam by Robenov on 3/26, the findings, the plan for physical therapy and the prescriptions for Mobic and tizanidine; the 3/29 exam by Duque, the findings, and the prescriptions for cyclobenzaprine, ibuprofen, and diclofenac 3% gel.

Weiss concedes that an oral anti-inflammatory and a muscle relaxant would be appropriate. But, "[d]ifferent anti-inflammatories should not be combined nor should different muscle relaxants. The different prescriptions from the same office by different practitioners are duplicative, and in fact, could be dangerous when multiple anti-inflammatories and muscle relaxants are mixed and treating physicians, particularly in the same exact office should coordinate their care." "It is my opinion the Mobic or meloxicam and the tizanidine furnished on 3/30/18 was appropriate although the cyclobenzaprine which is also a muscle relaxant would not be necessary over and above the tizanidine. Similarly, the ibuprofen would not be necessary over and above the meloxicam."

Regarding the diclofenac 3% gel, Weiss points out that at that strength diclofenac is used for a dermatologic disorder (actinic keratosis) and not for musculoskeletal pain.

To support his opinions, Weiss cites to the NY Mid and Low Back Treatment Guidelines, and other reliable authorities.

This peer review report sets forth an adequate factual basis and medical rationale to deny payment for the cyclobenzaprine, the ibuprofen, and the diclofenac 3% gel. Insurer met its initial burden of production and persuasion as to its lack of medical necessity defense.

Applicant's Rebuttal; Insurer's Addendum

Applicant submits an affirmed rebuttal to the peer review by Leonid Shapiro, MD, a physician board certified in anesthesiology. In his 7/24/20, Shapiro states his reasons and opinions why the cyclobenzaprine, ibuprofen, and diclofenac 3% gel were medically necessary.

Shapiro gives no details regarding his own education, training, or experience. He did not examine or treat Doe or prescribe the medications at issue. He does not state who requested him to opine on the medical necessity for the medications. He does not specifically identify what records or reports he may have reviewed. He merely states he reviewed Applicant's bills and the "relevant medical records."

Shapiro focuses solely on the 3/29/18 exam by Duque and the three medications she prescribed. He does not mention the exam by Robenov on 3/26. Shapiro does not mention or attempt to refute Weiss' argument about the danger of duplicative medications prescribed within days by different practitioners (Robenov and Duque) from the same office.

Accordingly, all that is left is the dispute over the medical necessity for the diclofenac 3% gel. Here, Shapiro does not effectively show that the 3% strength of diclofenac was appropriately prescribed. While lesser strengths of diclofenac are appropriately used for musculoskeletal conditions, the stronger formulation is not. Shapiro states that "diclofenac is a non-steroidal anti-inflammatory drug (NSAID)," and that "NSAIDs are among the most widely used pain medications whether for general post-traumatic pain control or in the post-surgical context." He cites an article to support his position, Jorge LL, Feres CC, Teles VE. Topical preparations for pain relief: efficacy and patient adherence. *J Pain Res.* 2010; 4:11â24. Published 2010 Dec 20. doi:10.2147/JPR.S9492. But that article never mentions diclofenac 3%. Rather it mentions 1% and 1.5% diclofenac. Other parts of the Shapiro rebuttal are focused on the efficacy of topical medications in general, pain medications, opioid and illicit drug abuse, etc.

Shapiro does not effectively refute Weiss's showing, and Shapiro does not point to any reliable authority or standard of care to show that the diclofenac 3% gel was medically necessary or appropriately prescribed for Doe. The rebuttal is not persuasive.

Insurer submits an addendum dated 8/26/20 from Weiss. Weiss reinforces his original arguments and argues that Shapiro did not refute them. Regarding the diclofenac 3%, Weiss again notes, "[t]he fact that a medication has value when taken orally or even when used topically at a certain dose does not mean any preparation of this medication has value." And regarding the duplicative medications, he states, "I never stated that these medications are not valuable medications under certain circumstances, merely that in this case multiple medications of the same type were furnished; something that is likely to be dangerous and no extenuating or extraordinary circumstances were noted as to why this was done."

Conclusion

All of the contentions raised by both parties have been considered and evaluated. The records in the parties' submissions and the authorities cited that could be located have been reviewed as well. The credible evidence does not overcome Insurer's showing that the medications in dispute were not medically necessary.

Based on the parties' submissions, their arguments, the law, the regulations, and the weight of the credible evidence, I conclude that Insurer has established its lack of medical necessity defense. Applicant is not entitled to payment on its claim.

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

10/24/2020
(Dated)

Neal S. Dobshinsky

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:
8061e536d58bae597dcb193c6bafb8c4

Electronically Signed

Your name: Neal S. Dobshinsky
Signed on: 10/24/2020