

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Health Choice Pharmacy, Inc  
(Applicant)

- and -

Allstate Insurance Company  
(Respondent)

AAA Case No. 17-20-1161-0799

Applicant's File No. N/A

Insurer's Claim File No. 0391825171

NAIC No. 19232

**ARBITRATION AWARD**

I, Anthony Kobets, 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 11/12/2020  
Declared closed by the arbitrator on 11/12/2020

Viktoriya Litvenko, Esq. from Viktoriya Litvenko, P.C. participated by telephone for the Applicant

Meghan McDonough, Esq. from Law Offices of John Trop participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 916.59**, was NOT AMENDED at the oral hearing.  
Stipulations WERE made by the parties regarding the issues to be determined.

At the hearing, the parties' representatives stipulated to the timely service of the bill and denial, to Applicant's prima facie burden and to the amount in dispute being in accordance with the applicable provisions of the New York State Workers' Compensation Fee Schedule.

3. Summary of Issues in Dispute

In dispute is the Applicant's bill totaling \$916.59 for a prescription compound topical medication provided to the patient (AB) on 12/7/15 as a result of injuries sustained in a motor vehicle accident on November 12, 2015.

Respondent denied the claim based upon the peer review report of Stuart Stauber, M.D. dated 1/14/16. Was the Applicant entitled to reimbursement for the services provided to the EIP?

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

At the hearing, the parties' representatives stipulated to the timely service of the bill and denial, to Applicant's prima facie burden and to the amount in dispute being in accordance with the applicable provisions of the New York State Workers' Compensation Fee Schedule.

The parties' representatives agreed that medical necessity was the sole issue in dispute herein.

The EIP (AB) was a 69-year old female passenger who was involved in a motor vehicle accident on November 12, 2015. Thereafter on 12/7/15, the patient received a prescription topical compound pain medication from the Applicant. Applicant seeks no-fault reimbursement for these services.

Respondent timely denied the bill in dispute herein based upon the peer review report of Dr. Stuart Stauber dated 1/14/16. Dr. Stauber reviewed the available medical records and indicated that "[f]urthermore, in this case, the claimant was prescribed a compound pain cream containing Baclofen and Gabapentin. This compound cream was not medically necessary in that there is little support in double blind studies documenting the efficacy of the medications used in the preparation described. In other words, administering a compound cream medication on the skin has no proven medical efficacy... In fact, there is no indication as to how this medication would be more beneficial than some of the more commonly used medications for management of acute soft tissue injuries as sustained in this case." Respondent's counsel argued that the Respondent met its burden in demonstrating that the medication was not medically necessary.

If the insurer presents sufficient evidence establishing a lack of medical necessity, then the burden shifts back to the Applicant to present its own evidence of medical necessity. See: *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc3d 131A (2006). Once the insurer [Respondent] makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, "[Applicant] must rebut it or succumb." See, *Bedford Park Med. Practice P.C. v. American Transit Tr. Ins. Co.*, 8 Misc. 3d 1025 (A), 2005, 2005 NY Slip Op 51282 citing *Bauman v Long Island Railroad*, 110AD2d 739, 741, [2d Dept 1985]). Applicant's counsel argued that the peer review failed to meet Respondent's burden of proving that the prescriptions were not medically necessary.

Applicant also relied on a rebuttal by Dr. Jean Barakat dated 9/29/20, wherein it was explained that "[b]ased on the clinical grounds, the prescribed compound cream is,

in my opinion, medically necessary and consistent with generally accepted standards in the medical community. There has been a sufficient number of studies of soft tissue conditions to demonstrate the superiority of topical NSAIDs over placebo and to suggest equivalent efficacy in comparison with some oral NSAIDs. Compounded creams are as effective as and better tolerated than oral NSAIDs. The benefit of compound vs. systemically administered medications is the lack of side effects. It is not addictive as many pain killers are. Topical nonsteroidal anti-inflammatory drugs are effective in relieving pain in acute and chronic conditions. (Moore, Tramer, Carroll, Wiffen, and McQuay. 'Quantitative Systematic Review of Topically Applied Non-Steroidal Anti-inflammatory Drugs.' British Medical Journal 316(1998): 336-339.)."

The evidence herein demonstrated that on 11/13/2016, the patient was examined by Dr. Jean Barakat and presented with complaints of constant neck pain and stiffness radiating to the left shoulder, mid-back and lower back pain, and left shoulder pain. Upon examination, the patient appeared to be in moderate distress due to pain and discomfort of the injured body parts. Examination of the cervical spine revealed tenderness upon palpation over the cervical levels; increased muscle tone bilaterally in the paravertebral, trapezius and rhomboid muscles; and diminished range of motion. Examination of the lumbosacral spine revealed moderate-to-severe tenderness upon palpation over the lumbar levels, increased muscle tone in the bilateral paravertebral muscles and diminished range of motion and positive SLR test. Examination of the left shoulder revealed diminished range of motion and tenderness upon palpation. Examination of the hip revealed decreased range of motion. The diagnostic impressions were cervicalgia; strain of muscle, fascia and tendon at neck level; lower back pain; sprain of ligaments of lumbar spine; unspecified sprain of left shoulder, pain in left shoulder, contusion of left shoulder, muscle spasm and myalgia. The patient was recommended a physical therapy evaluation and treatment and referred for chiropractor and acupuncturist consultations. She was also referred for MRI studies and prescribed compound cream containing Cyclobenzaprine HCL, Gabapentin powder, Ibuprofen powder, Lidocaine HCL powder, Baclofen powder, Ketoprofen powder, Ethoxy Digylcol, and Pentravan External "to specifically target the areas of pain for the treatment of her injuries."

An MRI of the cervical spine performed on 11/23/15 indicating annular bulging with thecal sac compression at the C2-C3 level; disc osteophyte complexes superimposed upon annular bulging with thecal sac compression at the C3-C4 and C4-C5 levels; annular bulging with thecal sac compression and right foraminal stenosis at the C5-C6 level; right subligamentous disc herniation superimposed upon annular bulging with thecal sac compression and right foraminal stenosis at the C6-CT level with left foraminal stenosis noted as well.

An MRI of the lumbar spine performed on 11/23/15 indicating moderate dextroscoliosis; central subligamentous disc herniation with thecal sac compression and left foraminal stenosis at the L3-L4 level; annular bulging with thecal sac compression and bilateral foraminal stenosis at the L4-L5 and L5-S1 levels; spinal stenosis at the L2-L3 level secondary to ligamentum flavum hypertrophy.

On 1/10/19, the patient received a prescription topical compound pain medication containing Cyclobenzaprine HCL, Gabapentin powder, Ibuprofen powder, Lidocaine HCL powder, Baclofen powder, Ketoprofen powder, Ethoxy Digylcol, and Pentravan External.

Based upon a review of the evidence herein along with the arguments of counsel, I find that the patient's treating physician was confronted with certain subjective complaints as well as objective clinical findings and justifiably determined that the medication was medically necessary. Dr. Stauber's analysis was unpersuasive considering his failure to adequately address the patient's continued complaints of radiating pain as well as the objective findings including decreased ranges of motion, tenderness, increased muscle tone and a positive Straight Leg Raise test.

I was also persuaded by Dr. Barakat's examination of the patient and explanation that "[i]n this instance, the goal with the compound cream was the relief of pain and increase of the mobility of the affected muscles. As evident from the medical records, the patient had complaints of pain as well as positive findings and was started on a course of conservative care. Though the patient was started on a course of conservative treatment, it would take time to take effect. She required some treatment for temporary relief from pain during the ongoing course of conservative treatment. Hence, the compound cream was prescribed. The topical compound cream was prescribed to use at home in conjunction with office-based therapy."

Furthermore, in Mount Sinai v. Triboro Coach, 263 A.D. 2d 11 (Second Dep't, 1999), the Court stated that the insurer has the burden of coming forward with proof in an admissible form to establish the fact or evidentiary foundation for its belief that the patient's condition was unrelated to the motor vehicle accident. Moreover, the insurer must show that the injury was not related to the accident at all. It must show how, when and where the injury happened and that it was not aggravated or exacerbated by the accident (emphasis added). The insurer's proof may not be vague, conclusory, inconsistent or unsupported by records. In Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, (A.D. 2d. Dep't, 2009) the Appellate Division, ruled that exacerbations of pre-existing conditions are covered by No-Fault, and that causation is presumed under the New York No-Fault law. An expert's affirmation is needed to provide a factual foundation for an insurance carrier's good faith belief that an alleged injury did not arise out of an insured accident; speculation or wishful thinking does not suffice. Mt. Sinai Hospital v. Triboro Coach Inc., 263 A.D.2d 11, 699 N.Y.S.2d 77 (2d Dept. 1999). Dr. Stauber's report in this matter is deficient, among other reasons, because it lacks sufficient factual support and medical rationale to justify the position that the services herein were not causally related. I find that the patient's medical records demonstrated that the services herein were causally related and reasonable to resolve an ongoing condition. I am also persuaded that the patient's injuries visualized and treated at the time of the 12/7/15 services were consistent with the patient's mechanism of injury as a direct result of the motor vehicle accident. An insurer fails to come forward with proof in admissible form to demonstrate the fact or the evidentiary foundation for its belief that the patient's treated condition was unrelated to his or her automobile accident where the affidavit of its medical expert is conclusory, speculative, and unsupported by

the evidence. E.g., New York & Presbyterian Hospital v. Selective Ins. Co. of America, 43 A.D.3d 1019, 842 N.Y.S.2d 63 (2d Dept. 2007).

Every peer review requires individual scrutiny to determine whether the burden should be shifted back to the claimant to submit contrary expert proof. If the claimant can demonstrate, through references to the medical records or otherwise, that the peer review doctor's opinion lacks a sufficient basis and/or medical rationale because it is conclusory or because it fails to address essential factual issues or is based upon disputed or apparently incorrect facts, the insurer has fallen short of its burden of proof. Novacare Medical P.C. v. Travelers Property Casualty Ins. Co., 31 Misc.3d 1205(A), 927 N.Y.S.2d 817 (Table), 2011 N.Y. Slip Op. 50500(U) at 4, 2011 WL 1226956 (Dist. Ct. Nassau Co., Michael A. Ciaffa, J., Apr. 1, 2011). **Accordingly, Applicant's \$916.59 claim for date of service 12/7/15 is granted.** This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of the hearing.

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
	Health Choice Pharmacy, Inc	12/07/15 - 12/07/15	\$916.59	Awarded: \$916.59
Total			\$916.59	Awarded: \$916.59

- B. The insurer shall also compute and pay the applicant interest set forth below. 03/31/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Where a claim is timely denied, interest shall begin to accrue as of the date arbitration is commenced by the claimant, i.e., the date the claim is received by the American Arbitration Association, unless arbitration is commenced within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant. See generally, 11 NYCRR 65-3.9. Where a motor vehicle accident occurs after Apr. 5, 2002, interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

#### C. Attorney's Fees

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

As this matter was filed **after** February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 11 NYCRR 65-4.6(d).

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

12/08/2020

(Dated)

Anthony Kobets

#### **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:**  
f3ac9a2b9ee9aad4024c873443bf29be

### **Electronically Signed**

Your name: Anthony Kobets  
Signed on: 12/08/2020