

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bronx Specialty Pharmacy Inc.  
(Applicant)

- and -

Geico Insurance Company  
(Respondent)

AAA Case No.	17-19-1136-5002
Applicant's File No.	161656118
Insurer's Claim File No.	0404904670101224
NAIC No.	35882

**ARBITRATION AWARD**

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 01/08/2021  
Declared closed by the arbitrator on 01/12/2021

Victoria Tarasova, Esq. from Law Offices of Zara Javakov, Esq. P.C. participated by telephone for the Applicant

Dominic Delorantis, Esq. from Law Office of Goldstein & Flecker participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,339.20**, 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

The claimant was the 40 year-old female restrained driver of a motor vehicle that was involved in an accident on 3/19/19. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. At issue is the medical necessity of Cyclobenzaprine, Celecoxib, and Diclofenac 3% gel dispensed by Applicant on 3/30/19 that Respondent timely denied reimbursement for based on a 6/3/19 peer review by Alan P. Wolf, M.D.

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

Based on a review of the documentary evidence, this claim is decided as follows:

An applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

The claimant was the 40 year-old female restrained driver of a motor vehicle that was involved in an accident on 3/19/19. The claimant reportedly injured her neck, left shoulder, left wrist, mid back, and low back. There was no reported loss of consciousness. There were no reported lacerations or fractures. Following the accident the claimant was transported to Brooklyn Hospital where she was evaluated, treated, and released. On 3/26/19 the claimant presented to Marina Gadaborshev, D.C. of MG Chiropractic, P.C. with complaints of neck pain, left shoulder pain, thoracic pain, and lower back pain. Pain was rated 9/10. Dr. Gadaborshev supervised Outcome Assessment (OSWESTRY) Testing and the claimant was initiated on chiropractic treatment. On 3/26/19 the claimant presented to Move Free Rehab PT, P.C. and was initiated on physical therapy. On 3/27/19 the claimant presented to Hong S. Pak, M.D. with complaints of neck pain with stiffness radiating to the bilateral upper extremities with numbness/tingling in bilateral arms/forearms/hands/fingers, bilateral shoulder pain, left wrist pain, thoracic pain, lower back pain with stiffness radiating to the bilateral lower extremities with numbness/tingling in bilateral legs/feet/toes, and bilateral hip pain. Pain was rated 7-9/10. Range of motion of the cervical spine was decreased [quantified]. Examination of the lumbar spine revealed paravertebral **muscle spasm**. Range of motion of the lumbar spine was decreased [quantified] and painful. Examination of the bilateral shoulders and cervical spine revealed decreased [quantified] and painful range of motion. Examination of the thoracic spine revealed paraspinal **muscle spasm**. Muscle strength was decreased in upper and lower extremities [unspecified and unquantified]. The claimant was recommended physical therapy, chiropractic treatment, and acupuncture care. The claimant was prescribed physical therapy, Cyclobenzaprine 5mg x90, Celecoxib 200mg x60, and Diclofenac 3% 200gm. On 3/28/19 the claimant underwent range of motion and manual muscle testing (ROM/MMT). On 3/28/19 Dr. Pak prescribed durable medical equipment (DME) consisting of a cervical pillow, lumbar cushion, personal massager, TENS unit with accessories, bed board, eggcrate mattress, cervical collar, thermal moist heat pad, water circulating pump with heat pad, orthopedic car seat, and right shoulder orthosis. On 3/30/19 Bronx Specialty Pharmacy, Inc. (Applicant) dispensed the prescribed Cyclobenzaprine, Celecoxib, and Diclofenac 3% gel; which are at issue here.

The burden has shifted to the Respondent as they have raised a medical necessity defense. In order to support a lack of medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that

there was a lack of medical necessity for the services rendered." See, *Provvedere, Inc. v. Republic Western Ins. Co.*, 2014 NY Slip Op. 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 20140. Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. See generally, *Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op. 52116 (App. Term 1st Dept. 2006). As a general rule, reliance on rebuttal documentation will be weighed in light of the documentary proofs and the arguments presented at the arbitration. Moreover, the case law is clear that a provider must rebut the conclusions and determinations of the IME/peer doctor with his own facts. *Park Slope Medical and Surgical Supply, Inc. v. Travelers*, 37 Misc.3d 19 (2012).

Respondent timely denied the medications at issue based on the 6/3/19 peer review by Alan P. Wolf, M.D. After reviewing the claimant's history, treatment, and medical records, Dr. Wolf opines "based on the medical records provided, I came to the conclusion that Celecoxib, Diclofenac 3% gel and Cyclobenzaprine dispensed 03/30/19 by Bronx Specialty Pharmacy was not medically necessary. The basis for the medications was Dr. Pak's initial evaluation of 03/27/19. Physical examination findings were significant for range of motion restriction of the cervical and lumbar spine. No tenderness or **spasm** was reported. Reflexes were symmetrical. Muscle strength was decreased but not graded. Sensation was intact." Dr. Wolf continues "according to the manufacturers packaging insert for Flexeril (Cyclobenzaprine HCl) tablets, this medication is indicated "as an adjunct to rest and physical therapy for the relief of **muscle spasm** associated with acute, painful musculoskeletal conditions." There was **no evidence of muscle spasm** on physical examination, and therefore the Cyclobenzaprine was not medically necessary. Celebrex (Celecoxib) is not a first line agent of musculoskeletal pain. According to Drugs and Supplements regarding Celecoxib provided by the Mayo Clinic, "Celecoxib is a nonsteroidal anti-inflammatory drug (NSAID) used to treat mild to moderate pain and help relieve symptoms of arthritis (e.g., osteoarthritis, rheumatoid arthritis, or juvenile rheumatoid arthritis), such as inflammation, swelling, stiffness, and **joint pain**" [*Citation omitted*]. Medications must be prescribed in the appropriate clinical context which was not the case for this claimant. It would have been appropriate to treat the claimant with standard medication for musculoskeletal pain such as over the counter pain medication or NSAIDs such as Ibuprofen or Naproxen. The claimant did not have any past medical history that would preclude the claimant from taking first line agents for musculoskeletal pain." Dr. Wolf asserts "topical pain medications such as Diclofenac 3% gel are not indicated as first line agents in the treatment of musculoskeletal pain. There was no indication the claimant had trialed and failed a medication treatment regimen including over the counter pain medications or NSAIDs. There was also no indication the claimant had developed any allergy or intolerance to any medications or was unable to swallow oral medications. According to the manufacturer's packaging insert (IPG Pharmaceuticals Inc.) Issued 12/2016 for Diclofenac Sodium Gel, 3%, this medication is indicated for the topical treatment of actinic keratoses. It is not indicated for musculoskeletal injuries [*Citation omitted*]. The standard of care would dictate that a rationale for topical medication such as a pain cream or patch be given such as that the patient was unable to continue with the conventional oral medications for a particular reason such as GI pathology. There also should be an indication that the claimant had a pain syndrome that would benefit from such medication." Dr. Wolf concludes "for the reasons stated above, the

prescription for these medications would therefore be considered both excessive and unnecessary and not consistent with the definition of medical necessity as described by the AMA below." Dr. Wolf recites the AMA definition of medical necessity without specifically indicating how it was contravened here.

Where the Defendant insurer presents sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to the Plaintiff which must then present its own evidence of medical necessity (see Prince on Evidence section 3-104, 3-202). *West Tremont Medical Diagnostic PC v. Geico*, 13 Misc.3d 131, 824 N.Y.S. 2d 759.

Applicant submitted an undated peer rebuttal by Michael Tamburo, D.O. After reviewing the claimant's history, treatment, and medical records, Dr. Tamburo opines "the patient was prescribed Cyclobenzaprine as it is a muscle relaxant and used with rest, physical therapy, and other measures to relax muscles and relieve pain and discomfort caused by strains, sprains, and other muscle injuries [*Citation omitted*]. Dr. Wolf states in his peer review report that the standard of care for the prescription of topical medication is that it should be given when a patient is unable to continue with oral medication for particular reason such as GI pathology. I disagree with Dr. Wolf's conclusion that topical medications should only be used when a patient is unable to continue with oral medications since it is the treating consultant's discretion to decide which course of treatment he wants the patient to use, as long as it works for the patient's aim to reduce her complaints; does not result in any side effects and is safe for the patient to use. The patient received a combination of medications which could be prescribed together for analgesia, muscle relaxation and neurologic pain, symptoms of which the patient presented. Topical administration of medications for pain management has become increasingly more common." Dr. Tamburo continues "a study concluded that topical NSAIDs, when used for treatment of pain resulting from sprains, strains or sports or overuse-type injuries, can provide good levels of pain relief without the systematic adverse events associated with oral NSAIDs [*Citation omitted*]. Spine-care physicians and pain specialists may recommend a topical pain-reliever to help relieve the symptoms of various back and neck disorders. For example, a topical medicine may be used to treat the pain associated with osteoarthritis, rheumatoid arthritis, neck or low back strain, whiplash, muscle inflammation and spasms, and some types of nerve pain. Additionally, compound pharmacy creams have numerous benefits some of which are as follows: Applying topical drugs to the site of the injury theoretically avoids systemic absorption and subsequent side effects; Combining multiple agents into a single preparation reduces the number of tablets or capsules needed and helps patients who have trouble swallowing oral preparations; Compounds can omit ingredients that cause an allergic or other adverse reaction in the patient. Also, Advantages of topical administration of drugs: Base (cream, ointment, gel, spray) makes application easy and controllable; Onset of symptom relief is usually faster than oral preparations; Symptoms are relieved at a steady rate and relief may last longer; A smaller amount of medicine may be needed when applied in a topical form; Formulations diffuse through the skin and enter the bloodstream, initially bypassing the digestive system (called 'first pass'). Many systemic (whole body) side effects, such as irritated stomach lining, may be lessened or eliminated [*Citation omitted*]. Dr. Tamburo asserts "Dr. Wolf further states that the Celecoxib and Diclofenac gel were not medically necessary as these medications are not the First line agents in the treatment of musculoskeletal pain and

that there was no indication that the claimant had trialed and failed a medication treatment regimen including over the counter pain medications or NSAIDs...The patient was prescribed Celecoxib as it is a selective cyclo-oxygenase-2 (COX-2) inhibitor that has been fully subsidized with restriction, since June 1, 2017. Celecoxib may be considered for the treatment of patients with acute pain, arthritic conditions and an alternative to the non-selective non-steroidal anti-inflammatory drugs (NSAIDs) e.g. Naproxen and Ibuprofen. The inhibition of COX-2 prevents the production of the prostaglandins that mediate pain, inflammation and fever. Celecoxib is a type of NSAID introduced to the market as safer alternatives to aspirin or ibuprofen (Motrin, Advil). Celecoxib are easier on the stomach. Celecoxib produces significant improvements in pain and inflammation and these effects are maintained during treatment for up to 24 weeks in clinical trials. Celecoxib is a nonsteroidal anti-inflammatory drug (NSAID). It works by reducing hormones that cause inflammation and pain in the body. Celecoxib is used to treat pain or inflammation caused by many conditions such as arthritis, ankylosing spondylitis, and menstrual pain. Celecoxib is used to treat juvenile rheumatoid arthritis in children who are at least 2 years old. It is also used in the treatment of hereditary polyps in the colon [*Citation omitted*]. The patient was prescribed Diclofenac gel for relief of pain and inflammation of joints amenable to topical treatment, such as the knees. It provides excellent relief without the side effects of oral medication. Diclofenac is the first prescription topical treatment for pain that has been approved by the U.S. Food and Drug Administration. Diclofenac Gel is a nonsteroidal anti-inflammatory drug or NSAID in topical form. Diclofenac Gel delivers effective pain relief and has a favorable safety profile. Diclofenac Gel receives US Regulatory Approval as the First Approved Topical Prescription treatment for pain. Clinical trials have demonstrated Diclofenac Gel to be highly effective in treating pain. Diclofenac Gel delivers effective pain relief with a favorable safety profile as its systemic absorption is 94% less than the comparable oral Diclofenac treatment [*Citation omitted*]. Topical NSAIDs are considered safe as placebo in the treatment of acute pain and therefore can be safely used by patients who are at a risk of developing complications associated with oral NSAIDs. Blood concentrations of NSAIDs after applying topical products are typically less than 5% of those reached by using oral NSAIDs. Approximately six or seven patients out of ten will experience successful pain control with topical NSAIDs [*Citation omitted*]. Dr. Tamburo concludes "finally, Dr. Wolf cites to the AMA's definition of medical necessity to support his contention. However, I believe that this very definition of medical necessity was adhered to and there was no deviation from any medical standards by prescribing the compounded medications for this patient. I would also like to mention that Dr. Wolf fails to explain as to how the prescribed compounded medications were not medically necessary and how its prescription deviated from the definition of medical necessity listed by him."

After careful consideration of both parties' evidence, I find that Applicant successfully refuted the peer reviewer's objections and demonstrated the medical necessity of the Cyclobenzaprine, Celecoxib, and Diclofenac 3% gel. I therefore find in favor of Applicant. Regarding the prescription of Cyclobenzaprine Dr. Wolf stated there "was no evidence of muscle spasm on physical examination" when Dr. Pak's 3/27/19 lumbar and thoracic spine examination findings included muscle spasm. Dr. Wolf acknowledged

that Celecoxib could help relieve symptoms of joint pain but did not adequately explain why it should not have been prescribed for that purpose here. As to the Diclofenac 3% gel I find the peer rebuttal by Dr. Tamburo to be more persuasive.

It is noted that Respondent submitted a Support Claim Services, Inc. Explanation of Benefits (EOB) which reduced the amount allowed for the Diclofenac 3% gel. As it changed the quantity billed (without explanation) from 200 units to 60 units I find this EOB to be insufficient to support this reduction. The only explanation contained in the EOB to support the reduction was a general one (*"In accordance to New York No-Fault Law, Regulation 68, the maximum reimbursement for generic prescription drugs or medicines using Medi-Span 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."*).

Accordingly, Applicant is awarded \$2,339.20.

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
	<b>Bronx Specialty Pharmacy Inc.</b>	<b>03/30/19 - 03/30/19</b>	<b>\$2,339.20</b>	<b>Awarded: \$2,339.20</b>
<b>Total</b>			<b>\$2,339.20</b>	<b>Awarded: \$2,339.20</b>

- B. The insurer shall also compute and pay the applicant interest set forth below. 07/25/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from 7/25/19 (the date that arbitration was requested) until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty day month.

C. Attorney's Fees

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

Pursuant to 11 NYCRR §65-4.6 (d), ". . . the attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon for each applicant for arbitration or court proceeding, subject to a maximum fee of \$1,360."

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

02/08/2021  
(Dated)

Charles Blattberg

### **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:**  
454fe431208e327081c54482b4426fe5

### **Electronically Signed**

Your name: Charles Blattberg  
Signed on: 02/08/2021