

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

M & D Elite Pharmacy LLC
(Applicant)

- and -

Nationwide Affinity Insurance Company Of
America
(Respondent)

AAA Case No. 17-19-1144-7966

Applicant's File No. ZJ161658481

Insurer's Claim File No. 406396-G1

NAIC No. 26093

ARBITRATION AWARD

I, Lester Hill, 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 04/30/2021
Declared closed by the arbitrator on 04/30/2021

Samantha McIsaac from Law Offices of Zara Javakov, Esq. P.C. participated in person for the **Applicant**

Brian Kaufman from Hollander Legal Group PC participated in person for the **Respondent**

2. The amount claimed in the Arbitration Request, **\$ 1,892.20**, 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

Was the diclofenac gel provided to the EIP on April 24, 2019 medically unnecessary based upon the peer report by Dr. John Leppard III? The 22-year-old EIP was involved in a motor vehicle on January 2, 2019 and received treatment for injuries to the neck and low back.

4. Findings, Conclusions, and Basis Therefor

At issue is whether the diclofenac gel provided to the EIP on April 24, 2019 was medically unnecessary.

The basis of the respondent's timely denial is the peer report by Dr. John Leppard III.

I have reviewed the documents contained in the electronic case folder as of April 30, 2021. This decision is rendered based upon those documents and the parties arguments at the hearing conducted on April 30, 2021.

An Applicant establishes a prima facie showing of its entitlement to No-Fault benefits as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and the payment of No-Fault benefits were overdue. *Westchester Medical Center v. Lincoln General Ins. Co.*, 60 A.D. 3d 1045, 877 N.Y.S.2d 340 (2d Dept. 2009); *Westchester Medical Center v. Clarendon National Ins. Co.*, 57 A.D. 3d 659, 868 N.Y.S. 2d 759 (2d Dept. 2008); *New York and Presbyterian Hosp. v. Allstate Ins. Co.*, 31 A.D. 3d 512, 818 N.Y.S. 2d 583 (2d Dept. 2006); *LMK Psychological Services, P.C. v. Liberty Mut. Ins. Co.*, 30 A.D. 3d 727, 816 N.Y.S. 2d 587 (3d Dept. 2006); *Nyack Hospital v. Metropolitan Property & Casualty Insurance Co.*, 16 A.D.3d 564, 791 N.Y.S. 2d 658 (2d Dept. 2005). The submission of Respondent's NF-10 denial of claim form established that the insurer received the claim referenced therein as having been submitted by the provider and that the insured did not pay the claim. *Lopes v. Liberty Mutual Ins. Co.*, 24 Misc.3d 127 (A), 2009 N.Y. Slip Op. 51279(U), 2009 WL 1799812 (App. Term 2d, 11th & 13th Dists. Jan. 26, 2009).

New York's Comprehensive Motor Vehicle Insurance Reparation Act requires an insurance carrier to reimburse an injured party (or his or her assignee) for all "reasonable and necessary expenses" and "medical expenses" arising from the use and operation of the insured vehicle.

Lack of medical necessity is a valid defense to an action to recover No-Fault benefits. *Countrywide Ins. Co v. 563 Grand Med.*, P.C. 50 A.D. 3d 313 (1st Dept. 2008); *A.B. Med. Servs., PLLC v. Liberty Mut. Ins Co.*, 39 A.D. 3d 779 (2d Dept. 2007), if raised in a denial that is (1) timely, *Presbyterian Hosp. in the City of New York v. Maryland Casualty Ins. Co.*, 226 A.D. 2d 613 (2d Dept. 1996), (2) includes the information called for in the prescribed denial of claim form, 11 NYCRR Section 65-3.4 (11); *Nyack Hosp. v. Metropolitan Prop. & Cas. Ins. Co.*, 16 A.D. 3d 564 (2d Dept. 2005); *Nyack Hosp. v. State Farm Mut. Auto Ins. Co.*, 2004 WL 2394038, 2004 NY Slip Op 07663 (2d Dept. Oct.25 2004), and (3) promptly apprises the Applicant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated, *General Accident Ins. Group v. Cirucci*, 46 N.Y. 2d 862, 414 N.Y.S. 2d 512 (1979); *New York University Hosp. Rusk Ins. V. Hartford Acc. & Indem. Co.*, 32 A.D. 3d 458, 2006 NY Slip Op 06223 (2d Dept. 2006).

An insurance carrier must establish a detailed factual basis and a sufficient medical rationale for its position that the medical service was not medically necessary. *Vladimir Zlatnick, M.D. P.C. v. Travelers Indem. Co.*, 2006 NY Slip Op 50963(U) (App Term 1st Dept. 2006).

The EIP was involved in a motor vehicle accident on January 2, 2019. The EIP was treated at the emergency room of Good Samaritan Hospital on the day the accident. Thereafter, the EIP underwent a course of treatment for injury to the neck and low back. The EIP underwent electrodiagnostic testing of the upper and lower extremities on March 25, 2019 which reported normal studies. The EIP underwent an MRI of the lumbar spine March 30, 2019 which reported bulges from L4 through S1. The EIP underwent an MRI of the cervical spine on April 6, 2019 which reported disc herniation some C4 through C6. The EIP presented to Physician Assistant Igbokwe on April 17, 2019 with complaints of pain in the neck and low back. The examination reported positive facet loading for the cervical spine. The EIP was prescribed 3% diclofenac gel which was provided to the EIP on April 24, 2019.

Dr. Leppard states that the diclofenac gel was medically unnecessary. He states that the standard of care for soft tissue injury is conservative treatment and anti-inflammatory oral medication. He states that that diclofenac is nonsteroidal anti-inflammatory and is recognized for the treatment of osteoarthritis, per the Mayo Clinic. He states that diclofenac gel at 3% is appropriate for the treatment of actinic keratitis, which was not the EIP's condition and that the prescription for 3% diclofenac gel is medically unnecessary.

Dr. Marc Gladstein submitted a rebuttal asserting that the diclofenac gel was medically necessary. He states that diclofenac topical medication is approved by the FDA for the treatment of osteoarthritis. He states that diclofenac gel has advantages over oral medication by targeting the areas of pain and not subjecting the body to systemic use of medication.

I find that the respondent has demonstrated by sufficient factual basis and medical rationale that the 3% diclofenac gel was medically unnecessary. It is true as referenced in the rebuttal that diclofenac gel is now FDA approved. However, that is 1% diclofenac and marketed under the name Voltaren. I find the peer report persuasive that there is no medical literature in support of the use of 3% solution for soft tissue injury and that the only use for 3% solution is for the treatment of actinic keratitis.

Accordingly, applicant's claim is denied in its entirety.

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

05/02/2021

(Dated)

Lester Hill

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:
cd42f97ac642adeca1c1d390a5a6ddac

Electronically Signed

Your name: Lester Hill
Signed on: 05/02/2021