

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

SMK Pharmacy Corp d/b/a Nature's First  
LTC & Compounding  
(Applicant)

- and -

Geico Insurance Company  
(Respondent)

AAA Case No.	17-19-1142-6641
Applicant's File No.	00047541
Insurer's Claim File No.	0479268510101053
NAIC No.	35882

### **ARBITRATION AWARD**

I, Debbie Thomas, 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 07/13/2021  
Declared closed by the arbitrator on 07/13/2021

Justin Rosenbaum from Drachman Katz, LLP participated in person for the Applicant

Michael Bluman from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,076.66**, 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

Applicant seeks reimbursement in the amount of \$1,076.66 for prescription medication provided on July 9, 2019 to Assignor, C.S., a 59-year-old male pedestrian who was struck by a motor vehicle on May 23, 2018. Respondent denied the claim based upon the November 5, 2018 Independent Medical Examination ("IME") of Richard D. Semble, M.D., which determined further treatment was not medically necessary as of November 25, 2018. The issues presented are whether the treatment provided after the IME cut off was medically necessary; and whether Respondent has established its fee schedule defense.

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

The within award is based upon this arbitrator's review of the record as well as oral argument at the time of the hearing of this matter.

Under Sec. 5102 of the New York Insurance Law (McKinney 1985), No-Fault first party benefits are reimbursement for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle.

It is well settled that a healthcare provider establishes its *prima facie* 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 that payment of No-Fault benefits were overdue. *Westchester Medical Center v. Lincoln General Insurance Company*, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2 Dept. 2009); *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). Respondent's denial(s) indicating receipt of the proof of claim shows that Applicant mailed the proof of claim form(s) to the Respondent (*see, Ultra Diagnostic Imaging v. Liberty Mutual Insurance Co.*, 9 Misc.3d 97). The evidence is sufficient to make out a *prima facie* case of entitlement to recovery of Applicant's bill.

The burden then shifted to the insurer to come forward with sufficient evidence to rebut the presumption of medical necessity which attached to the provider's claim forms. *See, West Tremont Med. Diagnostic, PC v. Geico Ins. Co.*, 13 Misc.3d 131(A) (N.Y. App. Term 2006).

Neither the Insurance Law nor the Regulations define "medical necessity." A review of case law reveals that most courts have evaluated medical necessity based on whether or not services provided were in accord with the generally accepted medical practices. Therefore, to prove that the services were not medically necessary, at a minimum, lack of necessity must be supported by competent evidence such as an IME or peer review. An IME report must set forth a factual basis and medical rationale for the conclusion that that further services are not medically necessary. *E.g., Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance*, 20 Misc.3d 144(A), 873 N.Y.S.2d 238, 2008 N.Y. Slip Op. 51863(U), 2008 WL 4222084 (App. Term 2d & 11<sup>th</sup> Dists. Sept. 3, 2008). Where the insurer presents sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to the plaintiff which must present its own evidence of medical necessity (*see West Tremont Medical Diagnostic, P.C. v Geico Ins. Co.*, 13 Misc3d 131(a)).

In support of its contention that further treatment was not medically necessary, Respondent relies upon the IME report of Richard D. Semble, M.D., referencing the orthopedic IME performed on November 5, 2018.

Assignor reported to Dr. Semble that he was a pedestrian who was struck by the vehicle on May 23, 2018. He lost consciousness for 15 minutes. He was dazed or confused. Following the accident, he was taken via ambulance to Lincoln Hospital for assessment. He underwent routine tests and was diagnosed with a left knee non-displaced subchondral fracture the posterior aspect of the lateral tibial plateau. He was admitted, treated and discharged after 3 days. Once released from the hospital, Assignor came under the care of various physicians including Dr. Goldenberg. He was given a prescription for a TENS machine, neck brace, back brace, shoulder strap, stretcher, knee brace and a cane. He had MRIs of the neck, lower back, right shoulder, and right hip and EMG/NCV tests. Assignor has been involved in physical therapy including chiropractic care, and acupuncture, which he has been attending three to four times per week. Assignor reported that he requires the use of a TENS machine, neck brace, back brace, shoulder strap, stretcher, knee brace, and a cane. Dr. Semble noted Assignor's current complaints of pain in the neck, lower back, bilateral shoulder and right arm.

Dr. Semble notes that Assignor walked into the examining room with a normal gait and stance. No cane or crutch was used for support. He was not wearing any brace on the back or neck. There was no limp. Heel/Toe walking was normal. No footdrop was present. He was able to get on the exam table independently.

Inspection of the spine demonstrated normal alignment. No deformity was noted and there was no swelling or lesions on the spinal column.

Cervical Spine examination revealed no surgical scars were present. Palpation along the spine revealed mild tenderness over the right paraspinal muscles. No spasm was noted in the paraspinal muscles.

Active range of motion revealed:

Flexion 50/50 degrees

Extension 60/60 degrees

Right and left lateral flexion 45/45 degrees each way

Right and left rotation 80/80 degrees each way

These motions were completed without pain

Assignor was able to shrug the shoulders against resistance. Spurling's test was negative for radiculopathy.

Motor Testing of the Upper Extremity was 5/5 in the deltoids, biceps, triceps, wrist extensors, wrist flexors, finger abductors, and finger adduction bilaterally.

Sensation testing demonstrated normal sensation to pinwheel testing from the C-5 through T-2 dermatomes bilaterally.

Reflex testing was +2/+2 in the biceps, triceps, and brachioradialis bilaterally,

Lumbar Spine examination revealed no surgical scars were present. Palpation along the spine revealed no tenderness over the midline or over the bilateral paraspinal muscles. No spasm was noted in the paraspinal muscles.

Active range of motion revealed:

Flexion 60/60 degrees

Extension 25/25 degrees

Right and left lateral bending 25/25 degrees each way

These motions were completed without pain.

Kemp's test was negative.

Motor testing of the lower extremities was 5/5/ in the hip flexors, quadriceps, hamstrings, ankle dorsiflexors, and ankle plantar flexors bilaterally.

Straight leg raise in the supine position was 80 degrees/80 degrees bilaterally.

Straight leg raise in the sitting position was 80 degrees/80 degrees bilaterally.

Reflex testing of the knees and ankles was +2/+2 bilaterally.

Right Shoulder examination revealed no surgical scars were present. Palpation revealed no tenderness in the AC joint. Inspection of the joint did not reveal any swelling, discoloration, or deformity. There were no skin lesions.

No winging of the scapula was present. No atrophy of the deltoid muscle or trapezius muscle was present. Palpation of the acromioclavicular joint and glenohumeral joint was non-tender. Muscle bulk appeared normal.

Active range of motion revealed:

Elevation 180/180 degrees

Abduction 180/180 degrees

Posterior Extension 40/40 degrees

Adduction 30/30 degrees

External rotation 90/90 degrees

Internal rotation 80/80 degrees

These motions were completed without pain.

Motor testing was 5/5 in the deltoid, supraspinatus, infraspinatus, and subscapularis bilaterally.

Impingement sign was negative. Hawkins test was negative. Apprehension test was negative. Speed's test was negative.

Left Shoulder examination revealed no surgical scars were present. Palpation revealed no tenderness in the AC joint. Inspection of the joint did not reveal any swelling, discoloration, or deformity. There were no skin lesions.

No winging of the scapula was present. No atrophy of the deltoid muscle or trapezius muscle was present. Palpation of the acromioclavicular joint and glenohumeral joint was non-tender. Muscle bulk appeared normal.

Active range of motion revealed:

Elevation 180/180 degrees

Abduction 180/180 degrees

Posterior Extension 40/40 degrees

Adduction 30/30 degrees

External rotation 90/90 degrees

Internal rotation 80/80 degrees

These motions were completed without pain.

Motor testing was 5/5 in the deltoid, supraspinatus, infraspinatus, and subscapularis bilaterally.

Impingement sign was negative. Hawkins test was negative. Apprehension test was negative. Speed's test was negative.

Left Knee examination: Inspection of the joint did not reveal any swelling, discoloration, or deformity. There were no skin lesions.

There is a complaint of tenderness upon palpation in the medial joint line.

Palpation of the knee did not demonstrate any pain along medial, lateral or patellofemoral joints. The alignment of the knee was normal. There was no varus or valgus deformity.

Active range of motion revealed:

Flexion 150/150 degrees

Extension 0/0 degrees

No pain was experienced with these motions. There is no crepitus along the joints with range of motion testing. The patella tendon is palpable without defects. No swelling of the joint is present. No popliteal cyst is present. There is no atrophy of the quadriceps muscle.

McMurray's testing was negative. Anterior Drawer was negative. Lachman's testing was negative. Pivot Shift was negative.

Dr. Semble diagnosed cervical spine sprain, resolved; lumbar spine sprain, resolved; bilateral shoulder sprain/strain, resolved.; and left knee contusion/ nondisplaced subchondral fracture the posterior aspect of the lateral tibial plateau, resolved and clinically healed. Dr. Semble notes that there were no objective clinical findings that correlate with the reported imaging/diagnostic studies or Assignor's subjective complaints. Based on his examination of Assignor, Dr. Semble concluded that there was no need for treatment, follow-up, surgery, diagnostic testing, physical therapy, massage therapy, household help, medical supplies, or transportation services from an orthopedic standpoint.

Applicant has not submitted a formal rebuttal to the IME report of Dr. Semble. Instead, Applicant relies on the medical records submitted. Counsel for Applicant notes multiple follow-up evaluations dated November 7, 2018; January 2, 2019; January 30, 2019; and February 6, 2019. Procedure reports dated November 7, 2018; January 3, 2019 and January 30, 2019 indicate that cervical/lumbar trigger point injections were performed.

The November 7, 2018 follow-up evaluation noted Assignor's complaints of neck, mid back, lower back, left shoulder, right hip, left knee, and left leg pain. Assignor was noted to have an antalgic gait. Examination of the cervical spine revealed moderate tenderness to palpation of the cervical paraspinal musculature on the right with muscle spasm. Spurling's test was positive on the left. Examination of the lumbar spine revealed moderate tenderness on palpation of the lumbar paraspinal musculature bilaterally with muscle spasm. Lasegue straight leg raise test was positive on the right. Bragard's test was positive on the right. Assignor was able to heel and toe walk with difficulty due to low back pain

Range of motion of the cervical spine was restricted:

Flexion 20 degrees (50 degrees being normal)

Extension 20 degrees (60 degrees being normal)

Right rotation 30 degrees (80 degrees being normal)

Left rotation 40 degrees (80 degrees being normal)

Right lateral flexion 15 degrees (45 degrees being normal)

Left lateral flexion 20 degrees (45 degrees being normal)

Range of motion of the lumbar spine was restricted:

Flexion 40 degrees (90 degrees being normal)

Extension 15 degrees (25 degrees being normal)

Right rotation 10 degrees (30 degrees being normal)

Left rotation 15 degrees (30 degrees being normal)

Right lateral flexion 10 degrees (25 degrees being normal)

Left lateral flexion 15 degrees (25 degrees being normal)

There was pain at extremes of motion observed and reported during range of motion testing of the cervical and lumbar spine.

Muscle strength of the upper extremities was 5/5 bilaterally. Muscle strength of the lower extremities was found to be deficient at 4/5 bilaterally. Sensory examination of the upper extremities was found to be deficient in the C4 and C5 distribution on the right and normal on the left. Sensory examination of the lower extremities was found to be deficient in the L4, L5 and S1 distribution on the left and normal on the right. Deep tendon reflexes of the upper extremities in the biceps, triceps and brachioradialis were 1+ bilaterally. Patellar and Achilles reflexes were 1+ bilaterally.

Cervical trigger point injections were performed by Leonid Kol, N.P. November 7, 2018. It was noted that Assignor continued to complain of pain, muscle spasm, and restricted range of motion in the cervical spine. On palpation, hyperirritability in a taut band of skeletal muscle was appreciated. When the areas were compressed, referred pain and tenderness were reported. Assignor experienced minimal and short-lived relief with conservative care. Trigger point injections were indicated to decrease pain, increase functionality and improve quality of life. Decreased pain was reported following the injections.

Counsel also notes that Assignor reported to Dr. Semble that he was taking Tylenol, Flexeril, and Motrin, which could have affected the results of the IME.

After careful consideration of the documents submitted and the parties' oral arguments at the hearing, I find in favor of Applicant. I find that Applicant has set forth a more credible and persuasive argument regarding the medical necessity for continuing treatment. I find the medical records submitted by Applicant demonstrate sufficient evidence of objective measures of injury to rebut the IME of Semble and establish medical necessity for continued treatment. In light of Assignor's continued subjective complaints and the positive objective findings noted in the contemporaneous examination and procedure reports, I am not persuaded that Assignor's injuries were

resolved as of the time of the IME. Additionally, I note that Dr. Semble's IME did not specifically cut off pain management treatment or prescription medication. Accordingly, an award will be entered in favor of Applicant.

### **Fee Schedule**

As regards the appropriate fee for the services provided by Applicant, Respondent maintains the charges in dispute are in excess of or not in accordance with the applicable fee schedule.

Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses (*see Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co.*, 2006 NY Slip 26240, 12 Misc.3d 172, 8222 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006)). If an insurer fails to demonstrate by competent evidentiary proof that a medical provider billed in excess of the appropriate fee schedule, its fee schedule defense cannot be sustained. *Continental Medical PC v. Travelers Indemnity Co.*, 11 Misc.3d 145A (App. Term, 1<sup>st</sup> Dept 2006); *Robert Physical Therapy, P.C. v. State Farm Mut. Auto. Ins. Co.*, 13 Misc. 3d 172 (Civ Ct Kings Co 2006). An insurer's unilateral decision to change an applicant's CPT codes, deny the claim, or pay reduced fees for disputed medical services is ineffectual when unsupported by a peer review report or by other proof setting forth a sufficiently detailed factual basis and medical rationale for the code changes, denials, and fee reductions. *Amaze Medical Supply v. Eagle Insurance Company*, 2 Misc.3d 128(A) (App Term 2d and 11<sup>th</sup> Jud Dist 2003). However, an arbitrator may take judicial notice of the fee schedule. *See, Kingsbrook Jewish Med. Ctr v. Allstate Ins. Co.*, 61 AD3d 13 (2d Dept. 2009).

With regard to the Tylenol, Diclofenac, and Lidocaine, counsel for Respondent contends that these are over-the-counter drugs that are not reimbursable under No-Fault. Respondent submits multiple arbitration awards holding that N.Y Ins. Law § 5102 (McKinney 2000) limits reimbursement under No-Fault to prescription drugs only. Over-the-counter drugs and products which may be purchased without prescription are not covered expenses, thus, reimbursement for the Tylenol, Diclofenac, and Lidocaine should be denied.

I find that Respondent has failed to establish that the Tylenol, Diclofenac, and Lidocaine are available without a prescription in the strength prescribed. Although Respondent submits evidence that Diclofenac Gel 1% is available over the counter, here, Assignor was supplied Diclofenac Sodium Transdermal Solution 1.5 %. I note that the arbitration awards submitted by Respondent are with regard to Terocin patches, which are not at issue here. The burden is on Respondent, in the first instance, to establish that the amounts billed by Applicant for the disputed services were excessive. I find that Respondent has failed to meet its burden that these medications are not reimbursable under No-Fault.

Respondent also submits an Explanation of Benefits ("EOB") which indicates that the allowed amount for the medications provided on July 9, 2019 is \$1,073.19.

For the Diclofenac Sodium Transdermal Solution 1.5 %, Lidocaine External Ointment 5 %, and Cyclobenzaprine HCl Oral Tablet 10 MG, Respondent's explanation for its reduction is:

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.

For the Tylenol Arthritis Acetaminophen, 650 MG Caplets, Respondents explanation for its reduction is:

In accordance to New York No-Fault Law, Regulation 68, the maximum reimbursement for brand-name prescription drugs or medicines using Redbook 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.

I find Respondent's EOB sufficient to make a *prima facie* showing that the amounts charged by Applicant were in excess of the fee schedule. The EOR establishes that the insurer reviewed the charges and reduced in accordance with established fees.

Once the insurer makes a *prima facie* showing that the amounts charged by a provider were in excess of the fee schedule, the burden shifts to the provider to show that the charges involved a different interpretation of such schedule or an inadvertent miscalculation or error. *Cornell Medical, P.C. v. Mercury Casualty Co.*, 24 Misc. 3d 58, 884 N.Y.S.3d 558 (App. Term 2d, 11th & 13th Dists. 2009).

Applicant has failed to submit any evidence to rebut Respondent's EOR. Accordingly, Applicant is awarded \$1,073.19.

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
	SMK Pharmacy Corp d/b/a Nature's First LTC & Compounding	07/09/19 - 07/09/19	\$1,076.66	Awarded: \$1,073.19
<b>Total</b>			<b>\$1,076.66</b>	<b>Awarded: \$1,073.19</b>

B. The insurer shall also compute and pay the applicant interest set forth below. 09/24/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

In accordance with 11 NYCRR 65-3.9(c) interest shall be paid on the claim awarded in the amount of \$1,073.19 from September 24, 2019, the date the arbitration was commenced.

C. Attorney's Fees

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

In accordance with 11 NYCRR 65-4.6(d) the insurer shall pay Applicant an attorney's fee on the claim awarded in the amount of \$1,073.19.

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

07/20/2021  
(Dated)

Debbie Thomas

#### **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:**  
e7951e8799c60598a0ef277630d60839

**Electronically Signed**

Your name: Debbie Thomas  
Signed on: 07/20/2021