

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Affinity Rx  
(Applicant)

- and -

St. Paul Travelers Insurance Co.  
(Respondent)

AAA Case No. 17-20-1160-9308

Applicant's File No. N/A

Insurer's Claim File No. IAN8560

NAIC No. 38130

**ARBITRATION AWARD**

I, Alise Schor, 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 (YA)

1. Hearing(s) held on 11/24/2021  
Declared closed by the arbitrator on 11/24/2021

Jeffrey Datikashvili, Esq. from The Sigalov Firm PLLC participated in person for the Applicant

Shana Kleinman, Esq. from Law Offices of Tina Newsome-Lee participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 4,599.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the hearing, the amount in dispute was amended to **\$3,671.94** to comport with the Fee Schedule. This resolved Respondent's Fee Schedule dispute.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that Applicant established a prima facie case of entitlement to No-Fault compensation with respect to its bill. They further stipulated that Respondent's Form NF-10 denial of claim forms were timely issued, i.e., within the 30-day deadline prescribed by Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1). Additionally, the parties stipulated that the only issue for this Arbitrator to determine is the medical necessity of the pharmaceuticals.

### 3. Summary of Issues in Dispute

Whether Applicant is entitled to reimbursement for pharmaceuticals provided to Assignor (YA), a 28-year-old female, on September 2, 2019, October 2, 2019 and October 11, 2019, which were denied by Respondent based on the findings reflected in the Peer Review Report of Dr. Isandr Dumesh, MD.

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

This arbitration stems from Lidocaine ointment provided to Assignor in connection with injuries she sustained as a passenger in a motor vehicle accident on July 31, 2019. Respondent denied Applicant's bills based upon the Peer Review Report of Dr. Isandr Dumesh which found that there was no medical necessity for the pharmaceuticals. Applicant submits a Rebuttal by Cathy Delorme-Pagan, M.D.

#### **Respondent's Peer Review Report:**

Respondent denied the topical medication on the basis of a lack of medical necessity as determined by Dr. Dumesh in his December 3, 2019 Peer Review Report. Dr. Dumesh lists the 17 records he reviewed. He states that the Assignor sustained acute musculo-skeletal injuries and that the standard of care for these types of injuries would be oral NSAID or Acetaminophen, possibly supplemented by a muscle relaxer. Any additional medication would be necessary if it potentially enhances the treatment (i.e., if the claimant is unable to tolerate the standard medication protocol described above).

Dr. Dumesh cites to an article: "Lumbosacral Spine Sprain/Strain Injuries" by Andrea Radebold, MD, published on e-medicine.medscape.com and updated on 03/11/2015 which states that "The goal of pharmacotherapy is to reduce patient morbidity and prevent complications. In acute injuries, pharmacotherapy should usually not exceed 6 weeks of treatment.... In the acute phase, muscle relaxants (IM injection or tablets) help to treat muscle spasms and facilitate light physical therapy. However, muscle relaxants have not been shown to shorten or alter the course of the injury process... NSAIDs are generally used to treat muscle pain in the acute and maintenance phases of treatment...". Dr. Dumesh opines that the Assignor sustained musculo-skeletal injuries to the spine and Lidocaine is not among the first-line-of therapy medications for the treatment of musculoskeletal injuries. Lidocaine would be appropriate in cases where the patient cannot tolerate standard pain medications, such as NSAID and/or Acetaminophen and muscle relaxants.

Dr. Dumesh points out that the Assignor was started on oral analgesic - Tylenol, following the initial evaluation and the Lidocaine ointment was prescribed following the

same initial evaluation. There was no evidence that the claimant failed treatment with oral medications (Tylenol, NSAIDs and/or muscle relaxants) and required an alternative therapy with a topical medication.

### **Rebuttal:**

In her March 9, 2020 Rebuttal, Dr. Delorme-Pagan, M.D, the prescribing doctor discusses her initial evaluation of the Assignor on August 21, 2019 and puts forth that Lidocaine 5% ointment with refills was a necessary part of treatment for the injuries the Assignor sustained in the accident. She states, "my choice of the first line of therapy or standard of care was a recommendation of physical therapy and medication. (Assignor) required some treatment for temporary relief from pain with the course of conservative treatment for the treatment of the aforementioned issues. Hence, the Lidocaine 5% ointment was prescribed." Dr. Delorme-Pagan also states that, "the patient had neuropathic pain. In this case, the patient had pain in the cervical spine, thoracic spine and lumbar spine, which was caused by the motor vehicle accident. Spinal cord injury can lead to neuropathic pain. Additionally, a patient cannot take oral medicines any time within 8 hours however the topical ointment can be used any time when required. As noted in the records, this patient was having pain at the multiple body parts. In such cases, there are instances when the patient gets sudden and severe episodes of pain at a particular injured area which requires urgent medical treatment. At such time, topical ointment plays an important role in providing symptomatic pain relief at a targeted body part such as the neck, lower back, and bilateral knees in this case. Therefore, it is my opinion; the purpose of the prescription of Lidocaine 5% ointment is different."

Dr. Delorme-Pagan concludes that the Lidocaine was prescribed with the goal to reduce pain and increase the mobility of affected muscles and to bring the patient to the pre-accident state.

### **Addendum:**

In the Addendum dated May 26, 2020, Dr. Dumesh addresses Dr. Delorme-Pagan's Rebuttal. He again points out that Tylenol was recommended at the initial evaluation and the Lidocaine was prescribed. Dr. Dumesh points out that the Rebuttal "did not provide comprehensive arguments as to why the claimant needed the above topical medication in the setting of ongoing physical therapy regimen, and how their use would have changed the treatment approach or outcome in this particular case." Dr. Dumesh reiterates his opinion that the Lidocaine Ointment was not medically necessary.

### **Findings:**

As it was stipulated that Applicant established its *prima facie* case, the burden shifts to Respondent to establish lack of medical necessity for the Lidocaine ointment at issue, See Citywide Social Work & Psychological Services, PLLC v. Allstate Ins. Co., 8 Misc 3d 1025 A (2005). A denial premised on a lack of medical necessity must be supported by competent evidence such as an independent medical examination, a peer review or other proof which sets forth a factual basis and a medical rationale for denying the claim. Healing Hands Chiropractic, P.C., v. Nationwide Assur. Co., 5 Misc., 3d 975, 787

N.Y.S. 2d 645 (Civ. Ct., New York County, 2004); King's Med. Supply Inc. v. Country Wide Ins. Co., 5 Misc. 3d 767, 783 N.Y.S. 2d 448.

I find that the Peer Review Report is sufficient to meet Respondent's burden of proof of lack of medical necessity. The burden therefore shifts back to Applicant to present competent medical proof as to the medical necessity of the Lidocaine ointment by a preponderance of the credible evidence. West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip Op. 51871(U) at 2 (App. Term 2d & 11th Dists. Sept. 29, 2006). A. Khodadadi Radiology, P.C. v. N.Y. Central Fire Mutual Insurance Company, 16 Misc. 3d 131[A], 841 N.Y.S.2d 824, 2007 WL 1989432 (App. Term 2d & 11th Dists. 7/3/08). Ultimately, the burden of proof rests with the Applicant (See Insurance Law Section 5102).

To meet that burden, Applicant submits a Rebuttal by the prescribing provider. Although Dr. Delorme-Pagan indicates the Assignor's complaints and clinical findings, I find she fails to persuasively correlate those findings with the medical necessity of the Lidocaine ointment. My review of the medical fails to reveal any indication that the Assignor was taking over the counter medication prior to the initial evaluation with Dr. Delorme-Pagan on August 21, 2019. In fact, in the report from that initial evaluation, Dr. Delorme-Pagan indicates that the Assignor was not taking any medication at that time.

I find that the medical records support Dr. Dumesh's opinion and I am persuaded by the Peer Reviewer's conclusions. Although Dr. Delorme-Pagan is the treating providing, I find her Rebuttal to be conclusory and that she prescribed the Lidocaine based upon a hypothetical, i.e., "there are instances when the patient gets sudden and severe episodes of pain at a particular injured area which requires urgent medical treatment." The Rebuttal has not convinced me that the Lidocaine ointment was medically necessary. I find the views expressed by the Peer Reviewer to be more compelling.

Accordingly, in light of the foregoing, based on the arguments of the parties' representatives, and after thorough review and consideration of all submissions, Applicant's claim is denied. This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator. Any additional issues raised in the hearing record are held to be moot and/or waived insofar as they were 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 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, Alise Schor, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

12/09/2021  
(Dated)

Alise Schor

#### **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:**

769c4d8adc6cb6998ac53d01f857ff38

### **Electronically Signed**

Your name: Alise Schor  
Signed on: 12/09/2021