

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Top Choice Pharmacy Corp
(Applicant)

- and -

Integon National Insurance Company
(Respondent)

AAA Case No. 17-20-1186-3677

Applicant's File No. 59229

Insurer's Claim File No. 9UINY07120-02

NAIC No. 29742

ARBITRATION AWARD

I, Susan Mandiberg, 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: The EIP

1. Hearing(s) held on 12/09/2021
Declared closed by the arbitrator on 12/09/2021

Robert Cippitelli, Esq. from Law Offices of Eitan Dagan (Elmhurst) participated in person for the Applicant

Usman Nawaz, Esq. from Law Offices of Moira A. Doherty 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

The 53-year-old male EIP was a driver of a vehicle who was involved in the instant motor vehicle accident on 7/23/20. Thereafter, the EIP sought medical treatment and was prescribed the instant medication, consisting of diclofenac gel, which was dispensed to the EIP on 9/1/20. Respondent denied reimbursement in full based upon a peer review generated by Jason Cohen, M.D. on 10/8/20. The issue presented is whether the medication prescribed/dispensed was medically necessary vis-à-vis the peer review upon which Respondent's denial is premised. No Fee Schedule issues have been raised with regard to this billing.

4. Findings, Conclusions, and Basis Therefor

This case involves billing for prescription medication consisting of diclofenac gel, that was dispensed to the EIP on 9/1/20 following a motor vehicle accident that took place on 7/23/20. Respondent timely denied the billing for the medication based upon a peer review performed by Jason Cohen, M.D. on 10/8/20. The case was decided after due consideration of the arguments of the parties via Zoom and after a thorough review of the submissions and the documents contained in the electronic case folder maintained by the American Arbitration Association, which are incorporated by reference herein.

Pursuant to 11 NYCRR 65-4 (Regulation 68-D), §65-4.5, an Arbitrator shall be the judge of the relevance and materiality of the evidence offered...The Arbitrator may question any witness or party and independently raise any issue that the Arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations. In addition, Master Arbitrator Peter J. Merani, in the case of Sports Medicine & Orthopedic Rehabilitation a/a/o "I.B." v. Country-Wide Insurance Co., AAA Case No. 17-R-991-14272-3, stated, in relevant part, that "the Arbitrator below is the trier of facts and must evaluate and weigh the evidence presented at the hearing in arrive at his decision. The Arbitrator, in weighing the evidence, has broad powers and discretion in determining what evidence is relevant and material. The Arbitrator is in the best position to evaluate the evidence and decide on the credibility of the submitted documents".

It is well-settled that a health care provider establishes its prima facie entitlement to judgment as a matter of law by proof that it submitted a claim, setting forth the fact and the amount of the loss sustained, and that payment of No-Fault benefits was overdue. Damadian MRI in Canarsie, PC a/a/o Tyrone Harley v General Assurance Co., 1006 NY Slip Op. 51048U; Supreme Court of NY, App. Term., 2nd Dept., June 2, 2006; *See*: Insurance Law §5106 a, Mary Immaculate Hosp. v. Allstate Ins. Co., 5 AD3d 742, 774 N.Y.S.2d 564 (2004); Amaze Med. Supply v. Eagle Ins. Co., 2 Misc. 3d 128A, 784 N.Y.S.2d 918 [2003 NY Slip Op 51701U (App. Term, 2nd & 11th Jud Dists.)]. *See also*: 11 NYCRR §65-1.1, Vista Surgical Supplies, Inc. v. Metropolitan Property and Casualty Ins. Co., 2005-1328 K C., 2006 NY Slip Op. 51047U, June 2, 2006. Based upon the evidence presented, I find that Applicant has established its prima facie case.

The evidence herein demonstrates that the 53-year-old male EIP was a driver of a vehicle that was involved in the instant motor vehicle accident on 7/23/20. The EIP was evaluated emergently at Brookhaven Hospital and was discharged later that day. On 7/24/20, the EIP was evaluated at Bedford Medical Services for complaints of pain in the neck with radiation to the upper extremity; mid back pain, lower back pain, and shoulder pain, among other things. The examination revealed diminished ranges of motion and positive objective findings. Prescription medication was recommended in addition to a course of physical therapy, chiropractic care, acupuncture, follow-up, MRI

scans, range of motion/manual muscle testing, functional capacity testing, and evaluations with an orthopedist and neurologist, respectfully. The EIP underwent an MRI scan of the cervical spine on 8/7/20, which revealed scoliotic cervical curvature, posterior broad-based central disc bulging at the C2-C3 level with peripheral disc herniation; posterior broad-based central disc herniation at the C3-C4 level which impressed the cord with central canal stenosis and posterior disc herniation at the C4-C5 level with cord compression and peripheral intra-foraminal herniation; and disc herniation at the C5-C6 level with cord compression, respectfully. MRI of the lumbar spine revealed disc herniation impressing the thecal sac at L4-L5 and at L5-S1, in addition to other findings. The 8/17/20 MRI of the EIP's right shoulder revealed a SLAP tear, among other findings. On 8/19/20, the EIP was re-evaluated at Bedford Medical Services for persisting complaints of pain in the neck, back, right shoulder, and right hand, respectfully. Diminished ranges of motion and other positive objective findings were noted upon exam. Continued conservative treatment, consisting of physical therapy, chiropractic and acupuncture treatment was recommended, in addition to durable medical equipment, referrals to other specialists, testing, and the instant diclofenac sodium gel for pain relief. The following day, on 8/20/20, the EIP presented for neurodiagnostic evaluation to Dr. Pak, who performed EMG/NCV testing of the bilateral upper and lower extremities. The lower extremity studies revealed evidence of right L5 and left S1 radiculopathy and bilateral axonal motor peroneal/tibial neuropathy and bilateral median sensory nerve neuropathy, respectfully. On 9/1/20, the diclofenac gel presently in dispute was dispensed to the EIP. All of the relevant medical reports, treatment notes, test results and documents were carefully reviewed and considered in addition to the detailed peer review rebuttal generated by Frank Segreto, M.D., dated 11/28/20, which referenced authoritative sources in support of his position.

Respondent's timely denial regarding the disputed billing relied upon the peer review report of Jason Cohen, M.D., dated 10/8/20, which concluded that the prescription medication in dispute (among others discussed) was not medically necessary. Dr. Cohen asserted that there was no evidence that the EIP had any osteoarthritis or increased risk factors for serious gastrointestinal adverse events necessitating prescription of NSAID formulations. It is noted, however, that Dr. Cohen does not specifically refer to the diclofenac gel prescribed to the EIP herein, but refers rather to "diclofenac topical solution". Dr. Cohen further asserts that prior to dispensing prescription topical medications, there should be a failed course of "first line agents, including over-the-counter acetaminophen, ibuprofen or naproxen". Dr. Cohen's peer review recited the definition of medical necessity as described by the American Medical Association ("AMA"), as well as other literature. There is no peer review addendum in evidence.

It is a long-standing tenet that once an Applicant makes a prima facie case of medical necessary, the burden shifts to Respondent who may refute Applicant's prima facie showing with medial evidence that the services provided were not medically necessary. The burden is on the insurer to prove that the medical services were not medically necessary. *See: Behavioral Diagnostics v. Allstate Ins. Co.*, 3 Misc. 3d 246, 776 N.Y.S.2d 178, 2004 Slip Op. 24041 (Civ. Ct. Kings County 2004); A.B. Medical

Services v. Geico Ins., 2 Misc. 3d 26, 773 N.Y.S.2d 773, 2003 Slip Op 23949 (App Term, 2nd Dept. 2003). *See also*: Elm Medical P.C. v. American Home Assurance Co., 2003 Slip Op. 51357U 2003 N.Y. Misc. LEXIS 1337 (Civ. Ct., Kings Co., 2003); Fifth Ave. Pain Control Ctr. v. Allstate Ins. Co., 196 Misc. 2d 801, 766 NYS2d 748 (Civ. Ct., Queens Co., 2003). An insurance carrier must, at a minimum, establish a detailed factual basis and a sufficient medical rationale for its asserted lack of medical necessity. Vladimir Zlatnick, M.D., P.C., v. Travelers Indemnity Co., 12 Misc3d 128(A), 2006 N.Y. Slip Op. 50963(U) (App. Term 1st Dept. 2006); Delta Diagnostic Radiology, P.C. v. Progressive Casualty Insurance Company, 21 Misc.3d 142(A), 2008 N.Y. Slip Op. 52450(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2008). A peer review report's factual basis may be insufficient if it fails to provide specifics of the claim, is conclusory, or otherwise lacks a basis in the facts of the claim. Devonshire Surgical Facility, Carnegie Hill Orthopedic Services, P.C. v. American Transit Insurance Company, 31 Misc.3d 129(A), 2011 N.Y. Slip Op. 50513(U) (App. Term 1st Dept. 2011); East Coast Acupuncture Services, P.C. v. American Transit Insurance Company, 14 Misc.3d 135(A), 2007 N.Y. Slip Op. 50213(U) (App. Term 1st Dept. 2007).

In the instant matter, after a review of the totality of the evidence, I find that the medical necessity of the billing/medication in dispute has not been credibly refuted by the peer review report submitted herein. As discussed in detail above, Applicant's medical records reflect that the EIP had continued subjective complaints and positive objective findings in support of the medical decision to provide the medication. Moreover, as stated in the detailed peer review rebuttal, the EIP was prescribed the instant medication due to his traumatic pain sustained as a result of this motor vehicle accident and that over-the-counter medications are not as good or as effective as the instant prescription medication. The various benefits of this medication were expounded upon. Moreover, Dr. Segreto not only cites authoritative sources, but further relies on the very same definition of medical necessity as formulated by the AMA as referenced in the peer review. The points raised in the peer review rebuttal are not adequately addressed in the peer review. As such, I find that the medical records demonstrate a sufficient and reasonable basis to prescribe the medication presently in dispute. I therefore find that the peer reviewer did not sufficiently apply or incorporate the medical findings with regard to this EIP, for which the medication was prescribed by his treating provider in the course of his medical treatment, nor was there a peer review addendum generated in response to the treating/prescribing physician's peer rebuttal.

Therefore, after review of the totality of the credible evidence, and for the reasons set forth herein, I find that the medical necessity of the billing in dispute has not been credibly refuted by the peer review report submitted herein.

Accordingly, this claim is granted.

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
	Top Choice Pharmacy Corp	09/01/20 - 09/01/20	\$1,892.20	Awarded: \$1,892.20
Total			\$1,892.20	Awarded: \$1,892.20

- B. The insurer shall also compute and pay the applicant interest set forth below. 11/26/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Respondent shall pay the Applicant interest computed from the above-noted date at a rate of 2% per month, simple, and ending with the date of payment of the award subject to the provisions of 11 NYCRR §65-3.9(e).

C. Attorney's Fees

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

The insurer shall also pay the Applicant an attorney's fee based upon the amount awarded herein and the interest, as calculated in section "B" above, and in accordance with the applicable Regulations.

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

12/13/2021
(Dated)

Susan Mandiberg

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:
9294d9708bc51f159810f48a04a4311b

Electronically Signed

Your name: Susan Mandiberg
Signed on: 12/13/2021