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)	AAA Case No.	17-21-1195-1258
	Applicant's File No.	00080499
	Insurer's Claim File No.	9UINY07180-03
- and -	NAIC No.	29742
Integon National Insurance Company (Respondent)		

ARBITRATION AWARD

I, Deepak Sohi, 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 07/21/2022
   Declared closed by the arbitrator on 07/21/2022

   Sasha Hochman from Drachman Katz, LLP participated in person for the Applicant

   Janice Rosen from Law Offices of Moira A. Doherty participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$903.59**, was NOT AMENDED at the oral hearing.
   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. The parties also stipulated that Respondent's NF-10 denial of claim form was timely issued.

3. Summary of Issues in Dispute

   This arbitration arises out of prescription medication, specifically lidocaine patchesprovided to the EIP, a31-year-old male, who was involved in a

motor vehicle accident as abicyclist on7/16/2020. Applicant is seeking reimbursement for the lidocainepatchesprovided to the EIP on date of service 12/17/2020. Respondent denied reimbursement for the lidocaine patchesbased on an Independent Medical Peer Review report by Dr.Bo Headlam, MD, dated 1/29/2021.

4. Findings, Conclusions, and Basis Therefor

This case was decided on the submissions of the parties as contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association and the oral arguments of the parties' representatives at the hearing. No witnesses testified at the hearing. I reviewed the documents contained in the ECF for both parties and make my decision in reliance thereon.

MEDICAL NECESSITY

LIDOCAINE PATCHES

DATE OF SERVICE 12/17/2020

If an insurer asserts that a medical test, treatment, supply or other service was not medically necessary, the burden is on the insurer to prove that assertion with competent evidence such as an independent medical examination, a peer review or other proof that sets forth a factual basis and a medical rationale for denying the claim. (See A.B. Medical Services, PLLC v. Geico Insurance Co., 2 Misc. 3d 26 [App Term, 2nd & 11th Jud. Dists. 2003]; Kings Medical Supply Inc. v. Country Wide Insurance Company, 783 N.Y.S. 2d at 448 & 452; Amaze Medical Supply, Inc. v. Eagle Insurance Company, 2 Misc. 3d 128 [App Term, 2nd & 11th Jud. Dists. 2003]).

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 2, 11 and 13 Jud. Dists. 2014). 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). The Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). To meet the burden of persuasion regarding medical necessity - in the absence of factually contradictory records - the applicant must submit a rebuttal which meaningfully refers to and rebuts the assertions set forth in the peer review report. See generally, Pan Chiropractic, P.C. v Mercury Ins. Co., 24 Misc 3d 136[A], 2009 NY Slip Op 51495[U] [App Term, 2d, 11th & 13th Jud Dists 2009].

In support of its denial, the Respondent submits an Independent Medical Peer Review report of Dr. Bo Headlam, MD, dated 1/29/2021. Dr. Headlam lists the medical records reviewed and details the EIP's relevant medical history. Dr. Headlam concluded that the lidocaine patches were not medically necessary. In his report Dr. Headlam stated:

> Lidocaine 5% topical patch provided to the patient on 12/17/20 was not medically justified for the following reasons:
>
> According to the provided documentation, the above-listed medication was prescribed by Dr. Goldenberg on 10/09/20. The prescription was issued for two refills and was refilled on 12/17/20. It should be noted that every refill should be accompanied by the doctor's note assessing the effectiveness of the medication. There should not be any refills provided to the claimant unless the physician has documented that the medication had benefited the patient. Such documentation from Dr. Goldenberg was not provided for this review.
>
> Also, if a topical medication is to be needed then an OTC medication can be used and would be a more appropriate choice. There is no evidence of this patient's trying any of such OTC patches/creams first.

> Also, according to the NYS Workers Compensation Medical Treatment Guidelines (MTG), Mid and Lower Back (2013), under the use of Creams and Ointments (D.71D - while it is noted that these can be prescribed for pain it is further noted that, "...there is no evidence of efficacy".
>
> Additionally, according to the policy BlueCross BlueShield Federal Employee Program, approved by the FEP® Pharmacy and Medical Policy Committee on June 24, 2016, Lidocaine Topical 5%, "FDA-approved indications: 1. Lidocaine ointment is indicated for production of anesthesia of accessible mucous membranes of the oropharynx. It is also used as an anesthetic lubricant for intubation and for the temporary relief of pain associated with minor burns, including sunburn, abrasions of the skin, and insect bites... Lidocaine topical may be considered investigational in diagnoses that are off-label or in formulations that do not have a confirmed FDA approval of use".
>
> According to "Topical preparations for pain relief: efficacy and patient adherence", Journal of Pain Research 2011:4 11-24, "However, due to the absence of specific compliance and adherence studies comparing topical treatment versus traditional routes in pain management, the role of topical preparations in patient adherence remains obscure".

I find Dr. Headlam's peer review insufficient as it fails to form a nexus between the injuries of the EIP and the contention that the lidocaine patches were not medically necessary. Merely setting forth conclusory statements and citing to medical journals without specifically connecting this information to this patient is factually insufficient and does not reflect a cogent medical rationale. This is not a medical necessity argument based upon the injuries of this patient. Dr. Headlam has failed to adequately address the actual presentation of symptoms by the EIP at issue in forming his rationale. Furthermore, merely stating that the EIP did not have a certain condition or injury is not sufficient to form a nexus between the injuries of the EIP and the contention that the lidocaine patches were not medically necessary.

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. Nir v. Allstate Ins. Co., 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005).

Therefore, Respondent has failed to meet its burden. I find that Dr. Headlam's peer review is lacking a cogent rationale and in turn, it does not serve to rebut the presumption of necessity. Therefore, the burden is not on Applicant to establish necessity.

The Applicant has met its initial burden to establish its entitlement to no-fault benefits. The burden then shifts to the Respondent. The Respondent's denial for lack of medical necessity must be supported by a peer review or other competent medical evidence which sets forth a clear factual basis and medical rationale for denying the claim. Healing Hands Chiropractic, P.C. v. National Assurance Co., 5 Misc. 3d 975; Citywide Social Work, et. al v. Travelers Indemnity Co., 3 Misc. 3d 608. The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 2009 NY Slip Op 00351 (App Div. 2d Dept., Jan. 20, 2009); Channel Chiropractic, P.C. v. Country-Wide Ins. Co., 2007 Slip Op 01973, 38 A.D.3d 294 (1st Dept. 2007); Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co., 2007 NY Slip Op 27427, 17 Misc.3d 97 (App Term 1 Dept., 2007), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident. Id. To successfully support its denial, the Respondent's peer review must address all of the pertinent objective findings contained in the Applicant's medical submissions. The peer review must set forth how and why the disputed services were inconsistent with generally accepted medical and/or professional practices. The conclusory opinions of the peer reviewer, standing alone and without support of medical authorities, will not be considered sufficient to establish the absence of medical necessity. See Citywide Social Work, et. al. v. Travelers Indemnity Co., supra; Amaze Medical Supply, Inc. v. Eagle Insurance Co., supra. Here, the Respondent has failed to meet its burden of proof to sustain its defense of lack of medical necessity.

In order to make out a prima facie case of lack of medical necessity, a peer review must discuss the generally accepted medical practice (that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling) and opine that the treatment or services would be ineffective or that the insurer's preferred health care treatment or lack of treatment would lead to an equally good outcome. Millennium Radiology, P.C. v. New York Central Mutual Fire Ins. Co., 23 Misc.3d 1121(A), 886 N.Y.S.2d 71 (Table), 2009 N.Y. Slip Op. 50877(U), 2009 WL 1261666 (Civ. Ct. Richmond Co., Katherine A. Levine, J., Apr. 30, 2009).

I find that the peer review of Dr. Bo Headlam, MD, has failed to set forth a sufficient factual basis and medical rationale for his opinion that the disputed medication was not medically necessary and therefore has not established, prima facie, a lack of medical necessity for those services rendered by Applicant. The burden has not shifted to the Applicant. This Arbitrator has considered all of the evidence and finds that the Applicant has demonstrated by a preponderance of the credible evidence that the services were medically necessary.

Accordingly, in light of the foregoing, based on the arguments of counsel, and after thorough review and consideration of all submissions, I find in favor of the Applicant. Consequently, the Applicant's claim is granted in the amount of $903.59 for the lidocaine patches provided for on date of service 12/17/2020.

This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as 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 applicant is AWARDED the following:

A.

Medical		**From/To**	**Claim Amount**	**Status**
	SMK Pharmacy Corp d/b/a Nature's First LTC & Compounding	**12/17/20 - 12/17/20**	**$903.59**	**Awarded: $903.59**
Total			**$903.59**	**Awarded: $903.59**

B. The insurer shall also compute and pay the applicant interest set forth below. 02/24/2021 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from the filing date for this case 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

After calculating the sum total of the first-party benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, as provided for in 11 NYCRR 65-4.6(d), subject to a maximum fee of $1,360.00.

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

07/25/2022
(Dated)

Deepak Sohi

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:
20c712865001dd8e6fa445fd091511a0

Electronically Signed

Your name: Deepak Sohi
Signed on: 07/25/2022