

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ready RX LLC
(Applicant)

- and -

State Farm Mutual Automobile Insurance
Company
(Respondent)

AAA Case No. 17-21-1221-2059

Applicant's File No. GM20-232448

Insurer's Claim File No. 32-09T6-20L

NAIC No. 25178

ARBITRATION AWARD

I, Eva Gaspari, 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: E.I.P and/or I.G.

1. Hearing(s) held on 07/27/2022
Declared closed by the arbitrator on 07/27/2022

Matthew Sledzinski from Law Offices of Gabriel & Moroff, P.C. participated in person for the Applicant

Craig Stabenau from James F. Butler & Associates participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,222.62**, 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

This arbitration dispute arises from an automobile accident which occurred on August 5, 2020, in which the Assignor (I.G), a 62- year-old female, was a driver. On November 20, 2020, the Applicant provided the assignor with prescribed Lidocaine 5% Ointment, for which it brings this claim totaling \$1,222.62. The Respondent has presented a medical necessity defense, based on a peer review by Dr. Tal Mednick, M.D., which is dated January 15, 2021. The question presented is whether this prescription for Lidocaine Ointment 5% was medically necessary.

4. Findings, Conclusions, and Basis Therefor

This matter was decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association, as well as upon the oral arguments of the parties at the time of the hearing. All documents contained in the ADR folder are hereby incorporated into this hearing and in reaching my findings I have reviewed all relevant exhibits contained in the ADR Center. Only submissions which were uploaded into the ADR Center at the time of the hearing were considered in making the instant determination. All matters raised on oral argument at the time of the hearing have been addressed herein. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

As an initial matter, I find that Applicant has submitted credible evidence to establish a prima facie case of medical necessity. (a medical provider establishes a prima facie showing of their entitlement to judgment 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 was overdue.) *See, Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept.2004) Similarly, I find that the Respondent has proffered a timely denial which preserves the defense of fee schedule and medical necessity, pursuant to the peer review.

Applicant, having established its prima facie case, the burden now shifts to the Respondent to demonstrate its defense of lack of medical necessity (*Alvarez v. Prospect Hosp.*, 68 N.Y.S.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d [1986]; *A.B.Medical Services v. Geico Ins. Co.*, 2 Misc 3d 26 [App Term 2d and 11th Jud Dists, 2003]). Respondent bears the burden of production in support of a 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 1 Dept. 2006).

On November 20, 2020, the Applicant provided the assignor with prescribed Lidocaine 5% Ointment, for which it brings this claim totaling \$1,222.62. The Respondent has presented a medical necessity defense, based on a peer review by Dr. Tal Mednick, M.D., which is dated January 15, 2021. The question presented

is whether this prescription for Lidocaine Ointment 5% was medically necessary. I have reviewed this peer review, the crux of which, is that this prescription deviated from the generally recognized standard of care, which is a course of conservative care. In rebuttal, the Applicant cites to the underlying treatment records, as well as to the formal rebuttal by Dr. Denny Rodriguez.

To support a defense that services were not medically necessary a peer report should set forth a factual basis and medical rationale for the opinion that services were not necessary. See, generally, AJS Chiropractic, PC v. Mercury Ins. Co., 22 Misc. 3d 133 (A), 880 NYS 2d 871 (App. Term 2d & 11 Jud Dist. 2009). A peer review report that does not provide specifics as to the claim at issue, is conclusory or vague will not be sufficient to meet the burden of proof. See generally, Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. Kings County, 2005). Moreover, to carry its burden, the opinion of the insurer's expert, standing, alone is insufficient to carry the insurer's burden of proving that the services were not medically necessary. See, Citywide Social Work & Psy. Serv. v. Travelers, Indem. Co., 3 Misc 3d 608 (N.Y. City Civ. Ct., Kings Co., 2004); A.R. Medical Art, P.C. v. State Farm Mutual Auto. Ins. Co., 11 Misc 3d 1057[A], 815 NYS2d 493, (N.Y. City Civ. Ct. Kings Co. 2006) "Generally accepted" practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and value that define its calling. A.R. Medical Art, P.C. v. State Farm Mutual Auto. Ins. Co., supra See also, Williamsbridge Radiology and Open Imaging v. Travelers Indemnity Company, 14 Misc. 3d 1231 (A), 836 NYS 2d 496.

In evaluating the evidence, I have used the following standards for assessing medical necessity: Medically necessary care has been defined as "treatments or services which are appropriate, suitable, proper and conducive to the end sought by the professional health service in consultation with the patient. It means more than merely convenient or useful treatments or services, but treatments or services that are reasonable in light of the patient's injury, subjective and objective evidence of the patient's complaints of pain and the goals of evaluation and treating the patient." Fifth Avenue Pain Control Center v. Allstate Ins co, 196 Misc. 2d 801 (Civ. Ct Queens 2003). Put another way, "for an expense to be considered medically necessary, the treatment, procedure, or service ordered by a qualified physician must be based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed

with. Such treatment, procedure, or service must be warranted by the circumstances as verified by a preponderance of credible and reliable evidence, and must be reasonable in light of the subjective and objective evidence of the patient's complaints." *Nir v Travelers Ins. Co.* 2005 NY Slip Op 50466(U) Decided on April 7, 2005 (Civil Court Of The City Of New York, Kings County)

Upon a review of the proffered peer review report I find that the Respondent has not presented evidence which persuasively supports its defense that the services were not medically necessary. I find, after careful deliberation that the peer review is conclusory, vague and does not sufficiently address the claim at issue. *Nir v. Allstate, Supra.* Dr. Mednick's review is scant in analysis, does not provide an in-depth discussion of the patient-specific examination findings or diagnosis, and relies on a citation which is not elaborated upon in support of his opinion. Accordingly, it has not satisfied the burden of demonstrating that the services were not necessary. To that extent, Dr. Mednick does not adequately address the patient history, which includes several months of medical treatment, when reaching the conclusory position that the assignor did not undergo an adequate course of conservative care, nor does he adequately address the findings which were presented during this course of care. Ultimately it is the Peer Reviewer's burden to persuasively establish a standard of care, supported by credible sources and correlate such standard to the facts at hand to conclude whether or not there was a deviation. I do not find that Dr. Mednick meets this burden.

Accordingly, I find in favor of the Applicant and its claim is awarded.

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
	Ready RX LLC	11/20/20 - 11/20/20	\$1,222.62	Awarded: \$1,222.62
Total			\$1,222.62	Awarded: \$1,222.62

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/04/2021 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

In the instant matter Applicant is awarded interest pursuant to the no-fault regulations. 11 NYCRR 65-3.9 (a) provides that Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." Pursuant to 11 NYCRR 65-3.9 (c) provides that "if an applicant does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Department of Financial Services regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken." In the matter of LMK Psychological Servs. PC v. State Farm Mut. Auto. Ins. Co., 12 NY 3d. 217 (2009), the court addressed the issue of interest and found that pursuant to 11 NYCRR §65-3.9(c) interest shall be tolled upon the issuance of a denial whether it is timely or not when an applicant does not request arbitration or institute a lawsuit within thirty days after receipt of a denial form or payment of benefits calculated pursuant to Insurance Department regulations. It appears the intent of 65-3.9(c) was to start interest on the date of the request. Therefore, pursuant to N.Y. Comp. Codes R. & Regs. tit. 11, § 65-3.9 (2002), "Interest on overdue payments," the Respondent shall pay interest to the Applicant on the awarded overdue PIP benefit at a rate of two percent (2%) per month calculated on a pro rata basis using a thirty (30) day month, starting 10/04/21.

C. Attorney's Fees

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

As this matter was filed after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant the attorney's fee, in accordance with the newly promulgated 11 NYCRR 65-4.6(d).

- 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 Orange

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

08/26/2022

(Dated)

Eva Gaspari

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:
638ccbf2747837cf11f1ceed213d7b0f

Electronically Signed

Your name: Eva Gaspari
Signed on: 08/26/2022