

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Primecare Drug & Surgical Corp
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-22-1277-2397
Applicant's File No.	AR22-18095
Insurer's Claim File No.	0136253590101089
NAIC No.	35882

ARBITRATION AWARD

I, Ioannis Gloumis, 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 07/17/2023
Declared closed by the arbitrator on 07/17/2023

Alek Beynenson, Esq. from The Beynenson Law Firm, PC participated virtually for the Applicant

Diana Gonzalez, Esq. from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,480.94**, 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 of charges for prescription Diclofenac 1.3% film and lidocaine 5% patches that were dispensed on July 11, 2022, following a March 16, 2022 motor vehicle accident. Respondent denied the claim in dispute based upon the defense of lack of medical necessity.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions contained in the American Arbitration Association's Electronic Case Folder in MODRIA, said submissions constituting the record in this case. This award is based upon the arguments that were presented by the parties during the arbitration hearing and the documentary evidence submitted by the parties. There were no witnesses that testified during the arbitration hearing.

The EIP, then a 48-year-old male restrained driver, was injured in a motor vehicle accident on March 16, 2022. Following the accident, the EIP sought private medical attention for injuries to the neck, lower back, lower back, mid back, shoulder, knee, and hip. The EIP came under the care of Macintosh Medical PC and Blessed Hands Chiropractic PC. The EIP was evaluated by Mario Leon, P.A. on April 27, 2022 and underwent physical therapy and chiropractic treatment. The EIP was also prescribed a lumbar cushion, a lumbar support, a water circulation pump, a bed board, an egg crate mattress, a cervical collar, a cervical pillow, a TENS unit, a whirlpool, an EMS unit, a massager, and an infrared heating lamp.

On July 11, 2022, Dr. Jonathan Simhaee evaluated the EIP and prescribed Diclofenac 1.3% film and lidocaine 5% patches, which were dispensed by Applicant.

Applicant billed Respondent \$1,480.94 for the Diclofenac 1.3% film and lidocaine 5% patches, that were dispensed on July 11, 2022. The evidence shows that Respondent received Applicant's bill for the claim in dispute on August 11, 2022; therefore, Applicant has established its prima facie case. See *Amaze Med. Supply Inc. v. Allstate Ins. Co.*, 3 Misc.3d 133(A) (App Term, 2d & 11th Jud Dists 2004); *King's Med. Supply Inc. v. Country-Wide Ins. Co.*, 5 Misc.3d 767 (Civ Ct, NY County 2004).

Respondent timely denied the claim on September 2, 2022 based upon the peer review report by Mitchell Ehrlich, M.D. Dr. Ehrlich stated that the use of topical anesthetic preparation has not been shown to be efficacious for the neck, back, and extremity injuries presented in this case; the topical anesthetic preparation has limited efficacy with multifocal spinal and extremity complaints as it acts locally; the topical anesthetic does not penetrate spinal joints or into deep extremity joints; and there was no chronic neurogenic pain or cutaneous irritations to treat, which are the actual medical indications for the anesthetic topical preparation.

Moreover, Dr. Ehrlich stated that the diclofenac 1.3% film is a topical anti-inflammatory used when there is a relative contraindication to oral anti-inflammatories or for local irritations and are less efficacious when there are multifocal complaints and injures as reported in the EIP's case. Dr. Ehrlich opined that there was no contraindication to oral

anti-inflammatories which would be more efficacious for the reported injuries in this case. Dr. Ehrlich cited to literature and stated that there was no medically related reason to provide anti-inflammatories in this less efficacious topical form.

The July 11, 2022 pain management medical evaluation report from Dr. Simhaee documented that the EIP presented with pain in the neck which radiates to left upper extremity to the elbow, fingers, hand, shoulder, and wrist, and lower back pain which radiates to the bilateral legs, hips, and knees. The report noted that the EIP was currently undergoing physical therapy and taking Motrin. Dr. Simahee diagnosed the EIP with radiculopathy of the cervical region, spondylosis with radiculopathy of the cervical region, radiculopathy of the lumbar region, and spondylosis w/o myelopathy or radiculopathy of the lumbar region.

Dr. Simhaee's treatment plan stated the following: continue therapy; no oral meds due to h/o ulcers but will continue pain creams/patches; the EIP will continue the use of a TENS unit; continue back brace; discussed epidural injections - the EIP will hold off due to h/o UC; and follow-up evaluation in 4 weeks.

"At a no-fault trial involving a defense of lack of medical necessity, an insurer has an initial burden to rebut the presumption of medical necessity which attaches to a claim form." *Parkway Hospital, Inc. v. Integon National Ins. Co.*, 64 Misc.3d 139(A) (App. Term 2d, 11th & 13th Dists. July 19, 2019). See also *Dayan v Allstate Ins. Co.*, 49 Misc 3d 151[A] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]).

Furthermore, the court in *King's Med. Supply Inc. v Country-Wide Ins. Co.*, 5 Misc 3d 767, 772 held the following, in relevant part:

"...a denial premised on lack of medical necessity must be supported by evidence such as an independent medical examination, peer review, or examination under oath "setting forth a sufficiently detailed factual basis and medical rationale for the claim's rejection" (*Amaze Med. Supply v Eagle Ins. Co.*, 2 Misc 3d 128[A], 2003 NY Slip Op 51701, *1 [App Term, 2d Dept 2003]; see also *Rockaway Blvd. Med. P.C. v Travelers Prop. Cas. Corp.*, 2003 NY Slip Op 50842[U] [App Term, 2d & 11th Dists 2003]; see also 11 NYCRR 65-3.8 [b] [4]; *Choicenet Chiropractic P.C. v Travelers Prop. Cas. Corp.*, 2003 NY Slip Op 50697[U] [App Term, 2d & 11th Jud Dists 2003]; *Rockaway Blvd. Med. P.C. v Allstate Ins. Co.*, 2003 NY Slip Op 50681[U] [App Term, 2d & 11th Jud Dists 2003])..."

Having reviewed the evidence presented, I am not persuaded by the peer review report of Dr. Ehrlich in this case. Dr. Simhaee, the pain management physician, noted in the July 11, 2022 evaluation report that the EIP presented with continued complaints of pain in the neck and lower back with radiating symptoms despite receiving physical therapy and using Motrin. Dr. Simhaee recommended continued physical therapy, injections, the use of the topical medications/creams/patches and instructed the EIP to not consume oral medications due to ulcers. Dr. Simhaee diagnosed the EIP with radiculopathy of the cervical region, spondylosis with radiculopathy of the cervical region, radiculopathy of the lumbar region, and spondylosis w/o myelopathy or radiculopathy of the lumbar region. Dr. Ehrlich stated that the actual medical indications for the anesthetic topical preparation are chronic neurogenic pain or cutaneous irritations. The EIP had radicular symptoms, which are neuropathic pain conditions. Dr. Ehrlich stated that the diclofenac 1.3% film is a topical anti-inflammatory. There is evidence presented which shows that the EIP was instructed to refrain from oral medications due to the ulcers. Dr. Ehrlich did not adequately address this medical condition and Dr. Simhaee's basis for the prescription. I am not persuaded by the peer review report by Dr. Ehrlich in this case. Therefore, Respondent's denial of the claim should not be upheld.

Accordingly, Applicant's claim is hereby granted in its entirety.

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
	Primecare Drug & Surgical Corp	07/11/22 - 07/11/22	\$1,480.94	Awarded: \$1,480.94
Total			\$1,480.94	Awarded: \$1,480.94

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/02/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay Applicant the amount of interest computed from the date of filing, at the 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(c)* (stay of interest).

C. Attorney's Fees

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

Respondent shall also pay Applicant an attorney's fee in accordance with *11 NYCRR 4.6*.

- 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 NY

SS :

County of Nassau

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

08/02/2023
(Dated)

Ioannis Gloumis

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:
80e0ce4fa2be6133c50a5881138ec13b

Electronically Signed

Your name: Ioannis Gloumis
Signed on: 08/02/2023