

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Med Need Rx Pharmacy LLC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-23-1284-3995
Applicant's File No.	GM22-563027
Insurer's Claim File No.	0677314810000004
NAIC No.	22055

ARBITRATION AWARD

I, Nicholas Tafuri, 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 (SH)

1. Hearing(s) held on 10/13/2023
Declared closed by the arbitrator on 10/13/2023

Koenig Pierre from Law Offices of Gabriel & Moroff, P.C. participated virtually for the Applicant

Jaime Orlando from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,188.50**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that there are no fee schedule disputes. Respondent's fee audit calculates the same reimbursement amount as Applicant.

3. Summary of Issues in Dispute

EIP (SH), is a 23-year old male, who was the driver of a motor vehicle when an accident occurred on May 26, 2022. Following the accident, EIP sought medical treatment, and is subsequently prescribed several medications.

Applicant's claim for reimbursement for the medications prescribed, dispensed by Applicant on August 17, 2022, is denied by Respondent based on the peer review report of Stuart Springer, M.D., dated October 24, 2022.

The issue presented: Whether Applicant is entitled to no-fault reimbursement for medications dispensed, denied based on a peer review?

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the ADR Center Record as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the Hearing. Pursuant to 11 NYCRR 65-4 (Regulation 68-D), §65-4.5 (o) (1), an Arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The case was decided on the submissions of the Parties as contained in the ADR Center Record maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses.

EIP (SH), is a 23-year old male, who was the driver of a motor vehicle when an accident occurred on May 26, 2022. Following the accident, EIP sought medical treatment, and is subsequently prescribed several medications.

It is well settled that an applicant establishes its prima facie showing of entitlement to No-Fault benefits by submitting evidentiary proof that the prescribed statutory billing forms had been mailed, received by the respondent and that payment of no fault benefits were overdue. Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D. 3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004). I find Applicant establishes a prima facie case of entitlement to No-Fault compensation for its claim. The burden then shifts to the Respondent to prove that the bill in question was properly denied.

Applicant's claim for reimbursement for the medications prescribed, dispensed by Applicant on August 17, 2022, is denied by Respondent based on the peer review report of Stuart Springer, M.D., dated October 24, 2022.

Medical Necessity

In order to support a lack of medical necessity defense, respondent must "set forth a factual basis and medical rationale for the peer reviewer's [or examining physician'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 2d, 11th and 13th 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 Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006.)

The Civil Courts have held that a defendant's peer review or report of medical examination must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review or medical examination report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted specifics as to the claim at issue, is conclusory or vague. See Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005); See also, All Boro Psychological Servs. P.C. v. GEICO, 2012 Slip Op 50137(U) (N.Y. City Civ. Ct. 2012.) "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 values that define its calling." Nir, supra.

In support of its contention that the medications prescribed, were not medically necessary, Respondent relies on a peer review report by Dr. Stuart Springer, dated October 24, 2022. Based on his review of the medical records and citing authority, Dr. Springer avers that, in this case, there was no medical necessity for the prescribed Diclofenac Sodium 3% gel, Esomeprazole Magnesium, and Naproxen Sodium tablets. With respect to the prescription for Diclofenac gel, Dr. Springer avers that EIP's complaints were manageable with therapy sessions. Citing a medical journal article for the proposition that there are adverse effects due to skin irritation, Dr. Springer concludes that the outcome of conservative treatment would be better than the Diclofenac Sodium gel, as this medication would only provide provisional pain relief. In addition, there was no clear documentation indicating the need for prescribing Esomeprazole Magnesium tablets. Dr. Springer avers that the long-term use of this medication can lead to adverse effects and should be avoided. With respect to Naproxen sodium medication, Dr. Springer notes that

there is a debate as to whether the use of NSAIDs is beneficial after acute skeletal muscle injury. In this case, it was not clear why 60 tablets were prescribed when it can lead to adverse effects. EIP should have continued receiving conservative treatment in the form of physical therapy and chiropractic treatment as it is proven to be effective in pain management with no adverse effects. Based on the foregoing, Dr. Springer concludes that the prescribed Diclofenac Sodium 3% gel, Esomeprazole Magnesium, and Naproxen Sodium tablets, were not medically necessary. Based on the peer review report, I find that Respondent has provided sufficient evidence of a lack of medical necessity.

"Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th Ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip. Op. 5187(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006).

In response to the peer review by Dr. Springer, Applicant submits a rebuttal by Arun Agrawal, M.D. dated January 10, 2023. Dr. Agrawal details EIP's positive examination findings of 5/27/22 and 7/23/22, and avers that EIP's complaints, the clinical findings and a review of the medical history, the Diclofenac Sodium gel, Esomeprazole Magnesium and Naproxen, provided on 8/17/22, were medically necessary. Dr. Agrawal cites studies to argue the superiority in efficacy and physical function of Diclofenac solution. The studies provide scientific proof for the effectiveness of Diclofenac topical medication which includes targeted delivery, decrease systemic absorption, and limit toxicity without sacrificing local effect and benefit. Despite the commencement of conservative treatment on 6/1/22, and EIP's persistent complaints and positive findings upon examination, Dr. Agrawal avers that the prescribed medications were medically necessary. Esomeprazole Magnesium was indicated for the management of gastrointestinal problems associated with the intake of NSAIDs and aspirin. In further disagreeing with the peer review, Dr. Springer avers that the prescription for Naproxen, once a day as needed, for a 30-day period is not a long-term treatment. Naproxen is an NSAID that works by reducing hormones that cause inflammation and pain in the body. The common uses for NSAIDs include treatment for back pain, tenderness, inflammation and stiffness. Naproxen is FDA approved, and it was prescribed to provide EIP with pain relief. Based on the foregoing, Dr. Agrawal concludes that the prescribed medications were medically necessary, and the standard of care.

After review of the submissions and medical records included on the ADR Center and consideration of the arguments advanced by representatives for both parties, I find that Applicant met its burden in rebuttal. I find that the rebuttal sufficiently addressed the issues raised by the peer review, and provides a sound medical rationale that is in accordance with accepted medical standards. Notably absent in the peer review is an acknowledgement by Dr. Springer, that the subject medications were prescribed two (2) months following commencement of conservative treatment, when EIP continued to present with subjective complaints and positive examination findings. Given the recommendation of EIP's treating doctor for EIP to use the Diclofenac Sodium gel, Esomeprazole Magnesium and Naproxen, which is supported by objective medical findings and rationale, I defer to the treating doctor's determination that these medications were beneficial to EIP's recovery.

Accordingly, Applicant is awarded the amount of \$2,188.50.

This decision is in full disposition of all claims for no-fault benefits presently before this arbitrator.

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
	Med Need Rx Pharmacy LLC	08/17/22 - 08/17/22	\$2,188.50	Awarded: \$2,188.50
Total			\$2,188.50	Awarded: \$2,188.50

- B. The insurer shall also compute and pay the applicant interest set forth below. 01/30/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Respondent shall compute and pay to Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

For cases filed on or after February 4, 2015, the attorney's fee shall be calculated as follows: 20% of the amount of first-party benefits awarded, plus interest thereon, subject to no minimum fee, and a maximum fee of \$1,360.00. 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 NY
SS :
County of Nassau

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

10/16/2023
(Dated)

Nicholas Tafuri

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:
f44c044e19354f8d56bb389b6ecff69f

Electronically Signed

Your name: Nicholas Tafuri
Signed on: 10/16/2023