

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Leonaum Pharmacy Inc d/b/a Advantage
Pharmacy
(Applicant)

- and -

Hereford Insurance Company
(Respondent)

AAA Case No.	17-22-1239-4133
Applicant's File No.	FL22-55559
Insurer's Claim File No.	93512-05
NAIC No.	24309

ARBITRATION AWARD

I, Rebecca Novak, 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: Assignor ["JL"]

1. Hearing(s) held on 10/24/2023
Declared closed by the arbitrator on 10/24/2023

Nancy Orlowski, Esq. from Field Law Group, P.C. participated virtually for the Applicant

Mark Zemcik, Esq. from Law Offices of Ruth Nazarian participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$909.70**, was AMENDED and permitted by the arbitrator at the oral hearing.
Applicant amended the amount in dispute to \$732.92 to conform to Respondent's fee coder affidavit.

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 and to the timeliness of Respondent's denial. They stipulated that Applicant's fees as amended were correct. Additionally, they stipulated that should Applicant prevail, interest would accrue as of the date when the American Arbitration Association received Applicant's arbitration request.

3. Summary of Issues in Dispute

Whether Applicant established entitlement to No-Fault insurance compensation for Naproxen, Cyclobenzaprine, and a Diclofenac patch, dispensed to Assignor, a 52-year-old male, on July 15, 2021, subsequent to being injured in a motor vehicle accident on April 18, 2021.

Whether to deny compensation for the aforesaid medication on the basis of lack of medical necessity based on a peer review of Dr. Bo Headlam dated September 10, 2021.

4. Findings, Conclusions, and Basis Therefor

In this No-Fault insurance arbitration, Applicant is seeking as compensation \$732.92 for providing Naproxen, Cyclobenzaprine, and a Diclofenac patch, on July 15, 2021, to treat Assignor, a 52-year-old male, who was injured in a motor vehicle accident on April 18, 2021. This amount sought by Applicant reflects a reduction from the original amount sought when the arbitration was commenced. Respondent denied payment of the bill at issue based on a lack of medical necessity.

Both parties appeared at the hearing via Zoom by counsel who presented oral argument and relied upon documentary submissions. I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center as of the date of the hearing, said submissions constituting the record in this case.

Stipulations were entered into at the hearing, amongst which were that Applicant established a prima facie case of entitlement of No-Fault compensation for the amount it sought and that Applicant's bill was timely denied by Respondent.

Assignor, a 52-year-old male, was a restrained driver of a motor vehicle involved in an accident which occurred on April 18, 2021. The record reflects that Assignor sustained multiple injuries including injury to his left knee, neck, and lower back. He presented to Leonid Litovskiy, PA, for an evaluation on July 9, 2021, at which the diagnosis was other intervertebral disc displacement, lumbar region; radiculopathy, lumbar region; other cervical disc displacement, unspecified cervical region; cervicgia; muscle spasm and other bursitis of knee, unspecified knee. Assignor was recommended for physical therapy treatment and prescribed Naproxen 500 mg tablet, Cyclobenzaprine 10 mg tablet and Diclofenac Epolamine 1.3% patch. Respondent timely denied payment for the Diclofenac medication and Applicant now seeks reimbursement for all the medication prescribed.

Since Respondent's denial was timely, it was within its rights to assert lack of medical necessity as a defense. Liberty Queens Medical, P.C. v. Liberty Mutual Insurance Co., 2002 WL 31108069 (App. Term 2d & 11th Dists. June 27, 2002); cf. Country-Wide Insurance Co. v. Zablocki, 257 A.D.2d 506, 684 N.Y.S.2d 229 (1st Dept. 1999).

When an insurer relies upon a peer review report to demonstrate that a particular service was not medically necessary, the peer reviewer's opinion must be supported by sufficient

factual evidence or proof and cannot simply be conclusory. As per the holding in Jacob Nir, M.D. v. Allstate Insurance Co., 7 Misc.3d 544 (2005), the peer reviewer must establish a factual basis and medical rationale to support a finding that the services were not medically necessary, including setting forth generally accepted standards in the medical community. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden to prove that the services were not medically necessary. CityWide Social Work & Psychological Services, PLLC v. Travelers Indemnity Co., 3 Misc.3d 608, 777 N.Y.S.2d 241 (N.Y. Civ. Ct. Kings Co. 2004).

"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), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006). Thus, although Respondent must come forward with prima facie proof of lack of medical necessity, the burden will shift to Applicant to prove medical necessity by a preponderance of the credible evidence if Respondent meets its burden.

In support of its denial, Respondent relied on the peer review of Dr. Bo Headlam dated September 10, 2021, as well as an addendum dated April 7, 2022.

It is noted at the outset that Respondent's denial denied only the Diclofenac but failed to deny the other two medications dispensed. An insurer is not permitted to assert a defense in litigation which was not preserved in the denial of claim form. Metropolitan Radiological Imaging, P.C. v. State Farm Mutual Automobile Ins. Co., 7 Misc.3d 675, 678, 790 N.Y.S.2d 373, 377 (Civ. Ct. Queens Co. 2005).

An insurer must stand or fall upon the defense upon which it based its refusal to pay and cannot create new grounds. Matter of State Farm Ins. Co. v. Domotor, 266 A.D.2d 219, 220-221, 697 N.Y.S.2d 348, 350 (2d Dept. 1999).

Accordingly, I find that Respondent, having failed to deny both the Naproxen tablet and the Cyclobenzaprine tablet, failed to make out a prima facie case in support of its defense of lack of medical necessity for those two medications. The burden of proof did not shift to Applicant and Applicant's prima facie case of entitlement to No-Fault compensation stands.

In his peer review, Dr. Headlam began by listing the various medical records which he reviewed and declared at the outset that based on his review of the records, there was no detailed explanation provided by Leonid Litovskiy, PA as to why the topical medication of Diclofenac was indicated for Assignor. He stated that after his evaluation of Assignor, PA Litovskiy recommended physical therapy and prescribed a Diclofenac patch, but the conservative treatment was sufficient to manage this patient's condition and the prescription of the medication was excessive. He also asserted that if a topical medication is to be needed then an OTC medication can be used and would be a more appropriate choice. But in this case, there was no evidence of Assignor trying any of such OTC creams/ patches first. Dr. Headlam cited to the AMA definition of medical

necessity and also cited to medical literature when he stated that "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."

Dr. Headlam maintained that both the Naproxen tablet and the Cyclobenzaprine tablet were medically justified and were indicated for Assignor for pain relief. However, he noted that using Naproxen together with Diclofenac is generally not recommended, with both of these medications to be considered NSAIDs. "Since the medication in Diclofenac topical may be absorbed from the skin, combining it with Naproxen may increase the risk and/or severity of side effects reported with this class of drugs, including stomach ulcer, fluid retention, high blood pressure, bleeding, and liver or kidney problems."

Dr. Headlam concluded that while the Naproxen and Cyclobenzaprine tablets were justified, the Diclofenac patch was not medically necessary.

I find that Dr. Headlam's peer review was imbued with a factual basis and that he clearly conveyed that the Diclofenac patch provided did not follow generally accepted medical practice. Based on the totality of his report, I find that his review contained a proper medical rationale. There being a factual basis and medical rationale, the peer review made out for Respondent a prima facie case of lack of medical necessity. Per the case law, the burden of proof shifted to Assignor to rebut the peer review and affirmatively prove medical necessity.

In response to the peer review, Applicant submitted a rebuttal by Dr. Drora Hirsch dated March 10, 2022. Dr. Hirsch first disagreed with the peer's conclusion, stating that there are no specific guidelines delineating the absolute structured path for treatment to be universally prescribed to all patients, and therefore, great deference should be given to the treating provider to determine the proper treatment. "A patient has the right to use a topical medication in lieu of oral medications" and "Many patients need more than just one medication to treat their pain, and for some, the adverse effects and allergies of oral medications are too much to bear." Dr. Hirsch reviewed the evaluation of Assignor by PA Litovskiy which she declared warranted the prescription of the Diclofenac patch. She asserted that Assignor was prescribed Diclofenac gel for relief of pain and inflammation of joints amenable to topical treatment, such as the knees. "It provides excellent relief without the side effects of oral medication."

Dr. Hirsch discussed the efficacy, advantages, and benefits of topical medications in general and noted that all the drugs in the compounded medication were FDA approved. Maintaining that the "ultimate goal that motivates the development of topical preparations is the improvement of patient compliance to medical treatment by providing efficient pain relief with less central nervous system effects," Dr. Hirsch concluded that the Naproxen and Cyclobenzaprine tablets, as well as the Diclofenac patch, were medically necessary.

As noted above, an addendum was submitted by Dr. Headlam in which he reiterated some of the salient points made in his peer review, noting that Dr. Hirsch did not provide

any explanation of why Assignor needed the Diclofenac patch. He asserted that the rebuttal provided general information for necessity of topical medications but maintained that if a topical medication was necessary, there are multiple variations of topical medications, patches, creams and ointments, available over the counter, which are quite effective and widely recommended by medical professionals.

After a careful review of the records and consideration of the parties' oral arguments, I am more persuaded by Dr. Headlam's peer review and find that the rebuttal did not meaningfully refute the peer review report.

A necessary medical expense under the No-Fault Law is one incurred for a treatment, procedure, or service ordered by a qualified physician based on the physician's objectively reasonable belief that it will further the patient's diagnosis and treatment. The use of the treatment, procedure, or service must be warranted by the circumstances and its medical value must be verified by credible and reliable evidence. Medical Expertise, P.C. v. Trumbull Ins. Co., 196 Misc.2d 389, 765 N.Y.S.2d 171 (Civ. Ct. Queens Co. 2003). Thus, in order to assess whether a medical service in dispute was warranted, it is important that the treating physician explain why he or she thought it would further the injured person's diagnosis and treatment. As applied to this case, this means that the best evidence in support of medical necessity for the compound cream would have come from PA Litovskiy who examined Assignor and then prescribed the medication. Yet PA Litovskiy did not submit a rebuttal. The rebuttal was written by Dr. Hirsch, who never examined Assignor. And while in the rebuttal itself, Dr. Hirsch noted that great deference should be given to the treating provider to decide as to whether the prescribed drug is appropriate, it would also seem - especially in light of the aforesaid case law - that the treating doctor submit a rebuttal. In light of this, the submission of a report from a non-treating doctor -- in an attempt to rebut the insurer's peer review -- does not achieve much especially where, as here, the non-treating doctor makes no reference to statements from the treating doctor as to why a service was prescribed. Thus I accord Dr. Hirsch's rebuttal less probative value.

Since Dr. Headlam's peer review presented sufficient evidence to establish Respondent's defense of lack of medical necessity and I find that Applicant failed to satisfy its burden to demonstrate medical necessity by a preponderance of credible evidence, I find that Respondent properly denied Applicant's claim. I sustain Respondent's defense and it prevails over Applicant's initial prima facie case.

Accordingly, the within arbitration claim is granted but only to the extent of \$88.44 for the Naproxen and Cyclobenzaprine tablets and dispensing fee.

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	Amount Amended	Status
	Leonaum Pharmacy Inc d/b/a Advantage Pharmacy	07/15/21 - 07/15/21	\$909.70	\$732.92	Awarded: \$88.44
Total			\$909.70		Awarded: \$88.44

B. The insurer shall also compute and pay the applicant interest set forth below. 02/18/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The date set forth above is the date when the American Arbitration Association received the arbitration request.

The parties stipulated that should Applicant prevail, interest would accrue as of said date. The end date for the period of interest shall be the date of payment of the claim. Interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. See 11 NYCRR 65-3.9, 65-4.5(s)(3).

C. Attorney's Fees

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

Applicant is entitled to an attorney's fee pursuant to Insurance Law §5106(a). After calculating the sum total of the first-party (No-Fault) benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, subject to the following limitations: In the event the above filing date was prior to Feb. 4, 2015, the attorney's fee is subject to a minimum of \$60.00 and a maximum of \$850.00, per 11 NYCRR 65-4.6(e). In the event the above filing date was on or after Feb. 4, 2015, the attorney's fee is subject to a maximum of \$1,360.00, per 11 NYCRR 65-4.6(d). In the event the above filing date was on or after Feb. 4, 2015 and first-party (No-Fault) benefits are awarded to more than one Applicant herein, the attorney's fee shall be calculated separately for each Applicant, each Applicant's attorney fee being subject to the \$1,360.00 maximum.

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

10/25/2023
(Dated)

Rebecca Novak

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:
48a731d4f58471b5e5b2bc20cbf3a666

Electronically Signed

Your name: Rebecca Novak
Signed on: 10/25/2023