

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Everhealth Pharmacy Inc.
(Applicant)

- and -

Hereford Insurance Company
(Respondent)

AAA Case No. 17-23-1282-1000

Applicant's File No. 170.348

Insurer's Claim File No. 99525-02

NAIC No. 24309

ARBITRATION AWARD

I, Kenneth Rybacki, 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

1. Hearing(s) held on 10/30/2023
Declared closed by the arbitrator on 10/30/2023

George Malonoukos, Esq. from Tsirelman Law Firm PLLC participated virtually for the Applicant

Chris Fingerhut, Esq. from Law Offices of Ruth Nazarian participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,107.20**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

Counsel for the parties stipulated that Respondent's denials were issued within applicable thirty-day claim-determination periods prescribed by Ins. Law Sec. 5106 and/or 11 NYCRR 65-3.8 and that Applicant's claims comported with applicable fee schedules.

3. Summary of Issues in Dispute

Whether pharmaceuticals were necessary for the management of injuries sustained in an 8/7/22 accident by T.W. a twenty-three-year-old male. Applicant's claims for Celocoxib,

Lidocaine 5% ointment and cyclobenzaprine provided on 9/10/22 were denied by the Respondent on the recommendation of its peer reviewer, Eric Roth, M.D.

4. Findings, Conclusions, and Basis Therefor

This matter was decided on the submissions of the parties as maintained by the American Arbitration Association ("AAA") in its ADR Center and oral argument. No submissions after 3/23/23 were admitted to the record, 11 NYCRR 65-4.2 (b); Matter of Mercury Casualty Co. v. Healthmakers Medical Group, P.C., 67 A.D.3d 1017, 888 N.Y.S.2d 762 (2d Dept. 2009). Arbitration procedure contained in the No-Fault regulations, specifically, 11 N.Y.C.R.R. 65-4.2 (b)(3)(iii), provides

(iii) The written record shall be closed upon receipt of the respondent's submission or the expiration of the period for receipt of the respondent's submission. Documents submitted by either party after the record is closed shall be marked "Late."

This action for the payment of claims for Celocoxib, Lidocaine 5% ointment and cyclobenzaprine provided on 9/10/22 arises from an 8/7/22 accident. Respondent denied the claims on the recommendations of its peer reviewer, Dr. Roth.

It is well-settled that submission of a provider's claim form to the carrier is prima facie evidence of the necessity of the services contained therein, Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498; Amaze Medical Supply Inc. v. Eagle Ins. Co., 2 Misc.3d 128(A), 784 N.Y.S.2d 918. Respondent can rebut that presumption through competent, contrary opinion that would shift the burden back to the applicant to put forth evidence in support of its claims, see, e.g., Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443; B.Y., M.D., P.C. v. Progressive Casualty Ins. Co., 26 Misc.3d 125(A), 907 N.Y.S.2d.

Respondent's peer reviewer, utilized by the Respondent to assess the necessity of pharmaceuticals, must provide a factual basis and medical rationale to support the expert's opinion that the same were not necessary, Delta Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co., 21 Misc.3d 142(A). That factual basis is lacking if the expert's report 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, 796 N.Y.S.2d 857.

Respondent's peer reviewer is also required to establish the generally accepted professional practices regarding the use of pharmaceuticals for conditions sustained by the Assignor and how it is that the provider being reviewed departed from those practices and standards, Elmont Open MRI & Diagnostic Radiology, P.C. v. State Farm Ins. Co., 26 Misc.3d 1211(A), 906 N.Y.S.2d 779.

Respondent's expert notes that celecoxib is a nonsteroidal anti-inflammatory (NSAID) medication. He states that the use of NSAIDs is part of the "standard of care" and first-line treatment for musculoskeletal pain. The expert stated that celecoxib should only be provided if there were documented side effects from use of other NSAIDs. However, nothing submitted to the record supports the conclusion that adverse effects

from other NSAIDs are a prerequisite to the prescription of celecoxib. I find that its use therefore comported with accepted professional practices in the treatment of musculoskeletal injuries and award Applicant \$227.10.

Respondent's expert notes that cyclobenzaprine is a muscle relaxant used in addition to rest and physical therapy for short-term relief of muscle spasm associated with acute, painful musculoskeletal conditions. In fact, the expert concedes that its use was a reasonable choice at the beginning of treatment, but that there "was no need for the much more expensive extended release 15 mg form." The expert provides no rationale whatsoever to explain why the form of cyclobenzaprine provided was not needed. Applicant is awarded \$1,358.10 based on the expert's concession that use of this pharmaceutical comported with accepted professional practices.

Lidocaine 5% ointment, a topical analgesic, was opined by the expert to be unnecessary because there was no evidence of a neuropathic pain. According to literature cited by the expert, topical analgesics such as that in issue are used to treat neuropathic pain. The prescriptions in this matter identify the prescribing doctor as Joseph Jiminez. The Assignor was initially evaluated by Dr. Jiminez on 8/10/22 and was diagnosed with lumbar, bilateral wrist and right knee injuries. Physical therapy and MRI was the plan of care following this examination with follow-up to occur in three to four weeks. The Assignor was initially evaluated by Dr. Paul Ackerman on 9/2/22 and was diagnosed with internal derangement of the right knee, rule out meniscus tear. Physical therapy and MRI of the right knee was recommended with a follow-up in two weeks. Neither provider's report indicates that pharmaceutical management utilizing Lidocaine 5% ointment was necessary for the management of the Assignor's injuries and the record is devoid of any rebuttal opinion supporting the use of the ointment. Consequently, I find that the Applicant failed to maintain its continuing burden of persuasion on the issue of necessity. Respondent's denial of the claim for the ointment is therefore sustained.

Applicant is awarded \$1,585.20.

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
	Everhealth Pharmacy Inc.	09/10/22 - 09/10/22	\$2,880.10	Awarded: \$1,358.10
	Everhealth Pharmacy Inc.	09/10/22 - 09/10/22	\$227.10	Awarded: \$227.10
Total			\$3,107.20	Awarded: \$1,585.20

B. The insurer shall also compute and pay the applicant interest set forth below. 01/11/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Statutory interest shall run from the date of filing, 1/11/23 to the date of payment by the Respondent.

C. Attorney's Fees

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

Attorney fees are awarded at 20% of the amount of first-party benefits awarded in the aggregate, plus interest, in accordance with the limitations set forth in 11 NYCRR 65-4.6.

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 Suffolk

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

11/03/2023
(Dated)

Kenneth Rybacki

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:
e6e15ee540bf2ff362dc7844be6ee349

Electronically Signed

Your name: Kenneth Rybacki
Signed on: 11/03/2023