American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

NYC Family Chemists Corp. (Applicant)	AAA Case No.	17-22-1267-7396
	Applicant's File No.	165.661
- and -	Insurer's Claim File No.	0660716480000002
	NAIC No.	35882
Geico Insurance Company (Respondent)		

ARBITRATION AWARD

I, Donald MacKenzie, 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 10/27/2023
   Declared closed by the arbitrator on 10/27/2023

   Vincent Ku from Tsirelman Law Firm PLLC participated virtually for the Applicant

   Cindy Covelli from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$1,820.20**, 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

   The EIP, WY, a 77 year old male was involved in a motor vehicle accident on 3/3/22. The amount in dispute was the fee of $1,820.20 for pharmaceuticals with a date of service of 6/8/22. Respondent denied the claim based upon the peer review of Dr. Edward Weiland, M.D. dated 8/4/22. The issue presented is whether the services were medically necessary.

4. Findings, Conclusions, and Basis Therefor

This case was decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

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 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 2nd , 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of it lack of 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 1st Dept. 2006).

The trial courts have held that a peer review 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 medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See generally, Nir v. Allstate Ins. Co., 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); See also, All Boro Psychological Servs. P.C. v. GEICO, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

In support of the contention that the services were not medically necessary, Respondent denied payment based on the peer review of Dr. Edward Weiland, M.D. dated 8/4/22. Topical medications like lidocaine are approved for postherpetic neuralgia treatment and other focal neuropathic syndromes (mononeuropathies, intercostal neuralgias and post amputation pain) in which traditional treatment using tricyclic antidepressants, anticonvulsants and opioids fail. The standard of care has not been met. A review of peer literature found that no clinical efficacy or medically necessary for the utilization or a lidocaine patch to treat soft tissue trauma with radicular symptoms. There was no reference to the other medications.

Applicant relies on the medical records and the rebuttal of Quazi Rahman, M.D. dated 11/29/22. The patient had complaints of pain in the neck, upper back, lower back, and bilateral shoulders along with tenderness, trigger points, muscle spasm, decreased range of motion and positive Soto Hall test. Also, MRI studies of the cervical and lumbar spine revealed disc herniation and MRI study of the left shoulder revealed abnormal findings. Spinal disorders, including radiculopathy due to disc herniation, spinal stenosis, or spinal cord injury, are common causes of neuropathic pain. Hence, the patient was prescribed Lidocaine ointment for musculoskeletal and neuropathic pain. NSAIDs (non-steroidal anti-inflammatory medications) are commonly utilized in the treatment of musculoskeletal pain and inflammation. These medications are particularly useful not only because they help decrease pain, but also help control swelling and inflammation. Ibuprofen is a nonsteroidal anti-inflammatory drug (NSAID). It works by

reducing hormones that cause inflammation and pain in the body. Ibuprofen is used to reduce fever and treat pain or inflammation caused by many conditions such as headache, toothache, back pain, arthritis, menstrual cramps, or minor injury. The peer review did not discuss if the Esomeprazole 20mg capsule was not medically necessary for this patient.

I find that Applicant rebuts the peer review and demonstrated that the prescription of the medications was within generally accepted medical standards. The peer failed to address two of the three meidcations prescribed. Accordingly, Applicant's case is granted in the amount of $1,820.20.

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**
	NYC Family Chemists Corp.	**06/08/22 - 06/08/22**	**$1,820.20**	**Awarded: $1,820.20**
Total			**$1,820.20**	**Awarded: $1,820.20**

B. The insurer shall also compute and pay the applicant interest set forth below. 10/04/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Pursuant to Insurance Law § 5106 (a), interest accrues on overdue no-fault insurance claims at a rate of 2% per month. A claim is overdue when it is not paid within 30 days after a proper demand is made for its payment (Insurance Law § 5106 [a]; 11 NYCRR 65.15 [g]). The Superintendent's regulation tolls the accumulation of interest if the claimant "does not request arbitration or institute a lawsuit within 30 days after receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations" (11 NYCRR 65-3.9 [c]). The Superintendent has interpreted this provision to mandate that the accrual of interest is tolled, regardless of whether the particular denial at issue was timely. That interpretation was upheld by the Court of Appeals in *LMK Psychological Servs, P.C. v. State Farm Mut. Auto. Ins. Co., 2009 NY Slip Op 02481 (April 2, 2009).* Where no denial of claim is issued in response to a proper demand for payment, the insurer does not benefit from the tolling provision and interest will accrue from the date 30 days after the proper demand for payment is made. Interest that accrues when a denial of claim is not issued within 30 days after the proper demand for payment is made will be tolled upon the issuance of a denial of claim, although such denial is untimely, and the failure to request arbitration or institute a lawsuit within 30 days after receipt of that denial of claim form.

C. Attorney's Fees

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

11 NYCRR 65-4.6 establishes a minimum attorneys' fee and further provides that:

For cases filed on or before February 4, 2015, the "attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the . . . court, subject to a maximum of $850" (11 NYCRR 65-4.6 [e]). The October 8, 2003, opinion letter of the Superintendent interpreted that regulation and stated that the minimum amount of attorneys' fees awarded to an assignee health care provider pursuant to Insurance Law § 5106 is "based upon the aggregate amount of payment required to be reimbursed based upon the amount awarded for each bill which had been submitted and denied. The minimum attorney fee . . . is not due and owing for each bill submitted as part of the total amount of the disputed claim sought in the court action" (Ops Gen Counsel NY Ins Dept No. 03-10-04 [Oct. 2003]). For purposes of calculating attorneys' fees, the Superintendent has interpreted a claim to be the total medical expenses claimed in a cause of action pertaining to a single insured, and not each separate medical bill submitted by the provider. The Insurance Department's interpretation of its own regulation was upheld by the Court of Appeals in *LMK Psychological Servs, P.C. v. State Farm Mut. Auto. Ins. Co., 2009 NY Slip Op 02481 (April 2, 2009).* Attorneys' fees are therefore to be calculated based on the aggregate of all bills for each insured; and

For cases filed after February 4, 2015, the attorney's fee 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). The attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant per arbitration or court proceeding, subject to a maximum fee of $1,360. If the nature of the dispute results in an attorney's fee that could be computed in accordance with the limitations prescribed in both subdivision (c) and this subdivision, the higher attorney's fee shall be payable.

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

11/15/2023
(Dated)

Donald MacKenzie

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:
b38c5713b402de6ef0941a43e85b4cd9

Electronically Signed

Your name: Donald MacKenzie
Signed on: 11/15/2023