

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

S & K Warbasse Pharmacy Inc  
(Applicant)

- and -

Geico Insurance Company  
(Respondent)

AAA Case No. 17-22-1252-4868  
Applicant's File No. DK22-233669  
Insurer's Claim File No. 0404011100101089  
NAIC No. 22063

### ARBITRATION AWARD

I, Neal S Dobshinsky, 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: J Doe

1. Hearing(s) held on 11/08/2023  
Declared closed by the arbitrator on 11/08/2023

Jennifer Raheb from Korsunskiy Legal Group P.C. participated virtually for the Applicant

Marco Carvajal from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$447.18**, 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 dispensed three prescription drugs to J Doe. Applicant sought payment in the total amount of \$1,817.49.

Insurer timely paid only a portion of the fees billed. Insurer denied the balance as excessive and not in accordance with the fee schedule.

Did Insurer pay the correct amounts?

#### 4. Findings, Conclusions, and Basis Therefor

I have read and considered the materials in the AAA ADR case file. I have heard and considered the arguments of counsel. I find as follows:

##### **Background**

On 9/20/21, J Doe, then 34 years old, was the driver of a motor vehicle that was in an accident. The vehicle was insured for no-fault benefits by respondent Insurer. Doe claimed he was injured. Doe then sought care and treatment.

On 1/14/22, Phyllis Gelb, MD, prescribed 30 meloxicam 15 mg tablets; 200 grams lidocaine 5% ointment; and 90 cyclobenzaprine 7.5 mg tablets.

On 1/14/22, applicant S & K Warbasse Pharmacy dispensed the drugs to Doe.

##### **Applicant's Claim and Insurer's Payment/Denial**

Applicant, as Doe's assignee, timely submitted a claim to Insurer for a total of \$1,817.49 for no-fault benefits for payment.

Applicant billed \$121.20 for the meloxicam; \$1,224.09 for the lidocaine; and \$10.02 for the cyclobenzaprine. Applicant also billed a \$5.00 dispensing fee for each of the drugs.

Insurer timely paid a total of \$1,370.31 for the drugs. It paid for the meloxicam and for the lidocaine as billed. It paid only \$10.02 for the cyclobenzaprine. It denied the balance on the ground that the amount sought is excessive and not in accordance with the fee schedule. Insurer stated that drugs are reimbursed at 150% of the price listed in the applicable Red Book for the date of service.

The only issue argued and submitted for determination was whether Insurer paid the correct amounts. All other issues were waived.

##### **Insurer's Fee Schedule Defense**

An insurer is only required to reimburse a claimant in accordance with the regulations and applicable fee schedule. 11 NYCRR 65-3.8 (g) (1) (ii). An insurer is not even required to establish that it had timely denied the claim to preserve its fee schedule defense. *Oleg's Acupuncture, P.C. v Hereford Ins. Co.*, 58 Misc3d 151[A] [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2018], 2018 NY Slip Op 50095[U]. Here, Insurer checked box 18 on its denial of claim, "fees not in accordance with fee schedules.

It is an insurer's burden to come forward with competent evidentiary proof to support the defense. *Robert Physical Therapy, P.C. v State Farm Mut. Auto Ins. Co.*, 13 Misc3d 172 [Civ Ct Kings Co 2006] [internal citations omitted]. The defense may be established through the parties' submissions which may include references to and excerpts from the fee schedule. See *Natural Acupuncture Health, P.C. v Praetorian Ins.*

*Co.*, 30 Misc3d 132[A], 2011 NY Slip Op 50040(U) [App Term 1st Dept 2011]). An arbitrator may take judicial notice of the fee schedule, CPLR 4511(b); see *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 21 [2d Dept 2009]), In an appropriate case, reference to the fee schedule and the other papers submitted by the parties may establish the defense as a matter of law. *Jing Luo Acupuncture, P.C. v NY City Tr. Auth.*, 60 Misc3d 136[A] [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2018], 2018 NY Slip Op 51083(U).

If an insurer shows that the amount charged by applicant for a particular service exceeds the fee schedule amount, the burden shifts to the applicant to show that the amount billed reflects a different interpretation of such schedule or an inadvertent miscalculation or error. *Cornell Med., P.C. v Mercury Cas. Co.*, 24 Misc3d 58, 61 [App Term, 2d Dept, 2, 11 & 13 Jud Dists 2009].

Payment for prescription drugs is to be made in accordance with the Pharmacy Fee Schedule, 12 NYCRR 440.

According to the fee schedule, the correct reimbursement for prescription drugs is determined by reference to the Red Book for the date of service. However, Insurer has not submitted any excerpt from the Red Book. Without any evidence of the price listed in the Red Book for the date that the drugs were dispensed, Insurer's determinations as to the reimbursable amounts are mere assertions without any evidentiary basis. A mere assertion is not sufficient to meet Insurer's initial burden.

No rebuttal from Applicant is required.

## **Conclusion**

Insurer failed to establish its fee schedule defense.

Based on the parties' submissions, their arguments, the law, the regulations, and the weight of the credible evidence, I conclude that Applicant is entitled to payment of the balance sought.

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
	<b>S&amp;K Warbasse Pharmacy</b>	<b>01/14/22 - 01/14/22</b>	<b>\$447.18</b>	<b>Awarded: \$447.18</b>
<b>Total</b>			<b>\$447.18</b>	<b>Awarded: \$447.18</b>

B. The insurer shall also compute and pay the applicant interest set forth below. 06/01/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Insurer shall compute and pay interest from the accrual date noted above-the date on which Applicant requested arbitration by filing with the AAA-at a rate of 2% per month, simple interest, calculated on a pro-rata basis using a 30-day month and ending with the date of payment subject to the provisions of 11 NYCRR 65-3.9.

C. Attorney's Fees

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

Insurer shall pay Applicant's attorney a fee in an amount equal to 20% of the total amount of the benefits plus interest awarded in this arbitration, subject to the provisions of 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 New York

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

11/17/2023  
(Dated)

Neal S Dobshinsky

**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:**  
9dfdfc0206ae0fd1e4c8e14a49c5235d

**Electronically Signed**

Your name: Neal S Dobshinsky  
Signed on: 11/17/2023