

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

SMK Pharmacy Corp d/b/a Nature's First
LTC & Compounding
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-23-1293-9905
Applicant's File No.	00111985
Insurer's Claim File No.	0570316010101041
NAIC No.	22055

ARBITRATION AWARD

I, Karen Fisher-Isaacs, 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 11/28/2023
Declared closed by the arbitrator on 11/28/2023

Rachel Drachman from Drachman Katz, LLP participated virtually for the Applicant

Elba Iris Cornier from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$128.28**, 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 seeks reimbursement of charges for providing Assignor, a 60-year old male, with pain medication (prescription Tylenol and baclofen) on February 16, 2023 in connection with treating injuries following a March 22, 2022 motor vehicle accident. Respondent timely denied Applicant's claim based on Dr. Magda Fahmy's December 13, 2022 Physical Medicine and Rehabilitation (PM and R exam).

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the American Arbitration Association's ADR Center as of the date of the hearing in this matter and have considered all pertinent documents contained therein for the purpose of rendering this award.

Applicant seeks reimbursement in the amount of \$128.28 for providing Assignor, a 50- year old male, with pain medication on February 16, 2023 in connection with treating injuries sustained in a motor vehicle accident on March 22, 2022. Respondent timely denied Applicant's claim based on an IME report.

As a threshold matter, I find that Applicant has established its prima facie case as Applicant has met the requirements enunciated in *Ave T MPC Corp. v Auto One Ins. Co.*, 32 Misc 3d 128[A], 2011 NY Slip Op 51292[U] [App Term, 2d, 11th & 13th Jud Dists 2011]). To meet its burden and establish a lack of medical necessity, Respondent must present competent medical evidence setting forth a clear factual basis (specifics of the claim) and medical rationale for denying the claim. *Citywide Social Work and Psych Services, PLLC v. Allstate*, 8 Misc. 3d 1025A (2005); *Healing Hands Chiropractic v. Nationwide Assurance Co.*, 5 Misc. 3d 975 (2004).

Assignor was the driver of a motor vehicle that was involved in an accident on March 22, 2022. Shortly after the accident he began a course of conservative treatment including physical therapy.

Respondent's evidence established that it timely denied Applicant's billing based on Dr. Fahmy's IME. Assignor presented to Dr. Fahmy on December 13, 2022 complaining of neck, mid back and low back pain. Dr. Fahmy's physical examination was within normal limits as there was no evidence of spinal tenderness or spasm, range of motion testing was full and all orthopedic tests were negative. Additionally, the neurological exam revealed full strength, reflexes and sensation. Based on the lack of any objective evidence, Dr. Fahmy diagnosed cervical/ thoracic/ lumbar spine contusions- resolved and that Assignor did not require further treatment.

The law is well settled that the burden is on the insurer to prove that medical treatment performed was not medically necessary. (See *A.B. Medical Services PLLC v. Geico Insurance*, 2 Misc.3d 26, 773 N.Y.S.2d 773 [App. Term, 2nd & 11th Jud. Dists. 2003]; *King's Medical Supply Inc. v. Country-Wide Insurance Company*, 783 N.Y.S.2d at 448). I find Dr. Fahmy's IME sufficient to meet this burden.

Once Respondent, through Dr. Fahmy's report, established the merits of its challenge to the medical necessity of the medication, the burden shifted. Now, Applicant was bound to present competent medical proof establishing the medical necessity for the post IME medication, and to do so by a preponderance of the credible evidence. *West Tremont Medical Diagnostic, P.C. v. GEICO*, 13 Misc.3d 131[A], 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U), 2006 WL 2829826 (App. Term 2d & 11 Jud. Dists. 9/29/06), *A. Khodadadi Radiology, P.C. v. N.Y. Central Fire Mutual Insurance Company*, 16 Misc. 3d 131[A], 841 N.Y.S.2d 824, 2007 WL 1989432 (App. Term 2d & 11 Dists. 7/3/08). Ultimately, the burden of proof rests with the Applicant (See, Insurance Law Section 5102).

Applicant relied on contemporaneous physical therapy notes from Central Park Physical Medicine and Rehab, P.C. along with Dr. Joyce Goldenberg's January 17, 2023 follow up examination report. While I do not usually find SOAP notes sufficient to refute an IME, here the notes are detailed and establish more than just the fact that the physical therapy took place. For instance on December 5, 2022 and December 12, 2022, Assignor's therapists, Dexter Bongato and Eunyoung Lee both noted that Assignor walked with a positive antalgic gait favoring his right leg with a straight cane. Their cervical and lumbar exams revealed tenderness and spasm. Assignor's serial SOAP notes, before and after Respondent's IME, continued to indicate positive findings. Significantly, Dr. Goldenberg's January 17, 2023 follow up exam was replete with positive findings. She noted that Assignor walked with a cane and that his gait was antalgic. Her physical examination of Assignor's cervical and lumbar spine indicated restricted range of motion testing in all planes. She reported trigger points and spasm with severe tenderness throughout. Spurling's test was positive bilaterally and upper and lower sensation testing was decreased. Dr. Fahmy recommended continued physical therapy and pain medications.

I find Assignor's medical records sufficient to refute Dr. Fahmy's determination that Assignor's accident-related injuries had all resolved as of the IME date.

As no fee schedule issues were raised or addressed, Applicant is awarded \$128.28, the entirety of its claim.

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
	SMK Pharmacy Corp d/b/a Nature's First LTC & Compounding	02/16/23 - 02/16/23	\$128.28	Awarded: \$128.28
Total			\$128.28	Awarded: \$128.28

B. The insurer shall also compute and pay the applicant interest set forth below. 04/05/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Respondent shall pay the Applicant the amount of interest computed from the date of filing (noted above) of the AR-1, at a rate of 2% per month, simple, and ending with the date of payment of the award subject to the provisions of 11 NYCRR 65-3.9(e).

C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee, subject to a maximum fee of \$1,360.00, in accordance with 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 NJ

SS :

County of Bergen

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

12/05/2023
(Dated)

Karen Fisher-Isaacs

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:
bd8ac8a2be698a818ba31dd2637380a7

Electronically Signed

Your name: Karen Fisher-Isaacs
Signed on: 12/05/2023