

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Matrix Health Corp DBA Liberty Chemists
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-22-1265-5252
Applicant's File No. 160.496
Insurer's Claim File No. 0683463820000003
NAIC No.

ARBITRATION AWARD

I, Marcie Glasser, 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: Claimant

1. Hearing(s) held on 12/11/2023
Declared closed by the arbitrator on 12/11/2023

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

Philippa Tapada, Esq. from Geico Insurance Company participated virtually for the
Respondent

2. The amount claimed in the Arbitration Request, **\$2,631.80**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the hearing, Applicant's counsel reduced the total amount claimed to \$2,626.40 so that the bills are in accordance to the New York Workers' Compensation Fee Schedule ("fee schedule"). The Demand for Arbitration is hereby amended accordingly.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

This arbitration stems from treatment of a 51 year-old male who sustained injuries as driver of a motor vehicle involved in an accident on May 24, 2022. The issue is the medical necessity of Lidothol Film 4.5/5% dispensed on June 11, 2022. Denial is timely based on the Peer Review of Shruti Patel, M.D. dated July 7, 2022.

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. I reviewed the documents contained in the electronic file for both parties and make a decision in reliance thereon.

Applicant has established its prima facie entitlement to reimbursement based on submission of a properly completed claim form setting forth the amounts of the losses sustained and establishing that No-Fault payment is overdue. *Ave. T MPC Corp. v. Auto One Ins. Co.*, 32 Misc. 3d 128 (A), 934 N.Y.S. 2d 32 (Table), 2011 N.Y.S Slip Op. 41292(U), 2011 WL2712964 (App Term 2d, 11th & 13th Dists., 7/5/2011); *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D. 3d 782, 774 N.Y.S. 2d 564 (2nd Dep't., 2004; *Vista Surgical Supplies, Inc. v. Metropolitan Property and Casualty Ins. Co.*, 2005-1328 K.C., 2006 N.Y. Slip Op. 51047 (U), June 2, 2006.

As a preliminary matter, Applicant's counsel argued that the records reviewed by Dr. Patel were not submitted.

In the case of *East 75th Street Diagnostic Imaging v. Clarendon National Insurance*, 33 Misc. 3d 573, 574 (N.Y. Dist. Ct. 2011) the Court held the following:

Although a defendant need not necessarily submit those records in order to make a prima facie showing on a lack of medical necessity defense (see Active Imaging, PC. v. Progressive Northeastern Ins. Co., 29 Misc. 3d 130[A], 2010 N.Y. Slip Op 51842[U] [App. Term, 2d Dept. 2010]), the opponent can certainly make use of such records in challenging whether the peer doctor's opinion has a sufficient "factual basis and medical rationale." (See, Novacare Med. P.C. v. Travelers Prop. Cas. Ins. Co., 31 Misc. 3d 1205[A], 2011 N.Y. Slip Op 50500[U] [Nassau Dist. Ct 2011, Ciaffa, J.].) Before the opponent can do so, however, it must first obtain the records. If the records are not records belonging to the provider suing for payment, the records typically are obtainable through discovery. In the case of Active Imaging P.C. v. Progressive Northeastern Insurance Co. 2010 NY Slip Op 51842 (U), 29 Misc.3d 130(A), (App. Term, 2nd Dept), the Court held the following: Plaintiff contends that defendant failed to establish its prima facie entitlement to summary judgment since, although defendant's peer review doctor listed the medical reports and/or records of third parties that he had reviewed in reaching his conclusion that the services rendered were not medically necessary, defendant failed to annex to its moving papers copies of these documents. We reject this contention since these reports and records are not part of defendant's prima

facie showing. We note that, pursuant to CPLR 3212 (f), a court has discretion to deny a motion for summary judgment or order a continuance to permit affidavits to be obtained or disclosure to be had, if "facts essential to justify opposition may exist but cannot then be stated." However, plaintiff failed to "put forth some evidentiary basis to suggest that discovery might lead to relevant evidence" (Trombetta v Cathone, 59 A.D. 526, 527 [2009]; see Canarick v Cicarelli, 46 A.D. 3d 587 [2007]; Kimyagarov v Nixon Taxi Corp. 45 A.D.3d 736 [2007]; Ruttura & Sons Constr. Co. v Petrocelli Constr., 257 A.D.2d 614 [1999]), and the "mere hope" that discovery will uncover the existence of a material issue of fact is insufficient to delay a summary judgment determination (Giraldo v Morrissey, 63 A.D. 784, 785 [2009]). Inasmuch as plaintiff failed to rebut defendant's prima facie showing of its entitlement to summary judgment, defendant's motion was properly granted.

Applicant's challenge to the reliability of the medical records and reports reviewed by Dr. Patel is unavailing. The Peer Review Report indicated the records reviewed. Dr. Patel, in forming his opinion, relied upon these records as to Claimant's injury, diagnosis and the treatment rendered. Based on the above case law, I find that the probative value of the Peer Review Report is not diminished by the reviewed records not being submitted by Respondent.

The defense of medical necessity of the Lidothol Film 4.5/5% is premised on the Peer Review Report of Shruti Patel, M.D. dated July 11, 2022.

A denial premised on lack of medical necessity must be supported by competent evidence such as an independent medical examination, peer review or other proof which sets forth a factual basis and medical rationale for denying the claim. *See, Healing Hands Chiropractic, P.C. v. Nationwide Assur. Co.*, 5 Misc3d 975 (2004). The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 2009 NY Slip Op 00351 (App Div. 2d Dept., Jan. 20, 2009); *Channel Chiropractic, P.C. v. Countrywide Ins. Co.*, 2007 Slip Op 01973, 38 A.D.3d 294 (1st Dept. 2007); *Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 NY Slip Op 27427, 17 Misc.3d 97 (App Term 1st Dept., 2007), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. 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, Jacob Nir, M.D. v. Allstate*, 7 Misc.3d 544, 796 N.Y.S 2d 857 (Civ. Ct Kings Co. 2005) 7; *All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct.

2012). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Nir, supra*.

An insurance carrier must, at a minimum, establish a detailed factual basis and a sufficient medical rationale for its asserted lack of medical necessity. *Vladimir Zlatnick, M.D., P.C. v. Travelers Indem. Co.*, 2006 NY Slip Op 50963(U) (App. Term, 1st Dep't 2006); *accord Delta Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co.*, 21 Misc. 3d 142(A), 2008 NY Slip Op 52450(U) (App. Term, 2d Dep't, 2nd & 11th Jud. Dists. 2008).

Respondent's Peer Review Report

Dr. Patel concluded that the Lidocaine patches were not medically necessary. The standard of care in the treatment of musculoskeletal injuries is the use of oral non-steroidal anti-inflammatory drugs (NSAIDs) as first-line treatment prior to using topical Lidocaine. If the oral medication fails to improve the pain, the next step would be to change the dose or try another oral medication. If there is contraindication to oral medication, then topical medication is justified.

Legal Analysis

As noted above, Applicant has established its prima facie entitlement to reimbursement. The burden then shifts to Respondent to establish lack of medical necessity for Lidocaine Film 4.5/5% which warrants competent, expert proof in admissible form. *Citywide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co.*, 3 Misc. 3d 608, 777 N.Y.S. 2d 241, 2004 N.Y. Slip Op. 24034 (Civ Ct., Kings Co., 2004), *aff'd.*, 8 Misc. 3d 1025 (2005).

I find that Respondent's Peer Review Report is sufficient to meet its burden of proof of lack of medical necessity and to rebut Applicant's prima facie evidence. Therefore, the burden shifts back to Applicant to present competent medical proof as to the issue of medical necessity by a preponderance of 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. 7/3/09). Ultimately, the burden of proof rests with the Applicant (See, Insurance Law Section 5102).

I find that Applicant's burden has not been met based on the medical records or evidence collectively. I am convinced by the credible Peer Review Report that the standard of care in treatment of musculoskeletal injuries is the use of NSAID. In accordance with the Peer Review Report, I find oral NSAID is a proper first-line treatment. Notably, there were no contraindications documented in the medical records as to the use of oral medication for pain relief. The use of topical Lidocaine is found to have been unnecessary under the circumstances. Without a Rebuttal Report or medical records to

support the prescription for Lidothol Film, Applicant has not presented competent medical proof as to the issue of medical necessity by a preponderance of credible evidence.

Accordingly, in light of the foregoing, based on arguments of counsel and after thorough review and consideration of all submissions, I find in favor of Respondent and deny the claim in its entirety.

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 claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of FL

SS :

County of Palm Beach

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

12/13/2023
(Dated)

Marcie Glasser

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:
c941898e5a54c49d5c21271e63b20198

Electronically Signed

Your name: Marcie Glasser
Signed on: 12/13/2023