

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Right Choice Pharmacy
(Applicant)

- and -

Hereford Insurance Company
(Respondent)

AAA Case No. 17-22-1276-0718

Applicant's File No. DK22-298783

Insurer's Claim File No. 95810-05

NAIC No. 24309

ARBITRATION AWARD

I, Lori Ehrlich, 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 11/20/2023
Declared closed by the arbitrator on 11/20/2023

Evan Polansky, Esq from Korsunskiy Legal Group P.C. participated virtually for the Applicant

Pleshette Duncan from Hereford Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$4,722.00**, 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

In dispute are Applicant's claims in the sum of \$4,722.00 for Diclofenac gel furnished to Applicant's assignor, L.B., a forty-nine-year-old female, said claims arising from an automobile accident on October 26, 2021.

Respondent has denied these claims based on peer review of Dr. Stuart Stauber dated September 6, 2022, and Applicant relies on a rebuttal from Dr. Jean-Pierre Georges Bakarar dated October 5, 2023. The issue presented is one of medical necessity.

The parties appeared via Zoom.

I have reviewed the documents entered into the ADR by November 20, 2023.

4. Findings, Conclusions, and Basis Therefor

The prescriptions at issue were furnished to the Claimant on February 3, 2022, May 27, 2022, and July 1, 2022. Applicant has set forth a prima facie case by the submission of a completed health claim form documenting the fact and amount of the loss sustained (*Amaze Medical Supply v. Eagle Ins. Co.*, 2 misc. 3d 128A, 784NYS 2d 918, 2003 NY Slip Op.517014 [App Term, 2d & 11 Jud. Dusts.]). Upon proof of a prima facie case by the Applicant, the burden now shifts to the insurer to prove that the services at issue were not medically necessary. (see *Citywide Social Work & Psy. Serv. P.L.L.C v. Travelers Indemnity Co.*, 3 Misc. 3d 608, 2004 NY Slip Op 24034 [Civ. Ct., Kings County 2004]).

As concerns dates of service February 3, 2022, and May 27, 2022, Respondent's denials state that they are based on the peer review of Dr. Stauber. However, Respondent has failed to submit a peer review which addresses either of these dates of service. Accordingly, Applicant is unable to prove that the prescriptions furnished on these dates were not medically necessary, and Applicant is awarded the amount billed for those dates of service.

In his peer review, Dr. Stauber notes that the Claimant was an unrestrained back seat passenger in a vehicle that was struck in the rear and then pushed into the vehicle in front. The Claimant was evaluated at the ER of Lincoln Hospital where she complained of headaches and cervical, shoulder and lumbar pain; x-rays were performed, and medication was provided. According to Dr. Stauber, the Claimant consulted with Mario Leon, PA on November 2, 2021 at Macintosh Medical, P.C., and trigger point injection, chiropractic, physical therapy, and acupuncture treatments were recommended, as were MRI studies, and functional capacity testing, and medication was prescribed. The Claimant was seen for physical therapy for the cervical spine, thoracic spine, lumbar spine, and left shoulder pain complaints, and at the referral of Sonia Sikand, P.A-C, on 12/6/21, was provided with durable medical equipment and subsequently referred for ultrasound studies. Under the management of P.A. Leon, the Claimant was prescribed medication. Dr. Stauber states that prescriptions for medications were provided for the Claimant by Dr. Jean Pierre Barakat on May 27, 2022 and June 10, 2022, noting that Dr. Barakat evaluated the Claimant for complaints of neck, bilateral shoulder, left hip and lower back complaints. When evaluated by Dr. Barankat the Claimant reported that she been seen for an epidural steroid injection, did not note any allergies, and reported that she was taking only thyroid medication. Analgesics/NSAIDs were recommended, prescriptions for topical medications were prescribed and medical supplies were ordered for home use.

Dr. Stauber opines that the Claimant sustained soft tissue sprain/strain injuries and that the standard of care for these types of injuries includes evaluation by a physician, ordering of plain radiographs if there is suspicion of fracture or a severe mechanism of injury, prescribing medications such as anti-inflammatory medications, rest and / or conservative physiotherapy for a period of 6-8 weeks with follow-up. He further opines

that the standard of care does not involve the referral for multiple medications after the accident and injury described in the Claimant's medical records.

Dr. Stauber cites to "an FDA warning letter from 2016", which states that 3% Diclofenac is "... indicated for the relief of the pain of osteoarthritis of joints amenable to topical treatment, such as the knees and those of the hands" but he asserts that there are no FDA approved indications for the use of this topical medication for acute soft tissue injury. Dr. Stauber notes that medication prescribed runs the risk of hepatic effects, and therefore, considering the lack of FDA approval for the use of this topical for acute soft tissue injury, a more commonly used NSAID or OTC topical gel should have been prescribed.

I find that Respondent has effectively rebutted the presumption of medical necessity established by the Applicant. Dr. Stauber's peer review sets forth sufficient factual foundations and medical rationale upon which his conclusions are based. As such, the burden shifts to the Applicant to refute the Respondent's evidence (see Expo Medical Supplies Inc. v. Claredon Ins. Co., 2006 NY Slip Op 50892(u)).

Applicant has submitted a rebuttal to the peer review from Dr. Bakarar, Claimant's treating physician who notes that an initial examination on May 26, 2022, with complaints of posterior neck pain and stiffness with radiation to the bilateral shoulder; lower back pain; bilateral shoulder pain; and left hip pain. Examination of the cervical spine revealed tenderness at the C4- C7 spinous levels; increased muscle tone in the bilateral paravertebral and trapezius muscles; decreased and painful range of motion; and bilaterally positive Shoulder Depression Test. Examination of the lumbosacral spine revealed moderate tenderness at L1-L5-S1 spinous levels; increased muscle tone in bilateral paravertebral muscles; and restricted and painful range of motion. Examination of the bilateral shoulder revealed limited ranges of motion and tenderness over the rotator cuff insertions (ligaments of sit muscles), and examination of the left hip revealed painful range of motion. A course of conservative treatment was recommended.

Dr. Bakarar notes that an MRI of the cervical spine conducted on December 3, 2021 revealed disc bulges; an MRI of the lumbar spine conducted on December 3, 2021 revealed disc bulges and herniation; an MRI of the left shoulder conducted on November 16, 2021 revealed tendinosis of supraspinatus tendon, mild changes of osteoarthritis in the glenohumeral joint, mild hypertrophic changes in the acromioclavicular joint, mild lateral downsloping of the acromion, minimal synovial effusion, and minimal fluid in subacromial/subdeltoid bursae; and an MRI of the right shoulder conducted on June 7, 2022 revealed Acromioclavicular joint hypertrophy impinging upon the supraspinatus muscle tendon complex, interstitial tear of the supraspinatus tendon with fluid in the glenohumeral joint and the subacromial/subdeltoid and subscapular bursae, and intact biceps anchor complex. Dr. Bakarar further notes that EMG/NCV studies of the upper and lower extremities test performed on February 8, 2022, revealed evidence of mild C5-C6 radiculopathy on the right side and C6-C7 radiculopathy on the left side and evidence of mild S 1-S2 radiculopathy on the left side and evidence of severe bilateral carpal tunnel syndrome (medial nerve entrapment at wrist) affecting sensory components.

In responding to Dr. Stauber's contention that Diclofenac gel is limited to relief of the pain of osteoarthritis of the joints such as knees and hands, Dr. Bakart maintains that these are not the only indicators for the prescription of Diclofenac gel. Rather he asserts that topical medications are part of a multimodal approach to musculoskeletal and neurological injuries. He points out that topical creams give the prescribers the opportunity to treat patients right at the site of their pain providing high local concentrations resulting in a greater analgesic effect, and that they can be used anytime required unlike oral medications.

Dr. Bakarat highlights that Diclofenac is the first prescription topical treatment for pain that has been approved by the FDA, that it is a non-steroidal anti-inflammatory drug (NSAID) in topical form, delivers effective pain relief and has a favorable safety profile. He further asserts that Diclofenac was found to be effective in treating acute musculoskeletal pain and has been approved for it, and that the Claimant had post-traumatic musculoskeletal and neuropathic pain symptoms that warranted the need for pain management. Therefore, Dr. Bakart maintains that the topical medication was appropriately prescribed to enhance the efficacy of conservative treatment.

Upon careful review of the evidence presented I find that Applicant has meaningfully addressed the issues raised by the peer reviewer and established that the medication at issue was medically indicated for the Claimant. Therefore, I defer to the opinion of the treating provider in determining the medical necessity of the prescription at issue.

I note that one day prior to the hearing Respondent submitted the Affidavit of Veroinca Pabon a certified professional coder, who opined that the prescription furnished on date of service July 17, 2022, should be reimbursed at \$183.50. When raising a fee schedule defense, Respondent has the burden to come forward with competent evidentiary proof to support its fee schedule defenses. Robert Physical Therapy, P.C. v. State Farm Mut. Auto. Ins. Co., 13 Misc. 3d. 172(Civ. Ct. Kings Co. 2006). When a Respondent fails to demonstrate by competent evidentiary proof that an Applicant's claims were in excess of the appropriate fee schedules, Respondent's defense of noncompliance with the appropriate fee schedule cannot be sustained. Continental Medical, P.C. v. Travels Indemnity Co., 11 Misc. 3rd 145A (App. Term 1st Dept. 2006). I find that Ms. Pabon's affidavit is insufficient to establish Respondent's fee schedule defense. The affidavit does not offer a sufficient explanation as to how Ms. Pabon calculated the fee for the prescription. Based on the foregoing, Applicant is awarded \$4,722.00.

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
	Right Choice Pharmacy	02/03/22 - 02/03/22	\$943.00	Awarded: \$943.00
	Right Choice Pharmacy	05/27/22 - 05/27/22	\$1,886.00	Awarded: \$1,886.00
	Right Choice Pharmacy	07/17/22 - 07/17/22	\$1,893.00	Awarded: \$1,893.00
Total			\$4,722.00	Awarded: \$4,722.00

B. The insurer shall also compute and pay the applicant interest set forth below. 11/25/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Insurer shall pay interest at the rate of 2% per month, simple (not compounded), on a pro rata basis using a 30-day month. Interest shall be computed from November 25, 2022 to the date of payment.

C. Attorney's Fees

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

This case is subject to the provisions as to attorney fee promulgated in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D): There is an attorney fee of 20% of benefits plus interest, with no minimum fee and a new maximum fee of \$1360.00. However, for all arbitration requests filed on or after April 5, 2002, if the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

- 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 Westchester

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

12/16/2023
(Dated)

Lori Ehrlich

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:
89fa3aa256b7f69d6089213f79b516d3

Electronically Signed

Your name: Lori Ehrlich
Signed on: 12/16/2023