American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Eliyahus Pharmacy Inc (Applicant)	AAA Case No.	17-23-1281-9102
	Applicant's File No.	170.417
- and -	Insurer's Claim File No.	95810-05
	NAIC No.	24309
Hereford Insurance Company (Respondent)		

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 12/21/2023
   Declared closed by the arbitrator on 12/21/2023

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

   Mark Zemick, Esq. from Law Offices of Ruth Nazarian participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$2,629.16**, 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 $2,629.16 for Lidothol Film 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 this claim based on the peer review of Dr. Stuart Stauber dated November 10, 2022, and Applicant relies on a rebuttal from Dr. Pervaiz Qureshi dated March 6, 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 prescription at issue was furnished to the Claimant on October 13, 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, 784 NYS 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 an initial issue, I note that Dr. Qureshi's peer review was submitted into evidence on December 19, 2023, two days before the hearing. Notably Applicant filed its AR1 on January 10, 2023. 11 NYCRR 65 -4.2 (3), also known as "Rocket Docket", provides that within thirty calendar days after the American Arbitration Associating advises a Respondent of its receipt of a request for arbitration, that Respondent "shall provide all documents supporting its position on the dispute manner", or may request in writing for an additional 30 calendar days to respond". 11 NYCRR 65-4.2 (3) (ii). "The written record shall be closed upon receipt of Respondent's submission or the expiration of the period for receipt of the Respondent's submission". 11 NYCRR 65-4.2 (3) (iii). After the written record is closed, any additional written submission can be made "only at the request of or with the approval of the arbitrator.

After considering the arguments of Counsel, I decline to exercise my discretion to accept Applicant's late submission. I find that the rebuttal was submitted with flagrant disregard of the No-Fault Regulations. Clearly, the intent of 11 NYCRR 65 -4.2 (3), is to ensure that hearings can be timely conducted without surprise to either party. Although the statute affords a degree of flexibility, Applicant has failed to submit any evidence or offer any explanation as to why the evidence was submitted two days before the hearing. Therefore, Applicant's rebuttal is precluded from consideration.

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 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 states, "Based upon my review of the medical records, I find that the Lidothol film 4.5-5% was not medically necessary under the circumstances of this case. The claimant, in this case, sustained multiple soft tissue injuries without any significant subjective complaints or physical examination findings to suggest a need for a specialized medication or topical medication. In this case, the claimant should undergo a course of standard, conservative management of pain before prescribing the Lidothol film 4.5-5%." Dr. Stauber further points out that, "…according to the FDA, updated July 1, 2019 these are used to relieve the pain of post-herpetic neuralgia are indicated for ′ temporary relief of minor aches or pains of the muscles and joints associated with simple backache, arthritis, strains′". This was not the diagnosis in this case. This external analgesic for topical application was not medically necessary. In this case, the claimant was diagnosed with soft tissue injury and as noted above, he was given ample time in a course of conservative treatment before this ointment had been prescribed and had no specific need for this topical ointment."

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)). Given that Applicant has failed to submit a timely rebuttal or any other compelling medical evidence to refute the findings of the peer reviewer. Based on the foregoing, Applicant's claim is denied.

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 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.

12/24/2023
(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:
013ef6600bb96230c0272008834eec72

Electronically Signed

Your name: Lori Ehrlich
Signed on: 12/24/2023