

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Fulton Care Pharmacy
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-23-1301-1083
Applicant's File No. FC-122
Insurer's Claim File No. 0552169400101017
NAIC No. 35882

ARBITRATION AWARD

I, Teresa Girolamo, Esq., 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: S.K.

1. Hearing(s) held on 12/28/2023
Declared closed by the arbitrator on 12/28/2023

Maria Dudley, Esq. from Rosado, Apat & Dudley, LLP participated virtually for the Applicant

Kimberly Loescher, Esq. from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,235.75**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the time of the Arbitration Applicant acknowledged payment for the Naproxon and withdrew the claim for the balance as such the new number in this case is \$2,021.85

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

3. Summary of Issues in Dispute

Whether a bill in the amount of \$673.95 for Lidocaine 5 % patches dispensed on 11/1/2022 were medically necessary as same was timely denied by Respondent based upon a peer report of Samuel Carli, M.D. dated 12/10/2023?

Whether a bill in the amount of \$673.95 for Lidocaine 5 % patches dispensed on 12/1/2022 were medically necessary as same was timely denied by Respondent based upon a peer report of Samuel Carli, M.D. dated 1/9/2023?

Whether a bill in the amount of \$673.95 for Lidocaine 5% patches dispensed on 1/3/2023 were medically necessary as same was timely denied by Respondent based upon a peer report of Samuel Carli, M.D. dated 1/28/2023?

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing.

Both Applicant and Respondent each submitted evidence in support of their contentions. This decision is based on my review of that file, as well as the arguments of the parties at the hearing. Each of the parties appeared via ZOOM.

Legal Analysis:

With respect to lack of medical necessity is an affirmative defense that is the Respondent's burden to prove. *See, Alliance Medical Office, P.C. v. Allstate*, 196 Misc.2d 268, 269, 764 N.Y.S.2d 341, 342 (Civil Ct., Kings Cty. 2003); *Choicenet Chiropractic, P.C. v. Allstate*, 2003 WL 1904296, 2003 N.Y. Slip Op. 50672U (App.Term 2 Dept. 2003). "At a minimum, [Respondent] must establish a factual basis and medical rationale for the lack of medical necessity of [Applicant's] services. *Nir v. Allstate*, 7 Misc.3d 544, 546-47, 796 N.Y.S.2d 857, 860 (Civil Court, Kings Cty. 2005). Once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, "plaintiff must rebut it or succumb", *Bedford Park Medical Practice P.C. v. American Transit Ins. Co.* 8 Misc. 3d 1025 (A) 806 N.Y.S. 2d 443 (Table),

A treatment or service is medically necessary if it is "appropriate, suitable, proper and conducive to the end sought by the professional health service in consultation with the patient. It means more than merely convenient or useful treatment or services, but treatment or services that are reasonable in light of the patient's injury, subjective and objective evidence of the patient's complaints of pain, and the goals of evaluating and treating the patient." *Fifth Avenue Pain Control Center v. Allstate*, 196 Misc. 2d 801, 807-808 (Civ. Ct. Queens Cty. 2003). Medically necessary treatment or services must be "consistent with the patient's condition, circumstances and best interest of the patient with regard to the type of treatment or services

rendered, the amount of treatment or services rendered, and the duration of the treatment or services rendered." *Id.*

Medical services are compensable where they serve a valid medical purpose. *Sunrise Medical Imaging PC v. Lumbermans Mutual* 2001 N.Y. Slip Op. 4009.

"A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards." *Id.* Similarly, "[a] peer review report's factual basis may be insufficient if it fails to provide specifics of the claim, is conclusory, or otherwise lacks a basis in the facts of the claim." *Id.*, citing, *Amazg Medical Supply v. Allstate*, 3 Misc.3d 43, 779 N.Y.S.2d 715 (App Term 2d and 11 Jud Dists 2004).

In order for Respondent to meet its burden of establishing the lack of medical necessity, a peer review should (1) set forth applicable accepted medical standards relevant to the services at issue; and (2) comment on whether the Applicant had followed or deviated from those standards in providing the disputed services. This does not necessarily require that the peer review quote or cite medical literature. The *Nir* decision clearly contemplates that a peer may cite "medical authority, standard, or generally accepted practice as a medical rationale for his findings". *Nir*, 7 Misc.3d at 548.

Only if Respondent can establish a *prima facie* defense does the burden of proof shift to Applicant to rebut the defense. See, *A. Khodadadi Radiology PC v. NY Central Mutual Fire Ins. Co.*, 2007 NY Slip Op 51342(U). In general, Applicant's "rebuttal" need not be in the form of an affidavit or other statement specifically created in response to the peer review; Applicant may rely on the existing medical records and reports already in evidence to counter the peer's arguments.

Facts:

On 6/5/2022 S.K. was involved in an accident. At the time of the accident S.K. was a then 56-year-old female who was the driver of a vehicle that was struck from the rear. Due to said accident S.K. complained of neck, mid/ lower back, left shoulder and bilateral knee pain.

On 6/9/2022 S.K. presented to Colin Clarke, M.D. for an Initial Evaluation. At the time of the initial evaluation both the lidocaine 5% patches and the diclofenac sodium 3% gel were prescribed despite a different dispensing date. On 6/9/2022 S.K. received left trapezius trigger point injections.

Since the initial visit with Colin Clarke, M.D., S.K. continued to treat with conservative care. In this case there are three dates of dispute 11/1/2021, 12/1/2022 and 1/19/2023 for which S.K. was prescribed Lidocaine 5 % patches.

Applicant submitted the appropriate health claim forms to Respondent for reimbursement. Respondent submitted same to Samuel Carli, M.D. for an opinion as to whether or not the lidocaine 5 % patches were medically necessary.

In this case there are three separate peer reports by Samuel Carli, M.D. each recommending that each of the three bills should be denied as not medically necessary.

Linked case:

At the time of the Arbitration Applicant notes that there is the linked matter of AAA 17-23-1290-8524 *Fulton Care Pharmacy/ S.K. v. GEICO* that came before me on 10/30/2023. In that case Applicant, the injured party and Respondent are all identical. In that case as herein the lidocaine 5% patches for date of service of 9/1/2022 and 10/3/2022 were denied based upon 2 peer reports by Samuel Carli, M.D., dated 10/6/2022 and 11/10/2022.

As Arbitrator in each of these two matters I am able to review the documents. In reviewing the two peer reports in the linked matter to the three peer reports in this matter the conclusion sections are identical.

In the linked matter in reviewing the peer reports and considering the arguments presented I found each of the peer reports legally insufficient to establish Respondent's affirmative defense of lack of medical necessity.

In the instant case as previously indicated there are essentially 3 identical peer reports by Samuel Carli, M.D., dated 12/10/2022; 1/9/2023 and 1/28/2023.

In reviewing each of the three peer reports I find that each fails to adequately establish a current standard of care that was deviated; each peer report fails to reference current literature; fails to take into consideration uses other than was the medication was originally intended and fails to establish the affirmative defense of lack of medical necessity. As such, Applicant's claims are granted.

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	Amount Amended	Status
	Fulton Care Pharmacy	11/01/22 - 01/19/23	\$2,235.75	\$2,021.85	Awarded: \$2.00
Total			\$2,235.75		Awarded: \$2.00

B. The insurer shall also compute and pay the applicant interest set forth below. 03/27/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

1. Interest is payable from 3/27/2023 to date of payment as date of filing of 3/25/2023 was a Saturday

C. Attorney's Fees

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

Respondent is directed to pay attorney fees in accordance with No Fault Regulations.

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 CT

SS :

County of Fairfield

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

12/28/2023

(Dated)

Teresa Girolamo, Esq.

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:
58e3f5159c8dd453a932b32411970152

Electronically Signed

Your name: Teresa Girolamo, Esq.
Signed on: 12/28/2023