

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Pro Aid Pharmacy Inc
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-23-1294-8021
Applicant's File No.	GM23-589938
Insurer's Claim File No.	0605722690101023
NAIC No.	35882

ARBITRATION AWARD

I, Frank Marotta, 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-JG

1. Hearing(s) held on 12/26/2023
Declared closed by the arbitrator on 12/26/2023

Helen Cohen, Esq. from Law Offices of Gabriel & Moroff, P.C. participated virtually for the Applicant

Jaime Drantch, Arbitration Representative from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$948.00**, 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

The record reveals that the Assignor-JG, a 57-year-old-male, sustained injuries in a motor vehicle accident on 10/4/22.

The Applicant seeks reimbursement for dispensing Diclofenac Sodium 3% Gel prescribed by Dr. Gabriel Dassa on 1/30/23.

The Respondent denied reimbursement based on a peer review by Robert Cristofaro, M.D. dated 3/7/23.

The issue is whether the Diclofenac Sodium 3% Gel was medically necessary.

4. Findings, Conclusions, and Basis Therefor

The Applicant filed this arbitration in the amount of \$984.00 for a disputed fee in connection with dispensing Diclofenac Sodium 3% Gel on 2/9/23.

This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing. In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations. The parties appeared and the hearing was conducted virtually via zoom.

The Applicant's prima facie case is not in dispute nor is the fact that the Respondent preserved for consideration their lack of medical necessity defense based on the peer review with the issuance of a timely denial of claim form.

In support of its defense Respondent relies on a peer review by Dr. Robert Cristofaro dated 3/7/23. Dr. Cristofaro provides a history of the Assignor as a 57-year-old male who was involved in a motor vehicle accident on 10/4/22 as a restrained driver. On 11/22/22 he came under the care of Dr. Gabriel Dassa with complaints of left shoulder pain. Based on his examination findings Dr. Dassa diagnosed the Assignor with pain, rotator cuff tear and slap tear. The claimant was recommended physical therapy and follow up. The Assignor was seen again by Dr. Dassa. His clinical examination revealed continued findings in the left shoulder. The claimant was recommended physical therapy and prescribed Diclofenac gel 3%. On 2/9/23 the claimant was provided the Diclofenac gel by the Applicant.

According to Dr. Cristofaro the Diclofenac Sodium 3% Gel was not medically necessary as the efficacy of such medications is questionable and there were other alternatives available at that time which could have been better options, such as NSAIDs and other pain medications.

Diclofenac gel in other formulations is used to reduce pain or discomfort caused by skin irritations such as sunburn insect bites, poison ivy, poison sumac and minor cuts, scratches, hemorrhoids, and burns. Diclofenac gel can also be used to treat sores inside the mouth, during dental procedures to numb the gums, and to numb the skin for a medical procedure (such as getting stitches). However, there is no evidence in peer-reviewed medical literature that combined topical preparations is as effective as a standard treatment regimen with oral agents that can include NSAID, muscle relaxants and analgesics as needed for the patient's diagnosis.

In this case the claimant had no neuropathic pain that would warrant the use of topical ointment. Diclofenac and Lidocaine ointment are not potent, and it is short-acting and not medically indicated for moderate or strong pain. There was no requirement of prescribing this claimant topical lidocaine when the standard of care is oral analgesic. Any oral NSAID medication would be enough to treat the claimant's pain. Dr. Cristofaro goes on to state that there is no evidence-based scientific proof that topical agents are effective or superior to other available alternatives. There is no evidence that the claimant was unable to use oral medications. Dr. Cristofaro referred to a 2010 article in stating that the role of topical presentations when compared to traditional routes has not been fully explored. Dr. Cristofaro states that multiple topical medications are available for the treatment of pain including NSAIDs, anesthetics, counterirritants, and narcotic analgesics. Dr. Cristofaro reports that these medications have advantages and disadvantages to oral or intravenous administration. While the efficacy of these agents has been demonstrated their use does not eliminate safety concerns.

After a review of the documents contained in the ECF and in consideration of the arguments made by the parties at the hearing, I find for the Applicant. Dr. Cristofaro's peer fails to set forth a sufficient factual basis and medical rationale as to why the Diclofenac Sodium 3% Gel was not medically necessary. Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219 (U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014); Jacob Nir, M.D. v. Allstate Ins. Co., 7 Misc.3d 544, 546-47 (Civ. Ct. Kings Co. 2005). Dr. Cristofaro's peer review provides generic statements regarding the use of topical medication including lidocaine which is an issue in the instant matter. He reports that Diclofenac gel "in other formulations" is used to treat pain and discomfort for skin conditions but fails to establish any medical standard applicable to the prescribed medication, Diclofenac Sodium 3% Gel, from which it can be said the treating doctor deviated by prescribing it. Additionally, Dr. Cristofaro's peer review is absent a significant discussion of the Assignor's symptomology in relationship to the discussions supported by the cited medical journals. Dr. Cristofaro did not provide any meaningful discussion as to why the Diclofenac Sodium 3% Gel for Assignor's would not be beneficial. As such, I find that the Respondent has not met its prima facie burden establishing that the Diclofenac Sodium 3% Gel was medically unnecessary with the peer review of Dr. Cristofaro and therefore the Applicant is entitled to be reimbursed.

The Respondent provides a fee audit by ISG dated 12/18/23 indicating that the proper fee for the Diclofenac Sodium 3% Gel is \$948.00 the amount billed.

The Applicant is awarded \$984.00.

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
	Pro Aid Pharmacy Inc	02/09/23 - 02/09/23	\$948.00	Awarded: \$948.00
Total			\$948.00	Awarded: \$948.00

B. The insurer shall also compute and pay the applicant interest set forth below. 04/12/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Respondent shall pay interest at a rate of 2% per month, calculated on a pro rata basis using 30-day month and in compliance with 11 NYCRR §65-3.9. Interest shall begin to accrue from the date of filing with the American Arbitration Association and end on the date the award is paid.

C. Attorney's Fees

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

The insurer shall also pay the applicant for attorney's fees as set forth below Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$850." Id. The minimum attorney fee that shall be

awarded is \$60. 11 NYCRR §65-4.5(c). However, 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 (i). For claims that fall under the Sixth Amendment to the regulation the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, subject to a maximum fee of \$1,360." 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 NY

SS :

County of Suffolk

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

01/01/2024

(Dated)

Frank Marotta

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:
bc082d41612db9ce1b7287e6020b502c

Electronically Signed

Your name: Frank Marotta
Signed on: 01/01/2024