

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

United Pharmacy NYC Inc.
(Applicant)

- and -

Integon National Insurance Company
(Respondent)

AAA Case No. 17-23-1319-8237

Applicant's File No. 23-0233

Insurer's Claim File No. 9XINY06135-02

NAIC No. 29742

ARBITRATION AWARD

I, Joseph Endzweig, 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 07/23/2024
Declared closed by the arbitrator on 07/23/2024

Anna Bangiyev, Esq. from The Bangiyev Law Firm PLLC participated virtually for the Applicant

Lauren Hirschfeld, Esq. from Law Offices of Eric Fendt participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,808.46**, 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

This arbitration arises out of treatment of a 49 year old male for injuries sustained in a motor vehicle accident occurring on 6/9/23. Applicant seeks reimbursement for Cyclobenzaprine 10 mg tablets, Lidocaine 5% ointment, Ibuprofen 600 mg tablets and Omeprazole 20 mg capsules, dispensed on June 28, 2023. The amount of the claim is \$1,808.46. Respondent denied reimbursement based on the peer review report of Dr. Jason Cohen dated 9/27/23.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the hearing.

This arbitration arises out of treatment of a 49 year old male for injuries sustained in a motor vehicle accident occurring on 6/9/23. Applicant seeks reimbursement for Cyclobenzaprine 10 mg tablets, Lidocaine 5% ointment, Ibuprofen 600 mg tablets and Omeprazole 20 mg capsules, dispensed on June 28, 2023. The amount of the claim is \$1,808.46. Respondent denied reimbursement based on the peer review report of Dr. Jason Cohen dated 9/27/23.

According to the records submitted by the parties, the claimant was a restrained passenger of a motor vehicle involved in an accident. He initially sustained injuries to his neck, upper back, lower back and right shoulder. There was no reported loss of consciousness. He was transported by ambulance to the local hospital emergency room that same day for evaluation and treatment. Report of examination by David Carmili, M.D., on June 22, 2023 noted subjective complaints of pain in the neck, upper back, lower back and right shoulder. Musculoskeletal examination of the cervical spine revealed decreased range of motion. Lumbar spine examination revealed decreased range of motion. Right shoulder examination revealed tenderness and decreased range motion. Impression was sprain of ligaments of cervical spine; sprain of ligaments of lumbar spine; sprain of right shoulder, joint. The claimant was recommended physical therapy; nerve block; MRI cervical spine, lumbar spine and right shoulder. He was prescribed Cyclobenzaprine 10 mg tab, Lidocaine 5% ointment, Ibuprofen 600 mg tab and Omeprazole 20 mg capsule. On June 28, 2023, the claimant was dispensed the Cyclobenzaprine 10 mg tab, Lidocaine 5% ointment, Ibuprofen 600 mg tab and Omeprazole 20 mg capsule.

Respondent submits a peer review report from Dr. Jason Cohen. Dr. Cohen concludes that based upon the medical records presented there is no indication for Cyclobenzaprine 10 mg tab, Lidocaine 5% ointment, Ibuprofen 600 mg tab and Omeprazole 20 mg capsule dispensed on June 28, 2023. He notes that "Flexeril (Cyclobenzaprine) belongs to a class of drugs called Skeletal Muscle Relaxants and is a prescription medicine used to treat the symptoms of muscle spasms." (<https://www.rxlist.com/flexeril-drug.htm>) He maintains that there is no evidence on examination by Dr. David Carmili, of muscle spasm for which Cyclobenzaprine hydrochloride would be indicated. He further notes that "Evidence also supports the use of topical lidocaine in the treatment of postherpetic neuralgia and diabetic neuropathy." (Charles E. Argoff, MD "Topical Analgesics in the Management of Acute and Chronic Pain". Mayo Clin Proc. n February 2013;88(2):195-205). He states that there is no evidence on examination by Dr. David Carmili, of any peripheral nerve pain for which a topical lidocaine anesthetic ointment may be indicated. He further states that "Acetaminophen should be used as a first-line agent as an effective and safe analgesic at therapeutic doses and can be combined with opioid, e.g., codeine, to increase its efficacy. Thereafter the rule would seem to be to use ibuprofen for preference at the lowest effective dose. When other NSAIDs are required, naproxen should be used, as it has intermediate risks of adverse events. Generally, the lower risk NSAIDs should be used first and the more toxic NSAIDs should only be used in the event of a poor clinical response to the

less toxic agent (Ong CKS, Lirk P, Tan CH, Seymour RA. An EvidenceBased Update on Nonsteroidal Anti-Inflammatory Drugs. Clinical Medicine and Research. 2007;5(1):19-34.). There is no documentation by David Carmili, M.D., of any failed first line agents including over-the-counter acetaminophen, ibuprofen or naproxen prior to dispensing prescription NSAIDs. He notes that "Prophylaxis with omeprazole is effective for the prevention of gastroduodenal ulcers, maintenance of remission and alleviation of dyspeptic symptoms in NSAID recipients." (Clin Drug Investig. 2012 Apr He maintains that there is no documentation or evidence on consultation by Dr. David Carmili, of any medical history including GI Symptoms.

Applicant does not submit a rebuttal, letter of medical necessity, or any other evidence to refute the findings of the peer or to support the necessity of the disputed medications.

It is Applicant's prima facie burden to establish its entitlement to payment for the subject medications.

It is well settled that a health care provider establishes its prima facie entitlement to payment as a matter of law by proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see *Insurance Law* § 5106 a; *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 AD 3d 742, 774N.Y.S. 2d 564 [2004]; *Amaze Med. Supply v. Eagle Ins. Co.*, 2 Misc. 3d 128A, 784 N.Y.S. 2d918, 2003 NY Slip Op 51701U [App Term, 2d & 11th Jud Dists]).

If an insurer asserts that the medical test, treatment, supply or other service was medically unnecessary the burden is on the insurer to prove that assertion with competent evidence such as an independent medical examination, a peer review or other proof that sets forth a factual basis and a medical rationale for denying the claim. (See *A.B. Medical Services, PLLC v. Geico Insurance Co.*, 2 Misc. 3d 26 [App Term, 2nd & 11th Jud Dists 2003]; *Kings Medical Supply Inc. v. Country Wide Insurance Company*, 783 N.Y.S. 2d at 448 & 452; *Amaze Medical Supply, Inc. v. Eagle Insurance Company*, 2 Misc. 3d 128 [App Term, 2nd and 11thJud Dists 2003]).

Since Applicant submitted a timely and proper claim the burden is on the respondent to prove that the disputed medications were not medically necessary.

In the event an insurer relies on a peer review report to demonstrate that a particular service was medically unnecessary the peer reviewer's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory or may be supported by evidence of generally accepted medical/professional practice or standards. See *Nir v. Allstate Insurance Company*, 2005 NY Slip Op 25090; 7 Misc.3d 544; 796 N.Y.S.2d 857; 2005 N.Y.Misc. LEXIS 419 and *Citywide Social Work & Psy. Serv. P.L.L.C. v. Travelers IndemnityCo.*, 3 Misc. 3d 608; 777 N.Y.S.2d 241; 2004 NY Slip Op 24034.

A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards. For example, the medical rationale may be insufficient if not supported by evidence of the generally accepted medical

professional practice." Jacob Nir, M.D. a/a/o Josapphat Etienne v. Allstate Ins. Co., 7 Misc. 3d 544, 796 N.Y.S.2d 857 (Civ. Ct. Kings Co. 2005).

When an insurer interposes a timely denial of claim that sets forth a sufficiently detailed factual basis and adequate medical rationale for a claim's rejection, the presumption of medical necessity attached to the applicant's properly completed claim is rebutted and the burden shifts back to the claimant to refute the peer review and prove the necessity of the disputed services. *Id.* See, e.g., *CPT Med. Servs., P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 NY Slip Op 27526, 18 Misc.3d 87 (App. Term 1st Dept.); *Eden Med., P.C. v. Progressive Cas. Ins. Co.*, 2008 NY Slip Op 51098(U), 19 Misc.3d 143(A) (App Term 2d & 11th Jud Dists., 2008); *Bath Med. Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 2008 NY Slip Op 50347(U) (App. Term 2d Dept., Feb. 26, 2008) (since the provider failed to rebut the peer review's showing of a lack of medical necessity, defendant was entitled to dismissal of complaint). Where Respondent has set forth a medical rationale and factual basis in support of its contention that the treatment was not medically necessary, the burden then shifts to Applicant, who bears the ultimate burden of persuasion.

I find that Respondent has failed to meet its burden of demonstrating that the disputed medications were not medically necessary. Respondent fails to set forth a factual basis and medical rationale for denying the claim. The peer fails to cite any relevant authoritative source to support his position that the disputed medications were not medically necessary or improperly prescribed in this clinical setting. Simply stating that "Flexeril (Cyclobenzaprine) belongs to a class of drugs called Skeletal Muscle Relaxants and is a prescription medicine used to treat the symptoms of muscle spasms" does not in and of itself mean that it could not properly be used for other conditions. Again, simply asserting that "Evidence also supports the use of topical lidocaine in the treatment of postherpetic neuralgia and diabetic neuropathy," does not mean that it could not properly be used for other conditions. Dr. Cohen states "Acetaminophen should be used as a first-line agent as an effective and safe analgesic at therapeutic doses and can be combined with opioid, e.g., codeine, to increase its efficacy....Here, Acetaminophen was used as a first line agent. He states that "Prophylaxis with omeprazole is effective for the prevention of gastroduodenal ulcers, maintenance of remission and alleviation of dyspeptic symptoms in NSAID recipients." He does not exclude its use for other purposes. Dr. Cohen clearly fails to demonstrate that prescribing these medications in the within clinical setting was a departure from generally accepted medical standards.

Accordingly, I find in favor of Applicant, and award the sum of \$1,808.46.

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
	United Pharmacy NYC Inc.	06/28/23 - 06/28/23	\$1,808.46	Awarded: \$1,808.46
Total			\$1,808.46	Awarded: \$1,808.46

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/06/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall run from the date the request for arbitration was received by the AAA.

C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee in accordance with 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 Westchester

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

07/24/2024

(Dated)

Joseph Endzweig

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:
07f62dc42df99cee27795d6aecff0c3d

Electronically Signed

Your name: Joseph Endzweig
Signed on: 07/24/2024