

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Better Soon RX Inc
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-23-1292-4995

Applicant's File No. 176.464

Insurer's Claim File No. 0690017736
2HF

NAIC No. 29688

ARBITRATION AWARD

I, Rhonda Barry, 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: EIP

1. Hearing(s) held on 07/26/2024
Declared closed by the arbitrator on 07/26/2024

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

Olga Gromyko, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,902.50**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the hearing, the applicant's counsel amended the amount in dispute from \$1902.50 to \$1528.72 based upon the applicable fee schedule for medical services in this case.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that the denial is timely. If applicable, interest accrues in accordance with 11 NYCRR§65-3.9.

3. Summary of Issues in Dispute

The EIP, "JF" is a 24 year old female injured as a bicyclist in a motor vehicle accident on 10/14/22. She was evaluated at a hospital, treated, and released. Applicant seeks \$1528.72 for lidocaine ointment dispensed to the EIP on DOS 12/28/22. Respondent denied applicant's claim based upon lack of medical necessity according to the peer review of Richard Coven, MD. Applicant submits a rebuttal from the treating/referring physician, Jean Pierre Barakat, MD.

4. Findings, Conclusions, and Basis Therefor

This matter is linked with AAA #17-23-1328-4114. Documents in each ADR Center record is considered in each matter and for each decision. The cases were heard on the same day. The applicants were represented by the same attorney. The respondent was represented by the same attorney.

I have completely reviewed all timely submitted documents contained in the ADR Center record maintained by the American Arbitration Association and considered all oral arguments. No additional documents were submitted by either party at hearing. No witnesses testified at the hearing.

ANALYSIS

Applicant submitted evidentiary proof that the prescribed statutory billing forms (including facts and amount) were mailed to and received by respondent; payment of no-fault benefits is now overdue. As such, and as a matter of law, applicant established its prima facie entitlement to reimbursement. Mary Immaculate Hospital v. Allstate Insurance Company, 5 AD 3d 742, (2nd Dept. 2004). Westchester Medical Center v. Lincoln General Ins. Co., 60 AD 3d 1045 (2nd Dept. 2009).

The burden now shifts to respondent to establish a lack of medical necessity with competent medical evidence which sets forth a clear factual basis (specifics of the claim) and medical rationale for denying the claim. Citywide Social Work and Psych Services, PLLC v. Allstate, 8 Misc. 3d 1025A (2005); Healing Hands Chiropractic v. Nationwide Assurance Co., 5 Misc. 3d 975 (2004).

The insurer must establish a factual basis and medical rationale for its asserted lack of medical necessity, which is supported by evidence of the generally accepted medical/professional practices. Beal Medea Products Inc. v. Geico, 27 Misc. 3d 1218 (A), 910 NYS 2d 760 (Civ. Ct. Kings County 2010). Failing to mention the applicable generally accepted medical/professional standard and the plaintiff's departure from it denudes the defendant's proof of a prima facie case of lack of medical necessity. Cambridge Medical, PC v Geico, 18 Misc. 3d 1144 (A), 859 NYS 2d 893 (Civ. Ct. Richmond County 2008).

Respondent has sufficiently satisfied its burden of proof of lack of medical necessity for the transcranial doppler testing at issue. The peer report herein sets forth a factual basis and medical rationale for the services at issue. AJS Chiropractic, PC v. Mercury Ins. Co., 22 Misc. 3d 133 (A), 880 NYS 2d 871 (App. Term 2d & 11th Jud Dist. 2009).

Dr. Coven considered sufficient medical records including evaluations by Dr. Barakat on 10/25/22. The EIP's complaints of pain included pain to the lumbar spine and left ankle. As to the lumbar spine Dr. Barakat noted tenderness and spasm. Objective tests including straight leg raise were negative. Range of motion was diminished but reflexes were normal. Examination of the left ankle indicated decreased range of motion. There is no indication of crepitus, swelling or edema. The EIP has a history of diabetes. There was no significant past surgical history, and she was not taking medication. There was no history of GERD, peripheral neuropathy, uncontrolled blood pressure, gastric surgery or gastric also. Subjective complaints and physical findings were consistent with sprain/strain injury of the spine and contusion with strain of the extremity. She was recommended for MRI testing, medication, medical supplies, and physical therapy. Dr. Barakat reevaluated the EIP on 11/29/22 revealing a normal motor, sensory and reflex examination. A follow-up on 12/26/22 was essentially identical.

The standard of care for soft tissue injury and or musculoskeletal would include a comprehensive evaluation by the physician, ordering plain radiographs (if there is a suspicion of fracture or instability) prescribing anti-inflammatory medication, cold modality, rest, and formal conservative care (physical therapy, chiropractic, and acupuncture) for a period of 4 to 8 weeks. The standard of care does not involve routine prescribing of lidocaine ointment for soft tissue and musculoskeletal injuries.

Citing medical authority Dr. Coven concluded that there was no necessity for lidocaine ointment. Lidocaine is used as a topical anesthesia of the skin and mucous membranes or stomatitis, for endotracheal intubation, for the treatment of pain associated with postherpetic neuralgia or painful diabetic neuropathy. It may also be used for urethral anesthesia or local anesthesia including peripheral nerve block. It is typically used to relieve pain and itching caused by sunburn or other minor burns, insect bites or stings. It is used to relieve nerve pain caused by herpes zoster or shingles. There was no indication that the sprain/strain and contusion/strain injuries would require this medication.

Dr. Coven provided a satisfactory standard of generally accepted medical practice. See, Williamsbridge Radiology and Open Imaging v. Travelers Indemnity Company, 14 Misc. 3d 1231 (A), 836 NYS 2d 496 Further Dr. Coven's report successfully correlates the medical necessity of the lidocaine to this EIP. See, James Ligouri Physician, PC v. State Farm Mutual Automobile Insurance Company, 2007 NY Slip op 50465 (U) (New York District Court 2007).

Respondent established a reasonable factual basis and medical rationale with its expert opinion as to the medical necessity for the disputed treatment. Applicant must now

meaningfully refer to or rebut the conclusions set forth in the peer review. Yklik, Inc v. Geico Ins. Co, 2010 NY Slip Op 51336(u) (App Term 2nd, 11th, and 13th Jud Dist. 7/22/10). In the absence of such a rebuttal, the claim may be denied. A. Khodadadi Radiology, PC v. NY Cent Mut Ins. Co, 16 Misc. 3d 131 (A), 2007 NY Slip Op 51342[U] (App term 2nd and 11th Jud Dist. 2007).

Dr. Barakat's rebuttal is sufficient to refute respondent's burden of proof. In addition to the positive findings on clinical examination, an EMG/NCV of the upper extremities on 12/13/22 revealed left C5/6 radiculopathy and carpal tunnel syndrome. The findings clearly indicate that the patient had musculoskeletal and neuropathic injuries. Pain management can include more than one type of medication. The EIP was prescribed lidocaine ointment to provide pain relief and enhance the efficacy of conservative treatment. Lidocaine is an analgesics used to achieve relief from pain. Topical analgesic assures targeted drug delivery and is used to block nociceptive signals. It is effective in treating acute and chronic pain.

After careful consideration of the parties' submissions and the arguments at hearing I find that the referral for lidocaine ointment was not a deviation from generally accepted medical practice. Applicant's claim is awarded.

Interest: Applicant is awarded interest in accordance with 11 NYCRR§65 - 3.9 (a)-(f). Accordingly, interest is calculated at a rate of 2% per month, calculated on a pro rata basis using the 30 day month. A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. If an applicant does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form, or payment of benefits calculated pursuant to Department of Financial Services Regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken. 11 NYCRR §65 - 3.9 (c). The Superintendent and the New York Court of Appeals have interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Services PC v. State Farm Mutual Automobile Insurance Company, 12 NY 3d 217 (2009).

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
	Better Soon RX Inc	12/28/22 - 12/28/22	\$1,902.50	\$1,528.72	Awarded: \$1,528.72
Total			\$1,902.50		Awarded: \$1,528.72

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.

Based on the submission of a timely denial, interest shall be paid from 3/27/23, the date of filing, on the amount awarded of \$1528.72.44 at a rate of 2% per month, simple, and ending with the date of payment of the award subject to the provisions of 11 NYCRR 65 - 3.9 (e).

C. Attorney's Fees

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

As this matter was filed **after** February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4.6(d) (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 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 Nassau

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

07/30/2024
(Dated)

Rhonda Barry

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:
f8dee01a0723a66c7a9837e5cb368aae

Electronically Signed

Your name: Rhonda Barry
Signed on: 07/30/2024