

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Dulex Pharmacy (Applicant)	AAA Case No.	17-24-1330-9569
- and -	Applicant's File No.	M07450
	Insurer's Claim File No.	0717194260 YEK
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

**ARBITRATION AWARD**

I, Kihyun Kim, 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: the Assignor

1. Hearing(s) held on 07/11/2024  
Declared closed by the arbitrator on 07/11/2024

Ashley Andrews Santillo, Esq. from Munawar Law Firm, PLLC participated virtually for the Applicant

Marissa Allis, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,944.85**, 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 issues presented are (1) whether certain claims for reimbursement were properly billed and paid pursuant to the fee schedule, and (2) whether the medications were medically necessary.

The Assignor (AN) was a 43-year-old female who was the driver of an automobile that was involved in an accident on June 11, 2023. Applicant seeks reimbursement in the aggregate amount of \$2,944.85 for the balance of the charges, which were partially paid by Respondent, for the cyclobenzaprine tablets and ibuprofen tablets provided to the

Assignor on June 18, 2023; and for the lidocaine 5% ointment also provided to the Assignor on June 18, 2023. Reimbursement for the lidocaine was denied based on the peer review by Kevin J. Curley, M.D., dated September 28, 2023.

#### 4. Findings, Conclusions, and Basis Therefor

This arbitration was conducted using the documentary submissions of the parties contained in the ADR Center, maintained by the American Arbitration Association. I have reviewed the documents contained therein as of the closing of the hearing, and such documents are hereby incorporated into the record of this hearing. Both parties appeared at the hearing by representatives, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

The Assignor was a 43-year-old female who was injured in an automobile accident on June 11, 2023. Following the accident, the Assignor sought treatment and testing for her injuries from various providers, including Applicant.

On June 18, 2023, Applicant provided the Assignor with cyclobenzaprine tablets, lidocaine 5% ointment, and ibuprofen tablets prescribed by Chadae Haffenden-Morrison, FNP, on the same date. Applicant billed Respondent for the medication and Respondent paid Applicant's claims for the ibuprofen and cyclobenzaprine in part, and timely denied the remainder based on a fee schedule dispute. Applicant timely denied Applicant's claims for the lidocaine based upon the September 28, 2023 peer review by Kevin J. Curley, M.D., who found medication to be medically unnecessary.

Applicant now seeks reimbursement in the aggregate amount of \$2,944.85 for the balance of the charges, which were partially paid by Respondent, for the cyclobenzaprine tablets and ibuprofen tablets provided to the Assignor on June 18, 2023; and for the lidocaine 5% ointment also provided to the Assignor on June 18, 2023.

#### **Legal Framework - Fee Schedule**

It is well established that a healthcare provider must limit its charges according to the applicable fee schedule. *Goldberg v. Corcoran*, 153 AD2d 113, 117-18 (App Div, 2d Dept 1989). Amended Regulations section 65-3.8(g)(1) states proof of the fact, and amount of loss sustained pursuant to Insurance Law section 5106(a) shall not be deemed supplied by an applicant to an insurer and no payment shall be due for such claimed medical services under any circumstances: (i) when the claimed medical services were not provided to an injured party; or (ii) for those claimed medical service fees that exceed the charges permissible pursuant to Insurance Law sections 5108(a) and (b) and the regulations promulgated thereunder for services rendered by medical providers. This subdivision applies to medical services rendered on or after April 1, 2013.

Notwithstanding the foregoing, the insurer has the burden to come forward with competent evidentiary proof to support its fee schedule defenses. *Robert Physical Therapy, P.C. v. State Farm Mut. Auto. Ins. Co.*, 13 Misc. 3d. 172 (Civ. Ct. Kings Co. 2006). In the absence of such proof, a defense of noncompliance with the appropriate

fee schedule cannot be sustained. *Continental Medical, P.C. v. Travelers Indemnity Company*, 11 Misc. 3d 145(A), 2006 N.Y. Slip Op. 50841(U) (App. Term 1st Dept. 2006). A lay person is not qualified to evaluate the CPT codes or to change if the code is used by a health provider in its bills. See *Abraham v. Country-Wide Ins. Co.*, 3 Misc. 3d 130A (App. Term 2d. Dept. 2004). Once the insurer makes a prima facie showing that the amounts charged by a provider were in excess of the fee schedule, the burden shifts to the provider to show that the charges involved a different interpretation of such schedule or an inadvertent miscalculation or error. *Cornell Medical, P.C. v. Mercury Casualty Co.*, 24 Misc. 3d 58, 884 N.Y.S.3d 558 (App. Term 2d, 11th & 13th Dists. 2009).

### **PPO Agreement**

While Insurance Law § 5108(a) prohibits billing in excess of the Worker's Compensation Fee Schedule, the Insurance Department (now the Department of Financial Services) has stated, in an Opinion dated February 2, 2009, that, "a health care provider may accept reimbursement in an amount less than the maximum permissible fees as payment in full from the no-fault insurer." The Insurance Department found that an agreement where providers are reimbursed a rate lesser than the Worker's Compensation Fee Schedule per the providers PPO contract does not violate Insurance Law § 5108(a).

While not necessarily binding on the courts, the Court of Appeals has, "long held that the Superintendent's 'interpretation, if not irrational or unreasonable, will be upheld in deference to his special competence and expertise with respect to the insurance industry, unless it runs counter to the clear wording of a statutory provision.'" *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217, 906 N.E.2d 1046 (2009) (citing *Matter of New York Pub. Interest Research Group v. New York State Dept. of Ins.*, 66 N.Y.2d 444, 448, 497 N.Y.S.2d 645 [1985]).

### **Analysis - Fee Schedule - Ibuprofen/Cyclobenzaprine - DOS 6/18/23**

In the present case, Applicant billed Respondent in the amount of \$68.70 for the ibuprofen tablets provided to the Assignor on June 18, 2023, in the amount of \$555.00 for the cyclobenzaprine tablets also provided to the Assignor on June 18, 2023, and in the amount of \$2,447.50 for the lidocaine 5% ointment also provided to the Assignor on June 18, 2023. The bill was received on July 24, 2023. Following receipt of the bill, Respondent sent an initial and follow-up verification request/delay letter (in the form on an EOB), dated July 29, 2023 and September 1, 2023, respectively, to Applicant, the Assignor and the Assignor's counsel that advised that Applicant's claims would be delayed pending Respondent's investigation and the examinations under oath of [the Assignor] and claimant [PR]. More specifically, the letters stated:

All claims for no fault benefits are being delayed pending Allstate's investigation and the examinations under oath of [the Assignor] and [PR]. Allstate Insurance Company is seeking to verify proof of claim. Allstate Insurance Company is seeking particulars regarding the nature and extent of the injuries, treatment received and contemplated; proof of the accident facts and the amount of loss sustained.

Respondent also uploaded to the record the respective EUO scheduling letters/verification requests to the Assignor and [PR]. The EUO scheduling letter/verification request, dated July 21, 2023, was timely sent to the claimant the Assignor and her counsel scheduling the examination under oath of the Assignor for September 7, 2023, and the examination under oath of the Assignor was held on such date. The first EUO scheduling letter/verification request, dated August 4, 2023, was timely sent to [PR] and his counsel scheduled the examination under oath of [PR] for October 3, 2023, and [PR] did not appear on such date. As such, a second EUO scheduling letter/verification request was sent to [PR] and his counsel on October 5, 2023, scheduling the examination under oath of [PR] for December 15, 2023. The examination under oath of the Assignor was held on such date.

On October 5, 2023 (within 30 days of the EUO of the Assignor and receipt of proof of claim), Respondent timely denied Applicant's claims for the lidocaine 5% ointment in full based on the peer review by Kevin Curley, M.D., dated September 28, 2023 (discussed later in this award) and partially paid Applicant's other claims of the ibuprofen and cyclobenzaprine in the aggregate amount of \$126.35. The remainder (\$497.35) was timely denied based on a fee schedule dispute.

Contrary to the assertions of Applicant's counsel at the hearing, the delay letters to Applicant, together with the EUO scheduling letters to the Assignor and claimant [PR], were timely sent within the requirements of 11 NYCRR 65-3.5 (b) and 11 NYCRR 65-3.6 (b) and sufficiently establish that Applicant's claims were timely and properly tolled for additional verification (i.e., the examinations under oath of the Assignor and [PR]). Thereafter Applicant's claims were timely denied on October 5, 2023, within 30 days of the EUO of the Assignor and receipt of proof of claim.

With respect to the partially paid claims for the ibuprofen and cyclobenzaprine, the EOB/denial stated, in pertinent part, that:

This amount has been reduced according to Direct negotiations with you regarding payment of this bill through National HealthQuest (888) 268-0695.

Respondent did not upload a fee schedule/coder affidavit or any other evidence to support its fee schedule defenses. Respondent also did not upload any proof regarding any PPO agreement.

At the hearing, Respondent's counsel conceded that Respondent actually underpaid Applicant in the aggregate amount of \$18.29 under the PPO agreement, and acknowledged that such additional reimbursement was due Applicant.

Notwithstanding such concessions, I actually find, based on the totality of the evidence in the record, that Applicant is entitled to additional reimbursement in the aggregate amount of \$497.35. It is not disputed that the insurer has the initial burden to come forward with competent evidentiary proof to support its fee schedule defenses. *Robert Physical Therapy, P.C. v. State Farm Mut. Auto. Ins. Co.*, 13 Misc. 3d. 172 (Civ. Ct. Kings Co. 2006). Respondent, however, has failed to meet such initial burden. Respondent failed to upload any coder affidavit, or otherwise provide an adequate explanation of how or why Applicant's charges are in excess of the fee schedule.

Respondent also failed to upload the relevant sections of the fee schedule or any underlying documentation, including any Redbook search results or other permissible evidence of the average wholesale price for the medications at issue, and failed to show its calculations under the fee schedule, or to otherwise show that its payment reductions were correct and proper. In addition, Respondent did not upload any proof regarding any PPO agreement(s); as such, any and all reductions to Applicant's charges based upon any PPO agreement(s) cannot be sustained. As Respondent failed to meet its initial fee schedule burden, Applicant is awarded additional reimbursement in the aggregate amount of \$497.35 for the balance of the charges, which were partially paid by Respondent, for the cyclobenzaprine tablets and ibuprofen tablets provided to the Assignor on June 18, 2023.

### **Legal Framework - Medical Necessity**

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment (*Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13 [2d Dept. 2009]), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. *See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp.*, 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

To support a lack of medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." *See Provvedere, Inc. v. Republic W. Ins. Co.*, 42 Misc 3d 141(A), 2014 NY Slip Op 50219(U) (App. Term 2d, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. *See generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 13 Misc 3d 136(A), 2006 NY Slip Op 52116 (App Term 1st Dept. 2006). The Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. *Amherst Med. Supply, LLC v. A. Cent. Ins. Co.*, 41 Misc 3d 133(A), 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet Respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. *See generally Nir v. Allstate Ins. Co.*, 7 Misc.3d 544, 547 (Civ. Ct. Kings Co. 2005). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Id.*, at 547 (*citing City Wide Social Work & Psychological Servs. v. Travelers Indem. Co.*, 3 Misc. 3d 608, 612 [Civ. Ct., Kings County 2004]).

To meet the burden of persuasion regarding medical necessity - in the absence of factually contradictory records - the applicant must submit a rebuttal which meaningfully refers to and rebuts the assertions set forth in the peer review report. *See generally, Pan Chiropractic, P.C. v Mercury Ins. Co.*, 24 Misc 3d 136[A], 2009 NY Slip Op 51495[U] (App Term, 2d, 11th & 13th Jud Dists 2009).

#### **Peer Review - Kevin J. Curley, M.D., dated September 28, 2023**

Respondent relies upon the peer review report by Kevin J. Curley, M.D., dated September 28, 2023, in asserting lack of medical necessity for the the lidocaine 5% ointment also provided to the Assignor on June 18, 2023. At the outset, the peer report lists the various medical records that Dr. Curley reviewed and provides a brief medical history of the accident and the treatment that the Assignor received. Dr. Curley opined that after reviewing the available records, the lidocaine 5% ointment prescribed and provided on June 18, 2023 was not medically indicated. Dr. Curley also opined that the cyclobenzaprine tablets and ibuprofen tablets provided on June 18, 2023 were medically indicated.

Citing medical authority, Dr. Curley asserted that:

. . . Recommendations for the use of 5% Lidocaine include the following: As a first line drug in the treatment of localized peripheral neuropathic pain especially with accompanying allodynia alone or in combination with another first line drug and for central pain induced by spinal cord compression caused by metastatic tumor of the subarachnoid space.

Dr. Curley found, however, that in this particular case, there was no evidence of local neuropathic pain, finding that there were no sensory deficits noted in the upper or lower extremities at the time of the initial evaluation. Dr. Curley cited other medical authority that supported the use of topical lidocaine for neuropathic pain.

Dr. Curley maintained that the standard of care for the use of topical lidocaine in medical practice would have been to reserve it for cases of local neuropathic pain, such as seen in post-herpetic neuralgia. He asserted that this was clearly not the case here.

#### **Rebuttal - Viviane Etienne, M.D., dated June 4, 2024**

To refute the September 28, 2023 peer review by Dr. Curley, Applicant relies principally upon a rebuttal, dated June 4, 2024, from Viviane Etienne, M.D., the treating physician. Dr. Etienne respectfully disagreed with Dr. Curley's assessment and conclusions, and opined that the lidocaine ointment provided by Applicant was medically necessary.

Dr. Etienne explained that:

. . . The peer doctor argues that there was no evidence of neuropathic pain, however that is not an accurate description of this patient's clinical picture. The patient had neuropathic pain which was evidenced by: headaches, photophobia, nausea and a positive SLR. These signs and symptoms of neuropathic pain

indicated the need for treatment with Lidocaine. This medication was necessary. Dr. Curley overlooks the examination findings from 6/15/2023 and claims since there were no sensory deficits that this medication would not be warranted. However, sensory deficits are not the only indicators of neuropathic pain.

Dr. Etienne also noted that the lidocaine was part of a conservative treatment plan, and asserted that the patient did not need to fail oral medications first. Citing medical authority, she contended that topical NSAIDs may be considered as comparable alternatives to oral NSAIDs and are associated with fewer serious adverse events (specifically GI reactions) when compared with oral NSAIDs. She maintained that there was no need to fail oral medications before using a topical medication.

### **Analysis - Medical Necessity - Lidocaine Ointment - DOS 6/18/23**

After reviewing all of the submissions and taking into account the oral arguments of the parties, I find that Applicant established, by a preponderance of credible evidence, that the lidocaine 5% ointment provided to the Assignor on June 18, 2023 was medically necessary. While Dr. Etienne's rebuttal was somewhat limited and could have been more detailed, overall, I find that the rebuttal and Applicant's supporting medical records adequately address and rebut the arguments and opinions of the peer review and establish the medical necessity for the medication at issue. The lidocaine ointment (along with cyclobenzaprine and ibuprofen tablets) was prescribed and provided on June 18, 2023, seven days after the accident. The Assignor was also prescribed diclofenac gel 3% on June 22, 2023. The contemporaneous initial examination report, dated June 15, 2023, provided only a limited and general explanation of the prescriptions noting that the oral and topical analgesics were "ordered to decrease pain and inflammation;" "were selected for the best possible outcome;" and "topical pain management for joints and large muscle groups." The peer reviewer asserted that the standard of care for the use of topical lidocaine in medical practice would have been to reserve it for cases of local neuropathic pain, which he found was not the case here. Dr. Etienne asserted in the rebuttal that the Assignor had neuropathic pain which was evidenced by the Assignor's symptomology and findings on examination. While the evidence was not overwhelming, I do find that the findings on examination were sufficient to support her diagnosis of nerve root compression/radiculitis and the existence of neuropathic pain. I also find it appropriate to give some deference to the treating and prescribing physician in this case. When faced with two inconsistent, but credible opinions, deference would be accorded to the treating provider, who actually performed examinations, established treatment and diagnostic plans, made diagnoses and performed medical services for the Assignor. Ultimately, I find the rebuttal and Applicant's supporting medical records and arguments to be more credible and persuasive than the peer review with respect to the prescription of medication at issue. Based on the totality of the evidence in the record, Applicant has rebutted Respondent's defense and established the medical necessity for the lidocaine ointment. As Applicant has sustained its burden of persuasion, Applicant is entitled to reimbursement in the amount of **\$2,447.50** for the lidocaine 5% ointment provided to the Assignor on June 18, 2023.

### **Conclusion**

For the reasons set forth herein, Applicant is awarded reimbursement in the total amount of \$2,944.85, with attorney's fees, interest and the arbitration filing fee as set forth below. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

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
	Dulex Pharmacy	06/18/23 - 06/18/23	\$2,944.85	Awarded: \$2,944.85
Total			\$2,944.85	Awarded: \$2,944.85

- B. The insurer shall also compute and pay the applicant interest set forth below. 01/03/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall be computed from January 3, 2024, the AR-1 filing date, at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).



C. Attorney's Fees

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

Respondent shall pay the Applicant's attorney's fees 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 Suffolk

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

08/10/2024  
(Dated)

Kihyun Kim

**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:**

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### Electronically Signed

Your name: Kihyun Kim  
Signed on: 08/10/2024