

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Right Choice Pharmacy (Applicant)	AAA Case No.	17-23-1294-3280
	Applicant's File No.	DK23-350080
- and -	Insurer's Claim File No.	0690017736 2NG
Allstate Fire & Casualty Insurance Company (Respondent)	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 08/23/2024
Declared closed by the arbitrator on 08/23/2024

Henry Guindi, Esq. from Korsunskiy Legal Group P.C. participated virtually for the Applicant

Peggy Gizzarelli, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,786.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the hearing, the applicant's counsel amended the amount in dispute from \$3786.00 to \$3784.28 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 denials are 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 \$3784.28 for diclofenac sodium gel 3% dispensed to the EIP on DOS 12/7/22 and 1/17/23. Respondent denied applicant's claim based upon lack of medical necessity according to the 1/31/23 and 3/1/23 peer reviews of Richard Coven, MD. Applicant submits a 7/11/24 rebuttal from Jean-Pierre Georges Barakat, MD. Respondent further argues that applicant billed excessively.

4. Findings, Conclusions, and Basis Therefor

Respondent initially argues that the matter must be dismissed without prejudice as applicant signed a stipulation withdrawing with prejudice all existing bills, claims, lawsuits, appeals, arbitrations, judgments and other proceeding seeking payment from respondent and all of the companies listed on the addendum on or before 1/31/24 in the name or on behalf of Right Choice Supply Inc. The stipulation is signed by the president and owner, Irene Yagudayev.

The applicant at issue in this matter is Right Choice Pharmacy. The owner is Florina Farber, licensed pharmacist. There is nothing in respondent submission to suggest that the two companies are related in any way. The fact that they have similar names is no basis to dismiss this action.

Respondent has failed to submit sufficient evidence that this applicant agreed to withdraw all cases against respondent. The only issue to be determined is medical necessity.

This matter is linked with AAA #s17-23-1287-8075. 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).

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 low back, bilateral hip, bilateral knee and bilateral 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. A follow-up evaluation on 11/29/22 revealed normal motor, sensory and reflex examination. Range of motion was decreased but all objective orthopedic tests were negative. The EIP was recommended for MRI testing, medication, medical supplies, and physical therapy.

Citing in part to a website (www.drugs.com), Dr. Coven opines that there was no medical necessity for the *diclofenac gel*. The medication is an NSAID that works by reducing hormones that cause inflammation and pain in the body. It is used to treat joint pain in the hands, wrist, elbows, hips, ankles, or feet caused by osteoarthritis. Medication may not be effective in treating arthritis pain elsewhere in the body. Dr. Coven explains that there were no medical notes to indicate what the diclofenac gel was used for or that there was a failure of traditional oral anti-inflammatory pain medication. Diclofenac gel is not prescribed for neck or back muscles as there is no medical evidence that it would penetrate deeply enough into the affected muscles. Sprain/strain

injuries do not require this type of medication. There were no medical notes to indicate what the diclofenac gel was used for or that was a failure to traditional oral anti-inflammatory pain medication.

Dr. Coven acknowledges that topical NSAIDs can be safer than oral consumption, but further studies are needed to compare topical efficacy to other administration and delivery methods. There were no well-controlled studies or randomized controlled trials to indicate any significant benefit and adherence of topical medication over traditional routes and pain management. Nonetheless he acknowledges that topical NSAIDs can be safer than oral consumption and provide good levels of pain relief in acute conditions such as sprains, strains, and overuse injuries probably similar to that provided by oral NSAIDs.

The medical records clearly established that the EIP sustained injuries to the lower back bilateral hip, knee and ankle. Dr. Coven does not adequately discuss the efficacy of the diclofenac gel for EIP's pain to multiple joints. He does not explain whether or not pain in the joints caused by injury is different and distinct from pain caused by osteoarthritis so as to preclude the use of diclofenac gel.

Dr. Coven's reports do not credibly demonstrate a deviation from generally accepted medical practice. Applicant's rebuttal is moot. *Applicant's claims for diclofenac gel are 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
	Right Choice Pharmacy	12/07/22 - 12/07/22	\$1,893.00	\$1,892.14	Awarded: \$1,892.14
	Right Choice Pharmacy	01/17/23 - 01/17/23	\$1,893.00	\$1,892.14	Awarded: \$1,892.14
Total			\$3,786.00		Awarded: \$3,784.28

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/07/2023 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 4/7/23, the date of filing, on the amount awarded of \$ 3784.28 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.

08/27/2024

(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:

7ec0ccfe5fbc40557021fb354a47c5e

Electronically Signed

Your name: Rhonda Barry
Signed on: 08/27/2024