

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

BMS Pharmacy, Inc. dba Wappingers Falls Pharmacy (Applicant)	AAA Case No.	17-23-1317-8688
	Applicant's File No.	M23-729279
	Insurer's Claim File No.	0504763640101058
- and -	NAIC No.	22055

Geico Insurance Company
(Respondent)

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 08/27/2024
Declared closed by the arbitrator on 08/27/2024

Edward Shapiro, Esq. from Shapiro & Associates, P.C. participated by written submission for the Applicant

Tali Hernstat, Esq. from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,810.92**, 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 EIP, "YJ" is a 39 year old female injured as a restrained driver in a rear end motor vehicle accident on 9/15/22. Air bags did not deploy and there was no loss of consciousness. The EIP was transported by ambulance to a hospital, treated and released. Applicant seeks \$3810.92 for ZTLido external patches dispensed to the EIP on DOS 7/14/23. Respondent denied applicant's claim based upon lack of medical necessity according to the 8/15/23 peer review of Matthew H. Kalter, MD, PMR. Applicant submits a 6/24/24 rebuttal from Kenneth Shapiro, MD. Relying on a Techsource fee audit respondent additionally opines that applicant billed excessively.

4. Findings, Conclusions, and Basis Therefor

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 hearing.

ANALYSIS

Applicant has established its prima facie entitlement to reimbursement for no fault benefits based upon the submission of a properly completed claim form setting forth the amount of the loss sustained, and that payment is overdue. 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) Respondent must offer sufficient and credible medical evidence that addresses the standards in the applicable medical community for the services and treatment in issue; explains when such services and treatment would be medically appropriate, preferably with understandable objective criteria; and why it was not medically necessary in the instance at issue.

A no-fault insurer defending a denial of first party benefits on the ground that the billed for services were not medically necessary must at least show that the services were inconsistent with generally accepted medical/professional practice. See, Williamsbridge Radiology and Open Imaging v. Travelers Indemnity Company, 14 Misc. 3d 1231 (A), 836 NYS 2d 496. 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. Kalter considered extensive medical records including an initial consultation by Robert Akey, PA and Priti Vohra, DO on 12/8/22 follow-up evaluations on 2/16/23 and 5/2/23. He also reviewed MRIs of the cervical and lumbar spine with positive findings. The EIP participated in a course of chiropractic care and lumbar medial branch blocks.

The initial evaluation on 12/8/22 documented complaints of burning pain in the neck and throbbing, shooting pain in the lower back that radiates down the back of the leg. There was decreased range of motion, tenderness and spasm. There were positive findings on objective orthopedic tests.

As of 2/16/23 the EIP presented with complaints of pain to the neck and intermittent aching lower back pain without radiation. She noticed left-sided thigh pain that is burning in nature. Musculoskeletal examination revealed good ROM and moderate tenderness to palpation on the left trochanteric bursa. Ober's iliotibial band test was positive on the left. Examination of the lumbar spine revealed mild to moderate tenderness and muscle spasm to palpation. Full range of motion with pain. Kemp's test was positive bilaterally.

At a 5/2/23 evaluation the EIP complained of pain to the neck and lower back. Low back pain was intermittent, burning and stabbing left leg pain radiating to the left lateral thigh. Examination of the lumbar spine revealed moderate tenderness upon palpation but no gross motor deficits are noted. MMT was 5/5, reflexes +2 and sensation unaltered. The EIP was recommended to lumbar radiofrequency ablation and prescribed ZTLido and gabapentin.

Although not discussed, the chiropractic evaluations documented numerous positive findings on objective orthopedic tests.

MRIs of the cervical and lumbar spine documented multilevel bulges. An EMG/NCV of the lower extremities with negative the lumbar radiculopathy.

According to Dr. Kalter, ZTLido (lidocaine topical system) is a drug - in- adhesive topical delivery system that is typically used to alleviate the symptoms of localized pain. However, it is not recommended as a first-line treatment with the exception of neuropathic pain related to herpetic lesions or diabetic peripheral neuropathy. It can be used off label for various localized peripheral neuropathic pain after evidence of the trial of failure first-line medication, such as gabapentin and pregabalin. Lidocaine is also used for neuropathic pain related to peripatetic lesions. As per the standard of care, topical lidocaine is suggested as a second or third line treatment when a diagnosis of neuropathic pain as documented in other first-line TCA medications have failed. In this case the EIP had symptoms of musculoskeletal discomfort and pain from the MVA. The standard of care is not to use topical lidocaine for muscular deep injuries. There is no indication of the failure of other first-line medications. There is no indication of neuropathic pain and a dermatomal pattern which will necessitate the use of topical analgesics.

Dr. Kalter provided a satisfactory standard of generally accepted medical practice the lidocaine patches. See Williamsbridge Radiology and Open Imaging v. Travelers Indemnity Company, 14 Misc. 3d 1231 (A), 836 NYS 2d 496 Further Dr. Kalter's report successfully correlates the medical necessity of the lidocaine patches 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).

Applicant has failed to submit an affidavit from a health care practitioner which meaningfully referred to, let alone rebutted, the conclusions set forth in Dr. Kalter's report. Pan Chiropractic, PC v. Mercury Insurance Co, 24 Misc. 3d 136 (A) (App. Term

2d, 11th and 13th Jud. Dist. 2009). The medical records reviewed indicate that the EIP was prescribed ibuprofen and a muscle relaxant. There is no indication of any other type of medications. Additionally, the most recent medical report fails to establish any neurological injuries to the EIPs cervical or lumbar spine. Chiropractic progress notes indicate that the EIP was improving with each visit.

Dr. Shapiro's rebuttal discusses the efficacy of ZTLido 1.8 % external patch. He explains its use and its purpose. Dr. Shapiro specifically notes that lidocaine is a local anesthetic used to relieve the pain of post peripatetic neuralgia. It can also relieve minor pain and the shoulders, arms, neck and legs in adults. It is used to relieve pain from damaged nerves that follows the healing of shingles. Dr. Shapiro concluded that the EIP suffered from neuropathic pain and the lidocaine patches were medically necessary. As indicated, the medical records do not support a diagnosis of neuropathic pain. The EMG/NCV was negative and the MRIs of the cervical and lumbar spine failed to document any nerve root or cord involvement. The 5/2/23 evaluation noted normal muscle strength, sensation and reflexes.

After careful consideration of the party submissions and the arguments at hearing I find that respondent has sustained its burden of proof that the ZTLido was a deviation from generally accepted medical practice. Its denial is sustained.

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 claim is DENIED in its entirety

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.

08/29/2024
(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:
f985b5ead758f8d9a7db9685df96b57e

Electronically Signed

Your name: Rhonda Barry
Signed on: 08/29/2024