

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

United Pharmacy NYC Inc.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-24-1345-4115
Applicant's File No.	23-0860
Insurer's Claim File No.	8773471300000001
NAIC No.	22055

ARBITRATION AWARD

I, Corinne Pascariu, 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: Assignor

1. Hearing(s) held on 08/30/2024
Declared closed by the arbitrator on 08/30/2024

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

Kevin Smith from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,066.39**, 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

Assignor is a male who was 43-years-old when he was injured as the driver of a motor vehicle involved in an accident on October 1, 2023. He subsequently commenced conservative treatment. On November 3, 2023, Applicant provided assignor with Ibuprofen, Lidocaine ointment, Cyclobenzaprine and Omeprazole. Respondent denied reimbursement of the medications other than the Ibuprofen, based on peer review report by Shruti Patel, M.D. dated December 1, 2023, in which Dr. Patel asserted that the medication was not medically necessary. Applicant seeks \$2066.39 in reimbursement for the medication it dispensed.

Issue

There are two issues. Whether Respondent can establish that the amount billed by Applicant exceeds the permissible rate of reimbursement under the applicable fee schedule. Whether the medication was medically necessary.

4. Findings, Conclusions, and Basis Therefor

Upon reviewing the evidence submitted by the Applicant, I find the Applicant submitted sufficient credible evidence to establish a prima facie case with the respect to the services that are the subject of this arbitration. See, Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004); Amaze Medical Supply Inc. v. Eagle Ins. Co., 2 Misc 3d 128[A], 2003 NY Slip Op 51701 (U) (App Term, 2d and 11th Jud Dists 2003).

Once Applicant has made out a prima facie case, the burden shifts to Respondent to timely request additional verification, deny, or pay the claim. Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 NY3d 312 (2007).

Respondent timely denied the claims.

Medical Necessity:

Applicant's claim stems from a prescription for Ibuprofen, Lidocaine ointment, Cyclobenzaprine and Omeprazole it provided to assignor on November 3, 2023. Respondent denied reimbursement of the medications other than the Ibuprofen, based on peer review report by Dr. Patel dated December 1, 2023, in which she asserted that the medication was not medically necessary.

To meet its burden, at a minimum, the No-Fault insurer must establish a factual basis and medical rationale for its asserted lack of medical necessity of the health care provider's services. A.M. Medical Services, P.C. v. Deerbrook Ins. Co., 18 Misc.3d 1139(A), 859 N.Y.S.2d 892 (Table), 2008 N.Y. Slip Op. 50368(U), 2008 WL 518022 (Civ. Ct. Kings Co., Sylvia G. Ash, J., Feb. 25, 2008).

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, 871 N.Y.S.2d 680 (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).

The appellate courts have not clearly defined what satisfies the insurer's evidentiary standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 41 Misc.3d 133(A), 981 N.Y.S.2d 633 (Table), 2013 NY Slip Op 51800(U), 2013 WL 5861523 (App. Term 1st Dept. Oct. 30, 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, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); *see also* All Boro Psychological Servs. P.C. v. GEICO, 34 Misc.3d 1219(A), 950 N.Y.S.2d 490 (Table), 2012 NY Slip Op 50137(U), 2012 WL 309328 (Civ. Ct. Kings Co., Reginald A. Boddie, J., Jan. 31, 2012).

"Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006). Assuming the insurer establishes a lack of medical necessity, it is ultimately the claimant who must prove, by a preponderance of the evidence, that the services or supplies were medically necessary. Dayan v. Allstate Ins. Co., 49 Misc.3d 151(A), 29 N.Y.S.3d 846 (Table), 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015); Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co., 37 Misc.3d 19, 22 n., 952 N.Y.S.2d 372, 374 n. (App. Term 2d, 11th & 13th Dists. 2012).

Peer Review Report by Shruti Patel, M.D.

Dr. Patel indicated that "All types of pain should first be treated with nonpharmacologic therapy, however if persistent then pharmacologic therapy may be utilized. Nociceptive pain is treated with NSAID as first line therapy and topical agents such as topical NSAID or lidocaine as second- or third-line therapy. Neuropathic pain is often treated with SNRI or tricyclic antidepressants, gabapentinoids as first line treatment."

Topical Lidocaine is often not considered as first line treatment for neuropathic pain or osteoarthritic pain. If a patient is intolerant or not responding to other treatments,

lidocaine may be considered as a second and/or third line treatment management for neuropathic pain only.

Here, there is no indication that assignor had positive findings of neuropathy on physical exam. The management described does not follow standard of care in that there is no notation that claimant failed physical therapy and NSAID therapy and hence requiring second- and third-line treatment. Therefore, topical lidocaine 5% ointment would not be appropriate or not medically necessary in this case.

With regard to cyclobenzaprine, Dr. Patel stated that muscle relaxants can be used as an adjunctive therapy for second or third line agents. "In this case, the claimant was provided this medication along with the refill. However, long term use of these medications is not accepted as it has habit forming potential, seizure risk if stopped abruptly and has also led to death. Standard of care remains to use NSAID if there is no contraindication and physical therapy. Reviewing the case, documentation provided does not indicate any failed first line therapy. Therefore, it's no standard of care to prescribe muscle relaxant, cyclobenzaprine 10 mg in this case and was not medically necessary or appropriate."

As for the omeprazole, Dr. Patel explained that PPI can be added for gastric protection if patients have history of reflux disease or ulcers. Assignor had no need for the omeprazole prescription. There is no notation for any NSAID related adverse GI effects such as ulcers or bleeding history or current adverse events.

Findings

I find that Dr. Patel's peer review reports fail to meet the Respondent's burden of proof. She sets forth what she asserts is the standard of care for injuries such as assignor's, but provided no authority upon which it was based. The articles she sites do not indicate what she argued is the standard of care. Further, regarding the lidocaine the articles she relies upon only discuss treatment for neuropathic pain which Dr. Patel clearly indicates assignor does not have. Dr. Patel fails to indicate how the articles would be relevant to assignor's symptoms and type of pain. As for cyclobenzaprine, Dr. Patel recognizes that "skeletal muscle relaxants are effective agents used for the management of acute nonspecific low back pain." Finally, with respect to the omeprazole, Dr. Patel stated that the ibuprofen which he determined was medically necessary could cause adverse effects affecting on the gastric mucosa. He also noted that "multiple strategies to control symptoms in OA should be considered on an individual patient basis." As such, it makes little sense the medication would not be necessary in this instance. In Nir v. Allstate Insurance Co., 2005 NY Slip Op 25090; 7 Misc. 3d 544; 796 N.Y.S.2d 857; 2005 N.Y. Misc. LEXIS 419 (Civ. Ct. Kings Cty. 2005) the court held that a peer reviewer's medical rationale is insufficient if it is unsupported by or lacks evidence of medical standards in the community, enabling the peer reviewer to arrive at the conclusions rendered. In short, his report did not persuasively demonstrate that the providing the medications was a deviation from accepted medical practice, and therefore, did not sustain the Respondent's burden of demonstrating that it was not medically necessary. The burden does not shift to Applicant.

Based on the forgoing I find in favor of Applicant and award \$2066.39 in satisfaction of the claim.

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.	11/03/23 - 11/03/23	\$2,066.39	Awarded: \$2,066.39
Total			\$2,066.39	Awarded: \$2,066.39

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/05/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall be calculated from the date listed above, until the date that payment is made at two percent per month, simple interest on a pro rata basis using a thirty-day month.

C. Attorney's Fees

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

Attorney's Fees shall be calculated pursuant to the amended terms, as follows: 20 percent of the amount of first-party benefits, plus interest thereon, subject to a maximum fee of \$1,360. [11 NYCRR §65-4.6(d)]. There is no minimum fee.

- 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 NJ

SS :

County of Bergen

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

09/05/2024
(Dated)

Corinne Pascariu

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:
5c5a027f09e3c43a3e7df035f99ea019

Electronically Signed

Your name: Corinne Pascariu
Signed on: 09/05/2024