

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Metro Chemists Pharmacy Inc (Applicant)	AAA Case No.	17-23-1325-8068
- and -	Applicant's File No.	165568
	Insurer's Claim File No.	0714811080 2RK
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

**ARBITRATION AWARD**

I, Carolyn Terrell-Nieves, 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: Claimant

1. Hearing(s) held on 08/13/2024  
Declared closed by the arbitrator on 08/13/2024

Aleksay Selipanov, Esq., from The Law Offices of John Gallagher, PLLC participated virtually for the Applicant

Angela Venetsanos, Esq., from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,066.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

The initial amount claimed was amended at the hearing to \$1,663.68.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The Assignor, MH, a 41-year-old male, was involved in a motor vehicle accident on 5/16/23. At issue in this case is the amended amount of \$1,663.68 for Naproxen Sodium 550 mg (Qty: 30) Lidocaine 5% Ointment (Qty: 250) and Cyclobenzaprine 10 mg (Qty: 30) provided on 7/28/23. Respondent timely denied the claim based upon a peer review

of Dr. Samuel Carli dated 10/21/23. The issue presented is whether the medication was medically necessary.

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

This case was decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

#### **History**

This is a 41-year-old (DOB 11/26/1981) male who was involved in a motor vehicle accident on 05/16/2023. The claimant was a seat-belted rear-seat passenger of a vehicle that was rear-ended. The claimant sustained alleged injuries to the neck, right shoulder, lower back, and right knee. The airbags did not deploy. There was no reported loss of consciousness associated with the MVA. After the accident, the claimant visited to the emergency room at Queens Hospital for evaluation.

After the MVA, the claimant saw Sheila Soman, M.D. on 05/17/2023 for complaints of pain. He complained of headache, pain in the right knee, and lower back pain, 10/10 in intensity. Examination of lumbosacral spine revealed decreased and painful range of motion. Examination of right knee revealed pain on palpation. Range of motion was painful. Diagnoses were made of sprain of ligament of lumbar spine, lumbosacral radiculopathy, and sprain of knee. The claimant was advised to undergo conservative care. He was advised to undergo physical therapy, chiropractic care, acupuncture, pain consultation, and orthopedic consultation. MRI's of brain, lumbar spine, cervical spine, and right knee were ordered. He was prescribed bed board, egg crate mattress, cervical pillow, cervical collar (2 pc), LSO, lumbar cushion, Thermophore, TENS/EMS Unit, TENS/EMS belt, massager, and infrared heating lamp. He was also recommended cold compression therapy unit with knee wrap, electrical osteogenesis stimulator, and Pain Away Laser Home Care

Applicant establishes its prima facie entitlement to reimbursement with proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue. See Insurance Law § 5106 a; *Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 501 (2015); *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 A.D. 3d 742, 774 N.Y.S. 2d 564 (2nd Dept., 2004). Once an Applicant has established its prima facie case, the burden shifts to the insurer to establish that it timely and properly denied the claims, and the basis of its denial.

Based upon a review of the parties' submissions, I find that Applicant established its prima facie entitlement to reimbursement. I also find that Respondent timely denied the subject bills. The sole issue for determination herein is the medical necessity of the subject treatment.

When an insurer asserts that the medical service was medically unnecessary, the burden is on the insurer to establish that the subject service was medical unnecessary by competent evidence such as an independent medical examination or a peer review or other proof that sets forth a factual basis and a medical rationale for denying the claim. See generally, *Kings Medical Supply Inc. v. Country Wide Ins. Co.*, 5 Misc. 3d 767 (N.Y.C. Civ. Ct., 2004); *Amaze Medical Supply, Inc. v. Eagle Insurance Company*, 2 Misc. 3d 128 (App. Term, 2 Dept., 2003].

The issue of medical necessity cannot be resolved without resorting to medical facts from a medical expert. *Kingsborough Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, (2 Dept., 2009). A peer review report must set forth a factual basis to establish the absence of medical necessity and will be insufficient "if it fails to provide specifics of the claim, is conclusory, or otherwise lacks a basis in the facts of the claim." See *Nir v Allstate Ins. Co.*, 7 Misc. 3d. 544, 547 (Civ. Ct., Kings Co., 2005); see also *New Horizon Surgical Ctr., L.L.C. v Allstate Ins. Co.*, 52 Misc.3d 129(a) (App. Term. 2nd Dept., 2016). Further, a peer review holding that no-fault services were medically unnecessary must at least show that the services were inconsistent with generally accepted medical/professional practice. *Id.* The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden to prove that the services were not medically necessary. *CityWide Social Work & Psychological Services, PLLC v. Travelers Indemnity Co.*, 3 Misc.3d 608, 777 N.Y.S.2d 241 (N.Y.Civ. Ct. Kings Co. 2004).

Dr. Carli opined that the medical records provided for this peer review failed to support the medical necessity of the Naproxen Sodium 550 mg (Qty: 30), Lidocaine 5% Ointment (Qty: 250), and Cyclobenzaprine 10 mg (Qty: 30) dispensed on the date of 07/28/2023 by Metro Chemists Pharmacy Inc.

#### **Regarding Naproxen 550 mg Oral Tablets:**

Dr. Carli opined as per the medical standard of care, the first-line pharmacologic agent for the symptomatic treatment of mild to moderate pain is acetaminophen or a nonsteroidal anti-inflammatory drug (NSAID). The choice between these two medications depends on the type of pain and patient risk factors for NSAID-related adverse effects (e.g., gastrointestinal, renovascular, or cardiovascular effects). Chronic pain can be treated with NSAIDs (nonsteroidal anti-inflammatory medications). Chronic persistent pain is a type of pain that is severe enough to require medication.

#### **Regarding Topical Lidocaine 5% Ointment:**

Dr. Carli stated that topical lidocaine is a medication that is typically used to alleviate the symptoms of localized pain. As per the medical standard of care, it is recommended

as a first-line treatment for neuropathic pain caused by postherpetic neuralgia and diabetic peripheral neuropathy. Topical lidocaine patches and ointment can be used off-label for various localized peripheral neuropathic pain after evidence of a trial and failure of a first-line medication, such as a tricyclic antidepressant, a SNRI antidepressant or an anti-epileptic drug (i.e., gabapentin or pregabalin). For generalized or focal musculoskeletal pain, a clinician should trial standard therapies such as rest, ice, compression, elevation (RICE) in addition to over-the-counter traditional oral NSAIDs, such as naproxen or ibuprofen.

Dr. Carli further noted occasionally, lidocaine is prescribed for neuropathic pain related to herpetic lesions. However, according to Zakrzewska et al., "There is insufficient evidence to recommend topical lidocaine as a first-line agent in the treatment of PHN (post-herpetic neuralgia) with allodynia. Further research should be undertaken on the efficacy of topical lidocaine for other chronic neuropathic pain disorders, and also to compare different classes of drugs (e.g., topical anesthetics versus anti-epileptics)." Zakrzewska JM. Insufficient evidence to recommend topical lidocaine as first-line treatment for postherpetic neuralgia. *Evid Based Dent.* 2007;8(3):85-6. doi: 10.1038/sj.ebd.6400514. PMID: 17891129.

Dr. Carli noted that as per the standard of care, topical lidocaine is indicated as a first-line treatment for neuropathic pain due to postherpetic neuralgia or diabetic peripheral neuropathy. For other causes of neuropathic pain, it is indicated as a second- or third-line treatment when a diagnosis of neuropathic pain is documented and other first-line tricyclic antidepressant medications have failed. In this case, the claimant has symptoms of musculoskeletal discomfort/pain as a result of the accident. However, according to the medical standard of care, it is not suggested to use topical lidocaine for muscular or deep injuries. Additionally, there is no indication of failure of other first-line medications in treating the claimant's symptoms.

Furthermore, the physical examination for this claimant does not indicate the presence of neuropathic pain in a dermatomal pattern which would indicate the use of topical lidocaine. As a result, the criteria had not been met according to the medical standard of care to indicate the necessity of topical lidocaine for this claimant. Therefore, the Lidocaine 5% Ointment (Qty: 250) dispensed on 07/28/2023 was not medically necessary in this case.

#### **Regarding Cyclobenzaprine 10 mg Oral Tablets:**

Dr. Carli stated that health care providers prescribe skeletal muscle relaxants for a variety of indications. However, the comparative efficacy of these drugs is not well known. Chronic use of benzodiazepines or any muscle relaxant is not recommended, due to its habit-forming potential, and central nervous system adverse effects such as extreme drowsiness/dizziness, seizure risk following abrupt withdrawal, and confirmed contribution to respiratory depression-related mortality in patients on chronic opioids. As per the medical standard of care, muscle relaxants can be recommended to use during the early stages of neck or low back pain (up to two weeks) after trying first second line medications including NSAIDs, and/or acetaminophen. Although typically recommended for short term treatment of back pain, muscle relaxants are often used

chronically and are prescribed to subpopulations potentially at risk for adverse effects. Muscle relaxants are not invasive, have significant adverse effects, are low to moderately costly and do not have evidence of efficacy to treat chronic persistent pain. However, they have indications for short term treatment of muscle spasms and exacerbations and are selectively recommended.

I find that Dr. Carli's peer report had a proper factual basis in that Dr. Carli reviewed various patient medical records, as well as a medical rationale to support Respondent's denial in reimbursement of the medication. Per the case law cited above, the burden of proof shifted to Applicant to rebut the peer review and affirmatively prove medical necessity by a preponderance of the credible evidence.

A formal rebuttal was not submitted by Applicant. Applicant relied upon its submission to refute the peer review. After having carefully reviewed both parties' medical reports and evidence, I am not persuaded by Applicant's evidence. Applicant's reliance on the medical record itself lacks the benefit of expert medical opinion evidence rebutting the salient points made in the peer review. I therefore sustain the defense asserted in the denial and this defense prevails over Applicant's prima facie case of entitlement to No-Fault compensation.

Accordingly, the within arbitration claim is denied in the entirety.

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

09/06/2024  
(Dated)

Carolynn Terrell-Nieves

### **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:**  
7541efa5d995974ceae5a124b69fa465

### Electronically Signed

Your name: Carolynn Terrell-Nieves  
Signed on: 09/06/2024