

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

SMK Pharmacy Corp d/b/a Nature's First
LTC & Compounding
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-24-1338-2428
Applicant's File No.	N/A
Insurer's Claim File No.	8699167340000001
NAIC No.	35882

ARBITRATION AWARD

I, Regina Anzalone Kurz, 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 injured party.

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

Yekaterina Argarenov, Esq. from Marc L. Schwartz P.C. participated virtually for the Applicant

Iqra Shah, Esq. and Joan Patricia Knight-Mingo, Esq. (observing) from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$252.09**, 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

No-Fault health benefits claimed for the balance of charges for Diclofenac gel and a Lidocaine external patch furnished to the injured party, identified in the record as a 30-year-old female, on October 32, 2022 following her involvement in an automobile accident on October 21, 2022. Respondent denied the claim based solely on a fee schedule defense.

4. Findings, Conclusions, and Basis Therefor

As per 11 NYCRR Section 65-4.2(3)(iii), often referred to as the "Rocket Docket," the written record is deemed closed upon receipt of the respondent's submissions OR the expiration of the time period set forth for same, 30 calendar days. **Documents received by the American Arbitration Association after the close of conciliation and marked "late" were not considered by the undersigned in making this Award.**

It is well-settled that a health care provider establishes its *prima facie* entitlement to No-Fault Benefits under Article 51 of the Insurance Law by offering proof that it submitted documentation setting forth the particulars of the claim to the insurer and that payment of same is overdue. See *Mary Immaculate Hospital v. Allstate Insurance Co.*, 5 AD3d 742 (2d Dept.2004); *Amaze Medical Supply v. Eagle Insurance*, 2 Misc. 3d 128A 784 NYS2d 918, 2003 N.Y. Slip Op. 251701U [App.Term, 2d & 11th Jud. Dists.]. I find that Applicant has met its *prima facie* threshold.

After a *prima facie* case has been presented, the claim must generally be paid or denied within 30 days, or it is "overdue," commencing the accrual of interest and attorney fees. See, N.Y. Ins. Law § 5106[a] (McKinney 2000); 11 NYCRR § 65-3.8(a)(1), *Presbyterian Hospital v. Maryland Cas. Co.*, 90 N.Y.2d 274, 660 N.Y.S.2d 536 (1997).

Where a fee schedule defense has been asserted, it has been held that the insurer has the burden of coming forward with competent evidentiary proof to support its fee schedule reduction or denial. See, e.g., *Roberts Physical Therapy, P.C. v. State Farm Mutual Automobile Insurance Company*, 13 Misc.3d 172, 3006 N.Y. Slip Op. 26240 (N.Y. 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).

However, where a plain reading is appropriate, an arbitrator is permitted to take judicial notice of the workers' compensation fee schedule. See, *Kingsbrook Jewish Med. Ctr. v., Allstate Ins. Co.*, 61 A.D.3d 13, 20 (2d Dept. 2009); *LVOV Acupuncture, P.C. v. Geico Ins. Co.*, 32 Misc.3d 144(A), 2011 NY Slip Op 51721(U) (App Term 2d, 11th & 13th Jud Dists. 2011); *Natural Acupuncture Health, P.C. v. Praetorian Ins. Co.*, 30 Misc.3d 132(A), 2011 NY Slip Op 50040(U) (App Term, 1st Dept., 2011).

This is a claim for the balance of charges for Diclofenac gel and a Lidocaine external patch furnished to the injured party, identified in the record as a 30-year-old female, on October 32, 2022 following her involvement in an automobile accident on October 21, 2022.

Respondent denied the claim based solely on a fee schedule defense, with the following verbiage:

"BA Billed Amount. 2

NY_PHARM Reimbursement for pharmaceutical supplies, as specified under Chapter V. of 1 Title 12 NYCRR Subchapter M, Parts 440.

NY_SMK Reimbursed pursuant to the Settlement Agreement completed July 22, 2022 3, 4 that was executed between Geico and Simon Field, Marc Kassman, Kim Volman, Alexander Burlak, Jacqueline Mitsel, and Arlen Leis."

According to the record, the parties entered into an agreement by which the provider would be reimbursed 75% of the Pharmacy Fee Schedule, including any applicable ground rules for topical medications. This includes all patches, creams, gels, ointments, lotions, solutions, and topicals, as well as all therapeutic equivalents. All tablets and capsules were to be reimbursed at 100% of the Pharmacy Fee Schedule, including any applicable ground rules for topical medications.

Applicant contends that it billed 75% of the charges for the Diclofenac gel, a Lidocaine external patch, and Naproxen, but the carrier further reduced the claim by another 25%. Applicant offered sufficient proof of the fee scheduled rates and explained how the guidelines set forth in the subject agreement were followed. To wit, for the Diclofenac gel,

AS PER ATTACHED AWP- 100 UNITS= \$242.77

$\$242.77 \times 2$ (200 UNITS BILLED)= \$485.54

$\$485.54 - 20\% + \$5 = \$393.43$

$\$393.43 - 25\%$ (GEICO SETTLEMENT)= \$295.07 - PROVIDER BILLED \$296.39 - GEICO IMPROPERLY TOOK OFF AN ADDITIONAL 25% FROM THE BILLED AMOUNT

With regard to the Lidocaine,

AS PER ATTACHED AWP- 30 UNITS= \$280.81

$\$280.81 \times 3$ (90 UNITS BILLED)= \$842.43

$\$842.43 - 20\% + \$5 = \$678.94$

$\$678.94 - 25\%$ (GEICO SETTLEMENT)= \$509.20- PROVIDER BILLED \$510.49 - GEICO IMPROPERLY TOOK OFF AN ADDITIONAL 25% FROM THE BILLED AMOUNT

Respondent offered an unsigned, unsworn fee audit not specific to this claim in support of its defense.

Upon careful consideration of the record, I find that the evidence favors Applicant as to matters of law and fact. In so doing, I have determined that the defense has not been sustained. Accordingly, the claim for further reimbursement is granted in its entirety.

Pursuant to the Regulations, the Arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. The Arbitrator may question any party or witness or raise any issue that she deems relevant to rendering an Award that is consistent with the Insurance Law and the Regulations. 11 NYCRR Section 65-4.5 (o) (1).

All other issues in play which were not raised by the parties at the time of the hearing are considered waived and/or rendered moot by this decision.

Therefore, based upon the foregoing, Applicant is awarded No-Fault health benefits in the sum of \$252.09; interest pursuant to B below; attorneys' fees pursuant to C below; plus the return of Applicant's \$40.00 filing fee pursuant to D below.

This case is subject to the provisions as to attorney fees promulgated in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Interest is awarded from the date of filing, February 28, 2024, at the rate of two percent per month, not compounded, on a pro-rata basis.

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.

		Claim	
--	--	--------------	--

Medical		From/To	Amount	Status
	SMK Pharmacy Corp d/b/a Nature's First LTC & Compo unding	10/31/22 - 10/31/22	\$252.09	Awarded: \$252.09
Total			\$252.09	Awarded: \$252.09

- B. The insurer shall also compute and pay the applicant interest set forth below. 02/28/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest is awarded from the date of filing, February 28, 2024, at the rate of two percent per month, not compounded, on a pro-rata basis.

C. Attorney's Fees

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

This case is subject to the provisions as to attorney fees promulgated in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-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, Regina Anzalone Kurz, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

09/07/2024

(Dated)

Regina Anzalone Kurz

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:
b2a3b42dbcfab7a61afe0e1f0de33f64

Electronically Signed

Your name: Regina Anzalone Kurz
Signed on: 09/07/2024