

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Best Care Pharmacy of New York Inc
(Applicant)

- and -

Integon National Insurance Company
(Respondent)

AAA Case No. 17-24-1344-9015

Applicant's File No. MBA10285

Insurer's Claim File No. 9XINY12426-02

NAIC No. 29742

ARBITRATION AWARD

I, Daniel Felber, 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: CC

1. Hearing(s) held on 09/03/2024
Declared closed by the arbitrator on 09/03/2024

Gregory Flood, Esq. from Law Office of Marvin Ben-Aron, P.C. participated virtually for the Applicant

Joseph Licata, Esq. from Rossillo & Licata LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$7,120.56**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended the total amount in dispute to \$7,082.00 to conform with Respondent coder's analysis.

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

3. Summary of Issues in Dispute

Assignor CC, a 23-year-old male, was the driver of a motor vehicle involved in an accident on December 20, 2023. Assignor suffered injuries to his neck and back for which he received treatment. In dispute is Applicant's claim for diclofenac, lidocaine,

and cyclobenzaprine provided to Assignor on December 27, 2023 ("Tranche 1") and diclofenac, lidocaine, lidocaine and cyclobenzaprine provided to Assignor on January 25, 2024 ("Tranche 2") Respondent denied Tranche 1 based upon the peer review reports and Addendum of Sammy Dean, M.D., dated February 7, 2024 , February 15, 2024, and July 17, 2024, respectively (collectively " Peer 1"). Respondent denied Tranche 2 based upon the peer review report and Addendum Jason Cohen, M.D., dated March 12, 2024 and July 10, 2024, respectively (collectively "Peer 2"). The sole issue to be determined in this arbitration is whether Respondent sustained its lack of medical necessity defenses.

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.

Applicant established a *prima facie* showing of entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms were mailed and received, and that payment of no-fault benefits was overdue. Insurance Law § 5106 [a]; 11 NYCRR 65.15 [g] [3]; *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986); *Mary Immaculate Hosp. v Allstate Ins. Co.*, 5 A.D.3d 742 (2d Dept. 2004).

LACK OF MEDICAL NECESSITY

In order to support a lack of medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." *See, Provvedere, Inc. v. Republic Western Ins. Co.*, 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. *See, generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

A peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. Indeed, 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*, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005).

In support of the contention that the medications were not medically necessary, Respondent relies on Peers 1 and 2. The Peers assert that the standard of care for musculoskeletal injuries after a motor vehicle accident is an initial trial of conservative treatment and the prescription of oral NSAIDs and muscle relaxants. The Peers aver that the standard of care does not include topical diclofenac and/or lidocaine unless the patient cannot tolerate traditional oral pain medications. The Peers observes that there is no evidence that Assignor tried and failed treatment with oral NSAIDs or that other alternatives to topical pain medication were prescribed, in deviation of the standard of care. With respect to the cyclobenzaprine, the Peers aver that long-term use of this medications may lead to serious side effects.

In opposition to the Peers Applicant offers a rebuttal from Idy Liang, NP, dated June 3, 2024 ("the Rebuttal"). The Rebuttal details Assignor's injuries, as reflected in the medical records, which articulate the need for the prescribed medications. In addition, the Rebuttal cites to several medical articles which speak to the benefits of the prescribed topical medications, including localized pain relief and reduced risks of the side effects associated with oral medications. With respect to the cyclobenzaprine, the Rebuttal avers that this medication is routinely used together with conservative care to relax muscles and relieve pain and discomfort caused by strains, sprains, and other muscle injuries.

I find the Rebuttal more persuasive than the Peers.

After a careful review of the submissions, I am persuaded by Applicant's detailed rebuttal. Treatment, procedures, or services may be warranted by the circumstances as verified by a preponderance of credible and reliable evidence and may be reasonable in light of the subjective, and objective, evidence of the patient's complaints. *Complete Med. Care Servs. Of N.Y. v. State Farm Mut. Auto. Ins. Co.*, 2008 N.Y. Slip Op. 28324(U) (Civ. Ct. Queens Co. 2008) (In No-Fault Laws and/or Regulations, it is not whether or not the service will produce results but rather, if the provider believes it would be helpful. It is not for a judge/arbitrator to second guess a doctor who decides that a prescription, which is not inconsistent with generally accepted practices, is necessary for his diagnosis and treatment, and the only opposition is a Peer doctor who never examined the patient). *See, also, Alliance Medical Office, P.C. v. Allstate Ins. Co.*, 196 Misc. 2d 268, 2003 N.Y. Slip Op. 23633 (Civ. Ct. Kings County, 2003), *City Wide Social Work & Psychological Services v. Travelers Ind. Co.*, 3 Misc. 3d 608, 777 N.Y.S. 2d 241 (Civ. Ct. Kings, 2004).

I find that the rebuttal is factually sufficient to meet the burden of persuasion, and therefore, an award shall be issued in favor of Applicant.

For the foregoing reasons, Applicant's amended claim is granted in the amount of \$7,082.00.

Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of the hearing.

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
	Best Care Pharmacy of New York Inc	12/27/23 - 12/27/23	\$1,901.00	\$1,893.00	Awarded: \$1,893.00
	Best Care Pharmacy of New York Inc	12/27/23 - 12/27/23	\$1,657.28	\$1,648.00	Awarded: \$1,648.00
	Best Care Pharmacy of New York Inc	01/25/24 - 01/25/24	\$1,537.00	\$1,527.50	Awarded: \$1,527.50
	Best Care Pharmacy of New York Inc	01/25/24 - 01/25/24	\$2,025.28	\$2,013.50	Awarded: \$2,013.50
Total			\$7,120.56		Awarded: \$7,082.00

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/20/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30-day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when 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 Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217 (2009).

C. Attorney's Fees

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

As this matter was filed on or 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 (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) For claims that fall under the Sixth Amendment to the regulation, the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved dispute, subject to a maximum fee of \$1,360.

- 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 Westchester

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

09/11/2024

(Dated)

Daniel Felber

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:
3f9b6b8de1d3a03d640c830ba24f75a3

Electronically Signed

Your name: Daniel Felber
Signed on: 09/11/2024