

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Shop-N-Save Pharmacy Inc
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-24-1343-5264
Applicant's File No. GM24-745250,
Insurer's Claim File No. 0662589940000001
NAIC No. 35882

ARBITRATION AWARD

I, Preeti Priya, 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 [FE]

1. Hearing(s) held on 09/11/2024
Declared closed by the arbitrator on 09/11/2024

Koenig Pierre, Esq., from Law Offices of Gabriel & Moroff, P.C. participated virtually for the Applicant

Michael Morra from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$4,413.80**, 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 dispute arises from the underlying automobile accident of September 15, 2023, in which the Assignor, then a 51-year-old male, was a driver. The issues in this matter are: Whether Applicant established entitlement to No-Fault compensation for medications provided to Assignor;

Whether Respondent made out a prima facie case of lack of medical necessity and, if so, whether Applicant rebutted it.

4. Findings, Conclusions, and Basis Therefor

At the hearing held virtually via Zoom, Applicant was represented by Koenig Pierre, Esq., who presented oral arguments and relied upon documentary submissions. Michael Morra, appearing on behalf of Respondent, presented oral arguments and relied upon documentary submissions. I have reviewed the submissions contained in the American Arbitration Association's ADR Center. These submissions are the record in this case.

The records indicate that Assignor sought private medical attention and was evaluated by Hiram Emmanuel Luigi-Martinez, MD, on September 26, 2023. He received conservative care including physical therapy and underwent diagnostic tests. Of significance to this matter is that on January 17, 2024, Assignor received medications. Applicant submitted the claims for the medications to Respondent; payment was denied.

After reviewing the record and evidence presented, I find that Applicant established a prima facie case of entitlement to reimbursement of its claim. Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). The burden now shifts to the Respondent to demonstrate lack of medical necessity. Alvarez v. Prospect Hosp., 68 N.Y.S.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d [1986]; A.B. Medical Services v. Geico Ins. Co., 2 Misc 3d 26 [App Term 2d and 11th Jud Dists, 2003].

On February 20, 2024, Mitchell Goldstein, MD, performed a peer review on behalf of Respondent regarding the medical necessity of the medication provided to Assignor. Dr. Goldstein reviewed medical records of Assignor including, evaluation report, prescription, progress notes, and diagnostic test results. He then summarized the treatment of the Assignor.

The No-Fault carrier may rebut the inference of medical necessity by providing proof that the claimed healthcare benefits were not medically necessary. A. Khodadadi Radiology, P.C. v. New York Central Mutual Fire Ins Co., 16 Misc 3d 131(A), 841 N.Y.S.2d 824, 2007 N.Y. Slip Op 51342(U) (App Term, 2nd Dept - 2007); Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co., 21 Misc 3d 142(A), 2008 NY Slip Op 52450(U) (App Term, 2nd Dept - 2008); Delta Diagnostic Radiology, P.C. v. Integon Natl. Ins. Co., 2009 NY Slip Op 51502(U) (App Term, 2nd Dept - 2009). Where the No-Fault carrier's proof consists of a peer review report, that report must be predicated upon a sufficient factual basis and medical rationale. AJS Chiropractic, P.C. v. Mercury Ins. Co., 2009 NY Slip Op 50208(U), 22 Misc 3d 133(A) (App Term, 2nd Dept - 2009).

Dr. Goldstein concluded "The medical records presented for the peer review failed to support the medical necessity of Diclofenac 3% gel, Lidocaine 5% ointment, and Baclofen 200 mg tablet." He found "The standard of care was not met for the use of topical diclofenac. Topical NSAIDs, such as topical diclofenac, are widely available and may be purchased over-the-counter. There is no documentation that claimant tried over-the-counter topical NSAIDs before topical diclofenac was prescribed. Further, topical diclofenac is used for the treatment of osteoarthritis. There is no documented evidence that the claimant is using diclofenac to treat osteoarthritis."

He stated "The overall evidence for the use of lidocaine for musculoskeletal pain is low. There are no randomized controlled trials to indicate its efficacy over traditional pain medications like NSAIDs. Moreover, it is also not the most cost-effective alternative. Therefore, it should be used sparingly. It is approved by the FDA for use in neuropathy and neuralgia. The use of lidocaine for musculoskeletal pain is not considered as standard of care. It is considered as an off-label use." He also stated "The claimant complained of musculoskeletal pain post-MVA. There is no record to indicate that the claimant suffered neuralgia or neuropathy. Physical examination findings are negative for neuropathy. The use of lidocaine in such an instance is considered as off-label use. Traditional NSAIDs should be tried first before lidocaine can be used for musculoskeletal pain as per the standard of care. Therefore, it is not considered as medically necessary."

He explained "The standard of care does not recommend chronic use of any centrally acting muscle relaxant such as Baclofen due to their habit-forming potential, severe sedation, seizure risk following abrupt withdrawal, and documented contribution to deaths of patients on chronic opioids due to respiratory depression....Baclofen is used for relief of spasticity. The medical records are not indicative of the spasticity on examination. Therefore, baclofen is not medically necessary. "

He cited to medical literature and guidelines in support of his conclusions. I find Dr. Wolf's report predicated upon a sufficient factual basis and medical rationale. AJS Chiropractic, P.C. v. Mercury Ins. Co., supra.

"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 NY Slip Op. 51871(U), 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006. "[T]he insured / provider bears the burden of persuasion on the question of medical necessity. Specifically, once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, 'plaintiff must rebut it or succumb.'" Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 WL 1936346 at 3 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005).

Applicant submitted a Rebuttal by Drora F. Hirsch, MD, in response to the Peer Review report and in support of the medication. Dr. Hirsch listed Assignor's complaints, findings and treatment. She noted "the peer reviewer himself is acknowledging that the NSAID is effective in treating pain symptoms; however, he is simply denying the medical necessity of the prescription Diclofenac Sodium 3% gel and recommends over-the-counter medication in place of it." She also "note the peer reviewer himself is acknowledging that the NSAID is effective in treating pain symptoms; however, he is simply denying the medical necessity of the prescription Diclofenac Sodium 3% gel and recommends over-the-counter medication in place of it." She explained "The lidocaine ointment was prescribed to quell the pain the patient was suffering in the injured areas

because lidocaine is a local anesthetic that works by causing temporary numbness/loss of feeling in the skin and mucous membranes. Topical lidocaine has provided effective peripheral analgesia for localized pain associated with joint and low back ailments."

I do not find Dr. Goldstein explains lack of medical necessity with explanation to Assignor's medical history regarding Diclofenac and Baclofen. I find Dr. Goldstein's statements discuss efficacy of the medication. Dr. Hirsch, with specificity and detail, refutes the conclusions of the Peer Reviewer. Applicant is awarded \$2,358.00 and \$153.30.

However, I find Dr. Goldstein persuasive in his discussion of the lidocaine. His statement "The claimant complained of musculoskeletal pain post-MVA. There is no record to indicate that the claimant suffered neuralgia or neuropathy. Physical examination findings are negative for neuropathy." is significant. Applicant has not rebutted Respondent's defense and has not sustained Applicant's burden of proof by a preponderance of credible evidence.

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
	Shop-N-Save Pharmacy Inc	01/17/24 - 01/17/24	\$4,413.80	Awarded: \$2,511.30
Total			\$4,413.80	Awarded: \$2,511.30

B. The insurer shall also compute and pay the applicant interest set forth below. 04/10/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant's award shall bear interest at a rate of two percent per month, calculated on a pro rata basis using a 30-day month from the date payment became overdue to the date of the payment of the award pursuant to 11 NYCRR 65-3.9 (a). The end date for the calculation of the period of interest shall be the date of payment of the claim. General Construction Law § 20 ("The day from which any specified period of time is reckoned shall be excluded in making the reckoning.")

C. Attorney's Fees

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

Respondent shall pay Applicant a separate attorney's fee, in accordance with 11 NYCRR 65-4.6(d). Since the within arbitration request 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 11 NYCRR 65-4.6(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 New York

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

09/13/2024
(Dated)

Preeti Priya

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:
fdf554fb19d5208587c2393b03102c1e

Electronically Signed

Your name: Preeti Priya
Signed on: 09/13/2024