

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

S & K Warbasse Pharmacy Inc
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-23-1290-5541
Applicant's File No. DK23-334647
Insurer's Claim File No. 0380561060101024
NAIC No.

ARBITRATION AWARD

I, Rhonda Barry, 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: EIP

1. Hearing(s) held on 09/10/2024
Declared closed by the arbitrator on 09/10/2024

Artur Finkel, Esq. from Korsunskiy Legal Group P.C. participated virtually for the Applicant

Jason Ciani, Esq. from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$348.72**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the hearing, the applicant's counsel amended the amount in dispute from \$348.72 to \$348.67 based upon the applicable fee schedule for medical services in this case.

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

3. Summary of Issues in Dispute

The EIP, "BD" is a 40 year old female injured as a passenger in a motor vehicle accident on 10/22/22. Applicant seeks \$348.72 for lidocaine ointment dispensed to the EIP on DOS 1/18/23. Upon receipt of applicant's claim, respondent recalculated the amount due, made partial payment and denied the balance based upon the NYS Workers

Compensation Fee Schedule. Respondent's denial also provides that applicant was reimbursed in accordance with a 7/22/22 settlement agreement.

4. Findings, Conclusions, and Basis Therefor

I have completely reviewed all timely submitted documents contained in the ADR Center record maintained by the American Arbitration Association and considered all oral arguments. No additional documents were submitted by either party at hearing. No witnesses testified at hearing.

ANALYSIS

Applicant has established its prima facie entitlement to reimbursement for no fault benefits based upon the submission of a properly completed claim form setting forth the amount of the loss sustained, and that payment is overdue. Mary Immaculate Hospital v. Allstate Insurance Company, 5 AD 3d 742, (2nd Dept. 2004). Westchester Medical Center v. Lincoln General Ins. Co., 60 AD 3d 1045 (2nd Dept. 2009).

The insurer has the burden of proving that the fees charged were excessive and not in accordance with the Worker's Compensation fee schedule. St. Vincent Medical Care PC v. Countrywide Insurance Company, 26 Misc. 3d 146 (A), 907 NYS 2d 441 (App. Term 2d, 11th and 13th Dists. 2010). If the insurer fails to demonstrate, by competent evidentiary proof, that the claims were in excess of the appropriate fee schedule, the defense of noncompliance cannot be sustained. See, Continental Medical PC v Travelers Indemnity Company, 11 Misc.3d 145(a), 819 NYS 2d 847 (App Term 1st Dept. 2006).

I am permitted to take judicial notice of the Worker's Compensation fee schedule. Kingsbrook Jewish Medical Center the Allstate Insurance Company, 61 AD 3d 13 (2d Dept. 2009); LVOV Acupuncture PC v. Geico Insurance Company, 32 Misc. 3d 144 (A) (App. Term 2d, 11th and 13th Jud. Dists. 2011). Natural Acupuncture Health PC v. Praetorian Insurance Company, 30 Misc. 3d 132 (A), 2011 N Y slip op 50040 (U), (App. Term 1st Dept. 2011).

In accordance with the Worker's Compensation Pharmacy Fee Schedule, 12 NYCRR §440.5(a) (1), the maximum reimbursement for prescription drugs dispensed shall be the average wholesale price (AWP) -12% plus a dispensing fee of \$4s for brand-name prescription drugs or medicines; and the AWP -20% plus dispensing fee of \$5 for generic prescription drugs and medications. AWP means the average wholesale price of a prescription provided in the Redbook by Thompson Media, Medi-Data Span Master Drug Database, Bluebook by First Databank, or other nationally recognized drug pricing index adopted by the Chair of the Worker's Compensation board with the Chair's designee. See Insurance Circular Letter no.9 (9/18/2008, Worker's Compensation Pharmaceutical Fee Schedule).

Respondent's submission does not include any evidence indicating how it determined that the proper reimbursement for applicant's claims. There is no report from a certified coder or other analysis indicating the AWP. The NF-10 references the "Redbook", but there is no supporting documentation as to the proper pricing index.

As such respondent failed to substantiate its fee schedule defense. The defense of fees not being in accordance with fee schedule must be rejected where the insurer fails to address how the amount charged by the provider was in excess of the fee schedule. See, Jesa Medical Supply, Inc. v. GEICO Ins. Co., 25 Misc. 3d 1098, 887 NYS 2d 482 (Civ. Ct. Kings County 2009).

Nonetheless, applicant and respondent entered into an agreement on 7/22/22 which includes all services rendered thereafter. Specifically, the agreement provides that,

"6. Future bills, lawsuits, arbitrations

- A. The SMK parties agree that they shall not, in the future submit or cause to be submitted bills to, or commence, or cause to be commenced any lawsuits, arbitrations or other proceedings against GEICO or its insureds for healthcare related services and/or goods provided by or through SMK involving dates of service prior to the effective date...
- B. SMK owners, Warbasse owners and pharmacies agree that in the event that any of them seek to submit billing to Geico or an insured seeking payment for healthcare related goods and/or services rendered to an insured (not otherwise prohibited by this agreement) with dates of service after the effective date (hereinafter "future claims") in the name of a future billing entity, they shall provide Geico with 30 days advance written notice prior to the first submission of such billing in the manner required to pursuant to paragraph 7.

The stipulation provides for necessary information to be included in the notice. Without such notice, any future claims submitted by or through any future billing entity shall be deemed null and void, shall not be subject to resubmission, shall be non-reimbursable under any circumstances, And there shall be no right to litigate or arbitrate future claims.

The stipulation also provides a billing schedule. According to the schedule, for all patches, creams, gels, ointments, lotions solutions and topical's, applicant is entitled to 75% of the reimbursable amount pursuant to the Pharmacy Fee Schedule including any applicable ground rules.

As respondent has not submitted any evidence to establish the proper fee for the lidocaine at issue. Respondent has also failed to submit evidence that the \$5 dispensing fee is included in the calculation.

Applicant submits a fee schedule affidavit in an unrelated matter with a different insurer. While respondent questions the veracity of the affidavit, it includes excerpts from the

MediSpan drug database and the same NDC number is used by applicant herein. The unit base for Lidocaine 5% is $\$7.6186 \times 300 \text{ units} = \2285.58 . As this was generic, the amount was reduced by 20% or $\$457.12 = \$1828.46 + \$5.00 \text{ dispensing fee} = \1833.46 . As applicant agreed to reimbursement in the amount of 75%, applicant was entitled to \$1375.10. Respondent has already been reimbursed \$1031.17. Applicant is awarded \$343.93.

Interest: Applicant is awarded interest in accordance with 11 NYCRR§65 - 3.9 (a)-(f). Accordingly, interest is calculated at a rate of 2% per month, calculated on a pro rata basis using the 30 day month. A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. If 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 Department of Financial Services Regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken. 11 NYCRR §65 - 3.9 (c). The Superintendent and the New York Court of Appeals have interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Services PC v. State Farm Mutual Automobile Insurance Company, 12 NY 3d 217 (2009).

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 |
|--------------|----------------------------------|----------------------------|-----------------|-----------------|--------------------------|
| | S&K Warbasse Pharmacy | 01/18/23 - 01/18/23 | \$348.72 | \$348.67 | Awarded: \$343.93 |
| Total | | | \$348.72 | | Awarded: \$343.93 |

- B. The insurer shall also compute and pay the applicant interest set forth below. 03/14/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Based on the submission of a timely denial, interest shall be paid from 3/14/23, the date of filing, on the amount awarded of \$343.93 at a rate of 2% per month, simple, and ending with the date of payment of the award subject to the provisions of 11 NYCRR 65 - 3.9 (e).

C. Attorney's Fees

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

As this matter was filed ~~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 65-4.6(d) (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).

- 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 Nassau

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

09/16/2024
(Dated)

Rhonda Barry

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:
9a2bccf15005d4ed1b142ceb3b4d7647

Electronically Signed

Your name: Rhonda Barry
Signed on: 09/16/2024