

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Metro Chemists Pharmacy Inc
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-23-1319-8560

Applicant's File No. 164577

Insurer's Claim File No. 0716307087

NAIC No. 29688

ARBITRATION AWARD

I, Debbie Kotin Insdorf, 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

1. Hearing(s) held on 09/19/2024
Declared closed by the arbitrator on 09/19/2024

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

Jeff Winston, Esq, from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,984.10**, was AMENDED and permitted by the arbitrator at the oral hearing.

The Applicant's Attorney amended the amount in dispute to \$3,116.12 after taking into account Respondent's payment of \$96.10 for Cyclobenzaprine and to be in accordance with the fee schedule

Stipulations WERE made by the parties regarding the issues to be determined.

The Respondent's denials based on peer review are timely; the amended amount is in accordance with the fee schedule.

3. Summary of Issues in Dispute

The Applicant is seeking reimbursement for Diclofenac sodium 3% gel and Lidocaine 5% ointment dispensed to Assignor SB on 7/11/23, following a motor vehicle accident on 5/25/23. The Respondent issued timely denials based on a peer review by Dr. Kevin J. Curley on 10/04/23.

4. Findings, Conclusions, and Basis Therefor

The Applicant's claim is for \$3,116.12 for Diclofenac sodium 3% gel and Lidocaine 5% ointment dispensed to the Assignor on 7/11/23.

The Respondent issued timely denials based on a peer review.

On 5/25/23, the forty six year old Assignor was involved in a motor vehicle accident. On 6/27/23, she was examined at Belmont Medical Care for complaints of pain in the neck, right shoulder and lower back. There was tenderness, spasms and decreased range of motion in the cervical and lumbar spine. The doctor's impression was cervical and lumbar sprain. The treatment plan was physical therapy.

On 6/27/23, a prescription was written for Diclofenac sodium gel, Lidocaine ointment and Cyclobenzaprine. Applicant dispensed the prescription medication to the Assignor on 7/11/23.

On 10/04/23, Dr. Kevin J. Curley reviewed documents made available to him to determine the medical necessity for the prescription medication. He found the Cyclobenzaprine medically necessary because it was given due to muscle spasm associated with acute pain from musculoskeletal condition. The Diclofenac sodium gel and Lidocaine ointment were found not to be medically necessary.

In an action to recover assigned first-party no-fault benefits, an Applicant establishes a "prima facie showing of their entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue." Mary Immaculate Hospital v. Allstate Insurance Company, 5 AD3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004).

Once Applicant has established a prima facie case the burden is on the insurer to prove that the medical treatment was medically unnecessary. See, Citywide Social Work & Psychological Services, PLLC a/a/o Gloria Zhune v. Allstate Ins. Co., 8 Misc.3d 1025A, 806 N.Y.S.2d 444 (App Term 1st Dept 2005); A.B. Medical Services, PLLC v. Geico Ins. Co., 2 Misc 3d 26, 773 N.Y.S.2d 773 (App Term, 2nd & 11th Jud Dist 2003); Fifth Ave. Pain Control Center a/a/o Gladys Quintero v. Allstate Ins. Co., 196 Misc.2d 801, 766 N.Y.S. 2d 748 (Civ. Ct. Queens Co. 2003). "A denial premised on lack of medical

necessity must be supported by competent evidence such as an independent medical examination, peer review or other proof which sets forth a factual basis and medical rationale for denying the claim." Healing Hands Chiropractic, P.C. a/a/o Cleeford Franklin v. Nationwide Assurance Company, 5 Misc.3d 975, 787 N.Y.S. 645, (Civ. Ct NY Co. 2004). Restated, the evidence must at least show that the services were inconsistent with generally accepted medical/professional practice. Once the generally accepted medical practice (the medical rationale) is articulated, the expert must apply the facts of the case and only then may she properly conclude the services in issue were not medically necessary due to the provider's violation of the generally accepted medical standards.

Dr. Curley noted that the standard care for the use of Lidocaine 5% ointment would be to utilize it in cases of local neuropathic pain such as seen in post-herpetic neuralgia. Since this was not the case herein, the Lidocaine ointment was not medically necessary.

With regard to the Diclofenac sodium 3% gel, the standard of care would be to utilize it in cases of actinic keratoses or chronic osteoarthritis (if given in lower strength). Since this was not the case herein, the Diclofenac sodium 3% gel was not medically necessary.

In the instant case, the conclusions of the peer reviewer upon which the denials were based were supported by a sufficient factual foundation and medical rationale to warrant rejection of Applicant's claim and accordingly, were sufficient to support the defense of medical necessity.

The burden now shifts to applicant to refute Respondent's evidence. See, Bath Med. Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 2008 NY Slip Op 50347 (U) (App Term 2d Dept., Feb. 21, 2008); A. Khodadadi Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co., 16 Misc.3d 131,[A] 2007 NY Slip Op 51342 [U] (App. Term 2d & 11th Dists. July 3, 2007).

A rebuttal was written by Dr. Andrew Glyptis. He noted "...there is strong evidence in favor of an off label use of topical diclofenac, including its uses in treatment of whiplash injuries." He only cited to one online blog to support his position.

With regard to the Lidocaine, Dr. Glyptis cited to studies which support the effectiveness and safety of Lidocaine patch for those with low back pain. He indicated that Lidocaine treatment is an accepted first line treatment for localized neuropathic pain. Dr. Glyptis wrote that whiplash injury can result in nerve damage.

Dr. Glyptis emphasized that lidocaine patches have advantages of orally administered pain relief medications such as improved localization, greater flexibility in dosage variation, decreased side effects and increased patient adherence.

After reviewing all of the documents on file in the ADR Center maintained by the American Arbitration Association and considering the arguments set forth by both sides, I am upholding Respondent's denial of the Diclofenac sodium 3% gel. However, the Respondent's denial of the Lidocaine 5% ointment cannot be upheld. Dr. Glyptis

adequately and persuasively rebutted Dr. Curley's conclusion that the Lidocaine ointment was not medically necessary for the type of injuries sustained by this Assignor.

Accordingly, Applicant is awarded \$1,223.98.

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
	Metro Chemists Pharmacy Inc	07/11/23 - 07/11/23	\$1,626.10	\$1,223.98	Awarded: \$1,223.98
	Metro Chemists Pharmacy Inc	07/11/23 - 07/11/23	\$2,358.00	\$1,892.14	Denied
Total			\$3,984.10		Awarded: \$1,223.98

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/05/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the motor vehicle accident occurred after Apr.5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. 11 NYCRR 65-3.9(a). If an applicant does not request arbitration or institute a lawsuit within 30 days after receipt of a denial of claim form or from the payment of benefits, interest shall not accumulate on the disputed claim or element until such action is taken. 11 NYCRR 65-3.9(c). In accordance with 11 NYCRR 65-3.9 (c), interest shall be paid on the claim (s), totaling \$1223.98 from 10/05/23, the date the arbitration was commenced.

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 (Insurance Regulation 68-D). The insurer shall pay the applicant an attorney's fee, in accordance with 65-4.6(d). This amendment takes into account that there is an attorney fee of 20% of benefits plus interest with no minimum fee and a maximum attorney fee of \$1360.00.

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

09/26/2024
(Dated)

Debbie Kotin Insdorf

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:
4a140e14f728d72108b4f2ec7ab5d384

Electronically Signed

Your name: Debbie Kotin Insdorf
Signed on: 09/26/2024