

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 -

Geico Insurance Company
(Respondent)

AAA Case No.	17-24-1347-7815
Applicant's File No.	MBA10334
Insurer's Claim File No.	8738395570000002
NAIC No.	35882

ARBITRATION AWARD

I, Kenneth Rybacki, 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 09/30/2024
Declared closed by the arbitrator on 09/30/2024

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

Jerry Marino from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$5,149.04**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount in issue was reduced to \$5,121.75 as per the agreement of the representatives of the parties to comport Applicant's claims to applicable fee schedules.

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

The representatives for the parties stipulated that Respondent's denials were issued within applicable thirty-day claim-determination periods prescribed by Ins. Law Sec. 5106 and/or 11 NYCRR 65-3.8 and that Applicant's claims comported with applicable fee schedules.

3. Summary of Issues in Dispute

Whether Naproxen, Lidocaine 5% ointment, diclofenac gel 3% and baclofen, provided on 1/6/24, and Nabumetone and Lidocaine 5% ointment provided on 3/21/24 were necessary for the management of injuries sustained by 31-year-old male J.T. in an 11/28/23 accident. Applicant's claims for date of service, 1/6/24 were denied as medically unnecessary on the recommendations of Respondent's peer reviewer, Michael Sirkin, M.D. The remaining claim was denied on the recommendations of peer reviewer, Ayman Hadhoud, M.D.

4. Findings, Conclusions, and Basis Therefor

This matter was decided on the submissions of the parties as maintained by the American Arbitration Association ("AAA") in its ADR Center and oral argument. No submissions after 6/20/24 were admitted to the record, 11 NYCRR 65-4.2 (b); Matter of Mercury Casualty Co. v. Healthmakers Medical Group, P.C., 67 A.D.3d 1017, 888 N.Y.S.2d 762 (2d Dept. 2009). Arbitration procedure contained in the No-Fault regulations, specifically, 11 N.Y.C.R.R. 65-4.2 (b)(3)(iii), provides

(iii) The written record shall be closed upon receipt of the respondent's submission or the expiration of the period for receipt of the respondent's submission. Documents submitted by either party after the record is closed shall be marked "Late."

This action for the payment of claims for Naproxen, Lidocaine 5% ointment, diclofenac gel 3% and baclofen, provided on 1/6/24, and Nabumetone and Lidocaine 5% ointment provided on 3/21/24 arises from an 11/28/23 accident. Respondent denied the claims on the recommendation of its peer reviewers, Dr. Michael Sirkin and Ayman Hadhoud, M.D. creating a question of fact as to the need for these pharmaceuticals.

It is well-settled that submission of a provider's claim form to the carrier is prima facie evidence of the necessity of the services contained therein, Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498; Amaze Medical Supply Inc. v. Eagle Ins. Co., 2 Misc.3d 128(A), 784 N.Y.S.2d 918. Respondent can rebut that presumption through competent, contrary opinion that would shift the burden back to the applicant to put forth evidence in support of its claims, see, e.g., Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443; B.Y., M.D., P.C. v. Progressive Casualty Ins. Co., 26 Misc.3d 125(A), 907 N.Y.S.2d.

Respondent's peer reviewer, utilized by the Respondent to assess the necessity of pharmaceuticals, must provide a factual basis and medical rationale to support the expert's opinion that the same were not necessary, Delta Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co., 21 Misc.3d 142(A). That factual basis is lacking if the expert's report fails to provide specifics of the claim, is conclusory, or otherwise lacks a basis in the facts of the claim, Nir v. Allstate Ins. Co., 7 Misc.3d 544, 796 N.Y.S.2d 857.

Respondent's peer reviewer is also required to establish the generally accepted professional practices regarding the use of pharmaceuticals for conditions sustained by the Assignor and how it is that the provider being reviewed departed from those practices and standards, Elmont Open MRI & Diagnostic Radiology, P.C. v. State Farm Ins. Co., 26 Misc.3d 1211(A), 906 N.Y.S.2d 779.

All pharmaceuticals in issue were prescribed by P.A. Amira Nasser of Atlantic Medical and Diagnostic, P.C. PA Nasser first evaluated the Assignor on 12/7/24 providing diagnoses of cervical and thoracolumbar sprains and strains and left shoulder derangement. Re-evaluation occurred on 1/4/24 following which Naproxen, Lidocaine 5% ointment, diclofenac gel 3% and baclofen were prescribed.

Both the Applicant's rebuttal expert, Dr. Vladimir Gressel, and Respondent's expert agree that Naproxen is a non-steroidal anti-inflammatory drug used to decrease swelling and inflammation. Respondent's expert indicates that NSAIDs are a first-line medication for the treatment of musculoskeletal injuries, but that "over-the counter (OTC) agents may suffice and should be tried first." This a speculative, summarily stated conclusion without support in the record. More importantly, it is a tacit admission that the modality delivered by Naproxen was necessary for injuries such as those sustained by the Assignor. Applicant is accordingly awarded \$32.60 inclusive of a dispensing fee.

Applicant's claim for Diclofenac 3% solution \$1,892.14 is denied. This pharmaceutical is a topical NSAID. Respondent's expert indicates that a topical NSAID offers low levels of absorption and is indicated where systemic administration is contraindicated. Applicant's expert agrees that a topical NSAID offers good levels of pain relief without the adverse effects of oral NSAIDs. However, there is no explanation offered by Applicant as to why a topical NSAID was needed when the Assignor was provided with a systemic oral NSAID on the same day.

The experts agree that Baclofen is an anti-spasmodic agent. A review of PA Nasser's 1/4/24 examination report indicates that no spasms were appreciated on palpation of the paraspinal musculature. I therefore find that use of Baclofen was not demonstrated to be medically necessary. Applicant's claim for the same, \$64.30, is denied.

Applicant is awarded its claim of \$75.19 for Nabumetone, an oral NSAID provided on 3/21/24. Respondent's expert simply provides references to literature without explaining why use of Nabumetone was not specifically indicated for the specific injuries sustained by this Assignor. The opinion therefore fails to rebut any presumptions attaching to the claim.

The remaining claims are for Lidocaine 5% ointment provided on 1/6/24, \$1,528.80 and 3/21/24, \$1,528.72. All experts agree that this is a topical analgesic that works as a local anesthetic. Respondent's experts indicate that the use of the same is for neuropathic pain. Applicant's expert indicates that neuropathic pain was demonstrated on examination of the Assignor and lists those findings that lead to that conclusion. Respondent's expert cites Topical Treatments and Their Molecular/Cellular Mechanisms in Patients with Peripheral Neuropathic Pain-Narrative Review Pharmaceuticals 2021 Mar 26;13(4):450 in which it is stated "neuropathic pain in humans results from an injury or

disease of the somatosensory nervous system at the peripheral or central level." Respondent's experts fail to explain why the findings noted on examination could not support a conclusion that neuropathic pain was indicated. I therefore use of this pharmaceutical was necessary and award Applicant its claims for Lidocaine 5% ointment provided on 1/6/24 and 3/21/24.

Applicant is awarded \$3,165.31.

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	01/06/24 - 01/06/24	\$1,567.28	\$1,561.40	Awarded: \$1,561.40
	Best Care Pharmacy of New York Inc	01/06/24 - 01/06/24	\$1,969.36	\$1,956.44	Denied
	Best Care Pharmacy of New	03/21/24 - 03/21/24	\$1,612.40	\$1,603.91	Awarded: \$1,603.91

	York Inc				
Total			\$5,149.04		Awarded: \$3,165.31

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/14/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Statutory interest shall run from the date of filing, 5/14/24 to the date of payment by the Respondent.

C. Attorney's Fees

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

Attorney fees are awarded at 20% of the amount of first-party benefits awarded in the aggregate, plus interest, in accordance with the limitations set forth in 11 NYCRR 65-4.6.

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

10/02/2024
(Dated)

Kenneth Rybacki

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:
3db2491df8e641add8e14b16463b225f

Electronically Signed

Your name: Kenneth Rybacki
Signed on: 10/02/2024