

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 -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-24-1348-4889

Applicant's File No. N/A

Insurer's Claim File No. 0728473539

NAIC No. 29688

ARBITRATION AWARD

I, Carolyn Terrell-Nieves, 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: Claimant

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

Galena Feldsherova, Esq., from Kopelevich & Feldsherova, PC participated virtually for the Applicant

Allison Lindsey, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,561.38**, was AMENDED and permitted by the arbitrator at the oral hearing.

The initial amount was amended at the hearing to \$3434.00.

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

3. Summary of Issues in Dispute

The claimant, (CA) a 44-year-old male, was involved in a motor vehicle accident on 3/26/23. Thereafter, the claimant sought medical attention for the injuries sustained. This dispute arises from claims for prescribed Lidocaine 5% ointment and Diclofenac Sodium 3% gel provided on 11/2/23. Applicant amended the initial amount in dispute to

\$3,434.00. The respondent denied the claims based on the peer reviews by Howard Levy, MD. dated Applicant submitted a rebuttal to the peer by Amira Nassar P.A. Fee schedule issues were raised.

The issue to be decided is whether the respondent's lack of medical necessity defense can be sustained.

4. Findings, Conclusions, and Basis Therefor

This case was decided on the submissions of the parties as contained in the Electronic Case Folder maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in the ECF for both parties and made my decision in reliance thereon.

The claimant (CA) a 44-year-old male was involved in a motor vehicle accident on 9/11/2023. In this accident, he was the restrained driver of a car that was rear-ended by another vehicle. As a result of the impact, he sustained multiple injuries, including injuries to his mid-back, low back and right shoulder. Due to the developed complaints of pain, the patient started on a course of physical therapy.

On 9/26/2023, (CA) presented to Joseph Martone, PA-C, for an evaluation of his injuries. At that time, he complained of constant and tender mid-back pain with stiffness, throbbing and tight right shoulder pain with stiffness, and constant, aching, cramping and pinching bilateral low back pain. The pain rated 6-8/10 and worsened by lifting, extension, bending and changing position. The patient reported difficulty staying asleep due to pain and waking up due to pain at night. Examination of the thoracic spine revealed tenderness, pain upon hyperextension, and positive Jump Sign. Examination of the lumbar spine revealed facet pain upon palpation at the L3-L4, L4-L5 and L5-S1 levels, intervertebral spaces upon palpation, tender trigger points, painful range of motion, and positive Jump Sign. Examination of the right shoulder revealed tenderness upon palpation and painful range of motion. The diagnoses were sprain of thoracic region, spasm of thoracic back muscle, lumbar back sprain, lumbar paraspinal muscle spasm, derangement of right shoulder joint and bursitis of right shoulder. The treatment plan included injection, diagnostic studies, conservative treatment, medical supplies and follow-up evaluation. Based on the painful clinical conditions of the patient, he was also prescribed Lidocaine 5% ointment, Diclofenac Sodium 3% gel, Tizanidine Hydrochloride 4mg tablet, and Naproxen 550mg tablet for pain relief.

The patient then continued with the ongoing course of physical therapy.

The prescribed Lidocaine 5% ointment, and Diclofenac Sodium 3% gel, were dispensed to the patient by Best Care Pharmacy of New York, Inc., on 11/2/2023 and 12/5/23.

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. See, *Healing Hands Chiropractic, P.C. v. Nationwide Assur. Co.*, 5 Misc. 3d 975 (2004).

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 2009 NY Slip Op 00351 (App Div. 2d Dep't., Jan. 20, 2009); *Channel Chiropractic, P.C. v. CountryWide Ins. Co.*, 2007 Slip Op 01973, 38 A.D.3d 294 (1st Dep't. 2007); *Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 NY Slip Op 27427, 17 Misc. 3d 97 (App Term 1st Dep't., 2007), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident. *Id.*

The trial courts have held that 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 Ins. Co.*, 7 Misc. 3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); See also, *All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

Peer

In support of its contention that the services were not medically necessary, the respondent relied upon the peer review by Dr. Levy which stated. The standard of care for a musculoskeletal injury after a motor vehicle accident would begin with a reasonable trial of conservative treatment which consists of an evaluation by the physician, prescribing activity modification if necessary, encouraging return to activity as much as possible, prescription of medications such as anti-inflammatory medications, and conservative physiotherapy for a period of 4-6 weeks, followed by another modified course of therapy and exercises program if the patient is not responding to the initial course of treatment. The long-term use of medication can lead to adverse effects and thus, should be avoided. Further, topical formulations are indicated as an alternative to oral therapy. They are used when the oral route is contraindicated due to swallowing problems, intractable nausea and vomiting, and when the drug in the formulation irritates the gastric mucosa. Several factors must be considered regarding topical preparations.

With respect to Lidocaine 5% ointment:

Dr. Levy opined, "Lidocaine is an anesthetic agent which can only ease the pain for a short period. It does not aid in the healing process of injury."

Dr. Levy noted that "Lidocaine absorption is dependent upon the total dose administered, the route by which it is delivered, and blood supply to the site [10]. When applied topically, lidocaine needs to permeate through the skin to act as an anesthetic or analgesic. The outer layer of skin is made up of keratinized stratified squamous epithelium that it forms a permeability barrier that keeps water both in and out of the body. This barrier is largely produced by a lipid matrix that exists between the cells of the stratified squamous endothelium. Compounds that are polar and water-soluble cannot penetrate this barrier, but lipid-soluble compounds like corneum lidocaine can and therefore reach areas where peripheral nerve fibers are found. Topical lidocaine absorption will also be affected by the thickness and surface area of the stratum at the site of application, local vascularity, and the duration of application."

In this case, the claimant was involved in a motor vehicle accident on 9/11/2023 and sustained injuries to the neck, right shoulder, upper/mid-back, and lower back. The claimant was prescribed Lidocaine 5% ointment 250 gm. As per the above article, Lidocaine absorption is dependent upon the total dose administered, the route by which it is delivered, and the blood supply to the site. Further, several factors must be considered regarding topical preparations. Marked interindividual variability of skin properties may influence percutaneous absorption and distribution of the drug when applied topically. The therapeutic effects also depend on the rate, amount, and depth of penetration into the skin and the potential toxicological hazards of drugs. Also, the amount of variability of individual metabolic properties directly influences bioavailability and needed doses or precautions. Based on the available medical records, there was no evidence of burning sensations for which an anesthetic agent would have been beneficial. The claimant was receiving conservative care in the form of physical therapy and chiropractic treatment. There was no evidence of failure of the provided conservative care. The claimant should have continued the course of conservative treatment in the form of physical therapy and chiropractic treatment and initiated acupuncture treatment, massage therapy, activity modifications, a home exercise program, and an aerobic strengthening program for all the affected regions for complete resolution of symptoms. Moreover, Lidocaine is an anesthetic agent which can only ease the pain for a short period. It does not aid in the healing process of injury. Therefore, based on the above-cited article and the available medical records, the Lidocaine 5% ointment 250 gm prescribed was not medically necessary.

With respect to Diclofenac Sodium 3% gel:

In this case, the claimant was involved in a motor vehicle accident on 9/11/2023 and sustained injuries to the neck, right shoulder, upper/mid-back, and lower back. The claimant was prescribed Diclofenac Sodium 3% gel. As per the above article, nearly all adverse effects were due to skin irritation. Only Diclofenac demonstrated a significant risk of adverse effects. Patients treated with Diclofenac also were more likely than those treated with placebo to stop treatment. The reason why the topical ointment was prescribed was not clearly understood when it can lead to adverse effects. Further, as per the available records, the claimant was actively engaged in conservative treatment in the form of chiropractic treatment and physical therapy for the affected regions. There was no evidence of failure of the conservative treatment. The claimant should have

continued with conservative treatment in the form of physical therapy and chiropractic treatment and initiated acupuncture treatment, massage therapy, activity modifications, a home exercise program, and an aerobic strengthening program as they have better clinical outcomes in pain management. Also, the outcome of conservative treatment would be better than the Diclofenac Sodium 3% gel as Diclofenac would provide only provisional pain relief. Therefore, based on the cited article and the available medical records, the Diclofenac Sodium 3% gel was not medically necessary.

Dr. Levy cited an article titled Topical NSAIDs for Chronic Musculoskeletal Pain in Adults, 2017 which noted, "Nearly all adverse effects were due to skin irritation. Only Diclofenac demonstrated a significant risk of adverse effects." Please note, the above cited article is for topical NSAIDs for chronic pain, however, Dr. Levy stated, "The reason why the topical ointment was prescribed was not clearly understood when it can lead to adverse effects. Further, as per the available records, the claimant was actively engaged in conservative treatment in the form of physical therapy for the affected regions. There was no evidence of conservative treatment being contraindicated."

In regards to the Lidocaine 5% ointment

Dr. Levy opined that in this case, the claimant was involved in a motor vehicle accident on 9/11/2023 and sustained injuries to the neck, right shoulder, upper/mid-back, and lower back. The claimant was prescribed Lidocaine 5% ointment 250 gm. As per the above article, Lidocaine absorption is dependent upon the total dose administered, the route by which it is delivered, and the blood supply to the site. Further, several factors must be considered regarding topical preparations. Marked interindividual variability of skin properties may influence percutaneous absorption and distribution of the drug when applied topically. The therapeutic effects also depend on the rate, amount, and depth of penetration into the skin and the potential toxicological hazards of drugs. Also, the amount of variability of individual metabolic properties directly influences bioavailability and needed doses or precautions. Based on the available medical records, there was no evidence of burning sensations for which an anesthetic agent would have been beneficial. The claimant was receiving conservative care in the form of physical therapy and chiropractic treatment. There was no evidence of failure of the provided conservative care. The claimant should have continued the course of conservative treatment in the form of physical therapy and chiropractic treatment and initiated acupuncture treatment, massage therapy, activity modifications, a home exercise program, and an aerobic strengthening program for all the affected regions for complete resolution of symptoms. Moreover, Lidocaine is an anesthetic agent which can only ease the pain for a short period. It does not aid in the healing process of injury. Therefore, based on the above-cited article and the available medical records, the Lidocaine 5% ointment 250 gm prescribed was not medically necessary.

I find that the peer review reports sufficient to meet Respondent's burden of proof. Dr. Levy's analysis set forth a medical rationale, supported by evidence of a deviation from "generally accepted medical" standards and relies on citations to medical authority. The burden shifts back to Applicant to present competent medical proof as to the medical necessity for the medical supplies by a preponderance of the credible evidence. West Tremont Medical Diagnostic, P.C. v. GEICO, 13 Misc.3d 131[A], 824 N.Y.S.2d 759

(Table), 2006 N.Y. Slip Op. 51871[U] (App. Term 2d & 11 Jud. Dists. 9/29/06), A. Khodadadi Radiology, P.C. v. N.Y. Central Fire Mutual Insurance Company, 16 Misc. 3d 131[A], 841 N.Y.S.2d 824 (App. Term 2d & 11 Dists. 7/3/08).

Where the Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden then shifts to the Applicant which must then present its own 11th ed]], Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company, 2008 NY Slip Op 50456U, 18 Misc. 3d 1147A, 2008 N.Y. Misc. LEXIS 1121.

The Applicant has submitted the 7/8/24 Rebuttal of Amira Nassar, P.A. All pharmaceuticals in issue were prescribed by P.A. Amira Nasser of Atlantic Medical and Diagnostic, P.C. After due consideration of the evidence submitted and the arguments of counsel, I find that Applicant has successfully refuted the peer review report of the Respondent and has established the medical necessity for the Lidocaine ointment, and Diclofenac gel by a fair preponderance of the evidence. I am persuaded by P.A. Nasser's rebuttal, which I find credible on the issue of medical necessity. There were numerous complaints and positive findings on exam that included radiating neck and back pain, mid-back and knee pain, decreased range of motion, spasms and positive orthopedic testing. Dr. McGee set forth evidence of the EIP's need as well as the efficacy and benefits of the medications in treating the EIP's pain. Accordingly, I find that the services at issue were a reasonable exercise of discretion and medically necessary. Therefore, I find in favor of the Applicant.

Fee Schedule

The Applicant seeks reimbursement in the amended amount of \$3,434.00 for the prescribed medications. Respondent contends that the Applicant's charges were in excess of the fee schedule.

Respondent has the burden of coming forward with "competent evidentiary proof" supporting its fee schedule defenses. See, Continental Med., P.C. v. Travelers Indem. Co., 11 Misc.3d 145a (2006) An insurer fails to establish the existence of an issue of fact with respect to a defense that fees charged were excessive and not in accordance with the Workers' Compensation fee schedule in the absence of proof establishing the defense. St. Vincent Medical Care., P.C. v. Country Wide Ins. Co., 26 Misc.3d 146(A), 907 N.Y.S.2d 441 (Table), 2010 N.Y. Slip Op.50488(U), 2010 WL 1063914 (App. Term 2d, 11th & 13th Dists. Mar. 19, 2010). If respondent fails to demonstrate by competent evidentiary proof that an applicant's claims were in excess of the appropriate fee schedules, respondent's defense of noncompliance with the appropriate fee schedules cannot be sustained. See, Continental Medical PC v. Travelers Indemnity Co., 11 Misc.3d 145A, 819 N.Y.S.2d 847, 2006 NY Slip Op 50841U, 2006 N.Y. Misc. LEXIS 1109 (App. Term, 1st Dep't., per curiam, 2006).

The Respondent relies on its Explanation of Benefits (EOB) in support of its defense. I find that the EOB is vague and does not set forth sufficient supporting detail. Conspicuously absent is a detailed explanation from a fee specialist, such as a Certified Professional coder, explaining why the Applicant is not entitled to reimbursement. A lay person is not qualified to evaluate the CPT codes or to change the code if the code is

used by a health provider in its bills. See *Abraham v. Country-Wide Ins. Co.*, 3 Misc. 3d. 130A (App. Term 2d. Dept. 2004). When a defendant fails to demonstrate by competent evidentiary proof that a plaintiff's claim was in excess of the appropriate fee schedules, defendant's defense of noncompliance with the appropriate fee schedule cannot be sustained. *Continental Medical, P.C. v. Travels Indemnity Co.*, 11Misc.3d.145A (App. Term 1st Dept. 2006).

Accordingly, after a careful review of the records and consideration of the parties' oral arguments, I find that Respondent offered insufficient evidence in support of its reductions and therefore failed to sustain its defense. I therefore find for the Applicant. Reimbursement as requested is due and owing herein in the amount of \$3,428.86.

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	11/02/23 - 11/02/23	\$1,901.00	\$1,901.00	Awarded: \$1,901.00
	Best Care Pharmacy of New York Inc	11/02/23 - 11/02/23	\$1,533.00	\$1,533.00	Awarded: \$1,533.00

	Best Care Pharmacy of New York Inc	12/05/23 - 12/05/23	\$127.38	\$0.00	Denied
Total			\$3,561.38		Awarded: \$3,434.00

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/20/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Respondent shall compute and pay the Applicant the amount of interest computed from the date the AR-1 was deemed filed with the American Arbitration Association, at the 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(c).

C. Attorney's Fees

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

The Applicant's attorney is entitled to one attorney 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 Nassau

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

10/10/2024
(Dated)

Carolynn Terrell-Nieves

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:
655b96017cc0eb27d89380193be9cb2b

Electronically Signed

Your name: Carolynn Terrell-Nieves
Signed on: 10/10/2024