

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

| | | |
|--|--------------------------|-------------------|
| Big Apple Drugs Inc. (Applicant) | AAA Case No. | 17-23-1300-4369 |
| - and - | Applicant's File No. | DK23-344573 |
| | Insurer's Claim File No. | 0685388950 2HH |
| Allstate Indemnity Company (Respondent) | NAIC No. | 19240 |

ARBITRATION AWARD

I, Gary Peters, 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 09/24/2024
Declared closed by the arbitrator on 09/24/2024

Henry Guindi from Korsunskiy Legal Group P.C. participated virtually for the Applicant

John Palitianos from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,985.20**, 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 Assignor was a 56 year old female who was a seat belted passenger in a motor vehicle and involved in an accident on 8/3/22.

Applicant is seeking payment for pharmaceuticals wherein the claim was denied by the Respondent for lack of medical necessity, based on its Independent Peer Review Report.

4. Findings, Conclusions, and Basis Therefor

This hearing was conducted using the Electronic Case Folder maintained by the American Arbitration Association. All documents contained in that folder are made part of the record of the hearing and I have reviewed the documents contained therein. Any documents submitted after the hearing or at the hearing that have not been entered in the Electronic Case Folder as of the date of this award, will be listed immediately below this language and forwarded to the American Arbitration Association at the time this award is issued for inclusion.

As stated above, the Assignor was a 56 year old female who was a restrained passenger in a motor vehicle involved in an accident on 8/3/22. She sustained multiple bodily injuries and came under the care of various medical providers. She initially presented to Dr. Pak on 8/11/22 and presented with complaints of pain in the neck, back, bilateral shoulders and right hip. A complete physical examination was conducted wherein the Assignor was treated with physical therapy and recommended for follow-up evaluations.

On 9/26/22, the Assignor's physical therapy continued and she was prescribed additional medication. On 1/9/23, Dr. Pak recommended Lidothol 4.5-5% film which was dispensed on 2/24/23.

As stated above, the claim was denied by Respondent for lack of medical necessity based on the Independent Peer Review Report of Dr. Allen Wolf.

Once an Applicant establishes a prima facie showing, the burden shifts to the Respondent. Respondent's denial for lack of medical necessity must be supported by competent medical evidence setting for a clear and factual basis and medical rationale for denying the claim. Citywide Social Work v. Travelers Indemnity Company, 3 Misc.3d 608 (Civil Court, Kings County, 2004).

To successfully support its denial, the Respondent's Peer Review or I.M.E. Report must address all pertinent objective findings contained in the Applicant's medical submissions and set forth how and why the disputed services were inconsistent with generally accepted medical practices. The conclusory opinions of a peer reviewer, standing alone and without support of medical authorities, will not be considered sufficient to establish the absence of medical necessity (Citywide Social Work v. Travelers Indemnity Company,) Supra; Amaze Medical Supply Inc. v. Eagle Insurance Company, 2 Misc.3d 128A, 784 N.Y.S.2d 918 (App. Term 2d 11th Judicial District).

Where Respondent meets its burden, it is incumbent upon the claimant to rebut the findings and recommendations of the Respondent's reports. The 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 Insurance Company, 8 Misc.3d 1025A).

It is undisputed that the Applicant has established a prima facie case of entitlement to first party benefits by demonstrating it submitted a timely claim setting forth the fact,

amount of loss sustained and that payment of the claim has not been made. As stated above, the burden shifts to the Respondent to set forth a clear and factual basis in medical rationale to deny the claim.

On behalf of the Respondent, Dr. Allen Wolf reviewed multiple medical records and submitted an Independent Peer Review Report.

Dr. Wolf states in his peer review report that *"the Lidothol pad provided to the patient was not medically necessary as the claimant did not have any past medical history that would preclude the claimant from taking first line agents for musculoskeletal pain; and there was no indication the claimant had trialed and trialed a medication treatment regimen including over the counter pain medications or NSAIDs"*.

Dr. Pak disagreed with Dr. Wolf's conclusions, as preclusion from taking first line agents due to medical history or trial and failure of medication treatment regimen including over the counter pain medications or NSAIDs are not the only indicators for the prescription of Lidothol pad. Also, there are no specific guidelines delineating the absolute structured path for treatment to be universally prescribed to all patients. Accordingly, great deference should be given to the treating provider charged with the responsibility to examine, diagnose and treat a patient who presents with symptoms and positive clinical findings.

Also, the rationale for the prescription of Lidothol pad is that topical medications are part of a multimodal approach to musculoskeletal and neurological injuries. Many patients experience pain flare ups when they are out of the office and Lidothol is a helpful alternative for treating localized pain. While topical application may be the only option for some patients who are unable to tolerate oral medication, there is no established medical standard that people who are able to tolerate oral medication should not be given topical medication. On the contrary, the whole advantage of topical medication is that it prevents adverse effects before they start and has numerous additional advantages over oral administration in both groups of patients (those who can and cannot tolerate oral application).

"A topical pain relief patch consisting the local aesthetic Lidocaine and the topical analgesic Menthol. The patch assists patients in the management of mild to moderate acute pain or mild to moderate aches. Lidothol is applied to the skin at the specific region experiencing these pain symptoms. The synthesis of Lidocaine and Menthol is a highly effective combination of pain relievers working to alleviate discomfort while the root cause is being managed and treated by healthcare providers." (Lidothol Patch, medically reviewed by Dmgs.com. Last updated on Dec 1, 2019.)

Lidocaine has been successfully used to treat pain for many decades. It is a powerful pain medication which is significantly more effective than OTC pain medication. Topical application has many advantages. Lidocaine has been found to be very effective in treating both acute and chronic pain. Please refer to: J. Anesth Clin Res. 2017 Jan; 8(1): 697. Published online 2017 Jan 1. Lidocaine Infusion: A Promising Therapeutic Approach for Chronic Pain Enas Kandil et. al. Lidocaine is more

effective at treating pain than most other agent including even some as powerful as opioids. Anesth. Pain Med. 2014 Feb; 4(1): e15444. Lidocaine and Pain Management in the Emergency Department: A Review Article, Samad EJ Golzari et. al. "The antinociceptive properties of Lidocaine are derived from multifaceted mechanisms, turning it into a medication that is safe to administer via different routes which makes it available for use in a variety of medical conditions." "Our study revealed that Lidocaine is broadly used in various therapeutic approaches for different types of pain ."

A study concluded that topical NSAIDs, when used for treatment of pain resulting from sprains, strains or sports or overuse-type injuries, can provide good levels of pain relief without the systematic adverse events associated with oral NSAIDs. { *Cochrane Database Syst Rev. 2010 Jun 16; 6; CD007402. Topical NSAIDs for acute pain in adults. Massey T, Derry S, Ndiaye RA, McQuay HJ).*

Topical non-steroidal anti-inflammatory drugs are effective in relieving pain in acute and chronic conditions. (Ndiaye, Tramer, Carroll, Wiffen and McQuay. "Quantitative Systematic Review of Topically Applied Non- Steroidal Anti-inflammatory Drugs." *British Medical Journal* 316 (1998): 336-339.)

Dr. Pak also disagreed with Dr. Wolf's conclusion that medications must be prescribed in an appropriate clinical context which was not the case for this patient.

Considering the Assignor's painful condition, as indicated by the medical records and reported in Dr. Wolf's peer report as well, it is clear that the patient was severely affected due to the accident and remained symptomatic on her evaluation visits dated 8/11/2022 and 9/26/2022, when she presented with the subjective complaints and positive objective findings of - neck pain with stiffness and restriction of motion rated at 6-10/10 with radiation to the bilateral upper extremities associated with numbness and tingling in both arms, forearms, hands and fingers; mid back pain rated at 6-10/10; lower back pain with stiffness and restriction of motion rated at 6-10/10 with radiation to the bilateral lower extremities; right hip pain rated at 6-10/10; and bilateral shoulder pain rated at 6-10/10. Neurological examination revealed decreased deep tendon reflexes of the bilateral brachioradialis, patellar and ankle of 1+; and decreased muscle motor strength of the bilateral upper extremities as well as the lower extremities. The patient was diagnosed with sprain ligament, lumbar spine-IE; sprain ligament, cervical spine-JE; sprain ligament, thoracic spine-IE; sprain, unspecified muscle, fascia and tendon at shoulder and upper arm-IE; as well as hip pain, unspecified-IE. Additionally, MRI studies of the cervical, thoracic and lumbar spine revealed multiple disc bulges and multiple disc herniations. All these complaints and findings were consistent with musculoskeletal and neuropathic pain symptoms. Therefore, the prescription of Lidothol 4.5-5% pad was medically necessary for the treatment of the patient's musculoskeletal and neuropathic pain.

By prescribing the topical medication, Dr. Pak stated that he has not deviated from any standard norms, as there is ample evidence based on empirical practice suggesting that topically applied medications are almost as effective as those taken orally, with a good safety profile in terms of adverse effects. Also, the ultimate goal

that motivates the development of topical preparations is the improvement of patient compliance with medical treatment, by providing efficient pain relief.

After reviewing all the evidence I give deference to the treating physician. Dr. Pak provided a credible Peer Review Rebuttal wherein he set forth the reasons for prescribing the medication and that great deference should be given to the treating physician. He also cited to credible medical authority to support his position.

The Respondent has failed to establish that the treating physician has deviated from standard accepted medical practice and for the reasons as stated above, Applicant is awarded payment in the sum of \$2,985.20.

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 |
|---------|----------------------|---------------------|--------------|---------------------|
| | Big Apple Drugs Inc. | 02/24/23 - 02/24/23 | \$2,985.20 | Awarded: \$2,985.20 |
| Total | | | \$2,985.20 | Awarded: \$2,985.20 |

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/22/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest to be 2% per month simple, not compounded on a pro rata basis using a 30 day month. Respondent shall compute and pay Applicant interest from the day of filing of arbitration to the date of payment of the award.

C. Attorney's Fees

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

The insurer shall pay the Applicant an attorney fee in accordance with 11 NYCRR 65-4.6(d) or "As this matter 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 11NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the Applicant an attorney fee in accordance with the newly promulgated 11 NYCRR 65-4.6(d). This amendment takes into account that the maximum attorney fee has been raised from \$850.00 to \$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 NASSAU

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

10/23/2024
(Dated)

Gary Peters

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:
0676bc1555c35610ba20287601949006

Electronically Signed

Your name: Gary Peters
Signed on: 10/23/2024