

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

21st Century Pharmacy Inc  
(Applicant)

- and -

Integon National Insurance Company  
(Respondent)

AAA Case No. 17-23-1318-0602

Applicant's File No. RFA23-321563

Insurer's Claim File No. 9UINY03046

NAIC No. 29742

### ARBITRATION AWARD

I, Anne Malone, 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 11/18/2024  
Declared closed by the arbitrator on 11/18/2024

Philip Kim, Esq. from Horn Wright, LLP participated virtually for the Applicant

Joseph Licata, Esq. from Rossillo & Licata LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$4,762.00**, 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 29 year old EIP reported involvement in a motor vehicle accident on March 10, 2020; claimed related injury and received Lidocaine patches provided by the applicant on June 10, 2020 and July 22, 2020.

The applicant submitted a claim for this prescription medication, payment of which was denied by the respondent based upon a peer review by Sammy Dean, M.D. dated September 14, 2020. In response, the applicant submitted a rebuttal dated May 31, 2023 by Drora Hirsch, M.D. who was not the prescribing or treating medical provider. Dr. Dean submitted an addendum dated June 17, 2024

The respondent also asserted a fee schedule defense.

**The issues to be determined at the hearing are:**

**Whether the respondent established that the topical prescription medication at issue was not medically necessary.**

**Whether the respondent established its fee schedule defense.**

#### 4. Findings, Conclusions, and Basis Therefor

This decision is based upon the documents reviewed from the Modria File as well as the arguments made by counsel and/or representative at the arbitration hearing. Only the arguments presented at the hearing are preserved in this decision; all other arguments not presented at the hearing are considered waived.

##### Medical Necessity

In order to support a lack of medical necessity defense respondent must "set forth a factual basis and medical rationale for the peer reviewer's [or examining physician's] determination that there was a lack of medical necessity for the services rendered." Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term2d, 11<sup>th</sup> and 13<sup>th</sup> Jud. Dists. 2014.) Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to applicant. See Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1<sup>st</sup> Dept. 2006.)

The Civil Courts have held that a defendant's peer review or report of medical examination must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review or medical examination 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 specifics as to the claim at issue, is conclusory or vague. See Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005.)

In support of its contention that the topical prescription medication provided by the applicant was not medically necessary, respondent relies upon the report of the peer review by Dr. Dean who reviewed the medical records of the EIP, noted the injuries claimed and the treatment rendered to her. Dr. Dean considered possible arguments and justification for the need for the topical prescription medication at issue and determined that it was not warranted under the circumstances presented.

Dr. Dean specifically noted that although the EIP complained of neck, lower back and left wrist, the notes by Dr. Liu on March 13, 2020 and a telemedicine evaluation dated April 24, 2020 indicated painful range of motion with no recorded values and tenderness and spasm of the cervical and lumbar spine and left wrist. All tests were negative and muscle strength and sensation tests were within normal limits.

Dr. Dean discussed the uses and benefits of the Lidocaine patch and concluded, based on limited subjective evidence of neuropathic pain, and the essential negative examinations that the Lidocaine patches at issue were not medically necessary.

He supported, with relevant medical literature, his opinion that the topical prescription medication at issue was not medically necessary.

Respondent has factually demonstrated that the topical prescription medication at issue was not medically necessary. Accordingly, the burden now shifts to the applicant, who bears the ultimate burden of persuasion, pursuant to Bronx Expert Radiology, P.C., supra.

In opposition to the peer review, the applicant presented a rebuttal by Dr. Hirsch, who reviewed the EIP's medical record, disagreed with the conclusions reached by Dr. Dean and discussed the injuries sustained by the EIP and the treatment rendered to her. Dr. Hirsch noted that at her initial evaluation on March 13, 2020 and follow-up on April 24, 2020 the EIP complained of achy low back pain and Dr. Liu noted that examination of the lumbar spine revealed painful range of motion, without noting specific restrictions or limitations.

Based on her review of these reports, Dr. Hirsch that the need for the prescribed medication was based on the EIP's history and positive findings documentation in the reports of the two evaluations.

Dr. Hirsch discussed in detail the general uses and benefits of Lidocaine patches and supported her opinion that they were medically necessary with medical literature.

In response, Dr. Dean submitted an addendum in which he responded to the arguments raised by Dr. Hirsch and giving some deference to the prescribing physician determined that there was no new information as to the necessity of the topical medication at issue to establish that it was medically necessary for this particular EIP.

After a review of all the evidence submitted an issue of fact remains as to whether the prescription medication provided to the EIP was medically necessary. Conflicting opinions have been presented in the peer review and addendum by Dr. Dean and the rebuttal by Dr. Hirsch submitted on behalf of the applicant.

In this instance, Dr. Hirsch did not submit a rebuttal which meaningfully refers to and rebuts the findings of Dr. Dean and the medical reports submitted do not contradict his assertions.

Based on the foregoing, I find that the respondent established that the topical prescription medication at issue was not medically necessary.

Under these circumstances, the fee schedule issue is moot.

**Accordingly, the claim is dismissed with prejudice.**

Any further issues submitted in the record are held to be moot and/or waived insofar as they were not raised at the time of this hearing. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator.

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 claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of CT  
SS :  
County of Fairfield

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

11/22/2024

(Dated)

Anne Malone

**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:**  
75e4d34b5e17522f127cd7777220cc90

**Electronically Signed**

Your name: Anne Malone  
Signed on: 11/22/2024