

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

F & D Pharmacy Inc DBA Medical Arts
Chemists & Surgical
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No.	17-23-1328-9507
Applicant's File No.	DK23-416148
Insurer's Claim File No.	0720653062
NAIC No.	29688

ARBITRATION AWARD

I, Rhonda Barry, 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 12/24/2024
Declared closed by the arbitrator on 12/24/2024

Artur Finkel, Esq. from Korsunskiy Legal Group, P.C. participated virtually for the Applicant

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

2. The amount claimed in the Arbitration Request, **\$4,815.33**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the hearing, the applicant's counsel amended the amount in dispute from \$4815.33 to \$4439.30 based upon the applicable fee schedule for lidocaine in this case.

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

The parties stipulated that the denial is timely. If applicable, interest accrues in accordance with 11 NYCRR§65-3.9.

3. Summary of Issues in Dispute

The EIP, "LPS" is a 29 year old male injured as a restrained front seat in a motor vehicle accident on 7/7/23. There was no immediate hospital attention. Applicant seeks \$4439.30 for medication dispensed to the EIP on DOS 10/5/23. Respondent denied applicant's claim based upon lack of medical necessity according to the 11/16/23 peer review of Peter Chiu, MD, PMR. Applicant submits a rebuttal from Kyungsook Bu, NP.

4. Findings, Conclusions, and Basis Therefor

According to Dr. Chiu the cyclobenzaprine was medically necessary and applicant acknowledges reimbursement of \$356.12.

This matter is linked with AAA #s17-23-1317-1383 and 17-23-1323-1902. Documents in each ADR Center record is considered in each matter and for each decision. The cases were heard on the same day. The applicants were represented by the same attorney. The respondent was represented by the same attorney.

I have completely reviewed all timely submitted documents contained in the ADR Center record maintained by the American Arbitration Association and considered all oral arguments. No additional documents were submitted by either party at hearing. No witnesses testified at hearing.

ANALYSIS

Applicant has established its prima facie entitlement to reimbursement for no fault benefits based upon the submission of a properly completed claim form setting forth the amount of the loss sustained, and that payment is overdue. Mary Immaculate Hospital v. Allstate Insurance Company, 5 AD 3d 742, (2nd Dept. 2004). Westchester Medical Center v. Lincoln General Ins. Co., 60 AD 3d 1045 (2nd Dept. 2009).

The burden now shifts to respondent to establish a lack of medical necessity with competent medical evidence which sets forth a clear factual basis (specifics of the claim) and medical rationale for denying the claim. Citywide Social Work and Psych Services, PLLC v. Allstate, 8 Misc. 3d 1025A (2005); Healing Hands Chiropractic v. Nationwide Assurance Co., 5 Misc. 3d 975 (2004). Respondent must offer sufficient and credible medical evidence that addresses the standards in the applicable medical community for the services and treatment in issue; explains when such services and treatment would be medically appropriate, preferably with understandable objective criteria; and why it was not medically necessary in the instance at issue.

To prevail, respondent's peer review must address all of the pertinent objective findings contained in applicant's medical evidence. It must then clearly explain why, notwithstanding those findings, the disputed service was inconsistent with generally accepted medical or professional practices. Amaze Medical Supply Inc. v. Eagle

Insurance Co, 2 Misc. 3d 128(A), Citywide Social Work, et al, v. Travelers Indemnity Company, 3 Misc. 3d 608.

Dr. Chiu considered appropriate medical records most significantly the 7/13/23 evaluation from Kyungsook Bu, NP. The EIP complained of pain to the neck, mid and lower back, right shoulder and right knee. Range of motion was decreased to the cervical and lumbar spine and right shoulder was diminished. Muscle strength was normal with the exception of the right shoulder which was decreased to 4/5. Straight leg raise was positive and there was muscle spasm. The EIP was not taking any medication and in fact was prescribed an NSAID. There was no history of GERD, peripheral neuropathy, uncontrolled blood pressure, gastric surgery or gastric ulcer. History, subjective complaints and physical exam findings were consistent with sprain/strain injury of the spine and contusion strain of the extremity. The EIP was recommended to conservative care and prescribed DME and medication. An 8/15/23 evaluation by NP Bu revealed motor changes (4/5) and a normal sensory and reflex examination. The EIP's course of conservative care was continued. An MRI of the lumbar spine (8/31/23) indicated a herniated disc at L5/S1 with narrowing of the neural foramina bilaterally and possible impingement of the exiting nerve root. The EMG/NCV of the lower extremities (8/17/23) revealed evidence of bilateral L5/S1 radiculopathy. Pain 9/21/23 evaluation by NP Bu indicated decreased range of motion to the cervical and lumbar spine as well as the right shoulder. Motor strength, sensation and reflexes were normal.

According to Dr. Chiu the EIP sustained sprain/strain/contusion injury. The standard of care includes a detailed and thorough history, a comprehensive examination by the treating provider, course of conservative care for a period of 4 to 8 weeks, rest, called modality and prescribing of oral anti-inflammatory medications and/or NSAIDs for short period of time as needed. The standard of care does not involve the routine prescribing of diclofenac sodium gel, lidocaine ointment and celecoxib for soft tissue and musculoskeletal injuries. In this case, there was no significant medical or surgical history, no history of Gerd, peripheral neuropathy, uncontrolled blood pressure, gastric surgery or gastric ulcer. Subjective complaints and physical examination findings were consistent with sprain/strain injury.

According to Dr. Chiu, the diclofenac sodium gel was medically unnecessary. The medication is an NSAID. 1% is used to treat joint pain in the hands, wrist, elbows, knees, ankles, or feet caused by osteoarthritis. The 1.5% solution is used to treat pain in the knees caused by osteoarthritis. Osteoarthritis would not be causally related to an MVA. The 3% solution is used to treat warty overgrowth on the skin (actinic keratosis) on sun exposed areas of the body. The EIP was prescribed diclofenac sodium gel 3%. Citing to medical authority, Dr. Chiu explains that topical NSAIDs can be safer than oral consumption, but further studies are needed to compare topical efficacy to other administration and delivery methods. Topical NSAIDs provide good levels of pain relief an acute condition such as sprains, strains, and overuse injuries probably similar to that provided by oral NSAIDs, but there is insufficient data for comparison.

Citing to medical authority, Dr. Chiu explains that lidocaine ointment is for topical anesthesia of the skin and mucous membranes for the treatment of pain associated with

post herpetic neuralgia, painful diabetic neuropathy, urethral anesthesia, or local anesthesia including peripheral nerve block anesthesia. It causes numbness or loss of feelings for patients having certain medical procedures and may be used for itching caused by sunburn, minor burns, insect bites or stings, poison ivy, poison oak etc. It is used to relieve nerve pain caused by herpes zoster or shingles (postherpetic neuralgia). There was no indication that sprain/strain and contusion/strain/injuries would require this type of medication.

Lastly and with respect to the celecoxib, it is an NSAID used to treat pain or inflammation caused by many condition such as arthritis, spondylitis and menstrual pain.

After careful consideration of the parties' submissions and the arguments at hearing I find that the prescription for the diclofenac gel and Celecoxib tablets were not a deviation from generally accepted medical practice. Dr. Chiu standard of care includes NSAIDs. His determination that celecoxib was medically unnecessary is not supported by his own report.

With respect to the diclofenac gel the medication is used to treat the symptoms of osteoarthritis not the underlying condition. The symptoms the EIP experience may very well be similar to those suffering from osteoarthritis. Dr. Chiu does not adequately address this issue in his peer review. As to the percentage of diclofenac gel, that is a decision best left to the treating physician.

However, as to the lidocaine, Dr. Chiu provided a satisfactory standard of generally accepted medical practice for the Lidocaine at issue. See Williamsbridge Radiology and Open Imaging v. Travelers Indemnity Company, 14 Misc. 3d 1231 (A), 836 NYS 2d 496 Further Dr. Chiu's report successfully correlates the medical necessity of the Lidocaine to this EIP. See, James Ligouri Physician, PC v. State Farm Mutual Automobile Insurance Company, 2007 NY Slip op 50465 (U) (New York District Court 2007).

In rebuttal, NP Bu explains that lidocaine is a local anesthetic that relieves itching, burning and pain by blocking nerve impulses. Lidocaine and assists in pain relief by blocking sodium channels and stopping nerves from sending pain signals. Lidocaine is broadly used in various therapeutic approaches for different types of pain. It prevents pain signals to the brain by stopping them before they begin. The MRI findings coupled with the positive straight leg raise is indicative of neurological insult or injury. It can be used for neuropathic and non-neuropathic pain as a safe and effective add-on therapy. It can be used with mild to moderate strains.

After careful consideration of the parties' submissions and the arguments at hearing I find that the lidocaine ointment was medically necessary. Applicant's claim is awarded.

Interest: Applicant is awarded interest in accordance with 11 NYCRR§65 - 3.9 (a)-(f). Accordingly, interest is calculated at a rate of 2% per month, calculated on a pro rata basis using the 30 day month. A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. If an applicant does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form, or payment of benefits calculated pursuant to Department of Financial Services Regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken. 11 NYCRR §65 - 3.9 (c). The Superintendent and the New York Court of Appeals have interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Services PC v. State Farm Mutual Automobile Insurance Company, 12 NY 3d 217 (2009).

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
	F&D Pharmacy Inc DBA Medical Arts Chemists & Surgical	10/05/23 - 10/05/23	\$4,815.33	\$4,439.30	Awarded: \$4,439.30
Total			\$4,815.33		Awarded: \$4,439.30

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/14/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Based on the submission of a timely denial, interest shall be paid from 12/14/23, the date of filing, on the amount awarded of \$4439.30 at a 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 (e).

C. Attorney's Fees

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

This case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4.6(d) (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 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, Rhonda Barry, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

12/27/2024
(Dated)

Rhonda Barry

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:
cdd67151b3ff933ea339da5eba00b2c1

Electronically Signed

Your name: Rhonda Barry
Signed on: 12/27/2024