

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

K Drug Depot Inc  
(Applicant)

- and -

Integon National Insurance Company  
(Respondent)

AAA Case No. 17-23-1327-9519

Applicant's File No. M23-734729

Insurer's Claim File No. 97XINY08098

NAIC No. 29742

**ARBITRATION AWARD**

I, Ioannis Gloumis, 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 12/31/2024  
Declared closed by the arbitrator on 12/31/2024

James Errera, Esq. from Shapiro & Associates, P.C. participated virtually for the Applicant

L. Hirt, Esq. from Law Offices of Eric Fendt participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$4,554.21**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount of \$4,554.21 was amended by stipulation between the parties during the arbitration hearing to \$4,164.08, which represents the following: \$2,635.36 for Pennsaid 2% solution and \$1,528.72 for Lidocaine 5% topical ointment. Applicant withdrew the claim for the Cyclobenzaprine 10mg medication with prejudice.

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

Applicant stipulated that Respondent timely denied the claim in dispute based upon the defense of lack of medical necessity.

### 3. Summary of Issues in Dispute

Applicant seeks reimbursement of charges for prescription Pennsaid 2% solution and Lidocaine 5% topical ointment dispensed on August 30, 2023, following an August 12, 2023 motor vehicle accident. Respondent denied the claim in dispute based upon the defense of lack of medical necessity predicated upon the peer review report by Jay Weiss, M.D. dated November 15, 2023.

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

I have reviewed the submissions contained in the American Arbitration Association's Electronic Case Folder in MODRIA, said submissions constituting the record in this case. This award is based upon the arguments that were presented by the parties during the arbitration hearing and the documentary evidence that has been submitted by the parties. There were no witnesses that appeared and testified during the arbitration hearing.

The EIP, then a 55-year-old male restrained driver, was injured in a motor vehicle accident on August 12, 2023. Following the accident, the EIP sought private medication attention for injuries to the neck, lower back, and right knee. The EIP came under the care of John McGee, D.O. Based upon prescriptions from Dr. McGee dated August 16, 2023, Applicant dispensed Pennsaid 2% solution and Lidocaine 5% topical ointment on August 30, 2023.

Applicant billed Respondent for the prescription medications that were dispensed on August 30, 2023. Respondent's evidence demonstrates that Respondent received the bill for the claim in dispute on October 19, 2023. Thus, Applicant has established its prima facie case. See *Amaze Med. Supply Inc. v. Allstate Ins. Co.*, 3 Misc 3d 133(A) (App Term, 2d & 11th Jud Dists 2004); *King's Med. Supply Inc. v. Country-Wide Ins. Co.*, 5 Misc 3d 767 (Civ Ct, NY County 2004); *Ultra Diagnostics Imaging v. Liberty Mutual Ins. Co.*, 9 Misc.3d 97 (App. Term 9th & 10th Dists. 2005).

Moreover, Respondent timely denied the claim on November 16, 2023 based upon the defense of lack of medical necessity predicated upon the peer review report by Jay Weiss, M.D. dated November 15, 2023.

Dr. Weiss opined that the Cyclobenzaprine tablets, an oral muscle relaxant, were appropriate given the muscular complaints; however, he opined that the Pennsaid 2% solution and the Lidocaine 5% topical ointment were not medically necessary. Dr. Weiss

stated that the Pennsaid 2% solution is indicated for osteoarthritis of the knee, something that was not noted to be present in this case, and something that would not be accident-related when seen only two days after the motor vehicle accident. Regarding the Lidocaine 5% topical ointment, Dr. Weiss stated that there was no evidence of a hyperesthetic or hyperpathic condition as would be seen in disorders such as or similar to postherpetic neuralgia that would necessitate topical lidocaine in any form. Dr. Weiss further opined that the use of Lidoderm or topical lidocaine for musculoskeletal pain is an off label use and no rationale for the prescription was given in this case.

Applicant provided a rebuttal from Kenneth Shapiro, M.D. dated November 8, 2024. Dr. Shapiro stated that Lidocaine is essential for effective pain management due to its rapid onset, superior safety profile, and versatile therapeutic uses, including local and topical anesthesia; its widespread application and proven efficacy in routine medical care make it medically necessary; the topical medication was prescribed for the relief of pain in these specific areas; such topical medication was prescribed to avoid systemic exposure, avoid sedation, avoid high serum levels of the drug, and reduce the risk of side effects and drug interactions compared to oral ingestion; the patient could not tolerate an increased dose of or addition of oral medication; and the topical medication that was prescribed would work well with other therapies.

Regarding the Pennsaid 2% solution, Dr. Shapiro cited an article and stated that the article explains that topical diclofenac is designed to minimize systemic absorption and toxicity while providing effective local anti-inflammatory and analgesic benefits, and it highlights Diclofenac's superior efficacy in treating musculoskeletal disorders compared to placebo and other vehicles; it reduces pain and swelling and helps improve the ability to move and flex the joint; Diclofenac is known as a nonsteroidal anti-inflammatory drug (NSAID) with multiple benefits; and the topical pain medication was prescribed to manage pain while minimizing gastrointestinal issues, reducing narcotic use, and avoiding systemic effects and drug interactions, with no required wait time before starting treatment.

"At a no-fault trial involving a defense of lack of medical necessity, an insurer has an initial burden to rebut the presumption of medical necessity which attaches to a claim form." *Parkway Hospital, Inc. v. Integon National Ins. Co.*, 64 Misc.3d 139(A) (App. Term 2d, 11th & 13th Dists. July 19, 2019). See also *Dayan v. Allstate Ins. Co.*, 49 Misc 3d 151[A] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]).

Furthermore, the Court in *King's Med. Supply Inc. v. Country-Wide Ins. Co.*, 5 Misc 3d 767, 772 held the following, in relevant part:

"...a denial premised on lack of medical necessity must be supported by evidence such as an independent medical examination, peer review, or examination under oath "setting forth a sufficiently detailed factual basis and medical rationale for the claim's rejection" (*Amaze Med. Supply v Eagle Ins. Co.*, 2 Misc 3d 128[A], 2003 NY Slip Op 51701, \*1 [App Term, 2d Dept 2003]; see also *Rockaway Blvd. Med. P.C. v Travelers Prop. Cas. Corp.*, 2003 NY Slip Op 50842[U] [App Term, 2d & 11th Dists 2003]; see also 11 NYCRR 65-3.8 [b] [4]; *Choicenet Chiropractic P.C. v Travelers Prop. Cas. Corp.*, 2003 NY Slip Op 50697[U] [App Term, 2d & 11th Jud Dists 2003]; *Rockaway Blvd. Med. P.C. v Allstate Ins. Co.*, 2003 NY Slip Op 50681[U] [App Term, 2d & 11th Jud Dists 2003])..."

Where the insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the applicant provider which must then present its own evidence of medical necessity. See *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc 3d 131(A) (2006).

Following a complete review of the evidence presented, I find that Applicant's claim for the Pennsaid 2% topical solution should be granted. However, I am not persuaded that the Lidocaine 5% topical ointment was medically necessary on August 30, 2023. The diagnoses on August 14, 2023 consisted of cervical sprain/strain, cervical radiculopathy, cervical disc displacement, thoracic sprain/strain, lumbar sprain/strain, lumbar radiculopathy, lumbar disc displacement, and right knee internal derangement. The EIP was prescribed Pennsaid 2% solution, Cyclobenzaprine tablets, and Lidocaine 5% topical ointment, DMEs, physical therapy, chiropractic treatment, EMG/NCV, MRIs, and follow-up evaluations. Dr. Weiss opined that the Cyclobenzaprine, an oral muscle relaxant, was medically necessary given the EIP's muscular symptoms. I am persuaded that the topical NSAID was also medically necessary in conjunction with the oral muscle relaxant for inflammation and the relief of pain in the spine and the right knee. However, I am not persuaded that the Lidocaine 5% topical ointment, a topical anesthetic, was medically necessary in conjunction with the prescribed topical NSAID, oral muscle relaxant, and physical therapy on August 30, 2023. I remain persuaded by Dr. Weiss that the Lidocaine 5% topical ointment was not medically necessary.

Accordingly, Applicant's claim for the Pennsaid 2% topical solution is hereby granted in its entirety. Applicant's claim for the Lidocaine 5% topical ointment is hereby denied in its entirety.

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
	K Drug Depot Inc	08/30/23 - 08/30/23	\$4,554.21	\$4,164.08	Awarded: \$2,635.36
Total			\$4,554.21		Awarded: \$2,635.36

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/07/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay Applicant the amount of interest computed from the date of filing, 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)* (stay of interest).

C. Attorney's Fees

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

Respondent shall pay Applicant an attorney's fee in accordance with *11 NYCRR 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 Nassau

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

01/06/2025

(Dated)

Ioannis Gloumis

### **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:**  
7ec52508cbc63dff2b5aad141518298c

### **Electronically Signed**

Your name: Ioannis Gloumis  
Signed on: 01/06/2025