

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

AV Chemist LLC  
(Applicant)

- and -

Allstate Insurance Company  
(Respondent)

AAA Case No. 17-23-1309-3226

Applicant's File No. RB-59-359775

Insurer's Claim File No. 0698587797

NAIC No. 19240

**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 12/16/2024  
Declared closed by the arbitrator on 12/16/2024

Elyse Ulino, Esq. from Baker & Narkolayeva Law P.C. participated virtually for the Applicant

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

2. The amount claimed in the Arbitration Request, **\$5,990.02**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount claimed was amended by the applicant to \$5,605.26 to conform to the appropriate fee schedule.

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 a motor vehicle accident on January 6, 2023; claimed related injury and received Lidocaine ointment, and Naproxen prescription medication provided by the applicant on March 24, 2023 and April 18, 2023.

The applicant submitted a claim for this prescription topical and oral medication, payment of which was denied by the respondent based upon a peer review by Isandr Dumesh, M.D. dated May 24, 2023. In response, the applicant submitted a rebuttal dated September 24, 2024 by Regina Moshe, M.D. who was not one of the EIP's treating medical providers.

**The issue to be determined at the hearing is whether the respondent established that the oral and topical prescription medication at issue was not medically necessary.**

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

This hearing was held on Zoom and the 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.

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.)

To support its contention that the Lidocaine ointment and Naproxen oral prescription medication provided by the applicant was not medically necessary, respondent relies upon the report of the peer review by Dr. Dumesh who reviewed the medical records of the EIP and noted the injuries claimed and the treatment rendered to him. Dr. Dumesh 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. Dumesh discussed the standard of care for the musculoskeletal injuries sustained by the EIP and determined that they did not meet these criteria. Although he found that Cyclobenzaprine was medically necessary, he determined that Naproxen was not recommended in this particular case.

It was his opinion that Lidocaine ointment is not among the first line of therapy medications for the treatment of the injuries sustained by the EIP and noted the adverse side effects associated with this topical medication.

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

Respondent has met its evidentiary burden. The peer review adequately sets forth the factual basis and medical rationale to support the conclusion that the prescription medication at issue was not indicated for this particular EIP. Therefore, pursuant to Bronx Expert Radiology, *supra* the burden shifts to the applicant, who bears the ultimate burden of persuasion to establish that the prescription medication at issue were medically necessary.

In opposition to the peer review, the applicant presented a rebuttal by Dr. Moshe, who reviewed the EIP's medical records and disagreed with the conclusions reached by Dr. Dumesh. She discussed in detail the injuries sustained by the EIP and the treatment rendered to him and the general uses and benefits of the topical and oral medications at issue here.

Dr. Moshe also referred to each of the arguments made by Dr. Dumesh and noted various studies which contradicted the conclusions he documented in the peer review regarding Naproxen. She noted that there are no specific guidelines regarding treatment to be universally prescribed for all patients and that great deference should be given to the treating provider.

As to Naproxen, Dr. Moshe stated that co-administration of Naproxen with Cyclobenzaprine is generally regarded as safe and is often recommended by doctors to protect the stomach. She did not indicate what conditions related to this particular EIP were present to necessitate this medication being prescribed for him.

Regarding Lidocaine ointment Dr. Moshe again reviewed the general benefits and uses of topical prescription medication and determined based on this EIP having pain at multiple body parts, that topical medication plays an important role in provided pain relief at a targeted body part.

Dr. Mosch supported, with relevant medical citations, her opinion that the topical and oral prescription medication at issue was medically necessary. However, she did not provide sufficient reference to the need for these medications by this particular EIP.

Based on the foregoing, the applicant did not submit a rebuttal which meaningfully rebuts the findings of Dr. Dumesh and the medical reports submitted do not contradict the assertions made by him.

Therefore, I find that the respondent established that the prescription medication at issue was not medically necessary.

**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.

01/12/2025  
(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:**  
dbc9d597ee96a55825d8d55b574ddbea

### Electronically Signed

Your name: Anne Malone  
Signed on: 01/12/2025