

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

R Family Pharmacy Inc.  
(Applicant)

- and -

Travelers Personal Insurance Company  
(Respondent)

AAA Case No. 17-23-1306-2719

Applicant's File No. DK23-347007

Insurer's Claim File No. 272 PP IPG8399  
P

NAIC No. 38130

### 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 12/23/2024  
Declared closed by the arbitrator on 01/05/2025

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

Tamara Lefranc, Esq. from Law Offices of Tina Newsome-Lee participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,364.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount claimed was amended by the applicant to \$1,892.14 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 37 year old EIP, reported involvement a motor vehicle accident on January 10, 2023; claimed related injury and received Diclofenac gel prescription medication provided by the applicant on February 7, 2023.

The applicant submitted a claim for this prescription medication, for which the respondent claims that partial payment was made pursuant to its calculation of the correct reimbursable amount pursuant to the appropriate fee schedule.

This claim was also denied by the respondent based upon a peer review by Isandr Dumesh, M.D. dated March 27, 2023.

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

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

**Whether the respondent established that the 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.

##### Fee Schedule

Based on the submissions, the applicant submitted an NF-3 for date of service 02/07/2023 in the amount of \$2,364.00 for Diclofenac gel and dispensing services, receipt for this medication, delivery slip and a copy of the prescription.

The respondent submitted copies of a bill in the same amount for the same topical medication provided on March 7, 2023, with the same supporting documentation and a copy of the prescription all of which were for the March 7, 2023 date of service.

Included in the respondent's original submissions was an NF-10 dated 04/21/2023 for prescription medication provided and payment details for March 7, 2023 date of service. The amount of the payment was \$1,897.14.

Since there was confusion at the hearing regarding whether the respondent made partial payment of the bill for prescription provided on February 7, 2023, I requested a post-hearing brief so that the respondent could provide a copy of the check, NF-10 and EOB for prescription medication provided on February 7, 2023.

The response included the NF-10 for date of service 02/07/2023 with supporting documentation, AOB, peer review by Dr. Dumesh dated March 27, 2023 and a

denial based solely on lack of medical necessity supported by the peer. There were no medical records submitted by either party.

### Medical Necessity

The issue of medical necessity was not discussed at the hearing since the parties relied solely on the issue of partial payment of the bill for dates of service February 7, 2023.

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 Diclofenac gel topical 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, 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 acute musculoskeletal injuries sustained by the EIP which included physical therapy treatment for three to four months with oral pain medication. Any additional medication would be necessary if the EIP was unable to tolerate standard medication protocol.

Dr. Dumesh discussed in detail the uses, benefits and risks of Diclofenac gel. It was his opinion that in this instance, since the EIP was undergoing physical therapy treatment and there was no evidence that he failed treatment with oral NSAIDs or Acetaminophen he did not require alternative therapy with a topical medication.

Dr. Dumesh supported, with relevant medical literature, his opinion that the Diclofenac gel at issue was not medically necessary.

Although 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 there are several reasons that it was insufficient to meet the respondent's burden to establish a lack of medical necessity.

First, there were no medical records submitted to support the peer review and second the peer review and denial upon which it was based were not received until after the hearing when the post-hearing brief was submitted.

Based on the foregoing, I find that the respondent has failed to establish partial payment of the claim at issue or that the prescription medication at issue was not medically necessary.

**Accordingly, the applicant is awarded \$1,892.14 in disposition of this claim.**

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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Amount Amended	Status
	<b>R Family Pharmacy Inc.</b>	<b>02/07/23 - 02/07/23</b>	<b>\$2,364.00</b>	<b>\$1,892.14</b>	<b>Awarded: \$1,892.14</b>
<b>Total</b>			<b>\$2,364.00</b>		<b>Awarded: \$1,892.14</b>

B. The insurer shall also compute and pay the applicant interest set forth below. 07/05/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a *pro rata* basis using a 30 day month." See 11 NYCRR §64-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when 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 Insurance Department regulations. Where a claim is untimely denied, or not denied or paid, interest shall accrue as of the 30<sup>th</sup> day following the date the claim is presented by the claimant to the insurer for payment. Where a claim is timely denied, interest shall accrue as of the date an action is commenced or an arbitration requested, unless an action is commenced or an arbitration requested within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant. See, 11 NYCRR §65-3.9(c.) The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial was timely. LMK Psychological Servs. P.C. v. State Farm Mut. Auto. Ins. Co., 12 NY3d 217 (2009.)

C. Attorney's Fees

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

Applicant is awarded statutory attorney's fees pursuant to the no fault regulations. For cases filed after February 4, 2015 the attorney's fee shall be calculated as follows: 20% of the amount of first-party benefits awarded, plus interest thereon subject to no minimum fee and a maximum of \$1,360.00. See 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 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.

01/15/2025  
(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:**  
076c0c486e120e966f402fdda4c043dc

**Electronically Signed**

Your name: Anne Malone  
Signed on: 01/15/2025