

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

K Drug Depot Inc
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-23-1325-0610

Applicant's File No. M23-733724

Insurer's Claim File No. 0715172540
2AG

NAIC No. 29688

ARBITRATION AWARD

I, Corinne Pascariu, 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: Assignor

1. Hearing(s) held on 02/06/2025
Declared closed by the arbitrator on 02/06/2025

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

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

2. The amount claimed in the Arbitration Request, **\$4,537.86**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended the amount in dispute to \$3682.82 to comply with the fee schedule.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

Background

Assignor is a male who was 32-years-old when he was injured as a passenger in a motor vehicle involved in an accident on May 19, 2023. On August 10, 2023, he presented to John McGee, D.O. with complaints of pain. That day he prescribed lidocaine ointment

5% and Diclofenac Sodium solution which Applicant dispensed on August 16, 2023. Respondent denied reimbursement of the medications based upon a peer review report by Ajendra Sohal, M.D. dated October 13, 2023, wherein he opined that the medication was not medically necessary. Applicant seeks \$3682.82 in reimbursement for the medication provided.

Issue

Whether Respondent can establish that the medications provided were not medically necessary.

4. Findings, Conclusions, and Basis Therefor

This decision is based upon the oral arguments of counsel at the hearing and the documents submitted. I have reviewed the documents contained in the ADR Center maintained by the American Arbitration Association as of the date of this award and considered the oral arguments of the parties' representatives. There were no witnesses.

To receive payment of a claim, Applicant "need only file a 'proof of claim' (11 NYCRR 65.11(k)(3)), and the insurers are obliged to honor it promptly or suffer the statutory penalties." Dermatossian v. New York City Transit Authority, 67 N.Y.2d 219, 224, 501 N.Y.S.2d 784, 787 (1986). Furthermore, the No-Fault law requires a carrier to either pay or deny a claim for No-Fault benefits within thirty (30) days from the date an applicant supplies proof of claim. See, Insurance Law §5106 (a) and 11 NYCRR 65-3.8. I find that Applicant established a prima facie case of entitlement to reimbursement of its claim, by submitting evidence that the prescribed statutory billing form was mailed, and that the Respondent failed to either pay or deny the claim within the requisite 30-day period. Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). Once Applicant establishes its prima facie case, the burden of proof shifts to the insurer. Amaze Medical Supply, Inc. v. Eagle Insurance Company, 2 Misc.3d 128(A), 2003 N.Y. Slip Op. 51701(U) (App Term 2nd and 11th Jud. Dists. 2003).

Applicant established a prima facie case. Respondent timely denied the claim.

Medical Necessity:

On August 10, 2023, he presented to John McGee, D.O. with complaints of pain. That day he prescribed lidocaine ointment 5% and Diclofenac Sodium solution which Applicant dispensed on August 16, 2023. Respondent denied reimbursement of the medications based upon a peer review report by Ajendra Sohal, M.D. dated October 13, 2023, wherein he opined that the medication was not medically necessary. Applicant seeks \$3682.82 in reimbursement for the medication provided.

To meet its burden, at a minimum, the No-Fault insurer must establish a factual basis and medical rationale for its asserted lack of medical necessity of the health care provider's services. A.M. Medical Services, P.C. v. Deerbrook Ins. Co., 18 Misc.3d 1139(A), 859 N.Y.S.2d 892 (Table), 2008 N.Y. Slip Op. 50368(U), 2008 WL 518022 (Civ. Ct. Kings Co., Sylvia G. Ash, J., Feb. 25, 2008).

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S.2d 680 (2d Dept. 2009), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp., 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

The appellate courts have not clearly defined what satisfies the insurer's evidentiary standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 41 Misc.3d 133(A), 981 N.Y.S.2d 633 (Table), 2013 NY Slip Op 51800(U), 2013 WL 5861523 (App. Term 1st Dept. Oct. 30, 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review 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 medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See generally Nir v. Allstate Ins. Co., 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); see also All Boro Psychological Servs. P.C. v. GEICO, 34 Misc.3d 1219(A), 950 N.Y.S.2d 490 (Table), 2012 NY Slip Op 50137(U), 2012 WL 309328 (Civ. Ct. Kings Co., Reginald A. Boddie, J., Jan. 31, 2012).

"Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006). Assuming the insurer establishes a lack of medical necessity, it is ultimately the claimant who must prove, by a preponderance of the evidence, that the services or supplies were medically necessary. Dayan v. Allstate Ins. Co., 49 Misc.3d 151(A), 29 N.Y.S.3d 846 (Table), 2015 N.Y. Slip

Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015); Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co., 37 Misc.3d 19, 22 n., 952 N.Y.S.2d 372, 374 n. (App. Term 2d, 11th & 13th Dists. 2012).

Peer Review by Dr. Ajendra Sohal

Dr. Sohal reviewed the relevant records, provided an overview of the examination findings which led to the prescription at issue and rendered an opinion as to the lack of medical necessity for the medications at hand.

He stated that subsequent to an acute trauma, the use of generic and oral formulation of medications are considered reasonable and appropriate. If there is any contradiction to the oral medication only then topical formulations are to be considered.

Dr. Sohal explained that Pennsaid is a topical diclofenac. It is generally approved for knee osteoarthritis, but there is no causally related knee pathology for this particular claimant. It is not evaluated for use on spine, hip, or shoulder.

With respect to Lidocaine 5% ointment, he wrote "that compound creams and topical ointment are not necessary. It does not penetrate into deeper structures and for systemic blood levels. It is not going to be efficacious for joints and large muscle groups. It is not useful for nociceptive pain. There is no area of small neuropathic pain. It is also used for various mucosal surface such as urethra and vagina or oral cavity. There is no such indication. Use of lidocaine ointment and most of the compound cream was not needed. Compound formulations have questionable utility and even FDA has raised issue regarding the utility of the topical compound formulation and their quality."

I find that Respondent's peer review report fails to establish that the medications lacked medical necessity. Dr. Sohal's assertion that assignor did not require Pennsaid because he did not have related knee pathology is contradicted by the medical record which indicates that assignor did in fact have knee symptomology caused by the accident. Further, the article upon which Dr. Sohal relies contradicts his assertion that the medication is for knees, stating, "Topical analgesics containing menthol, methylsalicylate, or capsaicin ***are available OTC for treatment of mild muscle and joint pain***; while generally well-tolerated, there have been rare reports of severe skin burns requiring treatment or hospitalization." As for the Lidocaine, Dr. Sohal focuses on compound creams, which lidocaine is not.

Moreover, Dr. Sohal neither established the standard of care for prescribing the medications at issue nor did he establish that providing such medications is a deviation from such standard. In Nir v. Allstate Insurance Co., 2005 NY Slip Op 25090; 7 Misc. 3d 544; 796 N.Y.S.2d 857; 2005 N.Y. Misc. LEXIS 419 (Civ. Ct. Kings Cty. 2005) the court held that a peer reviewer's medical rationale is insufficient if it is unsupported by or lacks evidence of medical standards in the community, enabling the peer reviewer to arrive at the conclusions rendered. In short, his report did not persuasively demonstrate that the providing the medications was a deviation from accepted medical practice, and

therefore, did not sustain the Respondent's burden of demonstrating that it was not medically necessary. As such, I find that Respondent fails to establish that the topical medication was not medically necessary. The burden does not shift to Applicant. If it had, the rebuttal report of Dr. McGee is more persuasive. It addresses Dr. Sohal's arguments, explains the benefits of the medications and credibly establishes that they were medically necessary for assignor.

In short, I find that Respondent fails to establish of a prima facie case of lack medical necessity for the Lidocaine and Pennsaid. Accordingly, I award reimbursement for this claim.

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 | 08/16/23 - 08/16/23 | \$4,537.86 | \$3,682.82 | Awarded: \$3,682.82 |
| Total | | | \$4,537.86 | | Awarded: \$3,682.82 |

- B. The insurer shall also compute and pay the applicant interest set forth below. 11/14/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall be calculated from the date listed above, until the date that payment is made at two percent per month, simple interest on a pro rata basis using a thirty-day month.

C. Attorney's Fees

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

Attorney's Fees shall be calculated pursuant to the amended terms, as follows: 20 percent of the amount of first-party benefits, plus interest thereon, subject to a maximum fee of \$1,360. [11 NYCRR §65-4.6(d)]. There is no minimum fee.

- 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 NJ

SS :

County of Bergen

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

02/10/2025

(Dated)

Corinne Pascariu

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:
bbcb0fbcace743b0d57eeb97733b697b

Electronically Signed

Your name: Corinne Pascariu
Signed on: 02/10/2025