

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bay Ridge Rx Inc  
(Applicant)

- and -

Progressive Casualty Insurance Company  
(Respondent)

AAA Case No. 17-24-1364-2928

Applicant's File No. 189928

Insurer's Claim File No. 24-8683563

NAIC No. 24260

**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 04/25/2025  
Declared closed by the arbitrator on 04/25/2025

Aleksey Selipanov, Esq. from The Law Offices of John Gallagher, PLLC participated virtually for the Applicant

Alice Downing from Progressive Casualty Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$4,412.90**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount claimed was amended by the applicant to \$3,548.53 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 April 1, 2024; claimed related injury and received Diclofenac gel, Lidocaine ointment and Baclofen prescription medication provided by the applicant on July 3, 2024.

The applicant submitted a claim for this topical and oral prescription medication, payment of which was denied by the respondent based upon a peer review by Stuart Springer, M.D. dated August 21, 2024.

**The issue to be determined at the hearing is whether the respondent established that the topical and oral 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 Diclofenac gel and Lidocaine ointment prescription medication provided by the applicant was not medically necessary, respondent relies upon the report of the peer review by Dr. Springer, who reviewed the medical records of the EIP and noted the injuries claimed and the treatment rendered to him. Dr. Springer 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. Springer discussed the standard of care for the injuries sustained by the EIP and determined that it consists of a reasonable trial of conservative treatment including evaluation by a physician, a course of anti-inflammatory medications and physiotherapy for 4 to 6 weeks. He noted that Diclofenac gel and Lidocaine ointment were first prescribed on April 24, 2024, 14 days post-accident and again on May 22, 2024.

According to the submissions, the EIP received only 9 sessions of physical therapy for the injuries he sustained in the subject accident. In addition, there was no indication that the previously prescribed topical medication was helpful and therefore the need for repeated prescriptions of Diclofenac gel and Lidocaine ointment was not necessary when prescribed on July 3, 2024 and that no further prescriptions of these medications were medically necessary.

Dr. Springer supported, with relevant medical literature, his opinion that the Diclofenac gel and Lidocaine ointment at issue were not medically necessary for this particular EIP at the time they were provided.

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.

The applicant did not submit a formal rebuttal. However, the applicant relies upon the submissions, including the evaluation of the EIP by Sonia Sikand, PA-C on June 26, 2024 at which time refill of the prescriptions for Lidocaine ointment, Diclofenac gel and Baclofen were ordered.

In this case, the submitted medical records do not meaningfully address the arguments that are raised in the peer review and do not establish that the prescription medication at issue was medically necessary.

Furthermore, the applicant did not provide a rebuttal to the peer review and therefore it did not respond to the respondent's argument that the topical prescription medication provided to the EIP was a deviation from a reasonable medical standard of care. The medical records alone are not sufficient to rebut the conclusions of Dr. Springer.

The peer review did not mention the lack of medical necessity for the Baclofen tablets oral prescription medication.

Based on the foregoing, I find that the respondent established that the topical prescription medication at issue was not medically necessary. However, it did not establish that the oral prescription medication was not medically necessary.

**Therefore, the applicant is awarded \$127.67 for the oral medication at issue pursuant to the applicable fee schedule.**

**Accordingly, the applicant is awarded \$127.67 for the oral medication at issue and the remainder of 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Amount Amended	Status
	Bay Ridge Rx Inc	07/03/24 - 07/03/24	\$2,358.00	\$1,892.14	Denied
	Bay Ridge Rx Inc	07/03/24 - 07/03/24	\$2,054.90	\$1,656.39	Awarded: \$127.67
Total			\$4,412.90		Awarded: \$127.67

- B. The insurer shall also compute and pay the applicant interest set forth below. 09/09/2024 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.

05/14/2025  
(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:**  
220cd3888ba154474e65930778f73f4c

### Electronically Signed

Your name: Anne Malone  
Signed on: 05/14/2025