

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Argyle Pharmacy Inc  
(Applicant)

- and -

MVAIC  
(Respondent)

AAA Case No. 17-25-1414-4846

Applicant's File No. MB-97982

Insurer's Claim File No. 736031

NAIC No. Self-Insured

### 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 05/27/2026  
Declared closed by the arbitrator on 05/27/2026

Mark Bratkovsky, Esq. from Law Offices of Mark Bratkovsky, P.C. participated virtually for the Applicant

Frank D'Esposito, Esq. from Marshall & Marshall, Esqs. participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$7,609.96**, was NOT AMENDED at the oral hearing.  
Stipulations WERE NOT made by the parties regarding the issues to be determined.
3. Summary of Issues in Dispute

The 40 year old EIP reported involvement in a motor vehicle accident on October 29, 2024; claimed related injury and received Tizanidine, Naproxen, Ibuprofen, Lidothal film and Diclofenac gel provided by the applicant on December 3, 2024, December 27, 2024, January 23, 2025 and February 19, 2025.

The applicant submitted a claim for this topical and/or oral prescription medication. Payment of the charges for December 3, 2024 - \$1,498.95, 12/27/24 - \$1,455.00 and January 23, 2025 - \$3,163/23 was timely denied by the respondent based upon a peer review by Jeffry Beer, M.D. dated April 15, 2025.

In response, the applicant submitted a rebuttal dated October 21, 2025 by Vladimir Gressel, M.D. who was not one of the EIP's treating medical providers and Dr. submitted an addendum dated

The respondent made partial payment of \$42.53 for prescription medication provided on February 19, 2025 - \$1,535.31, leaving a balance of \$1,492.78 based on the peer review by Howard Kiernan, M.D. dated April 25, 2025.

The respondent asserted a fee schedule defense for all dates of service.

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

**Whether the respondent established that the prescription medication provided by the applicant on December 3, 2024, December 27, 2024, January 23, 2025 and February 19, 2025 was not medically necessary.**

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

#### 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.

##### Medical Necessity

The respondent denied payment for the aforementioned oral and topical prescription medication provided on December 3, 2024, December 27, 2024, January 23, 2025 based on the peer review by Dr. Beer dated April 15, 2025.

The respondent made partial payment for oral medication provided and February 19, 2025 for a lack of medical necessity with the exception of a partial payment for oral medication provided on February 19, 2025 based on the peer review by Dr. Kiernan dated April 25, 2025.

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.)

#### Peer Review - Dr. Beer

To support its contention that the prescription medication provided by the applicant on December 3, 2024, December 27, 2024, and January 23, 2025 was not medically necessary, respondent relies upon the peer review by Dr. Beer, who reviewed the medical records of the EIP, noted the injuries claimed and the treatment rendered to him. Dr. Beer considered possible arguments and justification for the need for the oral and topical prescription medication at issue and determined that it was not warranted under these circumstances.

Dr. Beer submitted a cogent and comprehensive report in which he discussed each type of prescription medication provided and his reasons for determining that each one was not medically necessary for this EIP. He specifically noted the standard of care for the treatment of the musculoskeletal injuries sustained by the EIP which included plain radiographs and/or conservative modalities and concluded that in this case the oral and topical medication provided to him deviated from the standard of care.

He supported, with relevant medical literature, his opinion that the topical and oral medication provided to the EIP on December 3, 2024, December 27, 2024, and January 23, 2025 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 topical and oral prescription medication was not indicated for this EIP at the time it was provided. 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 was medically necessary.

#### Peer Review - Dr. Kiernan

To support its contention that the prescription medication provided by the applicant on February 19, 2025 was not medically necessary, respondent relies upon the peer review by Dr. Kiernan, who also reviewed the medical records of

the EIP, noted the injuries claimed and the treatment rendered to him. Dr. Kiernan considered possible arguments and justification for the need for the oral and topical prescription medication at issue and determined that it was not warranted under these circumstances.

Dr. Kiernan submitted a report in which he discussed each type of prescription medication provided and his reasons for determining that each one was not medically necessary for this EIP.

He determined that in this particular case, there was no evidence that the claimant failed conservative treatment including physical therapy or chiropractic care and that he required alternative therapy with a topical medication.

It was his opinion that the medications at issue are primarily recommended for neuropathic pain when trials of anti-depressants and anticonvulsant medications have failed, which is not the case with this claimant. Thus, the Diclofenac Sodium 3% gel; and Lidocaine 5% film ER provided to the claimant on February 19, 2025 were not medically necessary.

He supported, with relevant medical literature, this conclusion that the topical and oral medication provided to the EIP on February 19, 2025 was not medically necessary.

Respondent has factually demonstrated that the topical and oral medication at issue was not medically necessary. Accordingly, the burden now shifts to the applicant, who bears the ultimate burden of persuasion, pursuant to Bronx Expert Radiology, P.C., supra.

In opposition to the peer reviews by Dr. Beer and Dr. Kiernan, the applicant presented rebuttals by Dr. Gressel, who disagreed with the conclusions reached by Drs. Beer and Kiernan and explained the rationale for his determination that each specific oral and topical medication provided to the EIP was medically necessary.

Dr. Gressel described in detail the injuries claimed by the EIP and the treatment rendered to him and cited relevant medical literature to support the general benefits for each of the topical and oral medications provided to him. Dr. Gressel also described the specific symptoms and complaints articulated by the EIP the specific reasons that each type of medication was medically necessary for him.

In opposition to the peer review report the applicant submitted a rebuttal which meaningfully refers to and rebuts the findings of Drs. Beer and Kiernan and the medical records submitted contradict the assertions made by them. Under these circumstances, the applicant has met the burden of persuasion in rebuttal.

After a review of all the evidence submitted an issue of fact remains as to whether the topical and oral prescription medication at issue was medically necessary. Conflicting opinions have been presented in the peer reviews by Dr.

Beer and Dr. Kiernan and the report of Dr. Gressel who submitted a rebuttal on behalf of the applicant.

In this instance, Dr. Gressel submitted a rebuttal which meaningfully refers to and rebuts the findings of Dr. Beer and Dr. Kiernan and the medical records submitted contradict their assertions.

Under these circumstances, I find that the submissions of Dr. Gressel were more persuasive in this instance.

Based on the foregoing, I find that the respondent has failed to establish that the oral and topical prescription medication at issue was not medically necessary.

**Therefore, an award will be issued in favor of the applicant pursuant to the appropriate fee schedule.**

#### Fee Schedule

The applicant billed a total of \$7,652.49 for the topical and oral medication provided to the EIP and acknowledged in the AR-1 that the respondent made partial payment of \$42.53 for medications provided on February 19, 2025.

The respondent denied additional payment based on a lack of medical necessity for the prescription medication at issue. I have already determined that the respondent did not establish this defense. The only remaining issue is the correct reimbursable amount pursuant to the applicable fee schedule.

In order to prevail in its fee schedule defense, the respondent must demonstrate by competent evidentiary proof that the applicant's claims are in excess of the appropriate fee schedule. If the respondent fails to do so, its defense of noncompliance with the New York Workers' Compensation Medical Fee Schedule cannot be sustained. See Continental Medical, P.C. v Travelers Indemnity Co., 11 Misc. 3d 145A (App. Term 1<sup>st</sup> Dept. 2006.)

The respondent asserted a fee schedule defense for the oral and topical prescription medication at issue and provided specific sections of the Redbook to support this defense and determined that the total reimbursable amount for the topical and oral medication at issue is \$4,207.91.

The applicant did not submit any documentation to refute the respondent's submissions.

**Accordingly, the applicant is awarded \$4,207.91 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	Status
	Argyle Pharmacy Inc	02/19/25 - 02/19/25	\$1,492.78	Awarded: \$340.87
	Argyle Pharmacy Inc	12/03/24 - 12/03/24	\$1,498.95	Awarded: \$1,112.47
	Argyle Pharmacy Inc	12/27/24 - 12/27/24	\$1,455.00	Awarded: \$1,077.31
	Argyle Pharmacy Inc	01/23/25 - 01/23/25	\$3,163.23	Awarded: \$1,677.26
	Argyle Pharmacy Inc	02/19/25 - 02/19/25	\$0.00	Denied
<b>Total</b>			<b>\$7,609.96</b>	<b>Awarded: \$4,207.91</b>

B. The insurer shall also compute and pay the applicant interest set forth below. 08/19/2025 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.

06/25/2026

(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:**  
279ef790849e034e462b1709be3d6c8f

**Electronically Signed**

Your name: Anne Malone  
Signed on: 06/25/2026