

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

3rd Avenue Chemists Inc  
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company  
(Respondent)

AAA Case No. 17-24-1361-3405

Applicant's File No. OS-75708

Insurer's Claim File No. 0719463051  
MAD

NAIC No. 29688

### 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 06/08/2026  
Declared closed by the arbitrator on 06/08/2026

Rachel Stein, Esq. from Law office of Olga Sklyut, PC participated virtually for the Applicant

Kevin Lynch, Esq. from Law Offices Of Richard Schoenberg participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,989.89**, 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 28 year old EIP reported involvement a motor vehicle accident on July 21, 2023; claimed related injury and received Lidocaine ointment, Cyclobenzaprine and Celecoxib prescription medication provided by the applicant on July 17, 2023.

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 Isandr Dumesh, M.D. dated January 5, 2024. In response, the applicant submitted a rebuttal dated March 12, 2024 by David Carmili, M.D. one of the EIP's treating medical providers.

The respondent also asserted a fee schedule defense.

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

**Whether the respondent established that the oral and topical prescription medication at issue 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.

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/Lidocaine ointment 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 her. 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 each of the medication provided and determined that the Cyclobenzaprine and Celecoxib were medically necessary for this EIP at the time they were provided.

He discussed the standard of care for the injuries sustained by the EIP and determined the Lidocaine ointment did not meet these criteria. It was his opinion that there was no evidence that the EIP was tried on and failed treatment with oral NSAIDs and/or Acetaminophen and/or muscle relaxants and required an alternative pain management using topical medication. Therefore, the Lidocaine ointment was not medically necessary.

Dr. Dumesh supported, with relevant medical literature, his opinion that Lidocaine ointment 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 Cyclobenzaprine and Celecoxib were medical necessary, but that the Lidocaine ointment topical medication 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. Carmili, who disagreed with the conclusions reached by Dr. Dumesh and discussed the general uses and benefits of Lidocaine ointment prescribed for the EIP.

He determined that it was evident from the medical records the topical medication was prescribed to quell the pain the EIP was experiencing by providing Lidocaine ointment to relieve her shooting pain, aching and other positive findings.

Dr. Carmili supported, with relevant medical citations, his opinion that the topical prescription medication at issue was medically necessary.

After a review of all the evidence submitted an issue of fact remains as to whether the prescription medication provided to the EIP was medically necessary. Conflicting opinions have been presented in the peer review by Dr. Dumesh and the report of Dr. Carmili, who submitted a rebuttal on behalf of the applicant.

In this instance, the rebuttal meaningfully refers to and rebuts the findings of Dr. Dumesh. In addition, the medical reports submitted are sufficient to establish the medical necessity for the prescription medication at issue.

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

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

#### Fee Schedule

To prevail in a fee schedule defense, the respondent must demonstrate by competent evidentiary proof that applicant's claims were in excess of the appropriate fee schedules, or otherwise respondent's defense of noncompliance with the appropriate fee schedule cannot be sustained. Continental Medical, P.C. v. Travelers Indemnity Co., 11 Misc.3d 145(A) (App. Term 1<sup>st</sup> Dept. 2006.)

An insurer fails to raise a triable issue of fact with respect to a defense that the fees charged were not in conformity with the Workers' Compensation fee schedule when it does not specify the actual reimbursement rates which formed the basis for its determination that the claimant billed in excess of the maximum amount permitted. See St. Vincent Medical Services, P.C. v. GEICO Ins. Co., 29 Misc.3d 141(A), 907 N.Y.S.2d 441 (App. Term 2d, Dec. 8, 2010.)

The respondent supported its fee schedule defense, with the copies of the relevant sections of the Redbook related to the specific oral and topical medications at issue and has already made payment for the oral prescription medication which is acknowledged in the AR-1.

The applicant did not submit any documentation to refute the fee schedule for the topical Lidocaine ointment determined by the Redbook.

**Accordingly, the applicant is awarded \$1,529.00 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
	3rd Avenue Chemists Inc	07/17/23 - 07/17/23	\$1,989.89	Awarded: \$1,529.00
<b>Total</b>			<b>\$1,989.89</b>	<b>Awarded: \$1,529.00</b>

B. The insurer shall also compute and pay the applicant interest set forth below. 08/16/2024 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.

07/07/2026

(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:**  
84191eedf91af4c886c2498230bb4c2d

**Electronically Signed**

Your name: Anne Malone  
Signed on: 07/07/2026