



FORTHRIGHT

In the Matter of the Arbitration between

Seaview Orthopaedics a/s/o M.B.
CLAIMANT(s),

v.

State Farm Indemnity Company
RESPONDENT(s).

Forthright File No: NJ1901001825861
Proceeding Type: On-the-Papers
Insurance Claim File No: 30-901M-832
Claimant Counsel: Midlige Richter
Claimant Attorney File No: 350.1614
Respondent Counsel: Chasan Lamparello
Mallon & Cappuzzo, PC
Respondent Attorney File No: 03731-9986
Accident Date: 06/16/2016

Award of Dispute Resolution Professional

Dispute Resolution Professional: Maria Annunziata Esq.

I, the Dispute Resolution Professional assigned to the above matter, pursuant to the authority granted under the "Automobile Insurance Cost Reduction Act", *N.J.S.A. 39:6A-5, et seq.*, the Administrative Code regulations, *N.J.A.C. 11:3-5 et seq.*, and the *Rules for the Arbitration of No-Fault Disputes in the State of New Jersey* of Forthright, having considered the evidence submitted by the parties, hereby render the following Award:

Hereinafter, the injured person(s) shall be referred to as: MB

Findings of Fact and Conclusions of Law

This matter arises out of treatment rendered to MB for injuries allegedly sustained in a June 16, 2016 automobile accident. Claimant, a medical provider, filed the subject Demand for Arbitration based on an Assignment of Benefits executed by MB. There has been no dispute presented regarding the validity of the Assignment or MB's eligibility to receive PIP benefits under Respondent's insurance policy.

Issue: Were the May 18, 2018 and June 1, 2018 office examinations clinically supported as reasonable, medically necessary and causally related to injuries MB sustained in the subject June 16, 2016 automobile accident?

Claimant forwarded the following documentation for my review and consideration:

- Demand and Attachments filed with Forthright on January 18, 2019
- Claimant's Initial Submission dated May 20, 2019
- Claimant's Final Submission dated June 19, 2019
- Certification of Services

Respondent forwarded the following documentation for my review and consideration:

- Respondent's Initial Submission dated April 29, 2019
- Respondent's Final Submission dated June 19, 2019

MB, a 64 year old female, was involved in an automobile accident on June 16, 2016. Following the accident, she presented to the Emergency Room of a local hospital. She represents that she was diagnosed with a concussion and neck and elbow injuries, but this DRP cannot confirm same since no records were provided.

On July 5, 2016, MB presented to Claimant Group for an initial evaluation by Vinay Chopra, M.D.. Her chief complaints consisted of headaches, dizziness, balance instability, difficulty concentrating, neck discomfort, and left elbow pain. Dr. Chopra examined MB and diagnosed her with concussion, cervicgia, left elbow pain and bilateral vestibular dysfunction. She was advised to undergo a left elbow x-ray as well as neuropsychological testing.

The Patient returned to Dr. Chopra on July 19, 2016. She underwent neuropsychological testing consisting of visual memory testing, visual motor testing, verbal memory testing and reaction time testing. There was also concentration testing, attention and calculation testing. Her scores were quite high, so she was encouraged to seek physical therapy and vestibular rehabilitation.

Dr. Chopra referred the Patient to H. Lambro Demetriades, M.D., also of Claimant Group, for her continued neck and right arm pain. MB's initial consultation was on July 25, 2016. He reviewed x-rays of her cervical spine. He diagnosed the Patient with displacement of intervertebral disc of the mid-cervical region, degenerative disc disease of C4-5, C5-6, C6-7 and cervicalgia. At her August 15, 2016 re-examination, MB advised Dr. Demetriades that her neck pain "is much better" as a result of the physical therapy.

On August 16, 2016, MB returned to Dr. Chopra. She advised that she was still suffering concussion symptoms, and other symptoms were still ongoing, but physical therapy had helped her significantly. Dr. Chopra performed more testing on the Patient. He noted continued improvement with the testing.

On August 2, 2017, MB underwent a cervical MRI. It revealed a broad herniation across the C4-5 disc and a small central disc herniation at C6-7 with some superior extrusion.

On February 23, 2018, MB returned to Claimant Group for an examination by C.J. Spagnuola, M.D.. She complained of left arm pain. She indicated that most of her treatment was for her cervical pain and concussion. Her pain management physician, Owen J. Carolan, M.D., believed that her pain could be actual true shoulder pathology and elbow pathology. Dr. Spagnuola prescribed left shoulder and left elbow MRI studies.

On May 1, 2018, the Patient underwent the prescribed MRIs. The left shoulder study revealed supraspinatus and infraspinatus tendinosis, subacromial subdeltoid bursitis, and suspected nondisplaced tear of the posterior superior labrum. The left elbow study revealed mild degenerative changes at the ulnohumeral joint.

The Patient returned to Dr. Spagnuola on May 18, 2018. He recommended continued follow up with her pain management physician. They discussed surgery for the left shoulder. She wished to avoid surgery and pursue cortisone injection therapy under ultrasound guidance.

On June 1, 2018, the Patient returned to Dr. Spagnuola. She mentioned pursuing arthroscopic surgery for the shoulder, but Dr. Spagnuola believed it was too premature. He first wanted to see if the injection would be helpful.

MB returned to Dr. Spagnuola on June 22, 2018 at which time he administered the cortisone injection or performed an arthrocentesis of the left shoulder.

The Demand was filed for the two dates of service, May 18, 2018 and June 1, 2018. Respondent has denied reimbursement for these charges based on two Independent Medical Examinations ("IMEs"). On September 5, 2017, the Patient was seen by orthopedist, Joseph C. Tauro, M.D.. He believes that the Patient suffered a cervical sprain and it was causally related to the subject accident. He placed the Patient at maximal medical improvement. Therefore, by correspondence dated September 20, 2017, Respondent advised MB and Professional Orthopedic Associates that no further orthopedic bills or expenses would be considered after September 30, 2017.

On February 5, 2018, MB presented for an IME with pain management specialist, Nathan Zemel, M.D.. He found a completely normal exam. He diagnosed the Patient with a *minimal* cervical strain/sprain, *minimal* lumbosacral sprain/strain (pre-existing but exacerbated), and left lumbosacral radiculitis. He found no need for further treatment. By correspondence dated March 7, 2018, Respondent advised MB and Spine and Pain Center that no further physical medicine and rehabilitation expenses after March 17, 2018 would be considered.

Medical Necessity: Where there is a dispute as to PIP benefits, the burden rests on the claimant to establish that the services for which he seeks PIP payments were reasonable, necessary and causally related to an automobile accident. *Miltner v. Safeco Ins. Co. of America*, 175 N.J. Super. 156 (Law Div. 1980). Claimant must prove that burden by a preponderance of the evidence. See *State v. Seven Thousand Dollars*, 136 N.J. 233 (1994). The necessity of medical treatment is a matter to be decided in the first instance by claimant through the claimant's treating physicians, and an objectively reasonable belief in the utility of a treatment or diagnostic method based on the credible and reliable evidence of its medical value is enough to qualify the expense for PIP reimbursement. See *Thermographic Diagnostics v. Allstate Ins. Co.*, 125 N.J. 491 (1991). I have carefully reviewed the proofs, and I must find that Claimant has sustained its burden for the outstanding dates of service.

There was continuous treatment for the Patient's shoulder and elbow pain. It may have been treated as cervical pain, but after some time, it was seen to be actual left shoulder and arm pain. The Patient was 65 years old. Her diagnostic studies are bound to reveal degenerative changes.

Dr. Spagnuola wrote a persuasive appeal request. He noted that the Patient was injured in a significant accident. She had significant tenderness over her medial epicondyle as well as a strain of her rotator cuff tendon. None of the therapy alleviated her spinal complaints. Due to her continued spine complaints, she altered the use of her left upper extremity and this accentuated her issues as well.

The treatment did not have gaps. In fact, some of Dr. Spagnuola's services were paid, and some were denied. All of it was from 2018, after the IMEs. The actual injection performed on June 22, 2018 is not part of this Demand. The denials are simply not very persuasive.

Therefore, Claimant is awarded a total of **\$240.70**, subject to application of any remaining co-pay and/or

deductible. This amount is also subject to the remaining policy limits available.

Claimant is awarded interest on this amount. Claimant shall rely on Respondent's calculation of same.

Attorney's Fees and Costs: I find Claimant to be the prevailing party, and, therefore entitled to an award of attorney's fees and costs. Counsel forwarded a Certification of Services requesting \$1,365.00 in fees and costs of \$203.90. Counsel billed 4.2 hours at a rate of \$325.00 per hour. Respondent argues that this is excessive.

Pursuant to N.J.A.C. 11:3-5.69(e): "Where attorney's fees for a successful claimant are requested, the DRP shall make the following analysis consistent with the jurisprudence of this State to determine reasonable attorney's fees, and shall address each item below in the award:

1. Calculate the "lodestar", which is the number of hours reasonably expended by the successful claimant's counsel in the arbitration multiplied by a reasonable hourly rate in accordance with the standard:

i. The lodestar calculation shall exclude hours not reasonably expended;

ii. If the DRP determines that the hours expended exceed those that competent counsel reasonably would have expended to achieve a comparable result, in the context of the damages prospectively recoverable, the interests vindicated, and the underlying statutory objectives, then the DRP shall reduce the hours expended in the "lodestar" calculation accordingly; and

iii. The lodestar total calculation may also be reduced if the claimant has only achieved partial or limited success and the DRP determines that the 'lodestar' total calculation is therefore an excessive amount. If the same evidence adduced to support a successful claim was offered on an unsuccessful claim, the DRP should consider whether it is nevertheless reasonable to award legal fees for the time expended on the unsuccessful claim.

2. DRPs, in cases when the amount actually recovered is less than the attorney's fee request, shall also analyze whether the attorney's fees are consonant with the amount of the award. This analysis will focus on whether the amount of the attorney's fee request is compatible and/or consistent with the amount of the arbitration award. Additionally, where a request for attorney's fees is grossly disproportionate to the amount of the award, the DRP's review must make a heightened review of the lodestar calculation described in (e)1 above."

In Enright v. Lubow, 215 N.J. Super. 306 (App. Div.), cert. denied 108 N.J. 193 (1987), the Court circumstances. As the Court pointed out in *Scullion v. State Farm*, 345 N.J. Super. 431 (App. Div. 2001), while the *Enright* factors are to be considered in making the threshold determination as to whether to award counsel fees, many of those factors are equally applicable in determining the amount of counsel fees to be awarded. The Court in *Scullion* clearly suggests that the proper determination of the amount of counsel fees to be awarded requires a line by line analysis of the various Certifications of

Services to determine whether hours expended by counsel are excessive for what appears to be routine efforts.

DRPs are to consider R.P.C. 1.5 when calculating an award of counsel fees. There are eight factors to be considered in assessing fees, and they include: (1) the time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional services; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

I have carefully reviewed this file, and I find that the number of hours billed and the billable rate are excessive. There were no MROs, Examinations under Oath or other statements requested. The briefs were sufficiently detailed. Counsel is awarded fees of \$625.00. Counsel is also awarded costs of \$200.00 which represents Forthright's filing fees. There was no support for the additional costs requested.

