In the Matter of the Arbitration between

Lakewood Surgery Center a/s/o D.P.
CLAIMANT(s),

v.

Forthright File No: NJ1902001830271
Proceeding Type: In-Person
Insurance Claim File No: 1957003-002
Claimant Counsel: Midlige Richter
Claimant Attorney File No: 260.0706
Respondent Counsel: The Law Office of Bobbi J. Vilacha
Respondent Attorney File No: 19-1117
Accident Date: 11/03/2015

New Jersey Skylands Insurance Company
RESPONDENT(s).

Award of Dispute Resolution Professional

Dispute Resolution Professional: Andrea L Lardiere 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: DP

In Person Proceeding Information

A proceeding was conducted on: 03/05/2020

Claimant or claimant's counsel appeared in person . Respondent or respondent's counsel appeared in person .

The following amendments and/or stipulations were made by the parties at the hearing:

None

Findings of Fact and Conclusions of Law

This arbitration demand was filed for unpaid facility fees for left shoulder arthroscopic surgery performed at Lakewood Surgery Center on October 24, 2018. The eligibility of DP to make claim for PIP Benefits pursuant to the terms and conditions of a policy of automobile insurance issued by the respondent has not been contested.

The issue presented by the parties is whether the surgery as discussed above was reasonable, medically necessary and causally related to the automobile accident?

This matter is consolidated with those filed by Shore Orthopedics (NJ 1816346) and Specialty Anesthesia Associates (NJ 1840896).

The following documentation was submitted by claimant for review and consideration: Demand for arbitration with attachments, pre-hearing submission with attachments dated December 12, 2019 and Certification of Services.

The following documentation was submitted by respondent for review and consideration: Pre-hearing submission with attachments dated September 6, 2019.

I have also considered the materials submitted in the consolidated cases and the oral arguments of counsel for Claimant and Respondent. At the conclusion of the hearing, the parties declined the opportunity to provide post-hearing arguments. The matter was closed without objection on March 5, 2020.

DP was involved in an automobile accident on November 3, 2015 and injured his neck, back, left shoulder, elbow, arm and left knee. He received a course of chiropractic treatment from Dr. Rizzo. Dr. Rizzo referred the patient to Shore Orthopedic Group on December 9, 2015 for a pain management consultation for persistent pain in his neck, left shoulder going down the arm and elbow, and left knee pain. He was referred to Dr. Markbreiter, an orthopedic surgeon at Claimant's facility, for an evaluation of his shoulder injury.

The patient was seen by Dr. Markbreiter on January 11, 2016 and reported neck pain, shoulder pain all down the left side, arm, elbow and left knee. On exam, there was severe impingement noted in the left shoulder with positive Hawkins sign. Dr. Markbreiter injected the left shoulder subacromial space with lidocaine and Depo-medrol.

The patient continued to have severe shoulder pain and underwent trigger point injections and

subacromial injection in the left shoulder on February 3, 2016.

He underwent another left shoulder injection on March 16, 2016.

The patient then turned his attention to treatment of his neck pain with injections and acupuncture.

On December 29, 2016, the patient consulted with Dr. Charles Rizzo for a shoulder surgery consult. He noted that the patient had received multiple injections and trigger point injections to his left shoulder and continued to be symptomatic. Physical exam showed a positive Neer and Hawkins sign, weakness in abduction and external rotation and a positive supraspinatus test. Dr. Rizzo opined that the patient symptoms were consistent with shoulder impingement. Dr. Rizzo recommended a shoulder MRI.

The MRI was denied by Respondent, as was the request for physical therapy to the shoulder.

The patient followed up on March 29, 2018 with Dr. Rizzo. Physical exam of the shoulder showed continued weakness in abduction and external rotation. He had a positive drop arm test. Dr. Rizzo stated that his symptoms were clearly consistent with a rotator cuff injury. MRI was necessary.

The patient followed up on May 17, 2018 and continued to complain of severe pain in his left shoulder. His MRI was denied again by Respondent. His physical exam was unchanged. He was encouraged to proceed with the MRI.

Finally, an MRI of the left shoulder was performed on June 19, 2018 and revealed a massive tear of the rotator cuff involving the full width of both the supraspinatus and subscapularis tendons with medial retraction of the conjoined tendon stump to the base of the coracoid process. This tear propagates posteriorly as a high end grade partial-thickness articular tear of the anterior and central fibers of the infraspinatus tendon with interstitial delamination to its myotendinous junction.

On August 30, 2018 the patient followed up with Dr. Rizzo and continued to have severe pain in his shoulder. Dr. Rizzo opined that surgery was medically necessary.

The left shoulder surgery was performed on October 24, 2018 at Lakewood Surgery Center.

The patient followed up on February 21, 2019 and reported that he had not been in PT because he had a severe case of the flu. Physical exam of the shoulder showed some improvement with ROM. Still some weakness. Dr. Rizzo recommended home based exercises.

Respondent denied the subject office visits and surgery based on an IME by Dr. Stephen Horowitz on April 3, 2017. Dr. Horowitz fully reviewed the patient's MVA history and also reviewed the full course of treatment, reviewed multiple records and/or relevant diagnostic records. On exam of the left shoulder, he had reduced range of motion. He had discomfort with any attempt to passively move his left shoulder. Impingement sign was equivocal. Dr. Horowitz noted that the patient had not had an MRI of the shoulder. He noted that the patient had no physical therapy for his left shoulder. PT would be standard treatment. It was unclear why the patient had not had any PT for his shoulder. Therefore Dr. Horowitz found the patient had not reached maximum medical improvement ("MMI") and instead authorized an additional two months of physical therapy for the left shoulder and if he did not improve, then an MRI could be considered.

Respondent states that after this IME, no PT or further treatment was pursued. No MRI was pursued. Instead the first treatment was an office visit on March 29, 2018, followed by additional office visits on May 17, 2018, August 30, 2018 and October 24, 2018, culminating with a left shoulder arthroscopy, without an MRI or further PT, held on October 24, 2018.

There is a second IME held by Dr. Horowitz more than a year later, on May 7, 2018. At this visit, the patient advised that his insurance company would not allow PT. He had no PT, no injections and no surgery. On exam, there was reduced range of motion in abduction and forward flexion. Dr. Horowitz diagnosed a shoulder contusion. He states that an MRI of the shoulder would not be supported prior to a course of conservative care. There was a gap in treatment from March 30, 2017 to March 29, 2018. Therefore, Dr. Horowitz stated that he was unable to draw a causal relationship between the need to obtain a left shoulder MRI and the accident of November 3, 2015. The patient had reached MMI. Based on this exam, the Respondent terminated orthopedic treatment as of May 10, 2018.

Claimant filed an appeal of this decision and Dr. Ponzio reviewed the appeal on behalf of Respondent. He upheld the IME stating:

> [DP] sought medical care with Dr. Rizzo on 12/29/16, approximately 13 months following the motor vehicle accident. Preceding this visit, the causality of the left shoulder impingement had not been established. Review of the medical records did not show appropriate conservative management for the left shoulder to support the medical necessity for an MRI. With regard to the cervical spine, [DP] had a complete course of conservative care. His examination revealed a normal neurologic examination without signs of radiculopathy or radiculitis. Further, [DP] had a cervical spine MRI that showed pre-existing degenerative changes. I agree with Dr. Horowitz's diagnoses of a cervical sprain and strain superimposed upon underlying degenerative changes. Additionally, the appeal letter did not offer additional medical documentation supporting the continuation of orthopedic care, relate a left shoulder injury to the MVA, or explain the approximate one-year gap in treatment. In this regard, Dr. Horowitz's determination is upheld.

Claimant responds that Respondent denied treatment prior to the IME, including PT and MRI of the left shoulder. Furthermore, in his appeal letter of October 9, 2018, Dr. Rizzo stated that the accident was the

direct cause of the rotator cuff tear. Moreover, Dr. Rizzo provided the MRI of the shoulder which showed the massive tear in the shoulder. The MRI of the left shoulder was repeatedly requested and denied. The patient suffered unnecessarily due to the authorization process. Further, Dr. Rizzo addressed the gap in treatment and stated that the patient had some serious health issues unrelated to his accident which had taken priority. All doctors documented the left shoulder injury related to the accident. He had a great deal of conservative treatment which did not alleviate his pain, but based on the MRI, conservative treatment was not the answer. He was clearly a surgical candidate to attempt to repair his torn rotator cuff.

In Bowe v. New Jersey Manufacturers Insurance Company, 367 N.J. Super 128 (App. Div. 2004), the Court held that a party seeking Personal Injury Protection Benefits must prove by a preponderance of the evidence that the pre-existing injury or condition was aggravated by the accident for which coverage is sought. The Court further held that once that causal link is established, the insurer is liable for treatment "even if that treatment addresses, in whole or in part, the pre-existing injury or condition." Bowe, at 139. Thus, where a PIP carrier asserts that the insured's condition is exclusively related to a pre-existing condition, the burden is then on the insured to prove that the treatment at issue was causally linked to an aggravation of that pre-existing condition or a new injury independent of the pre-existing injury or condition. In either case, the claimant must still demonstrate that the treatment resulted from the accident triggering coverage. To prove that aggravation of a pre-existing condition occurred, the insured must present objective medical evidence from which a medical professional can form an opinion that the trauma suffered in this accident caused the aggravation.

Where there is a dispute on the issue of medical necessity, the claimant bears the burden of proof to a preponderance of the evidence to establish that services for which PIP Payment is sought were reasonable, medically necessary and causally related to an automobile accident. Miltner v. Safeco Ins. Co. of Am., 175 N.J. Super. 156 (Law Div. 1980). The claimant has the burden of proof to a preponderance of the evidence. See, State v. Seven Thousand Dollars, 136 N.J. 233 (1994). "Medically Necessary" is defined in N.J.A.C. 11:3-4.2 as medical treatment or diagnostic testing which is consistent with the clinically supported symptoms, diagnosis or indications of the injured person. Further, the Administrative Code defines "clinically supported" as meaning that a health care provider prior to selecting, performing or ordering the administration of a treatment or diagnostic has "(1) personally examined the patient to insure that the proper medical indications exist to justify ordering the treatment or tests; (2) physically examine the patient including making an assessment of any current and/or historical subjective complaints, observations, objective findings, neurologic indications and physical tests; (3) considered any and all previously performed tests that relate to the injury…; (4) recorded and documented these observations…" .

The necessity of medical treatment is a matter to be decided in the first instance by 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 purposes. Thermographic Diagnostics v. Allstate, 125 N.J. 491 (1991).

To sustain the burden of proof to a preponderance of the evidence, the evidence supporting the claim must weigh heavier and be more persuasive than the contrary evidence. It makes no difference if the heavier weight is small in amount. As long as the evidence supporting the claim weighs heavier, then the burden of proof has been satisfied. However, if the evidence is equal in weight, or if the evidence weighs heavier against the party who has the burden, then the burden of proof has not been carried. When there is a difference in medical opinion, generally greater weight is to be given to the testimony of the treating physician. Mewes v. Union Bldg. & Constr. Co., 45 N.J. Super. 89 (App. Div. 1957); Bialko v. H. Baker Milk Co., 38 N.J. Super 169 (App. Div. 1955); Abelit v. Gen. Motors Corp., 46 N.J. Super.

475 (App. Div. 1957). While it is true that the opinion of a treating provider is not entitled to a conclusive presumption of accuracy, Black & Decker Disability Plan v. Nord, 123 S.Ct. 196 (2003) (relating to ERISA Plans), it is accorded an appropriate measure of deference.

Having reviewed the medical evidence and considered the arguments of counsel, I find that Claimant has established, to a preponderance of the evidence, that the subject office visits and left shoulder surgery were reasonable, necessary and causally related to the motor vehicle accident of November 3, 2015. There is no evidence that this patient had a history of left shoulder pain or injury prior to the subject accident. The records clearly document his complaints of left shoulder pain as early as December 9, 2015 when he first saw Dr. Woska for a pain management consultation. On examination on December 9, 2015, there was severe impingement of the left shoulder with positive Hawkins sign. The patient was recommended for an orthopedic evaluation with Dr. Markbreiter at that time. It is noted in the records that the MRI of the left shoulder was continually denied by Respondent. Therefore, this put the IME doctor, Dr. Horowitz in the position of denying shoulder surgery without the benefit of the IME which clearly showed a "massive tear" of the rotator cuff. Therefore, I am not persuaded by Dr. Horowitz's opinion in this regard. I am persuaded by the records of Dr. Rizzo who opined that arthroscopic surgery was medically necessary to repair this tear.

Accordingly, I will award $9,160.86, subject to patient co-pay and deductible.

Interest is also claimed and is awarded, subject to Respondent's calculation of same.

Counsel for the claimant has made claim for attorney's fees and costs, and in connection therewith has submitted a Certification of Services wherein is sought counsel fees in the amount of $2,600.00 together with costs of $228.90. Counsel for the respondent has objected to an award of counsel fees in that amount, arguing that the hourly rate and the total number of hours billed are excessive.

In N.J. Coal. for Healthcare v. DOBI, 323 N.J. Super 207 (App. Div. 1999) the Court noted that "an award of counsel fees to an insured who successfully obtains an Arbitration Award against an insurance carrier for payment of PIP Benefits…has been the statutory and historical jurisprudence of our State." The Courts have construed that Rule 4:42-9(a)(6) which allows for an award of counsel fees "in an action upon a liability or indemnity policy of insurance, in favor of a successful claimant" to permit an award of attorney's fees and judicial actions brought under the PIP Statute.

I find the claimant was successful and is entitled to award of counsel fees. In Enright v. Lubow, 215 N.J. Super 306, (App. Div.), cert. denied 108 N.J. 193 (1987) the Court indicated the factors to be considered in deciding whether to award attorney's fees include the insurer's good faith in refusing to pay the claim, the excessiveness of plaintiff's demands, the *bona fides* of the parties, the insurer's justification in litigating the issues, the insured's conduct as it contributes substantially to the need for litigation, the general conduct of the parties and the totality of the circumstances. As to Court pointed out in Scullion v. State Farm Ins. Co., 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 appear to be routine efforts.

In Rendine v. Pantzer, 141 N.J. 292 (1995), our state supreme court stated: "both as a matter of economic reality and simple fairness, we have concluded that a counsel fee awarded under a fee shifting statute cannot be "reasonable" unless the lodestar, calculated as if the attorney's compensation were guaranteed irrespective of result, is adjusted to reflect the actual risk that the attorney will not receive payment if the suit does not succeed." Id. at 338.

Pursuant to N.J.S.A. 39:6A-5.2(g), the costs of the proceedings shall be apportioned by the DRP and the award may include reasonable attorney's fees for a successful claimant in an amount consonant with the award. 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 standards in Rule 1.5 of the Supreme Court's Rules of Professional Conduct (http://www.judiciary.state.nj.us/rules/appendices/rpc.htm#P65_6482).

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 also 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.

As a general principle I find that an hourly rate of $300.00 is reasonable in this matter. However, an attorney's fee is also a product of the complexity of the service being rendered.

I have considered the criteria and standards set forth herein and have reviewed the line item entries reflected on the Certification of Services and find that an award of counsel fees in the amount of $1,200.00 is consonant with the amount at issue herein and is consistent with the requisites of RPC 1.5 as well as consistent with the degree of effort, expertise and experience required for a successful prosecution of this claim. I also award costs in the amount of $228.90.

Therefore, the DRP ORDERS:

Disposition of Claims Submitted

1. Medical Expense Benefits: Awarded

Medical Provider	Amount Claimed	Amount Awarded	Payable To
Lakewood Surgery Center	$9,160.86	$9,160.86	Lakewood Surgery Center

The awarded amounts are subject to:
Deductibles
Co-payments
Medical fee schedule

2. Income Continuation Benefits	Not in Issue	
3. Essential Services Benefits	Not in Issue	
4. Death Funeral Expense Benefits	Not in Issue	
5. Award of Interest	Awarded	Amount to be calculated by Respondent pursuant to N.J.S.A. 39:6A-5.2g

Attorney's Fees and Costs

I find that the Claimant prevailed and I award the following costs and fees (payable to Claimant's attorney unless otherwise indicated) pursuant to N.J.S.A. 39:6A-5.2g

Cost:$ 228.90 Attorney's fees:$ 1,200.00

THIS AWARD is rendered in full satisfaction of all claims and issues presented in the arbitration proceeding.

Entered in the State of New Jersey

Andrea L. Lardiere, Esq.
Dispute Resolution Professional

Date:03/26/20