In the Matter of the Arbitration between

Shore Orthopaedic Group a/s/o T.K.
CLAIMANT(s),

v.

Forthright File No: NJ1903001834316
Proceeding Type: On-the-Papers
Insurance Claim File No: 1001-95-2152
Claimant Counsel: Midlige Richter
Claimant Attorney File No: 190.1809
Respondent Counsel: The Law Office of John S. Bava
Respondent Attorney File No:
Accident Date: 03/01/2017

AAA Mid-Atlantic Insurance Group
RESPONDENT(s).

Award of Dispute Resolution Professional

Dispute Resolution Professional: Kenneth L. O'Donnel Jr., 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: TK

Findings of Fact and Conclusions of Law

In rendering this decision, I have reviewed all documents submitted by the parties to Forthright, the official repository of all documents which may be considered in reference to this matter pursuant to the New Jersey No Fault Arbitration Rules, Part III, Rule Number 53.

ISSUES IN DISPUTE

In the documents submitted to Forthright pursuant to Rule 53, the parties presented the following issues to be decided by the Dispute Resolution Professional:

1. Whether the cervical epidural steroid injection performed by Claimant on the patient on 08/31/17 was clinically supported as medically necessary and causally related to treatment of injuries sustained in the relevant auto accident. If so, how should any awarded service be reimbursed?

This matter concerns an automobile accident which occurred on 03/01/17 at which time the patient/subrogor/injured party TK sustained injuries. Subsequently, TK sought pain treatment and services from Claimant Shore Orthopedics.

On the date this accident occurred, it is uncontested in this matter that TK was eligible to receive PIP benefits from Respondent AAA Mid-Atlantic Insurance Company.

It is agreed by all parties that the New Jersey Statute 39:6A-1 et seq., known as the "Automobile Cost Reduction Act" and the Regulations promulgated thereunder, specifically New Jersey Administrative Code Section 11:3-3.1 et seq. and the case law interpreting the Statutes, Regulations and policy terms and condition apply to this matter.

Claimant advises that they have provided pain treatment to TK and have submitted billing for medical expenses to Respondent. Claimant further advises that the services were medically necessary and properly billed, however Respondent failed to reimburse them for these services in an appropriate and timely manner.

FACTS & POSITIONS PRESENTED

Respondent requests that any award in this matter be made subject to co-payment and deductible obligations and the policy limits for medical payments, still available to the patient/subrogor at the time of the award.

Issue #1: Medical necessity

Claimant indicates that TK sought medical treatment and services for injuries sustained in an auto accident which occurred on 03/01/17. Initially the patient reported neck and back pain and sought chiropractic treatment. Despite conservative care the patient continued to report neck and back symptoms and presented to Shore Orthopedic Group on 06/28/17.

At that time the patient reported neck pain radiating to the shoulders; low back and knee pain. Examination revealed spasm, tenderness, restricted cervical range of motion, positive Spurling sign, and decreased reflexes in the upper extremities. Prior MRI revealed disc herniations at C5-6 and C6-7. Dr. Woska recommended lower extremity EMG testing and cervical epidural steroid injection ("CESI").

Respondent advises that they denied precertification and reimbursement of the recommended procedure, based initially on the MDR prepared by Dr. Rahman on XX. In his report, Dr. Rahman notes that the patient reported neck pain radiating to the shoulders. Dr. Rahman commented that ESI are not indicated

when paresthesia is not present. Based upon a lack of reported paresthesia Dr. Rahman found no support for CESI.

Claimant argues that paresthesia is not the sole criteria for support of CESI. Claimant references the patient's reported radicular symptoms and positive examination findings in support of the medical necessity of CESI for this patient.

Claimant also provides proof that an appeal was submitted of Respondent's denial of medical necessity.

Reimbursement

The patient proceeded with the recommended CESI on 08/31/17 which Claimant Shore reported as 62321, which Claimant Shore agrees should be crosswalked to 62310, for which they seek reimbursement of the fee schedule amount of $967.17.

Respondent argues that the parties are both members of the CHN PPO which allows for reimbursement at the lesser of a 35% discount from the billed amount or the New Jersey Physician's Fee Schedule rate. In their audit, Respondent concedes that the Fee Schedule rate is the proper reimbursement amount if the DRP find the injection medically necessary.

APPLICABLE LAW

Where there is a dispute as to reimbursement of PIP benefits, the burden of proof rests with the claimant to establish that the services for which PIP benefits are sought were reasonable, necessary and causally related to an automobile accident. "The burden of establishing this by a preponderance of the evidence should remain on plaintiff as in any other civil case." Miltner v. Safeco Ins. Co. of Am., 175 N.J. Super. 156, 158 (Law Div. 1980); State v Seven Thousand Dollars, 136 N.J. 223 (1994).

Issue #1: Medical necessity

The necessity of medical treatment is a matter to be decided, in the first instance, by the patient's treating physicians and an objectively reasonable belief in the utility of a treatment or diagnostic method based upon credible and reliable evidence of its medical value is enough to qualify the expense for PIP reimbursement. Thermographic Diagnostics, Inc. v. Allstate Ins. Co., 125 N.J. 491, 512 (1991) "A necessary medical expense under the Act is one incurred for a treatment, procedure or service ordered by a qualified physician based on the physician's objectively reasonable belief that it will further the patient's diagnosis and treatment." Id. at 512.

In evaluating the necessity of a particular treatment, "treating physicians enjoy wide discretionary latitude in determining the extent of treatment needed for a particular patient. It is not unusual to witness a genuine dichotomy of medical opinion as to the type and extent of treatment needed for a particular injury." Elkins v. N.J. Mfrs. Ins. Co.,203 N.J. Super. 695, 701 (App. Div. 1990) citing Miskofsky v. Ohio Cas. Ins. Co., 203 N.J. Super. 400,410 (Law Div. 1984). It has been established that "where there is a conflict in the testimony of medical experts, the court will give greater weight to that of the treating physician." Mewes v. Union Bldg. & Const. Co., 45 N.J. Super. 89, 94 (App. Div. 1957) citing Fusco v Cambridge Piece Dyeing Corp., 135 N.J. L. 160 (E. & A. 1947) and Bialko v. H. Baker Milk Co., 38N.J. Super. 169, 171 (App. Div. 1955)

However, the AICRA legislation of 1999 specifically defined "medically necessary". Pursuant to N.J.S.A. 39:6A-2(m):

> 'Medically necessary' means that the treatment is consistent with the symptoms or diagnosis, and treatment of the injury (1) is not primarily for the convenience of the injured person or

> provider, (2) is the most appropriate standard or level of service which is in accordance with standards of good practice and standard professional treatment protocol, as such protocols may be recognized or designated by the Commissioner of banking and Insurance, in consultation with the Commissioner of Health and Senior Services or with a professional licensing or certifying board in the Division of Consumer Affairs in the Department of Law and Public Safety, or by a nationally recognized professional organization, and (3) does not involve unnecessary diagnostic testing.

Thus, the Supreme Court's holding in T.D.I.,Supra. must be considered in conjunction with the later promulgation of the Care Path guidelines and associated regulations.

N.J.A.C. 11:3-4.2 states:

> 'Medically necessary' or 'medical necessity' means that the medical treatment or diagnostic test is consistent with the clinically supported symptoms, diagnosis or indications of the injured person, and: 1. The treatment is the most appropriate level of service that is in accordance with the standards of good practice and standard professional treatment protocols including the Care Paths in the Appendix, as applicable; 2. The treatment of the injury is not primarily for the convenience of the injured person or provider; and 3. Does not include unnecessary testing or treatment.

N.J.A.C. 11:3-4.2 states:

> 'Clinically supported' means that a health care provider prior to selecting, performing or ordering the administration of a treatment or diagnostic test has: 1. Personally examined the patient to ensure that the proper medical indications exist to justify ordering the treatment or test; 2. Physically examined the patient to ensure that the proper medical indications exist to justify ordering the treatment or test; 3. Considered any and all previously performed tests that relate to the injury and the results and which are relevant to the proposed treatment or test; and 4. Recorded and documented these observations, positive and negative findings and conclusions on the patient's medical records

The New Jersey Care Paths identify typical courses of intervention. There may be patients who require more or less treatment. Cases that deviate from the Care Paths, however, may be subject to more careful scrutiny and may require documentation of special circumstances. Treatments must be based on patient need and professional judgment. Deviations may be justified by individual circumstances, such as pre-existing conditions and/or co-morbidities. N.J.A.C. 11:3-4.10.

The guidelines established in the Care Paths are designed to avoid the continuation of treatment and therapy, week after week, over many months and years without any observable improvement. Such practice is not only wasteful but may cause a patient to suffer unnecessarily because more effective and beneficial care might be available from a different type of treatment. The Care Paths, then, do not deprive the patient of the opportunity to seek the treatment of choice but rather they encourage alternative choices if a treatment plan becomes unproductive. See Comments of DOBI, December 21, 1998.

ANALYSIS & CONCLUSION

Having reviewed the positions of both parties, based on a preponderance of the evidence presented and applying the standards discussed herein, I find:

Issue #1: Medical necessity

I find that Claimant has met their burden and has demonstrated the medical necessity of the CESI performed on 08/31/17. I find that the patient presented with radicular symptoms in his neck into his shoulders. I find that examination demonstrated positive Spurling test and diminished reflexes in the upper extremities which confirmed radicular condition which may be treated with epidural injections.

I find that, while Dr. Rahman considers paresthesia as the sole criteria for ESI, other indicators may also be used to support this form of injection therapy. I find that certain of those other criteria were present in the patient and supported Dr. Woska's recommendation in this matter.

I award Claimant Shore $967.17 for the CESI performed on 08/31/17.

The award in this matter is made subject to remaining deductible and copayment owed by the patient under the applicable policy. Notwithstanding the actual amount of PIP benefits awarded to Claimant in this case, Claimant's recovery may not exceed the amount of remaining policy benefits, if any.

Interest

Claimants have made a claim for and are entitled to interest in this case.

Interest is awarded pursuant to N.J.S.A. 39:6A-5h.

Respondent shall calculate the interest awarded to Claimants at the percentage of interest prescribed in the Rules Governing the Courts of the State of New Jersey for judgments, awards and orders for the payment of money. Interest shall be calculated from the date on which payment was overdue through the date on which payment of the Amount Awarded is issued to Claimants.

Apportionment of fees & costs

I find that Claimant to be a prevailing party.

N.J.A.C. 11:3-5.6(d)(2) provides that:

> The Award shall apportion the costs of the proceedings, regardless of who initiated the proceedings, in a reasonable and equitable manner consistent with the resolution of the issues in dispute.

N.J.A.C. 11:3-5.6(e) provides:

> 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:
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> 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;
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> 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.

Further, in determining the proper amount of fees, "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." H.I.P. v. K. Hovnanian at Mahwah VI, Inc., 291 N.J. Super. 144, 157 (App. Div. 1996) citing Robb v. Ridgewood, 269 N.J. Super. 394, 404 (Ch. Div. 1993). The DRP is given discretion to adjust the fees upward or downward. Id. at 158.

R.P.C. 1.5 sets forth the factors to be considered in determining the reasonableness of a fee. The factors are as follows:

(1) The time and labor required, the novelty and difficulty of the questions 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 relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) Whether the fee is fixed or contingent.

Claimant has submitted a detailed attorney fee certification in the amount of $1,430.00 in fees and $203.90in costs. [Filing fee and eLaw costs]

I have taken into consideration that Claimant's counsel completed an initial review, prepared the demand for arbitration, prepared the on-the-papers submission, reviewed Respondent's on-the -papers submission, and was required to review various correspondence generated during the pendency of the arbitration.

I have considered Respondent's detailed opposition and arguments which included the fees are excessive, as the hourly rate is excessive given the time and labor required and the level of difficulty involved. Respondent also objects to the cost component and number of hours and argues any fee must be commensurate with the award.

In accordance with the case law, rules and statutes cited, I have determined the number of hours reasonably expended by Claimant's counsel multiplied by a reasonable hourly rate and have considered whether same should be enhanced or reduced. I have considered that Claimant was successful in prosecuting this claim.

Having considered the Claimant's certification, Respondent's objections, and all relevant circumstances including the amount of recovery and the guidelines/factors set forth in R.P.C. 1.5, I award $800.00 in attorney's fees consonant with the amount awarded and $203.90 in costs.

Therefore, the DRP ORDERS:

Disposition of Claims Submitted

1. Medical Expense Benefits: Awarded

Medical Provider	Amount Claimed	Amount Awarded	Payable To
Shore Orthopaedic Group	$967.17	$967.17	Shore Orthopaedic Group

The awarded amounts are subject to:
Deductibles
Co-payments
Policy limits

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:$ 203.90 Attorney's fees:$ 800.00

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

Entered in the State of New Jersey

Kenneth O'Donnel, Esq.
Dispute Resolution Professional

Date:09/30/19