



## FORTHRIGHT

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**In the Matter of the Arbitration between**

Sall Myers Medical Associates a/s/o M.G.

**CLAIMANT(s),**

**Forthright File No: NJ1909001864518**

**Proceeding Type: In-Person**

**Insurance Claim File**

**No: 0434310350101043**

**Claimant Counsel: Midlige Richter**

**Claimant Attorney File No: 150.3824**

**v.**

**Respondent Counsel: Law Offices of Taryn**

**E. Curry**

**Respondent Attorney File No: 19P2550**

**(MH)**

**Accident Date: 07/01/2018**

GEICO Insurance Company

**RESPONDENT(s).**

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**Award of Dispute Resolution Professional**

Dispute Resolution Professional: David M. LaPorta 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: M.G.

**In Person Proceeding Information**

A proceeding was conducted on: 02/04/2020

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

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

Claimant amended its Demand from the amount of \$2,067.43 to the fee scheduled amount of \$1,044.20.

## **Findings of Fact and Conclusions of Law**

In rendering this decision, I have reviewed the following documents submitted by Claimant:

- Demand with attachments; and
- 1/13/20 submission with attached Exhibits A through D.

Additionally, I have reviewed the following documents submitted by Respondent:

- 1/8/20 submission with attached Exhibits A through C.

I also considered the oral argument of counsel on the date of the hearing.

### *Facts*

This matter arises out of a motor vehicle accident (MVA) which occurred on 7/1/18. M.G. subsequently was referred for testing with the Claimant on 2/6/19 and 2/7/19. On the date of loss, M.G. was eligible to receive PIP benefits under a policy of insurance issued by Respondent. Claimant now alleges that it is entitled to payment for the testing rendered on the above dates of service (DOS) in the amount of \$1,044.20.

### *Issues*

The following issues are presented:

- Whether the EMG/NCV testing rendered by Claimant on 2/6/19 and 2/7/19 was medically necessary?

No other issues have been identified by the parties and no other issues will be addressed herein. The parties understand that issues not raised at the time of the hearing, regardless as to whether they were raised in the parties' submissions, will not be addressed herein and are deemed waived.

### *Respondent's Argument*

Respondent maintains that the EMG/NCV testing performed on 2/6/19 was not medically necessary and relies on the physician advisory determination (PHAD) report of Thomas Bonazinga, MD, dated 12/31/18 in support of same. Respondent noted the following from that report:

Apparently, treatment was complicated by gynecological surgery and there is a multi month gap in the clinical documentation leading up to the 12/18/18 office visit. Relatedness issues are considerations in this case. Work activities, activities of daily living, recreation, degenerative changes, and unrealized trauma can produce the symptoms and findings reported. The submitted documentation does not clinically support medical necessity for the EMG/NCV in relation to the MVA. The EMG/NCV is not recommended to be certified. Of note, this precertification request does not pertain to injuries, or conditions that are unrelated to the MVA.

Dr. Bonazinga also prepared a First Level Appeal determination report on 1/15/19. Respondent noted the following from that report:

Apparently, treatment was complicated by gynecological surgery and there is a multi month gap in the clinical documentation leading up to the 12/18/18 office visit. Relatedness issues are considerations in this case in view, in part, by the gap in submitted documentation and the Dr. Strell IME reported lack of relatedness. Work activities, activities of daily living, recreation, degenerative

changes, and unrealized trauma can produce the symptoms and findings reported. The submitted documentation does not clinically support medical necessity for the EMG/NCV in relation to the MVA. The EMG/NCV is not recommended to be certified. Of note, this precertification request does not pertain to injuries, or conditions that are unrelated to the MVA. This recommendation is supported by *NJAC 11: 3-4* guidelines.

Based on the foregoing, Respondent argues that Claimant has not established, by the preponderance of the evidence, that the EMG and Nerve test were medically necessary or justified by both the Appropriateness Criteria and the Care Path Guidelines.

I have also considered Respondent's argument regarding attorney's fees sought by the Claimant.

#### *Claimant's Argument*

Claimant provided the following synopsis of the treatment rendered to M.G. in support of the medical necessity of the treatment at issue:

The Patient began treating with Sall Myers Medical Associates on 07/12/18 for injuries sustained in a 07/01/18 motor vehicle accident wherein the patient was the restrained left rear passenger in a vehicle that was rear-ended twice. Upon both impacts, the patient's body was thrown forward, striking her right knee twice against the console, then back into her seat. Subsequently, the patient developed pain in her low back and right knee.

Upon presentation to Sall Myers the patient complained of low back pain across her back with radiation into the bilateral buttocks and right knee pain involving the entire anterior aspect of the knee associated with the knee giving way during ambulation. Following an examination, the patient was instructed to commence a course of conservative treatment, including x-rays and physical therapy to the affected areas.

Due to ongoing low back pain with radiation into the buttock and thigh, the patient underwent a lumbar MRI on 10/12/18, paid for by Respondent, which revealed: straightening of the lumbar spine suggesting muscle spasm.

On 12/18/18 the patient presented for a follow-up evaluation with continued complaints of episodic numbness in the right leg with cramping, clicking in the right knee, and stiffness in the lower back.

An examination revealed: right knee tenderness with a noticeable click; a Tinel sign was elicited when percussing over the right capitulum fibula head; weakness was noted in right foot eversion 4/5; straight leg raise revealed hamstring tightness on the right.

Following his examination and taking into account the patient's ongoing complaints, Dr. Dane recommended the patient undergo EMG/NCV of the right groin to differentiate right peroneal entrapment versus a right-sided lumbar radiculopathy to help guide future treatment of the patient's symptoms.

The recommended EMG/NCV testing was performed on 02/06/19 and revealed no evidence of lumbosacral radiculopathy or peripheral neuropathy at that time.

The patient presented for a follow-up exam on 01/07/19 following her EMG/NCV testing with continued complaints of right-sided low back pain. Following an examination and review of the aforementioned MRI and recent EMG/NCV studies, Dr. Speez recommended the patient be referred to pain management for an opinion regarding lumbar facet joint injections.

The patient presented for a pain management evaluation on 03/19/19 reporting low back pain, but noted it had improved over recent weeks. After a physical examination, Dr. Rothstein recommended the patient continue with conservative care at that time. The patient has not had further treatment with Sall Myers to date.

Based on the foregoing, Claimant submits that Dr. Dane properly recommended EMG/NCV testing due to the fact that the patient was still experiencing lower back pain with cramping despite receiving conservative care.

### *Analysis*

When there is a dispute as to the services provided, the burden rests upon the claimant to establish that the medical expenses for which it seeks PIP benefits were reasonable, necessary and causally related to an automobile accident. See *Miltner v. Safeco Insurance Co. of America*, 175 N.J. Super. 156 (Law Div. 1980).

Under *N.J.S.A. 39:6A-2(e)*, “medical expenses” means reasonable and necessary expenses for treatment for services as provided by the policy. Under *N.J.S.A. 30:6A-2(n)* “medically necessary” means that the treatment is consistent with the symptoms or diagnosis--and that the treatment (1) is not primarily for the convenience of the injured person or provider, (2) is the most appropriate standard or level of service according to the standards of good practice and standard professional treatment protocols, and (3) does not involve any unnecessary diagnostic testing.

Under *N.J.A.C. 11:3-4.2*, “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.

Under *N.J.A.C. 11:3-4.2*, “clinically supported” means that a healthcare provider made an assessment of current and/or historical subjective complaints, observations, objective findings, neurological indications and physical tests.

Further, certain diagnostic tests are recognized as having value in the evaluation and treatment of patients and are reimbursable when medically necessary and consistent with clinically supported findings. Pursuant to *N.J.A.C. 11:3-4.5(b) (1)*, EMGs are reimbursable “when used in the evaluation and diagnosis of neuropathies and radicular syndrome where clinically supported findings reveal a loss of sensation, numbness or tingling.”

Similarly, NCV studies are “reimbursable when used to evaluate neuropathies and/or signs of atrophy.” *N.J.A.C. 11:3-4.5(b) (3)*.

After reviewing the evidence and argument presented by both parties, and based upon the specific facts of this matter, I conclude that Claimant has proven by a preponderance of the evidence that the testing at issue was medically necessary. I find that the clinical examination of the patient by Dr. Dane clinically supports the testing as medically necessary and that the testing was consistent with the clinically supported symptoms, diagnosis and indications of the patient. To wit, Dr. Dane documented in his 12/18/18 examination that the patient complained of numbness in the right leg with cramping and stiffness in the lower back. Moreover, Dr. Dane recommended the testing to differentiate right peroneal entrapment versus right sided lumbar radiculopathy to help guide future treatment. I therefore find that Dr. Dane made an assessment of the subjective complaints, observations, objective findings, and neurological indications of the patient that support the testing. Further, I find that the follow up examination on 2/7/19 was necessary to determine the appropriate treatment plan based on the result of the testing. Based on the foregoing clinical findings, I disagree with Dr. Bonazinga’s opinion regarding

medical necessity.

### *Conclusion*

Based upon the foregoing analysis, Claimant is awarded the amount of \$1,044.20, which amount is subject to amounts paid, the limits of Respondent's policy of insurance, and to any applicable deductible and/or copayment.

I find the Claimant to be the prevailing party and award attorney fees and costs pursuant to *Rule 22* of the New Jersey No-Fault PIP Arbitration Rules, effective 4/1/11, which are administered by Forthright, and the PIP Alternate Dispute Resolution Rules as amended on 1/4/13, which state, in pertinent part that:

*N.J.A.C. 11:3-5.6*, entitled, *Conduct of PIP dispute resolution proceedings* reads:

(e) 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.

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 per RPC Rule 1.5(a): A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(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.

The Claimant has submitted a Certification of Services seeking attorney fees in the amount of \$2,437.50, representing an hourly rate of \$325.00 times 7.5 hours. The Respondent argued that the hourly rate and number of hours billed were excessive.

The Certification of Services submitted by Claimant's counsel has been reviewed in accordance with *N.J.A.C. 11:3-5.6(e)*, as set forth above. Respondent's argument that the fees sought by Claimant's counsel are excessive has been taken into consideration as well.

In determining the amount of the attorney fee, I have also considered the principles set forth in *Enright v. Lubow*, 215 N.J. Super. 306 (App. Div.), *certif. den.* 108 N.J. 193 (1987), *Litton Industries v. IMO Industries*, 200 N.J. 372 (2009), *Scullion v. State Farm Insurance Company*, 345 N.J. Super 431 (App. Div. 2001), *Rendine v. Pantzer*, 141 N.J. 292 (1995) and *RPC 1.5* for determining the lodestar for legal fees as well as for determining whether it should be enhanced or reduced.

Applying these factors, under the guidelines of the above referenced parameters, I find that an attorney's fee of \$1,375.00 is consonant with the award. Costs of \$228.90 are also awarded.

**Therefore, the DRP ORDERS:**

**Disposition of Claims Submitted**

1. Medical Expense Benefits: Awarded

<b>Medical Provider</b>	<b>Amount Claimed</b>	<b>Amount Awarded</b>	<b>Payable To</b>
Sall Myers Medical Associates	\$1,044.20	\$1,044.20	Sall Myers Medical Associates

The awarded amounts are subject to:

- Deductibles
- Co-payments
- Payments made
- 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:\$ 228.90 Attorney's fees:\$ 1,375.00

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

Entered in the State of New Jersey



David M. Laporta, Esq.  
Dispute Resolution Professional

Date:03/11/20