



## FORTHRIGHT

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### In the Matter of the Arbitration between

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

v.

Plymouth Rock Assurance of New Jersey  
**RESPONDENT(s).**

**Forthright File No: NJ1911001871251**  
**Proceeding Type: In-Person**  
**Insurance Claim File No: 695301567553**  
**Claimant Counsel: Midlige Richter**  
**Claimant Attorney File No: 350.1804**  
**Respondent Counsel: Law Office of Patricia**  
**A. Palma**  
**Respondent Attorney File**  
**No: 695301567553FAN**  
**Accident Date: 03/30/2018**

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### Award of Dispute Resolution Professional

Dispute Resolution Professional: Patrick J. Caserta 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: the patient or MC

### In Person Proceeding Information

A proceeding was conducted on: 03/10/2020

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

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

The parties agree that this is a claim for future treatment only and that this Demand does not seek an award of benefits.

## Findings of Fact and Conclusions of Law

The injured person was involved in a motor vehicle accident on March 30, 2018. She reportedly sustained injuries and now seeks review of a request for future treatment, specifically cervical surgery. Claimant proceeds here pursuant to an assignment of benefits. At the in-person hearing, the parties agreed that reimbursement is not an issue to be decided here.

It is important to understand that the arbitration of this claim is conducted and decided as per the statutory and regulatory provisions of *N.J.S.A. 39:6A-5.1 et seq.* and *N.J.A.C. 11:3-5.1 et seq.* as well as the rules established by the arbitration administrator, Forthright.

The parties are reminded of the mandatory requirements of R. 16 which, in addition to requiring a summary of the claims and defenses, mandates that both parties point to the evidence supporting each claim and defense. The failure to fully comply with the requirements of R. 16 can be detrimental to either party. It must be understood that merely because there may be evidence or argument somewhere within the documents presented it is the parties' obligation to specifically direct the DRP to that information. A neutral DRP should not be expected to search through the submissions, locate what information might be relevant and determine how that information might support or refute a particular claim or defense.

An in-person hearing was conducted on March 10, 2020 and representatives appeared for the Claimant and the Respondent. At the hearing the parties' representatives were asked to confirm the issues being presented to the DRP for decision as per R. 43. The parties' representatives agreed that the following issue(s) are the only issues presented for determination by the DRP: (1) Whether the disputed procedure would be necessary and causally related. All other issues, including those issues raised via the parties' written submissions but not confirmed at the oral hearing, are deemed waived.

I have reviewed all submissions presented to Forthright. Forthright is the source of all documentation for the DRP and therefore these are the only submissions considered by this DRP. No so-called "courtesy copies" were accepted at any time. Again, the DRP's consideration is limited to the issues raised, the submissions presented by the parties and their presentation at the oral hearing. All issues and evidence have been considered and any issue or evidence not specifically referenced below was considered irrelevant and/or immaterial.

In addition to the Demand and any supporting attachments, Claimant offers the following submission(s): 3.6.20 – 106 pages

Respondent offers the following submission(s): 2.8.20 – 24 pages

The Claimant sought precertification for cervical decompression with fusion. The Attending Provider Treatment Plan (AFTP) form was submitted on 9.24.19 and denied by Respondent following a review by Elena Napolitano, MD on 9.27.19. The denial was upheld on appeal review by Dr. Weintraub. Respondent offers the reports of an independent medical examination (IME) conducted by David Lopez, MD on 11.1.19 as additional support for its denial.

Dr. Napolitano stated: *"The documentation submitted does not substantiate a causal relationship between the injury and the MVA. Orthopedic evaluation 12/20/18 referred to resolution of neck pain, and therefore complaint/exam did not focus on cervical spine. Dr. Chern Orthopedic, 3/21/19 follow-up did not report cervical complaints. Treatment with PT, narcotic, and surgery for cervical stenosis is not supported as MVA related."* She recommended a referral for an IME.

Dr. Weintraub reported: *"The documentation submitted does not substantiate a causal relationship between the injury and the MVA. As per this review, it is again noted as for resolution of neck pain as*

*of 12/20/18; Gap is noted as for Sub/Objective cervical spine data from 12/2018 – 6/2019; all treatment for the cervical spine is not related to this now remote MVA [more than] 1.5 years prior.”*

Dr. Lopez stated in his report that the proposed surgery was “...related to the longstanding degenerative changes revealed on [the patient’s] imaging studies and are [sic] not the result of the 3/30/18 motor vehicle accident.”

I find that the Respondent’s denials focus on causation and that the denials have not stated that the proposed surgery would not be medically necessary. Dr. Napolitano and Dr. Weintraub emphasized what they considered to be a gap in care. Dr. Lopez stressed the patient’s pre-existing degenerative condition.

The patient was seen at Jersey Shore University Medical Center shortly after the accident on 3.30.18. A cervical CT scan done at that time reported a normal alignment, no evidence of fracture or subluxation and no evidence of dislocation. The scan did show multilevel degenerative changes.

MC was evaluated by Samantha Kanarek, DO of Brielle Orthopedics. The patient complained of neck pain with left arm pain and low back pain. Dr. Kanarek’s report of 4.10.18 noted a lot of stiffness with restricted ranges of cervical motion in all planes. She also noted guarding of the left shoulder but no signs of impingement. The x-rays taken on that date revealed severe mid-cervical spine disc degeneration with severe facet arthropathy. Dr. Kanarek’s report states that she explained to MC that her neck had “quite a bit of degenerative changes” but that the car accident did not cause arthritis.

Further, Dr. Kanarek explained that the accident “...could certainly exacerbate underlying arthritis.” Physical therapy was ordered along with a prednisone taper to be followed with meloxicam and gabapentin.

At the 5.23.18 re-evaluation the patient’s complaints included left-sided neck pain with left arm pain.

Cervical and lumbar MRIs were ordered. Dr. Kanarek’s report stated: “...I did indicate to [the patient] that if both MRI images mainly demonstrates degenerative changes then we may need to make her maximally medically improved as at that point they [sic] will be no way to prove that the car accident really caused any of these degenerative changes. She has a lot of degenerative changes more so involving her neck than the low back.” The patient decided to stop physical therapy as it was not helping but to continue with home exercises. The patient also reported that the medications were not helping.

A cervical MRI was done on 6.5.18. The findings indicated multilevel spondylosis, worst in the upper-mid cervical spine, straightening of the normal lordosis and slight spondylolisthesis, C2/3, C3/4 and C4/5 herniations with ventral cord deformity but no definite cord signal abnormality, C4/5 central canal and left more than right foraminal stenosis with possible compression of exiting nerve roots.

The patient returned to Dr. Kanarek on 6.12.18 reporting neck pain with left radiating arm pain. Dr. Kanarek reported: “I spoke with the patient and her husband regarding her situation explaining to them that car accidents do not cause degenerative changes, which is what she has in her situation; however, it can certainly exacerbate degenerative changes. At this point, she has reached maximum medical improvement. From my standpoint, I just do not think that epidural steroid injections or facet joint injections are going to provide her with relief that she is looking for. I think she is dealing with chronically bad neck and chronically bad low back that has been exacerbated.” The patient was discharged as Dr. Kanarek stated there was nothing else she could do for MC.

The patient was first seen at Seaview Orthopaedic on 7.19.18. The exam of her neck noted tenderness and muscle spasm with the ranges of motion limited by pain and a positive Spurling’s test caused left arm pain. Praveen Yalamanchili, MD of Seaview reported that he reviewed the cervical MRI. He

summarized the MRI report as noting disc herniations at C2/3, C3/4 and C4/5 along with some mild degenerative changes with spinal stenosis and cord deformity. He recommended physical therapy, acupuncture and massage as well as referral to a pain management specialist and the patient saw Keiron Greaves, MD of Seaview. Dr. Greaves saw the patient on 8.7.18 noted that physical therapy was not beneficial and recommended a cervical epidural injection.

Dr. Yalamanchili's 9.13.18 office note indicates the patient was unable to proceed with the cervical epidural injection because of concerns being addressed by the patient's cardiologist. He recommended continued physical therapy.

The injection was provided on 10.18.18. At the follow-up evaluation on 11.9.18, the patient reported that her pain level had been reduced from 7-8/10 to 4/10. A "increase in her level of functionality" was also noted by Dr. Greaves. He referred the patient to his partners for an evaluation of her left shoulder complaints.

Kenneth Chern, MD of Seaview then saw the patient on 11.29.18. He noted her chief complaint was left shoulder pain rated at 8/10. He noted that her neck pain had gotten better following the injections. Dr. Chern reported: "She has been under treatment of other physicians, Dr. Yalamanchili and Dr. Greaves, who thought that her shoulder and arm pain were all coming from the neck but she remembers this specific injury to the left shoulder that she states she had documented with Dr. Yalamanchili." Dr. Chern recommended an injection for the left shoulder pain.

The record includes an operative report dated 12.6.18 which reveals that Dr. Greaves performed another cervical epidural injection. The next report in this record reflects the re-exam by Dr. Chern on 12.20.18. He stated that the patient's radiating neck pain had resolved which then made her shoulder injury obvious. His report notes that the insurer had denied the need for the left shoulder injection and stated that there had been no report of a left shoulder injury. Dr. Chern noted that there had previously been a suspicion that her cervical injury was causing pain in her left shoulder.

Dr. Chern saw the patient again on 3.21.19 and again reported her chief complaint as left shoulder pain. Although the insurer continued to deny the necessity of the shoulder injection, Dr. Chern proceeded with that treatment on 4.18.19. The patient saw Dr. Chern again on 5.13.19 and reported her shoulder pain would be rated at 3-4/10 but that the injection did help. Dr. Chern's exam focused on the shoulder. He did not record any complaints of neck pain.

The patient returned to Seaview to see Dr. Yalamanchili on 6.6.19 with complaints of neck and low back pain. She rated her neck pain at 5/10. Dr. Yalamanchili characterized the results of the cervical injections as helping slightly but that the pain was persistent. He determined that the patient required the cervical decompression procedure with fusion but noted that the patient was hesitant to proceed with surgery apparently based upon her husband's experience with low back surgery. However, she returned on 9.16.19 and advised that she wished to have go forward with this cervical surgery. The precertification request, reviews, appeals and IME discussed above followed, leading to this application by counsel for Seaview.

The regulations define medical necessity. N.J.A.C. 11:3-4.2 provides as follows:

"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 also provides that “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 including making an assessment of any current and/or historical subjective complaints, observations, objective findings, neurological indications and physical tests; (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.

As Respondent noted, the court addressed the issue of causation in a PIP setting in *Bowe v. NJ Manufacturers*, 367 N.J. Super. 128 (App. Div. 2004). The court held that the insured has the burden of showing that the treatment was the result of an aggravation of a pre-existing condition asserted as a defense by the insurer. The insured must present objective medical evidence that the accident aggravated the condition and an evaluation of the medical records of the insured prior to the accident. There is no dispute here that PIP benefits would be available if the evidence supports a finding that the accident aggravated the patient’s pre-existing degenerative cervical spine condition.

Respondent argued that the patient’s cervical injuries had resolved following the two cervical epidural injections. As pointed out above, Dr. Napolitano’s denial was based, in part, on the gap in reported cervical complaints and treatment. Seaview’s Dr. Chern reported that the patient’s neck pain had resolved as of 12.20.18, two weeks after the second cervical injection. There is no record of complaints of neck pain until the patient returned to Dr. Yalamanchili on 6.6.19.

Respondent’s experts did not go so far as to state that the cervical epidural steroid injections would be expected to provide permanent or even long-term relief of the patient’s neck pain. It is reasonable to consider that the benefits of those injections lasted for several months and then the pain returned. While Dr. Chern described the neck pain as resolved, Dr. Yalamanchili’s report suggests that it may have been reduced to and remained rated at 4/10 following the injections.

My review of the record evidence leads to a determination that the gap in treatment and the report that the patient’s neck pain had resolved on 12.20.18, does not lead to a reasonable conclusion that the neck pain had not returned six months later or that the neck pain reported in June 2019 could not be causally related to this MVA. Respondent’s reviews imply that the patient’s neck injuries would have been permanently resolved by the epidural injections but there is no opinion or objective evidence in this record supporting that proposition.

Dr. Yalamanchili’s 10.7.19 appeal letter provides convincing support for this conclusion. He further noted that the patient’s positive response to the cervical injections supported the conclusion that her pain originated from her neck.

I find the greater weight of the record evidence confirms the patient’s pre-existing, degenerative condition. Therefore, the final question to be addressed here would be whether the pre-existing condition was exacerbated by this MVA. Dr. Yalamanchili’s appeal describes the MRI findings as evidencing herniations but offered no comments as to the pre-existing degenerative condition. I note that Dr. Yalamanchili also authored a letter to an attorney in response to a request for a narrative report on the patient. The letter is dated 8.13.19 and provides a detailed discussion of the patient’s history following this MVA. I note again that Dr. Yalamanchili discussed the cervical MRI and noted mild

degenerative changes, stenosis, cord deformity and right foraminal narrowing and cervical disc herniations. Dr. Yalamanchili stated: *"It is my opinion within a reasonable degree of medical probability that the above diagnoses are related to the motor vehicle accident that occurred on 3/30/18. [MC] had new onset of pain in the affected areas after the injury. Her history, mechanism of injury, and subjective and objective findings, including MRI findings, are consistent with the above diagnoses."*

I find that Seaview's physicians acknowledged only a mild degenerative cervical spine condition and did not provide a *Bowe* analysis. Dr. Yalamanchili's statement, above, simply offers a conclusion that the patient's cervical complaints were causally related based upon his statement that the patient had a "new onset of pain." I find that this limited evidence and the lack of a *Bowe* analysis without more would be insufficient to support the proposed surgery as causally related.

However, Claimant's counsel included the reports of Brielle Orthopedics with the frank and credible statements of Dr. Kanarek which I found quite convincing. As discussed above, Dr. Kanarek clearly acknowledged that the patient's underlying degenerative condition was not caused by the MVA. She also noted that the MVA could aggravate those conditions and in her final report she described a chronically bad neck condition which had been exacerbated.

Dr. Lopez stated that the need for surgery was related to the patient's pre-existing condition and he did not convincingly assert that this condition was not aggravated by the MVA.

It is my determination that the greater weight of the evidence as discussed above supports the medical necessity of the proposed surgery. I find that the surgery is necessary due to the aggravation of the patient's pre-existing degenerative condition as credibly stated by Dr. Kanarek and supported by Seaview's clinical records.

#### Counsel Fees

N.J.A.C. 11:3-5.6(e) provides that the decision of the dispute resolution professional "may include attorney's fees for a successful claimant in an amount consonant with the award and with Rule 1.5 of the Supreme Court's Rules of Professional Conduct." In determining the proper amount of fees, "the most useful starting point . . . is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *HIP v. K. Hovnanian at Mahwah*, 291 N.J. Super. 144, 157 (App. Div. 1996). Other relevant factors are set forth in R.P.C. 1.5 and *Enright v. Lubow*, 215 N.J. Super. 306 (App. Div.), cert. denied 108 N.J. 93 (1987); *Scullion v. State Farm Ins. Co.*, 345 N.J. Super. 431, 437-438 (App. Div. 2001).

In *Enright v. Lubow*, 215 N.J. Super. 306 (App. Div. 1987), cert. den. 108 N.J. 193 (1987), the court set out seven basic factors to be included in a counsel fee determination under Rule 4:42-9(a)(6): (1) the insurer's good faith in refusing to pay the claim; (2) the excessiveness of plaintiff's demands; (3) the bona fides of the parties; (4) the insurer's justification in litigating the issues; (5) the insured's conduct as it contributes substantially to the need for litigation; (6) the general conduct of the parties; and (7) the totality of the circumstances. *Id.*, at 313.

I have carefully considered the relevant factors and I have reviewed Claimant's fee certification. N.J.A.C. 11:3-5.6(d) 2 provides: "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." I find it would be appropriate to apportion the Claimant's filing fee and some additional costs to be reimbursed by Respondent. I have reviewed the lodestar amount set forth by the

Claimant and find some reductions are appropriate. For example: Services that were more administrative than professional, time spent (all or in part) for claims that were not successful, etc. The fee may also be reduced beyond the lodestar calculation to be consonant with the award of benefits. I recognize that, at times, the claim for counsel fees may exceed the actual claim for benefits or, at least, the award of benefits. I also recognize that some minimum effort is required to prosecute a PIP arbitration claim and that in some instances a fee may be higher than the award of benefits. I conclude that the Claimant is entitled to an award of counsel fees and costs as set forth below.

**Therefore, the DRP ORDERS:**

**Disposition of Claims Submitted**

1. Medical Expense Benefits: Not in Issue

<b>Medical Provider</b>	<b>Amount Claimed</b>	<b>Amount Awarded</b>	<b>Payable To</b>
Seaview Orthopaedics	\$0.00	\$0.00	Seaview Orthopaedics

- 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                    Not in Issue

**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:\$ 1,250.00

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

Entered in the State of New Jersey



Patrick J. Caserta, Esq.  
Dispute Resolution Professional

Date:04/06/20