



FORTHRIGHT

In the Matter of the Arbitration between

Seaview Orthopaedics a/s/o J.H.
CLAIMANT(s),

v.

Allstate New Jersey
RESPONDENT(s).

Forthright File No: NJ1911001872518
Proceeding Type: In-Person
Insurance Claim File No: 0537385049
Claimant Counsel: Midlige Richter
Claimant Attorney File No: 350.1805
Respondent Counsel: Law Offices Pamela
D. Hargrove
Respondent Attorney File No: 0537385049.1
G42
Accident Date: 02/27/2019

Award of Dispute Resolution Professional

Dispute Resolution Professional: Suzanne J. Frankland

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: JH

In Person Proceeding Information

A proceeding was conducted on: 02/25/2020

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 claim arises from a motor vehicle accident that occurred on 2/27/19 for which JH seeks PIP benefits from Allstate New Jersey.

Nature of dispute:

In accordance with N.J.A.C. 11:3-5.6(d) and Forthright Rule 43, the following issue were identified by the parties and submitted for my determination at the time of hearing as the issues in dispute:

Issue I: Medical Necessity

The only issue identified by the parties are those set forth above. No other issues have been presented for my determination. Any other issues raised previously by the parties in prehearing submissions are deemed waived.

In rendering my decision, I have considered the applicable law, counsel's arguments at the oral hearing on February 25, 2020 and the following documents submitted by the parties:

Claimant:

1. Demand with attachments.
2. Submission dated 2/20/20.

Respondent:

1. Submission dated 2/7/20.

Claimant's Position:

Claimant seeks payment for treatment performed on 5/20/19 – 9/12/19 in the amount of \$5,463.81.

Claimant submits that the patient was injured in an MVA on 2/27/19. He was a pedestrian at the accident and, according to claimant, sustained injury to the right knee. He was seen by Dr. Spagnuola of Seaview Orthopedics on 3/8/19 with significant pain and swelling in the knee. Exam showed effusion, tenderness and lateral joint line laxity. Dr. Spagnuola suspected that the patient may have a displaced bucket handle tear of the meniscus causing his discomfort. He provided a brace and recommended PT and MRI of the right knee to further diagnose his injury. Claimant states that the patient followed up with Dr. Spagnuola over the next several months, but his right knee symptoms remained persistent despite PT, rest, medication and alteration of activities. The patient was seen on 5/20/19 for continued knee pain. His symptoms were referred to the medial joint in end radiated posteriorly about the knee consistent with meniscal tear. McMurray's sign was consistent with meniscal tear. The patient was unable to undergo MRI due to a spinal stimulator in his low back. Based on persistent pain and positive findings despite conservative pain management, Dr. Spagnuola recommended arthroscopic surgery to evaluate claimant's meniscus and treat his meniscal tears. The patient was seen on 8/26/19 with continued knee pain. The patient indicated that he wished to proceed with arthroscopic surgery of the right knee with evaluation of the meniscus with either debridement or repair. It was again noted that the patient could not undergo MRI due to spinal stimulator. The surgery was performed on 9/12/19. The patient was seen post operatively on 9/20/19 and was making good progress with PT following the surgery. Claimant notes that respondent authorized and paid claimant's post-operative PT as well as claimant's subsequent office visits.

Claimant argues that the surgery and unpaid visits were medically necessary.

Respondent's Position:

Respondent denied payment for the knee surgery based on an MDR of Dr. Sean Lager, IME of Dr. Arnold Berman and Appeal Review of Dr. Robert Ponzio.

Respondent submits an MDR of Dr. Lager dated 5/29/19. He states that exam of the right knee revealed full ROM, positive medial joint line tenderness and positive McMurrays. He notes mechanical symptoms of instability, however, there was no locked or blocked knee. He states that the ODG guidelines require a positive meniscal tearing on an MRI and the patient cannot undergo an MRI due to a spinal stimulator. Dr. Lager recommended an IME and denied the right knee surgery

An appeal was filed, and a report issued by Dr. Lager on 6/24/19. He stated that the provider had not supplied any additional clinical information to support the surgery. The denial was upheld.

Respondent submits an IME from Dr Berman dated 7/5/19. He notes that the patient was on disability at the time of the accident from an unrelated lumbar spine injury. Exam revealed normal ROM with pain, negative Lachman's and Drawer's tests and positive McMurray's test, no tenderness, heat and swelling, erythema or effusion. Dr. Berman stated that the patient had not reached MMI however, right knee surgery was not medically necessary. Dr. Berman recommended that a right knee CT arthrogram be completed prior to any arthroscopic procedure and that surgery could be considered if the CT Arthrogram is positive.

An appeal was filed, and a report issued by Dr. Ponzio dated 10/7/19 regarding a request for post-surgical PT. He noted that the IME determined that the medical necessity for right knee arthroscopy surgery was dependent upon the CT arthrogram findings. Dr. Ponzio stated that there was no approval for the surgery, therefore, post-surgical PT was denied.

Law:

Pursuant to N.J.S.A. 39:6A-5(g), payment of PIP benefits:

“...shall be overdue if not paid within 60 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. If such written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 60 days after such written notice is furnished to the insurer. Any part or all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 60 days after such written notice is furnished to the insurer; provided, however, that any payment shall not be deemed overdue where, within 60 days of receipt of notice of the claim, the insurer notifies the claimant or his representative in writing of the denial of the claim or the need for additional time, not to exceed 45 days, to investigate the claim, and states the reasons therefor.”

According to N.J.S.A. 39:6A-1, *et seq.*, for “medical expenses” to be compensable under the New Jersey No-Fault Act, a health care provider’s service must be “medically necessary”. Specifically, N.J.S.A. 39:6A-2 provides:

“e. “Medical expenses” means reasonable and necessary expenses for treatment or services as provided by the policy, including medical, surgical, rehabilitative and diagnostic services and hospital expenses, provided by a licensed health care provider licensed or certified by the State or by another state or nation, and reasonable and necessary expenses for ambulance services or other transportation, medication and other services may be provided for, and subject to such limitations as provided for in the policy, as approved by the commissioner....

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 protocols, as such protocols may be recognized or designated by the Commissioner of Banking and Insurance, in connection with the Commissioner of Health and Senior Services or with the 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." *Id.*

Where there is a conflict of testimony of medical experts, generally greater weight is to be given to the testimony of the treating physician. *Mewes v. Union Building & Construction Co.*, 138 N. J. Super (App. Div. 1957). Nevertheless, "[e]xpert testimony need not be given greater weight than other evidence nor more weight than it otherwise deserves in light of common sense and experience." See *Matter of Yaccarino*, 117 N.J. 175, 196 (1989)

Findings:

Based on a thorough review of the medical evidence provided, I find that claimant has sustained its burden of proof as to medical necessity of the knee surgery on 9/12/19 and office visit on 5/20/19. It is clear that the patient sustained a knee injury in the MVA. Further, complaints and positive findings were noted in both the treating records of Dr. Spagnuola, the MDR of Dr. Lager and the IME of Dr. Berman note knee complaints and agree that there are positive findings on examination. The MDR states that the ODG guidelines require positive meniscal tearing on MRI in order to support the necessity of surgery; however, an MRI could not be done due to a spinal stimulator. The IME does not find MMI for the knee, in fact the IME recommended a right knee CT arthrogram prior to knee surgery. Given the fact that all providers agree on the need for additional knee treatment, I find that deference to the treating provider is appropriate. The treating provider was the most familiar with the patient's condition as well as the patient's inability to undergo an MRI. The documents clearly evidence ongoing knee pain and positive findings on exam despite conservative treatment. I accept Dr. Spagnuola's recommendation for surgery. I also note that the follow up exam on 9/20/19 reported good progress with surgery and post-surgical PT. Additionally, it is noted that the subsequent office visits and the post-operative PT were paid by respondent. As such, the demand is awarded in full.

Attorney Fees:

Having determined that the claimant has prevailed, the attorney for the claimant is entitled to an award of fees and costs and the undersigned must now evaluate that claim. The attorney for the claimant has submitted a Fee Certification setting forth 8.1 hours of attorney time at \$375 per hour for a total fee request of \$2,632.50. Costs are listed as the filing fee of \$225 plus elaw for total costs of \$228.90.

Rule 22 of the New Jersey No-Fault PIP Arbitration Rules provides that the costs of the proceedings shall be apportioned by the DRP and the Award may include attorney's fees for a successful claimant for hours 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.

Rule 1.5 of the Supreme Court's Rules of Professional Conduct which provides that 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.

See also Scullion v. State Farm Ins. Co., 345 N.J. Super. 431 (App. Div. 2001) and Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372 (2009).

Further, in Enright v. Lubow, 215 N.J. Super. 306 (App. Div.), cert. den. 108 N.J. 193 (1987), the Court set out seven basic factors to be included in the determination to award attorney's fees:

(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.

Claimant here is a successful party in this matter. As such, claimant's counsel is entitled to a counsel fee as a matter of law. Reviewing the factors set forth above, the issue was straightforward, there was no novelty in the issues presented, there is no any indication that the acceptance of this matter precluded the attorney from other employment, the hourly rates customarily charged by attorneys in this area of practice do include the hourly rate assessed by the attorney for the claimant. It is noted, however, the amount at issue and the result obtained is disproportionate to the counsel fee sought. Claimant's attorney has a practice devoted largely to handling PIP cases similar to this one and the attorney's level of

experience would also not adversely impact on the amount of the fee charged. Lastly, it is noted that the fee in this matter is contingent, with recovery only if the claimant is found to be a prevailing party. In the view of the undersigned, the most compelling guideline is the guideline which requires that the counsel fee must be consonant with both the amount of the award and with Rule 1.5 of the Supreme Court's Rules of Professional Conduct.

Taking note of all of these factors, and most importantly noting the emphasis on the amount of the counsel fee being "in an amount consonant with the award" as directed by N.J.S.A. 39:6A-6(g) and N.J.A.C. 11:3-5.6 (d) 3, the undersigned concludes that the appropriate fee in this case is \$1,500 and that fee is found to be consonant with both the amount of the award and Rule 1.5 as per Enright, supra. The claimant's attorney is also awarded 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
Seaview Orthopaedics	\$5,463.81	\$5,463.81	Seaview Orthopaedics

The awarded amounts are subject to:

- Deductibles
- Co-payments
- Medical fee schedule
- Policy limits

This Award is subject to respondent's \$15,000 policy limit.

- 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

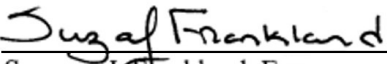
Attorney's Fees and Costs

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:\$ 1,500

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

Entered in the State of New Jersey



Suzanne J. Frankland, Esq.
Dispute Resolution Professional

Date:04/08/20