A M E R I C A N A R B I T R A T I O N A S S O C I A T I O N
NO-FAULT/ACCIDENT CLAIMS

In the Matter of the Arbitration between

(Claimant)

v.

FIRST TRENTON INDEMNITY CO.
(Respondent)

AAA CASE NO.: 18 Z 600 03851 00
INS. CO. CLAIMS NO.: SME 197171
DRP NAME: Nicholas J. Fano
NATURE OF DISPUTE: Failure to Cooperate,

AWARD OF DISPUTE RESOLUTION PROFESSIONAL

I, THE UNDERSIGNED DISPUTE RESOLUTION PROFESSIONAL (DRP), designated by the American Arbitration Association under the Rules for the Arbitration of No-Fault Disputes in the State of New Jersey, adopted pursuant to the 1998 New Jersey "Automobile Insurance Cost Reduction Act" as governed by *N.J.S.A. 39:6A-5, et. seq.*, and, I have been duly sworn and have considered such proofs and allegations as were submitted by the Parties. The Award is **DETERMINED** as follows:

Injured Person(s) hereinafter referred to as: injured patient.

1. ORAL HEARING held on 8/23/00.

2. NO ONE APPEARED at the oral hearing(s) .

ALL PARTIES appeared telephonically.

3. Claims in the Demand for Arbitration were NOT AMENDED at the oral hearing (Amendments, if any, set forth below). STIPULATIONS were not made by the parties regarding the issues to be determined (Stipulations, if any, set forth below).

4. FINDINGS OF FACTS AND CONCLUSIONS OF LAW:

The medical issue in this case involves a determination of whether neurodiagnostic testing, bilateral lower NCV and EMG testing, was medically necessary, reasonable and causally related to the injuries in this car accident. However, the initial issue involves a determination of whether this claim is barred because of a failure of the injured patient to cooperate with the respondent insurance carrier.

Respondent requests a dismissal of this action indicating that there was a refusal to cooperate by the injured patient in this case. Respondent's submissions indicate the following:

1. On 7/30/99 respondent's investigator went to the address listed by the injured patient. It was an apartment building but the investigator was unable to locate the patient's name on any of the six (6) mailboxes at that building.
2. On 8/6/99 the investigator called the patient's personal attorney and left a message that he would like to schedule a statement of the injured patient.
3. On 8/19/99 the investigator again called the patient's attorney and was advised to send a letter requesting that a statement date be scheduled.
4. On 9/2/99 the investigator sent a letter to the patient's attorney requesting that a statement date be scheduled.

Both parties agree that the injured patient's name does in fact appear on the police report in this case.

Rule 17 of the AAA provides that the arbitrator may establish the extent of and schedule for any "exchange of information pertaining to the subject matter of the arbitration, including, but not limited to the carrier's rights under N.J.S.A. 39:6A-13 or as provided by the applicable policy of insurance".

The relevant statute does not reference the taking of a statement under oath of any person.

The standard policy of insurance however does provide for the statement under oath of the insured. Respondents often contend that they are absolutely entitled to an S.U.O.; that they have an unfettered right to same without any need to show cause for same.

The Appellate Division in the case of N.J.A.F.I.U.A v. Jallah, 256 N.J.Super. 134 (App.Div.1992) held that a statement under oath is required when that request is based on standards of reasonableness and fairness. That case specifically dealt with a request for a statement under oath of the insured wherein the respondent asserted that the right to a statement arose by the terms of the insurance policy issued by the respondent. In that case there was a suspicion of fraud. The Court stated that review of the specific facts of each case is appropriate. The Court went on to state that a dismissal of an otherwise deserving claim for failure to submit to a statement should be reserved for egregious breaches. The Court referred to a dismissal as "a draconian remedy".

Subsequent to the Jallah case, in the unpublished case of Allstate v. Back & Neck Center of Brick, (A-3574-95), the Appellate Division referenced the Jallah case and held that unless there is actual evidence of fraud the carrier does not have the right to request a statement under oath. The Court there held that the arbitrator ultimately has full discretion in this regard.

Our Appellate Division has continually held that the arbitrator always has full discretion in deciding all issues in the AAA PIP arbitration setting, as so stated in Commerce Bank v. DiMaria Construction, 300 N.J.Super. 9 (App.Div.1997) and State Farm v. Molino, 289 N.J.Super. 406 (App.Div.1996).

Most recently, the Appellate Division reaffirmed the doctrine that any request by a carrier for a statement under oath is within the sound discretion of the arbitrator. In Pennsylvania National Mutual Casualty Insurance Company v. Chiropractic Care Center, et al., unpublished,

Appellate Division, decided 2/23/99, A-1756-97T2, the Court stated that the reasonableness of a carrier's request for a statement under oath in the AAA PIP arbitration setting is ultimately to be determined by the arbitrator assigned the matter by the American Arbitration Association. In that case the insurance carrier filed a Declaratory Judgment action seeking to remove the arbitration demand from the jurisdiction of the American Arbitration Association and have the Court declare that there was no coverage since the injured claimant(s) failed to appear for a statement under oath. In that case the attorney for the medical provider contended that given the time lapse of the request for the examination under oath, which was made more than one (1) year after the accident and seven (7) months after the injured claimants had settled their bodily injury claims, and the fact that the injured parties were unavailable, the examination under oath should not be compelled. The Court ultimately held that "[w]e are satisfied that, while compliance with a reasonable request for an examination under oath is a prerequisite to coverage, the issue of whether the carrier's conduct… excused compliance is for the arbitrator to decide and that, therefore, the PIP claim is subject to arbitration" - at 4.

Likewise in the unpublished Appellate Division case of Advanced Chiropractic Center v. General Accident Insurance Company, decided 3/21/00, A-2057-98T4, the Court held that where there was a failure of an injured patient to attend a Court ordered statement under oath and there was no egregious breach of the duty to submit to such a statement, and the only "evidence" of fraud was the suspicion of the carrier, there was no basis to find the provider's claim for PIP benefits fraudulent. Accordingly, a dismissal of the claim for failure of the injured patient to attend a Court ordered statement under oath was too harsh and, a lesser sanction, such as suppression of the testimony of the patient, should have been imposed. In that case the medical provider filed a lawsuit in Superior Court to collect medical bills from the insurance carrier. There was a Court Order compelling an examination under oath of the injured patient. The Appellate Division remanded the matter to the Trial Judge to consider less severe sanctions than the sanction dismissing the medical provider's claim. The Appellate Division there held however that a carrier need not show fraud to be entitled to a statement under oath.

Accordingly, our Courts have basically held that a carrier is entitled to a statement under oath if the request is considered reasonable within the sound discretion of the arbitrator. Thus, an arbitrator must consider the following elements in deciding whether a requested statement under oath should be compelled:

1. Whether there is a sufficient showing of need for requesting the S.U.O.
2. Whether the request for a statement under oath is reasonable and "timely"; i.e., When the carrier first received notice of the treatment in question and when the carrier first scheduled the statement.
3. Whether there is evidence of fraud.
4. The availability of the individual from whom the statement is requested.

Where there is a request for a dismissal of an action for a failure to comply with a requested statement under oath, the arbitrator must determine whether the failure to comply with that request was egregious.

As stated by the Supreme Court of New Jersey in Ohio Casualty Insurance Company v. Benson, 187 N.J. 191 (1981), New Jersey has a policy of favoring arbitration as a speedy and inexpensive method for settling disputes. The Supreme Court cited Carpenter v. Bloomer, 54 N.J.Super. 157, 162 (App.Div.1959) for the holding that arbitration is favored because it is a speedy, inexpensive and amicable method of settling disputes.

In this case I find that the respondent failed to make a threshold showing of why a statement under oath was requested in the first place in this case. That is, there has been absolutely no showing of need regarding the statement. Accordingly, the respondent has not satisfied the initial threshold requirement.

Furthermore, I do not find a lack of cooperation by the patient in this case. In other words, although the investigator contacted the injured patient's personal attorney, there was no follow up by the investigator or attempt to schedule the hearing after the 9/2/99 letter sent by the investigator to the patient's attorney. There was no refusal by the injured patient to appear for a statement under oath in this case.

Accordingly, I do not find a lack of cooperation on the part of the injured patient in this case and, accordingly, the respondent's request for dismissal based upon a lack of cooperation is denied.

The evidences in this case revealed that this 42 year old male was involved in a motor vehicle accident on 6/21/99. On 7/19/99 he underwent bilateral NCV and EMG testing of his lower extremities by the petitioner medical provider as well as an office visit on that date with this provider. A report from Apex Chiropractic Center dated 7/19/99 indicates that this patient had continued episodes of severe pain, spasm, numbness and tingling radiating into an extremity. A report from Neuro Muscular Medical Group dated 7/19/99 indicates that this patient was complaining, among other things, of lower back pain radiating to the lower extremities along with pain and tenderness in that region. The report also sets forth the causal relationship between the injuries and the accident in question.

Given the patient's complaints of numbness and radiating pain into both extremities I find that the bilateral EMG and NCV testing were medically reasonable and necessary because of the injuries sustained in this accident.

The parties consented to having the bills subject to application of the fee schedule.

5. MEDICAL EXPENSE BENEFITS:

Awarded

Provider	Amount Claimed	Amount Awarded	Payable to
Neuro Muscular Med. Group	$1,578.00	$1,578.00**	Neuro Muscular Med. Group

Explanations of the application of the medical fee schedule, deductibles, co-payments, or other particular calculations of Amounts Awarded, are set forth below.

**Subject to application of the fee schedule by consent of the parties.

6. INCOME CONTINUATION BENEFITS: Not In Issue

7. ESSENTIAL SERVICES BENEFITS: Not In Issue

8. DEATH BENEFITS: Not In Issue

9. FUNERAL EXPENSE BENEFITS: Not In Issue

10. I find that the CLAIMANT did prevail, and I award the following COSTS/ATTORNEYS FEES under N.J.S.A. 39:6A-5.2 and INTEREST under N.J.S.A. 39:6A-5h.

(A) Other COSTS as follows: (payable to counsel of record for CLAIMANT unless otherwise indicated): $325.00

(B) ATTORNEYS FEES as follows: (payable to counsel of record for CLAIMANT unless otherwise indicated): $900.00

(C) INTEREST is as follows: waived per the Claimant. $.

This Award is in **FULL SATISFACTION** of all Claims submitted to this arbitration.

9/20/2000
Date

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Nicholas J. Fano, Esq.