

**AMERICAN ARBITRATION ASSOCIATION  
NO-FAULT/ACCIDENT CLAIMS**

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In the Matter of the Arbitration between

(Claimant)

v.  
AMICA MUTUAL  
INSURANCE COMPANY

(Respondent)

AAA CASE NO.: 18 Z 600 10365 03  
INS. CO. CLAIMS NO.: L15200202705D  
DRP NAME: John J. Fannan  
NATURE OF DISPUTE: MEDICAL  
NECESSITY

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**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: The Claimant

1. Oral Hearings were held on: October 14, 2003
2. ALL PARTIES APPEARED at the oral hearing(s).

NO ONE appeared telephonically.

3. Claims in the Demand for Arbitration WERE NOT amended at the oral hearing as permitted by the DRP (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:**

I find the claimant was injured as the result of an automobile accident which occurred on April 19, 2002. I further find that the claimant was eligible to make claim for PIP benefits pursuant to the terms and conditions of a policy of automobile insurance issued to her by the respondent.

According to the records, the claimant sustained a number of injuries as a result of the accident including cervical sprain/strain, postero-central disc protrusion at L5-S1, head trauma with post-concussion syndrome, post-traumatic headaches and blurred vision,

pain and ringing in left hear and problems with right ear, left carpal tunnel syndrome and left shoulder injury.

During the course of her treatment by Dr. Patel, the claimant was referred to Dr. Haidri for neurological evaluation. During her first visit to the office of Dr. Haidri, she informed the Doctor that during the accident she had struck her head against some part of the car and sustained a swelling over the left fronto-temporal area. She was confused after the accident, felt nauseated and dizzy and noted blurring of vision “right away”.

The claimant, who stated she was asymptomatic prior to the accident, experienced increasing symptoms, including headaches and blurring of vision in both eyes. Dr. Haidri diagnosed post-concussion syndrome, post-traumatic headaches and blurring of vision and ordered ophthalmological consult. A follow-up visit noted worsening of her symptoms. Dr. Haidri ultimately referred the claimant to Dr. James Cinberg, an ear, nose and throat specialist who first examined the patient in December, 2002. Dr. Cinberg requested Certification to perform a number of different tests, some of which were approved by the respondent but others of which were denied.

The sole issue pending before this arbitration is the claimant’s request for approval of additional ENT Testing and/or treatment from Dr. Cinberg. Specifically, Dr. Cinberg seeks authorization to perform the following tests: posturography, electro-cochleography, otoacoustic emissions. Dr. Cinberg in a Certification dated June 25, 2003 indicated he suspected there may be a “lesion” present, which could only be further diagnosed and treated after additional testing. In a letter dated 3/24/03 addressed to claimant’s counsel, Dr. Cinberg notes that the tests he had requested were “absolutely necessary” to insure the future good health of the claimant “in that inattention to a lesion, that these tests might permit me to identify, will result in permanent decrease in the quality of her life given the results of these tests, specifically the subnormal right inner ear response to caloric stimulation, her symptoms and her history.”

The respondent’s determination not to authorize the testing is based primarily on a report by Dr. Stephen F. Freifeld, also an otolaryngologist, dated January 13, 2003. Dr. Freifeld examined the claimant and performed a number of tests and concluded the patient did not have a hearing impairment. He further concluded the intermittent noise which the patient described hearing “is not, in and of itself, disabling.” He further concluded that the claimant’s history suggested she has post-concussion syndrome which “may result in symptoms of imbalance, occasional episodes of true vertigo or spinning, and a noise in her ears.” Dr. Freifeld then concludes “this syndrome is generally self-limiting...with passage of more time, symptoms will improve.” He concluded no further treatment was necessary. Dr. Freifeld subsequently reviewed the results of the testing performed by Dr. Cinberg which he concluded did not show any “significant peripheral inner-ear impairment.” Dr. Freifeld indicated that his prior opinion was unaffected by these test results.

The following documents have been submitted for review and consideration:

- Demand for Arbitration;
- Certification of Dr. Cinberg;
- Certification of claimant;
- Letter of Dr. Cinberg (3/24/03) with test results;
- Reports and records of Dr. Haidri;
- CV of Dr. Cinberg;
- Certification of Services;
- Report of Dr. Freifeld;
- Supplemental report of Dr. Freifeld;
- CV of Dr. Freifeld;
- PIP Application;
- PIP Payment Ledger;
- Notice of Commencement of Medical Treatment from Dr. Cinberg;
- Request for Pre-Certification by Dr. Cinberg with Treatment Plan attached;
- EOB from ALTA;
- Letter from ALTA Services regarding Certification/Non-certification of requested testing;
- HCFA Forms;
- MRI Report.

Additionally, the claimant was present and testified. She stated she had experienced no prior ear/head/neck injuries or problems and no prior episodes of dizziness or ringing in her ears. She reaffirmed the fact that she struck her head on the side window of her vehicle which caused her vision to “go black and then come back”. She felt dizzy and nauseous and went to her family doctor (Dr. Patel) complaining of a constant sound in her ears with headaches, both of which caused an inability to sleep. She claimed that when she rises, she feels like she is going to fall, a circumstances she described as a balance problem not dizziness. She did admit to episodes of dizziness several times per week as well as daily headaches and sound in her ear. She has trouble concentrating and does feel she experienced some hearing loss. She felt these problems had continued unabated since the time of the accident.

As to the request for further treatment, no specific treatment has been identified. Therefore, it is impossible to determine whether the treatment which will be proposed by Dr. Cinberg is reasonable or medically necessary. Therefore, no additional treatment can be authorized at this time, and the portion of the Demand for Arbitration which seeks to compel the respondent to be responsible of future treatment from Dr. Cinberg is denied as untimely.

What remains is the issue of the testing requested by Dr. Cinberg. Where as here the issue is medical necessity, the claimant has the burden of proof to a preponderance of the evidence. Where there is a dispute, the burden rests on the claimant to establish that the services for which he seeks PIP Payment were reasonable, necessary and causally related to an automobile accident. Miltner v. Safeco Insurance Company of America, 175 N.J.

Super 156 (Law Div. 1980). The necessity of medical treatment is a matter to be decided in the first instance by the claimant's treating physicians, and an objectively reasonable belief in the utility of a treatment or diagnostic method based on the credible and reliable evidence of its medical value is enough to qualify the expense for PIP Purposes. Medical expenses have been considered necessary even if the services only provide temporary relief from symptoms and will neither cure nor repair a medical condition or problem. Miskofsky v. Ohio Casualty Insurance Company, 203 N.J. Super 400 (Law Div. 1984). The necessity of medical treatment is a matter to be decided in the first instance by the claimant's treating physicians, and an objectively reasonable belief in the utility of a treatment or diagnostic method based on the credible and reliable evidence of its medical value is enough to qualify the expense for PIP purposes. Thermographic Diagnostics v. Allstate, 125 N.J. 491 (1991). While the fact that a treatment is only intended to provide relief from symptoms is not alone a reason to deny benefits, such treatment must still be reasonable and necessary. Palliative care is compensable under PIP when it is medically reasonable and necessary. Elkins v. New Jersey Manufacturers Insurance Co., 244 N.J. Super 695 (App. Div. 1990). N.J.A.C. 11:4-2 defines medical necessity as medical treatment or diagnostic testing which is consistent with "clinically supported symptoms." Clinically supported is further defined as a personal examination in which the physician makes an assessment of subjective testing, complaints, observations, objective findings, neurologic indications and physical tests. Nowhere does the regulation require that the physician make an objective findings in order to administer a diagnostic test. Rather, the regulations clearly contemplate that such findings (or the lack thereof) are only a portion of a physician's assessment of the patient in his decision making process. In fact, the regulations require the recording and documentation of positive and negative findings and conclusions on the patient's medical records.

Additionally, pursuant to Case Law developed in this State, 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 Company, 45 NJ Super 89 (App. Div. 1957); Biaco v. H. Baker Milk Company, 38 NJ Super 109 (App. Div. 1955); Abelit v. General Motors Corporation, 46 NJ Super 475 (App. Div. 1957).

NJSA 30:6A-4 requires that every automobile liability insurance policy "shall provide personal injury protection coverage...for the payment of benefits without regard to negligence, liability or fault of any kind, to the named insured...who sustained bodily injury as the result of an accident" which results from the use of an automobile. Read in conjunction with NJSA 39:6A-2(e), it is clear that medical expenses must be both reasonable and necessary, as well as causally related to subject accident. Legislation involving automobile insurance must be liberally construed to give the broadest protection to the automobile accident victims consistent with the language with the pertinent Statute. Brokenbaugh v. New Jersey Manufacturers Insurance Company, 158, NJ Super 424 (App. Div. 1978).

A "Medical Expense" means the reasonable and necessary expenses for treatment or services rendered by a provider, including diagnostic services. NJAC 11:3-4.2. That same section of the Administrative Code defines "diagnostic test" as follows: "A

medical service or procedure...intended to assist in establishing a medical, dental, physical therapy, chiropractic or psychological diagnosis, for the purpose of recommending or developing a course of treatment for the tested patient to be implemented by the treating practitioner or by the consultant.”

“Medically Necessary” is defined in NJAC 11:3-4.3 as medical treatment or diagnostic testing which is consistent with the clinically supported symptoms, diagnosis or indications of the injured person. The same section of the Administrative Code defines “clinically supported” as meaning that a health care provider prior to selecting, performing or ordering the administration of a treatment or diagnostic has “(1) personally examined the patient to insure that the proper medical indications exist to justify ordering the treatment or tests; (2) physically examine the patient including making an assessment of any current and/or historical subjective complaints, observations, objective findings, neurologic indications and physical tests; (3) considered any and all previously performed tests that relate to the injury...;(4) recorded and documented these observations....”

Dr. Cinberg, as the treating physician, has made a determination as to what additional testing is necessary in order to diagnose and treat his patient. Dr. Freifeld concludes the symptomatology demonstrated by the claimant is indicative of a post-concussion syndrome, which symptoms will resolve over time. That observation was made at his examination in January 2003. At the hearing of this matter, in October 2003, the claimant indicated those symptoms continued unabated.

Clearly, Dr. Cinberg and Dr. Freifeld enjoy equally impressive qualifications. It is just as clear the two doctors do not dispute the causation of the claimant’s injuries, nor their very real nature. Their dispute is on how the treatment (including the diagnosis) of the claimant should proceed. As the Court pointed out in Miskofsky, “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 type and extent of treatment needed for a particular injury.” (citing *Iavocoli, No Fault and Comparative Negligence in New Jersey*, 1 Ed. 1973, Section 12 at 42).

I find the reports and records submitted by the treating physician do establish to a preponderance of the evidence that the testing requested is reasonable, medically necessary and for a condition or conditions causally related to the subject accident and direct that the respondent shall be responsible for payment of the costs of the three tests sought by Dr. Cinberg, i.e posturography, electro-cochleography, otoacoustic emissions. That payment shall be subject to application of the New Jersey Fee Schedule, including usual, customary and reasonable billing considerations.

I further find the claimant was successful and is entitled to an award of counsel fees. In NJ Coaliton for Healthcare v. DOBI, 323 NJ Super 207 (App. Div. 1999) the Court noted that “an award of counsel fees to an insured who successfully obtains an Arbitration Award against an insurance carrier for payment of PIP Benefits...has been the statutory and historical juris prudence of our State.” The Courts have construed that Rule 4:42-

9(a)(6) which allows for an award of counsel fees “in an action upon a liability or indemnity policy of insurance, in favor of a successful claimant” to permit an award of attorney’s fees and judicial actions brought under the PIP Statute. The cases construing the propriety of an award of counsel fees are premised on the “claimant” being “successful”. The definition of a “successful claimant” is given a liberal interpretation so as to include settlements effectuated prior to trial. Olewinsky v. Aetna Cas. & Sur., 234 NJ Super 429 (Law Div. 1988). See also Brewster v. Keystone Ins. Co., 238 NJ Super 580 (App. Div. 1990). Counsel for the claimant has submitted a Certification of Services seeking counsel fees in the amount of \$1,881.25 together with costs of \$425.00. Counsel for the respondent has entered an objection to an award of counsel fees in that amount, noting correctly that at least a portion of that billing reflects time expended on an Emergent Application in this matter, which application was unsuccessful. I have reviewed the line entries on the Certification of Services and find indeed the number of entries do pertain to the Emergent Application, which was unsuccessful and for which the claimant is not entitled to an award of counsel fees. However, there are clearly services that were rendered by counsel which directly impacted on the outcome of this matter and I find that an award of counsel fees in the amount of \$875.00 is consonant with the matters at issue herein, and is consistent with the requisites of RPC 1.5 as well as consistent with the degree of effort, expertise and experience required for a successful prosecution of this claim. I also award costs in the amount of \$285.00. I further find the award of counsel fees in that amount to be consistent with the mandates of the Court in Enright v. Lubow, 215 NJ Super 306, (App. Div.), cert. Denied 108 NJ 193 (1987) as well as of Scullion v. State Farm, 345 N.J. Super 431 (App. Div. 2001).

This matter was the subject of an oral hearing conducted on October 14, 2003. The hearing was held open for a period of one week to afford the parties the opportunity to make additional submission, which both parties did, and thereafter was declared closed.

#### 5. MEDICAL EXPENSE BENEFITS:

##### NOT AT ISSUE

Provider	Amount Claimed	Amount Awarded	Payable to

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

**The claimant is awarded approval for the following testing to be performed by/prescribed by Dr. Cinberg: posturography, electro-cochleography and otoacoustic emission tests. The respondent is found responsible for payment of these tests, subject to application of the New Jersey Fee Schedule, including usual, customary and reasonable billing considerations.**

#### 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): \$285.00

(B) ATTORNEYS FEES as follows: (payable to counsel of record for CLAIMANT unless otherwise indicated): \$875.00

(C) INTEREST is as follows: DENIED AS NOT APPLICABLE.

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

December 12, 2003  
Date

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John J. Fannan, Esq.