

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

In the Matter of the Arbitration between

(Claimant)

v.
MET LIFE
INSURANCE COMPANY

(Respondent)

AAA CASE NO.: 18 Z 600 12534 02
INS. CO. CLAIMS NO.: A1A97544
DRP NAME: John J. Fannan
NATURE OF DISPUTE: CAUSATION
AND MEDICAL NECESSITY

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 Patient/Claimant CHS

1. Oral Hearings were held on: February 13, 2003
2. ALL PARTIES APPEARED at the oral hearing(s).

NO ONE appeared telephonically.

3. Claims in the Demand for Arbitration WERE 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).

The claim of the patient/claimant CHS was amended to include the bill of Santoro Chiropractic in an amount of \$6,650.00 for dates of service 6/5/02 through 11/21/02.

The claim was also amended to reflect the correct date of accident to be 1/25/02.

4. FINDINGS OF FACTS AND CONCLUSIONS OF LAW:

This claim is a consolidated action involving the claims of a number of different providers for treatment to the patient/claimant CHS for injuries allegedly resulting from an automobile accident which occurred on January 25, 2002. I find the patient/claimant

CHS 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.

The patient/claimant CHS testified that at the time of the accident, her vehicle was moving slowly (almost stopped) at an entrance ramp onto Route 3. She herself at the time was turned to her left looking at traffic when her vehicle was struck from the rear, propelling it forward and causing her (she thought) to strike the left of her body (including her head) on the left door. The claimant/patient was taken to the emergency room at Passaic General Hospital by East Rutherford Emergency Squad. There she complained of neck and back pain, left-sided lower back pain and a swollen left cheek. She indicated that she was “dazed” but unsure if she had “passed out”. She was discharged the same day but her symptoms worsened and on January 29, 2002, she came under the care of the Mayhill Medical Group (Dr. Hermann). She indicated at her initial visit with Dr. Hermann that she had been asymptomatic prior to the accident despite her involvement a few years ago in an accident in which she injured her head and lower back. At the time of this initial visit she complained of neck and back pain. The physical examination conducted by Dr. Hermann revealed that she walked with a limp due to low back pain, experienced muscle weakness in the left upper and left lower extremity, tenderness to palpation in the paravertebral area with notable significant muscle spasm and limitation of neck movement. An examination of the lumbar spine revealed tenderness to percussion as well as limitation of movement with pain. An examination of the left shoulder revealed pain induced limitation of movement. Based upon the subjective complaints and the physical examination, Dr. Hermann formed the following diagnosis: acute traumatic cervical and lumbar spine sprain/strain with muscle spasm; acute traumatic left shoulder sprain/strain; acute traumatic left side of face edema and edema of the neck; acute traumatic left anterior chest wall contusion; and post-traumatic concussive syndrome headaches and dizziness. The patient was placed on a program of physical therapy, which was to be localized to the cervical and lumbar spine and left shoulder. The modalities involved would consist of ultrasound and electric stimulation. At this initial visit (1/29/02) the patient was advised to obtain MRIs of the left shoulder (“to rule out rotator cuff tear”) and MRIs of the cervical and lumbar spine (“to rule out herniated and bulging discs with nerve impingement”). These MRIs were conducted on January 30, 2002 at Progressive Open MRI. The patient continued to treat with Mayhill Medical Group through 5/8/02. During the course of this treatment, the patient was also referred to Dr. Thomas Findley for neurological consultation and neurodiagnostic tests (EMG, NCV). The report of Dr. Hermann also notes that at some time the patient was advised to obtain a chiropractic consultation for spinal adjustments and spinal manipulations. On June 5, 2002, the patient came under the care of Santoro Chiropractic Center complaining at that time of neck pain, nervousness, numbness in fingers, pins and needles in leg, low back pain and shoulder pain. An orthopedic examination and testing revealed pain and spasticity of the entire cervical and lumbar spine with hyperesthesia. Santoro Chiropractic Center began a program of manual manipulation and adjunctive physiotherapeutic modalities including strengthening/rehabilitation exercise and massage. She continued to treat with Santoro Chiropractic Center through 11/21/02.

The following bills are claimed to be due and owing:

1. To Passaic General Hospital (\$275.00) for date of treatment 1/25/02;
2. To Passaic Emergency Physicians (\$150.00) for date of treatment 1/25/02;
3. To North Jersey Primary Care (\$175.00) for date of service 1/27/02;
4. To Hackensack Radiology Group (\$90.00) for date of service 1/27/02;
5. To Progressive Open MRI (\$2,985.00) for date of service 1/30/02;
6. To Mayhill Medical Group (\$6,390.76) for dates of service 1/29/02 through 5/8/02;
7. To Thomas Findley, M.D. (\$2,600.00) for dates of service 3/7/02 and 4/12/02;
8. To Santoro Chiropractic Center (\$6,650.00) for dates of service 6/5/02 – 11/21/02.

The respondent argued the patient/claimant CHS had been involved in an accident in 1991 in which she was injured, and had injured her shoulder in a fall at work just prior to this accident. Also, the respondent relies on the report by Vincent W. Antonetti, Ph.D., President and Director of Engineering of Amatech Review. This “biomechanical evaluation” is offered by the respondent as establishing that the subject accident was a low speed, minimum impact accident which would not have subjected the patient to any greater “head G-forces” than she might experience during the course of ordinary living (e.g. more than a “slap on the back” but less than a “hop off a step”.)

The patient/claimant CHS was present and testified. She agreed that there was virtually no damage to her car but the impact jolted the rearview mirror loose. She admitted to having fallen on her left arm and leg approximately ten days prior to this accident while at work but minimized that that incident and stated she “felt fine” at the time of this collision. She also admitted to a prior automobile accident some seven to eight years ago for which she was hospitalized.

The numerous documents submitted included:

- Demands for Arbitration;
- Medical bills;
- Assignment forms;
- Emergency room treatment record;
- Reports of Mayhill Medical Group (Dr. Hermann);
- Reports of Santoro Chiropractic Center (Dr. Santoro);
- Reports of Dr. Findley;
- IME report of Dr. Seth Cain;

MRI reports;
Neurodiagnostic test results;
Mayhill Medical Group patient history;
Physical and neurological evaluation sheet;
Report of Amatech Review (Dr. Vincent W. Antonetti);
Transcript of patient/claimant CHS Examination Under Oath;
Letter from Dr. Cain (10/17/02);
Letter from Concentra terminating chiropractic treatment after 11/19/02;
Certifications of Services.

First, we must deal with the question of causation as addressed by the Amatech report. Clearly, the attempt to dismiss that report as “junk science” is misplaced. The report is based on principles of physics. The respondent references the matter of Persley v. NJ Transit Bus Operation, 357 NJ Super 1 (App. Div. 2003) as establishing the admissibility of a biomechanical analysis into evidence. The facts in Persley have to do with the admissibility of a video simulation. The Persley Court found the video conformed with nearly all the evidence surrounding the subject accident and was authenticated and did not incorporate a testimonial component addressing extraneous information “which could have potentially been used by the jury as substantive evidence.” However even in the Persley case, the engineer who testified as the accident reconstruction expert (Dr. Nolte) conceded that because he was “not a biomechanical engineer, he could not say ...the force with which plaintiff’s head struck the seat in front of him.” At trial, Dr. Nolte further acknowledged that, if the various factors he used in his calculations, such as the speed of the bus, were not accurate, “the video would not be an accurate representation of the movement of plaintiff’s body.” In Suanez v. England, 353 NJ Super 191 (App. Div. 2002), the issue as stated by the Court was whether there was a “reliable scientific foundation for purported expert opinion testimony by a biomechanical engineer that a low impact automobile accident cannot cause a herniated disc.” There the Court noted that the biomechanical engineer who testified (Dr. Thibault) was not a physician or medical researcher, that his education and training are in the field of physics and mechanical engineering with only basic training in anatomy, physiology and pathology. Dr. Thibault had not himself conducted or observed tests of low impact collisions on humans and his knowledge of the subject was derived solely from literature in the field. Therefore, the reliability of Dr. Thibault’s opinion turned on whether that literature provided a reliable scientific foundation for the conclusion that a low impact automobile accident cannot cause a herniated disc. None of that literature was introduced into evidence.

In the matter at hand, the credentials of Dr. Antonetti have not been introduced into evidence. It is not established that he is a biomechanical engineer. Further, although his report refers to tables and bar graphs, the source of those is not provided. In addition, clearly Dr. Antonetti’s report relies on certain factual assumptions which are not fully explained. For instance, the speed of the vehicle which struck the claimant/plaintiff’s vehicle is set at 4.9 mph, apparently based upon only a review of the photographs depicting the damage to the two vehicles, and comparison of that damage (as well as the dollar amount of repair estimates) to unexplained “models”. There is no indication that

Dr. Antonetti ever physically inspected the vehicles. Further, Dr. Antonetti's report makes the observation that, despite the fact the Oldsmobile had a front bumper piston type energy absorber, due to its age it "undoubtedly had significant rust and road grime buildup" and these energy absorbers "were at least partially frozen and not functioning properly." Absolutely no basis for that assumption is offered, nor is the significance of that observation explained. Further, there is no mention in the report of the significance of the fact that, by her own testimony, the claimant/patient was turned to the left to view oncoming traffic. The report does not address whether physical implications may be far more severe for a passenger in a vehicle experiencing minimal G force if that passenger's body is twisted as opposed to facing directly forward. In fact, nowhere does the report of Dr. Antonetti address the correlation between impact G forces and physical injuries. Dr. Antonetti's report notes that the G forces to which he concludes the claimant/patient was subject were greater than that which might be expected to be experienced during a common sneeze...yet it cannot be seriously contended that more than a few spinal injuries have resulted from a sneeze in an awkward position.

I find the report of Dr. Antonetti to be conclusory and I further find that report fails to negate, as it purportedly is offered to do, a causal link between the subject accident and the injury sustained by the claimant.

Contrary to respondent's representations, I found the claimant/patient's testimony to be generally credible and convincing, albeit not without occasional uncertainties easily attributable to the imperfection of memory rather than to a deceitful intent.

Further, as to questions of causation, the PIP Statute (NJSA 39:6A-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 injuries as the result of an accident' which results from the use of an automobile. Personal Injury Protection coverage is further denied to mean "payment of reasonable, medical expense benefits." With respect to causation, the Courts in this State have consistently held that it is not necessary that an accident be the sole proximate cause of an injury'; rather, the Courts have held that where there is a "substantial nexus" between the occupancy or use of the vehicle in the injury, PIP Payments are due and owing. See Sobeck v. Centennial Insurance Company, 234 NJ Super 445, (Law Div. 1998). See also Burns v. Market Transition FAC., 281 NJ Super 304 (App. Div. 1995). Once the treatment in questions is shown to be reasonable, necessary and casually related to the injuries sustained in the accident in question, the PIP carrier becomes obligated by Statute to pay such benefits as they come due. Aetna Casualty & Surety Company v. Para Manufacturing Company, 176 NJ Super, 532 (App. Div. 1980).

I find the reports and records submitted by the claimants do establish to a preponderance of the evidence the substantial nexus between the injuries for which treatment was administered and the subject accident.

As to questions of 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.

There is no doubt that the bills of Passaic General Hospital and Passaic Emergency Physicians were for emergency care, having been rendered on the date of the subject accident. Payment of those bills is awarded in the following Fee Scheduled amounts:

To Passaic General Hospital - \$176.00;
To Passaic Emergency Physicians - \$111.88.

The billing of North Jersey Primary Care (\$175.00) and Hackensack Radiology Group (\$90.00) is for services rendered not on the date of the accident but on January 27, 2002. No explanation is given as to why these services were rendered two days after the accident nor is the medical necessity or reasonableness of these services established. Therefore, that portion of the bill which seeks payment of these two bills is denied.

With respect to the billing of Dr. Findley (\$2,600.00), I find both his records and reports and those of Mayhill Medical Group substantially support the necessity and reasonableness of the administration of the tests which were performed. NJAC 11:3-

4.5(a)(1) and (2) establish the Needle EMG and NCV and H-Reflex studies to be reimbursable when used to evaluate neuropathies and radicular syndrome where clinically supported findings reveal a loss of sensation, numbness or tingling and/or signs of atrophy. The symptoms such as would give rise to the administration of these tests are more than adequately documented in the reports of Dr. Findley and Dr. Hermann. Therefore, the bill of Dr. Findley is awarded in the Fee Scheduled amount of \$1,921.00.

With respect to the bill of Mayhill Medical Group, I note that only the initial examination on 1/29/02 produced a report. Although subsequent re-examinations are billed, absolutely no reports have been introduced which would in any way describe those office visits, their nature or purpose, and the portion of the bill which seeks payment of those is denied. However, the treatment sessions are demonstrated by the reports and records submitted to reasonable, medically necessary and for a condition or conditions causally related to the subject accident and payment of same is awarded in the Fee Scheduled amount of \$3,093.00. This Fee Scheduled amount reflects the application of the Daily Maximum Allowable Fee of \$90.00 set forth in NJAC 11:3-29.4(m).

I further find the bill of Santoro Chiropractic Center has been shown to be for treatments reasonable, medically necessary and for a condition or conditions causally related to the subject accident and payment of same is awarded in the Fee Scheduled amount of \$4,794.00.

With respect to bill of Progressive Open MRI , it is noted that these tests were performed on the 5th day of the insured event. NJAC 11:3-4.5(b)(5) provides for the MRI to be reimbursed when used in accordance with the guidelines contained in the American College of Radiology ACR Appropriateness Criteria to evaluate injuries in numerous parts of the bodies, particularly the assessment of nerve root compression and/or motor loss. While the MRI is not normally performed within 5 days of the insured event, a clinically supported indication of neurological gross motor deficit or acute nerve root compression with neurologic symptoms may justify an MRI testing during the acute phase immediately post-injury. The reports and records submitted clearly describe the presence of muscle spasm, limited movement and pain in the neck and lumbar spine, numbness in the hand and weakness in the hand and foot, all of which describe neurological deficit. The appropriateness rating for an MRI according to the American College of Radiology ACR Appropriateness Criteria,(Cervical Spine Trauma at Variant 6) is 8 out of 9. For lumbar spine trauma with neurological deficit, that appropriateness rating is 6 out of 9 for an MRI. I find the cervical and lumbar MRIs which were administered were reasonable, medically necessary ordered in conformity with the American College of Radiology ACR Appropriateness Criteria and are reimbursable in the Fee Scheduled amount of \$1,609.44. However, with respect to the shoulder MRI, the only reference regarding the claimant/patient's shoulder condition contained in relevant pre-test reports is to shoulder pain. The American College of Radiology ACR Appropriateness Criteria regarding shoulder MRIs requires demonstrably more evidence than mere pain to warrant the administration of a shoulder MRI. I do not find the reports and records meet that criteria with respect to the shoulder MRI and payment of that portion of the claim is denied.

Finally, it is interesting to note that Dr. Cain, in his IME of the claimant/patient performed at the request of the respondent, did offer the opinion that “as part of this motor vehicle accident, she clearly suffered a major closed-head injury.”

Inasmuch as no calculation of interest has been provided, the claim for interest is deemed to have been waived.

I further find the claimants were successful and are entitled to an award of counsel fees. Counsel for the claimant Progressive Open MRI submits a Certification of Services wherein is sought counsel fees in the amount of \$1,800.00 together with costs of \$345.00. Counsel for the patient/claimant CHS submits a Certification of Legal Services wherein is sought counsel fees in the amount of \$1662.50 together with costs in the amount of \$325.00. Counsel for the respondent entered an objection to any award of counsel fees, with particular opposition noted to both the total number of hours billed by both counsel (8.0 & 9.5) as well as the hourly billing rate (\$225.00 & \$175.00). I have reviewed each and every line item entry in the Certifications of Legal Services and find that an award of counsel fees for the attorney for Progressive Open MRI in the amount of \$1100.00, plus costs of \$325.00, and to counsel for patient/claimant CHS in the amount of \$1400.00, plus costs of \$325.00, is consonant with the amounts awarded 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 note Counsel for the patient/Claimant CHS did attend an EUO of the patient/Claimant, scheduled and conducted at the request of the Respondent. I also find the amounts awarded are 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). I also award costs in the amount of \$325.00.

This matter was the subject of an oral hearing conducted on February 13, 2003. The hearing was held open to afford the parties the opportunity to make additional submissions (which all parties did) and was declared closed as of May 8, 2003.

5. MEDICAL EXPENSE BENEFITS:

Awarded

Provider Amount Claimed Amount Awarded Payable to

Passaic Gen. Hospital	\$275.00	\$176.00	Passaic Gen. Hospital
Passaic Emerg. Physicians	150.00	111.88	Passaic Emerg. Physicians
No. Jersey Primary Care	175.00	-0-	
Hackensack Radiology Gp.	90.00	-0-	
Thomas Findley, M.D.	2600.00	1,921.00	Thomas Findley, M.D.
Mayhill Medical Group	6,390.76	3,093.00	Mayhill Medical Group
Santoro Chiropractic Center	6,650.00	4,794.00	Santoro Chiropractic Center
Progressive Open MRI	2,985.00	1,609.44	Progressive Open MRI

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

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 to Counsel for Progressive Open MRI and
\$325.00 to Counsel for patient/claimant CHS**

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

**Counsel for Progressive Open MRI - \$1100.00,
Counsel for patient/claimant CHS - \$1400.00**

(C) INTEREST is as follows: Waived.

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

June 18, 2003

Date

John J. Fannan, Esq.