

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

In the Matter of the Arbitration between

(Claimant)

v.
METLIFE AUTO & HOME
INSURANCE COMPANY

(Respondent)

AAA CASE NO.: 18 Z 600 21406 03
INS. CO. CLAIMS NO.: 45875762
DRP NAME: John J. Fannan
NATURE OF DISPUTE: MEDICAL
NECESSITY & CAUSATION

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: March 24, 2004
2. ALL PARTIES APPEARED at the oral hearing(s).

COUNSEL FOR THE RESPONDENT 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 February 16, 2003. 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 by the respondent to Karen Allen.

In connection with the filing of this matter, the counsel for the claimant filed an Application for Emergent Relief, which was previously heard. The claim for emergent

relief was denied and the matter was scheduled for a hearing in the normal course of events.

What is at issue is the request of the claimant for an Order directing the respondent to pay the cost of septoplasty surgery, including surgical fees, facility fees and anesthesia fees, to correct a deviated septum which it is argued was causally related to the subject accident.

The respondent argues the request for Pre-Certification of this procedure was denied, as was the appeal, based upon a physician advisor review request conducted by Dr. Nitti.

Numerous documents have been submitted for review and consideration, including:

- Demand for Arbitration;
- Certification of Claimant;
- Police report;
- Hospital emergency room records;
- Report of Dr. Park;
- Letters of Medical Necessity of Dr. Park;
- Scan of paranasal sinuses (10/10/03);
- Results of Brain MRI;
- Letters from Drs. Cipriano & Dr. Park;
- Certification of Services;
- Hospital records;
- Report of Dr. Cipriano;
- MRI reports;
- Records of Dr. Mayer;
- Records of JFK Medical Center (2002);
- Records of Dr. Rosenblum;
- Records of Dr. Park.

In addition, the claimant appeared and testified at the hearing. It was his testimony that at the time of the accident his air bags deployed and he struck his head on the wheel. The glasses he was wearing broke on impact and at the hospital he complained of the taste of blood in his throat. He testified that while he had allergies in the past, he did not previously experience ear, nose and throat problems of the nature he has experienced since the incident.

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); Biacco v. H. Baker Milk Company, 38 NJ Super 109 (App. Div. 1955); Abelit v. General Motors Corporation, 46 NJ Super 475 (App. Div. 1957).

Further, as to the issue of causation, the Appellate Division has recently held that an individual seeking Personal Injury Protection Benefits must prove by a preponderance of the evidence that the treatment for which reimbursement is sought for an injury proximately caused by the particular automobile accident at issue. Bowe v. New Jersey Manufacturers' Insurance Company, 367 NJ Super 128 (App. Div. 2004).

The reports and records submitted by the claimant do establish the presence of a deviated septum. This is confirmed by the CT Scan performed on October 10, 2003. Further, Dr. Park indicates in his report of 12/19/03 that the claimant is suffering from a severe deviated nasal septum with sinus blockage causing inflammation and nose bleeds which Dr. Park causally relates to the subject accident. The claimant, admitting he had previously been treated and taken medication for (sinus) draws a distinction between his post-accident and pre-accident condition.

Among the documents submitted by the respondent are hospital records relating to a 2002 elbow surgery which the claimant underwent. An Anesthesia Questionnaire completed by the patient at that time contains absolutely no reference to any deviated septum or

other sinus problem. The admission form which was completed at the time of that admission does note a history of sinusitis but no respiratory distress or nasal dysfunction.

The police report submitted confirms the representation of the claimant that the air bags deployed in his vehicle upon impact.

I find the reports and records submitted by the claimant have established to a preponderance of the evidence that the claimant is presently suffering from a deviated nasal septum, which was proximately caused by the subject accident. I further find those reports and records have demonstrated to a preponderance of the evidence that the surgery which is sought to be performed by Dr. Park is reasonable and medically necessary and therefore compensable under PIP coverage afforded by the particular policy of insurance issued by the respondent.

Therefore, the relief requested by the claimant is hereby awarded and the respondent is directed to authorize payment for the nasal septal surgery requested by Dr. Park, as well as the facility fees and anesthesia fees attendant thereto. The bills for such services shall be subject to reduction by application of the New Jersey Fee Schedule, including considerations of usual, customary and reasonable billing practices, as well by application of such portion of the insured's policy of insurance deductible and co-payment as may be remain open and unsatisfied.

I further find the claimant was successful and is entitled to an award of counsel fees. Counsel for the claimant has submitted a Certification of Services wherein is sought counsel fees in the amount of \$2,030.00 together with costs of \$385.00. Counsel for the respondent has entered a vehement objection to an award of counsel fees in that amount, arguing that both the total number of hours billed (10.15) as well as the hourly billing rate (\$200.00) are excessive. Counsel for the respondent further argues the billing submitted include attorney's fees and expenses specifically attendant to the application for Emergent Relief, on which application the claimant was unsuccessful. I find that argument to be persuasive. In reviewing the line item entries on the Certification of Services and I find that an award of counsel fees in the amount of \$1100.00 is consonant with the amount 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).

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.

I find the deviated nasal septum condition diagnosed by Dr. Parks was proximately caused by the subject accident. I find the proposed corrective surgery of Dr. Park to be reasonable and medically necessary and the respondent is directed to approve payment for same, subject to reduction by application of the New Jersey Fee Schedule, including usual, customary and reasonable billing considerations, as well as any applicable portion of the insured’s policy, deductible and co-payment.

- 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 awarded in part as follows: (payable to counsel of record for CLAIMANT unless otherwise indicated): \$1100.00

(C) INTEREST is as follows: Not in issue.

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

May 3, 2004
Date

John J. Fannan, Esq.