In the Matter of the Arbitration between

Ira Klemons, D.D.S., P.C. a/s/o D.M.

CLAIMANT(s),

Forthright File No: NJ1302001487739
Proceeding Type: In Person
Insurance Claim File No: 30057W526
Claimant Counsel: Law Offices of Sean T. Hagan
Claimant Attorney File No: 13-029
Respondent Counsel: Chasan, Leyner & Lamparello
Respondent Attorney File No: 03731-7496
Accident Date: 11/08/2011

v.

State Farm

RESPONDENT(s).

Award of Dispute Resolution Professional

Dispute Resolution Professional: Patrick W. Foley Esq.

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: Assignor.

In Person Proceeding Information

A proceeding was conducted on: February 26, 2014.

Claimant or claimant's counsel appeared by telephone. 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 arbitration arises as a result of an automobile accident that occurred on November 8, 2011. On that date, the assignor of the claimant was an eligible recipient of PIP benefits from the respondent when she suffered injuries as a result of the accident. The claimant herein provided TMJ therapy to the assignor that extended out over the course of months. The respondent has not interposed any defense of this claim based upon medical necessity. Rather, the respondent also contends that the assignor of the claimant selected a reduced $15,000.00 PIP policy limit on the policy of insurance purchased from the respondent and that the $15,000.00 policy limit has been exhausted by claims previously paid by the respondent and, based upon the fact that the policy limits were exhausted, there is no basis for an award of medical benefits in this matter. The claimant maintains that the respondent has failed to adequately prove that the assignor chose a reduced policy limit and, accordingly, the undersigned should find that the standard $250,000.00 policy limits apply to this matter.

From the claimant in this matter, the undersigned has the Demand for Arbitration together with attachments thereto. In addition, the attorney for the claimant filed an arbitration statement dated August 13, 2013 with attachments thereto inclusive of a certification of services. From the respondent, the undersigned has an arbitration statement dated July 31, 2013 with attachments thereto. At the conclusion of the hearing, the respondent requested that the hearing be left open to allow it to provide a signed coverage selection form, explanations of benefits (EOBs) demonstrating payment exhausting the policy limits and any other evidence of policy exhaustion it could produce. The claimant did not object to this request provided it was given an opportunity to comment on the respondent's post-hearing submission. Both requests were granted. Accordingly, on March 7, 2014, the respondent made two post-hearing submissions with attachments thereto and, on March 14, 2014, the claimant made a post-hearing submission.

As indicated above, the assignor of the claimant was involved in an accident on November 8, 2011. In that accident, she suffered injuries and, as a result of those injuries, she sought medical treatment from various providers, including the claimant herein. No issue regarding the reasonableness and/or necessity of the treatment provide by the claimant is raised herein by the respondent. As outlined by the respondent, however, the assignor generated bills from various medical providers and those bills were paid. The respondent contends that, at some point prior to the date of hearing in this matter, the sum of $15,000.00 had been paid on behalf of the assignor and, given that the assignor had chosen lower policy limits of $15,000.00, the policy limits were exhausted. Therefore, the respondent argues that the instant Demand for Arbitration should be denied based on the fact that the undersigned has no jurisdiction to make an award once policy limits have been exhausted.

As indicated above, the claimant contends that the respondent has failed to demonstrate adequately that the assignor did, in fact, choose a lower policy limit. The claimant contends that the respondent has not shown sufficient proof that the assignor selected a reduced policy in writing nor that the payments have actually been made for medical expenses up to the reduced policy limits. The claimant notes that the standard policy is $250,000.00 and an insured must specifically select a reduced policy limit in writing. The claimant maintained at the time of hearing that the respondent has not provided a signed coverage election form electing limited PIP benefits for the policy covering this motor vehicle accident.

The claimant maintains that N.J.S.A. 39:6A-4, 6A-23 and 6A-321, as well as, N.J.A.C. 11:3-15.7 set forth mandatory PIP coverage of $250,000.00 unless an insured elects reduced coverage down to a policy as low as $15,000.00 in writing. The claimant argues that these statutes and administrative code provisions hold that, if none of these medical expense benefit options is affirmatively chosen in writing, the policy shall provide $250,000.00 in medical expense benefits. The insured must make a written selection of lower PIP benefits for each policy. The claimant maintained that the respondent had not presented a valid signed coverage selection form for the policy at issue as required under N.J.S.A. 39:6A-4.3(e) and N.J.A.C. 11:3-15.7. In its pre-hearing arbitration statement, the respondent submitted a copy of the PIP payment ledger and letters to the providers involved advising that policy limits had been exhausted. As noted above, at the time of hearing, the respondent requested that the hearing be left open to allow for the post-hearing production of EOBs demonstrating exhaustion of the $15,000.00 policy and a copy of the signed coverage selection form.

While the respondent did produce numerous EOBs post-hearing which appear to demonstrate that the respondent paid a total of $15,000 in PIP expenses in this matter. That being said, however, the respondent provided only a declaration page for the policy in question demonstrating limited policy limits and not the signed coverage selection form. As noted above, the evidence of selected lower policy limits by production of the signed coverage selection form is a requirement of N.J.S.A. 39:6A-4.3(e) and N.J.A.C. 11:3-15.7.

With regard to this matter, the undersigned has reviewed all of the evidence submitted by both sides. In order to prevail on any given point, a party must show proof by a preponderance of credible evidence. Proof by a preponderance of the evidence allows for a conclusion that an allegation is probably true. Stated another way, proof must show that an allegation is more likely true than not. When evidence is in equal balance, a party has not proven his case. The party seeking to prove a point must show evidence and argument that is more persuasive and must weigh heavier in the mind of the finder of fact. It is not a question of how much more persuasive or how much heavier proof is; only that it is sufficiently heavier.

In this matter, the relief being sought by the respondent is quite drastic in that, should the undersigned find that a $15,000.00 policy limit has been established in this case and that those limits are, in fact, exhausted, the net result is a denial of this claim based, not on the merits, but rather on that exhaustion of benefits. It is therefore critical that a respondent seeking to prove exhaustion of benefits demonstrate by a clear preponderance of the evidence as defined above that the lower policy limits have been affirmatively chosen in this matter. Having reviewing the proof submitted by the respondent in this matter, the undersigned is unable to conclude by a clear preponderance of the credible evidence that the assignor affirmatively chose the lower $15,000 policy limit. The respondent's failure to produce a signed coverage selection form as required by statute and the administrative code makes this finding inevitable.

In the view of the undersigned, the failure of the respondent to produce the signed coverage selection form demonstrating selection of the lower policy limits is fatal to its defense of exhaustion of benefits. Accordingly, the undersigned finds in this case that the lower policy limit has not been demonstrated based upon the facts as presented before, at the time and after the hearing in this matter. Accordingly, given the fact that the undersigned is unable to conclude that benefits have been exhausted and given the fact that no other defense was presented to this claim, the undersigned concludes that the claimant has demonstrated by virtue of producing medical records, treatment records and documentation

of treatment that the treatment at issue herein was, in fact, reasonable, necessary and causally related to the accident in question and the undersigned awards this demand in its entirety.

The above results in a total award to the claimant of $647.95, which award is rendered net of the New Jersey Medical Fee Schedule but is subject to any remaining deductible and co-pay of the assignor. A claim for interest was presented and interest is awarded in an amount to be calculated by the respondent.

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 9.2 hours at $300.00 per hour for a total fee request of $2,760.00. 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 in accordance with *N.J.A.C.* 11:3-5.6.

N.J.A.C. 11:3-5.6 provides as follows:

> (e) Pursuant to *N.J.S.A.* 39:6A-5.2(g), the costs of the proceedings shall be apportioned by the DRP and the award may include reasonable attorney's fees for a successful claimant in an amount consonant with the award. Where attorney's fees for a successful claimant are requested, the DRP shall make the following analysis consistent with the jurisprudence of this State to determine reasonable attorney's fees, and shall address each item below in the award:
>
> 1. Calculate the "lodestar," which is the number of hours reasonably expended by the successful claimant's counsel in the arbitration multiplied by a reasonable hourly rate in accordance with the standards in Rule 1.5 of the Supreme Court's Rules of Professional Conduct.
>
> i. The "lodestar" calculation shall exclude hours not 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.

The undersigned also takes note of 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).

In Enright v. Lubow, 215 N.J. Super. 306 (App. Div.), certif. 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.

As decided above, the undersigned found herein that the claimant is a successful party entitled to a counsel fee as a matter of law since the claimant was successful in recovering unpaid bills through the efforts of its attorney. That being established, the undersigned has reviewed the submissions of both parties and finds that very little pre-hearing document exchange took place and only a modest amount of attorney driven legal work appears to have taken place.

In reviewing the R.P.C. 1.5 factors outlined above, the undersigned notes that there was no novelty in the issues presented, nor was there any indication that the acceptance of this matter precluded the attorney from other employment, and the hourly rates customarily charged by attorneys in this area of practice do include the hourly rate assessed by the attorney for the claimant. That being said, however, the undersigned finds that the amounts at issue and the results obtained are disproportionate to the counsel fee sought. It is noted that the 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. Finally, 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 $900.00 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 $225.00.

Therefore, the DRP ORDERS:

Disposition of Claims Submitted

1. Medical Expense Benefits: Awarded:

Medical Provider	Amount Claimed	Amount Awarded	Payable To
Ira Klemons, D.D.S., P.C.	$819.69	$647.95	Ira Klemons, D.D.S., P.C.*

*Award is rendered net of the New Jersey Medical Fee Schedule, but is subject to any remaining deductible and co-pay of the assignor.

2. Income Continuation Benefits: Not in issue.

3. Essential Services Benefits: Not in issue.

4. Death or Funeral Expense Benefits: Not in issue.

5. Interest: I find that the Claimant did prevail. Interest is awarded pursuant to *N.J.S.A. 39:6A-5h.*: in an amount to be calculated by the respondent.

Attorney's Fees and Costs

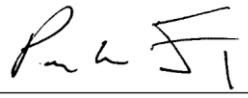
☐ I find that the Claimant did not prevail and I award no costs and fees.

☒ 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:*

Costs: $ 225.00 Attorney's Fees: $ 900.00

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

Entered in the State of New Jersey



Patrick W. Foley, Esq.
Dispute Resolution Professional

Date: 03/22/14