In the Matter of the Arbitration between

Advanced Spine Surgery Center a/s/o Magdalena Villacis

CLAIMANT(s),

v.

Selective Insurance Company of America

RESPONDENT(s).

Forthright File No: NJ1409001581707
Proceeding Type: In Person
Insurance Claim File No: 20951803
Claimant Counsel: Brach Eichler, LLC
Claimant Attorney File No:
Respondent Counsel: Sullivan and Graber
Respondent Attorney File No: 11677-002a
Accident Date: 02/07/2010

Award of Dispute Resolution Professional

Dispute Resolution Professional: Phillip A. LaPorta 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: MV

In Person Proceeding Information

A proceeding was conducted on: June 16, 2015.

Claimant or claimant's counsel appeared in person. Respondent or respondent's counsel appeared in person.

The following amendments and/or stipulations were made by the parties at the hearing:

The parties have stipulated that the decision rendered in this matter is binding in the consolidated matter of NJ back Institute a/s/o MV v. Selective Insurance Company, Forthright Arbitration # 1453548.

Findings of Fact and Conclusions of Law

In rendering this decision, all documents submitted by the parties have been reviewed. I also heard oral argument from the parties at the hearing conducted on 6/16/15.

Facts:

MV was injured in an automobile accident that occurred on 2/7/10. At the time of that accident the respondent Selective Insurance Company was responsible for providing PIP (Personal Injury Protection) benefits to MV for necessary medical treatment related to injuries sustained in that accident. Following the accident, MV received care from the claimant Advanced Spine Surgery as well as NJ Back Institute which is the claimant in the consolidated matter. The claimants contend that the respondent failed to fully and properly issue payment for services rendered to MV following the accident.

Issues:

Whether the respondent is warranted in denying payment for medically approved services to both the provider and facility due to the fact that the facility was not accredited at the time that the procedure was conducted?

Whether the services conducted would be subject to a 50% pre-certification penalty?

Analysis and conclusion:

At the hearing, the respondent argued for the first time that the services should be denied due to an improper/illegal referral contending that the provider NJ Back Institute was a part owner of the facility where the services were conducted. This Issue was not raised by the respondent until after the hearing had commenced and after the primary issue had been argued. Both claimants objected to this issue being raised as it was untimely. The claimants noted that there were approximately 8 pre-hearing submissions in this matter without raising this new issue. The claimants contend that the nature of the issue prejudiced their ability to address it in post hearing and requested an adjournment which was objected to by the respondent. After considering all arguments presented, the claimant's postponement request was denied due to the fact that it was not made prior to the hearing. I further found that the claimants would be prejudiced by this late issue and as such it was barred from consideration due to its untimeliness. Accordingly any reference to this issue in the respondents post hearing submission will not be considered.

The respondent contends that all payments were properly denied due to the fact that the ASC facility where the services were conducted had not yet gained accreditation at the time that the services were conducted.

The ASC in this matter had been in business and properly licensed for several years prior to the enactment of NJSA 26:2H-12. That statute requires that all new ASC facilities must be accredited at the time that they open for business. The statute further permits currently licensed facilities to remain in business and must gain accreditation by October 19, 2011.

There is no dispute that the facility had not gained accreditation as of October 19, 2011 and was not accredited on the dates of service at issue in this matter.

The claimant argues that not only was the facility properly licensed but further argues that despite the October 19th, 2011 deadline, The Department of Health and Social Services (Hereafter referred to as DHSS) renewed the claimant's license in October of 2011 without any conditions. The claimant notes that there were no interruptions, fines or suspensions issued by the department of health and Social Services. The claimant contends that the reason for this is that the facility was in the process of becoming accredited at the time that the license was renewed as evidenced by the fact that they gained accreditation on June 8, 2011.

The claimant argues that the DHSS is the body that specifically governs ASC licensing and that the DHSS renewed the facilities license during the period that the facility's accreditation was pending and ultimately granted. The claimant further argues that N.J.S.A. 26:2H-12 calls for financial penalties against the surgery center in violation. The claimant argues that the respondent has failed to submit sufficient proof that the statute authorizes the barring of medical reimbursements as an available penalty for non-compliance.

After considering all documentation submitted, as the finder of fact I conclude by the preponderance of the evidence submitted that the respondent has failed to establish that retroactive barring of medical services is an appropriate remedy of enforcement for violation of N.J.S.A. 26:2H-12. I further find by the same preponderance that I am persuaded by the claimant's argument that DHSS relaxed the strict application of the statute given that it was only enacted in March of 2009 and the accreditation process proved to be lengthy as every facility in the State was in the Process of gaining accreditation. The claimant's position that the DHSS re-issued their license without interruption during the time that the facility was in the process of being accredited is not disputed.

Essentially the respondent is requesting that this arbitrator ignore and overrule the licensing decision made by the DHSS without providing any authority to do so. The purported non-compliance with the requirements for maintaining a license is an issue to be determined by the licensing agency.

The respondent further argues that at the time that the services were conducted the ASC's corporate status was revoked. The claimant disputes this contention by arguing that although the corporate status of the facility was suspended due to a failure to file annual reports, their status was reinstated on 1/23/13 retroactively. In support of this contention the claimant relies on NJSA 14A:4-5(7) which states that " the reinstatement relates back to the date of issuance of the proclamation revoking the certificate of incorporation or certificate of authority and shall validate all actions taken in the interim.

After considering all documents submitted, as the finder of fact I conclude by the preponderance of the evidence submitted that the respondent has failed to submit sufficient evidence to rebut the claimants argument that once reinstated, the claimant is entitled to payment. Accordingly the claimant is hereby awarded payment for the services rendered.

The respondent next argues that the claimant failed to pre-certify services rendered under CPT code 63030 and as such those services are subject to a 50% pre-certification penalty.

The claimant notes that CPT code 63056 was submitted for pre-certification and approved. Once the operative procedure started, the surgeon determined that the procedure did not warrant billing under CPT code 63056 as anticipated and performed the lesser included services of CPT code 63030. The claimant contends that in approving CPT code 63056, all cervices defined under CPT code 63050 were approved. Due to the fact that the more significant procedure was not necessary, the claimant only billed for that portion which was actually performed.

After considering all documentation submitted, as the finder of fact I conclude by the preponderance of the evidence submitted that the services conducted are not subject to a pre-certification penalty as the respondent actually approved those services when approving the higher code which includes the procedure conducted as well as additional services which were not performed or billed by the claimant. Accordingly the respondent is not entitled to the application of a pre-certification penalty to the services rendered except for the services billed under CPT code 0232T for PRP injection as well as the second unit of CPT code 62290 which were not included in a pre-certification request.

Accordingly the claimant Advanced Spine and Surgery is awarded the following payments;

62290 $1,937.53
62290 $484.38 after application of the 50% pre-certification penalty as well as a MMR reduction
63030 $5,086.97
22899$2,543.49 after application of the MMR formula
0232T $632.55 after application of pre-certification penalty
Total award to Advanced Spine and Surgery is $10,684.92

Accordingly the claimant NJ Back Institute is hereby awarded payment as follows

62290 $1,378.05
62290 $344.52after application of the 50% pre-certification penalty as well as a MMR reduction
63030 $30,878.77 awarded at UCR (application of pre-certification penalty not warranted)
22899$0.00 (not included in claimants demand)
0232T $1,500.00 after UCR awarded at $3,000 les additional application of pre-certification penalty
Total award to NJ Back Institute $34,101.34

I find the Claimant to be the prevailing party. Attorney fees and costs are hereby awarded pursuant to Rule 22 of the NJ No-Fault PIP Arbitration Rules, effective April 1, 2011, Administered by Forthright and the PIP ADR Rules as of January 4, 2013 which state in pertinent part:

N.J.A.C. 11:3-5.6 Conduct of PIP dispute resolution proceedings

(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.

As per RPC Rule 1.5(a): 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.

The claimant has submitted a Certification of Services seeking attorney fees in the amount of $2,506.25. The respondent argued that the hourly rate and amount of hours billed were excessive.

The Certification of Services submitted by Claimant's counsel has been reviewed in accordance with N.J.A.C. 11:3-5.6(e), as set forth above. Respondent's argument that the fees sought by Claimant's counsel are excessive has been taken into consideration as well.

In determining the amount of the attorney fee I have also considered the principles set forth in *Enright v. Lubow*, 215 N.J. Super. 306 (App. Div.), certif. den. 108 N.J. 193 (1987), *Litton Industries v. IMO Industries*, 200 N.J. 372 (2009), *Scullion v. State Farm Insurance Company*, 345 N.J. Super 431 (App.

Div. 2001), *Rendine v. Pantzer*, 141 N.J. 292 (1995) and RPC 1.5 for determining the lodestar for legal fees as well as for determining whether it should be enhanced or reduced.

Applying these factors, under the guidelines of the above referenced parameters, I find that an attorney's fee of $1,600.00 is consonant with the award. Costs of $250.12 are also awarded.

Therefore, the DRP ORDERS:

Disposition of Claims Submitted

1. Medical Expense Benefits: Awarded:

Medical Provider	Amount Claimed	Amount Awarded	Payable To
Advanced Spine Surgery Center	$11,169.31	$10,684.92	Advanced Spine Surgery Center

This award is subject to the respondents available policy limits

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.*: to be calculated by the respondent.

Attorney's Fees and Costs

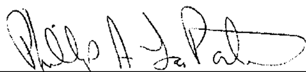
☐ I find that the Claimant did not prevail and I award no costs and fees.

☒ 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: $ 250.12 Attorney's Fees: $ 1,600.00

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

Entered in the State of New Jersey



Phillip A. Laporta, Esq.
Dispute Resolution Professional

Date: 08/20/15