A M E R I C A N A R B I T R A T I O N A S S O C I A T I O N
NO-FAULT/ACCIDENT CLAIMS

In the Matter of the Arbitration between

(Claimant)

v.

Allstate Ins. Co.
(Respondent)

AAA CASE NO.: 18 Z 600 18185 03
INS. CO. CLAIMS NO.: 412413600504
DRP NAME: Nanci G. Stokes
NATURE OF DISPUTE: Failure to Cooperate, Reasonable and Necessary, Licensure.

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: S.R.

1. ORAL HEARING held on 3/1/04.

2. ALL PARTIES APPEARED at the oral hearing(s) .

Respondent appeared telephonically.

3. Claims in the Demand for Arbitration were NOT AMENDED at the oral hearing (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:

S.R. was involved in a motor vehicle accident on 6/4/03 from which the within matter arises.

Nature of Dispute:

I. Was claimant properly licensed and/or "grandfather" from obtaining a Certificate of Need?

II. If yes, were the lumbar MRI and cervical MRI on 8/29/03 reasonable and medically necessary?

The following documentation was submitted for consideration and reviewed:

Claimant:
Demand including bill, medical records and assignment.
Submission of 11/4/03 including narrative.
Submission dated 12/10/03 with attachment including awards.
Submission dated 1/30/04 including medical records
Submissions dated 3/10/04 with letter memorandum and attached statutes.
Certification of Services.

Respondent:
Submission dated 1/9/04 including discovery request.
Submission dated 1/30/04 including statement and exhibits A-N.
Submission dated 1/30/04 with attached peer reviews.
Submission dated 2/23/04 with UCC statement.
Submission dated 2/25/04 with UCC statement search
Submission of 3/18/04 with attachments.
Submission of 3/19/04 with attached statutes and regulations

There is good cause to accept post-hearing submissions of the parties as they respond to issues raised at the hearing..

I also heard the arguments of counsel.

I. Respondent initially argues that the demand must be denied due to claimant's failure to cooperate in supplying records and appearing at an EUO under the terms of the policy. Pursuant to Rule 17, any dispute regarding the exchange of information between the parties will be determined by the DRP, including the carrier's rights under N.J.S.A39:6A-13 and the policy of insurance. Such resolution may protect against annoyance, embarrassment or oppression. Further, the payment of costs and expenses and may be ordered as justice requires. N.J.S.A. 39:6A-13(g)

Claimant has also not produced documents supposedly provided to the DHSS when claimant's grandfather status was determined. There are asserted licensing issues presented. No discovery ruling was presented in advance of the hearing.

The policy in question requires the insured to submit to reasonable requests for an EUO. An insurer is entitled to non-oppressive discovery concerning PIP matters, especially where there is vulnerability to fraud. State Farm v. Dalton, 234 N.J. Super 128 (App. Div. 1989); New Jersey Auto Full. Ins. Underwriting Assn. v. Jallah, 256 N.J. Super. 134 (App. Div. 1992). N.J.S.A. 39:6A-13(b) requires a medical provider to furnish a written report as to the history, condition, treatment, dates and costs of such treatment of the

injured person and permit inspection and copying of medical records pertaining to same. The requests in this case are well outside the scope of N.J.S.A. 39:6A-13. Additional information was supplied in post hearing as to the documentation supplied to DHSS in connection with claimant's grandfather status.

Claimant has produced several awards on the licensing issue in its favor including against the carrier involved in this matter. Thus, claimant asserts the issue is not novel and thus, there is no reasonable basis to again request an examination under oath. I agree. In. N.J.A.F.I.U.A v. Jallah, 256 N.J.Super. 134 (App.Div.1992), the court addressed discovery requested by an insurer investigating a PIP claim. The court held that a dismissal of an otherwise deserving claim for failure to submit to discovery should be reserved for egregious breaches of an insured's failure to cooperate. Id at 142. The Court referred to a dismissal of benefits as “a draconian remedy.” I find that claimant has not failed to cooperate in any manner sufficient to warrant a dismissal of this claim.

Respondent asserts that claimant is an “ambulatory health care facility” and may operate in New Jersey only if has been licensed by the Department of Health and Human Services ("DHSS"). DHSS is the department which oversees licensure of ambulatory care facilities including diagnostic imaging centers. Claimant contends that is exempt from licensure because it is “grandfathered” pursuant to Department of Health and Human Services regulations.

In 1971, the Legislature enacted The Health Care Facilities Planning Act, NJSA 26:2H-1, et seq., which required any new health care facility to obtain a Certificate of Need, except those conducted by a physician in his private practice N.J.S.A. 26:2H-2b. Marsh v. Finley, 160 N.J.Super. 193, 198-99 (App. Div.), certif. denied, 78 N.J. 396 (1978). Health care service includes "care provided in or by a health care facility . . ." N.J.S.A. 26:2H-2b. A health care facility means the "facility or institution, whether public or private, engaged principally in providing services for . . . treatment of human disease, pain, injury, deformity or physical condition . . .including a diagnosis center" Thus, at the time enacted, a health care service was not subject to a Certificate of Need requirement when provided by a physician in his or her private practice.

The statute was subsequently amended in 1991 to require physicians to obtain a Certificate of Need if they intended to initiate a service that involved the purchase of major moveable equipment whose cost exceeded $1,000,000.. MRI equipment is included in that definition and thus, the amendment established for the first time the requirement that a physician initiating an MRI facility in his or her private practice, obtain a Certificate of Need. However, providers of MRI services who had initiated services prior to July 31, 1991, or who had contracted to purchase MRI equipment prior to that date were “grand fathered” and did not require a Certificate of Need or a license. N.J.S.A 26H-7. The amount was later amended to $2,000,000 in 1998

Respondent asserts that clamant is not a physician in his own private practice, because he

does not treat patients and operates solely as a diagnostic center receiving clients only on referrals. In addition, respondent contends that the "grandfather" status conferred upon claimant is improper.

Claimant maintains that the questions raised by respondent are irrelevant in light of the administrative actions approving claimant's grandfather status. Once grandfather status is conferred, a license is not needed irrespective of whether the physician is in private practice or not.

Respondent relies upon Women's Medical Center v. Finley, 192 N.J. Super. 44 (App.Div. 1983) to support its position. In this case, the Appellate Division addressed whether Women's Medical Center ("Center") was a health care facility or a private medical practice. DHSS asserted that the plaintiff was a health care facility subject to the Certificate of Need/licensure requirements in that it had a contractual relationship with a management company. The trial court noted primary characteristics which distinguish a physician's office from a health care facility. Specifically, the degree of control exercised by the physician and the nature of the procedures undertaken at the place of business. The trial court ruled in favor of the medical provider. On appeal, the Appellate Division upheld the lower court's decision finding that the Center was engaged in the private practice of medicine stating that:

> If the manner of [the management company's] performance (of non-medical task) does not impinge upon the ordinary patient-private physician relationship and does not impinge upon professional control by the physicians of the medical practice and does not effect the essential character and commonly understood attributes of private practice, then it is evident that the in house v. out of house business and administrative management of the practice has no fundamental impact on the modality of delivery of healthcare services.

However, in Radiological Society v. New Jersey Department of Health, 208 N.J.Super. 548 (App.Div. 1986), the Appellate Division found that the mere fact that MRI equipment is owned by a medical doctor does not exempt the physician from requirements of a Certificate of Need. In that case, diagnostic imaging services were provided to hospital in-patients. The Court determined that the circumstances demonstrated that the plaintiff was providing health care facility services subject to the licensure requirements.

Claimant sought verification of his status from the Department of Health and Senior Services ("DHSS").. The letter dated 3/10/00 of Susan Hendrickson, Esq. to DHSS with attachments is supplied. Specifically, Ms. Hendrickson wrote to DHSS and explained that claimant had been faced with denial of MRI services due to the non-licensure issue. She states that Dr. Conte and Open MRI [claimant] are eligible for grandfather status for the operation of MRI services as apart of his practice prior to July 1991. Further, she provided the New Jersey medical license of Dr. Conte along with the lease for the MRI

equipment with his then partner Dr. Rubin of Brook Med on 6/26/90. She advises that the name later changed to Open MRI of Rochelle Park.

In response, the Department wrote: "Please be advised that MRI services initiated as part of a physician's private practice prior to July 31, 1991 were exempted from the Department's Certificate of Need and licensing requirements by a law enacted a that time. You have indicated that you began providing MRI Services in 1988, and therefore would not have been subject to Department Certificate of Need, or licensing requirements introduced in 1991…." See Correspondence dated 6/2/00 from Marilyn Dahl, Acting Senior Commissioner of the State of New Jersey, Department of Health and Senior Services (DHSS).

In response to a further inquiry, the Department wrote in October 2000: "The [DHSS} is the entity responsible for licensing MRI services. Open MRI of Rochelle Park (Open MRI)[claimant] is considered grandfathered from the MRI licensure requirements. However, Open MRI is voluntarily seeking licensure, which is encouraged by the DHSS." See correspondence dated 10/26/00 from Daryl Todd, Jr., Esq., Director, Office of Legal and Regulatory Affairs, under DHHS.

Dr. Conte also supplies an Affidavit including the following information:

Open MRI of Rochelle Park is owned and operated by Steven J. Conte, DO. This is the entity through which he provides diagnostic and MRI testing to members of the public. Dr. Conte has been licensed as physician since1967 and has been a Board Certified Radiologist since 1975. In 1989, he owned and operated an MRI with a partner. In 1995, two of his physician partners left the practice and he moved his practice and the MRI to his present location and began using the name Open MRI and Imaging of Rochelle Park. Dr. Conte is the sole owner. He has been continually providing MRI services since 1989 with equipment upgrades to meet ACR criteria.

In 1999, claimant submitted an Application for Licensure. DHSS misplaced that application which caused a delay. The inspection/survey required for licensure demonstrated several violations which required a plan of corrections/remedial measures in order to obtain a license. Rather than undergo costly alterations, claimant chose to withdraw its application. As claimant was grandfathered and was not required to undergo such costly measures to continue providing MRI services, claimant opted not to obtain the license and incur such costs. This is understandable. Regardless, whether claimant filed an application is irrelevant as DHSS determined claimant was grandfathered.

Stephen Conte, Sr. is not a doctor and is listed as a "director." Respondent asserts this violates restriction on the ownership of medical care facilities by persons without medical licenses. However, the record is clear that only Stephen J. Conte, Jr., DO is the owner of the facility. There is no evidence that Stephen J. Conte, Sr. has an ownership interest or that a non-licensed person serving in the capacity of a director is prohibited.

Respondent also relies upon a 1996 and 2000 UCC financial statement filed with the Secretary of State of New Jersey securing a debt between Claimant and Hi-Tec Financial Services. The 1996 statement covered Hitachi MRI equipment. The 2000 statement search identifes the same parties but simply identifies "equipment" as collateral. Respondent also questions the lease for the Brook-Med Toshiba MRI System. One of the partners in Brook Med has apparently been in possession of the MRI machine rather than Dr. Conte. Thus, it would appear that a new or replacement machine was obtained in 1996 when Dr. Conte moved his location. Dr. Conte supplies a response to this allegation. Specifically, he states the UCC financial statement applies to refinancing of the original machine, not replacement of an exiting machine. Respondent maintains that the claimant must now obtain a Certificate of Need, even if claimant was "grandfathered." Specifically, N.J.A.C. 8:33-3.7 is cited for the proposition that the purchase of replacement equipment also requires a Certificate of Need. However, N.J.A.C. 8:33-3.7 discusses cardiac care services and is therefore, not applicable here. Also, the respondent notes that the grandfather statute states the entity must have "entered into a contract to purchase MRI equipment", not lease the equipment. However, it is noted that the letter of Susan Hendrickson, Esq. specifically advises DHSS of the lease.

Respondent also supplies an application to house the MRI equipment in a trailer/temporary location on the premises while construction was performed in connection with an addition to the claimant's building. Respondent maintains that the claimant must now obtain a Certificate of Need, even if claimant was "grandfathered." Specifically, N.J.A.C. 8:33-3.6(a) is cited for the proposition that renovations to a building used to provide services subject to a health planning regulation require a Certificate of Need. However, N.J.A.C. 8:33-3.6(a) was repealed and therefore, not applicable. N.J.S.A.26:2H-7(e), also cited, requires any renovation to be over $1,000,000 to apply and there is no evidence that the addition to the building exceeded that amount.

Also of relevance is the Deposition of John Calabria, Director, Certificate of Need and Acute Care Licensure Program, DHSS. Mr. Calabria was deposed as to another MRI facility and the operation of "grandfather status." The only change which would require a grandfathered physician to obtain a Certificate of Need was "only if there were no longer physicians involved." A name change or location change would not matter for purposes of obtaining a Certificate of Need. Purchase of a new MRI does not change the provider's grandfather status.

I find that the cases relied upon by respondent as to the difference between health care facilities and private practices address different factual situations and not relevant to the determination at bar. The cases address health care entities which came into existence after 1991. Nothing in the cases require claimant to obtain a Certificate of need/License as the grandfather status conferred is compelling and authoritative on this issue. DHSS has consistently upheld claimant's grandfather status and accordant permission to perform MRI services without having obtained a Certificate of Need. DHSS is entrusted by the Legislature with the power to determine whether a Certificate of Need is required and/or whether grandfather status is to be conferred upon a provider. DHSS is the only entity permitted to issue licenses/Certificates of Need for an ambulatory care facility. DHSS's

decision is entitled to deference by this forum. Contrary to respondent's position, it is not within the function or purview of a dispute resolution professional to usurp regulatory and decision making authority from DHSS or make findings as to the propriety of DHSS's determination. DHSS's determination would be subject only to judicial review in the Superior Court of New Jersey. Any failure on the part of DHSS in this regard is not properly raised here.

II. The referring provider began treating S.R. on 7/3/01. Upon initial examination, the patient complained of headaches, neck pain with associated radiation into the shoulders, lower back pain and knee pain.. Spasm, restricted range of motion and positive orthopedic tests were noted on examination of the cervical and lumbar spine. These findings persisted and the provider recommended MRIs of the cervical and lumbar spine.

Respondent denied payment for the MRIs based upon the physician advisor determination of Dr. Goldman. Dr. Goldman noted no sensory examination was performed which would be part of a thorough examination. Further, no urgent or individual circumstances, gross motor deficits or gross neurological compromise are presented to warrant the MRIs

Under Miltner vs. Safeco Ins. Co. of America, 175 N.J.Super. 156 (Law Div. 1980), where there is a dispute as to PIP benefits, 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. Claimant must carry that burden by a preponderance of the evidence. See, State v Seven Thousand Dollars, 136 N.J. 233 (1994). Pursuant to the administrative code, a medically necessary treatment or test is "consistent with the clinically supported symptoms, diagnosis or indications of the injured person" and "is the most appropriate level of service that is in accordance with good practice and standard professional treatment protocols including the Care Paths [applicable to spinal injuries]. N.J.A.C. 11:3-4.2.

Certain diagnostic tests are recognized as having value in the evaluation and treatment of patients and are reimbursable when medically necessary and consistent with clinically supported findings. Pursuant to N.J.A.C. 11:3-4.5(b)(5), MRIs are reimbursable when performed "in accordance with the guidelines contained in the American College of Radiology, Appropriateness Criteria, to evaluate injuries . . . particularly the assessment of nerve root compression and/or motor loss." The Criteria state that "MRIs should be reserved for cases of known or suspected soft tissue injuries such as disc herniations . . . especially in the presence of a neurological deficit." MRIs are not adequate for evaluation of bony trauma.

MRIs during the first five days following an accident may be justified by clinical findings of incontinence or gross neurologic motor deficits. However, as the MRIs were performed more than a month post-accident this heightened standard need not be met. Rather, the Criteria provide the standard.

The Criteria identify a scale of 1 to 9 with 9 being the most appropriate for identified findings/symptomatology. For cervical spine trauma with neurologic deficit presented, MRI is rated 8 out of 9 on the appropriateness criteria scale. For cervical pain and clinical indications suggesting ligamentous injury, MRI is rated 6 out of 9 on the appropriateness criteria scale. For lumbar spine trauma with neurologic deficit presented, MRI is rated 8 out of 9 on the appropriateness criteria scale

Based on the weight of the credible evidence, I find that claimant has sustained its burden as to the medical necessity of the cervical MRI. Sufficient clinically supported neurologic deficit is noted in the records to justify the cervical testing. However, radicular complaints are not noted as to the lumbar area. While no sensory examination was performed, other aspects of the examination revealed sufficient evidence of neurologic deficit, e.g., positive orthopedic testing addressing nerve root involvement. Neck pain had persisted for nearly 3 months at the time of the testing suggestive of ligamentous injury. The heightened standard relied upon by Dr. Goldman does not apply.

I find that the claimant to be a prevailing party and I award attorney's fees and costs. Having reviewed the Certification of Services submitted by claimant and considered the opposition of respondent; I award $1,625 in fees and $285 in costs. The fees awarded are in conformity with guidelines set forth in R.P.C. 1.5. See Enright v. Lubow, 215 N.J. Super. 306 (App. Div.) cert denied 108 N.J. 93 (1987); Scullion v. State Farm Ins. Co.345 N.J. Super. 431, 437-438 (App. Div. 2001). The issues were complex and required numerous and substantial submissions.

No interest calculation or argument was presented to support an award of interest in this matter and the claim is deemed waived.

5. MEDICAL EXPENSE BENEFITS:

Awarded

Provider	Amount Claimed	Amount Awarded	Payable to
Open MRI of Rochelle Park	$2,200.00	$1,100.00	Provider

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

The amount awarded is subject to the New Jersey Fee Schedule, co-payment and deductible obligations of S.R.

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

(B) ATTORNEYS FEES as follows: (payable to counsel of record for CLAIMANT unless otherwise indicated): $1,625.00

(C) INTEREST is as follows: waived per the Claimant. $.

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

4/27/04 _____
Date Nanci G. Stokes, Esq.