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.

LIBERTY MUTUAL
INSURANCE COMPANY

(Respondent)

AAA CASE NO.: 18 Z 600 03508 03
INS. CO. CLAIMS NO.: 56834807
DRP NAME: John J. Fannan
NATURE OF DISPUTE: CAUSATION, MEDICAL NECESSITY, FEE SCHEDULE AND UNBUNDLING

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

1. Oral Hearings were held on: 9/18/03

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

NO ONE 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 Patient was injured as the result of an automobile accident which occurred on January 21, 2000. I further find that the Patient 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 Eric Castellon.

As a result of the impact, the claimant was thrown forward and backward against the seat of her vehicle, striking her head on the back of the seat. On October 31, 2000, the patient

came under the care of Dr. Klemons and Craniofacial Associates, at which time her injuries were diagnosed as follows: myalgia, head and/or facial pain, cervicalgia, swallow dysphagia, vertigo, tinnitus, otalgia, inflammatory arthritis, muscle spasm, interstitial myofibrositis, posterior capsulitis, temporal tendonitis (short and long head), stylomandibular ligament sprain, articular disc disorder and traumatic arthropathy. Craniofacial Associates provided treatments including diagnostic casts, occlusal guard, diagnostic x-ray, physiotherapy treatments consisting of electrogalvanic stimulation, heat and ultrasound, and trigger point injections. Dr. Klemons provided the following services: diagnostic consultation, testing, orthotic appliance, joint mobilization/manipulation, occlusal adjustment, modification of orthosis and test measurement. The patient continued to treat with Craniofacial Associates through 3/27/01 and with Dr. Klemons through 4/3/01. It is the bill for these treatments, (Dr.

Exemplar EOBs;
EOBs with record of payment received;
7 Audit Reports of Dr. Winner;
Report of Dr. Geron;
Page 10 of CPT Code Book;
Letter from State of New Jersey DOBI (6/6/96);
Certification of Services.

With respect to causation, it is noted the audits of Dr. Winner all indicate that causality and medical necessity are not confirmed. A number of the audit reports indicate that non-payment is recommended in reliance on Code 120, which is defined as "treatment not accident related; insufficient evidence of causality." In addition, Dr. Geron concludes, premised on the patient's history of not having sustained direct trauma to her head, face, teeth or jaw, a causal link between the accident and the injuries has not been established. Dr. Geron also notes the months which elapsed between the time of the injury and the commencement of treatment with the claimants herein as rendering it improbable that the injuries were caused by the accident. He reviews the notes of the treating chiropractor and indicates the notes are silent as to any complaints of patient made relative to TMJ difficulties. As to causation, I note the claimants have supplied the Patient Medical Form of Dr. Klemons, which consists of 9 pages and approximately 105 questions without subparts, indicating that the patient stated her face pain began not immediately but the next day after the accident. She described experiencing pain in the face and jaw joint daily, which caused daily difficulty in opening the mouth. She occasionally heard clicking when she opened or closed her mouth and indicated it was painful for her to chew, smile, laugh and yawn. She denied she experienced any such pain prior to the accident. Additionally, Dr. Klemons has supplied a form signed by Dr. Fotiou, the patient's treating chiropractor, who confirms the patient complained of headaches, face pain, ear pain and clicking of the jaw after the accident. I find there has been shown a substantial nexus between the accident and the condition complained of and I find causation has been satisfactorily established.

In the 7 audits of Dr. Winner, complete with charts and explanation codes, a number of denials of payments are premised upon his use of Code 120, defined above. Clearly, that is in conflict with the data provided in the reports and records of Dr. Klemons. Further, these "audits" of Dr. Winner offer conclusions without providing any underlying evidential support and in fact in any number of instances draw legal conclusions which are then offered as the basis of non-payment. For example, a number of denials of payments are recommended because Dr. Winner opines "charge violates NJ PIP Statute and Cobo v. Market Transition Facility"; "violates NJ SA 45:6-19(1)"; "procedure or treatment outside of permitted limited dental license area"; "violates NJAC 13:30-8.22"; or the ultimate conclusory code, "UN", which is described as meaning "not medically necessary." There are also a number of inconsistencies in these audit. For example, Dr. Winner would authorize the payment of one unit of CPT Code 97128 ("PMT one area; init 30 Min; electstim") while also finding that same CPT Code is not compensable because, *inter alia*, it is a "procedure or treatment outside a permitted limited dental license." The same anomaly appears on several occasions for the billing of CPT Code

97128 (ultrasound). The audit offers on any number of occasions as a basis of a denial the Doctor's finding that "procedure can be performed at home." None of these opinions are explained in detail nor is any evidentiary support submitted therefor. I find the audit reports of Dr. Winner to be wholly conclusory, without offering a scintilla of evidentiary underpinning and of virtually no probative value.

I also note that, in this matter, the Certification of Dr. Klemons has been introduced, which certification is directed at the reports of Dr. Winner. Included among the attachments to the Certification is an excerpt of Deposition Testimony of Dr. Winner. In the Certification, most of which is spent fanning the flames of the *animus* which exists between Drs. Klemons and Winner, Dr. Klemons argues interpretation of judicial decisions and other points of law, none of which is appropriate for inclusion in a Certification, within his frame of expertise or in any way helpful. Insofar as the Certification of Dr. Klemons offers legal argument, it is of no probative value.

Further, I have reviewed the audit submitted by the claimants performed by Nurse Truskosky, an audit which supports full payment of the bills as well as interest. The qualifications of Nurse Truskosky to perform such an audit do not appear in her analysis which is simply a recitation of the bills. The conclusions she draws suggests that the charges/services appear to have been medically necessary, a conclusion which is appropriately left to a practitioner in the same discipline as the claimants, and really offers no evidentiary underpinning for her conclusions. I find the claimant's audit report to summary, self-serving, wholly conclusory and of no probative value.

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 it's 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 it's 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).

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

I find the reports and records submitted by the claimants do establish to a preponderance of the evidence that, for the most part, the treatments for which payment is sought by Craniofacial Associates were reasonable and medically necessary through February 8, 2001. I also find the reports and records do establish to a preponderance of the evidence that, for the most part, the treatments for which payment is sought by Dr. Klemons are reasonable and medically necessary through February 26, 2001. The Patient Progress Report-Office Visit record of December 1, 2000 shows virtually every complaint had either decreased or was absent altogether, with most face and jaw complaints noted as occurring less often and of milder nature. The Patient Progress Report Office Visit Note of January 2, 2001 notes a change from the prior report in that many of the previous symptoms were now noted to be gone altogether, including facial pain. Jaw pain is noted to have decreased to once a week was described as "mild." The Patient Progress Report Office Visit of February 26, 2001 notes virtually the same findings as that of the prior report, with facial pain gone, nausea gone, ear aches gone and jaw pain reduced to one to two times per week, mild in nature. These reports clearly indicate the patient had been improving and had reached a treatment plateau. After treatment to effectuate a cure or rehabilitation has ended and the patient's condition has plateaued, medical expenses for palliative treatment may continue, but only to the extent that such expenses are deemed reasonable and necessary. The reasonableness and necessity of palliative expenses must be evaluated in the context of the quantum of pain involved, plaintiff's tolerance of pain and the overall effect of the pain on plaintiff's life. Perun v. Utica Mutual Insurance Company, 280 N.J. Super 280, 285-86 (Law Div. 1994). The services must be shown by competent medical testimony to be such as are reasonable and necessary for the particular patient, taking into consideration his individual condition and need. Howard v. Harwood's Restaurant Company Rest. Co., 25 NJ 72 (1957). In determining what is reasonable and necessary, the "touchstone is not the (patient's) desires or what he (sic) thinks is to be most beneficial. Rather it is what is shown by sufficient competent evidence to be reasonable and necessary to cure and relieve him (sic)." Squeo v. Comfort Control Corp., 99 NJ 588 (1995).

I find no competent medical testimony has been introduced such as would demonstrate to a preponderance of the evidence that treatments beyond 2/8/01 (Craniofacial Associates) or 2/6/01 (Dr. Klemons) were reasonable or medically necessary as opposed to purely palliative, and the portion of the claims of Dr. Klemons and Craniofacial Associates which seeks payments for treatment after those dates is denied. I also note the treatments after that date by Craniofacial Associates include trigger point injections. The Notification of Continuing Treatment report prepared by Dr. Klemons and dated 2/28/01 indicates that trigger point, ligament and tendon injections would be employed "if found to be necessary." In fact, that phrase in printed in bold letters on that form. Nowhere in the Daily Treatment Records or Office Notes or Office Visit Report is there any

explanation or any comment whatsoever regarding the necessity for introduction of trigger point injection therapy. Absolutely no evidence has been presented to support the reasonableness or medical necessity of those treatments.

With respect to the actual billing submitted by Craniofacial Associates, payment is awarded through date of service 2/8/01. However, I note these bill-1.1cPde 9 chargesy foe

presented in order to properly present this claim elevated the matter to a somewhat higher plain of complexity than that of an ordinary PIP hearing. I find that an award of counsel fees in the amount of $1,450.00 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 $325.00. 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:
Awarded

Provider	Amount Claimed	Amount Awarded	Payable to
Ira Klemons, DDS	$1,199.00	$909.50	Ira Klemons, DDS
Craniofacial Assoc., P.C.	$3,545.50	$1,737.75	Craniofacial Assoc., P.C.

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

(B) ATTORNEYS FEES as follows: (payable to counsel of record for CLAIMANT unless otherwise indicated): $1350.00

(C) INTEREST is as follows: Craniofacial Associates - $200.00
Dr. Klemons - $110.00

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

October 27, 2003
Date

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John J. Fannan, Esq.