

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

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In the Matter of the Arbitration between

(Claimant)

v.  
NEW JERSEY MANUFACTURERS  
INSURANCE COMPANY

**AAA CASE NO.: 18 Z 600 08428 03**  
**INS. CO. CLAIMS NO.: 2000688741**  
**DRP NAME: John J. Fannan**  
**NATURE OF DISPUTE: PRE-  
CERTIFICATION, 21-DAY NOTICE,  
NOTICE OF BILLINGS AND  
MEDICAL NECESSITY**

(Respondent)

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**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: January 20, 2004
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 Claimant was injured as the result of an automobile accident which occurred on September 29, 2000. 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 Linda Henderson.

The patient came under the care of Dr. Lipovsky at the Cherry Street Medical Associates on October 3, 2000. As a result of the accident, the claimant sustained injuries to his left knee and shoulder, and underwent a surgical repair of his shoulder in December 2000. The patient received physical therapy treatments from Dr. Lipovsky from 10/6/00 through April 17, 2001. It is the bill for these services, as well as the initial exam of 10/3/00 and a subsequent exam of 11/13/01 (\$11,000.00) which is open and unpaid and is the subject of this arbitration.

The claimant acknowledges the subject policy is a "health care primary" policy. In accordance with that policy, the bills of Dr. Lipovsky were first directed to Blue Cross/Blue Shield. Inasmuch as no payments of these billings were made, Dr. Lipovsky had submitted the bills to the respondent for payment, a request which the respondent declined.

The respondent argues payment is barred for several reasons. First, it is claimed NJM received only a single bill, for date of service 11/13/2001, which was denied for insufficient evidence/medical documentation. It is argued no additional bills were submitted. Further, the respondent argues a 21-Notice of Commencement of Treatment was never sent to NJM. Further, the respondent points to an IME report of Dr. David Gross, as not supporting the medical necessity of the treatment afforded by Dr. Lipovsky/Cherry Street Medical Associates. And finally, the respondent argues that at no time were requests for Pre-Certification filed with the respondent by Dr. Lipovsky.

The following documents have been submitted for review and consideration:

- Demand for Arbitration;
- Medical Bills;
- Notice of Commencement of Medical Treatment (dated 10/10/00);
- PIP Application;
- Letter from Dr. Lipovsky (10/29/03);
- Blue Cross Referral Forms;
- Certification of Services;
- Certification of Patricia DeSantis;
- Exemplar AAA Awards;
- Respondent Decision Point Review/Pre-Certification Plan;
- Report of Dr. Gross.

Additionally, Ms. DeSantis appeared and testified at the hearing with respect to the content of her Certification. She also advised the PIP Files and the UM Files maintained by the respondent are entirely separate and neither may be reviewed by the claim staff handling the other without authorization. Therefore, any billing, reports or records submitted by the claimant in connection with a UM claim would not be necessarily included in the PIP File. It was also noted that Ms. DeSantis is employed in the Parsippany Office of NJM whereas the Hammonton Office handled the claim involved here.

As to the issue of 21-Day Notice, the claimant has presented a notice prepared by Cherry Street Medical Associates dated 10/10/00 which notice was sent to NJM at their Trenton location. Further, the PIP Application completed by the claimant dated 10/17/00 is an NJM Insurance Group Form, bears the NJM Claim Number and is noted to be directed to "Sharon Stauch" at the NJM Claims Department. That form advises that the claimant was being treated by Dr. Lipovsky. I find the claimant has established that the requirement of 21-Day Notice has been met.

With respect to the billings, there is evidence presented that billings were sent in June 2002 to NJM by the claimant's attorney directed to Sonia Garcia. Although Ms. DeSantis certifies and testifies (most credibly) that the "first time NJM received any materials from Cherry Street Medical Associates was on December 4, 2001", and that "NJM never received any additional bills, medical reports, treatment records or other materials from Cherry Street Medical Associates after December 4, 2001", she can obviously testify only to her own knowledge of such receipt or that her review of the file supports that conclusion. However, the mere absence of documents from a file does not compel the conclusion that same were not sent. I find the respondent has established to a preponderance of the evidence that the billings were in fact provided, certainly in conjunction at least with the letter of claimant's counsel sent in June 2002 to Sonia Garcia.

With respect to the issue of medical necessity, I do not find the report of Dr. Gross conclusively determines that the physical therapy treatments administered by Dr. Lipovsky were in any way not medically necessary, reasonable or for a condition causally related to the subject accident. I find the reports and records of Dr. Lipovsky are clear with respect to the treatments administered to the claimant, and the necessity therefor and have thus established those treatments to be reasonable, medically necessary and for a condition or conditions causally related to the subject accident.

Thus, the final issue remaining to be decided is whether or not an additional 50% co-payment penalty should be attached to the billings due to claimant's failure to properly pre-certify.

Claimant argues Dr. Lipovsky properly sent notifications and referral forms to Horizon Blue Cross, inasmuch as the matter involved a health insurance primary policy. Claimant argues this notification should be sufficient for PIP Carrier. Claimant argues they "would like to know where in the NJM policy it states that when health insurance is primary,....notification and pre-certification are required...." The requirement of Pre-Certification however is not created by the contract. Rather it is established under the New Jersey Administrative Code at NJAC 11:3-4.8. Clearly, the Administrative Code does not make an exception to the requirements of Pre-Certification where a "health care primary" policy is concerned. The provider clearly recognized its obligation to notify NJM as evidenced by its submission of the 21-Day Notice of Treatment Letter, as well as by submission of the PIP Application. Further, it was noted at the hearing that the reason Blue Cross denied payments to Dr. Lipovsky was that he was not a member. Obviously that is a circumstance of which Dr. Lipovsky was well aware and should have reasonably

concluded he would have had to seek payment pursuant to NJM Policy. Both the Administrative Code and the respondent's policy provide for imposition of a 50% additional co-payment penalty for medically necessary treatments which are incurred without first complying with Pre-Certification Requirements. I find 50% additional co-payment penalty is applicable to the billings of Cherry Street Medical Associates, since pre-certification requirements were not complied with.

In reviewing the specific billings, I have denied payment for examinations (CPT Code 99214) performed on 2/25/01, 3/30/01 and 11/13/01, inasmuch as the medical necessity for same is wholly unsupported by the evidence submitted. In addition, all of the billing submitted have been reviewed in light of the appropriate sections of the New Jersey Fee Schedule, including the Multiple Procedure Reduction Formula. In applying that Fee Schedule and formula to the billing submitted, I find the total eligible charges of Dr. Lipovsky/Cherry Street Medical Associates to \$6,341.65. Applying the 50% co-payment penalty to these eligible charges for failure of Dr. Lipovsky to properly pre-certify, the claim of Cherry Street Medical Associates is awarded in the sum of \$3,170.83.

Inasmuch as no calculation of interest has been provided, the claim for interest is deemed to have been waived.

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 \$2612.50 as well costs of \$285.00. Counsel for the respondent has entered a vehement objection to an award of counsel fees in this amount, arguing that both the total number of hours billed (9.5) and, in particular, the hourly billing rate (\$275.00) are excessive. Counsel for the respondent argues the matter was not particularly complex and did not require significant pre-hearing discovery or preparation. I have reviewed the line item entries on the Certification of Services and find that an award of counsel fees in the amount of \$1,100.00 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).

This matter was the subject of an oral hearing conducted on January 20, 2004. The hearing was held open to afford the parties the opportunity to make additional submission, which both parties did, and was declared closed of February 3, 2004

#### 5. MEDICAL EXPENSE BENEFITS:

Awarded

Provider	Amount Claimed	Amount Awarded	Payable to
Cherry Street Med. Assoc.	\$11,000.00	\$3170.83	Cherry Street Med. Assoc.

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): \$285.00

(B) ATTORNEYS FEES as follows: (payable to counsel of record for CLAIMANT unless otherwise indicated): \$1100.00

(C) INTEREST is as follows: Waived.

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

March 15, 2004

Date

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John J. Fannan, Esq.