

**DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT - CIVIL PART 2**

CARLE PLACE CHIROPRACTIC
a/a/o CARLOS RODRIGUEZ

Index No. CV-018233-09

Plaintiff(s),
-against

Present:
Hon. Michael A. Ciaffa

ALL STATE INSURANCE COMPANY
Defendant(s).

DECISION AFTER TRIAL

Plaintiff, Carle Place Chiropractic, sued defendant Allstate Insurance Company for no-fault benefits following denial of its claims for payment for services rendered after an IME. Trial of the action, limited to issues of medical necessity, was held on October 27, 2011. Dr Michael Berke testified for Allstate. Dr. Peter Swerz gave rebuttal testimony for plaintiff.

Documentary proof in evidence shows that plaintiff's assignor, Carlos Rodriguez, was injured in an auto accident on December 18, 2004. According to Dr. Swerz's initial consultation report, dated December 20, 2004, Mr. Rodriguez had an "acute" cervical and lumbar strain/sprain. Dr. Swerz devised an "intensive" treatment program for his 12 year old patient.

In order to further assess the boy's condition, Dr. Swerz sent him for a neurological evaluation. Dr. Kerin Hausknect, a neurologist, evaluated the boy on February 24, 2005. At that time, the boy's chief complaints were intermittent lower back pain, right side neck pain, and soreness. Based upon the reported symptoms and the doctor's neurological and mechanical examinations, Dr. Hausknect recommended continued conservative treatment, including chiropractic therapy. He added: "I would like to reassess his condition in six to eight weeks, after further treatment."

A second specialist evaluation was performed by an orthopedist, Dr. Dov Berkowitz, on February 15, 2005. Dr. Berkowitz recommended "conservative management" for a knee strain, which he believed would "improve over time."

On April 5, 2005, Dr. Berke performed his IME. Although the boy complained of continued knee pain and intermittent back pain, neck pain, and chest pain, “he stated that his condition had not improved since beginning chiropractic treatment.” Additionally, upon physical examination, the doctor found no abnormalities. Dermatomal sensory testing revealed limited complaints of reduced sensation. The neurological examination was otherwise normal.

Dr. Berke concluded that the boy’s cervical and lumbar strain had “resolved,” and that his examination failed to demonstrate “any objective disability.” Consequently, he perceived no need for further chiropractic treatment.

Defendant paid a claim for chiropractic treatment rendered on April 15, 2005, but all other claims for subsequent treatments were denied based upon Dr. Berke’s IME. The treatments in question continued through July 1, 2005.

In assessing the medical necessity of treatments provided after the IME, the Court is guided initially, by Judge Hirsh’s decision in Amato v. State Farm, 2010 NY Slip Op 20431 (Dist Ct Nassau Co.). As explained in that decision, the term IME cut-off” is “a misnomer.” An IME is merely “a snapshot of the injured party’s medical condition as of the date of the IME.”

Nevertheless, when treatments are rendered in close time proximity to an IME, the IME report can often provide a sufficient factual basis and medical rationale for an insurer’s denial.

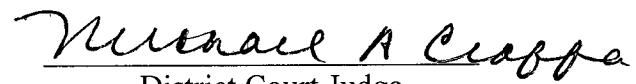
Here, given the fact that plaintiff’s treatments were provided within weeks of the date the IME was performed, the results of that medical examination were clearly probative and relevant to whether the subsequent treatments were necessary. Based upon the findings of the IME report, plaintiff’s adolescent patient was apparently receiving no benefit from continued chiropractic treatments. Dr. Berke’s testimony on that point was generally credible and withstood cross-examination.

In the face of those findings, the burden properly shifts to plaintiff to rebut the factual basis and/or medical rationale for denying payment. Plaintiff’s proof in rebuttal was ineffective in controverting defendant’s proof on the issue. Notably, although plaintiff’s treating doctor, Dr. Swerz, gave a general defense of his overall treatment plan, his recollection of the boy’s condition in April and June was vague and unhelpful. No follow up reports or records were provided respecting the post-IME treatments provided by Dr. Swerz. Accordingly, the weight of

the trial proof predominates in favor of defendant's contention that the continued treatments were not medically necessary.

Judgment is therefore rendered for defendant, dismissing plaintiff's claim.

SO ORDERED:


Michael A. Cappo
District Court Judge

Dated: November 9, 2010

cc: Law Offices of Robert E. Dash
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