AMERICAN ARBITRATION ASSOCIATION
CASE NO.: 17 990 06230 99

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In the Matter of the Arbitration Between
CLAIMANT,

Claimant,

RESPONDENT'S BRIEF

-against-

TRAVELERS INDEMNITY COMPANY,

RETURN DATE:
February 22, 2001

Respondent.

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Respondent, TRAVELERS INDEMNITY COMPANY, by its attorney, LAW OFFICE, hereby submits its appeal brief in the above entitled matter as follows:

Statement of Facts

This arbitration was demanded by CLAIMANT for payment of No-Fault benefits (medical and lost wages), interest and attorney fees for personal injuries allegedly sustained by XXXXXXXX due to a motor vehicle accident which occurred on December 27, 1993. These injuries claimed include those to her right shoulder, lower back and left knee. After the accident, CLAIMANT was taken to Jamaica Hospital where she complained only of right shoulder pain. There was no indication of a left knee pain, contusion or injury at that time.

Assignments of benefits were made to Dr. Benetar, Jamaica Hospital and Dr. Sadigh.

Of important note is that CLAIMANT had a prior, relatively serious work related injury, for which she was receiving worker's compensation benefits until, as far as the undersigned is aware, 1995. The injuries claimed in that accident were to the lower back with pain radiating down the left lower extremity.

TRAVELERS concedes that it paid medical bills referable to the new shoulder injury until an Independent Medical Examination was performed by Dr. O'Neill on July 11, 1994, after which all future bills relating to the shoulder back would be denied due to the fact that Claimant told Dr. O'Neill that she had reinjured herself at work on June 21, 1994. Additionally, TRAVELERS, after reviewing the Worker's Compensation File TRAVELERS denied any medical treatment to the left knee as not being causally related to the motor vehicle accident on December 27, 1993. This denial was supported by two peer reviews of the medical records including MRI reports pertaining to the left knee by Dr. Michael Katz (radiologist) and Dr. Sondra Pfeffer (radiologist). Dr. Pfeffer gave a lengthy narrative regarding the biomechanics of knee injury of which Arbitrator Shulman relied to make his decision.

RESPONDENT IS ASKING FOR RELIEF THAT IS OUTSIDE OF THE BOUNDS OF MASTER ARBITRATION REVIEW

Pursuant to 11 NYCRR 65.18, grounds for review by a Master Arbitrator are as follows:

(a) Grounds for Review

An award by an arbitrator rendered pursuant to section 5106(b) of the Insurance Law and 11 NYCRR 65.16 and 65.17 (Regulation No. 68) may be vacated or modified solely by appeal to a master arbitrator and only upon one or more of the following grounds:

(1) any ground for vacating or modifying an award enumerated in Article 75 of the Civil Practice Law and Rules (an Article 75 proceeding), except the ground enumerated in CPLR section 7511(b) (1)(iv)(failure to follow Article 75 procedure);

(2) that the award required the insurer to pay amounts in excess of the policy limitations for any element of first-party benefits; provided that, as a condition precedent to review by a master arbitrator, the insurer shall pay all their amounts set forth in the award which will not be subjects of the appeal, as provided for in section 65.16 or 65.17;

(3) that the award required the insurer to pay amounts in excess of the policy, limitations for any element of additional first-party benefits (when the parties had agreed to arbitrate the dispute under the additional personal injury protection endorsement for an accident which occurred prior to January 1, 1982), provided that, as a condition precedent to review by a master arbitrator, the insurer shall pay all other amounts set forth in the award which will not be subjects of the appeal, as provided for in 11 NYCRR 65.16 or 65.17;

(4) that an award rendered in an AAA expedited arbitration under 11 NYCRR 65.16(c)(3)(I), a regular AAA arbitration under 11 NYCRR 65.16(c)(3)(iv), or an arbitration under 11 NYCRR 65.17 was incorrect as a matter of law (procedural or factual errors committed in the arbitration below are not encompassed within this ground);

(5) that the attorney fee awarded by an arbitrator below was not rendered in accordance with the limitations prescribed in 11 NYCRR 65.16(c)(8) or 65.17(b)(6), provided that, as a condition precedent to review by a master arbitrator, the insurer shall pay all other amounts set forth in the

> award which will not be subjects of the appeal, as provided for in 11NYCRR 65.16 or 65.17;
> (6) that the award rendered in the AAA arbitration is inconsistent and irreconcilable with the award rendered in the HAS arbitration involving the same personal injury.

Under these guidelines, the basis for claimant's request to appeal Arbitrator Schulman's factual findings are meritless. In furtherance of this, please refer to the enclosed Master Arbitration decision rendered by Hon. Peter J. Merani. Judge Merani stated the following with respect to the scope of a Master Arbitrator's review:

> "In making such an evaluation the Master Arbitrator is precluded from evaluating or weighing the testimony or evidence presented and from substituting his judgment as to what testimony or evidence should have been accepted or rejected. In addition, he cannot determine what inferences were drawn therefrom **or engage in such factual review** as would constitute a do novo review. Dr. E. Wiseman a/a/o Francis Sands and State Farm Insurance Company, *New York State No-fault/SUM Arbitration Reporter,* NF 2666, Volume 22, Number 3, Sept. 1997, pp 7-8. (Relying on *Petrofsky v. Allstate Ins. Co.*, 54 NY2d 207 (1981). (Emphasis Added). (Copy of the Petrofsky decision is annexed hereto as Exhibit "B")

Claimant's entire position in Point One of Appellant's brief is that this Master Arbitrator re-evaluate testimony and evidence presented in the lower arbitration and decide on which evidence should have been accepted and rejected. Arbitrator Shulman decided to accept the two peer reviews (of MRI's taken of appellant's right knee) and Independent Medical Examination report submitted by TRAVELERS over Dr. Benetar's contradictory reports. It is clear by Arbitrator Shulman's decision, annexed hereto as Exhibit "A" that he engaged in an extensive factual review, which included weighing certain evidence, assessing the credibility of medical reports and making independent findings of fact.

In the instant case, there is more than enough evidence submitted that would support Arbitrator Shulman's finding. Petrofsky and its progeny mandate that a Master Arbitrator's powers of review do not include a de novo review of the facts, nor do they authorize him to determine the weight of the evidence introduced. His review is limited to whether or not the evidence is sufficient.

Appellant has attempted to undermine the strength of peer reviews submitted by carriers in order to support and defend their position of a denial of a claim. It is submitted that the introduction and consideration of peer reviews to arbitrators is a common and accepted practice of determining medical necessity of objective medical testing such as MRI's and causal relation of injuries to an accident. They are

in direct compliance with the New York No Fault Regulation, which seeks to hasten and expedite No Fault claims.

THE REVOCATION OF ASSIGNMENT DOES NOTHING TO ALTER THE LOWER ARBITRATOR'S FACTUAL FINDINGS WITH RESPECT TO ALLEGED LEFT KNEE INJURY

At the lower arbitration TRAVELERS produced an assignment of benefits signed by Appellant to Dr. Benetar. Your affirmant does not have any recollection that Appellant produced the revocation of assignment by Dr. Benetar. If she did, Arbitrator Schulman would have addressed it in his decision. However, as Arbitrator Shulman indicates in his decision, "[The assignments] have not been revoked, and … any claim must be brought in the name of the provider, as assignee."

. Moreover, Appellant's argument that Dr. Benetar revoked his assignment of benefits do nothing to change the fact that claimant's knee injuries were not causally related to the accident at issue. Arbitrator Schulman's decision regarding the left knee injury and the subsequent surgery would have persuasive if not collateral estoppel effect on any arbitration having to do with any treatment to the left knee performed by Dr. Benetar.

CLAIMANT HAS NO STANDING TO BRING CLAIMS ON BEHALF OF PROVIDERS TO WHICH SHE HAS ASSIGNED HER BENEFITS

At the lower arbitration, TRAVELERS produced assignments of benefits signed by Appellant to Dr. Benetar, Jamaica Hospital and Dr. Sadigh. Your affirmant does not have any recollection that Appellant produced the revocation of assignment by Dr. Benetar, if she did, Arbitrator Schulman would have addressed it in his decision. However, as Arbitrator Shulman indicates in his decision, "[The assignments] have not been revoked, and … any claim must be brought in the name of the provider, as assignee."

TRAVELERS has never disputed that Dr. Benetar, Jamaica Hospital and Dr. Sadigh have the right to commence their own arbitrations with respect to the care and treatment provided to appellant. However, as the lower arbitration was commenced solely by CLAIMANT, and since none of the assignments were revoked at the time of the arbitration, it is submitted that those bills under assignment can not be remanded, as Appellant requests. They must be brought independently and separately either by the providers themselves, or through a proven revocation of the assignment.

For the reasons set forth above, it is respectfully requested that the decision of the Arbitrator stand.

Dated: February 20, 2001
Garden City, New York

Very truly yours,

LAW OFFICE

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