

# PIP Defense Medical Exams

When your client is injured and needs medical treatment, his PIP benefits are supposed to pay for that care. Some insurers demand a PIP defense medical exam after paying some benefits, saying that such exams are necessary to determine whether further treatment is reasonable and necessary. To many plaintiffs it appears that PIP exams are used as a tool to cut off benefits. If your client's PIP insurer requests a medical exam, here are a few things to think about.



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### Reasonable and Necessary Benefits

Auto insurance policies often provide coverage for medical bills incurred because of an injury. Typical language is as follows:

We will pay reasonable expenses incurred for necessary medical and funeral services because of bodily injury caused by accident and sustained by a covered person.

Therefore, as far as the PIP insurer is concerned, the issue is whether the medical services were "necessary" in order to treat the injuries, and whether the charges for those services were "reasonable" in amount.

### Request for Defense Medical Examination

An insurer will frequently point to its policy language as entitling it to multiple examinations of your client in order to determine whether the PIP benefits are due and payable. Typical policy language provides:

A person seeking Personal Injury Protection benefits must submit, at our expense and as often as we reasonably require, to physical examinations by physicians we select.

Although most policies only require you to submit to "reasonable" examinations, in my experience insurers feel that they can have your client examined on multiple occasions and have your client examined by a physician from a field entirely different from that of the treating physician.

### Working With the PIP Adjuster

When the PIP insurer requests a defense medical exam, it makes sense to talk with the adjuster, to learn what his or her concerns are, and then see if you can address them. In most cases the PIP adjuster has not even requested that the treating physician provide information as to why the treatment is reasonable or necessary. I often ask the adjuster, "Doesn't it seem unfair to cut off your insured's benefits without even asking the treating physician why the treatment was reasonable and necessary?"

If the adjuster really has legitimate questions about whether treatment was reasonable and necessary, I tell the adjuster to write me a letter stating what questions they want the treating physician to answer. I then forward that letter to the treating physician with our cover letter asking the physician to write a report addressing those issues, to bill

the insurer for the report, and to send us a copy.

When the adjuster says that she wants to send your client to an orthopedist or neurologist who will determine whether the chiropractic treatment was "reasonable and necessary," you know you have trouble. You know in advance that the report will probably be critical of chiropractic care and that the insurer may cut off benefits based on the report. I take the position that it is improper to cut off first-party benefits based on a report from a nontreating physician, from a field of practice different from the client's chosen treating physician. If the insurer persists in the exam by a physician from a different field, and then cuts off benefits, I note a PIP arbitration. More on that later.

In talking with the PIP adjuster you should also warn that, if the insured goes to a very conservative doctor who writes a negative report, then that insurer may have just prejudiced its recovery of its subrogation claim.

Another thing you might mention to the PIP adjuster is that by sending the insured to a very conservative doctor, the doctor's report may prejudice the insured's tort claim. I will sometimes ask a PIP carrier to contact its attorney to provide me assurances that the PIP report will not be discoverable in the third party action. In some cases PIP insurers have foregone the exam when these assurances were requested.

You also may want to remind the PIP insurer of its first party fiduciary obligations not to harm the plaintiff's third party claim. You might want to tell the insurer that it does not have your client's permission to share the report with any other insurer, that you expect the insurer to notify you of any attempt to obtain the report, and that you expect the insurer to object to producing the report to any other insurer under *Crenna* and *Motherhead*.

### Options for Dealing With PIP Defense Medical Exam

Sometimes the PIP insurer will demand an examination of your client, and may take the position that since their contract provides for an examination, they are entitled to an examination, no matter what.

When the insurer demands a defense medical examination, without having requested information from the treating physician regarding the reasonableness and the necessity of the medical bills and treatment, you have several options. Under certain circumstances, I believe you may properly deny the carrier the PIP examination. Most PIP policies provide that "local rules of procedure and evidence apply." It seems to me that an insurer may compel a defense medical examination "only on motion for good cause shown and upon notice to the person to be examined," and specifying the time, place, manner, and scope of the exam. CR 35. If an insurer fails to request information from the treating physician as to why treatment is necessary, then perhaps it will be difficult to show good cause for defense medical exam. You may have to deal with policy language specifically authorizing a defense exam. I am not suggesting that you always advise a client not to attend a PIP defense medical exam, only that it is an option to consider.

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If the insurer persists in sending your client to an examiner who is likely to be hostile to the client's chosen treatment, this could harm your client's third party claim since a hostile report may be discoverable by the third party's attorney. If the first party insurer takes steps which make it more difficult to settle a third party claim, then you can remember the insurer's actions when it comes time to negotiate the subrogation repayment to the PIP insurer. The PIP insurer cannot have it both ways, saying that it is questionable whether PIP benefits should be paid, and then turn around and say in the subrogation setting that the recovery of those benefits from the third party was so clear that the plaintiff attorney's actions did not benefit that recovery.

If the defense medical examination occurs, and the PIP insurer cuts off benefits based on a report that is critical of your client's chosen health care, then you can consider noting the matter for PIP arbitration. The policy language will tell you what notice you must give, and what must be proved. Generally, to recover PIP benefits, you must prove by a preponderance of the evidence that the treatment was necessary and that the charges were reasonable.

Given that the PIP insurer owes fiduciary duties to your client, and that your client's health care is at stake, it is unlikely that a defense medical exam will be enough to result in a denial of first party benefits. Also, in many cases the insurer will not want to litigate the entitlement to PIP benefits.

When the insurer wrongfully refuses to pay PIP benefits, you may also want to consider a bad faith lawsuit. Possible causes of action include the insurer's breach of its duty to deal in good faith with its insureds, negligence in its adjusting of the claim, breach of contract,

violation of the Consumer Protection Act, breach of the administrative duties found in the Washington Administrative Code, and breach of fiduciary duties.

If the insurer cuts off benefits that are owed to your client, and you file a PIP arbitration or bad faith lawsuit, then you may have a very valuable tool for recovering your client's benefits, and the attorneys fees necessary to obtain those benefits. The recent case of *Olympic Steamship v. Centennial Ins.*, 117 Wn.2d 37 (1991), states as follows:

We also extend the right of an insured to recoup attorneys fees that it incurs because an insurer refuses to defend or pay the justified action or claim of the insured, regardless of whether a lawsuit is filed against the insured. . . . When an insured purchases a contract of insurance, it seeks protection from expenses arising from litigation, not "vexatious, time-consuming, expensive litigation with his insurer."

### Conclusion

When your client is an insured under a PIP contract that calls for the payment of reasonable charges for necessary medical treatment arising out of an accident, your client should receive the benefits that are owed. Existing law gives you the tools to see that your client receives what he or she is entitled to.

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