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Arbitrator  
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8 IN THE MATTER OF THE ARBITRATION  
9

10  
11 ) Case No. 12884  
12 )

13 ) Claimant,  
14 )

15 ) vs.  
16 )

17 ) Respondent.  
18 )  
19 )

ORDER GRANTING SUMMARY  
JUDGMENT MOTION

20 On June 2, 2015, commencing at 10:00 a.m., a telephonic  
21 hearing was held on Respondent's Motion for Summary Judgment herein  
22 (hereinafter sometimes referred to as "said Motion"), Arnold H. Gold,  
Arbitrator, presiding. Claimant participated *in propria persona*.  
23 Respondent participated by its attorneys, , by  
24 , Esq. Claimant and Mr. argued orally, and said Motion  
25 was taken under submission.

26 The Arbitrator, having read and considered the documents  
27 submitted in support of and in opposition to said Motion and having  
28 heard and considered the oral arguments of Claimant and Mr. and

1 the oral objections of Mr. , now rules and orders as follows on  
2 said Motion:

3 SAID MOTION IS HEREBY GRANTED. A SUMMARY JUDGMENT HEREIN IN  
4 FAVOR OF RESPONDENT AND AGAINST CLAIMANT IS HEREBY ORDERED. IMMEDIATELY  
5 FOLLOWING HIS SIGNING AND FILING OF THE WITHIN ORDER, THE ARBITRATOR IS  
6 SIGNING AND FILING A SUMMARY JUDGMENT HEREIN IN FAVOR OF RESPONDENT AND  
7 AGAINST CLAIMANT.

8 **REASONING**

9 "The motion for summary judgment shall be granted if all the  
10 papers submitted show that there is no triable issue as to any  
11 material fact and that the moving party is entitled to a judgment as a  
12 matter of law." (Code of Civil Procedure Section 437c, subd. c.) If  
13 only the papers submitted by Respondent are considered, Respondent has  
14 met its burden - the Declaration of , M.D. is sufficient  
15 to establish that the conduct of Respondent did not violate any  
16 applicable standard of care in the care and treatment of Claimant.

17 However, Claimant has filed opposition papers. The question  
18 then becomes: Do Claimant's opposition papers show that a triable  
19 issue of one or more material facts exists as to Claimant's claims  
20 herein? (See Code of Civil Procedure Section 437c, subd. (p)(2).)

21 Claimant's opposition papers do not point out any defect in  
22 Respondent's moving papers, except for a contention that the  
23 Declaration of Dr. should be ignored because he is biased (a  
24 "hired gun"). No factual showing of bias on the part of Dr. is  
25 contained in Claimant's opposition. The fact that Dr. has been  
26 willing to give a declaration is not a showing of bias; nor is the  
27 fact that Dr. was paid for giving a declaration - if that be a  
28 fact - again, no factual showing of payment has been made by Claimant.



1 If Claimant's contention were correct - and it is not - Respondent  
2 could never submit an expert declaration; Claimant would always be  
3 able to claim that the mere fact of giving a declaration in favor of  
4 one side demonstrates disqualifying bias against the other side!

5 So because Claimant has not pointed out any defect in  
6 Respondent's moving papers, the inquiry then becomes: Do Claimant's  
7 papers show facts undermining Respondent's moving papers?

8 Code of Civil Procedure Section 437c, subd. (b)(2),  
9 contemplates that the party opposing a summary judgment motion (here,  
10 Claimant) is to make his factual showing by "affidavits, declarations,  
11 admissions, answers to interrogatories, depositions, and matters of  
12 which judicial notice shall or may be taken." Of these methods, the  
13 only one utilized by Claimant is "declaration": Claimant's own  
14 declaration. So the question then becomes: Does Claimant's  
15 declaration set forth facts that undermine Respondent's moving papers?

16 It would, if no objection thereto was made and sustained.  
17 However, subdivision c of Code of Civil Procedure Section 437c does  
18 not permit the judicial officer (here, the Arbitrator) hearing the  
19 motion to consider evidence set forth in the papers as to which  
20 objections have been made and sustained.

21 Respondent has objected to each item of evidence set forth  
22 in Claimant's declaration on multiple grounds, including but not  
23 limited to hearsay, lack of relevance, violation of Evidence Code  
24 Section 720 and violation of Evidence Code Sections 803 and 804.

25 Subdivision (d) of Code of Civil Procedure Section 437c  
26 requires that declarations in opposition to a summary judgment motion  
27 "shall be made by [a] person on personal knowledge, shall set forth  
28 admissible evidence, and shall show affirmatively that the affiant is



1 competent to testify to the matters stated in the" declaration.

2 Claimant's declaration does not satisfy those requirements:

3           1. Claimant's declaration is, in relevant part,<sup>1</sup> entirely  
4 an expression of Claimant's opinion - that is, Claimant expresses the  
5 opinion that the exhibits attached to his declaration constitute and  
6 prove various things. However, the exhibits attached to Claimant's  
7 declaration are entirely inadmissible hearsay.

8           A non-expert ("lay") witness cannot render an opinion based  
9 on hearsay rather than on the perception of the witness. (Evidence  
10 Code Section 800.) However, under limited circumstances an expert can  
11 express an opinion based upon hearsay materials and can set forth the  
12 matters upon which that opinion is based. (Evidence Code Section  
13 802.) In his declaration Claimant does not purport to express his own  
14 opinion that Respondent breached any standard of care or that any such  
15 breach caused Claimant's injuries, loss or damages; instead,  
16 Claimant's declaration expresses the opinion that the attached  
17 exhibits show such breaches and causation. But even if Claimant's  
18 declaration had expressed his own opinion that Respondent breached any  
19 standard of care or that any such breach caused Claimant's injuries,  
20 loss or damages, there would be no foundation for such an opinion  
21 because Claimant has not demonstrated that he is an expert<sup>2</sup> - and so  
22 Claimant's opinion would not be admissible under the limited  
23 circumstances permitted under Evidence Code Section 802 for the

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25           <sup>1</sup>I say "in relevant part" because Paragraph 1 thereof, declaring that declarant  
26 is the Claimant, while relevant and not objectionable, is undisputed. It is Paragraph  
27 2 of Claimant's declaration that represents Claimant's effort to demonstrate the  
28 existence of a triable issue of material fact.

<sup>2</sup>See the requirements set forth in Evidence Code Section 720 for a person to  
qualify as an expert. Claimant has submitted no evidence tending to demonstrate that  
he satisfies any of these requirements.



1 opinion of an expert. Under such circumstances, the Arbitrator must  
2 exclude Claimant's opinion. (Evidence Code Section 803.)

3 2. As an entirely independent defect in Claimant's  
4 opposition: Even if the exhibits attached to Claimant's declaration  
5 had been properly authenticated, they do not show what Claimant says  
6 they show, namely, that Respondent or its health professionals  
7 breached any standard of care in the treatment of Claimant. At least  
8 some of the articles that are the exhibits to Claimant's declaration  
9 suggest different - and, in some instances, what the article's  
10 author(s) believe are better - methods for treating the health  
11 problems from which Claimant suffered. However, not one of those  
12 articles opines that not following the suggestions contained in the  
13 article amounts to a breach of a standard of care. Not following what  
14 one or some experts feel are best practices does not mean that not  
15 adhering to those practices is conduct below the standard of care in  
16 the profession. For example, one cannot say that when a new treatment  
17 regimen is discovered or developed, every medical practitioner who has  
18 not yet decided to follow that regimen has breached the "standard of  
19 care" in the profession.


#### 20 CONCLUSION

21 For the foregoing reasons, Claimant's opposition does not  
22 demonstrate the existence of a triable issue of material fact, and the  
23 Arbitrator concludes that there is no triable issue as to any material  
24 fact herein and that the moving party is entitled to a judgment as a  
25 matter of law. A Summary Judgment herein in favor of Respondent and  
26 against Claimant is hereby granted.

27 **Nothing in this decision prohibits or restricts Claimant or**  
28 **Respondent from discussing or reporting the underlying facts, results,**

1 terms and conditions of this decision to the Department of Managed  
2 Health Care.

3 DATED: June 19, 2015.

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5 ARNOLD H. GOLD  
6 Arbitrator

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