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7 Arbitrator

8
9 **IN THE MATTER OF BINDING ARBITRATION**
10 **BETWEEN**

11)
12) **ARBITRATION AWARD**
13) No.: 13868
14) J.W. Case #: A218179-39
15) Hearing Date(s):
16) January 23 – February 3, 2017
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Claimant,
vs.
AND
Respondents.

17 The above referenced matter was presented to the undersigned in arbitration. The dates
18 of arbitration were January 23, 2017 through February 3, 2017. Claimants were ably
19 represented by Attorneys Esq. and
20 Esq. of the law firm Respondents were
21 professionally and well represented by Attorneys Esq. and
22 Esq. of the law firm
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24 Claimants and are husband and wife. At all times
25 relevant, Ms. was eligible for medical care from respondents. On March 1, 2015 she went
26 to at their in Fontana California. She was seen by
27 Dr. MD. At that time she was 26 years old and complained, inter alia, of having
28 had chills fever nausea and vomiting. However, her chief complaint was pain in the right foot

1 associated with a fall down a couple of stairs approximately six days earlier. Although no one
2 knew it at that time, the weight of the evidence is that the foot pain was caused, at least in large
3 part, by an aggressive bacterial infection known as necrotizing fasciitis. Dr. saw her as an
4 outpatient and diagnosed plantar fasciitis. He provided her with crutches and sent her on her
5 way. Although claimant alleges otherwise, this arbitrator has already announced that the care
6 given by Dr. on that date met the standard of care required of him under the totality of the
7 circumstances. It is important to note that her vital signs showed that she was suffering from
8 tachycardia with a pulse rate of 130.

9 Her pain persisted and she returned to respondent for additional medical attention on
10 March 6, 2015 in the morning. On that occasion she was seen by Dr. MD.
11 Her symptoms on that occasion were recorded accurately. Her primary complaint was once
12 again pain in her right foot. Not insignificantly, her pulse rate was alarmingly high at 140. X-
13 rays were done on that occasion and discussed with Dr. No fracture was found in her
14 right foot but there was "... Approximately 3.3 x 1.5 cm area of lucencies suggestive of gas
15 seen within the proximal plantar aspect of the foot adjacent to the posterior aspect of the
16 calcaneus." The evidence shows that the gas was a result of the previously mentioned
17 necrotizing fasciitis. The evidence further demonstrates that the infection at that time was
18 isolated in her foot. (I'm aware of evidence to the contrary.) However, the bacteria were
19 replicating exponentially; at an alarming/life threatening rate. Unfortunately, no diagnosis of
20 necrotizing fasciitis was made. Although additional findings and patient instructions are found
21 in the records for that date she was again released, this time by Dr. to return to her home.
22 She was also given a "routine" referral to a podiatrist. Respondents have stipulated, and the
23 arbitrator hereby incorporates in his findings, that the medical care provided by respondents
24 and Dr. on that occasion fell below the standard of care required in that medical
25 community. Claimant should have been immediately transferred to the emergency room for
26 additional care, which would have confirmed a diagnosis of necrotizing fasciitis. Emergency
27 surgery would have begun immediately with debridement of the infected areas of her right foot.

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1 Inappropriately sending her home at that time subjected her to nearly losing her life, and
2 literally losing her limb.

3 Claimant returned again for medical care on March 8, 2015. Her symptoms were very
4 much worse. At this time, an accurate diagnosis was made of necrotizing fasciitis. It was also
5 discovered that she was a diabetic with an onset at least 60 to 120 days predating March 2015.
6 The notes of the physician on March 8th include ankle pain and swelling with redness and pain
7 to the calf of her foot. It is noted "the calf pain started today". By 6 o'clock that evening an
8 emergency surgery was performed. Upon admission to the emergency room the
9 impressions/diagnoses were: "necrotizing fasciitis", "new onset diabetes", and "sepsis". Her
10 primary diagnosis was the necrotizing fasciitis. Further review of her medical history is not
11 warranted at this time. As is fully understood, she almost lost her life to the sepsis that invaded
12 her body. Although she survived and presently is in reasonably good health, the physicians a
13 few months later had to amputate her right leg just below the knee. This happened even though
14 the physicians attending her gave her excellent medical care.

15 That brings us to the primary disputed question in this case, i.e. to determine whether or
16 not the admittedly improper medical care given on March 6, 2015 was the legal cause of her
17 injuries; in the guise of the amputation of her right leg? The answer is YES, a preponderance
18 of the evidence establishes that but for the incorrect diagnosis and treatment on March 6, 2015
19 claimant would still have her leg and foot. Exactly how good her foot would have been after the
20 necessary debridement surgeries is not clear, but it has been established that the amputation,
21 which the doctors fought so hard to avoid on and after March 8th - would have been avoidable
22 before then, specifically on March 6th. Although there was brilliant and often contradictory
23 medical evidence offered at trial; all agree that necrotizing fasciitis is an extremely rapidly
24 reproducing bacterial infection in which time is of the essence for best possible treatment
25 results. Although defense argues that while earlier treatment might have saved claimant from
26 the extreme sepsis and shock to her bodily organs, which nearly resulted in death; earlier
27 treatment would not have been able (based on morbidity/ mortality data and research) to save

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1 the limb itself. The arbitrator understands this contention, has reviewed the evidence on which
2 it is based but does not find the argument is supported by the weight of the evidence.

3 Claimant has sustained her burden of proof to show that the amputation was caused by
4 the acknowledged medical negligence on March 6, 2016. She is entitled to reasonable damages
5 resulting from the loss of her limb. It follows that her husband is also entitled to reasonable
6 damages for his claim of loss of consortium.

7 Turning first to the question of loss of consortium, the arbitrator notes that since the
8 California Supreme Court decision in Rodrigues vs. Bethlehem Steel Corporation (1974) 12 Cal
9 third 382 "... each spouse has a cause of action for loss of consortium, as defined herein, caused
10 by a negligent or intentional injury to the other spouse by a third-party." The case of Ledger
11 vs. Tippett (1985) 164 Cal app third 625, 633 teaches us that "The concept of consortium
12 includes not only loss of support or services; it also embraces such elements as love,
13 companionship, comfort, affection, society, sexual relations, the moral support each spouse
14 gives the other through the triumph and despair of life, and the deprivation of a spouse's
15 physical assistance in operating and maintaining the family home." In other words although
16 loss of consortium is often thought of as interference with one's sex life, that is only one part of
17 the larger general damage encompassed by injury to a spouse.

18 It is not an "economic damage" and therefore should not include items that are properly
19 awarded to the physically injured person. In the case at bench, Mr. had the "honeymoon
20 phase" of his marriage challenged by life-threatening injuries to his wife. He had to attend her
21 in the hospital and watch her desperately fight a battle that resulted in the loss of her right limb.
22 She was not able to continue as the cheerful happy companion who took on many
23 responsibilities around the home. Instead he has spent the last couple of years working through
24 an entirely different relationship with the love of his life. While the arbitrator does not doubt
25 that they will meet these challenges and have a happy and secure marriage and household in the
26 future; nonetheless, the arbitrator finds that these first two years have resulted in a substantial
27 loss of consortium, not just in terms of sexual relations but from all the factors that are properly
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1 included in such damages. Accordingly, Mr. is hereby awarded the sum of \$100,000 for
2 loss of consortium.

3 Mrs. is hereby awarded \$250,000 in general damages. The parties do not need me
4 to explain to them why the compensable loss of a limb of a 26-year-old woman would bring
5 such an award for pain and suffering and other noneconomic damages. It should be obvious
6 that but for the "MICRA cap" the award for such damages would be substantially larger.

7 The question of properly compensating complainant for economic damages must now be
8 considered.

9 The first issue is with regard to a life care plan, a diversified list of future needs of
10 complainant due to her amputation. These include everything from physician care costs to
11 moisturizing creams. The arbitrator in reaching his decisions has considered carefully the
12 arguments and evidence presented by counsel and is not unmindful of respondent's position that
13 future medical care will be taken care of by insurance provided through complainant's husband's
14 medical care insurance provider at his place of employment. The arbitrator finds that argument
15 to be speculative and not persuasive.

16 Of greater evidentiary value was the life care plan of Dr. MD, particularly
17 as critiqued by PhD. Her testimony and matrix has been particularly valuable to
18 the arbitrator.

19 Dr. life plan for complainant totals \$1,016,082.53. Dr. analysis urges a
20 total of \$250,559. Neither of those totals is adjusted for either future inflation nor present worth
21 of that total. Based upon my evaluation of the evidence I find the life care totals for complainant
22 should be \$483,459 before any consideration of inflation or present worth. Using Dr.
23 matrix as a reference point I will review the matrix explaining the decisions I have made.

24 On page 1 Dr. comments about an endocrinologist are well taken. I find that the
25 diabetes suffered by the complainant has not been proven to be related to the below the knee
26 amputation suffered by complainant nor to the necrotizing fasciitis.

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1 The three items on page 1 relating to care of complainant's trigger finger I do find to be
2 related to her use of a walker and therefore the three items set forth by Dr. for hand and
3 finger care are approved.

4 The last item on page 1 of 6 I agree with Dr. and award nothing for a nutritionist.

5 The first item on page 2 of 6 "routine diagnostic costs" are awarded to the complainant
6 as prayed. I do not agree with Dr. comment that the spine problems are speculative and
7 not supported by sufficient evidence.

8 Under the heading "rehabilitation services" Dr. would award nothing for gym
9 membership or occupational therapy evaluation. I disagree with both those suggestions and
10 make an award including both items in their entirety. Dr. suggestion to increase the
11 amount of physical therapy to \$8075 for lifetime total is adopted by the arbitrator.

12 The first item on page 3 of 6 dealing with individual counseling - I make an award of
13 \$3173.24. I find that Dr. suggestion to limit the individual counseling to one year is not
14 appropriate. However, I do not think the evidence supports more than an additional four years
15 of individual counseling for a total of 28 visits over a five-year period. Using the cost per visit
16 of \$113.33 one can derive the total \$3173.24.

17 At the bottom of page 3 of 6 I award for beach/water prosthesis the amount of \$97,280
18 for the lifetime total. I do not find the request for recreational prosthesis to be supported by
19 sufficient evidence and deny that request as is suggested by Dr.

20 At the top of page 4 of 6 I find that the \$9,000 request for prosthesis maintenance is
21 appropriate.

22 That brings us to the nursing and attendant costs - a large item. I am not persuaded by
23 the evidence that complainant will require four hours a day at \$84 a day for home health aide
24 after her 65th birthday. On the other hand I do not think that one housekeeping visit a week, as
25 suggested by Dr. is adequate. I find that complainant will need, after age 65, two
26 housekeeping visits per week which will allow her to keep up with the heavy housework as well

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1 as other routine items such as washing clothing and bed changing etc. Thus I have doubled Dr.
2 \$81,600 lifetime total to \$163,200.

3 Except as I have discussed, I have approved the matters requested where they are not in
4 conflict between Dr. and Dr. A recap of my totals follow:

5 Physician	\$ 21,217.16
6 Diagnostics	\$ 1,370.50
7 Medications	\$ 1,260.00
8 Lab studies	\$ 0.00
9 Rehab Services	\$ 54,352.46
10 Equip./Sup.	\$242,059.00
11 Nursing	\$163,200.00
12 TOTAL	\$483,459.12

13 I recognize the obligation of the arbitrator to adjust the above total for both inflationary
14 costs and for present worth of the future interest. The arbitrator heard from two economists,
15 and Neither of them could know of the arbitrator's
16 exact findings and therefore could not opine directly on exactly what adjustments they would
17 use. However, of the two, the approach of Mr. appealed to the arbitrator with more
18 convincing force than that of Mr. Mr. after adjusting \$1,016,083 upward for
19 future value and downward for present value ended with a present worth of \$793,083. This is a
20 reduction of approximately 22.5%. Using the exact same percentage as he did to 7decimal
21 places I adjusted the above total of \$483,459.12 to a present worth of \$377,354 which is hereby
22 awarded.

23 Finally this arbitrator addresses the question of complainant's contention that she has lost
24 earning capacity and her request for an award of damages based on that loss of earning capacity.
25 Complainant's primary expert on this point was His reports of December 21
26 and 22nd are in evidence and show his synopsis of the various physical problems that he
27 believes Mrs. will have based on the medical examinations he has reviewed. Using this

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1 information he then voices six opinions about her earning capacity pre-incident and post
2 incident. The arbitrator weighed this against the respondent's expert opinions.

3 DO and PhD each testified and presented written evidence. Dr. " "
4 is board certified in physical medicine and rehabilitation. His office does pain management and
5 regenerative medicine. He expressed an opinion that Mrs. can work a full eight hour shift.
6 He opined as to the various things she could do professionally, including becoming a nurse case
7 manager or getting into rehab nursing.

8 Dr. explained that his assignment was to determine Mrs. employability
9 and earning capacity. He said he was familiar with opinions and that he
10 agreed with some and disagreed with others. In particular he disagreed with Mr. that
11 she had a 35% loss of earning capacity. The experts from both sides seem to agree that the kind
12 of nursing Mrs. did in the Philippines and was expecting to do in the United States, i.e.
13 hands-on nursing with blood draws, handling patients, and taking care of a patient at bedside is
14 not in her future. The experts seem to agree that she will undoubtedly complete the last two
15 courses that she needs and ultimately be licensed as a registered nurse in California. There is no
16 doubt that she is a very bright lady with good nursing skills.

17 When looking into her future it seems clear that she will be able to gain employment in a
18 different type of nursing capacity or in the general workforce for people who already have their
19 bachelor's degree (as does Mrs.). When Mr. looks at the limitations placed on
20 Mrs. by reason of being an amputee, of having existing pain that may persist into the
21 future, of needing to miss work from time to time because of her difficulty in ambulation and
22 just a general attitude in the workplace that favors non-amputees over amputees; he would rate
23 that as a 35% disability.

24 Dr. couldn't disagree more in terms of her disability. He tends to see Mrs.
25 as a capable able-bodied woman who will find employment equivalent to what she would earn
26 as a registered nurse, just in slightly different areas. It is clear he assumes she will be able to
27 do just fine with her prosthesis given a little more time and will be able to work full workweeks
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1 without debilitating pain. He believes she will not meet any significant resistance in the
2 workforce in terms of finding jobs. He does recommend that Mrs. would benefit from 30
3 hours of vocational rehabilitation services to assist in her return to work. He estimates that
4 would cost approximately \$150 an hour for a total of \$4,500. Thus he sees no lost earning
5 capacity.

6 the economist translates the 35% earning loss of capacity into a
7 present value of \$919,052. It should be noted that respondent's
8 economist, calculates the present worth of that future interest at \$630,699.

9 In examining all the evidence and weighing it as I must, it is my finding that Mrs.
10 would benefit from the 30 hours of rehabilitation services suggested by Dr. Thus she is
11 awarded \$4,500 to help her receive vocational counseling so she can return to the workforce in
12 the most acceptable way and consistent with her abilities. While no one can see the future,
13 when I look at her present condition it is clear that Mrs. does not have the same
14 competitive abilities she would have had before she lost her leg. This is true even if she seeks
15 work in the semi sedentary areas for which she now seems best suited. This is not her area of
16 preference, she would be competing against able-bodied persons who might well land available
17 jobs more readily. While I do not foresee disaster for her the evidence supports that she has lost
18 some competitive edge which translates into loss of earning capacity. However, I do not find
19 that to be a 35% loss if earning capacity. The evidence just does not support such a finding.
20 On the other hand I cannot find that her earning capacity will not be diminished - even
21 assuming she has rehabilitation therapy. Based on all the evidence I find that her lost earning
22 capacity will result in a loss of \$300,000 over her earning lifetime. Said \$300,000 is the present
23 value of that loss of earning capacity.

24 In summary Mrs. is entitled to judgment in this proceeding as follows:

25 General Damages (pain and suffering)	\$250,000
26 Life Care Plan	\$377,354
27 Rehabilitation Counseling	\$ 4,500

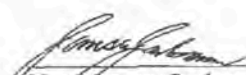
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Loss of Earning Capacity	\$300,000
TOTAL (To Mrs.)	\$931,854
To Mr. (loss of consortium)	\$100,000

Nothing in this arbitration decision prohibits or restricts the enrollee from discussing or reporting the underlying facts, results, terms and conditions of this decision to the Department of Managed Health Care.

Dated: February 22, 2017



Hon. James Jackman (Ret.)
Arbitrator

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IN THE MATTER OF THE ARBITRATION BETWEEN

)	Case No.: 13212
)	Judicate West No. A217454
	Claimant,)	(Proposed) ORDER DISMISSING
vs.)	ARBITRATION PROCEEDING WITH
)	PREJUDICE
)	[Arbitrator: Hon. James A. Jackman, ret.]
and)	
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	Respondents.)	
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)	Arbitration: August 21-24, 2017

On July 21, 2017, at 11:00 a.m., Respondents,
and Motion to Dismiss the
Arbitration Proceeding came on to be heard telephonically before the Hon. James A. Jackman, ret.,
the duly appointed Neutral Arbitrator. Claimant, in Pro Se, did not appear, and
appeared on behalf of Respondents by Esq.
The Arbitrator having reviewed the Respondents' Motion and Notice of Non-Opposition, and

1 considered the comments of Respondents' counsel Esq., regarding service of the
2 Motion and recent contact with Claimant, found that good cause existed for the
3 granting of the Motion, as more particularly set forth in the transcript of the hearing attached hereto
4 as Exhibit A, and incorporated by this reference, and hereby Orders that this Arbitration proceeding
5 be dismissed, with prejudice, pursuant to *California Code of Civil Procedure*, Section 583.410,
6 *California Rules of Court*, Rule 3.142, and and

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8 **Nothing in this arbitration prohibits or restricts the enrollee from discussing or reporting the**
9 **underlying facts, results, terms and conditions of this decision to the Department of Managed**
10 **Health Care.**

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13 DATED: August 28, 2017


14 Hon. James A. Jackman, retired
15 Neutral Arbitrator

16 Prepared by:

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19 By: Esq.
20 Attorneys for Respondents