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Arbitrator

JAMS

In the Matter of the Arbitration between Claimant, and Respondents.	**JAMS Ref. No. 1120011071** **Arbitration No. 11488** **FINAL AWARD**

Counsel for Claimant, :

Counsel for Respondent, :

I.

Pursuant to the entered into by ( ) and ( ) at pages 38 to 41, a binding arbitration hearing was held in Oakland, California between October 24 and 29, 2013. Seven witnesses testified and a deposition and parts of depositions were read into evidence. A bankers box of exhibits was received in evidence. Pre-arbitration briefs were reviewed and closing oral arguments were heard. The matter was submitted for decision on October 29, 2013.

The Arbitrator has fully considered and examined the submissions of proof, considered the allegations of the parties with the arguments of counsel. A statement of those facts found by the Arbitrator to be true and necessary to the award is stated here. To the extent that the resolution differs from any party's position, this is a result of the Arbitrator's determination of the credibility and relevance of the evidence, consideration of the burden of proof and the weighing of the evidence, both oral and written. The analysis of the various claims is based on the facts found by the Arbitrator.

filed a request for arbitration on March 21, 2012 and seeks compensation for two years of pain and suffering because negligently failed to recognize that her pains were caused by spinal deficiencies, and referred her to a surgery consultant two to three years late.

Ms. has the burden of proof that was negligent, *i.e.*, that physicians failed to use care and skill ordinarily exercised in like cases by reputable members of the profession practicing in the same community, or that doctors failed to use diligence and best judgment in the exercise of their skills.

II.

For 15 years, Ms. (dob) was a public middle school teacher in and for about the same number of years was a full or part time employee in the admittance department, mostly at , Hayward. More recently, she has her own catering and table decorating business in the Bay Area.

As a member she was treated at facilities for more than 15 years. For

example, she was treated for leg pains in 2004 and for back and leg pains in August 2005. In August 2005, Dr. , a spine surgeon reviewed a May 1, 2005 MRI report which showed multi-level degenerative disc disease but showed no neurological deficits. Dr. concluded that her leg pain was not related to her back, but more likely related to her hip. In late 2005, Ms. suffered an osteomyelitis infection in her hip bone and was hospitalized for five weeks.

For most of 2006 Ms. was not seen at medical facilities and seemed to be relatively pain free. Prior to 2006, Ms. was treated for arthritis of the hip, muscle abscesses, cancer of the cervix, fatigue, depression, chronic pain and other illnesses.

On January 3, 2007, Ms. was in a motor vehicle accident. She saw Dr. the next day complaining of shoulder and neck pain, and sought treatment. Dr. ordered treatment by heat and rest. Two weeks later Ms. complained of left leg pain. On January 17, 2007, she was seen by Dr. , a physical medicine specialist, complaining of left anterior thigh pain. Dr. reviewed the 2005 MRI report and affirmed that Ms. had multi-level disc disease but no neurological involvement. Dr. ordered another MRI to see if any significant spine changes developed since 2005. She had spinal bone spurs, spinal arthritis problems, moderate stenosis and degenerative disc problems that affected L-3-L4, L 4 and 5, and S 5. There were no significant changes from the 2005 MRI report. Dr. proposed conservative treatment – pain medicines, pain management and therapy. Dr. and Ms. decided to hold off on any spinal injections of steroid and referral to a surgery consultant as Ms. had just recovered from bone infections.

On June 8, 2007, again saw Dr. and complained of pain in her left anterior thigh. A physical examination showed signs of bursitis. Dr. eviewed history of osteomyelitis, radiation therapy for vaginal cancer and other past illnesses in the hip area and concluded that no surgical consult was warranted. Dr. stated that had Ms. stated a desire to see a surgeon, Dr. would have referred her to one.

Dr. next saw Ms. on November 14, 2008 for a continuing complaint of pain in her left thigh. A medical examination showed no neurological abnormalities. Dr. referred Ms. for another MRI to see if there were any changes in her spine. The December 23, 2008

MRI showed conditions similar to the previous 2005 and 2007 MRIs: "unchanged multi-level disc disease, similar to prior exam." Dr. offered a conservative treatment program, including steroid injection, which declined due to her continuing concern to possible exposure to renewed infection in the hip bone. This rejection of invasive treatment would exclude surgery.

Unhappy with the lack of left thigh and back pain relief provided at Oakland , Ms. sought treatment at Hayward . was referred to Dr. , a skilled physiatrist. On January 12, 2009, Dr. reviewed Ms. medical history of back and thigh pain, which Ms. stated had increased since the motor vehicle accident of 2007. A medical exam showed her condition normal with no neurological deficits. Dr. ordered an MRI of hip.

In March 2009, Ms. made inquiries to Dr. about back surgery since hip pain might originate from her spine or from the hip. Dr. stated to Ms. that spine surgery results are "unpredictable." Dr. ievertheless referred to Orthopedic Surgeon Dr. for evaluation of ip pain. Dr. evaluated condition and in September 2009 told Dr. that hip pain was more related to her back and spine than her hip. Dr. discussed treatment options including steroid injections and possible spine surgery. Again Ms. declined the invasive options because of the risk of infections.

In January 2010, Ms. saw Dr. to discuss surgical relief for her back and thigh pain. Dr. reviewed the prior MRIs, conducted a further medical examination and concluded that surgery was not indicated.

On May 24, 2010, Ms. consulted Dr. at Hayward . Dr. is a senior specialist in neurology and for 15 years was a colleague and friend of Ms. . Dr. had a good relationship with and knew much about Ms. and her son's medical history. Dr. examined Ms. for her complaints of thigh pain and consulted with Ms. for about 35 minutes. Dr. recognized increasing pain and he too proposed continued conservative treatment. Dr. continued to follow treatment from May 2010 to October 2010 and learned that two surgeons recommended surgery.

Dr. warned Ms. that she should take extreme caution in pursuing surgery and expressed his opinion that he was not confident surgery was a good alternative decision. He referred to other medical problems relating to her back and thigh pain as well as the proposed multi-level surgery to correct her disc problems. He told that surgery may help, but would "temper my enthusiasm for a good outcome given long time pain issues."

In 2012 Dr. saw Ms. after her March 15, 2011 surgery. While she enjoyed reduced pain in her left thigh and could walk greater distances, she still could not stand for longer periods of time, say to cook a meal and she had similar complaints of ongoing pain in her back, legs and thighs just as she had pre-surgery.

Meanwhile Ms. went back to Dr. in June 2010 complaining of bilateral leg pain. She had trouble walking short distances without resting, her pain was increasing in intensity and frequency – "like torture." Dr. ordered another MRI of Miro's spine. The MRI showed changes in L-3 and L4 and L-4 and L-5. Dr. referred to Dr. , a neurosurgeon in Redwood City for a surgical consult. Treatment options including surgery were discussed with Dr. . Dr. referred Ms. to Dr. , a spine surgeon who ordered a CT scan and an EMG in September 2010. These tests confirmed Ms. changed condition. The July 2010 MRI showed spondylolisthesis and increased stenosis for the first time. The CT scan and EMG confirmed further deterioration of Ms. spine. After discussions with Dr. in September 2010, stated she would consider treatment options including surgery and would contact office about any surgery decision.

Instead Ms. went to Roseville to consult with spinal surgeon Dr. for a second opinion. She recognized that she might have to undergo multi-level surgeries, possible fusions and all this with a background of abscesses, osteomyelitis, prior vaginal cancer and psychological difficulties. She had to assess the risk of surgery resulting in no relief from her pain, possible paralysis, added pain, cord injury and other serious consequences.

Six months later in March 2011 she had the surgery, which provided relief of the pain in Ms. left thigh and allowed her the ability to walk greater distances. However, in 2012

some of pre-surgery pain returned and she continues to seek treatment at in 2013 for similar complaints of pain.

III.

Dr. , Ms. standard of care expert, testified that the failure of Dr. and Dr. in 2008, 2009 and 2010 to take treatment to the next level of care, *i.e.*, referral to a surgical consultant was below the standard of care in the community and was negligence. Dr. testified that Dr. and Dr. should have been more pro-active in explaining and advocating treatment options including surgery. Two years of delay caused her added pain and suffering. Dr. claims that by 2009, Ms. showed classic signs of increased spinal stenosis and her increasingly painful walking and standing showed increased disc disease. However there was no evidence of Ms. deteriorating condition until the July 2010 MRI which first showed medical signs of spondylolisthesis and increased stenosis. The September 2010 CT scan and EMG confirmed the deteriorating spine. Dr. and Dr. did exercise reasonable medical judgment in discussing possible surgery, but until 2010, Ms. deferred consideration of this most invasive procedure out of her concern for infection. Dr. and Dr. had no duty to be more pro-active or to insist that see a surgical consultant, at least before July 2010.

Dr. further asserts that Dr. statement to Ms. that surgery was "unpredictable" was unnecessarily discouraging and unduly alarming to Ms. . The term suggests risks, uncertainty and doubt in the outcome. Prior to the July 2010 MRI, the discussions with Ms. regarding surgery focused on her concern for a new infection. The term "unpredictable" is proper in view of Ms. past medical history.

Dr. , a standard of care expert, opined that Dr. and Dr. treatment advice was within the standards of care in the community. Ms. pain was possibly from many sources and the origin of her pain difficult to identify with precision. Until July 2010, deferring referral of Ms. to a surgery consult was within the standard of care and consistent with Ms. wishes. Conservative treatment before July 2010 was within the standards of care and was a reasonable medical judgment by Dr. and Dr. .

Dr. , another standard of care expert, also testified that conservative treatment until July of 2010 when deterioration of disc was evident but without neurological deficiencies was reasonable medical treatment and within the standard of care in the community. Given Ms. extensive medical history of pain, infections, cancer and other medical issues, Ms. was at a greater risk of an unsuccessful surgery. acted in a timely manner waiting until the July 2010 MRI, the CT scan and EMG to refer Ms. to surgery.

Ms. contends that doctors ignored her complaints, showed no compassion or sympathy, and generally disregarded her complaints. She alleges that some of the doctors dismissed her complaints of pain as only psychological or a product of her imagination. There is no evidence to support these contentions and allegations. Furthermore Ms. pain was real and was treated by doctors as real.

The defense that Ms. claim is barred by the statute of limitations in this malpractice claim need not be ruled on in view of the Arbitrator's findings.

IV.

From the preceding statement of facts, the Arbitrator makes these conclusions of law:

1. physicians and staff treated Ms. pain complaints conservatively at first, and in a non-invasive manner as requested by Ms. . acted within the standards of care in the community. The decisions to not refer Ms. to surgical consultant before July 2010 was based on MRIs generally showing neurological normal conditions in Ms. spine. is not negligent, and doctors acted reasonably with skills ordinarily possessed by members of the profession in similar circumstances.

This conclusion of law is based on the convincing evidence and testimony of experts who testified in this case.

2. medical staff and doctors were not negligent just because efforts from 2007 to 2010 may not have been successful in relieving pain. doctors performed within the standards of care and with the skills and knowledge other reasonable

practitioners would have in similar circumstances in the community. doctors were not negligent.

3. doctors chose medically accepted methods of pain treatment and diagnosis from 2007 to 2010. Even if another method of treatment may have turned out a better choice, doctors exercised the level of skill, knowledge and treatment that other reasonable, careful practitioners would perform under similar circumstances in the community.

V. AWARD

Ms. shall not receive an award of money from .

This interim award is made in favor of , and is found to be the prevailing party. Each party is responsible for her/its own attorney fees. is responsible for the arbitration cost and the arbitration fees as per the plan agreement.

All issues submitted to the Arbitrator have been resolved. If any issue is claimed unresolved, it is deemed denied as to the party requesting relief and to the party having the burden of proof in the claim for relief.

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

I appreciate both counsels' fine presentation in this arbitration and wish Ms. a return to good health. I thank for their hospitality in providing the venue for this arbitration hearing.

Dated: November 19, 2013

Harry W. Low

Justice Harry W. Low (Ret.),
Arbitrator