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IN RE MATTER OF ARBITRATION

ARBITRATION No. 14461
ORDER (AMENDED) GRANTING
RESPONDENT MOTION FOR
SUMMARY JUDGMENT

Claimant,
vs.
and
Respondents.

Respondents
and ("Respondents") filed a
Motion for Summary Judgment (Motion) as to all claims in Claimant
(Claimant) Demand for Arbitration. Claimant is not represented by legal
counsel in this matter. Therefore, the Arbitrator desired that, to the extent legally permissible,
the decision on Respondent's Motion be based on the substance of the matter, rather than
on legal technicalities, namely the timing and format of an opposition. In that regard, despite
the failure of to timely serve an opposition to the Motion, the Arbitrator considered
the moving papers Memorandum of points and Authorities, including the Declarations and

1 exhibits submitted in support, the arguments of counsel, and the letter submitted by Claimant
2 on September 5, 2017 in which she asserted her opposition to certain points raised in the
3 Motion

4 However, the points raised by Ms. do not satisfy the mandate of Code of
5 Civil Procedure Section 437c(B)(3) which states:

6 *Each material fact contended by the opposing party to be disputed shall be followed by a*
7 *reference to the supporting evidence. Failure to comply with this requirement of a*
8 *separate statement may constitute a sufficient ground, in the court's discretion, for*
granting the motion.

9 In her letter dated September 5, 2017, which, though late, the Arbitrator is
10 treating as Ms. /s "Opposition", she takes issue with a few of the
11 "Undisputed Material Facts" cited by 's counsel in its Motion. Each of the
12 material facts set forth in 's Motion are followed by a reference to the
13 supporting evidence as required by Section Section 437c(b)(3):

14 *Each material fact contended by the opposing party to be disputed shall be followed by a*
15 *reference to the supporting evidence. Failure to comply with this requirement of a*
16 *separate statement may constitute a sufficient ground, in the court's discretion, for*
granting the motion.

17 Having failed to provide a separate statement of material facts, with each asserted
18 fact followed by a reference to supporting evidence, as required by Code of Civil
19 Procedure Section 437c(B)(3), I find that the Material Facts set forth by ; in its
20 SEPARATE STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF
21 RESPONDENT'S MOTION FOR SUMMARY JUDGMENT are, undisputed, and form
22 the basis of my ORDER GRANTING RESPONDENT
23 'S MOTION FOR SUMMARY JUDGMENT.

24 The Motion was decided without hearing.

25 After consideration and reading of all materials received from both
26 Respondents, and Claimant, And good cause appearing therefore, the Arbitrator

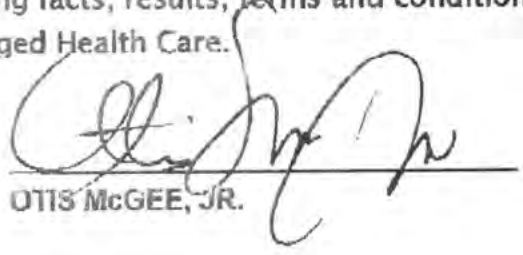
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finds there are not triable issues of Material fact and Respondents are entitled to judgment as a matter of law.

IT IS ORDERED that Respondents' Motion for Summary Judgment is GRANTED in Its entirety.

"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: September 12, 2017


OTIS MCGEE, JR.

Arbitration Award

Instructions: The Neutral Arbitrator must serve the Award form on the parties and the within fifteen business days of the date of the closing of most arbitration hearings. (If there are three arbitrators, this Award must be signed by at least two of them.) See Rules 37 - 39.

Arbitration Name: _____ **Arbitration Number:** 14240

The Arbitrator(s) selected to determine the dispute between the Parties in the above referenced action, find(s):

An arbitration hearing was held on July 5-19, 2018.

It is the decision of the Arbitrator(s) that the prevailing Party in this Arbitration is **(check one)**:

The Claimant(s) is entitled to _____.

Or:

The Respondent(s) is entitled to an award in its favor.

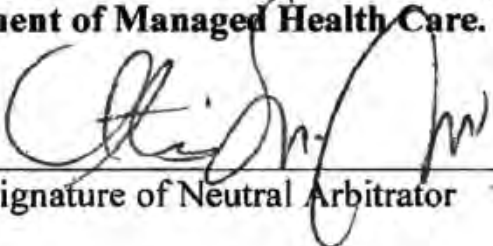
The hearing was conducted **(check one)**:
 in person by telephone video conference by documents only

Were attorney's fees awarded? yes no
If yes, how much and to whom? _____

The reasons for this decision are attached.

(Rule 38 requires that the Award provide findings of fact and conclusions of law, consistent with California Code of Civil Procedure Section 437c(g) or Section 632.)

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.



Signature of Neutral Arbitrator

8/23/18

Date

Signature of Party Arbitrator

Date

Signature of Party Arbitrator

Date

– Findings of Fact & Conclusions of Law

1. Introduction

On the morning of July 15, 2015, Claimant, _____ (Claimant), presented at _____ with a complaint of back and neck pain arising from a motor vehicle accident on June 23, 2015. Claimant's history included an incident arising from tripping over a dog 8 months earlier. During that incident, Claimant fell onto her left side. Claimant's long term Primary Care Physician (PCP), _____, MD, was on vacation so, instead, Claimant was referred to _____ Doctor, _____, MD, the Chief of Family Medicine.

Dr. _____ confirmed that a CT scan did not reflect any fractures and recommended that Claimant receive an injection of Torodol for pain relief. According to Claimant, Dr. _____ explained that the injection might be painful and may leave bruising. Claimant, thereafter, received an injection of Torodol, administered by Nurse _____, an LVN at _____.

The claim, from which this arbitration arose, is that the IM injection of Torodol, by LVN _____, fell below the standard of care, as it was to an inappropriate location on Claimant's right buttock, and resulted in injury to her sciatic nerve.

2. Evidentiary Background

Torodol is administered by intramuscular (IM) injection which, at _____ facilities, are customarily performed by Licensed Vocational Nurses (LVNs) _____, an LVN at _____, administered the injection.

According to Claimant, before administering the injection in Claimant's buttock, Nurse _____ asked Claimant whether she was allergic to any drugs and a) whether Claimant would like to lie down, or bend over, for the injection and b) into which buttock she would like to receive the injection. Claimant advised Nurse _____ she was allergic to sulfa drugs and chose to bend over for the injection into her right buttock.

Claimant testified that she bent over for the injection and dropped her shorts to the floor. She then felt a cold wipe on her right buttock which she assumed was a sanitizing swab. She next felt an excruciating pain, extending from her inner right buttock to her right foot. She exclaimed about the pain she was experiencing and turned to Nurse _____ and asked her, "_____ what have you done?" According to Claimant, Nurse _____ responded, "I don't know. It's a thick needle." Further, according to Claimant, Nurse _____ placed a bandaid on the site of the injection and told Claimant, only, that she should remain in the facility for 15 minutes to be certain she did not experience a reaction from the injection.

On July 19, four days after the injection, Claimant spoke to Dr. _____, by telephone, and advised him about the pain she continued to suffer from the Torodol injection.

Claimant further testified that, upon her return from vacation, her PCP, Dr. _____, examined her, and Dr. _____ told Claimant she could see where the Torodol shot was injected. Claimant asserts that the injection administered by Nurse _____ was inserted in the "lower inner quadrant" of her right buttock (an improper location), rather than the "upper outer quadrant" of her right buttock.

Claimant further testified that during a discussion with Dr. _____ after the injection, Dr. _____ told her she "may have sustained an injury to her sciatic nerve" and "we're all concerned."

3. Findings of Fact

A. A 1 ½ inch hypodermic needle was used during the injection of Torodol

Facts - A 1 ½ inch needle was used during the injection and the medication injected was Torodol. (Testimony of [redacted] regarding her looking at the vial and determining it was Torodol; testimony of [redacted] regarding 1 ½ inch needles being routinely used for IM injections of Torodol; Exhibits 103, 104 – Medical Administration Record).

Findings – A 1 ½ inch needle was used during the IM injection of Torodol, administered by Nurse [redacted] to Claimant on July 15, 2015.

B. A 1 ½ inch needle will not reach the sciatic nerve if injected into any area of the buttock

Facts - Several medical practitioners, qualified as experts in this proceeding, testified that a 1 ½ inch needle is incapable of reaching the sciatic nerve if injected into any area of the buttocks. A 1 ½ inch needle is too short to reach the sciatic nerve due to its length and the presence of subcutaneous muscle. (Testimony of doctors [redacted], [redacted], [redacted]. This testimony, that a 1 ½ inch needle, injected into any area of the buttocks, cannot reach the sciatic nerve, was uncontroverted.

Findings – A 1 ½ inch needle is incapable of reaching the sciatic nerve if injected into any area of the buttocks. The injection of Torodol, by Nurse [redacted] on July 15, 2015, using a 1 ½ inch needle, did not strike, or penetrate Claimant's sciatic nerve.

C. Claimant's testimony regarding the location of the injection is controverted by credible evidence

Facts - Claimant testified that a) the Torodol injection administered by Nurse [redacted] on July 15, 2015, was in the lower inner quadrant of her right buttock; b) Dr. [redacted] told her "it appears you sustained an injury to your sciatic nerve" and "we're all concerned about it"; and c) Doctor [redacted], upon her return from vacation, could see where the injection was administered. Each of these points is controverted by credible evidence.

1. The location of the injection – Nurse [redacted] does not recall administering the Torodol injection to Claimant on July 15, 2015. However, prior to that date she had administered more than 1000 such injections since she began working for [redacted] in May, 2009. A normal part of the process of administering injections at [redacted] is the completion of a "Medication Administration Record" (MAR), Exhibits 103 and 104, immediately following the injection. Onto the MAR, the administering nurse inserts pertinent information regarding the medication administered and the location of the injection. The MAR completed following the Torodol injection of Claimant, was filled out by Nurse [redacted] at 10:26 a.m., within minutes after the injection. Regarding the location of the injection, the MAR reflects "RUOQ" which stands for "Right Upper Outer Quadrant."

Nurse [redacted] has, throughout her employment at [redacted], administered in excess of 1000 IM injections. She, and other LVNs, routinely undergo competency testing, performed by RN supervisors. In 2014, during competency testing, Nurse [redacted] was observed to competently perform IM injections. Following the receipt of Claimant's complaint regarding the July 15, 2015 injection, Nurse [redacted] was observed by her supervisors, RNs [redacted] and [redacted], properly administering IM injections. There were no records of complaints regarding Nurse [redacted] administration of IM injections at any time prior to July 15, 2015 offered in evidence. Nurse [redacted] testified that no patient to whom she administered IM injections ever advised her of experiencing excruciating pain in the past and that, if Claimant, or any other patient had done so, Nurse [redacted] would have immediately contacted the referring physician.

Without dispute, if the Torodol injection at issue in this case was administered in the "upper outer quadrant" of Claimant's right buttock, it would have been within the standard of care. This issue, then, is material to a determination of this matter. Nurse [redacted]'s testimony regarding completing the MAR entry is that, although she had no specific recollection of performing the injection, the MAR entry on Exhibit 104 1) was made by her, 2) was done contemporaneously with the administration of the injection, and 3) reflected where the injection was done. It was not controverted that the MAR was completed at 10:26 a.m. on July 15, 2015.

Claimant testified that, following the Torodol injection, Nurse [redacted] offered Claimant a Band-Aid which was placed on the injection site. This Band-Aid was removed by Claimant and, other than Claimant, no one testified to having seen the Band-Aid in place. However, Claimant testified that upon her return from vacation, Dr. [redacted] told Claimant she could see the injection site. Dr. [redacted] testified she did not see the injection site, nor did she make a statement to Claimant to that effect. There is, consequently, a credibility question as to this issue, namely whether Claimant, or Dr. [redacted], is to be believed.

Similarly, there is a credibility question regarding the comments, purportedly made by Dr. [redacted], that "it appears your sciatic nerve was injured" and "we're all concerned." Claimant testified that Dr. [redacted] made these statements to her. Dr. [redacted] testified he did not recall having made such statements.

Findings – Claimant bears the burden, in this civil proceeding, to prove, by a preponderance of the evidence the material facts in support of her claims. I find that Claimant did not meet the burden of showing it is more likely than not that the IM injection of Torodol on July 15, 2015 was administered in an improper location of her right buttock. In this regard, I find that the testimony regarding the contemporaneous entries on the MAR is credible as it was prepared within minutes of the injection being administered. As such, it could not have been prepared – or fabricated – to address plaintiff's complaints.

I further find that Claimant failed to meet her burden of proving, by a preponderance of the evidence, that Dr. [redacted] told her she may have sustained an injury to her sciatic nerve as a result of the injection. I also find that Claimant failed to meet her burden of proving that Dr. [redacted] told Claimant she could see the location of the injection.

2. Did Claimant suffer a sciatic nerve injury

Facts – Whether Claimant suffered an injury to her sciatic nerve is also disputed and was properly a subject for expert testimony. One expert, _____, MD, testified that Claimant suffered such an injury. Several experts, including Drs. _____, _____, and _____, testified that she did not. The several doctors who testified they were of the opinion that Claimant did not suffer an injury to her sciatic nerve, uniformly based their opinions on the results of various objective, diagnostic tests, including EMGs and MRIs, which reflected normal, and bilateral, findings. More than one of these same doctors, testified that Claimant’s complaints of pain may be attributable to an injury to her “ischial tuberosity,” a condition which mimics, but is not, an injury to the sciatic nerve.

Dr. _____ testified, among other things, that Claimant sustained an injury to her sciatic nerve as a result of the injection of Toradol on July 15, 2015. Significantly, Dr. _____ acknowledged that, in forming this opinion, he was not aware of the length of the needle used to administer the injection.

Findings - Whether several witnesses testify regarding material facts, or only one, is not a factor in determining whether a party has met its burden of proof. Only one credible witness is necessary. However, a party with the burden of proof in a civil matter must meet that burden by a preponderance of the evidence. I find that Claimant has not met her burden on this point. Among other reasons, Dr. _____, who was of the opinion Claimant sustained an injury to her sciatic nerve as a result of the Toradol injection into the wrong area of Claimant’s right buttock, formed his opinion without thoroughly reviewing pertinent available records and discovery. For example, he was not aware of the length of the needle, 1 ½ inches, used for the injection. Nor had he reviewed the MAR (Exhibits 103 and 104) which reflected the location of the injection, Right Upper Outer Quadrant, or the deposition testimony of various experts who testified that Claimant could not have suffered an injury to her sciatic nerve.

3. Claimant’s complaints of pain and physical limitations

Facts - In addition to complaints of pain, Claimant testified she continues to suffer from lifting limitations and restricted range of motion. The continual pain, lifting limitations, and restricted range of motion affect her ability to work, to drive and to enjoy leisure activities. The medical providers, and retained experts, who testified in this matter, uniformly accepted, at face value, the validity of Claimant’s stated concerns. Dr. _____ perhaps, best summed it up by noting that he “was not a truth seeker” as it relates to determining whether a patient’s complaints of pain are real. If a patient asserts that he/she is experiencing pain, he accepts that statement as true.

Respondent, however, presented evidence in the form of *subrosa* videos demonstrating that Claimant was not truthful in her testimony regarding her physical limitations. Moreover, evidence was presented by medical providers, and experts, demonstrating that objective findings on diagnostic tests, conducted at various times since July 15, 2015, are inconsistent with Claimant’s subjective complaints of pain and physical limitations.

Findings – I find it unnecessary to resolve these disputed facts regarding whether Claimant is, or is not, suffering the pain, and physical limitations, about which she complains. For reasons listed above, I have concluded that Claimant cannot be suffering from an injury to her sciatic nerve resulting from the July 15, 2015 injection of Torodol. Claimant may, indeed, be suffering from the pain and the physical limitations she described. I find, nonetheless, that any such pain and physical limitations do not arise from an injury to her sciatic nerve caused by the July 15, 2015 Torodol injection.

4. Conclusion

Credibility issues abound in this matter, the resolution of which might be dispositive of the case. However, I need not reach a determination of who is, or is not, to be believed on certain material issues raised. My award is based on uncontroverted evidence offered by several credible witnesses, namely that a 1 ½ inch needle cannot reach the sciatic nerve if injected into any area of the buttock.

I therefore find in favor of Respondents.

Arbitration Award

Instructions: The Neutral Arbitrator must serve the Award form on the parties and the within fifteen business days of the date of the closing of most arbitration hearings. (If there are three arbitrators, this Award must be signed by at least two of them.) See Rules 37 - 39.

Arbitration Name: _____ **Arbitration Number:** 15024

The Arbitrator(s) selected to determine the dispute between the Parties in the above referenced action, find(s):

An arbitration hearing was held on September 21, 2018.

It is the decision of the Arbitrator(s) that the prevailing Party in this Arbitration is (check one):

The Claimant(s) is entitled to _____.

Or:

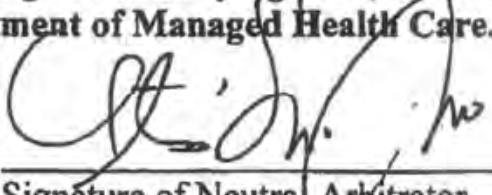
The Respondent(s) is entitled to granting of their Motion for Summary Judgment.

The hearing was conducted (check one):
 in person by telephone video conference by documents only

Were attorney's fees awarded? yes no
If yes, how much and to whom? _____

The reasons for this decision are attached.
(Rule 38 requires that the Award provide findings of fact and conclusions of law, consistent with California Code of Civil Procedure Section 437c(g) or Section 632.)

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.



Signature of Neutral Arbitrator

9/24/18
Date

Signature of Party Arbitrator

Date

Signature of Party Arbitrator

Date

4. Initially, Ms. [redacted] was represented by attorney [redacted], Esq., who signed, and presumably drafted, the Demand. Mr. [redacted] brought a Motion to Withdraw as Ms. [redacted]'s attorney and, on December 29, 2017, Mr. [redacted] Motion to Withdraw was granted. Since December 29, 2017, Ms. [redacted], who is not an attorney, has represented herself.
5. During a January 25, 2018 Arbitration Management Conference (AMC), Ms. [redacted] confirmed that she did not intend to seek an attorney to represent her in this proceeding. She also confirmed that she did not intend to seek leave to amend the demand and that she would proceed with her claims as set forth in the demand.
6. Code of Civil Procedure (CCP) Section 437c sets forth the timelines related to filing and opposing a Motion for Summary Judgment (MSJ). Section 437c was amended effective January 1, 2003 to lengthen the Notice period for filing such motions to 75 days. A result of the 2003 amendment was to give parties responding to such motions more time, 60, instead of 30, days' notice of such an impending motion. Nowhere does the CCP provide for exceptions to the time requirements related to filing, or opposing, such motions due to a parties' status as *in pro per*. Such parties, whether plaintiffs or respondents, are obligated to follow prescribed legal procedures related to timelines.
7. Respondents' Notice of Motion (Notice) and MSJ were filed and served on May 30, 2018, noticing a hearing date of August 20, 2018. Claimant was, therefore given 82 days, instead of the required 75 days' notice of the motion. Claimant had until August 6, 14 days before the hearing, to file an opposition.
8. On August 16, 2018, 10 days after an opposition to the MSJ was due, and 4 days before the scheduled hearing, Claimant served a request for leave to file a motion to extend the time to file and opposition to Respondents' MSJ. She was directed by this Neutral Arbitrator to file and serve her motion requesting addition time and to include with her motion, her proposed opposition to the MSJ. Claimant thereafter filed and served her motion for leave to file a late opposition, and her proposed opposition.
9. Respondents thereupon filed and opposition to Claimant's Motion to Extend Time and, in the same filing, a Reply to Claimant's Opposition to the MSJ. Respondents' Opposition to Claimant's Motion to Extend Time is persuasive as Claimant makes no showing that grounds exist to afford her addition time to that set forth in CCP Sec. 437c to file and serve an opposition to the MSJ. Representing oneself does not, in itself excuse parties from legal procedural requirements. Even *pro per* parties to legal proceedings are required, absent a showing of good cause, to comply with the procedural requirements set forth in applicable law. Merely stating the obvious, i.e.

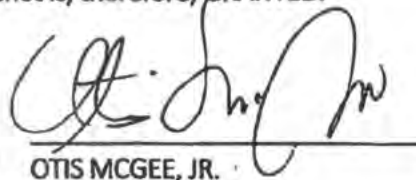
that she is not represented by counsel, is not enough to make a showing of good cause.
C

10. Claimant's Opposition was not timely filed and, therefore, her proposed Opposition will not be considered.

ORDER

- a. There being no showing of good cause by Claimant that her Motion to Extend the time to file an opposition to Respondents' Motion for Summary Judgment should be granted, her motion is DENIED.
- b. There being no timely filed opposition to Respondents' Motion for Summary Judgment, pursuant to Code of Civil Procedure Sec. 437c(c), the Motion for Summary Judgment *shall be granted* as there is not showing that there is a triable issue of any material fact. Respondents' Motion for Summary Judgment is, therefore, ~~GRANTED~~.

Dated: September 21, 2018



OTIS MCGEE, JR.
Neutral Arbitrator