

1 Honorable Kevin J. Murphy (Retired)
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7 ADR SERVICES, INC.

8 IN THE MATTER OF THE ARBITRATION BETWEEN

9
10) CASE NO: 14185
11 Claimants,) ADRS NO:
12) **AMENDED FINAL ARBITRATION**
13 vs.) **AWARD**
14) Hon. Kevin J. Murphy, Arbitrator
15) Date: April 23-27 & May 8, 2018
16 Respondents.)

17
18 I. BACKGROUND

19
20 On October 29, 2015, Claimants (Mr.) and (Mrs.)
21 filed a Civil Complaint in the (Case No.
22) against the Respondents
23 ,) and , M.D. (Dr.
24) and M.D. (Dr.).

25
26 The Complaint alleged a cause of action for negligence against all Respondents on behalf of Mr.
27 , and a cause of action for loss of consortium against all Respondents on behalf of Mrs.
28 . On February 16, 2016, the Respondents filed an Answer to the Complaint alleging,
29 among other things, the Statute of Limitations as an affirmative defense.

1 On June 2, 2016, the Honorable _____, Judge of the Superior Court, granted the
2 Respondents' Motion to Compel Arbitration. On July 14, 2016, the case was filed with the
3 _____ and on September 9, 2018, the undersigned was advised
4 of his appointment as arbitrator.

5
6 The case proceeded to an Arbitration Hearing at the _____ on
7 April 23, 2018 and was concluded on May 8, 2018 with final argument.

8
9 After considering the evidence presented at that hearing and the arguments of counsel the
10 following decision is issued. Any reference to testimony given by the witnesses in this decision
11 refers to sworn statements given at the Arbitration Hearing as opposed to a deposition.

12
13 II. DECISION

14
15 I. INTRODUCTION

16
17 In 2007, Mr. _____ began experiencing a series of physical ailments that led to several visits to
18 _____ in 2007 and 2008. His primary complaint was lower back pain. He
19 underwent a lumbar spine MRI in 2007. In 2008, he visited the Hospital's Emergency
20 Department complaining of intense back pain with numbness and tingling.

21
22 In 2008 Mr. _____ became a _____ patient, and on October 7, 2008 was seen by Dr.
23 _____ who became his primary care physician. Mr. _____ advised Dr. _____ that he was suffering
24 from back pain and numbness in the groin area. During the visit the Doctor reviewed the lumbar
25 spine MRI taken in 2007. The MRI revealed a L-5-S1 central 3.4 mm disc protrusion with slight
26 mass effect on the existing left S-1 nerve right side.

1 At the conclusion of the appointment Dr diagnosed the Claimant as having a herniated
2 nucleus pulposus lower back, recommended physical therapy, and referred him to a spine
3 specialist, Dr. .

4
5 On October 14, 2008, Mr. saw Dr. . The Claimant described intermittent pain
6 in the posterior right leg that had been improving with chiropractic treatment. Mr.
7 illustrated his symptoms on a diagram indicating numbness in the front right groin area and right
8 back pain that extended to the back of the right leg. The Doctor diagnosed a right lumbar strain
9 and sprain and advised home exercise and future contact as needed.

10
11 From October 2008 through August 2014, Mr. had contact with both doctors, but
12 primarily with Doctor , and participated in physical therapy and acupuncture at their
13 recommendation.

14
15 Mr. testified that in September of 2009 an incident occurred where he experienced right
16 foot weakness. The Claimant testified that he spoke to Doctor by phone and reported
17 the event.

18
19 Dr. testified that he spoke to the Claimant by phone on September 16, 2009 and
20 ordered a lumbar MRI that ultimately revealed a mild degenerative disc. The Doctor indicated
21 that he had no record or recollection of Mr. mentioning foot weakness. After considering
22 the evidence regarding this event, the undersigned concluded that the Claimant did not report the
23 incident involving foot weakness to Dr. .

24
25 On September 12, 2013, Mr. saw Dr. and for the first time indicated that he had
26 left side low back pain. Dr. again made a referral to Dr. who saw the
27 Claimant on September 18, 2013. Four years had passed since Mr. last saw Dr.

1 As a result of the September 18, 2013, appointment Dr. ordered another lumbar MRI
2 and made a referral for acupuncture. The Doctor noted that Mr. was not interested in
3 surgery, but would agree to injection therapy. The results of this second MRI showed
4 little change in Mr. 's condition.

5
6 On July 23, 2014, Mr. experienced an episode of right leg weakness with a partial
7 collapse of his right foot. The following day he contacted Dr. who on July 30, 2014,
8 referred him to a neurologist. This was the first time that the Claimant was referred to a
9 neurologist during his treatment by .

10
11 On August 1, 2014, Mr. saw Doctor who ordered a complete MRI of
12 lumbar, thoracic and pelvic spines. This was the first time that Mr. was referred for a
13 complete MRI. The thoracic MRI revealed a cavernous malformation at the level of T9-10. Mr.
14 was referred to a neurosurgeon.

15
16 On September 5, 2014, the Claimant saw neurosurgeon Doctor who
17 informed Mr. that the treatment options were observation or surgery. Mr. elected
18 surgery that was performed on December 19, 2014. The cavernous malformation was removed.

19
20 Dr. testified during the Arbitration Hearing that at no time during his treatment of
21 Mr. did he suspect a thoracic spine problem or consider a referral for a thoracic MRI.
22 According to the Doctor, his first awareness of such a condition occurred when he learned the
23 results of the August 2014 thoracic MRI that indicated a cavernous malformation.

24
25 Dr. , who saw Mr. approximately 10 times, testified that at no time did she believe
26 that a thoracic spine MRI was warranted or a referral to neurologist necessary. She indicated that
27 she did not review the reports generated by the physical therapists nor could she recall inspecting
28 reports prepared by Doctor . She did not remember speaking to Dr. about
29 Mr. 's case.

1 three lumbar MRIs that did not explain the symptomology. She also knew that on September 12,
2 2013, the Claimant presented with left side complaints. Her failure to take proper diagnostic
3 steps was malpractice.

4
5 (2) DR

6
7 Dr. was not negligent.

8
9 Dr. had limited contact with Mr. due in large part to the Claimant's failing to
10 follow up for treatment for a four-year period of time. His contact with the Claimant was
11 referral-based, and it was Dr. who was primarily in charge of Mr. 's treatment. In
12 the words of Doctor , she was the "quarterback."

13
14 When Dr. became aware of the July 23, 2014, incident involving a partial collapse of
15 the right foot, he immediately referred the Claimant to a neurologist. The referral led to the
16 August 2014 thoracic MRI that revealed the cavernous malformation.

17
18 The undersigned found that Dr. 's opinion in which he stated Dr.
19 committed negligence following his first appointment with the Claimant by not doing one of
20 three things: ordering a thoracic MRI; directing Mr. to keep a written diary and return for
21 a follow up appointment; or, referring him to a neurologist, was unreasonable. The Arbitrator
22 accepted the testimony of the Respondent's experts suggesting Dr. did not commit
23 malpractice.

24
25 B. CAUSATION

26
27 The evidence established that because the Claimant did not have earlier surgery (until December
28 of 2014), he suffered a permanent injury to his right leg manifested by a permanent limp.
29 However, the Arbitrator rejects the Claimants' suggestion that the Mr. 's erectile

1 functioning problems were associated with the cavernous malformation or the negligence of any
2 of the Respondent. The undersigned recalls Doctor repeating multiple times
3 during his testimony that he didn't see such a connection between the cavernous malformation
4 and erectile dysfunction.

5
6 The Respondents' argue that there is no evidence to support the conclusion that Mr.
7 would have agreed to an earlier surgery that would have prevented the permanent right leg
8 condition. cited the fact that the Claimant had a history of not following up with treatment
9 referrals and rejecting the idea of surgery. Thus, maintains that the Respondent failed to
10 show a proper causal connection between negligence and a resulting harm.

11
12 The undersigned rejects the Respondents' causation argument. Because of the malpractice Mr.
13 was denied the opportunity to select surgical intervention at an earlier time where
14 permanent injury to his right leg could have been avoided. Moreover, the evidence established
15 that once the cavernous malformation was diagnosed, the Claimant immediately opted for
16 surgery.

17
18 (C) STATUTE OF LIMITATIONS

19
20 Code of Civil Procedure section 340.5 provides that a malpractice action against a health care
21 provider must be filed within 3 years of the date of injury or 1 year after the Plaintiff discovers or
22 reasonably should have discovered the injury, whichever occurs first.

23
24 The term "injury" refers to the damaging effect of the negligent act evidenced by when an
25 appreciable harm is first manifested (Brown v. Bleiberg (1982) 32 Cal. 3d 426, 437 fn. 8).

26
27 An appreciable harm amounts to an injury that is presented in some significant fashion regardless
28 whether or not the plaintiff actually became aware of the injury (Marriage & Family Center v.
29 Superior Court (1991) 228 Cal. App. 3d 1647).

1 For the purpose of Code of Civil Procedure section 340.5, the 3 year limitation the time runs
2 from the date of the injury caused by the negligent act until the date the Complaint is filed.

3
4 The lawsuit was filed on October 29, 2014. As concluded above, Doctor 's negligence
5 occurred in October of 2013. Shortly thereafter, injury was manifested in the form of the July 23,
6 2014, right foot collapse. The case was properly filed within the Statute of Limitations.

7
8 (D) DAMAGES

9
10 Mr seeks both economic and noneconomic damages. He petitions for economic damages
11 based on the claim that because of the symptoms associated with his negligently undiagnosed
12 condition, he lost the opportunity to earn 2.5 times his regular salary by working for his
13 employer in Iraq. This claim was based on speculation and not established by the evidence.

14
15 In terms of noneconomic damages, the Arbitrator finds that the Claimant is entitled to recover
16 \$250,000 the maximum amount permitted by Medical Injury Compensation Reform Act.

17
18 Regarding Mrs. 's damage claim for loss of consortium, the Arbitrator has considered the
19 harm she suffered associated with the negligent misdiagnosis of her husband's condition, and
20 awards damages in the amount of \$100,000.

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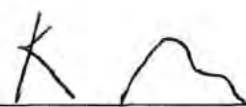
III. CONCLUSION

1. Judgment for Mr. _____, and against all Respondents except Doctor _____, in the amount of \$250,000.

2. Judgment for Mrs. _____, and against all Respondents except Doctor _____, in the amount of \$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.

DATE: May 15, 2018



Hon. Kevin J. Murphy, Arbitrator