Claimants

v.

Respondents

AWARD OF ARBITRATOR

Claimants are represented by . Respondents are represented by .

Claimant had a lapidus bunionectomy on June 28, 2012. It was performed by , DPM, who is an employee of Respondent . As a result of the surgery, complains of constant pain in her right foot, which she states causes her to walk on the outer edge of her right foot so as to avoid putting weight under the base of her big toe. The pain is permanent. After her surgery, in October and November, 2012, claimant consulted other physicians, who recommended further surgery. She and her husband, , decided that she should not have further surgery performed by a physician.

On September 27, 2012, she consulted , M.D., an orthopedic surgeon at , who specializes in foot and ankle surgery. She complained of significant pain in her forefoot; he found deformity of her big toe, 25 degree dorsiflexion, and no EHL function. He recommended waiting three months before deciding on further surgery. She saw Dr. again on December 8, 2012 for further evaluation. He found had experienced persistent pain for six months since her surgery, significant deformity of her foot, absent EHL motor function, the big toe significantly dorsiflexed 30 degrees, and valgus position. He recommended reconstructive surgery, which he performed on December 20, 2012. He found the articular cartilage of the dorsal half of the first metatarsal significantly damaged.

had post-op visits with Dr. on December 31, 2012, January 31, 2013, February 26. 2013, and April 12, 2013. On this date, Dr. found that has had difficulty progressing in her activities, continued to have pain below the first metatarsal, and over the lateral plantar aspect of the fifth metatarsal, which is

limiting. In his progress note for his follow-up on October 29, 2013, Dr. found that continues to have significant medial plantar pain over the first metatarsal, she had developed pain over the lateral aspect of her foot, and that her standing and working tolerance have been reduced due to pain, and that she is able to work half the amount of time as before the surgery performed by Dr. , secondary to discomfort from standing.

The primary issue in determining Respondents' liability to Claimants is whether or not Dr. breached the standard of care in the surgery she performed. Respondents' expert, , DPM, stated his opinion that while the best foot and ankle surgeons set a very high bar for the procedures they perform, which is above the standard of care, the general population of foot and ankle surgeons meet the standard of care based upon less than that very high bar. He testified that while the first metatarsal was over plantarflexed by Dr. , that is a complication that can happen to any surgeon performing the procedure. Dr. testified that claimant experienced a sub-optimal result, but one that occurred during the reasonable process of seeking to adequately plantarflex the metatarsal so that it was an effective weight-bearing structure, even going so far as to lengthen the extensor tendon above it to avoid potential dorsal contraction of the great toe.

Claimants' expert, , DPM, testified that during the surgery on June 28, 2012, Dr. repositioned first metatarsal in an excessive downward tilt, and then used a Synthes locking plate to fix it in that malaligned position. Over plantarflexion is an iatrogenic problem which is below the standard of care. The excessive plantarflexion would have been obvious during surgery. Since the immediate post-op x-ray taken on June 28, 2012 showed the big toe in dorsiflexion, this would have been apparent during the surgery to the naked eye. Intraoperataive flouorscopy would have shown the first metatarsal was not anatomically aligned. Over plantarflexion must be addressed at the time of surgery. Dr. testified that failure to recognize the over plantarflexion during the surgery is below the standard of care. The standard of care requires the surgeon to remove the Synthes plate, reposition the first

metatarsal in anatomic alignment, and then re-fix the position by attaching the plate so as to maintain anatomical alignment. Failure to correct the over plantarflexion intraoperatively is below the standard of care. In addition, Dr. testified that Dr. lengthening the EHL tendon was below the standard of care. Dr. did not describe a medically appropriate reason either before surgery or during the procedure to cut and resew a healthy tendon. It is below the standard of care to perform a surgical procedure that is not indicated. An x-ray of foot performed post-operatively on June 28, 2012, shows the big toe popping up. X-rays show the first metatarsal to be over platar flexed. The big toe popping up is a clue to the surgeon indicating plantarflexion. Lengthening the EHL tendon was below the standard of care because the pre-op x-rays show no indication of a tight tendon, and therefore no need to lengthen the EHL tendon for this procedure. Moreover, not fixating the EHL tendon after lengthening it is below the standard of care. Dr. expressed the opinion that the surgeon did not recognize the reason for the big toe pop-up, and further testified that Dr. should have discussed revision with the patient during the post operative period. Not doing so was below the standard of care. Failure to perform revision on June 28, 2012 is a cause of current complaints. Dr. further testified that Dr. should have discussed the need for revision with during her follow-up visits on July 7, 2012 and July 13, 2012. X-Rays taken on the latter date show the first metatarsal to be dorsiflexed, and the big toe standing up in the air, indicating over plantarflexion of the first metatarsal. Failure to discuss revision procedures on July 13, 2012 was below the standard of care, and failure to revise on that date is a significant cause of current problems related to her foot. Also, wiggling the big toe back and forth 15 days after surgery would slow healing; to do so is below the standard of care. Dr. also expressed the opinion that at post-op visit on August 13, 2012, Dr. should have discussed the need for surgical revision, and proceeded to do it.

Claimant testified that she had no discussion with Dr. after her surgery was performed; Dr. said nothing about revising the procedure, and made no

such recommendations during her post-op visits on July 7, 2012, July 13, 2012, or August 13, 2012. She would have accepted such recommendation from Dr. on any of the above dates.

The arbitrator finds Dr. testimony more persuasive than that of Dr. on the issue of standard of care, and finds that Claimant has met her burden of proof on this predicate issue.

The next issues to be considered are noneconomic and economic damages.

NONECONOMIC DAMAGES

Claimant was born in Viet Nam on October 13, 1965. She and Claimant were married in 1994. They have two children, age 14, and , age 12. She testified that she is unable to walk properly, and for no more than short distances. She is unable to stand for long periods of time. She is in constant pain, which becomes worse with prolonged standing or walking. She has difficulty walking up and down stairs. She can only drive short distances, and uses her left foot to control the accelerator and brake. She requires assistance to do household work and to maintain her household. Before her surgery by Dr. , her family activities included walking in the neighborhood, annual family ski trips, volunteer work at her temple, taking her daughter shopping at the mall, driving her son and daughter to soccer, golf, and tennis. She is no longer able to do these things. Dr. is of the opinion that she will have chronic pain in her right foot for the rest of her life. She was examined twice by Dr. , on December 4, 2013, and July 25, 2014. He is of the opinion that will continue to have pain and develop degenerative arthritic changes in the joints of her foot and ankle, and potentially of her knee and hip. She has what he describes as an abduction gait, which will result in accelerated arthritis, from her ankle to her hip and her back. These changes will affect her ability to perform activities of daily living, and because her work requires standing, will limit her work life as well.

husband, Claimant , who works at as a quality assurance technician, testified that the family took an annual vacation to places like Cancun, the Bahamas, Viet Nam, and Las Vegas. On a trip since her surgery, she

could not care for children alone, and she stayed in their hotel room 85 per cent of the time. In July, 2014, during a vacation to New York City, she chose not to use a wheelchair. He had to handle the luggage without assistance from his wife, and was responsible for both children, buying them lunch and drinks would walk for five to seven minutes, and then sit down to rest because of pain in her foot. He and the children did sightseeing without her. Before her foot surgery, 90 per cent of the housework and activities of their children was her responsibility. Now she watches her son and daughter do housework. His sister helps out; she drives , and the children, she helps with housework, and helps with care of the children. He can tell feels sad that she can no longer do the household activities , including care of the children, as she did before the surgery.

ECONOMIC DAMAGES

Claimant graduated from high school in 1985, and attended Saddle-back College for one year. She then became a licensed cosmetologist. She has worked full time as a self-employed hairstylist since 1986, her only occupation. Normal recovery time would have allowed her to return to work within three to four months after her surgery on June 28, 2012. She was unable to return to work until April, 2013. Her normal work week was six to seven days a week, for eight to ten hours a day. Between 2009 and 2011, her average annual net income (gross income less operating expenses) was $54,337.16, according to Claimants' expert economist, calculation did not include automobile expenses. Claimant testified that she anticipated working until age 70, so as to be able to contribute to her children's college expenses. Dr. estimated she could work no longer than three to four more years because of the consequences of the surgery. testified that work life expectancy for a woman who is age is age 62. Assuming she returned to work on September 1, 2014, her losses to that date would be: wage loss, $102,425; household services cost, $40,521; offset earnings, ($25,712); past medical expense, $37,208 (the cost of surgery performed by Dr.); reasonable automobile expenses to age 62, $14,492, for a total loss of $168,934. The arbitrator concludes that it is reasonable to conclude that she would be able to work part time until age 62, rather

than work to age 70, or for only three to four more years. Assuming she continues to work part time for the duration of her work life expectancy, her earnings would be $240,479; her future lost earnings total $681,533; future loss of household services total $154,797. Claimant total future economic losses total $595,851. Her past and future economic losses total $764,785. She is awarded this amount for her economic damages.

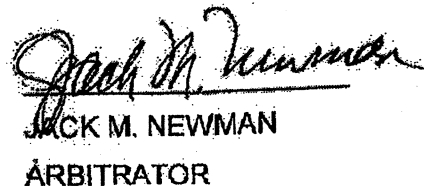
The arbitrator finds that Claimants and testified honestly and credibly about the effects of the surgery on her life, including the pain and suffering she experiences, and the detrimental effect on her daily life and that of her family. Respondents had an investigator follow for a number of days and record her activities. She was shown to walk and carry laundry without apparent difficulty. Even assuming the recording is accurate, it is not in fact the "elephant in the room", as described by Respondents' counsel. The investigator followed her for far more time than the few minutes of the few days shown in the recording. It is not reasonable that she would forego half her former earnings based on a hope that she would recover enough to fully compensate her from this case.

The maximum compensation for noneconomic damages that a claimant may recover in a medical malpractice case is $250,000. Claimant is awarded $250,000, payable by Respondents, for her noneconomic damages.

Claimant claims loss of consortium. He described the changes in their life together as it affects him. He is awarded noneconomic damages in the amount of $100,000. Costs are awarded to Claimants as provided by the arbitration agreement.

Nothing in this arbitration decision prohibits or restricts the enrollee from Discussing or reporting the underlying facts, results, terms and conditions this decision (or Settlement Agreement) to the Department of Managed Health Care

Dated: November 3, 2014



JACK M. NEWMAN
ARBITRATOR