

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN RE THE ARBITRATION OF

VS.
ET AL.

ARBITRATION NO. 14558

PARTIAL AWARD

Claimant,
vs.
; ;
M.D.; and , M.D.
Respondents

This matter came on for Hearing on May 14, 2019. Claimant was represented by
, Esq. of and , Esq. of and the
Respondents were represented by , Esq. and , Esq. of
. The proceedings continued over the course of sixteen days, concluding with
argument on July 5, 2019.

The Arbitration arises from a failed Medical Procedure conducted at a
located on in San Diego, California (also known as or simply),
the purpose of which was to correct the Claimant's (a minor at the time) spinal deformity caused by
scoliosis, a condition marked by a curvature of the spine caused by congenital abnormalities. The
surgery was performed by three surgeons, , M.D., M.D., and
M.D. Doctors and were members of the staff and Dr. was
granted permission to participate in the surgical procedure. The failure of the procedure resulted in

1 rendering the Claimant paraplegic, who contends is responsible for the damages he has
2 incurred.¹

3 The causes of action are premised on two separate theories. The Claimant contends the risks of
4 the surgery were not adequately explained to his parents/guardians nor Claimant and the Surgical
5 procedure was conducted at a level below the Standard of Care required in the medical community.

6 Preliminarily, the Claimant also contends the privileges granted to Dr. were not
7 properly extended. The evidence is to the contrary. Dr. testified clearly as to his recollection of
8 the procedure and resultant approval and Exhibit U evidences this fact. The timing of the authorizing
9 signatures was challenged; however, it is not controlling as the approval could be in the form of a pre-
10 authorization or a ratification.

11 The necessity for the surgery was also challenged notwithstanding the opinions of the medical
12 experts for both the Claimant and the Respondent that it was indicated by the historical evidence which
13 included an increasing deformation in the spinal curve. The extent of this curve is measured by what is
14 known as the Cobb angle which when the value exceeds 50 degrees is the threshold beyond which
15 surgeons recommend surgery. In the case of this Claimant, the curve had reached a value in excess of
16 70 degrees—a level that is consistent with the Claimant's ongoing complaints of back pain.² It was the
17 opinion of the surgeons that without the procedure the condition would have continued to deteriorate,
18 and the increased pain and passage of time would result in a more difficult and dangerous procedure.³

19 The Claimant's contention that his parents, in their role as guardians, were not adequately
20 informed of the risks inherent in the procedure to which they consented arises initially from the
21 argument Dr. was not qualified to communicate those risks to them. Again the
22 evidence is to the contrary. Dr. was qualified pursuant to the guidelines by a process

23

24 ¹ The parties stipulated to the vicarious liability of in the event the damages are determined to
25 have been incurred as a result of negligence by any of the surgeons.

26 ² Reported as being anywhere from 6 to 8 on a scale of 10 and causing the Claimant to report his desire
to not want to get out of bed in the morning.

27 ³ The Claimant's Informed Consent expert, Dr. , tested his credibility in disagreeing with these
28 opinions.

1 known as self-reporting. While there was no evidence of testing by _____, he had maintained his role
2 as an interpreter with his Spanish speaking patients while practicing at _____ without complaint. Dr.
3 _____ further testified that in his several meetings with the family he was never asked to replace
4 himself with a Spanish speaking interpreter. He testified to an extensive history of Spanish learning
5 and practicing. Dr. _____ also testified he did indeed explain the risks of the procedure to the
6 family on more than one occasion, including the possibility of neurologic injuries, though could not
7 recall having articulated the possibility of paralysis or paraplegia—specifically, a practice followed by
8 Dr. _____ and Respondents’ expert Dr. _____. The testimony established the chances of this result
9 were less than 1%. Notwithstanding this remote possibility, the law does require in complicated
10 procedures that “a medical doctor... disclose to his patient the potential of death or serious harm. . .”
11 *Cobbs v Grant* (1972) 8 Cal.3d 229, 244.

12 Although Dr. _____ failed to properly disclose the potential of paraplegia, the inquiry
13 does not end there. Claimant must then establish a causal relationship between the physician’s failure
14 to inform and the injury. “Such causal connection arises only if it is established that had revelation
15 been made consent to treatment would not have been given.” *Cobbs*, at 245. This seminal case on the
16 subject of informed consent also holds that where a risk has not been explained adequately to a patient
17 “an objective test is preferable⁴: i.e. what would a prudent person in the patient’s position have decided
18 if adequately informed of all significant perils (citation).” *Ibid*. There can be no other answer than to
19 elect to proceed. The anticipated future, without surgery, was simply unacceptable. The credible
20 medical opinions all anticipated continued and aggravated pain, and spinal deformity, possible
21 neurologic injuries rendering the patient vulnerable to the potential of paraplegia and certainly
22 rendering any future surgery problematic. The family appreciated the significance of the procedure
23 with the Claimant’s father testifying, “Obviously, like anyone with scoliosis what’s going to happen
24 further on

26 ⁴ “Since at the time of trial the uncommunicated hazard has materialized, it would be surprising if the
27 patient-plaintiff did not claim that had he been informed of the dangers he would have declined
28 treatment.” *Cobbs*, at 245.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

in life if there's no surgery or treatment, obviously they're going to grow hunched. They're going to start growing hunched or tilted to one side or be constantly suffering from pain and fatigue. That's why we made that decision so that he would not have to suffer through that, go through that." The Claimant's older brother, _____, was not able to attend the meeting with Dr. _____ when the decision to have the surgery was made and at a family dinner where the topic was discussed recalled the understanding to be, "He had to do it ASAP because if he didn't then it was just going to get worse and worse as he kept going" and that the option to not have surgery meant "pain for the rest of his life every time getting worse and worse and worse." The Claimant himself understood his options to be "pain or surgery" and that "the longer you wait, it's going to get worse."

The Claimant also contended that the failure to provide the opportunity to accept or reject the assistance of Dr. _____, the surgeon claimed to be responsible for the incident, was below the standard of care. It was not. Dr. _____ testified it was necessary only to inform the patient of the surgeon's intent to have an assistant and if, as was contended, this fell within the informed consent obligation, it is similarly excused pursuant to the above prudent person test.

Finally, the Claimant contends the surgical technique employed by Dr. _____ fell below the standard of care and more specifically the process which led to the invasion of the epidural space as described in the operative report, Exhibit G, was the cause of the injury to his spinal cord. This process was described as the slippage of a nut driving device (screwdriver) causing the device to glance off a pedicle screw head and impact the dura which covers the spinal cord ("incident" herein.)⁵ Again, the medical testimony was unanimous in acknowledging the slipping of a screwdriver is not uncommon and in any event in and of itself is not evidence of a practice below the standard of care. However, both Dr. _____ (Claimant's expert) and Dr. _____ (Respondents' expert) testified that a surgeon's practice falls below the standard of care if the force of the screwdriver on the dura is great enough to

⁵ Dr. _____ testified he was in the process of loosening a screw that had been provisionally tightened when the screwdriver slipped. According to the operative report, the slip happened during screw tightening.

1 cause injury to the spinal cord. Dr. testified this incident unequivocally caused the injury, a
2 conclusion driven by the temporal nature of the event and the realization that an injury had occurred.
3 The operative report, dictated immediately post-surgery by Dr. , the surgeon in whose hands
4 the screwdriver was when it slipped, reads "Following rod placement and during some set screw
5 tightening there was a violation of the epidural space with one of the nut driving devices... motor
6 evoked potentials⁶ following this were reduced bilaterally... The loss was identified within a minute of
7 the occurrence." With this occurrence a wake-up test was ordered, blood pressure was elevated and
8 surgical pause initiated. The report continues, "With this concern that the loss may have been due to
9 the intrusion into the space..."

10 Dr. was unable to identify a singular cause of the spinal cord injury. He attributed the
11 injury to multi facets including the underlying congenital condition, the impact on the blood supply of
12 the process, and the correction process inherent in the procedure. He also acknowledged that he could
13 not exclude the incident itself. Dr. was a credible witness. However, his opinion does little
14 more than provide a summary of the possible causes alone or in combination which is of little
15 assistance to the fact finder. The surgeons contend the correction process was ongoing and it was only
16 at the conclusion of that process that a call for the Motor Evoked Potentials was requested. The
17 operative report does not support this contention.

18 The law requires the Claimant to produce sufficient evidence to establish the basis for his
19 contention. The burden in this case is that of establishing by a preponderance of the evidence that the
20 injury to the spinal cord was caused by the incident. This burden is typically described as requiring that
21 the evidence relied upon is more probable than not to have been the cause of the injury. In order to be
22 actionable, the cause must be a substantial factor defined in California Civil Jury Instruction #430,
23 which reads:

24 "A substantial factor in causing harm is a factor that a reasonable person would
25 consider having contributed to the harm. It must be more than a remote or
26 trivial factor. It does not have to be the only cause of the harm."

27 ⁶ Motor Evoked Potentials (MEPS) are used to measure spinal cord function in spinal surgeries.
28

1 The incident is described as an invasion of the epidural space by a nut driving device, followed
2 by a loss of the motor evoked potentials within a minute. The combination of the following absolutes
3 compels the conclusion that it is at least more likely than not that the incident was a substantial factor
4 causing the injuries suffered by the Claimant:


- 5 (1) the Claimant suffered a spinal injury during the course of the medical
6 procedure;
- 7 (2) the anatomical location of the injury was at the T-12 level of the spinal
8 column;
- 9 (3) the incident resulted in a blunt force impact of the dura at the T-12 level;
- 10 (4) blunt force trauma could cause injury to the spinal cord;
- 11 (5) the MEPS monitor reflected a significant reduction in activity within one
12 minute of the incident;
- 13 (6) the procedure had been ongoing for almost eight hours before the incident
14 and the MEPS had been regularly checked and found to be normal; and
- 15 (7) edema or a lesion was detected in a review of an MRI the day following the
16 surgery located at the T-12 level.

17 Having found that the incident caused the injury, the Arbitrator concludes that the failure by
18 Dr. to prevent the screwdriver from slipping and impacting the dura with sufficient force to
19 cause injury fell below the standard of care.

20 Accordingly, it is the finding of this Arbitrator that the Claimant has prevailed on the initial
21 issue of liability and is responsible for the Damages which he has or will suffer. It is the hope of
22 this Arbitrator that the parties will use the time between the publishing of this Partial Award and the
23 time by which the Final Award including damages is due, or August 2, 2019, to enter into good faith
24 settlement negotiations.

25 **IT IS SO ORDERED**

26 Dated: 7-22-19

27 
28 _____
Hon. Thomas P. Nugent

1
2 **IN RE: ARBITRATION BETWEEN**

3
4
5
6
7 **ARBITRATION NO: 14558**

8
9 **AMENDMENT(S) TO PARTIAL AWARD.**

10 Claimant,

11 vs.

12
13
14
15
16
17 Pursuant to Rule 37 of the Rules For Kaiser Permanente Member Arbitrations requiring the service
18 of "the Award in Extraordinary and Complex cases, no later than thirty (30) business days after the
19 closing of the Arbitration Hearing"(July 5, 2019) the Partial Award dated July 22, 2019 on page 6,
20 lines 19 through 22 attached hereto and incorporated herein by this reference, is hereby amended to
21 provide:

22 "It is the hope of the Arbitrator that the parties will use the time between the publishing of this
23 Partial Award and the time by which the Final Award including damages is due, or August 16, 2019,
24 to enter into good faith settlement negotiations".

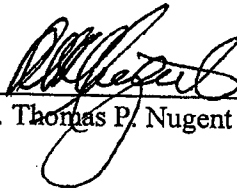
25 Pursuant to Rule 38 (b) of the Rules For Kaiser Permanente Member Arbitrations the Partial
26 Award is further Amended to provide:

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO ORDERED

7-27-19
Date


Hon. Thomas P. Nugent