JAMS ARBITRATION CASE REFERENCE NO.

ARBITRATION NO. 15669

and

Claimants,

And

Respondents.

AMENDED ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The Motion for Summary Judgment by Respondents came on for hearing at 10:00 a.m. on December 20, 2019 by JAMS conference call. Esq. appeared for Respondents. , Esq. appeared for Claimants.

After full consideration of the evidence, and the written and oral submissions by the parties, the arbitrator finds that there are no triable issues of material fact, and that the Respondents are entitled to judgment as a matter of law for the following reasons:

1. Respondents have shifted the burden to Claimants on this motion.
2. Claimants lack any admissible evidence establishing medical treatment fell below the standard of care.
3. Claimants lack any admissible evidence establishing caused any injury.
4. Alleged malpractice before September 11, 2017 is barred by the statute of limitations.
5. loss of consortium claim cannot be sustained.

This determination is based on the following evidence:

1. Respondents served Claimants with comprehensive written discovery. In response to requests seeking all facts and witnesses supporting the claims of malpractice, Claimants failed to produce any admissible evidence or expert testimony supporting the claim that (1) any conduct or omission by Respondents caused Claimants' injury; or (2) that any treatment by Respondents fell below the standard of care. [UMF Nos. 39-40.] The global

and non-specific responses to discovery have shifted the burden of proof on this motion to Claimants. Andrews v. Foster Wheeler (2006) 138 Cal.App.4th 96, 107. Once the burden has shifted, Claimants must "show that a triable issue of one or more material facts exists." CCP Sec. 437c(p)(2). To sustain their burden, the Claimants must "set forth the specific facts showing that a triable issue of material fact exists." CCP Sec. 437c(p)(2).

2. Respondents' retained expert, Dr. M.D., submitted a detailed declaration that summarized his background and qualifications, listed and attached the relevant medical records that formed the basis for his opinion and then supported his opinions and conclusions with a well reasoned analysis. He concludes by opining that throughout 2017 and 2018 had provided Mr. with treatment, evaluations and referrals that has been well within the professional standard of care. [See Dr. Decl., Para. 21.] The records attached to the declaration of Dr. were properly authenticated by Respondents' Custodian of Records, . [See Decl. of .]

   By contrast the declaration of Claimants' retained expert, Dr. , M.D., suffers from multiple defects. First, Claimants have failed to submit any authenticated medical records to support the conclusions of Dr. For this reason alone, the declaration is not admissible. Garibay v. Hemmat (2008) 161 Cal.App.4th 735, 742. Therefore, Dr. lacks the foundation to assert what did or allegedly failed to do.

   Second, Dr. declaration is inadmissible because it is conclusory, based on speculation and lacks evidentiary foundation. The declaration fails to provide support for the conclusions reached. Why does he believe "an appropriate psychological evaluation was required in 2017?" [See Dr. Decl., Para.5.] Why does he believe the multispecialty care Mr. received from in 2017, which included psychiatric treatment, was insufficient? Why does he believe it was below the standard of care to not send Mr. to Kentucky? [See Dr. Decl., Para. 5.] Lacking evidentiary value, it may be excluded from evidence. Jennings v. Palomar Pomerado Health Systems, Inc. (2003) 114 Cal.App.4th 1108, 1116.

   It is unclear what records Dr. has reviewed. As such, he lacks foundation to attest to what was done and not done at The arbitrator is unable to ascertain whether Dr. conducted an adequate review of the relevant records. This renders his opinions inadmissible. "[A] medical opinion is not substantial evidence if it is based . . . on inadequate medical histories or examinations, . . ." Yeager Const. v. Workers' Comp. Appeals Bd. (2006) 145 Cal.App.4th 922, 928.

   Finally, the assertions of Dr. as to the standard of care are so vague and ambiguous that they fail to qualify as expert opinion because they would not assist the trier of fact.

Evid. Code Sec. 801. For example, his declaration does not specify what treatment Mr. should have received in Kentucky or even the name of the facility.

The only other declaration submitted in support of the opposition is the declaration of Claimant In his declaration Mr. attempts to offer opinions on the standard of care and causation. This is expert opinion. No foundation is provided to suggest Mr. is qualified as an expert on these topics. His attempt to offer evidence in the form of medical opinions is inadmissible. Evid. Code Sec. 720(a).

Because the declaration of Dr. is inadmissible and the medical opinions of Mr. are inadmissible, Claimants lack any admissible evidence establishing medical treatment fell below the standard of care.

3. Respondents also contend that there is no dispute of fact that suggests any injury alleged by Mr. was caused by acts or omissions of [See Dr. Decl., Para. 19-21.] Claimants' opposition to this causation argument is based on paragraph 6 of Dr. declaration. [See Claimants' response to Respondents' UMF Nos. 36,37.] Paragraph 6 provides:

"The behavior of acting out, of suicide ideation and other behaviors arise from his post traumatic stress disorder, et al. and/or a manifestation of his frustration at the failure to obtain proper treatment."

This assertion is vague and ambiguous. For example, what behavior constitutes "acting out?" What are the unidentified "other behaviors" referred to?

Paragraph 6 fails to identify the cause of the behaviors. Were the behaviors caused by post traumatic stress disorder, by Mr. inability to control his own frustrations, or was it some other source identified only as "et al."? The conclusions are further qualified by the term "and/or." Such an opinion is insufficient to meet Claimants' burden of establishing causation within a reasonable medical probability. Jones v. Ortho Pharmaceutical Corp. (1985) 163 Cal.App.3d 396, 402-403.

Finally, the declaration fails to establish causation because it is conclusory. Dr. fails to provide an explanation why he believes the assertions in Paragraph 6. "[A]n expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert's opinion is worth no more than the reasons and facts on which it is based. (Citations omitted)" Bushling v. Fremont Medical Center (2004) 117 Cal.App. 4th 493, 510.

For these reasons Dr. declaration fails to establish any triable issue of material fact as to whether Mr. alleged injuries were caused by Respondents.

4. There appears to be no dispute that any alleged malpractice before September 11, 2017 is barred by the statute of limitations. CCP Sec. 340.5. The opposition does not address this issue. It is undisputed.

5. A cause of action for loss of consortium in California is dependent upon the existence of an injury to the other spouse caused by a third party. Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal.3d 382, 408. The opposition does not address this issue. It is undisputed.

The arbitrator's rulings on Respondents' objections to evidence filed by Claimants in opposition to motion for summary judgment are contained in the separate order served along with this order.

Therefore, it is ordered that the Motion for Summary Judgment is granted, and that an arbitration award in favor of Respondents and against Claimants shall be entered accordingly.

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: 1/3/20

Hon. William J. Elfving (Ret.)

Arbitrator