(State Bar No.)
(State Bar No.)

Telephone:
Facsimile:

Attorneys for Respondents,

non-profit corporation; and
., a non-profit corporation

IN RE: THE ARBITRATION BETWEEN:

Claimant,

vs.

, a non-profit corporation; and
., a non-profit corporation, and

Respondents.

[PROPOSED] ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The Motion for Summary Judgment of Respondents,
., a non-profit corporation, and
., a non-profit corporation, came on for telephonic hearing on October 2, 2017, , Esq., neutral arbitrator, presiding. , Esq. appeared on behalf of Respondents, and no appearance was made by Claimant. After consideration of the moving papers and file for this matter, and after hearing oral argument,

IT IS HEREBY ORDERED that the Motion is GRANTED.

Claimant, , claimed that Respondents committed medical negligence in the care and treatment of his finger, which caused injury to him.

Respondents have presented evidence in the form of the expert testimony of

EXHIBIT "A"

, M.D. (hand surgeon), , M.D. (emergency medicine) and , M.D. (cardiology), that Respondents' conduct did not breach the applicable standard of care and did not cause the claimant injury. Claimant has not responded with expert testimony that Respondents breached the standard of care or caused him injury, as he must in this action based on medical malpractice. Landeros v. Flood (1976) 17 Cal.3d 399, 410, 131 Cal. Rptr. 69; Cobbs v. Grant (1972) 8 Cal.3d 229, 236-237, 104 Cal. Rptr. 505; Huffman v. Lindquist (1951) 37 Cal. 2d 465, 473, 234 P.2d 34.

For that reason, Respondents have established that there is no triable issue of fact that Respondents' complied with the standard of care in their treatment of Claimant, and, moreover, anything that Respondents did or failed to do, did not cause Claimant injury. Respondents are entitled to summary judgment.

Nothing in this 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.

IT IS SO ORDERED

DATED: October 4, 2017.

ERIC S. EMANUELS, ESQ.
NEUTRAL ARBITRATOR

(State Bar No.)
(State Bar No.)

Telephone:
Facsimile:
E-mail:

Attorneys for Respondent(s), a non-profit corporation; and a non-profit corporation

IN RE THE ARBITRATION BETWEEN:

, Claimant(s),

vs.

, a non-profit corporation; and , a non-profit corporation, and , Respondent(s).

NOTICE OF ENTRY OF ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 4, 2017, the neutral arbitrator, Eric S. Emanuels, entered an Order granting respondents', , ., a non-profit corporation; and ., a non-profit corporation's, Motion for Summary Judgment.

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An executed copy of said Order is attached hereto as Exhibit "A".

DATED: October 5, 2017.

By: _____

Attorney for Respondent(s), ., a non-profit corporation; and ., a non-profit corporation

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: 15588**

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

An arbitration hearing was held on January 23, 2020 through January 28, 2020 .

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

__X__ The Claimant(s) is entitled to $150,000.00

Or:

_____ The Respondent(s) is entitled to _____

The hearing was conducted **(check one):**
__X__ 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.

Eric S. Emanuels, Esq.
Arbitrator

Date February 7, 2020

ERIC S. EMANUELS, State Bar #140168
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ARBITRATOR

IN THE ARBITRATION BETWEEN:

Claimant,	**Arbitration No. 15588**
v.	ARBITRATION AWARD
Respondents	

I. INTRODUCTION

alleges medical malpractice against Respondent claiming Respondent's physicians failed to timely diagnose a tracheal glomus tumor. Mr tracheal glomus tumor was diagnosed in October 2017 and he underwent an open tracheal resection and tumor removal at that time. Mr. contends that his tumor should have been diagnosed earlier and that if it was diagnosed earlier, he would not have suffered a recurrent laryngeal nerve injury because the tumor would have been removed endoscopically, which carried less risk of injury to the recurrent laryngeal nerves than open surgical resection of the trachea and tumor.

Mr. was a 25-year-old, obese male who appointed as an outpatient on January 22, 2016 to , M.D., in the Adult Medicine Department at

California. He complained of trouble breathing, coughing and coughing up approximately one tablespoon of blood two weeks before this encounter.

Mr. then saw a different primary care provider , M.D., on February 11, 2016. He saw Dr. again on February 25, 2016; April 4, 2016; October 19, 2016; January 2, 2017; April 10, 2017 and April 24, 2017. Accordingly, Mr. saw Dr. a total of seven times after he reported coughing up blood. medical records do not reflect any ongoing complaints of coughing up blood from Mr. . medical records also do not document that he was asked if his complaint of coughing up blood reoccurred. Mr. testified at arbitration that he informed Dr. each time that he saw her that he coughed up blood.

Mr also was referred by Dr. to , M.D., an allergist on April 13, 2017, and again on October 11, 2017. A pulmonary function test was done on August 29, 2017, and a CT scan of Mr. sinuses was also obtained. Both the pulmonary function test and CT scan of Mr. sinuses were normal.

Mr. was evaluated in the emergency room on October 18, 2017 at . He had complaints now of stridor. A head and neck CT was done and he was diagnosed with a tracheal tumor that was later determined to be a tracheal glomus tumor. [1] Mr. care was transferred to and, ultimately, UCSF for tumor resection. Mr. contends that he suffers from a right recurrent laryngeal nerve palsy because the tumor was not previously diagnosed. He contends that an earlier diagnosis would have resulted in a different surgical approach, namely, endoscopic removal of the tumor which had a significantly less risk of laryngeal nerve injury. Mr. claims that he can no longer sing because of the right recurrent laryngeal nerve paralysis. His voice is somewhat tempered.

[1] Tracheal glomus tumors are rare neoplasms, usually benign, and there have only been about 70 reported cases. Glomus tumors usually arise in perivascular smooth tissue.

II. ANALYSIS OF CASE

The sole reference to blood in the medical record is identified in the January 22, 2016 outpatient encounter with , M.D. Mr. reported, and Dr. recorded in her HPI (History of Present Illness), an episode of coughing up one tablespoon of blood two weeks before. There are no other references of blood in the medical record until the tumor was diagnosed in October 2017. Mr also complained to Dr. about chest tightness and shortness of breath.

Mr. next saw a provider on February 11, 2016, when he saw Dr. for a chief complaint of shortness of breath. He also reported nasal congestion and feeling like there was mucous in his throat. He was diagnosed with seasonal or perennial allergies. There is no documentation in the record that Mr. complained of bleeding.

Dr. testified at arbitration hearing. Dr. is a Board-Certified Internal Medicine Physician. Dr. first saw Mr. on February 11, 2016, which was 20 days after Mr. had seen Dr. . Dr. did not review Dr. 'HPI' from Dr. visit with Mr on January 22, 2016. Dr. testified that her custom and practice is to only review a previous physician's 'assessment and plan' portion of an outpatient adult medicine note. Dr. doesn't review the HPI portion of notes from previous encounters because she wants to hear complaints directly from the patient. Dr. further testified that coughing up blood is a "big thing" because it warrants further questioning and would have warranted a referral, but Dr. was adamant the Mr never again complained to her about coughing up blood.

Dr. also testified that has a medical weight management program. Mr. weighed approximately 500 lbs. during the time that he had encounters with Dr. . There is no documentation that Dr. ever referred Mr to this medical weight management program.

M.D. testified as to standard of care for . Dr. is well-qualified and has practiced internal medicine for approximately 40-years and is Board-Certified by the American Board Internal Medicine. He manages a busy outpatient practice and is familiar with the electronic medical records systems utilized by as his practice uses the same system.

Dr. testified that Dr. complied with the standard of care when she reviewed only the assessment and plan portion of Dr. note of January 22, 2016. Dr. , was not required to read the entire note which included the HPI provided by Mr. to Dr. Dr. testified the standard of care did not require further investigation of the cause of coughing up blood as recorded in the January 22, 2016 note, as this was the sole reference to blood in the medical record.

Dr. also testified that the blood identified by Dr. in January 2016 likely was from Mr. tumor. Dr. testified that recurrent complaints of bleeding warrant further investigation such as referral to an appropriate specialist such pulmonology or ENT, for potential additional imaging and/or endoscopy to visualize the trachea. A single complaint of blood when coughing did not require surveillance.

Mr. introduced evidence from , M.D., a primary care physician who is also Board-Certified by the American Board of Internal Medicine. Dr. practice was very similar to Dr. and Dr. practice up until 2017. Dr. testified that Dr. did not meet the standard of care because she did not follow up on Mr. previous complaint of coughing up blood. She added that breathing complaints such as shortness of breath, coughing up blood, congestion and mucus production, etc., mandate a thorough review of the respiratory system such as asking the patient about coughing, i.e. how often does the cough occur, the quality and nature of sputum production and the duration of those symptoms.

Dr. testified that Mr. complaint of blood on January 22, 2016, required surveillance by physicians following his care. Dr. concluded Dr. fell below the standard of care because Dr. did not review the entirety of Dr. note 20 days earlier recording the history of blood in Mr. sputum. Because Dr. didn't review the entirety of Dr. previous note, Dr. didn't know Mr had complained of bleeding when coughing and thus did not follow up with Mr. regarding his complaint of bleeding.

Causation experts testified regarding whether an earlier diagnosis would have prevented or minimized the risk of recurrent laryngeal nerve injury. [2] Respondent's expert, , M.D., an imminently well-qualified thoracic surgeon, testified that Mr. was never a candidate for endoscopy because the glomus tumor emanated from the tracheal wall necessitating open resection. He testified the tumor was pedunculated and thus endoscopic removal would not have removed all of the tumor from Mr. trachea. Dr. would have been the surgeon from to remove Mr. tumor but he decided to transfer Mr. care to because of the availability of Extracorporeal Membrane Oxygenation (ECMO). [3] Dr. testified that the procedure to remove the tumor would have been an open resection and that the risk of nerve injury was the same irrespective of tumor size and when the tumor was diagnosed.

Dr. testimony was supported by testimony from , M.D. Dr. is an ENT physician who opined that endoscopy "probably was not an option" because the tumor emanated or began growing in the wall of the trachea. He estimated that a significant amount of the tumor was outside of the trachea.

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[2] The recurrent laryngeal nerve (RLN) is a branch of the vagus nerve (cranial nerve 10) that provides motor innervation to the muscles of the larynx which provides most of the movement of the vocal cords.

[3] ECMO is technology which both pumps and oxygenates a patient's blood outside of the body, allowing the heart and lungs to rest.

Claimant presented testimony from M.D., an associate professor at the . Dr. is trained as a head and neck surgeon and is board-certified by the American Board of Otolaryngology. He also is the Director at the Voice and Swallowing Center within the Division of Laryngology, Department of Otolaryngology at the . Dr. testified that he performed laryngoscopy on Mr. and identified a right recurrent laryngeal nerve paralysis. Dr. testified that a reasonably competent head and neck surgeon would have been able to remove the tumor within the first six months of 2016 without injury to Mr. laryngeal nerves. He testified that the mass was smaller and thus could have been removed endoscopically had it been diagnosed earlier. Dr. testified Mr. tumor was extraluminal, and had extensions growing outside of Mr. trachea. Dr. opinion that Mr. was a candidate for endoscopic removal of the tumor within the first six months of 2016 was based upon the fact that the tumor was not extraluminal during the first six months of 2016. He based this testimony on the fact there was no evidence of obstruction from the pulmonary function test done in 2016; meaning the tumor in early 2016 was sufficiently small in size so that it was non-obstructive and not extending beyond the tracheal wall.

III. DISCUSSION

Mr. testified that he reported coughing up blood to Dr. on the seven visits that he had with her between February 2016 to October 2017 when he ultimately was diagnosed with the tracheal glomus tumor. Dr. testified Mr did not complain to her about coughing up blood. The records also don't identify complaints of blood, other than the January 22, 2016 entry from Dr. . Mr. credibility on whether he reported additional complaints of bleeding is not determinative. This is because Dr. was required by the standard of care in 2016 to read the prior complaint identified by Dr. from Mr. where he told Dr. that he had coughed up a tablespoon of blood. Had

Dr. reviewed that note, she would have asked him if that complaint continued as opposed to remaining an isolated and singular event.

Mr. did not strike the arbitrator as someone who is direct about his complaints. In fact, he passive. Irrespective of Mr. personality, the arbitrator was persuaded that the standard of care required surveillance of the complaint of blood identified on January 22, 2016. Under these circumstances, it is incumbent upon the patient's physician to review the entirety of the note from the previous encounter so as to be able to follow up on any complaints identified in that previous encounter. That did not happen. Accordingly, because Dr. did not familiarize herself with the entirety of Dr. note of January 22, 2016, Dr. was not armed with knowledge of an important clinical symptom (coughing up blood in a young nonsmoker) and thus was unable to follow up with her patient regarding that clinical complaint. It just did not make sense to the arbitrator that Dr. would only review a portion of the prior note from January 22, 2016, and not the note in its entirety which identified the complaint of blood from Mr.

As to causation, both Claimant and Respondent presented testimony on whether an earlier resection would have minimized the risk of nerve injury to Mr. . To ultimately determine whether that was true or not, all experts presented testimony on the nature of glomus tumor itself. Testimony was submitted principally from experts identifying that this tumor began to grow in Mr. tracheal wall and was extraluminal. Dr. believed that resection of the tumor endoscopically would have been accomplished and that this is supported by the literature by "coring" the tumor out of the trachea. He believed that because the right recurrent laryngeal nerve is outside of the trachea, that an endoscopic approach would have been safer and minimized the risk of injury to that nerve. The arbitrator believes Dr.

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IV. CONCLUSION

The arbitrator determines that Respondent fell below the standard of care in its treatment of Claimant and that this caused his right recurrent laryngeal nerve injury. There is no claim for lost earnings or earning capacity. Mr. is unable to sing although he was able to sing before his right laryngeal nerve injury occurred. Mr. was offered medialization procedures which would assist him to sing but has not availed himself of those treatment options. These options were made available to him by Respondent but he has not chosen to undergo medialization in an attempt to improve his singing voice.

The arbitrator determines that an award in favor of claimant in the amount of $150,000.00 is appropriate.

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: February 4, 2020

LEVANGIE LAW GROUP

By: _____
ERIC S. EMANUELS