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8 IN THE MATTER OF THE ARBITRATION BETWEEN

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v.

ADRS CASE No. 13-3303-CWM  
ARBITRATION AWARD

Respondents.

19 This matter was heard on March 16, 18, 19 and 20, 2015 in the San Diego office of ADR  
20 Services, Inc. Claimant was represented by Esq. and Esq.  
21 Respondents were represented by Esq. Cary W. Miller, Esq. served as the  
22 Arbitrator.

24 Both parties submitted prehearing briefs. After both sides gave opening statements, the  
25 following witnesses were called to testify under oath: ;  
26 ; M.D. (Claimant's Expert); CPA; ;  
27 M.D.; M.D. (Respondent's Expert). The parties also submitted a  
28 binder of joint exhibits. After the parties gave oral summations, the Arbitrator declared the  
29 Arbitration Hearing closed on March 20, 2015.

1  
2 Claimant claims that she suffered significant and life altering injuries as the result of  
3 Respondents' negligent failure to timely diagnose and treat sepsis that developed following  
4 bowel surgery on November 28, 2011.

5  
6 Having reviewed and considered all testimony and documentary evidence, the Arbitrator  
7 makes the following findings of fact and conclusions of law:

8  
9 STANDARD OF CARE

10  
11 Claimant failed to prove that Respondents violated the standard of care before  
12 approximately 3:22 p.m. on December 2. Until that time, Ms. did not have evidence of  
13 sepsis and her signs and symptoms were appropriately attributed to a post-operative ileus. She  
14 was noted to be doing well when assessed by Dr. and Dr. on December 1 at  
15 5:39 p.m. and on December 2 at 8:43 a.m. The Arbitrator agrees with the testimony of Dr.  
16 that there was insufficient evidence of infection during either visit to require the  
17 ordering of tests (CBC with differential and/or acute abdominal series) or antibiotics.

18  
19 Furthermore, neither expert testified that the nurses should have contacted Dr.  
20 or Dr. at any time before they returned to assess Ms. on December 2 at  
21 approximately 3:22 p.m.

22  
23 Respondents violated the standard of care on December 2 at approximately 3:22 p.m. At  
24 this time, Ms. demonstrated a dramatic change in condition including lethargy and dusky  
25 digits. These were the first observed signs of sepsis and multi-organ breakdown. The Arbitrator  
26 agrees with the testimony of both experts that the standard of care required the institution of  
27 antibiotics at this time. It was appropriate for Dr. to institute IV fluids with bolus and  
28 order a chest x-ray and abdominal series to look for free air which would indicate an anastomotic  
29 breakdown or leakage. However, the Arbitrator agrees with Dr. that it was below the

1 standard of care to wait as long as three or four hours to review the test results and recheck Ms.

2  
3 CAUSATION

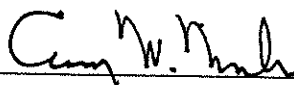
4  
5 Claimant failed to meet her burden of proof that Ms. 's damages were caused by  
6 the delay in diagnosing her condition on or soon after December 2 at 3:30 p.m. The Arbitrator  
7 agrees with Dr. 's testimony that the institution of antibiotics at that time would not have  
8 reversed Ms. 's sepsis or altered her outcome. The Arbitrator also agrees with the  
9 testimony of Dr. , a Gyn-Oncologist with far more experience and expertise than Dr.  
10 with regard to the handling of bowel perforations, that Ms. 's surgery would have  
11 been no different if it had occurred earlier. On the issue of causation, Claimant only presented  
12 evidence that early treatment of sepsis is generally preferred and the outcome is generally better.  
13 This is insufficient to prove that an earlier transfer to ICU, which occurred at 5:45 p.m., and  
14 earlier surgery would have altered Ms. 's damages or resulted in a different surgical  
15 procedure. Accordingly, the Arbitrator would be required to engage in speculation in order to  
16 determine the damage, if any, suffered by Ms. as a result of the delay in diagnosis.

17  
18 DECISION

19  
20 Respondents are the prevailing parties and Claimant is not entitled to an award of  
21 monetary damages.

22  
23 **Nothing in this arbitration decision prohibits or restricts the enrollee from**  
24 **discussing or reporting the underlying facts, results, terms and conditions of this decision**  
25 **to the Department of Managed Health Care.**

26  
27 Dated: 3/26/15

28   
Cary W. Miller, Esq.  
Arbitrator

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8 IN THE MATTER OF THE ARBITRATION BETWEEN  
9

10 KAISER FOUNDATION HEALTH PLAN, INC., )  
11 )

11 Claimant, )  
12 )

13 v. )

ADRS CASE No. 16-0426-CWM

14 , AN INDIVIDUAL; AND DOES )

ARBITRATION AWARD

15 1 TO 10 INCLUSIVE, )  
16 )

16 Respondents. )  
17 )  
18 )

19 The undersigned Arbitrator, having been selected for the purpose of conducting a binding  
20 arbitration on all claims alleged by the parties and having examined the submissions and exhibits  
21 offered and received, now FINDS, CONCLUDES and AWARDS as follows:  
22

23 THE PARTIES AND THE CLAIM

24 Claimant Kaiser Foundation Health Plan, Inc. ("Kaiser") is a medical benefits plan.  
25 Respondent was at all relevant times a Kaiser member. The claim at issue is a single claim for  
26 recovery of medical expenses paid by Kaiser in connection with an automobile accident on  
27 October 1, 2013. Respondent did not participate in the arbitration despite notice thereof.  
28  
29

1 STATEMENT OF FACTS

2 Based upon Kaiser's Arbitration Brief and supporting documents, the following is a  
3 summary statement of those facts found by the Arbitrator to be true. The standard of proof  
4 applied by the Arbitrator is that of a preponderance of the evidence, i.e. that which is more likely  
5 true than untrue. The facts presented by Kaiser are undisputed.

6  
7 Respondent was an insured under a Kaiser Permanente Individual Member Plan ("Plan").  
8 The Plan provided for payment of Respondent's medical expenses in the event of injury, subject  
9 to Respondent's right to recover sums received by Respondent from a third party. Respondent  
10 was involved in an automobile accident caused by another driver on October 1, 2013.  
11 Respondent received medical benefits paid for by the Plan after the accident. The reasonable  
12 value of these medical benefits was \$23,651.20.

13  
14 After the accident, Kaiser made repeated requests of Respondent as to whether she was  
15 pursuing a claim against a third party. Respondent did not respond to Kaiser's first four requests  
16 for information about her claim. On April 28, 2014, Respondent responded that she was not  
17 making a claim and had not hired an attorney. In this time frame, Respondent learned from the  
18 insurance adjuster for the third party that Respondent had in fact retained an attorney and  
19 received a settlement in the amount of \$30,000.00 in January 2014. Kaiser sent Respondent a  
20 Notice of Lien on May 1, 2014. Kaiser initiated this action because Respondent has failed to  
21 provide reimbursement.

22  
23 DISCUSSION

24 Under the Plan, Kaiser was obligated to pay any medical expenses Respondent incurred  
25 in the event of an injury caused by a third party. The Plan further provides that, if Respondent  
26 obtained a settlement from a third party who allegedly caused an injury for which she received  
27 Covered Services, Respondent must pay Kaiser its charges for those Services, except that the  
28 amount she must pay will not exceed the maximum amount allowed under California Civil Code  
29 Section 3040. Under the Plan, Respondent was obligated to send written notice to Kaiser's

1 representative within 30 days after submitting a claim against a third party. The language of the  
2 Plan satisfies the case law that in order to vitiate the "made-whole" rule of reimbursement, the  
3 contractual provision must clearly and specifically give the insurer priority out of any proceeds  
4 regardless of whether the insured is first made whole. See Progressive West Ins. v. Yolo County  
5 Superior Court (Preciado) (2005) 135 Cal. App. 4th 263.

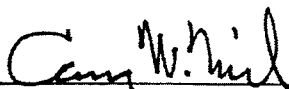
6  
7 The undisputed evidence is that Respondent's lawsuit was settled for \$30,000. One third  
8 of that amount is \$10,000, which is the maximum amount that Civil Code Section 3040 allows  
9 Kaiser to recover. Kaiser secured its rights by submitting a Notice of Lien on May 1, 2014. Any  
10 arguable delay in asserting the lien is the result of Respondent's failure to timely notify Kaiser of  
11 her claim and her false representations that she had not retained an attorney and received a  
12 settlement from a third party.

13  
14 **AWARD**

- 15 1. Kaiser shall take \$10,000 from Respondent.  
16 2. The costs of this arbitration shall be borne by Kaiser.

17 **Nothing in this arbitration decision prohibits or restricts the enrollee from discussing or**  
18 **reporting the underlying facts, terms and conditions of this decision to the Department of**  
19 **Managed Health Care.**

20  
21 Dated: 4/26/16

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24 Cary W. Miller, Esq.  
25 Arbitrator  
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8 IN THE MATTER OF THE ARBITRATION BETWEEN

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10 )  
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12 ) Claimant,  
13 )  
14 ) v.  
15 )  
16 )  
17 )  
18 ) Respondents.

ADRS CASE No. 15-9013-CWM

RULING GRANTING RESPONDENTS'  
MOTION FOR SUMMARY JUDGMENT

19 Respondents submitted their Motion for Summary Judgment on June 9, 2016.

20 Respondents argued that the undisputed facts warrant Summary Judgment on Claimant's only  
21 cause of action for medical negligence because (1) there is no admissible expert opinion  
22 testimony critical of the Respondents' care and treatment of Claimant, and (2) no act or omission  
23 by Respondents caused or contributed to Claimant's damages.

24  
25 In support of their motion, Respondents' submitted the Declaration of M.D.  
26 Dr. is a Board Certified Orthopedic Surgeon who specializes in hand surgery. Dr.  
27 reviewed the medical records and imaging studies pertaining to the care and treatment of  
28 Claimant's left hand and wrist injury by and M.D. Upon  
29 doing so, Dr. set forth his professional opinions that (1) Respondents' treatment and care

1 of Claimant was appropriate and within the standard of care; and (2) no act or omission by  
2 Respondents caused or contributed to any of the damages that Claimant alleges to have  
3 sustained.  
4

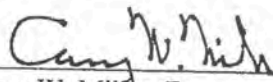
5 Claimant failed to submit any opposition to the Motion for Summary Judgment. More  
6 specifically, Claimant failed to present an expert declaration that contradicts the opinions of Dr.  
7

8  
9 In California, the standard of care for physicians in a medical negligence case may be  
10 established only by qualified expert testimony. Unless the matter at issue is a matter of common  
11 knowledge, expert testimony is conclusive and cannot be disregarded. California courts have  
12 incorporated the expert medical requirement into their standard for summary judgment in  
13 medical malpractice cases. When a defendant moves for summary judgment and supports his  
14 motion with expert declarations that his conduct fell within the community's standard of care, he  
15 is entitled to summary judgment unless the plaintiff comes forward with conflicting evidence.  
16 *Munro v. Regents of the University of California* (1989) 215 Cal. App. 3s 977, 984; *Willard v.*  
17 *Hagemeister* (1981) 121 Cal. App.3d 406, 412.  
18

19 Claimant must also prove that Respondents' negligence was a cause-in-fact of injury.  
20 This must be proven within a reasonable medical probability upon competent expert testimony.  
21 Based on the undisputed medical opinions of Dr. \_\_\_\_\_ the Arbitrator hereby grants summary  
22 judgment in favor of Respondents on both asserted grounds. Claimant's claim is dismissed.  
23

24 **Nothing in this arbitration decision prohibits or restricts the enrollee from**  
25 **discussing or reporting the underlying facts, results, terms and conditions of this decision**  
26 **to the Department of Managed Health Care.**  
27

28 DATE: 9/20/16

29   
Cary W. Miller, Esq.  
Arbitrator