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IN RE THE MATTER OF THE ARBITRATION BETWEEN

)	CASE NO. 11675
Claimant,)	
v.)	FINDINGS OF FACT AND ARBITRATION AWARD
)	Arbitrator: Charles D. Richmond, Esq.
)	Date: February 10, 2014 to February 12, 2014
)	Location: 12707 High Bluff Dr., Suite 100
)	San Diego, CA 92130
; et al.,)	
Respondents.)	

Arbitrator, Charles D. Richmond, submits the following Findings of Fact in the above-referenced Arbitration:

I.
FACTS

The Claimant, (hereinafter referred to as “ ”) filed for Arbitration against and its affiliated organizations arising out of a fall on a golf course on or about July 17, 2011 and medical care of the injury from that fall. was walking up some wooden plank steps to the golf course when he suddenly slipped on one of the slippery wooden steps. He fell to his side on his right shoulder. On the same day as his fall, went to Urgent Care with complaints of pain and stiffness and was examined by Urgent Care Doctor, , M.D. X-rays were taken. The urgent care doctor’s diagnosis was a shoulder injury. was instructed to call his primary doctor if his shoulder did not get better.

1 he discussed the risk and alternatives of surgical treatment versus physical therapy, no such evidence
2 was submitted in the Arbitration.

3 **III.**

4 **FINDINGS**

5 A. Duty of Care

6 Arbitrator finds:

7 1. There was no misdiagnosis of the Claimant. diagnosis was a differential
8 diagnosis, "a soft tissue injury", which could include a torn tendon/rotator cuff tear;

9 2. The physical therapy given by was an appropriate alternative to treating a soft
10 tissue injury given the subjective information received from the Claimant in the case;

11 3. The delay in treatment would have been reasonable given the standard of care in the
12 community given the apparent progress of the Claimant from the benefits of the physical therapy
13 without having an MRI;

14 However, the Arbitrator heard no testimony from either Claimant or the treating physical
15 therapist indicating that Claimant was ever informed of the fact that if indeed his rotator
16 cuff had a full thickness tear, the operative time to repair it was within thirty to ninety days.¹

17 Respondents' physical therapy expert, , testified the physical therapist had a duty
18 to inform the patient of what the benefits and risks of not having surgery in a relatively short time as
19 opposed to attempting to resolve the soft tissue injury in physical therapy.

20 Arbitrator, therefore, finds pursuant to the Respondents' own expert's opinion as to the
21 standard of care of a physical therapist, physical therapist had a duty to give
22 informed consent in regard to the alternative treatments for their differential diagnosis which could
23 include a full thickness tear.

24 B. Causation

25 Here, the factual issue raised by the Respondents was that it was possible that the Claimant
26

27 ¹ Both Respondents' and Claimant's experts and the treating doctor, orthopedic surgeon, Dr. , concur, with the
28 exception of Dr. , Respondent's orthopedic surgeon, the optimum time for successful surgery of a full rotator cuff
tear is between thirty and ninety days. Dr. indicated there was one case in which he was able to repair a full
thickness tear within one to two years, but that was the exception.

1 had a full thickness tear on July 27, 201, the time of his injury.

2 Although all of the Respondents' experts opined it was possible, none of the Respondent's
3 experts had any examples of a patient they had seen who had a full thickness tear and was
4 asymptomatic. The rationale given for the absence of patients who any of the doctors saw with a full
5 thickness tear was patients do not see doctors unless they have some symptoms.

6 The Arbitrator hereby finds because the Claimant had never seen a doctor and had no history
7 of medical problems with his shoulders before the accident and the Respondents have failed to
8 produce evidence to refute Claimant's contention, he was tear free before the accident.

9 **IV.**

10 **DAMAGES**

11 A. Current Medical Specials

12 Pursuant to Claimant's response to Respondents' Special Interrogatory No. 47, Claimant
13 admitted "Claimant did not have any economic loss as a result of this lawsuit". Therefore, there are
14 no current medical special damages.

15 B. Future Medical Specials

16 Claimant's claim for future medical damages in this case rests on the testimony of Dr.
17 which presented no written evidence of cost or other written documentation. Respondents' expert,
18 Dr. opined that to repair a shoulder was extremely problematic. He gave an estimate of
19 success less than 15%. Dr. qualifications in this area were extremely credible. The
20 Arbitrator therefore holds that under jury instruction CA CI3900, future medical damages are not
21 awarded when they are speculative. These damages are clearly speculative.

22 C. General Damages – Pain and Suffering

23 Respondent submitted sub-rosa videos taken by private investigator of the
24 Claimant after his operation. The tapes clearly showed the Claimant activity level after the
25 operation which were inconsistent with his testimony at the Arbitration.

26 testified at the Arbitration on direct he continued to have pain and suffering. As an
27 example of his pain and suffering, he testified before the operation, he could extend his swing with
28 his right shoulder, but as shown in the video, after the injury and operation, he could not fully extend

1 his right shoulder too. The videos demonstratively demonstrated testimony was not
2 credible. Moreover, on one day the tapes pictured at the driving range for three to four hours.
3 Arbitrator never saw partially extend with his right shoulder. At all time there appear to be
4 excellent follow through. never demonstrated any grimacing or partial impairment of his
5 shoulder.

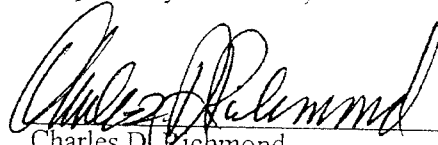
6 In addition, there was no submission of continuing physical therapy or medication after the
7 operation. Therefore, the Arbitrator finds that Claimant had no pain to the extent it was noticeable
8 after the operation on the rotator cuff despite the fact the full thickness tear was not repairable.

9 Although the Arbitrator believes fell below the standard of care in failing to
10 advise/inform Claimant of the risk of not having an MRI and surgery thereafter, breach
11 resulted in no damage to the Claimant

12 **Nothing in this arbitration decision (or settlement agreement) prohibits or restricts the**
13 **enrollee from discussing or reporting the underlying facts, results, terms and conditions of this**
14 **decision (or settlement agreement) to the Department of Managed Health Care.**

15
16 DATED: 3/20/14

Respectfully submitted,



Charles D. Richmond
Arbitrator in the Matter of v. et al.

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