

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 THE MATTER OF THE ARBITRATION BETWEEN

Claimants,
vs.
Respondent.

Arbitration No. 12612

MSZ

~~[REDACTED]~~ ORDER OF DISMISSAL

DISCOVERY CUT-OFF: 01/09/15
ARBITRATION DATE: 02-9/15
ACTION FILED: 11/25/13

Respondent's Motion for Terminating Sanctions based on claimants' failure to comply with a previous order to provide discovery responses came on regularly for hearing by telephone conference call on February 11, 2015. No written opposition to the motion was submitted. No one participated in the conference call hearing on behalf of the claimants. of appeared on behalf of Respondent and moving party.

Upon due consideration of the facts and issues raised by Respondent's motion and based on the procedural history of the case, the motion will be granted, effective February 25, 2015,


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

unless claimants show good cause why the motion should be denied before the close of business on Tuesday, February 24, 2015.

Claimants' action in arbitration is dismissed *with* *out* *PREJUDICE*.

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

DATED: February 25, 2015



JUDGE MICHAEL B. RUTBERG (RET.),

NEUTRAL ARBITRATOR

1 moving to Los Angeles in 2002, she came under the care of Dr. _____, a gynecological oncologist at
2 Respondent _____. He performed a laparoscopic unilateral (left) salpingo-oophorectomy in March of
3 2003. The pathology showed mullerian cystadonoma of mixed cell type with focal atypia, non-
4 malignant and probably arising from endometriosis.

5 In November 2007, Claimant was examined by Dr. _____ at _____ for complaints relating
6 to upper stomach discomfort (indigestion). His primary diagnosis was dyspepsia. He ordered a CT
7 scan of the abdomen and pelvis to evaluate for gastric wall thickness due to a family history of linitus
8 plastica, a type of intrabdominal stomach cancer. The clinical history presented to Dr. _____, the
9 radiologist who subsequently interpreted the November 20, 2007 CT scan as "family history of linitus
10 plastica in an identical twin sister whom died at the age of 29 and recent dyspepsia with a 30 pound
11 weight loss".
12

13
14 The November 20, 2007 CT scan showed an irregularity/abnormality in the right abdominal
15 wall which Dr. _____ either missed or disregarded in her findings concerning the scan. For the following
16 five and one half years up to February 25, 2013, the date of the CT scan which revealed the 2007
17 abnormality/irregularity to be a full thickness right abdominal wall tumor, _____ physicians, as well as
18 Claimant herself, were unaware of said tumor. During this period of time Claimant suffered periodic
19 episodes of intermittent pelvic and lower right quadrant stomach pain and on several occasions
20 complained of the same to various _____ physicians. During the five and one half year period of time
21 Claimant complained of blood in her stools. To rule out stomach cancer and to help alleviate her mental
22 distress associated with her fear of the same based on the earlier loss of her twin sister to stomach
23 cancer, Claimant at different time periods underwent several medical procedures at _____ (endoscopic
24 evaluation, colonoscopy and surgical removal of hemorrhoids) all of which failed to reveal any cancer.
25

26
27 In December 2012, Claimant had visited two plastic surgeons (Dr. _____ and Dr. _____) for a
28

DECISION OF ARBITRATOR

1 consultation regarding a “mommy makeover”, (abdominoplasty and breast/lift augmentation). During
2 his physical exam, Dr. palpated a mass in Claimant’s lower right abdominal quadrant which re-
3 ignited Claimant’s concern regarding stomach cancer motivating her to have an MRI of her stomach at
4 in late January 2013. At the urging of Claimant’s husband, who is and was a medical doctor and
5 a partner with , the MRI was finally read by Radiologist Dr. on February 21, 2013.
6 Dr. then told Claimant’s husband that the MRI had revealed a mass in the right lower anterior
7 abdominal wall, outside the abdominal and pelvic cavity. Upon receiving this troubling information
8 Claimant then underwent a CT scan of her stomach at on February 25, 2013. Dr. , the
9 radiologist, who read the February CT scan, was the doctor to discover the tumor in the
10 November 2007 CT scan had been missed. In her findings concerning the February 2013 CT scan, Dr.
11 reports that the lower right quadrant mass measures 4.3 x 2.2cm, that there were multiple
12 surgical clips that appear to be from an earlier surgery of a “malaria and cystadenoma” and that “a small
13 lesion in this area was present on the 2007 examination where it measured 2.1 x 1.3cm.
14

15
16 Upon receiving this information and specifically with the knowledge that the tumor had been in
17 her body in the lower right quadrant undetected for five and one half years and had grown considerably
18 in size during that time, Claimant became extremely distraught, losing complete confidence in
19 The Claimant had the tumor surgically removed on March 19, 2013 at the cancer hospital
20 in Boston Massachusetts. Claimant and her husband spent approximately two weeks in Boston waiting
21 anxiously for the pathology report relating to the March 19th surgery. They were advised during this
22 period not to leave Boston because of the possible need for further imminent medical procedures in the
23 event the pathology disclosed a malignancy. The pathology findings were released on April 3, 2013
24 with a finding that the mass was a non-malignant tumor (borderline cancer). Follow up MRIs have
25 shown no evidence of a recurrence of the mass. To date, there has been no finding a hernia.
26
27
28

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

LEGAL ISSUES

Were Respondents negligent (failed to comply with the accepted standard of practice in the community)? If Respondents were negligent, did said negligence constitute a substantial factor pertaining to Claimant's injuries? If Claimant carries her burden of proof as to both these issues, then the issue of damages must be determined.

STANDARD OF CARE

Did Dr. act reasonably when reviewing the November 20, 2007 CT scan and did she use the degree of skill that a reasonable radiologist would have used in the same or similar circumstances? Dr. is a well trained and competent radiologist who is not, under the applicable standard of care, required to be 100% accurate in picking up every abnormality in a film, no matter how slight or subtle, that may be lurking in the hundreds of body parts that are revealed in the typical CT scan of the stomach and pelvis with contrast. Dr. , Respondent's expert on standard of care, testified that the preferred practice in determining standard of care issues as they pertain to a missed diagnosis, is to have the preferred expert look "cold" at the scan in question (prospectively) by standing in the shoes of the radiologist who first looked at the questioned film and without the benefit of any hindsight or targeted bias such as subsequent oral or written indications to the expert suggesting as to where to look for the questioned missing or unreported irregularity or abnormality in the first film. Dr. maintains that the testimony of Dr. who is Claimant's expert on the standard of care, is not credible because it is subject to hindsight or targeted bias based on the letter of Mr. to Dr. dated October 14, 2014 (Ex. D) purportedly directing Dr. as to where to look for the missed diagnosis on the 2007 CT scan. To support his opinion that Dr. missed diagnosis in 2007 CT scan did not fall below the applicable standard of care, Dr. maintains that he looked at the November 2007 CT scan prospectively because he received no such subsequent targeted direction in writing or

1 orally suggesting as to where to look for the questioned missed mass in the November 2007 CT scan.
2 When presented with the evidence that other radiologists such as Dr. , Dr. and Dr.
3 , all of whom did see the missed mass in the 2007 scan, Dr. downplays this evidence
4 because it is based on targeted bias when these radiologists first looked at the February 25, 2013 CT
5 scan before the looked November 2007 CT scan.
6

7 While the concept of hindsight or targeted bias may have some relevance in evaluating the
8 credibility of an expert opinion on the standard of care in an earlier missed radiological diagnoses, it
9 certainly is not conclusive especially when board certified radiologists are trained to look for all
10 abnormalities when the indicators are present. To suggest that an experienced, board certified
11 radiologist would be unable to set aside the potential influence of a later film so as to be unable to
12 prospectively look at the first film qualifications of a board certified radiologist.
13

14 The Arbitrator finds that the Claimant has met her burden of proof on the standard of care.
15 Unlike Dr. who testifies almost exclusively for the defense and has testified almost 50 times
16 on behalf of Respondent's counsel of record in this case on other matters, Dr. testifies almost
17 equally for both Plaintiffs and Defendants. As stated earlier, Dr. , Dr. and Dr.
18 were able to see the missed tumor in the November 2007 CT scan. To the naked eye in slices 100-105
19 there is an asymmetry in the right abdominal wall which, given the white contrast against the black
20 background, presents a "top hat" effect. Dr. testified that the standard of care requires that the
21 radiologist is responsible for every set of images and that all structures must be reviewed. He testified
22 that prospectively the 2007 mass shows an asymmetry in the right abdominal wall, that the mass
23 elevates the facial plane and that there is soft tissue contour that should not be present. These are all
24 indicators which Dr. should have perceived and noted in her report. Her failure to diagnose the
25 mass in November 2007 scan is not due to incompetence, but was due, in all probability, to her large
26
27
28

DECISION OF ARBITRATOR

1 daily work load in November 2007 (almost 100 films to review during a typical work day).

2 CAUSATION

3 Claimant has met her burden of proof as to causation. During the five and one half years
4 between the November 2007 CT scan and the March 2013 surgery, the tumor had grown from the size
5 of a walnut (2.2cm x 1.7 x 1.5) to the size of a lime (5.5 x 5.0 x 3.5). During this period of time the
6 tumor grew almost tenfold in volume from an estimated 3 cc's to 28cc's in 2013. The pictures of
7 Claimant in a two piece bikini taken by her husband in 2012 while on vacation in Hawaii (several
8 months before the February 25th CT scan) clearly shows to the naked eye, a prominent bulge in the
9 lower right quadrant of her stomach above the bikini line. Most compelling is the evidence that when
10 the tumor was surgically removed in March 2013, Claimant's stomach pain essentially went away. Dr.

11
12 was correct when he testified that when the tumor was removed, the pain goes away.
13 Claimant's pelvic pain episode on October of 2014 is not probative as to the causation issue because it
14 appears to be one incident of post menopausal menstrual pain which came about when Claimant stopped
15 her many years of breast feeding.
16

17 Dr. a board certified surgeon of 30 years who read all of the essential medical records
18 including both CT scans, opined that Claimant's five and one half years of pain in her lower right
19 quadrant was due to the missed diagnosis of the tumor in the November 2007 CT scan because of the
20 growing pressure on the ileo hypo gastric nerve which runs through the area of the mass. Dr.
21 further opined that had the tumor been surgically removed in early 2008 when it was considerably
22 smaller, the surgery would have been far less evasive than the March 2013 surgery, with no removal of
23 muscle or fascia, a much smaller incision, minimum clearing of margins, and less recovery time in the
24 hospital. Because there would be no defect in the fascia, the chance of a future hernia would be reduced.
25

26 Dr. testified that had the surgery been performed in early 2008, the incision would have been
27

28 DECISION OF ARBITRATOR

1 shorter than the incision in the March 3013 surgery.

2 **DAMAGES**

3 Claimant was understandably particularly sensitive to the discomfort in her stomach for five and
4 one half years for the reason that her twin sister died of stomach cancer at the age of 29. Because of the
5 missed diagnosis in the November 27 CT scan, Claimant unnecessarily went through five and one half
6 years of stomach pain and the emotional trauma that she too may have stomach cancer which proved
7 fatal to her twin sister several years earlier. She became extremely distraught after learning on February
8 25, 2013 that the tumor was in her stomach for the past five and one have years and had grown
9 considerably larger during that period of time. She became alarmed that she would suffer the same fate
10 as her twin sister and feared that her three young children would be left without a mother. As a result of
11 the March 2013 surgery, she is left with a rather prominent scar that is visible when she wears a bikini
12 swim suite or other clothes with a bare midriff. She has discomfort in the area of the scar when she
13 exercises at the gym and has a rational fear of a future hernia from the 2013 surgery.
14
15

16 **AWARD**

17 Claimant is awarded the sum of \$250,000.00 in general damages.

18 Claimant is also awarded the sum of \$8,000.00 in special economic damages which were
19 reasonably incurred based on her required extended stay in Boston (two weeks) for her surgery and post
20 operative pathology report which came out in early April 2013. Claimant's husband was managing her
21 care and was required to be in Boston with Claimant. Claimant's mother and sister were required to fly
22 to California to care for Claimant's three young children. Claimant's choice of treatment in Boston at
23 one of the leading woman's cancer center in the United States was reasonable under the circumstances.
24 Respondent paid for the March 19, 2013 surgery in Boston but did not pay for Claimant's expenses
25 relating to the Boston surgery.
26
27
28

DECISION OF ARBITRATOR

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


CONCLUSION

The Arbitrator wishes to thank all counsel and their respective clients for the opportunity to arbitrate this matter. The Arbitrator is most appreciative of the courtesy and professionalism of counsel in this matter.

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

SO ORDERED:

DATE: 3-5-15


Hon. Michael B. Rutberg, Retired

DECISION OF ARBITRATOR

(SBN)

Telephone No. / Facsimile No.
Attorneys for Respondents,
and

IN RE ARBITRATION

**RULING ON MOTION FOR SUMMARY
JUDGMENT BY RESPONDENTS AND
ARBITRATION AWARD**

and

Claimants,

vs.

and

Respondents.

A telephonic arbitration status conference was held on June 22, 2017. Claimants were represented by their counsel of record and respondents appeared through their counsel of record. At the parties' joint request the arbitrator advanced the hearing date on the motion for summary judgment filed by respondents from June 29, 2017 to June 22, 2017. At that time, claimants' counsel advised the arbitrator and respondents' counsel that he did not intend to file an opposition to the motion for summary judgment, and therefore the motion could be considered on the moving papers alone.

After full consideration of the moving papers, the supporting evidence, and all documents submitted by respondents, including the Separate Statement, the declarations of M.D., and and the authorities submitted by respondents, the arbitrator grants the motion for summary judgment. The arbitrator found that the moving parties are entitled to summary judgment as a matter of law for the following reasons:

1. That based on the declarations and evidence submitted, there are no triable issues of material fact that respondents did not breach the standard of care in their care and treatment of decedent;
2. That based on the declarations and evidence submitted, there are no triable

issues of material fact that respondents did not cause or contribute to decedent's death;

3. That claimants' lack of opposition to the motion acceded to the merits of respondents' position regarding those claims.

IT IS THEREFORE ORDERED that the motion for summary judgment is granted.

AWARD OF ARBITRATOR

Based on the arbitrator's ruling granting respondents' motion for summary judgment, the arbitrator hereby enters an award in favor of respondents.

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.

SO ORDERED.

(MS/L)

DATED: AUG. 6, 2017

~~_____~~



Honorable Michael B. Rutberg, Arbitrator

Judge ~~_____~~ Ret.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Post Office Box 22636, Long Beach, CA 90801-5636. On July 6, 2017, I served a true and correct copy of the following document on the list of interested parties below:

RULING ON MOTION FOR SUMMARY JUDGMENT BY RESPONDENTS AND ARBITRATION AWARD

Esq.

Facsimile
Attorney for Claimants

- By United States Mail (CCP §§1013a, et seq.):** I enclosed said document(s) in a sealed envelope or package to each addressee. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, with postage fully prepaid.
- By Overnight Delivery/Express Mail (CCP §§1013(c)(d), et seq.):** I enclosed said document(s) in a sealed envelope or package provided by an overnight delivery carrier to each addressee. I placed the envelope or package, delivery fees paid for, for collection and overnight delivery at an office or at a regularly utilized drop box maintained by the express service carrier at