

1 **State Bar No.**
2 **State Bar No.**

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4 **Telephone** • **Facsimile**

5 Attorneys for Respondents.
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8 **IN THE MATTER OF THE ARBITRATION BETWEEN**
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12 Claimant,
13 vs.

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16 Respondents.
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ARBITRATION NO.: 16696

[PROPOSED] ORDER AND AWARD

DATE: March 9, 2021
TIME: 9:00 a.m.

Telephonic Appearance
Dial-in Number:
Pass Code:

ARBITRATION DATE: 6/10/2021
ACTION FILED: 06/12/20

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19 **ORDER**

20 Respondents

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22 Motion for
23 Summary Judgment or in the Alternative, Summary Adjudication of Issues, came on regularly for
24 telephonic hearing before the Neutral Arbitrator the Honorable Michael C. Solner (Ret.), at 9:00 a.m. on
25 March 9, 2021.

26 After full consideration of the evidence and the Points and Authorities submitted by the parties,
27 and oral argument of counsel, it appears and the Neutral Arbitrator finds that Respondents

28 have shown by admissible evidence and

1 reasonable inferences therefrom, not contradicted by other evidence or inferences, and by matters
2 judicially noticed by the Neutral Arbitrator, that the Demand for Arbitration of _____ received
3 on June 12, 2020 has no merit and that there is no triable issue of material fact with respect thereto, and
4 that, therefore, said moving party is entitled to Order of judgment as a matter of law.

5 IT IS ORDERED that the Motion for Summary Judgment is granted and judgment shall be entered
6 forthwith as requested in said Motion in favor of Respondents

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

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13 DATED: 3/9/2021

Michael C. Solner
The Honorable Michael C. Solner (Ret.)
Neutral Arbitrator

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17 **AWARD**

18 The Motion for Summary Judgment of Respondents,

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20 came on regularly for telephonic hearing before the Neutral Arbitrator, Hon.
21 Michael C. Solner (Ret.), on March 9, 2021 at 9:00 a.m. or as soon thereafter as it was able to be heard.

22 All appearances are as noted in the record.

23 At the above time and place, the Neutral Arbitrator granted the Motion for Summary Judgment
24 by Respondents,

25 _____ ordered entry of
26 Judgment as requested in said Motion.

27 **IT IS ORDERED** that the said Motion is granted and an Award is entered forthwith as requested
28 in said Motion in favor of Respondents

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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: 3/9/2021

Michael C. Solner
The Honorable Michael C. Solner (Ret.)
Neutral Arbitrator

1 Following the surgery, Claimant began having pain in the area of the operative osteotomy
2 site and, over time, sought several second opinions of physicians both at and elsewhere. It
3 was determined that the ulna was not healing as expected. One explanation was that claimant
4 was a smoker (although on occasion he claimed to have stopped) and smoking was known
5 medically as a cause to inhibit healing. Mr. also described an incident when he struck
6 the arm on the side of his pick-up truck door, potentially harming the healing process. He had
7 healed appropriately from prior surgeries and that was the expectation here. Whatever the actual
8 reason, the healing here did not progress as expected.

9 Dr. had previously treated claimant for a left-hand injury that resulted from a
10 physical fight. Prior to the osteotomy surgery on May 1, Dr. and claimant had a
11 discussion between themselves about the risks and benefits of the osteotomy procedure, and Mr.
12 was fully informed. Mr. 's left ulna was seen on Xray as being longer than his
13 left radius, the other long bone of the arm, causing impaction between the bones. The diagnosis
14 was left ulnar impaction syndrome and Mr. was provided with treatment options
15 including observation, splinting, NSAIDs, therapy, exercises, corticosteroid injections and
16 surgery. Mr. elected to have the surgery. He alleges that the surgery to correct this
17 condition fell below the standard of care in the community, resulting in a non-union or delayed
18 union of the ulna fracture site and failed hardware with the need for subsequent surgery.

19 The hardware involving the plate and the screws was removed on March 11, 2020 by Dr.
20 at , following X rays of December 23, 2019, showing a maintained
21 osteotomy with intact hardware with excellent compression. Mr. , however, was
22 continuing to have pain at the site of the osteotomy prior to this surgery. However, during this
23 surgery, Dr. noted that the osteotomy site appeared quite healed. According to the testimony
24 of the experts, hardware removal at the request of the patient is not unusual and the fact of
25 removal is not an indication of prior negligence or below standard care.

26 At the arbitration hearing, claimant called Dr. an orthopedic surgeon
27 with a subspecialty in hand and upper extremity surgery, as his expert witness. Dr is
28 retired from surgical practice and now does mostly consultations within the worker's
29 compensation system in California. She described the AO method of compression fixation as

1 establishing the standard of care for this procedure. The AO was a foundation of Swiss
2 orthopedists who developed the commonly accepted principles of fixation for this type of
3 surgery, among others. Dr. described several manufactured systems (Rayhack, Synthes,
4 TriMed) that were used for ulnar shortening osteotomies. Each of them required inserting six
5 screws and a lag screw through a plate placed on the ulna. According to her, each of the screws
6 was required to penetrate all the way through both cortices of the ulna and protrude through the
7 far cortex by 1 to 2 millimeters (bicortical fixation). The TriMed system was the one used by Dr.
8 here. Dr. had never used the TriMed system in her practice, nor had she ever
9 testified as an expert witness in a case involving an ulnar shortening osteotomy.

10 Dr. examined claimant on Oct. 5, 2018, some 5 months after the surgery. She
11 ordered a CAT scan to determine the condition of the hardware placed by Dr. . From
12 that, she saw no evidence of bone healing, saw that the lag screw was not in proper position for
13 interfragmentary compression and saw that there was no bi-cortical penetration of some of the
14 screws, two of which had slightly backed out. She determined that a revision of the surgery was
15 going to be necessary.

16 In claimant's case, the screws inserted by Dr. did not protrude beyond the far
17 cortex of the ulna by the required 1 to 2 millimeters and in fact two of the screws actually backed
18 out slightly. Dr. opined that this was evidence of below standard care.

19 Dr. an orthopedic hand surgeon testified as an expert witness on behalf of
20 respondent. After reviewing the X rays and medical records, he could find no fault with Dr.
21 's surgery. He opined that the standard advocated by Dr. that the screws needed
22 to penetrate the far cortex by 1 to 2 millimeters could actually cause harm to patient by
23 interfering with muscles, ligaments, tendons and nerves on the other side of the ulna. The
24 critical consideration was that the screws penetrate some portion of the far cortex far enough so
25 as to hold it in place. That was accomplished here and vessels and other structures were not put
26 at risk by the tips of overly penetrating screw tips.

27 Giving consideration to the entirety of the testimony of the witnesses, some of which
28 have not been mentioned here because their testimony did not contribute to the final analysis of
29 the evidence, Claimant has failed to sustain his burden of proof. He had post surgical problems

1 following the ulna shortening osteotomy performed by Dr. _____, and experienced pain over a
2 significant period of time, but none of his problems were due to medical malpractice or failure to
3 adhere to the standard of care.

4 Judgment is for the Respondent. Claimant shall take nothing by way of his Demand for
5 Arbitration.

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

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11 SO ORDERED.

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14 Dated: April 13, 2021

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17 Hon. Michael C. Solner (Ret.), Arbitrator
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