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ARBITRATION PROCEEDING

JUDICIAL ARBITRATION AND MEDIATION SERVICE

JOHN MITCHELL

Claimant,

vs.

KAISER FOUNDATION HEALTH PLAN, INC. et al.,

Respondents.

JAMS ARBITRATION NO. 1200053639

Kaiser Arbitration No. 15018

Preliminary Arbitration Award

By agreement of all parties this matter was referred to the undersigned for binding arbitration. The Arbitrator having been selected an arbitration hearing was conducted August 20-24 and 27, 2018, at the JAMS San Diego Dispute Resolution Center. Robert F. Vaage of the Law Offices of Robert Vaage appeared with and on behalf of Claimant. Barton Hegeler and Storm P. Anderson of Hegeler & Anderson appeared on behalf of Respondents. Evidence was received and considered and the parties have submitted post-Hearing briefs. This matter having now been submitted for decision the Arbitrator makes the following Preliminary Arbitration Award and provides a brief Statement of Reasons supporting said award.

Claimant John Mitchell (herein "Mitchell") had fallen at work in early 2016 and injured his back. He was diagnosed with lumbar muscle strain and over the period of several months the symptoms abated and was able to resume most of his normal activities.

However, in late 2016 he began experiencing increasing back pain and consulted with his Kaiser primary care physician, Dr. Butler, on or about January 5, 2017. Mitchell reported sharp bilateral back pain, numbness and weakness in his back. Dr. Butler referred Mitchel to Kaiser Physician Dr. Lindy O'Leary (herein "O'Leary) and Mitchell was examined by O'Leary on February 1, 2017. During this examination Mitchell advised O'Leary he was experiencing numbness, tingling and gait abnormality.

O'Leary attended Mitchell again on February 8, 2017. The medical records reflect that during this visit Mitchell reported his leg numbness had increased, the previously reported leg weakness had increased, and he was having difficulty in walking. In general Mitchell's condition was deteriorating. The medical records reflect it was during this February 8 visit that O'Leary first diagnosed Mitchell with symptoms of spinal cord compression and potentially a herniated intervertebral disc and recommended an MRI scan. O'Leary further noted

Mitchell's neurological symptomology was worsening. The more credible expert opinions offered in evidence concluded the symptoms reported to and observed by O'Leary during her examination of Mitchell on February 8, 2017, indicated an urgent need for an MRI procedure to provide a more certain diagnosis. Under these circumstances, and because of Kaiser Procedures that prohibited her from ordering an immediate MRI, O'Leary caused Mitchell to be transported to the Emergency Department of the Kaiser facility.

Approximately 7 hours after first arriving at the Emergency Department Mitchell was finally attended by Dr. Jose Vega (herein "Vega"). Vega observed Mitchell's condition as being no better than had been reported by O'Leary, and in order to rule out cord compression and other spinal cord conditions he ordered an emergency MRI of the lumbar spine, which was done. On review the MRI results did not show any disc compression in the lumbar area of the spine. The importance of the lumbar MRI should not be ignored. It was significant not in what it did show, but in what it did not. By the process of elimination it should have been apparent to trained medical personnel that the lack of any observable problem in the lumbar spine, in the face of symptomology the suggested cord compression, raised a strong inference that there was a possible cord compression at some other level of the spine. This inference was subsequently validated when a thoracic spine MRI was conducted on February 19, 2017, and disclosed the disc compression in the thoracic spine that resulted in the spinal cord injury that caused Mitchell's current disabilities. All testifying experts agreed that disk compressions are far more likely to occur in the lumbar region of the spine, although they can occur at a higher level. Regardless of the location, disc compressions of the spinal cord create a dangerous condition that must addressed with immediate surgical intervention in order to avoid seriously disabling injuries.

Having reviewed the lumbar MRI, and not having observed a disc compression or other condition that would fully explain Mitchell's symptomology,

Vega consulted with Physician Assistant Roderick Lazo (herein "Lazlo"), as to whether or not Mitchell should be referred to a spine surgeon for evaluation to determine if immediate spinal surgery was appropriate. Lazlo, having reviewed the MRI of the lumbar spine, opined that such a referral was not necessary, and recommended a referral to a non-surgical Kaiser department. Vega's decision not to refer Mitchell for evaluation by a spine surgeon, in reliance upon Lazlo's recommendation, was contrary to guidelines adopted by Kaiser that were in effect at the time and fell below the applicable standard of care. Credible expert testimony established that a spinal cord compression triggers a need for immediate surgical intervention to relieve the pressure on the spinal cord in order to prevent permanent spinal cord injury. The longer the delay the greater is the likelihood of permanent injury to the spinal cord. Finally, early in the morning of February 9, having spent the night in the Emergency Department, Mitchell was discharged, given a future medical appointment and walker to assist him, and left the hospital to go home.

On February 10, 2017, Mitchell returned to Kaiser and was attended to by O'Leary. Medical records indicate that during this visit it was observed that Mitchell's symptoms had increased in severity and O'Leary reached the conclusion these symptoms were clearly not consistent with or explained by the previously conducted lumbar MRI. O'Leary concluded that Mitchell's problem was probably in the thoracic spine and there was an urgent need for diagnostic surveys of the thoracic spine to identify the location and nature of the problem. Kaiser's published Clinical Practice Guidelines in effect at the time of these events clearly provided that based on Mitchell's symptomology and clinical findings there was a likelihood of a neurological emergency that required an immediate MRI of the spine and a consultation with a spine surgeon. The conditions that would trigger such an immediate referral for an MRI were observed during the February 8, 2017, meeting with O'Leary, and remained in place at all times

thereafter until the thoracic spine MRI was conducted on February 19, 2017, which was immediately followed by disc decompression surgery.

At the conclusion of the February 8, 2017, appointment with O'Leary she referred Mitchell to the neurological department of Kaiser with a notation of "emergency priority," Notwithstanding the urgency expressed by O'Leary in her referral to the neurology department Mitchell's appointment was not scheduled until February 15, 2017.

When Mitchell returned to Kaiser on February 15, 2017, he was attended to by Dr. Anni Cheng (herein "Cheng"). It appears that at long last a Kaiser physician recognized the seriousness of Mitchell's condition, and properly interpreted the medical records as indicating that Mitchell's problem was cord compression in the thoracic spine. Based upon this diagnosis Cheng ordered a thoracic spine MRI and requested it be done on an expedited basis, typically expressed as "stat". However, Kaiser employees charged with scheduling the procedure testified "stat" meant the first available appointment. Scheduling the procedure on this basis without considering the patient's need for more immediate attention clearly fell below the standard of care applicable herein. The evidence disclosed the scheduling of the MRI could have been expedited by sending the patient directly to the emergency department, or by a personal call from the attending physician to the radiology department explaining the reasons why the procedure should be given priority and done immediately. The medical records suggest that neither of these options were pursued by Cheng. Regardless of whether Cheng failed to take the appropriate steps necessary the expedited MRI, or she did and the radiology department ignored her, the result is the same. By failing to expedite the MRI Respondents fell below the applicable standard of care. In light of Cheng's testimony that she felt it was reasonable to schedule the procedure within 4 to 7 days following the referral under the circumstances she observed it seems more likely she did not take steps necessary to insure the MRI

was done immediately. The MRI of the thoracic spine was scheduled for February 19, 2017, four days after Cheng's referral.

On February 17, two days before the thoracic MRI scheduled for February 19, Mitchell again was seen by O'Leary and also by Kaiser Neurologist Dr. Howard Noack (herein "Noack"). The medical records establish beyond question that Mitchell's disabling symptoms had worsened to the extent that he was unable to stand up without support. The medical records reflect Noack as having concluded Mitchell's condition was occasioned by thoracic myelitis, a condition that was described in testimony as an inflammation of the spinal cord. The expert testimony established that without a thoracic spine MRI it is difficult to differentiate between spinal myelitis and spinal cord compression, although the sequelae of these two conditions are markedly different, with disc compression being by far more threatening in the short term. No effort was made to advance the appointment for the thoracic spine MRI. Credible expert testimony indicated that a critical component of any diagnostic process is the elimination of possible explanations for the conditions being observed. Failing to perform a thoracic spine MRI on or before February 10, 2017, was a violation of the applicable standard of care. Testimony offered by Respondents as to the rarity of a thoracic disk compression is of no significance. The statistical rarity of thoracic disc compressions is not an excuse for failure to properly diagnose the condition when the objective symptoms point to such a problem.

On February 19, 2017, ten days after O'Leary had observed neurological symptoms consistent with spinal cord compression at a level other than the lumbar spine, Mitchell presented at Kaiser for his thoracic spine MRI. Prior to arriving at the Kaiser facility on that day Mitchell began to experience bowel incontinence. Credible expert testimony established that bowel and/or bladder dysfunction is an indication that the damage to the spinal cord caused by a disc compression has progressed to the point where full recovery following surgery is unlikely. With

help from staff and with great difficulty Mitchell was able to place himself on the MRI table. By the time the MRI was completed he could not walk and was placed in a wheel chair. Three hours later a Kaiser spinal surgeon operated on Mitchell's thoracic spine, performing a laminectomy with decompression of T9-10. The surgery, while successful in avoiding additional damage to the spinal cord that would have resulted in full loss of use in Mitchell's lower extremities as well as more serious loss of bowel and bladder function, was not successful in avoiding the disabilities he is now experiencing. Credible expert opinion established that had the surgery been done not later than February 8, 2017, this result could have been avoided. Clearly the surgery was performed once the thoracic spine disc compression was discovered on February 19, 2017, and would have been performed immediate upon diagnosing that condition earlier. Therefore the inexcusable delay in conducting the thoracic spine MRI that made the correct diagnosis possible was the proximate cause of Mitchell's current disabilities. Expert opinion to the contrary offered by respondent was thoroughly impeached and is found to have been not credible.

Having found Respondents negligent in providing health care to Mitchell, and that Respondents' negligence was the proximate cause of Mitchell's current disabilities, the Arbitrator will now address the issue of damages. Mitchell seeks damages of $4,238,018, consisting of $2,708,154 for his Life Care Plan to provide services necessary to meet additional financial burden of providing life and health care needs resulting from his injuries, $31,536 for past lost income (including vacation and sick leave pay), $199,629 for future loss of income resulting from a necessary reduction in working hours, $1,048,699 future income loss resulting from a need for early retirement, and $250,000 in general damages.

The amounts sought are supported by credible expert testimony subject to the following adjustments based upon the Arbitrator finding that Mitchell, who has been described by all witnesses who addressed the subject as a model patient

with a very positive attitude and greater than average motivation to maintain a lifestyle as close as possible to that enjoyed prior to being burdened with is present disabilities, will cope with his disabilities in such a way as to reduce the anticipated costs that would be incurred by a less motivated person. Having considered these factors the Arbitrator finds Mitchell's damages resulting from Respondents' negligent conduct are as follows: Life Care, $2,301,930; past loss of earnings, $31,536; future loss of earnings based on reduced work hours, $141,736; future loss of earnings based on necessary early retirement, $744,576; and, general damages in the maximum amount allowed by law, $250,000, making the total award herein $3,469,778.

The Arbitrator will reserve jurisdiction to consider issues relating to taxable costs and provide a briefing schedule in that regard.

AWARD

The Arbitrator finds in favor of Claimant John Mitchell and against Respondents jointly and severally. Claimant if found to be the prevailing party. The following damages are awarded:

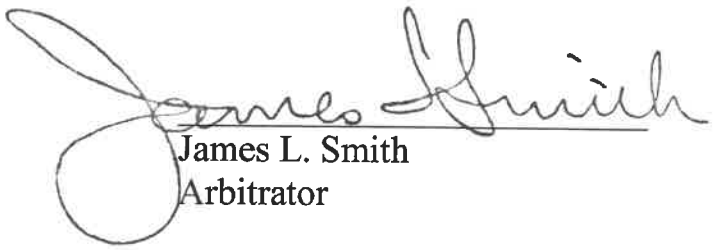
General damages:	$250,000.00
Past loss of earnings:	$31,536.00
Future loss of earnings:	$141,736.00
Future loss – early retirement:	$744,576.00
Life Care Plan:	$2,301,930.00
TOTAL AWARD	$3,469,778.00

The Arbitrator reserves jurisdiction to consider issues relating to the recovery of costs by the prevailing party. Claimant's brief in that regard shall be filed and served on or before November 7, 2018. Respondents' opposition thereto shall be filed and served on or before November 21, 2018. The matter will be

deemed submitted for issuance of a Final Award on November 21, 2018, unless the Arbitrator, in his sole discretion, requires additional briefing or hearings.

IT IS SO ORDERED:

Date: October 25, 2018



James L. Smith
Arbitrator

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 (DMHC).

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Mitchell, John vs. Kaiser - Arbitration No. 15018
Reference No. 1200053639

I, Danielle Osk, not a party to the within action, hereby declare that on October 25, 2018, I served the attached PRELIMINARY ARBITRATION AWARD on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Orange, CALIFORNIA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Orange, CALIFORNIA on October 25, 2018.

Danielle Osk
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