

1 RESOLUTION REMEDIES
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Perry D. Litchfield, Neutral Arbitrator
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8 **IN RE THE BINDING ARBITRATION OF:**

9 BOBBY D. HIGGINS)
10) No. 9943
11 Claimant,)
12 vs.) FINDINGS OF FACT AND
13) CONCLUSIONS OF LAW
14 KAISER FOUNDATION HOSPITALS, a)
15 non-profit corporation, KAISER)
16 FOUNDATION HEALTH PLAN, INC., a)
17 non-profit corporation, and THE)
18 PERMANENTE MEDICAL GROUP, INC.,)
19 a professional corporation,

20 Respondents.
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26 I. PRELIMINARY STATEMENT

27 The undersigned was duly appointed to act as the
28 Arbitrator in this binding arbitration proceeding on July 15,
2010. Jurisdiction for hearing this matter is pursuant to the
Court Order of December 17, 2009, compelling arbitration and
staying the proceedings in State Court.

The Arbitrator has had the opportunity to hear the
testimony of each witness, to observe the demeanor of each
witness, to assess the credibility of each witness, and to

1 determine weight to be given to the testimony of each witness.
2 In making this award the Arbitrator is doing so after hearing
3 all the evidence, the arguments of counsel, and reviewing the
4 documentary evidence admitted into evidence at the time of the
5 arbitration.
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7 The arbitration occurred at The Piccadilly Inn at 2305 W.
8 Shaw Avenue in Fresno, California, 93711, commencing on December
9 13, 2011, and continuing day to day until closing argument on
10 December 16, 2011. Before the matter was submitted for decision
11 counsel requested, and were granted, the opportunity to file
12 post-hearing Briefs on the issue of non-reductibility of future
13 special damages. The final Brief concerning this issue was
14 received on December 24, 2011, and the matter was then deemed
15 submitted for decision by the undersigned.
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18 The following represents the findings of fact and
19 conclusions of law of the Arbitrator. If a finding of fact is
20 misidentified as a conclusion of law or a conclusion of law is
21 misidentified as a finding of fact, then the item shall be
22 deemed to be whichever it should be.
23

24 II. FINDINGS OF FACT

25 A. LIABILITY

26 1. Bobby Higgins (hereinafter "HIGGINS") has been a patient
27 of the Kaiser Respondents (hereinafter "KAISER") for over 15
28 years. As a member of the Kaiser group, HIGGINS sought treatment

1 and care for an ongoing pancreatic problem that had persisted
2 since 2005.

3 2. Consistent with a recommendation from Kaiser staff,
4 HIGGINS presented to Rebecca Stickler, M.D. ("STICKLER"), his
5 Kaiser treating surgeon, on January 24, 2008, for a pre-
6 operative clinical review.
7

8 3. Quite some time prior to HIGGINS pre-operative clinical
9 review he had been diagnosed with schizophrenic pathology
10 (including "auditory hallucinations") and this condition was
11 well documented by Kaiser and had been treated with multiple
12 psychotropic medications, including Seroquel, Xanax, and
13 Effexor, since December 22, 2006.
14

15 When HIGGINS presented to STICKLER on January 24, 2008, it
16 was in preparation for a distal pancreatotomy. It was noted at
17 that time that there was a past medical history of
18 schizophrenia. At the time of the review by STICKLER she failed
19 to perform a Mental Status Exam as part of her assessment. As
20 expert witness Lester Zakler, M.D. opined, HIGGINS should have
21 received this Mental Status Exam at the time of his pre-
22 operative clinical presentation. On January 24, 2008, HIGGINS'
23 psychiatric condition of schizophrenia was not in remission and
24 could best be characterized as stable but not well controlled.
25 As such, STICKLER should have referred HIGGINS to a psychiatric
26 specialist. She also should have pre-warned HIGGINS of the
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1 potential for a psychiatric episode following surgery, which she
2 did not.

3
4 4. On February 12, 2008, HIGGINS was admitted by STICKLER
5 for pancreatotomy and underwent a distal pancreatotomy (removal
6 of distal tail of pancreas) without surgical or anesthesia
7 complications. HIGGINS then transferred to ICU and ultimately on
8 February 15, 2008, he was ordered transferred from ICU to the
9 Patient Ward. In the afternoon on February 15, 2008, HIGGINS was
10 transferred to room 325B via a wheelchair. He was met at his
11 new room by Kaiser nurse Leticia Rincon, RN. At the time he
12 arrived to room 325B, HIGGINS was pale and diaphoretic and his
13 IV bag of Dilaudid (PCA) was empty.
14

15
16 5. After arriving to room 325B HIGGINS requested that he
17 be moved to a single room. He remained agitated and was
18 tachycardic (HR 128); had an elevated temperature (99.4);
19 elevated respiration rate (RR 18) and elevated blood pressure
20 (152/75 vs. 119/72 on December 12, 2008 per anesthesia pre-op
21 evaluation). HIGGINS then reported that "I just saw my ex-wife;
22 she probably works here". As of the reporting of this
23 hallucination Nurse Rincon remained unaware of HIGGINS
24 psychiatric condition.
25

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27 6. STICKLER knew that HIGGINS was vulnerable following
28 surgery based on his mental condition. She also had information
in her possession prior to the subject surgery that HIGGINS had

1 had irrational thoughts after a previous surgery at Kaiser and
2 that he had a prior incident of leaving the Kaiser facility
3 following surgery against medical advice. STICKLER did nothing
4 to forewarn the other Kaiser staff members of these facts when
5 she clearly should have, at a minimum, told the nursing staff of
6 the mental condition and risks associated with this patient.
7

8 7. HIGGINS, after hearing what he thought was a request by
9 Nurse Rincon to leave the hospital, proceeded from the third
10 floor, down the staircase to the lobby. Nurse Rincon followed
11 HIGGINS from his room on the third floor to the lobby, at which
12 time she chose to return to the third floor to attend to other
13 patients. After returning she requested Nurse Redding go after
14 HIGGINS. Nurse Redding proceeded down the staircase to the lobby
15 whereupon she made contact with HIGGINS.
16
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18 8. In the meantime, Nurse Rincon contacted STICKLER and
19 advised her of the circumstances. STICKLER sarcastically posed
20 the following question to Nurse Rincon: "What do you want me to
21 do, go after him". STICKLER made no attempt to make contact with
22 her patient. Meanwhile, HIGGINS ultimately decided to leave the
23 lobby area and exit the hospital, with Nurse Redding following
24 closely behind. As they exited the hospital and entered the
25 hospital parking lot, hospital security came on the scene. Nurse
26 Redding requested that security restrain HIGGINS. Hospital
27 security refused stating that they were only allowed to observe.
28

1 As of this time no one from the hospital had made a
2 determination that HIGGINS was a danger to himself or others and
3 should be restrained, when it was obvious that he was a danger
4 to himself and others. Also, security should have responded
5 affirmatively to Nurse Redding's request and restrained HIGGINS
6 so that he would not cause danger to himself or others.
7

8 9. Ultimately, HIGGINS ended up in a traffic thoroughfare
9 and attempted to enter a third party's vehicle from the
10 passenger's side. The driver of the vehicle accelerated
11 dramatically while HIGGINS was grasping to the passenger door.
12 Ultimately she came to a stop and HIGGINS suffered, among other
13 things, severe head injuries. HIGGINS was transported by
14 ambulance to another hospital for treatment and care, the total
15 of which resulted in billings of approximately \$150,000.00.
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18 **B. DAMAGES**

19 10. As a consequence of the accident following HIGGINS
20 departure from Respondent's facility, HIGGINS sustained severe
21 brain trauma, and other bodily injuries. Before this accident
22 HIGGINS was very active, riding dirt bikes, dune buggies, and
23 other ATVs. He did target practice with his daughter and
24 enjoyed going to baseball games and NASCAR events. As a result
25 of his injuries, he has slowed down significantly. He is no
26 longer able to be in large crowds and cannot attend baseball
27 games and NASCAR events. He developed a very short attention
28

1 span and has become extremely emotional. He now has significant
2 memory loss. HIGGINS has difficulty finding words and has become
3 anxious and withdrawn. To his family it's like getting to know
4 a new person. He initially appeared to lose his will to live
5 and he appears to have lost his spirit for living. He is
6 essentially confined to his home for the most part and doesn't
7 do any of the things he used to for recreation.

9 11. HIGGINS has been on disability since the early 90's
10 and receives a monthly check from Social Security in the amount
11 of \$680.00. He has not paid any of his "outside" medical bills
12 and they have been paid by Medicare.

14 It appears that there no longer is a chance of full
15 recovery from this brain trauma. He will always have the brain
16 damage since it has been present for over three years now.

18 12. As HIGGINS ages he will develop progressive cognitive
19 decline and will necessarily have various forms of home health
20 care until his death. Due to his compromised physical state and
21 his psychiatric condition it is more likely than not that his
22 life expectancy will be less than what is provided by the US
23 Government Life Expectancy Statics and that Mr. HIGGINS should
24 be expected to live to the age of 69. He will need
25 approximately two hours per day of assistance between the age of
26 60 and 65 or for five years. Applying a reasonable rate of
27 \$20.00 per hour, this results in damages of \$73,000.00. He will
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1 then need four more years of care, but such care will be
2 necessarily more intensive. A reasonable estimate of the needed
3 care is eight hours per day for four years. The reasonable rate
4 should be adjusted for inflation at the level of \$25.00 per
5 hour. This amounts to allowable damages of \$292,000.00.
6

7 The pain and suffering of HIGGINS clearly exceeds the
8 maximum permissible recovery for pain and suffering pursuant to
9 Civil Code Section 3333.1 (\$250,000.00).
10

11 Based on the above, HIGGINS is entitled to a recovery as
12 against Kaiser in the amount of \$615,000.00.

13 III. CONCLUSIONS OF LAW

14 In coming to the decision on the issues of liability and
15 damages, the Arbitrator is mindful of the following precedent:
16

17 The standard of proof of causation in a medical malpractice
18 action requires that the plaintiff prove that the defendant's
19 negligence probably caused the injury. Jones v Ortho
20 Pharmaceutical Corp. (1985) 163 CalApp 3d 396, 402-403,
21 Morgenroth v Pacific Medical Center Inc. (1976) 54 CalApp 3d
22 521. These decisions make it clear that plaintiff in a
23 malpractice case must prove the defendant's negligence, in
24 probability, proximately caused the injury. A mere possibility
25 alone is not sufficient. Furthermore, causation must be proven
26 with a reasonable medical probability based upon competent
27 expert testimony.
28

1 As respondent's counsel appropriately points out in its
2 arbitration brief, medical malpractice is the failure of the
3 medical practitioner to possess and exercise that degree of
4 learning, skill, knowledge and care in the diagnosis and/or
5 treatment of the patient that would be expected of a
6 practitioner in good standing in the same or similar locality,
7 and under similar circumstances. Huffman v Lindquist (1951) 37
8 Cal 2d 465; see also Sinz v Owens (1949) 33 Cal 2d 749; CACI
9 501. The applicable standard with respect to specialists is the
10 skill and learning normally possessed by specialists under the
11 same or similar circumstances. Carmichael v Reitz (1971) 17
12 CalApp 3d 958; CACI 502.

15 A doctor is not responsible for adverse results in the
16 diagnosis and/or treatment of a patient in the absence of a want
17 of reasonable care and skill, because the doctor is not a
18 warrantor of cures or required to guarantee results. Stephenson
19 v Kaiser Foundation Hospitals (1962) 203 CalApp 2d 631.

21 Applying the aforementioned authority to the finding of facts in
22 the present matter, the Arbitrator concludes:

23
24 1. Respondents failed to exercise that degree of learning,
25 skill, knowledge and care in the diagnosis and treatment of
26 claimant that would be expected of a practitioner in good
27 standing in the same or similar locality, and under similar
28 circumstances. Specifically:

1 a. Respondents behavior fell below the standard of
2 care when the treating surgeon, Rebecca Stickler, failed to
3 administer a Mental Status Exam at the pre-operative
4 examination. In the absence of a Mental Status Exam, STICKLER
5 should have, at a minimum, referred HIGGINS to a psychiatrist to
6 assist in pre- and post-operative care.
7

8 b. Respondent should have advised HIGGINS of the
9 potential mental consequences of the surgical procedure and
10 having failed to do so lacked true informed consent to perform
11 the distal pancreatotomy.
12

13 c. Respondent also breached the applicable standard
14 of care when STICKLER failed to inform the treatment team, i.e.
15 nursing staff, of HIGGINS mental condition.
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17 d. Respondent also breached the applicable standard
18 of care when STICKLER failed to have an appropriate medication
19 regimen ready and available should HIGGINS' mental status
20 require immediate attention.
21

22 e. Respondents failure to restrain the patient when
23 it became obvious he was a danger to himself and others also
24 amounted to a failure of the respondent to exercise that degree
25 of learning, skill, knowledge and care that would be expected of
26 a practitioner in good standing the in same or similar locality,
27 and under similar circumstances. When HIGGINS left the third
28 floor he went to the lobby. He spent an appreciable amount of

1 time in the lobby before he exited the hospital. A code grey
2 should have been initiated. Hospital security should have been
3 on the scene by then, and representatives of the hospital should
4 have instituted restraint when it was obvious that HIGGINS had
5 become a danger to himself and others. Furthermore, hospital
6 security should have restrained the patient when he was
7 approached in the parking lot by security. They also should
8 have followed the direction of Nurse Redding to restrain the
9 patient. The failure of security to do so was another example
10 of behavior which fell below the applicable standard of care.
11
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13 2. It is the conclusion of the Arbitrator that the
14 aforementioned actions and inactions of respondent, in
15 probability, proximately caused the injuries which were
16 sustained by HIGGINS when he was involved in a
17 pedestrian/vehicular accident following his departure from the
18 hospital. Put another way, the evidence presented proves that
19 within a reasonable medical probability respondent's behavior,
20 in probability, proximately caused the injuries which HIGGINS
21 suffered.
22
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24 3. Civil code section 3333.2 limits non-economic losses in
25 this case to \$250,000.00. Claimant's non-economic damages exceed
26 \$250,000.00.
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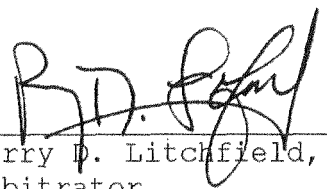
28 4. Civil code section 3333.1(a) allows a healthcare
provider who is a defendant in a medical malpractice action to

1 introduce evidence of collateral source payments available to
2 the plaintiff as a result of the plaintiff's injury. In this
3 case, the parties have stipulated that the reasonable value of
4 past benefits received from collateral sources equals
5 \$150,000.00. By virtue of Civil code section 3333.1(a) claimant
6 is precluded from recovering for his treatment and care in that
7 the same was paid by Medicare.
8

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10 5. Although counsel spent considerable effort arguing the
11 non-reductability of future special damages the issue is moot in
12 that it is the Arbitrator's conclusion that it is not reasonably
13 likely the benefits will be paid in the future. As pointed out
14 by respondent in its brief on this issue, "if the trier of fact
15 concludes that it is not reasonably likely the benefits will be
16 paid in the future, the trier of fact will not deduct the
17 benefits from the plaintiff's future damages". (Page 11, lines
18 12 - 13.)
19

20 6. Based on the findings of fact, claimant is entitled to
21 \$365,000.00 in future damages. Claimant is awarded \$250,000.00
22 for pain, suffering and any other non-economic losses. Claimant
23 is entitled to a total award of \$615,000.00 as against
24 Respondents.
25

26
27 Dated: 1/15/2012


28 Perry D. Litchfield,
Arbitrator

1 RESOLUTION REMEDIES
2 1101 Fifth Avenue, #230
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4 Telephone: 800-778-2823
5 Facsimile: 415-457-7843
6 Perry D. Litchfield, Neutral Arbitrator

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8 **IN RE THE BINDING ARBITRATION OF:**

9 BOBBY HIGGINS,) No. 9943
10)

11 Claimant,)
12 vs.) AWARD OF ARBITRATOR
13)

14 KAISER FOUNDATION HOSPITALS, a)
15 non-profit corporation, KAISER)
16 FOUNDATION HEALTH PLAN, INC., a)
17 non-profit corporation, and THE)
18 PERMANENTE MEDICAL GROUP, INC.,)
19 a professional corporation,)
20)

21 Respondents.

22 Perry D. Litchfield, the Arbitrator(s) selected to determine the
23 dispute between the Parties in the above referenced action,
24 find(s):
25

26 An arbitration hearing was held on December 13, 14, 15 & 16.

27 It is the decision of the Arbitrator(s) that the prevailing
28 Party in this Arbitration is:

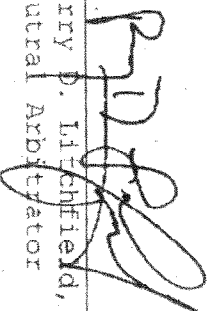
X The Claimant(s) is entitled to \$615,000.00.

OR:

The Respondent(s) is entitled to _____.

1 Nothing in this arbitration decision prohibits or restricts the
2 enrollee from discussing or reporting the underlying facts,
3 results, terms and conditions of this decision to the Department
4 of Managed Health Care.
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8 Dated: January 15, 2012


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Perry D. Litchfield,
Neutral Arbitrator

PROOF OF SERVICE

**** **HIGGINS v KAISER** ****

I am a resident of the United States and employed in the County of Marin, California. I am over the age of eighteen years and not a party to the within entitled cause; my business address is 1000 Fourth Street, Suite 875, San Rafael, CA 94901.

On January 17, 2012, I served the attached:

*** Award of Arbitrator ***

____ (BY MAIL) In a box designated for collection of mail, following ordinary business practices, at my business address;

- (a) I am familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service;
- (b) That this correspondence will be deposited with the United States Postal Service on the above date, in the ordinary course of business.

____ (BY OVERNIGHT MAIL SERVICE) I caused each such envelope to be delivered by Federal Express mail service to the addressee(s) noted below.

____ (BY PERSONAL SERVICE) I caused each such envelope to be delivered by hand to the addressee(s) noted below.

XXXXX (BY FACSIMILE) I caused the said document to be transmitted by Facsimile machine to the number indicated after the address(es) noted below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 17, 2012, at San Rafael, California.



Kate Silvera

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