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11 **IN THE MATTER OF THE ARBITRATION BETWEEN**  
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13 ) **ARBITRATORS' AWARD**  
14 ) **(BINDING ARBITRATION)**  
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Claimants,  
vs.  
Respondent.

Pursuant to an agreement between the parties, this matter was submitted to binding arbitration before Raymond Cardenas, Judge of the Superior Court, Retired; Joseph S. D'Antony, Esq.; and Alan Rushfeldt, Esq. The arbitration hearing was conducted on February 5, 6, 7, and March 19, 2002, in Orange County, California. Appearing for Claimants was

The Respondent,  
was represented

The parties filed briefs, witnesses testified, exhibits were

1 introduced into evidence, and counsel argued. The matter was submitted  
2 to the panel, and each member of the panel has read and considered the  
3 briefs, considered the testimony offered at the hearing, and considered  
4 the exhibits admitted into evidence. Final argument was heard on March  
5 19, 2002. In addition, the panel members also consulted among themselves  
6 on multiple occasions having had telephonic conference calls on March  
7 27, 2002; April 5, 2002; and April 30, 2002. After deliberating, the  
8 panel members submit the following as the panel's award.

9 This case deals with a delay of five months in the diagnosis and  
10 treatment of a Ewing's Sarcoma in the left upper back of the Claimant.  
11 Claimant was born on \_\_\_\_\_, is presently 27 years old and  
12 resides in \_\_\_\_\_ California. Claimant worked for a \_\_\_\_\_  
13 \_\_\_\_\_ as a field deputy where she earned \$2,198.99 per month.

14 Claimant presented to \_\_\_\_\_ from August 14, 1999, through January  
15 4, 2000, on 14 occasions with complaints of back pain. At all times  
16 prior to January 4, 2000, the \_\_\_\_\_ providers erroneously  
17 assumed that Claimant's back pains were caused by a muscle strain and/or  
18 strain. In fact, the pain was caused by the erosion of her ribs by a  
19 malignant Ewing's Sarcoma and not back sprain or strain.

20 Claimant presented to the emergency room at \_\_\_\_\_ on August 14,  
21 1999, with complaints of back pain. She was "triaged" to the Urgent Care  
22 Department where she gave a history of back pain of two weeks duration.  
23 \_\_\_\_\_ diagnosed her with "back strain" and prescribed Robaxin  
24 and Tylenol #3, a narcotic pain medication. Claimant returned to Urgent  
25 Care two days later on August 16, 1999, with the same complaints. She  
26 was seen by \_\_\_\_\_ Claimant advised \_\_\_\_\_ that the pain  
27 was so severe that she could not sleep at night, and further, that the  
28 medication prescribed by \_\_\_\_\_ upset her stomach.

1 advised Claimant to take Darvoset N-100 and Elavil to help her sleep.

2 did not determine the cause of the pain and prescribed the  
3 medications previously described. advised Claimant that the

4 medications prescribed would take a long time to work effectively.

5 Claimant next returned to on November 12, 1999, at which  
6 time she was seen by Claimant recited the history

7 of back pain and the severity of same which kept her up at night. She  
8 had other complaints which diagnosed as "viral infection"

9 and recommended warm compresses to the back and shoulder.

10 did not examine Claimant's back during the visit. On November 15, 1999,

11 Claimant once again saw who noted that this was Claimant's

12 fifth Urgent Care/Employment emergency room visit for the same

13 complaints. Following an examination diagnosed Claimant's

14 condition as "chronic back pain" and prescribed no treatment other than  
15 the ongoing medication. At that time, Claimant's mother,

16 insisted that refer Claimant to physical medicine and physical  
17 therapy. On November 17, 1999, Claimant returned and saw internist

18 who diagnosed Claimant's muscle complaint as muscle pain  
19 and prescribed Flexeril, a muscle relaxant. Claimant began physical

20 therapy on November 17, 19, 24, 26, December 1, and 3, 1999. In the  
21 interim, Claimant consulted with physiatrist, on November 24,

22 1999. drew a diagram which indicated that Claimant had sharp and  
23 stabbing pain in the upper left shoulder. also noted aching

24 throughout the left mid-back which had been ongoing since early August  
25 1999. diagnosed Claimant as having "mild muscle strain in the

26 left mid-back at the location of the latissimus dorsi muscle." He  
27 prescribed muscle stretching and strengthening exercises.

28 Claimant's condition worsened and she returned for physical therapy

1 on December 28, 1999. On that date, a therapist noted a soft-tissue mass  
2 and advised \_\_\_\_\_ who ordered an x-ray, however, the x-ray was of  
3 the lumbar spine rather than the upper left back, which was the affected  
4 area. On December 30, 1999, \_\_\_\_\_ prescribed pain medication,  
5 Restoril and Vicodin to Claimant. On January 4, 2000, \_\_\_\_\_ who  
6 was alerted by a physical therapist, noted a fist-size soft mass on the  
7 posterior chest wall and ordered chest x-rays which showed a "large  
8 chest wall mass." A CT scan was ordered, a biopsy was taken, and a  
9 Ewing's Sarcoma was diagnosed on January 7, 2000.

10 By the time the cancer was finally diagnosed in January 2000, it  
11 was 9x9x8 cm in size and was encroaching upon Claimant's spinal canal.  
12 Because of the tumor's growth, it reached the point where it was  
13 abutting the spinal canal and therefore Claimant's cancer could not be  
14 cured since the key to successful treatment and eradication of Ewing's  
15 Sarcoma is local control. Claimant's surgeon could not obtain clear  
16 margins due to the tumor's proximity to the spine and thus the cancer  
17 recurred in June 2001. Claimant's chances of surviving the disease at  
18 this point are extremely limited.

19 After January 7, 2000, Claimant underwent adjuvant chemotherapy  
20 followed by surgery wherein \_\_\_\_\_ removed the mass and three  
21 ribs. Claimant underwent additional rounds of chemotherapy. In June  
22 2001, a CT scan showed a reoccurrence of the tumor which indicated that  
23 the radical surgery did not totally remove the existing cancer. Claimant  
24 underwent additional chemotherapy and surgery by \_\_\_\_\_ wherein the  
25 lining of her aorta, part of her diaphragm, ribs and part of the lining  
26 of her spinal canal were removed. She was evaluated at \_\_\_\_\_ in  
27 California and was designated as a candidate for further surgery  
28 which Claimant has refused to undertake at the present time. Claimant's

1 prognosis is grim, and Claimant's experts agree that Ewing's Sarcoma  
2 will eventually result in Claimant's untimely death in the immediate  
3 future.

4 On the basis of the facts presented and Claimant's expert  
5 witnesses' testimony, the Arbitrators find that Claimant has established  
6 her case by a preponderance of the evidence. It is found that Respondent  
7 and its medical providers were negligent in the belated diagnosis and  
8 treatment of Claimant's Ewing's Sarcoma and that Claimant has sustained  
9 economic and non-economic damage as a proximate result of Respondent's  
10 negligence.

11 The Arbitrators have previously ruled and granted Respondent's  
12 motions with respect to the claim of for emotional  
13 distress and with respect to the loss of consortium claim of  
14

15 **AWARD**

16 Claimant shall recover the following sums from the  
17 Respondent

18 A.

- 19 1. \$22,870 for past lost wages;  
20 2. \$655,971 for present value of lost wages;  
21 3. \$250,000 for non-economic damage pursuant to C.C. §3333.2(b)  
22 (\$100,000 of the foregoing sum is found to be for past pain  
23 and suffering and the balance shall be for future pain and  
24 suffering.)

25 Total amount awarded to Claimant is \$928,841.

26 B.

27 In the event that there is a motion made for periodicization by  
28 either party pursuant to C.C.P. §667.7, the Arbitrators set forth the

1 following amounts that may be subject to periodicization:

2 1. \$150,000 non-economic damage, pain and suffering (insert that  
3 sum which shall be received if \$150,000 is invested prudently  
4 over the coming years). Salgado v. County of Los Angeles  
5 (1998) 19 Cal.4th 629.

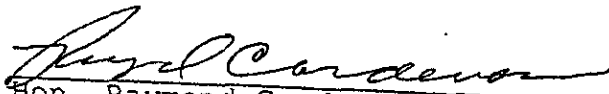
6 2. \$1,508,669.50 - future value of lost wages.

7 Total sum subject to periodicization is \$1,658,699.50.

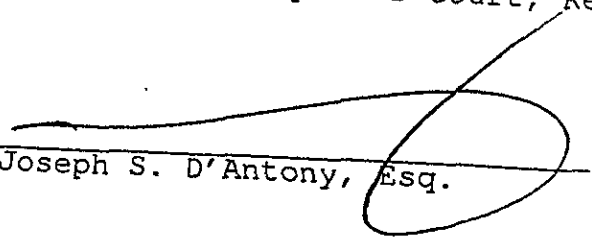
8 Past lost wages and \$100,000 past pain and suffering are not  
9 subject to periodicization.

10 The arbitration award or judgment entered is subject to  
11 modification pursuant to C.C.P. §667.7(b)(1).

12 Dated: May 23, 2002

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14   
15 Hon. Raymond Cardenas  
16 Judge of the Superior Court, Ret.

17 Dated: May 24, 2002

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20 Joseph S. D'Antony, Esq.

21 Dissent

22 I disagree with the majority opinion that there was negligence on  
23 the part of the physicians and I strongly disagree with the  
24 majority opinion that claimant met her burden of proving that any such  
25 negligence was a substantial factor in causing her apparent present  
26 terminal medical condition.

27 First, in regard to the issue of negligence on the August 16, 1999  
28 visit with claimant's expert admitted that the  
physician must focus on the chief complaint and evaluate the patient

1 based on the history. The chief complaint was back pain, and the history  
2 indicated it started earlier when moving boxes and returned two days  
3 before this visit when moving boxes again, and that the medications  
4 given two days earlier upset her stomach. changed the  
5 medications and told the claimant to return if the pain did not improve.

6 testified that met the standard of practice and it  
7 would seem that her care met the guidelines set out, but for  
8 his conclusionary statement.

9 The claimant did not return to any doctor for any reason until  
10 November 12, 1999 and did not even refill her pain medication  
11 prescriptions, thus being without pain meds for two months. Her  
12 testimony about her pain during this time period is totally inconsistent  
13 with her conduct.

14 When claimant returned on November 12, 1999, she again gave a  
15 history of back pain, brought on when moving furniture, and having a  
16 vaginal infection. did a limited exam and gave aftercare  
17 instructions to return in two days if her symptoms continued. She  
18 returned on November 15, 1999, was seen by and referred to  
19 physical medicine and physical therapy. Within the next few days,  
20 claimant was seen by and by the physical therapist,  
21 and received physical therapy, with the records reflecting much  
22 improvement in her condition, to the extent that she did not return to  
23 anyone from November 24, 1999 until December 20, 1999, when the first  
24 visual abnormality presented in her condition.

25 In light of the number of different physicians who saw claimant,  
26 all of whom, according to fell below the standard of practice,  
27 and in light of testimony about the importance of history and  
28 chief complaint, and in light of claimant's conduct being inconsistent

1 with her testimony, I have serious questions about claimant meeting her  
2 burden of proof in regard to negligence, when one also considers the  
3 testimony of the treating doctors and the experts called by the  
4 respondent.

5 However, if one assumes there was negligence on the part of several  
6 of the physicians who saw her from the middle of November through to the  
7 diagnosis in early January 2000, claimant must also prove by a  
8 preponderance of evidence that such negligence was a substantial factor  
9 in preventing her from being cured of the cancer. Without that burden  
10 being met, there is no liability for damages.

11 To evaluate whether claimant met her burden of proof on causation,  
12 one must evaluate the testimony of [redacted] called by claimant, and

13 [redacted] called by respondent (s), both being cancer experts. Although  
14 [redacted] was certainly qualified, [redacted] C.V. was most impressive.

15 One must also evaluate not only their conclusions, but also their  
16 reasoning and what they conceded either on direct or on cross.

17 [redacted] stated that in this type of cancer, the original  
18 mutation of the cell determines whether the cancer cell is the bad or  
19 aggressive type, or not, and there was no contrary testimony from

20  
21 [redacted] stated that the histologic response of the cancer cell  
22 is the most important factor in predicting cancer-free survival of the  
23 patient. Exhibit D12A, "Event Free Survival" also states that a good  
24 histologic response gives the patient a 77% chance for cancer-free  
25 survival, whereas a poor response gives only a 28% chance.  
26 [redacted] testified that a 10 to 15% necrosis following chemotherapy and radiation  
27 was a bad sign, and on cross-examination he testified that finding 85-  
28 90% live cells after treatment indicate a bad prognosis. The medical



1 record in this case states that there was only 10-15% necrosis of the  
2 cancer cells, with the balance being alive or viable. (See Final  
3 Diagnosis of Surgical Pathology report 05/18/00, Exhibit 34, Claimant's  
4 Exhibit Book).

5 When one looks at the above-cited evidence, it seems overwhelming  
6 that claimant did not and could not meet her burden of proof on  
7 causation, that a diagnosis made six weeks or even four-and-a-half  
8 months earlier would more than likely have brought about cancer-free  
9 survival. Even if one assumes negligence from mid-August or mid-November  
10 to early January, when the diagnosis was made, still the cell type and  
11 the histologic response is established at the original mutation and not  
12 at the time of diagnosis.

13 Claimant argues that since there was no effort to determine whether  
14 the cell type was either good or bad for prognosis, that one cannot  
15 conclude it was the bad type. That is pure speculation and, in fact, one  
16 can argue just as logically the opposite position from the lack of any  
17 study on the cell. However, we do have the finding that only 10-15% of  
18 the cancer cells died from the chemotherapy and radiation pre-operative  
19 treatment, proving the histological response was very poor.

20 Claimant also argues that, based upon a radiologist's review of a  
21 film, a "whisp" of cancer was left behind by the surgeon in the spinal  
22 area, notwithstanding that the surgeon testified and stated in his  
23 operative note that the margins were clear and that the pathologist  
24 found clear margins.


25 Furthermore, when the cancer reoccurred, it was found to be present  
26 in several adjacent areas and not just in the spinal area where the  
27 supposed "whisp" was seen by claimant's expert.

28 Therefore, this arbitrator believes strongly that claimant failed

1 to meet her burden of proof by the greater weight of the evidence on  
2 causation and that the overwhelming evidence was as  
3 testified.

4 Therefore, the award should be for the respondents and claimant  
5 should take nothing.

6 Dated: May 23, 2002

  
Alan Rushfeldt, Esq.

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