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**AMERICAN ARBITRATION ASSOCIATION  
COMMERCIAL ARBITRATION TRIBUNAL**

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UNIVERSITY OF UTAH HOSPITAL, )  
 UNIVERSITY OF UTAH ANESTHESIA )  
 ASSOCIATES, AND UNIVERSITY OF )  
 UTAH NEUROSURGERY ASSOCIATES)

**ARBITRATION AWARD**

Claimants, )

EDUCATORS MUTUAL INSURANCE )  
 ASSOCIATION OF UTAH, )

Case No. 81 134 103 01 VSS  
 Case Manager: Vasti S. Salinas  
 Arbitrator: James E. Morton

Respondent. )

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The above-referenced matter came on regularly for hearing the 10<sup>th</sup> day of December, 2002. Claimants were represented by Marcie E. Schaap of King, Burke & Schaap, P.C. Respondent was represented by Brent D. Wride of Ray, Quinney & Nebeker. Following the presentation of evidence and arguments by counsel, the Arbitrator and parties agreed upon certain topics to be covered in post-hearing briefing. Thereafter, each party submitted additional briefs and evidence which have now been considered.

It is the opinion of the Arbitrator that the matter may now be disposed of without the necessity of further argument or input from counsel.

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by University of Utah Hospital, University of Utah Anesthesia Associates, and University of Utah Neurosurgery Associates (hereinafter referred to as "Claimant") and Educators Mutual Insurance Association of Utah (hereinafter referred to as "Respondent"), and dated July 30, 2001 and having been duly sworn and having duly heard the proofs and allegations of the parties hereby, AWARD, as follows:

DISCUSSION

Mr. Keele's attempts to seek authorization for bilateral deep brain stimulators was presented to Respondent on multiple occasions by both Mr. Keele and his health care providers. While admittedly there were inconsistent positions taken by Respondent and its agents, the evidence is compelling that the procedure would not have gone forward had Claimants not been left with anything other than an affirmative understanding that the procedure was authorized. This is particularly true in light of Claimants' provider offering to perform the surgery at the cost of a unilateral procedure with the second deep brain stimulator being donated by the manufacturer. Notwithstanding the contention that IntraCorp was not an agent empowered to authorize the procedure, it seems that the role of IntraCorp in the process was obscure, at best. Simply stated, it is the opinion of the Arbitrator that the procedure would not have been immediately undertaken had Respondent been direct and unequivocal in its determination to deny authorization for payment.

With this finding, certain other legal and factual issues must be addressed to dispose of the claim.

I. ADMINISTRATIVE REVIEW OF THE DENIAL

There is no dispute that following performance of the procedure, Claimants' submissions for payment were denied. An initial timely appeal was undertaken and was also denied. It is Claimants' failure to seek a timely review of the second denial which creates the first legal issue which could potentially affect the disposition of the claim.

There is no dispute that the request to review denial of the claim was not timely. The real issue becomes one of whether the lack of timeliness should be excused. Claimants have offered that Respondent's continued participation in the claim following the failure to meet the established deadline for appeal of the denial resulted in a waiver. In addition, they contend that they have been prejudiced as a result of Respondent's continued participation in the defense of the claim on its merits.

Respondent, on the other hand, argues that its continued involvement in the merits of the claim does not constitute a waiver and, additionally, that the untimely request for review of the denial has caused it prejudice.

The Arbitrator agrees with Claimants on this issue. At best, it seems unusual that Respondent would have continued to address the claim on its merits if it simply could have refused to take any further action based upon the untimely request for review of the denial. Alternatively, Respondent's contention that it has suffered

prejudice due to the absence of records from IntraCorp as well as its inability to locate witnesses is speculative. There is no competent evidence that records from IntraCorp would have been available or were disposed of in an improper or untimely manner as a result of the delay. Moreover, the inability to locate former employees involved with the denial of the claim has not been linked in any way to the untimeliness of the request for review of the denial. Consequently, the late request to review the denial does not bar Claimants' claims.

**II. THE INFECTION.**

Based upon the finding that the bilateral procedure was authorized, the issue of the infection is moot. Any charges which flowed from complications arising from the initial procedure are covered.

**III. ALLOWED CHARGES.**

Respondent contends that even if charges are deemed to have been authorized and not waived, they should be limited in accordance with its "table of allowances". There has been no competent evidence of an actual table of allowances. Moreover, any negotiated charges for specific procedures are directly tied to the contract between the insurer and the provider and the specific health plan at issue. In the present case, a contractual relationship between the provider and insurer has not been produced nor is there competent evidence to suggest that such a contract exists. Moreover, it appears from the evidence that the specific plan covering Mr. Keele would not be subject to the contractual limitations in any event. Finally, it is undisputed that the combination of Mr. and Ms. Keele's plans would

cover 100% of the billed charges, so no reduction based upon individual plan limitations is in order.

**IV. PREJUDGMENT INTEREST.**

Given the standard that prejudgment interest is recoverable if losses are "calculable", combined with a determination of the equities of a particular claim, it is the considered opinion of the Arbitrator that an award of prejudgment interest is proper in this case. The loss may be calculated with mathematical certainty and Respondent's failure to have paid the claims in this case in a timely manner was inequitable. For these reasons, an award of prejudgment interest is appropriate.

**V. SUBSEQUENT CHARGES.**

The subsequent charges incurred by Mr. Keele do not appear to be an appropriate subject of this claim. Given counsel's representation that the charges are covered under different plans and were denied for different reasons support the contention that any attempt to dispose of these claims in this award would be inappropriate.


**AWARD**

While there exists a disparity between the parties relative to the submitted charges, Claimants have submitted the lesser amount of \$250,252.08 as the principal amount for charges associated with their claim. Prejudgment interest, accruing at the statutory rate of 10% is \$84,537.17, through the date of this award. Claimants are thus awarded the total sum of Three Hundred Thirty Four Thousand Seven Hundred Eighty Nine Dollars and Twenty Five Cents (\$334,789.25).

The administrative fee of the American Arbitration Association ("the Association") and the compensation and expenses of the Arbitrator totaling \$4,425.00 shall be borne by Respondent. Therefore, Respondent shall pay to the Association the sum of \$2,725.00, representing amounts still due the Association and/or the Arbitrator.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are, hereby denied.

Award entered this 10th day of February, 2003.

  
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 JAMES E. MORTON, Arbitrator

Arbitration Award

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