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\$1.25 million settlement with Allstate bucks trend in low-impact accidents

Dealing with aggravation of a pre-existing condition in an “eggshell” plaintiff

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Robert Allard of the San Jose law firm, Corsiglia, McMahon & Allard, LLP, settled a minor-impact car accident against an Allstate insured in October 2009 for \$1.25 million.



Allard

The case involved an accident in 2004 wherein the plaintiff's car was struck from behind by a vehicle traveling an estimated 10 miles an hour.

The property damage sustained by both cars was virtually non-existent and the police were not summoned. A few days later, the plaintiff began to experience neck pain and went to see her general physician. After an extended course of pain medications and physical therapy, an MRI was taken at which point it was determined that plaintiff presented with a herniation in her neck at C4-5. Surgery in the form of a laminectomy and cervical fusion was

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eventually performed over a year after this incident.

Post surgery, plaintiff returned to her work but eventually began to experience pain in her neck again. After another set of imaging studies, it was determined that the plaintiff was suffering from adjacent disc disease, meaning that the discs surrounding the fused site had become dis-

eased. Ultimately, it was determined that a second fusion surgery was needed and this was performed some four years after the accident.

Key to the case

Allard inherited the case following three unsuccessful mediations and after it had been set for trial on multiple occasions and expert witnesses disclosed. Allstate had earlier retained Bruce McCormack, M.D. as its DME. Dr. McCormack conducted three DMEs. Upon close examination, Allard found that the final DME differed in a key conclusion from the first two.

The key difference in Dr. McCormack's final 14-page DME report was a short, three-line paragraph that said the doctor could not, with medical certainty, state that the plaintiff would have required the first cervical spine surgery absent the car accident.

In the earlier DMEs, Dr. McCormack had causally connected the first surgery to the accident. With this connection,



medical literature would have made it difficult for him to then deny the causal relationship between the first surgery and the second surgery. So instead, the doctor reconsidered his earlier conclusions and now said, in effect, that the first surgery was not necessarily related to the accident and therefore neither was the second surgery.

Adding expert witnesses

The third DME came out after expert witnesses were disclosed. Based on the change in Dr. McCormack's position, Allard moved quickly to retain medical experts for his client. Allstate's defense counsel vigorously fought Allard's motion to add expert witnesses. "I think the defense counsel felt that they could win a case based on engineering science," said Allard. In fact, the defense had retained a biomechanical engineer who was prepared to testify that the impact was so minimal that the risk of any injury, much less one of this magnitude, was minimal if nonexistent.

In the Motion to Amend and Augment his Expert Witness list, Allard argued that McCormack's three-sentence opinion differed dramatically from his earlier opinion. Allard won the motion and now had to prove that the impact to the spine was the cause of his client's medical troubles, even though she already had a pre-existing condition that might have caused her medical problems even without the accident.

He retained a neurological radiologist to read the imaging files, a neurosurgeon to review the patient's medical history and a vocational rehabilitation counselor to testify that the plaintiff, a nursing assistant, would only be able to work about 50 percent of the time due to the neck surgery and consequent limitations on bending, stooping, lifting and flexing. "That assessment alone by the Rehabilitation Counselor was worth \$350,000 in past and future wage loss," said Allard.

"Science was totally against me. All of the literature says that it was virtually im-

possible that these type of forces could cause the type of injury my client had." So, through his experts, Allard had to prove his case medically and demonstrate that minimal forces caused his client's injury.

In a 3 1/2 hour deposition, Dr. McCormack first tried to advance Allstate's position that this type of force typically doesn't cause injuries, but he finally conceded that, although the forces were insignificant, they were enough to cause *this* plaintiff's injuries and necessitate the first surgery, and that the second surgery was a consequence of the first. "I think this is when the case turned around," remarks Allard. Before that, Allard believes that the authority Allstate had on the file was around \$500,000.

Take your plaintiffs as you find them

Allard advises attorneys to focus on what they have. In this case, Allard focused on the medical aspects, showing before and after snapshots, and getting Allstate defense counsel off the engineering track. "Everyone reacts differently to the same forces," said Allard. "Look at the unique situation that your client presents and use the California Civil Jury Instructions on Damages (CACI 3927 and CACI 3928) to your favor."

The "eggshell" plaintiff

CACI 3927 in part states, "However, if [name of plaintiff] had a physical or emotional condition that was made worse by [name of defendant]'s wrongful conduct, you must award damages that will reasonably and fairly compensate [him/her] for the effect on that condition." While CACI 3928 in part states, "You must decide the full amount of money that will reasonably and fairly compensate [name of plaintiff] for all damages caused by the wrongful conduct of [name of defendant], even if [name of plaintiff] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury."

"The law is telling you that you still need to award damages even if a pre-existing condition was aggravated," said Allard. He warns that attorneys should not fall into the trap of allowing the defense to introduce literature describing how normal, healthy people would react to this minor-impact force. Allard was prepared to file a motion in limine to exclude the evidence, arguing that the literature was irrelevant as the plaintiff was not a normal, healthy person.

The defense relied heavily on CACI 430, specifically the second paragraph which reads, "[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]." Dr. McCormack testified in the deposition that since the plaintiff had a pre-existing condition she would have suffered such injuries with or without the car accident. Allard's retained expert said that thousands of people with similar pre-existing conditions never require surgery and go on to lead normal lives.

The plaintiff acknowledged that she had a preexisting condition, but maintained that she was relatively symptom-free in the approximate two-year period prior to this incident and had never before experienced radicular pain. She acknowledged that she was unusually susceptible to injury, that this seemingly innocuous incident "sent her over the edge," and that the negligent acts of the defendant, therefore, were a "substantial factor" in causing the plaintiff's neck injuries and consequent surgical course.

The parties agreed to give private mediation one last shot just prior to trial, in lieu of a mandatory settlement conference with the court. After single session with mediator Charlie Hawkins, the matter settled for \$1.25 million.

In reviewing the \$56,000 spent to retain his medical experts, Allard says that investment got the plaintiff another \$750,000. "I take cases with the intent to litigate in the courtroom," said Allard. "I know what experts are needed to win my case, and I don't hesitate to retain those experts immediately," added Allard. "By



being pro-active and aggressive, I can file a complaint immediately, get a trial date within a year and start working with attorneys instead of adjusters to settle the case," added Allard. "Also, be sure to

allow your case to mature. Do not push to settle early if the client's condition has not completely resolved."

Edward Vásquez is the executive director of the Santa Clara County Trial Lawyers Associa-

tion. Attorney Robert Allard was named as one of the "The Top 100 Trial Lawyers" in California by The American Trial Lawyers Association for 2009. He received the Santa Clara County Trial Lawyer of the Year award for 2007 and 2009.