

AMERICAN ARBITRATION ASSOCIATION

In The Matter of Arbitration Between:

John Thomas, M.D.

and

The Hand Center of Western Connecticut, LLC, and  
Lionel G. Brown, M.D., and John G. Lunt, M.D.

Case Manager: Michele Gomez

AAA File No.: 12 166 00536 10

INTERIM AWARD

The undersigned Arbitrator having been designated in accordance with the Employment Agreement between the Claimant and the Respondents (*See* Cl. Exh. 2, ¶13) and the employment rules of the American Arbitration Association, and having been sworn and having heard and evaluated the evidence in the arguments by the parties and their counsel at hearings in Danbury, Connecticut, and having received and considered post-hearing memoranda, exhibits, and authorities, hereby enters the following Preliminary Partial Decision which is not to be construed as a final award:

The Claimant, a Board Certified hand surgeon, was hired by the Respondents in 2006 and worked at their offices in Danbury, Connecticut, from October 1, 2006 through January 24, 2010, on which date he was terminated. At the time that he was hired, he had been practicing in Seattle, Washington, but had left that practice. His departure from that practice resulted in a claim by Dr. Thomas against his former Seattle employer which was resolved by an Arbitration proceeding. At the time that Dr. Thomas joined the Danbury practice, he agreed to accept \$150,000.00 per year as salary with a provision for a bonus payment based on revenue collected. "Employee shall be entitled to a bonus equal to 90% of the excess of his collections less his direct expenses (including the benefits and expenses provided in Paragraphs 9 and 10 of this

Agreement) and allocated overhead as determined by the LLC's CPA." The Agreement also provided that the calculation would be done on a quarterly basis. The Agreement included a covenant not to compete (*see* ¶12 of the Agreement) wherein Dr. Thomas agreed that for a period of two years after leaving the Danbury practice "for any reason whatsoever" he was not to engage in the medical practice of hand surgery within a radius of 25 miles of his former employer's office location in Danbury. The Agreement also provided that he was not precluded from practicing medicine "other than hand surgery" during this period.

Dr. Thomas claims that he accepted employment "at a below market salary". The Agreement also provided that "to the extent that employees collections are less than his direct and allocated expenses, the shortfall will be carried forward to successive quarters until satisfied."

During the period of his employment, Dr. Thomas received one bonus payment of \$8,000.00.

Claimant's Exhibit 2 is the Employment Agreement of Dr. Thomas and The Hand Center.

This dispute arises out of the employment of the Claimant by the Respondents pursuant to an employment agreement by and between the Respondents and the Claimant. The Agreement provided for the employment of Dr. Thomas by The Hand Center for a period of two years commencing on September 1, 2006 and continuing until August 31, 2008. Dr. Thomas did not begin his employment until October 1, 2006, and was terminated on January 24, 2010, although he was compensated by The Hand Center through April 25, 2010.

Dr. Thomas now seeks to recover damages that he allegedly incurred as a result of Respondents failure to make bonus payments to him as well as damages for his termination when he sought to recover the bonuses that he claimed were past due.

Dr. Thomas claims that his damages include \$569,810 in past due bonus payments, plus bonus payments collected by The Hand Center for work prior to his termination. He further seeks accrued interest on his improperly withheld wages as of June 1, 2012, which he asserts amounts to \$365,302. He also claims that pursuant to Conn. Gen. Stat. §31-72, he is entitled to recover twice the value of his unpaid wages, in addition to his attorneys' fees and costs. He claims that his overdue bonus wages, once doubled, equal \$1,139,620.

In addition to his unpaid bonus wages, Dr. Thomas also claims that he is entitled to recover \$11,324 that was improperly omitted from his pension account.

Dr. Thomas further seeks to recover lost earnings and costs that he incurred as a result of his wrongful termination and The Hand Center's decision to enforce what he alleges to be an unreasonable non-compete agreement. It is his claim that his lost earnings, which are based on what he claims he should have earned in the two full years preceding his termination, equals \$675,566. In total, he makes a claim for damages in the amount of \$2,191,812.

Dr. Thomas also makes a claim that his damages should include income that he lost when he agreed to accept and continue the term of employment at a below market salary of \$150,000. He alleges that his Danbury salary constituted a sizeable pay cut from income he earned at his prior employer, where he alleges that he earned approximately \$225,000 a year in base salary in addition to approximately \$200,000 in bonus wages. He also testified that he turned down two offers from medical practices in Oklahoma and Poughkeepsie, New York, for a higher base

salary, i.e., \$450,000 and \$265,000, respectively. The undersigned Arbitrator rejects this claim because the basis for such an award would be highly speculative and unsubstantiated.

The claim for damages during the two year non-compete period can be disposed of quickly. The undersigned will make no award for damages claimed for this period by Dr. Thomas. It is difficult to understand how a skilled physician could sit at home for two years without making any effort to practice medicine outside of the 25 mile limit, beyond which limit he could have utilized his specialty in places such as New Haven, Hartford, Westchester County or New York City. In addition, he was not prohibited from practicing as a "physician" within the 25 mile radius should he have chosen to do so as long as he did not practice hand surgery. He made no effort to negotiate with his former employers regarding any modification of this restriction but simply spent two years "babysitting" for his children. Thus, no award of damages will be made on this claim.

There is no question but that Dr. Thomas' goal was to become a partner at The Hand Center with the understanding that Dr. Brown would ultimately step aside. It seems clear that with this goal in mind he determined that his long term interest would be served by entering into an employment agreement wherein he accepted a modest salary with the promise of bonuses during the contractual period and the lure of a partnership at the conclusion of the contractual period.

The undersigned concludes that more than the single bonus payment of \$8,000 was due and that the Claimant was entitled to additional payments during the period of his employment. The question to be determined is for what periods of time and the amount(s) of those payments. The determination rests on the testimony of the two accountants, Messrs. Teplitzky and Zaprzalka. There is no question but that the Respondents failed to comply with their contractual

obligations to calculate the Claimant's bonus on a quarterly basis pursuant to the formula set forth in his employment agreement. They never gave him the data from which he could have determined what his bonus would be under the terms of his contract and what overhead expenses had been allocated to him specifically by Mr. Teplitzky. There was also no evidence in the record that the Respondents ever asked Mr. Teplitzky to calculate the Claimant's bonus pursuant to his contract for any period during the course of his employment.

Mr. Teplitzky is a competent and well respected CPA, but clearly he took direction from his clients. The books and records of the practice did not properly reflect, in many instances, legitimate business expenses which ultimately required an amendment of the business and personal tax returns of Doctors Lunt and Brown. This came to light during Mr. Zaprzalka's audit of The Hand Center's financial records. Dr. Thomas should have been paid bonuses during the course of his employment in addition to the single \$8,000 bonus. It appears from the record that Mr. Teplitzky also reached the same conclusion. The Respondents appear to be in the uncomfortable position of arguing that Dr. Thomas was unproductive and was terminated because he did not meet their professional standards, yet he worked at The Hand Center for two years and at the end of his contractual term, he was kept on for another 16 months during which time discussions and negotiations were on-going concerning his admission to partnership. The Respondents now argue that he was incompetent and unqualified for admission to partnership.

The undersigned believes that one additional day of hearing should be held, the focus of which should be: 1) The amount of bonus payment due Dr. Thomas; 2) Should the payment, once determined, be doubled in accordance with the Connecticut Wage Statute; 3) Should attorneys' fees be awarded, and if so, the amount of fees to be paid.

As previously indicated, no award will be made with respect to the two year non-competition period for the reasons indicated earlier in this opinion.

It would be very helpful to the Arbitrator if concise calculations were provided along with the testimony of the accountants, if the parties deem that necessary, setting forth the exact claim of Dr. Thomas with respect to the bonuses he should have earned during the course of his employment.

To sum up, the undersigned will hear evidence on the amount to be awarded for additional bonuses earned, whether or not the ultimate award should be doubled pursuant to the Connecticut Wage Statute and whether or not attorneys' fees should also be awarded pursuant to the statute.

Concise and precise written calculations would be helpful along with focused testimony of the experts, if the parties deem their testimony necessary. It may be that the calculations referenced above would be sufficient without the testimony of the experts. The undersigned leaves that to the discretion of counsel.

So there is no misunderstanding, the undersigned Arbitrator intends to make an award of additional damages because he believes that bonuses were earned. The question is, "how much," "for what period," and "should they be doubled?" Additionally, the undersigned wishes to hear from counsel on whether or not attorneys' fees should be awarded, and if so, how much and how the claimed fees were calculated.

Additional briefing will be permitted prior to a hearing date to be agreed upon by counsel and the undersigned. Each side shall file simultaneous briefs not to exceed 20 pages on the issues outlined above.

As an alternative to the recall of the two accountants, the undersigned would have no objection to focused written opinions by each of the experts with a ten page limit for each referencing exhibits already admitted and transcript pages of the testimony.

It is hoped that the focus of the additional day's hearing on the amount due Dr. Thomas, whether or not it should be doubled and whether or not attorneys' fees should be paid, will assist counsel in narrowing their presentations.

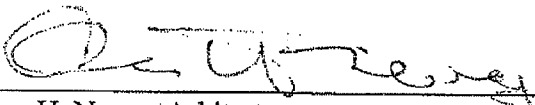
The undersigned sees no need for any further testimony by Drs. Thomas, Brown or Lunt.

Counsel should also address the issue of whether interest should be awarded, and if so, at what rate.

If the parties decide to submit briefs in lieu of the testimony of the accountants, those briefs should be submitted no later than **January 18, 2013**. I suggest that the hearing should be held on February 1, 2013, or any day during the week of February 4, 2013, on which counsel and parties are available.

**THIS AWARD SHALL REMAIN IN FULL FORCE AND EFFECT UNTIL SUCH TIME AS A FINAL AWARD IS RENDERED.**

Date: December 4, 2012

  
\_\_\_\_\_  
Alan H. Nevas, Arbitrator