691431-1

691431-1

No. 691431-I

DIVISION I
COURT OF APPEALS
OF THE STATE OF WASHINGTON

BRUCE PLEASANT AND KIMBERLY PLEASANT,
a marital community,

Appellants,

v.

REGENCE BLUESHIELD, a Washington Corporation,

Respondent.

RESPONDENT'S BRIEF

Stephania Camp Denton
WSBA No. 21920
MILLS MEYERS SWARTLING
Attorneys for Regence BlueShield

Mills Meyers Swartling
1000 Second Avenue, Suite 3000
Seattle, Washington 98104
Telephone: (206) 382-1000
Facsimile: (206) 386-7343

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

COURT RULES

I.

INTRODUCTION

Appellant Bruce Pleasant received all of the benefits to which he was entitled under his health care contract with Regence BlueShield, and the trial court properly rejected his arguments to expand the scope of that coverage.

First, Pleasant's health care plan excludes coverage for investigational services. In accordance with medical literature and the recommendations of the American Heart Association and numerous other national organizations, Regence Medical Policy classifies mechanical embolectomy as an investigational procedure when used in the treatment of acute stroke. Regence adopted its Medical Policy on mechanical embolectomy after a thorough review of the medical literature and discussion with members of the medical community. That policy is consistent with the consensus in the medical community that mechanical embolectomy is not proved to be safe or effective. Washington law permits health carriers to exclude coverage for services they deem to be investigational, and the trial court properly ruled that Bruce Pleasant is not entitled to coverage under his health care plan for the $415 charge for mechanical embolectomy.

The trial court also correctly enforced the plan's $4,000 benefit limit for an inpatient rehabilitation admission. The undisputed evidence established that two months after his stroke, Bruce Pleasant was admitted to the Rehabilitation Unit of Swedish Cherry Hill specifically for the purpose of receiving rehabilitative care, and his admission, therefore, was properly paid under the benefit limit of $4,000.

The undisputed evidence also showed that Regence fully and timely communicated with Pleasant both before and after the services were rendered. In the absence of any evidence to support Pleasant's allegations of bad faith, the trial court properly dismissed the extra-contractual claims.

The trial court's rulings were correct and should be affirmed.

II.

STATEMENT OF THE CASE

A. The Health Care Plan.

At times material to this case, Bruce Pleasant subscribed to an individual health care plan[1] with Regence. CP 155-226. Services are

[1] Individual coverage is health coverage that a person selects and buys directly from a health carrier as opposed to group coverage, which is generally purchased by an employer on the group's behalf. CP 227-28.

covered under the plan if they are "Medically Necessary,"[2] identified as a covered service, and not excluded. CP 197, 206.

Services identified as covered include professional, inpatient hospital, and inpatient skilled nursing facility, described as follows:

> SECTION 8.6 PROFESSIONAL. The services of a provider who is not a facility that provides Inpatient services, will be provided for the diagnosis and treatment of illness, accidental injury, or physical disability ....
>
> SECTION 8.7 HOSPITAL FACILITY.
>
> 8.7.1 INPATIENT BENEFITS. When the member is confined as an **Inpatient**,[3] Benefits will be provided for services and supplies provided by a Hospital ....
>
> * * *
>
> SECTION 8.30 SKILLED NURSING FACILITY. **Inpatient** services and supplies by a skilled nursing facility will be provided for illness, accidental injury, or physical disability, limited to 30 days per Year ....

CP 209, 221 (emphasis supplied for defined terms).

---

[2] *See* CP 209, ¶ 8.5 ("All services and supplies must be Medically Necessary as defined in Article 1, except as provided in this Article for preventive care services."). "Medically necessary" services are those provided "for the purpose of preventing, evaluating, diagnosing or treating an illness, injury, disease or its symptoms." CP 170.

[3] An "Inpatient" is defined as: "A person confined to overnight in a Hospital or other facility as a regularly admitted bed patient to whom a charge for room and board is made in accordance with the Hospital's or facility's standard practice." CP 168, ¶ 1.13.

However, the plan excludes coverage for "Investigational Services or Supplies, as defined in Article 1." CP 199, ¶ 6.1.17. "Investigational Services or Supplies" are services or supplies that are classified as such either by the national Blue Cross Blue Shield Association or by Regence, using five specifically identified criteria:

> SECTION 1.15 INVESTIGATIONAL SERVICE OR SUPPLY. A service or supply ... that is determined by the Company to meet any one of the following:
>
> 1.15.1 Any service or supply classified as experimental and/or investigational by the national Blue Cross Blue Shield Association ... as adopted by the Company. The national Blue Cross Blue Shield Association's determination is based on the following criteria:
>
> a. The scientific evidence must permit conclusions concerning the effect of the technology on health outcomes (which means significant measurable improvement in length of life, ability to function, or quality of life);
>
> b. The technology must improve the net health outcome (as defined above);
>
> c. The technology must be as beneficial as any established alternatives;
>
> d. The improvement must be attainable outside the laboratory or clinical research setting; and
>
> e. Items must have been approved by the U.S. Food and Drug Administration

(FDA) as being safe and efficacious for general marketing, and permission must have been granted by the FDA for commercial distribution; or

1.15.2 Any service or supply classified as experimental or investigational by the Company. The Company's determination is based on the criteria specified under Paragraph 1.15.1 ....

CP 169.

In addition, the plan excludes "[t]reatment for rehabilitative care, including speech therapy, physical therapy, or occupational therapy, except as specified in the Home Health, Hospice, and Rehabilitation Benefits of Article 8." CP 200, ¶ 6.1.34 (emphasis added).

Article 8 provides limited coverage for an inpatient rehabilitation admission as follows:

SECTION 8.29 REHABILITATION. The Benefits described below will be provided when Medically Necessary to restore and improve function that was previously normal but lost following a documented injury or illness:

8.29.1 INPATIENT. The Professional, Inpatient Hospital, and Skilled Nursing Facility Benefits of this Article will be provided to an Inpatient for an **Inpatient Rehabilitation Admission** for physical therapy, speech therapy, and occupational therapy, to a maximum of $4,000 per Year.

CP 220.

An "Inpatient Rehabilitation Admission" is defined as: "An inpatient admission to a Company approved facility specifically for the purpose of receiving speech, physical, or occupational therapy in an inpatient setting." CP 169, ¶ 1.14.

B. Pleasant's Medical History.

1. Inpatient Hospital Admission to Swedish Medical Center (3/18/10 to 4/5/10).

On March 18, 2010, while or shortly after undergoing knee surgery, Bruce Pleasant suffered a stroke, for which he received extensive medical care. He was admitted to Swedish Medical Center as a regularly admitted patient, where he received inpatient medical care for approximately three weeks to stabilize his condition. CP 229-30.

During Pleasant's hospitalization, Pleasant and his family discussed with Pleasant's caregivers options for Pleasant's continuing treatment following his discharge from the hospital and how to optimize use of the various benefits available to him under his Regence plan. CP 240. The various options included admission to a rehabilitation unit, admission to a skilled nursing facility, or a combination of the two. *Id.* After having specific conversations with Regence about the fact that the plan provided a limited benefit of $4,000 for inpatient rehabilitation, CP

232-35, 240, Pleasant decided to first enter a skilled nursing facility, then transfer to a rehabilitation facility. Pleasant recognized that this option would allow him to maximize both his 30-day skilled nursing facility benefit and the $4,000 benefit for inpatient rehabilitation. CP 245 (recommending that Pleasant "use at least 3-4 weeks of that [SNF[4]] benefit prior to paying privately for ARU[5]"); *see also* CP 247 (Swedish Care Manager noting Pleasant will "utilize SNF benefit first" then "pay privately at ARU when ARU benefit has been exhausted").

2. Admission to Skilled Nursing Facility (4/5/10 to 5/5/10).

Accordingly, on April 5, 2010, Pleasant transferred to a skilled nursing facility, where he stayed for 30 days.

[4] SNF means Skilled Nursing Facility.
[5] ARU means Acute Rehabilitation Unit.

3. Inpatient Rehabilitation Admission to Swedish Cherry Hill's Inpatient Acute Rehabilitation Unit (5/5/10 to 5/31/10).

On May 5, 2010, with full knowledge of his limited inpatient rehabilitation benefit and having made private pay arrangements, Pleasant was admitted to Swedish Cherry Hill's Inpatient Acute Rehabilitation Unit.[6] Pleasant's admission record identifies the admitting provider as Dr. David Clawson, a physician specializing in rehabilitation. CP 257. Pleasant was pre-authorized by Swedish Cherry Hill for admission to the Rehabilitation Unit,[7] and his admission record confirms this was an "elective" admission for the specific and only purpose of receiving

---

[6] Pleasant's contention – based solely on a citation to his own motion for summary judgment – that he was "readmitted to a different floor" of the same hospital that discharged him 30 days earlier is not accurate. *Brief on Appellants,* p. 5 (citing CP 12). In fact, the Swedish Rehabilitation Unit is a separate facility that operates under the rules and regulations applicable to rehabilitation facilities and charges accordingly. Inpatient rehabilitation facilities include distinct rehabilitation units within a hospital. 42 CFR 412.23. In order for a facility to qualify as a "rehabilitation unit," the facility must meet certain legally established criteria. WAC 182-550-1050; 42 CFR 412.25. Swedish's Rehabilitation Unit (in contrast to the hospital facility) "serves patients who are medically stable, but who still need intensive therapy before leaving the hospital after an inpatient stay for illness, injury or surgery." CP 248-53. Regence asked the trial court to strike this and other similarly unsupported statements by Pleasant on summary judgment. CP 139 (citing CR 56(e)).

[7] Rehabilitation Units have preadmission screening procedures to evaluate and determine a patient's eligibility for inpatient admission to the Unit, which require that the patient have suffered a new or recent onset of certain medical conditions (including a stroke), be "medically stable and show evidence of physical and cognitive readiness to participate in the rehabilitation program," and be "willing and capable" of participating in the program for at least three hours daily. WAC 182-550-2551; WAC 182-550-2561. Accordingly, in order to qualify Pleasant for benefits, Swedish Cherry Hill completed an Inpatient Rehabilitation Facility – Patient Assessment Instrument ("IRF-PAI") for him on May 5, 2010. CP 254-56. In addition to determining a patient's eligibility for an inpatient rehabilitation program, the IRF-PAI is used to determine the facility's reimbursement for the admission.

rehabilitative care.[8] Pleasant received intensive physical, occupational, and speech therapy every day during his rehabilitation admission. CP 257-493. Although he was not admitted as a regular patient hospitalized because of a need for medical care, as would be expected due to his previous stroke, Pleasant also received medical services and drugs during his inpatient rehabilitation admission.[9] He was discharged to his home on May 31, 2010. CP 493.

C. Regence's Coverage Determinations.

Regence provided full coverage for Pleasant's inpatient hospital admission in March 2010, for which Swedish charged approximately $250,000.[10] CP 585-600. Regence also fully covered Pleasant's 30-day stay at the skilled nursing facility. CP 236.

---

[8] The "Primary Service" is identified as "Rehab" and "Secondary Service" is identified as "None." CP 257; *see also* CP 259 (Swedish discharge summary stating reason for ARU admission: "Admitted for rehabilitation for deficits related to Right MCA embolic CVA related to patent foramen ovale following knee surgery.").

[9] Every rehabilitation patient must have an underlying medical illness or injury in order to qualify for rehabilitative care, and thus every rehabilitation patient has medical needs. WAC 182-550-2551; WAC 182-550-2561. In order to be admitted for rehabilitation, however, the patient's medical condition must be "medically stable." *Id.* Thus, by definition, an inpatient rehabilitation patient has a medical condition but does not need to be hospitalized for his or her condition.

[10] All of the hospital's charges for Pleasant's inpatient stay as a "regularly admitted bed patient" were covered under the inpatient hospital benefit of Pleasant's plan. CP 168, 209. This coverage included incidental rehabilitation services provided during his hospital admission, which were not applied to the limited benefit for an Inpatient Rehabilitation Admission, since Pleasant was not hospitalized "for the purpose of receiving ... therapy"). CP 168-69, 209.

In this case, Pleasant contests Regence's coverage determinations for a mechanical embolectomy procedure and for his inpatient rehabilitation admission.

1. Mechanical Embolectomy Procedure.

One of the many medical procedures Pleasant received on the day of his stroke is called "mechanical embolectomy." Both Regence and the Blue Cross Blue Shield Association classify mechanical embolectomy as an investigational procedure when used for the treatment of acute ischemic stroke. CP 789-96.[11] As detailed in the medical literature cited in Regence's Medical Policy, studies and medical trials conducted to date on the use of mechanical embolectomy for stroke patients are inconclusive on whether the procedure is safe, effective, or preferable to alternative treatments.[12] *Id.* Regence's Medical Policy also relies in part on the American Heart Association's opinion that the usefulness and effectiveness of mechanical embolectomy devices is "uncertain," and "the utility of the device in improving outcomes after stroke remains unclear." *Id.* In addition to the American Heart Association, the American Journal of Radiology, studies funded by the United States Department of Health

[11] Regence's Medical Policy, including citations to the medical publications and studies that are cited in the policy, is published for the public at http://blue.regence.com/trgmedpol/surgery/sur158.html (last accessed 6/15/12).
[12] In fact, mechanical embolectomy did not improve Pleasant's condition. CP 1193-95.

and Human Services, and numerous other public and private health carriers agree that the safety and efficacy of mechanical embolectomy for the treatment of acute ischemic stroke is unproven.[13] *See infra,* pp. 20-22.

In accordance with Pleasant's plan, Regence denied coverage for the physician's charge of $415 to perform the mechanical embolectomy procedure. Regence sent an Explanation of Benefits ("EOB") informing Pleasant of the basis for denial of the charge. CP 1192 (EOB stating "investigational or experimental services and supplies are not covered"). The EOB also described the procedure to appeal the denial and offered "a free explanation of our scientific or clinical judgment, applying the terms of the plan to your medical circumstances, is available upon request." *Id.* Regence followed up with a letter to Pleasant repeating the basis for the claim denial and providing the specific URL for the publication of Regence's Medical Policy on mechanical embolectomy. CP 1305-08.[14]

---

[13] Pleasant's representation that "Regence's own reviewing neurosurgeon, Dr. Maurice Collada" disagreed with the Medical Policy on mechanical embolectomy is false and misstates the record. *Brief of Appellants*, p. 11. Dr. Collada is not and never has been an employee or agent of Regence. CP 1552 (28:18-24). His comments were received by Regence in response to the company's practice of soliciting comments on draft policies from all medical providers in the state and merely reflect that one doctor out of the thousands in this state disagrees with the Medical Policy. *Id.*

[14] Pleasant's contention that the denial was "unexplained" clearly is inaccurate. *Brief of Appellants*, p. 13.

2. Inpatient Rehabilitation Admission.

Pleasant's May 5, 2010, admission to Swedish Cherry Hill's Rehabilitation Unit qualified as an Inpatient Rehabilitation Admission under the contract, defined as an admission "specifically for the purpose of receiving speech, physical, or occupational therapy in an inpatient setting." CP 169, ¶ 1.14. The "admitting diagnosis" is "the medical condition responsible for a hospital admission, as defined by ICD-9-M diagnostic code." WAC 182-531-0050. Pleasant's "admitting diagnosis" was "rehabilitation procedure" (coded as V57.89). CP 494.

In the health care industry, inpatient rehabilitation admissions are paid differently than and separately from inpatient hospital admissions.[15] Swedish Cherry Hill's Rehabilitation Unit, which is separate from the hospital facility, submitted an invoice for Pleasant's inpatient

[15] The Centers for Medicare and Medicaid Services ("CMS") has established various Prospective Payment Systems (or "PPSs") as methods to reimburse medical services. CP 500-01. Separate PPSs apply for reimbursement to acute inpatient hospitals, hospice, hospital outpatient, inpatient psychiatric facilities, inpatient rehabilitation facilities, and skilled nursing facilities; and facilities are prohibited from billing one patient under different categories for the same admission. *Id.*; *see also* WAC 182-550-2598(14)(b) (noting that the Washington Health Department "uses the per diem payment method to pay for services provided in ... distinct rehabilitation units").

rehabilitation admission.[16] Regence paid benefits for the inpatient rehabilitation admission up to the contract's limit of $4,000. CP 220, ¶ 8.29.1.

Pleasant was fully informed in advance that his Regence plan would provide a limited benefit of $4,000 for the admission. CP 238 (confirming on 3/24/10: "Your benefits for your stay on the inpatient rehabilitation unit are: Covered at 80%. Limit $4,000 per 12 months.").

D. Trial Court Procedural History.

The Pleasants filed the instant action on February 9, 2011, based Regence's enforcement of the plan's limit of $4,000 for an inpatient rehabilitation admission, and asserting claims for breach of contract, bad faith, and breach of the Washington Consumer Protection Act ("CPA"). CP 2-3.

On December 16, 2011, Pleasant moved for summary judgment, asking the trial court to rule that his plan's $4,000 limit on an inpatient rehabilitation admission should not apply because his May 2010 admission was not actually an "inpatient rehabilitation admission" as

[16] In accordance with federal regulations, Swedish Cherry Hill bills its 36-bed rehabilitation unit separately from its 385-bed acute care hospital. CP 503; *see* 42 CFR §412.105(b) (excluding beds located in a hospital's rehabilitation unit from the number of beds used to calculate hospital inpatient reimbursement amount). The invoice for Pleasant's inpatient rehabilitation admission invoice uses NPI number 1427103589, which is the NPI number for Swedish's Rehabilitation Unit. CP 494, 496. (An NPI number is a "unique identifier for health care providers" established by CMS. CP 495.) Swedish's general acute care hospital operates under a different NPI number. CP 498.

defined by the plan.[17] CP 11-19. However, Pleasant's medical records conclusively proved that he was admitted to the Rehabilitation Unit for the purpose of receiving rehabilitative therapy and, therefore, his admission was an "inpatient rehabilitation admission" as defined by the plan. On January 13, 2012, following oral argument, the Honorable Mary Yu denied Pleasant's motion for summary judgment, finding that Regence properly enforced the terms of Pleasant's heath care plan limiting benefits for an "inpatient rehabilitation admission" to $4,000 per year. CP 602-03.

Regence moved for summary judgment dismissal of Pleasant's claims that he was entitled to benefits over and above the $4,000 inpatient rehabilitation limit. CP 1682-1700. On April 10, 2012, Judge Yu again ruled that that Regence properly enforced the terms of Pleasant's heath care plan limiting benefits for an "inpatient rehabilitation admission" to $4,000 per year, and she granted "summary judgment and dismissal on the following issues:"

> a) Regence's policy with Mr. Pleasant caps claims for individuals in rehabilitative care and Regence properly enforced the terms of its contract for Mr. Pleasant's inpatient rehabilitation admission in May 2010; and

[17] Pleasant also argued that the benefit limitation is unenforceable under Washington public policy, but he appears to have abandoned this argument on appeal since it is not addressed in his brief. *See* RAP 10.3(a)(3) (appellant's brief must contain a "separate concise statement of each error" "together with the issues pertaining to the assignments of error"); RAP 12.1 ("the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs").

b) Pleasant's extra-contractual claims, based on allegations that Regence did not advise Mr. Pleasant to be discharged from the rehabilitation unit at an earlier time.

CP 1707-09.

However, at the April hearing, Judge Yu also permitted the Pleasants to assert a new claim based on Regence's denial of the $415 charge for a mechanical embolectomy procedure performed on March 18, 2010. *Id.* The parties filed cross-motions on this claim, and on July 13, 2012, the trial court ruled that Regence properly denied the mechanical embolectomy claim as an investigational procedure and dismissed the remainder of the lawsuit. CP 1512-13. The trial court denied Pleasant's motion for reconsideration, CP 1647, and this appeal followed.

III.

ARGUMENT

A. The Trial Court Properly Denied Plaintiffs' Summary Judgment Motions and Granted Regence's Summary Judgment Motions.

On review of an order granting summary judgment, the Court of Appeals performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.,* 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate if "after viewing the pleadings and record, and drawing all reasonable inferences in favor of the non-moving party, [the

court] finds there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Mayer v. Pierce Cy. Med. Bur., Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1996). The Court of Appeals may affirm on any basis supported by the record. *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 682, 183 P.3d 1118 (2008).

A plaintiff seeking coverage has the burden to show that the claimed loss falls within the terms of the insurance contract. *Waite v. Aetna Cas. & Sur. Co.,* 77 Wn.2d 850, 853, 467 P.2d 847 (1970). The contract "should be interpreted in a way that gives effect to each provision," and "specific terms and exact terms [should be] given greater weight than general language." *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354, 103 P.3d 773 (2004); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992). "Interpretation of an unambiguous contract is a question of law," and "[i]f a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision." *Mayer*, 80 Wn. App. at 420.

Here, the trial court correctly granted summary judgment for Regence on both the mechanical embolectomy and the inpatient rehabilitation issues. On both issues, the parties filed cross-motions for summary judgment, agreeing that the facts were undisputed. This undisputed evidence established that mechanical embolectomy is an

investigative procedure based on the criteria set forth in the contract, and Regence properly denied coverage for the procedure. The undisputed evidence also proved that Pleasant's May 2010 admission was an "inpatient rehabilitation admission" for which the contract provides a benefit of $4,000, and that Pleasant was fully aware of the scope of benefits in his chosen plan before he obtained the services. Plaintiffs' extra-contractual claims failed because they are contingent on proof that Regence acted unreasonably in enforcing the contract. The trial court properly granted summary judgment dismissal of Pleasant's claims, and the trial court's rulings should be affirmed on appeal.

B. The Trial Court Correctly Ruled that Mechanical Embolectomy Is an Investigational Procedure Excluded By the Terms of the Plan.

The trial court correctly ruled as a matter of law that the mechanical embolectomy procedure was not covered under the Regence plan, which excludes coverage for services classified as investigational. CP 199, ¶ 6.1.17; *see, e.g., Parsons v. Sisters of Charity of Leavenworth Health Systems, Inc.*, 2012 WL 3026395 (9th Cir. July 25, 2012) (affirming trial court's enforcement of "experimental and investigational" exclusion on summary judgment), *pet. for cert. filed 12/3/12*. Washington law permits health carriers to exclude coverage for investigational services, and the Regence contract complies with Washington law by

describing the specific criteria used to determine if a service is investigational.

Under WAC 284-44-043, health carriers may exclude coverage for investigational services.[18] Either the health carrier "or an affiliated entity" is authorized to "make [the] determination of which services will be considered to be experimental or investigational," provided that "the criteria it will utilize to determine whether a service is experimental or investigational [is] set forth in the contract and any certificate of coverage issued thereunder." WAC 284-44-043(2).

Here, in accordance with Washington law, Regence adopted a Medical Policy on mechanical embolectomy, determining that the procedure is investigational when used in the treatment of acute ischemic stroke, and Pleasant's plan sets forth the criteria the company used to make this determination.[19] Specifically, the contract states that a service is

---

[18] Although WAC 284-44-043 also sets forth procedural appeal steps, Pleasant did not appeal the coverage determination.

[19] Regence's Medical Director, Richard Rainey, M.D., confirmed that the Medical Policy is based on the five criteria identified in Pleasant's plan document. CP 789-91. Pleasant's argument on appeal to exclude Dr. Rainey's testimony and other evidence submitted by Regence, *Brief of Appellants*, pp. 31-33, must be rejected because he did not file a motion to strike before the trial court. CP 1656-1660; *see Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 755, 162 P.3d 1153 (2007) ("Where a party believes that proffered evidence is not properly before the trial court, it must move the trial court to strike such evidence from the record."). Furthermore, Regence's primary witness disclosure included identification of Regence employees, CP 1212, and all documents were produced both in accordance with an order entered by the trial court extending the date to respond and well in advance of the parties' dispositive motion filings.

excluded from coverage if it is classified as investigational either by the national Blue Cross Blue Shield Association or by Regence. CP 169, ¶ 1.15. The contract also sets forth the criteria these entities use to make this determination:

a. The scientific evidence must permit conclusions concerning the effect of the technology on health outcomes (which means significant measurable improvement in length of life, ability to function, or quality of life);

b. The technology must improve the net health outcome (as defined above);

c. The technology must be as beneficial as any established alternatives;

d. The improvement must be attainable outside the laboratory or clinical research setting; and

e. Items must have been approved by the U.S. Food and Drug Administration (FDA) as being safe and efficacious for general marketing, and permission must have been granted by the FDA for commercial distribution; or

CP 169.[20]

Using these criteria, the Medical Policies of both the national Blue Cross Blue Shield Association and Regence classify mechanical embolectomy as investigational. CP 789-96. Regence's determination is based on the lack of scientific evidence to prove that mechanical

[20] All Regence plans are submitted to the Office of the Insurance Commissioner for review and approval before marketing. RCW 48.44.020; RCW 48.44.040; WAC 284-43-920.

embolectomy is effective, beneficial and safe for acute stroke patients, or that the procedure is preferable to alternative treatments. *Id.* Rather, the studies conducted to date on mechanical embolectomy are limited from a medical standpoint because they involved patients with different types of occlusions and did not include appropriate control groups. *Id.* "Given the lack of controlled studies to assess the impact of this treatment on outcome, the effectiveness of mechanical embolectomy for the management of acute stroke remains uncertain," and more comparative data is necessary to evaluate the efficacy of the procedure. *Id.* Regence's Medical Policy relies in part on a recommendation by the American Heart Association that the usefulness and effectiveness of mechanical embolectomy devices is "uncertain," and "the utility of the device in improving outcomes after stroke remains unclear." *Id.*

Under WAC 284-44-043, Regence complied with Washington law by adopting a Medical Policy based on the criteria set forth in Pleasant's contract. Pleasant failed to provide any contrary evidence or argument, and the trial court properly dismissed his claim for coverage of the mechanical embolectomy procedure.

Washington law does not support Pleasant's argument that he can create an issue of fact by locating articles on the Internet debating whether or not the procedure is safe and effective. Furthermore, even if Pleasant

could raise an issue of fact in this manner, he did not. Pleasant submitted no expert or other medical testimony on the issue,[21] and all of the evidence submitted to the trial court questioned use of the procedure for stroke patients. For example, according to the American Journal of Radiology, although two devices that can be used for mechanical embolectomy have been "cleared" by the Food & Drug Administration (FDA) for marketing, neither of these devices "has demonstrated efficacy for the improvement of patient outcomes."[22] CP 1491. A review funded by the United States Department of Health and Human Services, published in 2011, notes the "lack [of] randomized trials to document that the neurothrombectomy devices improve patient outcomes." CP 1497. More recently, in April 2012, patient trials of mechanical embolectomy were suspended because the trials failed to produce the hypothesized results or prove that the

---

[21] Pleasant's representation on appeal that Dr. Clawson testified regarding mechanical embolectomy is not correct. *Brief of Appellants*, p. 31. Dr. Clawson is a rehabilitation doctor who did not treat Pleasant on the day of his stroke, and his declaration does not even address mechanical embolectomy. CP 1645-46.

[22] Pleasant's contention that mechanical embolectomy "has received FDA approval," *Brief of Appellants*, p. 30, also is not accurate. Rather, the Merci device was given 510(k) "clearance" for marketing, which is different from FDA "approval" that is given only after submission of a premarket approval application. CP 1085-86. "510(k) clearance does ***not*** mean that the FDA has evaluated the data or made a finding that the device is effective." https://www.avacor.com/blog/hair-regrowth/laser-hair-regrowth-devices-%E2%80%93-what-does-%E2%80%9Cfda-cleared%E2%80%9D-really-mean/ (last accessed 7/2/12) (discussing laser hair regrowth devices) (emphasis in original).

procedure improves patient outcomes. CP 1501.[23] Due to the lack of medical evidence or conclusive studies to prove the safety and effectiveness of the procedure, Regence is not alone in classifying mechanical embolectomy as an investigational procedure for the treatment of acute ischemic stroke.[24]

Finally, Pleasant's contentions that Regence's Medical Policy on mechanical embolectomy is not a part of the insurance contract, and that the trial court was somehow "befuddled" by this issue, also fail to support his position. *Brief of Appellants*, pp. 29-30. The insurance contract excludes services that are determined to be investigational either by Regence or by the Blue Cross Blue Shield Association. CP 169. Thus, the contract expressly incorporated the medical policy decisions by these entities. *See Western Wash. Corp. of Seventh-Day Adventists v.*

---

[23] The three documents submitted by Pleasant on mechanical embolectomy failed to support his assertion that the procedure is safe and effective for treatment of his type of injury. Two of the documents were written over two years after Pleasant received the procedure, CP 688-91 and CP 1640-44, and the third document questions the safety and efficacy of the procedure. CP 1533-34 (noting that limited studies "suggest[] that the procedure actually harmed people in whom recanalization could not be established (which was nearly half of the population) .... [T]hese data certainly provide no reassurance about the safety of mechanical embolectomy, yet alone the efficacy.").

[24] Many other health carriers (including Anthem, QualChoice, and HealthNow as applied to its Medicare Advantage products) also classify mechanical embolectomy as investigational and/or not medically necessary. CP 1504-10 (Anthem medical policy classifying mechanical embolectomy as "investigational and not medically necessary in the treatment of acute stroke"); CP 1511-14 (QualChoice policy stating "[m]echanical embolectomy ... is considered experimental and investigational for the treatment of acute ischemic stroke because its effectiveness has not been established."); CP 1515-18 (HealthNow policy applicable to Medicare Advantage products classifies mechanical embolectomy as investigational in the treatment of acute stroke).

Ferrellgas, Inc., 102 Wn. App. 488, 494, 7 P.3d 861 (2000) (discussing concept of incorporating contract terms by reference), *review denied*, 143 Wn.2d 1003 (2001). Washington law requires only that the criteria used to make the determination be identified in the contract. *See* WAC 284-44-043(2) (health care plan document must set forth "the criteria [the health carrier] will utilize to determine whether a service is experimental or investigational ..."). Judge Yu was not confused, and she properly ruled to enforce the terms of Pleasant's medical plan. *See* VRP (7/13/12 hearing).

The trial court's decision granting summary judgment to Regence on its denial of the mechanical embolectomy procedure was correct and should be affirmed.

C. The Trial Court Properly Enforced the Plan's Limited Benefit for Pleasant's Inpatient Rehabilitation Admission.

Pleasant's health care plan excludes coverage for rehabilitative care, "except as specified in the ... Rehabilitation Benefits of Article 8." CP 200, ¶ 6.1.34. Under Article 8, benefits are provided for an Inpatient Rehabilitation Admission to a maximum of $4,000 per year. CP 220, ¶ 8.29.1. An Inpatient Rehabilitation Admission is defined as:

> An inpatient admission to a Company approved facility specifically for the purpose of receiving speech, physical, or occupational therapy in an inpatient setting.

CP 169, ¶ 1.14.

The evidence before the trial court was undisputed that Pleasant's May 2010 admission was an Inpatient Rehabilitation Admission. He was admitted on an "elective" basis to the Swedish Cherry Hill ARU for the specific purpose of receiving rehabilitative care. CP 254-57. His admitting diagnosis was "rehabilitation procedure" with no other diagnosis, CP 494, and he received intensive rehabilitation services during each day of his admission. Of course, since all rehabilitation admissions are precipitated by an underlying medical condition, it is to be expected that patients such as Pleasant also will receive prescription drugs and medical services. *See* WAC 182-550-2501 (acute physical medicine and rehabilitation "is a twenty-four-hour inpatient comprehensive program of integrated medical and rehabilitative services provided during the acute phase of a client's rehabilitation") (emphasis added). Under the Regence contract, however, it is the purpose of the admission that determines coverage, and there is no evidence that Pleasant was or needed to be hospitalized as an inpatient in May 2010.[25] Furthermore, Pleasant was fully aware of the terms of his contract with Regence and he, his family and his medical providers made certain decisions regarding his care based

[25] Although not material to coverage as it is defined under the Regence plan, there also was no evidence before the trial court that any services received by Pleasant during his May 2010 admission were not related to rehabilitation. Pleasant's reference to the record in his brief (*see Brief of Appellants*, p. 20 citing CP 559) cites only to Pleasant's reply brief on summary judgment.

on their understanding that the contract provided a benefit of $4,000 for an inpatient rehabilitation admission.

The Washington Supreme Court has rejected the argument, made by Pleasant in this case, that a health care contract cannot define benefits based on the location of the services or the type of inpatient admission.[26] In the case of *Rew v. Beneficial Standard Life Ins. Co.*, 41 Wn.2d 577, 578, 250 P.2d 956 (1953), the Court held that the plaintiff was not entitled to health care benefits for an inpatient stay at a convalescent home under a policy that covered "confine[ment] as a resident bed patient within any hospital." The Supreme Court reversed the trial court, holding that the trial court erred in concluding "that since respondent wife secured in the convalescent home the same care she would have received at the Deaconess Hospital, had she remained there, the Valley View Convalescent Home was actually a hospital within the coverage of the policy," and remanded with instructions to enter judgment for the insurer. *Id.* at 581, 583; *see also Taylor v. Phoenix Mut. Life Ins. Co.*, 453 F. Supp. 372, 374-75 (E.D. Penn. 1978) (granting insurer's motion for summary

[26] The Regence plan defines benefits based both on the location of services and the type of admission. For example, services received by Pleasant while he was a hospital inpatient – including incidental rehabilitation services, non-prescription drugs, etc. – were covered without a limit under the plan's inpatient hospital benefit section. CP 209. These services would have been subject to different coverage provisions if they had been provided while in a different facility or if Pleasant received the services as an out-patient.

judgment and holding that when a patient is admitted to a facility "primarily for rehabilitative care," even though he or she may receive "incidental medical attention" during the admission, coverage is properly denied under a policy that limits coverage to "[c]harges made by a hospital").

The two cases cited by Pleasant do not contradict *Rew*. In *National Family v. Kuykandall*, 705 S.W.2d 267 (Tex. App. 1986), the only issue was whether a contract covering hospitalization in an "Intensive Care Unit" covered hospitalization in a unit "designated as the Coronary Care Unit." The plaintiff's physician testified that the Coronary Care Unit was essentially the same as an Intensive Care Unit, and the Court affirmed a jury finding on this issue. This case does not support Pleasant's argument that a plan cannot limit benefits based on the type of facility or type of admission; only that the terms of the contract did not do so. The other case cited by Pleasant, *Dobias v. Service Life Ins. Co. of Omaha*, 469 N.W.2d 143 (Neb. 1991), is similarly inapposite because it relied on the fact that the plaintiff received primarily acute medical care, the facility providing the care was not a rehabilitation facility (but only "coincidentally ... named a 'rehabilitation center'"), and, more importantly, that the plaintiff had been misled about the terms of the policy.

Here, by contrast, Pleasant's physician ordered that he be placed into a rehabilitation facility specifically for the purpose of receiving rehabilitative care, the contract expressly defines the scope of an Inpatient Rehabilitation Admission, Pleasant in fact received primarily rehabilitative care, and he was fully aware of the terms of his contract before the admission. Although the contract excludes rehabilitative care, it provides a limited benefit of $4,000 for an Inpatient Rehabilitation Admission. Regence appropriately paid for Pleasant's Inpatient Rehabilitation Admission under this limited benefit, and the trial court correctly granted summary judgment to Regence on this issue.

D. The Trial Court Properly Dismissed the Pleasants' Extra-Contractual Claims.

The trial court also properly dismissed Pleasant's extra-contractual claims. In order to establish a bad faith breach of an insurance contract, the insured must show that the breach was "unreasonable, frivolous, or unfounded." *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998). The defendant "is entitled to summary judgment if reasonable minds could not differ that its denial of coverage was based upon reasonable grounds." *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003); *see also Dombrosky v. Farmers Ins. Co. of Washington*, 84 Wn. App. 245, 260, 928 P.2d 1127 (1996) ("a reasonable

basis for denial of an insured's claim constitutes a complete defense to any claim that the insurer acted in bad faith or in violation of the Consumer Protection Act"), *review denied,* 131 Wn.2d 1018 (1997). Here, the undisputed evidence established that Regence's coverage determinations were consistent with the terms of the contract, supported by medical evidence, and correct.

Although an insured may maintain an action against an insurer for bad faith investigation of the insured's claim and violation of the Consumer Protection Act, regardless of whether the insurer was ultimately correct in denying coverage under the policy, *Coventry Assoc. v. American States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933 (1998), Pleasant does not assert such claims in this case. CP 3. Moreover, even if he did, these claims would fail because the regulations applicable to insurers, upon which these claims generally are based, do not apply to health care service contractors such as Regence, *Leingang v. Pierce County Med. Bureau, Inc.,* 131 Wn.2d 133, 151, 930 P.2d 288 (1997), and because Pleasant does not claim damages that are separate from and not inclusive of the policy benefits. *Coventry*, 136 Wn.2d at 276 (requiring evidence of harm to support bad faith and CPA claims).

Pleasant alleges Regence acted in bad faith by not explaining "the basis of its denial of the mechanical embolectomy procedure." *Brief of*

Appellants, p. 36. This contention is directly contradicted by the record, which includes communications to Pleasant describing both the company's Medical Policy on mechanical embolectomy and the voluminous medical literature supporting that policy and establishing the investigational nature of the procedure. *See, e.g.,* CP 1192, 1305-08.

The trial court also properly rejected Pleasant's argument that Regence acted in bad faith by "failing to advise" Pleasant that he could have obtained other policy benefits by being hospitalized instead of admitted to the Rehabilitation Unit. *Brief of Appellants*, p. 36. Pleasant acknowledges that Regence fully advised him as to the terms of the health care contract, and that he was aware of the benefit limitation on his inpatient rehabilitation admission; he argues only that Regence should have given him medical advice. However, Regence has no legal duty to give medical advice; in fact, Washington law discourages health carriers from becoming involved in a patient's health care decisions. *See* RCW 48.43.545 (a health carrier can face malpractice liability to the same degree as a health care provider, but can avoid liability by proving it did not "control[], influence[], or participate[] in the health care decision"). Moreover, there is a total lack of evidence that Pleasant needed to be hospitalized six weeks after his stroke – certainly, his attending physicians did not recommend hospitalization as opposed to rehabilitation. Instead,

Pleasant's medical records indicate that Pleasant's underlying medical condition was stable, and his medical providers presented him with the choice of either being admitted to a rehabilitation facility or being discharged to home and receiving rehabilitation services as an outpatient. CP 240.

Pleasant failed to present evidence that Regence breached any applicable law or regulations or otherwise acted wrongfully, and the trial court properly dismissed his extra-contractual claims.

IV.

CONCLUSION

The trial court properly enforced the terms of Pleasant's contract, which excludes coverage for an investigational procedure, such as mechanical embolectomy, and limits benefits for an inpatient rehabilitation admission to $4,000.

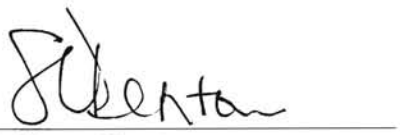
Mechanical embolectomy is a controversial procedure that to date, has not been proven to be safe or effective on the treatment of acute stroke. Regence Medical Policy, adopted in accordance with both Washington law and the terms of Pleasant's health care plan, categorizes mechanical embolectomy as an investigational procedure. The trial court properly ruled that the $415 physician charge for the procedure was not covered.

The trial court also properly enforced the plan's $4,000 limitation on Pleasant's inpatient rehabilitation admission. The undisputed evidence proved that Pleasant was admitted to Swedish Cherry Hills' Rehabilitation Unit for the purpose of receiving rehabilitative care. He did not need to be hospitalized for inpatient medical care, and the trial court properly ruled that Pleasant's May 2010 admission was in fact an "Inpatient Rehabilitation Admission" subject to the plan's benefit limit of $4,000.

The trial court properly dismissed all of Pleasant's claims against Regence in this matter, and Regence asks this Court to affirm the trial court's decisions.

RESPECTFULLY SUBMITTED this 18th day of January, 2013.

MILLS MEYERS SWARTLING
Attorneys for Respondent
Regence BlueShield

By 

Stephania Camp Denton
WSBA No. 21920

CERTIFICATE OF FILING AND SERVICE

I, Christine Stanley, hereby certify that I filed the foregoing by hand delivery upon the following counsel of record:

Attorneys for Appellant:
Rick J. Wathen
Cole, Lether, Wathen, Leid & Hall, P.C.
1000 Second Avenue, Suite 1300
Seattle, WA 98104

DATED this 18th day of January 2013.

Christine Stanley

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JAN 18 PM 4:36