

No. 38061-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TIMOTHY B. JOLLEY, M.D.,

Appellant,

v.

REGENCE BLUESHIELD,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

In order to balance the disparity in bargaining power between large health care contractors like Regence BlueShield (“Regence”) and individual physicians like Dr. Timothy B. Jolley (“Dr. Jolley”), Washington State requires a fair internal review process for provider complaints that preserves the provider’s ultimate right to a judicial remedy. Dr. Jolley was terminated by Regence twice, but neither time did he receive that fair review. Regence now seeks to deprive Dr. Jolley of any meaningful judicial remedy as well. Dr. Jolley respectfully asks this Court to correct these injustices by reversing the trial court’s grant of summary judgment to Regence, and either granting summary judgment for Dr. Jolley or remanding this case to resolve factual questions.

Regence voluntarily entered a Practitioner Agreement with Dr. Jolley. When Regence unilaterally terminated their agreement, Dr. Jolley tried to use the fair review process mandated by law and set forth in the contract, but Regence denied him a fair internal review by withholding the reasons for his termination. Dr. Jolley won reinstatement and damages in arbitration – only to have Regence immediately re-terminate him. Once again, Dr. Jolley went through the internal review process, and once again, Regence hid the ball. This time, however, he was not reinstated in non-binding arbitration.

Dr. Jolley then sought relief by filing this action in the Pierce County Superior Court. The Superior Court granted summary judgment to Regence, holding as a matter of law that Regence had fulfilled its contract. But the Superior Court reached this conclusion only by ignoring what the contract actually demands: a three-step review process, every distinct step of which is fair. Instead, the trial court held that Dr. Jolley received a fair review overall, and that was good enough.

In relying on the arbitrator's fairness to override the defects in Regence's internal process, the Superior Court made a further error. State law mandates that the fair review process preserve Dr. Jolley's right to a judicial remedy. Yet instead of a *de novo* judicial review of the company process, the trial court in effect rendered the arbitrator's decision binding. The trial court also erred by brushing aside Dr. Jolley's claim for damages based on the first termination. Because Regence violated its contract to Dr. Jolley's detriment, Dr. Jolley should receive summary judgment on liability and a remand for a trial on damages.

II. ASSIGNMENT OF ERROR

1. The trial court erred in granting Regence's motion for summary judgment and dismissing Dr. Jolley's claims with prejudice by Order entered March 28, 2008.

2. The trial court erred in denying Dr. Jolley's motion for summary judgment by Order entered March 28, 2008 .

Issues Pertaining To Assignment Of Error.

(1) Did Regence fail to honor its contractual obligations to provide Dr. Jolley with a fair review of his first complaint? (Assignments of Error 1 and 2).

(2) Did Regence fail to honor its contractual obligations to provide Dr. Jolley with a fair review of his second complaint? (Assignments of Error 1 and 2).

(3) Did Regence's unfair and deceptive acts violate the Consumer Protection Act? (Assignments of Error 1 and 2).

(4) Did the trial court's ruling that Dr. Jolley already received fair review through Regence's internal appeal process and the arbitration deprive Dr. Jolley of the opportunity to seek judicial remedies as required by contract and WAC 284-43-322? (Assignments of Error 1 and 2.)

(5) Did the trial court err in ruling as a matter of law that there was no disputed issue of fact as to whether additional evidence presented by Dr. Jolley to Regence's internal appeal committees would have made a difference in the decision to terminate Dr. Jolley? (Assignments of Error 1 and 2.)

III. STATEMENT OF THE CASE

A. Regence Contracts With Dr. Jolley To Provide A Fair Review Under State Law.

In 1999, Dr. Jolley and Regence entered into a Practitioner Agreement under which Dr. Jolley was to provide services for Regence subscribers. (CP 64-84). The Practitioner Agreement establishes a two-phase dispute resolution process, internal and external. (CP 66). Section 6 of the Practitioner Agreement is attached at Appendix A. An aggrieved provider must first exhaust Regence's internal provider appeals process. (CP 66). This Appeals Process is "intended to give practitioners ... an opportunity to make sure Regence BlueShield has reviewed all relevant information in making its decision." (CP 123). For providers whose contracts Regence terminated, this internal process also has two phases. First, the provider puts his grievance before a Level One Appeal Committee. (CP 123; *and see* CP 66 (incorporating Provider Manual into Practitioner Agreement)). If that does not resolve the problem, he has the further opportunity to "present his case in person" to a Level Two Appeal Committee. (CP 127). These Committees are "distinct": the first is a panel of Regence provider peers, the second includes such high-ranking Regence administrators as Medical Directors, a Vice President, and a lawyer. (CP 123-34).

If the internal review process is unavailing, the provider may move on to the second, external phase: non-binding arbitration under the rules of the American Arbitration Association. (CP 66).¹ The Practitioner Agreement was amended effective July 1, 2000 to satisfy the requirements of WAC 284-43-322. (CP 65). That Code provision was promulgated to clarify RCW 48.43.055, which requires Regence to establish procedures to “provide a fair review for consideration of [provider] complaints.” RCW 48.43.055 (attached at Appendix B). To constitute “fair review,” any mandatory alternative dispute resolution included in a carrier’s procedures may not operate “to the exclusion of judicial remedies.” WAC 284-43-322 (attached at Appendix C). The Practitioner Agreement now envisions that following arbitration, a provider may seek relief in court. (CP 66).

B. Regence Unilaterally Terminates The Practitioner Agreement, And Provides An Unfair Review.

Between October 20, 2003 and October 24, 2003, Dr. Jolley’s medical license was suspended by the Medical Quality Assurance Commission (“MQAC”) based on a complaint that Dr. Jolley, a pediatrician, had become intimately involved with parents of his patients. (CP 352). Only four days later, the Pierce County Superior Court stayed

¹ Either party may also initiate mediation after the internal appeals and before arbitration. (CP 67).

the suspension and reinstated Dr. Jolley, finding that he would likely prevail at a trial of the summary suspension.² (CP 98). Dr. Jolley and MQAC later reached a resolution of the Statement of Charges that MQAC issued against him. (CP 104-17). Dr. Jolley is practicing medicine today in compliance with MQAC conditions. (CP 352).

On October 22, 2003, during that four-day period, Regence terminated Dr. Jolley's contract. (CP 119). Under its contracted Internal Appeals Process, Regence must send a provider an initial letter to inform the provider of termination and "notif[y] the provider of how they do not meet the required standard(s) for participation...and inform the provider of the right to appeal." (CP 123).

In compliance with Regence's internal appeals process, Dr. Jolley appealed his termination to Regence's Level One Appeal Committee. (CP 57-58). Regence understood that Dr. Jolley was appealing his termination on the basis of MQAC's summary suspension of his medical license. (CP 58). Dr. Jolley prepared his appeal on this basis. (CP 353).

In its deliberation over Dr. Jolley's appeal, however, the Level One Appeal Committee did not even consider the original basis for termination, because "at that point, his license was reinstated with ...

² Although the nature of the charges against Dr. Jolley are only tangentially relevant to this appeal, it should be noted that his unwise conduct with patient's relatives did not violate the then current professional standards, and that his competence as a physician is not in question. (See the discussions at page 34, infra.)

conditions.” (CP 57-58). Instead, the Committee considered other criteria, none of which Regence had notified Dr. Jolley they were considering, including MQAC’s charges of sexual misconduct. (CP 146). Those charges were a factor in the Committee’s decision. (CP 59). Regence did not notify Dr. Jolley that the Level One Appeal Committee had considered or decided based on other criteria. Instead, it told Dr. Jolley that the Level One Appeal Committee’s decision was to “uphold the [original] decision.” (CP 57-58, 210).

Dr. Jolley then requested a Level Two Appeal. (CP 212-213). In his request, Dr. Jolley stated his understanding that the Level One decision was based on the original grounds for termination, the brief suspension of Dr. Jolley’s medical license. *Id.* Dr. Jolley’s written documentation in support of his Level Two Appeal addressed only this issue, as this was the only reason Regence had given Dr. Jolley for terminating him. *Id.*

On December 9, 2003, Regence denied the Level Two appeal and for the first time, Regence notified Dr. Jolley that his termination was upheld because MQAC had placed conditions on his license, not because his license had been suspended. (CP 223).³ Thus, it was not until the end

³ The week before, in a letter to Dr. Jolley’s counsel demanding that Dr. Jolley not tell patients he would be reinstated, Regence’s lawyer stated in passing that he had been terminated because of conditions on his license, which was simply counterfactual. If Regence intended to give Dr. Jolley notice that it was changing its ground for termination in mid-appeal, it

of the Internal Appeals Process that Regence notified Dr. Jolley of the actual reason for termination, after Dr. Jolley had exhausted his opportunity to address the actual reasons before company decision makers.

Dr. Jolley then filed an arbitration demand, pursuant to the Practitioner Agreement. (CP 229-230). Dr. Jolley and Regence submitted their dispute to private arbitration before former Commissioner JoAnne Tompkins of Judicial Dispute Resolution LLC. (CP 229-230).

On August 3, 2004, Commissioner Tompkins found that Regence had wrongfully terminated Dr. Jolley, by failing to reinstate him following the Pierce County Superior Court's ruling. (CP 229-230). Furthermore, because Regence had not given him notice of its actual reasons and considerations, Commissioner Tompkins ruled Regence failed to provide Dr. Jolley with an appeals process that met procedural due process requirements. *Id.* Commissioner Tompkins ordered that Regence reinstate Dr. Jolley, and awarded 60 days worth of damages. *Id.*

C. Regence Immediately Re-Terminates Dr. Jolley.

On October 5, 2005, immediately following his reinstatement, Dr. Jolley received another termination letter. (CP 232-233). In the letter, Regence invoked the so-called "at will" termination provision in the Practitioner Agreement. *Id.* In the same letter, Regence cited

chose a poor way to do it and did not comply with its Internal Appeals Process.

“conditions” on Dr. Jolley’s medical license as grounds for termination, and threatened to report his termination to the National Practitioner Data Bank. *Id.*

Unsure of Regence’s intentions, Dr. Jolley, through counsel, requested clarification. In a November 1, 2004 letter, Regence assured Dr. Jolley that Regence elected to terminate him under the “at will” termination section of the Practitioner Agreement and that Regence would not report the termination to the National Practitioner Data Bank. (CP 242-243).

D. Regence Again Denies A Fair Internal Review.

As before, Dr. Jolley appealed his termination through Regence’s Internal Appeals Process. (CP 239-240). The Level One Appeal Committee stated it did not find a sufficient basis to overturn the at will termination. (CP 245). The Level Two Appeal Committee decided to uphold the termination decision on a different basis. (CP 247). Despite Regence’s earlier assurances that Dr. Jolley was being terminated at will, the Level Two Appeal Committee upheld the termination based on the conditions on Dr. Jolley’s license. *Id.* Again, Dr. Jolley did not learn of the true reason for his termination until after he completed the Internal Appeals Process. (CP 353). Dr. Jolley was led to believe he was being terminated under the “at will” provision of the Practitioner Agreement.

(CP 353). *Id.* Dr. Jolley's appeal of the second termination addressed only this issue. *Id.* It was not until after the second appeal that Dr. Jolley learned the true reasons for his termination. *Id.*

The chart below illustrates that Regence's grounds for terminating Dr. Jolley were a moving target throughout both appeals processes.

FIRST TERMINATION	STATED REASON FOR TERMINATION	ACTUAL REASON FOR TERMINATION
Termination Letter (10/22/03) (CP 119)	Suspended medical license	Suspended medical license
Level One Appeal (11/21/03) (CP 210)	Uphold the original termination decision (suspension of medical license)	Conditions on medical license (CP 206-208)
Level Two Appeal (12/9/03) (CP 223)	Conditions on medical license	Conditions on medical license (CP 220-221)

Arbitrator Dr. Jolley reinstated. (8/13/04). (CP 229-230).
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SECOND TERMINATION	STATED REASON FOR TERMINATION	ACTUAL REASON FOR TERMINATION
Termination Letter (10/5/04) (CP 232-233)	At will & conditions on medical license	Conditions on medical license
Letter from Regence GC (11/1/04) (CP 242-243)	At will	
Level One Appeal (12/20/04) (CP 245)	At will	Conditions on medical license
Level Two Appeal (4/1/05) (CP 247)	Conditions on medical license	Conditions on medical license

E. Dr. Jolley Proceeds To Arbitration.

After completion of the second Internal Appeals Process, the parties returned to arbitration before Commissioner Tompkins. (CP 459). On July 29, 2005, Commissioner Tompkins entered an order dismissing Dr. Jolley's claims related to the second termination. *Id.*

F. Division One of the Court of Appeals Holds the Arbitration is Non-Binding.

In contravention of WAC 284-43-322(4), Regence attempted to confirm the arbitrator's awards on October 4, 2005. (CP 369). The Division One Court of Appeals, however, held that Regence could not require binding arbitration, and that Dr. Jolley was entitled to pursue judicial remedies. *Jolley v. Blueshield*, 139 Wn. App. 1016, not reported in P.3d, 2007 WL 1733215 (Div. 1 2007) (attached at Appendix D).

G. The Trial Court Grants Regence's Motion for Summary Judgment.

On October 22, 2007, Dr. Jolley initiated this suit in the Pierce County Superior Court. (CP 1). The parties filed cross-motions for summary judgment. (CP 605-607).

At the hearing on the cross-motions for summary judgment, Dr. Jolley presented the evidence he would have presented to Regence's internal appeal committees, had he known the true reasons for his

termination. (CP 536-540). Dr. Jolley presented evidence establishing that several Regence providers were credentialed despite conditions on their licenses. (CP 539-540). Dr. Jolley also explained that if he had known Regence was considering terminating him based on the conditions on his license, he would have offered the testimony of Dr. Douglas Diekema regarding the evolution of Washington's regulations on physician relationships with key third parties. (CP 537).

Despite Dr. Jolley's presentation of material facts that could have changed the outcome of the Regence internal appeals process, the trial court granted Regence's motion for summary judgment. (CP 605-607).

The trial court ruled:

I believe that Dr. Jolley has had a full and fair opportunity to have all issues reviewed by Regence and by a neutral fact finder. And that may be perhaps where I commit error if you're going to appeal this, where Division II may question what I do, but I did take notice of Commissioner Tompkins' materials because I think it was included in a fair review.

Even assuming that that [Commissioner Tompkins' materials] should not have been included in a fair review and that a fair review did not occur procedurally, based on the arguments made by Mr. Coulson, because the reasons were not stated or was a subterfuge or were not fully identified, I fail to see the genuine issue of material fact as to whether anything would have happened differently.

I find that this whole scenario, including two Level Ones, two Level Twos, the arbitrator's process in 2004, the arbitrator's process in 2005, was collectively a fair review. [...] I'm simply finding that collectively all those processes together were fair review.

(Verbatim Transcript of Proceedings, pp. 27-31).

After entry of final judgment, Dr. Jolley timely filed a notice of appeal on July 25, 2008. (CP 696-697).

IV. SUMMARY OF THE ARGUMENT

Regence breached its contractual and state mandated obligations to provide a fair review. By twice depriving Dr. Jolley of notice of the changes against him, Regence denied Dr. Jolley a fair and meaningful appeals process. This denial violated both state and contractual due process requirements.

After completing mandatory, non-binding arbitration, Dr. Jolley was entitled to pursue judicial remedies. By determining on summary judgment that Dr. Jolley already received a fair review through Regence's internal appeals process and the arbitration, the court adopted the arbitrator's findings of fact and rendered the arbitrator's decision binding, thereby depriving Dr. Jolley of his day in court.

V. ARGUMENT

A. Standard Of Review

This Court reviews the Superior Court's grant or denial of summary judgment *de novo*. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). Summary judgment is appropriate only if there is "no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." CR 56(c). Summary judgment should be granted only if, after considering the evidence in the light most favorable to the nonmoving party, reasonable persons could reach only one conclusion. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 790, 16 P.3d 574 (2001).

B. State Law and The Practitioner Agreement Require Regence to Create and Honor its Appeals Process

Under Washington law, health carriers like Regence are required to "file with the commissioner its procedures for review and adjudication of complaints initiated by health care providers. Procedures filed under this section *shall provide a fair review* for consideration of complaints." RCW 48.43.055 (emphasis added). Under the statutory authority of RCW 48.43.055, the Insurance Commissioner implemented WAC 284-43-322, which requires health carriers to include a formal process for resolution of all contract disputes. Under WAC 284-43-

322(4), Regence may not require that a health care provider submit to alternative dispute resolution to the exclusion of judicial remedies.

The legislature enacted RCW 48.43.055 to accommodate health care carriers' need for an efficient and economical dispute resolution process, while ensuring that providers received a fair shake. The carrier gets ample opportunity to resolve the dispute without having to engage in costly litigation, but the provider has the right to his day in court, and meanwhile must be given a "fair review." Although the statute does not define "fair review," due process, at a minimum, requires notice of charges and an opportunity to be heard. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994). Under the "fair review" requirements of RCW 48.43.055 and WAC 284-43-322, Dr. Jolley was entitled to, at a minimum, notice of the actual reasons and factors Regence's Internal Appeals Committees would consider, and an opportunity to be heard on those questions of fact.

Regence acknowledges it is required under state law to provide an appeals process. (CP 51). Regence responded to this "fair review" requirement by drafting and adopting the Dispute Resolution Section of the Practitioner Agreement, Section 6, which incorporates by reference the Provider Manual's description of the Regence internal review process. Thus, Regence drafted and entered into a specific contractual process to

“adjudicate disputes between the Practitioner and the Company,” in response to this statutory requirement. (CP 258).

On its face, Regence’s tripartite review system was intended to give a provider, such as Dr. Jolley, three very different sorts of review. He had the opportunity to put his case before two sorts of internal decision makers. At the first level, Dr. Jolley’s case was considered by his professional peers, well-respected fellow health-care providers for Regence. At the second level, Regence’s administration would hear him out. Between them, these internal hearings could have brought about a voluntary change in Regence’s mind.

The arbitration procedure, used after these internal appeals fail, clearly serves a very different function. An arbitrator, like a court, decides the party’s legal rights. At arbitration, Dr. Jolley could try to preserve his contractual rights, but has no chance to change Regence’s mind as to whether its decision to terminate him was wise or fair.

Predictably, Regence’s failure to carry out this three-step process fairly led to a poor result.

**C. The Superior Court Erred In Dismissing Dr. Jolley's Claim
For Damages Based On The First Termination.**

**1. The Superior Court Wrongly Treated The Two Sets Of
Hearings As One Termination.**

The Superior Court, at the March 28, 2008 hearing, lumped together both wrongful terminations as a single harm and all six hearings as a single process.⁴ This was error. Regence breached its contract and wrongfully terminated Dr. Jolley twice, ostensibly based on different events. On October 22, 2003, it terminated him because his license had been suspended (CP 119); and on October 5, 2004, after he was reinstated as a Regence provider, it terminated him apparently because conditions were placed on his practice of medicine (CP 232-233). Dr. Jolley sought damages based on both events. (CP 1-9).

The Superior Court, however, held that “this whole scenario, including two Level Ones, two Level Twos, the arbitrator’s process in 2004, the arbitrator’s process in 2005, was collectively a fair review.” (Verbatim Transcript, p. 31). The Superior Court essentially reduced two

⁴ This Court may consider the hearing transcript for guidance as to the basis and meaning of the written order. *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963); *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 842, 786 P.2d 285, review denied, 114 Wn.2d 1023, 792 P.2d 535 (Div. 1 1990); *Port Townsend Pub. Co., Inc. v. Brown*, 18 Wn. App. 80, 567 P.2d 664 (Div. 2 1977).

breaches into one. But even if the Superior Court had been correct to find that there was a fair review and no possible liability the second time around (which it was not), that would not excuse Regence's first breach of contract. Even when the Superior Court subsequently denied Regence's motion to overturn the arbitration award of damages based on the first termination, it failed to hold a trial to determine whether, if damages were owed for that termination, the damages awarded by the arbitrator were sufficient compensation.

**2. Regence Violated State Law and Breached the
Practitioner Agreement By Failing to Give Dr. Jolley
Notice of the Reason for his Termination**

Under the Internal Provider Appeals Process, Regence was required to send Dr. Jolley a letter notifying him why he did not meet the standards for participation. (CP 132). In the initial letter, Regence stated that Dr. Jolley did not meet Section 7.5 of the Practitioner Agreement because his license had been suspended. (CP 119). However, neither the Level One nor the Level Two appeal committees considered this reason in their deliberations. (CP 57-58, 220-221). During the appeal process, Regence never notified Dr. Jolley that both appeal committees were considering entirely different standards. Instead, Regence waited until

after the initial termination and *after* both rounds of appeals to inform Dr. Jolley that other criteria had been considered and determined to be the basis of the termination.

By denying Dr. Jolley notice of the charges against him to be considered, Regence denied Dr. Jolley a meaningful opportunity to be heard on those charges.

One telling example demonstrates this flagrant disregard for Dr. Jolley's contractual and statutory rights. Regence told Dr. Jolley the only basis for his termination was his summary suspension. However, in its actual deliberations, Regence considered sexual misconduct allegations. (CP 147, 220). This is particularly unfair because on Dr. Jolley's motion in the MQAC proceedings, the Department of Health threw out these very allegations. (CP 38). Regence's failure to comply with the appeal process resulted in severe detriment to Dr. Jolley, and eliminated any chance that he would have a "fair" review, as required under RCW 48.43.055.

The arbitration could not cure this deficiency, it could only order reinstatement and damages for the pre-existing breach of contract. Dr. Jolley was entitled to a judicial remedy for that breach of contract: summary judgment as to liability, since there is no genuine dispute that Regence failed to give him a fair hearing in compliance with the Provider Agreement, and a jury trial on damages.

D. The Trial Court Erred In Determining There Was No Breach Of Contract In The Second Termination And Review.

1. Regence Again Violated State Law And Its Contract By Failing To Comply With Its Own Appeal Procedures

Shortly after the arbitrator ordered Regence to reinstate Dr. Jolley, Regence sent Dr. Jolley a letter notifying him he was being terminated at will, and confirmed when specifically asked, that it was exercising its supposed right to arbitrary termination. Dr. Jolley prepared for both the Level One and Level Two appeals based on that information. It was not until after both rounds of appeal that Regence informed Dr. Jolley that other standards, conditions on his license, were the basis of the termination.

The Internal Provider Appeals Process is intended to give providers “an opportunity to make sure Regence BlueShield has reviewed all relevant information in making its decision.” (CP 130). Because Regence informed Dr. Jolley that the only basis of its termination was its right to arbitrarily dismiss him at will, Dr. Jolley did not have the opportunity to present all relevant information, such as information regarding the conditions on Dr. Jolley’s license or treatment of other Regence providers with license conditions. Once again, Regence’s failure

to comply with its own appeal process eliminated the fair review required by RCW 48.43.055 and the Practitioner Agreement, and did Dr. Jolley grave harm.

Regence's breach was particularly harmful because Dr. Jolley could otherwise have appealed the substantive basis of his current termination. Regence's policy is to give physicians with conditions on their licenses consideration and discretion regarding whether they may maintain their status as Regence providers. Discovery during the second round of arbitration revealed that Regence credentialed numerous physicians with conditions on their licenses, including some whose acts resulting in restrictions are objectively much more severe and pose a far greater risk to patients than Dr. Jolley's past conduct. At least sixteen providers from 2001 to 2005 were credentialed by Regence, despite conditions on their licenses. (CP 267). Six of those sixteen cases were notably more culpable than Dr. Jolley's, as they arose from the provider's sexual contact with the provider's patients. *Id.* By denying Dr. Jolley his right to a procedurally proper internal appeal, Regence denied Dr. Jolley the substantive opportunity afforded other physicians: discretion as to whether he may continue as a Regence provider despite conditions on his license.

2. The Superior Court Erred In Relying On The Arbitration To Cure The Unfair Internal Appeals.

The arbitration hearing could not cure the defects imposed by Regence upon its internal review. The arbitrator was not an internal decision maker. She was neither a peer provider nor a Regence administrator tasked by Regence to apply her experience and self-interest on the company's behalf. She could not decide on behalf of Regence whether the decision to terminate Dr. Jolley was reasonable, or exercise discretion on Regence's behalf, as they could have done. Instead, she merely asked whether Dr. Jolley had already been given a fair review. (CP 455).

Paradoxically, the Superior Court later decided that there had been a fair review, because of the arbitrator's external, after the fact, review of the very same question before the court. There had been a fair review, the Superior Court held, because the arbitrator had reviewed whether there was a fair review. This recursive reasoning ignores the plain intent of the Practitioner Agreement to provide a meaningful three-part process. The three reviews (two internal, one external) each add distinct value to the process: peer expertise, administrative discretion, and legal acumen. If Regence and Dr. Jolley had intended the fair review to encompass nothing more than the legal inquiry available from the arbitrator, the internal steps

would serve no real purpose. At most, to save some expense and time, there might have been a hearing before company counsel. Instead, the Provider Agreement and the incorporated Provider Manual require hearings by subject-matter fact experts. The parties bargained for, and Dr. Jolley was owed, much more than a determination by a lawyer as to legal compliance. Regence failed to provide that benefit, and thus breached its contract.

Even if the Superior Court were correct as a matter of contract interpretation that the “fair review” requirement could be satisfied by all the separate hearings “collectively,” that holding could not justify summary judgment. The factual question still remains: was that collective process, in fact, fair? At the very least, the evidence that parts of this collective process were unfair in that Dr. Jolley was not given proper notice, makes the overall fairness of the process a question of fact, not a pure question of law for the court. *See Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wash.App. 487, 494, 496, 983 P.2d 1129 (1999) *aff’d* 142 Wn.2d 784, 790, 16 P.3d 574 (2001) (whether insurer failed to perform reasonable investigation and thereby engaged in unfair business practice is question of fact unless undisputed). Even if it had gotten everything else right, the Superior Court should have left that question to the jury.

E. Regence Failed to Fulfill a Specific Promise it Made to Dr.

Jolley

In an analogous context, Washington courts recognize the duty of employers to abide by promises made to employees, independent of the contractual analysis of the duties between parties. This equitable claim often arises in the wrongful termination context and exists irrespective of the existence of an enforceable contract. The theory underscores the enforceability of procedural safeguards employers may offer their employees. Although Regence's Practitioner Agreement defines the relationship between Regence and its providers as independent entities, the right of employees to enforce promises made by employers is particularly instructive in this case.

Under this theory, employers are obligated to act in accordance with their policies under certain circumstances. Specifically, employers may expressly agree that the employment relationship will be terminated only pursuant to specific procedures. *See, e.g., DePhillips v. Zolt Construction Co., Inc.*, 136 Wn.2d 26, 959 P.2d 1104 (1998); *Kuest v. Regent Assisted Living, Inc.*, 111 Wn. App. 36, 43 P.3d 23 (Div. 1 2002); *Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 951 P.2d 280 (Div. 2 1998).

To prevail on a claim for breach of a specific promise for specific treatment, an employee must establish that a promise was contained in an employer policy, the employee justifiably relied on the promise, and the employer breached the promise. *DePhillips*, 136 Wn.2d at 36.

Whether an employment policy contains a promise of specific treatment in specific situations, whether the employee relied on that promise, and whether the promise was breached can be decided as a matter of law if reasonable minds could not differ in resolving these questions. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 104-106, 864 P.2d 937 (1994) (twice noting that the issues may be decided as a matter of law when reasonable minds can reach but one conclusion).

As previously discussed, Regence promised that termination of providers would only happen if Regence followed certain procedures and gave notice of its reasons for termination. Dr. Jolley detrimentally relied on Regence's appeal process and his right to present his case and to be heard. There is no question that Regence's appeal process was unfair as applied to Dr. Jolley and therefore Regence breached its promise to Dr. Jolley to provide an appeals process that was not illusory.

F. Regence's Conduct and its Illusory Appeals Process Violated the Washington Consumer Protection Act

Washington's Consumer Protection Act ("CPA") prohibits: (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) and causes injury to a party's business or property. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). Washington courts have determined physicians have standing to sue under the CPA. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993) (clarifying that CPA is not limited to consumer transactions, and holding that physician who proved injury had standing to pursue CPA claim).

Regence is a health carrier, as defined by RCW 48.43.005. RCW 48.43.055 requires health carriers to provide "fair review" of health care provider complaints. Under the statutory authority of RCW 48.43.055, the Insurance Commissioner implemented WAC 284-43-322, which requires health carriers to include a formal process for resolution of all contract disputes. Regence is required by law to provide a fair appeals process to allow aggrieved health care providers to be heard. Regence acknowledges it is required under state law to provide a fair appeals process. (CP 51).

1. Regence’s Representations and Actions Were Unfair and Deceptive

Regence’s conduct in twice terminating the Practitioner Agreement and failing to comply with its appeals process (required under RCW 48.43.055) was unfair and deceptive, in violation of the Washington CPA, RCW 19.86. The first element of the *Hangman Ridge* test may be met by showing that an act or practice has a *capacity to deceive* a substantial portion of the public. *Id.* at 785 (emphasis added). Dr. Jolley need only show that Regence’s unfair and deceptive acts have the capacity to deceive a substantial portion of the public. As the *Hangman Ridge* court stated, “[t]he purpose of the capacity-to-deceive test is to deter deceptive conduct *before* injury occurs.” *Id.* at 785 (internal citations omitted). Intent is not an element, and “good faith” is immaterial. *See Wine v. Theodoratus*, 19 Wn. App 700, 706, 522 P.2d 612 (1978).

Regence’s repeated failures to provide meaningful, fair appeals processes were unfair acts in violation of the CPA. The appeal process was not a “reasonable means allowing any health care provider aggrieved by actions of the health carrier to be heard [...],” in violation of RCW 48.43.055. Regence’s failure to notify Dr. Jolley of the grounds for termination considered by the Appeals Committees were deceptive acts and rendered the appeal process illusory.

Regence's unfair and deceptive acts have the capacity to deceive a substantial portion of the public. Regence is an enormous company whose acts and practices impact a significant portion of citizens in Washington. Undoubtedly, thousands of other Regence providers are subject to the same or very similar Practitioner Agreements such as the one at issue in this case. These providers are subject to the same appeals process as Dr. Jolley. Under state law, Regence must provide a fair appeals process to its providers. RCW 48.43.055. However, its appeals process is illusory if Regence is: (1) allowed to consider grounds for termination without notifying the provider; and (2) rely on at-will provisions for its terminations, when the terminations are actually on the basis of illegitimate or secret reasons. Accordingly, Regence's practices have a capacity to deceive its thousands of providers, who undoubtedly constitute a substantial portion of the public.

2. Regence's Unfair and Deceptive Acts Occurred in Commerce

The second element of the *Hangman Ridge* test may be met by showing the practice occurred in the conduct of any trade or commerce. *Hangman Ridge*, 105 Wn.2d at 785-86. "Trade or commerce" should be interpreted broadly and includes "the sale of assets or services and any commerce directly or indirectly affecting the people of the state of

Washington.” *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 173, 159 P.3d 10 (Div. 1 2007). The Washington CPA reflects “a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce.”” *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 173, 159 P.3d 10 (Div. 1, 2007) (quoting *Short v. Demopolis*, 103 Wash.2d 52, 61, 691 P.2d 163 (1984)).

Regence’s unfair termination of Dr. Jolley and its deceptive appeals process falls within this broad definition of “trade or commerce.” Regence and Dr. Jolley were involved in a Practitioner Agreement whereby Dr. Jolley was to provide medical services to the people of Washington.

3. Regence’s Unfair and Deceptive Acts Affect the Public Interest

The third element of a Washington CPA claim, the public interest impact, may be established by one of two methods. *Hangman Ridge*, 105 Wn.2d at 780. A party may prove a *per se* public interest by showing that a statute containing a legislative declaration of public interest impact has been violated. *Id.* at 791. A party may also satisfy the public interest requirement by showing a likelihood that additional plaintiffs have been or will be injured in exactly the same manner. *Id.* at 790.

Whether the public interest has been affected by a private transaction is determined by a trier of fact. *Hangman Ridge*, 105 Wn.2d at 789-90. A party to a private contract may show that the public interest is affected by establishing a likelihood that additional plaintiffs have been or will be injured in exactly the same fashion. *Id.* at 790. Factors indicating the public interest include: (1) whether the alleged acts were committed in the course of the defendant's business; (2) whether the defendant advertised to the public in general; (3) whether the defendant actively solicited the plaintiff; and (4) whether the plaintiff and defendant occupied unequal bargaining positions. *Id.* at 791. None of the elements are dispositive, and it is not necessary that all elements be present. *Id.*

Three uncontroverted factors show that Regence's actions have a public impact: (1) Regence committed the acts in the course of its business; (2) Regence advertises to the public; and (3) the parties' bargaining power was unequal. Regence's acts were committed in the course of its business because it is in the business of contracting with providers of services to Regence subscribers. Regence advertised to the general public. (CP 264). Regence and Dr. Jolley occupied positions of unequal bargaining power (as one of numerous Regence providers in Washington, Dr. Jolley had very little, if any, bargaining power vis-à-vis Regence and was presented

with a boilerplate Practitioner Agreement that was implicitly a “take it or leave it” contract).

**4. Regence’s Unfair and Deceptive Acts Caused
Substantial Injury to Dr. Jolley’s Business**

As a result of Regence’s unfair termination and its unfair and deceptive appeals process, Dr. Jolley has suffered substantial injuries to his business. Because he was unfairly deprived of his contractual right to remain a Regence provider, Dr. Jolley as lost the business of thousands of patients. (CP 354).

**G. Including the Arbitration as Part of Dr. Jolley’s “Fair Review”
Rendered the Arbitration Binding and Deprived Dr. Jolley of
his Judicial Remedy**

The Washington Supreme Court has ruled that RCW 48.43.055 and WAC 284-43-322(4) prohibit a health-care carrier from requiring its providers to submit to binding arbitration. *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*, 157 Wn.2d 290, 306, 138 P.3d 936 (2006). Regence may require arbitration as an adjunct to fair internal review, but not to the exclusion of the provider’s judicial remedies. *Id.* at 303.

Further, Division One of the Court of Appeals specifically ruled that the parties’ arbitration was non-binding. *Jolley v. Blueshield*, 139 Wn. App. 1016, not reported in P.3d, 2007 WL 1733215 (Div. 1 2007).

The question before the arbitrator was whether Dr. Jolley received a fair review through Regence's Internal Appeals Process. This same question was before the trial court, but the trial court instead ruled on whether Dr. Jolley received a fair review through Regence's Internal Appeals Process and the arbitration, based on findings of fact by the arbitrator. The trial court ruled:

I believe that Dr. Jolley has had a full and fair opportunity to have all issues reviewed by Regence and by a neutral fact finder. And that may be perhaps where I commit error if you're going to appeal this, where Division II may question what I do, but I did take notice of Commissioner Tompkins' materials because I think it was included in a fair review. [...]. (Verbatim Transcript of Proceedings, p. 27).

I find that this whole scenario, including two Level Ones, two Level Twos, the arbitrator's process in 2004, the arbitrator's process in 2005, was collectively a fair review. [...] I'm simply finding that collectively all those processes together were fair review. (Verbatim Transcript of Proceedings, p. 31).

The trial court erred when it adopted the arbitrator's findings of fact in its determination that Dr. Jolley received a fair review. WAC 284-43-322(4) provides that Regence may not require alternative dispute resolution to the exclusion of judicial remedies. The trial court based its decision on the fact-finding that occurred in the arbitration. This rendered the arbitrator's decision binding.

Under WAC 284-43-322(4), Dr. Jolley was entitled to a judicial remedy that included an independent fact-finding proceeding, and an

opportunity to present new or additional evidence and witnesses. By simply adopting the arbitrator's findings of fact, and granting Regence's motion for summary judgment, the trial court deprived Dr. Jolley of his right to seek a judicial remedy.

H. Genuine Issues Of Material Fact As To Harm Preclude Summary Judgment Against Dr. Jolley.

After Dr. Jolley learned the true reasons for his termination, he presented additional evidence at the trial court. The trial court wrongly held that no reasonable jury could possibly conclude that this sort of presentation before Regence's internal Appeals Committees could have changed the outcome.

When Dr. Jolley was able to present expert testimony on the history of the evolution of this policy to the review panel of another health care provider, that provider reinstated Dr. Jolley. (CP 543). As a result of Medical Quality Assurance Commission ("MQAC") proceedings against Dr. Jolley, Dr. Jolley was terminated by the Credentialing Committee of First Choice Health, a health service contractor similar to Regence. *Id.* First Choice Health operates a preferred provider network of 42,000 providers serving over 1 million members, primarily in Washington. (CP 561).

The First Choice Health Level II Appeals Committee overruled the decision by its recredentialing committee to terminate Dr. Jolley's participation in its network. (CP 543-544). In addition to considering Dr. Jolley's compliance with the provisions of the January 27, 2004 Stipulation and Findings of Fact, Conclusions of Law and Agreed Order ("Agreed Order"), the Committee considered testimony of Dr. Jolley's treating psychiatrist and an expert on medical history and ethics. *Id.*

Dr. Douglas Diekema, an emergency medical physician with a specialty in Pediatrics, an adjunct professor of medical history and ethics at the University of Washington Medical School, and Chair of the American Academy of Pediatrics Committee on Bioethics, testified at the hearing. (CP 544). Dr. Diekema explained to the committee that there is not a consensus behind the absolute prohibition of romantic or sexual relationships set forth in Washington's current regulations. *Id.* Dr. Diekema pointed out that the American Medical Association and the American Academy of Pediatrics still do not have rules that absolutely prohibit such relationships. *Id.*

Dr. Diekema pointed out that prior to the enactment of Washington's regulation, the rules in Washington were not clear and did not absolutely prohibit romantic relationships with key third parties. (CP 544). Dr. Diekema also pointed to MQAC meeting minutes that show

that prior to October of 2002, MQAC's attempts to enact an administrative rule regarding sexual misconduct were met with great opposition. (CP 573-76). MQAC abandoned its efforts to pass the regulation until 2006 when as a result of the statutory rule making procedure, MQAC adopted WAC 246-919-630. *Id.*

MQAC has acknowledged that prior to the adoption of the regulation, the rules governing sexual misconduct by physicians were not instructive. (CP 544). In a published administrative hearing order, MQAC found that a physician's sexual relationship with a former patient did not violate RCW 18.130.180 (24) because the relationship took place prior to the effective date of the rule. (CP 597).

If Dr. Jolley had known Regence was considering charges of inappropriate behavior, he would have presented this information to both appeals committees.

The trial court ignored this evidence, and ruled:

Even assuming that that [Commissioner Tompkins' materials] should not have been included in a fair review and that a fair review did not occur procedurally, based on the arguments made by Mr. Coulson, because the reasons were not stated or was a subterfuge or were not fully identified, I fail to see the genuine issue of material fact as to whether anything would have happened differently. (Verbatim Transcript of Proceedings, p. 27).

The trial court erred when it ruled as a matter of law that the additional evidence Dr. Jolley provided would not have made a difference

in the termination proceedings. Summary judgment should be granted only if reasonable persons could reach but one conclusion, after considering the evidence in the light most favorable to the nonmoving party. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 790, 16 P.3d 574 (2001). Interpreting the evidence favorably to Dr. Jolley, there are issues of material fact whether this additional information would have made a difference if presented to the Level One and Level Two Appeal Committees.

VI. ATTORNEY FEES ON APPEAL

Dr. Jolley requests an award of attorneys fees under RAP 18.1. The Practitioner Agreement provides for an award of attorney fees to the prevailing party. (CP 81). The parties have a “contractual provision authorizing attorney fees,” that provides “authority for granting fees incurred on appeal.” *Marassi v. Lau*, 71 Wn. App. 912, 920, 859 P.2d 605 (Div. 1 1993). *See also Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 322 n.21, 103 P.3d 753 (2004).

VII. CONCLUSION

The Court should vacate the trial court’s order granting summary judgment to Regence, and find as a matter of law that Regence failed to satisfy its contractual and state mandated obligations to provide Dr. Jolley

with a fair review. The Court should also enter an order requiring Regence to reinstate Dr. Jolley.

In the alternative, if this Court finds there are questions of fact that preclude a finding that Regence provided a fair review, it should vacate the trial court's order and remand the case for further proceedings

RESPECTFULLY SUBMITTED this 30th day of October, 2008.

FOSTER PEPPER PLLC

A handwritten signature in cursive script, appearing to read "Edward R. Coulson", written over a horizontal line.

Edward R. Coulson, WSBA No. 14014
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Attorneys for Appellant

No. 38061-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TIMOTHY B. JOLLEY, M.D.,

Appellant,

v.

REGENCE BLUESHIELD,

Respondent.

CERTIFICATE OF SERVICE

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ORIGINAL

The undersigned hereby certifies that on October 30, 2008 I caused to be served upon the parties in this action in the manner noted below, a true and correct copy of:

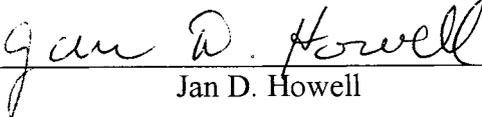
1. Appellant's Opening Brief;
2. Appendices To Appellant's Opening Brief; and
3. Certificate of Service.

VIA HAND DELIVERY TO:

Stephania Denton, Esq.
Mills Meyers Swartling
1000 - 2nd Ave., 30th Floor
Seattle, WA 98104

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on October 30, 2008, at Seattle, Washington.



Jan D. Howell

No. 38061-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TIMOTHY B. JOLLEY, M.D.,
Appellant,

v.

REGENCE BLUESHIELD,
Respondent.

APPENDICES TO APPELLANT'S OPENING BRIEF

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OCT 30 2008

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STATE OF WASHINGTON

Appendix A

The Practitioner will maintain a contemporaneous, written record of all treatment for which payment is requested that supports the diagnosis, shows that the treatment was Medically Necessary and demonstrates that the services were indeed performed by the Practitioner on the date claimed. Any alterations or amendments to these contemporaneous records must include the date and time of the alteration or amendment, be signed by the person making the alteration or amendment, refrain from obliterating or obscuring any prior documentation and be clearly identified and identifiable as an amendment or alteration. The Company may deny claims in those cases where, in the Company's sole discretion, there is inadequate documentation of the services rendered, in which case the Practitioner shall not bill the Patient.

- B. Pursuant to WAC 284-43-322, the Company hereby replaces Section 6 Dispute Resolution, in its entirety with the following Section 6 Dispute Resolution.

6. Dispute Resolution

- 6.1 Internal Provider Appeals Process.** The Company shall maintain an internal provider appeals process to adjudicate disputes between Practitioner and the Company. The Practitioner must exhaust the internal provider appeals process before seeking arbitration or mediation as provided herein. Copies of the Company's internal provider appeals process shall be available upon request and shall be published in the Practitioner Manual. The parties agree not to use the provider appeals process for disputes regarding the Company's determinations of Medically Necessary, for which the Company's Utilization Management Reconsiderations and Appeals Process shall be the appropriate remedy.
- 6.2 Arbitration.** Prior to seeking judicial remedy, any claims or disputes between the parties arising out of or relating to this Agreement that cannot be resolved through the internal appeals process shall be submitted to arbitration in accordance with the Commercial Arbitration rules and regulations of the American Arbitration Association then in effect. Such arbitration may be initiated by either party by making a written demand for arbitration on the other party within sixty (60) days of the date the dispute arose. The demand for arbitration must identify all issues on which the party seeks arbitration, the contractual provisions on which the party relies, the amount in dispute and the relief requested. Any issue not preserved through exhaustion of the appeals process and timely and complete demand to arbitrate shall be conclusively deemed to have been waived by the party and shall not be the subject of any arbitration, litigation, internal, external or extrajudicial process.

The arbitration shall be conducted in Seattle, Washington, unless the parties mutually agree otherwise. The parties agree that the dispute shall be submitted to one (1) arbitrator selected by mutual agreement of the parties. If the parties cannot agree on an arbitrator, they shall obtain a list of ten possible arbitrators from a neutral source, such as American Arbitration Association, and shall strike arbitrators from the list in turn, beginning with the party who won a coin toss, until only one arbitrator remains. The remaining arbitrator shall hear the dispute, unless either party show such bias as would disqualify a judge from hearing the proceeding, in which case the arbitrator shall be the next to last name stricken. The parties shall share equally the fee of the arbitrator, excluding the filing fee, if any, incurred in commencement of the proceeding. The parties shall have the right to make substantive motions. The arbitrator shall be bound by applicable

federal and Washington substantive law and shall render a written decision within thirty (30) days of the hearing. The arbitrator shall award attorneys' fees and costs, excluding the arbitrator's fees, and any filing fee, to the prevailing party. Judgment upon an award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

- 6.3 **Mediation.** Nothing in Paragraph 6.2 shall prevent the Company or the Practitioner from requesting non-binding mediation of issues on which the Company has issued a final determination following completion of the internal provider appeals process. The Practitioner and the Company shall split equally the costs of any mediation.
- C. Pursuant to WAC 284-43-324, the Company hereby replaces Sections 2.10, 2.11, 2.12 and 2.13 with the following new Sections 2.10, 2.11 and 2.12. There will be no section 2.13.

2.10 Maintenance and Retention of Records. The Practitioner will maintain medical, financial and administrative records concerning services provided to Patients in accordance with Company's requirements, applicable federal and state laws and generally accepted business and professional practices. The Practitioner will ensure that a medical record is established and maintained for each Patient who receives services from the Practitioner in accordance with Company's standards. This record will be opened at the time of a Patient's first visit. The Practitioner will maintain such records for a period of at least six (6) years from the date of service or from the date a Patient attains the age of majority, whichever is later. The obligations of the Practitioner under this section will survive the termination of this Agreement, regardless of the cause giving rise to such termination.

2.11 Access to Books and Records. The Company, its authorized representatives and government agencies, will have the right to inspect, review and make or obtain copies of medical, financial and administrative records, directly related to services rendered to Patients for purposes that may include but not be limited to: accuracy of claims, coverage for services, medical necessity, proper utilization and appropriateness of services, credentialing and recredentialing, quality improvement and appropriateness of billing, upon reasonable notice, during regular business hours. Copies of records requested by the Company or its representative will be furnished to the Company upon request and without charge to the Company or Patients. Insofar as Patients are required to execute an authorization for the release of their medical records to the Company upon becoming enrolled, the Practitioner agrees to accept from Company, as a legally sufficient release of Patients' medical records, Patients' participation in the Company's health plans and the Company will not be required to obtain an additional medical release from Patients in order to inspect, review, or make copies of Patients' medical records. This provision will survive the termination of this Agreement.

2.12 Audits. The Company may conduct audits of the Practitioner's facility and Patients' records at the Practitioner's office during the Practitioner's regular business hours. The Company shall provide the Practitioner no less than three (3) business days advance notice of such audit, except when the Company, in its discretion, determines there is a significant quality of care issue or risk that the Practitioner's documents may be altered, created or destroyed. In such case, the

Appendix B

C

West's Revised Code of Washington Annotated Currentness

Title 48. Insurance (Refs & Annos)

Chapter 48.43. Insurance Reform (Refs & Annos)

→ **48.43.055. Procedures for review and adjudication of health care provider complaints-
-Requirements**

Each health carrier as defined under RCW 48.43.005 shall file with the commissioner its procedures for review and adjudication of complaints initiated by health care providers. Procedures filed under this section shall provide a fair review for consideration of complaints. Every health carrier shall provide reasonable means allowing any health care provider aggrieved by actions of the health carrier to be heard after submitting a written request for review. If the health carrier fails to grant or reject a request within thirty days after it is made, the complaining health care provider may proceed as if the complaint had been rejected. A complaint that has been rejected by the health carrier may be submitted to nonbinding mediation. Mediation shall be conducted under chapter 7.07 RCW, or any other rules of mediation agreed to by the parties. This section is solely for resolution of provider complaints. Complaints by, or on behalf of, a covered person are subject to the grievance processes in RCW 48.43.530.

CREDIT(S)

[2005 c 172 § 19, eff. Jan. 1, 2006; 2002 c 300 § 6; 1995 c 265 § 20.]

<(Formerly: Certified Health Plans)>

Current with all 2008 Legislation.

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END OF DOCUMENT

Appendix C

Wash. Admin. Code 284-43-322

C

**WASHINGTON ADMINISTRATIVE CODE
TITLE 284. INSURANCE COMMISSIONER, OFFICE OF
CHAPTER 284-43. HEALTH CARRIERS AND HEALTH PLANS
SUBCHAPTER C PROVIDER CONTRACTS AND PAYMENT**

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Current with amendments included in the Washington State Register,
Issue 08-20, dated October 15, 2008.

284-43-322. Provider contracts--Dispute resolution process.

Except as otherwise required by a specific federal or state statute or regulation governing dispute resolution, no process for the resolution of disputes arising out of a participating provider or facility contract shall be considered fair under RCW 48.43.055 unless the process meets all the provisions of this section.

(1) A dispute resolution process may include an initial informal process but must include a formal process for resolution of all contract disputes.

(2) A carrier may have different types of dispute resolution processes as necessary for specialized concerns such as provider credentialing or as otherwise required by law. For example, disputes over health plan coverage of health care services are subject to the grievance procedures established for covered persons.

(3) Carriers must allow not less than thirty days after the action giving rise to a dispute for providers and facilities to complain and initiate the dispute resolution process.

(4) Carriers may not require alternative dispute resolution to the exclusion of judicial remedies; however, carriers may require alternative dispute resolution prior to judicial remedies.

(5) Carriers must render a decision on provider or facility complaints within a reasonable time for the type of dispute. In the case of billing disputes, the carrier must render a decision within sixty days of the complaint.

CREDIT(S)

Statutory Authority: RCW 48.02.060, 48.30.010, 48.43.055, 48.44.050, 48.44.070, 48.46.030, 48.46.200 and 48.46.243. 99-21- 016 (Matter No. R 98-21), § 284-43-322, filed 10/11/99, effective 11/11/99.

WAC 284-43-322, **WA ADC 284-43-322**

WA ADC 284-43-322
END OF DOCUMENT

Appendix D

C

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington, Division 1.
Timothy B. JOLLEY, M.D., Appellant,
v.

Regence BLUESHIELD, Respondent.
No. 57477-9-I.

June 18, 2007.

Appeal from King County Superior Court; Honorable Michael C. Hayden, J.

Edward R. Coulson, Foster Pepper PLLC, Brian David Desoto, Attorney at Law, Seattle, WA, for Appellant.

Stephanie Camp Denton, David Donald Swartling, Attorneys at Law, Mills Meyers Swartling, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

SCHINDLER, A.C.J.

*1 As required by the terms of the practitioner agreement, Dr. Timothy Jolley agreed to arbitrate his dispute with Regence BlueShield prior to pursuing a “judicial remedy.” Dr. Jolley challenges the trial court decision to confirm the arbitration rulings preventing his right to a trial de novo. The Washington State Supreme Court recently interpreted an identical provision in a practitioner agreement in *Kruger Clinic Orthopaedics, L.L.C. v. Regence BlueShield*, 157 Wn.2d 290, 138 P.3d 936 (2006), and held that Regence could not require binding arbitration and the provision did not prevent the practitioner from pursuing judicial remedies after participating in arbitration. We reverse the order confirming the arbitration rulings and remand.

Regence BlueShield (Regence) is registered as a

“health care service contractor” in the State of Washington. Regence contracts with medical providers for health care services for Regence subscribers.^{FN1} In March 1999 and again in June 2003, Regence entered into an agreement with Timothy B. Jolley, M.D. (Dr. Jolley) to provide pediatric medical services to its subscribers.

FN1. “ ‘Health care service contractor’ means any corporation, cooperative group, or association, which is sponsored by or otherwise intimately connected with a provider or group of providers, who or which not otherwise being engaged in the insurance business, accepts prepayment for health care services from or for the benefit of persons or groups of persons as consideration for providing such persons with any health care services.” RCW 48.44.010(3).

Section 6 of “The Regence BlueShield Practitioner Agreement with Timothy B. Jolley, MD Effective June 17, 2003” (the practitioner agreement) contains a mandatory dispute resolution process. Under Section 6.2, the practitioner must exhaust the internal appeals process before seeking arbitration or mediation. Section 6.2 provides in pertinent part:

Internal Provider Appeals Process. The Company shall maintain an internal provider appeals process to adjudicate disputes between the Practitioner and the Company. The Practitioner must exhaust the internal provider appeals process before seeking arbitration or mediation as provided herein ...

Prior to seeking a “judicial remedy”, Section 6.3 requires the parties to submit any claim or dispute that is not resolved through the internal appeals process to arbitration in accordance with the rules and regulations of the American Arbitration Association (AAA). Section 6.3 also requires the demand for arbitration to identify with specificity the issues and relief requested. According to Section

6.3, a party's failure to follow the dispute resolution process "conclusively" waives the right to adjudicate the issue and states that the issue "shall not be the subject of any arbitration, litigation, internal, external or extrajudicial process ."Section 6.3 provides:

Arbitration.Prior to seeking judicial remedy, any claims or disputes between the parties arising out of or relating to this Agreement that cannot be resolved through the internal appeals process shall be submitted to arbitration in accordance with the Commercial Arbitration rules and regulations of the American Arbitration Association then in effect. Such arbitration may be initiated by either party by making a written demand for arbitration on the other party within sixty (60) days of the date the dispute arose. The demand for arbitration must identify all issues on which the party seeks arbitration, the contractual provisions on which the party relies, the amount in dispute and the relief requested. Any issue not preserved through exhaustion of the appeals process and timely and complete demand to arbitrate shall be conclusively deemed to have been waived by the party and shall not be the subject of any arbitration, litigation, internal, external or extrajudicial process.

*2 In October 2003, Regence terminated the practitioner agreement with Dr. Jolley. After unsuccessfully challenging the termination through Regence internal appeals process, Dr. Jolley filed a demand for arbitration seeking reinstatement and damages. In the arbitration, Dr. Jolley and Regence filed cross motions for summary judgment. On August 13, 2004, the arbitrator granted Dr. Jolley's motion for summary judgment, ruling as a matter of law that Regence breached the practitioner agreement by wrongfully terminating Dr. Jolley. The arbitrator reinstated the practitioner agreement and ruled that the scope of Dr. Jolley's damages for breach of the agreement was limited to the 60 day period following the date of termination.

After reinstating the practitioner agreement with Dr. Jolley in October 2004, Regence again termin-

ated Dr. Jolley. Based on the October 2004 termination, Dr. Jolley amended his original arbitration demand to include new claims for wrongful termination, violation of the Consumer Protection Act, (CPA) chapter 19.86, RCW, and damages. On November 30, 2004, the arbitrator granted Regence's motion to dismiss the CPA and 42 U.S.C. § 1983 claims.

On July 27, 2005, following the arbitration hearing on the 2004 termination, the arbitrator upheld Regence's decision to terminate Dr. Jolley. The arbitrator also ruled that Dr. Jolley failed to prove the termination was retaliatory or violated public policy. On October 4, 2005, the arbitrator entered an order awarding Dr. Jolley \$28,403 in damages for the 2003 termination.

After entry of the arbitrator's trial order awarding damages, Regence filed a motion in King County Superior Court asking the court to enter an order confirming the arbitration decision under either the Federal Arbitration Act,^{FN2} or under the Washington Arbitration Act.^{FN3}

FN2.9 U.S.C. § 9 provides in relevant part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

FN3. Former RCW 7.04.150 (1982) stated in relevant part:

At any time within one year after the award is made, unless the parties shall extend the time in writing, any party to

the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order unless the award is beyond the jurisdiction of the court, or is vacated, modified, or corrected, as provided in RCW 7.04.160 and 7.04.170.

Dr. Jolley objected to the motion to confirm the arbitration rulings, arguing that under the terms of the practitioner agreement the arbitration was nonbinding and he was entitled to a trial de novo. Dr. Jolley also argued that state law prohibited Regence from requiring binding arbitration.^{FN4}

FN4. Dr. Jolley cited and relied on RCW 48.43.055 and WAC 284-43-322(4).

While Regence's motion to confirm the arbitration rulings was pending, Dr. Jolley filed a suit against Regence in Pierce County Superior Court, seeking reinstatement and damages and alleging breach of contract, wrongful discharge, and violation of the CPA.

On November 23, 2005, the King County Superior Court entered an order confirming the arbitration rulings of August 13, 2004, November 30, 2004, July 29, 2005, and October 4, 2005. On appeal, Dr. Jolley contends the court erred in entering the order confirming the arbitration rulings.

Relying on the language in the dispute resolution section of the practitioner agreement, RCW 48.43.055, and Washington Administrative Code (WAC) 284-43-322(4), Dr. Jolley asserts that the arbitration is nonbinding and he is entitled to a trial de novo. Specifically, Dr. Jolley argues that the language “[p]rior to seeking judicial remedy” in Section 6.3 of the practitioner agreement means that an aggrieved party must submit the dispute to arbitration before pursuing litigation, and the arbitration is nonbinding. Dr. Jolley also contends that the language stating that failure to comply with the dispute resolution process precludes “any arbitration, litigation, internal, external or extrajudicial process” also

supports the conclusion that the arbitration is a non-binding condition precedent to litigation. As further support, Dr. Jolley relies on RCW 48.43.055 and WAC 284-43-322(4).

*3 RCW 48.43.055 requires health care contractors like Regence to provide health care providers a fair review process for disputes. The statute also expressly approves nonbinding mediation. RCW 48.43.055 states:

Each health carrier as defined under RCW 48.43.005 shall file with the commissioner its procedures for review and adjudication of complaints initiated by health care providers. Procedures filed under this section shall provide a fair review for consideration of complaints.... A complaint that has been rejected by the health carrier may be submitted to nonbinding mediation. Mediation shall be conducted under chapter 7.07 RCW, or any other rules of mediation agreed to by the parties. This section is solely for resolution of provider complaints. Complaints by, or on behalf of, a covered person are subject to the grievance processes in RCW 48.43.530.

WAC 284-43-322(4) sets forth the criteria that health care contracts must meet in order to provide fair review. WAC 284-43-322(4) explicitly states that “[c]arriers may not require alternative dispute resolution to the exclusion of judicial remedies; however, carriers may require alternative dispute resolution prior to judicial remedies.”

The Washington State Supreme Court recently addressed the meaning of Regence's dispute resolution provision in *Kruger*. In *Kruger*, the court held that because RCW 48.43.055 and WAC 284-43-322 “regulat[e] the business of insurance” within the meaning of the McCarran-Ferguson Act, FN5 state law is not preempted by the Federal Arbitration Act. *Kruger*, 157 Wn.2d at 303. And, while a health care contract with a provider may require the parties to resolve disputes through some form of alternative dispute resolution, “the contract cannot prohibit a party from subsequently seeking a

court's redress of its complaints.” *Kruger*, 157 Wn.2d at 303.

FN5. Section 2(b) of the McCarran-Ferguson Act provides that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That ... [the federal antitrust statutes] shall be applicable to the business of insurance to the extent that such business is not regulated by State law. 15 U.S.C. § 1012(b).

The dispute resolution provision in the practitioner agreement in one of the two consolidated cases in *Kruger* is identical to the agreement between Regence and Dr. Jolley. The dispute resolution provision in that agreement also provided that:

Prior to seeking judicial remedy, any claims or disputes between the parties arising out of or relating to this Agreement that cannot be resolved through the internal appeals process shall be submitted to arbitration in accordance with the Commercial Arbitration rules and regulations of the American Arbitration Association then in effect....

...

... Judgment upon an award rendered by the arbitration may be entered in any court having jurisdiction thereof.

Kruger, 157 Wn.2d at 297.

In addressing the enforceability of the dispute resolution provision in *Kruger*, and the requirements of RCW 48.43.055 and WAC 284-43-322(4), the court held that even though the provision “does not explicitly state that the arbitration will be ‘binding’ and even appears to preserve ‘judicial remedies’ by stating that the parties must arbitrate ‘[p]rior to seeking judicial remedy,’ “ RCW 48.43.055 and

WAC 284-43-322(4) prohibit Regence from requiring health care providers to resolve disputes through binding arbitration. Thus, while RCW 48.43.055 and WAC 284-43-322(4) allow health care service contractors to require nonbinding alternate dispute resolution, Regence could not do so “to the exclusion of judicial remedies.” *Kruger*, 157 Wn.2d at 303.

*4 Reading the statute and regulation in concert, we conclude that they were intended to authorize some preliminary form of *nonbinding* ADR, one that preserves the parties' right to pursue judicial remedies' thereafter. In inception and by its very definition, ADR provides an alternative to the litigation of a dispute in court: ADR is [a] procedure for settling a dispute by *means other than litigation*, such as arbitration or mediation.' BLACK'S LAW DICTIONARY 86 (8th ed.2004) (emphasis added). In general, [p]arties are free to agree upon a variety of ADR mechanisms under Washington law to address their disputes,' *Godfrey v. Hartford Casualty Insurance Co.*, 142 Wn.2d 885, 892, 16 P.3d 617 (2001), but WAC 284-43-322(4) prohibits carriers such as Regence from imposing on providers a form of ADR to the exclusion of judicial remedies.' A judicial remedy' is broadly defined as [t]he means'-granted by a court'-of enforcing a right or preventing or redressing a wrong.' BLACK'S LAW DICTIONARY 1320. By the plain language of the WAC regulation, a carrier's contract with a provider may require that the parties initially attempt to resolve disputes through some form of ADR, but the contract cannot prohibit a party from subsequently seeking a court's redress of its complaints.^{FN6}

FN6. In reaching the conclusion that the dispute resolution provision in *Tacoma Orthopedics* could only require nonbinding arbitration, the Court rejected the same arguments Regence makes in this case on appeal.

Kruger, 157 Wn.2d at 303.

Regence attempts to distinguish *Kruger* by arguing that Dr. Jolley waived his right to challenge the enforceability of the dispute resolution provision by initiating and participating in arbitration proceedings without objection.^{FN7} But Dr. Jolley is not challenging the enforceability of the provision or the requirement to participate in arbitration. Rather, consistent with the decision in *Kruger*, Dr. Jolley contends that the arbitration provision is a nonbinding condition precedent to pursuing judicial remedies, including a trial de novo.

FN7. Once a party submits a claim to arbitration, that party is prohibited from challenging the authority of the arbitrator after receiving an unfavorable result. *Hanson v. Shim*, 87 Wn.App. 538, 550, 943 P.2d 322 (1997) (“Having sought arbitration of this dispute under the preincorporation agreement, Jenam cannot now challenge the arbitrator's authority or the court's jurisdiction to enter the arbitration award”); *ML Park Place Corp. v. Hedreen*, 71 Wn.App. 727, 862 P.2d 602 (1993). See also *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1440 (9th Cir.1994) (claimant's voluntary initiation of binding arbitration is interpreted as waiver of any objection he may have had over the authority of the arbitrator).

Regence also argues that by submitting his arbitration demand on the preprinted AAA form, Dr. Jolley agreed to binding arbitration. But unlike the cases Regence cites where the agreement unequivocally requires final and binding arbitration,^{FN8} here, the dispute resolution provision does not explicitly state whether the arbitration is binding. On this record, Dr. Jolley did not waive his right to object to Regence motion to confirm the arbitration rulings.

FN8. *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1440 (9th Cir.1994) (where agreement expressly states “final and binding arbitration,” terminated employee who

voluntarily initiates arbitration under the agreement has waived any objection he may have had over the arbitrator's authority); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union*, 611 F.2d 580, 584 (5th Cir.1980) (where collective bargaining agreement required final and binding arbitration and neither party questioned the arbitrability of the dispute, employer cannot question the arbitrator's jurisdiction after receiving adverse ruling); *Mays v. Lanier Worldwide, Inc.*, 115 F.Supp.2d 1330, 1344 (M.D.Ala.2000) (plaintiff was precluded from challenging enforceability of arbitration provision after voluntarily submitting his employment discrimination suit to binding arbitration and actively participating in arbitration); *Zazueta v. County of San Benito*, 44 Cal.Rptr.2d 678 (Cal.App.1995) (terminated employee who elected to submit matter of his termination to arbitration and who specifically invoked the “binding arbitration clause” cannot seek judicial review after receiving an unfavorable ruling); *Thompson v. S.L.T. Ready-Mix*, 627 N.Y.S.2d 802 (1995) (where collective bargaining agreement required final and binding arbitration, a party who otherwise is entitled to a judicial determination may waive that right by actively participating in the arbitration without otherwise preserving such right).

We reverse the order confirming the arbitration rulings and remand. Because the practitioner agreement authorizes attorney fees, upon compliance with RAP 18.1, Dr. Jolley is entitled to attorney fees on appeal.

WE CONCUR: GROSSE and BECKER, JJ.
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