

COURT OF APPEALS  
DIVISION II

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No. 38061-7-II

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

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TIMOTHY B. JOLLEY, M.D.,

Appellant,

v.

REGENCE BLUESHIELD,

Respondent.

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APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

The question before the Superior Court was whether Regence Blueshield (“Regence”) breached its provider contract with Timothy B. Jolley, M.D. (“Dr. Jolley”) by improperly terminating him in violation of a fair review procedure which Regence adopted pursuant to Washington law. *See* RCW 48.43.055. The Superior Court wrongly held that any procedural errors in Regence’s internal review were cured at arbitration. Dr. Jolley should have had the opportunity to bring his evidence in the first instance before Regence’s own fact finders. By relying on the arbitrator’s findings, the Superior Court effectively reviewed the non-binding arbitration for abuse of discretion – and so failed to conduct the *de novo* adjudication required by this Court in this very case. Because this Court (in Division 1) held that the arbitration must be deemed non-binding,<sup>1</sup> the Superior Court should not have deferred to the arbitrator. Therefore, this Court should reverse the trial court’s decision.

In its brief before this Court, Regence fails to address the Superior Court’s error. Regence focuses instead on Dr. Jolley’s ethical lapses. Neither the Superior Court nor this Court, however, are charged with determining whether it was a good idea to terminate Dr. Jolley; that was Regence’s role, and the issue is whether it fulfilled that role in accordance

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<sup>1</sup> *See Jolley v. Blueshield*, 139 Wn. App. 1016, not reported in P.3d, 2007 WL 1733215 (Div. 1 June 18, 2007). (CP 638-646).

with the parties' contract and Washington law. To the extent that the Superior Court relied, in the alternative, on a finding that there was no genuine issue of fact for trial as to whether a fair process would have changed the outcome, that finding was in error. This Court on *de novo* review should grant summary judgment on liability in favor of Dr. Jolley, reverse the trial court, and remand for trial on damages.

## **II. ARGUMENT**

### **A. The Trial Court Deferred To The Arbitrator And Denied**

#### **Dr. Jolley His Right To A Judicial Remedy.**

After he was terminated, Dr. Jolley sought and received reinstatement through the process provided in the Practitioner Agreement: a Level One internal appeal to a Regence peer panel; a Level Two internal appeal to a panel of Regence administrators, and finally a hearing before an outside arbitrator. After reinstatement, Regence re-terminated him and he went through each step again. Because these steps failed him, he then sought the judicial remedy guaranteed by WAC 284-43-322.

Although Regence now glosses over the differences between these three steps, they are profound. Washington law and code require a "fair review" of provider termination complaints, but leaves the health care contractors a certain amount of discretion to contractually define the exact

process of review. *See* RCW 48.43.055; WAC 284-43-322. Regence decided that the fair way to handle these complaints was to give the provider fair notice of the grounds for termination, and then give the provider the opportunity to dispute those grounds and/or raise grounds for leniency before two different sets of Regence agents. (CP 123-27). This process gives Regence the opportunity to fully consider the facts and exercise its discretion, and then to take the dispute to arbitration if necessary. *Id.* Each step of this process serves a distinct and useful role when the system works as designed and intended by Regence. The peer reviewers have expertise as to whether and to what extent the practitioner violated medical standards; the company administrators have expertise as to the company's needs and practices; and the arbitrator (often a retired judge) can apply his or her legal knowledge.

Importantly, only in the first two steps does Regence exercise its discretion. As happened here in Dr. Jolley's first go-round, an arbitrator may force the Company to go back to square one, but it cannot force Regence to change its mind. Only a change in facts could do that – and this is why it is crucial that a grievant have the opportunity to make his case to the internal reviewers. Whether Dr. Jolley had that opportunity was the primary question for the Superior Court.

On the second go-round, the arbitrator examined that same question: whether Dr. Jolley received a fair review through Regence's Internal Appeals Process. Dr. Jolley was entitled to *de novo* review of that question by the Superior Court. Contrary to Regence's characterization of the Superior Court's ruling, however, the court did not perform that review and "agree with" the arbitrator. Instead of ruling on that question, the Superior Court relied on Regence's conduct in arbitration and the arbitrator's own performance to conclude that Dr. Jolley received a fair review:

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).

Thus, the Superior Court asked whether, assuming there were lapses in the notice given Dr. Jolley before the internal, discretionary Regence review (which there were), the arbitration proceeding had adequately cured them, so that "a neutral fact finder" had performed the judicial role of applying the law to the facts. In other words, the Superior Court reviewed the arbitration proceeding for abuse of discretion. This is an appropriate level of review in many contexts – but it is misplaced here.

After arbitration and before the Superior Court's ruling, the Washington Supreme Court expressly held that Regence's provider contract cannot lawfully require binding arbitration in place of a judicial remedy for provider-contractor disputes. *Kruger Clinic Orthopaedics, L.L.C. v. Regence BlueShield*, 157 Wn.2d 290, 303, 138 P.3d 936 (2006). When Regence sought to enforce the arbitration award in this very dispute in King County Superior Court, Division One expressly held that the arbitration must be considered non-binding. *Jolley*, 139 Wn. App. at 1019. (CP 645).

These rulings are based on RCW 48.43.055 and WAC 284-43-322. The trial court committed reversible error by basing its decision on the arbitration result. Dr. Jolley never voluntarily submitted to binding arbitration, and could not be forced into binding arbitration. *Jolley*, 139 Wn. App. at 1019. (CP 645). The effect of reviewing the arbitrator's decision only for abuse of discretion, instead of finding facts *de novo*, however, is to render it binding. Under *Kruger*, and the law of this case, that decision cannot stand.

**B. The Trial Court Failed To Address Dr. Jolley's Claim For Damages Based On The First Termination.**

In a footnote, Regence asserts the first termination "is not relevant to Dr. Jolley's claims on appeal." *See Resp. Br.*, 26 n.9. Regence again

misses the point. The first termination is entirely relevant to Dr. Jolley's appeal. The arbitrator awarded Dr. Jolley sixty days' worth of compensation as damages for Regence's wrongful termination and breach of contract. (CP 229-230). The Superior Court did rule that Dr. Jolley was entitled to compensation, and allowed him to keep the award despite Regence's claims that the award should be returned. (CP 792-793). The trial court, however, failed to hold a trial to determine, or even examine, whether the damages awarded by the arbitrator were sufficient. The correct amount of damages is another issue of fact the trial court failed to address *de novo*, and another issue to address on remand.

**C. The Trial Court Erred In Finding That Regence Did Not Breach By Failing To Give Dr. Jolley A Fair Review.**

RCW 48.43.055, WAC 284-43-322 and Regence's own Internal Provider Appeals Process require that Regence provide fair review of provider complaints. The trial court erred in granting Regence's motion for summary judgment. The undisputed facts show that Regence breached the practitioner agreement by twice failing to notify Dr. Jolley of the actual reasons being considered for his termination.<sup>2</sup>

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<sup>2</sup> Regence continues to mischaracterize its accusations by grossly misrepresenting to this Court the charges against Dr. Jolley. Despite four internal appeals, two arbitrations, two court hearings and two appeals, Regence still incorrectly states four complaints prompted the Medical Quality Assurance Commission's ("MQAC") summary suspension. *See*

Regence attempts to justify its illusory appeals process by arguing that no Washington law imposes substantive requirements on the nature of the process. Regence fails to acknowledge it defined its own substantive requirements in its Internal Provider Appeals Process (CP 121-128). Regence's own procedures require that it notify a provider of the grounds for termination. (CP 123). The provider then has the right to appeal that decision to the Level One and Level Two Appeals Committees. (CP 126-127). The two committees are independent of each other and are comprised of different voting members. (CP 359).

Regence failed to comply with its own procedures on four occasions by not notifying Dr. Jolley of the actual grounds for termination. The facts show that Regence did not notify Dr. Jolley that the first termination was based on conditions on his license until Dr. Jolley had completed the internal appeals process. (CP 223). Dr. Jolley presented evidence to both the Level One and Level Two Appeals Committees based on Regence's earlier statement that Dr. Jolley was being terminated because of the suspension of his medical license. (CP 212-213, 353).

Following the second termination, Regence notified Dr. Jolley he was being terminated at will. (CP 232-233, 242-243). Dr. Jolley

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*Resp. Br.*, 8. The fact is MQAC's investigation was based on a single complaint. (CP 98).

proceeded through the Level One and Level Two Appeals on this basis. (CP 353). It was not until after both rounds of appeal that Dr. Jolley learned the true reasons for his termination. (CP 353).

By failing to notify Dr. Jolley of the charges against him, Regence deprived Dr. Jolley of a meaningful opportunity to be heard, and a chance to convince the appeals committees to reinstate him. The trial court erred in ruling as a matter of law that Dr. Jolley received a fair review. Dr. Jolley produced undisputed evidence that he was never given the actual bases for termination each committee was considering until after the appeals processes were finished. The trial court should have ruled as a matter of law that Regence breached the practitioner agreement, or at a minimum, that there were genuine issues of material fact whether Regence honored the practitioner agreement by providing Dr. Jolley with a fair review.

**D. Genuine Issues Of Material Fact As To Whether Regence's Defaults Changed The Outcome Prevent Summary Judgment.**

**1. Regence's Evidence As To Post-Hoc Changes In Similarly Situated Physicians' Status Are Irrelevant.**

Regence argues that even if it failed to provide Dr. Jolley with a fair review, Dr. Jolley cannot prove the unfairness affected the outcome.

RCW 48.43.055, WAC 284-43-322, and Regence's own Internal Provider Appeals Process were designed to protect against this kind of predetermined decision making, and to prevent the need for after-the-fact analysis whether a fair review would have changed the outcome of a termination proceeding. Further, to defeat Regence's motion for summary judgment, Dr. Jolley does not have to prove the unfairness more likely than not affected the outcome.<sup>3</sup> Dr. Jolley need only show there is a question of fact whether a fair review could have changed the outcome. Dr. Jolley did this by presenting evidence that Regence's inadequate and confusing notice prevented him from fully addressing the actual grounds for termination, and that if not for that, he could and would have presented the Level One and Level Two committees with material evidence.

At the time of Dr. Jolley's termination, at least fifteen other providers were credentialed by Regence despite having conditions on their licenses. (CP 267). Dr. Jolley was not given the opportunity to present this evidence of the treatment of similarly situated providers to Regence during Regence's internal review process, nor to present testimony from Dr. Diekema on the evolution of Washington's policy on physician

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<sup>3</sup> 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).

relationships with key third parties. Regence does not dispute this; it merely shows that Dr. Jolly did present some of this evidence to the arbitrator, during post-review arbitration as to whether the internal review was fair. *See Resp. Br.*, 33. Regence's implication that showing it to the arbitrator was enough, merely continues Regence's fundamental error as to the role of the Superior Court in giving a *de novo* review.<sup>4</sup>

Regence attempts to refute Dr. Jolley's evidence by suggesting that the other physicians as to whom Regence exercised discretion are no longer credentialed. *See Resp. Br.*, 33. What is relevant however, is that the physicians were credentialed by Regence, despite the conditions on their licenses, at the time Dr. Jolley was appealing his termination – and thus this evidence was material to that internal appeal. There are genuine

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<sup>4</sup> Regence's current position that the arbitration hearing was an integral part of its review process, so that all it really had to do was give fair notice before the arbitration, is also contrary to its own original position in this case. Regence's original position was that, far from being part of the fair review process, the arbitration was a contractual substitute for the very post-review judicial remedy that Dr. Jolley now seeks in Pierce County Superior Court. Regence attempted to enforce the arbitration award as binding (and therefore subject to only the mildest judicial oversight). Only the ruling of this Court (Division 1) that the arbitration award could not be binding under Washington law preserved Dr. Jolley's right to his day in court. Throughout the arbitration, however, Regence assumed that the arbitration could and would take the place of this contract action. Clearly, Regence did not intend the arbitration as part of the promised internal fair review of facts, and this Court should not treat it as such when Regence itself did not.

issues of material fact whether one of the two independent and distinct internal appeal committees would have come to different conclusions, had Dr. Jolley been given the opportunity to present this material evidence and address the actual grounds for his termination.

**2. Retrospective Rationales For Terminating Dr. Jolley Do Not Justify Regence's Breach of Contract**

Regence also asserts that because Dr. Jolley is allegedly not eligible to contract with Regence, this justifies Regence's failure to provide Dr. Jolley with a fair review of his complaint. Regence's retrospective justifications do not remedy its failure to meet its state-mandated and contractual obligations. Regence asserts that Dr. Jolley is automatically disqualified because DSHS terminated him from Medicare participation. *See Resp. Br.*, 37. But that disqualification is standard for physicians with conditions on their licenses, and yet Regence did accept other such physicians. Regence clearly had, and knew it had, discretion to do so in this instance: it reinstated Dr. Jolley in October 2004 despite his license conditions and DSHS status.

To the extent that Regence is asserting that Dr. Jolley's DSHS status is a separate, independent, and non-discretionary ground for termination, however, it is merely one more example of the unfairness of

the termination process, because Regence never mentioned this alleged ground through four internal reviews and two arbitration hearings. Regence raised it for the first time as a ground for termination in summary judgment briefing in the Superior Court. If Regence's position is now that it never had any discretion and the hearings were all based on false premises, then Dr. Jolley has spent a great deal of time and money, and incurred considerable distress, for no reason – and Regence owes him compensation for this foreseeable result of its contractual duty to give him fair notice.

**E. Regence Did Not Provide Dr. Jolley With Adequate Notice of its Grounds for Termination.**

Regence relies on two employment cases to support its argument that it provided Dr. Jolley with adequate notice of Regence's grounds for termination. These cases are distinguishable, as they did not involve a legislatively-mandated fair appeal process and there was no dispute in either case that the employees knew the factual reasons for their terminations. *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993) (“The trial court was correct in its determination that due process was satisfied because the City properly informed Respondent of the factual basis for his dismissal [...]”); *Payne v. Mount*, 41 Wn.

App. 627, 636, 705 P.2d 297 (1985) (“[Plaintiff] has not alleged, and there is no evidence to support the conclusion, that he believed that he was being discharged for any reason other than the alleged sexual abuse of his stepdaughter.”).

Unlike the employers in the cases Regence relies on, Regence was statutorily and contractually required to provide a fair appeals process. Unlike the employees in the cases Regence relied on, Dr. Jolley did not receive notice of the actual reasons for his termination until after he had completed the internal appeals process.

### **III. CONCLUSION**

For the reasons stated above and in Dr. Jolley’s opening brief, this 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.

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

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of January, 2009.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that on January 14, 2009 I caused to be served upon the parties in this action in the manner noted below, a true and correct copy of:

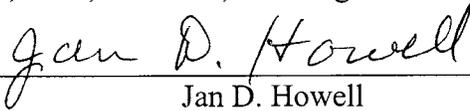
1. Appellant's Reply Brief; and
2. Certificate of Service.

VIA HAND DELIVERY TO:

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

Executed on January 14, 2009, at Seattle, Washington.

  
\_\_\_\_\_  
Jan D. Howell