UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARY M. ROSSKAMP	)	
	)	
Plaintiff	)	
	)	
v.	)	Civ. No. 12 cv 00601 ELH
	)	
PRUDENTIAL INSURANCE CO. OF AMERICA	)	
	)	
Defendant	)	
_____	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This Memorandum of Law is submitted by Mary Rosskamp, Plaintiff ["Mrs. Rosskamp"], through counsel, in support of her Motion for Summary Judgment.

Issues Presented

1. Whether Mrs. Rosskamp is entitled to accidental death benefits in the amount of $90,000 under the Group Universal Life Insurance Policy [Group Contract G-50555] [hereinafter the "Policy"] issued by Prudential Insurance Co. of America ["Prudential"] to Sears Holding Company ["Sears"]. The pertinent provision of the Policy states that benefits are payable when death is caused by an accidental bodily injury and from no *other cause*. The question before this Court is whether Mr. Rosskamp's susceptibility to intracranial hemorrhage is an *other cause* where closed head injury from an accidental fall is the underlying cause of death.

2. Whether coverage exclusions in the Policy for accidental death resulting from "sickness" and "medical or surgical treatment of sickness" are applicable.

Statement of Undisputed Facts [1]

At all relevant times, William Rosskamp ["Mr. Rosskamp" or "Rosskamp"], a Sears employee, was eligible for benefits under the Policy. Mrs. Rosskamp is Mr. Rosskamp's beneficiary under the Policy [Answer to Complaint].

The Policy provides an accidental death benefit in the amount of $90,000 [**Ex. A** 000409] if the following conditions are satisfied:

(1) The person sustains an accidental bodily Injury [2] while a Covered Person;

(2) The Loss [3] results directly from that Injury and *from no other cause;* and

(3) The person suffers the Loss within 365 days after the accident.

[**Ex. B**, 000458]

The Policy excludes coverage if death is caused by, *inter alia*,

Sickness, whether the Loss results directly or indirectly from the Sickness; and

Medical or surgical treatment of Sickness, whether the Loss results directly or indirectly from the treatment.

[*Id.*]

On February 9, 2011, Mr. Rosskamp was admitted to Western Maryland Regional Medical Center, two days after he fell and hit his head. The emergency room physician's

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[1] In this ERISA case, the Court's decision will be based on the administrative record considered by the plan administrator. The parties have stipulated to the contents of the administrative record. The exhibits attached hereto are all included in the administrative record. Citations to the administrative record herein include a reference to the page(s) in the administrative record where the cited material can be located.

[2] Injury is defined under the Policy as "injury to the body of a Covered Person." [**Ex. C**., 000466]

[3] Loss is defined under the Policy as the insured person's loss of life [**Ex. B**, 000458].

assessment was that Mr. Rosskamp had experienced an accidental "fall with subdural intraparenchymal hemorrhage with shift and herniation of the brain" [**Ex. D**, 000076]. Kheder Ashker, M.D. [4] performed the neurosurgical evaluation. In his Consultation Report, Dr. Ashker summarized Mr. Rosskamp's pertinent medical history as follows:

> This is a 67 year old gentleman who has been in normal health. He has been on Coumadin for atrial fibrillation. He apparently fell two days ago; and he did develop some headache. He did not want to come to the hospital. He did not feel well. The wife apparently had the flu, she felt he may have the flu. So, simply he did not come to the hospital. The headache has persisted. He woke up this morning at about 0400 in the morning and sat on the chair. He told his wife he has been up the whole day and he was complaining of severe headache, was very weak and the wife wanted him to come to the hospital. However, he apparently just did not really want to come. All of a sudden he deteriorated to a degree he became unconscious. He was brought in to the hospital by the ambulance to the ER. There he was evaluated. A CAT scan of the brain showed massive intracranial hemorrhage, involving the left brain, left subdural hematoma also left intracerebral hematoma with significant midline shift. The entire ventricles (both left and right) in the right side where (*sic*) off the midline. The patient was on Coumadin. His INR was 4.7. [5]

[**Ex. E**, 000078].

Mr. Rosskamp died in the hospital on 2/11/11. The hospital Discharge Summary lists the cause of death as "respiratory acidosis complicating (*sic*) from needing to be on the ventilator, status post subdural hematoma with brain herniation from fall." [**Ex. F**,

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[4] Dr. Ashker is board certified in Neurological Surgery [**Ex. E**, 000079].

[5] Coumadin, known generically as warfarin, is a widely prescribed anti-coagulant medication used to prevent thrombosis and thromboembolism, respectively the formation of blood clots in the blood vessels and their migration elsewhere in the body. INR is an abbreviation for International Normalized Ratio, a measure of the clotting tendency of blood. The normal range for the INR is 0.8–1.2. Using anticoagulants such as Coumadin, clinicians desiring therapeutic anticoagulation may aim for a higher INR in the 2.0 – 3.0 range. INR's above the therapeutic range are described as "supratherapeutic".

000074 - 75]. The Death Certificate certifies that the manner of death was an *accident*, with "fall with head injury" as the underlying cause of death. It further lists "supra-therapeutic international normalization ratio" and "intracranial bleed – massive" as intermediate conditions which contributed to respiratory insufficiency, the immediate cause of death [**Ex. G,** 000054].

In support of Mrs. Rosskamp's claim for accidental death benefits under the Policy, Dr. Ashker certified in the Proof of death – Attending Physician's Statement that the primary cause of death was "intracranial hemorrhage" which resulted when Mr. Rosskamp "fell and hit his head". "Anticoagulation for A. fib" is listed as a secondary or contributory cause of death. Dr. Ashker further states that Mr. Rosskamp's injury from the fall was "directly and independently of all other causes sufficient to produce death". He indicated that the extent to which "any disease or impairment" contributed to the death was "not known" [**Ex. H**, 000056].

Albert A. Kowalski, M.D., MBA, Prudential's in-house medical director, reviewed Mrs. Rosskamp's claim for accidental death benefits. [6] He agreed with Mr. Rosskamp's health care providers that Mr. Rosskamp sustained an accidental bodily injury within the meaning of the Policy as the result of a fall and closed head injury:

> 1. In your medical opinion, do the records support that the insured sustained an accidental bodily injury?
>
> As per the medical records, as well as the death certificate, support that the insured did had (*sic*) a ground level fall on 02/7/11 and did sustain a closed head injury without any obvious external head injury from the fall.

[6] Dr. Kowalski's job title is Vice President and Medical Director for Prudential Group Insurance. [**Ex. I**, 000413]

> Therefore, in my opinion and with a reasonable degree of medical certainty, the insured did sustain an accidental bodily injury (Closed Head Injury from Fall on 02/7/11)

[**Ex. I**, 000413].

Dr. Kowalski noted, though, that Mr. Rosskamp was on Coumadin, and that INR's greater than 3.0 have "more than twice the risk of intracranial bleeding". Further noting that anticoagulation is listed as a contributing cause of death on the death certificate, Dr. Kowalski concluded that anticoagulation "substantially contributed" to the development, progression and size of Rosskamp's intracranial bleed. Consequently, he determined that Rosskamp's death was not caused by the "injury (Closed Head Injury from Fall on 02/07/11) and from no other cause" [*Id.*]. [7]

Because Mr. Rosskamp took Coumadin to treat his cardiac condition, Dr. Kowalski further concluded that the Policy exclusion for death due to "sickness" (*i.e.*, atrial fibrillation) applied [*Id.*]. For the same reason, Dr. Kowalski concluded that the Policy exclusion for medical or surgical treatment of sickness (*i.e.*, Coumadin) also applied [*Id.*].

Based on Dr. Kowalski's in house review, Prudential on 6/6/11 denied Mrs. Rosskamp's claim for accidental death benefits. The basis for the denial was Mr. Rosskamp's supratherapeutic anticoagulation:

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[7] Dr. Kowalski cited a report by Stiles as the basis for his determination that anticoagulation substantially contributed to Mr. Rosskamp's intracranial hemorrhage, Stiles, "Warfarin Warning: Shortfalls in Anticoagulation for AF Up Risks of ICH and Embolic Stroke", Medscape Website, www.Medscape.com/viewarticle/581882_print. [hereinafter "**Stiles**"][**Ex. O**, 000385]

> Mr. Rosskamp's over-anticoagulation with Coumadin substantially contributed to the development, progression and size of Mr. Rosskamp's "massive" intracranial bleed/subdural hematoma and Mr. Rosskamp's death. The records do not support that the insured's loss resulted from that injury (Closed Head Injury from Fall on 02/07/11) and from no other cause.

[**Ex. J**, 000007] Additional justifications for the denial of Mrs. Rosskamp's claim included the coverage exclusions for death due to sickness (Atrial Fibrillation) and medical treatment of sickness (Coumadin) [*Id*.].

On 10/14/11, Mrs. Rosskamp requested reconsideration of Prudential's denial of her claim for accidental death benefits [**Ex. K**, 000358].

In connection with Mrs. Rosskamp's administrative appeal, Prudential consulted Philip Esce, M.D., a neurosurgeon. In his 11/18/11 report, Dr. Esce agreed with Dr. Kowalski's determination that Mr. Rosskamp's supra-therapeutic INR "substantially contributed" to the development, progression and size of the intracranial bleed following the 2/7/11 fall and head injury. He further opined that Mr. Rosskamp would not have died as the result of the fall and head injury in the absence of over-anticoagulation with Coumadin. In support of his conclusion, Dr. Esce asserted that patients on Coumadin "are over three times as likely to die from trauma" and have "an almost 50% increase (*sic*) risk of intracranial hemorrhage". [8] He concluded that because Coumadin anticoagulation

[8] Dr. Esces cited reports by Bonville and Punthakee as the basis for his determination that anticoagulation substantially contributed to Mr. Rosskap's intracranial hemorrhage, Bonville *et al*, "Impact of pre-injury warfarin and antiplatelet agents on outcomes of trauma patients", SURGERY, 150:4, 861- 868, Oct. 2011 [**Ex. P**, 000491][hereinafter "**Bonville**"]; Punthakee X et al, "Oral anticoagulant related intracerebral hemorrhage", THROMB. RES., 108:1, 31-6 Oct. 2002 [**Ex. Q,** 000501][hereinafter **Punthakee**].

"significantly increases the rate of mortality in traumatic events", it therefore is "directly related" to the claimant's death [**Ex. K**, 000372].

Prudential based its decision to deny Mrs. Rosskamp's appeal on Dr. Esce's report. [**Ex. L**, 000013]. The litigation presently before this Court ensued.

Argument

Summary Judgment Standard of Review

Summary judgment is only appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). When parties file cross-motions for summary judgment, the court must view each motion in a light most favorable to the non movant. *Mellen v. Bunting,* 327 F.3d 355, 363 (4th Cir. 2003). To defeat a motion for summary judgment, the nonmoving party must come forward with affidavits or other similar evidence to show that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). While the evidence of the nonmoving party is to be believed and all justifiable inferences drawn in his or her favor, a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. *See Deans v. CSX Transp., Inc.,* 152 F.3d 326, 330-31 (4th Cir.1998). Additionally, hearsay statements or conclusory statements with no evidentiary basis cannot support or defeat a motion for summary judgment. *See Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro,* 64 F.3d 962, 967 (4th Cir.1995).

ERISA Standard of Review

Because the Policy is a component of the Sears employee benefit plan, the law applicable to the interpretation and enforcement of the Policy is ERISA. The Summary Plan Description for the Sears Universal Life Coverage Plan confers sole discretion on Prudential as Claims Administrator to interpret the terms of the Policy, to make factual findings, and to determine eligibility for benefits [Summary Plan Description, 000473]. When an ERISA plan confers discretion on the administrator to make benefits decisions, a court reviews the plan administrator's decision to deny benefits for abuse of discretion, *Duperry v. Life Ins. Co. of North Am.,* 632 F.3d 860 (4th Cir., 2011); *Stup v. UNUM Life Ins. Co.*, 390 F.3d 301 (4th Cir. 2004); *Bernstein v. CapitalCare, Inc.*, 70 F.3rd 78 3, 787 (4th Cir. 1995). [9]

Under the abuse-of-discretion standard, a reviewing court will set aside a plan administrator's benefits decision only if it is not reasonable. *See Duperry v. Life Ins. Co. of North Am.,* 632 F.3d 860 (4th Cir., 2011); *Stup v. UNUM Life Ins. Co. of America*, *supra*. An administrator's decision is reasonable if it is the result of a "deliberate, principled reasoning process" and is "supported by substantial evidence". *See Bernstein v. CapitalCare, Inc.*, 70 F.3d 783, 788 (4th Cir. 1995). A plan administrator fails to engage in a deliberate, principled reasoning process when it misconstrues the evidence, takes evidence out of context, disregards evidence favorable to the claimant, or takes an

[9] Conferred discretion to interpret an ERISA plan only allows the plan administrator to resolve plan ambiguities. A reviewing court does not defer to a plan administrator's interpretation terms of the plan that are unambiguous. *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634 (4th Cir., 2007); *Colucci v. Agfa Corp. Severance Pay Plan*, 431 F.3d 170 (4th Cir. 2005).

adversarial approach to the evidence. *See, e.g.*, *Stup v. UNUM Life Ins. Co. of America, supra; Myers v. Hercules, Inc*., 253 F.3d 761 (4th Cir. 2001); *Dunbar v. Orbital Sciences Corp. Group Disability Plan*, 265 F. Supp.2d 572 (D. Md. 2003); *Laser v. Provident Life & Accident Ins. Co.*, 211 F. Supp.2d 645 (D. Md. 2002). A decision is not supported by "substantial evidence" unless a reasoning mind would accept the evidence as sufficient to support a particular conclusion, *see LeFebre v. Westinghouse Elec. Corp.*, 747 F.2d 197, 208 (4th Cir. 1984).

In *Booth v. Wal–Mart Stores, Inc. Associates Health & Welfare Plan*, 201 F.3d 335 (4th Cir.2000), the Fourth Circuit articulated the following nonexclusive factors which the district court may consider when determining the reasonableness of a plan administrator's decision to deny benefits:

> (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decision-making process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have.

Id. at 342–43. *See Williams v. Metropolitan Life Ins. Co.*, 609 F.3d 622, 630 (4th Cir. 2010).

It is well established that Prudential operates under a "structural conflict of interest" in its role as contract administrator of ERISA benefit plans. This is because Prudential, as an insurance company, both makes benefit decisions and is responsible for paying claims. *Bass v. Prudential Ins. Co. of America*, 764 F.Supp. 1436 (D. Kan., 1991) (strong conflict of interest exists when the fiduciary making discretionary decision is also

insurance company responsible for paying claim); *Smith v. Prudential Ins. Co. of America*, 513 F.Supp.2d 448 (E.D. Pa., 2007) (court concludes that there is structural conflict of interest, as well as procedural irregularities suggesting that conflict influenced Prudential's decision to deny benefits); *Givens v. Prudential Ins. Co. of America.*, 778 F.Supp.2d 1011 (W.D. Mo., 2011)(weighing Prudential's conflict of interest as factor, court finds that Prudential abused its discretion in denying benefits); *Weiss v. Prudential Ins. Co. of America*, 497 F.Supp.2d 606 (D.N.J., 2007)(same); *Neumann v. Prudential Ins. Co. of America*, 367 F.Supp.2d 969 (E.D. Va., 2005); *Humphrey v. Prudential Ins. Co. of America.*, 791 F.Supp.2d 655 (D. Minn., 2011); *Simmons v. Prudential Ins. Co. of America,* 564 F.Supp.2d 515 (E.D.N.C., 2008); *Zisel v. Prudential Ins. Co. of America*, 845 F.Supp. 949 (E.D.N.Y., 1994); *Pando v. Prudential Ins. Co. of America,* 524 F.Supp.2d 848 (W.D. Tex., 2007); *Miller v. Prudential Ins. Co. of America*, 625 F.Supp.2d 1256 (S.D. Fla., 2008); *Byrd v. Prudential Ins. Co. of America*, 758 F.Supp.2d 492 (M.D. Tenn., 2010). This Court must weigh Prudential's conflict of interest when determining the reasonableness of its decision to deny Mrs. Rosskamp's accidental death benefits claim. *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105, 128 S.Ct. 2543, 171 L.Ed.2d 299 (2008). Rosskamp respectfully suggests that Prudential's structural incentive to deny benefits warrants a degree of skepticism concerning the fairness of Prudential's claims review process and the quality of the evidence relied upon to support its decision to deny benefits. [10]

[10] Prior to *Glenn*, a court reviewed a conflicted plan administrator's benefits decision under a "modified abuse of discretion" standard, which granted the court latitude to lessen its deference to a conflicted administrator's benefits decision. *Ellis v. Metropolitan*

The *Reliance Standard Test*

In *Adkins v. Reliance Standard Life Insurance Co.*, 917 F.2d 794 (4th Cir. 1990), the Fourth Circuit construed an ERISA accidental loss policy which provided coverage for losses "resulting directly and independently of all other causes from bodily injury caused by accident …" *Id.* at 795. The district court entered summary judgment in the insurance company's favor, based on its determination that plaintiff's accidental injury would not have been totally disabling but for his pre-existing back injury. The Fourth Circuit considered the circumstances under which a pre-existing condition or susceptibility may be deemed an "other cause" of loss which prevents recovery under an accidental loss insurance policy.

Preliminarily, the appellate court observed that in order to recover under Reliance Standard's insurance policy, the plaintiff "would have to be in perfect health at the time of his most recent injury before the policy would benefit him, and that, of course, is a condition hardly obtained, however devoutly to be wished." *Id.* at 796. Citing ERISA's purpose to promote the interests of employees and beneficiaries of employee benefit plans, the Court rejected a stringent construction against coverage whenever a pre-existing condition is a contributing cause of disability or loss. Instead, the Court held that a pre-existing condition will not be deemed a "cause" of disability or loss unless it *substantially* contributes to the disability or loss:

Life Ins. Co., 126 F.3d 228, 233 (4th Cir. 1997). In *Glenn*, the Supreme Court held that a plan administrator's conflict of interest does not permit any modification of the abuse of discretion standard. Instead, the conflict is one of the several factors that a reviewing court must weigh and evaluate when determining the reasonableness of the benefits denial.

> A pre-existing infirmity or disease is not to be considered as a cause unless it substantially contributed to the disability or loss … [A] "pre-disposition" or "susceptibility" to injury, whether it results from congenital weakness or from previous illness or injury, does not necessarily amount to a substantial contributing cause. A mere relationship of undetermined degree is not enough.

917 F.2d at 797. [11]

In *Quesinberry v. Life Insurance Company of North America*, 987 F.2d 1017 (4th Cir. 1993), the Fourth Circuit articulated a two-step analysis which the district court should use when it applies the *Reliance Standard* test: first, whether there is a pre-existing disease, pre-disposition, or susceptibility to injury; and, second, whether this pre-existing condition, pre-disposition, or susceptibility substantially contributed to the disability or loss. *Id.* at 1028. A pre-disposition that has a "mere relationship of

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[11] In *Hall v. Metropolitan Life Ins. Co.*, 259 Fed.Appx. 589 (4th Cir. 2007)(unpublished opinion), the Fourth Circuit acknowledged the long-standing tug of war between insurance companies and the courts concerning the proper construction of accidental death insurance contracts:

> At one extreme, insurance companies can be characterized as proffering an interpretation of policy provisions in which "accidental death" coverage applies only on facts "which [are] the equivalent of a truck dropping from the skies, striking squarely and killing instantly a perfectly fit human specimen clutching a just-issued physician's clean bill of health." [citation omitted]. At the other, the beneficiary of a particularly fragile decedent might claim coverage even when an insignificant trauma had disproportionately debilitating consequences.

Id. at 594. When interpreting an accidental death contract, the court should consider the legitimate expectations of the insured because "a policy of insurance is not accepted with the thought that its coverage is restricted to an Apollo or a Hercules". *Id.* at 596 (quoting *Silverstein v. Metro. Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914, 915 (1930)).

undetermined degree" to the disability or loss is not a substantially contributing cause of the disability or loss. [12]

Prudential's Denial of Rosskamp's Claim for Accidental Death Benefits Was Not Reasonable

Rosskamp sustained an accidental bodily injury which was the underlying cause of death.

The Policy provides an accidental death benefit when, *inter alia*, the insured sustains an accidental bodily injury which causes the insured's death. The following uncontroverted evidence supports the conclusion that Mrs. Rosskamp's claim satisfies this condition:

The death certificate (Ex. G) states that the manner of Rosskamp's death was an "accident", and lists "fall with head injury" as the underlying cause of death;

The hospital discharge summary (Ex. F) lists "brain herniation from fall" as the cause of death;

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[12] In *Quesinberry*, the decedent, in preparation for a CT scan, was injected with Renografin, a contrast dye which aids the interpretation of the scan. The decedent had a fatal toxic reaction to the Renografin. An autopsy revealed that decedent had a pre-existing medical condition - neurosarcoidosis. – which enabled the toxic reaction by permitting the Renografin to breach the blood brain barrier. The insurance company asserted that plaintiff was not entitled to recover accidental death benefits because decedent's pre-existing condition substantially contributed to decedent's death. The district court held that decedent's reaction to Renografin was an accident within the meaning of the accidental death policy, and that although sarcoidosis contributed to decedent's death, her pre-existing condition was not a *substantial* contributing cause. Instead, the district court determined that there was a "mere relationship of undetermined degree" between the pre-disposition and her death. The Fourth Circuit affirmed the district court's ruling. *But cf*. *Hall v. Metropolitan Life Ins. Co.*, *supra* (decedent's allergy to bee sting substantially contributed to decedent's death from anaphylactic shock where death certificate, decedent's treating physician, and insurer's medical consultant listed the allergy as cause of death).

The Proof of Death – Attending Physician's Statement (Ex. H) states that the primary cause of death was "intracranial hemorrhage" which resulted when Rosskamp "fell and hit his head".

Dr. Kowalski, Prudential's medical consultant, concedes in his report that Rosskamp sustained an accidental bodily injury within the meaning of the Policy. Prudential does not deny that the fall with closed head injury was the underlying cause of Rosskamp's death (Ex. I).

Mr. Rosskamp's death resulted from no substantially contributing cause other than accidental bodily injury

The Policy provides coverage if death is caused by an accidental bodily injury and "from no other cause". The principal basis for Prudential's denial of Mrs. Rosskamp's claim is that over anticoagulation "substantially contributed" to the development, progression and size of Rosskamp's intracranial bleed. Prudential therefore contends that over anticoagulation was an "other cause" of death which justifies its decision to deny Mrs. Rosskamp's claim. For the following reasons, Prudential's benefits decision is not the result of a "deliberate, principled reasoning process" and is not "supported by substantial evidence" *Bernstein v. CapitalCare, Inc., supra*.

The analysis of Prudential's benefit decision under *Quesinberry* requires that this Court determine first whether Rosskamp had a pre-existing disease, pre-disposition, or susceptibility to intracranial hemorrhage. The answer to this inquiry is that Rosskamp took Coumadin, a widely prescribed medication which prevents blood clots. Anticoagulation is not a sickness or infirmity, but is the desired and intended therapeutic effect of this medication. As the medical literature cited herein documents, intracranial

hemorrhage is a known and accepted, though infrequent, risk of anticoagulant therapy. To this extent, Mr. Rosskamp had an increased susceptibility to intracranial hemorrhage.

The next inquiry under *Quesinberry* is whether Rosskamp's susceptibility to injury "substantially contributed" to the development, progression and size of the fatal intracranial bleed which developed as a result of the accidental fall. For the reasons set forth below, the record before this Court does not support Prudential's determination that Coumadin anticoagulation "substantially contributed" to Rosskamp's intracranial hemorrhage. Instead, the only reasonable conclusion on the record before this Court is that the relationship between Coumadin anticoagulation and Rosskamp's intracranial hemorrhage can not be quantified and therefore the relationship is one of "undetermined degree".

Dr. Ashker, Rosskamp's treating physician, has certified in the Proof of Death - Attending Physician Statement (Ex. H) that the primary cause of death was "intracranial hemorrhage" which resulted when "patient fell and hit his head". Although Dr. Ashker acknowledged that "anticoagulation for A. fib" was a secondary or contributory cause of death, he further indicated that the closed head injury from the fall was "directly and independently of all other causes sufficient to produce death". Moreover, he stated that the extent to which any impairment (*e.g.*, over anticoagulation) contributed to Rosskamp's death was "not known". Dr. Ashker's certification that the accidental fall was the primary cause of death, and that the extent to which any other impairment contributed to Rosskamp's death is not known, is evidence that over anticoagulation was not a substantial contributing cause of Rosskamp's death.

In support of his determination that anticoagulation was a substantial contributing cause of death, Prudential's Dr. Kowalski relied on the Stiles article (Ex. O), which reports that INR's greater than 3.0 carry "more than twice the risk of intracranial bleeding". A careful reading of Stiles, however, reveals that this report fails to establish that over anticoagulation substantially contributed to Mr. Rosskamp's intracranial bleed.

Stiles describes a study of 13,115 patients who received Coumadin for atrial fibrillation. In this particular study population, INR's were within the therapeutic range less than 20% of the time for about one third of the patients studied, and only 19% of this group had INR's in the therapeutic range all or most of the time. Thus, according to Stiles, the INR for most Coumadin patients is outside the therapeutic range most of the time, either above or below. To this extent, Rosskamp's supra-therapeutic INR does not appear to be unusual. [13]

Stiles reports that patients in his study population experienced only 62 intracranial bleeds during 13,200 person-years of INR monitoring. This translates into a 0.5% risk that a patient on Coumadin will experience an intracranial bleed in any given year. Thus, the risk of intracranial hemorrhage in a patient with a supratherapeutic INR appears to be about 1% per year, based on Stiles finding that patients with supratherapeutic INR's have approximately twice the risk of intracranial hemorrhage relative to patients with therapeutic INR levels. The low incidence of intracranial bleeding among over

[13] Rosskamp's INR was 4.7 on 2/9/11 at 2:17 p.m. Even though Dr. Ashker reported that the family declined fresh frozen plasma [**Ex. E**, 000078], which is used to reverse the effects of over anticoagulation [**Ex. P**, (Bonville)], lab results indicate that Rosskamp's INR fell to 1.40 (below the therapeutic range) on 2/10/11 at 4:10 a.m., a little more than

anticoagulated patients provides no support for Dr. Kowalski's conclusion that over anticoagulation "substantially contributed" to the development, progression and size of Rosskamp's intracranial bleed. If anything, Stiles suggests that it is unlikely that over anticoagulation was even a contributing cause, much less a substantially contributing cause of Rosskamp's death.

The unsupported conclusions of an ERISA plan administrator's medical consultant do not constitute substantial evidence in support of a decision to deny benefits. There must be a reasonable basis for a medical consultant's conclusions. *Duperry v. Life Ins. Co. of North America, supra; Stup v. Unum Life Ins. Co. of America, supra.* The Stiles article in Medscape is the only basis cited by Dr. Kowalski for his conclusion that over anticoagulation "substantially contributed" to Rosskamp's intracranial hemorrhage. Because Stiles provides no support for this conclusion, Dr. Kowalski's medical review does not constitute substantial evidence in support of Prudential's decision to deny Mrs. Rosskamp's claim.

Moreover, Dr. Kowalski's assertion that patients with INR's greater than 3.0 have "more than twice the risk of intracranial bleeding" refers to an increased risk of intracranial hemorrhage among over anticoagulated Coumadin patients *relative* to patients with INR's in the therapeutic range. Dr. Kowalski disregarded the low *absolute* risk (1% per year) that an over anticoagulated patient will experience an intracranial

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12 later [**Ex. N**, 000139]. There is no record of Rosskamp's INR during the 2/7/11 - 2/11/11 period, other than the 2/9/11 and 2/10/11 lab results.

hemorrhage. [14] In this manner, Dr. Kowalski selectively reported the results of the Stiles study in a biased and misleading manner. This is a strong indication that Prudential's decision to deny benefits was not the result of a deliberate, principled reasoning process. *E.g.*, *Stup v. UNUM Life Ins. Co. of America, supra.*

Dr. Esce's determination that supratherapeutic anticoagulation substantially contributed to Mr. Rosskamp's death is similarly flawed. Without providing any supporting rationale, Dr. Esce opines in his report (Ex. L) that Mr. Rosskamp would not have died as the result of his closed head injury, but for his over anti-coagulation. Even if Dr. Esce had provided a reasonable basis for his opinion, it would not constitute substantial evidence that supratherapeutic anticoagulation was a substantial contributing cause of Mr. Rosskamp's death. In *Quesinberry*, the decedent would not have died as the result of a routine injection of contrast dye in preparation for a CT scan, but for her pre-existing medical condition (neurosarcoidosis), which in combination with the contrast agent caused a fatal toxic reaction. If "but for" causation were sufficient to satisfy the *Reliance Standard* "substantially contributes" test, then the plaintiff in *Quesinberry* would not have prevailed.

Dr. Esce principally relies on the Bonville study (Ex. P), which reported that patients who take anticoagulants "are over three times as likely to die from trauma". Bonville, though, acknowledges the ongoing "controversy" concerning the association

[14] Similarly, the Punthakee article cited by Dr. Esce discusses several studies which reported that patients who take anticoagulants are at a significantly increased risk of intracranial hemorrhage *relative* to patients who do not take anticoagulants. However, consistent with Stiles, the studies which Punthakee cites indicate that the absolute risk of intracranial hemorrhage for patients who take anticoagulants is low (1.1%).

between anticoagulation and mortality risk in trauma patients. Bonville cites several studies which have concluded that the risk of mortality from trauma is the same for patients who take anticoagulants and patients who do not:

> … Fortuna *et al* studied 416 patients greater than 50 years of age and found no difference in mortality in those patients who had pre injury WAA use. Although a closer examination of this study does show a greater mortality of patients on warfarin, there was no separate analysis of warfarin only compared to controls. Ahmed and colleagues found no difference in mortality in their review of 29 patients with traumatic brain injury who were taking WAA compared with 63 patients not on WAA.
>
> In another large study, Wojcik *et al* used the Pennsylvania Trauma Outcome Study database to review patients admitted with pre injury warfarin. In the head injury cohort, there were no significant differences between the warfarin (n = 416) and the control group (n= 416) …. Mortality (7.5% v. 8.2%) … [was] similar between the control and treated patients. [15]

[**Ex. P**, 000492]

Moreover, Bonville acknowledges that the increased risk of mortality from trauma for Coumadin patients does not necessarily mean that Coumadin is the cause of the increased risk. It could be that Coumadin "merely acts as a marker for comorbidities that lead to worse outcomes" [**Ex. P**, 000496].

Because the association between anticoagulant medication and mortality risk in trauma patients is unsettled, Bonville supplies an insufficient and unreliable basis for Dr. Esce's conclusion that supratherapeutic anticoagulation "substantially contributed" to Rosskamp's demise. The conflicting and inconclusive medical studies instead support the conclusion that there is a "mere relationship of undetermined degree" between anticoagulant use and the risk of death from traumatic injury. For this reason, Dr. Esce's

[15] "WAA" is an abbreviation for warfarin and antiplatelet agents.

opinion does not constitute substantial evidence in support of Prudential's denial of Mrs. Rosskamp's benefits claim. *Duperry v. Life Ins. Co. of North America, supra; Stup v. Unum Life Ins. Co. of America, supra.* Moreover, Dr. Esce's failure to consider the controversy concerning the relationship between anticoagulant medication and mortality risk is an indication that his determinations were not the result of a deliberate, principled reasoning process. *Stup v. Unum Life Ins. Co. of America, supra.*

If Prudential's medical consultants had cited medical studies that establish the factors that reliably predict which Coumadin patients are likely to experience a disabling or fatal intracranial hemorrhage, and Mr. Rosskamp fit the profile of a patient at risk for such a complication, perhaps Prudential then could have reasonably determined that anticoagulation therapy substantially contributed to Mr. Rosskamp's intracranial bleed. As Punthakee (Ex. Q) notes, though, "little research has been done" to determine which Coumadin patients are at risk for disabling or fatal intracranial hemorrhage. Because medical science is presently unable to identify at risk patients, this Court must conclude that there is "a mere relationship of undetermined degree" between Rosskamp's Coumadin usage and his fatal intracranial hemorrhage.

Coverage Exclusions in the Policy for Sickness and Medical Treatment of Sickness are Inapplicable

An ERISA plan administrator carries the burden of proving that a claim for benefits falls within the scope of a coverage exclusion under the plan. *Jenkins v. Montgomery Ind.*, 77 F.3d 740 (4th Cir. 1996); *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038 (11th Cir.1998); *Mario v. P & C Food Markets, Inc.*, 313 F.3d 758 (2nd

Cir. 2002); *Rasenack ex rel. Tribolet v. Aig Life Ins. Co.*, 585 F.3d 1311 (10th Cir., 2009); *McCartha v. National City Corp.,* 419 F.3d 437 (Fed. 6th Cir., 2005). *Cf. Boyd & Stevenson Coal Co. v. Director, Office of Workers' Compensation Programs*, 407 F.3d 663 (4th Cir. 2005); *ACE American Insurance Co. v. Ascend One Corp*., 570 F. Supp.2d 789 (D. Md. 2008); *Mutual Fire Ins. Co. v. Ackerman*, 872 A.2d 110, 162 Md. App. 1 (2005). The terms of an exclusion cannot be extended by interpretation but must be given a strict and narrow construction. *Megonnell v. United States Auto. Ass'n,* 368 Md. 633, 796 A.2d 758 (2002). Since exclusions are designed to limit or avoid liability, they will be construed more strictly than coverage clauses and must be construed in favor of finding coverage. *Id.*

Sickness Exclusion

In its 6/6/11 denial letter (Ex. J), Prudential relied on the exclusion for loss resulting from "Sickness, whether the Loss results directly or indirectly from the Sickness" [16] Prudential determined that this exclusion applied because "Mr. Rossney's (*sic*) cause of death did not result directly from that Injury but was due to a sickness (Atrial Fibrillation) …" [17] Atrial fibrillation, though, is not listed on the death certificate (Ex, G) as a cause of death, and there is no indication in Rosskamp's medical records that his health care providers ever considered atrial fibrillation to be a cause of death, either directly or indirectly.

[16] Sickness is defined in the Policy as "any disorder of the body or mind of a Covered Person, but not an Injury". [**Ex. C,** 000466].

The implied rationale for Prudential's reliance on the sickness exclusion appears to be as follows: atrial fibrillation, a sickness, was the medical indication for Coumadin, which caused anticoagulation, which contributed to Rosskamp's intracranial bleed. If this Court determines that anticoagulation was not a "cause" of death within the meaning of *Reliance Standard* and *Quesinberry*, then it necessarily follows that the sickness exclusion is inapplicable. In any event, Prudential's expansive interpretation of the sickness exclusion is plainly unreasonable, because the connection between atrial fibrillation and Mr. Rosskamp's fatal intracranial hemorrhage is too attenuated. At most, atrial fibrillation is a cause of a cause of a cause of Rosskamp's fatal intracranial bleed. Taking Prudential's conflict of interest into account, its unreasonable interpretation of the sickness exclusion is a further indication that the decision to deny Mrs. Rosskamp's claim was not the result of a "deliberate, principled reasoning process", *Bernstein v. CapitalCare, Inc.*, *supra*.

Medical Treatment of Sickness Exclusion

Prudential also relies on the coverage exclusion for death caused by "medical or surgical treatment of Sickness, whether the Loss results directly or indirectly from the treatment". According to Prudential, this exclusion is applicable because Coumadin, a medical treatment, caused Mr. Rosskamp's over anticoagulation, which was a contributing cause of his fatal intracranial hemorrhage. [**Ex. J**, 000007]. If this Court determines that anticoagulation was not a "cause" of death, though, then it necessarily

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[17] In its 12/2/11 letter denying Mrs. Rosskamp's administrative appeal (Ex. M), Prudential did not rely on the sickness exclusion. However, Prudential has not conceded that its earlier reliance on this exclusion was erroneous.

follows that the exclusion for medical treatment of sickness, like the exclusion for sickness, is inapplicable.

Moreover, cases which have upheld benefit denials based on the medical treatment exclusion in an accidental death policy have generally involved accidental injuries which were the result of medical errors and mishaps. *See, e.g., Whetsell v. Mutual Life Insurance Co. of New York*, 669 F.2d 955 (4th Cir. 1982)(surgical patient died as result of bacterial endocarditis contracted from infected I.V.); *Handler v. Metropolitan Life Insurance Co*., 193 F.Supp.2d 864 (D. Md. 2002)(surgical patient died as result of lung perforation during catheter placement); *Reid v. Aetna Life Ins. Co.*, 440 F. Supp.1182 (S.D. Ill. 1977)(patient died as result of mistaken injection with muscle relaxant instead of normal saline); *Pickard v. Transamerica Occidental Life Ins. Co.*, 663 F.Supp. 126 (W.D. Mich., 1987)(death due to drinking wrong solution in preparation for colonoscopy); *Reid v. Aetna Life Ins. Co.*, 440 F. Supp. 1182 (S.D. Ill., 1977)(accidental injection of lethal drug).

Mr. Rosskamp's intracranial hemorrhage was not the result of medical error or mishap involving Coumadin. For example, Mr. Rosskamp did not experience a fatal intracranial hemorrhage because Coumadin was misprescribed or contraindicated. He did not receive an overdose of this medication. On the contrary, the record reflects that he took his medication exactly as prescribed and for its intended therapeutic purpose. Plaintiff has discovered no case in which a court has upheld a denial of accidental death benefits based on the medical treatment exclusion in the absence of an injury caused by medical error or mishap. Construing the medical treatment exclusion strictly, Plaintiff

respectfully suggests this Prudential's expansive interpretation of this provision was unreasonable.

Conclusion

For all of the foregoing reasons, it was not reasonable and it was an abuse of discretion for Prudential to deny Mrs. Rosskamp's claim for accidental death benefits. Accordingly, Plaintiff respectfully requests that this Court enter summary judgment in her favor, and for such other and further relief as justice may require.

Date: 6/14/12

/s/ James P Koch
1101 St. Paul St.
Suite 404
Baltimore, MD 21202
410 539 7816
Attorney for Mary Rosskamp