

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and SHANNON ANDREWS,

Plaintiffs,

v.

ORDER

17-cv-264-wmc

ROBERT J. CONLIN, STATE OF WISCONSIN
DEPARTMENT OF EMPLOYEE TRUST
FUNDS, STATE OF WISCONSIN GROUP
INSURANCE BOARD, MICHAEL S. FARRELL,
STACEY ROLSON, CHARLES GRAPENTINE,
WAYLON HURBURT, THEODORE NIETZKE,
J.P. WIESKE, BOB ZIEGELBAUER, JENNIFER
STEGALL, ROBERT WIMMER, HERSCHEL
DAY, and NANCY THOMPSON,

Defendants.

During the telephonic conference last week, the parties raised an issue as to the scope of admissible testimony of one of defendants' witnesses and, more generally, the admissibility of evidence and argument challenging plaintiffs' proof of causation. The court ordered the parties to file supplemental briefs on this issue. (Dkt. ##230-231.) Having reviewed this briefing, the court provides the following guidance on the scope of permissible testimony and argument. *First*, defendants may neither elicit testimony nor argue that third-party insurance providers could have adopted their own blanket exclusion for gender-confirming surgeries and procedures if the challenged Exclusion was not in place. Defendants' responses to plaintiffs' second set of requests for production, in which defendants stated that the Uniform Benefits is the "only document that provides the criteria used to determine whether coverage is available for surgery to treat a medical condition, injury, infection, or congenital condition" (Defs.' Resp. (dkt. #199-1) 3-4),

estops them from making such a challenge. Moreover, such a blanket exclusion would violate the terms of the Uniform Benefits and federal laws for reasons explained in the court's summary judgment opinion.¹

Second, in seeking reimbursement of the cost of surgery it is plaintiffs' burden to demonstrate that it is more likely than not that the surgery would have been covered but for the Exclusion. As such, to the extent defendants can lay a proper foundation, their designated witness Eileen Mallow may testify and defendants may argue that, generally speaking, third-parties contractually bound to provide services under the terms of the Uniform Benefits could find a specific procedure not "medically necessary," subject to appeal. Still, absent a satisfactory proffer made outside of the juries' presence, Mallow would appear to lack personal knowledge to opine as to whether *plaintiffs'* gender-confirming surgery and procedures were medically necessary, much less whether a third-party provider would dispute plaintiffs' treatment providers' medical opinion that the surgery or procedures were medically necessary. Accordingly, this leaves defendants with the argument that plaintiffs have failed to prove a third-party would have found the procedure medically necessary under the Uniform Benefits.²

¹ For this reason, even if listed as an exhibit, it would appear that defendants would be precluded from arguing non-coverage under Dean Health Plan Medical Policy MP9469. (*See* Defs.' Suppl. Br. (dkt. #231) 7.) Indeed, at least by virtue of the version available online, that policy seems to override its own blanket determination of medical necessity for Medicare and BadgerCare patients, as well as others whose private insurance allows for coverage of "sex transformation services." *See* <https://www.deancare.com/DHP/media/Documents/Medical-Policies/Dean-Sex-Trans-Surgery-Std-9469.pdf?ext=.pdf>.

² The court is sympathetic to plaintiffs' argument that defendants effectively waived this argument by stating that the Uniform Benefits controlled, but that does not preclude defendants from arguing that third-party insurance providers play a separate role in approving or denying coverage *consistent with the Uniform Benefits*.

Third, regardless of whether the jury awards plaintiffs compensatory damages based on their out-of-pocket costs of surgeries and related therapies, plaintiffs may still argue that the Exclusion itself -- in other words, being subjected to a blanket discrimination -- caused them psychological pain and suffering.

Fourth, and finally, to address lingering concerns about causation as a separate element of plaintiffs' damage claim, the court has decided to grant defendants' request for a separate proximate cause verdict question as to each plaintiff. Accordingly, the court attaches to this order, consistent with that decision, revised closing instructions and a special verdict form. The parties will have an opportunity to review these changes with the court either at the 8:30 conference tomorrow morning or some other break during trial.

Entered this 8th day of October, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

CLOSING INSTRUCTIONS

A. Introduction

Ladies and Gentlemen of the Jury:

You are about to hear closing arguments of the parties. Before these arguments, I will instruct you on the law. After closing arguments, I will provide very brief instructions governing your deliberations. After that, the case will be in your hands.

1. Questions for Deliberations

As I explained at the outset of this trial, my job is to decide what rules of law apply to this case and to explain those rules to you. It is your job to follow the rules, even if you disagree with them or don't understand the reasons for them. You must follow all of the rules; you may not follow some and ignore others.

The case will be submitted to you in the form of a special verdict consisting of 4 questions. [Read special verdict form.] In answering the questions, you should consider only the evidence that has been received at this trial. Do not concern yourselves with whether your answers will be favorable to one side or another, or with what the final result of this lawsuit may be.

2. Burden of Proof

When a party has the burden to prove any matter by "a preponderance of the evidence," it means that you must be persuaded by the testimony and exhibits that the matter sought to be proved is more probably true than not true.

B. Compensatory Damages

As the party asking for damages, plaintiffs have the burden of convincing you, by a preponderance of the evidence that: (1) the Exclusion proximately caused each plaintiff injury or damage; *and* (2) the amount of those damages.

1. Proximate Cause

Each plaintiff must prove by a preponderance of the evidence that the Exclusion proximately caused her injury or damage. Here, an injury or damage is “proximately caused” by the Exclusion if it appears from the evidence in the case that the Exclusion was a substantial factor in bringing about or actually causing the injury or damage to the plaintiff, and that the plaintiff’s injury or damage was either a direct result or a reasonably probable consequence of the Exclusion.

If you find that a plaintiff has not met her burden of demonstrating proximate causation, you must answer the relevant question for that plaintiff on the verdict form “No.” If you find that a plaintiff has met her burden of demonstrating proximate causation, you must answer the relevant question for that plaintiff on the verdict form “Yes.” Please note that questions nos. 2 and 4 in the verdict form are only to be answered if you answer the immediately preceding question “Yes.” Please read any bolded directions after a question carefully to ensure that you are not answering questions needlessly.

2. Amount of Damages

If you find that either plaintiff has shown the Exclusion of coverage for gender-confirming surgery and related hormone therapy for state employees caused her injury or damage, then you must determine the amount of money that will fairly and reasonably

compensate that plaintiff for any injury or damage sustained *as a result of the Exclusion*. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money. If you find they were caused by the Exclusion, a damage award may include both the physical and mental aspects of injury, even if they are not easy to measure.

Do not measure damages by what the lawyers ask for in their arguments. Their opinions as to what damages should be awarded should not influence you unless their opinions are supported by the evidence. It is your job to determine from the evidence you have seen and heard what amount of the damages, if any, were sustained by virtue of the Exclusion. Examine that evidence carefully and impartially. Do not add to the damages award or subtract anything from it because of sympathy to one side or because of hostility to one side.

In assessing damages here, you should consider the following types of compensatory damages:

- a) The costs of surgeries and hormone therapy received and paid for by the plaintiffs that were not covered by their State employee health insurance because of the Exclusion, including costs of financing that medical care;
- b) The reasonable costs of other medical care that plaintiffs reasonably needed, actually received, and paid for that would not have been covered but for the Exclusion; and
- c) Mental and emotional suffering resulting from the Exclusion. No evidence of the dollar value of physical, mental or emotional pain and suffering has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate plaintiffs for the injuries they have sustained.

On the other hand, if you find that plaintiffs have failed to prove any compensatory damages, you must return a verdict for them in the amount of *one* dollar.

C. Damages Period

As described above, you should compensate plaintiffs for any injury that you find they sustained during the period of their employment by the State of Wisconsin to the present day directly resulting from the wrongful Exclusion at issue in this lawsuit. Shannon Andrews has been a State employee and subject to the Exclusion from March 2014 to the present. Alina Boyden has been a State employee and subject to the Exclusion from May 2015 to the present. You heard testimony from plaintiffs about their gender dysphoria and efforts to treat that medical condition, which *predate* their employment with the State of Wisconsin, and thus also predate being subject to the Exclusion of coverage at issue in this lawsuit. In determining the appropriate damages award, you should *not* award plaintiffs damages for any uncovered out-of-pocket costs or emotional distress they experienced before the dates of their employment, as described above, or beyond today.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and SHANNON ANDREWS,

Plaintiffs,

VERDICT - DAMAGES

v.

17-cv-264-wmc

STATE OF WISCONSIN DEPARTMENT OF
EMPLOYEE TRUST FUNDS, and STATE OF
WISCONSIN GROUP INSURANCE BOARD,

Defendants.

We, the jury, for our damages verdict, do find as follows:

QUESTION NO. 1: Has plaintiff Alina Boyden proven by a preponderance of the evidence that the Exclusion proximately caused her injury or damage?

Yes _____ No _____

If you answered Question No. 1 "Yes," then answer Question No. 2. If you answered Question No. 2 "No," then skip Question No. 2 and proceed to Question No. 3.

QUESTION NO. 2: What amount of money do you award as compensatory damages to plaintiff Alina Boyden?

\$ _____

QUESTION NO. 3: Has plaintiff Shannon Andrews proven by a preponderance of the evidence that the Exclusion proximately caused her injury or damage?

Yes _____ No _____

If you answered Question No. 3 “Yes,” then answer Question No. 4. If you answered Question No. 3 “No,” then skip Question No. 4 and proceed to the end of the verdict form and sign and date it.

QUESTION NO. 4: What amount of money do you award as compensatory damages to plaintiff Shannon Andrews?

\$ _____

Presiding Juror

Madison, Wisconsin
Dated this ____ day of October, 2018.