NO. 95251-5

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL MURRAY,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER
DEPARTMENT OF LABOR & INDUSTRIES

ROBERT W. FERGUSON
Attorney General

Anastasia Sandstrom
Senior Counsel
WSBA No. 24163
Office Id. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-6993

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUES 2

1. Legislative decisions delegated to the executive branch are constitutional if the Legislature has provided procedural safeguards to control arbitrary administrative action. Here there is notice, open hearing, public comment, reconsideration of decisions, and conflict screening, combined with judicial review through a constitutional writ. Do these procedures provide adequate procedural safeguards so the delegation of legislative power to the HTCC was lawful? 2

2. RCW 70.14.120(3) provides that a workers' compensation treatment disallowed by the HTCC "shall not be subject to a determination in the case of an individual patient as to whether it is medically necessary, or proper and necessary treatment." The Department followed the HTCC's determination that a procedure Murray sought was not a covered benefit. Did the Board of Industrial Insurance Appeals and superior court correctly decline to consider whether Murray's denied procedure was proper and necessary treatment? 2

III. FACTS 2

A. The HTCC Uses an Open and Transparent Process to Make Health Care Assessments and Determinations 2

B. The HTCC Found that the Safety, Efficacy and Cost of FAI Surgery Does Not Warrant Exposing Patients to the Surgery's Hazards 4

C. The Department Denied Payment for FAI Surgery Because the HTCC Has Disapproved This Treatment, and the Board and Superior Court Affirmed 6

IV. ARGUMENT 7

A. No Significant Constitutional Issue Is Presented by the Routine Application of Supreme Court Cases 8

1. Administrative procedural protections: the HTCC Act provides for notice, public comment, conflict screening, and reconsideration of decisions 9

2. Judicial review: interested parties may seek a constitutional writ to review HTCC decisions 11

B. No Issue of Substantial Public Interest Is Presented by Routine Statutory Construction.....15

V. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Armstrong v. State,
91 Wn. App. 530, 958 P.2d 1010 (1998) 14

Atkins v. Parker,
472 U.S. 115, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985) 13

Auto. United Trades Org. v. State,
183 Wn.2d 842, 357 P.3d 615 (2015) 1, 12, 20

Barry & Barry, Inc. v. Dep't of Motor Vehicles,
81 Wn.2d 155, 500 P.2d 540 (1972) ..... passim

Brown v. Vail,
169 Wn.2d 318, 237 P.2d 263 (2010) 10, 13

Buchanan v. Int'l Bhd. of Teamsters,
94 Wn.2d 508, 617 P.2d 1004 (1980) 20

City of Auburn v. King Cty.,
114 Wn.2d 447, 788 P.2d 534 (1990) 1, 12

Det. of Williams,
147 Wn.2d 476, 55 P.3d 597 (2002) 17

Holbrook, Inc. v. Clark Cty.,
112 Wn. App. 354, 49 P.3d 142 (2002) 13

Joy v. Dep't of Labor & Indus.,
170 Wn. App. 614, 285 P.3d 187 (2012),
review denied, 176 Wn.2d 1021 (2013) ..... passim

Lenk v. Dep't of Labor & Indus.,
3 Wn. App. 977, 478 P.2d 761 (1970) 18

Matthews v. Dep't of Labor & Indus.,
171 Wn. App. 477, 288 P.3d 630 (2012) 18

McDonald v. Hogness,
92 Wn.2d 431, 598 P.2d 707 (1979) 1, 13

Pierce Cty. Sheriff v. Civil Serv. Comm'n of Pierce Cty.,
98 Wn.2d 690, 658 P.2d 648 (1983) 11, 14

Saldin Sec., Inc. v. Snohomish Cty.,
134 Wn.2d 288, 949 P.2d 370 (1998) 11

Williams v. Seattle Sch. Dist. No. 1,
97 Wn.2d 215, 643 P.2d 426 (1982) 11

Wynn v. Earin,
163 Wn.2d 361, 181 P.3d 806 (2008) 19

Constitutional Provisions

Const. art. IV, § 6 11

Statutes

Laws of 2006, ch. 307 18

Laws of 2006, ch. 307, § 6 19

Laws of 2016, 1st Spec. Sess., ch. 1. 20

RCW 34.05.320 10

RCW 34.05.325 ..... 9, 10

RCW 34.05.328 10

RCW 34.05.570(2)(c) 14

RCW 42.30 4

RCW 42.30.060 10

RCW 42.52.020 10

RCW 70.14.080(6) 3

RCW 70.14.080-.130 2

RCW 70.14.090(1) 2

RCW 70.14.090(3)(a) 4, 10

RCW 70.14.090(4) 4, 10

RCW 70.14.100(1)(a) 3

RCW 70.14.100(2) 4, 6, 10

RCW 70.14.100(3) 6

RCW 70.14.100(4) 3

RCW 70.14.100(4)(a) 3

RCW 70.14.100(4)(c) 3

RCW 70.14.110 ..... 3, 9, 16

RCW 70.14.110(1) 3, 4

RCW 70.14.110(1)(a) 15

RCW 70.14.110(1)(b) 15

RCW 70.14.110(2) 9

RCW 70.14.110(2)(a) 4

RCW 70.14.110(2)(b) 4, 9

RCW 70.14.120 ..... 6, 15, 16, 18

RCW 70.14.120(1) 4, 16

RCW 70.14.120(1)(a) 18

RCW 70.14.120(3)..... passim

RCW 70.14.120(4)..... 18

RCW 70.14.120(b)..... 18

Rules

RAP 13.4..... 20

RAP 13.4(b)..... 8

Regulations

WAC 182-55-030..... 9

Other Authorities

Final Bill Report on E2SHB 2575, 59th Wash. Leg. (Wash. 2006)..... 3

I. INTRODUCTION

This case involves applying well-established constitutional standards to the Legislature's delegation of power to an administrative agency. The Legislature wanted evidence-based medicine—not the vagaries of individual workers' compensation cases—to determine whether medical procedures are safe and effective. The Legislature created the Health Technology Clinical Committee (HTCC) and designated medical experts to determine when the State will cover selected medical procedures. The state constitution permits such a delegation if procedural safeguards exist to control arbitrary administrative action.[1]

A routine application of this test shows that the HTCC decision-making process contains robust procedural protections including notice, open public meetings, and multiple opportunities for public comment. Because individuals can challenge HTCC decisions by obtaining a constitutional writ, the HTCC does not have "unreviewable authority," as Murray repeatedly asserts. Pet. 1, 14, 16.[2]

This case does nothing more than apply existing law and does not present new ground warranting Supreme Court review.

---

[1] *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972).

[2] *See Auto. United Trades Org. v. State*, 183 Wn.2d 842, 859-61, 357 P.3d 615 (2015); *City of Auburn v. King Cty.*, 114 Wn.2d 447, 452, 788 P.2d 534 (1990); *McDonald v. Hogness*, 92 Wn.2d 431, 446-47, 598 P.2d 707 (1979).

II. ISSUES

Review should not be granted, but if it is, the issues are:

1. Legislative decisions delegated to the executive branch are constitutional if the Legislature has provided procedural safeguards to control arbitrary administrative action. Here there is notice, open hearing, public comment, reconsideration of decisions, and conflict screening, combined with judicial review through a constitutional writ. Do these procedures provide adequate procedural safeguards so the delegation of legislative power to the HTCC was lawful?

2. RCW 70.14.120(3) provides that a workers' compensation treatment disallowed by the HTCC "shall not be subject to a determination in the case of an individual patient as to whether it is medically necessary, or proper and necessary treatment." The Department followed the HTCC's determination that a procedure Murray sought was not a covered benefit. Did the Board of Industrial Insurance Appeals and superior court correctly decline to consider whether Murray's denied procedure was proper and necessary treatment?

III. FACTS

A. The HTCC Uses an Open and Transparent Process to Make Health Care Assessments and Determinations

The Legislature formed the HTCC to establish an independent committee to judge selected medical technology and procedures by their safety, efficacy, cost-effectiveness, and health outcomes. RCW 70.14.080-.130. The HTCC is an independent committee of 11 practicing medical professionals. RCW 70.14.090(1).The HTCC evaluates medical evidence in determining which health technologies and procedures the State will

cover, and "if covered, the criteria which the participating agency administering the program must use to decide whether the technology is medically necessary, or proper and necessary treatment." RCW 70.14.110(1). Participating state agencies are the Health Care Authority, the Department of Labor and Industries, and the Department of Social and Health Services. RCW 70.14.080(6). The Legislature created the HTCC to incorporate evidence-based medicine into the decision-making process about what technologies and procedures the State would fund. *See* Final Bill Report on E2SHB 2575, 59th Wash. Leg., at 2-3 (Wash. 2006).

The HTCC reviews a procedure or technology when there are concerns about its safety, efficacy, or cost-effectiveness, especially relative to existing alternatives, or significant variations in its use. RCW 70.14.100(1)(a). The HTCC obtains a report from an evidence-based research center and requires the researchers to evaluate evidence related to a medical procedure's safety, health outcome, and cost data, and evidence submitted by any interested party. RCW 70.14.100(4)(a), (c). The HTCC then considers the "evidence regarding the safety, efficacy, and cost-effectiveness of the technology as set forth in the systematic assessment conducted under RCW 70.14.100(4)," public comment, and expert treatment guidelines to determine the conditions under which the State should cover a procedure. RCW 70.14.110. The HTCC Act mandates that

participating agencies comply with HTCC determinations. RCW 70.14.110(1), .120(1). If the HTCC covers a treatment, the HTCC's coverage criteria establish what participating agencies must use to decide medical necessity. RCW 70.14.110(1).

The HTCC Act provides transparency and independence in the HTCC's decision-making process:

- In making its determination, the committee shall consider "in an open and transparent process," evidence about the safety, efficacy, and cost-effectiveness of the particular technology. RCW 70.14.110(2)(a).

- The committee must provide an opportunity for public comment. RCW 70.14.110(2)(b).

- The committee meetings and any advisory group meetings are subject to the Open Public Meetings Act (RCW 42.30). RCW 70.14.090(4).

- The committee members may not contract with or be employed by a health technology manufacturer or a participating agency during their term or for 18 months before the appointment, and each member must agree to conflict of interest terms and conditions. RCW 70.14.090(3)(a).

- The coverage determinations must be reviewed at least once every 18 months if evidence has since become available that could change a previous determination. RCW 70.14.100(2).

B. The HTCC Found that the Safety, Efficacy and Cost of FAI Surgery Does Not Warrant Exposing Patients to the Surgery's Hazards

In 2010, the HTCC began its review of hip surgery for femoroacetabular impingement (FAI) syndrome. AR 71. FAI surgery is an

invasive procedure where a surgeon cuts off abnormal bone growths, removes damaged cartilage, and reshapes the femoral neck of the hip. AR 75. Major potential complications include avascular necrosis (cellular death of bone tissue), femoral head-neck fracture, deep infection, significant hip motion limitation, neurovascular injury, and symptomatic venous thromboembolism (blot clot). AR 112-13.

For a year, HTCC conducted an extensive review process that included contracting with an evidence-based researcher who conducted a scientific assessment, holding public meetings, reviewing the scientific evidence, and providing an opportunity for formal public comment. AR 72, 74-390.

Here is the timeline for the public process:

11/3/10:	Preliminary recommendations published
11/16/10:	Public comments due
12/17/10:	Topics published
1/17/11:	Public comments due
4/20/11:	Draft key questions published
5/4/11:	Public comments due
5/31/11:	Key questions finalized
7/27/11:	Draft report finalized
8/17/11:	Public comments due
8/26/11:	Final report finalized (responding to public comments)
9/16/11:	Public deliberation of recommendation and preliminary vote
10/10/11:	Findings and draft decision published
10/24/11	Public comments due
11/18/11:	Public final adoption after considering public comments

AR 74-75, 299-301, 348.

After multiple opportunities for public comment and considering scientific evidence, the HTCC determined that the evidence weighed against FAI surgery and directed the participating state agencies not to cover it. AR 76-79. Since the HTCC decision, no one has requested that the HTCC revisit its FAI surgery determination. AR 72; *see* RCW 70.14.100(2), (3).

C. The Department Denied Payment for FAI Surgery Because the HTCC Has Disapproved This Treatment, and the Board and Superior Court Affirmed

Michael Murray sustained an industrial injury in August 2009. AR 57. The Department allowed his claim and provided medical treatment. AR 57. James Bruckner, MD, asked the Department to authorize surgery regarding Murray's hip condition. AR 57, 60. The Department denied payment for FAI surgery because the HTCC disallowed its coverage. AR 57, 63-64. Since the HTCC's decision binds the Department and because the HTCC's coverage criteria are what the Department must use to decide whether a technology is medically proper and necessary, it has not independently passed on whether the FAI surgery is medically proper and necessary. RCW 70.14.120; AR 58, 63-64. Dr. Bruckner performed the surgery on Murray without authorization from the Department. AR 58, 67-68.

Murray appealed the Department's decision denying payment for the surgery to the Board, which affirmed the Department. AR 3, 16-19, 26. Murray appealed to superior court, which affirmed the Board. CP 1-2, 123-24. Murray appealed to the Court of Appeals, which affirmed the superior court. CP 125. *Murray v. Dep't of Labor & Indus.*, __ Wn. App. __, 403 P.3d 949, 950 (2017). The Court of Appeals held that the Legislature constitutionally delegated its powers because the agency had sufficient procedural protections and because individuals could file writs of certiorari to obtain judicial review. *Murray*, 403 P.3d at 952-54. And "[b]ased on the plain language analysis of the statute," an "HTCC non-coverage determination is a determination that the particular health technology is not medically necessary or proper in *any* case." *Murray*, 403 P.3d at 954 (quoting *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 624, 285 P.3d 187 (2012), *review denied*, 176 Wn.2d 1021 (2013)).

IV. ARGUMENT

This case involves simply applying well-established constitutional and statutory construction principles, so Murray shows no issue warranting review. There is no significant constitutional question, nor is

there an issue of substantial public interest. This Court should deny review. *See* RAP 13.4(b).

A. No Significant Constitutional Issue Is Presented by the Routine Application of Supreme Court Cases

There is no significant constitutional question because the Court of Appeals correctly applied well-settled constitutional case law. The Legislature's delegation of its power to the HTCC to make uniform health care coverage decisions makes sense because it is not practical to have a legislative bill addressing myriad treatment procedures. The Legislature may authorize the executive branch to take action, and a delegation of legislative power is constitutional, when: "(1) the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that [p]rocedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power." *Barry & Barry, Inc., v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972).

Murray does not dispute that the HTCC statute satisfies the test's first prong but argues that applying the second prong shows error. A straightforward application of *Barry & Barry* shows that the Legislature imposed robust procedural protections for the promulgation of HTCC

determinations and that the courts can review the constitutionality of the delegated standards after promulgation through a constitutional writ. Murray is incorrect that "[t]here are no procedural safeguards to control arbitrary Committee action or its abuse of discretionary power." Pet. 15.

1. Administrative procedural protections: the HTCC Act provides for notice, public comment, conflict screening, and reconsideration of decisions

RCW 70.14.110 provides protections similar to those in the Administrative Procedure Act with numerous safeguards for HTCC decisions by statutorily incorporating expertise, transparency, and independence in the HTCC's decision-making process. RCW 70.14.110(2).

The administrative protections in the HTCC Act equal or exceed protections in the APA in at least five ways. First, the HTCC takes public comment—five rounds—for each determination. RCW 70.14.110(2)(b); WAC 182-55-030; AR 74, 299-301, 348. The public comment is more than APA, which mandates only one round of public comment. RCW 34.05.325.

Second, the HTCC provides detailed materials to the public (including the preliminary recommendations, topics, draft key questions, final key questions, draft report, final report, and draft decision). RCW 70.14.110(2)(b); WAC 182-55-030; AR 82-245, 300-01, 325-58. These

filings equate to or exceed the APA filings. *See* RCW 34.05.320, .325, .328. Third, comparable to decision-makers under the APA, the HTCC Act subjects HTCC members to conflict screening: committee members may not contract with a health technology manufacturer or a participating agency during their term or for 18 months before their appointment. RCW 70.14.090(3)(a); RCW 42.52.020. Fourth, unlike unitary-head executive agencies operating under the APA, the HTCC conducts all of its decision-making in public under the Open Public Meetings Act. RCW 70.14.090(4); RCW 42.30.060. Finally, also unlike the APA, the HTCC Act requires decision re-review every 18 months to confirm the determination follows the most up-to-date evidence-based research. RCW 70.14.100(2).

That the APA does not apply to HTCC decisions is not dispositive on whether adequate procedural safeguards exist, as Murray acknowledged below. CP 20 (Murray admits "[n]ot every legislative delegation of authority has to be subject to the APA . . . ."). The Legislature may designate different standards than the APA. *See Brown v. Vail*, 169 Wn.2d 318, 332, 237 P.2d 263 (2010) (drug protocols met constitutional standards even though no review under the APA).[3] Taken

[3] Murray quotes a passage from *Brown* that approves of following APA requirements, but *Brown* did not require the APA to apply. Pet. 16; *Brown*, 169 Wn.2d at 332.

together, the statutory provisions in the HTCC Act mandate notice and comment in public meetings, prohibit conflicts of interest and backdoor dealings, and allow for revised opinions. These robust procedural safeguards in the HTCC Act are more than adequate to control arbitrary administrative action and any administrative abuse of discretionary power.

2. Judicial review: interested parties may seek a constitutional writ to review HTCC decisions

An HTCC decision is subject to judicial review, contrary to Murray's assertions otherwise. Pet. 1, 4, 14-16. While the HTCC Act has no statutory judicial review language, an interested party may obtain review through a constitutional writ. *E.g.*, *Pierce Cty. Sheriff v. Civil Serv. Comm'n of Pierce Cty.*, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983). As this Court has explained, "The superior court has inherent power provided in article IV, section 6 of the Washington State Constitution to review administrative decisions for illegal or manifestly arbitrary acts." *Saldin Sec., Inc. v. Snohomish Cty.*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). "A constitutional right to judicial review still exists notwithstanding the statutory bar. This does not make the statute unconstitutional, but does restrict the nature of judicial review." *Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 218, 643 P.2d 426 (1982). Consistent with this Court's

settled case law, judicial review of HTCC decisions by a constitutional writ provides adequate safeguards.

This Court has repeatedly found the availability of a constitutional writ a sufficient procedural protection to pass the *Barry & Barry* test. Recently, in *Automotive United*, this Court held that a statute that provided no obvious route for judicial review met the *Barry & Barry* procedural safeguards test. *Auto. United Trades Org. v. State*, 183 Wn.2d 842, 861, 357 P.3d 615 (2015). Rejecting a challenge to statutes authorizing the Governor to negotiate fuel tax refunds with tribes, this Court held that separation of powers requires only that procedural safeguards exist, not that the statute create those safeguards. *Id*. at 861-62. Sufficient safeguards exist with the availability of writs of certiorari, among other things. *Id*.[4] And other Supreme Court cases establish that the writ availability provides sufficient review under *Barry & Barry* in challenges involving the alleged unlawful power delegation. *City of Auburn v. King Cty.*, 114 Wn.2d 447, 452, 788 P.2d 534 (1990) (constitutional writ acceptable review of legislative power of board of arbitration); *McDonald v. Hogness*, 92

[4] In *Automotive United*, fewer procedural protections existed compared to here. There, the Governor needed only to provide reports and audits to the Legislature. 183 Wn.2d at 861. This is less onerous than the HTCC statute, which allows for notice and opportunity to comment and decisions made under the Open Public Meetings Act. Yet the *Automotive United* Court held the statute constitutional—pointing to the court challenge, despite no statutory route to judicial review. 183 Wn.2d at 861.

Wn.2d 431, 446-47, 598 P.2d 707 (1979) (review under the arbitrary and capricious or abuse of discretion standards, coupled with published criteria for an administrative body's decisions, were sufficient review for delegation of powers inquiry).

Contrary to Murray's new contention, judicial review need not occur under only the APA or the Industrial Insurance Act. Pet. 4; CP 20, (Murray admits that protections need not be under the APA), 49 (Murray admits that a delegation of authority is constitutional when "[c]ase law permits judicial review"); *see Brown*, 169 Wn.2d at 332.

Finally, Murray suggests there needs to be an "individualized review" of the HTCC decision in his case to satisfy the delegation of power test. Pet. 3. But the state constitution requires no individualized review right of a quasi-legislative decision for a constitutional delegation of legislative power. [5] Even under the APA, judicial review of rulemaking is severely limited. "In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the

[5] The Legislature may establish rights to benefits without individual hearings. *See Atkins v. Parker*, 472 U.S. 115, 129-30, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985) (government may make mass coverage decisions without an individual hearing addressing each individual's claimed entitlement to benefits); *Holbrook, Inc. v. Clark Cty.*, 112 Wn. App. 354, 364, 49 P.3d 142 (2002) (area-wide zoning actions involving the exercise of policy-making are considered legislative and not subject to individual hearing).

agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious." RCW 34.05.570(2)(c). A party cannot contest the rule's merits either in an adjudicative hearing or in a judicial rules review as applied to the individual. *See Armstrong v. State*, 91 Wn. App. 530, 536-37, 958 P.2d 1010 (1998) ("The wisdom or desirability of the rule is not a question for the court's review.").

This judicial review in the APA is nearly identical to the Court's inherent authority to review agency rulemaking. *Compare* RCW 34.05.570(2)(c) *with Pierce Cty.*, 98 Wn.2d at 694 (the superior court's "inherent power of review extends to administrative action which is contrary to law as well as that which is arbitrary and capricious"). Under a constitutional writ challenging an HTCC decision, similar to the APA, an interested party may challenge the legality and constitutionality of the quasi-legislative decision, but the merits of that legislative decision applied to an individual are not before the Court.

The Legislature's delegation of power to the HTCC presents no significant constitutional issue because *Barry & Barry* controls and under the routine application of this test, adequate safeguards exist to control arbitrary administrative action.

B. No Issue of Substantial Public Interest Is Presented by Routine Statutory Construction

Murray quarrels with the routine statutory construction of RCW 70.14.120 but shows no issue warranting review. Murray disagrees with *Joy*'s and *Murray*'s interpretation of the HTCC statute to uphold RCW 70.14.120(3). Pet. 16-18; *Joy*, 170 Wn. App. at 624; *Murray*, 403 P.3d at 954. RCW 70.14.120(3) provides that an HTCC determination "shall not be subject to a determination in the case of an individual patient as to whether it is medically necessary, or proper and necessary treatment." Straightforward principles of statutory construction compel the conclusion that whether an HTCC-reviewed technology is medically necessary is not reviewable in an industrial insurance hearing.

By statute, the HTCC shall determine, for each health technology or procedure reviewed, "[t]he conditions, if any, under which the health technology will be included as a covered benefit in health care programs of participating agencies . . . ." RCW 70.14.110(1)(a). The HTCC determines criteria for when a procedure is "medically necessary, or proper and necessary treatment." RCW 70.14.110(1)(b). When the HTCC decides not to cover a technology, that technology is never proper and necessary as a matter of law. *Joy*, 170 Wn. App. at 624. This is because the technology "shall not be subject to a determination in the case of an individual patient as to whether it is medically necessary, or proper and

necessary treatment." RCW 70.14.120(3). Under the plain language of this statute, "[An] HTCC non-coverage determination is a determination that the particular health technology is not medically necessary or proper in *any* case." *Joy*, 170 Wn. App. at 624.

Murray argues that RCW 70.14.120(3) does not apply to the Board and superior court because they are not participating agencies. Pet. 17-18. RCW 70.14.120(1) provides "A participating agency shall comply with a determination of the committee under RCW 70.14.110 unless [exceptions not applicable here apply.]" In *Joy*, the claimant acknowledged that RCW 70.14.120(1) prohibited the Department, as a participating agency, from approving the spinal cord stimulator after the HTCC determined it was not a covered benefit. *Joy*, 170 Wn. App. at 622. But Joy argued that RCW 70.14.120 allowed a reviewing court to determine that the treatment was proper and necessary for an individual claimant. *Id.* at 622-23. Like Murray, she argued that the "participating agency" reference in subsection (1) applied to limit whom subsection (3) applied to, and under this logic reasoned that subsection (3) did not apply to a reviewing agency or court. *Joy*, 170 Wn. App. at 623; Pet. 17. Joy posited that an HTCC determination does not bind the Board or a superior court under RCW 70.14.120(3). *Joy*, 170 Wn. App. at 623.

The *Joy* Court correctly rejected this argument, holding that the Legislature did not insert subsection (1)'s reference to "participating agency" in subsection (3), so subsection (3)'s prohibition on a "proper and necessary" review applies to the Board and reviewing courts, and the Department. *See Joy*, 170 Wn. App. at 623. This correctly applies the principle that expressly mentioning one thing in one place, but not mentioning it in another, conveys a different meaning. *See Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

The *Joy* Court appropriately recognized the important policy objectives in having uniform policies to ensure that the State pays for only safe and effective procedures and technology. *Joy*, 170 Wn. App. at 621, 626-27. It concluded that absurd results would occur if the Department could not individually determine whether a health technology was proper and necessary treatment, but a reviewing court could do so. *Id.* at 626-27. Holding that an individual claimant's appeal could reverse an HTCC determination would thwart the Legislature's mandate to have a uniform

system to ensure safe and effective treatment. The case law resolves the participating agency issue, so this Court should deny review.[6]

Nor does RCW 70.14.120(4) allow Murray to contest the HTCC decision's merits.[7] *Contra* Pet. 5, 17. RCW 70.14.120(1) and (3) control what an individual may contest in an appeal—namely, the individual cannot claim a denied procedure is proper and necessary treatment. *Joy*, 170 Wn. App. at 624-25. Under subsection (4), an individual has appeal rights to argue that the HTCC decision does not apply to the individual or that the participating agency did not comply with subsections (1)(a) or (b) of RCW 70.14.120. But as the general provision, it does not control over the specific bar to contesting the merits of the treatment. *Joy*, 170 Wn. App. at 624-25. *Joy*'s routine application of this rule does not warrant review.

Finally, Murray is wrong about the veto's import. The Governor's veto message does not show that Murray can appeal a decision that his

---

[6] Also, the Board and superior court could not consider whether the treatment was proper and necessary because they only have appellate jurisdiction of workers' compensation matters, so they could not consider new evidence of whether the treatment was proper and necessary because the Department, which has original jurisdiction, could not consider such evidence. *See Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491-92, 288 P.3d 630 (2012); *Lenk v. Dep't of Labor & Indus*., 3 Wn. App. 977, 986-87, 478 P.2d 761 (1970).

[7] RCW 70.14.120(4) provides: "Nothing in chapter 307, Laws of 2006 diminishes an individual's right under existing law to appeal an action or decision of a participating agency regarding a state purchased health care program. Appeals shall be governed by state and federal law applicable to participating agency decisions."

treatment is not proper and necessary under an HTCC decision. Pet. 17. The statutory provision that the Governor vetoed would have provided for the Health Care Authority to set up a system to review HTCC decisions:

> The administrator shall establish an open, independent, transparent, and timely process to enable patients, providers, and other stakeholders to appeal the determinations of the health technology clinical committee made under section 4 of this act.

Laws of 2006, ch. 307, § 6. It would not have created an individual appeal right to argue a treatment is proper and necessary treatment in an individual case, as Murray suggests. Pet. 14. Knowing the constitutional writ process, the Legislature upheld the veto. *See Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008) (Legislature presumed to know the law). It did not intend to create an individual right to present evidence that a non-covered procedure is proper and necessary treatment because the Legislature adopted subsection (3), which bars individual determinations about proper and necessary treatment.[8]

The *Joy* decision occurred in 2012. 170 Wn. App. at 614. Since then, the Legislature has not amended RCW 70.14.120(3) despite

[8] The veto message's meaning is unclear as to what the Governor believed the bar on individually appealing HTCC determinations meant. Laws of 2006, ch. 307, veto message. To the extent the Governor implies that the bar does not apply, the Court cannot adopt such a rule because it contradicts RCW 70.14.120(3)'s plain language. In any event, the veto message is legislative history, which is irrelevant to the plain language analysis applicable here. *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013) (when statutory language is unambiguous, the court does not use interpretive tools such as legislative history).

amending the HTCC Act in 2016. Laws of 2016, 1st Spec. Sess., ch. 1. By passing on amending RCW 70.14.120(3), the Legislature has acquiesced to the court's statutory construction. *See Buchanan v. Int'l Bhd. of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980). No need exists to revisit this decision.

V. CONCLUSION

The issues here are resolved by applying this Court's precedent in *Barry & Barry*, *Automotive United*, and routine statutory interpretation cases. No new ground is broken here, and this case meets no criterion in RAP 13.4. This Court should deny review.

RESPECTFULLY SUBMITTED this 20th day of December, 2017.

ROBERT W. FERGUSON
Attorney General

A. Sandstrom

ANASTASIA SANDSTROM
Senior Counsel
WSBA No. 24163
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

No. 95251-5

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL E. MURRAY, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES and BROCKS INTERIOR SUPPLY, INC., Respondents.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Answer and this Certificate of Service in the below described manner:

E-Filing via Washington State Appellate Courts Portal:

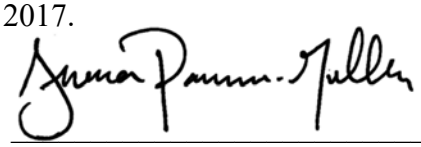
Susan L. Carlson
Supreme Court Clerk
Supreme Court of the State of Washington

E-Mail via Washington State Appellate Courts Portal:

Patrick Palace
Palace Law Offices
patrick@palacelaw.com

Philip Buri
Buri Funston Mumford
philip@burifunston.com

DATED this 20th day of December, 2017.



SHANA PACARRO-MULLER
Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-5808

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

December 20, 2017 - 4:22 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95251-5
Appellate Court Case Title:	Michael E. Murray v. State of Washington, Department of Labor & Industries
Superior Court Case Number:	15-2-00566-1

The following documents have been uploaded:

- 952515_Answer_Reply_Plus_20171220162118SC134693_2917.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  Certificate of Service
  The Original File Name was DeptAnswer.pdf

A copy of the uploaded files will be sent to:

- jordan@palacelaw.com
- patrick@palacelaw.com
- philip@burifunston.com

Comments:

Answer to Petition for Review and Certificate of Service

Sender Name: Shana Pacarro-Muller - Email: shanap@atg.wa.gov
Filing on Behalf of: Anastasia R. Sandstrom - Email: anas@atg.wa.gov (Alternate Email:)

Address:
800 Fifth Avenue, Ste. 2000
Seattle, WA, 98104
Phone: (206) 464-7740

Note: The Filing Id is 20171220162118SC134693