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1 **ARGUMENT**

2 Rather than harmonize RCW 70.14.120(3) and (4), the Department
3 of Labor and Industries’ argument attempts to assert the superiority of
4 subsection 3 over 4. However, the State’s approach of ignoring the
5 mandate of RCW 70.14.120(4) and Governor Gregoire’s Veto Message,
6 creates significant Constitutional questions. The State’s approach would
7 violate Ms. Joy’s due process rights and her right to a jury trial. Rather
8 than read RCW 70.14 in a way that violates the Washington State
9 Constitution, Ms. Joy’s interpretation of RCW 70.14 and Title 51 RCW
10 give effect to every portion of the statute without violating her due process
11 and jury trial rights.

12 **I. Any Deprivation of Ms. Joy’s Vested Right to Receive Medical**
13 **Treatment Under Title 51 RCW Must Be Subject To The Due Process**
14 **Clause of Article I, Section 3 Of The Washington State Constitution.**

15 The Department argues that the only reasonable interpretation of
16 RCW 70.14.120(3) is that once the Health Technology Clinical
17 Committee (HTCC) acts to exclude a procedure, an injured worker’s
18 individual right to appeal has been extinguished. (Respondent’s Brief pp.
19 13-14). The Department further argues that because the right to appeal
20 has been extinguished, the only reasonable interpretation of RCW
21 70.14.120(4) is that injured workers retain the right to appeal other
22 decisions of the Department. (Respondent’s Brief pp. 15-19). Instead of
23 having an individual right to appeal, the Department argues injured
24 workers have the individual right to attend the meetings of the HTCC.
25 (Respondent’s Brief p. 11) Finally, the Department takes the position that

1 RCW 70.14.120(3) & (4) are mere procedural changes, not substantive
2 changes to the vested property rights of injured workers. (Respondent’s
3 Brief pp. 19-21).

4 **A. Ms. Joy has a vested property right to further medical**
5 **care under her workers’ compensation claim.**

6 Assuming, *arguendo*, the Department’s interpretation of RCW
7 70.14.120 is correct, then it creates serious questions whether RCW
8 70.14.120 unconstitutionally violates Ms. Joy’s due process rights under
9 the 14th Amendment of the U.S. Constitution and Article I, Section 3 of
10 the Washington Constitution. In its Response Brief, the Department raises
11 the issue, for the first time, that RCW 70.14.120 does not affect Ms. Joy’s
12 substantive (i.e. vested) right to medical treatment under Title 51 RCW.
13 In other words, for the first time the State is asserting the position that
14 RCW 70.14.120 does not adversely affect Ms. Joy’s constitutional right to
15 due process.

16 To prove deprivation of due process, Ms. Joy must legitimately
17 establish entitlement to the property at issue. *Willoughby v. Dep’t of*
18 *Labor & Indus.*, 147 Wn. 2d 725, 732 (2001). Legitimate property rights
19 must be vested with Ms. Joy. *Id.* Once a claim for benefits under the
20 Industrial Insurance Act (IIA) is allowed, then the injured worker’s
21 property right to current and future benefits are vested. *Willoughby*, 147
22 Wn. 2d at 733 (“All workers who suffer an industrial injury covered by the
23 Industrial Insurance Act, Title 51 RCW, have a vested interest in disability
24 payments upon determination of an industrial injury”).

1 While *Willoughby* addressed permanent partial disability
2 payments, Ms. Joy’s right to medical treatment under the IIA is similarly
3 vested. RCW 51.36.010 states, “Upon the occurrence of any injury to a
4 worker entitled to compensation under the provisions of this title, he or
5 she shall receive proper and necessary medical and surgical services at the
6 hands of a physician of his or her own choice.” (emphasis added).
7 Therefore, it is reasonable for this Court to conclude Ms. Joy’s right to
8 medical treatment became a vested property right as soon as her claim was
9 allowed.

10 Furthermore, the fact that Ms. Joy is seeking additional
11 compensation, in the form of a spinal cord stimulator, does not defeat a
12 finding that her right to medical compensation is vested. Division I of this
13 Court has held, relying upon *Willoughby*, that where the Department has
14 allowed a claim, injured workers who later seek additional benefits are
15 merely “challenges only to the amount of that compensation. They
16 therefore had a vested right at stake.” *Kustura v. Dep’t of Labor & Indus.*,
17 142 Wn. App. 655, 675 (2008).

18 Therefore, it is clear that prior to the decision of the HTCC on
19 October 22, 2010, Ms. Joy had a vested property right in further necessary
20 and proper medical and surgical services under Title 51 RCW, including
21 the right seek additional compensation in the form of a Spinal Cord
22 Stimulator, which was recommended by a surgeon of her choice. Once a
23 determination is made that there exists a vested property right, this Court
24 must determine if RCW 70.14.120(3) deprives Ms. Joy of that vested
25 property right without the due process of law.

1 **B. Denial of Due Process**

2 Where there is an allegation of a denial of due process, the Court
3 must assess whether RCW 70.14.120 is first, “aimed at achieving a
4 legitimate public purpose; [second,] whether it uses means that are
5 reasonably necessary to achieve that purpose; and [third,] whether it is
6 unduly oppressive.” *Willoughby*, 147 Wn. 2d at 733. Ms. Joy concedes
7 that RCW 70.14 is generally aimed at achieving the legitimate public
8 purpose of reducing the cost on taxpayers for paying for ineffective
9 medical procedures through state purchased health care programs.
10 However, the means used, as argued by the Department in its Brief, to
11 achieve this purpose are not reasonable and are unduly oppressive.

12 The Department argues that by denying individuals any right to
13 appeal its decisions, which deny treatment per determinations made by the
14 HTCC, RCW 70.14.120(3) achieves “a uniform system of health
15 technology assessment and determination in lieu of individual
16 determinations as to whether particular health technologies are necessary
17 and proper.” (Respondent’s Brief p. 21). Any system created by the
18 Legislature that uniformly, without exception or appeal, takes away an
19 entire class of citizens’ vested property rights is unreasonable and unduly
20 oppressive. For the first time in this matter, the Department implies that
21 Ms. Joy’s due process rights can be accessed through the Open Meetings
22 Act (RCW 42.30). (Respondent’s Brief p. 11). RCW 42.30 is a laughable
23 substitute for the trial-like process adopted under Title 51 RCW.

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1 The Open Meetings Act itself does not give any member of the
2 public any right to participate with the meetings. RCW 42.30 merely
3 gives the public the right to attend meetings of certain agencies. However,
4 if those meetings are interrupted, the Act gives the agencies the authority
5 to clear the room and continue without the public's attendance. RCW
6 42.30.050. However, RCW 70.14.130 requires the HTCC to give notice
7 of meetings and the time for interested parties to submit information and
8 public comment. Ms. Joy maintains a public comment period is a poor
9 substitute for a full trial-like procedure and creates a high risk of undue
10 oppression on her vested property rights.

11 An alternate set of factors used by the Washington Courts in
12 determining what process is due when the State denies vested property
13 rights is to weigh: "(1) the private interest at stake in the governmental
14 action; (2) the risk of an erroneous deprivation of such interest through the
15 procedures used and the probable value, if any, of additional or substitute
16 procedural safeguards; and (3) the government interest, including the
17 additional burdens that added procedural safeguards would entail."
18 *Kustura*, 142 Wn. App. at 674 (*citing Mathew v. Eldridge*, 424 U.S. 319,
19 334 (1976)).

20 **1. Ms. Joy has a significant private interest in having her**
21 **Spinal Cord Stimulator covered until Title 51 RCW**

22 In the present matter, Ms. Joy's private interest is high as her
23 personal surgeon seeks to perform a procedure that could dramatically
24 reduce her pain caused by her claim-related injuries. Furthermore, by
25 reducing her pain, the Spinal Cord Stimulator could increase her ability to

1 function and perform activities of daily living. This could result in
2 sufficient recovery to return Ms. Joy back to work, which is one of the
3 ultimate aims of the IIA.

4 **2. The Department’s proposed new process creates a high**
5 **risk of erroneous deprivation versus Ms. Joy’s request that her appeal**
6 **be allowed under existing Title 51 RCW procedures.**

7 Under the Department’s interpretation of RCW 70.14.120, there is
8 a high risk of an erroneous deprivation of Ms. Joy’s vested property right.
9 The only procedural safeguard identified by the Department is the Open
10 Meetings Act that governed the public meetings held by the HTCC.
11 (Respondent’s Brief p. 17). Being able to attend the meetings of the
12 HTCC is a poor substitute for Ms. Joy to the existing procedural
13 safeguards created by Title 51 RCW.

14 Where there is a deprivation of vested property rights, the Court’s
15 must ask, “What process is due to Ms. Joy?” The Department’s answer to
16 this question is effectively, “None.” Ms. Joy’s answer to the question is,
17 “Whatever process I’m otherwise due under the Industrial Insurance Act.”

18 The IIA requires specific notice be given to Ms. Joy of any denial
19 of additional compensation, with clearly stated jurisdictional deadlines to
20 protest or appeal. RCW 51.52.050 and .060. Once before the Board of
21 Industrial Insurance Appeals (Board), WAC 263-12 creates its own set of
22 procedures for it to hear the appeal. These procedures create a process
23 similar to a bench trial in Superior Court. The IIA then provides injured
24 workers the further right to have the matter heard before a jury of her
25 peers in Superior Court, followed by appeals to this Court and the

1 Washington State Supreme Court.¹ Without this individualized
2 assessment of Ms. Joy's case, the risk of an erroneous deprivation of her
3 vested property rights is high.

4 The Department takes the position that by enactment of RCW
5 70.14.120(3), the Legislature simply eliminated this entire set of
6 procedures that are present to protect Ms. Joy's vested property rights.
7 The risk that Ms. Joy's vested property rights may be erroneously
8 deprived under the Department's interpretation of RCW 70.14.120(3) is
9 high. It is high because as one injured worker, with no medical degree or
10 scientific background, attending a meeting of the HTCC the likelihood of
11 her influencing the outcome of the deliberations is low.

12 The *Kustura* decision also requires a balancing of the risk of
13 erroneous deprivation with the value of additional procedural safeguards.
14 Ms. Joy is not proposing this Court create a new set of procedural
15 safeguards out of whole cloth to minimize the risk of erroneous
16 deprivation. Ms. Joy is simply seeking the procedural protections already
17 provided to her under Title 51 RCW. Given that these existing protections
18 have been present for a century², with some legislative modifications over
19 the decades, the probable value of RCW 51.52 is known and established.

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¹ Which, in turn, creates a separate violation of Ms. Joy's right to have a trial by a jury under Article I, Section 21 of the Washington State Constitution.

² 2011 is the centennial anniversary of the enactment of the Industrial Insurance Act.

1 **3. Ms. Joy’s interpretation of RCW 70.14.120 strikes the**
2 **right balance between the State’s interests and reducing Ms. Joy’s**
3 **risk of erroneous deprivation of her vested property rights.**

4 The final factor balances the government’s interest against the
5 costs of the “additional” procedural safeguards. Ms. Joy is not asking for
6 “additional” procedural safeguards. Ms. Joy is simply requesting she be
7 allowed to use the existing procedural safeguard incorporated into Title 51
8 RCW. This is not an undue cost balanced against the State’s interest in
9 reducing the payment of unnecessary or ineffective medical procedures.

10 Under Ms. Joy’s interpretation of the interaction of RCW
11 70.14.120(3) with RCW 70.14.120(4), an effective balance is created. The
12 determination of the HTCC simply removes any discretion from the
13 Department in initially approving Spinal Cord Stimulators. Any injured
14 worker who disagrees with that decision may still appeal to the Board and
15 the Courts under the existing standards set forth by the IIA. In essence,
16 this creates a burden-shift to injured workers where they are always the
17 ones who must appeal and bear the initial cost of presenting the requisite
18 expert testimony.

19 This interpretation is consistent with the legislative history,
20 specifically the Governor’s veto message. The Governor was concerned
21 that the bill that passed the Legislature would create a separate, parallel
22 system of appeals for citizens affected by decisions of the HTCC, such as
23 Ms. Joy. Rather than create a whole new procedural structure to protect
24 Ms. Joy’s vested property rights, the Governor recognized that RCW
25 70.14.120(4) preserves existing protections. In the context of the IIA, that

1 means injured workers retain the right to appeal any denials and have their
2 appeals heard based on existing standards within the workers'
3 compensation system.

4 This balance helps achieve the government's interests in reducing
5 costs and minimizing ineffective treatment. By removing the
6 Department's discretion, the Department must issue orders denying all
7 requests for Spinal Cord Stimulators. Not every injured worker will
8 appeal that decision, thereby reducing costs and allegedly ineffective
9 treatment. However, those injured workers who believe they will benefit
10 retain the right to appeal and bear the cost of proving, through expert
11 testimony, that they would benefit from a Spinal Cord Stimulator
12 procedure³. In other words, injured workers who believe enough they
13 should receive the procedure must "put their money where their mouth is."
14 Stated differently, removing the Department's discretion, but retaining an
15 injured worker's right to appeal under RCW 51.52, must create a chilling
16 effect on the payment of Spinal Cord Stimulators that still achieves the
17 State's expressed interests.

18 **C. Conclusion: RCW 70.14.120 should not be Interpreted**
19 **to Deprive Ms. Joy of her Vested Property Rights with the Due**
20 **Process of Law.**

21 In summary, Ms. Joy has a vested property to medical treatment
22 under the IIA. That right vested prior to the October 2010 decision of the
23 HTCC, which determined all Spinal Cord Stimulators to not be a covered

³ Ms. Joy's surgeon testified that he would first perform a short trial implantation to determine if Ms. Joy would benefit from a permanent stimulator. The Department denied even the trial procedure.

1 benefit by the Department of Labor and Industries. Therefore, that
2 governmental decision deprived Ms. Joy of her vested property right.
3 However, the State argues that the only process of law due to Ms. Joy was
4 to attend the meetings of the HTCC. This alleged due process creates a
5 high risk of erroneous deprivation of vested property rights.

6 Instead, a more reasonable interpretation of RCW 70.14.120 is that
7 it does not affect Ms. Joy's right to seek judicial review of the Board's
8 decision to affirm the Department's denial of a Spinal Cord Stimulator.
9 RCW 70.14.120 simply removes the Department's discretion to cover
10 certain procedures, while retaining an injured worker's existing rights to
11 appeal the Department's decision. Ms. Joy's interpretation permissibly
12 reads RCW 70.14.120(3) and (4) as a whole, gives effect to both sections,
13 and harmonizes it with the existing rights under the IIA and Article I,
14 Section 3 of the Washington State Constitution.

15 **II. Any Removal Of Ms. Joy's Right To Have Her Claim For**
16 **Additional Workers' Compensation Benefits Be Tried Before A Jury**
17 **Violates Article 1, Section 21 Of The Washington State Constitution.**

18 The Department argues in its responsive brief that once the HTCC
19 denies coverage, its process (no right to an individual appeal) trumps Ms.
20 Joy's substantive (i.e. vested) rights. (Respondent's Brief p. 17). This
21 argument by the Department would ask the Court to interpret RCW
22 70.14.120 in a way that violates Ms. Joy's right to a jury trial. Article I,
23 Section 21 of the Washington State Constitution preserve's Ms. Joy's right
24 to a jury trial in civil matters. RCW 51.52.115 also grants Ms. Joy the
25 right to a jury trial. This State's Supreme Court has acknowledged, albeit

1 without discussion, that injured workers have a right to a jury trial
2 regarding their right to compensation under the IIA. *Allison v. Dep't of*
3 *Labor & Indus.*, 66 Wn. 2d 263 (1965). Division III of the Court of
4 Appeals has more recently affirmed an injured worker's right to a jury
5 trial. *Spring v. Dep't of Labor and Indus.*, 39 Wn. App. 751 (1985). The
6 Department's interpretation of RCW 70.14.120(3) would not only
7 eliminate Ms. Joy's right to have her entitlement to a Spinal Cord
8 Stimulator decided by the Board, but also by a jury.

9 When applying Article I, Section 21 of the Washington State
10 Constitution our Supreme Court uses a historical analysis. *Sofie v.*
11 *Fibreboard Corp.*, 112 Wn.2d 636, 645 (1989). "The court examines (1)
12 whether the cause of action is one to which the right to a jury trial applied
13 in 1889, and (2) the scope of the right to a jury trial." *Nielson v.*
14 *Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 266 (1998).

15 **A. Injured Workers had the right to a jury trial when**
16 **suing their employers in 1889.**

17 From the express language of RCW 51.04.010, prior to the
18 adoption of the IIA, these matters were subjected to civil courts. In such
19 cases, whether a workman was injured and the amount of the damages was
20 a question of fact, which is the province of the jury. *State ex. rel. Davis-*
21 *Smith Co. v. Clausen*, 65 Wn. 156, 209 (1911). It can be inferred that
22 injured workers retained the right to sue their employers, under the
23 common law, and have their case heard in the 22 years prior to the
24 adoption of the IIA. Furthermore, even in the earliest version of the IIA,
25 the Legislature recognized worker's and employer's right to eventually

1 have their case heard by a jury, upon demand. *State ex. rel. Davis-Smith*
2 *Co.*, 65 Wn. at 173-74. Therefore, from the earliest days of the IIA, the
3 Legislature has acknowledged and affirmed the parties' constitutional
4 right to a jury trial under the IIA.

5 **B. While the Department's Interpretation of RCW**
6 **70.14.120 Eliminates Ms. Joy's Right to a Jury Trial, Ms. Joy's**
7 **Interpretation Preserves Her Constitutional Right.**

8 The fundamental premise of the Industrial Insurance Act is the
9 "Grand Compromise" between employers and workers to remove from
10 private controversy civil lawsuits between workers and employers arising
11 from on the job injuries. RCW 51.04.010; *Birklid v. The Boeing Co.*, 127
12 Wn.2d 853, 859 (1995); *see also Stertz v. Indus. Ins. Cmms'n*, 91 Wn.
13 588, 590 (1916). In exchange, injured workers, such as Ms. Joy, were
14 entitled to sure and certain relief. *Id.* Prior to enactment of the IIA,
15 injured workers had the right to bring their injury claims to trial before a
16 jury. As noted above, the IIA preserves the requirements of Article I,
17 Section 21 by eventually allowing injured workers and employers to have
18 their cases heard before a jury after exhausting administrative remedies.
19 RCW 51.52.115.

20 But the State's interpretation of RCW 70.14.120(3) and (4)
21 bypasses this grand compromise and ignore injured workers' 1889
22 constitutional right to have their entitlement to benefits heard by a jury of
23 their peers. Instead of "sure and certain" relief, the State now maintains
24 that RCW 70.14.120(3) and (4) simply denies specific treatment
25 modalities to an entire class of citizens, without any ability to appeal.

1 Instead, the remedy to injured workers is to attend the open meetings of
2 the HTCC, a poor substitute to a jury of Ms. Joy’s peers.

3 Ms. Joy is not seeking an expansion of her current rights to a jury
4 trial, but instead is protesting the apparent elimination of her right as
5 proposed by the State. In effect, the State’s interpretation of RCW
6 70.14.120 would reduce the scope of her right to nothing. This Court
7 should find that reading unconstitutional under *Sofie*. Instead, Ms. Joy’s
8 interpretation, which acknowledges a burden-shift, not only harmonizes
9 RCW 70.14.120(3) and (4) with the provisions of the IIA, but also results
10 in a preservation of her existing right to a jury trial.

11 **III. The Triggering Event That Affected Ms. Joy’s Substantive**
12 **Rights Was Not When RCW 70.14 Was Enacted but when the HTCC**
13 **Decided Not To Cover Spinal Cord Stimulators.**

14 The Department asks the Court to look at when RCW 70.14 was
15 enacted, rather than to the October 22, 2010 decision of the HTCC in
16 determining whether the denial of coverage should have a retroactive
17 effect. (Respondent’s Brief p. 19-21). However, Division I of this Court
18 has held, “A statute operates prospectively when the *precipitating event*
19 for its application occurs after the effective date of the statute. Again, it
20 has long been held that awards payable under the worker’s compensation
21 act are governed by the law in effect at the time of the injury.” *Cena v.*
22 *Dep’t of Labor & Indus.*, 121 Wn. App. 915, 922 (2004) (emphasis
23 added). The *Cena* Court also reaffirmed that “a statute will not be applied
24 retroactively if it affects a substantive or vested right.” *Cena*, 121 Wn.
25 App. at 923.

1 While RCW 70.14 was in effect at the time of Ms. Joy’s injury,
2 there was no blanket prohibition to coverage decisions regarding Spinal
3 Cord Stimulators. The key question for this Court is what was the
4 “precipitating event” for the application of the provisions of RCW
5 70.14.120? The answer lies in RCW 70.14.110. The precipitating or
6 triggering event was the October 22, 2010 decision of the HTCC that
7 Spinal Cord Stimulators should not be a covered benefit.

8 It is that decision the Department seeks to rely upon to deprive Ms.
9 Joy of her vested property right to have her compensation increased under
10 the IIA. Without the October 22, 2010 decision, there would be no legal
11 basis to attempt to apply RCW 70.14.120(3) to Ms. Joy’s claim. It is the
12 October 22, 2010 determination of the HTCC that is the “precipitating
13 event” that triggers application of RCW 70.14.120. But applying the
14 October 22, 2010 determination to Ms. Joy’s existing claim creates a
15 retroactive effect on a vested right. Therefore, this Court should reverse
16 the Judgment of the Clark County Superior Court and order a new trial.

17 Next, the October 22, 2010 decision to deny coverage of Spinal
18 Cord Stimulators was not a procedural event, but a substantive
19 determination. RCW 70.14 provides the procedures to determine the
20 substantive rights of injured workers. The mechanism for how a decision
21 is made changed, but the outcome of the decision affected Ms. Joy’s
22 substantive right to have a jury of her peers decide whether a SCS was
23 necessary and proper treatment. The result of the decision affected the
24 property right of Ms. Joy and the State is maintaining a position that she

1 effectively has no procedural due process rights to challenge this
2 deprivation of her vested property right.

3 **IV. RCW 70.14.120(1) Exceptions Are An Additional Source Of**
4 **Remedy To Ms. Joy, Not The Exclusive Source.**

5 The Department argues that Ms. Joy's remedy must lie under the
6 exceptions found in RCW 70.14.120(1). Under Ms. Joy's complete
7 reading of RCW 70.14, Title 51 RCW, and her rights as preserved by the
8 Washington State Constitution, these exceptions only apply to decisions of
9 the Department of Labor and Industries. It is the Department, as the only
10 participating state agency in this case, that must make the initial
11 adjudication. The Department is robbed of discretion, unless it determines
12 the claim falls within the provisions of RCW 70.14.120(1). Regardless,
13 per RCW 70.14.120(4), Ms. Joy retains all of her rights under the IIA to
14 seek review of the Department's decision. This is because by the express
15 language of RCW 70.14.120(1), the exceptions only apply to participating
16 agencies, such as the Department of Labor and Industries.

17 In this appeal, the Superior Court was asked to review the Decision
18 and Order of the Board of Industrial Insurance Appeals, a non-
19 participating agency. Therefore, the Board is under no statutory
20 requirement to comply with these exceptions. Instead, the reasonable
21 reading of RCW 70.14.120 in context of this appeal is that review of the
22 Board's Decision and Order is governed by RCW 70.14.120(4).
23 Subsection 4 provides that injured workers have the right to appeal under
24 Title 51 RCW and such appeals are governed by the existing laws,
25 administrative rules, and legal decisions of the Industrial Insurance Act.

1 Furthermore, RCW 70.14.120(1)(a) creates such a large exception,
2 under the State’s rationale, that it destroys the rule. The non-coverage
3 decision of the HTCC is not enforceable if it is determined that decision
4 conflicts with a contrary but applicable state statute. In this appeal, the
5 contrary, applicable state statute is Title 51 RCW, which provides, “Upon
6 the occurrence of any injury to a work entitled to compensation under the
7 provisions of this title, he or she shall receive proper and necessary
8 medical and surgical services at the hands of a physician of his or her own
9 choice.” RCW 51.36.010. In other words, if Ms. Joy’s physician
10 maintains a spinal cord stimulator is necessary and proper under her claim,
11 then she shall be entitled to such surgical services. However, Title 51
12 RCW also provides, “Whenever the director or the self-insurer deems it
13 necessary in order to resolve any medical issue, a worker shall submit to
14 examination by a physician or physicians selected by the director.” RCW
15 51.36.070. Finally, Title 51 RCW, provides that when the Department
16 makes “any order, decision, or award” it shall serve that decision on the
17 worker and the worker has 60 days from receipt to file a protest or an
18 appeal of said decision. RCW 51.52.050 and .060.

19 In other words, almost the entirety of the State’s interpretation of
20 the operation of RCW 70.14.120(3) on Ms. Joy’s claim renders the
21 HTCC’s coverage decision in conflict with the applicable state statute:
22 Title 51 RCW. As you can see, the implication of the State’s reliance on
23 RCW 70.14.120(1) as the source of Ms. Joy’s only remedy renders
24 application of 70.14 absurd. This Court must avoid interpretations of
25 statutes that lead to absurd results.

1 Instead, Ms. Joy’s interpretation of RCW 70.14.120 does not lead
2 to absurd results. It gives effect to RCW 70.14.120(1) by allowing the
3 Department to cover a Spinal Cord Stimulator if there is a more specific
4 state or federal law order coverage; alternatively it can provide coverage if
5 there is a newer experimental technology. It gives effect to RCW
6 70.14.120(3) but removing the Department’s discretion to order
7 authorization of Spinal Cord Stimulators to cases arising after October 22,
8 2010. In such cases, it would be the worker’s obligation to appeal said
9 decision if he or she sought to have it authorized. Finally, it gives effect to
10 RCW 70.14.120(4), by preserving her due process and jury trial rights, as
11 protected by the Washington State Constitution and Title 51 RCW, by
12 authorizing the Board and Courts to order coverage if it deems a Spinal
13 Cord Stimulator is necessary and proper treatment per RCW 51.36.010.
14 This Court should reverse the Judgment of the Clark County Superior
15 Court and remand this matter for a new trial.

16 **V. Attorney Fees**

17 Should Ms. Joy prevail in this appeal, she is entitled to an award of
18 attorney fees, as fixed by this Court. RCW 51.52.130; RAP 18.1. The
19 State relies upon the *Tobin* decision for its interpretation of RCW
20 51.52.130. *Tobin v. Dep’t of Labor & Indus.*, 169 Wn.2d 396. However,
21 the *Tobin* Court did not conduct any analysis of RCW 51.52.130 and
22 awarded fees with little comment.

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1 In contrast, the Supreme Court had previously analyzed RCW
2 51.52.130 and reach a conclusion contrary to the position of the State.
3 *Brand v. Dep't of Labor and Indus.*, 139 Wn.2d 659. The *Brand* Court
4 started its analysis with a statement of the purpose of RCW 51.52.130:
5 “The purpose behind the award of attorney fees in workers’ compensation
6 cases is to ensure adequate representation for injured workers who were
7 denied justice by the Department.” *Brand*, 139 Wn. 2d at 667. Then after
8 comparing RCW 51.52.130 to RCW 51.52.120, the Court concluded,
9 “Under the statute the worker’s degree of overall recovery is
10 inconsequential. This holding is consistent with the purposes behind
11 RCW 51.52.130. Awarding full attorney fees to workers who succeed on
12 appeal before the superior or appellate court will ensure adequate
13 representation for injured workers.” *Brand*, 139 Wn.2d at 670.

14 In the matter on appeal, Ms. Joy has appealed an order of the
15 Board of Industrial Insurance Appeals denying authorization of a spinal
16 cord stimulator. After appealing that decision to Clark County Superior
17 Court, her appeal was rejected through erroneous application of RCW
18 70.14.120(3). Ms. Joy has appealed the lower court’s decision to the
19 Court of Appeals. As the *Brand* Court acknowledged, attorney fees
20 should be awarded to injured workers who prevail in appellate courts to
21 ensure adequate representation. The *Brand* Court broadly construed RCW
22 51.52.130 to allow an award where a worker prevails.

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1 Furthermore, an earlier Supreme Court decision has expressly
2 rejected as unconstitutional the requirement that the accident fund be
3 affected in order to award attorney fees. In *Johnson v. Tradewell Stores*,
4 95 Wn.2d 739 (1981), the issue of whether RCW 51.52.130 authorized an
5 award of attorney fees in cases with self-insured employers was raised.
6 The self-insured employers correctly pointed out that where the injured
7 workers prevailed, the State’s accident fund would not be affected. It
8 would not be affected because the accident fund does not pay benefits in
9 self-insured cases. The self-insured employers then reasoned that they
10 were not statutorily obligated to pay attorney fees.

11 While the *Johnson* Court implicitly acknowledged the logic of the
12 self-insured employer’s reasoning, it still rejected their conclusions. “It is
13 a manifest injustice of the most egregious nature, and we hold it to be a
14 violation of the equal protection clause of the Fourteenth Amendment and
15 Const. art. 1, § 12 to classify one group of employees so that they receive
16 fewer benefits than similarly situated employees simply because the
17 employer chooses to be self-insured.” *Johnson*, 95 Wn. 2d at 745. The
18 *Johnson* Court has thereby held the requirement that the accident fund
19 must be affected in order to award attorney fees to be unconstitutional.
20 Subsequent to the Court’s decision, the Legislature has had an opportunity
21 to amend RCW 51.52.130, but has failed to do so. This failure to amend
22 is a silent acquiescence to the Court’s interpretation. *Bradley v. Dep’t of*
23 *Labor & Indus.*, 52 Wn.2d 780 (1958).

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1 that Spinal Cord Stimulators should not be covered. While the
2 Department is a participating agency under RCW 70.14, the HTCC does
3 not affect Ms. Joy's existing rights under Title 51 RCW. RCW
4 70.14.120(4).

5 The correct balance is to interpret RCW 70.14.120(3) to rob the
6 Department of discretion to order payment of a Spinal Cord Stimulator
7 (unless it falls under the RCW 70.14.120(1) exceptions). However, the
8 injured worker could still appeal, as in any other case, as allowed by RCW
9 70.14.120(4). This burden shifting achieves the State's interest that lead
10 to enacting RCW 70.14, without depriving Ms. Joy of a vested property
11 right without the due process of law or eliminating her right to a jury trial.

12 Whereas the Department's position is that Ms. Joy can be deprived
13 of her vested property rights and her only recourse is to have attended the
14 open meetings of the HTCC prior to the HTCC's decision to deprive her
15 vested property right. The Department's position is not due process.
16 Furthermore, the Department's position effectively eliminates Ms. Joy's
17 right to a jury trial as granted by the Washington State Constitution and as
18 acknowledged by Title 51 RCW. Next, the October 22, 2010 decision of
19 the HTCC had a substantive effect on Ms. Joy's vested property right and

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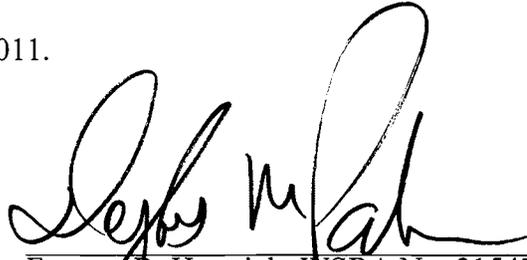
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1 should not be retroactively applied to her existing workers' compensation
2 claim. Finally, should Ms. Joy prevail, she is entitled to an award of
3 attorney fees to be determined by this Court or the Clark County Superior
4 Court.

5 Dated: November 18, 2011.

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9 _____
10 Frances R. Hamrick, WSBA No. 31547
11 Douglas M. Palmer, WSBA No. 35198
12 Attorneys for Cheryl Joy, Plaintiff/Petitioner
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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

BEFORE THE COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

CHERYL JOY,

Appellant/Plaintiff

v.

DEP'T OF LABOR & INDUS.,

Respondant/Defendant.

) Case No. 42118-6-II

) Proof of Mailing

The undersigned states that on Friday, the 18th day November 2011, I deposited in the United States Mail, with proper postage prepaid, Reply Brief of the Appellant/Plaintiff as attached, addressed as follows:

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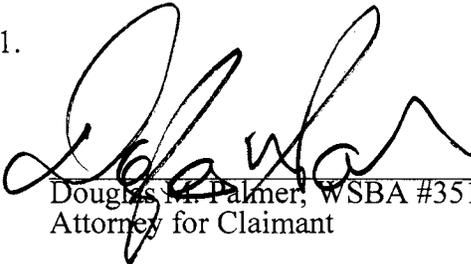
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Clerk of the Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

Dated: November 18, 2011.



Douglas M. Palmer, WSBA #35198
Attorney for Claimant