

FILED
SUPREME COURT
STATE OF WASHINGTON
4/16/2018 4:10 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
4/25/2018
BY SUSAN L. CARLSON
CLERK

No. 95251-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL MURRAY,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Daniel E. Huntington
WSBA No. 8277
422 W. Riverside, Suite 1300
Spokane, WA 99201
(509) 455-4201

Valerie D. McOmie
WSBA No. 33240
4549 NW Aspen St.
Camas, WA 98607
(360) 852-3332

On Behalf of
Washington State Association
for Justice Foundation

TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUES PRESENTED	2
IV. SUMMARY OF ARGUMENT	3
V. ARGUMENT	4
A. The IIA Affords An Individual Determination Of An Injured Worker’s Entitlement To “Proper And Necessary Medical And Surgical Services.”	4
B. Interpreting RCW 70.14.120(3) And 70.14.120(4) Under The Plain Meaning Rule Retains An Injured Worker’s Right To An Individual Determination Of Entitlement To Proper And Necessary Medical Treatment Under The IIA.	10
C. If The Court Determines RCW 70.14.120 Is Ambiguous Or Sections (3) and (4) Are Conflicting, Legislative History Supports An Injured Worker’s Right To An Individual Determination As To Whether A Particular Medical Treatment Is “Proper And Necessary” Medical Services Under The IIA.	12
D. Chapter 70.14 RCW Is An Unconstitutional Delegation Of Legislative Authority Because There Are Inadequate Guidelines And Procedural Safeguards To Control Arbitrary Administrative Action And Abuse Of Discretionary Power.	17
VI. CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
<i>AUTO. United Trades Org. v. State</i> , 183 Wn.2d 842, 357 P.3d 615 (2015)	18
<i>Barry & Barry v. Dep't of Motor Veh.</i> , 81 Wn.2d 155, 500 P.2d 540 (1972)	17
<i>Birklid v. Boeing Co.</i> , 127 Wn.2d 853, 904 P.2d 278 (1995)	4
<i>Bridle Trails v. Bellevue</i> , 45 Wn. App. 248, 724 P.2d 1110 (1986)	19
<i>Cannabis Action Coalition v. City of Kent</i> , 180 Wn. App. 455, 322 P.3d 1246 (2014) <i>aff'd</i> , 183 Wn.2d 219, 351 P.3d 151 (2015)	15
<i>Clark County PUD No. 1 v. Wilkinson</i> , 139 Wn.2d 840, 991 P.2d 1161 (2000)	19
<i>Coballes v. Spokane County</i> , 167 Wn. App. 857, 274 P.3d 1102 (2012)	19
<i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002)	11, 13
<i>Dep't of Ecology v. Theodoratus</i> , 135 Wn.2d 582, 957 P.2d 1241 (1998)	13
<i>Dep't of Labor & Indus. v. Kantor</i> , 94 Wn. App. 764, 973 P.2d 30, <i>review denied</i> , 139 Wn.2d 1002 (1999)	5
<i>Dep't of Labor & Indus. v. Lyon Enters., Inc.</i> , 185 Wn.2d 721, 374 P.3d 1097 (2016)	4, 5
<i>Doty v. Town of South Prairie</i> , 155 Wn.2d 527, 120 P.3d 941 (2005)	7
<i>Ewing v. Seattle</i> , 55 Wash. 229, 104 P. 259 (1909)	18

<i>In re Estate of Kerr</i> , 130 Wn.2d 328, 949 P.2d 810 (1998)	15, 16
<i>In re: Susan M. Pleas</i> , 1998 WL 718232 (Wash. Bd. Of Ind. Ins. Appeals August 31, 1998)	6, 7, 8, 12
<i>In the Matter Powell</i> , 92 Wn.2d 882, 602 P.2d 711 (1979)	17
<i>Joy v. Dep't of Labor & Indus.</i> , 170 Wn. App. 614, 285 P.3d 187 (2012), <i>review denied</i> , 176 Wn.2d 1021 (2013)	2, 14, 15, 16
<i>McIndoe v. Dep't of Labor & Indus.</i> , 144 Wn.2d 252, 26 P.3d 903 (2001)	5
<i>Murray v. Dep't of Labor & Indus.</i> , 1 Wn. App. 2d 1, 403 P.3d 949 (2017), <i>review granted</i> , 412 P.3d 1262 (2018)	1, 2, 18
<i>Raynes v. Leavenworth</i> , 118 Wn.2d 237, 821 P.2d 1204 (1992)	19
<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355, <i>review denied</i> , 167 Wn.2d 1015 (2009)	5, 6
<i>Saldin Sec., Inc. v. Snohomish County</i> , 134 Wn.2d 288, 949 P.2d 370 (1998)	18
<i>Shelton Hotel Co. v. Bates</i> , 4 Wn.2d 498, 104 P.2d 478 (1940)	15
<i>State v. Bigsby</i> , 189 Wn.2d 210, 399 P.3d 540 (2017)	13
<i>State v. Ervin</i> , 169 Wn.2d 815, 239 P.3d 354 (2010)	11
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003)	13
<i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 281 (2005)	11

<i>State v. Reis</i> , 183 Wn.2d 197, 351 P.3d 127 (2015)	13, 15
<i>State v. Simmons</i> , 152 Wn.2d 450, 98 P.3d 789 (2004)	18
<i>Torrance v. King County</i> , 136 Wn.2d 783, 966 P.2d 891 (1998)	19
<i>Weyerhaeuser Co. v. Tri</i> , 117 Wn.2d 128, 814 P.2d 629 (1991)	7

Statutes and Rules

Ch. 307, Laws of 2006	1, 2, 10, 11
Ch. 307, Laws of 2006(5)(4)	13
Ch. 307, Laws of 2006(6)	13, 14
Ch. 34.05 RCW	18
Ch. 51.52 RCW	10, 12
Ch. 70.14 RCW	passim
RCW 51.04.010	4
RCW 51.04.020	5
RCW 51.04.030	5
RCW 51.12.010	4
RCW 51.36.010	6, 8, 12
RCW 51.36.010(2)(a)	3, 5
RCW 70.14.080(5)	10
RCW 70.14.080(6)	10, 12, 16
RCW 70.14.090(1)	10
RCW 70.14.090(5)	18

RCW 70.14.110	10, 16
RCW 70.14.110(1)	10
RCW 70.14.120	passim
RCW 70.14.120(3)	passim
RCW 70.14.120(4)	passim
Ch. 296-20 WAC	5, 12
WAC 263-12-195(1)	6
WAC 296-20-010(9)	5
WAC 296-20-01001	8
WAC 296-20-01001(2)(a)	8
WAC 296-20-01001(2)(d)(v)	8
WAC 296-20-01001(4)	8
WAC 296-20-01002	5, 6, 7
WAC 296-20-01002(4)	6
WAC 296-20-01505	6, 8
WAC 296-20-02700	7
WAC 296-20-2701	7
WAC 296-20-2702	7
WAC 296-20-2703	8
WAC 296-20-2704	9
WAC 296-20-2704(1)	9
WAC 296-20-2704(3)(b)	9
WAC 296-20-2705	9

WAC 296-20-2705(3)	9
WAC 296-20-2700 - 2705	12, 16
WAC 296-20-02850	6
WAC 296-20-03002	6, 8
WAC 296-20-03002(6)	6, 7

Other Authorities

2 House Journal, 59 th Leg., Reg. Sess., at 1201 (Wash. 2006)	13
2 House Journal, 59 th Leg., Reg. Sess., at 1587 (Wash. 2006)	14

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in an injured worker's entitlement to "proper and necessary medical and surgical services" under the Industrial Insurance Act (IIA), and whether the Legislature's delegation of authority to the Health Technology Clinical Committee (HTCC) in ch. 307, Laws of 2006 (codified in ch. 70.14 RCW) provided adequate guidelines and procedural safeguards to control arbitrary administrative action and abuse of discretionary power.

II. INTRODUCTION AND STATEMENT OF THE CASE

The facts are drawn from the Court of Appeals' opinion and the briefing of the parties. *See Murray v. Dep't of Labor & Indus.*, 1 Wn. App. 2d 1, 403 P.3d 949 (2017), *review granted*, 412 P.3d 1262 (2018); Murray Supp. Br. at 3-7; Department Supp. Br. at 2-6.

In 2009, Michael Murray injured his right hip at work, and the Department of Labor and Industries (Department) allowed his claim. In 2013, the Department denied Murray's request for authorization for surgical treatment of femoral acetabular impingement (FAI), because in 2011 the HTCC had determined that FAI surgery was unproven and therefore not a covered benefit. Murray appealed, and the Board of Industrial Insurance

Appeals (Board) granted summary judgment for the Department on the basis that the Board could not overrule the HTCC's decision. Murray paid for the FAI surgery himself, and the surgery proved successful. Murray appealed to superior court, and the superior court granted the Department's motion for summary judgment based on the HTCC's decision that FAI surgery was not a covered benefit. Murray appealed to Division II of the Court of Appeals.

The Court affirmed, holding that pursuant to RCW 70.14.120(3), an HTCC determination that a particular surgical procedure is not a covered treatment "is a determination that the particular health technology is not medically necessary or proper in *any* case." *Murray*, 1 Wn. App. 2d at 13 (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)). The Court adhered to its earlier decision in *Joy* and held the statute does not permit an individualized review of an HTCC determination.

The Court of Appeals also held that the legislature's delegation of authority to the HTCC is constitutional, because there are appropriate procedural safeguards to control arbitrary action and prevent the abuse of discretionary power by the HTCC. *See Murray*, 1 Wn. App. 2d at 12.

Murray petitioned for review, which this Court granted.

III. ISSUES PRESENTED

1. RCW 70.14.120(3) provides that a surgical procedure 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." RCW 70.14.120(4) provides "[n]othing in chapter 307, Laws of 2006 diminishes an individual's right under existing law to appeal an action or decision of a participating agency." Do these statutory

provisions, properly construed, eliminate the right of an injured worker to IIA Board and state court review of whether a particular surgical procedure disallowed by the HTCC should be authorized as “proper and necessary medical and surgical services” pursuant to RCW 51.36.010(2)(a)?

2. Is the authority given to the HTCC in chapter 70.14 RCW to determine whether a particular surgical procedure will be excluded as a covered benefit to which an injured worker may be entitled under the IIA an unconstitutional delegation of legislative authority due to the failure to provide adequate guidelines and procedural safeguards to control arbitrary administrative action and abuse of discretionary power?

IV. SUMMARY OF ARGUMENT

The IIA is to be liberally construed in order to achieve its purpose of providing compensation, including proper and necessary medical services, to injured workers, with all doubts resolved in favor of the worker. In 2006, the Legislature enacted ch. 70.14 RCW, which created the HTCC, and delegated the HTCC authority to review medical procedures to determine whether they would be included as covered benefits in the health care programs of participating agencies, which included the Department. A plain reading of RCW 70.14.120 provides in section (3) that if the HTCC determines that a medical procedure is not a covered benefit, a claimant is not entitled to an individual determination as to whether that medical procedure is proper and necessary treatment, unless as provided in section (4) the claimant has a right under existing law to appeal a decision of a participating agency. Since “existing law” gives an injured worker the right to appeal a Department decision excluding coverage, an injured worker is not precluded from an individual determination regarding whether a medical procedure is proper and necessary treatment. If this Court determines that

RCW 71.14.120 is ambiguous, or that sections (3) and (4) of that statute are conflicting, then legislative history, in the form of the Governor's veto statement, supports an interpretation that the injured worker is entitled to an individual determination regarding whether a medical procedure disallowed by the HTCC is a proper and necessary medical service under the IIA.

The legislature's delegation of authority to the HTCC in ch. 70.14 RCW to make medical coverage determinations applicable to the IIA is unconstitutional because of the absence of guidelines and procedural safeguards to ensure the HTCC is making determinations with all doubts regarding coverage resolved in favor of the injured worker.

V. ARGUMENT

A. **The IIA Affords An Individual Determination Of An Injured Worker's Entitlement To "Proper And Necessary Medical And Surgical Services."**

Washington's workers' compensation law was enacted in 1911, and was the result of a compromise between employers and workers that provided for "sure and certain relief for workers" in exchange for generally abolishing state court causes of action for personal injuries against employers. RCW 51.04.010; *see also Birklid v. Boeing Co.*, 127 Wn.2d 853, 858, 904 P.2d 278 (1995). IIA provisions must be "liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries ... occurring in the course of employment." RCW 51.12.010. Courts are to resolve all doubts as to the meaning of the IIA in favor of coverage. *See Dep't of Labor & Indus. v. Lyons Enters., Inc.*, 185

Wn.2d 721, 734, 374 P.3d 1097 (2016). “Further, the guiding principle when interpreting provisions of the IIA is that it is a remedial statute that is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.” *Id.* (citation omitted).

Injured workers’ rights to benefits are statutory. *See McIndoe v. Dep’t of Labor & Indus.*, 144 Wn.2d 252, 256, 26 P.3d 903 (2001). Under the IIA an injured worker is entitled to “receive proper and necessary medical and surgical services.” RCW 51.36.010(2)(a); *see also Rogers v Dep’t of Labor & Indus.*, 151 Wn. App. 174, 181, 210 P.3d 355, *review denied*, 167 Wn.2d 1015 (2009). The Legislature gave the Department authority to make rules regarding the provision of medical care and treatment. *See* RCW 51.04.020, 51.04.030; *see also Dep’t of Labor & Indus v. Kantor*, 94 Wn. App. 764, 780, 783, 973 P.2d 30, *review denied*, 139 Wn.2d 1002 (1999). Pursuant to this authority, the Department promulgated Medical Aid Rules in chapter 296-20 WAC, which address medical coverage under the IIA. The Medical Aid Rules provide that the Department shall pay for “proper and necessary medical care” (WAC 296-20-010(9)), and include a definition of “proper and necessary” health care services. WAC 296-20-01002; *see also Rogers*, 151 Wn. App. at 181-82; *Kantor*, 94 Wn. App. at 783. “Proper and necessary” refers to health care services which are: (a) reflective of standards of good practice, (b) curative or rehabilitative, (c) not delivered primarily for the convenience of the claimant or health care providers, and (d) cost-

effective. See WAC 296-20-01002; *Rogers*, 151 Wn. App. at 182. The Medical Aid Rules list specific provider types, services and treatments that the Department will not authorize. See WAC 296-20-01505, 296-20-03002.

The definition of “proper and necessary” health care services in WAC 296-20-01002(4) states that “[s]ervices that are controversial, obsolete, investigational or experimental are presumed not to be proper and necessary, and shall be authorized only as provided in WAC 296-20-03002(6) and 296-20-02850.” (Brackets added.) WAC 296-20-03002(6) and 296-20-02850 provide that the Department will not allow or pay for treatment measures of a controversial, obsolete, or experimental nature, except “under certain conditions” treatment may be approved.

In *In Re: Susan M. Pleas*, 1998 WL 718232 (Wash. Bd. of Ind. Ins. Appeals August 31, 1998), the Board reversed and remanded to the Department with direction to issue an order authorizing payment for a spinal cord stimulator. See *id.* at *1. The Board granted review “in order to provide an analytical framework for determining what constitutes ‘proper and necessary medical and surgical services’ to which injured workers are entitled pursuant to RCW 51.36.010,” because “[s]uch a framework is important to aid in uniformity in analysis of the facts and the applicable law.” *Id.* (brackets added).¹ The Board noted that the Department refuses to authorize spinal cord stimulator implants in all cases, based upon the

¹ *In Re: Susan M. Pleas* is designated a “Significant Decision,” signifying that this is a decision which the Board considers to have an analysis or decision of substantial importance to the Board carrying out its duties. See WAC 263-12-195(1).

recommendation from its Medical Advisory Industrial Insurance Committee, and reviewed medical testimony from Department witnesses, who stated there was insufficient medical literature meeting scientific standards to show treatment was effective or leads to functional improvement of patients. *See id.* The Board found that the treatment was “controversial” within the meaning of WAC 296-20-03002(6), so it must be presumed not to be medically necessary. *See id.* at *5. The Board discussed how to analyze whether the treatment could be determined to be medically necessary:

Since such treatment can be approved in certain cases, it follows that the presumption that it is not medically necessary can be rebutted. This regulation requires the Department to use a *case-by-case* analysis based on the definition of medically necessary found in WAC 296-20-01002.

Id. (italics added). Examining Pleas’ individual case, the Board held that the spinal cord stimulator was “proper and necessary medical and surgical services” within the meaning of WAC 296-20-01002. *See id.*²

The Medical Aid Rules provide that a “medical coverage decision” is a decision by the Department director to include or exclude a specific health care service as a covered benefit. *See* WAC 296-20-02700. The Rules provide that the director of the Department makes medical coverage decisions (*see* WAC 296-20-02701), the medical coverage decisions are used by Department claim managers “to help them make claim-specific decisions” (*see* WAC 296-20-02702), and covered and noncovered medical

² "While the Board's interpretation of the Act is not binding upon this court, it is entitled to great deference." *Doty v. Town of South Prairie*, 155 Wn.2d 527, 537, 120 P.3d 941 (2005) (quoting *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991)).

services are specified in the Medical Aid Rules (*see* WAC 296-20-02703).

As in *Pleas*, if a particular medical treatment is not listed in the Medical Aid Rules as a treatment that is not covered or authorized by the Department, an injured worker has a right to an individual determination as to whether that particular medical treatment is proper and necessary treatment under RCW 51.36.010. FAI is not specified in the Medical Aid Rules as a treatment or service that is excluded from coverage. *See* WAC 296-20-01505, 296-20-03002.

The legislature created the HTCC in ch. 70.14 RCW. Following that enactment, the Department filed Medical Aid Rules that specifically reference the role of HTCC determinations in the Department's medical coverage decisions. WAC 296-20-01001 provides for the appointment of a Medical Advisory Committee that advises the Department with respect to the development of coverage criteria, and review of coverage decisions and technology assessments. *See* section (2)(a). The Committee's function may include advising the Department "on coverage decisions from technology assessments based on the best available scientific evidence, from which the Department may use the committee's advice for making coverage decisions and for making proper and necessary industrial insurance claim decisions for covered services." Section (2)(d)(v). Section (4) provides that the Committee "shall coordinate with the state health technology assessment program," and that "[w]ith regard to issues in which the committee's opinion may differ with findings of the state health technology assessment program ... the

department must give greater weight to the findings of the state's health technology assessment program." (Brackets added.)

WAC 296-20-02704 lists sources of information the Department uses to make medical coverage decisions, which include, but are not limited to, recommendations from the Department's Medical Advisory Committee and the Washington state health technology assessment clinical committee. *See* WAC 296-20-02704(1) and (3)(b). The regulation provides that because of the "unique nature of each health care service," the quality of information available may vary and the director "weighs the quality of the available evidence in making medical coverage decisions." *See* section (1).

WAC 296-20-02705 provides that the Department may develop treatment guidelines in collaboration with specified committees, which include the Department's Medical Advisory Committee and the Washington state health technology assessment clinical committee. Section (3) provides that in implementing these guidelines, the Department may find it necessary to make a formal coverage decision on treatment options. "The department, *not the advisory committees* [which include the Washington state health technology assessment clinical committee], is responsible for implementing treatment guidelines and *for making coverage decisions* that result from such implementation." (Italics and brackets added.)

The Medical Aid Rules promulgated after the creation of the HTCC in 2006 provide that HTCC determinations are one of several sources of information the Department uses to make medical coverage decisions. While

the HTCC determinations are given greater weight than Medical Advisory Committee opinions, the regulations do not give HTCC determinations preclusive effect. The Department, not the HTCC, remains responsible for medical treatment coverage decisions. Those Department medical coverage decisions are then subject to review before the Board and in superior court, pursuant to chapter 51.52 RCW.

B. Interpreting RCW 70.14.120(3) And 70.14.120(4) Under The Plain Meaning Rule Retains An Injured Worker's Right To An Individual Determination Of Entitlement To Proper And Necessary Medical Treatment Under The IIA.

Chapter 70.14 RCW established the HTCC. *See* RCW 70.14.090(1). The HTCC reviews "health technology" to determine whether it will be included as a covered benefit in the health care programs of participating agencies. *See* RCW 70.14.110(1). "Health technology" includes medical and surgical devices and procedures, medical equipment and diagnostic tests. *See* RCW 70.14.080(5). The Department of Labor and Industries is included as a "participating agency." *See* RCW 70.14.080(6).

RCW 70.14.120 provides in relevant part as follows:

(3) A health technology not included as a covered benefit under a state purchased health care program pursuant to a determination of the [HTCC] under RCW 70.14.110, or for which a condition of coverage established by the committee is not met, 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.

(4) 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 ... law applicable to participating agency decisions.

(Brackets added.) The issue presented by RCW 70.14.120 is whether section (4) operates to prevent (3) from precluding an injured worker from an individual determination as to whether a particular medical treatment disallowed by the HTCC is “proper and necessary” medical treatment under the IIA.

The Court’s primary duty in interpreting a statute is determining legislative intent, *see State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010), and the “surest indication of legislative intent is the language enacted by the legislature.” *Id.* If the meaning of a statute is plain, the Court gives effect to that meaning as the expression of the legislature’s intent. *See State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). That plain meaning is discerned by reviewing an act as a whole, with related statutory provisions interpreted together, not piecemeal. *See Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).

RCW 70.14.120 provides in section (3) that if the HTCC determines a medical procedure is not a covered benefit, a claimant is not entitled to an individual determination as to whether that medical treatment is proper and necessary treatment, *unless* section (4) prevents the application of section (3). Section (4) provides that nothing in chapter 307, Laws of 2006 (which includes section (3)), diminishes a claimant’s right under existing law to appeal an action or decision of a participating agency. “Existing law” gives an injured worker the right to appeal a Department denial of a claim requesting authorization for payment for FAI surgery. Furthermore, pursuant

to RCW 51.36.010, ch. 296-20 WAC Medical Aid Rules, and the Board's analysis in *Pleas*, the worker is entitled to an individual determination as to whether the FAI surgery is proper and necessary treatment.

The Medical Aid Rules adopted after the enactment of chapter 70.14 RCW provide that HTCC determinations are only one of several sources of information the Department considers in making medical coverage decisions, do not preclude coverage decisions opposing HTCC determinations, and leave the responsibility for making medical coverage decisions with the Department, *not* the HTCC. *See* WAC 296-20-2700 – 2705. These rules are consistent with a recognition that RCW 70.14.120(3) HTCC determinations do not summarily foreclose an injured worker's right on appeal to an individual determination as to whether a particular medical treatment is proper and necessary.

Section (3) may still apply to other "participating agencies" (*i.e.*, the Department of Social and Health Services, the State Health Care Authority (*see* RCW 70.14.080(6))). Section (3) does not foreclose a worker's right to an individual determination of whether a particular medical procedure is a "proper and necessary" medical service, even if that procedure is disallowed by the HTCC, because the worker has the right to an individual determination in an appeal under chapter 51.52 RCW, which existed at the time chapter 70.14 RCW was enacted.

C. If The Court Determines RCW 70.14.120 Is Ambiguous Or Sections (3) and (4) Are Conflicting, Legislative History Supports An Injured Worker's Right To An Individual Determination As

To Whether A Particular Medical Treatment Is “Proper And Necessary” Medical Services Under The IIA.

After application of the plain meaning rule, if a statute remains ambiguous or has conflicting provisions the Court may turn to aids to statutory construction to arrive at the legislature’s intent, including legislative history. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *Campbell & Gwinn*, 146 Wn.2d at 12. Legislative history serves an important role in discerning legislative intent, and where provisions of an act appear to conflict, the Court may discern legislative intent by examining the legislative history of the enactment. *See State v. Bigsby*, 189 Wn.2d 210, 216, 399 P.3d 540 (2017). In disapproving legislation, the Governor acts in a legislative capacity, and the Governor’s veto message indicates legislative intent. *See State v. Reis*, 183 Wn.2d 197, 212-13, 351 P.3d 127 (2015). “In determining legislative intent of a statute, the reviewing court considers the intent of the Governor when [she] vetoes a section.” *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 594, 957 P.2d 1241 (1998) (brackets added).

Section 6 of the bill, as originally passed by the legislature, provided “[t]he administrator shall establish an open, independent, transparent, and timely process to enable patients, providers, and other stakeholders to appeal the determinations of the [HTCC]...” 2 House Journal, 59th Leg., Reg. Sess., at 1201 (Wash. 2006). The Governor vetoed that section, stating:

I strongly support [the bill] and particularly its inclusion of language that protects an individual’s right to appeal. Section 5(4) of the bill [subsequently codified as RCW 70.14.120(4)] states that “nothing in this act 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.” This is an important provision and one that I support wholeheartedly.

I am, however, vetoing Section 6 of this bill, which establishes an additional appeals process for patients, providers, and other stakeholders who disagree with the coverage determinations of the [HTCC]. The health care provider expertise on the clinical committee and the use of an evidence-based practice center should lend sufficient confidence in the quality of decisions made. Where issues may arise, I believe the individual appeal process highlighted above is sufficient to address them, without creating a duplicative and more costly process.

2 House Journal at 1587 (*italics added; brackets added*).

Plainly, the governor’s veto message is strong evidence of legislative intent that individuals retained the right to appeal under existing law, and that where individuals disagreed with HTCC coverage determinations those issues would be resolved through the individual appeal process.

In *Joy v. Dep’t of Labor & Indus.*, *supra*, the Court of Appeals stated the Legislature’s failure to override the Governor’s veto and reinstate the review process in section 6 did not support an interpretation of RCW 70.14.120(4) allowing injured workers to relief on appeal from a Department order denying medical treatment that the HTCC determined is not covered. *Joy*, 170 Wn. App. at 626.³ However, the Governor’s veto message is the only statement of legislative intent regarding RCW 70.14.120(4), and speaks

³ In *Joy*, the court agreed that RCW 70.14.120 does not prevent a worker's right to appeal L&I's denial of treatment, but held that section (3) prevents a worker from seeking a determination that treatment is necessary and proper in an individual case. 170 Wn. App. at 624-25. Of course, such an appeal results in a summary denial of coverage based solely upon HTCC's determination, with no ability for the worker to present evidence as to why the medical treatment is proper and necessary.

to the continuing right of individuals to disagree with HTCC coverage determinations through the individual appeal process. “When referring to what the legislature intended, we must not forget that the governor ... [is] acting in a legislative capacity, and we cannot therefore consider the intent of the house and the senate apart from the intent of the governor.” *State v. Reis*, 183 Wn.2d at 213 (quoting *Shelton Hotel Co. v. Bates*, 4 Wn.2d 498, 506, 104 P.2d 478 (1940)). A legislative override would have nullified the governor’s veto message, and the legislature’s failure to override the veto functions as legislative approval of the governor’s veto message. *See Cannabis Action Coalition v. City of Kent*, 180 Wn. App. 455, 474, 322 P.3d 1246 (2014), *aff’d*, 183 Wn.2d 219, 351 P.3d 151 (2015).

In *Joy*, the court also relied upon the canon of statutory construction that more specific statutes prevail over general statutes when a conflict exists, in order to find that RCW 70.14.120(3) controls over 70.14.120(4). *Joy*, 170 Wn. App. at 627. However, the specific/general rule applies only if the statutes conflict to the extent that they cannot be harmonized. *In re Estate of Kerr*, 130 Wn.2d 328, 343, 949 P.2d 810 (1998). Here, the provisions can be harmonized: section (3) provides that an HTCC conclusion that a medical treatment is not a covered benefit is not subject to an individual determination as to whether it is proper and necessary treatment, unless under section (4) one of the “participating agencies” has existing law that permits such an individual determination on appeal.

This interpretation does not render RCW 70.14.120(3) meaningless

or lead to absurd results. Under section (4) the Department of Labor & Industries has existing law that provides an injured worker a right to an individual determination of whether a particular medical treatment is proper and necessary treatment, so section (3) does not “diminish” that right. Section (3) may still operate to foreclose individual determinations in other “participating agencies,” *i.e.*, the Department of Social and Health Services and the State Health Care Authority. In addition, RCW 70.14.080(6), listing the Department as a “participating agency,” and 70.14.110, providing the HTCC shall determine the conditions, if any, under which a health technology will be included as a covered benefit, retain meaning under this interpretation because the Department includes HTCC determinations as part of the information it reviews in making medical coverage decisions. *See* WAC 296-20-02700 – 02705.

Furthermore, the maxim of construction that more specific statutes prevail over general statutes should not be used to defeat legislative intent. *Estate of Kerr*, 134 Wn.2d at 343. Here, the final statement of legislative intent is the Governor’s veto message interpreting RCW 70.14.120(4) as providing individuals the right to appeal HTCC determinations where allowed by existing law.

Finally, while the Court in *Joy* found that 70.14.120(3) is the more specific provision compared to 70.14.120(4), the opposite is more plausible: section (3) provides generally that HTCC decisions are not subject to individual patient determinations by the participating agencies, unless under

section (4) a specific participating agency has existing law that provides for individual determinations on appeal.

D. Chapter 70.14 RCW Is An Unconstitutional Delegation Of Legislative Authority Because There Are Inadequate Guidelines And Procedural Safeguards To Control Arbitrary Administrative Action And Abuse Of Discretionary Power.

In *Barry & Barry v. Dep't of Motor Veh.*, 81 Wn.2d 155, 500 P.2d 540 (1972), the Court held that it is not unconstitutional for the legislature to delegate administrative power when protection against arbitrary and unjustified administrative action is provided as follows: (1) the legislature provides standards or guidelines which define in general terms what is to be done and the administrative body which is to do it; and (2) adequate procedural safeguards exist in regard to the procedure for promulgating rules and for testing the constitutionality of the rules after promulgation. *Barry*, 81 Wn.2d at 163-64. The Court found that adequate procedural safeguards existed because the Administrative Procedure Act applied to "ensure that interested parties will be heard *before* a rule is adopted," and the act "provides for judicial review of administrative rules and standards to protect against arbitrary and capricious administrative action *after* it has occurred." *Id.* at 164. A later case considered it "crucial" that the regulatory scheme challenged in *Barry* only affected the economic interests of the parties. *See In the Matter of Powell*, 92 Wn.2d 882, 892, 602 P.2d 711 (1979). To determine whether a delegation of power includes sufficient procedural safeguards, "it is imperative to consider the magnitude of the interests which are affected by the legislative grant of authority." *Id.*; *see also State v.*

Simmons, 152 Wn.2d 450, 460, 98 P.3d 789 (2004). The interest of an injured worker to “sure and certain relief” including proper and necessary medical treatment is paramount to economic interests.

In certain cases, this Court found sufficient safeguards exist because of the availability of administrative review and writs of certiorari. *See AUTO. United Trades Org. v. State*, 183 Wn.2d 842, 861, 357 P.3d 615 (2015), and cases cited therein. Here, there is no available administrative review for testing HTCC determinations after promulgation, as ch. 70.14 RCW provides no such review and RCW 70.14.090(5) states the HTCC is not an agency “for purposes of chapter 34.05 RCW” (the Administrative Procedure Act). In *Murray*, the court agreed with the Department’s contention that the availability of a constitutional writ of certiorari fulfills the requirement for adequate procedural safeguards after rule promulgation. *Murray*, 1 Wn. App. 2d at 9-12.

The constitutional writ of certiorari may be unavailable. “At common law, only judicial or quasi-judicial decisions were reviewable under the writ of certiorari, and not legislative, discretionary, or ministerial acts.” *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 305, 949 P.2d 370 (1998) (Talmadge, J. concurring); *see also Ewing v. Seattle*, 55 Wash. 229, 236, 104 P. 259 (1909). “[B]efore deciding whether to issue a constitutional writ of certiorari, our courts must determine if the decision to be reviewed qualifies as a judicial or quasi-judicial decision.” *Saldin*, 134 Wn.2d at 307

(Talmadge, J. concurring) (brackets added).⁴ *But see Bridle Trails v. Bellevue*, 45 Wn. App. 248, 252, 724 P.2d 1110 (1986) (“Nor can the superior court ever lack the jurisdiction to entertain application for a writ alleging acts in excess of jurisdiction by an inferior body, whether exercising judicial functions or administrative ones. This jurisdiction is inherent in the court, as recognized in the Constitution.”)

Even if it were available, the constitutional writ of certiorari would be an inadequate procedure for Murray to test HTCC determinations. This form of review lies entirely within the trial court’s discretion; it cannot be mandated by anyone, including a higher court. *Clark County PUD No. 1 v. Wilkinson*, 139 Wn.2d 840, 846, 991 P.2d 1161 (2000); *Bridle Trails*, 45 Wn. App. at 252. Constitutional writs of certiorari are extraordinary remedies that should be granted sparingly. *Torrance v. King County*, 136 Wn.2d 783, 793, 966 P.2d 891 (1998); *Coballes v. Spokane County*, 167 Wn. App. 857, 865, 274 P.3d 1102 (2012).

Here, the delegation of authority to the HTCC in ch. 70.14 RCW to make medical coverage determinations applicable to the IIA is unconstitutional because of the lack of guidelines or procedural safeguards to ensure the HTCC is making determinations with all doubts regarding coverage resolved in favor of the injured worker. As a worker injured in the course of employment, Murray is entitled to proper and necessary medical

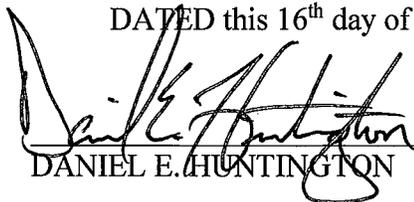
⁴ HTCC determinations under ch. 70.14 RCW do not meet the criteria to qualify as agency actions that are judicial or quasi-judicial. *See Raynes v. Leavenworth*, 118 Wn.2d 237, 244-45, 821 P.2d 1204 (1992).

benefits under the IIA, with a statutorily mandated liberal construction of the provisions of the IIA in favor of compensating Murray, with all doubts regarding coverage resolved in his favor. The HTCC is an agency established outside of the statutes and regulations of the IIA that govern the Department. Unlike the Department, the HTCC is not required in ch. 70.14 RCW to resolve all doubts regarding benefits coverage in favor of compensating injured workers when making its determinations regarding which benefits are covered under the IIA. The delegation of authority to the HTCC to make medical coverage determinations that are binding in IIA appeals is unconstitutional, because: 1) the HTCC is an agency outside of the Department and is not bound by the statutes that require the Department to resolve all doubts regarding medical coverage in favor of the injured worker; 2) there are no procedural safeguards to ensure that HTCC coverage determinations are made with all doubts resolved in favor of the injured worker.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

DATED this 16th day of April, 2018.


DANIEL E. HUNTINGTON

for


VALERIE D. MCOMIE

On Behalf of WSAJ Foundation

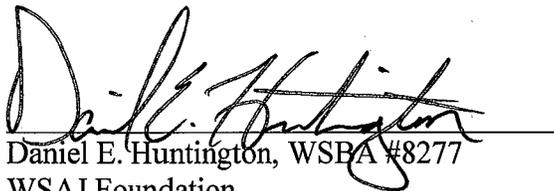
CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 2018, I electronically filed the foregoing document with the Clerk of the Court using the Washington State Appellate Courts Portal which will send notification of such filing to all counsel of record herein.

Patrick A. Palace patrick@palacelaw.com
Jordan L Couch jordan@palacelaw.com

Philip. J. Buri philip@burifunston.com

Anastasia R. Sandstrom anas@atg.wa.gov
Shana Pacarro-Muller shanap@atg.wa.gov


Daniel E. Huntington, WSBA #8277
WSAJ Foundation

APPENDIX

2006
SESSION LAWS
OF THE
STATE OF WASHINGTON

REGULAR SESSION
FIFTY-NINTH LEGISLATURE
Convened January 9, 2006. Adjourned March 8, 2006.



Published at Olympia by the Statute Law Committee under
Chapter 6, Laws of 1969.

K. KYLE THIESSEN
Code Reviser

<http://www1.leg.wa.gov/codereviser>

Passed by the House March 6, 2006.

Passed by the Senate March 3, 2006.

Approved by the Governor March 29, 2006.

Filed in Office of Secretary of State March 29, 2006.

CHAPTER 307

[Engrossed Second Substitute House Bill 2575]

HEALTH TECHNOLOGY CLINICAL COMMITTEE

AN ACT Relating to establishing a state health technology assessment program; amending RCW 41.05.013; adding new sections to chapter 70.14 RCW; and creating new sections.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION, Sec. 1. A new section is added to chapter 70.14 RCW to read as follows:

DEFINITIONS. The definitions in this section apply throughout sections 2 through 7 of this act unless the context clearly requires otherwise.

(1) "Administrator" means the administrator of the Washington state health care authority under chapter 41.05 RCW.

(2) "Advisory group" means a group established under section 4(2)(c) of this act.

(3) "Committee" means the health technology clinical committee established under section 2 of this act.

(4) "Coverage determination" means a determination of the circumstances, if any, under which a health technology will be included as a covered benefit in a state purchased health care program.

(5) "Health technology" means medical and surgical devices and procedures, medical equipment, and diagnostic tests. Health technologies does not include prescription drugs governed by RCW 70.14.050.

(6) "Participating agency" means the department of social and health services, the state health care authority, and the department of labor and industries.

(7) "Reimbursement determination" means a determination to provide or deny reimbursement for a health technology included as a covered benefit in a specific circumstance for an individual patient who is eligible to receive health care services from the state purchased health care program making the determination.

NEW SECTION, Sec. 2. A new section is added to chapter 70.14 RCW to read as follows:

HEALTH TECHNOLOGY COMMITTEE ESTABLISHED. (1) A health technology clinical committee is established, to include the following eleven members appointed by the administrator in consultation with participating state agencies:

(a) Six practicing physicians licensed under chapter 18.57 or 18.71 RCW; and

(b) Five other practicing licensed health professionals who use health technology in their scope of practice.

At least two members of the committee must have professional experience treating women, children, elderly persons, and people with diverse ethnic and racial backgrounds.

(2) Members of the committee:

(a) Shall not contract with or be employed by a health technology manufacturer or a participating agency during their term or for eighteen months before their appointment. As a condition of appointment, each person shall agree to the terms and conditions imposed by the administrator regarding conflicts of interest;

(b) Are immune from civil liability for any official acts performed in good faith as members of the committee; and

(c) Shall be compensated for participation in the work of the committee in accordance with a personal services contract to be executed after appointment and before commencement of activities related to the work of the committee.

(3) Meetings of the committee and any advisory group are subject to chapter 42.30 RCW, the open public meetings act, including RCW 42.30.110(1)(I), which authorizes an executive session during a regular or special meeting to consider proprietary or confidential nonpublished information.

(4) Neither the committee nor any advisory group is an agency for purposes of chapter 34.05 RCW.

(5) The health care authority shall provide administrative support to the committee and any advisory group, and may adopt rules governing their operation.

NEW SECTION. Sec. 3. A new section is added to chapter 70.14 RCW to read as follows:

TECHNOLOGY SELECTION AND ASSESSMENT. (1) The administrator, in consultation with participating agencies and the committee, shall select the health technologies to be reviewed by the committee under section 4 of this act. Up to six may be selected for review in the first year after the effective date of this act, and up to eight may be selected in the second year after the effective date of this act. In making the selection, priority shall be given to any technology for which:

(a) There are concerns about its safety, efficacy, or cost-effectiveness, especially relative to existing alternatives, or significant variations in its use;

(b) Actual or expected state expenditures are high, due to demand for the technology, its cost, or both; and

(c) There is adequate evidence available to conduct the complete review.

(2) A health technology for which the committee has made a determination under section 4 of this act shall be considered for rereview at least once every eighteen months, beginning the date the determination is made. The administrator, in consultation with participating agencies and the committee, shall select the technology for rereview if he or she decides that evidence has since become available that could change a previous determination. Upon rereview, consideration shall be given only to evidence made available since the previous determination.

(3) Pursuant to a petition submitted by an interested party, the health technology clinical committee may select health technologies for review that have not otherwise been selected by the administrator under subsection (1) or (2) of this section.

(4) Upon the selection of a health technology for review, the administrator shall contract for a systematic evidence-based assessment of the technology's safety, efficacy, and cost-effectiveness. The contract shall:

(a) Be with an evidence-based practice center designated as such by the federal agency for health care research and quality, or other appropriate entity;

(b) Require the assessment be initiated no sooner than thirty days after notice of the selection of the health technology for review is posted on the internet under section 7 of this act;

(c) Require, in addition to other information considered as part of the assessment, consideration of: (i) Safety, health outcome, and cost data submitted by a participating agency; and (ii) evidence submitted by any interested party; and

(d) Require the assessment to: (i) Give the greatest weight to the evidence determined, based on objective indicators, to be the most valid and reliable, considering the nature and source of the evidence, the empirical characteristic of the studies or trials upon which the evidence is based, and the consistency of the outcome with comparable studies; and (ii) take into account any unique impacts of the technology on specific populations based upon factors such as sex, age, ethnicity, race, or disability.

NEW SECTION. Sec. 4. A new section is added to chapter 70.14 RCW to read as follows:

HEALTH TECHNOLOGY COMMITTEE DETERMINATIONS. (1) The committee shall determine, for each health technology selected for review under section 3 of this act: (a) The conditions, if any, under which the health technology will be included as a covered benefit in health care programs of participating agencies; and (b) 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.

(2) In making a determination under subsection (1) of this section, the committee:

(a) Shall consider, in an open and transparent process, evidence regarding the safety, efficacy, and cost-effectiveness of the technology as set forth in the systematic assessment conducted under section 3(4) of this act;

(b) Shall provide an opportunity for public comment; and

(c) May establish ad hoc temporary advisory groups if specialized expertise is needed to review a particular health technology or group of health technologies, or to seek input from enrollees or clients of state purchased health care programs. Advisory group members are immune from civil liability for any official act performed in good faith as a member of the group. As a condition of appointment, each person shall agree to the terms and conditions imposed by the administrator regarding conflicts of interest.

(3) Determinations of the committee under subsection (1) of this section shall be consistent with decisions made under the federal medicare program and in expert treatment guidelines, including those from specialty physician organizations and patient advocacy organizations, unless the committee concludes, based on its review of the systematic assessment, that substantial evidence regarding the safety, efficacy, and cost-effectiveness of the technology supports a contrary determination.

NEW SECTION. Sec. 5. A new section is added to chapter 70.14 RCW to read as follows:

COMPLIANCE BY STATE AGENCIES. (1) A participating agency shall comply with a determination of the committee under section 4 of this act unless:

(a) The determination conflicts with an applicable federal statute or regulation, or applicable state statute; or

(b) Reimbursement is provided under an agency policy regarding experimental or investigational treatment, services under a clinical investigation approved by an institutional review board, or health technologies that have a humanitarian device exemption from the federal food and drug administration.

(2) For a health technology not selected for review under section 3 of this act, a participating agency may use its existing statutory and administrative authority to make coverage and reimbursement determinations. Such determinations shall be shared among agencies, with a goal of maximizing each agency's understanding of the basis for the other's decisions and providing opportunities for agency collaboration.

(3) A health technology not included as a covered benefit under a state purchased health care program pursuant to a determination of the health technology clinical committee under section 4 of this act, or for which a condition of coverage established by the committee is not met, 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.

(4) Nothing in this act 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.

***NEW SECTION. Sec. 6.** A new section is added to chapter 70.14 RCW to read as follows:

APPEAL PROCESS. *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.*

*Sec. 6 was vetoed. See message at end of chapter.

NEW SECTION. Sec. 7. A new section is added to chapter 70.14 RCW to read as follows:

PUBLIC NOTICE. (1) The administrator shall develop a centralized, internet-based communication tool that provides, at a minimum:

(a) Notification when a health technology is selected for review under section 3 of this act, indicating when the review will be initiated and how an interested party may submit evidence, or provide public comment, for consideration during the review;

(b) Notification of any determination made by the committee under section 4(1) of this act, its effective date, and an explanation of the basis for the determination; and

(c) Access to the systematic assessment completed under section 3(4) of this act, and reports completed under subsection (2) of this section.

(2) Participating agencies shall develop methods to report on the implementation of this section and sections 1 through 6 of this act with respect to

health care outcomes, frequency of exceptions, cost outcomes, and other matters deemed appropriate by the administrator.

Sec. 8. RCW 41.05.013 and 2005 c 462 s 3 are each amended to read as follows:

(1) The authority shall coordinate state agency efforts to develop and implement uniform policies across state purchased health care programs that will ensure prudent, cost-effective health services purchasing, maximize efficiencies in administration of state purchased health care programs, improve the quality of care provided through state purchased health care programs, and reduce administrative burdens on health care providers participating in state purchased health care programs. The policies adopted should be based, to the extent possible, upon the best available scientific and medical evidence and shall endeavor to address:

(a) Methods of formal assessment, such as a health technology assessment under sections 1 through 7 of this act. Consideration of the best available scientific evidence does not preclude consideration of experimental or investigational treatment or services under a clinical investigation approved by an institutional review board;

(b) Monitoring of health outcomes, adverse events, quality, and cost-effectiveness of health services;

(c) Development of a common definition of medical necessity; and

(d) Exploration of common strategies for disease management and demand management programs, including asthma, diabetes, heart disease, and similar common chronic diseases. Strategies to be explored include individual asthma management plans. On January 1, 2007, and January 1, 2009, the authority shall issue a status report to the legislature summarizing any results it attains in exploring and coordinating strategies for asthma, diabetes, heart disease, and other chronic diseases.

(2) The administrator may invite health care provider organizations, carriers, other health care purchasers, and consumers to participate in efforts undertaken under this section.

(3) For the purposes of this section "best available scientific and medical evidence" means the best available clinical evidence derived from systematic research.

NEW SECTION. Sec. 9. A new section is added to chapter 70.14 RCW to read as follows:

Sections 1 through 7 of this act and RCW 41.05.013 do not apply to state purchased health care services that are purchased from or through health carriers as defined in RCW 48.43.005.

NEW SECTION. Sec. 10. Captions used in this act are not any part of the law.

NEW SECTION. Sec. 11. If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, the conflicting part of this act is inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and this finding does not affect the operation of the remainder of this act in its application to the agencies concerned. Rules adopted under this act must meet

federal requirements that are a necessary condition to the receipt of federal funds by the state.

Passed by the House March 6, 2006.

Passed by the Senate March 3, 2006.

Approved by the Governor March 29, 2006, with the exception of certain items that were vetoed.

Filed in Office of Secretary of State March 29, 2006.

Note: Governor's explanation of partial veto is as follows:

"I am returning, without my approval as to Section 6, Engrossed Second Substitute House Bill No. 2575 entitled:

"AN ACT Relating to establishing a state health technology assessment program."

I strongly support ESSHB No. 2575 and particularly its inclusion of language that protects an individual's right to appeal. Section 5(4) of the bill states that "nothing in this act 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." This is an important provision and one that I support whole-heartedly.

I am, however, vetoing Section 6 of this bill, which establishes an additional appeals process for patients, providers, and other stakeholders who disagree with the coverage determinations of the Health Technology Clinical Committee. The health care provider expertise on the clinical committee and the use of an evidence-based practice center should lend sufficient confidence in the quality of decisions made. Where issues may arise, I believe the individual appeal process highlighted above is sufficient to address them, without creating a duplicative and more costly process.

In the implementation of this bill, I expect the Health Care Authority, with the cooperation of participating agencies, to facilitate a timely and transparent process, to prioritize and manage the review of technologies within appropriated funds, and to meaningfully consider stakeholder feedback regarding the program and appeals processes. I further expect that the implementation of the Health Technology Assessment Program will be consistent with sound methods of assessment and the principles of evidence-based medicine.

I appreciate the Legislature's passage of this bill and have full confidence that it will help ensure that Washingtonians receive health care services that are safe and effective.

For these reasons, I have vetoed Section 6 of ESSHB No. 2575.

With the exception of Section 6, ESSHB No. 2575 is approved."

CHAPTER 308

[Second Substitute House Bill 2583]

COMMUNITY AND TECHNICAL COLLEGES—PART-TIME ACADEMIC EMPLOYEES— HEALTH CARE BENEFITS

AN ACT Relating to community and technical college part-time academic employee health care benefits; adding a new section to chapter 41.05 RCW; adding a new section to chapter 28B.50 RCW; and creating a new section.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. Part-time academic employees at community and technical colleges are currently eligible for full health care benefits beginning the second consecutive quarter of employment, at half-time or more of an academic workload, as defined in RCW 28B.50.489. They are also eligible for health benefits through the summer even if they receive no work at all that

RCW 70.14.080**Definitions.**

The definitions in this section apply throughout RCW 70.14.090 through 70.14.130 unless the context clearly requires otherwise.

(1) "Administrator" means the administrator of the Washington state health care authority under chapter 41.05 RCW.

(2) "Advisory group" means a group established under RCW 70.14.110(2)(c).

(3) "Committee" means the health technology clinical committee established under RCW 70.14.090.

(4) "Coverage determination" means a determination of the circumstances, if any, under which a health technology will be included as a covered benefit in a state purchased health care program.

(5) "Health technology" means medical and surgical devices and procedures, medical equipment, and diagnostic tests. Health technologies does not include prescription drugs governed by RCW 70.14.050.

(6) "Participating agency" means the department of social and health services, the state health care authority, and the department of labor and industries.

(7) "Reimbursement determination" means a determination to provide or deny reimbursement for a health technology included as a covered benefit in a specific circumstance for an individual patient who is eligible to receive health care services from the state purchased health care program making the determination.

[2006 c 307 § 1.]

NOTES:

Captions not law—2006 c 307: "Captions used in this act are not any part of the law." [2006 c 307 § 10.]

Conflict with federal requirements—2006 c 307: "If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, the conflicting part of this act is inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and this finding does not affect the operation of the remainder of this act in its application to the agencies concerned. Rules adopted under this act must meet federal requirements that are a necessary condition to the receipt of federal funds by the state." [2006 c 307 § 11.]

RCW 70.14.090**Health technology clinical committee.**

(1) A health technology clinical committee is established, to include the following eleven members appointed by the administrator in consultation with participating state agencies:

(a) Six practicing physicians licensed under chapter 18.57 or 18.71 RCW; and

(b) Five other practicing licensed health professionals who use health technology in their scope of practice.

(i) At least two members of the committee must have professional experience treating women, children, elderly persons, and people with diverse ethnic and racial backgrounds.

(ii) At least one member of the committee must be appointed from nominations submitted by the Washington state medical association or the Washington state osteopathic medical association.

(2) In addition, any rotating clinical expert selected to advise the committee on health technology must be a nonvoting member of the committee.

(3) Members of the committee:

(a) Shall not contract with or be employed by a health technology manufacturer or a participating agency during their term or for eighteen months before their appointment. As a condition of appointment, each person shall agree to the terms and conditions imposed by the administrator regarding conflicts of interest;

(b) Are immune from civil liability for any official acts performed in good faith as members of the committee; and

(c) Shall be compensated for participation in the work of the committee in accordance with a personal services contract to be executed after appointment and before commencement of activities related to the work of the committee.

(4) Meetings of the committee and any advisory group are subject to chapter 42.30 RCW, the open public meetings act, including RCW 42.30.110(1)(I), which authorizes an executive session during a regular or special meeting to consider proprietary or confidential nonpublished information.

(5) Neither the committee nor any advisory group is an agency for purposes of chapter 34.05 RCW.

(6) The health care authority shall provide administrative support to the committee and any advisory group, and may adopt rules governing their operation.

[2016 sp.s. c 1 § 1; 2006 c 307 § 2.]

NOTES:

Captions not law—Conflict with federal requirements—2006 c 307: See notes following RCW 70.14.080.

RCW 70.14.100**Health technology selection and assessment.**

(1) The administrator, in consultation with participating agencies and the committee, shall select the health technologies to be reviewed by the committee under RCW 70.14.110. Up to six may be selected for review in the first year after June 7, 2006, and up to eight may be selected in the second year after June 7, 2006. In making the selection, priority shall be given to any technology for which:

(a) There are concerns about its safety, efficacy, or cost-effectiveness, especially relative to existing alternatives, or significant variations in its use;

(b) Actual or expected state expenditures are high, due to demand for the technology, its cost, or both; and

(c) There is adequate evidence available to conduct the complete review.

(2) A health technology for which the committee has made a determination under RCW 70.14.110 shall be considered for rereview at least once every eighteen months, beginning the date the determination is made. The administrator, in consultation with participating agencies and the committee, shall select the technology for rereview if he or she decides that evidence has since become available that could change a previous determination. Upon rereview, consideration shall be given only to evidence made available since the previous determination.

(3) Pursuant to a petition submitted by an interested party, the health technology clinical committee may select health technologies for review that have not otherwise been selected by the administrator under subsection (1) or (2) of this section.

(4) Upon the selection of a health technology for review, the administrator shall contract for a systematic evidence-based assessment of the technology's safety, efficacy, and cost-effectiveness. The contract shall:

(a) Be with an evidence-based practice center designated as such by the federal agency for health care research and quality, or other appropriate entity;

(b) Require the assessment be initiated no sooner than thirty days after notice of the selection of the health technology for review is posted on the internet under RCW 70.14.130;

(c) Require, in addition to other information considered as part of the assessment, consideration of:

(i) Safety, health outcome, and cost data submitted by a participating agency; and (ii) evidence submitted by any interested party; and

(d) Require the assessment to: (i) Give the greatest weight to the evidence determined, based on objective indicators, to be the most valid and reliable, considering the nature and source of the evidence, the empirical characteristic of the studies or trials upon which the evidence is based, and the consistency of the outcome with comparable studies; and (ii) take into account any unique impacts of the technology on specific populations based upon factors such as sex, age, ethnicity, race, or disability.

[2006 c 307 § 3.]

NOTES:

Captions not law—Conflict with federal requirements—2006 c 307: See notes following RCW 70.14.080.

RCW 70.14.110**Health technology clinical committee determinations.**

(1) The committee shall determine, for each health technology selected for review under RCW 70.14.100: (a) The conditions, if any, under which the health technology will be included as a covered benefit in health care programs of participating agencies; and (b) 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.

(2) In making a determination under subsection (1) of this section, the committee:

(a) Shall consider, in an open and transparent process, 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);

(b) Shall provide an opportunity for public comment; and

(c) May establish ad hoc temporary advisory groups if specialized expertise is needed to review a particular health technology or group of health technologies, or to seek input from enrollees or clients of state purchased health care programs. Advisory group members are immune from civil liability for any official act performed in good faith as a member of the group. As a condition of appointment, each person shall agree to the terms and conditions imposed by the administrator regarding conflicts of interest.

(3) Determinations of the committee under subsection (1) of this section shall be consistent with decisions made under the federal medicare program and in expert treatment guidelines, including those from specialty physician organizations and patient advocacy organizations, unless the committee concludes, based on its review of the systematic assessment, that substantial evidence regarding the safety, efficacy, and cost-effectiveness of the technology supports a contrary determination.

[2006 c 307 § 4.]

NOTES:

Captions not law—Conflict with federal requirements—2006 c 307: See notes following RCW 70.14.080.

RCW 70.14.120**Agency compliance with committee determination—Coverage and reimbursement determinations for nonreviewed health technologies—Appeals.**

(1) A participating agency shall comply with a determination of the committee under RCW 70.14.110 unless:

(a) The determination conflicts with an applicable federal statute or regulation, or applicable state statute; or

(b) Reimbursement is provided under an agency policy regarding experimental or investigational treatment, services under a clinical investigation approved by an institutional review board, or health technologies that have a humanitarian device exemption from the federal food and drug administration.

(2) For a health technology not selected for review under RCW 70.14.100, a participating agency may use its existing statutory and administrative authority to make coverage and reimbursement determinations. Such determinations shall be shared among agencies, with a goal of maximizing each agency's understanding of the basis for the other's decisions and providing opportunities for agency collaboration.

(3) A health technology not included as a covered benefit under a state purchased health care program pursuant to a determination of the health technology clinical committee under RCW 70.14.110, or for which a condition of coverage established by the committee is not met, 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.

(4) 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.

[2006 c 307 § 5.]

NOTES:

Captions not law—Conflict with federal requirements—2006 c 307: See notes following RCW 70.14.080.

RCW 70.14.130**Health technology clinical committee—Public notice.**

(1) The administrator shall develop a centralized, internet-based communication tool that provides, at a minimum:

(a) Notification when a health technology is selected for review under RCW 70.14.100, indicating when the review will be initiated and how an interested party may submit evidence, or provide public comment, for consideration during the review;

(b) Notification of any determination made by the committee under RCW 70.14.110(1), its effective date, and an explanation of the basis for the determination; and

(c) Access to the systematic assessment completed under RCW 70.14.100(4), and reports completed under subsection (2) of this section.

(2) Participating agencies shall develop methods to report on the implementation of this section and RCW 70.14.080 through 70.14.120 with respect to health care outcomes, frequency of exceptions, cost outcomes, and other matters deemed appropriate by the administrator.

[2006 c 307 § 7.]

NOTES:

Captions not law—Conflict with federal requirements—2006 c 307: See notes following RCW 70.14.080.

RICHTER-WIMBERLEY, P.S.

April 16, 2018 - 4:10 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_Briefs_20180416155141SC110519_7961.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Murray Amicus Brief of WSAJF.pdf
- 952515_Motion_20180416155141SC110519_7455.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was Murray Motion for Leave to File Amicus Brief of WSAJF.pdf

A copy of the uploaded files will be sent to:

- anas@atg.wa.gov
- brian@causeywright.com
- jordan@palacelaw.com
- patrick@palacelaw.com
- philip@burifunston.com
- sumnerlaw@aol.com
- valeriemcomie@gmail.com

Comments:

Sender Name: Bonita Felgenhauer - Email: bonitaf@richter-wimberley.com

Filing on Behalf of: Daniel Edward Huntington - Email: danhuntington@richter-wimberley.com (Alternate Email: bonitaf@richter-wimberley.com)

Address:
422 W. Riverside
Suite 1300
Spokane, WA, 99201-0305
Phone: (509) 455-4201

Note: The Filing Id is 20180416155141SC110519