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NO. 95251-5

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL E. MURRAY,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

**DEPARTMENT OF LABOR & INDUSTRIES'
SECOND SUPPLEMENTAL BRIEF**

ROBERT W. FERGUSON
Attorney General

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

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I. INTRODUCTION

The Legislature made the policy choice in the Health Technology Clinical Committee (HTCC) Act and Industrial Insurance Act (IIA) to favor evidence-based medical treatment that covers all Washington workers. For the controversial procedures reviewed by the HTCC Act, this evidence-based approach replaced an ad hoc system in which workers were required to present evidence to persuade individual administrative law judges of the safety and efficacy of procedures on a case-by-case basis. The Legislature's approach is not only consistent with the IIA, but strengthens its promise of "sure and certain relief" because workers receive safe and effective treatment.

Once the HTCC has made a coverage decision regarding a particular procedure or technology, the Act's primary purpose and explicit text prohibit (with some exceptions) evaluation of whether the procedure is necessary and proper in an individual patient's case. *See* RCW 70.14.120(1), (3). Given the statute's purpose and explicit text, the provision retaining an individual's appeal rights and the impact of the Governor's veto cannot mean that individuals retain the right to challenge the HTCC decision in an individual appeal. Instead, individuals retain the right to appeal whether the HTCC decision is applicable to them and whether an exception applies. Neither the vetoed section, had it become

law, nor the remaining legislation, after the Governor's veto, allow for individual evaluations in an appeal. To the extent the Court considers the Governor's veto as legislative history, it should disregard the veto message's suggestions that are contrary to the text of the statute.

II. ANALYSIS

A. Governor Gregoire's Veto Has Legal Significance Only as Part of the Statute's Legislative History

The Court asked what the legal significance of the veto is in view of the sure and certain relief in the workers' compensation statutes. Order at 1. The Court should not consider legislative history like the veto because the statute is not ambiguous. *See State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013). L&I's interpretation is the only reasonable one, as Murray's gives no meaning to section (3). But even if it is considered, the veto changes nothing.

The vetoed section provided only a system to review the HTCC's coverage decisions, not a system to review decisions made by L&I that follow the HTCC's coverage decisions.¹ This section would not have allowed claimants to argue in their individual case that a treatment was

¹ "The administrator shall establish an open, independent, transparent, and timely process to enable patients, providers, and other stakeholders to appeal the determinations of the health technology clinical committee made under section 4 of this act." Laws of 2006, ch. 307, § 6

proper and necessary despite the HTCC determination. Instead, it would have allowed a statutory appeal to the HTCC decisions themselves.² The Governor appeared to believe differently, possibly believing that the appeal provisions in section (4) allowed someone to challenge a HTCC determination for an individual patient and that section (6) duplicated this right.³ Laws of 2006, ch. 307. This is an incorrect construction of sections (4) and (6) because section (3) provides that a non-covered treatment “shall not be subject to a determination in the case of an individual patient as to whether it is . . . proper and necessary treatment.” Neither sections (4) nor (6) contravene section (3). Indeed the Court should be “wary” about giving too much weight to legislative statements when the Court must “psychoanalyze” the intent of the author. *2A Sutherland Statutory Construction* § 48:2 (7th ed.) (citing *United States v. Pub. Util. Comm’n of Cal.*, 345 U.S. 295, 319, 73 S. Ct. 706, 97 L. Ed. 1020 (1953) (Jackson, J., concurring)). A more compelling statement of legislative intent is that the Legislature has amended the HTCC Act since *Joy v. Dep’t of Labor &*

² A party may now similarly challenge a HTCC decision in a constitutional writ. *Dorsten v. Port of Skagit Cty.*, 32 Wn. App. 785, 788–89, 650 P.2d 220 (1982) (constitutional writ available for quasi-legislative acts).

³ The Governor stated “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. . . . 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.” Laws of 2006, ch. 307.

Indus., 170 Wn. App. 614, 624, 285 P.3d 187 (2012), and has not changed sections (3) and (4), thus indicating legislative acquiescence to *Joy*. Laws of 2016, 1st Spec. Sess., ch. 1; *Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 462, 645 P.2d 1076 (1982) (resolving ambiguity by looking at Legislature's decision not to change statute).

The Court asked about the veto's legal significance considering the IIA's provision of "sure and certain" relief. Order at 1; RCW 51.04.010. Under RCW 51.04.010, relief is "sure and certain" for injured workers because they do not have to sue or seek damages and in return receive statutorily defined benefits: the "grand compromise." *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995). Under this compromise, claimants receive only the benefits dictated by statute. *Weiffenbach v. City of Seattle*, 193 Wash. 528, 535, 76 P.2d 589 (1938).

In particular, in furtherance of the grand compromise, the Legislature has limited recovery for treatment. *Durant v. State Farm Mut. Auto. Ins. Co.*, No. 94771-6 (Wash. 2018). The Legislature covered medical care in 1917, but limited it to "proper and necessary" care in RCW 51.36.010. Laws of 1917, ch. 28, § 5.⁴ The HTCC's use of

⁴ There are other benefit limitations in the IIA. *E.g.*, RCW 51.32.060, .090 (limitation of wage replacement benefits to 60 percent of wages up to statutory cap); RCW 51.32.080 (limitation on amount of compensation for permanent disabilities). Thus, the Legislature may limit the type and amount of benefits provided, consistent with the grand compromise.

evidence-based coverage decisions furthers the IIA’s goal of providing for “sure and certain” relief: by providing for uniformity in treatment coverage decisions, it makes the relief a worker can receive both more sure and more certain than it would otherwise be.

The proper and necessary treatment statute, RCW 51.36.010(1), promotes “occupational health best practices” and “evidence-based” medicine, and consistent with this, the HTCC evaluates treatments to ensure safety, efficacy, and cost-effectiveness using “evidence-based” techniques. RCW 70.14.100, .110. The HTCC Act ensures that only “proper and necessary” care is provided because it provides for safe treatment. RCW 70.14.100 and .110 create a robust and uniform medical process, including review by 11 medical experts using a detailed scientific report. RCW 70.14.120(1) and (3) provide that agencies and the reviewing bodies must follow the determination. Even if the veto is considered as a constructive aid, “the interpretation adopted should always be one which best advances the legislative purpose.” *Dep’t of Transp.*, 97 Wn.2d at 459. The HTCC Act shows the Legislature’s intent was to adopt a binding and uniform evidence-based approach, which would be thwarted if the HTCC’s decisions were subject to individual appeals.

B. RCW 70.14.120(3) and (4) Operate the Same After the Veto and Murray’s Remedy Under RCW 70.14.120(3) and (4) Is to Dispute Whether the HTCC Decision Applies to His Condition

or Whether an Exception Applies

The Court asked how to apply sections (3) and (4), given the veto. Order at 1. After the veto, section (4) still does not address an appeal's scope, but provides generally for an appeal from a decision of the State to deny treatment, while section (3) sets the scope for those appeals. Any other reading gives no effect to section (3) and the Legislature's evidence-based approach in RCW 70.14.100 and .110.

The Court asked the parties to discuss available remedies under RCW 70.14.120(3) and (4) in light of the Medical Aid Rules implementing RCW 51.36.010, including the rules about coverage decisions, appeals under RCW 51.52, and other relevant provisions. Order at 1-2. Under the IIA, a worker never has had the right to receive a treatment barred by a rule or coverage decision. For example, WAC 296-20-03002 lists several treatments—*i.e.* acupuncture and several types of injections, machines, and surgeries—that a worker is barred from receiving.⁵ In an appeal under RCW 51.52.050, a worker would not be able to argue that one of these treatments was proper and necessary;

⁵ Other rules also limit treatment. The medical aid rules limit treatment to curative and rehabilitative treatment, not allowing palliative care even if palliative care relieves a worker's pain. *See* WAC 296-20-01002 (definition of "proper and necessary"). L&I also prohibits controversial, obsolete, investigative, or experimental treatment, unless an exception applies, in L&I's discretion. WAC 296-20-03002(6); WAC 296-20-02850.

instead, the rule would be binding on that question.

Nor can a worker argue that a treatment precluded by a coverage decision is nevertheless proper and necessary. The Legislature authorized L&I to make coverage decisions outside the rule-making process. RCW 51.36.010(1); RCW 51.04.030(1); WAC 296-20-02700 to -02704.

“Network providers must be required to follow the department’s *evidence-based coverage decisions . . .*” RCW 51.36.010(1) (emphasis added). The Department has adopted a coverage decision denying FAI surgery based on the HTCC decision. *See* RCW 51.36.010(1).⁶ Because there is a coverage decision denying FAI surgery, and because there is no dispute that Murray’s treatment falls within the scope of that coverage decision, Murray cannot receive relief under the IIA. But this is no different from any other case where a worker wishes to receive relief that is expressly precluded under the IIA.

In terms of remedies, the HTCC Act and IIA work together. RCW 70.14.100 and .110 provide for a detailed system for HTCC decisions. RCW 70.14.120(1) directs L&I to follow HTCC decisions: “A participating agency shall comply with a determination . . . unless [exceptions apply].” When a case is appealed to the Board, the Board may

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<http://www.lni.wa.gov/ClaimsIns/Providers/TreatingPatients/ByCondition/FAI.asp>

only consider matters that L&I can because the Board only has appellate jurisdiction. RCW 51.52; *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) (in its appellate review, Board “review[s] the specific Department action” that party appealed); *Karniss v. Dep't of Labor & Indus.*, 39 Wn.2d 898, 901-02, 239 P.2d 555 (1952) (Board is appellate body and may only consider matters the Department did); *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491-92, 288 P.3d 630 (2012). Because L&I must follow HTCC decisions, the Board of Industrial Insurance Appeals lacks the authority to consider information L&I could not consider: whether a non-covered treatment is proper and necessary treatment. *See id.*

The Legislature mirrored this principle in RCW 70.14.120(3): a non-covered procedure “shall not be subject to a determination in the case of an individual patient as to whether it is . . . proper and necessary treatment.” This is verified by RCW 51.36.010(1), which requires following coverage decisions, such as the Department’s FAI surgery one.

Murray argues that section (3) creates only a rebuttable presumption, relying on *Susan M. Pleas*, No. 96 7931, 1998 WL 718232 (Wash. Bd. Indus. Ins. Appeals Aug. 31, 1998). This argument fails. In *Pleas*, the treatment was controversial and not covered under WAC 296-20-03002(6) but, as the Board noted, that rule allowed case-by-case

exceptions. No such exception applies to HTCC determinations. The Court should not add language to create an exception. Also, a rebuttable presumption adds nothing to a workers' compensation case because the worker already has the burden of proof. RCW 51.52.050.

Murray's additional arguments that section (4) allows an individual to seek a non-covered treatment in an individual case would obliterate section (3) and the purpose of the HTCC statute. If every individual could present evidence that a non-covered treatment should nevertheless be paid for in the individual's case, the text of section (3) would be directly contradicted and the purpose of the statute of making evidence-based decisions about controversial treatments would be undermined. Instead, the Court should read section (4) in harmony with section (3). Section (4) provides the HTCC statute does not diminish "an individual's right under existing law to appeal a [participating agency's decision about] a state purchased health care program." An individual's pre-existing rights under RCW 51 did not and do not include the right to: (1) contest a matter outside the Board's scope of review, *Karniss*, 39 Wn.2d at 901-02, or (2) contest a categorical determination, whether by rule, coverage decision, or HTCC determination, of whether a particular treatment is proper and necessary. RCW 51.36.010(1), (10); RCW 70.14.120. Existing rights do not include challenging a proper and necessary definition.

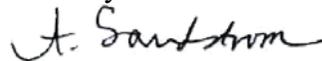
Instead, section (4) allows three challenges. First, Murray may argue that the HTCC decision does not apply because a different treatment or condition is involved. Second, Murray may argue an exception in RCW 70.14.120(1) applies. Third, an individual may argue that the individual meets the HTCC’s criteria so the individual may receive the treatment. RCW 70.14.110(1).⁷ Murray does not argue that the HTCC decision does not apply to him, or that an exception to it applies, or that he qualifies for the treatment under the HTCC decision. And no one—including Murray—can claim the HTCC decision is invalid in the context of an individual coverage decision. RCW 70.14.120(3).

III. CONCLUSION

The Legislature’s policy choice about evidence-based medicine is consistent with the IIA’s “evidence-based” approach (RCW 51.36.010(1)), providing sure and certain relief, and the overall grand compromise. This Court should affirm.

RESPECTFULLY SUBMITTED this 28th day of June 2018.

ROBERT FERGUSON
Attorney General



Anastasia Sandstrom, WSBA No. 24163
Senior Counsel

⁷ Most of the 45 coverage decisions allowing treatment have some conditions. FAI surgery (like 17 others) is a blanket denial, so Murray could not argue for a condition.

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DEPARTMENT OF LABOR AND
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SUPPLY, INC.,

Respondents.

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Supreme Court Clerk
Supreme Court of the State of Washington

E-Mail via Washington State Appellate Courts Portal:

Patrick Palace
Palace Law Offices
patrick@palacelaw.com

Philip Buri
Buri Funston Mumford
philip@burifunston.com

Kathleen Sumner
Law Offices of Kathleen G. Sumner
sumnerlaw@aol.com

Brian Wright
Causey Wright
brian@causeywright.com

Daniel Huntington
Richter-Wimberley
danhuntington@richter-wimberley.com

Valerie McOmie
valeriemcomie@gmail.com

DATED this 28th day of June, 2018.



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

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

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