

NO. 42118-6

11/17  
Ch

---

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

---

CHERYL D. JOY,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON,

Respondent.

---

**BRIEF OF RESPONDENT**

---

ROBERT M. MCKENNA  
Attorney General

RYAN S. MILLER  
Assistant Attorney General  
WSBA No. 40026  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
(206) 389-2770

**ORIGINAL**

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES .....2

III. COUNTERSTATEMENT OF THE CASE .....3

    A. Department Order Denying Spinal Cord Stimulator .....3

    B. Board Decision Affirming the Department’s Denial .....4

    C. Superior Court Judgment as a Matter of Law Based on  
        the Determination by the Health Technology Clinical  
        Committee.....4

IV. STANDARD OF REVIEW.....5

V. SUMMARY OF ARGUMENT.....7

VI. ARGUMENT .....9

    A. The Committee Was Created to Make Uniform Decisions  
        as to Whether a Particular Technology Is Necessary and  
        Proper for the State Health Programs, Including Workers’  
        Compensation .....9

    B. Under the Plain Language of RCW 70.14.120, the  
        Committee’s Determination that Spinal Cord Stimulation  
        Is Not Medically Necessary and Proper Precludes a  
        Contrary Determination .....11

    C. Subsection (4) Preserves Ms. Joy’s Right to Necessary  
        and Proper Treatment but Does Not Allow Her to  
        Challenge the Committee’s Determination that Spinal  
        Cord Stimulation Is Not Necessary and Proper .....15

    D. The Committee’s Determination Is Based on the Existing  
        Law and Did Not Retroactively Affect Ms. Joy’s  
        Substantive Right to Necessary and Proper Treatment  
        under Title 51 RCW .....19

E. Ms. Joy Is Not Entitled to Attorney Fees.....	21
VII. CONCLUSION .....	23
Appendix A – RCW 70.14.080	
Appendix B – RCW 70.14.090	
Appendix C – RCW 70.14.100	
Appendix D – RCW 70.14.110	
Appendix E – RCW 70.14.120	
Appendix F – RCW 70.14.130	
Appendix G – RCW 41.05.011	
Appendix H – RCW 41.05.013	

## TABLE OF AUTHORITIES

### Cases

<i>Agrilink Foods, Inc. v. Dep't of Rev.</i> , 153 Wn.2d 392, 103 P.3d 1226 (2005).....	6, 7
<i>Berrocal v. Fernandez</i> , 155 Wn.2d 585, 121 P.3d 82 (2005).....	14
<i>Bodine v. Dep't of Labor &amp; Indus.</i> , 29 Wn.2d 879, 190 P.2d 89 (1948).....	19
<i>Brown v. Superior Underwriters</i> , 30 Wn. App. 303, 632 P.2d. 887 (1980).....	6
<i>C.J.C. v. Corp. of the Catholic Bishop of Yakima</i> , 138 Wn.2d 699, 985 P.2d 262 (1999).....	18
<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006).....	7, 18
<i>City of Seattle v. St. John</i> , 166 Wn.2d 941, 215 P.3d 194 (2009).....	6
<i>Densley v. Dep't of Ret. Sys.</i> , 162 Wn.2d 210, 173 P.3d 885 (2007).....	19
<i>Indus. Indem. Co. of N.W., Inc. v. Kallevig</i> , 114 Wn.2d 907, 792 P.2d 520 (1990).....	6
<i>Leschner v. Dep't of Labor &amp; Indus.</i> , 27 Wn.2d 911, 185 P.2d 113 (1947).....	20
<i>Macumber v. Shafer</i> , 96 Wn.2d 568, 637 P.2d 645 (1981).....	20
<i>McClelland v. ITT Rayonier, Inc.</i> , 65 Wn. App. 386, 828 P.2d 1138 (1992).....	5

<i>Miebach v. Colasurdo</i> , 102 Wash.2d 170, 685 P.2d 1074 (1984) .....	20
<i>Piper v. Dep't of Labor &amp; Indus.</i> , 120 Wn. App. 886, 86 P.3d 1231 (2004).....	22
<i>R.D. Merrill Co. v. Pollution Control Hearings Bd.</i> , 137 Wn.2d 118, 969 P.2d 458 (1999).....	12
<i>Shelton Hotel C. v. Bates</i> , 4 Wn.2d 498, 104 P.2d 478 (1940).....	18
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	14
<i>State v. Martin</i> , 137 Wn.2d 149, 969 P.2d 450 (1999).....	12
<i>State v. Pillatos</i> , 159 Wn.2d 459, 150 P.3d 1130 (2007).....	19
<i>Stone v. Chelan Cy. Sheriff's Dep't</i> , 110 Wn.2d 806, 756 P.2d 736 (1988).....	14
<i>Stuckey v. Dep't of Labor &amp; Indus.</i> , 129 Wn.2d 289, 916 P.2d 399 (1996).....	6
<i>Tobin v. Dep't of Labor &amp; Indus.</i> , 169 Wn.2d 396, 239 P.3d 544 (2010).....	22

**Statutes**

34.05 RCW .....	11
42.30 RCW (Open Public Meetings Act) .....	11, 17
70.14 RCW .....	1, 2, 8
Laws of 2006, ch. 307 .....	9, 10, 11, 15, 16, 17, 18, 19, 20
RCW 41.05.011 .....	7

RCW 41.05.011(2).....	10
RCW 41.05.013 .....	7,9
RCW 41.05.013(1).....	10
Title 51 RCW (Industrial Insurance Act).....	1, 2, 9, 16, 19, 21
RCW 51.36.010 .....	16
RCW 51.52.130 .....	3, 21, 22, 23
RCW 51.52.140 .....	5
RCW 70.14.080 .....	7, 9, 14
RCW 70.14.080(6).....	10
RCW 70.14.090 .....	7, 9, 14, 17
RCW 70.14.090(1).....	10
RCW 70.14.090(1)(a) .....	10
RCW 70.14.090(1)(b).....	10
RCW 70.14.090(2)(a) .....	11
RCW 70.14.090(3).....	11
RCW 70.14.090(4).....	11
RCW 70.14.100 .....	7, 9, 14, 17
RCW 70.14.100(1).....	11
RCW 70.14.110 .....	7, 9, 12, 13, 14, 16, 17
RCW 70.14.110(1).....	10
RCW 70.14.110(2)(a) .....	11

RCW 70.14.110(2)(b).....	11
RCW 70.14.120 .....	6, 7, 9, 11, 14, 15, 19, 20, 21
RCW 70.14.120(1).....	1, 7, 8, 12, 13, 15, 17, 18
RCW 70.14.120(3).....	1, 5, 7, 8, 13, 15, 16
RCW 70.14.120(4).....	8, 15, 16, 17
RCW 70.14.130 .....	9, 14

**Rules**

RAP 18.1.....	21, 23
RAP 18.1(a) .....	23

**Other Authorities**

<i>Washington State Health Care Authority, Health Technology Clinical Committee Findings &amp; Coverage Decision on Spinal Cord Stimulation</i> <a href="http://www.hta.hca.wa.gov/documents/adopted_findings_decision_scs_102510.pdf">http://www.hta.hca.wa.gov/documents/adopted_findings_decision _scs_102510.pdf</a> .....	5
---	---

## I. INTRODUCTION

This is a workers' compensation case. The Department of Labor & Industries (Department) determined that spinal cord stimulation was not a necessary and proper medical treatment for Cheryl Joy's accepted condition. While Ms. Joy's appeal was pending, the Health Technology Clinical Committee (Committee) determined that spinal cord stimulation will not be covered under the state purchased health care programs, which includes workers' compensation. The superior court correctly applied the plain language of chapter 70.14 RCW to conclude as a matter of law that the Department may not authorize spinal cord stimulation.

In 2006, the Legislature established a state health technology assessment program and the Committee to assess and decide whether certain medical technologies will be covered as necessary and proper treatment for state health care programs. Once the Committee determines that a particular technology will not be covered, that technology "shall not be subject to a determination in the case of an individual patient as to whether it is medically necessary, or proper and necessary treatment." RCW 70.14.120(3). Although chapter 70.14 RCW preserves Ms. Joy's right to appeal the Department's decision under the Industrial Insurance Act, she may not contest the Committee's determination on grounds other than those stated in RCW 70.14.120(1). Ms. Joy's contrary argument

would render the Committee's determination irrelevant and undermine the legislative intent to create a uniform system to assess health technologies covered under the state health programs.

Finally, this case does not present retroactive application of new law because the law that grants the Committee authority to conclusively determine the medical necessity and appropriateness of a particular medical technology existed in 2006, before Ms. Joy's industrial injury. This Court should affirm the superior court judgment.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Once the Committee determines under chapter 70.14 RCW that a particular medical technology will not be covered under the state health care programs, that technology "shall not be subject to a determination in the case of an individual patient as to whether it is medically necessary, or proper and necessary treatment." Does the Committee's determination that a spinal cord stimulator will not be covered preclude Ms. Joy's argument that it is necessary and proper?
2. Chapter 70.14 RCW preserves an individual's right under existing law to appeal a Department decision and provides specific exceptions from complying with the Committee's determination, such as where it conflicts with applicable federal or state law. In her appeal from the Department order denying spinal cord stimulation, may Ms. Joy challenge as incorrect the Committee's determination that the technology was not necessary and proper?
3. Is the application of chapter 70.14 RCW to Ms. Joy's claim retroactive, when the statute was enacted before her injury? In any event, does the statute affect her substantive right to necessary and proper treatment under Title 51 RCW, when it only changed the procedures for determining whether particular medical technology (such as a spinal cord stimulator) is necessary and proper?

4. RCW 51.52.130 authorizes attorney fees from the Department for a prevailing worker only for the services at the court and only if the court reverses or modifies the Board of Industrial Insurance Appeals (Board) decision *and* the Department fund is affected by the litigation. Is Ms. Joy entitled to attorney fees when she does not prevail in this Court? Even if she prevails, may this Court award attorney fees from the Department without her obtaining further benefits on remand?

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. Department Order Denying Spinal Cord Stimulator**

Ms. Joy sustained an industrial injury in her neck on October 16, 2006. Certified Appeal Board Record (BR) Joy 11-12.<sup>1</sup> The Department allowed her claim and provided medical treatment such as physical therapy, cortisone injections, surgeries, and pain medications. BR 32; BR Joy 15-46.

Through Dr. Hyun Hong, Ms. Joy requested the Department to authorize spinal cord stimulation as a necessary and proper medical treatment. BR 25; BR Hong 31. The Industrial Insurance Medical Advisory Committee, which advises the Department on coverage decisions, voted unanimously to uphold the non-coverage decision for spinal cord stimulation based on a study that showed that spinal cord stimulation did not show any advantage, but rather showed harm. *See* BR

---

<sup>1</sup> This brief refers to the testimony taken at the Board by BR followed by the witness's surname and the page number of the hearing transcript. The transcript is located in the certified appeal board record.

Franklin 39-41. On September 24, 2009 the Department denied authorization for a spinal cord stimulator. BR 32.

**B. Board Decision Affirming the Department's Denial**

Ms. Joy appealed to the Board. BR 37. After a hearing, an industrial appeals judge (IAJ) of the Board issued a proposed decision. BR 17-34. The IAJ concluded that Ms. Joy was not a good candidate for a spinal cord stimulator for her cervical condition and that the procedure is not rehabilitative or curative and is not within the standards of good practice of neurosurgery and pain management. BR 32.

Ms. Joy petitioned the three-member Board to review the IAJ's proposed decision. BR 3-13. The Board denied Ms. Joy's petition and adopted the IAJ's proposed decision as its final decision. BR 2.

**C. Superior Court Judgment as a Matter of Law Based on the Determination by the Health Technology Clinical Committee**

Ms. Joy appealed to Clark County Superior Court. CP 1. The sole issue on appeal was whether spinal cord stimulation was a necessary and proper treatment for Ms. Joy. CP 40.

On October 22, 2010, while her appeal was pending, the Committee issued findings and a determination stating that spinal cord stimulation will not be covered as a necessary and proper procedure under

the state health care programs. Finding of Fact (FF) 1.2.<sup>2</sup> The Committee's findings and determination are available on the Health Care Authority's website. FF 1.2.<sup>3</sup> For example, the Committee found, among other things, that spinal cord stimulation "is less safe than alternatives, is an invasive procedure, and has many adverse events." CP 17. Based on the Committee's determination on spinal cord stimulation, the Department made a motion for a judgment as a matter of law. CP 3. The court granted the motion by concluding that the Committee's determination is binding on the Department and not subject to a contrary determination under RCW 70.14.120(3). CP 42. This appeal follows.

#### IV. STANDARD OF REVIEW

Review in this workers' compensation case is governed by RCW 51.52.140, under which an appeal lies from the judgment of the superior court as in other civil cases, and that ordinary practice in civil cases shall apply. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). On appeal from a superior court's ruling on a motion for directed verdict (judgment as a matter of law), this Court's

---

<sup>2</sup> Findings of fact refer to those made by the superior court in the judgment on appeal. *See* CP 40.

<sup>3</sup> Washington State Health Care Authority, Health Technology Clinical Committee Findings & Coverage Decision on Spinal Cord Stimulation, [http://www.hta.hca.wa.gov/documents/adopted\\_findings\\_decision\\_scs\\_102510.pdf](http://www.hta.hca.wa.gov/documents/adopted_findings_decision_scs_102510.pdf).

review is the same as the superior court's. *Indus. Indem. Co. of N.W., Inc. v. Kallevig*, 114 Wn.2d 907, 915, 792 P.2d 520 (1990).

A judgment as a matter of law is appropriate if, when viewing the material in evidence most favorably to the nonmoving party, there is no substantial evidence or reasonable inference therefrom to sustain a verdict for the nonmoving party. CR 50; *Kallevig*, 114 Wn.2d at 915. Substantial evidence is the quantum of the evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306, 632 P.2d. 887 (1980).

This case involves uncontested facts and presents an issue as to the meaning of RCW 70.14.120. Statutory interpretation is a question of law subject to de novo review. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

In interpreting the statute, the court's paramount duty is to discern and effectuate the legislative intent by looking to the plain meaning of the language itself. *City of Seattle v. St. John*, 166 Wn.2d 941, 945, 215 P.3d 194 (2009). If the language is susceptible to more than one reasonable interpretation, the statute is ambiguous, and a court may employ principles of statutory construction to resolve this ambiguity. *See Agrilink Foods, Inc. v. Dep't of Rev.*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). However, a statute is not ambiguous merely because different

interpretations are conceivable. See *Agrilink*, 153 Wn.2d at 396. An unambiguous statute is not subject to statutory construction. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).<sup>4</sup>

## V. SUMMARY OF ARGUMENT

In 2006, the Legislature recognized a need for state health programs, which include workers' compensation, to have uniform guidelines as to what health technologies are safe, effective, and cost efficient. To this end, the Legislature created a diverse and independent Committee of medical and health experts to make uniform decisions, with an opportunity for public comment, as to what health technologies will be authorized by participating state agencies, including the Department.

Contrary to Ms. Joy's claim, under the plain language of RCW 70.14.120, the Committee's determination that spinal cord stimulator treatment is not medically necessary and proper precludes a contrary determination in this case. Specifically, subsection (1) provides that participating agencies shall comply with the Committee's determination as to whether a particular health technology will be covered in the state health programs. RCW 70.14.120(1). Subsection (3) further provides that the Committee's determination precludes a contrary finding regarding an individual patient. RCW 70.14.120(3). Therefore, the plain

---

<sup>4</sup> Copies of RCW 70.14.080 through .130 and RCW 41.05.011 and .013 are attached to this brief in the appendix.

statutory language precludes the Department from authorizing and paying for a medical technology the Committee has determined not to be covered. Ms. Joy's interpretation that the Board or the Court (but not the Department) may make a determination on appeal from a Department order to override the Committee's determination has no support in the statutory language and would lead to inconsistent results and undermine the manifest statutory purpose to create uniformity in the assessment and determination as to the use of health technologies for the state health programs.

Further, Ms. Joy's reliance on subsection (4) is misplaced. This subsection preserves her right to appeal a participating agency's actions but does not allow her to challenge the Committee's determination made under chapter 70.14 RCW. Subsection (4) must be read in conjunction with subsections (1) and (3). The statute, read as a whole, allows Ms. Joy to prove one of the specific exceptions applies to preclude application of the Committee's determination as provided in subsection (1). However, no view of the statute allows her to challenge the Committee's determination as incorrect. Because Ms. Joy does not argue, and did not argue below, that any of the exceptions applied, the superior court correctly concluded as a matter of law that spinal cord stimulation was not a necessary and proper treatment for her.

Finally, the Committee's determination is based on the existing law and did not retroactively affect Ms. Joy's substantive right to necessary and proper treatment under Title 51 RCW. Specifically, RCW 70.14.120, which authorizes the Committee to make a conclusive determination as to the use of particular health technologies for the state health programs, existed before her industrial injury. The Committee's determination itself does not represent a change in the existing law subject to a retroactivity analysis. Even if it did, the retroactive application would still be appropriate, because the Committee's determination relates to the procedure or remedies for determining whether spinal cord stimulation was necessary and proper and the determination did not affect Ms. Joy's substantive right to necessary and proper medical treatment.

## VI. ARGUMENT

### A. **The Committee Was Created to Make Uniform Decisions as to Whether a Particular Technology Is Necessary and Proper for the State Health Programs, Including Workers' Compensation**

In 2006, the Legislature enacted an act establishing a state health technology assessment program. *See* Laws of 2006, ch. 307; RCW 70.14.080-.130; RCW 41.05.013. Before enacting the act, the Legislature recognized the need for developing uniform policies for state health care programs. The Health Care Authority "shall coordinate state agency efforts to develop and implement *uniform* policies across state

purchased health care programs.” RCW 41.05.013(1) (emphasis added). “State purchased health care” or “health care” means medical and health care, pharmaceuticals, and medical equipment purchased with state and federal funds by various state agencies, including the Department. RCW 41.05.011(2). There is no dispute that medical treatment provided under the state workers’ compensation program is “state purchased health care” subject to the Committee’s determinations under the 2006 act.

The 2006 act created the Committee as an independent committee of 11 practicing medical or health professionals appointed by the Health Care Authority in consultation with participating state agencies. RCW 70.14.090(1). Participating state agencies are the Health Care Authority, the Department of Labor & Industries, and the Department of Social and Health Services. RCW 70.14.080(6). The 11 Committee members comprise of six practicing state licensed physicians and five practicing licensed health professionals who use health technology in their scope of practice. RCW 70.14.090(1)(a), (b). At least two members must have professional experience treating women, children, elderly persons, and people with diverse ethnic and racial backgrounds. RCW 70.14.090(1).

The Committee assesses and determines whether particular health technologies will be included as a covered benefit in the state health care programs. RCW 70.14.110(1). The Health Care Authority, in

consultation with the participating agencies and the Committee, selects the health technologies to be reviewed by the Committee, considering, among other things, the existence of safety, efficacy, or cost-related concerns relative to the existing alternatives and availability of evidence for complete review. RCW 70.14.100(1).

The 2006 act ensures the transparency and independence in the Committee's decision-making process. In making its determination, the Committee shall consider "in an open and transparent process," evidence about the safety, efficacy, and cost-effectiveness of the particular technology. RCW 70.14.110(2)(a). The Committee must provide an opportunity for public comment. RCW 70.14.110(2)(b). The Committee meetings are subject to the Open Public Meetings Act (chapter 42.30 RCW). RCW 70.14.090(3). The Committee members may not contract with or be employed by a health technology manufacturer or a participating agency during their term or for 18 months before the appointment. RCW 70.14.090(2)(a). The Committee is not an "agency" for purposes of chapter 34.05 RCW. RCW 70.14.090(4).

**B. Under the Plain Language of RCW 70.14.120, the Committee's Determination that Spinal Cord Stimulation Is Not Medically Necessary and Proper Precludes a Contrary Determination**

Under the plain language of RCW 70.14.120, the Committee's uniform coverage determination for the state health programs is not

subject to a contrary individual determination in this case. Under the statute, a participating agency shall comply with a determination of the Committee, unless one of the specific exceptions applied:

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.

RCW 70.14.120(1) (emphasis added). The word “shall” is “presumptively imperative and operates to create a duty.” *State v. Martin*, 137 Wn.2d 149, 154, 969 P.2d 450 (1999). Also, “generally, exceptions to statutory provisions are narrowly construed in order to give effect to legislative intent underlying the general provisions.” *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999).

Therefore, under the plain statutory language, the Department is required to comply with the Committee’s determination, unless one of the exceptions applies. Here, there is neither support for nor argument made by any party that any of these exceptions applies. Thus, the Department must comply with the Committee’s determination.

Subsection (3) of the statute further provides that once the Committee determines that a particular technology will not be covered, that determination is not subject to a contrary determination in individual cases as to whether the technology is necessary and proper:

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.*

RCW 70.14.120(3) (emphasis added).

Ms. Joy argues that subsections (1) and (3) only limit the Department, as a participating agency, but not the Board or the court. Appellant's Brief 6. Ms. Joy asks this Court to adopt an interpretation that the Committee's determination "shall not be subject to a determination [*by a participating agency*]" in the case of an individual patient." Her interpretation thus adding the words "by a participating agency" after the phrase "shall not be subject to a determination," when the Legislature chose not to do so, although the Legislature used "by a participating agency" in other provisions of the same act. Her interpretation must fail, because courts may not add words to an unambiguous statute when the

Legislature has chosen not to include that language. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Further, Ms. Joy's interpretation makes no logical sense. Statutes must be interpreted and construed so that all the language used is given effect with no portion rendered meaningless or superfluous. *Stone v. Chelan Cy. Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988).

The Legislature created an elaborate health technology assessment program, and as part of that program, created a Committee of individuals with special expertise to make uniform determinations for the state health care programs to ensure only technologies that are safe, effective, and cost-effective are authorized by participating agencies. *See* RCW 70.14.080-130. Under Ms. Joy's interpretation, the Committee's determination is binding on the Department, but not on the Board or the courts. Her interpretation would thus lead to inconsistent results as to whether a particular health technology such as spinal cord stimulation is necessary and proper, with the particular fact-finder determining the issue in individual cases. It is unlikely that the Legislature contemplated such a result in creating a uniform health technology assessment program. *See Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005) (court may not interpret a statute to create "unlikely, absurd or strained results").

Moreover, the Department is the agency that is responsible for paying for treatment, whether this is treatment authorized at the Department level, at the Board level, or at the court level. It would make no sense to allow the Board or the courts to determine the treatment necessary and proper because then Department would have to pay for it, which would conflict with RCW 70.14.120(1) and RCW 70.14.120(3).

Under the plain language of RCW 70.14.120, the Committee's determination that spinal cord stimulation will not be a covered medical technology is not subject to a determination by *any* decision-maker in the state health care program (such as workers' compensation) as to whether it is medically necessary and proper.

**C. Subsection (4) Preserves Ms. Joy's Right to Necessary and Proper Treatment but Does Not Allow Her to Challenge the Committee's Determination that Spinal Cord Stimulation Is Not Necessary and Proper**

Ms. Joy argues that subsection (4) of RCW 70.14.120 gives her a right to appeal the Department's decision to deny spinal cord stimulation and challenge the Committee's determination that the technology is not medically necessary and proper. Appellant's Brief 6-7. "Nothing in chapter 307, Law 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." RCW 70.14.120(4). Ms. Joy is

correct that the 2006 act does not diminish her right to appeal a Department decision and receive necessary and proper treatment under Title 51 RCW. However, she is incorrect in asserting that the court in her appeal may determine that the spinal cord stimulator is a necessary and proper medical treatment, thus overriding the Committee's determination.

Under the plain meaning of subsection (4), the 2006 act preserves Ms. Joy's right to appeal a Department decision and receive benefits under Title 51 RCW. In fact, Ms. Joy did exercise her right to do so here.

Ms. Joy is not entitled to treatment that is *not* medically necessary and proper. The Industrial Insurance Act only grants necessary and proper medical benefits to injured workers. "Upon the occurrence of any injury to a worker . . . he or she shall receive proper and necessary medical and surgical services." RCW 51.36.010. The Committee, pursuant to its authority under RCW 70.14.110, made a determination to not include spinal cord stimulation as a covered benefit in the state health care programs. Thus, by operation of RCW 70.14.120(3), as of October 22, 2010, spinal cord stimulation was no longer subject "to a determination . . . as to whether it [was a] medically . . . proper and necessary treatment." Because spinal cord stimulation was determined by the Committee not to be a proper and necessary treatment, and because RCW 51.36.010 only

entitles workers to proper and necessary treatment, Ms. Joy was not entitled to spinal cord stimulator treatment.

In essence, the 2006 act only changed the mechanism (not substantive right) in which to determine whether a particular medical technology is necessary and proper for purposes of state health care programs. The Legislature created a uniform system, where the Committee comprised of 11 appointed medical and health professionals assess and determine in an open and transparent process, subject to the Open Meetings Act and public comments, as to whether certain technologies will be covered under the state health care programs. See RCW 70.14.090-.110. Subsection (4), which preserves *substantive* rights under existing laws, does not trump the statutory *process* to make a uniform coverage determination for the state health care programs.

Ms. Joy argues that subsection (4) cannot mean that individuals only have a right to appeal “other issues” but not denials of specific health care technologies. Appellant’s Brief 7. However, subsection (4) only preserves an individual’s right to appeal a determination by a participating agency, not the determination by the Committee, which is not a participating agency. Also, when the Committee determines that a specific technology is not covered, an individual may still argue that one of the exceptions for complying with the Committee under subsection (1)

applies. For example, if the Committee determines that a particular procedure is not covered, and the Department thus denies a worker's request for such a procedure, the worker who can establish an exception under subsection (1) may obtain the treatment. Here, Ms. Joy never argued that any of the exceptions under subsection (1) applied, and the record does not support any of the exceptions.

Therefore, when Ms. Joy asked the superior court to determine that spinal court stimulation was a necessary and proper health technology to treat her cervical condition, the court correctly concluded that this issue had already been answered by the Committee in the negative and properly issued a judgment as a matter of law for the Department.

Finally, because the plain statutory language controls the outcome in this case, this Court need not consider the Governor's veto in the 2006 act referenced by Ms. Joy. Appellant's Brief 7. An unambiguous statute is not subject to statutory construction. *Cerrillo*, 158 Wn.2d at 201. The Governor's act on a bill is part of the legislative history. *See Shelton Hotel C. v. Bates*, 4 Wn.2d 498, 506, 104 P.2d 478 (1940). However, if the statutory language is plain, the court may not look beyond that language or consider legislative history but should glean the legislative intent through the statutory language. *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999).

As shown above, the 2006 act at issue in this case is unambiguous and does not call for statutory interpretation or examination into legislative history. It is thus improper for Ms. Joy to rely on the Governor's partial veto and comments to establish the intent of the Legislature.

**D. The Committee's Determination Is Based on the Existing Law and Did Not Retroactively Affect Ms. Joy's Substantive Right to Necessary and Proper Treatment under Title 51 RCW**

Ms. Joy argues that the superior court retroactively applied the Committee's determination to her claim. Appellant's Brief 8-9. However, there is no retroactive application here because the superior court applied RCW 70.14.120, which existed at the time of her injury. The Committee's determination itself does not represent a change in the existing law subject to the retroactivity analysis.

A change in the law is generally presumed to apply prospectively only. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 222, 173 P.3d 885 (2007). A statute operates retroactively "if the 'triggering event' for its application happened before the effective date of the statute." *State v. Pillatos*, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007). "The rights of parties under workmen's compensation statutes are governed by the law in force at the time the injury occurred, and not the law in force at any subsequent time." *Bodine v. Dep't of Labor & Indus.*, 29 Wn.2d 879, 889, 190 P.2d 89 (1948).

Here, the application of the Committee's October 22, 2010 determination to Ms. Joy's claim was pursuant to RCW 70.14.120, which took effect on June 7, 2006. *See* Laws of 2006, ch. 307. Ms. Joy was injured in October 2006, and the superior court applied the law to her claim in this case in March 2011, after the law took effect. Thus, at the time of her injury, she had notice of the law, and it is a "universal maxim that ignorance of the law excuses no one." *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947). The application of the statute in this case does not present retroactive application of new law.

Even if the application of RCW 70.14.120 in this case was retroactive, such an application would still be appropriate because the statute relates only to the procedure, not substantive right. "[I]f a statute is remedial in nature and retroactive application would further its remedial purpose," it will be enforced retroactively. *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981). A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right. *Miebach v. Colasurdo*, 102 Wash.2d 170, 181, 685 P.2d 1074 (1984).

The 2006 act relates to the *procedures* to determine whether particular medical technologies are necessary and proper medical for coverage under the state health care programs, including workers'

compensation. The Legislature created a uniform system of health technology assessment and determination in lieu of individual determinations as to whether particular health technologies are necessary and proper. The act affects the remedies, not a substantive right. It does not diminish Ms. Joy's substantive right to receive necessary and proper medical treatment under the Industrial Insurance Act. It just affects the procedures in how this is determined.

Further, Ms. Joy did not suffer prejudice in relying on the old law. This is not a case, for example, where the Department initially allowed spinal cord stimulator treatment, and after the Committee's determination, denied the authorization after the treatment was performed. The Department never allowed spinal cord stimulation, and Ms. Joy has never received spinal cord stimulation under her claim. There is no unfairness in applying the Committee's determination to Ms. Joy's claim in this case.

In summary, the superior court correctly applied RCW 70.14.120 to conclude that the Committee's spinal cord stimulator coverage determination precludes a contrary determination in this case.

**E. Ms. Joy Is Not Entitled to Attorney Fees**

Ms. Joy seeks attorney fees under RCW 51.52.130 and RAP 18.1. She is not entitled to attorney fees, because, as shown above, she does not prevail in this appeal. However, even if she prevails in this case, attorney

fees are contingent on her receiving additional benefits affecting the Department's fund under RCW 51.52.130.

Under RCW 51.52.130, Ms. Joy may recover attorney fees from the Department only if (1) the Board decision is "reversed or modified" *and* (2) the result of the litigation affected the Department's "accident fund or medical fund":

If in a worker or beneficiary appeal the decision and order of the board is reversed or modified *and if the accident fund or medical aid fund is affected by the litigation . . .* the attorney's fee fixed by the court, for services before the court only . . . shall be payable out of the administrative fund of the department.

RCW 51.52.130 (emphasis added); *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 406, 239 P.3d 544 (2010); *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889-90, 86 P.3d 1231 (2004).

The relief sought by Ms. Joy in this case is a remand to the superior court for a new trial to decide whether spinal cord stimulation is a necessary and proper procedure to treat her accepted condition. Only if Ms. Joy ultimately receives the spinal cord stimulator treatment affecting the accident or medical aid fund, may she receive reasonable attorney fees for this appeal. Thus, any order awarding attorney fees must be conditioned on Ms. Joy obtaining the requested treatment upon remand.

Further, RAP 18.1 does not independently authorize attorney fees but authorizes attorney fees only if “applicable law grants to a party the right to recover reasonable attorney fees or expenses” on appeal. RAP 18.1(a). As shown above, the applicable law, RCW 51.52.130 does not authorize an attorney fee award here, because Ms. Joy does not prevail in this case, and even if she does, any attorney fee award must be contingent on her receiving the requested treatment upon a remand.

## VII. CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court affirm the superior court judgment in this case.

RESPECTFULLY SUBMITTED this 20 day of October, 2011.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink that reads "Ryan Miller". The signature is written in a cursive style with a large, stylized "R" at the beginning.

Ryan S. Miller, WSBA No. 40026  
Assistant Attorney General  
Attorneys for Respondent

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.]

## Appendix A

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.

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)(l), 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.

[2006 c 307 § 2.]

Notes:

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

## Appendix B

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.

## Appendix C

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.

## Appendix D

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.

## Appendix E

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.

## Appendix F

RCW 41.05.011  
Definitions.**\*\*\* CHANGE IN 2011 \*\*\* (SEE 1738-S2.SL) \*\*\***

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Administrator" means the administrator of the authority.
- (2) "State purchased health care" or "health care" means medical and health care, pharmaceuticals, and medical equipment purchased with state and federal funds by the department of social and health services, the department of health, the basic health plan, the state health care authority, the department of labor and industries, the department of corrections, the department of veterans affairs, and local school districts.
- (3) "Authority" means the Washington state health care authority.
- (4) "Insuring entity" means an insurer as defined in chapter 48.01 RCW, a health care service contractor as defined in chapter 48.44 RCW, or a health maintenance organization as defined in chapter 48.46 RCW.
- (5) "Flexible benefit plan" means a benefit plan that allows employees to choose the level of health care coverage provided and the amount of employee contributions from among a range of choices offered by the authority.
- (6) "Employee" includes all employees of the state, whether or not covered by civil service; elected and appointed officials of the executive branch of government, including full-time members of boards, commissions, or committees; justices of the supreme court and judges of the court of appeals and the superior courts; members of the state legislature. Pursuant to contractual agreement with the authority, "employee" may also include: (a) Employees of a county, municipality, or other political subdivision of the state and members of the legislative authority of any county, city, or town who are elected to office after February 20, 1970, if the legislative authority of the county, municipality, or other political subdivision of the state seeks and receives the approval of the authority to provide any of its insurance programs by contract with the authority, as provided in RCW 41.04.205 and 41.05.021(1)(g); (b) employees of employee organizations representing state civil service employees, at the option of each such employee organization, and, effective October 1, 1995, employees of employee organizations currently pooled with employees of school districts for the purpose of purchasing insurance benefits, at the option of each such employee organization; (c) employees of a school district if the authority agrees to provide any of the school districts' insurance programs by contract with the authority as provided in RCW 28A.400.350; and (d) employees of a tribal government, if the governing body of the tribal government seeks and receives the approval of the authority to provide any of its insurance programs by contract with the authority, as provided in RCW 41.05.021(1) (f) and (g). "Employee" does not include: Adult family homeowners; unpaid volunteers; patients of state hospitals; inmates; employees of the Washington state convention and trade center as provided in RCW 41.05.110; students of institutions of higher education as determined by their institution; and any others not expressly defined as employees under this chapter or by the authority under this chapter.
- (7) "Seasonal employee" means an employee hired to work during a recurring, annual season with a duration of three months or more, and anticipated to return each season to perform similar work.
- (8) "Faculty" means an academic employee of an institution of higher education whose workload is not defined by work hours but whose appointment, workload, and duties directly serve the institution's academic mission, as determined under the authority of its enabling statutes, its governing body, and any applicable collective bargaining agreement.
- (9) "Board" means the public employees' benefits board established under RCW 41.05.055.
- (10) "Retired or disabled school employee" means:
  - (a) Persons who separated from employment with a school district or educational service district and are receiving a retirement allowance under chapter 41.32 or 41.40 RCW as of September 30, 1993;
  - (b) Persons who separate from employment with a school district or educational service district on or after October 1, 1993, and immediately upon separation receive a retirement allowance under chapter 41.32, 41.35, or 41.40 RCW;
  - (c) Persons who separate from employment with a school district or educational service district due to a total and permanent disability, and are eligible to receive a deferred retirement allowance under chapter 41.32, 41.35, or 41.40 RCW.
- (11) "Premium payment plan" means a benefit plan whereby state and public employees may pay their share of group health plan premiums with pretax dollars as provided in the salary reduction plan under this chapter pursuant to 26 U.S.C. Sec. 125 or other sections of the internal revenue code.
- (12) "Salary" means a state employee's monthly salary or wages.

## Appendix G

(13) "Participant" means an individual who fulfills the eligibility and enrollment requirements under the salary reduction plan.

(14) "Plan year" means the time period established by the authority.

(15) "Separated employees" means persons who separate from employment with an employer as defined in:

(a) \*RCW 41.32.010(11) on or after July 1, 1996; or

(b) RCW 41.35.010 on or after September 1, 2000; or

(c) RCW 41.40.010 on or after March 1, 2002;

and who are at least age fifty-five and have at least ten years of service under the teachers' retirement system plan 3 as defined in \*RCW 41.32.010(40), the Washington school employees' retirement system plan 3 as defined in RCW 41.35.010, or the public employees' retirement system plan 3 as defined in RCW 41.40.010.

(16) "Emergency service personnel killed in the line of duty" means law enforcement officers and firefighters as defined in RCW 41.26.030, members of the Washington state patrol retirement fund as defined in RCW 43.43.120, and reserve officers and firefighters as defined in RCW 41.24.010 who die as a result of injuries sustained in the course of employment as determined consistent with Title 51 RCW by the department of labor and industries.

(17) "Employer" means the state of Washington.

(18) "Employing agency" means a division, department, or separate agency of state government, including an institution of higher education; a county, municipality, school district, educational service district, or other political subdivision; and a tribal government covered by this chapter.

(19) "Tribal government" means an Indian tribal government as defined in section 3(32) of the employee retirement income security act of 1974, as amended, or an agency or instrumentality of the tribal government, that has government offices principally located in this state.

(20) "Dependent care assistance program" means a benefit plan whereby state and public employees may pay for certain employment related dependent care with pretax dollars as provided in the salary reduction plan under this chapter pursuant to 26 U.S.C. Sec. 129 or other sections of the internal revenue code.

(21) "Salary reduction plan" means a benefit plan whereby state and public employees may agree to a reduction of salary on a pretax basis to participate in the dependent care assistance program, medical flexible spending arrangement, or premium payment plan offered pursuant to 26 U.S.C. Sec. 125 or other sections of the internal revenue code.

(22) "Medical flexible spending arrangement" means a benefit plan whereby state and public employees may reduce their salary before taxes to pay for medical expenses not reimbursed by insurance as provided in the salary reduction plan under this chapter pursuant to 26 U.S.C. Sec. 125 or other sections of the internal revenue code.

[2009 c 537 § 3; 2008 c 229 § 2. Prior: 2007 c 488 § 2; 2007 c 114 § 2; 2005 c 143 § 1; 2001 c 165 § 2; prior: 2000 c 247 § 604; 2000 c 230 § 3; 1998 c 341 § 706; 1996 c 39 § 21; 1995 1st sp.s. c 6 § 2; 1994 c 153 § 2; prior: 1993 c 492 § 214; 1993 c 386 § 5; 1990 c 222 § 2; 1988 c 107 § 3.]

Notes:

**\*Reviser's note:** RCW 41.32.010 was alphabetized pursuant to RCW 1.08.015(2)(k), changing subsections (11) and (40) to subsections (17) and (33), respectively.

**Effective date – 2009 c 537:** See note following RCW 41.05.008.

**Effective date – 2008 c 229:** See note following RCW 41.05.295.

**Short title–2007 c 488:** See note following RCW 43.43.285.

**Intent – 2007 c 114:** "Consistent with the centennial accord, the new millennium agreement, related treaties, and federal and state law, it is the intent of the legislature to authorize tribal governments to participate in public employees' benefits board programs to the same extent that counties, municipalities, and other political subdivisions of the state are authorized to do so." [2007 c 114 § 1.]

**Effective date – 2007 c 114:** "This act takes effect January 1, 2009." [2007 c 114 § 8.]

**Effective date -- 2001 c 165 § 2:** "Section 2 of this act takes effect March 1, 2002." [2001 c 165 § 5.]

**Effective date--Application -- 2001 c 165:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and except for section 2 of this act takes effect immediately [May 7, 2001]. This act applies to all surviving spouses and dependent children of (1) emergency service personnel and (2) members of the law enforcement officers' and firefighters' retirement system plan 2, killed in the line of duty." [2006 c 345 § 2; 2001 c 165 § 6.]

**Reviser's note:** Contractual right not granted -- 2006 c 345: See note following RCW 41.26.510.

**Effective date -- 2000 c 230:** See note following RCW 41.35.630.

**Effective date -- 1998 c 341:** See RCW 41.35.901.

**Effective dates -- 1996 c 39:** See note following RCW 41.32.010.

**Effective date -- 1995 1st sp.s. c 6:** See note following RCW 28A.400.410.

**Intent -- 1994 c 153:** "It is the intent of the legislature to increase access to health insurance for retired and disabled state and school district employees and to increase equity between state and school employees and between state and school retirees." [1994 c 153 § 1.]

**Effective dates -- 1994 c 153:** "This act shall take effect January 1, 1995, except section 15 of this act, which takes effect October 1, 1995." [1994 c 153 § 16.]

**Findings -- Intent--1993 c 492:** See notes following RCW 43.20.050.

**Short title--Severability -- Savings--Captions not law--Reservation of legislative power--Effective dates--1993 c 492:** See RCW 43.72.910 through 43.72.915.

**Intent -- 1993 c 386:** See note following RCW 28A.400.391.

**Effective date -- 1993 c 386 §§ 1, 2, 4-6, 8-10, and 12-16:** See note following RCW 28A.400.391.

RCW 41.05.013

State purchased health care programs — Uniform policies — Report to the legislature.

(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 RCW 70.14.080 through 70.14.130. 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.

[2006 c 307 § 8; 2005 c 462 § 3; 2003 c 276 § 1.]

Notes:

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

**Findings -- 2005 c 462:** See note following RCW 28A.210.370.

**Rule making -- 2003 c 276:** "Agencies administering state purchased health care programs shall cooperatively adopt rules necessary to implement this act." [2003 c 276 § 2.]

## Appendix H

No. 42118-6-II

FILED  
OCT 24 2011  
BY \_\_\_\_\_  
FEDERAL

**COURT OF APPEALS FOR DIVISION II  
OF THE STATE OF WASHINGTON**

CHERYL D. JOY,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

CERTIFICATE OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on October 21, 2011, she caused to be served the Brief of Respondent and this Certificate of Service in the below described manner.

**ORIGINAL: Via ABC Legal Messenger to:**

David Ponzoha, Court Administrator/Clerk Court  
Washington State Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

**COPY: Via US Mail, Postage Prepaid, to:**

Douglas M. Palmer  
Frances R. Hamrick  
Busick Hamrick, PLLC

**ORIGINAL**

PO Box 1385  
Vancouver, WA 98666

Signed this 21<sup>st</sup> day of October, 2011, in Seattle, Washington by:

A handwritten signature in black ink, appearing to read "Angelie Bounds", written over a horizontal line.

ANGELIE BOUNDS  
Legal Assistant  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188  
(206) 464-7740