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No. 95251-5

**IN THE SUPREME COURT
OF THE
STATE OF WASHINGTON**

MICHAEL MURRAY, Petitioner,

v.

**DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent**

**BRIEF OF *AMICUS CURIAE*
WORKERS' INJURY LAW & ADVOCACY GROUP
(WILG)**

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A. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Workers' Injury Law & Advocacy Group (WILG) is a national non-profit membership organization dedicated to protecting and advocating the rights of injured workers throughout the United States. WILG represents the interests of millions of workers and their families who, each year, suffer the consequences of workplace injuries and illnesses. WILG works principally to assist attorneys and non-profit groups in advocating the rights of injured workers through education, communication, research, amicus briefs, and information gathering. WILG, founded in 1995, represents an important, national voice for workers. WILG's members are committed to improving the quality of legal representation to those employees, regardless of legal status, who are injured on the job or who are victims of occupational disease, through superior legal education and through judicial and legislative activism.

Workers' compensation is a form of insurance that provides medical care and compensation for employees who are injured in the course of employment, while abrogating the employee's right to sue their employer for the tort of negligence. While schemes differ between jurisdictions, provisions are usually made for weekly payments in place of wages, compensation for economic loss (past and future), reimbursement

or payment of medical and like expenses, and benefits payable to the dependents of workers killed during employment. The benefits are administered on a state level, primarily by the state administrative agencies. Nationwide these benefits are being whittled down and the medical benefits for the compensable medical conditions are frequently either limited or denied—in this case by a quasi-administrative agency without a right of individual review.

Workers' compensation acts across the country are a heavily bureaucratic, adversarial system that generally short change injured workers. A. WIDMAN, *WORKERS' COMPENSATION: A CAUTIONARY TALE*, 2 (2006). To the extent that workers' compensation rate reductions have occurred, such rate reductions come at the expense of the injured workers by limiting disability and medical benefits, etc., because lawmakers slash benefits and push many of the injured workers out of the system and into other social programs, such as Social Security Disability, Medicare, Medicaid, and private health insurance.

“Workers' compensation is an unfortunate example of how a seemingly fair program can be manipulated by political forces into a nightmare for those it was originally meant to help. Once an area of law is removed from the civil justice system, it becomes vulnerable to money, politics, and influence-peddling. This happens either through aggressive

industry lobbying of legislators, political influence on the agencies charged with implementing the system, or orchestrated media efforts. All have happened to workers' compensation." *Id.* at 3.

WILG has substantial common interests in ensuring that the rights of injured workers throughout the United States are not further diminished through the depletion of the "grand bargain" struck on behalf of employees and employers throughout the United States. In this case, the medical rights of injured workers have been diminished through the operation of the decisions of Health Technology Clinical Committee (HTCC). Preserving the rights of injured employees requires vigilant protection. It is a fundamental tenet of the "grand bargain" as well as traditional notions of due process that a right to medical benefits cannot be diminished without an individualized inquiry. If such rights are denied, the injured employee must seek other avenues for medical treatment in order to recover, shifting the burden of the other sources, including private health insurance, or state and federally funded medical programs. This ultimately thwarts the policy of workers' compensation in general.

B. ARGUMENTS

I. THE LEGISLATION CREATING THE WASHINGTON STATE HEALTH TECHNOLOGY CLINICAL COMMITTEE (HTCC) IS AT ODDS WITH THE "GRAND BARGAIN"

The development of modern workers' compensation law came under the Prussian leadership of Chancellor Otto von Bismarck, who established a state-administered system in what was then Prussia in 1871 which established the "exclusive remedy." D.A. Gerdes, *Workers' compensation, an overview for physicians*, S. DAK. MED J. 17 (1990). The first comprehensive workers' compensation law was passed in Wisconsin in 1911, followed by 36 other states before 1920. G.P. Guyton, *A Brief History of Workers' Compensation*, 19 IOWA ORTHO. J. 106 (1999). Washington's Industrial Insurance Act was passed in 1911, and was modeled on the German act. *See Stertz v. Ind. Ins. Comm.*, 91 Wn. 588, 158 P. 256 (1916).

The central tenet of the American workers' compensation system—the grand bargain itself—is sure and certain no-fault remedies for injured workers and their families in exchange for employer immunity in all but the most egregious circumstances.¹ Washington's act—like those of other states—"came of a great compromise between employers and employed." *Stertz*, 91 Wn. 2d at 590.

The master, in exchange for limited liability, was willing to pay on some claims in future, where in the past there had been no liability at all. The servant was willing, not only to

¹ *See, e.g.* RCW 51.04.010; RCW 51.24.020; *Walston v. Boeing Co.*, 181 Wn. 2d 391, 334 P.3d 519 (2014) (employers immune from civil suit for on-the-job injuries except for injuries resulting from "deliberate intention" of employer).

give up trial by jury, but to accept far less than he had often won in court; provided he was sure to get the small sum without having to fight for it. All agreed that the blood of the workman was the cost of production, that the industry should bear the charge.

Id. at 590-91. In the face of constitutional challenges from both employers and employees, the U.S. Supreme Court held early on that the grand bargain did not violate Due Process for either. *See Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 39 S. Ct. 227, 63 L. Ed. 527 (1919); *Mountain Timber Co. v. Wash.*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917); *New York Cent. R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917).

Until recently, the grand bargain has stood the test of time, weathering numerous assaults upon its constitutionality. However, in recent years across the country, new challenges to the grand bargain have arisen. Insurance companies, employers, and those in charge of the provision of workers' compensation benefits have sought to curtail the benefits to which workers injured on the job are entitled. We are in the midst of what the federal Department of Labor cogently described as a "race to the bottom":

Opt out statutes have been proposed in Tennessee and South Carolina, although neither state legislature has acted on the proposals. Currently pending proposals in other states, while not including opt-out provisions, are also extensive; many focus on limiting the availability of

benefits. For example, in Illinois, legislation considered in 2016 would exclude injuries resulting from hazards or risks to which the general public is also exposed or medical conditions resulting from personal or neutral risks, and would add the “major contributing cause” requirement for any workplace injury. Other similar provisions are under consideration elsewhere. While these kinds of provisions may successfully limit the scope of workers’ compensation liability and result in reduction of costs to employers, they also transfer the costs of injuries to workers, families, communities and other social benefit programs.

U.S. DEP’T OF LABOR, DOES THE WORKERS’ COMPENSATION SYSTEM FULFILL ITS OBLIGATIONS TO INJURED WORKERS? (2016).² Washington’s Health Technology Assessment program is just another example of an unelected, unaccountable body making decisions that affect every single injured worker in the state.

Since 2006 the HTCC has issued sixty-two final Health Technology Assessments.³ Numerous of these assessments have obvious application to workers’ compensation injuries, including: discography (denied); implantable pain pumps (denied); knee arthroscopy (limited); spinal cord stimulation (denied); total knee replacement (limited); vertebroplasty/kyphoplasty (denied); FAI surgery (denied); knee cartilage

² Available at <https://www.dol.gov/asp/WorkersCompensationSystem/WorkersCompensationSystemReport.pdf> (Last accessed April 13, 2018).

³ See WASHINGTON STATE HEALTH CARE AUTHORITY, HEALTH TECHNOLOGY REVIEWS (available at <https://www.hca.wa.gov/about-hca/health-technology-assessment/health-technology-reviews>) (last accessed April 13, 2018).

transplantation (limited); cervical spinal fusion surgery (limited); hyaluronic acid/viscosupplementation injections (limited); facet neurotomy (limited); lumbar fusion for degenerative disc disease (denied); spinal injections (limited); & artificial disc replacement (lumbar denied, cervical limited). In virtually every scenario the HTCC has limited the medical treatments available to injured workers without any right of redress.⁴

The HTCC determinations violate the letter and spirit of the grand bargain to provide sure and certain relief to injured workers and their families, including proper and necessary medical and surgical services. An unelected, unaccountable quasi-administrative agency cannot be allowed to make a determination that certain treatments or procedures are *never* “proper and necessary,” which is precisely how the system operates under the court of appeals’ determinations in *Murray and Joy v. Dep’t of Labor & Indus.*, 170 Wn. App. 614, 285 P.3d 187 (2012). The grand bargain demands that an injured worker have a right to an individual determination in his or her particular circumstance as to whether a certain treatment is, or is not, proper and necessary. Instead, as construed here by the court of appeals, the HTCC operates as a quasi-administrative agency empowered

⁴ As numerous parties have pointed out, then-Governor Gregoire vetoed a provision of the 2006 legislation which would have allowed individual review of HTCC determinations. *See* LAWS OF 2006, ch. 307 § 6.

to legislate, which violates general principles regarding delegation of legislative authority as well as implicates Due Process concerns.

In this case, the HTCC is allowed to make an un-reviewable non-individualized denial of medical treatment recommended by an authorized treating physician in a workers' compensation case without notice to the affected (actual and potential) injured workers. This determination is non-reviewable, and is not based upon an individual's specific medical necessity, but rather is a committee determination based on abstracted principles of medical efficacy coupled with cost of delivery. When the HTCC makes a coverage determination, "committee members shall review and consider evidence regarding the safety, efficacy, and cost-effectiveness of the technology as set forth in the health technology assessment . . . and may also consider other information it deems relevant, including other information provided by the Director, reports or testimony from an advisory group, and submissions or comments from the public." WAC § 182-55-030(1).

WILG respectfully submits that the reduction, elimination, and limitation of medical benefits for injured employees under the HTCC contravenes the purpose of the Industrial Insurance Act. Under the HTCC system, Washington no longer provides full proper and necessary medical care to injured workers. The elimination or reduction of medical benefits

results in the shifting of the loss from the industrial insurance system to social programs and ultimately to the taxpayer through increased utilization of programs such as Medicaid and Medicare. When an injured worker can no longer obtain appropriate medical treatment for compensable injuries, it raises the question of whether the remedy granted to the worker in exchange for forfeiture of his or her right to redress against the employer is still sufficient.

II. THE HTCC STATUTES WORK AN IMPERMISSIBLE DELEGATION OF AUTHORITY TO LEGISLATE WHAT IS OR IS NOT PROPER AND NECESSARY TREATMENT FOR ALL INJURED WORKERS

Injured workers in Washington State have a vested right to “proper and necessary medical and surgical services.” RCW 51.36.010; *Murray v. Dep’t of Labor & Indus.*, 1 Wn. App. 2d 1, 15 fn. 5, 403 P.3d 949 (2017). While the legislature may properly define what constitutes proper and necessary medical care, it is an essential ingredient of the grand bargain. Importantly, though, it is the *legislature*, and the legislature alone, which may set standards and guidelines for determining what constitutes proper and necessary medical and surgical services. *See, e.g., Barry & Barry v. State Dep’t of Motor Vehicles*, 81 Wn. 2d 155, 158-64, 500 P.2d 540 (1972). Moreover, the legislature must, in any delegation of authority to an administrative agency, ensure that “procedural safeguards exist to control

arbitrary administrative action and any administrative abuse of discretionary power.” *Id.* at 159.

Notably, the Health Technology Clinical Committee is not an administrative agency for purposes of the Washington Administrative Procedure Act, Chapter 34.05 RCW. RCW 70.14.090(5). The court of appeals in this case glossed over this significant shortcoming by noting that the HTCC is “subject to the Open Public Meetings Act of 1971, chapter 42.30 RCW.” *Murray v. Dep’t of Labor & Indus.*, 1 Wn. App. 2d 1, 7, 403 P.3d 949 (2017). But the Open Public Meetings Act does not provide any protections against arbitrary and capricious administrative action or the administrative abuse of discretionary power because it does not provide, *inter alia*, appeal rights.

Under the Open Public Meetings Act there is no appeal procedure. *Cf.* RCW 34.05.410 *et seq.* There is no notice and comment or public access to the agency’s rulemaking file. *Cf.* RCW 34.05.310 *et seq.* None of the protections required for a constitutional delegation of legislative authority are in place under the Washington Constitution, Art. II, § 1. Unquestionably, a rule which determines ineligibility of an entire class of people—in this case, injured workers—to medical treatment would be considered a significant legislative rule. RCW 34.05.328. The APA has very strict requirements for adoption of significant legislative rules. The

HTCC is not required to comply with any of these requirements before it enacts a Health Technology Assessment. Instead, in order to comply with the Open Public Meetings Act, the HTCC need only ensure that its “meetings” are open and public (RCW 42.30.030); that its members vote publicly on any action taken (RCW 42.30.060); and that the public be informed of the time and location of any meetings (RCW 42.30.070). There is no substantive review of any decisions made under the Open Public Meetings Act. The legislature’s delegation of legislative authority to the HTCC is thus unconstitutional; the Open Public Meetings Act affords merely lip service to the requirements for a constitutional delegation of rulemaking authority.

Nor does the constitutional writ of certiorari afford the necessary protections under *Barry & Barry*. The court of appeals below held that the constitutional writ provides for sufficient “review of the HTCC’s execution of the authority delegated to it by the legislature” in part because it determined that “the APA’s scope of review of rule making authority is no broader than that of a constitutional writ of certiorari.” *Murray*, 1 Wn. App. 2d 1, 10. The court of appeals is incorrect for two reasons.

First, while both the APA and the constitutional writ may provide review of rule *making*, the constitutional writ does not provide for review

of the application of the rule in an individual case. For the particular injured worker, review of the rule making process and procedure is an illusory remedy, because the scope of such review goes to the rule making process itself rather than whether application of the rule wrongly deprives the injured worker of the right to proper and necessary medical treatment. The scope of review in a constitutional writ of certiorari is “whether the proceedings below were within the lower tribunal’s jurisdiction and authority,” and the “court will accept review only if the appellant can allege facts that, if verified, would establish that the lower tribunal's decision was illegal or arbitrary and capricious.” *Saldin Sec. v. Snohomish Cnty.*, 134 Wn. 2d 288, 292, 949 P.2d 370 (1998). The constitutional writ of certiorari does not enable an injured worker to challenge a HTCC determination *as applied* to his or her case. There is no ability for a court to determine in the context of a writ of certiorari that “agency” action applied to an individual injured worker works a deprivation of a proper and necessary medical procedure. Because the constitutional writ of certiorari cannot address the *specific* condition for the *specific* injured worker at issue in any case, it does not provide adequate procedural protections to preclude arbitrary and capricious denial of necessary and proper medical treatment.

Second, the court of appeals disregarded the fact that the Industrial Insurance Act demands a higher standard and level of review than even the APA. The APA's adjudicative procedures do not apply to the Department of Labor & Industries or to the Board of Industrial Insurance Appeals. RCW 34.05.030(2)(a) & (c). Instead, appeals are governed by chapter 51.52 RCW. The Board of Industrial Insurance Appeals is a quasi-judicial state agency created exclusively to hear appeals from determinations of the Department of Labor & Industries. The court's decisions in *Murray* and *Joy* fail to recognize that cases involving injured workers require a higher standard of review than even that provided under the APA, so even assuming *arguendo* that the constitutional writ of certiorari provides the same level of review as the APA, it still does not provide an adequate avenue of redress for injured workers. If injured workers in this state have a vested right to proper and necessary medical treatment, then absent legislation the Board of Industrial Insurance Appeals must be able to determine whether a medical treatment modality is proper and necessary for a particular injured worker, irrespective of the HTCC determination.

For the foregoing reasons, the constitutional writ of certiorari does not provide adequate procedural safeguards for an injured worker against arbitrary and capricious determinations by the HTCC. The HTCC

exercises an unconstitutional delegation of legislative authority—but this was not intended to be the case. A closer look at the statutes and the Governor’s partial veto message from 2006 reveal that the court in *Joy* created the problem which now plagues this Court when it attempted to resolve the conflict among RCW 70.14.120(4), RCW 70.14.120(3), and the Governor’s partial veto message.

III. THE COURTS INTERPRETATIONS OF RCW 70.14.120(3) & (4) FAIL TO RECOGNIZE THAT THE CONFLICT BETWEEN THE TWO SUBSECTIONS IS IRRECONCILABLE IN LIGHT OF THE GOVERNOR’S PARTIAL VETO OF THE HTCC LEGISLATION

The HTCC operates as an unconstitutional delegation of legislative authority to a quasi-administrative agency without sufficient safeguards in place to protect the rights of injured workers and preserve the vitality of the grand bargain. But it was not intended to function in this manner. Unfortunately, the court in *Joy* failed to recognize the full scope of the conflict between RCW 70.14.120(3) & (4), and the Governor’s partial veto of the HTCC legislation. Subsection (3) states that 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 . . . 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.” However, subsection (4) states that “Nothing in [the

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.”

The court in *Joy* recognized at least the conflict between subsections (3) & (4), but ultimately held that subsection (3) prevailed over subsection (4) because “more specific statutes prevail over general ones when a conflict exists.” 170 Wn. App. at 627. The court determined that subsection (3) was a specific statute because it “specifically addresses and precludes individualized medically necessary and proper determinations,” while “[i]n contrast, RCW 70.14.120(4) generally addresses appeals.” *Id.*

The Governor’s veto message, though, calls into question whether the court’s analysis is correct. Governor Gregoire’s partial veto message explicitly stated that the appeal process which she vetoed was duplicative given the individual right to review under RCW 70.14.120(4). LAWS OF 2006, ch 307, Governor’s Partial Veto Message. The section vetoed by the Governor provided *general* appeal rights to HTCC determinations, while RCW 70.14.120(4) guarantees the *specific* individual right to review of HTCC determinations as applied to the individual’s particular situation. Read in this light—which is clearly borne out from the Governor’s veto message—both subsections (3) & (4) are specific statutes, and courts do

not read statutes to produce unlikely, absurd, or strained results. *Double D Hop Ranch v. Sanchez*, 133 Wn. 2d 793, 799, 947 P.2d 727 (1997).

Instead, the Court here should recognize that the conflict between RCW 70.14.120(3) & (4) renders the statute *ambiguous*. As this Court knows well, by statute and by decades of case law the Industrial Insurance Act is to be liberally construed in favor of the injured worker; “where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation’s fundamental purpose, the benefit of the doubt belongs to the injured worker.” *Cockle v. Dep’t of Labor & Indus.*, 142 Wn. 2d 801, 815, 16 P.3d 583 (2000); RCW 51.12.010; *see also Street v. Weyerhaeuser*, 189 Wn. 2d 187 (2017), *Dennis v. Dep’t of Labor & Indus.*, 109 Wn. 2d 467 (1987), *Peet v. Mills*, 76 Wn. 437 (1913).

RCW 70.14.120(3) conflicts with subsection (4). The Governor’s partial veto of general appeal rights under the HTCC legislation makes it clear that her intent was to preserve the right to an individualized determination while foreclosing a wholesale appeal of HTCC determinations. At best, the statute still preserves an individual right of appeal, but at worst the statute is ambiguous. This Court should resolve any ambiguity in favor of allowing the injured worker to challenge whether a medical treatment subject to a HTCC determination is proper and necessary in his or her particular case. Other clear provisions of the

Industrial Insurance Act provide that the injured worker's right to proper and necessary treatment cannot be thwarted by an ancillary statute.

Under RCW 51.04.030(1), the Department is required to provide "prompt and efficient care and treatment." Moreover, "[u]pon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive proper and necessary medical and surgical services at the hands of a physician or licensed advanced registered nurse practitioner of his or her own choice." RCW 51.36.010(2)(a). There is nothing in the Industrial Insurance Act itself limiting the medical procedures recommended by treating physicians so long as those medical procedures are generally reflective of national standards.

Even legislative changes to the Industrial Insurance act *after* the adoption of the HTCC legislation make it clear that the legislature never intended to foreclose an individual right of review of a HTCC determination in a workers' compensation case. For example, RCW 51.36.140 was drafted in 2007, and created the "industrial insurance medical advisory committee," whose duty is to "advise the department on matters related to the provision of safe, effective, and cost-effective treatments for injured workers, including but not limited to the development of practice guidelines and coverage criteria, review of

coverage decisions and technology assessments, review of medical programs, and review of rules pertaining to health care issues.” The legislation itself, though, explicitly states that “the decisions of the state health technology assessment program and those of the state prescription drug program hold greater weight than decisions made by the department’s industrial insurance medical advisory committee.” RCW 51.36.140(7). LAWS OF 2007, Ch. 283 § 1. If the legislature had actually intended for the HTCC to make a final determination that medical treatment is “not medically necessary or proper in *any* case,” RCW 51.36.140(7) would be unnecessary because such determinations would be *preclusive* rather than simply weighty. *Joy*, 170 Wn. App. at 624.

The individual injured worker retains the right to argue that a medical treatment denied through a proclamation of the HTCC is proper and necessary in his or her particular case. The Board of Industrial Insurance Appeals and reviewing courts have the authority to rule in the individual’s favor where a preponderance of the evidence supports a derogation from the general rule set out by the HTCC.

C. CONCLUSION

Denying medical treatment to an injured worker who sustains an on-the-job injury increases the disability burden on the workers’ compensation system and leads to increased utilization of other social

insurance programs, diminishing the utility and viability of the grand bargain. The problem with the courts' analyses of the HTCC is that there is no individualized inquiry available to determine whether the treatment is proper and necessary in an injured worker's specific case. The alternatives for Mr. Murray in his case are to pay for the surgery through his own health insurance, his personal finances, or through his access to Medicare or Medicaid—in effect placing the burden of disability not on industry, but on the individual health insurance or on the State and Federal programs.

For the foregoing reasons, WILG respectfully submits that absent an individualized review, the benefit of the grand bargain is lost to the injured workers and their families in Washington.

Respectfully submitted this 16th day of April, 2018.



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