

NO. 48870-1-II

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

MICHAEL MURRAY,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

**SUR-REPLY
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

This sur-reply is authorized by the Commissioner's February 8, 2017 ruling allowing a response to new arguments raised in Murray's reply brief. Murray's arguments hinge on his mistaken notion that the Administrative Procedure Act must provide the relevant procedures when evaluating a delegation of legislative power question. As a recent Health Care Authority rule confirms, the constitution imposes no APA requirement. Providing for notice and opportunity to comment, combined with judicial review for arbitrary action, satisfies the constitution.

II. ARGUMENT

The Legislature has delegated legislative power to the HTCC to assess the safety of medical procedures and then issue determinations as to whether state agencies should cover the procedure. Under *Barry & Barry, Inc. v. Department of Motor Vehicles*, the courts affirm delegations if (1) the Legislature has sufficiently specified what the agency must do and (2) procedures exist to protect against arbitrary agency action. 81 Wn.2d 155, 159, 500 P.2d 540 (1972). Contesting only the second prong, Murray's reply now argues that recently amended Health Care Authority rules, together with APA rulemaking provisions, demonstrate an unlawful

delegation.¹ His arguments fail. The amended Health Care Authority rules reinforce the inherent authority of the court to review HTCC actions for arbitrariness. And this authority, combined with administrative procedures of notice and opportunity to comment, satisfy the *Barry & Barry* test. Additionally, the HTCC statute does not improperly supplant Department of Labor & Industries rulemaking authority under the APA because *Barry & Barry* permits the Legislature to use alternative procedures.

A. The Amended Health Care Authority Rules Properly Acknowledge the Constitutional Right to Review for Arbitrary State Action

Health Care Authority rule WAC 182-55-041 acknowledges that courts have the inherent power to review HTCC actions to determine if they are arbitrary or capricious:

Nothing in this chapter limits the superior court's inherent authority to review health technology clinical committee determinations to the extent of assuring the decisions are not arbitrary, capricious, or contrary to law.

This rule echoes the commands of our constitution and the Supreme Court. Under article 4, section 6, the superior court has inherent authority to review administrative action. *Saldin Sec., Inc. v. Snohomish Cty.*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). Review is not just for illegality or jurisdiction; rather the scope of review includes a determination whether

¹ The Health Care Authority adopted the amendments to WAC 182-55 on September 26, 2016.

the agency action “was arbitrary, capricious, or illegal” *Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 769, 261 P.3d 145 (2011).

WAC 182-55-041 acknowledges resort to the court’s inherent power as a proper avenue to satisfy delegation of power concerns where there needs to be protections against “arbitrary administrative action and any administrative abuse of discretionary power.” *Barry & Barry*, 81 Wn.2d at 159. Review for both arbitrary and capricious action satisfies the *Barry & Barry* standard. *See Auto. United Trades Org. v. State*, 183 Wn.2d 842, 861, 357 P.3d 615 (2015) (writ of certiorari “among other things” provides a sufficient safeguard to satisfy separation of power concern against arbitrary agency action).²

The amended Health Care Authority rules properly acknowledge the constitutional authority of the courts to protect against arbitrary action in WAC 182-55-041, and nothing in WAC 182-55-040 diminishes that acknowledgement. WAC 182-55-040 provides procedures for the Health Care Authority’s implementation of HTCC decisions in providing its state-purchased health care benefits. The Health Care Authority adopted those procedures voluntarily to implement an unprecedential settlement

² Arbitrary and capricious review satisfies constitutional concerns under article 4, section 6, and article 2, section 1. *Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 218, 225-26, 643 P.2d 426 (1982) (statute with express bar to appeal not unconstitutional under article 4, section 6 because of availability of writ to review for arbitrary action); *Auto. United Trades Org.*, 183 Wn.2d at 861 (writ one safeguard against arbitrary action in separation of power challenge).

agreement in the *Sund v. Regence Blue Shield* superior court case. Wash. St. Reg. 16-18-023.³ Murray claims that adopting the rule tacitly admitted to a procedural flaw in the HTCC statute. Reply 14. But no admission exists given that the Health Care Authority adopted a rule that confirmed its understanding of the superior court's inherent authority to review HTCC decisions. WAC 182-55-041. *Sund* did not analyze whether the availability of a judicial writ review in combination with the other procedural protections of the HTCC statute satisfied the *Barry & Barry* test. See CP 30-45. Compare to *Skinner v. Seattle School District No. 1*, King County No. 15-2-15630-6SEA (2016), which applied the correct analysis. CP 76-79. Although the Health Care Authority made a policy decision to have a regulation that is neither necessary nor required, this does not change the inquiry here: to apply the *Barry & Barry* test.

B. The Legislature May Decide to Use the HTCC Procedure Over the Rulemaking Procedures

Murray is correct that the HTCC statute supplants the Department's rulemaking authority. Reply 15. But this causes no constitutional concern because the Legislature granted the HTCC the authority to act. RCW 70.14.110. The HTCC statute does not permit the Department to cover HTCC-prohibited procedures. Although the Department has rulemaking

³ See *Bauman v. Turpen*, 139 Wn. App. 78, 87, 160 P.3d 1050 (2007) (superior court decisions not considered authority).

authority to make rules about proper and necessary treatment, the HTCC statute controls quasi-legislative decisions as to what constitutes proper and necessary care. This is because RCW 51.36.010(10) gives rulemaking power to the Department regarding proper and necessary treatment only, and an “HTCC non-coverage determination is a determination that the particular health technology is not medically necessary or proper in *any* case.” *Joy v. Dep’t of Labor & Indus.*, 170 Wn. App. 614, 624, 285 P.3d 187 (2012); RCW 70.14.120.

The Department does not need to promulgate a rule to deny coverage. *Contra* Reply 15. Besides the HTCC statute, RCW 51.04.030 provides that coverage decisions are not rules, contrary to Murray’s claim that the Department must adopt a rule to not cover a medical procedure. Reply 15. To satisfy procedural concerns, the Legislature directed the Department to adopt procedures to ensure fairness. RCW 51.04.030. Likewise, the Legislature adopted the HTCC process with procedural safeguards, and the constitution gives judicial review.

These procedures satisfy the *Barry & Barry* test because “[a]dministrative procedures tending to discourage arbitrary action provide adequate safeguards when combined with limited judicial review” under a writ. *City of Auburn v. King Cty.*, 114 Wn.2d 447, 452, 788 P.2d 534 (1990). Under this standard, the courts guard against arbitrary action.

But the writ need not provide a challenge to the “merits” of the decision or “review for error” under the APA to satisfy the *Barry & Barry* test. *Contra* Reply 14. Murray’s demand for this type of review here is flawed because the APA does not provide a substantive review right. The rights he seeks are for review of quasi-judicial actions, but the review here is quasi-legislative. *Compare* RCW 34.05.449 and .570(2)(c) (review of adjudicative proceedings) *with* RCW 34.05.570(3) (review of agency rules). The APA limits judicial review of rules to whether they are constitutional, arbitrary and capricious, within statutory authority and jurisdiction, and in compliance with rulemaking procedures (for rules less than two years old). RCW 34.05.570(2)(c), .375.⁴ Here there is no dispute over the HTCC’s statutory authority to act, and the court may review claims concerning jurisdiction, arbitrary procedural and discretionary action, and constitutional provisions under the writ standards.

Contrary to Murray’s claims, an agency may act constitutionally without using the APA. *Contra* Reply 14. The HTCC process provides procedural protections comparable to those in the APA:

⁴ Under the arbitrary and capricious standard, the court reviews agency action to determine if it was willful and unreasoning and taken without regard to attendant facts and circumstances. *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). “Where there is room for two opinions, an action taken after due consideration is not arbitrary or capricious, even though a reviewing court may believe it to be erroneous.” *Id.* at 905 (quotations omitted). The wisdom or desirability of the agency action is not before the reviewing court. *See Armstrong v. State*, 91 Wn. App. 530, 537, 958 P.2d 1010 (1998).

- Public notice of reviews and determinations—RCW 70.14.130
- Conflict screening—RCW 70.14.090(3)(a)
- Public comment—RCW 70.14.110(2)(b)
- Open meetings—RCW 70.14.090(4); RCW 42.30.060
- Detailed criteria for decision-making—RCW 70.14.100, .110
- Reconsideration of decisions—RCW 70.14.100(2)
- Judicial review—Art. IV, § 6

Murray is simply incorrect that the Legislature does not require notice of HTCC decision-making. Reply 16. RCW 70.14.130 directs the HTCC administrator to provide notice about the procedure that he or she has selected for review and requires public access to the assessment report outlining the determination recommendations. These notices are posted on-line. WAC 182-55-055.⁵ Additionally, the Open Public Meetings Act applies and requires public notice of agenda items the HTCC plans to consider. RCW 42.30.077; RCW 70.14.090(4).

The courts recognized that the Legislature may provide for alternative procedures other than the APA to implement quasi-legislative actions. *Brown v. Vail*, 169 Wn.2d 318, 332, 237 P.2d 263 (2010) (drug protocols met constitutional standards even though no review under the APA). What is necessary is a proportional amount of process considering the circumstances. For example, in *In re Powell*, when faced with an individual's loss of liberty, the Court required strict procedures even

⁵ This rule requiring notice has been in effect since 2006. *Contra* Reply 16; Wash. St. Reg. 06-23-083. Even before the rule, RCW 70.14.130 mandated posting.

though the agency followed the APA. 92 Wn.2d 882, 892-94, 602 P.2d 711 (1979). But solely economic interests—such as reimbursement for unauthorized treatment—do not warrant the same process as the *Powell* Court observed. *Powell*, 92 Wn.2d at 892; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60-61, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) (treatment payment is an economic issue).

The balancing test in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), applies to judge the sufficiency of the procedures provided here. *State v. Simmons*, 152 Wn.2d 450, 456, 98 P.3d 789 (2004) (applying balancing test to unconstitutional delegation of power question). Under *Mathews*, the court considers (1) the “private interest” effected by the government action, (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,” and (3) the government interest, including the additional burden that added procedural safeguards would entail. *Mathews*, 424 U.S. at 335. This test is satisfied here.

First, workers’ compensation claimants do not have a private interest in treatment because they have no interest in treatment that is not proper and necessary. *See Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 60-61. Although Murray has postured his constitutional claim as involving a

factual dispute as to whether the treatment is proper and necessary, in reality it does not because the HTCC has determined it is not proper and necessary treatment. *Joy*, 170 Wn. App. at 624 (holding that a procedure subject to a HTCC determination is not “medically necessary or proper in any case.”). In any case, the interest is economic because it involves who pays for the surgery, not whether it may be performed. *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 60-61. Here, Murray received the surgery. AR 58.

Second, the procedures here are sufficient: notice and opportunity to comment about HTCC decisions, as well as judicial review in a constitutional writ. The constitution requires no individual hearing about the merits of the quasi-legislative decision for class-wide mass determinations. *Atkins v. Parker*, 472 U.S. 115, 129-30, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985). But to ensure fair mass determinations, the Legislature has provided detailed instructions as to the criteria used to select procedures to review and the caliber of evidence that the HTCC should consider in making its decision. RCW 70.14.100. Moreover, individuals may contest whether the mass determination applies to their own situation by arguing an exception applies or that the determination does not apply to their condition. RCW 70.14.120.

And third, the government has a strong state interest in providing a uniform evidence-based system of health care. The APA rulemaking

processes provide for statutory deadlines and specific document filings. *E.g.*, RCW 34.05.315, .320, .325, .328, .340, .345. Although useful in the APA context, constitutional concerns do not dictate these procedures to secure notice and comment, and their added burden is unnecessary.

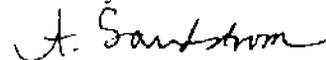
Balancing the factors shows that this statutory and regulatory scheme provides protections against arbitrary action that satisfy the *Barry & Barry* test. Using the procedural protections in the APA is one way to ensure procedural due process—but it is not the only way. Murray’s contention that resort to the APA is constitutionally mandated fails.

III. CONCLUSION

Sufficient procedures govern the HTCC’s decision-making to protect against arbitrary agency action. This Court should affirm the Legislature’s policy decision to have medical experts evaluate the safety, efficacy, and cost of medical procedures used and paid for by the State.

RESPECTFULLY SUBMITTED this 28th day of February, 2017.

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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Sur-Reply and this Certificate of Service in the below described manner:

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