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NO. 95251-5

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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MICHAEL MURRAY,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

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**DEPARTMENT OF LABOR & INDUSTRIES'  
ANSWER TO AMICI CURIAE BRIEFS**

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## I. INTRODUCTION

The two amici, Workers' Injury Law & Advocacy Group (WILG) and Washington State Association for Justice Foundation (WSAJF), offer no meritorious reason to reverse the Court of Appeals. The Health Technology Clinical Committee Act complies with *Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972), by its robust administrative safeguards and the availability of a constitutional writ. So the Legislature has properly delegated its power.

Both WILG and WSAJF offer new interpretations of RCW 70.14.120, which this Court should disregard because Murray has not argued for them. In any event, the amici's interpretations share the same flaw: they contradict the plain language of the statute and contravene the Legislature's intent to have safe, effective, and cost-efficient treatment for all Washingtonians receiving state-purchased health care.

## II. ARGUMENT

### A. **The HTCC Lawfully Delegated Power to the HTCC Because the HTCC Act Contains Procedural Safeguards, and Writs Allow Challenges to the HTCC's Decisions**

The Legislature lawfully delegated power to the HTCC. To have a lawful delegation, the Legislature must provide (1) general standards to govern what the agency does and (2) adequate procedures to safeguard against arbitrary administrative action. *Barry & Barry*, 81 Wn.2d at 159.

No one questions the first prong, leaving only the second at issue.

**1. The administrative procedures of public notice, opportunity for comment, open meetings, conflict screening, and reconsideration used to adopt HTCC determinations satisfy *Barry & Barry***

The HTCC Act provides robust procedural protections, contrary to WILG's arguments. WILG Br. 10-14. WILG posits that the Open Public Meetings Act, which applies here, does not protect against arbitrary administrative action since it provides no appeal rights, public comment, or public access to the agency's rule making file. WILG Br. 10. WILG also asserts that since the Administrative Procedure Act does not apply, the procedures must be inadequate. WILG Br. 10. These arguments miss the point. As detailed in the Department's Supplemental Brief, the HTCC statute provides many procedural protections that are comparable to the APA's rulemaking requirements, and applying the Open Public Meetings Act is just one additional protection in the HTCC Act. *See* L&I's Suppl. Br. 5, 7-9. The HTCC Act provides:

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

These statutory protections allow for significant input from the public and the medical community into the HTCC's determinations.

WILG cites the APA's strict requirements to adopt significant legislative rules, but the Legislature need not use APA under the delegation doctrine. *See Brown v. Vail*, 169 Wn.2d 318, 332, 237 P.2d 263 (2010) (drug protocols constitutional without APA review).<sup>1</sup>

In any event, WILG provides no example in which the APA provides more protections than the HTCC statute. WILG Br. 10-11. It admits that the Open Public Meetings Act mandates that meetings be open and votes be public. RCW 42.30.030, .060. WILG Br. 11. This contrasts with the APA, which does not require unitary-headed state agencies (like L&I) to have the public present when they decide what a rule says and whether to adopt it—there is no public viewing of that process under the APA, unlike here.

When creating the HTCC processes, the Legislature considered the interests at stake in creating the HTCC and provided significant procedural safeguards to protect these interests. WSAJF argues that to determine whether a delegation of power includes enough procedural safeguards, “it is imperative to consider the magnitude of the interests which are affected by the legislative grant of authority.” WSAJF Br. 17 (quoting *In re*

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<sup>1</sup> Indeed in *Automotive United Trades Organization v. State*, 183 Wn.2d 842, 861, 357 P.3d 615 (2015) (*AUTO*), the only administrative protections were reports and audits provided to the Legislature in a program that authorized the Governor to negotiate fuel tax refunds with tribes, and the Court rejected the delegation of power argument.

*Powell*, 92 Wn.2d 882, 892, 602 P.2d 711 (1979)). It is correct that *Powell* looked to the interests involved in weighing whether the procedure was sufficient. Here, unlike *Powell*, the procedure is sufficient when weighing the interests involved. *Powell* invalidated a rule because of the lack of notice and opportunity to comment when the Board of Pharmacy adopted emergency rules about how to classify controlled substances, rules that could lead to felony convictions. *Id.* at 892-94. Here by contrast, there was ample notice and public comment. AR 74-75, 299-301, 348.

Without support, WSAJF seems to imply the interest of payment of proper and necessary treatment either equates to the criminal interests in *Powell* or is more than the economic interests at issue in *Barry & Barry*. WSAJF Br. 17-18. This is not correct. But even so, this Court allows for quasi-legislative decision making in the criminal context if there are procedural protections. *Barry & Barry. Brown*, 169 Wn.2d at 332; *State v. Simmons*, 152 Wn.2d 450, 457-58, 98 P.3d 789 (2004). Key in the criminal context is that the individual receives a trial about whether the quasi-legislative decision applies to the individual. *Id.* Here, Murray received a hearing about whether the HTCC determination applied to the medical procedure.

2. **The constitution requires only a review of quasi-legislative decisions for arbitrariness and the Legislature need not provide an individual hearing on**

**whether the treatment is proper and necessary**

The type of review of HTCC decisions for arbitrariness and illegality under a constitutional writ satisfies the *Barry & Barry* test. *See City of Auburn v. King Cty.*, 114 Wn.2d 447, 451-52, 788 P.2d 534 (1990). Amici appear to claim two types of review are necessary here: (a) that the Court needs to review the HTCC decision itself for more than arbitrariness and illegality in that a court should also judge the wisdom of the decision—its merits; and (b) that Murray should have a hearing on whether the FAI surgery is proper and necessary as applied to him. WILG Br. 10-12; WSAJF Br. 5-12. Neither claim is correct.

**a. Quasi-legislative decisions do not require review for the wisdom—its merits—of the legislative decision**

Quasi-legislative decisions are subject to review on the merits only to determine if they are arbitrary, capricious, or contrary to law. *Lane v. Port of Seattle*, 178 Wn. App. 110, 126, 316 P.3d 1070 (2013). In the delegation context, *Barry & Barry* does not require review for the merits of a quasi-legislative decision; it only requires judicial review “for testing the constitutionality of the rules after promulgation,” which is an arbitrariness and illegality review. 81 Wn.2d at 164; *City of Auburn*, 114 Wn.2d at 451-52; *McDonald v. Hogness*, 92 Wn.2d 431, 446-47, 598 P.2d 707 (1979). In *Barry & Barry*, there was only judicial review under the

former APA, which does not provide for a merits review of a quasi-legislative decision. 81 Wn.2d at 164; *Am. Network, Inc. v. Wash. Util. & Transp. Comm'n*, 113 Wn.2d 59, 69, 776 P.2d 950 (1989). Under the former APA, “a court will not substitute its judgment for that of an agency. Nor will it examine a record for substantial evidence in reviewing . . . the validity of a rule.” *Am. Network*, 113 Wn.2d at 69.

Amici cannot dispute that APA review of agency rules satisfies *Barry & Barry. Brown*, 169 Wn.2d at 332. But there is little to no material difference between APA consideration and the kind of action at issue—a determination that excludes coverage for certain treatment as compared to an APA rule. For example, WAC 296-20-03002(2) excludes acupuncture treatments from coverage. Like the HTCC procedures, this rule was adopted after public comment and hearing. RCW 34.05.328. And like the HTCC procedures, a worker can only challenge the acupuncture rule based on whether it is unconstitutional, arbitrary, capricious, or illegal. RCW 34.05.570. Finally, like the HTCC procedures, a worker cannot claim in an individual appeal that, despite the rule, acupuncture is medically necessary and proper in the worker’s case. *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 910, 246 P.3d 1254 (2011) (agency regulations have the force and effect of law).

Likewise, the case law does not require a merits review. WSAJF’s

suggestion that *AUTO* required both “administrative review” and a writ of certiorari is wrong. WSAJF Br. 18. *AUTO* pointed out that under the case law, administrative review would suffice under the second prong of the *Barry & Barry* test, not that both a writ and administrative review were necessary. 183 Wn.2d at 861. In fact, *AUTO* noted that “No obvious route for administrative review appears here” and yet the Court did not invalidate the statute. *Id.* Administrative review is unnecessary.

No other source of authority requires an administrative merits review of the HTCC decision. The Industrial Insurance Act does not require a higher standard of a hearing about the merits of the HTCC decision, as WILG suggests. WILG Br. 13. The Industrial Insurance Act does not provide for administrative (or judicial) review of quasi-legislative decisions like rules or HTCC determinations, only quasi-judicial decisions involving individuals or companies, so it does not provide procedures stronger than the HTCC Act about quasi-legislative decisions. *See* RCW 51.52.050.

**b. The Legislature need not provide a hearing on whether FAI surgery is proper and necessary and may limit the scope of an individual appeal**

Although a claimant is entitled to an individual hearing to decide whether a quasi-legislative decision applies to the claimant (*Simmons*, 152 Wn.2d at 457-58), the claimant has no right to determine in the hearing if

the quasi-legislative decision itself had merit. *See Earle M. Jorgensen Co. v. City of Seattle*, 99 Wn.2d 861, 867-68, 665 P.2d 1328 (1983). WILG argues that the delegation doctrine is violated because there is no review of the “‘agency’ action applied to an individual injured worker” about whether the FAI surgery is necessary and proper treatment. WILG Br. 12. This type of review is unnecessary. A quasi-legislative decision has the force and effect of law. *Mills*, 170 Wn.2d at 910 (agency regulations have the force and effect of law). So the decision that the FAI surgery was not proper and necessary carries the force of law, and the Board and courts must apply the HTCC determination to an individual without review about the wisdom of the decision in general or as applied to an individual. RCW 70.14.120(3).

That a worker cannot claim that FAI surgery is proper and necessary in an individual hearing follows well-accepted legal principles. Courts hold that rights to individual hearings do not attach to purely legislative acts to determine if the legislative act has merit. In *Earle M. Jorgensen*, ratepayers argued they should be able to call witnesses to testify about the merits of a rate increase before a city council. 99 Wn.2d at 867-68. The Court rejected this argument because there is no individualized hearing right for a legislative decision. *See id*; *see also Holbrook, Inc. v. Clark Cty.*, 112 Wn. App. 354, 364, 49 P.3d 142 (2002)

(no right to individual notice because area-wide zoning actions involve exercise of legislative power); accord *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445, 36 S. Ct. 141, 60 L. Ed. 372 (1915) (“Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption.”).

Just like that the delegation doctrine requires no individualized appeal about the wisdom of the quasi-legislative decision, it does not stop the Legislature from limiting the scope of an individual appeal. A procedure not covered by the HTCC “shall not be subject to a determination in the case of an individual patient as to whether it is . . . proper and necessary treatment.” RCW 70.14.120(3). This statute works with subsection (4), which provides that nothing in the HTCC statute “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,” because this appeal right gives no individual the ability to contest whether an HTCC decision is proper and necessary. *Joy v. Dep’t of Labor & Indus.*, 170 Wn. App. 614, 622, 285 P.3d 187 (2012). Subsection (4) allows an appeal; subsection (3) sets the scope of that appeal.

The Legislature may limit the topics within the scope of an appeal. For example, the wisdom of a rule is not subject to judicial review under the APA. See *Armstrong v. State*, 91 Wn. App. 530, 536-37, 958 P.2d

1010 (1998). And also, for example, some statutes under the Industrial Insurance Act limit the scope of an appeal. Under RCW 51.48.040(3), an employer may not contest in an appeal the correctness of a tax assessment if it does not produce records in an investigation. RCW 51.52.050(1) and RCW 51.48.131 allow for an appeal of the assessment, but the employer cannot argue that the assessment is incorrect. It could argue other things, like whether there is an employer/employee relationship that triggers the payment of taxes, but an employer may not challenge the assessment amount. So the Legislature may limit what is appealable, like in RCW 70.14.120(3).

Despite RCW 70.14.120(3), WSAJF argues that the Industrial Insurance Act requires an individual determination of medical necessity. WSAJF Br. 5-10, 12. That would be true if the Legislature had not passed the HTCC Act. L&I is a participating agency and so the HTCC Act applies. RCW 70.14.080(6), .120(1), (3). WSAJF points to *Susan M. Pleas*, No. 96 7931, 1998 WL 718232 (Wash. Bd. Indus. Ins. Appeals Aug. 31, 1998), to argue that there must be a determination of medical necessity. The Board has overruled *Pleas* because the HTCC Act precludes the spinal cord stimulator at issue. *Ladonia M. Skinner*, No. 14 10594, 2015 WL 4153105, at \*2 (Wash. Bd. Ind. Ins. App. June 12, 2015).

### 3. A writ of certiorari provides adequate review

A constitutional writ provides for sufficient judicial review of the HTCC's determinations when it reviews for arbitrariness and illegality. See *City of Auburn*, 114 Wn.2d at 451-52; see also *Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 769, 261 P.3d 145 (2011); *Leschi Improvement Council v. Wash. State Highway Comm'n*, 84 Wn.2d 271, 279, 525 P.2d 774 (1974). A constitutional writ is available for legislative acts, contrary to WSAJF's suggestion. WSAJF Br. 18; *Dorsten v. Port of Skagit Cty.*, 32 Wn. App. 785, 788–89, 650 P.2d 220 (1982).

Despite WSAJF arguing that a writ is discretionary, and thus inadequate, this Court has upheld the use of the writ, even though it is discretionary, for not only decisions like *Barry & Barry* under article II, section one involving legislative power, but also to uphold the constitutionality of statutes under article IV, section six. WSAJF Br. 19; *City of Auburn*, 114 Wn.2d at 451-52; *Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 218, 643 P.2d 426 (1982). WSAJF hints that a court issues a writ only in extraordinary circumstances, but this Court has held extraordinary facts and circumstances are not required. *Saldin Sec., Inc. v. Snohomish Cty.*, 134 Wn.2d 288, 294, 949 P.2d 370 (1998); WSAJF Br. 19. “[W]e adhere to the long accepted rule that a court may grant a constitutional writ of certiorari if no other avenue of appeal is available

and facts exist that, if verified, indicate the lower tribunal has acted in an illegal or arbitrary and capricious manner.” *Saldin*, 134 Wn.2d at 294. The writ is available in these circumstances, even if they are not extraordinary.

*Id.* The writ satisfies constitutional concerns.

**B. The HTCC Act Provides That an Individual Cannot Argue that a Rejected Treatment Is Proper and Necessary**

Both WSAJF and WILG make statutory construction arguments that Murray did not raise, so this Court should disregard them. *State v. Jorden*, 160 Wn.2d 121, 128 n.5, 156 P.3d 893 (2007). But even if the Court considers them, they fail.

The HTCC statute provides that if the HTCC makes a determination, the participating agencies and reviewing bodies must follow it and parties cannot contest an HTCC medical necessity decision. RCW 70.14.120(1), (3); *Joy*, 170 Wn. App. at 622. The HTCC determines “[t]he conditions, if any, under which the health technology will be included as a covered benefit in health care programs of participating agencies . . . .” RCW 70.14.110(1)(a). The HTCC determines criteria that a participating agency, such as L&I, “must use to decide whether the technology is medically necessary, or proper and necessary treatment.” RCW 70.14.110(1)(b). And the procedure “shall not be subject to a determination in the case of an individual patient as to whether it is . . .

proper and necessary treatment.” RCW 70.14.120(3). Subsection (4) in turn provides that nothing in the HTCC statute “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.”

Subsections (3) and (4) work together and do not conflict. *Contra* WILG Br. 15. Under subsection (4), a person can appeal if the agency applies an HTCC determination, while subsection (3) limits the scope of such an appeal. The Legislature has the power to limit the topics that are the subject of an appeal. *See* Part II.A.2.b *supra*.

Subsection (4), the appeal provision, provides individuals with the ability to challenge three things. First, an individual may argue that the HTCC decision does not apply because the treatment is a different treatment than under the HTCC determination. Second, an individual can argue that the individual meets the HTCC’s criteria for a treatment so the individual may receive the treatment. RCW 70.14.110(1).<sup>2</sup> And third, an individual can argue that an exception in RCW 70.14.120(1)(a) or (b) applies.<sup>3</sup> But just like a claimant cannot claim that L&I’s quasi-legislative rule against acupuncture lacks merit in a Board hearing, a claimant also

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<sup>2</sup> For example, discography (a type of test) is not a covered benefit unless certain symptoms are present such as radiculopathy. <https://www.hca.wa.gov/about-hca/health-technology-assessment/discography>

<sup>3</sup> For example, a clinical trial could cover the treatment. RCW 70.14.120(1)(b).

cannot argue that a quasi-legislative HTCC non-coverage decision is not valid. RCW 70.14.120(3); WAC 296-20-03002(2). There is no conflict and the Court can readily harmonize the subsections.

Nor is WILG correct that any conflict creates an ambiguity. WILG Br. 16. There is no conflict here, but even if there were, the Court may resolve a specific and general conflict of two provisions under a plain language analysis when both provisions are unambiguous. *See Seven Sales LLC v. Otterbein*, 189 Wn. App. 204, 212-13, 356 P.3d 248 (2015). There is no need to consult legislative history or apply the doctrine of liberal construction. *See Griffin v. Thurston Cty.*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008) (canons of construction do not apply to unambiguous statutes). Under the plain language analysis, if there were a conflict, subsection (3) would control whether a party could contest a medical necessity determination, as that is the most specific statement on that issue. Subsection (4) is about appeal rights in general. *Joy*, 170 Wn. App. at 627; *contra* WSAJF Br. 16.

In any event, even if the statute is ambiguous, it does not change the result here. First, the doctrine of liberal construction applies only under the Industrial Insurance Act, not when construing the HTCC statute. RCW 51.12.010. This case involves RCW 70.14, not RCW Title 51, and—as WSAJF admits—liberal construction does not apply. WSAJF Br. 20.

Next, as stated above, the Court would resolve any conflict by looking to the more specific subsection (3). And finally, the Governor's veto is immaterial here because even if the Governor believed there were an individual appeal right under subsection (3)—a proposition unclear from the veto message's text—this cannot control over the statute's words and the Legislature's intent.

WSAJF is simply wrong that the veto message is the final statement of legislative intent about the appeal right. WSAJF Br. 16. The final statement was the Legislature's decision not to override the veto and to adopt subsections (3) and (4) in their current forms, showing an intent to provide safe and uniform treatment.

The Court should further this intent because when the Court construes an ambiguous statute, it does so in a way to “effectuate [the statute's] purpose.” *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 808, 863 P.2d 64 (1993). The Court resolves ambiguities in ways that ““further, not frustrate,”” the law's intended purpose. *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 656, 355 P.3d 258 (2015) (quoting *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007)).

Here, as expressed in the plain language of the statute, the Legislature intended to use evidence-based decisions to provide the best care for Washingtonians receiving state-purchased health care. RCW

70.14.100(4)(a). It did this to ensure safe, effective, and cost-efficient procedures. RCW 70.14.100(1)(a). The Legislature also applied the decisions across three state agencies, desiring to have consistent decision-making. Only L&I's interpretation furthers the Legislature's goals.

Accepting WILG's and WSAJF's arguments would lead to an absurd result: it would mean that the Legislature crafted a uniform system at the agency level that can be readily unraveled at the appeal level. Participating agencies must follow the HTCC guidelines under subsection (1) of RCW 70.14.120, as Murray has conceded. Pet. 17. The Legislature designed subsection (3) to apply the determinations to the agencies' decisions during the appeal process. It would make no sense for the Legislature to provide for a uniform coverage system at the agency level only to undermine that uniformity by inviting collateral attacks against the HTCC's decisions at the appeal level. *Joy*, 170 Wn. App. at 626-27. The Legislature could not have intended to create a system so tenuous.

WSAJF offers an alternative view of the statute that conflicts with the text and with legislative intent, arguing:

A plain reading of RCW 70.14.120 provides in section (3) that if the HTCC determines that a medical procedure is not a covered benefit, a claimant is not entitled to an individual determination as to whether that medical procedure is proper and necessary treatment, unless as provided in section (4) the claimant has a right under existing law to appeal a decision of a participating agency. Since "existing

law” gives an injured worker the right to appeal a Department decision excluding coverage, an injured worker is not precluded from an individual determination regarding whether a medical procedure is proper and necessary treatment.

WSAJF Br. 3. This focus on “existing laws” gives no meaning to subsection (3), as it would always allow an argument about medical necessity and the Legislature specifically precluded that. By using the term “existing law,” the Legislature did not intend to repeal subsection (3). Instead, as explained above, a claimant can argue about whether the HTCC determination applies and the other reasons outlined above.

Recognizing that its interpretation obviates subsection (3)’s application to L&I, WSAJF argues that “Section (3) may still apply to other ‘participating agencies.’” WSAJF Br. 12. But other participating agencies’ programs also have statutory appeal rights, so WSAJF’s “existing laws” argument gives no effect to RCW 70.14.120(3) for any agency. *E.g.*, RCW 74.09.741 (medicaid appeal right); RCW 41.05.017 and RCW 48.43.535 (right to appeal uniform medical plan decisions).

Finally, WILG points to RCW 51.36.140(7), which contemplates an advisory committee using HTCC decisions when advising L&I:

The industrial insurance medical advisory committee shall coordinate with the state health technology assessment program and state prescription drug program as necessary. As provided by RCW 70.14.100 and 70.14.050, 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 under Title 51 RCW.

*See* WILG Br. 17-18; *see also* WAC 296-20-01001, *cited by* WSAJF at 8.

WILG argues, "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 determination would be preclusive rather than simply weighty." WILG Br. 18 (emphasis omitted). The Industrial Insurance Medical Advisory Committee is an advisory committee only. RCW 51.36.140(1). Nothing in RCW 51.36.140(7) changes the mandates in RCW 70.14.120(1) and (3) to follow HTCC decisions. It merely provides that the committee should weigh information available under RCW 70.14.050 (a drug purchasing statute) and under RCW 70.14.100 (the evidence-based assessment report and decision) when advising L&I.

**C. The HTCC Act Reflects Important Health Care Policy Goals and Does Not Undermine the Grand Compromise**

Contrary to WILG's arguments, HTCC determinations do not undermine the letter and spirit of the grand compromise in the Industrial Insurance Act. WILG Br. 7.<sup>4</sup> The "grand compromise" by employers and

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<sup>4</sup> WILG also offers no citation to authority that says that the Legislature cannot modify the grand compromise. WILG Br. 7-9. It may, but it hasn't.

workers was one to provide workers with the right to “sure and certain relief” in the form of statutorily defined benefits instead of having the right to pursue relief through tort litigation. RCW 51.04.010; *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995). Under this system, the worker does not receive all the damages the worker could have received at common law. Instead, the worker receives only the benefits dictated by the workers’ compensation statutes, and the Court has repeatedly upheld the limitation on remedies. *Weiffenbach v. City of Seattle*, 193 Wash. 528, 535, 76 P.2d 589 (1938); *Stertz v. Indus. Ins. Comm’n*, 91 Wash. 588, 590-91, 597, 605, 158 P. 256 (1916), *abrogated on other grounds by Birklid*, 127 Wn.2d 853. This allows the Legislature to limit the benefits it provides, consistent with the grand compromise.

And the Industrial Insurance Act has always called for “sure and certain” relief. Laws of 1911, ch. 74, § 1. RCW 51.36.010(1) furthers this goal by finding “that high quality medical treatment and adherence to occupational health best practices can prevent disability and reduce loss of family income for workers, and lower labor and insurance costs for employers.” The HTCC Act advances these goals.

Ignoring the structure of the Industrial Insurance Act, WILG argues that an administrative agency “cannot be allowed to make a determination that certain treatments or procedures are never ‘proper and

necessary' . . . ." WILG Br 7 (emphasis omitted). But as WSAJF admits, L&I has rules that list specific types of treatments that the Department will not authorize. WSAJF Br. 6 (citing WAC 296-20-01505, 296-20-03002). WAC 296-20-03002(2) and WAC 296-20-01002 prohibit acupuncture and palliative care. So administrative agencies may make determinations about proper and necessary care.

The HTCC was set up to ensure that medical procedures are safe and effective for workers, so abiding by its determinations does not harm workers. Instead, it is an efficient means of determining, uniformly, what is proper and necessary care under RCW 51.36.010. This does not undermine the grand compromise underlying workers' compensation.

### III. CONCLUSION

The Legislature created a medical policy to ensure safe, effective, and cost-efficient treatment. WILG and WSAJF try to graft restrictions on the HTCC Act that the Legislature did not adopt. The Court should affirm.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of May 2018.

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**SUPREME COURT OF THE STATE OF WASHINGTON**

MICHAEL E. MURRAY,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES and BROCKS INTERIOR  
SUPPLY, INC.,

Respondents.

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