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STATE OF WASHINGTON  
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No.

COA No. 48870-1-II

IN THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

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MICHAEL MURRAY, Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

#15-2-00566-1

**APPELLANT MICHAEL MURRAY'S  
PETITION FOR REVIEW**

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## INTRODUCTION

This case tests the constitutional limits of the delegation doctrine. In 2006, the Washington Legislature created the Health Technology Clinical Committee (HTCC) as part of the State's Health Care Authority. It intended the Committee to make universal coverage determinations for State health care programs, while including provisions for beneficiaries to seek administrative and judicial review of the HTCC's decisions. But exercising a line item veto, Governor Christine Gregoire struck the review provisions from the enacted bill. By default, the HTCC now has unilateral authority to withdraw coverage for medical procedures, with no right to further review. Because of its universal authority, the HTCC can also foreclose coverage for workers' compensation claims under RCW Title 51, supplanting the program's administrative and judicial procedures.

Appellant Michael Murray is a victim of this unreviewable authority. On August 24, 2009, Mr. Murray suffered multiple injuries while working for Brocks Interior Supply in Poulsbo, Washington. (Administrative Record (AR) 30)\*. The Department of Labor and

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\* The clerk did not provide clerk's paper citations to the Administrative Record from the Board of Industrial Appeals. All references are to the Administrative Record (AR) page number.

Industries accepted Mr. Murray's claim and took responsibility for "the condition diagnosed as right labral tear, determined by medical evidence to be related to accepted condition under this industrial injury." (AR 31). In other words, the Department would pay for all proper and necessary medical treatment for Mr. Murray's injured right hip.

On September 20, 2013, Mr. Murray's attending physician, Dr. James Bruckner, recommended the only surgical procedure that could help him: arthroscopic osteoplasty of the acetabulum and/or femoral neck osteoplasty for treatment of femoral acetabular impingement (FAI), arthroscopic labral resection and/or arthroscopic synovectomy of the right hip joint. (AR 60-61). Without this FAI surgery, Mr. Murray's condition would deteriorate painfully until he qualified for a total hip replacement. (AR 60). During this deterioration, he would remain unable to work.

The Department, the Board of Industrial Appeals, Kitsap County Superior Court, and the Court of Appeals all denied authorization for the surgery. (AR 21) (AR 16) (CP 123); Murray v. State, Dep't of Labor & Indus., \_\_\_ Wn. App. \_\_\_, 403 P.3d 949 (2017). None would consider Mr. Murray's evidence that FAI surgery was proper and necessary care under the Industrial Insurance Act, RCW

51.36.010 and binding regulations, WAC 296-20-01002. Instead, because the HTCC concluded the medical procedure was unproven and therefore not covered, they summarily rejected Mr. Murray's request. Wanting to return to work, Mr. Murray paid for surgery on his own, and it successfully addressed his pain and lack of mobility. By any measure, it was proper and necessary care.

Mr. Murray now seeks review in the Supreme Court. The HTCC unilaterally withdrew compensation for medical treatment without meaningful agency or judicial review. Approving this, the Court of Appeals concluded "individualized review of discretionary decisions delegated to an administrative body is not required for the legislature to constitutionally delegate authority to an administrative body." Murray, 403 P.3d at 952. Because this ruling dilutes the delegation doctrine beyond constitutional limits, it presents a significant question of law under the State Constitution and an issue of substantial public interest. RAP 13.4(b)(3)-(4).

#### **I. IDENTITY OF PETITIONER**

Appellant Michael Murray asks this Court to accept review of the published Court of Appeals decision terminating review designated in Part II of this petition.

## II. COURT OF APPEALS DECISION

Mr. Murray seeks review of the Court of Appeal's decision in Murray v. State, Dep't of Labor & Indus., \_\_\_ Wn. App. \_\_\_, 403 P.3d 949 (2017), filed on October 24, 2017. A copy of the decision is in the Appendix at A-1 through A-8.

## III. ISSUES PRESENTED FOR REVIEW

Mr. Murray's petition presents three issues:

A. "Delegation of legislative power is justified and constitutional...when it can be shown...that Procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power." Barry & Barry, Inc. v. State Dep't of Motor Vehicles, 81 Wn.2d 155, 159, 500 P.2d 540 (1972). Because its decisions are not subject to the APA or the Industrial Insurance Act, the HTCC exercises unreviewed and unreviewable power over workers compensation benefits. Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 627, 285 P.3d 187 (2012). Is this delegation unconstitutional as applied to the Industrial Insurance Act?

B. "To fail to provide recourse for the claimant and physician who proceed with successful surgery, despite an absence of authorization...is to place simplistic, mechanical adherence to the medical aid rules above the requirement that the Industrial Insurance

Act be liberally construed.” Rogers v. Dept. of Labor and Indus., 151 Wn. App. 174, 184, 210 P.3d 355 (2009). Mr. Murray paid for FAI surgery on his own, and it was successful. Did the Department err by denying his claim nonetheless?

C. In Joy, the Court of Appeals held that a worker’s compensation claimant “may not obtain relief on appeal from L&I’s denial of coverage for treatment, when L&I’s denial is based on the HTCC’s determination of non-coverage for such treatment under all state health plans.” Joy, 170 Wn. App. at 627. Yet under RCW 70.14.120(4), 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.” Did the Joy court err by concluding that the Statute prohibits the Department and all reviewing courts from making an individual determination of the treatment?

#### **IV. STATEMENT OF FACTS**

Michael Murray worked for Brock’s Interior Supply, a carpet company in Poulsbo, Washington. On August 24, 2009, he severely injured his hips at work, leading to this claim for workers’ compensation. (AR 30). Dr. James Bruckner, a Board Certified Orthopedic Surgeon, diagnosed Mr. Murray with labral tears to his

right hip and CAM femoroacetabular impingement (FAI). (AR 60).  
The Department accepted Mr. Murray's industrial insurance claim  
and the diagnosed injury to his right hip. (AR 30-32).

During the next four years, Mr. Murray pursued conservative  
treatment for his injured right hip, but his condition worsened. (AR  
60). Throughout this he was unable to work. In 2013, Mr. Murray  
sought treatment with Dr. James Bruckner at Proliance Orthopaedics  
& Sports Medicine in Bellevue, Washington. (AR 60-61). Dr.  
Bruckner prescribed FAI surgery to repair the labral tears and CAM  
impingement in his hip. (AR 60).

As Dr. Bruckner described,

[t]he surgical procedures for this condition are  
Arthroscopic Osteoplasty of the Acetabulum and/or  
Femoral Neck Osteoplasty for treatment of Femoral  
Acetabular Impingement, Arthroscopic Labral  
Resection and/or Arthroscopic Synovectomy of the hip  
joint....

*There is no other surgery the Department covers that  
will address the worker's hip condition. Michael has a  
surgical condition that the Department of Labor &  
Industries does not authorize the particular procedure  
needed to treat his hip.*

(AR 60) (emphasis added).

The sole alternative to surgery – doing nothing – condemned Mr. Murray to increasing pain and deterioration until he qualified for a total hip replacement.

This condition will go on for years due to inability to proceed with surgical treatment. Eventually, patient will develop end stage osteoarthritis, which ultimately occurs if this condition is not treated surgically, and require a total hip replacement in the future.

(AR 60).

Mr. Murray requested authorization from the Department for FAI surgery, but on October 30, 2013, the Department refused. (AR 21). In its order, the Department relied only on the HTCC's determination that FAI surgery is not covered under any circumstances. (AR 21). No record exists of the Department reviewing Mr. Murray's medical condition, applying the relevant regulations, or consulting with a medical professional on the requested surgery.

On July 2, 2014, the Department affirmed its October 30, 2013 order, again without individual review. (AR 25). Mr. Murray timely appealed the Department's decision to the Board of Industrial Appeals.

Although it is not a "participating agency" under the HTCC statute, the Board considered itself bound by the HTCC's decision.

(AR 19). On February 13, 2015, five and a half years after Mr. Murray's workplace injury, the Board affirmed the Department's denial of medical treatment. (AR 19). It did not hold a hearing or address whether the FAI surgery was necessary and proper care for Mr. Murray. Instead, it concluded summarily that "the decisions of the HTCC may not be overruled by the Board." (AR 19).

Mr. Murray did not postpone surgery for the Department's authorization. On October 20, 2014, he had arthroscopic FAI surgery, and two weeks later was recovering as expected.

The right hip reveals the incisions have healed very nicely. No signs of infection. No increased warmth, erythema, or discharge. *He is ambulating with a normal heel-to-toe gait with no assistive device.* He is sitting comfortably with his hips flexed at 90 degrees.

(AR 67) (emphasis added). The surgery was a success, and rather than suffer from continuing deterioration and osteoarthritis, Mr. Murray is walking and sitting without pain.

Mr. Murray appealed the Board's decision to the Kitsap County Superior Court for a de novo trial under RCW 51.52.110. (Notice of Appeal; CP 1). He did not receive his trial, however. On March 29, 2016, Judge Kevin Hull granted summary judgment to the Department, concluding

there are no genuine issues of material fact with respect to whether the Health Technology Clinic Committee (HTCC) has made a non-coverage decision regarding hip surgery for femoroacetabular impingement syndrome and that the Department of Labor & Industries is a participating agency per RCW 70.14.080(6) that must follow a determination of the HTCC. Mr. Murray shows no constitutional violation.

(Summary Judgment Order at 2; CP 124).

He filed a timely appeal with the Court of Appeals, Division II – the third level of review. This court also refused his request for a chance to prove his claim.

After the HTCC's determination in 2011, surgical treatment for FAI could not be considered proper and necessary treatment in any case. Therefore, Murray had no vested interest in compensation for the surgery under the IIA.

Murray v. State, Dep't of Labor & Indus., \_\_\_ Wn. App. \_\_\_, 403 P.3d 949, 955 (2017). He now petitions this Court for review. Mr. Murray asks for the right to prove that FAI surgery, which substantially alleviated his damaged hip, was proper and necessary care.

## ARGUMENT

### V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

#### A. The HTCC Statute Is An Unconstitutional Delegation Of Legislative Authority

Industrial Insurance rests on a fundamental constitutional balance. Injured workers give up their constitutional right to access courts in exchange for “sure and certain relief.” RCW 51.04.010.

Washington's [Industrial Insurance Act] was the product of a grand compromise in 1911. Injured workers were given a swift, no-fault compensation system for injuries on the job. Employers were given immunity from civil suits by workers.

Birkliid v. Boeing Co., 127 Wn.2d 853, 870, 904 P.2d 278 (1995).

Workers compensation is not a need-based benefit program, but rather guaranteed payment for providing immunity to employers. “What they gave up for it is great, trial by jury and unlimited damages.” Stertz v. Indus. Ins. Comm'n of Washington, 91 Wash. 588, 591, 158 P. 256 (1916), abrogated by Birkliid v. Boeing Co., 127 Wn.2d 853, 904 P.2d 278 (1995).

Before the HTCC statute took effect, the Department had extensive regulations defining necessary and proper medical and surgical services.

**Proper and necessary:**

(1) The department or self-insurer pays for proper and necessary health care services that are related to the diagnosis and treatment of an accepted condition.

(2) Under the Industrial Insurance Act, “proper and necessary” refers to those health care services which are:

(a) Reflective of accepted standards of good practice, within the scope of practice of the provider's license or certification;

(b) Curative or rehabilitative. Care must be of a type to cure the effects of a work-related injury or illness, or it must be rehabilitative. Curative treatment produces permanent changes, which eliminate or lessen the clinical effects of an accepted condition. Rehabilitative treatment allows an injured or ill worker to regain functional activity in the presence of an interfering accepted condition. Curative and rehabilitative care produce long-term changes;

(c) Not delivered primarily for the convenience of the claimant, the claimant's attending doctor, or any other provider; and

(d) Provided at the least cost and in the least intensive setting of care consistent with the other provisions of this definition.

WAC 296-20-01002.

As this Court recognized in Roller v. Dep't. of Labor & Indus., 128 Wn. App. 922, 117 P.3d 385 (2005), “WAC 296-20-01002 requires that the Department pay for medical treatment that reflects good practice and is rehabilitative.” Roller, 128 Wn. App. at 927-28.

The Department must apply these regulations when deciding whether medical treatment is appropriate for an injured worker.

B. The Legislature And Governor Inadvertently Extinguished Claimants' Rights With The HTCC Statute

In 2006, the Legislature enacted a health technology assessment program as part of the State Health Care Authority. Laws of 2006, ch. 307 (health technology assessment); Laws of 2006, ch. 299 (Health Care Authority). The centerpiece of technology assessment was the Health Technology Clinical Committee.

The legislature...created the HTCC, an 11-member panel of practicing licensed physicians and health professionals selected by the HCA's administrator in consultation with participating state agencies. The HTCC determines whether health technologies selected for review by the HCA's administrator will be included as a covered benefit in health care programs of participating agencies, i.e., L&I, the HCA, and the department of social and health services.

Joy v. Dep't. of Labor & Indus., 170 Wn. App. 614, 621, 285 P.3d 187 (2012).

When the Legislature adopted the HTCC statute, it included a section permitting an appeal from the Committee's decisions. "The administrator shall establish an open, independent, transparent, and timely process to enable patients, providers, and other stakeholders

to appeal the determinations of the health technology clinical committee...” Laws of 2006, ch. 307 § 6. This appeal process was in addition to those preserved under participating agencies’ statutes and regulations.

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.

RCW 70.14.120(4).

Governor Christine Gregoire signed the HTCC statute, but vetoed the appeal provision in section 6, finding it *duplicative*.

I strongly support [the bill] and particularly its inclusion of language that protects an individual's right to appeal. Section 5(4) of the bill states that “nothing in this 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. Appeals shall be governed by state and federal law applicable to participating agency decisions.” This is an important provision and one that I support wholeheartedly.

I am, however, vetoing Section 6 of this bill, which establishes an additional appeals process for patients, providers, and other stakeholders who disagree with the coverage determinations of the [HTCC]. The health care provider expertise on the clinical committee and the use of an evidence-based practice center should lend sufficient confidence in the quality of decisions made. Where issues may arise, I believe the individual appeal process highlighted above is sufficient to

address them, without creating a duplicative and more costly process.

House Journal, 59th Leg., Reg. Sess., at 1587 (Wash.2006).

Without intending to, the Governor's veto eliminated an injured worker's right to appeal whether medical treatment is proper and necessary. In Joy, the Court of Appeals ruled that HTCC's coverage decisions are final and cannot be challenged.

We hold that RCW 70.14.120(3) controls over RCW 70.14.120(4), and Joy may not obtain relief on appeal from L & I's denial of coverage for treatment, when L & I's denial is based on the HTCC's determination of non-coverage for such treatment under all state health care plans.

Joy, 170 Wn. App. at 627. In a footnote, the Court recognized that HTCC decisions are unreviewed and unreviewable. "[T]he absence of remedies under RCW 70.14.120 for workers denied coverage by HTCC determinations is, nonetheless, a legislative problem that must be addressed by the legislature, not the courts." Joy, 170 Wn. App. at 627 n.13.

C. The Statute Violates The Delegation Doctrine

This is incorrect. By granting it unreviewable authority, the Legislature improperly delegated its legislative power to the HTCC.

[T]he delegation of legislative power is justified and constitutional, and the requirements of the standards doctrine are satisfied, when it can be shown (1) that the

legislature has provided standards or guidelines which define in general terms what is to be done and \*\*543 the instrumentality or administrative body which is to accomplish it; and (2) that Procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.

Barry & Barry, Inc. v. State Dep't of Motor Vehicles, 81 Wn.2d 155, 159, 500 P.2d 540 (1972). As the Barry court emphasized, the delegation doctrine retains its purpose “of protecting against unnecessary and uncontrolled discretionary power.” Barry, 81 Wn.2d at 161.

The lack of meaningful administrative or judicial review invalidates this flawed delegation of power. Under RCW 70.14.090(4), “neither the committee nor any advisory group is an agency for purposes of chapter 34.05 RCW [the Administrative Procedure Act].” There are no procedural safeguards to control arbitrary Committee action or its abuse of discretionary power. At least one Superior Court has ruled this delegation unconstitutional. See Sund v. Regence Blue Shield, King County No. 13-2-03122-1 SEA, Memorandum Decision on Pending Motions for Summary Judgment (Oct. 22, 2013) (“RCW 70.14.120(3) as interpreted by Joy is an unconstitutional delegation of administrative authority”) (Attached as Appendix B).

Washington law prohibits delegation of uncontrolled discretionary power. In Brown v. Vail, 169 Wn.2d 318, 237 P.3d 263 (2010), the Supreme Court emphasized the need for agency and judicial review.

When reviewing whether authority has been properly delegated to an agency to promulgate rules subjecting individuals to criminal sanctions, we have focused on the *safeguard* requirement. This requirement is satisfied where rules are promulgated pursuant to the Administrative Procedure Act (APA), chapter 34.05 RCW, and include an appeal process before the agency, or judicial review is available, and the procedural safeguards normally available to a criminal defendant remain.

Brown, 169 Wn.2d at 331. Under Title 51 and the grand bargain it represents, Mr. Murray has a right to proper and necessary medical care that vested when he was injured. The Legislature cannot delegate unreviewable authority to the HTCC to redefine and limit what is proper and necessary.

#### **VI. THE COURT OF APPEALS IN JOY INCORRECTLY ELIMINATED CLAIMANTS' RIGHTS TO REVIEW**

A more reasonable interpretation of the HTCC statute can avoid this unconstitutional delegation. In Joy, the Court of Appeals enforced RCW 70.14.120(3) – prohibiting individual determinations of proper and necessary treatment – above other provisions in the HTCC statute.

RCW 70.14.120(1) specifically addresses L & I's compliance with HTCC determinations and RCW 70.14.120(3) specifically addresses and precludes individualized medically and necessary proper determinations. In contrast, RCW 70.14.120(4) generally addresses appeals.

Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 627, 285 P.3d 187, 193 (2012). This incorrectly favored HTCC decisions over conflicting statutory requirements in the Industrial Insurance Act.

Although RCW 70.14.120(1) mandates that the Department of Labor and Industries as a "participating agency shall comply with the determination" of the HTCC, the Board of Industrial Insurance Appeals, a judicial body, is not a participating agency. Once it has jurisdiction to decide a claimant's appeal, the Board has authority to decide all issues in the appeal on the merits.

Both the HTCC statute and the Governor's veto message recognize that the statute does not diminish "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(1). As the Governor concluded, "where issues may arise, I believe the individual appeal process highlighted above is sufficient to address them, without creating a duplicative and more costly process." House Journal, 59th Leg., Reg. Sess., at 1587

(Wash.2006). The only issue in an HTCC decision is whether an exception exists for a specific claimant.

The Joy decision erred by expanding “participating agency” to include the Board and reviewing courts, binding them to HTCC decisions. This creates the untenable result of Mr. Murray having the right to file an appeal, but no right to relief. Although Mr. Murray may appeal the Department’s denial of his hip surgery, and both the Board and reviewing courts may hear the arguments, neither the Board nor the reviewing courts may reverse the Department’s decision even though it is clearly erroneous.

A system of redress for injury that requires the injured worker to legally forego any and all common law right of recovery for full damages for an injury, and surrender himself or herself to a system which, whether by design or permissive incremental alteration, subjects the worker to the known conditions of personal ruination to collect his or her remedy, is not merely unfair, but is fundamentally and manifestly unjust.

Westphal v. City of St. Petersburg, 194 So. 3d 311, 326 (Fla. 2016).

The only way to avoid this unfair outcome is to apply RCW 70.14.120(3) to participating agencies only, not the Board or courts.

### **CONCLUSION**

Washington courts require administrative and judicial review for good reason. No administrator or committee is infallible.

Because Appellant Michael Murray has a vested interest in proper and necessary medical care under the Industrial Insurance Act, he has the right to review *the substance* of a decision denying that care.

Mr. Murray respectfully requests this Court to accept review, find the HTCC Statute's denial of review unconstitutional, reverse the Department's decision denying reimbursement for his FAI surgery, and award him reasonable attorneys' fees for this case.

DATED this 21<sup>st</sup> day of November, 2017.

BURI FUNSTON MUMFORD, PLLC



By \_\_\_\_\_  
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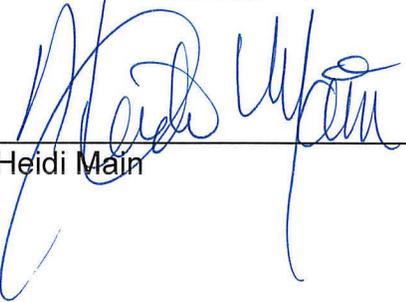
### DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Appellant Michael Murray's Petition for Review to:

Anastasia R. Sandstrom  
Attorney General's Office

800 5th Ave Ste 2000  
Seattle WA 98104-3188

DATED this 21<sup>st</sup> day of November, 2017.



Heidi Main

**APPENDIX A**

Filed  
Washington State  
Court of Appeals  
Division Two

October 24, 2017

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

MICHAEL E. MURRAY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF LABOR & INDUSTRIES,

Respondent.

No. 48870-1-II

PUBLISHED OPINION

SUTTON, J. — Michael E. Murray appeals the superior court’s order granting the Department of Labor & Industries’ (Department) motion for summary judgment affirming the Board of Industrial Insurance Appeals’ (Board) decision to deny payment for his hip surgery. The Department’s decision was based on the Health Technology Clinical Committee’s (HTCC) decision concluding that Murray’s proposed hip surgery was not a covered procedure under state health care law. Therefore, Murray was not entitled to an individualized inquiry as to whether the surgery was proper and necessary medical treatment. Murray argues that the delegation of authority to the HTCC is unconstitutional, thus, an HTCC decision cannot preclude review of an individualized inquiry into whether a specific medical treatment is proper and necessary. We hold that because there are appropriate procedural safeguards to control arbitrary action and prevent the abuse of discretionary power, the legislature’s delegation of authority to the HTCC is constitutional.

Murray also argues that we should overrule our holding in *Joy v. Department of Labor and Industries*.<sup>1</sup> He also argues that his procedural and substantive due process rights were violated because he was denied a review of the HTCC decision. We decline to overrule our holding in *Joy*. And, we hold that Murray has no vested right protected by due process, therefore, his due process claim fails. Accordingly, we affirm the Board's order denying Murray's claim for hip surgery.

#### FACTS

In 2009, Murray injured his right hip at work. The Department allowed his claim. In 2013, Murray sought authorization for surgical treatment of Femoral Acetabular Impingement (FAI) resulting from a labral tear in his right hip. The Department denied Murray's claim because, in 2011, the HTCC determined that the surgical treatment was not a covered benefit.

Murray appealed the Department's decision to the Board. The Department moved for summary judgment. The Board concluded that the HTCC's decision could not be overruled by the Board and affirmed the Department's decision. Murray appealed the Board's decision to the superior court.

The Department moved for summary judgment before the superior court. Murray filed a cross motion for summary judgment. The superior court denied Murray's motion for summary judgment and granted the Department's motion for summary judgment. Murray appeals.

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<sup>1</sup> 170 Wn. App. 614, 285 P.3d 187 (2012). *Joy* held that an HTCC determination that a particular medical technology is not a covered treatment, "is a determination that the particular health technology is not medically necessary or proper in *any* case." 170 Wn. App. at 624.

## ANALYSIS

### I. LEGAL PRINCIPLES

“RCW 51.52.110 and RCW 51.52.115 govern judicial review of matters arising under the Industrial Insurance Act.” *Stelter v. Dep’t. of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002). “When a party appeals from a board decision, and the superior court grants summary judgment affirming that decision, the appellate court’s inquiry is the same as that of the superior court.” *Stelter*, 147 Wn.2d at 707. A summary judgment motion will be granted only if after viewing all the pleadings, affidavits, depositions, admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party, it can be said that (1) there is no genuine issue of material fact, (2) all reasonable persons could reach but one conclusion, and (3) the moving party is entitled to judgment as a matter of law. *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014).

Under the Industrial Insurance Act<sup>2</sup> (IIA), a worker is entitled to medical treatment for work related injuries. RCW 51.36.010. Once a worker establishes that he or she is entitled to compensation, “he or she shall receive proper and necessary medical and surgical services.” RCW 51.36.010(2)(a).

### II. HTCC STATUTES

In 2006, the legislature created the HTCC. RCW 70.14.090. The HTCC is comprised of eleven members appointed by the Health Care Authority (HCA) administrator. RCW 70.14.090. The eleven members of the HTCC are practicing physicians and licensed health professionals who

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<sup>2</sup> Title 51 RCW.

No. 48870-1-II

use health technology in their scope of practice. RCW 70.14.090. The HTCC reviews health technology to determine:

- (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.

RCW 70.14.110(1). The HTCC is required to make its determinations “in an open and transparent process” considering “evidence regarding the safety, efficacy, and cost-effectiveness of the technology.” RCW 70.14.110(2)(a). The HTCC is also required to provide an opportunity for public comment. RCW 70.14.110(2)(b); RCW 70.14.130. And although the HTCC is not an agency subject to the Administrative Procedure Act (APA), chapter 34.05 RCW, it is subject to the Open Public Meetings Act of 1971, chapter 42.30 RCW. RCW 70.14.090(4), (5).

All participating agencies under the HCA, including the Department, are required to comply with the HTCC’s determinations. RCW 70.14.120. “A health technology not included as a covered benefit . . . 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). However, RCW 70.14.120(4) provides:

- Nothing in [this chapter] 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.

Health technologies for which the HTCC has already made a determination shall be considered for rereview after eighteen months. RCW 70.14.100(2). The HCA administrator selects technologies for rereview if new evidence has become available that could change the HTCC’s determination. RCW 70.14.100(2).

### III. DELEGATION OF LEGISLATIVE AUTHORITY

Murray argues that the legislature has unconstitutionally delegated its power to the HTCC by granting it unreviewable authority. The Department argues that the legislature's delegation of authority is constitutional because the constitutional writ of certiorari and statutory procedural safeguards are sufficient to prevent arbitrary administrative action or abuse of discretionary power. We hold that there are appropriate procedural safeguards to control arbitrary action and prevent the abuse of discretionary power, therefore, the legislature's delegation of authority to the HTCC is constitutional.

“The Legislature is prohibited from delegating its purely legislative functions[] to other branches of government.” *Auto. United Trades Org. v. State*, 183 Wn.2d 842, 859, 357 P.3d 615 (2015) (*AUTO*) (quoting *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989)). However, the well-established rule is that the legislature may delegate its power to an administrative body “when it can be shown (1) that the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that *procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.*” *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972).

But Murray argues that there are not adequate procedural safeguards to control the HTCC's exercise of discretion.<sup>3</sup> The Department argues that adequate procedural safeguards exist because

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<sup>3</sup> RCW 70.14.090-.110 provide standards and guidelines for the HTCC's determinations regarding health technology. Murray does not dispute that these standards are adequate to satisfy the first part of the *Barry & Barry* test for constitutional delegation of legislative authority.

an HTCC determination can be challenged through a constitutional writ of certiorari and because of the numerous procedural safeguards imposed by statute. But Murray contends that the constitutional writ of certiorari is insufficient because it is too narrow in scope. Instead, Murray asserts that adequate procedural safeguards require multiple avenues for review and, at a minimum, require the review provided for in the APA. However, we hold that individualized review of discretionary decisions delegated to an administrative body is not required for the legislature to constitutionally delegate authority to an administrative body. *Barry & Barry* only requires that “procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.” *Barry & Barry*, 81 Wn.2d at 159 (emphasis omitted). Because there are appropriate procedural safeguards here to control arbitrary action and prevent abuse of discretionary power, the legislature’s delegation of authority to the HTCC is constitutional.

The Department relies heavily on the constitutional writ of certiorari to support its argument that there are adequate procedural safeguards. Article IV, section 6 of our state constitution recognizes the distinct right to petition a court for a writ of certiorari. “The fundamental purpose of the constitutional writ of certiorari is ‘to enable a court of review to determine whether the proceedings below were within the lower tribunal’s jurisdiction and authority.’” *Coballes v. Spokane County*, 167 Wn. App. 857, 866, 274 P.3d 1102 (2012) (internal quotation marks omitted) (quoting *Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 769, 261 P.3d 145 (2011)). Review under a constitutional writ of certiorari is limited to whether the challenged action was “‘arbitrary, capricious, or illegal, thus violating a claimant’s fundamental right to be free from such action.’” *Coballes*, 167 Wn. App. at 867 (footnote and internal quotation marks omitted) (quoting *Fed. Way Sch. Dist.*, 172 Wn.2d at 769).

The constitutional writ of certiorari provides a procedure for a court to review the HTCC's actions for legality and to specifically review whether the HTCC's actions are arbitrary or capricious. That is all that is required by *Barry & Barry*. *Barry & Barry*, 81 Wn.2d at 159. Murray asserts that the delegation of legislative authority is unconstitutional because there is no mechanism for reviewing the *application* of the action to a particular person. But *Barry & Barry* does not require individualized review of the application of an administrative decision, it only requires procedural safeguards to control arbitrary action and prevent abuse of discretionary power. *Barry & Barry*, 81 Wn.2d at 159.

Murray also argues that the writ of certiorari is insufficient process because a writ of certiorari is limited to determining jurisdiction. But Murray's reading of the word jurisdiction is too restrictive. The scope of jurisdiction for the purpose of a constitutional writ encompasses whether an action is "arbitrary, capricious, or illegal." *Coballes*, 167 Wn. App. at 867 (footnote and internal quotation marks omitted) (quoting *Fed. Way Sch. Dist.*, 172 Wn.2d at 769). Therefore, the constitution writ of certiorari provides for review of the HTCC's execution of the authority delegated to it by the legislature.

Murray implies that a constitutional delegation of authority may only be constitutional if the safeguards imposed are under the APA. We disagree. Murray conflates the standards of review for adjudicative (or quasi-judicial) action with the standards of review for rulemaking. Here, the HTCC is not performing an adjudicative function, but is performing a rulemaking function. The APA provides:

In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

RCW 34.05.570(2)(c). In this context, the APA's scope of review of rulemaking authority is no broader than that of a constitutional writ of certiorari.

Murray also relies on a single sentence from *AUTO* which he alleges requires that there be multiple procedural safeguards in place for a delegation of legislative authority to be constitutional.

But Murray takes the sentence out of context. In *AUTO*, the court stated:

It is certainly correct that RCW 82.36.450 and RCW 82.38.310 themselves do not contain strong procedural safeguards against the legislature, governor, and the tribes failing to police the agreements. But separation of powers does not require the safeguards be found in the same statute under challenge—just that the safeguards exist. *Barry & Barry*, 81 Wn.2d at 158-59. *We have found sufficient safeguards exist because of administrative review and the availability of writs of certiorari, among other things. See e.g., id., City of Auburn v. King County*, 114 Wn.2d 447, 452-53, 788 P.2d 534 (1990); *McDonald v. Hogness*, 92 Wn.2d 431, 445-47, 598 P.2d 707 (1979). No obvious route for administrative review appears here, but should the executive and legislature both fail to police against administrative abuse of power, third parties would not be completely without a remedy. They could, for example, as *AUTO* did below, challenge the agreements on the grounds the legislature is giving a privilege to the tribes that is not enjoyed by others similarly situated in violation of the privileges and immunities clause (article 1, section 12 of the state constitution), which, frankly, seems to be *AUTO*'s real complaint—the abiding suspicion that the tribes got a privilege that they should not have.

183 Wn.2d at 861-62 (emphasis added).

Murray alleges that the italicized language above establishes that, to be constitutional, a delegation of legislative authority must contain multiple procedural safeguards including administrative review in addition to a constitutional writ of certiorari. But read in context, this is not the case. The court was simply giving examples of adequate procedural safeguards. *AUTO*,

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183 Wn.2d at 861-62. The court then went on to conclude that adequate safeguards exist in a delegation of legislative authority that *does not provide for administrative review*. *AUTO*, 183 Wn.2d at 861-62. The court affirmed the delegation of authority when the only procedural safeguards that exist are constitutional challenges to the validity of the administrative action. *AUTO*, 183 Wn.2d at 861-62.

Here, the constitutional writ of certiorari provides the same scope of review for the HTCC's determinations as the APA provides for rulemaking actions. Murray's chief complaint, that there is no mechanism to review the *application* of the HTCC's rule to his individual case, does not render the legislature's delegation of authority to HTCC unconstitutional. Moreover, there are additional procedural safeguards imposed by statute. The HTCC is required to provide an opportunity for public comment prior to making its determinations. RCW 70.14.110(2)(b). And the HTCC is subject to the requirements of the Open Public Meetings Act. RCW 70.14.090(4). These statutory safeguards ensure that people "may retain control over the instruments they have created." RCW 42.30.010. Ensuring that the people retain control over the instruments they have created protects against arbitrary government action as required by *Barry & Barry*. See *Barry & Barry*, 81 Wn.2d at 164. Together, the constitutional writ of certiorari and the statutory procedural safeguards provide the same protections as the rulemaking procedures under the APA. Therefore, the HTCC has procedural safeguards in place that are sufficient to control arbitrary action and prevent the abuse of discretionary power by the HTCC.

We hold that there are adequate safeguards to control arbitrary action and prevent an abuse of discretionary power granted to the HTCC by the legislature. Accordingly, RCW 70.14.120 is constitutional and Murray's claim fails.

#### IV. ADDITIONAL ARGUMENTS

Murray makes several additional arguments. Murray argues that we should reverse or abandon our holding in *Joy*. Murray also argues that the Department and the Board violated his substantive and procedural due process rights by relying exclusively on the HTCC determination. And Murray argues the merits of the HTCC decision as well as whether the surgery was “proper and necessary” in his individual case. Br. of App. at 3. As discussed above, the legislature’s delegation of authority to the HTCC is constitutional. There are no grounds for us to overrule our decision in *Joy*. And, Murray cannot establish that he has a vested property interest in the hip surgery because a claimant under the IIA only has a vested property right in proper and necessary medical treatment. Thus, we hold that Murray’s due process claims fail.

##### A. ADHERENCE TO *JOY*

In 2012, we decided *Joy*. Based on the rules of statutory construction, we held that neither the Board nor the courts could make an individualized determination regarding whether a treatment was proper and necessary. *Joy*, 170 Wn. App. at 623-24. We concluded that “RCW 70.14.120(3) is an absolute proscription against state health care coverage for health technologies the HTCC deems are not covered.” *Joy*, 170 Wn. App. at 623. Based on the plain language analysis of the statute, we held that an “HTCC non-coverage determination is a determination that the particular health technology is not medically necessary or proper in *any* case.” *Joy*, 170 Wn. App. at 624. We also held that there was no conflict between RCW 70.14.120(3) and RCW 70.14.120(4) that allows for an individualized review of an HTCC determination. *Joy*, 170 Wn. App. at 627.

Courts will not overturn or abandon precedent unless an appellant makes ““a clear showing that an established rule is incorrect and harmful.”” *State v. Johnson*, 188 Wn.2d 742, 756-57, 399 P.3d 507 (2017) (quoting *In re the Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Murray asserts that *Joy* is incorrect because (1) RCW 70.14.120’s prohibition against individual determinations does not apply to the Board or the courts and (2) the legislative intent, including the governor’s veto of a portion of the bill,<sup>4</sup> demonstrate that the legislature intended the IIA to allow for review of the application of HTCC determinations to individual cases. However, neither of these arguments demonstrate that *Joy* was incorrectly decided because they are the same arguments soundly analyzed and rejected by *Joy*. *Joy*, 170 Wn. App. at 626-27. Accordingly, we decline to overrule or abandon *Joy*.

#### B. PROCEDURAL AND SUBSTANTIVE DUE PROCESS

Murray also argues that the Department’s denial of coverage for his hip surgery violated his procedural and substantive due process rights. We disagree because based on *Joy*, Murray had no vested right protected by procedural and substantive due process.

The due process clause of our constitution guarantees no person will be deprived of life, liberty, or property without due process of law. *Dellen Wood Prods., Inc. v. Dep’t of Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014); WASH. CONST. art. I, § 3. A person alleging deprivation of due process must first establish a legitimate claim of entitlement entailing vested liberty or property rights. *Dellen Wood Prods.*, 179 Wn. App. at 627. “A vested right must be something more than a mere expectation based upon an anticipated continuance of the existing

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<sup>4</sup> See LAWS OF 2006, ch. 307 (creating the HTCC).

law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.” *Dellen Wood Prods.*, 179 Wn. App. at 627. Here, Murray cannot establish that he has a vested property interest in the hip surgery because a claimant under the IIA only has a vested property right in proper and necessary medical treatment.

Here, Murray’s property interests are defined by the IIA.<sup>5</sup> Under the IIA, all workers injured during their employment are entitled to compensation. RCW 51.32.010. But claimants under the IIA are entitled to receive only “proper and necessary medical and surgical services.” RCW 51.36.010(2)(a). As we noted above, *Joy* held that an HTCC determination that a particular medical technology is not a covered treatment, “is a determination that the particular health technology is not medically necessary or proper in *any* case.” *Joy*, 170 Wn. App. at 624.

Here, the HTCC determined that surgical treatment for Murray’s hip injury, FAI, was not covered in 2011, two years before Murray sought coverage for the surgery in 2013. After the HTCC’s determination in 2011, surgical treatment for FAI could not be considered proper and necessary treatment in any case. Therefore, Murray had no vested interest in compensation for the surgery under the IIA. Because Murray did not have any vested interest in compensation for surgical treatment for FAI, Murray cannot establish any “legitimate claim of entitlement” required

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<sup>5</sup> Murray also argues that he has a vested right to a particularized treatment. However, this is a mischaracterization of the rights created by the IIA. As explained here, the IIA only provides a right to “proper and necessary medical and surgical services.” RCW 51.36.010(2)(a). The IIA does not create a vested right to any particular treatment. Accordingly, we reject Murray’s attempts to frame his vested right as to anything other than proper and medically necessary medical treatment.

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for a constitutional due process claim. *Dellen Wood Prods.*, 179 Wn. App. at 627. Accordingly, Murray's due process claim fails.

#### C. MERITS OF HTCC'S DETERMINATION AND THE DEPARTMENT'S DECISION

Murray also argues the merits of the HTCC's determination and the Department's decision denying coverage for his hip surgery. However, for the reasons explained above, RCW 70.14.120 precludes us from making an individualized determination regarding whether the FAI surgery was proper and necessary medical treatment. And, the question of whether the HTCC properly exercised its rulemaking authority in determining that FAI surgery was not a covered benefit is not an issue properly before us. Accordingly, we do not address the merits of whether FAI surgery is a proper and necessary medical treatment in Murray's case.

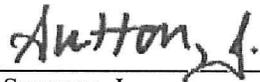
#### ATTORNEY FEES

Murray seeks an award of attorney fees on appeal under RAP 18.1(a) and RCW 51.52.130(1). RAP 18.1(a) allows a party to be awarded attorney fees provided for by statute. RCW 51.52.130(1) entitles a claimant to attorney fees if a decision of the Board is reversed or modified on appeal. Here, we affirm the Board's decision. Accordingly, Murray is not entitled to an award of attorney fees on appeal.

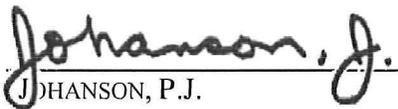
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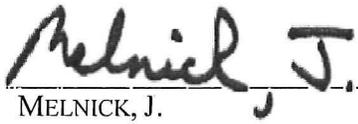
CONCLUSION

We affirm the Board's order denying Murray's claim for hip surgery.

  
SUTTON, J.

We concur:

  
JOHANSON, P.J.

  
MELNICK, J.

# APPENDIX B

The Honorable Beth Andrus

## SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GARY SUND and DENISE IRISH, husband and  
wife, and the marital community formed thereof,

Plaintiffs,

v.

REGENCE BLUESHIELD; WASHINGTON  
STATE HEALTHCARE AUTHORITY'S PUBLIC  
EMPLOYEE BENEFITS BOARD PROGRAM; and  
UNIFORM MEDICAL PLAN,

Defendants.

NO. 13-2-03122-1 SEA

MEMORANDUM DECISION ON  
PENDING MOTIONS FOR  
SUMMARY JUDGMENT

### PLEADINGS REVIEWED

The Court has reviewed the following pleadings on the pending dispositive and non-dispositive motions:

- I. Defendant Regence Blueshield's motion for summary judgment (Dkt. #13):
  - a. Declaration of Trisha McIntee (Dkt. #14);
  - b. Declaration of Trisha McIntee (Dkt. #23);
  - c. State Defendant's Response to Defendant Regence Blueshield's motion for summary judgment (Dkt. #24);
  - d. Plaintiffs' response to Defendants' motions to dismiss and for summary judgment (Dkt. #26);

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- e. Declaration of Denise Irish (Dkt. #27);
  - f. Declaration of Johyn D. Loeser, M.D. (Dkt. #28);
  - g. Declaration of Glen J. David M.D. (Dkt. #29);
  - h. Declaration of William C. Smart (Dkt. #30);
  - i. Defendant Regence Blueshield's Reply to State Defendant's Response (Dkt. #32);
  - j. Defendant Regence Blueshield's Reply to Plaintiffs' Opposition (Dkt. #33);
  - k. Declaration of Kendra Neumiller (Dkt. #34);
  - l. Declaration of Medora A. Marisscau (Dkt. #35);
  - m. Regence's Reply in Support of motion for summary judgment (Dkt. #84)
2. Defendant Washington State Healthcare Authority's motion to dismiss under CR 12(b)(6) and (alternatively) motion for summary judgment (Dkt. #16):
- a. Declaration of David M. Iseminger supporting State Defendant's motion to dismiss or summary judgment (Dkt. #17);
  - b. Plaintiffs' response to Defendants' motions to dismiss and for summary judgment (Dkt. #26);
  - c. Declaration of Denise Irish (Dkt. #27);
  - d. Declaration of Johyn D. Loeser, M.D. (Dkt. #28);
  - e. Declaration of Glen J. David M.D. (Dkt. #29);
  - f. Declaration of William C. Smart (Dkt. #30);
  - g. State Defendant's Reply to Plaintiff's Response to Defendants' motions for summary judgment (Dkt. #36);
  - h. Plaintiffs' Response to State's motion for summary judgment (Dkt. #74);
  - i. State Defendant's Reply to State's motion for summary judgment (Dkt. #90);
  - j. Errata to the Second Declaration of David Iseminger (Dkt. #87);
  - k. Second Declaration of David Iseminger (Dkt. #88 & #96);
  - l. Declaration of Chantel Gagnon-Bailey (Dkt. #97)

3. Plaintiffs' motion for partial summary judgment on breach of contract and regulatory violations (Dkt. #72):
  - a. Declaration of Isaac Ruiz in support of Plaintiffs' cross motions for summary judgment (Dkt. #66 & 67);
  - b. Declaration of Glen J. David M.D. (Dkt. #73);
  - c. Regence's Opposition to Plaintiffs' motion for partial summary judgment (Dkt. #76);
  - d. Declaration of Nicole Oishi (Dkt. #77);
  - e. State's Response to Plaintiffs' motion for partial summary judgment (Dkt. #78B and #81);
  - f. Declaration of Michelle George (Dkt. #78C);
  - g. Second Declaration of David Iseminger (Dkt. #78D);
  - h. Declaration of Chantel Gagnon-Bailey (Dkt. #79);
  - i. Plaintiffs' Reply in support of motion for summary judgment (Dkt. #92)
4. Plaintiffs' motion for partial summary judgment holding that the HTCC law is unconstitutional (Dkt. #70):
  - a. Declaration of Isaac Ruiz in support of Plaintiffs' cross motions for summary judgment (Dkt. #66 & 67);
  - b. Declaration of Glen J. David M.D. (Dkt. #73);
  - c. Regence's Response to Plaintiffs' motion for summary judgment (Dkt. #78);
  - d. State's Response to Plaintiffs' summary judgment motion (Dkt. #78A and #80);
  - e. Declaration of Michelle George (Dkt. #82);
  - f. Declaration of Chantel Gagnon-Bailey (Dkt. #85 & #86);
  - g. Plaintiffs' Reply in support of motion for summary judgment (Dkt. #93);
  - h. Supplemental Declaration of Isaac Ruiz (Dkt. #94)

The Court has also reviewed the following pleadings:

5. Order Granting Plaintiffs' motion for summary judgment holding the HTCC law unconstitutional (Dkt. #108)
6. Order for Specific Performance (Dkt. #109)
7. State's Supplemental Response Brief on Available Remedies (Dkt. #100 & #101)
8. Plaintiffs' Supplemental Brief re: Remedies (Dkt. #102 & #110)
  - a. Declaration of William C. Smart in support of Plaintiffs' Supplemental Brief re Remedies (Dkt. #103);
  - b. Declaration of Denise Irish regarding photographs (Dkt. #106)
  - c. State's Objections to Plaintiffs' Supplemental Brief on Remedies and Reply.
9. Order vacating summary judgment and order on recusal (Dkt. #115).
10. Temporary Order of Specific Performance (Dkt. #116).
11. Plaintiff's motion for re-entry of summary judgment orders and for attorney fees dated October 3, 2013 (Dkt. #134).
  - a. State's Response to Plaintiffs' Motion for Re-Entry of Summary Judgment Orders and For Attorney Fees (Dkt. #138)
  - b. Fourth Declaration of David Iseminger (Dkt. #139).

#### UNDISPUTED FACTS

Based on the foregoing pleadings and argument of counsel, the Court summarizes the key undisputed facts:

Plaintiff Gary Sund is a retired Clallam County superior court judge and commissioner. Plaintiff Denise Irish is his wife and is a current employee of the State of Washington. Ms. Irish is provided health insurance through the state Health Care Authority's Public Employee Benefits Program (PEBB). State employees, such as Ms. Irish, may choose from one of several insurance plans offered by the PEBB. Ms. Irish and her husband are insured under HCA's self-insured

plan, known as the Uniform Medical Plan (UMP). The remaining Defendant is the Washington HCA. The plan is administered for the HCA by Regence Blueshield.<sup>1</sup>

Judge Sund seeks insurance coverage for a medical procedure known as spinal cord stimulation (SCS) to treat severe chronic and debilitating pain in his lower right extremity. According to his treating physician, the pain is the result of a condition known as Chronic Regional Pain Syndrome (CRPS). SCS involves the implantation of wires that send a small electrical current to the spine. The current changes pain signals going to the brain. Usually, this treatment is only considered for patients who have unsuccessfully undergone more conservative and less-invasive therapies, such as medication, physical therapy and injections. Judge Sund was diagnosed with CRPS in the fall of 2011 and his physician recommended a trial of SCS, the typical first step in the process, in November 2011. Judge Sund's neurologist sought pre-authorization for an SCS trial on November 30, 2011. The HCA, through Regence, denied this request on December 15, 2011, relying on an October 22, 2010 decision of a committee known as the Health Technologies Clinical Committee (HTCC).

In 2006, the Washington state legislature created the HTCC, an 11-member panel of practicing licensed physicians and health professionals, to decide whether a medical procedure should be included as a covered benefit in state health care programs. Joy v. Department of Labor & Industries, 170 Wn. App. 616, 621, 285 P.2d 187 (2012); RCW 70.14.090; RCW 70.14.080(6). Under RCW 70.14.100, the Health Technology Assessment (HTA) administrator contracts with an outside research firm to assess selected technologies' safety, efficacy and cost-effectiveness. The HTCC reviews the research report and decides if the health technology should be included as a covered benefit; RCW 70.14.110,

The HTA administrator must:

(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

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<sup>1</sup> On October 11, 2013, the Court granted the motion for summary judgment filed by Defendant Regence Blueshield.

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.

RCW 70.14.100(4)(d). In addition, the HTCC's decisions:

... 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.

RCW 70.14.110(3).

On October 22, 2010, the HTCC decided that SCS is less safe than other available treatments for chronic neuropathic pain, and that the medical effectiveness and cost-effectiveness of SCS for this particular condition remains unproven. The Committee voted 8-to-1 not to cover SCS for chronic neuropathic pain. According to the web materials supplied by the HCA, the draft report was published on June 25, 2010, public comments were solicited from June 25 to July 16, 2010, the final report was published on July 21, 2010, and the HTCC conducted a public meeting to discuss the report on August 20, 2010. The HTCC draft and final reports were available to the public on the Committee's website throughout 2011.

On January 4, 2011, the HCA met with Regence to discuss implementation of the HTCC decision. Both the HCA and Regence recognized that the 2011 Certificate of Coverage for the UMP, drafted in November 2010, did not explicitly identify SCS as an exclusion. Regence requested that the HCA postpone the implementation of the SCS decision until the exclusion could be incorporated into the new 2012 Certificate of Coverage. An HCA representative rejected this request and instructed Regence to implement the decision as quickly as possible. The implementation became effective July 1, 2011. At oral argument, counsel for the HCA conceded that no notice was given to plan members that the SCS exclusion would become effective mid-plan year. Nor has the HCA explained why the decision was implemented on July 1, 2011, rather than on some other date.

Under the section entitled "Benefits: what the Plan Covers," the 2011 UMP provided:

For this plan to cover a service or supply, it must meet all of the following requirements:

- Be medically necessary
- Follow the plan's coverage policies and preauthorization requirements
- **Follow coverage decisions made by the Washington State Health Technology Clinical Committee, which evaluates health technologies for effectiveness, safety and cost (emphasis added).**

2011 UMP at 13. The plan, however, did not specify when a coverage decision would go into effect or notify plan members that coverage decisions could take effect mid-plan year.

In the fall of 2011, the HCA drafted the 2012 UMP Certificate of Coverage and included language that HTCC decisions could go into effect mid-year and also included a clear and unambiguous exclusion for SCS:

**Health Technology Clinical Committee**

Under state law, UMP Classic must follow coverage decisions made by the HTCC. If the Committee has determined that a service or treatment is not covered, then medical necessity is not an issue: it simply isn't covered (see exclusion 63 on page 50). ... Please note that these decisions may be made and take effect at any time during the plan year. You may view final decisions and ongoing reviews at [www.hta.hca.wa.gov](http://www.hta.hca.wa.gov).

2012 UMP at 14. Exclusion 63 included "Services ... determined not to be covered by the state HTCC." *Id.* at 50. Exclusion 68 included "Spinal cord stimulator for chronic neuropathic pain." *Id.* The 2012 Certificate of Coverage was available to plan members, including Ms. Irish, on the Internet by November 1, 2011. The open enrollment period for 2012 benefits was the month of November. Ms. Irish and Judge Sund apparently opted to remain insured under the 2012 UMP during the 2011 open enrollment period.

On October 31, 2011, Judge Sund's neurologist, Dr. Glen David, determined that Judge Sund was a good candidate for SCS. He recommended a psychological evaluation and an SCS trial. On November 16, 2011, the psychological evaluator found Judge Sund to be a good candidate for the SCS treatment. Thus, on November 30, 2011, Dr. David sought

preauthorization from Regence for a trial of SCS. The pre-authorization request identified the procedure as diagnostic in nature with a planned date of service of "[To be scheduled] ASAP,"

At that point, Judge Sund's condition was quite dire. He was in extreme pain and had lost substantial weight. His physician indicated that Judge Sund was literally wasting away. At six feet tall, he weighed less than 120 pounds.

On December 15, 2011, Regence denied the request for preauthorization, relying on the HTCC decision that SCS is not a medically necessary procedure for chronic neuropathic pain. On February 10, 2012, Dr. David appealed the denial on his client's behalf, noting that Judge Sund continued to suffer from severe and debilitating pain. On February 21, 2012, Regence requested an Independent Medical Review to confirm that Judge Sund's condition was in fact the result of chronic neuropathic pain, rather than some other condition that might be covered under the UMP. The reviewing physician confirmed, from reviewing Judge Sund's records, that the pain was neuropathic in nature. As a result, on February 22, 2012, Regence notified Dr. David and Judge Sund that SCS was not a covered medical treatment under the 2012 UMP.

On June 7, 2012, Judge Sund filed a second level appeal of the denial of the SCS trial. On June 21, 2012, an appeal panel met to discuss the appeal and, by letter dated the same day, notified Judge Sund that under the HTCC decision and the 2012 UMP, the SCS trial was not a covered benefit.

At some point, Judge Sund and Ms. Irish exhausted their savings and a part of Judge Sund's retirement fund to pay for the SCS trial. According to Ms. Irish, the change in his condition was startlingly good. Judge Sund was able to focus, sleep, walk more than 100 feet, and work in the garden. His physicians noted that the trial showed a 50 percent reduction in pain in the worst areas and more than that in other areas. Within hours of removing the trial stimulator, his severe pain returned and his mobility immediately diminished. His physician described his response to the trial as excellent and recommended that he undergo a permanent implantation of the stimulator.

On August 17, 2012, Dr. Ryder Gwinn, another physician involved in Judge Sund's care, submitted a request to Regence for preauthorization for the permanent SCS procedure. On August 30, 2012, Regence notified Judge Sund that SCS was not a covered benefit for the treatment of CRPS. On September 5, 2012, Ms. Irish appealed that decision. On September 17, 2012, Regence forwarded the request to an independent review board (IRB). On October 4, 2012, the IRB affirmed the denial of coverage based on the SCS exclusion in the 2012 UMP.

This lawsuit followed. Judge Sund contends that the HTCC law, as interpreted by the Joy court, is unconstitutional because it denies him any judicial review of the coverage decision. At issue on the pending motion is the contention that the law constitutes an impermissible delegation of lawmaking power to an unelected commission. Judge Sund also contends (among other things) that the HCA breached its insurance contract by denying coverage for the SCS trial and permanent surgical implantation, violated the Patient's Bill of Rights by failing to disclose the SCS exclusion in the 2011 UMP, and violated WAC 284-44-030 by failing to list the exclusion in the 2011 policy.

#### ANALYSIS

##### 1. Judge Sund's Contract & Regulatory Violation Claim Against the HCA

Judge Sund argues that because the 2011 UMP did not exclude SCS, the HCA breached the insurance agreement by denying coverage for both the trial and the permanent SCS procedure. The HCA contends RCW 70.14.120 required it to enforce the HTCC decision in 2011 and that it had to deny coverage. The HCA also argues that there was a clear SCS exclusion in the 2012 policy and that contractually it was entitled to deny coverage during that plan year.

This Court concludes that (a) the HCA had no legal obligation or contractual authority to unilaterally modify the 2011 UMP to exclude SCS while that plan remained in effect; and (b) the HCA did have the legal and contractual authority to expressly exclude SCS in the 2012 UMP.<sup>2</sup>

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<sup>2</sup> During oral argument, counsel for Judge Sund argued that the HCA could not exclude SCS in 2012 because RCW 41.05.065 requires the state to maintain benefits at a substantially equivalent level as benefit plans in

a. **Modification to 2011 UMP**

The HCA concedes that the 2011 UMP Certificate of Coverage is a contract and that until July 1, 2011, SCS for chronic neuropathic pain was a covered benefit under the 2011 UMP. The HCA has cited to no authority for the proposition that an insurance carrier may unilaterally modify the terms of an insurance policy mid-plan year without notice to the insured. While terminable-at-will agreements may be unilaterally modified, Duncan v. Alaska USA Federal Credit Union, Inc., 148 Wn. App. 52, 77, 199 P.3d 991 (2008), one party cannot otherwise unilaterally modify a contract. Jones v. Best, 134 Wn.2d 232, 240, 950 P.2d 1 (1998). This Court can find nothing to suggest that the UMP is terminable at will by the HCA; thus, the HCA has no legal authority to modify its coverage by adding exclusions in the middle of a plan year.

The HCA cites to the 2011 plan language that it will “follow coverage decisions made by the [HTCC].” But that language does not reserve to the HCA the right to add exclusions to the policy in the middle of a plan year.<sup>3</sup>

Additionally, this language is ambiguous. Ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable. Walsh v. Schlecht, 429 U.S. 401, 408, 97 S.Ct. 679, 50 L.Ed.2d 641 (1977). Under RCW 41.05.017, the UMP is subject to the provisions of RCW 43.505 to 48.43.535. RCW 48.43.510(1)(b) provides that the HCA may not offer to sell a health plan without offering to provide a list of exclusions before the plan is selected by an employee. This statute gives purchasers of health insurance the right to know of all exclusions before choosing the plan. Given this statutory right, it makes no sense to allow the HCA to impose an undisclosed exclusion on plan members who are signed up for the plan. The

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effect on January 1, 1993. This argument, however, was not pled or briefed by the parties. The Court has no evidence that SCS was a benefit extended to state employees in 1993.

<sup>3</sup> Such a reservation of rights may not be permissible in any event. See National Sur. Corp. v. Immunex Corp., 176 Wn.2d 872, 883, 297 P.2d 688 (2013) (suggesting that an insurance carrier cannot reserve the right to unilaterally modify a contract of insurance during the plan period).

Court finds unpersuasive the HCA's argument that it has the legal authority to unilaterally add exclusions to the UMP in the middle of a plan year.

Nor did the HCA have the legal obligation to impose the HTCC decision on its members before issuing the 2012 Certificate of Coverage. RCW 70.14.120(1) does require the agency to comply with a decision of the HTCC but it does not state when compliance must commence. WAC 182-55-040(2), a rule governing the Health Technology Assessment Program, provides that when an HTCC decision is published, the agency will implement the committee's determination "according to their statutory, regulatory or contractual process." This regulation recognizes that the HCA's contractual process may govern when it may start implementing exclusions mandated by the HTCC. Indeed, the fact that the HCA relied on an employee to make the somewhat arbitrary decision to implement the decision on July 1, 2011, supports the notion that the law does not obligate the HCA to implement the SCS exclusion mid-plan year.

Based on the foregoing analysis, and the undisputed facts before the Court, the HCA's denial of coverage for the SCS trial on December 15, 2011 was impermissible and a breach of the 2011 UMP.<sup>4</sup>

The Court does not rule, however, on the issue of causation. As the parties discussed at oral argument, there is insufficient evidence before the Court to determine whether the surgical procedure necessary to start the SCS trial would have or could have occurred in December 2011. Moreover, under RCW 48.43.525, a health carrier may not retrospectively deny coverage for care that had prior authorization at the time the care was rendered. Had the HCA granted pre-authorization in December 2011 and Judge Sund's physician performed the SCS trial in reliance on this pre-authorization (even if the procedure occurred in 2012), the HCA could not have legally denied coverage after the procedure had occurred. The Court leaves the issue of causation for another day.

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<sup>4</sup> The parties dispute whether WAC 284-44-030, requiring insurance policies to contain a complete list of all exclusions, applies to the HCA. The Court agrees that there is no private cause of action for a violation of this regulation. Given the Court's interpretation of RCW 48.43.510, whether the regulation applies to the HCA is a moot point.

**b. Changes to 2012 UMP**

From a contractual standpoint, the HCA had the legal authority to implement the HTCC decision in its 2012 UMP. It explicitly excluded SCS as a covered treatment for chronic neuropathic pain. The Certificate of Coverage was available on-line for plan members such as Ms. Irish to review before deciding whether to renew under that plan. Based on the undisputed facts, the HCA's denial of coverage for the permanent SCS procedure in 2012 did not breach the 2012 UMP.

The 2011 UMP did not apply to the 2012 request for coverage for the permanent SCS surgical procedure. Judge Sund asks the Court to find that the SCS trial and the permanent surgical procedures are one and the same for purposes of coverage. He contends that if the trial should have been covered under the 2011 UMP, then the permanent SCS procedure should similarly be covered under the same policy. The Court disagrees. The purpose of undergoing a "trial" is to determine if the treatment will be effective for a particular patient. Once data from the trial are known, the insurer would have had the contractual right to reassess medical necessity of the permanent procedure based on the results of the trial. Thus, the HCA's breach of the 2011 UMP does not result in coverage for the permanent surgical implantation of a stimulator in 2012.

**2. Judge Sund's Constitutional Claim of Unlawful Delegation of Legislative Power<sup>5</sup>**

Judge Sund challenges the HTCC's conclusion that SCS has not been demonstrated to be safe and effective for people diagnosed with CRPS who have successfully undergone a trial of the procedure. He also argues that the HTCC decision conflicts with Medicare's policy of covering the procedure for cases such as his. He has presented expert testimony that the procedure is medically necessary for him.

Under Joy, the HTCC law prohibits Judge Sund from challenging the HTCC's decision on medical necessity. RCW 70.14.120 (3) provides:

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<sup>5</sup> Plaintiffs challenge the HTCC law on several constitutional grounds but have not briefed any of the arguments other than the delegation issue. Plaintiffs expressly noted their intention to address the other constitutional issues in later briefing, if necessary. Despite Plaintiffs' invitation to reach the impairment of contract argument, the Court declines to do so because the state has not had the opportunity to respond to this claim.

A health technology not included as a covered benefit under a state purchased health care program pursuant to a determination of the [HTCC] ... shall not be subject to a determination of an individual patient as to whether it is medically necessary, or proper and necessary treatment.

RCW 70.14.120(3). Division II of the Court of Appeals held that “[a] HTCC non-coverage determination is a determination that the particular health technology is not medically necessary in *any* case.” Joy, 170 Wn. App. at 624.

Although RCW 70.14.120(4) states that nothing in the 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,” the Joy court concluded that subparagraph (3) precludes a person from obtaining judicial review of the denial of coverage when the denial is based on an HTCC decision. Id. at 627.

The Joy court noted that the bill, as passed by the legislature, contained a section providing appeal rights to patients:

Appeal process: The administrator shall establish an open, independent, transparent, and timely process to enable patients, providers, and other stakeholders to appeal the determinations of the health technology clinical committee made under section 4 of this act.

ESSHB 2575, § 6, Chapter 307, Laws of 2006 (eff. date 6/7/06). Governor Gregoire, however, vetoed Section 6, stating:

I strongly support ESSHB No. 2575 and particularly its inclusion of language that protects an individual’s right to appeal. ... [Section 5(4)] is an important provision and one that I support whole-heartedly.

I am, however, vetoing Section 6 of this bill, which establishes an additional appeals process for patients, providers and other stakeholders who disagree with the coverage determinations of the Health Technology Clinical Committee. The health care provider expertise on the clinical committee and the use of an evidence-based practice center should lend sufficient confidence in the quality of decisions made. Where issues may arise, I believe the individual appeal process highlighted above is sufficient to address them, without creating a duplicative and more costly process.

*Id.* The Joy court noted that the legislature failed to override this veto. 170 Wn. App. at 626. It concluded that “[i]n the absence of section 6 ... it appears there is no statutory procedure for substantively challenging HTCC determinations.” 170 Wn. App. at n.13.

Judge Sund argues that without the ability to substantively challenge the HTCC’s coverage decision, the HTCC law constitutes an unlawful delegation of legislative authority to an unelected commission. Under Barry and Barry, Inc. v. Dept. of Motor Vehicles, 81 Wn.2d 155, 159, 500 P.2d 540 (1972), it is not unconstitutional for the legislature to delegate administrative power to an agency or commission if (1) the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards exist to control arbitrary administrative action and administrative abuse of power. This Court evaluates Judge Sund’s constitutional argument under the appropriate standard of review; the Court must presume the statute to be constitutional and when a statute is challenged as unconstitutional, the Court must be convinced by argument and research that there is no reasonable doubt that the statute violates the constitution. Island County v. State of Washington, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

Judge Sund does not challenge the HTCC law under the first prong of the Barry test; his challenge focuses on the second—the lack of adequate procedural safeguards. The HCA contends that there is no constitutional infirmity because the HCA has promulgated rules governing how HTCC members are selected and how they are to assess health technologies, the HCA provides public notice of the technologies to be assessed by the HTCC and the HTCC deliberations themselves are public, and members of the public may submit comments to the HTCC before it renders a final decision.

The Court agrees with Judge Sund that these procedures are insufficient under Barry to protect from arbitrary agency decisions. For example, the HTCC decisions are not self-executing; the HCA must decide if and when to implement them. Under RCW 70.14.120(1), the

HCA is legally prohibited from implementing an HTCC determination if it conflicts with an applicable federal or state law. Because the Joy decision precludes judicial review of HCA's decision to implement the HTCC coverage determination, there is absolutely no mechanism for anyone to enforce this legal obligation.

Moreover, Judge Sund contends that the HTCC violated RCW 70.14.110(3), under which any decision:

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."

This provision is an "applicable" state statute within the meaning of RCW 70.14.120(1) and the HCA is legally prohibited from implementing an HTCC decision that conflicts with this statutory mandate. Yet, again, under Joy, there is no method for requiring the HCA to comply.

Judge Sund also argues that the HTCC decision conflicts with RCW 70.14.100(4)(d), under which the HCA must contract for technology assessments that:

... (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, ethnicity, race or disability.

Under this section of the law, the HCA has a statutory obligation to provide the specified information to the HTCC before the HTCC renders a coverage decision. Again, the HCA's failure to comply with this legal duty is unreviewable under Joy.

None of the statutory or regulatory provisions to which the HCA cites would provide a way to appeal or challenge the HCA's own actions or inactions. Although the Administrative Procedures Act allows an individual adversely affected by an agency action to appeal to superior court, RCW 34.05.570(4), the Joy court has interpreted RCW 70.14.120(3) to not only insulate the HTCC's actions from judicial review but also to insulate the HCA's decision on

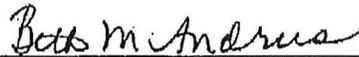
implementation of the HTCC coverage decisions from any judicial review. This result conflicts with the APA and with the provision of RCW 70.14.120(4). This Court has found, and the HCA has cited, no case law to support the contention that a statute denying any judicial review of an agency action meets the procedural safeguard mandate of Barry. For these reasons, the Court concludes that RCW 70.14.120(3), as interpreted by Joy, is an unconstitutional delegation of administrative authority.

This ruling does not, however, lead to the conclusion that Judge Sund is automatically entitled to coverage for SCS under the 2012 UMP. The remedy for the specific constitutional defect in the HTCC law is not to invalidate the HTCC's decision. It is, instead, to give Judge Sund the judicial review that the constitution requires to pass the Barry test. This Court concludes that Judge Sund must demonstrate that the HCA either failed to fulfill its duties under RCW 70.14.110(3) and RCW 70.14.100(4)(d) before implementing the HTCC coverage determination or that the HCA's action in implementing the coverage exclusion was otherwise unlawful, arbitrary or capricious. The Court makes no ruling on these contentions at this time as there are genuine issues of material fact in dispute on these issues.

#### ORDER

Based on the foregoing, the Court GRANTS in part and DENIES in part Plaintiffs' motion for partial summary judgment on breach of contract and regulatory violations. The Court GRANTS Plaintiffs' motion for partial summary judgment holding that the HTCC law is unconstitutional to the extent it prohibits judicial review of the HCA's decision to implement the HTCC non-coverage determination. The Court DENIES the HCA's motion for summary judgment.

Dated this 22<sup>nd</sup> day of October, 2013.



Honorable Beth Andrus  
King County Superior Court

**BURI FUNSTON MUMFORD, PLLC**

**November 21, 2017 - 2:09 PM**

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