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NOTE: See State's letter filed May 10, 2018, re: correction to Page 10

NO. 95251-5

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL MURRAY,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

SUPPLEMENTAL BRIEF
DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

Evidenced-based medicine helps improve patient outcomes by using scientific methods to shape medical care and public policy. The Legislature used this approach to improve care for Washington's workers by enacting the Health Technology Clinical Committee Act. This act allows injured workers to receive proper and necessary care by having medical experts evaluate scientific evidence to determine safe, effective, and cost-efficient treatment.

To implement this approach, the Legislature created an 11-member committee of medical experts—the Health Technology Clinical Committee—to evaluate procedures and decide whether three state agencies, including the Department of Labor & Industries, may cover them. To ensure fairness in the delegated authority, the Legislature mandated procedures like those in the Administrative Procedure Act: notice, public comment, and public hearings. And the HTCC's decisions are reviewable in superior court under a constitutional writ.

This Court should uphold L&I's order following the Legislature's policy choice to use the HTCC's evaluation of scientific evidence to determine whether a procedure is proper and necessary.

II. ISSUES

1. Legislative decisions delegated to the executive branch are constitutional if the Legislature safeguards against arbitrary action. Here decisions of the HTCC are subject to notice, public comment,

public hearings, conflict screening, and reconsideration, with judicial review through a constitutional writ. Is the delegation of power to the HTCC constitutional?

2. RCW 70.14.120(3) provides that a workers' compensation treatment disallowed by the HTCC "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." Did the Board of Industrial Insurance Appeals and superior court correctly decline to consider whether Murray's denied procedure was proper and necessary treatment, when the HTCC had disallowed the procedure?

III. FACTS

A. The HTCC Uses an Open and Transparent Process to Make Health Care Determinations

The Legislature formed the HTCC to use evidence-based medicine to improve health care outcomes and control costs in state-purchased health care. RCW 70.14.080-.130. This expanded medical policy to using more than only experience-based medicine in which medical providers often relied mainly on personal experience to determine clinical appropriateness. Leah Hole-Marshall, et al., *Evidence-Based Medicine Panel Discussion* (Oct. 6-7, 2016).[1] Evidence-based medicine "is, at its simplest, the idea that the care that the health professionals provide should be based as closely as possible on evidence from well-conducted research into the effectiveness of health care interventions . . . ." Kieran Walshe &

[1] http://www.lni.wa.gov/ClaimsIns/Providers/WhatsNew/NewsUpdates/default.asp; http://www.lni.wa.gov/ClaimsIns/Files/Providers/EvidenceBasedMedicinePanelDiscussion0715JW.pdf

Thomas G. Rundall, *Evidence-Based Management: From Theory to Practice in Health Care*, 79(3) Millbank Quarterly 429, 431 (2001).[2] Evidence-based medicine shifts the focus from experience-based opinion to "a more stringent review and application of high-grade scientific evidence." Carter L. Williams, *Evidence-Based Medicine in the Law Beyond Clinical Practice Guidelines: What Effect Will EBM Have on the Standard of Care?*, 61 Wash. & Lee L. Rev. 479, 481 (2004).

Applying evidence-based techniques, the 11 medical experts on the HTCC review procedures and technologies to determine "safety, efficacy, or cost-effectiveness." RCW 70.14.090(1), .100(1)(a). The committee obtains a report from an evidence-based research center and requires the researchers to evaluate a medical procedure's safety, outcome, and cost. RCW 70.14.100(4)(a), (c). Researchers must base their recommendation on the greatest weight of objective evidence. RCW 70.14.100(4)(d).

The Legislature established rigorous procedural requirements for the HTCC, mandating specific steps before making coverage determinations and many opportunities for public input:

- The committee must provide notice and an opportunity for public comment, including posting its proposed decision for comment. RCW 70.14.110(2)(b), .130; RCW 42.30.077; WAC 182-55-055.
- Committee meetings are subject to the Open Public Meetings Act (RCW 42.30), including publicized agendas. RCW

[2] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2751196/.

70.14.090(4); RCW 42.30.077.

- Members may not contract with a technology manufacturer or a participating agency for 18 months before the appointment or during a term. RCW 70.14.090(3)(a). Members may be removed for cause. WAC 182-55-025(2).

- The coverage determinations must be reviewed every 18 months if new evidence could change a decision. RCW 70.14.100(2).

After this open and transparent process, the HTCC establishes "(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. Participating agencies include L&I, the Health Care Authority, and the Department of Social and Health Services. RCW 70.14.080(6).

B. The HTCC Found That the Patients Should Not Be Subject to FAI Surgery's Hazards

In late 2010, the HTCC began its review of hip surgery for femoroacetabular impingement (FAI) syndrome. AR 71. FAI surgery is an invasive procedure in which a surgeon cuts off abnormal bone growths, removes damaged cartilage, and reshapes the femoral neck of the hip. AR 75. Major potential complications include avascular necrosis (cellular death of bone tissue), femoral head-neck fracture, deep infection, significant hip motion limitation, neurovascular injury, and symptomatic

venous thromboembolism (blood clot). AR 112-13.

For a year, HTCC reviewed the procedure by contracting with an evidence-based researcher, reviewing the scientific evidence, obtaining public comment, and holding public meetings. AR 72, 74-390.

11/3/10:	Preliminary selection recommendations published
11/16/10:	Public comments due
12/17/10:	Topics published
1/17/11:	Public comments due
4/20/11:	Draft key questions published
5/4/11:	Public comments due
5/31/11:	Key questions finalized
7/27/11:	Draft report finalized
8/17/11:	Public comments due
8/26/11:	Final report finalized (addressing public comments)
9/16/11:	Public deliberations and preliminary vote
10/10/11:	Findings and draft decision published
10/24/11	Public comments due
11/18/11:	Public adoption after considering public comments

AR 74-75, 299-301, 348.

The HTCC then decided that FAI surgery did not meet safety, outcome, and cost criteria, and disallowed it. AR 76-79. No one has since asked the HTCC to revisit its FAI surgery determination. AR 72.

C. L&I Denied Payment for FAI Surgery Because the HTCC Has Disapproved This Treatment

Michael Murray sustained an industrial injury in August 2009. AR 57. L&I allowed his claim and provided medical treatment. AR 57. His doctor asked in 2013 for L&I to authorize FAI surgery. AR 57, 60. In 2014, L&I denied authorization for FAI because of the HTCC's decision.

AR 57, 63-64. The doctor performed the surgery on Murray without Department approval. AR 58.

Murray appealed L&I's decision to the Board, superior court, and Court of Appeals, which all upheld L&I's decision. AR 3, 16-19, 26; CP 1-2, 123-25; *Murray v. Dep't of Labor & Indus.*, 1 Wn. App. 2d 1, 403 P.3d 949 (2017).

IV. ARGUMENT

The Legislature created a medical decision-making process tailored to achieve high quality care at an affordable cost. The Legislature's delegation of authority to the HTCC to make such decisions makes sense because it is not practical to have legislative bills about myriad treatment procedures, particularly because evidence-based medicine promotes considering current research data.

To have a lawful delegation of authority, *Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972), requires that the Legislature provide (1) general standards to govern what the agency does and (2) adequate procedures to safeguard against arbitrary administrative action. Murray does not contest the first prong. As to the second prong, when the Legislature delegated power to the HTCC to make safe and uniform health care coverage decisions, it created robust procedural protections to satisfy delegation of power concerns, with many opportunities for notice and public comment. And judicial review is

available through a constitutional writ.

RCW 70.14.120(3) carries out the Legislature's intent to use uniform evidence-based medicine by requiring agencies and reviewing bodies to follow HTCC determinations.

A. The Legislature Lawfully Delegated Its Power to the HTCC as Shown by the HTCC Act's Procedural Protections and the Availability of a Constitutional Writ

Only the second prong of the *Barry & Barry* test is at issue. And here adequate procedures to safeguard against arbitrary administrative action are provided by administrative processes and judicial review.

1. Administrative procedural protections: the HTCC Act provides for notice, public comment, conflict screening, and reconsideration of decisions

The delegation to the HTCC of making coverage determinations satisfies the second prong of the *Barry & Barry* test. The HTCC takes five rounds of public comment. RCW 70.14.110(2)(b), .130(1)(a); WAC 182-55-030; AR 74-75, 299-301, 348. It provides detailed materials to the public (including the preliminary topics, draft key questions, final key questions, draft report, final report, and draft decision). RCW 70.14.110(2)(b), .130(1); WAC 182-55-030; AR 82-245, 300-01, 325-48. And the 11-member HTCC conducts its decision-making at public meetings. RCW 70.14.090(4); RCW 42.30.060. These procedures allow the public to provide informed input about the HTCC determinations.

Despite these procedures, Murray argues the HTCC "dispensed with the notice and public comment procedures normally required in the ruling making process." Reply 10. He is wrong. Murray cites *In re Powell*, 92 Wn.2d 882, 602 P.2d 711 (1979). Reply 8-10. That case involved a challenge based on 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. There was no notice and public comment. Here by contrast, there was ample notice and public comment. AR 74-75, 299-301, 348.

The HTCC Act also uses conflict of interest screening and the state ethics act. RCW 70.14.090(3)(a); RCW 42.52.020. This prevents back door dealings. Murray points to *United Chiropractors of Washington*, *Inc. v. State*, 90 Wn.2d 1, 578 P.2d 38 (1978), to argue that there is a lack of public accountability. Reply 11. In *United*, private citizens provided the appointees to the committee, not the executive branch. *Id.* at 2-3. Here by contrast, the executive branch appoints, supervises, and supports the HTCC. RCW 70.14.090(1). Members may be removed for cause. WAC 182-55-025(2). And the HTCC Act requires consideration of re-review every 18 months. This ensures the most up-to-date evidence-based research. RCW 70.14.100(2).

These many safeguards equal or exceed the procedures in the APA. The APA requires only one comment round as compared to the five

of the HTCC. RCW 34.05.325. The HTCC filings are more comprehensive than the required APA filings. *See* RCW 34.05.320, .325, .328.[3] Although the APA does not apply to HTCC decision-making, the Legislature may provide for alternative procedures other than the APA. RCW 70.14.090(5); *Brown v. Vail*, 169 Wn.2d 318, 332, 237 P.2d 263 (2010) (drug protocols constitutional without APA review).

2. Judicial review: interested parties may seek a constitutional writ to review HTCC decisions

Because an HTCC decision is a quasi-legislative decision without a statutory appeal right, an interested party may obtain judicial review through a constitutional writ. *See City of Auburn v. King Cty.*, 114 Wn.2d 447, 451-52, 788 P.2d 534 (1990). This complies with the standard for evaluating delegations in *Barry & Barry*, which requires judicial review "for testing the constitutionality of the rules after promulgation." 81 Wn.2d at 164. A constitutional writ performs this testing because the "superior court has inherent power provided in article IV, section 6 of the Washington State Constitution to review administrative decisions for illegal or manifestly arbitrary acts." *Saldin Sec., Inc. v. Snohomish Cty.*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998); *Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 218, 643 P.2d 426 (1982) (a statute is not

[3] For example, an agency need provide a concise explanatory statement only if someone requests one or if someone commented on a rule. RCW 34.05.325(6)(b). The HTCC posts its reports on-line. RCW 70.14.130.

unconstitutional under article IV, section 6 if it does not have appeal rights in it because of the availability of a writ).

A constitutional writ satisfies the *Barry & Barry* test for judicial review. *Auto. United Trades Org. v. State*, 183 Wn.2d 842, 861, 357 P.3d 615 (2015). In *AUTO*, the Court upheld a statute that provided no obvious route for judicial review under the *Barry & Barry* test. *Id.* Rejecting a challenge to statutes authorizing the Governor to negotiate fuel tax refunds with tribes, the Court held that separation of powers requires only that procedural safeguards exist, not that the statute create those safeguards. *Id*. at 861-62. Sufficient safeguards include the availability of writs of certiorari. *Id*. And other Supreme Court cases establish that the writ procedure provides sufficient judicial review in delegation challenges. *City of Auburn*, 114 Wn.2d at 451-52 (constitutional writ acceptable review of arbitration board's legislative power); *McDonald v. Hogness*, 92 Wn.2d 431, 446-47, 598 P.2d 707 (1979) (arbitrary and capricious review, coupled with published criteria for administrative body's decisions, were sufficient review for delegation inquiry).

Murray argues against a constitutional writ. First, he complains that there is no APA review. Pet. 4. But the judicial review in a writ is comparable to the court's review under the APA. *Compare* RCW 34.05.570(2)(c) (limiting the court's ability to declare a rule invalid to only when the court finds the rule unconstitutional, outside the agency's

statutory authority, adopted in violation of statutory rule-making procedures, or arbitrary and capricious), *with Pierce Cty. Sheriff v. Civil Serv. Comm'n of Pierce Cty.*, 98 Wn.2d 690, 694, 658 P.2d 648 (1983) (the superior court's "inherent power of review extends to administrative action which is contrary to law as well as that which is arbitrary and capricious"). The writ review includes arbitrariness review and is not limited to jurisdiction and authority as Murray argues. Reply 4; *Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 769, 261 P.3d 145 (2011).

Second, he claims a writ "does not save an otherwise unreviewable delegation . . . If it did, there would be no need for, or meaning left in, the delegation doctrine." Reply 4. L&I does not rely solely on the constitutional writ. Instead, there are many procedural safeguards in place and the writ is available to test the constitutionality of the determination. *See AUTO*, 183 Wn.2d at 861; *City of Auburn*, 114 Wn.2d at 452. Murray fails to explain why review that satisfies article IV, section 6—a form of separation of powers review—does not satisfy the separation of power review under article II, section 1.

Third, Murray postulates that he has a vested interest in FAI surgery but this is not so. Pet. 16, 19. Claimants have no vested interest in treatment if an HTCC decision applies because they have no interest in treatment that is not proper and necessary. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60-61, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999)

(workers' compensation claimant has no property interest in treatment not found to be reasonable and necessary). RCW 51.36.010 provides for proper and necessary treatment. The overarching point of the HTCC statute is to determine if treatments are proper and necessary. So if an HTCC decision says a treatment is not proper and necessary, RCW 51.36.010 forbids it. And the State has a strong interest in providing a uniform evidence-based system of health care. Balanced against these interests, the HTCC Act and writ provide effective protections.

Finally, he objects to there being no review on the merits for errors of law or erroneous factual findings. Reply 3. But *Barry & Barry* did not require such review. Instead *Barry & Barry* referred to the then existing APA, RCW 34.04.070, which had limited rules review. 81 Wn.2d at 164. A rule was invalid only if it was unconstitutional, exceeded the agency's authority, or did not comply with statutory rule-making procedures. Laws of 1959, ch. 234, § 7, *amended by* Laws of 1988, ch. 288, § 516. The former APA provided for no substantive rule review: "a court will not substitute its judgment for that of an agency. Nor will it examine a record for substantial evidence in reviewing a declaratory judgment on the validity of a rule." *Am. Network, Inc. v. Wash. Util. & Transp. Comm'n*, 113 Wn.2d 59, 69, 776 P.2d 950 (1989).

HTCC decisions are like rules and the court does not consider a rule's wisdom. *See id.*; *Omega Nat. Ins. Co. v. Marquardt*, 115 Wn.2d

416, 429, 799 P.2d 235 (1990); RCW 34.05.570(2). For example, WAC 296-20-03002(2) prohibits acupuncture as a treatment, but a worker denied acupuncture treatment under the rule could not claim as a factual matter the rule was wrong or that acupuncture was actually effective. Instead, just like an HTCC decision, the worker could only claim that the rule did not apply.

Although no hearing on the merits of the quasi-legislative HTCC decision is necessary, a hearing on whether the decision applies to an individual shows that adequate procedures exist. *See State v. Simmons*, 152 Wn.2d 450, 457, 98 P.3d 789 (2004). In *Simmons*, an inmate challenged prisoner discipline rules under the delegation doctrine and the court upheld them, pointing to the process used to adopt the rules and pointing to the inmate's hearing on whether he violated the disciplinary rules. *Id.* Here, there is an appeal right under RCW 70.14.120(4) to argue that the HTCC decision does not apply or that exceptions apply.

That quasi-legislative decisions receive review targeted to arbitrariness reflects fundamental due process principles. The United States Supreme Court has held that system-wide coverage decisions ("mass changes") do not trigger individualized due process rights. *Atkins v. Parker*, 472 U.S. 115, 129-30, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985).[4]

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[4] *See also 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.").

Our courts have held that rights to individual hearings do not attach to purely legislative acts. *See Earle M. Jorgensen Co. v. City of Seattle*, 99 Wn.2d 861, 867-68, 665 P.2d 1328 (1983) (procedural due process requirements not implicated by exercise of legislative ratemaking power); *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).

To ensure fair mass coverage determinations, the Legislature has provided detailed instructions about how to conduct procedure reviews. RCW 70.14.100, .110. And a constitutional writ, combined with the administrative procedures, is sufficient because it allows the court to test the constitutionality of the rule, specifically arbitrariness. *Barry & Barry*, 81 Wn.2d at 164; *Saldin*, 134 Wn.2d at 292.[5]

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

To further the legislative policy of uniform health care policy and safe and effective treatment, the HTCC Act provides that an individual

[5] Health Care Authority rule WAC 182-55-041 acknowledges that courts have the inherent power to review HTCC actions to determine if they are arbitrary or capricious. WAC 182-55-040 provides procedures for the Health Care Authority's implementation of HTCC decisions in providing its state-purchased health care benefits. The Health Care Authority adopted those procedures voluntarily to implement an unprecedential settlement agreement in the *Sund v. Regence Blue Shield* superior court case. Wash. St. Reg. 16-18-023. Murray claims that adopting the rule tacitly admitted to a procedural flaw in the HTCC statute. Reply 14. But no admission (even if relevant) exists given that the Health Care Authority adopted a rule that confirmed its understanding of the superior court's inherent authority to review HTCC decisions. WAC 182-55-041.

cannot argue that a treatment is proper and necessary in an individual case. RCW 70.14.120(3); *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 627, 285 P.3d 187 (2012). 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).

Murray argues that the HTCC decisions apply only to L&I and not to the Board because the Board is not a participating agency. Pet. 17-18. Murray argues that the "participating agency" reference in subsection (1) applies to limit to whom subsection (3) applies. Pet. 17. But the Legislature did not use the term "participating agency" in subsection (3), causing the language in subsection (3) to apply to other entities such as the Board.[6] Using language in one place and not another shows a different meaning. *Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

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[6] *Compare* RCW 70.14.120(1) ("A participating agency shall comply with a determination of the committee under RCW 70.14.110 unless [exceptions not applicable apply.]") *with* RCW 70.14.120(3) ("A health technology not included as a covered benefit . . . under RCW 70.14.110 . . . shall not be subject to a determination in the case of an individual patient as to whether it is . . . proper and necessary treatment.").

No point to the legislation would exist if a worker could undo an HTCC decision in an individual hearing.[7] Instead, requiring evidence-based medical decisions at all levels furthers the legislative goal of promoting a statewide, uniform, evidence-based health care policy.

Nor does RCW 70.14.120(4) allow Murray to contest the HTCC decision's merits. Subsection (4) allows individual appeals in at least three ways. 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).[8] And third, the individual can argue that an exception in subsections (1)(a) or (b) applies.[9]

Subsection (4) does not diminish the ability of an individual to appeal a decision of a participating agency, so an individual may appeal, and raise the three arguments above. But an individual cannot argue that the treatment is proper and necessary because subsection (3) bars asserting the treatment's merits in that appeal. Murray's argument would render subsection (3) meaningless. *See Rivard v. State*, 168 Wn.2d 775, 783, 231

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[7] HTCC decisions also do not apply at the Board because the Board has no authority to consider issues outside what L&I considered. *Karniss v. Dep't of Labor & Indus.*, 39 Wn.2d 898, 901-02, 239 P.2d 555 (1952); *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491-92, 288 P.3d 630 (2012).

[8] 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

[9] For example, a clinical trial could cover the treatment. RCW 70.14.120(1)(b).

P.3d 186 (2010) (statutes not rendered meaningless).

Finally, Murray is wrong about the import of the Governor's veto. Pet. 14. The veto message is unclear on what the Governor believed the bar on individually appealing HTCC determinations meant. To the extent the message implies that the bar does not apply, this contradicts RCW 70.14.120(3)'s plain language. And a veto message is legislative history, which is not used if a statute is unambiguous. *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013). In any event, the Legislature did not overturn the veto, showing subsection (3) controls.

C. The Legislature Implemented Important Health Care Policy Goals in Creating the HTCC

Interpreting the HTCC Act to mean that the HTCC decisions govern at the L&I, Board, and court levels furthers the purposes of the act. The Legislature sought to "minimiz[e] the financial burden which health care poses on the state, its employees, and its charges, while at the same time allowing the state to provide the most comprehensive health care options possible." RCW 41.05.006. There are two sets of goals: (1) high-quality treatment at (2) an affordable price. RCW 70.14.110; RCW 41.05.006. First, the HTCC Act uses specialized decision makers—medical experts—to evaluate medical evidence. RCW 70.14.090. It relies on evidence-based medicine, which leads to improved health care outcomes. *See* RCW 70.14.100(4), .110. The HTCC Act creates a flexible

decision-making process to ensure that the State accesses up-to-date medical evidence, with consideration for re-review every 18 months. RCW 70.14.100(2).

Second, the HTCC Act contains costs by providing only treatment shown to be effective. RCW 70.14.110. It also consolidates medical necessity decision-making for three state agencies, creating an efficient system and uniform health care policy. RCW 70.14.080(6), .120(1).[10]

The goals of the HTCC Act mirror important goals of the Industrial Insurance Act. "The legislature finds 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. Injured workers deserve high quality medical care in accordance with current health care best practices." RCW 51.36.010. The HTCC Act furthers these high quality care goals.

Murray invokes the grand compromise underlying workers' compensation, suggesting this precludes an evidence-based health care policy. Appellant's Br. 16; Pet. 18. But in providing "sure and certain relief," the Legislature has always provided only for proper and necessary treatment. RCW 51.04.010; RCW 51.36.010. The Legislature allows L&I to make coverage decisions without rulemaking and to adopt the medical

[10] As a practical matter, it has consolidated review for two state agencies, the Health Care Authority and L&I because the Health Care Authority administers Medicaid now. RCW 74.09.500; RCW 74.09.530; RCW 41.05.021(1)(m).

aid rules that limit treatment. RCW 51.04.030(1) (allowing coverage decisions); RCW 51.36.010(10) (allowing rules about treatment); WAC 296-20-01002 (defining proper and necessary treatment); WAC 296-20-03002 (prohibiting some treatments). Similarly, the HTCC process is a way to provide only proper and necessary treatment—a way that the Legislature has determined is more effective in ensuring safe, effective, and cost-effective care.

The HTCC Act interacts with the Industrial Insurance Act by defining proper and necessary treatment. RCW 51.36.010 provides for proper and necessary treatment, and the HTCC Act defines what constitutes proper and necessary treatment for a procedure. So if an HTCC decision says a treatment is not proper and necessary, RCW 51.36.010 does not allow it. This ensures evidence-based medical policy.

Murray argues that since the FAI surgery had a good result, this means in hindsight the treatment should be covered. Pet. 4-5. But an individual's result does not set health care policy because legislative policy looks to evidence-based information considering all results, not one person's anecdotal experience. By using objective, scientific evidence to set health care policy, the Legislature provides safe, effective, and cost-

efficient care to Washingtonians.[11]

V. CONCLUSION

The Legislature wants an evidence-based medical policy to ensure safe, effective, and cost-efficient treatment. The Court should affirm.

RESPECTFULLY SUBMITTED this 6th day of April 2018.

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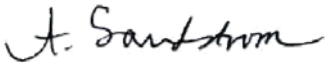

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[11] Murray is not entitled to attorney fees. A court may award fees only if the claimant wins and the litigation affects the accident or medical aid funds. RCW 51.52.130; *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011). Here, even if he prevails, the court proceeding will not directly affect either fund because he can only obtain a remand to L&I to determine if FAI surgery is proper and necessary. *Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 27, 288 P.3d 675 (2012).

No. 95251-5

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL E. MURRAY, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES and BROCKS INTERIOR SUPPLY, INC., Respondents.	CERTIFICATE OF SERVICE

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

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