BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

In re: JAMES R. LEWIS vs. DEPARTMENT OF LABOR & INDUSTRIES Claim No.: AU-90361	**Docket Nos.: 16 10479 and 16 20879** **CLAIMANT'S PETITION FOR REVIEW**

COMES NOW, Claimant, James R. Lewis, by and through his attorney of record, Spencer D. Parr, of Washington Law Center, and submits this Petition for Review for the Proposed Decision and Order of February 17, 2017 issued by the Honorable Industrial Appeals Judge, Mychal H. Schwartz. The Board has previously extended the deadline for filing of this petition until April 7, 2017.

I. INTRODUCTION

This is a summary judgment matter in which judgment has been improperly rendered against Mr. Lewis in both above-captioned dockets despite the fact that he submitted evidence sufficient to state and support his claims fully. Docket 16 10479 concerns whether it was proper to deny Mr. Lewis OATS ankle surgery merely because the state of Washington's Health Technology Clinical Committee ("HTCC") issued an assessment of non-coverage for that procedure in 2012. Docket 16 20879 concerns whether it is legally proper for the Department of

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Labor & Industries to deny time-loss benefits on public policy grounds during a period in which a claimant is temporarily totally disabled as a result of undergoing surgery related to his industrial injury if that type of surgery has previously been disapproved by the HTCC. The Board's PD&O of February 17, 2017 improperly awarded summary judgment to the Department in both dockets.

Mr. Lewis has supplied the Board his own Affidavit; the Affidavit of Michael E. Brage, M.D.; the Affidavit of Attorney Spencer D. Parr; the Declaration of De Ann McClung (originally submitted by the Department in support of its motion for summary judgment), including the exhibits attached thereto; and the Declaration of Josiah Morse (also originally submitted by the Department in support of its summary judgment motion), including the exhibits attached thereto. These items include the record and transcription of minutes corresponding to the (legally-void) non-coverage assessment determination which the HTCC made in 2012 with respect to OATS ankle surgery. These items also include medical expert declarations for each and every position Mr. Lewis has taken in the above-indicated dockets, both with respect to Mr. Lewis specifically needing OATS ankle surgery as a "proper and necessary" medical provision in his L&I matter and with respect to time loss certification for a period of time loss the Department denied (because Mr. Lewis dared to undergo an HTCC-disapproved procedure).

In short, Mr. Lewis has provided such admissible facts as should have allowed him to survive the Department's summary judgment motion, especially when reviewing the facts in the light most favorable to him. The Board's PD&O of February 17, 2017 failed to analyze the record in terms of its factual sufficiency under this applicable summary judgment standard; failed to note that the Department offered no meaningful rebuttal of the facts presented and argued by Mr. Lewis; and failed to arrive at the proper legal conclusions on numerous grounds set forth below. Moreover, the Board should utilize this case to explain that it is not "contrary to public policy," as the Board's Industrial Appeals Judge found in this matter, to award time-loss compensation for a period of undisputed temporary total disability consequent to the injured

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worker undergoing a surgical procedure which has been disapproved by the HTCC, especially where that surgical procedure remains the appropriate medical standard of care. The Board should specifically find that HTCC non-coverage determinations do not create legal presumptions by which an injured worker is properly denied time loss merely because the injured worker has undergone a recommended, but HTCC non-recommended surgery.

Mr. Lewis respectfully restates and incorporates herein all legal briefing and arguments from his November 10, 2016 "Response to Department's Motion for Summary Judgment," his January 4, 2017 "Reply to Department's Response of December 23, 2016" as well as the contents of his oral arguments made via the undersigned attorney on December 9, 2016 and January 12, 2017 as if each and every one of these were set forth in entirety herein.

II. FACTS:

All of the following facts have been demonstrated by admissible evidence submitted in the above-captioned matters, especially when construing all evidence in favor of Mr. Lewis. The Department has submitted no contrary facts. The Department has instead argued that both consolidated dockets can be decided as a pure matter of law, without the aid of these facts.

James R. Lewis was born on July 28, 1982 and is now 34 years of age. Mr. Lewis injured his left foot, ankle and heel (collectively "ankle") on June 12, 2014 while working in the course of employment covered by Washington's Industrial Insurance Act. As a result of his June 12, 2014 industrial injury, Mr. Lewis filed L&I Claim No. AU-90361, which the Department of Labor & Industries ("Department") duly allowed as compensable by its final and binding order dated August 21, 2014.

As a result of his left ankle injury in L&I Claim No. AU-90361, Mr. Lewis underwent all available and recommended modalities of conservative medical care, to include treatment with NSAIDs; opioids; rest; ice and elevation; physical therapy; and custom orthotic, but all of these measures failed to completely restore his left ankle function, as well as eliminate his pain, such

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that he had not yet reached maximum medical improvement as of August 3, 2016. On August 3, 2016, Mr. Lewis underwent OATS left ankle surgery even while maintaining this appeal to the Department's denial of that procedure. Construing all known facts in his favor, Mr. Lewis was forced into the choice of OATS ankle surgery because no other treatment alternative offered him an ability to escape being a cripple for the rest of his life. Also construing all medical facts in his favor, Mr. Lewis would have been temporarily totally disabled from August 3, 2016 to October 3, 2016 no matter what treatment course he chose.

According to the affidavit of his Attending Physician, Michael E. Brage, M.D., Mr. Lewis underwent left ankle radiographs on August 8, 2014; left ankle MRI on September 10, 2014; and left ankle CT exam on January 15, 2015. He was objectively diagnosed with an osteochondral cyst (a.k.a. "lesion") involving the medial aspect of his left talar dome with bone marrow edema extending throughout the medial aspect of the left talus posteriorly. Generally, his left ankle condition, pre-surgery, is referred to as "osteochondritis dessicans." He had a "full-thickness" lesion, by which it is meant that he suffered damage to his left ankle joint's articular cartilage extending from the top surface of that cartilage down, through to the underlying bone and even into the bone marrow at the center of his bone. As a result of this condition, Mr. Lewis suffered consistent, reproducible pain, especially upon weight-bearing. He was medically unable to weight-bear for more than approximately three hours per day prior to his surgery, a "crippling" circumstance at his relatively young age. According to Dr. Brage, this crippling condition would also likely be permanent and progressive if not surgically repaired. Dr. Brage recommended OATS ankle surgery because the only other available surgical option would be left ankle fusion surgery, but a fusion surgery would be medically less-desirable as it would leave Mr. Lewis with comparatively reduced flexibility and range of motion in his left ankle. In other words, Mr. Lewis would have remained partially crippled, although perhaps in less pain, had he elected to undergo a fusion surgery.

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In completing its 2012 assessment (as shown by minutes and transcripts of the HTCC's deliberations), the HTCC committee members openly discussed that there was no other existing, alternative surgery other than OATS ankle surgery effective to treat the kind of full thickness cartilage defect caused by Mr. Lewis' industrial injury. The only evidence the HTCC reviewed that met its extraordinarily-high evidentiary standards indicated that OATS ankle surgery produces similar, meaning effective and safe, results as OATS knee surgery, which the HTCC then overwhelmingly voted to approve. The HTCC reviewed no adverse outcome data indicating that OATS ankle surgery was (relative to any other option) ineffective, unsafe, excessively-costly or would become an over-utilized medical service if approved for purchase by participating agencies. The HTCC was presented evidence that every insurance company that had produced a policy or guidelines for potential coverage of OATS ankle surgery does cover the procedure under the circumstances of Mr. Lewis' case. EVERY INSURER. The HTCC relied upon limited research provided by "Spectrum, Inc.," a corporation which is not properly considered to be an Evidence-based Practice Center ("EPC") under applicable law and had zero medical experts on its research team. The HTCC members also indicated a belief their non-coverage determination would be appealable to the participating agencies, such as the Department of Labor and Industries, when they voted to disapprove the technology for participating agency purchase. The HTCC members did not call a subject matter expert with clinical experience in OATS ankle surgeries, although one was identified and was available to be consulted. The HTCC disregarded, over the objections of several medical doctors speaking during the public comment period, medical evidence regarding OATS ankle surgery published in the National Institutes of Health medical research database (available through PubMed[1]). No qualified, expert medical doctor spoke against the OATS ankle surgery in any way during the public comments or in testimony

[1] The transcripts of oral arguments repeatedly mistake the name of this database, but that is a transcription error.

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before the committee. Multiple doctors spoke out against the non-inclusive methods utilized by Spectrum Research, Inc., in conducting its research. The HTCC members are a committee comprised entirely of non-subject matter experts, who did not review all available scientific literature systematically, nor bother to consult with an appropriate subject matter expert when deciding to ration access to the OATS ankle procedure.

The "OATS" procedure refers to an "osteochondral allograft/autograft transfer system" surgery whereby a plug of healthy articular cartilage is removed from a non weight-bearing area of a joint (i.e., "donor site") and transferred to a weight-bearing area (i.e., "recipient site") as a replacement for damaged articular cartilage at the recipient site. An allograft is a plug of bone taken from a cadaver whereas an autograft is a plug of bone taken from the same patient into whom it will be repositioned at the site of the damaged articular cartilage being treated.

The objective of the OATS procedure is to allow for greater, less painful weight bearing and joint motion than might otherwise be achieved without replacing the damaged articular cartilage at the recipient site. Erosion or traumatic damage to articular cartilage, which provides a soft lining or cushion at the end of bones, is known to cause symptomatic osteoarthritis. Once the articular cartilage is damaged, it will generally continue to deteriorate, i.e., become progressive. Such damage is potentially crippling and was so in Mr. Lewis' case.

The Board's PD&O under petition failed to review or analyze any of these above-stated facts, although none of these facts was ever fairly placed into dispute by the Department. Instead, the Department argued that the Board has no proper place to decide the appropriateness of a medical authorization denial issued by the Department once the HTCC has voted against the requested procedure. The Department rests its position on the holding of *Joy v. Dept. of Labor & Industries*, 285 P.3d 187 (2012), *review denied*, 297 P.3d 708 (2013), a disreputable and highly-distinguishable case (it involved a different technology, different process of denial, and different arguments) from the instant case.

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III. ASSIGNMENT OF ERRORS:

Mr. Lewis assigns reversible error to each and every finding of fact and/or law (including omissions therefrom), contained within the Board's February 17, 2017 PD&O to the fullest extent those findings are inconsistent with the arguments set forth herein.

1. NO SUFFICIENT FACTS WERE FOUND

In these summary judgment proceedings, Mr. Lewis was entitled to an understanding of the facts, including any and all reasonable inferences drawn therefrom, which favored his position. The PD&O of February 17, 2017 failed to find the facts stated herein above, although each and every fact asserted above was supported in the Board's record. Had proper fact finding been done, giving the benefit of all factual considerations to Mr. Lewis, the Board could not have ruled against Mr. Lewis on summary judgment.

2. CRITICAL ARGUMENTS WERE SIMPLY LEFT UNADDRESSED:

Mr. Lewis has repeatedly argued that the HTCC's non-coverage assessment of OATS ankle surgery is ***void ab initio***, therefore unenforceable at law. The PD&O of February 17, 2017 failed to address this critical contention. Mr. Lewis has stated the factual and statutory basis by which the HTCC's assessment at issue is void as a matter of law, meaning without legal force, while the Board has never even ruled on the issue of whether it can consider such threshold disputes as "legal validity" before blindly enforcing an HTCC non-approval assessment (even if legally "void"). The Board's PD&O is in error for abdicating this duty.

Mr. Lewis has also repeatedly asserted the various state and federal Supreme Court cases direct both an analysis and outcome different than what was reached in the Board's PD&O of February 17, 2017, as well as that the Board should merely continue to follow higher legal precedents passed down by this state's Supreme Court, as well as by the U.S. Supreme Court, rather than rely upon the clearly-incomplete and historically-outlying position taken in Joy. The

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PD&O of February 17, 2017 failed to address and rule upon these vital pleas, leaving the Board's judgment incomplete.

Mr. Lewis also made clear in his oral arguments that certain findings with respect to the Industrial Insurance Act are required for effective review by higher courts (including federal courts), but the PD&O of February 17, 2017 improperly ignored this necessity. Specifically, Mr. Lewis has asked for the Board to state expressly that the Industrial Insurance Act confers both property and liberty interests upon injured workers whose cases are allowed/established on a final and binding basis. These rights include a property right to "proper and necessary" medical treatments and a liberty right to obtain care from a physician of the injured worker's own choosing.

3. THE HTCC ASSESSMENT ON OATS ANKLE SURGERY IS *VOID AB INITIO*:

In an Industrial Insurance Act claim, when acting in its proper oversight capacity, the Board cannot enforce, nor fail to prohibit, that which is legally void. Mr. Lewis has asserted and provided factual support for each of the following contentions that the HTCC's OATS ankle surgery assessment at issue in these dockets was void ab initio, meaning not legally passed and not legally enforceable. The PD&O of February 17, 2017 committed reversible error by failing to address these factually-supported contentions as a threshold issue that is imperative to any proper legal analysis by the Board or higher courts:

No Open and Transparent Process was Conducted:

Pursuant to RCW 70.14.110(2)(a), an HTCC assessment "shall **consider**, in an open and transparent process, evidence regarding the safety, efficacy, and cost-effectiveness of the technology as set forth in the systematic Assessment conducted under RCW 70.14.100(4)." (emphasis added). Here, proper consideration was not given. The evidence shows that the committee members had no fair understanding of the procedure being assessed, so simply voted against coverage, mistaking that outcome to be a requirement of their charge. The evidence

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shows that the committee expressly declined to follow scientific method, such as by fairly "considering" all evidence known to be available. The committee had evidence that OATS ankle surgery is as generally effective and safe as OATS knee surgery, which the committee approved during the same session. The committee neither had nor provided a rational basis for its contrary determination with respect to ankle surgery. Approving one but not the other resulted in an arbitrary and capricious outcome, not a considerate one. The committee members also clearly thought their assessment was conditional to the extent it would be subject to further appeal by those aggrieved[2], whereas the *Joy* decision has since been asserted to end that possibility on different facts than the HTCC considered. Such conclusory, arbitrary and capricious assessments predicated upon significant deficiencies in awareness and reasoning, conducted outside the bounds of the committee's mandates (and contrary to an interpretation of law that would follow) are not equitable and cannot logically be said to meet the statutory mandate of "transparency" and proper consideration which the legislature intended. The 2012 OATS ankle surgery assessment was not conducted in the open and transparent, i.e., "fair" process envisioned by the authorizing statute so it is *void ab initio*.

No "Appropriate Entity" Analysis was Provided to the HTCC:

Pursuant to RCW 70.14.100(4)(a), "a systematic evidence-based assessment" of a chosen technology must be conducted by an "evidence-based practice center designated as such by the federal agency for health care research and quality, or other appropriate entity." Here, the assessment was lead by "Spectrum Research, Inc.," a research company which conspicuously did not include a single Medical Doctor ("M.D.") or Doctor of Osteopathy ("D.O.") on its research staff. Spectrum was not designated as an "evidence-based practice center" ("EPC") by

[2] *Joy* was a very clumsy determination that begged the law of unintended consequences because it never considered conditional approvals or disapprovals by the HTCC, nor the virtually-guaranteed proposition that fact-and equity-based disputes such as the one presently at bar would need to be considered by the Department, Board and Courts later in time in order to preserve the rule of law.

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the appropriate federal agency, as the Board was expressly asked to recognize. Spectrum also is not an "other appropriate entity" by virtue of having no appropriate medical expertise on its research staff, and by expressly excluding scientific evidence from fair consideration rather than conducting a full, "systematic" review as required by statute. Therefore, the Board should find that the resulting assessment was neither systematic nor evidence-based as required by the Washington state legislature, and it was not conducted by an appropriate entity, as also required. Thus, it is *void ab initio*.

The HTCC Review was Admittedly Incomplete:

RCW 70.14.100(1)(c) provides that the HTCC may not review a medical technology unless there is "adequate evidence available to conduct [a] complete review." It is clear from committee minutes that available PubMed research was excluded from consideration and that no subject matter expert was called to testify regarding OATS ankle surgery specifically, even though the name of a local clinician was made available to the committee. The committee did not possess its own relevant expertise, did not consult an appropriate subject matter expert and excluded known scientific research from consideration. Despite these galactic deficiencies in its constitution and process, it voted to ration the specific healthcare now at issue in this case.

The HTCC's review was incomplete. It did not have evidence before it, and it made no findings of fact, that the OATS ankle procedure is comparatively unsafe, excessively costly, or in any other measurable way ineffective to its purpose. Instead, the only evidence considered by the committee actually indicated that it was the only available curative option for many individuals, including those like Mr. Lewis who have suffered a full thickness cartilage tear/osteochondritis dessicans. Every insurance company with a coverage policy covers the procedure, but the HTCC arbitrarily voted for non-coverage instead, expressly because it believed it didn't yet have enough highest-quality medical proofs to consider. Because this was its clear and obvious reason for rationing the OATS ankle surgery in Washington state, it must

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also be found that the HTCC didn't have "adequate evidence available to conduct [a] complete review," so violated its statutory authority by voting against coverage under this circumstance. Because the HTCC had "inadequate evidence" before it to conduct a complete review, its non-coverage assessment is *void ab initio* as a result of violating the HTCC's statutory authority.

Greatest Weight WAS NOT Give to the "Most Valid and Reliable" Evidence Before the Committee:

RCW 70.14.100(4)(d) expressly "requires" HTCC assessments to give the "greatest weight" to the objectively "most valid and reliable" evidence before the committee. Here, the only scientific evidence considered by the HTCC indicated that OATS ankle surgery is substantially comparable in terms of positive outcomes as OATS knee surgery, a procedure the committee approved. In other words, the "most valid and reliable" evidence logically should have directed a coverage determination had the HTCC acted within its statutory authority. Instead, the HTCC issued a blanket exclusion of coverage assessment for OATS ankle surgery because it didn't believe it had "enough" evidence to simply approve of that procedure. No particular excessive risks, costs or other detriments were found by the committee in its assessment. Meanwhile, the committee disregarded available evidence that could be found via PubMed search and declined to call a practicing clinician who performs the procedure, all while failing to obtain any expert medical testimony whatsoever that would be consistent with a denial of coverage determination. In conducting itself in this grossly-reckless, dismissive fashion, the HTCC violated the mandate of RCW 70.14.100(4)(d) requiring that greatest weight be given to what can be summed up as "the best evidence" available. Here, the only valid and reliable evidence was in favor of coverage, while additional available evidence was simply ignored, so the HTCC abused its discretion to vote for non-coverage under these circumstances. The 2012 OATS ankle surgery non-coverage assessment is therefore *void ab initio*.

No Variations in Use or Plausible Alternatives were Properly Considered:

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Pursuant to RCW 70.14.100(1)(a)-(c), HTCC assessments are to be specifically concerned with "safety, efficacy, or cost-effectiveness, especially **relative to** existing alternatives, or significant variations in its use," (emphasis added), and the HTCC is only authorized to take a position where "[t]here is adequate evidence available to conduct the complete review." Here, the HTCC did not consider alternative surgical procedures because it was understood within the committees deliberations that no existing alternatives really exist for persons suffering from the condition of osteochondritis dessicans and having a full thickness cartilage defect, as Mr. Lewis does on both counts. As a matter of law, the HTCC cannot pursuant to RCW 70.14.100(1)(a)-(c) prohibit state agencies from covering as "proper and necessary" the only known surgical procedure available in accepted medical practice, because that procedure is automatically superior to all others on a "relative" basis.

The binary process used by the HTCC of "approve based on extremely high, perhaps impossible evidence standards *or else* automatically disapprove" is not the "best evidence for approval or substantial evidence for disapproval" analysis that was required by the statutory scheme. The HTCC's 2012 OATS ankle surgery assessment was incomplete, inadequate and inconsiderate and failed to justify a non-coverage determination. It is *void ab initio*.

The HTTC Acted Contrary to Required Legal Standards:

In addition to the arguments provided herein elsewhere, RCW 70.14.110(3) prohibits the HTCC from disapproving technologies widely accepted in other treatment guideline contexts, unless "substantial evidence regarding the safety, efficacy, and cost-effectiveness of the technology supports a contrary determination." No such "substantial evidence" has been presented by the Department from within the records of the HTCC OATS ankle assessment process despite the fact that every insurance company that has developed a guideline approves of OATS ankle surgery. Zero evidence, and certainly not "substantial evidence" was considered by the HTCC as showing that OATS ankle surgery results in poor safety, efficacy and cost-

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effectiveness for the condition Mr. Lewis suffers. The Board has the HTCC's entire deliberative record and yet has no proof the HTCC had "substantial evidence," as statutorily required before disapproving the procedure Mr. Lewis seeks. Here, the Board should have found that the HTCC abused its discretion and its non-coverage determination is *void ab initio*.

HTCC Assessments Cannot Overrule Civil Rights:

The plain meaning of RCW 70.14.120(1)(a) provides that HTCC assessments do not overrule rights granted by the legislature under collateral statutes, including under the Industrial Insurance. Therefore the HTCC assessment pertaining to OATS ankle surgery cannot be said to extinguish an injured worker's civil right to that procedure should the injured worker prove that procedure is "proper and necessary" as that term is defined under the Industrial Insurance Act. An HTCC assessment also cannot be used to deny an injured worker's free choice of surgeon (treating or attending medical provider) under the Act, but in effect that is exactly what will happen in every instance in which the HTCC disapproves of a procedure which constitutes the recognized and appropriate standard of care the surgeon wants to perform. To the extent the HTCC's 2012 OATS ankle assessment is now being accorded the status of a sweeping and general (clearly legislative) prohibition against injured workers claiming a right to that procedure, as well as to their choice of their own medical provider under the Act, that assessment is *void ab initio*.

4. THE HTCC ASSESSMENT AT ISSUE CONFLICTS WITH THE INDUSTRIAL INSURANCE ACT, SO CANNOT BE ENFORCED BY THE BOARD:

An agency may exercise only those powers granted to it by the Legislature. *Anderson, Leech & Morse, Inc. v. State Liquor Control Bd.*, 89 Wn.2d 688, 694, 575 P.2d 221 (1978). The power to abdicate supervisory control over an organ of the state may exist for a monarch, but it does not exist in our American or Washington state system of government. Instead, our executive branch officers and agencies are to "faithfully execute" the laws passed by the democratic

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legislature, unless those be stricken down by the courts. The same is true of the Board acting in its capacity as a quasi-judicial tribunal. It may only act based upon the powers granted to it by the legislature, and conversely, it is expected to faithfully discharge the duties assigned it by the state legislature. Neither the Department nor Board may abdicate statutory duties.

Here, it cannot be said that the Department properly exercises the Director's supervisory role under the Industrial Insurance Act to ensure that "in all cases" surgical treatment for injured workers is held to the "recognized standard of modern surgery," pursuant to RCW 51.04.020(4), by passively acquiescing or blindly following an HTCC non-coverage determination that outlaws the only procedure available to Mr. Lewis to keep him from being a cripple. This is especially true where, as here, the procedure sought by the injured worker and that worker's chosen physician happens to be approved by every insurance provider with an established coverage policy (demonstrating that the procedure constitutes the "recognized standard of modern surgery").

Nor does the Board faithfully discharge its own duties by deferring to an HTCC determination since pursuant to RCW 51.52.020 "the board may not delegate to any other person its duties of interpreting the testimony and making the final decision and order on appeal cases." Quite literally, the rule of *Joy* cannot be the proper rule of law in this case since to follow *Joy* is to ignore the duties and obligations assigned by the legislature to the Department and Board. These two above-listed statutes, one each for the Department and Board, are illustrative, not exhaustive of the types of conflict blind adherence to HTCC determinations causes with respect to the Industrial Insurance Act.

5. THE PD&O RESULTS IN MULTIPLE CONSTITUTIONAL INFRACTIONS.

Mr. Lewis is Denied Due Process.

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RCW 51.36.010(2)(a) provides injured workers a statutory property interest in receiving "proper and necessary" medical treatment "upon the occurrence" of any covered injury. The Board should so find. RCW 51.36.010(2)(a) also provides injured workers a statutory liberty interest in allowing the worker to choose medical care offered by the "physician or licensed advanced registered nurse practitioner of his or her own choice." The Board should also so find. Then, the Board should find that the provision of these rights within the Industrial Insurance Act would become progressively more meaningless should the HTCC gradually determine that state agencies need not cover any medical procedures other than those which are the oldest known, most basic, best understood by committee members, and/or least expensive[3]. In order to protect against this potential, progressive weakening of injured workers' property and liberty interests under the Industrial Insurance Act, a full and fair hearing in which all due process rights are observed is a prerequisite to any enforceable outcome for an injured worker's claim to medical care under the Act, even where there exists an HTCC assessment position.

As the United States' Supreme Court held in *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976)(internal citations omitted), the following settled principle must now be observed:

> "Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment…This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"

Because Mr. Lewis has not been allowed a fair hearing on the question of OATS ankle surgery, and because RCW 70.14.120(4) expressly provides Mr. Lewis an appeal right consistent with settled principles of Due Process, there is no real question here that Mr. Lewis should be

[3] This constitutes an obvious "inherent" conflict between the HTCC-authorizing statute and the Industrial Insurance Act which was not considered in ***Joy***. The ill-conceived decision in ***Joy*** needs to be overruled in its entirety or limited to the facts and circumstances presented therein.

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allowed to maintain his appeal on the merits to the Board, i.e., on whether or not the specific OATS ankle surgery recommended for him constitutes "necessary and proper" treatment in his established L&I claim. The full Board and courts should agree that the HTCC authorizing statute allows nothing less than the rationing of medical care, rightly or wrongly, by government agencies and that this is not a power of government which can ever be ruled exempt from challenge in court by those, like Mr. Lewis, who can exhibit proper standing. No person stands above the law. Nor organ of government is exempt from challenge in court.

The department has argued that an adverse HTCC determination can be challenged effectively during the actual assessment process, and that a past governor of this state thought the process of HTCC deliberations sufficient to that end, but those arguments fail to provide the "meaningful" time and manner Due Process contemplated by *Mathews v. Eldridge*. They also ignore the statutory right that is supposed to exist for adversely-effected individuals to appeal under existing law. There is no Due Process without the allowance of an appeal on the merits, allowing arguments both at law and equity (particular to the exact circumstances present), and taking place after such time as the petitioner has fair notice (s)he is being damaged.

Legislative Power is Misplaced:

The power to decide what healthcare will be covered and what healthcare will not be covered by state agencies, i.e., "healthcare rationing," is fundamentally a legislative power. In the HTCC, too much legislative power is concentrated without check or balance. There is no executive branch recall available to the people. The HTCC may reach coverage determinations which no legislature would claim to have made, including potentially the one at issue in this case. Accordingly, WA State Constitution, Art. II, Section 1 (legislative power, where vested) is violated.

Political Power is Misplaced:

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Without the right to petition the government for a redress of his grievances, and without the right to vote to recall members of the HTCC or the "politicians in charge," here there exists a misplacement of the political power of Washington state. See, WA State Constitution, Art. I, Section 1 "POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." The fundamental structure and function of the HTCC as an executive branch, "super legislature," essentially enacting healthcare rationing schemes that are beyond political reproach, is improper.

Judicial Power is Misplaced:

Only the legislature can determine the scope of claims and suits against the state of Washington and its agencies. See, WA State Constitution, Art. II, Section 26 "SUITS AGAINST THE STATE. The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." If the Board fails to allow Mr. Lewis to obtain a hearing on the merits in a claim against the Department's of Labor & Industries, this failure violates the legislative determination that the Board shall make judicial determinations of the rights of injured workers in Labor & Industries claims, not the HTCC, and that the Board will oversee the Department's conduct. In addition, the Director's own quasi-judicial powers are displaced.

Legislative Power is Misused:

The legislature may only amend the Industrial Insurance Act by changing the specific text of the Industrial Insurance Act, not by collateral legislation. *See*, WA State Constitution, Art II. Section 37 "REVISION OR AMENDMENT. No act shall **ever** be revised or amended by mere reference to its title, ***but the act revised or the section amended shall be set forth at full length***." (emphasis added). In other words, it is constitutionally impossible for even the legislature to revise or amend the operative sections of the Industrial Insurance Act, such as by changing the definition of what is "proper and necessary," merely because Chapter 70.14 RCW

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indicates that the Department of Labor & Industries shall "cooperate" with the purposes, processes, guidelines and standards of the Healthcare Authority "to the extent permissible under Title 51 RCW." RCW 70.14.150 (emphasis added). Nor is any other collateral reference contained within Title 70 RCW sufficient on its own to modify the provisions of the Industrial Insurance Act. Express amendment via revision to and restatement of full sections of the Act was to be legislated if the HTCC was to assume the Director's statutory authority for supervising the provision of "proper and necessary" healthcare to injured workers. The same is true of the Board's own authority, which here has never been amended via proper legislative enactment. By failing to recognize this principle in Washington's law, the Board commits error. The Board is to apply the law as written in the Industrial Insurance Act, nothing more and nothing less, while here the Board's PD&O of February 17, 2017 is divorced from both the Department's and its own authority/duty to decide.

Judicial Authority is Disregarded:

The Department's foundational assertion that the HTCC is statutorily empowered (i.e., given the franchise) to ration healthcare to injured workers on a non-appealable basis is fundamentally inconsistent with the Industrial Insurance Act's express delegation of primary authority to the Department's Director pursuant to RCW 51.04.020(2)(a)("powers and duties"), which states that "***the Director shall supervise the medical, surgical, and hospital treatment to the intent that it may be in all cases efficient and up to the recognized standard of modern surgery"*** (emphasis added)[4]. Under the Industrial Insurance Act it has always been and remains the Department which must determine what constitutes "proper and necessary" medical care in Industrial Insurance Act cases, not the HTCC. *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 285 P.3d 187 (2012), *rev. den.*, 2013 WL 830001 (2013) is wrong and abominable to the

[4] *Joy* did not even consider this argument.

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extent it is read to hold otherwise. The HTCC is not a court. It does not provide adjudication and decision-making processes in the ways of a court. It is not even quasi-judicial in its actions to the extent that it is not empowered to hear individual cases and resolve their differences upon their merits. It cannot therefore provide for equitable results "in all cases." The HTCC is incapable of exercising truly judicial power, including powers of equity, or providing Due Process in its (legislative) deliberations.

The Board is incorrect in determining that the HTCC's assessment substitutes for, or obviates the need for the Department's Director to independently discharge the Director's own quasi-judiciary statutory duties. The Director's duty under the Industrial Insurance Act is to determine and supervise the proper and necessary medical care to be provided each injured or sick worker based on the facts of that worker's industrial injury or occupational disease. The Director's duties under the Act are not limited to imposing or acquiescing in the imposition of a population-based medical decision-making model (as opposed to the patient-based model accepted by the Industrial Insurance Act). The Director is not constrained to merely "salute and execute" the dictates of the HTCC, but is an independent actor, as is the Board. Moreover, the Director is specifically limited by the text of RCW 70.14.155 and may not even cooperate with HTCC guidelines and processes (therefore its "assessments") whenever those are in conflict with the Industrial Insurance Act.

<u>An Improper Grant of Irrevocable Privilege, Franchise or Immunity Results:</u>

The HTCC cannot have the unreviewable, permanent power to decide what healthcare can be provided by participating state agencies as this is an improper grant of irrevocable privilege, franchise or immunity. WA State Constitution, Art. I, Section 8 "IRREVOCABLE PRIVELEGE, FRANCHISE OR IMMUNITY PROHIBITED" provides that the legislature shall

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pass no law granting an irrevocable privilege or franchise, which if the Department's position in its briefings were accepted, the HTCC's franchise would violate. This is because according to the Department, the HTCC can come to any arbitrary healthcare purchasing determination it might, but it's privilege and franchise to act in that tyrannical capacity is not subject to any challenge by the people, ever, whether through the executive branch or the courts. That proposition is plainly wrong to assert.

6. THE BOARD'S PD&O INCORRECTLY DEFINES "PUBLIC POLICY."

The Full Board should immediately correct the PD&O of February 17, 2017 to the extent that proposed decision incorrectly interprets case law to find a violation of public policy that does not exist. As previously briefed in this record by Mr. Lewis, allowing time loss benefits to be paid during periods of temporary total disability, even where occasioned by the injured worker undergoing surgery that has been HTCC-disapproved, does not violate any known public policy of this state, but rather, is exactly consistent with the established provisions of the Industrial Insurance Act.

When judging the facts of this case in the light most favorable to him, Mr. Lewis merely underwent the only surgical procedure known to science that can offer him a potential respite from living the rest of his life as a cripple. A CRIPPLE! That procedure is authorized by every insurance company that has produced relevant guidelines regarding coverage of the condition Mr. Lewis suffered has suffered because of his industrial injury. That procedure is recognized as the appropriate standard of surgical care. That procedure was recommended by all of Mr. Lewis' treating physicians, and opposed by no medical expert whatsoever. That procedure was not even rationally rejected by the HTCC as a result of a legally-proper assessment, and even then such an assessment would only be applicable to medical benefits not indemnity benefits (i.e., time loss or loss of earnings power payments) under the Industrial Insurance Act. No provision of either Titles 51 or 70, RCW suggests in the slightest that an injured worker should

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be punished and deprived of the Industrial Insurance Act's indemnity benefits for undergoing an HTCC non-approved procedure, and certainly NOT under the specific circumstances presented in this case. Accordingly, the Board's PD&O of February 17, 2017 is clearly incorrect as to its stated finding regarding a breach of "public policy." Instead, it has been and remains the public policy of Washington state to provide "swift and certain" relief to injured workers, which cannot be achieved by punishing injured workers for their good faith efforts to avoid becoming lifelong cripples. Here, that is all Mr. Lewis did. He did not violate public policy, and neither would it violate public policy to pay him the time loss benefits he seeks.

IV. CONCLUSION:

The PD&O of February 17, 2017 is incorrect as a matter of fact, law and public policy. In Docket 16 10479 the Board should rule that under its express statutory authority granted by the legislature, it cannot defer adjudication of that which constitutes "proper and necessary" to any other person or entity, including the HTCC, just as the Department's supervisor is prevented from doing so under both Titles 51 and 70, RCW. The Board should note that *Joy* does not preclude this finding because it is based on an argument not raised or resolved in *Joy*. The Board should rule that the HTCC's 2012 OATS ankle surgery assessment is void ab initio when applied to Mr. Lewis' Industrial Insurance Act claim for the reasons stated herein. The Board should also confirm generally that both property interests (medical care) and liberty interests (the right to choose one's own provider) are Industrial Insurance Act benefits which an injured or ill worker obtains once the worker's L&I claim allowance stands as final and binding. As a result, the Board should either remand this case to the Department to exercise the Department's original jurisdiction or should grant summary judgment to Mr. Lewis since only Mr. Lewis has supplied the Board's record with medical expert testimony.

In Docket 16 20879, the Board should find that the proximate cause showing necessary to obtain time loss benefits in Washington L&I matters does not require a showing of legal

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causation (a non-applicable tort law concept entirely born of the need to fairly place liability only on at-fault parties, which need of attribution never exists in the strict-fault world of Industrial Insurance claims). Mr. Lewis was required only to show a "but for" contributory cause in this case, by mere preponderance of the evidence, before payment of time loss benefits must be awarded from August 3, 2016 to October 3, 2016 following his OATS ankle surgery. Because he did that, and paying him is consistent with public policy, the Board must now reverse its Industrial Appeals Law Judge and order that the Department pay.

RESPECTFULLY SUBMITTED THIS 6TH DAY OF APRIL, 2017.

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