IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In re: JAMES R. LEWIS, Plaintiff vs. GLANT TEXTILES CORP AND DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, Defendants	**Cause No.: 17-2-13299-3SEA** **CLAIMANT'S BRIEF TO SUPERIOR COURT**

COMES NOW, Claimant, James R. Lewis, by and through his attorney of record, Spencer D. Parr, of Washington Law Center, and requests that Superior Court reverse the Department of Labor & Industries determinations of November 18, 2015 affirming denial of authorization for Mr. Lewis to undergo OATS ankle surgery and September 23, 2016 affirming denial of time loss benefits to Mr. Lewis while he was recovering from OATS ankle surgery.

This suit contends that the Court of Appeals, Division 2, incorrectly interpreted the legislative intent of chapter 70.14 RCW (hereafter "the HTCC law(s)"), as well as disregarded applicable constitutional principles, in its landmark decision of *Joy v. Dep't of Labor & Indus.*, 170 Wn.App. 614, 285 P.3d 187 (2012), *review denied*, 176 Wn.2d 1021, 297 P.3d 708 (2013), a courtesy copy of which is herewith provided. Division 2 recently doubled-down on its errors just days prior to the submission of this briefing in *Murray v. Dep't of Labor & Indus.*, Dkt. No. 48870-1-II (October 24, 2017), a copy of which is also herewith attached.

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The HTCC law is fundamentally flawed on constitutional grounds and must otherwise be disregarded in appeals to the Board of Industrial Insurance Appeals because the HTCC law never modified the Industrial Insurance Act nor changed the scope of the Board's appellate review. This suit asks Superior Court to re-adjudicate constitutional and statutory interpretation issues incorrectly analyzed and/or avoided by Division 2 in its *Joy/Murray* cases because those did not address particular facts and arguments presented in the instant dispute. This case provides factual proof that a medical care rationing committee of the Health Care Authority known as the "HTCC" acted in an ultra vires fashion to render an arbitrary and capricious denial of coverage determination for a medical procedure Mr. Lewis needed as a result of a work-related injury. Superior Court should be aware that at least one Court has previously sided with the position of Mr. Lewis (a copy of that non-precedential decision is herewith included[1]), that it is unconstitutional to deny judicial review to those denied healthcare authorizations pursuant to the 2006 authorizing law which has enabled the HTCC.

I. ISSUES BEFORE THE COURT:

1) Did passage of the 2006 HTCC law change the Industrial Insurance Act?
(No. Not addressed in *Joy* or *Murray*)

2) Was Division 2 correct in how it interpreted legislative intent in *Joy*?
(No. Division 2 misunderstood the Legislative scheme)

3) Does the statutory scheme resulting from Joy's interpretation deny constitutional due process to Mr. Lewis and other injured workers similarly situated?
(Yes. This case demonstrates arbitrary HTCC process not analyzed in *Joy* or *Murray*)

4) Does the HTCC law inherently conflict with the Industrial Insurance Act?
(Yes. *Joy* failed to recognize and *Murray* failed to address this point)

[1] On information and belief, the state entered a consent agreement with Judge Sund rather than appeal the implicated constitutional questions in Division 1. The Sund decision is not precedential but correctly states the law. The issues presented in this case are of grave public policy concern as they touch the substantial and procedural rights of tens of thousands of people.

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5) May the Department follow as presumptively correct the HTCC non-coverage determination for OATS ankle surgery in Mr. Lewis' case?
(No. The Department my not defer on matters it is statutorily commanded to decide)

6) Is the Board of Industrial Insurance Appeals Bound by HTCC non-coverage determinations?
(No. But neither is the Board capable of HTCC oversight)

7) Was it proper for the Department of Labor & Industries to deny time loss to Mr. Lewis merely because he elected to undergo a non-HTCC covered surgery?
(No. HTCC determinations have nothing to do with time loss eligibility)

II. STANDARD OF REVIEW:

A) Scope of Review When Deciding Industrial Insurance Act Claims.

RCW 51.52.115 provides that a Superior Court reviews a decision of the Board of Industrial Insurance Appeals ***de novo.*** *Littlejohn Construction Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994). The Board's findings and conclusions are prima facie correct and the burden of proof is on the party attacking them. RCW 51.52.115; *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987). The plaintiff must meet this burden by a "fair preponderance of credible evidence." *McClelland v. ITT Rayonier*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). At no time is the Superior Court bound by the Board's findings unless the Court "finds itself unable to make a determination on the facts because the evidence is evenly balanced…" *Layrite Prods. Co. v. Degenstein*, 74 Wn. App. 881, 887 880 P.2d 535 (*quoting Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 43, 395 P.2d 633 (1964), *review denied*, 125 Wn.2d 1011, 889 P.2d 499 (1994).

The Superior Court's review is limited to the issues and evidence properly included within the Board's proceedings. RCW 51.52.115; *Shufeldt v. Dep't of Labor & Indus.*, 57 Wn.2d 758, 760, 359 P.2d 495 (1961); *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 (P.2d 940 (1969).

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B) Historically, Special Rules Apply to Industrial Insurance Act Claims.

The Industrial Insurance Act (hereafter, "IIA" or "the Act") was written to provide sure and certain relief to injured workers. *Dennis v. Dep't of Labor & Indus.*, 109 Wn2d 467, 470, 475 P.2d 1295 (1987). **All doubts with respect to its interpretation are to be resolved in favor of the injured worker.** *Dennis*, 109 Wn.2d at 470 (emphasis added). The "overarching objective" of Title 51 RCW is to reduce to a minimum "the suffering and economic loss arising from injuries and/or death occurring in the course of employment." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001)(quoting RCW 51.12.010). This means ensuring that the workers' compensation system must "serve the goal of swift and certain relief for injured workers." *Id*.

In workers' compensation cases "special consideration" is given to the opinion of the treating physician. *Hamilton v. Dept. of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). This is at least in part because "[a]n attending physician who ha[s] cared for and treated a patient over a period of time is better qualified to give an opinion as to the patient's [condition] than a doctor who has seen and examined the patient once." *Ruse v. Department of Labor & Indus.*, 138 Wn.2d 1, 6 977 P.2d 570 (1999). An "attending provider" or "treating physician" is one who "actively treats an injured or ill worker." *Clark County v. McManus*, 185 Wn.2d 466, 469 fn 1., 372 P.3d 764 (2016), En Banc (citing WAC 296-20-01002). In *Clark County v. McManus*, our Supreme Court observed that the "*Hamilton rule*" in workers' compensation matters has been the long-standing public policy of this state. *Id*. at 476.

III. FACTS:

James R. Lewis was born on July 28, 1982. 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 ("IIA"). As a result of his ankle injury, Mr. Lewis

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filed Labor & Industries ("L&I") Claim No. AU-90361, which the Department of Labor & Industries ("Department") allowed as compensable by final and biding order of August 21, 2014.

According to the affidavit of Mr. Lewis' Attending Physician, Michael E. Brage, M.D., Mr. Lewis 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, Mr. Lewis' left ankle condition is referred to as osteochondritis dessicans ("OD"). Mr. Lewis had a "full-thickness" OD lesion. This means 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 OD 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. This was a "crippling" circumstance.

Initially, 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. These measures failed to restore his left ankle function or eliminate his pain. According to Dr. Brage, Mr. Lewis' OD would be a permanent and progressive condition if not surgically repaired. Dr. Brage therefore recommended OATS ankle surgery, noting that the only other available surgical option would be left ankle fusion. A fusion surgery is medically less-desirable as it would leave Mr. Lewis with comparatively reduced flexibility and range of motion in his left ankle versus the OATS procedure. In other words, Mr. Lewis would have remained partially-crippled with a fusion surgery, whereas he could obtain full flexibility and range of motion with the OATS procedure. Dr. Brage has indicated, without contradiction, that OATS ankle surgery represents the appropriate standard of medical care for the OD condition Mr. Lewis suffered as a result of his work-related injury.

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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. 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, as Mr. Lewis' articular cartilage was, it generally continues to deteriorate, i.e., become progressive. The OATS procedure prevents this progressive degeneration.

Based on Dr. Brage's recommendation, Mr. Lewis sought authorization from the Department for OATS left ankle surgery. The Department denied authorization by an order of September 16, 2015, and then it affirmed this denial by order of November 18, 2015. The Department's denials were based on its belief that OATS ankle surgery is not a medical benefit which can be provided under the IIA pursuant to a 2012 coverage determination of a committee known as the Health Technology Clinical Committee ("HTCC").

On August 3, 2016, Mr. Lewis underwent OATS left ankle surgery performed by Dr. Brage even while maintaining an appeal to the Department's denial of authorization. Mr. Lewis elected OATS ankle surgery because no other treatment alternative, including a fusion surgery, offered him the ability to escape being a cripple for the rest of his life. Meanwhile, Dr. Brage has certified that regardless of which surgical option were performed, Mr. Lewis would have been a temporarily totally disabled injured worker from August 3, 2016 to October 3, 2016.

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IV. THE HTCC LAWS:

In 2006, the legislature created the HTCC when enacting Chapter 70.14 RCW ("the HTCC laws"). The HTCC is a committee of eleven members, all healthcare providers of various types, appointed by the Health Care Authority (HCA) administrator. RCW 70.14.090. Only six of the committee's members need be actual practicing physicians, RCW 70.14.090(1)(a), although all must "use health technology[2] in their scope of practice." RCW 70.14.090(1)(b). The HTCC may "establish ad hoc temporary advisory groups if specialized expertise is needed to review a particular health technology…" RCW 70.14.110(2)(c). Nevertheless, any rotating "clinical expert selected to advise the committee" is denied from voting. There is no statutory mechanism for removing an HTCC member once appointed. There is no statutorily-prescribed mechanism for appealing an HTCC determination to the HCA, other administrative agency or the Courts. When the HTCC laws were originally passed and presented to the Governor by the Legislature in 2006, Governor Christine Gregoire vetoed a section providing for appeal and administrative review before the HCA[3], but she left intact all other pre-existing appeal rights.

Technology selection and assessment is technically only supposed to happen when there are: 1) concerns about its safety, efficacy, or cost-effectiveness, **especially relative to existing alternatives**, or significant variations in its use; 2) actual or expected state expenditures are high, due to demand for the technology, its cost, or both; **and** 3) there is **adequate evidence available to conduct the complete review**. RCW 70.14.100(1)(a)-(c) (emphasis added). The HTCC reviews health technologies (inclusive of surgical procedures[4]) to determine if, and under what

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[2] RCW 70.14.080(5) defines "health technology" to mean "medical and surgical devices and procedures, medical equipment, and diagnostic tests," excluding prescription drugs governed by RCW 70.14.050.

[3] Veto statement contained at HOUSE JOURNAL, 59th Leg., Reg. Sess., at 1587 (Wash.2006).

[4] RCW 70.14.080

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conditions, participating agencies may [generally] pay for those technologies. RCW 70.14.110(1). The determinations of the HTCC must "be consistent with decisions made under the federal medicare program **and in expert treatment guidelines**, including those from specialty physician organizations…**unless** the committee concludes…that **substantial evidence** regarding the safety, efficacy, and cost-effectiveness of the technology **supports a contrary determination**." RCW 70.14.110(3) (emphasis added).

RCW 70.14.100(4) requires **systematic** evidence-based assessment of a chosen technology's safety, efficacy, and **cost-effectiveness**[5]. (emphasis added). **The assessment must "[g]ive 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." RCW 70.14.100(4)(d) (emphasis added).

Each participating agency is generally expected to comply with HTCC determinations **unless the determination "conflicts with** an applicable federal statute or regulation, or **applicable state statute."** RCW 70.14.120(1)(a) (emphasis added).

At least superficially and with express reference only to participating agencies, HTCC-disapproved technologies "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)[6]. However, the very next subsection provides that "nothing" in the HTCC laws "diminishes an individual's right under existing law to appeal an action or decision of a

[5] The Industrial Insurance Act does not deny medical benefits based on cost considerations.

[6] This provision clearly conflicts with the IIA and is unconstitutional for disallowing injured workers a right to be heard regarding what medical benefits they are entitled to under the Act.

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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)[7].

The Department of Labor & Industries is a "participating agency," RCW 70.14.080(6), but is statutorily exempted from at least some of the duties of the other participating agencies under the HTCC laws. RCW 70.14.020[8] and RCW 70.14.155[9]. Specifically, the Department is to streamline its authorizations and make those consistent with the other participating agencies, but only "to the extent possible under Title 51, RCW." RCW 70.14.155[10].

The HTCC is subject to the Open Public Meetings Act of 1971, chapter 42.30 RCW, although it is not an "agency" subject to the Administrative Procedure Act (APA), chapter 34.05 RCW. RCW 70.14.090(5), (4).

V. PROCEDURAL HISTORY:

Mr. Lewis attempted to appeal the Department's authorization denial to the Board of Industrial Insurance Appeals ("BIIA"), but the Board declined to hear his arguments based on a belief it must follow the Division 2 opinion in *Joy*. The Department also denied time loss benefits to Mr. Lewis during the period of August 3, 2016 to October 3, 2016 because Mr. Lewis was supposedly then disabled, in the Department's view, only because of reasons unrelated to his established industrial injury. The Board sustained this finding also, without significant analysis,

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[7] This language literally constitutes fraud against unsuspecting members of the Legislature who, it must be presumed, believed injured workers would retain their appeal rights under the Industrial Insurance Act.

[8] The Department need not identify the availability and costs of nonfee for service providers as other participating agencies must.

[9] The Department may only "to the extent permissible under Title 51 RCW" cooperate with the insurance commissioner…as well as…adopt the processes, guidelines and standards to streamline healthcare administration pursuant to Chapter 48.165 RCW (setting uniform administrative procedures concerning health care services).

[10] Laws of 2009, Chapter 298 § 3.

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finding that Mr. Lewis had not provided the Department with evidence of a causally-related, temporary total disability during the contested time period. Mr. Lewis has appealed the denials of medical authorization for OATS ankle surgery, contending that the HTCC employed ultra vires methods to arrive at an arbitrary and capricious denial of coverage determination that is void ab initio. Mr. Lewis has appealed the denial of time loss benefits because he did provide the Board Dr. Brage's uncontested testimony in the form of an affidavit indicating Mr. Lewis would have been temporarily totally disabled regardless of which surgery he might have elected.

Mr. Lewis hereby restates, incorporates by reference and re-asserts all of his arguments presented to the Board of Industrial Insurance Appeals as those are contained within the Certified Appeals Board Record ("CABR") in BIIA Dockets 16 10479 & 16 20879. Please see in particular Claimant's 4/6/17 Petition for Review, CABR pp. 11-32; Claimant's 1/4/17 Reply brief, CABR pp. 182-203; and Claimant's 11/10/16 Response brief, CABR pp. 212-237.

VI. ANALYSIS:

1) Did passage of the 2006 HTCC law change the Industrial Insurance Act?

NO. Although denied consideration by Division 2 in *Joy*, Wash. Const. art. II, § 37 prohibits one act of the Legislature from revising or amending by mere reference or implication another act of the Legislature. Section 37 states specifically that "[n]o 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). Because the Legislature did not republish the IIA in full at the time it was passing chapter 70.14 RCW in 2006, it follows that chapter 70.14 RCW cannot be said to amend or change any portion of the IIA. *The Act survived intact*.

As our Washington Supreme Court instructed in *Washington Citizens Action of Washington 1000 v. State*, 171 P.3d 486 (2007)(internal citations omitted):

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> "…article II section 37 is intended both to ensure disclosure of the general effect of the new legislation and to show its specific impact on existing laws in order to avoid fraud or deception. Citizens or legislators must not be required to search out amended statutes to know the law on the subject treated in a new statute. Under article II, section 37, a new statute must explicitly show how it relates to statutes it amends. Thus, a significant purpose of article II, section 37 is to ensure that those enacting an amendatory law are fully aware of the proposed law's impact on existing law…"
>
> 171 P.3d at 491, and
>
> "…In sum, the purpose of article II, section 37 is to avoid misleading those voting on a proposed law by ensuring disclosure of the general effect of the new legislation and by showing its specific impact on existing laws."
>
> *Id*. at 495-496.

This Superior Court should please judicially notice that when passing the HTCC law into existence, the Legislature did not set forth the IIA in full in order to incorporate any inferred changes thereto. Because the Legislature was constitutionally required to do this if it intended the HTCC Law to modify or disrupt the Act, the absence of such publication is conclusive proof the Legislature held no such intent. Even had the legislature intended to so modify the Act, the failure to republish the Act still means it was not modified as a matter of law. From either perspective, passage of the HTCC laws in 2006 caused zero change to the Industrial Insurance Act. Neither did it disrupt or change the legal processes and procedures applicable to the Act. The *Joy/Murray* Courts in Division 2 failed to recognize this basic procedural requirement for passing new laws in Washington.

2) Was Division 2 correct in how it interpreted legislative intent in *Joy*?

No. The *Joy* Court failed to cite and analyze the purposes of the Industrial Insurance Act; failed to apply liberal construction to the Act; failed to observe that the Legislature did not republish or modify the Act when passing the HTCC law; failed to explain how passage of the HTCC law without such republication could nevertheless upset historic understandings,

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administration and appeals processes already in place under the Act; failed to conclude that its interpretation of the HTCC law would leave an unconstitutional statutory scheme devoid of due process for aggrieved injured workers like Ms. Joy (and now Mr. Lewis); misconstrued the nature of Governor Gregoire's veto of Section 6 in the HTCC laws passed in 2006; and failed to give plain meaning to the appeal rights preserved in RCW 70.14.120(4). In the end, the *Joy* Court's lack of attention to these constitutional and statutory interpretation details caused it to pronounce an unsustainable precedent. *Murray* then compounded the *Joy* errors.

Concerning legislative intent, the *Joy* Court failed to discern that the HTCC law as originally passed by the Legislature contained and intended **two separate appeal tracks**. The first was Under Section 6 of the bill, which Governor Christine Gregoire ultimately vetoed. Under this vetoed section, the administrator of the Health Care Authority ("HCA") was to "establish an open, independent, transparent, and timely process to enable patients, providers, and other stakeholders to appeal the determinations of the [HTCC][11]." Individuals such as Mr. Lewis could use this first track to challenge an HTCC determination for its propriety and sufficiency ***before the HCA***. Mr. Lewis' arguments to the BIIA asserting ultra vires actions of the HTCC leading to a non-coverage determination that is void ab initio would have been, as the Legislature intended, properly appealed to the HCA but not the BIIA, absent the veto.

Then, under Section 5(4) of the bill, a provision which ultimately became RCW 70.14.120(4), an aggrieved individual could still *also* use existing appeal rights to separately challenge the [anticipated acquiescence] decisions issued by participating agencies, of which just one is the Department of Labor & Industries. Here and in *Joy*, that would have meant a second appeal track before the BIIA to determine if a Department denial of authorization were truly appropriate under the IIA. The entirety of RCW 70.14.120 refers only to [participating] agency

[11] This is explained in *Joy*, 285 P.3d at 192.

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compliance, so intended no impact on the BIIA. Accordingly, RCW 70.14.120(3) may have theoretically persuaded the Department to follow an HTCC coverage determination, but an appeal therefrom could still be taken to the BIIA under RCW 70.14.120(4).

Governor Gregoire's veto was clearly not aimed at eliminating all appeal rights challenging the propriety of an HTCC assessment, as the Court in *Joy* mistakenly believed, but only at eliminating one of the two possible appeal tracks an aggrieved individual might elect simultaneously. Accordingly, her veto only eliminated one of the two available appeal tracks. In fact, Governor Gregoire's veto message quoted accurately by *Joy* (but yet misinterpreted) makes clear that she didn't intend to deny all judicial process; but only that which she considered less necessary and more likely redundant. She, like the Court in *Joy/Murray*, apparently thought the chances of arbitrary determinations by the HTCC were slight if the HTCC followed the instructions of the Legislature, but unlike the Court in *Joy/Murray*, she intended to preserve appeal rights for individuals should an HTCC determination be demonstrated incorrect in a particular case. The Department might be persuaded by an HTCC assessment, but the BIIA would not be bound. Meanwhile, the present case proves that reliance upon multiple instructions and standards from the Legislature is no sufficient protection against HTCC tyranny.

Somehow the Court in *Joy* actually misinterpreted Governor Gregoire's veto statement that ***"I strongly support [the bill] and particularly its inclusion of language that protects an individual's right to appeal"*** as meaning no appeal rights were preserved! The *Joy* Court compounded its error by failing to observe that Governor Gregoire aimed her veto only at what she called "**an additional appeals process** for patients, providers, and other stakeholders who disagree with the coverage determinations of the [HTCC]." (emphasis added). Governor Gregoire called the anticipated appeals process before the HCA an "additional" appeals process because she understood that in the case of injured workers, they would still be able to appeal the [anticipated acquiescence] decisions of the Department to the BIIA.

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3) Does the statutory scheme resulting from Joy's interpretation deny constitutional Due Process to Mr. Lewis and others similarly situated?

YES. If *Joy* is allowed to stand, injured workers may be deprived of both liberty and property interests without due process of law. For at least a half century prior to 2006, RCW 51.36.010 has provided these workers a statutory property interest in receiving "proper and necessary" medical treatment ***"upon the occurrence"*** of any covered injury[12]. RCW 51.36.010(2)(a) currently provides both this property interest and a statutory liberty interest by allowing the worker to choose medical care offered by the "physician…of his or her own choice." Critically, under RCW 51.36.010 no specific property interest "vests" upon the occurrence of an injury, but that's when at least the general interest vests.

RCW 51.52.050(2)(a) states that **"[w]henever** the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the Board." (emphasis added). These rights were in no way changed, amended or diminished by passage of the HTCC laws because no republication of the IIA occurred simultaneously with that passage. Wash. Const. art. II, § 37. RCW 70.14.120(4) also expressly preserved Mr. Lewis' appeal rights intact.

Previous to the HTCC laws being enacted in 2006 an injured worker could request actual reconsideration of the Department or appeal any adverse coverage determination to the BIIA pursuant to RCW 51.52.050(2)(a), so after passage of the HTCC laws, the exact same procedural options must remain because the IIA didn't change.

Mr. Lewis wishes to challenge the HTCC determination that OATS ankle surgery is outlawed for coverage under the Industrial Insurance Act, essentially preventing his access to the only available non-crippling medical treatment and constraining his choice within the pool of

[12] True since at least the publication of The Laws of 1959, chapter 256 § 2.

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available ankle surgeons (i.e., requiring him to choose a surgeon who will perform something other than the standard-of-care OATS ankle surgery). The Department has made a decision to enforce the HTCC's non-coverage determination without "supervising" that result. Mr. Lewis is aggrieved by the Department's acquiescence for the following reasons. These reasons certainly allege an abuse of discretion by the HTCC, but they also go beyond that abuse:

1) The HTCC allowed a non-EPC entity with zero medical doctors on staff to conduct the OATS ankle assessment contrary to the requirement of RCW 70.14.100(4)(a) despite the fact that the need for **clinical** expertise is emphasized throughout the statutory scheme. See, e.g., RCW 70.14.100(1)(a)("practicing physicians" comprise at least six HTCC members; RCW 70.14.100(1)(b)(remainder of members must be "practicing licensed health professionals who use health technology in their scope of practice"); RCW 70.14.090(2)(committee to obtain advise from "clinical expert"); and RCW 70.14.090(1)(HTCC is itself called a "clinical committee").
2) The HTCC excluded scientific evidence known to exist in a national institutes of health database from its review and insisted upon such a high evidentiary standard no lower level evidence was considered. It therefore failed to conduct the "systematic" evidence-based assessment conceived and required by RCW 70.14.100(4);
3) The HTCC failed to credit the most valid and reliable evidence, here the evidence which showed OATS ankle surgery outcomes were similar to those for OATS knee surgery, which the HTCC approved. This was contrary to RCW 70.14.100(4)(d);
4) The HTCC failed to utilize specialized expertise on OATS ankle surgery pursuant to its authority under RCW 70.14.110(2)(c);
5) The HTCC failed to make a decision consistent with existing expert treatment guidelines including those maintained by every single insurer with a policy, contrary to the intent of RCW 70.14.110(3); Even if the HTCC wasn't expected to follow such

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recognized health care best practices as offering OATS ankle surgery to prevent a full thickness osteochondritis dessicans lesion from crippling an injured worker, the Industrial Insurance Act intends such "high quality medical care" and states that injured workers "deserve" it. RCW 51.36.010(1).

6) The HTCC failed to make well-supported findings that an alternative to OATS ankle surgery exists for cases like Mr. Lewis' OD condition pursuant to RCW 70.14.100(1)(a);

7) The HTCC failed to specify and rely upon "substantial evidence" when making an adverse coverage determination regarding a technology covered by all known insurers with a policy, contrary to the rule of RCW 70.14.110(3).

8) The HTCC pronounced a denial-of-coverage assessment where there was inadequate evidence presented to the committee for a complete review pursuant to the requirement of RCW 70.14.100(1)(c);

9) There is no other surgery other than OATS ankle surgery which constitutes "proper and necessary" care under the circumstances of Mr. Lewis' injury using the definition of "proper and necessary" which has existed since virtually the inception of the IIA;

10) Mr. Lewis is entitled to have the Department, as well as any and all review courts adjudicate his right to medical benefits under the IIA in a manner that employs the *Hamilton rule*, a position fundamentally more considerate of his interests than would be possible using only a writ of certiorari merely to challenge the HTCC's assessment.

11) In acquiescing to unsound or ultra vires HTCC coverage determinations, the Director fails in his/her duty to "supervise the medical, surgical, and hospital treatment [of the injured worker] to the intent that it may be in all cases efficient and up to the recognized standard of modern surgery." RCW 51.04.020(4).

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Thus, Mr. Lewis has legal, equitable and medical arguments he wished to have heard on appeal to the BIIA, not just an abuse of discretion claim against the HTCC. The *Murray* Court conceived of due process on medical coverage questions as a thing which arrives at its end once the HTCC speaks rather than as a thing which springs into existence for injured workers under long-standing law "upon the occurrence" of a covered injury.

The *Joy/Murray* analysis implicitly treats the word "whenever" in RCW 51.52.050(2)(a) as if that word is consumed by an absolute exception nowhere published within the text of the IIA. Under *Joy/Murray*, even arbitrary and capricious coverage determinations of the HTCC require strict BIIA and higher court adherence. No meaningful appeal is allowed on the question of what constitutes "proper and necessary" medical care.

By contrast, the United States Supreme Court has stated, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 332-333 (1976)(internal citations omitted). Held up to this standard, the *Joy* Court's assertion that injured workers can still appeal, just not the all-important issue of what medical care they might receive under the IIA is an abomination of reason.

The opinion and expertise of Dr. Brage are not irrelevant, as the *Joy/Murray* analysis functionally insists. In fact, the only way to achieve a meaningful hearing of Mr. Lewis' present complaints is by deeply considering his physician's recommendations. Otherwise, there's no analytical foil to the HTCC's dictate! Neither is it reasonable to say that the Legislative delegation of authority to the HTCC extends as far as snuffing out any judicial review that might look to the actual merits of an injured worker's specific claims for medical treatment as that notion violates Separation of Powers doctrine.

In response to the excessive delegation of Legislative authority argument, the *Murray* court responds by correctly citing, then blatantly misapplying the two-factor rule of *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972). That rule

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provides 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." According to *Murray*, individuals have only just the right to challenge the arbitrariness of an HTCC determination via writ of certiorari, but that position misapprehends the extent of "discretion" held by the HTCC. The HTCC's discretion does not extend to redefining, even just incrementally over time, the medical coverage benefits ultimately available under the Industrial Insurance Act. The HTCC is not statutorily aggrandized to the point it may supplant the Director's powers and duties to "supervise" medical care provision under the Industrial Insurance Act. Nor is it statutorily aggrandized to the point of supplanting the BIIA's role as the agency having oversight and appellate jurisdiction over actions of the Department. Even the HTCC must follow the rule that an agency may only exercise those powers granted to it by the Legislature. *Anderson, Leech & Morse, Inc. v. State Liquor Control Bd.*, 89 Wn2d 688, 694, 575 P.2d 221 (1978).

Also unstated in the *Murray* analysis is the further problem that any challenge of the HTCC's supposed super-discretion to preempt all other agencies and courts means that the preponderance of evidence standard otherwise applicable to medical coverage disputes in Industrial Insurance Act appeals must be suppressed in favor of an abuse of discretion standard that means an injured worker will have a nearly-impossible burden and rare prospects for success in the courts. Judicial review will become quite fleeting, not meaningful. This result is simply incompatible with a liberally-construed, remedial body of law historically intent on providing "swift and certain relief" to injured workers.

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4) Does the HTCC law inherently conflict with the Industrial Insurance Act?

YES. Even the legislature and Governor understood when enacting the HTCC laws that there would be inherent conflicts between the administration of HTCC laws and the Industrial Insurance Act. Indisputable proof of that is found in Governor Gregoire's veto statement praising the preservation of appeal rights. These would not be necessary were there never to be conflicts as between the HTCC laws and the IIA. Additional proof of inherent conflict is found in RCW 70.14.155, which provides that the Director of Labor and Industries may only cooperate with the HCA and HTCC to the extent this would be "permissible under the Industrial Insurance Act." When conflicts arise, the mitigation mechanism is that the Director of Labor & Industries must overrule the HCA, including its committee known as the HTCC. Those words in RCW 70.14.155 are not superfluous and cannot be interpreted in a way that fits the *Joy/Murray* utopian view of perfect harmonization between the HTCC law and the Industrial Insurance Act.

Meanwhile, Governor Gregoire's veto statement striking down appeals to the HCA but (as applied to the facts of this case) preserving them to the Board of Industrial Insurance Appeals further proves it is impossible to harmonize the absolute dictate of an HTCC determination as conceived by *Joy/Murray* with any right of reconsideration or appeal in RCW 51.52.050(2)(a). Division 2 also neglected the Department's own procedural rights pursuant to RCW 51.52.060(4)(a), providing that if an injured worker has appealed to the Board, the Department may modify, reverse, change or hold in abeyance its decision, all of which rightful options of the Department are gibberish if the Department must do only as the HTCC commands.

If we understand the HTCC law as it has been interpreted by the *Joy/Murray* Courts, then the "Supervisor" of Industrial Insurance is reduced to a mere servant, faithfully executing against injured workers every adverse coverage determination promulgated by the HTCC regardless of merits. By contrast, the statutory command of RCW 51.04.020(4) is that the Director of Labor & Industries ensure that "in all cases" surgical treatment for injured workers is held to the

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"recognized standard of modern surgery." All cases include those in which the HTCC has acted arbitrarily such that the Director must no longer participate by acquiescing. All cases include those in which the recognized standard of care has changed since the most recent HTCC non-coverage determination. All cases include those which are atypical, complex and/or do not have textbook presentations amenable to large-scale scientific studies. The "recognized" standard of modern surgery is not that which is established by the HTCC (largely for cost-containment purposes), but rather, that which is established in the relevant medical community as the standard of "modern" surgery. We know this because the Legislature's use of the word "recognized" pre-existed the HTCC laws in RCW 51.04.020(4) just as the definition of "proper and necessary" in RCW 51.36.010(2)(a) predated the existence of the HTCC! The "recognized standard of modern surgery" in the IIA did not suddenly become the cheapest or most common surgery our HCA's cost-containment committee can identify. Wash. Const. art. II, § 37.

To say that somehow the HTCC law is compatible with how the Industrial Insurance Act was written and previously-intended with respect to the Director's duties and the medical benefits intended by the Act is nonsensical. A "supervisor" is not a "subordinate" who defers to some other person or organ of government. The Director cannot remain the true "Supervisor" of Industrial Insurance and also be made to cow tow even to the most arbitrary HTCC determination.

Similarly, the BIIA's statutory and historical authority (such as pursuant to RCW 51.52.020) to take testimony and hear appeals in medical coverage disputes is completely meaningless if the Board must itself simply defer to HTCC coverage assessments. And what about the special rules that used to apply in workers' compensation matters as a matter of longstanding public policy? Liberal construction? Swift and certain relief? All condemned to the dictates of a medical care rationing committee, the members of which aren't even impeachable, recallable or subject to other Democratic removal process. Preposterous!

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Joy was clearly ***not*** a deeply considerate decision even if *Murray* self-congratulates and says so. Inherent conflict exists as between the HTCC law and the Industrial Insurance Act as they each clearly intend different things. The spirit of the HTCC law is medical care rationing and cost containment while the spirit of the Industrial Insurance Act is to rush swift and certain relief to an injured worker even if the cost of "proper and necessary" surgery may be quite high in a given case. The spirit of the HTCC law (as improperly construed by *Joy/Murray*) is to literally divest the Department of Labor & Industries of its original jurisdiction and the Board and Courts of their appellate jurisdiction while literally handing the power of life and death to a committee of politically-correct medical professionals, none of whom is necessarily an expert in the technology their panel is to assess.

5) May the Department follow as presumptively correct the HTCC non-coverage determination for OATS ankle surgery in Mr. Lewis' case?

No. If the Supervisor if Industrial Insurance is to meet the duties set forth in the Industrial Insurance Act, to ensure that "in all cases" the "proper and necessary" medical care is provided to injured and ill workers pursuant to RCW 51.04.020(4), then the Director must independently evaluate and decide "every case" just as (s)he was responsible to do before the HTCC law was enacted. An HTCC determination might be considered persuasive for the Director, but only if the HTCC's assessment precisely addresses the facts of an injured worker's medical condition; the HTCC's assessment is up-to-date with modern medicine standards; the HTCC's assessment was truly systematic and properly-conducted; and the HTCC's assessment is consistent with the benefits which are to be provided under the IIA. Please recall that although the Director of Labor and Industries is to cooperate with processes and guidelines adopted by the HCA, pursuant to RCW 70.14.155 the Director is exempt from doing so whenever this would not be "permissible under Title 51, RCW."

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6) Is the Board of Industrial Insurance Appeals Bound by HTCC non-coverage determinations?

No. Just as the enactment of the HTCC law did not change the Director's jurisdiction, duties or discretion under the Industrial Insurance Act, it did not change the Board's jurisdiction or duties either. Wash. Const. art. II, § 37. Instead, those were expressly preserved. RCW 70.14.120(4). Accordingly, where the Department denies medical coverage under the Act, the Board must hear and adjudicate on the medical merits the injured worker's timely appeal, regardless of whether a topical HTCC determination has already issued. The Board is to apply the rules and processes normally available as if no HTCC determination has been made. For example, the Board must continue to apply the *Hamilton rule*, which it obviously cannot do it if must simply ignore the position of the treating surgeon because the HTCC has spoken.

In addition, Mr. Lewis has raised before the BIIA (and hereby preserves and restates) in this litigation multiple complaints about the inadequacy of the HTCC process applicable to his case. He has argued that these render the HTCC's non-coverage determination for OATS ankle surgery void ab initio. These are arguments which the Board need not address so long as the Board takes the position that it will adjudicate medical coverage disputes under the Act as if no HTCC determination has been made. In process before the Board, an HTCC determination would be various degrees of hearsay, irrelevant, and likely to confuse a trier of fact since predicated significantly upon a cost-savings standard which is distinct and likely to be less liberal than the pure "modern medicine" standard applicable "to all cases" arising under the IIA.

Moreover, each HTCC assessment amounts to a population-based medicine approach to providing medical insurance coverage, whereas the "swift and certain" relief required of the Industrial Insurance Act demands a more patient-based approach, ***specifically*** while paying "special consideration" to the opinion of the treating physician(s). Treating physician opinions are entitled to this consideration under the IIA for reasons which clearly cannot be attributed to

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voting members of the HTCC, far removed from the particular circumstances of a given worker's injury or illness and perhaps not even an expert in treating the worker's resulting medical condition(s) at all. For these reasons and others, to include the fact that the Board is likely not the correct venue in which to raise disputes concerning HTCC assessment adequacy, the Board should be instructed to simply treat HTCC assessments as non-existent.

7) Was it proper for the Department of Labor & Industries to deny time loss to Mr. Lewis merely because he elected to undergo a non-HTCC covered surgery?

RCW 51.32.090(1) unambiguously provides that injured workers are to be paid time loss benefits during any period "so long as the total disability continues." These and all other workers' compensation benefits are meant to support the "welfare" of injured workers and their families, "regardless of fault." RCW 51.04.010. The IIA seeks "best outcomes for injured workers," RCW 51.04.062; and to "reduce to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment," RCW 51.12.010; as well as to "prevent disability…and loss of family income." RCW 51.36.010. The Act also seeks "to restore the injured worker as nearly as possible to the condition of self-support as an able bodied worker." RCW 51.32.055 (1). For these reasons, it is clear Mr. Lewis is owed time loss benefits during his period of temporary total disability, from August 3, 2016 to October 3, 2016. To treat Mr. Lewis' claim for time loss otherwise under the facts of this case is to improperly construe the industrial insurance act, a remedial statute, against him and contrary to the Act's purposes.

VII. CONCLUSION:

Superior Court should enter judgement in favor of Mr. Lewis, finding that OATS ankle surgery is "proper and necessary" treatment for his osteochondritis dessicans lesion. Judgment should also be entered that Mr. Lewis is entitled to time loss benefits during a period of temporary total disability which he suffered from August 3, 2016 to October 3, 2016 while undergoing that

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surgery. Superior Court should also find that nothing in chapter 307, Laws of 2006 requires the Department to cooperate with or adopt improperly-conducted HTCC reviews; the Director of Labor and Industries has his own statutory duties to determine what is "proper and necessary" care under the Industrial Insurance Act (independent of HTCC coverage assessments); the Director may not comply with HTCC coverage determinations if those are inconsistent with the purposes of Title 51, RCW; the standard for medical benefits coverage under the Industrial Insurance Act predated the creation of the HTCC; and no amendments were made to the Industrial Insurance Act when the HTCC laws were enacted. Accordingly, Superior Court should find that both the original jurisdiction of the Department and the appellate jurisdiction of the Board of Industrial Insurance Appeals remain whole and unaffected by passage of chapter 70.14, RCW. Finally, because Governor Gregoire vetoed a provision of the HTCC laws providing for challenges to HTCC determinations before the HCA; such challenges remain a requirement of constitutional due process for those who are aggrieved; and yet the BIIA is not likely the proper forum or venue in which to mount most such direct assaults on HTCC assessment validity; evidence as to the existence, contents and nature of an HTCC assessment may properly be excluded in BIIA matters as irrelevant, hearsay or likely to confuse the finder of fact.

Mr. Lewis hereby seeks an award of attorney fees pursuant to RCW 51.52.130(1) and RAP 18.1(a) should he prevail on this appeal.

RESPECTFULLY SUBMITTED THIS 30TH DAY OF OCTOBER, 2017.

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