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** **PLAINTIFF'S SUPPLEMENTAL BRIEF**

COMES NOW, James R. Lewis, per Attorney Spencer Parr of Washington Law Center to provide supplemental briefing regarding his claims that (1) the Department's argumentation regarding Wash. Const. art. II, § 37 is incorrect; (2) Mr. Lewis is entitled to time loss benefits from August 3, 2016 through August 26, 2016; and (3) that Wash. Const. art. II, § 37 renders Chapter 70.14 RCW unconstitutional. In taking these positions, Mr. Lewis relies on prior briefings before this Superior Court and his oral arguments provided on January 19, 2018 for his statement of the wider facts and issues. In particular he also relies upon the Certified Appeals Board Record ("CABR") pages 240-247, i.e., the affidavit of Attending Physician, Michael E. Brage.

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I. THE DEPARTMENT'S ARGUMENTS IN ITS SUPPLEMENTAL BRIEFING ARE INCORRECT:

A. The Department's Analysis Forgets the Actual Wording of the Constitution:

When doing constitutional analysis, its words and phrases are to be interpreted using the common meanings that will be understood by voters. *United States v. Sprague*, 282 U.S. 716, 731 (1931). Wash. Const. art. II, § 37 states plainly as follows:

> **"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).

The Department's briefing treats the very clear wording of this constitutional amendment as if it's of no constitutional concern at all. "No act" may be revised or amended by mere reference. Each amended act must be set forth at full length. These foundational rules would be clear in the mind of each voter, yet the Department urges Superior Court to adopt an understanding by which the rule of Wash. Const. art. II, § 37 is swallowed by exception. The Department argues that change after change imputed to the Industrial Insurance Act as a result of the passage of Chapter 70.14, RCW is legally meaningless, but that argument is without merit.

B. The Department Claims No Deception Of The Legislature Occurred, But That's Not Provable Nor Automatically True.

The Department argues that no deception or fraud on the legislature is evident (Supp. Brief. Pg. 1), but that is not sufficient to save the constitutionality of Chapter 70.14, RCW. The Department's argument is conclusory and forces the Court to speculate where it should not.

For example, RCW 70.14.120(1)(a) provides that compliance by the Department of Labor and Industries with an HTCC assessment is not required where that assessment conflicts with the Industrial Insurance Act. As will be argued later in this briefing, the Industrial Insurance Act is based upon individualized healthcare assessments, not population-based assessments. The

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Industrial Insurance Act allows the injured worker his/her choice of a physician under RCW 51.36.010, but each HTCC assessment against coverage makes physician choice irrelevant. That's a big change in healthcare rights for injured workers. Why hasn't the Industrial Insurance Act been republished with this amendment made expressly? It cannot be reasonably argued that the choice of an orthopedic physician versus a chiropractor (for example) is an inconsequential choice because the ability to choose one's own care provider is likely to have implications on the very type of care an injured worker receives. Thus, if an injured worker is not allowed to have a procedure offered only by qualified surgeons as a result of an HTCC vote, his/her Industrial Insurance Act right to choose an attending provider is virtually obliterated. Nowhere in Chapter 70.14, RCW is there an acknowledgement by the Legislature that said body of law is intended to limit injured workers' provider choice, but that is it's obvious as-applied consequence.

RCW 70.14.120(3) then says HTCC decisions are not subject to "proper and necessary" review. Mr. Lewis can agree with the Department's position that this phraseology can apply to other laws, not just the Industrial Insurance Act, but that only just increases the chance that individual Legislators may have failed to understand its implications upon Title 51 specifically. Use of "proper and necessary" in myriad ways doesn't decrease the chance of mistake or misperception by the voting Legislators, it increases it. The Department's admissions that this language is used in other laws only just proves Chapter 70.14 RCW is not a complete act.

Finally, RCW 70.14.120(4) states that nothing diminishes an individual's rights to appeal under existing law, but a fair reading of the ***Joy*** decision provides that this language must be interpreted by holding that every HTCC-disapproved procedure is automatically outside not only the Industrial Insurance Act's coverage, but also its appeal processes as well. Yet, if this is true, how can we explain that the Department is itself supposed to be able to non-comply with HTCC assessments under RCW 70.14.120(1)(a)? How are the voters to understand this?

The Department's brief fails to argue, because it is legally "unintelligible," how the Department can at the same time be exempted from implementing an HTCC assessment under

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RCW 70.14.120(1)(a); yet bound to "look away" and not follow the Industrial Insurance Act's traditional rules on what constitutes "proper and necessary" medical care under RCW 70.14.120(3); and all the while expect that existing appeal rights will remain undisturbed under RCW 70.14.120(4) because the Industrial Insurance Act's coverage isn't what's being invoked when an injured worker asks for curative treatment causally-relate to an industrial injury. The *Joy* Court read RCW 70.14.120(3) as if it did not conflict with RCW 70.14.120(4) so long as each HTCC non-coverage assessment was given super-legislative status (meaning not even subject agency analysis or higher court review), but that result still makes no sense and is not explained by either the *Joy* or *Murray* decisions if under RCW 70.14.120(1)(a) each agency is allowed to be in non-compliance with an HTCC assessment whenever that assessment conflicts with the law that agency is charged with implementing.

In other words, conflict between the Industrial Insurance Act and some HTCC assessments is legislatively presumed a possibility under RCW 70.14.120(1)(a), but following *Joy*'s resolution of the claimed conflict between RCW 70.14.120(3) and (4) renders that presumption in RCW 70.14.120(1)(a) "unintelligible."

The statutory scheme set forth at Chapter 70.14, RCW is legally "unintelligible" because any casual reader, whether Legislator or citizen, cannot discern the citizens' rights by looking to the plain language of each section. The confluence of these provisions under RCW 70.14.120 is mind-numbingly complex even before it is used as an overlay to the Industrial Insurance Act. This complexity alone invokes the prudence and protection of Wash. Const. art. II, § 37.

The Department argues by necessity that there was no fraud or deception of the Legislature, but that argument is unprovable and more likely than not false based on the extremely complex structure of RCW 70.14.120. This case does not present a straight-forward situation like where a three-strikes rule was imposed as an overlay on the criminal code in *Manussier* or where restrictions to the method of killing pestilent wildlife was adopted as an

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overlay to a prior law allowing ranchers to kill or trap dangerous animals in *Citizens for Responsible Wildlife Management*. The Department's case law citations prove nothing.

C. **The Department's Restatement Of Statutory Directions For The HTCC Adds Nothing To the Constitutional Analysis:**

The Department argues (Supp. Brief., pg. 2-4) that Chapter 70.14, RCW has plenty of direction from the legislature, so in effect, the legislature's meaning was sufficiently clear that there is no constitutional defect. This argument lacks merit because constitutional defect is nevertheless found whenever one law is used as an overlay on a prior law and the act of utilizing that overlay renders "unintelligible" the meaning of both acts when read together. Even if Superior Court may think it knows what the Legislature intended by looking at Chapter 70.14, RCW, because the Court must also review the Industrial Insurance Act using understandings which are not historically attached to that Act, and the Legislature failed to republish Title 51 with amendments set forth clearly therein, Wash. Const. art. II, § 37 is violated.

D. **The Department's Argues That Mr. Lewis' Good Surgical Outcome is Legally Meaningless, But This Proves A Further Conflict In Law.**

The Department argues (Supp. Brief., pg. 12) that Chapter 70.14, RCW creates no substantive change in the goal of the Industrial Insurance Act to return each injured worker to his/her most able-bodied condition. The Department argues that the fact Mr. Lewis had a good result from OATS ankle surgery cannot be considered in this litigation, even though injured workers are currently allowed to challenge the Department's refusal to pre-authorize surgery by first undergoing the recommended surgery and then showing that it yielded a curative outcome. Once again, the unintelligibility of RCW 70.14.120(1)(a) (compliance with HTCC assessment not required), here in direct conflict with RCW 70.14.120(3) (HTCC-disapproved procedures not subject to "proper and necessary" analysis) and RCW 70.14.120(4) (no appeal rights under existing law are diminished) is demonstrated, because the liberally-construed Industrial

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Insurance Act is now changed to a strictly-constructed proposition where even real medical facts and outcomes are apparently now to be ignored. Did any Legislator vote for a scheme in which even where an injured worker could prove via clear and convincing evidence of curative benefit received from a HTCC non-approved procedure, that such an outcome must be ignored under the liberally-construed Industrial Insurance Act?

E. **The Department Takes Implied ("Incidental") Permission Too Far.**

The Department argues that the overlay of Chapter 70.14, RCW on the Industrial Insurance Act is permissible because "implied amendments are allowed" (Supp. Brief, pg. 13). But see the plain text of Wash. Const. art. II, § 37. "No act may be revised or amended by mere reference" or implication. The Department then argues that there's no change of constitutional magnitude here because the Department also is allowed to enact other non-appealable rules, such as is provided at RCW 51.04.030 (physicians may not appeal reimbursement rates) and RCW 51.48.040 (employers may not contest correctness of tax assessments without producing the employer's own records). Those arguments are inapplicable and off-topic. Nevertheless, Mr. Lewis will address them briefly for illustration and contrast.

Physicians don't need Due Process appeal rights to Department reimbursement rates because Physicians contractually agree to accept whatever rate the Department pays for a given medical procedure; and if they don't want to accept that rate, they can simply practice medicine without treating injured workers. By contrast, every injured worker is required to rely solely upon the Industrial Insurance Act for medical treatment. RCW 51.04.010.

Meanwhile, a requirement to produce a prima facie case as a precondition to maintaining an appeal of a tax assessment is a reasonable rule of appellate procedure whereas here we are looking at a total refusal to acknowledge a prima facie case even if it's present (that OATS ankle surgery helped Mr. Lewis). The voluntary non-production of proofs is thereby equated in the Department's argument with the non-reviewability of proofs. This is non sequitur.

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In the end, this case demonstrates that Chapter 70.14, RCW goes too far. **The Industrial Insurance Act is a pure function of the Legislature's duty under Wash. Const. art. II, § 35** ("The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of same"). This pure duty of the Legislature is not to be exercised by inference or proxy via HTCC assessments. Wash. Const. art. II, § 37. The HTCC may exercise some legislative power, but it is not the Legislature and it is not constitutionally proper for the HTCC to change the Industrial Insurance Act. Art. II, § 37 prohibits this.

The Industrial Insurance Act is no average law; it is among the most historically-sacred and constitutionally-mandated of all laws of this state. The Department argues that the Industrial Insurance Act can be amended by the numerous implications at issue in this case, and it defends provision after provision of change via collateral law despite the fact that these clearly aggregate to a wholesale modification not adopted and republished within the Industrial Insurance Act itself. For example, the *Hamilton* rule is treated in the Department's supplemental briefing (see at pg. 16) as a meaningless change despite the fact that this rule is the recognized public policy of this state. The Department's briefing on the *Hamilton* rule is a clear concession that Chapter 70.14 RCW has changed the interpretation of the Industrial Insurance Act, and not in a small, incidental, or inconsequential way. The fact that injured workers can no longer put forward their treating physician's opinion on what is "proper and necessary" is a monumental change to the Industrial Insurance Act, so constitutionally had to be incorporated therein.

II. MR. LEWIS IS OWED TIME LOSS BENEFITS AS A MATTER OF LAW:

A. <u>All Doubts Regarding the Industrial Insurance Act Are To Be Resolved In Mr. Lewis' Favor</u>.

The Industrial Insurance Act, Title 51 RCW, was written to provide swift and certain relief ***<u>to injured workers</u>***. *Dennis v. Department of Labor & Industries*, 109 Wn.2d 467, 470, 475

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P.2d 1295 (1987); *Cockle v. Dept. of Labor and Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001)(emphasis added). The "overarching objective" of the Act is to reduce to a minimum "the suffering and economic loss arising from injuries and/or death occurring in the course of employment." *Cockle,* 142 Wn.2d at 822 (quoting RCW 51.12.010)(emphasis added). The Act is remedial in nature and is therefore to be construed liberally in order to achieve its purpose. RCW 51.12.010; *Sacred Heart Med. Ctr. V. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979). **All doubts are to be resolved in favor of the injured worker.** *Dennis*, 109 Wn.2d at 470; *Sacred Heart*, 92 Wn.2d at 635 (emphasis added).

B. Time Loss Payment To Mr. Lewis Is Required by Statute.

The Industrial Insurance Act provides for who is entitled to compensation and who is not. RCW 51.32.010 provides that workers injured in their employment are generally entitled to compensation benefits while RCW 51.32.020 excludes only those workers who deliberately produce their own injuries/death or who were involved in felonious conduct at the time of their injury. RCW 51.32.090 then provides that payment of temporary total disability benefits, known as "time loss" benefits, shall continue so long as there is such a temporary total disability.

Mr. Lewis' facts place his case squarely among those entitled to compensation. He claims total disability benefits from August 3 through August 26, 2016 are based upon the uncontested affidavit of Dr. Brage[1]. Nothing within the exclusionary text of RCW 51.32.020 permits the Department to deny him time loss compensation by putting him to the Hobbesian choice of either becoming a life-long cripple via ankle fusion surgery (and receiving compensation) or attempting a cure with medical standard-of-care OATS ankle surgery at the recommendation of his qualified surgeons (and therefore being denied compensation). No such absurd, Hobbesian "take it or leave it" choice is presented to the injured workers of this state, whether by Industrial Insurance

[1] CABR, pp. 240-247.

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Act statute or vote of the HTCC. To suggest otherwise would be to disregard the remedial nature of the Act.

C. Mr. Lewis Has Satisfied The "Proximate Cause" Analysis Required in Industrial Insurance Act Cases:

Mr. Lewis cannot be said to have deliberately caused his own temporary total disability by undergoing a physician-recommended, standard-of-care surgery in his good-faith attempt to heal from his industrial injury. Such a pronouncement would be offensive and absurd; certainly if not in law, then in equity. There is no doubt in this record, especially when reviewing the uncontested affidavit of Dr. Brage, that Mr. Lewis did need to undergo some form of surgery on or about August 3, 2016 in order to obtain a better measure of cure for his condition of osteochondritis dessicans. The evidence shows that conservative therapies had all failed up to that time and Mr. Lewis was unable to weight-bear for more than three hours per day.

The Industrial Insurance Act does not exist to keep Mr. Lewis a cripple, nor to punish him for merely following the unanimous recommendation of his treating physicians after suffering his industrial injury. Tort-related "proximate cause" analysis cannot be used to re-inject fault analysis into the Industrial Insurance Act because that notion was definitively removed by the legislature. RCW 51.04.010 provides that "swift and certain" relief is to be delivered to injured workers "***regardless of questions of fault***…except as otherwise provided in this title…" (emphasis added). Because no Industrial Insurance Act provision requires Mr. Lewis to be denied time loss benefits due to an HTCC vote, and Mr. Lewis is entitled to have every doubt regarding statutory construction resolved in his favor, Superior Court must now find he is entitled to time loss benefits.

The Department tries to avoid this conclusion by arguing a theory of proximate causation which is at home in tort law but has no place in workers' compensation analysis. In this state, a worker is entitled to benefits under the Industrial Insurance Act if his injury is "**a** proximate

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cause" of the alleged disability for which benefits are sought. *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 683–684 (1977) (emphasis added). The law does not require that the injury be ***the*** sole cause of such disability. *Id*.

With very few statutory exceptions, none of which are applicable or even argued by the Department here, time-loss compensation is paid to all temporarily totally disabled injured workers with open L&I claims "so long as the [temporary] total disability continues." RCW 51.32.090. WAC 296-20-01002 states specifically that "[f]ull-time loss compensation will be paid when the worker is unable to return to any type of reasonably continuous gainful employment as **a** direct result of an accepted injury or exposure." (emphasis added).

There is no real question based upon Dr. Brage's uncontested testimony that Mr. Lewis became temporarily totally disabled as soon as he underwent OATS ankle surgery on August 3, 2016. Meanwhile, this record need only provide a reasonable inference that Mr. Lewis was temporarily totally disabled from August 3, 2016 through August 23, 2016 as a result of his industrial injury in order to reverse the summary judgment improperly issued against him on that topic by the Board of Industrial Insurance Appeals. Certainly, Dr. Brage's testimony by affidavit suffices to demonstrate proximate cause between his period of claimed temporary total disability and his industrial injury condition. The Department didn't even submit a contrary affidavit!

Like the analysis of our Washington Supreme Court in ***Wendt***, as well as the plain wording of WAC 296-20-01002 cited supra, Washington Pattern Jury Instruction 15.01 similarly indicates that there may be multiple proximate causes for any particular event. It states: "proximate cause" merely means "a cause" which "in a direct sequence [unbroken by any superseding cause,] produces the event complained of and without such event would not have happened. Here, Mr. Lewis' industrial injury caused him an osteochondritis lesion. That lesion was not amenable to conservative treatment and required surgery. No matter what surgery Mr. Lewis elected, he would have been temporarily totally disabled commencing on August 3, 2016

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and lasting through August 26, 2016. Dr. Brage's uncontested testimony so provides. Accordingly, the established industrial injury is "a" proximate cause of Mr. Lewis need for some form of surgical treatment and his period of temporary total disability beginning on August 3, 2016. He would not have undergone OATS ankle surgery "but for" suffering an industrial injury. Nor can it be argued that his surgeons would have recommended that surgery "but for" his industrial injury. Meanwhile, even had he undergone a different form of surgery, such as a fusion surgery which is not an "uncovered" medical benefit pursuant to HTCC vote, Mr. Lewis still would have been temporarily totally disabled for the same period he claims due to having undergone OATS ankle surgery. In either event, his period of temporary total disability from August 3, 2016 through August 26, 2016 was literally unavoidable. The proximate cause analysis required of the Industrial Insurance Act is therefore established in his favor.

The Department attempts to argue that Mr. Lewis' choice of a medically-recommended surgical intervention that is "uncovered" as a result of an HTCC vote still breaks the causal relationship between his period of temporary total disability and his industrial injury as a matter of legal cause analysis (i.e., as a matter of law). The Board effectively so found. The Department essentially blames Mr. Lewis for his choice of medical care, contrary to the no-fault character of the entire Industrial Insurance Act. The Department argues that Mr. Lewis' unsanctioned decision to follow a unanimous medical recommendation constitutes a superseding legal cause that breaks the connection between his industrial injury and his period of temporary total disability factually necessitated (in any event) thereby. In order to do so, the Department borrows its proximate cause analysis from tort law without considering that tort law uses "legal cause" analysis only to apportion fault based on public policy grounds.

In tort law, "proximate cause" is generally thought to include two elements: "cause in fact" and "legal causation." These are distinct concepts which are not to be confused or conflated. "Cause in fact concerns *but for* causation, events the act produced in a direct unbroken sequence

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which would not have resulted had the act not occurred." *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 254 (2008). Restated, "[a]n act is a cause in fact if it is a necessary antecedent of an event." *PPG Industries Inc., v. TransAmerica Ins. Co.*, 20 Cal.4th 310, 315 (1999). By contrast to cause in fact analysis, legal causation analysis in tort law involves questions "grounded in policy determinations as to how far the consequences of a defendant's acts should extend." *Crowe v. Gaston*, 134 Wn.2d 509, 518, 951 P.2d 1118 (1998). The focus in tort law legal causation analysis is on "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn. 2d 190, 204 (2001), as amended (Jan. 31, 2001). In deciding "whether a defendant's breach of duty is too remote or insubstantial to trigger liability as a matter of legal cause," the courts evaluate "mixed considerations of logic, common sense, justice, policy and precedent." *Id.* (internal citations omitted).

The concept of legal causation is inapplicable in a worker's compensation setting. This is also due to "considerations of logic, common sense, justice, policy and precedent." As indicated supra, legal causation exists to allocate liability for a negligent act, and includes such considerations as comparative fault; concepts generally absent in Industrial Insurance Act matters. Proximate cause analysis in a Washington worker's compensation matter is different because under the Industrial Insurance Act there is no allocation of fault as between injured workers and those who may have caused their injury. RCW 51.04.010. Injured workers are themselves blameless. Accordingly, once an industrial injury is established as a cause in fact of the worker's disability, additional tort law principals for evaluating negligence actions simply *do not apply*. This is logical and based on common sense.

However, legal precedent also exists. "'Proximate cause,' as used in [the worker's compensation] context, is not the equivalent of its counterpart in tort law." *City of Bremerton v. Shreeve*, 55 Wn. App. 334, 340, fn. 5 (1989). "In worker's compensation cases, "fault" is

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immaterial, and **work-connection in fact is the only issue**." *Id*. (emphasis added)[2]. This demonstrates that justice, policy and precedent favor Mr. Lewis' position.

Thus, Mr. Lewis is to be paid time loss benefits for the period of August 3, 2016 through August 26, 2016 because "but for" his established ankle injury in L&I Claim No. AU-90361, he never would have been put to his physician-advocated OATS ankle surgery of August 3, 2016. The Department attempts to play a semantics game to blame Mr. Lewis for his own period of temporary total disability after this OATS ankle surgery, but playing that "blame game" is contrary to the no-fault declaration of RCW 51.04.010. It is inconsistent with the liberal construction which must be read into RCW 51.32.090. It is inconsistent with "considerations of logic, common sense, justice, policy and precedent." And again, all doubts as to these principles are to be resolved in favor of Mr. Lewis, the injured worker. *Dennis*, 109 Wn.2d at 470; *Sacred Heart*, 92 Wn.2d at 635.

III. CHAPTER 70.14, RCW VIOLATES *WASH CONST. ART. II, § 37* :

A. Legislative Power is Procedurally Constrained by Washington's Constitution:

Wash. Const. art. II, § 37 provides that "[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or amended shall be set forth at full length." Although the Washington State Legislature may have the power to achieve any particular result, including rationing healthcare to injured workers, that does not automatically render its action constitutional pursuant to Wash. Const. art 2, § 37; the Legislature must still follow the constitutional procedure of amending the Industrial Insurance Act itself. *State ex rel. Living Servs., Inc. v. Thompson*, 95 Wn.2d 753, 755, 630 P.2d 925 (1981). Nor may the courts declare

[2] See also, *South Coast Framing, Inc. v. WORKERS' COMP. APPEALS BD.*, 349 p.3D 141, 61 Cal.4th 291, 297-300 (2015) in which the California Supreme Court expressly held that to demonstrate "a proximate cause" in a California workers' compensation claim, the exact same showing as is performed in Washington L&I claims, there is no requirement to prove "legal cause" because that is an inapplicable tort-related concept which does not apply in a no-fault system.

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laws passed in violation of this constitution provision valid based upon public policy considerations. *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 24-25, 200 P.2d 467 (1948). In other words, it doesn't matter whether rationing healthcare to injured workers is actually good public policy or not; the legislature may only ration Industrial Insurance Act medical coverage by specific changes made to the text of the Industrial Insurance Act itself. If the Industrial Insurance Act's text has not been changed and set forth at full length, amendment by collateral legislation is constitutionally forbidden.

B. Construction and Purpose of Article II, § 37 Explained:

Article II, § 37 is to be given a reasonable construction. *In re Dietrick*, 32 Wash. 471, 477, 73 P.506 (1903). Its purpose is to fully disclose the effect of new legislation on existing legislation so that confusion and unintelligible legislation are avoided. *State v. Thorne*, 129 Wn.2d 736, 753, 921 P.2d 514 (1996). It serves to "protect the members of the legislature and the public against fraud and deception" during legislative processes. *Id*. at 755-766.

C. Amendatory Legislation Violates Article II, § 37 Whenever No Full Republication of the Amended Prior Law Occurs:

Whenever two acts address the same rights or duties and "one is required to read both statutes before the full declaration of the legislative will on the subject can be ascertained," Wash. Const. art. II, § 37 is violated. *State ex rel. Living Servs.*, 95 Wn.2d 753, 757, 630 P.2d 925 (1981)(citing *Copland v. Pirie*, 26 Wash. 481, 483, 67 P. 227 (1901)). The test is *not* whether or not an act "purports on its face to be amendatory or an independent act." *Id*.

Here, one clearly has to read RCW 51.36.010(2)(a) in conjunction with each next HTCC assessments issued pursuant to Chapter 70.14, RCW in order to determine whether an injured worker is entitled to a particular medical treatment requested by the injured worker's treating physician, and if so, under what conditions. One cannot look only to RCW 51.36.010(2)(a), nor only to the provisions of Chapter 70.14, RCW in order to determine what rights injured workers

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have to medical care under the Industrial Insurance Act. Accordingly, each HTCC assessment denying coverage to a particular technology or treatment sought by an injured worker, or otherwise conditioning that right based upon particular findings of the HTCC, requires careful consideration of both acts of the legislature (as well as each HTCC assessment). This is true for all participants in this state's workers' compensation system: doctors, injured workers, the Department of Labor & Industries, self-insured employers, Industrial Insurance Act judges at the Board of Industrial Insurance Appeals, and judges in the higher courts. The result is a confusing mess. It is no longer sufficient for injured workers, their physicians, and the judiciary to look only to the Industrial Insurance Act, or only to Chapter 70.14 RCW or even only to an HTCC assessment. The Industrial Insurance Act was never republished while incorporating the amendments cause by the enactment of Chapter 70.14, RCW and the authorization of the HTCC. This very clearly violates Wash. Const. Art. II, § 37.

RCW 70.14.120(3) (HTCC determinations not subject to individualized "proper and necessary" review) overrides, supplants and "amends" the Director's express "supervisory" duty and power given by the Legislature at RCW 51.04.020, as well as the Board of Industrial Insurance Appeals duties and powers to hear injured worker appeals pursuant to RCW 51.52.050, consolidating these powers and duties only or partially in the HTCC whenever the HTCC votes. See the holding of *Joy*. There is no question this statute is amendatory of the Industrial Insurance Act in its nature, and therefore unconstitutional.

For example, one day the Director is Supervisor because the HTCC has elected one path (blanket approval of a technology or medical procedure). The next day, the Director is a plebian subordinate because the HTCC has elected an opposite path (denial of approval under all circumstances). On yet another day, the Director has to check back with the HTCC to determine under which circumstances a technology or procedure has been conditionally approved earlier that same day. So too, the Board's judges (and those of all higher courts) one day are to

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understand that they have jurisdiction and power to decide a medical benefits controversy, but the very next day that power is modified or retracted entirely, even mid-litigation, by vote of the HTCC. The Director's duties and those of Industrial Insurance Act judges (and higher court judges) must therefore adjust on a day-by-day basis dependent upon what the HTCC may have most recently decided. The resulting scheme is chaotic and constitutionally intolerable.

Anyone involved in workers' compensation benefits adjudication must look to two different acts of the Legislature (and all votes of the HTCC), constantly, in order to determine what rights, duties and jurisdiction they have that day. No assurances exist for the day following. The same is true for injured workers who cannot possibly know whether to risk starting a costly appeal in a medical benefit determination conflict because the HTCC might speak any moment. Wash. Const., Article II, § 37 prohibits precisely this kind of quick-evolving, unpredictable day-by-day determination of what rights and duties injured workers and other Industrial Insurance Act stakeholders maintain. It prohibits this circumstance by forcing the Legislature to republish the entire Industrial Insurance Act every time the substantial and/or procedural rights of injured workers will be significantly affected.

D. <u>Chapter 70.14, RCW is not exempt from Wash. Const. art. II, Section 37:</u>

"An act is exempt from Section 37 requirements [only] if the act is complete, independent of prior acts, and stands alone on the particular subject of which it treats." *Retired Public Emp. Coun. v. Charles*, 148 Wn.2d 602, 632, 62 P.3d 470 (2003)(citing *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 246, 11 P.3d 762 (2000)**). "An act is amendatory, rather than complete, if it changes the scope or effect of a prior statute."** *Id.* (citing *State ex rel. Arnold v. Mitchell*, 55 Wash. 513, 518, 104 P. 791 (1909) (emphasis added). Here, the two-part test for exemption from art. II, § 37 is satisfied if (1) "the scope of the rights created or affected by the [Chapter 70.14, RCW] can be ascertained without referring to any other statute or

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enactment;" and if (2) "the scope of rights [under the Industrial Insurance Act] would be made erroneous [by Chapter 70.14, RCW]." *Retired Public Emp. Coun.*, 148 Wn.2d at 632.

One must certainly read Chapter 70.14, RCW as changing the scope of benefit and procedural rights available under the Industrial Insurance Act or making these erroneous, and most specifically with respect to: RCW 51.36.010(2)(a) (what constitutes "proper and necessary" medical care); RCW 51.52.050(2)(a) (injured workers and their physicians may request reconsideration of adverse benefit coverage determinations by the Department or appeal to the Board); and RCW 51.52.060 (injured workers, their physicians and others may appeal adverse coverage determinations to the Board and higher courts). The ruling of the *Joy* Court is that despite the existence of RCW 70.14.120(4) (nothing in Chapter 70.14, RCW diminishes appeal rights held under existing law), once the HTCC disapproves of a technology or procedure, it can no longer be covered under the Industrial Insurance Act… so the Department, Board and courts thereupon lose their jurisdiction to hear injured worker requests for reconsideration or appeals. This is clearly a change in the "scope or effect" of the appeal rights available under the Industrial Insurance Act as well as a change which makes appeal rights in particular "erroneous."

A related proof that HTCC assessments amend the Industrial Insurance Act is provided by the so-called "*Hamilton* rule." This court-made rule provides that 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 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. Dep't. of Labor & Indus.*, 138 Wn.2d 1, 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 Washington Supreme Court

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observed that the "*Hamilton* rule" in workers' compensation matters has been the long-standing public policy of this state. *Id*. at 476. Yet, according to *Joy*, once the HTCC votes against coverage for a particular technology or medical procedure, nobody else's opinion matters. The longstanding right of injured workers to obtain a fair hearing of medical coverage disputes is at its end, and the "special consideration" owed to the opinion of the treating physician is a public policy nullity. The HTCC has spoken, after all. Interestingly, to even follow *Joy* requires that Chapter 70.14 RCW be stricken as unconstitutional pursuant to Wash. Const. art. II, § 37.

Yet another proof that an HTCC assessment amends the Industrial Insurance Act is provided by looking to WAC 296-20-01002, which provides that the Department of Labor & Industries shall pay for "proper and necessary" medical services whenever these are "related to the diagnosis and treatment of an accepted condition." The Washington Administrative Code describes what constitutes "proper and necessary" treatment, without ever referring to HTCC assessments as establishing the "accepted standard of good practice, within the scope of practice of the provider's license or certification." WAC 296-20-01002(a). Prior to the adoption of Chapter 70.14, RCW, the "accepted standard of good practice," discussed in this WAC referred to the standard which had evolved in the relevant medical specialty, not to a fiat standard proclaimed by the (non-representative) HTCC, a committee of diverse medical practice areas that by its very structure effectively votes as a "Jack of all [medical] trades, master of none."

Another amendatory aspect of Chapter 70.14, RCW is that strict adherence is required of HTCC non-coverage assessments pursuant to *Joy*, whereas the Industrial Insurance Act previously allowed injured workers to plead the particular facts of their medical case. An injured worker could previously argue, for example, that their particular genetics, medical comorbidities, age, gender, or other factors related to their individual circumstances made one available treatment option better for them than another; whereas every time the HTCC votes against coverage, medical options for the injured worker as an individual disappear and are subordinated

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to population-based decision making per *Joy*. In other words, the character of coverage provided under the Act has been amended (and continues to be amended with every next HTCC vote), thereby converting a careful and considerate, patient-based medical care delivery model to a strictly-applied population-based model. This is an amendatory change of monumental character for the Industrial Insurance Act, not a mere incidental or insignificant change.

Finally, it must be acknowledged that with each next, strictly-applied and non-appealable HTCC non-coverage assessment comes the death of equity considerations otherwise embedded within the liberal construction courts are required to give to the Industrial Insurance Act. The very spirit of Title 51, RCW is contrary to the implementation of Chapter 70.14, RCW. For example, the Industrial Insurance Act is traditionally concerned overwhelmingly with the "welfare" of the injured worker. See, e.g., RCW 51.04.010. Meanwhile, nowhere within Chapter 70.14 RCW is the overall "welfare" of individual injured worker to be given anything close to controlling weight. The Industrial Insurance Act seeks "best outcomes" for each injured worker. See, e.g., RCW 51.04.010. HTCC assessments do not have to be weighted to ensure what is "best" for injured workers, just what is medically most cost-efficient across a large population model. The individual is forgotten. The Industrial Insurance Act seeks to "reduce to a minimum the suffering and economic loss arising from injuries…occurring in the course of employment." RCW 51.12.010 (emphasis added). Reducing such "economic loss" in particular isn't a factor cognizable in HTCC statutory processes at all. The HTCC doesn't consider whether one type of medical procedure or another will best enable a particular injured worker to return to his/her employment of injury, for example. The Industrial Insurance Act 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). Meanwhile, HTCC deliberations require no such maximizing of curative intentions. The liberal spirit and purposes of the Industrial Insurance Act are muted by each next

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HTCC non-coverage assessment, thereby resulting in a significant change of law (without proper Industrial Insurance Act re-codification). This violates Wash. Const. art. II, § 37.

E. The Department's Reliance on *Manussier* is Misplaced.

The Department tries to avoid this result by pre-empting with "scope" of collateral impact analysis ostensibly derived from *State v. Manussier*, 129 Wn.2d 652, 664-655, 921 P.2d 473 (1996). Tr. Br. pg. 12. In doing so, the Department hopes to create an additional, stand-alone exception to the operation of Wash. Const. art. II § 37 so broad it will then swallow the constitutional rule. The doctrine of stare decisis counsels against.

A fair reading of *Manussier* indicates that mere technical violations of article II, § 37 may not always rise to a "defect of constitutional magnitude" if the passage of a given law has merely incidental effect on a prior law. A similar explanation was provided in *State v. Thorne*, 129 Wn.2d at 755-756 (many citations omitted), but that does not create an independent "scope" exception to when art. II, § 37 applies. *Manussier's* explanation is merely a practical recognition that an unforeseen impact of insignificant scope created by one law on a prior law (not simultaneously republished with amendments) is of no real constitutional concern.

Here, *Manussier's* free pass for petty technical changes is not available because the amendments imputed to the Industrial Insurance Act as a result of enacting Chapter 70.14, RCW are extensive in breadth, monumental in scope, and literally change the spirit and character of the Industrial Insurance Act. Arguments to the contrary are without merit.

F. The Remedy to Constitutional Infraction via Statute is Invalidation:

Because the enactment of Chapter 70.14 RCW without amendment and republication of the Industrial Insurance Act violates art. II, § 37, the proper remedy is invalidation of Chapter 70.14, RCW. *Rourke v. Dep't of Labor & Indus.*, 41 Wn.2d 310, 314, 249 P.2d 236 (1952); *Weyerhaeuser v. King County*, 91 Wn.2d 721, 733, 592 P.2d 1108 (1979); *Wash. Educ. Ass'n*, 93 Wn.2d 37, 41, 604 P.2d 950 (1980). The Legislature may certainly vote to ration healthcare

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rights, including excluding some medical procedures from Industrial Insurance Act coverage. However, if the Legislature intends to do this in a manner that is constitutionally-proper, it must do so (i.e., make such amendment) expressly within the text of the Industrial Insurance Act.

IV. CONCLUSION:

For the reasons stated herein, Mr. Lewis should be found entitled to time loss benefits for the period of August 3, 2016 through August 26, 2016. In addition, Chapter 70.14, RCW should be held unconstitutional under Wash. Const. art. II, § 37.

RESPECTFULLY SUBMITTED THIS 2nd DAY OF FEBRUARY, 2018.

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