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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

HAJRUDIN KUSTURA, GORDANA LUKIĆ, AND MAIDA MEMIŠEVIĆ,

Consolidated Appellants,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

In its Brief, the Department of Labor & Industries (DLI) made several erroneous factual assertions. Paraphrased, these assertions are as follows:

1. Appellants failed to raise any arguments regarding the “black faced type” requirement of RCW 51.52.050 and/or Executive Order 13166 at the Board of Industrial Insurance Appeals (the Board) or in Superior Court, thus precluding consideration of these issues. [DLI Issue No. 1]

2. Appellants Lukić and Memišević never appealed DLI orders setting their wage rates, thus precluding this court from now considering the wage rate issue. [DLI Issue No. 2]

3. Appellant Kustura failed to present a prima facie case regarding the value of his health benefits. [DLI Issue No. 7]

4. Appellants Lukić and Memišević failed to present a prima facie case showing DLI’s wage claim orders were erroneous. [DLI Issue No. 8]

5. The Superior Court decision in these three consolidated cases did not affect the Accident Fund or Medical Aid Fund, thus precluding an award of attorney fees. [DLI Issue No. 9]

The first purpose of this Reply Brief is to demonstrate that the foregoing factual assertions are incorrect.¹

This Brief also addresses three legal assertions DLI makes. First, it will address DLI's assertion that Appellants have misread *Fred Meyer v. Shearer, infra*, and seek to receive "double benefits" arising out of paid holiday time.

Second, this brief will address DLI's assertion that these Appellants received equal protection of the law, notwithstanding that DLI intentionally sent them notices in English-only, while sending at least one other group of non-English speaking injured workers notices in their own language, thus providing that group preferential treatment.²

¹ The legal authorities supporting the Appellants in this matter were stated in the Amended Brief of the Appellants, and need not be repeated here.

² Since the dates of their Board testimony, all three Appellants have become United States citizens, despite their lack of English fluency.

Thirdly, this brief will address DLI's assertion that *Rodriguez v. DLI*, 85 Wn.App. 949, 540 P.2d 1259 (1975) applies but does not support Appellants.

II. REBUTTAL OF DLI'S FACTUAL ASSERTIONS

1. It is incorrect to say that the "black faced type" issue is being raised for the first time in this appeal. At the Superior Court and at the Board, the injured workers argued that DLI had failed to communicate with them as required by RCW 51.52.050 and RCW 51.52.060, and, for that reason, their appeals were timely.³

RCW 51.52.050 states that when DLI makes a final decision, the copy sent to the worker:

...shall bear on the same side of the same page of which is found the amount of the award, a statement, **set in black faced type** . . . that such . . . shall become final within sixty days from the date the order is communicated to the parties unless . . . an appeal is filed with the board . . . (emphasis added)

By citing the foregoing statute and by arguing that DLI did not

comply with it, Appellants effectively brought the “black faced type” requirement to the attention of the Board and the Superior Court. Simply put, Appellants did not waive the “black faced type” issue because this issue accompanies the statute they cited to support their arguments in the tribunals below.

Executive Order 13166 was first offered as authority supporting Appellants’ argument that they were entitled to communications in their own language after their motion for reconsideration had been denied. However, there is no requirement that all supporting authority for one’s position must be offered at the trial court. It is commonplace for parties to buttress their arguments on appeal with additional authority.

2. It is incorrect to say that neither Lukić nor Memišević appealed DLI orders implementing their benefits and, as a result, the Board had no jurisdiction to address any aspect of

³See Lukić & Memišević Superior Court Motions for Reconsideration 1-8 discussing RCW 51.52.050, .060 and *In re Leroy Hauser, supra*; and Board Petitions for review Lukić BR 88-9, 99; Memišević BR 47.

those orders.

In the Lukić case, three notices of appeal were filed with the Board. All three notices of appeal sought review of DLI orders under RCW 51.08.178. Each order stated the relief requested and, in each case, the relief requested included the following:

“Award to Injured Worker of the actual value to the Injured Worker of lost *Cockle* benefits, to include social security, Medicare, FICA, unemployment insurance, both state and federal and any other employment benefits received from her employment for the employer.” [See BR 152, 237 and 534]

The Board expressly accepted jurisdiction over the issues raised in the foregoing notices of appeal. In Lukić’s case, the initial and amended orders setting the litigation schedule contain the following statement by the ALJ signing the orders:

I find the Board has jurisdiction over the parties and the subject matter of the appeal.

These same orders state that one of the issues presented is:

“Did the Department correctly calculate the claimant’s wage loss and time loss compensation rate taking into consideration *Cockle vs. Department of Labor and Industries?*” [BR 217; see also BR 263]⁴

In the Memišević case, multiple notices of appeal were filed with the Board, all raising the issue of the calculation of her wage rate, *i.e.* the relief requested included:

Proper calculation of benefits, payment of full Industrial Insurance benefits, award of interest on underpaid past total temporary disability benefits, *Cockle* benefits increase, . . .” [BR 65, 584]

While, the Board orders establishing a litigation schedule in the Memišević case do not expressly state that the Board has jurisdiction over the issues before it, these orders do, however, state the issues to be decided by the Board:

"Claimant seeks to have her wages and time-loss compensation rate adjusted according to the *Cockle* criteria and provided with interpreter services by the Department." [BR 111 and 209]

DLI did not challenge jurisdiction in either the Lukić or

⁴ The two orders differ only in the schedule established; otherwise they are the same.

the Memišević case. No jurisdictional hearing was held as required by *In re Leroy Hauser*, Board Significant Decision No. 94 4636 (1995).⁵ Instead, the Board in each case held a full evidentiary hearing in which testimony was presented as to the value of the employee benefits lost due to injury.⁶

3. It is incorrect to say Appellant Kustura failed to present a prima facie case regarding the value of his health care insurance. Garth Fisher, a representative of the third party administrator which purchased Kustura's health insurance, administering the employer's benefit payments, testified the total monthly cost of the health care insurance premium was \$204.80; *i.e.*, \$167.49 for medical insurance and \$37.31 for

⁵ *In re Leroy Hauser, supra*, requires the Board to hold a jurisdictional hearing solely to determine jurisdiction and not to receive evidence on other issues unless the Board has jurisdiction over the issues on appeal.

⁶ In both cases, **the testimony was presented**. Testimony from both the employer and Robert Moss, forensic economist, was presented. In Lukić's case, Kate Moriarty, the employer's Assistant Director of Human Resources, testified to the actual monthly health insurance premium cost paid with the employer's funds. In Memišević's case, this testimony came from Garth Fisher, TPA NWA Account Executive.

dental insurance. [RP 12/29 5-6]

The Board inexplicably rejected the cost figures provided by Fisher and found the monthly health insurance cost was only \$110. It made this finding in the absence of any supporting testimony or documentary evidence.⁷

The only testimony remotely supporting the Board's finding was a statement by one witness (economist Robert Moss) who testified he had seen a figure in a letter indicating the cost of insurance was \$100 per month. That letter was never marked or admitted into evidence and the accuracy of the figure it cited was disputed by Ralph Davis, CEO of the company that employed Kustura. [RP 9/25 21]

4. It is incorrect to say that Appellants Lukić and Memišević failed to present a prima facie case showing that

⁷ Perhaps this figure was a miscalculation based on CEO Davis' testimony that the employer contributed \$1.10 per hour worked for employee benefits. RP 9/25 20-21. Even so, \$1.10 hourly contribution for a full time worker like Kustura calculates to an amount significantly greater than \$110 per month.

DLI's wage claim orders were erroneous.

In the Lukić case, HR Assistant Director Moriarty testified that the employer paid the full monthly dental insurance premium of \$25.02 and \$109.36 of the monthly medical insurance premium. [RP 6/30 11-13] There was also testimony that Lukić was paid for nine holidays per year on top of her regular pay whether she worked those holidays or not. [RP 6/30 22] Evidence was also presented that Lukić lost 3 days of free hotel accommodations and half-price meals as a result of her injury. [RP 6/30 24-27]

The Board disregarded the testimony about Lukić's dental insurance and, instead, included in its calculations only the monthly cost of her medical insurance. The Board also disregarded the evidence of the value of Lukić's paid holiday time, lost hotel accommodations, and subsidized meals.

In the Memišević case, Garth Fisher, Account Executive

with Northwest Administrators (Third Party Administrator which purchased Memišević's medical and dental insurance with money provided only from the employer) testified that on the date of her injury, Memišević enjoyed employer paid health and dental insurance with monthly premiums of \$227.56 and \$50.70 respectively. [RP 10/24 17-18].

Notwithstanding Fisher's testimony, the Board affirmed DLI's assigned value of \$252.30 as the monthly value of health care insurance Memišević enjoyed at the time of her injury. The Board also affirmed DLI's finding that health care insurance was the only benefit to receive *Cockle* treatment in determining her wage rate. [CBRA 2-3].⁸

In short, the record shows that both Lukić and Memišević presented evidence sufficient to make not only prima facie but strong cases that their DLI orders were erroneous.

⁸ The Board also affirmed DLI's finding that Memišević was "single with no dependents" at the time of injury notwithstanding that she was married. BR 3.

5. The Superior Court decision in these consolidated cases did in fact affect the Accident Fund or Medical Aid Fund, thus mandating an award of attorney fees. DLI would have this Court overlook the fact that the Superior Court modified the Board's findings in one significant way.

The Board's Finding of Fact No. 1 states that Memišević is "single with 0 dependents." [BR 3] The Superior Court correctly ruled the Board was in error in this finding and that Memišević is "married with 0 dependents." It is undeniable the Superior Court's ruling will necessarily result in an increase in the amount Memišević must be paid under RCW 51.32.090.⁹

Time loss payments come from the Accident Fund. When a worker prevails increasing time loss benefits, the Accident Fund is affected, entitling the worker to an award of attorney's fees. *Brand v. DLI*, 139 Wn.2d 659, 989 P. 2d 1111 (1999).

⁹ RCW 51.32.090 incorporates the total disability benefit schedule for workers without dependents, providing an unmarried worker a 60% benefit rate while providing a married worker a 65% benefit rate under RCW 51.32.060 (1)(a) & (g).

III. REBUTTAL OF DLI ARGUMENT RE: HOLIDAY PAY

It is undisputed that all three Appellants received holiday pay including holiday pay for days not worked, *i.e.* holiday leave pay. The only dispute is whether this pay is to be included in calculating their wages under RCW 51.08.178.

The foregoing question was squarely before the Court in *Fred Meyer v. Shearer*, 102 Wn. App. 336, 340, 8 P.3d 310 (2000). There can be no doubt as to the court's holding in *Fred Meyer* because the Court flatly stated (at 340) that "monthly wages include paid leave."

DLI acknowledges *Fred Meyer*, but tries to avoid its effect by asserting Appellants are trying to engage in some kind of "double counting." In truth, Appellants are simply asking that their holiday pay reported as income to IRS be included in calculating their wages, as required under *Fred Meyer*.

Under DLI's characterization and interpretation, however, paid leave represents no added cash benefit to the worker and, therefore, can effectively be ignored. This position

can be justified only if one accepts DLI's unstated theory that being paid for working is the same – economically – as being paid for not working.

Such a theory is obviously wrong. Common sense and everyday experience tell us that workers – especially those receiving subsistence wages – can and do supplement their meager incomes by working while on paid leave. In short, paid leave represents an added cash benefit, constitutes income to the worker, and should be included in the worker's wage calculation, as plainly required under *Fred Meyer*.

Further, DLI's theory ignores the fact that when these claimants worked on a holiday they received in addition to their pay for work that day, another full day's holiday pay.¹⁰

Thus, DLI's approach circumvents both RCW 51.08.178 as well as the holding of *Fred Meyer* and renders the benefits associated with paid leave meaningless. DLI's approach should be rejected.

IV. EQUAL PROTECTION OF THE LAW

Appellants pointed out in their opening Brief the ways in which their due process rights were abridged not only by the “English-only” notices, but also by the restrictions placed on the interpreter services provided to them. These arguments need not be repeated.¹¹ DLI cites many cases from other jurisdictions which are simply outdated or that address the issues other than those at hand. They may safely be ignored.

Instead, this brief will address DLI’s assertions that Appellants were provided with equal protection of the law, notwithstanding that DLI treated them less favorably than it treats at least one other non-English speaking group.

DLI first argues that it has no duty to provide notices to non-English speaking injured workers in their native language

¹⁰ Kustura Ex. 4 18-19, Ex. 5 18-19; Lukić Ex. 2 35-36, RP 6/30 22-23; Memišević Ex. 2, RP 10/24 77, 4/18 55-56.

¹¹ It should be noted, however, that by refusing to provide interpreter services for injured worker-attorney conferences, DLI makes a mockery of the injured worker’s right to legal representation. How effectively can an attorney represent an injured worker at hearing if the attorney and the injured worker are unable to communicate with each other during the course of the proceeding?

because “English is the national language of the United States.” The unspoken theory underlying the foregoing assertion is that citizens who are not proficient in English had better learn to speak “our” language and, until they do, they are out of luck.

Although this kind of thinking may appeal to those who, for whatever reason, find it convenient to overlook the fact that our country has a multi-cultural heritage and a multi-cultural makeup today, it does not represent the public policy of Washington. Instead, it is diametrically opposed to the public policy of our State.¹²

Nowhere is our public policy more clearly stated than in the field of public education. This court may take judicial notice of the fact that every public school in this state provides education to children in their native language, and does so as a matter of law. RCW 28A.180.040 states:

Every school district board of directors shall:

¹² RCW 2.43.010 bars discrimination due to inability to communicate effectively in English because of non-English speaking heritage and RCW 49.60.010 bars discrimination based on national origin.

(1) Make available to each eligible pupil transitional bilingual instruction to achieve competency in English, in accord with rules of the superintendent of public instruction.

(2) Wherever feasible, ensure that communications to parents emanating from the schools shall be appropriately bilingual for those parents of pupils in the bilingual instruction program.

Simply put, this Court should reject any argument premised on the notion that English is our “national language” and for that reason non-English speaking injured workers, including Appellants, cannot expect to receive notices in languages other than English. Any such argument is also at odds with the public policy of this State as shown above and as reflected in the codified, multi-lingual DSHS practices cited in Appellant’s Amended Brief.

Any such argument is also at odds with DLI’s actual practices. DLI concedes that it provides notices to Spanish speaking injured workers in their native language. In so doing, DLI obviously makes it far easier for such injured workers to

understand the content of the notices, including the crucial language stating the date by which an appeal must be filed. DLI is, in effect, providing free language assistance to injured workers of Hispanic national origin in their efforts to assert their rights under the Industrial Insurance Act.¹³

Unfortunately, DLI refused to grant the free language same assistance to Bosnian/Serbian/Croatian injured workers who are not proficient in English. DLI's policy on this matter amounts to discrimination based. The agency is assisting one minority group, but not another.

There is no doubt this discrimination is not merely the "impact" of a neutral policy. DLI's policy is not neutral. When dealing with Hispanic injured workers not proficient in English, the agency sends notices written in Spanish. When notified by Bosnian/Serbian/Croatian injured workers that they are not proficient in English, DLI refuses to provide the same free

¹³ DLI may provide notices to other non-English speaking injured workers as well; *e.g.*, to those whose native language is Chinese or Vietnamese. The agency has not revealed the entire scope of its practices in this arena.

language assistance provided to Hispanic injured workers and, instead, continues to send English-only notices. This is not “neutral” by any stretch of the imagination.

DLI asserts that “language” is not per se a suspect class. However, national origin is a recognized suspect class and that is what is involved here. When injured workers’ lack of English proficiency is linked to their national origin, as is true here, providing free language assistance to some non-English speaking injured workers but not to others necessarily involves a classification based on national origin.¹⁴ There is no doubt that national origin is a suspect class. See *American Network v. Utils. & Transp. Comm’n*, 113 Wn.2d 59, 77-78776 P.2d 950 (1989). As stated in *American Network*:

This court has held that in reviewing a challenge to legislation under the equal protection clause, where the classification neither involves **suspect criteria (race,**

¹⁴ As noted in Appellant’s Amended Brief, language is a reflection of national origin. See Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 Harv. C.R.-C.L. L. Rev., 293, 325, 328 n. 225 (1998); *St. Francis College v. Al-Khazaraji*, 107 S.Ct. 2002, 481 U.S. 604 (1987).

religion, national origin, alienage, gender) nor affects fundamental interests (*e.g.*, free speech, privacy, voting rights), the court will engage in only minimum scrutiny of the enactment.... (Emphasis added)

In short, because DLI's policy is based on the national origin of the injured worker, this court can and should subject DLI's policy to strict scrutiny.

Even if these injured workers' national origin is disregarded as being unrelated to their language use, DLI's policy cannot withstand scrutiny based on a lesser standard, namely, the "rational basis" test. DLI offers no reason for its decision to provide free language assistance to Hispanic injured workers who lack English proficiency, while refusing the same assistance to Bosnian/Serbian/Croatian injured workers who also lack English proficiency.

It is not surprising that DLI is silent on this subject, because there is no rational basis for DLI's discrimination. Common sense tells us that providing notices to Bosnian/Serbian/Croatian injured workers in their native language

would not impose a heavy financial burden on the agency, because the basic notice has to be translated only once. This court can take judicial notice of the fact that the notices sent by DLI to injured workers are not individualized letters, but instead are “forms” consisting almost entirely of boilerplate language. In most cases, the notices sent differ only terms of the injured worker’s name, dates involved, and numbers inserted to show the benefit amount awarded.¹⁵

In today’s world of computer technology and “desk top publishing,” it would be a simple and inexpensive matter to prepare the proper forms for injured workers such as the Appellants in this case. This court should reject any argument that it would be too costly to end the discrimination that DLI currently practices and to provide all injured workers with equal protection of the law. Where added administrative costs are nominal, as is true here, DLI cannot claim that these costs

¹⁵ The orders do not state the actual calendar date when an appeal must be filed, but, instead, explain only in English how to calculate the date.

constitute a “compelling state interest” justifying the denial of equal protection of the law to workers seeking benefits under the Act. *Macias v. DLI*, 100 Wn.2d 263, 668 P.2d 1278 (1983). Indeed, nominal administrative costs are unlikely to satisfy even a rational relationship test. See *Willoughby v. DLI*, 147 Wn.2d 725, 730, 57 P.3d 611 (2002). Thus, Washington’s Supreme Court has repeatedly rejected DLI’s claims of increased administrative costs to justify limiting benefits under the Industrial Insurance Act.¹⁶

DLI’s assertion that communicating with injured workers in their own languages will impose an increase in Industrial Insurance rates should be rejected. Despite using interpreter services to communicate in Spanish with Spanish-speaking injured workers, DLI has still been able to reduce Industrial Insurance rates for the year 2007.¹⁷

¹⁶ *Macias, supra*; *Cockle, supra*; *Willoughby, supra*.

¹⁷ See the DLI website at www.lni.wa.gov/ClaimsInsurance/default.asp.

V. REBUTTAL OF DLI *RODRIGUEZ* ARGUMENT

Contrary to DLI's assertion, *Rodriguez v. DLI, supra*, supports the exercise of equity to find Lukić's and Memišević's appeals timely. In applying *Rodriguez*, this Court must remember it was decided 30 years ago, 1) before the Legislature established clear public policies to a) protect non-English speakers from language discrimination in RCW 2.43.010 and b) bar discrimination based on national origin in RCW 49.60.010; 2) before DLI adopted its present policy to send all orders to Spanish speaking workers in Spanish regardless of intellectual capacity; and 3) before issuance of Executive Order 13166 mandating all claimants receive notices in their own languages.

Rodriguez was a Spanish speaker who could not understand a DLI order in English he received. The Court invoked equity to find his appeal timely. Both Lukić and Memišević lack English fluency and were sent DLI orders in English that they could not understand putting them squarely within the *Rodriguez* holding. Additionally equity should be

exercised for Lukić because the Board noted her “very limited intellectual capacities.” BR 11.

Equity is exercised to those who are unable to understand and thus cannot protect themselves and also against those with unclean hands. In *Ames v. DLI*, 176 Wash. 509, 513, 30 P.2d 239, 91 ALR 1392 (1934) the Court applied equity finding a late appeal timely where the worker was committed to a mental hospital and DLI sent the order elsewhere. See also *Rabey v. DLI*, 101 Wn. App. 390, 3 P.3d 217 (2000) where a claimant’s limited competency to understand DLI procedures combined with DLI misconduct justified finding her late appeal timely.

Here, both Lukić and Memišević have language disabilities and need protection. DLI engaged in misconduct by 1) sending their orders in English, 2) not including mandated language in black faced type, and 3) assigning both values lower than the actual health care premiums cost, improperly minimizing their benefits. In Memišević’s case DLI also

misstated her marital status and ignored her dependent child further reducing her benefit.

The *Rodriguez* Court, contrary to DLI's position, failed to address the other constitutional and statutory issues presented here. For this reason, *Rodriguez* is not good authority to reject our Supreme Court's rulings in *Macias* and *Willoughby*, the public policies set forth in RCW 2.43.010, RCW 49.60.010, and Executive Order 13166; or DLI's obligation to comply fully with the communication and black faced type requirements in RCW 51.52.050 and 51.52.060. Thus, taken in the context of the law and DLI practice as it now exists, *Rodriguez* supports finding Lukić's and Memišević's appeals timely rather than the reverse.

VI. CONCLUSION

DLI has responded with assertions of fact that are contradicted by the record.

DLI has offered an analysis of the *Fred Meyer v. Shearer* case at odds with common sense that would allow it to effectively disregard paid leave when calculating wages.

DLI has failed to show why this court should allow a policy that lets the agency to provide free language assistance to one group of non-English speakers yet withhold this same assistance from another such group similarly situated which differs only in national origin. Discrimination of this kind is sharply at odds with the law, and Washington public policy.

Finally *Rodriguez v. DLI*, supports this Court finding all these Appellants' appeals timely.

For the foregoing reasons, and for all the reasons stated in Appellants' opening brief, this Court should grant the relief requested by the Appellants.

Respectfully submitted this 16th day of January, 2007.



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