

81480-5

No. ~~81480-5~~

81478-3

SUPREME COURT OF THE STATE OF WASHINGTON

ENVER MEŠTROVAC,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON and THE BOARD OF INDUSTRIAL INSURANCE
APPEALS,

Respondents.

ANSWER OF RESPONDENT
BOARD OF INDUSTRIAL INSURANCE APPEALS
TO AMENDED PETITION FOR REVIEW

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I. INTRODUCTION

The Board of Industrial Insurance Appeals (Board) was neither a party to nor participated in the superior court matter involving the Department of Labor and Industries (Department) and Enver Meštrovac. Despite this, the superior court entered an order against the Board, requiring the Board to reimburse Mr. Meštrovac for any interpreter services expenses he incurred from the point he filed his appeal with the Board, forward. When the Board attempted to intervene to defend itself, the superior court denied its motion and assessed attorneys' fees against the Board.

The Court of Appeals properly concluded that the Board should have been allowed to intervene to defend itself and that the court's order requiring the Board to reimburse Mr. Meštrovac for his interpreter services expenses was in error. Mr. Meštrovac's Amended Petition for Review does not meet any of the criteria for review in RAP 13.4(b).

II. COUNTERSTATEMENT OF THE ISSUES

For reasons discussed below, the issues presented by Mr. Meštrovac do not satisfy the criteria for review in RAP 13.4(b). If review were accepted, the issues of concern to the Board are more fairly described as:

1. In *Kaiser Aluminum & Chemical Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 854 P.2d 611 (1993), this Court recognized that the Board may participate in certain cases. Did the Court of Appeals properly hold that the Board had standing to appeal the superior court's ruling ordering the Board to hold a hearing to determine how much the Board was required to reimburse Mr. Meštrovac in interpreter services expenses?

2. Under RCW 2.43, a state agency must pay for interpreter services when it initiates a legal proceeding against a person. Is the Board required to pay for interpreter services for non-indigent claimants who initiated the administrative appeal to the Board?

III. COUNTERSTATEMENT OF THE FACTS

The underlying matter in this appeal is a claim by Enver Meštrovac for additional workers' compensation benefits. The Board has no interest in that substantive issue. The Board's recitation of facts is limited to the claims seeking reimbursement for interpreter services against the Board, challenging the Board's ability to intervene when a court enters a judgment against it, and claims implicating the Board's jurisdiction and procedures on interpreter services.

On July 12, 2005, Mr. Meštrovac appealed the Board's June 9, 2005 Final Decision and Order to King County Superior Court. CP 1-3. Mr. Meštrovac did not name the Board as a party or include the Board in the caption. He sent a copy of the notice of appeal and the case schedule order to the Board's executive secretary as required to perfect his appeal.

CP 780.¹ His accompanying letter asked only that the Board transmit the administrative record to superior court by the date set in the case schedule order. CP 780. Neither the letter nor the appeal indicated that Mr. Meštrovac was seeking specific monetary relief against the Board. Thus, after transmitting the administrative record to the superior court, the Board did not appear or participate at the superior court until it learned that the court had entered an order against it.²

The order against the Board occurred after Mr. Meštrovac submitted a separate trial brief addressing the level of interpreter services provided at the Board. CP 512-26. He restated his position that the Board should have allowed the Board-provided interpreter to interpret his private attorney-client communications. He then clearly stated in his brief, under the heading “DLI & Board as Involved Agencies Pay for Interpreters,” that “[a]s costs incurred only because of an industrial injury/disease, it is logical and fitting that *DLI should bear interpreter costs*” CP 522 (emphasis added). Mr. Meštrovac repeated this position in the conclusion of his brief on interpreter services, stating: “Meštrovac’s interpreter costs

¹ RCW 51.52.110 provides that to perfect an appeal from a final order of the Board, the appealing party must serve a copy of the appeal on the Board (as well as on the Department). The statute goes on to provide that the Board is to file with the court and serve on the parties a copy of the administrative record.

² RCW 51.52.110 provides that the *Department* must enter a notice of appearance, at which point the superior court appeal is “deemed at issue.” The statute does not provide anything with respect to the *Board’s* entering a notice of appearance.

should be paid or reimbursed for all communications related to his industrial insurance claim, *by DLI as a benefit under the Act . . .*” CP 525 (emphasis added). He also addressed constitutional theories, but asserted only that the Board should have addressed his due process challenges to the interpreter services laws being implemented by the Department, which the Board had declined to address. CP 431-65. In other words, he offered no argument seeking costs or a remedy against the Board.

The superior court’s Memorandum Decision of March 20, 2006, affirmed the Board’s substantive decisions regarding workers’ compensation benefits. CP 667. However, with regard to the interpreter services issue, the court ordered that “this limited issue [of interpreter services] be returned to the Board . . . and the Department . . . to determine the amount of interpreter expenses incurred . . . and the amount of interest” CP 667.

On March 30, 2006, the Department requested reconsideration or clarification of the court’s ruling. CP 558-62; CP 534-57. The Department requested that the court either reconsider and reverse its March 20, 2006 rulings with regard to interpreter services or, in the alternative, clarify whether the Board or the Department should be required to pay for interpreter services at the Board level. CP 555-56.

Mr. Meštrovac joined the Department's request "to eliminate contradiction" but he requested that the court "implement [its] ruling in a manner which requires the BIIA and the DLI to pay Mr. Meštrovac for the interpreter services he incurred" CP 571.

On April 17, 2006, the court entered an Order on Reconsideration (CP 643-44), adopting the following additional conclusion of law:

The Board is directed to hold a hearing to determine the amount of all interpreter expenses Mr. Meštrovac incurred because of the Department's and the Board's failure to provide interpreter services for Mr. Meštrovac to communicate with the Department, his employer, his health care providers, and his lawyer regarding and about his claim and to award him those expenses plus interest at 1% per month from the date they were incurred under RCW 51.36.080.³ The Department shall pay those interpreter expenses incurred and interest thereon until the Board assumed jurisdiction. The Board shall pay those interpreter expenses incurred and interest thereon after Mr. Meštrovac filed his first notice of appeal to the Board.

CP 644 (emphasis added).⁴ Thus, for the first time, the court unambiguously directed the Board to conduct further proceedings on an unprecedented subject and imposed monetary relief against the Board. Neither the Department nor Mr. Meštrovac had provided the Board with copies of their pleadings on this issue or advised the Board that this relief was being requested. Prior to this time there had been no mention of the

³ RCW 51.36.080 "Payment of fees and medical charges *by Department*—interest--cost-effective payments methods—audits. . . . The *Department* shall pay interest at the rate of 1% per month. . . ."

⁴ The court also amended two previously entered conclusions of law.

Board being required to pay any monetary amount, nor of having the matter remanded to the Board for an initial determination of the amount owed by itself and the Department.

The Board, therefore, moved to intervene on May 11, 2006. CP 656-58; CP 648-55. The Board also moved the court to modify and partially vacate the court's April 17, 2006 order on reconsideration. CP 671-717.⁵

On June 15, 2006, the court signed an order denying the Board's motion to intervene, holding that the Board's motion was untimely. CP 956-57. Further, the court ordered the Board to pay attorneys' fees in the amount of \$7,590 to Mr. Meštrovac because he had to respond to the Board's motion to intervene and the Board's motion to partially modify and partially vacate, on which the court did not act. CP 957.

While the Board's motions were pending, Mr. Meštrovac, the Department, and the Board filed notices of appeal to the Court of Appeals. Thus, the superior court conditioned entry of the June 15, 2006 order denying intervention on permission by the Court of Appeals to enter the order pursuant to RAP 7.2, which permission it granted, over opposition by the Board.

⁵ The Board submitted a "corrected motion and memorandum" in order to comply with local court rules. CP 871-82. Nothing substantive was changed in this motion and memorandum.

On August 1, 2006, the superior court entered a second order denying the Board's motion to intervene. CP 986-87. This order was entered subsequent to the Court of Appeals granting permission under RAP 7.2 to enter the June 15, 2006 order denying the Board's intervention. The August 1, 2006 order was identical to the June 15, 2006 order, with the exception of an additional \$1,750 in attorneys' fees that the superior court awarded based on Mr. Meštrovac's work at the Court of Appeals. This order was based solely on a letter from Mr. Meštrovac requesting these additional fees. CP 969.

The Board timely appealed the superior court's June 15, 2006 and August 1, 2006 orders to the Court of Appeals. CP 958-62. After extensive briefing, the Court of Appeals held that the Board had standing to appeal because its procedural integrity was affected. *Meštrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 704, 176 P.3d 536 (2008) (attached as Appendix A). The Court of Appeals also held that the Board had standing as an aggrieved party because the superior court ordered the Board to reimburse Mr. Meštrovac for interpreter services. *Id.* at 704. With regard to interpreter services, the Court of Appeals held that the Board's interpreter procedures did not violate Mr. Meštrovac's due process or equal protection rights. It also held that even though the Board should have allowed the interpreter to interpret attorney-client

communication on breaks during the proceeding, this was not a reversible error.

IV. REASONS WHY REVIEW SHOULD BE DENIED

This matter does not meet the criteria for review in RAP 13.4(b) because the issues presented do not involve matters of broad public import and the issues specifically decided with regard to Mr. Meštrovac were correctly decided.

First, the issue of the Board's standing is not far-reaching. The Court of Appeals simply held that when a party is seeking—and in this case, receives—monetary relief against the Board, the Board is entitled to defend itself. The Court of Appeals recognized that this case created a unique situation with regard to the Board's involvement and was not a typical case as contemplated by *Kaiser*.

Second, the issue of interpreter services has been resolved except for Mr. Meštrovac's specific request for reimbursement. RCW 2.43 and the Court of Appeals' decision in this matter require the Board to provide qualified interpreters during the legal proceeding, including private attorney-client communications during breaks. This, coupled with the Board's own rule, WAC 263-12-097, which requires the Board to pay for interpreter services whenever an interpreter is provided, answers the questions and issues raised by Mr. Meštrovac for all future litigants with

regard to interpreter services and the Board's standing and renders his Petition moot in this regard.

Finally, with regard to Mr. Meštrovac's specific claim of reimbursement for interpreter services, he provided no legal support for this contention. To make an argument for reimbursement under RCW 2.43, Mr. Meštrovac would, at a minimum, need to show that, under RCW 2.43, he would have had an initial right to have the services paid. That statute, however, places the burden of payment on the person who initiates the legal proceeding absent a showing of indigency. Thus, in the absence of any legal support, Mr. Meštrovac does not meet any of the criteria under RAP 13.4(b).

A. The Court of Appeals Properly Concluded That the Board Had Standing to Appeal the Superior Court's Rulings

Mr. Meštrovac asserts that the Court of Appeals disregarded the holding in *Kaiser* when it permitted the Board's appeal of a superior court judgment ordering it to reimburse a litigant who appeared before it for interpreter services expenses and ordering the Board to hold a hearing to determine how much it was to reimburse the litigant. The Court of Appeals correctly concluded that under these circumstances, the Board did have the authority and standing to appeal the superior court decision.

1. The Court Correctly Determined That the Board Could Appeal a Decision Ordering It to Pay a Judgment to a Litigant Who Appeared Before It

In *Kaiser*, this Court found that the Board, as an impartial tribunal, must not have a partisan interest in the outcome of contested cases. *Kaiser*, 121 Wn.2d at 781. The Board does not have a partisan interest in the outcome of this case. The Board merely sought to protect its own interests by defending itself against a monetary judgment that was entered against it when it was not a party to the appeal of its decision. This was not the case in *Kaiser*. In *Kaiser*, the Board appealed a decision on behalf of a party, and as this Court stated, assumed the “role of advocate.” *Kaiser*, 121 Wn.2d at 786. The Board appealed the superior court’s order in this case for precisely the reasons set forth in *Kaiser*—to be able to “operate within the confines appropriate to an impartial, appellate tribunal.” *Id.* The Board cannot operate in this manner if parties are permitted to join claims against the Board with appeals of Board decisions. If a party can seek monetary relief against the Board while successfully arguing that the Board is precluded from defending itself under *Kaiser*, the Board is left with unending risk and no remedy. The Court of Appeals correctly concluded that such a circumstance created an “atypical—if not unprecedented—ruling.” *Meštrovac*, 142 Wn. App. at 710. This is especially true where, as here, the superior court exercised

improper jurisdiction over the Board. The Court of Appeals correctly concluded that this case was distinguishable from *Kaiser* and therefore does not provide a reason under which this Court should grant further review.

2. The Court of Appeals Correctly Concluded That the Superior Court's Orders Affected the Integrity of the Board's Decision-Making Process

The superior court did not simply conclude that the Board's interpreter services were constitutionally deficient; it also concluded that the Board was required to hold a hearing to determine how much to reimburse Mr. Meštrovac for that deficiency and to alter its procedures and allocate funds for additional services. The Court of Appeals found this to sufficiently affect the integrity of the Board's decision-making process to permit the Board standing, in addition to its having standing as an aggrieved party.

The fact that the court ordered the Board to hold a hearing to determine how much it was to pay a party for interpreter services created a circumstance under which the Board was required to be both finder of fact and party opponent to Mr. Meštrovac. The Court of Appeals did not reach this issue, but it provides one more basis on which to support its conclusion that the Board had standing to appeal the superior court's order.

B. The Court of Appeals' Decision That the Board Was Not Required to Pay for Interpreter Services Under RCW 2.43 for Non-Indigent Claimants Because the Board Did Not Initiate a Legal Proceeding Does Not Require Further Review by This Court

Under RCW 2.43.040, the cost of providing interpreter services is dependent on whether the governmental body initiates the legal proceeding. Specifically, RCW 2.43.040(2) provides:

In all legal proceedings in which the non-English-speaking person is a party . . . or is otherwise compelled by the appointing authority to appear, including criminal proceedings, grand jury proceedings, coroner's inquests, mental health commitment proceedings, and other legal proceedings *initiated by agencies of government, the cost of providing the interpreter shall be borne by the governmental body initiating the legal proceedings.*

(Emphasis added.) The Court of Appeals correctly concluded that the Board does not initiate the legal proceeding, as it is the claimant who brings the action to the Board. Specifically, in *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 175 P.3d 1117 (2008), the Court of Appeals noted that the "Board's authority may be invoked only by the *claimant's* act of initiating an appeal of the Department's action." *Kustura*, 142 Wn. App. at 680. Because it was Mr. Meštrovac who filed an appeal of a Department order to the Board, it cannot be said that the Board was initiating any proceeding and, therefore, the Board is not responsible for interpreter services expenses.

Finally, there was no claim for or finding of indigency. Therefore, Mr. Meštrovac cannot be entitled to paid interpreter services on this ground.

1. The Board Pays for Interpreter Services When Interpreters Are Appointed at the Board

Pursuant to its own rule, WAC 263-12-097, the Board pays for interpreter services expenses when it appoints an interpreter. For Mr. Meštrovac, the Industrial Appeals Judge (IAJ) appointed and paid for an interpreter to interpret all Board proceedings. CABR at 198. Board proceedings were not considered by the IAJ to include private attorney-client communications. The Court of Appeals ultimately disagreed with this conclusion and the Board has not cross-appealed that ruling.

Mr. Meštrovac argues that the Board violated his due process and equal protection rights by not allowing the Board's interpreter to interpret private attorney-client communication. He relies on *State v. Marintorres*, 93 Wn. App. 442, 969 P.2d 501 (1999), to support this argument. However, *Marintorres* is distinguishable. In *Marintorres*, two statutes were challenged that treated LEP (limited English proficient) criminal defendants differently from hearing-impaired criminal defendants by only assessing costs to LEP claimants under certain circumstances. The Court

of Appeals in that matter held that there was no rational reason to treat the two classifications differently.

In *Meštrovac*, there are no conflicting statutes and no conflicting actions by the Board with regard to classifications of individuals. Consistently, when the Board appoints an interpreter, the Board pays for the interpreter pursuant to its rule.

Prior to *Meštrovac*, individual IAJs did have discretion with regard to whether and when to appoint an interpreter. However, the Court of Appeals' decision has clarified these points and removed the discretion with regard to when an interpreter must be qualified and appointed. The Court of Appeals' decision also made clear that even though the Board was required to qualify and appoint the interpreter, it was not required by statute to pay for the interpreter, but only pursuant to its own rule. Therefore, there is no conflict with regard to the Court of Appeals' decision in *Marintorres* and there are no classification concerns with regard to how the Board treats claimants needing language assistance that would give rise to a potential question of whether an equal protection violation has occurred.

2. There Is No Legal Support for a Request for Reimbursement of Interpreter Services Expenses Even if the Board Had Been Required to Pay

Mr. Meštrovac argues that because the Court of Appeals held that the Board should have allowed the Board's interpreter to interpret private attorney-client communication during the hearing, any cost Mr. Meštrovac may have incurred associated with that communication should be reimbursed by the Department or the Board. However, Mr. Meštrovac overlooks the fact that even though the Court of Appeals held that the Board should have allowed such interpretation, it also held that the Board was not required to pay for any of the costs associated with the interpreter's use. Given these two holdings, there is no question that the Board should not be required to *reimburse* Mr. Meštrovac. But for the Board's own rule, it would not have been required to pay any amount of the interpreter services provided to Mr. Meštrovac. If Mr. Meštrovac had *no initial right* to paid interpreter services, a request for reimbursement for his expenses is without merit.

3. Because Mr. Meštrovac Is Not Entitled to Reimbursement Under RCW 2.43.040, the Issue of Who Is to Pay Is Moot

Notwithstanding the fact that RCW 2.43.040 does not require the Board to **pay** for interpreter services, there is no provision in RCW 2.43 that would allow for reimbursement of expenses when interpreter services

are not properly provided. Mr. Meštrovac had an opportunity to seek a writ of mandamus to compel the Board to provide the necessary interpreter services had he chosen to do so.⁶ Mr. Meštrovac was not required to have incurred any expense for interpreters when there was a legal remedy available to him. Because Mr. Meštrovac chose to incur the expense for which he seeks reimbursement, he now asks this Court to find a “substantial public interest” where none exists.

C. Mr. Meštrovac Has Presented No Other Issue Which Would Require Review by This Court

With regard to the Board, Mr. Meštrovac raises no other issue requiring review by this Court. But if this Court accepts review of this matter, the Board suggests that the issues be expressly defined by the Court so that the parties will not unnecessarily brief the broad arguments presented by Mr. Meštrovac.

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⁶ See *Meštrovac*, 142 Wn. App. at 706 (citing *Dils v. Dep't of Labor & Indus.*, 51 Wn. App. 216, 752 P.2d 1357 (1988)). *Meštrovac* cites *Dils* to address the issue of whether the Department was required to issue an order on the issue of interpreter services before Mr. Meštrovac could appeal. However, in the context of whether the Board was providing the proper level of interpreter services, Mr. Meštrovac could have also sought a writ of mandamus compelling the Board to provide the level of interpreter services he felt he was entitled to under RCW 2.43 and would not have incurred any interpreter costs in so doing.

V. CONCLUSION

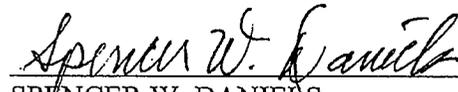
For the reasons stated above, this Court should deny Mr. Meštrovac's request for review.

RESPECTFULLY SUBMITTED this 22nd day of August, 2008.

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APPENDIX A

a result of this correction.⁸⁵ Thus, she fails to demonstrate that the court's correction resulted in an increase in benefits, and we deny her request for attorney fees.

¶65 We affirm.

BAKER and DWYER, JJ., concur.

[Nos. 58200-3-I; 58505-3-I. Division One. January 22, 2008.]

ENVER MESTROVAC, *Respondent*, v. THE DEPARTMENT OF LABOR AND INDUSTRIES ET AL., *Appellants*.

- [1] **Administrative Law — Agency Authority — Right To Appeal — Quasi-Judicial Agencies — Integrity of Decision-Making Process.** Although a quasi-judicial agency generally is not permitted to appeal an adverse court decision, a quasi-judicial agency interested in preserving the integrity of its decision-making process may appeal a decision that affects its procedures.
- [2] **Industrial Insurance — Judicial Review — Appellate Review — Standing — Board of Industrial Insurance Appeals — Interpreter Services — Integrity of Board Procedures.** In the interest of preserving the integrity of its decision-making process, the Board of Industrial Insurance Appeals has standing to appeal a superior court's rulings, made in an action in which the board was not a party, that the board's interpreter services are constitutionally deficient and that the board is required to alter those procedures and allocate funds for additional services.
- [3] **Appeal — Standing — Nonparty to Trial Proceedings — Aggrievement — What Constitutes.** Under some circumstances, a person who was not a formal party to a trial court proceeding but

married at the time of her injury (as found in the unappealed, and therefore final, order of February 22, 2003)."

⁸⁵ The order states that the Board's findings "failed to include that the Department order of February 22, 2002 calculated her wage rate based on her status of married with no dependents," and changed the finding to state that the Department's February 22, 2002 order set time-loss compensation "and included health care insurance of \$252.30, married with 0 dependents." (Emphasis omitted.) The order also states that the court found that she did not protest or appeal this order establishing the wage rate "and that plaintiff was married with no dependents." (Emphasis omitted.)

who is aggrieved by an order entered in the course of the proceeding may appeal the order as an "aggrieved party" within the meaning of RAP 3.1. "Aggrieved" means a denial of some personal or property right, legal or equitable, or the imposition of a burden or obligation.

- [4] **Industrial Insurance — Judicial Review — Appellate Review — Standing — Board of Industrial Insurance Appeals — Interpreter Services — Aggrieved Party.** The Board of Industrial Insurance Appeals can have standing as an aggrieved party to appeal a superior court's rulings, made in an action in which the board was not a party, that the board's interpreter services are constitutionally deficient and that the board is required to alter those procedures and allocate funds for additional services.
- [5] **Industrial Insurance — Judicial Review — Appellate Review — Standard of Review.** An appellate court reviews de novo a judgment entered by a superior court on judicial review of a Board of Industrial Insurance Appeals decision to determine whether substantial evidence supports the superior court's findings of fact and whether the superior court's conclusions of law flow from those findings.
- [6] **Industrial Insurance — Judicial Review — Standard of Review — Agency Record.** A superior court reviewing a Board of Industrial Insurance Appeals decision acts in an appellate capacity, reviewing the board's decision de novo, but it cannot consider matters outside of the record or presented for the first time on appeal.
- [7] **Industrial Insurance — Administrative Review — Board of Industrial Insurance Appeals — Scope of Review — Issues Decided by Department of Labor and Industries.** When reviewing a Department of Labor and Industries decision on an industrial insurance claim, the Board of Industrial Insurance Appeals may consider only those issues actually decided by the department.
- [8] **Industrial Insurance — Administrative Review — Decisions Reviewable — Written Decision in Record — Necessity.** Under RCW 51.52.050 and .060, for a Department of Labor and Industries decision on a worker's industrial insurance claim to be appealable by the worker, the decision must be in writing and served on the worker. The board does not have jurisdiction to consider an alleged departmental decision if there is no written decision in the record.
- [9] **Industrial Insurance — Administrative Review — Decisions Reviewable — Denial of Language or Interpreter Services — No Appealable Decision.** When an injured worker with limited English proficiency believes that the Department of Labor and Industries has been unresponsive to requests for language or interpreter services but there is no decision thereon from which the

worker can appeal, the worker may seek relief by a writ of mandamus. Where there does not exist a specific department decision addressing the issue of interpreter or language services, the department's continued use of English-only notices despite its knowledge that the worker has limited English proficiency is not an appealable department action.

- [10] **Industrial Insurance — Claims — Non-English-Speaking Claimant — Interpreter Services — Necessity — Legal Authority.** Neither chapter 2.43 RCW nor constitutional due process or equal protection considerations entitle an injured worker with limited English proficiency to interpreter services for communications with counsel outside of legal proceedings before an Industrial Appeals Judge or the Board of Industrial Insurance Appeals for which an interpreter has been appointed or to have the interpreter services paid as a public expense absent a determination that the worker is indigent.
- [11] **Industrial Insurance — Claims — Non-English-Speaking Claimant — Interpreter Services — Scope — Breaks and Off-the-Record Proceedings.** When an interpreter is appointed for an injured worker with limited English proficiency for proceedings before an Industrial Appeals Judge or the Board of Industrial Insurance Appeals, the worker is entitled to use the interpreter for communicating with counsel during the entire course of the proceedings, including breaks and proceedings off the record.
- [12] **Industrial Insurance — Claims — Non-English-Speaking Claimant — Interpreter Services — BIIA Proceedings — “Throughout the Proceeding” — Denial — Effect.** A failure by an Industrial Appeals Judge or the Board of Industrial Insurance Appeals to allow a non-English-speaking claimant to use an appointed interpreter at all appropriate times during a proceeding as required by chapter 2.43 RCW and WAC 263-12-097 is not reversible error if the claimant was not prejudiced by such failure. The worker is not prejudiced if the failure did not likely affect the outcome of the proceeding.
- [13] **Industrial Insurance — Claims — Non-English-Speaking Claimant — Interpreter Services — Necessity — Matters Outside of Board Hearing.** There is no authority for requiring the Board of Industrial Insurance Appeals to provide interpreter services for a non-English-speaking claimant for matters outside of the board hearing.
- [14] **Industrial Insurance — Claims — Non-English-Speaking Claimant — Interpreter Services — BIIA Proceedings — Payment by Board — Statutory Provisions.** Under chapter 2.43 RCW, which authorizes interpreter services for non-English-speaking persons in legal proceedings, the Board of Industrial Insurance Appeals is not required to pay for interpreter services for a non-

indigent party in proceedings before the board because the board is not an "initiating" government agency.

- [15] **Parties — Intervention — Timeliness — In General.** There is no rule limiting the time within which a person must file a motion to intervene in an action. The timeliness of a motion to intervene is determined by considering the specific circumstances of the case and the reasonableness of the movant's actions.
- [16] **Parties — Intervention — Matter of Right — Test.** A party may intervene in an action as a matter of right under CR 24(a)(2) if (1) the party has made a timely application for intervention, (2) the party claims an interest that is the subject of the action, (3) the disposition of the case likely will adversely affect the party's ability to protect the interest, and (4) the party's interest is not adequately represented by the existing parties.
- [17] **Industrial Insurance — Judicial Review — Parties — Intervention — Board of Industrial Insurance Appeals — Liability for Expenses.** The Board of Industrial Insurance Appeals should be allowed to intervene in an industrial insurance claimant's action for judicial review of an adverse administrative decision if the claimant is seeking a judgment against the board for reimbursement of expenses that the claimant alleges the board should bear.
- [18] **Judgment — Parties — Absent Party — Motion To Intervene — Denial — Abuse of Discretion.** A trial court abuses its discretion by entering a judgment against a person who is not a party and then refusing to allow the person to defend against that judgment.
- [19] **Costs — Attorney Fees — On Appeal — Request — To Appellate Court — Necessity.** Under RAP 18.1, a request for attorney fees incurred before an appellate court must be made to that court.
- [20] **Industrial Insurance — Disability — Total Disability — Temporary Total Disability — Time-Loss Compensation — Basis — Wages — Overtime Hours — Overtime Rate of Pay — Applicability.** An overtime rate of pay may be used for valuing overtime hours worked by an injured worker in calculating the worker's wage basis for time-loss compensation purposes only as provided in RCW 51.08.178. Under the statute, an overtime rate of pay may be used only if the worker's employment is "exclusively seasonal" or "part-time or intermittent."
- [21] **Administrative Law — Judicial Review — Findings of Fact — Failure To Assign Error — Effect.** An unchallenged administrative finding of fact is a verity before a reviewing court.
- [22] **Industrial Insurance — Disability — Total Disability — Temporary Total Disability — Time-Loss Compensation — Basis — Wages — Paid Leave — Calculation.** Holiday pay and vacation pay may be included in the calculation of an injured

worker's wage basis for time-loss compensation purposes by either (1) including the cash value of the employer's contributions for hourly leave in determining the hourly pay rate or (2) including the leave hours taken in determining the total number of hours worked. Where a 40-hour workweek is used to calculate a worker's wage basis, the days may be counted as days worked even if the worker took them as vacation days. The worker is not entitled to any additional amounts if no claim is made that additional leave was taken that is unaccounted for in the base calculation.

[23] Industrial Insurance — Disability — Total Disability — Temporary Total Disability — Time-Loss Compensation — Basis — Wages — Employer Contributions — Government Mandated Benefits. The value of employer-paid contributions to the Social Security fund, the Medicare fund, the industrial insurance fund, and the unemployment compensation fund on a worker's behalf does not constitute "wages" within the meaning of RCW 51.08.178, which defines the wage basis on which an injured worker's time-loss compensation is calculated.

Nature of Action: An injured worker with limited English proficiency sought judicial review of Board of Industrial Insurance Appeals decisions involving his wage-rate calculation for time-loss compensation purposes and his entitlement to interpreter services at public expense.

Superior Court: The Superior Court for King County, No. 05-2-22775-3, Deborah D. Fleck, J., on March 21 and April 19, 2006, entered a judgment partly in favor of the Department of Labor and Industries and partly in favor of the plaintiff, ruling that the plaintiff's wage basis was properly calculated but that the plaintiff was improperly denied interpreter services. The court later denied the board's motion to intervene in the action.

Court of Appeals: Holding that the plaintiff was not entitled to any greater interpreter services than were provided, that the plaintiff was not prejudiced by the board's failure to provide an interpreter for communications with counsel during the review hearing, that the board's motion to intervene in the action should have been granted, and that the plaintiff's wage basis for time-loss compensation purposes was properly calculated, the court *affirms* the judgment in part and *reverses* it in part.

Robert M. McKenna, Attorney General, John R. Wasberg, Senior Counsel, and Masako Kanazawa, Assistant, for appellant Department of Labor and Industries.

Robert M. McKenna, Attorney General, and Johnna S. Craig and Spencer W. Daniels, Assistants, for appellant Board of Industrial Insurance Appeals.

Ann Pearl Owen (of Ann Pearl Owen, PS), for respondent.

Paula Tuckfield Olson on behalf of Washington Self-Insurers Association, amicus curiae.

Bryan P. Harnetiaux and Michael J. Pontarolo on behalf of Washington State Trial Lawyers Association Foundation, amicus curiae.

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Michael J. Killeen, *Employment in Washington: A Guide to Employment Laws, Regulations and Practices* (4th ed.)

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Washington Rules of Court Annotated (LexisNexis ed.)

Annotated Revised Code of Washington by LexisNexis

¶1 AGID, J. — The Department of Labor and Industries (Department) and the Board of Industrial Insurance Appeals (Board) appeal a superior court order directing both the Department and the Board to reimburse Enver Mestrovac, a Department benefit claimant with limited English proficiency (LEP), for the cost of interpreter services not provided by either the Department or the Board. The Board also appeals from the superior court's order denying its motion to intervene and awarding attorney fees to Mestrovac. Mestrovac cross-appeals, challenging the superior court's ruling affirming the Department's wage rate calculation for his time-loss compensation. Because the Constitution does not require interpreter services beyond that which the Department and the Board provided, and Mestrovac demonstrates no prejudice resulting from the

Board's failure to provide an interpreter for communications with counsel during the hearing, we reverse the rulings requiring the Department and Board to reimburse Mestrovac for his interpreter expenses. Additionally, because the superior court's order imposed a judgment against the Board and affected the integrity of its procedures, we reverse its order denying the Board's motion to intervene. But because the Board correctly accounted for Mestrovac's holiday and vacation pay and properly excluded other employer-paid benefits as not critical to his basic health and survival, we affirm the wage calculation.

FACTS

¶2 Mestrovac is a Bosnian immigrant and is not fluent in the English language. In 2003, he injured his wrist while unloading furniture containers for A-America, Inc., and applied for and received benefits from the Department. On October 10, 2003, his attorney informed the Department that she was representing Mestrovac, that the Department was to communicate through her on his claim, and that Mestrovac "does not speak English as his native language." On October 20, 2003, his attorney sent the Department a letter requesting an order authorizing interpreter services and payment for Mestrovac's interpreter bills for services "in connection with [his] communications with his health care providers, [the Department], the Board, voc[ational] rehab[ilitation] personnel, IME [independent medical examination] examiners, and his counsel through all phases of his claim and appeals thereon." The Department did not issue an order or otherwise specifically respond to this request.¹

¶3 In October and November 2003, the Department issued three time-loss computation orders for certain time periods during which Mestrovac was temporarily totally disabled. In each of these orders, the Department computed

¹ While the Department asserts that it provided "an array" of interpreter services, but not all of those requested, it does not specify services it provided.

his monthly wage at \$1,584 based on eight-hour work days, five days a week, at \$9 per hour. All three orders were issued in English; one was sent to Mestrovac on October 10, 2003, and the other two were sent to his attorney on October 24 and November 7, 2003. Mestrovac appealed all three orders.

¶4 In his appeal he challenged his wage computation, asserting that it should have included (1) employer-provided health benefits; (2) average of regular overtime hours; (3) bonuses; (4) vacation and holiday pay; (5) employer contributions to retirement benefits, life insurance, accidental death and dismemberment insurance, and short-term disability insurance; and (6) employer taxes for Medicare, Social Security, and unemployment insurance. He also asserted that the Department did not provide him sufficient interpreter services during claim administration and that he was entitled to the following services from both the Department and the Board:

[interpreter services for] [a]ll communications addressed to him, his lawyer, to any of his treating physicians or other health care providers, to any [other] provider for the Department, with the Department, with his employer, with his counsel, with IME examiners, with the Board, and associated with vocational rehabilitation. . . .

¶5 During a scheduling telephone conference, the Industrial Appeals Judge (IAJ) ruled that the Board would provide and pay for interpreter services at the hearing, but not for communications with counsel during the hearing. Mestrovac's attorney then informed the IAJ that if he needed to hire an interpreter for attorney communications, he would be seeking reimbursement for these services as costs of the hearing. The IAJ also denied Mestrovac's claim for additional interpreter services at the Department level, concluding that the Board had no jurisdiction to grant such relief because the appeal before it was an appeal of the time-loss orders and no appealed Department order ad-

dressed the interpreter issue. Mestrovac sought interlocutory review of this order, which was denied.²

¶6 The IAJ then held a hearing on the wage computation issue but refused to hear evidence on the interpreter issue. The IAJ provided interpreter services during the hearing, but not for Mestrovac's communications with his attorney. The IAJ then issued a proposed decision and order reversing the time-loss orders and concluding that overtime hours, health care benefits, bonuses, holiday pay, and vacation pay should have been included in the wage computation. The IAJ also ruled that the value of other employer paid benefits and taxes should be excluded. The IAJ's ruling increased the monthly wage to \$2,119.41.

¶7 Both Mestrovac and the Department appealed the IAJ's proposed decision to the full Board. The Department challenged the wage computation that included holiday and vacation pay, and Mestrovac challenged the IAJ's adverse rulings on the wage computation issues. He also asserted that he incurred interpreter expenses at both Department and Board proceedings and requested that the Department: (1) determine the amount of expenses he incurred in pursuing his claim; (2) reimburse him for these expenses; and (3) provide him with interpreter services "until final closure occurs on the claim," including representation at the Department, Board, superior court, Court of Appeals, and Supreme Court levels.

¶8 The Board issued a decision and order agreeing with the IAJ's decision, except for the issue of holiday and vacation pay, concluding that the Department had already included those hours in its base wage calculation. The Board also concluded that the IAJ complied with the applicable law relating to interpreter services to be provided at Board hearings. The Board held that it lacked subject matter jurisdiction to consider any issues relating to interpreter services at the Department level.

² Later orders repeated the IAJ's ruling that the Board had no jurisdiction over this issue.

¶9 Mestrovac appealed the Board's order to the superior court. On March 20, 2006, the superior court issued a letter opinion, findings of fact and conclusions of law, and a judgment, affirming the Board on the wage computation issues but reversing on the interpreter issues. In the letter opinion, the court concluded that it had the authority to address Mestrovac's procedural due process claims, even if not addressed by the Board, and declined to include an attorney fees award to Mestrovac because he did not prevail on any of the substantive claims. In its conclusions of law, the court ruled that it did not have jurisdiction over the issue of the Department's provision of interpreter services, but that the Board had jurisdiction over issues Mestrovac raised on appeal relating to his LEP status, and that both the IAJ and the Board erred by failing to consider these issues. The court then entered judgment for the Department but ordered the Department to determine the amount of Mestrovac's interpreter expenses and to reimburse him with interest.

¶10 The Department moved for reconsideration and clarification of the court's rulings on the interpreter issue. On April 17, 2006, the court issued an order on this motion and revised its conclusions of law to state: (1) it had jurisdiction "over the issue of the Department's use of English to communicate with Mr. Mestrovac"; (2) the Board erred by failing to include findings on issues "regarding communications with him in English, his right to communications with his employer, the Department, and counsel of his choice regarding his industrial injury in his primary language or through interpreter services paid for by the Department"; (3) the Board must hold a hearing to determine the amount of interpreter expenses he incurred because of the Department's and the Board's failure to provide additional interpreter services; and (4) the Department must pay interpreter expenses incurred until the Board assumed jurisdiction, and the Board must pay those expenses incurred after Mestrovac filed his first notice of appeal to the Board.

¶11 On May 11, 2006, after receiving notice of the court's revised order, the Board moved to intervene in the superior court matter. A day later, the Department filed with this court a notice of appeal of the revised order, and both the Board and Mestrovac filed cross-appeals. On June 15, 2006, the superior court entered a proposed order that denied the Board's motion to intervene, contingent upon this court's permission to enter the order. The proposed order also granted attorney fees to Mestrovac against the Department, reversing its earlier decision denying Mestrovac an attorney fees award, and awarded attorney fees against the Board for work performed on Mestrovac's response to the Board's motion to intervene.

¶12 On July 18, 2006, we granted Mestrovac's motion to enter the superior court's proposed order but denied his motions to dismiss the Board's appeals to this court. On August 1, 2006, with this court's permission, the superior court entered a second order to include an additional attorney fees award of \$1,750 against the Board for Mestrovac's work before this court, seeking to enter the superior court's proposed order. The Board filed timely appeals of both superior court orders.

I. Department and Board Appeal of Superior Court Orders

¶13 We first address the Department's and Board's appeal of the superior court's March 20, 2006 and April 17, 2006 orders. Both the Department and the Board argue that the superior court did not have jurisdiction over Mestrovac's due process claims at the Department level, that neither the Department nor the Board violated his due process rights by denying his request for additional interpreter services, and that neither the Department nor the Board should reimburse Mestrovac for his additional interpreter expenses. The Board also contends that the trial court erred by requiring it to hold a hearing to determine the amount of interpreter fees to be reimbursed to Mestrovac because doing so would compromise its impartiality.

A. Board Standing To Appeal

[1, 2] ¶14 Mestrovac challenges the Board's standing to appeal the superior court's orders, contending that the court's orders do not affect the integrity of the Board's decision-making process. We disagree. As a quasi-judicial agency, the Board is "generally not permitted to bring appeals of adverse court decisions."³ But when quasi-judicial agencies "have interests in preserving the integrity of their decision[-]making process," they have authority to appeal decisions which impact their procedures.⁴ Here, the Board's procedural integrity was affected: the superior court found that its interpreter procedures were constitutionally deficient and required the Board to alter those procedures and allocate funds for additional services.

[3, 4] ¶15 Additionally, the Board was entitled to an appeal as an "aggrieved" party within the meaning of RAP 3.1.⁵ As this court has recognized, "under some narrow circumstances, persons who were not formal parties to trial court proceedings, but who are aggrieved by orders entered in the course of those proceedings, may appeal as 'aggrieved parties.'"⁶ "Aggrieved" has been defined to mean "a denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation."⁷ Here, the superior court's orders imposed upon the Board a burden and an obligation by holding it liable for Mestrovac's interpreter costs and requiring it to pay thousands of dollars in attorney fees for attempting to intervene. The Board was therefore sufficiently "aggrieved" to assert standing to appeal.

³ *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 781, 854 P.2d 611 (1993) (citing 4 AM. JUR. 2D *Appeal and Error* § 234 (1962)).

⁴ *Id.* at 782.

⁵ RAP 3.1 provides: "[o]nly an aggrieved party may seek review by the appellate court."

⁶ *State v. G.A.H.*, 133 Wn. App. 567, 574, 137 P.3d 66 (2006).

⁷ *Id.* (internal quotation marks omitted) (quoting *State v. A.M.R.*, 147 Wn.2d 91, 95, 51 P.3d 790 (2002)).

B. Appellate Review of Department Interpreter Services

¶16 The Department and the Board contend that the superior court erred by concluding that both the court and the Board had jurisdiction to address the Department's interpreter procedures because there was no Department order addressing these procedures from which Mestrovac could appeal. Mestrovac contends that the Department's repeated use of English-only communications with its knowledge of his LEP status amounts to an appealable decision within the meaning of RCW 51.52.060, despite the absence of a written decision from the Department addressing this procedure.

[5-8] ¶17 This is an issue of law. We review the superior court's decision de novo to determine whether substantial evidence supports its findings and whether its "conclusions of law flow from the findings."⁸ The superior court acts in an appellate capacity, reviewing the Board's decision de novo, but "cannot consider matters outside the record or presented for the first time on appeal."⁹ As discussed in the *Ferenčák* opinion, the "Board's scope of review is limited to those issues which the Department previously decided," and the relevant statutes imply that for a Department decision to be appealable, it must be in writing and served on the worker.¹⁰ Here, as in *Ferenčák*, there was no Department decision addressing the interpreter request or the Department's use of English-only communications with Mestrovac. Thus, the Board could properly refuse to consider Mestrovac's arguments on appeal challenging the Department's English-only communications because there

⁸ *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402, review denied, 130 Wn.2d 1009 (1996)).

⁹ *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969).

¹⁰ *Ferenčák v. Dep't of Labor & Indus.*, 142 Wn. App. 727, 742, 175 P.3d 1109 (2008) (quoting *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661, 879 P.2d 326 (1994) (citing *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970)), review denied, 125 Wn.2d 1019 (1995)).

was no Department decision from which to appeal. The superior court's finding to the contrary was error.

[9] ¶18 Mestrovac contends that because the statute refers to "any action" or "any decision" of the Department and it does not require the action or decision to be in writing, the Department's refusal to provide the additional interpreter services is an action from which he may properly appeal. We disagree. Mestrovac relies on language in *Dils v. Department of Labor & Industries*,¹¹ in which workers challenged the Department's delay of claims administration in a civil suit. There, the court held that the workers did not exhaust their remedies, noting that they "could have objected to the Department's claims processing procedures by requesting reconsideration by the Department or by appealing to the Board."¹² But the court also noted that if the Board or Department did not respond to their objections, the workers could have petitioned the court for a writ of mandamus to compel agency action.¹³ And in the later decision in *Cena v. State*,¹⁴ the court noted that if the claimant was frustrated with the process and could not procure a decision from the Department, he could have filed a writ of mandamus in superior court to compel the requested action.

¶19 Thus, if Mestrovac believed the Department was unresponsive to his requests but had no decision from which to appeal, he had available to him the remedy of filing a writ of mandamus. There is no legal support for his argument that absent a specific Department decision addressing this procedure, the Department's continued use of the English-only notices despite its knowledge of his LEP

¹¹ 51 Wn. App. 216, 752 P.2d 1357 (1988).

¹² *Id.* at 219.

¹³ *Id.*

¹⁴ 121 Wn. App. 352, 358 n.13, 88 P.3d 432 (2004), *review denied*, 153 Wn.2d 1009 (2005).

status is an appealable Department action.¹⁵ We therefore hold that the superior court erred by concluding in this case that the court and the Board had jurisdiction over Mestrovac's claims relating to the Department's English-only procedures.¹⁶

C. Due Process and Equal Protection

[10-12] ¶20 The Department and the Board also contend that the superior court erred by concluding that due process requires both the Department and the Board to provide and pay for more interpreter services than they had already provided. While the court's order did not make a specific finding that there was a due process violation, it did state that both the IAJ and the Board erred by failing to consider or enter findings on this issue and that Mestrovac was entitled to reimbursement for interpreter expenses "incurred because of the Department's and the Board's failure to provide interpreter services for [him] to communicate with the Department, his employer, his health care providers, and his lawyer." The superior court's ruling is without legal support.

¶21 As we held in the *Kustura* opinion, neither the Department's nor the Board's interpreter procedures conflict with the constitutional guaranties of due process or equal protection, as Mestrovac contends.¹⁷ Nor does chapter 2.43 RCW require interpreter services beyond those provided during Board hearings or that the Board pay for such services absent a finding of indigency.¹⁸ Thus, we determine only whether the Board provided sufficient in-

¹⁵ We also note that he requested that all Department communications be made through his English-speaking attorney, indicating that there was no such need for translated orders.

¹⁶ As in *Ferenčak*, we hold that the Department may not in the future avoid review of its policies by refusing to issue an order. *Ferenčak*, 142 Wn. App. at 743 n.37.

¹⁷ See *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 682-89, 175 P.3d 1117 (2008).

¹⁸ See *id.* at 19-20.

terpreter services "to assist [Mestrovac] throughout the proceeding," in compliance with the statute.¹⁹ Here, the Board provided and paid for an interpreter for the entire hearing, but the IAJ refused to allow Mestrovac to use the interpreter for any communications with counsel during breaks or off the record.²⁰ Thus, as we held in *Kustura*, by failing to provide an interpreter for communications with counsel during the hearing, the Board did not comply with the statute's directive to supply an interpreter "to assist [the claimant] throughout the proceedings." But as in *Kustura*, we find no reversible error.

¶22 As did the claimants in *Kustura*, Mestrovac fails to demonstrate any prejudice caused by the Board's failure to provide him an interpreter for his communications with counsel during the hearing. Mestrovac identifies the prejudice as the added financial cost of an interpreter to provide these additional services and asserts that by having to pay these additional costs, his benefits were reduced. But he does not allege that this additional language assistance likely affected the outcome of his claim. Indeed, his attorney reviewed all Department orders, he filed a timely appeal, he had an evidentiary hearing before the Board which was interpreted for him, and his attorney submitted extensive briefing on the legality of the wage computation. As in *Kustura*, it is unlikely that he could have offered any additional input that would have been critical to his case and that required an interpreter for his communications with counsel. Mestrovac makes no showing to the contrary. Most importantly, he ultimately obtained the correct amount of benefits from the Department.

¹⁹ RCW 2.43.030(1).

²⁰ The IAJ further ruled that the Board would not provide an interpreter for perpetuation depositions. While the workers assert briefly in their response to the Board's appeal that the Board may not withhold interpreters for perpetuated testimony, the superior court's order does not address interpreter services for perpetuation depositions, nor do the workers address the court's failure to include this in its order in their assignments of error on cross-appeal. Thus, this aspect of the IAJ's ruling is not before us, and we do not consider it here.

[13, 14] ¶23 Because Mestrovac fails to show any prejudice from the Board's failure to provide an interpreter for his communications with counsel at the Board hearing, we reverse the superior court's order requiring the Department and Board to pay for his interpreter services.²¹ There is no authority for requiring the Board to provide interpreter services for matters outside of the Board hearing. That portion of the trial court's order is also reversed. Thus, there is no basis for an award of attorney fees related to those issues. We do not need to reach the Department's and the Board's arguments challenging these fees and the court's order requiring the Board to conduct a hearing to determine these fees.

II. Denial of Board's Motion To Intervene

[15-18] ¶24 We next address the Board's appeal of the superior court's denial of the motion to intervene and award of attorney fees related to that motion. We agree with the Board's position that it had a right to intervene in the superior court proceedings and that there was no basis for the attorney fees award. Contrary to the superior court's findings, the Board's motion to intervene was timely under the circumstances.²² The motion was filed within a few weeks after the Board learned of the ruling, and there is no

²¹ While we conclude that the Board should have provided interpreter services for communications with counsel during the hearing, we also hold, as we did in *Kustura*, that the statute does not require the Board to pay for such services because it did not initiate the proceedings. See *Kustura*, 142 Wn. App. at 680-81. We recognize that board regulations provide for appointment of interpreters at Board expense but note that the applicable regulation is phrased in the permissive. See WAC 263-12-097(1) (providing that the IAJ "may appoint an interpreter"). Unless the claimant is indigent, the issue of who pays for interpreter services remains discretionary with the Board.

²² The superior court found that the motion was untimely because the Board knew since April 2004 that this issue would be decided when it was served with Mestrovac's notice of appeal to the Board. But because the notice of appeal did not name the Board as a party and did not indicate that any direct relief was requested against it, there was no way for the Board to know that Mestrovac was seeking a judgment against it for reimbursement of interpreter fees at that time. In fact, it was not until after the Department filed its motion for reconsideration and clarification of the superior court's decision that monetary relief against the Board was first suggested. The court's order on the motion to reconsider/clarify

rule limiting the time within which a party must file an intervention motion. Rather, the timeliness of the motion is determined by considering the specific circumstances of the case.²³ Here, the few weeks' delay was reasonable, considering that the court's order presented an atypical—if not unprecedented—ruling and placed the Board in a unique procedural posture, where it was treated as a party with a judgment against it but was also directed to determine the amount of that judgment as a quasi-judicial tribunal. Because the order created an inherent conflict for the Board, it was not unreasonable for it to take three weeks to formulate a thoughtful, careful response.

¶25 The Board also had an obvious interest in not paying a judgment against it for reimbursement fees, but because it was not a party, it could not defend against the claim. Nor was the Board's interest adequately protected by the Department. The Department had its own interest in not paying for the same fees and could dispute the way in which the court allocated the fees between itself and the Board.²⁴ Intervention was therefore appropriate to enable the Board to defend its interests. The trial court abused its discretion when it entered judgment against the Board as an absent party and then refused to allow it to defend against that judgment.²⁵ We reverse the trial court's ruling denying the Board's intervention motion.

[19] ¶26 Because the superior court improperly denied the Board's motion to intervene, there is no basis for the court's order awarding attorney fees to Mestrovac for responding to the motion to intervene. Accordingly, we reverse the attorney fees award against the Board. Nor is

was issued April 17, 2006, and the Board filed its motion to intervene a few weeks later on May 11, 2006.

²³ See *Martin v. Pickering*, 85 Wn.2d 241, 244, 533 P.2d 380 (1975) ("In considering the question of timeliness, all the circumstances should be considered, including the matter of prior notice of the lawsuit and the circumstances contributing to the delay in moving to intervene.").

²⁴ See *Spokane County v. State*, 136 Wn.2d 644, 650, 966 P.2d 305 (1998).

²⁵ See *id.* at 650 (rulings on permissive intervention are reviewed for an abuse of discretion).

there any authority for the court's award of attorney fees to Mestrovac for his briefing in this court.²⁶ A request of attorney fees incurred before this court must be made to this court.²⁷ And none was made in connection with the motion to intervene. Even if there had been a request, Mestrovac is not the prevailing party.

III. Wage Calculation

¶27 Finally, we address Mestrovac's cross-appeal in which he challenges the Department's wage calculation. He contends the Board erroneously excluded overtime pay, holiday and vacation pay, and employer contributions to government-mandated benefits. We disagree.

[20] ¶28 Mestrovac first argues that the Board's wage calculation did not include overtime pay of \$13.50 per hour. The Board's calculation included 10.39 hours of overtime but used his regular pay rate of \$9 per hour.²⁸ Mestrovac contends that this calculation did not comply with RCW 51.08.178(1) to include wages "from all employment at the time of injury." But that statute clearly states that wages "shall not include overtime pay except in cases under subsection (2) of this section."²⁹ Subsection (2) of the statute relates to employment that is "exclusively seasonal," or "part-time or intermittent,"³⁰ which is not at issue here. Thus, by including the overtime hours at the regular pay rate, the Board's calculation complied with the statute.³¹

²⁶ In the August 1, 2006 order the superior court awarded him additional attorney fees against the Board for work performed "to obtain leave under RAP 7.2 for the Superior Court to enter this order."

²⁷ RAP 18.1.

²⁸ CABR 761.

²⁹ RCW 51.08.178(1).

³⁰ RCW 51.08.178(2).

³¹ We also note that the statute refers to overtime "pay," not overtime "hours," evidencing an intent to exclude the overtime wage rate while including the overtime hours. See RCW 51.08.178(1).

[21] ¶29 Mestrovac also appears to challenge the number of overtime hours, noting that the evidence established he worked 20.90 hours overtime instead of 10.39, the amount determined by the Board. He asserts that he should have been paid the overtime rate of \$13.50 for these 20.90 hours. But because he did not assign error to this factual finding, it becomes a verity on appeal and we do not review it.³²

[22] ¶30 Mestrovac further argues that his wage calculation erroneously excluded holiday pay and vacation leave. Holiday and vacation pay may be included in the wage calculation by either (1) including the cash value of the employer's contributions for hourly leave in determining the hourly pay rate or (2) including the leave hours taken in determining the total number of hours worked.³³ Thus, if the Department used a 40-hour week in its calculation, which it did,³⁴ those days were included: they were counted as days worked even if Mestrovac took them as vacation days. We also note that he did not allege that he took additional leave that was unaccounted for in the calculation. He was not entitled to an additional amount.

[23] ¶31 Finally, Mestrovac contends that the wage calculation should have included the value of employer taxes for government-mandated benefits and asks this Court to reverse its decision in *Erakovic v. Department of Labor & Industries*.³⁵ For the reasons discussed in our opinion in *Ferenčak*, we reject these arguments and affirm the Board's findings and conclusions on this issue.³⁶

³² Nonetheless the Board's calculation is supported by substantial evidence. Mestrovac's expert, Robert Moss, testified that based on his review of 52 weeks of biweekly pay stubs, he worked an average of 4.81 overtime hours every two weeks, and the employer's human resource manager testified that his overtime was five hours every two weeks.

³³ See *Fred Meyer, Inc. v. Shearer*, 102 Wn. App. 336, 8 P.3d 310 (2000).

³⁴ CABR 3 (wage rate based on hourly pay, eight hours per day, five days per week).

³⁵ 132 Wn. App. 762, 134 P.3d 234 (2006).

³⁶ See *Ferenčak*, 142 Wn. App. at 741.

¶32 We reverse in part and affirm in part.

BAKER and DWYER, JJ., concur.

[No. 58878-8-I. Division One. January 22, 2008.]

IVAN FERENČAK, *Appellant*, v. THE DEPARTMENT OF LABOR AND
INDUSTRIES ET AL., *Respondents*.

- [1] **Industrial Insurance — Judicial Review — Burden of Proof.** Under RCW 51.52.115, a Board of Industrial Insurance Appeals decision in an industrial insurance case is *prima facie* correct. The burden of proving otherwise is on the party challenging the decision.
- [2] **Industrial Insurance — Judicial Review — Standard of Review — Agency Record.** Under RCW 51.52.115, a superior court reviewing a Board of Industrial Insurance Appeals decision in an industrial insurance case acts in an appellate capacity, reviewing the board's decision *de novo*, but it cannot consider matters outside of the record or presented for the first time on appeal.
- [3] **Industrial Insurance — Judicial Review — Appellate Review — Standard of Review.** An appellate court reviews *de novo* a judgment entered by a superior court on judicial review of a Board of Industrial Insurance Appeals decision to determine whether substantial evidence supports the superior court's findings of fact and whether the superior court's conclusions of law flow from those findings. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. Unchallenged findings of fact are verities on appeal.
- [4] **Parties — Intervention — Matter of Right — Review — Standard of Review.** A trial court's grant of intervention as a matter of right under CR 24(a)(2) will not be disturbed by a reviewing court absent an error of law.
- [5] **Parties — Intervention — Permissive Intervention — Review — Standard of Review.** A trial court's grant of permissive intervention under CR 24(b)(2) is reviewed for an abuse of discretion.
- [6] **Parties — Intervention — Matter of Right — Test.** A party may intervene in an action as a matter of right under CR 24(a)(2) if (1) the party has made a timely application for intervention, (2) the party claims an interest that is the subject of the action, (3) the disposition of the case likely will adversely affect the party's ability

NO. 81480-5

SUPREME COURT OF THE STATE OF WASHINGTON

ENVER MEŠTROVAC,

Petitioner,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON and THE BOARD OF
INDUSTRIAL INSURANCE
APPEALS,

Respondents.

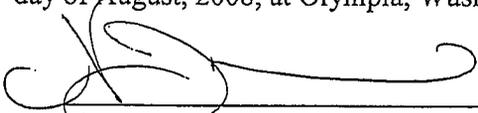
CERTIFICATE OF
SERVICE

I hereby certify that on August 22, 2008, I served a copy of an Answer of Respondent Board of Industrial Insurance Appeals to Amended Petition for Review on all parties or their counsel of record as indicated below:

Ann Pearl Owen Ann Pearl Owen PS 2407 - 14 th Avenue South Seattle, WA 98144-5014	<input checked="" type="checkbox"/> via U.S. mail, first class, postage prepaid <input type="checkbox"/> via facsimile <input type="checkbox"/> via email - annpearl@gmail.com <input type="checkbox"/> via ABC Legal Services
Michael J. Pontarolo Attorney at Law 601 W. Main Avenue, Suite 1212 Spokane, WA 99201-0635	<input checked="" type="checkbox"/> via U.S. mail, first class, postage prepaid <input type="checkbox"/> via facsimile <input type="checkbox"/> via email - mikep@dctpw.com <input type="checkbox"/> via ABC Legal Services

Paula T. Olson Burgess Fitzer, P.S. 1145 Broadway, Suite 400 Tacoma, WA 98402-3584	<input checked="" type="checkbox"/> via U.S. mail, first class, postage prepaid <input type="checkbox"/> via facsimile <input type="checkbox"/> via email - paulao@burgessfitzer.com <input type="checkbox"/> via ABC Legal Services
Kelby Dahmer Fletcher Peterson Young Putra 1501 - 4 th Avenue, Suite 2800 Seattle, WA 98101-1609	<input checked="" type="checkbox"/> via U.S. mail, first class, postage prepaid <input type="checkbox"/> via facsimile <input type="checkbox"/> via email - kfletcher@pypfirm.com <input type="checkbox"/> via ABC Legal Services
Bryan P. Harnetiaux WSTLA Foundation 517 E 17 th Avenue Spokane, WA 99203-2210	<input checked="" type="checkbox"/> via U.S. mail, first class, postage prepaid <input type="checkbox"/> via facsimile <input type="checkbox"/> via email - amicuswstlaf@winstoncashatt.com <input type="checkbox"/> via ABC Legal Services
Masako Kanazawa Assistant Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104	<input type="checkbox"/> via U.S. mail, first class, postage prepaid <input checked="" type="checkbox"/> via campus mail - TB-14 <input checked="" type="checkbox"/> via email - masakok@atg.wa.gov <input type="checkbox"/> via ABC Legal Services
Jay D. Geck Deputy Solicitor General 1125 Washington Street SE Olympia, WA 98504-0100	<input type="checkbox"/> via U.S. mail, first class, postage prepaid <input type="checkbox"/> via facsimile <input checked="" type="checkbox"/> via email - jayg@atg.wa.gov <input type="checkbox"/> via ABC Legal Services

DATED this 22nd day of August, 2008, at Olympia, Washington.



NANCY J. HAWKINS
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Hawkins, Nancy (ATG)
Cc: Craig, Johnna Skyles (ATG); annpearl@gmail.com; mikep@dctpw.com; paulao@burgessfitzer.com; kfletcher@pypfirm.com; amicuswstlaf@winstoncashatt.com; Kanazawa, Masako (ATG); Geck, Jay (ATG)
Subject: RE: Meštrovac v. L&I/BIIA, No. 81480-5

Rec. 8-22-08

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Hawkins, Nancy (ATG) [mailto:NancyH5@ATG.WA.GOV]
Sent: Friday, August 22, 2008 12:54 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Craig, Johnna Skyles (ATG); annpearl@gmail.com; mikep@dctpw.com; paulao@burgessfitzer.com; kfletcher@pypfirm.com; amicuswstlaf@winstoncashatt.com; Kanazawa, Masako (ATG); Geck, Jay (ATG)
Subject: Meštrovac v. L&I/BIIA, No. 81480-5

Dear Clerk,

Attached for filing in *Enver Meštrovac v. Department of Labor & Industries and Board of Industrial Insurance Appeals*, No. 81480-5, are: (1) Answer of Respondent Board of Industrial Insurance Appeals to Amended Petition for Review and (2) a Certificate of Service.

<<mestrovac answer.pdf>> <<mestrovac cert.pdf>>

Thank you.

Johnna Craig

Phone: 360-586-3457

WSBA No. 35559

JohnnaS@atg.wa.gov

email sent by Nancy Hawkins on behalf of Johnna S. Craig | Government Operations Division
7141 Cleanwater Dr. SW
Olympia, WA 98504

tel: 360-586-0810

fax: 360-586-3593

"Save the Trees" ... please print only when necessary