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NO. 58878-8-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

IVAN FERENČAK,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES and ,
BOARD OF INDUSTRIAL INSURANCE APPEALS,
INTERVENOR,

Respondents.

2007 JUN 12 11:02 AM
COURT OF APPEALS
STATE OF WASHINGTON
FILED

BRIEF OF APPELLANT

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I. INTRODUCTION

Ivan Ferencák [hereinafter Ferencák], a worker with limited English proficiency [LEP], was injured while legally employed. Mr. Ferencák appeals the Superior Court's order granting the Board of Industrial Insurance Appeals [Board] leave to intervene and the judgment affirming the Board's Decision affirming decisions of the Department of Labor & Industries [Department/DLI].

II. ASSIGNMENTS OF ERROR AND ISSUES

A. ASSIGNMENTS OF ERROR

1. The Superior Court erred by granting the Board's motion to intervene. [Error No. 1]
2. The Superior Court erred by affirming the Board's decision upholding the Department's wage determination. [Error No. 2]
3. The Superior Court erred by failing to address the Department's failure¹ to provide Mr. Ferencák interpreter services² and its issuance of orders in English only. [Error No. 3]
4. The Superior Court erred affirming the Board's decision on interpreter services Mr. Ferencák was entitled at the Board. [Error No. 4]

¹ When used in this brief, the terms "fail" and "failure" include the refusal to do something and the denial by action, if not by words, to do the thing which has not been done. Likewise, when used in this brief the terms "refuse" and "deny" include action which constitutes the failure to do something.

5. The Superior Court erred by affirming the Board's failure to enforce duly served *subpoenae duces teca* for evidence on wages and benefits and its failure to adduce necessary evidence. [Error No. 5]

6. The Superior Court erred by failing to award attorney fees and costs to Mr. Ferenčák. [Error No. 6]

7. The Superior Court erred in awarding the Department attorney fees against Mr. Ferenčák. [Error No. 7]

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Is it consistent with *Kaiser Aluminum & Chemical Corp.* to grant the Board leave to intervene at Superior Court? [Error No. 1]

2. Was the intervention motion timely and proper? [Error No. 1]

3. Did the Board undervalue health care benefits? [Error No. 2]

4. Is it consistent with *Fred Meyer v. Shearer* to exclude lost holiday and vacation pay from Mr. Ferenčák's wages? [Error No. 2]

5. Is it consistent with *Cockle* and *Granger* to exclude lost bonuses from Mr. Ferenčák's wages? [Error No. 2]

6. Is it consistent with *Cockle* and *Granger* to exclude the employer contributions to governmentally mandated worker benefit programs from wages? *I.e.* Has *Eraković* been overruled? [Error No. 2]

² The term "interpreter services" and "interpretation" refers not only to oral interpretation but also to written "translator services" and "translation."

7. Did the Board have jurisdiction over the Department's sending English only orders to Mr. Ferencák? [Error No. 3]

8. Did the Superior Court err by failing to address Mr. Ferencák's request for reimbursement of interpreter expenses incurred because the Department did not provide them free? [Error No. 3]

9. Does the Industrial Insurance Act [the Act] require communications with LEP injured workers on their claims in their primary language or through free interpreter services? [Errors No. 3 & 4]

10. Does Washington public policy require communications with LEP injured workers in their own language or through free interpreter services? [Errors No. 3 & 4]

11. Does RCW 2.43 require communications with LEP injured workers in their own language or through free interpreter services? [Errors No. 3 & 4]

12. Does Washington's Law Against Discrimination require communications with LEP injured workers in their own language or through free interpreter services on their claims? [Errors No. 3 & 4]

13. Does Due Process require communications with LEP injured workers in their own language or through free interpreter services? [Errors No. 3 & 4]

14. Does Equal Protection require communications with LEP injured workers in their own language or through free interpreter services? [Errors No. 3 & 4]

15. Does Executive Order 13166 require communications with LEP injured workers in their own language or through free interpreter services on Industrial Insurance claims? [Errors No. 3 & 4]

16. Is an LEP injured worker entitled to communicate confidentially with counsel during Board proceedings? [Error No. 4]

17. If the Board and Department communicate in English only with an LEP injured worker and do not provide interpreter services, is the LEP worker to be reimbursed for interpreter expenses? [Errors No. 3 & 4]

18. Is it error to refuse to require witnesses to appear pursuant to *subpoenae duces teca* with documents on wage and benefit information at the Board? [Error No. 5]

19. Is an injured worker entitled to attorney fees and costs under RCW 51.52.130 and *Brand* if he prevails only on one issue on appeal from the Board? [Error No. 6]

20. Does it violate the Act to award attorney fees to the Department against the worker at the Superior Court? [Error No.7]

III. STATEMENT OF THE CASE

A. FACTS PROVEN AT BOARD HEARING

1. Background Information.

Ivan Ferencák was raised in what is now Bosnia and Herzegovina.³ During the Bosnian War, he was put in a concentration camp due to his ethnicity and religion. TR 12/5 4-48. He left for Germany with his wife Vesna.⁴ TR 12/5 48-49. In Germany, Mr. Ferencák worked as a CNC machine operator. In April 2000, the Ferencáks and their two minor children came to the United States. TR 12/5 50. His wife and two children depended upon him when he was injured while working as a CNC machine operator for Travis Industries. TR 12/4 50-51.

2. LEP Issues

Mr. Ferencák grew up speaking Bosnian and could neither read nor speak English when injured, required interpreter services to communicate in English. The Department sent all paperwork in English and did not provide interpreter services. Interpreter services cost him \$60 per hour and were required to communicate with counsel on appeal.⁵

³ References to the Certified Board Record on Appeal appear as CBRA followed by the page number. References to transcripts of Board proceedings in the CBRA appear as TR preceded by the month and day of the proceeding and followed by the page number. References to Exhibits in the CBRA appear as EX followed by the exhibit number. References to evidence received by perpetuation deposition appear as PD preceded the witness name and followed by the page number.

⁴ Whose name appears misspelled as Vesnaf in the Board transcript.

⁵ 12/5 TR 44-45, 64-68.

3. Wages and Benefits Evidence

Ivan Ferencák testified that when injured, he received employer paid medical and dental insurance, accumulated paid vacation benefits [one week per year], got six paid holidays a year, and received a profit sharing bonus in the December before injury. He received no profit sharing bonus [2.32%] for wages earned in 2002. Because of his injury he lost his health care insurance, lost three regularly scheduled pay raises, received no holiday pay, and lost his accumulated vacation days [and was not paid for them]. When he returned to work after two surgeries, he was not covered by health benefits. 12/5 TR 54-65.

Ray Corwin, Travis HR manager, testified Mr. Ferencák was an excellent employee covered by health care who lost coverage due to his injury. He was expecting a scheduled annual review pay raise. 12/5 TR 16-21, 39-41. The monthly health care premiums totaled \$176.00 at time of injury. 12/5 TR 39-40.⁶ In a typical month, Mr. Ferencák earned \$138 in overtime wages. 12/5 TR 21-23. December profit sharing bonuses were paid as wages. 12/5 TR 32-33. Mr. Ferencák lost his health care insurance, his annual review increase and subsequent increases due to time off work from his industrial injury. Mr. Corwin testified to lacking any other knowledge on pay and benefits. 12/5 TR 26, 32, 34.

Jerry McCadam, new HR manager, came to hearing the next year without bringing all documents subpoenaed on wages and benefits. He testified that Mr. Ferencak was paid a 2.32% bonus on the hours he worked for 2002. 10/10 TR 18-20. The monthly cost of health insurance at time of injury was \$158.84 [medical] and \$44.00 [dental] [\$27.84 more than the \$175 figure the Department used in wages].⁷ 10/10 TR 45-46. Mr. McCadam did not bring subpoenaed documents and professed a lack of information on details and value of other wages components.⁸ .

Robert Moss forensic labor economist testified by perpetuation deposition that Social Security, Medicare/Medicaid, Unemployment Compensation and Industrial Insurance are programs providing subsistence and/or medical benefits to workers which are critical to health and survival, meeting the *Cockle* test. Moss PD 25-38, 44-45, 64.

Admitted exhibits: Mr. Ferencak's December paystub showed \$138 overtime pay for two weeks. EX 3, **Appendix. B.** 2002 Hours worked showed all hours worked at \$11.50 and no payment of bonus. EX 4. Medical coverage certificate showed coverage ended June 1, 2002. EX 6. Medical documentation showed unable to return to work due to injury. EX 7. 2002 Profit Sharing benefit was 2.32% but paid in 2003, when Mr.

⁶ Note conflict--Corwin's figure is \$176.00/month and McCadam's is \$202.84/month.

⁷ Note conflict--Corwin's figure is \$176.00/month and McCadam's is \$202.84/month.

Ferenčák was no longer employed there. EX 14. US Chamber of Commerce Employee Benefits Study shows average cost 39% of payroll, with manufacturing companies like Travis paying 38.6% of payroll for employee benefits. EX 17

B. DEPARTMENT ACTION

The Department accepted Mr. Ferenčák's claim, issuing all orders⁹ and communications¹⁰ in English only. The Department's wage calculation order¹¹ omitted Mr. Ferenčák's overtime pay, holiday pay, lost vacation days, his year end profit sharing bonus, and his employer's contributions to governmentally mandated employee subsistence benefit programs and valued his health care at \$175.00 per month. Mr. Ferenčák appealed all the Department's orders, several significantly more than 60 days after issuance. In 2003, after receipt of Mr. Ferenčák's November 2002 notices of appeal and notices of non-English speaking status, the Department continued to issue orders in English only. See *e.g.* DLI's payment orders from May to August 2003.¹²

C. BOARD ACTION

On and after November 15, 2002, Mr. Ferenčák filed notices of

⁸ 10/10 TR 8, 10, 11, 13, 25, 36, 37, 38, & 49.

⁹ CBRA

¹⁰ TR 12/5 54.

¹¹ CBRA 84-85.

¹² CBRA 718, 731, 741, 723, 752, 764, 772, 780

appeal¹³ of multiple English only Department orders¹⁴, including the wage calculation decision of May 6, 2002.¹⁵ He informed the Department and the Board of his LEP status, requesting recalculation of his wages, payment of back time loss, “translation services,” and reimbursement for interpreter costs he incurred in seeking benefits.¹⁶

The Board initially denied several of Mr. Ferencák’s appeals as untimely.¹⁷ The Department later stipulated all the appeals were timely because they were filed within 60 days after an interpreter communicated to Mr. Ferencák the significance of the orders.¹⁸ The Board’s scheduling order recognized this as the basis for Board jurisdiction over those appeals initially denied as untimely. This Board order set forth the issues, omitting Mr. Ferencák’s request for reimbursement for interpreter expenses at Department level. CBRA 201.

Mr. Ferencák moved for free “translation services” to assist him in preparation for hearing, to participate at hearing and for all written communications from the Department and Board.¹⁹ In an order entitled “Denying Request for Translation Services Other Than At Hearing,” the

¹³ Notices of Appeal: CBRA 86-91, 623-630, 640-647, 658-665, 675-680, 684-689, 699-704, 714-723, 732-735, 742-745, 765-768, 753-756, 773-776, 781-784.

¹⁴ DLI Orders: CBRA 84-85, 621-622, 639, 657, 662-665, 674, 683, 698, 713, 718, 723, 731, 741, 752, 764, 772, 780.

¹⁵ CBRA 84-85

¹⁶ See fn. 13, *supra*.

¹⁷ CBRA 351, 604-5, 610-11, 618.

¹⁸ CBRA 254, 267-268, 347, 351,

Industrial Appeals Judge [IAJ] held that Mr. Ferenčák was LEP. Despite this, the IAJ's order denied "interpretive services" to prepare his case, ruling that "the protections of the 14th amendment would not attach in the preparation stage." CBRA 188. The order stated "Claimant's request for interpretive services for her [sic] own testimony is hereby granted." CBRA 189. The order stated that the Board was not required to, but would, if requested, provide interpretive assistance for other witnesses *at the Board*. The order denied interpreter services for depositions. CBRA 189. The Board further ruled that the Department need not provide interpretive services during "this adjudication." CBRA 190.

Mr. Ferenčák had repeated *subpoenae duces teca* issued by the IAJ served on Travis' HR personnel [CBRA 576-579, 584-591] and on Premera Blue Cross. [CBRA 303-306, 447-450, 571-575]. These costs were necessitated by the Department's refusal to stipulate to figures on wages components. 8/13 TR 3-4. The IAJ 1) refused requests to require Travis Industries or Mr. McCadam to provide subpoenaed documents on wages and benefits and to set another hearing for receipt of that documentation, and 2) imposed the cost of deposing Mr. McCadam , including serving him a third time on Mr. Ferenčák. 11/10 TR 55-62. Mr. Ferenčák requested interlocutory review which request was denied.

¹⁹ CBRA 114-175,

CBRA 593-596. This left Mr. Ferencák without proof on the value and extent of components of his wages. The IAJ closed the record over Mr. Ferencák's objection that he had not yet received needed documents.

The IAJ issued a PD&O which valued Mr. Ferencák's health care benefit at \$197.15 per month²⁰ but affirmed the Department's wage calculation including only \$175 per month.²¹ Mr. Ferencák timely filed a Petition for Review²². The Board entered a D&O²³ which:

1. Held it had no jurisdiction over Department LEP issues [CBRA 3];
2. Affirmed all the IAJ's rulings [CBRA 3];
3. Held the appeals timely due to LEP status/ filing within 60 days of when explained in terms he could understand [CBRA 2];²⁴
4. Excluded vacation pay and holiday pay from wages [CBRA 6];
5. Excluded profit sharing bonus, because he "did not present evidence" of receiving such bonus in 2001, despite receiving a 2.32% bonus on his 2002 wages [CBRA 4-5, 11];
6. Excluded employer contributions to governmental subsistence programs as not critical to worker health and survival [CBRA 11];
7. Found the Board-provided interpreter services adequate despite denying such services for attorney-client communications [CBRA 2-3, 11-12]; and

²⁰ CBRA 81-82, **Appendix C**.

²¹ CBRA 84, **Appendix A**.

²² CBRA 15-65.

²³ CBRA 1-12.

²⁴ In so ruling, the Board applied a different timeliness standard than applied to other LEP workers, specifically injured workers Maida Memišević and Gordana Lukić [consolidated under COA No. 57445-1-I, Emira Resulović [COA No. 59614-4-I], and another Bosnian whose Board appeal was rejected whose appeal will be soon filed with this Court.

8. Found Mr. Ferencák had an adequate opportunity to present his case on wages and time loss [CBRA 2].

D. SUPERIOR COURT ACTION

The Superior Court granted the Board's late motion to intervene less than a week before hearing. CP 1-2. The Superior Court heard oral argument from the Board, the Department, and Mr. Ferencák and issued a Memorandum Decision affirming based on *Eraković*. CP 3-7.

The Superior Court entered judgment for the Department, affirming the Board's D&O on all issues and awarding attorney fees against Mr. Ferencák in favor of the Department. CP 15-18.

Mr. Ferencák timely appealed to the Court of Appeals.²⁵

IV. ARGUMENT

Seven assignments of error have been made. Argument is organized according to these assignments of error. Issues related to the assignments of error are addressed in turn.

A. THE SUPERIOR COURT ERRED GRANTING LEAVE TO INTERVENE.

1. The Board Lacks Standing to Litigate in Appeals of Its Decisions.

In *Kaiser Aluminum & Chemical Corp. v. DLI*, 121 Wn.2d 776, 854 P.2d 611 (1993), the Supreme Court discussed the Board's authority to litigate in appeals of its own decisions, indicating that this rested

“entirely” upon whether the Board’s enabling legislation granted that authority either expressly or by necessary implication. The Supreme Court noted that Chapter RCW 51.52, the Board’s enabling legislation, contained no such express or implied right of appeal, stating at 786:

The Board’s role as an impartial tribunal in hearing appeals from Department determinations weighs heavily against finding an implied right of appeal in RCW 51.52. In order for the Board to function properly as an appellate body, it must not have a partisan interest in the outcome of contested cases, nor should it present the appearance of such an interest. In assuming the role of advocate, the Board creates such an appearance and compromises the impartiality which is critical to its proper role. While there may be some limited utility in allowing the Board to bring appeals like this one, the public interest is better served by requiring the Board to operate within the confines appropriate to an impartial, appellate tribunal.

The Attorney General of Washington, which represents the Board, long ago issued a similar opinion that the Board lacks this authority.

In AGO 49-51 No. 170, the Attorney General states:

Unlike regulatory bodies, the Board of Industrial Insurance Appeals is not a party to its own proceedings; nor may it initiate proceedings on its own motion, hence it is in no sense a party litigant either in its own forum or in the superior and Supreme courts on appeal, as is the case of many regulatory bodies.

Because the Board lacked statutory authority to appear in appeals of its decisions, the Superior Court erred granting it leave to intervene.

²⁵ CP 8-14.

2. Board Intervention Destroys Its Neutrality.

When it moved to intervene, the Board had before it another open appeal [on Mr. Ferencák's medical benefits].²⁶ The Board has a statutory duty to be and appear to be neutral recognized by *Kaiser Aluminum*, *supra*. By moving to intervene in Mr. Ferencák's appeal of its own decision, the Board acted *ultra vires* and lost both its neutrality and any appearance of neutrality. Intervention made the Board Mr. Ferencák's direct adversary. It was error for the Superior Court to grant the Board leave to intervene because doing so destroyed both the appearance of and the actual neutrality of the Board on Mr. Ferencák's open appeal then at the Board.

3. The Board's Motion Was Untimely and Improper.

As an entity without authority to intervene, the Board's motion was improper under CR 24. The Board's motion was also untimely. Under CR 24, timeliness is a critical requirement. *Martin v. Pickering*, 85 Wn.2d 241, 243, 553 P.2d 380 (1975). When a prospective intervenor has notice of the litigation, it must exercise diligence to intervene or demonstrate extraordinary circumstances. *Kreidler v. Eikenberry*, 111 Wn.2d 828, 766 P.2d 438 (1989).

²⁶ In November 2006, the Board entered a decision in that appeal Docket No. 05 17298, similarly failing to address interpreter reimbursement requested in the notice of appeal.

The Board knew, since long before Mr. Ferencák's Superior Court appeal, that he intended to appeal the Board's order denying his request for free interpreter services.²⁷ Mr. Ferencák raised this issue on petition for review. CBRA 46-57. The Board ruled on the same. CBRA 11-12. The Board's notice of this appeal is proven by its December 2005 letter providing the CBRA to the Superior Court. The Board delayed, waiting until just before the Supreme Court hearing, to move to intervene.

The Board's unjustified delay in moving to intervene, its duty of neutrality, and its lack of statutory authority to litigate its own decisions required the Superior Court to deny the Board's motion. The Superior Court erred in granting intervention under CR 24.

4. Prejudice to Mr. Ferencák Justifies an Award of Attorney Fees Against the Board

The Board's intervention motion prejudiced Mr. Ferencák because

- 1) He incurred additional attorney fees to respond to the motion;
- 2) He had to address additional issues at Superior Court hearing;
- 3) He faced two opposing parties;

²⁷ 4/10 TR, 3-4 In an April 2003 phone conference, the following transpired:

Judge Hendrickson: Ms. Owen continues to have additional issues and requests for clarification as it refers to translation services. I know there was an interlocutory order issued last week on that matter but some further clarification or reconsideration is being sought of that order; is that a correct statement, Ms. Owen?

Ms. Owen: That is and insofar as the order denying certain translation services, we feel that the order is in error and if that doesn't get changed there will be an appeal to the Superior Court on that issue.

Judge Hendrickson: Okay . . .

- 4) His case suffered from having the Board, duty bound to be neutral regarding his claim, opposing him on substantive issues on language/ LEP issues and his right to interpreter services.

Thus, the Board's intervention motion and intervention was not without adverse financial consequences²⁸ on Mr. Ferencák for which this Court should award attorney fees under RCW 51.52.130 against the Board.

B. MR. FERENČAK'S WAGES WERE UNDERCALCULATED.

1. Wages Reflect Earning Capacity, Including Benefits Critical to Worker Health and Survival.

The Act provides time loss benefits for injured workers to provide subsistence benefits when wages are lost due to industrial injury. This benefit "is to reflect a worker's lost earning capacity." *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727, 952 P.2d 590 (1997). RCW 51.08.178(1) defines "wages," requiring compensation be based on wages the worker received from "all employment" including "board, housing, fuel or other consideration of like nature."

RCW 51.08.178 has been interpreted repeatedly by our Supreme Court. In *Cockle v. DLI*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001), the court interpreted "other consideration" to include health care benefits as:

readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival.

²⁸ Being as it was, contrary to the legislature's declaration of policy in RCW 51.12.010.

The Department paid Mr. Ferencák time loss benefits from a wage calculation omitting these important components of his earning capacity:

1. Lost holiday and vacation pay;
2. Bonus lost due to his industrial injury;
3. Employer payments to governmentally mandated employee benefit programs.

Authority on these issues will be addressed in turn.

2. Health Care Benefits were Undervalued in Wages.

The Board evaluated health care at \$175 per month. *Cockle* sets the value for health care as the insurance premium paid. Travis HR manager McCadam testified the employer's cost for health care was \$202.84 per month, \$27.84 more than the Department's and Board's figure. The Superior Court's affirming the Board was error.

3. Holiday/Vacation Pay was Wrongly Omitted from Wages.

In *Fred Meyer, Inc. v. Shearer*, 102 Wn.App. 336, 8 P.3d 310 (2000), this court held holiday pay constitutes "wages" under RCW 51.08.178. No doubt the moneys Mr. Ferencák lost for vacation days earned, but never paid to him due to his industrial injury, had value to him and should be included in his "wages." The Superior Court erred by excluding Mr. Ferencák's lost accumulated vacation days and his holiday

pay from “wages.” This alone requires remand for recalculation of wages and payment of back time loss underpayments with interest.

4. Mr. Ferencák’s Bonus was Erroneously Omitted from Wages.

RCW 51.08.178 specifically includes “bonuses” in “wages.” Mr. Ferencák’s employer paid him a yearly profit sharing bonus in cash in December before his injury. In the year of his injury, this bonus was significant [2.32%]. No documents showing any 2002 bonus paid to Mr. Ferencák, despite on whether any bonus was paid him for 2002 were produced pursuant to the subpoena. The testimony is conflicting and needs clarification by additional testimony or production of subpoenaed documents. But for his injury, Mr. Ferencák would have earned the bonus on a full year’s wages – a significant amount.²⁹ not just those interrupted due to industrial injury. RCW 51.08.178(3) specifically provides wages include bonuses paid within the twelve months before injury. Again, the employer did not provide the subpoenaed records on this benefit. The exclusion of Mr. Ferencák’s bonus [despite its being paid in 2001] from his wage calculations was error requiring remand for recalculation and payment of back time loss with interest.

5. Employer Payments for Governmentally Mandated Employee Subsistence Benefit Programs are “Wages.”

²⁹ 2.32% x \$11.50/hour x 2076 hours = a minimum of \$550 or over \$45/month lost.

a. Governmentally Mandated Employee Benefits Provide Critical Protection for Worker Health and Survival.

The United States Supreme Court has held that governmentally mandated programs supplying subsistence benefits provide for life's basic necessities. *Goldberg v. Kelly*, 397 U.S. 254, 268-269, 90 S.Ct. 1001, 25 L.Ed.2d 187 (1970) [Social Security]; *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S. Ct. 1322 (1969); *Memorial Hospital v. Maricopa County* [Medicaid], 415 U.S. 250, 39 L.Ed.2d 306, 94 S.Ct. 1076 (1974). Unemployment Compensation provides a core benefit critical to worker survival during unemployment. RCW 51.04.010. Industrial Insurance benefits ensure worker survival and health when faced by economic loss and health problems from injury at work. RCW 51.04.010, RCW 51.12.010. Thus, contributions to these programs meet the *Cockle* requirement as readily identifiable in kind components of earning capacity critical to worker health and survival.

b. Eraković has been Overruled.

In *Eraković v. DLI*, 132 Wn.App. 762, 134 P.3d 234 (2006), this court excluded employer payments to Social Security, Medicare/Medicaid, and Industrial Insurance from "wages"³⁰. At the Superior Court, the Department argued the employer payments for governmentally mandated

³⁰ This Court in *Eraković* left open whether employer contributions to Unemployment Compensation constitute "wages" at 775, fn. 41.

employee benefit programs, including Unemployment Compensation, should be excluded from wages based on *Eraković*. The Supreme Court's recent decision in *Granger, supra*, effectively overruled *Eraković*, necessitating inclusion of these employer benefit contributions in wages.

In *Eraković*, the issue was whether employer payments to governmentally mandated subsistence benefit programs should be included in calculating wages. The *Eraković* court ruled against Ms. Eraković, based on the rationale below:

Employer payments to government programs such as Social Security, Medicare, and Industrial Insurance are not wages because they are not consideration an employee receives from his or her employer. Even if they were, Erakovic [sic] was not receiving benefits from these programs at the time of her injury, and she fails to explain how the payments were critical to her health and survival at that time.

After the Supreme Court's decision in *Department of Labor & Industries v. Granger*, 159 Wn.2d 752, 153 P.3d 839 (2007), the *Eraković* rationale is simply no longer tenable. In *Granger*, the employer paid into a health trust fund for the worker's benefit. At injury, Granger was not yet eligible for health benefits. The Supreme Court addressed whether the employer's payments to the trust should be in Granger's wage calculation, summarizing the arguments thusly:

The Department argues that because Granger was not eligible to receive the benefits of that trust at the time of his injury, the payments made to the trusts should not be included in the

calculation. Granger argues that because his employer was paying \$2.15 per hour to the trust in return for Granger's work, that amount represents his earning capacity at the time of his injury and thus should be included in the calculation.

The Supreme Court rejected all these Department arguments, ruling in the worker's favor, including the employer's trust contributions in "wages."

It is readily apparent *Granger* invalidates the *Eraković* rationale. In *Eraković*, this court emphasized that Eraković: 1) was receiving neither Social Security nor Medicare *when injured* and 2) had not shown these benefits were critical to her *when injured*. The Supreme Court in *Granger* considered and rejected identical Department arguments.

The Supreme Court in *Granger* held it was only necessary to show that the employer's payments on the worker's behalf were being made at the time of injury. In other words, whether the worker received benefits at the time of injury was irrelevant.

The Department may argue *Eraković* was not overruled or was only partially overruled by *Granger*, because the *Eraković* decision was not exclusively based on the rationale rejected in *Granger*. However, the other rationale discussed in *Eraković* – that the employer's payments were not "consideration" -- also fails.

The Supreme Court addressed "consideration" in *Granger*, treating "consideration" as inseparable from the central issue, saying:

Although the parties ask us to construe the meaning of "receiving at the time of the injury," the disagreement also requires us to determine what constitutes "consideration": the payments to the trust, or the coverage itself.

In *Granger*, the Supreme Court ruled that employer payments reflect worker earning capacity and, therefore, must be included in wages. In so doing, the Supreme Court determined that those employer payments constituted "consideration."

Employer payments made on Eraković's behalf for governmentally mandated subsistence programs were no less "consideration" than the employer payments for health care benefits made in *Granger*. Thus, both reasons articulated by this court in *Eraković* were considered and rejected by the Supreme Court in *Granger*. *Eraković* has been effectively overruled by the Supreme Court in *Granger*.

Other than this court's opinion in *Eraković*, there is no simply no Washington authority for rejecting Mr. Ferencák's contention that his employer's payments for Unemployment Compensation benefits should be included in wage calculation. Those employer's payments were made on Mr. Ferencák's behalf in consideration of his work. Employer unemployment payments secured a crucial benefit for Mr. Ferencák and his family in the event of his future unemployment. Without those benefits, Mr. Ferencák, his wife, and their children could easily be

rendered destitute without the financial means to survive due to layoff or other circumstance beyond their control.

It is without dispute that the employer made Unemployment Compensation, Social Security, Medicare, and Industrial Insurance payments on Mr. Ferenčák's behalf at the time of his injury. It is likewise beyond dispute that those payments were made only because Mr. Ferenčák worked for the employer. Under *Granger*, these employer payments reflect part of Mr. Ferenčák's earning capacity, although he was not receiving benefits from these subsistence benefit programs when injured.

This court should also consider that these employer payments had value to Mr. Ferenčák, just as the employer health trust payments had value to Mr. Granger. The Supreme Court in *Granger* stated:

Eligibility depended upon banking hours, and when he became injured, Granger lost the ability to bank those hours; therefore the hourly payment by his employer did have value to him.

Mr. Ferenčák's eligibility for Unemployment Compensation benefits, like Granger's eligibility for health care benefits, depended on accumulating sufficient qualifying work hours in the period before unemployment.³¹ Similarly, a worker must accumulate 40 quarters of work credits to be eligible for full Social Security benefits.³² Further,

³¹ RCW 50.04.030, RCW 50.04.355.

³² USC Title 42,406.

benefits under Unemployment Compensation and Social Security are indexed to the wages earned before worker applies for benefits.³³ Thus, both Mr. Ferencák's eligibility for benefits and the amount of benefits to under those programs were affected by work lost due to his injury.

It is abundantly clear under both the law and the Board Record that benefits from Social Security, Medicare, Industrial Insurance, and Unemployment Compensation provide for basic survival needs. Mr. Ferencák produced and the Board accepted evidence on the critical nature of these benefits in forensic labor economist Robert Moss' testimony.

Finally, the court should not be misled by any attempt to characterize these employer contributions as "taxes." Whether benefit payments are mandated by the government, required by a collective bargaining agreement, or made voluntarily, the fact remains that these payments purchase something of value for the worker.

Why the employer makes these payments is of no consequence, just as it is of no consequence whether the worker is eligible to receive the benefits when injured. The only question is this: Are the benefits provided by the employer's payments critical for the worker's health or survival? The answer is clearly "yes."

³³See Moss PD 28, 33 showing benefits index to contributions based on gross wages for Unemployment compensation, and Social Security.

C. THE SUPERIOR COURT ERRED BY FAILING TO ADDRESS THE ISSUES OF THE DEPARTMENT'S USE OF ENGLISH ONLY.

1. The Board Had Jurisdiction of the Department's Decision to Use English Only to Communicate with Mr. Ferencák.

The Board found it had no jurisdiction to address the Department's use of English only to communicate on Mr. Ferencák's claim, stating:

The matter of whether, and to what extent, the Department should have provided interpreter services is not properly before this Board. No written order of the Department denying such a request, if any was made, is before the Board in these appeals.
CBRA 3

The Board has jurisdiction over worker appeals of any Department "order, decision, or award" under RCW 51.52.060. The Department is required to "communicate" its orders to workers under RCW 51.52.050. By referring to Board orders in his notices of appeal, Mr. Ferencák vested the Board with jurisdiction over the decisions made by the Board in issuing those orders, including the decision to send them in English only.

2. The Department Denied Requests for Communications in a Language Mr. Ferencák Understood.

Mr. Ferencák appealed each Department order. All were in English only, even those issued after he communicated his LEP status and request for communication in his language and/or free translator services.

The Department thus denied Mr. Ferencák's requests for communication with him in a way he could understand. The

Department knew of Mr. Ferencák's LEP status because 1) it paid for interpreters for his medical care and 2) it received his notices of appeal stating his LEP status, requesting "translation services," and reimbursement for his interpreter costs. Despite these requests, the Department continued to send all communications, including orders, to Mr. Ferencák in English only. Mr. Ferencák raised this issue at the Board and requested reimbursement for interpreter services necessitated by his industrial injury in his notices of appeal.

The Department's continuing issuance of English only orders represented a Department decision denying Mr. Ferencák's requests that communications be translated into a language he understood and for free interpreter services. Mr. Ferencák referenced these decisions in his notices of appeal vesting the Board with jurisdiction over the Department's repeated decisions to issue English only orders without providing free interpreter services.

Thus the Board had jurisdiction over the Department's use of English only on these appeals and was required to rule thereon. Thus, the Superior Court erred by not ruling on the Department's use of English only in its orders and other letters on Mr. Ferencák's claim.

D. MR. FERENČAK WAS ENTITLED TO FREE INTERPRETER SERVICES AT THE DEPARTMENT AND THE BOARD.

1. Department Policies Improperly Refuse Interpreter Services.

Department Interpreter policies in effect during Mr. Ferencák's claim [PB 99-09, PB 03-01, PB 05-04, **Appendix D**] consistently refuse interpreter services for certain communications essential for LEP injured workers seeking benefits under the Act. These include:

- Translating Department documents/forms at worker request;
- Scheduling medical appointments and testing;
- Translating correspondence to and from the Department;
- Interpreting for worker communication with counsel; and
- Interpreting worker phone calls to Department personnel.

Essentially, this shifts the expense for interpreter services to LEP workers and denies them access to documents and information provided at no expense in their own language to English- and Spanish-speaking workers.

2. Board Regulation Fails to Ensure Necessary Interpreter Services.

The Board interpreter regulation, WAC 263-12-097 [**Appendix E**], allows, but does not require, free interpreter services for LEP workers "throughout *the* proceeding." Thus, WAC 263-12-097 fails to ensure that LEP workers receive free interpreters needed for their appeals. The Board's implementation in this case, specifically refused interpreter services for perpetuated testimony, part of the Board's proceeding, demonstrating the inadequacy of WAC 263-12-097.

3. Denying Interpreter Services Violates the Industrial Insurance Act.

RCW 51.52.050 requires the Department to “communicate” orders to injured workers informing them of their appeal rights before orders become final and binding. It is obvious that LEP injured workers are entitled to know both their rights and their responsibilities under the Act.

Because the Act does not define the term “communicate,” the Court should look to the dictionary to determine its meaning. *Zachman v. Whirlpool Fin. Corp.*, 123 Wn.2d 667, 671, 869 P.2d 10, (1994).³⁴ Webster’s Third New International Dictionary (1986) defines “communicate” as to “make known: inform a person of: convey the information or knowledge of...”

If the Department sends orders or other written information to LEP workers in English only, this does not “communicate” that information unless and until the LEP worker receives interpreter services. Any information in those documents is not “made known, conveyed or imparted to” the worker, but is instead sent in language incomprehensible to the worker, which the Department knew he could not understand.

³⁴ When the common, ordinary meaning is not readily apparent, it is appropriate to refer to the dictionary. Mr. Ferencak submits that the ordinary meaning of “communicate” is not to send information to someone hidden in form which the recipient cannot understand. This is supported by the Department’s stipulation that interpreter services were necessary to communicate the contents of its orders to Mr. Ferencak, making all his appeals timely.

Common sense and everyday experience tell us that when trying to make something known to an LEP person, we are unlikely to accomplish our aim by using English language.³⁵ Rather, we must use a language which the recipient understands, *i.e.* the LEP person's primary language. Notwithstanding that it knew of both his LEP and recent immigrant status, the Department did not translate its orders – or any part of its orders – into Mr. Ferencák's primary language. As to written communications, it is clear that Mr. Ferencák could only find out what they meant only by hiring interpreter services because the Department Interpreter policies refused to provide those to him at no cost. This violated both the Department's duty to "communicate" under RCW 51.52.050 and Mr. Ferencák's right to be informed of his responsibilities and rights under the Act.

Thus, of necessity, to discharge its obligation to "communicate" information to LEP workers worker, the Department must either send written communications to them in their primary language or provide them interpreter services. Nothing in the Act authorizes the Department to 1) fail to communicate orders to the LEP injured workers, 2) deny them interpreter services, or 3) shift interpreter costs to them due to the Department's failure to use the worker's primary language.

³⁵ As noted by the Arizona Supreme Court in *Ruiz v. Hull, infra*, using English in this

4. Denying Interpreter Services Violates Public Policy.

To determine what public policy is, the courts look to the legislature for expressions of public policy. See *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). The Washington legislature expressed a clear public policy to ensure that all rights of LEP persons are protected in RCW 2.43.010 which states:

It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

It is grossly at odds with public policy as voiced by the Legislature to notify LEP workers of rulings on claims and appeals entirely in English, as the Department and Board did here without free interpreter services.

5. Denying Interpreter Services Violates WLAD.

Washington's Law Against Discrimination, RCW 49.60, was adopted "for the protection of the public welfare, health, and peace of the people of this state . . . in fulfillment of the provisions of the Constitution of this state concerning civil rights." RCW 49.60.010 states Washington public policy saying:

situation "effectively bars communication."

The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of . . . national origin. . . threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

WLAD bans discrimination based on national origin in public places and accommodations, defined broadly by RCW 49.60.040 to include:

Any place of public resort, accommodation, assemblage or where the public gathers, congregates, . . . or for the benefit, use, or accommodation of those seeking health, . . . or where medical service or care is made available, or where the public gathers, congregates, or assembles for . . . public purposes, or public halls

There can be no doubt that 1) obtaining benefits under the Industrial Insurance Act, whether medical or financial, is a public purpose and 2) discrimination based on national origin by both Department and Board is banned at any place *vis-à-vis* LEP injured workers. Likewise, it is beyond dispute that Department and Board facilities are public facilities subject to WLAD, just as Washington Courts are. *Duvall v. County of Kitsap*, 260 F.2d. 1124, 1139 (9th Cir. 2001).

6. Denying Interpreter Services Violates RCW 2.43.

a. RCW 2.43 Provides the Only Authority to Provide Interpreters.

Chapter RCW 2.43 was enacted to protect the “constitutional and other rights” of LEP persons in proceedings involving government agencies. Both the Department and the Board are government agencies with proceedings. The former issues orders which determine injured

worker benefits, the latter determines appeals of those orders. At Superior Court, both asserted that RCW 2.43 does not apply. This simply cannot be. To allow an injured worker's claim and appeal to be administered by state agencies which claim an exemption from RCW 2.43 -- not found therein -- violates RCW 2.43.

Both the Board and the Department expend public moneys for interpreters. Both recognize Chapter RCW 2.43 as authoritative on interpreter services. The Board recognizes this in WAC 263-12-097, providing *in pare materia*:

. . . [I]nterpreters in adjudicative proceedings are governed by the provisions of chapters 2.42 and 2.43 RCW.

The Department's Interpreter Policy recognizes this, listing "RCW 2.43.010, the Right to Interpreter Services in Legal Proceedings" as containing "relevant information for interpretive services providers."³⁶ There is simply no other legislative authorization found in Washington statute for purchasing interpreter services to provide to LEP workers.

b. Denying Interpreter Services Violates Chapter RCW 2.43.

RCW 2.43.010 requires agencies to provide interpreter services to LEP workers *throughout proceedings*. RCW 2.43.030 requires the agencies to pay for this expense and includes interpreter services as costs where

³⁶ PB 05-04, p. 16.

available, *i.e.* here under RCW 51.52.030. Because both the Department and Board violated RCW 2.43 by failing both to provide and pay for all necessary interpreter services, the Superior Court erred in not awarding Mr. Ferencák reimbursement of his interpreter costs under RCW 2.43.040.

7. Denying Interpreter Services Violates Executive Order 13166.

Washington's Industrial Insurance program is administered by the Department which receives millions of federal dollars every biennium into both its Medical Aid and Accident Funds.³⁷ See **Appendix F**.

Executive Order 13166³⁸ requires federally assisted programs to communicate with LEP benefit applicants in their primary language. EO 13166 requires such programs to observe Department of Justice regulations to "ensure meaningful access to their programs" by LEP persons. Regulations implementing EO 13166 are found in Department of Justice Guidance.³⁹ Section VI of the DOJ Guidance states that LEP persons are entitled to language assistance not only for "services" and "benefits" but also for "encounters" with federally assisted programs.

DOJ's LEP Guidance Introduction explains why compliance with EO 13166 is required, saying:

³⁷ The funds from which both worker benefits and Board expenses are paid.

³⁸ Entitled "Improving Access to Services for Persons with Limited English Proficiency"

³⁹ Entitled "Enforcement of Title VI of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons with Limited English Proficiency. LEP Compliance."

Language for LEP individuals can be a barrier to accessing important benefits or services, understanding and exercising important rights, complying with applicable responsibilities, or understanding other information provided. . . Recipients of Federal financial assistance have an obligation to reduce language barriers that can preclude meaningful access by LEP persons to important government services. (Emphasis added)

Their use and receipt of federal funds, requires both the Department and the Board⁴⁰ to communicate with LEP applicants, *i.e.* LEP injured workers, in their own languages. It is abundantly clear that both the Department and the Board violated EO 13166, as neither provided written communication in Mr. Ferencák's primary language.

8. Denying Interpreter Services Violates Title VI.

Title VI of the Civil Rights Act of 1964, 42 USC 2000d, *et seq.*, prohibits discrimination based on national origin. Department Interpreter Policy PB 05-04 [Appendix D] recognizes that the failure to provide adequate interpreter services in medical care constitutes discrimination based on national origin and violates Title VI. If this is so, then denial of interpreter services for other necessary communications on an Industrial Insurance claim – *e.g.* communications with the Department, the Board, the employer, one's health care providers, or one's attorney similarly constitutes banned discrimination based on national origin under Title VI.

⁴⁰Board expenses are paid from the Accident & Medical Aid Funds. RCW 51.52.030.

Another Washington agency, the Department of Social and Health Services, has long recognized that Title VI requires communication with benefit applicants in their own language. In 1991, pursuant to a decree in *Reyes & Penado v. DSHS*, US Dist. Court W. WA, No. C91-303 (1991) DSHS agreed to give all notices and communications to applicants in their primary languages. DSHS regulations so require. WAC 388-271-0010 requires interpretation of all in-person and phone communications and translation of all DSHS forms, letters and printed material into the applicant's primary language. WAC 388-271-0030 requires DSHS to provide all communications in the applicant's primary language. WAC 388-271-0020 requires DSHS to pay these expenses. These protections extend to administrative proceedings on DSHS benefits.

The Department of Employment Security likewise provides interpreters and translated notices to all its applicants, maintaining a compilation of federal laws, regulations and guidelines to ensure compliance, making it available for all at each office, providing "at least one person available to assist individuals seeking information on such programs" pursuant to WAC 192-12-173.

Not only does the Department fail to provide these necessary interpreter services and protections for LEP workers, Department Interpreter policies specifically refuse equivalent necessary services to

non-Spanish speaking LEP injured workers. Except for Spanish-fluent applicants,⁴¹ the Department provides none of the LEP protections adopted by DSHS and DES. Until the courts remedy this situation, the Department will continue to violate Title VI so that LEP persons who do not work receive interpreter services, but those who are injured at work do not.

9. Denying Interpreter Services Violates Due Process.

Both Washington State and United States Constitutions guarantee due process. Wash. Const. Article I § 4; US Const. Amend. XIV. The foundation of due process is notice and the opportunity to be heard. *Sherman v. Washington*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995). To be meaningful, notice must apprise a party of rights and provide the opportunity to know the opposing party's claims, the opportunity to meet them, and a reasonable time to prepare and respond. *Cuddy v. Dep't of Public Assistance*, 74 Wn.2d 17, 442 P.2d 617 (1968).

Sending English only orders to LEP workers does not constitute notice because, as noted by the Supreme Court of Arizona in *Ruiz v. Hull*, 191 Ariz. 441, 957 P.2d 984 (1998), using English to communicate with non-English speakers "effectively bars communication itself."

⁴¹ The Department provides Spanish language orders, letters, and informational brochures, and Spanish speaking claim adjudicators for Spanish-speaking workers. The Department provides none of these services for other LEP workers.

Another consequence of English only use is shifting costs to LEP injured workers. Both severely limit LEP workers' ability to present evidence proving entitlement to benefits – infringing their opportunity to be heard in a meaningful fashion and meet the Department's claims.

Since 1952, the Washington Supreme Court has recognized that the Board is bound by due process in worker appeals. *Karlen v. Department of Labor & Industries*, 41 Wn.2d 301, 304, 249 P.2d 364 (1952). Mr. Ferencak is entitled to procedural due process not only in his Board appeal, but also in claim handling at the Department level. In *Buffelen Woodworking v. Cook*, 28 Wn.App. 501, 625 P.2d 703 (1981), the Court so indicated, saying:

We perceive a worker's interest in potential benefits as substantial because of the statutory abrogation of his common law right to sue his employer for work-related injuries in exchange for his exclusive remedy under the worker's compensation act. See RCW 51.04.010. We hold that an applicant for worker's compensation benefits whose claim is not finally adjudicated has a property interest of sufficient magnitude to trigger the application of procedural due process requirements. *Davis v. United States*, 415 F. Supp. 1086 (D. Kan. 1976).

Any attempt by the Department or the Board to assert due process considerations apply differently here because "English is our national language" or because LEP injured workers are undeserving of benefits equal to other injured workers until they learn English should be rejected. A review of such "nativist" arguments should include consideration of

Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 Harv. C.R.-C.L. Law Review 293 (1989).

The Washington Supreme Court has applied due process concepts to invalidate a Department policies which limit payment of benefits to certain incarcerated injured workers, but not others, in *Willoughby v. DLI*, 147 Wn.2d 725, 57 P.2d 611 (2002). There, the Court applied substantive due process analysis in rejecting a Department policy, finding the policy violated due process. The Court rejected the Department's assertion that the policy was justified because it saved the state money, because:

The Act's purpose was to shift the cost of injury to industry and

Saving the state money did not justify withholding benefits.

Similarly, the Court should reject any arguments that policies shifting interpreter costs to LEP workers are justified to save the state money.

10. Denying Interpreter Services Violates Equal Protection.

Equal protection, the concept that the law should treat those situated similarly equally, applies under both the federal and state constitutions. US Const. Amend. XIV; WA Const. Article I§12. Equal protection applies to Industrial Insurance benefits and Department/Board administration of the Act. *Macias v. DLI*, 100 Wn.2d 263, 668 P.2d 1278 (1983); *Seattle School Dist. No. 1 v. DLI*, 116 Wn.2d 352, 804 P.2d 621 (1991). Since, under *Macias*, the Supreme Court held that equal

protection extends to undocumented immigrant workers, certainly legal or documented workers like Mr. Ferencák should receive the same equal protection embrace regarding their Industrial Insurance benefits.

Where a distinction in treatment involves a constitutional right or a suspect class, the strict scrutiny test applies. *Macias*, at 267-268. Such distinctions survive constitutional challenge *only* if a compelling interest supports them. In *Andersen v. King County*, 158 Wn.2d 1, 138 P. 963 (2006), the Court stated national origin is a suspect class, saying::

Race, alienage, and national origin are examples of suspect classifications. Suspect classifications require heightened scrutiny because the defining characteristic of the class is “so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others.

Mr. Ferencák has constitutional rights to travel, as did the worker in *Macias*, and to use a language other than English. *Meyer v. Nebraska*, 43 S.Ct. 625, 262 U.S. 390 (1923). There being no compelling interest mandating the Department’s and the Board’s policies on interpreter services, they violate equal protection.

If Mr. Ferencák were not protected by the strict scrutiny test, the rational relationship test would apply. Under this test, there must be a rational relationship between the classes distinguished and some permissible legislative purpose. When there is no rational relationship to

distinguish between the classes, there is a violation of the equal protection of the laws. See *Seattle School Dist. No. 1 v. DLI*, 116 Wn.2d 352, 804 P.2d 621 (1991). In *Willoughby*, the Court ruled that saving money at worker expense is not a permissible legislative purpose under the Act.

It is quite simple to see that there is no rational basis for the distinction between LEP recipients of DSHS and DES benefits and LEP recipients of DLI benefits and any legitimate legislative purpose under the Act. Therefore the Superior Court erred in not finding that the Board and Department actions violated equal protection under both the strict scrutiny and the rational relationship tests.

11. Refusing Interpreter Services Violates the Right to Counsel.

Injured workers are entitled to retained legal representation on claims both at Department and at Board levels. WAC 263-12-020. The right to retained counsel includes the right to confer with counsel to prepare for and during hearings. By denying LEP injured workers free interpreter services, Department and Board policy prevent LEP workers exercising their right to representation by retained counsel.

12. Refusing Interpreter Services at Depositions Violates Mr. Ferencák's Hearing Rights at the Board.

The business of the Board involves both receiving and evaluating testimony on issues before it. It goes without dispute that all injured

workers are entitled to attend and participate in all proceedings where testimony is received on their appeals. The right to representation by counsel at the Board includes the right to confer with counsel during Board proceedings to provide for adequate examination and cross examination of witnesses.

WAC 263-12-117 permits presenting testimony by perpetuation deposition. Further WAC 263-12-117 empowers IAJs to “require” perpetuation depositions. WAC 263-12-117 indicates that the IAJ must consider, *inter alia*, 1) the costs incurred by the parties and 2) the fairness to the parties before requiring perpetuation depositions.

After denying Mr. Ferencák interpreter services at perpetuation depositions, the IAJ both 1) required him to provide testimony of the health care insurer by perpetuation deposition and 2) admitted perpetuated testimony on wages and benefits at which free interpreter services were not provided. This effectively denied Mr. Ferencák a fair opportunity to participate in his appeal and to present evidence on employee benefits to be included in “wages” under *Cockle*. The Board’s decision indicating that Mr. Ferencák failed to present adequate evidence on the nature and amount of certain wage components demonstrates the prejudice which these rulings had on him. CBRA 4-6, 11. Many hours devoted to stipulations on the value of wages components went for naught, with the

IAJ nearly issuing sanctions for the AG's approach on the matter. 7/22

TR 2-7. 8/13 TR 4-13.

E. MR. FERENČAK IS ENTITLED TO REIMBURSEMENT FOR INTERPRETER EXPENSES INCURRED ON HIS INDUSTRIAL INSURANCE CLAIM.

1. Shifting Interpreter Costs Impermissibly Diminishes Benefits of LEP Workers.

Our Supreme Court called the first Industrial Insurance Act “this noble legislation” in *Stertz v. Ind'l Ins. Comm'n*, 91 Wash. 588, 158 P. 256 (1916). The Supreme Court has held that when a statute sets a minimum benefit, expenses incurred to obtain benefits may not be shifted to the insured because this reduces the guaranteed minimum benefit.

Kenworthy v. Penn. Gen. Ins., 113 Wn.2d 309, 779 P.2d 257 (1989).

It goes without dispute that Title 51 RCW establishes a statutory insurance benefit schedule for disabled injured workers. As a disabled worker with a wife and two dependent children, Mr. Ferencak was entitled to an Industrial Insurance time loss benefit of 69% of his “wages.” RCW 51.32.060 & 51.32.090.

The Department's and the Board's policies of shifting interpreter expenses to Mr. Ferencak significantly reduced his benefits below the benefit guaranteed by the Industrial Insurance Act. This cost shifting policy impermissibly “whittled away” at the Ferencak family's benefits based solely on Mr. Ferencak's LEP status and national origin. These

Department and Board policies violate the Act's objective to reduce the Ferencák "economic loss" due to industrial injury "to a minimum." The only way to rectify this diminution of Mr. Ferencák's Industrial Insurance benefits is to reimburse him for those interpreter expenses shifted to him and to award interest on that reimbursement.

F. AFFIRMING THE BOARD'S REFUSAL TO REQUIRE WITNESSES TO BRING EVIDENCE ON WAGES AND BENEFITS WAS ERROR.

Mr. Ferencák was entitled to the production of documentation in the possession of the employer and the health care insurer paid by the employer on Mr. Ferencák's wages and benefits. There was both conflicting evidence and a lack of evidence. The IAJ and Board refused to require the employer and the health care insurer to produce all the subpoenaed documentation on wages and such employee benefits as the amount of the overtime pay, health care premiums, profit sharing bonus, Mr. Ferencák's accumulated [and later lost] vacation days, and holiday pay. Under WAC 263-12-045, IAJs, required to be impartial, are empowered with the right and duty to elicit additional evidence if needed for fair adjudication of the issues before the Board.

By 1) failing to require subpoenaed witnesses to appear and produce necessary documentation, 2) imposing on Mr. Ferencák the obligation to perpetuate testimony of the health care insurer, and 3) failing

to elicit additional needed testimony to establish the nature and value of components of Mr. Ferenčák's wages, the IAJ violated her duties under WAC 263-12-045 to be impartial and adduce additional needed evidence to resolve any uncertainty or conflicts in the evidence. The Board erred by attributing to Mr. Ferenčák the failure to prove these components of his wages. In affirming the Board's failure, the Superior Court erred.

G. ATTORNEY'S FEES SHOULD BE AWARDED TO MR. FERENČÁK IF HE PREVAILS ON ANY ISSUE.

RCW 51.52.130 provides that injured workers who prevail on Superior Court and higher appeals are entitled to attorney fees and costs, including the costs incurred for witnesses at the Board.

In *Brand v. Department of Labor & Industries*, 139 Wn.2d 659, 989 P.2d 1111 (1999), the Supreme Court expressed the "unitary claim" theory that an injured worker who prevails *on any issue* is entitled to attorneys fees on all issues both at the superior court and at the appellate court level. The court in *Brand* stated at 668:

The Legislature amended RCW 51.52.130 to strengthen the purpose of providing representation for injured workers by allowing attorney fees awards at the appellate court as well as the superior court...

The Court further stated at 670:

By the plain language of RCW 51.52.130, a worker who obtains reversal or modification of the Board's decision and additional relief on appeal is entitled to an award of attorney fees.

Consistent with the plain language of RCW 52.52.130, its underlying purpose, and the entire Industrial Insurance Act's statutory scheme, attorney fees awards under RCW 51.52.130 should not be reduced in light of the total benefits obtained by the worker *nor should the attorney fees be limited to fees generated from the worker's successful claims.* [Italics and emphasis added]

Based on *Brand, supra*, there is no doubt that if this Court rules in Mr. Ferencák's favor on any issue, he is entitled to an award of attorney's fees for work on all issues at both the Superior Court and this court, including his interpreter expenses under RCW 2.43.040.

H. THE SUPERIOR COURT ERRED IN AWARDING ATTORNEY FEES TO THE DEPARTMENT AGAINST MR. FERENČAK.

1. Propriety of Attorney Fee Awards Against Workers Is Undecided.

In *Black v. DLI*, 131 Wn.2d 547, 933 P.2d 1025 (1997), the Supreme Court approved an attorney fee award to the Department under RCW 4.84.030 over a worker challenge. In so doing, the Supreme Court noted at 557 that the worker offered "no coherent argument why the award was improper." Because the *Black* decision had none to address, the following reasoned argument is offered showing why the Superior Court's award of attorney fees to the Department was error.

2. Awarding Attorney Fees Against Mr. Ferencák Violates the Act's Specific Statute on Attorney Fees.

The Industrial Insurance Act contains a comprehensive provision on attorney fees in appeals of Board decisions. RCW 51.52.130

specifically limits when attorney fees may be awarded at Superior Court and appellate courts. It provides only for an award of fees against the Department – not against workers.⁴² RCW 51.52.130 **never** provides for any attorney fee award against the injured worker. Indeed, the Supreme Court in *Brand, supra*, at 667, indicated the purpose of RCW 51.52.130 is to ensure injured workers get adequate legal representation without diminishing their benefits.

RCW 51.52.140 specifically indicates that “the practice in civil cases” applies to appeals of Board decisions “[e]xcept as otherwise provided” in the Act. RCW 51.52.130 provides otherwise and is contained in the Act. Therefore, it prevails over Chapter RCW 4.84.

The right to statutory attorney fees is a substantive right. *Pennsylvania Life v. Employment Security*, 97 Wn.2d 412, 413, 645 P.2d 693 (1982). Thus, workers’ freedom from awards of attorneys against them in RCW 51.52.130 and recognized through operation of RCW 51.52.140, is unaffected by Chapter RCW 4.84.

3. Awarding Attorney Fees Against Mr. Ferenčak Violates the Act’s Policy.

RCW 51.52.130 implements the Act’s policy stated in RCW 51.12.010 that the Act “**shall be liberally construed**” to reduce “**to a**

⁴² It also provides for a fee award to workers who prevail on appeal and to employers under limited circumstances against the Department but never against a worker.

minimum the . . . economic loss . . . from injuries . . . in . . . employment” and the mandate in RCW 51.04.010 for **“sure and certain relief for workers . . . to the exclusion of every other remedy.”** Quite simply, the Superior Court erroneously awarded a remedy and substantive right to the Department not provided in the Act and against which the Act specifically protected Mr. Ferenčák in RCW 51.52.130.

4. Awarding Attorney Fees Against Mr. Ferenčák Violates Principles of Statutory Interpretation.

Citing the lack of “coherent argument before it, the *Black* court interpreted RCW 51.52.140, construed the term “practice in civil cases” to mean the Revised Code of Washington, RCW 4.84.080 [statutory attorney fees] and RCW 4.84.030 [prevailing party costs]. Principles of statutory interpretation mandate a different result. As noted above, the Courts must interpret all ambiguities in the Act in favor of the injured worker.⁴³ Under this principle, the proper interpretation is that RCW 51.52.140 mandates the application of the RCW 51.52.130 -- not the application of Chapter RCW 4.84. Even the Code Reviser’s note to RCW 4.84.010 specifically refers to RCW 51.52.130 for attorney fees and costs for appeals from Board decisions.

⁴³*Cockle, supra*; 811, *Mackay v. DLI*, 181 Wn. 702, 44 P.2d 793 (1935).

The Court said in *In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004): “When more than one statute applies, the specific statute will supersede the general statute.” This principle of competing statutes mandates that 1) RCW 51.52.130 prevails over RCW 4.84 and 2) neither attorney fees nor costs may be awarded against Mr. Ferenčák here.

In the leading decision on attorney fees under the Act, *Brand, supra*, 670, the Supreme Court applied the principle *exclusio unius est inclusio alterius*,⁴⁴ saying:

Where the Legislature has expressly limited fees available at one phase of the proceedings, it is unlikely that the Legislature intended to limit fees awards at the other phases without expressly enumerating those limitations.

In RCW 51.52.130, the Legislature expressly limited awards of attorney fees and costs at Superior and higher courts in RCW 51.52.130, expressly providing such awards to workers and employers while not providing any to the Department. Thus, under *exclusio unius*, the Legislature intended to and did exclude any such awards for the Department against the worker.

5. Awarding Attorney Fees Against Mr. Ferenčák Violates the “Great Compromise.”

The Industrial Insurance Act is a result of the “great compromise” in which workers traded civil remedies for guaranteed benefits, “sure and certain relief” under the Act. *Stertz, supra; Dennis v. DLI*, 109 Wn.2d

467, 469, 745 P.2d 1295 (1987). The bargain guaranteed injured workers protection by the Act against assessment of both costs and attorney fees on unsuccessful appeals to Superior Court under RCW 51.52.130. The wording of RCW 4.84.010 that “[t]he measure and mode of compensation of attorneys . . . shall be left to the agreement . . . of the parties” requires this Court to respect and enforce the compromise struck nearly one hundred years ago which provides the basis for the Act. The Superior Court’s assessment of prevailing party fees and costs not included in RCW 51.52.130 violates the “great compromise” and is error.

V. CONCLUSION

Appellant respectfully requests this Court to issue an opinion 1) reversing the Superior Court’s order granting the Board leave to intervene, 2) vacating the Superior Court’s judgment affirming the Board, 3) remanding for entry of appropriate order and judgment requiring (a) wage benefits be recalculated as requested herein and any additional evidence needed to resolve conflicts on wage components such as the value of governmental benefit contributions, yearly bonus overtime, health care premiums, and the actual total “wages” be adduced by the IAJ in an impartial manner at no expense to Mr. Ferenčák, (b) payment of back time loss with interest, and (c) reimbursement with interest of interpreter

⁴⁴ The expression of one is the exclusion of the other.

expenses incurred by Mr. Ferencák during his claim; and 4) awarding attorneys fees and costs in the Superior Court and the Court of Appeal proceedings under RCW 51.52.130; *Brand, supra*; and RCW 2.43.040 against the Department and the Board.

Respectfully submitted this 11th of June 2007.

A handwritten signature in black ink, appearing to read 'Ann Pearl Owen', written over a horizontal line.

Ann Pearl Owen, #9033,
Attorney for Ivan Ferencák, Appellant

APPENDIX A

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
PO BOX 44291
OLYMPIA, WA 98504-4291

MAILING DATE 05/06/2002
CLAIM NUMBER Y388825
INJURY DATE 03/20/2002
CLAIMANT FERENCAK IVAN

EMPLOYER TRAVIS INDUSTRI
UBI NUMBER 601 073 429
ACCOUNT ID 053, 732-06
RISK CLASS 3404
SERVICE LOC Seattle

IVAN FERENCAK
3434 S 144TH ST APT 243
SEATTLE WA 98168-4093

NOTICE OF DECISION

The worker's wage is set by taking into account the following:

The wage for the job of injury is based on \$11.50 per hour,
8.00 hours per day, 5.00 days per week = \$2,024.00 per month.

Additional wage for the job of injury include:

Health Care Benefits	\$175.00 per month
Tips	NONE per month
Bonuses	NONE per month
Overtime	NONE per month
Housing/Board/Fuel	NONE per month

Worker's total gross wage is \$2,199.00 per month.

Worker's marital status eligibility on the date of this order is
married with 2 children.

Supervisor of Industrial Insurance
By Wendy J. Hansen
Claims Manager
(360) 902-4344

	YOUR LEGAL RIGHTS IF YOU DISAGREE WITH THIS ORDER: THIS ORDER	
	BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU	
	UNLESS YOU DO ONE OF THE FOLLOWING. YOU CAN EITHER FILE A	
	WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE	
	A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS.	
	IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS	
	YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF	
	LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA 98504-4291.	
	WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE	
	AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS,	
	PO BOX 42401, OLYMPIA WA 98504-2401.	

APPENDIX B

Travis Industries, Inc.

REGULAR RATE	REGULAR HOURS	OTHER HOURS	REGULAR EARNINGS	OTHER EARNINGS	TAXABLE ADJUSTMENT	NON-TAXABLE ADJUSTMENT	TAXABLE GROSS EARNINGS
11.500	8000	800	92000	13800			105800
TOTAL EARNINGS		DEDUCTIONS					
105800	FED. W/TAX: 6379	FICA: 8094	STATE TAX	COUNTY TAX	LOCAL TAX	SDI	IRA
EARNINGS		YEAR TO DATE					
718750	FED. W/TAX: 29171	FICA: 54985	STATE TAX	COUNTY TAX	LOCAL TAX	SDI	IRA
OTHER DEDUCTIONS							
UNION	1	2	3	4	5	6	7
			1496				
CO	DEPT			CHECK NO.	PERIOD ENDING	NET PAY	
05	DPD	5433	IVAN	8865E	12/21/02	898.31	
							F0023

Board of Industrial Insurance Appeals
 In re: Ferencak
 Docket No. 0221795
 Exhibit No. 3
 5.12.03
 ADM Date REL

EXH 3

APPENDIX C

- 1 2. Ivan Ferencak is a Bosnian immigrant who does not understand or
2 speak English. Mr. Ferencak became an employee of Travis Industries,
3 Inc., on June 11, 2001. He was injured while acting in the course of
4 employment with his company on March 20, 2002, when he lifted a
5 heavy metal sheet, twisted and something cracked or popped in his right
6 knee.
- 7
- 8 3. On March 20, 2002, Travis Industries, Inc., employed Mr. Ferencak
9 eight hours per day, five days per week, and paid him \$10.50 in regular
10 hourly wages.
- 11
- 12 4. Mr. Ferencak had not established a pattern of working an average of
13 three additional hours in overtime per week, at the rate of \$17.75.
- 14
- 15 5. Travis Industries, Inc., paid the sum of \$197.15 per month to a health
16 care plan in order to ensure that Mr. Ferencak had insurance coverage
17 for medical and dental care. This coverage began six months after
18 Mr. Ferencak's initial date of hire, June 11, 2001
- 19
- 20 6. After the March 2002 injury, Travis Industries, Inc., did not pay any
21 bonuses to Mr. Ferencak in exchange for his labor.
- 22
- 23 7. As of March 20, 2002, Travis Industries, Inc., made payments on
24 Mr. Ferencak's behalf to social security under the Federal Insurance
25 Contributions Act, paid a tax toward the Medicare program on his behalf,
26 allowed and paid the full costs to provide Mr. Ferencak with industrial
27 insurance and unemployment compensation coverage.
- 28
- 29 8. The benefits enumerated in Finding of Fact No. 7 are not core,
30 non fringe benefits that were critical to protecting Mr. Ferencak's basic
31 health and survival.
- 32
- 33 9. During all legal proceedings before the Board, a Bosnian/Serbo Croatian
34 interpreter was provided to the claimant at the Board's expense and at
35 no cost to the claimant.
- 36

CONCLUSIONS OF LAW

- 37
- 38
- 39 1. The Board of Industrial Insurance Appeals has jurisdiction over the
40 parties to and subject matter of these appeals.
- 41
- 42 2. Ivan Ferencak was not entitled to have the Board pay the cost of an
43 interpreter for communications between himself and his attorney
44 regarding the processing of his claim within the guidelines of
45 Department policy or as contemplated by WAC 263-12-090 and
46 RCW 2.43.
- 47

APPENDIX D



PROVIDER BULLETIN

PB 05-04

THIS ISSUE

Interpretive Services
Payment Policy
Effective July 1, 2005

TO:

Ambulatory Surgery Centers,
Audiologists, Chiropractic
Physicians, Clinics, Dentists, Drug
and Alcohol Treatment Centers,
Freestanding Emergency Rooms,
Freestanding Surgery Centers,
Hospitals, Interpretive Services
Providers, IME Exam Groups,
Massage Therapists, Naturopathic
Physicians, Nurses-ARNP,
Occupational Therapists, Opticians,
Optometrists, Osteopathic
Physicians, Pain Clinics, Panel
Exam Groups, Pharmacists,
Physicians, Physician Assistants,
Physical Therapists, Podiatric
Physicians, Prosthetists and
Orthotists, Psychologists,
Radiologists, Self-Insured
Employers, Speech Therapists &
Pathologists, Vocational Counselors

CONTACT: Provider Hotline
1-800-848-0811
From Olympia 902-6500

Loris Gies: PO Box 4322
Olympia, WA 98504-4322
(360) 902-5161
After July 1, 2005:
Karen Jost PO Box 4322
Olympia, WA 98504-4322
360-902-6803
Fax (360) 902-4249

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Purpose

This Provider Bulletin updates coverage and payment policies for interpretive services as required in WACs 296-20-02700 and 296-23-165. **This bulletin replaces Provider Bulletin's 03-01, 03-10 and 05-01.** The purpose of this bulletin is to notify providers and insurers of the following changes:

- Revised coverage and payment policy.
- Interpretive services provider qualifications.
- Revised interpretive services codes and descriptions.
- New fees for interpretive services.
- Limits on interpretive services.
- Verification of interpretive services requirement.

Interpretive Services for Healthcare and Vocational Services

This policy applies to interpretive services provided for healthcare and vocational services in all geographic locations to injured workers and crime victims (collectively referred to as "insured") having limited English proficiency or sensory impairments; and receiving benefits from the following insurers:

- The State Fund (L&I),
- Self-Insured Employers or
- The Crime Victims Compensation Program.

This coverage and payment policy including new fees, codes, service descriptions, limits and provider qualification standards is effective on and after July 1, 2005.

Policy Does Not Apply to Interpretive Services for Legal Purposes

This coverage and payment policy does not apply to interpretive services for injured workers or crime victims for legal purposes, including but not limited to:

- Attorney appointments.
- Legal conferences.
- Testimony at the Board of Industrial Insurance Appeals or any court.
- Depositions at any level.

Payment in these circumstances is the responsibility of the attorney or other requesting party(s).

Why Are Interpretive Services Covered?

The United States Department of Health and Human Services Office of Civil Rights concluded that inadequate interpretation for patients with Limited English Proficiency is a form of prohibited discrimination on the basis of national origin under Title VI of the Civil Rights Act of 1964. More information about the Civil Rights Act is available on the web at <http://www.hhs.gov/ocr/lep/>.

The Washington Workers' compensation law under RCW 51.04.030 (1) requires the provision of prompt and efficient care for injured workers without discrimination or favoritism. Therefore, interpretive services are covered so injured workers who have limited English proficiency or sensory impairments may receive prompt and efficient care.

Information for Healthcare and Vocational Providers

Insured individuals with limited English proficiency or sensory impairments may need interpretive services in order to effectively communicate with you. Interpretive services do not require prior authorization.

Under the Civil Rights Act, as the healthcare or vocational provider, **you** determine whether effective communication is occurring. If assistance is needed, then **you**:

- Select an interpreter to facilitate communication between you and the insured.
- Determine if an interpreter (whether paid or unpaid) accompanying the insured meets your communication needs.
- May involve the insured in the interpreter selection. **NOTE: Under the Civil Right Act, hearing impaired persons have the right to participate in the interpreter selection.**
- Should be sensitive to the insured's cultural background and gender when selecting an interpreter.

- The healthcare or vocational provider.
- Employee(s) of the healthcare or vocational provider whose primary job is **not** interpretation.
- Employee(s) of the healthcare or vocational provider whose primary job is interpretation but who is not a credentialed interpreter.

Persons Ineligible to Provide Interpretation/Translation Services

Some persons may not provide interpretation or translation services for injured workers or crime victims during healthcare or vocational services delivered for their claim. These persons are:

- The worker's or crime victim's legal or lay representative or employees of the legal or lay representative.
- The employer's legal or lay representative or employees of the employer's legal or lay representative.
- Persons under the age of eighteen (18). **NOTE: Injured workers or crime victims using children for interpretation purposes should be advised they need to have an adult provide these services.**

Persons Ineligible to Provide Interpretation/Translation Services at IME's

Under WAC 296-23-362 (3), "The worker may not bring an interpreter to the examination. If interpretive services are needed, the department or self-insurer will provide an interpreter." Therefore, at Independent Medical Examinations (IME), persons (including approved interpreter/translator providers) who may **not** provide interpretation or translation services for injured workers or crime victims are:

- Those related to the injured worker or crime victim.
- Those with an existing personal relationship with the injured worker or crime victim.
- The worker's or crime victim's legal or lay representative or their employees.
- The employer's legal or lay representative or their employees.
- Any person who could not be an impartial and independent witness.
- Persons under the age of eighteen (18).

Hospitals and Other Facilities May Have Additional Requirements

Hospitals, free-standing surgery and emergency centers, nursing homes and other facilities may have additional requirements for persons providing services within the facility. For example, a facility may require all persons delivering services to have a criminal background check, even if the provider is not a contractor or employee of the facility. The facility is responsible for notifying the interpretive services provider of their additional requirements and managing compliance with the facilities' requirements.

Fees, Codes and Limits

Why Is the Department Restructuring Fees and Codes?

A recent coverage and payment policy review showed the department's coding structure was not in line with interpreters' usual business practices. Therefore, the department decided the use of a single code for all payable services would work better for everyone. However, the department wanted to identify group services. So now there are two comprehensive codes for interpretive services—one for use with an *individual* client and one for use with multiple clients (*group*) at the **same** appointment.

In addition, the project's fee research showed the department was paying more than most other Washington State payers, who are paying between \$30 and \$50 per hour. The new coding structure includes all services; some of which the department had paid previously paid at \$30 per hour. The fee reduction takes into account the increased billing at full rate for all covered service time.

By law, the department has a responsibility to control benefits costs for the employers and injured workers who pay the workers' compensation insurance premiums.

Code	Description	How to Bill	Maximum Fee	L&I Code Limits
9988M	Group interpretation direct services time between two or more client(s) and healthcare or vocational provider, includes wait and form completion time, time divided between all clients participating in group, per minute	1 minute equals 1 unit of service	\$0.80 per minute	Limited to 480 minutes per day. Does not require prior authorization.
9989M	Individual interpretation direct services time between one insured client and healthcare or vocational provider, includes wait and form completion time, per minute	1 minute equals 1 unit of service	\$0.80 per minute	Limited to 480 minutes per day. Does not require prior authorization.
9986M	Mileage, per mile	1 mile equals 1 unit of service	State employee reimbursement rate (as of January 1, 2005 rate is 40.5¢ per mile)	Does not require prior authorization. Mileage billed over 200 miles per claim per day will be reviewed.
9996M	Interpreter "IME no show" wait time when insured does not attend the insurer requested IME, flat fee	Bill 1 unit only	Flat fee \$48	Payment requires prior authorization- -Contact Central Scheduling Unit after no show occurs. Contact number: 206-515-2799. Only 1 no show per claimant per day.
9997M	Document translation at insurer request	1 page equals 1 unit of service	BR	Requires prior authorization, which will be on translation request packet. Services over \$500 per claim will be reviewed.

Covered and Non-covered Services

Covered Services

The following interpretive services are covered. When billed, payment is dependent upon service limits and department policy. Interpretive services providers may bill the insurer for:

- Interpretive services which facilitate communication between the insured and a healthcare or vocational provider.
- Time spent waiting for an appointment that does not begin at time scheduled (when no other billable services are being delivered during the wait time).
- Assisting the insured to complete forms required by the insurer and/or healthcare or vocational provider.
- A flat fee for an insurer requested IME appointment when the insured does not attend.
- Translating document(s) at the insurer's request.
- Miles driven from a point of origin to a destination point and return.

Non-covered Services

The following services are not covered and may not be billed to nor will they be paid by the insurer:

- Services provided for a denied or closed claim (except services associated with the initial visit for an injury or crime victim or the visit for insured's application to reopen a claim).
- Missed appointment for any service other than an insurer requested IME.
- Personal assistance on behalf of the insured such as scheduling appointments, translating correspondence or making phone calls.
- Document translation requested by anyone other than the insurer, including the insured.
- Services provided for communication between the insured and an attorney or lay worker legal representative.
- Services provided for communication not related to the insured's communications with healthcare or vocational providers.
- Travel time and travel related expenses, such as meals, parking, lodging, etc.
- Overhead costs, such as phone calls, photocopying and preparation of bills.

Interpreter Organizations

Several interpreter and translator professional organizations have information and educational opportunities for interpretive services providers. Their websites are listed below. This list is neither comprehensive nor an endorsement of any of these organizations. It is provided for informational purposes.

Organization	Website	Phone
Northwest Translators and Interpreters Society	www.notisnet.org	206-382-5642
Society Of Medical Interpreters	www.sominet.org	206-729-2100
National Association of Judiciary Interpreters and Translators	www.najit.org	206-267-2300
Washington Interpreters and Translators Society	www.witsnet.org	206-382-5690
Washington State Registry of Interpreters for the Deaf	www.wsrid.com	No number listed
National Council on Interpreting in Healthcare	www.ncihc.org	FAX 707-541-0437

L&I Publications

L&I publishes several handbooks and pamphlets related to the Workers' Compensation and Crime Victims Program. Some of them are available in Spanish and other languages.

Provider related publications can be downloaded or ordered at
<http://www.LNI.wa.gov/ClaimsIns/Providers/FormPub/Pubs/default.asp>

Workers' compensation related publications can be downloaded or ordered at
<http://www.LNI.wa.gov/ClaimsIns/Claims/FormPub/Pubs/default.asp>

Crime Victims Program related publications can be downloaded or ordered at
<http://www.LNI.wa.gov/ClaimsIns/CrimeVictims/FormPub/default.asp>

Laws and Rules Relating to Interpretive Services

The following laws and rules contain relevant information for interpretive services providers and can be accessed at the Washington State Legislature's website <http://www1.leg.wa.gov/LawsAndAgencyRules/>. Links to these laws and rules are located at the L&I home page <http://www.LNI.wa.gov/>.

RCW Chapter 5.60	Witnesses—Competency
RCW 2.43.010	Right to Interpreter Services in Legal Proceedings
RCW 51.04.030 (1)	Medical Aid Rules
RCW 51.28.030	Medical Aid Fund
WAC 296-20-010	General Rules
WAC 296-20-01002	Definitions
WAC 296-20-015	Who may treat
WAC 296-20-02010	Review of Health Services Providers
WAC 296-20-022	Out of State Providers
WAC 296-20-02700	Medical Coverage Decisions
WAC 296-20-124	Rejected and Closed Claims
WAC 296-20-097	Reopenings
WAC 296-23-165(3)	Miscellaneous Services
WAC 296-23-362	May a worker bring someone with them to an Independent Medical Examination (IME)?
GR 11.1	Code of Conduct for Court Interpreters
RCW Chapter 5.60	Witnesses

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
PO BOX 44291
OLYMPIA, WA 98504-4291

MAILING DATE 05/06/2002
CLAIM NUMBER Y388825
INJURY DATE 03/20/2002
CLAIMANT FERENCAK IVAN

EMPLOYER TRAVIS INDUSTRIES
UBI NUMBER 601 073 429
ACCOUNT ID 053, 732-06
RISK CLASS 3404
SERVICE LOC Seattle

MAILED TO: WORKER - IVAN FERENCAK
3434 S 144TH ST APT 243, SEATTLE WA 98168-4093
EMPLOYER - TRAVIS INDUSTRIES INC
108050 117TH PL NE, KIRKLAND WA 98133
PROVIDER - O'RIORDAN COLM P MD
HIGHLINE MEDICAL GROUP, 16110 8TH AVE SW #A-3, BURIEN WA 98

	YOUR LEGAL RIGHTS IF YOU DISAGREE WITH THIS ORDER: THIS ORDER	
	BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU	
	UNLESS YOU DO ONE OF THE FOLLOWING. YOU CAN EITHER FILE A	
	WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE	
	A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS.	
	IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS	
	YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF	
	LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA 98504-4291.	
	WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE	
	AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS,	
	PO BOX 42401, OLYMPIA WA 98504-2401.	

APPENDIX E

WAC 263-12-097

Interpreters.

(1) When an impaired person as defined in chapter 2.42 RCW or a non-English-speaking person as defined in chapter 2.43 RCW is a party or witness in a hearing before the board of industrial insurance appeals, the industrial appeals judge may appoint an interpreter to assist the party or witness throughout the proceeding. Appointment, qualifications, waiver, compensation, visual recording, and ethical standards of interpreters in adjudicative proceedings are governed by the provisions of chapters 2.42 and 2.43 RCW and General Rule provisions GR 11, GR 11.1, and GR 11.2.

(2) The provisions of General Rule 11.3 regarding telephonic interpretation shall not apply to the board's use of interpreters.

(3) The industrial appeals judge shall make a preliminary determination that an interpreter is able to accurately interpret all communication to and from the impaired or non-English-speaking person and that the interpreter is impartial. The interpreter's ability to accurately interpret all communications shall be based upon either (a) certification by the office of the administrator of the courts, or (b) the interpreter's education, certifications, experience, and the interpreter's understanding of the basic vocabulary and procedure involved in the proceeding. The parties or their representatives may question the interpreter as to his or her qualifications or impartiality.

(4) The board of industrial insurance appeals will pay interpreter fees and expenses when the industrial appeals judge has determined the need for interpretive services as set forth in subsection (1). When a party or person for which interpretive services were requested fails to appear at the proceeding, the requesting party or the party's representative may be required to bear the expense of providing the interpreter.

APPENDIX F

TABLE

Federal Funds Received by Department of Labor & Industries & by Washington's Industrial Insurance Program

1997-2007

Biennium	Total Federal Funds In DLI Budget	Federal Funds in Accident Account	Federal Funds in Medical Aid Account	ESSB Reference
1997-1999	\$16,706,000	\$9,112,000	\$1,592,000	6062 § 218
1999-2001	\$16,654,000	\$9,112,000	\$1,592,000	5180 § 217
2001-2003	\$20,956,000	\$11,568,000	\$2,438,000	6153 § 217
2003-2005	\$24,818,000	\$13,396,000	\$2,960,000	5404 § 217
2005-2007	\$26,806,000	\$13,621,000	\$3,185,000	6090 § 217
Total	\$105,940,000	\$56,809,000	\$11,767,000	

APPENDIX G

RCW 51.52.130

Attorney and witness fees in court appeal.

***** CHANGE IN 2007 *** (SEE 1833-S.SL) *****

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

APPENDIX H

RCW 51.52.140

Rules of practice — Duties of attorney general — Supreme court appeal.

Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court as in other civil cases. The attorney general shall be the legal advisor of the department and the board.

[1961 c 23 § 51.52.140. Prior: 1957 c 70 § 64; 1951 c 225 § 19; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

Notes:

Rules of court: Method of appellate review superseded by RAP 2.1, 2.2.

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION ONE

IVAN FERENČAK,

NO. 58878-8-I

Appellant,

DECLARATION OF MAILING
OF BRIEF OF APPELLANT

v.

DEPARTMENT OF LABOR
& INDUSTRIES, BOARD
OF INDUSTRIAL
INSURANCE APPEALS,
INTERVENOR,

Respondents.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2007 JUN 12 AM 10:02

IVAN FERENČAK, petitioner herein, provides further proof of service of his Brief of Appellant to the Court of Appeals.

Ann Pearl Owen states under penalty of perjury of the laws of Washington as follows:

1. She is the attorney of record for Ivan Ferencak, Appellant herein, and makes these statements on her own personal knowledge.
2. On June 11, 2007, she placed the original and one true copy of the Brief of Appellant Ivan Ferencak to the Court of Appeals in the United States Postal Service with proper postage affixed addressed and sent one true copy in the same manner to the persons indicated below:

Maureen Mannix, AAG
Office of the Attorney General of Washington
800 Fifth Avenue #2000
Seattle, WA 98104

Johnna Craig, AAG
Office of the Attorney General of Washington
7141 Cleanwater Drive SW
PO Box 40108
Olympia, WA 98504-0108

3. Signed under penalty of perjury this 11th of June, 2007
at Seattle, WA.



ANN PEARL OWEN, WSBA# 9033
Attorney for Ivan Ferenčák, Appellant

Proof of Service:

Ann Pearl Owen states under penalty of perjury that she mailed a
copy of the above document by US Postal Service with proper postage
affixed this date to:

Attorney for the Department of Labor & Industries:

Maureen Mannix, AAG
Office of the Attorney General of Washington
800 Fifth Avenue #2000
Seattle, WA 98104

Attorney for the Board of Industrial Insurance Appeals:

Johnna Craig, AAG
Office of the Attorney General of Washington
7141 Cleanwater Drive SW
PO Box 40108
Olympia, WA 98504-0108

Signed at Seattle, Washington this 11th of June, 2007.



Ann Pearl Owen, WSBA# 9033