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NO. 60139-3-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

FERID MAŠIĆ,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

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COURT OF APPEALS
STATE OF WASHINGTON

REVISED BRIEF OF APPELLANT

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Honorable Robert F. Utter, Retired Justice
Washington State Supreme Court

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I. INTRODUCTION

Ferid Mašić, a recent immigrant not fluent in English [LEP or “limited English proficient”], was injured at work appeals the Superior Court’s judgment affirming a decision of the Board of Industrial Insurance Appeals [Board] affirming rejection of his claim at Department of Labor & Industries [Department] and awarding it attorney fees and interest.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. ASSIGNMENTS OF ERROR

1. The Superior Court erred by finding Mr. Mašić’s Board appeal was untimely. [Error No. 1]

2. The Superior Court erred in finding Mr. Mašić’s constitutional rights were not violated. [Error No. 2]

3. The Superior Court erred by approving the Department’s failure¹ to send Mr. Mašić information and orders on his claim, including his rights and responsibilities under the Act in a language in which he was fluent, and its issuance of orders on his claim to him in English-only, knowing him to lack English fluency. [Error No.3]

4. The Superior Court erred by affirming the limitations on the interpreter services provided to Mr. Mašić at the Board and the denial of

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

reimbursement for Mr. Mašić's interpreter services. [Error No. 4]

5. The Superior Court erred in affirming appointment of an interpreter Mr. Mašić objected to for jurisdictional hearings. [Error No. 6]

6. The Superior Court erred by affirming the Board's finding of appeal untimeliness based only on submissions attempting to impeach on collateral matters instead of holding a new hearing on timeliness to determine factual matters based on those late submissions. [Error No. 7]

7. The Superior Court erred by failing to award attorney fees and costs to Mr. Mašić. [Error No. 8]

8. The Superior Court erred in awarding the Department attorney fees and interest against Mr. Mašić. [Error No. 9]

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did Mr. Mašić file his Board appeals within 60 days of his receipt of a copy of the English-only Department order? [Error No. 1]

2. Did Mr. Mašić file his Board appeal within 60 days of first being first informed of the content of the Department order? [Error No. 1]

3. Did the Department order contain "black faced type" and required appeal language per RCW 51.52.050? [Error No. 1-3]

4. Did the Department "communicate" its order to Mr. Mašić as required by RCW 51.52.050? [Errors No. 1-4]

done. Likewise, when used in this brief the terms "refuse" and "deny" include action

5. Should equity be exercised on Mr. Mašić's behalf to find his appeal timely? [Error No. 1]

6. Was the Board required to address constitutional issues and other issues raised by Mr. Mašić at the Board? [Errors No.1-4]

7. Did the Superior Court err by denying Mr. Mašić reimbursement for interpreter costs incurred in discovery? [Error No. 3]

8. Does the Industrial Insurance Act [the Act] provide benefits of free interpreter services for communications with LEP injured workers in their primary language or via free interpreter services? [Errors No. 1-4]

9. Does Washington public policy, RCW 2.43, or RCW 49.60 require communications with LEP injured workers in their own language or via free interpreters? [Errors No. 1-4]

10. Do Due Process and/or Equal Protection require communications with LEP injured workers in their own language or via free interpreter services? [Errors No. 1 - 4]

11. Do Title VI of the Civil Rights Act of 1964 and/or Executive Order 13166 require communications with LEP injured workers in their own language or via free interpreter services? [Errors No. 1-4]

12. Is an LEP injured worker entitled to communicate confidentially with counsel during Board hearings? [Errors No. 2, 4]

which constitutes the failure to do something.

13. 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]

14. Is it error to appoint an interpreter proven unable to effectively interpret for the LEP person? [Errors No. 4 -6]

15. If the interpreter is not administered the interpreter's oath, should a new hearing be held? [Errors No. 4 - 6].

16. Was inadmissible collateral impeachment the basis of dismissal of Mr. Mašić's appeal? [Error No. 7]

17. Is an injured worker entitled to attorney fees and costs under RCW 51.52.130 and *Brand* if he prevails on any issue? [Error No. 8]

18. Does it violate the Act to award attorney fees and interest to the Department against the worker at the Superior Court? [Error No. 9]

III. STATEMENT OF THE CASE²

Ferid Mašić was born in Bosnia, came to the US in 1999 and resides here with his wife and 2 girls. 10/25 TR 10-12. When injured in 6/19/03, he was working for Seattle Concrete Design [SCD] when a power tool severely lacerated his arm and leg, causing PTSD and necessitating on-going medical care. Ex 1, CBRA 2052-61.

² References to the Certified Board Record appear as **CBRA** followed by page numbers; transcripts of Board proceedings appear as **TR** preceded by the month and day and

Mr. Mašić lacks English fluency. 10/25 TR 12. Without interpreter services, he cannot communicate in English.³ After rejecting the employer's offer of a \$1000 bribe not to pursue his claim, [CBRA 1973] Mr. Mašić sought benefits under the Act through an interpreter. EX 1. He wrote informing the Department he lacked English fluency and spoke Bosnian, and authorized contact through the interpreter, providing his contact number. EX 2. The Department rejected his claim. EX 3. Mr. Mašić requested reconsideration. EX 4. The Department denied reconsideration by a second English-only order 9/28/04. EX 5. The Board accepted his appeal subject to proof of timeliness. CBRA 82.

The Department took Mr. Mašić's discovery deposition through an interpreter. Because of multiple interpreter and reporter errors in the transcript, correcting the deposition transcript required 12 pages, costing Mr. Mašić \$480.00. CBRA 885-900. Mr. Mašić asked the Department to reimburse his interpreter expense to correct the deposition. He moved for reimbursement but received none. CBRA 882-900.

Mr. Mašić objected to the Board's appointing the same interpreter for evidentiary hearings. CBRA 882-899. The IAJ appointed the same interpreter over Mr. Mašić's objection and aware of deposition problems.

followed by page numbers; exhibits in the CBRA appear as EX followed by the exhibit number; appendices to this brief as APP followed by the appendix letter.

³ The IAJ acknowledged lack English fluency by appointing an interpreter. 10/25 TR 3-7.

At hearing, the IAJ failed to administer the interpreter oath. 10/25 TR 3-7. Evidentiary hearings were held at which the Board refused to allow Mr. Mašić to confer through the interpreter with his counsel and for which the interpreter who served at his deposition was appointed.

Mr. Mašić testified he received the second order on the weekend of 10/9/04 from another apartment resident who received it in his locked mailbox while out of town. 10/25 TR 31-34. He got promptly got it interpreted, got an appointment to see and hired a lawyer 10/28/04. 10/25 TR 34-37. He received a copy of his notice of appeal within 60 days of his receipt of the second order. 10/25 TR 35-6.

In cross-examination he was asked how he recalled when he receipt of the order. His answer was interpreted as: "My mother died." 11/9 TR 224, l. 26. In that questioning, the interpreter interpreted a word as "chagrined." *Ibid.* l. 23. Mr. Mašić later stated he did not say a word meaning "chagrined."⁴ CBRA 1843. The IAJ found Mr. Mašić's appeal timely. 11/18 TR p. 26.

Nearly a month later, SCD moved for an order to show cause on CR 60 why the finding of timeliness should not be reversed claiming Mr. Mašić had worked a fraud on the Board because his mother was alive. CBRA 1402-1414. SCD supported this motion with declarations from

Bosnia which contained falsehoods and even a forged document presented to the Board as an official record of a Bosnian Court. **CBRA 1416-1488.**

Mr. Mašić filed responsive declarations from 1) family members [uncle Smajo **CBRA 1881-8**, brother Besim **CBRA 1889-96**, father Rašid **CBRA 1892-1904**] in Bosnia about how his mother had almost died the weekend of October 9th, they called to tell Mr. Mašić so, and the mother had not been the same since, the family describing that as when she “died”; 2) a lawyer in Bosnia with official reports and statements as to the falsity of SCD’s Bosnian declarations and documents stating the forged nature of the document represented as an official court document [Dževad Hrnjić **CBRA 1905-14**]; and 3) his own [**CBRA 1549-1601 & 1842-74**] and his wife Dina’s [**CBRA 1877-1880**] declarations explaining that the same weekend he received the order from the other apartment resident he had received a very upsetting telephone call from Bosnia indicating that his mother was dying the weekend he received the order.

The IAJ never held an anticipated evidentiary hearing on the show cause matter mentioned in a letter to counsel. **CBRA 1662-1663.** Instead, the IAJ issued a Proposed Decision and Order [PD&O **CBRA 62-72**], ruling that the appeal was untimely because of “evidence presented by the employer” about Mr. Mašić’s mother being alive. **CBRA 68.** Notably,

⁴ The word “chagrined” does not appear appropriate to the testimony at that time.

the PD&O failed to address Department noncompliance with RCW 51.52.050, equity, Title VI, RCW 2.43, language accommodation issues, due process or equal protection, or the impact of LEP status on the obligation to communicate with Mr. Mašić in Bosnian. Mr. Mašić filed a Petition for Review. **CBRA 3-34**. Two of the 3-member Board denied the PFR adopting the PD&O as the Board's D&O. **CBRA 2**. The D&O failed to address Mr. Mašić's constitutional rights, his rights under RCW 2.43, RCW 49.60, and Title VI; and interpreter services at Department level.

Mr. Mašić appealed to Superior Court which affirmed and entered judgment for the Department and awarded attorney fees and interest against Mr. Mašić. **CP 1-3**.

IV. ARGUMENT

A. STANDARD OF REVIEW

This Court reviews statutory interpretation as a question of law *de novo*. *Stucky v. Department of Labor & Industries*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996). Issues of fact are reviewed for "substantial evidence to support them." Substantial means of sufficient quantity to persuade a fair-minded, rational person of the finding's truth. *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). Conclusions of law are reviewed to see if they flow from the findings of fact. *Grimes v. Department of Labor & Industries*, 78 Wn.App. 554, 897 P.2d 431 (1995).

B. STATUTORY CONSTRUCTION

1. The Industrial Insurance Act Must be Liberally Construed to Reduce Worker Suffering & Economic Loss.

RCW 51.12.010 requires the Industrial Insurance Act be “liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from [industrial] injuries.” See *Cockle v.*

Department of Labor & Industries, 142 Wn.2d 801, 16 P.3d 583 (2001).

2. Ambiguities Must be Interpreted in Worker’s Favor.

As a remedial statute, the Act is construed liberally to effectuate its purposes, with an expansive interpretation of benefits. *Sebastian v.*

Department of Labor & Industries, 142 Wn.2d 280, 12 P.3d 594 (2000).

C. THE SUPERIOR COURT ERRED FINDING MR. MAŠIĆ’S APPEAL UNTIMELY.

1. Mr. Mašić Timely Filed Within 60 Days of Receipt of the Order.

Mr. Mašić received the misdelivered order within 60 days of filing his Board appeal. So, despite the fact that he was not required to appeal by RCW 51.52.060, based on the defective notice provided addressed below, Mr. Mašić did appeal within 60 days of his actual receipt of the order, making his appeal timely under any calculations.

2. The Department Orders Violating Two of Three Requirements Imposed by RCW 51.52.050 are Not Final.

RCW 51.52.050 states that whenever DLI has made a final order or decision, the copy sent to the worker:

...shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board . . .

RCW 51.52.050 requires the Department do three things before any order becomes final and sparks the 60-day appeal period under RCW 51.52.060:

- a. State specific appeal rights on the order in “black faced type,”
- b. Communicate the order to the injured worker, and
- c. Provide a copy of the order to the injured worker.

The Department failed to accomplish the first two requirements, vitiating the effectiveness of the third. Therefore, the orders on appeal were invalid and never required filing an appeal in 60 days under RCW 51.52.060.

- a. The Appeal Notice in the Orders Violated the “Black Faced Type” Requirement.

The meaning of the term “black faced” type is neither obvious nor defined in the Act, necessitating interpretation. Using a dictionary definition is appropriate to determine the meaning of

an undefined term. *Zachman v. Whirlpool Finance Corporation*,
123 Wn.2d 667, 671, 869 P.2d 1078 (1994).

Dictionaries show that the term “black faced” is synonymous with “**bold faced**.”⁵ It is obvious that the Legislature used the term “black faced” to require **boldface** type to assure the worker’s attention is drawn to the appeal deadline. This aim was not met here because the orders sent to Mr. Mašić contain no “black faced” (*i.e.* **bold face**) type when stating the appeals rights information. See **Ex 3 & 5**.

The function of “black faced” type is crucially important when the orders go to persons unable to comprehend the language in which the order is sent. English- and Spanish- speaking injured workers receive orders in their languages with appeal notices in their languages and can readily understand them. Non-Spanish speaking LEP workers, like Mr. Mašić, cannot know the importance of the language describing appeal rights and deadlines or that any vital information on when they must act is even contained in the order.

Thus, the Department’s failure to provide the appeal notice in the required “black face” type prejudiced Mr. Mašić. The Legislature’s aim of assuring that his attention was called to this crucial information was

⁵ The *Random House Unabridged Dictionary*, 2nd Ed. (1993) defines “black face” first in theatrical terms and secondly referring to print as “2. *Print*. A heavy-faced type.”

vitiated by the failure to use **bold face** type. These orders never required an appeal within 60 days under RCW 51.52.060. Thus, Mr. Mašić appealed timely. See RCW 51.52.050 & RCW 51.52.060, **APP A**.

b. The Appeal Notice in the Second Order Violated the Requirement to Advise of Right to Protest and Request Reconsideration.

RCW 51.52.050 requires each order to become final to advise the worker of both the right to appeal and the right to protest in boldface type. The second order refusing reconsideration [EX 5] did not advise Mr. Mašić of his right to protest. Lacking the required protest language, this order was not an order which Mr. Mašić had to appeal within 60 days under RCW 51.52.060. Thus, his appeal was timely.

c. The Department, Board, and Courts May Not Rewrite RCW 51.52.050 to Eliminate the “Black Faced Type” and Protest/Reconsideration Right Notification Requirements.

Disregarding the defective appeal notice provisions of these orders is tantamount to rewriting the statute to omit the “black face” type and protest notice requirements. Our courts, however, are not authorized to re-write statutes. On the contrary, “courts are required to give effect to every part of a statute, whenever possible, and should not deem a clause superfluous unless it is the result of an obvious drafting error.” *Dennis v. Department of Labor & Industries*, 109 Wn.2d 467, 479, 745 P.2d 1295

Similarly, *Webster’s Third New International Dictionary* (1986) defines “black face” first as a type of sheep, then in theatrical terms, and finally as “boldface.”

(1987). Giving effect to every part of RCW 51.52.050 leads to the inevitable conclusion that Mr. Mašić was not given proper notice of his appeal and protest rights or the time period in which he must act, as required by our Legislature. It follows that RCW 51.52.060's 60-day appeal period never started and Mr. Mašić's appeal was timely.

d. English-only Orders to LEP Workers Do Not Satisfy the "Communication" Requirement.

i. *Receiving an order one cannot understand is not "communication."*

RCW 51.52.060(1)(a) requires one aggrieved by an Department order *must* appeal "within sixty days from the day on which a copy of the order . . . was *communicated* to such person" No worker need appeal within 60 days any Department order lacking the required appeal rights language in "black faced type" as explained above. Therefore, Mr. Mašić had no obligation to appeal the second order within 60 days of receipt, unless this Court holds the statutory language on both "black face" type and notifying of the right to "protest" is surplusage.

The Legislature put the "communication" requirement in both RCW 51.52.050 and RCW 51.52.060. The former statute requires the Department to "communicate" its order. The later starts the worker's appeal time period when the order is "communicated." Workers need not

appeal orders not “communicated” to them. *Haugen v. Department of Labor & Industries*, 183 Wash. 398, 401, 48 P.2d 565 (1935).

The Act does not define the term “communicate.” *Webster’s Third New International Dictionary* (1986) defines “communicate” as “to make known: inform a person of: convey the information or knowledge of.” Because this Court must adopt a definition favoring the injured worker, construing “communicate” as synonymous with “provide a copy of a written document in a language which the recipient cannot understand” is error. Common sense and everyday experience tell us that when trying make something known to one who cannot understand English, one cannot accomplish that by using English. Rather, to do so, one must use a language the recipient knows – his/her primary language.

Notwithstanding the fact it knew Mr. Mašić lacked English proficiency, the Department did not communicate its orders or any part of them to him in a language he understood. Thus, the Department orders were simply not “communicated” to Mr. Mašić upon receipt. The 60-day appeal period was, therefore, not triggered until he learned the contents of the orders, which he did within 60 days of filing his Board appeal.

ii. *Rodriguez* dicta on “communication” does not control here.

In *Rodriguez v. Department of Labor & Industries*, 85 Wn.2d 949, 540 P.2d 1359 (1975),⁶ the Court held that an LEP worker’s appeal of an English-only order was timely despite being filed over 60 days after receipt. In *Rodriguez*, the Court indicated in dicta the oft-stated principle [true in cases where there is no language barrier] that delivery constitutes “communication.”⁷ Rather than finding the appeal untimely, the Court applied equity to find the appeal timely. To the extent that *Rodriguez* is cited as holding that “delivery constitutes communication” to an LEP person, the language relied upon is *obiter dicta* at this time.

Rodriguez has value on application of equity to find appeals filed under these circumstances timely. This is especially true where both Department and employer come to the Board with unclean hands.⁸

To interpret “communicate” to mean “provide a copy [in English] of” violates both the Court’s obligation to interpret the Act liberally in the worker’s favor and two other time-honored rules of statutory construction -- the no surplusage rule, addressed above, and the “different words” rule.

⁶ Adopted 14 years before the Legislature adopted Chapter RCW 2.43, *vide infra*.

⁷ This Court recently cited *Rodriguez* for this principle in *Shafer v. Department of Labor & Industries*, ___ Wn.App. ___, 159 P.3d 473 (2007) a case involving an English-fluent worker where the assumption that receipt constitutes “communication” is appropriate.

⁸ The Department sent its orders in English, knowing Mr. Mašić lacked fluency. The employer failed to obtain coverage and filed false and forged documents to support the motion based on which the Board erroneously found Mr. Mašić’s appeal untimely.

The second rule is that "[w]hen the Legislature uses different words within the same statute, we recognize that a different meaning is intended." *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). This rule recognizes that Legislature intended two different meanings in using the words "send a copy" and "communicate" in RCW 51.52.050. This rule requires finding they meant different things -- not the same thing.

Applying *Rodriguez*' equitable reasoning to RCW 51.52.060 should not result in this Court's misconstruction of RCW 51.52.050. It must be remembered that in *Rodriguez*, the Supreme Court found the appeal timely based on equity but did not address constitutional and other arguments addressed raised here which require communicating the order to the LEP worker in the worker's primary language.

3. Washington State Public Policy Requires Orders be Communicated to LEP Persons in Their Primary Languages.

To determine public policy, the Courts look to the legislature's expressions of public policy. See *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). In RCW 2.43.010, our legislature expressed a clear public policy to ensure that LEP persons be adequately informed of their rights to be able to protect them, stating:

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 this public policy to notify LEP workers of appeal rights with notices entirely in English as the Department did. The appeal deadlines, having been stated in English only in those orders, should be deemed null and void as a matter of public policy.

4. Title VI and Executive Order 13166 Require All Notices and Orders to LEP Applicants be in Their Primary Languages.

The Civil Rights Act of 1964, Title VI, 42 USC §2000d and Executive Order 13166, 2000 further support Mr. Mašić. Title VI forbids discrimination based on national origin. EO 13166 guarantees LEP access to federally assisted benefit programs. EO 13166 mandates that federally assisted benefit programs take steps to “ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964....” The Department is bound by EO 13166, as its Industrial Insurance program accepts significant federal funds in its Medical Aid and Accident Funds each biennium. **CBRA** 1952, ESSBs 6062§218, 5180§217, 6153§217, 5404§217, 60990§217.

EO 13166 further states that these programs must comply with guidelines established by Department of Justice to assure full access by

LEP persons. Under Title VI, The DOJ LEP Guidance requires language accommodation for LEP persons, stating in § VI:

Individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English can be limited English proficient, or “LEP,” [and are] entitled to language assistance with respect to a particular type of service, benefit, or encounter.

The Introduction mandates all recipients of federal assistance comply:

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.]

Further, the Department of Labor Title VI Guidance entitled “*Policy Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*,” 68 Fed. Reg. 32290-01 (May 29, 2003) requires federal assistance recipients take steps to ensure LEP persons’ access to critical programs and to “formulat(e) a successful policy for effectively communicating with LEP individuals” in light of appeal deadlines and the risk of erroneous loss of benefits. *Id* at 32304.⁹

It is abundantly clear that the Department did nothing to reduce the language barrier for Mr. Mašić. This violated conditions imposed by its

acceptance of federal assistance. This failure to translate the orders into Bosnian made it impossible for him [without language accommodation] to understand the orders and his appeal rights, preventing him from knowing that and how he could protest, or whether he was entitled or required to appeal the orders in any given period of time under the Act.

Because these orders are in English-only, they are sharply at odds with Title VI, EO 13166, and DOJ/DOL Guidances mandating language assistance for LEP persons, thus both the Board and the Superior Court erred by enforcing the 60 day deadlines stated in English therein.

5. Sending Mr. Mašić English-Only Orders Violated Both Due Process and Equal Protection.

a. Due Process Violation

Due process is guaranteed by the Washington State Constitution Article I § 3 and U. S. Constitution Amendment XIV. In *Buffelen Woodworking v. Cook*, 28 Wn.App. 501, 625 P.2d 703 (1981), the Court held even a potential right under the Industrial Insurance Act triggers procedural due process requirements. The court in *Sherman v. Washington*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995) applied due process to all administrative proceedings, observing: “The fundamental requirement of due process is notice and the opportunity to be heard.” To

⁹ While the example used in DOL Title VI Guidance is unemployment benefits, certainly Industrial Insurance qualifies as such a critical program as well.

be meaningful, notice must 1) apprise a party of rights and 2) provide an opportunity to know and meet the opposing party's claims and a reasonable time to prepare and respond. *Cuddy v. Dep't of Public Assistance*, 74 Wn.2d 17, 442 P.2d 617 (1968).

It is too obvious for argument that for notice to be meaningful, it must be provided in a manner the recipient can understand. The United States Supreme Court so held, saying that "unique information about the intended recipient" determines whether a notice is adequate or not. *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 1716 (2006). In *Jones*, the Court invalidated notice under due process, saying at 1715 that:

[W]hen notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the [intended recipient] might reasonably adopt to accomplish it.

The orders here were not such notices, they instead prevented notice.

Ignoring Mr. Mašić's LEP status, they apprised him of nothing.

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

Another aspect of due process is the right to understand one's rights before waiving them. In *State v. Teran*, 71 Wn.App. 668, 862 P.2d 137 (1993), the Court held an LEP person may only waive rights

knowingly and voluntarily after being advised of those rights “in his native tongue.” This principle applies here. Mr. Mašić, not being advised of his appeal rights in his native tongue or his right to language assistance, could not and did not waive those rights by not appealing earlier.

b. Equal Protection Violation

Mr. Mašić’s equal protection rights were also violated. Equal protection, the American view 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 the administration of the Act by both Department and Board. *Macias v. Department of Labor & Industries*, 100 Wn.2d 263, 668 P.2d 1278 (1983). In *Macias*, the Court held that equal protection extends to undocumented immigrant workers. Certainly documented immigrant workers must also receive equal protection in claims handling and appeals.

Where differential treatment is based on 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.3d 963 (2006), the Court explained why 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. Mašić 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, especially when the Department communicates with workers in Spanish and English but not Bosnian.

In contrast, except for Spanish-speakers, LEP workers receive very different treatment from the Department. Bosnian-fluent workers receive no notices or written materials in their primary language and receive interpreter services in the most narrow of circumstances. It is clear that non Spanish speaking LEP injured workers are treated differently than LEP applicants are treated by two other State agencies as indicated below.

If Mr. Mašić is not protected by the strict scrutiny test, the rational relationship test would apply under which there must be both a rational relationship between the classes distinguished and a permissible legislative purpose. Where no rational relationship exists to distinguish between the

classes, equal protection is violated. *Seattle School District No. 1 v.*

Department of Labor & Industries, 116 Wn.2d 352, 804 P.2d 621 (1991).

The Department of Social and Health Services [DSHS] has sent all notices and communications to LEP applicants in their own languages for 15 years under *Reyes v. DSHS*, US DC WD WA No. C91-303 (1991) CBRA 35-56, a Title VI case against DSHS for using English with LEP applicants. The Employment Security Department [ESD] settled a similar class action by agreeing to use primary languages for LEP applicants in *Nava v. ESD*, Thurston County No. 93-2-00654-1 (1994). Pursuant to those cases, DSHS and ESD began providing free interpreters for all oral communications with LEP applicants and providing all important written communications, including notices on entitlement to and changes in benefits in the LEP applicant's language [DSHS]¹⁰ and providing notices on how to obtain free interpreter services [ESD].

c. Saving State Moneys Does Not Justify These Violations.

¹⁰ DSHS adopted WAC 388-271-0010 [providing free interpretation for all in person and phone communications with DSHS and free translation of DSHS forms, letters and printed material], WAC 388-271-0020 [DSHS provides "timely" interpreter services, pays for them, and may request them even if the applicant does not], and WAC 388-271-0030 [DSHS provides "timely" "fully translated" all written materials in the applicant's primary language including, but not limited to, pamphlets and informational material, forms and applications, letters; DSHS pays for all these translations].

ESD likewise provides interpreters and translated notices in a similar fashion to LEP applicants, maintaining a compilation of federal laws, regulations and guidelines to ensure compliance, available at each office, providing "one person available to assist individuals seeking information on such programs" pursuant to WAC 192-12-173.

Mr. Mašić submits that distinguishing between Spanish-fluent and other LEP workers is not rational, even if the Department argues it does so to save the state money. In both *Willoughby, infra*, and *Cockle, supra*, the Court ruled that saving money at worker expense is not a permissible legislative purpose under the Act. It is likewise easy to see that there is neither any rational basis to distinguish between LEP applicants for DSHS benefits and for L&I benefits nor any legitimate legislative purpose under the Act to do so. Therefore the Superior Court erred in not finding that the Board and Department actions violated Mr. Mašić's equal protection under both the strict scrutiny and the rational relationship tests.

Stated differently, had Mr. Mašić applied for DSHS benefits, he would have received free language assistance in all phases of his agency contacts, even if he were denied benefits. Mr. Mašić received *no* free language assistance, *no* Department-paid interpreter services, and *no* communication in Bosnian. This violated his right to equal protection.

There is no rational basis to distinguish between LEP applicants for DSHS benefits and for DLI benefits, just as there is no permissible government purpose to distinguish between Spanish-speaking and other LEP workers. Without both a rational relationship distinguishing these classes of recipients and a permissible legislative purpose, the scheme

does not survive equal protection analysis. When a rational relationship is lacking, the right to equal protection is violated. *Seattle Schools, supra*.

6. Mr. Mašić's Appeal was Timely Based on Equity.

Our Constitution gives equity power to the courts. The Act's adoption did not alter this power. *Fields Corp. v. Department of Labor & Industries*, 112 Wn.App. 450, 456, 45 P.3d 1121 (2002). The Court has a long-standing policy to assure fundamental fairness to the injured worker.

Somsak v. Criton Technologies, 113 Wn.App. 84, 52 P.3d 43 (2002).

When an injured worker is not "clearly advised" of the contents of a Department order, the Court intervenes as a matter of "fundamental fairness" to ensure the worker's rights are not violated and the right of appeal is protected. *Somsak, supra*. This Court does this here by finding:

- 1) The Department's orders did not meet the requirements of RCW 51.52.050 and therefore no appeal was required within 60 days by RCW 51.52.060; or
- 2) DLI's orders were not "communicated" to Mr. Mašić under RCW 51.52.050 or RCW 51.52.060; or
- 3) Equity requires finding an appeal timely despite apparently being filed late.

Even if the Court finds 1) all requirements of RCW 51.52.050 were met, and 2) the second order was received more than 60 days before the Board appeal was filed, the Court must determine whether equity requires finding Mr. Mašić appealed to the Board timely.

Inconsistent results in similar cases before this Court without real distinctions suggest finding Mr. Mašić's Board appeal timely is proper.¹¹

Significant Board Decisions intended to provide guidance are also inconsistent with the Board ruling in this case. In Board Significant Decision, *In re Cecelia Envilla*, No. 93 1856 (1994), an LEP worker appeal filed within 41 days of learning an order's contents from a doctor was held timely. Despite appealing within 60 days of his receipt of the English-only order and its interpretation to him, Mr. Mašić's appeals were found untimely. This inconsistency in the application of equity does not promote "sure and certain relief" under the Act and, instead, cries out for a rule on "communication" that treats LEP workers fairly and equitably.

Since the 1930s, our courts have applied equity to find Board appeals timely despite being apparently "late." In *Ames v. Department of Labor & Industries*, 176 Wash. 509, 513, 30 P.2d 239 (1934), the Court found an incompetent's appeal timely on equitable grounds, saying at 513:

The general policy of our laws is *to protect those who are unable to protect themselves*, and equitable doctrines grew naturally out of the humane desire to relieve under special circumstances from the harshness of strict legal rules. Our Legislature has always

¹¹ The Board found appeals by Ivan Ferencák [COA No. 58878-8-I months "late"] timely while finding Mr. Mašić's appeal untimely [when less than two weeks "late", assuming delivery to him within three days of issuance – denied by both Mr. Mašić and his wife]. In Mr. Ferencák's case, the Department stipulated the appeals were timely because he appealed "within 60 days of being informed of the contents of the order by an interpreter." In this case, Mr. Mašić's appeals filed well within the same time frame were found untimely. Both these cases are now before this Court on language issues.

been well advised of the uses and the purposes of equity, and it would be abhorrent and contrary to established public policy to hold that the legislature intended by the limitations in the industrial insurance act to permit the department to deal *ex parte* with a workmans claim and deny his just rights unheard while he was known to be non compos mentis.

In 1975 in *Rodriguez, supra*, the Court applied equity to find an appeal timely because the LEP worker had no interpreter available and received an English-only order. Since *Rodriguez*, the Legislature adopted RCW 2.43 and the Department sends Spanish-speaking workers all informational pamphlets, letters, orders and notices in Spanish to eliminate the language barrier. It does not and has not done so for Bosnians.

The essence of the Department error in both *Ames* and *Rodriguez* was sending workers orders knowing they could not understand them. The Supreme Court reviewed these cases in *Kingery v. Department of Labor & Industries*, 132 Wn.2d 162, 174. 937 P.2d 565 (1997), saying:

We avoided the statutory time limits because the claimant was insane and without a guardian during the appeal period, and the Department acted *ex parte*, knowing of Ames' incapacity. Similarly, in *Rodriguez v. Department of Labor & Indus.*, 85 Wash. 2d 949, 540 P.2d 1359 (1975), we held Rodriguez's untimely appeal would be allowed because he was unable to read or write Spanish or English and spoke Spanish only; moreover, the Department knew or should have known of such illiteracy through medical reports. Rodriguez's interpreter was unavailable when the order was issued.

In *Fields Corp.*, the Court analyzed the three *Kingery* opinions at 459:

[F]ive or more justices subscribed to three propositions. First, equitable relief from res judicata is *not* limited to circumstances in which the claimant was incompetent or illiterate; CR 60 and/or “the court’s equitable powers: permit the court to grant relief under other circumstances also. Second, as one condition of equitable relief, the claimant must have diligently pursued his or her rights. Third Kingery [not LEP] had not diligently pursued her rights.

In *Rabey v. Department*, 101 Wn.App. 390, 3 P.3d 217 (2000), the Court identified yet another factor for exercising equity – the claimant’s emotional condition. In *Rabey*, the Court found a Board appeal filed “late” timely, because a widow was “shocked and disoriented by [her husband’s] death.” The Court held she had “a form of diminished capacity roughly similar to that found in *Ames*.” With proof of this emotional condition, the Court required no proof of diligence. The Department need not be aware of the condition for equity to apply. Mr. Mašić has PTSD, industrially related, compounding the language barrier. **CBRA 2052-61.**

Thus, in general, the Court should consider the following equitable considerations to find an apparently “late” appeal timely:

1. The injured worker cannot understand the order because of inability to communicate in English or unsound mind.
2. The injured worker has a psychiatric/emotional condition impairing the ability to comprehend or act.
3. The Department is aware of the injured worker’s incapacity or inability to understand English.¹²

¹² Note, however, the Department need not know of the applicant’s psychological problem for equity to apply. *Rabey, supra*.

4. The Department sends an order containing finality language knowing the worker cannot likely understand it.

Other cases also consider the Department's misbehavior in applying equity.¹³ Because the Department knew Mr. Mašić lacked English fluency and knew he would not understand its order without an interpreter, this Court should find it acted with unclean hands in sending an English-only order and find Mr. Mašić's appeal timely. The fact the employer acted with unclean hands also supports finding timely appeals.

D. THE BOARD ERRED APPOINTING THE INTERPRETER FOR HEARINGS

Mr. Mašić's appeal was determined based on a single word interpreted in response to a single question on cross-examination where the Bosnian words for "was dying" and "died" sound nearly identical.

1. The Board Erred Appointing an Interpreter Neither Certified nor Qualified to Interpret Accurately for Mr. Mašić.

RCW 2.43 governs interpreters use at agency proceedings. RCW 2.43.030(1)(b) requires use the services of a certified interpreter if an LEP person is a party except when no certification is available for the language. No interpreters are certified for the Bosnian language. The Department maintains an extensive list on its website of qualified Bosnian interpreters. See APP B.¹⁴ The Board hired an interpreter neither certified nor qualified.

¹³ *Kingery, supra*,

¹⁴ Department website information on Bosnian Interpreters, available at <http://www.lni.wa.gov/ClaimsIns/Providers/Manage/Interpreters/default.asp>.

2. The Board Erred in Overruling Mr. Mašić's Objection to the Interpreter the Board Appointed.

The right to an interpreter means the right to an interpreter competent to communicate with the LEP person. In *State v. Teshome*, 122 Wn.App. 705, 94 P.3d 1004 (2004), the Court observed at 712:

Interpreters are provided to non-English speakers to secure their rights in legal proceedings. Thus, the standard for competence should relate to whether the rights of non-English speakers are protected, rather than whether the interpreting is or is not egregiously poor.

Mr. Mašić objected to the Board's hiring the interpreter shown by the corrections required to his deposition not to be competent to interpret adequately or accurately *for him*. See **CBRA 882-899**. The IAJ ignored both the written objection and the profuse deposition corrections and appointed the same interpreter for Mr. Mašić for all Board hearings. This violated RCW 2.43.030(1)(c) requiring appointment of a "qualified" interpreter. RCW 2.43.030(2) provides the appointing authority when appointing a non-certified interpreter "shall" make a preliminary determination "that the proposed interpreter is able to interpret accurately all communications to and from" the non-English speaking person in that particular proceeding. RCW 2.43.030(2) further provides that: The appointing authority shall satisfy itself on the record that the proposed

<https://fortress.wa.gov/lni/ils/ILSStart.aspx> cognizable as Legislative facts under *Rogstad v. Rogstad*, 74 Wn.2d 736, 446 P.2d 340 (1968)

interpreter, among other things, “is capable of communicating effectively with . . . the person for whom the interpreter would interpret.” The interpreter must take the interpreter’s oath after being found qualified.

Mr. Mašić submits that 1) the interpreter the IAJ appointed demonstrated at his deposition that she was not capable of communicating effectively *with him* and 2) the IAJ should not have overruled his written objection and should have appointed an interpreter who could communicate *with him* to interpret at Board’s evidentiary hearings.

E. ALLOWING INADMISSIBLE COLLATERAL IMPEACHMENT AS THE BASIS FOR CHANGING THE FINDING OF TIMELINESS WAS ERROR.

1. Collateral Impeachment is Not Allowed in Washington.

Black letter law in Washington forbids impeachment on collateral matters. Tegland, *Washington Practice 5A, Evidence Law and Practice* at § 607.19. Whether a matter is collateral depends on whether the party propounding the evidence would be entitled to prove it in his case. *State v. Johnson*, 192 Wash. 467, 73 P.2d 1342 (1937). The Court in *Warren v. Hynes*, 4 Wn.2d 128, 133, 102 P.2d 691 (1940), explained:

The rule is firmly established in this state that a witness cannot be impeached by showing the falsity of his testimony concerning facts collateral to the issue. In such matters, the party cross-examining the witness is concluded by the answers given.

While most cases on collateral impeachment are criminal, the principle also applies to civil cases. *Warren*, at 134. The beneficial effects of the rule against collateral impeachment are (1) avoidance of undue confusion of issues and (2) prevention of unfair advantage over a witness unprepared to answer on matters remote to the issues at issue. *State v. Oswalt*, 62 Wn.2d 118, 120-121, 381 P.2d 617 (1963)

2. The IAJ, Board, and Superior Court Erred in Granting Relief on SCD's Motion Based Only on Collateral Impeachment.

Relief under CR 60 was restricted to granting or denying a new hearing on the jurisdictional issue, i.e. whether Mr. Mašić timely filed his appeal. Before the show cause hearing, Mašić advised the IAJ on Washington law on collateral impeachment. CBRA 1765-1769.

Therefore, the relief available on SCD's motion was limited a finding that:

- 1) Good cause had not been shown and the appeal would proceed to a hearing on the merits of whether indeed Mašić was injured while covered by the Industrial Insurance Act, or
- 2) Good cause had been shown and the appeal would proceed to a second but new full evidentiary jurisdictional hearing on the merits of whether Mašić's appeal was timely.

Under CR 60, relief may not be granted based merely on impeachment on a collateral matter. Evidence relied upon in seeking vacation of an order or decision is insufficient if it is merely cumulative,

impeaching, or is unlikely to change the result upon a new trial/hearing.

Paddock v. Todd, 37 Wn.2d 711, 225 P.2d 876 (1950).

The evidence relied upon by the Board related only to impeachment on a collateral matter [whether Mr. Mašić's mother died in October 2004]. This was unlikely to change the result on a new hearing.

Therefore, it was error to find good cause and error to alter the timeliness finding even if a new hearing were held.

F. THE SUPERIOR COURT ERRED BY APPROVING THE FAILURES TO ACCOMMODATE THE LANGUAGE BARRIER FOR MR. MAŠIĆ.

1. Equal Access to Justice Demands Accommodating the Language Barrier for Mr. Mašić.

In 2003, the *Washington State Civil Legal Needs Study* of the Task Force on Civil Equal Justice Funding reported Washington was tenth of states with immigrants in the last ten years at page 18. Recent immigrants report civil rights problems, such as those suffered by Mr. Mašić here, at four times the average rate, at page 32. The study noted that because of the language and cultural barriers, other problems suffered by this population may be underreported. *Ibid* at page 32.

The introduction to the *Equal Access to Justice Report*¹⁵ states at page 1 that "When justice is inaccessible, the simple result is injustice. The need to eliminate barriers preventing access to our courts is real and

immediate.” The report states on page 3 that “Access to the courts is a fundamental right, preservative of all other rights.” This report discusses how communication barriers impact people, observing at page 15 that people affected by such barriers may “feel intimidated by court proceedings.” The report also indicates that “the law requires courts to remove barriers and/or provide reasonable accommodations. What constitutes a reasonable accommodation depends upon the particular circumstances.” The report also recognizes that the requirement to accommodate to ensure equal access to justice applies not only to courts, but also to state administrative agencies at page 12.

The Office of the Administrator of the Courts has recently reported on accommodating problems experienced by LEP persons with access to justice in the *Washington State LEP Plan* [July 2007], stating at 5-6 that:

Federal and Washington law require that LEP persons be provided with competent interpreters in all court proceedings.

Washington’s interpreter statute provides that the court, governmental body or agency initiating the proceeding is to pay for the interpreter in all legal proceedings in which the LEP individual is compelled to appear by the court, governmental body or agency.

Washington Courts have recognized that differences between accommodation required by RCW 2.42 for sensory-impaired persons and

¹⁵ *Ensuring Equal Access for People with Disabilities: A Guide for Washington Courts*, WSBA, August 2006, available at www.wsba.org/atj.

RCW 2.43 for LEP persons violate equal protection. *State v. Marintorres*, 93 Wn.App. 442, 969 P.2d 501 (1999). Thus, the duty to accommodate sensory-impaired persons and LEP persons is identical.

Thus, this Court must address the proper means for the Department, Board, and Superior Court to accommodate the language barrier for Mr. Mašić at any future proceedings on his Industrial Insurance claim.

2. Mr. Mašić Was Entitled to Free Interpreter Services at the Department and at the Board as Benefits under the Act.

a. Department Policies Improperly Refuse Interpreter Services.

As noted above, Mr. Mašić as an LEP person was entitled to language accommodations. The Department Interpreter policies in effect before during and after Mr. Mašić applied for benefits [PB 03-01, PB 05-04, APP C]¹⁶ specifically authorize interpreter services as a benefit under the Act for medical care, vocational services, and IMEs. Despite this, Mr. Mašić received no language accommodation at all at Department level nor any free interpreter to examine and determine that his psychological condition, PTSD, was industrially related.

These Department interpreter policies consistently refuse interpreter services for certain communications essential for LEP injured workers seeking benefits under the Act, including:

¹⁶ Department interpreter policies 2003, 2004 excerpts, cognizable as legislative facts under *Rogstad, supra*.

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 non-Spanish speaking LEP workers while denying them access to written information provided in their languages to English- and Spanish-speaking workers.

The Department has recognized these policies are unsupportable for communications with workers before they retain counsel. See Department

2007 Management Update, APP D¹⁷, stating in relevant portion:

The department . . . will provide an interpreter to communicate with an unrepresented worker who has limited English-speaking proficiency or similarly limiting sensory impairment.

Interpreters are authorized when a limited English proficiency worker needs to communicate with the department . . ., attend medical examinations, and vocational appointments, and at . . . (IME).

Interpreter services also include written translation of necessary correspondence to and from the unrepresented limited English proficiency worker.

While the Department's 2007 policy is deficient in refusing interpreter services once an LEP worker retains counsel, it does recognize the Department's duty to communicate orders to unrepresented workers like

Mr. Mašić either through a written translation or a Department provided interpreter. The Department did neither for Mr. Mašić.

Further, the Department's website recognizes that interpreter services are benefits covered under the Act saying: "Interpreting for an injured worker . . . is covered by L&I and does not require prior authorization." See **APP B**.¹⁸ The Department's position that it need not communicate its orders to Mr. Mašić in Bosnian is inconsistent with its position on interpreter services as benefits provided by the Act.

b. Board Regulation Fails to Ensure Necessary Interpreter Services.

The Board interpreter regulation, WAC 263-12-097 [**APP E**], allows, but does not require, free interpreter services for LEP workers "throughout *the* proceeding." Thus, WAC 263-12-097 fails to ensure LEP workers receive necessary interpreters throughout their appeals. The Board's implementation in Mr. Mašić's case specifically refused him interpreter services 1) in discovery to correct numerous interpretation errors in his deposition transcript and 2) to enable him to respond to the SCD motions filed after the IAJ made his finding of timeliness and based on which that finding was reversed. This demonstrates the inadequacy of WAC 263-12-097 as applied by the Board here.

¹⁷ Appended to Department Answer to Amicus Brief of Northwest Justice Project in *Kustura v. DLI*, No. 57445-1-I. Cognizable as legislative fact under *Rogstad, supra*.

¹⁸ At <http://www.lni.wa.gov/ClaimsIns/Providers/Manage/Interpreters/default.asp>.

3. Denying Interpreter Services Violates the Industrial Insurance Act.

As noted above, the Department's failure to "communicate" with Mr. Mašić in his language violated the Act's mandate that the Act be interpreted to minimize his "economic loss due to industrial injury" under RCW 51.12.010. The Department's policy instead increased his loss and delayed/denied his access to justice for a prompt and just determination on his claim, thus violating the Act's aim to provide "sure and certain relief" under RCW 51.04.010 and necessitating expensive, time consuming appeals. Likewise, denial of interpreter services at the Board further increased his economic loss and further delayed "sure and certain relief."

4. Denying Interpreter Services Violates Public Policy.

As noted above, the Legislature has expressed the firmly held public policy in RCW 2.43.010 that necessary interpreter services must be provided to LEP persons dealing with state agencies. Both the Department and Board in denying interpreter services to allow Mr. Mašić to correct his deposition and to respond to SCD's motions violated the same public policy that he be provided with interpreter services "to assist him" to protect his rights throughout proceedings.

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:

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) ruling on claims for benefits under the Industrial Insurance Act is a public purpose and 2) discrimination based on national origin by both Department and Board is banned at any place where such applications for such benefits are received or ruled upon by these agencies. This requires such locations to provide LEP workers free interpreter services so that their rights are treated equally with other workers. Likewise, it is beyond dispute that Department and Board facilities are public facilities subject to WLAD, as are Washington Courts. *Duvall v. County of Kitsap*, 260 F.2d. 1124, 1139 (9th Cir. 2001).

6. Denying Interpreter Services Violates RCW 2.43.

RCW 2.43 applies to both Department and Board proceedings when LEP worker claims or appeals are involved. The Department issues orders which determine injured worker benefits, while the Board determines appeals of those orders. At Superior Court, the Department asserted and the Superior Court apparently agreed 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 claiming an exemption from RCW 2.43 found nowhere in that Act violates RCW 2.43.010, *et seq.*

Both Board and Department spend public funds for interpreters. Both recognize Chapter RCW 2.43 the source of their authority to do so. The Board recognizes this in WAC 263-12-097, stating:

. . . [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."¹⁹

There is simply no other legislative authorization found in Washington statute for purchasing interpreter services to provide to LEP workers. For agencies which claim they derive their right to spend funds for interpreters from RCW 2.43 to deny that they are bound by RCW 2.43 is absurd.

¹⁹ PB 05-04, p. 16, Cognizable as legislative fact under *Rogstad, supra*.

RCW 2.43 requires agencies to provide interpreters to LEP persons *throughout proceedings*. RCW 2.43.030 requires the agencies to pay for this expense and includes interpreter services as costs where available, *i.e.* here under RCW 51.52.030. Because both Department and Board violated RCW 2.43 by failing to provide and pay for necessary interpreter services, the Superior Court erred in approving those practices.

7. Denying Interpreter Services Violates Title VI & EO 13166.

As noted above, as a federally assisted program, Washington's Industrial Insurance is required to provide language accommodation to LEP workers to avoid discrimination based on national origin. See **PB 05-04** at page 2 citing the determination by US HHS that "inadequate interpretation . . . is a form of prohibited discrimination on the basis of national origin under Title VI of the Civil Rights Act of 1964." By failing to provide adequate interpreter services, the Department and Board violated Title VI, EO 13166, DOJ and DOL guidance requirements.

8. Denying Interpreter Services for Consultation with Counsel Violates Due Process.

In *Karlen v. Department of Labor & Industries*, 41 Wn.2d 301, 304, 249 P.2d 364 (1952), the Washington Supreme Court recognized that due process governs Board appeals. A represented LEP worker cannot "place his claim" before the Board effectively without conferring with his

lawyer confidentially, including during hearings. If worker and counsel cannot understand one another, it is hard to imagine how the worker's claims can be presented in an adequate manner. Here, the Department refused Mr. Mašić's request for an interpreter to correct his deposition.

The Board refused to allow its interpreter to interpret confidential attorney-client communications in Board hearings resulting in Mr. Mašić's inability to communicate to explain the confusion about how he recalled the date he received the order which led to dismissal of his appeal.

This Court should reject any attempt to assert due process considerations do not apply or apply differently here because "English is our national language" or because LEP injured workers are undeserving of the same benefits as other injured workers until they learn English. Such "nativist" arguments are to be recognized for the unlawful prejudice they reflect. See Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 Harv. C.R.-C.L. Law Review 293 (1989).

9. Shifting Interpreter Costs to the Worker is Impermissible.

Another consequence of the failure to accommodate the language barrier is a shifting of interpreter costs to LEP workers which other injured workers do not have. The Model Court Interpreter Act § 8 condemns this practice, stating unequivocally:

In all legal proceedings, the cost of providing interpreter services shall be borne by the court of the administrative agency in which the legal proceeding originates.

Such cost shifting limits the ability to present evidence to prove right to benefits, infringes on the opportunity to be heard in a meaningful way, and adversely impacts the ability to meet opposing positions.²⁰

10. The Cost to Accommodate is Irrelevant.

In *Willoughby v. Department of Labor & Industries*, 147 Wn.2d 725, 57 P.2d 611 (2002), the Washington Supreme Court rejected the Department argument that a statutory scheme withholding benefits to certain workers was justified because it saved the state money, holding that 1) the Act's purpose was to shift the cost of injury to industry and 2) saving the state money did not justify withholding benefits.²¹ *Accord*, *Cockle, supra*. Here, the Court should also reject any such arguments.

11. Refusing Interpreter Violates the Right to Retained Counsel.

The Act, Board and Department all recognize the injured worker's right to representation by retained counsel. RCW 51.04.080, WAC 263-12-020. The Department's *Worker's Guide to Industrial Insurance*

²⁰ These problems and others are recognized in the literature. See e.g. Grabau & Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 New England Law Review 227 (1996).

²¹ A cost savings argument was similarly rejected in *Cockle, supra*.

Benefits,²² recognizes the right to representation by counsel “of the worker’s choosing” after issuance of the first Department order.

Under the APA RCW 34.05.048(2), applicants to any benefit program administered by a state agency have the right to be “represented by” and “advised by” counsel hired at the party’s own expense. The right to representation by counsel includes the right to confer with counsel during hearings to provide for adequate participation in and understanding of the proceedings.²³ GR 11.3(d) recognizes the requirement for interpreters to provide confidential attorney-client interpretation even for brief matters, saying “Attorney-client consultations must be interpreted confidentially.” This rule applies at the Board via WAC 263-12-125.

The worker’s right to retained counsel includes the right to confer with counsel to receive advice to prepare for and during hearings. By denying Mr. Mašić free interpreter services to understand orders and other pleadings, to respond in discovery, and to reply to a dispositive motion, the Department and Board prevented him from full exercise of his right to receive the advice of and representation by retained counsel.

²² Available on the Department’s website at <http://InjuredWorker.LNI.wa.gov> in English, at [http://www.lni.wa.gov/IPUB/242-104-111\(Russian\).pdf](http://www.lni.wa.gov/IPUB/242-104-111(Russian).pdf) in Russian, at [http://www.lni.wa.gov/IPUB/242-104-222\(Vietnamese\).pdf](http://www.lni.wa.gov/IPUB/242-104-222(Vietnamese).pdf) in Vietnamese, and at <http://www.lni.wa.gov/IPUB/242-104-999.pdf> in Spanish, but NOT available in Bosnian.

²³ See also *State v. Gonzales-Morales*, 138 Wn.2d 374, 387, 979 P.2d 826 (1999) indicating conferring with counsel through the interpreter is required in trial.

G. MR. MAŠIĆ IS ENTITLED TO REIMBURSEMENT OF INTERPRETER EXPENSES DUE TO INDUSTRIAL INJURY.

1. Shifting Interpreter Costs Diminishes Benefits of LEP Workers.

Our Supreme Court characterized the first Industrial Insurance Act “this noble legislation” in *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, 158 P. 256 (1916). Our Supreme Court has also held that when a statute sets a minimum benefit, expenses incurred to obtain benefits may not be shifted to the insured because this reduces a statutorily guaranteed minimum benefit. *Kenworthy v. Pennsylvania General Insurance*, 113 Wn.2d 309, 779 P.2d 257 (1989).

Title 51 RCW establishes a statutory insurance benefit schedule for injured workers. As a disabled worker with a spouse and two dependent children, Mr. Mašić was entitled to time loss benefit of 69% of his “wages” upon acceptance of his claim. RCW 51.32.060, RCW 51.32.090. That minimum benefit is diminished if he must pay his interpreters.

The Department and Board policies shifting interpreter expenses to Mr. Mašić will significantly reduce his benefits below the level guaranteed by the Act after his claim is accepted. These cost shifting policies “whittle away” at the Mašić family benefits based solely on LEP status and national origin. These Department and Board policies violate the Act’s objective to reduce the Mašić “economic loss” due to industrial injury “to

a minimum.” The only way to rectify this reduction of benefits is to reimburse for the interpreter expenses with interest.

H. ATTORNEY’S FEES & COSTS SHOULD BE AWARDED TO MR. MAŠIĆ IF HE PREVAILS ON ANY ISSUE.

RCW 51.52.130 provides that an injured worker who prevails at Superior Court and higher appeals is 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, 670, 989 P.2d 1111 (1999), the Supreme Court stated the “unitary claim” theory that a worker who prevails *on any issue* is entitled to attorneys fees on all issues both at Superior and appellate court levels. If Mr. Mašić prevails on any issue, he is entitled to an award of attorney’s fees and costs for work on all issues and interpreter expenses under RCW 2.43.040.

I. THE SUPERIOR COURT ERRED IN AWARDING ATTORNEY FEES TO THE DEPARTMENT AGAINST MR. MAŠIĆ.

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

In *Black v. Department of Labor & Industries*, 131 Wn.2d 547, 933 P.2d 1025 (1997), the Court approved an attorney fee award to the Department under RCW 4.84.030, noting that the worker offered “no coherent argument why the award was improper.” The following reasoned argument shows why the award of attorney fees here was error.

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

In RCW 51.52.130, the Act contains a comprehensive provision on attorney fees in appeals of Board decisions, specifically limiting when and to whom attorney fees may be awarded at Superior and appellate courts. This statute provides only for an award of fees for workers – never against them. Indeed, the Court in *Brand*, at 667 held the statute's purpose is to ensure workers adequate legal representation without diminishing benefits.

RCW 51.52.140 specifically states 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 and Chapter RCW 4.56.

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, freedom from awards of attorneys and interest thereon against workers contained in RCW 51.52.130 and recognized in RCW 51.52.140 is unaffected by Chapter RCW 4.84 and Chapter RCW 4.56.

3. Awarding Attorney Fees Against Mašić 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 minimum the ... economic loss ... from injuries ... in ... employment” and

mandated in RCW 51.04.010 “sure and certain relief for workers .. to the exclusion of every other remedy.” Quite simply, the Superior Court erroneously awarded the Department a remedy and a substantive right and specifically excluded in the Act as an “other remedy.” The Act thus protected Mr. Mašić against an award of attorney fees and interest.

4. Awarding Attorney Fees Against Mr. Mašić 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 include RCW 4.84.080 and RCW 4.84.030. Principles of statutory interpretation mandate a different result as the Court must interpret all ambiguities in the Act in favor of the injured worker. Under this principle, the proper interpretation is that RCW 51.52.140 mandates application of the RCW 51.52.130 -- not RCW 4.84. Even the Code Reviser’s note to RCW 4.84.010 specifically refers to RCW 51.52.130 concerning attorney fees and costs for appeals from Board decisions.

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 RCW 4.56 and 2) neither attorney fees nor interests may be awarded the Department.

In the *Brand, supra*, 670, the Supreme Court applied the principle *exclusio unius est inclusio alterius*,²⁴ 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 while never providing any against them or 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 and Interest Against Mr. Mašić Violates the “Great Compromise.”

The Act is a result of the “great compromise” where workers traded civil remedies for guaranteed benefits “sure and certain relief” under the Act. *Stertz & Dennis, supra*, 469. This bargain guaranteed 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 great compromise struck nearly one hundred years ago where the right to such fees flows

²⁴ The expression of one is the exclusion of the other.

only to workers. The Superior Court award of attorney fees 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) Finding that Mr. Mašić appealed all Department decisions timely;
- 2) Describing the language accommodation which the Department must provide to Mr. Mašić as an LEP applicant for benefits under the Industrial Insurance Act;
- 3) Describing the language accommodation which the Board of must provide in the future to Mr. Mašić as an LEP appellant;;
- 4) Reversing the Superior Court's judgment affirming the Board and awarding the Department attorney fees and interest;
- 5) Remanding for entry of appropriate judgment, findings of fact and conclusions of law which:
 - a. Find Mr. Mašić appealed timely;
 - b. Awarding him attorney fees and costs at Superior Court and on appeal with interest;
 - c. Remanding for hearing on the merits to the Board to determine if Mr. Mašić's injury was covered by the Industrial Insurance Act regardless of whether SCD obtained coverage for him or not;
- (6) Awarding Mr. Mašić attorney fees, costs, and interpreter expenses under RCW 51.52.130, RCW 2.43.040, and *Brand*.

Respectfully submitted this 5th of October, 2007.



Ann Pearl Owen, #9033,
Attorney for Ferid Mašić, Appellant

APPENDIX A

RCW 51.52.050

**Service of departmental action — Demand for repayment —
Reconsideration or appeal.**

Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, which shall be addressed to such person at his or her last known address as shown by the records of the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia: PROVIDED, That a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal: PROVIDED, That in an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

RCW 51.52.060

Notice of appeal — Time — Cross-appeal — Departmental options.

(1)(a) Except as otherwise specifically provided in this section, a worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board. However, a health services provider or other person aggrieved by a department order or decision making demand, whether with or without penalty, solely for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within twenty days from the day on which a copy of the order or decision was communicated to the health services provider upon whom the department order or decision was served, a notice of appeal to the board.

(b) Failure to file a notice of appeal with both the board and the department shall not be grounds for denying the appeal if the notice of appeal is filed with either the board or the department.

APPENDIX B



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To find an interpreter for a crime victim, call 1-800-762-3716 or 360-902-5386.

Interpreting for an injured worker or a crime victim is covered by L&I and does not require prior authorization. The doctor or vocational provider can determine if the patient needs communication assistance.

Do's & Don'ts - What you can and cannot do as an interpreter.

As an interpreter for an injured worker or crime victim, learn what is allowed.

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TANKIC AMEZA (INTERPRETER)	BELLEVUE	888-462-0500	
YMERAGA FERHAT (INTERPRETER)	BELLEVUE	425-453-9890	888-352-9890
ZAHIROVIC KATHERINA	BELLEVUE	425-453-9890	888-352-9890
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MILOYANOVIC BRANO (INTERPRETER)	FEDERAL WAY	509-363-0594	



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Search for an Approved Interpreter

Language

Location or or

Last name

Search Results below may include additional locations because the interpreter has indicated they are available to work in the location you selected.

Search Results: Found 61 Intrepreters

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Results sorted by: City, A to Z

Provider Name	City	Phone Phone	Alternate Phone
HADZIABDIC HALID (INTPR)	BELLEVUE	888-462-0500	
HADZIC HUSO (INTERPRETER)	BELLEVUE	888-462-0500	
HUSAROVIC HIDAJETA (INTERPRETE)	BELLEVUE	425-453-9890	888-352-9890
JURIC ZORICA (INTERPRETER)	BELLEVUE	425-702-8361	
JURIC ZORICA (INTERPRETER)	BELLEVUE	425-453-9890	888-352-9890
JURIE ZORICA (INTERPRETER)	BELLEVUE		425-985-2448
KOSTELAC ZORA	BELLEVUE	425-453-9890	
KOSTOVIC DOVOR (INTERPRETER)	BELLEVUE	206-849-7333	
KOSTOVIC NOVICA	BELLEVUE	206-227-3656	
MILOVANOVIC BRANO (INTERPRETER)	BELLEVUE	425-453-9890	888-352-9890



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Provider Name	City	Phone Phone	Alternate Phone
ADEE MERIMA (INTPR)	AUBURN	206-709-7777	
ADEE MERIMA (INTERPRETER)	BELLEVUE	425-453-9890	888-352-9890
AMIR ARSLANAGIC (INTPR)	BELLEVUE	425-453-9890	888-352-9890
BOJAT DAJANA (INTERPRETER)	BELLEVUE	888-462-0500	
COLEMAN JASMINA S (INTPR)	BELLEVUE	888-462-0500	
COLIC ZLATKO (INTER)	BELLEVUE	888-462-0500	
COLIC ZLATKO (INTERPRETER)	BELLEVUE	425-453-9890	888-352-9890
DELALIC ALMA (INTERPRETER)	BELLEVUE	206-660-5560	
DILBEREVIC SALMA (INTERPRETER)	BELLEVUE	425-238-7794	
FATKIC INDIRA (INTERPRETER)	BELLEVUE	425-453-9890	888-352-9890



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Results sorted by: City, A to Z

Provider Name	City	Phone Phone	Alternate Phone
TANKIC AMELA (INTERPRETER)	FEDERAL WAY		206-250-2397
VUJINOVIC VANJA (INTERPRETER)	FEDERAL WAY		206-545-3551
ZHELEZNYAK LIODMILA (INTRPTR)	FEDERAL WAY	253-661-7922	425-345-4592
ZLATKO COLIC (INTERPRETER)	FEDERAL WAY	253-661-7922	360-604-9007
JURIC ZORICA (INTERPRETER)	REDMOND	425-985-2448	925-702-8361
JURIC ZORICA (INTERPRETER)	RENTON	206-856-4650	
KOSTOVIC DAVOR (INTERPRETER)	RENTON	206-856-4650	
KOSTOVIC DAVOR (INTERPRETER)	RENTON	206-856-4650	
VUJINOVIC VANYA (INTERPRETER)	RENTON	206-856-4650	
VUJINOVIC VANYA (INTERPRETER)	RENTON	206-856-4650	



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Provider Name	City	Phone Phone	Alternate Phone
ARSLANAGIC AMIR (INTERP)	SEATTLE	206-214-8948	
JURIC ZORICA (INTERPRETER)	SEATTLE	425-985-2448	
APAYDIN ENVER (INTERPRETER)	SPOKANE	509-456-0619	
BOJAT DAJANA (INTERPRETER)	SPOKANE		
COLEMAN JASMINA	SPOKANE		
CONNER NADA (INTERPRETER)	SPOKANE	360-371-0115	
MILOVANOVIC BRANO	SPOKANE		
PERKOVIC EDINA	SPOKANE		509-710-5710
RASIC ELMA (INTPR)	SPOKANE		
MILOVIC NATASHA (INTERPRETER)	TACOMA	253-851-8255	



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Provider Name	City	Phone Phone	Alternate Phone
HADZIC HUSO (INTER)	TUKWILA	206-390-8467	
MILOVIC NATASHA (INTPR)	TUKWILA	206-261-1796	
TUMBIC RUSLAN (INTERPRETER)	TUKWILA	206-540-8944	
BRADVIC DRAGAN (INTERPRETER)	VANCOUVER	360-896-3881	
COLIC ZLATKO (INTERPRETER)	VANCOUVER	360-896-3881	
CONNER NADA (INTERPRETER)	VANCOUVER	360-871-4147	
FATKIC INDIRA (INTPR)	VANCOUVER	360-896-3881	
HRUSTIC ADVIJA (INTERPRETER)	VANCOUVER	360-566-0492	
HUSEINAGIC BELMA (INTERPRETER)	VANCOUVER	360-896-3881	
MILOVANOVIC BRANO INTERPRETER	VANCOUVER	360-566-0492	



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Provider Name	City	Phone Phone	Alternate Phone
ZIMMERMAN MILA H (INTER)	VANCOUVER	360-896-3881	



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APPENDIX C



Management Update

Insurance Services: Claims Administration and Self-Insurance

Effective Date

08/13/2007

REVISED 08/17/07

Topic

Interpreter and
Translation Services
To Workers.

Issuing Authority

Sandy Dziejdzic
Cheri Ward
Jean Vanek

Interpreter and Translation Services to Workers

The department or self-insured employer (SIE) (including the SIE third party administrator) will provide an interpreter to communicate with an unrepresented worker who has limited English-speaking proficiency or similarly limiting sensory impairment.

NOTE: Where a worker with limited English proficiency is represented by an attorney, the department or SIE may communicate through the attorney in English. It is the responsibility of the attorney representative to communicate with his or her client worker. If the represented worker with limited English proficiency contacts the department or SIE by phone or in person without counsel, an interpreter is authorized for the oral communications. The department or SIE is not required to provide interpreters for communications in relation to any proceedings at the BIIA or Court.

When the worker requests interpreter services, the department or SIE may verify whether the worker needs assistance in translation. Workers can report limited English proficiency status on the Report of Accident, SIF2 form, or by notifying the department or SIE by phone or letter.

Limited English proficiency is defined as limited ability or inability to speak, read, or write English well enough to understand and communicate effectively. This includes most people whose primary language is not English. Services should also be provided to workers similarly impacted by hearing, sight, or speech limitations.

Interpreters are authorized when a limited English proficiency worker needs to communicate with the department or SIE, attend medical and vocational appointments, and at independent medical examinations (IME). Authorized interpreters must be provided by the department or SIE for IMEs.

Interpreter services also include written translation of necessary correspondence to and from the unrepresented limited English proficiency worker. Copies of both the original and translated versions of the document should be maintained in the claim file.

Resources

AT&T Language Line Instructions

http://ohr.inside.lni.wa.gov/webhome/resource_docs/InterpreterService.htm

Online Reference System (OLRS)

<http://olrs.apps-inside.lni.wa.gov/>

Claims Training Bulletin: Translation Process

Management Memo: Spanish Translations

Training Handout: Services for the Hearing & Speech Impaired

WAC 296-20-2025

Contact Claims Training if you have any questions.

NOTE: This is an interim policy change. This issue has been referred to the policy committee to be included in upcoming revisions.

APPENDIX D



PROVIDER BULLETIN

PB 05-04

THIS ISSUE

**PB 05-04 -
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.

You may also want to refer to information at <http://www.phyins.com/pi/risk/faq.html> regarding use of interpretive services.

Either paid or non-paid interpreters may assist with communications. In all cases, the paid interpreter must meet the credentialing standards contained in this policy. **Persons identified as ineligible to provide services in this policy may not be used even if they are unpaid.** Please review the "Policy Changes for Interpretive Services Provider Standards" section of this bulletin for more information. **NOTE: Persons under the age of eighteen (18) may not interpret for injured workers or crime victims.**

For paid interpreters, you or your staff will be asked to verify services on either the L&I "Interpretive Services Appointment Record" or a similar provider's verification form. The form will be presented by the interpreter at the end of each appointment. You will be asked to verify a scheduled appointment if the worker fails to keep the appointment so the interpreter may be paid for mileage. You should also note in your records that an interpreter was used at the appointment.

When a procedure requires informed consent, a credentialed interpreter should help you explain the information.

How to Find an Interpretive Services Provider

By July 2005, you can find an L&I interpreter provider on our website. Searches are available by interpreter name, language and/or geographic area at <http://www.LNI.wa.gov/ClaimsIns/Providers/Billing/default.asp>.

Interpretive Services Provider Qualifications Policy

Obtaining an Interpretive Services Provider Account Number

All providers sending bills to the State Fund, Self-insured employers or Crime Victims Program (insurers) must have a provider account number with L&I. **Self-insurers do not have separate provider account systems. Self-insurers may verify a provider's account status with L&I.**

As of March 2003, every interpreter, billing an insurer for services, is required to obtain an individual provider account number(s). This includes interpreters and translators who are associated with interpretive service agencies, healthcare clinics, hospitals and other group providers. An individual provider may designate payment to a group provider account.

To obtain a provider account number, interpreters or translators must submit a provider account application and verification of their credentials to one or both of the insurers listed below. Credentials must verify the provider's fluency in English and the other language(s) for which they provide interpretive services.

Provider Bulletin 05-01 (January 2005) notified current interpretive services providers of these changes to provider qualifications and actions needed to maintain their provider account. Current interpretive service providers, who have not yet done so, should submit proof of their credentials to the insurers **by June 15, 2005.**

Provider account application forms are available on the department's website www.LNI.wa.gov/Forms/pdf/248011a0.pdf or by contacting the insurer(s) as listed below:

Workers' Compensation
Department of Labor and Industries
Provider Accounts
PO Box 44261 Olympia, WA 98504-4261
360-902-5140, 1-800-848-0811
FAX 360-902-4484

Crime Victims Program
Department of Labor and Industries
Crime Victims Provider Accounts
PO Box 44520 Olympia, WA 98504-4520
360-902-5377, 1-800-762-3716
FAX 360-902-5333

- 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.

Why Can't L&I Pay Interpreters a Minimum Fee?

Only services which are actually delivered to injured workers can be paid. With a minimum fee, the insurer might make part of the payment for undelivered services. This would violate the department's responsibility to employers and injured workers who pay the industrial insurance premiums.

Further, under WAC 296-20-010(5) the insurer can pay only for missed insurer arranged IME appointments. If there was a minimum interpretive services fee, the insurer might pay for missed appointments arranged by healthcare or vocational providers or by the insured. This would conflict with the WAC. **However, mileage is payable for missed and/or IME no show appointments since the mileage service was an incurred prior to the missed appointment.**

Some Services Don't Require Prior Authorization

Direct interpretive services (either group or individual) and mileage do not require prior authorization on open claims. Providers can check claim status with the insurer prior to service delivery.

Services prior to claim allowance are not payable except for the initial visit. If the claim is later allowed, the insurer will determine which services rendered prior to claim allowance are payable.

Only services to assist in completing the reopening application and for an insurer requested IME are payable unless or until a decision to reopen is made. If the claim is reopened, the insurer will determine which other services are payable.

Services at Insurer Request and/or Requiring Prior Authorization

IME Interpretation Services

When an IME is needed, the insurer will schedule the interpretive services. Prior authorization is not required. The insured may ask the insurer to use a specific interpreter. However, only the interpreter scheduled by the insurer will be paid. Interpreters who accompany the insured, without insurer approval, will not be paid nor allowed to interpret at the IME.

IME No Shows

For State Fund claims, authorization must be obtained prior to payment for an IME no show. For State Fund claims contact the Central Scheduling Unit supervisor at 206-515-2799 after occurrence of IME no show. Per WAC 296-20-010 (5) "No fee is payable for missed appointments unless the appointment is for an examination arranged by the department or self-insurer."

Document Translation

Document translation services are only paid when performed at the request of the insurer. Services will be authorized before the request packet is sent to the translator.

Fees, Codes, Service Descriptions and Limits

The hourly fee for direct interpretive services (either group or individual) is being adjusted from \$60 per hour to \$48 per hour. The IME no show fee is a flat fee of \$48. The mileage rate increased January 1, 2005 to 40.5¢ per mile (the state employee reimbursement rate). Document translation fee is now by report.

Limits in the L&I bill processing system will automatically deny services exceeding the maximum limit on a specific code or combination of codes. The following fees, service descriptions and limits on services apply to **services on and after July 1, 2005:**

Code	Description	How to Bill	Maximum Fee	ICD 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.



PROVIDER BULLETIN

PB 03-01

THIS ISSUE

Interpreter Services

TO:

Audiologists
Chiropractic Physicians
Clinics
Dentists
Freestanding Emergency Rooms
Freestanding Surgery
Hospitals
Interpretive Service Providers
Massage Therapists
Medical Physicians
Nurses
Occupational Therapists
Opticians
Optometrists
Osteopathic Physicians
Panel Exam Groups
Pharmacists
Physical Therapists
Podiatric Physicians
Prosthetists & Orthotists
Psychologists
Radiologists
Self Insured Employers
Speech Pathologists
Vocational Counselors

CONTACT:

Provider Toll Free
1-800-848-0811
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Paulette Golden
PO Box 44322
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Purpose

This Provider Bulletin updates payment policies and fee schedules for interpreter services. This bulletin replaces Provider Bulletin 99-09 and the section titled "Interpreter Services" from the "Professional Services" chapter of the July 1, 2002 *Medical Aid Rules and Fee Schedules*. It applies to interpretive services provided to injured workers or crime victims who have limited English language abilities or sensory impairments receiving benefits from:

- The State Fund
- Self insured employers and
- The Crime Victims' Compensation Program.

This policy is effective for dates of service on or after March 1, 2003.

What Is Changing?

- Clarification of the record documentation that must be kept by each interpreter.
- Interpretive services will be paid per minute. It is the department's expectations that an interpreter's workday will generally not exceed 8 hours per day. This expectation is based on the assumption that an interpreter needs to be alert and attentive to provide the highest quality of professionalism and accuracy in their work. Any billed interpreter time that exceeds 8 hours in a workday will be the basis for pre and post payment review.

- Mileage is paid point to point from the first mile. Over 50 miles billed per single claimant or 75 miles for multiple claimants will be a basis for department review.
- The maximum wait time is increased to 60 units (60 minutes) per day per interpreter. If wait time exceeds 60 minutes it will be a basis for pre and post payment review.
- The fee for wait time will now be one half (1/2) of the regular oral interpretation fee in order to be consistent with the department's other fee schedules.

Definitions

Claimant

Injured workers covered by the State Fund or self-insured employers (or their third party administrators), and victims of crime covered by the Department of Labor and Industries' Crime Victims' Compensation program.

Department

In this publication, this term refers to the Department of Labor and Industries including the State Fund, self-insured employers or their third party administrators, and/or the Crime Victims' Compensation program.

Interpretation

The oral or manual transfer of a message from one language to another language.

Interpreter Services

Providing interpretation between injured workers and health care or vocational service providers.

Interpreter Service Time

Direct service time that:

- Begins when the worker(s) goes into the exam room or other place where direct health services are provided (e.g., vocational provider's office, lab, physical therapy room, pharmacy).
- Ends when the worker(s) completes the appointment.
- Does not include travel time to the initial appointment and travel time after the completed services.

Insurer

Refers to the department (Department of Labor and Industries), the self-insured employer (or their third party administrator), or the Crime Victims' Compensation program.

Source Language

The language from which an interpretation and/or translation is rendered.

Target Language

The language into which an interpretation and/or translation is rendered.

Translation

The written transfer of a message from one language to another.

Wait Time

The time the interpreter spends in the provider's waiting room beginning from the worker's scheduled appointment time and ending when the worker enters the area where direct services are provided.

Standards for Interpreter Conduct when Providing Services to Injured Workers

The department has a responsibility to make sure that injured workers and victims of crime receive proper and necessary services. The following requirements outline the department's expectations for quality interpretive services, including:

- Accuracy and completeness
- Confidentiality
- Impartiality
- Competency
- Maintenance of role boundaries
- Responsibilities toward the claimant and provider.

Accuracy and Completeness

- Interpreters must always communicate the source language message in a thorough and accurate manner.
- The interpreter must not change, omit or add information during an interpreting assignment even if asked to do so by the claimant, the provider or another party.
- The interpreter must not filter communication, advocate, mediate, speak on behalf of either party, or in any other way interfere with the right of individuals to make their own decisions and speak on their own behalves.
- The interpreter must give consideration to linguistic differences in the source and target languages, and preserve the tone and spirit of the source language.

Confidentiality

The interpreter must not give out information about an interpretation job without specific permission of all parties or unless required by law. This includes content of the assignment such as:

- Time
- Place
- Identity of the people involved
- Purpose.

Impartiality

The interpreter must not discuss, counsel, refer, give advice, or state personal opinions or reactions to any of the parties for whom he or she is interpreting.

The interpreter must turn down an assignment if he or she has a vested interest in the outcome or when any situation, factor or belief exists that represents a real or potential conflict of interest.

Competency

The interpreter must be:

- Fluent in English
- Fluent in the claimant's language
- Fluent in medical terminology for both languages.

The interpreter must not accept an assignment that requires knowledge or skills beyond his or her competence.

Maintenance of Role Boundaries

Interpreters must not engage in any other activities that may be thought of as a service other than interpreting, such as phoning claimants directly.

Responsibilities Toward the Claimant and Provider

The interpreter must ensure that all parties understand the interpreter's role and obligations. The interpreter must:

- Inform all parties that everything said during the appointment will be interpreted and that they should not say anything that they don't want interpreted.
- Inform all parties that they will respect the confidentiality of the claimant.
- Inform all parties that they are obligated to remain neutral.
- Disclose any relationship with any party that may influence or someone may perceive to influence the interpreter's impartiality.
- Accurately and completely represent their certification, training and experience to all parties.

Who May Interpret

Who is eligible to interpret for health care and vocational services?

To serve as an interpreter for health care treatment, independent medical examinations (IME) or other medical or vocational evaluations requested by the insurer, interpreters must meet the following criteria:

- The interpreter must be fluent in English and in the claimant's language, including fluency in medical terminology for both languages.
- The interpreter must NOT be an attorney, an employee of a law firm or an agent of an injured worker's employer of injury.
- An interpreter for an Independent Medical Exam (IME) must NOT have an existing family or personal relationship with the claimant.
- An interpreter for an insurer requested IME must be an impartial and independent translator qualified to be a witness under RCW 5.60 et seq.
- The interpreter must have an active L&I provider account number.

Who Is Eligible to be Paid

Who is eligible to be paid for interpretive services?

To be eligible for payment, the interpreter must meet the following criteria:

- Meet the requirements defined above in "Who is eligible to interpret for health care and vocational services?"

AND

- Have an active L&I provider account.

An interpreter is NOT eligible for payment if he/she:

- Has an existing family or personal relationship with the claimant.
- Is the medical, health care or vocational provider.
- Is an employee of the provider serving the claimant and his/her primary job function is not interpreting

Who May Request and Select Interpreter Services

Who may request interpretive services and select an interpreter?

Any person may request interpretive services on behalf of a claimant. However, before authorizing interpretive services, the claim manager must verify the claimant's need based on information from the health care or vocational provider.

The requesting party or insurer may select and request services from an eligible interpreter as defined above in "Who is eligible to interpret for health care and vocational services?"

Obtaining Authorization

Authorization requirements

Initial Visit

Authorization is not required for the claimant's initial visit. The insurer will pay for interpretive services needed during the initial visit regardless of whether the claim is later allowed or denied. This initial visit includes interpretive services needed to obtain accident or medical history information or to fill out the appropriate State Fund or self-insured forms.

Other Services Prior to Claim Allowance

When interpretive services are required for additional visits prior to claim allowance, the provider may request the services of an eligible interpreter. The insurer **will not** pay for these services prior to claim allowance. If the claim is later allowed, the insurer will decide whether to authorize and pay for interpretive services.

Only interpreters may bill the department for interpretive services. The health care provider, injured worker or other party may pay for interpretive services provided prior to claim allowance. If the claim is later allowed and an interpreter has received payment from someone other than the insurer, the interpreter must refund in full all payment received from the other party and accept the department's maximum payment as full and complete payment. If the insurer does not allow the claim, or determines interpretive services are not necessary, the person requesting the services is responsible for the bill.

Services for Open Claims

Prior authorization is required for interpretive services for open claims. Before authorizing interpretive services, the insurer must verify the claimant's need based on information from the health care or vocational provider. Once authorized, interpretive services do not need repeat authorization. Interpreters are responsible for verifying the status of the claim and that the insurer has authorized interpretive services.

For an Independent Medical Exam (IME), the insurer will automatically authorize interpretive service when the need is evident from the claimant's file.

Reopening a claim

If a worker applies to reopen a claim, the insurer will initially pay only for interpretive services related to completing and submitting the reopening application.

Additional interpretive services provided while the insurer is determining whether to reopen the claim will be treated in the same manner as services described above in "Other Services Prior to Claim Allowance." No prior authorization is needed.

Document Translation

The insurer may request translation of specific documents. This service may be requested only by the insurer, and must be authorized each time the service is needed. The insurer will not pay for interpreter services performed at the request of the worker.

Billing Requirements – Payment & Fees

Provider Account Numbers

All interpreters must have an individual provider number with the department of Labor & Industries. Interpreters must submit bills to the insurer using his or her own L&I provider account number. An interpreter may designate another provider number (such as a group or clinic) as the payee.

Individual interpreters needing a provider account number must submit a provider application and form W-9 to the department. The Provider Application and Notice can be printed from the Internet at <http://www.lni.wa.gov/hsa/forms/htm>. Providers can also request a provider application by calling the Provider Hotline at 1-800-848-0811 or by calling the department's Provider Accounts Section at: (360) 902-5140.

Submitting Bills

Providers may submit bills electronically or on paper forms.

Electronic Billing

Electronic billing reduces the time for processing and paying bills. Providers who want to bill electronically must submit an "Electronic Billing Authorization" form (F248-031-000) to the department's electronic billing unit. The form can be accessed on the Internet by going to <http://www.lni.wa.gov/hsa/forms/Tables/ElectronicBilling.htm>. The form can also be ordered from the department's warehouse at:

Warehouse

Department of Labor and Industries
PO Box 44843
Olympia, WA 98504-4843

When requesting forms, please specify the form number and the quantity needed.

For more information about electronic billing, contact the department's electronic billing unit at:

Electronic Billing Unit
Department of Labor and Industries
PO Box 44264
Olympia WA 98504-4264
(360) 902-6511 or (360) 902-6512

Paper Billing

Paper bills should be submitted on the green "Statement for Miscellaneous Services" form. These forms are produced in single sheets (F245-072-000) or as a continuous form (F245-072-001), and are available from an L&I field office or from the department's warehouse at the address specified in "Electronic Billing" above. When requesting forms, please specify the form number and the quantity needed.

Charges Billed to the Insurer

Interpreters must bill their usual and customary fees when interpreting for injured workers or crime victims. The insurer will pay the lesser of the interpreter's usual and customary fee, or the fee schedule maximum (See WAC 296-20-010(2)).

Services Billed to the Insurer

Covered Services

The following interpretive services are covered and may be billed to the insurer. Payment is dependent on authorization requirements, service limits and department policy.

Interpreters may bill the insurer for:

- Interpretive services providing language communication between the claimant and a health care or vocational provider.
- Time spent waiting for an appointment that does not begin at its scheduled time (when no other billable services are provided during the wait time).
- Time spent assisting a claimant with the completion of an insurer form.
- Time spent waiting when a worker does not show up for an insurer requested Independent Medical Exam (IME).
- Time spent translating a document at the request of the insurer.
- Miles driven from a point of origin to a destination point and return.

Services Not Covered

The following services are not covered and may not be billed to the insurer:

- Services provided for a denied or closed claim (except for services provided for a claimant's initial visit or for the services associated with a claimant's application to reopen a claim).
- Time spent waiting for an appointment that does not begin at its scheduled time if other billable services are performed during the wait time (e.g. document translation or assisting a claimant with form completion).
- Missed appointments for any service except an insurer requested Independent Medical Exam (IME).
- Personal assistance on behalf of the claimant such as scheduling appointments, translating correspondence, or making phone calls.
- Document translation requested by anyone other than the insurer, including the injured worker.
- Interpretive services provided for communication between an attorney or worker representative and the claimant.
- Travel time and travel related expenses, such as meals. (Some mileage is payable as noted in other sections of this bulletin.)
- Overhead costs, such as for photocopying and preparation of billing forms.

Billing Codes

Interpreters should bill the following codes for interpretive services provided on or after 03-01-03.

Interpreter time that exceeds 8 hours in a workday will be a basis for pre and post payment review.

The 8-hour threshold applies to the combined total of all interpretive services paid per minute (9989M, 9990M, 9991M, 9996M, and 9997M).

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.