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NO. 57445-1-I, 57446-9-I, & 57447-7-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

HAJRUDIN KUSTURA, GORDANA LUKIĆ, AND MAIDA MEMIŠEVIĆ,

Consolidated Appellants,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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AMENDED BRIEF OF APPELLANTS

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APPENDICES

<u>Appendix</u>	<u>Description</u>
I	Superior Court's Memorandum Opinion
II	Table Showing DLI/Industrial Insurance Receipt of Federal Funding 1997-2007
III	Samples of DLI Orders in Board Records
IV	DLI Interpreter Services Policy 1999 Policy 10.30, Memišević Admitted Exhibit 23
V	DLI Interpreter Services Policy 2003 PB 03-01, Memišević Admitted Exhibit 27

I. ASSIGNMENTS OF ERROR

Hajrudin Kustura, Gordana Lukić, and Maida Memišević appeal from Superior Court judgments affirming decisions by the Board of Industrial Insurance Appeals (hereafter the Board). All three appellants are recent immigrants. All have limited English proficiency (LEP). All were injured while working legally in the United States.

Because of common legal issues, the three cases were consolidated in Superior Court (**Appendix I**) as they are on this appeal. The assignments of error and the issues on each are stated below.

A. ASSIGNMENTS OF ERROR

1. The Superior Court erred by affirming the Board's decision that wage determinations by the Department of Labor & Industries (hereafter, DLI) in the cases of Lukić and Memišević were final and binding, because they failed to appeal those DLI orders in a timely manner.

2. The Superior Court erred by affirming the Board's decision that appellants were not entitled to interpreter services for all critical aspects of the proceedings and further that they were not entitled to reimbursement for their interpreter expenses.

3. The Superior Court erred by affirming the Board's decisions upholding DLI's wage determinations.

4. The Superior Court erred by failing to award attorney's fees and costs in favor of appellants.

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Where an injured worker is of limited English proficiency (LEP), is a notice from DLI stating the time limit for appeal properly communicated to the worker if the notice is not in the worker's primary language? (Error 1)

2. Where an injured worker is of limited English proficiency (LEP), does Washington public policy require the notice from DLI stating the time limit for appeal to be in the worker's primary language? (Error 1)

3. Where an injured worker is of limited English proficiency (LEP), does Executive Order 13166 require the notice from DLI stating the time limit for appeal to be in the worker's primary language? (Error 1)

4. Where an injured worker is of limited English proficiency (LEP), is a notice from DLI stating the time limit for appeal void if it the appeal deadline is not in "black faced type" as required by RCW 51.52.050? (Error 1)

5. Where an injured worker is of limited English proficiency (LEP), is it a denial of due process and/or equal

protection of the law to refuse to provide notices in the worker's primary language and to refuse to provide interpreter services for all critical aspects of the proceedings? (Error 1 and Error 2)

6. Is it consistent with *Cockle v. DLI* to calculate an injured worker's wage benefits without including the actual premiums paid by the employer for all health care -- medical and dental -- insurance coverage? (Error 3)

7. Is it consistent with *Fred Meyer v. Shearer* to calculate an injured worker's wage benefits without including lost holiday pay? (Error 3)

8. Is it consistent with RCW 51.08.178 to calculate an injured worker's wage benefits without including free hotel accommodations and subsidized meals provided by the employer? (Error 3)

9. Is it consistent with *Cockle v. DLI* to calculate an injured worker's wage benefits without including the amounts paid by the employer for government mandated benefits? (Error 3)

10. Where one injured worker prevails on a single issue in Superior Court in a consolidated appeal from decisions by the Board of Industrial Insurance Appeals, is that worker entitled,

under *Brand v. DLI* to an award of attorney's fees and costs?

(Error 4)

II. STATEMENT OF THE CASES

A. THE KUSTURA CASE

1. Facts

Hajrudin Kustura was born and raised speaking Bosnian/Serbo-Croatian [Bosnian]. He was injured on October 12, 1999 working for Dependable Building Maintenance [DBM]. BR 258.

Economist Robert Moss testified that at \$1.00 per hour worked, DBM would contribute \$173 a month for health care and other insurance coverage, \$5,200 since Kustura lost his benefits. RP 9/18/02 5-6.¹

Ralph Davis, DBM CEO, testified DBM paid \$1.10 an hour for employee benefits. RP 9/25 21. Northwest Administrators [NWA] collected these employer funds and paid the health insurer Regence Blue Shield directly. RP 7. DBM paid the funds to NWA which accounted and administered the funds -- not the union. RP 8. In addition, DBM paid on top of wages amounts to governmentally mandated programs of Industrial Insurance [rate of \$.42585/hour], Social Security, and state disability insurance [\$.10985/hour]. RP 23, 26, 27. Ex 7.

¹ Where the date of Proceedings is the same for the paragraph, the date is not repeated.

Garth Fisher, NWA account executive, testified NWA paid health insurance premiums from employer contributions, no part of which was paid by the employee. RP 12/29 5, 9. Kustura's monthly health premiums were \$167.49 for medical and \$37.31 for dental coverage. RP 5-6.

2. Department Action

DLI accepted Kustura's claim issuing all orders in English. DLI included \$110 for Kustura's lost health care coverage in "wages," omitting his holiday pay and Unemployment Compensation. DLI found him to be married without dependents. Kustura appealed all orders within 60 days.

3. Board Action

Kustura filed notices of appeal at the Board noting his LEP status, requesting recalculation of his wages with *Cockle* benefits, payment of back time loss, interpreter services on appeal, and reimbursement for his interpreter costs. BR 264-272, 400-404, 425-432, 444-448, 449-456, 465-469, 478-481, 496-500, 508-517, 518-522.

The assigned Industrial Appeals Judge [IAJ] acknowledged the interpreter services issue was properly raised. BR 303, 313-314. The IAJ told Kustura's counsel to address his request for interpreter services at the Board to the Chief IAJ. Kustura did by motion. BR 285-286. No formal ruling was received on that motion.

At hearing, the IAJ refused to provide interpreter services throughout the hearing. RP 9/18 7-8. Kustura brought an interpreter at his own expense to the hearing on 9/18 whom the IAJ refused to allow to interpret the proceedings for Kustura. RP 4-5. No interpreter services were provided for translation of other witnesses' testimony.

Most of the IAJ's rulings denying interpretation by "Kustura's" interpreter and preventing Kustura from testifying on interpreter issues were omitted from the record. After the hearing, the IAJ refused Kustura's request to reopen to elicit testimony from an NWA employee identified by DLI immediately before hearing. RP 1/14/03 11.

The IAJ rejected the CBA and DBM CEO's letter. Ex 4, 7.

The IAJ entered a PD & O, including \$110 or \$1.10 an hour for health care in wages, but omitting holiday pay and Unemployment . BR 238-256. Kustura petitioned for review, requesting leave to present NWA testimony. BR 202-236. The Board vacated the PD&O, allowing NWA testimony. BR 155-161. NWA representative Fisher testified Kustura's \$208.50 monthly health care premium was paid entirely with employer funds. RP 12/29 5-6, 9. A new PD&O was issued repeating \$110 as the monthly value of health care. BR 67-86. Kustura again petitioned for review. BR 24-64. The Board issued a D&O signed by only two of three members, repeating again \$110 for monthly health care premium and

omitting holiday pay and Unemployment. BR 13-20. Kustura moved for reconsideration, demonstrating the mathematical impossibility of the value assigned for his health care premium. BR 6-12. The Board denied his motion. BR 1-3. The Board's final decision found that Kustura :

1. Filed a timely appeal;
2. Lacked English fluency;
3. Worked full time at injury receiving overtime and holiday pay;
4. Had the following benefits when injured:
 - a. Health coverage [medical, prescription, dental]
 - b. Life Insurance coverage
 - c. Accidental death & disability coverage
 - d. Governmentally mandated Unemployment Compensation, Industrial Insurance, Social Security and Medicare
5. Lost health coverage valued at "\$110 a month or \$1.10 per hour" rather than the \$208.60 total monthly premium testified to by Fisher who paid the premium;
6. Lost governmentally programs excluded from "wages," and
7. Was properly denied both interpretation of the full Board hearings and reimbursement for his own interpreter expenses.

B. THE LUKIĆ CASE

1. Facts

Gordana Lukić was born in Bosnia speaking Bosnian. The Lukić family entered the US legally in 1998 under the International Rescue Committee's auspices. RP 9/29 12-13. She quickly became employed,

moving to a job at the Four Seasons Olympic Hotel for better pay and benefits. RP 9/29 18. She worked with Mexicans and other LEP workers with only one American co-worker. RP 4/24 18. She had a green card. RP 9/29 13, Ex 4. She was injured and lost her health care coverage due to her injury. RP 4/24 45, 59.

Because she and her family do not speak English, Lukić cannot communicate with counsel, health care providers, or DLI. Her daughter cannot interpret for her with her lawyer. RP 4/24 34-35, 46, 50; 9/29 5-9. She cannot afford an interpreter and has no available free interpreter. RP 9/29 21-22, 27. Her industrial injury forced her to hire an interpreter to communicate on her claim with her doctors and her lawyer. RP 9/29 23-27. DLI never communicated with her in her own language or explained in her language that she must appeal any decision within a given period of time. RP 9/29 24; 4/24 64-65; 9/29 30. Before she hired current counsel, no one explained she had to appeal orders by a given date. RP 9/29 25. No one in her prior lawyer's office could speak Bosnian. RP 9/29 5. At hearing, only questions to her were interpreted. RP 9/29 31. At hearing, the uninterpreted hearing portion, largely held off the record, took longer than her questioning limiting her presentation of evidence. RP 9/29 31.

DLI provided a Bulgarian interpreter she could not understand for a doctor visit. RP 9/29 45. DLI never translated claim paperwork for her.

RP 45-46. DLI never spoke to her in her language to get claim information. RP 46. She arranged an acquaintance to interpret for her, but DLI sent a letter in English refusing that interpreter. RP 49, 54-56.

Dr. Braddock, her treating physician, testified that, because of the language barrier, she needed interpreter services for medical care, her medical care took longer, her ability to recover was negatively impacted, and physicians were prevented from knowing the full extent of her injuries. RP 7/1 72-77. As DLI has not appealed the total permanent disability finding, other medical facts are not reviewed here.

The Four Seasons Employee Handbook lists the following in her employee benefits: health insurance, nine paid holidays, Social Security, Worker Compensation Insurance, Unemployment Compensation Insurance, and free hotel services. Ex 2. The Handbook states at 41:

UNEMPLOYMENT COMPENSATION INSURANCE

Under certain conditions the law provides that I may receive some compensation for periods of unemployment. . . . The Hotel pays a large portion of this protection.

Kate Moriarty, Four Seasons representative, testified Lukić worked full time and had benefits, including comprehensive medical and dental coverage. Four Seasons paid the full monthly dental premium of \$25.02 and \$109.36 of the monthly medical premium. While Lukić was not given holidays off, she was paid for nine holidays/year in addition to her regular

pay whether she worked or not. RP 6/30 22. Due to injury, Lukić lost 3 days of free hotel accommodations and half price meals. RP 6/30 24-27.

2. Department Action

DLI accepted Lukić's claim, issuing all orders only in English. DLI excluded Lukić's paid holidays, dental coverage, free hotel rooms/ half price meals, and governmentally mandated programs from wages. DLI stopped time loss January 2002 and closed her claim without permanent disability award March 11, 2003. DLI refused to pay an interpreter for medical and psychological visits. She appealed within 60 days of the issuance of some, but not all, orders.

3. Board Action

Lukić's notices of appeal referred clearly to her LEP status and need for interpreter services. BR 151-160, 520-524, 533-537. Lukić filed a Notice of Non-English Speaking Status/Request for Relief requesting interpreter services for all communications on her injury at DLI and BIIA levels and reimbursement for interpreter fees with interest. BR 165-168.

The IAJ denied interpreter services except for Lukić's testimony. RP 2/12 II. Lukić moved for reconsideration. BR 168-212, 213-216, 225-227, 228-229, 234-235. The IAJ denied Lukić's motion for a continuance due to inability to prepare for lack of interpreter services. BR 242.

The Board denied interpreter services to prepare Lukić's case, and granted them for Lukić's and other witnesses at hearing, omitting any ruling on perpetuation deposition testimony. BR 243-245. RP 3/27.

At the hearing, the interpreter was questioned about interpreting a confidential conversation between Lukić and her counsel. RP 4/24 6. The IAJ conducted proceedings with the interpreter present which were not interpreted for Lukić. RP 4/24 1-34. The IAJ again refused Lukić interpretation for confidential communications with counsel at and during breaks in the proceeding. RP 4/24. See also RP 4/14 31/7-18

Lukić requested the IAJ to recuse herself for bias. BR 266-276. The IAJ requested the case be reassigned to another IAJ. BR 289-293.

On reassignment, the new IAJ also refused to allow confidential communications with counsel to be interpreted. RP 8/20 14-15:

The Board's Decision and Order found

1. Lukić has a limited intellectual capacity and cannot communicate effectively in English;
2. Lukić was totally temporarily disabled to January 20, 2000 after which she was totally permanently disabled;
3. Denied changing Lukić's "wages" finding she had not timely appealed DLI orders sent to her in English only; and
4. Denied any relief on interpreter expenses. BR 1-18.

C. THE MEMIŠEVIĆ CASE

1. Facts

Maida Memišević was born and raised in Bosnia, speaking only Bosnian RP 10/24 161-174. She was injured on November 11, 2001 while working for DBM. RP 10/24 191.

At the time of her injury, she lived with her son and used an interpreter to speak to her son's school teachers in Seattle. RP 174-180. She incurred interpreter expenses because DLI arranged a Russian interpreter at her IME. RP 4/5 122-124. She cannot communicate with counsel without an interpreter. RP 180-181.

Garth Fisher, NWA employee testified that at injury, Memišević had health care coverage with a total \$278.26 monthly premium. RP 10/24 18, Ex 2, 2A. The premium was paid by employer funds provided to the independent Third Party Administrator [TPA] under the Collective Bargaining Agreement. RP 11, 13. NWA merely administers the funds. The Trust is managed by a Board of Trustees with both employer and union members. RP 62. Employees make no contribution toward health care insurance. RP 19. Memišević lost her coverage.

DBM owner Ralph Davis testified DBM paid for Unemployment Compensation coverage quarterly at 0.6% of wages. RP 10/24 81-86, Ex

12. DBM also paid for Social Security and Industrial Insurance benefits. RP 77, Ex 10-11, 13-14. Due to her injury, DBM stopped paying for these benefit programs for Memišević.

Under the CBA, DBM paid direct Memišević seven days holiday pay for time not worked in addition to her hourly wages. RP 106, 197, Ex 16. Memišević received \$259.60 in holiday pay before her injury. RP 97. Holiday pay after Thanksgiving was lost due to her injury. RP 105-106.

Victoria Kennedy, DLI designee, testified that DLI has:

1. Information on rights under the Act in Spanish on its website,
2. Brochures on rights under the Act in Spanish,
3. Spanish fluent employees,
4. Spanish form letters,
5. An internal Spanish translation system,
6. Spanish telephone communication available free to workers,
7. A form to get documents interpreted into Spanish, and
8. A program to hire more Spanish speaking claim managers.

DLI provides none of the above in Bosnian. RP 12/11 29-35; 4/5 16-18, 29-40, 98, 109, 111. No translating service was used to send Memišević any documents in Bosnian. RP 4/5 91. The basic brochure on worker rights and benefits under the Act "Guide to Worker Rights," available in English and Spanish, is unavailable in Bosnian. RP 4/5 98-99.

DLI Interpreter Services policies refuse to pay interpreters to schedule health care appointments, translate documents to or from DLI, translate documents at the worker's request, make phone calls, or communicate with counsel. RP 4/5 86-90. Ex 23, 27. DLI sent no documents or orders to Memišević in Bosnian. RP 4/5 36-37. DLI never translated anything into Bosnian. RP 4/5 99.

Former DLI Director Moore responded to a Mexican Consulate NAFTA complaint on apple industry migrant workers, stating DLI pays benefits regardless of immigration status. RP 4/5 79-80, Ex 28, 29.

2. Department Action

DLI accepted Memišević's claim, issuing all orders in English. When calculating her benefits, DLI included \$256.30 for health insurance, but never paid it. DLI refused to authorize interpreter services for communications with counsel to prepare for her Board hearing. Ex 36. The lack of interpreter services prevented her counsel from answering a DLI request for information on her attending physician. Ex 40. When DLI arranged a Russian interpreter for her IME, Memišević had to pay a Bosnian interpreter \$60 an hour to attend also. RP 4/5 122-24.

Memišević appealed all DLI orders and the DLI's letter denying interpreter services to communicate with counsel. She requested interpreter services on her Board appeal. Some appeals were filed within

60 days of the DLI action appealed, some not. All DLI orders stating the time for appeal were entirely in English.

Memišević's notices of appeal stated her LEP status, requested wages recalculation with *Cockle* benefits, payment of increased time loss benefits, interpreter services on appeal, and reimbursement for interpreter services not provided free to her. BR 64-68, 582-586, 636-639, 657-661.

3. Board Action

The Board granted Memišević's motion [BR§ 116-136] for a Board provided interpreter only for Board evidentiary hearings she attended. BR 139. The Board never ruled on her requests for interpreter services to prepare for hearing and for confidential attorney-client communications at hearing or for reimbursement of interpreter services. The IAJ rejected evidence of Memišević's hours and pay, benefits, DBM rate of and payment for governmentally mandated benefit programs, Memišević's application for medical benefits, and DLI Director's letter stating DLI policy on immigrant workers. Ex. 6, 8, 10-14, 18A, 29.

The Board affirmed denial of interpreter services to communicate with counsel. BR 6. The Board affirmed the health care premium acknowledging it was less than paid by DBM but finding the wage calculation order was untimely appealed. The Board ruled:

1. Memišević was single and without dependents;

2. Memišević is not fluent in English and requires an interpreter for accurate communication in the English language,
3. Memišević did not timely appeal the DLI wage calculations;
4. Memišević's monthly health care premium was \$252.30;
5. Government safety net programs are excluded from wages;

BR 1-5 The Board failed to address Memišević's lost holiday pay. The Board affirmed DLI payment orders for periods after she lost health coverage which failed to pay for that loss, despite its \$252.30 value.

D. SUPERIOR COURT ACTION

The Superior Court heard argument in all three cases simultaneously. The Superior Court issued a single memorandum opinion [Appendix I] on all three cases. In judgments entered thereafter, the court affirmed the Board's determinations that the Lukić and Memišević appeals were not timely and affirmed all DLI wage determinations, with one exception, namely, the Court found Memišević to be married, thereby increasing her benefit from that ordered by the Board, See Appendix I, page 10. The court denied both the appellants' request for attorney fees and their timely motion for reconsideration. See Notice of Appeal.

III. ARGUMENT

As shown above, four assignments of error have been made.

Argument is organized according to these assignments of error. The

issues related to the assignments of error are addressed in turn.

A. ALL APPELLANTS' BOARD APPEALS WERE TIMELY OR SHOULD BE DEEMED TIMELY.

1. Orders entirely in English to LEP workers do not satisfy the "communication" requirement of RCW 51.52.060(1).

RCW 51.52.060(1)(a) states that a person aggrieved by a DLI order must file an appeal "within sixty days from the day on which a copy . . . was communicated to such person . . ."

The term "communicate" is not defined; hence, it is appropriate to look to a dictionary to ascertain its common, ordinary meaning. *Zachman v. Whirlpool Financial Corp.*, 123 Wn.2d 667, 671, 869 P.2d 1078 (1994) ("When the common, ordinary meaning is not readily apparent, it is appropriate to refer to the dictionary.")

Webster's Third New International Dictionary (1986) defines "communicate" as "to make known: inform a person of: convey the information or knowledge of...."

Common sense and everyday experience tell us that when trying to make something known to a person who does not understand English, we are unlikely to accomplish our aim by using the English language. As noted by the Supreme Court of Arizona in *Ruiz v. Hull*, 191 Ariz. 441, 957 P.2d 984 (1998), the use of English only to communicate with non-English speakers "effectively bars communication itself." To

communicate, it is necessary to use a language other than English in which the recipient is proficient -- in most cases the recipient's primary language.

Here, DLI did not translate its orders – or any part of its orders – into Bosnian, despite knowing that appellants lacked English proficiency and only understood Bosnian. As a result, DLI orders in English were not “communicated” to these workers. Therefore, the sixty-day time appeal period was not triggered as to these workers.

2. Washington public policy requires DLI orders to be communicated to LEP workers in their primary language.

When determining whether public policy mandates or prohibits a course of action, courts ordinarily look to the legislature for expressions of public policy. See *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). Our legislature has expressed a clear public policy in favor of ensuring that people who are not proficient in English are adequately informed of their rights. RCW 2.43.010 states:

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

It is grossly at odds with public policy as established by the Washington legislature to notify LEP workers of their appeal rights by

notices that are wholly in English, as DLI did here. The appeal deadlines, having been stated in English only, should be deemed null and void as a matter of public policy.

3. Compliance with Executive Order 13166 requires LEP workers be notified of appeal deadlines in their primary language.

Further support for the appellants is provided by Executive Order 13166, signed by the President on August 11, 2000. The Order focuses specifically on access to federally assisted programs by persons who are not proficient in English, mandating that programs receiving federal funds must 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....”

Washington’s DLI is a recipient of federal funds. See **Appendix II**, showing significant federal funding of DLI, specifically in the Accident and Medical Aid accounts which pay for Industrial Insurance benefits, for the years 1997-2007.

The Order further states that programs receiving federal funds must comply with guidelines established by Department of Justice to assure full access by LEP individuals. The LEP Guidance makes it clear LEP individuals are to receive language assistance. Section VI states:

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.

DOJ’s LEP Guidance Introduction demonstrates that compliance with the Executive Order is required of all recipients of Federal financial assistance, as is true of DLI:

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)

It is abundantly clear that DLI did not comply with either Executive Order 13166 or the DOJ LEP Guidance insofar as its written orders are concerned. By refusing to translate appeal deadlines into Bosnian for these three injured workers, DLI did nothing to reduce the language barriers facing them, and instead made it all the more difficult for them to obtain the benefits to which they are entitled. Because DLI’s orders are sharply at odds with Executive Order 13166, the appeal deadlines set forth therein should have been disregarded by the Board and by the Superior Court.

4. **The appeal deadlines stated in the DLI orders did not comply with the “black faced type” requirements of RCW 51.52.050.**

Not all the orders appealed are in the Board Record. Those which are have no “black faced” type. **Appendix III.** RCW 51.52.050 states that when DLI makes a final decision, the copy sent to the worker:

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

The Act does not define “black faced type.” Resort to dictionaries shows the term “black faced” is synonymous with “bold faced.” The Random House Unabridged Dictionary, 2nd Ed.,(1993) defines “black face” first in theatrical terms and then provides the following definition: “2. *Print.* A heavy-faced type.” Similarly, Webster’s Third New International Dictionary (1986) defines “black face” first as a type of sheep, then in theatrical terms, and finally as: “3. Boldface.”

It is obvious that the Legislature required boldface type to assure the recipient’s attention is drawn to the appeal deadline. This aim was not met in these cases, however, because the orders sent to the appellants did not employ black faced (or bold face) type when stating that they would become final and binding unless appealed within sixty days. The notice provided in these orders was, therefore, defective. A party who has not

received proper statutory notice is not precluded from raising an issue at a date later than that specified in the notice. See *Fraser v. Beutel*, 56 Wn. App. 725, 785 P.2d 470 (1990).

DLI may argue its failure to use "black faced" type is of no consequence and that providing notice of appeal deadlines in any form is sufficient. To support this view, DLI may cite *Porter v. DLI*, 44 Wn.2d 798 (1954) where appellant argued her appeal should be deemed timely because DLI did not provide notice of the appeal deadline in the precise language set forth in the statute. The Court disagreed, stating:

In the absence of a showing that the workman or person aggrieved by the action of the department was misled to his prejudice in the preparation or prosecution of his appeal, the variation from the language specified in the statute, while not to be approved, is not particularly important.

The case at hand is distinguishable. In *Porter*, there was no language barrier and the legislature's intent was not thwarted merely because DLI used phraseology slightly different than the statutory language. Here, however, DLI's failure to use black faced type obviously thwarted the intent to draw attention to the notice, emphasizing its importance. The public is accustomed to the use of black faced type to inform them on the importance of a particular part of a written communication. This court can take judicial notice of the fact that when communicating with the public, it

is commonplace for the courts and government agencies to use boldface type when communicating crucial information, including deadlines.

To disregard the defective notice provisions of DLI orders would rewrite the statute omitting the black faced type requirement. Our courts are not authorized to rewrite statutes. To 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. DLI*, 109 Wn.2d 467, 479, 745 P.2d 1295 (1987).

Giving effect to every part of RCW 51.52.050, including the “black faced type” requirement, leads to the inevitable conclusion that appellants did not receive proper notice of the appeal period, as required by our Legislature. It follows that the sixty-day appeal period never began, and that their Board appeals were all timely.

In the absence of substantial supporting evidence, findings of fact and conclusions of law drawn there from are erroneous. *Garrett Freightlines v. DLI*, 45 Wn.App. 355, 725 P.2d 463 (1986). Because the Board Record contains no evidence to support a finding that DLI orders complied with the RCW 51.52.050 requirement to advise appellants of their appeal rights in “black faced” type, the Board’s and the Superior Court’s finding the Lukić and Memišević appeals untimely are erroneous as unsupported by substantial evidence.

5. It is a denial of due process and equal protection of the law to provide notices to LEP workers entirely in English and to refuse interpreter services for all critical aspects of the proceedings.

The United States Constitution in XIV Amendment §1 states:

No state shall . . .; nor shall any state deprive any person of . .
. property without due process of law; nor deny to any person
within its jurisdiction the equal protection of the law.

The Washington State Constitution protects these interests in Article I, §§
3 and 12. Recipients of publicly funded subsistence and medical benefits
receive both due process and equal protection. *Shapiro v. Thompson*, 394
U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969); *Memorial Hospital v.*
Maricopa County, 415 U.S. 250, 39 L.Ed 2d 306, 94 S.Ct. 1076 (1974).

The Washington State Supreme Court has held both Board
proceedings and Industrial Insurance medical and disability benefits have
due process protection. *Karlen v. DLI*, 41 Wn.2d 301, 304, 249 P.2d 364
(1952); *Macias v. DLI*, 100 Wn.2d 263, 668 P.2d 1278 (1983); *Willoughby*
v. DLI, 147 Wn.2d 725, 57 P.3d 611 (2002).

In *Sherman v. Washington*, 128 Wn.2d 164, 184, 905 P.2d 355
(1995), the Washington State Supreme Court, applying due process to
administrative proceedings, observed: “The fundamental requirement of
due process is notice and the opportunity to be heard.”

To be meaningful, notice must apprise a party of rights and provide
the opportunity to know the opposing party’s claims, the opportunity to

meet them, and a reasonable time to prepare and respond. *Cuddy v. Dep't of Public Assistance*, 74 Wn.2d 17, 442 P.2d 617 (1968).

It is too obvious for argument that for notice to be meaningful, it must be provided in a manner that is understood by the recipient. Notice to an LEP worker that is entirely in English apprises the recipient of nothing and is no notice at all.

Another aspect of due process is the right to understand one's rights before waiver. See *State v. Teran*, 71 Wn.App. 668, 862 P.2d 137 (1993) where the Court recognized that when there is a language barrier, a person may waive rights knowingly and voluntarily only after being advised of those rights "in his native tongue." The same principle applies here. Appellants were never advised of their appeal rights in their native tongue, yet the Board and the Superior Court effectively ruled that they waived their appeal rights by not appealing within sixty days.

Federal cases also hold that the right to an interpreter is a matter of fundamental fairness and due process. See *Augustin v. Sava*, 735 F.2d 32, 37 (2nd Cir. 1984) where the Court addressed the right to a competent interpreter saying:

[T]ranslation services must be sufficient to enable an applicant to place his claim before the Judge. A hearing is of no value when the alien and the Judge are not understood.

Simply stated, failure to provide interpreter services sufficient to allow a non-English speaking person to place his or her claim before the tribunal is a denial of a fair hearing and, thus, a denial of due process.

What interpreter services are sufficient to satisfy the requirements of due process? Obviously, all testimony before the tribunal must be interpreted, otherwise, the LEP worker will be unaware of – and thus unable to rebut – adverse testimony. At Kustura’s Board hearing, he was provided an interpreter only for his own testimony and his own interpreter was prevented from interpreting the rest of the proceeding for him.

It is equally obvious that a LEP worker cannot “place his claim” before the Board without being able to communicate with counsel. If the worker and counsel cannot understand each other, it is hard to imagine how the worker’s claims can be presented to the Board effectively. In the cases before this court, requests for a translator to assist the workers to prepare for and communicate with counsel during hearing were denied.

These LEP workers have the right to retained counsel at the Board. WAC 263-12-020(1)(a). See *e.g. State v. Herzog*, 196 Wn.2d 383, 398, 402, 635 P.3d 694 (1981) where the Washington State Supreme Court found the right to counsel included the right to confer with counsel to prepare and “the opportunity for private and continual discussions”

between client and counsel throughout trial. *Accord State v. Damon*, 144 Wn.2d 686, 25 P.3d 418 (2001) unless exigent circumstances exist.

It is also the case that an injured worker cannot place his or her claim before a tribunal properly without being limited in their ability to make health care appointments and understand health care test results. DLI's interpreter services improperly policies bar interpreters for these purposes, limiting LEP workers' access to and receipt of healthcare. See **Appendix IV & V**, Memišević Adm. Exh. 23, p. 3 and Exh. 27, p. 7.

In short, by failing to provide notices in the appellants' native tongue, and by refusing to provide (or reimburse for) interpreter services for all aspects of the proceedings – including certain healthcare communications, hearing preparation, full proceedings and all testimony, and, communications with counsel -- the Board denied these appellants their due process rights.

The equal protection rights of these workers were also violated. The Department of Social and Health Services (DSHS) sends all notices and communications to its non-English speaking applicants in their own languages. It has been doing so since 1991 pursuant to a consent decree to resolve a class action case [*Reyes and Penado, v. DSHS*, US District Court W. Dist. of Washington, No. C91-303 (1991) brought under Title VI against DSHS for its use of English only with LEP recipients. Pursuant

to that consent decree, DSHS began providing interpreters for all oral communications with LEP persons at no cost to them. Further, DSHS agreed to provide all important written communications, including specifically all notices regarding entitlement to and changes in benefits, to LEP persons in their own languages.

DSHS adopted these LEP policies as provisions in WAC 388-271 which provides interpretation for all in-person and phone communications with DSHS and translation of all DSHS forms, letters and other printed materials into the applicant's primary language under WAC 388-271-0010. DSHS must pay for these services under WAC 388-271-0020. Under WAC 388-271-0030, DSHS must communicate with the applicants in that person's primary language, including DSHS brochures, pamphlets, information on rights and responsibilities, forms, applications, plans, and letters. DSHS bears the full cost of these translations under WAC 388-271-0030(2). DLI did none of this for appellants.

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

In contrast, except for Spanish speaking workers, injured LEP workers receive entirely different treatment by DLI and the Board. These LEP workers received no communications in their primary language, received no translation benefits and oral interpretation services in the most narrow of circumstances. It is clear that injured LEP workers -- other than those who speak Spanish -- are treated differently than LEP benefit recipients of at least two other State agencies.

Stated differently, had these three appellants applied for DSHS benefits, they would get notices in their own tongue and language assistance in all contacts with the agency. DLI treats them entirely differently. There is no rational basis for the distinction between LEP recipients of DSHS benefits and LEP recipients of DLI benefits. There must be a rational relationship between the distinction between these classes of recipients, and some permissible legislative purpose. If there is no rational relationship, there is a violation of equal protection. See *Seattle School Dist. No. 1 v. DLI*, 116 Wn.2d 352, 804 P.2d 621 (1991).

Additionally, these Bosnian-speaking LEP workers were discriminated against as compared to DLI's treatment of Spanish- and English-speaking workers. There is a constitutional right to use foreign languages. *Meyer v. Nebraska*, 43 S.Ct. 625, 262 U.S. 390 (1923). Discrimination based on national origin is forbidden. 42 USC § 1981, *et*

seq, RCW 49.60.010, *Andersen v. King County*, 138 P.3d (2006).

Discrimination based on language is discrimination based on national origin because language is a proxy for national origin. The use of English can mask discrimination based on national origin and conceal nativist sentiment. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 Harv. C.R.-C.L.L. Rev 293, 325, 328 n. 225 (1989). See *St. Francis College v. Al-Khazaraji*, 107 S.Ct. 2002, 481 U.S. 604 (1987).

B. Appellants' Wages Were Improperly Calculated.

1. Under *Cockle v. DLI*, the value for lost health coverage is the monthly premium cost for both medical and dental insurance.

The Court in *Cockle v. DLI*, 142 Wn. 2d 801, 16 P. 3d 583 (2001)

addressed the value for lost health care coverage at 820-821, saying:

[W]e reject as unnecessary the Court of Appeals' requirement that the "reasonable value" of a benefit like health care coverage be measured by its hypothetical market value rather than simply by the monthly premium actually paid . . . to secure it – or in the case of a group plan, the worker's portion thereof.

Here, the actual premium paid for appellants' monthly health care coverage, actually paid by employer funds, is found in the record--\$208.60 for Kustura, \$134.38 for Lukić, \$278.26 for Memišević. Despite this, DLI, the Board, and the Superior Court erred in adopting lesser amounts, for Kustura "\$110/month or \$1.10 per hour," for Lukić \$109.36, and for Memišević \$252.30.

The foregoing amounts are unsupported by substantial evidence admitted at the hearing. Hence, the wage determinations are subject to reversal under *Garrett Freightlines, supra*.

Note also that the amount assigned to Kustura's lost health coverage is a mathematical contradiction. If the premium amount actually were \$1.10 per hour worked, rather than the actual amount of the health insurance premiums, Kustura, a full time worker, would have a premium not less than \$193.60 per month -- much higher than \$110 per month assigned. This is easily calculated using the formula in RCW 51.08.178(1)(e) for workers working 5 days per week. As Kustura worked 5 days per week, 8 hours/day, his health care premium calculates as:

$$\underline{\$1.10/\text{hour} \times 8 \text{ hours/day} \times 22 \text{ days/month} = \$193.60.}$$

If one deducts from this amount the monthly premiums NWA paid for disability [\$14.00], life [\$.36], accidental death/dismemberment coverage [\$.12], the total health care premium is still \$179.12/month.

The evidence demonstrates, however, that the actual monthly premium paid for health coverage was \$208.60. This Court should reverse the Superior Court and the Board on the value of Kustura's lost health care coverage, there being no admissible evidence supporting the \$110 figure.²

² It is assumed the \$110 figure came from a misstatement of Kustura's health care premium in a letter which was neither offered nor admitted at hearing, but which appears only as an attachment to one of Kustura's notices of appeal. BR 517

Lukić's monthly health coverage value of \$109.36 also appears to be based on employer-supplied misinformation which omitted the monthly premium for her dental coverage. There is nothing in *Cockle* stating or even suggesting dental coverage falls outside the scope of health care coverage to be included in wage calculations. Obviously, dental coverage is a form of health care coverage and, for this reason, the Board and the Superior Court should be reversed on this issue.³

Nothing in the record supports the \$252.30 value assigned to Memišević's lost health coverage, suggesting it too was based on employer misrepresentation of the monthly health care premium. The record demonstrates that the monthly premium paid for her health coverage was \$278.26. This Court should remand all three appeals for recalculation so that wages and benefits can be properly calculated by using the actual health premiums paid, including dental coverage.

2. Under *Fred Meyer v. Shearer*, holiday pay should be included in wage calculations.

This Court held in *Fred Meyer, Inc. v. Shearer*, 102 Wn. App. 336, 8 P.3d 310 (2000) that holiday pay falls within the meaning of "wages"

Indeed, the DBM's president testified that the premium was not \$110. Garth Fisher testified it was \$208.60.

³ To the extent the Industrial Insurance Act is ambiguous as to the inclusion of dental coverage, the matter should be resolved in favor of the appellants. As stated in *Clauson v. DLI*, 130 Wn. 2d 580, 925 P.2d 624 (1996): "All doubts as to the

under RCW 51.08.178 (1). DLI, the Board, and the Superior Court all erred by omitting holiday pay from “wages.” Because all appellants’ holiday pay should be included in their wages, 8 days per year for Kustura and Memišević and 9 days per year for Lukić, remand requiring inclusion of holiday pay in wages is required.

3. Free hotel accommodations and subsidized meals provided by the employer are “wages” under RCW 51.08.178.

The record demonstrates that, due to her injury, Lukić, as a hotel employee, lost her employee benefit of three nights free hotel rooms and half price food for her family at any chain hotel.

“Wages” as defined by RCW 51.08.178 include board and housing received as part of the contract of hire. No Washington cases address free hotel accommodations and partial board under RCW 51.08.178. Common sense tells us, however, that free hotel rooms are a form of housing, and that subsidized meals are a form of board. There is no language in RCW 51.08.178(1), nor any Washington case, suggesting otherwise.⁴ The value of the lost board and housing was erroneously excluded from Lukić’s wages, and as a consequence, the Board’s affirmance of DLI’s wage calculation for Lukić should be reversed on this basis.

meaning of the Act must be resolved in favor of the injured worker.” See also *Kilpatrick v. DLI*, 125 Wn.2d 220, 230, 883 P.2d 1370 (1994).

⁴ All doubts must be resolved in favor of the injured worker. See *Clauson, supra*, and *Kilpatrick, supra*.

4. Government mandated benefits fall within the scope of wages under *Cockle v. DLI*.

In all three cases, DLI and the Board refused to take into account the value of government mandated benefits when calculating wages. This was error, for the reasons stated below.

a. *Eraković Was Incorrectly Decided on Mandated Benefits.*

In *Eraković v. DLI*, 132 Wn.App. 762, 134 P.3d 234 (2006), this Court ruled employer payments to Social Security, Medicare, or Industrial Insurance are not “wages” under RCW 51.08.178 because 1) these payments are not made to the employee as wages and 2) these programs did not provide benefits critical to worker health and survival.

This Court’s opinion in *Eraković* determined the benefits were not critical because *Eraković* was working and therefore not receiving benefits when injured. This ruling ignores the Washington Supreme Court’s reasoning in *Cockle, supra*, where our Supreme Court held that it was the loss of health care *coverage* which was the compensable item included in wages under RCW 51.08.178. As further demonstration that “coverage” was the benefit lost, the Supreme Court evaluated this lost benefit as the monthly health care premium paid to ensure coverage.

In practice, DLI includes no amount in the worker’s time loss compensation benefits until the worker’s health care *coverage* is lost.

Thus rationally this Court should include other lost benefits providing *coverage* that are critical for health and survival in “wages” evaluating them at the monthly cost for such coverage under *Cockle*.

This Court should note that in *Gallo v. DLI*, 155 Wn.2d 470, 120 P.3d 564 (2005), our Supreme Court excluded non health care union controlled fund contributions from “wages” on the basis the funds were out of the employer’s control. By contrast here, Lukić’s employer paid the premiums directly, and Kustura’s and Memišević’s employer paid the moneys to a TPA controlled by a committee composed of both employer and union representatives, continuing employer control until the TPA paid the funds as premiums to the health care insurers.

b. Mandated Government Programs Provide Basic Necessities of Life.

The United States Supreme Court has held that governmentally mandated programs supplying subsistence benefits provide for the basic necessities of life. *Goldberg v. Kelly*, 397 U.S. 254, 268-269, 90 S.Ct. 1011, 25 L.Ed.2d 187 (1970); *Shapiro, supra*. In *Memorial Hospital, supra*, the US Supreme Court held state-supplied indigent medical care is a basic necessity of life. Justice Marshall wrote the majority opinion, stating at 259-260:

Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much “a basic necessity of life” to an indigent as welfare assistance.

And, governmental privileges of benefits necessary to sustenance have often been viewed as being of greater constitutional significance than less essential forms of government entitlements. [citations omitted] It would be odd, indeed, to find that the State of Arizona was required to afford Evaro welfare assistance to keep him from the discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness.

Our state Supreme Court in *Macias, supra*, found the Industrial Insurance program similarly provides for basic necessities. Likewise, Unemployment provides subsistence benefits to secure food to prevent hunger and housing to protect from the elements – providing for two of life’s basic needs recognized in *Goldberg* and *Shapiro*. Surely, this Court was incorrect in finding other government programs providing subsistence benefits do not meet the *Cockle* test.

c. *Eraković* Does Not Apply to Unemployment Compensation.

This Court refused to address Unemployment Compensation benefits in *Eraković*, requiring that matter be addressed on these appeals even if this Court does not revisit its *Eraković* ruling on other benefits.

d. Unemployment Compensation Is Critical to Health & Survival.

Washington’s Unemployment Compensation provides subsistence benefits to eligible workers who become unemployed through not fault of their own, including those who become disabled under RCW 50.06.040.

RCW 50.01.010 recognizes that “economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state.” RCW 50.01.010 bases Unemployment on “the insurance principle” spreading risk and providing coverage, stating:

Social security requires protection against this greatest hazard of our economic life. This can be provided only by application of the insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment.

The foregoing reflects a recognition that workers cannot receive benefits while working, but do receive coverage based on their having worked.

Finally, RCW 50.01.010 states the legislative intent that this statutory unemployment compensation insurance system be “liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.” Certainly RCW 50.01.010 shows this system provides “coverage” which is critical to worker health and survival. This fits the *Cockle* test for “wages” as being critical to worker health and survival under RCW 51.08.178.

Washington’s Unemployment Compensation program is funded by employer payments under Chapter 50.24 RCW entitled “Contributions by employers.” The import of these contributions is emphasized by interest,

penalties and collection costs imposed on employers not contributing under RCW 50.24.040, RCW 50.24.120, and RCW 50.24.125.

e. Workers Lose Unemployment Benefits Due to Injury.

Just as workers lose health insurance coverage due to Industrial Injury, they also lose Unemployment Compensation coverage. Eligibility for Unemployment requires applicants lose work through no fault of their own [RCW 50.20.160] and have worked a certain number of hours in the year before application for benefits. Applicants do not get benefits if on Industrial Insurance benefits. RCW 50.20.085. Application must be made within 26 weeks of the disability start. Here, appellants were disqualified for Unemployment by the time DLI improperly stopped their Industrial Insurance benefits because 1) it was more than 26 weeks after disability onset and 2) they had not worked the requisite hours in the prior twelve months to qualify.

Appellants are all still disabled, years after their injuries. All lost their eligibility for and coverage by Unemployment Compensation because they were unable to work solely due to their industrial injuries.

Thus, appellants' injuries disqualified them from Unemployment benefits they would have received had they been laid off but not injured on the job.

f. Value of Unemployment Compensation: Employer Contribution

The reasonable value for lost unemployment compensation should be the employer's assigned contribution, stated on the DES Rate Notice. See Memišević's Rejected Ex. 11 [DES rate notice] setting DBM's contribution rate at .6% of the first \$26, 6000 earned.

D. Having Prevailed on One Issue in the Superior Court, Appellant Memišević was Entitled to Attorney Fees and Costs on All Issues.

Under the Supreme Court's decision in *Brand v. DLI*, 139 Wn.2d 659, 989 P. 2nd 1111 (1999), if a worker prevails on any issue, attorney fees are to be awarded for the work on all issues that were appealed. In *Brand* at 667, the Court observed:

The purpose behind the award of attorneys' fees in workers' compensation cases is to ensure adequate representation for injured workers who were denied justice by the Department. . .

Concluding that attorney fees should not be diminished because the worker did not prevail on every issue, the Court held at 670:

Under the statute, the worker's degree of overall recovery is inconsequential. This holding is consistent with RCW 51.52.130. Awarding full attorney fees to workers who succeed on appeal before the superior or appellate court will ensure adequate representation for injured workers.

In this case, Memišević prevailed on one issue at Superior Court, namely, one of the errors made in calculating Memišević's wage benefit was recognized and corrected by the Superior Court.

That is, the Court found Memišević to be married, and therefore increased her benefits. See **Appendix I**, page 10.

Although this correction was but one of many that should have been made, it nevertheless reflected a decision in favor of Memišević, and for which she was entitled to an award of attorney fees and costs. Under *Brand, supra*, the award should have encompassed work done on all issues at the Superior Court. Thus, the Superior Court erroneously denied Memišević's request for attorney fees and costs.

It should be emphasized that costs in this matter are not restricted to the usual statutory costs referred to in RCW 4.84.010. Rather, the costs awarded include all costs at the Board and Superior Court. Because these cases involved the need for an interpreter, the fees paid for interpreter services are also a taxable cost. RCW 2.43.040(4) provides:

The cost of providing the interpreter is a taxable cost of any proceeding in which costs ordinarily are taxed.

IV. REQUEST FOR ATTORNEY'S FEES

Appellants request an award of attorney fees and costs associated with this appeal. RCW 51.52.130 expressly provides for an award of attorney fees in the event an appellate court reverses or modifies an order of the Board and grants additional relief to a worker:

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

Further, appellants request they be awarded interest at 1% per month on their underpaid benefits including interpreter expenses.

V. CONCLUSION

Appellants respectfully request this Court to vacate the Superior Court's judgments affirming the Board in all three cases, and remand for entry of orders requiring (a) wage benefits to be re-calculated as requested herein, to be applied retroactively, including interest on the underpaid amount; (b) reimbursement with interest of all interpreter expenses paid by the appellants during the course of the Board and Departmental proceedings below; and (c) an award of full attorney's fees and costs in the Superior Court proceeding, as required by *Brand, supra*.

Appellants also request an award of attorney fees and costs for this appeal, as provided by RCW 51.52.130 and by *Brand, supra*.

RESPECTFULLY SUBMITTED this 7th day of September, 2006.



Ann Pearl Owen, WSBA# 9033
Attorney for Appellants Kustura, Lukić, and Memišević

APPENDIX I

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GORDANA LUKIC,)
)
Appellant,)
) NO. 04-2-24216-9 SEA ✓
v.)
) COURT'S MEMORANDUM
DEPARTMENT OF LABOR & INDUSTRIES,)
) OPINION ON APPEAL
)
Respondent.)

Ⓟ

MAIDA MEMISEVIC,)
)
Appellant,)
) NO. 04-2-26426-0 SEA
v.)
) COURT'S MEMORANDUM
DEPARTMENT OF LABOR & INDUSTRIES,)
) OPINION ON APPEAL
)
Respondent.)

Ⓟ

HAJRUDIN KUSTURA, ✓)
)
Appellant,)
) NO. 04-2-26427-8 SEA
v.)
) COURT'S MEMORANDUM
DEPARTMENT OF LABOR & INDUSTRIES,)
) OPINION ON APPEAL
)
Respondent.)

Ⓟ

The three above-captioned cases come on together for appeal, having been consolidated for oral argument in light of certain common legal issues. The Court intends to enter this brief memorandum opinion addressing those issues as well as some matters relating perhaps only to one or more of the cases. This document will be filed in each of the three court files. Counsel shall submit whatever additional orders, consistent with the opinions expressed herein, are seen as necessary or helpful to complete the record in the individual cases.

TIMELINESS OF APPEAL

In each of these cases, the claimant originally dealt with the Department of Labor and Industries without the assistance of counsel. These dealings were surely marked by a significant difficulty in communications because none of the claimants is fluent in the English language. For in-person and telephone dealings, language assistance was sometimes provided through the services of the "Language Line". At the time of these interactions, representatives of the Department were certainly aware of the claimants' language deficits. Nonetheless, when a final order setting payment amounts was mailed to each of the claimants, this order was written in English only.

Each of these orders contained the standard boxed and capitalized notice that unless an appeal or request for reconsideration of the order was filed, "THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU...." Under customary and well-established analysis, the failure to timely appeal transforms an agency order into a final adjudication by the Department. Marley v. Department of Labor and Industries, 125 Wn. 2d 533, 886 P. 2d 189 (1994).

After the passage of more than sixty days, the claimants retained legal counsel who sought to appeal from those orders, specifically challenging their wage rate determinations. To get around the usual rule of claim preclusion that would bar these appeals, two arguments are presented on their behalves. One is legal and the other equitable. As a legal matter, it is argued that the appeal period is only triggered once the underlying order has been "communicated" and, here, the language barrier prevented the orders from being communicated. As a matter of equity, claimants cite to the line of cases in which unusual circumstances have led to the conclusion that strict application of the claim preclusion rule would be unjust. See, Rodriguez v. Department of Labor and Industries, 85 Wn. 2d 949, 540 P. 2d 1359 (1975); Ames v. Department of Labor and Industries, 176 Wash. 509, 30 P. 2d 239 (1934).

"Communication", in its common sense, certainly implies comprehension on the part of the one receiving the communication; without this, it is said that there is a "failure to communicate." But, does it follow that when the term is used in this legal sense, a similar requirement is implicit? Ballentine's Law Dictionary (3rd Edition) defines "communicate" as "To make known; to impart information; to give by way of information." While the first one of these definitions seems to imply something about the recipient of the information, the remaining two focus on the act of transmitting the information.

When the word "communicated" is used in connection with a notice provision, the effectiveness of the communication is generally evaluated by objective rather than subjective standards. For instance, in the Washington Business Corporations Act, prior

to a 2002 amendment, a provision stated that "Oral notice is effective when communicated if communicated in a comprehensible manner." RCW 23B.01.410(6). (That section also refers to oral notice that is "communicated by radio, television or other form of public broadcast communication.") Whether an individual recipient of a communication made for notice purposes may lack sufficient subjective understanding of its specifics is an inquiry that the law does not generally require. While it can forcefully be argued that a translated notice from L & I would be considerate and helpful to the claimant and thus serve the goals of the Industrial Insurance Act, so too could it be argued that the placing of multilingual traffic signs might promote highway safety. Balancing of the affected interests with costs and other administrative considerations is the province of the legislature; the law does not require a finding of subjective understanding for a notice to have been effectively communicated.

The equitable exception to application of the claim preclusion rule in this context is said to be a "narrow" one. Kingery v. Department of Labor and Industries, 132 Wn. 2d 162, 175, 937 P. 2d 565 (1997). In Kingery, it was held that this exception requires that both of two requirements be met: first, that the claimant was "incompetent" at the time of receipt of the order and, second, that there was "some misconduct" on the part of the Department. In the case of the present claimants, the factual record simply does not demonstrate facts sufficient to justify the invoking of this narrow exception.

Any orders entered by the Department regarding the claims at issue herein, as to which a timely appeal was not filed, should be deemed final and binding and not subject to further review.

WAGE RATE CALCULATION

Certain of the appeals raised by the claimants are, or may be, free of the impediment addressed above and it is therefore necessary to address the issues raised regarding the calculation of their wage rates at the time of their injuries.

RCW 51.08.178 provides that, in calculating worker's compensation benefits, a worker's wage rate consists of his or her monthly cash wages plus "the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract for hire." The inclusion of "other consideration of like nature" injects some ambiguity into this calculation.

Pursuant to the holding of Cockle v. Department of Labor and Industries, 142 Wn. 2d 801, 16 P. 3d 583 (2001), the wage rate determinations of these claimants included the value of health insurance benefits provided by the employer at the time of their injuries. The claimants argue, however, that the Department erred in not also including various insurance and retirement benefits funded by their employer which, in their view, would provide a more true measure of their "lost earning capacity".

In adopting the Industrial Insurance Act, of course, the legislature exercised its authority in drawing the lines defining how wage rates for injured workers would be calculated. In doing so, it could have based the calculation upon any and all consideration received by the worker in exchange for his or her labors. Instead, it chose to adopt the more limited measure as stated above. RCW 51.08.178.

Application of this measure in particular cases is the responsibility of the Department of Labor and Industries. Ambiguities in the statute or uncertainties as to its application may present legal questions for resolution by the courts. The State Supreme Court, in Cockle, supra, has brought considerable clarity to this area. After concluding that costs of healthcare benefits were within the ambit of "consideration of like nature" to board and housing, the Court added that "[b]y contrast, we do not believe injury-caused deprivation of the reasonable value of *fringe* benefits that are *not* critical to protecting workers' basic health and survival qualifies as the kind of 'suffering' that Title 51 RCW was legislatively designed to remedy." 142 Wn. 2d at 823.

Two years later, the Court of Appeals shed additional light on the issue in the case of Gallo v. Department of Labor and Industries, 119 Wn. App. 49, 81 P. 3d 869 (review granted) (2003). That court held that since pension benefits were "not immediately available", they were "therefore not 'critical' to the worker's 'basic health and survival' at the time of the injury" and should not be included in the calculation. 119 Wn. App. at 60. That Court's analysis was argued in support of the Respondent's position here that, to be included, a benefit must be real, objective and presently available rather than being a contingent, future benefit. Since oral argument in the present case, the Washington Supreme Court has affirmed both the Court of Appeals' holding and reasoning, noting that "the legislature intended to include in wages only those items of in-kind consideration that a worker must replace while disabled and that are critical to the worker's health or survival." Gallo v. Department of Labor and

Industries, ___ Wn. 2d ___, slip opinion at p. 9, (Wa. Sup. Ct. 74849-7, September 29, 2005).

Since the Cockle and initial Gallo decisions, the legislature has not "overruled" them through amendments to the statute. The position advanced by the claimants herein would appear to have been rejected by both the legislature and the courts. The Department's calculation of the claimants' wage rates is consistent with the law and not erroneous.

Of course, the Supreme Court's recent ruling in Gallo, supra, is not yet final. If the Supreme Court should alter or clarify the calculation of wage rate in a way that would increase the compensation to be received by these claimants, then, to the extent this issue has been preserved for review, they should certainly receive the benefit of any such development.

INTERPRETER SERVICES

As stated above, each of these claimants processed his or her claim with the Department without legal representation. At some point along the way, counsel was retained and these appeals were initiated by these claimants. In connection with these appeals, issues have been raised regarding the Department's duty to provide interpreter services.

It is the policy of the State of Washington to see that the rights of non-English speaking persons are protected in "legal proceedings" through the available assistance of qualified interpreters. RCW 2.43.010. The definition of the term "legal proceedings"

includes hearings before administrative boards or agencies. RCW 2.43.020(3). The administrative appeals in this case, then, constitute legal proceedings. In contrast, the underlying agency action would not constitute a legal proceeding.

When a governmental body has initiated a legal proceeding, the government is responsible for the costs of providing the interpreter. RCW 2.43.040(2). Except in the case of indigency, when a non-English speaking person has initiated a legal proceeding, he or she must bear the costs of the interpreter. RCW 2.43.040(3).

Separate and apart from this statutory scheme, the State has adopted Administrative Code provisions that do provide for interpreters in an industrial insurance appeal proceeding to be paid by the Board of Industrial Insurance Appeals. WAC 263-12-097. Again, a "proceeding" includes a "hearing before ... an administrative board [or] agency". The industrial appeals judges did appoint interpreters to assist these non-English speaking parties and such services were provided for their hearings.

During a claimant's primary dealings with the Department of Labor and Industries in a pre-legal proceedings phase, the Department does arrange for a certain amount of translation and interpretation services. (See the testimony of Victoria Kennedy, Memisevic CABR 12/11/03 and 4/5/04.) With only monetary (as opposed to liberty) interests at stake, there is no constitutional principle that requires more. Nor is there any statutory or code provision requiring that the government provide an interpreter for communications outside of the context of a legal proceeding – such as in private consultations with a privately chosen and retained attorney.

Once a legal proceeding has been initiated by a non-English speaking claimant, there must be compliance with the above WAC provisions. When the administrative law judge has appointed an interpreter, that interpreter should be utilized to "assist the party ... throughout the proceeding." WAC 263-12-097(1). The WAC does not address matters outside of the proceeding itself.

Argument is presented that the scope of the interpreters' services was improperly limited during the proceedings. Certainly it would seem to the undersigned wise – that is to say, both efficient and considerate – to get as much help as possible out of an interpreter who is being paid to attend a hearing and that would include some attorney-client communications as well as matters on the record. However, an industrial appeals judge is properly vested with some discretion in these matters. Based on a review of the record and the nature of the issues raised, this Court cannot find that there was any abuse of discretion in connection with the handling of interpreter issues or that any restrictions on the role of the interpreters was prejudicial to these claimants.

MISCELLANEOUS ISSUES

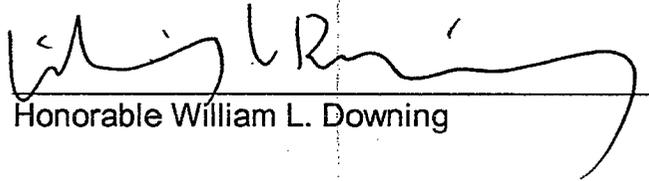
It has been argued that the administrative law judges should have allowed greater latitude in admitting evidence concerning the provisions of the claimants' collective bargaining agreements in connection with the wage rate calculations. Based on the subsequent decision in Gallo, supra, no prejudicial error can be found in this regard.

The Respondent has agreed that the record in the Memisevic case should be corrected to reflect that the claimant was married at the time of her injury (as found in the unappealed, and therefore final, order of February 22, 2003).

CONCLUSION

Counsel for the Respondent shall prepare and submit appropriate final orders for entry in each of the three individual appeals before the Court. In each case, that Order should affirm the decisions of the Board except as indicated herein.

Dated this ³⁰~~29~~th day of September 2005.



Honorable William L. Downing

APPENDIX II

TABLE

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

1997-2007

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

APPENDIX III

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

MAILING DATE 11/14/2001
CLAIM NUMBER P890033
INJURY DATE 10/12/1999
CLAIMANT KUSTURA
HAJRUDIN ST
EMPLOYER *MULTI*
UBI NUMBER *MULTI*
ACCOUNT ID *MULTI*
RISK CLASS *MULTI*
SERVICE LOC Seattle

HAJRUDIN KUSTURA
% ANN PEARL OWEN ATTORNEY
2407 14TH AVE. S.
SEATTLE WA 98144-5014



NOTICE OF DECISION

The Department of Labor and Industries has reconsidered the orders of 10/25/2001, 10/26/2001, 10/29/2001, and 11/05/2001. The department has determined the orders to be correct and they are affirmed.

Supervisor of Industrial Insurance
By Sharon L Vanderwal
Claims Manager
(360) 902-4305

ATTACHMENT

MAILED TO: CLAIMANT - HAJRUDIN KUSTURA, % ANN PEARL OWEN ATTORNEY
2407 14TH AVE. S., SEATTLE WA 98144-5014
EMPLOYER - DEPENDABLE BLDG MAINT OF WASH, % JOHNSTON AND CULB
TWO UNION SQUARE STE 3535, 601 UNION ST, SEATTLE WA 98101
EMPLOYER - CRYSTAL CLEAN MAINTENANCE
PO BOX 2518, AUBURN WA 98071
PROVIDER - HAKALA MICHAEL C DO
STE 206, 13030 MILITARY RD S, SEATTLE WA 98168-3080

Board of
Industrial Insurance Appeals
Olympia Washington

NOV 29 2001
RECEIVED

| ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL |
| INSURANCE APPEALS, P.O. BOX 42401, OLYMPIA WA 98504-2401 WITHIN 60 |
DAYS AFTER YOU RECEIVE THIS NOTICE, OR THE SAME SHALL BECOME FINAL.

EMPL: DEPENDABLE BLDG MAINT OF WASH
C/O JOHNSTON & CULBERSON INCOR
TWO UNION SQUARE STE 3535
601 UNION ST
SEATTLE WA 98101

State of Washington
Department of Labor and Industries
Division of Industrial Insurance
Olympia, WA 98504-4291

PROV: HAKALA MICHAEL C DO
STE 206
13030 MILITARY RD S
SEATTLE WA 98168-3080

Claim Number : P890033
Work Position ID: UC17
Mailing Date : 10/29/01
Injury Date : 10/12/99
Service Location: SEATTLE
UBI # : 600-345-824
Account ID : 420,153-04
Risk Class : 6602

CLMT: HAJRUDIN ST KUSTURA
%ANN PEARL OWEN ATTORNEY
2407 14TH AVE. S.
SEATTLE WA 98144-5014

OCT 2001
Received
ANN PEARL OWEN
ES.

PAYMENT ORDER

A PARTIAL PAYMENT OF BENEFITS IS BEING MADE TO ADJUST THE PREVIOUSLY PAID PERIOD OF 11/14/00 THROUGH 12/26/00 IN THE AMOUNT OF \$ 110.94.

THE WORKER'S TIME-LOSS COMPENSATION RATE FOR THIS PAYMENT PERIOD INCLUDES THE EMPLOYER'S CONTRIBUTION FOR HEALTH CARE BENEFITS.

IF YOU HAVE APPLIED FOR, OR ARE RECEIVING SOCIAL SECURITY BENEFITS, PLEASE NOTIFY YOUR CLAIMS MANAGER IMMEDIATELY.

DO NOT CASH THIS WARRANT IF YOU HAVE BEEN RELEASED TO RETURN TO WORK OR HAVE RETURNED TO ANY TYPE OF WORK. PLEASE RETURN THE WARRANT TO THE DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44835, OLYMPIA, WA 98504-4835.

TOTAL BENEFITS IN THE AMOUNT OF	\$ 110.94
LESS DEDUCTIONS:	
NET ENTITLEMENT	\$ 110.94

RECEIVED
NOV 29 10:13
WYMAN

Board of
Industrial Insurance Appeals
Olympia Washington

NOV 29 2001

RECEIVED

Name : SHARON VANDERWAL
Title: CLAIMS MANAGER
Phone: 360-902-4305

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

601 UNION ST
SEATTLE WA 5

Olympia, WA 9 1291

PROV: HAKALA MICHAEL C DO
STE 206
13030 MILITARY RD S
SEATTLE WA 98168-3080

Claim Number : Y275939
Work Position ID: UE14
Mailing Date : 02/24/03
Injury Date : 11/01/01
Service Location: SEATTLE
UBI # : 600-345-824
Account ID : 420,153-04
Risk Class : 6602

CLMT: MAIDA MEMISEVIC
%ANN PEARL OWEN ATTORNEY
2407 14TH AVE S
SEATTLE WA 98144-5014

PAYMENT ORDER

TIME LOSS COMPENSATION IS PAID FROM 02/06/03 THROUGH 02/19/03 IN THE AMOUNT OF \$ 589.96.

THE TIME LOSS COMPENSATION RATE FOR THE PAYMENT PERIOD:
02/06/03 THRU 02/19/03 IS \$1264.22 PER MONTH OR \$42.14 PER DAY

NOTICE TO EMPLOYER: PLEASE CALL THE CLAIMS MANAGER AND THE CLAIMANT IF YOU HAVE LIGHT DUTY WORK AVAILABLE. EARLY RETURN-TO-WORK EFFORTS WILL BENEFIT BOTH YOU AND YOUR EMPLOYEE.

DO NOT CASH THIS WARRANT IF YOU WERE RELEASED FOR WORK OR RETURNED TO ANY TYPE OF WORK DURING THE PERIOD PAID BY THIS ORDER OF PAYMENT. PLEASE RETURN THE WARRANT TO LABOR AND INDUSTRIES, PO BOX 44293 OLYMPIA, WA 98504-4293.

TOTAL BENEFITS IN THE AMOUNT OF	\$ 589.96
LESS DEDUCTIONS	
NET ENTITLEMENT	\$ 589.96

Name : DORETHA YOUNG
Title: CLAIMS MANAGER
Phone: 360-902-4326

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

PAGE 1 OF 1 (FILE COPY -- PAYMENT ORDER)

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

MAILING DATE 09/19/2002
CLAIM NUMBER P041251
INJURY DATE 01/20/2000
CLAIMANT LUKIC GORDANA

BOARD OF INDUSTRIAL INSURANCE APPEALS
EMPLOYER URBAN FOUR SEAS
IUI NUMBER 600 430 807
ACCOUNT ID 447, 997-00
RISK CLASS 4905
SERVICE LOC Seattle

'02 SEP 26 10:02

GORDANA LUKIC
% ANN PEARL OWEN ATTORNEY
2407 14TH AVE. S.
SEATTLE WA 98144-5014

OLYMPIA

SEP 2002
ANN PEARL OWEN
ATTORNEY

NOTICE OF DECISION

The Department of Labor and Industries has reconsidered the order of 08/30/2002. The department has determined the order is correct and it is affirmed.

Supervisor of Industrial Insurance
By Chris Creekpaum
Claims Manager
(360) 902-4803

MAILED TO: WORKER - GORDANA LUKIC, % ANN PEARL OWEN ATTORNEY
2407 14TH AVE. S., SEATTLE WA 98144-5014
EMPLOYER - URBAN FOUR SEASONS HOTEL, % INTEGRATED CLAIMS MANA
8830 TALLON LN NE STE A, LACEY WA 98516-6641
PROVIDER - SCHIFF STAN R MD
STE 380, 10330 MERIDIAN AVE N, SEATTLE WA 98133-9463

| ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL |
| INSURANCE APPEALS, P.O. BOX 42401, OLYMPIA WA 98504-2401 WITHIN 60 |
DAYS AFTER YOU RECEIVE THIS NOTICE, OR THE SAME SHALL BECOME FINAL.

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

MAILING DATE 03/11/2003
CLAIM NUMBER P041251
INJURY DATE 01/20/2000
CLAIMANT LUKIC GORDANA

EMPLOYER URBAN FOUR SEAS
UBI NUMBER 600 430 807
ACCOUNT ID 447, 997-00
RISK CLASS 4905
SERVICE LOC Seattle

GORDANA LUKIC
% ANN PEARL OWEN ATTORNEY
2407 14TH AVE S
SEATTLE WA 98144-5014

NOTICE OF DECISION

Time-loss benefits are ended as paid through 01/25/2002. This claim is closed effective 03/11/2003.

The medical record shows treatment is no longer necessary and there is no permanent partial disability. The Department of Labor and Industries will not pay for medical services or treatment after the closure date.

Supervisor of Industrial Insurance
By Chris Creekpaum
Claims Manager
(360) 902-4803

MAILED TO: WORKER - GORDANA LUKIC, % ANN PEARL OWEN ATTORNEY
2407 14TH AVE S, SEATTLE WA 98144-5014
EMPLOYER - URBAN FOUR SEASONS HOTEL, % INTEGRATED CLAIMS MANA
8830 TALON LN NE STE A, LACEY WA 98516-6641
PROVIDER - INTERNAL MED ASSC UNIV PHYS
ASSOC UNIV PHYS CLINIC, PO BOX 50095, SEATTLE WA 98145-5095

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

APPENDIX IV

5. Insurer will not compensate family, friends, or medical or vocational providers.

Although workers may have family members, friends, or medical or vocational providers serve as interpreters, the insurer will **not** compensate them for interpretive services.

6. Certain persons shall NOT serve as interpreters.

Attorneys and employees of law firms, other worker representatives, employers, and employer representatives shall **not** serve as interpreters for medical treatment, independent medical examinations (IMEs) or other medical or vocational evaluations requested by the insurer. This applies regardless of certification and regardless of whether they volunteer their services.

7. Only certain interpreters may interpret for IMEs.

When an IME is scheduled and interpretive services are necessary for communication between the injured worker and the doctor(s) performing the examination, only interpreters that have no existing familial or personal relationship with the injured worker will be used.

8. Insurer will reimburse interpreter for some additional services.

The insurer will pay for or reimburse the interpreter for:

- A maximum of 2 units (15 minutes each) when a worker does not attend an insurer requested IME.
- A maximum of 2 additional units (15 minutes each) for services such as wait time or completion of forms, for each date of service.
- Mileage at the Washington State reimbursement rate from the interpreter's place of business or home, whichever is closer. Mileage beyond a 50-mile radius must be pre-approved by the insurer.
- Document translation when specifically requested by the insurer.

9. Insurer will NOT reimburse for certain services.

The insurer will **NOT** pay for or reimburse the interpreter for:

- Services provided when a claim is denied or closed. (Except for completing a reopening application.)

- Missed appointments for routine medical or vocational services, such as office visits, physical therapy visits, or performance based physical capacity examinations.
- Personal assistance on behalf of the worker, for example, scheduling appointments, translating correspondence, or making phone calls. (Medical and vocational providers are responsible for providing their correspondence and phone calls in a language or format understood by the injured worker.)
- Document translation requested by anyone other than the insurer, including the injured worker.
- Attorney or worker representative visits.
- Travel time and travel related expenses, such as meals.
- Overhead costs, such as for photocopying and preparation of billing forms.

Policy author: Juanita C. Perry, (360) 902-4260
For technical questions: State Fund Claims Training, (360) 902-4576
Self-Insurance Claims Training, (360) 902-6904

APPENDIX V



PROVIDER BULLETIN

Published by
Health Services Analysis Section
Olympia, WA 98504-4322

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
902-6500 in Olympia

Paulette Golden
PO Box 44322
Olympia WA 98504-4322
360-902-6299

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http://www.lni.wa.gov/hsa/hsa_pbs.htm

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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 benefit 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 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.

Board of
Industrial Insurance A
In re: AMMIS/01
Docket No. 0311514
Exhibit No. 27
 12/11/03
ADM. Date

Eh
27

- 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).

The procedure code descriptions and maximum payments are listed below:

Code	Description	Maximum Fee	Code Limits
9989M	Interpretive services provided directly between the health care or vocational provider and the claimant, per minute	\$1.00 per minute	Billed time greater than 8 hours per day will be a basis for review.
9990M	Time spent assisting claimant with completion of insurer form, per minute, outside of the time spent with the provider of health or vocational services.	\$1.00 per minute	
9991M	Wait time for an appointment that does not begin at the scheduled time.	\$0.50 per minute	Billed time greater than 60 minutes will be a basis for review.
9996M	Interpreter "No show" wait time when a worker does not attend an insurer requested IME, per minute	\$0.50 per minute	Billed time greater than 60 minutes will be a basis for review.
9997M	Document translation at insurer request, per minute	\$1.00 per minute	Prior authorization is required for each document translated.
9986M	Interpreter mileage, per mile.	State employees' mileage rate*	Mileage billed beyond 50 miles per day per claim and total mileage beyond 75 miles per day to include all claims, will be a basis for review.

- * Interpreters' mileage will be reimbursed at the rate paid to Washington State employees, which is established by the Office of Financial Management. At publication time the mileage rate is \$0.345 per mile.

Billing for Group Services

When interpretive services are provided for two or more claimants concurrently, the time billed must be prorated among the claims. Total time billed for all claims must not exceed the actual time spent providing services.

Example:

An interpreter is interpreting for three (3) claimants at a physical therapy clinic from 9:00 am to 10:00 am. The 3 claimants are simultaneously receiving therapy at different stations. Although the same times (9:00 am to 10:00 am) must be documented for all three claimants, the amount of direct interpretive time billed should be prorated between the 3 claimants; 20 minutes each. If later audited by the department, the documentation should clearly show that there were 3 claimants.

Billing for Mileage

When traveling to a single location to serve multiple claimants, mileage must be prorated among the claims. The mileage proration applies to all claimants for whom the interpreter provides services. Total mileage billed for all claims must not exceed the total miles driven.

Mileage traveled beyond a 50-miles per claimant or 75 miles total per day will be a basis for pre and post payment review.

Example 1:

An interpreter travels from her office to a clinic where she has an 8:30 a.m. appointment with one claimant and a 9:00 a.m. appointment with a second claimant and a 10:00 a.m. appointment with a

third claimant. The interpreter drives 5 miles to the clinic, interprets for the three claimants and drives another 5 miles returning to her office.

The interpreter may bill a maximum of 10 miles for the sum of miles billed for all three claims. The interpreter should bill 4 miles for one claim and three miles each for the other two claims.

Example 2:

An interpreter drives 5 miles from his office to a physician's office and provides interpretive services for a claimant. Following this appointment the interpreter drives 8 miles from the physician's office to a physical therapist's office and provides interpretive services for three claimants receiving group physical therapy services. Following the physical therapy appointment, the interpreter drives 4 miles back to his own office.

The interpreter may bill a maximum of 17 miles total for these claims. The interpreter should bill 5 miles for the first claimant and prorate the remaining 12 miles (four miles each) between the other three claims.

Billing – Type of Service and Appropriate Coding

The following are examples of how to determine the type of service and appropriate billing codes. In addition to these codes, make sure to review the billing instructions outlined in the *Medical Aid Rules and Fee Schedules*.

Example #1 – Determining the Type of Service and Code to Bill

Example Scenario	Time Frames	Type of Service	Code to Bill
Interpreter drives 8 miles from his place of business to interpret for a workers' office visit with the attending physician (AP).	Not applicable	Mileage	Bill 8 units of 9986M
Worker has a 9:30 am scheduled appointment with the AP.	9:30 am to 9:45 am.	15 minutes of wait time.	Bill 15 units of 9991M
Worker is taken into the exam room and examined for 20 minutes. AP leaves room for 5 minutes, returns and writes a prescription for x-rays and medication.	9:45 am to 10:15am	30 minutes of interpretive services	Bill 30 units of 9989M
Interpreter drives 4 miles to meet worker for an appointment for X-rays. This takes 10 minutes. They wait 10 minutes before going in for X-rays, which take 20 minutes.	10:15 am to 11:00 am.	10 minutes of wait time 20 minutes of interpreter services Mileage	Bill 10 units of 9991M Bill 20 units of 9989M Bill 4 units of 9986M
Interpreter drives a few blocks to meet worker at the pharmacy. They wait in line for 5 minutes, and it takes 5 minutes to obtain the prescription.	11:00 to 11:20	5 minutes of interpretive time 5 minutes of wait time Mileage (1 mile)	Bill 5 units of 9989M Bill 5 units of 9991M Bill 1 unit of 9986M
After completing the interpretive services, the interpreter drives 12 miles to his next interpretive appointment	Not applicable	Mileage	Bill 12 units of 9986M
Total Payable Services for the above doctor appointment, subsequent services and mileage		Wait time Interpreter Services Mileage	30 units 9991M 55 units 9989M 13 units 9986M

Example #2 – Determining the Type of Service and Code to Bill

Example Scenario	Time Frames	Type of Service	Code to Bill
Interpreter drives 8 miles from her place of business for a worker's office visit with the attending physician (AP).	Not applicable	Mileage	Bill 8 units of 9986M
Meet the worker at the AP's office for a scheduled 9:30 appointment and wait for 15 minutes.	9:30 am to 9:45 am	15 minutes of wait time	Bill 15 units of 9991M
Worker is taken into exam room and examined for 30 minutes	9:45am to 10:15 am	30 minutes of interpretive services	Bill 30 units of 9989M
After completing the interpretive services, the interpreter drives 8 miles back to her place of business.	Not applicable	Mileage	Bill 8 units of 9986M
<i>There is a 1 ½ hour interval between the AP appointment and the standing PT appointment for this worker. This time may not be billed.</i>			
Interpreter drives 5 miles from her place of business to interpret for the same worker's physical therapy appointment.	Not applicable	Mileage	Bill 5 units of 9986M
Worker's standing physical therapy appointment at a PT clinic	11:45 am to 12:30 pm	45 minutes of interpretive service	Bill 45 units of 9989M
After completing the interpretive services, the interpreter drives 5 miles back to her place of business.	Not applicable	Mileage	Bill 5 units of 9986M
Total Payable Services for the above doctor appointment, subsequent services and mileage		Wait time Interpreter Services Mileage	15 units of 9991M 75 units of 9989M 26 units of 9986M

Place of Service

When billing, make sure to use the Place of Service (POS) code for the location of service. POS codes can be found in the *Medical Aid Rules and Fee Schedules* and on the back of the Miscellaneous green billing form. It can also be accessed at <http://www.lni.wa.gov/hsa>.

Documentation Requirements

For audit purposes, documentation of interpretive services must be retained for a minimum of five years per Washington Administrative Code 296-20-02005, which states:

A health services provider who requests from the department payment for providing services shall maintain all records necessary for the director's authorized auditors to audit the provision of services. A provider shall keep all records necessary to disclose the extent of services the provider furnishes to industrially injured workers. At a minimum, these records must provide and include prompt and specific documentation of the level and type of service for which payment is sought. Records must be maintained for audit purposes for a minimum of five years.

This documentation includes the documentation logs, appointment books, notes and copies of bills. Documentation at a minimum must include:

- Date of service
- Names and claim numbers of all claimants served

Additionally, for the following categories, documentation must include:

Time Spent Interpreting

- Time the appointment began (when the claimant entered the location where direct services were provided) and ended
- Type of visit (e.g., office visit, physical therapy visit, etc.)
- Total length of the appointment, in minutes
- Name and location of the health care or vocational provider who provided services.

Wait Time

- Scheduled appointment time
- Time the appointment actually began (when the claimant entered the location where direct services were provided)
- Total wait time, in minutes
- Name and location of the health care or vocational provider

Form Completion

- A brief description of the form or forms (e.g., Report of Accident)
- Time the interpreter began and ended assisting the worker with form completion
- Total time in minutes

IME No Show

- Scheduled appointment time
- Name and location of the scheduled IME

Document Translation

- A brief description of the document translated
- Time the interpreter began and ended the document translation
- Total time in minutes

Mileage

- Vehicle used for travel (identified by make, model, and license plate)
- Address of the point of origin (street address and zip code required)
- Address of the destination point (street address and zip code required)
- Vehicle's odometer reading at the point of origin and the destination point
- Total miles driven in the course of business (excluding any miles traveled for any side trips taken on the way to the destination point)

Mileage traveled beyond 50-miles per claimant or 75 miles total per day will be a basis for pre and post payment review. If mileage is being claimed for more than one client concurrently, then the mileage must be prorated between clients.

Resources

Laws and Rules Relating to Interpretive Services

The following laws and rules contain information relevant for interpreters and can be accessed at the Washington State Legislature's web site. Links to these laws and rules are located on the department's Provider Information home page at www.lni.wa.gov/hsa.

RCW Chapter 5.60	Witnesses – Competency
WAC 296-20-010	General Rules
WAC 296-20-01002	Definitions
WAC 296-20-015	Who May Treat
WAC 296-20-02010	Review of Health Services Providers
WAC 296-20-022	Out of State Providers
WAC 296-20-124	Rejected and Closed Claims
WAC 296-20-097	Reopenings
WAC 296-23-165(3)	Miscellaneous Services
WAC 296-23-255	Conditions for Accompaniment

Self-Insured Employer Lists

The address list for self-insured employers is available on the department's web site. To access the list, go to the department's main page at www.lni.wa.gov and select "Self-Insured Employer Lists" from the drop down menu list. The address list may also be requested by calling (360) 902-6860.