

ORIGINAL

81478-3
NO. 81481-3

SUPREME COURT
STATE OF WASHINGTON

FILED
JUL 29 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON
an

IVAN FERENČAK,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES, et al.,

Respondents.

AMENDED PETITION FOR REVIEW

Ann Pearl Owen, WSBA #9033
2407-14th Avenue South
Seattle, Washington 98144
(206) 624-8637

Attorney for Ivan Ferenčak, Petitioner

CLERK

BY RONALD B. CARPENTER

08 JUL 28 AM 9:00

CLERK OF SUPREME COURT
STATE OF WASHINGTON

TABLE OF CONTENTS

| | |
|---|----|
| I. IDENTITY OF PETITIONER..... | 1 |
| II. CITATION TO COURT OF APPEALS DECISION..... | 1 |
| III. ISSUES PRESENTED FOR REVIEW..... | 1 |
| IV. STATEMENT OF THE CASE..... | 2 |
| V. ARGUMENT..... | 3 |
| A. Board Refusal to Provide Full Language Accommodation Prejudiced Petitioner who is Entitled to Reimbursement of his Interpreter Fees..... | 3 |
| B. By Statute and Public Policy, the Department Must Provide Language Accommodation for LEP Workers..... | 5 |
| C. LEP Workers Sent English Orders Are Entitled to Equitable Relief from the 60-Day Board Appeal Period and to Reimbursement of Interpreter Expenses on the Claim..... | 7 |
| D. English Orders Deprived Mr. Ferenčák of Due Process and Equal Protection..... | 7 |
| E. Mr. Ferenčák's Wages were Undercalculated by Omission of Overtime Pay, Holiday/Vacation Pay, Government Benefit Contributions, & Yearly Bonus..... | 11 |
| 1. Benefits under the Act must be Equal..... | 11 |
| 2. Wages Include All Earnings..... | 12 |

| | |
|---|----|
| 3. Wages Reflect Future Earning Capacity..... | 12 |
| 4. Failure to Include Overtime Pay in Calculating Mr. Ferencák's Wages Denied Him Equal Protection..... | 12 |
| 5. Holiday and Vacation Pay should be Treated as Cash in Calculating Mr. Ferencák's Wages..... | 14 |
| 6. Employer Contributions for Government Mandated Benefits Should be Included in Wages..... | 15 |
| 7. Mr. Ferencák's Yearly Bonus was Erroneously Excluded..... | 17 |
| F. The Board Should Not Have been Permitted to Intervene.. | 18 |
| VI. ATTORNEY FEES & COSTS REQUEST..... | 20 |
| VII. CONCLUSION..... | 20 |

APPENDICES

- A COURT OF APPEALS OPINION
- B COURT OF APPEALS DECISION ON RECONSIDERATION
- C FEDERAL FUNDING OF INDUSTRIAL INSURANCE PROGRAM
- D STATUTES

TABLE OF AUTHORITIES

| <u>Washington Cases</u> | <u>Page</u> |
|--|-------------|
| <i>Anderson v. King County</i> 158 Wn.2d 1, 138 P.3d 963 (2006)..... | 9 |
| <i>Berrocal v. Fernandez,</i> 155 Wn.2d. 585, 121 P.3d 82 (2005)..... | 6 |
| <i>Brand v. Department of Labor & Industries,</i> 139 Wn.2d 659, 989 P.2d 1111(1999)..... | 20 |
| <i>Buffelen Woodworking v. Cook,</i> 28 Wn.App. 501, 625 P.2d 703 (1981)..... | 7-8 |
| <i>Cockle v. Department of Labor & Industries,</i> 142 Wn. 2d 801, 16 P. 3d 583 (2001)..... | 15-16 |
| <i>Cuddy v. Department of Public Assistance,</i> 74 WN.2d 17, 442 P.2d 617 (1968)..... | 8 |
| <i>Davis v. Department of Employment Security,</i> 108 Wn.2d 272, 737 P.2d 1262 (1987)..... | 13 |
| <i>Department of Labor & Industries v. Granger,</i> 159 WN.2d 752, 153 P.3d 839 (2007)..... | 17 |
| <i>Egede-Nissen v. Crystal Mountain,</i> 93 Wn.2d 127, 606 P.2d 1214 (1980)..... | 14 |
| <i>Eraković v. Department of Labor & Industries,</i> 132 Wn.App. 762, 134 P.3d 234 (2006)..... | 16 |
| <i>Ferenčak v. Department of Labor & Industries,</i> 142 Wn.App. 713, 175 P.3d 1109 (2008)..... | 1 |

| | |
|--|---------------|
| <i>Fred Meyer v. Shearer</i> , 102 Wn.App. 336, 8 P.3d 310 (2001)..... | 14 |
| <i>Harmon v. McNutt</i> , 91 Wn.2d 126, 587 P.2d 537 (1978)..... | 13 |
| <i>Kaiser Aluminum & Chemical Corp. v. Department of Labor & Industries</i> , 121 Wn.2d 776, 854 P.2d 611 (1993)..... | 18-19 |
| <i>Kilpatrick v. Department of Labor & Industries</i> , 125 Wn.2d 222, 883 P.2d 1370 (2994)..... | 12, 14, 18 |
| <i>Kustura v. Department of Labor & Industries</i> , 142 Wn.App. 655, 175 P.3d 1117 (2008)..... | 3 |
| <i>Macias v. Department of Labor & Industries</i> , 100 Wn.2d 263, 668 P.2d 1278 (2001)..... | 9, 10 |
| <i>Malang v. Department of Labor & Industries</i> , 139 Wn.App. 677, 162 P.3d 450 (2007)..... | 18 |
| <i>Meštrovac v. Department of Labor & Industries</i> , 142 Wn. App. 693, 176 P.3d 536 (2008)..... | 1 |
| <i>Rodriguez v. Department of Labor & Industries</i> , 85 Wn.2d 949, 540 P.2d 1359 (1975)..... | 7 |
| <i>Sherman v. Washington</i> , 128 Wn.2d 164, 905 P.2d 355 (1995)..... | 8 |
| <i>State v. Marintorres</i> , 93 Wn.App. 442, 969 P.2d 501 (1999)..... | 5 |
| <i>Steele v. Lundgren</i> , 85 Wn.App. 845, 935 P.2d 671 (1997)..... | 4 |
| <i>Washington v. G.A.H.</i> , 133 Wn.App. 567, 137 P.3d 66 (2006)..... | 19 |

| | |
|--|--------------|
| <i>Willoughby v. Department of Labor & Industries,</i> 147 Wn.2d 725, 57 P.3d 611 (2002)..... | 10-11, 14 |
| <i>Xieng v. People's National Bank,</i> 120 Wn.2d 512, 844 P.2d 389 (1993)..... | 9 |

Washington Statutes:

| | |
|--------------------|-------|
| RCW 2.42..... | 5, 20 |
| RCW 2.42.120..... | 5 |
| RCW 2.43..... | 5, 20 |
| RCW 2.43.010..... | 6 |
| RCW 2.43.020..... | 5 |
| RCW 2.43.030..... | 3 |
| RCW 2.43.040..... | 5 |
| RCW 43.22.331..... | 6 |
| RCW 49.46.130..... | 12 |
| RCW 49.60..... | 3, 10 |
| RCW 50.04.030..... | 17 |
| RCW 50.04.355..... | 17 |

| | |
|---|---------------|
| Industrial Insurance Act, RCW Title 51..... | <i>Passim</i> |
| RCW 51.04.020..... | 6 |
| RCW 51.04.030..... | 7, 11-13 |
| RCW 51.08.178..... | 12, 13 |
| RCW 51.12.010..... | 5, 13-15 |
| RCW 51.32.060..... | 12 |
| RCW 51.32.090..... | 12 |
| RCW 51.48.017..... | 6 |
| RCW 51.48.020..... | 6 |
| RCW 51.48.080..... | 6 |
| RCW 51.48.250..... | 7 |
| RCW 51.48.260..... | 7 |
| RCW 51.48.270..... | 7 |
| RCW 51.52.050..... | 8 |
| RCW 51.52.060..... | 8 |
| RCW 51.42.130..... | 20 |

Washington Regulations:

| | |
|---------------------|----|
| WAC 263-12-045..... | 18 |
| WAC 263-12-097..... | 3 |
| WAC 263-12-125..... | 4 |

Washington Court Rules:

| | |
|---------------|-----|
| GR 33..... | 3-4 |
| RAP 2.5..... | 14 |
| RAP 3.1..... | 19 |
| RAP 18.1..... | 19 |

United States Supreme Court Cases:

| | |
|--|-------|
| <i>Goldberg v. Kelly</i> , 397 U.S. 254, 90 S.Ct. 1001, 25 L.Ed.2d 187 (1970)..... | 15-16 |
| <i>Jones v. Flowers</i> , 547 U.S. 220, 126 S. Ct. 1708 (2006)..... | 8 |
| <i>Memorial Hospital v. Maricopa County</i> , 415 U.S. 250, 39 L.Ed.2d 306, 94 S.Ct. 1076 (1974)..... | 16 |
| <i>Plyler v. Doe</i> , 457 U.S. 202, 72 L.Ed.2d 786, 102 S.Ct. 2382 (1982)..... | 10 |
| <i>Shapiro v. Thompson</i> , 1394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969)..... | 16 |

Federal Statutes

| | |
|---|-------|
| Title VI of the Civil Rights Act of 1964, 42 USC §601 <i>et seq.</i> | 4, 10 |
|---|-------|

| | |
|---|-------|
| Title VII of the Civil Rights Act of 1964, 42 USC § 2000e..... | 4, 10 |
| USC Title 42,406..... | 17 |

Presidential Executive Order

| | |
|-----------------------------------|---|
| Executive Order 13166 (2000)..... | 6 |
|-----------------------------------|---|

Federal Statutes:

| | |
|--|---|
| Title VI of the Civil Rights Act of 1964..... | 6 |
| Title VII of the Civil Rights Act of 1964..... | 6 |

Seattle Municipal Code:

| | |
|--------------------|---|
| SMC 14.04.040..... | 4 |
|--------------------|---|

Cases from Other Jurisdictions

| | |
|--|---|
| <i>Ruiz v. Hull</i> , 191 Ariz. 441, 957 P.2d 984 (1998)..... | 8 |
|--|---|

I. IDENTITY OF PETITIONERS

Petitioner, Ivan Ferenčák, is an injured worker with limited English proficiency (LEP) who appealed Department of Labor & Industries (Department) orders first to the Board of Industrial Insurance Appeals (Board) and then to Superior Court and Division I.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the published opinion in *Ferenčák v. Dep't of Labor & Industries*, 142 Wn.App. 713, 175 P.3d 1109 (2008). His reconsideration motion was denied March 31, 2008. APP. A & B.

III. ISSUES PRESENTED FOR REVIEW

1. When the Board fails to provide interpreter services required by law, forcing an LEP worker to incur interpreter expense, should he be denied reimbursement on the grounds that he was not prejudiced?
2. Is the Department required by statute to provide interpreters for LEP injured workers for communications on their claims?
3. When the Department and Board know a worker lacks English proficiency and issue orders in English, is that worker entitled to reimbursement for interpreter expenses incurred to read those orders?
4. Did the Court of Appeals err in undercalculating wages by excluding Mr. Ferenčák's vacation/holiday pay, overtime wages, employer payments for government-mandated benefits, and bonus moneys?

5. Was it error to allow the Board to intervene?

IV. STATEMENT OF THE CASE

Petitioner, his wife, and two minor children are LEP legal immigrants. TR 12/5 4-50. After a job injury, the Department accepted his claim. He hired an interpreter to help establish his benefits under the Industrial Insurance Act [Act]. The Department issued multiple English orders in, knowing he needed language accommodation, never informing him of his rights/responsibilities under the Act in language he understood. He cannot communicate with counsel, doctors, the Department, or Board, without an interpreter. Even after being informed in writing of his LEP status/request for language accommodation, the Department issued 10 more English-only orders. CBRA 91, 207-12, 262-8.¹

Mr. Ferenčak appealed the Department undercalculation of his wages, failure to provide needed language accommodations, and issuance of English orders. He requested wage recalculation, time loss benefits, and language accommodation.² Recognizing his right to communication in language he could understand, the Department stipulated and the Board found that the appeals were timely despite first being filed more than 60 days after receipt because filed “within 60 days of the date on which an

¹ References to the Certified Board Record on Appeal appear as CBRA.

² CBRA 86-91, 623-30, 640-7, 658-65, 714-8, 732-5, 742-5, 753-6, 765-8, 773-6, 781-4.

interpreter communicated the order to him in terms that he could understand.” CBRA 2. The Board contradictorily refused language accommodation for communications with counsel 1) to prepare for hearing claiming “the protections of the 14th amendment would not attach in the preparation stage” at the Board and 2) for communications with counsel at hearing. CBRA 188-190. The Board affirmed the Department, denying reimbursement for interpreter expenses. CBRA 1-12.

Mr. Ferencák appealed to Superior Court where the Board was allowed to intervene just before the review hearing date. The Superior Court granted intervention and affirmed the Board. The Court of Appeals, Division I, affirmed when Mr. Ferencák appeal, ruling that he had a right to interpreter services throughout Board proceedings, but no prejudice from the Board’s failure to provide an interpreter throughout proceedings.

V. ARGUMENT

A. BOARD REFUSAL TO PROVIDE FULL LANGUAGE ACCOMMODATION PREJUDICED PETITIONER WHO IS ENTITLED TO REIMBURSEMENT OF HIS INTERPRETER FEES.

Citing RCW 2.43.030 and the Board’s own regulations,³ the Court of Appeals held in *Kustura v. Dep’t of Labor & Industries*, 142 Wn.App.

³ WAC 263-12-097(1) and 263-12-097(4). Now GR 33 requires accommodation of disabilities, including by furnishing interpreters “at no charge.” GR 33(a)(1)(B). Under this rule, persons with disabilities include anyone covered by the Law Against Discrimination, chapter 49.60 RCW “or other similar local, state, or federal laws.”

655, 175 P.3d 1117 (2008), that when the Board provides interpreters at its expense, it “may not prevent the interpreter from translating whenever necessary to assist the claimant during the hearing.” It further held:

But by not providing an interpreter for all other witnesses at Kustura’s hearing or for communications with counsel during any of the hearings, the Board failed to comply with the statute’s directive or its own regulations which required it to provide an interpreter to assist the workers “throughout the proceedings.”

The IAJ prevented the interpreter from interpreting confidential communications between Mr. Ferencák and counsel at the hearing and denied interpreter services at other times. Thus Mr. Ferencák had to hire interpreters to communicate with counsel during the appeals process and could not communicate with his counsel at or during breaks in hearings. Mr. Ferencák’s interpreter expenses during his Board appeal would have been unnecessary had the Board complied with the law. The Court of Appeals, however, ruled that he was not prejudiced by such expense and, therefore, entitled to neither reimbursement nor a new hearing.

This ruling should be reviewed for two reasons. First, it is ordinarily deemed “prejudicial” to cause a party unnecessary expense.

Steele v. Lundgren, 85 Wn.App 845, 859, 935 P.2d 671 (1997). Second,

Titles VI and VII of the Civil Rights Act of 1964 ban discrimination based on national origin in public facilities and employment benefits. The City of Seattle also bans discrimination based on national origin. SMC 14.04.040 The Board has adopted the procedural rules applicable to civil cases in Superior Court and is, therefore, subject to GR 33. See WAC 263.12.125.

it is inconsistent with public policy. The ruling allows the Board to avoid providing interpreters with impunity, shifting that expense incurred due to the industrial injury to one least able to afford it – an LEP injured worker.

B. BY STATUTE AND PUBLIC POLICY, THE DEPARTMENT MUST PROVIDE LANGUAGE ACCOMMODATION FOR LEP WORKERS.

The Act's intent is to protect workers from economic losses of job injury. RCW 51.12.010. Interpreter expense is one such economic loss.

Under RCW 2.43.010, an LEP party to any legal proceeding is entitled to an interpreter.⁴ A legal proceeding is defined as a "proceeding in any court in this state, grand jury hearing, or hearing before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof." RCW 2.43.020.

When an agency initiates a proceeding, it pays interpreters. RCW 2.43.040

The Court of Appeals applied the "last antecedent rule," holding a Department determination on time loss benefits was not a "hearing," and therefore not a "legal" proceeding. In so doing, it disregarded this Court's interpretation of the "last antecedent" rule: "But the rule further provides that 'the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to *all antecedents* instead of only the

⁴ Note that in *State v. Marintorres*, 93 Wn.App. 442, 969 P.2d 501 (1999), the Court held under equal protection analysis that free accommodation must be afforded the LEP when provided to the speech/hearing disabled under RCW 2.42. RCW 2.42.120(4) requires free interpreters for any law enforcement investigation.

immediately preceding one.” *Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3rd 82 (2005). The qualifier in RCW 2.43.010 is preceded by a comma, indicating the last phrase is intended to apply to all antecedents, not merely to the immediately preceding antecedent “hearings.” Had the Court of Appeals applied the last antecedent rule according to this Court’s instruction in *Berrocal*, it would have determined that a legal proceeding includes a proceeding before an administrative board or agency of the state. There can be no doubt that the Department is a state agency.

This requires require an LEP worker to hire his own interpreters. Otherwise, he cannot communicate pertinent facts to the Department to ensure they are known available when it adjudicates benefits.⁵

The Department argues the worker, not the agency, initiates the proceedings by asserting a claim. The truth is otherwise. By statute, employers must report injuries and the Department must investigate. RCW 51.04.020(6). As the first step in its investigation, the Department provides forms which require the worker to provide a written account of the injury under penalty of perjury.⁶ From the worker’s standpoint, the Department initiates the government action.

⁵ These are also legal proceedings because are issued by “claim adjudicators.”

⁶ The Department is both an investigative and a law enforcement agency. RCW 51.04.020(6) requires it to investigate all serious job injuries. The Department charges false reporting [RCW 51.48.020]; issues citations [RCW 43.22.331]; penalizes violators [RCW 51.48.080], self insured employers [RCW 51.48.017], and

C. LEP WORKERS SENT ENGLISH ORDERS ARE ENTITLED TO EQUITABLE RELIEF FROM THE 60-DAY BOARD APPEAL PERIOD AND TO REIMBURSEMENT OF INTERPRETER EXPENSES ON THE CLAIM.

Here, the Department admitted and the Board ruled that since the orders were sent in English, Mr. Ferencák need not appeal until order contents were communicated to him by an interpreter "in terms he could understand." This is consistent with *Rodriguez v. Dep't of Labor & Industries*, 85 Wn.2d 949, 540 P.2d 1359 (1975), where an appeal was found timely based on equity despite being filed "late."

Without apparent consistency, the Board refused to order any reimbursement to Mr. Ferencák for his interpreter expenses. This diminished his scheduled benefits under the Act based solely on his originating in a non-English speaking nation in violation of RCW 51.04.030(1) requiring equal treatment for all under the Act. Further, the Board itself issued all its orders in English, without affording Mr. Ferencák any interpreter services to comprehend the Board's orders.

D. ENGLISH ORDERS DEPRIVED MR. FERENČAK OF DUE PROCESS AND EQUAL PROTECTION.

Mr. Ferencák had potential rights under the Act, triggering due process at the Department level and continuing at the Board. *Buffelen*

workers [RCW 51.48.250]; orders reimbursement of moneys interest with interest [RCW 51.48.260], and refers workers for criminal prosecution [RCW 51.48.270].

Woodworking v. Cook, 28 Wn.App. 501, 625 P.2d 703 (1981).

Fundamental to due process is notice and the right to be heard

Sherman v. Washington, 128 Wn.2d 164, 184, 905 P.2d 355 (1995).

To be meaningful, notice must apprise a party of rights and afford an opportunity to meet the opponent's claims and reasonable time to prepare and respond. *Cuddy v. Dep't of Public Assistance*, 74 Wn.2d 17, 442 P.2d 617 (1968). "Unique information about the intended recipient" determines whether a notice is adequate or not. *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 1716 (2006). The *Jones* Court stated at 1715:

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

Rather than providing notice, English orders actually prevented Mr. Ferencák's comprehension when coupled with the refusal of both the Department and Board to provide language accommodation. As wisely observed by the Arizona Supreme Court in *Ruiz v. Hull*, 191 Ariz. 441, 957 P.2d 984 (1998), using English to communicate with those unable to speak it "effectively bars communication itself."⁷

The Department policy to furnish orders and notices only in English to all injured LEP workers, except those who fluent in Spanish

⁷ Because the Department knew the English orders could not be read by petitioner, it agreed the orders were not communicated to them, as required by RCW 51.52.050 and, therefore, his appeal was timely under the RCW 51.52.060 60-day appeal. CBRA 2.

places non-Spanish speaking LEP workers at a disadvantage as compared to English- and Spanish-fluent workers. The Board policy to provide notices and orders only in English regardless of the worker's fluency and not to provide any language accommodation for orders and notices to LEP workers disadvantages LEP workers at the Board.

It is obvious that 1) the language spoken by an injured worker is "inextricably intertwined" with the worker's national origin and 2) that not all immigrants to this country are fluent in English. The Court of Appeals ruled that the above policies do not constitute discrimination based on national origin. Hence it reasoned, such policies are not subject to strict scrutiny, but need satisfy only the "rational basis" test.⁸

In so ruling, Court of Appeals overlooked this Court's decision to the effect that classification based on English speaking ability English may constitute discrimination based on national origin.⁹ In *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 844 P.2d 389 (1993), this Court ruled that adverse employment action because of a person's "foreign" accent may constitute discrimination based on national origin.¹⁰

Executive Order No. 13166 states that federally assisted programs must "ensure that the programs and activities they normally provide in

⁸ *Macias v. Dep't of Labor & Industries*, 100 Wn.2d 263, 668 P.2d 1278 (1983).

⁹ National origin is a suspect classification. *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006).

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....” (Emphasis added)¹¹ The Industrial Insurance Program and the Board itself receives federal aid from the Department of Labor and are, therefore, subject to Executive Order 13166. See APP. C.¹²

In short, the Department’s and Board’s policies to refuse to communicate to LEP workers in a language they can understand without providing them language accommodation creates a suspect class based on national origin. Under *Macias, supra*, classifications disadvantaging a suspect class are “presumptively invidious” and require the State “to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.”¹³ The Department does not suggest its policy is precisely tailored to serve a “compelling governmental interest.”

These policies cannot withstand the less stringent “rational basis” test. This Court in *Willoughby v. Dep’t of Labor & Industries*, 147 Wn.2d 725, 57 P.3d 611 (2002), set forth the elements of this test:

Rational basis tests whether (1) all members of the class created within the statute are treated alike, (2) reasonable grounds exist to justify the exclusion of parties who are not within the class, and (3)

¹⁰ “Accent and national origin are obviously inextricably intertwined in many cases.”

¹¹ Title VII prohibits national origin discrimination in employment benefits. RCW 49.60 also forbids national origin discrimination in public programs/facilities.

¹² APP. C states federal aid received by the Industrial Insurance program 1997-2007.

¹³ Citing *Plyler v. Doe*, 457 U.S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982).

the classification created by the statute bears a rational relationship to the legitimate purpose of the statute.

The Department policy fails at least two parts of the test. First, the class of workers affected by the policy are LEP workers, yet not all LEP workers are treated alike. Spanish-speaking workers receive Department orders in their own language, while other LEP workers are not.

Second, the rationale for these policies -- to avoid added cost -- has been found insufficient.¹⁴ In *Willoughby*, at 743, the Court expressly rejected “cost saving arguments” in determining if a statute satisfies the rational basis test, holding that “preservation of state funds is not in itself a sufficient ground to defeat an equal protection challenge.”

Since the Act itself requires equal treatment of workers the Court of Appeals erred in declining to follow *Willoughby*, instead accepting a cost-saving argument unsupported by any evidence as persuasive.

E. MR. FERENČAK’S WAGES WERE UNDERCALCULATED BY OMISSION OF OVERTIME PAY, HOLIDAY/VACATION PAY, GOVERNMENT BENEFIT CONTRIBUTIONS, & BONUS.

1. BENEFITS UNDER THE ACT MUST BE EQUAL. RCW 51.04.030(1).

The Act requires equal treatment of workers similarly situated

¹⁴ Any claim about added cost is unsupported by any actual or estimated cost figures or by any other documented proof -- not surprising in light of the fact that once the basic forms are translated, the cost of providing orders and notices in Bosnian (or virtually any other language) would be miniscule.

“without discrimination or favoritism.” RCW 51.04.030(1). Disability payments are scheduled to ensure equality. RCW 51.32.060 and .090.

2. WAGES INCLUDE ALL EARNINGS. RCW 51.08.178(1).

RCW 51.08.178(1) states:

The monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed....

3. WAGES REFLECT FUTURE EARNING CAPACITY.

In *Kilpatrick v. Dep't of Labor & Ind.*, 125 Wn.2d 222, 230, 883

P.2d 1370 (1994), the Court recognized the Act's goal is "to insure fair compensation of disabled workers," saying on 230:

The purpose of workers' compensation benefits is to reflect **future** earning capacity rather than wages earned in past employment. [Emphasis added]

4. FAILURE TO INCLUDE OVERTIME PAY IN CALCULATING MR. FERENČAK'S WAGES DENIED HIM EQUAL PROTECTION.

Mr. Ferencak was paid overtime in the year before his injury at a rate exceeding his regular pay rate.¹⁵ See EX 3, a 2 week paystub showing \$138 overtime pay. The Court of Appeals relied on language in RCW 51.08.178(2) ruling that his overtime pay should not be included as his employment was not essentially seasonal, part time or intermittent. CBRA

4. In so doing, it excluded all Mr. Ferencak's overtime wages in

¹⁵ RCW 49.46.130 requires time and a half regular pay for overtime hours worked.

calculating his benefits in violation of RCW 51.08.178(1). For other workers, e.g. Mr. Meštrovac, the Board included overtime pay in wage calculations.¹⁶ This difference in treating overtime pay is unsupportable under the Act and calls for this Court to address overtime pay so all workers receive equal treatment as required under RCW 51.04.030(1).

"Equal protection of the laws under state and federal constitutions requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). In an equal protection challenge, a statute must withstand at least minimal scrutiny. As stated in *Davis v. Dep't of Employment Security*, 108 Wn.2d 272, 280, 737 P.2d 1262 (1987):

(1) it must apply alike to all members of the designated class; (2) there must be some basis in reality for reasonably distinguishing between those falling within the class and those falling outside of it; and (3) the challenged classification must have a rational relationship to the purposes of the challenged statute.

The Court of Appeals erred in excluding overtime pay for Mr. Ferenčák while including overtime pay [at regular hourly rate] for Mr. Meštrovac.¹⁷ This differential treatment is unsupportable under the Act's fundamental purpose -- to minimize the suffering and economic loss from work related injuries. RCW 51.12.010. While excluding Mr. Ferenčák's

¹⁶ *Meštrovac v. Dep't of Labor & Indus.*, 142 Wn.App. 693, 176 P.3d 536, 545 (2008).

¹⁷ Both supported families of four on their wages.

overtime from his wages results in a savings to the Department, the Court in *Willoughby, supra*, held cost savings does not justify disfavoring one set of injured workers as compared to another. Thus, the exclusion of Mr. Ferencák's overtime denied him equal protection of the laws under the constitutions of the United States and the State of Washington.¹⁸

5. HOLIDAY AND VACATION PAY SHOULD BE TREATED AS CASH IN CALCULATING MR. FERENČAK'S WAGES.

Paid holidays and vacation leave are included in calculating wages.

Fred Meyer v. Shearer, 102 Wn.App. 336, 8 P.3d 310 (2001). The Court of Appeals incorrectly held it "included" Mr. Ferencák's holiday and vacation pay by using a 40-hour work week for his wages. The Court of Appeals agreed. Both assumed, incorrectly, Mr. Ferencák took time off work for all holidays and vacation. It is unfair to assume one supporting a family of four on a low weekly wage would take time off work, rather than working for additional pay.¹⁹ Such an assumption conflicts with both *Kilkpatrick* and *Fred Meyer*, both *supra*, and this Court's policy "to construe the Industrial Insurance Act liberally to provide compensation to covered employees, with doubts resolved in favor of the employee."

Cockle, supra.

¹⁸ Because equal protection is a fundamental constitutional right, this argument may be raised now. RAP 2.5(a)(3), *Egede-Nissen v. Crystal Mountain*, 93 Wn.2d 127, 606 P.2d 1214 (1980) ("Manifest error affecting a constitutional right may, of course, be raised at any time.")

6. EMPLOYER CONTRIBUTIONS FOR GOVERNMENT MANDATED BENEFITS SHOULD BE INCLUDED IN WAGES.

Cockle v. Dep't of Labor & Industries, 142 Wn.2d 801, 822, 16 P.3d 583 (2001) construed the statutory phrase "board, housing, fuel, or other consideration of like nature" to mean "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival."²⁰ Having so construed the statute, the Court held that health insurance should be included when calculating "wages."

Employer contributions to Social Security, Medicare/Medicaid and Industrial Insurance fall within *Cockle*'s holding and, therefore, should be included in wages. Whether these contributions are voluntarily or are government mandated should be of no consequence. The determining factor is whether the benefits provided by these contributions are critical to protecting worker basic health and survival.

Any doubts about the critical nature of Social Security benefits were resolved long ago by the United States Supreme Court. Social Security medical and disability benefits provide for life's basic necessities. *Goldberg v. Kelly*, 397 U.S. 254, 268-269, 90 S.Ct. 1001, 25 L.Ed.2d 187

²⁰ In so ruling, the Court emphasized the Legislative mandate found in RCW 51.12.010: "This Title shall be liberally construed for the purpose of reducing to a minimum the

(1970); *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). Unemployment Compensation and Industrial Insurance assure survival when not a worker is not working.

All these programs meet the *Cockle* test as readily identifiable components of earning capacity critical to worker health and survival. Despite this, the Court of Appeals ruled that employer payments to these programs do not meet the *Cockle* test, relying on the rationale in *Eraković v. Dep't of Labor & Industries*, 132 Wn.App. 762, 134 P.3d 234 (2006):

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

The Court's assertion that such payments "are not consideration" is inconsistent with the ordinary meaning of this term in the employment context, namely, anything of value the employee receives in exchange for work. The contributions in question clearly have monetary value and are made only on behalf of persons who work for the employer.

The Court also asserted these contributions are not "wages" because the worker was not receiving benefits when injured. This

suffering and economic loss arising from injuries and/or death occurring in the course

rationale was rejected in *Dep't of Labor & Industries v. Granger*, 159 Wn.2d 752, 153 P.3d 839 (2007). There, the employer paid into a trust for the worker's benefit. The Department argued the payments should be excluded from "wages" because the worker was not yet eligible for health care benefits when injured. This Court rejected this argument, stating:

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

Social Security and Unemployment Compensation eligibility depends on accumulation of sufficient qualifying work hours.²¹ Thus, employer contributions to these programs have value even when the employee is not eligible for benefits. *Granger* holds such considerations are irrelevant.

7. MR. FERENČAK'S BONUS WAS ERRONEOUSLY EXCLUDED.

The employer paid a year-end bonus for employee labor.²² Due to his injury, Mr. Ferenčak could not work most of the year. He received the bonus on the time he worked before injury²³ but lost the bonus on the work he lost due to injury. The Department asserted this bonus was omitted from "wages" for lack of proof he received any bonus *in the*

of employment." Clearly interpreter costs are an economic loss arising from job injury.

²¹ RCW 50.04.030, RCW 50.04.355. 40 quarters of Social Security work credits are required for full benefits. USC Title 42,406. Unemployment and Social Security benefits are indexed to wages earned before benefit application. TR 4/18 28, 33 showing Unemployment and Social Security benefits indexed to gross wages.

²² CBRA Admitted Ex. 14 shows the bonus was paid at 2.32% of gross wages. This calculated to \$9.74 per month omitted from Mr. Ferenčak's wage calculations.

previous year. This proof was lacking because 1) employer witnesses failed to bring all subpoenaed pay documentation²⁴ and 2) the IAJ neither required the evidence be produced nor elicited it herself. Where an LEP worker cannot communicate with counsel, it is incumbent upon the IAJ to scrupulously discharge the duty to secure evidence “necessary to fairly and equitably decide the appeal” under WAC 263-12-045(2)(f).

The profit sharing bonus meets both definitions for wages stated in *Malang v. Dep’t of Labor & Ind.*, 139 Wn.App. 677, 162 P.3d 450, (2007), “remuneration from an employer” and “consideration . . . for work performed.” Because “wages” reflect *future*, not past, earning capacity, “wages” should include the full bonus Mr. Ferenčák would have received if not injured. When the Act’s remedial purpose is considered, this additional compensation lost due to industrial injury should be characterized most favorably to Mr. Ferenčák and included in his “wages.” The Court’s failure to include Mr. Ferenčák’s bonus in wages violates equal protection and conflicts with *Kilpatrick*, RCW 51.04.030(1) and liberal interpretation of the Act.

F. THE BOARD SHOULD NOT HAVE BEEN PERMITTED TO INTERVENE.

The Court in *Kaiser Aluminum & Chemical Corp. v. Dep’t of*

²³ TR 11/11/04, Corwin testimony at pages 18-19,

²⁴ RP 12/5: 26, lines 11-18. Documentation on profit sharing payments was never provided pursuant to the *subpoena duces tecum* issued by the Board. CBRA 429-432.

Labor & Industries, 121 Wn.2d 776, 854 P.2d 611 (1993) held whether the Board may appeal a decision is determined “entirely” by its enabling legislation. Analyzing the enabling legislation, RCW 51.52, the Court found that the legislation contains neither any express nor any implied right to appeal. The Court dismissed the Board’s appeal, explaining:

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

The Court of Appeals disregarded *Kaiser*, ruling the Board was an aggrieved party under RAP 3.1, citing *Washington v. G.A.H.*, 133 Wn.App. 567, 137 P.3d 66 (2006). There, the trial court ordered the Department of Health & Social Services (DSHS) to take action. Finding DSHS was an aggrieved party under RAP 3.1, the court permitted DSHS to appeal, even though it was not a party to the proceeding. *Washington v. G.A.H.* is distinguishable. DSHS is not a “quasi-judicial agency,” as is the Board. Finally, the Board was allowed to intervene untimely – after all Mr. Ferencák’s Superior Court briefing was already due and filed.

VI. ATTORNEY FEES & COSTS REQUEST

Petitioner requests an award of attorney fees and his costs, including his interpreter expenses, under *Brand v. Dep't of Labor & Industries*, 139 Wn.2d 659, 989 P.2nd 1111 (1999) where the Court ruled that prevailing on one issue entitles a worker to attorney fees on all issues, under RAP 18.1, RCW 51.52.130, under both RCW 2.43 and RCW 2.42.

VII. CONCLUSION

Review should be granted because 1) Division I's decision conflicts with several decisions of this Court, of Division II, and of Division III, 2) the application of Title RCW 2.43 to agencies making adjudications of benefits allowed under government benefit programs has not yet been examined by this Court, and 3) this case presents issues of substantial public interest this Court should decide.

The Court is respectfully requested to accept review and, upon review, to reverse the Court of Appeals, to award attorney fees and costs, including interpreter costs, and to remand for further proceedings consistent with the Court's opinion.

DATED this 25th of July 2008.



Ann Pearl Owen, WSBA# 9033
Attorney for Ivan Ferenčák, Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|---|---|-------------------------|
| IVAN FERENČAK, |) | |
| |) | No. 58878-8-1 |
| Appellant, |) | |
| |) | DIVISION ONE |
| v. |) | |
| |) | |
| DEPARTMENT OF LABOR & INDUSTRIES and BOARD OF INDUSTRIAL INSURANCE APPEALS, |) | PUBLISHED OPINION |
| |) | |
| Respondent. |) | FILED: January 22, 2008 |
| _____ | | |

AGID, J.—Ivan Ferencák, an injured worker with limited English proficiency (LEP), appeals a superior court order granting the Board of Industrial Insurance Appeals (Board) leave to intervene and the court's judgment affirming the Board's decision affirming the decisions of the Department of Labor and Industries (Department). Ferencák challenges the Board's wage calculation, its ruling denying his request for interpreter services for his communications with counsel, and various procedural decisions. But neither the law nor the facts support his wage calculation. And, as we held in Kustura v. Department of Labor & Industries, non-indigent LEP claimants are not entitled to free interpreter services for communications with counsel outside of legal

APPENDIX A

proceedings.¹ We therefore affirm the trial court and the Board. Finally, the trial court's intervention order was proper.

FACTS

Ferenčák is an LEP Bosnian immigrant. On March 20, 2002, he injured his right knee in the course of his employment at Travis Industries, Inc. (Travis). He applied for and the Department allowed a claim for worker's compensation benefits. The Department calculated his total gross wage as \$2,199 per month, based solely on his hourly wage of \$11.50 per hour for a 40 hour week and health care benefits of \$175 per month. Ferenčák appealed this determination and other Department orders paying or adjusting his benefits based on this wage determination.

In his notices of appeal to the Board, in addition to challenging the wage determination, Ferenčák argued that chapter 2.42 RCW, chapter 2.43 RCW, and due process entitled him to interpreter services provided by the Department or the Board for all necessary communications relating to his receipt of benefits, including those with his lawyer and treating physicians. Citing the same authority, he also asked the Industrial Appeals Judge (IAJ) to provide him with an interpreter for all hearings and communications with his attorney. The IAJ granted this request for interpreter services at hearings, but not for depositions or confidential communications between Ferenčák and his attorney.

After a hearing, the IAJ issued a proposed decision and order apparently affirming the Department's wage determinations, but using different values in the wage calculation reflected in the findings of fact. The IAJ valued Ferenčák's health benefits at

¹ No. 57445-1-1 (Wash. Ct. App. Jan. 22, 2008).

\$197.15. The IAJ also concluded that Ferencák was not entitled to Board-provided interpreter services for communications with his attorney and that the wage calculation properly excluded “employer-paid contributions to social security, Medicare, life and/or disability insurance policies, 401(K) or Money Purchase Pension plans, or . . . industrial insurance and unemployment compensation coverage.”

Ferencák petitioned for review by the Board, challenging the wage determinations, denial of interpreter services for communications with his attorney, and failure to enforce subpoenas designed to obtain evidence showing his overtime pay, rate of pay, and year end bonus payments. The Board affirmed both the Department’s original wage calculation and the IAJ’s proposed decision and order, including the IAJ’s finding of fact related to health care benefit costs that conflicted with the Department’s original calculation. The Board also concluded that Ferencák was not entitled to have the Board pay for interpreter services for communications with his attorney and declined to address his claim for denial of translation services at the Department level because there was no written denial of those services in the record.²

Ferencák appealed the Board’s decision to the superior court, seeking not only reversal and remand but also reimbursement for interpreter fees from the Board or Department. The Board moved for intervention of right or permissive intervention in the alternative. The court granted the Board’s motion to intervene,³ affirmed the Board’s decision, and awarded the Department \$200 in statutory attorney fees. Ferencák appeals.

² The Board did not address whether Ferencák might be entitled to Board-provided interpreter services for depositions because Ferencák did not raise that issue in his petition for review.

³ The order granting intervention does not specify whether it is permissive or of right.

DISCUSSION

Under RCW 51.52.115, the Board's decision is prima facie correct and the burden of proof is on the party challenging that decision.⁴ The superior court acts in an appellate capacity, reviewing the Board's decision de novo, but "cannot consider matters outside the record or presented for the first time on appeal."⁵ We review the superior court's decision de novo to determine whether substantial evidence supports its findings and whether its "conclusions of law flow from the findings."⁶ Substantial evidence is "sufficient to persuade a fair-minded, rational person of the truth of the matter."⁷ "Unchallenged facts are verities on appeal."⁸

I. Intervention

We will reverse an intervention of right only if the trial court committed an error of law.⁹ We review a decision granting permissive intervention for an abuse of discretion.¹⁰ Although the superior court did not disclose its basis for granting intervention, we must affirm if either kind of intervention was appropriate. To grant intervention of right under CR 24(a) the intervenor must satisfy four criteria: (1) the application is timely; (2) the applicant claims an interest that is the subject of the action; (3) the disposition will likely adversely affect the applicant's ability to protect the interest;

⁴ Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (citing Ravsten v. Dep't of Labor & Indus., 108 Wn.2d 143, 146, 736 P.2d 265 (1987)).

⁵ Sepich v. Dep't of Labor & Indus., 75 Wn.2d 312, 316, 450 P.2d 940 (1969).

⁶ Ruse, 138 Wn.2d at 5 (quoting Young v. Dep't of Labor & Indus., 81 Wn. App. 123, 128, 913 P.2d 402, review denied, 130 Wn.2d 1009 (1996)).

⁷ R&G Probst v. Dep't of Labor & Indus., 121 Wn. App. 288, 293, 88 P.3d 413 (citing Hamel v. Employment Sec. Dep't, 93 Wn. App. 140, 144, 966 P.2d 1282 (1998), review denied, 137 Wn.2d 1036 (1999)), review denied, 152 Wn.2d 1034 (2004).

⁸ Willoughby v. Dep't of Labor & Indus., 147 Wn.2d 725, 733 n.6, 57 P.3d 611 (2002) (citing State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

⁹ Westerman v. Cary, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994).

¹⁰ Spokane County v. State, 136 Wn.2d 644, 650, 966 P.2d 305 (1998) (citing Ford v. Logan, 79 Wn.2d 147, 483 P.2d 1247 (1971)).

and (4) the applicant's interest is not adequately protected by the existing parties.¹¹ For permissive intervention under CR 24(b) the application need only be timely and present a common question of law or fact with the main action, though the court will also consider whether the intervention would unduly delay or prejudice the rights of the original parties.¹²

Here, contrary to Ferencák's assertions, the Board's motion to intervene was timely. Because the notice of appeal did not name the Board as a party, there was no way for the Board to know that Ferencák was seeking a judgment against it for reimbursement of interpreter fees until the Department informed it of this fact after reading Ferencák's trial brief. The Board moved for intervention within three days after it learned that Ferencák had essentially made the Board a party to his appeal. The Board's interest in not paying a judgment for reimbursement of interpreter fees is obvious. And, while not the only issue on appeal, the extent to which the Board must provide interpreter services to LEP claimants was the central claim. What is less clear on this record is why the Board's interest would not be adequately protected by the Department. But, while this failing may mean that the Board was not entitled to intervention of right, nothing suggests that the superior court abused its discretion by allowing permissive intervention.¹³

Ferencák's argument against intervention relies on the holding in Kaiser Aluminum & Chemical Corp. v. Department of Labor & Industries that the Board

¹¹ Id. at 649.

¹² Vashon Island Comm. for Self-Gov't v. State Boundary Review Bd., 127 Wn.2d 759, 765 n.4, 903 P.2d 953 (1995).

¹³ See Vashon Island, 127 Wn.2d at 765 (permissive intervention is proper even if the intervenor's rights were arguably represented by one of the original parties).

generally cannot appeal adverse superior court decisions because it is a quasi-judicial agency.¹⁴ But Kaiser is distinguishable. There, the Board sought to appeal a superior court decision reversing its earlier ruling.¹⁵ Here, the Board did not appeal the superior court decision; it merely sought to intervene in a proceeding that might have adverse legal and financial implications. Further, Kaiser does not stand for the principal that the Board can never appeal a decision by the superior court. In fact, the court in Kaiser explained that one exception to the general rule against allowing a Board appeal is that quasi-judicial agencies may appeal decisions about their own procedures.¹⁶ Here, the Board sought to intervene in an appeal challenging its internal procedures; that is, whether it must provide free interpreter services to all LEP benefits claimants both for legal proceedings and for confidential communications with counsel. Kaiser does not support Ferencák's arguments against Board intervention.

City of Milford v. Local 1566,¹⁷ a Connecticut Supreme Court case cited in Kaiser for the proposition that an appeal by a quasi-judicial body concerning its own procedures is proper,¹⁸ supports the superior court's decision to allow intervention. There, the court upheld a lower court's decision allowing intervention by the Board of Mediation and Arbitration in an action to determine whether its arbitrators must take an oath before arbitrating every dispute, reasoning that the board's "significant interest" in protecting the validity of its procedures justified intervention.¹⁹ Here, the issue of whether the Board must provide free interpreter services to all LEP claimants is similarly

¹⁴ 121 Wn.2d 776, 781, 785, 854 P.2d 611 (1993).

¹⁵ Id. at 780.

¹⁶ Id. at 782.

¹⁷ 200 Conn. 91, 510 A.2d 177 (1986).

¹⁸ Kaiser, 121 Wn.2d at 782.

¹⁹ City of Milford, 510 A.2d at 180.

procedural and potentially has significant budgetary impacts. The Board has a similar interest in seeing that the issue is resolved in its favor. We hold that the superior court did not err by allowing the Board to intervene.

II. Wage Calculation

A. Health Care Benefits

Under RCW 51.08.178(1) wage calculation for time-loss benefits includes the value of employer-paid health care premiums.²⁰ Ferencák argues that the Board undervalued his health care benefits because it erroneously found his employer paid \$175 monthly even though a human resources manager testified that benefit payments were \$202.84 per month. This is a misstatement of the record. The Board actually found the employer paid \$197.15 monthly for health care coverage. To support his contention that the Board undervalued his benefits, Ferencák points to testimony from Travis' human resources manager where he mistakenly stated that medical coverage cost \$158.84 and dental coverage cost \$44.26.²¹ But he almost immediately corrected his testimony, explaining that he had mistakenly looked at what an employee would have to pay for the same coverage under COBRA. We hold that the Board did not undervalue Ferencák's health care benefits.²²

²⁰ Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 823, 16 P.3d 583 (2001).

²¹ It is unclear where Ferencák gets the \$202.84 figure, since adding the two figures he presumably relies on together results in a total benefits payment of \$203.10. Ferencák relies on different numbers yet again in his reply brief, where he states, without basis, that the employer-paid insurance premiums equaled either \$202.26 or \$202.40.

²² In fact, all the evidence suggests that the Board overvalued Ferencák's health care benefits when it found they totaled \$197.15. Both the current and former human resources managers at Travis testified that employer-paid health care premiums for medical and dental coverage combined equaled \$176 monthly. But, because the Department does not challenge the higher award, we need not consider it further.

B. Holiday/Vacation Pay

Ferenčák argues that his earned, but not taken, holiday and vacation days should be considered in his wage calculation based on this court's holding in Fred Meyer, Inc. v. Shearer that paid vacation and holidays should be included in calculating monthly wages under RCW 51.08.178(1).²³ But Shearer is distinguishable because there the employer sought to subtract paid vacation and holidays, already taken, from the injured worker's monthly wage calculation, which would have resulted in the workers being under-compensated.²⁴ Here, Ferenčák seeks additional monthly income based on vacation or holidays he could have taken in the future. Adding these days on to his monthly wage calculation would clearly result in overcompensation. This is the functional equivalent of asking for compensation based on work he would have done in the future, had he not been injured, for which he would not be entitled to compensation because RCW 51.08.178(1) limits the wage calculation to monthly wages the worker is receiving at the time of the injury.²⁵ The Board did not err in refusing to consider unused leave time in its wage calculation.

²³ 102 Wn. App. 336, 339-40, 8 P.3d 310 (2000), review denied, 143 Wn.2d 1003 (2001).

²⁴ Id. at 340.

²⁵ In his reply brief, Ferenčák cites Kilpatrick v. Department of Labor & Industries for its statement that "the purpose of worker's compensation benefits is to reflect future earning capacity rather than wages earned in past employment." 125 Wn.2d 222, 230, 883 P.2d 1370, 915 P.2d 519 (1994). But that statement was made in the context of determining whether the date of exposure or the date of the manifestation of the disease should be considered the time of injury for purposes of calculating benefits in an asbestosis case where the benefit schedule changed between the two dates. Id. This does not imply that speculative potential future earnings should be taken into consideration for wage calculations. On the contrary, Kilpatrick highlights the fact that the time of injury is the relevant date from which all future earning capacity is calculated.

C. Bonus

Ferenčák contends that the Board improperly excluded his yearly profit sharing bonus in its wage calculation. RCW 51.08.178(3) provides:

If, within the twelve months immediately preceding the injury, the worker has received from the employer at the time of injury a bonus as part of the contract of hire, the average monthly value of such bonus shall be included in determining the worker's monthly wages.

Ferenčák was injured in March 2002. He claims he received a yearly bonus in December 2001, but there is no evidence of this bonus in the record and he cites none in his opening brief. In his reply brief, he claims that exhibit 14, an email, shows the December 2001 bonus. But this exhibit is not included in the record, and it was admitted during the course of a discussion about the 2002 bonus, suggesting it likely did not reference a 2001 bonus.²⁶ He also argues that had the IAJ enforced certain subpoenas, there might have been evidence of a 2002 bonus. This is irrelevant: assuming that Travis pays annual bonuses at the same time every year, a December 2002 bonus would not qualify for inclusion in the wage calculation because it was not earned in the year preceding the injury.

D. Employer Payments for Government-Mandated General Fund Benefits

Ferenčák argues that the Board should have considered his employer's contributions to Social Security, Medicare, Industrial Insurance, and unemployment compensation in the wage calculation. RCW 51.08.178(1) explains the wage calculation and provides in relevant part:

²⁶ Ferenčák's counsel did not designate the exhibits admitted before the IAJ as part of the record on appeal.

The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire

We have already determined that Social Security, Medicare, and Industrial Insurance payments cannot be considered in calculating wages under RCW 51.08.178(1).²⁷ In Erakovic v. Department of Labor & Industries, we explained that these kinds of government-mandated general fund payments are not wages as defined by RCW 51.08.178(1):

Employers make payments for board, housing, fuel, or health care benefits directly to or on behalf of their employees, so the payments directly benefit the employees. In contrast, employer payments for Social Security, Medicare, and Industrial Insurance go to government programs that provide benefits for all qualified individuals. These payments are not earmarked for a specific employer's employees even though the payment amounts are based on the employees' gross cash wages. The plain language of RCW 51.08.178 requires that any "consideration" must be received *from the employer* as part of the contract for hire. An employer's mandatory payments for Social Security, Medicare, and Industrial Insurance are not "consideration" for its employees' services and therefore not "wages" under RCW 51.08.178. Even if the payments were "consideration," they are not "consideration of like nature"^[28]

In Erakovic, we declined to consider whether unemployment compensation, another government-mandated general fund employer payment, should be considered in the wage calculation because the injured worker failed to cross-appeal on this issue.²⁹ Ferencák provides no argument or authority to distinguish unemployment compensation payments from the other payments we considered and refused to include in the wage calculation in Erakovic. Instead, he claims that Erakovic was wrongly

²⁷ Erakovic v. Dep't of Labor & Indus., 132 Wn. App. 762, 776, 134 P.3d 234 (2006).
²⁸ 132 Wn. App. 762, 769-70, 134 P.3d 234 (2006) (footnote omitted).
²⁹ Id. at 775.

decided and implicitly overruled by Department of Labor & Industries v. Granger.³⁰ But Granger did not address whether government-mandated employer payments to general funds are “consideration of like nature” under RCW 51.08.178(1). In Granger, the Washington Supreme Court merely considered whether payments made on behalf of an individual employee into a health care trust fund are wages received at the time of the injury when the injured employee is not yet eligible to receive the health care benefits.³¹ The court did not need to ask whether employer payments made for health care are “consideration of like nature” because it had already answered that question affirmatively in Cockle v. Department of Labor & Industries.³² And, contrary to Ferencák’s assertions, Granger is not in conflict with Erakovic. Like the decision in Granger, we determined in Erakovic that employer payments made during the term of employment were received at the time of injury.³³ Because Granger does not require us to reconsider our holding in Erakovic and Ferencák fails to explain why a different analysis should apply to employer payments for unemployment compensation, we affirm the Board’s decision to exclude these payments from the wage calculation.

E. IAJ’s Evidentiary Rulings

Ferencák claims that the IAJ violated WAC 263-12-045 by failing to enforce subpoenas, requiring him to obtain testimony of a health insurer by perpetuation deposition, and by failing to elicit additional testimony necessary to valuing his wages. Because he provides no citation to the record proving these alleged violations occurred

³⁰ 159 Wn.2d 752, 153 P.3d 839 (2007).

³¹ Id. at 759.

³² 142 Wn.2d 801, 823, 16 P.3d 583 (2001).

³³ 132 Wn. App. at 772-73.

or authority explaining why these alleged actions constitute reversible error, we decline to consider this argument under RAP 10.3.³⁴

III. Scope of Review

The "Board's scope of review is limited to those issues which the Department previously decided."³⁵ RCW 51.52.060 governs the procedure for appealing the Department's decisions and requires a worker seeking review of a Department decision to file a notice of appeal within 60 days of receiving a copy of the decision. RCW 51.52.050 requires the Department to serve a written copy of any decision it makes on the injured worker. Read together, these statutes imply that for a Department decision to be appealable it must be in writing and served on the worker.

The Board refused to consider arguments on appeal related to the Department's English-only communications with Ferencák because the record contained no written copy of a decision by the Department to communicate in English only. Ferencák argues that the Department's repeated use of English-only communications when it knew of his LEP status should be considered an appealable decision within the meaning of RCW 51.52.060 despite the absence of a written decision. Because he provides no authority for this assertion, we decline to consider his argument³⁶ and affirm the Board's

³⁴ See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Although not readily discernible from his brief, Ferencák is likely referencing the IAJ's decision not to allow him to recall one of the human resources managers after his counsel realized that she had not elicited sufficient testimony from him or obtained all the documents she intended to obtain related to the annual profit sharing bonus. Nothing in the record suggests this was an abuse of discretion by the IAJ. In fact, the IAJ told counsel that she could obtain any additional evidence from the witness by deposition. There is no evidence in the record to suggest that she tried to do so.

³⁵ Hanquet v. Dep't of Labor & Indus., 75 Wn. App. 657, 661, 879 P.2d 326 (1994) (citing Lenk v. Dep't of Labor & Indus., 3 Wn. App. 977, 982, 478 P.2d 761 (1970)), review denied, 125 Wn.2d 1019 (1995).

³⁶ See RAP 10.3(a)(6); Cowiche Canyon Conservancy, 118 Wn.2d at 809.

conclusion that, in the absence of a written decision, it lacked jurisdiction to review these informal Department actions.³⁷

IV. Interpreter Services

Ferenčák contends that the IAJ's decision to provide him with interpreter services only for testimony at the hearing, but not for communications with counsel or perpetuation depositions, violated chapter 2.43 RCW, public policy as expressed by that chapter, and constitutional due process and equal protection. We addressed similar interpreter issues in Kustura and held that neither chapter 2.43 RCW nor constitutional due process or equal protection considerations entitle non-indigent LEP injured workers to free interpreter services for communications with counsel outside of legal proceedings for which an interpreter has already been appointed during an appeal of the Department's benefits calculation.³⁸ Nothing about the facts of this appeal requires a different result.³⁹ Like the LEP claimants in Kustura, Ferenčák has not shown he was prejudiced by any denial of interpreter services for communications with counsel during proceedings. And, because Ferenčák failed to petition the Board for review of the IAJ's

³⁷ We are concerned that the Department may avoid review of these or similar decisions simply for refusing to reduce them to writing. In future cases, the Department should supply the claimant with written reasons for refusing to recognize his or her LEP status to provide a basis for review in an appropriate case.

³⁸ No. 57445-1-I, slip op. at 19-22, 25-28 (Wash. Ct. App. Jan. 22, 2008).

³⁹ Ferenčák raises an additional equal protection issue not raised in Kustura, claiming that the Board's decision not to provide him with interpreter services impermissibly infringed on his fundamental right to travel. We decline to consider this issue because he fails to provide sufficient argument or authority under RAP 10.3(a)(6). But we note that this argument would probably fail because he appears to argue that the failure to provide interpreter services infringed on his right to travel from his country of origin to the United States. The fundamental right to travel refers only to interstate, not international, travel. See Haig v. Agee, 453 U.S. 280, 306, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981).

refusal to provide interpreter services for perpetuation depositions, that issue is not properly before us. We therefore decline to address it.⁴⁰

For the first time on appeal, Ferencák raises several new arguments to support his claim for additional interpreter services. He contends that denying his request for additional interpreter services violates (1) Washington's Law Against Discrimination, chapter 49.60 RCW, (2) Executive Order 13166, (3) Title VI of the Civil Rights Act of 1964,⁴¹ (4) WAC 263-12-020, (5) WAC 263-12-117, and (6) impermissibly shifts the costs of seeking benefits onto the injured LEP worker. Generally, we will not consider issues raised for the first time on appeal.⁴² Further, RCW 51.52.104 states that a petition for review of an IAJ decision must "set forth in detail" the grounds for appeal and failure to do so results in waiver of the issue. Because Ferencák failed to raise these new issues below, we decline to consider them on appeal. On this record, we hold that Ferencák was not entitled to free interpreter services for communications with counsel.

V. Statutory Attorney Fees

The superior court awarded the Department \$200 in statutory attorney fees under RCW 4.84.030. Ferencák argues that this is an improper award of attorney fees under RCW 51.52.130, which states when attorney fees should be awarded in an industrial insurance appeal. But these two provisions do not deal with the same kind of attorney fees. RCW 51.52.130 allows for an award of actual attorney fees incurred by an injured worker or employer on appeal to the superior or appellate court. In contrast, RCW 4.84.030 allows the superior court to award costs to the prevailing party, and under

⁴⁰ See Sepich, 75 Wn.2d at 316.

⁴¹ 42 U.S.C. 2000d, 88 P.L. 352.

⁴² RAP 2.5(a).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IVAN FERENČAK,

Appellant,

v.

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

Respondents.

No. 58878-8-1

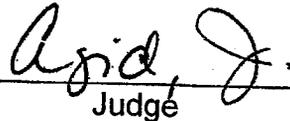
ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant, Ivan Ferencak, having filed a motion for reconsideration of the opinion filed January 22, 2008; respondent, Department of Labor & Industries, having filed an answer to appellant's motion for reconsideration; and the court having determined that said motion should be denied; Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 31st day of March 2008.

FOR THE COURT:


Judge

APPENDIX B

**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 C

RCW 2.43.020

Definitions.

As used in this chapter:

(1) "Non-English-speaking person" means any person involved in a legal proceeding who cannot readily speak or understand the English language, but does not include hearing-impaired persons who are covered under chapter 2.42 RCW.

(2) "Qualified interpreter" means a person who is able readily to interpret or translate spoken and written English for non-English-speaking persons and to interpret or translate oral or written statements of non-English-speaking persons into spoken English.

(3) "Legal proceeding" means a proceeding in any court in this state, grand jury hearing, or hearing before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof.

(4) "Certified interpreter" means an interpreter who is certified by the administrative office of the courts.

(5) "Appointing authority" means the presiding officer or similar official of any court, department, board, commission, agency, licensing authority, or legislative body of the state or of any political subdivision thereof.

RCW 51.08.178

"Wages" — Monthly wages as basis of compensation — Computation thereof.

(1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of the injury:

- (a) By five, if the worker was normally employed one day a week;
- (b) By nine, if the worker was normally employed two days a week;

APPENDIX D

- (c) By thirteen, if the worker was normally employed three days a week;
- (d) By eighteen, if the worker was normally employed four days a week;
- (e) By twenty-two, if the worker was normally employed five days a week;
- (f) By twenty-six, if the worker was normally employed six days a week;
- (g) By thirty, if the worker was normally employed seven days a week.

The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. As consideration of like nature to board, housing, and fuel, wages shall also include the employer's payment or contributions, or appropriate portions thereof, for health care benefits unless the employer continues ongoing and current payment or contributions for these benefits at the same level as provided at the time of injury. However, tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.

(2) In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern.

(3) If, within the twelve months immediately preceding the injury, the worker has received from the employer at the time of injury a bonus as part of the contract of hire, the average monthly value of such bonus shall be included in determining the worker's monthly wages.