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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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IVAN FERENČAK,

Appellant,

v.

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

Respondents.

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**BRIEF OF RESPONDENT  
BOARD OF INDUSTRIAL INSURANCE APPEALS**

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## I. INTRODUCTION

Mr. Ferencák asks this Court on one hand, to hold that the Board of Industrial Insurance Appeals (Board) cannot appear as a party in appeals of its decisions, and on the other, to hold that a court has jurisdiction over the Board so as to enter a monetary judgment against it. The practical application of this argument would be that a litigant before the Board can seek a monetary award against the Board at superior court without giving the Board an opportunity to defend itself. There is no legal support for this position, and the Board is entitled to defend itself when a litigant seeks relief against it.

The injured worker, Ivan Ferencák, is requesting that the Board be required to pay for interpreter services for communications between Mr. Ferencák and his attorney, as well as for all other communications purportedly necessary to assist Mr. Ferencák in the preparation of his case.

The Board provides, at Board expense, interpreter services throughout the course of the recorded proceeding. It does not provide interpreter services for Mr. Ferencák to communicate with his attorney or to otherwise assist him in the development of his case before the Board. Even if this Court finds that the Board should have provided additional interpreter services, the only proper remedy is reversal or remand, not imposition of monetary relief against the Board.

For these reasons, Mr. Ferenčák is not entitled to the relief he seeks against the Board.

## II. ISSUES

The primary legal issues in this appeal, as they relate to the Board, are:

1. Was Mr. Ferenčák's request for monetary relief against the Board sufficient to allow the Board to intervene to defend itself?
2. Is Mr. Ferenčák prohibited from seeking monetary relief against the Board for a decision made by the Board and/or an IAJ that is within their discretion and part of an adjudicative process?
3. Did providing interpreter services throughout the hearing at the Board meet statutory and constitutional requirements?

## III. STATEMENT OF FACTS

Because the Board's presence in this matter is limited to the issue of interpreter services and to what extent the Board is required to provide them, the Board has limited its recitation of the facts to this issue only.

### A. Proceedings Before The Board

On March 10, 2003, Mr. Ferenčák filed a motion before the Board requesting that:

the Board or DLI [Department of Labor and Industries] . . . pay for the services of a translator fluent in his native language not only to allow him to testify at the hearing, but also to translate for him for all statements of the Court, counsel, and all witnesses to allow him to participate

meaningfully at hearing, at any motions ad [sic] telephone conferences and to be able to provide contradicting testimony when and if false or inaccurate testimony is offered by any witness, including witnesses called by DLI.<sup>1</sup>

On March 28, 2003, after the reassignment of Mr. Ferencák's claim from Industrial Appeals Judge (IAJ) Crossland to IAJ Goodwin, Mr. Ferencák filed a "Motion for Change of Judge with Subjoined Declaration of Counsel."<sup>2</sup> In this motion, the injured worker requested that IAJ Goodwin recuse herself because Mr. Ferencák's attorney "fe[lt] that any non-English speaking client she represents w[ould] not receive the translation and interpreter services to which they have a right. . . based on rulings she made in another case . . ."<sup>3</sup> On April 2, 2003, the matter was reassigned to IAJ Verlaine Keith-Miller.<sup>4</sup>

On April 4, 2003, IAJ Keith-Miller issued an order granting Mr. Ferencak translation services for all testimony taken at the hearing.<sup>5</sup> In addition to the interpreter services provided, Mr. Ferencák requested translation services for communications with his attorney and for general preparation of his case. Interpreter services for Mr. Ferencák to communicate with his counsel and to prepare his case were denied. Specifically, the order stated:

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<sup>1</sup> Certified Appeals Board Record (CABR) at 117.

<sup>2</sup> CABR at 183.

<sup>3</sup> CABR at 185.

<sup>4</sup> CABR at 187.

<sup>5</sup> CABR at 188.

Mr. Ferencak contends that his due process rights are infringed if he is required to bear the cost of his own interpretive services. . . .

. . . .  
This tribunal does not believe it is under an obligation to provide an interpreter to the . . . claimant for the simultaneous translation of witness' testimony. . . . However, it is within my discretion to grant such interpretive services, and I do so grant these services for testimony taken at hearings.<sup>6</sup>

The order also held that the Department was not required to pay for interpreter services for Mr. Ferencak as he had requested.<sup>7</sup>

On or about July 5, 2005, Mr. Ferencak filed a Petition for Review of Proposed Decision and Order Dated April 15, 2005, with the Board. In his Petition for Review, Mr. Ferencak alleged that he was improperly denied interpreter services by the Board "in preparing for hearing and during breaks at hearing when [he] wanted to consult with his counsel."<sup>8</sup> Mr. Ferencak also alleged that he could not prepare for a hearing or "read BIIA rules applying to his claim without an interpreter."<sup>9</sup>

On October 18, 2005, the Board issued a final Decision and Order. With respect to interpreter services, the Board found that there was

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<sup>6</sup> CABR at 188-89.

<sup>7</sup> CABR at 190.

<sup>8</sup> CABR at 16.

<sup>9</sup> CABR at 18.

no unfair prejudice to Mr. Ferenčák by the level of interpreter services that were provided.<sup>10</sup>

## **B. Proceedings Before The Superior Court**

Mr. Ferenčák filed a notice of appeal to the King County Superior Court on or about November 8, 2005. On November 16, 2005, the Board received a copy of the notice of appeal<sup>11</sup> along with a cover letter from Mr. Ferenčák's attorney.<sup>12</sup> Neither the notice of appeal nor the cover letter makes reference to the Board as a party or as an entity against which Mr. Ferenčák was seeking monetary relief.<sup>13</sup>

The Board was not aware that specific monetary relief was being sought against it until the Department's attorney notified the Board's attorney of this on July 25, 2006.<sup>14</sup> Specifically, the Board's attorney was

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<sup>10</sup> CABR at 2-3. The Board further outlined the level of interpreter services that were requested by Mr. Ferenčák and denied. Specifically, the Board agreed with the denial of interpreter services at the Department level for Mr. Ferenčák to communicate with his attorney and at the Board level for matters outside the recorded proceeding.

<sup>11</sup> RCW 51.52.110 requires that all notices of appeal be filed with the Board. Specifically, that statute states:

Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and *on the board*.

.....

The board shall serve upon the appealing party, the director, the self-insurer . . . and any other party appearing at the board's proceeding, and file with the clerk of the court before trial, a certified copy of the board's official record which shall include the notice of appeal and other pleadings, testimony and exhibits, and the board's decision and order, which shall become the record of the case.

(emphasis added)

<sup>12</sup> CP 107-110.

<sup>13</sup> Id.

<sup>14</sup> CP 113.

informed that Mr. Ferencák had filed a trial brief that sought specific relief against the Board.<sup>15</sup> On July 28, 2006, three days after learning of Mr. Ferencák's attempt to get monetary relief against the Board, the Board filed its motion to intervene and responsive brief. On August 9, 2006, the court granted the Board's motion to intervene. The superior court rejected Mr. Ferencák's request for monetary relief against the Board.<sup>16</sup>

Mr. Ferencák appealed the superior court's order to this Court on November 6, 2006. CP 8-14.

#### IV. STANDARD OF REVIEW

Mr. Ferencák's appeal raises questions of jurisdiction, statutory construction, and constitutional interpretation. These are legal issues reviewed de novo. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 730, 57 P.3d 611 (2002) (statutory construction and constitutional interpretation); *Crosby v. Spokane Cy.*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999) (jurisdiction). Mr. Ferencák's appeal also contests intervention by the Board. Intervention as of right is reviewed under the error of law standard; permissive intervention is reviewed under the abuse of discretion standard. *Westerman v. Cary*, 125 Wn.2d 277, 302, 304, 892 P.2d 1067 (1994); *Kriedler v. Eikenberry*, 111 Wn.2d 828, 831, 766 P.2d 438 (1989).

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<sup>15</sup> CP 112-113.

<sup>16</sup> With regard to Mr. Ferencák's substantive claims regarding the amount of worker's compensation benefits, the Board takes no position and provides no factual accounting.

## V. ARGUMENT

This matter creates an awkward situation for the Board. The Board is not a party to workers' compensation disputes between the Department of Labor and Industries (Department) and injured workers. The Board's statutory role is limited to adjudicating such disputes. And yet, Mr. Ferenčák has requested specific monetary relief against the Board with regard to interpreter services, thereby bringing the Board into a matter it should not be in. Mr. Ferenčák's request required that the Board intervene to insure that no monetary judgment was entered against it.

The Board first learned of Mr. Ferenčák's attempt to obtain monetary relief against the Board three days before it requested intervention. Because a claimant is required under RCW 51.52.110 to notify the Board if an appeal has been taken of its decision in order for the Board to certify the administrative record, it is impossible for the Board to know, from the mere filing of a notice of appeal, that a litigant is attempting to seek a judgment against the Board and not simply reversal of the Board's decision. It was not until Mr. Ferenčák submitted his brief that the Board could have known of the relief being sought.

Furthermore, the Board is a quasi-judicial agency and is protected by quasi-judicial immunity with regard to the decisions it makes within the scope of its adjudicative authority. Even if this Court were to

determine that the Board did not meet procedural due process requirements with regard to the interpreter services it provided, the proper remedy is remand or reversal—not a monetary penalty against a quasi-judicial agency.

The Board is not a proper party to a judicial review of its decisions. If a litigant before the Board believes he has a claim against the Board for monetary damages, an appeal of the Board's administrative decision is not the appropriate forum under which to bring such a claim. The Board should not be subject to claims for damages or any other form of monetary relief against it in appellate proceedings from its decisions.

**A. The Superior Court Properly Granted The Board's Motion To Intervene**

The Board moved for intervention of right under CR 24(a) or in the alternative permissive intervention under CR 24(b). The Court properly granted the Board's motion to intervene.

Four criteria must be met to support the granting of intervention of right:

- (1) timely application for intervention;
- (2) the applicant claims an interest which is the subject of the action;
- (3) the applicant is so situated that the disposition will impair or impede the applicant's ability to protect the interest; and
- (4) the applicant's interest is not adequately protected by the existing parties.

*Spokane Cy. v. State*, 136 Wn.2d 644, 649, 966 P.2d 305 (1998). The Board met these four criteria, and therefore, intervention of right was properly granted.

**1. The Board's Motion To Intervene Was Made Three Days After The Board Learned That Mr. Ferenčák Was Seeking Monetary Relief Against The Board And Therefore Was Timely**

The Board sought intervention within three days of learning that Mr. Ferenčák was seeking relief against the Board. At the time the Board requested intervention, no orders had been entered and no hearing had been held on the matter. The Board did not request a continuance of the action then pending before superior court. The Board filed its responsive brief timely, in accordance with the briefing schedule already set. The Board was prepared to provide oral argument on the date that was set for oral argument.

The notice of appeal provided by Mr. Ferenčák to the Board on November 16, 2005, was provided, not as notice to a party, but rather as notice to a quasi-judicial agency for purposes of certifying the administrative record to the superior court. RCW 51.52.110. Service on the Board is a jurisdictional requirement placed on any party appealing a Board decision—it is not done to notify the Board that a judgment is being sought against it. RCW 51.52.110.

But for the notification made to the Board's attorney by the Department's attorney, the Board might still be unaware of Mr. Ferencák's attempts to obtain a judgment against the Board. The element of timeliness has been met, as the Board sought intervention as soon as it learned of the request for relief against it.

**2. The Board Had An Interest In The Fees Mr. Ferencák Requested Be Assessed Against It And In Maintaining The Integrity Of The Board As A Tribunal**

Because Mr. Ferencák requested that the Board, a non-party, be required to pay fees relating to interpreter services, the Board had an interest in Mr. Ferencák's appeal. *Westerman v. Cary*, 125 Wn.2d 277, 303, 892 P.2d 1067 (1994) (noting that the "meaning of 'interest' is to be broadly interpreted using flexibility and case-by-case analysis" (quoting *In re J.H.*, 117 Wn.2d 460, 468, 815 P.2d 1380 (1991))).

Furthermore, the Board is a separate, neutral tribunal, created to impartially decide issues arising under the workers' compensation statutes. *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 786, 854 P.2d 611 (1993). The Board is not an interested party in the proceedings between Mr. Ferencák and the Department. *Id.* Its only function is to hear the matter and enter a fair and impartial decision. *Id.* To request that the Board be required to pay a monetary penalty for a decision it made with regard to interpreter services during a quasi-judicial

proceeding creates a situation where the Board must actively defend itself against a party that appeared before it, thereby challenging the Board's ability to appear impartial. The Board has a direct interest in maintaining the integrity of its proceeding.

**3. The Board Was So Situated That The Disposition Of This Appeal Would Have Impaired Or Impeded The Board's Ability To Protect Its Interest**

The Board was so situated that a determination of whether the Board would be required to pay some monetary amount to Mr. Ferencák without the Board being given an opportunity to defend itself would have impaired or impeded the Board's ability to protect its interest.

First, the Board is protected by quasi-judicial immunity so that its impartiality cannot be compromised. *Kaiser*, 121 Wn.2d at 786. The mere fact that Mr. Ferencák attempted to seek relief against the Board, the quasi-judicial agency that rendered the administrative decision, creates a conflict which could very well compromise, at the very least, the appearance of impartiality. *Westerman*, 125 Wn.2d at 303 (noting that "the interest which the intervener seeks to protect must be one recognized by law and be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment," quoting *In re J.H.*, 117 Wn.2d at 468). The Board had an interest in protecting its process and insuring that the court recognized that

the Board could not be brought in as a party by a litigant seeking monetary relief.

Second, the Board had an interest in protecting itself from the financial burdens of being required to pay for the interpreter services that Mr. Ferenčák alleged it should be required to pay.

**4. The Board's Interest Was Not Adequately Protected By The Existing Parties**

Because the Board is an independent and impartial tribunal, neither of the existing parties could have adequately represented its interests. Furthermore, neither party was involved in this proceeding on behalf of the Board. The Board was required to represent itself against the claims raised by Mr. Ferenčák. *Westerman v. Cary*, 125 Wn.2d at 303.

**5. The Court Did Not Abuse Its Discretion By Allowing The Board To Intervene**

The Board met the requirements for intervention of right, and the superior court properly granted its motion to intervene. However, even if this Court finds that the Board did not meet the requirements for intervention of right, it would still need to hold that the court abused its discretion by allowing the Board permissive intervention. *Westerman*, 125 Wn.2d at 302. Because of the reasons set forth above, the court did not abuse its discretion in allowing the Board to intervene.

**B. The Board Has Standing To Defend Itself Against Improper Claims That Are Incorporated Into Administrative Appeals Of Its Decisions**

Mr. Ferenčák argues that the Board was improperly granted intervention in this appeal. However, what he is actually arguing is that the Board does not have standing to defend itself when a litigant seeks monetary relief against it when that relief is sought through an appeal of the Board's decision.

The Board has standing and authority to appear in a superior court action and again on appeal to protect itself against requests for monetary relief and to protect its procedural integrity. Under the principles set forth in *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 854 P.2d 611 (1993), the Board is prohibited from appealing issues regarding its substantive decisions regarding workers' compensation matters. Because the Board did not attempt to intervene to defend the merits of its final order, *Kaiser* is not on point. The Board intervened to defend itself against a claim that it owed a litigant money.

**1. Kaiser Does Not Preclude The Board From Intervening At The Superior Court Level When The Basis Of The Board's Intervention Is Not To Defend Its Underlying Decision But To Protect Itself Against Claims For Monetary Relief Against The Board And To Protect Its Procedural Integrity**

Administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise

only those powers conferred either expressly or by necessary implication.

*Kaiser*, 121 Wn.2d at 780.

Because the Board has not been expressly granted the authority to appear in superior court actions, as such, the Board's authority must be necessarily implied. By necessary implication, the Board must have the authority to appear in superior court actions for the limited purpose of defending itself against a party seeking monetary relief against it. If this authority is not necessarily implied, the Board would be unable to defend itself when a party sues the Board for monetary relief. Attaching a claim against the Board to an appeal of a Board decision does not limit the Board's authority to defend itself.

*Kaiser* does not preclude the Board from defending itself against claims for monetary relief against it. In *Kaiser*, the Board sought to appeal a superior court decision that had reversed the Board's decision regarding the amount of interest on worker's compensation benefits. *Kaiser*, 121 Wn.2d at 779. The Supreme Court held that, as a quasi-judicial agency, the Board is "*generally* not permitted to bring appeals of adverse court decisions." *Id.* at 781 (emphasis added).

This general rule does not apply to the Board in this circumstance because the Board is not appealing an adverse court decision. It is

defending itself in litigation. Further, the Board is not the appealing party in this matter.

In any event, the Board meets an exception to this general rule. The court in *Kaiser* recognized an exception to the general rule that a quasi-judicial agency does not have the authority to appeal court decisions reversing the agency's decisions. *Id.* at 782. The exception that provides the Board authority to appeal in this instance is the one that states that "quasi-judicial agencies have interests in preserving the integrity of their decision making process and therefore have authority to appeal decisions regarding the agency's procedures." *Id.* In the case before this Court, even though the Board is not the appealing party, the exception still applies because the Board intervened only to insure that no judgment was entered against it at the appeal stage of its decision. The Board did not intervene to defend its order or to otherwise support the claims or arguments of either party. The Board intervened to protect the integrity of its decision-making process. If litigants are able to bring new claims against the Board in an appeal to superior court and attempt to obtain relief against the Board, the Board becomes an active litigant at the appellate stage and cannot remain a disinterested tribunal.

**2. The Rationale In *Kaiser* For Precluding The Board From Appealing Superior Court Decisions On The Merits Does Not Apply When An Appellant Seeks To Add An Additional Claim Against The Board While At The Same Time Appealing The Merits Of A Board Decision**

The Court in *Kaiser* relied on two reasons for the general rule that the Board could not appeal an adverse superior court decision.

First:

quasi-judicial agencies may be analogized to lower courts. Since a lower court ordinarily has no right to appeal a reversal of its decision by a higher court, an administrative agency acting in a judicial capacity is deemed to have no right to appeal a reversal of its decision by a reviewing court.

*Kaiser*, 121 Wn.2d at 781. And second:

allowing a quasi-judicial agency to enter proceedings as a partisan may compromise the impartiality of that body in rendering its decisions.

*Id.* The Board has not appealed in this matter. Instead, it continues to defend itself against a litigant who seeks monetary relief against it. And even if this court were to hold that *Kaiser* applies to the Board whether it is an appellant or respondent, *Kaiser* still does not preclude the Board's presence in this case because the Board does not seek to offer an opinion as to the substantive positions of the parties—only to protect its own interests whether they be financial or procedural.

*Kaiser* did not hold that where a party seeks monetary relief against the Board, the Board has no ability to defend itself. The *Kaiser* court was not addressing a circumstance in which a party, in an appeal of a Board decision, adds an additional claim for monetary relief against the Board. The *Kaiser* court analogized the Board to “lower courts” and the authority a lower court would have to appeal a reversal of its decision. *Kaiser*, 121 Wn.2d at 781. As noted in *Kaiser*, neither a lower court nor the Board would typically have the authority to appeal a reversal of its own decision. However, the Washington Supreme Court and Court of Appeals do not fine lower courts for constitutional violations or require that lower courts reimburse a party appearing before it. Mr. Ferencák, in effect, requested that the superior court fine the Board for an alleged constitutional violation.

The second basis under which the court in *Kaiser* held that the Board should not be permitted to appeal a reversal of its own decision is that the Board, appearing as a partisan, may compromise its impartiality. *Id.* at 781. It is precisely to preserve its impartiality that the Board sought to intervene. If a litigant seeks to add a claim against the Board at superior court, the Board invariably becomes a party opponent to that litigant over that added claim. Procedurally, this is inconsistent with the overriding need to maintain the Board’s impartiality.

Using the rationale in *Kaiser*, the Board has authority to defend itself when a party seeks relief against it.

**C. Mr. Ferenčák Is Prohibited From Seeking Monetary Relief Against The Board For A Decision Made By The Board Or An IAJ That Is Within Their Discretion And Part Of An Adjudicative Process Because The Board And Its Judges Are Protected By Quasi-Judicial Immunity**

The Board has long been recognized as a quasi-judicial agency. *Dep't of Labor & Indus. v. Cook*, 44 Wn.2d 671, 677, 269 P.2d 962 (1949). In *Lutheran Day Care v. Snohomish Cy.*, 119 Wn.2d 91, 99, 829 P.2d 746 (1992), the Washington Supreme Court held that “[q]uasi-judicial immunity attaches to persons or entities who perform functions that are so comparable to those performed by judges that it is felt they should share the judge’s absolute immunity while carrying out those functions.” The Board is entitled to quasi-judicial immunity when the functions it carries out are adjudicative.

In the present case, the Board was conducting a hearing. It was acting as an impartial decision maker in regard to Mr. Ferenčák’s appeal. The decision to allow an interpreter during the proceeding only and not for use by Mr. Ferenčák to communicate privately with his counsel was a decision made in carrying out the Board’s adjudicative functions. This decision is protected by quasi-judicial immunity.

The purpose of quasi-judicial immunity is “to preserve and enhance the judicial process.” *Bruce v. Byrne-Stevens & Assoc. Engineers*, 113 Wn.2d 123, 128, 776 P.2d 666 (1989). If the Board or its judges must weigh the potential of being fined for making a decision with which a superior court later disagrees, the “judicial process” is not preserved or enhanced. Instead, the process becomes constrained and weighted with fear that fines and even damages might be awarded if they make the wrong decision.

An award of costs for interpreter services fees against the Board would be punitive, not remedial in nature. The payment of interpreter services does not cure any underlying constitutional violation. It would not render an unconstitutional proceeding constitutional. The only appropriate remedy for a constitutional violation is reversal and/or remand with some order correcting the alleged violation.

Quasi-judicial immunity protects the adjudicative process—when quasi-judicial immunity is not recognized, the very nature of proceedings before the Board is jeopardized because it makes the Board an interested party in an action in which it should be impartial.

In *Kaiser*, the court addressed the need for quasi-judicial agencies to remain impartial in proceedings before them. The Board in the present case cannot remain impartial when a party actively seeks a monetary

judgment against it. The very purpose of quasi-judicial immunity is to prevent such an action.

For these reasons, Mr. Ferencák's claim that fees should be assessed against the Board must fail as the Board is entitled to quasi-judicial immunity.

**D. The Board Did Not Violate Any Statute, Rule, Or Constitutional Provision With Respect To The Extent Of Interpreter Services It Provided To Mr. Ferencák**

The Board provided interpreter services throughout the course of the proceeding. In the Decision and Order of the Board, dated October 18, 2005, the Board held as a conclusion of law that "Ivan Ferencak was not entitled to have the Board pay the cost of an interpreter for communications between himself and his attorney regarding the processing of his claim . . . ." Industrial Appeals Judge (IAJ) Verlaine Keith-Miller issued an Interlocutory Order Denying Request for Translation Services Other than at Hearing, dated April 4, 2003, in which she ruled:

. . . I will hereby deny the claimant's request for interpretive assistance in the preparation of his case.

...

Claimant's request for interpretive services for her (sic) own testimony is hereby granted.

...

This tribunal does not believe it is under an obligation to provide an interpreter to the . . . claimant for the simultaneous translation of witness' testimony. . . . However, it is within my discretion to grant such interpretive services, and I do so grant these services for testimony taken at hearings.

The Board provided interpreter services at its expense during all of the evidentiary hearings in this matter.

**1. The Board Was Not Required By RCW 2.43.040 To Provide Additional Interpreter Services**

The Board was not required by RCW 2.43.040 to provide interpreter services beyond what it provided. This statute is not applicable to Mr. Ferencák's administrative appeal.

RCW 2.43.040(2) provides, in relevant part: “[i]n all legal proceedings in which the non-English-speaking person is a party . . . the cost of providing the interpreter *shall be borne by the governmental body initiating the legal proceedings*” (emphasis added). RCW 2.43.020(3) defines a “legal proceeding” as “a proceeding in any court in this state, grand jury hearing, or before an inquiry judge, or before [an] administrative board, commission, agency, or licensing body of the state or any political subdivision thereof.” The hearing before the Board was a legal proceeding.

However, the Board did not “initiat[e] the legal proceedings” as required by statute. In particular, here the Board is an adjudicative body with limited reviewing powers – it does not initiate proceedings. Rather,

parties bring appeals to the Board for a determination on the merits. In the present case, it was Mr. Ferenčák who “initiated the proceeding” by appealing an order of the Department. As such, RCW 2.43.040 does not require the Board to pay the costs of interpreter services to Mr. Ferenčák. RCW 2.43.040(3) provides that “in all other legal proceedings, the cost of providing the interpreter shall be borne by the non-English-speaking person [unless indigent]. . . .” While the Board does provide interpreter services pursuant to its own rules, it is not required to by RCW 2.43.

Even if this Court holds that this statute applies and requires the Board to provide interpreter services throughout the proceeding, the Board complied with the mandates of this statute.

**2. The Board Was Not Required By RCW 2.42, Which Deals With Interpreters For Deaf And Other “Impaired Persons,” To Provide Additional Interpreter Services**

Mr. Ferenčák also contends that the Board was required to provide additional interpreter services by RCW 2.42. That chapter is clearly inapplicable here.

RCW 2.42 addresses the interpreter needs of “deaf persons and of other persons who, *because of impairment of hearing or speech* are unable to readily understand or communicate the spoken English language.” RCW 2.42.010 (emphasis added). *See also* RCW 2.42.110(1) (defining “impaired person”). Mr. Ferenčák has not alleged or shown that he has an impairment of speech or hearing, and this chapter has no application here.

**3. The Board's Rule On Interpreter Services Did Not Require It To Provide Additional Services**

The Board's rule on interpreter services, WAC 263-12-097(4), did not require the Board to provide additional interpreter services. WAC 263-12-097 provides that the industrial appeals judge may appoint an interpreter to assist the party or witness throughout the proceedings. WAC 263-12-097(1).<sup>17</sup> Under this circumstance, the Board will pay for interpreter services. WAC 263-12-097(4). Because an interpreter was provided to Mr. Ferencák during the proceeding, the Board fulfilled any duty it may have had to provide interpreter services under its rule.

**4. The Board Did Not Violate Mr. Ferencák's Due Process Rights With Respect To Providing Interpreter Services**

**a. The Balancing Of Interests Indicates That The Board Was Not Required To Provide Additional Interpreter Services To Mr. Ferencák**

The United States Supreme Court, in *Landon v. Plasencia*, 459 U.S. 21, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982), set out the factors to consider in determining whether procedures are sufficient to satisfy due process concerns. Specifically, the Court held that the "constitutional sufficiency of procedures provided in any situation, of course, varies with

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<sup>17</sup> The rule is permissive. However, since the IAJ here did appoint an interpreter, this case does not involve a situation in which an interpreter was not provided, only the extent of interpreter services for which the Board would pay.

the circumstances.” 459 U.S. at 34 (internal citations omitted). The Court also stated that:

[i]n evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.

*Id.* The Court further explained its position by stating that “the role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that displace congressional choices of policy.” *Id.*

The courts have applied these principles in situations involving interpreter services. In *Abdullah v. Immigration and Naturalization Service*, 184 F.3d 158 (2d Cir. 1999), the court held that the United States was not required to provide an interpreter to “special agricultural workers” during interviews with Immigration and Naturalization Service legalization officers. The court found a significant difference in the level of procedure which should be afforded to individuals “defending against criminal prosecution, deportation, or exclusion” and those who “have affirmatively petitioned the government for a status enhancement, whose validity is their burden to establish.” *Id.* at 165. The federal court placed

great weight on whether the government was initiating action against an individual or whether the individual was affirmatively seeking a benefit. Specifically, the court stated that “it is reasonable to require petitioners to make suitable arrangement for the provision of the proof necessary to meet their burdens.” *Id.* The court also held that the government’s interest in avoiding excessive costs was an appropriate factor to weigh against the interests of the individual. *Id.* at 165-66. The court noted: “Upholding the right plaintiffs claim would no doubt require provision of interpreters in thousands of cases and in a huge range of languages. The expense and difficulty of meeting that need would be great.” *Id.* at 166.

Mr. Ferenčák’s interest in the Board’s proceedings is purely financial and is created by statute. In workers’ compensation claims, the benefits being sought are statutory benefits for which a worker must establish a right. The worker has the burden of proof. RCW 51.52.050. Therefore, a workers’ compensation case is analogous to seeking benefits and distinguishable from criminal prosecution or deportation initiated by the government.

Moreover, the Board has a financial interest in conserving limited resources and following legislative directions or limits. The cumulative cost of interpreters for non-English speaking injured workers communicating with their attorneys could be high. Furthermore, unlike

the recorded proceedings, in which the IAJ can avoid excessive interpreter costs by limiting irrelevant or repetitious testimony, the IAJ and the Board would have no practical way to control the costs of interpretation between an appellant and his or her attorney. The Board would have even less power to oversee interpretation costs when extended to the hearing preparation activities of Mr. Ferenčák.

Aside from cost, the Board has another interest in not providing interpreter services for the purpose of private attorney-client communications. The Board is an impartial decision maker. For the Board to pay for a service for an injured worker outside the proceeding creates an appearance of unfairness, by investing the Board in the worker's litigation. Thus, the balancing of interests did not require the Board to provide interpreter services to Mr. Ferenčák beyond what it did.

**b. To Establish A Due Process Violation, Mr. Ferenčák Would Have To Show That Providing Additional Interpreter Services Would Have Likely Affected The Outcome, Which He Cannot Do**

Even in cases in which the courts have determined that the level or quality of interpreter services provided did not comport with due process requirements, courts have not found a violation so long as the outcome would not have been different had the necessary interpreter services been provided. The underlying Board decision was affirmed. As such, no due

process violation could have occurred even if Mr. Ferencák was entitled to the level of interpreter services he claimed he was provided.

In *Tejeda-Mata v. Immigration and Naturalization Service*, 626 F.2d 721 (9th Cir. 1980), the petitioner was going through deportation proceedings and the immigration appeals judge refused to allow simultaneous translation of the testimony against him in his primary language. *Id.* at 726. The court found that deportation proceedings were civil and not criminal and therefore “all the due process protections accorded to a defendant in a criminal proceeding do not apply.” *Id.* Nevertheless, the court in *Tejeda-Mata* found that the refusal to allow simultaneous translation was an abuse of discretion. However, the court did not reverse or remand because “a new hearing would be no more than a futile gesture.” *Id.* at 727. The court found that the error of refusing to simultaneously translate was harmless. *Id.*

In *Gutierrez-Chavez v. Immigration and Naturalization Service*, 298 F.3d 824, 830 (9th Cir. 2002), the court held that an inadequate translation was not enough to create a violation of due process unless the petitioner could show that a better translation likely would have made a difference in the outcome. Although the court found that there were several instances where confusion resulted from the translation process, it held that this was not enough to create a due process violation. *Id.*

Both of these cases involved interpreter services during the actual proceeding. In the case before this Court, the Board provided significant interpreter services for the entire recorded proceeding. Mr. Ferenčák has not alleged that the interpreter services provided were deficient. With regard to the hearing, his allegation is that the IAJ should have allowed the interpreter, paid for by the Board, to interpret attorney-client communications. But that claim has no support in the case law.

The superior court here upheld the Board's decision regarding the workers' compensation benefits to which Mr. Ferenčák was entitled. He has not shown that a different level of interpreter services would have likely changed the outcome.

**c. Even If The Board Violated Mr. Ferenčák's Due Process Rights, Imposing Monetary Relief Against The Board Is Not Authorized By Law**

Even assuming that the Board violated Mr. Ferenčák's due process rights by not providing additional interpreter services, imposing monetary responsibility for his expenditures on the Board is not authorized by any law.<sup>18</sup> Instead, the law requires that Mr. Ferenčák show how a violation during the Board hearing could have made a difference in the outcome. Even then, the appropriate remedy is to remand the matter to the Board for

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<sup>18</sup> RCW 51.36.080 does not provide an award of interest against the Board. Specifically, this statute addresses the issue of when it is appropriate to award interest against the *Department*. By implication, this also supports the Board's position that the Legislature did not intend to provide an award of fees against the Board.

new or additional hearings that provide the unlawfully denied process. This flows from the principle that the object is to remedy the harm.

In *Tejeda-Mata*, for example, the court did not order the administrative agency to pay interpreter costs incurred to cure the due process violation. Rather, the court saw its options as to either reverse and remand or affirm (because the error was harmless). 626 F.2d at 726-27. Even the dissent in *Tejeda-Mata*, which would not have found the constitutional violation to have been harmless, recognized that the remedy was a remand. *Id.* at 730. Therefore, if the interpreter services provided to Mr. Ferencák were not sufficient, he is entitled to reversal or remand to address the error.

#### **5. Mr. Ferencák Has Failed To Show An Equal Protection Violation**

Courts have expressly rejected the argument that language equates to national origin or race for purposes of constitutional analysis. *See Commonwealth v. Olivo*, 369 Mass. 62, 337 N.E.2d 904, 911 (1975) (class of those unable to speak English is not a suspect class); *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2nd Cir. 1983) (“[I]anguage, by itself, does not identify members of a suspect class”); *Vialez v. New York City Housing Auth.*, 783 F. Supp. 109, 122 (S.D.N.Y. 1991).

*Moua v. City of Chico*, 324 F. Supp. 2d 1132 (E.D. Cal. 2004), is on point in reviewing a claim of an Equal Protection violation based on language. Specifically, that court held:

As long as a municipal policy or practice distinguishes among people for reasons other than race, ethnicity, national origin, or gender and does not burden the enjoyment of a fundamental right, it will be upheld against an equal protection challenge if it is rationally related to a legitimate governmental interest. See *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-314, 96 S.Ct. 2562, 2566-2567, 49 L. Ed. 2d 520 (1976).

*Moua*, 324 F. Supp. 2d at 1137. Further, the *Moua* court distinguished permissible and impermissible language laws, noting the differing levels of judicial scrutiny appropriate for a governmental election to (1) operate solely in English versus (2) address languages other than English in a non-uniform manner:

While there is some authority that singling out speakers of a particular language merits strict scrutiny, *no case has held that the provision of services in the English language amounts to discrimination against non-English speakers based on ethnicity or national origin.*

*Were the government to target a particular language group for differential treatment, the inference might be drawn that the intended target is the racial or ethnic group closely associated with that language group. But the facts and allegations here do not involve the singling out of one language group for a denial of interpreter services or the scrutiny or compulsion of persons speaking a particular language. And while it might be a laudable goal for cities to provide interpreters for all language groups in the provision of all services, the practical ability to meet that goal in a diverse nation in an*

era of limited public funds may be doubted. Nor ought the Equal Protection Clause . . . dictate budget priorities by elevating language services over all other competing needs. *Cf. Frontera v. Sindell*, 522 F.2d 1215, 1219 (6th Cir. 1975) (elaborating on the real-world consequences that would follow from such a view of equal protection doctrine).

*Id.* (emphasis added).

The facts in *Moua* are analogous to the instant case. Here, the Board has not targeted a particular language group for differential treatment. Instead, it provides the same level of interpreter services for all groups. As such, Mr. Ferencak cannot show an equal protection violation.

**6. Mr. Ferencak Has Failed To Show A Violation Of The Washington Law Against Discrimination**

RCW 49, the Washington Law Against Discrimination (WLAD), prohibits discrimination against individuals on the basis of certain characteristics.<sup>19</sup> WLAD echoes the equal protection clause's intent to ensure that individuals of different backgrounds and circumstances are treated equally.

As discussed above, no case has held that the provision of services in the English language amounts to discrimination against non-English speakers based on ethnicity or national origin. *Moua*, 324 F. Supp. 2d at

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<sup>19</sup> "The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010.

1137. Moreover, Plaintiff cites to no case law, statute, or other authority which supports the proposition that “national origin” as used in WLAD should be expanded to include all persons who speak a language other than English as their first language.

WLAD does not provide a cause of action against the Board for not providing interpreters for claimants during the preparation stage of their hearing. Further, Mr. Ferencák has failed to show how he has been treated differently from any other limited English speaking person. As such, he cannot show discrimination.

The Board did not discriminate against Mr. Ferencák on any grounds. Because “speakers with limited English proficiency” do not equate to “national origin,” Mr. Ferencák cannot bring a cause of action under WLAD.

**7. Mr. Ferencák Has Failed To Show A Violation Of Title VI Of The Americans With Disabilities Act**

Courts have expressly rejected the argument that language equates to national origin or race for purposes of constitutional analysis. *See Commonwealth v. Olivo*, 369 Mass. 62, 337 N.E.2d 904, 911 (1975). This is the only basis on which Mr. Ferencák attempts to argue discrimination.

The Fifth Circuit held in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir.1981), that “we do not think it can seriously be asserted that [a]

program [of allegedly inadequate bilingual education in a Texas public school] was intended or designed to discriminate against Mexican-American students” in violation of Title VI. *Id.* at 1007.

In *Franklin v. District of Columbia*, 960 F. Supp. 394 (D.D.C. 1997), *rev'd on other grounds*, 163 F.3d 625 (D.C.Cir. 1998), the court found after trial that the plaintiffs were not entitled to relief on their Title VI claims because the LEP Hispanic inmates were not being barred from participation in prison programs because of their race, color or national origin. While the programs were open to all inmates, participation in these programs was limited only by English fluency and not national origin. 960 F. Supp. at 432.

Furthermore, Mr. Ferencák has failed to make a prima facie case of intentional discrimination. In *Alexander v. Sandoval*, 532 U.S. 275, 280, 293, 121 S.Ct. 1511, 149 L. Ed. 2d 517 (2001), the Supreme Court held that private parties may not invoke Title VI regulations to obtain redress (whether injunctive or compensatory) for disparate-impact discrimination because Title VI itself prohibits only intentional discrimination. Thus, a plaintiff seeking relief for violations of Title VI must show intentional discrimination. *Id.* at 293. Because the Board does not provide interpreter services to any individual (other than for the recorded proceedings during the preparation stage of his claim) before the Board, Mr. Ferencák cannot

make out a prima facie case of intentional discrimination. For these reasons, Mr. Ferencák's claim of discrimination must fail.

**8. Mr. Ferencák Cannot State A Claim Under Executive Order 13166**

Executive Order 13166 (EO 13166)<sup>20</sup> was issued by the President on August 11, 2000. It outlines what federal agencies must do with regard to the entities who receive money from the various federal agencies in monitoring the services provided to limited English speaking persons.

This order clearly states:

This order is intended only to improve the internal management of the executive branch and does not create any right or benefit substantive or procedural enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.

(EO 13166)

EO 13166 does not have the force and effect of law and does not grant to Mr. Ferencák a private cause of action. *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 234-36 (8th Cir 1975), held that with regard to Executive Orders that do not expressly state that individuals have a private cause of action:

[t]o infer a private right of action . . . creates a serious risk that a series of protracted lawsuits brought by persons with little at stake would paralyze the rulemaking functions of federal administrative agencies.

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<sup>20</sup> CP 60-62.

As a result, EO 13166 provides no support for Mr. Ferencák claim for interpreter services.

Even if EO 13166 did apply and did create a private cause of action for Mr. Ferencák, the Board did not violate EO 13166 because it provided Mr. Ferencák with interpreter services at the hearing.

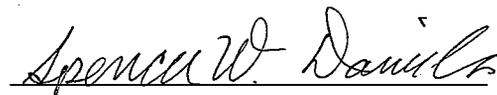
## VI. CONCLUSION

For the reasons set forth above, the Board respectfully requests that this Court affirm the superior court's order involving interpreter services and the Board.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of August, 2007.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10<sup>th</sup> day of August, 2007, at Olympia, WA.

  
KRISTINE HARPER  
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