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NO. 58200-3-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

ENVER MESTROVAC,

Respondent/Cross-Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, AND THE BOARD OF INDUSTRIAL INSURANCE APPEALS,

Appellants/Cross-Respondents.

BRIEF OF APPELLANT/CROSS-RESPONDENT BOARD OF INDUSTRIAL INSURANCE APPEALS

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I. INTRODUCTION

Enver Mestrovac appealed orders of the Department of Labor and Industries (Department) relating to his workers' compensation benefits to the Board of Industrial Insurance Appeals (Board). In his Notice of Appeal to the Board, Mr. Mestrovac challenged the level of interpreter services provided by the Department and further requested that the Board provide interpreter services at the Board level. The Board declined to review the issue of interpreter services provided by the Department because no final order had been issued by the Department regarding such services and because that issue was premised on a constitutional claim that exceeded the jurisdiction of the Board to review Department actions.

The Board then provided interpreter services for the recorded portions of the Board's proceedings but not for private attorney-client communications between Mr. Mestrovac and his counsel.

On judicial review to the superior court, the court ruled that the Board violated Mr. Mestrovac's procedural due process rights by not providing additional interpreter services. The court ordered the Board to conduct a hearing on the amount of interpreter services fees incurred and ordered that the Board and the Department pay that amount to Mr. Mestrovac.

When the Board learned of the court's rulings, imposing this unique remand order that required the Board to pay for interpretation services, the Board moved to intervene and to have the court reconsider its

rulings. The court denied the Board's motion to intervene and ordered the Board to pay attorney's fees to Mr. Mestrovac for having to respond to the Board's motions. The Board appeals these orders.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments Of Error

1. The superior court erred in its March 20, 2006, findings of fact and conclusions of law, when it held that the Board had jurisdiction over the Department to rule on the issue of interpreter services, where the Department had never issued an order on the matter.

2. The superior court erred in its April 17, 2006, order on reconsideration (1) by deciding that the Board violated Mr. Mestrovac's procedural due process rights in not providing interpreter services to Mr. Mestrovac beyond those that the Board did provide, and (2) by requiring the Board to hold a hearing in which the Board must decide how much the Board is to pay in interpreter services (3) by requiring the Board to hold a hearing to determine the amount of interpreter services owed by the Department without first allowing the Department to issue an order on the matter (4) by awarding interest against the Board under RCW 51.36.080.

3. The superior court erred in its June 15, 2006, order (1) by denying the Board's Motion to Intervene, and (2) by requiring the Board to pay attorney's fees for attempting to intervene. The court further erred in not reaching and granting the Board's motion for reconsideration of the court's March 20, 2006, and April 17, 2006, orders.

4. The superior court erred in its August 1, 2006, order by increasing the amount of attorney's fees initially awarded to Mr. Mestrovac based on work done at the Court of Appeals.

B. Issues Related To Assignments Of Error

This appeal raises the following principal issues:

1. Where the Board is served a copy of a petition seeking judicial review of its order (as required by statute) but the petitioner does

not request affirmative relief against the Board beyond reversal of its order:

(a) did the court have personal jurisdiction to grant monetary relief against the Board;

(b) did the court abuse its discretion by denying the Board's motion to intervene and participate on the claims the court was entertaining against the Board?

2. Did the Board violate any statutory or constitutional rights of Mr. Mestrovac by providing him with interpreter services for only the recorded portions of the administrative proceedings and not for him to communicate privately with his counsel?

3. Where there is no authority requiring the Board to pay additional interpreter services fees to Mr. Mestrovac, did the court err by ordering the Board to pay such fees on remand and hold a hearing to determine the amount owed?

4. Did the superior court err when it concluded that the Board erred by failing to exercise jurisdiction to determine how much the Department owed to Mr. Mestrovac in interpreter services fees, where the Department had never issued a determination on that issue?

5. Did the superior court err in ordering the Board to pay attorney's fees to Mr. Mestrovac for responding to the Board's motions and in increasing those fees for work done at the Court of Appeals without further leave of this Court?

III. STATEMENT OF THE CASE

The underlying matter in this appeal is a claim by Enver Mestrovac for additional workers' compensation benefits. The Board is not an interested party with regard to that substantive issue. Accordingly, the Board's recitation of the facts is limited to the claims seeking interpreter

services against the Board and those claims implicating the Board's jurisdiction and procedures on interpreter services. [1]

A. Proceedings Before The Board

In Mr. Mestrovac's notice of appeal to the Board, CABR at 155-60,[2], he requested interpreter services be provided to him at Department and/or Board expense for the following:

> All communications addressed to him, his lawyer, to any of his treating physicians or other health care providers, to any provider for the Department, with the Department, with his employer, with his counsel, with IME [independent medical examination] examiners, with the Board, and associated with vocational rehabilitation. . . . Such translation services should be paid by the Department of Labor & Industries throughout . . . .

CABR at 158-59.

In an Interlocutory Order Establishing Litigation Schedule,[3], dated February 4, 2004, the Industrial Appeals Judge (IAJ) framed the issue with

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[1] Mr. Mestrovac has filed a cross-appeal on the issue of the amount of his workers' compensation benefits, to which the Department will be responding. The Board refers the Court to Mr. Mestrovac's and the Department's briefs for facts relating to the underlying workers' compensation issue.

[2] The superior court transferred the pleadings filed at the administrative level to this Court but did not assign Clerk's Papers numbers to them. This brief will refer to these documents by the Certified Appeals Board Record (CABR) number, in the lower right hand corner of the documents. The superior court did transmit the administrative exhibits and transcript of proceedings with Clerk's Papers numbers, and this brief will refer to those documents by Clerk's Papers number.

[3] See Appendix A, February 4, 2004, Interlocutory Order.

regard to interpreter services as follows: "Is the Department required to issue orders in the claimant's native language?" CABR at 173.

On April 26, 2004, the IAJ conducted a phone conference with the parties, at which the issue of interpreter services was addressed. CP at 751. At this conference, the IAJ stated that she would not allow Mr. Mestrovac and his counsel to use interpreter services provided by the Board for private attorney/client communication. CP at 751. The IAJ explained her reasoning by stating that she believed it would compromise the objectivity of the interpreter and that it may be asking the interpreter to violate his code of conduct.[4] CP at 751.

In an Amended Interlocutory Order Establishing Litigation Schedule, dated April 26, 2004, the IAJ memorialized the rulings made in the above conference. In the Order, the IAJ ruled that the Board did not have jurisdiction over Mr. Mestrovac's claims against the Department with regard to providing interpreter services because that claim involved a constitutional issue and because the Department had not entered an order on the claim to trigger the Board's appellate jurisdiction.[5] CABR at 196.

With regard to the interpreter services sought during the Board hearing, the IAJ ruled that Mr. Mestrovac would be provided an

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[4] See Appendix B, transcript of April 26, 2004, Phone Conference.

[5] See Appendix C, April 26, 2004, Amended Interlocutory Order.

interpreter for Board proceedings. CABR at 198. Specifically, the IAJ held that the "Board will provide an appropriate interpreter to interpret all Board proceedings."[6] CABR at 198 (underlining in original deleted). The IAJ went on to memorialize her earlier ruling that the Board-provided interpreter could not interpret communications between Mr. Mestrovac and his attorney, even at Mr. Mestrovac's expense.[7] CABR at 196.

Mr. Mestrovac requested interlocutory review by the Board of the IAJ's rulings. CABR at 233. Review was declined on May 5, 2004. CABR at 233.

After the hearing, the IAJ issued a Proposed Decision and Order CABR at 758-75.[8] Consistent with the prior rulings, the IAJ did not enter additional rulings on the claims for interpreter services but did note that Mr. Mestrovac had "preserved those matters for appeal . . . ." CABR at 759.

In the Final Decision and Order of the Board dated June 9, 2005, CABR 1-11, the Board upheld the IAJ's rulings on interpreter services, stating:

> Mr. Mestrovac is challenging the interpretive services that were provided during the Board proceedings, we note that

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[6] See Appendix C.

[7] See Appendix C.

[8] See Appendix D, Proposed Decision and Order.

> the industrial appeals judge fully complied with the requirements of RCW 2.43[9] and WAC 263-12-097.[10]

CABR at 6.[11]

B. Proceedings Before The Superior Court

On July 12, 2005, Mr. Mestrovac filed an appeal of the Board's June 9, 2005, Final Decision and Order. CP at 1-3. He did not seek relief against the Board, stating that

> [t]he order from which the appeal is now taken is incorrect because it denies the Injured Worker benefits to which he is entitled under the Industrial Insurance Act, under RCW 4.41, under RCW 4.42[12], and under the Constitution of the State of Washington.

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[9] RCW 2.43.040(2) & (3) provide: "Fees and expenses—Cost of providing interpreter. (2) In all legal proceedings in which the non-English-speaking person is a party, or is subpoenaed or summoned by the appointing authority or is otherwise compelled by the appointing authority to appear, including criminal proceedings, grand jury proceedings, coroner's inquests, mental health commitment proceedings, and other legal proceedings initiated by agencies of government, the cost of providing the interpreter shall be borne by the governmental body initiating the legal proceedings.
(3) In other legal proceedings, the cost of providing the interpreter shall be borne by the non-English-speaking person unless such person is indigent according to adopted standards of the body. In such a case the cost shall be an administrative cost of the governmental body under the authority of which the legal proceeding is conducted."

[10] WAC 263-12-097 provides in pertinent part: "(1) When an impaired person as defined in chapter 2.42 RCW or a non-English-speaking person as defined in chapter 2.43 RCW is a party or witness in a hearing before the board of industrial insurance appeals, ***the industrial appeals judge may appoint an interpreter to assist the party or witness throughout the proceeding.*** Appointment, qualifications, waiver, compensation, visual recording, and ethical standards of interpreters in adjudicative proceedings are governed by the provisions of chapters 2.42 and 2.43 RCW and General Rule provisions GR 11, GR 11.1, and GR 11.2.

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

[11] See Appendix E, Final Decision and Order.

[12] RCW 4.41 and RCW 4.42 do not exist. It is believed that Mr. Mestrovac was referring to RCW 2.42 and 2.43.

CP at 2.

Mr. Mestrovac did not name the Board as a party or include the Board in the caption. Mr. Mestrovac sent a copy of the notice of appeal and the case schedule order to the Board's executive secretary along with a letter. CP at 780.[13] The letter requested only that the Board transmit the administrative record to superior court by September 13, 2005, the date set in the case schedule order. CP at 780. Neither the letter nor the appeal indicated that Mr. Mestrovac was seeking specific monetary relief against the Board. After complying with its statutory obligation to transmit the administrative record to the superior court, the Board did not appear or participate at the superior court until later, when it learned that the court had entered an order against it.[14]

Mr. Mestrovac submitted a separate trial brief on interpreter services, addressing the level of interpreter services provided at the Board. CP at 512-26. Specifically, Mr. Mestrovac restated his position that the Board should have allowed the interpreter the Board provided to interpret

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[13] RCW 51.52.110 provides that to perfect an appeal from a final order of the Board, the appealing party must serve a copy of the appeal on the Board (as well as on the Department). The statute goes on to provide that the Board is to file with the court and serve on the parties a copy of the administrative record.

[14] RCW 51.52.110 provides that the ***Department*** must enter a notice of appearance, at which point the superior court appeal is "deemed at issue." The statute does not provide anything with respect to the ***Board's*** entering a notice of appearance.

private attorney/client communications between him and his counsel. However, Mr. Mestrovac clearly stated in his brief, under the heading "DLI & Board as Involved Agencies Pay for Interpreters" that "[a]s costs incurred only because of an industrial injury/disease, it is logical and fitting that *DLI should bear interpreter costs* . . . ." CP at 522-23 (emphasis added). Mr. Mestrovac repeated this position in the conclusion of his brief on interpreter services, stating: "Mestrovac's interpreter costs should be paid or reimbursed for all communications related to his industrial insurance claim, *by DLI as a benefit under the Act* . . . ." CP at 525 (emphasis added).

In his brief on constitutional issues, Mr. Mestrovac asserted only that the Board should have addressed his due process challenges to the interpreter services laws being implemented by the Department, which the Board had declined to address. CP at 431-65.

The superior court's Memorandum Decision of March 20, 2006, affirmed the Board's substantive decisions regarding workers' compensation benefits. CP at 667. However, with regard to the interpreter services issue, the court determined that the court had the authority to address procedural due process claims regardless of whether the Board addressed them. CP at 667. On this point, the court ordered that "the limited issue [of interpreter services] be returned to the Board . . .

and the Department . . . to determine the amount of interpreter expenses incurred . . . and the amount of interest . . . ." CP at 667.[15]

In the Judgment for Department, (CP at 532-33), signed March 20, 2006, the court stated that "[t]he Defendant, Department . . . is ordered to determine the amount of interpreter expenses incurred . . . ."[16] In the Findings of Fact and Conclusions of Law, (CP at 527-29), also signed on March 20, 2006, the court found that Mr. Mestrovac had raised the issue of interpreter services and was not permitted to present evidence on the matter. The superior court further found that the IAJ refused to allow Mr. Mestrovac to communicate with his counsel outside of the record.[17] CP at 528.

The superior court then concluded that the Board had jurisdiction over the interpreter services issues and erred in refusing to allow Mr. Mestrovac to provide briefing on the issue before making her ruling. CP at 529. The court further held that the IAJ erred in limiting the presentation of evidence on the issue of interpreter services at hearing "which should have been received and put into colloquy to preserve that evidence for rulings by the Superior Court . . . ."[18] CP at 529.

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[15] See Appendix F, March 20, 2006, Memorandum Decision.

[16] See Appendix G, March 20, 2006, Judgment for Department.

[17] See Appendix H, March 20, 2006, Findings of Fact and Conclusions of Law.

[18] See Appendix H.

On March 30, 2006, the Department requested reconsideration or clarification of the court's ruling. CP at 558-62, CP at 534-57. The Department requested that the court either reconsider and reverse its March 20, 2006, rulings with regard to interpreter services, or in the alternative, clarify its order regarding which agency had the responsibility for paying for interpreter services for Mr. Mestrovac. The Department specifically asked the court to clarify whether the Board or the Department would be required to pay for interpreter services at the Board level or whether the Department would be required to pay at both levels. CP at 555-56.

Mr. Mestrovac joined the Department's request "to eliminate contradiction" and requested that the court "implement [its] ruling in a manner which requires the BIIA and DLI to pay Mr. Mestrovac for the interpreter services he incurred." CP at 571.

On April 17, 2006, the court entered an Order on Reconsideration (CP at 643-44), adopting the following additional conclusion of law:

> *The Board is directed to hold a hearing to determine the amount of all interpreter expenses Mr. Mestrovac incurred* because of the Department's and the Board's failure to provide interpreter services for Mr. Mestrovac to communicate with the Department, his employer, his health care providers, and his lawyer regarding and about his claim and to award him those expenses plus interest at 1% per month from the date they were incurred under RCW

> 51.36.080.[19] The Department shall pay those interpreter expenses incurred and interest thereon until the Board assumed jurisdiction. *The Board shall pay those interpreter expenses incurred and interest thereon after Mr. Mestrovac filed his first notice of appeal to the Board.* [20]

CP at 644 (emphasis added).[21] Thus, for the first time, the court unambiguously directed the Board to conduct further proceedings and imposed monetary relief against the Board. Neither the Department nor Mr. Mestrovac had provided the Board with copies of their pleadings on this issue or advised the Board that this relief was being requested. Prior to this time there had been no mention of the Board being required to pay any monetary amount, nor of having the matter remanded to the Board for an initial determination of the amount owed by itself and the Department.

The Board, therefore, moved to intervene on May 11, 2006. CP at 656-58, CP at 648-55. The Board also moved the court to modify and partially vacate the court's April 17, 2006, order on reconsideration. CP at 671-717.[22]

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[19] RCW 51.36.080 "Payment of fees and medical charges ***by Department***—interest--cost-effective payments methods—audits....The ***Department*** shall pay interest at the rate of 1% per month..."

[20] See Appendix I, April 17, 2006, Order on Reconsideration.

[21] The court also amended two previously entered conclusions of law.

[22] The Board submitted a "corrected motion and memorandum" in order to comply with local court rules. CP at 871-82. Nothing substantive was changed in this motion and memorandum.

Mr. Mestrovac opposed the Board's motion to intervene, CP at 796-811, as well as the Board's motion for modification and partial vacation. CP at 826-39, CP at 912-50. Mr. Mestrovac also requested attorney's fees pursuant to RCW 51.52.030 for his costs in responding to the Board's motions.[23]

On June 15, 2006, the court signed an order denying the Board's motion to intervene, holding that the Board's motion was untimely for the following reasons:

> a. The Board's motion is untimely because it knew since April of 2004 that the issue decided would be raised on appeal and it was served with Mr. Mestrovac's notice of appeal of its decision to the Superior Court and a copy of this Court's Order Setting Case Schedule.
> b. The Board failed to show extraordinary circumstances justifying its delay in moving to intervene.
> c. The Board is not entitled to intervene as a matter of right under CR 24.
> d. There will be no prejudice to the Board from denial of its motion to intervene.[24]

CP at 956-57. The court ordered the Board to pay attorney's fees in the amount of $7,590 to Mr. Mestrovac because he had to respond to the Board's motion to intervene, which was denied, and the Board's motion to

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[23] CP number pending, See Appendix J: Mestrovac's Response to Board's Pleading Entitled "Corrected Board of Industrial Insurance Appeals Motion and Memorandum in Support of its Motion to Partially Modify and Partially Vacate That April 17, 2006 Order" With Request for Attorney Fees and Declaration of Mailing.

[24] See Appendix K, June 15, 2006, Order Denying Board's Motion to Intervene.

partially modify and partially vacate, which the court did not act on. CP at 957.

While the Board's motions had been pending, the parties to the superior court proceedings, as well as the Board, filed notices of appeal to this Court. CP at 659-70 (Department's appeal of orders on interpreter services); CP at 812-25 (Mr. Mestrovac's cross-appeal of orders on merits of amount of worker's compensation benefits); CP at 731-38 (Board's appeal of April 17, 2006, order on reconsideration). Thus, the superior court conditioned entry of the June 15, 2006, order denying intervention on permission by this Court to enter the order pursuant to RAP 7.2, which permission this Court granted, over opposition by the Board.

On August 1, 2006, the superior court entered a second order denying the Board's motion to intervene.[25] This order was entered subsequent to this Court's granting of permission under RAP 7.2 of entry of the June 15, 2006, order denying the Board's intervention. The August 1, 2006, order was identical to the June 15, 2006, order, with the exception of an additional $1,750 in attorney's fees that the superior court awarded based on Mr. Mestrovac's work at the Court of Appeals. This order was

[25] CP pending, See Appendix J: Order Denying Board's Motion to Intervene and Awarding Attorney Fees Entered After Leave Granted by The Court of Appeals Pursuant to RAP 7.2.

based solely on a letter from Mr. Mestrovac requesting these additional fees. CP at 969.

The Board timely appealed the superior court's June 15, 2006, and August 1, 2006,[26] orders to this Court. CP at 958-62.

IV. STANDARD OF REVIEW

The Board'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 County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999) (jurisdiction). The Board's appeal also contests the denial of intervention by the Board. Denial of 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.3d 277, 302, 304, 892 P.2d 1067 (1994); *Kriedler v. Eikenberry*, 111 Wn.2d 828, 831, 766 P.2d 438 (1989).

V. SUMMARY OF THE ARGUMENT

The orders of the superior court require the Board to act in a manner that harms its procedural integrity and creates irreconcilable

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[26] CP number pending, See Appendix J: Board of Industrial Insurance Appeals' Notice of Appeal to Division I of the Court of Appeals.

conflicts of interest. It does so based on an erroneous constitutional conclusion that due process requires provision of interpreter services beyond that provided by the Board. It relies on an erroneous view of the Board's jurisdiction, extending it where there has been no Department order. It imposes a remedy of paying for interpretive services against the Board when statutes providing for judicial review of Board decisions do not authorize such relief. And it made these errors in a case where the Board had not been properly joined or addressed in the pleadings, compounding its error by failing to allow the Board to intervene.

The Board has the authority to bring this appeal because it does not address the substantive workers' compensation dispute between Mestrovac and the Department or defense of the Board's decision on that topic. The Board requests that this court reverse the superior court on the following orders: (1) the court's order that the Board be both fact finder and litigant with regard to the amount of interpreter services fees owed to Mr. Mestrovac by the Board, (2) the court's order requiring the Board to pay interpreter services and interest to Mr. Mestrovac, (3) the court's order requiring the Board to hold a hearing to determine the amount of fees owed by the Department without first requiring the Department to make a determination, and (4) the court's order requiring the Board to pay

attorney's fees to Mr. Mestrovac for attempting to intervene at superior court to address these errors.

VI. ARGUMENT

A. The Board Has Both Standing and Authority To Appeal The Superior Court's Orders

The Board is well aware of *Kaiser Aluminum & Chemical Corp. v. Dept. of Labor & Indus.*, 121 Wn.2d 776, 854 P.2d 611 (1993) which held that the Board has no appealable interest on the issue of the workers' compensation benefits. However, the Board does have standing and authority to appeal the superior court's orders on two grounds. First, under an exception to the general rule in *Kaiser*, the Board has authority to appeal an order which would damage the procedural integrity and decision making processes of the Board. And second, *Kaiser* does not preclude the Board from appealing an order that exercised improper jurisdiction over the Board and treated the Board as a party opponent. Finally, under RAP 3.1 and *Washington v. G.A.H.*, 133 Wn. App. 567, 574, 137 P.3d 66 (2006), the Board has standing to appeal the superior court's orders because those orders impose specific monetary relief against the Board.

1. *Kaiser* Does Not Preclude The Board From Appealing A Superior Court Order To Protect Its Procedural Integrity

In *Kaiser*, the issue was whether the Board could appeal a superior court decision that had reversed the Board's decision regarding the amount of interest due on workers' compensation benefits. 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). The court then recognized two common exceptions to this general rule. *Id.* at 782. The exception that provides the Board authority to appeal in this instance is the first, which 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.*

The Board has an interest in preserving the integrity of its decision-making process. If the superior court's orders stand, the Board's procedural integrity will be damaged in two respects. First, the Board will be required to hold a hearing to determine how much *the Board* owes to Mr. Mestrovac. The Board should not be placed in a position where it must hold a hearing to impose a monetary sanction on itself on behalf of a litigant before it. Second, the court's orders require the Board to determine, as the initial decision maker, how much the Department owes in interpreter fees. This contravenes the Board's well-established role as an *appellate* body to which Department orders are appealed. Because the

court's orders "concerned the board's statutory responsibility to conduct its proceedings . . . [they are] appealable" under *Kaiser*. *Id.* at 782.

2. *Kaiser* Does Not Preclude The Board From Defending Itself On Appeal When A Superior Court Improperly Treats The Board As A Party Opponent And Requires It To Pay Money To A Litigant Appearing Before The Board

In addition, the court's orders that make the Board responsible for interpreter fees and attorney's fees directly impact the Board's budget and are appealable. *Kaiser* does not permit a party to seek monetary relief against the Board and then bar the Board from participating to defend itself. Because Mr. Mestrovac sought and received monetary relief against the Board, the Board can defend itself.

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.

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. Allowing the Board to appeal in the present case does not contravene either of these reasons.

In the present case, the Board is not appealing a reversal of its decision and takes no position on Mr. Mestrovac's challenge of the substantive rulings of the Board and the superior court. However, the superior court decided that Mr. Mestrovac's procedural due process rights included additional interpreter services from the Department and Board. The court appears to have accepted Mr. Mestrovac's broad claims that the Department should have provided broader interpreter services, but then imposed that liability on both the Department and the Board without analyzing why monetary responsibility extends to the Board.

Kaiser did not hold that where a party seeks monetary relief against the Board, the Board has no recourse. The *Kaiser* court was not addressing a circumstance in which a party, in an appeal of a Board decision, requests 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. 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 impose monetary relief against superior courts, or ask the court to set the amount of money

it owes to a party. The *Kaiser* court's analogy to superior courts does not apply under these circumstances.

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. Allowing the Board to appeal here is not inconsistent with that rationale. On the contrary, by turning the Board into a party opponent to Mr. Mestrovac, the superior court's orders have undermined the Board's ability to appear impartial. Far from compromising the Board's impartiality, as was the concern in *Kaiser*, an appeal by the Board in this case is necessary to protect the Board's impartiality and procedural integrity.

The Board's presence in this matter does not violate the rationales set forth by the Supreme Court for disallowing the Board to appeal a superior court decision.

3. The Board Has Both Standing And Authority To Appeal The Superior Court's Orders Regardless Of Whether It Was A Party To The Proceeding At Superior Court

Regardless of whether the Board was a named party, the court treated the Board as a litigant before it by requiring the Board to pay for Mr. Mestrovac's interpreter services fees from the filing of the Notice of

Appeal forward. In *Kaiser*, the Court held that even where the Board is a named party, if it does not have the authority to participate in the proceeding the act of being named as a party will not grant it the authority. 121 Wn.2d at 786. The Supreme Court rejected the Board's argument that being named a party allowed the Board to appeal the superior court's order. *Id.* at 786-87. This illustrates that whether the Board has the authority to appeal is not determined by whether a party names the Board as a party.

In *Washington v. G.A.H.*, 133 Wn. App. 567, 574, 137 P.3d 66 (2006), this Court affirmed that under RAP 3.1, the Department of Social and Health Services (DSHS) could appeal a superior court decision, even though DSHS was not a party at the superior court level. RAP 3.1 states that "[o]nly an aggrieved party may seek review by the appellate court." The Court defined "aggrieved" to mean "a denial of some personal or property right, legal or equitable, or *the imposition upon a party of a burden or obligation."* *G.A.H.,* 133 Wn. App. at 574 (emphasis added) (quoting *Sheets v. Benevolent & Protective Order of Keglers,* 34 Wn.2d 851, 854-55, 210 P.2d 690 (1949). An aggrieved party has been defined as "one whose proprietary, pecuniary, or personal rights are substantially affected." *G.A.H.,* 133 Wn. App. at 575 (quoting *Breda v. B.P.O. Elks Lake City 1800 So-620*, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004)).

The Court also held that

> under some circumstances, persons who were not formal parties to trial court proceedings, but who were aggrieved by orders entered in the course of those proceedings, may appeal as "aggrieved parties."

G.A.H., 133 Wn. App. at 574.

Under the holding in *G.A.H.*, the Board is an aggrieved party entitled to appeal as a matter of right. The superior court in this case held that the Board, without being a named party, was financially responsible for interpreter services fees to a party that appeared before it. Furthermore, the court entered an order requiring the Board to pay thousands of dollars in attorney's fees for attempting to intervene. Under RAP 3.1 and the holding in *G.A.H.*, the Board is an "aggrieved party" entitled to obtain review as a matter of right to protect its institutional and monetary interests.

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

The Board provided interpreter services at its expense during all of the evidentiary hearings in this matter. However, Mr. Mestrovac contended that the Board was required to provide additional interpreter services for privileged communications between him and his attorney. The superior court implicitly rejected Mr. Mestrovac's argument that the

Board was required to provide additional interpreter services based on statute or rule, but the court concluded, without setting forth any analysis or reasoning, that Mr. Mestrovac's due process rights required additional interpreter services. The lack of analysis by the court is problematic when the court extended its remedy to impose liability on the Board. For example, if the court had concluded that a right to additional interpreter services is a constitutional obligation that stems from the state providing workers' compensation, then the obligation would, presumably, lie with the Department and there would be no reason to have imposed liability on the Board. However, if Mr. Mestrovac claims only that due process required more interpreter services during an administrative hearing, then there would be no reason to impose liability on any party and the proper analysis would be to ask whether there was harmful error.

Regardless of Mr. Mestrovac's theory, the court's ruling that due process required more interpreter services was incorrect and should be reversed. If reversed on this issue, the other portions of the superior court's orders challenged by the Board will be moot or similarly erroneous.

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. Indeed, that statute is not applicable to Mr. Mestrovac'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 hearing 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.

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 the injured worker who "initiated the proceeding" by appealing an order of the Department. As such, it cannot be said that RCW 2.43.040 requires the Board to pay the costs of interpreter services to Mr. Mestrovac. 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.

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. Mestrovac also contended 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. Mestrovac 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 here. The superior court found no erroneous application of this rule, and Mr. Mestrovac has shown no error by the Board.

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)[27] Under this circumstance, the Board will pay for interpreter services. WAC 263-12-097(4) Here, the Board affirmed the IAJ's ruling that the rule did not allow the Board to pay for an interpreter beyond the proceeding, as requested by Mr. Mestrovac's broad claims. The Board also upheld the IAJ's ruling that Mr. Mestrovac could not retain at his expense the interpreter provided by the Board, to interpret conversations between him and his attorney during the proceedings.[28]

Mr. Mestrovac has argued that "proceeding" in the Board's rule includes off-the-record communications between him and his attorney and the Board is misapplying its rule. However, the courts will give deference to an agency's interpretation of its own rules. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004); *Hayes v. Yount*, 87 Wn.2d 280, 289, 552 P.2d 1038 (1976). The Board did not err

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[27] 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.

[28] When appointment of an interpreter has been authorized, WAC 263-12-097(1) provides: "Appointment, qualifications, waiver, compensation, visual recording, and ethical standards of interpreters in adjudicative proceedings are governed by the provisions of chapters 2.42 and 2.43 RCW and General Rule provisions GR 11, GR 11.1, and GR 11.2."

in determining that its rule did not require it to provide Mr. Mestrovac interpreter services beyond those provided under the IAJ's rulings.[29] Accordingly, the court's remedy against the Board cannot be premised on these statutes or rules.

4. The Board Did Not Violate Mr. Mestrovac'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. Mestrovac

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 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

[29] At the superior court, Mr. Mestrovac also relied on rules and policies on interpreter services by agencies other than the Board, such as the Department of Social and Health Services. The Board is not bound by the rules or policies of other agencies. In addition, at least in the situation of DSHS, its policy may be the result of a consent decree in a court case to which the Board was not a party. Nor did the superior rulings appear to rely on such theories.

> 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.* at 34.

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. Mestrovac'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 cost of interpreters for non-English speaking injured workers communicating with their attorneys would 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 Mr. Mestrovac's witnesses and experts and hearing preparation activities.

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, investing the Board in the worker's litigation. Thus, the balancing of interests did not require the Board to provide interpreter services to Mr. Mestrovac beyond what it did.

b. To establish a due process violation, Mr. Mestrovac 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, the courts have not found a violation so long as a claimant was able to effectively participate in the proceeding. When applied to the Board's appeal, this shows that there was no error in the proceeding because the court did not remand for further hearings.

For example, 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.* 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 provided or not provided during the actual proceeding. In the case before this Court, the Board provided significant interpreter services for the entire recorded proceeding. Mr. Mestrovac 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. Mestrovac was entitled. He has not shown that the Board's not providing him additional interpreter services prevented him from effectively presenting his case or would likely have changed the outcome. To the extent the superior court's conclusion is based on a conclusion that the hearing violated Mr. Mestrovac's due process rights, it should be reversed.

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

1. The Appropriate Remedy Is A Remand For Further Hearings On The Merits

Even assuming this Court upheld the superior court's ruling that the Board violated Mr. Mestrovac's due process rights by not providing additional interpreter services, imposing monetary responsibility[30] for his expenditures on the Board is not authorized by any law. Instead, the law requires that Mr. Mestrovac show how a violation during the Board

[30] 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.

hearing could have made a difference in the outcome. Then, the appropriate remedy is to remand the matter to the Board for 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. 626 F.2d at 730. To the extent Mr. Mestrovac's arguments are that the hearing required additional interpreters, his remedy must be limited to a remand to address an error. [31]

2. As A Quasi-Judicial Agency, The Board Is Protected From Monetary Sanctions By Quasi-Judicial Immunity

In *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 99, 829 P.2d 746 (1992), the Washington Supreme Court held that

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[31] In contrast, to the extent Mr. Mestrovac's arguments are that the constitution implicitly requires workers' compensation laws to provide the interpreter services he claims he had to buy out of his own pocket, then Mr. Mestrovac has no legal basis for extending that claim for "interpreter benefits" against the Board. The Board, therefore, defers to the Department's brief on this issue, because presumably Mr. Mestrovac's theory that there is a right to interpreter benefits is logically an argument that the Department should be providing those services as a substantive "benefit".

> [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 has long been recognized as a quasi-judicial agency. *Dept. of Labor & Indus. v. Cook,* 44 Wn.2d 671, 677, 269 P.2d 962 (1949); *Kaiser Aluminum*, 121 Wn.2d at 781. 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. Mestrovac's appeal. The Board's decisions – not to reach Mr. Mestrovac's broad constitutional claims against the Department and the decision to limit the interpreter to the hearing and not provide one for use by Mr. Mestrovac to communicate privately with his counsel – were decisions made while carrying out the Board's adjudicative functions. Even if erroneous in making these decisions the Board is protected by quasi-judicial immunity from having monetary relief imposed on it.

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 held liable for making a decision that a superior court disagrees with, the "judicial process" is not preserved

or enhanced. Instead, the process becomes constrained and weighted with fear that fines and even damages can be awarded if the Board or an IAJ makes a decision with which the courts later disagree.

Regardless of whether the remedy imposed on the Board is characterized as damages or as a separate "reimbursement" award, as Mr. Mestrovac and the superior court characterized it, it is nevertheless a monetary award. Quasi-judicial immunity applies to the Board and protects it from any type of monetary award. In *Corrigan v. Tompkins*, 67 Wn. App. 475, 477, 836 P.2d 260 (1992), the court held that actions by a court commissioner and judges were "protected from *monetary claims* by absolute immunity" (emphasis added). Regardless of how the interpreter services fees are characterized, they amount to a monetary award from which the Board is protected by quasi-judicial immunity.

As noted above, this does not deprive Mr. Mestrovac of a remedy for a constitutional violation in the hearing process. Mr. Mestrovac had an adequate remedy at law because the Board's actions were subject to review on appeal. *See Corrigan*, 67 Wn. App. at 477 ("Mr. Corrigan had an adequate remedy at law because each judge's . . . acts were subject to review on appeal . . . ."). Furthermore, quasi-judicial immunity does not preclude actions for non-monetary remedies such as injunctive or

declaratory relief. *See Timmerman v. Brown*, 528 F.2d 811, 812, 814 (4th Cir. 1975).

In *Kaiser Aluminum & Chemical Corp. v. Dept. of Labor & Indus.*, 121 Wn.2d 776, 781, 854 P.2d 611 (1993), 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 seeks a monetary award against it. The very purpose of quasi-judicial immunity is to prevent such an action so that quasi-judicial agencies can carry out their duties without fear of reprisal. For these separate and independent reasons, the superior court's orders awarding fees or imposing the costs of interpretative services against the Board should be reversed.

D. The Court's Order Directing The Board To Hold A Hearing To Determine How Much It And The Department Owed In Interpreter Services Was Improper Because Such A Hearing Would Compromise The Board's Role As An Impartial Tribunal

The superior court's order on reconsideration, directing the Board to determine how much it and the Department owed to Mr. Mestrovac in interpreter services fees, was improper. Even assuming for argument that Mr. Mestrovac can show some right to interpreter services, and assuming that the right includes a right to reimbursement, the court's order that the Board conduct such a hearing compromises its role as an impartial tribunal.

Kaiser stressed "[t]he Board's role as an impartial tribunal in hearing appeals from Department determinations" and noted that to function properly in that role the board "must not have a partisan interest in the outcome of contested cases." 121 Wn.2d at 786. The court's order here puts the Board in exactly that compromising position of having a financial interest in the remand hearing described by the superior court. While the Board's primary position is that the court had no authority to impose monetary relief, it should not be the Board making the determination of how much it owes.

E. The Court's Order Directing The Board To Hold A Hearing To Determine The Amount Of Interpreter Services Fees The Department Owes Is Improper, As The Board Can Act In An Appellate Capacity Only

Even if Mr. Mestrovac abandons his theory that the Board should pay past interpreter service fees, the court's order directing the Board to determine the amount of interpreter service fees owed to Mr. Mestrovac by the Department is improper. The Board's authority is appellate and limited by statute. For the Board to have jurisdiction, there must first be an "order, decision, or award" by the Department from which an appeal may be taken. RCW 51.52.060. With regard to interpreter services, the Department has not issued such order, decision, or award. Until there is

an order issued by the Department that is appealed to the Board, the Board has no authority to act.

The courts have recognized that the Department should be given an opportunity to rule on a matter before the Board gets involved. In *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970), the court held that

> for the Board and the trial court to consider matters not first determined by the department would usurp the prerogatives of the department, the agency vested by statute with original jurisdiction.

The court cannot enlarge the Board's jurisdiction or convert the Board from an appellate tribunal to an initial decision-maker. RCW 51.52.115 states:

> [i]n case of modification or reversal, the superior court shall refer the same to the *department* with an order directing it to proceed in accordance with the findings of the court . . .. (emphasis added).

This statute does not make provision for the superior court to remand to the Board. Rather, it requires remand to the Department for compliance. This is because it is the Department that is responsible for administering the workers' compensation funds—not the Board. In addition, remand to the Department promotes judicial economy by obviating the need for an appeal to the Board in those cases where the

claimant is satisfied with the Department's determination following remand.

Assuming the court here were correct in concluding that the Department should pay for additional interpreter service costs, the proper action would have been to remand the matter to the Department to make a determination of the amount of those fees, subject to Mr. Mestrovac's right to appeal to the Board if necessary.

F. The Court Had No Authority To Award Attorney's Fees To Mr. Mestrovac For Having To Respond To The Board's Motions

Washington follows the American rule concerning attorney fees under which such fees are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). A statute awarding attorney fees against the state must be strictly construed because it constitutes both a waiver of sovereign immunity and an abrogation of the American Rule on attorney fees. *Rettkowski v. Dep't of Ecology*, 76 Wn. App. 384, 389, 885 P.2d 852 (1994), *aff'd in part, rev'd on other grounds in part* 128 Wn.2d 508, 910 P.2d 462 (1996). *See, e.g., Ancheta v. Daly*, 77 Wn.2d 255, 461 P.2d 531 (1969) (refusing payment from state funds of attorney fees incurred in administrative agency proceedings where statute, taken as a whole, did not specifically so provide*); Clark v. Washington*

Horse Racing Comm'n, 106 Wn.2d 84, 720 P.2d 831 (1986) (refusing to award attorney fees against state commission under judicial review provision of former APA where statute did not specifically so provide). Mr. Mestrovac claims that he is entitled to attorney's fees pursuant to RCW 51.52.130. Because this statute does not permit the award of attorney's fees against the Board and because the Board's motion to intervene was improperly denied, the superior court had no authority to award attorney's fees to Mr. Mestrovac.

1. Because The Court Improperly Denied The Board's Request For Intervention, An Award Of Attorney's Fees Was Improper

The Board was entitled to either intervention of right or permissive intervention.

a. The board was entitled to intervention of right

Under *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994) the Board is required to meet four requirements in order to have been entitled to intervention of right. First, the Board must have made timely application for intervention; second, the Board must have an interest which is the subject of the action; third, the Board must be so situated that the disposition will impair or impede the Board's ability to protect its interest; and fourth, the Board must not be adequately represented by the existing parties. *Westerman*, 125 Wn.2d at 303. The Board met all of these requirements, therefore it should have been granted intervention.

(1) The board requested intervention promptly

Among other things, the superior court ruled that since the Board had notice of Mr. Mestrovac's appeal, the Board's motion to intervene was not timely. CP at 956-57. This ruling is in error. That the Board had notice that an appeal had been taken from one of its decisions does not mean that the Board had notice that monetary and other relief might be entered against it. By statute, the Board receives a copy of every appeal taken of its decisions. This alone cannot be enough to put the Board on notice that someone is seeking financial relief against the Board, or seeking relief affecting its jurisdiction or decision making procedures.

Prior to the order on reconsideration, the Board had no direct interest in this appeal of its decision. *Kaiser* made it clear that the Board should, presumptively, have no direct interest in appeals of its decisions. Because no direct relief was requested against it in the notice of appeal, the Board had no reason to become involved in this matter. Even after the briefing was filed, neither party requested direct relief against the Board. It was not until the Department's motion for reconsideration that either party mentioned requiring the Board to pay for interpreter services. Aside from the initial notice of appeal, none of the parties' pleadings was ever

served on the Board. The Board could not have known that it might be held liable in an appeal of its decision for providing interpreter services fees to a party. Its actions were therefore timely.

(2) The Board had a monetary interest and a procedural interest in the orders entered by the superior court

Because Mr. Mestrovac requested that the court require the Board, a non-party, to pay fees relating to interpreter services, the Board has an interest which is the subject of the injured worker's action. *Westerman.* 125 Wn.2d at 303 (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).

Mr. Mestrovac has argued that the Board does not have a monetary interest here because the Board's expenses are funded from the accident fund and medical aid fund. *See* RCW 51.52.030. This argument is incorrect. While the accident fund and the medical aid fund are the ultimate source of the Board's funding, the Board's operating funds are appropriated by the state legislature through the budget process just as most other state agencies.

Under the State Constitution, no funds may be paid from any fund except pursuant to an appropriation. Article VIII, Section 4, Washington State Constitution. This constitutional provision is further refined in

statute. RCW 44.88.130 states that no agency may expend money in excess of the amounts appropriated for that purpose. The legislature appropriates funds for the Board in the budget. *See, e.g.*, Laws of 2006, ch. 372, § 215. The court's orders here directly impact the Board's appropriated budget.[32]

Furthermore, the Board is a separate, neutral tribunal, created to impartially decide issues arising under the workers' compensation statutes. *Kaiser*, 121 Wn.2d at 786. The court's order resulted in a situation in which the Board must actively defend itself against a party that appeared before it. This irreparably harms the Board's ability to appear fair and impartial. Because the order entered by the court damaged its procedural integrity, the Board has a protectable interest.

(3) The Board is so situated that the disposition will impair or impede the Board's ability to protect its interests

The court entered an order requiring the Board to hold a hearing in which it is itself a party and to pay interpreter services fees to a party appearing before it. The Board did not have the chance to litigate Mr.

---

[32] Mr. Mestrovac has argued that interpreter services are a "benefit" under the workers' compensation act. But that theory leads directly to the same conclusion, that the Board is not a proper defendant. The Board has no authority to pay workers' compensation benefits and, therefore, the court has no authority to direct it to do so. Only the Department has authority to pay benefits out of the accident fund and the medical aid fund. RCW 51.04.020(2).

Mestrovac's claim for interpreter services fees. The Board was not permitted to offer evidence with regard to the interpreter services it does provide, or present argument as to why it is not legally required to provide additional interpreter services. Nor was the Board allowed to present its defense of quasi-judicial immunity to the imposition of monetary relief against it.

Finally, by seeking relief against the Board, the quasi-judicial agency rendering the initial decision, Mr. Mestrovac creates a conflict which will compromise 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, 815 P.2d 1380)). The Board's interests have been impaired by not having been allowed to intervene to raise these points.

(4) The Board's interests are not adequately protected by the existing parties

Because the Board is an independent and impartial tribunal, neither of the existing parties can adequately represent its interests. Neither party is involved in this proceeding on behalf of the Board. Neither party requested specific relief against the Board initially. It was

not until the March 20, 2006 order was entered, that the Department requested reconsideration or clarification on whether it, or the Board, was responsible for interpreter services fees during the Board level. Mr. Mestrovac joined in the request for clarification. Neither the Department nor Mr. Mestrovac was protecting the interests of the Board when they asked the court these questions.

b. The court abused its discretion in denying permissive intervention

Even assuming that the Board did not have a right to intervene under CR 24(a), the court abused its discretion in denying the Board permissive intervention under CR 24(b). Given that Mr. Mestrovac had not included the Board as a party in the caption and gave no notice in the appeal that he sought relief against the Board, and in light of *Kaiser*, the Board's status in the case was not clear.[33] It was undisputed that the Board had not been actively participating in the case, and that Mr. Mestrovac and the Department had not served copies of their pleadings on the Board. The superior court had just modified its initial rulings to implicate the Board, so the Board was not asking the court to reconsider

[33] The court's order denying intervention was not based on any assertion that the Board was already a party. In this respect the court's rulings are internally inconsistent. On the one hand, the court apparently agreed that the Board was not already a party and did have to file a motion to intervene in order to participate in the proceedings. On the other hand, the court imposed procedural and monetary relief against the Board, which a court could not normally do to a non-party. CP at 956-957.

an order that the court had long since entered. Under these circumstances, it was an abuse of discretion for the court to deny the Board an opportunity to address the issues.[34]

2. RCW 51.52.130 Does Not Provide The Court Authority To Award Attorney's Fees Against The Board

Mr. Mestrovac relied on RCW 51.52.130 for attorney fees against the Board. This statute provides for the court to award attorney's fees if "the order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation." However, this statute states that "the attorney's fees fixed by the court . . . shall be payable out of the administrative fund of the *department*" (emphasis added). This statute does not authorize the court to award attorney's fees payable by the Board.

In addition, the superior court had no authority to award attorney's fees for work done before this Court. Even if attorney's fees could be awarded for this, it would be this Court, not the superior court that would have to award them. Moreover, the superior court, did not have authority to enter an order that differed from the order that this Court approved for entry pursuant to RAP 7.2.

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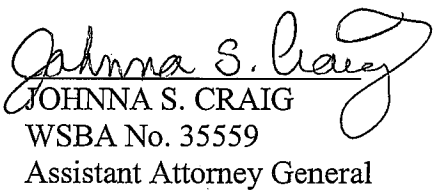
[34] Since the court's denial of intervention was in error, the court's assessing attorney's fees against the Board for Mr. Mestrovac's having to respond to the Board's motions must also be reversed.

VII. CONCLUSION

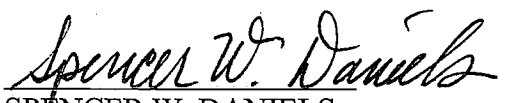
For the reasons set forth above, the Board of Industrial Insurance Appeals respectfully asks this Court to reverse the orders entered by the superior court imposing financial responsibility on the Board and exceeding the jurisdiction and proper decision making role of the Board.

DATED this 26 day of October, 2006.

ROB MCKENNA
Attorney General



JOHNNA S. CRAIG
WSBA No. 35559
Assistant Attorney General



SPENCER W. DANIELS
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Assistant Attorney General
Attorneys for Board of
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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

☒ US Mail Postage Prepaid via Consolidated Mail Service to

ANN PEARL OWEN
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ASSISTANT ATTORNEY GENERAL
900 FOURTH AVENUE, SUITE 2000
SEATTLE, WA 98164-1012

☐ ABC/Legal Messenger to
☐ State Campus Delivery
☐ Hand delivered

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

DATED this 26th day of October, 2006, at Olympia, WA.

KRISTINE HARPER
Legal Assistant

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2006 OCT 27 AM 10: 40

APPENDIX A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ENVER MESTROVAC	DOCKET NOS. 03 17948 & 03 18255
CLAIM NO. Y-654934	INTERLOCUTORY ORDER ESTABLISHING LITIGATION SCHEDULE

These matters came before the undersigned Industrial Appeals Judge as the result of a scheduling conference occurring on January 30, 2004. The following individuals participated in the conference:

APPEARANCES:

Claimant, Enver Mestrovac, by
Ann Pearl Owen, P.S., per
Ann P. Owen

Employer, A America, Inc., by
Washington Employers Workers' Compensation Services, per
Lloyd Brooks, Claims Services Manager

Department of Labor and Industries, by
The Office of the Attorney General, per
Marta Lowy, Assistant

ISSUES PRESENTED

The issue presented for each of these appeals is whether the Department correctly calculated the claimant's time-loss compensation benefit rate, in light of *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001).

Is the Department required to issue orders in the claimant's native language?

DISCOVERY

All discovery permitted by the Rules of Civil Procedure shall be completed by May 13, 2004, including sufficient time for responses and motions.

WITNESS CONFIRMATION

You must send confirmation of the availability of your witnesses to testify as scheduled in writing to the undersigned Industrial Appeals Judge. Your confirmation must state the identity of the witness and the time and place he/she will testify. Note any hearing time reserved but not needed. Witnesses not identified by the date set forth below may not be permitted to testify without permission of the Industrial Appeals Judge and the reserved hearing time may be canceled.

DEPOSITIONS

Depositions for perpetuation of testimony must be filed at the Board office in Olympia by the date set forth below to be considered in the Proposed Decision and Order. Any irregularities in any deposition, including failure of a witness not waiving signature to sign his or her deposition, shall be waived pursuant to CR 32(d)(4) unless a written objection is timely filed.

PRESENTATION OF EVIDENCE

With the conclusion of live testimony and with the publication of depositions, each party shall be deemed rested by the dates set forth below.

At the following dates, times, and locations, the **claimant** will call the following witnesses:

Date/Time	Witnesses	Location
June 10, 2004 9:30 AM to 5:00 PM	Enver Mestrovac Department Claims Manager Vicki Kennedy 2 Unidentified Employer Witnesses Labor Economist 1-2 Unidentified Lay Witnesses	Seattle
To Be Determined	1 Unidentified Medical Witness	By Perpetuation Deposition

Witness Confirmation: April 6, 2004
Deposition Deadline: Depositions for perpetuation of testimony on behalf of the claimant shall be taken no later than June 11, 2004, and shall be filed with the Board not later than July 12, 2004.

At the following dates, times, and locations, the **Department** will call the following witnesses:

Date/Time	Witnesses	Location
June 11, 2004 9:30 AM to 2:30 PM	3 Unidentified Lay Witnesses Claimant's witnesses (Reserved)	Seattle
To Be Determined	1 Unidentified Medical Witness	By Perpetuation Deposition

Witness Confirmation: April 13, 2004
Deposition Deadline: Depositions for perpetuation of testimony on behalf of the Department shall be taken and filed with the Board not later than July 12, 2004.

STATUS CONFERENCE

The undersigned will conduct a telephone conference with the parties on May 24, 2004 at 10:00 A.M., to discuss the status of the case in final preparation for the hearing.

ACCOMMODATION

The parties have not stated a need for any interpretive assistance, identified any special needs, or requested any other accommodation.

It is so **ORDERED**.

Dated this 4th day of February, 2004.

Laura T Bradley

LAURA T. BRADLEY
Industrial Appeals Judge
Board of Industrial Insurance Appeals

AN INTERLOCUTORY REVIEW OF THIS ORDER MAY BE REQUESTED PURSUANT TO WAC 263-12-115(6) BY FILING THE REQUEST FOR REVIEW IN WRITING ACCOMPANIED BY AN AFFIDAVIT IN SUPPORT THEREOF SETTING FORTH THE GROUNDS THEREFOR, INCLUDING THE REASONS FOR THE NECESSITY OF AN IMMEDIATE REVIEW DURING THE COURSE OF CONFERENCE OR HEARING PROCEEDINGS. THE SAME SHALL BE DIRECTED TO THE CHIEF INDUSTRIAL APPEALS JUDGE OF THE BOARD OF INDUSTRIAL INSURANCE APPEALS WITHIN FIVE (5) DAYS OF RECEIPT OF THIS ORDER.

CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

CL1

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Dated at Olympia, Washington 2/9/2004
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: David E. Threedy
DAVID E. THREEDY
Executive Secretary

In re: ENVER MESTROVAC
Docket No. 03 17948 03 18255

APPENDIX B

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

IN RE: ENVER MESTROVAC	)	DOCKET NOS. 03 17948, 03 18255
	)	
CLAIM NO. Y-654934	)	Olympia, Washington
	)	April 26, 2004

LAURA T. BRADLEY, Industrial Appeals Judge
(scheduled 9:30 a.m.) (actual 9:35 a.m.)

APPEARANCES:

Claimant, Enver Mestrovac, by
Ann Pearl Owen, Attorney at Law

Employer, A America, Inc., by
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Marta Lowy, Assistant

* * * * *

BY JUDGE BRADLEY:

This is a continued conference in the matter of Enver Mestrovac, Docket Numbers 03 17948 and 03 18255, regarding Claim Number Y-654934, being held by telephone. I don't think we were able to get seven-day notice, so Ms. Owen, are you willing to waive notice of this conference?

MS. OWEN: Yes.

JUDGE BRADLEY: And Ms. Lowy?

MS. LOWY: Yes.

JUDGE BRADLEY: Okay. The conference is being held originating in Olympia, Washington on April 26, 2004, before Laura Bradley, Industrial Appeals Judge for the

EXHIBIT B

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stopped paying.

JUDGE BRADLEY: My records reflect that he was paid to October 20, 2003. So my litigation order will reflect that. It will be the time-loss from October 20 to the date of the order that is under appeal.

MS. OWEN: So it's entitlement and wage rate, and then there is the interpreter issue.

JUDGE BRADLEY: Right. And that was the other thing I was going to mention.

It is my opinion, upon reflection, that the Board does not have jurisdiction over that issue, for two reasons, the first being that it is a constitutional question, a due process question, over which the Board does not have jurisdiction, we are an appellate court, not a court of general jurisdiction; and the second reason being that I didn't find anything in the record to reflect that the Department issued an order stating that they would not provide interpreter services or orders in the claimant's native language.

MS. OWEN: All right, Your Honor. On the due process issue, I do believe that this court has the obligation to provide due process in its hearings, and the cases in Washington from our Supreme Court are a hundred percent clear on that for over 50 years now.

And secondly, if you are talking about that issue, I wish you would enter an order so that we have an

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appealable order on -- directly, that includes the wording "with no just reason to delay any appeal to the superior court," so that we can get that matter resolved, so we don't have to try this case over and over and over again on the question of the right to interpreters at the Board level.

As to interpreter services at the Department level, whether or not that issue is presently raised is within your jurisdiction, I think by analysis of the orders in question, and so if you are not going to include it in the issues in the scheduling order, I wish you would enter an order that at least gives us the right to appeal that, at least with regard to the Board. I think that the authority on that is crystal clear in Washington.

MS. LOWY: I would like to respond to Ms. Owen.

JUDGE BRADLEY: Before you do, Ms. Lowy -- I will give you an opportunity to respond.

MS. LOWY: Thank you.

JUDGE BRADLEY: I am not going to include the issues about the Department providing interpreter services or providing orders in the native language. I will state in my litigation order that I do not believe the Board has jurisdiction over those issues. And Ms. Owen is certainly welcome to take any action based on that litigation order that is appropriate and that she feels is necessary.

With regard to due process at the Board, I will be providing an interpreter for all proceedings that take place before the Board, at which Mr. Mestrovac is present.

And so, Ms. Owen, included in my litigation order will be a requirement that you confirm when Mr. Mestrovac is going to be present, if he can be present for both days, so that we can have an interpreter available for the Board proceedings.

MS. OWEN: He will attend all the hearings, Your Honor.

JUDGE BRADLEY: Okay. The interpreter will not be available to you to communicate to Mr. Mestrovac outside of the formal proceedings, and so if you need to have someone assist you in communicating with him other than while are on the record, you will need to make arrangements for that.

MS. OWEN: So you are saying that if you hire an interpreter, you will instruct him not to interpret for us, not that we can't hire him for those in-between time periods where he is not interpreting for the Board?

JUDGE BRADLEY: Correct. I will instruct him not to --

MS. OWEN: So it's $120 an hour for a guy that is going to get about a 12-hour wage out of this claim, Your Honor? If I can respectfully point out that that is imposing a punitive sanction on my client for his being a non-English-speaking person, which is entirely

unconstitutional, it violates his due process as well as creates a suspect classification, which is subject to heightened scrutiny test under the equal process requirement, and I think that perhaps you would like to receive some briefing from me on that before you actually formalize that order?

JUDGE BRADLEY: You may file an interlocutory appeal from my interlocutory order, Ms. Owen, and provide briefing to the judge who will review it. The reason I am saying that I will instruct the interpreter not to interpret during breaks and when we are not on the record is because I believe it compromises the objectivity of the interpreter. The interpreters are bound to rules of ethical conduct that prevent them from being interested in the outcome in any way, and I believe that by letting him assist you in communicating with your client, there is a very good chance that we might be asking the interpreter to violate the code of conduct by which he is found.

MS. OWEN: Well, Your Honor, the code of conduct for interpreters is really clear, and in superior court as well as other courts they frequently interpret for both the court and for the parties. This is not a problem because they are bound to confidentiality and they are sworn to translate only what is said. They don't take the side of an advocate in any event. I'm letting you

know that I have had some experience with this and it frequently occurs that a court-hired interpreter will also interpret for the parties during the case.

JUDGE BRADLEY: I understand your position, and my ruling will stand, and it will be included in my interlocutory order establishing the litigation schedule.

Ms. Lowy, was there something you would like to add?

MS. LOWY: Yes. I think Your Honor is correct, under the Significant Decision Ann Boyle, a matter that has not been reviewed by the Department is not before the Board. And I concur in your opinion that there is no order from the Department denying Mr. Mestrovac interpreter services for communicating with his attorney. And therefore the Board indeed does not have subject-matter jurisdiction.

MS. OWEN: Your Honor, I do want to put you on notice that if my client is required to hire an interpreter to interpret for him so that he can have a meaningful participation in his hearing, we will request the assessment of those terms as costs of the hearing as he is entitled to under RCW 2.43. That means the Board will be paying instead of $60 an hour for the whole hearing, $120 an hour for the whole hearing. It seems like a real waste of funds.

JUDGE BRADLEY: Ms. Owen, you are entitled to seek whatever remedies you think are appropriate. My ruling does stand. I will be issuing my amended interlocutory order, of which, again, the parties may seek interlocutory

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review according to the Board rules.

Anything further at this time, Ms. Owen?

MS. OWEN: Nothing that I can be of help to the Court on, I believe, Your Honor.

JUDGE BRADLEY: Okay, thank you. Ms. Lowy?

MS. LOWY: As I was reviewing this file it occurred to me that there isn't really a wage-setting order, so the orders on appeal do not set the wage rate, the determinative wage rate. It's sort of -- time-loss was set for a period of two weeks, but it's not really a wage-setting order. I just wanted to bring it to your attention, because I was relying on the fact that this matter was being continued, I didn't really prepare for this hearing today, other than to look at my calendar and stuff like that, but I wanted to point it out because it may become an issue later on.

MS. OWEN: Your Honor, if I might: the failure to provide my client with any orders in his native language means that the initial appeal, where we appealed all prior orders of the Department, are all timely. If you look at the initial notice of appeal, it appeals the order dated October 10, 2003, and all prior orders. So I don't know how that can fail to include a wage-setting order unless the Department never made one. It must have made one to be able to start payments.

JUDGE BRADLEY: Okay, I am going to interject here.

APPENDIX C

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ENVER MESTROVAC	DOCKET NOS. 03 17948 & 03 18255
CLAIM NO. Y-654934	AMENDED INTERLOCUTORY ORDER ESTABLISHING LITIGATION SCHEDULE

These matters came before the undersigned Industrial Appeals Judge as the result of a scheduling conferences occurring on January 30, 2004 and April 26, 2004. The following individuals participated in the conferences, with the exception that no representative appeared on behalf of the employer during the April 26, 2004 conference:

APPEARANCES:

Claimant, Enver Mestrovac, by
Ann Pearl Owen, P.S., per
Ann P. Owen

Employer, A America, Inc., by
Washington Employers Workers' Compensation Services, per
Lloyd Brooks, Claims Services Manager

Department of Labor and Industries, by
The Office of the Attorney General, per
Marta Lowy, Assistant

ISSUES PRESENTED

1. Did the Department correctly calculate the claimant's time loss compensation benefits amount?

2. Was the claimant entitled to time loss compensation benefits from October 20, 2003 through October 24, 2003?

3. Did the Department correctly calculate the claimant's time-loss compensation benefit rate, in light of *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001).

The undersigned has determined that the Board does not have jurisdiction over the claimant's right to translation services at Department expense or the claimant's right to have orders issued in his native language because those issues represent due process/constitutional claims over which the Board does not have jurisdiction. In addition, the Department did not issue an order expressly denying those services. As an appellate body, the Board's jurisdiction is limited to reviewing the correctness of Department orders. The undersigned's reasons for this ruling were explained during a reported telephone conference on April 26, 2004.

DISCOVERY

All discovery permitted by the Rules of Civil Procedure shall be completed by May 13, 2004, including sufficient time for responses and motions.

WITNESS CONFIRMATION

You must send confirmation of the availability of your witnesses to testify as scheduled in writing to the undersigned Industrial Appeals Judge. Your confirmation must state the identity of the witness and the time and place he/she will testify. Note any hearing time reserved but not needed. Witnesses not identified by the date set forth below may not be permitted to testify without permission of the Industrial Appeals Judge and the reserved hearing time may be canceled.

DEPOSITIONS

Depositions for perpetuation of testimony must be filed at the Board office in Olympia by the date set forth below to be considered in the Proposed Decision and Order. Any irregularities in any deposition, including failure of a witness not waiving signature to sign his or her deposition, shall be waived pursuant to CR 32(d)(4) unless a written objection is timely filed.

PRESENTATION OF EVIDENCE

With the conclusion of live testimony and with the publication of depositions, each party shall be deemed rested by the dates set forth below.

At the following dates, times, and locations, the **claimant** will call the following witnesses:

Date/Time	Witnesses	Location
June 25, 2004 at 9:30 AM to 5:00 PM	Enver Mestrovac Department Claims Manager Vicki Kennedy 2 Unidentified Employer Witnesses Labor Economist 1-2 Unidentified Lay Witnesses	Seattle
To Be Determined	1 Unidentified Medical Witness	By Perpetuation Deposition

Witness Confirmation: April 6, 2004

Deposition Deadline: Depositions for perpetuation of testimony on behalf of the claimant shall be taken no later than June 25, 2004, and shall be filed with the Board not later than July 30, 2004.

At the following dates, times, and locations, the **Department** will call the following witnesses:

Date/Time	Witnesses	Location
July 1, 2004 1 PM to 5 PM	3 Unidentified Lay Witnesses Claimant's witnesses (Reserved)	Seattle
To Be Determined	1 Unidentified Medical Witness	By Perpetuation Deposition

Witness Confirmation: April 13, 2004

Deposition Deadline: Depositions for perpetuation of testimony on behalf of the Department shall be taken and filed with the Board not later than July 30, 2004.

STATUS CONFERENCE

The undersigned will conduct a telephone conference with the parties on May 24, 2004 at 10:00 A.M., to discuss the status of the case in final preparation for the hearing.

ACCOMMODATION

The claimant's representative has indicated a need for an interpreter in the Bosnian/Serbo-Croatian language to assist the claimant in understanding the proceedings. The Board will provide an appropriate interpreter to interpret all Board proceedings. The interpreter provided by the Board will not be permitted to assist the claimant and his representative in communicating during breaks or off the record unless those discussions involve the undersigned and all parties present. The Board will not provide an interpreter for any of the perpetuation depositions arranged by either party. The parties have not stated any other needs for interpretive assistance, identified any special needs, or requested any other accommodation.

It is so **ORDERED**.

Dated this 26th day of April, 2004.

Laura T Bradley

LAURA T. BRADLEY
Industrial Appeals Judge
Board of Industrial Insurance Appeals

AN INTERLOCUTORY REVIEW OF THIS ORDER MAY BE REQUESTED PURSUANT TO WAC 263-12-115(6) BY FILING THE REQUEST FOR REVIEW IN WRITING ACCOMPANIED BY AN AFFIDAVIT IN SUPPORT THEREOF SETTING FORTH THE GROUNDS THEREFOR, INCLUDING THE REASONS FOR THE NECESSITY OF AN IMMEDIATE REVIEW DURING THE COURSE OF CONFERENCE OR HEARING PROCEEDINGS. THE SAME SHALL BE DIRECTED TO THE CHIEF INDUSTRIAL APPEALS JUDGE OF THE BOARD OF INDUSTRIAL INSURANCE APPEALS WITHIN FIVE (5) DAYS OF RECEIPT OF THIS ORDER.

ERTIFICATE OF SERVICE BY M. L

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

CL1

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Dated at Olympia, Washington 4/27/2004
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: David E. Threedy
DAVID E. THREEDY
Executive Secretary

In re: ENVER MESTROVAC
Docket No. 03 17948 03 18255

APPENDIX D

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ENVER MESTROVAC	)	DOCKET NOS. 04 18245
	)	
CLAIM NO. Y-654934	)	PROPOSED DECISION AND ORDER

INDUSTRIAL APPEALS JUDGE: Laura T. Bradley

APPEARANCES:

Claimant, Enver Mestrovac, by
Ann Pearl Owen, P.S., per
Ann P. Owen

Employer, A America, Inc., by
Washington Employers Group Retro, per
Lloyd Brooks, Lay Representative

Department of Labor and Industries, by
The Office of the Attorney General, per
Marta Lowy, Assistant

The claimant, Enver Mestrovac, filed an appeal with the Department of Labor and Industries on November 13, 2003, from an order of the Department of Labor and Industries dated November 7, 2003. In this order, the Department paid the claimant time-loss compensation benefits for the period of October 21, 2003 through November 3, 2003. The time-loss compensation rate for that period was set at $968.55 per month. The claimant's appeal was forwarded to the Board of Industrial Insurance Appeals on July 19, 2004. The Department order is **REVERSED AND REMANDED**.

ISSUES

1. Did the Department correctly calculate Mr. Mestrovac's time-loss compensation benefits amount?

2. Did the Department correctly calculate Mr. Mestrovac's monthly wages in light of *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001)?

Early in the proceedings, Mr. Mestrovac raised additional issues relating to the Department's obligation to issue orders in the claimant's native language and to provide language translation

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services at the Department's expense. As noted in the Interlocutory Order Establishing Litigation Schedule issued on September 29, 2004, the undersigned determined that the Board lacked jurisdiction over these issues as they related to due process/constitutional claims. In addition, the undersigned noted that the Department had not issued an order expressly denying interpreter services or the issuance of orders in the claimant's native language. The undersigned's decision, as expressed in the litigation order and in the transcript of the April 26, 2004 telephone conference, held under Docket Nos. 03 17948 & 03 18255, is incorporated by reference herein.

PRELIMINARY MATTERS

The issues presented by this appeal were previously litigated before the undersigned under Docket Nos. 03 17948 & 03 18255. The undersigned issued a Proposed Decision and Order for those matters on November 22, 2004. During an unreported telephone conference on February 18, 2004, the parties stipulated that the record for Docket Nos. 03 17948 & 03 18255 contains all of the information necessary for the undersigned to resolve the issues presented by this appeal. Therefore, the record established under Docket Nos. 03 17948 & 03 18255 is the record upon which this Proposed Decision and Order is based and is incorporated by reference herein.

With regard to the issues relating to the Department's obligation to provide interpreter services to the claimant and to issue orders in his native language, the parties and the undersigned recognized that the undersigned's rulings in this matter would have been identical to the rulings issued in Docket Nos. 03 17948 & 03 18255. The claimant asserts his right to preserve those matters for appeal to the Board and to the courts and has not waived his right to do so.

PROCEDURAL AND EVIDENTIARY MATTERS

Under Docket Nos. 03 17948 & 03 18255, a hearing was held on August 6, 2004, in Seattle, Washington, wherein Robert W. Moss, Robert E. Rendon, Cindy Hartzer, and Enver Mestrovac testified on behalf of the claimant. During the August 6, 2004 hearing, the court reporter suffered

an equipment malfunction resulting in a portion of the testimony of Robert E. Rendon not being included in the transcript. The undersigned notified the parties of the problem with the transcript. The portion missing from the transcript was brief and the parties were able to reach a stipulation as to the content of the testimony missing from the transcript. The parties' stipulation was marked as Board Exhibit No. 46 and was admitted.[1]

During the August 6, 2004 hearing, the employer's representative made an objection recorded on page 217, line 9 upon which the undersigned did not rule. The objection is sustained and the testimony and comments contained on page 217, lines 1 through 12 are stricken.

A hearing was held on August 13, 2004, in Seattle, Washington, under Docket Nos. 03 17948 & 03 18255. Prior to taking testimony on that day, the parties stipulated to certain facts presented in a letter from the director of human resources at A America, Inc. (A America). The parties stipulated that: (1) the monthly life insurance premium for Mr. Mestrovac's coverage was $1.80; (2) the monthly accidental death and disability insurance premium was $0.32; (3) the monthly premium for short-term disability was $3.60; (4) the deposit for profit sharing for the plan year of May 1, 2002 to April 30, 2003, was $385.32, in which Mr. Mestrovac was 20 percent vested; and, (5) the deposit for the 401(k) plan for the plan year of May 1, 2002 to April 30, 2003, was $244.20, in which Mr. Mestrovac was 100 percent vested.

During the August 13, 2004 hearing, an attempt was made to continue with Mr. Mestrovac's testimony. After answering several questions, it became apparent that the interpreter and Mr. Mestrovac were not communicating effectively and that Mr. Mestrovac did not fully understand the questions being asked of him. In order to ensure a full, fair, and accurate record, the undersigned continued the hearing to a future date when a more competent interpreter could be

[1] The undersigned notes that the heading for the parties' stipulation included a third docket number, the docket number for this appeal, which was not consolidated with the other docket numbers at the time.

available. The testimony and comments contained in page 24, line 8 through page 27, line 23 and page 30, line 10 through page 38, line 4 of the August 13, 2004 hearing transcript are stricken.

A hearing was held on September 2, 2004, in Seattle, Washington, under Docket Nos. 03 17948 & 03 18255, wherein Enver Mestrovac testified.

EVIDENCE

The undersigned considered testimony from the following witnesses in rendering this Proposed Decision and Order:

1) Robert W. Moss, a labor economist, had been working in the field of labor economics for approximately forty years. His education and experience credentials are set forth in Board Exhibit No. 1. The claimant's representative asked Mr. Moss to evaluate Mr. Mestrovac's earning capacity as of the date of his industrial injury. Mr. Moss determined that at the time of Mr. Mestrovac's industrial injury, Mr. Mestrovac was earning a base wage of $9 per hour. Mr. Moss reviewed Mr. Mestrovac's pay stubs covering a period of approximately one year prior to the date of injury. The pay stubs indicated the hours worked each day and Mr. Mestrovac's total compensation divided into regular pay, overtime pay, and various deductions. On the date of injury, Mr. Mestrovac's overtime rate was $13.50 per hour. In determining the average number of the overtime hours Mr. Mestrovac worked per pay period, Mr. Moss averaged the number of overtime hours each pay period. The average number of overtime hours was 4.81 hours every two weeks or approximately 2 1/2 hours of overtime each week. As a regular employee of A America, Mr. Mestrovac received vacation, holiday, and sick leave pay. Mr. Moss was not able to determine whether the claimant would have been paid double wages if he worked on a holiday.

The employer was required by state and federal laws to make contributions to the industrial insurance fund. Mr. Moss was not able to determine the specific amount of the premium attributable to coverage for Mr. Mestrovac. Mr. Moss classified industrial insurance as a core

benefit because it was designed to provide economic support for the claimant and his family in case of injury.

The employer also contributed to Mr. Mestrovac's social security account. Mr. Moss described the social security contribution as a core benefit because, if Mr. Mestrovac became eligible through retirement, disability, or death, it would provide basic income support to the claimant and/or his family. The employer's contribution to the social security account was 6.2 percent of the claimant's gross wages. That amount was in addition to the 6.2 percent deducted from the claimant's gross wages.

The employer paid a premium for unemployment insurance. The specific amount of that premium attributable to coverage for Mr. Mestrovac would be determined based on the employer's experience rating. Mr. Moss opined that unemployment insurance is a core benefit because it provides basic income support to a worker and family during periods of involuntary unemployment.

The final government-mandated benefit Mr. Moss discussed was Medicare, which is a health insurance program for retired persons over the age of 65 and others who are totally disabled. The employer's contribution for Medicare was 1.45 percent of Mr. Mestrovac's gross wages. That amount was in addition to the 1.45 percent deducted from the claimant's gross wages. Mr. Moss opined that Medicare was a core benefit because it was a health insurance benefit.

The employer provided a health insurance plan for which the employer paid 100 percent of the premium for full-time employees. Mr. Moss estimated the cost of that premium to be approximately $253.68 per month as of May 2002, based on information indicating the cost for an employee to include his spouse in the health insurance benefit. Mr. Moss indicated that healthcare insurance would be a core benefit under the *Cockle* decision. The employer also provided short-term disability insurance and life insurance. Mr. Moss characterized short-term disability insurance as a core benefit because it is designed to preserve levels of earnings for a period of up

to six months. Mr. Moss estimated that the cost of coverage would be approximately 1 percent of gross wages. With regard to life insurance, Mr. Moss estimated that the cost to the employer would be less than $100 a year for the claimant. Mr. Moss believed that life insurance was a core benefit because it was designed to provide income to dependents of a deceased worker.

The employer also provided a 401(k) plan and a profit-sharing plan. The employer contributed 3 percent to Mr. Mestrovac's 401(k) plan regardless of whether Mr. Mestrovac made any contribution. Mr. Moss felt that the contribution to the 401(k) plan was a core benefit because it was designed to directly benefit the worker and/or his family and was part of the employer's total cost for employing the claimant. Mr. Moss also indicated that the contribution would be part of a claimant's calculation in determining what proportion of his income should be saved for retirement. The 3 percent contributions started after Mr. Mestrovac had completed twelve months of employment. Although the employer had a profit-sharing plan, Mr. Moss was not familiar with the specifics of the plan or the amount of benefit to Mr. Mestrovac. Mr. Moss opined that the profit-sharing plan also was a core benefit.

Mr. Moss explained that workers generally receive a compensation package that consists of cash in hand as well as deferred compensation. The deferred compensation typically would not be accessed until the employee reached retirement or some other conditions arose making the worker eligible for those payments. Mr. Moss opined that the deferred compensation contributions are similar to the money that a worker saves in preparation for retirement. He further explained that the core survival needs of the worker and his family are met through those deferred compensation benefits at some point in time.

Mr. Moss agreed that a worker would not be receiving industrial insurance benefits on the date of injury because those benefits are not available until after an injury occurs. Similarly, in order to receive unemployment compensation, the worker necessarily would not be working.

Therefore, that would not be a benefit the worker would be receiving at the time an industrial injury occurred.

Mr. Moss described the value of deferred compensation benefits as the value of future financial security for the family, which most people considered to be important. Mr. Moss believed that a worker gains a benefit every day from knowing that he and his family unit are more secure because a package of benefits is available in the event he is no longer working. The benefit the worker received was coverage. In Mr. Moss's opinion, workers receive a benefit in the form of satisfaction that they have planned for the future, because workers value those types of insurance benefits. He described an internal calculation, perhaps unconscious, that any time a worker makes a discretionary purchase, the worker does so on a rational basis deciding that he has adequately provided for future eventualities and therefore can spend the money on the purchase contemplated at the time. Mr. Moss indicated that fringe benefits would include the ability to join a credit union and the opportunity to purchase a Costco membership.

2) Robert E. Rendon, at the time of the hearing, was employed as an adjudicator in training III with the Department of Labor and Industries for the state of Washington. He had been in that position for three years. Prior to that, he worked as a customer service representative. Mr. Rendon received information from A America, in response to his October 20, 2003 request, indicating that Mr. Mestrovac was paid $9 an hour, worked 40 hours a week, and had a healthcare benefit of $244.56 per month. He did not know if that amount included dental insurance. A America also provided Mr. Rendon with information from 2002 to 2003, indicating Mr. Mestrovac's regular hours, overtime hours, and sick leave. Mr. Rendon's calculation indicated that the claimant worked, on average, 10.39 overtime hours per month. He multiplied that number by $9 per hour to determine part of Mr. Mestrovac's monthly gross wages. Mr. Rendon did not receive any information from A America as to the premium rates or contributions it made for the following

benefits: social security, Medicare, unemployment insurance, and industrial insurance. Mr. Rendon did not seek to determine what the employer's industrial insurance rate for that time period was. Mr. Rendon did not seek any information from the Department of Employment Security as to the unemployment insurance premium paid by A America. Mr. Rendon did not receive any information from A America about the life insurance premium, short-term disability insurance premium, 401(k) plan contributions, or profit-sharing plan contributions it paid on behalf of Mr. Mestrovac in 2003.

Mr. Rendon was not provided any information about the employer's paid holidays. Mr. Rendon did not have any information about the employer's paid sick leave policy, although he did ask if Mr. Mestrovac had used sick leave for his industrial injury and whether the employer had a buyback policy. Mr. Mestrovac had not used any paid sick leave for his injury.

The information that Mr. Rendon used in his calculations included the hourly wage, bonus, overtime, and healthcare benefits. The bonus was $1,079.30 for 2002 to 2003. Mr. Rendon was aware that healthcare benefits had terminated on July 25, 2003.

3) Cindy Hartzer, a human resource manager for A America, was responsible for processing the payroll and managing the employee benefits, including industrial insurance and unemployment. At the time of the hearing, A America had approximately 230 employees working in four different categories which included: office staff, management, sales staff, and warehouse staff. Ms. Hartzer estimated that there were probably 25 employees in the office staff category. She believed that there were approximately 25 employees in the management category. Approximately 40 employees worked on the sales staff. Approximately 100 employees worked in the warehouse. Ms. Hartzer recalled that A America's policy was to pay 1 1/2 times the normal wage for any hours worked over forty hours in a seven-day period.

A America had eight paid holidays, which were days the employees did not work, but received eight hours of pay. Employees also earned eighty hours of paid vacation per year.

Vacation pay was cashed out when an employee leaves the company. Mr. Mestrovac was paid for his unused vacation time when he left employment with the employer. A America also had a paid sick leave benefit. Employees earned 48 hours of sick leave per year and were permitted to accumulate up to 520 hours. Employees were not able to cash out their unused sick leave when they left employment with A America.

A America's medical coverage program included general medical coverage with a deductible and co-pay. The plan included dental care and prescriptions, but not vision care. In May 2003, A America had paid $176.45 as the premium for Mr. Mestrovac's medical coverage. The employer paid an additional $30.42 for the claimant's prescription coverage and $37.69 for dental coverage. The total monthly premium for healthcare coverage was $244.56. The cost of continuing coverage after separation from employment would have been approximately 2 percent above the $244.56. July 31, 2003, was the last day that Mr. Mestrovac was covered by the employer's healthcare insurance plan.

Ms. Hartzer noted that as of May 6, 2003, Mr. Mestrovac was qualified to participate in the employer's 401(k) plan. In 2003, the plan year was from May 1 through December 31, because the company was converting from a fiscal year to a calendar year. Mr. Mestrovac was not eligible for any profit-sharing in 2003, because he was not employed as of December 31, 2003. Ms. Hartzer explained that the contribution to the 401(k) plan made by the employer was 3 percent of gross wages, which would have included regular hours and overtime hours. As of May 6, 2003, Mr. Mestrovac was 20 percent vested in the 401(k) plan. After the claimant's employment with the employer ended, A America no longer made any contribution to employee benefits on his behalf.

As of May 6, 2003, the employer had life insurance benefits for employees, but Ms. Hartzer was not able to state the specific premium rate. In addition, A America offered a short-term disability insurance benefit. Again, Ms. Hartzer was not able to provide the premium rate. The final

paycheck to the claimant issued for actual hours worked was issued on June 27, 2003. The final payment issued on August 2, 2003, was for other accumulated benefits.

As of May 6, 2003, Mr. Mestrovac was participating in a flexible spending benefit plan whereby pre-tax dollars were placed into an account from which Mr. Mestrovac could draw to be reimbursed for out-of-pocket medical expenses. The cost to the employer for administering the flexible spending account was $5.25 per month per employee. As part of the life insurance policy, Mr. Mestrovac was eligible for travel assistance that would have provided referrals to medical providers when he was traveling in unfamiliar areas. A America employees were allowed to purchase furniture, using an employee discount, which allowed them to pay 15 percent above cost.

4) Enver Mestrovac, the claimant, lived in Seattle, Washington, with his mother, father, and brother at the time of the hearing and at the time he was injured. At the time he was injured, the claimant's brother was seventeen years old and was a full-time student. Also at that time, Mr. Mestrovac's father and mother did not have any income other than social security disability. Mr. Mestrovac was born on April 24, 1978, in Bosnia. In August 2001, he moved to the United States with his family, when his father was relocated as a political refugee.

He became employed with A America full time within three months of arriving in the United States. His duties at A America included unloading containers filled with furniture. The furniture was in boxes weighing from 20 to 130 kilograms. On May 6, 2003, Mr. Mestrovac was unloading a package weighing 119 kilograms when he lost his balance and slipped. He started to fall and held the package up with his right hand to prevent it from falling on top of him. He reported the injury to his supervisor. The supervisor sent him to see the doctor who advised him to put ice on it. The doctor also gave the claimant work restrictions. Mr. Mestrovac immediately returned to work and was assigned several different light-duty jobs.

Mr. Mestrovac recalled receiving a $300 cash Christmas bonus in 2002. While he was employed at A America, Mr. Mestrovac purchased a table and an entertainment center with his employee discount. In addition, he was given a damaged bed. The items Mr. Mestrovac purchased from A America were both for his family and for his friends.

Mr. Mestrovac recalled that on May 6, 2003, he was working eight hours a day, five days a week and was paid $9 per hour. Mr. Mestrovac was not married on May 6, 2003. He did not have any children as of that date.

DISCUSSION

In this appeal, the undersigned is asked to determine Mr. Mestrovac's monthly wage at the time of injury, including what benefits should be considered wages for the purposes of calculating the time-loss compensation rate. Mr. Mestrovac presented evidence regarding various benefits including: overtime hours, holiday pay, vacation leave, sick leave, health insurance, bonuses, flexible spending account, retirement account, life insurance, disability insurance, social security contributions, Medicare contributions, unemployment insurance contributions, industrial insurance contributions, profit-sharing, employee discounts, and other fringe benefits.

Pursuant to RCW 51.08.178, the claimant's monthly wages are determined by multiplying his daily wage by 22, based on the fact that he was normally employed five days a week. RCW 51.08.178(e). By statute, the term wages includes the "reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire . . . ." RCW 51.08.178.

The claimant's daily wage is determined by multiplying the claimant's hourly rate by the number of hours normally worked in a day. The overtime hours a claimant worked are accounted for by including them in the average number of hours worked in a day. In calculating the time-loss compensation rate, the "[d]epartment must take into account the overtime hours [the claimant]

worked, and **not** the overtime **pay** he received." *In re Park Johnson*, Dckt No. 99 13440 (September 14, 2004).

With regard to bonuses, if the claimant received a bonus from the employer as part of the contract of hire within the twelve months immediately preceding the injury, the average monthly value of the bonus is to be included in determining the claimant's monthly wages. RCW 51.08.178(3). With regard to vacation time for which a claimant receives payment in lieu of time off, the vacation hours should be included as hours normally worked, but the vacation pay should not be included in wage loss calculations. *See Fred Meyer, Inc. v. Shearer,* 102 Wn. App. 336, 340 (2000) and *Johnson*, at 3. The Board has determined, however, that to the extent that vacation pay may be accrued and carried over, and to the extent that it is paid upon termination of employment, vacation pay represents additional income available to the claimant that may be included in calculating the claimant's monthly wages. *In re Vesna Erakovic*, Dckt. No. 02 16363 (January 28, 2004).

The evidence presented in this case also raised the question of what benefits should be determined to be consideration of a nature like board, housing, or fuel under the *Cockle* case. In *Cockle*, the court found that healthcare benefits should be included because they are "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury . . . critical to protecting workers' basic health and survival." *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801, 822-23 (2001). In determining what benefits should be included under the *Cockle* analysis, it is necessary to identify those benefits that were available to the worker at the time of injury. *Gallo v. Department of Labor & Indus.*, 119 Wn. App. 49 (2003). In addition, any benefits included in the time-loss compensation rate must be critical to basic health and survival. *Gallo.*

The courts have determined that certain benefits should not be included in monthly wages for the purposes of calculating the time-loss compensation rate. For example, the *Gallo* court determined that pension benefits should not be included because they are not immediately available to the claimant unless he was eligible to receive them at the time of injury. The Board has determined that employer-provided contributions for life insurance benefits do not constitute wages within the meaning of RCW 51.08.178. *In re Douglas Jackson*, BIIA Dec., 99 21831 (2001). With regard to holiday pay, holiday pay should be included in monthly wages to the extent that it represents additional wages to employees under the contract. *Erakovic*. Another benefit that may affect the calculation of monthly wages is profit-sharing to the extent that it is paid in cash and is not part of a qualified retirement plan. *In re Scott Waugaman*, Dckt. No. 01 16694 (October 10, 2002).

The evidence presented established that Mr. Mestrovac normally worked eight hours a day, five days a week, for $9 per hour. His base monthly wage was $1,584. The claimant worked on average 10.39 overtime hours per month adding $93.51 to his base monthly wage. According to Mr. Rendon, Mr. Mestrovac received $1,079.30 in bonuses during the twelve months preceding his industrial injury. By including bonuses, Mr. Mestrovac's gross monthly wage increases by $89.94. The cost of the healthcare benefits, $244.56 per month must also be included. The claimant is entitled to receive cash payment for unused vacation leave when his employment with A America ended. The claimant accrued vacation leave at the rate of approximately 6.6 hours per pay period, increasing his monthly wage by $59.40 per month. In addition, under the employer's contract with the employees, employees received eight paid holidays. If employees worked on a holiday, they received pay for the hours worked in addition to the holiday pay. Including the holiday pay would increase Mr. Mestrovac's gross monthly wage by $48. With the inclusion of all those benefits, Mr. Mestrovac's gross monthly wage was $2,119.41.

Although profit-sharing proceeds can be included in gross monthly wages to the extent they are paid in cash, the evidence presented in this case demonstrated that the profit-sharing plan was part of a qualified retirement plan and therefore should not be included in gross monthly wages. With regard to the other benefits Mr. Mestrovac argued they should be included in calculating his gross monthly wage, the overriding premise is that the benefits must have been available and payable to Mr. Mestrovac on the date of injury in order to be considered part of his gross monthly wage. Clearly, Mr. Mestrovac was not eligible or entitled to receive benefits under any of the following categories: retirement, life insurance, disability insurance, social security, Medicare, unemployment, or industrial insurance. Therefore, none of the premium amounts discussed during the testimony is included in Mr. Mestrovac's gross monthly wage. With regard to the flexible spending account, the account was funded by pre-tax deductions from Mr. Mestrovac's gross wages and therefore is already accounted for in the calculation of hours and overtime.

Benefits such as the employee discount, travel insurance, credit union membership, and Costco membership, cannot be considered critical to Mr. Mestrovac's health and welfare as there are many employed individuals who do not enjoy similar benefits. Mr. Mestrovac's argument regarding the employee discount for furniture is not well taken primarily because Mr. Mestrovac testified that such furniture was purchased for his friends as well as himself. In addition, the evidence indicated that Mr. Mestrovac purchased one table, thirty chairs, and was given one bed. Clearly, the purchases were not designed to furnish a home for four people.

Although Mr. Mestrovac presented evidence tending to indicate that Mr. Mestrovac's father, mother, and brother were dependent upon him, benefits for temporary total disability are paid according to the schedule of payments contained in RCW 51.32.060(1) and (2). RCW 51.32.090. With regard to calculating the amount of monthly payment, RCW 51.32.060 does not use the term dependents, but rather refers to the status of being married or unmarried and with or without

children. It is clear from the evidence presented in this case that Mr. Mestrovac was not married at the time of injury and did not have any children.

DECISION

Mr. Mestrovac's gross monthly wage as of the date of injury was $2,119.41, including healthcare benefits, holiday pay, vacation, bonuses, and overtime. His time-loss compensation rate should be calculated based on gross monthly wages of $2,119.41 and his status as unmarried with no children. Other benefits such as retirement, pension, social security, Medicare, unemployment, industrial insurance, profit-sharing, life insurance, and disability insurance, were not available or payable to Mr. Mestrovac as of the date of injury and therefore are not considered critical to his health and survival during the period of temporary disability. In addition, fringe benefits such as the flexible spending account, credit union membership, Costco membership, travel insurance, and employee discount are not considered to be critical to Mr. Mestrovac's health and survival.

FINDINGS OF FACT

1. On May 6, 2003, the claimant, Enver Mestrovac, filed an Application for Benefits with the Department of Labor and Industries, alleging he was injured during the course of his employment with A America, Inc., (A America) on May 6, 2003. On July 9, 2003, the Department issued an order allowing the claim. On September 29, 2003, the Department issued an order paying time-loss compensation benefits for the period of September 9, 2003 through September 22, 2003, and setting the time-loss compensation rate at $968.55 based upon monthly wages of $1,584 and the claimant's status as unmarried with no dependents. On October 10, 2003, the Department issued an order paying time-loss compensation benefits for the period of September 23, 2003 through October 6, 2003.

   On October 20, 2003, Mr. Mestrovac filed a Protest and Request for Reconsideration regarding the calculation of the time-loss compensation rate. On October 24, 2003, the Department issued an order paying time-loss compensation benefits for the period of October 7, 2003 through October 20, 2003. On October 22, 2003, Mr. Mestrovac filed a Notice of Appeal to the October 10, 2003 Department order. On November 17, 2003, the Board issued an order which granted the appeal and assigned it Docket No. 03 17948.

On October 31, 2003, Mr. Mestrovac filed a Notice of Appeal to the October 24, 2003 Department order. On November 25, 2003, the Board issued an order which granted the appeal and assigned it Docket No. 03 18255.

On November 7, 2003, the Department issued an order paying time-loss compensation benefits for the period of October 21, 2003 through November 7, 2003. The November 7, 2003 order identified the time-loss compensation rate as $968.55 per month. On November 13, 2003, the claimant filed a Notice of Appeal to the Department's November 7, 2003 order with the Department. The claimant's November 13, 2003 Notice of Appeal was forwarded to and received at the Board on July 19, 2004. On August 16, 2004, the Board issued an order which granted the appeal and assigned it Docket No. 04 18245.

2. On May 6, 2003, Enver Mestrovac sustained an industrial injury to his right hand and wrist during the course of his employment with A America at the company's Oak Barn facility.

3. As of May 6, 2003, Enver Mestrovac was paid wages of $9 per hour, eight hours per day, five days per week, and worked on a full-time regular basis. In addition, Mr. Mestrovac worked an average of 10.39 overtime hours per month. He also received bonuses that averaged $89.94 per month. He was unmarried with no children.

4. As of May 6, 2003, Enver Mestrovac was paid for eight holidays each year or an average of 5.33 hours per month, as part of the contract between the employer and the employees. Under the contract with the employer, employees who worked on the designated holidays were paid for the hours worked in addition to eight hours of holiday pay.

5. As of May 6, 2003, Mr. Mestrovac was accruing approximately 6.6 hours of vacation leave per month. Mr. Mestrovac was entitled to receive payment for his accrued vacation when his employment with A America ended.

6. As of May 6, 2003, Enver Mestrovac was receiving healthcare benefits from premium payments made by his employer in the amount of $244.56. The employer paid the premiums with coverage effective through July 31, 2003. These benefits were critical to maintaining Mr. Mestrovac's basic health.

7. As of May 6, 2003, Mr. Mestrovac had coverage under the employer provided life insurance, short-term disability, and qualified retirement plans. The retirement plan consisted of a 401(k) savings account and profit-sharing. These benefits were not critical to protecting Mr. Mestrovac's basic health and survival.

8. As of May 6, 2003, A America was making regular payroll deductions from wages for necessary state and federal contributions to social security, Medicare, unemployment compensation, and industrial insurance. In addition, Mr. Mestrovac could have received additional benefits, pursuant to contract, that included jury duty leave, leave of absence, family leave, employee discounts, membership in a credit union, a Costco membership, travel insurance, and a flexible medical spending account. These benefits were not critical to Mr. Mestrovac's basic health and survival.

CONCLUSIONS OF LAW

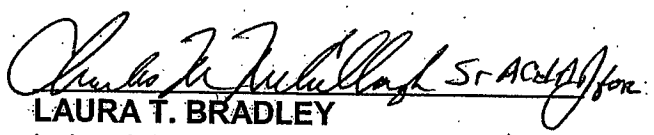
1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and subject matter of this timely appeal.

2. On May 6, 2003, Mr. Mestrovac's monthly wages, within the meaning of RCW 51.08.178(1) at the time of his injury, included his hourly wages, his healthcare benefits, his holiday pay at the rate of an additional 5.33 hours per month, his overtime at the rate of 10.39 hours per month, his vacation pay at the rate of 6.6 hours per month, and his bonuses at the rate of $89.94 per month, but did not include 401(k) contributions, profit sharing, life insurance, disability insurance, employee discounts, travel insurance, membership in a credit union, Costco membership, or contributions to state- and federally-mandated programs such as social security, Medicare, industrial insurance, and unemployment insurance.

3. The Department order dated November 7, 2003, is incorrect and is reversed. This matter is remanded to the Department of Labor and Industries with direction to issue an order finding that Mr. Mestrovac's monthly wage at the time of injury was $2,119.41, to determine his time-loss compensation rate in light of his monthly wages and his status as unmarried with no children, and to take such other action as is indicated by the facts and the law.

It is so **ORDERED**.

Dated this 18th day of February, 2005.



LAURA T. BRADLEY
Industrial Appeals Judge
Board of Industrial Insurance Appeals

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CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

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Dated at Olympia, Washington 2/25/2005
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: David E. Threedy
DAVID E. THREEDY
Executive Secretary

In re: ENVER MESTROVAC
Docket No. 04 18245

APPENDIX E

BEFORE TH BOARD OF INDUSTRIAL INSURA E APPEALS
STATE OF WASHINGTON

IN RE: ENVER MESTROVAC	DOCKET NOS. 03 17948, 03 18255 & 04 18245
CLAIM NO. Y-654934	DECISION AND ORDER

APPEARANCES:

Claimant, Enver Mestrovac, by
Ann Pearl Owen, P.S., per
Ann P. Owen

Employer, A-America, Inc., by
The Law Office of Robert M. Arim, PLLC, per
Robert M. Arim

Department of Labor and Industries, by
The Office of the Attorney General, per
Marta Lowy, Assistant

In Docket No. 03 17948, the claimant, Enver Mestrovac, filed an appeal with the Board of Industrial Insurance Appeals on October 22, 2003, from an order of the Department of Labor and Industries dated October 10, 2003. In this order, the Department paid the claimant time-loss compensation benefits for the period of September 23, 2003 through October 6, 2003, at the monthly rate of $968.55 or $32.29 per day. The Department order is **REVERSED AND REMANDED**.

In Docket No. 03 18255, Mr. Mestrovac filed an appeal with the Board of Industrial Insurance Appeals on October 31, 2003, from an order of the Department of Labor and Industries dated October 24, 2003. In this order, the Department paid time-loss compensation benefits for the period of October 7, 2003 through October 20, 2003, at the monthly rate of $968.55 or $32.29 per day. The Department order is **REVERSED AND REMANDED**.

In Docket No. 04 18245, Mr. Mestrovac filed an appeal with the Department of Labor and Industries on November 13, 2003, from an order of the Department of Labor and Industries dated November 7, 2003. In this order, the Department paid the claimant time-loss compensation benefits for the period of October 21, 2003 through November 3, 2003, at the monthly rate of $968.55 or $32.29 per day. The claimant's appeal was forwarded to the Board of Industrial Insurance Appeals on July 19, 2004. The Department order is **REVERSED AND REMANDED**.

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, the appeals in Docket Nos. 03 17948 and 03 18255, are before the Board for review and decision on timely Petitions for Review filed by the

Department and the claimant to a Proposed Decision and Order issued on November 22, 2004. The industrial appeals judge reversed the Department orders of October 10, 2003 and October 24, 2003, and remanded to the Department with direction to issue an order finding that Mr. Mestrovac's monthly wage at the time of injury was $2,119.41, to determine his time-loss compensation rate in light of his monthly wages and his status as unmarried with no children, and to take such other action as is indicated by the facts and the law.

The appeal in Docket No. 04 18245 is before the Board for review and decision on timely Petitions for Review filed by the Department and the claimant to a Proposed Decision and Order issued on February 18, 2005. The industrial appeals judge reversed the Department order dated November 7, 2003, and remanded to the Department with direction to issue an order finding that Mr. Mestrovac's monthly wage at the time of injury was $2,119.41, to determine his time-loss compensation rate in light of his monthly wages and his status as unmarried with no children, and to take such other action as is indicated by the facts and the law.

All three of these appeals involve the same parties, record, and issues. The appeal in Docket No. 04 18245 is therefore consolidated with the appeals in Docket Nos. 03 17948 and 03 18255, pursuant to WAC 263-12-045(2)(i) and CR 42.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. All of the rulings are affirmed.

DECISION

These appeals raise the question of what factors should be included in the calculation of Enver Mestrovac's monthly wage under RCW 51.08.178, for purposes of computing his time-loss compensation rate under RCW 51.32.090 and 51.32.060. We agree with the proposed disposition of these appeals in all respects, with two exceptions. The industrial appeals judge directed the Department to include additional vacation and holiday pay in Mr. Mestrovac's monthly wage. However, the Department had already included the hours of paid holiday and vacation days within the base wage calculation. Mr. Mestrovac has not shown that he received any additional amounts that should be added to his monthly wage. We have therefore granted review for the sole purpose of providing the relief requested by the Department in its Petitions for Review.

At the outset, we wish to clarify that we are not analyzing holiday and vacation pay under the rubric of *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001). In *Cockle*, the Supreme Court interpreted a different aspect of wages, *i.e.*, "other consideration of like nature received from the employer as part of the contract of hire." RCW 51.08.178(1). Because holiday and vacation

pay are money wages, they do not fit within that part of RCW 51.08.178. We have previously adopted an approach to holiday and vacation pay similar to that applied to bonuses received in the year prior to injury under RCW 51.08.178(3) or the averaging and inclusion of overtime hours under RCW 51.08.178(1). *In re Vesna Erakovic*, Dckt. No. 02 16363 (January 28, 2004). Either approach applied here shows that Mr. Mestrovac is not entitled to the inclusion of any additional holiday or vacation pay in his wage calculation.

The evidence is fully and accurately discussed in the Proposed Decisions and Orders. We will not repeat that summary here, other than to provide context and explain our decision.

Mr. Mestrovac began working for A-America, Inc., (A-America) in the fall of 2001, unloading containers filled with furniture. He sustained an industrial injury to his right hand and wrist on May 6, 2003. He continued working for a time and then was discharged by the employer. June 27, 2003 was his last day of work. His final paycheck included payment for his banked vacation leave.

The Department calculated Mr. Mestrovac's base wage as $1,584 per month. The industrial appeals judge arrived at the same figure, based on $9 per hour, eight hours per day, and five days per week. RCW 51.08.178(1)(e). This calculation included any days when Mr. Mestrovac took paid vacation and holidays. In addition, the industrial appeals judge added 6.6 hours per month ($59.40) in vacation pay, reasoning that Mr. Mestrovac could cash out his vacation leave if he terminated his employment. She calculated this amount by prorating 80 hours of vacation leave over 12 months.

The industrial appeals judge also added 5.33 hours per month ($47.97) in extra holiday pay. She reasoned that, if Mr. Mestrovac worked a holiday, he was paid for that day, as well as receiving an additional eight hours in pay. She calculated the additional 5.33 hours by prorating 64 hours (eight holidays) over 12 months.

Holiday pay: Neither Mr. Mestrovac nor Cindy Hartzer, the employer's human resources manager, nor Robert W. Moss, the worker's expert economist, provided much detail on how the employer handles holiday pay. The employer's policy is contained in its Employee Policies and Practices Handbook:

> A-America provides eight (8) eight hour paid holidays per year. These are:
>
> New Year's Day[,] Memorial Day[,] Independence Day[,] Labor Day[,] Thanksgiving Day[,] Day After Thanksgiving[,] Christmas Eve Day[, and] Christmas Day[.]

. . . .

> Employees eligible for paid holidays and who work on a holiday will be paid for both the holiday and the actual day worked (except the Day After Thanksgiving will be used as a floating holiday for retail warehouse and customer service staff and will not be paid in addition to working hours that day). Holiday hours will be included as hours worked for overtime calculations.
>
> Accumulated or unused floating holidays will not be cashed out or paid if the employee leaves the Company for any reason.

Board Exhibit Nos. 8 and 9, at 93-94.

Under this policy, there are eight paid holidays. The extra pay provision only applies to seven of those holidays; the policy excludes the day after Thanksgiving. If an employee works that holiday, the employee does not receive extra pay. Instead, the employee receives a floating holiday, which cannot be cashed out upon termination.

A-America's policy appears to be similar to the one in *Erakovic*. In that case, we included extra holiday pay within the worker's monthly wage. But in *Erakovic*, there was evidence that the worker actually received holiday pay in addition to her usual wages during the pay period in which she was injured, and this resulted in an actual increase in her income. The Department contends that the current case is distinguishable from *Erakovic*, because here there is no evidence that Mr. Mestrovac ever worked on a holiday or received any additional payment as a result. The Department is correct.

Board Exhibit No. 37 includes earnings statements, with time card details, for pay periods during the year prior to Mr. Mestrovac's May 6, 2003 industrial injury. Pursuant to ER 201, we take judicial notice of the fact that Memorial Day fell on May 27, 2002; Independence Day fell on July 4, 2002; Labor Day fell on September 2, 2002; Thanksgiving Day fell on November 28, 2002; the day after Thanksgiving was November 29, 2002; Christmas Eve fell on December 24, 2002; Christmas Day fell on December 25, 2002; and New Year's Day fell on January 1, 2003. The earnings statement for the pay period that would have included Thanksgiving and the day after Thanksgiving in 2002 has not been provided in Board Exhibit No. 37. For the other six holidays, the time card details show that Mr. Mestrovac was paid for the holiday, but did not work. He did not receive any extra payment under the holiday policy.

Mr. Mestrovac had the burden of proof. It was incumbent on him to show that he in fact worked holidays and received extra pay. The evidence shows just the opposite. We therefore

agree with the Department. There is no basis for the additional 5.33 hours in holiday pay that the industrial appeals judge included in Mr. Mestrovac's wage calculation.

Vacation pay: A number of Board Decisions and Orders have addressed the question of whether banked vacation hours or pay should be included within the wage calculation. In *In re Park E. Johnson*, Dckt. No. 99 13440 (September 14, 2004), the employer paid the employee for the vacation time he did not take and included those vacation hours in the wage calculation. In *In re Daniel Renshaw*, Dckt. No. 02 16572 (August 27, 2003), the employer contributed $1 per hour to a vacation fund. The money was available to the employee like a savings fund. That contribution was therefore included in the wage calculation. In *In re Fred Jones*, BIIA Dec., 02 11439 (2003), the employee could withdraw from the vacation trust on a quarterly, twice a year, or yearly basis, depending on how he had set up the benefit. So the employer's $1.25 per hour contribution to the vacation trust was included in wages.

However, *Erakovic* is the case most similar to the current appeal. In *Erakovic*, we held that vacation pay would not be considered additional wages to an employee just because leave accumulated during the year prior to termination could be cashed out. In this case, Mr. Mestrovac accrued 3.08 hours of vacation leave every two-week pay period or 80 hours of vacation leave a year. Mr. Mestrovac was only eligible to cash out his accrued vacation leave upon termination. At that time, he could cash out up to 160 hours of accrued leave. Board Exhibit No. 8, at 96. When Mr. Mestrovac was terminated, he exercised that right. Just as we concluded in *Erakovic*, vacation pay is not considered additional wages when it is only available to the worker upon termination.

Because Mr. Mestrovac was only eligible to receive cash for vacation leave upon termination and because he retained the right to cash out his accumulated vacation leave, the cash out amount cannot be otherwise added to his wage calculation. "[T]ime-loss compensation is meant to 'reflect . . . *lost* earning capacity,' not *retained* earning capacity." *Cockle*, 142 Wn.2d at 814. Cash in lieu of vacation time was only available once and Mr. Mestrovac did not lose his ability to collect this "one time" payout due to his injury. The amount of his accrued vacation leave should not be included in his wage calculation. The industrial appeals judge was therefore incorrect in adding an additional 80 hours of vacation leave, prorated over 12 months, to the wage calculation.

Furthermore, Mr. Mestrovac did not have 80 hours of accumulated leave when he was discharged. June 27, 2003, was his last day of work. The last earning statement contained in Board Exhibit No. 37 is for the period ending May 10, 2003. At that time, Mr. Mestrovac only had 11.4 banked hours of vacation leave. Since he only accrued 3.08 hours of leave every two-week

pay period, he would have had considerably fewer than 80 hours of banked leave as of June 27, 2003.

Other issues: With respect to the other items Mr. Mestrovac seeks to have included in his monthly wage, we adopt the thoughtful analysis outlined by our industrial appeals judge. In his Petitions for Review, Mr. Mestrovac renews his contention that the Department is constitutionally required to provide interpretive services. The industrial appeals judge correctly determined that that issue was not properly before her. Not only is Mr. Mestrovac raising constitutional issues that cannot be addressed in this forum, but the orders appealed from do not address interpretive services at the Department level. Furthermore, to the extent Mr. Mestrovac is challenging the interpretive services that were provided during the Board proceedings, we note that the industrial appeals judge fully complied with the requirements of RCW 2.43 and WAC 263-12-097.

Mr. Mestrovac also asks this Board to impose a penalty against the Department pursuant to RCW 51.48.080, due to its underpayment of benefits. That issue is not before the Board in these appeals because it was not addressed by the Department in the orders under appeal. In addition, it is doubtful that there is any statutory basis for assessing a penalty against the Department for the underpayment of benefits. *See, e.g., In re Robert Long*, Dckt. No. 02 16356 (June 9, 2003) (There is no legal basis for assessing a penalty against the Department for late payment of benefits under RCW 51.48.017.)

Finally, Mr. Mestrovac seeks interest under RCW 51.52.135. That question will be addressed under WAC 263-12-160, after the issuance of a final order.

After careful consideration of the Proposed Decisions and Orders, the Petitions for Review, the claimant's Response, and the entire record, we make the following:

FINDINGS OF FACT

1. On May 6, 2003, the claimant, Enver Mestrovac, filed an Application for Benefits with the Department of Labor and Industries, in which he alleged that he was injured during the course of his employment with A-America, Inc., on May 6, 2003. On July 9, 2003, the Department issued an order in which it allowed the claim.

   On September 29, 2003, the Department issued an interlocutory order in which it paid time-loss compensation benefits for the period of September 9, 2003 through September 22, 2003, and set the time-loss compensation rate at $968.55, based upon monthly wages of $1,584 and the claimant's status as unmarried with no dependents.

On October 10, 2003, the Department issued an order in which it paid time-loss compensation benefits for the period of September 23, 2003 through October 6, 2003, at the monthly rate of $968.55 or $32.29 per day.

On October 20, 2003, Mr. Mestrovac filed a Protest and Request for Reconsideration regarding the calculation of the time-loss compensation rate.

On October 24, 2003, the Department issued an order in which it paid time-loss compensation benefits for the period of October 7, 2003 through October 20, 2003, at the monthly rate of $968.55 or $32.29 per day.

On October 22, 2003, Mr. Mestrovac filed a Notice of Appeal of the October 10, 2003 Department order with the Board of Industrial Insurance Appeals. On November 17, 2003, the Board issued an order in which it granted the appeal and assigned it Docket No. 03 17948.

On October 31, 2003, Mr. Mestrovac filed a Notice of Appeal of the October 24, 2003 Department order. On November 25, 2003, the Board issued an order in which it granted the appeal and assigned it Docket No. 03 18255.

On November 7, 2003, the Department issued an order in which it paid time-loss compensation benefits for the period of October 21, 2003 through November 3, 2003, at the monthly rate of $968.55 or $32.29 per day. On November 13, 2003, the claimant filed a Notice of Appeal of the November 7, 2003 Department order with the Department. That Notice of Appeal was forwarded to and received at the Board on July 19, 2004. On August 16, 2004, the Board issued an order in which it granted the appeal and assigned it Docket No. 04 18245.

2. On May 6, 2003, Enver Mestrovac sustained an industrial injury to his right hand and wrist during the course of his employment with A-America, Inc., at the company's Oak Barn facility.

3. As of May 6, 2003, Mr. Mestrovac was paid wages of $9 per hour, eight hours per day, five days per week, and worked on a full-time regular basis. In addition, Mr. Mestrovac worked an average of 10.39 overtime hours per month. Within the twelve months immediately preceding his injury, he received a bonus of $1,079.30, which averages out to $89.94 per month. He was unmarried with no children.

4. Under the employer's Employee Policies and Practices Handbook, an employee who works on Memorial Day, Independence Day, Labor Day, Thanksgiving, Christmas Eve, Christmas Day, or New Year's Day is paid for both the holiday and the actual day worked. An employee who works

the day after Thanksgiving receives a floating holiday that cannot be cashed out upon termination of employment. During the twelve months immediately preceding his injury, there is no evidence that Mr. Mestrovac worked any of these holidays or that he received any extra holiday pay or a that he was credited with a floating holiday.

5. As of May 6, 2003, Mr. Mestrovac was accruing 3.08 hours of vacation leave every two-week pay period or 80 hours of vacation leave a year. He could cash out up to 160 hours upon termination of his employment. After the industrial injury, he was discharged from employment by A-America, Inc. His last day of work was June 27, 2003. At that time, he had fewer than 160 hours of banked vacation leave. He cashed out his vacation leave when he was terminated from employment.

6. As of May 6, 2003, Enver Mestrovac was receiving healthcare benefits from premium payments made by his employer in the amount of $244.56 per month. The employer paid the premiums with coverage effective through July 31, 2003. His healthcare coverage was terminated thereafter. These benefits were critical to maintaining Mr. Mestrovac's basic health.

7. As of May 6, 2003, Mr. Mestrovac had coverage under the employer provided life insurance, short-term disability, and qualified retirement plan. The retirement plan consisted of a 401(k) savings account and profit-sharing. These benefits were not critical to protecting Mr. Mestrovac's basic health and survival.

8. As of May 6, 2003, A-America, Inc., was making regular payroll deductions from wages for necessary state and federal contributions to Social Security, Medicare, unemployment compensation, and industrial insurance. In addition, Mr. Mestrovac could have received other benefits, pursuant to contract, that included jury duty leave, leave of absence, family leave, employee discounts, membership in a credit union, a Costco membership, travel insurance, and a flexible medical spending account. These benefits were not critical to Mr. Mestrovac's basic health and survival.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these consolidated timely appeals.

2. Under RCW 51.08.178(1) and (3), Mr. Mestrovac's monthly wages at the time of his injury included his hourly wages of $1,584 per month, his overtime at the rate of 10.39 hours or $93.51 per month, his bonus at the rate of $89.94 per month, and his healthcare benefits of $244.56 per month.

3. Under RCW 51.08.178(1) and (3), Mr. Mestrovac's monthly wages at the time of his injury did not include extra holiday pay, the banked vacation leave which he cashed out when his employment was terminated, 401(k) contributions, profit sharing, life insurance, disability insurance, employee discounts, travel insurance, membership in a credit union, Costco membership, or contributions to state- and federally-mandated programs such as Social Security, Medicare, industrial insurance, and unemployment insurance.

4. The Department orders dated October 10, 2003, October 24, 2003, and November 7, 2003 are incorrect and are reversed. These matters are remanded to the Department of Labor and Industries with direction to issue an order finding that Mr. Mestrovac's monthly wage at the time of injury was $2,012.01, determining his time-loss compensation rate in light of his monthly wages and his status as unmarried with no children, and taking further action as indicated by the facts and the law.

It is so **ORDERED.**

Dated this 9th day of June, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

Thomas E. Egan

THOMAS E. EGAN Chairperson

Calhoun Dickinson

CALHOUN DICKINSON Member

DISSENT

I dissent because I disagree with the majority's decision to exclude the retirement plan (the 401(k) and profit sharing) and life insurance. These are in-kind benefits, which represent a benefit paid to Mr. Mestrovac instead of monetary wages. The court, in *Cockle*, re-emphasized the liberal construction policy designed to reduce economic hardship to the workers of this state. In Mr. Mestrovac's case, his hourly wage was substantially reduced by deductions for each of these benefits. He will probably be forced to purchase his own life or disability insurance without receiving any compensation to reflect his lost coverage. He may have to come up with a new pension plan. These are only two illustrations of the possible economic losses he will suffer.

I also disagree with the majority decision to exclude holiday pay and vacation pay. These represent cash wages paid to the worker. I disagree with the majority's failure to recognize these additional forms of in-kind compensation as necessary for the worker's health and survival and the failure to recognize the additional wages received as holiday and vacation pay.

Dated this 9th day of June, 2005.

FRANK E. FENNERTY, JR. Member

CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

CL1

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AG1

MARTA LOWY, AAG
OFFICE OF THE ATTORNEY GENERAL
900 4TH AVE #2000
SEATTLE, WA 98164-1012

Dated at Olympia, Washington 6/9/2005
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: David E. Threedy
DAVID E. THREEDY
Executive Secretary

In re: ENVER MESTROVAC
Docket No. 03 17948 03 18255 04 18245

APPENDIX F

The Superior Court of King County

Deborah D. Fleck, Judge
401 - 4th Avenue North
Kent, Washington 98032-4429

(206) 296-9273

March 20, 2006

Ann Pearl Owen
2407 – 14th Ave. South
Seattle, WA 98144

Marta S. Lowy, AAG
Labor & Industries Division
900 Fourth Ave., 2000
Seattle, WA 98164-7740

Re: Meštrovac v. L&I, Cause No. 05-2-22775-3 KNT

Counsel:

The appellant seeks to have a number of employer-paid taxes, employer contributions to retirement benefits, as well as employer contributions to private life, disability, accidental death and dismemberment insurances included in the calculations of the appellant's wages and to be reimbursed for interpreter services he was required to incur because of the Department's failure to do so. The Department opposes inclusion of each of these items, on various bases including that they are not consideration for services under the contract for hire; that they do not meet the *Cockle* like-benefits test because they do not meet the temporal element of the test (i.e., that taxes, employer contributions toward various benefits and for various types of private insurance are not critical to the appellant's basic health and survival at the time of injury) and/or that they are not in-kind consideration that a worker must replace while disabled. The Department further opposes any consideration of the interpreter issue because it was not part of the Board's decision before me.

The *Gallo* court appears to have determined that payments for items such as life insurance and payments for retirement benefits should not be included because they are not critical to the "basic health and survival" of the injured worker at the time of injury and are "not intended to be, nor are they generally immediately available to the worker at the time of injury." I do not find that taxes for Social Security, Medicare (at least for this employee and referred to as hospital insurance), or unemployment compensation (for which the appellant is apparently disqualified, given his receipt of the benefits at issue here), should be included in wages as consideration of a like nature for the same reasons. Industrial insurance premiums are not premiums that need to be replaced by the worker during his period of time loss and therefore do not meet the like-benefits analysis of *Cockle*. Claims that disability insurance should be included seem to fall into this last category. Claims that accidental death and dismemberment insurances should be included appear to be comparable to the life insurance that was disallowed in *Gallo*.

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I have therefore enclosed final papers in this action. I have made one change to the proposed papers filed by the Department. While I understand that the issues before me are only those addressed by the Board with respect to the substantive issues, I do believe I have authority to address procedural due process issues raised by the appellant, even if the Board does not address them. For that reason, I have included Ms. Owen's proposed Findings and Conclusion with respect to interpreter issues and order that this limited issue be returned to the Board of Industrial Insurance Appeals and the Department of Labor & Industries to determine the amount of interpreter expenses incurred by the Injured Worker and the amount of interest owing on the interpreter expenses incurred by the Injured Worker and to pay the Injured Worker for all his interpreter expenses incurred related to his Industrial Insurance claim with interest at 12% from the date the expenses were incurred. After a review of appellant's brief on the attorneys' fee issue, including *Brand*, I have not included an attorneys' fee award because the appellant did not prevail on any of the substantive issues.

I apologize for the delay in getting this decision to you, but I needed additional time to review the case before making the decision.

Sincerely,

Deborah D. Fleck

DEBORAH D. FLECK

DDF:caa

Enclosure

APPENDIX G

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ENVER MESTROVAC, Plaintiff, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant.	Cause No. 05-2-22775-3 KNT JUDGMENT FOR DEPARTMENT

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	State of Washington Department of Labor and Industries
2. Judgment Debtor:	ENVER MESTROVAC
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Attorney Fees:	
6. Costs:	$ Costs per RCW 4.84
7. Other Recovery Amounts:	$0
8. Principal Judgment Amount shall bear interest at 0% per annum.	
9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.	
10. Attorneys for Judgment Creditor:	Marta Lowy, Portia C. Guerrero
11. Attorney for Judgment Debtor:	Ann Pearl Owen

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This matter was tried by the Court without a jury on February 16, 2006, the Honorable Deborah Fleck presiding. The plaintiff, Enver Mestrovac, appeared through his attorney of record, Ann Pearl Owen. The defendant, the Department of Labor and Industries of the State of Washington, appeared through its attorney of record, Rob McKenna, Attorney General, per Portia C. Guerrero, Assistant Attorney General and Marta Lowy, Assistant Attorney General.

The Court reviewed the Certified Appeal Board Record, considered the pleadings filed in the action, and heard the oral argument of the parties' counsel. On March 20, 2006, the Court ruled in part in favor of the Department. The Court made findings of fact and conclusions of law on March 20, 2006, which were entered on March 20, 2006. [A copy of the Court's findings and conclusions is attached as Exhibit A.]

Consistent with findings and conclusions of March 20, 2006, the Court enters final judgment in this matter as follows:

1. The June 9, 2005 Board of Industrial Insurance Appeals Decision and Order, which reversed the Department of Labor and Industries' orders dated October 10, 2003, October 24, 2003, and November 7, 2003, be and the same are hereby affirmed.

2. The Defendant Department of Labor & Industries is ordered to determine the amount of interpreter expenses incurred by the Injured Worker in association with his industrial injury, and the interest owing on the interpreter expenses incurred by the Injured Worker, and is ordered to pay the Injured Worker for all his interpreter expenses incurred related to his Industrial Insurance claim with interest at 12% from the date the expenses were incurred until they are paid.

DATED this 20 day of March, 2006.

Deborah A. Fleck
JUDGE DEBORAH FLECK

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APPENDIX H

FILED
KING COUNTY, WASHINGTON

MAR 21 2006

SUPERIOR COURT CLERK
BY JACQUELINE B. ANTICH
DEPUTY

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

ENVER MESTROVAC, Plaintiff, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant.	Cause No. 05-2-22775-3 KNT FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly before the Honorable Deborah Fleck in open court on February 16, 2006. The Plaintiff, ENVER MESTROVAC, appeared through his counsel, Ann Pearl Owen; the Defendant, Department of Labor and Industries (Department), appeared through its counsel, Rob McKenna, Attorney General, per Marta Lowy, Assistant Attorney General, and Portia C. Guerrero, Assistant Attorney General. The Court reviewed the records and files herein, including the Certified Appeal Board Record, and briefs submitted by counsel, and heard argument of Counsel. Therefore, being fully informed, the Court make the following:

I. FINDINGS OF FACT

1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) on August 6, 2004 and September 2, 2004.

Thereafter an Industrial Appeals Judge issued a Proposed Decision and Order on November 22, 2004, from which the Department and the Plaintiff filed timely Petitions for Review. On February 3, 2005, the Board, having considered Department and the Plaintiff's Petitions for Review, granted the same. On June 9, 2005, the Board, after consideration of the Proposed Decision and Order and the Petitions for Review, and a careful review of the entire record before it, issued a Decision and Order reversing the Department's orders dated October 10, 2003, October 24, 2003, and November 7, 2003. Plaintiff thereupon timely appealed the Board's June 9, 2005 order to this Court.

1.2 The Department orders on appeal are dated: October 10, 2003; October 24, 2003; and November 7, 2003. The Department Order dated October 10, 2003, is a Payment Order for time-loss compensation from 09/23/03 through 10/06/03 in the amount of $452.06. The Department Order dated October 24, 2003, is a Payment Order for time-loss compensation from 10/07/03 through 10/20/03 in the amount of $452.06. The Department Order dated November 7, 2003 is a Payment Order for time-loss compensation from 10/21/03 through 11/03/03 in the amount of $452.06.

1.3 The Board's Finding of Fact Nos. 1, 2, 3, 4, 5, 6, 7 and 8 are correct and are adopted.

1.4 Enyer Meštrovac, a native Bosnian speaker, came to the United States as a political refugee in 2001 and got a job with AAmerica through World Relief Organization. Mr. Meštrovac is not fluent in English.

1.5 All orders issued by the Department of Labor & Industries were issued in English. The Department's claim adjudicator realized that he was not dealing with a native English speaking person on Mr. Meštrovac's claim but made no effort to find out the native language group involved.

1.6 Mr. Meštrovac's notices of appeal raised the issue of his status as an immigrant and of his lack of English fluency. Despite this, the Industrial Appeals Judge refused to allow presentation of all the evidence on these issues and limited interpreter services at hearing to interpretation of matters on the record, preventing the interpreters from allowing Mr. Meštrovac to communicate with his counsel at breaks during the hearings.

Based upon the foregoing Findings of Fact, the Court now makes the following

II. CONCLUSIONS OF LAW

2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

2.2 This Court does not have jurisdiction over the issue of the Department's provision of interpreter services to Mr. Meštrovac.

2.3 This Court adopts as its Conclusions of Law, the Conclusions of Law, Nos. 1, 2, 3, and 4 of the Decision and Order of the Board of Industrial Insurance Appeals, dated June 9, 2005.

2.4 The Board had jurisdiction over issues raised in Mr. Meštrovac's notices of appeal relating to his status as a non-English speaking injured worker. The Industrial Appeals Judge erroneously ruled the Board had not jurisdiction over those issues *sua sponte*, without affording Mr. Meštrovac either notice or the opportunity to provide briefing before making her ruling. The Board's designee further erred in affirming that ruling when presented by Mr. Meštrovac's interlocutory appeal of that ruling. At hearing, the Industrial Appeals Judge erroneously limited the presentation of evidence on those issues at hearing, which should have been received and put into colloquy to preserve that evidence for rulings by the Superior Court on this appeal. The Industrial Appeals Judge erred in not addressing these issues in the Proposed Decision and Order. The Board erred by omitting these issues in its Decision and Order.

2.5 The Board's June 9, 2005 Decision and Order is correct and is affirmed.

DATED this 20 day of March, 2006.

Deborah L. Fleck

JUDGE DEBORAH FLECK

APPENDIX I

msl

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

ENVER MEŠTROVAC, Petitioner, vs. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	)	NO. 05-2-22775-3 KNT ORDER ON RECONSIDERATION

This matter came on before the undersigned for reconsideration of the court's decision dated March 20, 2006. The court has reviewed the respondent's motion for reconsideration, the petitioner's response and the documents in support, and is fully advised in the premises, now therefore,

ORDERED that Conclusions No. 2.2, 2.5 and 2.6 are amended as follows:

Conclusion No. 2.2: This Court has jurisdiction over the issue of the Department's use of English to communicate with Mr. Meštrovac regarding his claim and specifically in the orders issued in English and actions which Mr. Meštrovac

643

appealed to the Board and what relief Mr. Meštrovac is entitled to for interpreter services regarding his industrial insurance claim.

Conclusion No. 2.5: The Board's June 9, 2005 Decision and Order was correct as to the wage conclusion but was incorrect in failure to include findings of fact and conclusions of law regarding issues raised by Mr. Meštrovac regarding communications with him in English, his right to communications with his employer, the Department, and counsel of his choice regarding his industrial injury in his primary language or through interpreter services paid for by the Department.

Conclusion No. 2.6: ~~The Board is directed to hold a hearing to determine the amount of all interpreter expenses Mr. Meštrovac incurred because of the Department's and the Board's failure to provide interpreter services for Mr. Meštrovac to communicate with the Department, his employer, his health care providers, and his lawyer regarding and about his claim and to award him those expenses plus interest at 1% per month from the date they were incurred under RCW 51.36.080.~~ The Department shall pay those interpreter expenses incurred and interest thereon until the Board assumed jurisdiction. ~~The Board shall pay those interpreter expenses incurred and interest thereon after Mr. Meštrovac filed his first notice of appeal to the Board.~~

DATED: April 17, 2006

Deborah D. Fleck
JUDGE DEBORAH D. FLECK

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APPENDIX J

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

ENVER MESTROVAC, Plaintiff, v. DEPARTMENT OF LABOR AND INDUSTRIES, Defendant.	NO. 05-2-22775-3 KNT (Court of Appeals Div. I, No. 58200-3-1) DESIGNATION OF SUPPLEMENTAL CLERK'S PAPERS (RAP9.6(a))

TO: **TRANSCRIPT CLERK, KING COUNTY SUPERIOR COURT**

Please prepare for transmittal to the Court of Appeals, Division I, the supplemental clerk's papers listed below. If you have any questions, please contact Johnna S. Craig, Assistant Attorney General, at (360) 586-3457.

DATED this 23, October, 2006.

ROB McKENNA
Attorney General

JOHNNA S. CRAIG, WSBA # 35559
Assistant Attorney General

SPENCER W. DANIELS, WSBA #6831
Assistant Attorney General

Attorneys for the Board of
Industrial Insurance Appeals

COPY

ATTORNEY GENERAL OF WASHINGTON
Government Operations Division
7141 Cleanwater Drive SW
PO Box 40108
Olympia, WA 98504-0108
(360) 586-3636

CLERK'S PAPERS

Sub #	Code/Conn	Filing Date	Name of Document
68		6/2/06	MESTROVAC'S RESPONSE TO BOARD'S PLEADING ENTITLED "CORRECTED BOARD OF INDUSTRIAL INSURANCE APPEALS MOTION AND MEMORANDUUM IN SUPPORT OF ITS MOTION TO PARTIALLY MODIFY AND PARTIALLY VACATE THAT APRIL 17, 2006 ORDER" WITH REQUEST FOR ATTORNEY FEES AND DECLARATION OF MAILING
69		8/1/06	ORDER DENYING BOARD'S MOTION TO INTERVENE AND AWARDING ATTORNEY FEES ENTERED AFTER LEAVE GRANTED BY THE COURT OF APPEALS PURSUANT TO RAP 7.2
70		8/14/06	BOARD OF INDUSTRIAL INSURANCE APPEALS' NOTICE OF APPEAL TO DIVISION I OF THE COURT OF APPEALS

ATTORNEY GENERAL OF WASHINGTON
Government Operations Division
7141 Cleanwater Drive SW
PO Box 40108
Olympia, WA 98504-0108
(360) 586-3636

Copy of notice and attachments delivered to attorney for Plaintiff:

ANN PEARL OWEN
2407 14TH Avenue S
Seattle, WA 98144
Phone: (206) 624-8637
WSBA # 9033
Attorney for Plaintiff

And to attorneys for Defendant:

JOHN R. WASBERG
Assistant Attorney General
900-Fourth Ave. Ste. 2000
Seattle, WA 98164-1076

PROOF OF SERVICE

I certify that I served a copy of the ***Designation of Supplemental Clerk's Papers (RAP9.6(a))*** on all parties or their counsel of record on the date below as follows:

☐ US Mail Postage Prepaid via Consolidated Mail Service

☒ ABC/Legal Messenger to:

ANN PEARL OWEN
WSBA # 9033
2407 14TH Avenue S
Seattle, WA 98144

COURT OF APPEALS, DIVISION I
Richard D. Johnson
One Union Square, 600 University Street
Seattle, WA 98101-1176

☒ State Campus Delivery

JOHN WASBERG
Assistant Attorneys General
900 Fourth Avenue, Suite 2000
Seattle, WA 98164-1012

☐ Hand delivered by _____

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

DATED this 23rd day of October, 2006, at Olympia, WA.

KRISTINE HARPER
Legal Assistant

ATTORNEY GENERAL OF WASHINGTON
Government Operations Division
7141 Cleanwater Drive SW
PO Box 40108
Olympia, WA 98504-0108
(360) 586-3636

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JUN - 5 2006
Attorney General's Office
Gov. Operations Div.

COPY
AAG CRAIG

Honorable Deborah Fleck
Motion: Noted for 6/9/06

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ENVER MEŠTROVAC, Plaintiff/Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Defendant/Respondent.	NO. 05-2-22775-3 KNT MEŠTROVAC'S RESPONSE TO BOARD'S PLEADING ENTITLED "CORRECTED BOARD OF INDUSTRIAL INSURANCE APPEALS MOTION AND MEMORANDUM IN SUPPORT OF ITS MOTION TO PARTIALLY MODIFY AND PARTIALLY VACATE THAT APRIL 17, 2006 ORDER" WITH REQUEST FOR ATTORNEY FEES AND DECLARATION OF MAILING

Enver Meštrovac files this briefing to respond to the Board's so denominated "Corrected Motion to Partially Modify and Partially Vacate That April 17, 2006 Order." Also filed is the appended declaration affirming the facts stated herein and showing service by mailing.

I. FACTS

On May 24, 2006 after responding to the Board's brief in support of its as-yet-unreceived motion "to partially modify and partially vacate that order of April 17, 2006", Mr. Meštrovac's

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CRITICAL EVENT
Copy to Melissa Original to Linda
Date Jun 5 2006 Initials VS

counsel has received the following further pleadings from the Office of the Attorney General on behalf of the Board of Industrial Insurance Appeals:

1. Corrected Board of Industrial Insurance Appeals Motion and Memorandum in Support of its Motion to Partially Modify and Partially Vacate That April 17, 2006 Order [dated May 23, 2006 and signed by AAG Johnna S. Craig]

2. Declaration of Johnna S. Craig Regarding Exhibits in Support of Corrected Motion and Memorandum in Support of Its Motion to Partially Modify and Partially Vacate That April 17, 2006 Order [dated May 23, 2006 and signed by AAG Johnna S. Craig]

Though entitled a motion to "partially modify and partially vacate", the relief requested in this motion [pages 1-2, § I entitled Motion/Relief Requested] is only to allow the Board to intervene either as of right or permissively under CR 24(a). No prior "motion to partially modify and partially vacate" was previously provided to Meštrovac's counsel's office, despite the title of this pleading so suggesting.

The "corrected" motion merely incorporates the authority already provided in a memorandum form. Because this authority was addressed in Mr. Me^troavcx's Response to Board's Brief in Support of [As Yet Unreceived] Motion to Partial Modiry and Partially Vacate that [sic] Order of April 17, 2006 dated May 23, 2006, it will not be readdressed here.

The May 23, 2006 Craig declaration fails to provide information vital to the Court's determination of whether the Board's request for intervention is timely as required by CR 24(a) whether sought as of right or permissively. Again, the copy receipt dates for some of the exhibits have been removed and are not before the Court, demonstrating rather convincingly that the Board's proposed evidence does not support a finding of timeliness, but the reverse.

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II. REQUEST FOR ATTORNEY'S FEES

A. Facts on Attorney's Fees Request

Mr. Meštrovac's counsel is a sole practitioner who has no associated attorneys to assist her on this or any other of the cases in her case load. The undersigned has practiced law in Washington state for over 25 years. She has frequently been asked to contribute to Continuing Legal Education seminars over the years. She has repeatedly been recognized as a "Super Lawyer" by her peers in the Washington Law and Politics poll, being recognized as one of the 50 best women lawyers on more than one occasion. She has been rated AV by her peers by Martindale Hubbel's peer review process. She is the mother of six children, five of whom are currently college students. She has spent more than two years representing Mr. Meštrovac to date. During this time, the undersigned had to take significant time away from her work to care for her belated mother's final illness, death, and funeral in Illinois.

The Board's belated attempts to intervene in this matter have resulted in the expenditure of 25.4 hours of attorney time. These attorney hours were required only to respond to the pleadings received from the Board in the order and manner in which they were received by Mr. Meštrovac's counsel.

Because of her sole practitioner status, the various pleadings supplied to Mr. Meštrovac's counsel on this matter have required her to ignore other fee generating work and to take time away from her family and other professional activities.

The undersigned's attorney fee charge on an hourly fee basis for Industrial Insurance Appeals work to the Superior Court is $300 per hour which amount is reasonable in the Seattle area for that service. In fact, this rate is less than the rate the undersigned receives for work on

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other matters, such as the medical negligence cases which have been her predominant practice for over 20 years of her career. This rate is equal to the hourly rate the undersigned was charged by William Helsell who provided her legal advice on the dissolution of her former partnership with Daniel Sullivan over 20 years ago.

Other lawyers performing similar services in this field with comparable years of experience and similar high standing among their peers charge the same or higher rates for their time on this type of work. The undersigned knows that Terry Barnett has received an attorney fee award for a higher rate for work at the Superior Court within the last year on an Industrial Insurance appeal.

B. Authority Supporting Attorney Fees Award

Payment of interpreter services reimbursement by the Board and/or the Department will be made from funds derived 50% from the Department's Accident Fund and 50% from the Department's Medical Aid Fund under RCW 51.52.030. Because the ruling of the Superior Court modifies the Board's order and affects both the medial aid and accident funds, an award of attorney's fees is proper under RCW 51.52.130. *Flanigan v. DLI*, 123 Wn.2d 418, 427, 869 P.2d 14 (1994).

C. Proposed Order on "Corrected Motion"

Attached is Mr. Meštrovac's Proposed Order on the Board's "Corrected Motion."

III. INCORPORATION OF PRIOR PLEADINGS & AUTHORITY BY REFERENCE

Rather than repeat his prior pleadings on this topic, Mr. Meštrovac incorporates by reference herein all his prior pleadings on the Board's belated attempt to intervene and impact the Superior Court's action in this case.

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IV. AUTHORITY ON BOARD'S CORRECTED MOTION

As briefed earlier under CR 24 it is the Board's burden, as the prospective intervenor, to prove the timeliness of its request for intervention. In all its pleadings, the Board asserts, without providing any proof, that it first learned that Mr. Meštrovac sought reimbursement for interpreter services not supplied to him by the Board in May of 2006. The Board, despite providing the May 23, 2006 Craig declaration, fails to address the proof contained in the Board Record before the Court showing that at the April 24, 2004 telephone conference the Board's assigned Industrial Insurance Appeals Judge, the Honorable Laura Bradley, was informed that Mr. Meštrovac sought this relief and acknowledged that he had the right to seek it.

In all the proof before the Court, the Board has failed to demonstrate the required timeliness of its application for intervention, whether permissive or of right under CR 24. Thus, the Court must deny intervention.

CONCLUSION

Because the Department has filed an appeal to the Court of Appeals, Division One, the Court should not reach the merits of the Board's intervention motion and should enter Mr. Meštrovac's **Proposed Order C** awarding attorney's fees against the Board.

If the Court does reach the merits of the Board's intervention motion, it should deny the same by entering Mr. Meštrovac's **Proposed Order D** awarding attorney's fees against the Board. because the pleadings before the Superior Court and the Board's Record show that 1) the Board unreasonably delayed moving to intervene, 2) the Board lacks authority to appeal the Superior Court's ruling in this case, and 3) there is no prejudice to the Board from denial of its motion to intervene.

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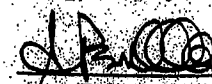
Respectfully submitted this 2nd of June 2006,



Ann Pearl Owen, WSBA# 9033
Attorney for Enver Meštrovac, Injured Worker

SUBJOINED DECLARATION OF COUNSEL CERTIFYING SERVICE BY MAIL

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

1. The undersigned is counsel of record for Enver Meštrovac and makes the following statements based on her review of the files and pleadings and the Board Record herein.

2. The Facts stated in Section I above are true.

3. The Facts on Attorney's Fees Request stated in Section IIA above are true.

4. The undersigned placed a copy of this declaration and the foregoing response to the Board's vacation brief in an envelope bearing proper postage and the addresses below and mailed the same with the United States Post Office on June 2, 2006 to:

Marta Lowy, AAG
Office of the Attorney General of Washington
900 – Fourth Avenue #2000
Seattle, WA 98164

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

Signed at Seattle, Washington this 2nd of June 2006.

Ann Pearl Owen, WSBA# 9033

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Gov. Operations Div.

Honorable Deborah D. Fleck

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ENVER MEŠTROVAC, Plaintiff/Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Defendant/Respondent.	NO. 05-2-22775-3 KNT ORDER DENYING BOARD'S MOTION TO INTERVENE AND AWARDING ATTORNEY FEES ENTERED AFTER LEAVE GRANTED BY THE COURT OF APPEALS PURSUANT TO RAP 7.2

This matter having come before the Court originally upon a motion filed by the Board of Industrial Insurance Appeals to intervene as a party in the appeal of Injured Worker Enver Meštrovac of the Board's decisions in Board Docket Nos. 03 17948, 03 18255, & 04 18245 and the Court of Appeals, Division I, having granted leave for entry of this order under RAP 7.2, the Court having reviewed the files and pleadings, including all pleadings in support of and in opposition to the motion to intervene and pleadings regarding partial modification and partial vacation and being fully advised in the circumstances,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Board's motion to intervene be and hereby is denied for the following reasons:

ANN PEARL OWEN, P.S.
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Seattle, WA 98144
(206) 624-8637

a. The Board's motion is untimely because it knew since April of 2004 that the issue decided would be raised on appeal and it was served with Mr. Meštrovac's notice of appeal of its decision to the Superior Court and a copy of this Court's Order Setting Case Schedule.

b. The Board failed to show extraordinary circumstances justifying its delay in moving to intervene.

c. The Board is not entitled to intervene as a matter of right under CR 24.

d. There will be no prejudice to the Board from denial of its motion to intervene.

~~e. It is unseemly and improper to allow an administrative agency such as the Board charged with the duty to determine appeals from administrative decisions to enter as a party in appeals of its decisions, making it a direct adversary of the individual whose rights it has decided in the administrative appeal process.~~

2. Attorney fees are awarded against the Board of Industrial Insurance Appeals to Mr. Meštrovac in the amount of $9,340 ($7,590 + $1,750) for the attorney work performed to respond to the Board's motion to intervene and pleadings on partial modification and partial vacation and to obtain leave under RAP 7.2 for the Superior Court to enter this order.

3. Attorney fees are awarded to Mr. Meštrovac against the Department of Labor and Industries in an amount to be determined upon proof there of provided by his counsel of record.

DATED this 1 day of August, 2006.

HONORABLE DEBORAH D. FLECK
King County Superior Court Judge

Proposed by:

Ann Pearl Owen, WSBA# 9038
Attorney for Enver Meštrovac

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P.S.

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

ENVER MESTROVAC, Plaintiff, v. DEPARTMENT OF LABOR AND INDUSTRIES, Defendant.	NO. 05-2-22775-3 KNT (Court of Appeals No. 58200-3-I) BOARD OF INDUSTRIAL INSURANCE APPEALS' NOTICE OF APPEAL TO DIVISION I OF THE COURT OF APPEALS

The Board of Industrial Insurance Appeals of the State of Washington, seeks review under RAP 2.2 by the designated appellate court of: (1) the trial court's Order Denying Board's Motion to Intervene and Awarding Attorney Fees Entered After Leave Granted By the Court of Appeals Pursuant to RAP 7.2 entered and filed on August 1, 2006.

Copies of the above-referenced document is attached to this notice.

DATED this 10th day of August, 2006.

ROB McKENNA
Attorney General

JOHNNA S. CRAIG, WSBA # 35559
Assistant Attorney General

SPENCER W. DANIELS, WSBA#6831
Assistant Attorney General

Attorneys for the Board of
Industrial Insurance Appeals

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AUG 04 2006
Attorney General's Office
Gov. Operations Div.

Honorable Deborah D. Fleck

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ENVER MEŠTROVAC, Plaintiff/Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Defendant/Respondent.	NO. 05-2-22775-3 KNT ORDER DENYING BOARD'S MOTION TO INTERVENE AND AWARDING ATTORNEY FEES ENTERED AFTER LEAVE GRANTED BY THE COURT OF APPEALS PURSUANT TO RAP 7.2

This matter having come before the Court originally upon a motion filed by the Board of Industrial Insurance Appeals to intervene as a party in the appeal of Injured Worker Enver Meštrovac of the Board's decisions in Board Docket Nos. 03 17948, 03 18255, & 04 18245 and the Court of Appeals, Division I, having granted leave for entry of this order under RAP 7.2, the Court having reviewed the files and pleadings, including all pleadings in support of and in opposition to the motion to intervene and pleadings regarding partial modification and partial vacation and being fully advised in the circumstances,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Board's motion to intervene be and hereby is denied for the following reasons:

ANN PEARL OWEN, P.S.
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Seattle, WA 98144
(206) 624-8637

a. The Board's motion is untimely because it knew since April of 2004 that the issue decided would be raised on appeal and it was served with Mr. Meštrovac's notice of appeal of its decision to the Superior Court and a copy of this Court's Order Setting Case Schedule.

b. The Board failed to show extraordinary circumstances justifying its delay in moving to intervene.

c. The Board is not entitled to intervene as a matter of right under CR 24.

d. There will be no prejudice to the Board from denial of its motion to intervene.

~~e. It is unseemly and improper to allow an administrative agency such as the Board charged with the duty to determine appeals from administrative decisions to enter as a party in appeals of its decisions, making it a direct adversary of the individual whose rights it has decided in the administrative appeal process.~~

2. Attorney fees are awarded against the Board of Industrial Insurance Appeals to Mr. Meštrovac in the amount of $9,340 ($7,590 + $1,750) for the attorney work performed to respond to the Board's motion to intervene and pleadings on partial modification and partial vacation and to obtain leave under RAP 7.2 for the Superior Court to enter this order.

3. Attorney fees are awarded to Mr. Meštrovac against the Department of Labor and Industries in an amount to be determined upon proof there of provided by his counsel of record.

DATED this 1 day of August, 2006.

HONORABLE DEBORAH D. FLECK
King County Superior Court Judge

Proposed by:

Ann Pearl Owen, WSBA# 9038
Attorney for Enver Meštrovac

ANN PEARL OWEN, P.S.
2407 – 14th Avenue South
Seattle, WA 98144
(206) 624-8637

Copy of notice and attachments delivered to attorney for Plaintiff:

ANN PEARL OWEN
2407 14TH Avenue S
Seattle, WA 98144
Phone: (206) 624-8637
WSBA # 9033
Attorney for Plaintiff

And to attorneys for Defendant:

JOHN WASBERG
Assistant Attorney General
900 Fourth Avenue, Suite 2000
Seattle, WA 98164-1012

PROOF OF SERVICE

I certify that I served a copy of the ***Board of Industrial Insurance Appeals' Notice of Appeal to Division of the Court of Appeals*** on all parties or their counsel of record on the date below as follows:

☐ US Mail Postage Prepaid via Consolidated Mail Service

☒ ABC/Legal Messenger to:

ANN PEARL OWEN
WSBA # 9033
2407 14TH Avenue S
Seattle, WA 98144

COURT OF APPEALS, DIVISION I
Richard D. Johnson
One Union Square, 600 University Street
Seattle, WA 98101-1176

☒ State Campus Delivery to:

JOHN WASBERG
Assistant Attorneys General
900 Fourth Avenue, Suite 2000
Seattle, WA 98164-1012

☐ Hand delivered by _____

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

DATED this 10th day of August, 2006, at Olympia, WA.

KRISTINE HARPER
Legal Assistant

ATTORNEY GENERAL OF WASHINGTON
Government Operations Division
7141 Cleanwater Drive SW
PO Box 40108
Olympia, WA 98504-0108
(360) 586-3636

APPENDIX K

RECEIVED ORIGINAL
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Gov. Operations Div.

Honorable Deborah Fleck

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ENVER MEŠTROVAC, Plaintiff/Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Defendant/Respondent.	NO. 05-2-22775-3 KNT Proposed Per R AP 7.2 ORDER DENYING BOARD'S MOTION TO INTERVENE AND AWARDING ATTORNEY FEES

This matter having come before the Court upon a motion filed by the Board of Industrial Insurance Appeals to intervene as a party in the appeal of Injured Worker Enver Meštrovac of the Board's decisions in Board Docket Nos. 03 17948, 03 18255, & 04 18245 and the Court having reviewed the files and pleadings, including all pleadings in support of and in opposition to the motion to intervene and pleadings regarding partial modification and partial vacation and being fully advised in the circumstances,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS: Contingent upon permission being granted by the Court of Appeals under Rules of Appellate Procedure for this Court to enter the proposed Order this Court approves an Order as follows:

1. The Board's motion be and hereby is denied for the following reasons:

   a. The Board's motion is untimely because it knew since April of 2004 that the issue decided would be raised on appeal and it was served with Mr. Meštrovac's notice

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Seattle, WA 98144
(206) 624-8637

of appeal of its decision to the Superior Court and a copy of this Court's Order Setting Case Schedule.

b. The Board failed to show extraordinary circumstances justifying its delay in moving to intervene.

c. The Board is not entitled to intervene as a matter of right under CR 24.

d. There will be no prejudice to the Board from denial of its motion to intervene.

e. ~~It is unseemly and improper to allow~~ an administrative agency such as the Board charged with the duty to determine appeals from administrative decisions to enter as a party in appeals of its decisions, making it a direct adversary of the individual whose rights it has decided in the administrative appeal process.

2. Attorney fees are awarded against the Board of Industrial Insurance Appeals to Mr. Meštrovac in the amount of $7,590 for the attorney work performed to respond to the Board's motion to intervene and pleadings on partial modification and partial vacation.

3. Attorney fees are awarded to Mr. Meštrovac against the Department of Labor and Industries in an amount to be determined upon proof there of provided by his counsel of record.

DATED this 15 day of June, 2006.

HONORABLE DEBORAH FLECK
King County Superior Court Judge

Proposed by:

Ann Pearl Owen, WSBA# 9033
Attorney for Enver Meštrovac

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