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SUPREME COURT OF THE STATE OF WASHINGTON

IVAN FERENČAK,

Petitioner,

v.

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

Respondents.

**ANSWER OF RESPONDENT
BOARD OF INDUSTRIAL INSURANCE APPEALS
TO AMENDED PETITION FOR REVIEW**

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I. IDENTITY OF RESPONDING PARTY

This Answer is filed by Respondent, Board of Industrial Insurance Appeals (Board).

II. COURT OF APPEALS' DECISION AT ISSUE

The Court of Appeals' decision of which Petitioner is seeking review is a published opinion by Division I, *Ferenčák v. Dep't of Labor & Indus. and Board of Industrial Insurance Appeals*, 142 Wn. App. 713, 175 P.3d 1109 (2008), originally issued January 22, 2008. A copy of the published opinion is attached as Appendix A.

III. COUNTERSTATEMENT OF THE ISSUES

For reasons discussed below, the issues presented by Mr. Ferenčák do not satisfy the criteria for review in RAP 13.4(b). If review were accepted, the issues of concern to the Board are more fairly described as:

1. In *Kaiser Aluminum & Chemical Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 854 P.2d 611 (1993), this Court recognized that the Board may participate in certain cases. Did the Court of Appeals properly hold that the Board had standing to intervene in the superior court matter to defend itself against a claim by Mr. Ferenčák for reimbursement of interpreter services?

2. Under chapter 2.43 RCW, a state agency must pay for interpreter services when it initiates a legal proceeding against a person. Is the Board required to pay for interpreter services for a non-indigent claimant who initiated the administrative appeal to the Board?

IV. COUNTERSTATEMENT OF THE FACTS

The background for this case occurred when a superior court in *Meštrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 176 P.3d 536 (2008) (petition for review pending), held that the Department of Labor & Industries (Department) was required to pay a monetary fee to a claimant for what the superior court deemed to be insufficient interpreter services during Department and Board proceedings. The Department filed a motion asking whether it or the Board should bear the cost of interpreter services at the Board level. The superior court ordered that the Board was required to pay from the filing of the notice of appeal to the Board forward. The Board, however, was not a party to the proceeding. Neither the Department nor Mr. Meštrovac had notified the Board that such relief was being sought against it. Only after the order was entered did the Department notify the Board that the order had been entered. *See generally Meštrovac.*

Because of *Meštrovac*, the Board realized that neither the Department nor a claimant seeking reimbursement for interpreter services could properly protect the Board's interests. Therefore, the Board began seeking intervention in those superior court cases involving reimbursement of interpreter services expenses at the Board.

Because the Board's presence in the present matter is limited to the issue of interpreter services and its right to intervene to defend itself against monetary claims against it, the Board limits its recitation of the facts to this issue only.

A. Proceedings Before the Board

In this case, Mr. Ferencák requested that the Board be required to pay for interpreter services (1) for communications between himself and his attorney during breaks in the Board's hearing, (2) during the preparation stage of his claim, and (3) for all other communications purportedly necessary to assist Mr. Ferencák in the preparation of his case. Specifically, Mr. Ferencák filed a motion before the Board requesting that:

the Board or DLI . . . pay for the services of a translator fluent in his native language not only to allow him to testify at the hearing, but also to translate for him for all statements of the Court, counsel, and all witnesses to allow him to participate meaningfully at hearing, at any motions ad [sic] telephone conferences and to be able to provide contradicting testimony when and if false or inaccurate testimony is offered by any witness, including witnesses called by [Department of Labor & Industries].

Certified Appeals Board Record (CABR) at 117.

On April 4, 2003, Industrial Appeals Judge (IAJ) Keith-Miller issued an order granting Mr. Ferencák translation services for all testimony taken at the hearing. CABR at 188. The order, however,

denied interpreter services for Mr. Ferenčák to communicate with his counsel and to prepare his case. Specifically, the order stated:

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

. . . .

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

CABR at 188-89.

The order also held that the Department was not required to pay for interpreter services for Mr. Ferenčák as he had requested. CABR at 190.

On or about July 5, 2005, Mr. Ferenčák filed a Petition for Review of Proposed Decision and Order dated April 15, 2005, with the Board. In his Petition for Review, Mr. Ferenčák alleged that he was improperly denied interpreter services by the Board "in preparing for hearing and during breaks at hearing when [he] wanted to consult with his counsel." CABR at 16. Mr. Ferenčák also alleged that he could not prepare for a hearing or "read BIIA rules applying to his claim without an interpreter." CABR at 18.

On October 18, 2005, the Board issued a final Decision and Order. With respect to interpreter services, the Board found that there was no

unfair prejudice to Mr. Ferencák by the level of interpreter services that were provided.¹ CABR at 2-3.

B. Proceedings Before the Superior Court

Mr. Ferencák filed a notice of appeal to the King County Superior Court on or about November 8, 2005. On November 16, 2005, the Board received a copy of the notice of appeal² along with a cover letter from Mr. Ferencák's attorney. CP 107-110. Neither the notice of appeal nor the cover letter makes reference to the Board as a party or as an entity against which Mr. Ferencák was seeking monetary relief. *Id.*

The Board was not aware that specific monetary relief was being sought against it until the Department's attorney notified the Board's attorney on July 25, 2006. CP 113. Specifically, the Board's attorney was informed that Mr. Ferencák had filed a trial brief that sought monetary relief against the Board. CP 112-113. Three days later, on July 28, 2006,

¹ The Board further outlined the level of interpreter services that were requested by Mr. Ferencák and denied. Specifically, the Board agreed with the denial of interpreter services at the Department level for Mr. Ferencák to communicate with his attorney and at the Board level for matters outside the recorded proceeding.

² RCW 51.52.110 requires that all notices of appeal be filed with the Board. Specifically, that statute states:

Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and *on the board*. . . . The board shall serve upon the appealing party, the director, the self-insurer . . . and any other party appearing at the board's proceeding, and file with the clerk of the court before trial, a certified copy of the board's official record which shall include the notice of appeal and other pleadings, testimony and exhibits, and the board's decision and order, which shall become the record in such case.

(Emphasis added.)

the Board filed its motion to intervene *and* responsive brief. On August 9, 2006, the court granted the Board's motion to intervene. The superior court rejected Mr. Ferenčák's request for monetary relief against the Board.³

Mr. Ferenčák appealed the superior court's order to the Court of Appeals, Division I, on September 25, 2006. CP 8-9.

C. Proceedings Before the Court of Appeals

The Court of Appeals affirmed the superior court's decision, holding that the Board's motion to intervene was timely and it could find no abuse of discretion in the superior court's granting the Board's motion because Mr. Ferenčák's notice of appeal did not name the Board and yet he sought specific relief against the Board. *Ferenčák*, 142 Wn. App. at 719. With regard to interpreter services, the Court of Appeals affirmed its decisions in *Meštrovac* and *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 175 P.3d 1117 (2008) (petition for review pending), and found no distinguishing facts in *Ferenčák* to warrant a different result. Further, it refused to address several new issues raised by Mr. Ferenčák for the first time on appeal. *Ferenčák*, 142 Wn. App. at 729.

³ With regard to Mr. Ferenčák's substantive claims regarding the amount of worker's compensation benefits, the Board takes no position and provides no factual accounting.

V. REASONS WHY REVIEW SHOULD BE DENIED

This matter does not meet the criteria for review under RAP 13.4 because the issues presented do not involve matters of great public import and the issues specifically decided with regard to Mr. Ferenčák were correctly decided.

First, the issue of the Board's ability to intervene at the superior court level under these unique circumstances is not far-reaching and intervention was correctly permitted based on all of the facts and circumstances. The Court of Appeals simply held that the superior court did not abuse its discretion by allowing the Board to intervene in order to defend itself against Mr. Ferenčák's request for damages against the Board for alleged deficiencies in the amount of interpreter services provided. The Court of Appeals recognized that this case, like *Meštrovac*, created a unique circumstance with regard to the Board's involvement and was not the type of case contemplated by *Kaiser* in that Mr. Ferenčák was actually seeking a judgment against the Board, not just a reversal of the Board's decision.

Second, the scope of interpreter services has been fully resolved but for Mr. Ferenčák's specific request for reimbursement. Chapter 2.43 RCW and the Court of Appeals' decision in this matter require the Board to provide qualified interpreters during the legal proceeding, including

private attorney-client communications during breaks. This, coupled with the Board's own rule, WAC 263-12-097, where the Board pays for interpreter services whenever an interpreter is provided, answers the issue raised by Mr. Ferencak for all future litigants with regard to interpreter services. Therefore, Mr. Ferencak's assertion that the Court of Appeals' "ruling allows the Board to avoid providing interpreters with impunity" is without merit.

Finally, with regard to Mr. Ferencak's specific claim of reimbursement for interpreter services, he provided no legal support for this contention. In order to be entitled to make an argument for reimbursement, Mr. Ferencak would need to show that, under chapter 2.43 RCW, he would have had an initial right for which the services were paid. He cannot show this and, therefore, any claim for future reimbursement is without merit.

A. The Court of Appeals Properly Concluded That the Board Had Standing to Intervene in Order to Defend Itself Against the Request for Reimbursement of Interpreter Services Expenses Raised Against the Board

Mr. Ferencak asserts that the Court of Appeals disregarded this Court's holding in *Kaiser* when it upheld the superior court's order allowing the Board to intervene to defend itself against a claim for reimbursement by a litigant who appeared before it for interpreter services

expenses. First and foremost, the Court of Appeals distinguished the Board's ability to intervene from the Board's ability to appeal under *Kaiser*. Specifically, the Court of Appeals stated "the Board did not appeal the superior court decision; it merely sought to intervene in a proceeding that might have adverse legal and financial implications." *Ferenčak*, 142 Wn. App. at 721. There is, however, no conflict whatsoever with *Kaiser*.

In *Kaiser*, this Court found that the Board, as an impartial tribunal, must not have a partisan interest in the outcome of contested cases. *Kaiser*, 121 Wn.2d at 781. The Board does not have a partisan interest in the outcome of this case. The Board merely sought to protect its own interests by defending itself against a monetary judgment that Mr. Ferenčak was seeking.

This was not the case in *Kaiser*. In *Kaiser*, the Board appealed a superior court decision reversing its order and in effect appealed on behalf of a party. By doing this, this Court determined that the Board was assuming the "role of advocate." *Kaiser*, 121 Wn.2d at 786. In the present case, the Board intervened at the superior court level to prevent the issues this Court was concerned about in *Kaiser*—to be able to "operate within the confines appropriate to an impartial, appellate tribunal." *Kaiser*, 121 Wn.2d at 786. The Board cannot operate in an impartial

manner if parties are permitted to join monetary claims against the Board with appeals of Board decisions.

The Court in *Kaiser* held that the Board did not have explicit or necessarily implied authority to appeal “a superior court judgment reversing the Board’s decision.” *Kaiser*, 121 Wn.2d at 780. This Court specifically narrowed its ruling to cases involving a Board order. *See Kaiser*, 121 Wn.2d at 780 (stating that “[n]othing in this legislation explicitly grants the Board the authority to appeal superior court decisions like the one in this case,” defining the question at issue as to whether “the Board . . . [has] the authority to bring an appeal of a superior court judgment reversing the Board’s decision . . .”).

Here, the Board does not seek to defend its own order. The issue of whether it is required to reimburse Mr. Ferencák for interpreter services expenses he allegedly incurred at the Board was a new issue presented to the superior court for the first time. The Board’s position, based on RCW 51.04.010, which abolished the original jurisdiction of the courts in workers’ compensation appeals, is that the superior court did not have jurisdiction or authority to decide such an issue in an appeal of the Board’s decision. However, because at least one superior court, *Meštrovac*, disagreed with this position, the Board has attempted to intervene to defend itself each time it became aware that specific monetary relief was

being sought against it. In the present case, the superior court granted the Board's motion to intervene.

Because the Board did not intervene to defend its own order but rather to protect its direct monetary interests, it was rightfully permitted intervention and the Court of Appeals correctly concluded such. This ruling presents no conflict with *Kaiser* and is not an issue requiring resolution by this Court.

B. The Court of Appeals' Decision That the Board Was Not Required to Pay for Interpreter Services for Non-Indigent Claimants Because the Board Did Not Initiate a Legal Proceeding Does Not Require Further Review by This Court

The Court of Appeals relied on its decisions in *Meštrovac* and *Kustura* in concluding that Mr. Ferencák was not entitled to reimbursement for interpreter services expenses. The reasoning from those cases will be set forth here.

Under RCW 2.43.040, the cost of providing interpreter services is dependent on whether the governmental body initiates the legal proceeding. Specifically, RCW 2.43.040(2) provides:

In all legal proceedings in which the non-English-speaking person is a party . . . 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.*

(Emphasis added.) The Court of Appeals correctly concluded that the Board does not initiate the legal proceeding, as it is the claimant who brings the appeal to the Board. Specifically, in *Kustura*, the Court of Appeals noted that the “Board’s authority may be invoked only by the *claimant’s* act of initiating an appeal of the Department’s action.” *Kustura*, 142 Wn. App. at 680. Because it was Mr. Ferencák who filed an appeal of a Department order, it cannot be said that the Board initiated any proceeding and, therefore, the Board is not responsible for interpreter services expenses pursuant to the statute.

Finally, there was no claim for or finding of indigency. Therefore, Mr. Ferencák cannot be entitled to paid interpreter services on this ground.

1. The Board Pays for Interpreter Services When Interpreters Are Appointed at the Board

Pursuant to WAC 263-12-097, the Board pays for interpreter services expenses when it appoints an interpreter. For Mr. Ferencák, the IAJ appointed and paid for an interpreter to interpret all Board proceedings. CABR at 196. Board proceedings were not interpreted by the IAJ to include private attorney-client communications. The Court of Appeals ultimately disagreed with this conclusion and the Board did not appeal that ruling. Therefore, in all future Board proceedings, chapter 2.43 RCW, requiring the Board to appoint a qualified interpreter,

coupled with the Board's rule requiring the Board to pay for any interpreter it appoints, resolves the issues presented by Mr. Ferencák, except for the limited issue of his own reimbursement in these proceedings.

2. There Is No Legal Support for a Request for Reimbursement of Interpreter Services Expenses Even if the Board Had Been Required to Pay

Mr. Ferencák argues that because the Court of Appeals held in *Meštrovac* that the Board should have allowed the Board's interpreter to interpret private attorney-client communication during the hearing, any cost Mr. Ferencák incurred associated with that communication should be reimbursed by the Department or the Board. However, Mr. Ferencák overlooks the fact that even though the Court of Appeals in *Meštrovac* held that the Board should have allowed such interpretation, it also held that the Board was not required to pay for any of the cost associated with the interpreter's use. Given these two holdings, there is no question that the Board should not be required to reimburse Mr. Ferencák. But for the Board's own WAC, it would not have been required to pay any amount of the interpreter services provided to Mr. Ferencák. If Mr. Ferencák had no initial right to paid interpreter services, a request for reimbursement for his own expenses is without merit.

3. Because Mr. Ferencák Is Not Entitled to Reimbursement Under RCW 2.43.040, the Issue of Who Is to Pay Is Moot

Notwithstanding the fact that RCW 2.43.040 does not require the Board to pay for interpreter services, there is no provision in chapter 2.43 RCW that would allow for reimbursement of expenses when interpreter services are not properly provided. Mr. Ferencák had an opportunity to seek a writ of mandamus to compel the Board to provide the necessary interpreter services had he chosen to do so. Mr. Ferencák was not required to have incurred any expense when there was a legal remedy available to him. Because Mr. Ferencák chose to incur the expense for which he now seeks reimbursement, he now asks this Court to find a “substantial public interest” where none exists.

C. Mr. Ferencák Has Presented No Other Issue Which Would Require Review by This Court

The Court of Appeals properly declined to review several issues raised by Mr. Ferencák for the first time on appeal. Specifically, Mr. Ferencák argued that he was entitled to interpreter services under (1) the Washington Law Against Discrimination, chapter 49.60 RCW, (2) Executive Order 13166, (3) Title VI of the Civil Rights Act of 1964, (4) WAC 263-12-020, (5) WAC 263-12-117, and (6) that the court’s ruling impermissibly shifts the costs of seeking benefits onto the injured LEP worker.

With regard to the Board, Mr. Ferencák raises no other issue requiring review by this Court. In fact, should this Court accept review of this matter, review should be specifically limited to the issues this Court is most concerned with, given the broad and general nature of Mr. Ferencák's claims.

VI. CONCLUSION

For the reasons stated above, this Court should deny Mr. Ferencák's request for review.

RESPECTFULLY SUBMITTED, this 21 day of August, 2008.

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APPENDIX A

¶32 We reverse in part and affirm in part.

BAKER and DWYER, JJ., concur.

[No. 58878-8-I. Division One. January 22, 2008.]

IVAN FERENČAK, *Appellant*, v. THE DEPARTMENT OF LABOR AND
INDUSTRIES ET AL., *Respondents*.

- [1] **Industrial Insurance — Judicial Review — Burden of Proof.** Under RCW 51.52.115, a Board of Industrial Insurance Appeals decision in an industrial insurance case is *prima facie* correct. The burden of proving otherwise is on the party challenging the decision.
- [2] **Industrial Insurance — Judicial Review — Standard of Review — Agency Record.** Under RCW 51.52.115, a superior court reviewing a Board of Industrial Insurance Appeals decision in an industrial insurance case acts in an appellate capacity, reviewing the board's decision *de novo*, but it cannot consider matters outside of the record or presented for the first time on appeal.
- [3] **Industrial Insurance — Judicial Review — Appellate Review — Standard of Review.** An appellate court reviews *de novo* a judgment entered by a superior court on judicial review of a Board of Industrial Insurance Appeals decision to determine whether substantial evidence supports the superior court's findings of fact and whether the superior court's conclusions of law flow from those findings. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. Unchallenged findings of fact are verities on appeal.
- [4] **Parties — Intervention — Matter of Right — Review — Standard of Review.** A trial court's grant of intervention as a matter of right under CR 24(a)(2) will not be disturbed by a reviewing court absent an error of law.
- [5] **Parties — Intervention — Permissive Intervention — Review — Standard of Review.** A trial court's grant of permissive intervention under CR 24(b)(2) is reviewed for an abuse of discretion.
- [6] **Parties — Intervention — Matter of Right — Test.** A party may intervene in an action as a matter of right under CR 24(a)(2) if (1) the party has made a timely application for intervention, (2) the party claims an interest that is the subject of the action, (3) the disposition of the case likely will adversely affect the party's ability

to protect the interest, and (4) the party's interest is not adequately represented by the existing parties.

- [7] **Parties — Intervention — Permissive Intervention — Grounds — Factors.** A party may intervene in an action by the permission of the court under CR 24(b)(2) if the application is timely and the party's claim or defense presents a common question of law or fact with the main action, though the court will also consider whether the intervention would unduly delay or prejudice the rights of the original parties.
- [8] **Industrial Insurance — Judicial Review — Parties — Intervention — Board of Industrial Insurance Appeals — Liability for Expenses.** The Board of Industrial Insurance Appeals should be allowed to intervene in an industrial insurance claimant's action for judicial review of an adverse administrative decision if the claimant is seeking a judgment against the board for reimbursement of expenses that the claimant alleges the board should bear.
- [9] **Industrial Insurance — Disability — Total Disability — Temporary Total Disability — Time-Loss Compensation — Basis — Wages — Employer Contributions — Health Insurance — In General.** The value of employer-paid health care premiums constitutes "wages" within the meaning of RCW 51.08.178, which defines the wage basis on which an injured worker's time-loss compensation is calculated.
- [10] **Industrial Insurance — Disability — Total Disability — Temporary Total Disability — Time-Loss Compensation — Basis — Wages — Paid Leave — Holiday and Vacation Days — Earned But Not Taken.** The value of holiday and vacation days that a worker has earned but not taken does not constitute "wages" within the meaning of RCW 51.08.178, which defines the wage basis on which an injured worker's time-loss compensation is calculated.
- [11] **Industrial Insurance — Disability — Total Disability — Temporary Total Disability — Time-Loss Compensation — Basis — Wages — Profit Sharing Bonus — Time of Payment — Effect.** The value of an injured worker's profit sharing bonus that was not earned in the year prior to the injury does not constitute "wages" within the meaning of RCW 51.08.178, which defines the wage basis on which an injured worker's time-loss compensation is calculated.
- [12] **Industrial Insurance — Disability — Total Disability — Temporary Total Disability — Time-Loss Compensation — Basis — Wages — Employer Contributions — Government Mandated Benefits.** The value of employer-paid contributions to the Social Security fund, the Medicare fund, the industrial insurance fund, and the unemployment compensation fund on a worker's behalf does not constitute "wages" within the meaning of RCW 51.08.178, which defines the wage basis on which an injured worker's time-loss compensation is calculated.

- [13] **Appeal — Assignments of Error — Argument — Basis in Record — Specific Citation — Necessity.** An appellate court may decline to consider a claim or argument that is unsupported by citation to the record.
- [14] **Appeal — Assignments of Error — Authority — Absence — Effect.** An appellate court may decline to consider a claim or argument that is unsupported by authority explaining why the alleged actions of the tribunal below constitute prejudicial error.
- [15] **Industrial Insurance — Administrative Review — Board of Industrial Insurance Appeals — Scope of Review — Issues Decided by Department of Labor and Industries.** When reviewing a Department of Labor and Industries decision on an industrial insurance claim, the Board of Industrial Insurance Appeals may consider only those issues actually decided by the department.
- [16] **Industrial Insurance — Administrative Review — Decisions Reviewable — Written Decision in Record — Necessity.** Under RCW 51.52.050 and .060, for a Department of Labor and Industries decision on a worker's industrial insurance claim to be appealable by the worker, the decision must be in writing and served on the worker. A decision that has not been reduced to writing and served on the worker is not properly before the Board of Industrial Insurance Appeals for review; i.e., the board does not have jurisdiction to consider an alleged departmental decision if there is no written decision in the record.
- [17] **Industrial Insurance — Claims — Non-English-Speaking Claimant — Interpreter Services — Necessity — Legal Authority.** Neither chapter 2.43 RCW nor constitutional due process or equal protection considerations entitle an injured worker with limited English proficiency to interpreter services for communications with counsel outside of legal proceedings before an Industrial Appeals Judge or the Board of Industrial Insurance Appeals or to have the interpreter services paid as a public expense absent a determination that the worker is indigent.
- [18] **Industrial Insurance — Claims — Non-English-Speaking Claimant — Interpreter Services — BIIA Proceedings — "Throughout the Proceeding" — Denial — Effect.** A failure by an Industrial Appeals Judge or the Board of Industrial Insurance Appeals to allow a non-English-speaking claimant to use an appointed interpreter at all appropriate times during a proceeding as required by chapter 2.43 RCW and WAC 263-12-097 is not reversible error if the claimant was not prejudiced by such failure.
- [19] **Industrial Insurance — Judicial Review — Decisions Reviewable — Industrial Appeals Judge Decision — Failure To Appeal — Effect.** An industrial insurance claimant's failure to petition the Board of Industrial Insurance Appeals for review of an

Industrial Appeals Judge's ruling precludes court review of the ruling.

[20] **Administrative Law — Judicial Review — Appellate Review — Issues Not Raised Previously.** An appellate court reviewing an agency order following review by a superior court may decline to consider issues or argument that were not raised before either the agency or the superior court.

[21] **Industrial Insurance — Administrative Review — Decisions Reviewable — Industrial Appeals Judge Decision — Petition for Review — Sufficiency.** Under RCW 51.52.104, a petition for review of an Industrial Appeals Judge's decision must set forth in detail the grounds for appeal. A failure to do so will result in waiver of the issue.

[22] **Industrial Insurance — Judicial Review — Attorney Fees — Prevailing Party — Department of Labor and Industries — Statutory Attorney Fees.** When the Department of Labor and Industries prevails in an action by an industrial insurance claimant for judicial review of an adverse administrative decision, the department may be awarded statutory attorney fees under RCW 4.84.030

Nature of Action: An injured worker with limited English proficiency sought judicial review of Board of Industrial Insurance Appeals decisions involving his wage-rate calculation for time-loss compensation purposes and his entitlement to interpreter services at public expense.

Superior Court: After granting the board's motion to intervene, the Superior Court for King County, No. 05-2-37144-7, Michael Hayden, J., on August 24, 2006, entered a judgment affirming the board's decisions.

Court of Appeals: Holding that the superior court properly allowed the board to intervene in the action, that neither the law nor the facts supported the plaintiff's claimed wage rate calculation, and that the plaintiff was not entitled to interpreter services for communications with counsel outside of legal proceedings, the court *affirms* the judgment.

*Ann Pearl Owen (of Ann Pearl Owen, PS), for appellant
Robert M. McKenna, Attorney General, and Masako
Kanazawa, Assistant, for respondent Department of Labor
and Industries.*

Robert M. McKenna, Attorney General, and Johnna S. Craig and Spencer W. Daniels, Assistants, for respondent Board of Industrial Insurance Appeals.

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Annotated Revised Code of Washington by LexisNexis

¶1 AGID, J. — Ivan Ferencák, an injured worker with limited English proficiency (LEP), appeals a superior court order granting the Board of Industrial Insurance Appeals (Board) leave to intervene and the court's judgment affirming the Board's decision affirming the decisions of the Department of Labor and Industries (Department). Ferencák challenges the Board's wage calculation, its ruling denying his request for interpreter services for his communications with counsel, and various procedural decisions. But neither the law nor the facts support his wage calculation. And, as we held in *Kustura v. Department of Labor & Industries*, nonindigent LEP claimants are not entitled to free interpreter services for communications with counsel outside of legal proceedings.¹ We therefore affirm the trial court and the Board. Finally, the trial court's intervention order was proper.

FACTS

¶2 Ferencák is an LEP Bosnian immigrant. On March 20, 2002, he injured his right knee in the course of his employment at Travis Industries, Inc. He applied for and the Department allowed a claim for worker's compensation

¹ 142 Wn. App. 655, 175 P.3d 1117 (2008).

benefits. The Department calculated his total gross wage as \$2,199.00 per month, based solely on his hourly wage of \$11.50 per hour for a 40 hour week and health care benefits of \$175.00 per month. Ferencak appealed this determination and other Department orders paying or adjusting his benefits based on this wage determination.

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

¶4 After a hearing, the IAJ issued a proposed decision and order apparently affirming the Department's wage determinations but using different values in the wage calculation reflected in the findings of fact. The IAJ valued Ferencak's health benefits at \$197.15. The IAJ also concluded that Ferencak was not entitled to Board-provided interpreter services for communications with his attorney and that the wage calculation properly excluded "employer-paid contributions to social security, Medicare, life and/or disability insurance policies, 401(K) or Money Purchase Pension plans, or . . . industrial insurance and unemployment compensation coverage."

¶5 Ferencak petitioned for review by the Board, challenging the wage determinations; denial of interpreter services for communications with his attorney; and failure to enforce subpoenas designed to obtain evidence showing his overtime pay, rate of pay, and year end bonus payments. The Board affirmed both the Department's original wage calculation and the IAJ's proposed decision and order,

including the IAJ's finding of fact related to health care benefit costs that conflicted with the Department's original calculation. The Board also concluded that Ferencák was not entitled to have the Board pay for interpreter services for communications with his attorney and declined to address his claim for denial of translation services at the Department level because there was no written denial of those services in the record.²

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

DISCUSSION

[1-3] ¶7 Under RCW 51.52.115, the Board's decision is prima facie correct and the burden of proof is on the party challenging that decision.⁴ The superior court acts in an appellate capacity, reviewing the Board's decision de novo, but "cannot consider matters outside the record or presented for the first time on appeal."⁵ We review the superior court's decision de novo to determine whether substantial evidence supports its findings and whether its "conclusions of law flow from the findings."⁶ Substantial evidence

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

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

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

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

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

is "sufficient to persuade a fair-minded, rational person of the truth of the matter."⁷ "Unchallenged facts are verities on appeal."⁸

I. Intervention

[4-7] ¶8 We will reverse an intervention of right only if the trial court committed an error of law.⁹ We review a decision granting permissive intervention for an abuse of discretion.¹⁰ Although the superior court did not disclose its basis for granting intervention, we must affirm if either kind of intervention was appropriate. To grant intervention of right under CR 24(a), the intervenor must satisfy four criteria: (1) the application is timely; (2) the applicant claims an interest that is the subject of the action; (3) the disposition will likely adversely affect the applicant's ability to protect the interest; and (4) the applicant's interest is not adequately protected by the existing parties.¹¹ For permissive intervention under CR 24(b), the application need only be timely and present a common question of law or fact with the main action, though the court will also consider whether the intervention would unduly delay or prejudice the rights of the original parties.¹²

[8] ¶9 Here, contrary to Ferencak's assertions, the Board's motion to intervene was timely. Because the notice of appeal did not name the Board as a party, there was no way for the Board to know that Ferencak was seeking a

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

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

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

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

¹¹ *Id.* at 649.

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

judgment against it for reimbursement of interpreter fees until the Department informed it of this fact after reading Ferencak's trial brief. The Board moved for intervention within three days after it learned that Ferencak had essentially made the Board a party to his appeal. The Board's interest in not paying a judgment for reimbursement of interpreter fees is obvious. And, while not the only issue on appeal, the extent to which the Board must provide interpreter services to LEP claimants was the central claim. What is less clear on this record is why the Board's interest would not be adequately protected by the Department. But, while this failing may mean that the Board was not entitled to intervention of right, nothing suggests that the superior court abused its discretion by allowing permissive intervention.¹³

¶10 Ferencak's argument against intervention relies on the holding in *Kaiser Aluminum & Chemical Corp. v. Department of Labor & Industries* that the Board generally cannot appeal adverse superior court decisions because it is a quasi-judicial agency.¹⁴ But *Kaiser* is distinguishable. There, the Board sought to appeal a superior court decision reversing its earlier ruling.¹⁵ Here, the Board did not appeal the superior court decision; it merely sought to intervene in a proceeding that might have adverse legal and financial implications. Further, *Kaiser* does not stand for the principal that the Board can never appeal a decision by the superior court. In fact, the court in *Kaiser* explained that one exception to the general rule against allowing a Board appeal is that quasi-judicial agencies may appeal decisions about their own procedures.¹⁶ Here, the Board sought to intervene in an appeal challenging its internal procedures; that is, whether it must provide free interpre-

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

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

¹⁵ *Id.* at 780.

¹⁶ *Id.* at 782.

ter services to all LEP benefits claimants both for legal proceedings and for confidential communications with counsel. *Kaiser* does not support Ferenčák's arguments against Board intervention.

¶11 *City of Milford v. Local 1566*,¹⁷ a Connecticut Supreme Court case cited in *Kaiser* for the proposition that an appeal by a quasi-judicial body concerning its own procedures is proper,¹⁸ supports the superior court's decision to allow intervention. There, the court upheld a lower court's decision allowing intervention by the Board of Mediation and Arbitration in an action to determine whether its arbitrators must take an oath before arbitrating every dispute, reasoning that the board's "significant interest" in protecting the validity of its procedures justified intervention.¹⁹ Here, the issue of whether the Board must provide free interpreter services to all LEP claimants is similarly procedural and potentially has significant budgetary impacts. The Board has a similar interest in seeing that the issue is resolved in its favor. We hold that the superior court did not err by allowing the Board to intervene.

II. Wage Calculation

A. Health Care Benefits

[9] ¶12 Under RCW 51.08.178(1) wage calculation for time-loss benefits includes the value of employer-paid health care premiums.²⁰ Ferenčák argues that the Board undervalued his health care benefits because it erroneously found his employer paid \$175.00 monthly even though a human resources manager testified that benefit payments were \$202.84 per month. This is a misstatement of the record. The Board actually found the employer paid \$197.15 monthly for health care coverage. To support his contention

¹⁷ 200 Conn. 91, 510 A.2d 177 (1986).

¹⁸ *Kaiser*, 121 Wn.2d at 782.

¹⁹ *City of Milford*, 510 A.2d at 180.

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

that the Board undervalued his benefits, Ferencak points to testimony from Travis' human resources manager where he mistakenly stated that medical coverage cost \$158.84 and dental coverage cost \$44.26.²¹ But he almost immediately corrected his testimony, explaining that he had mistakenly looked at what an employee would have to pay for the same coverage under COBRA (Consolidated Omnibus Budget Reconstruction Act of 1990, 42 U.S.C. § 1395). We hold that the Board did not undervalue Ferencak's health care benefits.²²

B. Holiday/Vacation Pay

[10] ¶13 Ferencak argues that his earned, but not taken, holiday and vacation days should be considered in his wage calculation based on this court's holding in *Fred Meyer, Inc. v. Shearer* that paid vacation and holidays should be included in calculating monthly wages under RCW 51.08-.178(1).²³ But *Shearer* is distinguishable because there the employer sought to subtract paid vacation and holidays, already taken, from the injured worker's monthly wage calculation, which would have resulted in the workers being under-compensated.²⁴ Here, Ferencak seeks additional monthly income based on vacation or holidays he could have taken in the future. Adding these days on to his monthly wage calculation would clearly result in overcompensation. This is the functional equivalent of asking for

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

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

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

²⁴ *Id.* at 340.

compensation based on work he would have done in the future, had he not been injured, for which he would not be entitled to compensation because RCW 51.08.178(1) limits the wage calculation to monthly wages the worker is receiving at the time of the injury.²⁵ The Board did not err in refusing to consider unused leave time in its wage calculation.

C. Bonus

[11] ¶14 Ferenčák contends that the Board improperly excluded his yearly profit sharing bonus in its wage calculation. RCW 51.08.178(3) provides:

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

Ferenčák was injured in March 2002. He claims he received a yearly bonus in December 2001, but there is no evidence of this bonus in the record and he cites none in his opening brief. In his reply brief, he claims that exhibit 14, an e-mail, shows the December 2001 bonus. But this exhibit is not included in the record, and it was admitted during the course of a discussion about the 2002 bonus, suggesting it likely did not reference a 2001 bonus.²⁶ He also argues that had the IAJ enforced certain subpoenas, there might have been evidence of a 2002 bonus. This is irrelevant: assuming

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

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

that Travis pays annual bonuses at the same time every year, a December 2002 bonus would not qualify for inclusion in the wage calculation because it was not earned in the year preceding the injury.

D. Employer Payments for Government-Mandated General Fund Benefits

[12] ¶15 Ferenčák argues that the Board should have considered his employer's contributions to Social Security, Medicare, Industrial Insurance, and unemployment compensation in the wage calculation. RCW 51.08.178(1) explains the wage calculation and provides in relevant part:

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

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

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

²⁷ *Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 776, 134 P.3d 234 (2006).

“consideration,” they are not “consideration of like nature”
[28]

¶16 In *Erakovic*, we declined to consider whether unemployment compensation, another government-mandated general fund employer payment, should be considered in the wage calculation because the injured worker failed to cross-appeal on this issue.²⁹ Ferencak provides no argument or authority to distinguish unemployment compensation payments from the other payments we considered and refused to include in the wage calculation in *Erakovic*. Instead, he claims that *Erakovic* was wrongly decided and implicitly overruled by *Department of Labor & Industries v. Granger*.³⁰ But *Granger* did not address whether government-mandated employer payments to general funds are “consideration of like nature” under RCW 51.08.178(1). In *Granger*, the Washington Supreme Court merely considered whether payments made on behalf of an individual employee into a health care trust fund are wages received at the time of the injury when the injured employee is not yet eligible to receive the health care benefits.³¹ The court did not need to ask whether employer payments made for health care are “consideration of like nature” because it had already answered that question affirmatively in *Cockle v. Department of Labor & Industries*.³² And, contrary to Ferencak’s assertions, *Granger* is not in conflict with *Erakovic*. Like the decision in *Granger*, we determined in *Erakovic* that employer payments made during the term of employment were received at the time of injury.³³ Because *Granger* does not require us to reconsider our holding in *Erakovic* and Ferencak fails to explain why a different analysis

²⁸ *Id.* at 769-70 (2006) (footnote omitted).

²⁹ *Id.* at 775.

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

³¹ *Id.* at 759.

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

³³ 132 Wn. App. at 772-73.

should apply to employer payments for unemployment compensation, we affirm the Board's decision to exclude these payments from the wage calculation.

E. IAJ's Evidentiary Rulings

[13, 14] ¶17 Ferencak claims that the IAJ violated WAC 263-12-045 by failing to enforce subpoenas, requiring him to obtain testimony of a health insurer by perpetuation deposition, and by failing to elicit additional testimony necessary to valuing his wages. Because he provides no citation to the record proving these alleged violations occurred or authority explaining why these alleged actions constitute reversible error, we decline to consider this argument under RAP 10.3.³⁴

III. Scope of Review

[15, 16] ¶18 The "Board's scope of review is limited to those issues which the Department previously decided."³⁵ RCW 51.52.060 governs the procedure for appealing the Department's decisions and requires a worker seeking review of a Department decision to file a notice of appeal within 60 days of receiving a copy of the decision. RCW 51.52.050 requires the Department to serve a written copy of any decision it makes on the injured worker. Read together, these statutes imply that for a Department decision to be appealable it must be in writing and served on the worker.

¶19 The Board refused to consider arguments on appeal related to the Department's English-only communications

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

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

with Ferenčak because the record contained no written copy of a decision by the Department to communicate in English only. Ferenčak argues that the Department's repeated use of English-only communications when it knew of his LEP status should be considered an appealable decision within the meaning of RCW 51.52.060 despite the absence of a written decision. Because he provides no authority for this assertion, we decline to consider his argument³⁶ and affirm the Board's conclusion that, in the absence of a written decision, it lacked jurisdiction to review these informal Department actions.³⁷

IV. Interpreter Services

[17-19] ¶20 Ferenčak contends that the IAJ's decision to provide him with interpreter services only for testimony at the hearing, but not for communications with counsel or perpetuation depositions, violated chapter 2.43 RCW, public policy as expressed by that chapter, and constitutional due process and equal protection. We addressed similar interpreter issues in *Kustura* and held that neither chapter 2.43 RCW nor constitutional due process or equal protection considerations entitle nonindigent LEP injured workers to free interpreter services for communications with counsel outside of legal proceedings for which an interpreter has already been appointed during an appeal of the Department's benefits calculation.³⁸ Nothing about the facts of this appeal requires a different result.³⁹ Like the LEP claimants in *Kustura*, Ferenčak has not shown he was

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

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

³⁸ 142 Wn. App. at 679-83, 686-89.

³⁹ Ferenčak raises an additional equal protection issue not raised in *Kustura*, claiming that the Board's decision not to provide him with interpreter services impermissibly infringed on his fundamental right to travel. We decline to consider this issue because he fails to provide sufficient argument or authority under RAP 10.3(a)(6). But we note that this argument would probably fail because he appears

prejudiced by any denial of interpreter services for communications with counsel during proceedings. And, because Ferencák failed to petition the Board for review of the IAJ's refusal to provide interpreter services for perpetuation depositions, that issue is not properly before us. We therefore decline to address it.⁴⁰

[20, 21] ¶21 For the first time on appeal, Ferencák raises several new arguments to support his claim for additional interpreter services. He contends that denying his request for additional interpreter services violates (1) Washington's Law Against Discrimination, chapter 49.60 RCW, (2) Executive Order 13166, (3) Title VI of the Civil Rights Act of 1964,⁴¹ (4) WAC 263-12-020, and (5) WAC 263-12-117, and impermissibly shifts the costs of seeking benefits onto the injured LEP worker. Generally, we will not consider issues raised for the first time on appeal.⁴² Further, RCW 51.52.104 states that a petition for review of an IAJ decision must "set forth in detail" the grounds for appeal and failure to do so results in waiver of the issue. Because Ferencák failed to raise these new issues below, we decline to consider them on appeal. On this record, we hold that Ferencák was not entitled to free interpreter services for communications with counsel.

V. Statutory Attorney Fees

[22] ¶22 The superior court awarded the Department \$200 in statutory attorney fees under RCW 4.84.030. Ferencák argues that this is an improper award of attorney fees under RCW 51.52.130, which states when attorney fees should be awarded in an industrial insurance appeal. But these two provisions do not deal with the same kind of

to argue that the failure to provide interpreter services infringed on his right to travel from his country of origin to the United States. The fundamental right to travel refers only to interstate, not international, travel. See *Haig v. Agee*, 453 U.S. 280, 306, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981).

⁴⁰ See *Sepich*, 75 Wn.2d at 316.

⁴¹ 42 U.S.C. § 2000d.

⁴² RAP 2.5(a).

attorney fees. RCW 51.52.130 allows for an award of actual attorney fees incurred by an injured worker or employer on appeal to the superior or appellate court. In contrast, RCW 4.84.030 allows the superior court to award costs to the prevailing party, and under RCW 4.84.080, those costs include a nominal statutory attorney fee award of \$200. RCW 51.52.140 states that the rules of civil procedure apply in all industrial insurance appeals to the superior court, and the Washington Supreme Court has held that this provision allows the court to impose statutory attorney fees under RCW 4.84.030.⁴³ Thus, we affirm the superior court's award of costs in the form of statutory attorney fees to the Department.

¶23 Ferencák also requests attorney fees on appeal. Because he has not prevailed on any issue, we deny his request.

¶24 We affirm.

BAKER and DWYER, JJ., concur.

[No. 58762-5-I. Division One. January 22, 2008.]

THE STATE OF WASHINGTON, *Respondent*, v. WAYNE ALLEN
NEWLUN, *Appellant*.

[1] **Criminal Law — Punishment — Sentence — Outside Standard Range — Validity — Sixth Amendment — Question of Law or Fact — Review — Standard of Review.** Whether an exceptional sentence was imposed in violation of the Sixth Amendment is a question of law that an appellate court reviews de novo.

⁴³ *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 557-58, 933 P.2d 1025 (1997) (citing *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422-23, 832 P.2d 489 (1992)).