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NO. 58200-3-I

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

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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.

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**CORRECTED BRIEF OF APPELLANT/CROSS-RESPONDENT  
DEPARTMENT OF LABOR & INDUSTRIES**

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FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2007 JAN -3 AM 10:13

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**Appendix**

Select statutes addressed in Department of  
Labor and Industries’ Opening Brief in  
*Mestrovac v. DLI and BIIA*

## **I. NATURE OF THE CASE**

This is a workers' compensation case. The Department of Labor and Industries (Department) appeals from a King County Superior Court decision. The Superior Court affirmed the Board of Industrial Insurance Appeals (Board) decision in favor of the Department on all compensation issues in the case. But then, on constitutional procedural due process grounds, the Superior Court ordered the Department and Board to reimburse claimant Enver Mestrovac (Mestrovac) for an as-yet undetermined amount of out-of-pocket interpreter expenses (for services beyond those already provided by the Department and Board) that he alleges he incurred in communications with his attorney, his employer, various service providers, and government personnel while his claim was being administered and adjudicated.

There is no legal or factual support for the Superior Court's ruling on interpreter services, and this Court therefore should reverse the ruling.

## **II. ASSIGNMENTS OF ERROR AND ISSUES**

### **A. Assignments of Error**

1. The trial court erred in its March 20, 2006 letter opinion declaring Mestrovac has a due process right to the broad array of Department-level and Board-level interpreter services for which he seeks reimbursement and interest for out-of-pocket expenses. CP at 530-31.

2. The trial court erred in its March 20, 2006 Judgment remanding this case to the Board to determine the amount of Mestrovac's Department-level and Board-level out-of-pocket expenses, plus interest, and ordering those agencies to pay those amounts. CP at 532-33.

3. The trial court erred in its April 17, 2006 Order on Reconsideration in Conclusions of Law 2.2, 2.5, and 2.6 clarifying its March 20, 2006 remand order. CP at 643-44.

4. The trial court erred in awarding attorney fees against the Department and Board in its June 15, 2006 Order Denying Board's Motion to Intervene and Awarding Attorney Fees. CP at 956-57.

**B. Issues Pertaining to All Assignments of Error**

1. Do the Board and the courts have jurisdiction to address Mestrovac's claim of right to additional Department-level interpreter services where no Department order on appeal addressed that claim?

2. During the Department's administration of Mestrovac's claim and during the Board's adjudication of his appeal, did the Department or Board violate Mestrovac's constitutional procedural or substantive due process or equal protection rights in limiting the extent of interpreter services?

3. During the Department's administration of Mestrovac's claim and during the Board's adjudication of his appeal, did the

Department or Board violate his statutory rights under RCW 2.43 in limiting the extent of interpreter services provided?

4. Even assuming a statutory or constitutional violation occurred during either Department-level claim administration or Board-level adjudication of Mestrovac's appeal in the limiting of interpreter services, was Mestrovac prejudiced in any way?

5. Where the superior court did not grant Mestrovac any relief on the wage-loss benefits issues on his claim, and where the interpreter services costs were incurred at administrative levels of claim administration and adjudication, did the superior court lack authority under RCW 51.52.130 to award him attorney fees against the Department?<sup>1</sup>

### III. STATEMENT OF THE CASE

#### A. Department Claim Administration

**Wage computation:** In 2003, Mestrovac was injured on the job and filed a claim for workers' compensation benefits, which the Department allowed. CABR 6-7.<sup>2</sup> In the fall of 2003, the Department

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<sup>1</sup> The Department will leave to the cross-appellant Board to address separate issues regarding the superior court's assessment of attorney fees against the quasi-judicial Board. The quasi-judicial Board also likely will raise other issues in its appeal.

<sup>2</sup> Certified Appeal Board Record documents are not separately numbered in the clerk's papers and will be cited as "CABR" with reference to the stamped page number supplied by the Board on the lower right hand corner of the Board document. Board transcripts will be cited as "CABR" with reference to the date of the proceeding and the page number in the transcript for that date's Board proceeding.

issued three time-loss compensation orders for wage replacement under RCW 51.32.090 for successive two-week periods during which Mestrovac was temporarily totally disabled. CABR 6-7.

Underlying each of these time-loss orders was a Department computation of Mestrovac's "monthly wage" under RCW 51.08.178 at a certain dollar amount, along with the Department's determination of his family status as unmarried with no dependent children. CABR 6-7. The Department had computed his monthly wage at \$1584 based on his working 8 hours per day, 5 days per week at \$9 per hour. CABR 3. As an unmarried person with no dependents, Mestrovac was entitled to time-loss compensation at 60% of his monthly wage. RCW 51.32.090; 51.32.060.

**Interpreter services:** It is undisputed that the Department provides, during its claim administration, interpreter services for some communications with the Department and providers, but not for all types of communications for which Mestrovac seeks such services. It is also undisputed that no Department order relevant to this case addressed the question of whether and to what extent Mestrovac was entitled to Department-level interpreter services. It is likewise undisputed that, prior to his appeals to the Board, neither Mestrovac nor any interpreter-services provider, nor anyone else, submitted a bill for services or informed the Department that Mestrovac had incurred out-of-pocket interpreter

expenses from an interpreter other than as provided by the Department under Department policies that are not in the record.

**B. Board Adjudication of Mestrovac's Appeal**

**1. Wage computation adjudication by Industrial Appeals Judge**

Mestrovac appealed the Department's three time-loss orders to the Board, seeking to increase his monthly wage computation under RCW 51.08.178 and to thus raise his time-loss compensation rate under RCW 51.32.090. CABR 287-91, 730-34, 721-25. Mestrovac sought to have included in his wage computation a variety of items, some of which the Department conceded early on should have been included, i.e., the value of (1) employer-provided health benefits, (2) average of regular overtime hours, and (3) bonuses. CABR 287-91, 730-34, 721-25. The other items Mestrovac sought to have included in his wage computation were vacation and holiday pay during a certain period, his employer's contributions to retirement benefits, life insurance, accidental death and dismemberment insurance and short-term disability, as well as his employer's taxes for Medicare and Social Security contributions and industrial and unemployment insurance. CABR 287-91, 730-34, 721-25. A Board Industrial Appeals Judge (IAJ) held hearings on this "monthly wage" issue. CABR transcripts: 8/06/04, 9/02/04.

The IAJ issued a proposed decision recommending that the Board reverse the time loss orders and establish a higher monthly wage. CABR 132-52. The IAJ concluded that as of the date of his industrial injury, Mestrovac was paid, as the Department had determined, regular cash wages of \$9.00 per hour, eight hours per day, five days per week, but that he also regularly worked overtime hours that must be included under the computation formula under RCW 51.08.178. CABR 151-52. The IAJ also found that Mestrovac was receiving health care benefits that must be included in wage computation under the Supreme Court decision in *Cockle v. Dep't of Labor & Industries*, 142 Wn.2d 801, 16 P.3d (2001). CABR 151-52. And the IAJ concluded that Mestrovac's monthly "wages" included bonuses (per subsection 3 of RCW 51.08.178), as well as his holiday and vacation pay for a certain period. CABR 151-52.

But the IAJ rejected Mestrovac's arguments for inclusion in his wage computation the values of other employer contributions and taxes. CABR 151-52; *see also Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 782, 134 P.3d 234 (2005). The IAJ's proposed ruling raised the monthly wage from \$1584.00 to \$2119.41. CABR 151-52.

**2. IAJ's rejection of Mestrovac's interpreter services claims.**

Mestrovac's primary language is Bosnian/Serbo-Croatian (hereafter "Bosnian"). There is no dispute that he is limited in his understanding of English. In his Notices of Appeal to the Board from Department time-loss compensation orders that said nothing about interpreter services, Mestrovac asserted that he had not been provided sufficient interpreter services by the Department during claim administration, and that he was entitled to the following broad array of interpreter services from both the Department and the Board:

[interpreter services for] all communications addressed to him, his lawyer, to any of his treating physicians or other health care providers, to any [other] provider for the Department, with his employer, with his counsel, with IME examiners, with the Board, and associated with his vocational rehabilitation.

CABR 712.

Early in the Board proceedings when the IAJ was seeking clarification of the issues, Mestrovac's counsel asserted Mestrovac was seeking an order for the Department, which already provides an array of interpreter services, to pay for a broader array of interpreter services to assist limited-English-proficiency (LEP) claimants such as Mestrovac for, among other things, all of their claim-related communications with their attorneys, their employers and others, while their claims are being administered at the Department level. CABR Tr 4/26/04, 4-9.

Mestrovac also argued to the IAJ that the Board, which was already providing an interpreter to assist in all on-the-record communications, should provide a broader array of interpreter services to cover confidential communications between him and his attorney, off the record, during breaks in the Board proceedings and presumably any other time they wished to communicate. CABR Tr 4/26/04, 4-9. Mestrovac's counsel informed the IAJ that, if counsel felt the need to hire an interpreter for such off-the-record communications, with his counsel, as well as a number of other persons, Mestrovac's attorney would later seek reimbursement as assessment of costs of the hearing. *Id.*

In rejecting Mestrovac's claim of a right to additional *Department-level* interpreter services, the IAJ explained that the Board had no jurisdiction to grant such relief because the case before the IAJ was strictly an appeal from time loss compensation orders, and no Department order on appeal had addressed the interpreter question. *Id.*; see discussion of the case law on Board and court subject matter jurisdiction *infra* Part VI.A.

The IAJ also denied Mestrovac's request for additional *Board* interpreter services to address, among other communications, off-the-record confidential communications with his counsel. CABR Tr 4/26/04, 4-9. The IAJ contemporaneously memorialized her decision in a written order. CABR 196-200. Mestrovac sought interlocutory review of these

rulings with a reviewing IAJ (CABR 200-32), and the Board's reviewing IAJ denied him relief. CABR 233. The IAJ incorporated her own and the reviewing IAJ's rulings on the Department-level and Board-level interpreter services issues in the IAJ's proposed decision. CABR 133.

### **3. Board Decision and Order on Department and Mestrovac Petitions for Board review**

Both Mestrovac and the Department filed Petitions for Review asking the 3-member Board for review of the IAJ's proposed decision. The Department's challenge was to the wage computation issues involving vacation and holiday pay. CABR 103-10.

In his petition, Mestrovac took exception to all of the IAJ's adverse findings of fact and conclusions of law on his broad range of wage-computation issues; Mestrovac also re-raised the interpreter services issues. CABR 36-91. Mestrovac did not document (nor has he ever documented or even quantified, by way of offer of proof or otherwise) any interpreter-billings to the Department or Board or anyone. CABR 36-91. But he indicated he had incurred such expenses at both the Department and Board, and he asked for the following relief:

Further, [after remand] the Department is directed to determine the amount of past interpreter expenses Mr. Mestrovac has incurred in association with his industrial injury and take, in addition the following action: repay Mr. Mestrovac for any interpreter expenses associated with his industrial injury or his attempts to obtain benefits under the

Act, provide any and all interpreter services needed by Mr. Mestrovac to receive benefits under the Act until final closure occurs on the claim. This specifically is to include the reasonable cost of interpreter services incurred at the rate normally paid by the Department and the Board for such services for Mr. Mestrovac to exercise his right to representation at the Department, Board, Superior Court, Court of Appeals and Supreme Court levels.

CABR 88.

The Board granted review but granted relief only to the Department. CABR 1-10. The Board issued a Decision and Order that agreed with the IAJ's proposed decision except that the Board ruled that the IAJ had misunderstood a distinguishable Board decision regarding holiday and vacation pay, and that the IAJ had thus erred in directing the Department to include additional values for vacation and holiday pay in Mestrovac's wage computation under RCW 51.08.178. CABR 2-6. This final Board decision concluded that the Department had in effect already included the hours of paid holiday and vacation days in its calculation of the base wage. CABR 2-6. This ruling reduced the monthly wage to \$2012.01. CABR 9. One Board member dissented, but only as to a few aspects of wage computation. CABR 9-10.

The final Board decision also addressed the interpreter services issues, stating that the IAJ had fully complied with applicable law as to the interpreter services that were provided during the Board hearings. CABR

6. Finally, the decision stated that, because no Department order on appeal had addressed any interpreter services issue, the Board lacked subject matter jurisdiction to consider any issues concerning Department-level interpreter services. CABR 6; *see* discussion *infra* Part VI.A.

### **C. Superior Court Appeal**

Mestrovac appealed the final Board decision to King County Superior Court. CP at 1-3. After bench trial, on March 20, 2006 the Superior Court issued (1) a letter opinion, (2) findings of fact and conclusions of law, and (3) a judgment. CP at 527-33. The Superior Court affirmed the Board decision except in one respect – it ruled for Mestrovac on his interpreter services issues. CP at 529, 531, 533. The Superior Court made its ruling on the interpreter services issues exclusively on constitutional procedural due process grounds. CP at 531.

The Department moved for reconsideration and clarification on the interpreter services issues. CP at 534-63. In a ruling dated April 17, 2006, the Superior Court again ruled for Mestrovac on these issues, although it revised its conclusions of law on those issues. CP at 643-44. Those revised conclusions of law adopted verbatim revised conclusions of law proposed by Mestrovac. Those revised conclusions of law provide:

2.2: This Court has jurisdiction over the issue of the Department's use of English to communicate with Mr. Mestrovac regarding his claim and specifically in the orders

issued in English and actions which Mr. Mestrovac appealed to the Board and what relief Mr. Mestrovac is entitled to for interpreter services regarding his industrial insurance claim.

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. Mestrovac 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.

2.6: 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. 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.

*Id.*<sup>3</sup>

On May 11, 2006, the Board filed with the Superior Court a motion to intervene. CP at 739-41. On May 12, 2006, the Department

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<sup>3</sup> This Order on Reconsideration drew the Board into this case by directing the Board to ignore subject matter jurisdiction limits on the Board and to hold a hearing to assess the costs of interpreter services that would then be assessed by the Board against itself and against the Department. The Department's Brief of Appellant will not address questions relating to - - 1) the Board's right to intervene in this case, and 2) the Superior Court's lack of authority to order the quasi-judicial Board to assess costs against itself. The Department will leave it to the Board to present the initial argument on those issues.

filed a notice of appeal with this Court. CP at 659-70. The Board and Mestrovac each filed cross appeals with this Court. CP at 731-38; 812-24.

On June 15, 2006 the Superior Court entered a "Proposed order per RAP 7.2 denying Board's motion to intervene and awarding attorney fees," contingent on this Court granting permission for entry of the order. CP at 956-57. That proposed order: 1) reversed the trial court's earlier decision that had expressly denied Mestrovac an attorney fee award against the Department; and 2) granted attorney fees against both the Department and the Board. *Id.* On June 21, 2006 Mestrovac moved this Court for permission for the Superior Court to enter its June 15, 2006 order. On July 18, 2006, this Court granted Mestrovac's motion but denied his motions to dismiss the Board's appeals to this Court.

#### IV. STANDARD OF REVIEW

The Department's appeal raises questions of subject matter jurisdiction, statutory construction and constitutional interpretation. These are all legal issues reviewed de novo. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 730, 57 P.3d 611 (2002) (statutory construction, constitutional interpretation); *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999) (jurisdiction).

## V. SUMMARY OF ARGUMENT

Mestrovac conclusorily alleged below, in his appeal from Department compensation orders that did not address his interpreter services theories, that the Department had not provided him with all of the interpreter services he desires. He argued that the Department and Board policies and practices regarding interpreter services violated constitutional procedural due process, substantive due process, and equal protection provisions, as well as Washington statutory provisions. Without any directly supporting authority from this or any other jurisdiction, he argued (1) that *the Department*, which provides an array of interpreter services, acted unlawfully in not providing him with language assistance in notices and for *all* of his communications with his attorney, his employer, the Department, and his healthcare providers about his industrial injury claim; and (2) that *the Board* (which provided him with an interpreter for all on-the-record communications) acted unlawfully in not providing him with an interpreter for this same virtually unlimited array of communications, including his private, off-the-record conversations with his attorney throughout the Board hearing process.

The Superior Court apparently agreed only with Mestrovac's procedural due process theory. But, agreeing with that theory, the Superior Court ordered that the Board determine the respective amounts of

interpreter services expenses that Mestrovac had incurred - - (1) while his claim was being administered by the Department and (2) while his appeal was being processed by the Board - - and for the Department and Board, respectively, to then reimburse him for all such costs he had incurred out of pocket in his communications with the Department, the Board, his employer, his healthcare providers, and his attorney, with interest of 1% per month accruing from the date any such costs were incurred.

The Superior Court erred in its interpreter services rulings. Mestrovac's theories for **Department-level interpreter services** fail for four reasons. First, the Superior Court, as a strictly appellate entity, could not address such theories because no Department order on appeal addressed that subject. Second, Mestrovac's constitutional procedural and substantive due process and equal protection arguments are unsupported and unsupportable in case law and constitutional policy. Third, RCW 2.43 does not support his theories, both because the Department's actions on his claim do not constitute "proceedings" as defined by RCW 2.43 and because the Department does not "initiate" claims within the meaning of RCW 2.43. Fourth, the Superior Court could not allow interpreter services as "costs" because RCW 51 does not allow costs to a non-prevailing party or for administrative-level costs.

Mestrovac's theories for **Board-level interpreter services** fail for two reasons. First, Mestrovac's state and federal constitutional procedural and substantive due process and equal protection arguments are unsupported and unsupportable in case law and constitutional policy. Second, RCW 2.43 does not support his theories because the Board does not "initiate" appeals within the meaning of RCW 2.43, and the Board did not deny him any interpreter services that would be required under RCW 2.43 if the statute were applicable to Board appeals.

## VI. ARGUMENT

### **A. Because No Department Order on Appeal Addressed Mestrovac's Claim of Right to Department-Level Interpreter Services, the Board and the Courts Have No Subject Matter Jurisdiction to Consider His Claim for Such Relief.**

In workers' compensation cases, the Board and the courts - - having appellate-only jurisdiction - - lack jurisdiction to address an issue (such as Mestrovac's claim of entitlement to Department-level interpreter services) until and unless the Department enters a decision expressly addressing the issue, and an aggrieved party appeals the order. As the Department explains in the discussion below in this section, because no such express Department decision was issued, and because Mestrovac's appeals are from Department orders addressing wholly unrelated matters, the Board and the courts lack jurisdiction to address his claim of right to

Department-level interpreter services, whatever the ground - - statutory, constitutional, or other - - he proffers for his claim of right.

The Industrial Insurance Act (IIA) is a self-contained scheme that provides exclusive procedures and remedies that apply to workers, employers, service providers (be they doctors or interpreters), the Department, and the Board. Title 51 RCW; *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999); *see also Rector v. Dep't of Labor & Indus.*, 61 Wn. App. 385, 390, 810 P.2d 1363 (1991) (“An industrial insurance claim, however, is governed by explicit statutory directives and not by the common law.”)

“A worker who receives workers’ compensation benefits under the act has no separate remedy for his or her injuries except where the act specifically authorizes a cause of action.” *Tallerday v. DeLong*, 68 Wn. App. 351, 356, 842 P.2d 1023 (1993). The jurisdiction of the Board and the courts under RCW 51 is limited by RCW 51’s terms. RCW 51.04.010; RCW 51.52.110; RCW 51.52.115; *Shufeldt v. Dep't of Labor & Indus.*, 57 Wn.2d 758, 760, 359 P.2d 495 (1961) (“[The superior court] has no original jurisdiction. It can decide only matters decided by the administrative tribunals.”).

In adopting the workers’ compensation laws, the Legislature anticipated a simple method for resolving disputes in which expense of

litigation to the worker can be avoided. *Deeter v. Safeway Stores, Inc.*, 50 Wn. App. 67, 74-75, 747 P.2d 1103 (1987). The explicit remedy provided by the IIA to resolve disputes regarding the administration of a claim is primarily found in the appeal provisions of RCW 51.52.050 and 51.52.060.

An aggrieved worker or other aggrieved party may appeal "any decision" of the Department regarding the "administration" of a claim (including the Department's decision not to pay for given medical, interpreter or other services) to the Board no matter if the adverse decision is conveyed in the form of a letter or a Department order. RCW 51.52.050, .060. But the aggrieved party must first obtain a decision of the Department on the matter to be appealed and "must" file an appeal to the Board from such Department order before the worker may appeal to the courts. RCW 51.52.050, .060; *see also* RCW 51.52.070 (requiring the party appealing to the Board to set forth the grounds on which the party challenges "such order, decision, or award").

Department decisions (made in the millions every year) under RCW 51.52 are made *ex parte* without benefit of adversarial hearing or any particular process. *See generally* Rutledge, "A New Tribunal in Washington," 26 Wash. L. Rev. 196, 204 (1951) ("New Tribunal"); Rutledge, "The Board of Industrial Insurance Appeals After Nine Years:

A Partial Evaluation,” 32 Wash. L. Rev. 80-82 (1958) (“BIIA After Nine Years”). Procedural protections are provided by the notice of decision requirement (RCW 51.52.050, 51.52.060), and by the opportunity to object to the Department order, decision, or award in an evidentiary hearing at the Board, which reviews the challenged order, decision, or award de novo in a hearing conducted under the rules of civil procedure. WAC 263-12-125; RCW 51.52.020; 51.52.100.

The process followed by the Department in making its decision and other aspects of Department claim administration are irrelevant to the Board’s review. *McDonald v. Dep’t of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2000) (“L & I’s deliberative processes [re-opening and then ultimately denying the re-opening of a claim] were irrelevant at trial where the jury’s task was to review the BIIA decision.”); “New Tribunal,” 26 Wash. Law Rev. at 204 (The board is not concerned with why the [Department] entered [its] order. [The board] considers the case as if no order, in fact, had been entered by the [Department] and the board decides, solely on the basis of the record made before it . . . .”); “BIIA After Nine Years,” 32 Wash. Law Rev. at 81-82 (“The Board . . . decides the case solely on the basis of the record made before it.”).

The Board reviews only the Department decision and cannot go beyond the scope of that decision in its review and relief. *Hanquet v.*

*Dep't of Labor & Indus.*, 75 Wn. App. 657, 661, 879 P.2d 326 (1994) (“The Board’s scope of review is limited to those issues which the Department previously decided.”); *Shufeldt*, 57 Wn.2d at 760. Here, the Board expressly and correctly declined to address Mestrovac’s claim of entitlement to certain interpreter services at the Department level because that issue was never addressed by any Department order.

An injured worker has the right to appeal the Board decision to superior court. RCW 51.52.110, .115. Superior court review of a Board decision and order is *de novo* but limited to the Board record and to those issues encompassed by the appeal to the Board or properly included in its proceedings. RCW 51.52.115; *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969) (“As a court of review, [the superior court] cannot consider matters outside the record or presented for the first time on appeal.”); *Shufeldt*, 57 Wn.2d at 760 (“[The superior court] can decide only matters decided by the administrative tribunals.”); *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970) (“[I]f a question is not passed upon by the department, it cannot be reviewed either by the board or the superior court.”); *Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 219-223, 292 P.2d 865 (1956) (“[W]e find no warrant in the statutory enumeration of the board’s powers, past or present, for the contention that the board can, on its own motion, change

the issues brought before it by a notice of appeal and enlarge the scope of the proceedings.”<sup>4</sup>

Here, Mestrovac’s claim of right to a vast array of additional Department-level interpreter services and his claim of right to reimbursement for purchasing such services was never addressed by any Department order or by the Board. Accordingly, the Superior Court here erred in concluding that it had jurisdiction to address Mestrovac’s theories.

Mestrovac may argue (though, as is the case for all of his unsupported interpreter services claims, with no factual support in this record) that asking the Department for an administrative order on his interpreter services issue would have been futile. Such argument, however, was rejected by this Court in *Dils v. Dep’t of Labor & Industries*, 51 Wn. App. 216, 752 P.2d 1357 (1988). The *Dils* Court rejected a civil action based on alleged wrongfully denied benefits,

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<sup>4</sup> The following are additional authorities supporting the same jurisdictional point: *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 800, 947 P.2d 727 (1997); *Roberts v. Dep’t of Labor & Indus.*, 46 Wn.2d 424, 425, 282 P.2d 290 (1955); *Lewis v. Dep’t of Labor & Indus.*, 46 Wn.2d 391, 394-96, 281 P.2d 837 (1955); *Turner v. Dep’t of Labor & Indus.*, 41 Wn.2d 739, 741-44, 251 P.2d 883 (1953); *Karniss v. Dep’t of Labor & Indus.*, 39 Wn.2d 898, 902, 239 P.2d 255 (1952); *Merchant v. Dep’t of Labor & Indus.*, 24 Wn.2d 410, 412-13, 165 P.2d 661 (1949); *Leary v. Dep’t of Labor & Indus.*, 18 Wn.2d 532, 540-41, 140 P.2d 292 (1943); *Smith v. Dep’t of Labor & Indus.*, 1 Wn.2d 305, 308-09, 95 P.2d 1031 (1939); *Woodard v. Dep’t of Labor & Indus.*, 188 Wash. 93, 95, 61 P.2d 1003 (1936); *DuFraine v. Dep’t of Labor & Indus.*, 180 Wash. 504, 512-13, 40 P.2d 987 (1935); *Cole v. Dep’t of Labor & Indus.*, 137 Wash. 538, 542-44, 243 P. 7 (1926).

unlawfully delayed final adjudication of claims, and unlawfully made decisions. Relying on RCW 51.52.050, this Court held in *Dils*:

instead of going to superior court suing in tort, Dils could have objected to the Department's claims processing procedures by requesting reconsideration by the Department or by appealing to the Board . . . .

*Dils*, 51 Wn. App. at 219.

The *Dils* Court rejected the plaintiffs' cause of action on jurisdictional grounds. *Id.*; see also *Cena v. Dep't of Labor & Indus.*, 121 Wn. App. 352, 358, 88 P.3d 432 (2004), *rev. denied*, 153 Wn.2d 1009 (2005) (rejecting, on jurisdictional grounds, a tort action grounded in negligent or delayed claim administration, and citing *Dils* and the mandamus remedy discussed there).

Hypothetically, if Mestrovac asked for an order on the interpreter services issue from the Department and became frustrated by an inability to extract any sort of memorialized decision from the Department, he could file a writ of mandamus in superior court. This Court in *Dils* rejected the argument that a civil tort action could be based on the claimed inability to extract an order from the Department. The *Dils* Court ruled that way because, “[a]ssuming for the moment that neither the Department nor the Board responded to Dils’ objections, Dils could have petitioned the court for a writ of mandamus pursuant to RCW 7.16.160 in

order to compel agency action.” *Dils*, 51 Wn. App. at 220. Mestrovac did not pursue his mandamus remedy, and therefore his request for reimbursement of interpreter expenses was not properly before the Board and is not properly before the courts.

In sum, Mestrovac cannot pursue his theories of entitlement to Department-level interpreter services, under any of his many theories - - statutory, constitutional or other - - because no Department order on appeal addressed that issue. The Superior Court thus lacked subject matter jurisdiction and erred in addressing Mestrovac’s theories about Department-level services.

**B. Mestrovac’s Constitutional Theories Are Unsupported, Unqualified and Staggering in their Ramifications.**

Assuming for the sake of argument that this Court somehow concludes that subject matter jurisdiction does exist in this case to address Mestrovac’s theories about Department-level interpreter services, this Court should nonetheless reject his constitutional theories.

There are over 6900 living languages in the world, and Mestrovac’s language of fluency, the Bosnian language, does not rank, in terms of number of speakers, in the top 100 languages spoken worldwide.<sup>5</sup>

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<sup>5</sup> Gordon, Raymond G., Jr. (ed.) 2005. *Ethnologue: Languages of the World*, 15<sup>th</sup> Edition. Online version: <http://www.ethnologue.com>. See also the *Ethnologue*-based compilation of languages spoken by at least 2 million people in the *World Almanac and Book of Facts 2006* at 731-32.

Mestrovac's theory in this litigation (apparently accepted by the Superior Court, though solely on procedural due process grounds) essentially is that all government agencies in the United States at all levels are legally obligated to provide limited-English-proficiency (LEP) claimants with all services in their primary languages.

Under Mestrovac's theory, government agencies are obligated to provide LEP claimants with language services for all of their communications with the claimants and for those between the claimants and their attorneys, employers, service providers, and others as the claimants deem necessary. This right would also include a self-help remedy, with after-the-fact reimbursement for any interpreter expenditures made by the claimants.

Mestrovac's theories have no support in any reported court decision in any civil case in any American jurisdiction involving only economic claims and no threatened loss of liberty, as here. Staggering expenditures of public resources would be required to make Mestrovac's interpreter services theories a reality. His public policy arguments for drastic change are for the Legislature, not the courts, to address.

**C. There Is No Merit to Mestrovac's Procedural Due Process Theory upon Which the Superior Court Granted Him Relief.<sup>6</sup>**

**1. Procedural due process protection generally**

To determine what process is due in a given context, the courts apply the balancing test under *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (evidentiary hearing is not required before the termination of disability benefits). See *City of Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004) (using the *Mathews* test).

The *Mathews* test recognizes that due process is “flexible and calls for such procedural protections as the particular situation demands.” *Mathews*, 424 U.S. at 334. The court is to balance (1) the private interest affected, (2) the risk of an erroneous deprivation of that interest through the procedures used and the value of additional safeguards, and (3) the government’s interest, including the function involved and the fiscal and administrative burdens the additional safeguards would entail. *Mathews*, 424 U.S. at 334-35.

The first *Mathews* factor requires “identification of the nature and weight of the private interest affected by the official action challenged.” *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979).

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<sup>6</sup> The Department will not engage in separate analysis of Washington and federal constitutional procedural due process protections because no greater protection is provided under the Washington constitution. See, e.g., *State v. Manussier*, 129 Wn.2d 652, 679-80, 921 P.2d 473 (1996).

Mestrovac's property interest in his *claim* for benefits is fundamentally different from, and falls short of, a vested right to them as involved in the case of the *termination* of benefits:

Petitioner urges us to consider his application for additional benefits as a vested right that he is being denied as a result of the Commission's action. However, as clearly evidenced in the statute supporting his action, he is making an application for benefits. These are not benefits to which he has already been deemed entitled, but ones he hopes to receive. The action of the Commission, at most, denies him *the opportunity to make his claim*. While this is an important right under both state and federal law, it falls short of a vested right to benefits as in *Mathews*.

*Lander v. Indus. Comm'n of Utah*, 894 P.2d 552, 555 (Utah Ct. App. 1995) (emphasis added).

The second *Mathews* factor "requires consideration of the likelihood of an erroneous deprivation of the private interest involved as a consequence of the procedures used." *Mackey*, 443 U.S. at 13. Although this factor "requires an assessment of relative reliability of the procedures used and the substitute procedures sought," due process "simply does not mandate that all governmental decision-making comply with standards that assure perfect, error-free determinations." *Mackey*, 443 U.S. at 13.

For example, California's Supreme Court rejected a procedural due process challenge in a civil case where a non-English-speaking, indigent, represented defendant challenged the trial court's denial of appointment of

an interpreter to assist attorney-client communications. *Jara v. Mun. Court*, 578 P.2d 94, 96-97 (Cal. 1978). The *Jara* Court noted that the evidence rule did provide for “court appointment of an interpreter for a witness,” which is “essential to permit the witness to understand questions asked and to inform counsel, judge and jury of the witness’ responses.” *Jara*, 578 P.2d at 95. *Jara* sought an interpreter for “communications between the litigant and his counsel and all oral proceedings at trial.” *Jara*, 578 P.2d at 95. In holding that due process did not require an interpreter for such “communications,” the *Jara* Court reasoned:

[T]he non-English speaking litigant ordinarily has alternative sources for language assistance to communicate with counsel and other community professionals and officials. The court proceedings being controlled by counsel, we further suggest that appellant is in no worse position than the numerous represented litigants who elect not to be present in court at all.

*Jara*, 578 P.2d at 96-97.

Finally, the “third *Mathews* factor requires consideration of the State’s interest in the fiscal and administrative burden that additional or substitute procedural requirements would entail.” *Moore*, 151 Wn.2d at 676. Cost is a significant factor when it comes out of a state benefit program with finite funds:

At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is

just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.

*Mathews*, 424 U.S. at 348. The concern with depleting limited funds is of particular significance in a workers' compensation case, where the law is designed to ensure "sure and certain relief" for injured workers by dispensing with expense, delay, and uncertainty of litigation. RCW 51.04.010; *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 256, 26 P.3d 903 (2001) ("Workers receive less than full tort damages but are spared the expense and uncertainty of litigation.").

## **2. Department-level communications**

As noted, the Superior Court agreed with Mestrovac that he had a procedural due process right to notice of Department decisions on wage computation in his native Bosnian language. CP at 531, 643-44. The Superior Court also agreed with Mestrovac's theory that, while his claim was being administered by the Department, he had a procedural due process right to an interpreter for all claim-related communications with his attorney and employer, as well as with Department personnel and a variety of other persons. *Id.* He has cited no authority in this or any other jurisdiction directly supporting any of his procedural due process theories

and there appears to be none. His procedural due process theories, like all of his theories for a right to the vast array of interpreter services he seeks, are unsupportable.

Most of the authority analyzed in this subpart of the Department's brief addresses whether a person with limited English proficiency has a procedural due process right to his or her primary language *notice of agency determinations* of civil economic matters (all holding against that proposition).<sup>7</sup> The same authority implicitly refutes Mestrovac's claim of a procedural due process right to an interpreter for any of the other communications his theory addresses.

No published Washington appellate court decision has yet addressed whether, in civil economic matters that do not involve potential deprivation of liberty (such as here), due process requires that notices from federal, state and local government agencies - - for all manner of services and all manner of programs - - be given to non-English-speaking persons in their primary language (whichever of the 6900-plus world languages those primary languages might be).

It appears, however, that the courts in other jurisdictions that have addressed this issue have uniformly upheld the constitutionality of

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<sup>7</sup> There is a dearth of authority on whether there is a due process right beyond written notices to the vast array of communications raised by Mestrovac. This dearth of authority is probably due to the fact that other litigants have recognized that such a theory is completely unrealistic and unsupportable in law and public policy.

English-only notices in this context. See *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (no due process right to unemployment notices in Spanish); *Toure v. United States*, 24 F.3d 444, 446 (2nd Cir. 1994) (no due process right to notice of administrative seizure in French); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2nd Cir. 1983) (no due process right to social security notices and services in Spanish), *cert. denied*, 466 U.S. 929, 104 S. Ct. 1713, 80 L. Ed. 2d 186 (1984); *Alfonso v. Dep't of Labor & Indus. Bd. of Review*, 444 A.2d 1075, 1076-78 (N.J. 1982) (“[I]n an English-speaking country, requirements of ‘reasonable notice’ are satisfied when the notice is given in English.”); *Commonwealth v. Olivo*, 337 N.E.2d 904, 909-10 (Mass. 1975) (no due process right to receive notice of condemnation in Spanish); *Hernandez v. Dep't of Labor*, 416 N.E.2d 263, 266-67 (Ill. 1981) (English-only notice of unemployment benefit denial did not violate due process); *Guerrero v. Carleson*, 512 P.2d 833, 837 (Cal. 1973) (“[P]rior governmental preparation of that notice in Spanish is not a constitutional imperative under the due process clause.”); see also *Frontera v. Sindell*, 522 F.2d 1215, 1221 (6th Cir. 1975) (no due process right to civil service exam in Spanish).

The Department’s notice to Mestrovac of the Department’s benefits-eligibility determination was addressed to him by his name, address, and case number. Such a notice should alert a non-English-

speaking claimant to seek language assistance, if necessary, as Mestrovac apparently did. See *Guerrero*, 512 P.2d at 836 (“[T]he government may reasonably assume that the non-English speaking individual will act promptly to obtain [language] assistance when he receives the notice in question.”); *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999) (“It has long been established that due process allows notice of a hearing (and its attendant procedures and consequences) to be given solely in English to a non-English speaker if the notice would put a reasonable recipient on notice that further inquiry is required.”).

As the Department noted *supra* Part VI.B, there are over 6900 living languages in the world. It only makes sense that courts have consistently held that a *reasonable* notice required by due process does *not* require that a notice for a non-English-speaking claimant be written in his or her native or primary language, a requirement that would place an insurmountable administrative burden and cost on government agencies.

Thus, the California Supreme Court explained in *Guerrero*:

In essence, plaintiffs’ contention would require the State of California and, presumably, all other States and the Federal Government to provide forms and to conduct its affairs and proceedings in whatever language is spoken and understood by any person or group affected thereby. The breadth and scope of such a contention is so staggering as virtually to constitute its own refutation. If adopted in as cosmopolitan a society as ours, enriched as it has been by the immigration of persons from many lands with their

distinctive linguistic and cultural heritages, it would virtually cause the processes of government to grind to a halt.

*Guerrero*, 512 P.2d at 838.

Multilingual notices and other services may *in some instances* be desirable. But decisions as to whether, when, how, and in which languages to provide such notices are matters that should be left to the Legislature, which must balance the costs, benefits, and needs:

The decision to provide translation, encompassing as it does the determination of when a translation should be provided, and to whom, and in what language, is one that is best left to those branches of government that can better assess the changing needs and demands of both the non-English speaking population and the government agencies that provide the translation.

*Alfonso*, 444 A.2d at 1977.

It might be appropriate and advisable for government agencies to give bilingual notice. . . . However, if such a burden on governmental function is desirable, it should be done by legislative action and with carefully delineated rules and guidelines. It is not appropriate for this court to enter so difficult and obscure an area without legislative mandate.

*Olivo*, 337 N.E.2d at 910 n.6 (citation omitted).

To be sure, those in this country for whom English is not a native tongue can face intense problems just in the daily chores of living, and for those also without the good fortune of a good education the pressures are far greater. Yet, it is not the role of the courts to resolve this societal situation by a strained, at best, construction of the Constitution.

*Valdez v. N.Y. City Hous. Auth.*, 783 F. Supp. 109, 121 (S.D.N.Y. 1991).

### 3. Board-level communications<sup>8</sup>

Upon his appeal from the Department's benefits eligibility orders, the Board provided Mestrovac with a hearing with an interpreter for all the testimony and statements made on the record throughout the hearings. Yet, the Superior Court ruled that due process required the Board to provide him with an interpreter for all of his private, off-the-record conversations with his attorney, plus other communications with a wide variety of other persons. CP at 531, 643-44. The trial court erred.

Mestrovac was represented by an attorney from the outset of the Board proceedings, and, unlike the defendant in *Jara*, was provided with an interpreter for all the testimony and statements made on the record throughout the hearing. He had the right (which he exercised) to seek judicial review of the Board decision. There is only a minimal risk of an erroneous decision on the wage issue as a result of absence of an interpreter for his private, off-the-record conversations with his attorney.

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<sup>8</sup> As the Department noted above, the Board has separately appealed and will address its own separate interests in relation to the Superior Court ruling on Board-level interpreter services. The Department separately addresses issues regarding Board-level interpreter services in this brief because the Department has its own separate interests regarding Board-level interpreter services issues, including, inter alia, possible exposure to a ruling by this Court that not the Board (as the superior court held), but the Department is liable for Mestrovac's out-of-pocket expenditures for additional interpreter services at the Board.

As explained *infra* Part VI.G, he has never alleged, nor did the superior court find, any prejudice from any lack of interpreter services.

Given the nature of Mestrovac's claim involving only the wage issue and the reliable procedural safeguards used against the risk of erroneous decision, the value of having an interpreter for his private, off-the-record conversations with his attorney is outweighed by the cost. Accordingly, under the *Mathews* balancing test, due process does not require such additional safeguards.

**D. There Is No Merit to Mestrovac's Substantive Due Process Theory as to Either Department-level or Board-level Communications.<sup>9</sup>**

Mestrovac's substantive due process argument fails as to both Department-level and Board-level communications for the same reasons - - i.e., because he cannot identify any right *protected by substantive due process*, nor can he explain how the challenged actions of the Department and Board deprived him of it.

"The concept of 'substantive due process,' semantically awkward as it may be, forbids the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered liberty.'" *Nunez*

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<sup>9</sup> The Department will not engage in separate analysis of Washington and federal constitutional substantive due process protections because no greater protection is provided under the Washington constitution. *See, e.g., State v. Manussier*, 129 Wn.2d at 679-80; *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 131, 118 P.3d 322 (2005).

*v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) (quoting *United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)).

Substantive due process “specifically protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (citations omitted). “The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.” *Albright v. Oliver*, 510 U. S. 266, 272, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847-49, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)). “These fields likely represent *the outer bounds of substantive due process protection.*” *Nunez*, 867 F.3d at 871 (emphasis added) (citing *Oliver*, 510 U. S. at 271-72 (“[T]he Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision-making in this uncharted area are scarce and open-ended.”)).

Mestrovac did not allege deprivation of any *constitutionally-created* right. He cited to no constitutional provision or court decision giving him a right to language assistance from the Department as it

processed his claim or a right to have his private, off-the-record conversations with his attorney interpreted at the Board hearing. Accordingly, his substantive due process argument must fail.

**E. There Is No Merit to Mestrovac's Equal Protection Theory.<sup>10</sup>**

**1. Department-level communications**

Mestrovac argued below that the Department violated the equal protection clause by providing him with English-only documents and, in most respects, English-only services.<sup>11</sup> His argument fails because the

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<sup>10</sup> The Department will not engage in separate analysis of Washington and federal constitutional substantive due process protections because no greater protection is provided under the Washington constitution. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 225 n.20, 5 P.3d 691 (2001) (citing *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996)); *State v. Shawn P.*, 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993). In the equal protection area, an independent state constitutional analysis "applies only where the challenged legislation grants a privilege or immunity to a minority class, that is, in the case of a grant of positive favoritism." *Andersen v. King County*, \_\_ Wn.2d \_\_, 138 P.3d 963, 971(2006) (plurality).

<sup>11</sup> In briefing below, for his constitutional theories, Mestrovac placed great reliance (without citing any relevant case law authority) on a Presidential Executive Order (EO 13166 - - 2000 WL 34508183) and a 1991 consent decree involving a different state agency (the Department of Social and Health Services). CP 512-17. His reliance is misplaced. EO 13166 (directing federal grant agencies to develop LEP guidelines) expressly states in section 5 that the EO is intended only for internal management within the federal administration and that EO 13166 does not create any enforceable rights:

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

EO 13166, § 5. Section 5 is unambiguous and dispositive. No privately enforceable rights are created by EO 13166. *See also Alexander v. Sandoval*, 532 U.S. 275, 280-81, 121 S.Ct. 1511, 149 L. Ed. 2d 517 (2001) (no privately enforceable rights are created by Title VI of the federal Civil Rights Act). Further, consent decrees are not enforceable by or against anyone but the parties to the decrees. *See generally Martin v. Wilks*, 490 U.S. 755, 762, 109 S. Ct. 2180, 2184, 104 L. Ed. 2d 835 (1989); *Blue Chip Stamps v. Manor*

Department's use for the most part of English rationally furthers a legitimate government interest in efficient adjudication of each claim in one common language.

Equal protection requires, within reason, "that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Seattle Sch. Dist. No. 1 v. Dep't of Labor & Indus.*, 116 Wn.2d 352, 362, 804 P.2d 621 (1991) (citation omitted). But equal protection "does not require identical treatment of people who are in fact different." *Seattle Sch. Dist. No. 1*, 116 Wn.2d at 364. It "requires equal treatment; it does not make people equal." *In re Ayers*, 105 Wn.2d 161, 167, 713 P.2d 88 (1986).

"The standard of review in a case that does not employ suspect classification or fundamental right is rational basis, also called minimal scrutiny." *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939 (2004) (citation omitted). The courts have consistently held that workers' compensation benefits are "finite resources," not a fundamental right. *Willoughby*, 147 Wn.2d at 739 (applying the rational basis test in a

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*Drug Stores*, 421 U.S. 723, 750, 95 S. Ct. 1917, 1932, 44 L. Ed. 2d 539 (1975); see also *Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 528-30, 106 S. Ct. 3063, 3078-79, 92 L. Ed. 2d 405 (1986). The Department of Labor and Industries was not a party to the consent decree in question and therefore is not bound in any way by the decree. Accordingly, Mr. Mestrovac's arguments grounded in ER 13166 and the consent decree should be rejected as meritless.

workers' compensation case because only economic interests were at issue); *In re Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995) (declaring, in a case asking whether there is an equal protection right to an attorney in civil cases, specifically including workers' compensation appeals: "Where as here, the interest at stake is only a financial one, the right which is threatened is not considered 'fundamental' in a constitutional sense.").<sup>12</sup>

Mestrovac argued below that "any classification based on ability to communicate effectively in English is an inherently suspect classification". CP 440. But language is not a suspect class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (suspect classes are those based on "race, alienage, or national origin") (plurality opinion). To qualify as suspect, "the class must have suffered a history of discrimination, have as the characteristic

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<sup>12</sup> Mestrovac cited in the superior court briefing a case addressing the fundamental right to travel – *Macias v. Dep't of Labor & Indus.*, 100 Wn.2d 263, 668 P.2d 1278 (1983). CP at 439-40. But he failed to explain how the Department's failure to provide him with language assistance impinged on his fundamental right to travel. *Macias* involved statutory exclusion of seasonal farm workers from workers' compensation unless they earn at least \$150 in a calendar year from the employer in whose employ they suffered injury. *Macias*, 100 Wn.2d at 264-65. Noting that the farm workers "must move farm to farm and *state to state* in order to obtain continual employment," *Macias*, 100 Wn.2d at 271 (emphasis added), the *Macias* court concluded that the \$150 threshold requirement effectively "penalized" them for engaging in farm work (involving interstate travel), when their basic necessities of life depended on their small income from each farm, *Macias*, 100 Wn.2d at 273. But Mestrovac failed to demonstrate that the Department "penalized" him for exercising his fundamental right to travel. The fundamental right to travel means "the right to travel *within the United States*." *Haig v. Agee*, 453 U.S. 280, 306, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981) (emphasis added) (explaining "the crucial difference between the *freedom* to travel internationally and the *right* of interstate travel"). *Macias* is inapposite here.

defining the class an obvious, *immutable trait* that frequently *bears no relation to ability to perform* or contribute to society, and show that it is a minority or politically powerless class.” *Andersen v. King County*, 138 P.3d at 978 (plurality) (emphasis added). Ability or lack of ability to speak and read English is not an immutable trait.

Although Mestrovac has argued his “lack of [English] fluency arises directly from his immigrant status” (CP at 441), he cannot show that by using English in providing its services, the Department *purposefully* discriminated against his alienage. To trigger strict scrutiny based on a suspect class, Mestrovac had to show “that a government actor *intentionally* discriminated against [him] on the basis of race or national origin.” *Jana-Rock Constr., Inc. v. Dep’t of Econ. Dev.*, 438 F.3d 195, 204 (2nd Cir. 2006) (emphasis added); *Macias*, 100 Wn.2d at 270 (strict scrutiny based on suspect classification requires “evidence of purposeful discrimination or intent” not “impact alone”). “Discriminatory purpose” is “more than intent as [mere] volition or intent as [mere] awareness of consequences.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). Mestrovac was required to show that the Department acted “at least in part ‘*because of*,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Feeney*, 442 U.S. at 279 (emphasis added); *see also Sandoval*, 532 U.S. at 280-81.

The Department's use primarily of English does not single out any particular race or national origin. "While there is some authority that *singling out speakers of a particular language* merits strict scrutiny, no case has held that the provision of services in the English language amounts to discrimination against non-English speakers based on ethnicity or national origin." *Moua v. City of Chico*, 324 F. Supp.2d 1132, 1137-38 (E.D. Cal. 2004) (emphasis added); *see also Soberal-Perez*, 717 F.2d at 41 ("Language, by itself, does not identify members of a suspect class."); *Commonwealth v. Olivo*, 337 N.E.2d 904, 911 (Mass. 1975) ("The class burdened, however, is not those of Spanish descent, but those unable to read English. This is not a suspect class."); *Valdez v. N.Y. City Hous. Auth.*, 783 F. Supp. 109, 122 (S.D.N.Y. 1991) ("[T]he Housing Authority's failure to provide its documents to plaintiff in Spanish does not implicate a protected class.").

Thus, the rational basis test applies, under which "there is a presumption of constitutionality," and the classification is upheld "unless it rests on grounds *wholly irrelevant* to achievement of legitimate state objectives." *Tunstall*, 141 Wn.2d at 226 (emphasis added) (quoting *State v. Shawn P.*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993)). A classification "will be upheld if *any conceivable state of facts* reasonably justifies the classification." *Tunstall*, 141 Wn.2d at 226 (emphasis added). "In the

ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.” *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). The party challenging the classification “has the burden of proving that the classification is ‘purely arbitrary.’” *Tunstall*, 141 Wn.2d at 226 (quoting *State v. Coria*, 120 Wn.2d 156, 172, 839 P.2d 890 (1992)).

No Washington court has addressed an equal protection claim that an agency must provide all non-English speakers with services in their native or primary languages. But courts in other jurisdictions have consistently upheld the constitutionality of English notices and services. *See Carmona v. Sheffield*, 475 F.2d at 739 (“[T]he choice of California to deal only in English [in providing notices and services of unemployment benefits] has a reasonable basis.”); *Guadalupe Org. v. Tempe Elementary Sch. Dist.*, 587 F.2d 1022, 1026-29 (9th Cir. 1978) (no right to bilingual education); *Frontera v. Sindell*, 522 F.2d 1215, 1218-20 (6th Cir. 1975) (conducting civil service examination only in English meets the rational basis test); *Soberal-Perez*, 717 F.2d at 42-43 (“[I]t is not irrational for the Secretary [of HHS] to choose English as the one language in which to conduct her official affairs.”); *Olivo v. Commonwealth*, 337 N.E.2d 904, 911 (Mass. 1975) (English-only notice of condemnation rationally based);

*Guerrero v. Carleson*, 512 P.2d at 837-39) (English-only notice of reduction or termination of welfare benefits meets the rational basis test).

As the above courts have recognized, the choice of a state agency to deal primarily in English has a reasonable basis. It is “not difficult for us to understand why [an agency decides] that forms should be printed and oral instructions given in the English language: English is the national language of the United States.” *Soberal-Perez*, 717 F.2d at 42; *Frontera*, 522 F.2d at 1220 (“It cannot be gainsaid that the common, national language of the United States is English. Our laws are printed in English and our legislatures conduct their business in English.”); *Olivo*, 337 N.E.2d at 911 (“English is the language of this country.”).

It may be a laudable social goal to have all agencies provide the broadest possible assistance to all of the 6900-plus world language groups. But the government presently cannot fully achieve that goal in this diverse society with finite funds. The “additional burdens on [the state’s] finite resources and [its] interest in having to deal with one language with all its citizens support the conclusion of reasonableness.” *Carmona*, 475 F.2d at 739. The equal protection clause is not intended to “dictate budget priorities by elevating language services over all other competing needs.” *Moua*, 324 F. Supp. 2d at 1138.

Mestrovac asserted below that the Department “routinely provides letters, forms and information translated into Spanish, treating Spanish-speaking injured workers differently than Bosnian-speaking injured workers . . .” CP at 515, 525. “But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State’s action be rationally based and free from invidious discrimination.” *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) (citation omitted). “A classification does not fail rational-basis review because ‘it is not made with mathematical nicety or because in practice it results in some inequity.’” *Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (quoting *Dandridge*, 397 U.S. at 485). The fact that the Department provides some services in Spanish in light of the many Spanish-speaking claimants does not demonstrate any invidious discrimination against Bosnian-speaking claimants.

## **2. Board-level communications**

Mestrovac’s equal protection challenge to the Board’s action in providing less than all of the interpreter services he desired is likewise without merit because, inter alia, he failed to demonstrate that the Board treated him differently from other English-speaking claimants. The Board

does not pay for English-speaking claimants' private, off-the-record consultations with their attorneys.

Mestrovac argues that, as an immigrant and non-English-speaking injured worker, he has a "right to counsel." *E.g.*, CP at 519. His argument is without merit. *An accused in a criminal case* is "guaranteed the right to effective assistance of counsel" under the Sixth Amendment to the federal constitution and article I, section 22 of the state constitution. *In re Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004) (citations omitted). But in "civil cases, the constitutional right to legal representation is presumed to be limited to those cases in which the litigant's physical liberty is threatened or fundamental liberty interest, similar to the parent-child relationship, is at risk." *In re Grove*, 127 Wn.2d at 237 (citations omitted). In fact, there is "no constitutional right to counsel afforded indigents involved in worker compensation appeals." *In re Grove*, 127 Wn.2d at 238.

Because English-speaking claimants have no right to counsel at the Board hearing, it cannot be said that the Board denied Mestrovac any treatment that was granted to English-speaking claimants, when it declined to provide him for an interpreter for his private, off-the-record conversations with his attorney. Accordingly, his equal protection challenge fails. *See Jara*, 578 P.2d at 96-97 (California Supreme Court

holds trial court's refusal to appoint an interpreter for a non-English-speaking, indigent, represented defendant in a civil case beyond the interpretation of the testimony did not violate the equal protection clause).

**F. No Statutory Right to Interpreter Services Was Denied Mestrovac by Either the Department or the Board.**

**1. Department-level communications**

Mestrovac argued below that RCW 2.43 supports his theories that the Department is obligated to reimburse him for all out-of-pocket interpreter expenses he allegedly incurred while his claim was pending at the Department. CP at 520-23. The Superior Court apparently did not agree, but instead based its ruling exclusively on procedural due process. CP at 531. *See* analysis of procedural due process issue *supra* Part VI.C. RCW 2.43 does not apply to the Department's claim administration process because such a process is not a "legal proceeding" or "initiated" by the Department, both of which are requisite to the statute's applicability.

The statute provides, in relevant part: "In 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.*" RCW 2.43.040(2) (emphasis added). By its clear language, the statute applies to "legal proceedings." The statute 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.” RCW 2.43.020(3).

The Department’s claim administration decision-making process is not a “legal proceeding” because it is not a “hearing” before the Department and is wholly irrelevant to a worker’s appeal to the Board. *See* discussion *supra* Part VI.A; *see generally McDonald*, 104 Wn. App. at 623. The hearing process begins *after* the Department makes its decision on a claim in an ex parte, non-adversarial manner and only when an aggrieved party appeals that decision to the Board. *Id.* The Board then engages in a completely de novo determination of whether the Department decision is correct. “New Tribunal,” 26 Wash. L. Rev. at 204-05; “BIIA After Nine Years,” 32 Wash. L. Rev. at 80-82.

Further, under RCW 2.43, the “cost of providing the interpreter shall be borne by the governmental body *initiating* the legal proceedings.” RCW 2.43.040(2) (emphasis added). It was *Mestrovac* who filed a claim with the Department and later “initiated” the appeal proceedings at the Board. The Department did not “initiate” any process. Therefore, assessment of interpreter fees against the Department at Department-level claim administration is neither required nor warranted under the statute.

## **2. Board-level communications**

RCW 2.43 does not require the Board to pay for interpreter services *Mestrovac* allegedly incurred while his appeal was pending at the Board. This is because the Board, like the Department, did not “initiate”

any legal proceeding in this case. RCW 2.43.040(2). As stated above, the statute directs the “governmental body initiating the legal proceedings” to bear the cost of interpreter services. RCW 2.43.040(2). It was Mestrovac who initiated the appeal proceedings at the Board by filing an appeal of the three Department orders at issue. Moreover, pursuant to its own rule, WAC 263-12-097, the Board provided Mestrovac with all interpreter services that would have been required by RCW 2.43 had the statute applied to the Board proceedings.

**G. Even Assuming That Mestrovac Was Entitled to Additional Interpreter Services, He Failed to Show Prejudice from the Denial of Such Services.**

Even assuming that Mestrovac’s procedural due process or other arguments for entitlement to additional interpreter services were to have any merit, he must also prove actual prejudice in order to establish a due process violation. *See Gutierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002) (“To make out a violation of due process as the result of an inadequate translation, Gutierrez must demonstrate that a better translation likely would have made a difference in the outcome.”); *Kuqo v. Ashcroft*, 391 F.3d 856, 859 (7th Cir. 2004) (“A generalized claim of inaccurate translation, without a particularized showing of prejudice based on the record, is insufficient to sustain a due process claim.”); *State v. Storhoff*, 133 Wn.2d 523, 528, 946 P.2d 783 (1997) (“But the Defendants . . . have

not explained how DOL's error deprived them of notice of their license revocations or their opportunity to request a formal hearing."); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) ("[T]o constitute a [due process] violation, the party must be prejudiced.").

Mestrovac has not identified any prejudice as a result of his claimed due process violation. In fact, he timely appealed the Department's benefit eligibility determination through his attorney and was provided with an evidentiary hearing before the Board with an interpreter provided throughout the hearing, except for his private, off-the-record conversations with his attorney. He submitted extensive briefing on wage-computation through his attorney at the Board and at the superior court (which ultimately upheld the Department's wage calculation). Mestrovac has never alleged that additional language assistance likely would have made a difference in the outcome. Nor could he reasonably make such an allegation when the outcome was based on the legal correctness of the Department's interpretation of the word "wages" in RCW 51.08.178. In fact, the Superior Court ruled against Mestrovac on that sole wage issue in this case, thus recognizing that no prejudice occurred in relation to the claimed lack of interpreter services.

**H. The Superior Court Erred in Granting Mestrovac Costs for Interpreter Services, Both Because He Was Not a Prevailing Party**

**and Because Out-of-Pocket Interpreter Costs Incurred at the Administrative Level Can Never Be Awarded to Any Party.**

There is no statutory authority for a worker taking a self-help remedy of paying for interpreter services (or other services) and then seeking reimbursement for those services in the first instance at the Board, either as to Department-level or Board-level services. Perhaps that is why Mestrovac argued below (CP at 522 (citing RCW 2.43.040) that interpreter expenses in the context of this case are a form of costs. See RCW 2.43.040 (though not applicable to the Department - - see discussion *infra* Part VI.F.1 - - this statute supports the proposition that interpreter services are a form of costs).

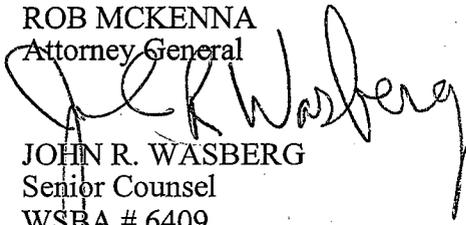
However, costs (and attorney fees) cannot be awarded in a workers' compensation appeal except at the court level to a party prevailing on the merits, and then only for attorney fees incurred at court and generally only costs and witness fees incurred in relation to the court action, not all costs incurred the Board proceedings, and no "costs" incurred at the Department level. RCW 51.52.130 (fourth sentence); *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889-90, 86 P.3d 1231 (2002) *rev. denied*, 152 Wn.2d 1032 (2005). Mestrovac did not prevail on the merits in his appeal to the Superior Court and did not incur any interpreter costs at Superior Court. Therefore, he is not entitled to an award for the interpreter costs. *Piper*, 120 Wn. App. at 889-90; RCW 51.52.130.

## VII. CONCLUSION

For the reasons stated above, the Department requests that this Court reverse the Superior Court decision on the interpreter services issues, and reinstate the Board's decision on all issues.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of December, 2006.

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NO. 58200-3-I  
**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

ENVER MESTROVAC,

Respondent/Cross Appellant,  
v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

Appellant/Cross Respondent.

CERTIFICATE OF  
SERVICE BY MAIL

I, Janice Ost, certify that I served a copy of **Corrected Brief of  
Appellant/Respondent Department of Labor and Industries** on all the  
parties or their counsel of record on the date below by placing said documents in  
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I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 29th day of December, 2006, at Seattle, WA

  
JANICE M. R. OST

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