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STATE OF WASHINGTON

SUPREME COURT  
STATE OF WASHINGTON

ENVER MEŠTROVAC,  
Petitioner,

v.

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

AMENDED PETITION FOR REVIEW

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## TABLE OF CONTENTS

I. IDENTITY OF PETITIONER.....	1
II. CITATION TO COURT OF APPEALS DECISION.....	1
III. ISSUES PRESENTED FOR REVIEW.....	1
IV. STATEMENT OF THE CASE.....	2
V. ARGUMENT.....	5
A. Petitioner should be Reimbursed for Interpreter Expenses Incurred during Department and Board Proceedings.....	5
1. Interpreter Expenses are a Benefit under the Act to Ensure LEP Workers Equal Access to Benefits.....	5
2. Interpreter Expenses at the Board are Not the Worker's.....	7
B. The Board should Not be Permitted to Intervene and Appeal the Trial Court's Ruling.....	9
C. Failure to Include All Overtime Pay in Calculating Mr. Meštrovac's Wages Denies Him Equal Protection.....	12
D. Employer Contributions for Government-Mandated Benefits should be Included in Determining Wages.....	15
E. Holiday and Vacation Pay should be Treated as Cash in Calculating Mr. Meštrovac's Wages.....	17
F. The Board had Jurisdiction to Consider the Appeal of Department Failure to Provide Additional Language	

Accommodation.....	18
VI. ATTORNEY FEES & COSTS REQUEST.....	20
VII. CONCLUSION.....	20

## APPENDICES

- A COURT OF APPEALS OPINION
- B COURT OF APPEALS DECISION ON RECONSIDERATION
- C EXCERPT FROM BOARD ORDER & DECISION
- D FEDERAL FUNDING OF INDUSTRIAL INSURANCE PROGRAM

## TABLE OF AUTHORITIES

<u>Washington Cases</u>	<u>Page</u>
<i>Berrocal v. Fernandez</i> , 155 Wn.2d. 585, 121 P.3d 82 (2005).....	6
<i>Brand v. Department of Labor &amp; Industries</i> , 139 Wn.2d 659, 989 P.2d 1111(1999).....	9, 20
<i>Cockle v. Department of Labor &amp; Industries</i> , 142 Wn. 2d 801, 16 P. 3d 583 (2001).....	15, 18, 19
<i>Davis v. Department of Employment Security</i> , 108 Wn.2d 272, 737 P.2d 1262 (1987).....	13
<i>Department of Labor &amp; Industries v. Granger</i> , 159 WN.2d 752, 153 P.3d 839 (2007).....	17
<i>Dils v. Department of Labor &amp; Industries</i> , 51 Wn.App. 216, 752 P.2d 1357 (1988).....	19
<i>Egede-Nissen v. Crystal Mountain</i> , 93 Wn.2d 127, 606 P.2d 1214 (1980).....	15
<i>Eraković v. Department of Labor &amp; Industries</i> , 132 Wn.App. 762, 134 P.3d 234 (2006).....	16
<i>Fred Meyer v. Shearer</i> , 102 Wn.App. 336, 8 P.3d 310 (2001).....	17
<i>Harmon v. McNutt</i> , 91 Wn.2d 126, 587 P.2d 537 (1978).....	13
<i>Kaiser Aluminum &amp; Chemical Corp. v. Department of Labor &amp; Industries</i> , 121 Wn.2d 776, 854 P.2d 611 (1993).....	9-11

<i>Kustura v. Department of Labor &amp; Industries,</i> 142 Wn.App. 655, 175 P.3d 1117 (2008).....	5, 6
<i>Kreidler v. Eikenberry,</i> 111 Wn.2d 828, 766 P.2d 438 (1989).....	12
<i>Martin v. Pickering,</i> 85 Wn.2d 241, 523 P.2d 380 (1975).....	12
<i>Meštrovac v. Department of Labor &amp; Industries,</i> 142 Wn. App. 693, 176 P.3d 536 (2008).....	1
<i>State v. Marintorres,</i> 93 Wn.App. 442, 969 P.2d 501 (1999).....	6
<i>State v. Smith,</i> 97 Wn.2d 856, 651 P.2d 207 (1982).....	5
<i>Steele v. Lundgren,</i> 85 Wn.App. 845, 935 P.2d 671 (1997).....	7-8
<i>State v. Stivason,</i> 134 Wn.App. 648 (2006).....	8
<i>Washington v. G.A.H.,</i> 133 Wn.App. 567, 137 P.3d 66 (2006).....	11
<i>Willoughby v. Department of Labor &amp; Industries,</i> 147 Wn.2d 725, 57 P.3d 611 (2002).....	15

**Washington Statutes:**

RCW 2.42.....	6
RCW 2.42.120.....	6
RCW 2.43.....	6

RCW 2.43.010.....	5-6
RCW 2.43.030.....	7
RCW 2.43.040.....	9, 20
RCW 43.22.331.....	6
RCW 49.60.....	6
Industrial Insurance Act, RCW Title 51.....	<i>Passim</i>
RCW 51.48.017.....	6
RCW 51.48.020.....	6
RCW 51.48.080.....	6
RCW 51.48.250.....	6
RCW 51.48.260.....	6
RCW 51.48.270.....	6

**Washington Regulations:**

WAC 263-12-045.....	11
WAC 263-12-097.....	8

**U.S. Supreme Court and Federal Authorities:**

<i>Davis v. Washington</i> , 547 U.S. 813, 165 L.Ed.2d 207, 126 S.Ct. 2266 (2006).....	5
<i>Goldberg v. Kelly</i> , 397 U.S. 254, 90 S.Ct. 1001, 25 L.Ed.2d 187 (1970).....	16

<i>Memorial Hospital v. Maricopa County</i> , 415 U.S. 250, 39 L.Ed.2d 306, 94 S.Ct. 1076 (1974).....	16
<i>Shapiro v. Thompson</i> , 1394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969).....	16

**Presidential Executive Order**

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

**Federal Statutes:**

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

## **I. IDENTITY OF PETITIONER**

Petitioner Enver Meštrovac is an injured worker with limited English proficiency [LEP]. He appealed Department of Labor & Industries [Department] decisions to the Board of Industrial Insurance Appeals [Board], then to Superior Court. The Department and Board appealed to Division I. Mr. Meštrovac cross-appealed. He now seeks review of the rulings of the Court of Appeals.

## **II. CITATION TO COURT OF APPEALS DECISION**

Petitioner seeks review of the opinion in *Meštrovac v. Dep't of Labor & Industries*, 142 Wn. App. 693, 176 P.3d 536 (2008). Petitioner's motion for reconsideration was, in substance, denied on February 29, 2008. See **APP. A & B.**

## **III. ISSUES PRESENTED FOR REVIEW**

This petition raises issues of great import on how the Industrial Insurance Program should treat LEP injured workers as well as issues on wages.

1. When the Department or Board provides incomplete interpreter services to an LEP worker during their proceedings, thus requiring him to pay his own interpreter, is this worker entitled to reimbursement for interpreter expenses?
2. When a court rules the Board must reimburse an LEP worker for interpreter expenses incurred during Board proceedings, may the Board intervene and, later, appeal that ruling at the Court of Appeals?
3. Is a worker denied equal protection by exclusion of part of his overtime

pay in calculating his wages under RCW 51.08.178 because he was a full time employee rather than a seasonal, part time, or intermittent employee?

4. When calculating a worker's wages, should the Department include the employer's payments for government-mandated benefits of a critical nature?

5. If an employer provides employees paid holidays and vacation, may the Department, in calculating wages, disregard the employer's policy to give an employee additional pay in lieu of taking time off, assuming the worker will take time off rather than work those days and receive cash instead?

6. Does the Board have jurisdiction to hear an appeal of a Departmental decision that is not in the form of a written order?

#### **IV. STATEMENT OF THE CASE**

Enver Meštrovac is a lawful LEP immigrant from Bosnia. TR 8/6 217-20. When injured, he worked in a warehouse for \$9 per hour and \$13.50 per hour for overtime. TR 8/6 137-8. He worked significant overtime, supporting his disabled father, his mother and his minor brother. TR 8/6 37-8, 140-1; 9/2 13-7. He received health insurance and paid holidays and vacation time. The employer let its workers opt to either 1) take time off with pay for holidays and vacation or 2) not take time off and receive regular pay for the days worked plus additional cash in lieu of taking time off with pay. Ex. 8, pp. 94 & 95, Ex. 9, pp. 93-94, TR 8/6 38, 142.

Mr. Meštrovac's injury disabled him. His physician filed a claim with the

Department and certified him for time loss benefits. TR 9/2 17-8. The Department knew he was LEP and needed language accommodation, but never communicated with him in Bosnian. TR 8/6 114. While his claim was pending, he requested language accommodation from the Board and Department for communications on his claim and appeal with his employer, lawyer, the Department, the Board, and health care providers. The Department provided limited interpreter services for medical care, but for no other purposes, and continued to send orders in English only. See CBRA 330-42.

Mr. Meštrovac appealed Department wage orders on grounds they failed to include (1) the value of employer-provided health benefits, (2) his overtime earnings, (3) bonuses, (4) vacation/holiday pay, and (5) employer contributions for Medicare, Social Security and Unemployment insurance. He also requested interpreter services during Board appeal and on his claim and reimbursement for interpreter expenses which the Department did not provide. See CBRA 330-42.

The Industrial Appeals Judge (IAJ) originally stated whether the Department issued orders in Bosnian as an issue, later finding no jurisdiction for that and other language issues. CBRA 173, 196. The IAJ determined Mr. Meštrovac was entitled to interpreter services during the proceedings, denying interpreter services for communications with counsel, through a Board-appointed interpreter present at evidentiary hearings. CABR 237, TR 4/26, 4-9. Mr.

Meštrovac incurred interpreter expenses to communicate with his lawyer during Board proceedings, his employer on his injury, with his health care providers, and to read Department English only orders. The IAJ disallowed such testimony, there being no jurisdiction on constitutional or language issues. CBRA 133, 196.

The IAJ found Mr. Meštrovac's health care premiums, his bonuses, and his paid holiday and vacation time should be included in calculating his wages. CABR 151-52. The IAJ ruled against Mr. Meštrovac on all other wage calculation issues and also ruled against him in his appeal of Department refusal to provide additional interpreter services. CABR 196-200.

Mr. Meštrovac and the Department requested review of the ALJ's decision by the full Board. CABR 36-91. A split Board with a written dissent denied Mr. Meštrovac relief on wage calculation and ruled that pay for holidays and vacation time is not to be added in calculating wages, on the ground that these amounts were included when determining he worked a 40 hour week. CBRA 1-10. APP. C. The Board denied reimbursement for interpreter expenses. CABR 6.

The Superior Court affirmed the Board's decision on wage calculation issues, but ruled Mr. Meštrovac was entitled to reimbursement for interpreter expenses during both Department and Board proceedings. CP 527-533. The Superior Court remanded to the Board to determine the amount of interpreter expenses Mr. Meštrovac incurred. The Court of Appeals stayed that order.

The Board moved to intervene and filed a Notice of Appeal, seeking review of the court's decision requiring it to determine his interpreter expenses and reimburse Mr. Meštrovac. The court denied intervention, awarding attorney fees to Mr. Meštrovac. CP 957. The Department appealed. CP 659-70. Mr. Meštrovac cross-appealed on wage calculations. CP 812-25.

The Court of Appeals affirmed the trial court on all wage calculation issues, ruled the Board had standing to intervene and appeal, and ruled the Board had failed to provide full interpreter services as required by law, but because he was not prejudiced, Mr. Meštrovac was neither entitled to reimbursement nor to a new hearing with communication with counsel interpreted for him.

## V. ARGUMENT

### A. PETITIONER SHOULD BE REIMBURSED FOR INTERPRETER EXPENSES INCURRED DURING DEPARTMENT AND BOARD PROCEEDINGS.

#### 1. INTERPRETER EXPENSES ARE A BENEFIT UNDER THE ACT TO ENSURE LEP WORKERS EQUAL ACCESS TO BENEFITS.

The Department pays interpreters for medical care as a benefit under the Act. RCW 2.43.010 entitles LEP persons to interpreters in "legal proceedings." Department investigations<sup>1</sup> result in orders that become determine worker benefits and thus are legal proceedings, notwithstanding *Kustura v. Dep't of Labor &*

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<sup>1</sup> Statements made to agencies are "testimonial" and part of "legal proceedings." *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982); *Davis v. Washington*, 547 U.S. 812, 165 L.Ed.2d 224 (2006).

*Industries*, 142 Wn.App. 655, 175 P.3d 1117 (2008). In *Kustura*, the Court of Appeals ignored this Court's interpretation of the "last antecedent" rule in *Berrocal v. Fernandez*, 155 Wn.2d 585, 121 P.3d 82 (2005). Applying the *Berrocal* rule to interpret RCW 2.43.010 results in agency proceedings being included in "legal proceedings" where interpreters are free.

On equal protection analysis, *State v. Marintorres*, 93 Wn.App. 442, 969 P.2d 501 (1999) held that free interpreters must be provided to LEP persons under RCW 2.43 to the same extent that free language accommodation is given to the speech/hearing disabled under RCW 2.42. RCW 2.42.120(4) requires free accommodation in law enforcement investigations. The Department is both an investigative and a law enforcement agency.<sup>2</sup> Thus, free interpreters must be provided with the result that LEP worker benefits will not be diminished by interpreter expenses and will equal benefits of similarly situated English-fluent workers. This Court should accept review to reconcile the conflict between the opinions of Division I in *Kustura* and Division III in *Marintorres*.

Executive Order 13166, Titles VI and VII of the Civil Rights Act of 1964, and RCW 49.60 require language accommodation and bar discrimination based

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<sup>2</sup> RCW 51.04.020(6) requires the Department investigate all serious job injuries. The Department charges false reporting [RCW 51.48.020], issues WISHA citations [RCW 43.22.331], penalizes violations [RCW 51.48.080], penalizes self insured employers [RCW 51.48.017], penalizes workers and orders reimbursement of moneys received with interest [RCW 51.48.250 & .260], and refers workers for criminal prosecution [RCW 51.48.270].

on national origin in federally assisted programs, public facilities and programs, employment, and employment benefits like Industrial Insurance. See APP. D, Biennial federal aid received by the Industrial Insurance program 1997-2007.

2. INTERPRETER EXPENSES AT THE BOARD ARE NOT THE WORKER'S.

Under RCW 2.43.30(1), the Board was required to appoint an interpreter for Mr. Meštrovac to assist him throughout the proceedings. RCW 2.43.30(1) states:

Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings.

The IAJ appointed an interpreter for evidentiary, but not other, hearings, refusing to let the interpreter to assist Mr. Meštrovac communicate with counsel during proceedings. Mr. Meštrovac incurred interpreter expenses to do this.

The Court of Appeals correctly held that by “failing to provide an interpreter for communications with counsel” the Board did not comply with the statute’s directive to supply an interpreter ‘to assist [the claimant] throughout the proceedings.’” The Court of Appeals, however, ruled that he was not prejudiced and, thus, not entitled to reimbursement.

This ruling should be reviewed for two reasons. First, it is ordinarily deemed “prejudicial” to cause a party to incur unnecessary expenses. *Steele v.*

*Lundgren*, 85 Wn.App. 845, 859, 935 P.2d 671 (1997). Mr. Meštrovac's interpreter costs would not have occurred had the Board complied with the law.

Second, the ruling allows the Board to disregard a legislative directive with impunity by shifting the burden and expense of a qualified interpreter to the injured worker. While the Court of Appeals asserted that who pays for interpreter expenses is at Board discretion, the Board's own regulations state otherwise.

Under WAC 263-12-097, when an IAJ judge determines that an interpreter is needed, the expense "will" be paid by the Board.<sup>3</sup> The regulation states:

(1) When an impaired person as defined in chapter 2.42 RCW or a non-English-speaking person as defined in chapter 2.43 RCW is a party or witness in a hearing before the board of industrial insurance appeals, the industrial appeals judge may appoint an interpreter to assist the party or witness throughout the proceeding. . . .

(4) The Board of industrial insurance appeals will pay for interpreter expenses when the industrial appeals judge has determined the need for interpretive services as set forth in subsection (1). . . .

RCW 51.52.030 states all necessary Board expenses are to be paid not from the Board's budget, but equally from two Department funds dedicated to pay worker benefits – *i.e.* the Accident and Medical Aid funds. This shows that interpreter cost is not a worker responsibility, but a worker benefit under the Act.

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<sup>3</sup> In construing statutes and court rules, the words "will" and "shall" are mandatory, while words like "may" are permissive and discretionary. *State v. Stivason*, 134 Wn.App. 648, 656 (2006).

The Court of Appeals ruling allows shifting of interpreter expenses to the LEP worker, effectively reducing the worker's disability benefits. Such an outcome is at odds with the objectives of the Industrial Insurance Act [Act]. The applicable principle was stated in connection with attorney's fees in *Brand v.*

*Dep't of Labor & Industries*, 139 Wn.2d 659, 989 P.2<sup>nd</sup> 1111 (1999):

When, however, this practice [of obligating the worker to cover her own legal costs] is superimposed upon a closely calculated system of wage-loss benefits, a serious question arises whether the social objectives of the legislation may to some extent be thwarted. The benefit scales are so tailored as to cover only the minimum support of the claimant during disability. There is nothing to indicate that the framers of the benefit rates included any padding to take care of legal and other expenses incurred in obtaining the award. (Emphasis added)

The "other expenses" cited by *Brand* readily encompass interpreter expenses incurred by LEP workers when the Board fails to provide them free.

**B. THE BOARD SHOULD NOT BE PERMITTED TO INTERVENE AND APPEAL THE TRIAL COURT'S RULING.**

As stated in *Kaiser Aluminum & Chemical Corp. v. Dep't of Labor & Industries*, 121 Wn.2d 776, 854 P.2d 611 (1993), whether the Board may appeal a Superior Court decision is determined "entirely" by its enabling legislation:

Thus, the question of the Board's authority to appeal a superior court decision rests entirely upon whether such an authority is expressly granted by the Board's enabling legislation or is necessarily implied.

Noting that the Board's enabling legislation, RCW 51.52, provides no

express right to appeal, the Court then determined that the legislation contains no implied right to appeal. The Court then dismissed the Board's appeal, explaining:

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

Notwithstanding the Court's holding in *Kaiser*, the Board here relies on *dicta* to the effect that there are two exceptions to the general rule against appeals by a quasi-judicial agency, one of which involves preserving the "integrity of their decision making process." The Board asserts that its decision making integrity is adversely affected by the Superior Court decision in two ways: first, by having to determine how much money it should pay Mr. Meštrovac,<sup>4</sup> and second, by acting as an initial decision maker, not as an appellate body.

As for the first assertion, the trial court's order does not prescribe the manner in which the Board is to decide the amount to be reimbursed. As for the second assertion, the Board does not function as an appellate body in the strictest

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<sup>4</sup> The Board says that it is being asked to impose sanctions on itself. In truth, it is merely to determine how much Mr. Meštrovac had to pay for interpreter services, and then reimburse him.

sense. The Board has a staff of Industrial Appeals Judges who are authorized to conduct evidentiary hearings and make findings of fact. See WAC 263-12-045. There is nothing in the trial court's order preventing the Board from delegating this matter to one of its judges with instructions to conduct a hearing to determine the amount Mr. Meštrovac should be reimbursed.

The Board also argues that it is an "aggrieved party," and therefore has a right to intervene under RAP 3.1. The Board advanced the same "aggrieved party" argument in *Kaiser*. This Court rejected this argument, thusly:

The question in this case is not whether the Board is "aggrieved" in order to permit review by this court, but instead whether the Board has the statutory authority to bring the appeal in the first place. The mere fact this court's doors may be open under RAP 3.1 to hear the Board's appeal does not imply the Board has the statutory authority to walk through those doors.

The Court of Appeals disregarded *Kaiser*, instead ruling the Board was an aggrieved party under RAP 3.1. As authority, the Court cited *Washington v. G.A.H.*, 133 Wn.App. 567, 137 P.3d 66 (2006). There, the trial court entered an order directing the Department of Health & Social Services (DSHS) to take action. Finding that DSHS was an aggrieved party under RAP 3.1, the court permitted DSHS to appeal, even though it was not a party to the proceeding.

*Washington v. G.A.H.* is distinguishable. DSHS is not a "quasi-judicial agency," as is the Board. Allowing DSHS to enter the proceedings did not compromise its position as an impartial decision maker, as it does here because

the Board is charged with ruling on Mr. Meštrovac's other Board appeals.

Finally, the Board's motion to intervene was untimely. The Superior Court found Mr. Meštrovac had notified the Board that he intended to ask the Superior Court to require the Board to reimburse him for his interpreter expenses early in his appeal. The Board did nothing until after the trial court entered its order in this case. Delay of this magnitude is sufficient to sustain the trial court's denial of the motion to intervene. In *Martin v. Pickering*, 85 Wn.2d 241, 243, 523 P.2d 380 (1975), this Court upheld the trial court's denial of a motion to intervene after judgment had been entered, stating: "A critical requirement is that the motion must be timely. A strong showing must be made to intervene after judgment." See *Kreidler v. Eikenberry*, 111 Wn.2d 828, 766 P.2d 438 (1989).

**C. FAILURE TO INCLUDE ALL OVERTIME PAY IN CALCULATING MR. MEŠTROVAC'S WAGES DENIES HIM EQUAL PROTECTION.**

RCW 51.08.178(1) states:

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

It is undisputed that Mr. Meštrovac worked overtime, and that his overtime pay rate was greater than his regular rate of pay. The Court of Appeals ruled that Mr. Meštrovac's overtime hours should be included when calculating his wages, but that his regular pay rate of \$9 per hour should be applied to those hours, not the rate he actually received -- \$13.50 per hour. In so doing, the Court

of Appeal relied on language in RCW 51.08.178(1) stating that wages “shall not include overtime pay except in cases under subsection (2) of this section.”

Subsection (2) refers to employment that is “seasonal in nature” or that is “part time or intermittent.” Therefore, Mr. Meštrovac’s wages were calculated to be less than they actually were, *i.e.* part of his pay from “all employment” was omitted. He was awarded time loss benefits that were less than would have been awarded had he been a seasonal, part time or intermittent worker.

The statute in question effectively creates two classes of injured workers: those who are seasonal, part time or intermittent, and all others; *i.e.*, those who work full time in non-seasonal jobs. Those in the former class receive full credit for their overtime pay (and thus receive time loss benefits that take into account all of their earnings). In contrast, workers in the latter class receive credit only for their overtime hours – but not all their overtime pay – and thus receive time loss benefits that do not include all of their earnings contrary to RCW 51.08.178(1).

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

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

The statute excluding a part of overtime pay in calculating wages of workers like Mr. Meštrovac does not satisfy the rational basis test for two reasons.

First, there is no basis in reality for reasonably distinguishing between full time employees and those working on a seasonal or part time or intermittent basis.

Members of both classes, especially those working for near-minimum wages like Mr. Meštrovac, are likely to depend on overtime pay to supplement their regular earnings. There is no reason why full time employees, such as Mr. Meštrovac, should be penalized for working full time, yet that is the effect of the statute.

Second, the classification has no rational relation to the statute's purpose -- to establish the worker's wages and thus determine the worker's time loss benefit. Including all overtime pay for one class of workers, while excluding part of it for another, does not advance the purpose of the statute in any way.

The classification also bears no rational relationship to the Act's fundamental purpose -- to minimize the suffering and economic loss from work related injuries. RCW 51.12.010. Instead, the classification adds to the suffering and economic loss of injured full time workers, because they will not receive time

loss benefits based on all their overtime earnings. The Court in *Willoughby v. Dep't of Labor & Industries*, 147 Wn.2d 725, 57 P.3d 611 (2002), held cost savings does not justify disfavoring one set of injured workers as compared to another. Workers, thus, are penalized arbitrarily for their status as full-time employees, in violation of their right to equal protection of the laws under the constitutions of the United States and the State of Washington.<sup>5</sup>

**D. EMPLOYER CONTRIBUTIONS FOR GOVERNMENT-MANDATED BENEFITS SHOULD BE INCLUDED IN DETERMINING WAGES.**

Time-loss benefits are determined by a worker's "wages," as that term is defined in RCW 51.08.178. In relevant part, the statute states:

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....

In *Cockle v. Dep't of Labor & Industries*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001), this Court construed the statutory phrase "board, housing, fuel, or other consideration of like nature" to mean "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival." The Court held the value of employer-provided medical insurance is part of "wages."

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<sup>5</sup> Because equal protection is a fundamental constitutional right, this argument may be raised now. RAP 2.5(a)(3), *Egede-Nissen v. Crystal Mountain*, 93 Wn.2d 127, 606 P.2d 1214 (1980) ("Manifest error affecting a constitutional right may, of course, be raised at any time.")

Social Security benefits provide for life's basic necessities. *Goldberg v. Kelly*, 397 U.S. 254, 268-269, 90 S.Ct. 1001, 25 L.Ed.2d 187 (1970). Medical benefits under the Social Security program provide for life's necessities. *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S. Ct. 1322 (1969); *Mem'l Hosp'l v. Maricopa Cy*, 415 U.S. 250, 39 L.Ed.2d 306, 94 S.Ct. 1076 (1974).

Unemployment Compensation and Industrial Insurance benefits assure worker survival during periods when they cannot work. Both are readily identifiable components of earning capacity critical to worker health and survival.

The Court of Appeals ruled employer payments to Social Security, Medicare/Medicaid, and Industrial Insurance are not wages, citing in *Eraković v. Dep't of Labor & Industries*, 132 Wn.App. 762, 134 P.3d 234 (2006):

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

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

The *Eraković* opinion asserts these contributions are not "wages" because

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

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

Eligibility for Social Security and Unemployment Compensation depends upon a worker accumulating sufficient qualifying work hours in the period before unemployment.<sup>6</sup> In short, employer contributions to these programs have value, even if the employee is not yet receiving, or eligible for, the benefit at injury.

**E. HOLIDAY AND VACATION PAY SHOULD BE TREATED AS CASH IN CALCULATING MR. MEŠTROVAC'S WAGES.**

Paid holidays and vacation leave are included in calculating wages for time loss compensation. *Fred Meyer v. Shearer*, 102 Wn.App. 336, 8 P.3d 310 (2001). According to the Court of Appeals here, the Department may either include the cash received by the worker or, merely, include hours taken off for

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<sup>6</sup> RCW 50.04.030, RCW 50.04.355. A worker must accumulate 40 quarters of work credits to be eligible for full Social Security benefits. USC Title 42,406. Unemployment and Social Security benefits are indexed to wages earned before benefit application. See Moss TR 8/6 28, 33.

holidays or vacation when determining the total hours worked.

Using a 40-hour work week for Mr. Meštrovac's wages, the Department argued it already included holiday/vacation pay. The Court of Appeals agreed. Both assumed, incorrectly, Mr. Meštrovac took time off work for holidays and vacation. The proof at hearing showed Mr. Meštrovac had accumulated significant holiday and vacation time for which he would be paid on discharge. There was no evidence he took time off for holidays/vacations. It is patently unfair to assume a man supporting a family of four on a regular wage of \$360 per week would take time off work, rather than working and receiving additional pay.<sup>7</sup> Such an assumption conflicts with this Court's policy "to construe the Industrial Insurance Act liberally to provide compensation to covered employees, with doubts resolved in favor of the employee." *Cockle, supra*.

**F. THE BOARD HAD JURISDICTION TO CONSIDER THE APPEAL OF THE DEPARTMENT FAILURE TO PROVIDE LANGUAGE ACCOMMODATION.**

It is undisputed Mr. Meštrovac requested interpreter services and orders in his language from the Department to assist him in establishing his claim. The Department decision refusing this request is seen by its issuance of orders in English which it knew Mr. Meštrovac did not understand. He appealed that Department decision. Because the Department did not state in its orders that it

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denied the request to communicate with him in his language or provide interpreter services, the Board ruled it lacked jurisdiction to consider that issue on appeal.

The Court of Appeals agreed, citing and ignoring RCW 51.52.050, which states:

Whenever the Department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the Department, or may appeal to the board. . . .

No Washington appellate court has previously construed this statute to mean that the action or decision must be manifested in writing. By so construing the statute, the Court disregarded legislative policy, that the Act is to be “liberally construed” in the injured worker’s favor. RCW 51.12.010. *Cockle* stated at 811:

In other words, where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation’s fundamental purpose, the benefit of the doubt belongs to the injured worker. [Emphasis added]

The Court of Appeals’ construction disfavors the injured LEP worker and, instead, permits the Department to ignore worker requests, leaving the worker with no remedy, other than retaining an attorney to seek a writ of mandamus.<sup>8</sup>

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<sup>8</sup> The Court of Appeals relies on *Dils v. DLI*, 51 Wn.App. 216, 752 P.2d 1357 (1988) which does not say the only remedy is a writ of mandamus. At 219, the *Dils* court stated :

Dils could have objected to the Department’s claims processing procedures by requesting reconsideration by the Department **or by appealing to the Board**.... (Emphasis added.)

The court referred to a writ of mandamus only when both the Department and the Board have ignored a worker’s objections:

## VI. ATTORNEY FEES & COSTS REQUEST

Mr. Meštrovac requests reinstatement of the attorney fees and costs award from Superior Court and an award of attorney fees and costs pursuant to RAP 18.1 and RCW 51.52.130 as construed in *Brand, supra*, where the court held that prevailing on any issue entitles the worker to attorney fees and costs for all issues, including interpreter costs awarded under RCW 2.43.040(3) & (4).

## VII. CONCLUSION

Review should be granted 1) because the Court of Appeals decision conflicts with several decisions of this Court, 2) because the constitutionality of a statute is at issue, 3) because of a conflict between Divisions I and III, and 4) because this case presents issues of substantial public interest that should be determined by this Court. The Court is respectfully requested to reverse on all the issues stated here, to award attorney's fees and costs, including interpreter costs and to remand for proceedings consistent with the Court's opinion.

DATED this 23<sup>rd</sup> day of June 2008.



Ann Pearl Owen, WSBA# 9033, Attorney for Petitioner Meštrovac

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Assuming 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.

JAN 2008

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ENVER MESTROVAC, )  
 )  
 Respondent/ )  
 Cross-Appellant, )  
 )  
 v. )  
 )  
 DEPARTMENT OF LABOR & )  
 INDUSTRIES OF THE STATE OF )  
 WASHINGTON and BOARD OF )  
 INDUSTRIAL INSURANCE APPEALS, )  
 )  
 Appellants/ )  
 Cross-Respondents.)  
 \_\_\_\_\_ )

No. 58200-3-I  
(consolidated w/58505-3-I)

DIVISION ONE

PUBLISHED OPINION

FILED: January 22, 2008

AGID, J.—The Department of Labor and Industries (Department) and the Board of Industrial Insurance Appeals (Board) appeal a superior court order directing both the Department and the Board to reimburse Enver Mestrovac, a Department benefit claimant with limited English proficiency (LEP), for the cost of interpreter services not provided by either the Department or the Board. The Board also appeals from the superior court's order denying its motion to intervene and awarding attorney fees to Mestrovac. Mestrovac cross-appeals, challenging the superior court's ruling affirming the Department's wage rate calculation for his time-loss compensation. Because the Constitution does not require interpreter services beyond that which the Department

APPENDIX A

and the Board provided, and Mestrovac demonstrates no prejudice resulting from the Board's failure to provide an interpreter for communications with counsel during the hearing, we reverse the rulings requiring the Department and Board to reimburse Mestrovac for his interpreter expenses. Additionally, because the superior court's order imposed a judgment against the Board and affected the integrity of its procedures, we reverse its order denying the Board's motion to intervene. But because the Board correctly accounted for Mestrovac's holiday and vacation pay and properly excluded other employer-paid benefits as not critical to his basic health and survival, we affirm the wage calculation.

#### FACTS

Mestrovac is a Bosnian immigrant and is not fluent in the English language. In 2003, he injured his wrist while unloading furniture containers for A-America, Inc., and applied for and received benefits from the Department. On October 10, 2003, his attorney informed the Department that she was representing Mestrovac, that the Department was to communicate through her on his claim, and that Mestrovac "does not speak English as his native language." On October 20, 2003, his attorney sent the Department a letter requesting an order authorizing interpreter services and payment for Mestrovac's interpreter bills for services "in connection with [his] communications with his health care providers, DLI [the Department], the Board, voc rehab personnel, IME examiners, and his counsel through all phases of his claim and appeals thereon." The Department did not issue an order or otherwise specifically respond to this request.<sup>1</sup>

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<sup>1</sup> While the Department asserts that it provided "an array" of interpreter services, but not all of those requested, it does not specify services it provided.

In October and November 2003, the Department issued three time-loss computation orders for certain time periods during which Mestrovac was temporarily totally disabled. In each of these orders, the Department computed his monthly wage at \$1,584 based on eight-hour work days, five days a week, at \$9 per hour. All three orders were issued in English; one was sent to Mestrovac on October 10, 2003, and the other two were sent to his attorney on October 24 and November 7, 2003. Mestrovac appealed all three orders.

In his appeal he challenged his wage computation, asserting that it should have included (1) employer-provided health benefits, (2) average of regular overtime hours, (3) bonuses, (4) vacation and holiday pay, (5) employer contributions to retirement benefits, life insurance, accidental death and dismemberment insurance and short-term disability insurance, and (6) employer taxes for Medicare, Social Security and unemployment insurance. He also asserted that the Department did not provide him sufficient interpreter services during claim administration and that he was entitled to the following services from both the Department and the Board:

[interpreter services for] [a]ll 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 the Department, with his employer, with his counsel, with IME examiners, with the Board, and associated with vocational rehabilitation. . . .

During a scheduling telephone conference, the Industrial Appeals Judge (IAJ) ruled that the Board would provide and pay for interpreter services at the hearing, but not for communications with counsel during the hearing. Mestrovac's attorney then informed the IAJ that if he needed to hire an interpreter for attorney communications, he would be seeking reimbursement for these services as costs of the hearing. The IAJ

also denied Mestrovac's claim for additional interpreter services at the Department level, concluding that the Board had no jurisdiction to grant such relief because the appeal before it was an appeal of the time-loss orders and no appealed Department order addressed the interpreter issue. Mestrovac sought interlocutory review of this order, which was denied.<sup>2</sup>

The IAJ then held a hearing on the wage computation issue but refused to hear evidence on the interpreter issue. The IAJ provided interpreter services during the hearing, but not for Mestrovac's communications with his attorney. The IAJ then issued a proposed decision and order reversing the time-loss orders and concluding that overtime hours, health care benefits, bonuses, holiday pay and vacation pay should have been included in the wage computation. The IAJ also ruled that the value of other employer paid benefits and taxes should be excluded. The IAJ's ruling increased the monthly wage to \$2,119.41.

Both Mestrovac and the Department appealed the IAJ's proposed decision to the full Board. The Department challenged the wage computation that included holiday and vacation pay, and Mestrovac challenged the IAJ's adverse rulings on the wage computation issues. He also asserted that he incurred interpreter expenses at both Department and Board proceedings and requested that the Department: (1) determine the amount of expenses he incurred in pursuing his claim, (2) reimburse him for these expenses, and (3) provide him with interpreter services "until final closure occurs on the claim," including representation at the Department, Board, superior court, Court of Appeals and Supreme Court levels.

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<sup>2</sup> Later orders repeated the IAJ's ruling that the Board had no jurisdiction over this issue.

The Board issued a decision and order agreeing with the IAJ's decision, except for the issue of holiday and vacation pay, concluding that the Department had already included those hours in its base wage calculation. The Board also concluded that the IAJ complied with the applicable law relating to interpreter services to be provided at Board hearings. The Board held that it lacked subject matter jurisdiction to consider any issues relating to interpreter services at the Department level.

Mestrovac appealed the Board's order to the superior court. On March 20, 2006, the superior court issued a letter opinion, findings of fact and conclusions of law, and a judgment, affirming the Board on the wage computation issues, but reversing on the interpreter issues. In the letter opinion, the court concluded that it had the authority to address Mestrovac's procedural due process claims, even if not addressed by the Board, and declined to include an attorney fees award to Mestrovac because he did not prevail on any of the substantive claims. In its conclusions of law, the court ruled that it did not have jurisdiction over the issue of the Department's provision of interpreter services, but that the Board had jurisdiction over issues Mestrovac raised on appeal relating to his LEP status, and that both the IAJ and the Board erred by failing to consider these issues. The court then entered judgment for the Department but ordered the Department to determine the amount of Mestrovac's interpreter expenses and to reimburse him with interest.

The Department moved for reconsideration and clarification of the court's rulings on the interpreter issue. On April 17, 2006, the court issued an order on this motion and revised its conclusions of law to state: (1) it had jurisdiction "over the issue of the Department's use of English to communicate with Mr. Mestrovac"; (2) the Board erred

by failing to include findings on issues "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"; (3) the Board must hold a hearing to determine the amount of interpreter expenses he incurred because of the Department's and the Board's failure to provide additional interpreter services; and (4) the Department must pay interpreter expenses incurred until the Board assumed jurisdiction, and the Board must pay those expenses incurred after Mestrovac filed his first notice of appeal to the Board.

On May 11, 2006, after receiving notice of the court's revised order, the Board moved to intervene in the superior court matter. A day later, the Department filed with this court a notice of appeal of the revised order, and both the Board and Mestrovac filed cross-appeals. On June 15, 2006, the superior court entered a proposed order that denied the Board's motion to intervene, contingent upon this court's permission to enter the order. The proposed order also granted attorney fees to Mestrovac against the Department, reversing its earlier decision denying Mestrovac an attorney fees award, and awarded attorney fees against the Board for work performed on Mestrovac's response to the Board's motion to intervene.

On July 18, 2006, we granted Mestrovac's motion to enter the superior court's proposed order, but denied his motions to dismiss the Board's appeals to this court. On August 1, 2006, with this court's permission, the superior court entered a second order to include an additional attorney fees award of \$1,750 against the Board for Mestrovac's

work before this court seeking to enter the superior court's proposed order. The Board filed timely appeals of both superior court orders.

I. Department and Board Appeal of Superior Court Orders

We first address the Department's and Board's appeal of the superior court's March 20, 2006 and April 17, 2006 orders. Both the Department and the Board argue that the superior court did not have jurisdiction over Mestrovac's due process claims at the Department level, that neither the Department nor the Board violated his due process rights by denying his request for additional interpreter services, and that neither the Department nor the Board should reimburse Mestrovac for his additional interpreter expenses. The Board also contends that the trial court erred by requiring it to hold a hearing to determine the amount of interpreter fees to be reimbursed to Mestrovac because doing so would compromise its impartiality.

A. Board Standing to Appeal

Mestrovac challenges the Board's standing to appeal the superior court's orders, contending that the court's orders do not affect the integrity of the Board's decision-making process. We disagree. As a quasi-judicial agency, the Board is "generally not permitted to bring appeals of adverse court decisions."<sup>3</sup> But when quasi-judicial agencies "have interests in preserving the integrity of their decision[-]making process," they have authority to appeal decisions which impact their procedures.<sup>4</sup> Here, the Board's procedural integrity was affected: the superior court found that its interpreter procedures were constitutionally deficient and required the Board to alter those procedures and allocate funds for additional services.

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<sup>3</sup> Kaiser Aluminum & Chem. Corp. v. Dept. of Labor & Indus., 121 Wn.2d 776, 781, 854 P.2d 611 (1993) (citing 4 Am. Jur. 2d Appeal and Error § 234 (1962)).

<sup>4</sup> Id. at 782.

Additionally, the Board was entitled to an appeal as an "aggrieved" party within the meaning of RAP 3.1.<sup>5</sup> As this court has recognized, "under some circumstances, persons who were not formal parties to trial court proceedings, but who are aggrieved by orders entered in the course of those proceedings, may appeal as 'aggrieved parties.'"<sup>6</sup> "Aggrieved" has been defined to mean "a denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation."<sup>7</sup> Here, the superior court's orders imposed upon the Board a burden and an obligation by holding it liable for Mestrovac's interpreter costs and requiring it to pay thousands of dollars in attorney fees for attempting to intervene. The Board was therefore sufficiently "aggrieved" to assert standing to appeal.

B. Appellate Review of Department Interpreter Services

The Department and the Board contend that the superior court erred by concluding that both the court and the Board had jurisdiction to address the Department's interpreter procedures because there was no Department order addressing these procedures from which Mestrovac could appeal. Mestrovac contends that the Department's repeated use of English-only communications with its knowledge of his LEP status amounts to an appealable decision within the meaning of RCW 51.52.060, despite the absence of a written decision from the Department addressing this procedure.

This is an issue of law. We review the superior court's decision de novo to determine whether substantial evidence supports its findings and whether its

<sup>5</sup> RAP 3.1 provides: "[o]nly an aggrieved party may seek review by the appellate court."

<sup>6</sup> State v. G.A.H., 133 Wn. App. 567, 574, 137 P.3d 66 (2006).

<sup>7</sup> Id. (internal quotation marks omitted) (quoting State v. A.M.R., 147 Wn.2d 91, 95, 51 P.3d 790 (2002)).

“conclusions of law flow from the findings.”<sup>8</sup> 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.”<sup>9</sup> As discussed in the Ferenčák opinion, the “Board’s scope of review is limited to those issues which the Department has previously decided,” and the relevant statutes imply that for a Department decision to be appealable, it must be in writing and served on the worker.<sup>10</sup> Here, as in Ferenčák, there was no Department decision addressing the interpreter request or the Department’s use of English-only communications with Mestrovac. Thus, the Board could properly refuse to consider Mestrovac’s arguments on appeal challenging the Department’s English-only communications because there was no Department decision from which to appeal. The superior court’s finding to the contrary was error.

Mestrovac contends that because the statute refers to “any action” or “any decision” of the Department and it does not require the action or decision to be in writing, the Department’s refusal to provide the additional interpreter services is an action from which he may properly appeal. We disagree. Mestrovac relies on language in Dils v. Department of Labor & Industries,<sup>11</sup> in which workers challenged the Department’s delay of claims administration in a civil suit. There, the court held that the workers did not exhaust their remedies, noting that they “could have objected to the Department’s claims processing procedures by requesting reconsideration by the

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<sup>8</sup> Ruse v. Dep’t of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting Young v. Dep’t of Labor & Indus., 81 Wn. App. 123, 128, 913 P.2d 402, review denied, 130 Wn.2d 1009 (1996)).

<sup>9</sup> Sepich v. Dep’t of Labor & Indus., 75 Wn.2d 312, 316, 450 P.2d 940 (1969).

<sup>10</sup> See Ferenčák v. Dep’t of Labor & Indus., No. 58878-8-1, slip op. at 12 (Wash. Ct. App. Jan. 22, 2008) (citing RCW 51.52.060; Hanquet v. Dep’t of Labor & Indus., 75 Wn. App. 657, 661, 879 P.2d 326 (1994), review denied, 125 Wn.2d 1019 (1995); Lenk v. Dep’t of Labor & Indus., 3 Wn. App. 977, 982, 478 P.2d 761 (1970)).

<sup>11</sup> 51 Wn. App. 216, 752 P.2d 1357 (1988).

Department or by appealing to the Board."<sup>12</sup> But the court also noted that if the Board or Department did not respond to their objections, the workers could have petitioned the court for a writ of mandamus to compel agency action.<sup>13</sup> And in the later decision in Cena v. State,<sup>14</sup> the court noted that if the claimant was frustrated with the process and could not procure a decision from the Department, he could have filed a writ of mandamus in superior court to compel the requested action.

Thus, if Mestrovac believed the Department was unresponsive to his requests but had no decision from which to appeal, he had available to him the remedy of filing a writ of mandamus. There is no legal support for his argument that absent a specific Department decision addressing this procedure, the Department's continued use of the English-only notices despite its knowledge of his LEP status is an appealable Department action.<sup>15</sup> We therefore hold that the superior court erred by concluding in this case that the court and the Board had jurisdiction over Mestrovac's claims relating to the Department's English-only procedures.<sup>16</sup>

### C. Due Process & Equal Protection

The Department and the Board also contend that the superior court erred by concluding that due process requires both the Department and the Board to provide and pay for more interpreter services than they had already provided. While the court's order did not make a specific finding that there was a due process violation, it did state

<sup>12</sup> 51 Wn. App. at 219.

<sup>13</sup> Id.

<sup>14</sup> 121 Wn. App. 352, 358 n.13, 88 P.3d 432 (2004), review denied, 153 Wn.2d 1009 (2005).

<sup>15</sup> We also note that he requested that all Department communications be made through his English-speaking attorney, indicating that there was no such need for translated orders.

<sup>16</sup> As in Ferenčak, we hold that the Department may not in the future avoid review of its policies by refusing to issue an order. Ferenčak, No. 58878-8-1, slip. op. at 13 n.37.

that both the IAJ and the Board erred by failing to consider or enter findings on this issue and that Mestrovac was entitled to reimbursement for interpreter expenses “incurred because of the Department’s and the Board’s failure to provide interpreter services for [him] to communicate with the Department, his employer, his health care providers, and his lawyer.” The superior court’s ruling is without legal support.

As we held in the Kustura opinion, neither the Department’s nor the Board’s interpreter procedures conflict with the constitutional guarantees of due process or equal protection, as Mestrovac contends.<sup>17</sup> Nor does chapter 2.43 RCW require interpreter services beyond those provided during Board hearings or that the Board pay for such services absent a finding of indigency.<sup>18</sup> Thus, we determine only whether the Board provided sufficient interpreter services “to assist [Mestrovac] throughout the proceeding,” in compliance with the statute.<sup>19</sup> Here, the Board provided and paid for an interpreter for the entire hearing, but the IAJ refused to allow Mestrovac to use the interpreter for any communications with counsel during breaks or off the record.<sup>20</sup> Thus, as we held in Kustura, by failing to provide an interpreter for communications with counsel during the hearing, the Board did not comply with the statute’s directive to supply an interpreter “to assist [the claimant] throughout the proceedings.” But as in Kustura, we find no reversible error.

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<sup>17</sup> See Kustura v. Dep’t of Labor & Indus., No. 57445-1-I, slip op. at 22-28 (Wash. Ct. App. Jan. 22, 2008).

<sup>18</sup> See id., slip op. at 19-20.

<sup>19</sup> RCW 2.43.030(1).

<sup>20</sup> The IAJ further ruled that the Board would not provide an interpreter for perpetuation depositions. While the workers assert briefly in their response to the Board’s appeal that the Board may not withhold interpreters for perpetuated testimony, the superior court’s order does not address interpreter services for perpetuation depositions, nor do the workers address the court’s failure to include this in its order in their assignments of error on cross-appeal. Thus, this aspect of the IAJ’s ruling is not before us, and we do not consider it here.

As did the claimants in Kustura, Mestrovac fails to demonstrate any prejudice caused by the Board's failure to provide him an interpreter for his communications with counsel during the hearing. Mestrovac identifies the prejudice as the added financial cost of an interpreter to provide these additional services and asserts that by having to pay these additional costs, his benefits were reduced. But he does not allege that this additional language assistance likely affected the outcome of his claim. Indeed, his attorney reviewed all Department orders, he filed a timely appeal, he had an evidentiary hearing before the Board which was interpreted for him, and his attorney submitted extensive briefing on the legality of the wage computation. As in Kustura, it is unlikely that he could have offered any additional input that would have been critical to his case, and that required an interpreter for his communications with counsel. Mestrovac makes no showing to the contrary. Most importantly, he ultimately obtained the correct amount of benefits from the Department.

Because Mestrovac fails to show any prejudice from the Board's failure to provide an interpreter for his communications with counsel at the Board hearing, we reverse the superior court's order requiring the Department and Board to pay for his interpreter services.<sup>21</sup> There is no authority for requiring the Board to provide interpreter services for matters outside of the Board hearing. That portion of the trial court's order is also reversed. Thus, there is no basis for an award of attorney fees related to those

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<sup>21</sup> While we conclude that the Board should have provided interpreter services for communications with counsel during the hearing, we also hold, as we did in Kustura, that the statute does not require the Board to pay for such services because it did not initiate the proceedings. See Kustura, No. 57445-1-I, slip op. at 20. We recognize that Board regulations provide for appointment of interpreters at Board expense, but note that the applicable regulation is phrased in the permissive. See WAC 263-12-097(1) (providing that the IAJ "may appoint an interpreter."). Unless the claimant is indigent, the issue of who pays for interpreter services remains discretionary with the Board.

issues. We do not need to reach the Department's and the Board's arguments challenging these fees and the court's order requiring the Board to conduct a hearing to determine these fees.

## II. Denial of Board's Motion to Intervene

We next address the Board's appeal of the superior court's denial of the motion to intervene and award of attorney fees related to that motion. We agree with the Board's position that it had a right to intervene in the superior court proceedings and that there was no basis for the attorney fees award. Contrary to the superior court's findings, the Board's motion to intervene was timely under the circumstances.<sup>22</sup> The motion was filed within a few weeks after the Board learned of the ruling, and there is no rule limiting the time within which a party must file an intervention motion. Rather, the timeliness of the motion is determined by considering the specific circumstances of the case.<sup>23</sup> Here, the few weeks' delay was reasonable considering that the court's order presented an atypical—if not unprecedented—ruling and placed the Board in a unique procedural posture where it was treated as a party with a judgment against it, but was also directed to determine the amount of that judgment as a quasi-judicial tribunal.

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<sup>22</sup> The superior court found that the motion was untimely because the Board knew since April 2004 that this issue would be decided when it was served with Mestrovac's notice of appeal to the Board. But because the notice of appeal did not name the Board as a party and did not indicate that any direct relief was requested against it, there was no way for the Board to know that Mestrovac was seeking a judgment against it for reimbursement of interpreter fees at that time. In fact, it was not until after the Department filed its motion for reconsideration and clarification of the superior court's decision that monetary relief against the Board was first suggested. The court's order on the motion to reconsider/clarify was issued April 17, 2006, and the Board filed its motion to intervene a few weeks later on May 11, 2006.

<sup>23</sup> See Martin v. Pickering, 85 Wn.2d 241, 244, 533 P.2d 380 (1975) ("In considering the question of timeliness, all the circumstances should be considered, including the matter of prior notice of the lawsuit and the circumstances contributing to the delay in moving to intervene.").

Because the order created an inherent conflict for the Board, it was not unreasonable for it to take three weeks to formulate a thoughtful, careful response.

The Board also had an obvious interest in not paying a judgment against it for reimbursement fees, but because it was not a party, it could not defend against the claim. Nor was the Board's interest adequately protected by the Department. The Department had its own interest in not paying for the same fees and could dispute the way in which the court allocated the fees between itself and the Board.<sup>24</sup> Intervention was therefore appropriate to enable the Board to defend its interests. The trial court abused its discretion when it entered judgment against the Board as an absent party and then refused to allow it to defend against that judgment.<sup>25</sup> We reverse the trial court's ruling denying the Board's intervention motion.

Because the superior court improperly denied the Board's motion to intervene, there is no basis for the court's order awarding attorney fees to Mestrovac for responding to the motion to intervene. Accordingly, we reverse the attorney fees award against the Board. Nor is there any authority for the court's award of attorney fees to Mestrovac for his briefing in this court.<sup>26</sup> A request of attorney fees incurred before this court must be made to this court.<sup>27</sup> And none was made in connection with the motion to intervene. Even if there had been a request, Mestrovac is not the prevailing party.

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<sup>24</sup> See Spokane County v. State, 136 Wn.2d 644, 650, 966 P.2d 305 (1998).

<sup>25</sup> See 136 Wn.2d at 650 (rulings on permissive intervention are reviewed for an abuse of discretion).

<sup>26</sup> In the August 1, 2006 order the superior court awarded him additional attorney fees against the Board for work performed "to obtain leave under RAP 7.2 for the Superior Court to enter this order."

<sup>27</sup> RAP 18.1.

### III. Wage Calculation

Finally, we address Mestrovac's cross-appeal in which he challenges the Department's wage calculation. He contends the Board erroneously excluded overtime pay, holiday and vacation pay, and employer contributions to government-mandated benefits. We disagree.

Mestrovac first argues that the Board's wage calculation did not include overtime pay of \$13.50 per hour. The Board's calculation included 10.39 hours of overtime, but used his regular pay rate of \$9 per hour.<sup>28</sup> Mestrovac contends that this calculation did not comply with RCW 51.08.178(1) to include wages "from all employment at the time of injury." But that statute clearly states that wages "shall not include overtime pay except in cases under subsection (2) of this section."<sup>29</sup> Subsection (2) of the statute relates to employment that is "exclusively seasonal," or "part-time or intermittent,"<sup>30</sup> which is not at issue here. Thus, by including the overtime hours at the regular pay rate, the Board's calculation complied with the statute.<sup>31</sup>

Mestrovac also appears to challenge the number of overtime hours, noting that the evidence established he worked 20.90 hours overtime instead of 10.39, the amount determined by the Board. He asserts that he should have been paid the overtime rate of \$13.50 for these 20.90 hours. But because he did not assign error to this factual finding, it becomes a verity on appeal and we do not review it.<sup>32</sup>

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<sup>28</sup> CABR 761.

<sup>29</sup> RCW 51.08.178(1).

<sup>30</sup> RCW 51.08.178(2).

<sup>31</sup> We also note that the statute refers to overtime "pay," not overtime "hours," evidencing an intent to exclude the overtime wage rate while including the overtime hours. See RCW 51.08.178(1).

<sup>32</sup> Nonetheless the Board's calculation is supported by substantial evidence. Mestrovac's expert, Robert Möss, testified that based on his review of 52 weeks of bi-weekly

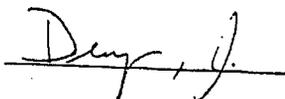
Mestrovac further argues that his wage calculation erroneously excluded holiday pay and vacation leave. Holiday and vacation pay may be included in the wage calculation by either (1) including the cash value of the employer's contributions for hourly leave in determining the hourly pay rate or (2) including the leave hours taken in determining the total number of hours worked.<sup>33</sup> Thus, if the Department used a 40-day week in its calculation, which it did,<sup>34</sup> those days were included: they were counted as days worked even if Mestrovac took them as vacation days. We also note that he did not allege that he took additional leave that was unaccounted for in the calculation. He was not entitled to an additional amount.

Finally, Mestrovac contends that the wage calculation should have included the value of employer taxes for government-mandated benefits and asks this Court to reverse its decision in Erakovic v. Department of Labor & Industries.<sup>35</sup> For the reasons discussed in our opinion in Ferenčak, we reject these arguments and affirm the Board's findings and conclusions on this issue.<sup>36</sup>

We reverse in part, and affirm in part.



WE CONCUR:





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play stubs, he worked an average of 4.81 overtime hours every two weeks, and the employer's human resource manager testified that his overtime was five hours every two weeks.

<sup>33</sup> See Fred Meyer v. Shearer, 102 Wn. App. 336, 8 P.3d 310 (2001).

<sup>34</sup> CABR 3 (wage rate based on hourly pay, eight hours per day, five days per week).

<sup>35</sup> 132 Wn. App. 762, 134 P.3d 234 (2006).

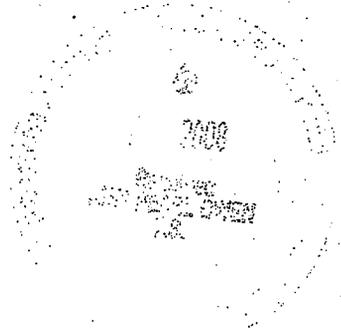
<sup>36</sup> See Ferenčak, No. 58878-8-I, slip op. at 11.

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

ENVER MEŠTROVAC, )  
)  
) Respondent/ )  
) Cross-Appellant, )  
)  
) v. )  
)  
) DEPARTMENT OF LABOR & )  
) INDUSTRIES OF THE STATE OF )  
) WASHINGTON and BOARD OF )  
) INDUSTRIAL INSURANCE APPEALS, )  
)  
) Appellants/ )  
) Cross-Respondents.)  
\_\_\_\_\_ )

No. 58200-3-I  
(consolidated w/58505-3-I)

ORDER DENYING MOTION  
FOR RECONSIDERATION  
AND AMENDING OPINION



Respondent/Cross-Appellant, Enver Meštrovac, having filed a motion for reconsideration of the opinion filed January 22, 2008, and the court having determined that said motion should be denied; Now, therefore, it is hereby

ORDERED that respondent/cross-appellant's motion for reconsideration is denied. It is further

ORDERED that the name "Mestrovac" be changed throughout the opinion to Meštrovac. And it is further

ORDERED that the reference to "40-day week" in the third sentence of the first paragraph on page 16 of the opinion be changed to "40-hour week."

DATED this 29<sup>th</sup> day of February 2008.

FOR THE COURT:

R. J. ...  
Judge

APPENDIX B

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2008 FEB 29 PM 2:46

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3. Under RCW 51.08.178(1) and (3), Mr. Mestrovac's monthly wages at the time of his injury did not include extra holiday pay, the banked vacation leave which he cashed out when his employment was terminated, 401(k) contributions, profit sharing, life insurance, disability insurance, employee discounts, travel insurance, membership in a credit union, Costco membership, or contributions to state- and federally-mandated programs such as Social Security, Medicare, industrial insurance, and unemployment insurance.
  4. The Department orders dated October 10, 2003, October 24, 2003, and November 7, 2003 are incorrect and are reversed. These matters are remanded to the Department of Labor and Industries with direction to issue an order finding that Mr. Mestrovac's monthly wage at the time of injury was \$2,012.01, determining his time-loss compensation rate in light of his monthly wages and his status as unmarried with no children, and taking further action as indicated by the facts and the law.

18 It is so **ORDERED**.

19 Dated this 9th day of June, 2005.  
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22 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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THOMAS E. EGAN Chairperson

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CALHOUN DICKINSON Member

35 **DISSENT**

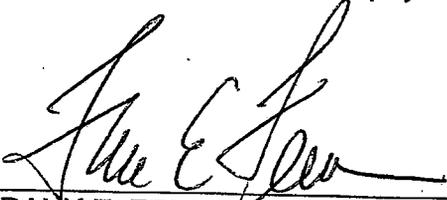
36 I dissent because I disagree with the majority's decision to exclude the retirement plan (the  
37 401(k) and profit sharing) and life insurance. These are in-kind benefits, which represent a benefit  
38 paid to Mr. Mestrovac instead of monetary wages. The court, in *Cockle*, re-emphasized the liberal  
39 construction policy designed to reduce economic hardship to the workers of this state. In  
40 Mr. Mestrovac's case, his hourly wage was substantially reduced by deductions for each of these  
41 benefits. He will probably be forced to purchase his own life or disability insurance without  
42 receiving any compensation to reflect his lost coverage. He may have to come up with a new  
43 pension plan. These are only two illustrations of the possible economic losses he will suffer.  
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**APPENDIX C**

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

Dated this 9th day of June, 2005.

  
FRANK E. FENNERTY, JR. Member

**Federal Funds Received by Department of Labor & Industries  
& by Washington's Industrial Insurance Program**

**1997-2007**

<b>Biennium</b>	<b>Total Federal Funds In DLI Budget</b>	<b>Federal Funds in Accident Account</b>	<b>Federal Funds in Medical Aid Account</b>	<b>ESSB Reference</b>
<b>1997-1999</b>	<b>\$16,706,000</b>	<b>\$9,112,000</b>	<b>\$1,592,000</b>	<b>6062 § 218</b>
<b>1999-2001</b>	<b>\$16,654,000</b>	<b>\$9,112,000</b>	<b>\$1,592,000</b>	<b>5180 § 217</b>
<b>2001-2003</b>	<b>\$20,956,000</b>	<b>\$11,568,000</b>	<b>\$2,438,000</b>	<b>6153 § 217</b>
<b>2003-2005</b>	<b>\$24,818,000</b>	<b>\$13,396,000</b>	<b>\$2,960,000</b>	<b>5404 § 217</b>
<b>2005-2007</b>	<b>\$26,806,000</b>	<b>\$13,621,000</b>	<b>\$3,185,000</b>	<b>6090 §217</b>
<b>Total</b>	<b>\$105,940,000</b>	<b>\$56,809,000</b>	<b>\$11,767,000</b>	

**APPENDIX D**