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NO. 57445-1-I

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

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HAJRUIN KUSTURA, et. al.,

Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

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**BRIEF OF RESPONDENT**

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ROB MCKENNA  
Attorney General

Charlotte Ennis Clark-Mahoney  
Assistant Attorney General  
WSBA No. 13096  
800 Fifth Avenue, Ste 2000  
Seattle WA 98104  
(206) 464-6597

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## I. NATURE OF THE CASE

In this consolidated workers' compensation appeal, three injured workers raise several wage computation issues under RCW 51.08.178, most of which were previously decided by this Court in *Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 134 P.3d 234 (2006). The workers, all with limited English proficiency ("LEP" herein), also ask this Court, despite the absence of any supporting authority from any American jurisdiction, to create constitutional rights to virtually unlimited interpreter services for attorney-client communications and other communications relating to any and all processes at the Department of Labor and Industries (Department) and at the Board of Industrial Insurance Appeals (Board).

The Board and King County Superior Court held that two of the workers (Lukic and Memisevic) are barred by jurisdictional limitations and the res judicata effect of unappealed Department wage orders from raising wage computation issues, and that the wage issues raised by Kustura are without merit factually and legally. The Board and Superior Court also rejected the interpreter services issues raised by the three workers as being unsupported in law. This Court should affirm the Superior Court decisions in this case.

## II. ISSUES

1. Did Lukic and Memisevic waive any arguments regarding the "black-faced type" requirement of RCW 51.52.050 and regarding Executive Order 13166 when they failed to raise those arguments at the Board of Industrial Insurance Appeals or at Superior Court?

2. The Department has original jurisdiction in workers' compensation matters. Neither Lukic nor Memisevic has ever appealed from the Department orders in their claims setting their wage rates under RCW 51.08.178. In the absence of such appeal, is there any jurisdiction in the Board or the courts to address issues regarding formatting, communication, content or validity of those Department wage orders?

3. Assuming arguendo that the Board and courts do have jurisdiction to address issues regarding the formatting, communication, content or validity of the Department wage rate orders in the claims of Lukic and Memisevic, should Lukic or Memisevic be excused from appealing under RCW 51.52.060 based on either (A) their limited English proficiency, or (B) formatting of the Department orders?

4. Do the Board and the courts have jurisdiction to address Kustura's or Lukic's theories seeking additional Department interpreter services where no Department order on appeal addressed those theories?

5. Assuming arguendo there is jurisdiction to address all of their interpreter services theories, during the Department's administration of any of the three workers' claims and during the Board's adjudication of their appeals, did the Department or Board violate their constitutional procedural or substantive due process or equal protection rights or statutory rights in limiting the extent of interpreter services?

6. Even assuming a statutory or constitutional violation occurred during either Department-level claim administration or Board-level adjudication of any of the workers' claims in the limiting of interpreter services, were any of the workers prejudiced in any way?

7. Does substantial evidence support the Superior Court's findings on the value of Kustura's health benefits for purposes of determining Kustura's monthly wage under RCW 51.08.178, and, in any event, did Kustura fail to present a prima facie case regarding the value of his health benefits?

8. Assuming arguendo that the Borad and Superior Court have jurisdiction to address issues regarding Lukic's and Memisevic's wage rate claims, did they each fail to present a prima facie case as to error in the Department order, and therefore does substantial evidence support the Superior Court's findings on the value of their health benefits for purposes of determining their monthly wages under RCW 51.08.178?

9. Where the Superior Court decisions in each of the three consolidated matters did not affect the accident fund or medical aid fund, and where a decision of this Court affirming the Superior Court decisions likewise will not affect those funds, are any of the workers entitled to an award of Superior Court or Court of Appeals costs or attorney fees?

### III. STATEMENT OF THE CASE

#### 1. Hajrudin Kustura

Appellant Kustura was employed by Dependable Building Maintenance (DBM). He applied for and received benefits from the Department for an allowed industrial injury claim. He timely appealed to the Board from certain Department orders, including the wage rate order for his claim.<sup>1</sup> *Kustura D&O CABR 16*<sup>2</sup>.

In his appeal to the Board, Kustura sought inclusion in the wage rate and other bases for wage loss compensation under RCW 51.08.178, RCW 51.32.060, and RCW 51.32.090 of: (1) his dependent daughter; (2) the cost to him of replacing health care insurance, rather than the amount of the employer's contribution for health benefits; (3) a greater amount for

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<sup>1</sup> Kustura is the only one of the three workers in this consolidated matter who appealed from the Department order setting a wage rate on the claim. Accordingly, as the Department explains *infra* Part VI. B. 2, only Kustura invoked the appellate jurisdiction of the Board and the courts to determine the wage rate on the claim.

<sup>2</sup> "CABR" references the Certified Appeals Board Record. The Department will reference documents in the CABR using the stamped page numbers, and the Department will refer to testimony in the CABR by name of witness and page number in the transcript.

the employer's contribution; and (4) inclusion of the total amount of the employer's contributions under the Collective Bargaining Agreement (CBA) to the health and welfare funds, including life, disability, accidental death and dismemberment insurance and pension payments, plus the value of employer taxes for Social Security, Medicare and unemployment compensation and Department of Labor and Industries assessments. *Kustura* PD&O 2/27/04 CABR 71-2; D&O CABR 15.

Testimony was taken from Garth Fisher, an account executive with Northwest Administrators, the third party administrator for the CBA's union trust. *Kustura* PD&O 4/2/03 CABR 241; Order Vacating PD&O 6/18/03 CABR 155. Fisher testified to the employer's contribution to the trust. He testified that the total paid by the employer was \$1.10 per hour worked by Kustura, but that that amount was for *all* benefits, not just those allowable under the *Cockle* decision. *Kustura* CABR, Fisher 7-8.<sup>3</sup> He also confirmed that the employer actually paid less per month than the costs of the plans for individual employees. The hourly rate included all benefits that were available for the worker through the Collective Bargaining Agreement (CBA), medical, prescription drug, dental, life

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<sup>3</sup> Cf. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 821, 16 P.3d 583 (2001) (health benefits are included in wage computation) with *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 491-93, 120 P.3d 564 (2005) (retirement, life insurance and most other CBA welfare benefits are not included in wage computation).

insurance and accidental death and dismemberment coverage and “time loss”, a short term disability program. *Id.*

The testimony that explained the actual amount the employer paid for the included benefits came from Robert Moss, an economist who testified for Kustura. Moss testified that he reviewed the records relating to the benefits, including the CBA, and documents from the employer. He testified the employer’s records showed that the monthly premium for health care benefits during the month of injury was \$110. *Kustura CABR, Moss 56-57.*

The IAJ’s second Proposed Decision and Order found that even with Fisher’s testimony, Kustura still had not met his showing that the Department’s order was incorrect. *Kustura PD&O 2/27/04 CABR 78.* Kustura petitioned the three-member Board for review, the Board accepted review, and issued a Decision and Order agreeing with the IAJ’s proposed order, thus affirming the amount used by the Department for health benefits - - \$110 per month. *Kustura D&O CABR 15-16.*

There was also undisputed testimony regarding Kustura’s limited proficiency in English. Neither the Department nor the Board disputed his request for an interpreter for the Board hearings. There is nothing indicating that Kustura had requested interpreter services during the pre-appeal stage while his claim was being administered at the Department

level. The Board provided an interpreter during the portion of the hearing where Kustura testified. Kustura, through counsel, requested that the Board provide an interpreter for communications between him and counsel. *Kustura* CABR Transcript 9/18/02 at 7. The Board denied the request. In the proposed decisions, adopted in the Decision and Order, the IAJ relied upon WAC 263-12-097 in deciding to provide interpreter services only during the time Kustura testified. *Kustura* CABR 13-21.

Kustura timely appealed to the Superior Court. His case was consolidated there with Lukic and Memisevic. The Superior Court reviewed the Board record and pleadings, heard argument and issued a memorandum opinion that affirmed the Board's decision. CP 32-41, 89-98. The Court entered judgment and findings of fact and conclusions of law that adopted the Board's findings and conclusions. CP 176-81. All three claimants moved for reconsideration, and the motion was denied. 42-58, 99-175.

After reconsideration was denied, the claimants sent letters suggesting the applicability of Executive Order 13166 to the interpreter issue. This issue was never raised or argued previously at the Board or the Superior Court, and is not part of the record.

## 2. Gordana Lukic

On March 15, 2001, the Department issued an order in which it determined that Lukic's wage rate, on which her time loss rate was based, was \$1,351.65 per month if the employer discontinued health care benefits. This was based on cash wages of \$9.65 per hour, eight hours a day, five days a week, plus \$109.36 in health care benefits per month. Also included in the calculation was the fact that the claimant was married with two dependent children. *Lukic* CABR 258-99. It is undisputed that the claimant never filed a protest or appeal to the order.

The record does not reflect that Lukic ever requested interpreter services while her claim, pre-appeal, was being administered by the Department, nor is there any Department order addressing interpreter services.

Lukic appealed two Department orders (issued subsequent to the unappealed wage order). The appealed orders terminated time-loss payments and closed the claim without permanent partial disability payment. *Lukic* CABR 260.

At the Board, Lukic raised the issue of her time loss rate at the first conference held in connection with her appeal to the Board. *Lukic* CABR, transcript, 2/12/03 at 4. Along with other benefits issues, Lukic sought to raise the wage issues that Kustura raised (*see* above), as well as certain

other wage issues unique to her. The first assigned IAJ and the parties overlooked the jurisdictional issue on the wage issue (*see* discussion *infra* Part VI. B) and proceeded with the hearings addressing all issues.

A second assigned IAJ raised the issue that the wage order had never been appealed. *Lukic* CABR, 8/20/03 Transcript 13-14. She noted that there had been neither appeal nor protest to the Department wage rate order, and she requested that the parties submit briefing regarding the Board's authority to exercise jurisdiction over the wage rate issues. Neither *Lukic* nor the Department filed any such briefing. *Lukic* D&O CABR 13-4

*Lukic* requested interpreter services for the hearings. *Lukic* CABR, transcript 2/12/03 at 11-12. There was no dispute that *Lukic* has limited English proficiency. Interpreter services were provided for her testimony and the testimony of witnesses at hearing, but not for *Lukic's* communication with counsel or for deposition testimony.

Testimony was presented regarding interpreter services that the Department provided. The Department provided interpreters for *Lukic's* treatment sessions with her physicians and during independent medical examinations. *Lukic* CABR, transcript 9/29/03 at 42-46. There was one unfortunate occasion where an interpreter who did not speak her language, was provided. *Lukic* CABR, transcript 9/29/03 at 42.

On the merits of Lukic's request for additional worker benefits, the IAJ found Lukic was in need of treatment and was temporarily totally disabled for a specific period. The IAJ also found in the Proposed Decision and Order that Lukic had filed no appeal to the March 15, 2001 Department order that set the wage rate, and the IAJ therefore declared that all testimony related to the wage rate was irrelevant. The IAJ rejected Lukic's theories for relief regarding interpreter services issues. *Lukic* PD&O CABR 138-147.

Lukic petitioned for review to the three-member Board. The Board reversed the IAJ on benefits, placing Lukic on the pension rolls, but affirmed the ruling on the finality of the wage rate order<sup>4</sup> and the adequacy of interpreter services by the Board. *Lukic* D&O CABR 1-17.

Lukic timely appealed to the Superior Court. This case was consolidated with those of Kustura and Memisevic. The Superior Court reviewed the Board record and pleadings, heard argument and issued a memorandum opinion that affirmed the Board's decision in this case. CP 32-41, 89-98. The Court entered judgment and findings of fact and conclusions of law that adopted the Board's findings and conclusions. CP 176-81.

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<sup>4</sup> Neither the IAJ in her PD&O nor the Board in its D&O made any findings on wage rate because, in the absence of any appeal from the Department wage order, that issue was not before the Board. *Lukic* CABR 15.

### 3. Maida Memisevic

At the time of her injury, Memisevic worked for Dependable Building Maintenance (DBM). Under the CBA, DBM funded certain non-cash benefits. Thus, the CBA required that each month DBM pay to a trust, certain specified amounts for every worker who met certain time-worked requirements. *Memisevic* CABR transcript 10/24/03 at 11-15. The trust (per agreement in the CBA) administered health and welfare benefits plans for workers' medical, dental, vision, life insurance, and several types of non-work disability insurance. Also, a retirement plan was funded through the trust by DBM. *Id.*

There is no dispute that DBM was paying a certain amount of money each month on Memisevic's behalf to the trust to fund her health care benefits as well as short-term disability, life insurance, and paying into a retirement fund. A dispute arose, as in the other two cases, as to whether these benefits should be included in calculating Memisevic's time-loss benefits under the Supreme Court's *Cockle* decision.

Unlike the other two cases, the record in Memisevic's case shows that she requested that the Department pay for interpreter services for attorney-client communications during claims adjudication. *Memisevic* D&O CABR 1-5. The Department responded by letter March 27, 2003. As the Board described in its decision, "the letter acknowledged that

interpreter services were needed for the claimant and had been provided when required. The Department denied authorizing interpreter services for communication between the claimant and her attorney.” *Id.* By policy, the Department pays for an interpreter if an injured worker needs medical treatment, is meeting with a vocational counselor, or needs to speak with the Department about her claim. *See Memisevic* CABR exhibit 36. Once a worker is represented by an attorney, however, the Department communicates through the attorney. *Memisevic* CABR transcript 4/5/04 at 91-92. There is no dispute that Memisevic has an attorney and did while the claim was still being adjudicated at the Department.

The Proposed Decision and Order granted no relief on either the wage rate or the interpreter claims. The PD&O ruled that the benefits requested would not be included in the wage rate, but that the February 22, 2002 wage rate order was unprotested and unappealed and therefore final. *Memisevic* PD&O CABR 50-61. The claimant petitioned for review to the full Board. *Id.* at 8-48. The Board granted review but affirmed the proposed decision. *Id.* D&O at 1-5.

Memisevic timely appealed to the Superior Court. This case was consolidated with those of Kustura and Lukic. The Superior Court reviewed the Board record and pleadings, heard argument and issued a

memorandum opinion that affirmed the Board's decision in this case. CP 32-41, 89-98. The Court entered judgment and findings of fact and conclusions of law that adopted the Board's findings and conclusions. CP 61-63<sup>5</sup>.

#### IV. KEY STATUTES

##### A. RCW 51.08.178

RCW 51.08.178 guides the determination of the "*monthly wages* the worker was receiving from all employment *at the time of injury.*" Since 1971, for regularly employed workers on a fixed hourly wage such as Kustura, Lukic and Memisevic, "monthly wage" has been computed under the formula of RCW 51.08.178(1).

For Kustura, Lukic and Memisevic, it is undisputed that they were employed five days per week, and that the Department, Board and Superior Court so determined. The five days per week figure includes, as if the days were worked, paid holidays and paid leave days that were not actually worked. *Shearer v. Dep't of Labor & Indus.*, 102 Wn. App. 336, 340, 8 P.3d 310 (2000); *In re Shearer*, BIIA Dec., 96 3384, 96 3385, 1998 WL 440532, \* 6 (1998) (*see discussion infra* Part VI. A. 3).

"Monthly wage" under RCW 51.08.178, is comprised of two types of consideration. First, the statute implicitly includes all "cash wages," which

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<sup>5</sup>The Superior Court did correct an apparent clerical error in on of the Board's findings, but that change did not grant any relief. *See discussion infra* Part VI. D.

the Department defines as “payment in cash, by check, by electronic transfer or by other means made directly to the worker before any mandatory deductions required by state or federal law.” WAC 296-14-522(1).

Second, in addition to cash wages, certain classes of employer-provided benefits are included, “[t]he 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 . . . . RCW 51.08.178(1) (emphasis added).

To come within RCW 51.08.178 as either cash wages or includable fringe benefits, employer payments, among other things, must be consideration for services and must be part of the contract of hire. *See* discussion *infra* Part VI. A regarding this Court’s *Erakovic* decision.

**B. RCW 51.52.050 and 51.52.060**

The Department has exclusive original jurisdiction in workers’ compensation matters. Chapter RCW 51.52; *Lenk v. Dep’t of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). The Board and courts have only appellate jurisdiction and do not have jurisdiction to review Department action until the Department issues an order and a party appeals such an order, first to the Board and then to the courts; furthermore, in the event of a Department order and an appeal, the

jurisdiction of the Board and the courts is limited to the scope of the Department determination. *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661, 879 P.2d 326 (1994); *Lenk*, 3 Wn. App. at 977.

Absent a protest or appeal of a Department order, the Department has no authority to address any aspect of the order, including whether it was communicated to the worker or whether the worker should be excused from the timely protest or appeal requirements of RCW 51.52.050 and 51.52.060. Neither Lukic nor Memisevic have filed appeals to the wage orders in their cases. If the workers here were to appeal from the Department orders, the Department would have authority to address timeliness of the appeals and other questions relating to the finality and validity of the orders. RCW 51.52.060(4). In *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533, 537-38, 886 P.2d 189 (1994), the Supreme Court held that the same *res judicata* effect must be given to final Department orders as is given to final court decisions. Because the wage orders of Lukic and Memisevic were never appealed, they are final orders and neither the Board, the Superior Court nor this court has jurisdiction to disturb their terms.

## V. STANDARD OF REVIEW

This case requires that this Court address Kustura's challenge to factual findings of the Superior Court determining the value of his health benefits. AB 30-32. The standard for review of the Superior Court factual findings in a workers' compensation case is the same as in appeals in most other types of civil cases (RCW 51.52.140), and thus "is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review. . . ." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Evidence is substantial if "sufficient to persuade a fair-minded, rational person of the truth of the matter." *R & G Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004). In determining whether substantial evidence exists, the Court must take the "record in the light most favorable to the party who prevailed in superior court": here, the Department. *Harrison Memorial Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Moreover, if the evidence is insufficient to establish a fact on an issue either way, the party having the burden of proof on the issue, here the appealing injured workers, loses; remand for more evidence is not an option on appeal in such cases. *See Ivey v. Dep't of Labor & Indus.*, 4 Wn.2d 162, 164, 102 P.2d 683 (1940) ("[T]he evidence in the record, as it stood, being to the court's mind so conflicting

that it could not decide the question presented. That, of course, must necessarily mean that the claimant had not sustained the burden of proof required of him by the statute.”).

This case also requires that this Court construe RCW 51.08.178. Statutory construction is a question of law reviewed de novo.<sup>6</sup> *Cockle*, 142 Wn.2d at 807.

## VI. ARGUMENT

### A. The Superior Court Correctly Affirmed The Board’s Exclusion Of Employer Taxes Relating To Government Benefits Programs From The Wage Rate Calculations

#### 1. Employer taxes for Unemployment Benefits, in addition to taxes for Social Security, Medicare, and Industrial Insurance were properly excluded by the Superior Court from the wage calculations both because they are neither consideration nor temporally related

In *Erakovic* this Court held that taxes paid by the employer to the government in relation to Social Security, Medicare, and Industrial Insurance programs are not included in wage computation. *Erakovic*, 132 Wn. App. at 770. No petition for review was filed in *Erakovic*, therefore the decision is given stare decisis effect. The workers here apparently are asking this Court to overrule its *Erakovic* decision regarding the taxes that were at issue there. See AB 34-36. Other than misstating the rationale of

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<sup>6</sup> Also reviewed de novo are the questions in this case on subject matter jurisdiction, res judicata effect of unappealed Department orders, and constitutional law. *Willoughby v. Dep’t of Labor & Indus.*, 147 Wn.2d 725, 730, 57 P.3d 611 (2002) (constitutional law); *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999) (jurisdiction); *Lynn v. Dep’t of Labor & Indus.*, 130 Wn. App. 829, 837, 125 P.3d 202 (2005) (res judicata).

this Court's ruling in *Erakovic* (AB 34) and of the Supreme Court's rationale and the factual circumstances in the *Gallo* decision (AB 35), the workers offer no new argument from those their counsel raised in *Erakovic*, nor do they offer any persuasive authority or logic suggesting that *Erakovic* was wrongly decided.

The workers here also argue that taxes for Unemployment Benefits are somehow materially different from taxes for Social Security, Medicare and Industrial Insurance. AB 36-38. This Court stated two wholly independent rationales for its holding in *Erakovic*, both of which apply equally to exclude employer taxes paid in relation to the government's Unemployment Benefits program, a question that the *Erakovic* Court did not address because the Superior Court in that case had rejected taxes for Unemployment Benefits, and *Erakovic* had not appealed. *Id.* at 775.

Thus, there are two independent reasons under *Erakovic* for rejecting the workers' arguments for inclusion of Unemployment Benefits taxes as wages. First, the *Erakovic* Court explained that taxes an employer pays to the government-run benefits programs such as Social Security, Medicare, and Industrial Insurance are not consideration for services under the contract of hire between the worker and the employer. *Id.* at 770. That independent rationale for the *Erakovic* Court's rejection of employer taxes for Social Security, Medicare and Industrial Insurance as purported "wages" applies equally to employer taxes for Unemployment Benefits.

Second, the *Erakovic* Court held that Social Security, Medicare and Industrial Insurance do not constitute "other consideration of a like

nature” to wages. *Id.* at 770-75; *see generally supra* Part IV. That rationale applies to Unemployment Benefits taxes as well.

Unemployment benefits were not critical to protecting the basic health and survival of Kustura, Lukic, and Memisevic at the time of their injuries. There is nothing in the record that would show how unemployment insurance benefits are critical during periods of injury-caused temporary disability. The workers offer no new authority or argument to support the inclusion of the value of employer unemployment taxes under RCW 51.08.178. Instead, they simply make a conclusory statement that “[appellants] lost their eligibility for and coverage by unemployment compensation because they were unable to work solely due to their industrial injuries. Thus, appellants’ injuries disqualified them from unemployment benefits they would have received had they been laid off but not injured on the job.” AB 38.

The workers’ claim of wage-inclusion based solely on loss through injury ignores the Legislature’s intent to include in wages only those items of in-kind consideration that a worker must replace while temporarily disabled and that are critical to the worker’s health or survival at the time of injury. *See, Gallo*, 155 Wn.2d at 491-93. Under no stretch of the imagination or of *Cockle*, *Gallo*, *Doty* and *Erakovic* do employer taxes for unemployment insurance meet this test. *See also* WAC 296-14-524.

Ironically, if the claimants were unable to work solely due to their industrial injuries, they would be eligible for injury-based wage replacement compensation, and unemployment benefits would not be

needed. *See* RCW 50.20.085. It is illogical to include in a worker's time-loss benefits the value of employer contributions for a benefit (i.e. unemployment compensation) that the worker would be disqualified from receiving while on time loss compensation.

**2. Lukic's potential benefits of three-free-nights-per-year hotel accommodation and discount meals therewith were properly excluded from the wage calculation because such benefits fail to meet the *Cockle* "like-benefits" test**

Lukic conclusorily asserts that her employee benefit of three-free-nights-per-year accommodations at chain hotels and discount meals for these stays should be included in the value of her wages. AB 33. There is no evidence, however, that Lukic had ever used this benefit by staying free at a chain hotel. Thus, she cannot establish that her injury caused her to lose anything in this regard.<sup>7</sup>

Moreover, even if she had used the benefit in the past, she could not establish how these particular benefits were critical to her health or survival at the time of injury such that she would be required to replace the benefit discount during a period of disability in order to preserve her health or in order to survive. *See* WAC 296-14-524. Thus, she fails to

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<sup>7</sup> The case law is clear that, for a purported component of "wages" to be included in the computation under RCW 51.08.178, an injury must have caused a worker to lose that component due to the industrial injury. The item must be something that the worker was living on at the time of injury and that the worker lost due to injury in order to be included in wage computation. *Cockle*, 142 Wn.2d at 815, n. 6 (where employer continues to provide health benefits during disability period there has not been a loss of such for wage-computation purposes); *Gallo*, 155 Wn.2d at 493-95 (same).

meet her burden of proof to establish how the value of these employee discounts was critical to her basic health and survival during her disability period. Accordingly, the Board and Superior Court correctly excluded the value of the benefits from the wage calculation.

**3. The workers' wage rate calculations included paid holidays as days worked when they did not, and they are not entitled to have holiday pay counted twice**

Seeking to increase wage computation by the value of their employers' contributions to provide holiday pay, the workers contend that "[t]his Court held in *Fred Meyer, Inc. v. Shearer*, 102 Wn. App. 336, 8 P.3d 310 (2000) that holiday pay falls within the meaning of wages under RCW 51.08.178(1)." AB 32-33. The workers have misread *Shearer*. In relation to paid leave, *Shearer* held that the *hours* of leave taken during any relevant time period should be counted in determining the worker's schedule for purposes of applying the work-schedule-based formula of subsection (1) of RCW 51.08.178. *Shearer*, 102 Wn. App. at 340.

But, as is clear from the reasoning of the Board in its Significant Decision in *Shearer* - - reasoning that is expressly adopted by the *Shearer* Court (*Id.* at 340) - - in applying the formula of subsection (1) of RCW 51.08.178, the general rule is that one cannot (as it appears the workers here are trying to do) include both: (1) the cash value of hourly employer contributions for leave (annual, holiday, sick, bereavement, or other leave pay) in determining the hourly pay rate, and (2) the leave hours taken in determining the hours-per-day or days-per-week figure under the formula.

*In re Kay Shearer*, BIIA Dec., 96 3384, 96 3385, 1998 WL 440532, \* 6 (1998). This would be impermissible double-counting unless the worker regularly worked every holiday such that the worker received both holiday pay and pay for working that day as well. There is no evidence or finding in this case that any of these workers worked any holidays.

Not one word in the Board decision in *Shearer* suggests any support for the proposition that one can both count leave hours in determining schedule and count employer contributions to leave pay for that same leave time. Moreover, the *Shearer* Court also made clear that the only question in that case in relation to paid leave was whether the *hours* of paid leave should be counted in determining the hours-per-week worked by the claimant in that case. *Shearer*, 102 Wn. App. at 340.

Thus, the *Shearer* Court noted in setting up its discussion that: “[Shearer] averaged 36.1 hours per week, including compensation for paid hours of vacation, funeral, and holiday leave.” *Shearer*, 102 Wn. App. at 338. The Court then stated its agreement with the decision by the Board that the paid-leave hours were properly included by the Board in the hours-worked element of the RCW 51.08.178(1) computation:

The Board concluded that Shearer’s monthly wages should include hours for which she was paid holiday, sick, vacation, and funeral leave because these payments represented benefits paid in lieu of work under her employment contract. To exclude these hours would understate the hours she was normally employed. Again, we adopt the Board’s reasoning that monthly wages include paid leave.

*Shearer*, 102 Wn. App. at 340.

It would thus be impermissible double-counting to include both: (1) the cash value of hourly employer contributions for leave (annual, holiday, sick, bereavement, etc.) in determining the hourly pay rate, and (2) the leave hours taken in determining the hours-per-day or days-per-week figure under the formula. In the Board's *Shearer* decision, the Board addressed a hypothetical worker who earns \$10 per hour for a 40-hour work week, but earns and takes 2 hours of annual leave in each work week. *In re Kay Shearer* at \*6. Under the Board's hypothetical in *In re Kay Shearer*, the employer contributes \$.53 per hour to pay for such annual leave. *Id.* The Board stated that, to avoid understating the worker's true hourly wage, one must either treat the worker as employed 40 hours per week at \$10 per hour, or one must deem the worker employed at 38 hours per week at \$10.53 per hour. *Id.*

The Board concluded that including *Shearer's* paid-leave hours in the work-schedule part of the wage-computation formula was what the scheme under subsection (1) of RCW 51.08.178 required. *Id.* The Board did not suggest that there was any support for the absurd proposition that the hypothetical worker should be able to double-count the paid leave, and thus qualify for a wage computation at 40 hours per week at \$10.53 per hour.

In sum, this Court's *Shearer* decision does not provide any support for the workers' claim here that they are entitled to double-counting of paid-leave in their monthly wage computation under RCW 51.08.178.

**4. The workers failed to establish a prima facie case as to whether the value of the health care benefit was correct and substantial evidence supports the superior court findings**

Each of the workers asserts that the Superior Court undervalued their health care benefits in computing their wages. AB 30-32. The workers lose on these factual challenges, however, because substantial evidence supports the Superior Court findings regarding the value of the workers' employer-provided health benefits. *Ruse*, 138 Wn.2d at 5 (substantial evidence is the standard of review for challenges to Superior Court factual findings in workers' compensation appeals); *see supra* Part V (standard of review).

In Kustura's case, the Board reversed its first decision and remanded for claimant to present additional testimony regarding the amount paid by the employer. However, after hearing the claimant's witness, the Board found that there was still insufficient evidence to overturn the Department's order. *Kustura*, Decision & Order, CABR 15-16. the evidence that supports the finding that his health benefits were of a value of \$110 per month is supported by the testimony of Robert Moss and Garth Fisher. *Kustura* BR Moss 56-57; Fisher 7-8.

In Lukic's and Memisevic's appeals, however, the evidence regarding wage rate is irrelevant because the Board and courts lack jurisdiction to address wage rates where unappealed Department orders

are *res judicata*. (see discussion *supra* Part VI.B). Accordingly, because Kustura is the only one of the three workers who appealed the Department wage rate order, the Department need only provide response to Kustura's substantial evidence challenge to the Superior Court's wage rate determination in his case. Neither Lukic nor Memisevic met her burden in establishing that the Department's order was incorrect.

In Lukic's case, the evidence that supports the finding that her health benefits were of a value of \$109.36 is found in the testimony of Kate Moriarity, Assistant Director of Human Resources for the employer, Four Seasons Olympic Hotel. She testified that the hotel paid \$109.36 for health insurance benefits that include vision benefits. *Lukic* CABR Moriarity Dep 11.

In Memisevic's case, the claimant offered the testimony of Garth Fisher, an account executive for Northwest Administrators, the third party administrator for the trust funds of the claimant's union. In addition, she presented the testimony of Ralph Davis, the CEO of Dependable Building Management, the employer. Fisher testified to the funds the trust used to pay for the health insurance for the employees. *Memisevic* CABR 13-15. In testimony similar to that in the *Kustura* hearing, Fisher explained that the employer pays in and the trust pays out. The claimant offered exhibits, apparently in an effort to demonstrate that the value was incorrect, yet the

values on the exhibits 2, 2A, 4 and 4A are all less than the rate used by the Department and the amounts paid by the trust. *Id.* at 15; *Memisevic* CABR exhibits 2, 2A, 4 & 4A. There was no further testimony as to the *employer's* contribution. The bulk of the testimony centered on the value of the other amounts the claimant sought to include.

Furthermore, even if the workers could establish a lack of substantial evidence to support the Superior Court findings on the value of their health benefits, that would still not be enough for them to prevail. The workers must (but cannot), demonstrate that there is competent evidence *to the contrary* allowing a determination of a different value of their health benefits. *See Ivey*, 4 Wn.2d at 164 (“[T]he evidence in the record, as it stood, being to the court’s mind so conflicting that it could not decide the question presented. That, of course, must necessarily mean that the claimant had not sustained the burden of proof required of him by the statute.”). *Ivey* also holds that it is not appropriate for a court to remand to the Board to allow a worker to establish the *prima facie* case that the worker failed to make in the first round of evidentiary proceedings.

**B. The Superior Court Correctly Found That The Wage Rate Orders Of Lukic And Memisevic Were Final And Binding**

- 1. The appellants waived the arguments relating to executive order 13166, and the “black faced type” requirements in RCW 51.52.050 by not raising the issues below**

The Appellants waived argument on the applicability of EO 13166 and the RCW 51.52.050 “black faced type” theory when they failed to raise the issues in their petitions for review at the Board or at the Superior Court. *See, e.g., Kustura* CABR 2-16; *Lukic* CABR 26-105; *Memisevic* CABR 8-48. Accordingly, they waived them and may not raise the issues for the first time on this appeal. RCW 51.52.104 (“Such petition for review shall set forth in detail the grounds therefore and the party . . . filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.”); RAP 2.5(a) (setting forth the general rule that an appellate court may refuse to review any claim of error not raised in the trial court); *Stelter v. Dep’t of Labor & Indus.*, 147 Wn.2d 702, 711, n.5, 57 P.3d 248 (2002) (declining to reach an issue that “was not raised or briefed to the Board or in judicial proceedings below”); *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (“Notwithstanding the merits of her petition, Allan waived this objection because it was not set out in her petition for review of the ruling of the Industrial Appeals Judge as required by RCW 51.52.104.”);

*Cosmopolitan Eng'g Group, Inc. v. Ondeo*, 128 Wn. App. 885, 893-94, 117 P.3d 1147 (2005) (raising an issue only in a footnote in a trial brief did not adequately preserve the issue under RAP 2.5(a)). This court should decline to consider arguments not presented for the Board and the Superior Court to consider.

**2. Neither Lukic nor Memisevic has ever appealed the wage computation orders in their respective claims, and therefore the board and courts lack jurisdiction to consider the wage computation issues in their cases**

The Department of Labor and Industries has exclusive original jurisdiction in workers' compensation matters. *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). The Board and courts have only appellate jurisdiction and do not have jurisdiction to review Department action until the Department issues an order and a party appeals such an order, first to the Board and then to the courts; furthermore, in the event of a Department order and an appeal, the jurisdiction of the Board and the courts is limited to the scope of the determination under the Department order. *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661, 879 P.2d 326 (1994); *Lenk*, 3 Wn. App. at 977.

Lukic and Memisevic argue at length that the appeal deadline should be extended due to the Department's failure to translate the orders into Bosnian. AB 17-30. But Lukic and Memisevic gloss over the fact

that they have never, to this day, appealed from the Department wage rate determinations that they want reviewed.

The Board and the courts lack jurisdiction at this time to consider any of their challenges to the wage orders, including their two timeliness challenges: (1) that the wage orders should have been translated into Bosnian (AB 17-21; 24-30); and (2) that the appeal deadlines in the Department orders were fatally defective because not in “black faced type” (AB 21-23). The Board and courts will not have jurisdiction to consider a timeliness-of-appeal question on the Department wage orders until Lukic and Memisevic actually appeal from the orders.

Thus, in *Lukic*, the Board explained that, because the appeal by Lukic was not from the Department’s wage computation order, but instead was from subsequent Department orders, the Board did not have jurisdiction to consider the validity or correctness of that order. *Lukic* D&O CABR 13-14. The same logic applies to the appeal by Memisevic; she has never appealed the Department’s wage computation order, but instead has appealed from subsequent Department orders, and accordingly the Board and courts do not have jurisdiction to adjudicate the issues relating to the wage rate calculations.

Absent a protest or appeal of a Department order, the Department has no authority to address any aspect of the order, including whether it was communicated to the worker or whether the worker should be excused from the timely protest or appeal requirements of RCW 51.52.050 and 51.52.060. If the workers here were to appeal from the Department

orders, the Department would have authority to address timeliness of the appeals and other questions relating to the finality and validity of the orders. RCW 51.52.060(4).

Here, there has been no appeal filed in either case by either claimant, both of whom were represented by counsel at the time the orders were issued, and which counsel had filed other appeals on their behalf, including ones before the Board in these appeals. The parties stipulated to the Historical/Jurisdictional facts for the purpose of establishing the Board's jurisdiction over issues in the appeal. In both the *Lukic* and *Memisevic* appeals, the Board's Historical/Jurisdictional facts documents demonstrate that there was no appeal to the wage orders that determined the wages on which their time-loss rate was based, in *Lukic*, the order of March 15, 2001, in *Memisevic*, February 22, 2003. *Lukic* CABR 258-59; *Memisevic* BR 667-68. Neither claimant presented any evidence relating to the circumstances surrounding the receipt of the wage order. In *Lukic*, the IAJ gave the parties the opportunity to establish the Board's jurisdiction but neither did. *Lukic* CABR transcript 8/20/03 at 13-14. Accordingly, the wage orders are final the binding and the challenges to the orders cannot be addressed in this appeal.

- 3. Assuming arguendo that the board and courts have jurisdiction to consider the timeliness question on the imaginary appeals of *Lukic* and *Memisevic* from their wage orders, the workers are not excused based merely on their LEP status**

a. **Lukic and Memisevic do not meet the test of *Rodriguez* for equitable relief**

Even if we assume for argument's sake that the Board and courts could address timeliness questions regarding the Lukic and Memisevic challenges to the wage computation determinations by the Department, the workers would not be excused for their untimely appeals on the record in this case. In *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533, 537-38, 886 P.2d 189 (1994), the Supreme Court held that the same *res judicata* effect must be given to final Department orders as is given to final court decisions. *Id.* at 537-39. In *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 174, 937 P.2d 565 (1997) (plurality), the Supreme Court recognized that there is a narrow equitable exception to finality of Department orders where there is: (1) claimant incompetency in understanding the content of the order, and (2) misconduct of the Department in communicating its order to the claimant where the Department knew or should have known that the claimant is burdened by that lack of competency. *Id.*

The *Kingery* Court cited and discussed *Rodriguez v. Dep't of Labor & Industries*, 85 Wn.2d 949, 540 P.2d 1359 (1975). In that case, an illiterate claimant who the Department knew or should have known spoke no English filed an appeal of a Department closing order seven months after the order was sent. The *Rodriguez* Court held that the order

was communicated when the claimant received it in the mail, but that the claimant was equitably excused for his late filing (until such time as the order was translated for him) by the fact that the Department communicated its order to the claimant where the Department knew or should have known that the claimant was burdened by that lack of competency. *Id.* at 952-53.

Under *Rodriguez*, as applied by the plurality in *Kingery*, there is no *per se* extension of the appeal deadline merely because an order is in English but sent to an LEP claimant. The claimant in these circumstances must establish that: (1) claimant lacked competency to understand the order; (2) the Department had knowledge or constructive knowledge of the incapacity; (3) the claimant subsequently became aware of the contents of the order; and (4) the claimant then filed an appeal thereafter within the 60 day deadline of RCW 51.52.060(1)(a). The mere fact that Lukic and Memisevic received their orders in English when they are LEP individuals is insufficient to extend the appeal deadline. They must demonstrate the other facts necessary for equitable relief, and then only after they have actually *filed an appeal*. Neither filed an appeal, and therefore under *Marley* and under the jurisdictional limits on the Board and the courts noted above in this section, the wage rate orders are final and binding at this time.

**b. Executive Order 13166 has no bearing on the ruling in *Rodriguez*; nor does a 1991 consent decree in a DSHS case**

Lukic and Memisevic rely (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). AB 19-30. This reliance is apparently a vague attempt to excuse their neglect in not appealing the wage orders. 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).

Furthermore, 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 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, the arguments grounded in EO 13166 and the consent decree should be rejected as without merit.

**c. Lukic and Memisevic misplace reliance on the “black faced type” requirement of RCW 51.52.050.**

RCW 51.52.050 imposes certain formatting requirements for Department final orders, including a requirement that the orders be in “black faced type.” Lukic and Memisevic assert that a Department order can never become final and binding if it is not in conformity with the “black faced type” requirement of RCW 51.52.050. AB 21-23.<sup>8</sup> In fact, however, if there is any deviation from the formatting requirements of RCW 51.52.050, any such deviation is irrelevant unless the party challenging the order can show prejudice. *Porter v. Dep’t of Labor & Indus.*, 44 Wn.2d 798, 801-02, 271 P.2d 429 (1954); *In re Eugene Jackl*, BIIA Dec., 88 2528, 1988 WL 236608 (1988). Lukic and Memisevic have

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<sup>8</sup> As the Department explains *supra* Part VI. B. 1, this argument was raised for the first time in this Court, and therefore the argument should be rejected as having been waived in the Board and superior court proceedings below.

not demonstrated prejudice in relation to the formatting of the Department wage orders in their cases.

Perhaps more important, Lukic and Memisevic cannot establish that the orders were not properly formatted. The copies of Department orders attached to their Amended Brief of Appellants as Appendix III are unclear copies of Department orders from which no determination of Department compliance with the “black faced type” requirement can be made. Significantly, none of the orders are the unappealed wage orders at issue; indeed those wage orders are not part of the record. The “black faced type” argument of Lukic and Memisevic is a purely theoretical argument and should be rejected for lack of any factual or legal support.

**C. The Board And Department Provided All Interpreter Services Required Under Any Procedural Or Substantive Due Process Or Equal Protection Or Statutory Analysis.<sup>9</sup>**

Solely in the context of their timeliness-of-appeal arguments, Lukic and Memisevic raise due process and equal protection arguments regarding the Department’s English language wage orders. AB 24-30. In the workers’ Assignments of Error (AB 1) and in their Conclusion (AB 41), however, the workers also assert without explanation of their rationale or supporting authority that they are entitled to reimbursement of their out-

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<sup>9</sup> The Department will not engage in separate analysis of Washington and federal constitutional procedural and substantive due process protections or equal protection requirements because no greater protection is provided under the Washington constitution. *See, e.g., State v. Manussier*, 129 Wn.2d 652, 672, 679-80, 921 P.2d 473 (1996).

of-pocket, self-help interpreter expenses occurred during Department administration<sup>10</sup> and Board adjudication<sup>11</sup> of these matters. There is no basis for the workers' apparent claim of a stand-alone or extra-statutory right to reimbursement of administrative-level interpreter services, but in an abundance of caution the Department will address the constitutional issues in stand-alone manner. The workers' constitutional theories are without merit whatever the context, as are their passing references to RCW 2.43.010 and RCW 2.43.040(4). AB 18, 40.<sup>12</sup>

#### 1. Procedural due process protection generally

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<sup>10</sup> Of the three workers, only Memisevic sought or obtained a Department order addressing interpreter services at the Department level, and, because the Department has original jurisdiction in workers' compensation matters (*see* "original jurisdiction" discussion *supra* Part VI. B. 2) only Memisevic can even pursue a request for reimbursement of out-of-pocket interpreter services, whatever her rationale might be.

<sup>11</sup> The workers' consolidated Amended Brief of Appellants: (1) assigns error to the Superior Court's affirmance of "the Board's decision that appellants . . . were not entitled to reimbursement for their interpreter expenses" (AB 1); (2) conclusorily asserts that costs to be awarded under RCW 51.52.130 if Memisevic is deemed to have prevailed at superior court include fees she allegedly paid for interpreter services (AB 40); (3) asserts as to Kustura (AB 7) and Lukic (AB 11), but not as to Memisevic (AB 16), that the Board denied reimbursement for interpreter expenses; and (4) concludes by requesting "reimbursement with interest of all interpreter expenses paid by the appellants during the course of the Board and Departmental proceedings below" (AB 41). Nowhere in the record and nowhere in the Amended Brief of Appellants is there any assertion that the Board, which was not named as a party to the appeals to Superior Court or the Court of Appeals, and is not participating in this appeal, is responsible for reimbursement of any interpreter services. The Department assumes that the workers are seeking reimbursement of interpreter expenses from the Department only.

<sup>12</sup> Chapter 2.43 RCW does not apply to Department claim activities because such are not "legal proceedings" as defined in RCW 2.43.020(3), nor are such activities "initiated" by the Department within the meaning of RCW 2.43.040(2). And Chapter 2.43 RCW does not apply to the Board because the Board does not "initiate" proceedings at the Board.

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.

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.

## **2. Department communications and procedural due process**

There is no basis for the workers’ theory that, while their claim was being administered by the Department, they had a procedural due process right to an interpreter for all claim-related communications with their attorney and others. AB 27. This is not a case where a government agency provides no interpreter services at all; the record demonstrates that the Department provided interpreter services for medical, vocational and psychological services. *Lukic* CABR transcript 9/29/03 42-3; *Memisevic* CABR, Exhibit 36.

Most of the authority analyzed in this constitutional analysis subpart of the Department’s brief addresses whether a person with limited

English proficiency has a constitutional right to receive in his or her primary language *notice of agency determinations* of civil economic matters (all holding against that proposition).<sup>13</sup> The same authority implicitly refutes the workers' claim of a constitutional right to an interpreter for any of the other communications their 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.

However, courts in other jurisdictions that have addressed this issue have uniformly upheld the constitutionality of 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

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<sup>13</sup> There is a dearth of authority on whether there is a due process or equal protection right beyond written notices to the array of communications raised by the workers.

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).

### **3. Board communications and procedural due process**

During the hearings on the appeal from the Department’s orders, the Board provided the workers with hearings with interpreters for all the critical testimony. There has been no allegation or proffer of any actual prejudice from any alleged deficiency in the interpreter services. There has been no indication of information that the workers could have brought to the attention of counsel that would have altered the cases presentations or outcomes.

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

#### **4. Substantive due process**

The workers identify no protected substantive due process rights, nor do they provide any explanation of how the Board's or Department's actions deprived the workers of the rights. "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 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 workers' substantive due process argument, to the extent they are making one, fails as to both Department-level and Board-level communications for the same reasons as the procedural rights argument - i.e., because they cannot identify any right *protected by substantive due process*, nor can they explain how the challenged actions of the Department and Board deprived them of it.

The workers do not allege deprivation of any *constitutionally-created* right. They cite to no constitutional provision or court decision giving a right to language assistance from the Department as it processed their claims or a right to have their private, off-the-record conversations with their attorney interpreted at the Board hearing. Accordingly, any substantive due process argument fails.

#### **5. Equal protection and Department communications**

The workers argue that the Department violated the equal protection clause by providing them with English-only documents and, in most respects, English-only services. AB 27-30. The argument fails because the 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).

Language is not a suspect class. A classification based on ability to communicate effectively in English is not an inherently suspect classification. But *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 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*, 158 Wn.2d 1, 19, 138, P.3d 963 (2006) (plurality) (emphasis added). Ability or lack of ability to speak and read English is not an immutable trait.

The workers cannot establish that by using English primarily to provide its services, the Department *purposefully* discriminated against their alienage. To trigger strict scrutiny based on a suspect class, the

workers would have to show “that a government actor *intentionally* discriminated against [them] 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 v. Dep’t of Labor & Indus.*, 100 Wn.2d 263, 270, 668 P.2d 1278 (1983) (strict scrutiny based on suspect classification requires “evidence of purposeful discrimination or intent” not “impact alone”). The workers would have to show that the Department acted “at least in part ‘*because of,*’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Per. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed.2d 870 (1979) (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).

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 v. Bergeson*, 141 Wn.2d 201, 226, 5, P.3d 691 (2000) (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). 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)).

A state agency’s decision 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.”).

The workers also claim an equal protection violation in the Department’s providing of Spanish-language notices to some workers. AB 29. It is immaterial, however, that the Department provides Spanish-language translation in some circumstances where it does not provide

translation in any of the other thousands of non-English languages of the world. “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. at 486 (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. at 319 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970)). The fact that the Department provides some services in Spanish, in light of the many Spanish-speaking claimants in the State of Washington, does not demonstrate any invidious discrimination against Bosnian-speaking claimants<sup>14</sup>.

## 6. Equal protection and Board communications

Similarly, the Board’s providing less than all of the interpreter services desired is likewise permissible because the Board did not treat the workers differently from other English-speaking claimants. The Board

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<sup>14</sup> Without citation to any supporting authority, the workers also assert as a broad legal proposition that if one government agency, DSHS, provides more services to a particular class of persons than does another government agency, DLI, the lower level of services at the second governmental agency violates constitutional equal protection requirements unless there is a rational basis for the distinction. AB 29. Such is not the law of equal protection; if it were, the courts would have little time to try anything but equal protection cases. As the Department explains above, “the Equal Protection Clause does not require that [government] must choose between attacking every aspect of a problem or not attacking the problem at all.” *Dandridge* at 486,

does not pay for English-speaking claimants' private, off-the-record consultations with their attorneys. The workers confuse the right to counsel of criminal defendants with a civil litigant's right to retain counsel. AB 26.

*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 221, 897, P.2d, 1252 (1995) (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 these claimants any treatment that was granted to English-speaking claimants, when it declined to provide them with an interpreter for private, off-the-record conversations with their attorney. Accordingly, this 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).

**D. The Workers Are Not Entitled To An Award Of Costs Or To Attorney Fees Under RCW 51.52.130 In Relation To The Proceedings At Superior Court Or In This Court.**

RCW 51.52.130 provides for awards of costs and reasonable attorney fees to appealing workers for costs and work in Superior Court and in appellate court proceedings where, per the fourth sentence of RCW 51.52.130, the outcome of the appeal is to reverse or modify the Board decision and "if the accident fund or medical aid fund is affected by the litigation." *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889-90, 16 P.3d 1231 (2004), *rev. denied* 152 Wn.2d 1032 (2004).

Memisevic argues at AB 39-40 that she was improperly denied attorney fees at Superior Court because the Superior Court corrected a finding in the Board's final decision that stated that "she was single with no dependents" when in fact she was married with no dependents. This revision in the findings does not entitle her to costs or attorney fees under RCW 51.52.130, however, because the Superior Court, in light of the jurisdictional (*see supra* Part VI. B. 2) and res judicata (*see supra* Part VI. B. 3) defects in her challenges to her wage rate, did not make any change in her wage rate. The Superior Court findings corrected the Board

finding's omission of the claimant's marital status as it appeared on the unappealed wage order. *Memisevic* Jurisdictional/historical facts stipulation CABR 667. The Superior Court affirmed the status quo, it did not change the calculation or the benefits the claimant received. The Superior Court's and Board's Conclusion of Law No. 2 confirms the finality of the February 22, 2002 wage rate order. *Id.*; CP 61-63. Thus, Memisevic's Superior Court appeal did not affect either the accident fund, the medical aid fund or her benefits.

All three workers also argue for costs and attorney fees on the rationale that the Superior Court decision should be reversed on one or more of the grounds they raise on appeal to this Court. AB 40-41. There is no merit to any of their theories on appeal, however, and therefore attorney fees should be denied under a decision by this Court affirming the Superior Court decision.

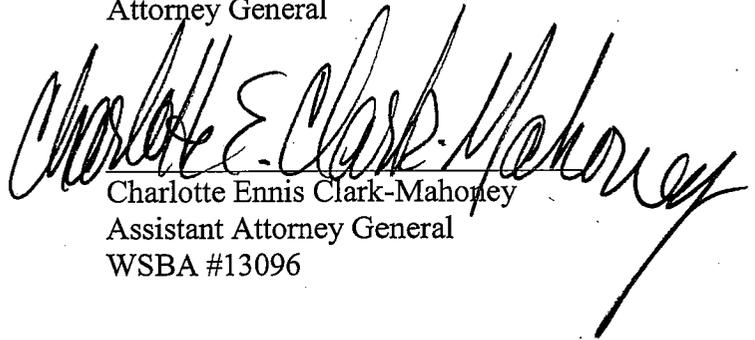
## VII. CONCLUSION

For the reasons stated above, this Court should affirm the Superior Court decision in these consolidated cases. Lukic and Memisevic cannot litigate the wage issues on their claims because they did not appeal the Department wage orders in their cases, and their challenges are in any event barred by *res judicata*. Furthermore, regardless of finality issues, none of the workers has established any error in wage computation by the

Superior Court. Finally, the workers have no statutory or constitutional right to reimbursement for any self-help interpreter expenses they allegedly incurred during Department and Board adjudication of their claims.

RESPECTFULLY SUBMITTED this 13<sup>19</sup> day of December, 2006.

ROB MCKENNA  
Attorney General



Charlotte Ennis Clark-Mahoney  
Assistant Attorney General  
WSBA #13096