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NO. 59614-4-I

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

EMIRA RESULOVIĆ,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This is a workers' compensation case governed by Washington's Industrial Insurance Act, Title 51 RCW.¹ Emira Resulović appeals from a Superior Court judgment that affirmed the order of the Board of Industrial Insurance Appeals that dismissed, as untimely, her appeals from the orders of the Department of Labor & Industries issued on her workers' compensation claim. It is undisputed that Resulović appealed the April 2, 2001 and February 20, 2004 Department orders in January 2005, long after the 60-day appeal deadline under RCW 51.52.060. The Board and the Superior Court declined to equitably excuse Resulović from the appeal deadline by finding that she was not diligent in pursuing her appeals.

Resulović argues that her appeals were timely because the Department orders never became final, claiming that the orders were not "communicated" to her in her primary Bosnian language and did not state her appeal rights in "black faced type" in violation of RCW 51.52.050 and 51.52.060. She also argues that her appeals should be deemed timely in equity. She further argues that the Department's sending English-written

¹ This case involves the issues of the existence and the scope of limited-English-proficient claimant's right to interpreter services. The same issues are being raised in the following four cases currently pending at this Court involving Bosnian-speaking workers represented by the same counsel who represents Resulović: *Mestrovac v. Dep't of Labor & Indus.*, No. 58200-3-I; *Kustura v. Dep't of Labor & Indus.*, No. 57445-1-I (three consolidated cases); *Ferenčak v. Dep't of Labor & Indus.*, No. 58878-8-I; *Masic v. Dep't of Labor & Indus.*, No. 60139-3-I. The oral argument in *Mestrovac* and *Kustura* are tentatively set to be heard on the same date.

notices and providing limited interpreter services as well as the Board's not providing her with interpreter services during discovery or for her confidential communications with her attorney violated a variety of Constitutional provisions, federal and state statutes, and public policies.

But our Supreme Court has rejected the argument that the word "communicated" in RCW 51.52.050 denotes "some actual understanding on the part of the [claimant] of the nature of the order." *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 951, 540 P.2d 1359 (1975) (rejecting an extremely illiterate Spanish-speaking claimant's argument). Also, Resulović admitted at the Board that each "order contained black faced ten point type on the same side as the decision in English stating the Department's decision." Certified Appeal Board Record (CABR) 68. Equity does not excuse her untimely filing, because she does not challenge the Superior Court finding (supported by substantial evidence) that she did not diligently pursue her appeals. *See Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 178, 937 P.2d 565 (1997) (equity requires diligence).

Resulović received adequate notice of the Department orders but failed to diligently pursue her appeals despite her demonstrated ability to obtain help in communicating with the Department in English in writing. *See Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999) ("It has long been established that due process allows notice of a hearing (and its attendant

procedures and consequences) to be given solely in English to a non-English speaker if the notice would put a reasonable recipient on notice that further inquiry is required.”); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2nd Cir. 1983) (“A rule placing the burden of diligence and further inquiry on the part of a non-English-speaking individual served in this country with a notice in English does not violate any principle of due process.”), *cert. denied*, 466 U.S. 929, 104 S. Ct. 1713, 80 L. Ed. 2d 186 (1984). The Board provided her with an interpreter for all on-the-record testimony and statements throughout its proceeding.

Resulović’s claim for further interpreter services has no support in law and should best be addressed to the Legislature.²

II. COUNTERSTATEMENT OF THE ISSUES

- A. **When a Department order is received by an injured worker, has the order been “communicated” to the worker under RCW 51.52.050 and 51.52.060?**
- B. **Resulović does not challenge the finding that she was not diligent in pursuing appeals from the Department orders at issue. Is this finding a verity and does it preclude equitable relief? In any event, does substantial evidence support the finding?**

² There are 6900 plus living languages in the world. Raymond G. Gordon, Jr., *Ethnologue: Languages of the World* (15th ed. 2005), available at <http://www.ethnologue.com>; see also *World Almanac & Book of Facts* 731-732 (2006) (ethnologue-based compilation of languages).

- C. Did the Department violate Resulović's statutory, Constitutional, or other rights in sending English orders or providing limited interpreter services?
- D. Did Resulović waive her argument on the Board's provision of interpreter services, when she did not raise it at the Board? In any event, did the Board violate her statutory, Constitutional, or other rights in not providing an interpreter for discovery or her confidential communications with her attorney?
- E. Did the Department or the Board "shift" any interpreter costs to Resulović?
- F. Did the Superior Court properly award the Department as costs the \$200 statutory attorney fee under Chapter 4.84 RCW and the Supreme Court *Black* decision?

III. STATEMENT OF THE CASE

A. Department Claim Administration

It is undisputed that Emira Resulović is limited in English proficiency (LEP). On November 23, 1999, Resulović sustained an industrial injury and applied to the Department for workers' compensation, which the Department allowed. CABR 123 (stipulated history); TR (8/17/05) 61. On April 2, 2001, the Department mailed her an order stating the wage computation for her time-loss benefits (wage order). CABR 132; Finding of Fact (FF)³ 1. On February 20, 2004, the Department mailed her an order closing her claim with an award for low

³ Findings of Fact refer to those made by the Board in its Decision and Order (CABR 1-5) adopted by the Superior Court in its judgment with a deletion of a sentence in Finding of Fact 4 (CP 5). Copies of the Superior Court judgment and the Board Decision and Order are attached to this brief as Appendices A and B, respectively.

back permanent partial disability (closing order). CABR 90; FF 1. It is undisputed that Resulović received both orders but did not protest to the Department or appeal them to the Board until January 19, 2005. FF 1, 5.

During the pendency of her claim at the Department, Resulović never asked the Department, orally or in writing, to translate any written correspondence or orders. Grigsby (8/17/05) 47-48⁴; FF 4. In fact, she sent many English-written documents with her signature to the Department. Grigsby (8/17/05) 42-48, 54; BD Ex. 2-6. Janet Grigsby, the claim adjudicator of the Department who worked on Resulović's claim, Grigsby (8/17/05) 24-25, believed, based on her review of Resulović's claim, that Resulović was able to communicate in written English, Grigsby (8/17/05) 38-39, 45-46, 54. Grigsby also received calls from, and talked on several occasions in English with, Resulović's husband, Grigsby (8/17/05) 47-48, 56, who seemed to speak English "quite well" and never indicated he did not understand her English, Grigsby (8/17/05) 56.

On one occasion in 2000, Resulović orally requested and was provided with an interpreter for a telephone conversation with Grigsby. Resulović (8/17/05) 14. The Department also provided her with

⁴ This brief refers to the testimony or statement during the Board hearings by either "TR" or by the surname of the witness, followed by the date of the hearing, and the page number of the transcript in which the testimony or the statement is located. The Board transcripts are contained in the Certified Appeal Board Record.

interpreters to translate oral communications at medical examinations and vocational consultations on her claim. Grigsby (8/17/05) 31, 58.

B. Board Proceedings

On January 19, 2005, through her attorney, Resulović appealed the 4/2/01 wage and 2/20/04 closing orders to the Board. CABR 86-89, 134-137. She requested interpreter services for all communications addressed to her and also to her English-speaking attorney. CABR 88, 136.

The hearing occurred on August 17, 2005 and September 7, 2005, where Resulović gave her testimony and presented that of Grigsby on the issue of whether her appeals were timely. TR (8/17/05); TR (9/7/05). The Board provided her with an interpreter for all the on-the-record testimony and the statements throughout the hearings. TR (8/17/05); TR (9/7/05).

Resulović testified she was fluent only in Bosnian for speaking, reading, and writing but always had language help available. Resulović (8/17/05) 9-20, 62-63; Resulović (9/7/05) 18, 28. As she testified, "Where we lived in the apartments there are a lot of Bosnian people and people from former Yugoslavia and there was always somebody who would help me out," Resulović (9/7/05) 18, "Somebody from our neighbors was always there to help," Resulović (9/7/05) 28. She testified she obtained help for completing Department documents from her husband, friends, and neighbors, Resulović (8/17/05) 64-74; Resulović (9/7/05) 8-9, 13, 17-18,

28, 71, and indicated “maybe” her husband or friend helped her fill out a Department change of address form, Resulović (8/17/05) 71. She testified that after a document is translated to Bosnian, “of course I would understand it.” Resulović (8/7/05) 22.

After the hearings, an industrial appeals judge (IAJ) issued a Proposed Decision and Order dismissing Resulović’s appeals as untimely. CABR 73-84. The IAJ found that the wage and closing orders “contained *black faced ten point type* . . . advising [Resulović] of the Department’s decision.” CABR 82 (Finding of Fact 2) (emphasis added). The IAJ also found that Resulović did not seek translation of these orders, CABR 82 (Finding of Fact 4), and “did not exercise diligence in perfecting and prosecuting her claim for compensation.” CABR 82 (Finding of Fact 6).

Resulović petitioned the 3-member Board to review the IAJ’s decision. CABR 7-13, 48-71. In her petition for review, Resulović did not make any claim or argument that the interpreter services provided during the Board proceedings were inadequate. CABR 7-13, 48-71. Nor did she challenge the IAJ’s finding that the wage and closing orders contained “black faced ten point type” advising her of the Department’s decision. CABR 7-13, 48-71. In fact, Resulović proposed the Board to find, among other things, that “[e]ach order contained black faced ten point type on the same side as the decision in English stating the

Department's decision." CABR 68. She argued that the wage and closing orders did not become final because the orders were not "communicated" to her in her Bosnian language and that the Department violated a variety of Constitutional provisions, federal and state statutes, and public policies in not providing notice in her Bosnian language and providing limited interpreter services during the claim administration. CABR 7-13, 48-71.

The Board issued a Decision and Order dismissing Resulović's appeals as untimely. CABR 2-6. The Board adopted the IAJ's finding that the wage and closing orders used black faced type advising Resulović of the Department decisions, FF 2, and she never sought translation of the wage and closing orders, FF 4, or diligently pursued her appeals, FF 6.

C. Superior Court Proceedings

Resulović appealed the Board decision to King County Superior Court. The Superior Court affirmed the Board decision and adopted all of the findings and conclusions, while striking a sentence in one of the findings ("She did not file an appeal within sixty days after of the time her doctor told her that his bills had not been paid and that she had to appeal any Department order she thought was incorrect."). CP 1-6. The Superior Court determined that Resulović was not entitled to any equitable relief, CP 5 (Conclusion of Law 2), and that the Board provided appropriate interpreter services during its proceedings, CP 5 (Finding of Fact 5).

Resulović appeals from the Superior Court judgment. CP 7-14.

IV. STANDARD OF REVIEW

“RCW 51.52.110 and RCW 51.52.115 govern judicial review of matters arising under the Industrial Insurance Act.” *Bennerstrom v. Dep’t of Labor & Indus.*, 120 Wn. App. 853, 857, 86 P.3d 826 (2004).

The superior court reviews a Board decision “only in an appellate capacity” and “cannot consider matters outside the record or presented for the first time on appeal.”⁵ *Sepich v. Dep’t of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969); RCW 51.52.115. The “findings and decisions of the Board are prima facie correct and the burden of proof is on the party attacking them”: here, Resulović. *Ravsten v. Dep’t of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987); RCW 51.52.115.

This Court reviews “the findings made after the superior court’s de novo review” to “see whether substantial evidence supports the findings” and “whether the court’s conclusions of law flow from the findings.” *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). The superior court’s decision “upholding the Board’s findings and decision must also be presumed correct.” *Intalco Aluminum v. Dep’t of*

⁵ Resulović requests relief far beyond the scope of her appeals. Appellant’s Brief at 49-50. The Board may not go beyond the scope of an appealed Department decision, and the Superior Court and this Court likewise cannot go beyond that scope. *See, e.g., Hanquet v. Dep’t of Labor & Indus.*, 75 Wn. App. 657, 661-666, 879 P.2d 326 (1994). If this Court decides this case in Resulović’s favor, the only relief that can be granted is remand to the Board to consider her appeals from the wage and closing orders.

Labor & Indus., 66 Wn. App. 644, 653, 833 P.2d 390 (1992) (citation omitted). 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). A reviewing 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); RCW 51.52.140 (appeal from superior court lies “as in other civil cases”).

This Court reviews questions of statutory and constitutional interpretation de novo. See *Willoughby v. Dep’t of Labor & Indus.*, 147 Wn.2d 725, 730, 57 P.3d 611 (2002).

V. ARGUMENT⁶

A. Resulović Conceded that the Department Orders Used the “Black Faced Type,” Thus Waiving Her Contrary Argument, and, In Any Event, Her Argument Lacks Merit

Resulović argues that the wage and closing orders were “void” and never became final because they failed to use “black faced type” as required by RCW 51.52.050. Appellant’s Brief at 11-13. A final Department order must contain “a statement, set in black faced type of at

⁶ Resulović divides her central argument into two parts, timeliness (Appellant’s Brief at 12-29) and general attacks grounded in multiple sources of law based on claimed Department and Board interpreter practices (Appellant’s Brief at 29-42). She repeats much of the discussion from the first part in the second. The Department has structured this brief to address only once each of the sources of law that she raises.

least ten point body or size, that such final order . . . shall become final within sixty days from the date the order is communicated to the parties . . .” RCW 51.52.050. As Resulović notes, “black faced” is synonymous with “bold faced,” and the Department orders stated her appeal rights in black, capitalized letters, not bold type. CABR 90, 132.

But Resulović did not raise this argument when she petitioned the Board to review the IAJ’s decision, which found that the Department orders contained black faced type. CABR 48-71. In fact, she conceded that “[e]ach order contained black faced ten point type on the same side as the decision in English stating the Department’s decision.” CABR 68. By having failed to contest the lack of black faced type in the Department orders at the Board and expressly conceded the Department’s use of such type, Resulović waived her black faced type argument. *See* RCW 51.52.104 (“petition for review shall set forth in detail the grounds therefor and the party . . . filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein”); *Sepich*, 75 Wn.2d at 316 (superior court, “as an appellate tribunal” can “only pass upon those matters that have first been presented to the Board and preserved in the Board’s record for review”); *Stelter v. Dep’t of Labor & Indus.*, 147 Wn.2d 702, 711 n.5, 57 P.3d 248 (2002) (failure to raise a theory in a petition to the Board waives argument on that theory on later

judicial appeal); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (“Allan waive this [insufficient notice] objection because she did not set it out in her petition for review . . .”).

In any event, the statement of appeal rights “is not statutory notice of the action of the department to the person to whom it is mailed.” *Porter v. Dep't of Labor & Indus.*, 44 Wn.2d 798, 800, 271 P.2d 429 (1954). “The copy of the order . . . is itself the notice of the action taken,” and “the statement required to be printed on the copy thereof is *merely a warning of the statutory requirement* that an appeal must be taken within sixty days, and *does not affect the validity of the communication of the ‘order’ . . . to the person who receives it.*” *Porter*, 44 Wn.2d at 801-802 (emphasis added); *see also In re Eugene Jackl*, BIIA Dec., 88 2528, 1988 WL 236608, *2 (1988) (significant decision) (“No evidence was presented that the claimant was in any way prejudiced by the Department’s failure to print the ‘notice of appeal rights’ in ten point, 100% black faced type.”); *O’Keefe v. Dep’t of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005) (the Board’s significant decisions are “persuasive authority”).

Resulović fails to demonstrate actual prejudice from the Department’s failure to use black typed face. Although her brief argues that the orders did not communicate the importance of the appeal deadline to her, Appellant’s Brief at 13, she never testified to that effect.

B. Resulović's Receipt of the Department Orders Constituted "Communication" under RCW 51.52.050 and Rodriguez

Resulović argues that the wage and closing orders never became final, claiming that they were not "communicated" to her under RCW 51.52.050 and 51.52.060 because they were not written in her primary Bosnian language. Appellant's Brief at 14-17, 31.

But our Supreme Court has rejected the argument that the word "communicated" denotes "some actual understanding on the part of the workman of the nature of the order." *Rodriguez*, 85 Wn.2d at 951. The word "communicated" requires "only that a copy of the order be received by the workman." *Rodriguez*, 85 Wn.2d at 952-953.

Without much explanation, Resulović argues that *Rodriguez* is "dicta" and "outdated." Appellant's Brief at 16. She is incorrect. The *Rodriguez* Court authoritatively determined that the claimant's appeal there was "not timely" under RCW 51.52.060, *Rodriguez*, 85 Wn.2d at 953 (emphasis added), but *equitably excused* the untimely filing under the "special circumstances" there presented, *id.* at 954.

Rodriguez is controlling here on the meaning of the term "communicated" in RCW 51.52.050 and 51.52.060. Although Resulović appears to question the wisdom of our highest court's interpretation of the term, our Legislature has not amended the statute since *Rodriguez*, a 1975

decision, and she provides no basis for this Court to ignore its stare decisis effect. See *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976) (“[O]nce a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it.”).

C. The Superior Court Properly Declined to Equitably Excuse Resulović from the Statutory Appeal Deadline⁷

Resulović seeks equitable relief from the wage and closing orders she failed to timely appeal. Appellant’s Brief at 24-29. An appellate court reviews the trial court’s decision to exercise equitable power for an abuse of discretion. See *Rabey v. Dep’t of Labor & Indus.*, 101 Wn. App. 390, 397, 3 P.3d 217 (2000). The Superior Court properly declined to grant equitable relief, and Resulović fails to demonstrate an abuse of discretion.

Although Washington courts have equitable power to set aside a Department action, WASH. CONST. art. IV, § 6; *Kingery*, 132 Wn.2d at 173 (plurality), they have rarely exercised that power, *Kingery*, 132 Wn.2d at 173 (plurality); *Rabey*, 101 Wn. App. at 395 (“This equitable exception

⁷ Resulović complains that in an unrelated case involving a different worker, a different Assistant Attorney General agreed in the Board proceedings that the 60-day period for appeal of a Department order in that case did not begin until an interpreter translated the order to the worker. Appellant’s Brief at 25. But Resulović does not provide any argument that such an agreement in an unrelated case with different factual circumstances would have any relevance here. The parties’ agreement on jurisdiction in that case would not be binding on the Board or courts even in that case, much less in this unrelated case. See *State v. Knighten*, 109 Wn.2d 896, 901-902, 748 P.2d 1118 (1988) (a court is not bound by a party’s erroneous concession or stipulation on a question of law); *Barnett v. Hicks*, 119 Wn.2d 151, 161, 829 P.2d 1087 (1992) (“Litigants cannot stipulate to jurisdiction nor can they create their own boundaries of review”).

has been used sparingly when workers have missed the 60-day limit for filing appeals.”). It is “a well-established rule that an equitable remedy is an extraordinary, not ordinary form of relief.” *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006) (citation omitted).

Our Supreme Court has found extraordinary circumstances warranting equitable relief from the appeal deadline under RCW 51.52.060 in *Ames v. Dep’t of Labor & Industries*, 176 Wash. 509, 30 P.2d 239 (1934) (equitable relief granted to an incompetent committed to a hospital during the appeal period), and *Rodriguez, supra* (equitable relief granted to an extreme illiterate whose interpreter was hospitalized and his mother about to undergo surgery in Texas during the appeal period).⁸

Ames involved a worker who the Department knew had legally been found violently insane and committed to a hospital at the time the Department sent its order rejecting his workers’ compensation claim to his home. *Ames*, 176 Wash. at 510. Within 60 days of his discharge, the claimant hired an attorney and requested a hearing on his claim, which the Department denied as untimely. *Ames*, 176 Wash. at 510-511. Under

⁸ In a different context, this Court in *Rabey* upheld the trial court’s grant of equitable relief from the 1-year statutory limitation for filing a survivor’s claim, as based on “reasonable and tenable grounds,” *Rabey*, 101 Wn. App. at 399, when the worker’s widow (1) was “shocked and disoriented” by her husband’s death, which was compared to “a form of diminished capacity similar to that found in *Ames*,” *Rabey*, 101 Wn. App. at 397; (2) reasonably relied on the employer’s lead human resource manager, who led her to believe she had no claim; and (3) “ha[d] not exhibited a lack of diligence in perfecting her claim,” *Rabey*, 101 Wn. App. at 398.

these circumstances, the Supreme Court upheld the trial court's grant of equitable relief from the appeal deadline, because it would be "abhorrent and contrary to established public policy" to "permit the department to deal *ex parte* with a workman's claim and deny his just rights unheard while he was known to be non compos mentis." *Ames*, 176 Wash. at 514.

Rodriguez involved an "extremely illiterate" workers' compensation claimant, who did not write or read either Spanish or English, and, at the time he received the Department order closing his claim, his interpreter was hospitalized and unable to interpret the order for him, and the worker's mother in Texas was about to undergo surgery. *Rodriguez*, 85 Wn.2d at 949-950. The claimant left for Texas, notifying the Department of his change of address through his doctor, and, within 60 days of his return, had his interpreter explain the claim closure to him and filed an appeal to the Board, which denied his appeal as untimely. *Rodriguez*, 85 Wn.2d at 950. In exercising equitable power under *Ames*, the Supreme Court noted authority holding that "illiteracy will not excuse failure to comply with provisions of workmen's compensation acts as to the giving of notice" but that "extreme illiteracy is 'within the reach of the mental incompetency principle.'" *Rodriguez*, 85 Wn.2d at 954 (citation omitted). The Court reasoned that the claimant was "extremely illiterate"

and that the Department “knew or should have known” of the illiteracy at the time of claim closure. *Rodriguez*, 85 Wn.2d at 954-955.

On the other hand, the courts have declined to exercise equitable power in cases that do not demonstrate the claimant’s diligence, *Kingery*, 132 Wn.2d at 178 (“Mrs. Kingery did not diligently pursue remedies available to her.”); *Kingery*, 132 Wn.2d at 178 (Madsen, J., concurring) (“I agree with the majority . . . that the claimant in this case failed to diligently pursue her rights.”); *Harman v. Dep’t of Labor & Indus.*, 111 Wn. App. 920, 927, 47 P.3d 169 (2002) (“Ignorance of the law has never been an adequate defense.”), or when the claimants failed to show their inability to understand the order or misconduct on the part of the Department, *see, e.g., Lynn v. Dep’t of Labor & Indus.*, 130 Wn. App. 829, 839, 125 P.3d 202 (2005).⁹

The *per se* rule proposed by Resulović that LEP claimants are entitled to equitable relief from the appeal deadline, so long as the Department was aware of the claimants’ LEP status when it sent English orders, Appellant’s Brief at 28,¹⁰ ignores the reality that many LEP

⁹ The plurality in *Kingery* and this Court in *Lynn* recognized that, under *Ames* and *Rodriguez*, two elements must be met for equitable relief from the timeliness requirements of RCW 51.52.060 – (1) the claimant’s inability to understand the order and the appellate process and (2) the Department’s misconduct in communicating the order. *Kingery*, 132 Wn.2d at 174 (plurality); *Lynn*, 130 Wn. App. at 839.

¹⁰ Although Resulović suggests that she had “a psychiatric/emotional condition impairing the ability to comprehend or act,” Appellant’s Brief at 28, her suggestion is not

claimants, like Resulović, are able to use resources to understand English documents and that about 180,000 claims are filed with the Department each year. *Kingery*, 132 Wn.2d at 169 (plurality).

In the due process context, the courts have required diligence and further inquiry to a LEP person and held that English-written notice to the person is sufficient so long as it “would put a reasonable recipient on notice that further inquiry is required.” *Nazarova*, 171 F.3d at 483; *Guerrero v. Carleson*, 512 P.2d 833, 836 (Cal. 1973) (government “may reasonably assume” that LEP person “will act promptly to obtain [language] assistance when he receives the notice in question”), *cert. denied*, 414 U.S. 1137, 94 S. Ct. 883, 38 L. Ed. 2d 762 (1974); *Soberal-Perez*, 717 F.2d at 43 (requiring “diligence and further inquiry” to a LEP person “served in this country with a notice in English does not violate any principle of due process”). As Massachusetts’s Supreme Court stated, when a person receives notice which would be sufficient if the person were not under a disability, that notice is sufficient as to a person actually under a disability if:

- (1) it would put a reasonable person on notice that inquiry is required,
- (2) further inquiry would reveal the facts necessary to understand the nature of the proceeding and the opportunity to be heard, and

supported by any finding or evidence. In fact, she testified that after a document is translated to Bosnian, “of course I would understand it.” Resulović (8/7/05) 22.

- (3) the party's disability does not render him incapable of understanding the need for such inquiry.

Commonwealth v. Olivo, 337 N.E.2d 904, 909 (Mass. 1975).

Similarly, in the context of statutory limitations for filing a habeas corpus petition, courts "have rejected a per se rule that a petitioner's language limitations can justify equitable tolling, but have recognized that equitable tolling may be justified if language barriers actually prevent timely filing." *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006) ("non-English speaker *who could not find a willing translator could qualify for equitable tolling*"); *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002) ("the existence of a translator" to assist a person during his appellate proceedings implies that the person lacks reasonable cause for "remaining ignorant of the legal requirement for filing his claim").

The requirement of diligence and further inquiry on LEP persons in due process and other legal contexts is consistent with the principles developed in *Ames*, *Rodriguez*, and *Kingery* that require diligence on the claimant seeking equitable relief from the 60-day appeal deadline.

Here, Resulović has not assigned error to or otherwise challenged the Superior Court finding (adopting the Board finding) that she "did not exercise diligence in perfecting and prosecuting her claim for compensation." CP 5; FF 6 (CABR 5). This finding is a verity. *See*

Willoughby, 147 Wn.2d at 733 n.6 (unchallenged findings are verities). This finding thus precludes equitable relief here. See *Kingery*, 132 Wn.2d at 178 (equity requires diligence); *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947) ("Equity aids the vigilant, not those who slumber on their rights."); *Labor & Indus. v. Fields Corp.*, 112 Wn. App. 450, 459, 45 P.3d 1121 (2002) ("[A]s one condition of equitable relief, the claimant must have diligently pursued his or her rights.").

In any event, the evidence, viewed in the light most favorable to the Department, supports the finding that Resulović was not diligent in pursuing her appeal. Resulović had no problem obtaining translation of, and help in filling out, Department documents, because "[w]here we lived in the apartments there are a lot of Bosnian people and people from former Yugoslavia and there was always somebody who would help me out." Resulović (9-07-05) 18, 28 ("Somebody from our neighbors was always there to help."). Her husband called the Department several times and seemed to speak English "quite well." Grigsby (8/17/05) 47-48, 56. She sent to the Department many documents but never indicated she needed documents translated. Grigsby (8/17/05) 47-48, 56; CABR Ex. 2-6; FF 4.

The wage and closing orders Resulović failed to timely appeal contained the Department's name and address, the claim manager's phone number, and Resulović's name, claim number, and injury date. CABR 90,

132-133. The Department orders having every official appearance of relating to Resulovic's claim reasonably put her on notice that further inquiry is required. *See Nazarova*, 171 F.3d at 483; *Guerrero*, 512 P.2d at 836; *Soberal-Perez*, 717 F.2d at 43; *Olivo*, 337 N.E.2d at 909. Resulović did not explain why she did not obtain help in translating these orders. Nor did she testify that she was unable to obtain such help at the time she received the orders. These facts are sufficient to persuade a fair-minded person that Resulović did not diligently pursue her appeals.

Unlike the legally insane, hospital-confined claimant in *Ames* and the "extremely illiterate" claimant in *Rodriguez*, whose *interpreter was hospitalized and unavailable* and his mother about to undergo surgery in Texas when he received the Department order, there is no evidence here showing that Resulović, *for reasons beyond her control*, was unable to understand the orders she failed to timely appeal – she demonstrated her ability to understand and deal with Department orders with the assistance of her family members, friends, neighbors, or an interpreter.

Further, Resulović fails to demonstrate any misconduct by the Department. *Kingery*, 132 Wn.2d at 174 (plurality) (Department misconduct is an element for equitable relief); *Lynn*, 130 Wn. App. at 839 (same). She claims that the Department must have known of her inability to understand the Department orders, because it had provided her with an

interpreter for some oral communications. Appellant's Brief at 5, 15, 28. But she overlooks the distinction between fluency in *oral* communications in a second language and that in *written* communications. Resulović, in her many written communications in English with the Department, never asserted any limitation on her ability to read English or to readily obtain help from a dictionary or family or friends, Grigsby (8/17/05) 42-48, 54; BD Ex. 2-6, and she thus cannot claim that the Department committed misconduct or has "unclean hands" in continuing to send orders in English. As the Department's claim adjudicator Grigsby testified, based on her review of Resulović's claim, she believed Resulović was able to communicate in written English. Grigsby (8/17/05) 38-39, 45-46, 54.

Resulović's reliance on *Somsak v. Criton Technologies*, 113 Wn. App. 84, 52 P.3d 43 (2002), is misplaced. *Somsak* does not involve an English order sent to a LEP claimant – it addressed the res judicata effect of a Department order that did not clearly encompass the issue, the litigation of which the employer sought to preclude. *Somsak* holds only that when the language of an order does not clearly address a particular issue, the parties receiving it are not bound on that issue. *Somsak*, 113 Wn. App. at 92. There is no issue here about the clarity of the language (in English) in the wage and closing orders at issue.

Resulović's reliance on *In re Cecelia Envila*, Dckt. No. 93 1856, 1994 WL 739079 (Nov. 14, 1994) (Board decision), is also misplaced.¹¹ *Envila* is factually distinct and wrong. It involved a 41-day delay, much shorter than the 9-month and 3.5-year delays here. The Board stated that the illiterate, LEP claimant had no duty to immediately seek translations of documents, *Envila*, 1994 WL 739079, at *2. *Envila* is thus inconsistent with the duty of diligence recognized in *Kingery*, 132 Wn.2d at 178, and with due process and equitable tolling decisions requiring diligence and inquiry, *Nazarova*, 171 F.3d at 483; *Guerrero*, 512 P.2d at 836; *Soberal-Perez*, 717 F.2d at 43; *Olivo*, 337 N.E.2d at 909; *Mendoza*, 449 F.3d at 1069; *Cobas*, 306 F.3d at 444. As the Board dissent correctly pointed out, a claimant, "whether illiterate, would pay special attention to 'official' communications upon receipt." *Envila*, 1994 WL 739079, at *5 (dissent).

In sum, the Superior Court properly declined to exercise equitable power in this case. Resulović fails to prove an abuse of discretion.

D. Resulović Fails to Show Violation of Chapter 2.43 RCW

Resulović argues that both the Department and the Board violated Chapter 2.43 RCW. Appellant's Brief at 33-35. But she never challenged the Board's provision of interpreter services in her petition for review to

¹¹ Resulović incorrectly describes *Envila* as a significant decision of the Board. See RCW 51.52.160 (the Board shall publish its "significant decisions").

the Board.¹² CABR 7-13, 1-70. She thus waived her argument about the Board's provision of interpreter services. *See* RCW 51.52.104; *Sepich*, 75 Wn.2d at 316; *Stelter*, 147 Wn.2d at 711 n.5; *Allan*, 66 Wn. App. at 422. In any event, her argument lacks merit, because Chapter 2.43 RCW does not *require* the Department or the Board to provide interpreter services.

Chapter 2.43 RCW does not create a right to an interpreter, *see* RCW 2.43.010, but requires that an interpreter *when appointed* in a "legal proceeding" be "qualified," RCW 2.43.030(1). It allocates interpreter costs to "the governmental body initiating the legal proceeding," RCW 2.43.040(2), or, in "other legal proceedings," to "the non-English-speaking person, unless such person is indigent," RCW 2.43.040(3). This distinction is consistent with the due process law that distinguishes "government-initiated proceedings seeking to affect adversely a person's status" such as "criminal prosecution, deportation or exclusion" and "hearings arising from the person's affirmative application for a benefit". *Abdullah v. INS*, 184 F.3d 158, 165 (2nd Cir. 1999) (due process does not require an interpreter for special agricultural worker status applicants

¹²Resulović claims that, in an oral ruling that was not recorded, the IAJ denied interpreter services in relation to a discovery issue about a Department request for admissions. Appellant's Brief at 8, 31, 42. It was Resulović's burden to make a record that such a ruling occurred so that it could be preserved for superior court review. *See generally Sepich*, 75 Wn.2d at 316. She did not make such a record. Nor can she show any prejudice in any such ruling. *She* offered to admit her response to the Department's request for admission at the hearing over the Department's objection, TR (8/17/05) 17-19, and the Board ultimately rejected it, CABR 4.

during INS interviews); *see also State v. Nemitz*, 105 Wn. App. 205, 211, 19 P.3d 480 (2001) (“The purpose of the interpreter statute is to provide interpreters for *defendants, witnesses, and others compelled to appear.*”).

In claiming that Chapter 2.43 RCW applies to the Department claim administration, Resulović does not present any legal analysis other than to say, “There is simply no other legislative authorization found in Washington statute for purchasing interpreter services to provide to LEP workers.” Appellant’s Brief at 34. But she overlooks the implied power the Legislature has vested in the Department to carry out its programs. *See generally Tuerk v. Dep’t of Licensing*, 123 Wn.2d 120, 124-125, 864 P.2d 1382 (1994) (implied authority explained); *see also* RCW 43.22.030; RCW 51.04.010-.030(1); RCW 51.32.095(1)-.114; RCW 51.36.010(1).

The statute does not apply to the Department claim administration, because it is not a “legal proceeding.” A “legal proceeding” is “a [1] proceeding in any court in this state, [2] grand jury hearing, or [3] hearing before an inquiry judge, or before an administrative board, commission, *agency*, or licensing body of the state or any political subdivision thereof.” RCW 2.43.020(3) (bracketed numbers added).¹³ The claim administration

¹³ The word “proceeding” is qualified only by the phrase “in any court in this state,” which is *separated* by a comma from “grand jury hearing,” and by another comma from “hearing before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state . . .” RCW 2.43.030(3). “A comma serves many functions, but its purpose always is to set a phrase apart from the rest of the sentence.” *E.*

is not a “hearing” and is irrelevant to a worker’s appeal to the Board. *See, e.g., McDonald v. Dep’t of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001) (Department decision making processes are irrelevant). The hearing begins *after* the Department makes an *ex parte* decision in a non-adversarial manner, and an aggrieved party appeals it to the Board, which then conducts a *de novo hearing* to determine whether the decision is correct. RCW 51.52.050–.104; *McDonald*, 104 Wn. App. at 623.

The Board proceeding is a “legal proceeding,” but the Board is not required to provide an interpreter at its expense, because it did not “initiate” the proceeding. RCW 2.43.040(2). *Resulović* “initiated” the proceeding by filing an appeal. RCW 51.52.050, .060. Although *not required*, the Board, per its rule adopted under RCW 51.52.020 (not under Chapter 2.43 RCW as *Resulović* claims¹⁴), provided her with an interpreter for the hearing. *See* WAC 263-12-097 (“When . . . a non-English-speaking person as defined in chapter 2.43 RCW is a party . . . in a hearing before the [Board], the [IAJ] *may* appoint an interpreter . . .”). Her

Gig Harbor Improvement Ass’n v. Pierce County, 106 Wn.2d 707, 713, 724 P.2d 1009 (1986). The qualifying prepositional phrases that follow “hearing” in the statute’s description of the third category of legal proceeding modify only the word “hearing” that immediately precedes those qualifying prepositional phrases. *See Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82 (2005) (“[U]nless a contrary intention appears in the statute, qualifying words and phrase refer to *the last antecedent*.”).

¹⁴ *Resulović* claims that the Board recognizes its authority to adopt WAC 263-12-097 derives from Chapter 2.43 RCW. Appellant’s Brief at 34. But the regulation derives from RCW 51.52.020 and recognizes only that, *when an interpreter is appointed at the Board proceeding for a LEP claimant*, Chapter 2.43 RCW is incorporated only in part for certain specified definitions, appointment standards and other matters.

challenge to WAC 263-12-097 (Appellant's Brief at 31) is not based on any authority and should be rejected.

E. Resulović's Claims of Violation under Chapter 49.60 RCW, Title VI, and Presidential Executive Order Lack Merit

Resulović claims the Department and Board¹⁵ discriminated against her for her national origin in violation of Chapter 49.60 RCW, Washington's Law Against Discrimination (WLAD) and Title VI of the Civil Rights Act, Appellant's Brief at 32-33, 35-37, and violated EO 13166, Appellant's Brief at 18-19, 35. Her arguments lack merit.

EO 13166 (2000 WL 34508183) (directing federal grant agencies to develop LEP guidelines) expressly and unambiguously states it does *not* create any enforceable "right or benefit, substantive or procedural":

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 (emphasis added). This language demonstrates Presidential intent specifically to reject the type of argument raised by Resulović here.

As to WLAD and Title VI, Resulović does not explain how a worker may raise such a discrimination claim in her appeal under Title 51

¹⁵ Resulović waived these claims with respect to the Board's provision of interpreter services as she failed to raise them at the Board in her petition for review. CABR 7-13, 1-70; see RCW 51.52.104; *Sepich*, 75 Wn.2d at 316; *Stelter*, 147 Wn.2d at 711 n.5; *Allan*, 66 Wn. App. at 422

RCW. See RCW 49.60.030(2) (“Any person deeming himself . . . injured by any act in violation of this chapter shall have *a civil action* in a court of competent jurisdiction.”); *Sepich*, 75 Wn.2d at 316 (superior court “has no original jurisdiction” in workers’ compensation cases); *Brand v. Dep’t of Labor & Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999) (Title 51 RCW “provides exclusive procedures and remedies for injured workers”).

Nor does Resulović provide adequate analysis under WLAD or Title VI to demonstrate an actionable discrimination. See *Alexander v. Sandoval*, 532 U.S. 275, 280-293, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (Section 602 of Title VI creates a privately enforceable right against “intentional discrimination,” but not “disparate impact”). This Court should thus reject her arguments as not supported by any authority or analysis. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“[T]he three grounds argued are not supported by any reference to the record nor by any citation of authority; we do not consider them.”); *State v. Thomas*, 150 Wn.2d 821, 868-869, 83 P.3d 970 (2004) (“[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made.”).

Resulović points out a Department provider bulletin PB 05-04 and argues that it “recognizes that the failure to provide adequate interpreter services for medical care constitutes discrimination based on national

origin and violates Title VI.” Appellant’s Brief at 36. But the provider bulletin is “advisory only” and “does not implement or enforce the law”. *Wash. Educ. Ass’n v. Pub. Disclosure Comm’n*, 150 Wn.2d 612, 619, 80 P.3d 608 (2003). PB 05-04 describes a *federal agency’s* Title VI disparate impact analysis, which, as stated above, is not privately enforceable. Further, this case does not address the health care interpreter services addressed in PB 05-04, which the Department indisputably provides.

F. Resulović Fails to Explain How the Department or the Board Violated a Public Policy under RCW 2.43.010

Citing RCW 2.43.010, Resulović claims that the Department is required by the policy in the statute to provide notice to LEP claimants in their primary languages, Appellant’s Brief at 17-18, and that the Department and the Board¹⁶ violated the policy by providing only limited interpreter services, Appellant’s Brief at 32. But the policy is “to secure the rights, constitutional or otherwise” of LEP persons. RCW 2.43.010. Because she fails to show any violation by the Department or the Board of any of her “rights, Constitutional or otherwise,” her argument lacks merit.

¹⁶ As stated above, Resulović waived her argument about the Board’s provision of interpreter services, which she failed to raise at the Board. CABR 7-13, 1-70; see RCW 51.52.104; *Sepich*, 75 Wn.2d at 316; *Stelter*, 147 Wn.2d at 711 n.5; *Allan*, 66 Wn. App. at 422.

G. Resulović Failed to Show a Due Process Violation¹⁷

Resulović argues that the Department and the Board¹⁸ violated her procedural due process rights. Appellant's Brief at 10-22, 37-39. "Due process requires notice and an opportunity to be heard." *State v. Storhoff*, 133 Wn.2d 523, 527, 946 P.2d 783 (1997). The Department orders at issue and the Board's evidentiary hearing with an interpreter provided for all of the on-the-record testimony and statements satisfied due process.

1. The Department English Notice Satisfied Due Process

Resulović argues that the Department orders sent to her violated her due process rights, saying, "Sending English only orders to LEP workers does not constitute notice". Appellant's Brief at 21. Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). The Department orders satisfied such notice.

¹⁷ The Department will not engage in separate analysis of Washington and federal due process clauses, because Resulović does not make such analysis or suggest that a greater protection is provided under Washington's with an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

¹⁸ Resulović waived her argument on the Board provision of interpreter services, which she failed to raise at the Board. CABR 7-13, 1-70; see RCW 51.52.104; *Sepich*, 75 Wn.2d at 316; *Stelter*, 147 Wn.2d at 711 n.5; *Allan*, 66 Wn. App. at 422.

The courts in other jurisdiction have determined that, in civil cases involving only economic interests as here, due process does not require government agencies to provide notices or services to persons with limited English proficiency *in their primary language*. See *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (notice of unemployment benefit denial); *Toure v. United States*, 24 F.3d 444, 446 (2nd Cir. 1994) (administrative seizure); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2nd Cir. 1983) (social security benefit denial), *cert. denied*, 466 U.S. 929, 104 S. Ct. 1713, 80 L. Ed. 2d 186 (1984); *Frontera v. Sindell*, 522 F.2d 1215, 1221 (6th Cir. 1975) (no due process right to civil service exam in Spanish); *Alfonso v. Bd. of Review*, 444 A.2d 1075, 1076-1078 (N.J. 1982) (unemployment benefit denial); *Commonwealth v. Olivo*, 337 N.E.2d 904, 909-910 (Mass. 1975) (condemnation); *Hernandez v. Dep't of Labor*, 416 N.E.2d 263, 266-267 (Ill. 1981) (unemployment benefit denial); *Guerrero v. Carleson*, 512 P.2d 833, 837 (Cal. 1973) (termination of welfare benefits), *cert. denied*, 414 U.S. 1137, 94 S. Ct. 883, 38 L. Ed. 2d 762 (1974).

As stated above, *supra* Section V(C), the courts have placed a duty of diligence and further inquiry on LEP persons, see *Guerrero*, 512 P.2d at 836; *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999); *Soberal-Perez*, 717 F.2d at 43; *Olivo*, 337 N.E.2d at 909. As stated above, *supra* Section V(C), the Department orders contained Resulović's name, claim number,

and injury date, the Department's name and address, and the phone number of the claims manager (CABR 90, 132-133) and would alert any reasonable LEP claimant to seek language assistance, if necessary.

Resulović's reliance on *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998), is misplaced. *Hull* did not involve a due process issue. It involved the constitutionality, under the First Amendment and the federal equal protection clause, of Arizona's constitutional amendment that "*explicitly and broadly prohibit[ed] government employees from using non-English languages,*" thus prohibiting the "use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English." *Hull*, 957 P.2d at 996 (emphasis added). The *Hull* Court held that the amendment impermissibly restricted speech of public employees and others and was not narrowly tailored to meet its goal to promote English as a common language, because "English can be promoted *without prohibiting the use of other languages* by state and local governments." *Hull*, 957 P.2d at 1001 (emphasis added). *Hull* pointed out, and turned in significant part on, the "critical difference between encouraging the use of English and repressing the use of other languages." *Hull*, 957 P.2d at 991.

Unlike the constitutional amendment in *Hull*, the Department's English notices or services do not *prohibit* the use of any other languages.

Arizona's broad ban on public employees' use of other languages in *Hull* must be distinguished from Resulović's claim of an "affirmative right to compel state government to provide information in a language that [he] can comprehend." *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 936 (9th Cir. 1995) (en banc) (emphasis added), *vacated as moot*, 520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997).¹⁹

The *Hull* Court recognized that it is "not [the Court's] prerogative to impinge upon the Legislature's ability to require, under appropriate circumstances, the provision of services in languages other than English." *Hull*, 957 P.2d at 997 (emphasis added). In other words, the decisions as to whether, when, and in what languages to provide language services should be "best left to those branches of government that can better assess the changing needs and demands of both the non-English speaking population and the government agencies that provide the translation." *Alfonso*, 444 A.2d at 1977; *see also Olivo*, 337 N.E.2d at 910 n.6; *Valdez v. N.Y. City Hous. Auth.*, 783 F. Supp. 109, 121 (S.D.N.Y. 1991).

Resulović's reliance on *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006), is likewise misplaced. *Jones* involved a situation where a notice of a tax lien sale sent via a certified mail to a

¹⁹ Although the Supreme Court has vacated the Ninth Circuit opinion in *Arizonans for Official English* on mootness grounds, the *Hull* Court explicitly relied on the opinion, stating, "On the merits of the case, however, we agree with the result and with much of the reasoning of the Ninth Circuit opinion." *Hull*, 957 P.2d at 987 n.1.

property owner was *returned unclaimed*, yet the government proceeded to sell his property. *Jones*, 126 S. Ct. at 1712-1713. The Supreme Court held “that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.” *Jones*, 126 S. Ct. at 1713. The Court emphasized that the government “knew that [the property owner] could not be reached at his address of record,” *Jones*, 126 S. Ct. at 1717, and reasoned that if a letter is returned unclaimed, the sender “will ordinarily attempt to resend it,” “especially . . . when . . . the subject matter of the letter concerns such *an important and irreversible prospect as the loss of a house*,” *id.* at 1716 (emphasis added). Unlike the situation in *Jones*, where a property owner *did not receive* the tax sale notice, of which fact the government was aware, there is no claim here that Resulović *did not* receive the Department orders at issue.

Resulović’s reliance on *State v. Teran*, 71 Wn. App. 668, 862 P.2d 137 (1993), is likewise misplaced. *Teran* holds only that a LEP criminal defendant’s waiver of his or her *Miranda* right against self-incrimination, to be valid, must be made after advisement of the right in his or her native tongue. *Teran*, 71 Wn. App. at 672. Resulović does not explain how the waiver of constitutional right in *Teran* has any relevance to the notice of the Department decisions on her workers’ compensation claim.

2. Resulović Received Due Process at the Board Evidentiary Hearing with an Interpreter

Without reference to the record, Resulović claims that her “request for an interpreter to respond in discovery was not accommodated, costing her \$180.” Appellant’s Brief at 37. Her assertion is improper and not supported by the record and should be rejected. *See* RAP 10.3(a)(5), (a)(6) (reference to the record must be included “for each factual statement” and argument); *In re Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (“strict adherence to [RAP 10.3] is not merely a technical nicety”).

Further, Resulović does not present any 3-factor analysis under *Mathews v. Eldridge*, 424 U.S. 319, 334-335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to explain why the Board evidentiary hearing with an interpreter provided for all the on-the-record testimony and statements was inadequate as a matter of constitutional due process. The Court should not consider her “naked castings into the constitutional sea,” which “are “not sufficient to command judicial consideration and discussion.” *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (citations omitted); *see also Cowiche Canyon*, 118 Wn.2d at 809 (argument not supported by any reference to the record or citation of authority need not be considered); *Thomas*, 150 Wn.2d at 868-869 (argument inadequately developed or given only passing treatment need not be considered).

In any event, Resulović's argument lacks merit. Due process "has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as to preclude any possibility of error." *Mackey v. Montrym*, 443 U.S. 1, 13, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979). The court will determine the specific dictates of due process in a particular case by balancing (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 334-335.

As to the first *Mathews* factor, although Resulović has a protected interest in her *claim* for more benefits than was awarded to her, such an interest, no matter how important, is not as great as, and must be distinguished from, a *vested* right to benefits involved in *Mathews*. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60-61, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) (workers' interests in "their *claims* for payment" are "fundamentally different" from a *vested* right to benefits); *Lander v. Indus. Comm'n of Utah*, 894 P.2d 552, 555 (Utah Ct. App. 1995) (worker's interest in his claim for benefits "falls short of a vested right to benefits as in *Mathews*"); *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d

461, 475, 843 P.2d 1056 (1993) (“Where the Department has neither considered nor determined whether a worker is permanently and totally disabled, that worker has a *future expectation of benefits, not a vested right.*”). Also, her interest must be assessed in light of the fact he will be awarded full retroactive relief if she ultimately prevails. *See Mathews*, 424 U.S. at 340 (relevant to the first factor analysis was the fact the disability recipient whose benefits were terminated would be awarded full retroactive relief if he ultimately prevailed²⁰). This is not a case where the State “will not be able to make [a driver whose license was suspended] whole” through a post-suspension process. *Mackey*, 443 U.S. at 11.²¹

As to the second factor, Resulović does not explain what risk of an erroneous decision on the contested timeliness issue would result from the lack of interpreter services for her discovery response or for her confidential communications with her attorney. California’s Supreme Court has rejected a civil, indigent, and represented LEP defendant’s due process challenge to the trial court’s denial of an interpreter for attorney-client communications, because, as the court proceedings were “controlled by counsel,” the defendant was “in no worse position than the numerous

²⁰ Also, the benefits at stake in *Mathews* and here are not the last safety net for the worker. *See Mathews*, 424 U.S. at 342 (“[T]he disabled worker’s need is likely to be less than that of a welfare recipient.”).

²¹ While recognizing this fact, the Supreme Court in *Mackey* nonetheless concluded that due process does not require a prior evidentiary hearing for suspending a driver’s license under Massachusetts’ implied consent law. *Mackey*, 443 U.S. at 11-19.

represented litigants who elect not to be present in court at all.” *Jara v. Municipal Court*, 578 P.2d 94, 96-97 (Cal. 1978).

Resulović was represented by her attorney from the outset of the Board proceedings, and, unlike the defendant in *Jara*, was provided with an interpreter for all the testimony and statements made on the record throughout the proceedings. She had a right (which she exercised) to seek judicial review of the Board decision. She does not explain how interpreter services for either (1) her response to the Department’s request for admission, which *she offered* to admit at hearing over Department objection, TR (8/17/05) 17-19, and the Board ultimately rejected, CABR 4, or (2) for her confidential communications with her attorney would have changed the outcome of this case.

As to the third factor, cost is a significant factor when it comes out of a state benefit program with finite funds. *Mathews*, 424 U.S. at 348 (emphasis added). Given the nature of Resulović’s claim and the reliable procedural safeguards used (the evidentiary hearing with an interpreter), *the value of having interpreter services for her response to the Department’s request for admission* is simply outweighed by the cost.

Resulović claims that “saving the state money” does not justify “withholding benefits,” citing *Willoughby v. Department of Labor & Industries*, 147 Wn.2d 725, 57 P.2d 611 (2002). Appellant’s Brief at 39.

Willoughby involved a *substantive* (not *procedural*) due process challenge to a statute that denied disbursement of certain benefits to prisoners who had no statutory beneficiaries and were unlikely to be released from prison, although the prisoners were otherwise eligible for the benefits. *Willoughby*, 147 Wn.2d at 728-730. *Substantive* due process analysis differs from *procedural* due process analysis. In any event, the Department here did *not*, just to save money, deny Resulović any benefits to which she was otherwise entitled, just because she speaks Bosnian.

For her claim for Department-level language services, Resulović relies on the statement in *Buffelen Woodworking v. Cook*, 28 Wn. App. 501, 625 P.2d 703 (1981), that a workers' claimant has a protected interest in potential benefits. Appellant's Brief at 20. But, as stated above, the Department notice of its decisions and the Board hearing satisfied due process. *See Mathews*, 424 U.S. at 332-349 (for termination of disability benefits, due process does *not* require *pre-deprivation* hearing).

H. Resulović Fails to Show Prejudice Resulting from Her Inability to Obtain Additional Language Services

To prove a due process violation, Resulović must show actual prejudice. *See Gutierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002) (“a violation of due process as the result of an inadequate translation” requires a showing “that a better translation likely would have made a

difference in the outcome”); *Kuqo v. Ashcroft*, 391 F.3d 856, 859 (7th Cir. 2004) (“A generalized claim of inaccurate translation, without a particularized showing of prejudice based on the record, is insufficient to sustain a due process claim.”); *State v. Storhoff*, 133 Wn.2d 523, 528, 946 P.2d 783 (1997) (due process violation requires actual prejudice); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) (same).

Resulović fails to prove prejudice, as she fails to show that the lack of additional services has *affected the outcome in this case*. See *Gutierrez-Chavez*, 298 F.3d at 830 (prejudice must be shown in the outcome).

I. Resulović Fails to Show an Equal Protection Violation²²

Resulović argues that the Department and the Board²³ violated her equal protection rights. Appellant’s Brief at 22-24, 40-41. She is wrong.

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). It “does not require identical

²² The Department does not engage in separate equal protection analysis under Washington and federal Constitutions, because Resulović does not make such separate analysis or suggest that a greater protection is provided under Washington’s with an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). In the equal protection area, an independent state constitutional analysis “applies only where the challenged legislation grants a privilege or immunity to a minority class, that is, in the case of a grant of positive favoritism.” *Andersen v. King County*, 158 Wn.2d 1, 14, 138 P.3d 963 (2006) (plurality).

²³ She waived her argument on the Board provision of interpreter services, which she failed to raise at the Board. CABR 7-13, 1-70; see RCW 51.52.104; *Sepich*, 75 Wn.2d at 316; *Stelter*, 147 Wn.2d at 711 n.5; *Allan*, 66 Wn. App. at 422.

treatment of people who are in fact different.” *Seattle Sch. Dist.*, 116 Wn.2d at 364. “The standard of review in a case that does not employ suspect classification or fundamental right is rational basis, also called minimal scrutiny.” *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939 (2004) (citation omitted).

Here, the rational basis review applies, because Resulović fails to show any suspect classification or fundamental right. Workers’ benefits are “finite resources,” not a fundamental right. *Willoughby*, 147 Wn.2d at 739; *In re Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995) (“Where as here, the interest at stake is only a financial one, the right which is threatened is not considered ‘fundamental’ in a constitutional sense.”). “Language, by itself, does not identify members of a suspect class.” *Soberal-Perez*, 717 F.2d at 41; *Olivo*, 337 N.E.2d at 911 (“The class burdened, however, is not those of Spanish descent, but those unable to read English. This is not a suspect class.”); *Valdez*, 783 F. Supp. at 122 (housing authority’s “failure to provide its documents to plaintiff in Spanish does not implicate a protected class”); *Moua v. City of Chico*, 324 F. Supp.2d 1132, 1137-38 (E.D. Cal. 2004) (“[N]o 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.”).

Resulović argues that she has a fundamental right to travel, citing *Macias v. Department of Labor & Industries*, 100 Wn.2d 263, 668 P.2d 1278 (1983). Appellant's Brief at 40. But she fails to explain how the Department or the Board impinged on her fundamental right to travel. *Macias* involved statutory exclusion of seasonal farm workers from benefits unless they earn at least \$150 in a calendar year from the employer in whose employ they suffered injury. *Macias*, 100 Wn.2d at 264-265. Noting that the workers "must move farm to farm and *state to state* in order to obtain continual employment," *Macias*, 100 Wn.2d at 271 (emphasis added), the *Macias* court concluded that the \$150 requirement effectively "penalized" them for engaging in farm work (involving interstate travel), when their basic necessities of life depended on their small income from each farm, *id.* at 273. Resulović fails to explain how the Department or the Board "penalized" her for exercising her fundamental right to travel, which is "the right to travel *within* the United States." *Haig v. Agee*, 453 U.S. 280, 306, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981) (emphasis added) (noting a "crucial difference between the *freedom* to travel internationally and the *right* of interstate travel").

Under the rational basis test, "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 ex rel. Tunstall v. Bergeson, 141 Wn.2d 201, 226, 5 P.3d 691 (2000) (emphasis added). A classification “will be upheld if *any conceivable state of facts* reasonably justifies the classification.” *Tunstall*, 141 Wn.2d at 226 (emphasis added). Resulović, who challenges the classification, “has the burden of proving that the classification is ‘purely arbitrary.’” *Tunstall*, 141 Wn.2d at 226.

Although there is no Washington case directly on point, the courts in other jurisdictions that have addressed a LEP person’s equal protection challenge to English notices or services have consistently upheld the constitutionality of such notices and services. *See Carmona*, 475 F.2d at 739 (“[T]he choice of California to deal only in English [in providing notices and services of unemployment benefits] has a reasonable basis.”); *Guadalupe Org. v. Tempe Elementary Sch. Dist.*, 587 F.2d 1022, 1026-29 (9th Cir. 1978) (no right to bilingual education); *Frontera v. Sindell*, 522 F.2d 1215, 1218-20 (6th Cir. 1975) (English-only civil service examination met the rational basis test); *Soberal-Perez*, 717 F.2d at 42-43 (“[I]t is not irrational for the Secretary [of HHS] to choose English as the one language in which to conduct her official affairs.”); *Olivo*, 337 N.E.2d at 911 (English-only notice of condemnation rationally based); *Guerrero*, 512 P.2d at 837-839 (English-only notice of reduction or termination of welfare benefits met the rational basis test).

The choice of the Department 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 (“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 “additional burdens on [the state’s] finite resources and [its] interest in having to deal with one language with all its citizens support the conclusion of reasonableness.” *Carmona*, 475 F.2d at 739. Equal protection does not “dictate budget priorities by elevating language services over all other competing needs.” *Moua*, 324 F. Supp. 2d at 1138.

Resulović points out that the Department provides Spanish-speaking claimants with some services in Spanish. Appellant’s Brief at 23. The provision of such services does not violate equal protection, which “does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State’s action be rationally based and free from invidious discrimination.” *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) (citation omitted). “A classification does not fail rational-basis review because ‘it is not made with mathematical

nicety or because in practice it results in some inequity.” *Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (quoting *Dandridge*). The Department’s providing services in Spanish in light of the many Spanish-speaking claimants is rational and does not demonstrate any invidious discrimination against other-language-speaking claimants.

Resulović refers to a consent decree apparently entered in an unrelated case, involving the Department of Social and Health Services (DSHS). Appellant’s Brief at 22. But consent decrees are not enforceable by or against anyone but the parties to the decrees. *See, e.g., Martin v. Wilks*, 490 U.S. 755, 762, 109 S. Ct. 2180, 2184, 104 L. Ed. 2d 835 (1989) (“A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.”). The Department of Labor and Industries was not a party to the consent decree and is not bound by it. Further, the fact the DSHS or another state agency provides services *per their regulations* does not mean that the Department of Labor and Industries has a legal duty to do so.²⁴

Further, Resulović fails to demonstrate that the Board treated her any differently from other English-speaking claimants – the Board does not pay for English-speaking claimants’ confidential communications with their attorneys or for their responses to the Department’s request for

²⁴ The record is inadequate to assess the level of interpreter services actually provided by DSHS or any other state agency.

admission. *See Jara*, 578 P.2d at 96-97 (court's refusal to appoint an interpreter for a non-English-speaking, indigent, represented party in a civil case beyond the testimony did not violate equal protection).

J. Resulović Has No Right to Counsel

Citing to WAC 263-12-020, Resulović claims that the Department and the Board²⁵ violated her “right to confer with counsel to prepare for and during hearings.” Appellant’s Brief at 42. This rule allows a party to appear *pro se* or “by an attorney at law,” WAC 263-12-020(1)(a), but does not create any *right to counsel*. There is “no constitutional right to counsel afforded indigents involved in worker compensation appeals.” *In re Grove*, 127 Wn.2d at 238.

K. Resulović’s Challenge to Department Policies Lacks Merit

Without reference to the record, she claims that she “did not receive interpreter services for all her medical care,” Appellant’s Brief at 30, and that “after these appeals, the Department has continued to send [her] English only orders,” Appellant’s Brief at 29. Her claims are inappropriate, RAP 10.3(a)(5), (a)(6), *In re Lint*, 135 Wn.2d at 532, and not supported by the record and should not be considered. In any event,

²⁵ She waived her argument on the Board provision of interpreter services, which she failed to raise at the Board. CABR 7-13, 1-70; *see* RCW 51.52.104; *Sepich*, 75 Wn.2d at 316; *Stelter*, 147 Wn.2d at 711 n.5; *Allan*, 66 Wn. App. at 422.

she does not explain why the Department's sending to her English-speaking attorney English-written documents is inappropriate.

Resulović challenges Department provider bulletins (PB 99-09, 03-01, 05-04) as providing inadequate interpreter services. Appellant's Brief at 30. But she fails to demonstrate why the Department's providing (albeit limited) interpreter services violates any law.

L. There Was No Cost Shifting, and Resulović's Request for Reimbursement of Alleged Out-of-Pocket Costs Is Baseless

Resulović claims that the Department and the Board²⁶ *shifted* interpreter costs to her and argues that she is entitled to a reimbursement of the interpreter costs she allegedly incurred. Appellant's Brief at 42-44.

There was no cost *shifting*, because, as shown above, neither the Department nor the Board was required to provide further language services than was provided to Resulović. Other expenses she allegedly incurred are her own or overhead costs of her attorney. Also, costs (and attorney fees) cannot be awarded in a workers' compensation appeal except at the court level to a party prevailing on the merits, only for attorney fees incurred at court, not all costs incurred at the Board, and no costs incurred at the Department level. RCW 51.52.130 (fourth sentence); *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889, 86 P.3d 1231

²⁶ Again, she waived her argument on the Board provision of interpreter services, which she failed to raise at the Board. CABR 7-13, 1-70; see RCW 51.52.104; *Sepich*, 75 Wn.2d at 316; *Stelter*, 147 Wn.2d at 711 n.5; *Allan*, 66 Wn. App. at 422.

(2002) (“The statute contains ‘no provision for the recovery of attorney’s fees from or payable by the department for services rendered before the board.’”), *review denied*, 152 Wn.2d 1032 (2005). Because Resulović did not prevail at the Superior Court, she is not entitled to a cost award.

Resulović’s reliance on *Kenworthy v. Pennsylvania Gen. Ins. Co.*, 113 Wn.2d 309, 779 P.2d 257 (1989), is misplaced. *Kenworthy* involved the interpretation of the uninsured motorist (UIM) statute and is inapposite here. In any event, the court held that a clause in a UIM policy requiring an insured to pay the arbitration cost was void under the UIM statute but carefully stated “that costs such as fees for expert witnesses hired by a party and claimant’s attorney fees . . . are distinguishable because they are normally associated with recovery in civil litigation between an injured party and an insured motorist, and would be assumed voluntarily.” *Kenworthy*, 113 Wn.2d at 315. Resulović and her attorney *voluntarily* incurred the alleged interpreter expenses associated with her claim.²⁷

²⁷ Resulović claims she was prejudiced by “being forced to respond to questions about documents presented to her only in English which the IAJ would not allow the interpreter to interpret before she was required to respond to Department questioning about whether she could recognize documents in a language which she could not read.” Appellant’s Brief at 43-44 (referring to TR (9/7/05) 40-45). But she did not raise this argument in her petition for review to the Board, CABR 7-13, 1-70, and thus waived it, *see* RCW 51.52.104; *Sepich*, 75 Wn.2d at 316; *Allan*, 66 Wn. App. at 422. In any event, she was only asked, *through a Bosnian interpreter*, if she could *recognize* certain documents or the handwriting thereof, and she testified she recognized her signature in some and could not recognize the handwriting in some. Resulović (8/17/05) 64-65, 70-71, Resulović (9/7/05) 8-10, 12-45. These were legitimate cross-examination questions

M. The Superior Court Properly Granted the Department the Cost of \$200 Attorney Fees Pursuant to Chapter 4.84 RCW

Resulović challenges the Superior Court cost award of statutory attorney fees to the Department. Appellant's Brief at 45-49. But our Supreme Court has already rejected this challenge and approved the cost award to the Department under RCW 51.52.140 and Chapter 4.84 RCW. *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 557-558, 933 P.2d 1025 (1997); RCW 51.52.140 (except as otherwise provided, "the practice in civil cases shall apply"); RCW 4.84.030 (in any superior court action, "the prevailing party shall be entitled to his or her costs and disbursements . . ."); RCW 4.84.080(1) ("costs to be called the attorney fee" when allowed in all actions where judgment is rendered are \$200); *Allan*, 66 Wn. App. at 423 ("The Department as prevailing party is entitled to its statutory costs including statutory attorney fees.").

Although Resulović claims that *Black* was wrong, "once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it." *Johnson*, 87 Wn.2d at 927. Our Supreme Court's reading of RCW 51.52.140 in *Black* to allow costs under RCW 4.84 has not been overruled or superseded by any legislative action and must thus stand.

on the question of her English proficiency, when she sought to establish her lack of English proficiency during her direct examination. Resulović (8/17/05) 8-20.

N. Any Attorney Fee Award to Resulović Must Be Contingent on the Accident Fund Being Affected by the Decision

A reasonable attorney fee award to a prevailing worker “payable out of the [Department’s] administrative fund” derives from the fourth sentence of RCW 51.52.130. *Piper*, 120 Wn. App. at 889-891. Thus, if Resulović prevails in this case, any award to her would have to be made contingent on whether “the accident fund or medical aid fund [were] affected” by the court decision. RCW 51.52.130.

VI. CONCLUSION

For the reasons stated above, the Department requests that this Court affirm the Superior Court judgment below.

RESPECTFULLY SUBMITTED this 17th day of August, 2007.

ROBERT M. MCKENNA
Attorney General

Masako Kanazawa

Masako Kanazawa, WSBA #32703

Assistant Attorney General

John R. Wasberg, WSBA #6409

Senior Counsel

800 5th Avenue

Seattle, WA 98104-3188

(206) 389-2126

APPENDIX A

FILED 8/30/11
COURT OF APPEALS
STATE OF WASHINGTON
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KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

FEB 26 2007
AGG LIAISON DIVISION
SEATTLE

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

EMIRA RESULOVIC,

NO. 06-2-07059-3 SEA

Plaintiff,

JUDGMENT

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Defendant.

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	State of Washington Department of Labor and Industries
2. Judgment Debtor:	EMIRA RESULOVIC
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Attorney Fees:	\$200.00
6. Costs:	\$0
7. Other Recovery Amounts:	\$0
8. Principal Judgment Amount shall bear interest at 0% per annum.	
9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.	
10. Attorneys for Judgment Creditor:	James M. Hawk, AAG
11. Attorney for Judgment Debtor:	Ann Pearl Owen

JUDGMENT

ATTORNEY GENERAL OF WASHINGTON
LABOR & INDUSTRIES DIVISION
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

1
2 JUDGMENT

3 This matter was tried by the Court without a jury on September 29, 2006, the
4 Honorable Douglass North presiding. The Plaintiff, Emira Resulovic, *did not appear D.A.M.* appeared through her
5 attorney of record, Ann Pearl Owen. *having filed her opposition in writing D.A.M.* The Defendant, the Department of Labor and Industries
6 of the State of Washington, appeared through its attorney of record, James M. Hawk, Assistant
7 Attorney General.

8 The Court reviewed the Certified Appeal Board Record, considered the pleadings filed
9 in the appeal from a Decision and Order of the Board of Industrial Insurance Appeals, and
10 heard the oral argument of the parties' counsel. The Court at this time also makes and enters
11 Findings of Fact and Conclusions of Law that are attached. The Court enters its judgment in
12 favor of the Department, and therefore affirms the decision of the Board that dismisses
13 Claimant's appeals below. The Court's revisions to the Decision and Order are explicitly
14 identified in the Findings of Fact and Conclusions of Law entered herewith.

15 Consistent with its Findings of Fact and Conclusions of Law, the Court enters final
16 judgment in this matter as follows:

17 1. The February 6, 2006 Decision and Order of the Board of Industrial Insurance
18 Appeals, which dismissed Claimant's appeals from Department orders dated February 20,
19 2004, and April 2, 2001, is affirmed. Based upon the untimely filing of the appeals, the Board
20 did not have jurisdiction over the subject matter of the separate appeals.

21 2. Plaintiff is not entitled to any equitable relief from the consequences of her failure
22 to timely appeal from her receipt of the Department orders dated February 20, 2004, and April
23 2, 2001.

24 3. Plaintiff is not entitled to any relief based upon any due process or equal protection
25 rights and protections that Plaintiff possesses under the Washington State or United States
26 Constitutions. Plaintiff was not entitled to receive any Department order written in any

1 language other than English under application of any Federal Executive Order or Federal
2 statute.

3 4. Plaintiff was not entitled under Title 51 RCW, the Industrial Insurance Act, or other
4 Washington statute to any additional interpreter services than those provided by the Board of
5 Industrial Insurance Appeals, which are evident in the Certified Appeal Board Record.
6 Plaintiff is not entitled to any compensation from the Defendant-Department for any interpreter
7 services expenses she may have incurred in relation to any aspect of her claim or appeals.

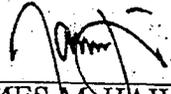
8 5. The Defendant is awarded, and the Plaintiff is ordered to pay, a statutory attorney
9 fee of \$200.00.

10 6. The Defendant is awarded interest from the date of entry of this judgment as
11 provided by RCW 4.56.110.

12
13 DATED this 5th day of February, 2007.

14
15 Douglas A. North
16 JUDGE DOUGLASS NORTH

17 Presented by:
18 ROB MCKENNA
19 Attorney General

20 
21 JAMES M. HAWK
22 Assistant Attorney General
23 WSBA No. 19287

24 Copy received, approved as to form;
25 Notice of presentation waived

26 ANN PEARL OWEN
Attorney for Plaintiff
WSBA No. 9033

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KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

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

EMIRA RESULOVIC,

NO. 06-2-07059-3 SEA

Plaintiff,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Defendant.

This matter came on regularly before the Honorable Douglass North in open court on September 29, 2006. The Plaintiff, Emira Resulovic, *did not appear O.A.N.* appeared through her counsel, Ann Pearl Owen, *having filed her opposition in writing O.A.N.* the Defendant, Department of Labor and Industries (Department), appeared through its counsel, Rob McKenna, Attorney General, per James M. Hawk, Assistant Attorney General. The Court, having reviewed the records and files herein, including the Certified Appeal Board Record and briefs submitted by counsel, and having heard argument of counsel, therefore, being fully informed, makes the following:

FINDINGS OF FACT

1. Hearings were held at the Board of Industrial Insurance Appeals (Board) on August 17, 2005, and September 7, 2005, in Seattle. An interpreter was present on both dates to translate for Claimant, who was present.
2. Thereafter an Industrial Appeals Judge issued a Proposed Decision and Order on December 1, 2005. Claimant filed with the Board a timely Petition for Review from the Proposed Decision and Order. By Order dated January 3, 2006, the Board granted Claimant's Petition for Review. On February 6, 2006, the Board, per its Chairperson

1 and Member Dickinson, having made "a careful review of the entire record," issued a
2 Decision and Order with Findings of Fact and Conclusions of Law, as required.
3 Plaintiff then timely appealed the Board's February 6, 2006 order to this Court (RCW
4 51.52.110). In the Decision and Order, the Board expressly declined to consider the
5 "questions of constitutional law" raised by Claimant (Certified Appeal Board Record at
6 page 3).

7
8 3. The Board's Finding of Fact Nos. 1, 2, 3, 5, and 6 are correct and should be affirmed.
9 The Court adopts those findings.

10 4. The Board's Finding of Fact 4 is affirmed and adopted with the last sentence stricken.
11 The Court finds, then, that

12 **Emira Resulovic did not seek translation of the February 20, 2004**
13 **Department order from English to Bosnian/Serbo-Croatian. Emira**
14 **Resulovic did not seek translation of the April 2, 2001 Department**
15 **order from English to Bosnian/Serbo-Croatian.**

16 5. Plaintiff was not provided interpreter services by the Department or compensated or
17 reimbursed by the Department for any interpreter services she may have received at any
18 time related to her considering whether to file the appeals at issue, or for any events
19 subsequent to her filing the appeals. The Board, under its rules and procedures, made
20 arrangements for an appropriate interpreter to be present to assist Plaintiff with
21 translation during the complete hearing proceedings on August 17 and September 7,
22 2005.

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

24 CONCLUSIONS OF LAW

25 1. This Court has jurisdiction over the parties to, and the subject matter of, this appeal.
26 This Court does have jurisdiction to consider all of Plaintiff's legal arguments,
including those constitutional law arguments that were not considered by the Board.

1. Plaintiff is not entitled to any equitable relief from the consequences of her failure to
timely appeal from her receipt of the Department orders dated February 20, 2004, and
April 2, 2001.

3. This Court adopts as its Conclusions of Law, the Conclusions of Law Nos. 1, 2, 3, and
4 of the Decision and Order of the Board of Industrial Insurance Appeals, dated
February 6, 2006.

4. Plaintiff received appropriate interpreter services to effectuate the purposes of Title 51
RCW; the interpreter services received by Plaintiff were in compliance with applicable
laws.

5. Plaintiff suffered no deprivation of any due process or equal protection right or
guarantee under the State or United States Constitutions during any event or proceeding
below, as presented in the Board certified record.

1 6. The Board's decision to dismiss Claimant's appeals (Conclusion of Law No. 5) is
2 correct and should be affirmed.

3 DATED this 5th day of February 2007.

4
5 Douglas A. North
6 JUDGE DOUGLASS NORTH

7 Presented by:
8 ROB MCKENNA
9 Attorney General

10 JAMES M. HAWK
11 Assistant Attorney General
12 WSBA No. 19287

13 Copy received, approved as to form;
14 Notice of presentation waived

15
16
17 ANN PEARL OWEN
18 Attorney for Plaintiff
19 WSBA No. 9033

APPENDIX B

FILED 1 DIV. #1
COURT OF APPEALS
STATE OF WASHINGTON
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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: EMIRA RESULOVIC) DOCKET NOS. 05 10573 & 05 10574
2)
3 CLAIM NO. X-304647) DECISION AND ORDER

4 APPEARANCES:

5 Claimant, Emira Resulovic, by
6 Law Office of Ann Pearl Owen, P.S., per
7 Ann Pearl Owen

8 Employer, Celebrate Express, Inc.,
9 None

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 James M. Hawk, Assistant

13 The claimant, Emira Resulovic, filed two appeals with the Board of Industrial Insurance
14 Appeals on January 19, 2005, from orders of the Department of Labor and Industries dated
15 February 20, 2004 and April 2, 2001.

16 **Docket No. 05 10573:** In the order dated February 20, 2004, the Department closed the
17 claim with an award for permanent partial disability equal to Category 5, permanent dorso-lumbar
18 and/or lumbosacral impairments. The claimant's appeal from the Department order of February 20,
19 2004, is **DISMISSED**.

20 **Docket No. 05 10574:** In the order dated April 2, 2001, the Department established the
21 claimant's rate of time loss compensation benefits. The claimant's appeal from the Department
22 order of April 2, 2001, is **DISMISSED**.

23 **DECISION**

24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
26 issued on December 1, 2005, in which the industrial appeals judge dismissed the orders of the
27 Department dated February 20, 2004 and April 2, 2001.

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

30 It is undisputed that Emira Resulovic's two appeals were not filed with the Board within
31 60 days of her physical receipt of the appealed orders. We reject her contention that the word
32

1 "communicated", as used in RCW 51.52.060, requires that she receive information contained in
2 Department orders in her native language, Bosnian/Serbo-Croatian. The word 'communicated'
3 contained in RCW 51.52.060 requires only that a copy of the order be received by the worker.
4 Since appellant's notice of appeal was not filed within 60 days of the receipt of the closing order,
5 the notice of appeal was not timely. *Rodriguez v. Department of Labor & Indus.*, 85 Wn.2d 949,
6 953 (1975).

7 Ms. Resulovic has proven that she is limited in her ability to read and understand English. In
8 her Petition for Review, she contends that this language barrier resulted in a lack of procedural due
9 process and civil rights violations that entitle her to seek relief at the Board. We cannot reach these
10 issues because questions of constitutional law are outside of this Board's jurisdiction, even where
11 the issues arise in a workers' compensation context. *In re James Gersema*, BIIA Dec., 01 20636
12 (2003).

13 We agree with our industrial appeals judge's conclusion that Ms. Resulovic's appeals are not
14 within our subject matter jurisdiction because they were not timely filed. We further agree that there
15 exists no equitable basis for hearing and deciding these appeals. We have granted review solely to
16 address several unresolved evidentiary issues involving Exhibit Nos. 1, 4 and 7.

17 Exhibit No. 1 is the Department's First Request for Admissions, including "Responses and
18 Objection Thereto" by Ms. Resulovic. Included in the exhibit are a series of documents that the
19 Department alleges were filled in, written, and/or signed by Ms. Resulovic. The exhibit was offered
20 by claimant's attorney during the August 17, 2005 hearing. The Department objected to the
21 inclusion of the Request for Admissions document in the exhibit. The judge admitted the entire
22 exhibit, including the Request for Admissions and Responses and Objection Thereto, for the stated
23 purpose of clarifying the attachments.

24 A substitute hearing judge presided over the hearing of September 7, 2005. During this
25 hearing, the Department extensively questioned Ms. Resulovic about documents contained in
26 Exhibit No. 4, which consists of nearly all of the documents included in Exhibit No. 1. The
27 Department offered Exhibit No. 4 into evidence. Ms. Resulovic's attorney objected to both the
28 exhibit and the testimony as cumulative.

29 The Department also offered into evidence Exhibit No. 7, a document allegedly written
30 and/or signed by Ms. Resulovic. Because Ms. Resulovic had testified that she did not recognize
31 the signature or any of the handwriting on Exhibit No. 7, her attorney objected on the grounds of
32 lack of foundation.

1 At the time of the September 7, 2005 hearing, the August 17, 2005 transcript was not yet in
2 the file, and the record did not indicate which exhibits were previously admitted. For that reason,
3 the judge presiding over the hearing properly deferred these evidentiary rulings to the assigned
4 hearing judge. He made a record of the outstanding evidentiary issues and indicated that the
5 assigned judge would review the transcript and further address the issues in her Proposed Decision
6 and Order. Because she did not do so, we now rule on the admission of Exhibit Nos. 1, 4, and 7.

7 We agree with Ms. Resulovic that the admission of both Exhibit Nos. 1 and 4 would be
8 cumulative. But we agree with the Department that the admission of Exhibit No. 1, which includes
9 the Request for Admissions and Responses, adds confusion to the record. We find it most clear
10 and probative to admit Exhibit No. 4; because the documents contained therein are put in context
11 by the Assistant Attorney General's examination of Ms. Resulovic. Exhibit No. 1 is hereby rejected.
12 In addition, Exhibit No. 7 is rejected due to lack of foundation.

13 After consideration of the Proposed Decision and Order, Ms. Resulovic's Petition for Review
14 filed thereto, the Department's Response to Claimant's Petition for Review, the Claimant's
15 Response to the Department's Response, and a careful review of the entire record before us, we
16 make the following:

17 FINDINGS OF FACT

- 18 1. On February 7, 2000, the Department received an application for
19 benefits in which the claimant, Emira Resulovic, alleged that she
20 sustained an industrial injury on November 23, 1999, while in the course
21 of her employment with Celebrate Express, Inc. On April 2, 2001, the
22 Department entered an order in which it set the claimant's rate of time
23 loss compensation. On February 20, 2004, the Department closed the
24 claim with a permanent partial disability award for Category 5 permanent
25 dorso-lumbar and/or lumbosacral impairments. On January 19, 2005,
the Board received the claimant's appeals from the orders of
February 20, 2004 and April 2, 2001. These appeals were assigned
Docket Nos. 05 10573 and 05 10574, respectively.
- 26 2. The orders of February 20, 2004 and April 2, 2001, were directed to
27 Ms. Resulovic at her last known address as shown by the records of the
28 Department. Each order contained black-faced ten-point type on the
29 same side as the decision advising Ms. Resulovic of the Department's
30 decision. Each order was timely communicated to Ms. Resulovic by
U.S. mail in due course and in the English language, only.
- 31 3. At all relevant times, Bosnian/Serbo-Croatian was the only language in
32 which either Ms. Resulovic or her husband was literate.
Bosnian/Serbo-Croatian was the only language spoken in their home.

1 4 Emira Resulovic did not seek translation of the February 20, 2004
2 Department order from English to Bosnian/Serbo-Croatian.
3 Emira Resulovic did not seek translation of the April 2, 2001 Department
4 order from English to Bosnian/Serbo-Croatian. ~~She did not file an
5 appeal within sixty days after of the time her doctor told her that his bills
6 had not been paid and that she had to appeal any Department order she
7 thought was incorrect.~~) stricken

6 5. Ms. Resulovic did not file a protest or appeal within sixty days of the
7 communication of the February 20, 2004 Department order nor did she
8 file a protest or appeal within sixty days of the communication of the
9 April 2, 2001 order.

10 6. The claimant did not exercise diligence in perfecting and prosecuting her
11 claim for compensation.

12 **CONCLUSIONS OF LAW**

13 1. The Board has jurisdiction over the parties to these appeals.

14 2. Ms. Resulovic's appeals in Docket Nos. 05 10573 and 05 10574, were
15 not timely filed pursuant to RCW 51.52.060.

16 3. There exists no basis for equitable relief at the Board from these
17 untimely filings.

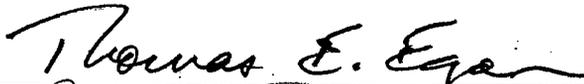
18 4. The Board does not have jurisdiction over the subject matter of these
19 appeals.

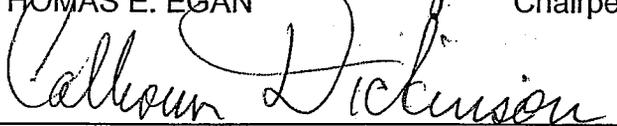
20 5. The appeals in Docket Nos. 05 10573 and 05 10574, are dismissed.

21 It is so **ORDERED**.

22 Dated this 6th day of February, 2006.

23 BOARD OF INDUSTRIAL INSURANCE APPEALS

24
25 
26 THOMAS E. EGAN Chairperson

27
28 
29 CALHOUN DICKINSON Member
30

NO. 59614-4-I
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

EMIRA RESULOVIC,

Appellant,

v.

DEPARTMENT OF LABOR &
INDUSTRIES,

Respondent.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on the 20th day of August, 2007, she caused to be served by ABC Legal Services a copy of the **Respondent's Brief** with attached copies of **Superior Court Judgment (Appendix A)**, and the **Board's Decision and Order (Appendix B)** to the attorney for the Appellant, as follows:

ANN PEARL OWEN
2407 14TH AVENUE SOUTH
SEATTLE WA 98144-5014

DATED AT Seattle, Washington, August 20th, 2007.

Petray
PETRA I. DIAZ
Office of the Attorney General
Labor and Industries Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

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STATE OF WASHINGTON
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