NO. 44713-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

DALE WEEMS,

Appellant,

v.

STATE BOARD OF INDUSTRIAL APPEALS,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

THE HONORABLE JAMES DIXON

BRIEF OF APPELLANT

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I. INTRODUCTION

Under first impressions, this case appears to be one in which an injured worker, trying to reopen his claim before the Board, should be able to find a workers' compensation attorney to represent him on a contingency basis. However, the fact-specific circumstances of this case precluded Mr. Weems from obtaining legal representation. Upon closer examination, the fact-specific circumstances of this case will reveal one in which a workers' compensation claimant was denied a meaningful opportunity to be heard at his Board hearings. This is a case wherein Mr. Weems should have been afforded assistance through the accommodation doctrines of Title II of the ADA and the WLAD.

II. ASSIGNMENTS OF ERROR

A. Whether the trial court erred in concluding that the Board was not required to perform a fact-specific investigation regarding Mr. Weems' mental health disability and his ability to represent himself before a Board hearing.

B. Whether the trial court erred in concluding that the Board did not have a constitutional or statutory requirement to provide a necessary reasonable accommodation for Mr. Weems' mental health disability under Title II of the Americans with Disabilities

Act (hereinafter "ADA") or Washington Law Against Discrimination (hereinafter "WLAD").

C. ADA/WLAD remedy to an attorney at the Board of Industrial Insurance Appeals (hereinafter "Board") hearing level.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. The trial court erred in concluding that the Board was not required to perform a fact-finding investigation regarding Mr. Weems' mental health disability and his resultant ability to represent himself before a Board hearing when the Board was advised and informed that Mr. Weems had a mental health disability and was unable to represent himself.

B. The trial court erred in concluding that there is no statutory or constitutional right to provide any accommodation at the Board hearing level when Title II of the ADA and the WLAD require state agencies to provide accommodations for equal access to judicial proceedings.

C. The trial court erred in concluding that the Board did not have a duty to provide an attorney under Title II of the ADA or WLAD for Mr. Weems' mental health disability when the contingency fee system under the Industrial Insurance Act and Industrial Appeals

Judge assistance was inadequate to provide Mr. Weems with equal access to his hearing.

IV. STATEMENT OF THE CASE

The appellant, Dale Weems (hereinafter "Mr. Weems"), is a 62 year old man who sustained a workers' compensation injury on May 9, 1973. AREX 1[1] On that date, Mr. Weems testified that while working for Delson Lumber Company, a donkey cable hit him in the nose, tearing off the tip of his nose. ARTR[2] Dale Weems 9/10/08 at 27 - 28. Mr. Weems described the industrial accident having torn off his face, and when the donkey cable came back down, it hit him in the back of the head. ARTR Dale Weems 9/10/08 at 48. The Department of Labor and Industries (hereinafter "Department") allowed Mr. Weems' workers' compensation claim for an open wound of the nose and contusion of the face, scalp and neck. AR 12[3]. His claim was subsequently closed on July 6, 1973. AR 5.

The Department received an aggravation application by Mr. Weems requesting reopening of his claim on December 3, 2007. AR 42[4] The Department issued an order on December 11, 2007 denying the

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[1] Agency Record Exhibit
[2] Agency Record Transcript - will be identified by name of party testifying (if applicable), date of testimony and page numbers.
[3] Agency Record
[4] The jurisdictional history notes it as "AA" which is abbreviation code for "Aggravation Application." See AR 44.

application to reopen Mr. Weems' claim and the claim remained closed. AR 26. On January 10, 2008, Mr. Weems timely protested the Department's order. AR 42. On February 21, 2008, the Department issued an order affirming the December 11, 2007 order. AR 25. Mr. Weems timely protested the February 21, 2008 order. AR 24. Mr. Weems' protest was forwarded to the Board as a direct appeal on March 7, 2008. AR 29. Under docket number 08 12202, the Board granted the appeal on April 2, 2008 . AR 31.

On June 3, 2008, a scheduling conference was held before Industrial Appeals Judge James M. Gilligan (hereinafter "IAJ Gilligan"). IAJ Gilligan advised Mr. Weems that he could have an attorney at any point in the hearing process. Mr. Weems replied that had tried to get an attorney, but no one would take his case. ARTR 6/3/08 at 13.

Mr. Weems' wife, Beverly Weems (hereinafter "Mrs. Weems"), also asked IAJ Gilligan for an attorney for Mr. Weems due to his mental capacity and inability to represent himself. IAJ Gilligan responded that Mr. Weems was "responsive," and appeared to have the ability to know what was happening in the Board process. Mrs. Weems explained that Mr. Weems could answer questions, but she did not feel he understood the "consequences or the procedures" like an attorney. IAJ Gilligan affirmed that Mr. Weems did not have the legal ability to adequately represent

himself. IAJ Gilligan recommended that Mr. Weems obtain legal representation. ARTR 6/3/08 at 28 – 29.

Because Mr. Weems did not read, IAJ Gilligan allowed Mrs. Weems to participate in the hearing process to help Mr. Weems. ARTR 7/31/08 at 4 – 5. On September 10, 2008, both Mr. Weems and Mrs. Weems testified about Mr. Weems' conditions they believed were related to his industrial injury and worsening of his conditions.

Mrs. Weems was called first. Mrs. Weems testified that Mr. Weems was forgetful, very depressed and angry. ARTR B. Weems 9/10/08 at 16 – 17. Mr. Weems then testified that he had received Social Security benefits at the age of 50. ARTR D. Weems 9/10/08 at 35. Mr. Weems also stated that he had taken his mental health medication that morning to help calm him, but did not think it was helping. ARTR D. Weems 9/10/08 at 37. Mr. Weems further testified that a couple of months prior to the Board hearing that:

> Okay. Well, I got really upset one day and I got me a baseball bat and I was going to beat people up and I was going to run over people and I was going to kill myself.

ARTR D. Weems 9/10/08 at 50.

On September 15, 2008, David Wagner, MD testified on behalf of Mr. Weems by telephone. Dr. Wagner's testimony noted that Mr. Weems

had complained of headaches since his industrial injury in 1973. ARTR Dr. Wagner, 9/15/08 at 11. Dr. Wagner also discussed Mr. Weems' mental health condition as possibly an "additive" to his industrial injury. ARTR Dr. Wagner, 9/15/08 at 77.

After Mr. Weems' case rested, Assistant Attorney General, Dana Blackman (hereinafter "AAG Blackman"), counsel for the Department of Labor and Industries (hereinafter "Department"), moved the Board to dismiss Mr. Weems' case for unsuccessfully presenting a prima facie case. ARTR 9/15/08 at 87. IAJ Gilligan granted the Department's motion to dismiss on September 15, 2008. ARTR 9/15/08 at 93.

IAJ Gilligan entered a Proposed Decision and Order (hereinafter "PD&O") dismissing Mr. Weems' appeal on December 17, 2008. AR at 22. Mr. Weems timely appealed the PD&O on January 5, 2009. AR at 9 – 10. The Board denied Mr. Weems' petition for review and adopted the PD&O as their Decision and Order on January 5, 2009. AR at 8. On February 7, 2009, Mr. Weems requested reconsideration of the Board Decision and Order. AR at 4. The Board denied Mr. Weems' motion to reconsider on May 8, 2009. AR at 1.

Mr. Weems timely appealed the Board Decision and Order to Thurston County Superior Court. He was appointed a GR 33 attorney to represent him in his appeal due to his impairment under the ADA. AR at

66. Thurston County Superior Court Judge Wm. Thomas McPhee, after hearing oral arguments, concluded that Mr. Weems had shown a prima facie case to support his assertion that his headaches and mental health condition were proximately related to the 1973 industrial injury and had worsened between August 7, 2003 and February 21, 2008. AR at 66.

Judge McPhee remanded Mr. Weems' case back to the Board to complete the record and enter a decision as to whether Mr. Weems' headaches and/or depression were proximately worsened by the 1973 industrial injury. Judge McPhee did not order a psychiatric evaluation, but did recommend it. He relieved the GR 33 attorney from further representation. AR at 67. Finally, Judge McPhee, in his findings of fact number 6, noted that "Mr. Weems currently suffers from a mental health condition that effects his ability to fully and effectively represent himself and prosecute his labor and industries case." AR at 66.

Mr. Weems' case was remanded back to the Board with a new Industrial Appeals Judge, Wayne B. Lucia (hereinafter "IAJ Lucia"). After consideration, IAJ Lucia decided not to order a psychiatric evaluation. ARTR 9/9/10 at 3. On October 27, 2010, IAJ Lucia met with the Weems and AAG Blackman to discuss settlement of Mr. Weems' appeal. IAJ Lucia noted that there was a Washington State Patrol officer also present. ARTR 10/27/10 at 2. The parties agreed to a Board-

commissioned medical examination to be paid by the Board with the physician chosen by IAJ Lucia. ARTR 10/27/10 at 4.

IAJ Lucia chose Karl Goler, MD, a neurologist, to perform the Board-commissioned medical examination. ARTR 12/6/10 at 2. IAJ Lucia informed the parties that the issues to be addressed at this examination was the diagnosis, causal relationship of the condition to the industrial injury, whether any of the conditions worsened, and whether further treatment was needed. Finally IAJ Lucia reminded the parties that they would be bound by the results of the physician's report. ARTR 12/6/10 at 3 – 4.

On April 7, 2011, IAJ Lucia met with the Weems and a new Assistant Attorney General, Dana Gigler (hereinafter "AAG Gigler"), as well as having two Washington State Patrol officers present, to discuss problems with obtaining all medical records for the Board-commissioned examination. ARTR 4/7/11 at 1 – 2. The parties were having problems obtaining Mr. Weems social security medical records. AAG Gigler reported that she had talked to someone at the Social Security Administration. She was told that archives had sent the records to the local social security office, but they had not received them. IAJ Lucia indicated that he was not permitted to assist in getting those records.

These records were not included with the examination. ARTR 4/7/11 at 5 – 6.

IAJ Lucia explained that he would be issuing a PD&O based on the Board-commissioned examiner's findings that his physical conditions had not worsened; however, IAJ Lucia had not provided questions concerning the headaches or his mental health conditions pursuant to Judge McPhee's order. Therefore, the parties would need to discuss their further options. ARTR 6/13/11 at 2 – 3.

The Weems were frustrated with the amount of time it took to adjudicate their case. Mrs. Weems confirmed that they would need to find an attorney. ARTR 6/13/11 at 5. IAJ Lucia cautioned Mrs. Weems that she was getting Mr. Weems "kind of wound up a little bit," because of Mr. Weems' agitation. ARTR 6/13/11 at 9 – 10. After some discussion, IAJ Lucia decided to proceed with the Department's hearing time. ARTR 6/13/11 at 12.

On August 29, 2011, IAJ Lucia met with the parties to hear the Department's motion for a CR 35 psychiatric examination. ARTR 8/29, 2011 at 3; AR 123. AAG Gigler explained that in the Superior Court's remand that Mr. Weems had made a prima facie case that his psychiatric condition was proximately caused by the 1973 industrial injury. As a result, they needed the CR 35 psychiatric examination to determine

whether the psychiatric condition was proximately caused by the 1973 industrial injury. ARTR 8/29/11 at 3 – 4. Mr. Weems became agitated and left the hearing room. Mrs. Weems explained that the hearing process was enraging Mr. Weems. ARTR 8/29/11 at 4. IAJ Lucia told Mrs. Weems to stop talking on three occasions when she objected to the CR 35 examination. IAJ Lucia turned the discussion to AAG Gigler regarding the place, time, and travel/food reimbursement for the examination. AAG Gigler informed IAJ Lucia that the examination had already been scheduled. IAJ Lucia granted the CR 35 Motion. ARTR 8/29/11 at 5 – 7; AR 128. Mrs. Weems then stated that Mr. Weems would need an attorney to protect his rights. IAJ Lucia responded that they would have to get an attorney on their own. Mrs. Weems replied that she understood they would have to pay for an attorney on their own. ARTR 8/29/11 at 9.

The Department called its witnesses consisting of expert witness Thomas Dietrich, MD, a neurosurgeon, and Richard Schneider, MD, the Department's CR 35 psychiatrist. Dr. Dietrich testified on October 11, 2011 that there were many causes of Mr. Weems' headaches. Dr. Dietrich opined that there was no causal relationship between Mr. Weems' headaches and the industrial injury. ARTR Dr. Dietrich, 10/11/11 at 17. Mr. Weems, when asked if he had any questions for Dr. Dietrich, did not,

as he believed Dr. Dietrich had testified favorably for him. IAJ Lucia stated that Mrs. Weems had been assisting Mr. Weems and wanted to know if she had any questions. Mrs. Weems replied that they did not have an attorney and that she was "attorney illiterate." She had no questions. IAJ Lucia did not ask any questions on their behalf. ARTR Dr. Dietrich, 10/11/11 at 19 – 21.

On October 13, 2011, Dr. Schneider testified on behalf of the Department. Dr. Schneider opined that there was no psychiatric condition attributable to the 1973 industrial injury. Dr. Schneider further opined that there was no mental health issue or worsening that required any treatment between 2003 and 2008. ARTR Dr. Schneider, 10/13/11 at 26 – 28.

Mr. Weems became frustrated during Dr. Schneider's testimony. Mr. Weems made a couple of outbursts and stated that he thought Dr. Schneider was on their side. ARTR Dr. Schneider, 10/13/11 at 28. Both Mr. Weems and Mrs. Weems made comments and asked a few questions of Dr. Schneider. ARTR Dr. Schneider, 10/13/11 at 30 – 31. However, Mr. Weems became frustrated with the questioning and commented that he was going "to blow" and needed to see his Oregon Health and Science University (hereinafter "OHSU") psychiatrist. Mrs. Weems attempted to ask questions of Dr. Schneider, while also trying to calm Mr. Weems.

Finally, Mrs. Weems requested that she take her husband outside of the hearing room. ARTR Dr. Schneider, 10/13/11 at 32 – 34.

Upon their return, the Weems provided a September 6, 2011 medical note that noted Mr. Weems had a traumatic brain injury with symptoms of memory and mood symptoms. IAJ Lucia read the report to Dr. Schneider to determine whether this record would change his opinion. While not completely ruling out a brain injury, Dr. Schneider's opinion had not changed nor did he believe the brain injury was related to the 1973 industrial injury. ARTR Dr. Schneider, 10/13/11 at 35 – 36. Mrs. Weems informed Dr. Schneider that Mr. Weems had been hit in the parietal area of his head. IAJ Lucia assisted Mrs. Weems with finding out whether this type of injury would cause problems. Dr. Schneider responded that it could cause problems with headaches, reading and writing and ability to sense heat and cold. IAJ Lucia did not ask any further questions about causality or worsening of this condition to the 1973 industrial injury. ARTR Dr. Schneider, 10/13/11 at 36 – 38.

After the Department rested its case, IAJ Lucia issued a PD&O on December 30, 2011 concluding that neither Mr. Weems' headaches nor his mental health condition were proximately caused by the 1973 industrial injury. AR 145 – 146. On January 9, 2012, Mr. Weems requested a review of the PD&O by the Board. AR 148. On January 26, 2012, the

Board denied Mr. Weems' Petition for Review and the PD&O became the Decision and Order of the Board. CP 8. On February 24, 2012, Mr. Weems appealed this decision to Thurston County Superior Court. CP 7.

On May 11, 2012, the Thurston County Superior Court, again, appointed a GR 33 attorney, Jean A. Pirzadeh, to represent Mr. Weems for his appeal. CP 17. The main issue on appeal was whether Mr. Weems should have been provided with a GR 33 attorney for his hearings and whether it should be remanded back for an entirely new hearing. CP 30. On November 2, 2012, Judge James J. Dixon heard oral arguments and read the briefs by Jean Pirzadeh and Michael J. Throgmorton (hereinafter "AAG Throgmorton"), Assistant Attorney General for the Department. Judge Dixon issued a bench decision in which he concluded that Mr. Weems had been denied equal access at the Board hearing due to his mental health condition. CP 134.

On November 20, 2012, Judge Dixon issued an order vacating the Board decisions remanding Mr. Weems case back to the Board for a new hearing on his issues and appointing an attorney for him. CP 136 – 137. His decision was based on his Conclusions of Law that the Board had not conducted a fact-finding investigation to determine what accommodations would be reasonable, the Board was a "court" for purposes accommodating persons with disabilities, and the Board was subject to the

Superior Court rules and statutes so long as the rules did not conflict with any of the Board's rules. CP 136.

On November 30, 2012, a Motion for Reconsideration was filed on behalf of the Board by Assistant Attorney Generals, Spencer w. Daniels and Kathryn Wyatt (hereinafter "AAG Daniels" and AAG Wyatt"). CP 140.

On December 21, 2012, Judge Dixon heard oral arguments of the parties' counsel. Judge Dixon granted the Board's motion to reconsider his previous order. CP 198. On March 8, 2013, Judge Dixon signed the Order to Grant Reconsideration and Vacating Order. His decision was based on there being no constitutional, statutory or court rule requiring the Board to provide a fact-finding investigation for a reasonable accommodation or provide an attorney for Mr. Weems. CP 204. A Notice of Appeal by Mr. Weems was timely filed on March 29, 2013. CP 206.

V. STANDARD OF REVIEW

When a case is under appeal of the Board, "the findings and decision of the Board shall be prima facie correct and the burden of proof shall be upon the party attacking the same." RCW 51.52.115; *Ruse v. Department of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570, 572 (1999). On review by the superior court, it may only replace the Board's finding

and decision with its own if "it finds "from a fair preponderance of credible evidence' that the Board's findings and decisions are incorrect." *McClelland v. ITT Rayonier*, Inc. 65 Wash. App. 386, 390, 828 P.2d 1138 (1992)(quoting *Weatherspoon v. Department of Labor & Indus.*, 55 Wash. App. 439, 440, 777 P.2d 1084 (1989). Under Mr. Weems' appeal, "review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Ruse v. Department of Labor & Indus.*, 138 Wn.2d at 5 (quoting *Young v. Department of Labor & Indus.*, 81 Wash. App. 123, 128, 913 P.2d 2402 (1996).

VI. ARGUMENT

A. THE BOARD WAS REQUIRED TO PERFORM A FACT-SPECIFIC INVESTIGATION REGARDING MR. WEEMS' MENTAL HEALTH DISABILITY AND HIS ABILITY TO REPRESENT HIMSELF BEFORE A BOARD HEARING.

A public entity, upon notice that accommodation for a disability is necessary, must commence a fact-specific investigation to determine what, if any, reasonable accommodation is necessary. After gathering satisfactory facts from the person with a disability and expert opinion, if

necessary, the public entity has a duty to determine what accommodations are necessary. *Duvall v. Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001).

RCW 49.60.040(7)(a)[5] and (b) assists the fact finder in understanding how disability is defined:

> (7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:
>
> (i) Is medically cognizable or diagnosable; or
>
> (ii) Exists as a record or history; or
>
> (iii) Is perceived to exist whether or not it exists in fact.
>
> (b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

The legislature passed the new definition of disability in 2007. The legislature recognized that enactment of this definition of disability under the WLAD would provide its state citizens with:

> protections that are wholly independent of those afforded by the federal Americans with Disabilities Act of 1990, and that the law against discrimination has provided such protections for many years prior to the passage of the federal act.

Hale v. Wellpinit School Dist. No. 49, 165 Wn.2d 494, 501-502, 198 P.3d 1021 (2009) *quoting* Laws of 2007, Ch. 317 § 1.

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[5] Previously codified as RCW 49.60.040(25)(a)

The Board was placed on formal notice of Mr. Weems' disability and inability to represent him at the Board hearings on two occasions. First, Mrs. Weems requested an attorney for Mr. Weems due to his "mental capacity." After being told that Mr. Weems would be held to the same standard as an attorney, Mrs. Weems responded:

MRS. WEEMS: So it's almost pertinent that we do need and attorney. We do need an attorney, I'm sure.

JUDGE GILLIGAN: I would say that I highly recommend an attorney to any --

MRS. WEEMS: Because I don't think Mr. Weems can represent himself. His mental capacity is – I've said he wouldn't be able to represent himself.

JUDGE GILLIGAN: All right. He seems responsive today and seems very able to answer questions. He seems to understand what's going on.

MRS. WEEMS: He can answer questions, but I don't think he fully can understand the consequences or the procedures that attorneys or – I don't know what her name is, but who represents –

JUDGE GILLIGAN: Ms. Blackman?

MRS. WEEMS: Ms. Blackman who represents Labor and Industries, I don't think they are of that caliber.

JUDGE GILLIGAN: Well, yes. As I indicated previously, unless you have specific legal training, Mr. Weems, it's unlikely that you would be able to --

MRS. WEEMS: Prevail?

ARTR 6/3/08 at 28 – 29.

IAJ Gilligan's inquiry ended at this point.

The second formal notice was that of Judge McPhee's order on June 30, 2010. In his Findings of Fact number 6, Judge McPhee wrote "[t]hat Mr. Weems currently suffers from a mental health condition that effects his ability to fully and effectively represent himself and prosecute his labor and industries case." AR 66. However, Judge McPhee did not order the Board to obtain a psychiatric evaluation, but did recommend it. AR 67.

Despite the fact that IAJ Lucia took much of the brunt of Mr. Weems' mental health outbursts, and even required Washington State Patrol officers to be present, he did not make any inquiry into Mr. Weems' mental health disability. And despite all that IAJ Lucia had seen and experienced, he did not believe that a psychiatric evaluation was necessary. Unfortunately, mental health disabilities are less readily seen

than physical disabilities. Mr. Weems, though, in appearing before IAJ Lucia gave numerous signals that he was suffering from a mental health condition.

B. THE BOARD, AS A STATE AGENCY, DOES HAVE A CONSTITUTIONAL AND STATUTORY REQUIREMENT TO PROVIDE A NECESSARY REASONABLE ACCOMMODATION UNDER TITLE II OF THE ADA AND WLAD FOR MR. WEEMS' MENTAL HEALTH DISABILITY.

1. Title II of the Americans with Disability Act does apply to the Board, which as a public entity, must provide a accommodation for Mr. Weems' mental health disability.

Title II of the ADA was enacted in 1990 to protect persons with disabilities from discrimination by "public entities." 42 U.S.C. § 12131(1). Under its own rules, the Board's function and jurisdiction is defined as a state agency "to review, hold hearings on, and decide appeals filed from final orders, decisions or awards of the department of labor and industries." WAC 263-12-010. One of its functions is to adjudicate contested claims under the Industrial Insurance Act. WAC 263-12-010(1). The Board is under the jurisdiction of the ADA as an "agency" as defined under 42 U.S.C. § 12131(1)(B), which prohibits an agency from discriminating against a person with a disability from involvement in its "programs or activities. . ." 42 U.S.C. § 12131(2)

As applicable to Title II of the ADA, the Board as a public entity is confirmed in its administrative rules and regulations, which reads:

(1) Any State or local government;

(2) Any department, **agency**, special purpose district, or other instrumentality of a State or States or local government . . .

28 C.F.R. § 35.104(1) and (2); *Tennessee v. Lane*, 541 U.S. 509, 517, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004). (emphasis added)

The constitutionality of Title II of the ADA to require reasonable accommodation for the disabled by the States' public entities was upheld in *Tennessee v. Lane*. This case addressed the issue of whether Title II exceeded Congress' authority under §5 of the Fourteenth Amendment because it would permit private citizens to bring a Title II action for money and equitable relief when the state court system had denied reasonable access. The two respondents were wheelchair-bound paraplegics. The first respondent was Mr. Lane who was required to crawl up the courthouse stairs to appear in his criminal case. On the second appearance, he refused to crawl up the stairs or be carried up; therefore, he was not able to appear, and was jailed. The second respondent, Ms. Jones, was a court reporter who had lost work due to her inability to access the courthouse as a result of her disability. *Tennessee v. Lane*, 541 U.S. at 513 – 514.

The State argued that the Eleventh Amendment precluded a private action against the State. *Tennessee v. Lane*, 541 U.S. at 513. Eleventh Amendment proclaims that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Eleventh Amendment also pertains to private citizens' suits against their own State. *Tennessee v. Lane*, 541 U.S. at 517. However, under §5 of the Fourteenth Amendment, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Court, in *Tennessee v. Lane*, held that the States have no Eleventh Amendment immunity even in the case of some civil litigation. Under the Due Process Clause of the Fourteenth Amendment these civil litigants have the right to "a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings." *Tennessee v. Lane*, 541 U.S. at 523; quoting *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); see also *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996).

In coming to this decision, the Court considered a two-part analysis. First, it considered whether Congress "unequivocally expressed its intent" to eliminate the States' Eleventh Amendment right to be

immune from lawsuits by private citizens for Title II actions. *Tennessee v. Lane*, 541 U.S. at 517; *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). And, if Congress did so intend, then the Court was to consider whether Congress had the constitutional authority to do so. *Kimel v. Florida Bd. Of Regents*, 528 U.S. at 73; *Tennessee v. Lane*, 541 U.S. at 517.

Under the first inquiry, the Court held that Congress unequivocally expressed its intent to abrogate a State's immunity under the Eleventh Amendment when it had violated the ADA. 42 U.S.C. §12202; *Tennessee v. Lane*, 541 U.S. at 518. Under the second inquiry, the Court expressed the §5 limitation of Congress' authority. While Congress can create "appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a 'substantive change in the governing law.'"*Tennessee v. Lane*, 541 U.S. at 520, quoting *City of Boerne v. Flores*, 521 U.S. 507, 519, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). The test is in determining whether §5 legislation is appropriate if it demonstrates "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Tennessee v. Lane*, 541 U.S. at 520, quoting *City of Boerne v. Flores*, 521 U.S. at 520.

In determining that Congress did have §5 authority to implement Title II, the Court turned to the historical nature of inequity of persons

with disabilities in court access and proceedings. The Court pointed out multiple discriminatory actions by state agencies toward persons with disability, such as baseless commitment to mental institutions, abusive and neglectful treatment in mental health institutions and even "irrational discrimination in zoning decisions." *Tennessee v. Lane*, 541 U.S. at 525. Congress learned much from testimony of individuals who were the object of court inaccessibility, including the "failure to permit the testimony of adults with developmental disabilities in abuse cases . . ." *Tennessee v. Lane*, 541 U.S. at 527. The voluminous evidence before Congress led to the conclusion that "prophylactic legislation" was needed. *Tennessee v. Lane*, 541 U.S. at 529. Based on the considerable evidence of systemic discrimination in access and exclusion to the courts, the Court held that "Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' §5 authority to enforce the guarantees of the Fourteenth Amendment." *Tennessee v. Lane*, 541 U.S. at 534.

In so deciding, the Court cautioned that the remedies for Title II are not limitless. A public entity need only make those accommodations necessary that are reasonable. A reasonable accommodation is practical and would not cause an inordinate administrative or financial burden on the public entity. It should also not ". . . fundamentally alter the nature of

the service provided. . ." *Tennessee v. Lane*, 541 U.S. at 532. The Court did note that cost and convenience alone for accommodation were not sufficient objections to "meaningful right of access to the courts." *Tennessee v. Lane*, 541 U.S. at 533. Additionally, any costs for accommodation must be provided by the agency, and must not be put on to the person requesting accommodation. 28 C.F.R. § 35.130(f).

In Mr. Weems' case, appointment of counsel would be the most practical approach to accommodation. An attorney could assist with procedural matters, understand Mr. Weems' overall objectives and continue with cross-examination and motion arguments even if Mr. Weems were not to attend the hearing or leave the hearing room. This would be exemplified by the instance in which IAJ Lucia continued with the Department's CR 35 motion despite the fact that Mr. Weems had left the room. An appointed attorney would be able to continue with responses and argument. Mr. Weems was also confused about one of the Department's witnesses in which he felt that expert was on his side. An appointed attorney could cross-examine the witness and at the same time communicate with Mr. Weems regarding the nature of the Department witness's testimony.

This reasoning is illustrated in *Franco-Gonzalez v. Holder,* 828 F. Supp.2d 113 (C.D. Cal. 2011). In *Franco-Gonzalez v. Holder,* a class

action case, the plaintiffs requested a preliminary injunction against the Board of Immigration Appeals (hereinafter "BIA"). *Franco-Gonzalez v. Holder*, 828 F. Supp.2d at 1136. The BIA is a federal administrative agency that was not required to appoint counsel , but the alien did have the right to counsel, but not at the expense of the government. *Franco-Gonzalez v. Holder*, 828 F. Supp.2d at 1144; see also 8 U.S.C. § 1362.

In this case Mr. Zhalezny was a mentally disabled detainee who appeared before the Immigration Court for a removal proceeding. The judge appointed Mr. Zhalezny's father, a non-attorney, to represent him. *Franco-Gonzalez v. Holder*, 828 F. Supp.2d at 1137. The BIA argued that Mr. Zhalezny's father was an adequate accommodation and placed Mr. Zhalezny in the same position as a pro se detainee. *Franco-Gonzalez v. Holder*, 828 F. Supp.2d at 1147-1148.

The Court responded:

> If [the BIA] had a system in place to identify mentally incompetent detainees and to promptly accommodate their needs by the appointment of a Qualified Representative, Immigration Judges would not be placed in the untenable position of navigating uncharted territory when confronted with mentally ill aliens in their courtrooms. In the absence of any systemic guidelines setting forth what is a "reasonable accommodation" for unrepresented mentally incompetent aliens in removal proceedings, the Court finds that the appointment of a Qualified Representative, as redefined above, is a "reasonable accommodation" for Plaintiff at his custody hearing in this case.

Franco-Gonzalez v. Holder, 828 F. Supp.2d at 1148.

The *Franco-Gonzalez* plaintiffs were granted their injunctive relief of either a pro bono or government-paid qualified representative. *Franco-Gonzalez v. Holder,* 828 F. Supp.2d at 1150.

Mr. Weems' case demonstrates the problems inherent when an Industrial Appeals Judge attempts to proceed without a qualified legal representative for a mentally disabled claimant. Both Industrial Appeals Judges struggled with a timely, efficient and organized hearing. Mr. Weems, without legal representation, became frustrated by a system that ground on with little assistance or explanations of his rights and duties. His wife, who described herself as "attorney illiterate" also struggled to both calm her husband and try to understand the proceedings before her.

Understandably the Industrial Appeals Judge's role cannot become one of advocate. This would fundamentally alter the nature of agency hearings.

Any proposed modifications will be inconvenient to the Board. The Board has not provided any financial data that appointment of an attorney would be cost prohibitive. Therefore, Mr. Weems respectfully requests that his case be remanded back to the Board for consideration of modifications necessary to provide him with equal access to and an opportunity for meaningful access to his agency hearing.

2. The Washington Law Against Discrimination does apply to the Board, which as a public entity, must provide an accommodation for Mr. Weems' mental health disability.

The Board is also a public entity under Washington State law. The WLAD has declared that a person with a mental disability is entitled to civil rights and to be free from discrimination. This includes "[t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement . . ." RCW 49.60.030(1)(b).

The WLAD, as it pertains to courts, defines "[A]ny place of public resort, accommodation, assemblage, or amusement" as including "where the public gathers, congregates, or assembles for amusement, recreation, or public purposes . . ." RCW 49.60.040(2). In its definition of "Person," the WLAD encompasses, in pertinent part, "any political or civil subdivisions of the state and any **agency** or instrumentality or of any political or civil subdivision thereof . . ." RCW 49.60.040(19)(emphasis added); *Washington State Board Against Discrimination v. Board of Directors, Olympia School District No. 1, Dr.*, 68 Wn.2d 262, 268, 412 P.2d 769 (1966).

Washington law considers "distinction, restriction, or discrimination" by "any person or the person's agent or employee" to be

an "unfair practice." RCW 49.60.215. In Mr. Weems case the Industrial Appeals Judges are employees of the BIIA, a state agency. Since the Industrial Appeals Judges restricted or discriminated against Mr. Weems through failure of accommodating Mr. Weems' mental disability, the BIIA has participated in an "unfair practice." See WAC 162-26-170(6) and WAC 162-26-080(1).

In determining what is a reasonable accommodation this "depends on the cost of making the accommodation, the size of the place of public accommodation, the availability of staff to make the accommodation, the importance of the service to the person with a disability, and other factors bearing on reasonableness in the particular situation." WAC 162-26-080(2).

The Board has argued that the costs and processes for funding accommodations have not been contemplated by the Board. CP 142. In so arguing the Board has not provided any numbers or data to support its contention. It is highly unlikely that the circumstances in Mr. Weems' case would replay on a consistent basis. Most workers' compensation claims would generate present or future funds; thereby being more receptive to legal representation under a contingency fee system.

C. THE BOARD HAD A DUTY TO PROVIDE AN ADA/WLAD REMEDY BECAUSE MR. WEEMS' MENTAL AND COGNITIVE DISABILITY IMPAIRS HIS ABILITY TO REPRESENT HIMSELF BEFORE A WORKERS' COMPENSATION CLAIMS HEARING. THE USUAL REMEDY OF CONTINGENT FEE COUNSEL IS NOT AVAILABLE AND THE INDUSTRIAL APPEALS JUDGES COULD NOT PROVIDE GREATER ASSISTANCE.

1. The Industrial Insurance Act contingency fee practice does not apply to this case, and, thus does not preclude other ADA or WLAD remedies.

In understanding why Mr. Weems would not have been able to obtain his own legal representation, it is helpful to look at the fee structure system under the Industrial Insurance Act. This analysis will demonstrate how it affected Mr. Weems' appeal before the Board, and why it does not apply to his specific case.

The workers' compensation fee structure is generally a contingency-based system. Under RCW 51.52.120, it is unlawful for an attorney to charge an unreasonable fee. If there is a question of whether a fee is reasonable, the Department can issue an order fixing the fee upon written request. An attorney may charge up to a thirty percent fee[6], but only after the attorney has obtained an increase in a Department award at the Department level. RCW 51.52.120(1).

[6]Claim resolution structured settlement agreements are limited to up to fifteen percent.

At the Board appeal level, an attorney can only charge a fee if the attorney has successfully adjudicated a Department order, decision, or award by obtaining a reversal or modification. Again, the Board can fix a fee when there is a written request. RCW 51.52.120(2). In understanding how the Board determines how fees are calculated, WAC 263-12-165 is useful.

The majority of fees fixed by the Board involve compensation obtained as a result of the attorney's services, such as permanent partial disability, loss of earning power and total temporary disability. WAC 263-12-165(3) (a) (b). The only section that deals with obtaining medical benefits as the sole relief is WAC 263-12-165(3)(c). Subsection (c) reads:

> Where no additional compensation is obtained, but the worker or crime victim is relieved of the payment for medical benefits, a fee from 10 to 25 percent of the amount the worker or crime victim is so relieved of paying shall be fixed after considering all factors.

WAC 263-12-165(3)(c).

However, the attorney's fees are fixed at ten to twenty five percent of the net benefits considered. Thus, costs for medical examinations and witness fees are first deducted with the remaining amount considered. WAC 263-12-165(2)(v). In Mr. Weems' case, it is likely that two experts would be needed, a neurologist and a psychiatrist, to examine and testify

on behalf of Mr. Weems. These costs could be high, and likely prohibitive in generating much income for the attorney from the medical net proceeds.

Additionally, Mr. Weems applied to reopen his claim in December 2007. Had Mr. Weems claim been reopened, the Department can reimburse for medical bills up to "sixty days *prior* to date the application is received by the department or self-insurer." WAC 296-20-097 (emphasis in WAC); see also RCW 51.28.040. Medical treatment could only have been reimbursed from October 3, 2007 through February 21, 2008 (the date of the appealable order). Reimbursement would have only garnered a little over four months' worth of medical treatment.

It is also highly unlikely the attorney would receive any future fees should the claim to reopen be positive. Mr. Weems' claim closed in 1973. Pursuant to RCW 51.32.160, an injured worker has "seven years from the date the first closing order becomes final" to apply to reopen his/her claim. After seven years, the director of the Department may make available medical and surgical services to an injured worker. RCW 51.32.160(1)(a). Mr. Weems applied to reopen his claim in 2007 citing the relevant period of worsening of his conditions to be from 2003 through 2008. His application was over the seven years in which his claim first closed. His claim would have only provided him with medical treatment for his worsened medical and mental health conditions.

The Department director does have discretion to consider wage replacement benefits if the worker has not voluntarily retired from the workforce and must demonstrate through medical evidence that they are unable to work so long as they meet one of four reopening criteria. This reopening criteria includes necessity for surgery, treatment to preserve life, new medical treatment that would considerably minimize the impairment, or substantial increased Permanent Partial Disability (hereinafter "PPD"). Department Policy 16.40; *In re Robert Dorr, Jr.*, BIIA Dec., 07 23982 (2009). It is highly unlikely that Mr. Weems would have met any of the four reopening criteria. He did not require surgery, does not have evidence of having a life threatening medical condition, does not need treatment from new medical technology and it is unknown whether there would have been a substantial increase of PPD. Therefore, it is unlikely that future fees would be generated.

Mr. Weems had indicated that he could not find an attorney. The reason for this is not surprising. An attorney would have to spend considerable time preparing the case for hearing, for a fixed fee of ten to twenty five percent of a four month period of medical treatment costs after the expert fees have been deducted, with a client with a mental health disability.

Moreover, a non-attorney cannot represent a workers' compensation claimant unless authorized by the Board and cannot request payment from the claimant for services performed at the Board. WAC 263-12-020(3).

Considerable discussion has been had here regarding the fee process under the Workers' Compensation Act. It is necessary to point out that this case is not merely about financial gain. A general understanding of fees under the Workers' Compensation Act is necessary, because it will likely be argued that Mr. Weems is not entitled to appointment of counsel by the Board as one of its accommodations because of *In re Grove*, 127 Wn.2d 221, 987 P.2d 1252 (1995).

In re Grove dealt with whether it was permissible for a civil appeal to be publicly funded when the appellant was indigent. *Grove*, 127 Wn.2d at 228. This was a consolidation of three cases of which the pertinent appellant was a workers' compensation claimant who was indigent and requested public funding for his appeal. The Court concluded that since the claimant had no right to be appointed an attorney under the workers' compensation statute for indigency, he did not have a statutory or constitutional right to publicly funded counsel on appeal under RCW 10.101. *Grove*, 127 Wn.2d at 237. The Court reasoned that when "the interest at stake is only a financial one, the right which is threatened is not

considered 'fundamental' in a constitutional sense." *Grove*, 127 Wn.2d at 238; *United States v. Kras*, 409 U.S. 434, 445, 93 S.Ct. 631, 638, 34 L.Ed.2d 626 (1973); *Ortwein v. Schwab*, 410 U.S. 656, 659, 93 S.Ct. 1172, 1174, 35 L.Ed 626 (1973); *Housing Auth. v. Saylors*, 87 Wn.2d 732, 739, 557 P.2d 321 (1976). As a result, indigent workers' compensation claimants have no constitutional right to an attorney when the interest is only a financial one. *Grove*, 127 Wn.2d at 238.

But Mr. Weems' case is not one about whether he has a financial interest upon appeal; but, rather, one which he asks whether he has a fundamental right and a meaningful opportunity to be heard and participate in his Board hearing. This is a case about accommodation of a person with a disability.

The BIIA has argued that there is no constitutional or statutory right to an appointment of counsel based on *Kustura v. Dept. of Labor and Indus.*, 169 Wn.2d 81, 233 P.3d 853 (2010). CP 143. The facts in *Kustura* differ from those in Mr. Weems' case before the Board. In *Kustura*, the Court denied interpreter services for nonindigent, represented workers' compensation claimants who had commenced appeals before the Board. The appellants argued that all persons of limited English should be afforded government-paid interpreter services under RCW 2.43.040. *Kustura*, 169 Wn.2d at 85. The Court held that only when the government

has begun a legal proceeding against the person with limited English language will interpreter services be paid. Because the appellants had commenced the action against the government, then under RCW 2.43.040 the Board did not have a statutory obligation to provide interpreter services. *Kustura*, 169 Wn.2d at 89.

In Mr. Weems case, the Board does have a statutory duty under RCW 49.60 to provide an accommodation, even appoint an attorney, because his mental disability precluded him from being able to represent himself at his Board hearings. Each case that came before the Board would be assessed on a case-by-case basis after a proper fact-specific investigation.

2. The Board Industrial Appeals Judges' pro se assistance was not sufficient to provide adequate accommodation for a person with a disability.

An Industrial Appeals Judge must assist a pro se party, who has the burden of proof, and to "ask those questions necessary to elicit a prima facie case." *In re Evangelina Acevedo*, BIIA Dec., 08 15613 (2009) at 7.

This is supported by RCW 51.52.102, which states that "the Board may continue hearings on its own motion to secure in an impartial manner such evidence, in addition to that presented by the parties, as the Board, in its opinion, deems necessary to decide the appeal fairly and equitably..."

The Washington Administrative Code assists the Industrial Appeals Judge regarding what is appropriate, and how they may assist a pro se litigant.

WAC 263-12-045 defines the duties and powers of an Industrial Appeals Judge. Pursuant to WAC 263-12-045(2)(e) and (f), the Industrial Appeals Judge has the authority to:

> (e) To interrogate witnesses called by the parties in an impartial manner to develop any facts deemed necessary to fairly and adequately decide the appeal;
>
> (f) To secure and present in an impartial manner such evidence, in addition to that presented by the parties, as he or she deems necessary to fairly and equitably decide the appeal, including the obtaining of physical, mental, or vocational examinations or evaluations of workers . . .

WAC 263-12-020(1)(d) provides additional assistance to the Industrial Appeals Judge concerning parties that appear before them:

> (d) Although the industrial appeals judge may not advocate for either party, all parties who appear either at conferences or hearings are entitled to the assistance of the industrial appeals judge presiding over the proceeding. Such assistance shall be given in a fair and impartial manner consistent with the industrial appeals judge's responsibilities to the end that all parties are informed of the procedure which is to be followed and the issues which are involved in the proceedings. Any party who appears representing himself or herself shall be advised by the industrial appeals judge of the burden of proof required to establish a right to the relief being sought.

(emphasis added)

In re Evangelina Acevedo dealt with whether an Industrial Appeals Judge could ask questions of Ms. Acevedo's witnesses in making a complete record. The claimant, Ms. Acevedo, was representing herself with her appeal. The Industrial Appeals Judge assisted Ms. Acevedo in questioning her witnesses. *In re Evangelina Acevedo* at 11. When the Department objected, the Board pointed out that "[t]he test of whether he acted appropriately is not whether he took the lead in asking questions or the number of questions asked, but whether those questions were asked in an advocatory manner rather than to elicit facts. *In re Evangelina Acevedo* at 11; see also, discussion, *Sherman v. Moloney*, 106 Wn.2d 873, 882-884, 725 P.2d 966(1986).

However, the Board cautioned its Industrial Appeals Judges that they were not advocates of an unrepresented party. Nor could an Industrial Appeals Judge "cross-examine the opposing party's witnesses on behalf of the unrepresented party." *In re Evangelina Acevedo* at 11.Thus, it is the unrepresented party's duty to cross-examine the opposing party's witness, and the Industrial Appeals Judge may only clarify such matters as an expert witness's qualifications. *In re Evangelina Acevedo* at 11.

In his initial appeal before IAJ Gilligan, Mr. Weems did receive assistance from IAJ Gilligan to assist him in questioning his witnesses,

including his expert witness, Dr. Wagner. And in fact IAJ Gilligan's assistance facilitated, upon appeal to superior court, a finding of making a prima facie case for worsening of Mr. Weems headaches and mental health conditions. AR 66. Judge McPhee ordered Mr. Weems' case back to the Board to complete the record meaning the Department would need to put on its case. AR 6. However, upon remand, in completing the record, the only witnesses to be called were those of the opposing party, the Department. Mr. Weems would not be able to expect the assistance of IAJ Lucia to cross-examine the Department's witnesses as he was not permitted to do so.

IAJ Lucia did not ask any questions of Dr. Dietrich on cross-examination; instead turning questioning over to Mr. Weems. Mr. Weems stated five different times that he thought Dr. Dietrich was on his side and thought he had done a good job. Mrs. Weems attempted to tell him Dr. Dietrich was not on his side. However, Mr. Weems continued in his belief. IAJ Lucia did not explain to Mr. Weems the consequences of not cross-examining the Department's witness nor did he explain that Dr. Dietrich was not testifying on his behalf. ARTR 10/11/11 at 18 - 21.

The next witness called on behalf of the Department was Dr. Schneider, their CR 35 psychiatrist. While IAJ Lucia asked cross-examination questions of Dr. Schneider on behalf of Mr. Weems, and did

elicit answers concerning the symptoms caused by a parietal head injury, he did not go further in his questioning as to whether these symptoms had a causal relationship or indicative of a worsening as a proximate cause of the industrial injury. ARTR 10/13/11 at 37.

Additionally, IAJ Lucia did not send Mr. Weems to a board-commissioned examination with the right questions. A board-commissioned examination is one in which the parties agree to be bound by an examiner's conclusion and paid for by the Board. Instead of sending new questions or scheduling a new examination with the appropriate examiner specialty, IAJ Lucia decided to have the Department continue with its case. ARTR 6/13/11 at 3.

Finally, IAJ Lucia was presented a motion for a CR 35 psychiatrist by the Department. During discussion between IAJ Lucia and the Department's counsel, Mr. Weems left the hearing room. Mrs. Weems, who was authorized to assist, attempted to object to the examination. IAJ Lucia told Mrs. Weems to stop talking on three occasions. ARTR 8/29/11 at 5. The examination had already been scheduled by the Department, and IAJ Lucia questioned the Department about the time, place and mileage. Mrs. Weems was never given the opportunity to make a meaningful objection.

For the reasons stated above, Mr. Weems respectfully believes that the Industrial Appeals Judge cannot provide a meaningful assistance to a pro se litigant who is a person with a disability. In his case, errors were made by IAJ Lucia that did not assist Mr. Weems in having a meaningful opportunity to be heard. Industrial Appeals Judges also do not have, rightfully, all of the information concerning the unrepresented party, and would not always be able to assist fully.

VII. ATTORNEY'S FEES

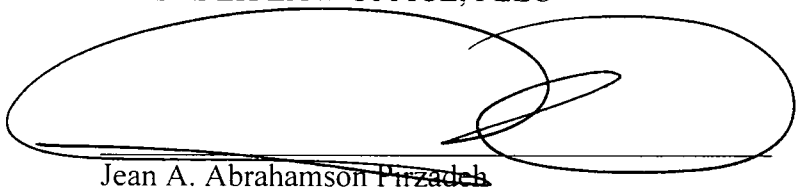
Pursuant to RAP 18.1, Appellant respectfully requests an award of attorney fees and costs in accordance with RCW 4.84.350. Under RCW 4.84.350(a), "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorney fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." A qualified party is a party that has obtained relief on a significant issue that achieves some benefit to the qualified party. RCW 4.84.350(a). Attorney fees shall be set by the court and not exceed $25,000.00. RCW 4.84.350(b). Pursuant to RAP 18.1(d), counsel for Appellant will submit a cost bill subsequent to a ruling on the merits

VIII. CONCLUSION

For the reasons stated above, Mr. Weems respectfully requests that his case be remanded back to the Board for a new hearing in which he will have a fundamental right to a meaningful opportunity to be heard and to participate in the Board proceedings. He also asks that he be appointed an attorney with costs paid by the Board so that he will be appropriately able to participate in said hearing.

DATED this 12th day of June, 2013.

PIRZADEH LAW OFFICE, PLLC



Jean A. Abrahamson ~~Pirzadeh~~
WSBA No. 31080
Attorney for Appellant, Dale Weems

DECLARATION OF SERVICE

On this day, the undersigned personally served a copy of the Brief of Appellant, under No. 44713-4-II, to which this declaration is attached, to:

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FURTHER on this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the Brief of Appellant, to which this declaration is attached to:

Dale Weems
5303 NE Mason Street
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of June, 2013 in Centralia, Washington.

Brian Smalley
Legal Assistant