NO. 44713-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DALE WEEMS,

Appellant,

v.

STATE BOARD OF INDUSTRIAL INSURANCE APPEALS,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

This is a workers' compensation case arising under Title 51, RCW, the Industrial Insurance Act. The Thurston County Superior Court determined that Weems was not entitled to have the Board of Industrial Insurance Appeals (Board) appoint him counsel at public expense because no statute, rule, or constitutional provision entitled him to such relief. Weems appeals, arguing that the Americans With Disabilities Act (ADA) and Washington's Law Against Discrimination (WLAD) required the Board to appoint him counsel at public expense, or, alternatively, conduct a fact-specific inquiry into whether such an appointment was necessary.

However, Weems fails to support his argument, and this Court should affirm the superior court's determination. Neither the ADA nor the WLAD grant Weems the right to an attorney appointed by the Board at public expense. The ADA provides only for a right to meaningful access to public entities, and Weems received meaningful access to the Board despite proceeding pro se. Similarly, the WLAD provides only for a right for disabled persons to receive services comparable to the services provided to the nondisabled, and Weems received a service comparable to the service provided to the nondisabled.

II. COUNTER STATEMENT OF THE ISSUES

1. Under the ADA and the WLAD, was the Board required to conduct a "fact-specific inquiry" to determine whether Weems required a reasonable accommodation, when Weems did not request an accommodation?

2. Under the ADA, was Weems entitled to representation by counsel appointed by the Board at public expense, when there is a right to an accommodation under the ADA only if it is necessary to provide for meaningful access to a public entity, and when Weems received meaningful access to the Board without being appointed counsel at public expense?

3. Under the WLAD, was Weems entitled to representation by counsel appointed by the Board at public expense, when, under *Fell v. Spokane Transit Authority*,[1] a public entity is required to provide an accommodation only when doing so is necessary to provide a disabled person a service "comparable" to what it provides to nondisabled persons, and when Weems received a service comparable to the service received by pro se litigants who appear before the Board?

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[1] *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 630-32, 911 P.2d 1319 (1996).

III. STATEMENT OF THE CASE

A. History Of The Adjudication Of Weems's Claim

Weems was injured on May 11, 1973, while in the course of employment. *See* BR 41, 145, 151.[2] The Department of Labor and Industries (Department) closed Weems's claim in July 1973. BR 41.

Weems applied to reopen his claim in 2000, which the Department denied. BR 41. Weems appealed this decision to the Board, but the Board affirmed it. BR 42.

In 2003, Weems applied to reopen his claim a second time. BR 42. The Department denied this request, and Weems appealed. BR 42. However, Weems, through counsel, dismissed his appeal. BR 42.

In 2008, Weems filed a third request to reopen his claim. *See* BR 42. The Department denied it on February 2008, and Weems appealed, leading to the current dispute. BR 42-43.

B. Weems's Original Appeal To The Board

Weems represented himself before the Board pro se, receiving assistance from his wife. Industrial Appeals Judge (IAJ) Gilligan conducted a conference on June 3, 2008, to explain the hearing process to

[2] The certified appeal board record contains numerous documents that are consecutively numbered with a machine-stamped number, as well as the transcripts of hearings and depositions that do not have such numbers. Citations to the documents containing machine-stamped numbers will be listed with BR followed by the appropriate page number(s). Citations to the hearing transcripts will be listed with BR, followed by the date of the hearing and the page number of the transcript.

Weems and to schedule hearings. BR 6/3/2008 at 3-23. The IAJ advised Weems of his right to an attorney, and told Weems that even if he initially declined to retain one, he could change his mind and retain one later. BR 6/3/2008 at 3. The IAJ also told Weems that the Board could not appoint an attorney for him. BR 6/3/2008 at 3. Weems did not raise any objection or concern in response to that statement, and stated that he did not intend to retain counsel. *See* BR 6/3/2008 at 3-4.

After hearings were scheduled, Ms. Weems asked, "At some point in time if you hire an attorney, can we submit that to the court instead of him representing himself, instead of Mr. Weems representing himself?" BR 6/3/2008 at 24-25. IAJ Gilligan stated that if Weems hired an attorney that the attorney would then be able to represent him at the Board. BR 6/3/2008 at 25. Ms. Weems then asked, "And we have to give you notice of that, is that correct?" BR 6/3/2008 at 25. IAJ Gilligan responded that the attorney would file a notice of appearance with the Board. BR 6/3/2008 at 25.

IAJ Gilligan then briefly discussed the fact that either Weems or the Department could serve the other party with discovery. BR 6/3/2008 at 26-27. After asking for an explanation of what "discovery" was, and receiving one, Ms. Weems stated, "So its [sic] almost pertinent that we do need an attorney. We do need an attorney, I'm sure." BR 6/3/2008 at 28.

IAJ Gilligan noted that he would highly recommend an attorney. BR 6/3/2008 at 28. Ms. Weems continued, "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." BR 6/3/2008 at 28.

IAJ Gilligan noted, "All right. He seems responsive today and seems very able to answer questions. He seems to understand what's going on." BR 6/3/2008 at 28. Ms. Weems replied, "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 . . . ." BR 6/3/2008 at 28.

IAJ Gilligan asked, "Ms. Blackman?" (referring to Dana Blackman), the Assistant Attorney General who represented the Department in that matter. BR 6/3/2008 at 28. Ms. Weems responded, "Ms. Blackman who represents Labor and Industries, I don't think they are of that caliber." BR 6/3/2008 at 28. IAJ Gilligan noted, "Well yes, as I indicated previously, unless you have specific legal training, Mr. Weems, it's unlikely you would be able to . . . ." BR 6/3/2008 at 29. Ms. Weems asked, "Prevail?" BR 6/3/2008 at 29. IAJ Gilligan responded, "Well, handle the case like an attorney would handle it just because you don't have the training and the understanding of the Workers' Compensation

laws. All right?" BR 6/3/2008 at 29. Ms. Weems responded, "Yeah, I imagine I don't." BR 6/3/2008 at 29.

Ms. Weems then asked what she should do if any changes occurred. BR 6/3/2008 at 29. She was told she could call the Board to ask a procedural question, but that any other communication with the Board should be in writing. BR 6/3/2008 at 29. IAJ Gilligan asked if Weems understood what he needed to do, and Weems responded that he did. BR 6/3/2008 at 30. IAJ Gilligan asked if Weems had any further questions, and Weems responded that he did not. BR 6/3/2008 at 30.

A hearing was held on September 10, 2008. Weems and Ms. Weems testified. *See generally* BR 9/10/18. IAJ Gilligan asked Weems and Ms. Weems several questions regarding the history of Weems's industrial injury. *See* BR 9/10/2008 at 10-21, 25-51.

A further hearing was held on September 15, 2008, for the presentation of the testimony of David Wagner, M.D., who had provided treatment to Weems. *See* BR 9/15/2008 at 10-72. IAJ Gilligan asked Dr. Wagner numerous questions regarding the treatment he had provided to Weems, regarding which medical conditions Weems suffered from and whether Dr. Wagner believed that they were related to his 1973 injury, and regarding whether any of Weems's medical conditions had worsened between 2003 and 2008. *See* BR 9/15/2008 at 10-64, 69-71.

Weems then asked Dr. Wagner questions regarding whether Dr. Wagner had treated him for sinus infections, whether Dr. Wagner was familiar with a medical record of a Dr. Emily White (who Weems indicated had treated him for bleeding sinuses), whether Dr. Wagner had reviewed x-rays that were taken shortly after his injury, and whether Dr. Wagner had reviewed the accident report that was filed for Weems's 1973 injury, and whether Dr. Wager had seen any records indicating that a "team of doctors" spent 36 hours "reconstructing" Weems's face following his industrial injury. BR 9/15/2008 at 64-69, 71-72.

Dr. Wagner indicated that he had treated Weems for sinusitis, that he did have Dr. White's record available, that he suspected Weems had had a nose bleed but that the sinuses themselves were not responsible for the bleeding, that he had reviewed a report of an x-ray taken shortly after the injury, that he had reviewed Weems's accident report, and that he did not see any records indicating that Weems's face had been radically reconstructed. BR 9/15/2008 at 64-69, 71-72.

At the close of Dr. Wagner's testimony, Weems rested. BR 9/15/2008 at 86. The Department moved to dismiss Weems's appeal, contending that Weems had failed to present evidence that would support the conclusion that his claim should be reopened. BR 9/15/2008 at 87-88.

The IAJ issued a proposed decision and order that dismissed Weems's appeal, because the IAJ concluded that Weems had not made a prima facie case. BR 17-23. Weems petitioned for review. BR 24. The Board denied it, adopting the proposed decision as its own decision. BR 8. Weems moved for reconsideration of this decision, but the Board denied the motion. BR 1, 4.

C. Weems's First Appeal To Superior Court

Weems appealed to Thurston County Superior Court. *See* BR 65-67. The superior court appointed Weems counsel under GR 33. BR 66.

The superior court found that Weems had not made a prima facie case that his "accepted conditions" had objectively worsened during the relevant time period, but that Weems *had* made a prima facie case that he had headaches and a mental health condition that were related to his injury and that had worsened during the relevant time period. BR 66. The order remanded the case to the Board for further proceedings consistent. BR 67. The order noted that the Board should "consider" a psychiatric evaluation, but it did not order the Board to conduct one. BR 67.

D. Further Adjudication Of Weems's Appeal By The Board On Remand

On remand, the case was assigned to IAJ Wayne Lucia. *See generally* BR 9/9/2010.

The parties attempted to resolve the appeal through an agreed examination. Under this agreement, Weems would be seen by a medical doctor who would review medical records and examine Weems, and then submit a report indicating whether any condition proximately caused by Weems's injury had worsened during the relevant time frame. BR 10/27/2010 at 4-7. An examination was conducted, but the examining doctor's report did not indicate whether Weems had a headache or mental health condition proximately caused by his injury, nor did it indicate whether any such condition had worsened during the relevant time period. BR 6/13/2011 at 3-4. Therefore, the examination report was not used to resolve the appeal, and hearings were scheduled to allow the Department to present evidence with regard to those issues. BR 6/13/2011 at 4, 13-15.

The Department moved for a mental health examination under CR 35. BR 8/29/2011 at 3-4. Weems left the hearing room before IAJ Lucia had ruled on that motion. *See* BR 8/29/2011 at 4. Ms. Weems, on Weems's behalf, objected to the examination, but was overruled by IAJ Lucia. BR 8/29/2011 at 5. IAJ Lucia explained that he was granting the Department's motion for a CR 35 examination because the superior court had ruled that Mr. Weems had made a prima facie case for acceptance of a mental health condition, and the Department could not

present evidence with regard to that issue without receiving a CR 35 examination. BR 8/29/11 at 9.

Ms. Weems then asked, "And are we supposed to get an attorney? Is that what we're supposed to do? Are we supposed to get an attorney to look after our rights? Or what?" BR 8/29/2011 at 9. IAJ Lucia responded, "If you get an attorney, you'll have to do that on your own." BR 8/29/2011 at 9. Ms. Weems stated, "I understand that, sir. I didn't think you guys were going to pay for anything." BR 8/29/2011 at 9. IAJ Lucia reiterated that the Board would not appoint them an attorney, and Ms. Weems again noted that she understood that they would have to pay for one. BR 8/29/2011 at 9. IAJ Lucia asked if she would like to place anything else on the record, and Ms. Weems declined to do so. BR 8/29/2011 at 9.

The Department presented the testimony of a neurosurgeon, Thomas Dietrich, M.D., who opined that Weems's headaches were unrelated to his industrial injury. BR 10/11/2011 at 4, 17. Weems did not have any questions for Dr. Dietrich. BR 10/11/2011 at 18-21. Weems indicated that he thought Dr. Dietrich had "did a very good job" and indicated that he thought Dr. Dietrich had testified on his "behalf." BR 10/11/2011 at 19, 20. Ms. Weems explained to Weems that

Dr. Dietrich had not testified in their behalf, but neither Ms. Weems nor Weems elected to ask questions of Dr. Dietrich. BR 10/11/2011 at 20.

The Department also presented the testimony of a psychiatrist, Richard Schneider, M.D. BR 10/13/2011 at 3-4. Based on a mental health examination and his review of the medical records, Dr. Schneider concluded that there was no evidence that Weems had suffered a traumatic brain injury as a result of his industrial injury, and that there was no evidence that the injury caused any sort of psychological dysfunction, including, in particular, memory problems, depression, or anxiety. BR 10/13/2011 at 26.

Dr. Schneider testified that there was "nothing unusual about his mental status examination." BR 10/13/2011 at 21. Dr. Schneider made no findings during the examination that Weems had exhibited abnormal thoughts, feelings, or behavior. BR 10/13/2011 at 21.

Dr. Schneider also testified regarding Weems's overall mental health, and that aspect of his opinion was not confined to assessing the residuals of Weems's industrial injury. Dr. Schneider concluded that Weems met the diagnostic criteria for episodic alcohol use and daily cannabis use, but that neither diagnosis was related to his injury. BR 10/13/2011 at 22. Dr. Schneider also concluded that Weems had "explosive personality traits," which were likely present from early in life,

perhaps even from birth, and which were unlikely to have changed as a result of external factors or stressors, including his industrial injury. BR 10/13/2011 at 23-24.

Dr. Schneider concluded that Weems's GAF, or global assessment of functioning—which is an overall assessment of a person's mental health, and which is expressed as a number between 1 and 100—would properly be placed in the range of 61 to 70. BR 10/13/2011 at 26. Dr. Schneider explained that this meant that Weems had "mild problems" and was "not entirely happy," but that Weems was generally "doing pretty good" and was "certainly not clinically depressed." BR 10/13/2011 at 26.

Weems and Ms. Weems each asked Dr. Schneider questions on cross-examination. BR 10/13/2011 at 28-40. During cross-examination, Weems became frustrated, and he noted that he was "going to blow" and that he intended to go see his psychiatrist "through OHSU." BR 10/13/2011 at 32. At one point during cross-examination, Weems left the hearing room, and the hearing was adjourned until he returned. BR 10/13/2011 at 30. From that point onward, Weems continued to participate throughout the hearing. BR 10/13/2011 at 28-40.

Ms. Weems and Weems asked Dr. Schneider questions regarding the probable affect of an injury resulting in brain trauma, whether Dr. Schneider had told Weems during Dr. Schneider's examination of him

that Dr. Schneider did believe that Weems had suffered a brain injury, whether Dr. Schneider understood that Weems was unconscious following his industrial injury, whether Dr. Schneider had reviewed records of Dr. Takacs (another provider who had treated Weems), whether Dr. Schneider ever lied in court, whether Dr. Schneider was familiar with a September 6, 2011 medical record from the Oregon Health and Science University (OHSU), and what the probable consequences would be of a traumatic injury to the parietal region of the brain. BR 10/13/2011 at 28-38.

Dr. Schneider indicated that a traumatic brain injury would likely be followed by a period of severe incapacity, that he had told Weems that it was *possible* that Weems had suffered a brain injury in another incident that was completely unrelated to the 1973 industrial injury, that he had reviewed Dr. Takacs's records, that he had not lied in court, that he was not familiar with the September 6, 2011 record but that it did not change his opinion regarding Weems's condition, and that an injury to the parietal region of the brain could cause symptoms including hearing problems, headaches, difficulties with speech, problems with receptive learning, difficulty with writing, and difficulty sensing heat and cold. BR 10/13/2011 at 28-38.

The IAJ issued a proposed decision and order that affirmed the Department's decision to deny Weems's request to reopen his claim, and that specifically concluded that the preponderance of the evidence showed that Weems's headaches and mental health conditions were not related to his industrial injury. BR 134-147. Weems petitioned for review. BR 148. The Board denied his petition, adopting the proposed decision as its own decision. BR 151.

E. Weems's Second Appeal to Superior Court

Weems again appealed to superior court. CP 3. The superior court appointed Weems counsel under GR 33. CP 17.

Weems argued that the Board erred by failing to appoint him counsel, contending that GR 33, the ADA, and the WLAD all made him entitled to such relief, and also contending that his constitutional right to due process demanded that he be appointed counsel. CP 25-117, 126-33. The superior court initially remanded the case to the Board and directed it to appoint Weems counsel. CP 135-37. However, the Board intervened and moved for reconsideration, contending that neither GR 33 nor any statute or constitutional provision authorized the Board to appoint counsel for Weems. CP 140-76. The superior court granted the Board's motion, vacated its order, and issued a new order concluding that the Board could not be ordered to appoint Weems counsel. CP 203-05.

Weems appealed the order on reconsideration, contending that the ADA and the WLAD support his claim for relief, but abandoning the issue of whether GR 33 would support such a request. CP 206-10.

IV. SUMMARY OF THE ARGUMENT

Weems, representing himself pro se, appealed a decision of the Department that denied his request to reopen his claim. Weems arranged for a medical witness to testify on his behalf. Through this witness's testimony, Weems established a prima facie case that he had headaches and depression that were related to his injury and that those conditions had worsened during the relevant dates. However, the Board ultimately found that Weems's claim should not be reopened.

Weems does not challenge the merits of the Board's decision. Rather, he argues that he was entitled to have the Board appoint him counsel at public expense under the ADA and the WLAD. However, he does not support this assertion.

The case law establishes that a disabled person has a right to an accommodation under the ADA only if it is necessary to provide the disabled person with "meaningful access" to the public entity and its programs. Similarly, under the WLAD, there is a right to accommodation only to the extent necessary to provide a disabled person with services "comparable" to the services provided to the non-disabled.

Here, Weems had "meaningful access" to the Board, and he received a comparable service from it, notwithstanding his alleged disability, and despite proceeding pro se. Thus, he was not entitled to have counsel appointed for him as a reasonable accommodation.

Furthermore, a right to the appointment of counsel at public expense has only been found in a case in which 1) a fundamental liberty interest was at stake and 2) the litigant was not only disabled, but mentally incompetent. As Weems is not mentally incompetent and as his case involves a financial interest rather than a fundamental liberty, he has failed to establish a right to counsel at public expense under the ADA.

V. STANDARD OF REVIEW

As the Supreme Court explained in *Ruse v. Department of Labor & Industries*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999), an appellate court's role is limited to reviewing the Board's administrative record to determine whether the trial court's findings are supported by substantial evidence and to determine whether the superior court's conclusions of law follow from its findings of fact.

An appellate court reviews a superior court's legal conclusions de novo. *Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997). However, when an administrative agency is charged with application of a statute, the agency's interpretation of an ambiguous

statute is accorded great weight. *City of Pasco v. Pub. Emp't Relations Comm'n*, 119 Wn.2d 504, 507-08, 833 P.2d 381 (1992). The Department and the Board's interpretations of the Industrial Insurance Act are entitled to great deference, and the courts "must accord substantial weight to the agenc[ies'] interpretation of the law." *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000); *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

VI. ARGUMENT

A. Weems Is Not Entitled To An Appointment Of Counsel At Public Expense Under The ADA

The ADA does not contain a provision that expressly, or even implicitly, grants a disabled person the right to counsel at public expense in a legal action that was not brought under that Act, nor has a federal regulation been adopted that sets forth such a right. Weems argues that he has the right to appointed counsel based on language in the ADA that in general terms grants disabled persons the right to access places of public assemblage without discrimination based on their disabled status, and based on case law providing that a failure to provide a reasonable accommodation to a disabled person can constitute unlawful discrimination. App's Br. at 19-28. However, Weems fails to support his

argument that the appointment of counsel at public expense is a reasonable accommodation that he is entitled to under the ADA.

1. Under the ADA, an accommodation is not necessary if a person can receive "meaningful access" to a public program without an accommodation, and, even then, it must not impose an undue hardship

The ADA is split into three parts: Title I, which relates to employment; Title II, which relates to public entities and programs; and Title III, which relates to private entities that provide goods or services to the public. *Tennessee v. Lane*, 541 U.S. 509, 516-17, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004); 42 U.S.C. §§ 12111-12117 (Title I); 42 U.S.C. §§ 12131-12165 (Title II); 42 U.S.C. §§ 12181-12189 (Title III). Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132.

To state a claim under Title II, a plaintiff must allege 1) that he or she is an individual with a disability; 2) that he or she is otherwise qualified to receive the benefit; 3) that he or she was excluded from participation in, or denied the benefits of, a public entity's services, programs, or activities; and 4) that this exclusion was by reason of a disability. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135-36 (9th Cir.

2001). A person has a disability under the ADA if he or she suffers "a physical or mental impairment that substantially limits one or more of the major life activities" of that person. 42 U.S.C. § 12102(2)(A).

A public entity may be required to provide a disabled person with a reasonable accommodation if the accommodation is necessary to allow the disabled person to receive "meaningful access" to the public entity and its services. *Alexander v. Choate*, 469 U.S. 287, 301-02, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985) (holding that Rehabilitation Act requires accommodation when necessary to ensure that individuals receive "meaningful access" to a public entity and its programs); *Ballard v. Rubin*, 284 F.3d 957, 960 (8th Cir. 2002) (explaining that case law discussing the Rehabilitation Act and the ADA is "interchangeable," since the same basic standards and definitions apply). However, if a disabled person can receive meaningful access to a program *without* an accommodation, a public entity is not required to provide the requested accommodation, even if it would have been beneficial to the disabled person. *See Choate*, 469 U.S. at 301-02.

A public entity need not provide an accommodation if doing so would impose an undue hardship. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287-88, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987). An undue hardship exists if the requested accommodation would impose an

excessive administrative or financial burden on the public entity, or if providing the accommodation would fundamentally alter the basic nature of the services it provides. *Id.*

2. Weems was not entitled to the appointment of counsel as an accommodation under the ADA

Weems's argument that the Board was required to appoint him counsel under the ADA fails, as he has not established that he is a person with a disability as defined by the ADA, that the accommodation he requested was necessary to provide him with reasonable access to the Board, or that the accommodation he requests would not impose an undue administrative and financial burden.

a. Weems has not shown that he is disabled under the ADA

First, Weems has not established that he is disabled under the ADA, as he has not shown that he suffers from a condition that substantially interferes with a major life activity. Weems broadly argues that he suffers from a mental health condition, but he does not identify any particular major life activity that is substantially impaired by that condition. *See, e.g.*, App's Br. at 26. Presumably, he would argue that his condition interferes with his ability to think. However, while the Department does not dispute that thinking is a major life activity, Weems has not established that he has a condition that substantially interferes with

his ability to think. Indeed, the only mental health expert who expressed an opinion regarding Weems's mental capacity expressly noted that Weems did not show any unusual thoughts or behaviors during his mental status examination and that Weems's overall ability to function is "pretty good," notwithstanding that Weems is "not entirely happy." BR 10/13/2011 at 26. It cannot be concluded from this that Weems has a mental impairment that significantly compromises his ability to think.

b. Weems received meaningful access to the Board without an accommodation

Second, Weems has not shown that the accommodation he requests—appointed counsel—was necessary to provide him with meaningful access to the Board. As *Choate* reveals, a disabled person is entitled to an accommodation only if the accommodation is necessary to allow the person to have meaningful access to the services provided by that entity. *Choate*, 469 U.S. at 301-02. Weems received meaningful access to the Board despite proceeding pro se, and, therefore, the Board's alleged failure to accommodate him did not deprive him of his right to receive meaningful access to it.

(1) A failure to accommodate claim cannot succeed where an individual received meaningful access to a public agency

Choate involved a class action brought by a group of Medicaid recipients challenging some changes that Tennessee had recently made to its Medicaid program. *Choate*, 469 U.S. at 289-90. Tennessee, faced with projected costs that would exceed its Medicaid budget, instituted a variety of cost-saving measures, including a provision that reduced the number of inpatient hospital days per year that would be covered under the program from 20 to 14. *Id.* The plaintiffs argued that Tennessee should be required to accommodate disabled persons by eliminating the 14-day limit on inpatient coverage when necessary. *See Choate*, 469 U.S. at 290-91.

The Supreme Court rejected this argument, concluding that an accommodation is mandated only if it is necessary to provide disabled persons with *meaningful access* to a public entity and its programs. *See Id.* at 302-03. The Supreme Court did not dispute that disabled persons were, in fact, more likely to require more inpatient care than the general public. *See id.* at 303. However, it concluded that a disparate impact of this type is not enough to show that there has been a failure to accommodate under the Rehabilitation Act. *See id.* at 303-04. Rather, the test is whether the disabled persons were denied "meaningful access" to the program as a result of the state's refusal to provide their requested accommodation. *Id.* at 302-04. Since Tennessee's Medicaid program, even with its 14-day cap, provided a benefit that was meaningful and

valuable to both disabled and nondisabled persons, the court held that the cap did not deny disabled persons meaningful access to Medicaid, and, therefore, it was not necessary for Tennessee to relax the cap in order to accommodate disabled persons. *Id.*

In rejecting the plaintiff's argument, *Choate* emphasized that the Rehabilitation Act "seeks to ensure *evenhanded treatment* and the *opportunity* for handicapped persons to participate in and benefit from programs" that are subject to that Act. *Choate*, 469 U.S. at 304 (emphasis added). The Rehabilitation Act does not, however, "guarantee the handicapped *equal results* from the provision of state Medicaid . . . ." *Id.* (emphasis added).

The Supreme Court applied a similar standard with regard to a court's duty to accommodate disabled persons in *Lane*, by holding that the ADA provided for a right to meaningful access to the courts. *Lane*, U.S. 541 at 531-33. In *Lane*, the Supreme Court concluded that Title II of the ADA was a valid waiver of the Eleventh Amendment's ban on suits against states "as it applies to the class of cases implicating the accessibility of judicial services." *Id.* at 531. In concluding that the ADA was a proper exercise of congressional authority in that context, *Lane* stressed that it was well-settled that due process requires that an individual receive a meaningful opportunity to be heard. *See id.* at 531-33 (internal

citations omitted). *Lane*'s discussion's of the right to have "meaningful access to the courts" under the ADA is plainly tied to its recognition that there is a constitutional right to receive a "meaningful opportunity to be heard," strongly suggesting that the two rights involve a similar standard, and that an individual is deprived of a meaningful access to the courts when a meaningful opportunity to be heard was denied. *Lane*, 541 U.S. at 531-33. As a corollary, where a meaningful opportunity to be heard was provided, meaningful access to the courts was provided as well. *See Lane*, 541 U.S. at 531-33.

(2) Weems received meaningful access to the Board

Here, Weems contends that he was denied reasonable access to the Board because it did not provide him with an attorney, but he does not support his claim that the opportunity to be heard that he received was not meaningful. As a general matter, a worker who has a mental disability, but who is not mentally incompetent, is capable of meaningfully participating in an appeal, and, therefore, does not require an accommodation in order to have "meaningful access" to the Board. Weems is not incompetent and he was able to, and did, meaningfully participate in his appeal, and he did so without receiving the accommodation he seeks. Since Weems received meaningful access to the

Board and to the service it provides—despite proceeding pro se, and despite having a mental health condition—he has not demonstrated that the Board violated the ADA when it did not appoint him an attorney at public expense.

Indeed, the record shows that Weems understood the basic nature of the proceeding that he was involved in and that he was able to articulate a theory as to why the Department's decision denying him benefits was incorrect. Furthermore, Weems meaningfully participated in the appeal by securing the testimony of a medical expert in support of his appeal and by asking relevant questions of both his medical witness and of the Department's psychiatric expert on cross-examination. BR 9/15/2008 at 64-69, 71-72; BR 10/13/2011 at 28-40. Although Weems ultimately did not prevail on appeal, he established a prima facie case for relief, which is a feat that many pro se litigants who do not suffer from any mental health condition have failed to achieve.

Weems suggests that he did not receive a meaningful opportunity to be heard because the record shows that, during the hearing, he was confused as to the significance of some occurrences and he became frustrated by others. App's Br. at 18-19, 26. However, it can be reasonably expected that nearly any person who proceeds pro se, whether he or she has a disability as defined by the ADA or not, will experience

both confusion and frustration when attempting to navigate the waters of an industrial insurance appeal. That a pro se person failed to litigate his or her case as effectively as an attorney might have done does not establish that he or she was deprived of a meaningful opportunity to be heard.

c. Requiring the Board to appoint counsel for Weems would impose an undue burden upon it

Furthermore, the accommodation Weems requests, appointment of an attorney at public expense, would impose undue administrative and financial burdens on the Board. Under the rule of law Weems proposes, the Board would be required to accommodate not only him, but also any individual suffering from a mental health condition that arguably impacts that individual's ability to successfully advocate his or her case. While the record does not reveal what the probable costs of such appointment of counsel would be, the cost would plainly be considerable. This cost would be ultimately be borne by employers and workers in the state of Washington, as the Board's funding comes from the Department's medical aid and accident funds. RCW 51.52.030 (providing that Board's expenses shall be covered through medical aid fund and accident fund); RCW 51.44.010 (establishing medical aid fund); RCW 51.44.020 (establishing accident fund).

Moreover, in addition to imposing significant economic costs, such a rule of law would impose a heavy administrative burden on the Board. Under Weems's proposed rule of law, the Board would be required to conduct a highly fact-specific inquiry as to whether any given pro se party has a mental health condition that affects the worker's ability to litigate his or her case. The Board would also be required to develop a process for locating attorneys who are both competent to represent workers in workers' compensation disputes and willing to represent workers at what, presumably, would be a relatively modest hourly rate. The Board would also have to develop criteria to determine the scope of the representation of such attorneys, and to develop rules to determine whether to allow an appointed counsel to withdraw from a given case, and whether to seek new counsel for the worker in that instance.

These administrative burdens would be exacerbated by the fact that there are no provisions in the Industrial Insurance Act that either authorize the Board to appoint counsel for otherwise pro se litigants or that give it any guidance as to how to exercise such discretion (assuming it had such discretion). Unlike the courts, which are endowed with broad discretion as to how to execute their constitutional duties, the Board is a "creature of statute," and it has only the powers that are plainly granted to it by its enabling act. *Kaiser Aluminum Chem. Corp. v. Dep't of Labor & Indus.*,

121 Wn.2d 776, 780, 854 P.2d 611 (1993). Thus, it would be problematic for the Board to make ad hoc decisions as to whether, and under what parameters, to appoint counsel for litigants, given the absence of any guidance from the legislature as to how it should address those issues.

3. A right to an attorney as an "accommodation" has only been found when a litigant was mentally incompetent and was involved in a proceeding implicating a fundamental liberty interest

Weems relies heavily on *Franco-Gonzales v. Holder,* 828 F. Supp. 2d 1133 (C.D. Cal. 2011), to support his contention that he was entitled to the appointment of counsel in his Board appeal, but that case is readily distinguishable. *See* App's Br. at 24-26. In *Franco-Gonzales*, the court, relying primarily on its analysis of the statutes and case law governing immigration proceedings, concluded that an immigrant who was mentally incompetent, and who had been held in a correctional facility for several months in anticipation of a future deportation proceeding, should be granted a "qualified representative" as a "reasonable accommodation." *Franco-Gonzales*, 828 F. Supp. 2d at 1136-48.

Zhalezny, one of the plaintiffs in *Franco-Gonzales*, had been diagnosed with undifferentiated schizophrenia. *Id.* at 1136. He suffered from a severe "thought process impairment" and was preoccupied with delusional thoughts, such as the belief that the fluorescent lights in his jail

cell were killing him. *Franco-Gonzales,* 828 F. Supp. 2d at 1136. A mental health expert who was appointed to evaluate him concluded that Zhalezny was incapable of understanding either the basic nature of the immigration proceedings in which he was embroiled or the basic nature of the charges that had been brought against him, and that he was incapable of representing himself. *Id.*

The immigration judge ultimately appointed Zhalezny's father as Zhalezny's representative. *Id.* at 1137-38. However, *Franco-Gonzales* concluded that, under the Fifth Amendment and federal case law, an immigrant facing proceedings such as the ones Zhalezny faced had the right to counsel and could proceed without an attorney only if there was a "knowing and voluntary" waiver of that right. *Id.* at 1144-46. Since Zhalezny was incompetent, he was incapable of knowingly and voluntarily waiving that right. *Id.*

Franco-Gonzales further noted that, under 8 C.F.R. § 1229 (a regulation governing immigration proceedings of this sort), a "qualified representative" *can* include a family member, but only if the immigrant facing that proceeding *requested* that he or she be represented by a family member instead of by an attorney or other representative. *See id.* at 1146-48. Zhalezny had not requested that his father do so, so his father was not a qualified representative under that regulation. *See id.* at 1147.

Based on all of the above, *Franco-Gonzales* ordered that Zhalezny be represented by an attorney, by a law student or graduate acting at an attorney's direction, or by an accredited representative. *Id.* at 1147, 1149-50. The court provided that this representative could either represent Zhalezny pro bono or represent him at the government's expense. *Franco-Gonzales*, 828 F. Supp. 2d at 1149-50.

Although *Franco-Gonzales* noted that Zhalezny had established a prima facie case for a violation of the Rehabilitation Act, *Franco-Gonzales* did not discuss the Rehabilitation Act in detail, nor did it expressly rely on its terms in concluding that Zhalezny should be represented by an attorney or other "qualified representative." *See id.* at 1144-50. On the contrary, as noted, the court's analysis was driven by its conclusion that Zhalezny had a right to counsel that he had not knowingly and voluntarily waived, and by its conclusion that Zhalezny's father could not properly represent him under the plain language of 8 C.F.R. § 1292.1. *See Franco-Gonzales*, 828 F. Supp. 2d at 1144-50.

Here, in contrast, there is no evidence that Weems is mentally incompetent. On the contrary, it is apparent from the record that Weems did understand the basic nature of the proceedings he was involved in and that he was able to, and did, articulate why he should receive relief. In fact, the only mental health expert to have conducted any sort of

evaluation of Weems is Dr. Schneider, who opined that Weems's level of functioning is actually quite good, notwithstanding the fact that he suffers from a dependency on alcohol and cannabis and that he has explosive personality traits. BR 10/13/2011 at 26.

Furthermore, Weems, unlike Zhalezny, does not face either the loss of his physical freedom or the loss of a comparable liberty interest. *See Franco-Gonzales*, 828 F. Supp. 2d at 1145-46. Zhalezny was being detained in a facility in order to facilitate his future deportation, while Weems seeks additional workers' compensation benefits under the Industrial Insurance Act. *See id.* The two cases do not implicate comparable liberty interests. *See In re Grove*, 127 Wn.2d 221, 227-28, 240, 242, 897 P.2d 1252 (1995) (holding that a claimant seeking additional industrial insurance benefits has filed an action involving only "property or financial interests," and does not have a constitutional right to counsel). Nor do the regulations governing immigration proceedings, which were plainly central to *Franco-Gonzales*'s analysis, apply here.

Weems's case is much more analogous to *Hoang Minh Tran v. Gore*, __ F. Supp. 2d __, 2013 WL 878771, at *2-*6 (S.D. Cal. 2013), a case in which the court found that a pro se litigant was not entitled to the appointment of counsel under the ADA, than it is to *Franco-Gonzales*. In *Tran*, the plaintiff was an inmate who filed a complaint alleging that

several of his rights were violated while he was incarcerated in a correctional facility. *Tran*, 2013 WL 878771, at *1-*2. The plaintiff requested the appointment of counsel at public expense as a "reasonable accommodation" under the ADA because he suffered from numerous mental health conditions that prevented him from effectively representing himself, but the court denied the request. *Id.* at *1-*4.

The court concluded that counsel could be appointed for the plaintiff under the ADA only on a discretionary basis. *Id.* at *2-*4. The court concluded that despite having several mental health conditions that may have presented him with "some difficulties" in pursuing his appeal, he was nonetheless capable of articulating his position on appeal and was, thus, not entitled to counsel at public expense. *Id.* at *3-*5.

Notably, the plaintiff submitted several medical records in support of his motion for appointed counsel that documented that he had a history of suffering from several, serious mental health conditions, including "depression, schizophrenia, post traumatic stress disorder, anxiety, and a suicide attempt." *Id.* at *5. The plaintiff also provided documentation of several, significant, medical conditions. *Id.* The medical records established that, with medication, the plaintiff was "relatively stable" from a mental health standpoint. *Id.* However, the court acknowledged that the claimant had "some difficulties" as a result of his medical conditions,

including sometimes hearing voices when he was alone, having a poor ability to cope with stress, suffering distress that "negatively affect[s] his daily functioning," having trouble organizing his appointments and information, and having "flashbacks" of the time when his family narrowly escaped the Vietcong. *Tran*, 2013 WL 878771, at *5.

In denying the plaintiff's request for appointed counsel, the court emphasized that the claimant was not mentally incompetent and that the record showed that he understood the basic nature of the proceedings and was able to articulate arguments in support of his position. *Id.* at *3-*6. The court noted that when the plaintiff faced sanctions for failure to comply with written discovery requests, he asserted that he had had emotional anxieties and panic attacks that prevented him from timely completing the requests. *Id.* at *6. However, rather than viewing the plaintiff's anxiety and panic attacks when attempting to respond to discovery as evidence that he was disabled and unable to represent himself, the court viewed his ability to articulate an explanation for his late discovery responses as evidence that he was mentally competent and did not require the appointment of counsel. *Id.* at *6.

When *Franco-Gonzales* is read in conjunction with *Tran*, the rule that emerges is that the appointment of counsel at public expense is only appropriate as an accommodation under the ADA or the Rehabilitation

Act when an individual is not only disabled but *mentally incompetent* and when the case involves a fundamental liberty interest, such as a loss of physical freedom. Since the Board exclusively hears appeals that involve exclusively financial interests, it could not ever be properly required to appoint counsel at public expense as an accommodation under the ADA, and, thus, it did not err when it did not appoint counsel for Weems. Furthermore, since Weems is mentally competent, he did not require an accommodation in order to receive meaningful access to the Board. *See Tran*, 2013 WL 878771, at *2-*6.

B. Weems Is Not Entitled To The Appointment Of Counsel As A Reasonable Accommodation Under The WLAD, Because Such An Appointment Is Not Necessary To Provide Him With A Comparable Service

The WLAD, like the ADA, addresses both a disabled person's right to employment and his or her right to access places of public assemblage or accommodation.[3] RCW 49.60.215 (prohibiting discrimination in right to place of public assemblage or accommodation); RCW 49.60.180 (prohibiting discrimination in the workforce). RCW 49.60.215 prohibits discrimination in public places:

[3] The WLAD differs from the ADA in some details, but has the same basic aim, of preventing discrimination against the disabled. Therefore, Washington courts treat ADA case law as persuasive authority when interpreting the WLAD, but they are not bound by it. *Wash. State Comm. Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 190, 293 P.3d 413 (2013).

> [I]t shall be an unfair practice for any person . . . to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of . . . the presence of any sensory, mental, or physical disability . . . ."

In *Fell*, the seminal case governing an individual's right to receive a reasonable accommodation from a public entity, the Washington Supreme Court held that a disabled person is only entitled to a reasonable accommodation under the WLAD if the accommodation is necessary to ensure that the public agency provides him or her a service that is "comparable" to the service provided to non-disabled persons. *Fell*, 128 Wn.2d at 630-637. Furthermore, as with the ADA, a public entity does not need to provide an accommodation under the WLAD if it would impose an undue burden on the public entity. *See Snyder v. Medical Service Corp.*, 145 Wn.2d 233, 257, 35 P.3d 1158 (2001) (stating that employer has obligation to reasonably accommodate employee, unless employer establishes that doing so would impose an undue hardship).

Fell expressly rejected the argument that the WLAD demands that a public entity provide all "reasonably possible" accommodations that are necessary to ensure "full enjoyment" of its services by disabled persons.

Fell, 128 Wn.2d at 630. *Fell* explained that the legislature enacted the WLAD "to remove barriers to *equal opportunity* in our society, not to entitle certain protected classes to some unspecified type and unlimited level of services." *Fell*, 128 Wn.2d at 631 (emphasis in original). A failure to accommodate claim is only valid if the failure to accommodate constitutes discrimination against the disabled rather than a refusal to provide disabled persons services in excess of the "designated services" provided to nondisabled persons. *Id.* at 630-32.

Fell explained that since the WLAD is an anti-discrimination statute, it could not be reasonably construed to create an entitlement to services that go beyond the services that a public entity provides to non-disabled persons. *Id.* at 631-32, 639-40. *Fell* noted that the question of whether disabled persons should receive services *in excess* of the services provided to non-disabled persons was "more appropriately left to the legislative and executive branches," and such a right could not properly be found under the WLAD. *Id.* at 631.

Here, the designated service the Board provides is simply an opportunity to be heard. RCW 51.52.050. The Board does not have the authority under the Industrial Insurance Act to appoint an advocate to act on the behalf of a litigant who appears before it, and, thus, the

appointment of paid advocates for litigants is not a designated service that the Board provides.

Weems is not entitled to the appointment of counsel under the WLAD for three reasons. First, notwithstanding his mental health condition, Weems received a service comparable to the service the Board provides to nondisabled litigants without receiving the extraordinary remedy of appointed counsel. As explained above, Weems was provided with a meaningful opportunity to be heard, as his mental health conditions did not prevent him from understanding the basic nature of the proceedings he was involved in nor from articulating a theory as to why he was entitled to relief, nor from asking relevant questions of the witnesses. Since Weems received a service comparable to the service the Board provides to other pro se claimants, he was not entitled to further accommodation. *See Fell*, 128 Wn.2d at 631-32, 635-36.

Second, if the Board were to appoint Weems counsel based on his disabled status, it would be providing him a service—the appointment of a paid advocate—that is different in kind from the services it provides to all other litigants who appear before it. The appointment of counsel is not an accommodation that merely allows a disabled person to *participate* in an appeal, in the same way that an auxiliary aid (such as a sign language interpreter) allows a hearing-disabled person to participate in a hearing.

Rather, it is the appointment, at public expense, of an individual who would then have a legal and professional duty to *advocate for* the disabled person's interests. Since the appointment of paid advocates is not one of the designated services the Board provides to appellants, the Board could not properly be required to provide such a service to Weems under the guise of reasonably accommodating him, as this is a service different in kind from the services the Board provides to other litigants who appear before it. *See Fell*, 128 Wn.2d at 635-36.

Third, as noted above with regard to the ADA, it would be unduly burdensome, both financially and administratively, for the Board to appoint counsel as an accommodation to disabled appellants who appear before it, particularly in the absence of any direction from the legislature as to what parameters should govern such appointments of counsel. Therefore, such an accommodation would be improper under the WLAD as well. *See Snyder*, 145 Wn.2d at 257.

C. Weems Is Not Entitled To Counsel Based On A Right To Due Process, Because He Does Not Face The Loss Of A Fundamental Liberty Interest

Although Weems makes vague references to the constitutional right to due process, he offers no legal argument demonstrating that a violation of his constitutional rights has occurred. App's Br. at 19, 33-35. Naked castings into the constitutional sea do not merit consideration by a

court. *State v. Blilie*, 132 Wn.2d 484, 493 n.2, 939 P.2d 691 (1997) (quoting *U.S. v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

In any event, Weems could not prevail in arguing that he has a constitutional right to counsel. In *Grove*, the Washington Supreme Court held that a pro se litigant does not have the right to an attorney in a workers' compensation proceeding because a workers' compensation proceeding does not implicate a fundamental liberty interest comparable to the loss of physical freedom or the termination of parental rights. *Grove*, 127 Wn.2d at 227-28, 240, 242.

Weems attempts to distinguish *Grove* by arguing that *Grove* only involved an injured worker's attempt to receive additional benefits, while Weems contends that he has a fundamental right to counsel. App's Br. at 33-34. Weems's attempt to distinguish *Grove* fails. Weems, like the worker in *Grove*, contends that he has a fundamental right to have an attorney appointed for him, but, also like the worker in *Grove*, the ultimate issue raised by his appeal is whether he should receive additional industrial insurance benefits. *See Grove*, 127 Wn.2d at 227-28, 240, 242. Thus, as in *Grove*, the interest at stake in this appeal is a financial one, and, as in *Grove*, there is no constitutional right to the appointment of counsel at public expense. *See id.*

D. Even Assuming That A Right To An Accommodation Could Hypothetically Be Found, Weems Cannot Be Heard To Complain That The Board Failed To Accommodate Him, Because He Did Not Request An Accommodation From It

In order to show that the Board failed to provide him a reasonable accommodation under the ADA, Weems must show that he requested an accommodation from it. *See Ballard*, 284 F.3d at 961-62 (concluding that worker's argument that employer failed to reasonably accommodate his disability failed because he had not provided employer with reasonable notice that he had requested an accommodation). While it is not necessarily fatal to a failure-to-accommodate claim for the plaintiff to have not made an express and unequivocal request for accommodation, the "notice must nonetheless make clear that the employee wants assistance for his or her disability . . . . The employer must know *both* of the disability and *the employee's desire for accommodations for that disability*." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999) (emphasis added). Here, Weems did not request an accommodation from the Board when he appeared before it, and, therefore, his argument that the Board failed to accommodate him necessarily fails. *See Ballard*, 284 F.3d at 961-62.

As *Ballard* shows, an employer has no duty to speculate about whether an accommodation is necessary where one has not been

requested, even if it is obvious that the worker has a medical condition that likely qualifies as a disability under the ADA or a similar federal law. *Id.* at 959, 961-62. In *Ballard*, an employee who was required to use leg braces and crutches as a result of having contracted polio as a child alleged that his employer failed to reasonably accommodate his disability. *Ballard*, 284 F.3d at 958-59. However, *Ballard* held that the employee had failed to give the employer sufficient notice that he was requesting an accommodation for his disability, notwithstanding that the employer had clear notice of the fact that the worker had a disabling condition. *See Id.* at 961-62. Indeed, the employer in that case was not only aware of the worker's disabling condition, but it had also received a complaint from the worker in which he alleged that it had failed to reasonably accommodate his disability. *Id.* However, *Ballard* concluded that this could still not be viewed as a request for accommodation, and, therefore, the employee's failure-to-accommodate claim failed. *See id.* at 961-62.

As *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998), explains, "There is no question that the EEOC [Equal Employment Opportunity Commission] has placed the initial burden of requesting an accommodation on the employee. The employer is not required to speculate as to the extent of the employee's disability or the employee's need or desire for an accommodation."

Similarly, under the WLAD, an entity must receive reasonable notice that a person has a disability that requires accommodation before the entity can be found to have failed to reasonably accommodate that person. *See Lindblad v. Boeing Co.*, 108 Wn. App. 198, 203-04, 31 P.3d 1 (2001) (stating that to make a prima facie case for a claim that employer failed to accommodate plaintiff, plaintiff must present evidence that "he notified [his employer] that he had a disability that required accommodation . . . ."); *Maxwell v. Dep't of Corrections*, 91 Wn. App. 171, 179-80, 956 P.2d 1110 (1998) (rejecting worker's argument that employer, who knew worker had diabetes, was required to investigate the worker's diabetes and determine the extent of his disability from it).

Here, Weems never requested the Board provide him an accommodation. In contending that he did make such a request, Weems relies on a statement Ms. Weems made during a conference to the effect that she believed that she and Weems "do need an attorney, I'm sure." App's Br. at 17-18. However, Ms. Weems neither stated nor implied that the Board should provide them with one, nor did she state that the Board should otherwise accommodate Weems. See BR 6/3/2008 at 28-29. Ms. Weems made the statement that she and Weems "do need" an attorney shortly after she asked the IAJ a question about whether they should provide the Board with notice in the event that they retained

counsel. BR 6/3/2008 at 27-29. In this context, the reasonable inference is that Ms. Weems was merely expressing the belief that it would be necessary for her and Mr. Weems to retain an attorney in order to prevail on appeal.

Furthermore, Weems never argued that he should have been appointed an attorney at any time while his case was in front of the Board. It was only once Weems's case had reached superior court that Ms. Weems's statement was characterized as a request for an accommodation under the ADA or the WLAD. As noted, however, Ms. Weems's statement cannot be reasonably interpreted as such a request.

In addition to not having clearly requested an accommodation, Ms. Weems also did not clearly assert that Weems was mentally disabled. Although Ms. Weems referenced Weems's "mental capacity" to represent himself, she did so in the context of comparing his ability to represent himself with the assistant attorney general's ability to represent the Department. BR 6/3/2008 at 28-29. A worker is not mentally disabled merely because the worker is not capable of representing his or her interests as ably as a competent attorney would be capable of doing. *See Tran*, 2013 WL 878771 *3 (ruling that fact that litigant alleging ADA violation is not capable of representing himself as well as an attorney

could does not warrant the appointment of counsel). Therefore, mere notice that a worker is not capable of representing himself or herself as ably as an attorney cannot be considered notice that a worker has a mental disability that requires accommodation. *See Tran*, 2013 WL 878771 *3.

Weems also argues that the Board had notice that an accommodation was necessary because the superior court, in a previous round of litigation, made a finding that Weems had a mental health condition that "effects" [sic] his ability to represent himself. *See* App's Br. at 18; BR 66. However, as noted, mere notice of the presence of a disability does not constitute notice that a request for accommodation has been made: there must also be notice indicating that the disabled person is seeking an accommodation of some kind. *See Ballard*, 284 F.3d at 961-62; *Lindblad*, 91 Wn. App. at 203-04. The superior court's order did not provide the Board notice that Weems was requesting that his disability be accommodated, nor that an accommodation was necessary.

Weems argues that under *Duvall*, a court—and, by extension, the Board—is required to conduct a fact-specific inquiry as to what accommodation is necessary whenever it has notice that a litigant who has appeared before it might be disabled. App's Br. at 15-16 (citing *Duvall*, 260 F.3d at 1139). However, *Duvall* did not so hold. *See Duvall*, 260 F.3d at 1136-37, 39. In *Duvall*, the plaintiff who alleged that the Kitsap

County Court had failed to reasonably accommodate him had expressly told the court both that he had a disability (a severe hearing impairment) and that he was requesting accommodation for that disability. *Id.* at 1129-30. Thus, the *Duvall* Court had no occasion to decide, and it did not decide, whether a court is required to investigate whether a litigant might need accommodation whenever it appears that the litigant might be disabled. *See id.* at 1129-32, 1136-37.

Furthermore, the language in the *Duvall* opinion that Weems relies upon does not support his argument. App's Br. at 16 (citing *Duvall*, 260 F.3d at 1139). In *Duvall*, one of the defendants' arguments was that the accommodation the plaintiff requested would not have been feasible. *Id.* at 1136-37. The *Duvall* Court responded to that argument by noting "[w]e have observed that 'mere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement; the Acts create a duty to gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary . . . .'" *Id.* at 1136-37, 1139. It was in this context that the *Duvall* Court later noted that the law is settled that "upon receiving a request for accommodation" an employer or other entity subject to the ADA is required to make a fact-specific inquiry to determine what form of accommodation is needed. *Id.* at 1139-40.

Thus, under *Duvall*, once a person has requested an accommodation under the ADA, an entity that is subject to the ADA cannot refuse to provide the accommodation based on an unsupported assumption that the accommodation is not feasible. *See Duvall*, 260 F.3d at 1139-40. However, there is no duty to determine what accommodation is necessary until a request for accommodation has been made, and *Duvall* does not suggest otherwise. *Compare Ballard*, 284 F.3d at 961-62 *and Lindblad*, 108 Wn. App. at 203-04 *with Duvall*, 260 F.3d at 1139-40.

E. Assuming Arguendo That Weems Required An Accommodation, The Board Provided A Reasonable Accommodation To Him

As noted, Weems did not request an accommodation from the Board while his case was before it, and, therefore, he cannot prevail in showing that the Board failed to reasonably accommodate him. However, assuming arguendo that Weems did request accommodation from the Board and the ADA or WLAD required such accommodation, the Board reasonably accommodated him by ensuring that the industrial appeals judge asked questions of Weems's witnesses that were sufficient to create a factual record upon which the judge could make a reasoned decision.

The IAJ assigned to the appeal asked extensive questions of Weems's medical witness, Dr. Wagner, to ensure that a full and complete record was made. BR 9/15/2008 at 10-72. The IAJ asked Dr. Wagner to

review all of his records that related to the relevant time period, and the IAJ asked Dr. Wagner numerous questions regarding each of the relevant medical records. BR 9/15/2008 at 10-72. The IAJ also asked Dr. Wagner, specifically, whether Weems's industrially-related conditions had become aggravated during the relevant time period, and the IAJ addressed ambiguities in the doctor's responses by asking further questions in an attempt to clarify which conditions, if any, the doctor believed to be related to Weems's injury, and whether any of the related medical conditions had become aggravated during the applicable time period. BR 9/15/2008 at 10-72.

Weems argues that, under *Franco-Gonzales*, assistance by a judge is inadequate to constitute a reasonable accommodation of a disabled litigant. App's Br. at 24-26 (citing *Franco-Gonzales*, 828 F. Supp. 2d at 1147-48). However, as noted, *Franco-Gonzales* is readily distinguishable, as it involved a plaintiff who was not merely disabled but mentally incompetent, and it involved a plaintiff who had a fundamental liberty interest at issue. *See Franco-Gonzales*, 828 F. Supp. 2d at 1144-50. Here, in contrast, Weems is not facing a loss of a fundamental liberty interest and he is not mentally incompetent. Therefore, an accommodation that was not sufficient to address the difficulties that were present in *Franco-Gonzales* was more than ample here. *Cf. id.*

F. Weems Cannot Be Found Entitled To An Attorney Based On An Alleged Difficulty Of Obtaining Counsel On A Contingency Basis

Finally, Weems argues that he could not likely obtain an attorney on a contingent basis, as it is unlikely that he would receive a financial reward that would be large enough to make his case enticing to an attorney, at least if the attorney represented him on a contingent basis. App's Br. at 29-35. Weems does not argue that it would have been impossible to obtain counsel on a contingent basis, nor does he argue that, if this were impossible, this would serve as an independent legal basis for concluding that he is entitled to the appointment of counsel at public expense. *See* App's Br. at 29-35. Since Weems does not argue that his probable difficulty in obtaining counsel on a contingent basis makes him entitled to the appointment of counsel by the Board, and since he has failed to show that either the ADA or the WLAD makes him entitled to such an appointment of counsel, his argument that it would be difficult for him to obtain counsel on that basis is unavailing.

G. Even Assuming Weems Prevails In This Appeal, He Is Not Entitled To An Award of Attorney Fees Under RCW 4.84.350

Weems argues that he is entitled to an award of reasonable attorney fees under RCW 4.84.350. App's Br. at 40. For the reasons discussed above, Weems should not prevail, and he should not receive an

award of attorney fees. However, even assuming this Court concludes that the Board should have appointed an attorney for Weems under the ADA or the WLAD, Weems would still not be entitled to an award of fees under RCW 4.84.350.

In *Cobra Roofing Services, Inc. v. Department of Labor & Industries*, 157 Wn.2d 90, 98-99, 135 P.3d 913 (2006), the Supreme Court held that RCW 4.84.350 only authorizes an award of fees when the case involves a court appeal that was authorized by the Administrative Procedures Act and the judicial proceedings are governed by the APA. Since, in *Cobra Roofing*, the appeal involved an alleged WISHA violation, and since appeals in WISHA matters are not brought under the APA, RCW 4.84.350 does not apply to such appeals and cannot support a request for attorney fees. *Cobra Roofing*, 157 Wn.2d at 98-99.

Here, similarly, Weems's appeal to this Court is authorized and governed by the Industrial Insurance Act, not the APA. Although Weems seeks relief based on the ADA and the WLAD, the statute that actually authorizes his appeal is the Industrial Insurance Act. Furthermore, Weems's arguments based on the ADA and the WLAD do not have any nexus, substantive or procedural, to any provision of the APA. Therefore, Weems is not entitled to an award of fees under RCW 4.84.350, even assuming that he prevails. *See Cobra Roofing,* 157 Wn.2d at 98-99.

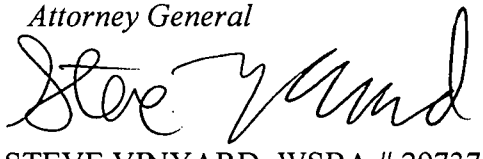
Weems's argument also fails because the Department's and Board's positions in this case are substantially justified. Where a state's position on appeal is one that "could satisfy a reasonable person," its position is substantially justified, and no fee award is proper, even if a court concludes on appeal that the agency was incorrect. *Alpine Lakes Protection Soc'y v. Dep't of Natural Res.*, 102 Wn. App. 1, 18-19, 979 P.2d 929 (1999). Here, the Department and Board have presented arguments as to why Weems is not entitled to the appointment of counsel by the Board that could satisfy a reasonable person. *See id.*

VII. CONCLUSION

For the reasons discussed above, the Department requests that this Court affirm the decision of the superior court.

RESPECTFULLY SUBMITTED this 7 day of August, 2013.

ROBERT W. FERGUSON
Attorney General



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NO. 44713-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DALE WEEMS,
Appellant,
v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent

DECLARATION OF SERVICE

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent and this Declaration of Service to all parties on record as follows:

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