NO. 44713-4-II

COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON

DALE WEEMS,

Appellant,

v.

WASHINGTON BOARD OF INDUSTRIAL INSURANCE APPEALS,

Respondent.

BRIEF OF RESPONDENT BOARD OF INDUSTRIAL INSURANCE APPEALS

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I. INTRODUCTION

Mr. Weems is a worker who appeared before an industrial appeals judge of the Board of Industrial Insurance Appeals (Board) for a hearing on whether his 1973 industrial injury claim should be reopened. Mr. Weems asserts on appeal that he requested and was improperly denied counsel at public expense for the Board hearing. Mr. Weems contends that the Board must make counsel available to mentally disabled workers at public expense. He also claims that the Board must hold a hearing to determine whether counsel at public expense is warranted every time a worker claims a mental disability.

This court should decline to adopt such sweeping holdings because the Board's current procedures provide ample options for accommodation. Declining Mr. Weems' request also respects the legislature's prerogative to determine, absent a constitutional right to counsel, in what circumstances public funds should be expended to provide counsel and in what circumstances other flexible accommodations suffice. The legislature has not specifically authorized the Board to appoint counsel at public expense nor has it appropriated funding for that purpose.

The Board's existing procedures offer multiple options for accommodating workers who assert a mental or cognitive disability. First, the Board's statutes and rules encourage attorneys to represent workers on

a contingency basis, which makes it easier for workers to obtain counsel even when they cannot afford an hourly fee. Second, the Board's statutes and rules allow for lay representation by paralegals, union representatives, guardians, and others. Third, the Board's rules allow for lay assistance by any person of the worker's choosing. Fourth, the Board's statutes, rules, and significant decisions impose a duty on industrial appeals judges to assure the record is fully developed so the case can be fairly decided. The judges can question witnesses, assure that relevant evidence is not improperly excluded, and even subpoena and present evidence, including expert evidence, at the Board's expense. Industrial appeals judges have much more flexibility in accommodating workers with disabilities than is available in superior courts.

In the vast majority of cases, by exercising the options already available to it under its statutes and rules, the Board can accomplish what is required by the Americans with Disabilities Act (ADA) and the Washington Law Against Discrimination (WLAD): access, through reasonable accommodation, for mentally disabled workers that is comparable or equal to that provided to other workers.[1] Requiring appointment of counsel at public expense, or a separate hearing to evaluate appointment of counsel at public expense in every case where a worker

[1] The ADA is codified primarily at 42 U.S.C. §§ 12101 through 12213. The WLAD is codified at RCW 49.60.

claims a mental disability, would exceed any requirement of the these statutes. Therefore, this court should decline to adopt the sweeping holding that Mr. Weems requests. Instead, this court should maintain the Board's ability to address access for mentally disabled workers on a case-by-case basis using the many options already readily available.[2]

II. ISSUE ON REVIEW

In light of the procedural safeguards provided in statute, regulation, and practice, must the Board provide a party an attorney at public expense, or hold a specific hearing to evaluate a request for an attorney at public expense, in every case where a party asserts that mental disability prevents him from adequately representing himself?

III. STATEMENT OF THE CASE

A. The Role Of The Board Of Industrial Insurance Appeals In This Case Is Limited To Addressing The Board's Procedures

The basic administration of the Industrial Insurance Act in Washington is performed by the Department of Labor and Industries (Department). *See* CP at 140, n.1; *Kaiser Aluminum Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 781, 854 P.2d 611 (1993). The Board of Industrial Insurance Appeals (Board) is a separate and independent,

[2] The Board's only role in this appeal is to present arguments regarding the adequacy of the Board's process, while the Department of Labor and Industries addresses the specific facts of this case. Thus, the Board takes no position as to whether Mr. Weems adequately requested accommodation in this case or, if so, whether the industrial appeals judge appropriately accommodated Mr. Weems in light of his claimed disability.

quasi-judicial administrative agency whose function is to hear appeals from decisions the Department makes. *See* CP at 140, n.1; *Kaiser Aluminum*, 121 Wn.2d at 781 (citing RCW 51.52.050).

In most cases, quasi-judicial agencies like the Board do not play a role in appeals of their rulings. *See* CP at 140, n.1; *see generally Kaiser Aluminum*, 121 Wn.2d at 781-82. One important exception, however, is where the quasi-judicial agency has an interest in preserving the integrity of its decision-making process. In such circumstances, the Board can participate in an appeal to the extent that its procedures are at issue. *See* CP at 140, n.1; *Kaiser Aluminum*, 121 Wn.2d at 782. Accordingly, the Board participates in this appeal only to the extent necessary to explain what is required of the Board where a party before it asserts he or she has a mental disability that requires accommodation.

The Board does not have a partisan interest in the outcome of specific cases, and therefore, it does not address the particular facts of this case, including for example, whether an assertion of disability and request for accommodation were adequately made here. *See id.* at 786. Such fact-specific arguments are left to the Department, though if this court determines that Mr. Weems did not adequately assert a disability or request an accommodation, it need not reach the issues addressed in this brief.

B. The Superior Court Ultimately Concluded That The Board Had No Additional Duty To Appoint Counsel

The superior court initially applied General Court Rule 33 (GR 33) to the Board of Industrial Insurance Appeals proceedings, concluding the rule required the Board to "undertake a fact-finding investigation to determine what constitutes a reasonable accommodation." CP at 136. Because the superior court ruling affected the Board's procedures, the Board appeared and moved for reconsideration. CP at 177-78, 140. The Board argued that GR 33 had recently been amended to remove the very language the superior court relied upon. CP at 141-42.

The Board also cited Washington Supreme Court holdings that, absent a constitutional right to counsel, the legislature must decide whether public funds should be expended to provide counsel in administrative proceedings. CP at 143-44. In addition, the Board relied on the Supreme Court's specific holding that there is no constitutional right to counsel before the Board. CP at 143-44.

Finally, the Board pointed to existing protections available in Board proceedings, including the requirement that industrial appeals judges assist all parties in fully developing the record. For example, industrial appeals judges must participate in fair and impartial questioning

of witnesses, and may independently develop and present evidence at the Board's expense if necessary to fairly resolve the appeal. CP at 143-44.

The superior court granted the Board's motion for reconsideration, concluding that "there is no requirement presently in constitution, statute, or rule requiring the Board to" "undertake a fact-finding investigation to determine" whether the Board should appoint counsel in this case. CP at 203-04. Mr. Weems appealed.

IV. SUMMARY OF ARGUMENT

The Board's statutes and rules provide a wide range of options for accommodating workers appearing before the Board who have a mental disability. And because the Board's hearings are administrative in nature, many of these options are available even though they would not be permitted in superior court. For example, the Board's statutes and rules permit lay representation, lay assistance, and active participation by the industrial appeals judge in fairly developing the record.

The Washington Supreme Court has held that there is no constitutional or statutory right to counsel at public expense when a party is appearing before the Board. The Court has also emphasized that absent a constitutional right to counsel, it is the legislature's prerogative to determine when such an entitlement exists and how it should be funded.

Mr. Weems relies on the ADA and the WLAD as the source of his asserted right to counsel at public expense and/or a hearing on whether he is entitled to counsel at public expense. But these statutes do not entitle him to either. They require only that the Board provide access to its hearing process, through reasonable accommodations, that is comparable to or equal to that provided to non-disabled workers. The Board routinely and effectively meets these equal-access requirements by exercising the options already available. Even assuming for the sake of argument that there could be a rare case in which these options might prove inadequate, this court should decline to adopt the sweeping holding that Mr. Weems suggests.

V. ARGUMENT

A. Standard Of Review

An appellate court reviews a superior court's legal conclusions, including the scope of a constitutional or statutory duty, de novo. *Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997); *see also State v. Merritt*, 91 Wn. App. 969, 973, 961 P.2d 958 (1998). However, the courts must give substantial weight to an agency's interpretation of its governing law, and the Department and the Board's interpretations of the Industrial Insurance Act are entitled to great deference. *Department of Labor & Indus. v. Allen*, 100 Wn. App. 526,

530, 997 P.2d 977 (2000). Therefore, this court should review de novo the legal question of the scope of the Board's duty to conduct fact-finding or appoint counsel at public expense, but the Board's interpretation of the Industrial Insurance Act should receive deference.

B. The Board's Current Procedures Provide A Broad Continuum Of Options For Assisting Unrepresented Parties With Disabilities

Washington statutes, the Board's regulations, and the Board's significant decisions discussing the duties of the industrial appeals judges together provide a broad continuum of options for assisting parties with disabilities when they appear before the Board.

1. The Board's statutes and rules encourage representation by facilitating reasonable contingency fee agreements.

The legislature contemplated that attorneys would represent parties before the Board on a contingency basis, and protections exist in both statute and regulation to maintain reasonable contingency fees. For example, RCW 51.52.120 gives the Board the authority to fix a reasonable contingency fee when requested by a party or an attorney.[3]

The Board's rules address such fees in more detail, acknowledging that contingency fee arrangements are a "prevalent practice" before the

[3] The purpose of RCW 51.52.120 is to prevent the charging of unreasonable fees; it is not to assess fees against the Department for proceedings before the Board. *See Harbor Plywood Corp. v. Dep't of Labor and Indus.*, 48 Wn.2d 553, 558-59, 295 P.2d 310 (1956).

Board. WAC 263-12-165(2)(e)(vii). The Board's rules protect workers by establishing ranges of reasonable contingency fees, overall from 10 to 30 percent. WAC 263-12-165(3). Even where the result of the Board's review is not additional compensation, but instead that the worker is relieved of the need to pay for medical benefits, the Board's rules provide for a fee of 10 to 25 percent of the amount for medical benefits that the worker will no longer need to pay. WAC 263-12-165(3)(c).

Thus, contingency attorney fee arrangements are a "prevalent" practice before the Board, and the Board facilitates this practice through its regulations setting reasonable fees for myriad circumstances before the Board. Contingency fees serve to encourage attorney representation, even where a party cannot afford to pay an attorney's hourly rates. *See, e.g.*, *Gisbrecht v. Barnhart*, 535 U.S. 789, 806, 122 S. Ct. 1817, 152 L. Ed. 2d 996 (2002) (quoting report to Congress about contingency fee arrangements in Social Security proceedings, which explained that while the contingency fee method was "hardly flawless," the Social Security Administration can "'identify no more effective means of ensuring claimant access to attorney representation'").

2. The Board's rules allow lay representation by paralegals, union representatives, guardians, and others.

Unlike the superior court, the Board's rules allow lay representation. WAC 263-12-020. Paralegals who are supervised by a licensed attorney can represent any party before the Board and be paid to do so. WAC 263-12-020(3)(d). Union representatives can appear before the board on behalf of workers. WAC 263-12-020(3)(a). And any other lay representative can appear on behalf of a party so long as he or she does not charge a fee. WAC 263-12-020(3).

In cases where a party is incapacitated and a full or limited guardian has been appointed under RCW 11.88, the guardian is permitted to represent his or her ward's interests before the Board. WAC 263-12--020. Moreover, while an industrial appeals judge does not have the authority to determine a party's capacity or appoint a guardian, he or she can certainly grant any continuance necessary to have a guardian or limited guardian appointed under RCW 11.88 if it becomes clear that a guardian or limited guardian is needed. *See* WAC 263-12-045 (granting judges the authority to rule on motions regarding procedure and scheduling), -095 (authorizing prehearing orders regarding scheduling).

3. The Board's rules allow lay assistance for parties appearing pro se.

Furthermore, any unrepresented party "may be accompanied, both at [the prehearing] conference and at hearing, by a lay person of his or her choosing who shall be permitted to accompany the party into the conference or hearing room and with whom he or she can confer during such procedures." WAC 263-12-020(1)(c). Thus, a disabled worker can receive assistance during the hearing from a family member, friend, caseworker, or any other person of the worker's choosing. *See id.* These assistants can help in innumerable ways including helping a disabled worker to keep track of proceedings; taking notes; repeating rulings, questions, or testimony in language the worker can easily comprehend; assisting with development of arguments; and providing emotional support. Such assistance is another way that the needs of a mentally disabled worker can be accommodated.

4. The Board's statutes, rules, and significant decisions require impartial assistance from the judge to fully develop the record.

Also, unlike in superior court, the Board's rules specifically provide that the parties are entitled to impartial assistance from the assigned industrial appeals judge presiding over the Board proceeding. WAC 263-12-020(1)(d). Such assistance must 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." WAC 263-12-020(1)(d). All parties appearing pro se must be informed of the burden of proof required to establish the right or relief being sought. *Id.*

The legislature has also authorized the Board to secure evidence in addition to the evidence presented by the parties, as necessary to fairly and equitably decide the appeal. RCW 51.52.102. The industrial appeals judge has the authority to issue subpoenas on his or her own motion; interrogate witnesses impartially to fully develop the facts necessary to fairly and adequately resolve the appeal; and independently secure evidence beyond that presented by the parties, including an expert medical or vocational evaluation at the Board's expense. WAC 263-12-045(2).

The rules repeat that the industrial appeals judge has the authority, after the parties have rested, to present additional evidence. WAC 263-12-120. The industrial appeals judge must present the evidence impartially, and must provide all parties the opportunity to cross examine and present rebuttal evidence. RCW 51.52.102; WAC 263-12-120.

In its published decisions, the Board has emphasized the importance of the industrial appeal judge's duty to fully develop the record. The Board has held that "when the party with the burden of proof

is unrepresented, [the industrial appeals judge] *must* ask those questions necessary to elicit a prima facie case." CP at 173 (BIIA Significant Decision, *Evangelina Acevedo*, Docket No. 08 15613, at 7) (emphasis added), *available at* http://www.biia.wa.gov/SignificantDecisions/085613.htm).

Upon an objection about the admissibility of evidence, the industrial appeals judge must ascertain whether evidence presented by an unrepresented party is admissible under an evidentiary exception, whether or not the unrepresented party recognizes or raises the exception. *See id.* This specific duty arises from the general duty to ensure appeals are decided fairly and equitably. *Id.*

And when an unrepresented party is struggling to elicit expert testimony, an industrial appeals judge must, in a fair and impartial manner, assist any party in obtaining relevant testimony from witnesses. CP at 173-74 (*Evangelina Acevedo*, Docket No. 08 15613, at 8). So long as an industrial appeals judge's questions are asked to elicit facts, rather than to advocate for one side or the other, the Board has approved the judge taking the lead in questioning, even where the judge asked hundreds of questions. CP at 174-75 (*Evangelina Acevedo*, Docket No. 08 15613, at 9-10).

The Board has held that an industrial appeals judge should refrain from cross-examining witnesses, but once a party has conducted cross examination, the judge should ask clarifying questions, or questions "pertaining to matters uniquely within the judge's purview, like an expert's qualifications." CP at 176 (*Evangelina Acevedo*, Docket No. 08 15613, at 11).

In sum, Board proceedings are substantially more flexible than superior court proceedings with regard to assistance that can be provided to parties with disabilities. Attorneys are encouraged to represent parties at the Board through reasonable contingency fees. Non-attorneys, including paralegals, union representatives, and guardians are permitted to represent parties before the Board. Parties appearing before the Board pro se are permitted to bring a person of their choosing to assist them during the proceedings. And perhaps most importantly, the Board has made it clear that its industrial insurance judges have a duty to assist pro se parties, in a fair and impartial manner, to assure that they have elicited relevant testimony. Industrial insurance judges can even secure and present evidence in a fair and impartial manner, and can obtain and present expert medical or vocational testimony at the Board's expense.

Perhaps because all of these options are currently available, the legislature has not specifically authorized expenditure of public funds to provide counsel.

C. There Is No Right To Counsel At Public Expense In Industrial Insurance Appeals, And The Legislature Has Not Directed Or Authorized The Board To Appoint Or Expend Public Funds To Pay For Counsel; Nor Has It Provided Funding To Do So

To the extent that Mr. Weems asserts some constitutional right to counsel before the Board, he is simply incorrect. The Washington Supreme Court has held that there is no constitutional right to legal representation unless a physical liberty interest is threatened. *In re Grove*, 127 Wn.2d 221, 237, 240, 897 P.2d 1252 (1995) (citing *Lassiter v. Dep't of Soc. & Health Servs.*, 452 U.S. 18, 25, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)). Specifically in workers' compensation cases, "where . . . the interest at stake is only a financial one, the right which is threatened is not considered 'fundamental' in the constitutional sense," there is no constitutional right to counsel in worker compensation appeals. *In re Grove*, 127 Wn.2d at 238.

Thus, any right to counsel in these cases would have to derive from the legislature. Administrative agencies, including the Board, are "creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by . . .

implication." *Kaiser Aluminum*, 121 Wn.2d at 780 (internal quotations and citations omitted).

The Washington Supreme Court has held that "[i]t is the Legislature's prerogative, as the taxing and appropriating branch of government, to determine what actions other than those which are constitutionally mandated will be publicly funded." *In re Grove*, 127 Wn.2d at 236. "[I]t is not for the judiciary to weigh competing claims to public resources," even where one might believe that the legislature *should* expend resources to provide counsel to certain civil litigants. *King v. King*, 162 Wn.2d 378, 397-98, 174 P.3d 659 (2007) (declining to require appointment of counsel for pro se parties in dissolution proceedings and explaining that such policy decisions must be left to the legislature).

The Washington Supreme Court also has recognized that nothing in the workers' compensation statute, RCW 51.52, provides for appointment of counsel at public expense. *See* RCW 51.52; *In re Grove*, 127 Wn.2d at 237. The legislature has provided no funding mechanism through which the Board could appoint counsel at public expense. *Id.* Indeed, in other contexts where the legislature has authorized counsel at public expense, it has also enacted a mechanism for funding that has been detailed and highly regulated. *See In re Grove*, 127 Wn.2d at 228 n.5

(discussing the Indigent Defense Fund, a fund specifically appropriated by the legislature).

This lack of either a constitutional right or a clear statutory right to counsel distinguishes this case from the cases upon which Mr. Weems relies. For example, in *Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133 (2011), the federal district court recited the statutory provision addressing representation in immigration cases and explained that the "alien's right to counsel stems from the Fifth Amendment's due process guarantee." *Franco-Gonzales*, 828 F. Supp. 2d at 1144 (involving an alien in detention, whose physical liberty was therefore restricted). The court went on to explain that immigration judges have the duty to assess whether the right to counsel has been validly waived. *Id.* at 1144-45. Here, there is no right to counsel in workers' compensation cases unless and until the legislature has created such a right. RCW 51.52; *In re Grove*, 127 Wn.2d at 237.

In sum, absent a fundamental liberty interest at stake, the legislature is the appropriate body to determine whether counsel at public expense is authorized or required. Mr. Weems has pointed to no specific, legislatively-granted right to counsel at public expense in Board proceedings, nor has he pointed to a mechanism for funding appointed counsel here. Instead, the legislature and the Board have created a more

flexible system, which supports contingency fee agreements, allows lay representation and assistance, and requires industrial insurance judges to assist in developing the evidence when necessary to fairly decide the appeal. There is no legal basis for the sweeping rule Mr. Weems seeks.

D. Neither ADA Nor WLAD Requires A Separate Hearing Or Appointment Of An Attorney At Public Expense Every Time A Party Claims Mental Disability Or Impairment

1. The ADA prohibits discrimination by requiring that public entities provide meaningful, equal access without undue burden on the public entity.

The ADA forbids discrimination against people with disabilities in three major areas of public life: employment (covered in Title I, 42 U.S.C. §§ 12111 through 12117); public programs, services, and activities (Title II, 42 U.S.C. §§ 12131 through 12165); and in places of public accommodation (Title III, 42 U.S.C. §§ 12181 through 12189). Mr. Weems relies on Title II, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The term "public entity" includes state and local governments as well as their agencies and instrumentalities. 42 U.S.C. § 12131(1).

Parties with disabilities are "qualified" if they "with or without reasonable modifications to rules, policies, and practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, [meet] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). A person has a disability under the ADA where he or she has a physical or mental impairment that affects one or more major life activities, a record of an impairment, or is regarded as having an impairment. 42 U.S.C. § 12102(1).

Thus, in order to prove an ADA violation, a party must show: 1) he or she is a qualified individual with a disability, and 2) that he or she is being excluded from participation in or denied benefits of public services, activities, or programs, or is otherwise being discriminated against, 3) by reason of his or her disability. *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001).

The federal regulations implementing the ADA require that a public entity must consider the accommodation requested by the disabled party, and the public entity must "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability *an equal opportunity to participate in and enjoy the benefits of a service,*

program, or activity conducted by a public entity." 28 C.F.R § 35.160(b)(1), (2) (emphasis added).

When interpreting these requirements, the United States Supreme Court has focused on whether the disabled party has been provided "meaningful access to the benefit" offered. *Alexander v. Choate*, 469 U.S. 287, 301-02, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985).[4] As part of this analysis, the Ninth Circuit has asked whether the party "was unable to participate *equally* in the proceedings at issue." *Duvall*, 260 F.3d at 1137 (emphasis added).

While any pro se party would likely fare better with appointed counsel, the test is not whether accommodation would improve the outcome. Instead the test is whether accommodations are necessary to allow the party meaningful access to the proceedings that is equal to that of other pro se parties. *See, e.g., Tran v. Gore*, ___ F. Supp. 2d ___, 2013 WL 878771 at *4 (S.D. Cal. 2013) (explaining that the disabled party must demonstrate that the accommodations provided leave him with "an inability to represent himself beyond the ordinary burdens encountered by *pro se* parties"). The agency is not required to produce positive results or

[4] While this case analyzes Section 504 of the Rehabilitation Act, courts have explained that the ADA and Section 504 analyses are often interchangeable because the statutes contain the same basic standards and definitions. *E.g., Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002); *Ballard v. Rubin*, 284 F.3d 957, 960 n.3 (8th Cir. 2002).

a level of achievement identical to that reached by nondisabled participants; it must simply afford disabled parties equal opportunity to obtain the same result or reach the same level of achievement. *Choate*, 469 U.S. at 305 (quoting 45 C.F.R. § 84.4(b)(2)(1984)).

The United States Supreme Court articulated this equality principle in *Tennessee v. Lane*, 541 U.S. 509, 531-32, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004), a case involving architectural barriers that prohibited the plaintiffs from having adequate access to a courthouse. The Court recognized that:

> Title II does not require States to employ *any and all* means to make judicial services accessible to persons with disabilities . . . . It requires only 'reasonable modifications' that would not fundamentally alter the nature of the services provided . . . . As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways.

Id. (emphasis added).

The Washington Supreme Court has also emphasized that a public agency need not immediately adopt the most costly alternative—counsel at public expense: "It is more than an insignificant linguistic leap to equate [the physical barriers to access in *Lane*] with a right to publicly funded legal representation." *King*, 162 Wn.2d 378, 390, 174 P.3d 659 (2007).

A variety of less costly measures can be implemented so long as they are reasonable. Only if those measures are ineffective is the public entity required to resort to more costly measures. *See Lane*, 541 U.S. at 532; *see also Choate*, 469 U.S. at 308 (considering the prohibitive cost of requiring accommodations that are "most favorable, or least disadvantageous, to [the disabled party]"). Finally, under Title II, a public agency cannot be required to undertake measures that would impose an undue financial or administrative burden. *E.g.*, *Randolph v. Rogers*, 170 F.3d 850, 858 (8th Cir. 1999).

In sum, the ADA requires that the Board provide disabled parties with meaningful access to its proceedings, access that is equal to the access enjoyed by other, non-disabled workers. The Board can initially implement less costly accommodations than requested, so long as they are reasonable. Only if those accommodations are ineffective must the Board turn to more expensive alternatives. And even then, the Board cannot be required to undertake measures that would impose an undue financial burden.

2. Similarly, the Washington Law Against Discrimination requires that disabled people receive comparable services.

Like the ADA, the Washington Law Against Discrimination (WLAD) prohibits discrimination on the basis of any "sensory, mental, or

physical disability," and provides for "the right of full enjoyment of any accommodations, advantages, facilities, or privileges of any place of public . . . accommodation." RCW 49.60.030(1). Under the statute, it is an unfair practice to commit an act that results directly or indirectly in any "distinction, restriction, or discrimination" based on the presence of a disability. RCW 49.60.215(1).

The Washington Supreme Court has held that to prove a public accommodation violation of the WLAD based on disability, a plaintiff must make four showings:

> (1) they have a disability recognized under the statute; (2) the defendant's business or establishment is a place of public accommodation; (3) they were discriminated against by receiving treatment *that was not comparable to the level of designated services provided to individuals without disabilities* by or at the place of public accommodation; and (4) the disability was a substantial factor in causing the discrimination."

Fell v. Spokane Transit Authority, 128 Wn.2d 618, 637, 911 P.2d 1319 (1996) (emphasis added).[5] In *Fell*, the seminal disability discrimination/ public accommodation case in Washington, the Washington Supreme Court emphasized the importance of a comparability test: the complaining

[5] While the ADA distinguishes between public agencies (covered by Title II) and places of public accommodation (covered by Title III), the Washington Supreme Court has analyzed public services like the public transportation at issue in *Fell* as "public accommodations" under the WLAD. *See Fell*, 128 Wn.2d at 637.

party must show that he or she is being denied an opportunity equal to that of nondisabled parties. *Fell*, 128 Wn.2d at 631-32.

An agency does not violate the WLAD "if it fails to provide services to disabled people *in excess* of the services it provides to the nondisabled." *Id.* at 631. "The statute was *not* intended to entitle certain protected classes to some unspecified type and unlimited level of services." *Id.* While society may wish to provide unlimited services to disabled individuals, that is not what the anti-discrimination statute requires—it requires comparable treatment. *Id.* at 631-32.

The *Fell* Court recognized that without the "touchstone of comparable treatment," the WLAD would not have any limiting principle. "To meet the test of comparable treatment, the law should not require mathematical precision, particularly in the area of public accommodations where there is a need to afford some latitude to governments and businesses in achieving the goal." *Id.* at 636. Thus, in order to show a WLAD violation, the disabled party must prove, in part, that "they were discriminated against by receiving treatment that was not comparable to the level of designated services provided to individuals without disabilities by or at the place of public accommodation; and . . . the disability was a substantial factor causing the discrimination." *Id.* at 637.

Finally, even if the prima facie elements of a WLAD violation are met, the burden then shifts to the agency to establish a legitimate nondiscriminatory reason for its action or decision. *Fell*, 128 Wn.2d at 641-42. The *Fell* court explicitly recognized that a public entity can "advance financial unfeasibility as a legitimate nondiscriminatory reason for its action." *Id.* at 642.

Thus, the WLAD, like the ADA, requires public agencies to provide individuals with disabilities with access that is comparable to the access provided to nondisabled individuals. While society may wish to provide more, the failure to do so does not amount to discrimination under the WLAD as long as the offered accommodations make access comparable. Under the WLAD, the Board must accommodate disabled workers so they achieve access comparable to other, non-disabled workers, unless "financial unfeasibility [is] a legitimate nondiscriminatory reason" for the Board's action. *See id.*

3. The options currently available to assure comparable or equal access to Board hearings are robust and adequately accommodate disabled workers.

The protections already available under the Board's statutes and rules assure the equal and meaningful access to parties with disabilities that the ADA and WLAD require. The Board's administrative procedures offer flexibility not available in superior court, and thus, the Board has a

broader continuum of options for accommodating disabled workers. In fact, it is difficult to imagine circumstances under which appointment of counsel would be necessary to provide access to the Board's hearings that would be comparable or equal to the access provided to other workers.

All of the tools discussed above can be used to provide a disabled worker access to the proceedings equal to that afforded non-disabled workers, as required by the ADA and WLAD. These existing protections are far broader than those available in superior court. Where a disabled worker asks for accommodation, the industrial appeals judge can immediately evaluate the extent of disability and exercise a wide variety of options, including, but not limited to: delaying proceedings to allow the worker to obtain counsel on a contingency basis; delaying proceedings to allow for appointment of a guardian or limited guardian; allowing lay representation; allowing lay assistance from a coach, assistant, family member, or other person of the worker's choosing; providing additional questioning of witnesses in a fair and impartial manner; ordering expert evaluation at the Board expense; and even presenting that expert's testimony at a hearing. *See* RCW 51.52.120; WAC 263-12-020, -045, -095, -120, -165. In more serious cases, the Board might provide lay representation at the Board's expense, but the need for such representation

would likely be rare, especially because incapacitated workers can be represented by guardians.

Under the ADA and WLAD, only if these accommodations are ineffective must the Board evaluate and turn to more expensive alternatives. *See Lane*, 541 U.S. at 532; *see also Choate*, 469 U.S. at 308; *Fell*, 128 Wn.2d at 626. Because the readily available options are so broad, it is hard to imagine a situation where appointment of counsel at public expense might ever be required.

Moreover, Washington courts have made it clear that, absent a constitutional right to counsel, it is the legislature that should authorize and fund counsel at public expense. As a result, this court should be reluctant to require the Board to engage in separate fact-finding hearings or appoint counsel every time a party asserts some disability. *In re Grove*, 127 Wn.2d at 236. "[I]t is not for the judiciary to weigh competing claims to public resources," even where one might believe that the legislature should expend resources to provide counsel to certain civil litigants. *King*, 162 Wn.2d at 397-98.

In addition, both the ADA and the WLAD require consideration of the financial and administrative burden. *E.g.*, *Randolph,* 170 F.3d at 858; *Fell*, 128 Wn.2d at 642. Widespread appointment of counsel at public expense, without first attempting reasonable but less extreme options,

would very likely lead to an undue burden on the Board, especially where the legislature has not provided a mechanism for administering a system for appointment or for funding the costs of appointed counsel. *See generally* RCW 51.52.

Mr. Weems asks this court to require fact-finding, presumably through a hearing, as soon as a worker requests counsel at public expense. But when a worker has provided evidence that he or she has a disability and requests accommodation, the Board's interactions with the worker, to evaluate needs and determine the most appropriate accommodation, can be informal. *See Vinson v. Thomas*, 288 F.3d 1145, 1154 (2002) (describing an "informal interactive process"). And neither the ADA nor the WLAD requires the Board to immediately turn to the most costly alternative. *King*, 162 Wn.2d at 390. Both statutes allow the agency to adopt a reasonable accommodation, and evaluate more costly alternatives if the accommodation originally provided is not sufficient. *See Lane*, 541 U.S. at 532; *see also Choate*, 469 U.S. at 308; *Fell*, 128 Wn.2d at 642.

In sum, given the continuum of options readily available in the Board's administrative proceedings, this court should not dictate that appointment of counsel at public expense, or a separate hearing on whether counsel should be appointed, is required in every case. The anti-

discrimination laws are best served by permitting industrial appeals judges flexibility in providing reasonable accommodations.

E. Attorney Fees Are Not Warranted In This Case

Finally, Mr. Weems requests attorney fees on appeal, citing RCW 4.84.350. Br. of Appellant at 40. RCW 4.84.350(1) provides: "Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails on *judicial review of an agency action* fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make the award unjust." (Emphasis added).

First and foremost, Mr. Weems should not prevail, and if he does not, he is not entitled to attorney fees. Second, the Washington Supreme Court has concluded that RCW 4.84.350 does not apply to judicial review of Board decisions. The Court recognized that the legislature defined "agency action" and "judicial review" for purposes of this statute by incorporating the definitions and limitations of those terms that appear in the Administrative Procedure Act, RCW 34.05. *Cobra Roofing Servs., Inc., v. Dep't of Labor & Indus.*, 157 Wn.2d 90, 99, 135 P.3d 913 (2006). Because the Administrative Procedure Act's judicial review provisions expressly do not apply to adjudicative proceedings before the Board, the

Cobra Roofing Court concluded that attorney fees could not be awarded for judicial review of Board decisions. *Id.* (citing RCW 34.05.030(2)(c)). Thus, attorney fees under RCW 4.84.350 would not be appropriate even if Mr. Weems were to prevail.[6]

VI. CONCLUSION

The ADA and the WLAD support the laudable goals of equal access to public services for disabled citizens. These goals are best served when public agencies retain flexibility to determine what reasonable accommodations are necessary on a case-by-case basis. This Court should not adopt the sweeping holdings requested by Mr. Weems.

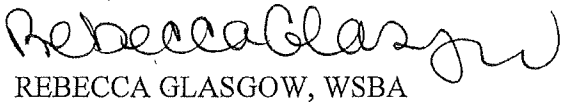
Instead, the Court should recognize the multiple options already available to industrial appeals judges. This more limited approach would be consistent with the deference Washington courts have typically given

[6] RCW 51.52.130 also allows attorney fee awards to prevailing workers in some cases. But this court has held that attorney fees shall be payable by the Department only where "the injured worker requesting fees prevail[s] in the action and . . . the accident fund or medical fund [is] affected." *Pearson v. Dep't of Labor and Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011); *Spring v. Dep't of Labor and Indus.*, 39 Wn. App. 751, 757, 695 P.2d 612 (1985). Thus, where a case is remanded for a new trial, but the superior court awards no additional benefits, attorney fees are not available under this statute. *See Spring*, 39 Wn. App. at 757; *see also Kustura v. Dep't of Labor and Indus.*, 142 Wn. App. 655, 692, 175 P.3d 1117 (2008) (holding an incidental increase in worker benefits was not enough to trigger an award of attorney fees because the worker failed to demonstrate that the superior court order actually increased her benefits).

the legislature in determining when counsel at public expense should be provided. Therefore, this court should affirm.

RESPECTFULLY SUBMITTED this 12th 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 BOARD OF INDUSTRIAL INSURANCE APPEALS,

Respondent.

DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Brief of Respondent Board of Industrial Insurance Appeals to all parties on record as follows:

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Rosemary Sampson
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WASHINGTON STATE ATTORNEY GENERAL

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