

Interpreters at Workers' Compensation Appeals Board (WCAB)
Appearances – A nuisance or a necessity?

by

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While an entire book can be written about the many interpreter issues that exist in workers' compensation cases, this article is intentionally limited to address those issues relating to interpreter services at WCAB appearances.

Labor Code Section 5811 states unequivocally:

“(b) It shall be the responsibility of any party producing a witness requiring an interpreter to arrange for the presence of a qualified interpreter...
...Interpreter fees which are reasonably, actually, and necessarily incurred **shall** be allowed as cost under this section, provided they are in accordance with the fee schedule set by the administrative director...”

Early last year, before going on the record on the third day of trial in an extremely complex case involving multiple witnesses, the Spanish language interpreter politely asked me if there was something he could do to be paid for the two prior dates of trial at which he had been present and served as interpreter. He said that he had provided defense counsel with an invoice for his services on each of the dates of trial, but he had not received payment nor had defendant filed an objection. A period of at least two months passed between each date of hearing. Frankly, I was surprised that defense hadn't paid the interpreter for their services at the prior WCAB hearings and, on the record, I ordered defendant to pay the invoices in full, as the amounts charged were reasonable for each morning and afternoon session and the services were certainly required and used. Further, the interpreter had done an excellent job during the trial.

It was then that I began to become aware that there was a problem with interpreters getting paid for their services rendered at WCAB appearances. It seemed that many claims examiners, some defense attorneys and even some judges were construing the services rendered by interpreters at WCAB appearances as pesky liens and not as the necessary communication services required for competent hearings. Many defendants have been putting them into the same category as unauthorized medical treatment lien claimants -- not paying for their services and not objecting to their bills or liens, and doing both with impunity.

Interpreters are an absolute necessity at WCAB appearances when an injured worker, a dependent of a deceased injured worker, or another necessary witness is not proficient in English to a degree necessary to communicate during a legal proceeding. If a person does not have the ability to speak and understand English well enough to understand what is going on, then an interpreter is required for the hearing to be

construed as valid and competent. It is a fundamental due process issue. How can it be said that one has been given an opportunity to be heard if that person doesn't understand English well enough to be able to communicate in a court proceeding? If a proceeding goes forward without an interpreter when one is needed to effectively communicate, the likelihood is very great that upon closer scrutiny by a reviewing court, the proceeding will be deemed to be incompetent and any documents signed or rulings made will likely be deemed to be invalid and void.

I often hear defense arguments that the employer in question requires their employees to speak English, so they refuse to authorize payment for interpreter fees. I typically remind parties that the ability to speak and understand English well enough to drive a vehicle, to get by in a manual labor job, to do assembly line work, or to work as a housekeeper or custodian is different than understanding English well enough to engage in complex legal proceedings, when an error of understanding could have serious legal ramifications and may lead to a charge of perjury. The point is, we want our hearings to be competent and valid, and we want our evidence, our decisions and our orders to hold up to scrutiny. I would like to think that a prudent defendant would find it preferable to pay for an interpreter's services than to face the potential result of having to re-litigate a claim or having key evidence excluded or deemed insubstantial because a court found that due process had been violated by failure to provide an interpreter. Why would a defendant want to dispute a charge that affords them some protection from such a claim?

Government Code Section 68560(e) specifically states:

"The Legislature recognizes that the number of non-English-speaking persons in California is increasing, and recognizes the need to provide equal justice under the law to all California citizens and residents and to provide for their special needs in their relations with the judicial and administrative law system."

Government Code Section 11435.25 sets forth that the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the WCAB or the administrative director (AD) of the DWC. The Rules of Practice and Procedure, 8 CCR 9795.3 states that the fees for services performed by a qualified interpreter, where the employee does not proficiently speak or understand the English language, shall be paid by the claims administrator for ANY of the following events:

1. Examination by physician at request of the claims administrator, the AD or the appeals board.
2. A comprehensive or supplemental medical-legal evaluation, per 9793, subject to compensability of the report to which the services apply. Party retaining interpreter may be liable to pay the interpreter's fee in the event the claims administrator isn't liable.
3. A deposition of an injured employee (or their dependent) at the request of the claims administrator, including: preparation of the deponent immediately prior to deposition; reading of deposition prior to signing; and reading of prior volumes to a deponent in preparation for continuation of a deposition.
4. An appeals board hearing, arbitration, or formal rehabilitation conference.
5. An informal rehabilitation conference.
6. An I&A conference (per LC 5450 et seq.) to assist in resolving a dispute between an injured worker and claims administrator.
7. Other similar settings determined by the WCAB to be reasonable and necessary to determine the validity and extent of injury to an employee.

What should always be remembered is that per Labor Code 3202, workers' compensation laws must be construed liberally in favor of extending benefits for the protection of persons injured in the course of their employment. Thus, when there is a question as to whether or not a person is proficient in English, a prudent judge or practitioner should err on the side of caution and allow the services of an interpreter so as to not risk an attack as to the competency of the evidence or the validity of the hearing.

Interpreters at WCAB appearances and depositions are NOT medical-legal lien claimants, they are NOT medical treatment lien claimants, and they are NOT even required to file a lien. Just as deposition attorney fee petitions per Labor Code Section 5710 may be filed and ordered paid by judges at any time during the pendency of a claim, an interpreter's petition for costs or services pursuant to Labor Code Section 5811 or 5710 does NOT have to wait until conclusion of the case-in-chief to be addressed by a judge. A judge has the authority and discretion during the pendency of the claim to order payment of reasonable litigation costs per LC 5811. Why should interpreters have to wait until a case concludes to be paid for their necessary services at WCAB hearings and at depositions? This just doesn't make sense. There may be times when there is a true dispute as to the services rendered by an interpreter at a hearing or deposition, but those should be the exception and not the rule.

Interpreter services at WCAB hearings and depositions constitute a litigation cost pursuant to Labor Code Section 5811, and that section clearly states that interpreter services for such events *shall* be allowed as a cost. There is even an EAMS document entitled, "Petition for Costs/5811," which, when filed appropriately, will generate a task in EAMS for a judge to address. Even though such a petition will generate a task assigned to a judge, there is no guarantee that a judge will act on such a petition before conclusion of the case. If the 60 days mandated by 8 CCR 9795.4 to pay or object to *any* interpreter bill has passed without payment or objection, and a judge had declined to act on a LC 5811 petition, the interpreter may wish to consider filing a lien to make sure they are added to the Official Address Record. Any lien filed by an interpreter should clearly identify whether the lien is for services for medical-legal examinations (LC 4628), treatment (per LC 4600 and *Guitron v. Santa Fe Extruders, SCIF* (2011) 76 CCC 228), depositions (per LC 5710), appeals board hearings (per LC 5811), or "other" types of settings.

Since there is no provision in the Labor Code or in the AD Rules for penalties and interest to apply to the untimely payment of interpreter fees for WCAB appearances and depositions, there is little inducement for defendants to comply with the time deadlines for payment of or objecting to interpreter fees. However, parties should keep in mind that failure to timely pay for or object to interpreter services is a violation of the AD Rules (8 CCR 9795.4) and may be construed by a judge to be in bad faith per Rule 10561(b)(4). The imposition of sanctions, fees and costs may prove to be more expensive (and a more effective enforcement tool) in the long run than penalties and interest.

Interpreters who appear for depositions and at WCAB hearings must be certified or "qualified." Currently, there are 15 languages designated for certification status through the Judicial Council, and there are eight languages certified through the State Personnel Board for Administrative Hearing or Medical Interpreters. An interpreter certified through the Judicial Council may interpret for all state court proceedings and medical examinations. An interpreter of a language not designated for certification may become qualified as a "registered interpreter of a non-designated language," which requires passing an English proficiency written examination, an English oral proficiency examination and to fulfill Judicial Council requirements. A person certified through the SPB as an Administrative Hearing Interpreter is qualified to interpret at Workers' Compensation hearings and medical examinations. Those persons certified through the SPB as Medical Interpreters are certified to interpret for medical

exams, but not for administrative hearings. All interpreters certified through either the Judicial Council or through the SPB receive ID badges which should be worn or displayed at all proceedings for which they are performing interpreting services.

The qualifications of interpreters may be verified at the following websites:

<http://www.courts.ca.gov/programs-interpreters.htm> (for Judicial Council-certified or registered interpreters)

<http://jobs.spb.ca.gov/InterpreterListing/> (for Administrative Hearing and Medical interpreters certified through the State Personnel Board)

An interpreter who is not certified may perform services when a certified interpreter cannot be present ONLY if they are provisionally certified. An interpreter may be “provisionally certified” by the residing officer at an appeals board hearing or arbitration at the request of a party or parties, OR upon agreement of the parties for services other than at an appeals board hearing or arbitration. There must be good cause shown as to why a certified interpreter cannot be present (i.e., interpreting in one of the non-designated languages, no certified interpreter available), and the person provisionally certifying such interpreter needs to be persuaded that there is competent communication to insure the validity of the proceeding.

Prudent interpreters protect their interests by obtaining something in writing from the party requesting their services or benefitting from the use of their services. For example, when an interpreter is used for a medical treatment appointment, the interpreter should get something in writing from the physician that meets the requirements for reimbursement per the *Guiron* case (i.e., the interpreting services were required to communicate with the patient/examinee who is not proficient in English, the doctor isn't proficient to communicate without interpreting assistance, their office doesn't provide interpreters to assist patients, and it is their office policy that an interpreter should accompany a patient/examinee who isn't proficient in English). It is likely easier to get the doctor to sign some type of form setting this forth at the time of the examination than trying to get something from the physician after the fact.

Prudent interpreters may also request the assigned judge to sign an order for the payment of their fees on the date interpreting services were rendered for appeals board hearings, MSCs, trials and conferences. Attorneys who represent non-English-proficient injured workers and dependents should be requested to present such petitions to the judge when they obtain a disposition

Overview:

1. WHO PAYS FOR INTERPRETER SERVICES AT WCAB APPEARANCES AND ARBITRATIONS?

THE CLAIMS ADMINISTRATOR per 8 CCR 9795.3.

2. WHAT IS A REASONABLE FEE FOR INTERPRETER SERVICES AT WCAB HEARINGS, ARBITRATIONS, DEPOSITIONS, MSCs AND STATUS CONFERENCES?

THE RATE FOR ONE-HALF DAY OR ONE FULL DAY PER THE SUPERIOR COURT FEE SCHEDULE FOR THAT COUNTY OR MARKET RATE, WHICHEVER IS GREATER per 8 CCR 9795.3(b)(1).

Title 8 CCR 9795.3 states, in pertinent part:

“(b) The following fees for interpreter services provided by a certified interpreter shall be presumed to be reasonable:

(1) For an appeal board hearing, arbitration, deposition, or formal rehabilitation conference: interpreter fees shall be billed and paid at the greater of the following (i) at the rate for one-half day or one full day as set forth in the Superior Court fee schedule for interpreters in the county where the service was provided, or (ii) at the market rate. The interpreter shall establish the market rate for the interpreter’s services by submitting documentation to the claims administrator, including a list of recent similar services performed and the amounts paid for those services. Services over 8 hours shall be paid at the rate of one-eighth the full day rate for each hour of service over 8 hours...”

3. WHAT IS A REASONABLE FEE FOR INTERPRETER SERVICES AT AN INFORMAL I & A CONFERENCE OR OTHER EVENT ENUMERATED IN 9795.3(a)?

\$11.25 PER QUARTER HOUR, WITH TWO HOUR MINIMUM, OR MARKET RATE, WHICHEVER IS GREATER per 8 CCR 9795.3(b)(2).

Title 8 CCR 9795.3 differentiates between formal legal proceedings (appeals board hearings, arbitrations, depositions and formal rehabilitation conferences) and all other events for which interpreter services are appropriate (i.e., physician examinations, medical-legal evaluations, informal rehabilitation conferences, informal I & A conferences and “other similar settings” determined by the WCAB to be reasonable and necessary) and has specifically set forth two separate fee schedules. Subsection (b)(2) of 8 CCR 9795.3 states:

“(2) For all other events listed under subdivision (a), interpreter fees shall be billed and paid at the rate of \$11.25 per quarter hour or portion thereof, with a minimum payment of two hours, or the market rate, whichever is greater. The interpreter shall establish the market rate for the interpreter’s services by submitting documentation to the claims administrator, including a list of recent similar services performed and the amounts paid for those services...”

4. CAN AN INTERPRETER REQUEST PAYMENT FOR MILEAGE AND TRAVEL TIME?

YES, WHEN REQUESTED, ADEQUATELY DOCUMENTED, WHERE REASONABLE AND NECESSARY TO PROVIDE THE SERVICE AND WHERE THE DISTANCE BETWEEN THEIR PLACE OF BUSINESS AND WCAB IS OVER 25 MILES per 8 CCR 9795.3(b)(3).

Title 8 CCR 9795.3 also states, in pertinent part:

“(3) The fee in paragraph (1) or (2) shall include, when requested and adequately documented by the interpreter, payment for mileage and travel time where reasonable and necessary to provide the service, and where the distance between the interpreter’s place of business and the place where the service was rendered is over 25 miles. Travel time is not deemed reasonable and necessary where a qualified interpreter listed in the

master listing for the county where the service is to be provided can be present to provide the service without the necessity of excessive travel.

(i) Mileage shall be paid at the minimum rate adopted by the Director of the Department of Personnel Administration pursuant to Section 19820 of the Government Code for non-represented (excluded) employees at Title 2, CCR § 599.631(a).

(ii) Travel time shall be paid at the rate of \$5.00 per quarter hour or portion thereof..."

5. IS IT APPROPRIATE FOR AN INTERPRETER TO REQUEST PAYMENT WHEN THEY SHOW UP FOR AN EVENT THAT HAS BEEN CANCELLED AT THE LAST MINUTE OR WHERE THE PERSON NEEDING INTERPRETING SERVICES DOES NOT APPEAR?

YES per 8 CCR 9795.3(c).

Title 8 CCR 9795.3 also states, pursuant to subsection (c),

"...(c) Unless notified of a cancellation at least 24 hours prior to the time the service is to be provided, the interpreter shall be paid no less than the minimum fee."

Just because a claims examiner is required to pay the fee for late cancellations or events where the person requiring interpreting services fails to appear (per 8 CCR 9795.3), that does not mean they have no recourse if they are not at fault. Since interpreter fees for depositions, appeals board hearings and other settings are considered litigation costs per Labor Code Section 5811, and such costs as between the parties may be allowed by the WCAB, there is nothing to prevent a defendant from filing its own "Petition for Costs/LC 5811" for charges paid by defendant to an interpreter when a non-defense witness requiring an interpreter has failed to appear or when defense is not at fault for insufficient notice of cancellation of an event requiring an interpreter.

6. WHEN MUST AN INTERPRETER BILL BE PAID?

WITHIN 60 DAYS AFTER RECEIPT OF BILL FOR DATES OF SERVICE ON OR AFTER 1/1/94 per 8 CCR 9795.4.

Title 8 CCR 9795.4 states, in pertinent part:

"(a) All expenses for interpreter services shall be paid within 60 days after receipt by the claims administrator of the bill for services unless the claims administrator, within this period, contests its liability for such payment, or the reasonableness or the necessity of incurring such expenses. A claims administrator who contests all or any part of a bill for interpreter services shall pay the uncontested amount and notify the interpreter of the objection within 60 days after receipt of the bill..."

This section also includes what specific information must be included in any notice of objection.

7. WHAT CAN AN INTERPRETER REALISTICALLY DO TO GET PAID FOR WCAB APPEARANCES?

REQUEST THE JUDGE TO SIGN AN ORDER FOR PAYMENT OF THEIR SERVICES ON HEARING DATES OR FILE A "PETITION FOR COSTS/5811" NO SOONER THAN 60 DAYS AFTER BILL WAS RECEIVED BY DEFENSE WITHOUT PAYMENT BEING MADE.

A number of judges, myself included, when requested at WCAB hearings by interpreters or attorneys who have requested interpreter services for their clients who are not proficient in English, will sign an Order per LC 5811 requiring defendants to pay for interpreter services at that hearing. The order is at the bottom of a brief Petition filled out by the interpreter and signed under penalty of perjury listing the date, time and type of setting scheduled, who requested the services of the interpreter, the fee requested, the certification number, the printed name and the signature of the interpreter. The order has a "self-destruct" clause stating that a timely objection filed will void the order and cause the issue to be reserved for time of trial, at which time appropriate sanctions, fees and costs will be addressed. The order further states that all non-disputed amounts must be timely paid and objection to disputed amounts must be timely made per 8 CCR 9795.4.

We have all heard the horror stories of the interpreters who sign in on every case with a Hispanic surname (just in case they may need an interpreter whether they do or not and whether they have been contracted to appear or not), interpreters who "steal" each other's clients, and unqualified interpreters who sign in using someone else's certification number. Transgressions of this nature have been brought to my attention in my 10+ years of being a judge. There are always people who abuse the system and try to get away with it. However, the system has a regulation to address those who engage in unethical or fraudulent conduct (8 CCR 9721.32) and the WCAB has broad powers to address issues brought to its attention. It is just not worth the risk of losing one's certification or being criminally prosecuted to engage in such behavior and we should ALL work towards maintaining, promoting and enforcing professional and ethical conduct of ALL participants in the workers' compensation process.

Interpreters are a necessary and valuable component in our workers' compensation system for injured workers, dependents of injured workers, and necessary witnesses not proficient in English. Every participant in our judicial process should have a vested interest in ensuring that qualified interpreters remain in our system -- whether claims administrator, attorney, physician, injured worker or judge. Understanding and acknowledging the interpreter's role in this process is a good start -- making sure they are appropriately and timely paid will go a long way in retaining and attracting qualified professional interpreters required for valid and competent workers' compensation proceedings.