

Advisory Committee Memorandum

October 25, 2018

To: Workers' Compensation Board Chair and Members

From: ALJ Bruce D. Smith
Mr. Krishna Balasubramani
Mr. Bin Chen
Ms. Jennifer Flood
Ms. Katherine Krametbauer
Ms. Ana Maria Meneses-Henry
Ms. Jovanna Patrick
Mr. Matthew U'Ren

Subject: Translation of Written Evidence; and Important Document Notice

Dear Chair Wold and Board Members:

Consistent with the April 26, 2018 letter from Board Chair Wold, the Advisory Committee offers the following comments, analysis, and recommendations concerning proposed rule concepts brought to the Board by the Workers' Compensation Section concerning Translation of Written Evidence at Hearings; and Important Document Notice enclosures to accompany specified documents originating from the Board and its Hearings Division.

Our instructions were to provide input concerning two proposed rule concepts, and to address the anticipated financial impact of any resulting policies. The committee held public meetings concerning the proposed concepts on May 25, 2018, and August 9, 2018. Its findings and recommendations are set forth below.

Translation of Written Evidence

Summary of Proposed Concept

Pursuant to this proposed concept, the Workers' Compensation Board would adopt a rule requiring that all evidence submitted as a hearing exhibit be in English. The party submitting the document would bear the expense of translation if the original was in another language. Cost of translation could be a recoverable litigation expense for claimants.

As the Board is aware, this proposal, which arises out of *Camacho v. SAIF*, 263 Or App 647, 656 (2014) (statements in the documentary record that are in a language other than English should be translated and cannot simply be ignored), originated with the Access to Justice Committee of the Workers' Compensation Section. The Section expressed three primary concerns: (1) that Board-appointed interpreters not be required to provide in-hearing translation of written evidence; (2) that translation of foreign-language evidence be accomplished in advance of hearing, preferably by stipulation of the parties; and (3) that the cost of translation not impede access to justice for the parties, particularly claimants.

Consensus or Majority Opinion

A narrow majority of the committee favors a simple rule, outlining a procedure for translation non-English material where the parties have not been able to agree on the translation in advance of hearing. While recognizing that counsel will generally be able to agree on the translation of short sections of foreign-language material, the majority believes that a rule would assist the parties, particularly in cases that involve extensive material requiring translation. Although most cases do not involve non-English language documents, claimant attorneys who frequently represent foreign-born workers often see such documents.

A majority of the committee believes that the party offering the evidence should bear the cost of translation. A plurality of these members feels that the cost of translation should be a reimbursable litigation expense if advanced by claimant. Two other members would give the ALJ discretion to determine which party should bear the expense of translation.

Minority Opinion

Three committee members are not persuaded that a rule is required, noting that the issue arises infrequently, and mostly with unrepresented workers. One of these members believes that the proponent of the evidence should either be required to submit the document in English, or offer a witness who can translate it at hearing. Another suggests that lawyers representing the parties can consult Google Translate, adding that the Board's interpreter could perform sight translation at hearing if parties cannot agree on the translation.

Two members responded that relying on Google for translation is not a good idea. One of them, herself a Board-certified interpreter, stresses that for the sake of accuracy any foreign-language material longer than a single line should be translated into English *prior to* hearing.

Proposed Language

The committee is not proposing specific language for a rule at this time, but will reconvene for that purpose at the Board's request, if indicated.

Financial Impact

It is not expected that adoption of a rule would have a significant financial impact on the agency, as the cost of translation would be borne mostly by the parties.

Important Document Notice

Summary of Proposed Concept

Pursuant to this proposed concept, the Workers' Compensation Board would adopt a rule or policy requiring that certain documents (Notice of Hearing; final ALJ orders, including Order of Dismissal and Opinion and Order; and Orders on Review) be accompanied by a multi-language notice, alerting the recipient that important rights may be affected. The notice would include contact information for the Ombudsman for Injured Workers.

Consensus or Majority Opinion

The committee was unanimous in its recommendation for adoption of a Board policy of including an important document notice with all final orders and notices of hearing issued by the Board or its Hearings Division. (The committee was reminded that a formal rule is not required for a policy that affects only the Board and its Hearings Division.) One member felt that the notice could be incorporated into the underlying order or notice; but the consensus was for a separate page, attached to the important document.

The majority of the committee favors using plain white paper for the notice, although a minority felt that colored paper would be more likely to draw the reader's attention. One member noted that if the document (and notice) were to be transmitted electronically the notice would typically appear as black-on-white.

The consensus of the committee was for a one-page list, including translation of the notice into English, Spanish, Chinese, Vietnamese, and Russian. Some members felt that the notice could also include any other language determined by the Workers' Compensation Division to represent a significant cohort of injured workers.

As the Board is aware, the WCD is currently studying the advisability of adopting a parallel rule that would apply to documents published under its authority. A copy of the WCD's draft notice – entitled "Workers' Compensation Multi-Language Help Page" – accompanies this report, marked "Exhibit A." WCD's draft proposed implementing rule also accompanies this report, marked "Exhibit B." Its draft Bulletin No. 379 is included, as "Exhibit C."

Proposed Language/Format

The committee is not recommending specific language for the notice itself. Two members believe that the notice should be consistent with language under consideration by the Workers' Compensation Division, but another member felt that it is not essential that Board notices precisely mirror WCD notices. To the extent that the Board might adopt language similar to that being contemplated by WCD, however, a majority of the committee would replace the WCD's phrase "*before* the deadline" with "*by* the deadline." This would prevent a loss of rights by someone who fails to act on the last day, mistakenly believing that it is too late.

Financial Impact

The committee finds that implementation of the proposed policy would have only a modest financial impact upon the agency. According to a representative of the Administrative Services Division, such a policy would require the use of an additional 118 reams of paper per year. According to ASD, printing notices on single sheets of white paper would cost the agency \$344 per year; and colored paper would cost \$927 per year.

The Advisory Committee wishes to thank the Workers' Compensation Board for giving it the opportunity to participate in this project. Please contact the Committee if further information or advice is needed.