



Compensation not Open to Interpretation

Language Access in
New York State Workers'
Compensation Hearings



WORKERS' PROTECTION COALITION

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I. WORKERS' PROTECTION COALITION

The Workers' Protection Coalition unites unions, injured workers, workers' centers, law firms, and community-based organizations to advocate for a Workers' Compensation system that works for injured workers and that is governed by principles of equity and justice.

II. ABOUT THE AUTHORS

Primary authors of this report are Leah Lotto and Katie Deabler, both Staff Attorneys at the National Center for Law and Economic Justice. For more than fifty years, NCLEJ has fought for the rights of low-income people, both in New York and across the United States through litigation, policy advocacy, and support for low-income organizing.

III. EXECUTIVE SUMMARY

The Workers' Compensation system of New York State has provided a critical safety net for workers for more than a century. Almost all private employers in New York are legally required to carry Workers' Compensation insurance, which pays medical bills and compensation for lost wages to workers who are injured or made ill by a job. When Workers' Compensation functions properly, it prevents workplace injuries or illness from devastating New York families' basic wellbeing.

Currently, however, the Workers' Compensation system is not functioning properly for many New York residents. Workers with limited English proficiency (LEP) require translation and interpretation (language access) services to benefit from Workers' Compensation on an equal basis with English-speaking workers. However, these services are vastly inadequate in New York's Workers' Compensation System.

From May to December of 2016, the Worker Protection Coalition collected data on the language access practices followed by the Workers' Compensation Board (Board) which administers the system.¹ We observed close to 500 hearings before the Board to determine whether the needs of LEP New Yorkers were being met. These hearings address issues such as whether a claimant is eligible for Workers' Compensation benefits, at what level benefits will be awarded, the medical treatment to which an injured worker is entitled, and how long benefits will be received.

a. Summary of Key Findings

The data gathered show that the Board's language access practices are failing workers with limited English proficiency. While the Board provides interpretation to some LEP claimants during hearings, interpretation is not provided to all who need it. When interpretation is provided, it is sub-standard and not sufficient to allow LEP workers to understand issues being decided at the hearings, which are essential to the success or failure of their Workers' Compensation claims.

¹ The Workers' Compensation system is governed by the Workers' Compensation Board. The Board implements New York's Workers' Compensation Law, issues regulations and other governing documents pertaining to Workers' Compensation, conducts hearings, makes benefit awards, and conducts most other functions necessary for the Workers' Compensation system to run.

We found:

- In 18% of all hearings observed, the claimant required interpretation.
- 42% of LEP claimants were not provided interpretation by the Board.
- 0 of 51 hearings in which interpretation services were provided were interpreted in their entirety.
- When the Board provides interpretation, it employs telephone interpretation services, which are inadequate because:
 - interpreters are not familiar with Workers' Compensation terminology;
 - the telephone calls have poor audio quality; and
 - interpreters make errors that are uncorrected in the record.

b. Summary of Recommendations

We recommend both legislative changes and changes to the Board's interpretation practices.

We call upon the Legislature to:

- **Codify Executive Order 26 in the Workers' Compensation Law.** Language access protections issued by Governor Cuomo should be codified into statute by the Legislature to strengthen these essential rights.

We call upon the Worker's Compensation Board to:

- **Interpret the Entirety of Every Hearing.** Fundamental fairness and due process require that Workers' Compensation claimants have access to interpretation of everything said, so that they can understand all aspects of the adjudication of their rights and participate fully.
- **Use In-Person Interpretation.** The quality of in-person interpretation far exceeds that of telephone interpretation services.
- **Use Selective Certification in Board Hiring.** As an interim measure, prioritize hiring individuals, including for non-interpreting roles, who speak the most common non-English languages spoken in New York to increase the availability of in-person interpretation.
- **Use Contract Interpreters.** Increase in-person interpretation if not enough full-time interpreters are on staff.
- **Ask About Need for Interpretation at the Beginning of Every Hearing.** The Board has the duty to provide interpretation to every claimant who requires it.
- **Track Language Access Needs of Individual Claimants.** At every stage of interaction with a claimant, ask if the claimant has language access needs and denote language access needs prominently in each claimant's file.
- **Ensure That All Interpretation Errors Are Noted in the Record.** Ensure interpretation errors that are noted during the hearing are placed on the record so claimants can pursue appeals when interpretation errors damage the success of their claims.
- **Consult with Other Agencies.** Other state agencies are currently meeting language access needs more effectively and can provide the Board advice and training.

● Create Greater Transparency and Community Engagement:

- **Form an Advisory Committee on Language Access.** Increase communication between the Board and communities with language access needs.
- **Increase Transparency and Report Language Access Data.** Provide the public with annual reports on language access in the Workers' Compensation System.

IV. WORKERS' COMPENSATION IN NEW YORK

New York State established its Workers' Compensation system more than a century ago, in the wake of the fire at the Triangle Shirtwaist Factory that claimed the lives of 146 workers. The deaths of these workers, who were mostly young immigrant women, and the experiences of their families attempting to navigate the civil court system following this tragedy, galvanized New Yorkers to create the Workers' Compensation system.

The system uses no-fault insurance to provide medical benefits and wage replacement to workers made ill or injured by work. This system is based on the idea that workers give up their right to sue the employer in court for workplace illness or injury and the inherent uncertainty of recovery, in return the certainty of insurance coverage, albeit in amounts that might be less than what they might have received through litigation.

In the more than 100 years since its creation, the scales of this "grand bargain," intended to give workers the certainty of some basic coverage and employers the benefit of lower caps on possible payments for injuries and illnesses, have tipped more and more to favor the interests of employers and insurance companies over the rights of workers.

Employers and insurers have successfully won statutory changes to the system that reduce worker recoveries, while administrative policies of the Board have created barriers to workers accessing benefits. Most significantly, legislation passed in 2007 made multiple substantive and procedural changes in the rules for filing and pursuing a Workers' Compensation claim.² The legislation increased the maximum weekly benefit rate while simultaneously implementing lifetime caps on the possible temporal duration of permanent partial disability benefits. These changes were advantageous to a few high-wage workers who experience temporary disability, but severely detrimental to all low-wage workers. Rather than increasing worker benefits, the net effect of these changes in their first year was to reduce benefit payments by approximately \$700 million annually.³ As a result of these changes, a worker who is permanently partially disabled now only receives Workers' Compensation benefits for a maximum of ten years following the date of injury.⁴ This is but one example of how the current reality of New York's Workers' Compensation system has eroded the original promise of protecting workers' health and safety.⁵

V. WHAT IS AT STAKE IN WORKERS COMPENSATION HEARINGS

Tens of thousands of New York workers report being injured at work or suffering from occupational illness every year.⁶ These injuries and illnesses can result in an inability to work and loss of

² For a thorough discussion of these changes, see Robert Grey, *Workers' Compensation 2016: The Aftermath of the 2007 Reforms for Injured Workers and the Impact of the Business Council Agenda*, available at <http://workerscomphub.org/sites/default/files/resource-files/Wage%20Loss%20and%20WC%20Release.pdf>.

³ New York Compensation Insurance Rating Board, Summary 2007 Rate Revision Pre-Filing (Jun. 26, 2007), available at http://www.dfs.ny.gov/insurance/wc/2007_nysid_wc_rf_opdec.pdf; NYS Governor's Office Press Release: Workers' Compensation Rates to Drop by Record 20.5% (Jul. 11, 2007), available at <http://www.ny.gov/governor/press/0711071.html>.

⁴ New York State Workers' Compensation Board, "The Success of New York's 2007 Workers' Compensation Reform" at 9 (2012), available at <http://www.wcb.ny.gov/content/main/TheBoard/Post2007Reform.pdf>.

⁵ *Verschleiser v. Joseph Stern Son, Inc.*, 229 N.Y. 192, 199 (1920) ("The law has been and should be construed fairly, indeed liberally, in favor of the employee. Against its justness or economic soundness nothing can be said.").

⁶ "2015 Annual Report of the New York State Workers' Compensation Board", available at <http://www.wcb.ny.gov/content/main/TheBoard/2015AnnualReport.pdf>.

essential income to the workers and their families. Workers' Compensation is designed to replace the worker's wages for the period of time she or he is unable to work, as well as cover the cost of medical care resulting from the work-related illness or injury. What was envisioned as a straightforward process has become increasingly bureaucratic and hard to navigate.

INJURED WORKER SPEAKS

"I worked for many years as a welder. I started to have trouble breathing and pain in my hand from the work, and I finally filed a workers' comp claim. I don't speak English, and all of the notices that the Workers' Compensation system sent me were in English. Every time I received a letter, my wife and I would have to go outside to look for someone to translate it for us. The language in the notices was complicated, and even if I found someone, they did not know how to translate the words. I felt frustrated that I did not understand what was happening in my case and scared that I would not get help."

– Jose, Queens

Workers' Compensation hearings are presided over by administrative law judges called Workers' Compensation Law Judges (WCLJ). Hearings typically consist of the WCLJ, and attorneys for workers and insurance companies who primarily practice Workers' Compensation law. These lawyers and judges interact on a daily basis and employ a high level of specialized language, including a large number of acronyms.⁷ The hearings are often very short, with some matters dispensed with in mere minutes. One WCLJ will frequently preside over more than ten hearings in one three-hour session. The hearings also move at a fast pace, with little opportunity for a claimant to process the information being presented and ruled on. Hearings are scheduled back to back, and often attorneys must rush from one hearing to another with little time in between to meet with clients immediately before or after a hearing.

During the life of a Workers' Compensation claim, a claimant often has a number of hearings. A hearing can be held to establish that the injury in question happened at work; that the claimant meets the legal definition of an employee of the relevant employer; and that the correct insurance company is liable for the claim. Each of these decisions has the potential to end a Workers' Compensation claim and leave the worker with no legal recourse to seek compensation for her or his injury through the worker's compensation process. Additional hearings may be needed to authorize continued or changed medical treatment, order lost wages, approve settlements, determine disability level, or determine the permanency of a disability. These decisions have profound effects on the amount and duration of benefits a worker will receive. Whether workers too ill or injured to return to work receive sufficient benefits often determines their families' future access to health care, housing, and even food.

Thus, issues that determine workers' and their families' future economic security are decided in brief, rapid hearings that can be difficult to understand even for English-speaking claimants.

VI. LANGUAGE ACCESS IN CONTEXT

New York City is a very diverse city, in which more than two hundred languages are spoken. Half of all New York City residents speak a language other than English at home,⁸ and 13% of New York state residents have limited English proficiency.⁹ Individuals who do not speak English as their

⁷ Indeed, on the first day a lawyer and second-year law student went to observe hearings for this report, a friendly member of the Workers' Compensation bar offered assistance with understanding the proceedings and quickly wrote a list of 17 commonly-used acronyms. That list was helpful, while still far from comprehensive.

⁸ "New York City Population," <https://www1.nyc.gov/site/planning/data-maps/nyc-population/population-facts.page> (last visited Feb. 22, 2017).

⁹ Jie Zong and Jeanna Batalova, *The Limited English Proficient Population in the United States*, MIGRATION POLICY INSTITUTE, Fig. 2 (Jul. 8, 2015), <http://www.migrationpolicy.org/article/limited-english-proficient-population-united-states>.

primary language and who have a limited ability to read, speak, write, or understand English can be limited English proficient. When interacting with government agencies, LEP individuals often require translation and interpretation services. New York City's public agencies simply must accommodate residents' language access needs.

Addressing language access needs is crucial in the Workers' Compensation context. LEP workers often work more dangerous, physically demanding, lower-paying jobs than workers who speak fluent English and are thus at greater risk of injury and loss of critical earnings.¹⁰ For example, in 2014, 32.3% of people working construction jobs in the United States were Latino or Hispanic,¹¹ while Latino and Hispanic individuals make up only 16.1% of people working in all occupations.¹² That same year, construction-related jobs were among the most dangerous in the country.¹³ According to the Occupational Safety and Health Administration, 903 Latino workers were killed on the job in 2015.¹⁴ When LEP workers are injured, they require translation and interpretation services in order to receive the Workers' Compensation benefits to which they are entitled.

Competent interpretation services are crucial in Workers' Compensation proceedings because Worker's Compensation is such a complicated area of law, and the hearings employ a high amount of technical legal language and acronyms. Board proceedings can be challenging for any lay person to understand. The lack of language access further complicates claimants' ability to understand proceedings that are essential to their health and livelihood.

"I worked preparing food orders at a market, and one day at work, a forklift hit me. I was in a lot of pain and we had to call the ambulance. I had surgery and I could not walk for weeks. It has been difficult to get workers' compensation benefits. They almost always send me notices in English, and I do not understand what they say. I have to go to a community organization for help to translate what the notices say. There was no interpretation at my last hearing. The judge asked me questions in English and I had to respond in English. I understand limited English, but it is very hard for me to speak it. I hope that the system is improved for workers."

– Guillermo, Brooklyn

**INJURED
WORKER
SPEAKS**

In New York, all state agencies that interact with the public are required to meet certain language access requirements under New York State Executive Order 26 (EO 26).¹⁵ EO 26 requires that state agencies translate key documents into the six most common languages spoken by individuals with limited English proficiency in the state; that agencies provide interpretation services to individuals with language access needs; and that each agency maintain a language access plan.¹⁶ While the EO has improved language access in New York by giving more of the LEP population access to translated documents and interpretation services, there is still significant room for improvement.¹⁷

¹⁰ Jorgensen, Emile, et. al., *An English/Spanish Safety Climate Scale for Construction Workers*, AMERICAN JOURNAL OF INDUSTRIAL MEDICINE Vol. 50, 438-39 (2007) (noting that in the U.S., construction workers have the third highest rate of fatal occupational injuries and the highest rate of non-fatal occupational injuries, and that in 2000, 15% of construction workers self-identified as Hispanic.).

¹¹ Latino or Hispanic people comprise 63% of the LEP population in the United States, and only 12% of the English proficient population. Zong, *Limited English Proficient Population*.

¹² Bureau of Labor Statistics, "Hispanics and Latinos in industries and occupations," (Oct. 9, 2015), available at <https://www.bls.gov/opub/ted/2015/hispanics-and-latinos-in-industries-and-occupations.htm>.

¹³ Bureau of Labor Statistics, Highest incidence rates of total nonfatal occupational injury and illness cases, 2014, available at <https://www.bls.gov/iif/oshwc/osh/os/ostb4347.pdf>; Bureau of Labor Statistics, "Highest incidence rates of total nonfatal occupational injuries and illnesses by industry and case types," 2014, <https://www.bls.gov/iif/oshwc/osh/os/ostb4343.pdf>.

¹⁴ Occupational Safety and Health Administration, "Commonly Used Statistics," available at <https://www.osha.gov/oshstats/commonstats.html> (last visited Feb. 22, 2017).

¹⁵ State of New York, Executive Order 26 "Statewide Language Access Policy" (2011).

¹⁶ *Id.*

¹⁷ Center for Popular Democracy and Make the Road New York, "Language Access in New York State: A Snapshot from a Community Perspective" (2013).

As of 2013, a majority of LEP individuals in New York still did not receive translated documents or interpretation services when trying to access state benefits.¹⁸ Additionally, executive orders in New York cannot be enforced through lawsuits brought by private individuals, leaving individuals who are harmed by their violation with limited recourse.

New York must also provide LEP workers the same level of access to Workers' Compensation hearings as monolingual English speakers in order to comply with federal law. Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color, or national origin by any federally funded agency or program.¹⁹ Executive Order 13166, issued by President Clinton in 2000, further outlined the responsibilities of federally funded agencies, including state agencies receiving pass through dollars, under Title VI.²⁰

LANGUAGE ACCESS IN OTHER CONTEXTS

Language access is crucial at all stages of a Workers' Compensation claim. This report focuses on interpretation at Board hearings, but a recent decision shines light on how the Board views language access need of claimants who are looking for work after having been injured on the job. The claimant is a 70 year old man who was injured at work in December of 2014. He was awarded benefits based on his partial disability, and the insurance company raised the defense that he was not sufficiently searching for work he could perform with his disability. The claimant has limited English proficiency, and submitted evidence that his granddaughter assisted him in applying for jobs. The WCLJ found that the "claimant [had] not sufficiently taken part in his own job search and ... instead, delegated the responsibility to his family members." WCB Case No. G120 2663 at 2 (Feb. 2, 2017). The decision was upheld by the Board. Id. at 5. Such reasoning shows that the Board fundamentally misunderstands the importance and use of interpretation and translation for LEP workers.

VII. METHODOLOGY

Members of the Worker Protection Coalition and volunteer law students observed a total of 496 hearings at three Worker Compensation Board hearing sites between May of 2016 and December of 2016. Hearings were observed at the Manhattan, Brooklyn, and Queens hearing sites. Observers did not pre-screen the hearings observed.

Most observers were lawyers or law students, and all were trained by NCLEJ staff.

Observations were noted on a standardized form and responses aggregated in a spreadsheet.

Worker Protection Coalition observations are premised on the presumption that administrative hearings are open to the public absent a compelling reason to close the proceedings.²¹

VIII. FINDINGS

This Section summarizes our findings.

a. Need for Interpretation

Of the 496 hearings observed for this report, 88, or 17.7 percent, were hearings where the claimant required interpretation.

Of the 88 claimants who required interpretation, one claimant each required Bengali, Indonesian,

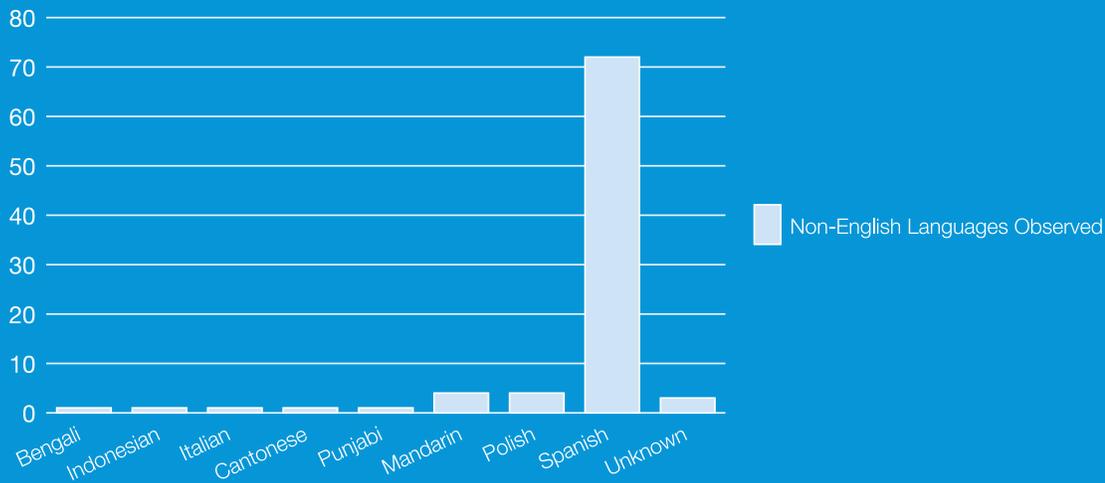
¹⁸ Id. at 5-8.

¹⁹ See 42 U.S.C. § 2000d.

²⁰ See Exec. Order No. 13,166, 65 Fed. Reg. 150, 121 (Aug. 16, 2000).

²¹ *Matter of Herald Co. v. Weisenberg*, 59 N.Y. 2d. 378 (1983).

Non-English Languages Observed



Italian, Cantonese, and Punjabi interpretation; four claimants required Mandarin interpretation; four claimants required Polish interpretation; 72 required Spanish interpretation; and three additional claimants whose language could not be determined by the observer required interpretation.²²

The claimants who required interpretation were geographically distributed across the City: 23 had hearings at the Brooklyn hearing site, which hears claims from Brooklyn and Staten Island; 35 had hearings at the Manhattan hearing site, which hears claims from Manhattan and the Bronx; and 28 had hearings at the Queens hearing site.

Claimants with LEP Needs at Each Hearing Site



Additionally, five of the claimants who required interpretation were not represented by counsel.

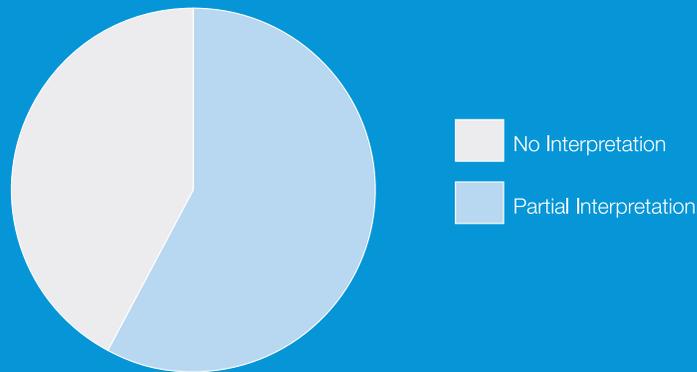
b. Inadequate and Unprofessional Interpretation

i. No Interpretation Provided

The Board did not provide any interpretation services in 37 of the 88 hearings where the claimant required interpretation, meaning forty-two percent of claimants were denied Board interpretation.

²² In three hearings, the observer was not able to identify the claimant's language due to the short length of the hearing and limited speaking by the claimant.

Rate of Interpretation in Observed Hearings



At nine of these 37 hearings, the claimant’s attorney provided interpretation during the hearing. In an additional six hearings, the claimant’s attorney spoke the claimant’s language and did not provide interpretation during the hearing, but instead summarized the hearing to her or his client after the hearing ended. In one hearing, the WCLJ asked one question of the claimant in Spanish, and the claimant’s attorney summarized the rest of the hearing for the claimant after it had ended. In one hearing, the claimant’s attorney used a translation application on his smart phone to attempt to interpret the legal proceeding for his client.

Of the remaining 20 hearings where the Board provided no interpretation to LEP claimants, we observed no interpretation for the claimant from either the Board or the claimant’s attorney.

Of the 37 hearings where the Board did not provide interpretation, one claimant spoke Bengali, one spoke Cantonese, one spoke Italian, three spoke Mandarin, two spoke languages the observers were unable to identify, and 29 spoke Spanish.

ii. Lack of Professionalism

For the 58% of hearings where the Board did provide interpretation services to claimants, the Board used telephone interpretation. Telephone interpretation services provide interpretation in multiple languages on demand. When a hearing requires interpretation, the presiding WCLJ calls into the service and specifies the language needed. Telephone interpretation services allow WCLJs to access interpreters efficiently. However, the interpreters are not held to the same certification standards as court interpreters. Interpretalk, the telephone interpretation service that the Board utilizes, does not require its interpreters to meet any external certification standards.²³

Based on our observations, Interpretalk did not provide interpreters with any background knowledge of the Workers’ Compensation system. This contributed to inadequate interpretation in hearings. New York Workers’ Compensation law is a specialized, complicated area of law. It has its own technical legal language and acronyms that are unique to Workers’ Compensation, and unique to New York. The interpreters who work for telephone interpretation services fill general interpretation needs. They lack the specialized knowledge of Workers’ Compensation terms and proceedings to adequately interpret Workers’ Compensation hearings in a way that will ensure that LEP workers have meaningful opportunities to understand and participate in their own hearings, at which important rights and remedies are at stake.

The use of telephone interpretation, in lieu of in-person interpretation, can cause problems, regardless of interpreter quality. Three observers noted audio quality issues during interpretations.

²³ See “Overview of LSA’s Interpreter Selection Process,” Language Service Associates, available at <https://lsaweb.com/overview-of-lsas-interpreter-selection-process/> (last visited Feb. 16, 2017).

The observers found that the audio issues impeded the quality of the interpretation and the efficiency of these hearings.

Indeed, the Board used to provide in-person interpretation, conducted by interpreters who were familiar with Workers' Compensation terminology. One observer reported a conversation with a Workers' Compensation law judge in which the judge expressed frustration with the telephone interpreters, and compared them negatively to the in-person interpreters used previously.

iii. Errors in Interpretation

While not systemically studied as part of this monitoring, observers noted errors in the interpretation provided in some hearings. Observers who speak the language being interpreted reported errors that went unnoticed by the hearing participants.²⁴

For example, during one hearing, a Spanish language telephone interpreter made more than one error regarding numbers, specifically. During another, a different Spanish language telephone interpreter made a number of errors, including errors relating to medication names, dates, and issues relating to checks that were getting lost before reaching the claimant. Another observer reported an interpreter making multiple errors that were caught and corrected by the presiding WCLJ during the hearing. While this individual judge may have preserved an accurate record in that hearing, in other instances, substantive information that could influence a claimant's family's ability to meet basic needs was entered incorrectly on the hearing record due to erroneous interpretation.

iv. Incomplete Interpretation

Out of 51 interpreted hearings observed, zero were interpreted in their entirety. Even when the Board provided telephone interpretation services, that service was limited to questioning the claimant directly, and the interpreter did not interpret any other part of the hearing. In one hearing, the presiding WCLJ hung up with the interpreter part way through the hearing, apparently feeling that interpretation was no longer needed. One observer reported a WCLJ neglecting to call an interpreter after a claimant's attorney specifically requested interpretation. Another reported that the WCLJ was hesitant to call an interpreter when one was requested, and asked the claimant's attorney if there was enough information on the record to proceed without testimony from the claimant.

Claimants with language access needs do not have access to complete, thorough, hearing interpretation. Rather, only very limited parts of the hearing are interpreted. Claimants thus receive disjointed, incomplete impressions of their hearings, and may be left completely unaware of what was said by other parties or their own attorneys. Claimants are left to rely on attorneys who may not speak their language to explain what happened at the hearing and how it will impact their claim.

IX. RECOMMENDATIONS

Codify Executive Order 26 in the Workers' Compensation Law.

As discussed in this report, state agencies are required by EO 26 to provide interpretation to those who require it to use services provided by the agency; to provide translated versions of certain documents in the most common non-English languages spoken in New York; to maintain a language access plan; and to hire a language access coordinator.²⁵ Codifying EO 26 in the Workers' Compensation context would enhance the protections accorded to all LEP workers and prevent a future administration from revoking current protections.

Assemblymember Moya has introduced Assembly Bill Number A6043 to accomplish this goal.

²⁴ On five occasions, observers who spoke Spanish noted interpretation errors.

²⁵ State of New York, Executive Order 26 "Statewide Language Access Policy" (2011).

Interpret the Entirety of Every Hearing.

As discussed above, our observers did not observe a single hearing that was interpreted in its entirety. Most commonly, only questions to, and answers from, the claimant were interpreted. This makes it impossible for claimants to understand hearings that are essential to the ultimate success or failure of their Workers' Compensation claims.

This problem would be significantly alleviated if entire hearings were interpreted. Interpreting entire hearings would place claimants with language access needs on a similar footing as English-speaking claimants, and would be very effective in beginning to eliminate the language-based inequality that undermines many Workers' Compensation hearings.

Use In-Person Interpretation.

In-person interpretation from qualified professionals should be provided whenever possible. In-person interpretation is generally higher quality than telephone interpretation, and full-time interpreters employed by the Board would have the benefit of specialized knowledge of the Workers' Compensation system, its procedures, and its terminology. Additionally, in-person interpretation would make interpreting entire hearings possible. Because telephone interpretation eliminates the possibility of simultaneous interpretation, it adds a significant amount of time to hearings, while in-person interpretation does not.

Employing or contracting professional interpreters directly, rather than contracting through a telephone interpretation service, would also enable the Board to require certifications on the same level as those required of court interpreters and ensure the highest quality interpretation available.

Currently, the Board and other state agencies are required by EO 26 to maintain a language access plan that, among other things, identifies the five most common non-English languages spoken by the population that they serve.²⁶ This executive order provides an excellent guidepost for the provision of in-person interpretation. The Board should provide in-person interpretation for the six most common languages as identified by its language access plan. In 2015, these were Spanish, Chinese (Mandarin/Cantonese), Russian, Italian, Korean, and Haitian Creole.²⁷

Use Contract Interpreters.

When an injured or sick worker begins the process of filing a Workers' Compensation claim, the first step is completing the C-3 form. The C-3 requests basic information about the claimant, their employer, and the injury or illness, including whether the claimant will require interpretation at a hearing, and, if so, in which language.

In the past, the Board utilized the information provided on the C-3 to ensure that claimants with language access needs were provided with interpretation at hearings.²⁸ When a hearing was scheduled for a claimant who indicated on their C-3 that they required interpretation, the Board would hire a contract interpreter to attend the hearing. The Board should revive this abandoned practice.

Use Selective Certification in Board Hiring.

After years of using telephone interpreters exclusively, it may take time for the Board to build up the infrastructure needed to provide interpretation performed by qualified professionals to LEP claimants. As an interim measure, the Board should utilize selective certification, which allows state

²⁶ *Id.*

²⁷ Language Access Plan for LEP Individuals, Workers' Compensation Board, 1-2 (April 1, 2015) available at <https://dhr.ny.gov/sites/default/files/pdf/lep/WCB%202014%20LAP.pdf>.

²⁸ The C-3 uses the term "translator" rather than "interpreter." The form can be found at <http://www.wcb.ny.gov/content/main/forms/c3.pdf>

agencies to prioritize specific skills when hiring new staff, to prioritize hiring individuals who speak the most common non-English languages spoken in New York as identified under EO 26.

When state agencies hire new staff, they can include a preference for certain language skills in the job description. New staff should be trained in the specific language of Board hearings. Selective certification allows agencies to better serve populations with language access needs.

Using selective certification in this manner will allow the Board to provide in-person interpretation on demand for speakers of common non-English languages, while they rebuild their in-person interpretation funding, staff, and procedures. If, for example, an employee at the Customer Service desk of a hearing site spoke Spanish, he or she could simply be assigned to a hearing to provide interpretation as needed.

Ask about Interpretation at the Beginning of Every Hearing.

Some of our observers reported not being able to determine if certain claimants needed interpretation or not. Generally, if the claimant's attorney does not specifically request interpretation, none is provided. While claimants' attorneys have their clients' best interests in mind, they are frequently scheduled for back-to-back hearings, and spend hearing days rushing from one client to the next. As a result, claimants' attorneys do not always aggressively advocate for interpretation and not every claimant who needs interpretation receives it. Additionally, under current Board practices, even the most zealous attorney is only able to secure inadequate telephone interpretation for their LEP clients. The duty to provide required interpretation ultimately falls on the Board administering the hearing and should be fulfilled by the Board.

Greater efforts should be made to ensure that every single claimant who requires interpretation receives it. The Board currently has posters at their hearing sites instructing claimants to request interpretation if needed. However, not a single observer reported monitoring a hearing in which a claimant advocated for him or herself and requested an interpreter. Instead of relying on the claimant or their attorney to speak up, WCLJs should ask every claimant, at the beginning of every hearing, if they require interpretation.

Track Language Access Needs of Individual Claimants.

By the time a claimant reaches their first hearing, they have filled out forms and received written notices from the Board. Additionally, most Workers' Compensation claims that go to a hearing eventually require multiple hearings to resolve.

Each form filled out and hearing conducted presents an opportunity for the Board to learn a claimant's language access needs. The Board should make sure to ask, at every stage of interaction with a claimant, if the claimant has language access needs. The Board should then include language access needs prominently in each claimant's file, so that WCLJs know before a claimant even enters a hearing room whether the claimant requires interpretation.

Ensure That All Interpretation Errors Are Noted in Record.

The Board should train all WCLJs to ensure that any and all interpretation errors that are flagged by claimants, attorneys, or other hearing participants are flagged in the official record of the hearing. Under current practices, interpretation errors may not be included in the official record of a hearing. Board hearings are informal, and the proceedings frequently shift rapidly between being on the record and off the record. Side conversations clarifying a point or an interpretation error may happen in off the record interactions. Our observers noticed interpretation errors that were central to the success of the claim in question. Making sure these errors are on the record will enable claimants to pursue appeals when interpretation errors damage the success of their claims. While

well-trained, specialized interpreters are needed, giving claimants the tools to protect their rights will help mitigate the damage caused by incompetent interpretation when it occurs.

Consult with Other Agencies.

While there is significant room for improvement in the Board's language access practices, other state agencies, including other subdivisions of the Department of Labor, serve LEP individuals effectively. The Board should consult with and adopt the practices utilized by the Unemployment Insurance Board, which, according to practitioners, is proactive in identifying the language access needs of claimants and utilizes in-person interpreters at hearings, even for less common languages.

Create Greater Transparency and Community Engagement.

Form an Advisory Committee on Language Access.

The sub-standard language access practices employed by the Board, despite New York's diverse population, indicate that the Board has lost touch with the needs of the population it serves. Increased communication between the Board and communities with language access needs is essential, both to remedy current language access problems and to continue to improve in the future.

The Board should form an advisory committee on language access, to be comprised of Workers' Compensation claimants, ill and injured workers who have faced barriers to accessing Workers' Compensation benefits, community groups, and other stakeholders, and should consult this committee on a regular basis regarding how the Board could better serve the needs of language access claimants.

Increase Transparency and Report Language Access Data.

The monitoring conducted for this report was made necessary by the Board's own lack of transparency. Freedom of Information Law (FOIL) requests from Coalition members were subject to delays and stonewalling.²⁹

Additionally, the Department of Labor has neglected to release statutorily required reporting relevant to tracking the impact of recent Workers' Compensation reforms. The 2007 New York Workers' Compensation Law Reform amending the Workers' Compensation law directed the Commissioner of the Department of Labor to track all claimants who had been awarded Partial Permanent Disability (PPD) status, in conjunction with the Board and the Superintendent of Insurance. The Governor and Legislature asked that the annual "Safety Net" report identify, at a minimum, the number of PPD claimants who have: (1) returned to gainful employment; (2) been re-categorized as being totally industrially disabled; (3) remain subject to duration limitations set forth in paragraph w of subdivision three of section fifteen of this article; and (4) not returned to work, and whose indemnity payments have expired. The statute directed the Commissioner to outline any additional steps necessary to minimize the number of workers who have not returned to work and who have not been recategorized from PPD. After issuing this report in 2008, the Board and the Commissioner of Labor have stopped complying with this statutory provision.³⁰

Going forward, the Board should provide the public with annual reports on language access. These reports should include the number and percentage of hearings in which the claimant indicated that they needed interpretation and the number and percentage of hearings in which interpretation was provided.

²⁹ The Board declined to respond to an earlier FOIL request submitted on February 4, 2016, in its entirety. After the submitting party filed an appeal, the Board agreed to produce a response. In this response, the Board declined to respond to all queries relating to language access.

³⁰ The report was officially published in 2008 and it is unclear whether it has been produced in any subsequent year, but it has not been made available for public access since 2008. See <https://www.labor.ny.gov/agencyinfo/annualrpt.shtm> (listing New York Department of Labor annual reports.)

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