NAA CLE Panel—Facilitating Self-represented Litigants

Comments from Linda Williams and Robert Krabill, Board of Industrial Insurance Appeals

1. What are the best practices for identifying a litigant who may need an accommodation?

We have an accommodations committee to address all accommodations requests. It includes two members of executive leadership and a coordinator with specialized focus and training. We ask litigants to make accommodations requests in writing, but we accept oral requests at hearing events. Our judges have experience, skill, and training identifying accommodation needs and designing accommodations in the pre-trial planning process. It is covered in our bench manual, so every judge gets initial training on the subject.

When a person struggles with participating in the early stages of the process, the judge should *sensitively* ask, "You seem to be struggling. Can we do something to make our process more accessible to you?" Our intent is to be open and accessible, but a litigant might infer we perceive them to be incompetent. We can't assume that someone who appears to have a disability needs or wants an accommodation in our forum. Listening for cues and taking a soft approach allow a careful, appropriate, and quickly adjustable dialogue that respects the independence, autonomy, and dignity of our litigants with disabilities.

2. For individuals with significant barriers to adequately representing themselves what tools can agencies provide short of appointment of an attorney?

For outsiders, finding the appropriate law presents an initial barrier. Agencies should develop and support a user-friendly public website as a self-help information hub. The website should include links to appropriate law where users can find and read it for themselves.

Jargon and complex language present a second barrier. As insiders, we can forget the initial effort we put into understanding insider words, phrases, and conventions that effectively exclude outsiders. Plain talk is a style of communication that strives to simplify vocabulary and grammar to a level more likely to be understood by outsiders, including less educated people and non-native speakers. Because plain talk puts the burden of communication on the speaker, rather than the listener, it shifts that burden to the party with the time and skill to do it well. Agencies should maximize plain talk in all written and oral communication to minimize the effort needed to understand, the risk of misunderstanding, and the risk of misinterpretation.

The presenters covered the issues of interpreters and the wide range of sensory, physical, mental, and exertional accommodations. Our accommodations committee has been innovative in developing solutions based on individual need.

Recently, we issued an order pursuant to WAC 263-12-120, which provides:

> That the board may continue hearings on its own motion to secure in an impartial manner such evidence, in addition to that presented by the parties, as the board, in its opinion, deems necessary to decide the appeal fairly and equitably . . . .

In the order, we wrote:

> Admittedly, RCW 51.52.102 and WAC 263-12-120 historically have been infrequently used by the Board, but that doesn't suggest it can't be used when, in the Board's opinion, further evidence should be secured to allow it to decide a matter fairly and equitably. In consideration of whether the authority should be invoked, we acknowledge that there is a current environment of greater expectations from judicial and quasi-judicial institutions to do what is proper to increase access to justice.
>
> We are mindful of the judiciary's increasing acknowledgment that courts can take a proactive role in increasing access to justice of all parties who seek it. In 2014 the Supreme Court issued an order under the title In the Matter of Reauthorization of the Access to Justice Board. In that order the Court reestablished the Access to Justice Board to be administered by the Bar Association; it is charged with achieving equal access to the civil justice system for those facing economic and other significant barriers. One of the stated priorities of the Access to Justice Board is to work with statewide partners to stimulate new and effective delivery innovations in the pursuit of increasing access to justice. Another example is GR 33, which provides for accommodations, including appointment of an attorney. Consistent with this philosophy, a court has required this Board to appoint an attorney when it was deemed necessary to allow access to justice as a reasonable accommodation for disability. These developments, and others, convince us that we must be increasingly proactive in ensuring the litigants before us have access to justice. To achieve this we must sometimes invoke our legislatively granted authority to secure the evidence we need to decide a matter fairly and equitably.

This order shows the BIIA's commitment to building a record in cases where it is clear that the self-represented litigant has made an effort to participate and has a viable case. In the Smith order, the worker actually had been represented. The attorney failed to appear on multiple occasions. The Department order favored the worker, yet the assistant attorney general did not present the worker's doctor. Because the worker's own attorney, the Department, and our process all failed to acquire and present the witness the worker needed, the Board remanded the case to the hearings process.

This decision does not require appointment of an attorney. Our IAJs have a duty to build a record usually met by taking the evidence that attorneys present. When parties represent themselves, the IAJ will instruct them in what is necessary to present a case, issue subpoenas as requested, and question the witnesses who appear. Those parties who identify a medical expert witness and arrange for them to testify can present a winning case.

3. When should an agency be required to appoint an attorney for a self-represented litigant?

In an order we issued in February 2020, we set forth the following factors we examine in determining whether counsel should be appointed:

a. How convincingly has the worker shown that they can't retain an attorney on their own?
b. How badly do the worker's disabilities interfere with self-representation?
c. Why won't the standard procedures for self-represented parties meet the worker's needs?
d. What accommodations short of appointing an attorney has the Board tried?
e. How badly have those accommodations failed?
f. How much does **not** appointing an attorney cost?

We decided we should begin building a body of law on this subject so our judges and the public could understand how we analyze a request for accommodation, especially in the case where they ask for counsel. Our accommodations order is currently under appeal to superior court, which has appointed an attorney.

In different cases, some factors may weigh more strongly than others. But, the factors give us a framework to analyze representational accommodation requests. As we decide cases, we will build a body of case law defining when this extraordinary accommodation is necessary.

We also felt that transparency was important in preserving the record of our efforts. The Weems ruling was attached to the materials. In that case, we were ordered to provide legal counsel for Mr. Weems. The court indicated that we failed to show how we accommodated Mr. Weems. After we complied with that ruling, we realized it was important to demonstrate the efforts we make in all future cases.

4. What are the range of accommodations provided by BIIA? OAH?

Our IAJs can and do adjust the standard process for litigants all the time without the need for a formal accommodation process. For example, they allow parties and witnesses to appear by telephone if travel poses a barrier, they allow witnesses to change position freely and take breaks frequently to stay comfortable, and they select accessible hearing venues. This spontaneous informal accommodation meets the accommodation needs of most litigants with disabilities. As part of their commitment to building a complete record, our IAJs routinely assist self-represented litigants in presenting their cases by explaining the process, asking them to identify witnesses, issuing subpoenas, and questioning witnesses.

We offer several kinds of accommodations: sensory, physical, exertional, and representational. Sensory accommodations include sign language interpreters and real-time court reporting. Physical accommodations include shifting venue and accessible facilities for proceedings, postural accommodations (sitting, lying down, freedom to roam, frequent breaks, etc.). Exertional accommodations include frequent breaks, longer breaks, multiple hearing days, Zoom or telephone hearings, and stays or continuances. At this time, representational accommodations are limited to appointment of an attorney. We have a clear set of criteria for determining when such a case is appropriate.

IAJs explain the process and the minimum requirements of a prima facie case to self-represented parties both orally on the record and in writing. When an IAJ fails to document that explanation, the Board may remand the case. The other panelists recommended continuances to seek representation, and we do offer at least one continuance when a self-representated party asks for more time to obtain representation. We offer subpoenas so that a self-represented party can

compel a witness' attendance. Unfortunately, a party may not serve their subpoenas properly. When a party fails to serve a subpoena, but has made an effort, we offer continuances for a second chance.

We believe that a support person better meets the needs of our litigants than a lay representative. A support person can provide emotional support helping a self-represented party through emotionally difficult argument and testimony. A support person can provide clerical support calendaring dates, organizing papers, and taking notes. But, a support person does not intermediate between the self-represented person and the judge, the witnesses, and the other parties. The judge can still communicate directly with the self-represented party. Unlike a support person, a *suitable representative* under a WAC like OAH's would place a barrier between the judge and the self-represented party.

We are using our accommodations committee, our case law, and our power to procure evidence to ensure a fair record to increase accessibility for the self-represented litigant.

Workers' compensation cases often involve complex medical issues. And, the rules of evidence and the court rules govern our cases. For these reasons, we restrict lay representation. In fact, lay representatives cannot collect a fee. Knowledgeable lay representatives can represent litigants in claim management interactions with the Department. They can even represent litigants through the mediation process, but their primary role in the hearing process should be facilitating representation by a qualified attorney.

Because the industrial insurance appeals process provides a method for attorneys to be paid on a contingency, workers typically can and do secure specialized professional representation on their own. *See* WAC 263-12-165. These workers do not need representational accommodation. The problem of representational accommodation arises for, first, those workers whose impairments interfere with obtaining representation and, second, for those who have consulted attorneys but whose cases are rejected because the attorneys do not expect an adequate potential contingency fee. We cannot easily tell the difference. For the first group, pairing the worker with an attorney may be a full solution, although capacity to consent to and direct representation may be a problem. For the second group, providing an attorney would encourage marginal litigation and disrupt the current system for attorney compensation. A suitable representation WAC would discourage self-represented parties from acquiring a qualified attorney and interfere with the current system for providing professional representation.

5. What are the challenges facing an attorney representing a person with disabilities? What are the challenges facing an attorney representing a person with socioeconomic barriers?

Todd effectively addressed this question, but the challenges counsel faces are obvious from our vantage point as well. Socioeconomic factors come into play that often reveal a distrust in the process. Many have a history of negative interactions with authority and the legal system. While many self-represented parties have ongoing benefits as a source of income, many do not—that may be why they are appealing. A lack of resources may result in an inability to pay witness fees upwards of $200 an hour. Many experience social barriers to securing professional class

medical witnesses. Many also have educational or linguistic barriers that confound communication and reduce trust.

Many self-represented parties, particularly those who have not been able to get an attorney on their own, have uncertain addresses and unreliable mail or phone access. Actually finding your client can be a challenge in itself! Once you have secured your client's participation, you may still have to overcome their distrust.

Your client may have a mental illness or cognitive impairment that interferes with their ability to perceive the world, identify goals, and make decisions based on those goals. An attorney must consider whether their client has the capacity to consent to representation. How should an attorney respond to erratic and inconsistent client decisions? A client may persevere in a losing argument against legal advice. A client may be unwilling to consider an apparently reasonable alternative. While these problems arise with all clients, clients with mental illness or cognitive impairment raise special concerns in conflicts between autonomy and the attorney's perception of the client's best interests because their disabilities interfere with the exercise of autonomy.

6. What are the best practices for promoting access without compromising judicial values of fairness and impartiality?

First, adjudicative agencies must train line personnel to recognize and respond to real and apparent disabilities. Second, they must develop a formal process to address accommodations through trained and sensitized team members.

Once we identify a disability, the judge must not only facilitate the accommodation, but also remain neutral. We have several WACs that require us to make an adequate record. That duty is balanced against our duty to provide an unbiased forum. We have endorsed our judges asking questions to create an adequate record. We examined this duty in our significant decision *In re Evangelina Acevedo*, BIIA Dec., 08 15613 (2009).

7. When reviewing a record made by a judge, what do you look for to ensure a litigant received a fair hearing and appropriate accommodations were made?

Of course, we always turn to the litigant's own impressions relayed in a complaint or on the record. We don't accept it at face value, but we use it as the framework for investigation. Once there is an allegation that the hearing was unfair, we look at a number of factors. We first look to see if the party received adequate notice, explanations, and warnings regarding their responsibilities in writing. Once the party has received all of the information they need in writing, we look to the sufficiency of the record. Did the judge ask the questions needed to make a fair and complete record? Did the judge give the party an adequate opportunity to present their case?

We also review the accommodation process to ensure that the party was able to meaningfully participate. This can happen at the time the request was made or during the review process. If a party alleges that they were unable to present their case as a result of their disability AFTER the case is completed and the result is unfavorable, we may send the case back to the accommodations committee to check that the person was properly accommodated.

8. What types of assistance can and should support or professional staff provide to self-represented litigants?

A large share of self-represented litigants call to ask questions about the process before the first conference with a judge. Our staff is trained to answer all procedural and quasi-procedural questions. They are also skilled at drawing the line between explanation of the procedure and legal advice. We are mindful that they are in a precarious position when they answer the phone. To make sure that a qualified person answers the questions, we may ask the caller to call back at a specific time when they can speak to a judge. Often, our assistant chiefs and judges will speak to litigants who appear in our offices to ask questions.

As mentioned above, we adhere to our obligation to build a complete record and we guide self-represented parties through the process. They receive multiple warnings outlining their obligations and responsibilities. It's important that they know they can seek accommodation without making them feel singled out. We scrutinize the record to make sure that our judge gave the self-represented party a fair opportunity to be heard. Our judges are uniformly trained to handle unrepresented litigants with professionalism and grace.