No. 81478-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, GORDANA LUKIĆ, and MAIDA MEMIŠEVIĆ,

Petitioners,

vs.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

FILED
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STATE OF WASHINGTON

WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION AMICUS CURIAE MEMORANDUM SUPPORTING REVIEW

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On Behalf of
Washington State Trial Lawyers Association Foundation

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of the State of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which now operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress under the civil justice system. More particularly, WSTLA Foundation has an interest in the right of workers' compensation claimants with limited English proficiency (LEP) to interpreter services under Ch. 2.43 RCW, with regard to the processing and adjudication of their claims under the Industrial Insurance Act, Title 51 RCW.

WSTLA Foundation filed an amicus curiae brief in this case before the Court of Appeals, Division I, and appeared at oral argument in that court. See Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation (C.A. #57445-1-I) [WSTLA Fdn. Kustura Am. Br.] This Court granted WSTLA Foundation permission to file this amicus curiae memorandum, pursuant to RAP 13.4(h).

II. BACKGROUND

This review arises out of the published opinion of the Court of Appeals in Kustura v. Labor & Indus., 142 Wn.App. 655, 175 P.3d 1117 (2008), *review pending*.[1] These cases consolidate three separate workers'

[1] Kustura is the lead case of three cases decided by Division I on the same day, each of which addresses the rights of LEP claimants under Ch. 2.43 RCW, in a

compensation claims by Hajrudin Kustura, Gordana Lukić, and Maida Memišević (collectively Kustura), each of which unsuccessfully challenged below Department of Labor & Industries (Department) wage-rate calculations made pursuant to RCW 51.08.178. The Court of Appeals ultimately concluded that the LEP claimants were not entitled to any relief, and affirmed the superior court. This review followed.

Each LEP claimant contends on review, *inter alia*, that he or she was denied rights under Ch. 2.43 RCW, governing entitlement to interpreter services in certain court and administrative proceedings, before the Department and/or the Board of Industrial Insurance Appeals (Board). See Kustura, 142 Wn.App. at 663-68; Kustura Amended Pet. for Rev. at 1-7.[2] The LEP claimants raise two issues on review which call into question the Court of Appeals' interpretation and application of Ch. 2.43 RCW. See Kustura Pet. for Rev. at 1-2. These are:

> [1.] Is the Department required by statute to provide interpreters for LEP injured workers for communications on their claims?
>
> [2.] When the Board does not provide interpreter services required by law, forcing LEP workers to incur interpreter expense, should they be denied reimbursement on the grounds that they were not prejudiced?

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workers' compensation context. See Meštrovac v. Labor & Indus., 142 Wn.App. 693, 176 P.3d 536 (2008), *review pending* (S.C. #81480-5); Ferenćak v. Labor & Indus., 142 Wn.App. 713, 175 P.3d 1109 (2008), *petition for review pending* (S.C. #81481-3). WSTLA Foundation appeared as amicus curiae in Meštrovac before Division I, see Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation (C.A. #58200-3-I), and is also filing an amicus curiae memorandum in Meštrovac in support of review in that case.

[2] This amicus curiae memorandum only addresses issues on review involving interpretation and application of Ch. 2.43 RCW.

See Kustura Amended Pet. for Rev. at 1. These legal issues stem from three aspects of the Court of Appeals opinion regarding Ch. 2.43 RCW:

- The definition of "legal proceeding" under RCW 2.43.020(3) does not include Department claims processing and adjudication because no hearing is involved. See Kustura, 142 Wn.App. at 677-80.

- The Department is not the "governmental body initiating the legal proceedings" under RCW 2.43.040(2), for purposes of determining responsibility for the cost of interpreter services at the hearing before the Board. See id. at 680-81.[3]

- Notwithstanding the failure to provide interpreter services for the LEP claimants with respect to communications with counsel during Board hearings, in violation of RCW 2.43.030(1), the court did not expressly address Kustura's request for reimbursement of expenses, concluding only that "none of the workers demonstrates prejudice as a result of the Board's failure to comply with the statute so we can find no reversible error." Id. at 681; see also Kustura Br. at 1,7, 10, 15, 41 (seeking reimbursement for certain interpreter expenses).

III. ISSUES PRESENTED

The issues on review discussed in this amicus curiae memorandum include:

1. Does Ch. 2.43 RCW apply to claims processing and adjudication before the Department of Labor & Industries under the Industrial Insurance Act, Title 51 RCW? (See Kustura Amended Pet. for Rev. at 1 (issue #2)).

2. If an LEP claimant is denied interpreter services before the Board in violation of Ch. 2.43 RCW and incurs expenses in obtaining the necessary services, is the LEP claimant

[3] The court also held that the Board is not the governmental body initiating the proceedings at the Board level because the claimant is the one who must appeal the Department action. See Kustura at 680. (The Department concedes that Ch. 2.43 RCW applies at the Board level. See id. at 679-80.)

entitled to reimbursement for such cost, irrespective of whether the workers' compensation claim is successful? (See Kustura Amended Pet. for Rev. at 1 (issue #1)).

3. Under RCW 2.43.040, who is responsible for paying for the cost of interpreter services for an LEP claimant, required in the course of proceedings before the Board of Industrial Insurance Appeals? (See Kustura Amended Pet. for Rev. at 1 (issues ##1 &2), 9-11).

IV. SUMMARY

Almost twenty years ago the Washington Legislature recognized that persons with limited English proficiency are entitled to interpreter services in certain judicial and administrative proceedings in order that their rights, "constitutional or otherwise," be "fully protected." See 1989 Laws Ch. 358 §1 (codified as RCW 2.43.010); see also id. at §§2-8 (codified in RCW 2.43.020-.080, as amended). This Court has yet to interpret this remedial statutory scheme. This case provides a much-needed opportunity for the Court to clarify the intent and meaning of these statutes, in the familiar setting of workers' compensation claims adjudication under Title 51 RCW. More importantly, the case presents a number of difficult legal questions regarding the rights of LEP claimants under Ch. 2.43 RCW, each of which is of substantial public interest under RAP 13.4(b)(4).

V. ARGUMENT IN SUPPORT OF REVIEW

This case belongs in the Supreme Court. It involves interpretation of far-reaching remedial legislation first enacted in 1989. See 1989 Laws

Ch. 358 §§1-8 (codified in Ch. 2.43 RCW, as amended).[4] These statutes are essentially designed to put LEP claimants involved in legal proceedings with governmental entities in state courts or administrative agencies on an equal footing with English-speaking claimants. See generally RCW 2.43.010 (declaring Washington public policy to fully protect the rights of LEP persons in legal proceedings by providing qualified interpreters to assist them); see also RCW 2.43.040(2) (explaining when claimants involved in a legal proceeding with a governmental body receive interpreter services at public expense). This Court has yet to interpret this statutory scheme, which is designed to serve a crucial role in providing access to justice to an increasingly larger segment of the citizenry who do not speak the English language.

Review of this case would allow the Court to interpret this statutory scheme in a familiar and important context – the processing and adjudication of workers' compensation claims under the Industrial Insurance Act, Title 51 RCW. This alone suggests the case is worthy of the attention and guidance of the highest court of this State. More importantly, the particular issues before the Court on review involving Ch. 2.43 RCW each meet the "substantial public interest" criteria of RAP 13.4(b)(4).

If the Court of Appeals opinion stands as binding precedent, the impact on LEP claimants is profound in the Industrial Insurance context.

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[4] The current version of Ch. 2.43 RCW is reproduced in the Appendix to this amicus curiae memorandum.

The opinion concludes: (1) LEP claimants have no entitlement to interpreter services at the Department level, where claims are initially worked up and decided, because agency processing and adjudication of claims is not a "legal proceeding," and (2) while Ch. 2.43 RCW applies at the Board level, it does not require the Department or the Board to cover the cost of interpreter services at that level because neither entity is a "governmental body initiating the legal proceedings" under RCW 2.43.040(2). See Kustura, 142 Wn.App. at 677-82; see also Mestrovăc, 142 Wn.App. at 708.[5]

The above holdings were issued in the face of well-defined arguments to the contrary. See e.g. WSTLA Fdn. Kustura Am. Br. at 6-20. WSTLA Foundation argued below that, properly interpreted, the definition of "legal proceeding" in RCW 2.43.020(3) includes *any* procedure for seeking redress before an agency, and does not require that the administrative process involve a hearing. See id. at 15-17. The Court of Appeals rejected this argument, apparently based on the "last antecedent" rule of construction. See Kustura, 142 Wn.App. at 680. Kustura challenges on review whether this rule applies. See Kustura Amended Pet. for Rev. at 9-10. Below WSTLA Foundation offered an

[5] In Kustura the Court of Appeals did not expressly decide whether an LEP claimant who was denied the full benefit of interpreter services before the Board can obtain reimbursement for the cost of such interpreter services, concluding somewhat vaguely that in the absence of proof that those services affected the outcome of the underlying industrial insurance claim, no "reversible error" was established. See Kustura at 681; compare Mestrovăc at 708 (rejecting argument that reimbursement is required because otherwise claimant's benefits are effectively reduced by additional expense).

interpretation of "legal proceeding" that includes three types of court proceedings and all administrative-type proceedings where redress is sought by aggrieved persons. See WSTLA Fdn. Kustura Am. Br. at 15-17. Under this interpretation the definition is *not* limited to administrative hearings. Id.; see also Kustura & Meštrovac "WSTLA Foundation Demonstrative Exhibits/Handouts for Oral Argument, November 19, 2007" at CHART #1 (Demonstrative Exhibits/Handouts).[6]

The Court of Appeals also rejected the notion that the Department should be considered the "governmental body initiating the legal proceedings" under RCW 2.43.040(2) for purposes of determining the responsibility for costs of interpreter services before the Board. See Kustura, 142 Wn.App. at 680-81; WSTLA Fdn. Kustura Am. Br. at 17-20. This argument is based upon the dictates of RCW 51.28.010. This statute requires the Department, upon receipt of a notice of accident form from an employer regarding a worker injury involving, among other things, medical treatment, to provide notice to the injured worker "in non-technical language" of his or her rights regarding the processing of an industrial insurance claim. See WSTLA Fdn. Kustura Am. Br. at 18-20; see also Demonstrative Exhibits/Handouts at CHART #2.[7] Under this

[6] This three page document is reproduced in the Appendix to this amicus curiae memorandum, albeit with slightly different formatting.

[7] The Department's response to the argument regarding this statutory mandate is extraordinary. In its answer to WSTLA Foundation's amicus brief it contended that the claims-filing process required by the statute "seldom occurs," apparently leaving claimants to rely upon their physicians to provide the necessary information regarding the processing of claims. See Department Ans. to WSTLA Amicus Curiae Brief at 18-20 & Appendix A. It supports this argument

proposed analysis, the Department would be the initiating governmental body for purposes of reimbursement for the costs of interpreter services at the Board level, should reimbursement be required. See WSTLA Fdn. Kustura Am. Br. at 20. In other words, if this Court grants review in this case and determines Kustura is entitled to reimbursement for the costs incurred for interpreter services involving communications with counsel at the Board hearing, it will be necessary to decide whether either the Board or Department must pay such reimbursement under RCW 2.43.040(2) (regarding initiating governmental body), and RCW 2.43.020(3) (regarding definition of "legal proceeding").

These Ch. 2.43 RCW issues, and any other related issues presented on review, should be determined by the highest court of this State. This Court should independently assess whether the Court of Appeals' interpretation of Ch. 2.43 RCW provides these LEP claimants the full protection contemplated by the Legislature.

VI. CONCLUSION

Filed as Attach to Brief

This Court should grant review in this case.

DATED this 14th day of July, 2008.

BRYAN P. HARNETIAUX * MICHAEL J. PONTAROLO *

On Behalf of WSTLA Foundation

*Document to be transmitted for filing by e-mail; signed original retained by counsel.

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by two declarations by Department administrators. See id. at Appendix A; but see Wilber v. Labor & Industries, 38 Wn.App. 553, 556-57, 686 P.2d 509 (1984) (suggesting worker cannot excuse non-compliance with statutory duty based upon physician's assurances of timely compliance), *review denied*, 103 Wn.2d 1016 (1985).

APPENDIX

RCW 2.43.010

Legislative intent.

It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

It is the intent of the legislature in the passage of this chapter to provide for the use and procedure for the appointment of such interpreters. Nothing in chapter 358, Laws of 1989 abridges the parties' rights or obligations under other statutes or court rules or other law.

[1989 c 358 § 1. Formerly RCW 2.42.200.]

RCW 2.43.020

Definitions.

As used in this chapter:

(1) "Non-English-speaking person" means any person involved in a legal proceeding who cannot readily speak or understand the English language, but does not include hearing-impaired persons who are covered under chapter 2.42 RCW.

(2) "Qualified interpreter" means a person who is able readily to interpret or translate spoken and written English for non-English-speaking persons and to interpret or translate oral or written statements of non-English-speaking persons into spoken English.

(3) "Legal proceeding" means a proceeding in any court in this state, grand jury hearing, or hearing before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof.

(4) "Certified interpreter" means an interpreter who is certified by the administrative office of the courts.

(5) "Appointing authority" means the presiding officer or similar official of any court, department, board, commission, agency, licensing authority, or legislative body of the state or of any political subdivision thereof.

[2005 c 282 § 2; 1989 c 358 § 2. Formerly RCW 2.42.210.]

RCW 2.43.030

Appointment of interpreter.

(1) Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings.

(a) Except as otherwise provided for in (b) of this subsection, the interpreter appointed shall be a qualified interpreter.

(b) Beginning on July 1, 1990, when a non-English-speaking person is a party to a legal proceeding, or is subpoenaed or summoned by an appointing authority or is otherwise compelled by an appointing authority to appear at a legal proceeding, the appointing authority shall use the services of only those language interpreters who have been certified by the administrative office of the courts, unless good cause is found and noted on the record by the appointing authority. For purposes of chapter 358, Laws of 1989, "good cause" includes but is not limited to a determination that:

(i) Given the totality of the circumstances, including the nature of the proceeding and the potential penalty or consequences involved, the services of a certified interpreter are not reasonably available to the appointing authority; or

(ii) The current list of certified interpreters maintained by the administrative office of the courts does not include an interpreter certified in the language spoken by the non-English-speaking person.

(c) Except as otherwise provided in this section, when a non-English-speaking person is involved in a legal proceeding, the appointing authority shall appoint a qualified interpreter.

(2) If good cause is found for using an interpreter who is not certified or if a qualified interpreter is appointed, the appointing authority shall make a preliminary determination, on the basis of testimony or stated needs of the non-English-speaking person, that the proposed interpreter is able to interpret accurately all communications to and from such person in that particular proceeding. The appointing authority shall satisfy itself on the record that the proposed interpreter:

(a) Is capable of communicating effectively with the court or agency and the person for whom the interpreter would interpret; and

(b) Has read, understands, and will abide by the code of ethics for language interpreters established by court rules.

[2005 c 282 § 3; 1990 c 183 § 1; 1989 c 358 § 3. Formerly RCW 2.42.220.]

RCW 2.43.040

Fees and expenses — Cost of providing interpreter.

(1) Interpreters appointed according to this chapter are entitled to a reasonable fee for their services and shall be reimbursed for actual expenses which are reasonable as provided in this section.

(2) In all legal proceedings in which the non-English-speaking person is a party, or is subpoenaed or summoned by the appointing authority or is otherwise compelled by the appointing authority to appear, including criminal proceedings, grand jury proceedings, coroner's inquests, mental health commitment proceedings, and other legal proceedings initiated by agencies of government, the cost of providing the interpreter shall be borne by the governmental body initiating the legal proceedings.

(3) In other legal proceedings, the cost of providing the interpreter shall be borne by the non-English-speaking person

unless such person is indigent according to adopted standards of the body. In such a case the cost shall be an administrative cost of the governmental body under the authority of which the legal proceeding is conducted.

(4) The cost of providing the interpreter is a taxable cost of any proceeding in which costs ordinarily are taxed.

[1989 c 358 § 4. Formerly RCW 2.42.230.]

RCW 2.43.050

Oath.

Before beginning to interpret, every interpreter appointed under this chapter shall take an oath affirming that the interpreter will make a true interpretation to the person being examined of all the proceedings in a language which the person understands, and that the interpreter will repeat the statements of the person being examined to the court or agency conducting the proceedings, in the English language, to the best of the interpreter's skill and judgment.

[1989 c 358 § 5. Formerly RCW 2.42.240.]

RCW 2.43.060

Waiver of right to interpreter.

(1) The right to a qualified interpreter may not be waived except when:

(a) A non-English-speaking person requests a waiver; and

(b) The appointing authority determines on the record that the waiver has been made knowingly, voluntarily, and intelligently.

(2) Waiver of a qualified interpreter may be set aside and an interpreter appointed, in the discretion of the appointing authority, at any time during the proceedings.

[1989 c 358 § 6. Formerly RCW 2.42.250.]

RCW 2.43.070

Testing, certification of interpreters.

(1) Subject to the availability of funds, the administrative office of the courts shall establish and administer a comprehensive testing and certification program for language interpreters.

(2) The administrative office of the courts shall work cooperatively with community colleges and other private or public educational institutions, and with other public or private organizations to establish a certification preparation curriculum and suitable training programs to ensure the availability of certified interpreters. Training programs shall be made readily available in both eastern and western Washington locations.

(3) The administrative office of the courts shall establish and adopt standards of proficiency, written and oral, in English and the language to be interpreted.

(4) The administrative office of the courts shall conduct periodic examinations to ensure the availability of certified interpreters. Periodic examinations shall be made readily available in both eastern and western Washington locations.

(5) The administrative office of the courts shall compile, maintain, and disseminate a current list of interpreters certified by the office.

(6) The administrative office of the courts may charge reasonable fees for testing, training, and certification.

[2005 c 282 § 4; 1989 c 358 § 7. Formerly RCW 2.42.260.]

RCW 2.43.080

Code of ethics.

All language interpreters serving in a legal proceeding, whether or not certified or qualified, shall abide by a code of ethics established by supreme court rule.

[1989 c 358 § 8. Formerly RCW 2.42.270.]

Washington State Court of Appeals, Division I

Kustura, et. al. v. Department of Labor & Industries (C.A. #57445-1-I),

&

Meštrovac v. Department of Labor & Industries (C.A. #58200-3-I)

WSTLA Foundation Demonstrative Exhibits/Handouts for Oral Argument
November 19, 2007

CHART #1

COMPARATIVE ANALYSIS, TEXT OF RCW 2.43.020(3)

WSTLA Foundation Analysis:

"'Legal proceeding' means a proceeding

in any court in this state, grand jury hearing, or hearing before an inquiry judge,

or before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof."

Department of Labor & Industries' Analysis, as understood by WSTLA Foundation:

"'Legal proceeding' means a proceeding

in any court in the state, grand jury hearing,

or hearing before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof."

CHART #2

TEXT OF RCW 51.28.010 & EXTRACT, DECLARATION OF SANDRA DZIEDZIC

RCW 51.28.010 provides:

(1) Whenever an accident occurs to any worker it shall be the duty of such worker or someone in his or her behalf to forthwith report such accident to his or her employer, superintendent, or supervisor in charge of the work, and the employer to at once report such accident and the injury resulting therefrom to the department pursuant to RCW 51.28.025 where the worker has received treatment from a physician, has been hospitalized, disabled from work, or has died as the apparent result of such accident and injury.

(2) **Upon receipt of such notice of accident, the department shall immediately forward to the worker or his or her beneficiaries or dependants notification, in non-technical language, of their rights under this title.** The notice must specify the worker's right to receive health services from a physician of the worker's choice under RCW 51.36.010, including chiropractic services under RCW 51.36.015, and must list the types of providers authorized to provide these services."

(Emphasis added)

Extract, Declaration of Sandra Dziedzic:

4. "I have read the portion of Brief of Amicus Curiae by Washington State Trial Lawyers Association Foundation filed in the above-referenced case, which describes a way in which an application for workers' compensation is made – claimant reports the accident to the employer, who notifies it to the Department, which then notifies the claimant of his or her rights under RCW 51.28.010(2). **However, in reality, this way of claim filing seldom occurs.** Usually and ordinarily, claimants are assisted in the first instance by a doctor's office that has Report of Accident forms, and the doctor's office helps claimants complete and send the forms to the Department. At this point, there is no need for the Department to explain to the claimants their right to file the claim they have already successfully filed."

(Emphasis added)

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Subject: RE: Kustura v. Labor & Indus (S.C. #81478-3)

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Subject: Kustura v. Labor & Indus (S.C. #81478-3)

Attached is the WSTLA Foundation amicus curiae memorandum for filing with the Court. A copy of it has been served on counsel of record by email, per prior arrangement.

Respectfully submitted,

Bryan Harnetiaux, WSBA #5169
On behalf of WSTLA Foundation

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