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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

HAJRUDIN KUSTURA, GORDANA LUKIĆ, AND MAIDA
MEMIŠEVIĆ,

— Consolidated Appellants,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER TO WSTLA AMICUS CURIAE BRIEF

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I. INTRODUCTION

Washington State Trial Lawyers Association (WSTLA) asks this Court to equitably excuse Appellants Lukić and Memišević from the res judicata effect of the orders of the Department of Labor & Industries that set their wage and time-loss compensation rate (wage orders).¹ WSTLA argues that *if* these workers' compensation claimants with limited English proficiency (LEP) were "incapable of understanding" the wage orders, and the Department should be aware of it, they are entitled to equitable relief. WSTLA at 8, 13. WSTLA further argues that the Department was required to provide language services to Appellants Kustura, Lukić, and Memišević throughout its claim administration and the proceedings at the Board of Industrial Insurance Appeals, claiming that these processes are "a [single] legal proceeding" "initiated" by the Department under Washington's interpreter statute, Chapter 2.43 RCW. WSTLA at 13-20.²

But neither Lukić nor Memišević challenges the Superior Court decision not to grant *equitable* relief – they argue *only* that the wage

¹ WSTLA assumes that Lukić and Memišević "belatedly" appealed the wage orders. WSTLA at 3, 6, 8. But as stated in the Department's previously-filed brief, neither Lukić nor Memišević *ever* appealed the wage orders (timely or belatedly), and the Board and the Superior Court thus lacked jurisdiction over them. DLI Respondent's Brief at 28-30. For purposes of this answer, the Department responds to WSTLA's argument on the assumption, *without conceding*, that the Board and the Superior Court had *jurisdiction* to grant equitable relief to excuse their failure to appeal the wage orders.

² WSTLA suggests that the Department is even required to provide an interpreter for *court* proceedings. WSTLA at 20. But WSTLA expressly limits the scope of its analysis to administrative-level services throughout its brief (e.g., WSTLA at 2) and offers no argument to support such a suggestion about court-level interpreter services.

orders *never became final* under RCW 51.52.050 because they were not “communicated” to them in Bosnian language. Amended Brief of Appellants 17-18. Equitable relief should not be granted on the sole request by amicus curiae. *See Wash. State Republican Party v. Pub. Disclosure Comm’n*, 141 Wn.2d 245, 255 n.2, 4 P.3d 808 (2000) (“Generally, claims raised only by amicus are not considered.”).

In any event, WSTLA fails to demonstrate such extraordinary circumstances or diligence by Lukić or Memišević to justify equitable relief. *See Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006) (equitable relief is “extraordinary”); *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 178, 937 P.2d 565 (1997) (equity requires diligence). The law places a duty of diligence and further inquiry on a LEP person. *See supra* Part II(A). Both Lukić and Memišević indicated they had resources to review and contest Department orders – Memišević used an interpreter “every time” she received a Department document, *Memišević* (12/11/03) 76, and Lukić had an attorney, *Lukić* TR (4/24/03) 52, *Lukić* TR (9/23/03) 25, CABR 174-175 (stipulated history). WSTLA fails to demonstrate that, *because they were LEP*, they failed to timely appeal.

Further, WSTLA’s broad interpretation of Chapter 2.43 RCW is inconsistent with its text, which does not apply to the Department’s claim administration, because the *ex parte* process is not a “legal proceeding,”

which is “a proceeding *in any court* in this state, grand jury hearing, or hearing before an inquiry judge, or before an . . . agency . . .” RCW 2.43.020(3) (emphasis added). Nor does the statute require the Department to provide interpreter services at the Board proceedings the Department did not initiate. The statute allocates interpreter costs to “the governmental body initiating the legal proceeding,” RCW 2.43.040(2), or to “the non-English-speaking person, unless such person is indigent,” RCW 2.43.040(3). Here, the claimants initiated the Board proceedings by filing a notice of appeal, and there is no indigency.

Although not required by the statute, the Board provided Kustura, Lukić, and Memišević with an interpreter for at minimum their testimony. WSTLA’s argument calls for more interpreter services than are provided in law and should best be addressed to the Legislature, not to this Court.

II. ARGUMENT

A. WSTLA Fails to Demonstrate Extraordinary Circumstances or Diligence to Justify Equitable Relief

An appellate court reviews the trial court’s decision to exercise equitable power for an abuse of discretion. *See Rabey v. Dep’t of Labor & Indus.*, 101 Wn. App. 390, 397, 3 P.3d 217 (2000). Although Washington courts have equitable power to set aside a Department action, WASH. CONST. art. IV, § 6; *Kingery*, 132 Wn.2d at 173 (plurality), they have

rarely exercised that power, *Kingery*, 132 Wn.2d at 173 (plurality); *Rabey*, 101 Wn. App. at 395 (“This equitable exception has been used sparingly when workers have missed the 60-day limit for filing appeals.”).

WSTLA cites to three cases as “key cases outlining the circumstances under which equitable relief is available”: *Ames v. Dep’t of Labor & Indus.*, 176 Wash. 509, 30 P.2d 239 (1934) (relief granted to a hospital-confined incompetent); *Rodriguez v. Dep’t of Labor & Indus.*, 85 Wn.2d 949, 540 P.2d 1359 (1975) (relief granted to an extreme illiterate whose interpreter was hospitalized and his mother about to undergo surgery); and *Kingery*, *supra* (relief not granted because the claimant failed to show diligence). WSTLA at 8-9. WSTLA argues that under these cases, “unquestionably relief is justified for a belated appeal under RCW 51.52.060 when an LEP claimant does not understand a Department order and the Department knows or should know of this shortcoming.” WSTLA at 13. WSTLA’s reliance on these cases is misplaced.

An “equitable remedy is an extraordinary . . . form of relief.” *Sorenson*, 158 Wn.2d at 531. Lukić and Memišević had the burden of showing a basis for such relief. *See Kingery*, 132 Wn.2d at 176 (plurality) (“Mrs. Kingery has not established a basis in equity for relief.”).

The courts have found extraordinary circumstances warranting equitable relief in *Ames* and *Rodriguez*.³ *Ames* involved a worker, who the Department knew had legally been found violently insane and committed to a hospital at the time the Department sent its order rejecting his workers' compensation claim to his home. *Ames*, 176 Wash. at 510. Within 60 days of his discharge, the claimant hired an attorney and requested a hearing on his claim, which the Department denied as untimely. *Ames*, 176 Wash. at 510-511. Under these circumstances, the Supreme Court upheld the trial court's grant of equitable relief from the appeal deadline, stating that it would be "abhorrent and contrary to established public policy" to "permit the department to deal *ex parte* with a workman's claim and deny his just rights unheard while he was known to be non compos mentis." *Ames*, 176 Wash. at 514.

Rodriguez involved an "extremely illiterate" workers' claimant who did not write or read Spanish or English, and, at the time he received a Department order closing his claim, his interpreter was hospitalized and unable to interpret for him, and the worker's mother in Texas was about to

³ As noted by WSTLA (WSTLA at 11 n.7), this Court in *Rabey* upheld the trial court's grant of equitable relief from the 1-year statutory limitation for filing a survivor's claim, as based on "reasonable and tenable grounds," *Rabey*, 101 Wn. App. at 399, when the worker's widow was "shocked and disoriented" by her husband's death, which was compared to "a form of diminished capacity similar to that found in *Ames*," *Rabey*, 101 Wn. App. at 397, reasonably relied on the employer's lead human resource manager, who led her to believe she had no claim, and "has not exhibited a lack of diligence in perfecting her claim," *Rabey*, 101 Wn. App. at 398.

undergo surgery. *Rodriguez*, 85 Wn.2d at 949-950. The claimant left for Texas, notifying the Department through his doctor of his change of address to Texas, and, within 60 days of his return, had his interpreter explain the order and filed an appeal to the Board, which denied it as untimely. *Rodriguez*, 85 Wn.2d at 950. In exercising equitable power, the Supreme Court noted authority holding that “illiteracy will not excuse failure to comply with provisions of workmen’s compensation acts as to the giving of notice” but that “extreme illiteracy is ‘within the reach of the mental incompetency principle.’” *Rodriguez*, 85 Wn.2d at 954 (citation omitted). The Court reasoned that the claimant was “extremely illiterate” and that the Department “knew or should have known” of the illiteracy at the time of claim closure. *Rodriguez*, 85 Wn.2d at 954-955.

On the other hand, the courts have declined to exercise equitable power in cases where the claimants failed to demonstrate diligence⁴ or their inability to understand the order or misconduct by the Department.⁵

⁴ See *Kingery*, 132 Wn.2d at 178 (“Mrs. Kingery did not diligently pursue remedies available to her.”); *Kingery*, 132 Wn.2d at 178 (Madsen, J., concurring) (“I agree with the majority . . . that the claimant in this case failed to diligently pursue her rights.”); *Labor & Indus. v. Fields Corp.*, 112 Wn. App. 450, 459, 45 P.3d 1121 (2002) (“[A]s one condition of equitable relief, the claimant must have diligently pursued his or her rights.”); *Leschner v. Dep’t of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947) (“Equity aids the vigilant, not those who slumber on their rights.”); *Harman v. Dep’t of Labor & Indus.*, 111 Wn. App. 920, 927, 47 P.3d 169 (2002) (“Ignorance of the law has never been an adequate defense.”).

⁵ See *Kingery*, 132 Wn.2d at 174 (plurality) (for equitable relief from the 60-day appeal deadline, the claimant must show (1) his or her inability to understand the order

The facts in this case do not demonstrate such extraordinary circumstances as presented in *Ames* and *Rodriguez*, diligence on the part of Lukić and Memišević in pursuing appeals from the wage orders, or the Department's misconduct in sending English-written orders.⁶

Lukić hired an attorney "maybe six months" after the Department temporarily stopped benefits in March or April 2000. *Lukić* (4/24/03) 52. On March 5, 2001, her attorney filed a protest from a different Department order. CABR 174, *Lukić* TR (9/29/03) 25. In September 2001, Lukić's current attorney filed a protest from a 8/30/01 Department order denying time-loss benefits for certain time period; and, in June 2002, requested psychological treatment. CABR 174-176 (stipulated history). Lukić did not explain why she did not appeal the 3/15/01 wage order. There is no showing that Lukić acted diligently in pursuing her appeal from the order.

Memišević testified to ready availability of an interpreter for Department orders. On the day she sustained her industrial injury, an

and the appellate process and (2) the Department misconduct); *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 839, 125 P.3d 202 (2005) (same).

⁶ WSTLA claims that the Department knew Lukić and Memišević were LEP, when it sent the wage orders at issue. WSTLA at 3, 8. But WSTLA does not provide any reference to the record for its claim in violation of RAP 10.3(a)(5), (a)(6), (e). *See, e.g., In re Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) ("strict adherence to [RAP 10.3] is not merely a technical nicety"). Although it refers to the Amended Brief of Appellants filed in this case (pages 10, 14-15, and 18) and the Appellants' Reply Brief (pages 4-7), these briefs provide *no reference* to the record for such an assertion. Also, because neither Lukić nor Memišević presented the wage orders they failed to timely appeal, the record does not show whether the orders were sent to them or to their attorney. The record indicates Lukić was represented by an attorney when the wage order was sent. *Lukić* (4/24/03) 52; *Lukić* CABR 174-176 (stipulated history).

interpreter went to a hospital with her. *Memišević* (12/11/03) 57. She “always had interpreter” for important matters, *Memišević* (10/24/03) 180, and used one “every time” she received a document from the Department, *Memišević* (12/11/03) 76. She drives with a Washington license – she passed the written test in English with an interpreter. *Memišević* (12/11/03) 100-101. As she testified, “It’s not hard to find interpreters.” *Memišević* (12/11/03) 118. With her sister’s help, she filled out W-4 and employment application forms (name, address, telephone and social security numbers, emergency contact, and that she was applying for a cleaning job). *Memišević* (12/11/03) 106-108; *Memišević* CABR Exs. 31, 32. Through her doctor, she protested a 10/17/02 claim closing order, *Memišević* CABR 108-109 (stipulated history), and, through her current attorney, filed the current appeal in February 2003, *Memišević* CABR 108-109. She did not explain why she did not appeal the 2/22/02 wage order. WSTLA fails to show *Memišević* diligently pursued her appeal from the order.

Unlike the legally insane, hospital-committed claimant in *Ames*, and the “extremely illiterate” claimant in *Rodriguez* whose interpreter was hospitalized and his mother about to undergo surgery in Texas when he received the Department order, there is no evidence in this case showing that *Lukić* or *Memišević*, *for reasons beyond their control*, were unable to understand the wage orders – they demonstrated their ability to understand

and deal with Department orders through an interpreter or attorney. Further, unlike the claimant in *Ames*, who diligently pursued his appeal after his release from the hospital confinement, and the claimant in *Rodriguez*, who diligently pursued his appeal after his return from Texas and his interpreter becoming available, there is no evidence in this case to show that Lukić or Memišević acted diligently in pursuing their appeals from the wage orders –the facts indicate that they slumbered on their rights. WSTLA fails to show it was the claimants’ limited English proficiency that actually prevented them from timely appealing the orders.

A *per se* rule proposed by WSTLA that LEP claimants are equitably excused from the statutory appeal deadline so long as the Department is aware of their LEP status ignores the reality that many LEP claimants, like Lukić and Memišević, were able to use resources to understand English documents, and about 130,000 to 150,000 claims are filed with the Department each year. *Memišević* (12/11/03) 38. As the Department program manager Kennedy testified, some claimants “quite commonly would use family members and are more comfortable with that process than an individual interpreter.” *Memišević* (4/5/04) 46-47.

Due process permits English-written notice to a LEP person so long as “the notice would put a reasonable recipient on notice that further inquiry is required.” *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999);

see also Guerrero v. Carleson, 512 P.2d 833, 836 (Cal. 1973) (“[T]he government may reasonably assume that the non-English speaking individual will act promptly to obtain [language] assistance when he receives the notice in question.”); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2nd Cir. 1983) (“A rule placing the burden of diligence and further inquiry on the part of a non-English-speaking individual served in this country with a notice in English does not violate any principle of due process.”), *cert. denied*, 466 U.S. 929, 104 S. Ct. 1713, 80 L. Ed. 2d 186 (1984). As Massachusetts’s Supreme Court stated, when a person receives notice which would be sufficient if the person were not under a disability, that notice is sufficient as to a person actually under a disability if:

- (1) it would put a reasonable person on notice that inquiry is required,
- (2) further inquiry would reveal the facts necessary to understand the nature of the proceeding and the opportunity to be heard, and
- (3) the party’s disability does not render him incapable of understanding the need for such inquiry.

Commonwealth v. Olivo, 337 N.E.2d 904, 909 (Mass. 1975).

Similarly, in the context of statutory limitations for filing a habeas corpus petition, courts “have rejected a per se rule that a petitioner’s language limitations can justify equitable tolling, but have recognized that equitable tolling may be justified if language barriers actually prevent timely filing.” *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006)

(“non-English speaker *who could not find a willing translator could* qualify for equitable tolling”); *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002) (“the existence of a translator” to assist a person during his appellate proceedings implies that the person lacks reasonable cause for “remaining ignorant of the legal requirement for filing his claim”).

The requirement of diligence and further inquiry on the part of LEP persons in the due process and other legal contexts is consistent with the principles in *Ames*, *Rodriguez*, and *Kingery* that require diligence on the claimant for equitable relief from the 60-day statutory appeal deadline.

Although WSTLA shows in its brief what it claims is a Bosnian version of a Department notice, WSTLA at 7, it does not show the other part of the Department order that states the Department’s name and address, the claim manager’s phone number, and the claimant’s name, claim number, and injury date, *Lukić* CABR 150 (9/19/02 order affirming 8/30/02 order upon Lukić’s protest), 532 (3/11/03 order closing Lukić’s claim); *Memišević* CABR 68 (1/27/03 order sent to Memišević), 586 (2/10/03 order sent to her current counsel), 635 (2/24/03 order sent to her current counsel), 662 (3/27/03 letter sent to her current counsel). The Department orders having every official appearance of relating to their claims should reasonably have put Lukić and Memišević on notice that further inquiry was required – in fact, Lukić hired an attorney, *Lukić*

(4/24/03) 52, and Memišević used an interpreter “every time” she received a Department document, *Memišević* (12/11/03) 76.

In sum, the Superior Court properly declined to exercise equitable power in this case. WSTLA fails to prove otherwise.

B. Chapter 2.43 RCW Does Not Apply to the Department Claim Administration or Require the Department to Provide an Interpreter at Claimant-Initiated Board Proceedings

WSTLA argues that Washington’s interpreter statute, Chapter 2.43 RCW, requires the Department to provide interpreter services during the Department claim administration and the Board proceedings. WSTLA at 13-20. Relying heavily on the liberal construction principle, WSTLA claims that these separate Department and Board processes are a “legal proceeding” “initiated” by the Department. WSTLA at 13-20. But the plain language of the statute does not support WSTLA’s interpretation.

“A court’s objective in construing a statute is to determine the legislature’s intent,” and if “the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). The “plain meaning is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Tingey*, 159 Wn.2d at 657. The liberal construction rule does not authorize the

court to read a statute inconsistent with its plain text. *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947) (“[T]he liberal construction rule has not yet been extended to permit the consideration of a claim which the statute, in effect, says shall not be considered.”); *Boyd v. Sibold*, 7 Wn.2d 279, 289, 109 P.2d 535 (1941) (“[T]he rules of liberal construction do not contemplate that a statute shall be so interpreted as to make abortive the meaning of words therein employed.”).

Chapter 2.43 RCW does *not create* any new right to an interpreter but is intended only to “secure the rights, constitutional or otherwise,” of LEP persons. RCW 2.43.010. The statute provides, “*Whenever* an interpreter is appointed to assist a [LEP] person in a legal proceeding, the appointing authority shall [absent waiver] appoint a certified or a qualified interpreter to assist the person throughout the proceedings.” RCW 2.43.030(1) (emphasis added). The statute acknowledges the law that requires an interpreter in *some* cases. *See State v. Aquino-Cervantes*, 88 Wn. App. 699, 706, 945 P.2d 767 (1997) (“The purpose of RCW 2.43 is to uphold the constitutional rights of non-English speaking persons.”); *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999) (criminal LEP defendant has constitutional right to interpreter); *Nazarova*, 171 F.3d at 484 (LEP alien deportee has due process right to interpreter). WSTLA cites no authority that a workers’ claimant has a right to an interpreter.

1. Department claim administration is not a “legal proceeding”

As WSTLA notes, Chapter 2.43 RCW governs use of interpreters in “legal proceedings.” WSTLA at 13. A legal proceeding is “a [1] proceeding in any court in this state, [2] grand jury hearing, or [3] *hearing* before an inquiry judge, or *before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof.*” RCW 2.43.020(3) (emphasis and bracketed numbers added).

WSTLA reads the statute to cover a “proceeding . . . before [an] . . . agency.” WSTLA at 16. But the word “proceeding” is qualified only by the phrase “in any *court* in this state,” which is *separated* by a comma from “grand jury hearing,” and by another comma from “*hearing* before an inquiry judge, or before an administrative board, commission, agency, or licensing body of the state” RCW 2.43.030(3) (emphasis added). “A comma serves many functions, but its purpose always is to set a phrase apart from the rest of the sentence.” *E. Gig Harbor Improvement Ass’n v. Pierce County*, 106 Wn.2d 707, 713, 724 P.2d 1009 (1986). The qualifying prepositional phrases that follow “hearing” in the statute’s description of the third category of legal proceeding modify only the word “hearing” that immediately precedes those qualifying prepositional phrases. *See Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82

(2005) (“[U]nless a contrary intention appears in the statute, qualifying words and phrase refer to *the last antecedent*.”).

The plain language of Chapter 2.43 RCW thus covers only court proceedings, grand jury hearings, and “hearing[s]” before the specified government agencies. The Department claim administration is not a “hearing” and is irrelevant to a worker’s appeal to the Board. *See, e.g., McDonald v. Dep’t of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001) (Department’s decision making processes are irrelevant at the Board). A hearing begins *after* the Department makes an *ex parte* decision in a non-adversarial manner, and an aggrieved party appeals it to the Board, which then conducts a *de novo hearing* to determine whether the decision is correct. RCW 51.52.050–104. The statute thus does not apply to the Department claim administration, and WSTLA’s argument based solely on its misinterpretation of “legal proceeding” fails.

The interpretation of “legal proceedings” by WSTLA that links its broad definition of “proceeding” (e.g., “An act or step that is part of a larger action” – WSTLA at 16) to “agency” produces an absurd result that essentially every oral or written communication by every government employee with every member of the public about anything at any time would constitute a “legal proceeding.” WSTLA’s interpretation must be rejected because it produces this absurd result. *Glaubach v. Regence*

Blueshield, 149 Wn.2d 827, 833, 74 P.3d 115 (2003) (“We avoid readings of statutes that result in unlikely, absurd, or strained consequences.”).

Another absurdity produced by WSTLA’s interpretation of Chapter 2.43 RCW, which govern only *governmental* proceedings and hearings, is that it would provide interpreter services during claim administration for workers of state-fund employers (whose claims are administered by the Department) but not for workers of self-insured employers (whose claims are administered by the employers themselves, most of whom are private, for-profit entities clearly not subject to Chapter 2.43 RCW). It is unlikely that the Legislature intended such a disparity. *Cf. Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 745, 630 P.2d 441 (1981) (workers for self-insurers generally must be treated the same as workers for state fund employers); *In re Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993) (statutes construed to avoid constitutional issues).

WSTLA points out that Chapter 2.42 RCW, the interpreter statute for hearing impaired persons, applies only to “judicial and quasi-judicial proceedings.” WSTLA at 17; RCW 2.42.120(1). But WSTLA does not explain why this difference in definitions could support reading into RCW 2.43.020(3) something that is not suggested by its plain text.

///

2. Chapter 2.43 RCW does not require the Department to pay for interpreters at claimant-initiated Board proceedings

The Board proceedings are “legal proceedings” under RCW 2.43.020(3). But the statute does not require the Department or the Board to provide interpreter services at the proceedings, because neither is a “governmental body initiating the legal proceedings.” RCW 2.43.040(2).

The statute distinguishes legal proceedings *initiated by* a governmental body, RCW 2.43.040(2), from those *not* initiated by a governmental body but conducted “under the authority” thereof, RCW 2.43.040(3). It allocates interpreter costs in the former to “the governmental body initiating the legal proceeding,” RCW 2.43.040(2), and the latter to “the non-English-speaking person, unless such person is indigent” – then, “the cost shall be an administrative cost of the governmental body under the authority of which the legal proceeding is conducted,” RCW 2.43.040(3). This is consistent with the distinction recognized in the due process law between “government-initiated proceedings seeking to affect adversely a person’s status” such as “criminal prosecution, deportation or exclusion” and “hearings arising from the person’s affirmative application for a benefit”. *Abdullah v. INS*, 184 F.3d 158, 165 (2nd Cir. 1999) (due process does not require an interpreter for special agricultural worker status applicants during INS

interviews); *see also State v. Nemitz*, 105 Wn. App. 205, 211, 19 P.3d 480 (2001) (“The purpose of the interpreter statute is to provide interpreters for *defendants, witnesses, and others compelled to appear.*”). The statute thus recognizes “the rights, constitutional or otherwise” to an interpreter provided in those government-initiated proceedings. RCW 2.43.010.

Here, the Department did not initiate the Board proceedings – the claimants did by filing a notice of appeal and requesting a Board hearing to contest the correctness of the Department decisions.

WSTLA acknowledges its lack of knowledge as to “the sequence of events” about “the reports of injury and application for benefits” in this case. WSTLA at 19. But WSTLA argues that the Department initiated a legal proceeding, because the Department has a duty under RCW 51.28.010(1) to notify workers of their rights when they report their accidents to their employers and the employers report the accidents to the Department. WSTLA at 18.⁷ WSTLA’s argument rests on the premise that the Department claim administration is a “legal proceeding,” which, as stated above, is incorrect. Further, the asserted duty of notification by the Department arises only if, and *after*, the claimant fulfills *his or her*

⁷ In reality, this claim filing scenario seldom occurs, and there is no evidence that it occurred in this case. Claimants ordinarily are assisted in the first instance by a doctor’s office that has accident report forms and helps claimants complete accident reports and sends them to the Department. At that point, there is no need for the Department to explain to the claimants their right to file the claim they have successfully filed. *See Declaration of Sandra Dziejdzic* (attached to this brief as Appendix A).

duty of reporting his or her industrial accident to his or her employer, and his or her employer then reports such accident and injury to the Department. RCW 51.28.010(1); RCW 51.28.030. WSTLA cannot reasonably claim the Department's notification under RCW 51.28.010(2) "initiates" the Board proceedings *that may or may not occur*.⁸

WSTLA suggests that the Board's presumptively correct interpreter rule, WAC 263-12-097, adopted pursuant to RCW 51.52.020, is inconsistent with Chapter 2.43 RCW, because the rule makes *the Board* the appointing authority and because the Board itself pays for interpreter services. WSTLA at 20 n.11. "Administrative rules adopted pursuant to a legislative grant of authority are presumed to be valid and should be upheld on judicial review if they are reasonably consistent with the statute being implemented." *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004). "[A]ppointment of an interpreter is a matter within the discretion of *the trial court*," *State v. Gonzales-Morales*, 138 Wn.2d 374, 381, 979 P.2d 826 (1999) (emphasis added), here *the Board* that is charged with conducting hearings, RCW 51.52.100.

⁸ WSTLA attaches a copy of a Report of Industrial Injury or Occupational Disease and points out it asks for the claimant's language preference. WSTLA at 19. But the language preference flag was added to the form in February 2003 and started being captured by the Department system LINIIS (Labor and Industries Insurance System) in *August of 2003*, after the claims of Kustura, Lukić, and Memišević were filed. See declaration of Cheri Ward (attached to this brief as Appendix B); *Kustura* CABR 295 (claim filed on 1/28/00 – stipulated history); *Lukić* CABR 258 (1/28/00); *Memišević* CABR 108 (11/7/01).

Chapter 2.43 RCW does not preclude the Board from providing interpreter services *not-required* under the statute.⁹

III. CONCLUSION

For the reasons stated in this and its previously-filed brief, the Department requests that the Court affirm the Superior Court judgment.

SUBMITTED this 30th day of August, 2007.

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⁹ WSTLA also claims that “RCW 2.43.040(2) “contemplates the non-English-speaking person is involved in a proceeding with one or more governmental bodies” and “may serve as a basis for addressing which governmental body is responsible for the cost of services when more than one is involved.” WSTLA at 13 n.6. WSTLA disregards another statutory provision that, in not-government-initiated legal proceedings, “the cost of providing the interpreter *shall be borne by the non-English-speaking person unless such person is indigent,*” and, 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.” RCW 2.43.040(3) (emphasis added). These two provisions plainly distinguish two different types of legal proceedings, not two different governmental bodies involved in one or the other type of legal proceeding. In interpreting a statute, “all of [its] provisions . . . must be considered in their relation to each other, and, if possible, harmonized to insure proper construction of each provision.” *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996); see also *Tingey*, 159 Wn.2d at 657 (the plain meaning of the statute must be discerned by examining “the statutory scheme as a whole”).

APPENDIX A

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AGO L&I DIVISION
SEATTLE

NO. 57445-1-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, GORDANA
LUKIĆ, AND MAIDA MEMIŠEVIĆ,

Appellants,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

DECLARATION OF
SANDRA DZIEDZIC

I, Sandra Dziedzic, declare under penalty of perjury:

1. I am over the age of 18 years and make this declaration based on my personal knowledge.
2. I work at the Washington State Department of Labor and Industries (Department) as Claims Administration Program Manager. I have occupied this position for the past four years. I have worked for the Department for the past 29 years.
3. My current position at the Department includes responsibilities, among other things, to oversee the program that adjudicates and manages all state fund claims filed by workers in Washington.
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 that point, there is no need for the Department to explain to the claimants their right to file the claim they have already successfully filed.

5. All claims are filed either through the worker's attending medical provider with portions of a Report of Accident form to be completed by the worker and the treating provider or through a pilot program. There is a small pilot program with 310 employers, which started in January 2007 to allow a worker to file his or her claim through his or her employer – with portions to be completed by the worker, who then takes a copy of the form to his or her medical provider for completion. Between January 1 and June 30, 2007, the Department received only 204 claims in this pilot.
6. Our Report of Accident forms are pre-numbered and sent to medical providers to be filed in accordance with RCW 51.28.020. The workers' claims are placed in the Department's system upon receipt of the Report of Accident form, and the Department sends a copy of the information from the worker and provider to the

- employer, notifying the employer of the receipt of the claim. At this point, the employer is asked to provide their information.
7. When workers contact the Department about their accident, the Department informs them that they need to file their claims through their treating medical providers and send them a Report of Accident form to take to their attending medical provider for completion if necessary. Report of Accident forms provide all of the information to the worker about who can treat them.
 8. In rare instances, especially when a worker is injured outside of the state, the Department receives written notification from the employer (on their state/insurer forms). The Department will then contact the worker and medical provider to complete the claim.

SIGNED this 27th day of August, 2007, at Olympia,
Washington.


SANDRA DZIEDZIC

APPENDIX B

57445-1-1

NO. 57445-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

HAJRUDIN KUSTURA, GORDANA
LUKIĆ, AND MAIDA MEMIŠEVIĆ,

Appellants,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

DECLARATION OF
CHERI A. WARD

I, Cheri A. Ward, declare under penalty of perjury:

1. I am over the age of 18 years and make this declaration based on my personal knowledge.
2. I work at the Washington State Department of Labor and Industries (Department) as Program Manager for Policy & Quality Coordination. I have occupied this position for the past 2.5 years. I have worked for the Department for the past 23 years.
3. My current position at the Department includes responsibilities for the Claims Training, Quality Assurance, Coach/Mentor, and Pension Benefits/Social Security Offset work units. I am also responsible for coordinating the rule and policy development within the statewide worker's compensation program.

4. As the Policy & Quality Coordination Program Manger, I have access to information regarding changes to our forms and Labor and Industries Insurance System (LINIIS).
5. It was in February 2003 that the Department added the language preference flag to the Report of Accident form, but it was in August 2003 that the Department started capturing the language preference indicator in its LINIIS when the worker indicated a language preference on the Report of Accident.

SIGNED this 28th day of August, 2007, at Olympia,
Washington.



CHERI A. WARD