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NO. 57445-1-I, 57446-9-I, & 57447-7-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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COURT OF APPEALS, DIV. I
STATE OF WASHINGTON

HAJRUDIN KUSTURA, GORDANA LUKIĆ, AND MAIDA MEMIŠEVIĆ,

Consolidated Appellants,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

APPELLANTS' PROPOSED ANSWER TO WSIA AMICUS BRIEF

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I. INTRODUCTION

The Washington Self-Insurers Association served the undersigned with an Amicus Brief by mail on October 22, 2007. Not knowing whether the WSIA Amicus Brief will be accepted by the Court, this Proposed Answer to WSIA Amicus Brief is being offered in response.

The WSIA Amicus Brief attempts to expand the scope of this appeal at the last moment by injecting a new issue not ruled on by the Department, , not considered by the Board, not ruled on by the Superior Court, nor even raised by any of parties at this level of these three consolidated appeals. That issue deals with how the August 2007 Management Update and WAC 296-15-350(9) affect self-insurers and their obligations to provide interpreters/language accommodation to LEP injured workers.

II. FACTS

1. No Self Insured Employers Are Involved in Appeals

Appellants were all employed by employers which were and are participants in the Washington State Industrial Insurance fund. There is no self insured employer involved in any of these three consolidated appeals. The other LEP workers whose appeals are also set for oral argument on November 19, 2007, Enver Meštrovac and Ivan Ferenćak,

were also employed by state fund participants and not self-insurers.¹ As there are no self-insurers involved in any of these five appeals, there are no injured workers with issues or motivation to provide briefing on any issues related to self-insurers. The briefs filed to date in all these appeals have not yet addressed any issues involving self-insurers, including their obligations to provide language accommodation to LEP workers.

III. ARGUMENT

Should the Court decide to review the new issue proposed by WSIA's briefing -- that self insured employers need not provide interpreter services to LEP injured workers, this argument is offered.

1. The Court Should Decline WSIA's Invitation to Address WAC 296-15-350(9) by Refusing to Issue an Advisory Opinion.

The WSIA Amicus Brief at page 10 argues this Court should "give some direction to the Department and to WSIA members" on the 2007 Management Update which it characterizes as an interpretation of WAC 296-15-350(9). WAC 296-15-350 lists some of the duties of self-insured employers. For the following reasons, the Court should decline this invitation to expand the issues just before oral argument:

1. This requests a disfavored advisory opinion.
2. There is no justiciable controversy on this new issue.

¹ *Enver Meštrovac v. Dep't of Labor & Indus.*, COA No. 58200-3-I; *Ivan Ferenčak v.*

3. There are no self-insured employers involved.
4. None of the briefing to date filed at the Board, at the Superior Court and at the Court of Appeals addressed any issues involving self insurers.
5. None of the issues raised by the appellants deals with WAC 296-15-350.
6. None of the briefing filed to date cited WAC 296-15-350.
7. The Department's Management Update was first cited in the Department's Answer to WSTLA Foundation's Amicus Brief.
8. The WSTLA Foundation Amicus Brief did not raise any issues related to self-insurers or their duties under WAC 296-15-350.
9. The issue is not ripe for review.
10. Other cases involving LEP injured workers and self insured employers will better present the issue WSIA tries to inject.²
11. The Court should not engage in rendering advisory opinions on issues not before it.

Many Washington opinions, some involving Industrial Insurance, state the rule that our appellate courts do not issue advisory opinions, or rule on hypotheticals. A recent example is *Sonnens v. Dep't of Labor & Indus.*, 101 Wn.App. 350, 359-360, 3 P.3d 756 (2000), where the court stated:

Dep't of Labor & Indus. & Bd. of Indus. Ins. Appeals, COA No. 58878-8-I.

²Such a case would be a case of an LEP injured worker who was refused interpreter services by a self-insured employer or its representative. There are such cases working their ways through the Board of Industrial Insurance Appeals at this time but none of them has yet reached the Court of Appeals.

Despite the Board's findings that Barrett did not have control over the workers, Sonners asserts that if Barrett is not an employer for industrial insurance purposes, then all employee leasing companies and temporary agencies would not be considered employers and would not pay premiums. Sonners contends "[t]he fundamental disagreement between the parties has always been whether workers who are assigned to a client by an employee leasing entity must be separately insured by both of their employers." **That issue is not before us. We do not give advisory opinions.** *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994). Similarly, we do not address the hypothetical of what the result would be if Barrett were a joint employer. (Emphasis added)

Based on the foregoing rule, it seems clear that the court can and should decline to address the question posed by WSIA's Amicus Brief.

The Court may and here should decline to address issues which are not ripe for review. Issues which have not been decided by the trial court are not ripe for review. *Department of Ecology v. Acquavella*, 131 Wn.2d 746, 759-60, 935 P.2d 595 (1997); *State v. Verharen*, 136 Wn.2d 999, 969 P.2d 64 (1998). If another case would better present an issue, the Court should decline to review that issue. *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007). Issues raised for the first time on appeal generally will not be heard. *State v. Anderson*, 58 Wn.App. 107, 110, 791 P.2d 547 (1990); *State v. Phillips*, 65 Wn.2d 239, 828 P.2d 42 (1992). The court may, and here should, decline to address issues where there is no justiciable controversy. *Patrol Lieutenants Ass'n v. Sandberg*, 88

Wn.App. 652, 661-62, 946 P.2d 404 (1997). The requirements for a justiciable controversy are:

"(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."³

Simply, this case does not present a justiciable controversy on the meaning of WAC 296-15-350(9). There is neither any LEP injured worker insured by a self insured employer, nor any self-insured employer party to any of these appeals having any direct interest in WAC 296-15-350(9) and its interpretation. Thus any language in the opinions in any of these appeals addressing WAC 296-15-350(9) would be dicta and neither be final nor conclusive on the impact of the 2007 Management Update thereon.

2. WSIA's Facts Lacks Citation to Record, Violating RAP 10.3.

WSIA's brief states and misstates facts without any citations to any of the Certified Board Records on Appeal, any testimony, or any exhibit in any of these three consolidated appeals. Therefore, the WSIA discussion of the facts should be stricken or at least ignored. For this reason, WSIA's misstatements of the facts will not be addressed here.

3. WSIA Concedes RCW 2.43 Applies to Department Proceedings, Requiring Interpreters for All Department LEP Communications.

It is important to note that WSIA rightly concedes at page 7 that proceedings before the Department [i.e. injury investigation and claims handling] are legal proceedings and, therefore, RCW 2.43 applies at the Department level. On page 9, WSIA concedes that the Department should provide interpreters for LEP communications with the Department.

4. Interpreter Costs Cannot be Imposed on Injured Workers.

WSIA's analysis on RCW 2.43 fails to note that whether or not the LEP person is indigent, the Department or self-insured employer must pay for the interpreter. This is so for two reasons. First, Title VI does not allow imposing interpreter costs on LEP injured workers when not also imposed on English proficient workers. Second, interpreter costs may not be imposed on LEP persons under *Marintorres, infra*, because RCW 2.42 does impose interpreter costs on those with speech or hearing defects and the Legislature intended treating LEP persons similarly in RCW 2.43.

5. Interpreters Must be Provided by Self Insured Employers.

Notably, WSIA fails to address the implications of the holding in *State v. Marintorres*, 93 Wn.App. 442, 969 P.2d 501 (1999), that under equal protection analysis, LEP persons are entitled to the same interpreter

³ *First United Methodist Church of Seattle v. Hearing Exam'r*, 129 Wn.2d 238, 245,

services under RCW 2.43 as under 2.42. This is important because WSIA ignores the fact that broader interpreter services requirements in RCW 2.42. RCW 2.42.120(1) requires interpreters be appointed and paid for “any stage of a . . . quasi-judicial proceeding in the state. RCW 2.42.120(4) requires interpreters for law enforcement agency investigations where the person facing the language barrier is “a victim, witness, or suspect.” Thus, clearly, for all Department investigations of industrial injuries, interpreters are required for LEP persons.

Washington’s initial Industrial Insurance Act required all employers to pay premiums to the Department and participate as members of the State Fund. Washington’s “second” Industrial Insurance Act allowed certain employers to qualify as self-insured employers by maintaining financial resources and providing “all appropriate benefits to the injured worker” to use WSIA’s statement of self insured employer’s obligation to pay benefits equal to those provided by the State Fund. WSIA Amicus Brief at page 9. RCW 51.14. To qualify as self insured under the Act, self-insured employers must also report industrial injuries and perform the quasi-judicial functions of paying compensation and handling claims in the Department’s stead. RCW 51.14.030(5). Acting in the Department’s stead, self-insured employers must likewise provide interpreters both as

916 P.2d 374 (1996) (quoting *First Covenant Church of Seattle v. City of Seattle*, 114

benefits under the Act, under RCW 2.43, under RCW 2.42, and under Title VI, whenever the Department must do so. For failure to provide benefits or maintain solvency, self-insurers may be fined under RCW 51.48 or decertified under RCW 51.14.080. Thus a self-insured employer which fails to provide required language accommodation/interpreters can be decertified as a self insurer.

6. WSIA Offers No Justification for Different Treatment of LEP Workers by Self Insured Employers and by the Department.

WSIA's brief concedes at page 10 that self insured employers' obligations for claims handling are much the same as the Department's. Yet WSIA's brief provides no justification for the application of any lower standard for providing interpreter services/language accommodation for LEP workers than the standard that applies to the Department.

7. WSIA Failed to Address Other Authority Requiring Language Accommodation/Interpreter Services.

WSIA's brief ignores completely self-insured employers' obligations to provide language accommodation under Title VI, Executive Order 13166, Department of Justice LEP Guidance, Department of Labor Title VI Regulations, RCW 49.60, equal protection, and due process. Thus, the arguments on why self-insured employers must provide the

Wn.2d 392, 398, 787 P.2d 1352 (1990)).

same level of language accommodation/interpreter services on those bases, already addressed in other briefing, is not repeated here. However, it should be noted that, independent of the equal protection analysis required by *Marintorres*, both self insured employers and the Department must provide interpreters when the worker meets indigency standards under RCW 2.43.040. As the Department has failed to adopt such standards, no self insured employer can shift interpreter costs to any injured worker until it can determine by application of a Department-adopted indigency standard that the worker is not indigent.

IV. CONCLUSION

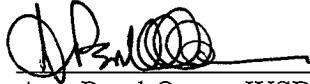
For the reasons stated above, the Court should refuse to reach the issue proposed by WSIA's Amicus Brief.

If the Court chooses to address that issue, the only supportable resolution of that issue would be that like the Department, self-insured employers must provide language accommodation/interpreter services at no cost to LEP injured workers under the Act, under RCW 2.43 and 2.42, under Title VI, under EO 13166, and under RCW 49.60.

Appellants Hajrudin Kustura, Gordana Lukić, and Maida Memišević repeat their request for assessment of attorney fees and costs

under RCW 51.52.130, to include for the time spent responding to
WSIA's Amicus Brief.

Respectfully submitted this 9th of November, 2007,

A handwritten signature in black ink, appearing to read 'Ann Pearl Owen', written over a horizontal line.

Ann Pearl Owen, WSBS# 9033

Attorney for Hajrudin Kustura, Gordana Lukić, and
Maida Memišević, Consolidated Appellants