

No. 81478-3, consolidated with Nos. 81480-5, 81481-3, 81759-6, 81758-8

SUPREME COURT OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, ET AL,

Petitioners,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

**THE DEPARTMENT OF LABOR & INDUSTRIES'
ANSWER TO AMICUS WSAJ**

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I. INTRODUCTION

Amicus Washington State Association for Justice Foundation (WSAJ) urges an interpretation of “legal proceeding” in RCW 2.43 that would require the Department of Labor & Industries to appoint a qualified interpreter during its *ex parte* claim administration. However, this interpretation is inconsistent with the statutory definition and disregards the workers’ compensation statutory scheme that carefully separates “front-line” and “quasi-judicial” agency functions.¹

A workers’ compensation case involves two state agencies: the Department and the Board of Industrial Insurance Appeals. The Department, a “front-line” agency, performs claim administration, whereas the Board, a “quasi-judicial” agency, conducts a *de novo* evidentiary hearing when a party aggrieved by a Department decision appeals. *Kaiser Aluminum & Chem. Corp. v. Dep’t of Labor & Indus.*, 121 Wn.2d 776, 780-81, 854 P.2d 611 (1993). In this context, a “legal proceeding” is a “hearing . . . before” the Board, where workers receive a due process hearing. RCW 2.43.020(3). When the Board uses a qualified interpreter at the Board hearing, it secures the claimants’ right to procedural due process. *See State v. Gonzales-Morales*, 138 Wn.2d 374,

¹ The Department filed a separate brief to answer the amicus briefs from Northwest Justice Project (NJP), American Civil Liberties Union of Washington (ACLU), and Washington State Court Interpreter and Translator Society (WITS).

381, 979 P.2d 826 (1999) (“The purpose of RCW 2.43 is to uphold the constitutional rights of non-English-speaking persons.”).

WSAJ also presents arguments about who should be responsible for paying for interpreters. But this case does not squarely present this issue, because the Board paid for the interpreters appointed for each claimant during the hearings, and nothing in the statute provides for reimbursement of an interpreter brought by a party. *See* RCW 2.43.040(1) (addressing the costs of interpreters “appointed according to [the statute]”). However, WSAJ is incorrect in suggesting that Board hearings (“legal proceedings”) are proceedings initiated by government, for which the statute provides a publicly-funded interpreter without regard to indigency. *See* RCW 2.43.040(2). Instead, the claimants initiated the “legal proceedings” by filing an appeal, triggering the Board jurisdiction.

WSAJ, however, correctly recognizes that RCW 2.43 allows industrial appeals judges (IAJs) reasonable discretion in the use of interpreters at the hearings. WSAJ 5, 20. As addressed in the Department’s answer to the other amici (NJP, ACLU, and WITS), the IAJs provided an interpreter for each claimant during the hearings, and the claimants show no prejudicial error in the provision of interpreter services.

II. ARGUMENT

A. A “Legal Proceeding” Does Not Include the Department *Ex Parte* Claim Administration

RCW 2.43 requires appointment of a qualified interpreter when a limited English proficient (LEP) person is involved in a “legal proceeding.” RCW 2.43.030(1)(c). The Court of Appeals properly interpreted “legal proceeding” defined in RCW 2.43.020(3) to exclude the stage where the workers apply for benefits before the Department, prior to the adjudicative hearing at the Board. *Kustura v. Dep’t of Labor & Indus.*, 142 Wn. App. 655, 680, 175 P.3d 1117 (2008).

WSAJ claims that the word “proceeding” includes “any procedural means for seeking redress,” to cover the Department claim administration. WSAJ 8. Under WSAJ’s interpretation, “legal proceeding” includes any “proceeding” before any state or local agency, regardless of whether it involves a “hearing.” WSAJ 8-15. Neither the statutory language nor purpose supports this interpretation. Nor is there any judicial, legislative, or agency interpretation to support WSAJ’s expansive view that RCW 2.43 applies to various agency actions that occur prior to a hearing.

1. The plain statutory definition of “legal proceeding” does not cover agency actions prior to a hearing

The statute defines “legal proceeding” by listing three categories of proceedings in sequence:

“Legal proceeding” means 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) (brackets added). WSAJ argues that this definition includes any “proceeding . . . before an administrative agency.” WSAJ 8-16. But the phrase “before an administrative . . . agency . . . of the state or any political subdivision thereof” can only be read to refer to immediately preceding noun “hearing.” *Kustura*, 142 Wn. App. at 680; *Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82 (2005) (qualifying words refer to the last antecedent unless contrary intent appears).²

This is because the first conjunction “or” shows this sentence contains a list of three “noun clauses,”³ each separated by a comma:

“Legal proceeding” means a

² WSAJ incorrectly states this Court declined to apply the last antecedent rule based on legislative intent in *In re Smith*, 139 Wn.2d 199, 986 P.2d 131 (1999). WSAJ 11. *Smith* did apply the rule but discussed what constituted the antecedent and qualifying phrases. *Smith* involved a statute that applied 15% earned early release cap in the case of “an offender convicted of a serious violent offense or a sex offense that is a class A felony committed on or after July 1, 1990”. *Smith*, 139 Wn.2d at 202 (citing former RCW 9.94A.150(1)). The issue was whether the word “that is a class A felony” modified only “a sex offense” or also “a serious violent offense.” *Id.* at 202. This Court concluded that the class A felony modified both, pointing out that there were *two* qualifying phrases “that is a class A felony” and “committed on or after July 1, 1990,” with *no punctuation* separating them. *Id.* at 204. Thus, “the proper application of the ‘last antecedent’ rule in this case is to construe the entire phrase, ‘a serious violent offense or a sex offense’ as a single antecedent which is modified by both qualifying phrases”. *Id.* at 205.

³ A “noun clause” is a dependent clause that functions as a noun, that is, as a subject, object, or complement within a sentence. Here, the three clauses function as complements in the sentence “legal proceeding means A, B, or C.” See About.com, *Grammar & Composition*, <http://grammar.about.com/od/mo/g/nounclauseterm.htm> (last visited October 8, 2009).

- proceeding in any court in this state,
- grand jury hearing, or [1st conjunction]
- hearing before an inquiry judge, or [2nd conjunction] before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof.

RCW 2.43.020(3) (bullets and underline added). In contrast, the second conjunction “or” simply connects two prepositional phrases (starting with “before”) that are part of the third category: “a . . . 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) (underline added).

As shown in the next section, the statutory language is not susceptible to WSAJ’s interpretation that “legal proceeding” includes general agency actions that do not involve a hearing. Although WSAJ at 6-7 asks this Court to apply a liberal construction principle to reach its result, liberal construction cannot disregard statutory language. *See Leschner v. Dep’t of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947) (“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) (“rules of liberal construction do not contemplate that a statute shall be so interpreted as to make abortive the meaning of words therein employed”).

Further, this Court should give no weight to WSAJ's bootstrap argument where it affixes the label "adjudication" to describe Department claim administration. *E.g.*, WSAJ 13. In the workers' compensation statutory scheme, the Department "makes the final decision," but "this order may be contested before the board, where *the proceedings* are completely *de novo*." Ivan C. Rutledge, *A New Tribunal in Washington*, 26 Wash. L. Rev. 196, 205 (1951) ("*New Tribunal*") (emphasis added). Title 51 RCW uses the word "proceeding" in connection only with the Board or court, never with the Department. *See, e.g.*, RCW 51.52.100 ("The Department shall be entitled to appear in all *proceedings* before the board and introduce testimony in support of its order.").

2. WSAJ's interpretation that "legal proceeding" includes "proceeding" before a state agency is not reasonable

WSAJ argues that a "legal proceeding" includes the Department claim administration, reading the phrase "before an administrative . . . agency" to modify "proceeding." WSAJ 4-16. This interpretation is flawed and inconsistent with the rules of grammar and logic. WSAJ's interpretation breaks down as follows and is grammatically nonsensical:

- "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.

WSAJ 9 (bullets and underline added).

WSAJ creates a list of two prepositional and two noun clauses, connected by *two* conjunctions “or” instead of one. *See Commonwealth v. Jean-Pierre*, 837 N.E.2d 707, 709 n.3 (Mass. App. Ct. 2005) (“a list of particulars is separated by commas and connected by a single conjunction”); Strunk & White, *The Elements of Style* 2 (4th ed. 2000) (same). This creates glaring grammatical flaws, because the noun clauses cannot logically follow the claimed antecedent “proceeding.” The phrases “proceeding . . . grand jury hearing” and “proceeding . . . hearing before an inquiry judge” make no grammatical or logical sense. As WSAJ must admit, “to be an antecedent, the modifier following it must be a fit.” *See Berrocal*, 155 Wn.2d at 594; WSAJ 14 (citing *Berrocal*).

WSAJ argues that the comma before the second “or” allows it to ignore how the phrase “before an administrative . . . agency” refers to “hearing.” WSAJ 14 n.13. However, that interpretation is not grammatically or logically workable as shown above. Also, contrary to WSAJ’s claim, the punctuation of “placing a comma before a conjunction separating two short compound phrases” is “not unusual,” and such use of a comma is grammatically accepted. *Berrocal*, 155 Wn.2d at 592 n.2.

Further, contrary to WSAJ's argument at 13-14, the second use of the word "before" in this clause is not superfluous. Without the words "or before an," the statute would read "hearing before an inquiry judge, administrative board, commission, agency, or licensing body *of the state or any political subdivision thereof.*" RCW 2.43.020(3) (emphasis added). The use of the words "or before an" avoids the implication that "of the state or any political subdivision thereof" also modifies the "before an inquiry judge" phrase.

WSAJ's interpretation is unreasonable. There is no ambiguity in the statute that would extend "legal proceeding" to state or local agency actions that occur prior to hearing.

3. The statutory context confirms only hearings, not other state or local agency actions, are subject to RCW 2.43

WSAJ argues that other provisions of the statute express intent to cover agency actions prior to hearings. WSAS 9-11. However, every other feature in the overall statutory scheme confirms the correctness of the interpretation that a "legal proceeding" includes administrative "hearings," but not other state or local agency actions.

For example, the oath provision refers to the LEP person as "the person being examined":

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.

RCW 2.43.050 (emphasis added). This provision contemplates witness examination, which is common in agency hearings but never occurs at the Department *ex parte* claim administration. Compare RCW 51.52.100 (IAJs "have power to administer oaths" and duty "to examine witnesses"); RCW 34.05.449(2) (presiding officer in hearing under the APA affords parties the opportunity to, among other things, "present evidence" and "conduct cross-examination") with Rutledge, *New Tribunal*, *supra*, at 204-05 (Department acts administratively "*ex parte*" or as a "party litigant").

Moreover, *all* the other legal proceedings listed in the statutory definition involve proceedings in a formal setting before the decision maker – "proceeding in any court in this state," "grand jury hearing," and "hearing before an inquiry judge." RCW 2.43.020(3); *State v. Flores*, 164 Wn.2d 1, 12, 186 P.3d 1038 (2008) ("meaning of a word may be indicated or controlled by reference to associated words"). Similarly, administrative hearings usually take place before a neutral decision maker on the record. See RCW 51.52.100 (IAJ conducts hearing with all testimony stenographically reported and transcribed), RCW 51.52.140 ("the practice

in civil cases shall [generally] apply”); RCW 34.05.449(4) (hearing must be recorded). The listed proceedings and administrative hearings are thus similar in nature, not “apples-and-oranges” as WSAJ claims (at 15-16). On the other hand, including general state and local agency actions that do not involve a hearing would create the “apples-and-oranges” problem.

WSAJ argues the words “fully protected” in the intent section justify its expansive reading of “legal proceeding.” WSAJ 12 (RCW 2.43.010). This argument is circular, because the words “fully protected” are immediately modified by the very phrase “in legal proceedings.” RCW 2.43.010 (LEP persons “cannot be fully protected *in legal proceedings* unless qualified interpreters are available to assist them”).

Contrary to WSAJ’s argument, the intent section is entirely consistent with the interpretation that “legal proceeding” is a “hearing” before the Board, not other state or local processes for claims and licenses. The statute is intended to “secure the rights, constitutional or otherwise, of [LEP] persons”. RCW 2.43.010; *Gonzales-Morales*, 138 Wn.2d at 381 (statute is intended “to uphold the constitutional rights of non-English-speaking persons”). The statute does not create or change other rights. *See* RCW 2.43.010 (“Nothing in [the statute] abridges the parties’ rights or obligations under other statutes or court rules or other law”). A worker who disagrees with a Department decision receives due process through a

de novo evidentiary hearing before the Board. *Karlen v. Dep't of Labor & Indus.*, 41 Wn.2d 301, 303-04, 249 P.2d 364 (1952) (parties received a “full and complete” due process hearing “before such board”); Rutledge, *New Tribunal, supra*, at 205 (Board “proceeding is not a review; the matter comes on for hearing completely de novo”). Requiring a qualified interpreter during the hearing satisfies the statutory purpose.

WSAJ then argues that other “sweeping” statutory provisions imply intent to cover a broad scope of agency actions. WSAJ 12; RCW 2.43.060 (knowing and voluntary interpreter waiver); .070 (“administrative office of the courts” shall establish interpreter testing and certification program); .080 (interpreters “serving in a legal proceeding” subject to the ethics code). But each of these procedural safeguards logically applies to hearings or judicial proceedings. These provisions are not logically relevant to *ex parte* state or local decisions.

The overall statutory scheme thus confirms the plain language definition. A “legal proceeding” means hearings, not other state or local agency actions that occur prior to hearings, such as the Department claim administration. Accordingly, the Court should reject WSAJ’s invitation to read RCW 2.43 to apply prior to the hearings before the Board.⁴

⁴ Further, the claimants’ attorney-client communications for hearing preparation or discovery outside of the actual hearings are not part of the “legal proceeding,” which is a “hearing . . . before an administrative board” in this case. The word “before” means,

B. The Claimants' Hearings before the Board Were Not Initiated by Government but Arose Out of Their Benefit Applications

Interpreters "appointed according to [the statute]" are entitled to reasonable fees and "shall be reimbursed for actual expenses which are reasonable," as provided in the statute. RCW 2.43.040(1).

In each hearing, the IAJs appointed an interpreter at Board expense. *See* WAC 263-12-097 (IAJ may appoint interpreter at Board expense). Thus, the Court need not address whether RCW 2.43 provides a non-indigent claimant with a publicly-funded interpreter. WSAJ, however, addresses this issue. WSAJ 16-21.

If the Court reaches this issue, WSAJ is wrong in suggesting that the claimants were statutorily entitled to a publicly-funded interpreter. The statute assigns interpreter costs to non-indigent persons in all proceedings *not initiated by government*. *See* RCW 2.43.040(2), (3). The statutory language does not support WSAJ's argument.

among other things, "being considered, judged, or decided by [the matter before the committee]." Webster's New World Dictionary 127 (2d coll. ed. 1976).

This interpretation is confirmed by the parallel statute for hearing-impaired persons. RCW 2.42 treats "proceedings" and attorney-client communications for case preparation separately. One provision requires an interpreter "at any stage of a judicial or quasi-judicial proceeding" to interpret the "proceedings," and a separate provision addresses "communications with counsel in all phases of the preparation and presentation of the case" when it is the policy and practice to appoint and pay counsel for indigent persons. RCW 2.42.120(1), (6). In using the same term "proceeding" in RCW 2.43, a similar statute, the Legislature likely intended the same meaning where "proceeding" does not generally mean case preparation. If "proceeding" does not include case preparation, neither does the narrower term "hearing . . . before an administrative board."

1. WSAJ's "government-initiated" argument fails, because it focuses on the Department claim administration, which is not a "legal proceeding"

WSAJ argues that the word "initiate" means "to cause or facilitate the beginning of." WSAJ 17-19. WSAJ then points to RCW 51.28.010, which describes a worker's initial duty to report injury to the employer, the employer's duty to then report such accident to the Department, and the Department's duty to then forward notice of rights to the worker. WSAJ 16. Based on this possible claim filing scenario, WSAJ argues that the Department "facilitates" workers' claims by sending them a notice of their rights to receive benefits. WSAJ 16-19.

As shown above, this argument is irrelevant because the agency decision-making prior to a hearing is not a "legal proceeding" subject to RCW 2.43. However, even under WSAJ's theory, it is the claimants, not the Department, who "facilitated *the beginning* of" their claims by reporting an injury and thus initiated what WSAJ incorrectly claims a "legal proceeding."

Like the claimants, WSAJ refers to nothing in the record to show the claim filing actually took place in the fashion as described in RCW 51.28.010. In fact, "the worker generally reports the injury to a physician who, in turn, reports the injury to the department." RCW 51.28.015(1)(a); Declaration of Sandra Dziejic (App. A to the Department's answer to

WSTLA) (same). In the absence of evidence, WSAJ claims the Department should be deemed the initiating agency as a matter of law (*de jure*) even if it did not initiate any proceeding as a matter of fact (*de facto*). WSAJ 17-18. Even this *de jure* argument fails because a worker has the *initial* legal duty of reporting his or her injury under RCW 51.28.010.⁵ In any event, the entire argument about how a claim is initiated is immaterial, because the relevant inquiry is who initiated the hearings before the Board, the “legal proceedings” addressed by RCW 2.43.

2. Board hearings are not proceedings “initiated by agencies of government” under RCW 2.43.040

The claimants initiated the legal proceedings before the Board by filing an appeal, thus triggering Board jurisdiction. *Kustura*, 142 Wn. App. at 680-81. The language of RCW 2.43.040 supports this conclusion.

Reading the phrase “proceedings initiated by agencies of government” in RCW 2.43.040 in context confirms that the Board hearings in this case are not government-initiated for purposes of interpreter cost allocation. A “single word in a statute should not be read in isolation.” *Flores*, 164 Wn.2d at 12. When a particular word is listed in a series, a court should “take into consideration the meaning naturally attaching to them from the context” and “adopt the sense of the words

⁵ See also *Pate v. Gen. Elec. Co.*, 43 Wn.2d 185, 190, 260 P.2d 901 (1953) (“The responsibility of initiating a claim is upon the work[er].”).

which best harmonizes with the context.” *Flores*, 164 Wn.2d at 12 (citation omitted) (*noscitur a sociis*).

The statute lists specific proceedings as examples of government-initiated proceedings:

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.

RCW 2.43.040(2) (underline added).

Under the principles of *noscitur a sociis* and *ejusdem generis*, the general phrase “other legal proceedings initiated by agencies of government” is restricted by the associated specific proceedings. *See Flores*, 164 Wn.2d at 12-13 (when general and specific words are “clearly associated in the same sentence in a pattern such as ‘[specific], [specific], or [general],’” the specific words restrict the meaning of the general).

The specific proceedings listed in the statute – “criminal proceedings, grand jury proceedings, coroner’s inquests, mental health commitment proceedings” – are proceedings where individuals are compelled to appear. Thus, the phrase “legal proceedings initiated by agencies of government” suggests such compulsory proceedings initiated

primarily for public interest, where it makes sense to provide a publicly-funded interpreter for those compelled to appear.

Further, this interpretation is consistent with due process law, which generally affords more protection in “government-initiated proceedings seeking to affect adversely a person’s status,” than in “hearings arising from the person’s affirmative application for a benefit”. *Abdullah v. INS*, 184 F.3d 158, 165 (2d Cir. 1999) (no right to interpreter at INS interview for special agricultural worker status); *Santosky v. Kramer*, 455 U.S. 745, 756, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (noting heightened due process protection “in a variety of government-initiated proceedings that threaten the individual involved with a ‘significant deprivation of liberty’ or ‘stigma’”).

Here, the claimants were not compelled to appear before the Board. Instead, the hearings arose out of their affirmative applications for workers’ benefits and appeals, in pursuit of their private rights. Such proceedings are not government-initiated as that term is used in the statute.

C. RCW 2.43 Allows Reasonable Discretion in the Use of Interpreters during the Board Hearings

The Department’s answer to amici NJP, ACLU, and WITS at 11-14 fully addresses how an IAJ would use an interpreter when required by RCW 2.43. WSAJ correctly recognizes that IAJs are allowed reasonable

discretion in the use of interpreters during Board hearings. WSAJ 5, 20 (citing *Gonzales-Morales*). WSAJ is also correct that the IAJs should, in the exercise of discretion, provides interpreter services in such a manner as to secure LEP claimants' due process rights. WSAJ 20. However, the IAJs' decisions as to the use of interpreters may reasonably reflect that, unlike in a criminal case, there is "no constitutional right to counsel afforded indigents involved in worker compensation appeals." *In re Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995).

III. CONCLUSION

For the reasons stated in this and its previously-filed briefs, the Department asks this Court to affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 9th day of October, 2009.

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