

NO. 81478-3

SUPREME COURT OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, et al.,

Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**AMICUS CURIAE BRIEF OF
NORTHWEST JUSTICE PROJECT**

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Northwest Justice Project's ("NJP's") identity and interest as amicus curiae is described in its Motion for Leave to File Amicus Brief.

II. INTRODUCTION

NJP in this brief addresses the issue of when a civil case should be reversed and remanded because the hearing authority failed to comply with RCW 2.43's mandate to appoint an interpreter to assist a limited-English-proficient (hereafter, LEP) litigant throughout his or her legal proceeding. It is a matter of first impression for the court.¹

In enacting RCW 2.43 twenty years ago, the Legislature declared that full protection of the rights, "constitutional or otherwise," of non-English speaking litigants required that they be provided with qualified interpreters throughout all civil, criminal, and administrative legal proceedings. The Legislature established a high standard for voluntary waiver of those rights, clearly indicating that the right to an interpreter is critical and fundamental.

The Court of Appeals found that the Board violated RCW 2.43 in Mr. Kustura's and Ms. Lukić's cases by failing to provide interpreting

¹ NJP submitted an amicus brief in this case to the Court of Appeals. This brief is intended to be read in conjunction with the previous brief and expands upon certain points, without waiving any argument previously made.

throughout their legal proceedings, including for communication with counsel, and this ruling should be affirmed. However, the Court of Appeals held no prejudicial error had occurred, finding that the appellants failed to show that the outcome would have differed had they been able to understand their proceedings and communicate with counsel.²

The Court's outcome-based analysis of prejudice in this case was erroneous and should be reversed. The appropriate prejudice analysis should focus on whether the failure to provide interpreting throughout the proceedings, as required by RCW 2.43, impaired substantial rights or resulted in fundamental unfairness in the proceeding. Inability to understand and participate in one's hearing always harms substantial rights and is fundamentally unfair. For this reason, we urge the Court to adopt a bright line rule requiring reversal and remand where RCW 2.43 is violated by a failure to provide interpretation for either all witness testimony, or for significant or critical portions of a legal proceeding. Such an approach is also supported by compelling public policy concerns, which include maintaining confidence in the legal system within the limited-English-speaking communities of Washington State and ensuring accurate judicial fact-finding.

² NJP's briefing below and herein addresses only the cases of Mr. Kustura and Ms. Lukić as it has not reviewed other appellants' records, but this analysis applies equally to any appellant in these consolidated cases who was denied full interpretation.

III. ISSUE

Where a Limited-English-Proficient Litigant Cannot Understand Substantial or Critical Portions of An Adjudication Because Interpretation is Not Provided, Is Reversal and Remand for a Fully Interpreted Hearing The Appropriate Remedy?

IV. STATEMENT OF RELEVANT FACTS

Mr. Kustura was denied interpretation during the hearing except to place his own testimony in the record. Kustura CABR Tr 9/18/02, 7-8, Kustura PD & O CABR 71, adopted by Kustura D & O CABR 13-21. Without offering any rationale, Mr. Kustura's hearing judge specifically held that interpretation of testimony by witnesses other than Mr. Kustura was "not deemed necessary." Kustura PD & O CABR 71. The judge also barred Mr. Kustura from using an interpreter that he had hired and brought to the hearing. Kustura CABR Tr 9/18/02 at 5. Consequently, Mr. Kustura could not communicate with counsel or participate meaningfully.

Ms. Lukić was similarly denied interpretation of preliminary matters and hearings on motions in her case, despite having requested full interpretation. Lukić CABR Tr 2/12/03, 11, 4/24/03, 1-29, 39. On the first day of her hearing, she was allowed only occasional summaries of the words of the judge and counsel. Lukić CABR Tr 4/24/03, 29-32.³ She received full interpretation for the remainder of the hearing following

³ Ms. Lukić was provided with an interpreter for her testimony and the testimony of one witness at hearing. Lukić CABR Tr 2/12/03, 11-12.

assignment of a new judge, but was denied interpretation to communicate with counsel throughout her hearing. Lukić CABR Tr 8/20/03, 14-15.

The Court of Appeals held that the Board failed to comply with RCW 2.43 and WAC 263-12-097 in Mr. Kustura's case by not providing an interpreter for all other witness testimony or for communications with counsel. *Kustura v. Dep't. of Labor and Industries*, 142 Wn.App 655, 681, 175 P.3d 1117, 1130 (2008). However, the court applied what is in essence the "harmless error" doctrine and held that there was no reversible error in either Mr. Kustura's or Ms. Lukić's case, because "none of the workers demonstrates prejudice as a result of the Board's failure to comply with the statute." *Id.* at 681, 175 P.3d at 1130. The court found that Mr. Kustura's appeal involved wage determination issues that were "largely legal and involved expert testimony," and that it was unlikely he could have offered "critical" input or altered the hearing's outcome even if he had been provided with full interpreting. *Id.* at 682, 175 P.2d at 1130. The court similarly found that Ms. Lukić had not demonstrated any likelihood that complete interpreting would have changed the outcome of her hearing. *Id.*

V. ARGUMENT

A. The Board's Failure To Provide Interpreting Throughout The Proceedings Was Prejudicial Because It Violated Substantial Rights And Created Fundamental Unfairness.

1. RCW 2.43 Protects Substantial Rights And The Fairness Of Proceedings.

The Court of Appeals erred in applying the “harmless error” doctrine and in finding that no prejudice occurred in Mr. Kustura’s and Ms. Lukić’s cases. “Harmless error” is defined under Washington case law as error that is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case.” *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496, 503 (2000)(emphasis added), quoting *State v. Smith*, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997).⁴ The Board’s failure to provide interpretation throughout the legal proceedings, as required by RCW 2.43, was not a trivial or formal error. It rendered the appellants unable to fully participate in their own hearings. They could not understand all the testimony or effectively contest or question such testimony. Nor could they communicate with counsel. Because the Board’s failure to comply with RCW 2.43’s requirements impaired important procedural rights and undermined the fundamental fairness of

⁴ RCW 4.36.240 limits application of the “harmless error” doctrine to “any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party...”

the appellants' proceedings, their cases should be reversed and remanded. Moreover, where, as here, litigants cannot understand adverse testimony due to a language barrier, they or their counsel may fail to identify entire legal issues, and thus an analysis based solely on impact on issues identified on appeal is intrinsically flawed.

This Court has previously reversed where procedural irregularities in an administrative proceeding resulted in prejudice and undermined the fundamental fairness of the proceeding. In *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995), a doctor sued the University of Washington after his residency was terminated due to chemical dependency. The trial court granted summary judgment for the doctor, and the state appealed. One of the issues on appeal was whether the trial court judge should have recused himself after having engaged in ex parte communication through a judicial extern who had gathered general information from an agency about how it monitored chemically dependent physicians. In determining that remand was the appropriate remedy, the Court reasoned that even if bias had not actually occurred, a reasonable person might believe it had. *Id.* at 205-206, 905 P.2d at 378.⁵ The Court rejected the opposing party's

⁵ Similarly, a treatise on Social Security administrative hearings notes that ALJ bias should not be treated as harmless error because "it is the conduct of the administrative hearing, not the content of the evidence, which is the subject of the court's review." BARBARA SAMUELS, 2 SOC. SEC. DISAB. CLAIMS PRAC. & PROC. § 19:43 (2nd ed. 2008)

contention that recusal was unwarranted because appellants had suffered no prejudice on account of the ex parte communication, noting: “in deciding recusal matters, actual prejudice is not the standard. The [Code of Judicial Conduct] recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating.” *Id.* at 205, 905 P.2d at 378.

RCW 2.43 is intended to protect important procedural rights, including constitutional rights, of LEP litigants. RCW 2.43.010. The Board's failure to comply with RCW 2.43's procedural protections severely damaged the rights accorded by the statute. Like the judge's bias in *Sherman*, failure to provide complete interpretation in a Board proceeding pervades the entire adjudication, creates fundamental unfairness, and has the potential to damage public confidence in the justice system. As such, the appropriate remedy here, as in *Sherman*, is reversal and remand.⁶

⁶ Several federal courts have noted that it is not appropriate to require a litigant to show error is not harmless where an agency fails to comply with a regulation intended to confer important procedural benefits or to protect fundamental rights derived from the Constitution or a federal statute, or where the agency's failure to comply undermines the fundamental fairness of the proceeding. *See, e.g., Montilla v. INS*, 926 F.2d 162, 170 (2d Cir. 1991)(violation of regulation concerning right to counsel at appellant's own expense at deportation hearing required reversal “irrespective of whether a new hearing would produce the same result”); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 334 (2003) (“...the standard for demonstrating lack of prejudicial error is strict. Agency mistakes constitute harmless error...only where they

RCW 2.43 provides that it is state policy:

... 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 (emphases added).

RCW 2.43.010. In enacting RCW 2.43, the Legislature placed the right to complete, competent interpretation on par with constitutional rights meriting the highest protection. The Legislature ensured that RCW 2.43's protections not be given up lightly, by restricting waiver of the right to an interpreter to those cases in which the appointing authority determines on the record that the LEP person has waived such right "knowingly, voluntarily, and intelligently." RCW 2.43.060(1)(b). This strict requirement for knowing and voluntary waiver is identical to that pertaining to constitutionally protected rights such as the rights to counsel and jury trial in criminal cases. *See State v. Tetzlaff*, 75 Wn.2d 649, 652, 453 P.2d 638, 640 (1969)(criminal counsel); *State v. Bugai*, 30 Wn. App. 156, 157, 632 P.2d 917, 918 (Div. 1 1981)(jury trial).

Notwithstanding RCW 2.43.040's different cost mandates, RCW

clearly had no bearing on the procedure used or the substance of the decision reached")(citing to *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001).

2.43.010, .020, .030 and .060 establish equivalent rights to interpreters in civil and criminal cases. This is notable, in light of the substantial and long-standing body of law on due process rights to an interpreter in criminal cases. *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970), *cert. denied*, 395 U.S. 936, 89 S.Ct. 2000, 23 L.Ed.2d 452 (1969).⁷ In 2008, the Legislature again demonstrated its commitment to civil court interpreting by requiring each state court to create a detailed language assistance plan “to provide a framework for the provision of interpreter services for non-English-speaking persons accessing the court system in both civil and criminal legal matters.” RCW 2.43.090(1) (emphasis added).

This Court has previously considered what rights are protected by RCW 2.43’s mandate of court interpretation in the context of a criminal case, *State v. Gonzales-Morales*, 138 Wn.2d 374, 979 P.2d 826 (1999). Because the Legislature chose in every respect other than cost allocation to treat criminal and civil interpretation identically under RCW 2.43, *Gonzalez-Morales*’ rationale should apply equally to civil cases. In *Gonzales-Morales*, the trial court “borrowed” the interpreter appointed to interpret for the petitioner in a criminal trial to interpret the testimony of a

⁷ See also Thomas M. Fleming, *Right of Accused to Have Evidence or Court Proceedings Interpreted*, Annotation, 32 A.L.R. 5th 149 (updated weekly).

Spanish-speaking witness for the state. The Court of Appeals found that the use of the petitioner's interpreter to interpret the testimony of a state witness did not violate the petitioner's constitutional right to assistance of counsel, and the Supreme Court affirmed.⁸ The Court noted that the petitioner had been given the option of calling a recess to communicate with his counsel through the interpreter if needed, and "was able to fully understand every word spoken in the courtroom either through translation from English into Spanish or direct from Spanish..." *Id.* at 388, 979 P.2d at 833. The Court cited with approval *United States v. Lim*, 794 F.2d 469, 471 (9th Cir. 1986) that "[a]s long as the defendant's ability to understand the proceedings and communicate with counsel is unimpaired, the appropriate use of interpreters in the courtroom is a matter within the discretion of the district court." *Gonzalez-Morales*, 138 Wn.2d at 382, 979 P.2d at 830.

Unlike the defendant in *Gonzalez-Morales*, the appellants in this case were severely impaired in their ability to understand their proceedings and communicate with counsel. Civil litigants are afforded due process rights to be present, to confront witnesses, and to be represented by counsel. *See, e.g., Flory v. Dept. of Motor Vehicles*, 84

⁸ It should be noted while the Court found that the hearing officer in *Gonzales-Morales* had discretion about *how* to accomplish RCW 2.43's requirement to provide complete interpreting, RCW 2.43 is unambiguous in requiring appointment of an interpreter throughout a legal proceeding for LEP litigants. RCW 2.43.030.

Wn.2d 568, 527 P.2d 1318 (1974)(due process rights in license revocation included right to confront adverse witnesses, present evidence and oral argument, and be represented by counsel); *Mansour v. King County*, 131 Wn. App. 255, 128 P.3d 1241 (Div. 1 2006)(due process requires pet owner contesting order removing dog from county to be allowed to subpoena witnesses and records); *Goldberg v. Kelly*, 397 US 254, 90 S.Ct. 1011(1970)(welfare benefits termination requires hearing with opportunity to cross-examine adverse witnesses and be represented by counsel.) Mr. Kustura and Ms. Lukić cannot be said to have been “present” in any meaningful sense of the word for those portions of the proceedings that were not interpreted.

Mr. Kustura’s case was particularly egregious in this respect. During Mr. Kustura’s hearing, his employer testified concerning Mr. Kustura’s wages and benefits. Kustura CABR Tr 9/25/02, 3-64. Mr. Kustura’s inability to understand the employer’s testimony and to assist in cross examination and rebuttal clearly impaired his ability to effectively litigate his case.⁹ *See Lenca v. Employment Sec. Dept.*, 148 Wn. App.

⁹ The Department argues that an interpreter Mr. Kustura brought to the hearing himself **could have** interpreted for him, but there is no evidence in the record that this person did in fact interpret. Indeed, the judge did not allow Mr. Kustura to have this person interpret during the hearing, Kustura CABR Tr 9/18/02 at 5, so any interpreting would have been limited to summaries during breaks. Summary interpretation does not comply with the requirements for precise interpreting set forth in the Code of Conduct for Court Interpreters. *See* GR 11.2(b). Moreover, RCW 2.43.030 plainly requires that the interpreter be appointed by the court.

565, 200 P.3d 281 (Div. 2. 2009)(unemployment appeal remanded to allow employee to submit evidence that employer had testified falsely about his earnings after employee had to leave hearing.)

The Court in this case need not reach the constitutional question of whether LEP litigants have a due process right to interpretation, because RCW 2.43 plainly mandates that interpreting throughout legal proceedings is required to protect other substantial rights.¹⁰ As noted by one commentator, “[b]ecause language is the principal means of communication in a legal proceeding, the participants’ ability to understand and speak that language is critical to the proceeding’s fairness.”¹¹ Within the last decade, courts in other states have repeatedly held that fundamental fairness requires an interpreter in civil cases, reflecting evolving notions of due process. *See, e.g., Figueroa v. Doherty*, 303 Ill.App.3d 46, 707 N.E.2d 654 (1999)(unemployment); *Daoud v. Mohammad*, 952 A.2d 1091, 1093, 402 NJ Super. 57, 60 (Sup Ct of NJ, Appellate Div. 2008)(dismissed as moot)(commercial tenancy); *In re Doe*, 57 P.3d 447, 457 (Hawaii 2002)(parental rights); *Strook v. Keding*, 766 N.W.2d 219(Wis. App. 2009)(civil trespass). In New York state, numerous courts have held that civil court interpretation is required by

¹⁰ NJP concurs in the due process arguments presented by amicus ACLU.

¹¹ Fleming, *supra*, note 7.

both state law and due process protections. *See, e.g., 610 West. 136th St. Tenants Assoc. v. Romero*, 10/9/2001 N.Y.L.J. 20, col. 6 (Civ. Ct. N.Y. Co.); *Yellen v. Baez*, 177 Misc.2d 332, 335, 676 N.Y.S.2d 724, 726 (N.Y. City Civ. Ct. 1997)(eviction); *Lizotte v. Johnson*, 4 Misc.3d 334, 342, 777 N.Y.S. 2d 580 (2004)(foster care payment); *Santana v. Coughlin*, 90 A.D.2d 947, 457 N.Y.S.2d 944 (N.Y. App. Div. 3d Dep't 1982)(inmate disciplinary hearing).

2. The Board's Error Harmed Appellants' Right To Be Free From National Origin Discrimination.

In its analysis of whether appellants were prejudiced by the violation of RCW 2.43, the Court of Appeals additionally failed to recognize that failure to provide full interpretation harmed appellants' right to be free from discrimination based on national origin, a substantial right. Such discrimination violates Title VI of the Civil Rights Act of 1964, 42 U.S.C.A § 2000d (1994). NJP briefed below the issues of whether Title VI applied to the Department of Labor and Industries, and Title VI requirements for providing full interpretation of legal proceedings, including administrative hearings regarding benefits.¹²

¹² See, Northwest Justice Project's amicus curiae brief before the Court of Appeals at 4-5 and 13 for a detailed discussion of Title VI obligations on agencies receiving federal funds; see p. 13, fn. 21 on Title VI coverage of the Department of Labor and Industries. While *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001) held that Title VI disparate impact regulations create no private right of action, it did not strike down the disparate impact regulations. DOJ continues to enforce Title VI's language service

National origin discrimination unacceptably taints any proceeding in which it occurs. Had Mr. Kustura instead been a deaf litigant, with the judge prohibiting a sign language interpreter from providing him with any interpretation of what was said, or from helping him communicate with his counsel, the discriminatory impact would be clear. The discrimination herein is equivalent, and requires that a reviewing court treat a significant and pervasive violation of RCW 2.43 as harm to a substantial right.

B. Reversal Is Mandated Under RCW 51.52.115 For Violation Of WAC 263-12-097.

Under RCW 51.52.115 , a decision by the Board of Industrial Appeals should be upheld only “[i]f the court shall determine that the board has acted within its power and has correctly construed the law and found the facts.” Otherwise, the Board’s decision “shall be reversed or modified.” *Id.* The procedural requirements of WAC 263-12-097 should properly be viewed as part of the law the Board must “correctly constru[e]” under RCW 51.52.115. *See Deffenbaugh v. Department of Social and Health Services*, 53 Wn. App. 868, 870-71, 770 P.2d 1084, 1085-86 (Div. 1 1989)(holding that administrative agencies are bound by their own rules; “[t]his general rule is particularly appropriate in the

requirements, with recent DOJ enforcement activities involving interpreting in the Maine and Indiana state court systems. <http://www.lep.gov/whats_new/IndianaCourtsLetterfromMAF2009.pdf>. Thus, *Sandoval* does not bar this court from considering whether Appellant’s Title VI rights were violated by failure to provide full interpretation of hearings.

hearing process, which is conducted by an administrative law judge from an independent agency of government to insure that the contestant has a fair and impartial fact finder”).

While the Board’s adjudications regarding worker’s compensation benefits are exempted from coverage under the Administrative Procedures Act¹³ (hereafter “APA”), the APA’s definition of prejudice requiring reversal and related case law offer useful guidance. The APA provides that relief shall be granted from an agency order if “the agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure.” RCW 34.05.570(3)(c). Washington courts have reversed and remanded for a new proceeding in cases covered by the APA where the agency below failed to follow procedural requirements. *See, e.g., Mills v. Western Washington University*, 150 Wn. App. 260, 208 P.3d 13 (Div. 1 2009)(unlawful procedure or decision-making process statutorily defined as prejudice mandating reversal under the APA); *Seattle Area Plumbers v. Washington State Apprenticeship and Training Council*, 131 Wn. App. 862, 882, 129 P.3d 838, 848 (Div. 2 2006)(hearing reversed and remanded for failure to allow discovery and cross-examination on relevant topic). Here, the Court should similarly find unlawful procedure equates to prejudice.

¹³ *See* RCW 34.05.030(2)(a).

C. Public Policy Supports Reversal And Remand Where The Board Failed To Provide Full Interpreting Throughout The Hearing.

Public policy reasons also support reversal and remand where RCW 2.43 is substantially violated. The provision of complete and competent court interpreting is essential to maintaining confidence in the judicial system within LEP communities, and to assuring accurate judicial fact-finding. A bright line rule for reversal and remand is needed to ensure uniform compliance with RCW 2.43 and to provide guidance to courts and litigants on the statute. Finally, the state of Washington has a responsibility to ensure that LEP injured workers have full and fair access to assert workers' compensation claims.

Immigrants comprise a substantial portion of the population in Washington State. The foreign-born population in Washington State grew by 23.3% between 2000 and 2005, to comprise 12.2% of Washington's total population.¹⁴ The provision of full and competent interpretation of legal proceedings is critical to allowing this growing community to participate fully and meaningfully in legal proceedings.

Failure to provide full interpretation can easily lead to perceptions that the system is unfair or biased, causing LEP community members to

¹⁴ *Fact Sheet on the Foreign Born, Demographic & Social Characteristics*, Migration Policy Institute (visited Sept. 11, 2009) <www.migrationinformation.org/DataHub/state.cfm?ID=WA>.

stay away from courts even when legal protections are desperately needed: “[i]n the eyes of linguistically isolated groups, courts become a one-sided institution—available to legitimize and enforce the taking of their property, eviction from their homes, and garnishment of their wages, but unavailable for redress of their own legal claims.”¹⁵ Ms. Lukić’s experience bears this out: describing the first day of her hearing, of which almost nothing was interpreted, she stated, “I just felt like somebody was hiding something from me.” Lukić CABR Tr 9/29/03, 31. A recent report by the Brennan Center for Justice cites to several studies finding that various immigrant groups believe the legal system is biased in favor of English speakers.¹⁶

Complete, competent interpretation is also needed to preserve the accuracy of judicial fact-finding. Where a litigant cannot understand testimony or argument, the increased risk of error is significant. *See* Steven M. Kahaner, *The Administration of Justice in a Multilingual Society—Open to Interpretation or Lost in Translation?* 92 JUDICATURE 220, 224-225 (April-May 2009).

¹⁵ *Language Barriers to Justice in California*, at 31, California Commission on Access to Justice (Sept. 2005)

<http://www.calbar.ca.gov/calbar/pdfs/reports/2005_Language_Barriers_Report.pdf>.

¹⁶ *Language Access in State Courts*, Brennan Center for Justice (2009)

<http://www.brennancenter.org/content/resource/language_access_in_state_courts>.

The Board's failure to provide full interpreting herein is out of step with the commitments to competent, complete interpretation made by Washington's Legislature, its courts, and its other agency hearing appeals on income-maintenance programs. Washington State has in fact been in the forefront of nationwide efforts to provide language access to limited-English-speakers in legal proceedings. In addition to passing RCW 2.43 in 1989, Washington was one of the first four states to participate in a national consortium in 1995 to ensure high proficiency standards for court interpreters.¹⁷ In 2008, the Legislature strengthened RCW 2.43 by appropriating funds and requiring each state court to create a detailed language assistance plan for LEP persons involved in civil and criminal matters.¹⁸ RCW 2.43.090(1). Since 1985, the Office of Administrative Hearings, which conducts Employment Security and Department of Social and Health Services hearings, has required appointment of an interpreter and complete interpretation at no cost for LEP persons. WAC 388-02-0120 and -0145, previously at WAC 388-08-150, WAC 10-08-040 and -150.

¹⁷ IMMIGRANTS IN COURTS (Joanne I. Moore, ed., 1999) at 30. See also Nancy Schweda Nicholson, *The Court Interpreters Act of 1978: A 25 Year Retrospective: Part I*, XIV PROTEUS 4 (Winter 2006) at 10-11 (found at

<<http://www.najit.org/Publications/Proteus/Court%20Interpreter%27s%20Act.pdf>

¹⁸ See *Court Interpreters and Language Assistance in Washington State*, Washington Courts website (visited Sept. 11, 2009)

<http://www.courts.wa.gov/programs_orgs/pos_interpret/index.cfm?fa=pos_interpret.display&fileName=courtInterpretersAndLanguageAssistance>.

The failure to provide complete interpretation is particularly problematic in the context of workers' compensation claims. Immigrants are an important engine for economic growth in Washington. The foreign-born population in Washington State comprises 14.2% of the state's civilian employees.¹⁹ Immigrants account for almost two-thirds of farming, fishing and forestry workers, and for about a fifth of service, production, and transportation workers.²⁰ The state must ensure that when injured, LEP workers—who are concentrated in fields involving physical labor—have complete access to the industrial insurance system.

Where error consists of a failure to provide interpretation of all witness testimony or of a substantial or critical portion of a proceeding, a bright-line rule for reversal and remand for a fully interpreted adjudication is needed to ensure compliance with RCW 2.43 and best serves judicial efficiency. Requiring an LEP party to establish that complete interpreting would have led to a different outcome would render RCW 2.43's protections essentially unenforceable in many cases. LEP parties not provided with interpreting simply do not know what happened in their adjudications, and cannot determine how the evidence proffered or

¹⁹ *Fact Sheet on the Foreign Born, Workforce Characteristics*, Migration Policy Institute (visited Sept. 11, 2009)

<<http://www.migrationinformation.org/datahub/state3.cfm?ID=WA>>.

²⁰ *Id.*

argument of counsel differed from their understanding of the facts.²¹

Where violation of RCW 2.43 is substantial, judicial economy is also best served by a clear rule for remand. It is inefficient for a reviewing court to sift through a record to determine whether an outcome may have differed with an interpreter, a speculative question at best. *See Montilla v. INS*, 926 F.2d at 169.

IV. CONCLUSION

Amicus asks that this Court affirm the Court of Appeals' ruling that an interpreter is required throughout the proceeding, including for communication with counsel. Where an interpreter either is not provided to interpret the testimony of all witnesses, or is not appointed for significant or critical portions of a legal proceeding, the Court should enunciate a bright line rule of per se reversal and remand for a fully interpreted proceeding. Here, Mr. Kustura's case clearly falls within that rule, and it should be reversed and remanded for a fully interpreted Board hearing. The Court should also reverse and remand Ms. Lukić's case based on the denial of interpretation of attorney-client communication during the hearing, due to the resulting harm to her substantial rights to confront witnesses, consult with counsel, and participate in her hearing.

²¹ *See* Debra L. Hovland, *Errors in Interpretation: Why Plain Error is Not Plain*, 11 LAW & INEQUALITY 473, 487 (June 1993).

DATED this 15th day of September, 2009.

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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]

Notes:

Severability – 1989 c 358: See note following RCW 2.43.010

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.]

Notes:

Severability – 1989 c 358: See note following RCW 2.43.010

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.]

Notes:

Severability – 1989 c 358: See note following RCW 2.43.010

RCW 2.43.090

Language assistance plan — Required for each trial court — Submission of plan to interpreter commission — Report.

(1) Each trial court organized under this title and Titles 3 and 35 RCW must develop a written language assistance plan to provide a framework for the provision of interpreter services for non-English-speaking persons accessing the court system in both civil and criminal legal matters. The language assistance plan must include, at a minimum, provisions addressing the following:

(a) Procedures to identify and assess the language needs of non-English-speaking persons using the court system;

(b) Procedures for the appointment of interpreters as required under RCW 2.43.030. Such procedures shall not require the non-English-speaking person to make the arrangements for the interpreter to appear in court;

(c) Procedures for notifying court users of the right to and availability of interpreter services. Such information shall be prominently displayed in the courthouse in the five foreign languages that census data indicates are predominate in the jurisdiction;

(d) A process for providing timely communication with non-English speakers by all court employees who have regular contact with the public and meaningful access to court services, including access to services provided by the clerk's office;

(e) Procedures for evaluating the need for translation of written materials, prioritizing those translation needs, and translating the highest priority materials. These procedures should take into account the frequency of use of forms by the language group, and the cost of orally interpreting the forms;

(f) A process for requiring and providing training to judges, court clerks, and other court staff on the requirements of the language assistance plan and how to effectively access and work with interpreters; and

(g) A process for ongoing evaluation of the language assistance plan and monitoring of the implementation of the language assistance plan.

(2) Each court, when developing its language assistance plan, must consult with judges, court administrators and court clerks, interpreters, and members of the community, such as domestic violence organizations, pro bono programs, courthouse facilitators, legal services programs, and/or other community groups whose members speak a language other than English.

(3) Each court must provide a copy of its language assistance plan to the interpreter commission established by supreme court rule for approval prior to receiving state reimbursement for interpreter costs under this chapter.

(4) Each court receiving reimbursement for interpreter costs under RCW 2.42.120 or 2.43.040 must provide to the administrative office of the courts by November 15, 2009, a report detailing an assessment of the need for interpreter services for non-English speakers in court-mandated classes or programs, the extent to which interpreter services are currently available for court-mandated classes or programs, and the resources that would be required to ensure that interpreters are provided to non-English speakers in court-mandated classes or programs. The report shall also include the amounts spent annually on interpreter services for fiscal years 2005, 2006, 2007, 2008, and 2009. The administrative office of the courts shall compile these reports and provide them along with the specific reimbursements provided, by court and fiscal year, to the appropriate committees of the legislature by December 15, 2009.

RCW 51.52.115

Court appeal — Procedure at trial — Burden of proof.

Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110: PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the superior court shall refer the same to the department with an order directing it to proceed in accordance with the findings of the court: PROVIDED, That any award shall be in accordance with the schedule of compensation set forth in this title. In appeals to the superior court hereunder, either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in actions at law. Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court.

[1961 c 23 § 51.52.115. Prior: 1957 c 70 § 62; 1951 c 225 § 15; prior: (i) 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part. (ii) 1949 c 219 § 6; 1939 c 184 § 1; Rem. Supp. 1949 § 7697-2.]

WAC 263-12-097

Interpreters

(1) When an impaired person as defined in chapter 2.42 RCW or a non-English-speaking person as defined in chapter 2.43 RCW is a party or witness in a hearing before the board of industrial insurance appeals, the industrial appeals judge may appoint an interpreter to assist the party or witness throughout the proceeding. Appointment, qualifications, waiver, compensation, visual recording, and ethical standards of interpreters in adjudicative proceedings are governed by the provisions of chapters 2.42 and 2.43 RCW and General Rule provisions GR 11, GR 11.1, and GR 11.2.

(2) The provisions of General Rule 11.3 regarding telephonic interpretation shall not apply to the board's use of interpreters.

(3) The industrial appeals judge shall make a preliminary determination that an interpreter is able to accurately interpret all communication to and from the impaired or non-English-speaking person and that the interpreter is impartial. The interpreter's ability to accurately interpret all communications shall be based upon either (a) certification by the office of the administrator of the courts, or (b) the interpreter's education, certifications, experience, and the interpreter's understanding of the basic vocabulary and procedure involved in the proceeding. The parties or their representatives may question the interpreter as to his or her qualifications or impartiality.

(4) The board of industrial insurance appeals will pay interpreter fees and expenses when the industrial appeals judge has determined the need for interpretive services as set forth in subsection (1). When a party or person for which interpretive services were requested fails to appear at the proceeding, the requesting party or the party's representative may be required to bear the expense of providing the interpreter.

[Statutory Authority: RCW 51.52.020, 06-12-003, § 263-12-097, filed 5/25/06, effective 6/25/06; 00-23-022, § 263-12-097, filed 11/7/00, effective 12/8/00.]

WAC 388-02-0120

Do you have a right to an interpreter in the hearing process?

If you need an interpreter because you or any of your witnesses are a person with limited English proficiency, OAH will provide an interpreter at no cost to you.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0120, filed 9/1/00, effective 10/2/00.]

WAC 388-02-0145

What requirements apply to the use of interpreters?

(1) Interpreters must:

(a) Use the interpretive mode that the parties, the hearing impaired person the interpreter and the ALJ consider the most accurate and effective;

(b) Interpret statements made by the parties and the ALJ;

(c) Not disclose information about the hearing without the written consent of the parties; and

(d) Not comment on the hearing or give legal advice.

(2) The ALJ must allow enough time for all interpretations to be made and understood.

(3) The ALJ may video tape a hearing and use it as the official transcript for hearings involving a hearing impaired person.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0145, filed 9/1/00, effective 10/2/00.]