

~~81180-5~~

81478-3

NO. 58200-3-1

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

ENVER MESTROVAC,

Respondent/Cross-Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON, AND THE BOARD OF INDUSTRIAL INSURANCE
APPEALS,

Appellants/Cross-Respondents.

**AMICUS CURIAE BRIEF
WASHINGTON SELF-INSURERS ASSOCIATION**

WASHINGTON SELF-INSURERS ASSOCIATION

Paula T. Olson, WSBA #11584

BURGESS FITZER, P.S.

1145 Broadway, Suite 400

Tacoma, WA 98402-3584

Tel. (253) 572-5324

Fax (206) 627-8928

ATTORNEYS FOR AMICUS

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2017 OCT 19 PM 3:59

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. IDENTITY AND INTEREST OF AMICUS.....	2
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT.....	4
A. Standard of Review.....	7
B. The Appellants had Adequate Notice and Opportunity to be heard at both the Department and the Board levels.....	4
1. Statutory Interpretation does not support the Appellants’ contention that they are entitled to expanded interpreter services.....	5
2. Due process considerations does not require Department-level interpreter services.....	8
3. Self Insured Employers provide more than adequate interpreter and translation services to its workers.....	8
C. The “perceived irregularities” did not undermine the fundamental fairness of the proceedings in which the Appellants participated.....	11
V. CONCLUSION	12

TABLE OF CASES

Page

I. FEDERAL CASES

Soberal-Perez v. Heckler, 717 F.2d 36 (2nd Cir. 1983) 11

II. STATE CASES

Bour v. Johnson, 122 Wn.2d 829, 835, 864 P.2d 380 (1993) 6

Enterprise Leasing, 139 Wn.2d 546, 988 P.2d 961 (1999) 5

In re Sehome Park Care Center, Inc., 127 Wn.2d 774,
903 P.2d 443 (1995) 6

Garrison v. Nursing Bd., 87 Wn.2d 195, 550 P.2d 7 (1976) 6

Mansour v. King County, 131 Wn. App. 255, 128 P.3d 1241 (2006) 4

Motley-Motely, Inc. v. State, 127 Wn. App. 62, 110 P.3d 812 (2005) 11

Sherman v. State 128 Wn.2d 164, 184, 905 P.2d 355 (1995) 5

State v. Storhoff, 133 Wn.2d 523, 946 P.2d 783 (1997) 11

State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999) 5

III. STATE STATUTES

RCW 2.43.010 – 080 5, 13

RCW 2.43.020(3) 5, 6

RCW 2.43.040 5

RCW 2.43.040(2)	5
RCW 2.43.040(3)	5
RCW 51.08.173	8
RCW 51.14.010 - .140	9
RCW 51.28.010(1)	7
RCW 51.32.090	3

IV. STATE REGULATIONS

WAC 296-15-001 to -265	9
WAC 296-15-121 to -181	9
WAC 296-15-200 to 221	9
WAC 296-15-200	7
WAC 296-15-350	10
WAC 296-15-350 (9)	10, 12

V. OTHER AUTHORITIES.

Webster’s New World Dictionary (2 nd College ed., 1984)	6
Washington Self Insured Association Website - www.wsiassn.org	2
December 2006 Memo from Dept. of Labor & Industries	10

I. INTRODUCTION

The appeal in this case addresses several issues, most particularly the added responsibility of the Appellants/Cross Respondents Department of Labor and Industries (hereinafter referred to as “the Department”) and the Board of Industrial Appeals (hereinafter referred to as “the Board”) toward workers compensation claimants who have limited English proficiency (hereinafter referred to as LEP”). The Washington Self-Insurers Association (hereinafter referred to as “WSIA”) agrees with the positions advocated by the Department and the Board to the extent that the existing statutes and regulations adequately protect the federal and state constitutional rights of LEP claimants.

The Respondent/Cross-Appellant (hereinafter referred to as “Mr. Mestrovac”) hopes that this court will extend the existing requirements of prepaid interpretation and translation into the native languages for LEP persons to any and all communications with any attorney, advocate, or person working on behalf of the worker regarding a workers’ compensation claim, in any way, shape or form. Mr. Mestrovac and/or his supporters cannot point to one compelling principle of law that mandates this expansion of interpreter and translation services to any and all communications. The existing requirements for these services to be provided by the Department, the Board, and the self insured employers are already sufficient, if not beyond legal requirements.

Although the WSIA agrees with all of the arguments raised by the Department and the Board regarding subject matter jurisdiction, equal protection and due process protections, this brief will focus solely on the impropriety of Mr. Mestrovac's requested relief, how the current required interpreter and translation services fully comply with federal and state law and must not be expanded. For these reasons and the reasons set forth by the Department and the Board, the order of the Superior Court regarding those services should be reversed.

II. IDENTITY AND INTEREST OF AMICUS

The WSIA was established in June 1972 when the then-new Washington State law authorized self-insurance for workers' compensation. The association has grown from the original 52 members to 385 and is the only statewide, non-partisan, nonprofit organization dedicated to represent the interests of self insured employers (sometimes referred herein as "SIE").¹ The purpose and mission of the WSIA is to provide industry leadership and support to employers through legislation, education and technical services to ensure that its members give the highest quality services to their employees when seeking workers' compensation benefits. *Id.* The WSIA has a legal committee and an amicus subcommittee who selects appropriate cases and appeals to advocate the unique and specific positions of the membership of the WSIA.

¹ See the WSIA website found at www.wsiassn.org.

III. STATEMENT OF THE CASE

Enver Mestrovac, an injured worker seeking worker compensation benefits, spoke a dialect of Bosnian, not English, a fact known by all concerned. In response to his application for benefits, he received Departmental time-loss compensation orders for wage replacements pursuant to RCW 51.32.090. At no point in the proceedings before the Department did Mr. Mestrovac seek reimbursement for translation or interpreter services.

Mr. Mestrovac appealed these orders to the Board, seeking an increase in the computation. Mr. Mestrovac also sought an order requiring the Department to pay for various translation and interpreter services, including all communications between Mr. Mestrovac and his attorney, their employers and others for services at the Department level. A hearing was held before the Board and a proposed decision was issued, adjusting the Department orders to include overtime hours and health care benefits into the computations, but upholding the remainder of the Department's calculations.

During the Board proceedings, an interpreter was provided by the Board, but Mr. Mestrovac sought expanded services to include any and all communications between himself and his attorney. The Board rejected Mr. Mestrovac's request for reimbursement for department-level interpreter services for lack of jurisdiction and his request for expanded services at the Board level.

Both Mr. Mestrovac and the Department sought review by the three-member Board for the proposed decision. The Board granted relief sought by the Department and agreed with the proposed decision with one exception addressing holiday and vacation pay. The Board also found full compliance with requirements for interpreter services at the Board level, but because there was no Department order regarding interpreter services, the Board lacked subject matter jurisdiction.

Mr. Mestrovac next appealed to the Superior Court. The Superior Court affirmed in all respects, except as to the interpreter services issue. The Department moved for reconsideration on the interpreter issue and, although the Superior Court revised its original ruling, it again found for Mr. Mestrovac. The Board unsuccessfully attempted to intervene. Thereafter, the Department, the Board, and Mr. Mestrovac filed cross appeals with this court.

IV. ARGUMENT.

A. *Standard of Review.*

An agency's decisions and actions are questions of law to be reviewed de novo, including those which invoke violations of due process rights. *See e.g. Mansour v. King County*, 131 Wn. App. 255, 263, 128 P.3d 1241 (2006). When due process grounds for reversal of the agency's actions or decision are presented, the reviewing court must make two determinations: 1) whether the aggrieved party had adequate notice and opportunity to be heard; and 2) whether the alleged

“procedural irregularities” did not undermine the fundamental fairness of the administrative proceeding. *See Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995).

B. Mr. Mestrovac had Adequate Notice and Opportunity to be Heard at both the Department and the Board levels.

The Washington Legislature enacted RCW 2.43.010 - 080 to ensure that LEP citizens will be fully protected during legal proceedings, interpreters were required. Legal proceedings were defined in RCW 2.43.020(3) as “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.” The Legislature, in RCW 2.43.040 divided up the responsibility for the cost of interpreters: to the governmental body “**initiating the legal proceedings**” when the LEP citizen is subpoenaed, summoned or otherwise compelled to attend, or is determined to be indigent (.040(2) emphasis added), and to the LEP citizen in all other legal situations. .040(3).

1. Statutory interpretation does not support Mr. Mestrovac’ contention that they are entitled to expanded interpreter services.

Statutory interpretation rules require the courts to give effect to the legislative intent. *Enterprise Leasing*, 139 Wn.2d at 552, 988 P.2d 961 (citing *State v. Sweet*, 138 Wn.2d 466, 477-78, 980 P.2d 1223 (1999)). The courts first

look to the plain language of the statute to determine its meaning and then review the contested statutory language within the context of the entire statute. *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995). The courts try to avoid “[s]trained, unlikely or unrealistic” interpretations. *Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380 (1993). If there is no ambiguity or no statutory definition, then the court give the words in a statute their common and ordinary meaning, consulting the dictionary where necessary to discover the common meaning. *Garrison v. Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976).

Here, two terms are at issue: and “legal proceedings” and “initiating.” The term “legal proceedings,” clearly and specifically defined by RCW 2.43.020(3), “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.” The term “initiating” is not defined by the statute but is in Webster’s New World Dictionary 725 (2nd college ed.1984), “to introduce by first doing or using; start.”

Using these definitions, both as the statutory definition and as the common meaning, the results are that the proceedings before the Department and the Board are legal proceedings, but the worker is the one who initiates the compensation claim. To the extent that claims adjudication is similar when carried out by a SIE, the same analysis applies. Therefore, if the Department is not required to provide

interpreter services, likewise the self insured employer should not legally bear the responsibility for the expense of translation or interpretation.

Without authority, Mr. Mestrovac and his proponents want to stretch the legislative and common meaning of both the terms “legal proceeding” and “initiate” beyond logic. Mr. Mestrovac and others argue that the Department actually initiates the proceeding because it adjudicates the claim, and if the worker is not satisfied with the Department’s determination, further litigation goes forward, and it is the Board that initiates the appeal. *See e.g.* Amicus Brief of WSTLA, p.11. Similarly, Mr. Mestrovac contends that the self-insured employer initiates the proceeding because it is required to notify the Department when there is an industrial accident giving rise to a worker injury. *See e.g.* RCW 51.28.010(1); WAC 296-15-200. These arguments are nonsensical, and if true, then one can argue that every civil defendant who files an answer to a complaint with defenses or counterclaims “initiates” the legal proceedings. The reality is simple: The claimant initiates the legal proceedings and for those times specified by statute or regulation, a LEP claimant is entitled to a prepaid interpreter. If not specifically required by statute or regulation, the LEP must provide his or her own interpreter and translator.

2. Due process considerations does not Department-level interpreter services.

WSIA adopts, without repeating, the Department's analysis of the law of procedural and substantive due process which applies to this argument. *See* Corrected Brief of Appellant/Cross Respondent Department, pp. 25 – 36. The Department provided for interpreter services in full compliance with the principles of due process. Those occasions where such services were provided included appointments for medical and vocational treatments, IMEs, and communications with the Department. These are the same occasions where the self insured employers would also provide interpreter services. The only difference is that the interpretation would include communications with the employer, not the Department. The WSIA conducted its own research as did the Department, and no published civil case was found in any Washington appellate court that required the interpreter services for attorney sought by Mr. Mestrovac.

3. Self insured Employers Provide More than Adequate Interpreter and Translation Services to its LEP Workers.

The self insured employers find themselves in similar straits as does the Department on this issue. Self-insurance is a unique program in which the employer provides any and all appropriate benefits to the injured worker. *See e.g.* RCW 51.08.173. The decision to manage its workers claims is considered by self insured employers to be a privilege, a huge responsibility, and a serious

commitment to their workers. In order to qualify as self insured employers, business entities must comply with the statutory requirements established in RCW 51.14.010 - .140. Simply described, self-insurance is a long-term obligation by the employer to be responsible for the payment of benefits during the time that a claim is open. The employer remains liable for benefits during a lengthy reopening period provided in industrial insurance law. This remains the employer's responsibility whether the self-insurance certification is continued or surrendered. The Department oversees the provision of benefits to ensure compliance with its rules and regulations and reviews the financial strength of the self-insurer to ensure that workers' compensation obligations can be met. *See* WAC 296-15-001 to -265.

In large part, the regulations for the actual handling of worker compensation claims are much the same as those regulations in force for claims handled by the Department but much more is expected of SIE. In addition to requirements for proof of sufficient funds to pay appropriate claims (*see* WAC 296-15-121 to -181), self insured employers must also produce various reports to the Department on the claims that the self insured employers are handling. *See e.g.* WAC 296-15-200 to 221. If, however, the Department is forced to provide more services of any kind, including interpreter services for communications between workers and their attorneys, the self insured employers will also be required to provide those services.

WAC 296-15-350 specifically tells the self-insured employer what it must do to ensure appropriate handling of claims. In situations where a worker is LEP and is making a claim for compensation arising from a work related injury, subsection (9) provides as follows: “[e]very self-insurer must ensure a means of communicating with all injured workers.” While this regulation appears to be clear on its face, and the self-insured employers understand and apply it, the Department has given additional guidance.

The most recent Departmental interpretation of WAC 296-15-350(9) dated August 13, 2007 applies to both self insured employers and the Department. It states that for LEP workers, communication in English is appropriate with the claimant’s attorney, if s/he has an attorney. If not, an interpreter is necessary for communications with the claimant. Translation of documents into the native language of the claimant is appropriate **if** the worker needs such assistance as well as interpretation during communications with the Department, SIE, at medical, vocational and independent medical examination appointments. *See Appendix A* for a complete copy of this Management Update. The WSIA contends that this interpretation is beyond that stated in WAC 296-15-350(9) and hopes that these appeals will give some direction to the Department and to WSIA members.

The WSIA is also very concerned that workers are allowed prepared interpreters for communications with their attorneys, there will not be any checks or balances on whether those communications pertained to the benefits case or

other matters. Not unlike prohibited fishing expeditions in discovery, the self insured employer might be forced to pay for attorney client communications for matters outside the workers' compensation claim process. No one, not the employer, the Department, or the reviewing court would know as those communications are confidential.

B. The “perceived irregularities” did not undermine the fundamental fairness of the proceedings in which Mr. Mestrovac participated.

In order to show that Mr. Mestrovac's due process rights were violated by his need to have prepaid interpreter services for communications with his attorneys, he must demonstrate actual prejudice. *See Motley-Motely, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) (holding that to constitute a due process violation, the plaintiff must be prejudiced); *State v. Storhoff*, 133 Wn.2d 523, 528, 946 P.2d 783 (1997) (same). *See also Gutierrez-Chaves, INS*, 298 F.3d 824, 830 (9th Cir. 2002) (holding that in order to prove a due process violation, the claimant must show that a better translation would have resulted in a better outcome.). Mr. Mestrovac has not, and cannot, demonstrated such prejudice, actual or otherwise. Mr. Mestrovac had all of his issues adequately presented to both the Department and the Board. In fact, he prevailed in part and there is no showing at all that the orders in which he did not prevail were because he did not have an interpreter for his attorney client communications. Neither he nor any of his supporters can point to one instance where the lack or inadequacy of

interpretation cost him benefits, reduced benefits, or prejudiced him at any of the administrative or court proceedings.

The Department discussed the vast number of languages spoken in the world and in the State of Washington. *See* Corrected Brief of Appellant/Cross Respondent Department, p. 23 (referencing 6,900 languages spoken in the world). The Department's authority notes that the Bosnian language is not one of the most commonly spoken languages in the United States or the world, which alone underscores the point. It is not cost that makes providing interpreter services for all possible languages impossible; it is the number of languages that must be considered, the realistic difficulty in obtaining qualified interpreters for other than the most common non-English languages, and the inherent delay to the workers created by finding, hiring, and scheduling qualified interpreters. Certainly, the self insured employers are not in a position to bear that cost for the languages of their current and future employees. If this solution is acceptable, it is within the purview of the Legislature, not the courts, to order it. *See* Corrected Brief of Appellant/Cross Respondent Department, pp.32-3.

V. CONCLUSION.

The problem of fully participating in a country where the vast majority speaks a different language arises in far more situations than when LEP claimants seek workers' compensation benefits. Although Washington State has a policy of providing interpreter and translations services as provided in RCW 2.43 *et seq.*,

Mr. Mestrovac cannot expect that he will receive prepaid interpreter and translation services for each and every attorney-client communication from the beginning of the claim process to the last word of a decision on appeal. Such a result is beyond the expectations of due process rights and beyond the realistic expectations of self insured employers, such as members of the WSIA. The current law and regulations more than adequately provide for prepaid translation and interpreter services and should not be extended. For these reasons and the reasons presented by the Department and Board, the WSIA seeks reversal of the Superior court on reimbursement of interpreter services.

Respectfully submitted this 19 day of October 2007.

BURGESS FITZER, P.S.



PAULA T. OLSON, WSBA #11584
Attorney for Amicus Washington
Self-Insureds Association

ATTACHMENT A



Management Update

Insurance Services: Claims Administration and Self-Insurance

Interpreter and Translation Services to Workers

Effective Date

08/13/2007

REVISED 08/17/07

Topic

Interpreter and
Translation Services
To Workers

Issuing Authority

Sandy Dziedzic
Cheri Ward
Jean Vanek

The department or self-insured employer (SIE) (including the SIE third party administrator) will provide an interpreter to communicate with an unrepresented worker who has limited English-speaking proficiency or similarly limiting sensory impairment.

NOTE: Where a worker with limited English proficiency is represented by an attorney, the department or SIE may communicate through the attorney in English. It is the responsibility of the attorney representative to communicate with his or her client worker. If the represented worker with limited English proficiency contacts the department or SIE by phone or in person without counsel, an interpreter is authorized for the oral communications. The department or SIE is not required to provide interpreters for communications in relation to any proceedings at the BIA or Court.

When the worker requests interpreter services, the department or SIE may verify whether the worker needs assistance in translation. Workers can report limited English proficiency status on the Report of Accident, SIF2 form, or by notifying the department or SIE by phone or letter.

Limited English proficiency is defined as limited ability or inability to speak, read, or write English well enough to understand and communicate effectively. This includes most people whose primary language is not English. Services should also be provided to workers similarly impacted by hearing, sight, or speech limitations.

Interpreters are authorized when a limited English proficiency worker needs to communicate with the department or SIE, attend medical and vocational appointments, and at independent medical examinations (IME). Authorized interpreters must be provided by the department or SIE for IMEs.

Interpreter services also include written translation of necessary correspondence to and from the unrepresented limited English proficiency worker. Copies of both the original and translated versions of the document should be maintained in the claim file.

Resources

AT&T Language Line Instructions

http://ohr.inside.lni.wa.gov/webhome/resource_docs/InterpreterService.htm

Online Reference System (OLRS)

<http://olrs.apps-inside.lni.wa.gov/>

Claims Training Bulletin: Translation Process

Management Memo: Spanish Translations

Training Handout: Services for the Hearing & Speech Impaired

WAC 296-20-2025

Contact Claims Training if you have any questions.

NOTE: This is an interim policy change. This issue has been referred to the policy committee to be included in upcoming revisions.