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SUPREME COURT OF THE STATE OF WASHINGTON

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ENVER MEŠTROVAC,

Petitioner,

v.

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

Respondents.

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ANSWER TO WSTLA AMICUS CURIAE BRIEF

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## I. ARGUMENT IN RESPONSE TO WSTLA AMICUS

Amicus curiae Washington State Trial Lawyers Association Foundation (WSTLA) argues that this Court should accept Meštrovac's petition on the applicability of Washington's interpreter statute, chapter 2.43 RCW, if this Court grants review in *Kustura v. Department of Labor & Industries*, 142 Wn. App. 655, 175 P.3d 1117 (2008). WSTLA at 4-5. Review is not warranted in this case for the same reasons review is not warranted in *Kustura*, as demonstrated in the Department of Labor & Industries answer to WSTLA in *Kustura*, which will not be repeated here.

In this case, WSTLA emphasizes the Court of Appeals holding that the Board of Industrial Insurance Appeals violated the statute in not allowing the interpreter to translate Meštrovac's private communications with his attorney during hearing breaks. See *Meštrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 708, 176 P.3d 536 (2008). WSTLA argues that this Court should decide if Meštrovac is entitled to reimbursement for the interpreter expenses he allegedly incurred for this violation. WSTLA at 4-6. But this argument lacks merit and presents no basis for review.

There is no evidence Meštrovac incurred any interpreter expenses. Nor was he entitled to a *free* interpreter at the Board hearing he initiated. RCW 2.43.040; *Meštrovac*, 142 Wn. App. at 707. Finally, there is no claim of any prejudice in the outcome resulting from the alleged error.

**A. WSTLA Admits That, Unlike *Kustura*, This Case Does Not Present The Issue Of Whether The Interpreter Statute Applies To The Department Claim Administration**

The Court of Appeals held that Meštrovac's asserted entitlement to interpreter services during the Department claim administration was not properly before the court, because the Department did not make any decision on this issue in an appealable order under Industrial Insurance Act, Title 51 RCW. *Meštrovac*, 142 Wn. App. at 705-07. WSTLA acknowledges and does not challenge this holding. WSTLA at 2-3. Yet, WSTLA asserts that this case raises the question of whether the Department claim administration is a "legal proceeding" covered by the interpreter statute. WSTLA at 6-7. But WSTLA does not explain why.

The Court of Appeals in *Meštrovac* did not address the applicability of the interpreter statute to the Department claim administration because, as noted, the issue was not properly before the court. Thus, even if this Court accepted review in *Kustura* for this issue, there is no reason for this Court to accept review in *Meštrovac*.

Even if the issue was preserved in *Meštrovac*, the Department answer to WSTLA in *Kustura* demonstrates that the term "legal proceeding" defined in RCW 2.43.020(3) does not include the Department claim administration. WSTLA's interpretation to the contrary is grammatically impossible, leads to absurd results, and thus does not

present a question appropriate for review. See Department Answer to WSTLA in *Kustura* at 2-6.

**B. Meštrovac Was Not Entitled To Free Interpreter Services At The Board, And WSTLA's Argument That He Is Entitled To Reimbursement For Interpreter Expenses Lacks Merit**

There are several flaws in WSTLA's argument that this Court should determine whether Meštrovac is entitled to reimbursement for the interpreter expenses he allegedly incurred for his confidential communications with his attorney at the Board hearing. WSTLA at 5-7. First, WSTLA cannot point to any evidence in the record that Meštrovac did incur such interpreter expenses. This factual deficiency alone should preclude review because this Court should not give advisory opinions on hypothetical questions. See *Obert v. Envtl. Research & Dev. Corp.*, 112 Wn.2d 323, 335, 771 P.2d 340 (1989) ("We do not give advisory opinions . . . . Our decision must be limited to the facts of the instant case.").

Second, WSTLA shows no error in the Court of Appeals straightforward application of the interpreter cost allocating statute, RCW 2.43.040. Under that statute, the Board was not required to pay for the cost of interpreter services at the Board hearing, because the hearing was not a proceeding "initiated" by government as in a criminal prosecution. *Meštrovac*, 142 Wn. App. at 709 n.21 (citing *Kustura*, 142 Wn. App. at 680-81); Department Answer to WSTLA in *Kustura* at 6-10.

The Court of Appeals concluded that “the Board should have provided interpreter services for communications with counsel during the hearing.” *Meštrovac*, 142 Wn. App. at 709 n.21.<sup>1</sup> But this error was not “reversible” because there was no showing of prejudice. *Id.* at 708. Further, the “statute does not require the Board to pay for such services because it did not initiate the proceedings.” *Id.* at 709 n.21 (citing *Kustura*, 142 Wn. App. at 680-81). The “issue of who pays for interpreter services remains discretionary with the Board.” *Id.*

Meštrovac initiated the Board hearing by filing a notice of appeal. He never claimed indigency. RCW 2.43.040(3) thus allocated interpreter cost to him. *Meštrovac*, 142 Wn. App. at 709 n.21. Because Meštrovac was not entitled to free interpreter services at the Board, he was not entitled to reimbursement of any interpreter expenses he allegedly incurred at the Board.<sup>2</sup>

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<sup>1</sup> The interpreter statute requires appointment of an interpreter for a LEP person involved in a legal proceeding to assist the LEP person “throughout the proceeding.” RCW 2.43.030(1). The Department argued below that Meštrovac’s confidential off-the-record communications with his attorney are not a part of the “legal proceeding,” because 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); Department’s Court of Appeals Answer to WSTLA at 14-15. The Court of Appeals disagreed with the Department on this single point. *Meštrovac*, 142 Wn. App. at 708.

<sup>2</sup> Although not required, the Board provided at its expense interpreter services to Meštrovac throughout the hearing except for his confidential communications with his attorney pursuant to WAC 263-12-097(4). As noted by the Court of Appeals, and not disputed by WSTLA, this regulation permits (but does not require) provision of interpreter services at the Board’s expense. *Meštrovac*, 142 Wn. App. at 709 n.21.

WSTLA refers to its own argument that the Department should be deemed as the “governmental body initiating the legal proceedings” under RCW 2.43.040. WSTLA at 6-7 (referring to its court of appeals brief at 6-13). As shown in the Department answer to WSTLA in *Kustura* at 7-9, WSTLA’s analysis makes no sense and creates no basis for review.

WSTLA asks, “why should reimbursement for interpreter expenses incurred abide the merits of the underlying claim?” WSTLA at 5-6. But this is not the reasoning or issue in this case. Meštrovac was simply not entitled to *free* interpreter services at the Board under RCW 2.43.040, regardless of the merits of his appeal. *See Meštrovac*, 142 Wn. App. at 709 n.21. The Court of Appeals engaged in the prejudice analysis only to determine whether a reversal and a new hearing was required, not whether Meštrovac was entitled to reimbursement. *Id.* at 708-09.<sup>3</sup>

Other than its reliance on the interpreter statute, WSTLA provides no analysis to demonstrate why persons incurring self-help, extra-statutory interpreter expenses should be entitled to *reimbursement*. The only remedy for improper denial of statutorily required interpreter services is remand for a new hearing, available only when denial was prejudicial. *See Nazarova v. INS*, 171 F.3d 478, 484-85 (7th Cir. 1999) (remand ordered when LEP alien did not obtain an interpreter at a deportation hearing

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<sup>3</sup> WSTLA does not suggest any error in the conclusion that the Board’s actions were not prejudicial. *See Meštrovac*, 142 Wn. App. at 708-09.

resulting in prejudice); *Gutierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002) (prejudice to the outcome required for a remand in case of inadequate interpreter services).

In sum, the Court of Appeals correctly concluded that RCW 2.43.040 does not entitle Meštrovac, a non-indigent claimant, to free interpreter services at the Board hearing. WSTLA offers no sound reason for this Court to address its strained statutory interpretation or its hypothetical claim of reimbursement to Meštrovac on this record, where there is no evidence of any expenses to be reimbursed.

## II. CONCLUSION

For the foregoing reasons, the Department requests that the Court deny the petition for review in this case.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> July, 2008.

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