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NO. 57445-1

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

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HAJRUDIN KUSTURA, et. al.,

Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

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**ANSWER TO NW JUSTICE PROJECT AMICUS CURIAE BRIEF**

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2007 AUG 31 PM 3:13  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

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## I. INTRODUCTION

Citing general demographic data on limited English proficient (LEP) persons in this state, Northwest Justice Project (NJP) argues that Appellants Lukić and Memišević are not bound by the 60-day time limit under RCW 51.52.060 to appeal the orders of the Department of Labor & Industries that set their wage for time-loss compensation (wage orders).<sup>1</sup> NJP claims that the orders not written in the LEP claimants' primary Bosnian language were not "communicated" under the statute to trigger the 60-day deadline. NJP alternatively argues that Lukić and Memišević should be equitably excused from the statutory deadline, claiming that the Department *knew* they were LEP when it sent English orders.<sup>2</sup>

NJP also argues that Washington's interpreter statute, Chapter 2.43 RCW, required the Board of Industrial Insurance Appeals, which conducted hearings upon appeals filed by Appellants Kustura, Lukić, and Memišević, to provide them with an interpreter throughout its proceedings, including their confidential communications with their attorney. NJP argues that the Board failed to provide them with complete

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<sup>1</sup> NJP's argument assumes that Lukić and Memišević appealed the wage orders. But as stated in the Department's previously-filed brief, neither Lukić nor Memišević *ever* appealed the wage orders (timely or untimely), and the Board and the Superior Court thus lacked jurisdiction over them. DLI Respondent's Brief at 28-30. For purposes of this answer, the Department responds to NJP's argument on the assumption, *without conceding*, that the Board and the Superior Court had *jurisdiction* over the wage orders.

<sup>2</sup> As stated in the Department's Answer to WSTLA Amicus Curiae Brief, because neither Lukić nor Memišević seeks equitable relief in this case (see Amended Brief of Appellants), equitable relief on the sole request by amici is not warranted.

interpreter services in violation of Chapter 2.43 RCW as well as its own regulation, WAC 263-12-097. NJP further argues that the challenged Department and Board actions violated Title VI of the Civil Rights Act.

But our Supreme Court has interpreted the word “communicated” in RCW 51.52.060 as *not* denoting “actual understanding on the part of the [claimant] of the nature of the order.” *Rodriguez v. Dep’t of Labor & Indus.*, 85 Wn.2d 949, 951, 540 P.2d 1359 (1975) (rejecting an extremely illiterate LEP claimant’s argument). NJP attaches a Department self-insurance section memo on interpreter services as interpreting the word “communicated” differently than *Rodriguez* to require translation of orders for LEP claimants in all circumstances. But NJP interprets the Department memo incorrectly and fails to explain how the memo can overrule or supersede *Rodriguez*, when the court or Legislature has not.

Equitable relief is not warranted in this case, because NJP fails to demonstrate that Lukić and Memišević were diligent in pursuing their appeals from the wage orders. *See Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 178, 937 P.2d 565 (1997) (equity requires diligence). In the due process and federal habeas corpus contexts, the courts have placed a duty of diligence and further inquiry on LEP persons receiving English-

written government notices.<sup>3</sup> Both Lukić and Memišević indicated they had access to resources to review and contest Department orders – Memišević used an interpreter “every time” she received a Department document, *Memišević* (12/11/03) 76, and Lukić had an attorney, *Lukić* TR (4/24/03) 52, *Lukić* TR (9/23/03) 25, CABR 174-175 (stipulated history). NJP fails to show that they failed to timely appeal *because they were LEP*.

For its Title VI argument, NJP relies exclusively on a federal Department of Labor (DOL) Guidance. But there is no “private right to enforce regulations promulgated under [Title VI].” *Alexander v. Sandoval*, 532 U.S. 275, 291, 121 S. Ct. 1511, 149 L. Ed.2d 517 (2001) (Title VI prohibits only intentional discrimination). In any event, NJP fails to explain how the Department’s sending English orders or the Board’s providing interpreter services in this particular case constituted a violation of the Guidance, let alone intentional discrimination.

Finally, Chapter 2.43 RCW does not create any *new* right to an interpreter but only secures the existing “rights, constitutional or otherwise” of LEP persons. RCW 2.43.010. Because the Board did not “initiate” its proceedings below, the statute allocates interpreter costs to “the [LEP] person, unless such person is indigent”: here, the claimants. RCW 2.43.040(3). Although *not required*, the Board, per its own rule,

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<sup>3</sup> See discussion and authority cited in the Department’s Answer to WSTLA Amicus Curiae Brief filed in this case.

WAC 263-12-097, provided the claimants with an interpreter for at minimum their testimony. NJP's claim that they were entitled to more interpreter services than were provided has no support in law and should best be addressed to the Legislature, not to this Court.

## II. ARGUMENT

### A. Under *Rodriguez*, Receipt, Not Subjective Understanding, of Orders Constitutes "Communication" under RCW 51.52.060, and NJP's Reliance on a Department Memo is Misplaced

A worker aggrieved by a Department order has 60 days in which to appeal it to the Board after "the day on which a copy of the order . . . was communicated" to the worker. RCW 51.52.060. In a case involving an extremely illiterate LEP claimant, our Supreme Court held that the claimant's physical receipt, *not his subjective understanding*, of a Department order constitutes "communication" of the order to trigger the 60-day statutory appeal deadline. *Rodriguez*, 85 Wn.2d at 952-953.

NJP acknowledges *Rodriguez*, NJP at 8, yet argues that the Department has interpreted the word "communicated" under RCW 51.52.060 differently to require translation of its orders for LEP claimants, attaching an excerpt from a 2006 Department memo that directs self-insurers to provide interpreters for LEP workers in some circumstances, NJP at 6-9. NJP argues that the memo interprets WAC 296-15-350(1)(9)

and represents the Department's concession or a double standard imposing greater requirements on self-insurers than itself. NWJP at 6-9.

But NJP fails to explain how the Department can interpret a statute contrary to our Supreme Court's interpretation.<sup>4</sup> Once "a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it." *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976); *see also Wash. Educ. Ass'n v. Pub. Disclosure Comm'n*, 150 Wn.2d 612, 619, 80 P.3d 608 (2003) (agency's statutory interpretation is "advisory only" and "does not implement or enforce the law"); *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 715, 153 P.3d 846, 853 (2007) (rules inconsistent with statutes are invalid). Our Legislature has not amended RCW 51.52.060 since *Rodriguez*, a 1975 decision.

The Department provides interpreter services in certain circumstances, and requires self-insurers to do the same, pursuant to its implied power under Title 51 RCW to employ lawful, necessary means to effectively administer workers' compensation.<sup>5</sup> *See Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994) (agencies "have

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<sup>4</sup> Similarly, NJP's claim that the Department in its provider bulletin acknowledged it was required under Title VI to provide interpreter services for medical appointments, NJP at 13 n.20, is misplaced. In any event, interpreter services for medical contexts (undisputedly provided) are not at issue in this case.

<sup>5</sup> NJP suggests that the Department's written guidance to self-insurers on use of interpreters is based on EO 13166 and Title VI regulations that are directed at governmental entities. NJP at 9. But the vast majority of self-insurers are private, for-profit entities that are not subject to these laws. In addition, as discussed below, such laws do not confer any private enforcement right. *See discussion infra* Part II(B).

implied authority to carry out their legislatively mandated purposes” and to do “everything lawful and necessary to the effectual execution of the power”); *see also* RCW 43.22.030(1) (the Department must exercise “all the power and perform all the duties prescribed by law with respect to the administration of workers’ compensation and medical aid in this state”).<sup>6</sup>

Neither WAC 296-15-350(1)(9) nor the 2006 memo constitutes the Department’s concession to the contrary. WAC 296-15-350(1)(9) does not on its face address interpreter services, and the portion of the memo addressing interpreter services has recently been replaced by a 2007 Department Management Update,<sup>7</sup> which clarifies that the interpreter provision in the memo applies to both the Department and self-insurers.

The memo and the Management Update inform the Department claim

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<sup>6</sup> *See also* RCW 51.04.020(3) (the Department shall regulate “the proof of accident and extent thereof” and supervise “the medical, surgical, and hospital treatment”); RCW 51.04.030(1) (the Department and self-insurers must provide prompt and efficient medical care for injured workers “without discrimination or favoritism”); *Greenwood v. Bd. for Cmty. Coll. Educ.*, 82 Wn.2d 667, 671, 513 P.2d 57 (1973) (the court examines an agency’s powers by looking at all relevant statutes to determine legislative intent). In addition, RCW 51.14.030, -.080, -.090, 51.32.055, -.190, and -.195, among other statutes, require that self-insurers follow reasonable claim administration practices. RCW 51.32.095(1) vests broad discretionary power in the Department to make vocational rehabilitation services available to injured workers of both state fund and self-insured employers to enable the workers to “become employable at gainful employment.” RCW 51.32.114 requires the Department to “develop standards for the conduct of special medical examinations [of workers for both state fund employers and self-insurers] to determine permanent disabilities. . . .” RCW 51.36.010(1) requires that each injured worker receive “proper and necessary medical and surgical services . . . [from a physician] of his or her own choice . . . .”

<sup>7</sup> A copy of the Management Update is attached to this brief as Appendix A. It is available (under August ’07) at <http://listserv.wa.gov/cgi-bin/wa?A0=LNI-SELF-INSURANCE>. This URL can be accessed by joining the Listserv by following the instructions at <http://www.lni.wa.gov/Main/Listservs/ClaimsIns/SelfInsurance.asp>.

administration staff, and the staff of self-insurers, of the need to provide interpreters for *specified* oral and written communications for LEP claimants and authorize translation of written documents to and from *unrepresented* LEP claimants, *at the claimants' request after verification of the need for such translation*. App. A. Here, the record indicates that Lukić was *represented* by an attorney when the Department sent the wage order at issue, *Lukić* (4/24/03) 52; *Lukić* CABR 174-176 (stipulated history), and Memišević admitted she *never requested* translation services during the claim administration, *Memišević* (12/11/03) 93-94.

In sum, under *Rodriguez*, the wage orders were “communicated” to Lukić and Memišević upon their receipt, and they failed to timely appeal.

**B. NJP Fails to Demonstrate Extraordinary Circumstances, Diligence, or Misconduct to Justify Equitable Relief**

NJP alternatively argues that Lukić and Memišević should be equitably excused from the statutory appeal deadline. NJP at 10-14. NJP argues that *Lukić* and *Memišević* cases “involve the exact factors justifying equitable relief in [*Rodriguez, supra,*] and [*Ames v. Dep't of Labor & Indus.*, 176 Wash. 509, 30 P.2d 239 (1934)].” NJP at 14. This Court reviews the Superior Court decision not to invoke equitable power for an abuse of discretion. *See Rabey v. Dep't of Labor & Indus.*, 101 Wn. App. 390, 397, 3 P.3d 217 (2000). NJP fails to show an abuse of discretion.

An “equitable remedy is an extraordinary, not ordinary form of relief.” *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006). Lukić and Memišević had the burden of demonstrating a basis for equitable relief. *See, e.g., Kingery.*, 132 Wn.2d at 176 (“Mrs. Kingery has not established a basis in equity for relief.”).

Our Supreme Court found extraordinary circumstances justifying equitable relief from the appeal deadline under RCW 51.52.060 in *Ames*, *supra*, (relief granted to an incompetent committed to a hospital during the appeal period), and *Rodriguez*, *supra* (relief granted to an extreme illiterate whose interpreter was hospitalized and his mother about to undergo surgery in Texas during the appeal period). On the other hand, the courts have declined to exercise equitable power in cases that do not demonstrate the claimant’s diligence<sup>8</sup> or when the claimants failed to show either inability to understand the order or misconduct by the Department.<sup>9</sup>

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<sup>8</sup> *See Kingery*, 132 Wn.2d at 178 (“Mrs. Kingery did not diligently pursue remedies available to her.”); *Kingery*, 132 Wn.2d at 178 (Madsen, J., concurring) (“I agree with the majority . . . that the claimant in this case failed to diligently pursue her rights.”); *Labor & Indus. v. Fields Corp.*, 112 Wn. App. 450, 459, 45 P.3d 1121 (2002) (“[A]s one condition of equitable relief, the claimant must have diligently pursued his or her rights.”); *Leschner v. Dep’t of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947) (“Equity aids the vigilant, not those who slumber on their rights.”); *Harman v. Dep’t of Labor & Indus.*, 111 Wn. App. 920, 927, 47 P.3d 169 (2002) (“Ignorance of the law has never been an adequate defense.”).

<sup>9</sup> *See Kingery*, 132 Wn.2d at 174 (plurality) (for equitable relief from the 60-day appeal deadline, the claimant must show (1) his or her inability to understand the order and the appellate process and (2) the Department’s misconduct in communicating the order); *Lynn v. Dep’t of Labor & Indus.*, 130 Wn. App. 829, 839, 125 P.3d 202 (2005) (same).

The facts in this case do not demonstrate such extraordinary circumstances as presented in *Ames* and *Rodriguez*, diligence on the part of Lukić and Memišević in pursuing appeals from the wage orders,<sup>10</sup> or the Department's misconduct in sending English-written orders.<sup>11</sup>

Lukić hired an attorney "maybe six months" after the Department temporarily stopped benefits in March or April 2000. *Lukić* (4/24/03) 52. On March 5, 2001, her attorney filed a protest from a different Department order. *Lukić* CABR 174, *Lukić* (9/29/03) 25. In September 2001, Lukić's current attorney filed a protest from a 8/30/01 Department order denying time-loss benefits for certain time period, and, in June 2002, requested psychological treatment. *Lukić* CABR 174-176 (stipulated history). Lukić did not explain why she did not appeal the 3/15/01 wage order. There is no showing that Lukić diligently pursued appeal from the order.

Memišević testified to ready availability of an interpreter for Department orders. On the day she sustained her industrial injury, an interpreter went to a hospital with her. *Memišević* (12/11/03) 57. She "always had interpreter" for important matters, *Memišević* (10/24/03) 180,

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<sup>10</sup> As stated above, the courts in the due process and federal habeas corpus contexts have placed a duty of diligence and further inquiry on LEP persons. See discussion and authority cited in the Department's Answer to WSTLA Amicus Curiae Brief.

<sup>11</sup> Because neither Lukić nor Memišević presented the wage orders they failed to timely appeal, the record does not show whether the orders were sent to them or to their attorney. The record indicates that Lukić was represented by an attorney when the wage order was sent. *Lukić* (4/24/03) 52; *Lukić* CABR 174-176 (stipulated history).

and used one “every time” she received a document from the Department, *Memišević* (12/11/03) 76. She drives with a Washington license – she passed the written test in English with an interpreter. *Memišević* (12/11/03) 100-101. As she testified, “It’s not hard to find interpreters.” *Memišević* (12/11/03) 118. With her sister’s help, she filled out W-4 and employment application forms (name, address, telephone and social security numbers, emergency contact, and that she was applying for a cleaning job). *Memišević* (12/11/03) 106-108; *Memišević* CABR Exs. 31, 32. Through her doctor, she protested a 10/17/02 claim closing order, *Memišević* CABR 108-109 (stipulated history), and, through her current attorney, filed the current appeal in February 2003, *Memišević* CABR 108-109. She did not explain why she did not appeal the 2/22/02 wage order. NJP fails to show *Memišević* diligently pursued her appeal from the order.

Unlike the legally insane, hospital-committed claimant in *Ames*, and the “extremely illiterate” claimant in *Rodriguez* whose interpreter was hospitalized and *unavailable* and his mother about to undergo surgery in Texas when he received the Department order, there is no evidence in this case showing that *Lukić* or *Memišević*, *for reasons beyond their control*, were unable to understand the wage orders – they demonstrated their ability to understand and deal with Department orders through an interpreter or attorney. Further, unlike the claimants in *Ames* and

*Rodriguez*, who diligently pursued their appeals after release from hospital confinement (*Ames*) or return from Texas and interpreter becoming available (*Rodriguez*), the facts here indicate that Lukić and Memišević slumbered on their rights. NJP fails to show it was their limited English proficiency that prevented them from timely appealing the wage orders.

NJP argues that the Department committed “misconduct” in sending English orders to Lukić and Memišević, claiming that the Department “knew” they were LEP. NJP at 12. But misconduct is only one element for equitable relief – diligence is another. *See, e.g., Kingery*, 132 Wn.2d at 178. As stated above, NJP fails to establish diligence here.

In any event, NJP points to *nothing* in the record to support its claim that the Department knew Lukić was LEP when it sent the wage order. As stated above, the record indicates Lukić had an attorney long before the Department issued the order. *Lukić* (4/24/03) 52; CABR 174. If a claimant is represented, the Department communicates with the attorney. *Memišević* (4/5/04) 56, 92. Memišević admittedly never requested translation of English documents, *Memišević* (12/11/03) 93-94, and used an interpreter to translate Department documents “every time” she received one, *Memišević* (12/11/03) 76.<sup>12</sup>

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<sup>12</sup> At NJP 11, NJP cites to the record about a 3/27/03 Department letter sent to Memišević’s current attorney allowing interpreter services for medical and vocational processes. *Memišević* (4/5/04) 10-11; *Memišević* CABR Ex. 36. But the 3/27/03 letter

NJP argues, relying *exclusively* on a 2003 DOL Guidance 68 Fed. Reg. 32290-01, that the Department violated Title VI.<sup>13</sup> NJP at 12-13. NJP claims that the Guidance requires the Department, as a federal fund recipient, to take steps to effectively communicate with LEP claimants. NJP at 13. But there is no “private right to enforce regulations promulgated under [Title VI].” *Sandoval*, 532 U.S. at 291. Title VI allows federal “agencies to enforce their regulations” after determining that “compliance cannot be secured by voluntary means” but *does not confer any rights* to “the individuals who will ultimately benefit from Title VI’s protection” to enforce such regulations. *Sandoval*, 532 U.S. at 289.

In any event, NJP fails to show that the Department violated the Guidance in sending English orders. The Guidance is flexible, and

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does not prove the Department’s knowledge of her LEP status more than a year earlier *on February 22, 2002*, when the Department issued the wage order. NJP also cites (NJP at 12) to the testimony of the Department’s program manager Kennedy on a single line in a hospital’s consent-to-care form (*Memišević* CABR Ex. 26) where Memišević identified her translator as the person to contact in November 2001. *Memišević* (12/11/03) 46-51. But, as Kennedy testified, a claim manager “would look to the detail of the report of accident concerning description of the injury as opposed to this particular form.” The mention of a translator in a hospital’s consent form *alone* does not warrant an inference of constructive knowledge of Memišević’s LEP status on the part of the Department, which receives 130,000 to 150,000 claims each year. *Memišević* (12/11/03) 38. In any event, even assuming that the Department knew Memišević’s LEP status when it send the wage order at issue, equitable relief is inappropriate, because, as stated above, there is no showing that she diligently pursued her appeal from the order.

<sup>13</sup> NJP also cites to *Nichols v. Lau*, 414 U.S. 563, 94 S. Ct. 786, 39 L. Ed.2d 1 (1974), NJP at 4, but, as the courts have recognized, “many cases finding a violation of Title VI – or the regulations promulgated under it [such as *Lau*] – are not good law.” *Almendares v. Palmer*, 284 F. Supp.2d 799, 804 (N.D. Ohio 2003); *Sandoval*, 532 U.S. 285 (“[W]e have since rejected *Lau*’s interpretation of [Title VI] as reaching beyond intentional discrimination.”). Also, EO 13166 “does not create any right or benefit, substantive or procedural, enforceable at law or equity . . .” EO 13166 § 5.

“strong evidence of compliance” is shown if the Department “provides written translations of vital documents for each eligible LEP language group that constitutes five percent or 1,000, whichever is less, of the population of persons eligible to be served or likely to be affected or encountered.” 68 Fed. Reg. 32290. NJP shows no evidence that the group of Bosnian-speaking claimants constitutes 5% or 1,000 of those eligible for workers’ compensation in Washington. Further, the “failure to provide written translations [specified in the Guidance] does not mean there is non-compliance.” 68 Fed. Reg. 32290. If translation would be “so burdensome as to defeat the legitimate objectives of its programs, the translation of the written materials is not necessary.” 68 Fed. Reg. 32290.

In sum, the Superior Court properly declined to equitably excuse Lukić and Memišević from the 60-day statutory deadline.<sup>14</sup>

**C. Chapter 2.43 RCW Does Not Require the Board to Provide an Interpreter at Claimant-Initiated Board Proceedings**

NJP argues that Chapter 2.43 RCW requires the Board to provide interpreter services throughout its proceedings, including confidential attorney-client communications. NJP at 15-17. NJP argues that the statute “requires the provision of interpretation in all legal proceedings.”

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<sup>14</sup> NJP refers to other state agencies’ practice and regulations in providing interpreter services and settlement agreements in other unrelated cases that did not involve the Department of Labor & Industries or the claimants in this case. NJP at 5-6. NJP does not explain how such practice or agreements have any relevance in this case.

NJP at 14. But the plain language of the statute does not support NJP's interpretation. *See Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007) (“[I]f the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.”).

Chapter 2.43 RCW does *not create* a right to interpreter but is designed to “secure the rights, constitutional or otherwise,” of LEP persons. RCW 2.43.010. The statute provides: “*Whenever an interpreter is appointed* to assist a [LEP] person in a legal proceeding, the appointing authority shall [absent waiver] appoint a certified or a qualified interpreter to assist the person throughout the proceedings.” RCW 2.43.030(1) (emphasis added). The statute thus *acknowledges* the law that requires an interpreter in *some* cases. *See* RCW 2.43.010; *State v. Aquino-Cervantes*, 88 Wn. App. 699, 706, 945 P.2d 767 (1997) (“The purpose of RCW 2.43 is to uphold the constitutional rights of non-English speaking persons.”); *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999) (criminal LEP defendant has constitutional right to interpreter); *Nazarova v. INS*, 171 F.3d 478, 484 (7<sup>th</sup> Cir. 1999) (LEP alien deportee has due process right to interpreter).

NJP acknowledges that RCW 2.43.040 “addresses who shall pay for the interpreter required by RCW 2.43.030(1).” NJP at 15. The statute distinguishes legal proceedings *initiated by* a governmental body, RCW

2.43.040(2), from those *not* initiated by a governmental body but conducted “under the authority” thereof, RCW 2.43.040(3). It allocates interpreter costs in the former to “the governmental body initiating the legal proceeding,” RCW 2.43.040(2), and the latter to “the non-English-speaking person, unless such person is indigent” – then, “the cost shall be an administrative cost of the governmental body under the authority of which the legal proceeding is conducted,” RCW 2.43.040(3). This is consistent with the distinction recognized in the due process law between “government-initiated proceedings seeking to affect adversely a person’s status” such as “criminal prosecution, deportation or exclusion” and “hearings arising from the person’s affirmative application for a benefit”. *Abdullah v. INS*, 184 F.3d 158, 165 (2<sup>nd</sup> Cir. 1999) (due process does not require an interpreter for special agricultural worker status applicants during INS interviews); *see also State v. Nemitz*, 105 Wn. App. 205, 211, 19 P.3d 480 (2001) (“The purpose of the interpreter statute is to provide interpreters for *defendants, witnesses, and others compelled to appear.*”).

The Board did not initiate any proceedings against Kustura, Lukić, or Memišević – the claimants did by filing a notice of appeal. Thus, the Board was *not required* to pay for interpreter services. RCW 2.43.040(3).

NJP argues that WAC 263-12-097 “acknowledges” that Chapter 2.43 RCW applies to the Board proceedings. NJP at 15-16. There is no

dispute that the statute may apply to the Board proceedings, but the question is who is responsible for the interpreter costs. As stated above, the statute does not require the Board to provide interpreter services, and the regulation only *allows* the Board to provide such services. Under the regulation, *when a non-English-speaking person as defined in Chapter 2.43 RCW is a party or a witness*, IAJ “may appoint an interpreter to assist the party or witness throughout the proceeding”. WAC 263-12-097(1) (emphasis added). NJP fails to explain why the permissive language “may” *requires* appointment of an interpreter.<sup>15</sup> See *Bell v. State*, 147 Wn.2d 166, 182 n.10, 52 P.3d 503 (2002) (“may” is discretionary); *Nat’l Elec. Contractors Ass’n v. Riveland*, 138 Wn.2d 9, 28, 978 P.2d 481 (1999) (“the term ‘may’ is permissive and does not create a duty”); *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002) (“Rules of statutory construction apply to administrative rules and regulations.”).

NJP argues that the Board violated Title VI based exclusively on DOL Guidance 68 Fed. Reg. 32296.<sup>16</sup> NJP at 19. But as stated above,

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<sup>15</sup> NJP cites to *Parker v. Taylor*, 136 Wn. App. 524, 150 P.3d 127 (2007), NJP at 16 n.22, but does not explain why *Parker*, which held that the term “may” in a Residential Landlord-Tenant Act provision applied not only to one event but also to “the chain of events” stated in the provision, *Parker*, 136 Wn. App. at 529, has any application to its claim that WAC 263-12-097(1) *requires* appointment of interpreter services.

<sup>16</sup> NJP also states, “The Washington Law Against Discrimination . . . may also have been violated.” NJP at 19-20 n.25. This Court should reject this assertion made in passing treatment without any analysis by amicus curiae. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“[T]he three grounds argued are not supported by any reference to the record nor by any citation of authority;

Title VI does not confer any private right to enforce disparate impact regulations promulgated under Title VI. *See* discussion *supra* Part II(B).

NJP argues that a remand for another hearing is necessary in *Kustura* and *Lukić*.<sup>17</sup> NJP at 27-20. But the IAJs properly exercised their discretion in providing interpreter services based on the nature of each case,<sup>18</sup> and a remand is not warranted or necessary. *Kustura* involved the mostly *legal* issues of what constitutes “wages” under RCW 51.08.178. *Kustura* CABR 303; Amended Brief of Appellants at 30-39. He brought his own interpreter to the hearing and was permitted to have him present, although the IAJ used the Board-arranged one for official translation. *Kustura* TR (9/18/02) 4-5. *Kustura*’s attorney had “no concerns about the qualifications” of, and did not object to, the Board interpreter. *Kustura* TR (9/18/02) 4. Although the IAJ did not extend the interpreter services to cover the testimony of other witnesses, these witnesses addressed only the *employer-paid* cost for certain benefits, and the Board found no conflict in their testimony. *Kustura* CABR 11-12. Further, as the Board pointed out, *Kustura* could have used his interpreter “to assist him in understanding the testimony of the other witnesses.” *Kustura* CABR 158.

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we do not consider them.”); *State v. Thomas*, 150 Wn.2d 821, 868-869, 83 P.3d 970 (2004) (“[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made.”).

<sup>17</sup> NJP does not argue that *Memišević* should be remanded. NJP at 17-20.

<sup>18</sup> As NJP acknowledges (NJP at 18), the standard for review on interpreter appointment is abuse of discretion. *See Gonzales-Morales*, 138 Wn.2d at 387.

*Lukić* involved the issue of whether *Lukić* was totally and permanently disabled. *Lukić* CABR 263.<sup>19</sup> The IAJ provided her with an interpreter for all the testimony and statements throughout the hearings, but not for the perpetuation depositions in which she did not participate. *Lukić* TR (8/20/03) 14-15. Although NJP claims that *Lukić* was “allowed only occasional summaries of statements by the judge or counsel” on the first day, NJP at 17, the record cited by NJP (*Lukić* TR (4/24/03) 29-32) reveals only *procedural matters* discussed by the judge and counsel for *Lukić* and the Department. *Lukić* prevailed on the merits based on the evidence she presented and was awarded a pension. *Lukić* CABR 1-17.

Under these circumstances, it cannot be said that the IAJs’ provision of interpreter services was manifestly unreasonable or untenable. *See State v. Enstone*, 137 Wn.2d 675, 679-680, 974 P.2d 828 (1999) (decision is an abuse of discretion if it is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons”).

NJP relies on criminal cases involving the Sixth Amendment right to cross-examination and counsel to argue that the IAJs should have provided Kustura and *Lukić* with interpreter services for their confidential

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<sup>19</sup> *Lukić* also raised the issue of the amount of their “wages” for her time-loss compensation rate under the Washington Supreme Court decision in *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001). But the Board determined that, as she did not appeal the order that set her time-loss compensation rate, the order became final and binding. *Lukić* CABR 16 (Conclusion of Law 2).

communications with their attorney.<sup>20</sup> NJP at 18-19. But, unlike criminal prosecutions involving liberty interest, 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).

Further, NJP fails to show any prejudice arising from the asserted inadequacy in the interpreter services. NJP claims that it is “impossible to evaluate harm caused by lack of interpreter services without translated transcripts to identify errors or omissions.” NJP at 20. But the law requires *actual* prejudice for a constitutional error based on inadequate interpreter services. *See Gutierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002) (“To make out a violation of due process as the result of an inadequate translation, Gutierrez must demonstrate that a better translation likely would have made a difference in the outcome.”); *Kuqo v. Ashcroft*, 391 F.3d 856, 859 (7th Cir. 2004) (“A generalized claim of inaccurate translation, without a particularized showing of prejudice based on the record, is insufficient to sustain a due process claim.”). Although NJP claims that a constitutional error in criminal cases is presumed prejudicial,

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<sup>20</sup> *See Gonzales-Morales*, 138 Wn.2d at 379 (“In this State, the right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and ‘the right inherent in a fair trial to be present at one’s own trial.’”); *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986) (“A criminal defendant who relies principally upon a language other than English has a statutory right [under federal Court Interpreters Act, 28 U.S.C. § 1827(d)] to a court-appointed interpreter when his comprehension of the proceedings or ability to communicate with counsel is impaired.”).

NJP at 20, this is a workers' compensation, not a criminal, case. *See Gonzales v. Dep't of Licensing*, 112 Wn.2d 890, 900, 774 P.2d 1187 (1989) ("Important consequences flow from this criminal/civil distinction.") (rejecting a driver's argument that actual prejudice is not required for incorrect implied consent warning given).

In sum, NJP's arguments call for more interpreter services than are currently provided in law for LEP workers' compensation claimants. Its policy arguments should best be directed to the Legislature.

### III. CONCLUSION

For the reasons stated in this and its previously-filed brief, the Department requests that the Court affirm the Superior Court judgment.

SUBMITTED this 30<sup>TH</sup> day of August, 2007.

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# **APPENDIX 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](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.*