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No. 57445-1-I

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

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STATE OF WASHINGTON
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HAJRUDIN KUSTURA, GORDANA LUKIĆ, AND
MAIDA MEMIŠVIĆ,

Consolidated Appellants,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

**BRIEF OF AMICUS CURIAE
ACLU OF WASHINGTON**

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I. INTRODUCTION

These consolidated appeals consider the obligations of the Department of Labor and Industries (“L&I” or the “Department”) towards workers’ compensation claimants of limited English proficiency (“LEP”). Among the questions presented are whether such claimants are entitled to written notice of their appeal rights in their native language and interpreter services for all portions of hearings before the Board of Industrial Insurance Appeals (the “Board”). Under the Due Process Clauses of the United States and Washington Constitutions, the answer to both questions is a resounding yes.

The ACLU concurs in the statutory arguments presented by amicus Northwest Justice Project. This amicus curiae brief focuses solely on the constitutional infirmity of the procedures employed by the Department. At its most fundamental level, the Due Process Clause requires that the state provide individuals facing loss of vested interests with adequate notice and a meaningful opportunity to be heard that is “tailored to the capacities and circumstances of those who are to be heard.” Goldberg v. Kelly, 397 U.S. 254, 268-69, 90 S. Ct. 1011 (1970). There is no dispute that under Washington law L&I claimants have vested property interests in their L&I awards. Yet, despite the knowledge that Appellants were not

fluent in English, the Department sent Appellants notice of appeal deadlines in English and prohibited Appellants from using interpreters for substantial portions of the hearings before the Board.

In effect, the Department precluded the Appellants from participating in a meaningful way in the proceedings. Any cost savings or efficiency that the Department achieved by depriving the Appellants of notice and a “meaningful opportunity to be heard” do not outweigh the serious risks posed by these deprivations.

The Department cannot credibly claim that its actions were “tailored to the capacities and circumstances” of the Appellants, and no substantial state interest in its current practices outweighs the risks to Appellants. This Court therefore should find, if the case is not resolved in Appellants’ favor on non-constitutional grounds, that the Department violated Appellants’ procedural due process rights.

II. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization with over 25,000 members, dedicated to the preservation and defense of civil liberties, including the rights of aliens, immigrants, and citizens not proficient in English. It has participated as amicus in numerous cases involving questions of

constitutional due process and the right of all persons to fair treatment from government agencies.

III. STATEMENT OF THE CASE

The Department sent Appellants notices about their hearing rights and appeal deadlines, but only in English and Spanish.¹ The Department was aware from its earlier dealings with these Appellants that they spoke a dialect of Bosnian. The Department's failure to provide notice of deadlines in a language Appellants could understand caused some of them to file notices of appeal that were arguably untimely.

Once hearings were held, the Board severely limited the Appellants' access to, and use of, interpreter services. As a result, the Appellants were unable to understand the proceedings fully. At Hajrudin Kustura's hearing, for example, the Board refused to order interpretation of any testimony, argument, or rulings—other than the interpretation of Mr. Kustura's own testimony for the benefit of the Board. The Industrial Appeals Judge even refused to allow an interpreter retained by Mr. Kustura to interpret the proceedings for him. The barring of that private interpreter also prevented Mr. Kustura from communicating with his attorney during the hearing.

¹ This factual summary is drawn from Appellants' briefing and the trial court order.

The Board permitted Appellants Gordana Lukić and Maida Memišvić only slightly more access to interpreter services—allowing interpretation of Appellants’ testimony and the live testimony of other witnesses. Nonetheless, neither Ms. Lukić nor Ms. Memišvić were able to understand the entirety of the hearings. Specifically, in Ms. Lukić’s case, the Board refused to allow interpretation of: (a) the hearings on motions; (b) testimony presented through perpetuation depositions; and (c) communications between Ms. Lukić and her counsel. Similarly, the Board denied Ms. Memišvić the services of an interpreter for testimony presented via perpetuation depositions or for her communications with counsel.

On appeal to the Superior Court, the court acknowledged that “[a]t the time of these interactions [between the Department and the claimants], representatives of the Department were certainly aware of the claimants’ language deficits.” Court’s Mem. Op. on Appeal at 2. The court continued:

Certainly it would seem to the undersigned wise – that is to say, both efficient and considerate – to get as much help as possible out of an interpreter who is being paid to attend a hearing and that would include some attorney-client communications as well as matters on the record.

Id. at 9. Notwithstanding this commentary, the court refused to find that the Board abused its discretion or that the claimants suffered prejudice as a result of the restrictions placed on the interpreters. Id.

IV. ARGUMENT

A. Standard of Review

Whether an agency's actions violate due process rights is a question of law to be reviewed de novo. Mansour v. King County, 131 Wn. App. 255, 263, 128 P.3d 1241 (2006). Before affirming an agency's action questioned on due process grounds, a court must satisfy itself both (a) that the party had adequate notice and opportunity to be heard, and (b) that the procedural irregularities did not undermine the fundamental fairness of the proceedings. Sherman v. State, 128 Wn.2d 164, 184, 905 P.2d 355 (1995).

B. Constitutional Due Process Principles

1. The Circumstances of the Case Dictate the Level of Due Process Required.

The Department does not, and cannot, dispute that the Appellants are entitled to due process in the determination of their L&I benefits. The Constitutions of both Washington and the United States protect an individual's right to due process in governmental actions that could

deprive individuals of life, liberty, or property interests. U.S. Const. amends. V, XIV; Wa. Const. art. I, § 3.²

Instead, the issue here is the level of process necessary to adequately protect the Appellants. Procedural due process is a flexible concept; varying situations may demand differing levels of procedural protection. Id. at 334. The Supreme Court has held that, in evaluating the process due in a particular circumstance, courts should weigh: (1) the private interest at stake in the governmental action; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) the government interest, including the additional burden that added procedural safeguards would entail. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893 (1976); see also In re Harris, 98 Wn.2d 276, 285, 654 P.2d 109 (1982) (applying the Mathews balancing test for due process determinations).

2. The Fundamental Requirements of Procedural Due Process Are Notice and An Opportunity to Be Heard.

Application of the Mathews factors determines the extent of the process afforded in particular circumstances. Nonetheless, at its most basic level, the Due Process clause mandates: (a) notice “such as one

² Washington’s constitution provides the same scope of due process protection as the United States Constitution. E.g., State v. Crawford, 159 Wn.2d 86, 93, 147 P.3d 1288

desirous of actually informing the absentee might reasonably adopt to accomplish it,” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 206, 315, 70 S.Ct. 652, 94 L.Ed. 865 (1950); and (b) “an opportunity to be heard at a meaningful time and in a meaningful manner.” Mathews, 424 U.S. at 333.

Importantly, “the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.” Goldberg, 397 U.S. at 268-69 (emphasis added). A party’s “opportunity to be heard” includes the opportunity to confront and cross-examine adverse witnesses. Id. at 269. The opportunity to confront and cross-examine is given special emphasis where, as here, claimants have challenged determinations as “resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.” Id.³ In such circumstances, where an individual is not permitted to confront or cross-examine adverse witnesses, such “omissions are fatal to the constitutional adequacy of the procedures.” Id. at 268 (emphasis added).

Likewise, with respect to notice, “[t]he government must consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.” Jones v. Flowers, 547 U.S. 220, 126 S.Ct. 1708, 1716 (2006)

(2006).

(emphasis added). When the government has knowledge that its ordinary methods of notice will be ineffective, it has to make reasonable efforts under the circumstances to effect notice through other means. Id.

C. Application of the Matthews v. Eldridge Factors.

1. Claimant's Private Interest: Property Rights.

As noted above, the first factor a court weighs in determining the process due in a particular proceeding is the private interest at issue. To establish a due process violation, the claimant "must first establish a legitimate claim of entitlement to the life, liberty, or property at issue." Willoughby v. Dept. of Labor & Indus., 147 Wn.2d 725, 732, 57 P.3d 611 (2002). "Legitimate claims of entitlement generally entail vested liberty or property rights." Id.

It is undisputed that workers' compensation benefits constitute a property interest subject to protection of the Due Process Clause. The Washington Supreme Court has held that:

All workers who suffer an industrial injury covered by the Industrial Insurance Act, Title 51 RCW, have a vested interest in disability payments upon determination of an industrial injury.

Id. at 733 (emphasis added). Elsewhere, the Court has called Washington's workers' compensation program a basic necessity of life

³ See Amended Br. of Pet'rs at Part II, A-C.

akin to health care or welfare payments. Macias v. Dep't of Labor and Indus., 100 Wn.2d 263, 274, 668 P.2d 1278 (1983) (analysis of equal protection challenge). The government thus may not deprive claimants of workers' compensation benefits without due process of law. Willoughby, 147 Wn.2d at 733; accord, Figuroa v. Doherty, 303 Ill. App. 3d 46, 50, 707 N.E.2d 654 (1999) (holding that an unemployment hearing "must accord with fundamental principles of due process").

2. Risk of Erroneous Deprivation of Benefits

The second factor a court must consider is twofold: (a) to what extent the government's procedures pose a risk of erroneously depriving an individual of his or her vested interest; and (b) the probable value of additional or substitute procedural safeguards. Mathews, 424 U.S. at 335.

a. The Department's procedures pose a significant risk of erroneous deprivation of claimants' benefits.

As it currently stands, the Department's policy is to provide notice of appeal deadlines in only English or Spanish, even where the Department has actual knowledge of a claimant's lack of English or Spanish proficiency. Moreover, the Department permits the Board to limit severely a claimant's use of interpreter services during Board hearings. These practices pose significant risks to claimants with limited English proficiency.

First, without adequate notice of the appeal deadline, the entire process will be truncated. Obviously, inadequate notice carries significant risk of wrongful denial of L&I benefits if the claimant is denied access to the appellate procedure because he or she cannot read the notice.

Second, without full access to interpreter services to aid LEP claimants throughout Board hearings, claimants lack a meaningful opportunity to be heard. LEP claimants may not be able to testify on their own behalf, to understand the questions of the Board, or to communicate with counsel. This combination severely limits claimants' ability to present their cases and to be heard in "a meaningful manner." See Mathews, 424 U.S. at 333.

Moreover, claimants who must present their appeal without the aid of an interpreter will not be able to understand the testimony of adverse witnesses (whether presented live or through perpetuation depositions). As a result, claimants will be crippled in their ability to cross-examine and rebut testimony. Again, as the Supreme Court stated in Goldberg: "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg, 397 U.S. at 269 (emphasis added); accord, United States ex rel. Negron v. New York, 434 F.2d 386, 390 (2d Cir. 1970) (a party's "incapacity to respond to specific testimony would inevitably

hamper the capacity of his counsel to conduct effective cross-examination”).

In the cases at bar, the Appellants were effectively excluded from substantial portions of their hearing. Mr. Kustura could not understand anything of the hearing other than his own testimony, nor could he talk to his attorney. If interpretation had been provided, he could have alerted his attorney to errors or discrepancies in the testimony of opposing witnesses. Ms. Lukić and Ms. Memišević could not speak to their attorney, nor could they understand crucial expert testimony. The Department’s present practices pose far too high a risk of erroneous deprivation of the Appellants’, and other similarly situated LEP claimants’, vested interest in their L&I benefits.

b. Additional procedural safeguards better protect claimants’ vested interests.

To ensure adequate notice, one solution would be to include a multi-lingual, pre-printed leaflet with all Department mailings to known LEP claimants. The leaflet would alert LEP claimants that the accompanying notice affects their legal rights and they must take action (such as seeking translation or legal assistance). Such an alert would be far more effective in protecting claimants’ rights than notice in English alone.

Additionally, where an interpreter is available throughout the Board proceedings, all the constitutional ills addressed above are cured. The claimant, through the interpreter, understands all testimony as well as the other portions of the proceedings (e.g., arguments on motions, dialogue between the judge and the attorneys). With an interpreter, claimants can fully participate in the fact-finding process, including participation in cross-examinations of adverse witnesses. There can be no real uncertainty regarding the value of having an interpreter present where claimants would otherwise be essentially excluded from the proceedings in which their rights are determined.

3. Government Cost-Savings Do Not Outweigh the Risks.

The additional cost of including a multi-lingual, pre-printed leaflet with Department mailings is minimal. There would be an up-front charge to draft the appropriate language, and then to translate it into a number of languages, but this would be a one-time expense that might be shared across agencies. Providing interpreter services to L&I claimants will admittedly be more costly. Nonetheless, a cost increase does not outweigh the serious risk that claimants will suffer erroneous deprivation of their vested interests if they are unable to understand and participate effectively in Board hearings. In Mathews, the Supreme Court held that “[f]inancial cost alone is not a controlling weight in determining whether due process

requires a particular procedural safeguard prior to some administrative decision.” 424 U.S. at 348 (emphasis added). Likewise, in the context of a prisoner’s L&I claim, the Washington Supreme court has held that “[s]aving money is not a sufficient ground for upholding an otherwise unconstitutional statute.” Willoughby, 147 Wn.2d at 737.

Moreover, the legitimacy of the Department’s reliance on financial burden or efficiency as a consideration in this analysis is undermined by our Legislature’s clear policy declaration:

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.

RCW 2.43.010 (emphasis added).⁴

Washington’s strong public policy, coupled with the potential for injustice in this case and others like it, make it clear that the government’s interest in saving time or money does not outweigh the serious risk to claimant’s interests posed by the lack of available interpreter services throughout Board hearings.

⁴ Chapter 2.43 RCW supports appointment of interpreters for the reasons addressed in more depth in the brief of amicus Northwest Justice Project.

D. The Supreme Court Requires Notice Reasonably Calculated to Actually Inform the Recipient.

The Supreme Court has clarified that “unique information about an intended recipient” informs whether notice is reasonably calculated to inform the recipient of the proceedings. Jones, 126 S.Ct. at 1716. In Jones v. Flowers, the state government began statutory foreclosure procedures against a homeowner whose taxes were delinquent. The government sent two notices by certified mail to the house to be foreclosed, but the owner did not live there. No one signed for or picked up the certified mail, so it was returned “unclaimed” to the government. Without doing more, the government completed the tax sale. Id. at 1713.

The United States Supreme Court invalidated the sale for lack of notice. The court invoked the rule of Mullane, cited above: “when notice is a person’s due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” Id. at 1715. The Court continued:

We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed.

Id. See also Covey v. Town of Somers, 351 U.S. 141, 146-47, 76 S. Ct. 724 (1956) (holding that “notice of foreclosure by mailing, posting, and

publication was inadequate when town officials knew that the property owner was incompetent and without a guardian's protection").

Likewise, here, the Department knew the Appellants did not speak or read English, yet took no steps to see that Appellants would receive actual, intelligible notice of the appeal deadlines. This failure violated Appellant's due process rights.

E. Other Jurisdictions Require the Provision of Interpreter Services Under Due Process Analysis.

1. Interpreter Services Are Required to Protect Individual Rights in Civil and Administrative Proceedings.

This court will stand in good company in holding that due process requires interpreter services at benefits hearings. Many other courts have held similarly. These courts reason that the only reasonable way to "tailor" the opportunity to be heard to the "capacities and circumstances" of a party who is not fluent in English, as required by Goldberg, is to provide the party with full access to an interpreter for the entire proceeding.

For example, in reviewing an administrative order for unemployment benefits, the Appellate Court of Illinois held:

Fundamental due process rights may require a court to permit an interpreter to translate courtroom proceedings. "This is so because inherent in [the] nature of justice is the notion that those involved in litigation

should understand and be understood.” 75
Am. Jur. 2d Trial § 230 (1991).

Figueroa v. Doherty, 303 Ill. App. 3d at 50 (emphasis added).

In Figueroa, a Spanish-speaking claimant sought unemployment benefits after being fired. As here, the hearing officer did not permit full translation of the proceedings. Id. Rather, the officer directed the interpreter to translate only when the claimant had a specific question about the testimony. Id. Further, the officer directed the interpreter to summarize the testimony of both the claimant and the employer’s witness, rather than translate it word-for-word. Id.

On appeal, the court held the failure to provide a complete translation of all proceedings deprived the claimant of his due process rights, including the right to testify on his own behalf and the right to a fair hearing in which he could understand and be understood. Id. at 52. As the court stated: “[A] failure to provide a full translation of proceedings goes to the heart of constitutional due process of law.” Id. at 51 (quotation omitted).

Similarly, in Lizotte v. Johnson, 777 N.Y.S. 2d 580, 4 Misc.3d 334 (N.Y. Sup. Ct. 2004), a foster parent sought review of an administrative decision regarding the amount of foster-care payments. The hearing officer provided the foster parent with an interpreter for only a portion of

the hearing. Id. at 586. The interpreter did not translate either the dialogue between the government's representative and the hearing officer or any of the documentary evidence. Id. In the words of the court, the foster parent "was left completely in the dark as to the nature of the proceeding transpiring before her." Id. As a result, the court held that the foster parent was deprived of fundamental due process. Id.

In another New York case involving a summary landlord/tenant proceeding, the court held as follows:

It is a fundamental axiom of our system of jurisprudence that due process of law includes the right to have an adequate interpretation of the proceedings. This would apply to a litigant who does not speak sufficient English to understand the proceedings; or suffers from some developmental disability that might require the assistance of another person or an interpretive device; or is in need of a guardian to protect his or her rights. . . .

To require the tenant to proceed when it is obvious that an interpreter is needed would violate due process of law [and] would make a mockery of the due process protection afforded by the Constitution.

Yellen v. Baez, 676 N.Y.S.2d 724, 177 Misc. 2d 332, 335-336 (N.Y. Sup. Ct. 1997) (emphasis added) (citations omitted). See also Santana v. Coughlin, 90 A.D.2d 947, 457 N.Y.S.2d 944 (N.Y. App. Div. 1982) (due process violation found where interpreter in inmate disciplinary hearing failed to interpret exact questions and answers and interpreted inaccurately).

Courts have also required interpretation to protect the fundamental fairness of civil immigration proceedings. In Augustin v. Sava, 735 F.2d 32 (E.D. N.Y. 1984), for example, the court stated that, although the rights of the alien seeking asylum were protected by statute, constitutional due process also provided protection. Augustin, 735 F.2d at 38. “A hearing is of no value when the alien and the judge are not understood The very essence of due process is a meaningful opportunity to be heard.” Id. at 37 (citations omitted); accord, Nazarova v. I.N.S., 171 F.3d 478, 484 (7th Cir. 1999) (non-English-speaking alien has due process right to an interpreter at deportation hearing).

Similarly, in the cases at bar, the Appellants were entitled to translation for the entirety of the Board hearings. The due process requirement of a meaningful opportunity to be heard, which must be “tailored to the capacities and circumstances of those who are to be heard,” demands no less. Goldberg, 397 U.S. at 268-69.

2. Interpreter Services are Required to Protect Constitutional Rights in Criminal Proceedings.

Although the present appeals arise from civil hearings, cases recognizing a due process right to interpreters in criminal proceedings are also instructive. Washington already requires the provision of interpreters to LEP defendants in the criminal context. E.g., State v. Mendez, 56 Wn.

App. 458, 462, 784 P.2d 168 (1989). Other jurisdictions are in accord. In Negron, 434 F.2d 386, for instance, the Second Circuit examined the due process objections of a recent LEP immigrant convicted of murder. The Court overturned the conviction on the ground that the trial court had violated fundamental due process by failing to provide an interpreter. Id. at 389. As the court noted, a party's mental disability would prompt inquiry into a party's competency in a court of law. Id. at 390. A person's inability to speak or understand English:

[I]s as debilitating to his ability to participate in a trial as a mental disease or defect. But it [is] more readily 'curable' than any disorder.

Id. (emphasis added). See also United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973) ("The right to an interpreter rests most fundamentally . . . on the notion that no defendant should face the Kafkaesque specter of an incomprehensible ritual which may terminate in punishment."); Wilson v. United States, 391 F.2d 460, 462 (D.C. Cir. 1968) (due process requires that a defendant have a "present ability to follow the course of the proceedings against him and discuss them rationally with his attorney"); People v. Estrada, 176 Cal. App. 3d 410, 415, 221 Cal. Rptr. 922 (1986) (under the California Constitution, "a defendant is entitled to two interpreters, one to interpret the witnesses' testimony and the other to be the personal interpreter for the defendant").

V. CONCLUSION

Language, of course, is the principal means of communication in any legal proceeding. A person's facility with that language is critical to the proceeding's fairness. Here, due to the Department's failure to address Appellants' LEP status, the Appellants were denied notice and a meaningful opportunity to be heard, including the right to confront and cross-examine adverse witnesses. The Department and the hearing officers were undisputedly aware of the Appellants' limited English proficiency, yet notice was sent in English only and interpreter services were provided sporadically. The Appellants were relegated to sitting in incomprehension as their rights were adjudicated. The integrity of the fact-finding process was undermined by excluding Appellants from full meaningful participation in the hearings. This Court should rule that these errors are fatal to the constitutional adequacy of the Department proceedings below.

For these reasons, the ACLU of Washington respectfully requests that the Court reverse and remand.

Respectfully submitted this 27th day of June,

2007.

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