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

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.

**APPELLANT/CROSS-RESPONDENT
BOARD OF INDUSTRIAL INSURANCE APPEALS'
RESPONSE TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION
FOUNDATION**

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I. INTRODUCTION

The Washington State Trial Lawyers Association Foundation (hereafter, "WSTLA") provides this Court with no legal basis to require the Board of Industrial Insurance Appeals (Board) to provide or pay for interpreter services to any greater extent than the Board already has. WSTLA makes only policy arguments with regard to the use of interpreter services. It is well established that such policy determinations are left to the legislature, which is in a position to balance all the interests involved. WSTLA's arguments should be addressed to the legislature and are of little consequence to this Court's resolution of the constitutional and other legal issues before it in this appeal.

II. ARGUMENT

WSTLA relies primarily on public policy considerations, rather than on legal arguments, to support its position that interpreter services are required for the preparation and presentation of a workers' compensation claim.¹

WSTLA relies on RCW 2.43 to support its public policy argument that interpreters are required throughout workers' compensation

¹ Although WSTLA ultimately concludes that the Department of Labor and Industries, not the Board, should be held accountable for interpreter services, it is possible that this Court could apply WSTLA's reasoning to the Board. For this reason, the Board makes its arguments in response to WSTLA's reasoning.

proceedings—from preparation of the claim to the presentation of evidence at the legal proceeding. However, as WSTLA acknowledges, nowhere in RCW 2.43 is there a *legal* requirement that an agency provide interpreter services. Instead, this chapter serves to regulate the appointment of interpreters,² their minimum qualifications,³ and who is to pay for interpreters when they are appointed.⁴

RCW 2.43.030 provides:

Whenever an interpreter is appointed to assist a non-English speaking person in a legal proceeding, the appointing authority shall . . . appoint a certified or a qualified interpreter to assist the person throughout the proceeding.

(Emphasis added.) This statute does not dictate when interpreters are to be used. It only requires that the interpreters that are used meet certain minimum qualifications.

WSTLA acknowledges that a litigant must have an underlying right to an interpreter from some source other than RCW 2.43.⁵ WSTLA goes on to argue that without interpreter services “the person’s right cannot be ‘fully protected’ in the legal proceeding.”⁶ However, at no time does WSTLA identify the source of any right to an interpreter that

² RCW 2.43.030.

³ RCW 2.43.070.

⁴ RCW 2.43.040.

⁵ Brief of Amicus, WSTLA Foundation, pg. 8.

⁶ Brief of Amicus, WSTLA Foundation, pg. 8.

workers' compensation claimants such as Mr. Mestrovac have. Without a right to interpreter services, this Court does not even reach the issues of what constitutes a legal proceeding or who should be responsible for paying for interpreter services under RCW 2.43, where none has been provided. If anything, WSTLA's brief reinforces the Board's argument that the source of any right by Mr. Mestrovac to interpreter services at the Board level is the Board's own rule, WAC 263-12-097, not RCW 2.43 or any other statute.

As the Board has already shown in its opening brief, Mr. Mestrovac had no right under rule, statute, or constitutional provision to interpreter services at the Board level beyond those provided to him.

A. Even If WSTLA Could Identify A Right To An Interpreter, RCW 2.43 Does Not Require The Board To Pay For Or Provide Interpreter Services Outside Of The Legal Proceeding

The Board was not required by RCW 2.43.040 to provide interpreter services beyond what it provided. Indeed, that statute is not applicable to Mr. Mestrovac's administrative appeal.

RCW 2.43.040(2) provides, in relevant part: “[i]n all legal proceedings in which the non-English-speaking person is a party . . . the cost of providing the interpreter *shall be borne by the governmental body initiating the legal proceedings*” (emphasis added). RCW 2.43.020(3) defines a “legal proceeding” 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 hearing before the Board was a legal proceeding.

However, the Board did not “initiat[e] the legal proceedings” as required by statute. In particular, here the Board is an adjudicative body with limited reviewing powers – it does not initiate proceedings. Rather, parties bring appeals to the Board for a determination on the merits. In the present case, it was the injured worker who “initiated the proceeding” by appealing an order of the Department. As such, it cannot be said that RCW 2.43.040 requires the Board to pay the costs of interpreter services to Mr. Mestrovac. RCW 2.43.040(3) provides that “in all other legal proceedings, the cost of providing the interpreter shall be borne by the non-English-speaking person [unless indigent].” While the Board does provide interpreter services pursuant to its own rules, it is not required to by RCW 2.43.

B. The Department’s Administration Of A Claim And The Board’s Adjudication Of An Appeal Of A Department Order Is Not One Continuous “Legal Proceeding” As WSTLA Contends

WSTLA seems to contend that administration of a claim at the Department through adjudication at the Board is one single “legal

proceeding.” WSTLA’s contention is wrong for several reasons. First, it is questionable whether any aspect of the Department’s process of administration of workers’ compensation claims is a “legal proceeding” as contemplated by RCW 2.43.

Second, even if this Court were to hold otherwise, the filing of the appeal at the Board is what “initiates” the legal proceeding at the Board level. The Board is a separate, quasi-judicial agency completely independent of the Department, an operational agency. RCW 51.52; *see generally* Washington Pattern Instructions, § 155.04 (5th ed.). Contrary to WSTLA’s theory, a worker’s compensation claim is no more a continuous legal proceeding from Department to Board than a civil action would be from superior court to the court of appeals. Each phase of appeal or litigation is its own legal proceeding. WSTLA cannot show otherwise.

WSTLA’s theory that would make the Department an appointing authority under RCW 2.43 for Board appeals also makes no sense in light of the fact that the Department does not always participate in Board appeals. Employers, workers, beneficiaries, health service providers, and/or any other person aggrieved by a Department order may appeal to the Board. RCW 51.52.070. However, the Department is not allowed to appeal to the Board, and the Department is not required to be involved in every appeal at the Board. In some circumstances, the Department is only

given the *option*. RCW 51.52.100; WAC 296-15-490(2). For instance, claims involving a worker and a self-insured employer do not necessarily need the Department's involvement in order to be resolved at the Board level. In fact, the Department usually does not participate in appeals involving self-insured employers.

Finally, to interject the Department into Board proceedings as the appointing authority for interpreters would undercut the Board's ability to direct and control matters pending before it. The legislature could not have intended such a result when it adopted RCW 2.43.

C. The Party Appealing A Department Order To The Board Is The Party That Initiates The Legal Proceeding Before The Board

RCW 2.43.040 establishes two methods for paying for an interpreter's services. First, if a governmental agency initiates a proceeding, that agency is required to pay for interpreter expenses. Second, in all other legal proceedings, the non-English-speaking party is required to pay for the use of an interpreter.

Specifically, RCW 2.43.040(2) states:

In all legal proceedings in which the non-English-speaking person is a party, or is subpoenaed or summoned by the appointing authority or is otherwise compelled by the appointing authority to appear, including criminal proceedings, grand jury proceedings, coroner's inquests, mental health commitment proceedings, and other legal proceedings initiated by agencies of government, the cost

of providing the interpreter shall be borne by the governmental body initiating the legal proceedings.

And RCW 2.43.040(3) states:

In other legal proceedings, the cost of providing the interpreter shall be borne by the non-English-speaking person unless such person is indigent according to adopted standards of the body. In such a case the cost shall be an administrative cost of the governmental body under the authority of which the legal proceeding is conducted.

The Board clearly cannot initiate the legal proceeding, as it is simply the quasi-judicial tribunal under which legal proceedings are initiated. Because Mr. Mestrovac was the party who initiated the legal proceeding by filing an appeal before the Board, he is responsible for paying for his own interpreter services pursuant to RCW 2.43.040(3). To hold otherwise would lead to absurd and strained results.⁷ WSTLA argues that the mere “presence” of a state agency in an action triggers a requirement that the state agency pay for interpreter services, regardless of who initiated the proceeding. This is contrary to RCW 2.43.040 and should be rejected by this Court.

D. WAC 263-12-097 Does Not Conflict With RCW 2.43

WSTLA argues that WAC 263-12-097 is invalid because it conflicts with RCW 2.43. Administrative regulations are presumed valid

⁷ *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) (“[s]tatutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided.”)

and WSTLA offers this Court no reason to invalidate it other than its desire to require the Department to be entirely responsible for interpreter service fees. *Baker v. Snohomish Cy. Dep't of Planning & Cmty. Dev.*, 68 Wn. App. 581, 589, 841 P.2d 1321 (1992), *review denied*, 121 Wn.2d 1027 (1993) (administrative regulations presumed valid and given great weight); *see also Converse v. Lottery Comm'n*, 56 Wn. App. 431, 435, 783 P.2d 1116 (1989) (same).

WAC 263-12-097 merely states that an appeals judge may appoint an interpreter to assist a limited English-speaking party or witness. WAC 263-12-097(1). It goes on to require that the appeals judge make a preliminary determination that the interpreter is able to accurately interpret. WAC 263-12-097(3). It states that “qualifications, waiver, compensation, . . . and ethical standards of interpreters in adjudicative proceedings are governed by the provisions of chapters 2.42 and 2.43.” WAC 263-12-097(1). Finally, this WAC requires that the Board pay for interpreter service fees and expenses when “the industrial appeals judge has determined the need for interpretive services” WAC 263-12-097(4). None of these provisions contradicts or otherwise conflicts with RCW 2.43.

WSTLA is attempting to limit the Board’s authority to determine when interpreters should be used and to control their use during the Board

proceeding. It is unclear how WSTLA can conclude that taking the control of hiring and monitoring interpreters from the independent quasi-judicial tribunal—Board—and placing that control with the often-opposing party—Department—is in the best interests of the worker or that this is the intent of RCW 2.43. WAC 263-12-097 only reflects the Board's attempts to remain an impartial quasi-judicial agency by controlling the skill, qualification, and use of interpreters who interpret legal proceedings before it.

E. Even If This Court Determines That Mr. Mestrovac Had A Right To Additional Interpreter Services In The Proceedings Before The Board, It Is Still Improper To Require The Board To Pay After The Proceeding Has Concluded

As the Board pointed out in its initial briefing, even if Mr. Mestrovac could establish that he had a right to additional interpreter services, he would also have to show that the failure to provide these would have changed the outcome of his appeal. Furthermore, even if he could show that, the proper remedy would be to remand the matter for further proceedings, not to impose monetary relief against the Board.

In addition to the reasons already addressed in the Board's initial briefing, requiring the Board to reimburse a party for interpreter services after the proceeding has ended is improper because the Board cannot at

that point comply with the mandates of RCW 2.43, nor can it ensure compliance with GR 11.2.

RCW 2.43 sets forth the requirements for the use and appointment of interpreters. The Board cannot ensure compliance with these provisions if it did not know, at the time the interpreter was used, that it was required to provide such service. As such, the Board did not have the opportunity to verify that the interpreter services used by Mr. Mestrovac qualified under RCW 2.43. As such, requiring the Board to pay for the interpreter services used by Mr. Mestrovac will not cure any underlying constitutional or statutory violation because there is no showing that the interpreter services used would have qualified under RCW 2.43. Further, there were no findings, pursuant to RCW 2.43.030(2), that the interpreter was able to interpret accurately. The arguments raised by WSTLA regarding RCW 2.43 show precisely why the order requiring the Board to pay for interpreter services after the fact is improper. “Full protection,” which WSTLA alleges is required under RCW 2.43, cannot be accomplished after the fact.⁸ It can only be accomplished prior to the interpreter’s use, as the Board’s rule and RCW 2.43 contemplates. As such, the only proper remedy, if any, is remand for a rehearing with the level of interpreter services that this Court deems appropriate—not

⁸ Brief of Amicus, WSTLA Foundation, pg. 8.

reimbursement for services of interpreters who may not have been qualified under RCW 2.43.

III. CONCLUSION

WSTLA has not provided this Court with any legal basis for its assertion that the Board was required to provide Mr. Mestrovac with more interpreter services than it did.

RESPECTFULLY SUBMITTED this 30th day of August, 2007.

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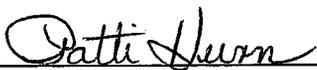
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I certify under penalty of perjury under the laws of the state of
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RE: *Enver Mestrovac v. Dep't of Labor & Industries et al.*
Court of Appeals Cause No. 58200-3-I

Dear Mr. Johnson:

Enclosed for filing, is the original of the Appellant/Cross-Respondent Board of Industrial Insurance Appeals' Response to Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation in the above-referenced case. Also included is a copy of the front page of the document to be conformed and returned in the self-addressed stamped envelope provided for your convenience.

Thank you for your attention to this matter.

Sincerely,

PATTI HURN
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