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No. 81478-3

(Consolidated Nos. 81480-5, 81481-3, 81758-8, & 81759-6)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, et al.,

Petitioners,

vs.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent,

and

BOARD OF INDUSTRIAL INSURANCE APPEALS,

Intervenor.

SUPPLEMENTAL BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. Both WSTLA and WSTLA Foundation name changes were effective January 1, 2009, after review was granted by the Court in these consolidated cases.

WSAJ Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including the rights of limited English proficiency (LEP) claimants seeking workers' compensation benefits under the Industrial Insurance Act, Title 51 RCW (IIA).

WSAJ Foundation files this supplemental amicus curiae brief to augment prior amicus curiae briefing by WSTLA Foundation before the Court of Appeals in two of these consolidated cases, Kustura v. Labor & Indus., 142 Wn.App. 655, 175 P.3d 1117, *review granted*, 165 Wn.2d 1001 (2008), and Meštrovac v. Labor & Indus., 142 Wn.App. 693, 176

P.3d 536, *review granted*, 165 Wn.2d 1001 (2008).¹ WSTLA Foundation also filed amicus curiae memorandums in Kustura and Meštrovac.²

II. INTRODUCTION AND STATEMENT OF THE CASE

This Court limited its grant of review in each of these five consolidated cases (involving seven claimants) to the "interpreter services issue." See e.g. Kustura Order, 12/2/08 (S.C. #81478-3). This supplemental amicus curiae brief principally addresses the legal issues arising from the Court of Appeals' interpretation of Ch. 2.43 RCW, governing interpreter services for non-English-speaking persons. The underlying facts in these five consolidated cases are not recounted here. WSAJ Foundation addresses interpretation of Ch. 2.43 RCW generally, leaving it to the parties to discuss potential consequences of these arguments in each individual case.³

¹ Kustura includes two other cases, Lukić v. Labor & Indus., and Memišević v. Labor & Indus. The other three cases consolidated here, in which WSTLA Foundation did not file amicus curiae briefs at the Court of Appeals, are: Ferenčak v. Labor & Indus., 142 Wn.App. 713, 173 P.3d 1109, *review granted*, 165 Wn.2d 1002 (2008); Resulović v. Labor & Indus., noted at 144 Wn.App. 1005, 2008 WL 1778229 (*per curiam*), *review granted*, 165 Wn.2d 1002 (2008); Mašić v. Labor & Indus., noted at 144 Wn.App. 1008, 2008 WL 1778315 (*per curiam*), *review granted*, 165 Wn.2d 1002 (2008).

WSTLA Foundation's amicus curiae brief in Kustura is referred to as "Kustura WSTLA Fdn. Am. Br.," and WSTLA Foundation's brief in Meštrovac is referred to as "Meštrovac WSTLA Fdn. Am. Br."

² WSTLA Foundation's amicus curiae memorandum in Kustura is hereafter referred to as "Kustura WSTLA Fdn. ACM."

³ Throughout this brief the Department of Labor & Industries is referred to as "Department" or "Dept.," and the Board of Industrial Insurance Appeals is referred to as "Board."

III. ISSUES PRESENTED

1. Under Ch. 2.43 RCW, are LEP claimants entitled to interpreter services at the Department claims adjudication stage, in addition to interpreter services on appeals before the Board? More particularly, does the definition of "legal proceeding" in RCW 2.43.020(3) include claims adjudication at the Department level, even though a hearing does not occur at that level?
2. If LEP claimants are entitled to interpreter services at the Department and Board levels, who pays for these services? More particularly, does the Department pay for these services under RCW 2.43.040(2) because it is the "governmental body initiating the legal proceedings?"
3. If LEP claimants are entitled to interpreter services at the Department and/or Board level, what is the scope of these services?

IV. SUMMARY OF ARGUMENT

Re: Legislative Intent and Rule of Liberal Construction

The Court of Appeals opinions fail to take into account, in interpreting key provisions of Ch. 2.43 RCW, the strong legislative intent to secure and fully protect the rights of non-English speaking persons, such as the LEP claimants involved in these appeals. The court also overlooked the rule of statutory construction that requires liberal interpretation of remedial legislation of this nature. This legislative intent and rule of liberal construction must guide this Court's interpretation of the pivotal questions of statutory construction on review.

Re: Definition of "Legal Proceedings"

There is no real dispute that Ch. 2.43 RCW applies at the Board level. The Court of Appeals erred in concluding this chapter does not apply at the Department level because it misapplied the "last antecedent" rule by interpreting RCW 2.43.020(3) as only applying to administrative *hearings* and not to inquisitional claims adjudication at the Department level. This interpretation overlooks the role of legislative intent and other factors in applying the last antecedent rule. Properly interpreted, RCW 2.43.020(3) includes within the definition of legal proceeding any procedural means for seeking redress before a tribunal or agency, regardless of whether a hearing is involved. Under this view, the Department's claims adjudication process is subject to Ch. 2.43 RCW.

Re: Payment for Interpreter Services

The Court of Appeals misinterpreted the phrase "governmental body initiating the legal proceeding," in determining that the Board is not responsible under RCW 2.43.040(2) for the cost of interpreters for LEP claimants appearing before the Board. In so doing, the court mistakenly focused on the claimant's act of initiating an appeal to the Board. Because the court had previously determined that Ch. 2.43 RCW does not apply at the Department level, it did not meaningfully consider whether the *Department* is the governmental body initiating the legal proceedings.

The Department is duty-bound under RCW 51.28.010 to notify a worker of his or her rights under the IIA, once it receives notice from the employer of the worker's accident. This is the proper application of RCW 2.43.040(2) in the IIA context. Under this view, the Department is responsible for the cost of interpreter services at both the Department and Board levels; the Board is not responsible for this cost.

Re: Scope of Interpreter Services Required

The Court should confirm that to fully protect LEP claimants' rights under the IIA, they must be provided all interpreter services reasonably necessary to fully develop and process the particular claim at the Department and Board level. At minimum, interpreter services must be made available at the Department level for communications with health care providers, claims adjudicators, and others pivotal to the claims adjudication process. Also, to be effective, time sensitive orders and notices should be issued to known LEP claimants in their primary language. At the Board level, interpreter services must be provided for all facets of the hearing process, including a LEP claimant's confidential communications with his or her lawyer during the Board hearing. Anything less leaves these claimants without the full protection that the Legislature intended. (The exact services required in a particular case is a question for the sound discretion of the Board.)

V. ARGUMENT

Introduction

This supplemental amicus brief augments prior briefing by WSTLA Foundation before the Court of Appeals and this Court in Kustura and Meštrovac. The brief focuses on the Court of Appeals analysis as to three crucial questions regarding interpretation and application of Ch. 2.43 RCW: a) whether the chapter applies at the Department level; b) whether the Department is responsible for paying for interpreter services for LEP claimants at both the Department and Board levels; and c) the scope of any interpreter services required at the Department and Board levels. When helpful, cross-references to prior WSTLA Foundation briefing are provided in order to avoid repetition.⁴

A. Overview Of The Remedial Nature Of Ch. 2.43 RCW And The Strong Legislative Intent Reflected In This Chapter To Fully Protect The Rights Of Non-English-Speaking Persons Involved In Legal Proceedings.

Ch. 2.43 RCW sets forth a strong and far-reaching statement of legislative intent. See RCW 2.43.010.⁵ This statute declares it to be the

⁴ It is unclear whether this Court's grant of review regarding the "interpreter services issue" encompasses whether LEP claimants may be entitled to equitable relief when they belatedly appeal a Department order due to a lack of understanding of the order because it is not in their primary language. See e.g., Kustura, 142 Wn.App. at 670-73 & accompanying notes. The parties have addressed this issue in their supplemental briefing. See Kustura et al. Supp. Br. at 22-24; Dept. Supp. Br. at 21-25. To the extent this question is before the Court, WSAJ Foundation stands on its briefing at the Court of Appeals on this issue. See Kustura WSTLA Fdn. Am. Br. at 8-13.

⁵ The current version of Ch. 2.43 RCW is reproduced in the Appendix to this brief.

policy of this state to secure and fully protect the rights of non-English-speaking persons – "constitutional or otherwise" – by providing qualified interpreters for such persons when they are involved in legal proceedings. This legislative mandate should be a principal consideration in resolving uncertainties as to the meaning of provisions of this chapter. See Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 157-59, 961 P.2d 371 (1998) (recognizing legislative intent of act protecting payment of wages requires liberal construction). Yet, as noted below, the Court of Appeals makes only one reference to this legislative policy, and does not appear to consider it in resolving the legal issues involved in these consolidated appeals. See Kustura, 142 Wn.App. at 674, n.22. Similarly, the court overlooks the remedial nature of Ch. 2.43 RCW and the liberal construction that is due in resolving uncertainties regarding interpretation and application of this type of legislation. See Kustura WSTLA Fdn. Br. at 13-14; Schilling, 136 Wn.2d at 159.

B. Given The Strong Legislative Intent Underlying Ch. 2.43 RCW And The Remedial Nature Of This Chapter, The Definition Of "Legal Proceeding" In RCW 2.43.020(3) Includes The Department Claims Adjudication Process, In Addition To Hearings Before The Board; The "Last Antecedent" Rule Does Not Dictate Otherwise.

This Court has before it two dramatically different interpretations of RCW 2.43.020(3), defining "legal proceeding." This sub-section provides:

"Legal proceeding" 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.

WSAJ Foundation interprets this provision to cover any administrative proceeding in which an aggrieved party seeks redress, regardless of whether the proceeding involves a hearing. See Kustura WSTLA Fdn. Am. Br. at 13-17. More particularly, "proceeding" includes any procedural means for seeking redress from an administrative agency. See id. at 16.

The Department urges that a proceeding does not include administrative adjudication unless a hearing is involved. See Dept. Supp. Br. at 6 (urging "common meaning" interpretation). It also contends that this result is required under the last antecedent rule of statutory construction. See Dept. Ans. to Kustura WSTLA Fdn. Am. Br. at 14-16; Dept. Supp. Br. at 3-6.

These two interpretations are reflected in the following schematics of the text of the definition of "legal proceeding":

WSAJ Foundation interpretation:

"Legal proceeding" 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.⁶

Department interpretation:

"Legal proceeding" 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.⁷

The Court of Appeals accepted the Department's analysis, applying the last antecedent rule in concluding that only administrative hearings qualify as proceedings. See Kustura, 142 Wn.App. at 680 & n.46. This analysis is incorrect, and misapplies the last antecedent rule. The last antecedent rule is a manifestation of the principle of statutory interpretation known as *reddendo singula singulis* ("by rendering each to each"). See 2A Norman J. Singer, et al., Sutherland Statutes & Statutory

⁶ This schematic is drawn from an exhibit used by WSTLA Foundation at oral argument before the Court of Appeals, later reproduced, with slight variation, in Kustura WSTLA Fdn. ACM at Appendix.

⁷ See Dept. Supp. Br. at 5.

Construction § 47:26 (7th ed. 2009)⁸; see also Black's Law Dictionary, s.v.

"reddendo singula singulis" (8th ed. 2004). This principle provides:

Where a sentence contains several antecedents and several consequents they are to be read distributively. The words are to be applied to the subjects that seem most properly related by context and applicability.

2A Singer, supra § 47:26.⁹ In applying this principle, a limiting or restrictive clause is generally construed to refer to an immediately preceding clause, or the last antecedent. See id.

This principle is intended to assist courts in discovering the Legislature's intent, not to supplant legislative intent. See In re Smith, 139 Wn.2d 199, 205, 986 P.2d 131 (1999). As explained in Smith:

The [last antecedent] rule is another aid to discovery of intent or meaning *and is not inflexible or uniformly binding*. Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, *the word or phrase will not be restricted to its immediate antecedent*.

Id. (emphasis & brackets in original; quoting State v. McGee, 122 Wn.2d 783, 788-89, 864 P.2d 912 (1993)). Accordingly, the last antecedent rule cannot be applied if the result would be contrary to the intent of the Legislature. See In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 781, 903 P.2d 443 (1995) (stating "unless a contrary intention appears in the

⁸ The Court has cited prior versions of this treatise with approval on the subject of the last antecedent rule. See e.g. Berocal v. Fernandez, 155 Wn.2d 585, 593, 121 P.3d 82 (2005); State v. McGee, 122 Wn.2d 783, 788-89, 864 P.2d 912 (1993).

⁹ Reading the sentence "distributively" means "referring singly and without exception to the members of a group <each, either, and none are distributive>." See Merriam-Webster OnLine, s.v. "distributively" (viewed Aug. 17, 2009).

statute, qualifying words and phrases refer to the last antecedent”); State v. Wentz, 149 Wn.2d 342, 348, 68 P.3d 282 (2003) (applying last antecedent rule “[b]ecause the statute evidences no contrary intention”); Smith, 139 Wn.2d at 205-06 (declining to apply last antecedent rule based on legislative intent).

The Court of Appeals did not explore the Legislature’s intent underlying Ch. 2.43 RCW before applying the last antecedent rule.

Turning directly to the language of RCW 2.43.020(3), the court stated:

In the phrase, “*hearing before an inquiry judge, or before an administrative, board, commission, agency, or licensing body of the state or any political subdivision thereof*,” the second clause, “before an administrative board, commission, [etc.],” modifies only the word “hearing,” which immediately precedes those qualifying prepositional phrases. Thus, because Department action is neither a court proceeding; a grand jury hearing; *nor a hearing before an inquiry judge, an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof*, it is not a “legal proceeding” within the meaning of the statute and is not subject to the interpreter requirements.

Kustura, 142 Wn.App. at 680 (emphasis added; footnote omitted).

The Court of Appeals erred because its interpretation is contrary to legislative intent. Legislative intent can be discerned from the text of the statute, and from other sections of the same statutory scheme. See Smith, 139 Wn.2d at 205 (considering “sense of the entire act”); McGee, 122 Wn.2d at 787-89 (considering other statutes); Wentz, 142 Wn.2d at 351 (considering “statute as a whole”). The definition of “legal proceeding” at

issue in this case is exceptionally broad. Both the Department (an administrative agency) and the Board (an administrative board) are included within the types of forums described in the definition.¹⁰

The statement of legislative intent introducing Ch. 2.43 RCW confirms the broad nature of legal proceedings for which interpreter services are contemplated. The intent of the chapter is to secure the rights of LEP persons, and to fully protect those rights in legal proceedings without qualification. RCW 2.43.010. Full protection requires interpreter services when there is an inability to "readily understand or communicate" in English. Id. In order to ensure that LEP persons are, in fact, fully protected, interpreters are subject to testing, certification, and other requirements. See RCW 2.43.070-.080. Also, LEP persons have limited ability to waive the right to an interpreter, and the relevant forum has discretion to appoint an interpreter notwithstanding the waiver. RCW 2.43.060(1)(b), (2). In light of these sweeping provisions, interpreter services would seem to be required any time that the legal rights of LEP persons are being adjudicated. Otherwise, their rights would be neither secured nor fully protected as intended by the Legislature.¹¹

¹⁰ Compare RCW 2.42.120(1) (limiting interpreter services for hearing impaired persons to judicial and quasi-judicial proceedings).

¹¹ Since the reach of "legal proceeding" under Ch. 2.43 RCW is limited to the adjudication of LEP persons' rights, the Department's contention that interpreter services

Giving due regard to the Legislature's intent, this Court should conclude that interpreter services are contemplated in administrative adjudications such as those that occur before the Department. The rights of LEP persons are adjudicated no less at the Department than at the Board level. These rights are neither secured nor fully protected if LEP persons do not readily understand the adjudication process and cannot readily communicate. It is difficult to imagine the Legislature intended to leave non-English-speaking persons like these LEP claimants solely to their own devices until they lose at the Department level, and then, if they have the will and resources to invoke the right of review, provide them with interpreter services for the first time at the Board hearing. This falls far short of full protection.¹²

Beyond the failure of the Court of Appeals to evaluate the impact of legislative intent on application of the last antecedent rule, it also misapplied the rule. First, the presence of a comma before the phrase "or before an administrative board, [etc.]" indicates that the court should look

would be required for "every oral or written communication ... about anything" is unsupported. See Dept. Ans. to Kustura WSTLA Fdn. Am. Br. at 15.

¹² The Department argues that this would create an incongruity between state-fund and self-insured employers. See Dept. Ans. to Kustura WSTLA Fdn. Am. Br. at 16. The Department has authority to approve and enforce self-insured claims handling processes, including the provision of interpreter services, under RCW 51.14.030(5)(d) and WAC 296-15-350(9). See also Kustura Washington Self Insurers Ass'n Am. Br. at 9-12. Furthermore, the Department performs adjudication of most claims and oversees self-insured adjudication of the limited number of remaining claims. See RCW 51.32.055(6), (9).

beyond the last antecedent. See Soter v. Cowles Publishing Co., 162 Wn.2d 716, 754, 174 P.3d 60 (2007) (stating “qualifying words and phrases refer to the last antecedent, absent a comma before the qualifying phrase”); Sehome, 127 Wn.2d at 781-82 (stating presence and location of comma indicates more than one antecedent).¹³

Second, the qualifying phrase “before an administrative board, [etc.]” is a better “fit” with the antecedent “proceeding” than the antecedent “hearing.” “Simply put, to be an antecedent, the modifier following it must be a fit,” both as to grammar and substantive meaning. Berrocal, 155 Wn.2d at 594. The qualifying phrase fits with the antecedent “proceeding”: “‘Legal proceeding’ means a proceeding ... before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof.” RCW 2.43.020(3). The qualifying phrase does not fit with the antecedent “hearing” because there is a superfluous preposition (“before”): “‘Legal proceeding’ means a ... hearing *before* an inquiry judge, or *before* an administrative board, [etc.]” See id. The Court should avoid interpretations of statutes that render words superfluous. See Homestreet, Inc., v. Department of Revenue, 166

¹³ The Department argues that a comma separates “proceeding” from the qualifying phrase “before an administrative board, [etc.]” but fails to acknowledge that another comma also separates “hearing” from the phrase. See Dept. Ans. to Kustura WSTLA Fdn. Amicus Br. at 14. The existence of a comma indicates more than one antecedent, rather than severing a qualifying phrase from all possible antecedents.

Wn.2d 444, 452, 210 P.3d 297 (2009). The preposition “before” is not superfluous if the antecedent of the qualifying phrase is understood as “proceeding.”¹⁴

Third, there is an apples-and-oranges problem with the Court of Appeals analysis arising from the lack of a substantive “fit.” The court’s analysis conjoins the qualifying phrase “before an administrative board, [etc.]” with the phrase “hearing before an inquiry judge,” even though administrative and inquiry judge proceedings are completely unrelated. Just as importantly, as a consequence, the court’s analysis separates proceedings before an inquiry judge from grand jury proceedings, assigning each to a different clause, even though they are closely related as a matter of substance. See Ch. 10.27 RCW (relating to grand juries and special inquiry judges).¹⁵ The Legislature created a close substantive link between these two types of proceedings. Not only are they established in the same chapter, the same statute authorizes, inter alia, the presence of interpreters at “sessions” of a grand jury or a special inquiry judge. See RCW 10.27.080. The Court of Appeals’ analysis disregards this affinity in its rigid and formalistic application of the last antecedent rule.

¹⁴ The Court of Appeals’ paraphrase of RCW 2.43.020(3) omits the second “before,” confirming that its reading renders the preposition superfluous. See Kustura, 142 Wn.App. at 680.

¹⁵ See also Ch. 10.29 RCW (relating to statewide special inquiry judges).

Properly interpreted, the definition of legal proceedings under RCW 2.43.020(3) includes claims adjudication before the Department, and similar administrative proceedings.

C. Under RCW 2.43.040(2) The Department Is The Governmental Body "Initiating The Legal Proceedings," And Thus Responsible For The Cost Of Providing Interpreters For LEP Claimants At The Department And Board Levels.

RCW 2.43.040(2) provides that in legal proceedings subject to Ch. 2.43 RCW "the cost of providing the interpreter shall be borne by the governmental body *initiating the legal proceedings.*" (Emphasis added.)¹⁶ WSAJ Foundation argued below that, under the IIA, the Department must be deemed the governmental body initiating the legal proceedings and thus is responsible for the cost of an interpreter at the Department and Board levels. See Kustura WSTLA Fdn. Am. Br. at 17-20 & accompanying notes. This argument is premised on the manner in which workers' compensation claims unfold under the IIA. RCW 51.28.010(1) provides that when a worker is injured he or she reports the industrial accident to the employer, who, in turn, notifies the Department of the occurrence. When the Department receives such notice, it "shall immediately forward to the worker or his or her beneficiaries or dependents notification, in non-technical language, of their rights under this title." RCW 51.28.010(2).

¹⁶ Under 2.43.040(2) a LEP claimant pursuing a benefit claim before the Department is a "party." See RCW 51.52.050(1) (including worker among "parties" entitled to seek reconsideration or appeal of a Department order or decision).

The statutory obligation of the Department renders it the *initiating* governmental body for purposes of RCW 2.43.040(2), because this is the first step in the Department-worker claims dynamic. See Kustura WSTLA Fdn. Am. Br. at 17-20. To "initiate" means "to cause or facilitate the beginning of : set going." Merriam-Webster OnLine s.v. "initiate" (viewed Sept. 19, 2009). After such notification, the worker then must apply for industrial insurance benefits. See RCW 51.28.020.¹⁷ Once this occurs, the Department investigates and adjudicates the claim. Under this analysis, the Court should hold that the Department is the "governmental body initiating the legal proceeding."

The Department's response to this argument is extraordinary. At the Court of Appeals, it provided a declaration from Department administrator Sandra Dziedzic suggesting that this statutorily-mandated procedure "seldom occurs." See Dept. Ans. to WSTLA Fdn. Am. Br. at 18-20 & Appendix A; see also Kustura WSTLA Fdn. ACM at 7-8 & ns.6-7; Dept. Ans. to Kustura WSTLA Fdn. ACM at 8-9 & accompanying note (repeating argument).¹⁸ On this basis, the Department contends that it cannot be the initiating governmental body *de jure* because *in fact* the

¹⁷ The full text of the current versions of RCW 51.28.010 and RCW 51.28.020 are reproduced in the Appendix to this brief.

¹⁸ An extract from the Dziedzic declaration is reproduced in the Appendix to this brief.

claimant usually initiates the proceeding by applying for benefits through his or her physician.¹⁹

The Court of Appeals did not address this disconnect between the requirement of RCW 51.28.010 and how the claims process dynamic actually occurs. Instead, the court rejected WSTLA Foundation's argument, concluding:

[WSTLA Foundation] argues that because the Department must notify an injured worker of his rights before a claimant may apply for benefits, the Department initiates the action that the Board reviews. But this ignores the fact the Board's authority may be invoked only by the *claimant's* act of initiating an appeal of the Department's action. Thus, the Board cannot be the body "initiating" such proceedings, and the non-English-speaking person must bear the cost of using interpreters during such hearings unless indigency is established.

Kustura at 680-81 (footnote omitted).

This analysis is flawed. First, WSAJ Foundation's view is that the Board is *not* the initiating governmental body. See Kustura WSTLA Fdn. Am. Br. at 17-20 & accompanying notes.²⁰ Instead, the Department is the initiating governmental body, and remains so throughout the Department and Board levels. The Court of Appeals did not address this issue because

¹⁹ The Department further contends that because this is the way it is done "there is no need for the Department to explain to the claimants their right to file the claim they have already successfully filed." See Dziedzic Dec. extract at Appendix, infra. Of course, this does not account for those LEP claimants who never processed a Report of Accident through the physician's office because of a lack of understanding of their rights.

²⁰ The Board's designee is the "appointing authority," to the extent there is any issue regarding entitlement to interpreter services at the Board level. See RCW 2.43.020(5); RCW 2.43.030(1). This is a separate role from the governmental body initiating the legal proceeding.

it had previously determined that the claims adjudication process before the Department does not meet the definition of "legal proceeding." As a consequence, the court does not appear to have entertained the idea that the Department could be the initiating governmental body. See Kustura, 142 Wn.App. at 680-81.

Second, the Court of Appeals' focus on the claimant's act of initiating the appeal to the Board is not the liberal construction to which non-English-speaking persons are entitled, given the remedial nature of this legislation. Properly construed, in the context of the IIA, the Department initiates (causes or facilitates the beginning of) legal proceedings by providing the formal notification to workers of their rights under the IIA. The Department should not be able to avoid this designation because it has cultivated a procedure that substantially departs from the legislative mandate of RCW 51.28.010.

This Court should conclude that proper application of RCW 2.43.040(2) in the context of the IIA renders the Department the initiating governmental body for purposes of payment of interpreter fees at the Department and Board level.

D. Under RCW 2.43.010, The Department And Board Are Responsible For Providing Those Interpreter Services Reasonably Necessary To Fully Protect LEP Claimants' Rights Under The IIA To The Same Extent As English-Speaking Claimants.

The Court of Appeals properly concluded that Ch. 2.43 RCW applies at the Board level. See Kustura, 142 Wn.App. at 679-80. It is also correct in concluding that LEP claimants participating in a Board hearing are entitled to interpretation of all testimony in the hearing, and use of an interpreter for communications with their counsel during the course of the hearing. See id. at 680; Meštrovac, 142 Wn.App. at 707-08; see also Meštrovac WSTLA Fdn. Am. Br. at 14-15. Additionally, this Court should clarify that, under the letter and spirit of Ch. 2.43 RCW, LEP claimants are entitled to those interpreter services at the Board hearing reasonably necessary to fulfill the legislative mandate so that they have the same protections accorded English-speaking-claimants.²¹

If the Court determines that the Department claims adjudication process is also a "legal proceeding" under RCW 2.43.020(3), then the Department must also be required to provide all reasonably necessary services for the proper processing of a claim. Again, this would mean whatever is reasonably necessary to fully protect LEP claimants to the

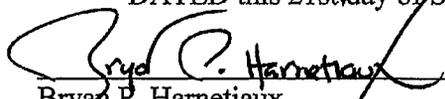
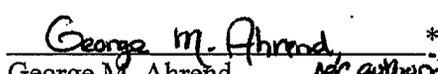
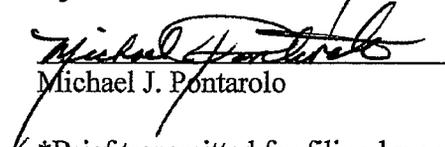
²¹ What may be deemed necessary in any given circumstance is a matter for the sound discretion of the Board. See State v. Gonzales-Morales, 138 Wn.2d 374, 381-86, 979 P.2d 826 (1999) (applying abuse of discretion standard to interpreter-related decision-making under Ch. 2.43 RCW, in criminal context).

same extent as English-speaking claimants, thereby providing LEP claimants an equal prospect for obtaining the "sure and certain relief" contemplated under the IIA without having to go to the Board to get it. See RCW 51.04.010; Meštrovac WSTLA Fdn. Am. Br. at 14. To this end, interpreter services at the Department level should include communications with health care providers, claims adjudicators, and others pivotal to the claims adjudication process. Also, to assure full protection for known LEP claimants, time-sensitive orders should be issued in their primary language. See Kustura WSTLA Fdn. Am. Br. at 7.

VI. CONCLUSION

The Court should adopt the reasoning advanced in this supplemental amicus curiae brief, and the prior amicus curiae submissions, and resolve each of these consolidated cases accordingly.

DATED this 21st day of September, 2009.

 Bryan P. Harnetiaux *	 George M. Ahrend *
 Michael J. Pontarolo *	per authority by Bryan P. Harnetiaux On Behalf of WSAJ Foundation

*Brief transmitted for filing by email; signed original retained by counsel.

APPENDIX

RCW 2.43.010

Legislative intent.

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.

It is the intent of the legislature in the passage of this chapter to provide for the use and procedure for the appointment of such interpreters. Nothing in chapter 358, Laws of 1989 abridges the parties' rights or obligations under other statutes or court rules or other law.

[1989 c 358 § 1. Formerly RCW 2.42.200.]

RCW 2.43.020

Definitions.

As used in this chapter:

(1) "Non-English-speaking person" means any person involved in a legal proceeding who cannot readily speak or understand the English language, but does not include hearing-impaired persons who are covered under chapter 2.42 RCW.

(2) "Qualified interpreter" means a person who is able readily to interpret or translate spoken and written English for non-English-speaking persons and to interpret or translate oral or written statements of non-English-speaking persons into spoken English.

(3) "Legal proceeding" 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.

(4) "Certified interpreter" means an interpreter who is certified by the administrative office of the courts.

(5) "Appointing authority" means the presiding officer or similar official of any court, department, board, commission, agency, licensing authority, or legislative body of the state or of any political subdivision thereof.

[2005 c 282 § 2; 1989 c 358 § 2. Formerly RCW 2.42.210.]

RCW 2.43.030

Appointment of interpreter.

(1) Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings.

(a) Except as otherwise provided for in (b) of this subsection, the interpreter appointed shall be a qualified interpreter.

(b) Beginning on July 1, 1990, when a non-English-speaking person is a party to a legal proceeding, or is subpoenaed or summoned by an appointing authority or is otherwise compelled by an appointing authority to appear at a legal proceeding, the appointing authority shall use the services of only those language interpreters who have been certified by the administrative office of the courts, unless good cause is found and noted on the record by the appointing authority. For purposes of chapter 358, Laws of 1989, "good cause" includes but is not limited to a determination that:

(i) Given the totality of the circumstances, including the nature of the proceeding and the potential penalty or consequences involved, the services of a certified interpreter are not reasonably available to the appointing authority; or

(ii) The current list of certified interpreters maintained by the administrative office of the courts does not include an interpreter certified in the language spoken by the non-English-speaking person.

(c) Except as otherwise provided in this section, when a non-English-speaking person is involved in a legal proceeding, the appointing authority shall appoint a qualified interpreter.

(2) If good cause is found for using an interpreter who is not certified or if a qualified interpreter is appointed, the appointing authority shall make a preliminary determination, on the basis of testimony or stated needs of the non-English-speaking person, that the proposed interpreter is able to interpret accurately all communications to and from such person in that particular proceeding. The appointing authority shall satisfy itself on the record that the proposed interpreter:

(a) Is capable of communicating effectively with the court or agency and the person for whom the interpreter would interpret; and

(b) Has read, understands, and will abide by the code of ethics for language interpreters established by court rules.

[2005 c 282 § 3; 1990 c 183 § 1; 1989 c 358 § 3. Formerly RCW 2.42.220.]

RCW 2.43.040

Fees and expenses — Cost of providing interpreter.

(1) Interpreters appointed according to this chapter are entitled to a reasonable fee for their services and shall be reimbursed for actual expenses which are reasonable as provided in this section.

(2) 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.

(3) 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.

(4) The cost of providing the interpreter is a taxable cost of any proceeding in which costs ordinarily are taxed.

[1989 c 358 § 4. Formerly RCW 2.42.230.]

RCW 2.43.050

Oath.

Before beginning to interpret, every interpreter appointed under this chapter shall take an oath affirming that the interpreter will make a true interpretation to the person being examined of all the proceedings in a language which the person understands, and that the interpreter will repeat the statements of the person being

examined to the court or agency conducting the proceedings, in the English language, to the best of the interpreter's skill and judgment.

[1989 c 358 § 5. Formerly RCW 2.42.240.]

RCW 2.43.060

Waiver of right to interpreter.

(1) The right to a qualified interpreter may not be waived except when:

(a) A non-English-speaking person requests a waiver; and

(b) The appointing authority determines on the record that the waiver has been made knowingly, voluntarily, and intelligently.

(2) Waiver of a qualified interpreter may be set aside and an interpreter appointed, in the discretion of the appointing authority, at any time during the proceedings.

[1989 c 358 § 6. Formerly RCW 2.42.250.]

RCW 2.43.070

Testing, certification of interpreters.

(1) Subject to the availability of funds, the administrative office of the courts shall establish and administer a comprehensive testing and certification program for language interpreters.

(2) The administrative office of the courts shall work cooperatively with community colleges and other private or public educational institutions, and with other public or private organizations to establish a certification preparation curriculum and suitable training programs to ensure the availability of certified

interpreters. Training programs shall be made readily available in both eastern and western Washington locations.

(3) The administrative office of the courts shall establish and adopt standards of proficiency, written and oral, in English and the language to be interpreted.

(4) The administrative office of the courts shall conduct periodic examinations to ensure the availability of certified interpreters. Periodic examinations shall be made readily available in both eastern and western Washington locations.

(5) The administrative office of the courts shall compile, maintain, and disseminate a current list of interpreters certified by the office.

(6) The administrative office of the courts may charge reasonable fees for testing, training, and certification.

[2005 c 282 § 4; 1989 c 358 § 7. Formerly RCW 2.42.260.]

RCW 2.43.080

Code of ethics.

All language interpreters serving in a legal proceeding, whether or not certified or qualified, shall abide by a code of ethics established by supreme court rule.

[1989 c 358 § 8. Formerly RCW 2.42.270.]

RCW 51.28.010

Notice of accident--Notification of worker's rights--Claim suppression

(1) Whenever any accident occurs to any worker it shall be the duty of such worker or someone in his or her behalf to forthwith report such accident to his or her employer, superintendent, or supervisor in charge of the work, and of the employer to at once report such accident and the injury resulting therefrom to the department pursuant to RCW 51.28.025 where the worker has received treatment from a physician or a licensed advanced registered nurse practitioner, has been hospitalized, disabled from work, or has died as the apparent result of such accident and injury.

(2) Upon receipt of such notice of accident, the department shall immediately forward to the worker or his or her beneficiaries or dependents notification, in nontechnical language, of their rights under this title. The notice must specify the worker's right to receive health services from a physician or a licensed advanced registered nurse practitioner of the worker's choice under RCW 51.36.010, including chiropractic services under RCW 51.36.015, and must list the types of providers authorized to provide these services.

(3) Employers shall not engage in claim suppression.

(4) For the purposes of this section, "claim suppression" means intentionally:

(a) Inducing employees to fail to report injuries;

(b) Inducing employees to treat injuries in the course of employment as off-the-job injuries; or

(c) Acting otherwise to suppress legitimate industrial insurance claims.

(5) In determining whether an employer has engaged in claim suppression, the department shall consider the employer's history of compliance with industrial insurance reporting requirements, and whether the employer has discouraged employees from reporting

injuries or filing claims. The department has the burden of proving claim suppression by a preponderance of the evidence.

(6) Claim suppression does not include bona fide workplace safety and accident prevention programs or an employer's provision at the worksite of first aid as defined by the department. The department shall adopt rules defining bona fide workplace safety and accident prevention programs and defining first aid.

[2007 c 77 § 1, eff. July 22, 2007; 2004 c 65 § 3; 2001 c 231 § 1; 1977 ex.s. c 350 § 32; 1975 1st ex.s. c 224 § 4; 1971 ex.s. c 289 § 5; 1961 c 23 § 51.28.010. Prior: 1915 c 188 § 9; 1911 c 74 § 14; RRS § 7689.]

RCW 51.28.020.

Worker's application for compensation--Physician to aid in

(1)(a) Where a worker is entitled to compensation under this title he or she shall file with the department or his or her self-insured employer, as the case may be, his or her application for such, together with the certificate of the physician or licensed advanced registered nurse practitioner who attended him or her. An application form developed by the department shall include a notice specifying the worker's right to receive health services from a physician or licensed advanced registered nurse practitioner of the worker's choice under RCW 51.36.010, including chiropractic services under RCW 51.36.015, and listing the types of providers authorized to provide these services.

(b) The physician or licensed advanced registered nurse practitioner who attended the injured worker shall inform the injured worker of his or her rights under this title and lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the worker. The department shall provide physicians with a manual which outlines the procedures to be followed in applications for compensation involving occupational diseases, and which describes claimants' rights and responsibilities related to occupational disease claims.

(2) If the application required by this section is:

(a) Filed on behalf of the worker by the physician who attended the worker, the physician may transmit the application to the department electronically using facsimile mail;

(b) Made to the department and the employer has not received a copy of the application, the department shall immediately send a copy of the application to the employer; or

(c) Made to a self-insured employer, the employer shall forthwith send a copy of the application to the department.

[2005 c 108 § 3, eff. June 30, 2007; (2005 c 108 § 2 expired June 30, 2007); 2004 c 65 § 4; 2001 c 231 § 2; 1984 c 159 § 3; 1977 ex.s. c 350 § 33; 1971 ex.s. c 289 § 38; 1961 c 23 § 51.28.020. Prior: 1927 c 310 § 6, part; 1921 c 182 § 7, part; 1911 c 74 § 12, part; RRS § 7686, part.]

Extract, Declaration of Sandra Dziedzic

4. “I have read the portion of Brief of Amicus Curiae by Washington State Trial Lawyers Association Foundation filed in the above-referenced case, which describes a way in which an application for workers’ compensation is made – claimant reports the accident to the employer, who notifies it to the Department, which then notifies the claimant of his or her rights under RCW 51.28.010(2). However, in reality, this way of claim filing seldom occurs. Usually and ordinarily, claimants are assisted in the first instance by a doctor’s office that has Report of Accident forms, and the doctor’s office helps claimants complete and send the forms to the Department. At this point, there is no need for the Department to explain to the claimants their right to file the claim they have already successfully filed.”

See Department Ans. to Kustura WSTLA Fdn. Am. Br. at APPENDIX A (text of Dziedzic declaration).