

NO. 81478-3

SUPREME COURT OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, et al.,

Plaintiff/Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Defendant/Respondent.

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**AMICI CURIAE BRIEF OF WASHINGTON STATE COURT
INTERPRETER AND TRANSLATOR SOCIETY and
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON**

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I. INTRODUCTION

The Court of Appeals ruled that the failure of the Department of Labor and Industries (the “Department”) to provide interpreters to claimants of limited English proficiency (“LEP”) for all parts of a hearing and for all communications with counsel during a hearing violated Chapter 2.43 RCW and the Department’s own regulations. *Kustura v. Dep’t of Labor & Indus.*, 142 Wn. App. 655, 681, 175 P.3d 1117 (2008). The Court of Appeals declined to reach the constitutional due process issue because of this ruling. *Id.* at 683.

Amici believe the Court of Appeals was correct in holding the Department’s conduct unlawful. However, that ruling did not correct the injustices suffered by the individual claimants, Kustura, Lukić, and Memišević, because the Court of Appeals affirmed the trial court, holding that the claimants had not shown any prejudice resulting from the error. *Id.* at 682. This holding should be reversed. As set forth in more detail in the brief of amicus Northwest Justice Project, the statute requiring an interpreter precludes the Court of Appeals’ holding.

As amici explain below, the pertinent statutes and regulations should be construed in light of due process concerns to require interpretation of all parts of the hearing of an LEP claimant and to require reversal where such interpretation is not provided. The state and federal

constitutions require that when the State is seeking to deprive an individual of a property right, due process must be provided. U.S. Const. Am. 14; Wash. Const. Art. 1, sec. 3. The Court of Appeals' denial of a remedy here perpetrates a due process violation whereby a hearing which is unintelligible to an individual claimant passes for that claimant's constitutionally-protected opportunity to be heard.

This Court need not reach the constitutional due process question, however, because the relevant statutes and regulations can and should be interpreted to preserve the claimants' due process rights. Additionally, the clear public policy of this state, as expressed in RCW 2.43.010, requires that non-English-speaking persons be "fully protected" in legal proceedings by having a qualified interpreter to assist them. The Court of Appeals' decision affirming the trial court in this case should be reversed.

II. IDENTITY AND INTEREST OF AMICI CURIAE

Two groups jointly offer this brief to the Court: the American Civil Liberties Union of Washington ("ACLU") and the Washington State Court Interpreters and Translators Society ("WITS"). The ACLU submitted an amicus brief to the Court of Appeals in this case. The instant brief is intended to be read in conjunction with and as a supplement to the previously-filed brief, without waiving any points previously raised.

The ACLU is a statewide, nonpartisan, nonprofit organization with over 20,000 members, dedicated to the preservation and defense of civil liberties, including due process, and the rights of persons 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. *See, e.g., Bellevue School District v. E.S.*, 148 Wn. App. 205; 199 P.3d 1010 (2009).

WITS is a nonprofit professional organization officially established in Washington in September 1988. WITS seeks to further the goals of the interpreting and translating profession, enhance the professional standing of its members, and inform the public about the profession. A WITS interpreter is an officer of the Court and a neutral party, and must comply with the Interpreter Code of Ethics. WITS believes strongly that any litigant has the right to hear and understand everything stated at a legal hearing—in any legal venue at which his or her rights are at issue. WITS members provide interpretation for all statements made by all present in court or administrative settings, so that the non-English speaking participant can understand all of it.

III. STATEMENT OF THE CASE

A. Factual Background

The facts of this case are addressed more fully elsewhere, including in the Court of Appeals opinion. The following summarizes the details underlying the due process issues.

Hajrudin Kustura, Gordana Lukić, and Maida Memišević were all injured workers who made claims for workers' compensation. Because of their limited English proficiency, they each requested an interpreter to assist them at the Department's proceedings. The Department deprived each of full interpretation of the proceedings and communications with counsel. For instance, at a hearing before an Industrial Appeals Judge ("IAJ"), the Department only provided an interpreter during Kustura's own testimony. *Kustura*, 142 Wn. App. at 664. The Department refused to provide an interpreter for any other part of the hearing. *Id.* The other witnesses testified in English. *Id.* The Department also declined the request for an interpreter for communications between Kustura and his counsel. *Id.* Thus, at the hearing, Mr. Kustura could not understand the other witnesses, the IAJ, the Department's attorney, or even his own attorney.

The Department also refused the requests by claimants Lukić and Memišević for an interpreter for communications with counsel during the

hearing. *Id.* at 666, 668. Lukić was denied interpretation of extensive preliminary matters at a hearing, and one witness refused to return for a second hearing as a result of the lack of an interpreter. Supp. Br. of Petitioners at 8.

B. Procedural Background

The claimants appealed the Department's decisions, including the decisions denying interpreter services throughout the proceedings, to the Superior Court. *Kustura*, 142 Wn. App. at 668. The Superior Court affirmed the Department's rulings. *Id.* The Court of Appeals determined that the Department erred in failing to provide an interpreter for all witnesses and for communications with counsel. *Id.* at 681. The Court of Appeals reasoned that applicable statutes (RCW 2.43.030) and regulations (WAC 263-12-097) required interpretation of all testimony and communication with counsel "throughout the hearing," but rejected this as a due process requirement. *Id.* at 680 n.47. Instead, the Court of Appeals found no reversible error, on the ground that the claimants had not proven prejudice resulting from violations of the interpreter requirement at the hearings. *Id.* at 682. The Court ruled (citing RCW 2.43.040) that the claimant had to bear the burden of paying for the interpreter at the hearing, unless indigency was established, because the State is only required by statute to pay for "government-initiated" hearings and it is the claimant's

appeal of the Department's actions that triggers a Board hearing. *Id.* at 680-81.

IV. ARGUMENT

A. Workers Run an Unacceptable Risk They Will Be Wrongly Deprived of Their Vested Property Right if Limited or No Interpreter Services Are Provided at Hearings.

A claimant who cannot understand the words spoken or the written evidence at a hearing in which the government determines whether his or her L&I payments will continue is deprived of a meaningful opportunity to be heard, an essential component of constitutional due process. Such a claimant cannot understand what other witnesses are saying about the facts—or even about the claimant—and cannot offer contradictory testimony, evidence, or argument. The claimant cannot confer with his or her attorney to better the chances of prevailing. In short, the claimant has *no* meaningful opportunity to be heard unless he or she can understand what is happening at the hearing. For this reason, the Court should interpret the statutes and regulations consistent with due process and conclude that full interpretation of a hearing is required for LEP claimants.

The best way to ensure that someone who has limited English proficiency has a meaningful opportunity to be heard is to provide an interpreter. The importance of providing interpreters for all parts of civil legal hearings has been recognized in a recent Brennan Center report:

For many of the tens of millions of Americans with limited proficiency in English, our court system is impenetrable. With no access to an interpreter, they cannot communicate with judges, court clerks or even their own lawyers, cannot give or understand testimony, and cannot even comprehend settlement agreements or court orders. As the Arizona Supreme Court puts it, a trial involving a defendant who cannot understand English and has no interpreter is “an invective against an insensible object.” [citing *State v. Natividad*, 526 P.2d 730, 733 (Ariz. 1974).] The consequences can be dire. Litigants who cannot understand court proceedings cannot . . . compel employers to pay wages owed them.

Laura Abel, *Language Access in State Courts*, Brennan Center for Justice, at http://brennan.3cdn.net/c611a37ee2b6eb199e_9bm6b3so4.pdf.

Workers *only* have a meaningful opportunity to be heard if they are provided interpreter services during all phases of the hearing including communications with counsel. Although the Court of Appeals agreed in principle, it did not recognize this entitlement as a due process right. Instead, it ruled that the claimants’ failure to demonstrate “prejudice” rendered the government’s error harmless. This ruling should be reversed.

The United States Supreme Court has held that, in evaluating the process due in a particular circumstance, courts should weigh three factors. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893 (1976). One factor is the private interest at stake in the governmental action. *Id.* Worker’s compensation benefits are a statutory substitute for the constitutional right to sue in court and have a jury trial for tort damages.

See Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989); *see also Shafer v. Dept. of Labor and Industries*, --- Wn.2d ---, 213 P.3d 591 (August 13, 2009) (No. 81049-4, slip op. at 8–9). This Court ruled years ago that a claimant has a vested property interest in disability payments. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733, 57 P.3d 611 (2002).

Another factor is the government interest, including the additional burden that added procedural safeguards would entail. *Mathews*, 424 U.S. at 335. Here, the government could face a monetary burden by providing interpreters during Department hearings. But the government also has an interest in the fairness—and public perception of fairness—of its courts.

In this case, the factor which requires the most analysis is “the risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.” *Id.* Amici focus on that factor herein.

A meaningful opportunity to be heard is a multi-faceted concept. Importantly, “the opportunity to be heard must be 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, 25 L. Ed. 2d 287 (1970). The claimants’ “capacities and circumstances” include their limited understanding of the English language. Their inability to understand all of

the testimony due to the lack of interpretation is a categorical due process violation that necessarily poses an unacceptable risk of error and undermines the reliability of the proceeding:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Greene v. McElroy, 360 U.S. 474, 496-97, 79 S. Ct. 1400, 3 L.Ed.2d 1377 (1959). The government's case is functionally not "disclosed" to a person who cannot understand the language.

B. Due Process Includes the Right to Be Present at a Hearing.

It has long been established that a party to a civil action has a due process right to be present in the courtroom at all stages of his trial. *See, e.g., Payne v. Superior Court of Los Angeles County*, 17 Cal. 3d 908, 553 P.2d 565, 576 (Cal. 1976) (holding that a prisoner facing a civil suit had a "due process right of access to the courts which [had] been abridged" by the denial of a right to appear personally in court); *Lenard's of Plainfield v. Dybas*, 31 A. 2d 496, 497 (N.J. 1943) (holding that "[t]he right of the parties to the cause to be present in person and by counsel at all stages of the trial, except the deliberations of the jury, is basic to due process."); *Carlisle v. County of Nassau*, 408 N.Y.S. 2d 114, 116 (N.Y.A.D. 1978)

(holding that “[a] party to a civil action not in default is entitled to be present in the courtroom and be represented by counsel at all stages during the actual trial of the action.”).¹

The right to be present at the hearing is inextricably tied to the right to hear and understand all the testimony and to confer and strategize with counsel. At least one court explicitly recognized the same in holding that the right to be present is not forfeited when a party is represented by counsel:

The suggestion . . . that a party somehow forfeits his constitutional right to be present at any and all stages of the trial when represented by counsel has no basis either in law or in logic. Waiver of the right to be present at a particular stage of the trial must be strictly construed [H]is right not only to be an interested and concerned observer of a proceeding which ultimately affects him, but to help plan and plot trial strategy is in no way denigrated by the presence of retained or assigned counsel. The attorney is not the alter ego of his client, but his representative or agent. As such he may not supplant the client either at his or the court’s unbridled pleasure.

Carlisle, 408 N.Y.S. 2d at 117. Thus, due process requires that workers be afforded an opportunity to be present throughout the hearing process in a *meaningful* sense. *Goldberg*, 397 U.S. at 268. Physical presence is meaningless to a person who cannot comprehend what is going on in the

¹ The Court recently distinguished cases in which an in-person hearing is not necessary. *City of Bellevue v. Lee*, 166 Wn.2d 581, 588, 210 P.3d 1011 (2009). In that case, the agency’s hearing involved “processing paperwork, not fact-finding.” *Id.* Here, the Department hearing does involve fact-finding.

courtroom. Allowing the hearing to proceed in a language the litigant does not understand is the functional equivalent of physically excluding the litigant from entire parts of the hearing. Certainly, such physical exclusion would be not consistent with due process and would be particularly egregious if only LEP litigants were excluded from parts of worker compensation hearings.

The presence of counsel in this case did not lessen the risk of error from not interpreting all parts of the hearing. If the claimants had been excluded from the room for parts of the hearing, while counsel was allowed to be present, this would not be considered compliance with due process. Nor is it sufficient to receive a summary of testimony from counsel. Significant risk of error is injected into the proceedings if counsel must summarize the testimony for the claimant, rather than the claimant hearing the testimony translated verbatim. And even if counsel summarizes the testimony, it does the claimant no good unless it is interpreted into the claimant's language. The National Association of Judicial Interpreters & Translators (of which amicus WITS is a member)

has strict ethical rules requiring accurate and complete translation of legal proceedings.²

Having an interpreter translate all of the testimony and communications between the claimant and counsel at a hearing clearly reduces the risk of error and promotes a reliable, fair outcome of the proceeding. Failure to provide interpretation of all of a hearing for an LEP litigant, including communications with counsel, effectively excludes the litigant from the hearing room—and is just as offensive to due process.

C. Due Process Contemplates the Right to Take Part in Meaningful Cross-Examination.

Courts also have repeatedly identified the related right to cross-examine adverse witnesses as a basic element of the right to fair hearing guaranteed by the Fifth and Fourteenth Amendment due process clauses. *E.g., Goldberg*, 397 U.S. at 269 (holding that welfare recipients must be given an opportunity to confront and cross-examine the adverse witnesses, because “[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.”); *Greene*, 360 U.S. at 507 (holding that due process was violated when undisclosed confidential informant

² See <http://www.najit.org/documents/PP%20Supplement.pdf> (Position Papers, p. 1-5, 31-34 (the latter explaining why summary interpretation introduces inaccuracies, violates interpreter ethics and “runs the risk of compromising due process”)).

evidence was used by an administrative agency to revoke a person's security clearance and force him to lose his job; the Court recognized that disclosure of all evidence to an administrative hearing litigant is an essential component of the litigant's right to rebut the evidence against him). Here failing to interpret parts of the hearing testimony is analogous to the agency relying on secret evidence known to the government but not the claimant. Both *Goldberg* and *Greene* recognize a due process right to confront and cross-examine the witnesses in a civil proceeding; "only thus is there a reasonable opportunity of checking and verifying testimony." *Little v. Rhay*, 8 Wn. App. 725, 730, 509 P.2d 92 (1973).

Many courts have noted that a claimant's inability to understand adverse testimony in a hearing significantly diminishes his attorney's capacity to conduct effective cross-examination. *E.g.*, *United States ex rel. Negron v. New York*, 434 F.2d 386, 390 (2d Cir. 1970) (stating that "Negron's incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination."); *State v. Natividad*, 526 P.2d 730, 733 (Ariz. 1974) (stating that "[a] defendant's inability to spontaneously understand testimony being given would undoubtedly limit his attorney's effectiveness, especially on cross-examination.").

In the present case, the right to cross-examine was abridged because the workers were not provided with interpreter services during all phases of the hearing. They were not able to identify for their attorney the evidence they could contradict. The workers were not afforded a meaningful opportunity to cross-examine adverse witnesses because interpreter services were not provided for witness testimony and attorney-client conversations.

D. The Due Process Right to a Meaningful Opportunity to Be Heard Can Only Be Vindicated if Workers Are Able to Participate in and Contribute to the Hearing Process as Autonomous Beings.

The guarantee of due process concerns not only the precise procedural mechanics of a proceeding, but also individuals' dignity and self-respect throughout the adjudication. In fact, "the preservation of each party's dignity and self-respect during the judicial proceedings is one of the primary functions of procedural due process." Marianne Brower Blair, *The Right of an Indigent Defendant to an Interpreter in a Civil Trial: Jara v. Municipal Court*, 40 Ohio St. L.J. 663, 688 (1979). "To force a person to sit in total incomprehension while others decide issues vitally important to the welfare of both the defendant and his family transforms a civil adjudication into a dehumanizing experience that should not be associated

with the judicial system of a country aspiring to the ideals of justice and equality.” *Id.*

Many courts have characterized the problem in similar terms. The Second Circuit, in the *Negron* case, stated that “as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores” *Negron*, 434 F.2d at 390. The First Circuit also stated in *United States v. Carrion*, 488 F.2d 12 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974), that “the right to an interpreter rests most fundamentally, . . . on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.” *Id.* at 14.³

The most prominent scholars of constitutional law also support the concept of individual dignity at the heart of the constitutional guarantee of due process. Professor Jerry Mashaw states:

State coercion must be legitimized, not only by acceptable substantive policies, but also by political processes that respond to a democratic morality’s demand for participation in decisions affecting individual and group interests. At the level of individual administrative

³ The First Circuit references Franz Kafka’s novel *The Trial*, which forcefully depicted the existential crisis of a man who encounters and struggles with the indecipherable law and impenetrable legal system.

decisions this demand appears in both the layman's and the lawyer's language as the right to a "hearing" or "to be heard," normally meaning orally and in person. To accord an individual less when his property or status is at stake requires justification, not only because he might contribute to accurate determinations, but also because a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable.

Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 49 (1976-1977) (footnotes omitted).

Similarly, Professor Laurence Tribe notes that one of the two ways to conceptualize the primary purpose of due process is to focus on the concept of individual dignity:

One approach begins with the proposition that there is intrinsic value in the due process right to be heard, since it grants to the individuals or groups against whom government decisions operate the chance to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons. From this perspective, the hearing may be considered both as a "mode of politics," and as an expression of the rule of law, regarded here as the antithesis of power wielded without accountability to those on whom it focuses. **Whatever its outcome**, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. **Both the right to be heard from, and the right to be told why, are analytically distinct from**

the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one. Justice Frankfurter captured part of this sense of procedural justice when he wrote that the “validity and moral authority of a conclusion largely depend on the mode by which it was reached No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.” At stake here is not just the much-acclaimed *appearance* of justice but, from a perspective that treats process as intrinsically significant, the very *essence* of justice.

(Bold emphasis added; italics emphasis in original.) Laurence H. Tribe, *American Constitutional Law*, p. 666 (2d ed. 1988) (footnotes and citations omitted).

Viewed from this angle, the denial of interpreter services during all phases of the hearing not only is detrimental to implementing the procedural mechanism that can assure accurate fact-finding, but also undermines the individual dignity that the constitutional guarantee of due process is intended to achieve.

E. Violations of a Claimant’s Right to Full Interpretation of a Hearing Are Necessarily Prejudicial and Reversible Error.

It is impossible to evaluate what the record would look like if the hearings, including consultations with counsel, had been interpreted. Therefore it is equally impossible to conclude, as the Court of Appeals did here, that there was no prejudice from the unreliable procedure that was

used. The Court of Appeals ruled no prejudice was shown as a result of the failure to provide interpretation for all of the hearing because the claimants were represented by counsel, presented evidence and legal argument, pursued appeals and obtained benefits from the Department. *Kustura*, 142 Wn. App. at 681–82. In *Kustura*'s case, where the only part of the hearing translated was his own testimony, the Court of Appeals dismissed the wage determination issues as "largely legal," noted they involved expert testimony about what employer contributions should be included in the wage rate, and found no "conflict in the testimony." Based on this rationale, they found it "unlikely" Mr. *Kustura* could have offered critical input on these issues even if the entire hearing had been translated. *Id.* at 682. But this conclusion overlooks the fact that Mr. *Kustura* was not allowed to even understand what the experts were saying about the amount of his compensation. Both at the hearing below and on appeal, Mr. *Kustura* disputed the Department's wage calculation. Whether or not he had "critical input" to add on these issues, his right to be present at the hearing included the right to have the witness testimony on the very subject he was disputing translated into a language he could understand, rather than be put in the position of in effect being excluded from the proceeding.

Consistent with due process, the Court should construe the statute and regulations to provide that proof of prejudice is not required where the State fails to provide an interpreter throughout the proceedings. The Court should hold that the Court of Appeals erred in denying a remedy for the legal violation that occurred.

F. If This Court Upholds the Right to Full Interpretation of Hearings on Non-Constitutional Grounds, It Need Not Reach the Due Process Issue.

The Court of Appeals correctly ruled, based on statutes and regulations, that interpretation “throughout” the proceeding, including consultation with counsel, is required. This Court should affirm that holding on non-constitutional grounds. For the reasons set forth in this brief, serious due process concerns would arise were the statute interpreted to deny interpreters to non-English-speaking claimants. This constitutional violation can be avoided by interpreting the statutes as the Court of Appeals did, to require interpretation of all of the proceedings including communication with counsel. *See State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 402, 494 P.2d 1362 (1972) (“[W]here a statute is susceptible of several interpretations, some of which may render it unconstitutional, the court, without doing violence to the legislative purpose, will adopt a construction which will sustain its constitutionality if at all possible to do so.”).

V. CONCLUSION

Where a claimant cannot understand proceedings affecting his or her rights, there is an obvious risk that the claimant will be wrongfully deprived of his or her rights. The statutes and regulations requiring interpretation should be read to protect those rights by providing an interpreter for all parts of a hearing. To the extent that the statute leaves any question, the Court should rule that constitutional due process requires interpretation of all parts of a hearing for a claimant of limited English proficiency.

Respectfully submitted this 18th day of September, 2009.

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DECLARATION OF SERVICE

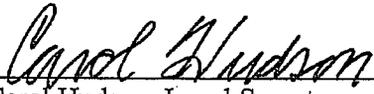
The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of the foregoing AMICI CURIAE BRIEF to be delivered via email, per prior consent of counsel, to the following:

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Dated this 18th day of September, 2009 at Seattle, Washington.



Carol Hudson, Legal Secretary
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