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81478-3
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STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, GORDANA LUKIĆ, AND MAIDA
MEMIŠEVIĆ,

Petitioners,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER TO WSTLA AMICUS CURIAE BRIEF

ROBERT M. MCKENNA
Attorney General

Masako Kanazawa, WSBA #32703
Assistant Attorney General
800 Fifth Avenue Suite 2000
Seattle, WA 98104-3188
(206) 389-2126

Jay D. Geck, WSBA #17916
Deputy Solicitor General

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I. ARGUMENT IN RESPONSE TO WSTLA AMICUS

Amicus curiae Washington State Trial Lawyers Association Foundation (WSTLA) argues that the Court of Appeals application of Washington's interpreter statute, chapter 2.43 RCW, presents an issue appropriate for review. WSTLA at 4-5. WSTLA offers an implausible interpretation that makes no grammatical sense, requires the addition or deletion of words, and thus has no support in the statutory language.

The Court of Appeals adopted the only reasonable interpretation to hold that the term "legal proceeding" as defined in RCW 2.43.020(3) for interpreter appointment does not include the Department of Labor & Industries *ex parte* claim administration. See *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 677-80, 175 P.3d 1117 (2008). There likewise is no error in the court's straightforward application of the interpreter cost allocating statute, RCW 2.43.040, that the Board of Industrial Insurance Appeals hearing was a proceeding "initiated by" the claimants, not by government as in a criminal prosecution. *Id.* at 680-81.

The Court of Appeals published opinion provides sufficient guidance as precedent. WSTLA's strained analysis presents no basis for review under RAP 13.4(b).

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A. WSTLA Interpretation That A Legal Proceeding Includes The Department *Ex Parte* Claim Administration Is Grammatically Impossible, Absurd, And Creates No Basis For Review

All parties agree that the interpreter statute requires appointment of an interpreter *only* in a “legal proceeding.” *Kustura*, 142 Wn. App. at 677-80; WSTLA at 6-7; Petition at 9-11. WSTLA reiterates its argument that a “legal proceeding” includes the Department *ex parte* claim administration. WSTLA at 6-7. The Court of Appeals correctly rejected this argument as not supported by the statutory language.

By its plain language, the statute defines a “legal proceeding” to mean a (1) court proceeding, (2) grand jury hearing, or (3) hearing before an inquiry judge or a specified administrative body:

“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.

RCW 2.43.020(3) (emphasis added); *Kustura*, 142 Wn. App. at 680. The term “before an administrative . . . agency . . . of the state” modifies only the immediately preceding noun “hearing.” *Kustura*, 142 Wn. App. at 680; *Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82 (2005) (qualifying words “refer to the last antecedent,” unless contrary intent appears). The statute thus lists three types of legal proceedings in parallel:

“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.

RCW 2.43.020(3) (bullets added).¹ Neither the claimants nor WSTLA argued (nor can they reasonably claim) that the Department *ex parte* claim administration is a court proceeding, grand jury hearing, or hearing.²

To escape the link between the terms “hearing” and “before an administrative . . . agency . . . of the state,” WSTLA offers a grammatically impossible interpretation that the latter term leaps past “hearing” to modify “proceeding.” WSTLA 6-7. “This is precisely the sort of telescopic interpretation that the last-antecedent rule disfavors: words leaping across stretches of text, defying the laws of both gravity and grammar.” *Flowers v. Carville*, 310 F.3d 1118, 1124 (9th Cir. 2002).

WSTLA’s interpretation requires words to be added to and deleted from the statute, in one of the following two ways:

- “Legal proceeding” means a proceeding
- in any court in this state, [or before a] 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.

¹ In its appendix, WSTLA does not accurately portray the Department analysis.

² A hearing begins after the Department makes an *ex parte* decision, and only if an aggrieved party appeals it to the Board, which will then conduct a de novo hearing to decide whether the decision is correct. RCW 51.52.050–.104.

RCW 2.43.020(3) (words [added] and deleted as shown).

“Legal proceeding” means

- a proceeding in any court in this state, grand jury hearing, or hearing before an inquiry judge, or
- [a proceeding] before an administrative board, commission, agency, or licensing body of the state or any political subdivision thereof.

RCW 2.43.020(3) (words [added] as shown).

Courts may not “add to or subtract from the clear language of a statute,” unless “the addition or subtraction of language is imperatively required to make the statute rational.” *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002). Even in “construing an ambiguous statute, courts may not read into it matters that are not in it,” under the “guise of interpreting a statute.” *Id.* at 955-56. The statute as interpreted by the Court of Appeals makes rational sense and needs no addition or deletion of any word – a legal proceeding is a court proceeding, grand jury hearing, or hearing before an inquiry judge or listed administrative body.

Besides its strained interpretation, WSTLA’s argument that the Department claim administration is a “legal proceeding” rests on another faulty premise that a “proceeding” means “any procedures for seeking redress” under one dictionary definition. WSTLA at 6. WSTLA ignores the more relevant definition in the same dictionary: “The business

conducted by a court or other official body; a hearing.” *Kustura*, 142 Wn. App. at 679 (citing Black’s Law Dictionary at 1241).

WSTLA’s interpretation would also be absurd in practice. If the Department claim administration is a “legal proceeding,” whenever a LEP claimant calls a Department employee about a claim, the employee would have to act as an “appointing authority”³ to appoint a qualified interpreter and administer an oath.⁴ If the claimant waives an interpreter, the employee must determine “on the record that the waiver has been made knowingly, voluntarily, and intelligently,” which would require a court reporter. RCW 2.43.060(1). These duties are common for a court or quasi-judicial tribunal but would pose difficulties if assigned to other state or local government employees. *See Kaiser Aluminum & Chem. Corp. v. Dep’t of Labor & Indus.*, 121 Wn.2d 776, 781, 854 P.2d 611 (1993) (distinguishing the Board, a “quasi-judicial” agency, from the Department, an “enforcement or ‘front line’ agency”); *Glaubach v. Regence Blueshield*,

³ The statute refers to the person who appoints an interpreter under the statute as the “appointing authority.” RCW 2.43.030. 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.” RCW 2.43.020(5). It is absurd to claim that a Department staff member who responds to a claimant’s phone call is the “presiding officer” or similar official.

⁴ Before beginning to interpret, every interpreter appointed under chapter 2.43 RCW “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.” RCW 2.43.050.

149 Wn.2d 827, 833, 74 P.3d 115 (2003) (courts avoid interpretation that results in “unlikely, absurd, or strained” results).

In sum, the Court of Appeals interpretation is the only reasonable one consistent with statutory language. A “legal proceeding” is triggered when the Board convenes *a hearing* as a result of an appeal from a Department decision, not when the Department administers an application for benefits. RCW 51.52.060, .102. WSTLA’s interpretation to the contrary fails for the above reasons and creates no basis for review.

B. WSTLA Theory That The Board Hearings Requested By The Claimants Were Nonetheless Proceedings “Initiated By” The Department Lacks Merit and Creates No Basis For Review

All parties agree that the hearing process at the Board is a “legal proceeding.” WSTLA argues that this Court should review the Court of Appeals application of RCW 2.43.040 that the claimants were not entitled to *free* interpreter services at the Board. WSTLA at 7-8; *Kustura*, 142 Wn. App. at 680. But WSTLA offers no good reason why.

WSTLA agrees that RCW 2.43.040 governs the issue of who should bear the cost of interpreter services required by the statute. The statute distinguishes legal proceedings initiated by government, RCW 2.43.040(2), from those not initiated by government but conducted “under the authority” thereof, RCW 2.43.040(3). It allocates interpreter costs in the former to “the governmental body initiating the legal proceeding,”

RCW 2.43.040(2), and the latter to “the non-English-speaking person, unless such person is indigent,” – then, “the cost shall be an administrative cost of the governmental body under the authority of which the legal proceeding is conducted,” RCW 2.43.040(3).

The statutory interpreter cost allocation is consistent with the distinction drawn in the due process law between “government-initiated proceedings seeking to affect adversely a person’s status” such as “criminal prosecution, deportation or exclusion” and “hearings arising from the person’s affirmative application for a benefit”. *Abdullah v. INS*, 184 F.3d 158, 165 (2d Cir. 1999) (due process does not require an interpreter for special agricultural worker status applicants during INS interviews). The statute is intended “to secure the rights, constitutional or otherwise” of a LEP person. RCW 2.43.010. This confirms that the Legislature intended this recognized distinction in assigning costs. *See State v. Gonzales-Morales*, 138 Wn.2d 374, 381, 979 P.2d 826 (1999) (“The purpose of RCW 2.43 is to uphold the constitutional rights of non-English-speaking persons.”); *State v. Nemitz*, 105 Wn. App. 205, 211, 19 P.3d 480 (2001) (“The purpose of the interpreter statute is to provide interpreters for defendants, witnesses, and others compelled to appear.”).

WSTLA reiterates its rejected “notion that the Department should be considered the ‘governmental body initiating the legal proceedings’

under RCW 2.43.040(2) for purposes of determining the responsibility for costs of interpreter services before the Board.” WSTLA at 7. WSTLA’s argument has no merit and creates no basis for review.

WSTLA claims that the Board hearings are part of the legal proceedings the Department initiated in this case because the Department has a duty under RCW 51.28.010(2) to notify workers of their rights when they report their industrial accidents to their employers, and the employers report the accidents to the Department. WSTLA at 18. WSTLA’s argument is factually flawed because there is no evidence that the claims were filed in this fashion in this case.⁵ WSTLA’s argument is also legally flawed because it rests on the premise that the Department claim administration is a “legal proceeding,” which, as shown above, is wrong.

In any event, WSTLA’s argument “ignores the fact that the Board’s authority may be invoked only by the claimant’s act of initiating an appeal of the Department’s action.” *Kustura*, 142 Wn. App. at 680;

⁵ WSTLA points out a portion of the declaration by the Department claims administration program manager that described how a claim is typically filed. WSTLA at 7-8 n.7. The declaration stated that claims are usually filed with the assistance of a doctor and that the WSTLA-suggested manner of claim filing seldom occurs. A copy of the entire declaration is attached to this answer as Appendix A. The Legislature has expressly recognized that “the worker generally reports the injury to a physician who, in turn, reports the injury to the department.” RCW 51.28.015. WSTLA argues that the declaration is “extraordinary,” because a worker may not rely on his doctor’s assurance in filing a timely appeal, citing *Wilbur v. Dep’t of Labor & Indus.*, 38 Wn. App. 553, 556-57, 686 P.2d 509 (1984) (attending doctor’s failure to perform statutory duty to inform the worker of his or her rights and lend all necessary assistance in filing a claim does not excuse the worker from performing his duty to timely file a claim). But the declaration only pointed out the factual deficiency in the WSTLA’s theoretical claim that the Department “initiated” the legal proceedings in this case.

RCW 51.52.050, .060. The Department's duty of notification arises only if, and after, the claimants first fulfill their duty of reporting their industrial accidents to their employer, and their employers report such accidents to the Department. RCW 51.28.010(1), .030. The statutory duty of notification does not "initiate" any "legal proceeding."

Finally, WSTLA's argument eviscerates the statutory purpose in distinguishing government-initiated (compulsory) and individual-initiated (voluntary) proceedings for cost allocation and again leads to absurd results. If the Department is the "governmental body initiating the legal proceedings" at the Board, the statutes would require the Department, not the industrial appeals judge, to act as "appointing authority" and make an interpreter appointment decision. RCW 2.43.030. It makes little sense to assign the Department this role when it appears as a party at the Board. RCW 51.52.100.

In contrast to the WSTLA interpretation, the Court of Appeals analysis is straightforward. The claimants initiated the Board hearings by filing a notice of appeal. They never claimed indigency. RCW 2.43.040(3) thus allocated interpreter cost to them. Because they were not entitled to free interpreter services at the Board, they were not entitled to reimbursement of any interpreter expenses they allegedly incurred at the Board. *Kustura*, 142 Wn. App. at 680-81.

In sum, the Court of Appeals correctly concluded that RCW 2.43.040 does not entitle non-indigent workers' compensation claimants to free interpreter services at the Board hearing process. WSTLA's strained interpretation and analysis present no basis for review.⁶

II. CONCLUSION

For the foregoing reasons, the Department requests that the Court deny the petition for review in this case.

RESPECTFULLY SUBMITTED this 31st day of July, 2008.

ROBERT M. MCKENNA
Attorney General


Masako Kanazawa WSBA #32703
Assistant Attorney General
800 5th Avenue
Seattle, WA 98104-3188
(206) 389-2126

Jay D. Geck, WSBA #17916
Deputy Solicitor General

⁶ Although not required, the Board provided at its expense interpreter services to the claimants for at minimum their testimony under WAC 263-12-097(4). WSTLA, however, focuses on the claimants' asserted right to reimbursement under RCW 2.43.040 without challenging the Court of Appeals' conclusion that the Board's not appointing an interpreter for certain testimony or confidential attorney-client communications during the hearings was not prejudicial. *Kustura*, 142 Wn. App. at 682. In any event, WSTLA provides no analysis to demonstrate why persons incurring self-help, extra-statutory interpreter expenses should be entitled to reimbursement or why that issue meets RAP 13.4(b). WSTLA does not address relevant law that only remedy for unlawful denial of interpreter services is remand for a new hearing, available only when denial was prejudicial. See *Nazarova v. INS*, 171 F.3d 478, 484-85 (7th Cir. 1999) (remand ordered when LEP alien did not obtain an interpreter at a deportation hearing resulting in prejudice); *Gutierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002) (prejudice to the outcome required for a remand in case of inadequate interpreter services).

Appendix A

Declaration of Sandra Dziezic

NO. 57445-1-I

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

HAJRUDIN KUSTURA, GORDANA
LUKIĆ, AND MAIDA MEMIŠEVIĆ,

Appellants,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

DECLARATION OF
SANDRA DZIEDZIC

I, Sandra Dziedzic, declare under penalty of perjury:

1. I am over the age of 18 years and make this declaration based on my personal knowledge.
2. I work at the Washington State Department of Labor and Industries (Department) as Claims Administration Program Manager. I have occupied this position for the past four years. I have worked for the Department for the past 29 years.
3. My current position at the Department includes responsibilities, among other things, to oversee the program that adjudicates and manages all state fund claims filed by workers in Washington.
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 that point, there is no need for the Department to explain to the claimants their right to file the claim they have already successfully filed.

5. All claims are filed either through the worker's attending medical provider with portions of a Report of Accident form to be completed by the worker and the treating provider or through a pilot program. There is a small pilot program with 310 employers, which started in January 2007 to allow a worker to file his or her claim through his or her employer – with portions to be completed by the worker, who then takes a copy of the form to his or her medical provider for completion. Between January 1 and June 30, 2007, the Department received only 204 claims in this pilot.
6. Our Report of Accident forms are pre-numbered and sent to medical providers to be filed in accordance with RCW 51.28.020. The workers' claims are placed in the Department's system upon receipt of the Report of Accident form, and the Department sends a copy of the information from the worker and provider to the

employer, notifying the employer of the receipt of the claim. At this point, the employer is asked to provide their information.

7. When workers contact the Department about their accident, the Department informs them that they need to file their claims through their treating medical providers and send them a Report of Accident form to take to their attending medical provider for completion if necessary. Report of Accident forms provide all of the information to the worker about who can treat them.
8. In rare instances, especially when a worker is injured outside of the state, the Department receives written notification from the employer (on their state/insurer forms). The Department will then contact the worker and medical provider to complete the claim.

SIGNED this 27th day of August, 2007, at Olympia,
Washington.


SANDRA DZIEDZIC