

# WSIA's Washington Supreme Court Report

*Major Cases, 2010 — Present*







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### August, 2016

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The nine elected members of the Washington Supreme Court form one of Washington's three co-equal branches of state government, along with the Legislature and the Governor.

The court is powerful, and its work takes on even more significance in the areas of workers' compensation and workplace safety law, two areas governed by statutes passed by the Legislature and implemented by the Department of Labor & Industries, but constantly subject to interpretation by the state judiciary.

As the court of last resort for state law, the pronouncements of the Washington Supreme Court become binding precedent for all of the lower courts of appeal, superior courts, and the Board of Industrial Insurance Appeals.

We've assembled this special report, selecting major cases from the last six years, to give a snapshot of where currently sitting justices come down on the big cases where we've either participated as a "friend of the court" by filing an amicus curiae brief, or we've had an opinion about the outcome.

The purpose is two-fold: education about an often opaque branch of government, and use in forming an opinion about justices' records in these issues as they ask for your support and your vote when running for re-election to the bench.

A judge or lawyer can become a justice of the Washington Supreme Court through appointment by the Governor, or by election in a statewide vote.

Each two-year election cycle, three of the nine positions on the court are on the ballot. More about the justices and those seeking re-election is on the following page.

Employer and business interest in the court's safety and workers' compensation cases, while always high, probably intensified in the modern era with the court's decision in *Cockle v. Dept. of Labor & Industries* in 2001, where the court surprised many observers by interpreting the nearly century-old definition of wages to suddenly include an employer's payments toward workers' health insurance.

Dissenting in the 5-4 case, then-Justice Phil Talmadge predicted such tinkering "will provoke an immediate and bitter struggle in the Legislature to address the definition of wages," a true prediction that remains accurate 15 years later.

*Cockle* is just one example of how sometimes surprising judicial interpretations of workers' compensation law spill over into the Legislature, the Department, and deeply impact the cost and operation of the workers' comp system.

Use this report to see how, in more recent cases, these issues arise and how the justices view them.





### The 9 sitting justices of the Washington Supreme Court

L-R, Top: Sheryl Gordon McCloud, **Charles Wiggins\***, Stephen Gonzalez, **Mary Yu\***  
 L-R, Bottom: Mary Fairhurst, Charles Johnson, **Barbara Madsen\***, Susan Owens, Debra Stephens  
 \*seeking re-election in 2016

## How did they vote in the cases?

All of the current justices' votes are tallied in the following pages. Of the three justices seeking re-election this year, on the cases selected in this report, we see the following trends:

### Chief Justice Madsen—64%

Chief Justice Madsen is one of the longest-serving members of the court, first elected in 1992. She participated in all of the cases we reviewed here.

Her positions in the cases aligned with our point of view on the case **64 percent of the time**.

### Justice Wiggins—22%

Justice Wiggins, elected to the court in 2010, participated in nine of the cases we examine.

His positions aligned with our point of view on in just two of those cases, or **22 percent of the time**.

Both cases were unanimous decisions.

### Justice Yu—33%

Justice Yu, first appointed to the court in 2014 and now seeking re-election, is the newest member of the court and has participated in fewer cases. Of the cases we review here, she participated in six of them.

Her positions aligned with our point of view in two of those six cases, or **33 percent of the time**.

## How did we pick the cases?

On average, the Washington Supreme Court decides around 145 cases a year, of which about half are criminal and about half are civil. A couple cases a year tend to involve safety or workers' compensation issues. Of all the major decisions the last six years, we chose to count those where there's either an obvious or reasonably evident WSIA position on the legal or public policy question at issue.

## Some cases of interest not counted

A few cases we monitored but did not have a sufficiently definite WSIA position to include in the report:

**Utter v. BIAW, 182 Wn.2d 398 (2015)** held that use of fees from BIAW's retrospective ratings program for political contributions may have caused the association to become a political committee subject to various restrictions. The ruling was unanimous with partial dissent (Madsen).

**Boeing v. Doss, 183 Wn.2d 54 (2015)** held that the 2nd Injury Fund does not cover the cost of discretionary post-pension medical treatment. The ruling was unanimous.

**Labor & Industries v. Lyons, \_\_\_ Wn.2d \_\_\_ (May, 2016)** held that franchises without employees are themselves covered workers for workers' compensation regardless of the intent of the franchisor and franchisee. The ruling was unanimous.

Cases	WSIA Position?	Current Justices voting for result	Current Justices opposing result
Workplace Safety/WISHA Issues			
<i>Afoa v. Port of Seattle</i> , 176 Wn.2d 460 (2013). The court expanded landowners' liability under tort, WISHA, and other theories, for injuries suffered by the employees of licensees operating on the property.	Opposed Result	Fairhurst Gonzalez Owens Stephens Wiggins	<b>Madsen</b>
<i>Rose v. Anderson Hay &amp; Grain Co.</i> , 184 Wn.2d 268 (2015). The court expanded an employer's tort liability to an alleged workplace safety whistleblower.	Opposed Result	Johnson Stephens Wiggins Gonzalez Gordon-McCloud Yu	<b>Fairhurst Madsen Owens</b>
Workers' Compensation Issues			
<i>Kustura v. Labor &amp; Industries</i> , 169 Wn.2d 81 (2010). The court placed an appropriate limitation on the provision of state-paid interpreter services in workers' compensations appeals.	Supported Result	<b>Madsen Johnson Owens Fairhurst</b>	
<i>Tobin v. Labor &amp; Industries</i> , 169 Wn.2d 396 (2010). The court limited the ability of the Department of Labor & Industries and self-insured employers to reimburse themselves for benefits paid to a worker injured by the negligence of a third party when the worker recovers money from the third party. <i>WSIA filed an amicus curiae brief in Tobin.</i>	Opposed Result	Madsen Johnson Owens Stephens	<b>Fairhurst</b>
<i>Becerra-Becerra v. Expert Janitorial, LLC</i> , 176 Wn.2d 694 (2013). Using the joint employer doctrine, the court expanded the liability of companies for coverage of the employees of independent contractors.	Supported Result	<b>Owens Madsen Johnson Fairhurst</b>	Wiggins Gordon-McCloud Gonzalez Stephens

<b>Workers' Compensation Issues (cont'd)</b>	<b>WSIA position</b>	<b>Current Justices voting for result</b>	<b>Current Justices opposing result</b>
<i>Walston v. Boeing</i> , 181 Wn.2d 391 (2014). The court preserved the integrity of the Industrial Insurance Act's exclusive remedy provision by refusing to apply a substantial expansion to the "deliberate intent to injure" exception. <i>WSIA filed an amicus curiae brief in Walston.</i>	Supported Result	<b>Owens Madsen Johnson Fairhurst</b>	Wiggins Gordon-McCloud Gonzalez Stephens
<i>Gorre v. City of Tacoma</i> , 184 Wn.2d 30 (2015). The court refused to expand the conditions for which firefighters have a presumption of occupational disease beyond the list of statutorily enumerated conditions. <i>WSIA filed an amicus curiae brief in Gorre.</i>	Supported Result	<b>Yu Madsen Owens Fairhurst Stephens Wiggins Gonzalez</b>	Johnson Gordon-McCloud
<i>Demetrio v. Sakuma Bros Farms, Inc.</i> , 183 Wn.2d 649 (2015). The court complicated the calculation of workers' compensation benefits for agricultural workers by adopting a complicated scheme for figuring paid rest breaks for workers paid on a piece rate.	Opposed Result	Yu Madsen Johnson Owens Fairhurst Wiggins Gonzalez Gordon-McCloud Stephens	
<i>Labor &amp; Industries v. Rowley</i> , 185 Wn.2d 186 (2016). The court maintained the preponderance-of-the-evidence standard for proving that the commission of a felony bars entitlement to workers' comp benefits.	Supported Result	<b>Gordon-McCloud Johnson Owens Stephens Gonzalez Yu Madsen Fairhurst</b>	



Workers' Compensation Issues (cont'd)	WSIA position	Current Justices voting for result	Current Justices opposing result
<i>Clark County v. McManus</i> , ___ Wn.2d ___ (April, 2016). The court held it is an abuse of discretion for a trial court not to give the “special consideration” rule for attending physician testimony.	Opposed Result	Johnson Madsen Owens Fairhurst Wiggins Gonzalez Gordon-McCloud Stephens Yu	
<i>Kovacs v. Labor &amp; Industries</i> , ___ Wn.2d ___ (July, 2016). The court interpreted the one year statute of limitations for injury claims to start on the day following injury, according to general litigation principles rather than prior judicial and Board precedent.	Opposed Result	Gonzalez Madsen Johnson Owens Fairhurst Stephens Wiggins Gordon-McCloud Yu	



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***Our mission:*** “To help members successfully implement and operate workers’ compensation and workplace safety programs, to keep Washington employees safe, healthy, and working.”

