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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY   
DEPUTY

No. 45692-3-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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PATRICK J. BIRGEN,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF  
THE STATE OF WASHINGTON,

Respondent,

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APPELLANT'S REPLY BRIEF

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**ORIGINAL**

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**I. ARGUMENT IN RESPONSE TO THE RESPONDENT,  
DEPARTMENT OF LABOR AND INDUSTRIES**

**A. MR. BIRGEN'S PAST WAGES, WHEN CALCULATING  
THE SOCIAL SECURITY OFFSET, SHOULD BE  
UPDATED.**

In support of its position that there is no basis for updating, or adjusting, Mr. Birgen's wages when it calculates and applies the social security offset provisions of the Industrial Insurance Act (the Act), the Department cites a Social Security Administration Program Operations Manual System (POMS) that instructs its social security administration staff on calculating the average current earnings figure (ACE). Respondent Brief at 11. The Department points out that this POMS does not provide for indexing earnings when determining the ACE. *Id.*

While these manuals may be entitled to respect to the extent it provides a persuasive interpretation of an *ambiguous* regulation, they do not carry the force and effect of law. *See Carillo-Yeras v. Astrue*, 671 F.3d 731, 735 (9<sup>th</sup> Cir. 2011) (emphasis added). The Department's reliance on this manual and its interpretation on how to calculate the ACE shows that 42 U.S.C. § 424a is not unambiguous and is subject to more than one interpretation regarding whether or not to index or update the old earnings.

Moreover, the effective date of the POMS is September 13, 2012 to the present. Respondent Brief at appendix 1, pg. 1. The Department order on appeal in this case is dated April 5, 2012. CP at 84. Thus, reliance should not be placed on this POMS which was not in effect at the time of the Department's offset calculations.

The Department has the benefit of the offset and itself applies it because of Washington's RCW §§ 51.32.220 and 51.32.225. The POMS do not, and could not, instruct the Department on how to calculate the offset it is taking under Washington law. In calculating and applying the social security offset provisions of the Act, based on the underlying purposes and policies of the Act, the Department should have taken Mr. Birgen's antiquated 1983 earnings and updated, or adjusted, them to accurately determine his entitlement to benefits under the Act.

The Department also argues that the plain language of 42 U.S.C. § 424a(a)(8) is clear because it uses the phrase "calendar year" as the time that the wages are to be based upon. Respondent Brief at 13-14. However, the plain meaning of the phrase "calendar year" points to a specific twelve month period to look at as opposed to any twelve month period which would constitute a year.

This does not indicate that the calendar year, as the starting point for comparing wages and earnings, should not be updated, or adjusted, to a

truly comparable value in order to assess which calendar year has the highest earnings, which ACE figure is actually the highest, and what is properly the most amount of benefits an injured worker can receive under both programs. The underlying policies and purposes of the Act leads to the conclusion that updating these outdated earnings in an effort to minimize the economic harm and loss suffered by workers injured in Washington State is the correct application of the Act's social security offset provisions.

**B. The Act as a Whole Supports Updating or Adjusting Outdated Earnings in Calculating and Applying Washington's Offset**

The Department also acknowledges that the Industrial Insurance Act, like the Social Security Act, provides for updating benefits to account for inflation. Respondent Brief at 23. However, the Department argues that the acts do not provide for updating the wages that are used to initially calculate the injured worker's basic benefit amount. *Id.* While this may be true, it misconstrues Mr. Birgen's argument. Mr. Birgen is not seeking that his basic benefit amount be updated or adjusted. Indeed, his basic benefit amount is essentially updated or adjusted through RCW § 51.32.075 with its cost of living adjustments.

What Mr. Birgen is seeking is that, in calculating and applying the social security offset provisions of the Act, his outdated and antiquated

earnings be updated or adjusted such that an accurate determination can be made regarding his ACE and to make sure that he does not suffer unnecessary and unjust economic harm and loss as a result of his workplace injury in Washington.

Additionally, other areas of the Act have been interpreted as needing outdated wages or earnings to be updated, or adjusted, to determine an accurate amount of benefits to be provided, such as with loss of earning power benefits, which further supports that such an adjustment should be made when applying the social security offset provisions of the Act. This is due to the underlying purpose and policies of the Act to avoid economic harm to injured workers. *See e.g.* RCW § 51.12.010. That clear policy should be enforced through the updating, or adjusting, of prior earnings when calculating and applying the Act's social security offset provisions.

## II. CONCLUSION

Mr. Birgen respectfully requests that the Court reverse the Superior Court's affirmance of the Board's Decision and Order, which determined that the Department correctly calculated the ACE figure and applied the social security offset under the Act and that he was not entitled to require the Department to adjust his prior earnings, and remand this matter with instructions to the Department to calculate his pension benefit amount by

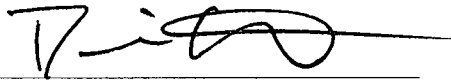
applying the social security offset with updated, or adjusted, values for his prior earnings to a present day value when applying the offset.

Mr. Birgen further requests attorney's fees pursuant to RCW § 51.52.130.

Dated this 14<sup>th</sup> day of August, 2014.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and  
ASSOCIATES

By: \_\_\_\_\_

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**CERTIFICATE OF MAILING**

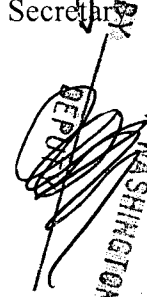
SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 15th day of August, 2014, the document to which this certificate is attached, Appellant's Reply Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

John S. Barnes  
Office of the Attorney General  
P.O. Box 40121  
Olympia, WA 98504-0121

DATED this 15<sup>th</sup> day of August, 2014.

  
LYNN M. VENEGAS, Secretary

  
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