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No. 45692-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

PATRICK J. BIRGEN,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent,

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER

Comes now the petitioner, Patrick J. Birgen, Appellant and Plaintiff below, by and through his attorney of record, Dorian D.N. Whitford of the Law Offices of David B. Vail, Jennifer Cross-Euteneier and Associates, and hereby asks this court to accept review of the Court of Appeals' decision terminating review.

II. DECISION PRESENTED FOR REVIEW

Mr. Birgen seeks review of Opinion No: 45692-3-II. The Court of Appeals, Division II, filed its opinion on April 7, 2015 and filed its Order Granting Motion for Reconsideration and Amending Opinion on May 19, 2015.

III. ISSUE

Whether the Court of Appeals erred by affirming the Superior Court's decision that the Department of Labor and Industries is not required to adjust Mr. Birgen's past earnings to present value when calculating and applying the State of Washington's social security offset provisions in RCW § 51.32.220 and RCW § 51.32.225?

IV. STATEMENT OF THE CASE

This case originates under RCW Title 51, the Industrial Insurance Act ("the Act") from an administrative law review appeal from a February 7, 2013 Decision and Order of the Board of Industrial

Insurance Appeals ("the Board") which granted summary judgment for the Department of Labor and Industries ("the Department"), despite the fact that a cross motion for summary judgment had not been filed, finding that the Department properly applied the State of Washington's social security offset provisions in calculating Mr. Birgen's workers' compensation benefits.

When an injured worker is receiving monetary benefits under his workers' compensation claim, such as total disability benefits, and is also receiving monetary benefits from the Social Security Administration, such as disability or retirement benefits, the Department reduces, or offsets, the amount of benefits it provides an injured worker under RCW § 51.32.220 or RCW § 51.32.225. These Washington statutes look at the federal statute, 42 U.S.C. § 424a in applying the offset.

Here, Mr. Birgen suffered an industrial injury while working for the Boise Cascade Corporation on February 2, 1984. CP[1] 79. He filed a claim, which was allowed, and Mr. Birgen was ultimately determined to be a permanently and totally disabled injured worker as of July 19, 1991. CP. At 82. As a result of this determination, Mr. Birgen was

[1] The record of proceedings in this case is the Clerk's Papers. This will be cited CP.

entitled to monthly monetary benefits for the rest of his life. RCW § 51.32.060, RCW § 51.08.160.

Over twenty-eight years after his industrial injury, the Department issued a March 5, 2012 order which offset Mr. Birgen's pension[2] benefits based on his receipt of social security benefits. CP at 62. The Department determined that Mr. Birgen's new monthly benefit amount would be $2,081.42 based on his receipt of social security benefits in the amount of $830 per month and due to his highest year's earnings of $30,965 for the year 1983. *Id.*

The Department applied the offset of Mr. Birgen's workers' compensation benefits, but did so by using his antiquated 1983 earnings figure when arriving at his "average current earnings" to determine the maximum amount of benefits Mr. Birgen could receive in combined workers' compensation and social security benefits.

Mr. Birgen protested this calculation method arguing that the Department incorrectly applied the State of Washington's offset provisions because it did not update, or adjust, his prior earnings to a present day value when determining his benefits in light of the social

[2] In the parlance of worker's compensation practitioners, permanent total disability benefits are referred to as pension benefits. Additionally, the Superior Court's finding of fact 1.1 erroneously designates these benefits as time-loss compensation benefits instead of pension benefits. However, this error does not materially change the analysis.

security offset as supported by the purposes, policies, and analogous interpretations of the Act. After the Department affirmed its offset order, Mr. Birgen appealed and made his arguments to the Board. CP at 65, 102-109, 155-167.

The Board concluded that the Department correctly calculated Mr. Birgen's social security offset under the Act and Mr. Birgen was not entitled to require the Department to update, or adjust, his antiquated earnings figure used to calculate his benefits with the social security offset.

Mr. Birgen appealed that decision to Superior Court asserting that the Board had legally erred in not requiring the Department to update his 1983 earnings figure to its present day value when calculating the social security offset as a result of the Board's misapplication of the law and policy of the Act.

The Superior Court affirmed the Board's decision after considering briefing and oral argument. Judgment was entered on November 15, 2013. Mr. Birgen appealed that decision to the Court of Appeals, Division II. The Superior Court's decision was affirmed. Appendix A1.

Mr. Birgen now petitions the Supreme Court for review and requests, that the Court of Appeals' opinion be reversed, and this matter be

remanded to the Department to update, or adjust, his antiquated 1983 earnings figure to a present day value when calculating and applying the State of Washington's social security offset provisions, in order to adhere to the underlying purpose and policy of the Act of reducing the economic harm to injured workers in the State of Washington.

The Court of Appeals' opinion, which affirmed the Superior Court's decision, undercuts the purpose and policy of the Act by holding that Mr. Birgen is not entitled to have the Department update, or adjust, his 1983 earnings which thereby, causes Mr. Birgen, and similarly situated injured workers in the State of Washington, to suffer an unnecessary and unjust economic loss. The Court of Appeals' interpretation of the statutes in this matter is inconsistent with the Act's stated policy. This is a matter of substantial public interest that affects many injured workers in the State of Washington.

V. ARGUMENT

The Supreme Court should accept review, pursuant to RAP 13.4(b)(4). This case involves an opinion of the Court of Appeals dealing with the legal issue of whether, in applying the State of Washington's social security offset provisions, the Department should update, or adjust, outdated earnings in order to avoid the harsh economic result to injured workers by using such outdated earnings in contradiction to the underlying and

overarching polices and purposes of the Act. As such, the Court of Appeals' opinion addresses an issue that has substantial public interest as it relates to injured workers in the State of Washington.

A. Introduction: The Social Security Offset Provisions of the Industrial Insurance Act.

Under the Social Security Act ("SSA"), a reduction is made in disability benefits if the recipient of such benefits is also entitled to disability benefits under a workers' compensation law. 42 U.S.C. § 424a(a)(2)(A). The injured worker is entitled to receive benefits from both programs, but the worker cannot receive the full benefits from both programs if the aggregate of the benefits under both programs exceeds 80 percent of the worker's "average current earnings" ("ACE"). 42 U.S.C. § 424a(a).

The ACE figure is the highest of three figures. *Id.* Those figures are 1) the average monthly wage used for determining the amount of social security disability benefits; 2) one-sixtieth of the total earnings for a consecutive five year period; and 3) one-twelve of the total earnings for the calendar year in which the worker had the highest earnings during the five years preceding the year in which the worker became disabled. *Id.* The reduction of benefits under the SSA cannot be such that the combined

amount of benefits under both programs is less than the total amount of benefits due under the SSA if there had been no reduction. *Id.*

As was concisely stated in *Herzog v. Dep't of Labor and Indus.*, 40 Wn. App. 20, 21-2, 696 P.2d 1247 (1985):

> Some recipients of worker's compensation disability payments are entitled to social security payments. When this is so, Federal law prohibits the combined benefits from exceeding 80 percent of the recipient's average current earnings at the time the disability was suffered. Combined benefits exceeding this level must be reduced. Federal law permits a state to take full advantage of this by permitting the reduction to be taken entirely from the state benefits. Washington has accepted this largesse by the enactment of RCW § 51.32.220.

The Act contains two provisions allowing the Department to reduce or "offset" a person's total disability benefits, whether temporary or permanent, if that person also receives social security disability benefits (RCW § 51.32.220) or also receives social security retirement benefits (RCW § 51.32.225).

Both of these Washington State statutes provide that the total disability benefits shall be reduced by the amount of social security benefits payable but not to exceed the amount of the reduction in 42 U.S.C. § 424a. RCW § 51.32.220(5) further provides that any reduction cannot reduce the total benefits received under both programs to an amount which would be less than the injured worker would receive in the absence of an offset under

either program. Thus, the maximum amount of benefits an injured worker can receive in combined benefits is the larger of: the social security monthly benefit, 80 percent of the ACE figure, or the workers' compensation monthly benefit.

Here, the Department determined that Mr. Birgen's ACE figure was derived from the third possible ACE option above, namely one-twelfth of his highest year's earnings of $30,965 for 1983, the year immediately preceding his industrial injury, or $2,580 per month. 80 percent of this amount is $2,064. The Department then compared this amount with his monthly $830 entitlement to social security benefits and his pension benefit amount of $2,911.42[3].

Thus, the Department determined that the maximum amount Mr. Birgen could receive was his pension benefit amount of his workers' compensation benefits and just reduced this amount, dollar for dollar, with the amount of his social security benefits. Per the Department's order under appeal, Mr. Birgen's new pension benefit amount, after applying the social security offset, was $2,081.42.

When it calculated and applied the social security offset, had the Department updated, or adjusted, Mr. Birgen's outdated 1983 earnings

[3] This figure is determined based on the Department's March 5, 2012 order which reduced Mr. Birgen's pension benefits by the amount of his monthly social security benefit ($830+$2,081.42=$2,911.42).

figure to a present day value to compare it to his present day value pension benefit amount, thereby comparing apples to apples, it could have determined that the ACE figure was actually the maximum benefit Mr. Birgen could receive such that he could have received benefits under both programs without the entire social security benefit being offset from his pension benefits. This method would serve to avoid unnecessary economic loss to injured workers in the State of Washington.

For example, if the Department indexed the 1983 earnings figure to bring it up to a 2012 value and that would have resulted in a monthly, or one-twelfth amount of $4,000. This would be the ACE figure. 80 percent of that figure would be $3,200. Comparing this figure to Mr. Birgen's social security benefits of $830 and his pension benefits of $2,911.42, leads to the conclusion that this 80 percent ACE figure is the maximum amount of benefits he can receive under both programs.

Therefore, under this scenario, Mr. Birgen would receive his entire social security benefit and also receive $2,370 in pension benefits[4]. This is more than the $2,081.42 per month in pension benefits the Department determined he was entitled to.

[4]This is arrived at by taking the maximum amount ($3,200) minus social security benefits ($830) to arrive at the remaining amount the Department would provide to bring Mr. Birgen up to the maximum he could receive. The Department would still be offsetting $541.42 in social security benefits. ($2,911.42-$2,370).

B. The Underlying Purpose of the Act Supports Adjusting Injured Workers' Prior Earnings to Determine Their ACE Figure When Determining the Compensation Amount in Light of the Social Security Offset.

The Industrial Insurance Act was established to protect and provide benefits for injured workers. It has been held for many years that the courts and the Board are committed to the rule that the Act is remedial in nature and its beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Dep't of Labor and Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963).

Furthermore, RCW § 51.04.010 declares that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault." Similarly, RCW § 51.12.010 indicates that the Act "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." Thus, any doubts that arise when interpreting or applying the Act must be resolved in favor of the worker. *Clauson v. Dep't of Labor and Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

From these statements of policy and interpretations of the Act it is clear that the overarching purpose of the Act is to minimize suffering and economic loss by injured workers and their families and that when the Act

is interpreted, or when questions arise as to how the Act should be applied in a given situation, the Act should be construed liberally to reach a favorable outcome for the injured worker. *See e.g. Wilber*, 61 Wn.2d at 446.

For all injured workers, these guiding principles are critical to interpretation of statutes in cases such as Mr. Birgen's. It is necessary to keep them in mind when considering this case regarding statutory language and the economic loss suffered by Mr. Birgen, and similarly situated injured workers. When the language of a statute is at issue, its interpretation should be consistent with the spirit or stated purpose of related statutes. *See Nationscaptial Mortg. Corp. v. Dep't of Fin. Inst.*, 133 Wn. App. 723, 736-37, 137 P.3d 78 (2006). In order to effectuate the purposes of the Act and reduce the economic harm suffered by Mr. Birgen, and similarly situated injured workers, the Department should be required to update, or adjust, prior earnings to a present day value when calculating and applying the Act's social security offset.

C. Mr. Birgen's Earnings From 1983 Should be Adjusted To Reflect the Value of What Those Earnings Would Be in the Year 2012 When the Department Actually Applied the Offset and Adjusted his Compensation Benefits.

In order to accurately identify the maximum amount of benefits Mr. Birgen can receive under both programs, and in so doing reduce to a

minimum the economic suffering he experiences as a result of his industrial injury, the Department should have adjusted his prior earnings over his earning history to the baseline year, 2012, the year the Department applied the offset. By adjusting each year's earnings to the equivalent value in a single year, the Department would be able to more accurately assess what year Mr. Birgen actually made the most, or which five year period Mr. Birgen actually earned the most. With the cost-of-living increases of RCW § 51.32.075, Mr. Birgen's pension benefits are already adjusted, or updated to a present day value. With an adjustment to Mr. Birgen's 1983 earnings, the Department would be comparing apples to apples as opposed to apples to oranges, so to speak. The Department can then accurately determine Mr. Birgen's ACE figure and compare 80 percent of that to the benefits he is entitled to from social security and what he is entitled to under the Act in order to ensure Mr. Birgen does not suffer unjust economic loss. This way Mr. Birgen, and similarly situated injured workers would not suffer unnecessary economic harm as a result of industrial injuries in our state, which is to be avoided.

As a further example, if Mr. Birgen had made $30,000 several years prior to 1983, if that were adjusted to reflect equivalent earnings for the year 2012, and the earnings of $30,965 from 1983 were adjusted to a 2012 value, the Department may have found that the value of Mr. Birgen's

earnings several years prior to 1983 were actually higher than his earnings in 1983 (despite the fact, all things being equal $30,000 is less than $30,965).

In this example, the Department would have to use the adjusted value of the earlier year's earnings rather than the adjusted value of the 1983 earnings when determining Mr. Birgen's ACE figure. This would then be compared to Mr. Birgen's entitlement benefits to see what the maximum amount of benefits he was entitled to receive. Proceeding in this fashion reduces the economic loss and the harm which is to be avoided to injured workers.

As a result, when reviewing one's earnings to be used in calculating the ACE figure, the Department should adjust all of those earnings to reflect an equivalent value in the year in which the Department applies the offset. Thereby, the Department would be able to compare apples to apples, allowing the Department to determine what year, or years[5], the individual actually earned the most and use that figure to avoid unnecessary economic loss and harm.

1. Considering the Act as a Whole and the Policies Underlying the Act Show that the Court of Appeals Should have Required the Department to Make this Adjustment.

[5] The example also applies to the second method of determining the ACE figure, by taking one-sixth of a five year period where the injured worker was making the most earnings.

Numerous Washington courts have upheld the rule of statutory construction that "a statute should be construed consistently with the purpose of the act as a whole and with the declarations of policy within the act itself [...]" *Allan v. Dep't of Labor and Indus.*, 66 Wn. App. 415, 418, 832 P.2d 489 (1992) (citations omitted), *see also Weyerhaeuser Co. v. Tri,* 117 Wn.2d 128, 133, 814 P.2d 629 (1991) (citation omitted) ("each provision of the statute should be read in relation to the other provisions, and the statute should be construed as a whole").

As noted above, in the course of interpreting the Act, Washington courts have held that all doubts as to the meaning of the Act are to be resolved in favor of the injured worker. *Shafer v. Dep't of Labor and Indus.*, 140 Wn. App. 1, 7, 159 P.3d (2007) (quoting *Clauson v. Dep't of Labor and Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

The Act also contains an explicit declaration of policy to minimize the suffering and economic loss arising from injuries. RCW § 51.12.010. Hence, the State of Washington's social security offset provisions of the Act should be liberally construed to minimize the suffering and economic loss to injured workers.

That is to say, when those provisions are interpreted in light of the Act as a whole and in light of its underlying policies, the Department should adjust all of the injured worker's prior earnings to reflect an equivalent

value in the year in which the Department is applying the offset and determining how much compensation to provide the injured worker when they are receiving benefits under both workers' compensation and social security programs. Additionally, where the Act is ambiguous, policy considerations should guide the interpretation. *Allan v. Dep't of Labor and Indus.*, 66 Wn. App. at 418 (citations omitted).

Neither the Act's offset provisions nor 42 U.S.C. § 424a provide any indication whether or not the "average current earnings" (or the earnings underlying one's "average current earnings") should be adjusted to reflect the change in the value of a dollar at the time the average current earnings are being calculated and determined. As a result of this ambiguity, the Court must look to the policies underlying the Act for guidance in interpreting these provisions. Doing so leads to the same conclusion as when the provisions are interpreted in light of the other provisions of the Act (because the Act contains explicit declarations of policy, as discussed above). Thus, the Court is again led to the conclusion that the social security offset provisions of the Act should be liberally construed to minimize the suffering and economic loss of injured workers, which would mean the earnings used to calculate one's average current earnings should be adjusted to what their value would be in the year in which the Department performs the offset calculations.

In Mr. Birgen's case, and similarly situated injured workers who are subject to the State of Washington's social security offset statutes, the Department deviated from the purposes of the Act when applying the social security offset provisions in the way it did. By using a stale monetary value that was 29 years old when calculating Mr. Birgen's average current earnings rather than using a present day equivalent of such monetary value, Mr. Birgen suffers a substantial loss, which the Act instructs should be avoided. RCW § 51.12.010. Thus, the Department should consider the extent of the increase in the value of a dollar between 1983 and 2012, and adjust Mr. Birgen's average current earnings accordingly and should do so for others similarly situated.

2. There are Other, Similar Contexts in Which the Act has Been Interpreted to Require Adjustments of Benefits to Account for Factors Such as Inflation.

Furthermore, in similar scenarios, the Courts, the Board, and the Department have recognized the need to adjust monetary values over time in order to properly compensate injured workers in accordance with the purposes of the Act. For example, when an injured worker is entitled to loss of earning power benefits, the Board has recognized that "[i]t is proper to consider what a worker's earnings were at the time of his industrial injury and to establish the extent of increase, if any, which has occurred in

earnings paid for such employment since the industrial injury [....]". *In re Chester Brown*, Dckt. No. 88 1326 (June 29, 1989).

This approach has been affirmed by the Washington Court of Appeals. *See e.g. Hunter v. Dep't of Labor and Indus.*, 43 Wn.2d 696, 263 P.2d 586 (1953); *see also Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1289 (9th Cir. 1983) ("[T]he purpose of workers' compensation benefits is to reflect future earning capacity rather than wages earned in past employment [....]"). Just as the Department adjusts the underlying wages of an injured worker from the wages at the time of injury to what the wages would be at the later time when loss of earning power benefits are calculated, so should the Department adjust Mr. Birgen's underlying highest year's earnings from $30,965.00 in 1983 to what the value would be in 2012 when calculating his average current earnings.

Another portion of the Act suggesting that the Department should adjust Mr. Birgen's 1983 earnings to reflect what equivalent earnings would be in 2012 is RCW § 51.32.075. This section of the Act provides for cost-of-living increases in pension as well as other benefits. *Id.* This portion of the Act recognizes that the value of a dollar changes over time, and when benefits are calculated based on a dollar-value long in the past, that underlying dollar-value must be brought up to date.

The same reasoning should be applied in Mr. Birgen's case. Rather than using the monetary value of Mr. Birgen's highest year's earnings from 29 years ago when calculating his average current earnings, the Department should use the present day equivalent of his highest year's earnings.

Given the examples of adjustment of loss of earning power benefits and cost-of-living increases for other benefits under the Act, it would be unreasonable to argue that similar adjustments to the value of an individual's highest year's earnings or average current earnings for purposes of the social security offset under the Act should not be made. In order to interpret the Act's social security offset provisions consistently with the other provisions of the Act and consistently with the policies underlying the Act, Mr. Birgen's earnings should have been adjusted from 1983 to reflect what would be equivalent earnings in 2012, the year in which the Department calculated and applied the offset.

D. This Case Involves a Substantial Public Interest in Protecting All Injured Workers From Suffering Unnecessary and Unjust Economic Harm.

This case involves a substantial public interest that should be decided by the Supreme Court. There is a substantial public interest in protecting workers injured in the State of Washington as well as protecting their economic livelihood and reducing to a minimum the economic harm

that results from industrial injuries. This Court noted in *Cockle v. Dep't of Labor and Indus.*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001) that "Title 51's overarching objective is 'reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment."

This case serves as an example of how injured workers can suffer unnecessary and unjust economic harm as a result of an industrial injury. Mr. Birgen's benefit amount is kept down due to an outdated 1983 figure used in applying the State of Washington's social security offset provisions. This is compared to his 2012 pension benefit figure, which with the benefit of cost-of-living adjustments over the years, is typically going to be the larger figure. But this is comparing apples to oranges. Both figures should be adjusted to 2012 dollars to determine which figure is actually the larger figure.

Injured workers should not be penalized for suffering an industrial injury. Injured workers on total disability benefits rely on those benefits for their livelihood. Ensuring that unnecessary and unjust economic harm is avoided is critical to injured workers' survival on disability benefits. This can be avoided by updating, or adjusting, an injured worker's outdated earnings when applying and calculating the State of Washington's social security offset provisions. This is consistent with the primary purpose of

the Act and other areas of the Act. Protecting injured workers' economically is a substantial public interest. For these reasons, this Petition should be granted and the Court of Appeals' opinion should be reversed.

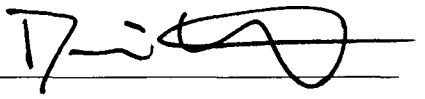
VI. CONCLUSION

Mr. Birgen respectfully requests that this Petition be accepted and the Court of Appeals' opinion in his case be reversed with this matter being remanded back to the Department to apply the State of Washington's statutes providing for an offset of workers' compensation benefits for the receipt of social security benefits with the express purposes and policies of the Industrial Insurance Act being fully realized by updating, or adjusting, his outdated 1983 earnings to a present day figure to compare apples to apples. Lastly, Mr. Birgen also respectfully requests fees and costs to be awarded pursuant to RCW § 51.52.130.

Dated this 17th day of June, 2015.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and ASSOCIATES

By: 

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent,

v.

PATRICK J. BIRGEN,

Appellant.

No. 45692-3-II

ORDER GRANTING MOTION FOR RECONSIDERATION AND AMENDING OPINION

The respondent Department of Labor & Industries requests reconsideration of the published opinion filed by this court on April 7, 2015, contending that this court applied an incorrect standard of review in its opinion. In response, appellant Birgen agrees that this court applied an incorrect standard of review.

The court grants respondent's motion for reconsideration in part and amends the opinion as follows:

1. On page 2, line 5, delete "the Board and."

2. On page 3, delete lines 12-22, and replace with:

"The ordinary civil standard of review governs appeals of proceedings under the Industrial Insurance Act, Title 51 RCW. RCW 51.52.140. As a result, we review the superior court's decision rather than the Board's decision. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009) (footnote omitted). Our review is the same as in any other civil case: we determine whether substantial evidence supports the superior court's findings and whether those findings support the superior court's conclusions of law. *Id.* And we review the superior court's legal conclusions de novo. *Id.*"

3. On page 4, line 5, delete "the Board and."

4. On page 12, line 1, delete "the Board and."

IT IS SO ORDERED.

DATED this 19TH day of MAY, 2015.

MAXA, P.J.

We concur:

LEE, J.

MELNICK, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PATRICK J. BIRGEN, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	No. 45692-3-II PUBLISHED OPINION

MAXA, P.J. — Patrick Birgen appeals the superior court's order affirming a Board of Industrial Insurance Appeals (Board) decision that the Department of Labor and Industries (DLI) properly calculated the amount by which his workers' compensation disability benefits must be offset by his federal social security benefits. Under RCW 51.32.220, a claimant's workers' compensation disability benefits must be reduced by the amount that person receives in social security benefits or by an amount calculated under 42 U.S.C. § 424a(a), whichever is less. The amount of the offset under 42 U.S.C. § 424a(a) generally is the amount by which a claimant's combined monthly disability and social security benefits exceed 80 percent of the claimant's "average current earnings," which usually is one-twelfth of the claimant's highest annual earnings during the year of disability or the preceding five years.

DLI calculated Birgen's offset under 42 U.S.C. § 424a(a) based on his 1983 earnings. Birgen argues that DLI was required to adjust his 1983 earnings to present value – i.e., 2012

dollars – when calculating his offset. He claims that this present value adjustment would have lowered the amount of the offset. Both the Board and the superior court rejected this argument. We agree with the Board and the superior court, and hold that RCW 51.32.220 and 42 U.S.C. § 424a(a)(8) unambiguously require that the offset for social security benefits be calculated using Birgen's unadjusted 1983 income. Accordingly, we affirm the Board and the superior court.

FACTS

Birgen sustained an industrial injury in 1984 and filed a workers' compensation claim. DLI allowed his claim, and ultimately determined that he was permanently and totally disabled as of July 1991. As a result, Birgen was entitled to receive monthly workers' compensation benefits for the remainder of his life. By 2012, those disability payments were $2,911.42 per month.

In 2012, DLI learned Birgen also was receiving social security benefits of $830 per month. It issued an order offsetting Birgen's workers' compensation benefits by that amount, resulting in a new monthly disability payment of $2,081.42. The order states that the offset was based on Birgen's social security payments of $830 and his highest year earnings of $30,965 for 1983.[1] Birgen requested that DLI reconsider its order. After reconsidering the order, DLI determined it was correct and affirmed the order.

Birgen filed an appeal with the Board and the case was assigned to an industrial appeals judge (IAJ). Birgen did not dispute on appeal that his social security offset should be based on

[1] Presumably, DLI followed RCW 51.32.220 and calculated the amount of the offset under 42 U.S.C. § 424a(a) based on the $30,965 earnings and compared that to Birgen's social security payments of $830. DLI apparently found that Birgen's monthly social security benefit was the lesser number, and reduced Birgen's workers' compensation benefits by $830.

his 1983 earnings. Instead, he argued that DLI should have adjusted the amount of his 1983 earnings to their present value in calculating the offset. Birgen filed a motion for summary judgment on this issue. The IAJ ruled that DLI was not required to adjust Birgen's 1983 earnings to present value, and that DLI was entitled to summary judgment even though it did not file a cross motion.

Birgen appealed to the Board. The Board affirmed DLI's order, ruling that DLI correctly calculated Birgen's social security offset. Birgen appealed to the superior court, which affirmed the Board's order and decision.

Birgen appeals.

ANALYSIS

A. STANDARD OF REVIEW

The Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of the Board's decision in a workers' compensation case. RCW 51.52.140; *see Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 657, 219 P.3d 711 (2009). We review the agency record rather than the trial court record. *Eastwood*, 152 Wn.2d at 657. We review the Board's findings of fact for substantial evidence, which is evidence sufficient to persuade a fair-minded person of the declared premise. *Id.* We review the Board's legal conclusions de novo, but we give "substantial weight to the agency's interpretation when the subject area falls within the agency's area of expertise." *Dep't of Labor & Indus. v. Mitchell Bros. Truck Line*, 113 Wn. App. 700, 704, 54 P.3d 711 (2002). On appeal, "[t]he burden of proving that the agency action was invalid . . . lies with the party challenging the action." *Mader v. Health Care Auth.*, 109 Wn. App. 904, 911, 37 P.3d 1244 (2002), *reversed in part on other grounds*, 149 Wn.2d 458 (2003).

B. CALCULATING THE SOCIAL SECURITY OFFSET

Birgen challenges DLI's calculation of his social security offset. He argues that under 42 U.S.C. § 424a(a) the term "average current earnings" is ambiguous because the term fails to state whether the DLI must adjust a claimant's wages for inflation. We hold that 42 U.S.C. § 424a(a) is not ambiguous and affirm the Board and the superior court.[2]

1. Legal Principles

Under RCW 51.32.220, a claimant's workers' compensation disability benefits must be reduced by the amount that person receives in social security benefits or by an amount calculated under 42 U.S.C. § 424a(a), whichever is less.[3] 42 U.S.C. § 424a(a)(2)-(6) provides that the amount of the offset is the amount by which a person's combined monthly disability and social

[2] Birgen assigns error to the Board's determination that DLI was entitled to summary judgment even though it had not filed a cross motion for summary judgment. Birgen fails to support this assignment of error with argument as required by RAP 10.3(a)(6). *Skagit County Pub. Hosp. Dist. No. 1 v. Dep't of Revenue*, 158 Wn. App. 426, 440, 242 P.3d 909 (2010). Accordingly, we decline to consider this argument further.

[3] The record is unclear on whether Birgen received social security *disability* or social security *retirement* benefits under 42 U.S.C. § 424(a)(a). Because he received a type of social security benefit, DLI is authorized by either RCW 51.32.220 (social security disability benefits) or RCW 51.32.225 (social security retirement benefits) to offset Birgen's workers' compensation benefits. The parties recognized that our analysis would not differ under either statute. For clarity, we refer only to RCW 51.32.220 but recognize that our analysis would be the same under RCW 51.32.225.

security benefits exceed 80 percent of that person's "average current earnings".[4] 42 U.S.C. § 424a(a)(8) defines "average current earnings" as the largest of three different amounts, which in most situations is one-twelfth of the person's highest annual earnings in the year of disability or in the preceding five years.

Using Birgen's 1983 earnings without adjustment for present value results in an amount calculated under 42 U.S.C. § 424a(a) that is greater than the $830 he received in social security benefits. Birgen claims that if his 1983 earnings were increased to present value, the amount of the offset under 42 U.S.C. § 424a(a) would be lower than $830.

2. Adjustment of Average Current Earnings to Present Value

Birgen argues that 42 U.S.C. § 424a(a)(8)'s definition of "average current earnings" is ambiguous with respect to whether a claimant's highest annual earnings should be adjusted to present value. We disagree.

a. Statutory Interpretation

Statutory interpretation is a question of law that we review de novo. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014). The goal of statutory interpretation is to determine and give effect to the legislature's intent. *Id.* at 762. To determine legislative intent, we first look to the plain language of the statute. *Id.* We consider the meaning of the provision in

[4]Federal law allows the federal government to reduce the amount of social security benefits it pays to a worker under the age of 65 who also receives state disability benefits. 42 U.S.C. § 424a. This process eradicates the potential problem of a worker being financially better off disabled than if he or she returned to work. 42 U.S.C. § 424a(d) contains an exception to the general offset rule; it allows for a "reverse offset" if a state passes enabling state legislation. *Frazier v. Dep't of Labor & Indus.*, 101 Wn. App. 411, 416, 3 P.3d 221 (2000). RCW 51.32.220 and .225 were passed by the Washington legislature to take advantage of this reverse offset provision. *Id.*

question, the context of the statute in which the provision is found, and related statutes. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). If a statute is unambiguous, we must apply the statute's plain meaning as an expression of legislative intent without considering other sources of such intent. *Jametsky*, 179 Wn.2d at 762.

If the plain language of the statute is susceptible to more than one reasonable interpretation, the statute is ambiguous. *Id.* But a statute is not ambiguous merely because different interpretations are conceivable. *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). We resolve ambiguity by considering other indications of legislative intent, including principles of statutory construction, legislative history, and relevant case law. *Jametsky*, 179 Wn.2d at 762.

We do not rewrite unambiguous statutory language under the guise of interpretation. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). Similarly, we "must not add words where the legislature has chosen not to include them." *Rest. Dev., Inc. v. Canalwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 589 (2003). Instead, we construe statutes assuming that the legislature meant exactly what it said. *In re Marriage of Herridge*, 169 Wn. App. 290, 297, 279 P.3d 956 (2012).

b. Plain Language of Statutes

Our analysis must start with the plain language of the relevant statute. *Jametsky*, 179 Wn.2d at 762. The relevant statute here is RCW 51.32.220, which allows DLI to take an offset if the claimant is receiving social security benefits. However, RCW 51.32.220 provides that the offset may depend on a calculation based on 42 U.S.C. § 424a(a). Therefore, we must analyze the language of both statutes.

The question here is whether a claimant's highest annual earnings in the year of disability or in the five preceding years, which is used to calculate the offset under 42 U.S.C. § 424a(a), must be adjusted to present value before performing the offset calculation. The parties agree that neither RCW 51.32.220 nor 42 U.S.C. § 424a(a) expressly provides that a claimant's highest annual earnings must be adjusted to present value before performing the offset calculation. On the other hand, neither statute expressly precludes such an adjustment. The statutes are silent on this issue.

We hold that the plain language of the statutes provides that a claimant's highest annual earnings should not be adjusted to present value before making the offset calculation. The statutes do not provide for such an adjustment. Further, 42 U.S.C. § 424a(a)(8) clearly looks to the claimant's earnings in a particular year in the past, without in any way suggesting that those historical wages be adjusted in any manner. Only by adding language to the statute could we allow the adjustment to present value. And if a statute is silent on an issue, we generally decline to read into the statute what is not there. *See, e.g., Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005).

Birgen argues without analysis that 42 U.S.C. § 424a(a)(8) is ambiguous because it is silent on whether a claimant's highest annual earnings must be adjusted to their present value. He apparently claims that 42 U.S.C. § 424a(a)(8) reasonably can be interpreted as requiring a present value adjustment or not requiring an adjustment, which creates an ambiguity. However, Birgen does not explain how we can adopt this interpretation without adding language to the statute. Further, he does not explain how a statue that does not provide for a present value adjustment can be interpreted as requiring such an adjustment.

The plain language of 42 U.S.C. § 424a(a)(8) provides no support for Birgen's argument that the statute requires DLI to adjust a claimant's past earnings to present value when calculating the offset for social security benefits. Neither does RCW 51.32.220. Arguably, if either the Washington legislature or Congress had intended such an adjustment, they would have provided appropriate language in the statutory provisions.

c. Related Statutes

While our analysis must first and foremost focus on performing a plain language analysis, we may consult the context of the statute in which the provision is found as well as related statutes to help determine the plain meaning of the statute. *Henne v. City of Yakima*, ___ Wn.2d ___, 341 P.3d 284, 288 (2015). Both parties rely on the fact that other statutes in the Industrial Insurance Act (IIA), chapter 51 RCW, provide for cost of living increases. However, the existence of these statutes supports DLI's interpretation and does not support Birgen's interpretation.

The parties are correct that the IIA includes provisions providing for cost of living adjustments and present wage calculations. RCW 51.32.075 addresses updating a claimant's permanent total disability benefits to account for cost of living changes. This statute is the legislature's attempt to deal with the problem of inflation in the context of workers' compensation benefits. *Crabb v. Dep't of Labor & Indus.*, 181 Wn. App. 648, 656, 326 P.3d 815, *review denied*, 181 Wn.2d 1012 (2014). Another IIA provision, RCW 51.32.090(3)(a)(ii), addresses calculating a claimant's loss of earning power benefits and specifically refers to calculating a claimant's benefits using "eighty percent of the actual difference between the worker's *present wages* and earning power at the time of injury." (Emphasis added.) Similarly,

42 U.S.C. § 424a(f) requires a triennial redetermination of the amount of a worker's benefits subject to an offset.

Birgen argues that these provisions provide support for his interpretation of RCW 51.32.220 and 42 U.S.C. § 424a(a)(8) because they show that the Washington legislature and Congress intended to provide benefits that reflect present value. However, these statutes actually support DLI's interpretation. They show that the Washington legislature and Congress knew how to update a claimant's benefits to account for inflation and knew how to use a claimant's present wages in calculating his or her benefits, but specifically chose not to do so in the context of adopting 42 U.S.C. § 424a(a)(8)'s offset formula.[5] Here, we presume that the legislature was deliberate when it did not provide a directive that a claimant's offset be calculated using his wages at their present day value. *See State v. Kelley*, 168 Wn.2d 72, 83, 226 P.3d 773 (2010) ("Expression of one thing in a statute implies exclusion of others, and this exclusion is presumed to be deliberate.").

d. Liberal Construction/Policy Considerations

RCW 51.12.010 provides that the IIA "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries . . . occurring in the course of employment." *See also Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 8, 201 P.3d 1011 (2009). Birgen argues that this statement of intent must be considered in determining the

[5] Birgen also argues that 42 U.S.C. § 424a(a)(8), which states that "an individual's average current earnings means *the largest* of [the three options]," supports the inference that the legislature intended for a worker's wages to be adjusted. (Emphasis added.) This argument is unpersuasive because it ignores the remainder of 42 U.S.C. § 424a(a)(8), which as discussed above, requires the DLI to use the largest number of three set options – not the largest possible number imaginable.

plain meaning of RCW 51.32.220 and 42 U.S.C. § 424a(a)(8) and mandates that we liberally construe 42 U.S.C. § 424a(a)(8) to hold that DLI must adjust Birgen's 1983 earnings to their present value.

Similarly, Birgen argues that our interpretation of RCW 51.32.220 and 42 U.S.C. § 424a(a)(8) must be guided by policy considerations. He argues that the policy of the IIA is to provide full compensation to injured workers, and that not requiring a claimant's highest annual earnings to be adjusted to present value would undermine this policy. Birgen correctly points out that he may be worse off if his highest annual earnings are not adjusted to present value before calculating his offset under 42 U.S.C. § 424a(a)(8). He argues that this result is inconsistent with the policy of the IIA.

In general, where the statute at issue or a related statute includes an applicable statement of purpose, the statute must be read in a manner consistent with that stated purpose. *See Nationscapital Mortg. Corp. v. Dep't of Fin. Inst.*, 133 Wn. App. 723, 736-37, 137 P.3d 78 (2006). However, the liberal construction requirement also must be applied in conjunction with our ultimate goal of carrying out legislative intent by giving effect to the legislature's statutory language. *Doty v. Town of South Prairie*, 155 Wn.2d 527, 533, 120 P.3d 941 (2005). We cannot use the liberal construction requirement to support a "strained or unrealistic interpretation" of statutory language. *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997).

In addition, Birgen's policy arguments are inconsistent with the plain statutory language. We "resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle that 'the drafting of a statute is a legislative, not a

judicial, function.' " *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999)).

Here, the plain language of RCW 51.32.220 and 42 U.S.C. § 424a(a)(8), as well as the IIA's related statutes, suggests that the legislature intended to calculate a claimant's offset using the claimant's actually earned wages. We refrain from giving a liberal construction to the statute that would be contrary to the plain language of the statute. *See Doty*, 155 Wn.2d at 533.

4. Conclusion

42 U.S.C. § 424a(a)(8) bases its offset calculation on the claimant's highest annual earnings during the year of disability or in the preceding five years. This statute generally refers to a claimant's highest annual wages earned during some past year. Nevertheless, neither RCW 51.32.220 nor 42 U.S.C. § 424a(a)(8) provides that the highest annual earnings be adjusted to present value, even though other Washington and federal statutes do provide for a cost of living adjustment. Accordingly, we hold that the plain language of RCW 51.32.220 and 42 U.S.C. § 424a(a)(8) does not require that a claimant's highest annual earnings be adjusted to present value before DLI conducts the offset calculation under 42 U.S.C. § 424a(a).[6]

[6] Birgen requests reasonable attorney fees pursuant to RCW 51.52.130. A party may be awarded attorney fees when a claimant's appeal results in a reversal or modification of a Board decision. *Chunyk & Conley/Quad-C v. Bray*, 156 Wn. App. 246, 256, 232 P.3d 564 (2010). Here because we affirm the superior court and the Board, we deny Birgen's request for attorney fees. *Id.*

We affirm the Board and the superior court.

MAXA, P.J.

We concur:

LEE, J.

MELNICK, J.

A2

RCW 51.32.220

Reduction in total disability compensation — Limitations — Notice — Waiver — Adjustment for retroactive reduction in federal social security disability benefit — Restrictions.

(1) For persons receiving compensation for temporary or permanent total disability pursuant to the provisions of this chapter, such compensation shall be reduced by an amount equal to the benefits payable under the federal old-age, survivors, and disability insurance act as now or hereafter amended not to exceed the amount of the reduction established pursuant to 42 U.S.C. Sec. 424a. However, such reduction shall not apply when the combined compensation provided pursuant to this chapter and the federal old-age, survivors, and disability insurance act is less than the total benefits to which the federal reduction would apply, pursuant to 42 U.S.C. 424a. Where any person described in this section refuses to authorize the release of information concerning the amount of benefits payable under said federal act the department's estimate of said amount shall be deemed to be correct unless and until the actual amount is established and no adjustment shall be made for any period of time covered by any such refusal.

(2) Any reduction under subsection (1) of this section shall be effective the month following the month in which the department or self-insurer is notified by the federal social security administration that the person is receiving disability benefits under the federal old-age, survivors, and disability insurance act: PROVIDED, That in the event of an overpayment of benefits the department or self-insurer may not recover more than the overpayments for the six months immediately preceding the date the department or self-insurer notifies the worker that an overpayment has occurred: PROVIDED FURTHER, That upon determining that there has been an overpayment, the department or self-insurer shall immediately notify the person who received the overpayment that he or she shall be required to make repayment pursuant to this section and RCW 51.32.230.

(3) Recovery of any overpayment must be taken from future temporary or permanent total disability benefits or permanent partial disability benefits provided by this title. In the case of temporary or permanent total disability benefits, the recovery shall not exceed twenty-five percent of the monthly amount due from the department or self-insurer or one-sixth of the total overpayment, whichever is the lesser.

(4) No reduction may be made unless the worker receives notice of the reduction prior to the month in which the reduction is made.

(5) In no event shall the reduction reduce total benefits to less than the greater amount the worker may be entitled to under this title or the federal old-age, survivors, and disability insurance act.

(6) The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise his or her discretion to waive, in whole or in part, the amount of any overpayment where the recovery would be against equity and good conscience.

(7) Subsection (1) of this section applies to:

(a) Workers under the age of sixty-two whose effective entitlement to total disability compensation begins before January 2, 1983;

(b) Workers under the age of sixty-five whose effective entitlement to total disability compensation begins after January 1, 1983; and

(c) Workers who will become sixty-five years of age on or after June 10, 2004.

(8)(a) If the federal social security administration makes a retroactive reduction in the federal social security disability benefit entitlement of a worker for periods of temporary total, temporary partial, or total permanent disability for which the department or self-insurer also reduced the worker's benefit amounts under this section, the department or self-insurer, as the case may be, shall make adjustments in the calculation of benefits and pay the additional benefits to the worker as appropriate. However, the department or self-insurer shall not make changes in the calculation or pay additional benefits unless the worker submits a written request, along with documentation satisfactory to the director of an overpayment assessment by the social security administration, to the department or self-insurer, as the case may be.

(b) Additional benefits paid under this subsection:

(i) Are paid without interest and without regard to whether the worker's claim under this title is closed; and

(ii) Do not affect the status or the date of the claim's closure.

(c) This subsection does not apply to requests on claims for which a determination on the request has been made and is not subject to further appeal.

[2007 c 255 § 1; 2005 c 198 § 1; 2004 c 92 § 1; 1982 c 63 § 19; 1979 ex.s. c 231 § 1; 1979 ex.s. c 151 § 1; 1977 ex.s. c 323 § 19; 1975 1st ex.s. c 286 § 3.]

Notes:

Effective dates -- Implementation -- 1982 c 63: See note following RCW 51.32.095.

Applicability -- 1979 ex.s. c 231: "This 1979 act applies to all cases in which notification of the first reduction in compensation pursuant to RCW 51.32.220 is mailed after June 15, 1979, regardless of when the basis, authority, or cause for such reduction may have arisen. To such extent, this 1979 act applies retrospectively, but in all other respects it applies prospectively." [1979 ex.s. c 231 § 2.]

Severability -- 1979 ex.s. c 231: "If any provision of this 1979 act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1979 ex.s. c 231 § 3.]

Applicability -- 1979 ex.s. c 151: "This 1979 act applies to all cases in which notification of the first reduction in compensation pursuant to RCW 51.32.220 is mailed after May 10, 1979, regardless of when the basis, authority, or cause for such reduction may have arisen. To such extent, this 1979 act applies retrospectively, but in all other respects it applies prospectively." [1979 ex.s. c 151 § 3.]

Severability -- 1979 ex.s. c 151: "If any provision of this 1979 act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1979 ex.s. c 151 § 4.]

Severability -- Effective date -- 1977 ex.s. c 323: See notes following RCW 51.04.040.

A3

RCW 51.32.225

Reduction in total disability compensation — Offset for social security retirement benefits.

(1) For persons receiving compensation for temporary or permanent total disability under this title, the compensation shall be reduced by the department to allow an offset for social security retirement benefits payable under the federal social security, old age survivors, and disability insurance act, 42 U.S.C. This reduction shall not apply to any worker who is receiving permanent total disability benefits prior to July 1, 1986.

(2) Reductions for social security retirement benefits under this section shall comply with the procedures in RCW 51.32.220 (1) through (6) and with any other procedures established by the department to administer this section. For any worker whose entitlement to social security retirement benefits is immediately preceded by an entitlement to social security disability benefits, the offset shall be based on the formulas provided under 42 U.S.C. Sec. 424a. For all other workers entitled to social security retirement benefits, the offset shall be based on procedures established and determined by the department to most closely follow the intent of RCW 51.32.220.

(3) Any reduction in compensation made under chapter 58, Laws of 1986, shall be made before the reduction established in this section.

[2006 c 163 § 1; 1986 c 59 § 5.]

Notes:

Effective date -- 1986 c 59 § 5: See note following RCW 51.32.090.

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 17th day of June, 2015, the document to which this certificate is attached, Petition for Review, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

John S. Barnes
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DATED this 17th day of June, 2015.

LYNN M. VENEGAS, Secretary