NO. 98153-1

SUPREME COURT
OF THE STATE OF WASHINGTON

ZBIGNIEW M. LASKOWSKI,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW, DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

This Court should deny review because this case involves the routine application of the plain language of RCW 51.32.220 and substantial evidence review. Under RCW 51.32.220, when a workers' compensation claimant receives both social security benefits and time-loss compensation benefits, there is a reduction in benefits to take account of the social security benefits—an offset.

The Court of Appeals properly followed plain language principles to reject Laskowski's argument that the Department erred in applying Cost of Living Adjustments "COLAs" to calculate the benefit amount he should receive after the offset. If the Department had used the COLAs, Laskowski would have received less money than he did under the Department's calculations.

And the Court of Appeals also correctly determined that, contrary to Laskowski's argument, the Department properly gave Laskowski notice of the offset and implemented the offset only after it gave him notice.

The Court of Appeals and the superior court properly affirmed the Department's offset order. This Court should deny the petition for review.

II. ISSUES

1. Did the Department correctly calculate the offset when it did not change Laskowski's payments based on his COLAs because the

COLAs did not make his time-loss compensation rate large enough to affect the calculation of the offset?

2. Did the Department give the required one-month notice before assessing an overpayment when it notified Laskowski of the offset on November 2, 2011, and it issued an order reducing his benefits on December 1, 2011?

III. FACTS

A. Overview of Statutes Governing Social Security Offsets

The Department provides time-loss compensation—a wage replacement benefit—to workers who are temporarily unable to work due to an injury. RCW 51.32.090. However, RCW 51.32.220 requires the Department to offset a worker's time-loss compensation when the worker is also receiving social security benefits for the same period. As recognized by numerous courts, RCW 51.32.220 prevents a worker from receiving a windfall of duplicate wage-replacement benefits by providing for an offset. *E.g.*, *Frazier v. Dep't of Labor & Indus.*, 101 Wn. App. 411, 420, 3 P.3d 221 (2000); *Potter v. Dep't of Labor & Indus.*, 101 Wn. App. 399, 405, 3 P.3d 229 (2000); *Herzog v. Dep't of Labor & Indus.*, 40 Wn. App. 20, 25, 696 P.2d 1247 (1985). When injured workers receive social security benefits together with total disability benefits from the Department, the Department must offset their workers' compensation benefits. RCW 51.32.220.

As required by RCW 51.32.220, the Department makes the offset using a formula in the federal Social Security Act, which calculates the offset based on three things: (1) the amount of the social security benefits before an offset, (2) the industrial insurance benefits the worker would otherwise be eligible to receive, and (3) eighty percent of the worker's "average current earnings." *See* RCW 51.32.220; 42 U.S.C. § 424a. The "average current earnings" are typically determined by looking to the worker's "wages and self-employment income . . . for the calendar year" in which the worker became disabled and the five years before the worker became disabled, and using the highest wage within that time frame. 42 U.S.C. § 424a(a)(8)(C). The offset is calculated by subtracting the worker's social security benefits from either eighty percent of the worker's average current earnings or the worker's pre-offset time-loss compensation rate, using whichever of those figures leads to the lowest offset. *See* RCW 51.32.220; 42 U.S.C. § 424a.

RCW 51.32.220(2) requires the Department to give a worker notice of its intent to reduce a worker's benefits based on the social security offset before the Department can assess an overpayment for periods of time where the worker received both types of benefits. Once the Department gives notice, it can issue an order in the next month that imposes an offset and that assesses an overpayment of benefits, which can

reach back up to six months before the Department gave the worker notice that it intended to assess an overpayment. RCW 51.32.220(2), (4).

B. The Department Assessed an Offset of Laskowski's Time-Loss Compensation Upon Learning That He Was Receiving Both Time-Loss Benefits and Social Security Benefits

Laskowski injured his back in January 2006 while working for Air Van Lines, Inc. AR 33.[1] The Department allowed Laskowski's claim for this injury. AR 33. The Department closed the claim in 2008. AR 58–59. In August 2009, the federal Social Security Administration informed the Department that Laskowski was receiving social security disability benefits. AR Richardson 58. The Department later reopened the claim effective April 2010 and paid Laskowski time-loss compensation starting on that date. AR 59. Thus, beginning in April 2010 Laskowski was receiving both time-loss compensation and social security disability benefits.

On November 2, 2011, the Department notified Laskowski that it would be offsetting the time-loss payments based on Laskowski's receipt of social security benefits, and that it would be assessing an overpayment of the time-loss compensation based on the offset. AR 37–38. It did not

[1] The brief cites the administrative record created at the Board of Industrial Insurance Appeals as the "AR." Citations to testimony in the administrative record are cited as "AR" followed by the name of the witness and the page number in the transcript.

offset the wages until December 1, 2011, when it assessed an overpayment for the prior six months.

C. Following a Court Remand, the Department Included Additional Wages in Laskowski's Offset Calculation

The Department at first calculated Laskowski's offset based on what the Social Security Administration's wage records showed Laskowski had earned in 2006. AR Richardson 55–56; AR Ex 10 at 2. Laskowski appealed this order to the Board of Industrial Insurance Appeals (Board).

The Board affirmed the Department's order but the superior court reversed it, determining that Laskowski received additional wages in 2007 based on work he performed in 2006, which were not reflected in the Social Security Administration records that the Department had used. *See* AR 28–30; AR Ex 10 at 2. The superior court directed the Department to include that payment in the calculation of Laskowski's 2006 wages, which led to a higher calculation of his "average current earnings" (ACE). AR 28–30; AR Ex 10 at 2.

On remand, the Department issued another order in 2015 that, as the superior court had directed, included the additional 2007 wages in the calculation of Laskowski's ACE, which led to an annual wage of $50,196.90 and an ACE, measured in monthly wages, of $4,183.08. *See*

AR 43-46. Eighty percent of $4,183.08 is $3,346.46. AR 43–46. As of September 2009, the effective date of the offset, his time-loss rate before the offset was $2,976.25, and his social security benefit rate was $867. AR 39–40. The Department calculated the offset by subtracting $867 (the social security benefit) from $3,346.46 (eighty percent of the average current earnings) to result in a benefit of $2,479.46 ($3,346.46 - $867 = $2,479.46). AR 43. Laskowski received more benefits under the 2015 offset order than he had under the original offset order. AR 39–40, 43–46.

The Department's 2015 order also found that, effective January 1, 2015, Laskowski's time-loss rate after the offset would increase to $2,692.12 because of a triennial redetermination[2] that had taken place. AR 43. The Department assessed an overpayment of time-loss compensation based on the offset, though the amount of the overpayment was modified as a result of the change to the offset. AR 43.

Laskowski appealed the Department's 2015 offset order, arguing that the Department's offset was still too large. The Board and superior court affirmed the Department's order. AR 3, 27–36; CP 166–69.

[2] The Social Security Administration recalculates a worker's ACE roughly every three years, through a process known as a triennial redetermination. *See* AR Richardson 68. The Department adjusts its offset when the triennial redetermination causes an increase to the ACE. *See* AR Richardson 68.

Laskowski appealed to the Court of Appeals. In an unpublished decision, the Court of Appeals affirmed. *Laskowski v. Dep't of Labor & Indus.*, No. 53064-3-II, 2020 WL 71303 (Wash. Ct. App. Jan. 7, 2020). The Court rejected Laskowski's argument that the Department used the wrong effective date for the offset and his contention that the Department failed to apply RCW 51.32.075, which provides for adjustments to time-loss compensation known as cost of living adjustments, to his benefits. *Laskowski*, No. 53064-3-II at 5-8.

Laskowski now petitions for review.

IV. ARGUMENT

Laskowski shows no reason for review; indeed, he cited none of the RAP 13.4(b) factors and none of them supports review. This case involves substantial evidence review and statutory construction principles, which were properly applied by the Court of Appeals.

The Court of Appeals properly affirmed the superior court. Laskowski shows no conflict with case law or an issue of substantial public interest. This Court should deny the petition for review.

A. There Is No Reason To Review the Department's Application of COLAs To the Social Security Offset Calculation: The Department Properly Rejected Using Laskowski's Proposed Formula, Which Would Have Led To Less Benefits

Laskowski does not show that the Department's application of COLAs to his social security offset either conflicts with case law or presents an issue of substantial public interest. *See* RAP 13.4(b). And even considering the merits, there is no error. Laskowski's primary claim is that the Department did not properly consider COLAs in calculating his offset. Pet. 8, 10. But there is no error because under the step-by-step calculations of his offset, consideration of the COLAs does not lead to a higher benefit amount. In fact, using Laskowski's proposed approach would lead to less benefits.

RCW 51.32.220 provides that "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" causes a lower reduction. *Birgen v. Dep't of Labor & Indus.*, 186 Wn. App. 851, 856, 347 P.3d 503 (2015).[3] 42 U.S.C. § 424a(a) "provides that the amount of the offset is the amount by which a person's combined monthly disability and social security benefits exceed eighty percent of that person's 'average current earnings'" (ACE). *Birgen*, 186 Wn. App. at 856. Thus, under federal law the offset

[3] Although Laskowski cites liberal construction standards, in considering an offset issue this Court in *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993), declined to do so because the offset statute at issue was unambiguous.

cannot reduce a person's combined monthly payment below eighty percent of the ACE.

42 U.S.C. § 424a(a)(8) defines "average current earnings" as the largest of three amounts, which typically is one-twelfth of the person's highest annual earnings within either the year the person became disabled related to the Social Security Act or any of the preceding five years. *Birgen*, 186 Wn. App. at 857. In Laskowski's case, the highest yearly wage he ever earned was earned in 2006, which was within five years of the date he became disabled (2009).

Substantial evidence supports each of the Department's calculations about Laskowski. First, as the Department's witness explained, the Department found that Laskowski earned $50,196.90 in 2006—an amount that includes the additional wages that the superior court ordered the Department to include—which leads to an ACE of $4,183.08. AR 43–46, 57. Eighty percent of that amount is $3,346.46. And Laskowski appears to agree that his ACE should be calculated based on a yearly wage of $50,196.90. *See* Pet. 11.

Next, the Department found that as of September 2009, Laskowski's time-loss compensation rate before the offset was $2,976.25. AR 58. A Department employee testified to this being the rate in effect as

of September 2009, so substantial evidence supports this finding. *See* AR 58. And Laskowski does not show otherwise.

Last, the Department found that as of September 2009, Laskowski's social security benefit rate was $867. AR 58. This finding is also supported by substantial evidence as a Department employee testified to this amount. AR 58. And again, Laskowski does not show otherwise.

Since eighty percent of Laskowski's ACE figure ($3,346.46) is higher than Laskowski's time-loss compensation rate ($2,976.25), the Department calculates the offset by subtracting the social security benefit rate ($867) from eighty percent of the ACE ($3,346.46), which leads to a time-loss compensation rate after the offset of $2,479.46. *See* RCW 51.32.220; 42 U.S.C. § 424a(a)(2)–(6).

Laskowski argues that the Department did not properly take into account his cost of living adjustments when calculating his offset. Pet. 17–19. But calculating his offset based on his time-loss compensation rate would not aid him, even taking the COLAs into account. RCW 51.32.075 provides for yearly adjustments to a worker's time-loss compensation rate effective July 1 of each year, based on the annual change to the average monthly wage in the state. While RCW 51.32.075 provides for cost of living adjustments to the time-loss compensation rate, RCW 51.32.220 requires the Department to offset the worker's time-loss

compensation based on the duplicative receipt of social security benefits, using the formula in 42 U.S.C. § 424a.

Under the federal statute, the offset amount depends on the time-loss compensation rate, the social security benefits, and eighty percent of the worker's average current earnings. Contrary to Laskowski's suggestion, the Department did take the COLAs into account, but the COLAs did not change the offset because Laskowski's ACE figure was still much higher than his time-loss compensation rate even *after* taking the COLAs into account. Since eighty percent of the ACE continued to exceed all of the other figures, it continued to drive the social security offset calculation, which meant that the COLAs did not cause an increase to Laskowski's time-loss rate after the offset. AR Richardson 68. While Laskowski disagrees with this result (Pet. 8, 10), it reflects the law and is amply supported by the facts. Laskowski shows no legal error, no issue of substantial public interest, and no conflict with the case law.

B. There Is No Need To Review Whether, Consistent with the Statutory Requirement To Give Notice of the Offset One Month Before It Reduces the Worker's Benefits, the Department Gave Adequate Notice of the Offset, as Substantial Evidence Shows That It Did

There is no merit to Laskowski's claim he did not receive adequate notice of the offset. RCW 51.32.220(2) provides that the Department must notify a worker before it assesses an overpayment based on that statute.

And RCW 51.32.220(4) provides that the Department must give the worker notice of an offset in the month prior to the month that it reduces the worker's benefits. The Department notified Laskowski that it would reduce his benefits and assess an overpayment in November 2011. AR 37–38. The Department reduced the benefits and assessed an offset in December 2011. AR 39–40.

Laskowski relies on *Frazier v. Dep't of Labor & Indus.*, to argue there was inadequate notice. Pet. 6–8. But this case aids the Department, not Laskowski. In *Frazier*, the Department mailed notice to the worker that it would reduce the worker's benefits based on the receipt of social security benefits on May 31, 1994, but the worker did not receive the notice until June 1994. *Frazier*, 101 Wn. App. at 421. The *Frazier* Court concluded that this meant that the Department could not offset benefits until July 1, 1994, the month after the worker actually received notice of the offset. *Id.*

Here, consistent with *Frazier*, the Department provided Laskowski with notice that it would reduce his benefits on November 2, 2011, and it issued an order reducing his benefits on December 1, 2011. AR 39–40. The Department's actions were thus consistent with the plain language of the statute and with *Frazier*.

Laskowski also suggests that the Department had to give him notice of the offset before each of the time-loss payments, which are issued every two weeks. *See* Pet. at 8. This argument lacks merit: the Department must give a worker notice before it imposes a social security offset, but neither RCW 51.32.220 nor any other legal authority requires it to give notice before issuing each and every payment of benefits. And in *Frazier* the Department only gave the worker notice of the offset *once*, which the Court concluded allowed the Department to reduce each of his future payments once the worker had received proper notice. *Frazier*, 101 Wn. App. at 421. Since the Department gave Laskowski notice on November 2, 2011, it properly reduced his benefits on December 1, 2011, and the Department properly reduced all of the time-loss compensation payments after that.

V. CONCLUSION

Laskowski shows no reason under RAP 13.4(b) for this Court to take review. Substantial evidence supports both that the Department properly calculated the wage rate, properly considering whether the COLAs would increase his benefit, and properly gave notice. This Court should deny review.

RESPECTFULLY SUBMITTED this 1st day of April, 2020.

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ZBIGNIEW M. LASKOWSKI, Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the state of Washington, declares that on the below date, I served the Answer to Petition for Review, Department of Labor and Industries and this Declaration of Service in the below described manner:

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DATED this 1st day of April, 2020, at Olympia, Washington.

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April 01, 2020 - 2:45 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98153-1
Appellate Court Case Title:	Zbigniew Laskowski v. Washington State Department of Labor and Industries
Superior Court Case Number:	16-2-03591-1

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