NO. 91825-2

SUPREME COURT OF THE STATE OF WASHINGTON

PATRICK J. BIRGEN,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

DEPARTMENT OF LABOR AND INDUSTRIES' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

A worker seeking workers' compensation benefits must show that a statute provides for the relief that the worker is seeking, and Patrick Birgen has failed to do that here. Liberal construction of the Industrial Insurance Act does not allow a court to supply terms to a statute. When a worker receives both social security benefits and workers' compensation benefits, the Industrial Insurance Act directs the Department of Labor and Industries (Department) to offset the workers' compensation benefits using a formula contained in the federal Social Security Act. Without any support in either the Industrial Insurance Act or the Social Security Act, Birgen argues that when the Department calculated his offset using that formula, it should have adjusted his historical wages to their present day value. However, the Social Security Act directs the use of a worker's historical earnings without suggesting that those wages should be adjusted to account for inflation, and, therefore, it cannot reasonably be read to provide for what Birgen seeks here. No issue of substantial public interest is raised by the proper application of the plain language to the facts of the case, and this Court should deny review. RAP 13.4(b)(4).

II. ISSUE PRESENTED

Discretionary review is not merited in this case, but if review were granted, the following issue would be presented:

RCW 51.32.220 provides that when a worker receives both social security and workers' compensation benefits, the Department must apply an offset under 42 U.S.C. § 424a, which is calculated in part based on the wages the worker received before becoming disabled. Should the Department have adjusted Birgen's wages to present day value when calculating his offset even though no statute provides for such adjustments?

III. STATEMENT OF THE CASE

A. Birgen Receives Both Pension Benefits and Social Security Benefits, and Thus His Pension Benefits Are Subject to an Offset

Birgen sustained an industrial injury to his neck in 1984 while working for the Boise Cascade Corporation. CP 79. Birgen's claim was allowed and he was placed on a pension in 1991. CP 82. In 2012, the Department determined that Birgen was receiving social security benefits.

RCW 51.32.220 and RCW 51.32.225 require the Department to offset a worker's pension benefits when he is receiving social security benefits for the same time period. The reduction is made using the Social Security Act, which provides that the amount of the reduction depends on the amount of social security benefits and industrial insurance benefits the worker would otherwise be eligible to receive, as well as the worker's "average current earnings." *See* RCW 51.32.220;

RCW 51.32.225. The"average current earnings" are determined by looking to the worker's "wages and self-employment income . . . for the calendar year" that 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).

Birgen received $830 a month in Social Security benefits. His highest annual wage was $30,965, which he earned in 1983. CP 62-63. The Department reduced Birgen's pension benefit rate from $2,911.42 to $2,081.42 per month as a result of his concurrent receipt of industrial insurance benefits and social security benefits. CP 62-63; App.'s Br. at 10. This reduction based on Birgen's receipt of social security benefits is known as an "offset." *See, e.g., Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 420, 832 P.2d 489 (1992).

B. The Board Concluded That the Plain Language of the Statutes Did Not Support Birgen

Birgen appealed to the Board, arguing that the Department should have updated his 1983 earnings to their present day value. CP 65-67, 102-09, 155-67. Following Birgen's motion for summary judgment (CP 102-09), an industrial appeals judge granted summary judgment to the Department, concluding the plain language of the statutes did not provide for the Department to adjust a worker's average current earnings based on

inflation as neither the Industrial Insurance Act nor the Social Security Act provide any basis for updating a worker's wages to their present day value. CP 55-58.

Birgen petitioned the Board for review. CP 26-36. The Board granted review, but affirmed the Department. CP 17-19.

C. The Superior Court and the Court of Appeals Affirmed the Board and the Department

Birgen appealed the Board's decision to the Pierce County Superior Court. CP 1. The superior court affirmed the Board's decision, concluding that both the Department and the Board were correct that neither the Industrial Insurance Act nor the Social Security Act provide any authority for Birgen's argument that his 1983 wages should have been updated to their present day value when calculating his average current earnings. CP 191-94.

Birgen then appealed to the Court of Appeals. CP 195-202. The Court of Appeals affirmed, concluding that the plain language of RCW 51.32.220 and 42 U.S.C. § 424a did not allow for the relief that Birgen seeks. *Birgen v. Dep't of Labor & Indus.*, __ Wn. App. __, 347 P.3d 503, 506-09 (2015). The Court of Appeals noted that Birgen failed to explain how the statute could be be construed to provide for adjusting a worker's historical wages to a modern day value. *Id.* at 508-09. The Court

of Appeals also observed that while the Industrial Insurance Act is subject to liberal construction, liberal construction cannot be used to grant relief in violation of the plain language of the relevant statute. *Id.* at 508-09.

Birgen then petitioned for review with this Court.

IV. ARGUMENT

When a worker receives both social security benefits and worker's compensation benefits, the Legislature and Congress have directed an offset to prevent a double recovery in the form of duplicate wage replacement benefits. *See Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 148-49, 736 P.2d 265 (1987) (observing that purpose of statute is to avoid overlapping benefits for the same disability); *Herzog v. Dep't of Labor & Indus.*, 40 Wn. App. 20, 25, 696 P.2d 1247 (1985) (stating that "the obvious intent of controlling statutes" was to avoid a "windfall" in the form of duplicate disability benefits). The state and federal statutes involved here are unambiguous in providing that a worker's actual wages are used to calculate the offset. Birgen's entire argument rests on the notion that because Congress did not say one way or the other whether to index wages, this means the federal statute is ambiguous. This notion flatly contradicts well established rules of statutory construction where the Court looks at the very words used by the

Legislature to determine a statute's meaning. No review is necessary to reconsider such a bedrock principle.

A. An Argument That Is Unsupported by Any Statutory Language Does Not Present a Matter of Substantial Public Interest

Key to establishing the offset is calculating a worker's "average current earnings." Under the plain language of RCW 51.32.220 and 42 U.S.C. § 424a(a)(8), a worker's average current earnings are calculated based on a worker's actual, historical wages, and the worker's wages are not updated to account for inflation.

1. Under the Plain Language of 42 U.S.C. § 424a(a)(8)(C), a Worker's Previously Earned Wages Are Not Adjusted to Their Present Day Value When Calculating the Average Current Earnings

Under 42 U.S.C. § 424a(a)(8), a social security offset is calculated based on three factors: the worker's unreduced social security benefit amount, the worker's unreduced industrial insurance benefit amount, and eighty percent of the worker's average current earnings. 42 U.S.C. § 424a(a)(8) provides for three methods to calculate a worker's average current earnings, all of which involve looking at actual wages that the worker earned in the past, and none of which provide for indexing the worker's wages to account for inflation:

> (A) the average monthly wage (determined under section 415(b) of this title as in effect prior to January 1979) used

for purposes of computing his benefits under section 423 of this title,

(B) one-sixtieth of the total of his wages and self employment income . . . for the five consecutive calendar years after 1950 for which such wages and self-employment were highest, or

(C) one-twelfth of the total of his wages and self employment income . . . for the calendar year in which he had the highest such wages and income during the period of consisting of the calendar year in which he became disabled . . . and the five years preceding that year.

42 U.S.C. § 424a(a)(8).

Here, it is undisputed that the highest wage Birgen ever earned was the wage he earned in 1983, the year before he suffered an injury that caused him to become disabled. Birgen's only dispute to the Department's calculation of his average current earnings is his contention that the Department should have adjusted his 1983 wages to their present day value. Pet. 8-9. The plain language of the statute establishes that the average current earnings figure is calculated based on a wage that the worker actually earned in the past, not based on a historical wage that has been indexed to account for inflation.

All three of the methods of calculating a worker's average current earnings that are provided for in the statute involve looking at wages that the worker actually earned in the past. 42 U.S.C. § 424a(a)(8)(A), (B), (C). No language in the statute suggests that any of three methods of

calculating the worker's average current earnings the worker's historical wage information should be modified or adjusted, and thus the statutes provide no support for the idea that the wages must be adjusted to account for inflation. 42 U.S.C. § 424a(a)(8)(A), (B), (C).

Furthermore, the term "wages" is defined by the Social Security Act as "remuneration paid." 42 U.S.C. § 409. Thus, when 42 U.S.C. § 424a(a)(8)(C) references the "wages" a worker received within five years of the date of disability, it is referencing the amount of remuneration that was actually paid to the worker at that time, not a hypothetical, present day value that could be assigned to those historical wages.

The statute does not need to expressly rule out updating to have that meaning, contrary to Birgen's arguments. *Contra* Pet. 15. Birgen cites no authority for the proposition that the Legislature's decision to not expressly rule out an option renders the statute ambiguous. Such a novel proposition must be supported by authority and the Court should disregard it in the absence of such authority. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (a court may generally assume that where no authority is cited, counsel has found none after a diligent search). In fact, Birgen's proposition is contradicted by well-established authority that the Court looks to the actual words used by the Legislature. *See Louisiana-Pacific Corp. v. Asarco, Inc.*, 131

Wn.2d 587, 600, 934 P.2d 685 (1997) (explaining that it construing a statute, a court looks first "to the ordinary meaning of the word used by the Legislature"); *Homestreet, Inc. v. Dep't of Rev.*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (observing, "the better practice is to look at the words in the statute at issue to determine what the statute means"). The Court does not add words to the statute. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

In order to show ambiguity, Birgen needed to show that the statute could reasonably be read to require the use of updated wages, and Birgen failed to do so. By expressly directing the use of the worker's annual wages, without suggesting that that number should be modified in any fashion, 42 U.S.C. § 424a(a)(8) unambiguously provides that the wage figure is not modified to account for inflation or any other factor. Put another way, because the words in the statute do not provide for updating, they cannot be reasonably read to require updating.

2. When 42 U.S.C. § 424a(a)(8) Is Read in Conjunction With Related Statutory Provisions, This Further Supports That a Worker's Wages Are Not Indexed

Reading 42 U.S.C. § 424a(a)(8) in conjunction with related provisions within the Social Security Act provides further support for the conclusion that a worker's wages are not updated when calculating a worker's average current earnings. There are some circumstances where

the Social Security Act does provide for indexing a worker's wages, but, far from supporting Birgen's arguments, this supports the conclusion that Congress intentionally decided not to include any provision for indexing in the context of the initial calculation of a worker's average current earnings figure.

Where, unlike here, the Social Security Act does require indexing a worker's wages, it has very specific directions as to how one should go about indexing. For example, 42 U.S.C. § 415(b)(3)(A) specifies that when calculating a worker's average indexed quarterly earnings, the worker's wages should be updated by comparing the national average wage index for the second calendar year preceding the worker's disability with the national average wage index for the year in which a given wage was earned. Here, the Social Security Act does not provide for indexing when initially calculating a worker's average current earnings, and, therefore, it does not set out any particular methodology to use to bring a worker's historical wages to present day value. *See* 42 U.S.C. § 424a(a)(8); *see also* 42 U.S.C. § 424a(f) (Congress specified how to perform triennial redetermination to recalculate wages periodically after the initial offset). Had Congress wanted to add indexing to the initial determination of the wages for the purposes of taking the initial offset, it would have specified so, as it did in other contexts.

3. The Industrial Insurance Act Provides for Adjustments to a Worker's Benefits In Some Circumstances, but It Does Not Provide for Adjusting Wages Here

While the Industrial Insurance Act provides for an adjustment of benefits to account for inflation in some circumstances, it contains no such provision in the context relevant here: the calculation of a worker's average current earnings. *See* RCW 51.32.220 (citing 42 U.S.C. § 424a(a)). Birgen argues that the Department adjusts a worker's benefits to account for inflation in what he calls "similar scenarios" – loss of earning power benefits and cost of living adjustments to pension payments – and that, therefore, it should do so here. Pet. 16. However, the "scenarios" Birgen points to are not analogous to the current case because, in each of those examples, a statute provides for an adjustment to the worker's benefits to account for inflation, while no statute provides for the relief Birgen seeks here.

First, loss of earning power benefits, Birgen's first example, are governed by RCW 51.32.090(3), and that statute provides for updating wages because it directs the Department to pay benefits to a worker when the worker's "*present earning power* is only partially restored." (Emphasis added.) Thus, in *Hunter v. Department of Labor & Industries*, 43 Wn.2d 696, 263 P.2d 586 (1953), when the Court directed the Department to use updated wages when deciding if the worker should receive loss of earning

power benefits, it based its ruling on the statute's explicit direction that benefits are provided when a worker's "present earning power is only partially restored." In contrast, 42 U.S.C. § 424a(a)(8) lacks any reference to a worker's "present earning power" or a similar concept.

Similarly, while Birgen is correct that RCW 51.32.075 provides for yearly adjustments to a worker's wage replacement benefits to account for inflation (Pet. 17), the key point is that a statute provides for those adjustments, while no statute provides for the adjustments that Birgen seeks here.

B. The Liberal Construction Doctrine Cannot Be Used to Override a Plain Statutory Directive

RCW 51.32.220 unambiguously requires the Department to calculate a worker's offset based on the amount that the offset would be under 42 U.S.C. § 424a, and 42 U.S.C. § 424a unambiguously requires the Department to use a worker's actual wages to calculate the average current earnings. Birgen attempts to overcome the plain language of those statutes by emphasizing that the Industrial Insurance Act is subject to liberal interpretation. Pet. 11-16.

But it is well-established that liberal construction does not apply when a statute is unambiguous. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). Courts do not use liberal

construction to rewrite a statute. *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001). And a court does not use the liberal construction doctrine to support a strained or unrealistic interpretation of the plain language of a statute. *Bird Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992); *Senate Republican Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997). Indeed, the courts have rejected similar attempts to use liberal construction to overcome the plain language of the offset statute. In *Allan*, the court rejected an argument that, like Birgen's, attempted to use the liberal construction doctrine to advance an unsupported interpretation of the statutes governing social security offsets. *Allan*, 66 Wn. App. at 418-20.

Birgen does not argue that the liberal construction standard can be used to override a plain statutory directive. Instead, he argues that the statutes at issue here are ambiguous, but he has failed to show any ambiguity. *See* Pet. 15. Birgen's attempt to render an unambiguous statute ambiguous does not create an issue of substantial public interest that merits this Court's review.

V. CONCLUSION

The Court of Appeals properly concluded that the plain language of RCW 51.32.220 and 42 U.S.C. § 424a establish that a worker's historical wages are not adjusted to present day value when calculating the

average current earnings figure. Birgen argues that the statute is ambiguous, but does not articulate how the statutes can be reasonably read to provide for the relief he seeks. They cannot be read to do so. This Court should deny review.

RESPECTFULLY SUBMITTED this 3rd day of August, 2015.

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No. 91825-2

SUPREME COURT
OF THE STATE OF WASHINGTON

PATRICK J. BIRGEN, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, 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 Department of Labor and Industries' Answer to Petition for Review and this Declaration of Service to all parties on the record as follows:

Via Email and First Class U.S. Mail, Postage Prepaid to:

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DATED this 3rd day of August, 2015, at Tumwater, Washington.

AUTUMN MARSHALL
Legal Assistant 3

OFFICE RECEPTIONIST, CLERK

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