

NO. 36943-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

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COURT OF APPEALS
DIVISION II
08 FEB 20 PM 1:17
STATE OF WASHINGTON
BY DEPUTY

DEPARTMENT OF LABOR AND INDUSTRIES,
Appellant,

v.

JEFFREY A. HUDGINS,
Respondent.

BRIEF OF APPELLANT

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Appendix A: RCW 51.32.220

Appendix B: Findings of Fact and Conclusions of Law

I. NATURE OF THE CASE

This is a workers' compensation case raising a single question of statutory interpretation involving RCW 51.32.220.¹ RCW 51.32.220 mandates that the Department of Labor and Industries (Department) or self-insured employers² offset against State workers' compensation wage replacement benefits the social security disability benefits that injured workers are receiving from the Federal government. The Washington Legislature's intent is to prevent double recovery of wage loss benefits, and to shift to the Federal government a part of the burden of providing wage loss benefits to those eligible for social security benefits. *See infra* Part V.A.

The offset provisions of RCW 51.32.220 require that workers receive notice *before* the Department reduces their State benefits under those statutes. Accordingly, when the Department was advised by the Federal government that Jeffrey A. Hudgins (Hudgins) was receiving social security disability benefits, the Department, even though Hudgins

¹ RCW 5.32.220 is set out in full in Appendix A.

² This case does not involve a self-insured employer, so, for the sake of simplicity of reference, all references to offset of State compensation by a Washington workers' compensation insurer will be to the Department. It is noteworthy, however, that any decision made in this case will similarly affect self-insured employers and their workers.

was not then being paid any State compensation benefits, gave Hudgins the notice that is a prerequisite to taking the offset if State compensation benefits were to be paid in the future.

Hudgins argues that no Department notice and order of its offset authority can be given until a worker is actually receiving State compensation benefits. However, there is no statutory barrier to the Department providing advance notice of offset. Instead, the plain meaning of the relevant statutory language, the underlying statutory purpose, and the relevant case law all support the notice that the Department gave in this case. Because Hudgins offers no other objections to the correctness of the notice of offset, the Superior court order should be reversed.³

II. ASSIGNMENTS OF ERROR AND ISSUE

A. Assignments Of Error

1. The Superior Court erred in its conclusions of law ## 3-10 that collectively and erroneously determines that the Department generally is not authorized to give notice of its right to offset at a point when an injured worker is not currently receiving State compensation benefits.

³ A similar issue is raised in two other Department appeals currently pending in this Court. See *Dep't of Labor & Indus. v. Doan*, No. 35877-8-II, involving a similar notice issue under the **retirement** offset provisions of RCW 51.32.225 - - argued in this Court on January 7, 2008, and awaiting decision); *Dep't of Labor & Indus. v. Campbell*,

2. The Superior Court erred in its award of attorney fees and costs in conclusions of law # 11 because the injured worker should not have prevailed on the substantive issue under RCW 51.32.220.

B. Issue

Did the Department lawfully give Hudgins advance notice that it intended to offset federal social security benefits against future State workers' compensation benefits?

III. STATEMENT OF THE CASE

A. Department Action

Hudgins sustained an industrial injury to his lower extremities in 1993. Hudgins Transcript (HTR) at 10. His claim was allowed and he received benefits including time-loss benefits. HTR at 10.

On January 7, 2005, the Department received notice from the Federal Social Security Administration that Hudgins was approved, and was indeed, receiving federal social security disability benefits. Richardson Transcript (RTR) at 14. On July 14, 2005, the Department issued a notice and order of social security offset. RTR at 7. The order adjusted compensation rate figures on the claim effective February 5, 2005, because Hudgins was receiving Social Security Disability Benefits.

No. 37139-1-II (similar notice issue under, as here, the *disability* offset provisions of RCW 51.32.220, though with a factual distinction - - currently in briefing in this Court).

RTR at 11-12; 14. The order was explicitly contingent (applying if State total disability compensation is paid in the future). RTR at 13. However, at the time the offset order was issued, Hudgins had a pending request for time-loss before the Department. RTR at 13. A short time later Hudgins' time-loss benefit was reinstated and he was paid for the period May 27, 2004, through May 25, 2005. RTR at 13-14. Hudgins protested the Department's July 14, 2005, offset notice and order, the Department affirmed that order, and Hudgins appealed to the Board.

B. Proceedings At Board

Hudgins appealed the Department's offset notice and order to the Board. Certified Appeals Board Record (CABR) at p. 26-30. The Board heard the testimony of the claimant, Mr. Hudgins, and Patricia Richardson from the Department of Labor and Industries. Following the hearings, both parties filed Post Hearing Briefs. Hudgins' only argument was that the provision in line 1 of subsection 1 of RCW 51.32.220 mandating that the Department offset social security benefits "for persons receiving" State compensation somehow prohibits the Department from giving anticipatory notice prior to initial payment or resumption of State disability compensation - - he would thus require the workers' receipt of State compensation before the Department could give notice of offset. The

Industrial Appeals Judge (IAJ) issued a proposed decision and order reversing the Department's July 14, 2005, order. CABR at 19-24.

The Department petitioned for review of the ruling to the three-member Board, which denied review, thus making the IAJ's proposed decision the final order of the Board. CABR at 2; 8-14; RCW 51.52.106.

C. Kitsap County Superior Court

The Department appealed the Board's decision to Kitsap County Superior Court. CP at 1-10. After reviewing the Board record and briefing, as well as hearing oral argument, the Superior Court affirmed the Board's decision. The Superior Court's Findings of Fact and Conclusions of Law are attached as Appendix B to this brief.

IV STANDARD OF REVIEW AND GUIDES TO STATUTORY CONSTRUCTION

Review of superior court decisions in workers' compensation cases is under the ordinary standard for civil cases. RCW 51.52.140; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). This case requires that this Court review the superior court's ruling that construed RCW 51.32.220. Statutory construction is a question of law reviewed de

novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

The provisions of Washington's Industrial Insurance Act are "liberally construed." RCW 51.12.010; *see also Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1993). This rule of construction does not trump other rules of statutory construction and does not authorize an unrealistic interpretation that produces strained or absurd results and defeats the plain meaning and intent of the Legislature. *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992); *Senate Republican Comm. v. Pub. Disclosure Com'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997).

Department interpretations of the Industrial Insurance Act are entitled to great deference, and the courts "must accord substantial weight to the agenc[ies'] interpretation of the law." *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994) (deference given to Department interpretation).

V. ARGUMENT

A. The Purpose And Development Of The Federal Offset Provisions And The State "Reverse Offset" Legislation, RCW 51.32.220

The Social Security Act of 1935 (Act), as initially enacted, did not

provide disability benefits. *Freeman v. Harris*, 625 F.2d 1303, 1305 (5th Cir. 1980). In 1956, Congress expanded the Act to include monthly benefits for disabled wage earners. *Id.* The 1956 amendments fully offset state workers' compensation from social security disability benefits. *Freeman*, 625 F.2d at 1306. The offset reflected Congress's judgment that the state workers' compensation programs and the federal disability insurance program served a common purpose: to replace lost earnings. *Id.*

Congress repealed the offset provision in 1958, but the repeal deleteriously affected state workers' compensation programs. *Cf. Freeman*, 625 F.2d at 1306. Data submitted to the federal legislative committees in 1965 showed that in the majority of states, the typical worker who received non-taxable workers' compensation and federal disability benefits actually received more in benefits than his pre-disability take home pay. *Id.*

In 1965 Congress passed legislation to once again coordinate state workers' compensation programs and federal disability benefits, and enacted 42 U.S.C. § 424a, to address the problem of overcompensation. *Freeman*, 625 F.2d at 1306; *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 467, 471, 843 P.2d 1056 (1993); *Regnier v. Dep't of Labor & Indus.*, 110 Wn.2d 60, 62, 749 P.2d 1299 (1988). Section 424a of Title 42 U.S.C. requires an offset of social security disability benefits against workers' compensation.

Under 42 U.S.C. § 424a, assuming that Washington did not have the "reverse offset" statute, RCW 51.32.220, a worker would receive all of

their state industrial insurance compensation and only a portion of their social security disability benefits, the total equaling no more than 80 percent of their pre-disability income. *Freeman*, 625 F.2d at 1306.

Section 424a(d) of Title 42 U.S.C. creates an exception to the reduction in federal benefits. Section 424a(d) of Title 42 provides, in part, that:

The reduction of benefits required by this section shall not be made if the [state] law or plan described in subsection (a)(2) of this section under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages . . . of an individual entitled to benefits under section 423 of this title, and such law or plan so provided on February 18, 1981.

42 U.S.C. § 424a(d) (1998). This exception authorizes the states to reverse the offset provisions of 42 U.S.C. § 424a, so that the worker collects the entire amount of their social security disability benefits, then collects only that part of their state compensation necessary to bring the total benefits amount up to 80 percent of the worker's pre-disability earnings. *Harris*, 120 Wn.2d at 469; *Regnier*, 110 Wn.2d at 63.

In 1975, the Washington Legislature took "full advantage" of this reverse offset provision and enacted RCW 51.32.220. *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 419, 832 P.2d 489 (1992); *Herzog v. Dep't of Labor & Indus.*, 40 Wn. App. 20, 21-22, 696 P.2d 1247 (1985). Subsection (1) of RCW 51.32.220 provides that the compensation the Department pays workers under age 65 for temporary or permanent total

disability, pursuant to Chapter 51.32, “shall” be reduced by the amount of federal disability benefits payable to that worker. This “reverse offset” provision effectively shifts costs back to the federal government, by reducing state workers’ compensation benefits to account for federal social security benefits. *Harris*, 120 Wn.2d at 467. It reduces state payments for total disability compensation, by obligating the SSA to pay the full amount of social security disability benefits to which the worker is entitled. *Ravsten v. Dep’t of Labor & Indus.*, 108 Wn.2d 143, 149, 736 P.2d 265 (1987); *Allan*, 66 Wn. App. at 419-20.

B. RCW 51.32.220 Prevent Double Recovery Of State And Federal Wage Loss Benefits

It is well-established in Washington that: (1) Congress’ intent in adopting the Federal offset provisions of 42 U.S.C. § 424a, and the Washington Legislature’s intent in implementing the “reverse offset” authorized by Federal law (42 U.S.C. § 424a(d)) via the reverse social security offset provisions of RCW 51.32.220 (disability offset) was to prevent payment of overlapping and duplicate Federal and State wage loss benefits; and (2) the Washington offset statutes should be construed so as to further this legislative intent. *See Ravsten v. Dep’t of Labor & Indus.*, 108 Wn.2d at 150; *Regnier v. Dep’t of Labor & Indus.*, 110 Wn.2d at 62; *Harris v. Dep’t of Labor & Indus.*, 120 Wn.2d at 469; *Herzog v. Dep’t of*

Labor & Indus., 40 Wn. App at 25; *Potter v. Dep't of Labor & Indus.*, 101 Wn. App. 399, 3 P.3d 229 (2000); *Frazier v. Dep't of Labor & Indus.*, 101 Wn. App. 411, 3 P.3d 221 (2000).

C. RCW 51.32.220 Unambiguously Authorizes The Department To Give Notice Of Offset Before Paying State Total Disability Compensation

The plain language of Washington's reverse offset statutes allows the Department to give advance notice of reverse offsetting of future State total disability compensation that may become due an injured worker. In determining the meaning of a statute, this Court is required to first look to the relevant statutory language. *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 821, 748 P.2d 1112 (1988). This Court must give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the subject statute or from related provisions which disclose legislative intent about the provision in question. *Dep't of Ecology v. Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). A statute that is clear on its face is not subject to statutory construction, and this Court must "simply apply it." *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d at 474.

Subsection (2) of RCW 51.32.220 provides:

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 . . .

Subsection (4) of RCW 51.32.220 provides:

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

Here, the Department has received the required subsection 2 notice from the Federal government (RTR at 14-15), and the Department has given Hudgins the required subsection 4 notice (CABR at 29-30). If Hudgins becomes eligible for State total disability compensation in the future, all required notices will have been given and received, and the Department will be authorized to immediately implement the reduction. Moreover, there is not any qualifying language in the *advance-notice* provision of subsection 4 of section 220 that would support Hudgins' *advance-receipt* construction of the statute.

Thus, the plain language of the notice provisions of the statutes, as well as their policy purposes, will have been met - - Hudgins will have known in advance that offset was going to occur, he will have had opportunity to plan for it, and he will not have had false expectations that he could receive duplicative wage loss benefits from both the federal government and from the Department.

Hudgins argues, however, that the phrasing of the legislative mandate to the Department in RCW 51.32.220(1) precludes the Department from giving advance notice of offsetting of future benefits that may become due (except in certain circumstances where past litigation has resulted in a Board or court order for back payment of a lump sum of State total disability compensation). Hudgins' argument is based on the word "receiving" in subsection (1) of RCW 51.32.220, which provides in relevant part:

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. (Emphasis added)

RCW 51.32.220(1) (Emphasis added)

The word "receiving" in line 1 of subsection 1 of section 220 is not modified and is not linked to any temporally qualifying language in either subsection 1 or in any other subsection of section 220. The phrase "for persons receiving [State compensation]" in line 1 of subsection 1 of section 220 simply provides a description of those whose State workers' compensation wage-replacement benefits, if and when such benefits are paid after statutory notice provisions have been met, must be offset by

their federal disability benefits pursuant to the express authority of section 220. Read naturally and fairly, the language of the statute does not express or imply that the Department's authority to give notice of offset to any worker applies only if the worker is presently receiving State total disability compensation benefits.

Hudgins does concede that in the circumstance where past litigation has resulted in a Board or court order for back payment of a lump sum of State total disability compensation, then the Department could give notice to the injured worker before the worker has received any State compensation. CP at 42-43.

In essence, Hudgins is asking this Court to rewrite subsection 1 of section 220 to apply "for persons receiving compensation for temporary or permanent total disability compensation at the time that notice of reduction is given by the department under subsection 4 of RCW 51.32.220, except that advance notice may lawfully be given in circumstances where past litigation has resulted in a Board or court order for back payment of a lump sum of State total disability compensation . . ." (underlining indicates the language suggested by Hudgins' arguments).

But that is not what the statute states. Nor does the text of the Department-notice-to-worker requirement of subsection 4 of

RCW 51.32.220 support his argument. That subsection states only that “no reduction may be made unless the worker receives notice of the reduction prior to the month in which the reduction is made.” Hudgins would have this Court rewrite that subsection to say that “no reduction may be made unless the worker receives notice of the reduction prior to the month in which the reduction is made, and notice of the reduction cannot be given by the department except (a) in a period during which a worker is currently receiving compensation for temporary or permanent total disability compensation, or (b) in circumstances where past litigation has resulted in a Board or court order for back payment of a lump sum of State total disability compensation . . .” (underlining indicates the language that Hudgins apparently wants added to the statute). This Court should reject Hudgins’ invitation to rewrite the statute. *See generally State v. Halsten*, 108 Wn. App. 759, 33 P.3d 751 (2001).

Here there is no such temporal limitation in the phrase “for persons receiving” in line 1 of subsection 1 of section 220. Instead, the words “persons receiving” are a general description of those whose State workers’ compensation wage-replacement benefits must be offset by their federal disability benefits pursuant to the express authority of sections 220.

Nor is there any qualifying language in the notice provisions of subsection 4 of section 220 that would support Hudgins' theory.

Accordingly, at such point in time that the Department would provide State compensation to Hudgins, the necessary statutory Federal agency notice to the Department and Department notice to Hudgins will previously have been given, and Hudgins will have been allowed to plan accordingly without false expectations of receiving overlapping federal and State wage loss compensation. Hence, both the statutory language and its purposes compel the conclusion that advance notice of offset is lawful, and, where there has been advance notice, the Department is authorized to immediately implement the offset by reducing State compensation payments, if and when those State compensation benefits are paid. Hudgins fails in his attempt to read an advance-receipt limitation into the statutory notice requirement that the Legislature has chosen not to limit.

D. Assuming Arguendo That The Phrase "For Persons Receiving" In RCW 51.32.220 Is Ambiguous, It Should Be Construed, Consistently With Legislative Policy And Consistently With This Court's *Potter* And *Frazier* Decisions, As Allowing The Advance Notice Given Here.

As noted *supra* Part V.A, the Washington courts have consistently construed RCW 51.32.220 broadly in a variety of contexts so as to further legislative intent to prevent workers' receipt of duplicative and

overlapping State and Federal wage loss benefits. More to the point here, this Court construed these statutes in its *Potter* and *Frazier* decisions in a way that, while not squarely on point here, is consistent with the Department and Board decisions in the instant case, and is inconsistent with Hudgins' construction of the statutory language at issue.

In *Potter*, the worker raised a challenge under RCW 51.32.220 against the Department's offsetting of her Federal social security disability compensation against a Board-ordered, lump sum, back payment of State time loss compensation. *Potter*, 101 Wn. App. at 402. Ms. Potter raised an elusive, argument similar to that raised by Hudgins. Like Hudgins, Ms. Potter based her argument on the "for persons receiving" phrase, arguing that the Legislature had meant to limit offset to persons who - - at the moment when the Department gave notice of its authority to offset - - were then receiving payments from the Department on a current monthly basis. *Potter*, 101 Wn. App. at 405-09.

Like Hudgins, Ms. Potter argued that her interpretation was supported by plain meaning analysis. This Court rejected Ms. Potter's argument both under its own plain meaning analysis (*Potter*, 101 Wn. App. at 406) and under statutory purpose analysis (*Potter*, 101 Wn. App. at 408-09 - - noting as to legislative purpose that Ms. Potter

should not be allowed the windfall of receipt of both State and Federal benefits to compensate for lost wages for the same period). The *Potter* Court thus explained as to statutory language and legislative purpose:

A commonsense and harmonized reading of RCW 51.32 and RCW 51.52 supports the Department's contention that it has authority to make lump sum retroactive payments upon the Board's final determination of eligibility and to apply the reverse offset retroactively as well This reading furthers the Legislature's intent to avoid overlapping and duplicate payment of both state and federal disability payments. RCW 51.32.220(1); 42 U.S.C. § 424a(d); *Harris*, 120 Wn.2d at 469; *Regnier v. Dep't of Labor & Indus.*, 110 Wn.2d at 62; *Ravsten*, 108 Wn.2d at 149.

Potter, 101 Wn. App. 408-09.⁴

It is significant here that in *Potter* the Department sent the worker notice of offset before the Department paid the lump sum payment of time loss compensation. *Potter*, 101 Wn. App. at 402, 409-10. The *Potter* Court rejected Ms. Potter's notice argument, but the Court's opinion did not explain the exact content of Ms. Potter's notice argument. *Potter*, 101 Wn. App. at 409-10. Nonetheless, the result in *Potter* is inconsistent

⁴ See also the following Board decisions upholding the Department's authority to retroactively offset lump sum back time loss benefits after giving advance notice of the Department's authority to offset. *In re Eddy Maupin*, BIIA Dec., 03 21206, 2004 WL 3218307 (2004); *In re Billie Davis*, BIIA Dec., 97 3639, 1998 WL 835120 (1998); *In re Allensworth*, Dckt. No. 94 4223, 1995 WL 631742 (September 14, 1995); *In re Claudia Hyde*, Dckt. No. 93 2664, 1994 WL 238292 (April 15, 1994); *In re Shirley Benstine*, Dckt. No. 88 2101, 1989 WL 168616 (December 5, 1989); *In re James Conrad*, BIIA Dec., 68

with a straightforward application of Hudgins' "receiving" argument, which is purportedly a *plain meaning* interpretation of the statutes that would generally require that a worker be currently receiving State compensation when the Department gave notice of its offset authority.

Inconsistency of his advance-receipt interpretation of "for persons receiving" with *Potter* is the obvious reason that Hudgins has grafted a lump-sum-back-payment-award (per court or Board order) exception onto his proposed rule against advance Department notice of offset. Hudgins can provide no text-based explanation for this exception because there is no textual basis for his proposed rule. Hudgins' argument thus admits to the inconsistency of his proposed general advance-receipt rule with *Potter*, demonstrating a further reason to reject his argument.

Similarly in *Frazier*, the worker challenged application of offset to a court-ordered lump sum payment of back time loss compensation (*Frazier*, 101 Wn. App. at 414), and raised an elusive argument based on the phrase "for persons receiving," this time where the phrase appears in the first line of subsection 1 of section 225 (Mr. Frazier's case was a reverse *retirement* offset case). *Frazier*, 101 Wn. App. at 415-20. As in *Potter*, the *Frazier* Court rejected the worker's argument against applying

967, 1985 WL 25916 (1985); *In re Kenneth Beitler*, BIIA Dec., 58 976, 1982 WL 591184 (1982).

the offset. Again this Court relied on a combination of plain meaning and statutory purpose analysis. *Frazier*, 101 Wn. App. at 420. The *Frazier* Court thus explained:

The plain language of the statute does not support Frazier's argument that the phrase "receiving compensation" means that the claimant must currently be receiving *monthly* payments. *Potter*, at 403, 407. Further, Frazier's interpretation of the word "receiving" is contrary to the purpose of the statute, which is to fully compensate without allowing a windfall to the claimant. *Ravsten*, 108 Wn.2d at 149; *Herzog*, 40 Wn. App. At 25; *Potter*, at 409. Allowing Frazier to claim an exception to the offset rule because of a delay in his receipt of benefits would not only result in a windfall to him, it would also encourage others to use litigation to delay the physical delivery of benefits so as to reap the same windfall.

Frazier, 101 Wn. App. at 420.

And, as noted above in regard to the *Potter* decision, it is significant that in *Frazier* as well the Department sent the worker notice of offset before the Department paid the lump sum payment of time loss compensation, but this Court nonetheless rejected the worker's notice argument. *Frazier*, 101 Wn. App. at 414, 420-21.⁵ Thus, the results in *Frazier* and *Potter* are inconsistent with a straightforward application of Hudgins' "receiving" argument, and, as noted, for that reason he has grafted an exception onto his rule for retroactively received lump sum

⁵ The facts and issues regarding notice in *Frazier* were more complicated, but the principle applied is the same as in *Potter*.

compensation that follows a Department offset notice. Hudgins, however, can provide no reasoned or statutory-text-based explanation for this exception to his proposed rule other than its convenient service as a way to avoid inconsistency of his rule with *Potter* and *Frazier*.

Absent the *Potter/Frazier* exception proffered by Hudgins, Hudgins' argument for a general advance-receipt rule under RCW 51.32.220 and RCW 51.32.225 is inconsistent with the rulings in those cases.

The only difference between the circumstances here and those in *Potter* and *Frazier* is the uncertainty here of whether the Department will pay a State total disability compensation award. This is a distinction without a difference where the only statutory-text-based argument of the worker turns on the statutory phrase "for persons receiving" in line 1 of subsections 1 of sections 220. Ms. Potter and Mr. Frazier were no more "receiving" State total disability compensation when the Department gave its offset notice in their cases than was Hudgins when the Department gave its offset notice in his case.

Thus, Hudgins' advance-receipt interpretation of the phrase "for persons receiving" in the offset statutes threatens to undo *Potter* and

Frazier, and would thus prevent offsetting against lump sum payments or at least parts of such payments.⁶

Even if this Court were to find a logical way to accept Hudgins' one exception to his proposed advance-receipt rule - - i.e., his exception for court-ordered and Board-ordered lump sum payments of back State compensation - - his advance-receipt rule would frustrate legislative intent to prevent double recovery in another categorical circumstance, i.e., back payment circumstances that are not the result of litigation. The Department authorizes time loss compensation based on what information is made available to the Department. The worker can have considerable control over when and what information is provided to the Department.

A worker receiving Federal benefits could avoid offset by purposely delaying the providing of information to the Department. In the latter circumstance, if the Department then determined that a lump sum of time loss compensation was due the worker for an extended back period, it appears that Hudgins' proposed advance-receipt interpretation of the statute would not permit the Department to offset the payments of State

⁶ If the Department were barred from giving advance notice of offset, it appears that the overpayment recoupment provisions of RCW 51.32.220(2) would limit the Department to recovering only six months of the lump sum, and that the remainder of a seven-month-or-more lump sum back payment would escape offset. *See Potter*, 101 Wn. App. at 410. This would frustrate legislative policy to prevent double recoveries as recognized in *Potter* and *Frazier*.

compensation. As in the circumstances at issue in *Potter* and *Frazier* (back payments that resulted from litigation), Hudgins' interpretation must be rejected because it would frustrate legislative policy to prevent windfall recoveries.

Moreover, an injured worker who receives a lump sum award, whether court-ordered, Board-ordered, or determined by the Department, will receive payment from the Department more quickly under the Department's interpretation of the statutes than under Hudgins'. Under *Potter* and *Frazier*, the Department is authorized to delay paying the lump sum award until the Department has first given notice of offset prior to the month of payment of the award. *Potter*, 101 Wn. App. at 409-10; *Frazier*, 101 Wn. App. at 421. But if the Department has already given notice before the determination of the lump sum award is made, then the Department need not wait before paying the award.

Finally, it is important to note that the circumstances here do not present the hardship circumstances that the Legislature was trying to protect against with its limitations on overpayments and its notice requirements. In the Board's *Billie Davis* decision, the Board explained that the Legislature was concerned that workers would receive State compensation payments, spend the money, and only much later find out

that they would need to pay back the money. *Davis*, 1998 WL835120 at * 3. That legislative concern is not implicated here, of course, because no State compensation benefits have yet been paid.

VI. ATTORNEY FEES ARE NOT AWARDABLE

The Superior Court awarded attorney fees to Hudgins consistent with the fourth sentence of RCW 51.52.130 (“If . . . in an appeal by the department . . . the worker . . .right to relief is sustained, . . . the attorney’s fee fixed by the court for services before the court only . . .shall be payable out of the administrative fund of the department.”). CP at (Finding of Fact 8); CP at (Conclusion of Law 11).

The Superior Court attorney fee award should be reversed because, as explained above in this brief, Hudgins should not have prevailed on the merits at Superior Court. For the same reason, no appellate review attorney fees and costs should be awarded to Hudgins in this Court under RCW 51.52.130.

VII. CONCLUSION

The Department was correct in issuing an offset notice and order once it was notified that Mr. Hudgins was receiving Social Security disability benefits. The Department respectfully requests this Court to

reverse the Superior Court decision that affirmed the Board's decision and
reinstate the decision of the Department.

RESPECTFULLY SUBMITTED this 19th day of February, 2008.

ROBERT M. MCKENNA
Attorney General

Handwritten signature of John Barnes in cursive script.

JOHN BARNES
WSBA No. 19657
Assistant Attorney General

APPENDIX A

West's RCWA 51.32.220

West's Revised Code of Washington Annotated Currentness

Title 51. Industrial Insurance (Refs & Annos)

Chapter 51.3 2. Compensation--Right to and Amount (Refs & Annos)

→ 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.

APPENDIX B

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OCT 26 2007

DAVID W. PETERSON

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NOV 15 2007
ATTORNEY GENERAL'S OFFICE
LABOR & INDUSTRIES DIVISION
OLYMPIA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

DEPARTMENT OF LABOR AND)	
INDUSTRIES OF THE STATE OF)	CAUSE NO. 06 2 01329 0
WASHINGTON,)	
)	FINDINGS OF FACT AND
Plaintiff,)	CONCLUSIONS OF LAW
)	
vs.)	
)	
JEFFREY A. HUDGINS,)	
)	
Defendant.)	

This matter, having come before this Court for trial, this Court makes the following Findings of Fact and Conclusions of Law with regard to the above-referenced cause number:

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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FINDINGS OF FACT

1. On June 3, 1993, Jeffrey A. Hudgins filed an application for benefits with the Department of Labor and Industries alleging he sustained an injury while in the course of his employment with A&T Builders, Inc., on May 28, 1993. The claim was subsequently allowed.

On July 14, 2005, the Department issued an order which it stated that should further compensation benefits be deemed payable on the claim, the claimant's compensation rate would be adjusted effective February 1, 2005, due to his receipt of social security benefits. Any benefits payable for that date, or subsequent dates, would be based on his new compensation rate of \$495.80; this rate was based on monthly social security payments for the claimant totally \$817.00 and 80 percent of his highest year's earnings in the amount of \$1,312.80 per month, as provided by social security. The claimant filed a timely notice of appeal from the Department order of July 14, 2005; the Board of Industrial Insurance Appeals assigned the appeal Board Docket No. 05 17896.

Hearings were held and evidence presented with regard to Board of Industrial Insurance Appeals Docket No. 05 17896 resulting in a Proposed Decision and Order dated March 9, 2006. From the March 9, 2006 Proposed Decision and Order the Department of Labor and Industries filed a petition for

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review. In response to the petition for review, the Board of Industrial Insurance Appeals issued an Order Denying Petition for Review in Board Docket No. 05 17896 dated May 4, 2006 which adopted as the final decision of the Board of Industrial Insurance Appeals the Proposed Decision and Order dated March 9, 2006. From the Board Order Denying Petition for Review dated May 4, 2006, the Department of Labor and Industries filed an appeal to Kitsap County Superior Court.

2. Jeffrey Hudgins suffered an industrial injury on May 28, 1993.

3. The last period for which the claimant, Jeffrey Hudgins, received time loss compensation benefits based on the evidence presented was as paid through May 26, 2004.

4. The Department of Labor and Industries received notice from the Social Security Administration on January 7, 2005 that Jeffrey Hudgins was receiving social security disability benefits.

5. The Department of Labor and Industries issued an offset through a Department order dated July 14, 2005. The Department order dated July 14, 2005 contained language warning Jeffrey Hudgins that if no challenge was timely filed to the Department order of July 14, 2005, the decision would become final.

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6. At the time of the July 14, 2005 Department order Jeffrey Hudgins was no longer receiving time loss compensation benefits or any other form of wage replacement benefit from the Department of Labor and Industries.

7. At the time of issuance of the Department order of July 14, 2005 Jeffrey Hudgins was not receiving and was not scheduled to be receiving any retroactive or current wage replacement benefit from the Department of Labor and Industries.

8. Attorney fees in the amount of \$2,062.50 are reasonable.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter hereto.

2. The Department of Labor and Industries may impose a social security offset against a worker's total disability benefits paid by the Department of Labor and Industries.

3. The Department of Labor and Industries' authority to issue a Department order imposing a social security offset against total disability benefits is conditioned upon a worker receiving total disability benefits from the Department of Labor and Industries.

///

1 4. At the time of issuance of the July 14, 2005 Department order,
2 Jeffrey Hudgins was not "receiving" total disability benefits from the
3 Department of Labor and Industries as that word is used in RCW 51.32.220.
4

5 5. At the time of issuance of the July 14, 2005 Department order
6 Jeffrey Hudgins was not scheduled to be receiving any retroactive or current
7 total disability benefits through the Department of Labor and Industries.
8

9 6. At the time of issuance of the Department order of July 14, 2005
10 there was no intent by the Department of Labor and Industries to pay total
11 disability benefits to Jeffrey Hudgins.
12

13 7. The Department of Labor and Industries does not have authority to
14 issue a social security offset order when a worker is not receiving total disability
15 benefits.
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17 8. The Department of Labor and Industries is without authority to
18 issue a social security offset order payable on a contingency that "should further
19 benefits" be deemed payable, then the Department will impose an offset. The
20 Department cannot impose a social security offset in a determinative order
21 against benefits which a worker is not receiving.
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23 9. The legislative policy of preventing double compensation does not
24 exist where a worker is not actually receiving wage replacement benefits from
25 the Department of Labor and Industries.
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10. The Department order of July 14, 2005 is vacated as it was issued outside of the authority of the Department of Labor and Industries.

11. Attorney fees in the amount of \$2,062.50 are reasonable. Attorney fees are to be paid by the Department of Labor and Industries to the worker's attorney.

IT IS SO ORDERED.

DATED this _____ day of October 2007.

HONORABLE JAY B. ROOF
Superior Court Judge

Presented By:
CASEY & CASEY, P.S.

CAROL L. CASEY, WSBA #18283
Attorney for Defendant

Copy received, approved as to form
and content; notice of presentation waived:

ROB MCKENNA
Attorney General

JAY B. ROOF

JOHN BARNES, WSBA #19657
Assistant Attorney General

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

Department of Labor and Industries, <p style="text-align: right;">Appellant,</p> v. Jeffrey A. Hudgins, <p style="text-align: right;">Respondent.</p>		DECLARATION OF MAILING BY  DEPUTY
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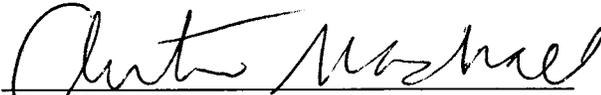
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 STATE OF WASHINGTON

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the 19th day of February 2008, I mailed the Brief of Appellant Department of Labor and Industries to all parties by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Carol L. Casey
Casey & Casey, P.S.
219 Prospect St.
Port Orchard, WA 98366-5325

DATED this 19th February, 2008.



 AUTUMN MARSHALL
 Legal Assistant