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I. NATURE OF THE CASE

This is a workers' compensation case. It arises from a Department of Labor and Industries order which contained specific provisions stating that the Decision and Order of the Department would "become final" if not challenged. The Department order under appeal is dated July 14, 2005. It stated that "if further compensation benefits be deemed payable under 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." (Finding of Fact No. 1).

The Industrial Appeals Judge hearing the case at the Board of Industrial Insurance Appeals identified the issue as:

"The issue, therefore, is a legal one – whether the Department may issue a social security disability offset order when the claimant is not actually receiving time loss compensation or permanent total disability benefits pursuant to RCW 51.32.220(1)."

...

The statute is clear and unambiguous and not in need of interpretation:

. . . . Because the language of the statute is clear and unambiguous, the Department may not issue a social security disability offset order when the claimant is not actually receiving time-loss compensation or permanent total disability benefits pursuant to RCW 51.32.220(1). Therefore, the Department's July 14, 2005, order should be reversed and the matter remanded to the Department with instructions to vacate and hold for naught its order of July 14, 2005." (PD&O, pp.3,4).

The Department challenged the decision of the Industrial Appeals Judge; the Board adopted the decision of the Industrial Appeals Judge. The Department appealed to Kitsap County Superior Court; Kitsap County Superior Court Judge Jay Roof affirmed the decision of the Board of Industrial Insurance Appeals. The Department appeals, yet again.

No party contends that the Department of Labor and Industries may not issue "notice" of a social security offset. The issue is whether the Department may impose a social security offset by way of a Department order which contains res judicata language where a worker is not receiving benefits.

II. STATEMENT OF THE CASE

Jeffrey Hudgins sustained an on the job injury in May 1993. The claim was allowed and closed in September of 1993. The

condition worsened and the claim was reopened by the Department of Labor and Industries in November 1993; then closed March 15, 1994. The condition continued to worsened so the claim was reopened by the Department of Labor and Industries on April 1, 1994.

In July 1995 the Department of Labor and Industries attempted to close the claim by calling the problem a "permanent partial disability." The claim closure was challenged and the Department voluntarily modified its own decision and the claim remained open.

On July 30, 1997 the Department issued a letter denying vocational services under the claim. That decision was challenged and the Director, by way of another letter in September 1997, indicated that total disability benefits would be reinstated.

In addition to the letter, the Department had attempted to deny total disability benefits by way of an order on August 11, 1997 (identifying a different reason). The Department of Labor and Industries modified own order and paid total disability benefits.

A short time later the Department, by letter, notified Mr. Hudgins that vocational services would not be provided because of perceived unrelated post-injury condition prevented participation

with an approved vocational program. (Department ltr., March 31, 1998). On March 31, 1998 the Department also issued an order terminating total disability benefits; that decision was challenged resulting in a Superior Court order which required payment of total disability benefits for seven and a half months for the period at issue and denied total disability benefits for four of the months at issue.

After the Superior Court litigation, the Department issued two orders in August 2002. One of the orders identified the "wages" under the state industrial claim. Wages are necessary in order to accurately pay total disability benefits. The other order closed the claim. Both those orders were affirmed by the Department of Labor and Industries on November 1, 2002; on challenge at the Board of Industrial Insurance Appeals the order of November 1, 2002 was reversed and the entire matter was remanded back to the Department for further action. The date of the Board order is December 10, 2003. At that point in time Jeffrey Hudgins had not received wage replacement benefits of any form since March 19, 1999. When the Department refused to act, a Writ of Mandamus was filed in May 2004 requesting the court order the Department of Labor and Industries to make a decision on the total disability issue.

Within days of the filing of the Writ the Department issued an order (May 28, 2004) denying all form of wage replacement benefits from Mach 30, 1999 through May 26, 2004. From that Department order Jeffrey Hudgins filed an appeal to the Board of Industrial Insurance Appeals.

The Department of Labor and Industries has the statutory right to reassume jurisdiction when a worker files an appeal from a decision of the Department of Labor and Industries. The Department's statutory right to reassume jurisdiction is limited; the Department must act within a certain amount of time to reassume jurisdiction and must issue its final decision within a maximum of 150 days from the reassumption period. RCW 51.52.060.

When the Department denied time loss (for the period covering March 1999 through May 2004) the claimant had filed the appeal from that May 28, 2004 decision. On July 1, 2004 the Department issued an order reassuming jurisdiction over the May 28, 2004 Department order. This gave the Department a statutory time frame of 150 days in which to respond to the time loss at issue from March 20, 1999 through May 26, 2004. When almost a year had past, the claimant filed yet another Writ in Superior Court requesting the court order the Department of Labor and Industries

to act on the reassumption. The Department's response? The Department issued the July 14, 2005 order which imposed a social security offset against benefits which had not been received at that point in time and for which no indication was provided that benefits would be made.

The order of July 14, 2005 imposed an offset. It 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." (FOF 5).

It is undisputed and both parties agree:

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

It is not disputed and agreed to by both parties that:

"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." (FOF 7).

After May 2004 there was a short period of time that Mr. Hudgins attempted employment activity in exchange for rent. (BR

Hudgins, p.11). This may affect Mr. Hudgins ability to receive labor and industries total disability benefits; it does not affect his ability to receive loss of earning power benefits under labor and Industries.

Sometime in 2005 Hudgins began receiving social security disability benefits. The leg problem has caused multiple surgeries – four or five – including a reattachment surgery.

Patricia Richardson is the social security offset person at the Department of Labor and Industries. She explained the offset occurs where a worker is receiving state industrial time loss benefits and social security benefits. (BR Richardson, p.6). Ms. Richardson initiated the offset order which is under appeal here. At the time of issuance of the order Mr. Hudgins was not receiving time loss from the Department. (BR Richardson, p.7). She did not “look back that far” to see if he received time loss any period during the calendar year of 2005. (BR Richardson, p.7). When asked whether the Department took an offset only if the worker was receiving benefits, she explained:

“Basically, when we consider the worker is eligible for benefits, we consider him to be receiving benefits. So, per policy, and as policy, we can initiate an offset.” (BR Richardson, p.8).

The Department's position is that an offset may be taken even where a worker is not receiving workers' compensation – even where it is clear the worker was not entitled to ever receive workers' compensation. Ms. Richardson explained that an offset is taken for “compensation” instead of specifying it is for total disability benefits because the Department believes itself able to take an offset for loss of earning power benefits. (BR Richardson, p.9).

At the time Ms. Richardson issued her offset order she was “not aware of what time loss periods had been paid, as that's a claims manager's. .” (BR Richardson, p.9).

At the time Ms. Richardson issued the July 14, 2005 order she was aware that there was a pending request for payment of time loss, the claims manager had “notified” her that “he or she was going to” pay time loss benefits but those simply had not yet been paid. (BR Richardson, p.13). At the time of her testimony, February 2, 2006, time loss had been paid only from May 27, 2004 through May 25, 2005. The payment from May 2004 through May 2005 did not occur until January 11, 2006. (BR Richardson, p.18).

Ms. Richardson acknowledge that no time loss had actually been paid during the calendar year 2004. (BR Richardson, p.19). The Department's position is that regardless how long it takes the

Department to actually get around to paying time loss, the social security offset order is not affected by the payment or non-payment of those time loss benefits.

III. STANDARD OF REVIEW

This case involves Findings of Fact which are not in dispute. These findings must be accepted as “verities on appeal.” This includes the finding that at the time of issuance of the Department order imposing the social security offset Mr. Hudgins was not receiving time loss or any other form of wage replacement benefit from the Department and was not scheduled to be receiving any retroactive or current wage replacement benefit from the Department of Labor and Industries.

The Department of Labor and Industries has interpreted “receiving” as that term is used in RCW 51.32.220(1) pursuant to a Department “policy.” There is no published Department policy addressing this. There is no Administrative Code interpreting this. There is simply no source other than a claim of “policy” to change the legislative term chosen in RCW 51.32.220(1). This “policy” does not deserve any special attention under the circumstances here.

Where the Board of Industrial Insurance Appeals has interpreted a provision of Title 51 consistently and over the course of a period of time, it is entitled to special attention. The Board is the legislatively created body designed to review the Department of Labor and Industries determinations for purposes of ensuring Departmental compliance with the law. The Board's interpretation in this case is further buttressed by the fact that the Industrial Appeals Judge and the Board have the same decision: there is no offset order that can be issued under the facts of this case.

Because this case does involve questions of law, the mandate of Title 51 is significant. RCW 51.12.010 provides:

“This Title shall be liberally construed for the purpose of reducing to a minimum the economic loss and harm arising from industrial injuries.”

Washington has a long history of statutory construction involving Title 51 always with the mandate that issues of law are to be construed in the manner most favorable to the injured worker. See, for example, Somsak v. Shearer and Dennis v. Dept. Labor & Industries.

As regards specific to interpretation concerning the social security offset statute, our courts have consistently held that

“policy” does not and cannot trump the language of the offset statutes. See Allen v. Dept. of Labor & Industries.

IV. RESPONSE TO ARGUMENT

The purpose of the state reverse offset statute, RCW 51.32.220, is not fulfilled here.

The purpose of the social security offset statute in this state is to shift the cost of benefits, where appropriate, back to the federal government. This is an appropriate goal for state legislation. No purpose is served when no state benefits are being paid. There is no “shifting” going on when no total disability benefits are being paid.

Certainly, when the Department makes the determination to pay benefits at a later date, the offset can then be imposed. However, when an offset is imposed by way of a dispositive Department order at a time when benefits are not being paid, a “policy” interpretation that attempts to effectuate the purpose behind the offset cannot trump the language of the offset statute which requires the worker to be receiving benefits at the time the offset is imposed.

RCW 51.32.220 is designed to prevent double recovery of state and federal wage loss benefits. The July 2005 Department order does not prevent "double recovery." First of all, at the time the order is issued there is no recovery whatsoever for the Department of Labor and Industries since no benefits are being paid. Second of all, the statute is not designed to prevent double recovery without regard to the offset formulations; RCW 51.32.220(1) specifies that the offset is not to exceed that imposed by the Social Security Administration. The Social Security Administration's implementing statute is 42 USCA 424a(a) and it specifies that an offset may be imposed on a worker's entitled to total disability benefits and actually receiving those benefits. The federal system does not permit an offset against "eligible" state industrial benefits. The worker must be actually receiving those benefits in order to implement the goal of double recovery. Any other analysis is simply engaging in speculation, theory, and guess work – all of which lead to errors. Some of those errors may advantage the Department of Labor and Industries (thereby not just preventing double recovery but permitting the Department to recover more than is appropriate) and some of those errors may advantage the injured worker (thereby resulting in insufficient

recovery for the Department of Labor and Industries). The legislature chose to require as a condition precedent that a worker be "receiving" total disability benefits at the time of the social security offset. This serves the goal of forcing the Department of Labor and Industries to make a decision as to whether total disability benefits are payable or loss of earning power benefits are payable and it serves the goal of forcing the injured worker of making some form of an assessment as to whether the offset order is or isn't accurate. Additionally, RCW 51.32.220 does not prevent double recovery when the offset order reduces "further compensation." The Department of Labor and Industries intends that further compensation may include loss of earning power benefits. The offset statutes do not permit loss of earning power benefit offset; they permit an offset only against total disability benefits. The Department order grossly exceeds the authorization for "double recovery" granted by law.

The Department seems overly concerned with the idea providing notice. The Department certainly can provide notice as early as it reasonably wants to, however, that notice should not be in a form of a social security offset order unless the worker is receiving total disability benefits. Most of the communications a

worker receives from the Department of Labor and Industries is not in a form of an order. For example, a worker may receive notice that he or she must attend an independent medical exam; that does not typically come in a form of a "order." The Department of Labor and Industries may send "notice" to an injured worker that a particular treatment is or isn't authorized; that "notice" typically does not come in a form of a Department order. Most of the communications from the Department do not come in a form of a Department order for good reason. Department orders are highly formal legalistic documents which contain a warning to the injured worker that the decision will become final. This can operate to the advantage or disadvantage of the Department, of the injured worker, or of the employer whose account expense can be drained by an erroneous decision of the Department. No one of these entities truly has a financial stake in the accuracy of the decision in the order unless benefits are actually being paid and actually being affected. When it remains a theoretical issue as to whether a worker or will or will not receive total disability benefits, then none of the three parties involve truly has a stake in the accuracy of the determination at issue.

The Department of Labor and Industries may provide "notice" by way of a letter which completely takes care of all of the Department's concerns. In addition to a letter, when the worker is actually paid benefits and the Department wants to impose an offset against those benefits the Department can issue an order imposing the offset against those benefits either the month prior to payment or the month after payment. To do it the month prior to payment is perfectly acceptable under RCW 51.32.220(4). This would result in absolutely no overpayment, even if the retroactive payment is years. To issue an offset order after the payment is made, the Department is perfectly within its rights to do so under the offset statute and as long as the overpayment claimed came within six months of the payment made, the Department can claim the overpayment for the entirety of the payment made.

In the facts of this case that means when the Department made payment from May 2004 through May 2005 for time loss benefits, that payment was made in January 2006. The Department could have made the payment in January 2006 with an offset order having been issued the month prior to its scheduled payment. This is notably different from what occurred in Hudgins where there was no schedule to be making payments at the time of

the July 14, 2005 Department order. The offset order would then identify the amount, the offset rate and a 100 percent reduction for the period from May 2004 through May 2005 for the offset could be imposed. This is consistent with the factual scenario argued for by the Department of Labor and Industries in Potter v. Dept. of Labor & Industries, 101 Wn.App. 399, 3 P.3d 229 (2000) and in Frazier v. Dept. of Labor & Industries, 101 Wn.App. 411, 3 P.3d 221 (2000). In Potter and in Frazier the Department argued vigorously that it needed the ability to issue a social security offset – not months or years prior to actual payment (as was done here) – but only after it was recognized that a total disability payment would need to be made. That is, when the Department, through whatever means, realized that it had to pay benefits the Department requested the Court of Appeals grant the Department the authority to issue the order the month prior to the month of actual payment. That was done in Potter and Frazier. It should have been done in Hudgins – it wasn't. The Department is now requesting authority from this Court exactly contrary to that which it had requested and received in the Potter and Frazier cases.

Alternatively, the Department could issue the order the month after the order paying time loss. In the Hudgins case, when

time loss was paid in January 2006 (for May 2004 through May 2005) then the Department could make the payment in January 2006, presumably the Department would still have its paternal concern over notifying the injured worker about the time loss offset and potential overpayment, the Department could issue the notice by way of a letter, and then to comply with RCW 51.32.220(4) the Department would then issue the order on February 2006 imposing the social security offset and claiming the overpayment. Again, 100 percent of the time loss paid from May 2004 through May 2005 is subject to the overpayment claimed and the Department would be entitled to recoup the full amount of the benefits paid.

This result is consistent with Washington law. In Washington we have never had a published decision where the Department was entitled to and did impose a social security offset against a worker who was not receiving total disability benefits. The published cases addressing the social security offset are the following:

Ravsten v. Dept. of Labor & Industries, 108 Wn.2d 143, 736 P.2d 256 (1987). Here a constitutional challenge was imposed against RCW 51.32.220. In Ravsten the worker was actually receiving total disability benefits when the offset was imposed.

Regnier v. Dept. of Labor & Industries, 110 Wn.2d 60, 749 P.2d 1299 (1988) where the issue was whether additional credits could be used in an offset computation formula. In Regnier the worker was actually receiving total disability benefits when the offset was imposed.

Allan v. Dept. of Labor & Industries, 66 Wn.App. 415, 832 P.2d 489 (1982) where the court held that the offset imposed by the Social Security Administration is largely the same offset to be applied by the Department of Labor and Industries. In Allan, the worker was actually receiving total disability benefits when the offset was imposed.

Harris v. Dept. of Labor & Industries, 120 Wn.2d 461, 843 P.2d 1056 (1993). Harris also involved a constitutional challenge and an argument concerning the meaning of "receiving." In Harris, the worker was actually receiving total disability benefits at the time the offset was imposed.

Stuckey v. Dept. of Labor & Industries, 129 Wn.2d 289, 916 P.2d 399 (1996) where the court held that an injured worker's spouse could be included in the offset computation. In Stuckey, total disability benefits were being paid at all times relevant to the offset.

Frazier v. Dept. of Labor & Industries, 101 Wn.App. 411, 3 P.3d 221 (2000) where the Department provided notice of the offset along with an order indicating that benefits would be paid, and the next month actually paid those benefits. The court held that Frazier did in fact receive compensation for periods where the offset was being imposed.

Potter v. Dept. of Labor & Industries, 101 Wn.App. 399, 3 P.3d 229 (2000) where the worker argued that if litigation delayed payment of total disability benefits, that should effect the offset. The court held that where a dispute as to the worker's entitlement to total disability has already been resolved in the worker's favor, then that worker who receives a retroactive payment is receiving the monthly payment in a lump sum subject to the offset.

Cena v. Dept. of Labor & Industries, 121 Wn.App. 915, 91 P.3d 903 (2004) where a Department order imposed an offset but was not challenged. When it was recognized sometime later that the order was incorrect, the order was held to be res judicata. In Cena the worker was in fact receiving total disability benefits when the offset was made.

Historically, every case cited involves an instance where the worker had been receiving total disability benefits. The parties

have both agreed that factually Mr. Hudgins was not receiving and was not scheduled to be receiving any retroactive or current wage replacement benefits when the Department issued its offset order. The word "receiving" has already been interpreted by our Supreme Court. The Harris v. Dept. of Labor & Industries, 120 Wn.2d 461 (1993) challenge involved an argument by the widow that the benefits were exempt from offset based upon the provision in RCW 51.32.225 which exempted the offset for those "receiving permanent total disability benefits prior to July 1, 1986." The worker in Harris did not actually receive total permanent disability prior to July 1, 1986, but wanted the opportunity to prove that total permanent disability benefits "should have" been paid prior to July 1, 1986, thereby invoking the exemption.

The Supreme Court in Harris rejected the argument:

"On its face, the statutory exception appears unambiguous. It simply makes an exception for those who are *receiving* permanent disability benefits as of a certain date. To receive is to 'take possession or delivery of' something. Webster's Third New International Dictionary 1894 (1976). Jack Harris was not taking possession or delivery of permanent disability benefits on July 1, 1986. He was only receiving temporary total disability payments on that date. He had not even requested a determination

as to whether he was permanently disabled under RCW 51.32.055(2). Essentially, the petitioner would have us read the term 'receive' to mean 'subsequently determined eligible to receive.' This would improperly stretch the language of the statute."

The Harris court found RCW 51.32.225 to be unambiguous so "we cannot construe the statute, and we must simply apply it."

The dissenting opinion argued exactly that which the Department presents to this Court in the Hudgins case. The dissenting opinion argued that "receiving" was ambiguous and could or should be interpreted to mean "eligible to" receive. The majority dismissed this with a footnote stating:

"The dissent argues this provision as ambiguous, without demonstrating how one could interpret the term 'receiving' differently. It deviates from a fundamental principle of statutory construction: that we will not construe unambiguous language in the statute. King Cy. v. Taxpayers of King Cy., 104 Wn.2d 1, 700 P.2d 1143 (1985). Only if the statute is ambiguous would we be able to employ a liberal construction to it for the benefit of the injured worker. The Department and one member of the Board of Industrial Insurance Appeals made the same error as the dissent by construing language which is clear and unambiguous." (footnote 7).

After the Harris decision, the social security offset statutes were not changed or modified as to the “receiving” requirement.

The cases of Frazier and Potter are relevant as they provide direction to the Department on how the offset is intended to be imposed where there is a delay in the payment of benefits. The statutory scheme anticipates that the Department will be paying time loss benefits on a fourteen day basis. See RCW 51.32.060/090. Obviously, that has not happened in Hudgins. When there is a delay in the payment of total disability benefits, both Frazier and Potter speak to what should occur.

In Frazier v. Dept. of Labor & Industries, social security retirement benefits were paid in 1993. On May 31, 1994 the Department issued an order indicating that total disability benefits would be paid by the Department under the claim, but those total disability benefits would be subject to offset effective December of 1993. On June 1, 1994, the Department issued an order which actually paid the temporary total disability benefits from August 1993 to May 1994 with the social security reduction effective December of 1993. The challenge in the Frazier case was that the claimant was not “receiving” total disability benefits on a monthly basis as anticipated by RCW 51.32.060/090, therefore no offset

could be imposed. The argument was rejected with the following analysis:

“The second relevant statute, RCW 51.32.225, was enacted in 1986. It allows the state to reduce disability payments for persons who receive federal social security *retirement* benefits.

Because the legislature had the same purpose in enacting both RCW 51.32.220 and .225 – to avoid duplication of wage loss benefits to injured workers – cases interpreting either of these statutes are instructive in interpreting the other.

Frazier’s first argument turns on the interpretation of the phrase ‘receiving compensation’ in RCW 51.32.225. He maintains that because he had not been receiving benefits from the Department on a monthly basis before he received the lump sum payment in June 1994, the plain language of the statute requires the Department to forgo any offset.

Construction of a statute is a legal question subject to de novo review. Stuckey v. Dept. of Labor & Industries, 129 Wn.2d 289, 295, 916 P.2d 399 (1996). However, where the meaning of a statute is clear, the court must give effect to that meaning without regard to rules of statutory construction. Allan v. Dept. of Labor & Industries, 66 Wn.App. 415, 418, 832 P.2d 489 (1992).

...

...In this case, in contrast to Harris, Frazier did in fact receive compensation

in June 1994 when he 'took possession or delivery of the award for TLC benefits. He was a person 'receiving compensation for temporary or permanent total disability under this title...' RCW 51.32.225(1); see also Potter v. Dept. of Labor & Industries, 101 Wn.App. 399, 407, 3 P.3d 229, 233, 2000 Wn.App. LEXIS 1170 (2000).

...

Because the meaning of the statute is clear, the trial court did not err in giving effect to that meaning." (emphasis added).

In Potter v. Dept. of Labor & Industries, 101 Wn.App. 399, 3 P.3d 229 (2000) the worker made the same argument – that an offset could be applied only if the worker was getting his monthly benefits on a monthly basis. Division II rejected the argument for the same reasons identified in the Frazier court.

In Potter, litigation delayed the payment of the total disability benefits. The Board of Industrial Insurance Appeals in September 1995 found Potter entitled to a retroactive period of temporary total disability. In December of 1995 the Department notified Potter that it would offset a portion of her back total disability benefit amounts because of her receipt of social security disability. The Department had already been ordered to pay that period of back time loss by the Board of Industrial Insurance Appeals. In January 1996 the

Department actually paid the back total disability benefits with the offset in place. The court noted:

“Generally, the Department pays disability benefits on a monthly basis. RCW 51.32.090(1). But where a dispute as to a claimant’s eligibility is later resolved in claimant’s favor, the Department will make a retroactive lump sum payment of past-due monthly benefits. We see no policy or legal reason to treat a lump sum payment differently than a monthly payment. A claimant who receives a retroactive payment is ‘receiving’ her monthly payments in one lump sum. Nothing in the plain language of RCW 51.32.220(1) prevents the Department from reducing this lump sum in the same fashion it would reduce a monthly payment by the amount of social security disability payments that the claimant received during the corresponding period.”

The distinction in both the Potter and the Frazier cases is that there was a determination made that the worker would in fact be receiving total disability benefits for the same period in which an offset was being claimed either at or prior to the imposition of a social security offset. In Hudgins, factually all parties agree that there was no such receipt and certainly no determination of entitlement to. There is simply a naked offset order because of the Department’s perception that at some point the Department might

actually get around to making a decision as to whether Hudgins was or wasn't eligible for total disability benefits. This is in the context of an instance where the Department had reassumed jurisdiction over a 2004 Department order and the mandate under Title 51 required the Department to act by 2004. This is under the factual scenario where the Department had, at the time of imposition of the July 2005 offset order, exceeded its authority under RCW 51.52.060 by not making a decision about entitlement to total disability benefits.

The Department of Labor and Industries argues that there is no real distinction between Potter/Frazier and Mr. Hudgins. The distinction is obvious. In Potter there was a Board of Industrial Insurance Appeals decision which required payment of the total disability benefits and that Board decision existed prior to the Department order identifying an offset. There had been litigation and a determinative decision from the Board, not subject to appeal, that required payment of those benefits. When payment of those benefits were identified and required, the Department then invoked a social security offset. At that point all parties were aware that benefits would in fact be paid, all parties had a motive and interest

in the accuracy of the social security offset, and a reason to challenge the offset order if it were erroneous.

In Frazier the Department of Labor and Industries notified Mr. Frazier of the Department's intent to make the retroactive payment of back total disability benefits in the same order in which it identified the social security offset order. (It didn't in fact pay the benefits until the next month). Again, we have a decision from an adjudicative body with authority to make such a decision that the back benefits would in fact be paid. Mr. Frazier, the Department and his employer all had a reason to ensure accuracy of the Department order which identified the offset terms, numbers, and reductions.

This contrasts dramatically with Hudgins. In Hudgins we have an order issued at a point in time where no benefits had been paid for approximately six years. In Hudgins we have an order imposing a social security offset for periods of time where the Department had not just refused to make payment of total disability benefits – but had refused to even make a decision as to the worker's entitlement to total disability benefits. In Hudgins, we have a circumstance where the Department had been obligated under Title 51 to make a decision concerning total disability benefits within

a 150 days from July 1, 2004. In Hudgins we have agreed facts that at the time of the offset order Mr. Hudgins “was no longer receiving time loss compensation benefits or any other form of wage replacement benefit from the Department of Labor and Industries” and at the time of the offset order 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.” (Findings of Fact Nos. 6,7).

The issue in Hudgins is not departmental compliance with Potter/Frazier. Had there been departmental compliance with Potter and Frazier the Board of Industrial Insurance Appeals and the Superior Court would have resolved this case differently. The issue in this case is whether Title 51 has any meaning. The Department has shown a consistent contempt of the provisions behind Title 51. The Department has not implemented the decision of the Board of Industrial Insurance Appeals on the “receiving” issue. The Department has not honored the mandates of RCW 51.52.060. The Department has not complied with the directives behind Frazier and Potter – both of which would provide the Department ample opportunity to issue an order imposing a social

security offset once the determination is made that Hudgins will be receiving benefits.

The bizarre justifications offered by the Department of Labor and Industries simply do not bear weight. The Department argues that the worker could "avoid offset" by delaying the information to the Department of Labor and Industries. Put that in context of Hudgins. Pretend Hudgins had the information in 1999 certifying total disability but just sat on it. It took the Department ten years to get the information out of Mr. Hudgins at which point the Department made the determination that total disability benefits should be paid. Under Potter/Frazier the Department simply issues the order identifying the offset and the following month pays the benefits. The worker has an offset for the entirety of the back period, has gained no economic advantage, and indeed because interest is not paid for the back ten years where the worker presumably sat on the information, the worker is out the value of the monies.

The Department also argues that RCW 51.32.220 should be interpreted as being "ambiguous" because that way the Department can provide ample advanced notice. The Department is under no obligation to issue an order providing advance notice. The advance

notice can come in the form of a letter or other communication which does not rise to the difficulties imposed by a Department order.

V. CONCLUSION

The impact of a departmental decision contained in an order cannot be understated. A departmental order contains a warning to an injured worker that the decision will be final unless challenged. Potentially interested parties have no cause to challenge a decision when it does not appear that the decision will in fact affect any monetary obligations. It doesn't matter that the decision is accurate or inaccurate – if it is unchallenged it becomes final. See Marley v. Dept. of Labor & Industries, 125 Wn.2d 533, 886 P.2d 189 (1994). The legislature chose to impose a condition upon the imposition of an offset. The condition is that the worker be “receiving” compensation. “Receiving compensation” means the person is either actually in fact getting their money or is scheduled to be getting their money. That is not a theoretical “might be eligible to” standard. The legislature chose to tie in the offset to an actual reduction so that if there is error, all parties involved will be in a position to pursue the error and correct it. Where the worker is not “receiving compensation” Title 51 does not permit the offset.

Perceived policy purposes simply do not trump the language of Title 51.

VI. ATTORNEY FEES

Attorney fees are requested pursuant to Title 51, RCW 51.52.130.

RESPECTFULLY SUBMITTED this 28th day of March 2008.

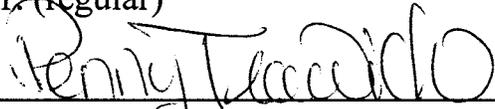
~~CASEY & CASEY, P.S.~~

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Mr. David C. Ponzoha, Clerk, Washington State Court of Appeals, DIVISION II, 950 Broadway, Ste. 300, M/S TB-06, Tacoma, WA 98402-4454; (regular)

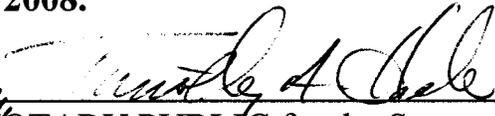
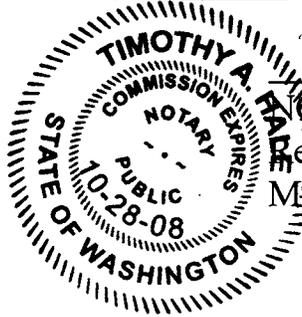
Attn: Case Manager, Washington State Court of Appeals, DIVISION II, 950 Broadway, Ste. 300, M/S TB-06, Tacoma, WA 98402-4454; (regular) and to

Mr. John Barnes, AAG, Office of the Attorney General, Labor and Industries Division, 7141 Cleanwater Ln. SW, Tumwater, WA 98501. (regular)



Penny Trawick, Legal Assistant to Casey & Casey, P.S.

SUBSCRIBED AND SWORN to before me this 31st day of March 2008.



NOTARY PUBLIC for the State of WA

Residing at: Tacoma

My Commission Expires: 10/28/08