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Court of Appeals  
Division II  
State of Washington  
1/25/2019 2:38 PM

NO. 53064-3-II

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

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ZBIGNIEW M. LASKOWSKI,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR  
AND INDUSTRIES,

Respondent.

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**DEPARTMENT'S BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

The Department offset Laskowski's time-loss compensation benefits because it learned he was also receiving social security disability payments. When a worker receives both of those benefits, RCW 51.32.220 directs the Department to reduce the worker's time-loss compensation in accordance with the federal statute governing social security offsets. Under the federal statute, the offset is calculated based on a worker's average current earnings, the worker's time-loss compensation rate before the offset, and the worker's social security benefit rate. The Department calculated Laskowski's offset based on those three figures, and Laskowski fails to show that the Department erred regarding any of those three things. Laskowski also fails to show that the Department's calculation based on those three figures is mathematically incorrect or inconsistent with RCW 51.32.220 or the federal Social Security Act. The superior court properly affirmed the Department's offset order and this Court should affirm as well.

## **II. FACTS**

### **A. Overview of Statutes Governing Social Security Offsets**

RCW 51.32.220 requires the Department to offset a worker's time-loss compensation (a wage replacement benefit) when the worker is also receiving social security benefits for the same time period. The

Department makes the reduction using a formula contained in the Social Security Act, which calculates the offset based on three things: (1) the amount of the social security benefits before an offset, (2) the industrial insurance benefits the worker would otherwise be eligible to receive, and (3) eighty percent of the worker's "average current earnings." *See* RCW 51.32.220; 42 U.S.C. § 424a. The "average current earnings" are typically determined by looking to the worker's "wages and self-employment income . . . for the calendar year" 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). This reduction of time-loss payments based on a worker'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).

RCW 51.32.220(2) requires the Department to give a worker notice of its intent to impose an overpayment based on an offset before the Department can assess an overpayment. Once the Department gives notice, it can issue an order in the following month that imposes an offset and that assesses an overpayment of benefits, which can reach back up to six months before the Department gave the worker notice that it intended to assess an overpayment. RCW 51.32.220(2), (4).

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

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

In November 2011, the Department notified Laskowski that it would be offsetting the time loss based on Laskowski's receipt of social security benefits, and that it would be assessing an overpayment of the time-loss compensation based on the offset. AR 37-38. Because it gave Laskowski this notice in November 2011, the Department could—under RCW 51.32.220—assess an overpayment reaching back up to six months before it gave him that notice, or May 2011. RCW 51.32.220(2), (4).

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

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

Using data it received from the Social Security Administration, the Department initially calculated Laskowski's offset based on the understanding that his highest annual wage in the five years proceeding his social security disability was \$34,289.49, which were wages he earned in 2006. AR Richardson 55-56; AR Ex 10 at 2. The Department issued an order in February 2012 that calculated the offset effective September 2009,<sup>2</sup> taking into account Laskowski's average current earnings, the pre-offset time-loss rate (\$2,976.25), and the social security benefit rate (\$867). AR 39-40. This led to a time-loss compensation rate, after the offset, of \$2,109.25. However, even though the offset was "effective" September 2009, the Department did not implement the offset until December 1, 2011, and it limited its assessment for an overpayment to the period after June 4, 2011, as required by law.<sup>3</sup> AR 39-40. Laskowski appealed this order to the Board.

The Board affirmed the Department's order but the superior court reversed it, determining that Laskowski received additional wages in 2007

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<sup>2</sup> The offset was "effective" September 2009 because the Department received notice of the social security benefits in August 2009, and an offset has an "effective" date one month after the Department receives this notice. RCW 51.32.220(2). AR Richardson 58.

<sup>3</sup> Under RCW 51.32.220(4), the Department cannot issue an order that implements an offset until one month after the Department has given the worker notice of the intent to assert an offset. The Department gave Laskowski notice of the offset on November 2011, so the offset could not be implemented until December 2011. AR 37-38. Once the Department implements the offset, it can assess an overpayment up to six months prior to the date that the worker received notice. RCW 51.32.220(2).

based on work he performed in 2006. AR 28-30; AR Ex 10 at 2. The superior court directed the Department to include that payment in the calculation of Laskowski's 2006 wages, which led to a higher calculation of his "average current earnings" (ACE). AR 28-30; AR Ex 10 at 2.

On remand, the Department issued a further order in 2015 that, as the superior court had directed, included the additional 2007 wages in the calculation of Laskowski's ACE, which led to an annual wage of \$50,196.90 and an ACE of \$4,183.08. Eighty percent of \$4,183.08 is \$3,346.46. AR 43-46. This led to a time-loss compensation rate, after the offset, of \$2,479.46, effective September 2009. AR 43. The Department's 2015 order also found that, effective January 1, 2015, Laskowski's time-loss rate after the offset would increase to \$2,692.12 as a result of a triennial redetermination<sup>4</sup> that had taken place. AR 43. The Department assessed an overpayment of time-loss compensation based on the offset. AR 43.

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<sup>4</sup> The Social Security Administration recalculates a worker's ACE roughly every three years, through a process known as a triennial redetermination. *See* AR Richardson 68. The Department adjusts its offset when the triennial redetermination results in an increase to the ACE. *See* AR Richardson 68.

Laskowski appealed the Department's 2015 offset order, arguing that the Department's offset was still too large. The Board and superior court affirmed the Department's order. AR 3, 27-36.<sup>5</sup>

### III. ISSUE

RCW 51.32.220 directs the Department to reduce the time-loss benefits of workers who receive both time-loss compensation and social security benefits. The amount of the reduction depends on the worker's time-loss rate before the offset, the social security benefit amount, and the worker's ACE. The Department presented evidence establishing its determination regarding each of these three things. Does substantial evidence support the superior court's findings?

### IV. STANDARD OF REVIEW

In a workers' compensation matter involving an appeal from a superior court's decision, the ordinary civil standard of review applies. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140. The court reviews the superior court's decision, not the Board's decision. *Rogers*, 151 Wn. App. at 180. The Administrative Procedures Act does not apply and it does not govern this Court's review of the case on appeal. *See id.* The court reviews the superior court's decision to confirm that its findings are supported by

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<sup>5</sup> The Board judge assigned to the case issued a Proposed Decision and Order that affirmed the Department's 2015 offset order. AR 27-36. Laskowski petitioned for review. AR 7-11. The Board denied Laskowski's petition, but made some minor, nonsubstantive changes to the proposed decision and order. AR 3.

substantial evidence and that its conclusions of law follow from its findings. *Id.*

The court reviews questions of law de novo on appeal. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996). An agency's interpretation of a law is given deference when that agency has specialized expertise in dealing with such issues. *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 925, 319 P.3d 23 (2014). Courts give deference to the Department's interpretation of the Industrial Insurance Act. *Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012).

## V. ARGUMENT

The Department properly assessed a social security offset and Laskowski has not shown otherwise. RCW 51.32.220 directs the Department to calculate offsets consistent with the provisions of 42 U.S.C. § 424a(a) of the Social Security Act, which governs offsets under the federal act. Under those statutes, the offset's amount depends on eighty percent of the worker's average current earnings, the worker's time-loss compensation rate before the offset, and the worker's social security benefit rate. As the superior court found, the Department used the correct calculation. This Court should affirm.

**A. Substantial Evidence Shows That the Department Correctly Calculated Laskowski's Offset as of September 2009 Based on Laskowski's Average Current Earnings, Time-Loss Compensation Rate Before the Offset, and Social Security Benefit Rate**

RCW 51.32.220 prevents a worker from receiving a windfall of duplicate wage-replacement benefits by providing for an offset. *E.g.*, *Frazier v. Dep't of Labor & Indus.*, 101 Wn. App. 411, 420, 3 P.3d 221 (2000); *Potter v. Dep't of Labor & Indus.*, 101 Wn. App. 399, 405, 3 P.3d 229 (2000); *Herzog v. Dep't of Labor & Indus.*, 40 Wn. App. 20, 25, 696 P.2d 1247 (1985). When injured workers receive social security benefits in addition to total disability benefits from the Department, the Department must offset their workers' compensation benefits. RCW 51.32.220.

Under RCW 51.32.220, a claimant's workers' compensation disability benefits must be reduced by the amount that person receives in social security benefits or by an amount calculated under 42 U.S.C. § 424a(a), whichever results in a lower reduction. *Birgen v. Dep't of Labor & Indus.*, 186 Wn. App. 851, 856, 347 P.3d 503 (2015). 42 U.S.C. § 424a(a) subsections (2) through (6) provide that the amount of the offset is the amount by which a person's combined monthly disability and social security benefits exceed eighty percent of that person's "average current earnings" (ACE). *Birgen*, 186 Wn. App. at 856.

RCW 51.32.220(2) directs the Department to assess an offset effective the month after it receives notice of the receipt of social security disability benefits. Since the Department received that notice in August 2009, it properly assessed the offset effective September 1, 2009. Laskowski argues that the Department should have used November 2011 rather than September 1, 2009. AB 9. But RCW 51.32.220(2) unambiguously directs the Department to assess an offset effective the month after it receives notice of the receipt of social security benefits, making September 1, 2009, the correct date to use for the initial calculation of the social security offset.

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

Each of the Department’s calculations regarding Laskowski is supported by substantial evidence. First, as the Department’s witness explained, the Department found that Laskowski earned \$50,196.90 in 2006, which leads to an ACE of \$4,183.08. AR 43-46, 57. Eighty percent

of that amount is \$3,346.46. The Department had previously found that Laskowski's wages in 2006 were \$34,289.49, but, in a prior appeal, the superior court directed it to add \$15,907.41 in wages to the calculation, resulting in a yearly wage of \$50,196.90. AR 28-30, 43-46. And Laskowski appears to agree that his ACE should be calculated based on a yearly wage of \$50,196.90. AB 3, 8.

Next, the Department found that as of September 2009, Laskowski's time-loss compensation rate before the offset was \$2,976.25. AR 58. A Department employee testified to this being the rate in effect as of September 2009, so substantial evidence supports this finding. *See* AR 58. And Laskowski does not show otherwise.

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

Since eighty percent of Laskowski's ACE figure (\$3,346.46) is higher than Laskowski's time-loss compensation rate (\$2,976.25), this means that the offset is calculated by subtracting the social security benefit rate (\$867) from eighty percent of the ACE (\$3,346.46), which leads to a

time-loss compensation rate after the offset of \$2,479.46.<sup>6</sup> *See* RCW 51.32.220; 42 U.S.C. § 424a(a)(2)-(6). The Department's calculation of the offset as of September 2009 is supported by substantial evidence and is consistent with the statutes governing offsets. The superior court properly affirmed and this Court should affirm as well.

**B. The Department Properly Concluded That Laskowski's Time-Loss Compensation Could Not Be Adjusted Based on RCW 51.32.075 in the Years Following 2009 Because the Average Current Earnings Figure Continued To Exceed the Time-Loss Compensation Rate**

The Department properly continued to base the calculation of Laskowski's offset on his ACE figure in the years after September 2009, because this figure continued to exceed his pre-offset time-loss compensation rate in those years. *See* AR Richardson 63-67. RCW 51.32.075 provides for yearly adjustments to a worker's time-loss compensation rate effective July 1 of each year, based on the annual change to the average monthly wage in the state.<sup>7</sup> These yearly adjustments to the time-loss compensation rate are known as cost of living

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<sup>6</sup> If Laskowski's time-loss compensation rate before the offset was higher than 80% of the ACE, then the offset rate would instead be calculated by subtracting the social security benefit rate from the time-loss compensation rate before the offset. But using that approach in Laskowski's case would lead to Laskowski receiving a lower time-loss compensation rate, because \$2,976.25 minus \$867 is \$2,109.25.

<sup>7</sup> Under an amendment to RCW 51.32.075, workers who were injured before 2011 did not receive an offset for July 1, 2011, but did receive them in subsequent years. Laws of 2011, 1st Spec. Sess., ch. 37, § 202.

adjustments, or COLAs. *See Messer v. Dep't of Labor & Indus.*, 118 Wn. App. 635, 641-42, 77 P.3d 1184 (2003).

But as the Department's witness explained, Laskowski's time-loss compensation rate before the offset continued to be lower than his ACE figure even after taking into account the COLAs for 2010, 2012, 2013, and 2014. *See AR Richardson 63-67*. As noted above, a worker's offset rate is calculated by subtracting the worker's social security benefit rate either from the time-loss compensation rate or eighty percent of the ACE amount, whichever results in a lower reduction to the time-loss compensation rate. RCW 51.32.220; 42 U.S.C. § 424a(a)(2)-(6). Because Laskowski's time-loss compensation rate before the offset continued to lag behind his ACE figure even after taking the COLAs into account, his offset continued to be driven by his ACE figure, not by the time-loss compensation rate before the offset. Therefore, his time-loss compensation rate after the offset did not increase in 2010, 2012, 2013, or 2014.

Laskowski's time-loss compensation rate after the offset did increase in 2015, based on a triennial redetermination that he received at that time. *AR Richardson 68*. As the Department's witness explained, the 2015 triennial redetermination increased Laskowski's ACE figure, which in turn increased the amount of time-loss compensation he could receive

after the offset.<sup>8</sup> AR Richardson 68. Laskowski argues that he should have received a triennial redetermination in 2014, not 2015, and that therefore his increase in 2015 cannot be explained based on the triennial redetermination. *See* AB 14. But Laskowski's assertion that the triennial redetermination would take place in 2014 is based on his erroneous argument that the effective date of his offset should have been November 2011 rather than September 2009. *See* AB 14; *but see* RCW 51.32.220(2). And, in any event, the Department witness testified that Laskowski received a triennial redetermination in 2015 and that this is what caused him to receive an increase to his time-loss compensation at that time. AR Richardson 68. This testimony is un rebutted.

The Department's adjudication of Laskowski's benefits is consistent with both RCW 51.32.075 and RCW 51.32.220. While RCW 51.32.075 provides for cost of living adjustments to the time-loss compensation rate, RCW 51.32.220 requires the Department to offset the worker's time-loss compensation based on the duplicative receipt of social security benefits, using the formula contained in 42 U.S.C. § 424a. Under the federal statute, the Department compares what the worker's time-loss compensation rate would be *without an offset* with the worker's social

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<sup>8</sup> The Department's witness testified that Laskowski also received a triennial redetermination in 2012, but that that redetermination did not lead to a higher calculation of the offset. AR Richardson 68.

security benefits and eighty percent of the worker's average current earnings. Since Laskowski's time-loss compensation rate without an offset is subject to COLAs, the Department compared Laskowski's time-loss compensation rate *after the COLAs* with eighty percent of the ACE, and compared both of those figures with the social security benefit rate. Since eighty percent of the ACE continued to exceed all of the other figures, it continued to drive the social security offset calculation, which meant that the COLAs did not result in an increase to Laskowski's time-loss rate after the offset. While Laskowski disagrees with this result, it is consistent with the law and is amply supported by the facts.

## VI. CONCLUSION

RCW 51.32.220 directs the Department to calculate offsets based on 42 U.S.C. § 424a. Under 42 U.S.C. § 424a, the amount of the offset depends on the worker's average current earnings, time-loss compensation rate before the offset, and social security benefit rate. Substantial evidence supports each aspect of the Department's calculation and the Department's ultimate calculation is consistent with the statutes governing offsets. Laskowski disagrees with the Department's offset calculation but fails to show either a factual or a legal error. This Court should affirm.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of January, 2019.

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A handwritten signature in cursive script that reads "Steve Vinyard".

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WASHINGTON STATE  
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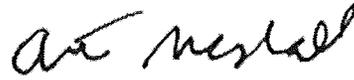
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**Superior Court Case Number:** 16-2-03591-1

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