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Court of Appeals  
Division II  
State of Washington  
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No. 53607-2-II

COURT OF APPEALS, DIVISION II OF THE  
STATE OF WASHINGTON

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TED NELSON, *Plaintiff / Appellant*

v.

DEPARTMENT OF LABOR AND INDUSTRIES, *Defendant*

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

This case involves an injured worker, Ted Nelson, who had already reached retirement age and was receiving old-age *retirement* benefits from the Social Security Administration prior to the time he was injured at work or even applied for industrial insurance benefits. The State of Washington, via RCW 51.32.220 and .225, having no independent right of offset, wrongfully applied the federal Social Security offset to Mr. Nelson's time-loss benefits, thereby reducing his monthly time-loss compensation by \$1746 each month, the amount he was receiving in old-age retirement benefits. When Mr. Nelson told the Department of Labor and Industries the federal offset did not apply because he did not meet the minimum requirements for offset under the statute, the Department ignored the merit of his argument and wrongfully mischaracterized his dispute as one of untimeliness of protest and appeal to their unlawful orders.

The state's authority to "reverse offset," RCW 51.32.220 and .225, is explicitly derived from the Social Security Act, 42 USC 424a(d). When the Social Security Administration cannot offset, neither can the state. Absent this federal "exception," there is no independent authority held by the state to offset anything related to Social Security benefits.

The Department, the Board of Industrial Insurance Appeals, and Lewis County Superior Court summarily denied Mr. Nelson his Constitutional right of due process to be heard on the merits of his appeals. He asks this Court to reverse the lower court's decision and order the Department to pay restitution in the amount of \$93,411, plus interest, for all wrongfully withheld benefits.

## II. ASSIGNMENTS OF ERROR

Assignments of Error:

1. The trial court erred in entering the order dated May 9, 2019, when it applied the Social Security offset provisions to a worker who had already attained full retirement age (66), was not receiving Social Security disability benefits, and was not subject to the provisions of the offset.
2. The trial court erred in entering the order dated May 9, 2019, finding that Appellant's appeal of the Department's underlying August 6, 2015 order was untimely, when the Department invited Appellant's protest of the January 20, 2016 order that specifically incorporated the August 6, 2015 order by reference.

3. The trial court violated Mr. Nelson’s right to due process in entering the order dated May 9, 2019, when denying Mr. Nelson the opportunity to address the merits of the January 20, 2016 order – the very subject of Mr. Nelson’s timely appeal.
4. The trial court erred in entering the order dated May 9, 2019 by denying review of the Department’s “temporary” time-loss orders that effectively deprived the worker of his right of due process to dispute each inappropriately reduced payment of time loss.

### III. STATEMENT OF THE CASE

Ted Nelson, born January 15, 1948, was 67 years old and was already receiving Social Security *retirement* benefits when he filed a worker’s compensation claim for occupational disease on February 5, 2015. CABR 227. On March 26, 2015, the Department issued a “temporary” payment order that established the date of injury (February 5, 2015), the worker’s marital status (married), number of dependents (zero), and monthly wages from all employment (\$6077.54). CABR 10-11, 156-157. Being a “temporary” order, as a matter of law, the March 26, 2015 order was *not appealable* as it contained no appealable language. *Id.*

On July 10, 2015, the Department issued an order *reducing* the worker’s time-loss compensation rate based on Mr. Nelson’s receipt of Social Security retirement benefits and assessed an overpayment of

\$3442.58. CABR 42-43, 169-170. This order contained appealable language. *Id.*

Within 60 days of its issuance, the Department exercised its discretion to modify the July 10, 2015 order by issuing an order on August 6, 2015. CABR 47-48, 174. The August 6, 2015 order specifically corrected and superseded the July 10, 2015 order, stating essentially that a calculation error had been made in the computation of the worker's time-loss rate, that time-loss still needed to be reduced by the amount of Social Security retirement benefits Mr. Nelson was receiving, and an overpayment still needed to be assessed, just in a different amount than had been calculated in the July 10, 2015 order. *Id.* This order contained appealable language. *Id.*

Five months after the August 6, 2015 order, the Department issued an order dated January 20, 2016 stating:

Your compensation rate *continues to be reduced* effective 06/01/2015 due to Social Security offset established by the order dated **08/06/2015**.

CABR 55, 180 (emphasis added). This order also contained appealable language, providing 60 days to appeal. *Id.* Mr. Nelson timely appealed this order on March 8, 2016. CABR 241-242. The written appeal explicitly stated that it was meant to be a protest to the January 20, 2016 order contesting the application of the Social Security offset. *Id.*

On March 22, 2016, the Department issued an appealable order correcting and superseding the order of January 20, 2016, reducing Mr. Nelson's wages at the time of injury to \$5296.28 per month and continuing to offset his time-loss compensation by his Social Security retirement benefits. CABR 243-244. Specifically, the order stated:

Your compensation rate *continues to be reduced* effective 06/01/2015 due to Social Security offset established by the order dated **08/06/2015**.

*Id.* (emphasis added). Mr. Nelson timely protested the March 22, 2016 order on May 12, 2016, asserting his disagreement that his time-loss compensation should continue to be reduced effective June 1, 2015 by his receipt of Social Security retirement benefits. CABR 245-246. Prior to the worker's compensation claim, he was already receiving full Social Security retirement benefits and the offset did not apply to his situation.

*Id.* In response, the Department issued an order dated August 9, 2016 stating Labor and Industries could not reconsider the order dated August 6, 2015 because the protest was not received within the 60-day time limitation. CABR 247-248.

The parties agreed to a stipulated facts trial (CABR 221-226) before the Board of Industrial Insurance Appeals (BIIA). CABR 140-143, 148-249, 289-317. The BIIA issued a Proposed Decision and Order (PDO) rejecting Mr. Nelson's protest and appeal, finding the worker's

protest and appeal of the January 20, 2015 order untimely as it related back to August 6, 2015 order. CABR 63-71. Mr. Nelson filed a timely Petition for Review with the BIIA (CABR 4-20), which was rejected on April 4, 2017, making the PDO the final Decision and Order of the BIIA (CABR 1). Mr. Nelson appealed the BIIA's decision to Lewis County Superior Court. CP 1-4. After bench trial by stipulated facts (CP 5-28), Judge Lawler affirmed the decision and order of the BIIA (CP 33-30). Hence the present appeal.

#### IV. SUMMARY OF ARGUMENT

Mr. Nelson was already 67 years old and receiving full Social Security retirement benefits *prior* to filing his claim for industrial insurance benefits. Having attained the full retirement age of 66, none of Mr. Nelson's pre-injury wages were subject to offset or reduction by the Social Security Administration. When the worker applied for benefits based on his occupational disease, the Social Security offset provision proscribed by 42 U.S.C. § 424a, did *not apply* to him because he was receiving old-age retirement benefits based on having attained (and surpassed) retirement age (66 years old), as opposed to benefits due to disability. Hence the reverse offset provision, 42 U.S.C. § 424a(d), that

allowed the State of Washington to take advantage of the offset did not apply as well.

Mr. Nelson had the right, as a matter of law, to appeal the Department's "continued reduction" of his time-loss compensation and did so when he timely appealed the January 20, 2016 order. Even if he was not able to reach back and attach all of the Department's reductions since inception on June 1, 2015 by having failed to timely appeal the August 6, 2015 order, the worker was still entitled, as a matter of law, to dispute the continued application of the offset to his time-loss in the months going forward since his protest of the January 20, 2016 order. Mr. Nelson was summarily denied the opportunity to dispute the continued application of the offset, and was summarily denied the opportunity to dispute each of the Department's bi-monthly time-loss orders when the Department wrongfully applied the offset. The Department's continued issuance of "temporary" time-loss orders contained no appealable language and were thus, non-reviewable. Because of the Department's actions in issuing "temporary" orders, it deprived Mr. Nelson of his right to due process in objecting to those orders.

The Department wrongfully applied the Social Security offset provision to Mr. Nelson's time-loss compensation, and wrongfully withheld \$1746 *each month* from his benefits beginning June 1, 2015

through October 15, 2019. The Department invited error and hence, the worker's appeal of the August 6, 2015 order by explicitly referencing it in the January 20, 2016 order. In sum, the Department unlawfully withheld \$93,411 (\$104,620.32, including simple 12% interest), of Mr. Nelson's vested time-loss compensation. The worker is entitled, as a matter of law, to full restitution equal to the sum wrongfully taken by the Department of Labor and Industries, plus interest.

## V. ARGUMENT

**Assignment of Error 1. The trial court erred in entering the order dated May 9, 2019, when it applied the Social Security offset provisions to a worker who had already attained full retirement age (66), was not receiving Social Security disability benefits, and was not subject to the provisions of the offset.**

Washington's Industrial Insurance Act, Title 51 RCW, governs judicial review of workers' compensation cases. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179, 210 P.3d 355 (2009). This Court reviews the superior court's decision, not the Board's order. RCW 51.52.140. As with the superior court's review of an administrative appeal, this Court's review is based solely on the evidence and testimony presented to the Board. RCW 51.52.115; *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004).

The Court of Appeals reviews the superior court's decision in the same manner as other civil cases. *Mason v. Georgia-Pac. Corp.*, 166 Wn. App. 859, 863, 271 P.3d 381 (2012). Specifically, this Court reviews whether substantial evidence supports the superior court's factual findings and whether the superior court's conclusions of law flow from those findings. *Rogers*, 151 Wn. App. at 180. The superior court's construction of a statute is a question of law, which this Court reviews *de novo*. *Mason*, 166 Wn. App. at 863. Substantial weight is given to an agency's interpretation of the law it administers. *Bennerstrom*, 120 Wn. App. at 858. This Court reviews the record in the light most favorable to the party who prevailed in superior court. *Rogers*, 151 Wn. App. at 180.

The Social Security Act allows the federal government to reduce the amount of Social Security *disability* benefits it pays to a worker *under the age of 66* who also receives state disability benefits. 42 U.S.C. § 424a; *Henderson v. Dep't of Labor & Indus.*, 197 Wn. App. 1032, 1036, 2017 Wash. App. LEXIS 160 (Wash. Ct. App., Jan. 17, 2017). 42 U.S.C. § 424a(d) contains an exception to the general offset rule: it allows for a “reverse offset” if a state passes enabling state legislation. *Frazier v. Dep't of Labor & Indus.*, 101 Wn. App. 411, 416, 3 P.3d 221 (2000). Reverse offset provisions allow the state to take advantage of the offset the federal government would otherwise make and thus shift costs to the

federal government. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 469, 843 P.2d 1056 (1993); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 419, 832 P.2d 489 (1992). Our legislature passed RCW 51.32.220 and RCW 51.32.225 in order to take advantage of this exception. *Frazier*, 101 Wn. App. at 416-17.

The constitutionality of 42 U.S.C. § 424a was upheld in *Richardson v. Belcher*, 404 U.S. 78, 30 L. Ed. 2d 231, 92 S. Ct. 254 (1971), when the court held that an offset could be permitted when Social Security *disability* benefits and workmen's compensation benefits *paid on account of permanent or partial disability, duplicated* efforts to provide the *same relief*. This reasoning was expressly adopted by the court in *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 149, 736 P.2d 266, 268 (1987).

The same would hold true in this instance, *if* the Mr. Nelson was receiving Social Security *disability* benefits and worker's compensation (*disability*) benefits. But this is not the case. Mr. Nelson was receiving *old-age retirement* benefits after having attained the full retirement age of 66 years old. In this instance, the offset contemplated by the Social Security Act implicitly waives offset against a worker's industrial insurance benefits by limiting the application of the statute to persons who

have *not yet attained retirement age*, and only those who are receiving Social Security *disability* benefits. 42 U.S.C. § 424a.

Section 424a requires a reduction in disability benefits, only for “*month[s] prior to the month in which an individual attains retirement age*,” as defined in 42 U.S.C.S. § 416(l)(1). Retirement age is defined as *66 years of age* for individuals who attain early retirement age<sup>1</sup> after December 31, 2004, and before January 1, 2017. 42 U.S.C.S. § 416(l)(1). Even if an individual had not yet attained the age of retirement, the Social Security offset provisions only apply to individuals who are both “*entitled to benefits under 42 U.S.C.S. § 423*,” and entitled to “*periodic benefits on account of his or her total or partial disability*.” By its plain language, 42 U.S.C.S. § 423 only pertains to federal Social Security *disability* benefits, *not old-age retirement* benefits. To qualify for disability insurance benefits, one must be:

§ 423. **Disability** insurance benefit payments

(a)(1)(A) is insured for disability insurance benefits (as determined under subsection (c)(1)), and (B) has *not attained retirement age* (as defined in section 216(l) [42 USCS § 416(l)])

42 U.S.C.S. § 423 (emphasis added).

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<sup>1</sup> “Early retirement age” means “age 62 in the case of an old-age, wife’s, or husband’s insurance benefit. 42 U.S.C.S. § 416(l)(2).”

Under RCW 51.32.220 and RCW 51.32.225, workers' compensation benefits can only be reduced by the amount a person receives in Social Security *disability* benefits or by an amount calculated under the Social Security Act pursuant to the *reduction* calculated by 42 U.S.C. § 424a, whichever is *less*. *Birgen v. Dep't of Labor & Industries*, 186 Wn. App. 851, 856, 347 P.3d 503, *review denied*, 184 Wn.2d 1012 (2015). However, if there is no offset pursuant to 42 U.S.C. § 424a, because the worker has already *attained retirement age* and is *not* receiving Social Security *disability* benefits, then there is equally no “reverse offset” to apply pursuant to 42 U.S.C. § 424a(d). Consistent with this intent is RCW 51.32.225, which states:

This reduction *does not apply* to workers who had applied to receive social security retirement benefits *prior to the date of their injury* or to *workers who were receiving social security benefits prior to their injury*.

RCW 51.32.225(1) (emphasis added).

Likewise, RCW 51.32.220 states:

(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*.

RCW 51.32.220(1) (emphasis added). Absent an actual reduction by the Social Security Administration, the State of Washington had no authority to offset and thereby reduce Mr. Nelson's industrial insurance benefits. 42 U.S.C. §. 424a(d). Plain and simple, the Department wrongfully applied the offset.

**Assignment of Error 2.      The trial court erred in entering the order dated May 9, 2019, finding that Appellant's appeal of the Department's underlying August 6, 2015 order was untimely, when the Department invited Appellant's protest of the January 20, 2016 order that specifically incorporated the August 6, 2015 order by reference.**

When Mr. Nelson attempted to dispute the offset, the Department mischaracterized the nature of his dispute as one of timeliness of appeal and denied him the very opportunity to fully and fairly dispute the merit of his claim, which was the *past* application of the Social Security offset against his current time-loss compensation. The BIIA further compounded the injustice by denying Mr. Nelson a full and fair opportunity to dispute the *continued* application of the offset to his time-loss from January 20, 2016 forward, the very order he timely appealed. The January 20, 2016 order included the statutory appealable language and stated:

Your compensation rate continues to be reduced effective 06/01/2015 due to Social Security offset established by the order dated 08/06/2015.

This order becomes final 60 days from the date it is communicated to you unless you do one of the following:  
File a written request for reconsideration with the Department or file a written appeal with the Board of Industrial Insurance Appeals. If you file for reconsideration, you should include the reasons you believe this decision is wrong and send it to: Department of Labor and Industries, PO Box 44291, Olympia, WA 98504-4291. We will review your request and issue a new order. If you file and appeal, send it to: Board of Industrial Insurance Appeals, PO Box 42401, Olympia, WA 98504-2401 or submit it on an electronic form found at [HTTP://WWW.BIA.WA.GOV/](http://www.bia.wa.gov/).

CABR 126. Mr. Nelson timely protested the January 20, 2016 order on March 8, 2016:

Please consider this letter a formal protest and request for reconsideration to the Department order dated 01/20/2016 received in this office on 01/21/2016 a copy of which is enclosed.

It is our position that this order is void and unlawful as he was receiving Social Security *Retirement* when he was injured. As he was receiving these benefits when he was working he should not be subject to any offset. Therefore, we request that the Department cancel this order and issue an adjustment warrant.

CABR 241-242 (emphasis added). There is no dispute Mr. Nelson timely protested the January 20, 2016 order that specifically incorporated the August 6, 2015 order. The only purpose of this order was to reaffirm the offset that was implemented by order dated August 6, 2015. The

Department invited reopening of the August 6, 2015 order. If the Department did not intend this, it should not have issued the order at all and certainly should not referenced appealable language in the order itself.

The basic premise of the invited error doctrine is that a “party who sets up an error at trial cannot claim that very action as error on appeal.” *In re Pers. Restraint of Serano Salinas*, 189 Wn.2d 747, 755, 408 P.3d 344, 347-48 (2018) (quoting *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009)). In determining whether the invited error doctrine applies, the court considers whether the defendant affirmatively assented to the error, ***materially contributed*** to it, or benefited from it.” *Id.* (emphasis in the original). Here, the Department singlehandedly ***created*** the January 20, 2016 order that clearly invited review of the August 6, 2015 order. The Department ***materially contributed*** to the creation of the January 20, 2016 order and should be prohibited from asserting Mr. Nelson’s invited appeal of the August 6, 2015 order was untimely.

When brought to the attention of Lewis County Superior Court, Judge Lawson erred in not considering the doctrine of invited error. He further erred by summarily adopting the BIIA’s flawed reasoning based on timeliness of appeal. Even though the agency and the lower court did not consider invited error, at the very least, both tribunals should have considered Mr. Nelson’s timely disagreement with the Department’s

*continuation* of the application of the offset and *continued reduction* of his bi-monthly time-loss checks from January 20, 2016 forward.

**Assignment of Error 3.      The trial court erred in entering the order dated May 9, 2019, when it failed to provide the worker simple procedural due process when refusing Mr. Nelson the opportunity to address the merits of the January 20, 2016 order – the very subject of Mr. Nelson’s timely appeal.**

At the most rudimentary level, Mr. Nelson was denied the basic opportunity to be heard on the merits of his complaint. Procedural due process under the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, requires that an individual receive notice of the deprivation and an *opportunity to be heard* to guard against erroneous deprivation of a protected interest. To determine whether a particular procedure for providing notice and an opportunity to be heard is constitutionally adequate, a court must assess the risk of erroneous deprivation in light of the competing interests at stake. To do so, the court must first recognize that there are different ways in which a deprivation might be erroneous. For instance, a deprivation might be erroneous based on a statutory or regulatory violation, where there is an error in applying the law as written to the facts presented. *Fields v. Dep’t of Early Learning*, 193 Wn.2d 36, 38, 434 P.3d 999, 1001 (2019). Here, by mischaracterizing the nature of

Mr. Nelson’s appeal as a singular issue of timeliness, the agency and lower court circumvented the worker’s right to be heard on the actual merits of his appeal of both the January 20, 2016 and August 6, 2015 orders.

**Assignment of Error 4. The trial court erred in entering the order dated May 9, 2019 by refusing Mr. Nelson the opportunity to address the “temporary” time-loss orders and effectively depriving him of his right of due process to dispute each inappropriately reduced payment of time loss.**

By continuing to issue “temporary” time-loss orders for every month following the August 6, 2015 offset order, the Department effectively deprived Mr. Nelson of his right to procedural due process to dispute the actual computation of each time-loss payment. At its core, procedural due process requires notice and an opportunity to be heard. The Department issued a mass of “temporary” time-loss orders *before* and *after* the disputed orders of August 6, 2015 (CABR 47-48, 174) and January 20, 2016 (CABR 55, 180):

1. April 29, 2015 (CABR 14, 32-33, 159-160),
2. May 12, 2015 (CABR 35, 162),
3. May 26, 2015 (CABR 36-37, 163-164),
4. June 9, 2015 (CABR 39, 166),
5. June 23, 2015 (CABR 40, 167),
6. July 7, 2015 (CABR 41, 168),
7. July 21, 2015 (CABR 44, 171),

8. August 5, 2015 (CABR 45-46, 172-173),
9. August 18, 2015 (CABR 49-50, 175),
10. September 1, 2015 (CABR 51-52, 176-177), and
11. September 15, 2015 (CABR 53-54, 178-179).

None of the “temporary” time loss orders contained any appealable language. By definition, each was non-reviewable. By issuing these types of non-reviewable orders, the Department effectively removed Mr. Nelson’s ability to dispute and appeal each order to a higher authority. This, in and of itself, amounted to another denial of procedural due process. Had the orders contained the right of appeal, Mr. Nelson could have renewed his objection that its provisions of 42 U.S.C. § 424a(d) did not apply because he had already attained retirement age, and was already receiving *old-age retirement* (not disability) benefits *prior* to his application for industrial insurance benefits.

## VI. CONCLUSION

The Department of Labor and Industries exceeded its authority to apply the “reverse offset” contained in 42 U.S.C. § 424a(d). When Mr. Nelson raised timely notice to the Department objecting to the application of the offset, he was ignored and summarily dismissed under the mischaracterization of having filed an untimely appeal. This mischaracterization tainted the worker’s further appeals to the BIIA and Lewis County Superior Court.

Mr. Nelson deserved due process. He received none. He is asking the Court of Appeals to right this wrong. The worker is entitled to restitution for the \$93,411 in vested wage-replacement benefits the Department wrongfully withheld from him, plus interest.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Dominique Jinhong", is written over a horizontal line.

Dominique' Jinhong  
Attorney for Appellant  
WSBA#28293

## VII. APPENDIX

### Department Orders

1. July 10, 2015 order (reducing the worker's time-loss compensation rate based on Mr. Nelson's receipt of Social Security retirement benefits and assessed an overpayment of \$3442.58.) CABR 42-43, 169-170.
2. August 6, 2015 order (specifically correcting and superseding the July 10, 2015 order, stating essentially that a calculation error had been made in the computation of the worker's time-loss rate, that time-loss still needed to be reduced by the amount of Social Security retirement benefits Mr. Nelson was receiving, and an overpayment still needed to be assessed, just in a different amount than had been calculated in the July 10, 2015 order.) CABR 47-48, 174.
3. January 20, 2016 order:

Your compensation rate *continues to be reduced* effective 06/01/2015 due to Social Security offset established by the order dated **08/06/2015**. CABR 55, 180 (emphasis added).
4. Mr. Nelson's timely protest of the January 20, 2016 order. CABR 241-242.
5. March 22, 2016 order correcting and superseding the order of January 20, 2016:

Your compensation rate *continues to be reduced* effective 06/01/2015 due to Social Security offset established by the order dated **08/06/2015**. CABR 243-244 (emphasis added).
6. Mr. Nelson's timely protest of the March 22, 2016 order (asserting his disagreement that his time-loss compensation should continue to be reduced effective June 1, 2015 by his receipt of Social Security retirement benefits.) CABR 245-246.

7. August 9, 2016 order (stating Labor and Industries could not reconsider the order dated August 6, 2015 because the protest was not received within the 60-day time limitation.) CABR 247-248.

**Lower Court Decision (Lewis County Superior Court)**

8. Judge Lawler's Decision. CP 30-33.

# APPENDIX #1

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44281  
OLYMPIA, WA 98504-4281

MAILING DATE 07/10/2015  
CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

TED NELSON  
PO BOX 697  
MOSSYROCK WA 98564-0697

### NOTICE OF DECISION

The compensation on your claim is being adjusted effective 06/01/2015 because you receive Social Security benefits. Your new compensation rate is \$1696.58 per month.

This rate is based on monthly Social Security payments for you and your spouse totaling \$1746.00 and 80 percent of your highest year's earnings in the amount of \$0.00 per month, as provided by Social Security.

This new rate is not being implemented until 08/01/2015, as required by law; therefore an overpayment has occurred for the period from 06/01/2015 through 07/31/2015. This overpayment is \$3492.00 and will be deducted from your benefits at an initial rate of \$424.14, per month.

NOTIFY THE DEPARTMENT OF LABOR AND INDUSTRIES IMMEDIATELY OF ANY CHANGES IN YOUR SOCIAL SECURITY BENEFITS, OTHER THAN COST OF LIVING INCREASES.

Supervisor of Industrial Insurance  
By Patricia Richardson  
Sso Benefits Specialist  
PHONE: 360-902-5119

|| THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS  
|| COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING: FILE  
|| A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR  
|| FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE  
|| APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE  
|| REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO:  
|| DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA  
|| 98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER.  
|| IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE  
|| APPEALS, PO BOX 42401, OLYMPIA WA 98504-2401 OR SUBMIT IT ON AN  
|| ELECTRONIC FORM FOUND AT [HTTP://WWW.BIIA.WA.GOV/](http://www.BIIA.WA.GOV/).

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44281  
OLYMPIA, WA 98504-4281

MAILING DATE 07/10/2015  
CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

MAILED TO: WORKER - TED NELSON  
PO BOX 697, MOSSYROCK WA 98564-0697  
PROVIDER - ANDERSON KEITH V MD  
WASHINGTON ORTHOPAEDIC CTR, 1900 COOKS HILL RD, CENTRALIA W

-----  
	THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS	
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	A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR	
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	98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER.	
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	APPEALS, PO BOX 42401, OLYMPIA WA 98504-2401 OR SUBMIT IT ON AN	
	ELECTRONIC FORM FOUND AT [HTTP://WWW.BIIA.WA.GOV/](http://www.BIIA.WA.GOV/).	
-----

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44281  
OLYMPIA, WA 98504-4281

HAILING DATE 07/10/2015  
CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

TED NELSON  
PO BOX 697  
MOSSYROCK WA 98564-0697

NOTICE OF DECISION

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NOTIFY THE DEPARTMENT OF LABOR AND INDUSTRIES IMMEDIATELY OF ANY CHANGES IN YOUR SOCIAL SECURITY BENEFITS, OTHER THAN COST OF LIVING INCREASES.

Supervisor of Industrial Insurance  
By Patricia Richardson  
Sso Benefits Specialist  
PHONE: 360-902-5119

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STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44281  
OLYMPIA, WA 98504-4281

MAILING DATE 07/10/2015  
CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

MAILED TO: WORKER - TED NELSON  
PO BOX 697, MOSSYROCK WA 98564-0697  
PROVIDER - ANDERSON KEITH V MD  
WASHINGTON ORTHOPAEDIC CTR, 1900 COOKS HILL RD, CENTRALIA W

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# APPENDIX #2

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44281  
OLYMPIA, WA 98504-4281

MAILING DATE 08/06/2015  
CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

TED NELSON  
PO BOX 697  
MOSSYROCK WA 98564-0697

### NOTICE OF DECISION

This order corrects and supersedes the order(s) of 07/10/2015.

The compensation on your claim is being adjusted effective 06/01/2015 because you receive Social Security benefits. Your new compensation rate is \$2,321.87 per month.

This rate is based on monthly Social Security payments for you and your spouse totaling \$1,746.00 and your highest year's earnings of \$61,018.00 for 2014.

This new rate is not being implemented until 08/01/2015, as required by law: therefore an overpayment has occurred for the period from 06/01/2015 through 07/31/2015. This overpayment is \$2,241.42 and will be deducted from your benefits at an initial rate of \$373.57, per month.

All prior overpayment deductions remain applied to this overpayment.

NOTIFY THE DEPARTMENT OF LABOR AND INDUSTRIES IMMEDIATELY OF ANY CHANGES IN YOUR SOCIAL SECURITY BENEFITS, OTHER THAN COST OF LIVING INCREASES.

Supervisor of Industrial Insurance  
By Christina L Gilson  
Sso Benefits Specialist  
PHONE: 360-902-5119

THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING: FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA 98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS, PO BOX 42401, OLYMPIA WA 98504-2401 OR SUBMIT IT ON AN ELECTRONIC FORM FOUND AT [HTTP://WWW.BIIA.WA.GOV/](http://www.BIIA.WA.GOV/).

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44281  
OLYMPIA, WA 98504-4281

MAILING DATE 08/06/2015  
CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

MAILED TO: WORKER - TED NELSON  
PO BOX 697, MOSSYROCK WA 98564-0697  
PROVIDER - ANDERSON KEITH V MD  
WASHINGTON ORTHOPAEDIC CTR, 1900 COOKS HILL RD, CENTRALIA W

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STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44281  
OLYMPIA, WA 98504-4281

MAILING DATE 08/06/2015  
CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

TED NELSON  
PO BOX 697  
MOSSYRDOCK WA 98564-0697

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Supervisor of Industrial Insurance  
By Christina L Gilson  
Sso Benefits Specialist  
PHONE: 360-902-5119

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-----

# APPENDIX #3

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44291  
OLYMPIA, WA 98504-4291

MAILING DATE 01/20/2016  
CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

TED NELSON  
% LAW OFFICES OF DAVID B. VAIL AND  
JENNIFER CROSS-EUTENEIER  
PO BOX 5707  
TACOMA WA 98415-0707

### NOTICE OF DECISION

Your compensation rate continues to be reduced effective 06/01/2015 due to Social Security offset established by the order dated 08/06/2015.

Supervisor of Industrial Insurance  
By Edward D Patrick  
Claim Manager  
(360) 902-4352

MAILED TO: WRKER/ATTY - TED NELSON, % LAW OFFICES OF DAVID B. VAIL  
JENNIFER CROSS-EUTENEIER, PO BOX 5707, TACOMA WA 98415-0707  
PROVIDER - ANDERSON KEITH V MD  
WASHINGTON ORTHOPAEDIC CTR, 1900 COOKS HILL RD, CENTRALIA W

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|| 98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER.  
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STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44291  
OLYMPIA, WA 98504-4291

MAILING DATE 01/20/2016  
CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

TED NELSON  
% LAW OFFICES OF DAVID B. VAIL AND  
JENNIFER CROSS-EUTENEIER  
PO BOX 5707  
TACOMA WA 98415-0707

NOTICE OF DECISION

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Supervisor of Industrial Insurance  
By Edward D Patrick  
Claim Manager  
(360) 902-4352

MAILED TO: WRKER/ATTY - TED NELSON, % LAW OFFICES OF DAVID B. VAIL  
JENNIFER CROSS-EUTENEIER, PO BOX 5707, TACOMA WA 98415-0707  
PROVIDER - ANDERSON KEITH V MD  
WASHINGTON ORTHOPAEDIC CTR, 1900 COOKS HILL RD, CENTRALIA W

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# APPENDIX #4

**LAW OFFICES OF  
DAVID B. VAIL & JENNIFER CROSS-EUTENEIER  
AND ASSOCIATES, PLLC**

DAVID B. VAIL  
JENNIFER M. CROSS-EUTENEIER  
DOUGLAS D.N. WATKINS  
KRISTEN R. FROSTBERG  
RICHARD I. BROWN  
JESSICA K. SAVAGE  
MARCUS DUNN, S.R. PARALEGAL  
LARRY K. MEYER, S.R. PARALEGAL

819 MARTIN LUTHER KING JR. WAY  
P.O. BOX 5707  
TACOMA, WA 98415-0707

GROUP ID: 328  
LOCATION ID: 341

CAROLINE ROBERTS, S.R. PARALEGAL  
DAWN LEON PARALEGAL  
HILARY KENNEDY PARALEGAL  
LISA GARDNER PARALEGAL  
PHIONA HUFF PARALEGAL  
KALEENA LEONOWICZ-LAMB PARALEGAL  
SARA LEON PARALEGAL

**DECLARATION OF MAILING**

March 8, 2016

The undersigned declares and states:  
On the 8 day of MARCH, 2016 I deposited  
in the mails of the United States of America, a properly  
stamped and addressed envelope directed to the following:

Edward Patrick, Claim Manager  
Department of Labor and Industries  
P.O. Box 44291  
Olympia, WA 98504-4291

**Edward Patrick**

containing the original of the document to which this  
letter pertains. I declare under penalty of perjury  
under the laws of the State of Washington that the  
copying is true and correct.

Re: Claimant: Ted Nelson  
Claim No: AT84036

*Phiona Huff*  
Sign: Phiona Huff day of  
MARCH 2016  
TACOMA, WA

Dear Mr. Patrick,

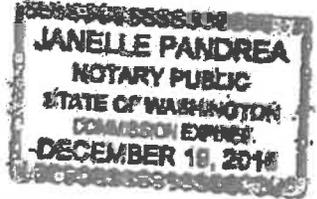
Sent via fax to 360-902-4567 and by U.S. mail

Please consider this letter a formal protest and request for reconsideration to the Department order dated 01/20/16 received in this office on 01/21/16 a copy of which is enclosed.

It is our position that this order is void and unlawful as he was receiving Social Security Retirement when he was injured. As he was receiving these benefits when he was working he should not be subject to any offset. Therefore, we request that the Department cancel this order and issue an adjustment warrant.

Your prompt attention and assistance with this matter is appreciated. Please contact me if you have any questions.

Sincerely,  
*Phiona Huff*  
Phiona Huff  
Paralegal  
w/Enclosure



STATE OF WASHINGTON  
PHIONA HUFF  
AFFIDAVIT OF DEPOSITION  
I, Phiona Huff, being duly sworn, depose and testify that the  
contents of the foregoing are true and correct to the best of my  
knowledge and belief.  
Subscribed and sworn to before me this 8th day of MARCH, 2016.  
*Phiona Huff*  
Notary Public for the  
State of Washington

Tacoma: (253) 383-8770      Seattle: (253) 874-2546      Olympia: (360) 943-8098

Facsimile: (253) 383-8774      Toll Free: 1-877-544-3452

**EXHIBIT 10**

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44291  
OLYMPIA, WA 98504-4291

MAILING DATE 01/20/2015  
CLAIM NUMBER A184038  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

PH  
3-10-16

EMPLOYER \*N/A\*  
OBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

TED NELSON  
& LAW OFFICES OF DAVID B. VAIL AND  
JENNIFER CROSS-EDTENMEIER  
PO BOX 5707  
TACOMA WA 98415-0707

NOTICE OF DECISION

Your compensation rate continues to be reduced effective 06/01/2015 due to Social Security offset established by the order dated 08/06/2015.

Supervisor of Industrial Insurance  
By Edward D Patrick  
Claim Manager  
(360) 902-4352

MAILED TO: WRKER/ATTY - TED NELSON, & LAW OFFICES OF DAVID B. VAIL  
JENNIFER CROSS-EDTENMEIER, PO BOX 5707, TACOMA WA 98415-0707  
PROVIDER - ANDERSON KEITH V MD  
WASHINGTON ORTHOPAEDIC CTR, 1900 COOKS HILL RD, CENTRALIA W

COPY TO WRKER/ATTY  
DATE: 01/21/16

RECEIVED  
JAN 21 2016  
Vail-Cross & Associates

THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING: FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA 98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS, PO BOX 42401, OLYMPIA WA 98504-2401 OR SUBMIT IT ON AN ELECTRONIC FORM FOUND AT [HTTP://WWW.BIIA.WA.GOV/](http://www.BIIA.WA.GOV/).

23850711000803071000000000

# APPENDIX #5

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44291  
OLYMPIA, WA 98504-4291

MAILING DATE 03/22/2016  
CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

TED NELSON  
X LAW OFFICES OF DAVID B. VAIL AND  
JENNIFER CROSS-EUTENEIER  
PO BOX 5707  
TACOMA WA 98415-0707

### NOTICE OF DECISION

This order corrects and supersedes the order(s) of 01/20/2016.

The worker's wage is set by taking into account the following:

The wage for the job of injury is based on \$5,296.28 per month.

Additional wage for the job of injury include:

Health Care Benefits \$842.23 per month Tips NONE per month Bonuses  
NONE per month Overtime NONE per month Housing/Board/Fuel NONE per  
month

Worker's total gross wage is \$5,296.28 per month.

Worker's marital status eligibility on the date of this order is  
married with 0 children.

Your compensation rate continues to be reduced effective 06/01/2015  
due to Social Security offset established by the order dated  
08/06/2015.

Supervisor of Industrial Insurance  
By Edward D Patrick  
Claim Manager  
(360) 902-4352

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|| THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS  
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STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44291  
OLYMPIA, WA 98504-4291

MAILING DATE 03/22/2016  
CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

MAILED TO: WRKER/ATTY - TED NELSON, % LAW OFFICES OF DAVID B. VAIL  
JENNIFER CROSS-EUTENEIER, PO BOX 5707, TACOMA WA 98415-0707  
PROVIDER - ANDERSON KEITH V MD  
WASHINGTON ORTHOPAEDIC CTR, 1900 COOKS HILL RD, CENTRALIA W

	THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS	
	COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING: FILE	
	A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR	
	FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE	
	APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE	
	REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO:	
	DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA	
	98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER.	
	IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE	
	APPEALS, PO BOX 42401, OLYMPIA WA 98504-2401 OR SUBMIT IT ON AN	
	ELECTRONIC FORM FOUND AT [HTTP://WWW.BIIA.WA.GOV/](http://www.BIIA.WA.GOV/).	

# APPENDIX #6

**LAW OFFICES OF  
DAVID B. VAIL & JENNIFER CROSS-BUTENEIER  
AND ASSOCIATES, PLLC**

DAVID B. VAIL  
JENNIFER M. CROSS-BUTENEIER  
DOUGLAS H. M. WHITFIELD  
KIMBERLY D. TROTTENBERG  
RICHARD I. GARDNER  
JESSICA M. SANDERSON  
MICHELLE S. DUNN, ESQ. PARALEGAL  
LAWRENCE M. MYERS, ESQ. PARALEGAL

819 MARTIN LUTHER KING JR. WAY  
P.O. BOX 5707  
TACOMA, WA 98416-0707

GROUP No: 308  
LOCATION No: 541

CAROLYN HORTON, ESQ. PARALEGAL  
BOBBI LYNN PARALEGAL  
HEATHER KIRKBY PARALEGAL  
LISA HANSEN PARALEGAL  
TAMARA HUNT PARALEGAL  
KATHLEEN LEONARDI, ESQ. PARALEGAL

**DECLARATION OF MAILING**

The undersigned declares and states  
On the 12 day of May, 2016, I have posted  
in the mail of the United States of America, a properly  
stamped and addressed envelope directed to the following:

Edward Patrick  
considering the original of this document to which this  
declaration is attached, declare under penalty of perjury  
under the laws of the State of Washington that the  
foregoing is true and correct.

*Phiona Huff*  
Signed this 12 day of  
May 2016 at  
Tacoma, Washington

May 12, 2016

Edward Patrick, Claims Manager  
Department of Labor and Industries  
P.O. Box 44892  
Olympia, WA 98504-4291

RE: Claimant: Ted Nelson  
Claim No: AT84036

Dear Mr. Patrick:

Sent via fax to 360-902-4567 and by U.S. mail

Please consider this letter a formal protest and request for reconsideration to the Department order dated 03/22/16 received in this office on 03/23/16 a copy of which is enclosed.

We are in agreement with the wage order that his monthly wage is correct. However, we are in disagreement that his compensation rate should continue to be reduced effective 06/01/15 as indicated in the above referenced order. Please be advised that while Ted was working, he was receiving full social security retirement benefits. It is our position that he should not be subject to any social security offset as he was receiving this while he was working.

Therefore, we request that you correct this order and issue a warrant check to pay back all monies that were withheld. Your consideration and attention to this matter is appreciated. Please contact me if you have any questions.

Sincerely,  
*Phiona Huff*  
Phiona Huff  
Paralegal  
W/Enclosure

SEARCHED INDEXED  
SERIALIZED FILED  
MAY 12 2016  
FBI - TACOMA  
*Phiona Huff*  
*Jennifer Cross-Buteneier*  
Olympia, WA

Tacoma: (253) 874-2546  
JANELLE PANDREA  
STATE OF WASHINGTON  
DECEMBER 16, 2011  
Toll Free: 1-877-544-3412

**EXHIBIT 457**

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44291  
OLYMPIA, WA 98504-4291

MAILING DATE 03/22/2016  
CLAIM NUMBER R164936  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

PA

5-11-16

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

TED NELSON  
\* LAW OFFICES OF DAVID B. VAIL AND  
JENNIFER CROSS-KUTNEIER  
PO BOX 5707  
TACOMA WA 98415-0707

NOTICE OF DECISION

This order corrects and supersedes the order(s) of 01/20/2016.

The worker's wage is set by taking into account the following:

The wage for the job of injury is based on \$5,296.28 per month.

Additional wage for the job of injury include:

Health Care Benefits \$842.23 per month Tips NONE per month Bonuses  
NONE per month Overtime NONE per month Housing/Board/Fuel NONE per  
month

Worker's total gross wage is \$5,296.28 per month.

Worker's marital status eligibility on the date of this order is  
married with 0 children.

Your compensation rate continues to be reduced effective 06/01/2015  
due to Social Security offset established by the order dated  
08/06/2015.

Supervisor of Industrial Insurance  
By Edward D Patrick  
Claim Manager  
(360) 902-4352

COPIED TO CLIENT  
DATE: 3/29/16

RECEIVED  
MAR 28 2016

Vail-Cross & Associates  
Scanned

THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS  
COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING: FILE  
A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR  
FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE  
APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE  
REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO:  
DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA  
98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER.  
IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE  
APPEALS, PO BOX 42401, OLYMPIA WA 98504-2401 OR SUBMIT IT ON AN  
ELECTRONIC FORM FOUND AT [HTTP://WWW.BIIA.WA.GOV/](http://WWW.BIIA.WA.GOV/).

# APPENDIX #7

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44291  
OLYMPIA, WA 98504-4291

MAILING DATE 08/09/2016  
CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
CLAIMANT NELSON TED D

EMPLOYER \*N/A\*  
UBI NUMBER \*N/A\*  
ACCOUNT ID \*N/A\*  
RISK CLASS 5003  
SERVICE LOC Olympia

TED NELSON  
% LAW OFFICES OF DAVID B. VAIL AND  
JENNIFER CROSS-EUTENEIER  
PO BOX 5707  
TACOMA WA 98415-0707

#### NOTICE OF DECISION

Labor and Industries cannot reconsider the order dated 08/06/2015 because the protest was not received within the 60 day time limitation. That order is final and binding.

Supervisor of Industrial Insurance  
By Edward D Patrick  
Claim Manager  
(360) 902-4352

MAILED TO: WRKER/ATTY - TED NELSON, % LAW OFFICES OF DAVID B. VAIL  
JENNIFER CROSS-EUTENEIER, PO BOX 5707, TACOMA WA 98415-0707  
PROVIDER - ANDERSON KEITH V MD  
WASHINGTON ORTHOPAEDIC CTR, 1900 COOKS HILL RD, CENTRALIA W

ANY APPEAL FROM THIS ORDER MUST BE MADE IN WRITING TO THE BOARD  
OF INDUSTRIAL INSURANCE APPEALS, P.O. BOX 42401, OLYMPIA, WA  
98504-2401 OR SUBMIT IT ON AN ELECTRONIC FORM FOUND AT  
[HTTP://WWW.BIIA.WA.GOV/](http://www.BIIA.WA.GOV/) WITHIN 60 DAYS AFTER YOU RECEIVE THIS  
NOTICE, OR THE SAME SHALL BECOME FINAL.

PO BOX 44291, OLYMPIA, WASHINGTON 98504-4291

August 9, 2016

TED NELSON  
X LAW OFFICES OF DAVID B. VAIL AND  
JENNIFER CROSS-EUTENEIER  
PO BOX 5707  
TACOMA WA 98415-0707

CLAIM NUMBER AT84036  
INJURY DATE 02/05/2015  
DATE OF BIRTH 01/15/1948  
CLAIMANT NELSON TED D

Dear Mr. Nelson:

After review of your clarified protest received on 05/12/2016, I made the decision to issue the not timely order.

Your protest is in regards to the decision that was communicated on 08/06/2015. That decision reduced Mr. Nelson's time loss compensation effective 06/01/2015 due to social security benefits he is currently receiving.

There is no protest within 60 days after the mail date of the social security offset order. Therefore, I have made the determination that your protest to that order is not timely.

If you disagree with this decision, submit a written request for appeal within 60 days after receipt of the not timely order.

Sincerely,

Edward D Patrick  
Claim Manager, Unit H  
PHONE: (360) 902-4352  
FAX: (360) 902-4567

\*\*\*\*\* GD PAPERLESS \*\*\*\*\*

Receive your claim related information electronically

Sign up now: [www.eCorrespondence.inl.wa.gov](http://www.eCorrespondence.inl.wa.gov)

Translated correspondence will be sent by postal mail

\*\*\*\*\*

ORIG: WRKER/ATTY - TED NELSON, X LAW OFFICES OF DAVID B. VAIL

EXHIBIT 14

# APPENDIX #8



FILED  
LEWIS COUNTY

2019 MAY -9 PM 4: 18

SUPERIOR COURT  
CLERK'S OFFICE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR LEWIS COUNTY

TED D. NELSON,

Plaintiff / Appellant

vs.

DEPARTMENT OF LABOR and  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

Defendant / Respondent.

No. 17-2-00846-21

RULING ON APPEAL FROM  
BOARD OF INDUSTRIAL  
INSURANCE APPEALS

Docket No. 16 20975

This appeal, brought by Appellant, challenges the June 2, 2017 decision of the Board of Industrial Insurance Appeals that denied his petition for review.

PROCEDURAL BACKGROUND

Ted Nelson filed a claim for benefits with the Department of Labor and Industries for an occupational disease, which claim was allowed in April of 2015. His time-loss compensation benefits were set by an order in April 2015. On August 6, 2015, the Department issued an order adjusting his compensation because it had determined that he was receiving Social Security benefits. This order was not appealed until May 12, 2016, when Mr. Nelson filed a protest of the August 6, 2015 order. On August 9, 2016, the Department refused to reconsider its ruling because the initial appeal had not been made within sixty days of the August 6, 2015 order and therefore was untimely. This decision was appealed to the Board of Industrial Insurance Appeals which affirmed the decision of the Department. The Board held that the deadline for the appeal was missed and there was no basis for excusing the tardiness of Mr. Nelson's protest. This appeal to Superior Court timely followed.

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II.

AUTHORITY AND DECISION

In early 2015, the Department issued a series of orders regarding Mr. Nelson's claim for benefits. The first order on April 8, 2015, allowed his claim for Bilateral Carpal Tunnel Syndrome and started paying time loss compensation. This order contained the sixty-day appeal language which provides that the order becomes final sixty days from the date the order is issued unless an appeal or written request for reconsideration is filed. This order was affirmed by a notice of decision on April 30, 2015 which order also contained the sixty-day appeal language.

After a series of payment orders, a notice of decision was issued on July 10, 2015, that indicated the compensation was being adjusted due to Mr. Nelson's receipt of Social Security benefits. That decision was corrected and superseded by a subsequent notice of decision on August 6, 2015. The August 6, 2015 decision also contained the sixty-day appeal language. It is this order which is at the center of this appeal. After a series of additional decisions were entered that corrected the payment amount, Nelson filed a letter of formal protest on May 12, 2016. This protest purported to challenge both the correcting order of March 22, 2016, and the original order dealing with Social Security offset dated August 6, 2015.

RCW 51.52.060(1) provides:

A worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board.

There is no evidence to suggest that Mr. Nelson did not receive the August 6, 2015 order and there is no evidence to suggest that he filed any protest before May 12, 2016. Nelson argues now that the series of temporary orders entered after August 6, 2015, had the effect of staying the requirement to file an appeal within sixty days. This argument is without merit. The subsequent orders did not change his basic rate but rather changed the reduction of his benefit because of the Social Security benefits he was receiving. The fact that his benefits would be reduced was established by the August 6, 2015 order and that order was not appealed. "The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication,

1 precluding any re-argument of the same claim.” *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d  
2 533, 886 P.2d 189 (1994).

3 The entry of subsequent orders may have changed the exact amount of benefits actually  
4 received by Mr. Nelson, but those changes appear to be related to the Social Security setoff that  
5 is required by statute. RCW 51.32.220 and 51.32.225 require the State to deduct Social Security  
6 benefits from disability payments to eliminate double payments for the same disability.  
7 Following this mandated action does not render previous orders void and does nothing to stay the  
8 sixty-day appeal requirement as stated on all of the relevant orders.

9 Even if the orders entered after August 6, 2015, were in error, they cannot be challenged  
10 after the sixty days for appeal has passed if the Department has both personal and subject matter  
11 jurisdiction over the claim. *Kingery v. Dep’t of Labor and Indus.*, 132 Wn.2d 162, 937 P.2d 565  
12 (1997). There is no claim in this case that the Department did not have personal and subject  
13 matter jurisdiction.

14 Nelson’s alternative argument is that, even though his protest was not timely, he should  
15 be granted equitable relief and allowed to proceed despite his non-compliance with the sixty-day  
16 rule. Case law is clear that in order to grant equitable relief under these circumstances, the court  
17 must find 1) that the claimant was not competent to understand the notice of decision and 2) that  
18 the Department committed some type of misconduct in communicating its order to the claimant.  
19 *Kingery* 132 Wn.2d at 174.

20 Here there is no evidence of either incompetence or misconduct. Appellant argues that  
21 since he was not represented by counsel at the time he was rendered incompetent. There is no  
22 case law to support this assertion and to allow this argument to succeed would mean that  
23 claimants could simply fire their attorney and thereby extend the appeal period. This would lead  
24 to an absurd result.

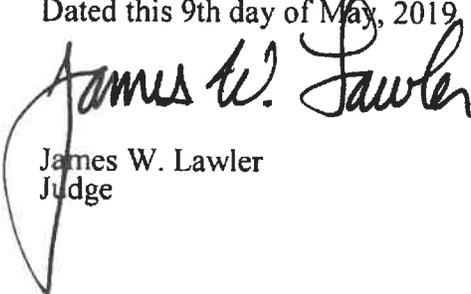
25 Likewise, there is no evidence of any misconduct in communicating the decision to the  
26 Appellant. In *Rodriguez v. Dep’t of Labor & Indus.*, 85 Wn.2d 949, 540 P.2d 1359 (1975), the  
27 court allowed a late protest because the claimant was illiterate, did not speak English and the  
28 Department did not provide an interpreter. No such misconduct occurred here.

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CONCLUSION

The Appellant's appeal of the August 9, 2016 decision wherein the Department decided that it would not reconsider its decision in the August 6, 2015 order was not timely. The August 6, 2015 order became a final order when it was not appealed within the sixty-day appeal period. There is no equitable basis for relief from the sixty-day time bar for appeals. Accordingly, the decision of the Board of Industrial Insurance Appeals is affirmed.

Dated this 9th day of May, 2019

  
James W. Lawler  
Judge

**CERTIFICATE OF MAILING**

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the \_\_\_\_ day of October, 2019, the document to which this certificate is attached, Appellant's Opening Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Alexander Yurivich Jouravlev  
Office of the Attorney General  
800 5<sup>th</sup> Ave., Suite 2000  
Seattle, WA 98104-3188

DATED this 30<sup>th</sup> day of October, 2019.

  
LYNN M. VENEGAS, Secretary

# VAIL CROSS AND ASSOCIATES

October 30, 2019 - 2:30 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53607-2  
**Appellate Court Case Title:** Ted Nelson, Appellant v. Department of Labor & Industries  
**Superior Court Case Number:** 17-2-00846-8

### The following documents have been uploaded:

- 536072\_Briefs\_20191030142926D2231887\_5228.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Nelson - Brief of Appellant.pdf*

### A copy of the uploaded files will be sent to:

- alexanderj@atg.wa.gov
- jennifer@davidbvail.com

### Comments:

---

Sender Name: Lynn Venegas - Email: lynn@davidbvail.com

**Filing on Behalf of:** Dominique Louise Eng Jinhong - Email: dominique.jinhong@gmail.com (Alternate Email: lynn@davidbvail.com)

Address:  
PO Box 5707  
Tacoma, WA, 98415-0707  
Phone: (253) 383-8770

**Note: The Filing Id is 20191030142926D2231887**