

FILED
Court of Appeals
Division II
State of Washington
2/3/2020 2:52 PM

NO. 53607-2

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

TED NELSON,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

Alexander Jouravlev
Assistant Attorney General
WSBA No. 44640
Office Id. No. 91018
800 Fifth Ave, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES.....	2
III.	STATEMENT OF THE CASE.....	2
	A. The Purpose and Development of the Federal Offset Provision and the State “Reverse Offset” Legislation, RCW 51.32.220	2
	B. RCW 51.32.220 Requires the Department to Offset Time-loss Benefits When an Injured Worker Is Simultaneously Receiving Social Security Benefits.....	4
	C. History of the Case.....	5
IV.	STANDARD OF REVIEW.....	9
V.	ARGUMENT	10
	A. The Department Properly Declined To Reconsider its August 2015 Decision to Assess A Social Security Offset Because Nelson Failed To Challenge That Order Until A Year After It Was Issued.....	11
	1. The Department did not invite error	12
	2. Nelson failed to timely protest or request reconsideration of the August 2015 order.	13
	B. Nelson Received Due Process	14
	1. The superior court properly rejected Nelson’s attempt to use the January 2016 order to sidestep the time bar	15
	2. Nelson had a hearing and was represented by counsel.....	16

C. The Department Was Required to Apply the Offset.....	17
D. The Department Properly Offset Against Nelson's Retirement Benefits	19
E. Nelson Cannot Contest the Provisional Time Loss Payment Orders And He Shows No Due Process Violation	22
1. Nelson cannot challenge the provisional time loss payment orders for the first time on appeal.....	22
2. The provisional time loss payment orders are not final orders.....	24
VI. CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Allan v. Dep't of Labor & Indus.</i> , 66 Wn. App. 415, 832 P.2d 489 (1992).....	3
<i>Birrueta v. Dep't of Labor & Indus.</i> , 186 Wn.2d 537, 379 P.3d 120 (2016).....	24
<i>Bowen v. Georgetown University Hosp.</i> , 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988).....	21
<i>Buecking v. Buecking</i> , 179 Wn.2d 438, 316 P.3d 999 (2013).....	22, 24
<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006).....	5
<i>City of Seattle v. Patu</i> , 147 Wn.2d 717, 58 P.3d 273 (2002).....	13
<i>Doan v. Dep't of Labor & Indus.</i> , 143 Wn. App. 596, 178 P.3d 1074 (2008).....	18
<i>Frazier v. Dep't of Labor & Indus.</i> , 101 Wn. App. 411, 3 P.3d 221 (2000).....	18
<i>Freeman v. Harris</i> , 625 F.2d 1303, 1306 (5th Cir. 1980).....	2, 3
<i>Harris v. Dep't of Labor & Indus.</i> , 120 Wn.2d 461, 843 P.2d 1056 (1993).....	2, 3
<i>Hill v. Dep't of Labor & Indus.</i> , 161 Wn. App. 286, 253 P.3d 430 (2011).....	9
<i>In re Flint</i> , 174 Wn.2d 539, 277 P.3d 657 (2012).....	21

<i>In re Robert A. Burnside</i> , No. 00 11502, 2001 WL 826754 (Wash. Bd. Indus. Ins. Appeals May 10, 2011).....	14
<i>Jones v. City of Olympia</i> , 171 Wn. App. 614, 287 P.3d 687 (2012).....	9
<i>Kingery v. Department of Labor & Industries</i> , 132 Wn.2d 162, 937 P.2d 565 (1997).....	14, 17
<i>Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.</i> , 112 Wn. App. 677, 50 P.3d 306 (2002).....	12
<i>Marley v. Dep't of Labor & Indus.</i> , 125 Wn.2d 533, 886 P.2d 189 (1994).....	13, 14
<i>Mullane v. Cent. Hanover Bank & Tr. Co.</i> , 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).....	15
<i>Olympic Forest Prods., Inc. v. Chaussee Corp.</i> , 82 Wn.2d 418, 511 P.2d 1002 (1973).....	15
<i>Pappas v. Hershberger</i> , 85 Wn.2d 152, 530 P.2d 642 (1975).....	22
<i>PT Air Watchers v. Dep't of Ecology</i> , 179 Wn.2d 919, 319 P.3d 23 (2014).....	9
<i>Ravsten v. Dep't of Labor & Indus.</i> , 108 Wn.2d 143, 736 P.2d 265 (1987).....	3
<i>Regnier v. Dep't of Labor & Indus.</i> , 110 Wn.2d 60, 749 P.2d 1299 (1988).....	2, 3
<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	9
<i>State v. Gordon</i> , 172 Wn.2d 671, 260 P.3d 884 (2011).....	23

<i>Stuckey v. Dep't of Labor & Indus.</i> , 129 Wn.2d 289, 916 P.2d 399 (1996).....	9
--	---

Statutes

42 U.S.C.....	18, 20
42 U.S.C. § 424a.....	passim
42 U.S.C. § 424a(d)	3
Laws of 2018, ch. 163, § 1.....	20
Laws of 2018, ch. 163, § 2.....	20
RCW 51.32.210	24
RCW 51.32.220	2, 4, 18
RCW 51.32.225	passim
RCW 51.32.225(1).....	2, 19, 20, 21
RCW 51.52.050	14, 24
RCW 51.52.060	14, 24
RCW 51.52.060(1)(a)	11, 12
RCW 51.52.140	9

Rules

RAP 2.5(a)	24
RAP 2.5(a)(3).....	22

I. INTRODUCTION

Ted Nelson concedes that he failed to timely challenge a Department order, and this dooms his appeal in this case. In August 2015, the Department assessed a social security offset on Nelson's time-loss compensation benefits because he simultaneously received time-loss compensation and social security benefits. Nelson had only 60 days to challenge this decision, but waited a year to file a challenge to it. Furthermore, even assuming for the sake of argument that the Court considers Nelson's untimely challenge to the social security offset rate, Nelson fails to show any error, as the Industrial Insurance Act unambiguously authorizes the Department to assess offsets in the manner it did in this case.

The Board and the superior court properly determined that Nelson failed to timely challenge the Department's August 2015 order. This Court should affirm as well.

II. ISSUES

1. Did Nelson's failure to timely challenge the August 2015 order prevent him from arguing that the Department erred in assessing social security offsets?
2. Did the January 2016 reference to the previous August 2015 decision allow Nelson to belatedly attack the merits of the August 2015 decision?
3. Has Nelson established a lack of due process?
4. Assuming the Court concludes that Nelson timely challenged the social security offset, has Nelson shown any error in assessing an offset?
5. Did the Department properly apply an offset to Nelson's social security retirement benefits under RCW 51.32.225(1) at the time that the Department issued its social security offset order?
6. Can Nelson challenge provisional time loss compensation payments for the first time on appeal?

III. STATEMENT OF THE CASE

A. The Purpose and Development of the Federal Offset Provision and the State "Reverse Offset" Legislation, RCW 51.32.220

In 1965, Congress passed legislation to coordinate state workers' compensation programs and federal disability benefits, and enacted 42 U.S.C. § 424a, to address the problem of overcompensation. *Freeman v. Harris*, 625 F.2d 1303, 1306 (5th Cir. 1980); *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 467, 471, 843 P.2d 1056 (1993); *Regnier v. Dep't of Labor & Indus.*, 110 Wn.2d 60, 62, 749 P.2d 1299 (1988). Section 424a of Title 42 U.S.C. requires an offset of social security benefits against workers' compensation. The purpose of the offset provision was to

prevent claimants from receiving “overlapping awards” in the state and federal systems.

Under 42 U.S.C. § 424a, assuming that Washington State did not have the “reverse offset” statute, RCW 51.32.225, a worker would receive all of their state industrial insurance compensation and only a portion of their social security benefits. *Freeman*, 625 F.2d at 1306.

Section 424a(d) of Title 42 U.S.C. creates an exception to the reduction in federal benefits. This exception authorizes the states to reverse the offset provisions of 42 U.S.C. § 424a, so that the worker collects the entire amount of their social security benefits, then collects only a portion of their state compensation. *Harris*, 120 Wn.2d at 469; *Regnier*, 110 Wn.2d at 63.

The “reverse offset” provision effectively shifts costs back to the federal government, by reducing state workers’ compensation benefits to account for federal social security benefits. *Harris*, 120 Wn.2d at 467. It reduces state payments for total compensation by obligating the Social Security Administration to pay the full amount of social security benefits to which the worker is entitled. *Ravsten v. Dep’t of Labor & Indus.*, 108 Wn.2d 143, 149, 736 P.2d 265 (1987); *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 419-20, 832 P.2d 489 (1992).

B. RCW 51.32.220 Requires the Department to Offset Time-loss Benefits When an Injured Worker Is Simultaneously Receiving Social Security Benefits

The offset statutes, RCW 51.32.220 and RCW 51.32.225, require the Department to offset an injured worker's receipt of time-loss benefits against his/her receipt of social security benefits. RCW 51.32.220 reads:

(1) For persons receiving compensation for temporary or permanent total disability pursuant to the provisions of this chapter, such compensation shall be reduced by an amount equal to the benefits payable under the federal old-age, survivors, and disability insurance act as now or hereafter amended not to exceed the amount of the reduction established pursuant to 42 U.S.C. Sec. 424a. However, such reduction shall not apply when the combined compensation provided pursuant to this chapter and the federal old-age, survivors, and disability insurance act is less than the total benefits to which the federal reduction would apply, pursuant to 42 U.S.C. 424a. Where any person described in this section refuses to authorize the release of information concerning the amount of benefits payable under said federal act the department's estimate of said amount shall be deemed to be correct unless and until the actual amount is established and no adjustment shall be made for any period of time covered by any such refusal.

While the Industrial Insurance Act is to be liberally construed in favor of injured workers, the Act should not be construed liberally to create an ambiguity where none exists. There is no ambiguity here. The statute is clear that the Department must offset when simultaneous benefits are being received. For a statute to be ambiguous, two reasonable

interpretations must arise from the language of the statute itself, not from considerations outside the statute. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). Where the statute is clear on its face, there is no room for interpretation and no liberal construction to create an ambiguity.

C. History of the Case

Nelson filed a workers' compensation claim in February 2015 for an occupational disease. Before it allowed his claim, the Department began paying him provisional time-loss compensation at a rate of \$3,442.58 per month. AR 10-11. The Department issued an order that allowed the claim and later affirmed the time-loss compensation rate in an April 30, 2015 order. AR 10, 12, 15.

The April 30 order advised Nelson that he had 60 days within which to appeal this order, or it would become final and binding. AR 15. Nelson did not appeal this order. The Department subsequently issued time-loss compensation orders paying Nelson benefits at this rate. *See* AR 35-37, 39-41.

On June 8, 2015, the Department issued an order setting the date of manifestation of his disease, as well as finding that no employer was liable for the claim. AR 38. The order also provided the standard notice that Nelson had 60 days to file an appeal or a request for reconsideration. AR 38. Nelson did not appeal it.

On July 10, 2015, the Department issued an order adjusting Nelson's compensation rate because of his simultaneous receipt of time-loss compensation and federal Social Security benefits, which reduced the benefit rate to \$1,696.58 per month. AR 42. Before the July 2015 order became final, the Department issued an order in August 2015 that modified that July order, setting Nelson's new compensation rate at \$2,321.87, raising it above the level in the July order. AR 47-48. This rate was based upon Nelson's receipt of \$1,746.00 in monthly Social Security payments and his highest year's earnings of \$61,018.00 for 2014. AR 47. The order stated that the new rate would not be implemented until August 1, 2015, and that an overpayment occurred for the period from June 1, 2015 through July 31, 2015, in the amount of \$2,241.42, which would be deducted from Nelson's benefits at a rate of \$373.57 per month. AR 47.

The Department's August 6, 2015 order also stated that it would become "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." AR 47. Nelson did not submit a written request for reconsideration or a written appeal within 60 days of this order. AR 47, 200-02, 206. He admitted in his briefing below that his May 12, 2016 protest to the August 6, 2015 order was not timely filed. *See* AR 206.

Moreover, the parties proceeded at the Board on stipulated facts, briefing, and oral argument. AR 70, 221-26. And the parties stipulated to the fact that Nelson “did not submit a written request for reconsideration or a written appeal within 60 days” of the August 2015 order. AR 223.

The Department then continued to issue time loss orders implementing the social security offset and paying Nelson time loss compensation benefits. *See* AR 49-54.

Between April 2015 and September 2015, the Department issued a series of provisional time-loss compensation payments that included the following language: “This is a temporary decision. Notice of a final decision will be issued at a later date.” *See* AR 13, 35, 36-37, 39, 40, 41, 44, 45-46, 49-50, 51-52, 53-54.

On January 20, 2016, more than three months after the August 2015 order became final, the Department issued an order to Nelson stating that his “compensation rate continues to be reduced effective 06/01/2015 due to Social Security offset established by the order dated 08/06/2015.” AR 55. This order contained language that it would become final within sixty days if he did not appeal it. AR 55. Nelson protested this order on March 8, 2016. AR 241. The Department then issued a March 22, 2016 order that set a new job of injury wage rate for Nelson, but did not change his social security offset reduction rate. AR 246. His compensation rate

was unchanged, and his social security offset rate was unaffected by either the March 22 or January 20 Department orders.

On May 12, 2016, Nelson filed a protest to the March 22, 2016 Department order, arguing that the Department could not reduce his compensation rate due to his receipt of social security benefits. AR 245. On August 9, 2016, the Department issued an order saying it could not reconsider the August 2015 order's decision to assess a social security offset, as Nelson's protest was untimely. AR 247-48. Nelson appealed to the Board. AR 250.

At the Board, the parties agreed to resolve the matter via stipulated facts, briefing, and oral argument. See AR 70, 221-26. The stipulated facts identified the relevant Department orders, and the parties stipulated to the fact that Nelson "did not submit a written request for reconsideration or a written appeal within 60 days" of the Department's August 2015 order. AR 223.

The Board judge issued a proposed decision that affirmed the Department. AR 63-71. Nelson filed a petition for review. AR 4-9. The Board denied his petition and adopted the proposed decision and order as its final decision and order. CP 3. Nelson appealed to superior court. CP 1-2. The superior court held that the Department's August 2016 decision correctly rejected Nelson's appeal of the August 2015 order because

Nelson did not protest or appeal the 2015 decision within the sixty-day appeal period. CP 33.

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, 180, 210 P.3d 355 (2009); RCW 51.52.140.¹ The court reviews the superior court's decision, not the Board's decision. *Rogers*, 151 Wn. App. at 180. The court reviews the superior court's decision to confirm that its findings are supported by substantial evidence and that its conclusions of law follow from its findings. *Id.*

The question presented is a question of law that the court reviews 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).

¹ The Administrative Procedure Act does not apply to workers' compensation cases under RCW 51.52.140; normal civil practice does. *See Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 292, 253 P.3d 430 (2011).

V. ARGUMENT

The essence of the appeal is whether Nelson's May 12, 2016 challenge to the August 6, 2015 order was timely. The parties proceeded by stipulated facts at the Board, and in those facts the parties stipulated that Nelson "did not submit a written request for reconsideration or a written appeal within 60 days" of the Department's August 2015 order. AR 223. And he admitted in his briefing at the Board that his May 12, 2016 protest to the August 6, 2015 order was not timely filed. *See* AR 206. And in an affidavit filed with the Board, Nelson admitted that he had received the July and August 2015 orders. AR 201. He then stated that he tried to secure representation with his current counsel in July 2015 because he thought that the Department's social security offset was incorrect, but he did not end up securing representation for this purpose until December 2015. AR 201. It was not until March 8, 2016 that Nelson filed a protest on his claim. AR 224.

This is fatal to his appeal. The Department properly rejected Nelson's challenge to the August 6, 2015 order applying a Social Security offset to his compensation because, as Nelson himself admitted, he did not timely challenge this order.

He had sixty days from receipt of the August 6, 2015 order to file a protest or appeal. AR 16. He did not do this. The Department's subsequent

payment orders did not alter his offset rate and did not, merely by reference to the August 2015 order, trigger a new timeframe within which Nelson could challenge that underlying order. The Department correctly rejected his March 8 and May 12 challenges. AR 247. This court should affirm.

A. The Department Properly Declined To Reconsider its August 2015 Decision to Assess A Social Security Offset Because Nelson Failed To Challenge That Order Until A Year After It Was Issued

The Department properly refused to reconsider its August 2015 order, and Nelson fails to show otherwise. Under RCW 51.52.060(1)(a), a worker must file either a request for reconsideration or an appeal from a Department order within sixty days, or the decision becomes final and not subject to further reconsideration:

[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.

Nelson does not dispute that received the August 6, 2015 order within standard mailing timelines. Nor does he dispute that, after the Department entered the August 2015 offset order, the first protest he filed was a March 8, 2016 protest to the Department's January 20, 2016 order. This is outside

the 60 days permitted by RCW 51.52.060(1)(a). And indeed, Nelson expressly conceded to the Board that he did not challenge the August 2015 order within sixty days.

1. The Department did not invite error

Nelson contends that the Department “invited error” by issuing the January 2016 order. AB 12, 19. But the Department did not set up any error because it took no erroneous action and its actions have been consistent between the Board, superior court, and appeal. The January 2016 order’s reference to the August 2015 order does not open the door to relitigating the August 2015 decision.

Although Nelson characterizes the January 20, 2016 order as “reaffirm[ing] the [2015] offset,” there is nothing in the January 2016 order that had any impact, substantive or procedural, on the continuation of the August 2015 order. AB 18. There is no support for his assertion that the Department “invited reopening of the August 6, 2015 order.” AB 19.

“Under the invited error doctrine, a party may not set up an error at trial and then complain of it on appeal. The doctrine applies when a party takes affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal.” *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wn. App. 677, 681, 50 P.3d 306 (2002) (internal citation omitted). The doctrine does not apply here because the

Department did not “set up” any error; the Department issued both the 2015 and the 2016 orders, but there is no error in either order. And even if Nelson could timely argue that there was an error in the 2016 order, there is no error in the 2015 order.

The purpose of the doctrine is to prevent parties from intentionally setting up errors in trial through their own action and then relying on the error as a basis to seek relief on appeal. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). But here the Department’s actions at the Board, superior court, and on appeal have been consistent. The invited error doctrine does not apply.

2. Nelson failed to timely protest or request reconsideration of the August 2015 order.

Nelson’s failure to timely request reconsideration of the August 2015 is dispositive. “The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim.” *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994). Although the Department’s August 2015 social security offset order was correct, even if the Department would have committed an error in that decision, Nelson is precluded from challenging it once 60 days expired. *Marley*, 125 Wn.2d at 538. Thus, even if the Department’s order was wrong, Nelson cannot now challenge it

because the Department had personal and subject matter jurisdiction over his claim at the time it issued the August 2015 order. *See id.* at 542.

The Washington Supreme Court reaffirmed this rule in *Kingery v. Department of Labor & Industries*, holding that “[w]here the Department has both personal and subject matter jurisdiction over the claim, even an error in the Department’s unappealed order does not render it void.” 132 Wn.2d 162, 170, 937 P.2d 565 (1997) (rejecting appeal as untimely because it was filed past the 60 day period in RCW 51.52.050 and .060). The Board similarly applies this rule in appeals from Department social security offset orders, holding that the *Marley* rule precludes an untimely filed challenge to a social security offset determination. *In re Robert A. Burnside*, No. 00 11502, 2001 WL 826754 (Wash. Bd. Indus. Ins. Appeals May 10, 2011). This court should apply the *Marley* and *Kingery* rule as well.

Nelson does not dispute that the Department has both personal and subject matter jurisdiction over his claim and over all orders and decisions it has made in his claim. Accordingly, he cannot now challenge the Department’s August 6, 2015 decision and this court should affirm.

B. Nelson Received Due Process

Nelson also argues that the Board denied Nelson a full and fair opportunity to dispute the continued application of the social security

offset to his time loss payments from January 20, 2016 onward. AB 17. He contends that, because the January 20, 2016 payment order incorporated language that his “compensation rate continues to be reduced” due to the August 2015 offset order, he could reach back to the August 2015 order setting his offset rate by protesting the January 2016 order. *See* AB 18. For reasons discussed above, his appeal was untimely and the reference to the 2015 order in the 2016 order does not trigger a new period for appeal. *See* V.A., *supra* at 13-14.

1. The superior court properly rejected Nelson’s attempt to use the January 2016 order to sidestep the time bar

Nelson also attempts to characterize the superior court’s ruling as a due process violation by rejecting his arguments that the January 2016 order allowed him to contest the merits of the August 2015 order. AB 20. The “due process clause of the Fourteenth Amendment demands that a deprivation of life, liberty or property be preceded by ‘notice and opportunity for hearing’” *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950)).

There is no due process requirement to allow a litigant to ignore a time bar. Nelson contends that the superior court's characterization of the issue prevented him from an opportunity to be heard on the merits of his appeal of the January 2016 and August 2015 orders. AB 21.

2. Nelson had a hearing and was represented by counsel

But Nelson did have an opportunity to be heard, both at the Board and superior court. The Board accepted his appeal of the Department order. AR 280. The Board held hearings and provided notice of them to Nelson, who was represented by counsel. AR 270-71. Following oral argument, and relying on the parties' stipulations and briefing, the Board issued a decision that addressed the merits of his arguments. AR 63-71. He appealed to superior court, still represented by counsel. CP 1-3. Following a hearing and briefing from both parties, the superior court issued a ruling. CP 30-33.

Nelson has had hearings at both the Board and superior court, with an attorney assisting him throughout the process. He fails to show that he was denied the opportunity for a hearing.

Even accepting a narrow application of Nelson's argument would make it simple for any claimant to avoid a timeliness bar by simply arguing that a Department order relies on or references a prior order. This would be especially common in any time loss compensation or social

security offset case, where orders issuing payment are necessarily based on a single preceding order setting the payment rate.

In *Kingery*, the Washington Supreme Court reiterated why strict time bar limitations were important. 132 Wn.2d at 175. “Thousands of claims are filed with the Department each year. To permit industrial insurance parties to pursue a court remedy with regard to otherwise final orders opens the door to untold cases in the courts.” *Id.* (rejecting expansion of equitable doctrines to allow relief from the strict time limits to appeal a Department order).

C. The Department Was Required to Apply the Offset

Nelson argues that 42 U.S.C. § 424a prohibits the Department from applying the offset because he was receiving Social Security retirement benefits. AB 14-16. This is not correct and, in any event, res judicata precludes his argument.

Although 42 U.S.C. § 424a prevents the federal government from applying its offset against a worker’s industrial insurance compensation benefits once the worker has attained retirement, it does not bar a state from applying its own offset. In fact, the Washington legislature specifically enacted RCW 51.32.225 to offset against federal Social Security retirement benefits. Both the title and text of the statute provide that the Department can implement an offset against social security

retirement benefits. Accordingly, the Court should reject Nelson's argument.

When injured workers receive federal social security retirement benefits, their Washington workers' compensation benefits are subject to offset under RCW 51.32.225, which directs the Department to reduce the worker's "compensation . . . to allow an offset for social security retirement benefits payable under the federal social security, old age survivors, and disability insurance act, 42 U.S.C."

RCW 51.32.220 and .225 require the State to reduce state industrial insurance payments for persons who receive federal social security disability (RCW 51.32.220) or retirement (RCW 51.32.225) benefits. Part of the purpose in enacting these statutes was to avoid duplicative benefits when a claimant receives retirement or disability wage-loss protection simultaneously from federal and state sources. *Frazier v. Dep't of Labor & Indus.*, 101 Wn. App. 411, 417, 3 P.3d 221 (2000). The social security offset provisions were enacted to allow the State to reduce its payments of disability benefits; this is precisely Nelson's situation here—he simultaneously receives federal social security retirement benefits and State disability benefits. *See Doan v. Dep't of Labor & Indus.*, 143 Wn. App. 596, 601-02, 178 P.3d 1074 (2008); *Frazier*, 101 Wn. App. at 417.

And RCW 51.32.225(1) specifically states that a worker's "compensation shall be reduced" by the Department to allow an offset against the claimant's receipt of federal social security benefits.

Accordingly, the Department has the authority to implement the social security offset against a worker's retirement benefits, regardless of the provisions of 42 U.S.C. § 424a.

D. The Department Properly Offset Against Nelson's Retirement Benefits

Nelson argues that RCW 51.32.225(1) prohibits the Department from applying the offset to him because the statute states that "[t]his 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." *See* AB 14-16. This issue is not properly before the court and he raises it for the first time in his briefing on appeal. The Court should reject his argument.

Moreover, although Nelson's cited language this is the current language of RCW 51.32.225, it is not the language of the statute at the time that Nelson applied for industrial insurance benefits and at the time that his social security offset order became final. The version of the statute in place in 2015 did not have this prohibition and, thus, the Department

was not precluded from applying the offset. This is a separate basis for the Court to reject his argument.

In 2015, at the time of the Department's order and at the time it became final, RCW 51.32.225(1) read:

For persons receiving compensation for temporary or permanent total disability under this title, the compensation shall be reduced by the department to allow an offset for social security retirement benefits payable under the federal social security, old age survivors, and disability insurance act, 42 U.S.C. This reduction shall not apply to any worker who is receiving permanent total disability benefits prior to July 1, 1986.

In 2015, no part of the statute precluded the Department from applying the offset to social security retirement benefits. Then, on June 7, 2018, the Legislature amended RCW 51.32.225(1) to add the following sentence to this subsection: "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." Laws of 2018, ch. 163, § 1.

And the 2018 amendment specifically states that it "applies to claims with dates of injury on or after the effective date of this section." Laws of 2018, ch. 163, § 2. Because this addition was enacted after the offset order in Nelson's claim became final, and after the date of his

protests and appeals of the Department order, Nelson cannot rely on this language to challenge the order. *See* AR 247, 280.

“Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988). “Statutory amendments are presumed to operate prospectively.” *In re Flint*, 174 Wn.2d 539, 546, 277 P.3d 657 (2012).

“The presumption is overcome only when the legislature explicitly provides for retroactive application or the amendment is curative or remedial.” *Id.* “A curative amendment clarifies or makes a technical correction to an ambiguous statute.” *Id.* “A remedial change relates to practices, procedures, or remedies without affecting substantive or vested rights.” *Id.* The Legislature did not expressly provide that the 2018 amendment to RCW 51.32.225(1) applies retroactively, and Nelson has not shown that it is curative or remedial.

If the current version of the statute was effective preceding the date that Nelson applied for industrial insurance benefits, then he is correct that the Department would not apply an offset against his social security retirement benefits. But because the relief that Nelson seeks is grounded in

an amendment that passed after the Department's 2015 order became final and binding, the court should reject his argument.

E. Nelson Cannot Contest the Provisional Time Loss Payment Orders And He Shows No Due Process Violation

Nelson also contends that, by issuing eleven provisional time loss compensation orders between April and September 2015, the Department deprived Nelson of his right to procedural due process to dispute the actual computation of each time-loss payment. AB 21-22. Nelson cannot challenge the payment orders in this appeal because he cannot raise a new issue for the first time on appeal and because the provisional payment orders are not final Department orders.

1. Nelson cannot challenge the provisional time loss payment orders for the first time on appeal

Nelson raises a challenge to the provisional time loss payment orders for the first time on appeal. AB 21-22. The appellate court will not consider issues raised for the first time before it where a party has failed to properly raise or preserve the issues at the trial court. *See Pappas v. Hershberger*, 85 Wn.2d 152, 153-54, 530 P.2d 642 (1975). Absent a manifest error affecting a constitutional right, the court should not consider an issue when the party raises the issue for the first time at the appellate level. *See* RAP 2.5(a)(3); *Buecking v. Buecking*, 179 Wn.2d 438, 454-55, 316 P.3d 999 (2013). "A constitutional error is manifest if the

appellant can show actual prejudice, i.e., there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (internal quotations omitted). Even if there is a manifest error, it may be harmless. *Id.*

The Department issued a final order setting Nelson’s offset rate on August 6, 2015. AR 174-75. His notice of appeal to the Board states that he was seeking “[t]he reversal of the Social Security offset order dated 08/06/2015 and an adjustment issued for time-loss benefits paid.” AR 250.

The Department issued a payment order on February 22, 2016 that Nelson protested on March 8, 2016. AR 181-82. But the February 2016 order did not modify or affect the social security offset rate, only his time loss compensation rate. AR 56. So Nelson’s March 2016 protest of the February 2016 order could challenge only the payment of time loss compensation per the February 2016 order, not the social security offset rate that was set by the August 2015 order. AR 47, 56. The social security offset order is independent from the February 2016 time loss compensation order.

Now, for the first time on appeal, Nelson raises a challenge to the provisional time loss payment orders. Although he argues an error affecting a constitutional right, he fails to show that it was manifest. *See*

RAP 2.5(a); *Buecking*, 179 Wn.2d at 455. There is no prejudice to Nelson because he would not have been able to challenge provisional payment orders at either the Board or superior court; they are not appealable Department orders. Accordingly, there is no manifest error affecting a constitutional right and thus the Court should reject his challenge.

2. The provisional time loss payment orders are not final orders

Nelson cannot challenge the provisional time loss payment orders because they are not final. Under RCW 51.32.210, in order to ensure prompt action on claims, the Department is required to issue provisional time loss compensation orders pending determination of whether the Department is obligated to pay any benefits to the injured worker. But the payment of such provisional time loss compensation is not considered a final order or a binding determination on the Department's obligations. RCW 51.32.210.

Orders of the Department paying provisional time-loss compensation, entered prior to the issuance of an order rejecting or allowing the claim on its merits, are not final orders of the Department under RCW 51.52.050 and .060. *See Birrueta v. Dep't of Labor & Indus.*, 186 Wn.2d 537, 545 n.3, 379 P.3d 120 (2016). Until the Department issues a determinative order either rejecting or allowing the claim, the

payment of provisional time-loss compensation cannot be challenged by an appeal to the Board. *See id.*

The orders Nelson listed in his brief include the following language: “This is a temporary decision. Notice of a final decision will be issued at a later date.” See, e.g., AR 53; AB 21-22. As they are not final orders, the Court should reject his attempt to challenge them.

VI. CONCLUSION

Nelson cannot challenge the Department’s August 2015 order now because he failed to challenge it within 60 days. He timely received the order, and it became final, but did not file a protest until May 2016. Nor did the Department’s reference in January 2016 to the August 2015 order open the door to challenge the August 2015 order. On the basis of this alone, the Court should reject Nelson’s arguments and affirm the superior court.

The Department’s August 2015 order properly assessed an offset against Nelson’s social security retirement benefits under the authority of RCW 51.32.225 that was in place at the time of the order. Although the statute was amended in 2018, it does not apply retroactively and thus Nelson cannot use that statute as a basis for relief. The Court should reject Nelson’s attempts to sidestep res judicata and his attempt to raise new arguments for the first time on appeal.

Finally, Nelson received due process; he had notice and an opportunity to be heard at both the Board and superior court. But he did not prevail because his appeal was simply not timely filed. He cannot contest the social security offset order, which has remained unchanged since August 2015, and the Court should reject his due process argument. This Court should affirm the superior court.

RESPECTFULLY SUBMITTED this 3rd day of February, 2020.

ROBERT W. FERGUSON
Attorney General



ALEXANDER JOURAVLEV
WSBA No. 44640
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

February 03, 2020 - 2:52 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_Affidavit_Declaration_20200203145051D2688039_8527.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was 200203_COS_DeptsBrief.pdf
- 536072_Briefs_20200203145051D2688039_4026.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 200203_DeptsBrief.pdf

A copy of the uploaded files will be sent to:

- dominique.jinhong@gmail.com
- jennifer@davidbvail.com
- lynn@davidbvail.com

Comments:

Sender Name: Jessica Sparks - Email: jessicas5@atg.wa.gov

Filing on Behalf of: Alexander Yurivich Jouravlev - Email: alexander.jouravlev@atg.wa.gov (Alternate Email:)

Address:
800 Fifth Avenue, Ste. 2000
Seattle, WA, 98104
Phone: (206) 464-7740

Note: The Filing Id is 20200203145051D2688039