No. 45692-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

PATRICK J. BIRGEN,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent,

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Comes now the Appellant, Patrick J. Birgen, Plaintiff below, by and through his attorney of record, Dorian D.N. Whitford of the Law Offices of David B. Vail, Jennifer Cross-Euteneier and Associates, and hereby offers this brief in support of his appeal.

This case originates under RCW Title 51, the Industrial Insurance Act ("the Act") from an Administrative Law Review (ALR) appeal from a February 7, 2013 Decision and Order of the Board of Industrial Insurance Appeals ("the Board") which granted summary judgment for the Department of Labor and Industries ("the Department"), despite the fact that a cross motion for summary judgment had not been filed. The Board concluded the Department correctly calculated Mr. Birgen's social security offset under the Act and Mr. Birgen was not entitled to require the Department to update, or adjust, his antiquated earnings figure used to calculate his benefits with the social security offset.

Mr. Birgen appealed that decision to Superior Court asserting that the Board had erred in not requiring the Department to update his 1983 earnings figure to its present day value when calculating the social security offset as a result of the Board's misapplication of the law and policy of the Act.

The Superior Court affirmed the Board's decision after considering briefing and oral argument. Judgment was entered on November 15, 2013.

As will be described further below, the law and policy of the Act leads to the conclusion that the Department should update, or adjust, Mr. Birgen's antiquated 1983 earnings figure to a present day value when calculating and applying the social security offset, in order to adhere to the underlying purpose and policy of the Act of reducing the economic harm to injured workers. The Superior Court's decision, affirming the Board, undercuts the purpose and policy of the Act by holding that Mr. Birgen is not entitled to have the Department update, or adjust, his 1983 earnings. Thereby, causing Mr. Birgen to suffer an unnecessary and unjust economic loss.

II. ASSIGNMENTS OF ERROR

A. The Superior Court, and the Board, erred in entering Finding of Fact 1.4 determining Mr. Birgen's highest year's wages were from 1983 and totaled $30,965 insofar as it failed to require the Department to update, or adjust his prior years' earnings to determine which year he actually earned the most and what amount that would be in the year the Department determined and applied the social security offset.

B. The Superior Court, and the Board, erred in entering Finding of Fact 1.5 determining that Mr. Birgen's average current earnings

(ACE) figure was derived utilizing the procedure found in 42 U.S.C. § 424a(a)(8) insofar as it failed to require the Department to update, or adjust his prior years' earnings to determine the correct and most accurate ACE figure.

C. The Superior Court, and the Board, erred in entering Finding of Fact 1.6 determining that Mr. Birgen's Social Security Offset figure was then calculated as provided by 42 U.S.C. § 424a(a)(8)(C) insofar as there is no offset figure calculation provided by that subsection.

D. The Superior Court, and the Board, erred in holding that the Department correctly calculated Mr. Birgen's average current earnings and social security offset figure within the meaning of RCW 51.32.220 and RCW 51.32.225 in Conclusion of Law 2.2.

E. The Superior Court, and the Board, erred in holding that Mr. Birgen was not entitled to require the Department to update his average current earnings figure to a present day value prior to calculating and applying his social security offset within the meaning of RCW 51.32.220 and RCW 51.32.225 in Conclusion of Law 2.3.

F. The Superior Court, and the Board, erred in determining that the Department was entitled to summary judgment, despite a lack of a cross summary judgment motion, as a matter of law, insofar as the Department's calculation and application of the social security offset was erroneous as a matter of law and policy in Conclusion of Law 2.4.

G. The Superior Court, and the Board, erred in determining that the Department's April 5, 2012 order is correct insofar as the Department failed to update, or adjust, Mr. Birgen's prior years' earnings in order to properly, fairly, and accurately determine the most benefits he could obtain while receiving both pension benefits and social security benefits in Conclusion of Law 2.5.

III. ISSUE

Whether the Department of Labor and Industries should have adjusted Patrick J. Birgen's past earnings to reflect the present day value of such earnings when determining his compensation rate in light of the social security offset.

IV. STATEMENT OF THE CASE

On February 2, 1984, Patrick J. Birgen suffered an industrial injury to his neck while working for the Boise Cascade Corp. CP[1] 79. Mr. Birgen's claim was allowed and ultimately the Board of Industrial Insurance Appeals ("the Board") determined that he was a permanently and totally disabled worker as of July 19, 1991. CP at 82. As a result, he was entitled to monthly monetary benefits as of that date for the rest of his life. RCW 51.32.060, RCW 51.08.160.

On March 5, 2012, the Department issued an order which adjusted Mr. Birgen's pension[2] benefits based on his receipt of social security benefits. CP at 62. The Department determined that his new rate would be $2,081.42 per month based on his monthly receipt of $830 in social

[1] The record of proceedings in this case is the Clerk's Papers. This will be cited CP.

[2] In the parlance of worker's compensation practitioners, permanent total disability benefits are referred to as pension benefits. Additionally, the Superior Court's finding of fact 1.1 erroneously designates these benefits as time-loss compensation benefits instead of pension benefits. However, this error does not materially change the analysis.

security benefits and Mr. Birgen's highest year's earnings of $30,965 for the year 1983. *Id.*

Following Mr. Birgen's protest, the Department affirmed this order on April 5, 2012. CP at 64. Mr. Birgen appealed this order to the Board arguing that the Department incorrectly calculated the amount of his benefits because it did not update, or adjust, his prior earnings to a present day value when determining his benefits in light of the social security offset as supported by the purposes, policies, and analogous interpretations of the Act. CP at 65, 102-109, 155-167.

The Board accepted review of the appeal concerning the Department's decision on Mr. Birgen's benefits based on the social security offset on May 22, 2012. CP 72. Following, Mr. Birgen's motion for summary judgment and oral argument on the motion, an Industrial Appeals Judge of the Board issued a Proposed Decision and Order on November 29, 2012 that entered summary judgment in favor of the Department, despite its failure to file a cross motion. Mr. Birgen petitioned the Board for review of the proposed decision and order on January 9, 2013. CP at 26-36. Subsequently, on February 7, 2013, the Board granted Mr. Birgen's request, corrected the findings of fact and conclusions of law in the IAJ's proposed decision, and affirmed the Department's decision. CP at 17-19.

The Board's decision was then appealed to Pierce County Superior Court and was assigned to Department Thirteen, the Honorable Judge Kathryn J. Nelson. CP 1. Both parties provided trial briefs and presented oral argument. CP 169-190. Having considered the briefing and argument, on November 15, 2013, the Court entered Findings of Fact, Conclusions of Law, and Judgment which affirmed the Board's February 7, 2013 Decision and Order, which held that Mr. Birgen was not entitled to require the Department to update his past earnings to a present day value prior to calculating his social security offset and that the Department correctly calculated his average current earnings and social security offset figure within the meaning of the pertinent sections of the Act. CP 191-93. Mr. Birgen has appealed this decision to the Washington State Court of Appeals, Division Two. CP at 195.

V. STANDARD OF REVIEW

The initial step in seeking review of a decision of the Department is to appeal that decision to the Board. RCW 51.52.060. At the Board, the appealing party, in this case Mr. Birgen, had the burden of presenting a prima facie case for the relief it seeks. RCW 51.52.050(2)(a).

When deciding an appeal from a decision of the Board, the Superior Court conducts a de novo review of the Board's decision but relies exclusively on the certified board record. RCW 51.52.115. The

Board's findings and decision are prima facie correct and the party challenging the decision has the burden of proof. *Id.* The presumption of correctness is a limited one, meaning that the decision will be overturned if the trier of fact finds from a preponderance of the credible evidence that the findings and decision of the Board are incorrect. *Cantu v. Dep't of Labor and Indus.*, 168 Wn. App. 14, 20-21, 277 P.3d 685 (2012) (internal citations omitted) *see also* RCW 51.52.115. Only if it finds the evidence to be equally balanced does the presumption require the findings to stand. *Id.*

In reviewing the decision from the Superior Court, the role of the Court of Appeals is to determine whether the trial court's findings, to which error is assigned, are supported by substantial evidence and whether conclusions of law flow therefrom. *Grimes v. Lakeside Industries*, 78 Wn. App. 554, 560, 897 P.2d 431 (1995). Questions of law are reviewed de novo. *See Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997) (Superior court's legal conclusions are reviewed de novo); *Romo v. Dep't of Labor and Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998).

The Department is charged with administering the Industrial Insurance Act, so the Court of Appeals affords substantial weight to its interpretation of the Act, but the Court of Appeals may nonetheless

substitute its judgment for that of the Department's because its review of the Act is de novo. *Dana's Housekeeping, Inc. v. Dep't of Labor and Indus.*, 76 Wn. App. 600, 605, 886 P.2d 1147 (1995).

Here, there is a legal question to be reviewed de novo. Namely, whether the Act, its underlying purpose and policy, and its social security offset provisions, require the Department to update, or adjust, Mr. Birgen's past earnings in determining his benefit amount in light of the offset.

VI. ARGUMENT

A. Introduction: The Social Security Offset Provisions of the Industrial Insurance Act.

Under the Social Security Act, a reduction is made in disability benefits if the recipient of such benefits is also entitled to disability benefits under a workers' compensation law. 42 U.S.C. 424a(a)(2)(A). The injured worker is entitled to receive benefits from both programs, but the worker cannot receive the full benefits from both programs if the aggregate of the benefits under both programs exceeds 80 percent of the worker's "average current earnings" ("ACE"). 42 U.S.C. 424a(a).

The ACE figure is the highest of three figures. *Id.* Those figures are 1) the average monthly wage used for determining the amount of social security disability benefits; 2) one-sixtieth of the total earnings for a

consecutive five year period: and 3) one-twelve of the total earnings for the calendar year in which the worker had the highest earnings during the five years preceding the year in which the worker became disabled. *Id.* The reduction cannot be such that the combined amount of benefits under both programs is less than the total amount of benefits due under the Social Security Act if there had been no reduction. *Id.*

As this Court concisely stated in *Herzog v. Dep't of Labor and Indus.*, 40 Wn. App. 20. 21-2, 696 P.2d 1247 (1985):

> Some recipients of worker's compensation disability payments are entitled to social security payments. When this is so, Federal law prohibits the combined benefits from exceeding 80 percent of the recipient's average current earnings at the time the disability was suffered. Combined benefits exceeding this level must be reduced. Federal law permits a state to take full advantage of this by permitting the reduction to be taken entirely from the state benefits. Washington has accepted this largesse by the enactment of RCW 51.32.220.

The Industrial Insurance Act currently contains two provisions allowing the Department to reduce or "offset" a person's total disability benefits, whether temporary or permanent, if that person also receives social security disability benefits (RCW 51.32.220) or also receives social security retirement benefits (RCW 51.32.225). Both of these statutes state that the total disability benefits shall be reduced by the amount of social security benefits payable but not to exceed the amount of the reduction in

42 U.S.C. 424a. RCW 51.32.220(5) further provides that any reduction cannot reduce the total benefits received under both programs to an amount which would be less than the injured worker would receive in the absence of an offset under either program.

Here, the Department determined that Mr. Birgen's ACE figure was derived from the third option above, namely one-twelfth of his highest year's earning of $30,965 for 1983, the year immediately preceding his industrial injury, or $2,580 per month. 80 percent of this amount is $2,064. The Department then compared this amount with his monthly $830 entitlement to social security benefits and his pension benefit amount of $2,911.42[3].

Thus, the Department determined the maximum amount Mr. Birgen could receive was his pension benefit amount and just reduced this amount, dollar for dollar, with the amount of his social security benefits. Per the Department's order under appeal, Mr. Birgen's new pension benefit amount, after applying the social security offset, was $2,081.42.

Had the Department updated, or adjusted, Mr. Birgen's 1983 earnings figure to a present day value to compare it to his pension benefit amount when it calculated and applied the social security offset, so it

[3] This figure is determined based on the Department's March 5, 2012 order which reduced Mr. Birgen's pension benefits by the amount of his monthly social security benefit ($830+$2,081.42=$2,911.42).

could compare apples to apples, it could have determined that the ACE figure was actually the maximum benefit Mr. Birgen could receive such that he could have received benefits under both programs without the entire social security benefit being offset from his pension benefits.

For example, if the Department indexed the 1983 earnings figure to bring it up to a 2012 value and that would have resulted in a monthly, or one-twelfth amount of $4,000. This would be the ACE figure. 80 percent of that figure would be $3,200. Comparing this figure to Mr. Birgen's social security benefits of $830 and his pension benefits of $2,911.42, leads to the conclusion that this 80 percent ACE figure is the maximum amount of benefits he can receive under both programs. Therefore, he would receive his entire social security benefit, as he is under the Department's March 5, 2012 determination, and also receive $2,370 in pension benefits[4]. This is more than the $2,081.42 per month in pension benefits the Department determined he was entitled to.

B. The Underlying Purpose of the Industrial Insurance Act Supports Adjusting Mr. Birgen's Prior Earnings to Determine His ACE Figure When Determining His Compensation Amount in Light of the Social Security Offset.

[4]This is arrived at by taking the maximum amount ($3,200) minus social security benefits ($830) to arrive at the remaining amount the Department would provide to bring Mr. Birgen up to the maximum he could receive. *The Department would still* be offsetting $541.42 in social security benefits. ($2,911.42-$2,370).

The Industrial Insurance Act was established to protect and provide benefits for injured workers. It has been held for many years that the courts and the Board are committed to the rule that the Act is remedial in nature and its beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Dep't of Labor and Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963); *Hastings v. Dep't of Labor and Indus.*, 24 Wn.2d 1, 163 P.2d 142 (1945); *Nelson v. Dep't of Labor and Indus.*, 9 Wn.2d 621, 115 P.2d 1014 (1941); *Hilding v. Dep't of Labor and Indus.*, 162 Wash. 168, 298 P. 321 (1931).

Furthermore, RCW 51.04.010 declares that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault." Similarly, RCW 51.12.010 indicates that the Act "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." Thus, any doubts that arise when interpreting or applying the Act must be resolved in favor of the worker. *Clauson v. Dep't of Labor and Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

As was discussed above and will be described further below, the Department should have adjusted, or updated, Mr. Birgen's past earnings to a present day value when applying the social security offset in order to

avoid the harsh and unjust result of Mr. Birgen suffering unnecessary economic harm from his on the job injury.

From these statements of policy and interpretations of the Act it is clear that the Act is meant to minimize suffering and economic loss by injured workers and their families and that when the Act is interpreted, or when questions arise as to how the Act should be applied in a given situation, the Act should be construed liberally to reach a favorable outcome for the injured worker. *See e.g. Wilber*, 61 Wn.2d at 446.

These guiding principles are critical to cases such as Mr. Birgen's. It is necessary to keep them in mind when considering a case such as this regarding statutory language and the economic loss suffered by Mr. Birgen. In order to effectuate the purposes of the Act and reduce the economic harm suffered by Mr. Birgen, the Department should be required to update, or adjust, Mr. Birgen's prior earnings to a present day value when determining his compensation rate in light of the social security offset.

C. Mr. Birgen's Earnings From 1983 Should be Adjusted To Reflect the Value of What Those Earnings Would Be in the Year 2012 When the Department Actually Applied the Offset and Adjusted his Compensation Benefits.

In order to accurately identify the maximum amount of benefits Mr. Birgen can receive under both programs, the Department should have

adjusted his prior earnings over his earning history to the baseline year, 2012, the year the Department applied the offset. By adjusting each year's earnings to the equivalent value in a single year, the Department would be able to more accurately assess what year Mr. Birgen actually made the most, or which five year period Mr. Birgen actually earned the most. That way the Department would be comparing apples to apples as opposed to apples to oranges, so to speak. The Department can then accurately determine Mr. Birgen's ACE figure and compare 80 percent of that to the benefits he is entitled to from social security and what he is entitled to under the Act in order to ensure Mr. Birgen does not suffer economic loss.

As a further example, if Mr. Birgen had made $30,000 several years prior to 1983, if that were adjusted to reflect equivalent earnings for the year 2012, and the earnings of $30,965 from 1983 were adjusted to a 2012 value, the Department may have found that the value of Mr. Birgen's earnings several years prior to 1983 were actually higher than his earnings in 1983 (despite the fact, all things being equal $30,000 is less than $30,965). In this example, the Department would have to use the adjusted value of the earlier year's earnings rather than the adjusted value of the 1983 earnings when determining Mr. Birgen's ACE figure. This would then be compared to Mr. Birgen's entitlement benefits to see

what the maximum amount of benefits he was entitled to receive. Proceeding in this fashion reduces economic loss and harm is avoided to the injured worker.

As a result, when reviewing one's earnings to be used in calculating the ACE figure, the Department should adjust all of those earnings to reflect an equivalent value in the year in which the Department applies the offset. Thereby, the Department would be able to compare apples to apples, allowing the Department to determine what year, or years[5], the individual actually earned the most and use that figure to avoid unnecessary economic loss and harm.

1. Considering the Act as a Whole and the Policies Underlying the Act Show that the Department Should Make this Adjustment.

Numerous Washington courts have upheld the rule of statutory construction that "a statue should be construed consistently with the purpose of the act as a whole and with the declarations of policy within the act itself [...]" *Allan v. Dep't of Labor and Indus.*, 66 Wn. App. 415, 418, 832 P.2d 489 (1992) (citations omitted), *see also Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 133, 814 P.2d 629 (1991) (citation omitted) ("each provision of the statute should be read in relation to the other provisions,

[5] The example also applies to the second method of determining the ACE figure, by taking one-sixth of a five year period where the injured worker was making the most earnings.

and the statute should be construed as a whole"). As noted above, in the course of interpreting the Act, Washington courts have held that all doubts as to the meaning of the Act are to be resolved in favor of the injured worker. *Shafer v. Dep't of Labor and Indus.*, 140 Wn. App. 1, 7, 159 P.3d (2007) (quoting *Clauson v. Dep't of Labor and Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

Moreover, the Act contains an explicit declaration of policy that it "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. Hence, the social security offset provisions of the Act should be liberally construed to minimize the suffering and economic loss of injured workers. That is to say, when those provisions are interpreted in light of the Act as a whole and in light of its underlying policies, the Department should adjust all of the injured worker's prior earnings to reflect an equivalent value in the year in which the Department is applying the offset and determining how much compensation to provide the injured worker when they are receiving benefits under both workers' compensation and social security programs.

Additionally, where the Act is ambiguous, policy considerations should guide in the interpretation of that provision. *Allan v. Dep't of Labor and Indus.*, 66 Wn. App. at 418 (citations omitted). As explained

above, the social security offset provisions of the Act require the Department to reduce the amount of the benefits it provides in the amount of social security benefits payable, not to exceed the reduction that the Social Security Administration would otherwise take based on the calculation in 42 U.S.C. 424a.

Neither the Act's offset provisions nor 42 U.S.C. 424a provide any indication whether or not the "average current earnings" (or the earnings underlying one's "average current earnings") should be adjusted to reflect the change in the value of a dollar at the time the average current earnings are being calculated and determined. As a result of this ambiguity, the Department must look to the policies underlying the Act for guidance in interpreting these provisions. Doing so leads to the same conclusion as when the provisions are interpreted in light of the other provisions of the Act (because the Act contains explicit declarations of policy, as discussed above). Thus, the Department is again led to the conclusion that the social security offset provisions of the Act should be liberally construed to minimize the suffering and economic loss of injured workers, which would mean the earnings used to calculate one's average current earnings should be adjusted to what their value would be in the year in which the Department performs the offset calculations and application.

In Mr. Birgen's case, the Department deviated from the purposes of the Act when applying the social security offset provisions in the way it did. By using a stale monetary value that was 29 years old when calculating Mr. Birgen's average current earnings rather than using a present day equivalent of such monetary value, Mr. Birgen would suffer a substantial loss, which the Act instructs should be avoided. RCW 51.12.010. Thus, the Department should consider the extent of the increase in the value of a dollar between 1983 and 2012, and adjust Mr. Birgen's average current earnings accordingly.

2. There are Other, Similar Contexts in Which the Act has Been Interpreted to Require Adjustments of Benefits to Account for Factors Such as Inflation.

Furthermore, in similar scenarios, the Department has recognized the need to adjust monetary values over time in order to properly compensate injured workers in accordance with the purposes of the Act. For example, when an injured worker is entitled to loss of earning power benefits, the Board has recognized that "[i]t is proper to consider what a worker's earnings were at the time of his industrial injury and to establish the extent of increase, if any, which has occurred in earnings paid for such employment since the industrial injury [....]" *In re Chester Brown*, Dckt. No. 88 1326 (June 29, 1989). This approach has been affirmed by the Washington Court of Appeals. *See e.g. Hunter v. Dep't of Labor and*

Indus., 43 Wn.2d 696, 263 P.2d 586 (1953); *see also Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1289 (9th Cir. 1983) ("[T]he purpose of workers' compensation benefits is to reflect future earning capacity rather than wages earned in past employment [....]"). Just as the Department adjusts the underlying wages of an injured worker from the wages at the time of injury to what the wages would be at the later time when loss of earning power benefits are calculated, so should the Department adjust Mr. Birgen's underlying highest year's earnings from $30,965.00 in 1983 to what the value would be in 2012 when calculating his average current earnings.

Another portion of the Act suggesting that the Department should adjust Mr. Birgen's 1983 earnings to reflect what equivalent earnings would be in 2012 is RCW 51.32.075. This section of the Act provides for cost-of-living increases in pension as well as other benefits. *Id.* This portion of the Act recognizes that the value of a dollar changes over time, and when benefits are calculated based on a dollar-value long in the past, that underlying dollar-value must be brought up to date.

The same reasoning should be applied in Mr. Birgen's case. Rather than using the monetary value of Mr. Birgen's highest year's earnings from 29 years ago when calculating his average current

earnings, the Department should use the present day equivalent of his highest year's earnings.

Given the examples of adjustment of loss of earning power benefits and cost-of-living increases for other benefits under the Act, it would be unreasonable to argue that similar adjustments to the value of an individual's highest year's earnings or average current earnings for purposes of the social security offset under the Act should not be made. In order to interpret the Act's social security offset provisions consistently with the other provisions of the Act and consistently with the policies underlying the Act, the Department should have adjusted Mr. Birgen's earnings from 1983 to reflect what would be equivalent earnings in 2012, the year in which the Department calculated and applied the offset.

3. The Social Security Act Supports This Adjustment.

While this is properly considered as an issue of state law, even interpretation of the relevant provisions of the Social Security Act suggests that, in this context, the earnings underlying one's "average current earnings" should be adjusted to reflect what their present-day value would be at the time the "average current earnings" are being calculated. For example, 42 USC 424a(a) states "an individual's average current earnings means *the largest* of [the following three options]."

(emphasis added.) The fact that the Social Security Act instructs use of the method of calculating average current earnings that yields the greatest earnings suggests the policy behind this provision is to perform the calculation to the greatest benefit of the claimant.

In addition, 42 USC 424a provides for a triennial redetermination. 42 USC 424a(f). 42 USC 424a(f) addresses the triennial redetermination of the amount of benefits subject to an offset. As the name indicates, this is a redetermination of the average current earnings figure after its initial determination. This triennial redetermination serves to adjust the average current earnings figure with the trend of inflation.

In other words, the purpose of the triennial redetermination is to mirror the ongoing changes in the value of today's dollar with changes to the value of the average current earnings figure. This is a distinctly different proposition than adjusting an individual's prior earnings in order to initially determine the correct average current earnings figure. Essentially, applying this redetermination to the facts in this case, Mr. Birgen would always be 29 years behind because the redetermination would be adjusting an already stale, 29 year old figure. Nevertheless, the fact that the triennial redetermination is included in the Social Security Act suggests the underlying policy that benefits awarded under the Act,

even when calculated based on past earnings, should be reflective of the present-day value of such earnings.

VII. CONCLUSION

Mr. Birgen respectfully requests that the Court reverse the Superior Court's affirmance of the Board's Decision and Order, which determined that the Department correctly calculated the ACE figure and applied the social security offset under the Act and that he was not entitled to require the Department to adjust his prior earnings, and remand this matter to the Department with instructions to calculate his pension benefit amount by applying the social security offset with updated, or adjusted, values for his prior earnings to a present day value.

Mr. Birgen further requests attorney's fees pursuant to RCW 51.52.130.

Dated this 1st day of May, 2014.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and ASSOCIATES

By: _____

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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 1st day of May, 2014, 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:

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DATED this 1st day of May, 2014.

Lynn M. Venegas

LYNN M. VENEGAS, Secretary