

NO. 35877-8-II

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

Department of Labor and Industries,

Appellant,

v.

Hoa Doan,

Respondent.

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY *MA*

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APPENDICES

Appendix A	RCW 51.32.220 RCW 51.32.225 42 U.S.C. § 424a
Appendix B	Findings and Conclusions of the Superior Court Memorandum Opinion of the Superior Court

I. NATURE OF THE CASE

This is a workers' compensation case raising a single question of statutory interpretation involving RCW 51.32.220 and RCW 51.32.225. Federal social security law for disability and retirement benefits provides for offsetting the amount of State workers' compensation wage loss benefits (42 U.S.C. § 424a), and allows states to pass laws reversing the offset by instead deducting the amount of Federal social security benefits from State wage loss benefits (42 U.S.C. § 424a(d)).¹

RCW 51.32.220 and RCW 51.32.225 are the Washington statutes that authorize reverse offset, mandating that the Department of Labor and Industries (Department) or self-insured employers² offset against State workers' compensation benefits the social security disability and retirement benefits that injured workers are receiving from the Federal government. The Washington Legislature's intent is to prevent double recovery of wage loss benefits, and to shift to the Federal government a

¹ All statutes discussed in this brief are set forth in full in Appendix A to this brief.

² This case does not involve a self-insured employer, so, for the sake of simplicity of reference, all references to offset of State compensation by a Washington workers' compensation insurer will be to the Department. It is noteworthy, however, that any decision made in this case will similarly affect self-insured employers and their workers.

part of the burden of providing wage loss benefits to those eligible for social security benefits. *See infra* Part VI.A.

No State workers' compensation benefits are presently due the injured worker, Mr. Hoa Doan (Doan). The offset provisions of RCW 51.32.220 (reverse disability offset) and RCW 51.32.225 (reverse retirement offset) require, *inter alia*, that workers receive notice *before* the Department reduces their State benefits under those statutes. Accordingly, when the Department was advised by the Federal government that Doan was receiving social security retirement benefits, the Department, even though Doan was not then being paid any State compensation benefits, gave Doan the notice that is a prerequisite to taking the offset if State compensation benefits were to be paid in the future.

Doan appealed to the Board of Industrial Insurance Appeals (Board) from the Department's notice and order regarding its right to offset. He did not argue that offsetting was incorrect; he instead contended that no Department notice and order of its offset authority can be given until a worker is actually receiving State compensation benefits.³

³ Doan's "plain meaning" argument relies on his incongruous reading of the phrase "for persons receiving" in RCW 51.32.225(1) (and RCW 51.32.220(1)). His reading would require advance *receipt* by a worker of State compensation before the Department could give advance *notice* of offset. Doan recognizes that a strict advance-receipt interpretation of the statute would conflict with this Court's decisions in *Potter v. Dep't of Labor & Indus.*, 101 Wn. App. 399, 3 P.3d 229 (2000); *Frazier v. Dep't of*

The Board affirmed the Department's notice and order, but the Superior Court reversed, and the Department appealed to this Court.

This Court should reverse the Superior Court decision. There is no statutory barrier to the Department providing advance notice of offset. Instead, the plain meaning of the relevant statutory language, the underlying statutory purpose, and the relevant case law all support the notice that the Department gave in this case. Because Doan offers no other objections to the correctness of the notice of offset, it should be affirmed.

II. ASSIGNMENTS OF ERROR AND ISSUE

A. Assignments of error

1. The Superior Court erred in form and substance in what it labeled findings of fact ## 16-19, which are actually all conclusions of law⁴ that collectively and erroneously determine that the Department

Labor & Indus., 101 Wn. App. 411, 3 P.3d 221 (2000). Hence, his "plain meaning" interpretation would allow Department notice to the worker to precede the worker's receipt of State compensation in one circumstance and only one circumstance, i.e., where, at the time the Department gave notice of offset, there was an outstanding court order or Board order to pay back time loss compensation. See discussion of *Potter* and *Frazier* in the Department's argument *infra* Part VI.C.

⁴ Regardless of the label by the trial court, findings and conclusions are reviewed for what they actually are. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). The Findings and Conclusions of the Superior Court here, as well as the Memorandum Opinion of the Superior Court are in Appendix B to this Brief of Appellant.

generally is not authorized to give notice of its right to offset at a point when an injured worker is not currently receiving State compensation benefits.

2. The Superior Court erred in its conclusions of law ## 4-7 that collectively and erroneously determine that the Department generally is not authorized to give notice of its right to offset at a point when an injured worker is not currently receiving State compensation benefits.

3. The Superior Court erred in its award of attorney fees and costs because the injured worker should not have prevailed on the substantive issue under RCW 51.32.225.

B. Issue

RCW 51.32.225(2) (the “social security retirement offset”) incorporates the procedures of RCW 51.32.220 (the “social security disability offset”). Subsection (2) of section 220 provides that a “reduction . . . shall be effective the month following the month in which the department . . . is notified” by Federal authorities that the person is receiving Federal social security benefits. Subsection (4) of section 220 provides that no reduction (i.e., payment with offset) may be made “unless the worker receives notice of the reduction prior to the month in which the reduction is made.” Subsection (1) of section 225 (as does section 220)

mandates that the Department take the social security retirement offset reduction “[f]or persons receiving” State total disability compensation.

The issue presented by Doan’s argument under these subsections is:

Does the unmodified phrase, “for persons receiving,” in line 1 of subsection 1 of RCW 51.32.225 and RCW 51.32.220 have its ordinary meaning of *persons who at some point receive compensation*, such that the Department may lawfully give workers notice of its right to offset before paying or determining eligibility for State compensation?

Doan argues that generally the statutory phrase, “for persons receiving,” implicitly precludes the Department from giving a person advance notice of the Department’s right to offset any such State benefits before payment has begun.⁵ The Court should reject Doan’s argument for the reasons stated below.

III. STATEMENT OF THE CASE

The facts have never been in dispute in this case. Indeed, the case was decided on summary judgment at the Board, and, while the summary judgment motion was not re-raised at Superior Court, the case was decided as a matter of law by the Superior Court.

⁵ Doan would allow one and only one exception to his advance-receipt interpretation of the statute - - the circumstance where a court or the Board orders payment of a lump sum of back total disability compensation. *See supra* fn. 3.

A. Department Action

Doan injured his right thumb and right shoulder while working. Certified Appeal Board Record (CABR) 28. Between 1988 and 1999, the Department provided medical treatment and paid State compensation benefits. CABR 28-31. The Department last paid Doan State total disability compensation in 1994. CABR 47.

On March 30, 1999, the Department closed the claim and granted a substantial award for permanent partial disability compensation. CABR 30. The Department reopened Doan's claim effective September 21, 1999. CABR 31. On July 14, 2003, the Department attempted to re-close the claim with an increased permanent partial disability award, but Doan protested claim closure, and the Department modified the closing order from final to interlocutory. CABR 31.

On August 3, 2004, the Department's Claims Manager Pamela L. Duran-Maguire sent a letter to Doan regarding possible resumption of loss of earning power benefits. CABR 47. Ms. Duran-Maguire also requested gross wages information from Doan relating to most of the period between 2000 and 2003 so that loss of earning power benefits calculations might be made. CABR 47.

Meanwhile, on August 25, 2000, the Department had received notice from the Federal Social Security Administration that Doan had been approved for and was receiving federal social security retirement benefits. CABR 46. On August 26, 2004, the Department issued a notice and order of social security offset. The order was explicitly contingent (applying if State total disability compensation is paid in the future). The order adjusted compensation rate figures on the claim effective September 1, 2000, because Doan had been receiving Social Security Retirement Benefits since at least August 2000 when the Department had been notified. CABR 16-17. The Department notice and order also provided for annual cost of living adjustments effective July 1, 2001, 2002, 2003, and 2004, again contingent on total disability compensation being paid to Doan in the future. CABR 16-17.

Doan protested the Department's August 26, 2004 offset notice and order, the Department affirmed that order, and Doan appealed to the Board. CABR 47. Notwithstanding the August 3, 2004, correspondence from the claims manager to Doan regarding the possible resumption of loss of earning power benefits, the Department again issued an order attempting to close the claim by separate order without paying any additional wage loss

compensation (CABR 47),⁶ which class of compensation, again, was last paid on Doan's claim in 1994 (CABR 47).

B. Board of Industrial Insurance Appeals

Doan appealed the Department's offset notice and order to the Board. CABR 18-21. Both parties filed for summary judgment. Doan's only argument was that the provision in line 1 of subsection 1 of RCW 51.32.225 mandating that the Department offset social security benefits "for persons receiving" State compensation somehow prohibits the Department from giving anticipatory notice prior to initial payment or resumption of State disability compensation - - he would thus require the workers' receipt of State compensation before the Department could give notice of offset. CABR 53-56.⁷ The Industrial Appeals Judge (IAJ) ruled the Department had authority under RCW 51.32.225 to issue the advance offset order. CABR 7-13.

The IAJ noted that the Board had ruled to the contrary in its non-significant decision in *In re Patricia Pimentel*, BIIA Dckt. No. 99 15844,

⁶ Doan separately appealed that Department closing order to the Board under Board docket number 04 24488. Those Board proceedings are not part of the instant appeal.

⁷ As noted, Doan would allow one and only one exception to his advance-receipt interpretation of the statute - - the circumstance where a court or the Board orders payment of a lump sum of back total disability compensation. *See supra* fn. 3.

2000 WL 1137212 (June 28, 2000),⁸ but he concluded that Board decisions issued both before and after the *Pimentel* decision, along with the statutory language and the legislative policy against double recovery of wage loss benefits, all militated against Doan's argument.

Doan petitioned for review of the ruling to the three-member Board, which denied review, thus making the IAJ's proposed decision the final order of the Board. CABR 1-4; RCW 51.52.106.

C. Kitsap County Superior Court

Doan appealed the Board's decision to Kitsap County Superior Court. CP 1-2. After reviewing the Board record and briefing, as well as hearing oral argument, the Superior Court reversed the Board's decision. The Superior Court issued a Memorandum Opinion (CP 3-7), followed by entry of Findings of Fact and Conclusions of Law (CP 8-16) and a Judgment (CP 17-20).

⁸ *Pimentel* is a non-significant Board decision. Board decisions are not precedential but are considered for their persuasive value (*Walmer v. Dep't of Labor & Indus.*, 78 Wn. App. 162, 167, 896 P.2d 95 (1994)), although as is noted *infra* Part IV, Board interpretations of RCW 51 should not be given the same degree of deference as Department interpretations of RCW 51. RCW 51.52.160 requires the Board to designate its "significant decisions," and to publish those decisions. Those Significant Decisions (cited as "BIIA Dec." herein) are accessible on the Internet at the Board's web page address at <http://www.wa.gov/biia>. In addition, most decisions of the three-member Board, both those that have been designated as "significant" and those that have not been so designated (the latter are cited as "BIIA Dekt." herein), can be accessed on WESTLAW at WAWC-ADMIN.

Findings of Fact ## 16 through 19 are, as noted *supra* footnote 4, are actually conclusions of law. Findings ## 16 through 19 here mirror the Superior Court's key (albeit redundant and overlapping) Conclusions of Law ## 2-6. Those Conclusions of Law read as follows:

2. RCW 51.32.220 and RCW 51.32.225 permit an offset where a worker is in fact receiving temporary total disability or permanent total disability benefits, or is entitled to a retroactive award of the same during periods where the worker also receives social security benefits pursuant to Frazier and Potter,⁹

3. The Department of Labor and Industries has the statutory authority to enter an order offsetting temporary total or total permanent disability benefits if the worker is actually receiving compensation or has been awarded a retroactive award of temporary total or permanent total disability benefits.

4. The Department of Labor and Industries cannot issue an order offsetting temporary total or permanent total disability benefits if the worker is not actually receiving those forms of compensation, or has not actually been awarded a retroactive money sum of total disability benefits at the time of the offset order.

5. The Department of Labor and Industries does not have authority to issue an order adjudicating a social security offset where a worker is not receiving either

⁹ The Superior Court's reference to *Potter* and *Frazier* is to this Court's decisions in *Potter v. Dep't of Labor & Indus.*, 101 Wn. App. 399, 3 P.3d 229 (2000); *Frazier v. Dep't of Labor & Indus.*, 101 Wn. App. 411, 3 P.3d 221 (2000). See the discussion *supra* fn. 3 and *infra* Part VI regarding the tortured semantics and illogic of the attempt by Doan and the Superior Court to allow for an exception, and thus make consistent with *Potter* and *Frazier*, their proposed restrictive Department-notice rule that is based on a purported "plain meaning" interpretation of the unmodified phrase "for persons receiving" in the first line of subsection 1 of section 225 (and section 220).

temporary total or permanent disability benefits and is not receiving a retroactive monetary award for the same.

6. The Department order under appeal is vacated as the Department was without authority to issue the order since Mr. Doan was not in fact receiving temporary total benefits or permanent total benefits for the periods for which the offset was claimed, nor was Mr. Doan entitled to a retroactive award of temporary or permanent total disability benefits for the periods for which the offset was claimed.

7. Attorney fees in the amount of \$2,234.38 and costs in the amount of \$200.00 are reasonable and are to be paid by the Department of Labor and Industries when and if the medical aid fund or accident fund is affected by this litigation.

CP 14-16.

The Department appealed to this Court.

IV. STANDARD OF REVIEW AND GUIDES TO STATUTORY CONSTRUCTION

Review of superior court decisions in workers' compensation cases is under the ordinary standard for civil cases. RCW 51.52.140; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). This case requires that this Court review the superior court's ruling that construed RCW 51.32.225. Statutory construction is a question of law reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

In determining the meaning of a statute, this Court is required to first look to the relevant statutory language. *Everett Concrete Prods., Inc.*

v. Dep't of Labor & Indus., 109 Wn.2d 819, 821, 748 P.2d 1112 (1988). This Court must give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the subject statute or from related provisions which disclose legislative intent about the provision in question. *Dep't of Ecology v. Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). A statute that is clear on its face is not subject to statutory construction, and this Court must "simply apply it." *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993).

The provisions of Washington's Industrial Insurance Act are "liberally construed." RCW 51.12.010; *see also Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1993). This rule of construction, however, does not authorize an unrealistic interpretation that produces strained or absurd results and defeats the plain meaning and intent of the Legislature. *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992); *Senate Republican Comm. v. Pub. Disclosure Com'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997).

A court should not, under the guise of statutory construction, distort a statute's meaning in order to make it conform to the court's own views of sound social policy. *Aviation West Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 432, 980 P.2d 701 (1999); *see also Rhoad v.*

McLean Trucking, Dep't of Labor & Indus., 102 Wn.2d 422, 425-26, 686 P.2d 483 (1984) (“a court may not read into a statute those things which it conceives the Legislature may have left out unintentionally”); *State v. Halsten*, 108 Wn. App. 759, 764, 33 P.3d 751 (2001) (“[t]he drafting of a statute is a legislative, not a judicial function”). The rule of liberal construction does not trump other rules of statutory construction. *Senate Republican Comm. v. Pub. Disclosure Com'n*, 133 Wn.2d at 243.

Department and Board interpretations of the Industrial Insurance Act are entitled to great deference, and the courts “must accord substantial weight to the agenc[ies’] interpretation of the law.” *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994) (deference given to Department interpretation); *Ackley-Bell v. Seattle School Dist.*, 87 Wn. App. 158, 165, 940 P.2d 685 (1997) (recognizing that deference is due the interpretations of both the Department and Board).

V. SUMMARY OF ARGUMENT

RCW 51.32.220 and RCW 51.32.225 mandate that the Department offset against state workers’ compensation benefits the social security disability and retirement benefits that injured workers are receiving from the federal government. The intent of these statutes is to prevent double

recovery of wage loss benefits and to reduce the cost of providing worker's compensation insurance to the state by shifting a part of the burden to the federal government.

Replying on the plain language of RCW 51.32.225(1), the Department provided Doan with advance notice of its intent to offset future state total disability compensation that may become due. Doan argues that the statutory language implicitly precludes the Department from giving a person advance notice of the Department's right to offset any such state benefits before payment has begun. However, there is no statutory barrier to the Department providing advance notice of offset. Instead, the plain meaning of the relevant statutory language, the underlying statutory purpose, and the relevant case law all support the notice that the Department gave in this case. Because the Department's interpretation of the notice provisions in RCW 51.32.220 and 225 are correct, any advance of attorney fees and costs to Doan should be denied.

VI. ARGUMENT

A. **RCW 51.32.220 And RCW 51.32.225 Prevent Double Recovery Of State And Federal Wage Loss Benefits**

Federal social security disability and retirement benefits are wage loss benefits, as are Washington workers' compensation total disability benefits. It is well-established in Washington that: (1) Congress' intent in

adopting the Federal offset provisions of 42 U.S.C. § 424a, and the Washington Legislature's intent in implementing the "reverse offset" authorized by Federal law (42 U.S.C. § 424a(d)) via the reverse social security offset provisions of RCW 51.32.220 (disability offset) and RCW 51.32.225 (retirement offset) was to prevent payment of overlapping and duplicate Federal and State wage loss benefits; and (2) the Washington offset statutes should be construed so as to further this legislative intent. See *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 150, 736 P.2d 265 (1987); *Regnier v. Dep't of Labor & Indus.*, 110 Wn.2d 60, 62, 749 P.2d 1299 (1988); *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d at 469; *Herzog v. Dep't of Labor & Indus.*, 40 Wn. App., 20, 25, 696 P.2d 1247 (1985); *Potter v. Dep't of Labor & Indus.*, 101 Wn. App. at 408-09; *Frazier v. Dep't of Labor & Indus.*, 101 Wn. App. at 416.

B. RCW 51.32.225 And RCW 51.32.220 Unambiguously Authorize The Department To Give Notice Of Offset Before Paying State Total Disability Compensation

In ordinary usage, the phrase "for persons receiving [State compensation]" in line 1 of subsection 1 of sections 220 and 225 means "for persons who at some point receive [State compensation]" Moreover, there is not any qualifying language in the advance-notice subsection 4 of section 220 that would support Doan's advance-*receipt*

construction of the statutes. Thus, the plain language of Washington's reverse offset statutes allows the Department to give advance notice of reverse offsetting of future State total disability compensation that may become due an injured worker.

Subsection (2) of RCW 51.32.225 provides:

(2) Reductions for social security retirement benefits under this section shall comply with the procedures in RCW 51.32.220 (1) through (6) and with any other procedures established by the department to administer this section.

The incorporated subsection (2) of RCW 51.32.220 provides:

Any reduction under subsection (1) of this section shall be effective the month following the month in which the department or self-insurer is notified by the federal social security administration that the person is receiving disability benefits under the federal old-age, survivors, and disability insurance act . . .

The incorporated subsection (4) of RCW 51.32.220 provides:

(4) No reduction may be made unless the worker receives notice of the reduction prior to the month in which the reduction is made.

Here, the Department has received the required subsection 2 notice from the Federal government (CABR 46), and the Department has given Doan the required subsection 4 notice (CABR 16-17). If Doan becomes eligible for State total disability compensation in the future, all required notices will have been given and received, and the Department will be authorized to immediately implement the reduction.

Thus, the plain language of the notice provisions of the statutes, as well as their policy purposes, will have been met - - Doan will have known in advance that offset was going to occur, he will have had opportunity to plan for it, and he will not have had false expectations that he could receive duplicative wage loss benefits from both the federal government and from the Department.

Doan argues,¹⁰ however, that the phrasing of the legislative mandate to the Department in RCW 51.32.225(1) precludes the Department from giving advance notice of offsetting of future benefits that may become due (except in certain circumstances where past litigation has resulted in a Board or court order for back payment of a lump sum of State total disability compensation). Doan's argument is based on the word "receiving" in subsection (1) of RCW 51.32.225, which provides:

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. (Emphasis added)

RCW 51.32.225(1).

¹⁰ The Superior Court adopted Doan's argument in whole. See CP 3-7 (Memorandum Opinion); CP 8-16 (Superior Court Findings of Fact and Conclusions of Law). When the Department refers in this brief to "Doan's" arguments, the Department is also referring to the analysis of the Superior Court.

The word “receiving” in line 1 of subsection 1 of section 225 is not modified and is not linked to any temporally qualifying language in either subsection 1 or in any other subsection of section 220 or 225. Read naturally and fairly, there is no implication that the Department authority to give notice of offset to any worker applies only if the worker is presently receiving State total disability compensation benefits.¹¹

Doan does concede that in the circumstance where past litigation has resulted in a Board or court order for back payment of a lump sum of State total disability compensation, then the Department could give notice to the injured worker before the worker has received any State compensation. CP 6.

In essence, Doan is asking this Court to rewrite subsection 1 of sections 220 and 225 to apply “for persons receiving compensation for temporary or permanent total disability compensation at the time that notice of reduction is given by the department under subsection 4 of RCW 51.32.220, except that advance notice may lawfully be given in circumstances where past litigation has resulted in a Board or court order for back payment of a lump sum of State total disability compensation . . .” (underlining indicates the language suggested by Doan’ arguments).

¹¹ The same words and phrasing are present in RCW 51.32.220(1), so any

But that is not what those statutes state. Nor does the text of the Department-notice-to-worker requirement of subsection 4 of RCW 51.32.220 support his argument. That subsection states only that “[n]o reduction may be made unless the worker receives notice of the reduction prior to the month in which the reduction is made.” Doan would have this Court rewrite that subsection to say that “[n]o reduction may be made unless the worker receives notice of the reduction prior to the month in which the reduction is made, and notice of the reduction cannot be given by the department except (a) in a period during which a worker is currently receiving compensation for temporary or permanent total disability compensation, or (b) in circumstances where past litigation has resulted in a Board or court order for back payment of a lump sum of State total disability compensation . . .” (underlining indicates the language that Doan apparently wants added to the statute).

This Court should reject Doan’s invitation to rewrite the statute. See generally *State v. Halsten*, 108 Wn. App. at 764. Moreover, Doan’s attempt to read convoluted temporal restrictions into the word “receiving” is contradicted by other statutory provisions where the Legislature uses the word “receiving” with other words to limit application of a statute to a

restrictive ruling in the instant case will also apply to reverse social security disability offset procedures.

narrow context. Thus, in the second sentence of RCW 51.32.225(1), the Legislature temporally restricted the word in one narrow context when it created an exception to the effective date of its enactment for application of the retirement reverse offset, providing an exclusion only “*for those receiving permanent total disability benefits prior to July 1, 1986.*”¹² The presence of a temporal limitation in the exception in subsection 1 of section 225 juxtaposed against the absence of temporal limitation in the usage in line 1 of that same subsection manifests legislative intent not to place temporal limits on the usage in line 1 of subsection 1. *See generally In re Detention of Dydasco*, 85 Wn. App. 535, 538, n. 2, 993 P.2d 441 (1997) (“The State’s construction of the provisions of the statute is consistent with the standard rule of statutory construction regarding the effect of specific inclusions versus implications. *Inclusio unius est exclusio alterius . . . to express or include one thing implies the exclusion of another*”) *See also* similar contrasting temporal limits on “receiving” in RCW 51.08.178 (addressing wages a worker was “*receiving . . . at the time of the injury*”); RCW 36.16.032 (“*receiving on January 1, 1973*”).

¹² *See Harris v. Dep’t of Labor & Indus.*, 120 Wn.2d at 471-74, interpreting the exception.

Here there is no such temporal limitation in the phrase “for persons receiving” in line 1 of subsection 1 of sections 225 and 220. Instead, the words “persons receiving” are a general description of who can receive the notice of offset pursuant to the express authority of sections 220 and 225. Nor is there any qualifying language in the notice provisions of subsection 4 of section 220 that would support Doan’s theory.

Furthermore, the Legislature was using a common statutory phrase that implies no temporal limitation when the Legislature used the phrase “for persons receiving.” Phrases such as “for persons receiving,” “for workers receiving,” “for individuals receiving,” are common parlance in statutes, regulations, appellate court decisions, and everyday usage meaning, when used without any particular qualifiers, to refer generally to persons who “receive” at any time. *See, e.g.*, RCW 43.21A.230 (“Fees and lab quality control requirements *for persons receiving* state or federal wastewater discharge permits shall not be implemented before September 3, 1998.”); RCW 43.70.020(2)(f) (“The secretary shall consider . . . A single point of access *for persons receiving* like services from the department which would limit the number of referrals between divisions.”); RCW 48.41.150(1) (“The board shall offer a medical supplement policy *for persons receiving* medicare parts A and B.”)

Thus, as noted, in ordinary usage the phrase “for persons receiving [State compensation]” in line 1 of subsection 1 of sections 220 and 225 means “for persons who at some point receive [State compensation] . . .” And again, there is not any qualifying language in the notice provision, subsection 4 of section 220, that would support Doan’s construction of the statutes.

Accordingly, at such point in time that the Department would provide State compensation to Doan, the necessary statutory Federal agency notice to the Department and Department notice to Doan will previously have been given, and Doan will have been allowed to plan accordingly without false expectations of receiving overlapping federal and State wage loss compensation. Hence, both the statutory language and its purposes compel the conclusion that advance notice of offset is lawful, and, where there has been advance notice, the Department is authorized to immediately implement the offset by reducing State compensation payments. Doan fails in his attempt to read an advance-receipt limitation into the statutory notice requirement that the Legislature has chosen not to limit.

- C. Assuming Arguendo That The Phrase “For Persons Receiving” In RCW 51.32.225 Is Ambiguous, It Should Be Construed, Consistently With Legislative Policy And Consistently With**

This Court's *Potter* And *Frazier* Decisions, As Allowing The Advance Notice Given Here.

As noted *supra* Part VI.A, the Washington courts have consistently construed RCW 51.32.220 and RCW 51.32.225 broadly in a variety of contexts so as to further legislative intent to prevent workers' receipt of duplicative and overlapping State and Federal wage loss benefits. More to the point here, this Court construed these statutes in its *Potter* and *Frazier* decisions in a way that, while not squarely on point here, is consistent with the Department and Board decisions in the instant case, and is inconsistent with Doan's construction of the statutory language at issue.

In *Potter*, the worker raised a challenge under RCW 51.32.220 against the Department's offsetting of her Federal social security disability compensation against a Board-ordered, lump sum, back payment of State time loss compensation. 101 Wn. App. at 402. Ms. Potter raised a similarly elusive, argument that Doan has raised. Like Doan, Ms. Potter based her argument on the "for persons receiving" phrase, arguing that the Legislature had meant to limit offset to persons who - - at the moment when the Department gave notice of its authority to offset - - were then receiving payments from the Department on a current monthly basis. 101 Wn. App. at 405-09.

Like Doan, Ms. Potter argued that her interpretation was supported by plain meaning analysis. This Court rejected Ms. Potter's argument both under its own plain meaning analysis (101 Wn. App. at 406) and under statutory purpose analysis (101 Wn. App. at 408-09 - - noting as to legislative purpose that Ms. Potter should not be allowed the windfall of receipt of both State and Federal benefits to compensate for lost wages for the same period). The *Potter* Court thus explained as to statutory language and legislative purpose:

A commonsense and harmonized reading of RCW 51.32 and RCW 51.52 supports the Department's contention that it has authority to make lump sum retroactive payments upon the Board's final determination of eligibility and to apply the reverse offset retroactively as well This reading furthers the Legislature's intent to avoid overlapping and duplicate payment of both state and federal disability payments. RCW 51.32.220(1); 42 U.S.C. § 424a(d); *Harris*, 120 Wn.2d at 469; *Regnier v. Dep't of Labor & Indus.*, 110 Wn.2d 60, 62, 749 P.2d 1299 (1988); *Ravsten*, 108 Wn.2d at 149.

101 Wn. App. 408-09.¹³

¹³ See also the following Board decisions upholding the Department's authority to retroactively offset lump sum back time loss benefits after giving advance notice of the Department's authority to offset. *In re Eddy Maupin*, BIIA Dec., 03 21206, 2004 WL 3218307 (2004); *In re Billie Davis*, BIIA Dec., 97 3639, 1998 WL 835120 (1998); *In re Allensworth*, Dckt. No. 94 4223, 1995 WL 631742 (September 14, 1995); *In re Claudia Hyde*, Dckt. No. 93 2664, 1994 WL 238292 (April 15, 1994); *In re Shirley Benstine*, Dckt. No. 88 2101, 1989 WL 168616 (December 5, 1989); *In re James Conrad*, BIIA Dec., 68,967, 1985 WL 25916 (1985); *In re Kenneth Beitler*, BIIA Dec., 58,976, 1982 WL 591184 (1982).

It is significant here that in *Potter* the Department sent the worker notice of offset before the Department paid the lump sum payment of time loss compensation. 101 Wn. App. at 402, 409-10. The *Potter* Court rejected Ms. Potter's notice argument, but the Court's opinion did not explain the exact content of Ms. Potter's notice argument. 101 Wn. App. at 409-10. Nonetheless, the result in *Potter* is inconsistent with a straightforward application of Doan's "receiving" argument, which is purportedly a *plain meaning* interpretation of the statutes that would generally require that a worker be currently receiving State compensation when the Department gave notice of its offset authority. See CP 6 (Memorandum Opinion characterizing Doan's analysis as a "plain meaning" analysis).

Inconsistency of his advance-receipt interpretation of "for persons receiving" with *Potter* is the obvious reason that Doan has grafted a lump-sum-back-payment-award (per court or Board order) exception onto his proposed rule against advance Department notice of offset. Doan can provide no text-based explanation for this exception because there is no textual basis for his proposed rule. Doan's argument thus admits to the inconsistency of his proposed general advance-receipt rule with *Potter*, demonstrating a further reason to reject his argument.

Similarly in *Frazier*, the worker challenged application of offset to a court-ordered lump sum payment of back time loss compensation (101 Wn. App. at 414), and raised an elusive argument based on the phrase “for persons receiving,” this time where the phrase appears in the first line of subsection 1 of section 225 (Mr. Frazier’s case, like the instant case, was a reverse *retirement* offset case). 101 Wn. App. at 415-20. As in *Potter*, the *Frazier* Court rejected the worker’s argument against applying the offset. Again this Court relied on a combination of plain meaning and statutory purpose analysis. 101 Wn. App. at 420. The *Frazier* Court thus explained:

The plain language of the statute does not support Frazier's argument that the phrase “receiving compensation” means that the claimant must currently be receiving *monthly* payments. *Potter*, at 403, 407. Further, Frazier's interpretation of the word “receiving” is contrary to the purpose of the statute, which is to fully compensate without allowing a windfall to the claimant. *Ravsten*, 108 Wn.2d at 149; *Herzog*, 40 Wn. App. at 25; *Potter*, at 409. Allowing Frazier to claim an exception to the offset rule because of a delay in his receipt of benefits would not only result in a windfall to him, it would also encourage others to use litigation to delay the physical delivery of benefits so as to reap the same windfall.

101 Wn. App. at 420.

And, as noted above in regard to the *Potter* decision, it is significant that in *Frazier* as well the Department sent the worker notice of offset before the Department paid the lump sum payment of time loss

compensation, but this Court nonetheless rejected the worker's notice argument. 101 Wn. App. at 414, 420-21.¹⁴ Thus, the results in *Frazier* and *Potter* are inconsistent with a straightforward application of Doan's "receiving" argument, and, as noted, for that reason he has grafted an exception onto his rule for retroactively received lump sum compensation that follows a Department offset notice. Doan, however, can provide no reasoned or statutory-text-based explanation for this exception to his proposed rule other than its convenient service as a way to avoid inconsistency of his rule with *Potter* and *Frazier*.

Absent the *Potter/Frazier* exception proffered by Doan, Doan's argument for a general advance-receipt rule under RCW 51.32.220 and RCW 51.32.225 is inconsistent with the rulings in those cases.

The only difference between the circumstances here and those in *Potter* and *Frazier* is the uncertainty here of whether the Department will pay a State total disability compensation award. This is a distinction without a difference where the only statutory-text-based argument of the worker turns on the statutory phrases "for persons receiving" in line 1 of subsections 1 of sections 220 and 225. Ms. Potter and Mr. Frazier were no more "receiving" State total disability compensation when the Department

¹⁴ The facts and issues regarding notice in *Frazier* were more complicated, but

gave its offset notice in their cases than was Doan when the Department gave its offset notice in his case.

Thus, Doan's advance-receipt interpretation of the phrase "for persons receiving" in the offset statutes threatens to undo *Potter* and *Frazier*, and would thus prevent offsetting against lump sum payments or at least parts of such payments.¹⁵

Even if this Court were to find a logical way to accept Doan's one exception to his proposed advance-receipt rule - - i.e., his exception for court-ordered and Board-ordered lump sum payments of back State compensation - - his advance-receipt rule would frustrate legislative intent to prevent double recovery in another categorical circumstance, i.e., back payment circumstances that are not the result of litigation. The Department authorizes time loss compensation based on what information is made available to the Department. The worker can have considerable control over when and what information is provided to the Department.

A worker receiving Federal benefits could avoid offset by purposely delaying the providing of information to the Department. In the

the principle applied is the same as in *Potter*.

¹⁵ If the Department were barred from giving advance notice of offset, it appears that the overpayment recoupment provisions of RCW 51.32.220(2) would limit the Department to recovering only six months of the lump sum, and that the remainder of a seven-month-or-more lump sum back payment would escape offset. See *Potter*, 101 Wn.

latter circumstance, if the Department then determined that a lump sum of time loss compensation was due the worker for an extended back period, it appears that Doan's proposed advance-receipt interpretation of the statute would not permit the Department to offset the payments of State compensation. As in the circumstances at issue in *Potter* and *Frazier* (back payments that resulted from litigation), Doan's interpretation must be rejected because it would frustrate legislative policy to prevent windfall recoveries.

Moreover, an injured worker who receives a lump sum award, whether court-ordered, Board-ordered, or determined by the Department, will receive payment from the Department more quickly under the Department's interpretation of the statutes than under Doan's. Under *Potter* and *Frazier*, the Department is authorized to delay paying the lump sum award until the Department has first given notice of offset prior to the month of payment of the award. *Potter*, 101 Wn. App. at 409-10; *Frazier*, 101 Wn. App. at 421. But if the Department has already given notice before the determination of the lump sum award is made, then the Department need not wait before paying the award.

App. at 410. This would frustrate legislative policy to prevent double recoveries as recognized in *Potter* and *Frazier*.

Finally, it is important to note that the circumstances here do not present the hardship circumstances that the Legislature was trying to protect against with its limitations on overpayments and its notice requirements. In the Board's *Billie Davis* decision, the Board explained that the Legislature was concerned that workers would receive State compensation payments, spend the money, and only much later find out that they would need to pay back the money. *Davis*, 1998 WL835120 at *3. That legislative concern is not implicated here, of course, because no State compensation benefits have yet been paid.

VII. ATTORNEY FEES ARE NOT AWARDABLE

The Superior Court awarded attorney fees to Doan as the prevailing party, but, as is required under the fourth sentence of RCW 51.52.130 (*see Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889-90, 86 P.3d 1231(2004), *review denied*, 152 Wn.2d 1032 (2004)), made the award contingent, requiring that the Department pay attorney fees and costs only "when and if the medical aid fund or accident fund is affected by the litigation." CP 14 (Finding of Fact 20); CP 15-16 (Conclusion of Law 7).

The Superior Court attorney fee award should be reversed because, as explained above in this brief, Doan should not have prevailed on the merits at Superior Court. For the same reason, no appellate review attorney

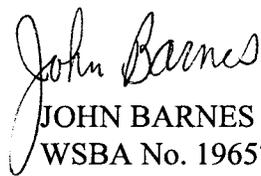
fees and costs should be awarded to Doan in this Court. Alternatively, if Doan prevails on the merits and attorney fees are awarded in this Court, the Court should make clear that any fee award is payable only “when and if the medical aid fund or accident fund is affected by this litigation.”

VIII. CONCLUSION

The Department was correct in issuing an offset order once it was notified that Mr. Doan was receiving Social Security retirement benefits. The Department respectfully requests this Court to reverse the Superior Court decision that reversed the Board and Department decisions in this case, and affirm the decision of the Board.

RESPECTFULLY SUBMITTED this 16th day of May, 2007.

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FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
DEPUTY

NO. 35877-8-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

Department of Labor and Industries,

Appellant,

v.

Hoa Doan,

Respondent.

DECLARATION
OF MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the 16th day of May 2007, I mailed the Brief of Appellant Department of Labor and Industries to all parties by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Carol L. Casey
Casey & Casey, P.S.
219 Prospect St.
Port Orchard, WA 98366-5325

DATED this 16th May, 2007.


JUDITH SEBASTIONELLI
Legal Assistant

RCW 51.32.220

Reduction in total disability compensation — Limitations — Notice — Waiver — Adjustment for retroactive reduction in federal social security disability benefit — Restrictions — Report.

***** CHANGE IN 2007 *** (SEE 1501.SL) *****

(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.

(2) Any reduction under subsection (1) of this section shall be effective the month following the month in which the department or self-insurer is notified by the federal social security administration that the person is receiving disability benefits under the federal old-age, survivors, and disability insurance act: PROVIDED, That in the event of an overpayment of benefits the department or self-insurer may not recover more than the overpayments for the six months immediately preceding the date the department or self-insurer notifies the worker that an overpayment has occurred: PROVIDED FURTHER, That upon determining that there has been an overpayment, the department or self-insurer shall immediately notify the person who received the overpayment that he or she shall be required to make repayment pursuant to this section and RCW 51.32.230.

(3) Recovery of any overpayment must be taken from future temporary or permanent total disability benefits or permanent partial disability benefits provided by this title. In the case of temporary or permanent total disability benefits, the recovery shall not exceed twenty-five percent of the monthly amount due from the department or self-insurer or one-sixth of the total overpayment, whichever is the lesser.

(4) No reduction may be made unless the worker receives notice of the reduction prior to the month in which the reduction is made.

(5) In no event shall the reduction reduce total benefits to less than the greater amount the worker may be entitled to under this title or the federal old-age, survivors, and disability insurance act.

(6) The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise his or her discretion to waive, in whole or in part, the amount of any overpayment where the recovery would be against equity and good conscience.

(7) Subsection (1) of this section applies to:

(a) Workers under the age of sixty-two whose effective entitlement to total disability compensation begins before January 2, 1983;

(b) Workers under the age of sixty-five whose effective entitlement to total disability compensation begins after January 1, 1983; and

(c) Workers who will become sixty-five years of age on or after June 10, 2004.

(8)(a) If the federal social security administration makes a retroactive reduction in the federal social security disability benefit entitlement of a worker for periods of temporary total, temporary partial, or total permanent disability for which the department or self-insurer also reduced the worker's benefit amounts under this section, the department or self-insurer, as the case may be, shall make adjustments in the calculation of benefits and pay the additional benefits to the worker as appropriate. However, the department or self-insurer shall not make changes in the calculation or pay additional benefits unless the worker submits a written request, along with documentation satisfactory to the director of an overpayment assessment by the social security administration, to the department or self-insurer, as the case may be.

(b) Additional benefits paid under this subsection:

(i) Are paid without interest and without regard to whether the worker's claim under this title is closed; and

APPENDIX A

(ii) Do not affect the status or the date of the claim's closure.

(c) This subsection applies only to requests for adjustments that are submitted before July 1, 2007, and does not apply to requests on claims for which a determination on the request has been made and is not subject to further appeal.

(d) By December 1, 2006, the department must report to the appropriate committees of the legislature concerning the benefit adjustments authorized in this subsection and must include information about similar benefit adjustments, if any, authorized in other states with social security disability benefit offset requirements. The report must include recommendations on whether additional statutory changes might be warranted in light of the actions of the federal social security administration.

[2005 c 198 § 1; 2004 c 92 § 1; 1982 c 63 § 19; 1979 ex.s. c 231 § 1; 1979 ex.s. c 151 § 1; 1977 ex.s. c 323 § 19; 1975 1st ex.s. c 286 § 3.]

Notes:

Effective dates – Implementation – 1982 c 63: See note following RCW 51.32.095.

Applicability – 1979 ex.s. c 231: "This 1979 act applies to all cases in which notification of the first reduction in compensation pursuant to RCW 51.32.220 is mailed after June 15, 1979, regardless of when the basis, authority, or cause for such reduction may have arisen. To such extent, this 1979 act applies retrospectively, but in all other respects it applies prospectively." [1979 ex.s. c 231 § 2.]

Severability – 1979 ex.s. c 231: "If any provision of this 1979 act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1979 ex.s. c 231 § 3.]

Applicability – 1979 ex.s. c 151: "This 1979 act applies to all cases in which notification of the first reduction in compensation pursuant to RCW 51.32.220 is mailed after May 10, 1979, regardless of when the basis, authority, or cause for such reduction may have arisen. To such extent, this 1979 act applies retrospectively, but in all other respects it applies prospectively." [1979 ex.s. c 151 § 3.]

Severability – 1979 ex.s. c 151: "If any provision of this 1979 act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1979 ex.s. c 151 § 4.]

Severability – Effective date – 1977 ex.s. c 323: See notes following RCW 51.04.040.

RCW 51.32.225

Reduction in total disability compensation — Offset for social security retirement benefits.

(1) 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.

(2) Reductions for social security retirement benefits under this section shall comply with the procedures in RCW 51.32.220 (1) through (6) and with any other procedures established by the department to administer this section. For any worker whose entitlement to social security retirement benefits is immediately preceded by an entitlement to social security disability benefits, the offset shall be based on the formulas provided under 42 U.S.C. Sec. 424a. For all other workers entitled to social security retirement benefits, the offset shall be based on procedures established and determined by the department to most closely follow the intent of RCW 51.32.220.

(3) Any reduction in compensation made under chapter 58, Laws of 1986, shall be made before the reduction established in this section.

[2006 c 163 § 1; 1986 c 59 § 5.]

Notes:

Effective date — 1986 c 59 § 5: See note following RCW 51.32.090.

Westlaw.

Page 1

42 U.S.C.A. § 424a

C

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
 TITLE 42. THE PUBLIC HEALTH AND WELFARE
 CHAPTER 7--SOCIAL SECURITY
 SUBCHAPTER II--FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE BENEFITS
 →§ 424a. Reduction of disability benefits

(a) Conditions for reduction; computation

If for any month prior to the month in which an individual attains the age of 65--

- (1) such individual is entitled to benefits under section 423 of this title, and
- (2) such individual is entitled for such month to--

(A) periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a State, or

(B) periodic benefits on account of his or her total or partial disability (whether or not permanent) under any other law or plan of the United States, a State, a political subdivision (as that term is used in section 418(b)(2) of this title), or an instrumentality of two or more States (as that term is used in section 418(g) of this title), other than (i) benefits payable under Title 38, (ii) benefits payable under a program of assistance which is based on need, (iii) benefits based on service all or substantially all of which was included under an agreement entered into by a State and the Commissioner of Social Security under section 418 of this title, and (iv) benefits under a law or plan of the United States based on service all or substantially all of which is employment as defined in section 410 of this title,

the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of--

- (3) such total of benefits under sections 423 and 402 of this title for such month, and
- (4) such periodic benefits payable (and actually paid) for such month to such individual under such laws or plans, exceeds the higher of--

(5) 80 per centum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under section 423 of this title for such month and of any monthly insurance benefits under section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 423 and 402 of this title for a month (in a

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continuous period of months) reduce such total below the sum of--

(7) the total of the benefits under sections 423 and 402 of this title, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made.

For purposes of clause (5), an individual's average current earnings means the largest of (A) the average monthly wage (determined under section 415(b) of this title as in effect prior to January 1979) used for purposes of computing his benefits under section 423 of this title, (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a)(1) and 411(b)(1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest, or (C) one-twelfth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a)(1) and 411(b)(1) of this title) for the calendar year in which he had the highest such wages and income during the period consisting of the calendar year in which he became disabled (as defined in section 423(d) of this title) and the five years preceding that year.

(b) Reduction where benefits payable on other than monthly basis

If any periodic benefit for a total or partial disability under a law or plan described in subsection (a)(2) of this section is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Commissioner of Social Security finds will approximate as nearly as practicable the reduction prescribed by subsection (a) of this section.

(c) Reductions and deductions under other provisions

Reduction of benefits under this section shall be made after any reduction under subsection (a) of section 403 of this title, but before deductions under such section and under section 422(b) of this title.

(d) Exception

The reduction of benefits required by this section shall not be made if the law or plan described in subsection (a)(2) of this section under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423 of this title, and such law or plan so provided on February 18, 1981.

(e) Conditions for payment

If it appears to the Commissioner of Social Security that an individual may be eligible for periodic benefits under a law or plan which would give rise to reduction under this section, the Commissioner may require, as a condition of certification for payment of any benefits under section 423 of this title to any individual for any month and of any benefits under section 402 of this title for such month based on such individual's wages and self-employment income, that such individual certify (i) whether he has filed or intends to file any claim for such periodic benefits, and (ii) if he has so filed, whether there has been a decision on such claim. The Commissioner of Social Security may, in the absence of evidence to the contrary, rely upon such a certification by such individual that he has not filed and does not intend to file such a claim, or that he has so filed and no final decision thereon has been made, in

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certifying benefits for payment pursuant to section 405(i) of this title.

(f) Redetermination of reduction

(1) In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 423 of this title and any benefits under section 402 of this title based on his wages and self-employment income was first required (in a continuous period of months), and in each third year thereafter, the Commissioner of Social Security shall redetermine the amount of such benefits which are still subject to reduction under this section; but such redetermination shall not result in any decrease in the total amount of benefits payable under this subchapter on the basis of such individual's wages and self-employment income. Such redetermined benefit shall be determined as of, and shall become effective with, the January following the year in which such redetermination was made.

(2) In making the redetermination required by paragraph (1), the individual's average current earnings (as defined in subsection (a) of this section) shall be deemed to be the product of--

(A) his average current earnings as initially determined under subsection (a) of this section; and

(B) the ratio of (i) the national average wage index (as defined in section 409(k)(1) of this title) for the calendar year before the year in which such redetermination is made to (ii) the national average wage index (as so defined) for the calendar year before the year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability).

Any amount determined under this paragraph which is not a multiple of \$1 shall be reduced to the next lower multiple of \$1.

(g) Proportionate reduction; application of excess

Whenever a reduction in the total of benefits for any month based on an individual's wages and self-employment income is made under this section, each benefit, except the disability insurance benefit, shall first be proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit shall then be applied to such disability insurance benefit.

(h) Furnishing of information

(1) Notwithstanding any other provision of law, the head of any Federal agency shall provide such information within its possession as the Commissioner of Social Security may require for purposes of making a timely determination of the amount of the reduction, if any, required by this section in benefits payable under this subchapter, or verifying other information necessary in carrying out the provisions of this section.

(2) The Commissioner of Social Security is authorized to enter into agreements with States, political subdivisions, and other organizations that administer a law or plan subject to the provisions of this section, in order to obtain such information as the Commissioner may require to carry out the provisions of this section.

Current through P.L. 110-26 approved 05-11-07

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ATTORNEY GENERAL'S OFFICE
LABOR & INDUSTRIES DIVISION
OLYMPIA, WASHINGTON

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OCT 24 2006

DAVID W. PETERSON

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KITSAP COUNTY

HOA DOAN,

Plaintiff,

vs.

DEPARTMENT OF LABOR
AND INDUSTRIES,

Defendant.

No. 05-2-01799-8

Memorandum Opinion

THIS MATTER comes before the Court on Hoa Doan's appeal from the Board of Industrial Insurance Appeals' denial of a Petition for Review of summary judgment. Hoa Doan, the plaintiff, is represented by Carol L. Casey. The Department of Labor and Industries (Department), the defendant, is represented by John S. Barnes, Assistant Attorney General.

Background Facts: On October 17, 1988, Hoa Doan injured his right thumb and shoulder in an industrial accident that occurred in the course of his employment with Cascade International Industries. The Department of Labor and Industries allowed his claim for temporary total disability benefits (also known as "time-loss compensation") on June 20, 1990. These benefits, including loss of earning power (LEP) compensation, ended on January 1, 1994. His claim was closed on March 30, 1999, and he received a lump sum

MEMORANDUM OPINION

- 1 -

COPY

JUDGE JAY B. ROOF
Kitsap County Superior Court
614 Division Street MS-24
Port Orchard, WA 98366

3
APPENDIX B

1 pay out of permanent partial disability benefits for a category three impairment in the
2 amount of \$21,780.00. Due to an increase in the extent of his injury, he re-opened his
3 claim in fall of 1999 and was awarded benefits for a category four impairment. Mr. Doan
4 then applied for and began receiving social security retirement benefits around August
5 2000.

6 On July 14, 2003, the Department closed Mr. Doan's reopened claim. He was
7 awarded a lump sum of \$4,500.00 for net permanent partial disability payments remaining.
8 Mr. Doan then filed a Protest and Request for Reconsideration on August 21, 2003, and on
9 July 20, 2004, the Department issued an order modifying the July 14 order from final to
10 interlocutory, effectively allowing his claim to remain open.

11 The Department issued an order on August 26, 2004, adjusting his compensation on
12 the initial claim effective September 1, 2000, due to the fact that Mr. Doan was receiving
13 social security retirement benefits. The order also included annual cost of living
14 adjustments beginning each July from 2001 through 2004. Mr. Doan timely appealed this
15 order. The August 2004 order contained the following language:

16 Your legal rights if you disagree with this order:

17 This order becomes final 60 days from the date it is communicated to you unless
18 you do one of the following. You can either file a written request for
19 reconsideration with the Department or file a written appeal with the Board of
20 Industrial Insurance Appeals.

21 On September 30, 2004, the Department issued an order affirming the July 14
22 order; and on November 30, 2004, it affirmed the August 26 order. Mr. Doan then
23 appealed to the Board of Industrial Insurance Appeals (BIIA). On June 10, 2005, the
24 proposed decision of Industrial Appeals Judge Allan R. Pearson was mailed to Mr. Doan,
25 which denied Mr. Doan's motion for summary judgment and granted the Department's
26 cross motion for summary judgment. He filed the proper Petition for Review on July 5,
27 2005. When the Board denied the Petition, Mr. Doan filed his appeal with this Court on
28 July 26, 2005.

1 **Legal Standards:** Pursuant to RCW 51.52.115, this Court reviews decisions of the
2 BIIA de novo and can rely only on the certified board record. The BIIA's decision is prima
3 facie correct, and the plaintiff bears the burden of proving by a preponderance of the
4 evidence that the BIIA's decision was incorrect. *Ruse v. Dep't of Labor & Indus.*, 138
5 Wn.2d 1, 977 P.2d 570 (1999).
6

7 **Analysis and Conclusions:** RCW 51.32.220(1) governs total disability
8 compensation offset by social security disability benefits, while RCW 51.32.220(2)
9 addresses total disability compensation offset by social security retirement benefits. Both
10 statutes provide for an offset "[f]or persons receiving compensation for temporary or
11 permanent total disability." Loss of earning power (LEP) and permanent partial disability
12 compensation are not considered total disability compensation. Therefore, neither of these
13 forms of compensation may be offset by social security benefits.

14 Mr. Doan and the Department disagree on the meaning of the phrase "receiving
15 compensation" as expressed in these statutes. Mr. Doan argues that this Court should take
16 a plain meaning approach, while the Department contends that the Court should rely on
17 legislative intent.

18 The Department's principal argument is that offsets are necessary to avoid double
19 compensation. Specifically, state total disability benefits and federal social security
20 retirement benefits both exist to replace lost wages, and if a claimant were to receive both,
21 he or she would receive duplicate benefits. The Department cites *Harris v. Department of*
22 *Labor & Industries*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993), to illustrate the fact that
23 the legislature established a bright line rule to ensure that duplicate benefits were not
24 received. However, *Harris* addresses *total* disability and its corresponding benefits. Here,
25 Mr. Doan was not receiving *total* disability benefits for lost compensation. Rather, he was
26 receiving benefits for a partial disability that did not preclude his ability to work and is not
27 mentioned in either of the statutes governing offsets.

28 Further, while *In re Larry Worley*, No. 02 21376 (2003), the basic facts appear
29 similar to those in this case, the Department suggests that the *Worley* order "did not require
30

1 any party to take any particular action....” *Department’s Trial Brief* at 7. Here, the August
2 26 order specifically stated that Mr. Doan must take action within sixty days of its issuance
3 or bear the consequences of the order’s finality.

4 The Department also cites BIIA decisions in which the claimant received
5 retroactive totally disability benefits. These decisions are inapposite to the present facts.
6 Thus the Court does not find these cases persuasive or helpful.

7 In contrast, Mr. Doan reasons that the Department can only enter an order offsetting
8 total disability benefits if the petitioner is either literally “receiving compensation” or has
9 been awarded a retroactive total disability benefit. Therefore, because he had not received
10 total disability benefits since January 1, 1994, the offset was not justiciable. Furthermore,
11 by its terms, the order becomes final after sixty days if not contested. Thus, if the order is
12 permitted to stand, the findings in it would affect Mr. Doan’s rights in the future despite the
13 initial impropriety of its issuance.

14 Mr. Doan correctly cites *Harris* for the proposition that “receiving compensation”
15 as used in RCW 51.32.225 is unambiguous and not open to this Court’s interpretation.
16 *Harris*, 120 Wn.2d at 474. However, the *Harris* court’s analysis of the word “receiving”
17 specifically addresses an offset exception rather than the provision at issue in this case.
18 Therefore, it is not entirely on point. Additionally, *Potter v. Department of Labor &*
19 *Industries*, 101 Wn. App. 399, 3 P.3d 229 (2000), and *Frazier v. Department of Labor &*
20 *Industries*, 101 Wn. App. 411, 3 P.3d 221 (2000), are not particularly persuasive as they
21 deal with claimants who actually received retroactive total disability benefits.

22 Similarly, the Industrial Appeals judge relied on the BIIA decision *In re Billie*
23 *Davis*, No. 97 3639 (Oct. 22, 1998), a case in which retroactive total disability benefits
24 were actually paid out, rather than *In re Patricia Pimentel*, No. 99 15844 (June 28, 2000), a
25 case with a factual scenario more like the present case. While the reasoning in *Davis* may
26 have been more in depth, it is undisputed that there is no suggestion at this time that Mr.
27 Doan is entitled to any past, present, or future total disability benefits. As a result, the
28 BIIA’s reliance on *Davis* was misplaced.

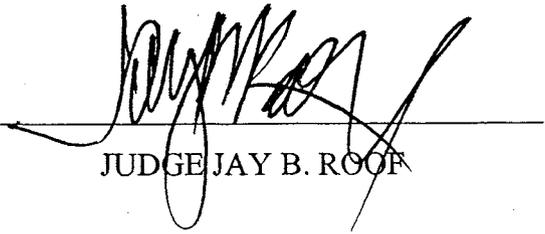
1 With little case law specifically on point, this Court is left to rely on common sense
2 and legislative intent, as originally proposed by the parties. First, it is true that Mr. Doan
3 may or may not be eligible to receive total disability benefits in the future. It is also true
4 that an offset may or may not be appropriate at that time, depending on whether he is
5 receiving social security benefits. However, if this Court allows the present order to stand,
6 Mr. Doan would have no opportunity to contest the offset when and if it is appropriate in
7 the future. While the facts here may one day develop such that Mr. Doan later receives
8 compensation subject to offsets, that is not the present factual scenario before this Court.

9 The Department argues that to accept Mr. Doan's reasoning would be "irrational."
10 *Department's Trial Brief* at 9. However, if Mr. Doan later provides information such that
11 he is entitled to retroactive benefits, an order imposing a retroactive offset would be
12 appropriate at that time under the very case law Mr. Doan cites, namely *Frazier* and *Potter*.

13 Second, the legislative intent behind RCW 51.32.225 to prevent double
14 compensation is not thwarted by this decision. Mr. Doan was not receiving compensation
15 for total disability, nor was he entitled to such compensation, at the time the Department
16 entered its order in August 2004 or during any period for which the order was declared
17 effective (September 2000–July 2004). Specifically, this Court finds that because Mr.
18 Doan has not received a retroactive award of total disability benefits, or any benefits from
19 which an offset can be taken under RCW 51.32.225, the Department did not have the
20 authority to enter the August 26 order. Therefore, it is hereby

21 **ORDERED** that the decision of the Board of Industrial Insurance Appeals is **REVERSED**.

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24 Dated: October 20, 2006.

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28 JUDGE JAY B. ROOF
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ATTORNEY GENERAL'S OFFICE
LABOR & INDUSTRIES DIVISION
OLYMPIA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

HOA DOAN,)	
)	NO. 05 2 01799 8
Plaintiff,)	
)	
vs.)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
DEPARTMENT OF LABOR)	
AND INDUSTRIES OF THE)	
STATE OF WASHINGTON,)	
)	
<u>Defendant.</u>)	

This Court, makes the following Findings of Fact and Conclusions of Law
with regard to the above-referenced cause number:

FINDINGS OF FACT

1. On November 7, 1988 Hoa Doan filed an application for benefits
with the Department of Labor and Industries alleging the occurrence of an

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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2 industrial injury on October 17, 1988 during the course of his employment with
3 Cascade International Industries.
4

5 On August 26, 2004 the Department issued an order adjusting
6 compensation on the claim effective September 1, 2000, due to Mr. Doan's
7 receipt of social security retirement benefits. The order stated the new
8 compensation rate was \$904.52 per month; effective July 1, 2001, the rate
9 increased to \$957.85 per month due to a worker's compensation cost of living
10 adjustment; effective July 1, 2002, the rate increased to \$972.02 per month due
11 to a worker's compensation cost of living adjustment; effective July 1, 2003, the
12 rate increased to \$1,001.69 per month due to a worker's compensation cost of
13 living adjustment; effective July 1, 2004, the rate increased to \$1,037.31 per
14 month due to worker's compensation cost of living adjustment. The offset was
15 calculated based on monthly social security payments for Mr. Doan totaling
16 \$581 and 80 percent of his highest year's earnings in the amount of \$0 per
17 month, as provided by social security.
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22 The Department order of August 26, 2004 was timely protested. On
23 November 30, 2004 the Department issued an order affirming the August 26,
24 2004 Department order. A timely notice of appeal was filed on behalf of the
25 claimant with the Board of Industrial Insurance Appeals; the appeal was
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FINDINGS OF FACT AND
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assigned Board of Industrial Insurance Appeals Docket No. 04 25187. On January 4, 2005, the Board issued an order which granted the appeal and directed that further proceedings be held.

Both parties moved for summary judgment before the Board of Industrial Insurance Appeals. On May 31, 2005 a Proposed Decision and Order was issued. A timely petition for review was filed and on July 19, 2005 the Board issued an Order Denying Petition for Review and adopting as the final decision of the Board the Industrial Appeals Judge's Proposed Decision and Order of May 31, 2005. From the Board order of July 19, 2005 a timely appeal was filed in Kitsap County Superior Court on behalf of Hoa Doan.

2. On October 17, 1988 Hoa Doan sustained an on the job injury in the course of his employment with Cascade International Industries.

3. The claim was allowed and benefits were paid under the claim. By March 30, 1999 the claim was closed with permanent partial disability.

An application to reopen for aggravation of condition was filed and, because the industrially related condition covered under the claim had worsened, the Department reopened the claim effective September 21, 1999.

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4. In August 2000 the Department first received notice of an approved federal social security retirement claim involving Hoa Doan.

5. On July 14, 2003 the Department issued an order closing the claim and paying additional permanent partial disability. No additional total disability benefits were paid.

6. The July 14, 2003 Department order was timely challenged. On July 20, 2004 the Department issued an order modifying the July 14, 2003 Department order from final to interlocutory, in effect allowing the claim to remain open.

7. On August 26, 2004 the Department issued an order adjusting total disability compensation under the claim effective September 1, 2000 because of Hoa Doan's receipt of social security retirement benefits. It is undisputed that at the time of the August 26, 2004 Department order Hoa Doan was not receiving total disability benefits and was not entitled to receive total disability benefits.

8. Effective September 1, 2000 Hoa Doan was not receiving total disability benefits and was not entitled to receive total disability benefits.

9. At all times involved Hoa Doan has not received temporary or permanent total disability benefits for all periods for which a social security offset was claimed.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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10. The Department order of August 26, 2004 was timely challenged. On November 30, 2004 the Department issued an order affirming the August 26, 2004 Department order. It is undisputed that as of November 30, 2004 Hoa Doan was not in fact receiving total disability benefits.

11. As of November 30, 2004 Hoa Doan was not entitled to receive a retroactive total disability benefit award under the claim and had not received total disability for any period identified in the social security offset decision from the Department of Labor and Industries.

12. On September 30, 2004 the Department issued an order which affirmed the July 14, 2003 order closing the claim. A timely appeal was filed on behalf of the claimant to the Department order of September 30, 2004.

13. Temporary total disability or permanent total disability benefits payable under a workers' compensation claim may be offset because of a worker's receipt of social security benefits (disability or retirement).

14. Loss of earning power benefits and permanent partial disability benefits are not temporary total or permanent total disability benefits.

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2 15. Loss of earning power benefits and permanent partial disability
3 benefits are not subject to an offset under Title 51 by the Department of Labor
4 and Industries because of a worker's receipt of social security benefits
5 (disability or retirement).
6

7 16. The Department order(s) at issue here involving the social security
8 offset contained determinative language which indicated the offset would
9 become final if the worker did not take further action. It is inappropriate to issue
10 a determinative order adjudicating a social security offset (disability or
11 retirement) when a worker is not receiving either temporary total disability
12 benefits or permanent total disability benefits.
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15 17. The Department of Labor and Industries may offset a worker's
16 temporary total or permanent total disability benefits because of receipt of social
17 security benefits if the worker in fact receives either temporary or permanent
18 total disability benefits, or when the worker receives a retroactive award for
19 temporary total or permanent total disability benefits pursuant to Frazier and
20 Potter.
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24 18. There is no "double compensation" for a worker who is receiving
25 social security benefits but is not in fact receiving ongoing temporary total or
26 / / /

1 permanent to disability benefits, or is not receiving a retroactive award for
2 temporary total or permanent total disability benefits.

3 19. There is no "double compensation" when a worker is not entitled to
4 receive temporary total or permanent total disability benefits at the time of the
5 social security offset order or during the period where the offset was declared
6 effective by the Department of Labor and Industries.
7

8 20. Attorney fees in the amount of \$2,234.38 and costs in the amount
9 of \$200.00 are reasonable and are to be paid by the Department of Labor and
10 Industries when and if the medical aid fund or accident fund is affected by this
11 litigation.
12

13
14 **CONCLUSIONS OF LAW**

15 1. This Court has jurisdiction over the parties and subject matter
16 hereto.
17

18 2. RCW 51.32.220 and RCW 51.32.225 permit an offset where a
19 worker is in fact receiving temporary total disability or permanent total
20 disability benefits, or is entitled to a retroactive award of the same during
21 periods where the worker also receives social security benefits pursuant to
22 Frazier and Potter.
23

24 3. The Department of Labor and Industries has the statutory authority
25 to enter an order offsetting temporary total or total permanent disability benefits
26

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1 if the worker is actually receiving compensation or has been awarded a
2 retroactive award of temporary total or permanent total disability benefits.

3 4. The Department of Labor and Industries cannot issue an order
4 offsetting temporary total or permanent total disability benefits if the worker is
5 not actually receiving those forms of compensation, or has not actually been
6 awarded a retroactive money sum of total disability benefits at the time of the
7 offset order.
8

9
10 5. The Department of Labor and Industries does not have authority to
11 issue an order adjudicating a social security offset where a worker is not
12 receiving either temporary total or total permanent disability benefits and is not
13 receiving a retroactive monetary award for the same.
14

15
16 6. The Department order under appeal is vacated as the Department
17 was without authority to issue the order since Mr. Doan was not in fact receiving
18 temporary total benefits or permanent total benefits for the periods for which the
19 offset was claimed, nor was Mr. Doan entitled to a retroactive award of
20 temporary or permanent total disability benefits for the periods for which the
21 offset was claimed.
22

23
24 7. Attorney fees in the amount of \$2,234.38 and costs in the amount
25 of \$200.00 are reasonable and are to be paid by the Department of Labor and
26 / / /

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1 Industries will and if the medical aid fund or a dependent fund is affected by this
2 litigation.

3 8. The Department shall take such other and further action as may be
4 indicated by the law and facts.
5

6 DATED this 2 day of January 2007.

7 **JAY B. ROOF**

8 HON. JAY B. ROOF
9 Superior Court Judge

10
11 Presented by:
12 CASEY & CASEY, P.S.

13 CAROL L. CASEY, WSBA #18283
14 Attorney for Plaintiff

15 Approved as to form and content;
16 notice of presentation waived:

17 ROB MCKENNA
18 Attorney General

19 John Barnes by Carol Casey per phone authority
20 JOHN BARNES, WSBA #19657
21 Assistant Attorney General
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23
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FINDINGS OF FACT AND
CONCLUSIONS OF LAW