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STATE OF WASHINGTON

NO. 35877-8-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

Department of Labor and Industries,

Appellant,

v.

Hoa Doan,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In its opening brief, the Department of Labor and Industries (Department) explained that advance notice of offsetting of federal social security benefits against Washington workers' compensation total disability benefits is permitted by plain language of RCW 51.32.220. The notice-of-offset language of RCW 51.32.220(4) is unambiguous. It does not contain any temporal limitation other than that the notice be given at least a month in advance of any reduced payments of the Washington total disability benefits. Appellant's Brief (AB) 15-22. Also, RCW 51.32.220(1)'s authorization to take offset "for persons receiving [Washington total disability compensation]," while necessarily limiting the Department's act of paying at reduced rates to circumstances when such Washington total disability payments are actually being made, does not contain any language that limits when advance notice can be given under subsection (4). AB 14-22.

The Department also explained that its interpretation of the plain language of the statute (1) is supported by this Court's decisions in the cases of *Potter v. Department of Labor & Industries*, 101 Wn. App. 399, 3 P.3d 229 (2000) and *Frazier v. Department of Labor & Industries*, 101 Wn. App. 411, 3 P.3d 221 (2000) (AB 22-28); (2) is supported by the

several legislative policy purposes underlying creation of the offset statute generally and of the notice provisions specifically (AB 14-15, 28-30); and (3) is consistent with legislative usage of other "receiving" phrases, both in RCW 51.32.220 and in other Washington statutes (AB 21-22).

Doan's Respondent's Brief (1) completely ignores the plain language of RCW 51.32.220(4); (2) illogically attempts to factually distinguish *Potter* and *Frazier*; (3) mischaracterizes the Department order on appeal and the Department's argument as relating to types of benefits other than total disability benefits; (4) offers unpersuasive counters to the Department's policy arguments; and (5) misses the Department's simple point in response to Doan's tangential theory regarding the "receiving" phrases found in RCW 51.32.220(1) and in other statutes.

II. ARGUMENT IN REPLY TO DOAN

A. Doan Does Not Offer Any Statutory-Text-Based Explanation Of How RCW 51.32.220(4)'s Advance Notice Requirement Can Be Read As Being Limited To Circumstances Where A Worker Is Presently Receiving Washington Total Disability Compensation

As noted, the Department's opening brief explained that nothing in the plain language of RCW 51.32.220(4)'s notice provision or in RCW 51.32.220(1)'s authorization for making actual reduced payments supports Doan's argument that the required advance notice cannot be given unless a

worker is contemporaneously receiving Washington workers' compensation for total disability. AB 15-22. Not one word in Doan's Respondent's Brief explains how this Court can import into RCW 51.32.220(4)'s advance notice requirement the temporal, or currently-receiving, limitation that he seeks. Indeed, he does not cite or even discuss RCW 51.32.220(4) in his Respondent's Brief. His failure in this regard should be dispositive of this case.

Doan's focus throughout his Respondent's Brief on the "for persons receiving" phrase in RCW 51.32.220(1) reflects that he is confused regarding the import and purpose of that subsection of the statute. Subsection (1) has nothing to do with the notice requirement of subsection (4). Subsection (1) provides the requirement for the Department to make reduced Washington total disability payments. Tautologically, of course, a *reduced* payment of Washington total disability benefits cannot be made unless *some* payment of Washington total disability benefits is being made.

So, in that limited sense, there is a temporal element - - or current-payment requirement - - in the "receiving" phrase of RCW 51.32.220(1). But there is no semantical, syntactical, or logical reason to import that

requirement of RCW 51.32.220(1) into subsection (4)'s notice requirement.

B. Doan's Arguments Conflict With This Court's Decisions In *Potter* And *Frazier* Permitting Advance Notice Of Offset Status

The Department's opening brief explained that Doan is in conflict with this Court's decisions in *Potter* and *Frazier* when he argues that, before the Department can lawfully give notice of future offsetting of benefits, the Department must be already paying an ongoing stream of total disability compensation. AB 22-28 (explaining that in *Potter*, 101 Wn. App. at 409-10, and in *Frazier*, 101 Wn. App. at 420-21, this Court rejected the worker's notice argument, despite the fact that the Department gave notice of offset before making any payment of Washington total disability compensation).

Doan's response is that in *Potter* and *Frazier*, the workers, after receiving notice, were in fact paid Washington total disability compensation. RB 20-25, 33-34, 42-47.[1] This case is a statutory construction case, not a common law case, so any factual distinction that is not tied to relevant statutory language is irrelevant.

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[1] Doan also notes in some other decisions under the social security offset statutes the workers in fact were receiving Washington total disability compensation when the Department applied offset. RB 16-20, 25-26. But those decisions are completely irrelevant here because none of those decisions involved a notice issue.

The Department's opening brief challenged Doan to provide a statutory-text-based rationale for applying RCW 51.32.220(4)'s notice requirement differently in this case than it was applied in *Potter* and *Frazier*. AB 25. Although Doan engages in extensive discussion of *Potter* and *Frazier*, his attempt to distinguish those decisions is conclusory, and he offers no statutory-text-based analysis that would provide this Court with a way to apply the statute differently to the advance notice provided to him. RB 20-25, 33-34, 42-47. Doan does not offer and the Department has not found any logical construct to explain how, where the subsection (1) phrase "workers receiving [Washington total disability compensation]" did not preclude giving subsection (4) notice to Potter and Frazier prior to actual payment of such compensation to them, the same phrase somehow precludes the giving of notice to Doan prior to any payment that is contingent on future eligibility for such compensation.

Doan relies for his factual distinguishing of the cases on the fact that both the *Potter* Court and the *Frazier* Court noted that the workers were "receiving" total disability compensation at the point when they received the post-notice payments of lump sum benefits from the Department. RB 22, 34 (without pinpoint cites, but apparently relying on

Potter, 101 Wn. App. at 407, 409; *Frazier*, 101 Wn. App. at 420). The parts of *Potter* and *Frazier* that Doan relies on, however, did not address the workers' subsection (4) notice arguments in those cases, but instead addressed different arguments regarding subsection (1) not relevant here. If Doan at some point in the future is paid reduced Washington total disability compensation by the Department, then the point made in *Potter* and *Frazier*, i.e., that upon payment the workers were "receiving" such compensation - - and hence that RCW 51.32.220(1) applied - - would apply equally to him. *See Potter*, 101 Wn. App. at 407, 409; *Frazier*, 101 Wn. App. at 420.

The notice analysis in those cases is simple and is consistent with the Department's argument here. This Court simply required, per subsection (4) of RCW 51.32.220, that notice be given at least a month in advance of any payment of Washington total disability compensation. *See* AB 25-27 (citing *Potter*, 110 Wn. App. at 409-10; *Frazier*, 110 Wn. App. at 420-21). Nothing in the notice analysis in those cases suggests that it is necessary, as Doan contends, that Washington total disability compensation be contemporaneous with or closely follow the Department's giving of advance notice of offset status.

C. Doan Mischaracterizes The Facts, As Well As The Department's Argument, In His Discussion Of Permanent

Partial Disability And "Loss Of Earning Power" Compensation.

Doan asserts that the Department's offset order on appeal "offsets PPD" (permanent partial disability compensation) and also "offsets LEP" (loss of earning power, i.e., temporary partial disability compensation). RB 32. That is not true. The Department order and briefing make it clear that neither the order in this case nor RCW 51.32.220 have anything to do with PPD or LEP. The Department's August 26, 2004 social security offset order under review adjusts Doan's monthly total disability compensation rate, should he establish eligibility in the future, because of his receipt of federal social security retirement benefits. CABR 16-17; 59.

Even if the Department's August 26, 2004 order and the Department's opening brief are not clear, the plain language of RCW 51.32.220(1) and RCW 51.32.225(1) addresses only two types of industrial insurance compensation - - "compensation for temporary [and] permanent total disability." Hence, only those two types of industrial insurance compensation are subject to the Washington social security offset statutes.

Doan's attack[2] that the Department order somehow addresses PPD and LEP is unsupported in the record. Likewise, his attack on a non-existent Department argument about PPD and LEP is unsupportable. Neither attack should be considered.

D. Doan Incorrectly Asserts That The Offset Statute's Purpose Of Preventing Double Recovery Is Irrelevant Here

In its opening brief, the Department explained that its interpretation furthers the Washington social security offset statutes' dual legislative purposes of preventing double recovery of wage replacement benefits and shifting the offset from the federal government to the State, particularly in light of the administrative burdens on the Department in attempting to monitor hundreds of thousands of claims. AB 14-15; 28-29. Doan's responses, other than his irrelevant discussion of PPD and LEP, are (1) to repeat his unsupportable argument under RCW 51.32.220(1) that notice cannot be given unless compensation is currently being paid, and (2) to suggest that the Department's task of administering hundreds of thousands of claims at once is quite simple. RB 27-30, 44-47.

The Department has responded above to the former point, and, for obvious reasons, the Department urges the Court not to take Doan's word for the latter point.

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[2] *See also* Doan's discussion of PPD and LEP at RB 4-5, 10-11, 30.

E. Doan Incorrectly Asserts That The Offset Statute's Purpose Of Providing Advance Notice Of Reduction Is Irrelevant Here

In its opening brief, the Department explained that advance notice under the circumstances here allows a worker to plan without false expectations of receiving overlapping federal and State wage loss compensation. AB 22. Doan responds that the Department could provide notice by way of a letter, thus avoiding the res judicata effect of the Department's notice of offset. RB 30-33. This Court should reject Doan's invitation to the Court to usurp the Department's administrative role and to micromanage the Department in the guise of statutory interpretation.

F. Doan Misplaces Reliance On RCW 51.32.220(1)'s Phrase "For Persons Receiving Compensation"

Giving Doan's implausible argument under RCW 51.32.220(1)'s phrase, "for persons receiving compensation," perhaps more attention than it deserves, the Department explained in its opening brief that the phrase was not by itself temporally limiting. AB 20-22. This discussion by the Department was in the alternative. As the Department notes *supra* Part II.A, the Court should rejects Doan's challenge to the notice he received because RCW 51.32.220(4) is unambiguous and is dispositive in not setting any limit on how far in advance notice is given, so long as at least one month's notice is given. AB 14-20.

As noted above, Doan does not even discuss the independently dispositive RCW 51.32.220(4) in his Respondent's Brief. He devotes most of his argument instead to attacking the Department's alternative discussion of the subsection (1) phrase, "for persons receiving compensation." Because the meaning of this phrase is of such tangential, if any, relevance in this case, the Department will only briefly respond to Doan's challenges.

The Department's point in its opening brief is that in common parlance, "for persons receiving" means "for persons who at some point receive." AB 21. This simply means that, in the context of RCW 51.32.220, for persons who at some point receive Washington total disability compensation, such compensation shall be reduced by their social security benefits - - but only if such persons have previously received at least a month's notice that an offset will occur upon their receipt of Washington total disability compensation. RCW 51.32.220(1), (4).

Doan's extensive musing purporting to extend this discussion in the Department's opening brief to other contexts is an exercise in irrelevancy, if not misdirection.

G. Attorney Fees Are Not Awardable, Or, If Awarded, Must Be Made Contingent On Whether This Court's Decision Affects The Accident Fund

In its opening brief, the Department noted that 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, made the award contingent. Thus, the Superior Court required that the Department pay attorney fees and costs *only* "when and if the medical aid fund or accident fund is affected by the litigation." AB 30-31 (citing CP 14 (Finding of Fact 20); CP 15-16 (Conclusion of Law 7)). The Department's opening brief requested reversal of the Superior Court award, as well as denial of an award at this level, on grounds that Doan should not prevail on the merits. *Id.* Alternatively, the Department asked that, if Doan prevails on the merits, and attorney fees are therefore awarded in this Court, the Court make clear that any fee award is payable only "when and if the medical aid fund or accident fund is affected by this litigation." *Id.*

Doan's Respondent's Brief asks conclusively for an award of attorney fees from this Court in the event that he prevails in this Court. He does not respond to, and hence he concedes, the Department's argument that any award to Doan as prevailing party must be contingent as noted above and as explained in the Department's opening brief.

III. CONCLUSION

The Department was correct in issuing an offset order once it was notified that 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 to affirm the decision of the Board.

RESPECTFULLY SUBMITTED this 1st day of October, 2007.

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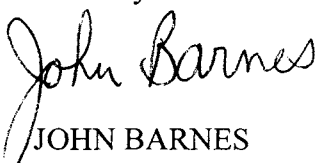

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COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

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 1st day of October 2007, I mailed the Reply 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:

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DATED this 1st October, 2007.

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