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*In re: Charles Hamby*

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## I. ISSUE

This is a worker's compensation case involving application of RCW 51.32.220 and RCW 51.32.225. These 'sister' statutes permit the Department of Labor and Industries to offset certain labor and industries benefits. RCW 51.32.225 refers directly to RCW 51.32.220 for the procedures involved in the offset.

RCW 51.32.220 permits the offset where the worker is entitled to social security disability benefits. RCW 51.32.225 permits the offset where the worker is entitled to social security retirement benefits. Mr. Doan received social security retirement benefits so RCW 51.32.225 was applied.

The issue is whether RCW 51.32.220/225 permits or should permit an offset by a determinative order with res judicata consequences when there is no receipt of or anticipation of receipt of or actual receipt of the type of worker's compensation benefits which can be the subject of

an offset (total disability benefits) but there is a question of payment of benefits which are not supposed to be the subject of the offset. (Loss of earning power benefits).

## II. STATEMENT OF THE CASE

Hoa Doan sustained an on the job injury in October 1988. (FOF 2). The claim was allowed and benefits paid. Total disability benefits were last paid in 1994; no total disability benefit has been paid since 1994. By March 1999 the claim was closed with a permanent partial disability rating. (FOF 3) (BR 47).

Mr. Doan's industrially related problem worsened. RCW 51.32.160 permits claim reopening on the worker's application if the application is submitted within seven years of the date the claim was first closed. Mr. Doan's application was timely, his condition had worsened, and the Department reopened the claim effective September 1999. (FOF 3).

In August 2000 the Department received notice that Mr. Doan's social security retirement application had been approved. (FOF 4).

No form of total disability benefits were ever paid under the claim in 2000 or for the year 2000 at any time. No notice of offset was issued by the Department in 2000.

No form of total disability benefit was ever paid under the claim for any time in 2001. No notice of offset was issued by the Department in 2001.

No form of total disability benefit was ever paid under the claim for any time in 2002. No notice of offset was issued by the Department in 2002.

No form of total disability benefit was ever paid under the claim for any time in 2003. No notice of offset was issued by the Department in 2003. The Department did issue an order closing the claim without additional permanent partial disability award in July 2003. Mr. Doan timely challenged that decision.

No form of total disability benefit was ever paid under the claim for any time in 2004. In July 2004 the Department responded to Mr. Doan's challenge to the July 2003 closing order by placing the July 2003 closing order in interlocutory status. The Department anticipated payment of LEP benefits (which are not subject to offset) and made inquiry. (BR 47) (FOF 14). The "anticipation" didn't pan out and the Department closed the claim in September 2004 without payment of LEP (the Department claim closure did recognize the increase in permanent partial disability, a benefit also not subject to offset). At the point the claim was closed no form of total disability benefit had been paid since 1994 – ten years earlier.

For reasons which make sense only to the Department, the Department issued an order offsetting "compensation" under the claim without distinguishing compensation which may be paid for LEP from

compensation which may be paid for total disability. The order under appeal reads:

“The compensation on your claim is being adjusted effective 09/01/2000 because you receive Social Security Retirement benefits. Your new compensation rate is \$904.52 per month.

Effective 07/01/2001, this rate increases to \$957.85 per month due to the workers' compensation cost of living adjustment.

Effective 07/01/2002, this rate increases to \$972.02 per month due to the workers' compensation cost of living adjustment.

Effective 07/01/2003, this rate increases to \$1,001.69 per month due to the workers' compensation cost of living adjustment.

Effective 07/01/2004, this rate increases to \$1,037.31 per month due to the workers' compensation cost of living adjustment.

This rate is based on monthly Social Security payments for you totaling \$581.00 and 80 percent of your highest

year's earnings in the amount of \$0 per month, as provided by Social Security.

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

YOUR LEGAL RIGHTS IF YOU DISAGREE WITH THIS ORDER: THIS ORDER BECOMES FINAL SIXTY DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING. YOU CAN EITHER FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO: DEPARTMENT OF LABOR AND INDUSTRIES, P.O. BOX 44291, OLYMPIA, WA 98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS, P.O. BOX 42401, OLYMPIA, WA 98504-2401."

(BR 59; Dept. order 8/26/04) (emphasis added).

The Department Order of August 26, 2004 was protested and on November 30, 2004 the Department issued an order affirming its August 26, 2004 order. (FOF 10). Hoa Doan appealed the November 30, 2004 order to the Board. That appeal is the subject of this litigation.

At the time the Department issued the November 30, 2004 Department order, the Department had already closed the claim and refused any payment of total disability benefits for any period of time involved in the social security offset order.

On appeal at the Board, both parties filed for summary judgment. The Industrial Appeals Judge found the offset to be appropriate as:

“This is necessary to meet the letter of the law and, to thereby avoid a windfall by which Mr. Doan would have received both the past paid social security disability payments and retroactive loss of earning power benefits. The fact that

the Department later decided to affirm its previous closing order without paying those retroactive benefits did not retroactively divest them of that authority.” (BR 11).

Of course, there was no “past paid social security disability payments” and all parties agree that if there was “retroactive loss of earning power benefits” those benefits would never be subject to a social security disability or retirement offset under Title 51. Finding of Fact 15 is not challenged. It provides:

“Loss of earning power benefits and permanent partial disability benefits are not subject to an offset under Title 51 by the Department of Labor and Industries because of a worker’s receipt of social security benefits (disability or retirement).”

The Industrial Appeals Judges’ decision was challenged. The Board declined to review the matter, adopting as its own the decision of the IAJ. (BR 1). On appeal to Superior Court, Judge Roof reversed the Board because the “letter of the law” does not permit an offset

against LEP benefits, no policy is served by the Department's offset, and a determinative order adjusting "compensation" for an offset is inappropriate when the adjustment is specific to time periods where no offsetable benefits were ever paid and the adjustment is specific to time periods where non-offsetable benefits would be paid.

### III. ARGUMENT

#### a. GENERAL CONCEPTS OF WORKER'S COMPENSATION

The Act contemplates two forms of total disability benefits. A "total" disability means there is a complete inability to participate in gainful employment efforts. That total inability to work may be "temporary" or it may be "permanent." The distinction between a temporary total disability and a permanent total disability is in duration only. Bonko v. Department of Labor and Industries, 2 Wn.App. 22, 466 P.2d 526 (1970); RCW 51.32.090; RCW 51.32.060.

An injury may impact the ability to work but that impact may be less than total. Perhaps he can work, just at fewer hours. Or perhaps he can work but at a lesser paying job. If a claim is open and the impact of the injury on the ability to work is less than total, a worker may qualify for temporary partial disability (also called “Loss of Earning Power” or “LEP”).

Loss of earning power benefits are not total disability benefits. (FOF 14). Loss of earning power benefits are a benefit to which the Department of Labor and Industries does not impose any form of social security offset.

An injury may cause a loss of functional ability. A loss of ability to function is measured, usually objectively, by medical practitioners without regard to the effect on employability. This benefit is addressed at the time of claim closure at a time when the worker has reached maximum improvement. Loss of ability to function is called permanent partial disability (“PPD”) and, just like

LEP, is not a benefit ever subject to a social security offset under Title 51. (FOF 15).

b. HISTORY OF THE SOCIAL SECURITY OFFSET

In In re Charles Hamby, BIIA Dec. 59 175 (1982)

the Board of Industrial Insurance Appeals reviewed the federal history of the social security disability offset:

Freeman v. Harris, 625 F.2d 1303 (1980), contains a rather succinct and intelligently written history of social security disability income and the offset provisions in federal law which provide an appropriate point of commencement for our discussion:

‘Social Security was first proposed by President Roosevelt as part of the New Deal legislative reform. As initially instituted, the Social Security Act of 1935 contained no provisions for disability insurance. It did, however, provide old age and unemployment insurance which, as a general rule, the states were not providing.

In 1956 the Social Security Act was expanded to include

monthly benefits for disabled wage earners. As enacted in 1956, there was a full offset of workers' compensation payments against Social Security disability benefits. 70 Stat. 816 (1956). 'It is self-evident that the offset reflected a judgment by Congress that the workmen's compensation and disability insurance programs in certain instances served a common purpose, and that the workmen's compensation programs should take precedence in the area of overlap.' Richardson v. Belcher, 404 U.S. at 82, 92 S.Ct. at 257. The offset provision was repealed in 1958, 72 Stat. 1025 (1958), but was reinstated in 1965 in a slightly different form, 79 Stat. 406 (1965).

The reinstatement of the offset was triggered by data submitted to legislative committees which showed that in the majority of the states, the typical worker who was receiving workers' compensation and federal disability benefits actually received more in benefits than his pre-disability take-home pay. Hearings on H.R. 6675 Before the Senate Comm. on Finance,

89<sup>th</sup> Cong., 1<sup>st</sup> Sess. 151 (1965). This was thought to cause two evils: first, it reduced the worker's incentive to return to the work place and hence impeded rehabilitative efforts; and second, it created fears that the duplication of benefits would lead to an erosion of state workers' compensation programs. Hearings on H.R. 6675 Before the Senate Comm. on Finance, 89<sup>th</sup> Cong. 1<sup>st</sup> Sess. 252, 259, 366, 540, 738-40, 892-97, 949-54, 990 (1965).

Section 424a of title 42 was then enacted to deal with the problem. As is relevant here, it requires an offset of Social Security disability payments against workers' compensation so that the total benefits received by the worker under the two programs do not exceed 80% of his pre-disability income... This eradicated the problem of a worker being financially better off disabled than if he or she returned to work.

...However, because Social Security disability payments are less than 80% of a workers' pre-disability income, the system

which resulted after the 1965 amendment did encourage workers to pursue state worker's compensation as well as federal Social Security.”

This history recited in the Freeman case is significant when the federal government is taking the offset, but it does not tell the whole story for those states like Washington which enacted offset-reversal statutes.

42 USC 424a, permits the Social Security Administration to reduce disability benefits to persons who are also receiving state workers' compensation periodic benefits. 42 USC 424a(d) provides that the reduction by the Social Security Administration shall not be taken“...if the workmen's compensation law or plan under which periodic benefits is payable provides for the reduction thereof...” This provision permits the states paying worker's compensation benefits to effectively reverse the offset. By so doing, a state could reduce the dollars paid from funds supported by employer premiums and cause the federal

government to pay disabled workers the full social security disability amounts which would be paid were they not receiving any periodic workers' compensation benefits.

Prior to 1975, persons who received temporary total or permanent total disability payments under this state's Industrial Insurance Act and who also qualified to receive social security disability benefits, were paid their full workers' compensation entitlement from the Department of Labor and Industries. Applying the offset reduction of 42 USC 424a, the Social Security Administration paid a lesser amount to these individuals than would have been paid had those individuals not been covered by the workers' compensation.

In 1975, the state legislature correctly perceived that fiscal benefits would insure to the state's advantage by enacting RCW 51.32.220. By "reversing" the offset, it was envisioned that this state's employers would realize considerable savings. Instead of having the state

compensation fund pay the lion's share of benefits, the offset reversal permitted the federal government with its larger tax base to carry the greater financial burden.

States capitalizing upon the offset reversal, however, must still maintain the legislative intent of 42 USC 424a. The purpose of Congress in requiring the reduction in benefits was to preclude individuals from receiving excessive combined benefits for the same disability. Iglinsky v. Finch, 314 F.Supp. 425 (D.La. 1970), *abb'd*, 433 F.2d 405.”

In Ravsten v. Department of Labor and Industries, 108 Wn.2d 143, 736 P.2d 256 (1987) the Court addressed a constitutional challenge to the reverse offset statute, RCW 51.32.220. Ravsten is the first published appellate case addressing the social security offset. The constitutional challenge failed for the same reasons the constitutional challenges to the federal offset statute had failed. In

Ravsten the worker was actually receiving total disability benefits when the offset was imposed.

In Regnier v. Department of Labor and Industries, 110 Wn.2d 60, 749 P.2d 1299 (1988) a request for a credit for the value of attorneys fees and medical expenses as a reduction against the offset was denied. In Regnier the worker was actually receiving total disability benefits when the offset was imposed.

In Allan v. Department of Labor and Industries, 66 Wn.App. 415, 832 P.2d 489 (1992) the Court held that the calculation which would have been used by the Social Security Administration in an offset is the same (basic) calculation to be used in an offset taken by the Department of Labor and Industries. In Allan the worker was actually receiving total disability benefits when the offset was imposed.

The next published decision addressing social security offset is Harris v. Department of Labor and

Industries, 120 Wn.2d 461, 843 P.2d 1056 (1993). Harris is the first published decision addressing RCW 51.32.225. In Harris one of the issues was whether the offset should be removed based on the exemption for those “receiving permanent total disability benefits prior to July 1, 1986.” Although Harris didn’t actually receive total permanent disability benefits prior to July 1, 1986, Harris wanted the opportunity to prove that total permanent disability benefits “should have” been paid prior to July 1, 1986, thereby invoking the exemption.

The Harris Court rejected the argument stating:

“On its face, the statutory exception appears unambiguous. It simply makes an exception for those who are *receiving* permanent disability benefits as of a certain date. To receive is to ‘take possession or delivery of something. *Webster’s Third New International Dictionary* 1894 (1976). Jack Harris was not taking possession or delivery of permanent disability benefits on July 1, 1986. He was only receiving temporary total disability payments on that date. He had not even

requested a determination as to whether he was permanently disabled under RCW 51.32.055(2). Essentially, the petitioner would have us read the term 'receive' to mean 'subsequently determined eligible to receive.' This would improperly stretch the language of the statute."

The Harris Court found RCW 51.32.225 to be unambiguous so "we cannot construe the statute, and we must simply apply it." The single dissenting opinion argued that "receiving" was ambiguous. In a footnote, the majority noted:

"The dissent argues this provision is ambiguous, without demonstrating how one could interpret the term 'receiving' differently. It deviates from a fundamental principle of statutory construction: that we will not construe unambiguous language in a statute. King Cy. v. Taxpayers of King Cy., 104 Wn.2d 1, 700 P.2d 1143 (1985). Only if the statute is ambiguous would we be able to employ a liberal construction to it for the benefit of the injured worker. The Department and one member of the Board of Industrial Insurance Appeals made the same error as the dissent by

construing language which is clear and unambiguous.” (footnote 7).

In Harris, total disability benefits were being paid at all relevant times involved in the offset.

In Stuckey v. Department of Labor and Industries, 129 Wn.2d 289, 916 P.2d 399 (1996) the Court held that social security benefits paid to an injured worker’s spouse could be included in the offset computation under RCW 51.32.220. The holding was based primarily upon the fact that the federal offset statute would require inclusion of the spouse’s social security benefits in this circumstance. In Stuckey, total disability benefits were being paid at all times relevant to the offset.

Frazier v. Department of Labor and Industries, 101 Wn.App. 411 3 P.3d 221 (2000) is a Division II case relevant to the Doan case. Mr. Frazier received social security retirement benefits beginning around November 1993. On May 31, 1994 the Department issued an order

indicating total disability benefits would be paid, but that those total disability benefits would be offset effective December 1993. On June 1, 1994, the Department issued an order which paid the temporary total disability benefits from August 1993 to May 1994 with a social security reduction effective December 1993.

The challenge (relevant to the Doan case) was that Mr. Frazier was not “receiving” total disability benefits on a monthly basis, therefore no offset could be imposed. That argument was rejected with the following analysis:

“The second relevant statute, RCW 51.32.225, was enacted in 1986. It allows the State to reduce disability payments for persons who receive federal social security *retirement* benefits.

Because the Legislature had the same purpose in enacting both RCW 51.32.220 and .225 – to avoid duplication of wage-loss benefits to injured workers – cases interpreting either of these statutes are instructive in interpreting the other.

Frazier's first argument turns on the interpretation of the phrase 'receiving compensation' in RCW 51.32.225. He maintains that because he had not been receiving benefits from the Department on a monthly basis before he received the lump sum payment in June 1994, the plain language of the statute requires the Department to forgo any offset.

Construction of a statute is a legal question subject to de novo review. *Stuckey v. Department of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996). However, where the meaning of a statute is clear, the court must give effect to that meaning without regard to rules of statutory construction. *Allan v. Department of Labor & Indus.*, 66 Wn.App. 415, 418, 832 P.2d 489 (1992).

...

...In this case, in contrast to *Harris*, Frazier did in fact receive compensation in June 1994 when he 'took possession or delivery of the award for TLC benefits. He was a person 'receiving compensation for temporary or permanent total disability under this title...' RCW 51.32.225(1); see also *Potter v. Department of Labor & Indus.*, 101 Wn.App. 399, 407, 3 P.2d 229, 233, 2000 Wn.App. LEXIS 1170, (2000).

...

Because the meaning of the statute is clear, the trial court did not err in giving effect to that meaning.” (emphasis added).

In Frazier the worker actually received the total disability benefits for the periods where an offset was imposed.

The companion case to Frazier is Potter v. Department of Labor and Industries, 101 Wn.App. 399, 3 P.3d 229 (2000). In Potter the worker made the same argument that an offset could only be applied if the worker was receiving monthly benefits; the argument was rejected by Division II for the same reasons identified in Frazier. (Potter was an offset under RCW 51.32.220.)

In Potter, litigation delayed the payment of the total disability benefits. A decision from the Board of Industrial Insurance Appeals in September 1995 found Potter entitled to temporary total disability. In December 1995 the Department notified Potter that it would offset a portion of

her back total disability benefit because of her receipt of social security disability benefits. In January 1996 the Department paid the back total disability benefits with the offset in place. The Court noted:

“Generally, the Department pays disability benefits on a monthly basis. RCW 51.32.090(1). But where a dispute as to a claimant’s eligibility is later resolved in the claimant’s favor, the Department will make a retroactive lump sum payment of past-due monthly benefits. We see no policy or legal reason to treat a lump sum payment differently than a monthly payment. A claimant who receives a retroactive payment is ‘receiving’ her monthly payments in one lump sum. Nothing in the plain language of RCW 51.32.220(1) prevents the Department from reducing this lump sum in the same fashion it would reduce a monthly payment by the amount of social security disability payments that the claimant received during the corresponding period.”

It goes without saying that in Potter the worker did,

in

fact, receive total disability benefits which were the subject of the offset.

The last published appellate decision referencing the social security offset is Cena v. Department of Labor and Industries, 121 Wn.App. 915, 91 P.3d 903 (2004). The case is relevant to Doan because in Cena a Department order took an offset and Cena did not challenge the Department order. A subsequent order was appealed where Cena argued that the offset was being calculated incorrectly. The very first basis the Court used to reject the assertion was:

“First, the Department made its setoff determination in May 1996. Cena did not appeal the order and it became final and binding at that time. Under RCW 51.52.060(1)(a) a worker must file a notice of appeal of the order to the Board. Failure to appeal an order turns the order into a final adjudication and precludes reargument of the order. Therefore, we decline to review Cena’s claim of error.” (emphasis added).

In a footnote to the above quoted section the Court cited to Marley v. Dep’t of Labor & Indus, 125 Wn.2d 533,

538, 886 P.2d 189 (1994) and to Kingery v. Dep't of Labor & Indus., 132 Wn.2d 162, 173, 937 P.2d 565 (1997).

As with the other cases, in Cena the worker was, in fact, receiving total disability benefits when the offset was made.

c. RES JUDICATA

Marley v. Department of Labor & Industries, 125 Wn.2d 533, 886 P.2d 189 (1994) is a case of huge significance in the worker's compensation realm. The Department must issue decisions and communicate with interested parties. Most communications are not in the form of a "department order." A department order is a formal declaration by the Department which follows a statutory prescriptive with language warning the worker (or any aggrieved person) that if nothing is done within a limited time period, the Department's decision will become "final". RCW 51.52.050.

Prior to Marley it was generally accepted that an error in a department order which had not been timely protested or appeal could still be challenged and corrected. After Marley it was clear that a Department order which contained an error had better be challenged within the sixty days or the order could become “res judicata.” See, for examples, Solven v. Department of Labor and Industries, 101 Wn.App. 189, 2 P.3d 492 (2000); Chavez v. Department of Labor and Industries, 129 Wn.App. 236, 118 P.3d 392 (2005); Jimmy Lynn v. Department of Labor and Industries, 130 Wn.App. 829, 125 P.3d 202 (2005); Hyatt v. Department of Labor and Industries, 132 Wn.App. 387, 132 P.3d 148 (2006)

d. RCW 51.32.220/225 PREVENT DOUBLE RECOVERY. THIS LEGISLATIVE POLICY IS NOT APPLICABLE HERE

Policy arguments were advanced in Allan v. Dept. of Labor & Indus., 66 Wn.App. 415 (1992) and rejected because the clear meaning of the statute governed

interpretation of RCW 51.32.220. The Department correctly identifies one of the policy purposes behind the offset statutes but

“while policy considerations may provide a valuable rule of statutory construction in interpreting an ambiguous statute, where the meaning is clear its meaning must be given effect without resort to such a rule.”

Policy arguments were advanced in Potter v. Dept. of Labor & Indus., 101 Wn.App. 399 (2000) contrary to the express statutory language. The Court responded:

“We cannot give a statute an interpretation that is inconsistent with its plain language based upon speculation that a plain reading may possible produce negative repercussions.”

The language of RCW 51.32.225 upon which any Department offset of social security retirement benefits is conditioned is the following:

“(1) For persons under the age of sixty-five receiving compensation for temporary or permanent total disability pursuant to the

provision of chapter 51.32 RCW, such compensation shall be reduced...”

There is no dispute over whether Mr. Doan received or was receiving compensation for total disability – he wasn’t. (FOF 5, 7, 8, 9, 10, 11). There is no dispute that the potential benefits Mr. Doan could receive (and subsequently did receive) in the form of LEP and PPD are not total disability benefits and are not subject to offset. (FOF 14, 15).

The Legislature deemed the “policy” of preventing double recovery would be applied only to total disability benefit recipients during the period of actual receipt of such benefits. The clear language of the statute does not apply here and the Department’s invitation to apply the “policy” when the worker is not receiving total disability is inconsistent with the plain language of the statute and should be rejected. Any such offset is ultra vires.

The Legislature determined the “policy” of preventing double recovery would apply only where the benefits received by the worker are total disability. PPD doesn’t fit the policy since it is not a wage replacement benefit. See, for example, Clauson v. Dept. of Labor & Industries, 130 Wn.2d 580, 584-585, 925 P.2d 624 (1996)(permanent total disability and permanent partial disability do not award compensation for the same loss). LEP does not fit the “policy” since the worker *is working* in order to qualify for LEP. LEP operates as an incentive for a return to work; an offset would remove that incentive – the exact problem the offset is intended to address in the first place.

e. “NOTICE” IS NOT AN ADEQUATE EXCUSE TO IGNORE THE PLAIN LANGUAGE OF THE OFFSET STATUTES.

The Department’s argument is that notice is needed so the worker can plan or at least have the opportunity to plan for offset. Accepting this as the Department’s motive,

in an instance where a worker hasn't received 'offsetable' benefits for a decade and no fair wind suggests any 'offsetable' benefit is in his future, then the ability or need to plan is rather pointless. However, we do not object to the general idea that the Department may attempt to educating a worker of the law. Where that law is not to be applied, that is, if benefits are not being offset, then the educational efforts should come in the form of a letter or other non-binding communication.

In Doan, the Department chose to education Mr. Doan in a department order would warned it would become final and binding if Mr. Doan did not challenge it. Did the department order under appeal simply educate Mr. Doan of possible outcomes should total disability ever be paid in the future? No. Let's take a look at the language used by the Department in its determinative order.

No total disability benefit was ever paid in 2000; the order states "The compensation on your claim is being

adjusted effective 09/01/2000...Your new compensation rate is \$904.52 per month.” The same affirmative language adjusting compensation, without specifying whether the offset was limited to total disability or was to include LEP and PPD, was used for 2001, 2002, 2003 and 2004. No total disability benefit was ever paid for 2001, 2002, 2003 or 2004. The order has res judicata consequences if left standing.

Compensation in the form of PPD was paid in 2004. Although PPD is not subject to offset, the department order at issue here adjusts the 2004 compensation with a social security offset. It offsets PPD! The Department anticipated payment of retroactive LEP (which was, indeed, later paid); the department order under appeal offsets all LEP which may have been paid for 2000, 2001, 2002, 2003 and 2004. Again, LEP is not subject to offset and this order offsets LEP! This department order does not properly educate Mr. Doan; this department order is offsetting benefits which the

Department is supposed to pay without offset. Without a challenge, that error of law has res judicata consequences. Marley v. Dept. of Labor & Ind., 125 Wn.2d 533, 886 P.2d 189 (1994).

If the goal is simply a paternalistic concern for the worker's opportunity to plan, then the Department should send a letter educating the worker. That would avoid the problems occasioned here.

The offset statutes demand notice of *the* offset only where an offset is being imposed. If Mr. Doan were to become eligible for total disability benefits in the future (note, his claim is closed and his statute of limitations has run so this is truly an esoteric concern on the part of the Department) then and only then may the Department impose an offset against total disability benefits. The Potter and Frazier cases expressly permit the Department to prove notice of offset when paying a lump sum retroactive total disability award. There is no authority to impose an offset

for a benefit not paid, not anticipated, and not even at issue!  
There is no proper purpose served in the Department's  
"notice" of offset in this situation.

The word 'receiving' as used in the offset statutes has been interpreted by our courts. The Supreme Court in Harris used the common sense meaning of 'receiving' as "to take possession or delivery of." The Frazier Court upheld the offset because Frazier "did in fact receive compensation in June 1994 when he 'took possession or delivery of the award for TLC benefits.'" (TLC refers to time loss compensation or temporary total disability.) And Potter held "A claimant who receives a retroactive payment is 'receiving' her monthly payments in one lump sum" since she did take possession or delivery of the total disability benefit.

The State offset statutes reference the federal disability offset statute. 42 USC 424a does speak to the question of whether the offset may be imposed if the worker

is ‘in fact’ receiving total disability or imposed if the worker may, in theory, become entitled to total disability at some undefined point in the future. The federal statute allows offset where the individual receives social security disability and “periodic benefits” under a worker’s compensation plan. The “periodic benefits” are:

“(4) such periodic benefits payable (and actually paid) for such month to such individual under such laws or plans.” 42 USC 424a(a)(4).

The curious argument advanced by the Department is that the word ‘receiving’ is legislatively used as a “potential” event. This, of course, is undercut by the Department’s own argument that ‘receiving’ is used differently in RCW 51.32.225(1). It is also undercut by the use of the word in Title 51 generally.

The word ‘receiving’ in the offset statutes is tied to a temporal event – the receipt of compensation for total disability. The Department’s idea that there is “no temporal

limitation” on the word ‘receiving’ leads to odd results under the Act.

For example, “wages” under Title 51 are the basis for computing total disability benefits. The basic definition of “wages” is at RCW 51.08.178(1):

“For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless...”  
(emphasis added)(partial recitation)

The idea that my client’s expectations of the potential value of their wages in the future as a basis for total disability computations is a generosity which comes only from reading all meaning out of the word ‘receiving.’ Using the Department’s interpretation, I just may represent many potential millionaires whose temporary bad luck of being injured in their minimum wage job is now irrelevant.

More client happiness will be created if the Department’s idea of ‘receiving’ as a non-temporal event, a

potential, ever takes hold. For example, RCW 51.36.040

reads:

“The benefits are Title 51 RCW shall be provided to each worker receiving an injury, as defined therein, during the course of his or her employment...”  
(emphasis added) (partial recitation).

The Department’s definition of ‘receiving’ means the worker doesn’t have to be actually hurt but only have the potential for an injury at some unidentified point in the future and, voila, that person now gets all the benefits of Title 51. Doesn’t that pretty much cover everyone in the State so all *shall* receive the benefits of Title 51?

RCW 51.32.070 uses the word ‘receiving in the first paragraph tied to a specific date. The third paragraph of the same statute uses the word ‘receiving’ not tied to a specific date but tied to an event. The Department’s theory is that this framework, also found in RCW 51.32.225, means “receiving” in the second instance does not have a temporal

meaning but represents a future potential. Here's the language in the third paragraph:

“...but such payments shall not obtain or be operative while the worker is receiving care under or pursuant to the provisions of this title...” (emphasis added)(partial recitation)

‘Receiving’ in this third paragraph of RCW

51.32.070 is eventually tied to a worker's active medical treatment under RCW 51.36. RCW 51.32.070 authorizes L&I to pay for attendant care services when needed by the worker but those attendant care services no longer ‘shall’ be paid by the Department if the worker is ‘receiving’ medical treatment under Title 51. Every single injured worker, even those who are totally permanently disabled, has the potential to receive medical treatment under Title 51. (The Director has discretionary authority to authorize medical treatment to a totally permanently disabled worker). The Department's interpretation of ‘receiving’ in this third paragraph means no worker can ever have attendant care

services covered since each worker has the potential to 'receive' care services under the Act. An odd result indeed for an Act which is remedial in nature and intended to be liberally construed for the benefit of that worker. RCW 51.12.010.

When the Legislature references a potential benefit in the future under Title 51, it used language clearly indicating this. For example, RCW 51.28.030 permits a beneficiary to apply for a deceased worker's benefits. The application must include proof of death and proof of the relationship "showing the parties *to be entitled to compensation* under this title..." (emphasis added). RCW 51.12.102(1) coordinates potential benefits under maritime law with benefits under L&I requiring L&I to provide benefits "to any worker or beneficiary *who may have a right or claim for benefits under the maritime laws...*"

The cites offered by the Department in support of the ‘no-temporal’ virtual world meaning of ‘receiving’ do not pan out. RCW 48.41.150 states:

“(1) The board shall offer a medical supplement policy for persons *receiving* medicare parts A and B...” (emphasis added) (partial recitation).

In theory we all have the ‘potential’ to receive, at some point in the future, medicare parts A and B. Do we all get the medical supplement policy? The language in RCW 48.41.150 is similar to RCW 51.28.090 which states:

“The director shall notify persons *receiving* time-loss payments under this chapter of the availability of basic health care coverage to qualified enrollees under chapter 70.47 RCW...” (emphasis added) (partial recitation)

The Department’s interpretation is that since every potentially covered worker, with or without injury, has the potential in the future to be “receiving time loss payments” under Title 51, the Director now has expanded authority

over most of Washington State. This expansive view of ‘receiving’ leads to odd results.

The Department cites to RCW 43.21A.230. This statute uses ‘receiving’ in one paragraph not tied to a date but tied to an event. The last paragraph uses that same word, ‘receiving’, and ties it to a specific date. The relevant language of the statute is:

“Persons *receiving* a federal permit for wastewater discharge who operate a lab”

Can’t be charged more than the lesser of the yearly certification fee or \$4,000.00. The Department’s definition of ‘receiving’ permits a charge for federal permits which haven’t been issued or even applied for. The better interpretation of ‘receiving’ here is that it is tied to a temporal event. In RCW 43.21A.230, that event is the point at which the person actually gets a federal permit.

All these examples illustrate the same point. The word ‘receiving’ is tied to a date and/or an event. The word

'receiving' is not used statutorily to mean a potential occurrence for which there is no indication it will occur. It does not refer to a "maybe." In the offset statutes, 'receiving' is tied to an event – the money (compensation) being paid for total disability. If that event does not occur for any period where an offset is sought, then the statutes do not authorize offset.

f. POTTER AND FRAZIER AND DOAN ALL APPLY THE OFFSET STATUTE APPROPRIATELY

In Potter litigation resulted in a final and binding board decision that required payment of total disability benefits. The notice of offset was issued against benefits which the Department has to pay pursuant to a board order and did, in fact, pay the following month. There was no "maybe" no "potential". There was a binding board order mandating the compensation of total disability.

In Frazier the Department notified its intent to pay retroactive total disability benefits in the same order in

which it identified the offset. The next month the Department did, in fact, pay the total disability benefits. There was no “maybe” or “potential” for payment. The Department’s own adjudication was that payment was needed.

In Doan the Department has not expressed any intent to pay total disability benefits for any period covered by offset. In Doan there is no allegation that the worker is seeking total disability benefits for any period covered by offset. All the Department has is a theoretical possibility of ‘future’ total disability with no evidence for any source whatsoever that the possibility has even any tie to reality. Offset here means every worker with a claim, even when total disability is not paid or anticipated, can be subject to an offset in a determinative order. The harm? Marley. If the worker does not challenge the theoretical offset and, years later there is a total disability, even if the offset is incorrect the order stands. If the worker does challenge the

theoretical offset then parties are left using precious judicial time and energy on issues may or may not ever be of significance.

The Trial Court in Doan correctly held that there is no 'receiving' under the facts of this case so as to permit an offset when total disability hasn't been paid for over a decade, when there is no suggestion from any source that total disability is sought for any time period, and when the only relevant benefits payable during the offset periods (PPD and LEP) aren't supposed to be offset. The Trial Court's application conforms exactly with Potter and Frazier and every other published appellate case- in each case the worker *in fact* was paid total disability benefits for the period where the offset was sought.

The Department's repeated concern over unidentified workers who manipulate receipt of total disability to avoid offset is a sham. Assume the worst of Mr. Doan. He hadn't worked since 1994 and, as part of his clever ploy, he

permitted the Department to close his claim, he feigned the worsening in 1999, wasn't actually working at all but sitting on medical certification for total disability waiting to waive the certification around after claim closure with his challenge to the closure. He appeals the claim closure and shocks all with his clear proof of total disability. Maybe the Department reassumed jurisdiction under RCW 51.52.060, maybe the Board ordered payment of the total disability, maybe an appellate court required it; regardless of the mechanism, the Department would have complete control over the offset and its ability to offset all retroactive benefits. The Department would do exactly what it did in Potter – when payment is mandatory, then advise the worker of the offset.

It may be important to note the Department has other tools available to ferret out these manipulative workers (who apparently are eager to pay litigation costs and expenses and don't mind a standard 30% reduction off the

retroactive total disability award which is not credited to the offset). The Department may require evaluations medically and vocationally to assess the workers employability at any time it deems it necessary. RCW 51.32.110. The Department may force a worker to identify relief sought by denying total disability in a determinative order which, if not timely challenged, will be a final adjudication denying benefits. The Department has full access *at any time*, to the worker's attending physician and records with full subpoena power *to any information* the Department believes relevant to a claim. RCW 51.04.040; RCW 51.04.050. The Department has broad authority for recoupment and penalty upon actual fraud. RCW 51.32.240.

With these tools available it should not be surprising that the Department has no evidence of recalcitrant workers attempting to avoid an offset by purposefully delaying receipt of total disability. The two cases on point here are

Frazier and Potter and these are instructive. In Frazier the worker had to go the extraordinary measure of filing a writ of mandamus in superior court to force the department to issue a total disability decision; the worker wasn't recalcitrant, it was the department. In Potter the worker was forced to litigate her entitlement to total disability as the Department had refused even to reopen the claim much less pay benefits. The idea that these workers are attempting to avoid an offset through anything they did is contrary to fact and ignores the reality of these workers being charged attorney's fees and costs for retroactive total disability benefits which the department then imposed an offset against (without recognizing the decrease in the value of the worker's benefit because of the associated expenses).

#### IV. ATTORNEY FEES AND COSTS

RCW 51.52.130 authorizes payment of attorneys' fees and costs under certain circumstances. Doan requests attorney fees and costs for activity related to this appeal. I

will file an affidavit if requested to identify the time spent and costs.

V. CONCLUSION

The Respondent Doan requests this Court affirm the decision of the Trial Court. If the Trial Court is reversed, Doan requests the matter be remanded to the board for hearings.

RESPECTFULLY submitted this 30<sup>th</sup> day of July 2007.

CASEY & CASEY, P.S.

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CAROL L. CASEY, WSBA #18283  
Attorney for Respondent

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY E. [Signature]  
DEPUTY

NO. 35877-8-II

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

DEPARTMENT OF LABOR  
AND INDUSTRIES OF THE  
STATE OF WASHINGTON,  
Appellant

vs.

HOA DOAN,  
Respondent

**AFFIDAVIT OF MAILING**

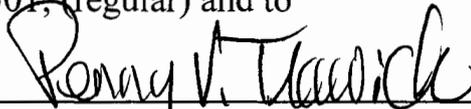
STATE OF WASHINGTON) )  
COUNTY OF KITSAP ) )

The undersigned, being duly sworn upon oath, deposes and states: I am a legal assistant to the Law Firm of Casey & Casey, P.S., attorneys for Respondent herein; that on **July 30, 2007**, I deposited in the United States mail at the Post Office in Port Orchard, Washington, postage fully prepaid, an envelope addressed and containing an original/copy of the

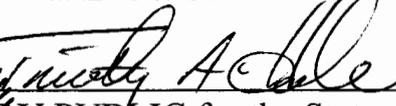
**Respondent's Brief** to the following interested parties:

Mr. David C. Ponzoha, Court Clerk, Washington State  
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Tumwater, WA 98501; (regular) and to



\_\_\_\_\_  
Penny V. Trawick, Legal Assistant to  
Casey & Casey, P.S.

SUBSCRIBED AND SWORN to before me this 30th  
day of July 2007  
  
  
\_\_\_\_\_  
TIMOTHY A. DALE, NOTARY PUBLIC for the State of WA  
Residing at: Tacoma  
Commission Expires: 10/28/08