

ORIGINAL

FILED
COURT OF APPEALS
DIVISION II

08 NOV 26 AM 10:11

NO. 37597-4-II

STATE OF WASHINGTON
BY
DEPUTY

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

Frantz G. Schiller,

Appellant,

v.

Department of Labor and Industries,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

JOHN BARNES
Assistant Attorney General
WSBA # 19657
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7708

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUE.....4

III. STATEMENT OF THE CASE5

 A. Department Adjudication Of Schiller’s Claim5

 B. Board Of Industrial Insurance Appeals Proceedings6

 C. Superior Court Proceedings7

IV. STANDARD OF REVIEW AND GUIDES TO STATUTORY CONSTRUCTION8

V. SUMMARY OF ARGUMENT.....10

VI. ARGUMENT13

 A. The Federal Social Security Offset Provisions And The State “Reverse Offset” Legislation13

 B. The Third Party Chapter16

 C. Schiller Was A Worker “Receiving [State] Compensation” For A Period When Federal Social Security Benefits Were Also Payable20

 1. The Underlying Legislative Purposes Of Both The Social Security Offset And Third Party Statutes Of (a) Preventing Double Recoveries And (b) Protecting The Industrial Insurance Funds, Support The Department And Board Interpretations Of RCW 51.32.220(1)20

 2. Case Law Supports The Identical Interpretation Of RCW 51.32.220 By The Department And Board.....29

 3. Schiller’s Fairness Argument Is Without Merit32

D. Schiller’s Reliance On A Maine Federal District Court
Magistrate’s Views About A Federal Agency Policy Is
Misplaced.....34

VII. CONCLUSION39

TABLE OF AUTHORITIES

Cases

<i>Ackley-Bell v. Seattle School Dist.</i> , 87 Wn. App. 158, 940 P.2d 685 (1997).....	10, 23
<i>Allan v. Dep't of Labor & Indus.</i> , 66 Wn. App. 415, 832 P.2d 489 (1992).....	15, 16
<i>Bankhead v. Aztec Constr.</i> , 48 Wn. App. 102, 737 P.2d 1291 (1987).....	17
<i>Bird-Johnson v. Dana Corp.</i> , 119 Wn.2d 423, 833 P.2d 375 (1992).....	10, 22, 27
<i>City of Seattle v. State</i> , 136 Wn.2d 693, 965 P.2d 619 (1998).....	28
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	8
<i>Cowlitz Stud Co. v. Clevenger</i> , 157 Wn.2d 569, 141 P.3d 1 (2006).....	17
<i>Dep't of Ecology v. Gwinn</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	9
<i>Dumas v. Gagner</i> , 137 Wn.2d 268, 971 P.2d 17 (1999).....	28
<i>Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.</i> , 109 Wn.2d 819, 748 P.2d 1112 (1988).....	9
<i>Frazier v. Dep't of Labor & Indus.</i> , 101 Wn. App. 411, 3 P.3d 221 (2000).....	30, 31
<i>Freeman v. Harris</i> , 625 F.2d 1303 (5th Cir. 1980).....	13, 14
<i>Harris v. Dep't of Labor & Indus.</i> , 120 Wn.2d 461, 843 P.2d 1056 (1993).....	9, 14, 15, 21

<i>Herzog v. Dep't of Labor & Indus.</i> , 40 Wn. App. 20, 696 P.2d 1247 (1985).....	15
<i>Littlejohn Constr. Co. v. Dep't of Labor & Indus.</i> , 74 Wn. App. 420, 873 P.2d 583 (1994).....	10, 22
<i>Maxey v. Dep't of Labor & Indus.</i> , 114 Wn.2d 542, 789 P.2d 75 (1990).....	19, 28
<i>Potter v. Dep't of Labor & Indus.</i> , 101 Wn. App. 399, 3 P.3d 229 (2000).....	29, 30
<i>Ravsten v. Dep't of Labor & Indus.</i> , 108 Wn.2d 143, 736 P.2d 265 (1987).....	16, 25, 29, 31
<i>Regnier v. Dep't of Labor & Indus.</i> , 110 Wn.2d 60, 749 P.2d 1299 (1988).....	14, 15, 16, 37
<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999).....	8
<i>Senate Republican Comm. v. Pub. Disclosure Com'n</i> , 133 Wn.2d 229, 943 P.2d 1358 (1997).....	9, 22, 28
<i>State v. Johnson</i> , 119 Wn.2d 167, 829 P.2d 1082 (1992).....	9
<i>State v. Marking</i> , 100 Wn. App. 506, 997 P.2d 461 (2000)	20
<i>Tallerday v. Delong</i> , 68 Wn. App. 351, 842 P.2d 1023 (1993).....	17
<i>Tobin v. Dep't of Labor & Indus.</i> , 145 Wn. App. 607, 187 P.3d 780 (2008).....	32
<i>Washington Ins. Guar. Ass'n v. Dep't of Labor & Indus.</i> , 122 Wn.2d 527, 859 P.2d 592 (1993).....	19
<i>West v. Zeibell</i> , 87 Wn.2d 198, 550 P.2d 522 (1976).....	17

Statutes

42 U.S.C. § 424a.....	14, 15
42 U.S.C. § 424a(a)(2).....	34
42 U.S.C. § 424a(d)	14, 15
Chapter 51.24 RCW.....	1, 5, 17
RCW 51.04.010	16
RCW 51.12.010	9, 22
RCW 51.24.010	1
RCW 51.24.030	1
RCW 51.24.030(1).....	1, 17
RCW 51.24.050	1
RCW 51.24.060	passim
RCW 51.24.060(1).....	18
RCW 51.24.060(1)(c)	2, 6
RCW 51.24.060(1)(e)	2, 23
RCW 51.32.220	passim
RCW 51.32.220(1).....	passim
RCW 51.32.220;230	1
RCW 51.32.225	1
RCW 51.52.106	7

RCW 51.52.140	8
The Social Security Act of 1935	13
Title 51 RCW, the Industrial Insurance Act.....	16, 20

I. INTRODUCTION

This unusual Industrial Insurance Act case arises at the intersection of what are known as the Act's "social security offset" statutes (RCW 51.32.220;230) and the "third party"¹ chapter (Chapter 51.24 RCW).

The social security offset statutes provide for a reduction in State workers' compensation total disability payments for workers who receive federal social security benefits, thereby reducing the cost to the industrial insurance funds of their injuries and ensuring that injured workers do not receive duplicative benefits. RCW 51.32.220; RCW 51.32.225.

The third party statute, on the other hand, allows an injured worker to seek damages from a non-employer tortfeasor. The industrial insurance funds share in any third party recovery so that Washington's workers and employers do not bear the cost of a third party's negligence. Like the social security offset provisions, the third party statute also prevents double recoveries. *See* RCW 51.24.030(1) RCW 51.24.050; RCW 51.24.060.

¹ The reference to "third" in "third party" is related to the general bar in the Industrial Insurance Act against suing one's own employer or co-worker. *See* RCW 51.24.010; RCW 51.24.030.

In this case, the injured worker, Frantz Schiller (Schiller), sued and recovered damages from the third party tortfeasor who caused his injury. Under the third party statute's distribution formula, the funds received a portion of his recovery as reimbursement for workers' compensation benefits he had previously received. RCW 51.24.060(1)(c). Schiller also retained a share of his third party tort damages as an "excess recovery," against which future workers' compensation benefits are credited. *See* RCW 51.24.060(1)(e). The amount of his excess recovery is reduced over time to reflect such credits, until it is "zeroed out." At that point workers' compensation benefits that had been offset against the excess recovery will be paid directly to Schiller.

The Department initially credited Schiller's disability rate, without social security offset, against his excess recovery, reducing the balance of that excess recovery by the amount of his workers' compensation entitlement. The Department subsequently reduced Schiller's State total disability benefit rate due to his receipt of social security benefits. To reflect this reduction, the Department began to credit his excess recovery by the new, lower total disability rate.

As of the date of the Department's order on appeal, Schiller's excess recovery had yet to be "zeroed out," meaning that the workers' compensation benefits to which he is entitled continue to be credited in

their entirety against his excess. At this point, therefore, Schiller is being paid social security benefits with his workers' compensation benefit entitlement reduced due to those federal benefits. The reduced State benefit is then offset against the third party excess recovery that Schiller was previously paid.

Schiller contends that during periods when he is entitled to workers' compensation benefits that are being offset against his third party excess recovery, he is exempt from Washington's social security offset statute despite the fact that he is being paid social security benefits. Under this theory Schiller contends that his excess recovery should be reduced more than the workers' compensation benefits to which he is actually entitled. Schiller thus seeks to have workers who recover against third party tortfeasors treated differently for social security offset purposes from workers who do not recover against third party tortfeasors, a difference that would provide him with a double recovery at the expense of the industrial insurance funds.

The Department, the Board and the Pierce County Superior Court all rejected Schiller's argument. So should this court.

//

//

II. ISSUE

RCW 51.32.220(1) provides that for a worker "receiving compensation for temporary . . . total disability pursuant to [chapter 51.32 RCW]", the compensation will be reduced to account for social security disability benefits payable by the federal government. Schiller was entitled to Washington time loss compensation benefits during the period at issue and his third party excess recovery was being reduced by the amount of his entitlement as required by RCW 51.24.060. Thus, while the Department was not paying time loss compensation directly to Schiller, he was receiving the benefit of this compensation via the reduction in his excess recovery.

Is Schiller exempt from RCW 51.32.220, which requires the Department to reduce total disability compensation for workers such as him who are paid federal social security benefits, simply because he receives his workers' compensation as a credit against his third party excess recovery instead of through a check delivered directly to him?

//

//

//

//

III. STATEMENT OF THE CASE

A. Department Adjudication Of Schiller's Claim

Schiller suffered an industrial injury when he was involved in a motor vehicle accident with a third party. BR 70.² The Department allowed Schiller's claim for workers' compensation benefits. BR 73. Schiller also pursued a third party claim against the third party tortfeasor under Chapter 51.24 RCW, and he eventually settled for \$305,000. BR 77-78.

In July of 2003, pursuant to the third party statute, RCW 51.24.060, the Department issued an order distributing the settlement proceeds of \$305,000.00 as follows: (1) \$104,662.42 net share to the attorneys; (2) \$135,723.20 net share to Schiller; and (3) \$64,654.38 net share to the Department by way of immediate reimbursement for \$98,416.03 in workers' compensation benefits that Schiller had been paid prior to his third party recovery. BR 77-78.³

The Department order also directed that no workers' compensation benefits would be paid to Schiller until the excess recovery Schiller received from his third party action, totaling

² "BR" references the Certified Appeal Board Record. This case was tried on stipulated facts, agreed exhibits, and briefing. From the outset of the proceedings at the Board, there has been no factual dispute, and there has been only one legal issue.

\$56,250.83, had been expended for costs incurred as a result of his injury. *Id.* Schiller has never challenged the order distributing his third party recovery, which is now final and binding. BR 51-52.

Effective on July 12, 2003, Schiller's total disability benefits were offset against his excess recovery instead of being mailed directly to him. On October 28, 2005, the Department issued an order reducing Schiller's time-loss compensation rate from \$1130.70 to \$764.20 with an effective date of March 1, 2004, due to Schiller's receipt of social security benefits. BR 117-19. Thus, Schiller's excess was credited by his entire total disability benefits for the period July 12, 2003, through February 29, 2004, after which the credit against the excess was reduced to reflect his social security benefits.

B. Board Of Industrial Insurance Appeals Proceedings

Schiller protested the Department's application of the social security disability offset that reduced the rate of drawdown against the third party excess recovery starting March 1, 2004. BR 22. The Department ultimately affirmed in an August 30, 2006 order. BR 121. Schiller appealed to the Board of Industrial Insurance Appeals from the

³ The reimbursement amount is less than the benefits paid figure because the Department is responsible for its proportionate share of attorneys' fees. See RCW 51.24.060(1)(c); BR 77-78.

Department's affirming order. BR 28-31. The appeal was tried on stipulated facts and exhibits. BR 62-128, 175.

The Board's Industrial Appeals Judge (IAJ) issued a proposed decision, ruling for the Department. BR 20-23. Observing that "[t]he claimant has no statutory authority to enlighten me as to why the social security offset should not apply to his unique situation," the IAJ explained his reasoning as follows:

Under the plan [the worker] proposes I would be setting this case up for a future double recovery. If I were to reverse the offset his excess recovery figure would be expended much quicker and the Department's financial responsibility would be impacted at a much earlier time. Mr. Schiller is in essence "receiving compensation" [per RCW 51.32.220(1)] at the present time and the offset is appropriate. The compensation is not being received in current dollars, but it is a benefit nonetheless, when it can have a great impact on his receipt of future dollars.

BR 22.

Schiller petitioned the three-member Board for review. BR 3-17. The Board denied his petition thus adopting the IAJ's proposed decision as the final decision of the Board. BR 1; RCW 51.52.106.

C. Superior Court Proceedings

Schiller appealed the Board decision to Pierce County Superior Court. CP 35-38.

A bench trial was held, and the Superior Court found that:

Because he is entitled to temporary total disability benefits and the amount of such benefits is being credited against his excess recovery, Mr. Schiller is receiving compensation from the Department of Labor and Industries even though the Department is not sending him checks for these benefits. To nullify the social security offset provisions would eventually effect the industrial insurance trust funds because the excess third-party recovery subject to offset would be exhausted sooner.

CP 37 (Finding of Fact 1.8); *see also* CP 37 (Conclusion of Law 2.3) (“The claimant is ‘receiving compensation’ from the Department through times loss compensation orders because his excess third-party recovery is being exhausted”). The Superior Court therefore affirmed the Board’s decision. *Id.*

Schiller 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 51.32.220. 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).

When construing statutes, the court's paramount duty is to give effect to legislative intent. *State v. Johnson*, 119 Wn.2d 167, 172, 829 P.2d 1082 (1992). If statutory language is susceptible to more than one meaning, it is ambiguous. *Johnson*, 119 Wn.2d at 172. The parties agree here that the phrase "receiving compensation" is ambiguous in this context. *See* AB 12.

The provisions of Washington's Industrial Insurance Act are "liberally construed." RCW 51.12.010. This general provision, however, does not trump other rules of statutory construction. *Senate Republican Comm. v. Pub. Disclosure Com'n*, 133 Wn.2d at 243. In particular, it does not require an unrealistic interpretation that produces strained or absurd

results and defeats the 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). It is well established that the intent of the Legislature under both the social security offset statutes and under the third party statute is to prevent double recoveries by workers and to reduce the cost of providing industrial insurance. See Argument *infra* Part VI.

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 mandates that the Department reduce state workers’ compensation benefits for claimants who receive federal social security disability benefits . The intent of the statute is to prevent double recovery by the worker of wage replacement benefits and to reduce the

cost to the State of providing workers' compensation insurance by shifting a part of the burden to the federal government.

Schiller appeals from a Department order that implements RCW 51.32.220 by reducing his rate of total disability compensation due to his social security benefits. At the time the Department issued the social security offset order, Schiller had an "excess recovery" from a third party action. The reduction in his total disability benefits therefore meant that his "excess recovery" amount would be reduced at a slower rate because the amount credited against the recovery each month would be smaller.

Despite the fact that he is receiving social security benefits and is entitled to State total disability compensation, Schiller argues that the Department must use his *full* time loss rate, without social security offset, to reduce the third party excess until the excess is fully consumed. Schiller bases this argument on his contention that he was not "receiving compensation" from the Department during the relevant periods and therefore falls outside the scope of RCW 51.32.220. More specifically, according to Schiller, despite the fact that he had "received" the \$56,250.83 in excess recovery, and despite the fact that his excess recovery figure was being reduced by the total disability benefits to which he was entitled, he somehow should not be viewed as

“receiving” compensation because the Department was crediting his benefits against his excess recovery (as required by RCW 51.24.060) instead of physically writing him checks.

But the relevant statutory language in this context, the underlying statutory purpose of both the social security offset statutes and the third party recovery statute – preventing double recovery of wage replacement benefits – and the relevant case law all support the Department’s draw down on the third party excess recovery at the social security offset rate instead of the full time loss rate. Schiller was “receiving compensation” from the Department because he had already received the cash of the excess recovery amount, and because his excess recovery figure was being reduced by the amount of his total disability benefits, which eventually will mean reinstatement of time loss compensation if his total disability status continues. The payment to Schiller of the “excess recovery” amount was in effect a contingent advance payment of time loss compensation that became an actual payment of the time loss compensation for each period during which he was temporarily totally disabled.

In sum, Schiller was a worker “receiving compensation” within the meaning of RCW 51.32.220(1), and to hold otherwise would thwart the Legislature’s intent when it enacted the social security offset and

third party recovery statutes. Therefore, application of the social security disability offset statute by the Superior Court, Board and Department was required by law. This court should affirm the Superior Court's decision.

VI. ARGUMENT

A. The Federal Social Security Offset Provisions And The State "Reverse Offset" Legislation

The Social Security Act of 1935 (Act), as initially enacted, did not provide disability benefits. *Freeman v. Harris*, 625 F.2d 1303, 1305 (5th Cir. 1980). In 1956, Congress expanded the Act to include monthly benefits for disabled wage earners. *Id.* The 1956 amendments also provided that social security disability benefits would be reduced by any workers' compensation benefits paid under state systems. *Freeman*, 625 F.2d at 1306. This offset reflected Congress' judgment that the state workers' compensation programs and the federal disability insurance program served a common purpose: to replace lost earnings. *Id.*

Congress repealed the offset provision in 1958, but the repeal deleteriously affected state workers' compensation programs. *Cf. Freeman*, 625 F.2d at 1306. Data submitted to the federal legislative committees in 1965 showed that in the majority of states, the typical worker who received non-taxable workers' compensation and federal

disability benefits actually received more in benefits than his pre-disability take home pay, thus providing an incentive to injured workers *not* to try to return to the work force or accept vocational rehabilitation services. *Id.*

In 1965 Congress sought once again to coordinate state workers' compensation programs and federal disability benefits by enacting 42 U.S.C. § 424a, to address the problem of overcompensation. *Freeman*, 625 F.2d at 1306; *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 467, 471, 843 P.2d 1056 (1993); *Regnier v. Dep't of Labor & Indus.*, 110 Wn.2d 60, 62, 749 P.2d 1299 (1988). Section 424a of Title 42 U.S.C. requires an offset of social security disability benefits against workers' compensation.

Under 42 U.S.C. § 424a, assuming that Washington did not have the "reverse offset" statute, RCW 51.32.220, a worker would receive all of their state industrial insurance compensation and only a portion of their social security disability benefits, the total equaling no more than 80 percent of their pre-disability income. *Freeman*, 625 F.2d at 1306.

Section 424a(d) of Title 42 U.S.C. creates what is known as the "reverse offset" exception to the reduction in *federal* benefits, allowing states to instead take the offset:

The reduction of benefits required by this section shall not be made if the [state] 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 . . . of an individual entitled to benefits under section 423 of this title, and such law or plan so provided on February 18, 1981.

42 U.S.C. § 424a(d) (1998). This exception authorizes states to reverse the offset provisions of 42 U.S.C. § 424a, so that the worker receives the entire amount of the *federal* social security disability benefits, then collects only that part of the *state* compensation necessary to bring the total benefits amount up to 80 percent of the worker's pre-disability earnings. *Harris*, 120 Wn.2d at 469; *Regnier*, 110 Wn.2d at 63.

In 1975, the Washington Legislature took "full advantage" of this reverse offset provision and enacted RCW 51.32.220. *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 419, 832 P.2d 489 (1992); *Herzog v. Dep't of Labor & Indus.*, 40 Wn. App. 20, 21-22, 696 P.2d 1247 (1985). Subsection (1) of RCW 51.32.220 provides that the compensation the Department pays workers under age 65 for temporary or permanent total disability "shall" be reduced by the amount of federal disability benefits payable to that worker.

This "reverse offset" provision shifts costs back to the federal government, by reducing state workers' compensation benefits to account for federal social security benefits. *Harris*, 120 Wn.2d at 467. It reduces state payments for total disability compensation, by obligating the Social Security Administration to pay the full amount of

social security disability benefits to which the worker is entitled. *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 149, 736 P.2d 265 (1987); *Allan*, 66 Wn. App. at 419-20.

Nothing in federal or Washington law requires that Washington's statutorily directed reverse offset procedures and calculation methods be identical in all respects to federal offset procedures and calculation methods. *Regnier*, 110 Wn.2d at 63-64. See discussion *infra* Part VI.D.

B. The Third Party Chapter

Washington workers injured in the course of their employment are entitled to benefits under Title 51 RCW, the Industrial Insurance Act. These workers' compensation benefits are, with very limited exceptions, the exclusive remedy available to injured workers. See RCW 51.04.010. As the Court of Appeals explained in the *Tallerday* case,

The act provides the exclusive remedy for workers . . . unintentionally injured during the course of their employment. . . . A worker who receives workers' compensation benefits under the act has no separate remedy for his or her injuries except where the act specifically authorizes a cause of action. . . . The preemption of civil actions by the act is sweeping and comprehensive, . . . and the act has been characterized as being of the broadest and most encompassing nature. . . . The goal of the act is to provide sure and certain relief to

injured workers and their families, not to award full tort damages. . .

Tallerday v. Delong, 68 Wn. App. 351, 356, 842 P.2d 1023 (1993) (citations omitted); *see also, e.g., Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572, 141 P.3d 1 (2006) (“[t]he [Industrial Insurance Act] is the product of a compromise between employers and workers. Under the [Act], employers accepted limited liability for claims that might not have been compensable under the common law. . . . In exchange, workers forfeited common law remedies”) (citations omitted); *West v. Zeibell*, 87 Wn.2d 198, 201, 550 P.2d 522 (1976) (Industrial Insurance Act’s bar to private actions “is of the broadest, most encompassing nature”).

The third party statute, Chapter 51.24 RCW, sets out the few exceptions to Title 51’s exclusive remedy provisions. *See Bankhead v. Aztec Constr.*, 48 Wn. App. 102, 106, 737 P.2d 1291 (1987) (“[t]he Act has preempted all civil causes of action arising from workplace injuries with the exception of those third party actions authorized under RCW 51.24”). Pertinent to this appeal is RCW 51.24.030(1), which permits an injured worker to pursue a tort claim “[i]f a third person, not in the worker’s same employ, is or may become liable to pay damages on account of a worker’s injury for which benefits and compensation are provided under this title”

The Legislature established a detailed formula setting forth the manner in which “any recovery” made by an injured worker under the third party statute “shall be distributed.” *See* RCW 51.24.060(1). That formula involves a five-step process:

(a): “The costs and reasonable attorneys’ fees shall be paid proportionately by the injured worker . . . and the department”

(b): “The injured worker . . . shall be paid twenty-five percent of the balance of the award”

(c): “The department . . . shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department . . . for benefits paid”

(d): “Any remaining balance shall be paid to the injured worker”

(e): “Thereafter no payment shall be made to or on behalf of an injured worker . . . by the department . . . for such injury until the amount of any further compensation and benefits shall equal any such remaining balance minus the department’s . . . proportionate share of the costs and reasonable attorneys’ fees in regards to the remaining balance. . . .”

RCW 51.24.060(1).

Thus, “any recovery” that an injured worker makes under the third party statute “shall be distributed” as follows: attorneys’ fees and costs are paid first; the worker receives 25 percent of the recovery (after fees and costs) free and clear of any Department claim; the Department

is then paid from the "recovery" to the extent necessary to "reimburse" it "for benefits paid" (less its proportionate share of fees and costs).

Finally under the formula, the worker receives the "remaining balance" as cash in hand, but thereafter is not directly paid further benefits from the Department until what is known as the "excess recovery" - - the remaining balance less the Department's proportionate share of the costs and reasonable attorneys' fees - - has been drawn down to zero by benefits to which the worker is entitled in the period subsequent to the distribution made under RCW 51.24.060.

The purposes of the third party chapter include (1) recouping from tortfeasors part of the benefits paid by the state fund and (2) preventing double recovery by workers:

[Chapter 51.24 RCW] mandates reimbursement to the Department so that (1) accident and medical funds are not charged for damages caused by a third party and (2) the worker does not make a double recovery. In other words, the worker, under the statute, cannot be paid compensation and benefits from the Department and yet retain the portion of damages which would include those same elements.

Maxey v. Dep't of Labor & Indus., 114 Wn.2d 542, 549, 789 P.2d 75 (1990); *see also Washington Ins. Guar. Ass'n v. Dep't of Labor & Indus.*, 122 Wn.2d 527, 535, 859 P.2d 592 (1993) ("The purposes of the workers' compensation act would be defeated if the Department's right to reimbursement were impaired" (citation omitted)).

C. Schiller Was A Worker “Receiving [State] Compensation” For A Period When Federal Social Security Benefits Were Also Payable

1. The Underlying Legislative Purposes Of Both The Social Security Offset And Third Party Statutes Of (a) Preventing Double Recoveries And (b) Protecting The Industrial Insurance Funds, Support The Department And Board Interpretations Of RCW 51.32.220(1)

RCW 51.32.220 governs offset of social security disability benefits. RCW 51.32.220(1) states:

For persons *receiving compensation* for temporary or permanent total disability pursuant to the provision 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 to the reduction established pursuant to 42 U.S.C. § 424a.

RCW 51.32.220(1) (emphasis added).

The statute is clear that for injured workers who are “receiving compensation” under Title 51 RCW, the Department *must reduce* “such compensation” if they are also receiving social security disability benefits. *State v. Marking*, 100 Wn. App. 506, 510, 997 P.2d 461 (2000) (“shall” imposes a mandatory requirement”).

The question this case presents is thus whether Schiller was “receiving compensation for temporary . . . total disability” at the same time his social security disability benefits were payable. Under the facts

of this case, the answer is “yes” in light of the relevant statutory language and the legislative purpose of avoiding payment of duplicative federal and State wage replacement benefits.

On October 30, 2003, Schiller was found to be entitled to federal disability benefits under the Social Security Act. BR at 118-19. September 6, 2000, was listed as the date of onset of eligibility for benefits. BR at 118-19. Nowhere does the record indicate that Schiller’s social security disability benefits were ever cut off during the periods at issue here. Hence, it must be determined whether Schiller was also receiving temporary total disability benefits, otherwise known as time loss compensation, during those periods.

The intent of the Washington Legislature in enacting the “reverse” social security offset statutes was to reduce the cost of industrial insurance. *Harris*, 120 Wn.2d at 467. This can only be achieved if the Department is allowed to reduce the State’s portion of wage replacement benefits by offsetting federal social security benefits. The statute requires it, it prevents double recovery of wage replacement benefits, and Schiller has not offered a good reason to treat himself differently from injured workers who do not have third party tort recoveries. It does not make sense to deny the State an offset when it is recouping a third party excess recovery.

Schiller argues that he is exempt from the social security offset statute because his State benefits are being credited against his third party excess recovery instead of being paid directly to him. AB 10, 13-22. It is not enough, he argues, that he has the use of his excess recovery money and that his excess is being reduced by the exact amount of total disability benefits to which he is entitled. *Id.* Instead, he argues that the ambiguous phrase “receiving compensation” under RCW 51.32.220(1) must be liberally construed to mean that only ongoing direct receipt of regular payments from the Department, in the form of checks payable to him, satisfies the statute’s “receiving compensation” requirement. *Id.*

It is true that the provisions of Washington’s Industrial Insurance Act are “liberally construed.” RCW 51.12.010. As noted, however, this rule of construction 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 at 427; *Senate Republican Comm. v. Pub. Disclosure Com’n*, 133 Wn.2d at 243.

Moreover, where statutory language is ambiguous, 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. at 423 (deference given to Department interpretation); *Ackley-Bell v. Seattle School Dist.*, 87 Wn. App. at 165 (recognizing that deference is due the interpretations of both the Department and Board).

Here, the underlying statutory purpose and the relevant case law support the Department's authority, indeed duty, to reduce Schiller's total disability benefits under the circumstances of this case. Schiller is "receiving compensation" for total temporary disability under RCW 51.32.220(1) as he continues to have the use of the excess recovery money provided to him under RCW 51.24.060(1)(e), and as the Department draws down his third party excess recovery figure during his total disability periods. The payment to Schiller of the "excess recovery" amount was in effect a contingent advance payment of time loss compensation that became an actual payment of the time loss compensation for each period during which he was temporarily totally disabled. Thus, he was receiving time loss compensation while receiving social security benefits.

The Department order dated November 7, 2005 is titled "Payment Order." BR at 118-19. The first paragraph states: Time-loss benefits are *paid* from 10/22/03 through 11/01/05 in the amount of \$20,499.56. *Id.* The second paragraph of the order explains that time-

loss is paid at the full rate for the payment period 10/22/03 through 02/29/04. *Id.* Schiller makes no argument that this amount cannot be credited against the third party excess recovery; in fact, he argues that it must be. AB 12. The very next line of the November 7, 2005, order states that the time loss rate for the period 03/01/04 through 11/01/05 is being reduced. *Id.* The reduction is for the social security offset. *Id.* Finally, the order indicates that no warrant is being issued because a deduction for the full amount of time loss benefits is being taken for the third party excess. *Id.*

Schiller was receiving time loss compensation benefits; he merely was not receiving that compensation in the form of warrants. The benefit he was receiving is a draw-down in the third party excess in the exact amount of his time loss compensation rate. Those deductions will, if his total disability continues long enough, eliminate the excess reserve. That will bring reinstatement of ongoing time loss compensation payments to Schiller.

Schiller's interpretation of RCW 51.32.220 would allow him to receive unreduced state and federal wage replacement benefits for the same months. This is directly contrary to the Legislature's intent in enacting the statute, which was "to see that a disabled person is fully

compensated for his disability, but not permitted to collect overlapping awards." *Ravsten*, 108 Wn.2d at 149.

Schiller asserts that he should be able to apply the unreduced state time loss benefit against the third party excess. This would, however, put him in a much better position than someone who did not recover from a third party tortfeasor. An example helps illustrate this fact:

- On January 1, 2007, Claimant A becomes entitled to temporary total disability benefits in the amount of \$1,000 per month.
- On July 1, 2007, Claimant A makes a third party recovery which results in an excess recovery of \$12,000.
- For the next six months Claimant A's excess recovery is reduced by the amount of temporary total disability benefits to which he is entitled. During the year 2007 Claimant A is thus paid temporary total disability benefits in the amount of \$6,000 (for the period January 1 – June 30) and the excess recovery of \$12,000, resulting in total payments of \$18,000. The balance of Claimant A's excess recovery as of December 31, 2007, is \$6,000, reflecting the original \$12,000 less credits of total temporary disability entitlement for the period July 1, 2007 – December 31, 2007.
- On January 1, 2008, social security benefits become payable to Claimant A in the amount of \$500 per month. Pursuant to RCW 51.32.220, the Department issues an order reducing Claimant A's rate of total disability benefits to \$500.
- From January 1, 2008 through December 31, 2008, Claimant A's excess recovery of \$6,000 is drawn down at the rate of \$500 per month to reflect the social security offset.
- As of December 31, 2008, therefore, Claimant A's excess recovery is reduced to zero and he is directly paid his total disability compensation beginning on January 1, 2009.

- By the end of 2008, Claimant A has been paid \$24,000 – the sum of (I) his third party excess recovery of \$12,000 plus (II) the 2007 total disability benefits of \$6,000 for the period January 1, 2007 through June 30, 2007 plus (III) social security benefits during 2008 totaling \$6,000.

The scenario set out above reflects the handling of Schiller's claim, with simplified numbers and dates. Notably, the total amount paid to Claimant A is *exactly* what he would have received had there been no third party claim and no excess recovery: he would have been paid total disability benefits for 2007 at a rate of \$1,000 per month, for 2008 at a rate of \$500 per month due to his social security benefits, and social security benefits of \$6,000 during 2008. These payments add to \$24,000.

Schiller seeks a markedly different result. Under Schiller's argument, Claimant A's third party excess recovery would continue to be reduced at his full total disability rate of \$1,000 per month in 2008, despite his receipt of social security benefits. This would exhaust the excess recovery in six months rather than 12, and only after that six-month period would Claimant A's total disability benefits be reduced under RCW 51.32.220. By the end of 2008 Claimant A would receive:

- \$6,000 (total disability benefits for January 1, 2007 through June 30, 2007);
- \$12,000 (excess recovery);
- \$6,000 (social security benefits during 2008); and

- \$3,000 (total disability benefits paid at reduced rate for July 1, 2008 through December 31, 2008).

Claimant A would thus receive \$27,000 during 2007 and 2008, or 12.5 percent more than the \$24,000 that he would receive if there had been no third party recovery *and* under the Department's application of RCW 51.32.220 in cases where there has been a third party recovery. Because there has been no change in the social security benefits or in the third party excess recovery, this increase comes directly from Washington's workers' compensation funds.⁴ Furthermore, the disparity is even greater in Schiller's case, because his excess recovery is nearly five times larger than the excess recovery in the above hypothetical.

It certainly would be an anomaly, and lead to an absurd result, for the Legislature to treat claimants so differently, i.e., allowing one party to receive unreduced state benefits while others were subject to the offset, especially where to do so would result in a windfall to certain claimants by providing them with greater workers' compensation benefits simply because they made third party recoveries. *Bird-Johnson v. Dana Corp.*, 119 Wn.2d at 427 (strained reading or absurd results to be avoided in

⁴ See discussion *infra* Part VI. C. 3 responding to Schiller's argument that the industrial insurance funds are not affected while he draws down against his third party excess recovery.

statutory interpretation); *Senate Republican Comm. v. Pub. Disclosure Com'n*, 133 Wn.2d at 243 (same).

Thus, this court should reject Schiller's interpretation that yields the absurd result of treating social security offset differently based on the irrelevant fact of whether a worker made a third party tort recovery. *Id.*; see also *Dumas v. Gagner*, 137 Wn.2d 268, 286, 971 P.2d 17 (1999) ("In construing statutes in one context, this court has stated that the spirit and intent of the statute should prevail over the literal letter of the law and there should be made that interpretation which best advances the perceived legislative purpose."); *City of Seattle v. State*, 136 Wn.2d 693, 697-98, 965 P.2d 619 (1998) (When construing an ambiguous statute, "The purpose of an enactment should prevail over express but inept wording.").

Finally, Schiller's argument that he should receive increased workers' compensation benefits because he made a third party recovery is the exact opposite of what the Legislature intended to accomplish when it enacted the third party statute. That law exists to *replenish* the funds and to prevent double recoveries, *Maxey, supra*, not to *increase* the cost to funds of claims filed by workers such as Schiller. By the same token, Schiller's argument that his rate of total disability compensation should not be reduced while social security benefits are payable to him accomplishes the opposite of the purpose of RCW 51.32.220, whose sole

purpose is to shift the cost of workers' compensation from the state onto the federal government.

Schiller's argument is absolutely contrary to the purposes of social security offset statutes as well as the third party statute. The decision-makers below properly rejected his argument, and this court should do the same.

2. Case Law Supports The Identical Interpretation Of RCW 51.32.220 By The Department And Board

Schiller's interpretation also is not supported by the relevant case law interpreting the social security offset statutes. Washington courts have consistently construed the social security offset statutes so as to further legislative intent to prevent workers' receipt of duplicative and overlapping state and federal wage loss benefits. *See, e.g., Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 149-51.

Similar in its factual and legal context to the circumstances here is *Potter v. Department of Labor & Industries*, 101 Wn. App. 399, 3 P.3d 229 (2000). There, Ms. Potter raised a challenge under RCW 51.32.220 against the Department's offsetting of her Federal social security disability compensation after the Board ordered the Department to make a lump sum, back payment of State time loss compensation. 101 Wn. App. at 402. Ms. Potter based her argument on the "receiving compensation"

phrase, arguing that the Legislature had meant to limit offset to persons who - - at the exact moment when the Department gave notice of its authority to offset - - were then actually receiving payments from the Department on a current monthly basis. *Potter* 101 Wn. App. at 405-09.

Ms. Potter argued that her interpretation was supported by similar analysis to that now argued by Schiller. This court rejected Ms. Potter's argument both under 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.

Similarly in *Frazier v. Department of Labor & Industries*, 101 Wn. App. 411, 3 P.3d 221 (2000), 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 was thus 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 the plain meaning of the phrase "receiving compensation" and the statutory purpose of preventing

double recovery of wage replacement benefits. 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.

Both the *Potter* and *Frazier* decisions interpreted the phrase "receiving compensation" broadly to ensure that the legislative purpose of avoiding double recovery is served. Both cases determined that the phrase "receiving compensation" does not mean that the claimant must currently be receiving monthly payments. In this case Schiller is receiving time-loss compensation in the form of a credit against his third party excess. *Cf. Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 147-48, 736 P.2d 265 (1987) (calculating future pension payments for purposes of distributing proceeds of third party recovery by subtracting social security benefits from workers' compensation entitlement).

3. Schiller's Fairness Argument Is Without Merit

Schiller argues that it is unfair for the Social Security offset to apply during the period in which a third party excess is being consumed because the industrial insurance fund is not being affected until after the third party excess has been consumed. AB 19-22. Schiller cites no statutory authority for this proposition. Moreover, as set out in the examples above, the industrial insurance fund is plainly being affected. Absent the third party excess, the Department would have to pay Schiller time-loss at the offset rate. This affects the industrial insurance fund. By the Department taking a deduction for the third party excess this preserves the industrial insurance fund. The fund does not take a hit for Schiller's time-loss. Either way the industrial insurance fund is affected.

Schiller claims support for his fairness argument in this court's recent decision in *Tobin v. Department of Labor & Industries*, 145 Wn. App. 607, 187 P.3d 780 (2008), *petition for review pending*, cited at AB 21. *Tobin*, however, has nothing to do with this case. The non-final decision in *Tobin* involves the Department's authority to distribute third party damages representing pain and suffering under RCW 51.24.060, an issue not remotely related to Schiller's claim.

Schiller's suggestion that the Department is receiving an "unjustified windfall" is not supported by *Tobin* and is misleading at best: as demonstrated above, it is Schiller who would receive a windfall if the court were to accept his argument. *See also* AB 20 (citing *Harris* and *Ravsten* for the proposition that "the goal" of the social security offset statutes "is to prevent the claimant [from collecting] an award that amounts to a windfall," thus supporting the Department's argument).

This windfall is why Schiller's assertion that "[b]ecause the third party tort recovery – through reimbursement to the Department and excess – is covering the cost of administering Frantz's claim, the State accident fund is not reduced by the administration of his claim" misses the point: Schiller himself will receive precisely the amount of money to which he is entitled under the proper application of the social security offset statute. The ancillary benefit to the industrial insurance funds about which Schiller complains is exactly what the Legislature intended when it enacted the social security offset statute (shifting the cost of workers' compensation onto the federal government) and the third party statute (shifting the cost of industrial injuries onto responsible third party tortfeasors).

The court should reject Schiller's invitation to disregard these policies. His invitation ultimately has no basis other than his wish to

disregard the clear legislative policies to gain benefits beyond those to which he is entitled under the law.

D. Schiller's Reliance On A Maine Federal District Court Magistrate's Views About A Federal Agency Policy Is Misplaced

Schiller relies on unpublished views stated in 1990 by a United States District Court magistrate in Maine. AB 16-18 (citing *Tanner v. Sullivan* (1990, D. Me.) CCH Unemployment Ins Rep; 15,403A). His reliance on the magistrate's decision is misplaced for a number of reasons, including at least the following reasons: (1) the magistrate's views concerning a federal statutory scheme and federal policies are of little weight in this case under the Washington statutory scheme; (2) there is no evidence that the federal policy on which the magistrate's decision is based is currently in effect; and (3) neither the federal policy that existed in 1990 nor the magistrate's analysis of that policy supports Schiller's argument.

Tanner involved a social security disability recipient who was entitled to state workers' compensation benefits. Pursuant to 42 U.S.C. § 424a(a)(2), Tanner's social security payments were reduced by the amount of his workers' compensation benefits. *See Tanner*, 1990 WL 44699 at *3. Tanner then pursued a third party action in which his workers' compensation provider intervened to protect its interest in any

recovery. In a complex settlement Tanner received \$60,000 “up front” from the third party defendant along with \$1,102 per month for 15 years. His attorney fees for the action totaled \$65,905, of which the workers’ compensation provider agreed to pay \$15,000 and released its interest in the recovery in exchange for “being excused from paying any future workers’ compensation indemnity benefits.” *Id.*

Tanner argued that his workers’ compensation provider had been required by law to pay the \$50,905 in attorney fees that he had personally paid, and therefore the \$50,905 payment to his attorney was “actual repayment of workers’ compensation,” a claim that, if correct, would affect his social security disability benefits under federal policy. His argument was based on language from the Social Security Administration’s Program Operations Manual System (POMS) in effect in 1990, a policy manual not adopted by regulation, under the heading “Special Situations When Offset Does Not Apply”:

D. Third Party Settlements

In some cases, [workers' compensation] is awarded for an injury caused by or contributed to by the action or negligence of a third party (i.e., not the employer). The worker, [workers' compensation] agency or insurance carrier either singly or jointly may file suit and recover amounts for which the third party is liable. If the lawsuit results in the worker being awarded payments from the negligent party, he may be required to repay the [workers' compensation] to the insurance company or State. This results in the worker's (sic) being in the same position he would have been in had he

never received [workers' compensation] but had simply sued for personal injuries. In such a case, offset will not apply and will be removed retroactively when evidence is submitted showing the results of the settlement and that repayment had been made. Only that part of the [workers' compensation] which is actually repaid by the worker out of the third party settlement is excluded from the offset.

Tanner at *2, quoting POMS Section D1 11501.045D.

In essence, Tanner's argument was that his attorney fees were amounts that he had "repa[id] . . . to the insurance company," and that his social security offset should not apply since he was "in the same position he would have been in had he never received [workers' compensation] but had simply sued for personal injuries." *See Tanner* at *2. The Magistrate rejected this argument for a number of reasons, including (a) that "on its face the settlement agreement [in which the provider expressly waived any repayment] precludes the plaintiff's exclusion from the offset as directed by the POMS," (b) that even if Tanner's attorney fees "could be deemed an actual repayment, the plaintiff has not demonstrated that such was the case here," and (c) that neither the New Hampshire statute nor the settlement agreement and order support the plaintiff's claim." *Tanner* at *4.

Most important for the current case, however, was the Magistrate's determination that Tanner was not entitled to the removal of his federal

offset even if his attorney fees were considered to be repayment to his workers' compensation provider:

even if this court were permitted to take a view of the POMS as requiring at the very least that the plaintiff be in the same position he would have been in if he had never received workers' compensation, but had simply sued for personal injuries, he still fails to meet the test. The plaintiff . . . has received \$178,392. If the plaintiff had never received workers' compensation he would have received a total of \$161,492 Thus, the plaintiff is requesting reimbursement even though he has actually received \$16,900 more than he would have had he received full Social Security benefits and the same recovery in a personal injury action. Even the most expansive reading of the POMS does not require such a result.

Tanner at *6 (footnotes omitted). In other words, the Magistrate *declined* to remove Tanner's social security offset because to do so would provide him with a windfall. This is analogous to Schiller's case, in which Schiller argues that his workers' compensation benefits not be reduced by his social security payments even though this will provide him with a windfall.

Tanner is also readily distinguished. It involves the offset of *federal* benefits and the application of such an offset under a *federal* policy. In *Regnier v. Department of Labor & Industries*, 110 Wn.2d 60, 62-64, 749 P.2d 1299 (1988), a Washington worker argued (1) that a federal administrative rule required that *federal* staff taking the *federal* statutory social security offset take into account the medical and legal

costs expended by a worker in obtaining *state* benefits, and (2) that the Department should follow a parallel approach under the reverse offset provisions of Washington law.

The Washington Supreme Court first questioned whether the worker had accurately interpreted the federal rule. *Id.* at 63-64. But the Court then went on to conclude that interpretation of the federal administrative rule was irrelevant because “there is no similar provision under Washington law for an exemption from the Washington industrial insurance benefits offset provisions.” *Id.* at 64. Accordingly, the Court rejected the worker’s argument. *Id.* at 64-65.

Similarly here, there is no similar policy or provision in Washington law to that considered in *Tanner* – in fact, as set out above, Washington law describes exactly how situations such as Schiller’s are to be handled: workers’ compensation benefits are reduced by the amount of social security payments (RCW 51.32.220) and excess third party recoveries are reduced over time by the amount of workers’ compensation benefits (RCW 51.24.060). This is precisely what the Department has done in Schiller’s claim, and it is entirely consistent with the reasoning behind *Tanner*: offsets remain in place where to remove them would put the claimant in a better position than he would be in if he had only his workers’ compensation or only his personal injury claim.

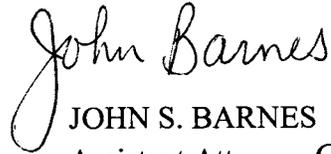
VII. CONCLUSION

For the reasons stated above, the Department respectfully requests that this court affirm the Superior Court's decision that affirmed the decisions of the Board and the Department.

RESPECTFULLY SUBMITTED this 25th day of November, 2008.

ROBERT M. MCKENNA

Attorney General

A handwritten signature in cursive script that reads "John Barnes". The signature is written in black ink and is positioned to the left of the printed name and title.

JOHN S. BARNES

Assistant Attorney General

WSBA # 19657

CERTIFICATE OF SERVICE

I, Autumn Marshall, certify under penalty of perjury under the laws of the state of Washington, that I caused the documents referenced below to be delivered via the method listed to the following parties:

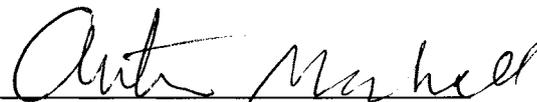
DOCUMENT(S) **Brief of Respondent**

ORIGINAL TO: *(Hand Delivered)*
David C. Ponzoha
Court Clerk
Court of Appeals (Division II)
950 Broadway, Suite 300
Tacoma, WA 98402

COPY TO: *(First Class, Postage Pre-Paid)*
Tara Jayne Reck
Vail-Cross & Associates
PO Box 5707
Tacoma, WA 98415-0707

FILED
COURT OF APPEALS
DIVISION II
08 NOV 26 AM 10:11
STATE OF WASHINGTON
BY  DEPUTY

DATED this 26th day of November, 2008, at Tumwater, Washington.


AUTUMN MARSHALL
Legal Assistant 2