

73561-6

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Court of Appeals
Division I
State of Washington

NO. 73561-6-I

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

OWEN M. HENDERSON,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR & INDUSTRIES**

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE ISSUE.....	1
III.	STATEMENT OF THE CASE.....	1
	A. Because Mr. Henderson Began Receiving Both Time-Loss Compensation and Social Security Retirement Benefits, the Department Offset His Time-Loss Compensation	1
	B. Mr. Henderson Appealed the Offset Order to the Board, but the Board Affirmed.....	5
	C. Mr. Henderson Appealed the Board’s Decision to Superior Court, and the Superior Court Affirmed the Board.....	6
IV.	STANDARD OF REVIEW.....	6
V.	ARGUMENT	7
	A. The Department Properly Offset Mr. Henderson’s Benefits in Accordance With 42 U.S.C. § 424a Because RCW 51.32.220 and RCW 51.32.225 Direct the Department to Offset a Worker’s Benefits Using That Federal Statute	7
	B. Neither RCW 51.32.225 nor 42 U.S.C. § 424a Provide for Calculating a Worker’s Offset Based on the Worker’s Monthly Wages at the Time of an Industrial Injury Instead of the Worker’s Average Current Earnings as Defined by 42 U.S.C. § 424a.....	11
	C. The Department’s Cancellation of the June 2011 Offset Order Is Irrelevant.....	13

D. Mr. Henderson Waived the Evidentiary Objections He Attempts to Assert Here, and in any Event Has Failed to Establish Reversible Error14

VI. CONCLUSION16

TABLE OF AUTHORITIES

Cases

<i>Birgen v. Dep't of Labor & Indus.</i> , 186 Wn. App. 851, 856 n.3, 347 P.3d 503 (2015).....	9, 10, 11, 12, 13
<i>Burke v. Hill</i> , 190 Wn. App. 897, 361 P.3d 195 (2015)	11
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	13, 16
<i>Dep't of Labor & Indus. v. Slauch</i> , 177 Wn. App. 439, 312 P.3d 676 (2013).....	11
<i>Frazier v. Dep't of Labor & Indus.</i> , 101 Wn. App. 411, 3 P.3d 221 (2000).....	8
<i>Herzog v. Dep't of Labor & Indus.</i> , 40 Wn. App. 20, 696 P.2d 1247 (1985).....	8
<i>Hill v. Dep't of Labor & Indus.</i> , 161 Wn. App. 286, 253 P.3d 430 (2011).....	6
<i>Jones v. City of Olympia</i> , 171 Wn. App. 614, 287 P.3d 687 (2012).....	7
<i>Potter v. Dep't of Labor & Indus.</i> , 101 Wn. App. 399, 3 P.3d 229 (2000).....	8
<i>PT Air Watchers v. Dep't of Ecology</i> , 179 Wn.2d 919, 319 P.3d 23 (2014).....	7
<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	6
<i>Sepich v. Dep't of Labor & Indus.</i> , 75 Wn.2d 312, 450 P.2d 940 (1969).....	15
<i>Somsak v. Criton Techs./Heath Tecna, Inc.</i> , 113 Wn. App. 84, 52 P.3d 43 (2002).....	14

<i>Stuckey v. Dep't of Labor & Indus.</i> , 129 Wn.2d 289, 916 P.2d 399 (1996).....	7
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Statutes

42 U.S.C. § 424a.....	passim
42 U.S.C. § 424a(a).....	4, 7, 9, 10
RCW 51.08.178	11, 12
RCW 51.32.060, .090	12
RCW 51.32.220	passim
RCW 51.32.225	passim
RCW 51.52.050(2)(b).....	2
RCW 51.52.140	6

I. INTRODUCTION

The Legislature has decided to reduce a claimant's workers' compensation benefits if he or she is also receiving social security retirement. As authorized by RCW 51.32.225, the Department of Labor and Industries reduced Owen Henderson's wage replacement benefits because he also received social security retirement benefits. Contrary to Mr. Henderson's argument, this "offset" is not calculated based on the Industrial Insurance Act's definition of "wages" but instead is based on the Social Security Act's definition of "average current earnings." The plain language of the governing statutes directs the Department to calculate offsets using the Social Security Act. This Court should affirm.

II. STATEMENT OF THE ISSUE

Did the superior court properly conclude that the Department's calculation of the social security offset was correct when RCW 51.32.220 and RCW 51.32.225 provide that offsets are calculated in accordance with 42 U.S.C. § 424a and when the Department calculated Henderson's offset using 42 U.S.C. § 424a?

III. STATEMENT OF THE CASE

- A. Because Mr. Henderson Began Receiving Both Time-Loss Compensation and Social Security Retirement Benefits, the Department Offset His Time-Loss Compensation**

Owen Henderson injured his left knee on the job in March 1991, when he slipped and fell while showing a property in his capacity as a real estate sales agent for Preview Properties, injuring his left knee, back, and shoulder. CP 190-91. At the time of injury, he had worked between three and six months for that employer. CP 194.

In March 2011, the Social Security Administration notified the Department that it had approved Mr. Henderson's request for social security retirement benefits effective April 2011. CP 235. As of October 1, 2011, Mr. Henderson was receiving \$1,203.00 per month in social security retirement benefits. CP 69, 124-25.

The Department issued an order in June 2011 that informed Mr. Henderson that his time-loss benefits would be reduced based on his receipt of social security benefits. CP 267. Mr. Henderson requested reconsideration of the June 2011 offset order. CP 268-69; RCW 51.52.050(2)(b). Mr. Henderson told the Department that he was going to voluntarily waive his right to receive social security retirement benefits. CP 238. The Department contacted the Social Security Administration and confirmed that Mr. Henderson had filed documents that waived his right to receive those benefits. *Id.* Based on this, the Department issued an order in July 2011 that cancelled the June 2011 offset order. CP 238, 270.

However, the Department later learned that Mr. Henderson had rescinded his waiver of social security retirement benefits and thus Mr. Henderson received both his full time-loss compensation and his social security retirement benefits without any offset. CP 238-39. Mr. Henderson did not inform the Department that he had rescinded his waiver of social security benefits. CP 238-39.

Upon learning that Mr. Henderson had been receiving both social security retirement benefits and time-loss compensation, the Department issued an order on March 2012 that again assessed a social security offset. CP 239.

Under RCW 51.32.220(2) and (4), the Department must give a worker notice of its intent to offset the worker's industrial insurance benefits based on the receipt of social security benefits and it can only assess an overpayment based on the receipt of social security benefits effective six months before the date that notice was given. Because the Department cancelled its original offset order of June 2011 based on Mr. Henderson's representation that he would waive his social security benefits and it had to issue a new offset order in March 2012, the Department could only assess an overpayment effective six months before March 2012, which allowed Mr. Henderson to retain duplicative social security benefits and worker's compensation benefits for a period of time

that would otherwise have been subject to an offset. CP 239; RCW 51.32.220(2), (4).

Under the Social Security Act, an offset is calculated based on a formula that takes into account three factors: (1) 80 percent of the worker's average current earnings, (2) the worker's social security benefit amount before any offset, and (3) the worker's industrial insurance benefit rate before any offset. 42 U.S.C. § 424a(a). The Department calculated Mr. Henderson's social security offset based on the understanding that his highest yearly earning was \$45,666, which he earned in 1989, that his social security benefits before any offset were equal to \$1,203, and that his time-loss compensation benefits before any offset were equal to \$3,928.96. CP 60-61. This led to an offset of \$1,203. CP 66, 158.¹

The Department determined that Mr. Henderson's highest yearly wages were \$45,666 based on a document that was created by the Social Security Administration. CP 60.

¹ Under 42 U.S.C. § 424a(a), the amount of the offset is calculated by taking the sum of the industrial insurance benefit rate and the social security benefit rate, and then subtracting either 80 percent of the worker's average current earnings or the worker's industrial insurance benefit rate, whichever results in a lower offset amount. The sum of Mr. Henderson's two benefit rates is \$5,131.96, combining \$3,928.96 and \$1,203. See CP 60-61, 66. If his industrial insurance benefit rate is subtracted from this figure, this leads to an offset of \$1,203. Conversely, if 80 percent of his average current earnings (\$45,666, 80 percent of which is \$36,532.80, or \$3,044.40 per month) is subtracted from his combined benefit figure of \$5,131.96, this leads to an offset of \$2,087.56, which would exceed the social security benefits themselves. *Id.* Therefore, the offset amount is \$1,203, as that is the lowest possible offset that can be used in this case.

B. Mr. Henderson Appealed the Offset Order to the Board, but the Board Affirmed

Mr. Henderson appealed the Department's order to the Board of Industrial Insurance Appeals. CP 268-69. Mr. Henderson contested the Department's method of calculating his offset and, as evidence, offered a 1099-MISC form used by the Internal Revenue Service showing his nonemployee compensation for the year 1989 in the amount of \$77,696.60. CP 266, 268-69.

The Department presented the testimony of Donald Roman, a social security offset specialist, who explained the Department's calculation. CP 234-37. Mr. Roman explained that Mr. Henderson's 1099-MISC form was not acceptable proof of his 1989 earnings for the purpose of calculating his offset because the 1099 form includes amounts that are not subject to taxation under the Federal Insured Contributions Act (FICA), while an offset is calculated based only on earnings that are subject to taxation under FICA. *See* CP 250.

Mr. Roman testified that, although the Department does not have a "policy manual" on social security offsets, it does use a "desk reference" that it follows when making social security offsets. CP 241-42. The desk reference sets out the procedures that should be used when calculating an offset. CP 242. The desk reference directs Department staff to calculate

offsets in a way that mirrors how offsets are calculated by the Social Security Administration. CP 242.

The Board affirmed the Department's order. CP 124-26.

C. Mr. Henderson Appealed the Board's Decision to Superior Court, and the Superior Court Affirmed the Board

Mr. Henderson appealed the Board's decision to superior court on November 13, 2013. CP 3-5. The superior court concluded that the Board correctly decided the offset question and affirmed. CP 312-15.² Mr. Henderson appealed the superior court's decision to this Court.

IV. STANDARD OF REVIEW

In a workers' compensation matter involving an appeal from a superior court's decision, the ordinary civil standard of review applies. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009); RCW 51.52.140.³ The court reviews the superior court's decision, not the Board's decision. *Rogers*, 151 Wn. App. at 180. The court reviews the superior court's decision to confirm that its findings are supported by substantial evidence and that its conclusions of law follow from its findings. *Id.*

² The superior court also found that Mr. Henderson failed to timely serve the notice of appeal on the Board. CP 315. However, the Department concedes that the service was timely on appeal.

³ The Administrative Procedures Act does not apply to workers' compensation cases under RCW 51.52.140; normal civil practice does. *See Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 292, 253 P.3d 430 (2011).

The question presented is a question of law that the court reviews de novo on appeal. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996). An agency's interpretation of a law is given deference when that agency has specialized expertise in dealing with such issues. *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 925, 319 P.3d 23 (2014). Courts give deference to the Department's interpretation of the Industrial Insurance Act. *Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012).

V. ARGUMENT

Mr. Henderson has failed to show that the Department erred when it assessed a social security offset. RCW 51.32.220 and RCW 51.32.225 direct the Department to calculate offsets consistently with the provisions of 42 U.S.C. § 424a(a) of the Social Security Act, which governs offsets under the federal act. The Department did so. Mr. Henderson's argument that the Department should have calculated his offset based on the Industrial Insurance Act's definition of "wages" rather than the Social Security Act's definition of "average current earnings" fails because the state statutes direct the Department to calculate offsets based on the federal Social Security Act. This Court should affirm.

A. **The Department Properly Offset Mr. Henderson's Benefits in Accordance With 42 U.S.C. § 424a Because RCW 51.32.220**

and RCW 51.32.225 Direct the Department to Offset a Worker's Benefits Using That Federal Statute

The offset provisions in RCW 51.32.220 and RCW 51.32.225 prevent a worker from receiving a windfall of duplicate wage-replacement benefits. *See, e.g., Frazier v. Dep't of Labor & Indus.*, 101 Wn. App. 411, 417, 3 P.3d 221 (2000); *Potter v. Dep't of Labor & Indus.*, 101 Wn. App. 399, 409-10, 3 P.3d 229 (2000); *Herzog v. Dep't of Labor & Indus.*, 40 Wn. App. 20, 25, 696 P.2d 1247 (1985). When injured workers receive social security benefits in addition to total disability benefits from the Department, the Department must offset their workers' compensation benefits. RCW 51.32.220, 225. RCW 51.32.225 directs the Department to offset worker's compensation benefits in cases where a worker is receiving social security retirement benefits, while RCW 51.32.220 directs the Department to offset social security disability benefits.

RCW 51.32.225(2) provides that when the Department offsets social security retirement benefits, the Department "shall comply with the procedures in RCW 51.32.220 (1) through (6) and with any other procedures established by the department to administer this section." RCW 51.32.225(2) also provides that any "procedures" that the Department establishes regarding the calculation of social security

retirement offsets must be ones that are “determined by the department to most closely follow the intent of RCW 51.32.220.”

The procedures contained in RCW 51.32.220(1) through (6) direct the Department to calculate a social security offset to be equal to what the reduction would be under 42 U.S.C. § 424a of the Social Security Act. Since RCW 51.32.225 directs the Department to follow the procedures contained in RCW 51.32.220, this means that the Department uses 42 U.S.C. § 424a to calculate offsets in social security retirement cases and social security disability cases. *See Birgen v. Dep’t of Labor & Indus.*, 186 Wn. App. 851, 856 n.3, 347 P.3d 503 (offset the same under RCW 51.32.220 and RCW 51.32.225), *review denied*, 184 Wn.2d 1012 (2015). Here, the procedure followed by the Department was to use 42 U.S.C. § 424a(a) as directed by RCW 51.32.220 and RCW 51.32.225. CP 74-75, 258. Mr. Henderson’s complaint that the Department has no procedures is without merit.⁴

⁴ In any event, Mr. Henderson incorrectly suggests that the Department employees who calculate offsets do not have any sort of manual providing guidance as to how to calculate such offsets. App. Br. at 10. The Department expert testified that the Department does not have a “policy manual” but does have a “desk reference.” 67-68. He explained that the “desk reference” shows what procedures are followed in calculating offsets, and that those procedures mirror the procedures used by the Social Security Administration. CP 68. Mr. Henderson argues that the superior court found that the Department has a “P&P” manual and that the evidence does not support such a finding. App. Br. at 5. However, the superior court did not find that the Department has a P&P manual: the superior court entered a conclusion of law that the Department’s calculation of the offset was consistent with RCW 51.32.220 and RCW 51.32.225. CP 315. This

Under RCW 51.32.220 and RCW 51.32.225, a claimant's workers' compensation disability benefits must be reduced by the amount that person receives in social security benefits or by an amount calculated under 42 U.S.C. § 424a(a), whichever is less. *Birgen*, 186 Wn. App. at 856. 42 U.S.C. § 424a(a)(2)-(6) provide that the amount of the offset is the amount by which a person's combined monthly disability and social security benefits exceed 80 percent of that person's "average current earnings." *Birgen*, 186 Wn. App. at 856. 42 U.S.C. § 424a(a) defines average current earnings as the largest of three different amounts, which in most situations is one-twelfth of the person's highest annual earnings in the year of disability or in the preceding five years. *Birgen*, 186 Wn. App. at 857.

This is true for Mr. Henderson, as the highest yearly wage he ever earned was in 1989, which he earned within 5 years of the date he became disabled (1991). CP 32, 43. Under 42 U.S.C. § 424a(a), the amount of Mr. Henderson's offset is \$1,203. CP 60. Since the amount of the offset under 42 U.S.C. § 424a(a) is \$1,203, this means that the offset under RCW 51.32.225 is also \$1,203, because RCW 51.32.225 directs the Department to use RCW 51.32.220 when calculating the amount of the

conclusion was correct and it does not depend on the assumption that the Department has a "P&P" manual.

offset and RCW 51.32.220(1) directs the Department to use 42 U.S.C. § 424a. *See Birgen*, 186 Wn. App. at 856 n.3.

B. Neither RCW 51.32.225 nor 42 U.S.C. § 424a Provide for Calculating a Worker's Offset Based on the Worker's Monthly Wages at the Time of an Industrial Injury Instead of the Worker's Average Current Earnings as Defined by 42 U.S.C. § 424a

Under the plain language of RCW 51.32.220 and RCW 51.32.225, the Department calculates offsets based on the amount the offset would be under 42 U.S.C. § 424a. Where a statute's meaning is plain, a "court will give effect to that plain meaning as an expression of legislative intent." *Dep't of Labor & Indus. v. Slauch*, 177 Wn. App. 439, 445, 312 P.3d 676 (2013). If the plain language of the statute is unambiguous, as here, the court's inquiry is at an end. *Burke v. Hill*, 190 Wn. App. 897, 907, 361 P.3d 195 (2015), *review denied*, 185 Wn.2d 1020 (2016).

The Department properly followed the directions of the offset statutes to use the federal statute. *See Birgen*, 186 Wn. App. at 856 n.3 (federal statute used for both social security disability and social security retirement). This Court should reject Mr. Henderson's attempt to use a separate statute, RCW 51.08.178, to calculate the offset. In administering Mr. Henderson's claim, the Department issued a wage rate order under RCW 51.08.178. CP 66. This included a finding as the amount of wages earned as of the date of injury. CP 66. This finding is used to calculate any

wage replacement benefits (time-loss compensation and pension payments). RCW 51.08.178; RCW 51.32.060, .090. Mr. Henderson argues that the amount of wages in the wage rate order issued under RCW 51.08.178—\$5,886.63—should be used to calculate the social security offset. App. Br. 9; CP 114.⁵ He is mistaken. The Department follows 42 U.S.C. § 424a when performing an offset. *Birgen*, 186 Wn. App. at 856-57, 856 n.3.

The Legislature could have provided that social security retirement offsets be calculated using the wage calculation under RCW 51.08.178, but it did not do so. In *Birgen*, the court considered a request of a worker to use a different procedure than that mandated in 42 U.S.C. § 424a. *Id.* at 856-57. The worker wanted the Department to use present value of wages, even though the statute did not provide for an adjustment for inflation. *Id.* at 857. The court rejected that argument, holding that it would not read requirements into the offset statute. *Id.* at 858-59. Like Mr. Birgen, Mr. Henderson attempts to add requirements to the statute that the Legislature did not provide. And, like in *Birgen*, the court here should not do so, either.

⁵ Mr. Henderson also claims that the Department issued another order on July 13, 2013 that changed his income to \$6,466.67, citing CP 115. App. Br. 9. It is not clear what Mr. Henderson means when he says that the July 13 order changed his income to \$6,466.67; the Department order contained at CP 115 cancelled a prior order dated June 15, 2011 that assessed a social security offset, but it made no comment on what Mr. Henderson's wages were at any time. CP 115.

Washington takes an offset for retirement and it is irrelevant that the federal government does not do so, contrary to Mr. Henderson's arguments. App. Br. 9. RCW 51.32.225 mandates use of RCW 51.32.220 and therefore 42 U.S.C. § 424a applies. *See Birgen*, 186 Wn. App. at 856 n.3.

C. The Department's Cancellation of the June 2011 Offset Order Is Irrelevant

The fact that the Department issued an order on July 2011 that cancelled a previous order dated June 2011, which assessed a social security offset, does not mean that the Department lost the ability to assess an offset, contrary to Mr. Henderson's suggestion. App. Br. 2. Mr. Henderson asserts that the Department's July 2011 order made him "qualified to receive" both social security benefits and time-loss compensation with no offset. App. Br. 2. However, he offers no citation to authority or legal argument that supports that claim, and the Court should disregard his arguments. *See* App. Br. 1-11; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court does not consider unsupported arguments).

But if this Court nonetheless considers the argument, it fails, because the Department's July 2011 cancellation order did not decide that Mr. Henderson could keep both social security retirement benefits and

industrial insurance benefits. While it is true that an unappealed Department order is final and binding, it is binding only with regard to “the issues encompassed within the terms of the order.” *See Somsak v. Criton Techs./Heath Tecna, Inc.*, 113 Wn. App. 84, 92, 52 P.3d 43 (2002) (matters not expressed in a Department order are not res judicata). Here, the July 2011 order did nothing more than cancel a previous order that assessed a specific social security offset at a specific amount. CP 115.

Mr. Henderson’s assertion that the July 2011 order made him “qualified” to receive both industrial insurance benefits and social security benefits without any offset is misleading given the context in which the July 2011 order was issued. App. Br. 2. The Department cancelled the order based on Mr. Henderson’s representation that he would waive his right to receive social security benefits and would receive time-loss compensation benefits alone. CP 64. Upon learning that Mr. Henderson was in fact receiving both forms of benefits simultaneously, the Department appropriately issued a new offset order on March 2012. CP 65.

D. Mr. Henderson Waived the Evidentiary Objections He Attempts to Assert Here, and in any Event Has Failed to Establish Reversible Error

Contrary to Mr. Henderson’s arguments, the Board did not preclude Mr. Henderson from presenting appropriate evidence and, in any

event, Mr. Henderson waived the right to object to the Board's evidentiary rulings by not raising any issue with those rulings during his hearing. *See* CP 202-05, 219-21, 226; *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316-17, 450 P.2d 940 (1969) (party must object at Board to preserve claim of error).

Although Mr. Henderson argues that the Board committed "gross error" by refusing to admit exhibits related to the procedural history of his claim, the record shows that the Board did not refuse to admit any exhibits about procedural history that Mr. Henderson offered. App. Br. 4; *see* CP 202-05. Similarly, Mr. Henderson erroneously claims that the Board "refused" to allow him to play a voice recording during the trial and that this was a "very gross error." App. Br. 4. However, the record shows that the Board did not refuse to allow Mr. Henderson to play the voice record; rather, Mr. Henderson elected not to offer it. *See* CP 219-20.

Mr. Henderson erroneously argues that the Board judge committed an error by referring to the document admitted as Exhibit Two as a "letter" rather than an order. However, this is not error, as the document admitted as exhibit two is a letter. And he did not object to this characterization at the hearing. CP 226.⁶

⁶ Mr. Henderson also complains that he had difficulty representing himself at the Board and complains about the work of his lawyer at superior court. App. Br. 5-6. Mr. Henderson offers no legal argument based on those complaints and does not

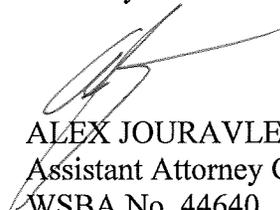
Mr. Henderson shows no error by the Board nor that any of his claimed errors prejudiced him.

VI. CONCLUSION

RCW 51.32.220 and RCW 51.32.225 direct the Department to calculate offsets based on 42 U.S.C. § 424a. Under 42 U.S.C. § 424a, the amount of the offset depends on the worker's average current earnings, not the monthly wages a worker was receiving at the time of the injury. Mr. Henderson has failed to show that the Department's offset calculation was incorrect and this Court should affirm.

RESPECTFULLY SUBMITTED this 22 day of June, 2016.

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articulate why either would provide a basis for relief; therefore, this Court need not consider them. *Cowiche Canyon Conservancy*, 118 Wn.2d at 809; *see* App. Br. 5-6.

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**DECLARATION OF
SERVICE**

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Brief of Respondent and this Declaration of Service to all parties on record as follows:

Via Email and First Class U.S. Mail, Postage Prepaid to:

Owen M. Henderson
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DATED this 22 day of June, 2016, at Tumwater, Washington.

Natashia Roberts

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