

## **Pregillana, Andres**

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### **SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)**

#### **Computation**

The average current wage provisions of 42 U.S.C. 424a, not the definition of wages under Washington State workers' compensation law, governs the calculation of wages for purposes of calculating the social security offset reduction. *In re Laverne McKenna*, BIIA Dec., 49,873 (1978). Accordingly, the inclusion of a healthcare benefit in wages has no effect on the calculation of the offset. **...In re Andres Pregillana, Jr., BIIA Dec., 06 14345 (2007)** [*Editor's Note:* The Board's decision was appealed to superior court under Kitsap County Cause No.07-2-01124-4.]

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

1 **IN RE:    ANDRES A. PREGILLANA, JR.            )** **DOCKET NO. 06 14345**  
2 **CLAIM NO. W-134732                                )** **DECISION AND ORDER**  
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4 **APPEARANCES:**

5           Claimant, Andres A. Pregillana, Jr., by  
6           Casey & Casey, P.S., per  
7           Gerald L. Casey & Carol L. Casey

8           Self-Insured Employer, IAP World Services Inc., by  
9           Intermountain Claims Inc.,  
10           None

11           Department of Labor and Industries, by  
12           The Office of the Attorney General, per  
13           John S. Barnes, Assistant

14           The claimant, Andres A. Pregillana, Jr., filed an appeal with the Board of Industrial Insurance  
15 Appeals on April 26, 2006, from an order of the Department of Labor and Industries dated  
16 March 24, 2006. In this order, the Department affirmed the provisions of an order dated  
17 January 20, 2006. In its January 20, 2006 order, the Department adjusted the claimant's  
18 permanent total disability benefits based on social security disability benefits the claimant was  
19 receiving, and assessed an overpayment of benefits in the amount of \$7,201.44, for the period from  
20 July 16, 2005 through January 15, 2006. The Department order is **AFFIRMED**.

21 **DECISION**

22           Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
23 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and  
24 Order issued on December 29, 2006, in which the industrial appeals judge reversed the order of the  
25 Department dated March 24, 2006. All contested issues are addressed in this order.

26           The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
27 no prejudicial error was committed. The rulings are affirmed. We have granted review because we  
28 disagree with the industrial appeals judge's ultimate conclusions in this case. We will summarize  
29 the evidence to the extent necessary to explain our decision.

1 On July 19, 1996, the claimant, Andres A. Pregillana, suffered an injury during the course of  
2 his employment with IAP World Services Inc., which was then known as Johnson Controls World  
3 Services. He filed an application for benefits, which was assigned Claim No. W-134732. The claim  
4 was allowed.

5 The Department issued an order on March 29, 2004, in which it set Mr. Pregillana's wage for  
6 the job of injury. (Exhibit No. 3). The wage was based on an hourly rate of \$16.56 for eight hours  
7 per day, 22 days per month, resulting in a monthly wage of \$2,914.56. In addition, the Department  
8 considered as wages employer healthcare benefits valued at \$297.46 per month. Therefore,  
9 Mr. Pregillana's total gross wage was \$3,212.02 per month. His status for the purposes of  
10 calculating time-loss compensation was married with no dependents.

11 Sometime prior to June 11, 2004, the Department determined that Mr. Pregillana was a  
12 permanently totally disabled worker. On June 17, 2004, Mr. Pregillana signed a pension benefits  
13 option form selecting Option 3, which provided that he would receive life time payments of  
14 \$2,323.31 per month, and that his surviving spouse would receive \$1,151.66 per month, *i.e.*,  
15 one-half the monthly amount to be paid to Mr. Pregillana. (Exhibit No. 4) On July 1, 2004, the  
16 Department issued an order in which it indicated that Mr. Pregillana had elected Option 3 under  
17 RCW 51.32.067(1); that he would receive an actuarially reduced [pension] benefit; and that any  
18 nominated unnamed spouse would continue to receive one-half of the reduced benefit as long as  
19 she was vested as a qualified beneficiary.

20 The Department first received notice from Mr. Pregillana that he was receiving social security  
21 benefits in May 2005. The Department did not receive notice from the Social Security  
22 Administration that Mr. Pregillana was receiving such benefits until December 2005. According to  
23 Ms. Lynn Wiltman, a pension benefits specialist employed by the Department, Mr. Pregillana was  
24 entitled to receive a maximum of \$2,843.20 per month under the Social Security Administration's  
25 regulations. This amount represented 80 percent of his highest annual earnings during the five  
26 years before his injury. In accordance with the federal regulations, the \$2,843.20 per month limit  
27 applied to combined social security benefits and workers' compensation benefits. Mr. Pregillana  
28 was receiving \$1,653 per month in social security disability benefits. The difference between  
29 Mr. Pregillana's pension benefits and the amount actually payable by the Department following the  
30 reduction for social security benefits was \$1,200.24 [per month]. Therefore, the Department  
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1 assessed an overpayment in the amount of \$7,201.44, the difference between the benefits  
2 Mr. Pregillana received from July 16, 2005 through January 15, 2006, and the amount of workers'  
3 compensation benefits to which he was entitled. Contrary to the conclusion of our industrial  
4 appeals judges, Mr. Pregillana's monthly payments during that period of time were \$2,390.44.

5 We find that the Department correctly calculated the overpayment amount based on  
6 Mr. Pregillana's monthly benefit amount between July 16, 2005 and January 15, 2006. In addition,  
7 we find that the amount of Mr. Pregillana's offset amount should not have been reduced by the  
8 amount of his health insurance premium under RCW 51.32.220. We have previously held "the  
9 'average current earnings' provisions of 42 U.S.C. 424a, not the definition of 'wages' in our state  
10 worker's compensation law, governs the calculation of the claimant's wage basis" for the purposes  
11 of calculating the offset reduction under 20 C.F.R. § 404.408(d). *In re LaVerne McKenna*, BIIA  
12 Dec., 49,873 (1978). Therefore, any inclusion of the value of healthcare benefits in wages pursuant  
13 to the Supreme Court's decision in *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001)  
14 has no effect upon the ultimate calculation of the offset except to the extent that the injured worker's  
15 pension benefit amount was calculated by including those healthcare benefits.

16 It appears the Mr. Pregillana is seeking a benefit that is not available under Washington's  
17 current Industrial Insurance Act. There is no provision that would permit us to award Mr. Pregillana  
18 a benefit to cover his private health insurance premiums. Even if such an award were possible, the  
19 reductions provided in 20 C.F.R. § 404.408(d) apply only when the federal system is exercising its  
20 right to benefit from the offset, not when the state is seeking to do so. See *Regnier v. Department*  
21 *of Labor & Indus.*, 110 Wn.2d 60, 63-64 (1988). Under this analysis, the Department correctly  
22 calculated Mr. Pregillana's benefit based upon his receipt of social security benefits. The  
23 Department order is affirmed.

#### 24 **FINDINGS OF FACT**

- 25 1. The claimant, Andres A. Pregillana, Jr., was injured while in the course  
26 of his employment with IAP World Services Inc. (Johnson Controls  
27 World Service), the self-insured employer, on July 19, 1996. His  
28 Application for Benefits in Claim No. W-134732 was filed with the  
29 self-insured employer on August 12, 1996. On March 26, 1997, the  
Department issued an order in which it closed the claim with medical  
benefits only.

30 The claimant filed an application to reopen the claim on March 5, 1998.  
31 On July 30, 1998, the Department entered an order in which it reopened  
32 the claim effective January 7, 1998, and also closed the claim with no  
award for permanent partial disability. The claimant filed a protest to the

1 July 30, 1998 order on September 14, 1998; and on September 21,  
2 1998, the Department entered an order in which it canceled the July 30,  
3 1998 order. In its September 21, 1998 order, the Department also  
4 reopened the claim effective January 7, 1998. On February 16, 1999,  
5 the Department entered another order in which it canceled the July 30,  
6 1998 order and reopened the claim effective January 7, 1998. The  
7 self-insured employer filed an appeal on March 15, 1999, to the  
8 February 16, 1999 order. The appeal was assigned Docket  
9 No. 99 12620, and was granted by an order of this Board dated April 9,  
10 1999. A Proposed Decision and Order was entered on May 1, 2000, in  
11 the appeal assigned Docket No. 99 12620; and on July 11, 2000, the  
12 Board entered an Order Denying Petition for Review in that appeal. An  
13 appeal to the Superior Court in Kitsap County was filed to the Board's  
14 order dated July 11, 2000, under Cause No. 00-2-02180-3. On  
15 August 14, 2002, the Department entered an order in which it recited  
16 that, pursuant to a judgment of the Superior Court dated June 24, 2002,  
17 a Department order dated July 31, 2000, was reversed, that the  
18 claimant's occupationally-related conditions objectively worsened  
19 between March 26, 1997 and January 16, 1999, and required further  
20 proper and necessary medical treatment.

21 On March 29, 2004, the Department entered an order in which it  
22 established the claimant's wage for the job of injury, based on \$16.56  
23 per hour, eight hours per day, 22 days per month, additional wages in  
24 the form of healthcare benefits in the amount of \$297.46 per month, and  
25 a marital status of married with no dependents. On April 7, 2004, the  
26 Department entered an order in which it placed the claimant on  
27 permanent total disability effective May 1, 2004, and provided that the  
28 Department would administer the permanent total disability benefits in  
29 compliance with the Industrial Insurance Act. On April 8, 2004, the  
30 Department entered an order in which it denied Second Injury Fund  
31 relief to the self-insured employer. The self-insured employer filed  
32 Protests and Requests for Reconsideration on May 12, 2004, to the  
April 7, 2004 and April 8, 2004 orders. On December 29, 2004, the  
Department entered an order in which it confirmed that claimant had  
been placed on permanent total disability, and allowed Second Injury  
Fund relief.

On January 20, 2006, the Department entered an order in which it  
adjusted the claimant's compensation effective June 16, 2005, because  
the claimant was receiving social security benefits, and assessed an  
overpayment of \$7,201.44 for the period from July 16, 2005 through  
January 15, 2006. The claimant filed a Protest and Request for  
Reconsideration on March 10, 2006, to the January 20, 2006 order. On  
March 24, 2006, the Department entered an order in which it affirmed  
the provisions of the January 20, 2006 order. On April 26, 2006, the

1 claimant filed an appeal to the Department's order dated March 24,  
2 2006. The appeal was assigned Docket No. 06 14345, and was granted  
3 by an order of this Board dated May 17, 2006. These proceedings  
4 followed.

- 5 2. Mr. Pregillana, a permanently totally impaired worker within the meaning  
6 of the Washington Industrial Insurance Act, was entitled to and received  
7 monthly industrial insurance benefits in the amount of \$2,390.44 per  
8 month, prior to any reduction, for the period from July 16, 2005 through  
9 January 15, 2006, pursuant to an election he made on June 17, 2004,  
10 and the regular cost of living increases required by statute.
- 11 3. In December 2005, the Department received notice from the Social  
12 Security Administration that Mr. Pregillana was receiving social security  
13 disability benefits in the amount of \$1,653 per month.
- 14 4. Mr. Pregillana was entitled to receive a maximum of \$2,843.20 per  
15 month in combined social security benefits and Washington  
16 workers' compensation benefits, which was 80 percent of his  
17 average current earnings as defined by 42 U.S.C. § 424a and  
18 20 C.F.R. § 404.408.
- 19 5. The Department was entitled to offset \$1,200.24 per month against  
20 Mr. Pregillana's benefits as a permanently totally disabled worker to  
21 prevent his total combined social security and workers' compensation  
22 benefits from exceeding \$2,843.20 per month.
- 23 6. The Department offset resulted in an overpayment of benefits to  
24 Mr. Pregillana in the amount of \$7,201.44 for the period of July 16, 2005  
25 through January 15, 2006.

#### **CONCLUSIONS OF LAW**

- 26 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
27 parties to and the subject matter of this appeal.
- 28 2. The Department properly calculated the offset to be applied to  
29 Mr. Pregillana's benefits due as a permanently totally disabled  
30 worker for the period from July 16, 2005 through January 15, 2006,  
31 for the purposes of 42 U.S.C. § 424a, 20 C.F.R. § 404.408, and  
32 RCW 51.32.220.
3. The Department properly applied the offset against Mr. Pregillana's  
benefits as a permanently totally disabled worker for the period from  
July 16, 2005 through January 15, 2006, and properly assessed an  
overpayment of benefits for the same period within the meaning of  
RCW 51.32.220.

1 4. The Department's order of March 24, 2006, is correct and is affirmed.

2 It is so **ORDERED**.

3 Dated this 4th day of April, 2007.

4 BOARD OF INDUSTRIAL INSURANCE APPEALS

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6  
7 /s/ \_\_\_\_\_  
8 THOMAS E. EGAN Chairperson

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10 /s/ \_\_\_\_\_  
11 CALHOUN DICKINSON Member

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