

Pregillana, Andres

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)
3) DECISION AND ORDER
4

APPEARANCES:

5 Claimant, Andres A. Pregillana, Jr., by
6 Casey & Casey, P.S., per
7 Gerald L. Casey & Carol L. Casey
8

9 Self-Insured Employer, IAP World Services Inc., by
10 Intermountain Claims Inc.,
11 None
12

13 Department of Labor and Industries, by
14 The Office of the Attorney General, per
15 John S. Barnes, Assistant
16

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

DECISION

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

30 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
31 no prejudicial error was committed. The rulings are affirmed. We have granted review because we
32 disagree with the industrial appeals judge's ultimate conclusions in this case. We will summarize
33 the evidence to the extent necessary to explain our decision.
34

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*, BI
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
Department entered an order in which it placed the claimant on
permanent total disability effective May 1, 2004, and provided that the
Department would administer the permanent total disability benefits in
compliance with the Industrial Insurance Act. On April 8, 2004, the
Department entered an order in which it denied Second Injury Fund
relief to the self-insured employer. The self-insured employer filed
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.

26 On January 20, 2006, the Department entered an order in which it
27 adjusted the claimant's compensation effective June 16, 2005, because
28 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
followed.

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

21 **CONCLUSIONS OF LAW**

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

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

It is so ORDERED.

Dated this 4th day of April, 2007.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/

THOMAS E. EGAN

Chairperson

/s/

CALHOUN DICKINSON

Member