

Darbous, Lee

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Computation based on benefit levels in effect on:

The date of actual notification of concurrent benefits.*In re Donald Clinton*, BIIA Dec., 61,711 (1983); *In re Lee Darbous*, BIIA Dec., 58,900 (1982)

The date of actual notification of concurrent benefits when the worker is noncooperative in disclosing information.*In re Lee Darbous*, BIIA Dec., 58,900 (1982)

Scroll down for order.

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

1 **IN RE: LEE V. DARBOUS**) **DOCKET NO. 58,900**
2)
3 **CLAIM NO. S-269241**) **DECISION AND ORDER**
4

5 APPEARANCES:

6
7 Claimant, Lee V. Darbous, by
8 Beckwith and Collins, per
9 David R. Collins

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11 Employer, City of Seattle, by
12 The City Attorney, per
13 Richard E. Mann, Assistant

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15 Department of Labor and Industries, by
16 The Attorney General, per
17 Linda McQuaid, Assistant

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19 This is an appeal filed by the claimant on February 17, 1981, from an order of the
20 Department of Labor and Industries dated December 17, 1980, wherein the offset for Social
21 Security Administration benefits received by the claimant was determined and further a
22 determination was made that an overpayment had previously been made and deduction for that
23 overpayment was provided. **AFFIRMED.**

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26 **DECISION**

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28 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
29 on timely Petitions for Review filed by the claimant, the employer and the Department of Labor and
30 Industries to a Proposed Decision and Order issued on September 18, 1981, in which the order of
31 the Department dated December 17, 1980 was reversed, and the matter remanded to the
32 Department and the self-insured employer with direction "to pay to the claimant his benefits as
33 authorized by law until the same may be reduced as authorized by law".

34 The case before us presents a new wrinkle under RCW 51.32.220 which we believe has not
35 been squarely confronted by any appellate jurisdiction in this nation. The issue in this appeal is, as
36 perceived by the claimant, a simple one: which federal disability and state workers' compensation
37 benefits must be used in calculating the amount of benefits to be offset, those existing in November
38 1978 or those in effect in October 1980. Stated another way, we perceived the agreed issue to be
39 whether Mr. Darbous is entitled to receive, unaffected by offset, the incremental increases in base
40 social security disability benefits and state workers' compensation time-loss benefits which occurred
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1 between November 1978 and October 1980. The Department of Labor and Industries and the self-
2 insurer, City of Seattle, maintain the offset should be calculated by reference to the level of benefits
3 in effect at the date the offset was calculated, October 1980. The claimant maintains the offset
4 should be calculated based upon the benefit levels which were in effect on the date of first
5 entitlement, November 1978.
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9 In 1975 the Washington Legislature first enacted RCW 51.32.220, and took advantage of a
10 somewhat veiled grant of authority in federal law relating to social security disability payments,
11 contained in 42 USC § 424a. In passing this legislation, this state was one of several which
12 deliberately and successfully placed a major financial obligation upon the federal government,
13 which theretofore was being absorbed by workers' compensation insurance funds supported by
14 employer premiums or by companies which had qualified to self-insure their workers' compensation
15 liability. Since that time, thousands of claims have been adjudicated spawning numerous appeals
16 to this Board concerning various aspects of administrative application of this piece of legislation,
17 which we have commonly come to refer to as the social security offset reversal statute.
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22 Before proceeding further, we deem it advisable to step back and once again survey the
23 relationship between the claimant's two benefit sources and the manner by which the present
24 problem was encountered. Freeman v. Harris, 625 F. 2d 1303 (1980), contains a rather succinct
25 and intelligently written history of social security disability income and the offset provisions in
26 federal law which provide an appropriate point of commencement for our discussion:
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30 "Social Security was first proposed by President Roosevelt as part of the
31 New Deal legislative reform. As initially instituted, the Social Security
32 Act of 1935 contained no provisions for disability insurance. It did,
33 however, provide old age and unemployment insurance which, as a
34 general rule, the states were not providing.

35 In 1956 the Social Security Act was expanded to include monthly
36 benefits for disabled wage earners. As enacted in 1956, there was a full
37 offset of workers' compensation payments against Social Security
38 disability benefits. 70 Stat. 816 (1956). 'It is self-evident that the offset
39 reflected a judgment by Congress that the workmen's compensation and
40 disability insurance programs in certain instances served a common
41 purpose, and that the workmen's compensation programs should take
42 precedence in the area of overlap.' Richardson v. Belcher, 404 U.S. at
43 82, 92 S.Ct. at 257. The offset provision was repealed in 1958, 72 Stat.
44 1025 (1958), but was reinstated in 1965 in a slightly different form, 79
45 Stat. 406 (1965).
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1 The reinstatement of the offset was triggered by data submitted to
2 legislative committees which showed that in the majority of the states,
3 the typical worker who was receiving workers' compensation and federal
4 disability benefits actually received more in benefits than his pre-
5 disability take-home pay. Hearings on H.R. 6675 Before the Senate
6 Common Finance, 89th Cong, 1st Sess.151 (1965). This was thought to
7 cause two evils: first, it reduced the worker's incentive to return to the
8 work place and hence impeded rehabilitative efforts; and second, it
9 created fears that the duplication of benefits would lead to an erosion of
10 state workers' compensation programs. Hearings on H.E. 6675 Before
11 the Senate Comm. on Finance, 89th Cong., 1st Sess. 252, 259, 366,
12 540, 738-40, 892-97, 949-54, 990 (1965).

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

19 ...However, because Social Security disability payments are less than
20 80% of a workers' pre-disability income the system which resulted after
21 the 1965 amendment did encourage workers to pursue state worker's
22 compensation as well as federal Social Security."
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25 This history recited in the Freeman case is significant when the federal government is taking the
26 offset, but it does not tell the whole story for those states like Washington which enacted offset-
27 reversal statutes.
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30 42 USC §424a, permits the Social Security Administration to reduce disability benefits to
31 persons who are also receiving state workers' compensation periodic benefits. 42 USC § 424a(d)
32 provides that the reduction by the Social Security Administration shall not be taken "...if the
33 workmen's compensation law or plan under which periodic benefits is payable provides for the
34 reduction thereof..." This provision permits the states paying worker's compensation benefits to
35 effectively reverse the offset. By so doing, a state could reduce the dollars paid from funds
36 supported by employer premiums and cause the federal government to pay disabled workers the
37 full social security disability amounts which would be paid were they not receiving any periodic
38 workers' compensation benefits.
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43 Prior to 1975, persons who received temporary total or permanent total disability payments
44 under this state's Industrial Insurance Act and who also qualified to receive social security disability
45 benefits, were paid their full workers' compensation entitlement from the Department of Labor and
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1 Industries. Applying the offset reduction of 42 USC §424a, the Social Security Administration paid
2 a lesser amount to these individuals than would have been paid had those individuals not been
3 covered by the workers' compensation.
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5 In 1975, the state Legislature correctly perceived that fiscal benefits would inure to the state's
6 advantage by enacting RCW 51.32.220. By "reversing" the offset, it was envisioned that this state's
7 employers would realize considerable savings. Instead of having the state compensation fund pay
8 the lion's share of benefits, the offset reversal permitted the federal government with its larger tax
9 base to carry the greater financial burden.
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11 States capitalizing upon the offset reversal, however, must still maintain the legislative intent
12 of 42 USC § 424a. The purpose of Congress in requiring the reduction in benefits was to preclude
13 individuals from receiving excessive combined benefits for the same disability. Iglinsky v. Finch,
14 314 F. Supp. 425 (D. La. 1970), *aff'd*.433 F. 2d 405.
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16 In this appeal, Mr. Darbous argues that a worker whose periodic benefits are offset based on
17 calculations premised on initial date of entitlement of benefits would receive more each month than
18 a worker whose offset is based on benefit levels in effect on the date the reduction by offset is
19 commenced. Failure to permit this differential, Mr. Darbous contends, amounts to an
20 unconstitutional denial of equal protection of the laws contrary to the 14th Amendment of the
21 federal constitution.
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23 Because of our construction of provisions of RCW 51.32.220, we fail to agree that an issue of
24 constitutional proportions is presented by the facts relevant to Mr. Darbous' claim adjudication.
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26 The operative feature of RCW 51.32.220 is to permit the Department or self-insurer to reduce
27 periodic state benefits paid in lieu of wages (temporary total disability or permanent total disability
28 benefits) and permit the injured worker to receive his full entitlement of social security disability
29 income. The net effect to the worker was intended to result in no change of combined monthly
30 dollar benefits than if the federal government was taking the offset under 42 USC §424a. It is
31 critical that this agency preserve that net effect to Mr. Darbous.
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33 The legislature has, however, placed additional requirements on the taking of reductions by
34 offset authorized by the state statute. For example, the injured worker must cooperate to authorize
35 the release of information from the Social Security Administration to properly compute his or her
36 benefits. If this cooperation is not secured, the Department may estimate the amounts payable
37 under the federal act and that estimate will be considered to be correct until the worker cooperates,
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1 with no readjustment for any period of non-cooperation. Such almost happened in this case, as the
2 employer had to twice send a letter requesting an information release (in May and August 1980)
3 and did not receive a reply from Mr. Darbous until September 24, 1980. Rather than a signed
4 release, the reply included a copy of a benefits explanation letter to Mr. Darbous dated April 17,
5 1980 from the Social Security Administration.
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9 Another requirement is that reduction in benefit payments cannot be commenced until "the
10 month following the month in which the Department or self-insurer is notified by the federal Social
11 Security Administration" that the worker is receiving federal disability benefits. RCW 51.32.220(2).
12 It was this provision which was the foundation for the decision in the Proposed Decision and Order
13 in this case.
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16 Factually, we must agree that the stipulation by the parties contains no specific statement
17 that the Social Security Administration directly informed the self-insurer or the Department of Mr.
18 Darbous' qualification for federal benefits. This was due, as we see it, in no small part to Mr.
19 Darbous' fault as he failed to execute required release of information forms which were properly
20 requested of him. Instead, when faced in September 1980 with his employer's estimate of federal
21 benefit levels (which would have resulted in much lower worker's compensation benefits being
22 paid) Mr. Darbous immediately sent a copy of the letter he had received from the Social Security
23 Administration five months earlier. Apparently, he never did return the requested release of
24 information forms.
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30 Under such circumstances, we do not think the legislature would require blind and slavish
31 adherence to the precise language of the statute that the Department or self-insurer be notified
32 directly "by" the federal agency. It was perceived when the statute was drafted that the Social
33 Security Administration controlled the flow of information necessary to make offset calculations and
34 could provide that information more quickly than the claimant. However, both the worker and
35 employer were satisfied that the data communicated to Mr. Darbous in April, 1980 by the Social
36 Security Administration was reliable and accurate. Under such circumstances, we see no need to
37 engage the bureaucratic process any further, by requiring the parties to pretend they don't have
38 information until that same data is directly communicated to the Department or self-insurer by the
39 federal Social Security Administration.
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45 Once the information concerning receipt of federal disability benefits is received, the
46 Department or self-insurer may only seek recovery for overpayments for the immediately preceding
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1 six months. Thus, if it takes the Social Security Administration longer than six months to assemble
2 the required data and respond to this state's request for information, then the Department or self-
3 insurer will not be entitled to recover any of the "extra" benefits paid to the worker. Moreover, such
4 recovery can only be made from future benefit payments. That is, a worker cannot be required to
5 reimburse the Department (or the self-insured employer) in a lump sum from previous payments he
6 or she has received. Additionally, reductions cannot begin until "the month following the month" in
7 which the worker receives notice that the reduction in benefits is being made.
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11 We must note that in this appeal we have not been asked to determine the appropriateness
12 of recovering overpayments which may have been made to Mr. Darbous prior to October 1980, and
13 on that point we make no comment. We do note, however, that had Mr. Darbous been diligent in
14 his reply to his employer's letter of May 1980, requesting the release of information, the effective
15 month for implementing a reduction in benefits could have been June 1980 instead of October
16 1980.
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20 Beginning November 1978, Mr. Darbous became entitled to receive both time loss and social
21 security disability income benefits. His time-loss benefit was \$759.62 per month at that time. His
22 federal disability benefit was \$486.10 at that time. Had information regarding entitlement to federal
23 benefits been provided by the Social Security Administration as of November 1978, Mr. Darbous
24 would have received \$3,082.46 less in benefits from November 1978 through September 1980, and
25 his offset would have been computed based upon the November 1978 combined benefit levels.¹ In
26 addition to that sum, the claimant received federal disability "cost of living" increases and time-loss
27 adjustment increases based on the rise in this state's average monthly wage. Consequently, as of
28 October 1980, the "pure" benefit levels had increased to \$615.20 per month for social security
29 disability income and \$886.87 for time-loss benefits each month.
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37 ¹ Computed as follows:

38 80% average current earnings (maximum monthly benefit	
39 which Mr. Darbous can receive)	\$1,111.70
40 Less social security income benefit	<u>(486.10)</u>
41 Self-insured employer's time-loss payment obligation	625.60
42 Actual time loss paid commencing November 1978	759.62
43 Less actual time-loss obligation	<u>(625.60)</u>
44 Monthly benefit excess paid	\$ 134.02
45 23 months (November 1978 thru September 1980) x \$134.02 per month = \$3,082.46 in total "extra" benefits	

1 Had the reduction by offset commenced in November 1978, Mr. Darbous would have been
2 entitled to receive these incremental increases, as we see it, on top of the 80% average current
3 earnings "lid" imposed by federal law. The federal act provides at 42 USC § 424a(a)(7) and (8)
4 that:
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7 In no case shall the reduction in the total of such benefits under
8 Sections 423 and 402 of this Title for a month (in a continuous period of
9 months) reduce such total below and the sum of:

10 (7) The total of the benefits under Sections 423 and 402 of this Title,
11 after reduction under this section, with respect to all persons entitled to
12 benefits on the basis of such individual's wages and self-employment
13 income for such months which were determined for such individual and
14 such persons for the first month for which reduction under this section
15 was made per month = \$3,082.46 in total "extra" benefits(or which would
16 have been so determined if all of them had been so entitled in such first
17 month), and
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19 (8) Any increase in such benefits with respect to such individual and
20 such persons, before reduction under this section, which is made
21 effective for months after the first month for which reduction under this
22 section is made." (Emphasis added)
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24 It is difficult to imagine terminology to be any more confusing or cause any more obfuscation than
25 that quoted above. Nevertheless, we believe for our purposes the language is intended to mean
26 that Mr. Darbous gets to keep incremental benefit increases beyond the 80% average current
27 earnings "lid" which are made effective after October 1980. We do not believe the federal statute
28 directly speaks to the issue presented by this appeal which is, essentially, whether Mr. Darbous
29 gets to keep from October 1980 forward the increases in base benefit levels which accrued
30 between November 1978 and October 1980, that is, in the months before the first month in which
31 reduction by offset is made.
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36 Appeals which have previously reached this Board concerning other legal issues surrounding
37 the application of RCW 51.32.220 have caused the development of what we feel is a straight
38 forward approach to the resolution of legal disputes. Absent additional considerations imposed by
39 this state's statutes such as those mentioned above, that approach reduced to its barest terms is
40 simply: The worker ought to be placed in the same position when the Department or self-insurer
41 takes the offset as was the case when the Social Security Administration was taking the offset. We
42 understand the federal statute and federal administrative regulations provide that when the Social
43 Security Administration was taking the offset from workers in this state, that reduction of benefits by
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1 offset was only commenced in the month after the month the Social Security Administration was put
2 on notice that the worker was entitled to state workers' compensation benefits. We understand that
3 the benefit levels in effect during the month the Social Security administration was put on such
4 notice of entitlement were relied upon for computing the extent of offset.
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7 A rule requiring reference to benefit levels during the month the Department or self-insurer is
8 put on notice of entitlement or with due diligence would have been put on notice has several
9 advantages under this state's statutory scheme. First, in most cases it is simple to administratively
10 determine. Second, it encourages the Department or self-insurer to make early inquiry whether
11 collateral federal benefits were being applied for and received. During the waiting period, the
12 worker still receives all benefits to which he is rightfully entitled, even if he is receiving both federal
13 and state benefits. By encouraging early inquiry on entitlement to benefits and pegging the offset to
14 that level, the worker is entitled to keep future federal cost-of-living increases and state time-loss
15 compensation adjustments even though such increases may exceed 80% of the worker's "average
16 current earnings". Also, if a worker fails to cooperate by releasing information, he or she would be
17 subject to the Department's "estimate" of federal benefits and not be able to receive an adjustment
18 for the period of non-cooperation.
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21 In resolving this dilemma with fairness and equity, we must also keep in mind two significant
22 intents present in the federal and state legislation. First, there is the Congressional intent that the
23 benefit structure should not be designed to discourage workers from returning to gainful work as
24 early as they reasonably can. Second, there is the clear intent in this state's law (which must be
25 considered in conjunction with the Congressional intent) not to penalize this state's injured workers
26 because of bureaucratic delay.
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29 We believe that this state's statute which (1) prohibits the Department or self-insurer from
30 recovering overpayments in lump sums from past benefits paid, (2) requires overpayments to be
31 recovered from future benefits solely, and (3) limits recovery to the overpayments made in the six-
32 month period immediately preceding the date reductions begin, provides a sound and sufficient
33 assurance that an injured worker will not be penalized by bureaucratic delay. Similarly, it appears
34 that if benefit levels were fixed (for purposes of offset computations) as of the date of first eligibility
35 for both federal and state benefits (here, November 1978), the net result would permit not only the
36 keeping of excess payments during the information-gathering period, but could serve to discourage
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1 cooperation of an injured worker in releasing information, and may well discourage that worker's
2 motivation for physical or vocational rehabilitation to enable an early return to the work force.
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4 The ultimate question, then, in Mr. Darbous' appeal is: What was the date the self-insured
5 employer was placed or should have been placed on notice of Mr. Darbous' entitlement to federal
6 benefits such that the legislative intent permeating this state's offset scheme and the Congressional
7 intent embodied in federal law is also observed?
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10 According to the facts presented for our consideration, prior to May 1980, the employer, City
11 of Seattle, made no attempt to determine whether Mr. Darbous was applying for or receiving social
12 security disability benefits. Much less did it give the claimant notice of its intention to offset some of
13 its self-insured workers' compensation liability. Because of this delay, Mr. Darbous most certainly
14 reaps the benefit of receiving and keeping the major portion of both benefits unscathed by the offset
15 reductions.² Still, the claimant could have authorized release of information from the Social
16 Security Administration if so requested to do by his employer. Yet, that information presumably
17 was in fact not available until April 17, 1980, the date that Mr. Darbous was notified by the Social
18 Security Administration of his entitlement.
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24 We note from Exhibit No. 5 that notification of social security acceptance of a claim often
25 takes the form of a large "catch-up" check "in lieu of any other notice". Apparently even under
26 federal regulations the offset could not commence until the month following such acceptance. We
27 do not see that the situation should be any different here.
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30 As we have noted earlier, Mr. Darbous was less than diligent in replying to his employer's
31 letters of May 1980 and August 1980. Yet, despite this failure of cooperation and although it was
32 probably justified in acting earlier, the employer made no attempt to take advantage of that
33 provision of state law allowing an "estimate" of federal benefits until September 15, 1980.
34 Consequently, for that period after May 1980 the employer paid the full amount of workers'
35 compensation benefits until such time as an "estimate" was being made. Because the employer is
36 required to continue making such payments, it would seem that Mr. Darbous could fail to cooperate
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41 ² We purposely make no attempt to discern under the law if the social Security Administration
42 could offset its benefits by the time-loss payments being made by the self-insurer until such time as
43 the self-insurer acts to implement the offset for its own benefit. That issue is not before us and is
44 surely a subject of federal law and not this state's jurisdiction and authority.
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1 as he did with total impunity unless the offset were based on benefit levels in effect when the
2 "estimate" is made or when the actual and accurate offset was implemented. We do not believe
3 Mr. Darbous should be able to act with such impunity.
4

5 In sum, we hold that it was proper to compute the offset reduction permitted by RCW
6 51.32.220 by reference to the actual benefit levels in effect for time-loss payments and social
7 security disability income as of the month the reduction was first taken (October 1980) without
8 reference to the benefit levels in effect on the earliest possible date reduction could conceivably
9 have been taken. Insofar as the Department's order of December 17, 1980 complies with this
10 holding, that order is affirmed.
11

12 **FINDINGS OF FACT**

13 Findings No. 1 and 2 of the Proposed Decision and Order are hereby adopted, and in
14 addition thereto, the Board enters the following findings:
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- 16 3. Effective November 1978, the claimant was entitled to receive from the
17 Social Security Administration for social security disability income
18 benefits had he also not been receiving workers' compensation benefits,
19 \$486.10 per month. As of October 1980, his social security disability
20 benefit base had risen to \$615.20.
- 21 4. As of November 1978, the claimant's entitlement to temporary total
22 disability benefits from his self-insured employer had he not also been
23 entitled to receive social security disability benefits was equal to
24 \$759.62. As of October 1980, the claimant's adjusted time-loss benefit
25 independent of social security disability income resources had risen to
26 \$886.87.
- 27 5. For purposes of RCW 51.32.220, reduction by offset, the self-insurer in
28 September 1980 had been provided information from the Social Security
29 Administration through the claimant, sufficient to permit its
30 commencement of reduction by offset of time-loss benefits effective for
31 the month of October, 1980.
32

33 **CONCLUSIONS OF LAW**

- 34 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
35 and subject matter of this appeal.
- 36 2. For purposes of instituting the reduction of benefits by offset pursuant to
37 RCW 51.32.220, it is appropriate for the department or self-insurer to
38 use in its calculations of the current benefit entitlement of the claimant
39 for workers' compensation and social security disability insurance, the
40 benefit levels in effect as of the first month for which reduction is made.
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1 3. The order of the Department of Labor and Industries dated December
2 17, 1980 is in accord with the above- stated Conclusion No. 2, and is
3 correct, and should be affirmed.
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5 It is so ORDERED.

6 Dated this 29th day of March, 1982.

7 BOARD OF INDUSTRIAL INSURANCE APPEALS
8

9
10 /s/
11 MICHAEL L. HALL Chairman

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13 /s/
14 FRANK E. FENNERTY, JR. Member

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16 /s/
17 PHILLIP T. BORK Member
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