

## **Berlin, Evelyn**

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### **[SOCIAL SECURITY DISABILITY OFFSET \(RCW 51.32.220\)](#)**

#### **Cost of living increases (COLIs)**

Where no offset could be taken when the worker first became entitled to concurrent benefits because the combined state and federal benefits were less than 80 percent of the average current earnings, a future offset can only be taken in the event state cost of living increases have increased the combined benefits so that they exceed the 80 percent limit. Federal cost of living increases cannot be considered to increase combined benefits to the point where an offset can be taken. ...*In re Evelyn Berlin, BIA Dec., 86 3615 (1987)*

Scroll down for order.

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

1     **IN RE: EVELYN E. BERLIN**                     )  
2   )  
3     **CLAIM NO. G-702510**                     )     **DOCKET NO. 86 3615**  
4   )     **DECISION AND ORDER**

5 APPEARANCES:

6  
7             Claimant, Evelyn E. Berlin, by  
8             Gerald L. Casey

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10            Employer, Swains General Store, Inc.,  
11            None

12  
13            Department of Labor and Industries, by  
14            The Attorney General, per  
15            William R. Strange, Assistant

16  
17            This is an appeal filed by the claimant on October 8, 1986 from an order of the Department of  
18     Labor and Industries dated September 19, 1986 which affirmed a prior order of April 7, 1986 which  
19     reduced time- loss compensation to \$390.75 per month in accordance with RCW 51.32.220 because  
20     of disability benefits received from the Social Security Administration, to begin May 1, 1986, and  
21     demanded reimbursement for overpayment of previous awards for the six month period of December  
22     1, 1985 to April 30, 1986 inclusive in the amount of \$1,290.48.     **REVERSED AND REMANDED.**

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**DECISION**

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on March 11, 1987 in which the order of the Department dated September 19, 1986 was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed. We wish, however, to clarify the record with respect to the agreement in the parties' stipulation that "the Department letter from the claim of Velma McCann be admitted." No such document was ever received at the Board nor was it offered by either party at the hearing held on February 6, 1987 during which the parties agreed to the admission of Exhibits A through K and rested. As a consequence, that document is not part of the record before us.

This appeal presents the question of what dates should determine the level of state and federal benefits for purposes of calculating the reverse offset allowed pursuant to RCW 51.32.220. Ms. Berlin

1 contends that August 1975, the date of her initial entitlement to concurrent state and federal benefits,  
2 is the determinative date for both state and federal benefits. She further argues that no offset should  
3 be taken because, as of that date, the combined amount that she was receiving was less than 80% of  
4 her "average current earnings" and thus protected from offset by both RCW 51.32.220(1) and 42  
5 U.S.C. 424a. Her argument is based on her contention that state and federal cost of living increases  
6 accruing after the initial entitlement to concurrent benefits cannot be included in the level of benefits  
7 used in the offset computation. Thus she challenges the Department's calculation of the offset based  
8 on the state and federal benefit levels (including state and federal cost of living increases since August  
9 of 1975) as of May 1, 1986, the effective date of the offset.  
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12 Ms. Berlin filed a claim for worker's compensation benefits on February 25, 1975. Time-loss  
13 compensation benefits were commenced on March 7, 1975, retroactive to February 5, 1975. She did  
14 not begin receiving social security disability payments until July 1978, retroactive to August 1975. Her  
15 time-loss compensation had been terminated one year earlier, in July 1977, and her state claim was  
16 ultimately closed on April 22, 1980 without further award for time-loss compensation. She was entitled  
17 to concurrent state and federal periodic benefits from August 1975 to May 20, 1976 and again from  
18 April 22, 1977 through July 22, 1977.  
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20  
21 Ms. Berlin continued to receive monthly social security disability benefits and in February 1984  
22 filed an application to reopen her state claim for aggravation of condition. The Department denied that  
23 application, requiring Ms. Berlin to litigate the question of whether her claim should be reopened. She  
24 was ultimately successful and the claim was finally reopened on June 25, 1985, with time-loss  
25 compensation reinstated as of February 16, 1984. Thus Ms. Berlin again became entitled to  
26 concurrent state and federal periodic benefits. Due to state and federal cost of living increases  
27 subsequent to August 1975, her combined benefits now exceeded 80% of her average current  
28 earnings and effective May 1, 1986 the Department began to offset her time-loss compensation  
29 benefits based on the state and federal benefit levels as of that date.  
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32 The roles of state and federal cost of living increases in the offset computation must be  
33 addressed separately since different rules apply. It is clear that state cost of living increases are to be  
34 included in the offset computation. Indeed, the offset is to be recalculated whenever a state cost of  
35 living increase raises the state benefit level. 20 C.F.R. 404. 408(k); 70A Am Jur 2d ] 247. Two Social  
36 Security Administration rulings support this view. SSR 80-14; SSR 82- 68. In SSR 82-68 the Social  
37 Security Administration made the following policy statement:  
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1 "All increases in public disability benefits [state benefits] after offset is first  
2 considered or imposed should be considered in the computation of the  
3 DIB [federal benefits] reduction and will result in the imposition of an  
4 additional offset where appropriate. Although this issue was not  
5 specifically addressed in section 224 of the Act, it is consistent with the  
6 intent of Congress to limit combined public disability benefits and DIB.  
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8 Each subsequent increase in the public disability benefit after offset is  
9 imposed may result in a further reduction of Federal disability benefits."

10 SSR 82-68 at 895.

11  
12 The status of federal cost of living increases is not so clear. 42 U.S.C. § 424a(7) and (8)  
13 provide:  
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15 "In no case shall the reduction in the total of such benefits under sections  
16 223 and 202 [42 U.S.C.S. §§ 402 and 423] for a month (in a continuous  
17 period of months) reduce such total below the sum of the total of the  
18 benefits under sections 223 and 202 [42 U.S.C.S. §§ 402, 423], after  
19 reduction under this section, with respect to all persons entitled to benefits  
20 on the basis of such individual wages and self-employment income for  
21 such months which were determined for such individual and such persons  
22 for the first month for which reduction under this section was made (or  
23 which would have been so determined if all of them had been so entitled in  
24 such first month) and any increase in such benefits with respect to such  
25 individual and such persons, before reduction under this section, which is  
26 made effective for months after the first month for which reduction under  
27 this section is made."  
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29 This language would seem to protect federal cost of living increases subsequent to the date of first  
30 offset from further reduction.  
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32 In addition, however, 42 U.S.C. 424a(d) provides:

33 "The reduction of benefits required by this section shall not be made if the  
34 workmen's compensation law or plan under which a periodic benefit is  
35 payable provides for the reduction thereof when anyone is entitled to  
36 benefits under this title on the basis of the wages and self-employment  
37 income of an individual entitled to benefits under section 223 [42 U.S.C.S.  
38 § 423]." (Emphasis added)  
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40 Three jurisdictions have excluded federal cost of living increases entirely from the offset computation.  
41 The court in McClanathan v. Smith, 606 P.2d 507 (Mont. 1980) interpreted the language of section  
42 424a(d) as limiting the state offset to "benefits under section 423"(i.e., the primary insurance benefit)  
43 and as excluding all cost of living increases under 42 U. S. C. 415(i)(1). In Great Atlantic & Pacific  
44 Tea Co. v. Wood, 380 So. 2d 558 (Fla. 1980) the court construed state statutory language to exclude  
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1 federal cost of living increases from the offset computation. The applicable statutory language there  
2 was:  
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4 "However, this provision shall not operate to reduce an injured worker's  
5 benefits under this chapter to a greater extent than they would have  
6 otherwise been reduced under 42 U.S.C. paragraph 424(a)." Great  
7 Atlantic at 558.  
8

9 The third jurisdiction, Colorado, excluded federal cost of living increases based on a determination that  
10 the state statutory language permitting an offset based on "periodic disability benefits granted by the  
11 federal old-age survivors, and disability insurance act" did not include federal cost of living increases  
12 within the phrase "periodic disability benefits." Engelbrecht v. Hartford Acc. & Indem. 680 P. 2d 231  
13 (Colo. 1984).  
14

15 While somewhat persuasive, these decisions from other jurisdictions are obviously not binding  
16 precedent. Furthermore, there is somewhat conflicting authority to be found at 70A Am Jur 2d § 246  
17 which reads:  
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19 "Events occurring after the initial reduction may cause the Social Security  
20 benefits due a worker and his family to increase. The offset cannot serve  
21 to reduce any such increase which occurs after the initial reduction. Thus,  
22 in any case where benefits are increased after the initial reduction, the  
23 amount of offset is not recalculated to take into account that increase. Any  
24 increase is simply added to what amount, if any, is payable. However, the  
25 Social Security Administration will not protect increases in Social Security  
26 benefits from offset if there is a new and separate workers' compensation  
27 award or a break in the worker's entitlement to workers' compensation  
28 benefits. If, for example, a worker received the full amount of  
29 compensation benefits due him and subsequently becomes entitled to  
30 workers' compensation benefits again because of a worsening in his  
31 condition, the SSA will recompute the offset, and any increases to that  
32 worker's Social Security disability benefits effective prior to the month  
33 offset is reimposed will not be protected." (Emphasis added)  
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37 For authority regarding the latter proposition, the Social Security Administration, Program Operations  
38 Manual System, § DI 00203.345 is cited.  
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40 We note that the appeal before us involves similar facts, i.e., reinstatement of state time-loss  
41 compensation benefits because of a worsening of condition. However, the example given at 70A Am  
42 Jur 2d § 246 also involves a distinguishing factor - prior to the break in workers' compensation benefits  
43 an offset had been taken. In the instant appeal, no offset could have been taken in August 1975 when  
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1 Ms. Berlin first became entitled to both state and federal benefits because her combined benefits did  
2 not exceed 80% of her "average current earnings" as required by 42 U.S.C. § 424a.  
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4 Exhibit I indicates that the Social Security Administration considered taking an offset at that  
5 time but concluded: "Your present workmens' compensation payments require no adjustment in your  
6 monthly social security benefits because of a recent change in the Washington State Workmens'  
7 Compensation Law." Despite the ambiguity of this language, it is clear that the Social Security  
8 Administration would have been entitled to take an offset retroactive to August 1975 if Ms. Berlin's  
9 combined benefits had been sufficient, which they were not.  
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11 This distinguishing factor is critical to our decision. For SSR 82-68 makes the following policy  
12 statement:  
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14 "Where offset was previously considered but not imposed because the  
15 combination of public disability benefits [state benefits] and DIB [federal  
16 benefits] did not exceed the 80 percent limit (or total family Social  
17 Security benefit, where applicable) such increases in the public disability  
18 benefit could, of course, result in the initial imposition of offset."  
19 (Emphasis added)  
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23 This is precisely the situation in the instant appeal. The import of this policy statement is clear. Where  
24 no offset could be taken when the worker first became entitled to concurrent benefits because the  
25 combined state and federal benefits were less than 80% of the average current earnings, a future  
26 offset can only be taken in the event state cost of living increases have increased the combined  
27 benefits so that they exceed the 80% limit. Federal cost of living increases cannot be considered to  
28 increase combined benefits to the point where an offset can be taken.  
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32 For all of the foregoing reasons we therefore conclude that the Department should have  
33 computed the reverse offset pursuant to RCW 51.32.220 based on the social security benefit level of  
34 August of 1975, excluding subsequent federal cost of living increases, and based on the state  
35 time-loss compensation benefit level of May 1, 1986, including state cost of living increases which had  
36 accrued since August of 1975. We leave it to the Department to determine whether and when, based  
37 on those benefit levels, an offset can in fact be taken.  
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#### 41 **FINDINGS OF FACT**

- 42
- 43 1. On February 25, 1975 Evelyn E. Berlin filed an accident report with the  
44 Department of Labor and Industries alleging that she had sustained an  
45 injury during the course of her employment with Swains General Store on  
46 February 5, 1975. The claim was allowed and on April 22, 1980 the  
47 Department issued an order closing the claim with a permanent partial

1 disability award equal to 10% as compared to total bodily impairment and  
2 with time- loss compensation as paid through July 22, 1977.

3  
4 On February 28, 1984 the claimant filed an application to reopen her claim  
5 for aggravation of condition and on June 25, 1985, after litigation, the  
6 Department issued an order reopening the claim effective February 16,  
7 1984. On April 7, 1986 the Department of Labor and Industries issued an  
8 order reducing the claimant's time-loss compensation payments to  
9 \$390.75 per month in accordance with RCW 51.32.220 because of  
10 disability benefits received from the Social Security Administration, to  
11 begin May 1, 1986, and demanding reimbursement of an overpayment of  
12 previous awards for the six month period of December 1, 1985 to April 30,  
13 1986 inclusive, in the amount of \$1,290.48.

14 On April 8, 1986 and April 10, 1986 the Department issued further orders  
15 adjusting claimant's rate of time-loss compensation for periods through  
16 April 30, 1986. On May 7, 1986 claimant filed a protest and request for  
17 reconsideration to the Department's orders dated April 7, 1986, April 8,  
18 1986 and April 10, 1986. On August 11, 1986 the Department issued an  
19 order closing the claim with no additional permanent partial disability  
20 award and an order adhering to the provisions of the Department's order  
21 dated April 7, 1986.

22 On August 29, 1986 claimant filed a notice of appeal with the Board of  
23 Industrial Insurance Appeals from the Department orders dated August  
24 11, 1986. This appeal was docketed under Docket No. 86 3121. On  
25 September 11, 1986 the Board issued an order returning the case to the  
26 Department for further action and on the same date the Department  
27 issued an order holding its order of August 11, 1986 in abeyance.

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29 On September 15, 1986 the Department issued an order setting aside and  
30 holding for naught the Department order dated August 11, 1986 closing  
31 the claim. On September 19, 1986 the Department issued an order  
32 affirming its order dated April 7, 1986.

33 On October 8, 1986 the Board received a notice of appeal from the  
34 claimant from the Department order dated September 19, 1986 which was  
35 assigned Docket No. 86 3614. On October 23, 1986 the Board issued an  
36 order granting the appeal and directing that hearings be held on the issues  
37 raised by the appeal.

- 38  
39 2. Evelyn Berlin sustained an industrial injury on February 5, 1975 while in  
40 the course of her employment with Swains General Store. The claim was  
41 allowed and benefits were provided, including time-loss compensation  
42 which was paid for the periods of February 5, 1975 through May 20, 1976  
43 and for the period of April 22, 1977 through July 26, 1977. The claim was  
44 closed on April 22, 1980 with time-loss compensation as paid.
- 45 3. On July 3, 1978 the Social Security Administration determined that  
46 claimant was entitled to social security disability benefits, retroactive to  
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1 August 1975, with an initial monthly payment of \$198.60. The Social  
2 Security Administration had notice of claimant's entitlement to concurrent  
3 state time- loss compensation benefits and considered taking an offset  
4 pursuant to 42 U.S.C. § 424a. However, as of August 1975, when  
5 claimant first became entitled to concurrent state time-loss compensation  
6 and federal social security disability benefits, the combined total of those  
7 benefits was less than 80% of her average current earnings (\$11,606.25)  
8 and no offset could be taken.

- 9
- 10 4. Ms. Berlin has continued to receive periodic monthly social security  
11 disability benefits since August 1975, along with associated cost of living  
12 increases.
- 13 5. On June 25, 1985, Ms. Berlin's state claim was reopened effective  
14 February 16, 1984 because of worsening of her condition. Time-loss  
15 compensation was recommenced as of February 16, 1984 and was paid  
16 continuously through May 1, 1986.
- 17 6. Claimant's time-loss compensation payments have increased due to cost  
18 of living increases since the initial date of entitlement, February 5, 1975.

19

20 **CONCLUSIONS OF LAW**

- 21 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties  
22 and subject matter of this appeal.
- 23 2. In determining if any reduction applies to Ms. Berlin's time-loss  
24 compensation benefits pursuant to RCW 51.32.220 and the amount of any  
25 such reduction, the Department must use the amount of social security  
26 disability benefits which were paid to the claimant in August of 1975,  
27 \$198.60, exclusive of subsequent cost of living increases, and the  
28 time-loss compensation rate being paid as of May 1, 1986.
- 29 3. The order of the Department of Labor and Industries dated September 19,  
30 1986 is incorrect and must be reversed and the claim remanded to the  
31 Department with directions to recalculate the reduction being made  
32 pursuant to RCW 51.32.220 based upon social security disability  
33 insurance benefits in the amount of \$198.60, exclusive of cost of living  
34 increases subsequent to August of 1975, and the time-loss compensation  
35 rates being paid as of May 1, 1986 and issue a further order with respect  
36 to the amount, if any, of any offset pursuant to RCW 51.32.220.

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38 It is so ORDERED.

39 Dated this 5th day of October, 1987.

40 BOARD OF INDUSTRIAL INSURANCE APPEALS

41  
42 /s/  
43 SARA T. HARMON Chairperson

44 /s/  
45 FRANK E. FENNERTY, JR. Member

46 /s/  
47 PHILLIP T. BORK Member