Hansen, Frank

RETROACTIVITY OF STATUTORY AMENDMENTS

Social security retirement offset (RCW 51.32.225)

The social security retirement offset of RCW 51.32.225 applies to persons injured before its effective date. *Ashenbrenner* rule, that the law in effect on the date of injury will control the rights of the worker, is simply a presumption which the courts will apply in the absence of legislative intent to the contrary. Retirement offset exemption contained in RCW 51.32.225(1) only excludes from application of the offset those persons "receiving permanent total disability benefits prior to July 1, 1986." ***….In re Frank Hansen*, BIIA Dec., 87 1408 (1989)** [dissent]; ***In re Lois Oakley*, BIIA Dec., 87 3830 (1989)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 89-2-00991-7.]

SOCIAL SECURITY RETIREMENT OFFSET (RCW 51.32.225)

Applicability

Persons not actually receiving permanent total disability benefits on June 30, 1986 (*i.e.*, actually on the pension rolls) are subject to the social security retirement offset. ***….In re Frank Hansen*, BIIA Dec., 87 1408 (1989)** [dissent]; ***In re Lois Oakley*, BIIA Dec., 87 3830 (1989)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 89-2-00991-7.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FRANK A. HANSEN	)	**DOCKET NO. 87 1408**
	)	
CLAIM NO. S-257154	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Frank A. Hansen, by
Curran, Thompson & Pontarolo, P.S., per
Robert H. Thompson, Jr.

Self-Insured Employer, URM Stores Incorporated, by
Underwood, Campbell, Brock and Ceruti P.S., per
Stephen R. Matthews

Department of Labor and Industries, by
The Attorney General, per
Donald R. Verfurth, Assistant

This is an appeal filed by the self-insured employer on May 1, 1987 from an order of the Department of Labor and Industries dated March 27, 1987 which adhered to the provisions of an order dated January 14, 1987. The order dated January 14, 1987 corrected and superseded an order dated September 30, 1986, and stated:

> WHEREAS, the above claimant sustained an injury while in the employ of URM Stores Inc., a self- insurer, and
>
> WHEREAS, it has been determined that the claimant's condition resulting from this injury has reached a fixed state and that the injury has resulted in total and permanent disability, which condition existed on or prior to June 30, 1986, and
>
> THEREFORE IT IS ORDERED that the claimant be so classified and placed on the pension rolls effective October 23, 1986;
>
> In accordance with RCW 51.36.010, no coverage of treatment may extend beyond the date an injured worker is placed on the permanent pension rolls.

By orders dated September 30, 1986 the Department had placed the claimant on the pension rolls effective October 23, 1986 with a reduced pension payment by an offset for social security benefits. The Department order is **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the Department of Labor and Industries to a Proposed Decision and Order issued on September 16, 1988 in which the order of the Department dated March 27, 1987 was reversed and this claim remanded to the Department with instructions to issue an order placing the claimant, Frank A. Hansen, on the pension rolls effective October 23, 1986, and offsetting his worker's compensation total permanent disability benefits against any social security retirement benefits received or payable.

This appeal, along with over 100 companion cases, concerns section 5 of Substitute House Bill 1875 (Laws of 1986, ch. 59,] 5, p. 204), codified as RCW 51.32.225, and the effect it may or may not have on a worker's right to receive temporary or permanent total disability benefits without offset for social security retirement benefits. The relevant portion of RCW 51.32.225 states:

> REDUCTION OF COMPENSATION FOR TEMPORARY OR PERMANENT TOTAL DISABILITY--OFFSET FOR SOCIAL SECURITY RETIREMENT BENEFITS
>
> (1) For persons receiving compensation for temporary or permanent total disability under this title, the compensation shall be reduced by the Department to allow an offset for social security retirement benefits payable under the federal social security, old age survivors, and disability insurance act, 42 U.S.C. <u>This reduction shall not apply to any worker who is receiving permanent total disability benefits prior to July 1, 1986.</u>

(Emphasis added)

In this appeal the parties have stipulated to admission of an exhibit containing the historical and jurisdictional facts of the claim. These establish that Mr. Hansen sustained an industrial injury prior to July 1, 1986, the effective date of the statute. Mr. Hansen was determined to be permanently totally disabled prior to July 1, 1986 by an order issued after July 1, 1986. The order placed him on the pension rolls effective October 23, 1986 but did not take the social security retirement offset. The parties have stipulated that Mr. Hansen was permanently totally disabled prior to July 1, 1986. However, the employer contends that since Mr. Hansen was not receiving permanent total disability benefits prior to July 1, 1986, his benefits should be subject to the social security retirement offset of RCW 51.32.225.

Mr. Hansen argues that it is a longstanding principle in this state that the benefits to which an injured worker is entitled are established by the law in effect on the date of the industrial injury.

Ashenbrenner v. Department of Labor and Industries, 62 Wn.2d 22 (1963). Since he was injured prior to July 1, 1986 (the effective date of the statute) he contends that the social security retirement offset of RCW 51.32.225 is not applicable to his claim. However, the more accurate description of the holding in Ashenbrenner is that a statute will not be held to apply retrospectively in the absence of language clearly indicating such a legislative intent. The "Ashenbrenner rule", that the law in effect on the date of injury will control the rights of the worker, is simply a presumption which the courts will apply in the absence of legislative intent to the contrary.

While Ashenbrenner is case authority that the date of injury ordinarily determines the level of benefits payable to the worker, it also stands for the proposition that the Legislature is presumed to be familiar with the rules, prior legislation, and prior court decisions pertaining both to the prospective and to the retrospective effect of legislation. Ashenbrenner, at 27. The Legislature is therefore presumed to have known that unless it included special language, the social security retirement offset would apply only to those individuals who were injured after the effective date of the statute. By including the last sentence of RCW 51.32.225(1) -- which we will refer to as the retirement offset exemption -- the Legislature has expressed the intention that the social security retirement offset will apply to persons not "receiving permanent total disability benefits prior to July 1, 1986." That language, quite obviously, would include persons injured prior to July 1, 1986. Because the language of RCW 51.32.225 contemplates retrospective application, the Ashenbrenner presumption does not apply. The statute clearly applies to the claims of persons injured before its effective date.[1]

The real issues presented in this case are: (1) what does it mean to be "receiving" permanent total disability benefits prior to July 1, 1986?; (2) does the Legislature's attempt to reduce the temporary and permanent total disability benefits of a worker injured prior to the effective date of the statute involve a deprivation of some vested right?; (3) does the legislation entail some unconstitutional impairment of contract?; and (4) does the legislation involve a denial of equal protection? Issues 2, 3, and 4 pertain to the question of the constitutionality of RCW 51.32.225. It is long settled that the Board does not have the authority to declare an act of the Legislature unconstitutional. See Bare v. Gorton, 84 Wn.2d 380 (1974). We will therefore assume that RCW

[1] The statute is retrospective only in the sense that it applies to persons injured before its effective date. However, it is prospective in the sense that it does not purport to allow the Department to apply the social security retirement offset against benefits due for periods prior to July 1, 1986.

51.32.225 is constitutional and not decide those issues. The issue which we will address concerns the meaning of the language "receiving permanent total disability benefits prior to July 1, 1986."

We must remain mindful that in construing RCW 51.32.225 our objective is to ascertain and give effect to the Legislature's intent. In re Eaton, 110 Wn.2d 892, 898 (1988). However, if the statute is not ambiguous, the meaning of the statute must be derived solely from the language of the statute itself. Id. Where the language of the statute is clear, its plain meaning must be given effect without resort to rules of statutory construction. Murphy v. Department of Licensing, 28 Wn. App. 620 (1981).

From our reading of the statute the meaning of the phrase "receiving permanent total disability benefits prior to July 1, 1986" is clear and unambiguous. To determine who is exempt from the social security retirement offset we believe the Department need look no further than the list of persons on the permanent total disability pension rolls on June 30, 1986. On that date the Department knew or, could have determined readily, which workers were exempt from the new offset. Persons not actually receiving permanent total disability benefits on that date are subject to the retirement offset.

We believe our interpretation is consistent with the plain meaning of the word "receiving." The applicable dictionary definition of "receive" is "to come into possession of: ACQUIRE." Webster's Third New International Dictionary 1894 (1986). Clearly, a worker who was not placed on the pension rolls until after July 1, 1986 had not "come into possession of" permanent total disability benefits prior to that date. This would be true even if his or her initial award included payment of permanent total disability benefits retroactive to a date prior to July 1, 1986.

Mr. Hansen and the Department contend that since Mr. Hansen was determined to be permanently and totally disabled "on or prior to June 30, 1986" he falls within the social security retirement offset exemption. This interpretation of RCW 51.32.225 is certainly not one which we feel is supported by the plain language of the statute. Had the Legislature intended such a construction, it could have easily included language to exempt from the retirement offset those workers receiving, or subsequently determined eligible to receive, permanent total disability benefits beginning on or prior to June 30, 1986. Yet such language was not included in the statute. From this we conclude that the Legislature intended precisely the result created by the language it used.

In light of the clear language of the statute, we feel it is unnecessary, and perhaps inappropriate, to resort to a review of legislative history in order to determine what was intended by the Legislature. In any event, there is nothing in the legislative history of RCW 51.32.225 which suggests that the Legislature intended any meaning other than that which we have discerned from the plain

language of the statute itself.[2] However, if resort is made to the rules of statutory construction, one such rule is to look to similar legislation on a related subject. See Sayan v. United Services Automobile Association, 43 Wn. App. 148, 154 (1986).

Prior legislation regarding the social security disability offset involved the 1982 amendment to RCW 51.32.220(1). Laws of 1982, ch. 63, § 19. The 1982 amendment raised the age limit for the disability offset from age 62 to age 65. The Legislature further provided that the change in the law "shall apply with respect to workers whose effective entitlement to total disability compensation begins after January 1, 1983." RCW 51.32.220(7). Thus a person placed on the pension rolls after January 1, 1983, but effective a date prior to January 1, 1983, would be exempt from the expanded disability offset.

If the Legislature had intended the social security retirement offset exemption to be similarly applied to workers who, although permanently and totally disabled prior to July 1, 1986, were not placed on the pension rolls until after July 1, 1986, it could have used the "effective entitlement" language used in RCW 51.32.220(7). The use of certain language in one instance, and different language in another, connotes a difference in legislative intent. United Parcel Service v. Department of Revenue, 102 Wn.2d 355, 362 (1984). Since it did not use the "effective entitlement" language in RCW 51.32.225(1), we must conclude that the Legislature intended that workers would be subject to the retirement offset if they were not, in fact, receiving permanent total disability compensation prior to July 1, 1986.

It has been argued that because the Department of Labor and Industries' policy differs from our reading of RCW 51.32.225, we should defer to the Department's interpretation.[3] The Department's

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[2] We note that after the Substitute House Bill was read the second time in the House on February 12, 1986 Representative McMullen asked the following question: "Representative Wang: I'm concerned that we are changing the rules in midstream on certain people. Section 5 is dealing with retired people. Is it the intent of this legislation that it would only apply to the people who apply to reopen their claims after the effective date of this act and not before?" Mr. Wang responded: "Yes, Representative McMullen, that is correct." Our review of the bill, the House Bill Report and House Bill Analysis leads us to conclude that in his question Mr. McMullen intended to reference the new sub-section, 17 of Section 1, rather than Section 5 of SHB 1875. Under sub-section 17, of Section if the Supervisor of Industrial Insurance determines that the worker is voluntarily retired and no longer attached to the work force, benefits should not be paid under Section 1. It applies "in the case of new or reopened claims." In contrast, the House Bill Report and the House Bill Analysis specifically suggest that the social security retirement offset "will not apply to workers who are receiving pensions prior to the effective date of the act." There is nothing in the House Bill Report, the House Bill Analysis, or in the language of the bill itself which would indicate any intent that the social security retirement offset would only apply to "the people who apply to reopen their claims after the effective date of this act."

[3] The Department policy was not made part of the record in this appeal. It is referenced as an attachment to the claimant's Memorandum of Authorities dated February 5, 1988, but it is not so attached. In this case, however, the Department policy is evidenced by the fact it was obviously applied in this case.

policy is that the social security retirement offset will not be applied if it is determined that the worker's condition was fixed, and that permanent and total disability existed on or prior to June 30, 1986, and if orders paying temporary total disability benefits for periods subsequent to that date have not become final and binding at the time of the pension determination. However, the rule of construction suggesting that we defer to administrative interpretation only comes into play if it is determined that a statute is ambiguous. Lee v. Jacobs, 81 Wn.2d 937, 940 (1973). We do not believe the statute is ambiguous. Furthermore, the fact the Department and Mr. Hansen may argue for a different interpretation does not make the statute ambiguous. Armstrong v. Safeco Insurance Co., 111 Wn.2d 784, 790 (1988). We note also that the Department has not adopted any rules, having the force and effect of law, which could be considered a binding interpretation of the statute. See Weyerhaeuser Company v. Cowlitz County, 109 Wn.2d 363, 371-372 (1987). The fact that the Department may have an informal policy which differs from the unambiguous language of the statute is, therefore, of no persuasive value in determining legislative intent.

In summary, as indicated in the Proposed Decision and Order, the Legislature has the authority to limit or terminate the rights to benefits under the Industrial Insurance Act. All rights accruing to an injured worker are statutory rights and as such they are not constitutionally protected against change or abrogation. Those rights in effect at the time of a worker's injury may be affected by legislative action at any time. Mattson v. Department of Labor and Industries, 176 Wash. 345 (1934), aff'd, 293 U.S. 151 (1934). The Legislature has clearly and definitively set July 1, 1986 as the cut- off date for the social security retirement offset exemption. Those workers who were receiving permanent total disability benefits prior to that date are exempt from the social security retirement offset. Those who were not are subject to that offset. While Mr. Hansen was, as a matter of fact, permanently and totally disabled prior to July 1, 1986, he was not receiving permanent total disability benefits prior to July 1, 1986. Thus, any benefits which Mr. Hansen receives subsequent to July 1, 1986 for temporary total disability or permanent total disability are subject to the social security retirement offset mandated by RCW 51.32.225.

After consideration of the Proposed Decision and Order and the Petitions for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law.

Proposed Findings of Fact Nos. 1 through 7 and Conclusions of Law Nos. 1 and 2 are hereby adopted as this Board's final Findings of Fact and Conclusions of Law and are incorporated herein by this reference. In addition, the Board makes the following additional Conclusion of Law:

CONCLUSIONS OF LAW

3. The order of the Department of Labor and Industries dated March 27, 1987 which adhered to the provisions of a Department order dated January 14, 1987 which determined that the claimant's condition resulting from the industrial injury had reached a fixed state and that the injury had resulted in total and permanent disability which existed on or prior to June 30, 1986 and ordered the claimant be placed on the pension rolls effective October 23, 1986 without requiring an offset for social security retirement benefits is incorrect and must be reversed and the claim remanded to the Department with instructions to issue an order determining that claimant's condition resulting from the industrial injury had reached a fixed state and that the injury had resulted in total and permanent disability which existed on or prior to June 30, 1986 and placing the claimant, Frank A. Hansen, on the pension rolls effective October 23, 1986, and offsetting any social security retirement benefits received by the claimant against any permanent total disability benefits as required by RCW 51.32.225.

It is so ORDERED.

Dated this 1st day of March, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
PHILLIP T. BORK Member

DISSENT

It is the majority's contention that the offset of social security retirement benefits contained in RCW 51.32.225 should apply to persons who were permanently and totally disabled prior to the effective date of the statute, but not placed on the pension rolls until a date subsequent to the effective date of the statute. While the wording in the statute may at first glance appear clear, the Department policies to which the statute relates must be considered.

It is not unusual for the Department of Labor and Industries to make a decision which necessitates pre-dating the effective date of pension benefits to a date sometime prior to the order awarding the pension. In a case involving a self-insured employer, for example, the employer handles the bulk of the administration regarding the claim. As a result, the self-insured employer is provided the specific information regarding the claim and the Department of Labor and Industries does not immediately have the full documentation it needs in order to make a just and equitable decision as to the worker's entitlement to permanent and total disability benefits.

Whether under a self-insured claim or a state fund claim, it is impossible for the Department of Labor and Industries to make an instantaneous decision regarding whether an individual is totally and permanently disabled as of a date certain. There must be, as a matter of course, time spent investigating the claim. While a few month's delay is to be expected when dealing with an administrative agency, procedures have been established in order to place an individual on the pension rolls retroactively so as not to penalize the worker for the Department of Labor and Industries' own delay. In any event, whether under self-insured or state fund claims, there are cases such as this where the worker can prove through medical or vocational testimony that he or she was indeed permanently and totally disabled on or before June 30, 1986.

This retroactive procedure necessary in pension administration does not detrimentally affect Mr. Hansen unless the literal interpretation of RCW 51.32.225 is applied. The majority of this Board would have him penalized for the delay of the Department of Labor and Industries in adjudicating his entitlement to pension benefits. Applying this literal reading of the statute would allow the self- insured employer or the Department to dictate whether or not the social security offset provisions of this statute should apply to a particular worker. Certainly it is not the intent of the industrial insurance laws of the State of Washington to treat those individuals differently who were placed on the pension rolls after July 1, 1986 only because of delay in administering their claims.

The literal reading of the statute also requires different treatment of those individuals who are forced to litigate their entitlement to pension benefits from those who are originally awarded a pension without the need to litigate. In this scenario, if a worker is forced to litigate the entitlement to a pension and the litigation in any way extends beyond the July 1, 1986 effective date of RCW 51.32.225, the offset will be applied to the pension benefits even if it is found he or she should have been receiving a pension prior to July 1, 1986. On the other hand, the worker originally awarded a pension prior to July 1, 1986 and not forced to litigate, will not have the offset applied. Once again, certainly it is not the

intent of the industrial insurance laws of the State of Washington to compensate workers differently based on whether or not they were required to exercise their appeal rights, as contained in RCW 51.52.

The majority argues that there is no ambiguity in the language of the statute. However, the Department's own interpretation of the statute belies the lack of any ambiguity. The Department's own policy in administering the statute provides that if a claimant was entitled to a pension before July 1, 1986 then the offset will not be applied to reduce his or her monthly compensation. It's hard to believe that the statute could not be considered ambiguous when the agency which must administer the statute has an interpretation that differs from the majority of this Board. Finally, when a statute is ambiguous, the construction placed upon it by the agency charged with its administration is entitled to considerable weight. Bradley v. Department of Labor and Industries, 52 Wn.2d 780 (1958). At the very least RCW 51.32.225 must be interpreted in light of the administrative procedures used to make pension determinations.

I believe the Act must be liberally construed in order to achieve its purpose of providing compensation, with doubts resolved in favor of the worker. Dennis v. Department of Labor and Industries, 109 Wn.2d 467, 470 (1987). Justice and fairness require that all workers be treated equally and not penalized due to delay in decision making by the Department of Labor and Industries or self-insured employers. Therefore, where the worker is found permanently totally disabled prior to July 1, 1986 -- as is the case here -- his or her pension benefits should not be offset by social security retirement benefits.

Finally, it has been argued that this legislation is unconstitutional because it reduces benefits retrospectively and without regard to the long established principle that the date of injury controls the level of a worker's benefits. See Ashenbrenner v. Department of Labor and Industries, 62 Wn.2d 22 (1963). Though it appears to me that those arguments are also meritorious, the Board does not have the authority to declare an act of the Legislature unconstitutional. It will be incumbent upon the courts to rectify the unconstitutional compromise of the rights of this worker inflicted by RCW 51.32.255.

Board of Industrial Insurance Appeals, State of Washington

/s/_____
FRANK E. FENNERTY, JR. Member