

## Hansen, Frank

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### 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**

<b>IN RE: FRANK A. HANSEN</b>	)	<b>DOCKET NO. 87 1408</b>
	)	
<u><b>CLAIM NO. S-257154</b></u>	)	<b>DECISION AND ORDER</b>

**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 The order dated January 14, 1987 corrected and superseded an order dated September 30, 1986, and stated: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**.

1 **DECISION**

2 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
3 and decision on timely Petitions for Review filed by the claimant and the Department of Labor and  
4 Industries to a Proposed Decision and Order issued on September 16, 1988 in which the order of the  
5 Department dated March 27, 1987 was reversed and this claim remanded to the Department with  
6 instructions to issue an order placing the claimant, Frank A. Hansen, on the pension rolls effective  
7 October 23, 1986, and offsetting his worker's compensation total permanent disability benefits against  
8 any social security retirement benefits received or payable.  
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10 This appeal, along with over 100 companion cases, concerns section 5 of Substitute House Bill  
11 1875 (Laws of 1986, ch. 59, ] 5, p. 204), codified as RCW 51.32.225, and the effect it may or may not  
12 have on a worker's right to receive temporary or permanent total disability benefits without offset for  
13 social security retirement benefits. The relevant portion of RCW 51.32.225 states:  
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15 **REDUCTION OF COMPENSATION FOR TEMPORARY OR**  
16 **PERMANENT TOTAL DISABILITY--OFFSET FOR SOCIAL SECURITY**  
17 **RETIREMENT BENEFITS**

- 18 (1) For persons receiving compensation for temporary or permanent total  
19 disability under this title, the compensation shall be reduced by the  
20 Department to allow an offset for social security retirement benefits  
21 payable under the federal social security, old age survivors, and disability  
22 insurance act, 42 U.S.C. This reduction shall not apply to any worker who  
23 is receiving permanent total disability benefits prior to July 1, 1986.  
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30 (Emphasis added)

31 In this appeal the parties have stipulated to admission of an exhibit containing the historical and  
32 jurisdictional facts of the claim. These establish that Mr. Hansen sustained an industrial injury prior to  
33 July 1, 1986, the effective date of the statute. Mr. Hansen was determined to be permanently totally  
34 disabled prior to July 1, 1986 by an order issued after July 1, 1986. The order placed him on the  
35 pension rolls effective October 23, 1986 but did not take the social security retirement offset. The  
36 parties have stipulated that Mr. Hansen was permanently totally disabled prior to July 1, 1986.  
37 However, the employer contends that since Mr. Hansen was not receiving permanent total disability  
38 benefits prior to July 1, 1986, his benefits should be subject to the social security retirement offset of  
39 RCW 51.32.225.  
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45 Mr. Hansen argues that it is a longstanding principle in this state that the benefits to which an  
46 injured worker is entitled are established by the law in effect on the date of the industrial injury.  
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1 Ashenbrenner v. Department of Labor and Industries, 62 Wn.2d 22 (1963). Since he was injured  
2 prior to July 1, 1986 (the effective date of the statute) he contends that the social security retirement  
3 offset of RCW 51.32.225 is not applicable to his claim. However, the more accurate description of the  
4 holding in Ashenbrenner is that a statute will not be held to apply retrospectively in the absence of  
5 language clearly indicating such a legislative intent. The "Ashenbrenner rule", that the law in effect on  
6 the date of injury will control the rights of the worker, is simply a presumption which the courts will  
7 apply in the absence of legislative intent to the contrary.  
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11 While Ashenbrenner is case authority that the date of injury ordinarily determines the level of  
12 benefits payable to the worker, it also stands for the proposition that the Legislature is presumed to be  
13 familiar with the rules, prior legislation, and prior court decisions pertaining both to the prospective and  
14 to the retrospective effect of legislation. Ashenbrenner, at 27. The Legislature is therefore presumed  
15 to have known that unless it included special language, the social security retirement offset would  
16 apply only to those individuals who were injured after the effective date of the statute. By including the  
17 last sentence of RCW 51.32.225(1) -- which we will refer to as the retirement offset exemption -- the  
18 Legislature has expressed the intention that the social security retirement offset will apply to persons  
19 not "receiving permanent total disability benefits prior to July 1, 1986." That language, quite obviously,  
20 would include persons injured prior to July 1, 1986. Because the language of RCW 51.32.225  
21 contemplates retrospective application, the Ashenbrenner presumption does not apply. The statute  
22 clearly applies to the claims of persons injured before its effective date.<sup>1</sup>  
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30 The real issues presented in this case are: (1) what does it mean to be "receiving" permanent  
31 total disability benefits prior to July 1, 1986?; (2) does the Legislature's attempt to reduce the  
32 temporary and permanent total disability benefits of a worker injured prior to the effective date of the  
33 statute involve a deprivation of some vested right?; (3) does the legislation entail some  
34 unconstitutional impairment of contract?; and (4) does the legislation involve a denial of equal  
35 protection? Issues 2, 3, and 4 pertain to the question of the constitutionality of RCW 51.32.225. It is  
36 long settled that the Board does not have the authority to declare an act of the Legislature  
37 unconstitutional. See Bare v. Gorton, 84 Wn.2d 380 (1974). We will therefore assume that RCW  
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44 <sup>1</sup> The statute is retrospective only in the sense that it applies to persons injured before its effective date. However,  
45 it is prospective in the sense that it does not purport to allow the Department to apply the social security retirement offset  
46 against benefits due for periods prior to July 1, 1986.  
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1 51.32.225 is constitutional and not decide those issues. The issue which we will address concerns the  
2 meaning of the language "receiving permanent total disability benefits prior to July 1, 1986."  
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4 We must remain mindful that in construing RCW 51.32.225 our objective is to ascertain and  
5 give effect to the Legislature's intent. In re Eaton, 110 Wn.2d 892, 898 (1988). However, if the statute  
6 is not ambiguous, the meaning of the statute must be derived solely from the language of the statute  
7 itself. Id. Where the language of the statute is clear, its plain meaning must be given effect without  
8 resort to rules of statutory construction. Murphy v. Department of Licensing, 28 Wn. App. 620 (1981).  
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10 From our reading of the statute the meaning of the phrase "receiving permanent total disability  
11 benefits prior to July 1, 1986" is clear and unambiguous. To determine who is exempt from the social  
12 security retirement offset we believe the Department need look no further than the list of persons on  
13 the permanent total disability pension rolls on June 30, 1986. On that date the Department knew or,  
14 could have determined readily, which workers were exempt from the new offset. Persons not actually  
15 receiving permanent total disability benefits on that date are subject to the retirement offset.  
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18 We believe our interpretation is consistent with the plain meaning of the word "receiving." The  
19 applicable dictionary definition of "receive" is "to come into possession of: ACQUIRE." Webster's  
20 Third New International Dictionary 1894 (1986). Clearly, a worker who was not placed on the pension  
21 rolls until after July 1, 1986 had not "come into possession of" permanent total disability benefits prior  
22 to that date. This would be true even if his or her initial award included payment of permanent total  
23 disability benefits retroactive to a date prior to July 1, 1986.  
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26 Mr. Hansen and the Department contend that since Mr. Hansen was determined to be  
27 permanently and totally disabled "on or prior to June 30, 1986" he falls within the social security  
28 retirement offset exemption. This interpretation of RCW 51.32.225 is certainly not one which we feel is  
29 supported by the plain language of the statute. Had the Legislature intended such a construction, it  
30 could have easily included language to exempt from the retirement offset those workers receiving, or  
31 subsequently determined eligible to receive, permanent total disability benefits beginning on or prior to  
32 June 30, 1986. Yet such language was not included in the statute. From this we conclude that the  
33 Legislature intended precisely the result created by the language it used.  
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36 In light of the clear language of the statute, we feel it is unnecessary, and perhaps  
37 inappropriate, to resort to a review of legislative history in order to determine what was intended by the  
38 Legislature. In any event, there is nothing in the legislative history of RCW 51.32.225 which suggests  
39 that the Legislature intended any meaning other than that which we have discerned from the plain  
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1 language of the statute itself.<sup>2</sup> However, if resort is made to the rules of statutory construction, one  
2 such rule is to look to similar legislation on a related subject. See Sayan v. United Services  
3 Automobile Association, 43 Wn. App. 148, 154 (1986).  
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5 Prior legislation regarding the social security disability offset involved the 1982 amendment to  
6 RCW 51.32.220(1). Laws of 1982, ch. 63, § 19. The 1982 amendment raised the age limit for the  
7 disability offset from age 62 to age 65. The Legislature further provided that the change in the law  
8 "shall apply with respect to workers whose effective entitlement to total disability compensation begins  
9 after January 1, 1983." RCW 51.32.220(7). Thus a person placed on the pension rolls after January  
10 1, 1983, but effective a date prior to January 1, 1983, would be exempt from the expanded disability  
11 offset.  
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13 If the Legislature had intended the social security retirement offset exemption to be similarly  
14 applied to workers who, although permanently and totally disabled prior to July 1, 1986, were not  
15 placed on the pension rolls until after July 1, 1986, it could have used the "effective entitlement"  
16 language used in RCW 51.32.220(7). The use of certain language in one instance, and different  
17 language in another, connotes a difference in legislative intent. United Parcel Service v. Department  
18 of Revenue, 102 Wn.2d 355, 362 (1984). Since it did not use the "effective entitlement" language in  
19 RCW 51.32.225(1), we must conclude that the Legislature intended that workers would be subject to  
20 the retirement offset if they were not, in fact, receiving permanent total disability compensation prior to  
21 July 1, 1986.  
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23 It has been argued that because the Department of Labor and Industries' policy differs from our  
24 reading of RCW 51.32.225, we should defer to the Department's interpretation.<sup>3</sup> The Department's  
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34 <sup>2</sup> We note that after the Substitute House Bill was read the second time in the House on February 12, 1986  
35 Representative McMullen asked the following question: "Representative Wang: I'm concerned that we are changing the  
36 rules in midstream on certain people. Section 5 is dealing with retired people. Is it the intent of this legislation that it would  
37 only apply to the people who apply to reopen their claims after the effective date of this act and not before?" Mr. Wang  
38 responded: "Yes, Representative McMullen, that is correct." Our review of the bill, the House Bill Report and House Bill  
39 Analysis leads us to conclude that in his question Mr. McMullen intended to reference the new sub-section, 17 of Section 1,  
40 rather than Section 5 of SHB 1875. Under sub-section 17, of Section if the Supervisor of Industrial Insurance determines  
41 that the worker is voluntarily retired and no longer attached to the work force, benefits should not be paid under Section 1.  
42 It applies "in the case of new or reopened claims." In contrast, the House Bill Report and the House Bill Analysis  
43 specifically suggest that the social security retirement offset "will not apply to workers who are receiving pensions prior to  
44 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  
45 itself which would indicate any intent that the social security retirement offset would only apply to "the people who apply to  
46 reopen their claims after the effective date of this act."  
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<sup>3</sup> 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.

1 policy is that the social security retirement offset will not be applied if it is determined that the worker's  
2 condition was fixed, and that permanent and total disability existed on or prior to June 30, 1986, and if  
3 orders paying temporary total disability benefits for periods subsequent to that date have not become  
4 final and binding at the time of the pension determination. However, the rule of construction  
5 suggesting that we defer to administrative interpretation only comes into play if it is determined that a  
6 statute is ambiguous. Lee v. Jacobs, 81 Wn.2d 937, 940 (1973). We do not believe the statute is  
7 ambiguous. Furthermore, the fact the Department and Mr. Hansen may argue for a different  
8 interpretation does not make the statute ambiguous. Armstrong v. Safeco Insurance Co., 111 Wn.2d  
9 784, 790 (1988). We note also that the Department has not adopted any rules, having the force and  
10 effect of law, which could be considered a binding interpretation of the statute. See Weyerhaeuser  
11 Company v. Cowlitz County, 109 Wn.2d 363, 371-372 (1987). The fact that the Department may have  
12 an informal policy which differs from the unambiguous language of the statute is, therefore, of no  
13 persuasive value in determining legislative intent.

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16 In summary, as indicated in the Proposed Decision and Order, the Legislature has the authority  
17 to limit or terminate the rights to benefits under the Industrial Insurance Act. All rights accruing to an  
18 injured worker are statutory rights and as such they are not constitutionally protected against change  
19 or abrogation. Those rights in effect at the time of a worker's injury may be affected by legislative  
20 action at any time. Mattson v. Department of Labor and Industries, 176 Wash. 345 (1934), aff'd, 293  
21 U.S. 151 (1934). The Legislature has clearly and definitively set July 1, 1986 as the cut- off date for  
22 the social security retirement offset exemption. Those workers who were receiving permanent total  
23 disability benefits prior to that date are exempt from the social security retirement offset. Those who  
24 were not are subject to that offset. While Mr. Hansen was, as a matter of fact, permanently and totally  
25 disabled prior to July 1, 1986, he was not receiving permanent total disability benefits prior to July 1,  
26 1986. Thus, any benefits which Mr. Hansen receives subsequent to July 1, 1986 for temporary total  
27 disability or permanent total disability are subject to the social security retirement offset mandated by  
28 RCW 51.32.225.

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

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

- 7 3. The order of the Department of Labor and Industries dated March 27,  
8 1987 which adhered to the provisions of a Department order dated  
9 January 14, 1987 which determined that the claimant's condition resulting  
10 from the industrial injury had reached a fixed state and that the injury had  
11 resulted in total and permanent disability which existed on or prior to June  
12 30, 1986 and ordered the claimant be placed on the pension rolls effective  
13 October 23, 1986 without requiring an offset for social security retirement  
14 benefits is incorrect and must be reversed and the claim remanded to the  
15 Department with instructions to issue an order determining that claimant's  
16 condition resulting from the industrial injury had reached a fixed state and  
17 that the injury had resulted in total and permanent disability which existed  
18 on or prior to June 30, 1986 and placing the claimant, Frank A. Hansen,  
19 on the pension rolls effective October 23, 1986, and offsetting any social  
20 security retirement benefits received by the claimant against any  
21 permanent total disability benefits as required by RCW 51.32.225.

22 It is so ORDERED.

23 Dated this 1st day of March, 1989.

24 BOARD OF INDUSTRIAL INSURANCE APPEALS

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29 /s/  
30 SARA T. HARMON Chairperson

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33 /s/  
34 PHILLIP T. BORK Member

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37 **DISSENT**

38 It is the majority's contention that the offset of social security retirement benefits contained in RCW  
39 51.32.225 should apply to persons who were permanently and totally disabled prior to the effective  
40 date of the statute, but not placed on the pension rolls until a date subsequent to the effective date of  
41 the statute. While the wording in the statute may at first glance appear clear, the Department policies  
42 to which the statute relates must be considered.  
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1 It is not unusual for the Department of Labor and Industries to make a decision which  
2 necessitates pre-dating the effective date of pension benefits to a date sometime prior to the order  
3 awarding the pension. In a case involving a self-insured employer, for example, the employer handles  
4 the bulk of the administration regarding the claim. As a result, the self-insured employer is provided  
5 the specific information regarding the claim and the Department of Labor and Industries does not  
6 immediately have the full documentation it needs in order to make a just and equitable decision as to  
7 the worker's entitlement to permanent and total disability benefits.  
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11 Whether under a self-insured claim or a state fund claim, it is impossible for the Department of  
12 Labor and Industries to make an instantaneous decision regarding whether an individual is totally and  
13 permanently disabled as of a date certain. There must be, as a matter of course, time spent  
14 investigating the claim. While a few month's delay is to be expected when dealing with an  
15 administrative agency, procedures have been established in order to place an individual on the  
16 pension rolls retroactively so as not to penalize the worker for the Department of Labor and Industries'  
17 own delay. In any event, whether under self-insured or state fund claims, there are cases such as this  
18 where the worker can prove through medical or vocational testimony that he or she was indeed  
19 permanently and totally disabled on or before June 30, 1986.  
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25 This retroactive procedure necessary in pension administration does not detrimentally affect Mr.  
26 Hansen unless the literal interpretation of RCW 51.32.225 is applied. The majority of this Board would  
27 have him penalized for the delay of the Department of Labor and Industries in adjudicating his  
28 entitlement to pension benefits. Applying this literal reading of the statute would allow the self- insured  
29 employer or the Department to dictate whether or not the social security offset provisions of this statute  
30 should apply to a particular worker. Certainly it is not the intent of the industrial insurance laws of the  
31 State of Washington to treat those individuals differently who were placed on the pension rolls after  
32 July 1, 1986 only because of delay in administering their claims.  
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37 The literal reading of the statute also requires different treatment of those individuals who are  
38 forced to litigate their entitlement to pension benefits from those who are originally awarded a pension  
39 without the need to litigate. In this scenario, if a worker is forced to litigate the entitlement to a pension  
40 and the litigation in any way extends beyond the July 1, 1986 effective date of RCW 51.32.225, the  
41 offset will be applied to the pension benefits even if it is found he or she should have been receiving a  
42 pension prior to July 1, 1986. On the other hand, the worker originally awarded a pension prior to July  
43 1, 1986 and not forced to litigate, will not have the offset applied. Once again, certainly it is not the  
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1 intent of the industrial insurance laws of the State of Washington to compensate workers differently  
2 based on whether or not they were required to exercise their appeal rights, as contained in RCW  
3 51.52.  
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6 The majority argues that there is no ambiguity in the language of the statute. However, the  
7 Department's own interpretation of the statute belies the lack of any ambiguity. The Department's own  
8 policy in administering the statute provides that if a claimant was entitled to a pension before July 1,  
9 1986 then the offset will not be applied to reduce his or her monthly compensation. It's hard to believe  
10 that the statute could not be considered ambiguous when the agency which must administer the  
11 statute has an interpretation that differs from the majority of this Board. Finally, when a statute is  
12 ambiguous, the construction placed upon it by the agency charged with its administration is entitled to  
13 considerable weight. Bradley v. Department of Labor and Industries, 52 Wn.2d 780 (1958). At the  
14 very least RCW 51.32.225 must be interpreted in light of the administrative procedures used to make  
15 pension determinations.  
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19 I believe the Act must be liberally construed in order to achieve its purpose of providing  
20 compensation, with doubts resolved in favor of the worker. Dennis v. Department of Labor and  
21 Industries, 109 Wn.2d 467, 470 (1987). Justice and fairness require that all workers be treated equally  
22 and not penalized due to delay in decision making by the Department of Labor and Industries or  
23 self-insured employers. Therefore, where the worker is found permanently totally disabled prior to July  
24 1, 1986 -- as is the case here -- his or her pension benefits should not be offset by social security  
25 retirement benefits.  
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29 Finally, it has been argued that this legislation is unconstitutional because it reduces benefits  
30 retrospectively and without regard to the long established principle that the date of injury controls the  
31 level of a worker's benefits. See Ashenbrenner v. Department of Labor and Industries, 62 Wn.2d 22  
32 (1963). Though it appears to me that those arguments are also meritorious, the Board does not have  
33 the authority to declare an act of the Legislature unconstitutional. It will be incumbent upon the courts  
34 to rectify the unconstitutional compromise of the rights of this worker inflicted by RCW 51.32.255.  
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40 Board of Industrial Insurance Appeals, State of Washington  
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43 /s/  
44 FRANK E. FENNERTY, JR. Member  
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