

Oakley, Lois

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.]

Calculation

RCW 51.32.225 authorizes a dollar-for-dollar reduction of temporary or permanent total disability benefits by the amount of the social security retirement benefits. Procedures for computing the social security disability offset, contained in RCW 51.32.220, do not apply to the social security retirement offset of RCW 51.32.225.*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.]

No federal pre-emption of social security retirement offset

There is no authority for the Social Security Administration to take an offset of state workers' compensation benefits against social security retirement benefits where the individual is not also receiving social security disability benefits. Absent such authority the state is not pre-empted from enacting legislation allowing the offset of social security retirement benefits against state workers' compensation benefits.*In re Lois Oakley, BIIA Dec., 87 3830 (1989)* [dissent]

Scroll down for order.

1 invalid; and the claim was remanded to the Department with instructions to reimburse the claimant for
2 the amount of time-loss compensation which had been offset due to her receipt of social security
3 retirement benefits.
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5 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
6 prejudicial error was committed and said rulings are hereby affirmed.
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8 The claimant, Lois Oakley, was born July 30, 1915. She commenced receiving social security
9 retirement benefits at the age of 62, in 1978. Her initial social security retirement benefit was \$149.00
10 per month. Ms. Oakley continued working after she began receiving retirement benefits. Her highest
11 earnings were \$9,672.33 for the year 1981. In that year her rate of social security retirement benefits
12 was \$287.10, but she received only \$227.10 because of a \$60.00 per month overpayment deduction
13 due to her excess earnings.
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18 Ms. Oakley sustained her industrial injury on October 22, 1982 and thereafter commenced
19 receiving time-loss compensation. Her initial time-loss compensation rate was \$600.60 per month. As
20 of July 1, 1986, her time-loss compensation rate was \$666.31 per month.
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22 By order dated August 11, 1986 the Department reduced the claimant's monthly compensation
23 rate to \$440.01 effective July 1, 1986 due to her receipt of social security retirement benefits.
24 According to Victoria A. Kennedy, a Department social security adjudicator, this new benefit amount
25 was calculated by subtracting a social security retirement amount of \$226.30. In fact Ms. Oakley's
26 monthly social security benefits in 1986 were \$399.51, but Ms. Kennedy had disregarded federal cost
27 of living adjustments (COLA's) which had been provided to Ms. Oakley. The offset figure, however,
28 did include additional wage credits earned by the claimant because of wages earned after she had
29 begun receiving social security retirement benefits in 1978. This explained the difference between the
30 offset of \$226.30 and the original social security retirement figure of \$149.00.
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35 According to Ms. Kennedy the Department has not adopted nor does it plan to adopt any rules
36 concerning the calculation of the social security retirement offset. Under policies developed by the
37 Department, the social security retirement offset required by RCW 51.32.225 is calculated essentially
38 the same as the social security disability offset authorized by RCW 51.32.220. Under the
39 Department's formula for computing the retirement offset, a worker's combined benefits cannot exceed
40 the highest of (1) 80% of the claimant's highest year's earnings computed from any year in the
41 claimant's working life; (2) the claimant's full time-loss compensation rate; or (3) the original social
42 security retirement rate plus any additional rate wage credits. This formula differs from that used
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1 under the social security disability offset by virtue of the fact that the highest year's earnings can be
2 computed from any year, as opposed to the highest year's wages during the five year period
3 preceding the year in which the worker became disabled. See 42 U.S.C.] 424a(a). Ms. Kennedy
4 explained that the Department based the offset calculation on Ms. Oakley's time-loss compensation
5 benefits as opposed to using 80% of Ms. Oakley's highest year's wages because Ms. Oakley had not
6 provided the wage information and because it apparently worked to Ms. Oakley's benefit. Ms.
7 Kennedy explained that the Department does not consider social security retirement benefits as
8 "wages" for purposes of computing a worker's "highest year's wages."
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10 The claimant has raised a number of objections to the social security retirement offset. She
11 contends that RCW 51.32.225 does not apply to her because she has a vested right in the amount of
12 time-loss compensation she can receive. She claims that the retirement offset statute has no
13 retroactive application and that applying this statute to her is contrary to legislative intent. She states
14 that RCW 51.32.225 does not apply to claims based on injuries which occurred prior to its effective
15 date. She makes a general allegation that the statute is unconstitutional and states that the offset is
16 either prohibited by federal law or constitutes "an unconstitutional preemption of a federal agency's
17 offset prerogative." Claimant's Reply Memorandum to Petition for Review, at 15. She also contends
18 that the retirement offset only applies to persons under the age of 65.
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20 In addition, the claimant raises a number of objections concerning the calculation of the offset.
21 She alleges that RCW 51.32.225 requires that the computation of the offset not exceed that allowed
22 by 42 U.S.C. § 424a. She also maintains that pursuant to 42 U.S.C. § 409(r) and 20 C.F.R. 404.428,
23 her social security retirement benefits should be included within the definition of wages for the purpose
24 of computing her highest year's wages. Finally, she maintains that because the Department has not
25 adopted any rules governing the calculation of the social security retirement offset pursuant to RCW
26 34.04, the Administrative Procedures Act, the Department is without authority to take such an offset.
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28 **APPLICABILITY OF RCW 51.32.225**

29 RCW 51.32.225 states:

30 Reduction of compensation for temporary or permanent total
31 disability--Offset for social security retirement benefits

32 (1) For persons receiving compensation for temporary or permanent total
33 disability under this title, the compensation shall be reduced by the
34 department to allow an offset for social security retirement benefits
35 payable under the federal social security, old age survivors, and disability
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1 insurance act, 42 U.S.C. This reduction shall not apply to any worker who
2 is receiving permanent total disability benefits prior to July 1, 1986.
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4 (Emphasis added)

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6 It is Ms. Oakley's contention that the social security retirement offset does not apply to her
7 because her benefits are determined by the law in effect on the date of her industrial injury. In support
8 of this contention she cites Ashenbrenner v. Department of Labor and Industries, 62 Wn.2d 22 (1963).
9 Since she was injured prior to July 1, 1986 (the effective date of the statute) she believes the
10 retirement offset is not applicable to her claim. However, the more accurate description of the holding
11 in Ashenbrenner is that a statute will not be held to apply retrospectively in the absence of language
12 clearly indicating such a legislative intent. The "Ashenbrenner rule", that the law in effect on the date
13 of injury will control the rights of the worker, is simply a presumption which the courts will apply in the
14 absence of legislative intent to the contrary.
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17 While Ashenbrenner is case authority that the date of injury ordinarily determines the level of
18 benefits payable to the worker, it also stands for the proposition that the Legislature is presumed to be
19 familiar with the rules, prior legislation, and prior court decisions pertaining both to the prospective and
20 to the retrospective effect of legislation. Ashenbrenner, at 27. The Legislature is therefore presumed
21 to have known that unless it included special language, the social security retirement offset would
22 apply only to those individuals who were injured after the effective date of the statute. By including the
23 last sentence of RCW 51.32.225(1) -- which we will refer to as the retirement offset exemption -- the
24 Legislature has expressed the intention that the social security retirement offset will apply to persons
25 not "receiving permanent total disability benefits prior to July 1, 1986." That language, quite obviously,
26 would include persons such as Ms. Oakley, who were injured prior to July 1, 1986. Because the
27 language of RCW 51.32.225 contemplates retrospective application, the Ashenbrenner presumption
28 does not apply. The statute clearly applies to the claims of persons injured before its effective date.
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31 We must remain mindful that in construing RCW 51.32.225 our objective is to ascertain and
32 give effect to the Legislature's intent. In re Eaton, 110 Wn.2d 892, 898 (1988). However, if the statute
33 is not ambiguous, the meaning of the statute must be derived solely from the language of the statute
34 itself. Id. Where the language of the statute is clear, its plain meaning must be given effect without
35 resort to rules of statutory construction. Murphy v. Department of Licensing, 28 Wn.App. 620 (1981).
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38 From our reading of the statute the meaning of the phrase "receiving permanent total disability
39 benefits prior to July 1, 1986" is clear and unambiguous. To determine who is exempt from the social
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1 security retirement offset, we believe the Department need look no further than the list of persons on
2 the permanent total disability pension rolls on June 30, 1986. On that date the Department knew, or
3 could have readily determined, which workers were exempt from the new offset. Persons not actually
4 receiving permanent total disability benefits on that date are subject to the retirement offset. Ms.
5 Oakley was not receiving permanent total disability benefits prior to July 1, 1986, and the retirement
6 offset therefore applies to her claim.
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10 We believe our interpretation is consistent with the plain meaning of the word "receiving." The
11 applicable dictionary definition of "receive" is "to come into possession of: ACQUIRE." Webster's
12 Third New International Dictionary 1894 (1986). Clearly, Ms. Oakley was not placed on the pension
13 rolls prior to July 1, 1986 and has not "come into possession of" permanent total disability benefits
14 prior to that date.¹
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18 The Legislature has the authority to limit or terminate the right to benefits under the Industrial
19 Insurance Act. All rights accruing to an injured worker are statutory rights and as such they are not
20 constitutionally protected against change or abrogation. Those rights in effect at the time of a worker's
21 injury may be affected by legislative action at any time. Mattson v. Department of Labor and
22 Industries, 176 Wash. 345 (1934), aff'd, 293 U.S. 151 (1934). The Legislature has clearly and
23 definitively set July 1, 1986 as the cutoff date for the social security retirement offset exemption.
24 Those workers who were receiving permanent total disability benefits prior to that date are exempt
25 from the social security retirement offset. Those who were not are subject to that offset. This includes
26 the claimant, Lois Oakley. Thus, any benefits which she receives subsequent to July 1, 1986 for
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34 ¹ There is nothing in the legislative history of RCW 51.32.225 which suggests that the Legislature intended any
35 meaning other than that which we have discerned from the plain language of the statute itself. The claimant accurately
36 notes that after Substitute House Bill 1875 was read the second time in the House on February 12, 1986 Representative
37 McMullen asked the following question: "Representative Wang: I'm concerned that we are changing the rules in midstream
38 on certain people. Section 5 is dealing with retired people. Is it the intent of this legislation that it would only apply to the
39 people who apply to reopen their claims after the effective date of this act and not before?" Mr. Wang responded: "Yes,
40 Representative McMullen, that is correct." Our review of the bill, the House Bill Report and House Bill Analysis leads us to
41 conclude that in his question Mr. McMullen intended to reference the new sub-section 17 of Section 1, rather than Section
42 5, of SHB 1875. Under sub-section 17 of Section 1 if the Supervisor of Industrial Insurance determines that the worker is
43 voluntarily retired and no longer attached to the work force, benefits should not be paid under Section 1. It applies "in the
44 case of new or reopened claims." In contrast, the House Bill Report and the House Bill Analysis specifically suggest that
45 the social security retirement offset "will not apply to workers who are receiving pensions prior to the effective date of the
46 act." There is nothing in the House Bill Report, the House Bill Analysis, or in the language of the bill itself which would
47 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."

1 temporary total disability or permanent total disability are subject to the social security retirement offset
2 mandated by RCW 51.32.225.
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4 We also do not believe, contrary to the allegations made by the claimant, that the social
5 security retirement offset of RCW 51.32.225 is prohibited by federal law. The claimant contends that
6 42 U.S.C. § 424a requires an offset by the Social Security Administration when social security
7 retirement benefits are being received along with state workers' compensation benefits. She then
8 maintains that the "reverse offset" exception of 42 U.S.C. § 424a(d) only permits a state to take such
9 an offset where a law or plan was in effect prior to February 18, 1981. Thus, since the state's social
10 security retirement offset statute was not enacted until July 1, 1986, she feels it is prohibited.
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12 The flaw in the claimant's argument is that there is no federal social security retirement offset.
13 The federal social security offset created by 42 U.S.C. 424a only applies to individuals who are (1)
14 under age 65, (2) entitled to social security disability benefits under 42 U.S.C. § 423, and (3) receiving
15 periodic benefits on account of total or partial disability under a state's workers' compensation law. 42
16 U.S.C. § 424a(a). 42 U.S.C. § 424a does not authorize the Social Security Administration to take an
17 offset for persons over the age of 65 who are not receiving social security disability benefits. The
18 "reverse offset" exception of 42 U.S.C. § 424a(d) which permits states to take the offset, but limits the
19 reverse offset to those states which had enacted such an offset prior to February 18, 1981, applies
20 only to social security disability offsets. It imposes no limitation on the authority of a state to offset any
21 other social security benefit (i.e., retirement benefits) against workers' compensation benefits.
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23 We find no authority for the Social Security Administration to take an offset of state workers'
24 compensation benefits against social security retirement benefits (payable under 42 U.S.C.] 402)
25 where the individual is not also receiving social security disability benefits (payable under 42 U.S.C. §
26 423). Absent such authority, we do not believe a state is prohibited from enacting legislation allowing
27 the offset of social security retirement benefits against state workers' compensation benefits.
28 Therefore, there is no merit to the claimant's contention that RCW 51.32.225 constitutes an
29 "unconstitutional preemption of a federal agency's offset prerogative".
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31 RCW 51.32.225 further provides that:
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33 (2) Reductions for social security retirement benefits under this section
34 shall comply with the procedures in RCW 51.32.220(1) through (6), except
35 those that relate to computation, and with any other procedures
36 established by the department to administer this section.
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1 As the claimant correctly notes, RCW 51.32.220, which concerns the social security disability
2 offset, provides in section (1) that it applies to "persons under the age of 65." Thus, claimant contends
3 that RCW 51.32.225 should not apply to persons such as herself, who are over the age of 65. This
4 argument, while ingenious, would render RCW 51.32.225 essentially meaningless. Few, if any,
5 workers receiving social security retirement benefits would be subject to the social security retirement
6 offset under this construction of the statute. In order to give meaning to RCW 51.32.225, we must
7 conclude that the age specification in RCW 51.32.220(1) does not relate to "procedures" as that term
8 is used in RCW 51.32.225(2).
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10 CALCULATION OF THE RETIREMENT OFFSET

11 While our Industrial Appeals Judge upheld the validity of RCW 51.32.225, he concluded that
12 RCW 51.32.225(2) required the Department to enact rules, as required under the Administrative
13 Procedures Act (RCW 34.04), governing the calculation of the social security retirement offset. Citing
14 Mahoney v. Shinpoch, 107 Wn.2d 679 (1987), he concluded that the Department's failure to follow
15 rule-making procedures prohibited the Department from taking the retirement offset. We disagree with
16 this conclusion.
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18 In Mahoney, our Supreme Court invalidated a rule promulgated by the Department of Social
19 and Health Services (DSHS) reducing State Supplemental Payments (SSP) to the federal
20 Supplemental Security Income (SSI) program, thus allowing the state to receive the benefit of a
21 federal SSI cost of living adjustment. Such a reduction was authorized by Congress, but no express
22 authorization by the state legislature was contained in the DSHS appropriation bill. DSHS had not
23 followed the requirements of the Administrative Procedures Act (APA) in adopting its rule. The court
24 held that since there had been no legislative indication that the reduction was mandatory, DSHS's
25 implementation of the reduction was subject to the rule-making requirements of the APA, and that
26 reduction could not occur until those requirements had been met. We believe RCW 51.32.225 does
27 contain a legislative mandate for the reduction of workers' compensation benefits due to receipt of
28 social security retirement benefits, i.e., " ... the compensation shall be reduced...." The
29 implementation of such reduction is therefore not dependent upon the Department's adoption of rules
30 concerning the calculation of the offset.
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32 In establishing the social security disability offset of RCW 51.32.220, our Legislature
33 specifically incorporated a computation procedure. It provided that the social security disability offset
34 would be calculated so as "not to exceed the amount of the reduction established pursuant to 42
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1 U.S.C. § 424a." RCW 51.32.220(1). It is by virtue of this reference to federal law, and not by virtue of
2 federal law itself, that we have frequently looked to federal law and procedures established by the
3 Social Security Administration in order to calculate the social security disability offset. See, e.g., In re
4 Evelyn E. Berlin, BIIA Dec., 86 3615 (1987). 42 U.S.C. § 424a(d), which creates the "reverse"
5 disability offset, does not require the states to follow any particular procedure in calculating a state
6 offset, although most states implementing the disability reverse offset have provided for an offset
7 which is usually equal to or less than that which could have otherwise been taken by the Social
8 Security Administration itself. See generally, 4 A. Larson, Workmen's Compensation Law, § 97.35.

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13 The social security retirement offset, on the other hand, does not specifically incorporate, by
14 analogy or otherwise, any federal limitations on the amount of the offset. An earlier draft of the
15 legislative bill creating the social security retirement offset, House Bill No. 1875, had provided
16 language which seemed to suggest that the offset would be equal to that applicable to persons
17 receiving social security disability benefits. House Bill 1875 would have amended RCW 51.32.220 by
18 addition of the following language:
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22 . . . (2) For persons receiving compensation for temporary or permanent
23 total disability under this title, the compensation shall be reduced under
24 procedures established by the department to allow an offset for an amount
25 equal to benefits payable under federal social security retirement,
26 pursuant to 42 U.S .C. Sec. 424a.
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28 For reasons which are not clear from the legislative history, this language was deleted from Substitute
29 House Bill (SHB) 1875, and a new section pertaining to social security retirement benefits was
30 created, which was eventually enacted into law. The new section became RCW 51.32.225. Perhaps
31 this change was due to the recognition that 42 U.S.C. § 424a only applies to social security disability
32 offsets. In any event, far from incorporating any reference to a federal method for calculating an offset,
33 RCW 51.32.225(2) specifically provides that the computation methods in RCW 51.32.220(1) through
34 (6) shall not apply.
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38 We believe that by providing that "compensation shall be reduced by the department to allow
39 an offset for social security retirement benefits" and by excluding such reduction from the computation
40 procedures in RCW 51.32.220, the Legislature intended to authorize a dollar-for-dollar reduction of
41 temporary or permanent total disability benefits by the amount of social security retirement benefits.
42 This conclusion is further supported by references in both the House Bill Analysis and House Bill
43 Report concerning SHB 1875 that under the new law workers' compensation benefits "will be reduced
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1 by the amount of social security retirement benefits received by the worker." The Department's fiscal
2 note concerning SHB 1875 proceeded with an assumption that the "affects (sic) of this offset would be
3 similar to current offset provisions against federal social security disability benefits" (Fiscal Note, SHB
4 1875, Request No. 55-86, p. 2). However, the language of the statute specifically belies a
5 construction that the retirement offset would be the same as the disability offset.
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9 The various statutory changes contained in SHB 1875 indicate that the Legislature fully
10 intended to treat retired workers differently from other workers and to reduce or eliminate workers'
11 compensation benefits because of the fact that they had removed themselves from the work force,
12 due to a voluntary decision to retire. The imposition of an offset because of retirement benefits,
13 greater than that allowed by 42 U.S.C. § 424a against social security disability benefits, is consistent
14 with that legislative purpose.
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18 Since we conclude that RCW 51.32.225 provides for the taking of a social security offset in
19 the full amount of social security retirement benefits being received by the worker, we must comment
20 on the question of the effect, if any, of the Department's policy not to reduce temporary or permanent
21 total disability benefits by the full amount of social security retirement benefits being received by the
22 worker in all cases. We believe that if the Department chooses to offset less than the full amount of
23 social security retirement benefits being received by the worker, then it is required to establish
24 procedures for doing so. Such procedures must comply with the administrative rule-making
25 requirements of RCW 34.04. We believe it is questionable whether the Department has the authority
26 to offset less than the full amount of the social security retirement benefits being received by a
27 claimant. However, since only the claimant has filed an appeal from the Department's decision to
28 reduce her time-loss compensation benefits by \$226.30 per month on account of her receipt of social
29 security retirement benefits, we do not have the occasion or the authority to decide in this appeal that
30 the reduction should have been greater and thus the claimant entitled to less time-loss compensation
31 than that which the Department has awarded her. See Brakus v. Department of Labor and Industries,
32 48 Wn.2d 218 (1956). Furthermore, in this particular claim the Department did in fact offset social
33 security retirement benefits, exclusive of COLA's, dollar-for-dollar against claimant's current time-loss
34 compensation benefits. Arguably such an offset comports with the terms of RCW 51.32.225.
35 However, since the issue is not appropriately before us, we specifically do not decide here whether or
36 not the COLA's authorized by the Social Security Act should be considered "social security retirement
37 benefits", as that term is used in RCW 51.32.225(1).
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1 The final issue raised by the claimant was whether her highest year's earnings for the purpose
2 of determining her "average current earnings" should include as "wages" her social security retirement
3 benefits received during that year. This issue assumes that definitions contained in the Social Security
4 Act and regulations promulgated pursuant thereto have a bearing on the manner in which the
5 retirement offset is calculated. However, whether social security retirement benefits constitute
6 "wages" for the purposes of computing "average current earnings" to calculate the social security
7 disability offset under 42 U.S.C. 424a has no legal significance to the determination of the amount of
8 the retirement offset created by our Legislature by enactment of RCW 51.32.225.
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13 After consideration of the Proposed Decision and Order, the Department's Petition for Review
14 filed thereto, the claimant's Reply Memorandum to Petition for Review, and a careful review of the
15 entire record before us, we are persuaded that the letter decision of the Department dated November
16 12, 1987 is correct and should be affirmed.
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19 Proposed Finding of Fact No. 1 and Conclusion of Law No. 1 are hereby adopted as the
20 Board's final finding and conclusion and are incorporated herein by this reference. In addition, the
21 Board makes the following additional Findings of Fact and Conclusions of Law:
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24 **FINDINGS OF FACT**

- 25 2. As of July 1, 1986, the claimant was entitled to time-loss compensation in
26 the amount of \$666.31 per month without consideration of any offset for
27 receipt of other benefits.
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29 3. As of July 1, 1986 the claimant was not receiving permanent total disability
30 benefits as defined by the Industrial Insurance Act.
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32 4. As of July 1, 1986 the claimant was receiving social security retirement
33 benefits in the amount of \$399.51 per month. Excluding cost of living
34 adjustments since her initial entitlement to social security retirement
35 benefits in 1978, but including additional wage credits earned subsequent
36 to April 1978, the claimant's social security retirement rate as of July 1,
37 1986 was \$226.30 per month.
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39 5. The Department of Labor and Industries has not adopted any rules or
40 regulations to administer RCW 51.32.225, including, but not limited to,
41 rules governing the method of calculation of the social security retirement
42 offset.

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44 **CONCLUSIONS OF LAW**

- 45 2. RCW 51.32.225(1) concerning the offset of time-loss compensation by
46 social security retirement benefits applies to injured workers such as the
47 claimant who were receiving time-loss compensation effective July 1,

1 1986 and who were receiving social security retirement benefits as of July
2 1, 1986.

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4 3. RCW 51.32.225(1) is mandatory and requires the Department to reduce
5 temporary or permanent total disability compensation to allow an offset for
6 social security retirement benefits, and provides for the taking of the offset
7 equal to the amount of such social security retirement benefits.
- 8 4. The letter decision of the Department of Labor and Industries dated
9 November 12, 1987 is correct and should be affirmed.

10 It is so ORDERED.

11 Dated this 27th day of April, 1989.

12 BOARD OF INDUSTRIAL INSURANCE APPEALS

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17 /s/
18 SARA T. HARMON Chairperson

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21 /s/
22 PHILLIP T. BORK Member

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24 **DISSENT**

25 One of the majority's contentions is that the offset of Ms. Oakley's social security retirement
26 benefits contained in RCW 51.32.225 should apply even if it could be found that she was entitled to a
27 pension made effective a date prior to the effective date of the statute, but not ordered until a date
28 subsequent to the effective date of the statute. While the wording in the statute may at first glance
29 appear clear, the Department policies to which the statute relates must be considered.

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

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44 Whether under a self-insured claim or a state fund claim, it is impossible for the Department of
45 Labor and Industries to make an instantaneous decision regarding whether an individual is totally and
46 permanently disabled as of a date certain. There must be, as a matter of course, time spent
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1 investigating the claim. While a few month's delay is to be expected when dealing with an
2 administrative agency, procedures have been established in order to place an individual on the
3 pension rolls retroactively so as not to penalize the worker for the Department of Labor and Industries'
4 own delay. In any event, whether under self-insured or state fund claims, there are cases where the
5 worker might be able to prove through medical or vocational testimony that he or she was indeed
6 permanently and totally disabled on or before June 30, 1986.
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10 This retroactive procedure necessary in pension administration does not detrimentally affect
11 these workers unless the literal interpretation of RCW 51.32.225 is applied. The majority of this Board
12 would have the worker penalized for the delay of the Department of Labor and Industries in
13 adjudicating his or her entitlement to pension benefits. Applying this literal reading of the statute would
14 allow the self-insured employer or the Department to dictate whether or not the social security offset
15 provisions of this statute should apply to a particular worker. Certainly it is not the intent of the
16 industrial insurance laws of the State of Washington to treat those individuals differently who were
17 placed on the pension rolls after July 1, 1986 only because of delay in administering their claims.
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22 The literal reading of the statute also requires different treatment of those individuals who are
23 forced to litigate their entitlement to pension benefits from those who are originally awarded a pension
24 without the need to litigate. In this scenario, if a worker is forced to litigate the entitlement to a pension
25 and the litigation in any way extends beyond the July 1, 1986 effective date of RCW51.32.225, the
26 offset will be applied to the pension benefits even if it is found he or she should have been receiving a
27 pension prior to July 1, 1986. On the other hand, the worker originally awarded a pension prior to July
28 1, 1986 and not forced to litigate, will not have the offset applied. Once again, certainly it is not the
29 intent of the industrial insurance laws of the State of Washington to compensate workers differently
30 based on whether or not they were required to exercise their appeal rights, as contained in RCW
31 51.52.
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37 The majority argues that there is no ambiguity in the language of the statute. However, the
38 Department's own interpretation of the statute belies the lack of any ambiguity. The Department's own
39 policy in administering the statute provides that if a claimant was entitled to a pension before July 1,
40 1986 then the offset will not be applied to reduce his or her monthly compensation. It's hard to believe
41 that the statute could not be considered ambiguous when the agency which must administer the
42 statute has an interpretation that differs from the majority of this Board. Finally, when a statute is
43 ambiguous, the construction placed upon it by the agency charged with its administration is entitled to
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1 considerable weight. Bradley v. Department of Labor and Industries, 52 Wn.2d 780 (1958). At the
2 very least RCW 51.32.225 must be interpreted in light of the administrative procedures used to make
3 pension determinations.
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5 I believe the Act must be liberally construed in order to achieve its purpose of providing
6 compensation, with doubts resolved in favor of the worker. Dennis v. Department of Labor and
7 Industries, 109 Wn.2d 467, 470 (1987). Justice and fairness require that all workers be treated equally
8 and not penalized due to delay in decision making by the Department of Labor and Industries or
9 self-insured employers. Therefore, in this case, where Ms. Oakley alleges her condition was fixed and
10 she was permanently and totally disabled prior to June 30, 1986 she should be allowed to litigate
11 those issues. If found permanently totally disabled prior to July 1, 1986, her pension benefits should
12 not be offset by social security retirement benefits.
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14 Finally, Ms. Oakley argues that this legislation is unconstitutional because it reduces benefits
15 retrospectively and without regard to the long established principle that the date of injury controls the
16 level of a worker's benefits. See Ashenbrenner v. Department of Labor and Industries, 62 Wn.2d 22
17 (1963). Ms. Oakley also argues that RCW 51.32.225 does not apply to her because she has a vested
18 right in the amount of time-loss compensation she was receiving. Though it appears to me that those
19 arguments are also meritorious, the Board does not have the authority to declare an act of the
20 Legislature unconstitutional. It will be incumbent upon the courts to rectify the unconstitutional
21 compromise of the rights of workers inflicted by RCW 51.32.225.
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32 /s/
FRANK E. FENNERTY, JR. Member
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