

## Johnson, Park

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

#### **Time-loss compensation**

The social security disability offset statute, RCW 51.32.220, as compared to the social security retirement offset, RCW 51.32.225, requires the offset be computed in the same manner as the federal government calculates the offset. Where the federal scheme does not provide for separate calculations for offsetting the spouse's or children's portion of the benefits, the offset of social security disability payments against time-loss compensation benefits is based upon the "total family entitlement". (*Distinguishing In re Earl F. Lique*, BIIA Dec., 88 3334 (1990). ...*In re Park Johnson*, BIIA Dec., 91 3189 (1993))

Scroll down for order.

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

1     **IN RE: PARK E. JOHNSON**                     )     **DOCKET NO. 91 3189**  
2   )   )  
3     **CLAIM NO. T-176693**                     )     **DECISION AND ORDER**  
4 \_\_\_\_\_)

5 APPEARANCES:

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7         Claimant, Park E. Johnson, by  
8         Casey & Casey, P.S., per  
9         Carol L. Casey and Gerald L. Casey, Attorneys

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11         Self-Insured Employer, Pope & Talbot, Inc., by  
12         Schwabe, Williamson, Ferguson & Burdell, per  
13         Elizabeth K. Reeve, Attorney

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15         The Department of Labor and Industries, by  
16         Office of the Attorney General, per  
17         Steve LaVergne, Paralegal, and Michael Davis-Hall, Assistant  
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19         This is an appeal filed by the claimant, Park E. Johnson, on June 11, 1991 from an order of the  
20 Department of Labor and Industries dated April 23, 1991 that affirmed an order dated March 13, 1991  
21 that corrected a prior order that reduced the time loss compensation rate. The order of March 13,  
22 1991 established a new time loss compensation rate of \$834.00 based on receipt of social security  
23 benefits totaling \$1,334.00 per month and claimant's highest year's earnings of \$32,520.00; ordered  
24 the new rate effective December 1, 1990; ordered the claimant be paid this new rate beginning April 1,  
25 1991; and, found there was an overpayment for the period from December 1, 1990 through March 31,  
26 1991 in the amount of \$1698.84; and, notified the claimant that the overpayment would be deducted  
27 from future awards at the rate of \$208.50 per month which is 25% of the new rate of time loss  
28 compensation. **AFFIRMED.**  
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34   **DECISION**

35         Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
36 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order  
37 issued on November 30, 1992 in which the order of the Department dated April 23, 1991 was affirmed.  
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39         The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no  
40 prejudicial error was committed and said rulings are hereby affirmed.  
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42         The numerous issues raised by the claimant concerning the calculation of the social security  
43 offset and recoupment of overpayment, are adequately set forth in the Proposed Decision and Order.  
44 The claimant's primary contention in his Petition for Review is that the calculation of the reverse offset  
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1 for social security disability benefits pursuant to RCW 51.32.220 should not take into account  
2 dependent benefits, and that the Board's decision in Earl F. Lique, BIIA Dec., 88 3334 (1990) is  
3 supportive of this proposition. We disagree. In Lique, the Board held that in calculating the social  
4 security retirement offset pursuant to RCW 51.32.225 where the worker had a dependent child, the  
5 Department should consider both the dependent child's time loss compensation and the child's federal  
6 benefits, but that the amounts are to be considered and calculated separately from the state and  
7 federal benefits received by the worker. Thus, Lique clearly articulates this Board's position that the  
8 social security retirement offset calculation consider both state time loss compensation and federal  
9 retirement benefits payable on behalf of minor children.

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11 Moreover, Lique involved calculation of the social security retirement offset, not the social  
12 security disability offset which is involved in this appeal. As we discussed in In re Lois Oakley, BIIA  
13 Dec., 87 3830 (1989), our legislature, in establishing the social security disability offset by virtue of  
14 RCW 51.32.220, specifically provided that the offset not exceed the amount of the reduction  
15 established pursuant to 42 U.S.C. § 424a. Because of this reference to federal law in RCW  
16 51.32.220, the Board has consistently looked to federal law and procedures established by the Social  
17 Security Administration in order to calculate the disability offset. See, e.g., In re LaVerne D. McKenna,  
18 BIIA Dec., 49,873 (1978), and In re Evelyn E. Berlin, BIIA Dec., 86 3615 (1987).

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20 The social security retirement offset statute, on the other hand, differs from the disability offset  
21 in that it does not specifically incorporate any federal limitations on the amount of the offset, but  
22 instead specifically provides that the computation methods in RCW 51.32.220(1) through (6) shall not  
23 apply. In Oakley, we held that because of the language contained in RCW 51.32.225, the Legislature  
24 authorized a dollar-for-dollar reduction of state total disability benefits by the amount of social security  
25 retirement benefits. We recognized that the statutory language belies a construction that the  
26 retirement offset would be calculated in the same fashion as the disability offset authorized by RCW  
27 51.32.220.

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29 Because the present case involves calculation of social security disability offset, we must look  
30 to the federal laws and regulations, specifically 42 U.S.C. § 424a, the section of the federal code that  
31 establishes the federal government's right to offset social security payments by state disability  
32 payments. In calculating what the federal government offset would be, 42 U.S.C. §§ 423 and 402  
33 require offset of the claimant's total benefits against the state's total workers' compensation payments.  
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1 Section 402 provides for benefits payable to relatives of persons receiving social security benefits of all  
2 kinds, such as wife's, husband's, child's, widower's, and parent's.  
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4 Moreover, the federal offset statute requires that the Social Security Administration offset the  
5 total of all social security benefits paid to a claimant and his or her children by any state disability  
6 payments. There is no provision for a "separate" calculation for children's benefits.  
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8 Federal regulations are even more explicit that all social security disability benefits payable  
9 must be offset by state disability payments. The regulations reference not only the disability insurance  
10 benefit to which an individual is entitled, but also any monthly benefit payable to others under 42  
11 U.S.C. § 402 on the basis of the same earnings record. 20 C.F.R. § 404.408(a).  
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13 In the present case, we affirm our holding in McKenna, id. The claimant's "total family  
14 entitlement" is the correct amount to consider in the calculation of the offset to be taken against his  
15 time loss compensation. We conclude that since the formula for calculating the federal offset does not  
16 provide for separate calculation for children, but requires offsetting the total of all social security  
17 benefits paid to the claimant and his children by any state disability benefits, the Department must also  
18 follow the federal formula. Therefore, the method for calculating social security retirement offset  
19 enumerated in Lique is inapplicable in this present appeal involving social security disability offset.  
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21 The claimant further contends that the Department is precluded from demanding repayment of  
22 benefit overpayments made to the claimant prior to the Department's notifying the claimant of the  
23 social security offset. RCW 51.32.220(2) clearly authorizes the Department to recover overpayments  
24 made up to six months before the date on which a claimant is notified that the overpayment has  
25 occurred. In the instant case, the order sought recoupment of overpayments made from December 1,  
26 1990 through March 31, 1991 which is a period covering less than four months before the notice was  
27 sent on March 13, 1991. While the reductions for the overpayments cannot be made unless the  
28 worker receives notice of the reduction prior to the month in which the reduction is made, here the  
29 reduction was not taken until the April benefit payment. The Department's recoupment of the  
30 overpayment is within the clear provisions of RCW 51.32.220.  
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32 Moreover, this record does not establish when the Department was notified by the Social  
33 Security Administration that Mr. Johnson was receiving social security disability benefits. We surmise  
34 from a review of the jurisdictional facts that this notice was probably received sometime in November  
35 1990, but there is no testimony or evidence of when the Department learned about the social security  
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1 benefits. The claimant failed to establish that the Department erred in establishing the effective date of  
2 the offset as December 1, 1990.  
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4 We further note that the claimant has not established that the Department made any error in its  
5 application of COLAs in its calculation of the reverse social security offset.  
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7 After review of the entire record, the claimant's Petition for Review, the Department's  
8 Response to the Claimant's Petition for Review, and the applicable statutory law and Board decisions,  
9 we conclude that the Proposed Decision and Order is supported by the preponderance of the  
10 evidence and is correct as a matter of law. The order reducing the claimant's monthly time loss  
11 compensation rate because of his receipt of social security disability payments and finding an  
12 overpayment of \$1,698.84 is affirmed.  
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### 16 **FINDINGS OF FACT**

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18 1. On November 28, 1988, the claimant, Park E. Johnson, filed an  
19 application for benefits with the Department of Labor and Industries  
20 alleging an industrial injury to have occurred on November 3, 1988 while in  
21 the course of employment with Pope and Talbot, Inc. The claim was  
22 allowed and time loss benefits paid.

23 On November 30, 1990, the self-insured employer forwarded information  
24 from the Social Security Administration that social security benefits were  
25 being provided the claimant effective July 1, 1989. On February 20, 1991,  
26 the self-insured employer requested the Department to review the matter  
27 of social security offset. On March 4, 1991, the Department entered an  
28 order informing the claimant that his time loss compensation was being  
29 reduced to \$1,202.00 effective December 1, 1990 because of his receipt  
30 of social security benefits, that the new time loss rate would begin on April  
31 1, 1991, that the claimant had been overpaid for the period from  
32 December 1, 1990 through March 31, 1991 in the amount of \$214.17, and  
33 that the overpayment would be deducted from future awards at the rate of  
34 \$35.70 per month. On March 11, 1991, the claimant protested, and on  
35 March 13, 1991, the Department entered a corrected order informing the  
36 claimant that the new time loss compensation rate because of receipt of  
37 social security benefits would be \$834.00 effective December 1, 1990, the  
38 new rate would begin on April 1, 1991, that the claimant had been  
39 overpaid for the period from December 1, 1990 through March 31, 1991 in  
40 the amount of \$1,698.84, and that the overpayment would be deducted  
41 from future awards at the rate of \$208.50 per month.

42 On April 12, 1991, the claimant protested the March 13, 1991 order, and  
43 on April 23, 1991, the Department issued an order affirming the order of  
44 March 13, 1991. On June 11, 1991, the claimant filed an appeal with the  
45 Board from the order dated April 23, 1991, and on July 31, 1991, the  
46 Board granted the appeal, and assigned it Docket No. 91 3189.  
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2. Park E. Johnson sustained an industrial injury on November 3, 1988 while in the course of employment with Pope and Talbot, Inc. He thereafter received time loss compensation as an injured worker pursuant to the Washington State Industrial Insurance Act. As of November 1988 Mr. Johnson was married and had two dependent children under the age of 18. His original rate of time loss compensation was \$1,164.59.
  3. Mr. Johnson's highest year's earnings used in calculating the social security offset were \$32,526.75 for 1986. The maximum permissible amount of combined social security disability and state time loss compensation is 80% of the average current earnings, or \$2,168.00 per month.
  4. Mr. Johnson was entitled to social security disability benefits effective July 1989 in the amount of \$890.00 and for his dependent children in the amount of \$444.00 for a total social security disability benefit of \$1,334.00.
  5. As of December 1, 1990, the amount of time loss compensation payable to Mr. Johnson was \$834.00 (\$2,168.00 minus \$1,334.00). Mr. Johnson was overpaid time loss compensation for the period from December 1, 1990 through March 31, 1991 in the amount of \$1,698.84 which was deductible from future benefits at the rate of \$209.50, which is 25% of the time loss benefit rate of \$834.00.
  6. By order dated March 13, 1991, Mr. Johnson received notice from the Department of the overpayment of \$1,698.84 and notice that the overpayment would be deducted from future benefits at the rate of \$208.50 per month.

#### **CONCLUSIONS OF LAW**

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1. The Board of Industrial Insurance Appeals has jurisdiction of the parties and the subject matter of this appeal.
  2. Mr. Johnson's total family entitlement in social security benefits is the correct amount to be considered in the calculation of the proper offset or reduction to be taken against his time loss compensation benefits. Calculation of offset pursuant to RCW 51.32.220 requires offsetting Mr. Johnson's and his minor children's combined social security disability benefit against any state time loss compensation or pension benefits.
  3. The Department has authority pursuant to RCW 51.32.220(2) to recoup overpayments made up to six months before the date on which a claimant is notified that the overpayment has occurred. The order of March 13, 1991 was notice to the claimant that the Department would recoup the overpayments made from December 1, 1990 through March 31, 1991 from future benefits. The Department's recoupment of the overpayment was correct and met the provisions of RCW 51.32.220(2).
  4. The order of the Department of Labor and Industries dated March 13, 1991, correcting the order of March 4, 1991 and determining that the

1 correct monthly time-loss rate is \$834.00 effective December 1, 1990, that  
2 the claimant would be paid the new rate beginning April 1, 1991, that the  
3 claimant was overpaid for the period from December 1, 1990 through  
4 March 31, 1991 in the amount of \$1,698.84 which will be deducted from  
5 future awards at the rate of \$208.50 per month (25% of the new time loss  
6 rate), is correct in all respects and is hereby affirmed.  
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8 It is so ORDERED.

9 Dated this 10<sup>th</sup> day of May, 1993.

10 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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12  
13 /s/  
14 S. FREDERICK FELLER Chairperson  
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17 /s/  
18 PHILLIP T. BORK Member  
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