

McClure, June

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Limitation on recovery of overpayment (RCW 51.32.220)

If the delay in payment of time-loss compensation benefits was not caused by administrative delay, but instead was due to the lack of medical information to support the payment of the benefits the Department is permitted to offset social security benefits from the retroactive benefits, distinguishing *In re Kenneth Beitler*, BIIA Dec., 58,976 (1982).***In re June McClure*, BIIA Dec., 95 2208 (1996)** [Editor's Note: The Board's decision was appealed to superior court under Kitsap County Cause No.96-2-02801-2. See also, *Potter v. Dep't of Labor & Indus.*, 101 Wn. App. 399 (2000).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

IN RE: JUNE A. MCCLURE) DOCKET NO. 95 2208
)
CLAIM NO. H-660153) DECISION AND ORDER

Appearances:

Claimant, June A. McClure, by
Casey & Casey, P.S., per
Carol Casey

Employer, Frontier Village Restaurant,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Jennifer J. Browning, Assistant

The claimant, June A. McClure, filed an appeal with the Board of Industrial Insurance Appeals on May 8, 1995, from an order of the Department of Labor and Industries dated April 28, 1995. The order corrected and superseded an order of March 25, 1994, and adjusted the monthly time-loss compensation rate to \$586.67 per month beginning June 1, 1990, \$619.80 beginning July 1, 1990, \$661.85 beginning July 1, 1991, \$714.04 beginning July 1, 1992, and abating the \$251 social security offset effective June 1, 1993, as she was to turn 62 years of age in that month. **AFFIRMED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department to a Proposed Decision and Order issued on May 29, 1996, in which the order of the Department dated April 28, 1995, was reversed and remanded to the Department with direction to pay the claimant her full time-loss compensation entitlement for the period from June 1, 1990 through May 31, 1993, without offset, less any amounts previously paid to her.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed, and the rulings are affirmed.

1 The Proposed Decision and Order in this appeal directed the Department to pay a lump sum
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3 for retroactive time-loss compensation to Ms. McClure without withholding any offset for social
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5 security benefits she received from June 1, 1990 through May 31, 1993. The industrial appeals
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7 judge based that direction on his interpretation of our decision in the case of *In re Kenneth Beitler*,
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9 BIIA Dec., 58,976 (1982). We granted the Department's Petition for Review of the Proposed
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11 Decision and Order in this case because we find this case factually distinguishable from *Beitler*
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13 and conclude that the Department properly applied the offset provisions of RCW 51.32.220 to
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15 Ms. McClure's time-loss compensation benefits.

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17 In *Beitler*, the Board was confronted with a case in which there had apparently been an
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19 administrative delay in sending notice to the claimant of the Department's intention to offset his
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21 time-loss compensation with the social security disability benefits that were being paid to him.
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23 Factually, the claimant in that case provided the Department with the necessary information to take
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25 an offset in August of 1978, but the Department did not implement the offset until
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27 January 20, 1981, when the offset order was sent to the claimant. Then on January 23, 1981, the
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29 Department issued a further order paying a lump sum payment for the time-loss described in the
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31 January 20, 1981 order. The Board in that case noted that there were two policies that were in
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33 competition. First, the intent that there be no excessive combined benefits for the same disability,
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35 and, second, that there should not be what the Board called bureaucratic delay in implementing the
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37 offset. The Board went on to say:

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39 We note specifically that the statute speaks to the fact of recovery of
40 overpayments. It can be argued that in fact, no "overpayment" had
41 been made since in fact no payments at all had been made between
42 January 18, 1979 and January 23, 1981. There having been no
43 overpayments, should the Department be able to apply the offset to the
44 accumulated lump sum of all those unpaid past time-loss benefits?
45 Although the logic to permit such retroactive recovery is superficially
46 attractive, when one examines why the accumulation of unpaid benefits
47 occurred, it is apparent that the Department's ineffective administration
of the claim, i.e., bureaucratic delay, bears sole responsibility. The

1 failure of the Department to continue to make regular periodic payments
2 was due to no fault of Mr. Beitler, based on the stipulated facts before
3 us. He had promptly responded to the Department, in August 1978,
4 everything which was requested of him about his social security
5 disability benefits. To hold otherwise and permit this method of
6 recovery would encourage the Department to purposely allow the claim
7 to be entangled in the bureaucracy of claims administration solely for
8 the purpose of delaying payments which rightfully should be paid to
9 disabled workers.

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11 *Beitler*, at 9.

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13 The Board went on to note that the delay of on-going benefit payments for months permitting the
14 accumulation of lump sums to offset frustrated the goals of the Social Security Act. The Board
15 thus limited the ability of the Department in *Beitler* to go back more than the six months specifically
16 provided for in RCW 51.32.220(2). In essence, the Board refused to allow the Department to
17 penalize the claimant for its failure to properly administer the claim in a timely fashion.
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23 The industrial appeals judge in this appeal found the Department similarly remiss in the
24 administration of Ms. McClure's claim, in that she had begun seeking time-loss compensation
25 benefits for the period in question in March of 1990, and she was not paid until April 1994. Her
26 attorney peppered the Department with repeated requests for action on the time-loss question,
27 making specific reference to the possibility that the Department would lose the right to deduct any
28 offset if the "delay" in payment of benefits exceeded six months. As the Department points out in
29 its Petition for Review, it is not the fervor with which counsel pursues time-loss compensation
30 benefits, but the presence of medical information supporting temporary total disability causally
31 related to the industrial injury that triggers the claimant's entitlement. In Ms. McClure's case, that
32 medical information was conspicuously absent before November 1993.
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43 Throughout the administration of this claim, the Department entertained reasonable doubts
44 about whether Ms. McClure's inability to work was due to a back injury or extreme obesity. In
45 May 1990, the Department submitted a copy of an independent medical examination to her
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1 attending physician, Dr. John R. Richardson, asking whether or not he concurred with the results of
2 the examination. He did not respond until January 1991, and then he concurred with the
3 examination that found no objective signs of disability. In November of 1990, Dr. Richardson
4 examination that found no objective signs of disability. In November of 1990, Dr. Richardson
5 submitted a time-loss card that stated that he had not seen Ms. McClure since December of the
6 previous year. For the entire period from March 1990 through January 1991, the claimant supplied
7 no information that unequivocally supported the payment of time-loss compensation benefits.
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13 On May 10, 1991, the Department issued an order that closed the claim with an award for
14 permanent partial disability consistent with a Category 3 low back impairment and a Category 3
15 mental health impairment, while denying responsibility for Ms. McClure's morbid obesity, and
16 ending time-loss compensation as paid. The claimant filed a Notice of Appeal on July 2, 1991. On
17 July 23, 1991, the Department issued an order abating the May 10, 1991 order. There was still no
18 medical information in the file relating Ms. McClure's temporary total disability to the industrial
19 injury. The Department then scheduled an independent medical examination in February 1992,
20 that also generated negative results. The report was sent to Dr. Richardson in April 1992. The
21 Department record shows that throughout 1992, the Department sent repeated requests to
22 Dr. Richardson asking which, if any, of Ms. McClure's multiple physical ailments were related to the
23 industrial injury. He did not directly answer that question.
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35 In late 1992, Dr. Richardson supplied the Department with information that Ms. McClure had
36 positive EMG findings. A third independent medical examination was scheduled in February 1993.
37 The panel could not elicit any objective findings that were not related to Ms. McClure's ongoing
38 diabetes and obesity. The positive EMG findings were most probably caused by diabetic
39 neuropathies unrelated to the industrial injury.
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45 The Department responded to continued demands for payment of time-loss compensation
46 by scheduling a fourth independent medical examination, reported in November 1993. That
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1 examination identified a cervical and lumbar strain causally related to the industrial injury which,
2 combined with Ms. McClure's unrelated problems, prevented her from working. Time-loss
3 compensation was reinstated within 60 days, notice of offset was issued on March 25, 1994. On
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5 April 4, 1994, the Department paid a lump sum for retroactive time-loss compensation for the
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7 period June 1, 1990 through November 9, 1993. Ms. McClure protested the March 25, 1994 order
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9 on the basis that the social security offset could not be calculated more than six months preceding
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11 the date of the notice of offset. On April 28, 1995, the Department issued the order on appeal that
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13 excluded from the offset that portion of the time-loss compensation that accrued after Ms. McClure
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15 reached the age of 62, per RCW 51.32.225, corrected the calculation of her monthly benefits
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17 beginning with July 1, 1990, and left the social security offset in place for the balance of the
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19 contested period.
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23 Unlike the situation in *Beitler*, where the Department delayed in calculating and
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25 administering the payment of benefits even though both the information supporting entitlement to
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27 time-loss compensation and the social security offset information were available, the Department in
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29 Ms. McClure's case acted to pay benefits as soon as the claimant established her entitlement to
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31 those benefits. The failure to make periodic payments was not due to ineffective administration,
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33 but to a lack of medical information to support total temporary disability causally related to the
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35 injury, and a legitimate dispute as to whether there was any relationship between the industrial
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37 injury and Ms. McClure's total temporary disability. Failure to apply the social security offset in this
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39 instance would not represent a legitimate sanction against the Department. It would result in
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41 precisely the situation that the offset statute is designed to prevent, namely a windfall to the
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43 claimant to the extent that she would be doubly compensated for her disability.
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1 The claimant's request that the attorney's fees incurred in connection with her application for
2 social security benefits be excluded from the offset calculation is properly rejected under the law as
3 set forth in *Regnier v. Department of Labor & Indus.*, 110 Wn.2d 60 (1988).
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7 **FINDINGS OF FACT**
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9 1. On March 3, 1980, the claimant, June A. McClure, filed an application for
10 benefits alleging that she had sustained an industrial injury on
11 February 22, 1980, during the course of employment with Frontier Village
12 Restaurant. On August 4, 1981, the Department of Labor and Industries
13 issued an order allowing the claim.
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15 On April 13, 1982, the claimant filed an aggravation application. On
16 June 2, 1982, the Department issued an order reopening the claim for
17 authorized treatment and action as indicated. On April 28, 1995, the
18 Department issued an order that corrected and superseded its order of
19 March 25, 1994, and adjusted the monthly time-loss compensation rate
20 to \$586.67 per month beginning June 1, 1990; \$619.80 beginning
21 July 1, 1990; \$661.85 beginning July 1, 1991; \$714.04 beginning July 1,
22 1992; and abating the \$251 social security offset effective June 1, 1993,
23 as she was to turn 62 years of age in that month. On May 8, 1995,
24 claimant filed a Notice of Appeal with the Board of Industrial Insurance
25 Appeals. On May 22, 1995, the Board issued an order granting the
26 appeal, assigning it Docket No. 95 2208, and directing that proceedings
27 be held on the issues raised by the Notice of Appeal.
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29 2. In May of 1990, the Department was notified by the Social Security
30 Administration the claimant was receiving social security disability
31 benefits.
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33 3. The Department served notice of its intent to offset the social security
34 disability payments on March 25, 1994, in the calendar month before
35 the month in which the retroactive time-loss compensation for
36 June 1, 1990 through May 1, 1993, was paid.
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38 4. The Department subsequently corrected and superseded the order and
39 notice of March 25, 1994, with its order and notice of April 28, 1995,
40 which is under appeal in this case. The net effect of the April 28, 1995
41 order and notice is to effectuate a retroactive offset of the claimant's
42 social security disability benefits against her entitlement for time-loss
43 benefits for the period from June 1, 1990 through May 31, 1993. Time-
44 loss offset for periods after May 31, 1993, were subsequently repaid to
45 the claimant.
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47 5. Between March of 1990 and January of 1994, the Department diligently
investigated whether the claimant was entitled to time-loss

1 compensation benefits. On January 6, 1994, the Department made an
2 initial time-loss payment to the claimant for the period from
3 November 10, 1993 through January 4, 1994. From that time forward
4 claimant has regularly been paid time-loss compensation benefits.
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- 6 6. On April 4, 1994, the Department issued a payment order paying the
7 claimant the sum of \$26,400.90 for the period from June 1, 1990
8 through November 9, 1993. That sum included the net effect of the
9 Department's social security disability offset.
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11 **CONCLUSIONS OF LAW**
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- 13 1. The Board of Industrial Insurance Appeals has jurisdiction over the
14 parties and the subject matter of this timely filed appeal.
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16 2. The Department appropriately offset the claimant's time-loss
17 compensation benefits for the period from June 1, 1990 through
18 May 31, 1993, within the meaning of RCW 51.32.220.
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20 3. The order of the Department of Labor and Industries dated April 28, 1995,
21 wherein the Department corrected and superseded its order of March
22 25, 1995, and adjusted the monthly time-loss compensation rate to
23 \$586.67 per month beginning June 1, 1990; \$619.80 beginning July 1,
24 1990; \$661.85 beginning July 1, 1991; \$714.04 beginning July 1, 1992;
25 and abating the \$251 social security offset effective June 1, 1993, as
26 she was to turn 62 years of age in that month, is correct and is affirmed.
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28 It is so ORDERED.
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30 Dated this 11th day of September, 1996.
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32 BOARD OF INDUSTRIAL INSURANCE APPEALS
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35 /s/ _____
36 S. FREDERICK FELLER Chairperson
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38 /s/ _____
39 JUDITH E. SCHURKE Member
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41 **DISSENT**
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43 I disagree with the majority finding that the Department acted diligently to resolve the issue
44 of Ms. McClure's entitlement to time-loss compensation. Even conceding that the medical
45 information necessary to support Ms. McClure's claim for time-loss compensation benefits was
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1 difficult or impossible to obtain, the Department kept her in limbo for three and one-half years.
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3 Regardless of the outcome, this delay does violence to the promise of "sure and certain relief"
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5 contained in RCW 51.04.010.

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7 The Department issued a closing order on May 10, 1991. When it abated the order on
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9 July 23, 1991, in response to Ms. McClure's appeal, it sent the message to all parties concerned
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11 that there was either information at hand that merited further consideration or information that was
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13 readily obtainable that might merit such further consideration. Instead, the Department allowed a
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15 delay of six months before the next independent medical examination was performed and further
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17 delays totaling 18 months for two additional examinations. At no point during that time did the
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19 Department issue a further order that would permit Ms. McClure to proceed with the appeal
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21 process if she still wished to do so.

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23 I find the Department's inaction in this case sufficiently similar to its behavior in *Beitler* to
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25 support a similar outcome. I would restrict the Department's application of the social security offset
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27 provision to the six months preceding the date of first notice that the offset applied.

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29 Dated this 11th day of September, 1996.

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