

Davis, Billie

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Adequacy of notice

The six-month limitation on retroactive collection of the offset relates to the date the worker received the benefits, not the dates for which it was paid. ...*In re Billie Davis*, **BIIA Dec., 97 3639 (1998)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 98-2-03368-3. *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**

1 **IN RE: BILLIE A. DAVIS**) **DOCKET NO. 97 3639**
2)
3 **CLAIM NO. N-173403**) **DECISION AND ORDER**
4 _____)

5 **APPEARANCES:**

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7 Claimant, Billie A. Davis, by
8 Casey & Casey, P.S., per
9 Carol L. Casey

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11 Employer, Washington State Department of Revenue,
12 None

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14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 Joanne E. Sprague, Assistant
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19 The claimant, Billie A. Davis, filed an appeal with the Board of Industrial Insurance Appeals
20 on May 9, 1997, from an order of the Department of Labor and Industries dated May 2, 1997. The
21 order adhered to an order of January 17, 1997, that adjusted the claimant's rate of payment for
22 time loss compensation effective September 1, 1994, as a result of her receipt of social security
23 disability benefits by establishing monthly compensation rates of \$867.44 effective September 1,
24 1994, \$896.70 effective July 1, 1995, and \$962.10 effective July 1, 1996. It also stated that the
25 rate was based upon social security payments totaling \$642, and a highest year's earnings of
26 \$22,641.59 for 1990. **REVERSED AND REMANDED.**
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35 **DECISION**
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37 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
38 and decision on timely Petitions for Review filed by the Department and the claimant to a Proposed
39 Decision and Order issued on June 23, 1998, in which the order of the Department dated May 2,
40 1997, was reversed and remanded to the Department with direction to recalculate the claimant's
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1 time loss compensation rate based upon the triennial redetermination conducted in 1997. It also
2 would commence the offset with the payment of time loss compensation beginning August 1, 1996,
3 and it directed the Department to take any other action as may be appropriate.
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7 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
8 no prejudicial error was committed and the rulings are affirmed. In her Petition for Review,
9 Ms. Davis argues that the Department's notices concerning the social security offset were
10 inadequate so that there either should be no offset or that it should be limited to six months. She
11 also seeks a reduction of any offset to account for attorney fees and costs she incurred in
12 recovering retroactive industrial insurance benefits. In its Petition for Review, the Department
13 contends that it did not unreasonably delay paying a two and one-half year retroactive period of
14 time loss compensation and that it should be allowed to take an offset for that period. The
15 following is a brief summary of key events in the claim of Ms. Davis to help explain our decision.
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| 24 | 6/14/91 | Ms. Davis is injured at the Washington State Department of Revenue. She files her claim with the Department of Labor and Industries on July 3, 1991 and benefits are provided. |
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| 26 | 10/4/91 | Time loss is terminated under a Department order dated October 7, 1991. |
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| 28 | 8/94 | The Social Security Administration (SSA) notifies the Department that Ms. Davis was approved for social security disability (SSD) benefits effective December 1991. |
| 29 | | |
| 30 | 8/2/95 | Following litigation under the claim, the Department issues an order paying time loss from October 5, 1991 through July 15, 1993, evidently without taking an offset for SSD benefits paid during that period. |
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| 32 | 1/17/97 | Following litigation under the claim, the Department issues an order paying time loss from July 16, 1993 through August 31, 1994, evidently without taking an offset for SSD benefits paid during that period. |
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2 1/17/97 The Department issues another order this day stating that
3 further compensation for Ms. Davis would be reduced
4 effective September 1, 1994 due to her receipt of SSD
5 benefits. It also set new compensation rates for her of
6 \$867.44 effective September 1, 1994, \$896.70 effective
7 July 1, 1995, and \$962.10 effective July 1, 1996.
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9 2/14/97 The Department issues an order paying time loss for the
10 period of September 1, 1994 through February 12, 1997,
11 evidently with an offset taken for SSD benefits paid during
12 that period.
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14 Ms. Davis was not being paid time loss compensation benefits by the Department under the
15 industrial insurance claim when she was awarded federal disability benefits by the Social Security
16 Administration in August 1994. The effective date of the federal benefits was December 1991.
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18 Ms. Davis evidently did not receive payment of time loss under her industrial insurance claim from
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20 October 5, 1991, until her receipt of the warrant accompanying the order of August 2, 1995. That
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22 order paid retroactive time loss benefits for the period of October 5, 1991 through July 15, 1993.
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24 The Department is not seeking an offset for that payment of time loss benefits. After issuance of
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26 the August 2, 1995 order and warrant, Ms. Davis did not receive payment of time loss benefits until
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28 her receipt of the warrant accompanying the order of January 17, 1997, that paid retroactive time
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30 loss benefits for the period of July 16, 1993 through August 31, 1994. Again, the Department is not
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32 seeking an offset for that payment of time loss benefits.
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36 During the period of June 14, 1991 to August 1994, Ms. Davis was not receiving social
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38 security disability benefit payments. In August 1994, she was paid a retroactive social security
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40 disability benefit payment from December 1991 to August 1994, and she continued to receive
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42 periodic social security disability payments thereafter. During the hearing on this appeal, Ms. Davis
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44 explained that the Social Security Administration had recently stopped paying her periodic social
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46 security disability payments in November 1997 due to her receipt of retroactive time loss under her
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state industrial insurance claim. The Social Security Administration apparently had declared an

1 overpayment of federal social security disability benefits of \$14,000 for her benefits and \$7,000 for
2 her son's benefits. Thus, it appears that from November 1997 forward both the Department and
3 the Social Security Administration have been attempting to collect overpayments while not paying
4 Ms. Davis either time loss compensation or social security disability benefits.
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9 The federal government has long had the statutory authority to offset its payment of social
10 security disability benefits from workers' compensation benefits. 42 USC § 424a. By federal
11 statute, the Social Security Administration will not take an offset if the workers' compensation
12 authority in question takes an offset due to the worker's receipt of social security disability benefits.
13 The Department has the statutory authority to take such an offset under RCW 51.32.220. We turn
14 to the various issues raised by the parties in this appeal.
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21 **Notice.** Under RCW 51.32.220(2), any reduction due to offset is effective the month
22 following the month in which the Department is notified by the Social Security Administration that a
23 worker is receiving federal benefits. Here, the Department received notice that Ms. Davis was
24 receiving benefits in August 1994. Thus under this provision, the Department could first start taking
25 its offset in September 1994. In fact, the Department eventually asserted its offset effective
26 September 1994. In addition, under RCW 51.32.220(4) no reduction may be made unless the
27 worker is notified of the offset reduction prior to the month within which it is made. Here, the
28 Department notified the claimant of the offset in January 1997, and it first took the offset through
29 the February 14, 1997 order that paid retroactive time loss compensation for the two and one-half
30 year period of September 1, 1994 through February 12, 1997. The Department has complied with
31 the statutory notice requirements.
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1 **Retroactive collection of offset over prior six months from the time loss**
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3 **compensation benefit payments claimant is "receiving."** RCW 51.32.230 and
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5 RCW 51.32.220(2) limit the Department to the recovery of overpayments of time loss due to receipt
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7 of both federal and state benefits for the six months immediately preceding the date the
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9 Department notifies the worker of the overpayment. The six-month limit is intended to mitigate the
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11 hardship on the worker imposed by the Department collecting money already paid and probably
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13 spent by the worker. In this case, Ms. Davis had not been receiving periodic time loss payments
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15 during the period in question. The collection of the overpayment was an accounting procedure
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17 made within the order paying back time loss. Thus, the policy of mitigation due to collection from
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19 money paid and spent does not apply. If a six-month limit were to be imposed, the claimant would
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21 receive a windfall of double disability payments. In the past, we have allowed the collection of such
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23 an overpayment of time loss beyond the proceeding six-month period. We allow the same here. *In*
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25 *re James Conrad*, BIIA Dec., 68,967 (1985).

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27 **Delay in issuing time loss until notice of the offset had been given.** By January 17,
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29 1997, the Department likely knew that Ms. Davis was entitled to retroactive time loss for the overall
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31 period of July 16, 1993 through February 12, 1997. The Department chose to issue two payment
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33 orders approximately one month apart, thereby splitting the payment of back time loss. The order
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35 of January 17, 1997, paid back time loss from July 16, 1993 through August 31, 1994. The later
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37 order of February 14, 1997, paid back time loss from September 1, 1994 through February 12,
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39 1997. On January 17, 1997, the Department had also given notice that it would take an offset
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41 beginning September 1, 1994. The Department's witnesses agreed that the orders were probably
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43 issued in this sequence to allow the Department to take the offset effective September 1, 1994.
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45 The industrial appeals judge determined that this delay was not reasonable and, therefore, did not
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1 allow the application of the offset for the period of July 16, 1993 through February 12, 1997. We
2 disagree.
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5 The one month delay in paying time loss from September 1, 1994, allowed the Department
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7 to meet the letter of the law and, thereby, avoid a substantial windfall to the claimant by which she
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9 would have received both the past paid social security disability benefits and retroactive time loss.
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11 While there was some delay, it was not unreasonable especially since the Department did not
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13 delay the payment of time loss for the period of July 16, 1993 through August 31, 1994, for which it
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15 was not seeking an offset. We again note that Ms. Davis is not being asked to reimburse money
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17 that she has already received and spent. It appears that the retroactive payment of time loss was
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19 the result of litigation on the industrial insurance claim. We cannot assume that the Department's
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21 position in that litigation was made in bad faith or due to unreasonable bureaucratic delay. We
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23 found such unreasonable bureaucratic delay in the case of *In re Kenneth Beitler*, BIIA Dec. 58,976
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25 (1982). Ms. Davis did not prove this here. She also did not prove that the dispute over past time
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27 loss was not bona fide. See *In re James Conrad*, BIIA Dec., 68,967 (1985). Therefore, the
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29 Department is not precluded from asserting an offset after September 1, 1994.
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31 **Reduction of offset for attorney fees and litigation costs.** Apparently, when applying its
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33 offset the Social Security Administration may reduce the offset to account for attorney fees and
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35 costs a worker incurs in obtaining workers' compensation benefits. The Social Security
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37 Administration's use of this reduction depends upon the structure of the workers compensation
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39 program. Regardless of the federal authority to make such a reduction, the Washington
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41 Department of Labor and Industries does not reduce its offset due to the worker's expenditure of
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43 attorney fees and costs. In the past, the Board and the Supreme Court of the State of Washington
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45 have refused to exempt legal and medical expenses incurred in establishing the right to benefits
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47 subject to the state offset. *Regnier v. Department of Labor & Indus.*, 110 Wn.2d 60 (1988). We fail

1 to see the distinction raised by the claimant in her Petition for Review, depending on the forum in
2 which the fees and costs were incurred. In *Regnier*, the court refused to legislate a reduction to the
3 offset for attorney fees and costs finding no statute or judicial precedent to allow the same.
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7 *Regnier*, at 65. We will not reduce the offset for attorney's fees and costs incurred by Ms. Davis in
8 obtaining retroactive time loss.
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11 **Recalculation of offset due to Department errors and federal overpayment action.**
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13 The Department's witnesses acknowledged that the Department must recalculate the offset due to
14 its inclusion of Medicaid money in social security disability benefits paid. Furthermore, during the
15 hearings on this appeal, the parties learned that the Social Security Administration has apparently
16 suspended social security disability benefits so that it can collect an overpayment it believes is
17 owing. This evidently has resulted in Ms. Davis not receiving either state or federal disability
18 benefits. Obviously, this situation needs to be investigated and rectified by the Department and the
19 Social Security Administration.
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27 In conclusion, the Department order of May 2, 1997, is reversed and the claim is remanded
28 to the Department to review the claimant's rate of time loss compensation in conjunction with the
29 Department's offset being taken due to the claimant's receipt of social security disability benefits
30 and in conjunction with any offset being taken by the Social Security Administration.
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35 **FINDINGS OF FACT**
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- 37 1. On July 3, 1991, the Department of Labor and Industries received an
38 application for benefits from Ms. Davis for an industrial injury of
39 June 14, 1991, incurred while working for the Washington State
40 Department of Revenue. On January 17, 1997, the Department issued
41 an order paying time loss compensation for the period of July 16, 1993
42 through August 31, 1994. Also on January 17, 1997, the Department
43 issued another order adjusting the claimant's rate of time loss
44 compensation effective September 1, 1994, due to her receipt of social
45 security disability benefits. The order set the rates of time loss
46 compensation as follows: \$867.44 per month effective September 1,
47 1994; \$896.70 per month effective July 1, 1995; and \$962.10 per month
effective July 1, 1996. It also stated that the rate was based upon social

1 security payments totaling \$642, and a highest year's earnings of
2 \$22,641.59 for 1990.

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4 On February 14, 1997, the Department issued an order paying time loss
5 compensation for the period of September 1, 1994, through
6 February 12, 1997. Ms. Davis filed a protest and request for
7 reconsideration on March 24, 1997, and on May 2, 1997, the
8 Department issued an adherence order. Ms. Davis filed an appeal with
9 the Board of Industrial Insurance Appeals on May 9, 1997, and on
10 June 30, 1997, the Board issued an order granting the appeal.

- 11
12 2. Between July 16, 1993 and February 12, 1997, Ms. Davis was unable to
13 engage in gainful employment due to the effects of the industrial injury
14 of June 14, 1991.
- 15
16 3. In August 1994, the Department of Labor and Industries first received
17 notice from the Social Security Administration that Ms. Davis was
18 approved to receive social security disability benefits effective
19 December 1991.
- 20
21 4. On January 17, 1997, the Department of Labor and Industries paid time
22 loss compensation to Ms. Davis for the period of July 16, 1993 through
23 August 31, 1994, without offset for her receipt of social security disability
24 benefits during that time period. The delay in paying time loss
25 compensation was due to a dispute between Ms. Davis and the
26 Department concerning her eligibility to receive the time loss
27 compensation. The Department's position in the dispute was not shown
28 to have been in bad faith.
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30 5. On February 14, 1997, the Department of Labor and Industries paid
31 time loss compensation to Ms. Davis for the period of September 1,
32 1994 through February 12, 1997, with an offset for her receipt of social
33 security disability benefits during that period. The delay in paying time
34 loss compensation was due to a dispute between Ms. Davis and the
35 Department concerning her eligibility to receive the time loss
36 compensation and due to the need to provide Ms. Davis with notice that
37 an offset would be taken. The delay in paying time loss compensation
38 was reasonable, and the Department's position in the dispute was not
39 shown to have been in bad faith.
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41 6. The Social Security Administration has notified Ms. Davis that it is taking
42 an offset from its payment of social security disability benefits due to her
43 receipt of time loss compensation benefits from the Department of
44 Labor and Industries.

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46 **CONCLUSIONS OF LAW**
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- 1 1. The Board of Industrial Insurance Appeals has jurisdiction over the
2 parties and subject matter of this appeal.
3
- 4 2. The notice to the claimant by the Department of Labor and Industries
5 that it would take an offset from her time loss compensation due to her
6 receipt of social security disability benefits was sufficient under
7 RCW 51.32.220 and the Industrial Insurance Act.
8
- 9 3. The offset from the claimant's time loss compensation due to her receipt
10 of social security disability benefits properly did not include a credit for
11 attorney fees and costs the claimant incurred in successfully litigating
12 her right to time loss compensation under the Industrial Insurance Act.
13
- 14 4. The defense of the Department of Labor and Industries to the payment
15 of time loss compensation for the periods after July 16, 1993, was not
16 unreasonable or in bad faith.
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- 18 5. The Department of Labor and Industries and the Social Security
19 Administration may not both take an offset for the payment of time loss
20 compensation and payment of social security disability benefits for the
21 same benefit period.
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- 23 6. The order of the Department of Labor and Industries dated May 2,
24 1997, that adhered to the order of January 17, 1997, that adjusted the
25 rate of payment of time loss compensation effective September 1, 1994,
26 due to the claimant's receipt of social security disability benefits is
27 reversed. The latter order set the rates of compensation as follows:
28 \$867.44 per month effective September 1, 1994; \$896.70 per month
29 effective July 1, 1995; and \$962.10 per month effective July 1, 1996. It
30 also stated that the rate was based upon social security payments
31 totaling \$642, and a highest year's earnings of \$22,641.59 for 1990.
32 The claim is remanded to the Department of Labor and Industries to
33 review the claimant's rate of time loss compensation in light of the fact
34 that the Department took an offset due to the claimant receiving social
35 security disability benefits while at the same time the Social Security
36 Administration took an offset because the claimant was receiving time
37 loss compensation benefits. Further, the Department is directed to
38 issue an order stating:
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40 (a) That, in August of 1994 the Department gave proper notice to the
41 claimant, under RCW 51.32.220(4) thereby enabling the Department to
42 take a social security offset commencing September 1994;
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44 (b) That, the Department gave proper notice to the claimant under
45 RCW 51.32.220(4) for the recovery of its social security offset for
46 retroactive time loss compensation benefits for the period
47 September 1, 1994 through February 12, 1997;

1 (c) That, the Department was not barred by RCW 51.32.320 and
2 RCW 51.32.220(2) from collecting overpayment of time loss
3 compensation benefits for the period September 1, 1994 through
4 February 12, 1997;
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6 (d) That, the Department cannot reduce its offset to account for
7 attorneys' fees and costs Ms. Davis expended to obtain time loss
8 compensation benefits or social security benefits subject to the
9 Department of Labor and Industries' offset; and, the Department is
10 directed to take such other and further action as is required under the
11 law and the facts of this case.
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13 It is so **ORDERED**.

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15 Dated this 22nd day of October, 1998.

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17 BOARD OF INDUSTRIAL INSURANCE APPEALS
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21 /s/ _____
22 THOMAS E. EGAN Chairperson
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25 /s/ _____
26 JUDITH E. SCHURKE Member
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