

## **Barker, Douglas**

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### **SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)**

#### **Computation**

Contributions to a "cafeteria plan" as provided by 42 U.S.C. § 409(a)(4)(l) are not taxable wages and cannot be included in wage calculation. ...*In re Douglas Barker*, BIIA Dec., 14 19053 (2015)

Scroll down for order.



1 2014 order, the subject of the above appeal. The Department order is **REVERSED AND**  
2  
3 **REMANDED.**

4 In Docket No. 14 19055, Mr. Barker filed an appeal with the Board on June 30, 2014, from a  
5 Department order dated June 24, 2014. In this order, the Department affirmed a prior order dated  
6 March 19, 2014, in which it determined Mr. Barker's total gross wages in his job-of-injury were  
7 \$5,213.85 per month. This calculation was based on an hourly pay of \$23.02 per hour, and work  
8 hours of 8 hours per day, 5 days per week, with additional wages of \$727.26 per month for health  
9 care benefits and \$435.07 per month in overtime, and a marital status of married with no  
10 dependents. In the March 19, 2014 order, the Department also stated this compensation rate would  
11 continue to be reduced by the social security offset established in the January 8, 2014 order. The  
12 Department order is **REVERSED AND REMANDED.**

#### 13 SUMMARY

14 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for  
15 review and decision on a timely Petition for Review filed by Mr. Barker to a Proposed Decision and  
16 Order dated on June 17, 2015. In Docket No. 14 19055, our industrial appeals judge reversed the  
17 June 24, 2014 order because the parties stipulated the March 19, 2014 wage order it affirmed was  
18 incorrect. Our judge affirmed the orders involved in the remaining two appeals.

19 Mr. Barker's total gross wages at the time of his injury were \$5,286.45 per month, \$72.60  
20 more than the \$5,213.85 total wages set forth in the March 19, 2014 order. We agree with our  
21 judge's disposition of Docket No. 14 19055.

22 The issues in Docket No. 14 19053 are whether the Department correctly calculated  
23 Mr. Barker's social security offset; his revised time-loss compensation benefits rate based on the  
24 offset; and the overpayment for time-loss compensation benefits he received in January 2014,  
25 before the offset could be implemented. At issue in Docket No. 14 19054 is whether a revised  
26 March 20, 2014 wage order issued one day after the March 19, 2014 wage order involved in Docket  
27 No. 14 19055 is correct. The March 20, 2014 order includes the reduction in Mr. Barker's time-loss  
28 compensation benefits rate based on his social security offset as calculated in the order involved in  
29 Docket No. 14 19053.

30 Mr. Barker maintains the Department miscalculated his social security offset because its  
31 determination of his highest year earnings in 2012 was too low. He argues the Department should  
32 include \$2,268.24 paid to a cafeteria plan when calculating his earnings for that year. He maintains  
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1 the Department should be ordered to recalculate his social security offset; his time-loss  
2 compensation benefits rate after the offset is implemented; and the overpayment for the benefits he  
3 received in January 2014. However, even if we conclude the sum paid into the cafeteria plan  
4 should not be included when totaling his highest year earnings, he still maintains the orders  
5 involved in Docket Nos. 14 19053 and 14 19054 should be reversed. He argues the increase in his  
6 wage order would alter the calculations that are the basis for the orders involved in those appeals.  
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10 We have concluded Mr. Barker's 2014 contributions to his cafeteria plan should not be  
11 included in his highest year earnings. Our judge held this sum should not be included because it  
12 was not subject to social security or federal income taxes. We agree with this conclusion.  
13 However, Mr. Barker maintains the federal statutes mandate the inclusion of this sum in his highest  
14 year earnings. We disagree with his analysis of the relevant statutory language. We agree the  
15 increase in Mr. Barker's wage order should cause the reversal of his two companion appeals. All of  
16 the current and past time-loss compensation benefits paid to Mr. Barker must be recalculated  
17 based on his increased wage rate. The calculation of Mr. Barker's social security offset and the  
18 resulting overpayment for the time-loss compensation benefits he received during January 2014  
19 should also be made using his corrected time-loss rate. The wage order involved in Docket  
20 No. 14 19054 also must be recalculated based on his increased wage rate and on any resulting  
21 reduction in the amount of his social security offset. We are reversing all three orders involved in  
22 this consolidated appeals.  
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### 30 DECISION

#### 31 **Factual Basis and Statutory Framework**

32 These consolidated appeals were decided based on stipulated facts. The parties have  
33 agreed Mr. Barker's wages at the time of his injury were \$5,286.45 a month, \$72.60 a month higher  
34 than the Department's March 19, 2014 wage order. His gross income included the same additional  
35 wages for health care benefits (\$727.26) and overtime (\$435.07) listed in the Department's  
36 March 19, 2014 wage order.  
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40 The following stipulations relate to the social security offset calculation. Mr. Barker's highest  
41 earning year was 2012, when he was paid \$53,313.54 in gross wages. However, the Internal  
42 Revenue Service (IRS) only counted \$50,645.30 of this sum as taxable income for that year.  
43 Similarly, that is the same amount that was subject to social security taxes. His gross wages for  
44 2012 included \$2,268.24 he contributed to an IRS Section 125 Cafeteria Plan out of his pretax  
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1 earnings. The cafeteria plan offered to him by his employer is defined by this statute as an  
2 employee benefit plan under which he could "choose among 2 or more benefits consisting of cash  
3 and qualified benefits."<sup>1</sup> A qualified benefit is further defined in the federal code as "any benefit . . .  
4 not includible in the gross income of the employee."<sup>2</sup> A *Labor and Employment Law* treatise  
5 clarifies that:  
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8 Cafeteria plans are formal written arrangements established by an employer to give its  
9 employees an opportunity to purchase health, child care, life insurance, and other  
10 benefits from a menu of several benefits. Because cash is always the basic benefit  
11 offered in a cafeteria plan, employees covered by such plans are able to forego  
12 taxable cash in favor of selecting a non-taxable benefit and paying for the benefit with  
13 before-tax dollars.  
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15 If it were not for the special tax rules applicable to cafeteria plans, merely giving an  
16 employee the right to choose cash instead of some other non-taxable benefit available  
17 under a cafeteria plan would, under the tax principle of constructive receipt, result in  
18 the taxation of the cash to the employee. Of course, if the employee actually chooses  
19 the cash, he or she will be subject to taxation on that amount. The cafeteria plan rules  
20 carve out an exception to the constructive receipt doctrine, and permit an employee to  
21 have the choice of cash or a non-taxable benefit.<sup>3</sup>  
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23 Accordingly, even though the parties' stipulation did not specify how the sum Mr. Barker  
24 contributed to his cafeteria plan was used, we know he had his taxable earnings in 2012 reduced  
25 by \$2,268.24. His contributions to his cafeteria plan were ostensibly used for health or child care  
26 expenses, life insurance, or other benefits. Mr. Barker chose to forego wages so he could use  
27 pretax dollars to purchase an employee benefit, reducing his taxable income. He is now seeking to  
28 have his contributions to his cafeteria plan included in his 2012 wages because that would reduce  
29 his social security offset and increase the time-loss compensation benefits he can retain. The total  
30 monthly social security and time-loss compensation benefits a worker can receive is 80 percent of  
31 his or her average current earnings (ACE). Mr. Barker's ACE is one-twelfth of his total wages in his  
32 highest earnings year. His highest earnings year was 2012. Mr. Barker wants to include the  
33 \$2,268.24 in his ACE because that would increase the 80 percent cap on the total benefits he can  
34 retain.  
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45 <sup>1</sup> 26 USC 125(d)(1)(B).

46 <sup>2</sup> 26 USC 125(f)(1).

47 <sup>3</sup> 6-159 *Labor and Employment Law* 159.01 (published by Matthew Bender & Co. 2015).

1 **DISCUSSION**

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3 As our industrial appeals judged noted, the Board has held the Department must use the  
4 definition of wages found in federal law when determining a worker's ACE.<sup>4</sup> In *David Short*, we  
5 cited three federal cases stating that a worker's earnings for the purpose of computing his ACE are  
6 those subject to social security taxes. Our holding also follows two prior Board decisions affirming  
7 that the Department's calculations of ACE should be based on the same definition of wages used  
8 by the Social Security Administration.<sup>5</sup> Since the parties stipulated Mr. Barker's \$2,268.24  
9 contributions to his cafeteria plan were not subject to social security taxes, they cannot be included  
10 in his ACE.  
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12 Mr. Barker, however, maintains the federal statute, 42 USC 409(a)(4)(I), requires that his  
13 contributions to a cafeteria plan be included in his ACE. This statute defines wages for the purpose  
14 of determining a worker's ACE. The pertinent language states that wages shall **not** include:  
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16 [a]ny payment made to, or on behalf of, an employee . . . under a  
17 cafeteria plan (within the meaning of section 125 of the Internal  
18 Revenue Code of 1986) if such payment would not be treated as wages  
19 without regard to such plan and it is reasonable to believe that ...section  
20 125 would not treat any wages as constructively received.<sup>6</sup>  
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22 Despite its obtuse language, this statute's meaning can be discerned. This section states a  
23 worker's wages cannot include any payment made to a cafeteria plan if that sum would not be  
24 treated as wages by the IRS. We know Mr. Barker's 2012 contributions of \$2,268.24 to his  
25 cafeteria plan were not subject to federal income tax. The prior quotation from the *Labor and*  
26 *Employment Law* treatise explains the constructive receipt doctrine does not apply to the \$2,268.24  
27 used to purchase cafeteria plan benefits and the contributions are not taxable. Because his  
28 contributions to his cafeteria plan would not have been treated as wages by the IRS, they cannot be  
29 included in his wages when calculating his ACE. We accordingly conclude federal law does not  
30 require Mr. Barker's contributions to his cafeteria plan to be included in his 2012 wages.  
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32 The Department correctly calculated Mr. Barker's ACE. However, because the Department  
33 has admitted it did not correctly calculate his wages at the time of his injury, it still must recalculate  
34 the offset amount. The increase in Mr. Barker's wages should cause an increase in his time-loss  
35 benefits. An offset order must be based on a correct monthly time-loss rate. An increase in  
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46 <sup>4</sup> *In re David Short*, Dckt. No. 03 19518, at 3 (August 23, 2004).

47 <sup>5</sup> *In re Laverne McKenna*, BIIA Dec., 49,873 (1978); *In re Joan B. Varnado*, Dckt. No. 09 15790 (September 22, 2010).

<sup>6</sup> 42 USC 409(a)(4)(I).

1 Mr. Barker's time-loss rate would increase the benefits he should have been paid during January  
2 2014. This should result in a change in the overpayment for the time-loss benefits paid to him  
3 during that month. The June 16, 2014 Department order should be reversed so the Department  
4 can recalculate his social security offset and the resulting overpayment based on the correct  
5 time-loss compensation benefits rate. Similarly, the March 20, 2014 order in which the Department  
6 changed Mr. Barker's time-loss compensation benefits rate must be based on the increased wage  
7 order, and a correctly calculated offset order.  
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10 We therefore are reversing all three orders before us so the Department can recalculate  
11 Mr. Barker's time-loss compensation benefits rate and also recalculate his social security offset and  
12 the resulting overpayment based on the correct time-loss rate.  
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### 16 **FINDINGS OF FACT**

- 17 1. On August 12, 2014, an industrial appeals judge certified that the parties  
18 agreed to include the Jurisdictional History, as amended, in the Board  
19 record solely for jurisdictional purposes.  
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- 21 2. The Department's June 16, 2014 social security offset order was based  
22 on a determination Mr. Barker's highest year earnings were \$50,645.30  
23 in 2012. The Department did not include the \$2,268.24 Mr. Barker  
24 contributed out of his pretax earnings in 2012 to an Internal Revenue  
25 Code Section 125 Cafeteria Plan in its calculation of "average current  
26 earnings" to determine the amount of the social security offset against  
27 Mr. Barker's time-loss compensation benefits payments.  
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- 29 3. At the time of Mr. Barker's December 7, 2012 industrial injury, he was  
30 married with no dependants. His wages were \$5,286.45 per month,  
31 which includes additional wages of \$727.26 per month for  
32 employer-contributed health care benefits and \$435.07 per month for  
33 overtime.  
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### 35 **CONCLUSIONS OF LAW**

- 36 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
37 parties and subject matter in these appeals.  
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- 39 2. The "average current earnings" provisions of 42 USC 424a of the  
40 federal code govern the calculation of the maximum amount of  
41 combined social security and time-loss compensation benefits a worker  
42 can retain after he receives social security benefits and is used by the  
43 Department to determine the proper social security offset by which his  
44 time-loss compensation benefits will be reduced based on his social  
45 security income. "Average current earnings" are those earnings subject  
46 to social security and federal income taxes under federal law and do not  
47 include contributions out of pretax earnings to a Section 125 Cafeteria  
Plan. 42 USC 409(a)(4)(I).

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3. In Docket No. 14 19055, the Department order dated June 24, 2014, is reversed. This matter is remanded to the Department to recalculate Mr. Barker's time-loss compensation benefits rate based on total gross monthly wages at his job of injury of \$5,286.45 per month, which includes additional wages of \$727.26 per month for health care benefits and \$435.07 per month for overtime, and a marital status of married with no dependents.
  4. In Docket No. 14 19053, the June 16, 2014 order is reversed. This matter is remanded to the Department to recalculate Mr. Barker's social security offset based on a corrected time-loss compensation benefits rate consistent with our decision in the above appeal. The Department is further ordered to recalculate the overpayment for Mr. Barker's January 2014 time-loss compensation benefits based on the corrected time-loss rate. The Department's determination in its January 8, 2014 order that Mr. Barker's highest year earnings were \$50,645.30 in 2012 is correct and is affirmed.
  5. In Docket No. 14 19054, the June 23, 2014 order is reversed. This matter is remanded to the Department with directions to recalculate the adjustment to Mr. Barker's time-loss compensation benefits rate based on a change in his healthcare benefits in the amount of \$727.26 per month, based on the corrected time-loss rate and social security offset amount consistent with our decisions in the above appeals.

Dated: August 20, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ \_\_\_\_\_  
DAVID E. THREEDY Chairperson

/s/ \_\_\_\_\_  
JACK S. ENG Member