IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 17

WCC No. 9211-6631

THOMAS R. BROEKER

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

GREAT FALLS COCA-COLA BOTTLING COMPANY

Employer.

IRVIN ELL

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

MONTANA DEPARTMENT OF HIGHWAYS

Employer.

[CORRECTED] DECISION AND JUDGMENT

Thomas R. Broeker (Broeker) and Irvin Ell (Ell) have jointly petitioned the Court to void or reduce the social security offset being taken by the State Compensation Insurance Fund (State Fund) against their workers' compensation benefits. All parties agree that the offset issues may be resolved upon the agreed facts set forth in the Final Pre-Trial Order [Revised], the exhibits and affidavits attached to the parties' briefs, and a deposition of an official of the Social Security Administration. (Final Pre-Trial Order [Revised] Docketed July 11, 1994; Stipulation Regarding Use of Affidavits and Exhibits, and Order docketed March 8, 1994.) Deferred for later consideration are petitioners' requests for penalties and attorney fees, as well as their request for class certification. (Final Pre-Trial Order [Revised] at 16.)

The Court has reviewed all of the factual materials submitted by the parties, along with their briefs. Since the essential facts appear undisputed, this decision will be in narrative form.

Citations to Record

Citations to exhibits, other than deposition exhibits, are to the 13 exhibits attached to Respondent/insurer's Opening Brief on Issues Pertaining to Social Security Offset. There are also two numbered exhibits (1 and 2) attached to Respondent/insurer's Reply Brief on Issues Pertaining to Social Security Offset. Those exhibits consist of portions of a Supreme Court brief filed in ***McClanathan v. Smith,*** *186 Mont. 56, 606 P.2d 507 (1980)* and an affidavit of respondent's counsel, Mr. William O. Bronson. The Bronson affidavit will be cited as Bronson Affidavit. The brief in ***McClanathan*** is not cited.

Factual Background

Petitioners were injured in separate industrial accidents. Ell suffered an injury to his low back on December 24, 1977, while working for the Montana Department of Highways. Broeker was injured on December 4, 1980, while working for Coca-Cola Bottling Company. He also injured his low back.

The State Fund was the responsible insurer for both accidents. It accepted liability for both claims.

Ell's injury resulted in a laminectomy which was performed in 1978. Following his recovery from surgery, Ell returned to work on December 10, 1978, and continued working until June 10, 1985. On October 15, 1985, the State Fund reinstated temporary total disability benefits retroactive to June of that year. The State Fund continued to pay temporary total disability benefits until November 7, 1991, when it determined Ell to be permanently totally disabled. Since November 7, 1991, the State Fund has paid Ell permanent total disability benefits.

Broeker did not need immediate surgery and returned to work following his injury.[(1)] He continued to work intermittently until August of 1984, at which time the State Fund commenced paying temporary total disability benefits. Those benefits continued until June 1, 1992, when the State Fund determined Broeker to be permanently totally disabled. Since then it has paid permanent total disability benefits.

On December 29, 1986, Ell applied for social security disability benefits. On March 2, 1988, an administrative law judge (ALJ) for the Social Security Administration found in Ell's favor, finding him to be disabled since June 10, 1985. The ALJ awarded benefits retroactive to December of 1985.

Although Broeker's inability to work began almost a year earlier than Ell's, he did not apply for social security disability benefits until May 1990. His application was finally adjudicated

on March 17, 1992. The ALJ found that his period of disability began August 23, 1984, and awarded benefits retroactive to May of 1989.

Following the social security determinations, the State Fund began offsetting both petitioners' benefits. Ell was notified by letter dated August 1, 1988, that the State Fund had begun offsetting his biweekly benefits effective July 25, 1988. (Ex. 12.) The letter also notified Ell that he would have to reimburse the State Fund $20,605.38 because of an overpayment resulting from the retroactive payment of the social security disability benefits. Broeker was notified by letter dated June 1, 1992, that the State Fund would begin offsetting his biweekly benefits effective June 3, 1992. The letter pegged his overpayment at $12,081.49.

In each case the State Fund based the amount of the offset on the **initial** amount of the social security disability benefit. For Ell that amount was $662.30 commencing in December 1985. (Ex. 11; Capp Dep. Ex. 3.) For Broeker the amount was $651.50. (Ex. 3; Capp Dep. Ex. 1.) While both petitioners received subsequent cost-of-living adjustments, those increases have not been included in computing the offsets.

Additional facts pertaining to the issues in this case are set out in the discussion below.

Issues

Initially petitioners asked this Court to declare the offsets entirely illegal because their social security benefits were not based on their industrial injuries. Petition for Trial. Broeker has since abandoned that contention. Petitioner Thomas R. Broeker's Abandonment of Argument No. 1 (docketed April 18, 1994). However, Ell continues to assert that in his case the State Fund cannot take an offset because his disability was caused by multiple injuries rather than the single injury he suffered in 1977.

The petitioners' other two challenges are to the manner in which the offset has been calculated. Broeker contends that the initial benefit rate used by the State Fund in calculating his offset included amounts attributable to cost-of-living increases. He argues that those increases should be excluded pursuant to ***McClanathan v. Smith,*** *186 Mont. 56, 606 P.2d 507 (1980).* Both petitioners further argue that the offset should be calculated on the social security disability payments they would have received had they become totally disabled at the time of their injuries and promptly applied for social security benefits. They argue that the "indexing" method of computing their benefits has inflated the offset.

The parties set out the issues in their Final Pre-Trial Order [Revised]. The Court restates those issues as follows:

> 1. Are petitioner Ell's social security disability benefits payable to him because of his December 24, 1977 industrial injury and therefore subject to Montana's offset statutes?

2. Did the amount used by the State Fund in calculating Broeker's social security offset include cost-of-living increases, and, if so, should the cost-of-living portions be excluded under ***McClanathan v. Smith,*** *186 Mont. 56, 606 P.2d 507 (1980)?*

3. Should the offsets have been based on the social security disability benefits petitioners *would have* received had the onset of their total disabilities coincided with their injuries?

Discussion and Decision

At the time of Ell's industrial accident, the authority to offset social security benefits was set forth in sections 92-701.1 and 92-702.1, R.C.M. 1947 (1977). At the time of Broeker's injury, the offset authority was found in sections 39-71-701(2) and -702(2), MCA (1979). In each case, the first cited statute authorized an offset against temporary total disability benefits and the second authorized a similar offset against permanent total disability benefits. All four cited sections are identical and provide:

> In cases where it is determined that periodic benefits granted by the Social Security Act, 42 U.S.C. 301 (1935), are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for such week.

The offset statute in effect at the time of the injury governs any offset. ***Watson v. Seekins,*** *234 Mont. 309, 312, 763 Mont. 309 (1988).* Therefore, the cited sections will be applied in this case.[(2)]

I

As an initial matter, Ell argues that no offset may be taken in his case because his social security benefits are not "payable *because* of the injury." (Joint Brief of Claimants/petitioners Broeker and Ell at 7, italics added, underline in original.) He would construe the offset statute as permitting the offset only where social security disability benefits are awarded "*exclusively* on account of the injury." (Responsive Brief of Claimants/petitioners Broker and Ell at 4, italics added, underline in original.)

Ell's preferred interpretation is doubtful. The phrase "because of" has a dictionary definition of "by reason of: on account of." Webster's New Ninth Collegiate Dictionary (1982 Edition). Those words reflect the concept of causation, but causation is not always defined in terms of "exclusive" causative factors. For example, in the context of the Age Discrimination in Employment Act (ADEA), the Court of Appeals for the Seventh Circuit construed the ADEA provision prohibiting employers from discharging any individual ". . . *because of* such individual's age" as meaning that "the employer would not have discharged the employee *if not* for the employee's age." ***Castleman v. Acme Boot Co.,*** *959 F.2d 1417, 1420 (7th Cir. 1992) (italics added).* It went on to describe the test as a "*but-for"*

test. "Thus it is not necessary that age be the only factor in the discharge; it need only be a 'but-for' factor." In the context of the offset provision, the "but-for" test would appear a more appropriate one than an exclusive factor test. However, we need not make any final determination concerning what test applies since Ell has failed to persuade the Court that an exclusive factor test is not satisfied.

Ell contends that after his 1977 back injury he suffered "four subsequent injuries on the job between 1978 and 1984" and that social security disability benefits were awarded on account of all of the injuries. Initially, it is important to determine the basis for that assertion.

In uncontested fact 18 of the Final Pre-Trial Order [Revised], the following statement is made:

> 18. Subsequent to December 24, 1977, Claimant **alleged** four other job-connected injuries. Defendant/Insurer denied the December 18, 1984 claim on the basis it was not filed and reported in a timely manner. [Emphasis added.]

In support of his allegation of subsequent injuries Ell contends in paragraph 28, as follows:

> 28. Claimant sustained and reported four other industrial injuries as follows:
>
> a. July 19, 1978 -- Slipped and fell, injuring back.
>
> b. May 6, 1981 -- While cleaning shop, bent and twisted back.
>
> c. December 1, 1982 -- Motor patrol overturned at work.
>
> d. December 18, 1984 -- Motor patrol went into ditch, severely injuring claimant in car.

(Final Pre-Trial Order [Revised] at 6.) He offers no evidence to back up the contentions.

The only additional information provided to the Court concerning the alleged subsequent injuries is contained in an affidavit of respondent's attorney, who reviewed the Fund's files for Ell's claims. (Bronson Affidavit.) He was unable to locate any claims for the alleged injuries in 1978 and 1981. (*Id.* at 2) With respect to the December 1982 alleged injury, he determined that no benefits were ever paid. Moreover, a copy of the claim submitted by Ell, which is attached to the affidavit as exhibit B, states that Ell "fell on right side" and injured his "right hip, shoulder and also neck." (*Id.* Ex. B.) There is no mention of any low-back injury. (*Id.*) With respect to the 1984 injury the Bronson Affidavit notes that the claim was not filed until 1986, and was rejected as untimely. (*Id.* at 2.)

The Bronson Affidavit also mentions another claim for an injury which Ell alleged occurred on July 10, 1985. The claim is attached to the Bronson Affidavit as Exhibit E. It was rejected by the State Fund because the employer reported that claimant was on leave without pay

on the date of the alleged injury. The Court also notes that claimant's temporary total disability benefits were reinstated effective June 8, 1985, a month prior to the alleged injury.

Thus, the evidence presented to the Court establishes only that one claim for a subsequent injury was accepted. The accepted claim did not result in payment of any benefits, even medical benefits. Utterly lacking is evidence that any of the alleged injuries were permanent in nature or that they resulted in any permanent impairment or disability.

The Court has also examined the decision of the ALJ. The decision found Ell to be "disabled primarily because of his low back pain related to the clinical findings and disc disease." (Respondent/insurer's Opening Brief on Issues Pertaining to Social Security Offset, Ex. 10 at 3.) The ALJ concluded:

> The weight of evidence establishes that claimant has severe impairments which preclude him from past work-related activity and all substantial gainful activity or sustained activity because of back pain with a history of herniated discs at the L4-5 and L5-S1 levels and the residual effects of surgeries including a laminectomy performed in 1978 and a laminectomy and fusion performed in March 1987 with residual low back pain and muscle tension. This disability precludes claimant from sustained activity and at best only semisedentary [sic] work activity since the initial period of disability commenced on June 10, 1985.

(*Id*.) The ALJ went on to state:

> The medical evidence stands uncontested. **The record shows a long history of back problems going back to claimant's initial back surgery in 1978**.

(*Id., emphasis added*.) Therefore, it is clear that the basis for the award of social security benefits was low-back trouble which commenced with claimant's 1977 injury. The ALJ does not mention any subsequent injuries. He does not mention any independent causal factors for claimant's disability.

Moreover, in June of 1985, when claimant became unable to work, he sought and obtained a reinstatement of his temporary total disability benefits, thereby attributing his inability to work to his 1977 injury. He has continued to receive total disability benefits on account of that injury.

Thus, there is no evidence that the award of social security benefits was based on any condition other than claimant's low-back condition, or that his low-back condition is attributable to anything other than his 1977 injury. Whether the language of the offset statute is interpreted as requiring the workers' compensation injury to be the sole basis for the social security benefits, or as requiring that the injury contribute to the award of benefits on a "but-for" or some lesser basis, the social security disability benefits paid to Ell in this case are "payable because of the injury." The State Fund is entitled to an offset.

II

Petitioner Broeker contends that the amount of the offset has been miscalculated because the disability benefit upon which it was based included cost-of-living increases. He cites ***McClanathan*** as prohibiting the inclusion of cost-of-living increases when calculating the offset. In ***McClanathan*** the Montana Supreme Court held that Congress intended that the offset apply only to the "primary insurance amount" specified under 42 U.S.C. § 423 and not to cost-of-living increases provided under 42 U.S.C. § 415. Ell does not join in this argument. See Joint Brief of Claimants/Petitioners Broeker and Ell.[(3)]

The cost-of-living adjustments at issue are those that were built into the Social Security Administration's initial benefit determination. Cost-of-living increases which were later added to that initial benefit are not at issue. All parties agree that those subsequent adjustments have been excluded from the offset computations.

The State Fund agrees that some portion of Broeker's initial social security benefit is attributable to cost-of-living adjustments. James R. Capp (Capp), operations supervisor for the Great Falls district office of the Social Security Administration, testified that in fact Broeker's initial benefit included cost-of-living adjustments. However, neither Broeker nor the State Fund identified the statutory basis for that conclusion.

Any cost-of-living increases, including those which become a part of the initial benefit, are governed by the Social Security Act. The Court must, therefore, determine whether Capp's testimony has any basis in law. ***Union Interchange, Inc. v. Parker,*** *183 Mont. 348, 355, 357 P.2d 339 (1960) (except in prosecutions for libel, questions of law are determined by the court).* Lacking any statutory guidance from the parties, or Capp, the Court has had to take the initiative in analyzing the Social Security Act.

After reviewing the Social Security Act, the Court has determined that the application of the Social Security Act in Broeker's case did indeed result in the inclusion of cost-of-living increases in his initial benefit rate. The inclusion of the adjustments came about because Broeker failed to promptly apply for social security disability benefits upon becoming disabled. His disability date was August 23, 1984. He applied for benefits in May of 1990, almost six years later.

Because of his delay in filing for benefits, Broeker was ineligible for benefits he would have otherwise received had he promptly applied. That loss was the result of the statutory waiting period imposed by the Social Security Act with respect to disability benefits. Title 42 U.S.C. § 423(a)(1)[(4)] provides that disabled individuals must satisfy an initial waiting period before they are entitled to disability benefits. The section provides in relevant part:[(5)]

> **(a) Disability insurance benefits**
>
> (1) Every individual who --

. . .

(D) is under a *disability (*as defined in subsection (d) of this section), shall be entitled to a disability insurance benefit (i) for each month *beginning with the first month after his waiting period* (as defined in subsection (c)(2) of this section) in which he becomes so entitled to such insurance benefits . . . . [Italics added.]

The prescribed waiting period, as set forth in 42 U.S.C. § 423(c)(2), is as follows:[(6)]

(c) Definitions; insured status; waiting period

. . .

(2) The term "waiting period" means, in the case of any application for disability insurance benefits, the earliest period of five consecutive calendar months--

(A) throughout which the individual with respect to whom such application is filed has been under a disability and

(B)(**i**) which begins **not earlier than with the first day of the seventeenth month before the month in which such application is filed** if such individual is insured for disability insurance benefits in such seventeenth month, or (ii) if he is not so insured in such month, which begins not earlier than with the first day of the first month after such seventeenth month in which he is so insured. [Emphasis added.]

Thus, if the disabled individual applies for benefits within seventeen months following the date of onset of his or her disability, benefits commence five months after the onset of disability. Benefits for an individual applying later than seventeen months following onset of disability commence twelve months prior to the date of the application.

In Broeker's case, had he made prompt application, the earliest he could have received benefits was on January 24, 1985, which was five months after the onset of his disability. Since he did not apply for benefits until May, 1990, his benefits did not commence until May 1989. (Capp. Dep. at 25-26.) As previously noted, Broeker's entitlement to the benefits was not adjudicated until March 17, 1992. Therefore, accrued benefits were paid retroactively to May 1989.

Broeker's initial benefit, effective May 1989, was $651.50. (Capp. Dep. at 29; Capp Dep. Ex. 1.) According to Capp, that amount included cost-of-living increases granted social security recipients between 1984 and 1988. (Capp Dep. at 26 and 35.) Those increases were as follows:

12/84 3.5%

12/85 3.1%

12/86 1.3%

12/87 4.2%

12/88 4.0%

(Capp Dep. Ex. 6.)

The Court has verified that the Social Security Act required the inclusion of the cost-of-living increases in Broeker's initial benefit. The increases are governed by 42 U.S.C. § 415(i). That section requires that following the third quarter (July 1 to September 30) of each year after 1974, the Secretary of Health and Human Services shall determine the amount, if any, of the cost-of-living increase. The increase is determined pursuant to a formula set forth in subsection (i)(1). In the event that the Secretary determines that there is a cost-of-living increase under the section, then he must increase disability benefits effective December of that year.[7] Subsection (i)(2)(A)(ii)-(iii) presently provides in relevant part:

> (ii) If the Secretary determines that the base quarter in any year is a cost-of-living computation quarter, he shall, effective with the month of December of that year as provided in subparagraph (B), increase --
>
> (I) the benefit amount to which individuals are entitled for that month under section 427 or 428 of this title,
>
> (II) *the primary insurance amount of each other individual on which benefit entitlement is based under this subchapter, ...*
>
> (iii) In the case of an individual who becomes *eligible* for an old-age or disability insurance benefit, . . . in a year in which there occurs an increase provided under clause (ii), the individual's primary insurance amount (*without regard to the time of entitlement to that benefit)* shall be increased . . . by the amount of that increase and subsequent applicable increases, but only with respect to benefits payable for months after November of that year. [Italics added.]

From the face of this provision, two things are apparent. First, the cost-of-living increase is added to the primary insurance amount (PIA). Second, increases which are granted in any year following and including the year the individual becomes *eligible* for benefits are added to the PIA "*without regard to the time of entitlement to that benefi*t." Broeker became *eligible* for benefits on August 23, 1984 (the date of the onset of his disability), subject to a waiting period. Thus, under 42 U.S.C. 415(i) he was entitled to the cost-of-living increases which were granted between that eligibility date and the date his benefits actually commenced.

In ***McClanathan,*** the Supreme Court held that the offset should be applied to the PIA but not to cost-of-living increases. The State Fund points out that Capp testified that Broeker's initial benefit **is** the PIA. (Capp Dep. at 11.) It argues that even though that PIA may contain a cost-of-living component, it is nonetheless the proper basis for computing the offset.

A careful review of the Social Security Act shows that Capp, as well as the Fund, are correct in characterizing Broeker's initial benefit as his PIA. Initially, 42 U.S.C. § 423 expressly provides that 42 U.S.C. § 415 shall govern the determination of the PIA. Section 423(a)(2) presently provides in relevant part:

> (2) Except as provided in section 402(q) of this title and section 415(b)(2)(A)(ii) of this title, such individual's disability insurance benefit for any month shall be equal to his primary insurance amount for such month *determined under section 415* of this title as though he had attained age 62 in--[(8)]

In discussing § 423, the Montana Supreme Court in ***McClanathan*** did not mention the reference to § 415 even though the reference was contained in § 423 as early as 1970. 42 U.S.C. § 423 (1970 ed.).

Title 42 U.S.C. § 415 presently defines the PIA as encompassing the cost-of-living increases provided in 42 U.S.C. § 415(i).[(9)] Section 415(a) provides that:

> **(a) Primary insurance amount.**
>
> **(1)(A)** The primary insurance amount of an individual shall (except as otherwise provided in this section) be equal to the sum of --
>
> (i) 90 percent of the individual's average indexed monthly earnings (determined under subsection (b) of this section) to the extent that such earnings do not exceed the amount established for purposes of this clause by subparagraph (B),
>
> (ii) 32 percent of the individual's average indexed monthly earnings to the extent that such earnings exceed the amount established for purposes of clause (i) but do not exceed the amount established for purposes of this clause by subparagraph (B), and
>
> (iii) 15 percent of the individual's average indexed monthly earnings to the extent that such earnings exceed the amount established for purposes of clause (ii), rounded, if not a multiple of $0.10, to the next lower multiple of $0.10, *and thereafter increased as provided in subsection (i) of this section.* [Italics added.]

The italicized language was adopted by Congress in 1977, P.L. 95-216, § 201, 91 Stat. 1514-15, and is, therefore, applicable to Broeker's injury.

Neither the calculation method set forth in the current statute, nor the language requiring inclusion of the cost-of-living adjustment, was part of 42 U.S.C. § 415(a) at the time of McClanathan's injury on February 26, 1974. While an average monthly wage was used in computing the PIA in 1974, 42 U.S.C. § 415(b) (1974 & Supp. III 1970), the actual PIA was fixed by a table, 42 U.S.C. 415(a) (1974 & Supp. III 1970). In 1974, 42 U.S.C. § 415(a) did not mention the cost of living adjustment.

The foregoing analysis finally brings us to the ultimate question. Does the 1977 redefinition of the PIA require a different result than reached in ***McClanathan*** with respect to cost-of-living increases, at least where those increases are contained in the initial benefit amount?

The question arises because the result in ***McClanathan*** appears at first blush to be predicated on the Supreme Court's understanding that cost-of-living adjustments are distinct from the PIA. The Court noted that state authority to offset social security benefits arises under 42 U.S.C. § 424a(d), which it quoted as providing:

> (d) The reduction of benefits required by this section shall not be made if the workmen's compensation law or plan under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423 of this title.

McClanathan at 63-64. While the language of the subsection has been changed from that quoted, the substance of the current subsection, including an express reference to § 423, remains the same.[(10)]

The Court stated that "[i]t is important to note that such cost-of-living increases occur under 42 U.S.C. § 415." It then concluded that the reference in § 424a(d) to "section 423 of this title" was significant in determining whether the offset applied to cost-of-living increases:

> [I]f Montana does not act to offset Workers' Compensation benefits in such cases, the federal act will control. The disabled person will have reduced benefits in any event. However, it is not equitable or necessary that the State reduce his benefits based on cost-of-living increases granted under the federal act. **This is recognized, I think, in the provisions of 42 U.S.C. § 424a(d) quoted above, which refers to "benefits under section 423 of this title."**
>
> The benefits to which appellant is entitled under 42 U.S.C. § 423 are disability benefits, not cost-of-living benefits, and are defined as "equal to his **primary insurance amount** for such month" calculated as though he had attained age 62. It is evident that the provisions of 42 U.S.C. § 424a(d) allowing the states to provide an offset contemplate only the benefits recoverable under 42 U.S.C. § 423, relating to the individual's **primary insurance** benefits. Therefore, we hold that the state offset may not be used to reduce the benefits accruing to the appellant under the cost-of-living increases provided in 42 U.S.C. § 415. [Emphasis added.]

McClanathan at 64.

As outlined in earlier discussion, the primary insurance benefit under 42 U.S.C. § 423 now encompasses cost-of-living increases. Notwithstanding that expansion of the PIA

definition, I am persuaded that the Supreme Court would reach the same conclusion today as it did in 1980 with respect to cost-of-living increases. I am also persuaded that the Supreme Court would extend its holding to cost-of-living increases which are incorporated in the initial benefit.

The basic benefit for disabled persons is still the amount prescribed by 42 U.S.C. § 415(a) before any cost-of-living increases are added. Any increase to that basic amount is due to increases in the cost of living, which in turn are caused by inflation. In ***McClanathan***, the Court held that inclusion of cost-of-living increases in offset calculations "is not equitable or necessary." One of the reasons such inclusion is not equitable is the lack of any provision under the Montana Workers' Compensation Act for cost-of-living increases. At least that was the case until 1987, when the Montana legislature provided a cost-of-living adjustment for permanent total disability benefits. § 39-71-702(5), MCA (1987).[(11)] The rule excluding cost-of-living increases is consistent with the rule in loss-of-earning capacity cases requiring comparison of pre-injury and post-injury wages for the same period of time. ***McDanold v. B.N. Transport, Inc.,*** *208 Mont. 470, 479-80, 679 P.2d 1188 (1984).*

At the time of McClanathan's injury, 42 U.S.C. 415(2)(A)(ii)(1973) instructed the Secretary to increase the "primary insurance amount" by the amount of any cost-of-living increase:

> (ii) If the Secretary determines that the base quarter in any year is a cost-of-living computation quarter, he shall, effective with the month of June of such year as provided in subparagraph (B), *increase* the benefit amount of each individual who for such month is entitled to benefits under section 427 or 428 of this title, *and the primary insurance amount of each other individual under this subchapter*. . . . [Italics added.]

I must assume that the Supreme Court was aware of this language when it decided ***McClanathan***. Since the language has the same effect as the 1977 amendment to 42 U.S.C. 415(a), which added the cost-of-living increase to the definition of the PIA, I must conclude that the added language would not change the result in ***McClanathan***.

The result reached in ***McClanathan*** finds further support in a decision of the Colorado Supreme Court which similarly held "that social security cost-of-living increases may not be deducted from workers compensation payments." ***Engelbrecht v. Hartford Accident and Indemnity,*** *680 P.2d 231, 233 (Colo. 1984).* The Colorado Court reasoned:

> Allowing an injured worker to keep his cost-of-living increase better protects the worker and gives him a more reliable source of income. In addition a cost-of-living increase does not result in a double award. The federal government has decided that it will maintain the buying power of social security payments, not that it will provide additional benefits for a particular injury. Because Colorado does not

> provide [workers' compensation] benefits to keep pace with inflation, there is no double payment.

Id. at 233. In ***Watson v. Seekins,*** *234 Mont. 309, 314-15, 763 P.2d 328 (1988),* the Montana Supreme Court expressed the purpose of the offset statute as follows:

> The legislative intent behind the workers' compensation statutes is to replace income to injured workers. The purpose behind the state offset statute is to prevent "over replacement" or duplication of disability pay. . . .

As the Colorado Court concluded, exclusion of cost-of-living increases does not undermine that purpose since such increases merely permit disability benefits to keep pace with inflation.

The State Fund argues that even under ***McClanathan*** it is not required to exclude cost-of-living increases which are part of the initial benefit amount. It says, "The concern expressed in ***McClanathan*** really was that the workers' compensation insurer not take advantage of subsequent cost of living increases in a based disability benefit." (Respondent/insurer's Opening Brief on Issues Pertaining to Social Security Offset at 27, emphasis in original.) But ***McClanathan*** did not distinguish between cost-of-living increases which are made *after* the initial award and those that are included in the initial award. Therefore, the Court can find no basis for the distinction argued by the Fund.

To summarize, the Court finds that ***McClanathan*** precludes consideration of cost-of-living increases when determining the social security offset. The Court further finds that the prohibition extends to cost-of-living increases which are included in the initial benefit rate.

The Court has not determined amounts which should have been excluded in Broeker's case since the parties have not provided calculations or specific evidence of that amount. If the parties are unable to agree on the proper amount of the offset they may request the Court to make the determination.

III

Both petitioners argue that the offset should be calculated on the amount they *would* have received had they become disabled at the time of their injuries. The issue arises because of the manner in which the PIA is calculated. The method for calculation is set out in 42 U.S.C. § 415(a). The pertinent text of the section has been quoted above at pages 11-12.

The PIA calculation is wage-driven in that it is based on the individual's prior earnings. The first step of the calculation requires a determination of the individual's historical earnings. Those earnings are then "indexed." Indexing is a method by which historical wages paid to the individual are converted into current dollars. The basic formula for indexing is:

> *Indexed earnings = Actual earnings x Average earnings*

for given year for given year for indexing year

Average earnings for given year

42 U.S.C. § 415(b)(3); (Capp Dep. Ex. 5). For example, assume an indexing year of 1984 and 1968 reported earnings of $10,000. The average earnings in 1968 was $5,571.76. (Capp. Dep. Ex 7.) The average earnings in 1984 was $16,135.07. (*Id.*) Thus, between 1968 and 1984 average earnings increased by 289.6% (*$16,135.07 ÷ $5,571.76*). The worker's indexed earnings for 1968 would therefore be $28,960 (*$10,000 x 16,135.07 ÷ 5,571.76*). Wages earned *after* the indexing year are included in the individual's earning history but at actual amounts; they are not indexed. 42 U.S.C. § 415 (b)(3)(B); (Capp Dep. at 13).

The "indexing year" is the second year *prior* to the benchmark year. 42 U.S.C. § 415 (3)(A)(ii); (Capp. Dep. at 12). The benchmark year is the year in which the individual became eligible for a disability insurance benefit, i.e., the year in which the individual's disability commenced. *Id*.

The final calculation is based on the individual's "*average* indexed monthly earnings." 42 U.S.C. § 415(a)(1)(A). That average is calculated after two to five years of earnings are cast out. 42 U.S.C. § 415(b)(2)(A); (Capp. Dep. at 16-18). The remaining earnings are added together, then divided by the total years of those earnings to obtain a yearly average. That average is then divided by twelve (12), which is the number of months in a year, to obtain a final monthly average. 42 U.S.C. § 415(b)(1); (Capp. Dep at 16-18).

The manner in which "average indexed monthly earnings" is calculated is illustrated through Broeker. His indexing year was 1982, which is two years prior to the August 1984 onset of his disability. (Capp. Dep. at 12.) Average earnings for 1982 was $14,531.34. In 1971, Broeker earned a total of $11.88. The average earnings for that year was $6,497.08. Thus, his indexed earnings for that year was $26.57, as shown by the following calculations:

11.88 x 14,531.34 = 26.57

6,497.08

(Capp Dep. Ex. 8.) For all years in which he worked, Broeker's actual and indexed earnings were as follows:

YEAR ACTUAL INDEXED

1971 $ 11.88 $ 26.57

1972 $ 889.76 $ 1,812.41

1973 $ 5,258.52 $10,080.70

1974 $ 2,076.54 $ 3,757.4-

1975 $ 538.40 $ 906.47

1976 $ 4,127.13 $ 6,500.07

1977 $ 6,725.57 $ 9,993.57

1978 $ 3,190.47 $ 4,391.9-

1979 $11,085.44 $14,032.57

1980 $12,569.52 $14,596.44

1981 $14,487.07 $15,284.62

1982 $17,815.25 $17,815.25

1983 $18,607.79 $18,607.79

1984 $ 9,841.40 $ 9,841.40

(Capp. Dep Ex. 3.) In Broeker's case, the net result of indexing was to put his earnings in terms of 1982 dollars, except for 1983 and 1984 earnings, which were actual earnings for those years.

Based on his average monthly earnings, Broeker's initial PIA in May 1989 was $651.50. (Capp Dep. Ex. 1; Capp Dep. at 29.) Had Broeker's disability commenced simultaneous to his injury (December 4, 1980), his PIA would have been $493. (Capp Dep. at 29; Capp Dep. Ex. 11.) The difference is due to two things. First, had disability commenced in 1980, only earnings through 1980 would have been used. Second, the indexing year would have been 1978 instead of 1982. In 1978 the average earnings were $10,556.03 (Capp Dep. Ex. 7), or approximately $4,000 less than in 1982. Accordingly, indexed earnings would be lower. Using the prior example of Broeker's earnings for 1971, his indexed earnings for 1978 would be:

11.88 x 10,556.03 = 19.30

6,497.08

or

11.88 x 1.62473 = 19.30

(Capp Dep. Ex. 11.)

In Ell's case, had his disability commenced at the time of his accident in 1977, his earnings would not have been subject to indexing at all. (Capp Dep. at 32.) His PIA in 1977 would have been $510.10, whereas his 1984 PIA was $662.30.

Petitioners argue that the language of the offset statute requires use of the theoretical offset determined as of the date of their injuries. Their argument is based on the phrase "for such week," which they interpret to mean "the week of the injury." (Claimants/Petitioners Supplemental Brief on Indexing Issue at 7-10.) The statute in question is previously set out at page 4 but bears repeating here. At the time of petitioner's injuries, it read:

> In cases where it is determined that periodic benefits granted by the Social Security Act, 42 U.S.C. 301 (1935), are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits **for such week**. [Emphasis added.]
>
> Petitioners insist that the bolded phrase is ambiguous and has one of three possible meanings, as follows:
>
> 1) The date of the claimant's industrial injury,
>
> 2) The date of the claimant's disability, or
>
> 3) The date of the claimant's ultimate entitlement to Social Security benefits.

(*Id*. at 8.) However, the Court finds nothing ambiguous about the phrase. None of the proposed interpretations is correct. The provision is express and clear. It provides that "the weekly [workers' compensation] benefits " are to be reduced by "one-half of the federal periodic benefits **for such week**." It is plain from the words and context of the provision that "for such week" refers to the week in which the workers' compensation benefits are paid. The statute requires that the offset be based on actual social security benefits paid during the same week as the workers' compensation benefits are paid. Thus, if benefits are paid for the week of February 20, 1995, they must be offset by any social security benefits the worker receives for that same week.

Petitioners argue that the offset statute must be construed liberally in their favor. But the rule of liberal construction, which was in effect at the time of petitioners' injuries but which has since been repealed, is inapplicable. The words of the statute are plain and unambiguous on their face and must be applied as written. ***Lovell v. State Compensation Ins. Fund,*** *260 Mont. 279, 285, 860 P.2d 95 (1993).* Rules of construction applicable to ambiguous statutes do not come into play.

JUDGMENT

1. The State Fund is entitled to a social security offset against Ell's workers' compensation benefits. The Court need not determine whether the State Fund is also entitled to an offset against Broeker's benefits because Broeker withdrew his challenge to the State Fund taking an offset.

2. The offset must be based on each petitioner's initial primary insurance amount, which in Broeker's case is $651.50 and in ell's case the amount is $662.30. However, with regard to Broeker, all cost-of-living increases which are included within the $651.50 must be subtracted from the primary insurance amount. The offset must then be calculated on the difference.

3. The state fund shall refund to Broeker the difference between the offset it has been taking and the offset which is computed pursuant to paragraph 2 of this judgment.

4. With the exception of the amount due Broeker under paragraph 3 of this judgment and petitioners' possible entitlement to attorney fees and a penalty, the petitioners shall recover nothing from the state fund on account of the claims made in this case.

5. If Broeker and the state fund are unable to agree to the amounts to be determined pursuant to paragraphs 2 and 3 of this judgment, they may apply to the court for a determination of those amounts.

6. The petitioners' entitlement, if any, to attorney fees and a penalty, as well as their request for class certification, will be considered at a later time.

7. The Court reserves continuing jurisdiction over the matters set forth in paragraphs 5 and 6 of this judgment. This decision is otherwise certified as final for purposes of appeal. ARM 24.5.348.

8. Any party to this dispute may have twenty (20) days in which to request a rehearing from this Decision and Judgment.

Dated in Helena, Montana, this 6th day of March, 1995.

Corrected Decision and Judgment signed the 24th day of March, 1995

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Lawrence A. Anderson
Mr. Richard V. Bottomly
Mr. William O. Bronson

1. Broeker ultimately underwent surgery in 1989.

2. The current offset provisions are found in sections 39-71-701(5) and -702(4), MCA, which are also identical. Those provisions presently provide:

> In cases where it is determined that periodic disability benefits granted by the Social Security Act are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for such week, which amount is to be calculated from the date of the disability social security entitlement.

3. Apparently, Ell's initial benefit rate did not include any cost-of-living increases.

4. The Court has reviewed the current version of the Social Security Act provisions applicable to its discussion, as well as the versions in effect on December 24, 1977 and December 4, 1980, when petitioners were injured. Copies of the three versions will be maintained in the Court file. In its discussion of the Social Security Act, the Court will specifically note any substantive changes to particular provisions wherever those changes are material.

5. The quoted language has not changed since 1976.

6. The waiting period provision has not changed since 1976.

7. As initially enacted, the cost-of-living adjustments were given in June rather than December. 42 U.S.C. § 315(i)(1976). I have not tried to determine when Congress changed the effective month from June to December.

8. The reference to § 415(b)(2)(A)(ii) was inserted by Congress in 1980. P.L. 96-265, § 102(b).

9. As noted in ***McClanathan,*** *186 Mont. at 63,* the cost-of-living adjustment set forth in 42 U.S.C. § 415 (i) was added by Congress in 1973.

10. Section 424a(d) currently reads:

The reduction of benefits required by this section shall not be made if the law or plan described in subsection (a)(2) of this section under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423 of this title, and such law or plan so provided on February 18, 1981.

Subsection (a)(2), which is mentioned in the above text, merely identifies the types of plans, including workers' compensation plans, to which the offset applies.

11. Since the injuries in this case occurred long before 1987, we need not consider whether the new provision for cost-of-living increases would affect the result in ***McClanathan.***