Legislative intention, equal protection, and offset of workers compensation benefits in Kansas: Hoesli v Triplett

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Introduction
As noted in earlier notes, one issue which has received considerable attention in terms of equal protection challenges in US courts is that concerning the offset of social security retirement benefits with worker’s compensation payments. The Supreme Court in Richardson v Belcher upheld the reduction in social security disability insurance because of receipt of a state worker’s compensation payment as rationally based and free from invidious discrimination. The Court and various federal courts of appeals have subsequently shown little interest in subjecting such offset provisions to more than a minimal level of scrutiny. State courts have also generally upheld provisions offsetting workers compensation and different forms of disability benefits. However, some State courts have continued to show considerable concern about attempts to offset old age and retirement benefits with worker’s compensation schemes and have, in a number of cases, struck down such provisions as unconstitutional under either the Federal or State constitutions (although a majority of courts in cases raising the issue have upheld such provisions).

In recent years, this trend continued with the Utah Supreme Court in Merrill striking down such an offsetting provision while, in contrast, the Montana Supreme Court upheld such an offset in Satterlee. Subsequently, the Montana court came to a different conclusion as regards rehabilitation benefits in Caldwell while the en banc Commonwealth Court of Pennsylvania rejected the Merrill approach and upheld an offset in Caputo. This note outlines a recent decision of the Kansas Supreme Court which overrules an earlier decision of that court and clarifies the current state of the law in that State.
The Kansas case law
The jurisprudence in Kansas dates back to the 1977 decision of the Supreme Court in *Baker v. List and Clark Construction Co.*\(^7\) In that case, the Court considered an offset – introduced in 1974 - which provided that workers compensation benefits due the dependents of a deceased employee were to be reduced if such dependents also received benefits under the Social Security Act because of the death of the employee. This was challenged as, inter alia, being in breach of the equal protection clause of the Federal Constitution. Following Larson, the Court saw workmen's compensation as 'one unit in an overall system of wage-loss protection' of which social security also formed part.\(^8\) It concluded that

> When the system of wage-loss protection is viewed as a whole, avoiding duplication or overlapping of benefits appears to be a reasonable legislative objective. It may be said that the classification created by the statute has a rational basis, is not arbitrary, and affords like treatment to persons similarly situated.\(^9\)

Thus, without any great difficulty, the Court upheld the constitutionality of the provision.

However, shortly afterwards, a somewhat different situation was considered by the Kansas Court of Appeals in *Boyd*.\(^10\) In that case, Mr. Boyd had already retired, was in receipt of social security retirement benefits and was working part-time to supplement that income when he was injured at work. The Court did not find it necessary to reach the issue of the constitutionality of the offset provision. Rather, the Court stated that

> In determining the constitutionality of a statute, the reviewing court should first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.\(^11\)

The Court set out its approach to statutory interpretation in the following passage:

> It is a fundamental rule of statutory construction that the legislative intent behind a statute be ascertained wherever possible, and the legislative intent governs its construction even though the literal meaning of the words used therein is not followed. In determining legislative intent, courts are not limited to a mere consideration of the language used, but look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested. When the interpretation of a section of an act according to the exact and literal import of its words would contravene the manifest purpose of the legislature, the entire act should be read according to its spirit and reason, disregarding so far as may be necessary the strict letter of the law.\(^12\)

The Court read the offset provision as being ambiguous ‘as to whether it applies to those who like plaintiff are injured while employed in a part-time job after normal retirement and

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\(^9\) 222 Kan. 127, 132.


\(^11\) At 426.

\(^12\) At 428-429. Citations omitted in this and other quotations.
after they have started to receive social security old age benefits’. It concluded that the legislature did not intend the statute so to apply. The Court of Appeals followed Baker in relation to the purpose of the offset being to prevent overlapping of wage-loss benefits. However, it concluded that workers such as Mr. Boyd who were already retired suffered a ‘second wage loss’ as a result of their injury. In such a case, the offset provision ‘would not prevent "duplication" but would operate to preclude the wage replacement which it was the intent of the legislature to provide through the Workmen's Compensation Act.’

Perhaps surprisingly, petition for review of this ruling was denied by the Supreme Court. Continuing the somewhat schizophrenic approach, the Court of Appeals did reach the constitutionality of the offset as it applied to workers in 1979 in Brown and upheld it following Baker. In that case, the worker had not yet retired at the time he was injured. The Supreme Court upheld this ruling with the majority of the Court adopting the opinion of the Court of Appeals. However, the offset provisions had, in any case, been repealed by the legislature in 1977.

Offsets were introduced again in 1993 as part of a broader package of workers compensation reforms (or cuts depending on one’s perspective). Again, these were soon challenged before the Kansas courts. In Franklin, the Supreme Court, relying on Baker and Brown, concluded that an offset against workers compensation benefits of social security retirement benefits received by the injured worker was ‘rationally related to the valid state interest of preventing the duplication of wage loss replacement benefits’ and did ‘not unconstitutionally violate equal protection’. In that case, the plaintiffs asked the court to interpret the offset so as not to apply to employees injured while they working on a job to supplement the social security benefits and others similarly situated – as in Boyd. However, the Supreme Court concluded that

... all of these questions deal more with the interpretation and application of the offset statute than with the constitutionality of the statute. ... Thus, an analysis of these questions is best saved until a more appropriate time.

That time came in Dickens in 1999. The Supreme Court adopted a very similar approach to that of the Court of Appeals in Boyd. It did not consider the constitutionality of the legislation but turned to its interpretation. Mr. Dickens – like Mr. Boyd – had retired and subsequently taken up other part-time work in which he was injured. The ALJ had not applied the offset, relying on Boyd but the Workers Compensation Board on appeal had applied the plain language of the offset so as to reduce his benefits. Adopting a similar approach to statutory interpretation as in the earlier case, the Court held that

13 Ibid.
14 At 428.
17 At 871.
The fundamental rule of statutory construction is to determine legislative intent whenever possible. In determining legislative intent, we are not limited to a mere consideration of the language used in the statute.\(^\text{18}\)

Further, the Court went on to say that ‘[l]egislative intent governs construction of a statute even though the literal meaning of the words used in the statute is not followed.’\(^\text{19}\) As the legislative intention was, the Court opined, ‘to prevent duplication of wage-loss benefits’ it would be contrary to the intent of the statute to apply in this case.\(^\text{20}\)

**Pressures mount**

Thus the ‘constitutional as interpreted’ approach to the offsets continued in Kansas. Shortly after *Dickens*, the Supreme Court held the offset *did* apply to an injured worker whose social security disability benefits were automatically converted to social security retirement benefits when the claimant had reached retirement age.\(^\text{21}\) In *Wishon*, the worker had been entitled to receive social security disability benefits and workers compensation benefits. However, once the social security benefits were converted to retirement benefits, the offset applied. Wishon argued that the offset should not apply, following *Dickens*, because he did not choose to retire but rather was forced to receive social security retirements benefits when he reached retirement age. The Supreme Court did not accept this argument holding that a worker who retired was no longer suffering wage loss because of injury but because of retirement — regardless of whether the retirement was forced or voluntary. The court concluded that ‘the plain language’ of the provision required that the offset be applied.\(^\text{22}\)

However, pressures on this approach mounted. On the one hand, the Court of Appeals attempted to apply the general principles of the case law to differing sets of facts. In *McIntosh*, the Court of Appeals set out the general pattern as being:

1. injury, then retirement: no duplication of benefits allowed; and
2. retirement, then injury: multiple benefits allowed.\(^\text{23}\)

However, the lower courts continued to struggle with difficult factual situations.\(^\text{24}\)

\(^{18}\) At 1071.

\(^{19}\) Ibid.

\(^{20}\) Ibid. Though the Court also accepted that the amendments were enacted ‘to reduce the cost of workers compensation insurance premium’.


\(^{22}\) 268 Kan. at 108. The Supreme Court in *Hoesli* referred to *Dickens* and *Wishon* as ‘apparently contradictory holdings’.


\(^{24}\) See the case listed in *Hoesli* including Farley v. Above Par Transportation, 50 Kan. App. 2d 866, 877, 334 P.3d 883 (Kan. App. 2014) (offset applied because there was insufficient evidence that the claimant, who was receiving social security retirement benefits at time of injury, had retired and returned to work before injury); Morales v. Wal-Mart, No. 107,526, 2013 WL 1010438, at *5 (Kan. App. 2013) (unpublished opinion) (offset applied when employee was injured after she began receiving social security retirement benefits because there was no evidence employee was retired and working to supplement social security income); Jones v. Securitas Sec. Services, No. 105,414, 2011 WL 6311105, at *3 (Kan. App. 2011) (offset not applicable when claimant received social security retirement benefits before re-entering workforce to supplement social
On the other hand, as the Court of Appeal identified in *Farley*, ‘our Supreme Court has become more inclined to apply a plain language approach to the construction of workers compensation statutes.’ This obviously called into question the *Boyd/Dickens* approach. Indeed it had been argued that *Dickens* should be reconsidered in the light of the trend of plain language statutory interpretation applied to the *Workers Compensation Act* by the Supreme Court. Matters came to a head when the Court of Appeals in *Hoesli* not only upheld that approach but extended it far beyond previous bounds.

**Hoesli - The Court of Appeals**

At the time of this case, the relevant offset provision provided that

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the *workers compensation act* for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee’s percentage of functional impairment.

Mr. Hoesli had reached pension age and was in receipt of a social security retirement pension but had not retired at the time of his work injury. Thus, he was in the *McIntosh* pattern 1 (injury, then retirement: no duplication of benefits allowed). However, he sought to distinguish this line of cases due to changes in federal law. He argued that the interpretation of the law in cases such as *McIntosh* and *Dickens* had been altered by the Senior Citizens’ Freedom to Work Act of 2000. The Act allows individuals age 65 and older to receive social security benefits and continue to work without penalty or reduction in wages. The Court pointed out that this was a question of first impression in Kansas.

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However, other State Supreme Courts had held that this altered the status of social security retirement pensions.

The Montana Supreme Court stated

[S]ocial security retirement benefits are not wage loss benefits. There is no requirement that to be entitled to social security benefits a person must stop working.29

The Utah Supreme Court held that the change in federal Social Security law ‘invalidat[ed] the rationale that social security retirement benefits are a wage replacement,’ and that after the change in federal law, the benefits were ‘not simply wage-loss replacement benefits, but serve[d] other, important purposes.’30 The Kansas Court of Appeals appeared to adopt this view of the federal law.31 But the Court still had to address the implications of this for the offset provisions. Rather than reconsidering the constitutionality of the provision, the Court turned again to its interpretation.

On the one hand, the Court accepted that ‘the plain language of K.S.A. 2010 Supp. 44-501(h) indicates that the offset applies to any individual receiving federal Social Security retirement benefits irrespective of any other considerations’.32 It also noted that in recent cases the Kansas Supreme Court had

emphasized that when a workers compensation statute is plain and unambiguous, an appellate court must give effect to the statute’s express language rather than determine what the law should or should not be.33

However, on the other, the Court referred back to the Boyd/Dickens emphasis on the ‘legislative intent’. The Court concluded that

It is counterintuitive to apply a statute that is intended ‘to eliminate any duplication of wage-loss benefits by different programs’ in a case in which one program’s benefits accrued regardless of whether any other income existed. Under these facts, the offset provision in K.S.A. 2010 Supp. 44-501(h) creates the same problem that this court disapproved of in Boyd, running afool of the statute’s purpose by ‘totally preclud[ing] any replacement of the wages which [an individual is] entitled to earn over and above old age social security benefits.’34

In conclusion the Court of Appeals noted that

At the time of Hoesli’s work-related injury, he was entitled to receive and was receiving two streams of income. Neither source of income was subject to offset or any other limitation. Hoesli would have continued to receive both undiminished

30 Merrill v. Utah Labor Com’n, 223 P.3d 1089, 1097-8 (Utah 2009).
31 Hoesli [Court of Appeals] at 24-5.
32 At 25.
34 At 25.
streams of income into the future but for his work-related injury. The grant of a workers compensation award in this case would serve to make Hoesli whole. It would replace an income he was legally receiving and would place him in a position similar to the position he was in prior to his injury. To apply the offset would act as a penalty, placing Hoesli in a worse position than he was in prior to the injury. To apply the K.S.A. 2010 Supp. 44-501(h) offset would result in an outcome inconsistent with the stated purpose of wage-loss replacement under our workers compensation statutes.\textsuperscript{35}

Therefore, the Court ruled that the offset did not apply.

**Hoesli - The Supreme Court**

The Supreme Court took a rather different view. Not only did it not extend the Dickens analysis in the light of the Federal law, it reviewed whether Dickens had been correctly decided. It concluded that

*Dickens* must be overruled because its foundation rests on what was viewed as the legislature’s subjective intent rather than conforming to the statutory language and correctly applying our longstanding caselaw for statutory interpretation.

**Approach to statutory interpretation and stare decisis**

The correct approach to statutory interpretation, the Supreme Court ruled, was that

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. We determine legislative intent by first applying the meaning of the statute's text to the specific situation in controversy.

Only ‘[w]hen the language is unclear or ambiguous’ should a court employ the canons of statutory construction, consult legislative history, or consider other background information to ascertain the statute's meaning.

Given that *Dickens* was also decision of the highest court, the Supreme Court considered the principle of *stare decisis*. It held that could overrule prior caselaw when: (1) it is clearly convinced a rule of law established in its earlier cases was originally erroneous or is no longer sound because of changing conditions and (2) more good than harm will come by departing from precedent.

**Applying these principles**

Turning to the application of these principles to the offset provision, the Court held that

The problem with *Dickens* is that it ignored the legislature's intent as expressed in the statute's plain language in favor of the court’s contrary perception of legislative

\textsuperscript{35} At 25-26.
purpose. In other words, it engaged maxims of statutory construction without discerning any uncertainty in the text.

As a result of this flawed approach, it concluded that Dickens and its progeny improperly give effect to a perceived legislative purpose underlying K.S.A. 2010 Supp. 44-501(h) that is contrary to the statutory text’s clearly expressed meaning: to offset all workers compensation payments by the amount of social security retirement benefits the claimant receives.

In any case, the Court held that the Dickens was in error in concluding that applying the offset when benefits are not duplicative conflicts with the perceived purpose. The most that can be concluded – said the Supreme Court - is that ‘the statute, as written, affects more claimants than may be necessary to carry out the legislative purpose; but that does not change the plain meaning of the statutory text’.

The Court held that Hoesli – and by implications the courts in cases such as Boyd and Dickens – was confusing this court’s duty to construe a statute as constitutionally valid when it is faced with more than one reasonable interpretation and only one interpretation is constitutional.

The Supreme Court held that the court’s duty to give effect to the plain language of an unambiguous statute is not diluted just because that effect renders the statute unconstitutional.36

For these reasons, the Court held that the doctrine of stare decisis must yield to consistency with its case law on statutory interpretation.

Constitutionality

Having held that the offset applied, the Court considered the constitutionality of the provision although this had not been addressed by the Court of Appeals. The Court followed its previous rulings on this point. It was not convinced that the Senior Citizens' Freedom to Work Act had altered this holding that ‘even after the 2000 amendments, social security retirement benefits still maintain their character as wage-loss benefits.’37 Even if the offset was overbroad and might ‘extend further than necessary to achieve its purpose by reaching workers compensation payments owed for injuries incurred during employment undertaken to supplement social security’ this did not make it unconstitutional under rational basis review.

36 At 000 citing cases from other State Supreme Courts including Brownsburg Area Patrons Affecting Change v. Baldwin, 714 N.E.2d 135, 139 (Ind. 1999); State v. Thompson, 836 N.W.2d 470, 484 (Iowa 2013); and Clark v. Martinez, 543 U.S. 371, 381, 125 S.Ct. 716, 160 L. Ed. 2d 734 (2005). Although the Court conceded that other courts had taken a more flexible approach citing Rich v. Department of Marine Resources, 994 A.2d 815, 818 (Me. 2010).

Thus the Court overruled Dickens – which it referred to as ‘the root of the problem’ – applied the offset according to its plain meaning and held that this was constitutional.38

**Discussion**

The Supreme Court was clearly correct to apply the plain language of the provision and, on the basis of rational review, to hold that it was not a breach of the equal protection guarantee. Whether or not the offset provisions in general or the specific provisions in Kansas represent a good policy approach is a different question and one reserved to the legislature not the courts. While the approach adopted in Dickens and its progeny may have appeared attractive in individual cases, in the end it simply amounted to a tweaking of the legislation on a case-by-case basis by the courts – a task which is simply not their role.

In this case, the ‘plain language’ of the offset was not ambiguous in any real sense of that word. The Supreme Court may have set out a rather narrow approach to when courts should apply ‘constitutional avoidance’ but, in this case, there was no unconstitutionality and only one possible construction of the statute.39

However, given the general limitations of the equal protection guarantee in the USA, it is striking how many State courts have been exercised with this issue (see annex 1).40 Even if only a minority of courts which have considered the question have found the offsets to be unconstitutional (or have applied a ‘constitutional avoidance’ approach to interpretation),41 in several of the States where the courts have upheld the offsets this has only been by a majority (a narrow majority in cases such as Kentucky).42

38 Indeed, by implication, *Boyd* and the various progeny of both decisions are also clearly no longer good law.

39 Certainly the US Supreme Court has taken a much broader approach to when it can apply this approach and as to what readings are ‘possible’: see the discussion in Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 Harv. L. Rev. 2109 (2015); and Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 Harv. L. Rev. 331 (2015).


41 In some of these cases (e.g. Louisiana and Utah) the courts were applying a higher State standard of review rather than federal rational basis.

42 The issue has been recently raised again in Kentucky by the Court of Appeals in *Cruse v. Henderson Cnty. Bd. of Educ.*, 2015 Ky. App. LEXIS 103, at *8 (Ky. Ct. App. 2015). Although the issue had not, in fact been raised, the
It is also noteworthy that State courts have come to decisions which are sometimes difficult to reconcile with each other. In this regard, the extent to which the Kansas courts differed is rather minor in a comparative context. For example, in recent years, the Montana Supreme Court has ruled that offsets in relation to different forms of workers compensation benefit are unconstitutional (Reesor), constitutional (Saterlee) and again unconstitutional (Caldwell). As MacMorris has pointed out, it would be difficult to reconcile these decisions with each other with members of the Montana Court differing as to the appropriate level of deference or scrutiny that the Court should apply to the law. In reality, in the decisions finding unconstitutionality, the Montana court has arguably applied a heightened level of scrutiny in what is supposed to be rational basis review.

There does not appear to be any basis for this heightened approach under the Federal equal protection clause. The Supreme Court held in Massachusetts Bd. of Retirement v. Murgia that classifications based on age are not considered suspect. Therefore, rational basis review applies. And, subject of course to the specific wording of the provisions, there would appear to be a general rationale for such offsets in order to avoid duplication of benefits, as has been found in the Kansas cases.

Court suggested that ‘it is time for the Supreme Court to look at this issue again’. The case is currently under appeal to the Kentucky Supreme Court.

43 Reesor v Montana State Fund, 2004 Mt. 370 (Mont. 2004); Satterlee v Lumbermen’s Mutual Casualty Company 2009 MT 368 (Mont. 2009); Caldwell v MACo Workers Compensation, 2011 MT 162 (Mont. 2011).


<table>
<thead>
<tr>
<th>Court</th>
<th>Upheld</th>
<th>Struck down</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td></td>
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<tr>
<td>Golden v Westark Community College, 333 Ark. 41, 969 S.W.2d 154. (Ark. 1998)</td>
<td>Law reducing WC by amount of public or private retirement benefits received (or eligible for) struck down as no logical basis for holding that WC and retirement benefits were duplicative</td>
<td></td>
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<tr>
<td>Colorado</td>
<td></td>
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<tr>
<td>Industrial Claims Appeals Office v Romero, 912 P.2d 62 (Colo. 1996)</td>
<td>Terminating WC at pension age violates equal protection guarantees of federal and state constitutions</td>
<td></td>
</tr>
<tr>
<td>Culver v Ace Electric, 971 P.2d 641 (Colo. 1999)</td>
<td>Terminating WC at pension age where person eligible to receive retirement pension upheld as rationally related to avoiding duplication of benefits (distinguishing Romero)</td>
<td></td>
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<tr>
<td>Connecticut</td>
<td></td>
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<tr>
<td>Rayhall v. Akim Co., 263 Conn. 328 (2003)</td>
<td>Offset of retirement benefits against WC upheld as rationally related to legitimate goal of cost saving</td>
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<tr>
<td>Florida</td>
<td></td>
<td></td>
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<tr>
<td>Sasso v Ram Property Management, 452 So.2d 932 (Fla. 1984)</td>
<td>Statute which terminated WC wage-loss benefits terminated at age 65 upheld as there were legitimate purposes for termination of benefits, such as reducing fringe benefits to reflect a productivity decline</td>
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47 Followed in Pasquariello v. Stop & Shop Cos., 281 Conn. 656, 673, 916 A.2d 803 (Conn. 2007).
with age, inducing older workers to retire, and reducing the cost of WC premiums.  

Kansas

<table>
<thead>
<tr>
<th>Case</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Baker v List and Clark Construction, 222 Kan 127, 563 P.2d 431 (Kan. 1977)</strong></td>
<td>Reduction of WC death benefits where social security death benefits also payable not unconstitutional</td>
</tr>
<tr>
<td><strong>Injured Workers of Kansas v Franklin, 262 Kan. 840 (Kan. 1997)</strong></td>
<td>Social security offset with WC was rationally related to the valid state interest of preventing the duplication of wage loss replacement benefits and did not unconstitutionally violate equal protection</td>
</tr>
</tbody>
</table>
| **Hoesli v Tripplet 361 P.3d 504 (Kan. 2015)** | The Supreme Court overturned its previous ruling in Dickens and held that the offset did apply to persons who had retired before injury and that this was constitutional.  

Kentucky

<table>
<thead>
<tr>
<th>Case</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Brooks v Island Creek Coal, 678 S.W.2d. 791 (Ky. Ap. 1984)</strong></td>
<td>Termination of WC at age 65 (i.e. retirement benefit age) upheld but reading the law as confined to situations where the person actually receives retirement benefits</td>
</tr>
<tr>
<td><strong>Wynn v Ibold, 969 S.W.2d 695 (Ky. 1998)</strong></td>
<td>Annual reduction of 10% in WC benefits from age 65-70 rationally related to the</td>
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<tr>
<td>State</td>
<td>Case</td>
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<td>----------------------------------------------------------------------</td>
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<tr>
<td></td>
<td><strong>Legitimate interest of avoiding duplication of benefits</strong></td>
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<tr>
<td>Kentucky</td>
<td><em>McDowell v Jackson Energy, 84 S.W.3d 71 (Ky. 2002)</em></td>
</tr>
<tr>
<td>Louisiana</td>
<td><em>Pierce v Lafourche Parish Council, 762 So.2d 608 (La. 2000)</em></td>
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<tr>
<td></td>
<td><em>Wal-Mart Stores v Keel, 817 So.2d 1 (La. 2002)</em></td>
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<tr>
<td>Maine</td>
<td><em>Berry v HR Beal 649 A.2d 1101 (Me. 1994)</em></td>
</tr>
<tr>
<td>Massachusetts</td>
<td><em>Case of Tobin, 675 N.E.2d 781 (Mass. 1997)</em></td>
</tr>
<tr>
<td>Montana</td>
<td><em>Reesor v Montana State Fund, 2004 Mt. 370 (Mont. 2004)</em></td>
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<td>State</td>
<td>Case Title</td>
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<td>Montana</td>
<td><strong>Satterlee v Lumbermen’s Mutual Casualty Company</strong> 2009 MT 368 (Mont. 2009)</td>
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<td><strong>Caldwell v MACo Workers Compensation, 2011 MT 162 (Mont. 2011)</strong></td>
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<td><strong>Pennsylvania</strong></td>
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<tr>
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<td><strong>Caputo v Workers Compensation Appeal Board 34 A.3d 908 (Penn. 2012)</strong></td>
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<td></td>
<td><strong>Tennessee</strong></td>
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<tr>
<td></td>
<td><strong>Vogel v Wells Fargo, 937 S.W.2d 856 (Tenn. 1996)</strong></td>
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<td><strong>Utah</strong></td>
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<td><strong>Merrill v Utah Labor Commission 2009 UT 26 (Utah 2009)</strong></td>
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⁵¹ The court held that the differential application of the cap to totally (as opposed to partially) disabled persons, which was ‘imperfect’ and led to ‘odd’ results (such as a person with less disability receiving more benefits), was irrational and constitutional. However, rather than striking down the total disability cap, the court extended its application to partial disability leaving it to the legislature to take further action if it saw fit.
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<thead>
<tr>
<th>State</th>
<th>Case Details</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Washington</td>
<td><strong>Harris v Labor Industries</strong>, 120 Wn.2d 461, P.2d 1056 (Wash. 1993)</td>
<td>Offsetting state industrial insurance benefits by the amount of Social Security retirement benefits, and not by amounts received from private pensions or other sources of benefits, did not violate equal protection</td>
</tr>
<tr>
<td>West Virginia</td>
<td><strong>West Virginia v. Richardson</strong>, 198 W.Va. 545, 482 S.E.2d 162, (W. Va. 1996)</td>
<td>Reduction in WC by 50% of old age benefits payable in breach of State constitution as benefits not duplicative</td>
</tr>
<tr>
<td></td>
<td><strong>State of West Virginia ex rel Beine v Smith</strong>, 214 W. Va. 771, 591 S.E.2d 329 (W. Va. 2003)</td>
<td>Provision terminating WC at pension age upheld as justified by the need to ensure the financial solvency of the fund (distinguishing <em>Richardson</em>)</td>
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</tbody>
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52 Also cited as State ex rel. Boan v. Richardson.