TIME-LOSS COMPENSATION (RCW 51.32.090)

Wage continuation precludes time-loss compensation (RCW 51.32.090(6))

Sick leave paid at the regular salary rate, which is not paid as a continuation of "wages," does not preclude the worker from receiving time-loss compensation for the same period. The employer is not prevented, however, from establishing a policy for recouping sick leave paid during a period of temporary total disability. ...In re Frank Serviss, BIIA Dec., 57,651 (1981) [dissent] [Editor's Note: Holding rejected, South Bend School Dist. No. 18 v. White 106 Wn. App. 309 (2001).]

Scroll down for order.
BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FRANK SERVISS

) DOCKET NO. 57,651

) CLAIM NO. G-709237

) DECISION AND ORDER

APPEARANCES:

Claimant, Frank Serviss, by
H. Frank Stubbs, per
Stan Rumbaugh

Employer, Franklin Pierce School District #402, by
Joseph Cheesman, Director of Personnel and
Communications

Department of Labor and Industries, by
The Attorney General, per
Thomas G. Hall and Dorothy Bullitt, Assistants

This is an appeal filed by the claimant on September 12, 1980, from an order of the
Department of Labor and Industries dated August 26, 1980, which adhered to the provisions of a
prior order demanding reimbursement for time-loss compensation paid for the periods June 16,
1975 through November 3, 1975, and June 11, 1976 through September 25, 1976, and denied
time-loss compensation for the period December 1, 1978 through September 3, 1979. REVERSED
AND REMANDED.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
and decision on timely Petitions for Review filed by the claimant and the Department of Labor and
Industries to a Proposed Decision and Order issued by an industrial appeals judge for this Board on
July 21, 1981 in which the order of the Department dated August 26, 1980 was reversed, and the
claim remanded to the Department.

The Board has reviewed the evidentiary rulings of the industrial appeals judge and finds that
no prejudicial error was committed and said rulings are hereby affirmed.

At issue in this appeal is whether Mr. Serviss is entitled to compensation for temporary total
disability for the specified periods: June 16, 1975 -- November 3, 1975, June 11, 1976--September
addition, we are asked to determine whether subsection (6) of RCW 51.32.090 effectively prohibits
Mr. Serviss from receiving time-loss benefits for periods he was being paid for using sick leave he

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had accrued during his years of service as a school teacher and wrestling coach for Franklin Pierce School District No. 402.

We are in agreement that during all pertinent periods at issue, Mr. Serviss was unable to perform his regular work or any suitable work for which he had training and experience, and ordinarily he would unquestionably be entitled to time-loss benefits.

During the course of his employment on February 18, 1975, Mr. Serviss injured his low back which later twice required surgery. He eventually returned to work in September 1979. Mr. Serviss' employment contract was typical of most public school district employees in this state whereby he was paid over a twelve-month period for services performed essentially between early September through mid-June. In addition and pursuant to state law, Mr. Serviss was granted ten days sick leave for each contract year which as of the date of his injury, also pursuant to statute, was allowed to accumulate only up to a maximum of 180 days. RCW 28A.58.100.

Ultimately the question for decision is whether RCW 51.32.090(6) legally precludes the claimant from receiving time-loss compensation for those periods of time he received sick leave pay at his regular salary rate from his employer. The statutory provision in question reads:

"Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages."

Prior to the enactment of RCW 51.32.090(6), numerous employers especially smaller ones in this state, did not have formal and definite leave policies. However, when a valued employee was injured on the job, a genuine concern for that employee’s welfare prompted many employers to continue the worker’s wages for a period of time to allay any immediate financial hardship on a worker or his or her family. When such circumstances prevailed, it seemed illogical to the legislature to further reward the worker with time-loss compensation benefits. It was perceived that to do so would prove to be a disincentive to return to work.

In situations like that before us, school teachers are not paid when sick or injured without giving up something in return which, up to a specific limit through the years, they had been able to "bank." Mr. Serviss’ case is not one where his employer either because of humanitarian largess or to avoid an adverse industrial insurance cost experience, voluntarily continued to pay his regular
salary. By electing to take sick leave, Mr. Serviss effectively called upon and used his own financial resources. In fact, RCW 28A.58.100(d) (formerly subsection (c)) states:

"(d) Compensation for leave for illness or injury actually taken shall be the same as the compensation such person would have received had such person not taken the leave provided in this proviso."

The statute's designation of level of compensation to be paid for sick leave in an amount equal to one's regular compensation had leave not been taken implies that something other than "wages" is being paid. It must be remembered that only the receipt of continued wages prohibits an injured worker from receiving time-loss benefits.

Parenthetically, we note that RCW 28A.58.100 requires local school boards to adopt written policies granting leave with compensation for "illness, injury, and emergencies" in accord with the statutory directive contained therein. The record before us does not contain a copy of any district policy which may govern the school district's right to seek recoupment of paid sick leave from Mr. Serviss. (See, e.g., the regulations governing classified employees of the state of Washington relative to sick leave adjustment for employees covered by workers' compensation, WAC 356-18-080). This is, of course, the reciprocal of the legal issue presented before this Board, and is one over which we have no authority.

In sum, we are of the view that the payment by Franklin Pierce School District No. 402 of accrued sick leave legally accumulated by Mr. Serviss does not, within the contemplation of RCW 51.32.090(6), preclude him from simultaneously receiving time-loss compensation.

Findings 1 through 5 and conclusion number 1 of the Proposed Decision and Order entered herein on July 21, 1981, are hereby adopted by the Board and incorporated herein by this reference. Conclusions 2 and 3 thereof are hereby stricken, and in lieu thereof the Board concludes:


3. The order of the Department of Labor and Industries dated August 26, 1980, which affirms a prior order demanding reimbursement for time-loss compensation for the periods from June 16, 1975 through November 3, 1975, from June 11, 1976 through September 25, 1976, and denied time-loss compensation for the period December 1, 1978 through September 3, 1979 is incorrect, and should be reversed and this
claim remanded to the Department with instruction to reopen the claim
and allow time-loss compensation for the aforementioned periods, plus
for the period from October 16, 1976 through January 3, 1977, and
thereupon to close the claim.

It is hereby ORDERED.

Dated this 3rd day of December, 1981.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____________________________________
M I C H A E L  L. H A L L                          Chairman

/s/_____________________________________
F R A N K  E. F E N N E R T Y, JR.        Member

D I S S E N T I N G  O P I N I O N

I must dissent from the Board's majority decision, because I believe it is erroneous as a
matter of law. The ultimate issue here is whether RCW 51.32.090(6) legally precludes a claimant
from receiving time-loss compensation for those periods of time he received sick-leave pay at his
regular salary rate from his employers.

This is not the first time this issue has been before the Board. It was presented as long ago
as 1965. In re S.G. Tudor, Docket No. 22,814, Proposed Decision and Order of February 2, 1965,
adopted by the Board March 5, 1965. In that case, it was held that a claimant in such a situation is
precluded from receiving time-loss compensation by the provisions of RCW 51.32.090(6). So far as
I am aware, the Board has not heretofore deviated from that view.

The language of the statute is, in my opinion, plain and unambiguous and, therefore, not
subject to construction and interpretation. Lane v. Department of Labor and Industries, 21 Wn. (2d)
420. It specifically provides that no time-loss compensation shall be paid to a worker for any period
during which his employer continues to pay the same amount as the wages he was earning at the
time of his injury. Here, the claimant elected to use sick leave, to the full extent it had accumulated
to his credit, as was his right. He thereby continued to receive money in the full amount of his
regular wages during the period sick leave was drawn. RCW 28A.58.100(d).

The majority opinion indicates that, if the employer had voluntarily continued to pay claimant
his regular salary, it would have applied RCW 51.32.090(6) to prohibit the simultaneous payment of
time-loss compensation; but, since the payments were based on accrued sick-leave credit, the
statute should not be applied. I fail to see any reason for this distinction, and the statute itself
certainly does not provide for any such exception.
It should be borne in mind that the basic purpose of temporary disability compensation is to replace the money a worker loses by reason of temporary inability to work due to an industrial injury. However, where a worker receives his normal salary from his employer in spite of his inability to work, he has not lost anything financially and there is nothing to replace, and the basic purpose of temporary disability compensation is not met.

As to the fact that the claimant "lost" his accumulated sick leave which he otherwise could have available to use during periods of illness or injury due to non-occupational causes, the simple answer is that there was no requirement that he apply for sick leave while incapacitated due to his industrial injury. He chose to use accumulated sick leave; but he could have chosen to take the status of leave without pay so as to not use up any sick leave, in which event, of course, he would clearly have been entitled to full time-loss compensation for the periods in question.

It is noted that the claimant did in fact use up his accrued sick leave as of February 9, 1979, and was on leave without pay after that date through September 3, 1979, when he returned to full employment for the school district. He is entitled to time-loss compensation for the February 10--September 3 period.

Based on my foregoing observations as to the applicability of RCW 51.32.090(6) in this case, and based also on the correct reasoning in the Proposed Decision and Order as to why claimant is entitled to time-loss compensation for basically the summer months, I would modify the Department's order of August 26, 1980, and adjudicate claimant's entitlement to time-loss compensation during the periods here in issue, as follows:

June 16, 1975 through September 1, 1975 -- compensation payable.
September 2, 1975 through November 3, 1975 -- compensation not payable
December 1, 1978 through February 9, 1979 -- compensation not payable.

Dated this 3rd day of December, 1981.

/s/ PHILLIP T. BORK
Member