Wareing, Frances

TIME-LOSS COMPENSATION (RCW 51.32.090)

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

A worker who is employed for nine months out of the year but has salary pro-rated over a 12-month period is not receiving continuation of wages during the three-month interim. The worker is entitled to time-loss compensation if unable to work during the three-month interim. ***….In re Frances Wareing,* BIIA Dec., 02 11829 (2003)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 03-2-01526-9.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FRANCES J. WAREING	**)**	**DOCKET NO. 02 11829**
	)	
CLAIM NO. W-314507	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Frances J. Wareing, Pro Se

Self-Insured Employer, Yelm School District No. 2, by
Reeve Shima, P.C., per
Elizabeth K. Reeve

Department of Labor and Industries, by
The Office of the Attorney General, per
Steve Vinyard, Assistant

The self-insured employer, Yelm School District No. 2, filed an appeal with the Board of Industrial Insurance Appeals on February 21, 2002, from an order of the Department of Labor and Industries dated January 10, 2002. The order affirmed an October 1, 2001 order that directed the self-insured employer to pay time loss compensation benefits to the claimant for the periods of June 23, 1999 through August 22, 1999, and June 21, 2001 through August 19, 2001. The Department order is **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department to a Proposed Decision and Order issued on January 7, 2003, in which the order of the Department dated January 10, 2002, was reversed and remanded to the Department with direction to issue an order that informs the self-insured employer that it is not required to pay the claimant time loss compensation benefits between June 23, 1999 and August 22, 1999, and between June 21, 2001 and August 19, 2001, and to take such other and further action as is consistent with the law and the facts.

We have granted review in this matter primarily for the purpose of reviewing this Board's decision in an earlier Decision and Order, *In re Ronald W. Nilson*, Dckt. No. 94 2262, issued on August 31, 1995. The industrial appeals judge relied on the pertinent language from *Nilson* to resolve the matter in this appeal. The Department of Labor and Industries, in its Petition for Review, asks us to review our holding in the *Nilson* case, and for reasons we set forth below, we have decided to do so.

Procedurally, this appeal by the self-insured employer, Yelm School District No. 2 (School District), was submitted for a decision on opposing motions for summary judgment filed by the parties. The School District filed its Motion for Summary Judgment on October 4, 2002, and the Department filed a Counter Motion for Summary Judgment on October 28, 2002. We agree with the industrial appeals judge that the materials submitted by the parties present no issue of material fact and that resolution of the issue raised involves a question of law. We incorporate by reference the discussion and legal authority referenced in the Proposed Decision and Order regarding the resolution of appeals by means of summary judgment.

In terms of deciding this appeal, we rely upon the materials submitted by the parties with their respective motions. The School District submitted: (1) the Declaration of Arnie Arksdall; (2) the Declaration of Kelly Early, and included Exhibit A, a July 19, 1999 letter to the claimant from Nancy Brannon; Exhibit B, a July 5, 2001 letter to the claimant from Kelly Early; and Exhibit C, a July 16, 2002 letter from Marti Fitzgerald-Spike; and (3) the Declaration of Christine Diklich, and included Exhibit A, a single page from the claimant's collective bargaining agreement pertaining to payment of wages. The Department, in its Counter Motion for Summary Judgment, submitted the declaration of the claimant, Ms. Wareing, dated October 21, 2002, and received by the Board on October 28, 2002. The School District filed a reply to the Department's materials on October 30, 2002, and a supplemental brief on November 21, 2002. The supplemental brief contained the second declaration of Christine Diklich.

A hearing on the motions for summary judgment was held on November 25, 2002, at which time the parties entered into several factual stipulations. These stipulations are as follows: (1) the claimant was physically unable to work because of her occupational disease between June 23, 1999 and August 22, 1999, and between June 21, 2001 and August 19, 2001; (2) the claimant worked for the self-insured employer for 27 years; (3) the claimant did not engage in extra work during the middle parts of any of her summer breaks from the School District; (4) the claimant did perform some extra work for the self-insured employer immediately after the end of the school year and immediately before the start of the school year; and (5) the parties agree there was not any issue of material fact.

As was the case with our industrial appeals judge, we have considered all of the declarations and materials in support of the motions for summary judgment, the factual stipulations listed herein, and the arguments of the parties as contained in the Board record in rendering our decision. Although the parties stipulated that there was no issue of material fact, we find that such

a statement merely means that they are not disputing the accuracy of the factual statements submitted to the Board. It is the role of the trier of fact to determine if there are disputes as to material issues of fact.

Ms. Wareing sustained an occupational disease to her right arm during the course of her employment with the Yelm School District. Ms. Wareing had been employed as a baker in the food service department of the School District for 27 years. Normally, she worked 190 days during the school year, although the wages for the work she performed were spread over the 12-month period. Thus, Ms. Wareing's work pattern is similar to other individuals who work for the public schools. She works during the school year and has no employment with the School District during the core summer months. Ms. Wareing's last day of work in 1999 was June 21. Her occupational disease condition was manifest or symptomatic by June 22, 1999. According to the stipulation of the parties, she was unable to engage in reasonably continuous employment due to the residuals of her occupational disease between the dates of June 23, 1999 and August 22, 1999. Evidently, she was able to return to work during the following school term and commenced employment on August 23, 1999. The parties also stipulated that Ms. Wareing was unable to engage in employment due to the residuals of her occupational disease during the summer break period of June 21, 2001 through August 19, 2001.

The School District contends that it should not have to pay Ms. Wareing time loss compensation benefits for the summer break in 1999 and again in 2001. It relies on RCW 51.32.090(6) and our earlier decision in *Nilson*. RCW 51.32.090(6) provides:

> 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.

The School District argues that because Ms. Wareing received her wages over a 12-month period, she has received a continuation of her wages and is, therefore, precluded from wage replacement benefits by the provisions of RCW 51.32.090(6).

This was the approach accepted by our industrial appeals judge. We reiterate the relevant language from *Nilson* at page 7.

> We also cannot require Morton to pay Mr. Nilson time-loss compensation benefits between June 15, and July 31, 1992. RCW 51.32.090(6) clearly states that an injured worker shall not receive any time-loss compensation benefits for a period during which he is paid the wages he was earning at the time of his injury. There is no doubt

> that during the summer of 1992, Mr. Nilson was paid the wages he earned when he was injured. Teachers are paid on a year-round basis. Accordingly, even though Mr. Nilson may have been physically incapable of working for six weeks following his knee surgery, we must follow this unambiguous statutory mandate and rule he was ineligible for time-loss benefits during this period.

We have reviewed *Nilson*, and we will address this passage later in this order.

The employer contends that Ms. Wareing lacked the requisite adverse economic impact to be eligible for time loss compensation because she did not normally work during the summer break. In other words, she would not have worked during the summer season even if she had been able to do so. Citing *Kaiser Aluminum & Chemical Corp. V. Overdorff*, 57 Wn. App. 291 (1990), the School District argues that Ms. Wareing's pattern of not working during the summer months is analogous to a voluntary retirement from the work force. RCW 51.32.090(8). Ms. Wareing's "normal" pattern of taking the summers off during the summer months of 1999 and 2001 meant that she suffered no adverse economic impact due to the effects of her occupational disease.

In contrast, the Department argues that the Board's previous application of RCW 51.32.090(6), as set forth in the *Nilson* case, is incorrect. The Department asserts that the money received by Ms. Wareing from the School District during the summer months was for work already performed, thus it was a **prorated wage** as opposed to a **continuation of a wage**. The Department also contends that Ms. Wareing had not voluntarily retired within the meaning of RCW 51.32.090(8). The Department's principal argument here is that Ms. Wareing cannot be determined to have voluntarily retired unless she was physically able to work and chose not to do so. *Weyerhaeuser Co. v. Farr*, 70 Wn. App. 759 (1993).

In reviewing the position and arguments presented by the parties, we are inclined to agree with the Department that our previous decision in *Nilson* was erroneous. We agree that Ms. Wareing's salary is best viewed as a prorated payment rather than a voluntary continuation of wages by the employer. Based on the documents and exhibits presented to us, it is apparent that the School District was obliged to pay Ms. Wareing all the money she was owed under the contract for the school year, irrespective of whether she obtained employment during the summer months. This was a contractual obligation for work already performed.

We understand RCW 51.32.090(6) to apply to those situations where an employer voluntarily continues to pay an injured worker's wages during a period of time when the worker would otherwise be entitled to receive temporary total disability benefits. Under such circumstances, the worker is not entitled to windfall by receiving duplicate benefits in the form of both wages and time

loss compensation. The emphasis here, however, is a continuation of wages when the employer chooses to extend such benefits, without regard to whether the worker has or will perform work for such wages. We believe that the facts in Ms. Wareing's case do not establish a "continuation" of wages, but rather a prorated payment of wages.

Our review of the matter is influenced by several factors. First, the money paid to Ms. Wareing appears to be in the nature of a debt or obligation for services already performed. The School District was required to pay Ms. Wareing even if she had elected to obtain summertime work. Indeed, she was free to work for other employers during the summer. Implicit in RCW 51.32.090(6) is the concept that the continuation of wages is not associated with any work performed by the worker for the employer. Here, the work had been performed, and the wages were being paid over an extended period of time as required by contract. Wages were simply not continued within the context and meaning of the statute.

Second, we agree with the Department that there is a potential for differential treatment of workers essentially in the same situation. As noted above, Ms. Wareing was free to seek employment during the summer periods. This would not have affected the money she was owed by the School District for work previously performed. Indeed, had Ms. Wareing elected to seek and obtain work during the summer months, any wages she earned by such employment would have been included in the calculation of her time loss compensation rate. This result would be more obvious in the situation where a worker in Ms. Wareing's situation received wages only during the period that the work was performed. However, to call Ms. Wareing's pay a continuation of wages is making a distinction where there is no difference. She should not be penalized just because her pay is extended over a longer period time. If we were to follow the School District's position and our own earlier decision in *Nilson*, workers such as Ms. Wareing would be precluded from receiving time loss compensation benefits, while workers who received payment on a different basis would not only be able to obtain time loss compensation, but could increase the rate of time loss compensation by working during the summer months.

Our industrial appeals judge was, of course, correct in citing *Nilson* in issuing the Proposed Decision and Order. Although *Nilson* is not a designated significant decision of the Board of Industrial Insurance Appeals, it is entirely appropriate to cite any prior Board decision that would help guide the parties in resolution of matters on appeal. It is our obligation to ensure consistency in all our rulings, irrespective of whether they are designated as one of our significant decisions

published in accordance with RCW 51.52.160. *In re Diane Deridder*, Dckt. No. 98 22312 (May 30, 2000). We also note that it is both the responsibility and prerogative of the Board to review decisions based upon subsequent legal authority and different factual patterns to ensure that our application of the law is not only consistent, but also correct. Insofar as our decision in *Nilson* is concerned, we believe that it was incorrect and that RCW 51.32.090(6) should not be used to prevent the payment of wage replacement or time loss compensation benefits under those circumstances where wages have been prorated and are paid over a period of time beyond the period for which the services have been rendered. To this extent, we overrule the *Nilson* decision.

We also agree with the Department that there is insufficient evidence to establish that Ms. Wareing had voluntarily retired within the meaning and application of RCW 51.32.090(8) and within the meaning of the *Overdorff* decision. Essentially, the School District argues by analogy that Ms. Wareing had "retired" during the summer breaks between school years in that she had not typically sought employment during this period of time. The School District contends that Ms. Wareing was like a retired person because she suffered no economic loss, as she did not seek alternate forms of employment during the summer. The parties agreed that Ms. Wareing was unable, due to the residuals of her occupational (work related) disease, to work during the summers of 1999 and 2001. Because Ms. Wareing could not be employed due to the effects of her injury, she was not in a position to choose whether to be employed or not. RCW 51.32.090(1) provides that: "[w]hen the total disability is only temporary, . . . [time loss] payments . . . **shall** apply, so long as the total disability continues." (Emphasis added.) The first issue presented by the statute in determining when to pay time loss compensation benefits is the status of temporary total disability. An injured worker is entitled to time loss compensation benefits for as long as the worker is undergoing treatment, and has not been at least partially restored to the capacity to perform some reasonably continuous employment. *Hunter v. Bethel School District*, 71 Wn. App. 501 (1993); *Oien v. Department of Labor & Indus*., 784 Wn. App. 566 (1994). The statutory mandate is clear that until the temporary total disability status has terminated, time loss compensation benefits shall apply.

We acknowledge that Ms. Wareing did not typically seek employment during the summer break from her school-year duties. In spite of the fact that she normally did not work summers, we deem it unduly speculative to find that she would not have chosen employment on a voluntary basis during these periods of time. We distinguish Ms. Wareing's situation from the *Overdorff* case and other similar cases because there is no evidence of actual retirement during the period of claimed

time loss compensation. In spite of her prior pattern, it is absolutely clear that she was precluded from even the possibility of working during the time that she was temporarily totally disabled. The standard in applying temporary total disability benefits is not whether there is economic loss, but whether the person was temporarily totally disabled. To say that Ms. Wareing is not entitled to time loss compensation during the summer periods of 1999 and 2001, because she would not have suffered an economic loss during these periods, would be to add an element of analysis to the statute that does not now exist and would be unduly speculative.

In summary, we believe that Ms. Wareing was entitled to wage replacement or time loss compensation benefits between the period of June 23, 1999 and August 22, 1999, and between the period of June 21, 2001 and August 19, 2001. Such a result does not constitute a windfall or a double payment to Ms. Wareing. Assuming, hypothetically, that all her wages had been paid during the school year and not prorated, she would clearly have received time loss compensation for as long as she was temporarily totally disabled. Further, had she typically sought employment during the summer months, she would have been entitled to have averaged those wages with her School District wages for the purpose of computing her time loss compensation under RCW 51.08.178(2), *Minturn v. School Dist. No. 401 Pierce County*, 83 Wn. App. 1 (1996), *Double D Hopp Ranch v. Sanchez*, 82 Wn. App., *Double D Hopp Ranch v. Sanchez*, 133 Wn. 2d 1001 (1997).

We agree with our industrial appeals judge that summary judgment is appropriate based on the facts and stipulations of the parties and that there is no dispute as to a material issue of fact. We disagree only to the extent that we reverse our prior decision in *Nilson* and affirm the Department's order of January 10, 2002, which affirmed the earlier order of October 1, 2001, awarding time loss compensation for the periods June 23, 1999 through August 22, 1999, and for the period June 21, 2001 through August 19, 2001. We also affirm the other provisions of the order dated October 1, 2001.

FINDINGS OF FACT

1. On July 14, 1999, the Department of Labor and Industries received an application for benefits that alleged an occupational disease condition having occurred to the claimant's right arm due to the distinctive conditions of her employment with the self-insured employer, Yelm School District No. 2. On September 13, 2000, the Department issued an order that allowed the claim as an occupational disease with a date of manifestation of June 22, 1999.

   On August 3, 2001, the claimant made protest to the Department that she had been denied disability benefits. On October 1, 2001, the

Department issued an order that established the claimant's time loss compensation rate, and directed the SIE to pay time loss compensation benefits from June 23, 1999 through August 22, 1999, and from June 21, 2001 through August 19, 2001. On November 29, 2001, the self-insured employer protested the Department order dated October 1, 2001. On January 10, 2002, the Department issued an order that affirmed the order dated October 1, 2001. On February 21, 2002, the self-insured employer filed a Notice of Appeal to the Department order dated January 10, 2002, with the Board of Industrial Insurance Appeals. On April 2, 2002, the Board issued an order that granted the appeal and assigned it Docket No. 02 11829.

2. On or about June 22, 1999, Frances J. Wareing sustained an occupational disease condition to her right arm due to the distinctive conditions of her employment with Yelm School District No. 2.

3. Between June 23, 1999 and August 22, 1999, and between June 21, 2001 and August 19, 2001, the claimant was a totally and temporarily disabled worker due to the residual impairment that was proximately caused by her occupational disease condition that became manifest on or about June 22, 1999.

4. Ms. Wareing worked for the School District for approximately 27 years as a baker. The claimant normally worked for the school district during the school year, and she would sometimes perform extra work one or more days just prior to the start of the school year, and one or more days just after the school year was finished. Ms. Wareing did not work for her employer, or any other employer, during the summer months.

5. The claimant was paid for her work with the Yelm School District for work performed during the normal school year. Pay for this work was prorated on a 12-month basis. Pay received at the conclusion of the school year was for work already performed and did not constitute a voluntary continuation of wages by the self-insured employer.

6. Ms. Wareing had not voluntarily retired from the work force during the period June 23, 1999 and August 22, 1999, and between June 21, 2001 and August 19, 2001.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. The claimant, Frances J. Wareing, was a temporarily totally disabled worker within the meaning of RCW 51.32.090, between the dates of June 23, 1999 and August 22, 1999, and between the dates of June 21, 2001 and August 19, 2001.

3. Between the dates of June 23, 1999 and August 22, 1999, and between the dates of June 21, 2001 and August 19, 2001, the claimant, Frances J. Wareing, had not voluntarily retired within the meaning of RCW 51.32.090(8).

4. Between the dates of June 23, 1999 and August 22, 1999, and between the dates of June 21, 2001 and August 19, 2001, the claimant, Frances J. Wareing, was not receiving a continuation of wages from the self-insured employer, the Yelm School District No. 2, as contemplated by RCW 51.32.090(6).

5. The Department order dated January 10, 2002, is correct and is affirmed.

It is so ORDERED.

Dated this 2nd day of July, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member