

## **Serviss, Frank**

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### **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).]

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

1     **IN RE: FRANK SERVISS**                             )     **DOCKET NO. 57,651**  
2   )  
3     **CLAIM NO. G-709237**                             )     **DECISION AND ORDER**  
4

5 APPEARANCES:

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7         Claimant, Frank Serviss, by  
8         H. Frank Stubbs, per  
9         Stan Rumbaugh

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

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15        Department of Labor and Industries, by  
16        The Attorney General, per  
17        Thomas G. Hall and Dorothy Bullitt, Assistants  
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19        This is an appeal filed by the claimant on September 12, 1980, from an order of the  
20 Department of Labor and Industries dated August 26, 1980, which adhered to the provisions of a  
21 prior order demanding reimbursement for time-loss compensation paid for the periods June 16,  
22 1975 through November 3, 1975, and June 11, 1976 through September 25, 1976, and denied  
23 time-loss compensation for the period December 1, 1978 through September 3, 1979. **REVERSED**  
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25 **AND REMANDED.**  
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28   **DECISION**

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30        Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
31 and decision on timely Petitions for Review filed by the claimant and the Department of Labor and  
32 Industries to a Proposed Decision and Order issued by an industrial appeals judge for this Board on  
33 July 21, 1981 in which the order of the Department dated August 26, 1980 was reversed, and the  
34 claim remanded to the Department.  
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37        The Board has reviewed the evidentiary rulings of the industrial appeals judge and finds that  
38 no prejudicial error was committed and said rulings are hereby affirmed.  
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40        At issue in this appeal is whether Mr. Serviss is entitled to compensation for temporary total  
41 disability for the specified periods: June 16, 1975 -- November 3, 1975, June 11, 1976--September  
42 25, 1976, October 16, 1976--January 3, 1977, and December 1, 1978--September 3, 1979. In  
43 addition, we are asked to determine whether subsection (6) of RCW 51.32.090 effectively prohibits  
44 Mr. Serviss from receiving time-loss benefits for periods he was being paid for using sick leave he  
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1 had accrued during his years of service as a school teacher and wrestling coach for Franklin Pierce  
2 School District No. 402.

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4 We are in agreement that during all pertinent periods at issue, Mr. Serviss was unable to  
5 perform his regular work or any suitable work for which he had training and experience, and  
6 ordinarily he would unquestionably be entitled to time-loss benefits.  
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9 During the course of his employment on February 18, 1975, Mr. Serviss injured his low back  
10 which later twice required surgery. He eventually returned to work in September 1979. Mr. Serviss'  
11 employment contract was typical of most public school district employees in this state whereby he  
12 was paid over a twelve-month period for services performed essentially between early September  
13 through mid-June. In addition and pursuant to state law, Mr. Serviss was granted ten days sick  
14 leave for each contract year which as of the date of his injury, also pursuant to statute, was allowed  
15 to accumulate only up to a maximum of 180 days. RCW 28A.58.100.  
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18 Ultimately the question for decision is whether RCW 51.32.090(6) legally precludes the  
19 claimant from receiving time-loss compensation for those periods of time he received sick leave pay  
20 at his regular salary rate from his employer. The statutory provision in question reads:  
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23 "Should a worker suffer a temporary total disability and should his or her  
24 employer at the time of the injury continue to pay him or her the wages  
25 which he or she was earning at the time of such injury, such injured  
26 worker shall not receive any payment provided in subsection (1) of this  
27 section during the period his or her employer shall so pay such wages."  
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30 Prior to the enactment of RCW 51.32.090(6), numerous employers especially smaller ones in this  
31 state, did not have formal and definite leave policies. However, when a valued employee was  
32 injured on the job, a genuine concern for that employee's welfare prompted many employers to  
33 continue the worker's wages for a period of time to allay any immediate financial hardship on a  
34 worker or his or her family. When such circumstances prevailed, it seemed illogical to the  
35 legislature to further reward the worker with time-loss compensation benefits. It was perceived that  
36 to so permit would prove to be a disincentive to return to work.  
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39 In situations like that before us, school teachers are not paid when sick or injured without  
40 giving up something in return which, up to a specific limit through the years, they had been able to  
41 "bank." Mr. Serviss' case is not one where his employer either because of humanitarian largess or  
42 to avoid an adverse industrial insurance cost experience, voluntarily continued to pay his regular  
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1 salary. By electing to take sick leave, Mr. Serviss effectively called upon and used his own financial  
2 resources. In fact, RCW 28A.58.100(d) (formerly subsection (c)) states:

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4 "(d) Compensation for leave for illness or injury actually taken shall be  
5 the same as the compensation such person would have received had  
6 such person not taken the leave provided in this proviso."  
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8 The statute's designation of level of compensation to be paid for sick leave in an amount equal to  
9 one's regular compensation had leave not been taken implies that something other than "wages" is  
10 being paid. It must be remembered that only the receipt of continued wages prohibits an injured  
11 worker from receiving time-loss benefits.  
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14 Parenthetically, we note that RCW 28A.58.100 requires local school boards to adopt written  
15 policies granting leave with compensation for "illness, injury, and emergencies" in accord with the  
16 statutory directive contained therein. The record before us does not contain a copy of any district  
17 policy which may govern the school district's right to seek recoupment of paid sick leave from Mr.  
18 Serviss. (See, e.g., the regulations governing classified employees of the state of Washington  
19 relative to sick leave adjustment for employees covered by workers' compensation, WAC 356-18-  
20 080). This is, of course, the reciprocal of the legal issue presented before this Board, and is one  
21 over which we have no authority.  
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24 In sum, we are of the view that the payment by Franklin Pierce School District No. 402 of  
25 accrued sick leave legally accumulated by Mr. Serviss does not, within the contemplation of RCW  
26 51.32.090(6), preclude him from simultaneously receiving time-loss compensation.  
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29 Findings 1 through 5 and conclusion number 1 of the Proposed Decision and Order entered  
30 herein on July 21, 1981, are hereby adopted by the Board and incorporated herein by this  
31 reference. Conclusions 2 and 3 thereof are hereby stricken, and in lieu thereof the Board  
32 concludes:  
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37 2. The claimant is entitled to compensation as a temporarily totally disabled  
38 worker for the periods from June 16, 1975 through November 3, 1975,  
39 from June 11, 1976 through September 25, 1976, from October 16,  
40 1976 through January 3, 1977, and from December 1, 1978 through  
41 September 3, 1979.  
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43 3. The order of the Department of Labor and Industries dated August 26,  
44 1980, which affirms a prior order demanding reimbursement for time-  
45 loss compensation for the periods from June 16, 1975 through  
46 November 3, 1975, from June 11, 1976 through September 25, 1976,  
47 and denied time-loss compensation for the period December 1, 1978  
through September 3, 1979 is incorrect, and should be reversed and this

1 claim remanded to the Department with instruction to reopen the claim  
2 and allow time-loss compensation for the aforementioned periods, plus  
3 for the period from October 16, 1976 through January 3, 1977, and  
4 thereupon to close the claim.

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6 It is hereby ORDERED.

7 Dated this 3rd day of December, 1981.

8 BOARD OF INDUSTRIAL INSURANCE APPEALS

9 /s/ \_\_\_\_\_

10 MICHAEL L. HALL Chairman

11 /s/ \_\_\_\_\_

12 FRANK E. FENNERTY, JR. Member

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14 **DISSENTING OPINION**

15 I must dissent from the Board's majority decision, because I believe it is erroneous as a  
16 matter of law. The ultimate issue here is whether RCW 51.32.090(6) legally precludes a claimant  
17 from receiving time-loss compensation for those periods of time he received sick-leave pay at his  
18 regular salary rate from his employers.  
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21 This is not the first time this issue has been before the Board. It was presented as long ago  
22 as 1965. In re S.G. Tudor, Docket No. 22,814, Proposed Decision and Order of February 2, 1965,  
23 adopted by the Board March 5, 1965. In that case, it was held that a claimant in such a situation is  
24 precluded from receiving time-loss compensation by the provisions of RCW 51.32.090(6). So far as  
25 I am aware, the Board has not heretofore deviated from that view.  
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29 The language of the statute is, in my opinion, plain and unambiguous and, therefore, not  
30 subject to construction and interpretation. Lane v. Department of Labor and Industries, 21 Wn. (2d)  
31 420. It specifically provides that no time-loss compensation shall be paid to a worker for any period  
32 during which his employer continues to pay the same amount as the wages he was earning at the  
33 time of his injury. Here, the claimant elected to use sick leave, to the full extent it had accumulated  
34 to his credit, as was his right. He thereby continued to receive money in the full amount of his  
35 regular wages during the period sick leave was drawn. RCW 28A.58.100(d).  
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39 The majority opinion indicates that, if the employer had voluntarily continued to pay claimant  
40 his regular salary, it would have applied RCW 51.32.090(6) to prohibit the simultaneous payment of  
41 time-loss compensation; but, since the payments were based on accrued sick-leave credit, the  
42 statute should not be applied. I fail to see any reason for this distinction, and the statute itself  
43 certainly does not provide for any such exception.  
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2 It should be borne in mind that the basic purpose of temporary disability compensation is to  
3 replace the money a worker loses by reason of temporary inability to work due to an industrial  
4 injury. However, where a worker receives his normal salary from his employer in spite of his  
5 inability to work, he has not lost anything financially and there is nothing to replace, and the basic  
6 purpose of temporary disability compensation is not met.  
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10 As to the fact that the claimant "lost" his accumulated sick leave which he otherwise could  
11 have available to use during periods of illness or injury due to non-occupational causes, the simple  
12 answer is that there was no requirement that he apply for sick leave while incapacitated due to his  
13 industrial injury. He chose to use accumulated sick leave; but he could have chosen to take the  
14 status of leave without pay so as to not use up any sick leave, in which event, of course, he would  
15 clearly have been entitled to full time-loss compensation for the periods in question.  
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21 It is noted that the claimant did in fact use up his accrued sick leave as of February 9, 1979,  
22 and was on leave without pay after that date through September 3, 1979, when he returned to full  
23 employment for the school district. He is entitled to time-loss compensation for the February 10--  
24 September 3 period.  
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28 Based on my foregoing observations as to the applicability of RCW 51.32.090(6) in this case,  
29 and based also on the correct reasoning in the Proposed Decision and Order as to why claimant is  
30 entitled to time-loss compensation for basically the summer months, I would modify the  
31 Department's order of August 26, 1980, and adjudicate claimant's entitlement to time-loss  
32 compensation during the periods here in issue, as follows:  
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- 35 June 16, 1975 through September 1, 1975 -- compensation payable.
- 36 September 2, 1975 through November 3, 1975 -- compensation not payable
- 37 June 11, 1976 through September 25, 1976 -- compensation payable.
- 38 October 16, 1976 through January 3, 1977 -- compensation not payable.
- 39 December 1, 1978 through February 9, 1979 --compensation not payable.
- 40 February 10, 1979 through September 3, 1979 -- compensation payable.

41 Dated this 3rd day of December, 1981.

42 /s/  
43 PHILLIP T. BORK  
44 Member