

MacIsaac, Harold

TIME-LOSS COMPENSATION (RCW 51.32.090)

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

The receipt of holiday pay at the regular salary rate does not preclude the worker from receiving time-loss compensation for the same period of time. ...*In re Harold MacIsaac*, BIIA Dec., 66,169 (1985) [dissent] [Editor's Note: But see, *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

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In Re:	HAROLD R. MacISAAC)	DOCKET NO. 66,169
)	
Claim No.	S-436951)	DECISION AND ORDER
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APPEARANCES:

Claimant, Harold R. MacIsaac
Pro se
 Self-Insured Employer, King County, by
 Perkins, Coie, Stone, Olsen and Williams, per
 Calhoun Dickinson

Department of Labor and Industries, by
 The Attorney General, per
 Zimmie Caner, Assistant

This is an appeal filed by the employer on November 1, 1983 from an order of the Department of Labor and Industries dated October 6, 1983 which corrected and superseded the prior Department order dated August 26, 1983, and ordered additional time-loss compensation be paid for July 5, 1982 in the amount of \$35.11. 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 employer to a Proposed Decision and Order issued on August 15, 1984 in which the order of the Department dated October 6, 1983 was affirmed.

The issue presented by this appeal and the stipulated facts presented by the parties are adequately set forth in the Proposed Decision and Order, and we agree Mr. MacIsaac is entitled to time-loss compensation in addition to payment for the paid holiday.

The Proposed Decision and Order has adequately resolved the issue and such proposed disposition is in line with our previous holding that utilization of sick leave benefits did not preclude a temporarily totally disabled worker from receiving time-loss compensation for the same period under certain special circumstances. (See In re: Frank Serviss, Docket No. 57,651, 12-3-81). In that appeal we held the payments which were made in exchange for a reduction in sick leave

1 balance did not amount to a wage continuation plan. By the terms of
2 the school district leave policy and contractual agreement in that
3 case, Serviss' sick leave was a personal resource he was entitled to
4 use if disabled.

5 We view the facts of the present appeal in much the same light.
6 The paid holiday was an earned right or benefit inuring to Mr.
7 MacIsaac by operation of a contract available to workers in "pay"
8 status (Exhibit B). Although a further contractual provision
9 prohibited simultaneous receipt of workers' compensation benefits
10 and sick leave pay, no similar contractual restriction exists for
11 holiday pay. Thus the compensation scheme used does not appear to
12 simply be a wage continuation program as far as paid holidays are
13 concerned. The attempt to "convert" it into such, and thus avoid
14 liability for payment of time-loss compensation, cannot be permitted.

15 Neither does RCW 51.32.090(6) provide a statutory shelter for
16 the employer here. That section speaks to continued payment of
17 wages as the operative fact necessary to relieve the requirement for
18 time-loss payments. Since we do not view the payment for the
19 specified holiday as a payment of wage, the section is inapplicable.

20 After consideration of the Proposed Decision and Order and the
21 Petition for Review filed thereto, and a careful review of the entire
22 record before us, we are persuaded that the Proposed Decision and
23 Order is supported by the preponderance of the evidence and is
24 correct as a matter of law.

25 The proposed findings 1-4, and the conclusions and order are
26 hereby adopted as this Board's final findings, conclusions and order
27 and are incorporated herein by this reference. Proposed finding

28 No. 5 is amended to read as follows:

29 5. The claimant, Harold R. MacIsaac, was paid an
30 amount as holiday pay for July 5, 1982 in an
31 amount equal to what would have been his regular
32 daily wage.
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2 It is so ORDERED.
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4 Dated this 14th day of March, 1985.
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6 BOARD OF INDUSTRIAL INSURANCE APPEALS
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9 /s/ _____
10 MICHAEL L. HALL Chairman
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13 /s/ _____
14 FRANK E. FENNERTY, JR. Member
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19 DISSENTING OPINION
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21 I must disagree with the Board's majority decision here, as I
22 also disagreed with the majority decision in the Frank Serviss case.
23 The issue of applicability of RCW 51.32.090(6) to these types of
24 situations was before this Board as long ago as 1965. In re S.G.
25 Tudor, Docket No. 22,814, Proposed Decision of 2/2/65, adopted by
26 the Board 3/5/65. The decision there was contrary to the decision
27 the majority has reached in this case and in the Serviss case.

28 As stated in my Serviss dissent, I feel the language of RCW
29 51.32.090(6) is plain and unambiguous, and thus not subject to
30 construction and interpretation. Lane v. Department of Labor and
31 Industries, 21 Wn. 2d 420. The statute specifically provides that
32 an injured worker "shall not receive" time-loss compensation for a
33 period during which the employer pays him the same amount as the
34 wages he was earning at the time of the injury. It is a stipulated
35 fact that Mr. MacIsaac was paid the "amount of his regular daily
36 wage for July 5, 1982, pursuant to the provisions of Exhibits A and
37 B regarding holiday pay."

38 But the majority says the claimant's "holiday" pay was an
39 earned right pursuant to contract and so not a "wage continuation
40 program," and thus he didn't receive "wages" for that day and the
41 statute is inapplicable. I do not join in such semantic gymnastics.
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The fact that the day's wages in question was called "holiday" pay does not change the matter at all. Why did the claimant receive his pay for July 5, 1982? Because, purely and simply, it was the full "wage" to which he was entitled for that day by virtue of being an employee of King County.

We should not lose sight of the fact 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 pay from his employer in spite of 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 fulfilled.

I also incorporate as my own the arguments ably set forth in the employer's Petition for Review, and I wish to quote portions thereof:

"The claimant was a temporarily totally disabled workman during a period including the Fourth of July, a King County holiday. Since the Fourth fell on a weekend, July 5th was treated as a holiday. Claimant, as well as other County employees, injured and non-injured, received for that holiday his regular daily wage.

It is the County's policy to see that workers absent by virtue of industrial or non-industrial illness receive a full day's pay for each day off. Thus, on an ordinary workday a worker disabled by a non-industrial injury receives a full day's wages charged to his sick pay account. On that same day, an industrially injured worker receives time loss plus an additional amount of sick pay to equal the same one day's wages.

On holidays the single day's wages paid King County employees are, by contract and policy, in lieu of sick benefits, private or industrial. Thus, claimant received his regular pay for July 5th and was not paid sick leave or workers' compensation benefits for that day. Non-industrially injured workers received on that same day one day's wages, and no sick leave."

...

"Like other employees, most County employees do not work on holidays. Those well employees receive on holidays one day's wage just as they do on workdays. Sick employees working for the County receive on holidays one day's wages just as they do on workdays."

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"The County has adopted a logical, fair system of handling compensation for employees injured either industrially or non-industrially, insuring that they receive wage continuation. It is the right of the County to adopt an overall compensation policy including its holiday pay program in which the daily wage received on holidays is in lieu of time loss, just as is permitted by RCW 51.32.090(6). To adopt the Department's unjustified and strained interpretation would require the County to pay to the claimant, and all others similarly situated, nearly twice as much for being sick on a holiday as they would have received had they been well ... From a practical standpoint that interpretation is absurd, from a legal standpoint it is incorrect."

I would reverse the Department's order of October 6, 1983.

Dated this 14th day of March, 1985.

/s/ _____
PHILLIP T. BORK Member