White, Carla

TIME-LOSS COMPENSATION (RCW 51.32.090)

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

Payment of shared leave benefits under RCW 41.04.665 does not constitute wage continuation and therefore time-loss compensation benefits are also payable. *Citing In re Frank Serviss*, BIIA Dec., 57,651 (1981). ***….In re Carla White,* BIIA Dec., 96 3129 (1998)** [dissent] [*Editor's Note*: *Reversed in part. Affirmed as to status of shared leave benefits. 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

IN RE: CARLA R. WHITE	)	**DOCKET NO. 96 3129**
	)	
CLAIM NO. T-716341	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Carla R. White, by
Aaby, Putnam, Albo & Causey, per
F. Wayne Lieb

Self-Insured Employer, South Bend School District #118, by
Craig, Jessup & Stratton, P.L.L.C., per
Gibby M. Stratton

Department of Labor and Industries, by
The Office of the Attorney General, per
Lori A. Oliver-Hudak, Assistant

The self-insured employer, South Bend School District #118, filed an appeal with the Board of Industrial Insurance Appeals on May 31, 1996, from an order of the Department of Labor and Industries dated May 17, 1996. The order cancelled a Department order dated September 7, 1995; directed the self-insured employer to pay time loss compensation for the period September 13, 1992 to February 24, 1993; and instructed the self-insured employer to calculate loss of earning power benefits from February 25, 1993, until the time the injured worker was released for full-time employment. **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, the Department, and the self-insured employer to a Proposed Decision and Order issued on December 12, 1997, in which the order of the Department dated May 17,1996, was reversed and remanded to the Department with directions to instruct the self-insured employer to pay time loss compensation for those days between September 13, 1992 through March 2, 1993, that the claimant was totally and temporarily disabled or partial time loss compensation in the form of loss of earning power benefits for the

particular days she was limited by her disability to working no more than half days during the period March 3, 1993 through May 1, 1993, in which she utilized sick leave. The Department was further directed to instruct the self-insured employer that it was not required to pay time loss compensation or loss of earning power benefits under this order for those particular days of disability for which she has received actual wage continuation through shared leave under RCW 41.04.665.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and the rulings are affirmed. All parties petitioned us to review the Proposed Decision and Order issued December 12, 1997. We have granted review because we want to reaffirm the majority holding in the case of *In re Frank Serviss*, BIIA Dec., 57, 651 (1981) as it addressed wage replacement and the injured worker's use of sick leave. Moreover, we have granted review because the issue of whether "shared leave" constitutes wage replacement under RCW 51.32.090(6) is one of first impression.

We believe that the Proposed Decision and Order accurately delineated the facts posed in this appeal. We will reiterate the pivotal facts only to the extent necessary to fully explain our decision.

Carla White was employed by the South Bend School District for the school year 1992-93. She started working in early September 1992. On September 12, 1992, Ms. White was injured in a motor-vehicle accident. At the time of her accident, the claimant had accumulated three days of sick leave. Ms. White was off work from the date of her industrial injury until March 2, 1993. Ms. White returned to work on March 3, 1993, and worked half days until May 2, 1993. Although the accident was an industrial injury, Ms. White did not file an application for benefits until April 1993. Prior to the allowance of the claim, and shortly after the accident, co-workers at South Bend School District donated their leave to Ms. White so that she would not lose her pay and benefits during her rehabilitation and recovery.

The Proposed Decision and Order held that the sick leave accumulated by Ms. White, that was either earned by her at South Bend School District or transferred to her account from her past employer, did not constitute wage replacement as contemplated by RCW 51.32.090(6). Our industrial appeals judge correctly relied on the precedent established in the case of *In re Frank Serviss,* above. The Department of Labor and Industries argues that we should vacate the majority holding in *Serviss* and adopt the reasoning of the dissent as the basis for reversing this rule. The self-insured employer, on the other hand, argues that *Serviss* does not apply since Ms. White had not "earned" the sick leave used. The claimant does not challenge the Proposed Decision and Order on this holding.

In *Serviss* we observed that:

> 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.

Serviss at 2-3.

The self-insured employer, in its Petition for Review, claimed that Ms. White's case was different from *In re Frank Serviss* since, "Ms. White had not accumulated any sick leave that amounted to 'her own financial resources'." Petition for Review at 6. This statement by the employer overlooks the fact that Ms. White entered her employment with South Bend School District with at least some sick leave that was carried over from her past employer.

South Bend School District characterized the remaining sick leave, that was furnished as a benefit to employees by the district, as "sick leave advanced to Ms. White's account in anticipation of 'future employment'." Self-Insured Employer Petition for Review at 6. Ms. White did in fact

return to her employment and would be required to repay this advanced sick leave instead of "banking" the sick leave as it was later acquired. The temporal distinction offered by the self-insured employer does not distinguish this case from our ruling in *Serviss*. It is difficult for us to believe that South Bend School District **gave** the leave to Ms. White out of humanitarian largess or to avoid an adverse industrial insurance cost experience in the future. Such motives, while admirable, would not be the best utilization of the tax dollars entrusted to it to run the school district. Accordingly, we hold that Ms. White had a financial interest in her own sick leave, whether accumulated in the past or advanced in anticipation of repayment during future employment. The dictates of *Serviss* apply to this fact scenario. The provided sick leave does not constitute wage replacement under sick leave. RCW 51.32.090 (6).

We are further asked to determine whether subsection (6) of RCW 51.32.090 effectively prohibits Ms. White from receiving time loss benefits for periods she was being paid shared leave donated to her from leave accounts of fellow employees. This leave, whether it was in the form of co-worker sick leave, annual leave, or that worker's personal holiday, amounted to benefits that had been earned, accumulated and vested in the account of the donating employee. The origin of this leave does not change its vested status. The employer argues that a worker can not collect time loss compensation and be a participant under the shared leave program. We do not have jurisdiction to determine when a person can or cannot participate under such a plan. Therefore, we are without authority to order the claimant to repay benefits to the donating co-workers. That remedy lies with another tribunal. We hold only that receipt and use of shared leave does not constitute wage replacement under RCW 51.32.090 (6).

FINDINGS OF FACT

1. On April 6, 1993, the Department of Labor and Industries received an application for benefits that alleged that Carla R. White sustained an industrial injury on September 12, 1992, in the course of her employment with South Bend School District.

On April 28, 1993, the Department issued an order that rejected the claim for the reasons that the claimant was not under the industrial insurance laws at the time of injury, and that at the time of injury, the claimant was not in the course of employment. Within 60 days the claimant filed a protest and request for reconsideration of that order and, on July 9, 1993, the Department issued an order that affirmed the order dated April 28, 1993. Within 60 days the claimant filed with the Board of Industrial Insurance Appeals a Notice of Appeal of the Department order dated July 9, 1993. Following litigation at the Board, under Docket No. 93 4008, on March 10, 1995, a Superior Court Judgment was entered in Cause No. 94-2-00230-1 that affirmed a Decision and Order of the Board of Industrial Insurance Appeals dated July 18, 1994, that reversed the order of the Department of Labor and Industries dated July 9, 1993, rejecting the claim.

On September 7, 1995, the Department issued an order that directed the self-insured employer to pay time loss compensation for certain periods from September 13, 1992 to September 1, 1994, and to pay loss of earning power benefits for certain periods from March 9, 1993 to April 28, 1995, because the worker was not kept on salary. On September 14, 1995, the employer filed with the Department a protest and request for reconsideration of the order dated September 7, 1995.

On May 17, 1996, the Department issued an order that cancelled the order dated September 7, 1995; directed the self-insured employer to pay time loss compensation for the period September 13, 1992 to February 24, 1993; and instructed the employer to calculate loss of earning power benefits from February 25, 1993, until the time the injured worker was released for full-time employment.

On May 31, 1996, the employer filed with the Board of Industrial Insurance Appeals a Notice of Appeal of the Department order dated May 17, 1996. On July 2, 1996, the Board issued an order that granted the appeal, under Docket No. 96 3129, and directed that further proceedings be held.

2. On September 12, 1992, Carla R. White sustained an industrial injury in a motor vehicle collision while in the course of her employment with South Bend School District.

3. During the period September 13, 1992 through March 2, 1993, as result of the residual impairment proximately caused by her industrial injury of September 12, 1992, Carla R. White was temporarily, totally precluded from obtaining or performing any gainful employment.

4. During the period March 3, 1993 through May 1, 1993, as a result of the residual impairment proximately caused by her industrial injury of

September 12, 1992, Carla R. White was precluded from working more than half-days at her regular employment with the South Bend School District.

5. A final determination that Ms. White was entitled to benefits under the industrial insurance laws for the disability caused by the motor vehicle collision of September 12, 1992, was not made until after the periods of disability addressed in Findings of Fact Nos. 3 and 4, above. While disabled and prior to the determination that she was entitled to benefits under the industrial insurance laws, Ms. White used certain leave benefits available through her employer, the South Bend School District. At the time of the motor vehicle collision, Ms. White had 3 days of sick leave accrued. Ms. White received a total of $14,805.14 in sick leave compensation for the period September 13, 1992 to March 2, 1993. Of this, $1,351.68 was from a combination of sick leave benefits she had either earned or was given credit for as if she had worked a full calendar year. The $12,453.36 in shared leave compensation was donated to Ms. White by co-workers. The $12,453.36 was deducted from the accounts of the 22 employees who donated that leave.

6. South Bend School District did not continue to pay Carla R. White the wages that she was earning at the time of her injury during that portion of her disability, resulting from the industrial injury of September 12, 1992, for which Ms. White used sick leave benefits either accumulated prior to her industrial injury or advanced to her by her employer. This money was paid from Ms. White's own sick leave account, on the basis of sick leave entitlements the claimant had already earned or that were advanced by the school district. In using her own sick leave, Ms. White consumed benefits that were then no longer available to her in the event of future illness.

7. South Bend School District did not continue to pay Carla R. White the wages that she was earning at the time of her injury during that portion of her disability, resulting from the industrial injury of September 12, 1992, for which Ms. White received shared leave paid to her. This money was paid by the school district after donation by Ms. White's co-workers.

8. There are no contested genuine issues of material fact.

CONCLUSIONS OF LAW

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

2. Since there are no contested material issues of fact, the matter is appropriate for resolution under Civil Rule 56, by summary judgment.

3. The claimant's use of her own sick leave benefits, whether earned or advanced to her after an industrial injury, did not constitute a continuation of wages by the employer within the meaning of RCW 51.32.090(6). This is true whether the sick leave used is available by virtue of having been previously earned by the injured worker or is advanced to the worker's sick leave account by the employer in anticipation of future employment.

4. The employer's payment of shared leave benefits to the claimant under RCW 41.04.665, that allowed the claimant to avoid having to enter leave without pay status during a period of disability that is later determined to have been caused by an industrial injury, did not constitute continuation of wages within the meaning of RCW 51.32.090(6).

5. The Board of Industrial Insurance Appeals does not have jurisdiction to determine whether, under Title 41, RCW, a worker has an obligation to repay to an employer the value of leave used by the worker for a disability where the worker subsequently is determined to be entitled to time loss compensation or loss of earning power benefits under the industrial insurance laws.

5. The order of the Department of Labor and Industries dated May 17, 1996, that cancelled a Department order dated September 7, 1995; directed the self-insured employer to pay time loss compensation for the period September 13, 1992 to February 24, 1993; and instructed the employer to calculate loss of earning power benefits from February 25, 1993 until the time the injured worker was released for full-time employment, is correct and is affirmed.

It is so ORDERED.

Dated this 6th day of July, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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

DISSENT

I dissent. As a general proposition, the employer's continued payment of wages to an injured worker constitutes wage replacement and excuses the employer from paying time loss compensation. RCW 51.32.090 (6). In the case of *In re Frank Serviss*, BIIA Dec., 57, 651 (1981), this Board determined that a worker's use of **their** own sick leave did not constitute wage replacement. The majority now extends the holding in *Serviss* to shared leave situations where co-workers donate leave to another employee. I disagree with this extension.

As stated in the Proposed Decision and Order, shared leave is not a benefit received by Ms. White in exchange for work she performed. Shared leave is the largesse of co-workers. The majority gives short shrift to this issue by asserting that because the shared leave was vested in any worker, it retains its character as earned sick leave by another worker. This stretches the concept of vesting too far. To be sure, the employer derives a benefit from shared leave by reducing the account of outstanding sick leave, but this benefit is too remote and too conditional to be regarded as a benefit in the same class as earned sick leave or vacation leave.

An injured worker who qualifies for shared leave privileges does not have a vested interest in the leave that is provided. If, for some reason, they need less leave than is used, the worker is obligated to return the leave to the donating worker. In addition, the shared leave is not a personal benefit of the injured worker. The recipient has no vested entitlement to that benefit. It is difficult to then categorize the donations of time from others in the same classification as earned sick leave banked in an employee's account.

I realize that the majority opinion will apply in what appears to be very rare circumstances. Under Title 41, a person would not normally qualify to receive shared leave if they are receiving time loss benefits for an industrial injury claim. In most instances, an application for benefits is immediately filed after an industrial injury. Moreover, the majority opinion, which I vehemently

oppose, is most likely limited to public sector employers within the purview of Title 41. Nonetheless, without a vested interest in the shared leave, South Bend School District #118 is entitled to the wage replacement protection of RCW 51.32.090 (6).

Dated this 6th day of July, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
JUDITH E. SCHURKE Member