ROBERT W. SMITH

v. Docket No. 94-DOH-446

WEST VIRGINIA DIVISION OF HIGHWAYS/

WEST VIRGINIA DIVISION OF PERSONNEL

DECISION

Grievant, Robert W. Smith, employed by the West Virginia Division of Highways (DOH), filed a level one grievance on July 19, 1993, in which he alleged "[t]here is a discrepancy in the amount of money I am to repay to Dept. of Highways to restore my sick leave." Following denials at levels one and two, an evidentiary hearing was conducted at level three on May 17, 1994. (See footnote 1) Commissioner Fred VanKirk denied the grievance on August 4, 1994, and appeal was made to level four on August 23, 1994. Following a hearing on October 26, 1994, the matter became mature for decision with the submission of proposedfindings of fact and conclusions of law by both parties on December 1, 1994. (See footnote 2)

The facts leading to this grievance are not in dispute. On February 8, 1991, Grievant injured his lower back while at work in the DOH District 5 sign shop. Pending a ruling on a claim filed with the Workers' Compensation Commission, Grievant utilized accrued sick leave. The compensation claim was determined compensable on March 5, 1991. Ultimately, Grievant received both temporary total disability benefits from the Workers' Compensation Fund and sick leave, including holiday pay, from DOH for the period from February 8, 1991, to March 4, 1991.

By letter dated August 20, 1993, District 5 Engineer Nicholas Bromhal advised Grievant that he had improperly received sick leave and Workers' Compensation benefits simultaneously during February and March 1991. Mr. Bromhal noted that Grievant needed to restore 106.5 hours of sick leave and 16 hours of holiday leave (15 days and 2 hours), for a total of $686.85. It is Grievant's position that he owes DOH $434.34 for 13 days and 2 hours of sick leave. He arrives at this amount by multiplying the daily award from Workers' Compensation, $32.64, times 13.25. Grievant argues

that this computation is correct in that W. Va. Code §23-4-1 and Division of Personnel Administrative Rule 15.09 bothrequire that employees be restored sick leave on a day for day basis which corresponds to the temporary total disability benefits. Grievant also relies upon an interpretation of House Bill 2672 (effective July 7, 1989) which stated that "[y]our sick leave time will be restored by paying one day of Workers' Compensation temporary total disability benefits to the Department of Highways for each day of sick leave that you received." (See footnote 3) Grievant further argues that he should not be required to reimburse DOH for the two holidays because Code §23-4-1 refers only to sick leave and does not mention paid holidays. Grievant also cites Code §23-4-7a, "[c]laimant shall not be liable by off set or otherwise for excess paid," in support of his contention that "once he signed to receive TTD benefits, the agency should have dropped holiday pay from the payroll." At level four DOH asserts that the correct amount Grievant owes to restore his sick leave is $732.11. (See footnote 4) This amount is determined beginning with Grievant's gross salary for 122.5 hours at $8.16 per hour wages, for a total of$999.60. From this amount social security, retirement, FIT, and SIT are deducted, leaving the total amount owed by Grievant to be $732.11. Respondents DOH and DOP argue that this method of calculation, which requires Grievant to repay what is essentially his net wages for the period of time in question, is consistent with the intent of Code §23-4-1, i.e., to "prevent an employee of the state. . . from collecting both temporary total disability benefits and sick leave benefits for the same time period."

Respondents note that while Grievant relies upon the statutory wording which requires restoration of sick leave on a "day for day basis," that does not literally translate into the daily amount awarded by Workers' Compensation. James E. Andrews, DOH Payroll Supervisor, testified at level four that while Grievant correctly identifies his daily compensation payment to be $32.64, this amount is based upon a seven day per week computation rather than the standard five-day work week. Mr. Andrews further stated that compensation payments are approximately 70% of an employee's gross wages, an amount generally corresponding to the employee's net pay. Thus, over the course of his disability, Grievant received approximately $760.00 in compensation benefits, while also receiving compensation benefits during the same time period.

Citing DOP Regulation §15.01(d), Respondents argue that Grievant must submit reimbursement for the two holidays in question. That section provides:

[a]n employee must either work or be on approved paid leave for either the full scheduled workday

before or after the holiday and either work or be on approved paid leave for any fraction of the scheduled workday before or after the holiday to receive pay for the holiday.

Respondents assert that because Grievant chose to retain his disability benefits and to "buy back" his sick leave, he would not be on approved paid leave either prior to or after the holiday, and therefore, was no longer eligible to receive holiday pay.

Because it is undisputed that an injured employee may not receive sick leave and Workers' Compensation benefits for the same time period, the only issue to be addressed is whether one day of Workers' Compensation will restore one day of sick leave. A review of the evidence establishes that restoration of sick leave is not based upon an employee's daily Workers' Compensation benefits.

W.Va. Code §23-4-1 provides in pertinent part:

[t]hat in the event an employee is injured in the course of and resulting from covered employment and such injury results in lost time from work, and such employee for whatever reason uses or obtains sick leave benefits and subsequently receives temporary total disability benefits for the same time period, such employee may be restored sick leave time taken by him or her as a result of the compensable injury by paying to his or her employer the temporary total disability benefits received or an amount equal to the temporary total benefits received. Such employee shall be restored sick leave time on a day for day basis whichcorresponds to temporary total disability benefits paid to the employer. . . .

(emphasis added).

DOP Regulation, Section 15.09, provides that an employee injured in the course of employment may elect to receive either Workers' compensation benefits or sick leave and that the employee may collect sick leave benefits until receiving temporary total benefits; however,

[u]pon receipt of such temporary total disability benefits the employee shall pay or assign to his or her employer the temporary total disability benefits received or an amount equal to the temporary total disability benefits received. Employees shall be restored sick leave time on a day for day basis which corresponds to the temporary total disability benefits paid to the employer. If the employee fails to pay or assign to the employer the temporary total disability benefits received or an amount equal to the temporary total disability benefits received, then the employer shall deduct from the employee's subsequent wage payment an amount equal to the temporary total disability benefits

received. Upon payment of this amount the employer shall restore sick leave time which corresponds to the amount of temporary total disability received by the employee.

Grievant was absent from work due to injury 13.25 days. Because he received compensation benefits for that time, he is required to reimburse DOH for 13.25 days of sick leave. Upon payment, Grievant's sick leave will be restored in the same amount of work time lost, "day for day." Grievant's interpretation of "day for day" to mean that one day ofWorkers' Compensation equals one day of sick leave is erroneous because the benefits are calculated differently. While sick leave is awarded on the standard five-day work week, Workers' Compensation is calculated on a seven-day calendar week. Because the per diem benefit for Workers' Compensation is lower than that for sick leave, repayment of five days of Workers' compensation would result in the employee receiving his entire sick leave plus a portion of the Workers' Compensation benefits.

In this instance, the intent of the legislation is clear that while an employee shall be compensated for on the job injuries, he may not "double-dip." Both Code §23-4-1 and DOP Regulation 15.09 require the employee to pay the employer the benefits received or an amount equal to the benefits received. Unquestionably, an employee is entitled to only one benefit, and Grievant may not restore all of the sick leave with only a portion of the Workers' Compensation he received. Grievant does not contest the claim by DOH that he received approximately $760.00 from Workers' Compensation. Although DOH could have demanded the entire amount received by Grievant, it has opted to use a calculation which requires that he repay only $732.11. (See footnote 5)

Grievant must reimburse DOH for the two holidays incompliance with DOP Rules and Regulations, Section 15.01(d). Because Grievant did not work and was not on approved paid leave, such as sick leave, on the days before and after the holidays, he was not eligible to receive a paid holiday. Further, because Grievant was compensated by Workers' Compensation for every day between February 8 and March 4, 1991, he was in fact paid for the holidays.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant is employed by the Division of Highways, and is assigned to the District Five Sign Shop.

2. Grievant incurred an on-the-job injury on February 8, 1991. As a result of this injury, Grievant was unable to work the following 15 days and 2 hours.

3. The period of Grievant's incapacitation included two holidays.

4. Pending a ruling on a Worker's Compensation claim, Grievant utilized sick leave. The Compensation claim was ruled compensable on March 5, 1991.

5. Grievant chose to retain the Workers' Compensation benefits and to restore his sick leave.

6. Grievant and DOH differ in their calculation of the total amount of money required for Grievant to restore thesick leave.

CONCLUSIONS OF LAW

1. Any employee injured in the course of covered employment which results in lost time for work, and such employee obtains sick leaves benefits and subsequently receives temporary total disability benefits for the same time period, may restore the sick leave time by paying the employer the temporary total disability benefits received or an amount equal to those benefits received. W.Va. Code §23-4-1.

2. Grievant's calculated cost of the reimbursed sick leave is inconsistent with the statutory provision which requires that payment be equal to the amount of the temporary total disability benefits received.

3. Because Grievant received Workers' Compensation benefits for the two holidays in question and was not on approved paid leave the days before and after the holidays, he was not eligible to receive paid holidays and must reimburse DOH for those days in compliance with DOP Regulation 15.01(d).

Accordingly, the grievance is DENIED.

DATED: March 30, 1995 Sue Keller, Senior Admn. Law Judge

Footnote: 1*Neither the level one nor the level two decisions were made a part of the record although Grievant indicated on the grievance form that the decisions were issued on July 19, 1993, and August 24, 1993, respectively. There was no explanation for the delay between levels two and three; however, because the issue of timeliness not raised, the lapse is inconsequential at this juncture.*

Footnote: 2*Because this grievance involves issues of compensation and sick leave, the Division of Personnel (DOP) was joined as a Respondent at level four.*

Footnote: 3*This interpretation was submitted as part of Grievant's Exhibit 4, which also contained a memorandum, dated July 20, 1989, from Deputy Commissioner Jane Cline to the DOH District Engineers regarding legislative and rule changes; a memorandum, dated July 7, 1989, from Lowell D. Basford, Acting Director of Personnel, regarding those changes; and an interpretation of the Parental Leave Act. Although paragraph three, cited infra, appears to support Grievant's position, it is unofficial and not controlling in this matter.*

Footnote: 4*In a statement dated July 19, 1993, attached to the grievance form, Grievant asserts that he was advised by the Comptroller's office on July 13, 1993, that he owed $714.56 for 14 days of sick leave.*

Footnote: 5*Because it is not precisely clear whether DOH calculated the payback in strict compliance with the cited statutory and regulatory provisions, the holding in this matter is limited to the specific issue presented by Grievant Smith.*