



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. B. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 18

Tribunal File Number: GE-15-3222

BETWEEN:

J. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: December 18, 2015

DATE OF DECISION: February 4, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Mr. J. B., the Appellant (Claimant) attended the hearing.

INTRODUCTION

[1] On May 6, 2009 the Appellant made an initial claim for employment insurance benefits. On September 11, 2012 the Commission notified the Appellant that action was taken against his employment insurance benefit claim because he failed to declare earnings. Thus an overpayment, penalty and notice of violation were imposed. The Appellant appealed to the Board of Referees who on August 1, 2013 dismissed the appeal thus the Appellant made a request for leave to appeal to the Appeal Division of the *Social Security Tribunal of Canada* (Tribunal). On May 4, 2015 the Appeal Division granted the leave to appeal. On October 14, 2015 a hearing was held and the Appeal Division allowed the appeal and that the case should be returned to the General Division of the Tribunal for reconsideration.

[2] The hearing was held by In person for the following reasons:

- a) The complexity of the issue(s) under appeal.
- b) The fact that the credibility may be a prevailing issue.
- c) The fact that more than one party will be in attendance.
- d) The information in the file, including the need for additional information.
- e) The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUES

[3] The Tribunal must determine if the monies the Appellant received constituted earnings pursuant to section 35 of *the Employment Insurance Regulations* (Regulations) and if the monies were allocated pursuant to section 36 of the Regulations.

[4] The Tribunal must determine if the imposition of a penalty pursuant to section 38 of the *Employment Insurance Act* (Act) be imposed because the Appellant made a misrepresentation by knowingly provided false or misleading statements.

[5] The Tribunal must determine if a Notice of Violation pursuant to section 7.1 of the Act should be imposed.

THE LAW

[6] Subsection 35(1) of the Regulations states the definitions in this subsection apply in this section. "Employment" means

(a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,

(i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

(b) any self-employment, whether on the claimant's own account or in partnership or co-adventure;

(c) the tenure of an office as defined in subsection 2(1) of the Canada Pension Plan.

[7] Subsection 35(2)(a) of the Regulations states subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19 or subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section

152.18 of the Act, and for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including (a) amounts payable to a claimant in respect of wages, benefits or other earnings from the proceeds realized from the property of a bankrupt employer.

[8] Subsection 36(4) of the Regulations states earnings are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

[9] Paragraphs 38(1)(a)(b) of the Act states the Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has (a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading; or (b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading.

[10] Subsection 7.1(1) of the Act states the number of hours that an insured person, other than a new entrant or re-entrant to the labour force, requires under section 7 to qualify for benefits is increased to the number provided in the table if the insured person accumulates one or more violations in the 260 weeks before making their initial claim for benefit.

[11] Subsection 7.1(4) of the Act states an insured person accumulates a violation if in any of the following circumstances the Commission issues a notice of violation to the person (a) one or more penalties are imposed on the person under section 38, 39, 41.1 or 65.1 as a result of acts or omissions mentioned in section 38, 39 or 65.1; (b) the person is found guilty of one or more offences under section 135 or 136 as a result of acts or omissions mentioned in those sections; or (c) the person is found guilty of one or more offences under the Criminal Code as a result of acts or omissions relating to the application of this Act.

[12] Section 91(2) of the Regulations states: (2) A claimant who provides their Social Insurance Number and the following information by telephone or other electronic means is deemed to have signed their respective claim for benefit:

(a) in the case of an initial claim for benefits, their date of birth; and

(b) in the case of a claim for benefits for a week of unemployment, their personal identification number.

EVIDENCE

[13] A record of employment indicates the Appellant was employed with Pride H2S Safety Services from July 14, 2009 to July 31, 2008 and the Appellant's address was PO Box X, X, Alberta (AD2-49).

[14] A record of employment indicates the Appellant was employed with Can-Am West Carriers from October 19, 2009 to November 23, 2009 and he was dismissed from his employment. It is indicated that the Appellant's address is X -X X Road, X, Manitoba (AD2-51).

[15] On March 8, 2011 the employer from Pride H2S Safety Service Ltd stated to the Commission that the Appellant received \$647.00 for the week of July 14 to 17, 2009 and was on salary the next two weeks were \$1080.00 each vacation included (AD2-52).

[16] On March 24, 2011 Can-Am West Carriers provided payroll information of the monies the Appellant received during the period of October 19, 2009 to November 23, 2009 (AD2-55).

[17] On March 31, 2011 the Commission requested the Appellant to provide a clarification of his earnings from the two employers. The request was mailed to the Appellant at a General Delivery address in X, Alberta. The request was returned to sender (AD2-57 to AD2- 58).

[18] On May 2, 2011 the employer from Can-Am West Carriers Inc. stated to the Commission the Appellant was dismissed because he not have adequate training or experience for the job requirements, no misconduct was alleged (AD2-59).

[19] On October 11, 2011 the Appellant stated to the Commission he could not verify his earnings from the two employers were correct because he didn't keep any time sheets or pay stubs and it was over two years ago. He stated he knew he was to declare his earnings but he

cannot give a reason for failing to do so. He stated he must have just made an error on those claimant reports. He stated that those reports were completed two years ago or more and he cannot remember the details (AD2-60).

[20] On August 31, 2012 the Commission determined there were a total of 5 claimant reports over the period under review. Three of the weeks under review fall prior to the 36 months limitation period for imposing a monetary penalty and this is the claimant's first infraction. The Commission determined the claimant knowingly made a total of 5 false statements and is subject to a penalty and calculated it to be \$1127.00 (AD2-61).

[21] On August 31, 2012 the Commission determined the claimant has an overpayment of \$3595.00 and a penalty imposed of \$1127.00. There were no mitigating circumstances. Given the severity of the infraction a serious violation was imposed (AD2-62).

[22] On September 11, 2012 the Commission notified the Appellant of the overpayment and penalty and a notice of debt was issued in the amount of \$4722.00 (AD2-62 to AD2-67).

[23] On October 4, 2012 the Appellant sent a letter of appeal stating that when he was working for Pride H2S Safety he was not getting paid and he didn't know he was to notify anyone. He stated he went to the labour board and eventually got paid. He stated in September 2009 he moved to Manitoba and never personally made any EI claims. He stated this confuses him and requested how claims were made under his name and SIN number when he was not making any claims since September 1, 2009 (AD2-68).

[24] A detailed calculation worksheet indicates the weeks and amounts the Appellant received of employment insurance benefits (AD2-73).

[25] The Board of Referees presented a list of questions regarding how the claims were made and where the monies were deposited to (GD2-94).

[26] On May 14, 2009 the Appellant contacted the Commission stating he does not have a bank account and provided the banking information of his father to ensure that payments be made into his dad's account. The Commission informed the Appellant that procedures indicate that a claimant cannot use a third party bank account for direct deposit (AD2-95).

[27] A history report indicates the reports made during the period from May 3, 2009 to November 29, 2009 were made by telephone (AD2-97).

[28] Attestation Certificate indicates the Royal Bank of Canada in X, AB was a branch to which debits and credits can be deposited directly in (AD2-100).

[29] A payment summary and copies of checks issued to J. B. are submitted (AD2- 101 to AD2-117)

[30] On December 3, 2012 the Commission requested banking information during the period of May 3, 2009 to December 12, 2009 from the Alberta Treasury to determine if the bank account 1051903-41 belongs to the son or father (AD2-118 to AD2-119).

[31] Copies of checks from September 20, 2009 to October 18, 2009 were submitted (AD2-183 to AD2-185).

[32] On February 4, 2013 an interview was conducted with the Appellant by the Commission. The Appellant was asked to explain what happened on his EI claim for the period of May 2009 to December 2009. The Appellant stated that he did work and did his reports until the end of July 2009. He stated he answered “no” to work and earnings on those reports as he never got paid until September and he knows and it admits that was wrong.

[33] The Appellant stated that he did call Service Canada asking them to add the banking information for his father’s account so that his EI payments could be made directly into his father’s account because he was unable to get an account. He stated at that time he and his father were on good terms. He stated eventually they were able to open an account and he believed the monies were being directly deposited (DD) to a TD account. He stated he never requested a DD after trying that first time.

[34] The Appellant stated the signature on the check in the amount of \$802.00 dated July 26, 2009 and August 9, 2009 are that of his dads. He stated he doesn’t know why his dad signed those check which is prior to his alleging his dad started completing his EI reports and cashing his checks without his knowledge in September 2009.

[35] The Appellant stated he never asked his dad or anyone to complete an EI E-report prior to September 2009.

[36] The Appellant was asked how his father would have ever become in possession of his EI Access code and his SIN number. The Appellant answered that in May 2009 he had his dad file a couple of reports so maybe he had his information. When asked why a few minutes earlier he stated he never asked his dad to do reports he replied he must have been confused, as his dad did file a couple of reports. He stated he did give his dad the access code and SIN number, He stated he never told his dad to stop filing because he didn't know he was still doing them.

[37] The Appellant stated that he moved to X, Manitoba on September 1, 2009 and started working for Can-Am Carriers around October. He stated he didn't collect EI from September because he was living off his wife and trying to get a job and he didn't think EI would carry over to Manitoba. He stated he had some mental health issues and was hospitalized in July in Alberta.

[38] The Appellant stated that his wife had lived at the address in X for 18 years so it wasn't until October 2010 the landlord were made to both names on the lease.

[39] The Appellant stated he never mentioned to the agent in October 2011 that he had moved back to X because he was heavily medicated and had a huge kidney stone and was in a great deal of pain.

[40] The Commission requested the Appellant to complete 4 forms declaration of alleged forged warrant (AD2-190 to AD2-201).

[41] The Appellant stated to the Commission that he does not believe he owes his father any money but his father will say he does. He stated the father will say about \$38,000.00 from a failed business venture. He stated he has no proof his father did hid E-reports but believed it would be because he owes him money and his dad needs money. He stated his dad is a 15 year member of the RCMP and figures he can get away with it.

[42] The Appellant confirmed to the Commission that he knowingly worked and failed to declare earnings for one period of his EI claim and deposited his checks knowingly into his

father's bank account but he alleging that for another period of his claim he decided not to continue the fraud and had no idea his father continued his reports and was cashing his checks.

[43] The Appellant stated to the Commission that he cannot provide any proof at this time his father made the reports and cashed the checks (AD2-187 to AD2-188).

[44] The Commission contacted the Appellant's father who confirmed the Appellant was his son. He stated his son did not provide him with a social insurance number or access code to his employment insurance claim. He stated his son never asked him nor did he file any EI reports. He stated that is son was living with him in 2009 and that his son did use his mailing address and yes him picked all the mail for the family.

[45] The Commission asked why his sons EI checks would be deposited into his account he replied he likely gave the money to his son because his son didn't have a bank account. He stated he has changed bank accounts but he did bank at the Alberta Treasury Branch.

[46] He stated his son did give him some or maybe all checks to deposit, he can't remember. He would never have given his son access to his bank account. He stated anyone in his family could have deposited checks into his account, even his son, he can't remember. He stated he would give his son the cash or buy him things he needed.

[47] The Appellant's father stated he believed his son moved to X around the end of 2009 but wasn't sure because his son cut them off and stopped talking to them around the time he moved, or shortly after he moved, maybe a couple of months. He stated his son hasn't talked to any of the family for many years. He made a choice to sever ties.

[48] The Appellant's father stated he never filed his son's employment insurance report cards and he wouldn't even know how.

[49] The Appellant's father, when asked how his son would have gotten the money after he moved, he stated that he would have sent him the money, it was his money, he didn't need it, and he was working and had a good job making good money. He stated he would have wired him the money or deposited into an account he wanted him to. He stated his son owes him money for a business venture but he will never get it back. He doesn't even want to think about it. He has

finally dealt with it and it can't be changed. His son no longer talks to him and his son blocked his number so his calls can't go through.

[50] The Appellant's father stated that his son had used his name previously and has had creditors coming after him for his son's bills. The only difference in their names is the middle initial. He stated he has never filed any police reports against his son and he didn't believe his son ever obtained credit in his name.

[51] The Commission indicated they had signatures they would like to confirm and the father stated that if he had cashed the check for his son he would have signed his own name, not his son's. The Commission indicated they had signatures they would like the Appellant's father to confirm but since he was unable to meet them in person they wouldn't be able to show him. (GD2-198 to AD2-201).

[52] The Commission provided additional representation to the Board of Referees (AD2-202 to AD2-212).

[53] A statement of account from May 2009 to December 2009 indicates account number 1051903 belongs to a J. K. B./V. L. B. (AD2-130 to AD2-177).

[54] In his Notice of Appeal the Appellant stated that he did not make all the false claims that are listed on the docket and he would like his name cleared (AD1-1 to AD1-3).

SUBMISSIONS

[55] The Appellant submitted that on the issue of Earnings/Allocation of Earnings that:

- a) He does not dispute that the earnings he received from Pride HS2, however he did not receive them at the time he worked but after he had left the company therefore he didn't report them. He stated he understands now that he should have reported the earnings and understands that he will have to repay them.
- b) He does not dispute the fact he worked and had earnings from Can Am-West Carriers however he was no longer filing his reports after September 1, 2009 and it was unbeknownst to him that the reports were still being filed and monies being sent to his

father. He does not believe he should be responsible for paying this money back as he never filed for it or received it. He was a victim of fraud.

[56] The Respondent submitted on the issue of Earnings/Allocation of Earnings that:

- a) The evidence shows the Claimant did work and have earnings from Pride HS2 and Can Am-West Carriers and that the monies constituted earnings pursuant to subsection 35(1) of the Regulations and were allocated to the period worked in accordance with subsection 36(4) of the Regulations.

[57] The Appellant submitted on the issue of the Penalty that:

- b) He takes responsibility for the monies he failed to declare from Pride H2 and if there is a penalty imposed he will accept it, but not for the monies from Can-Am West Carriers.

[58] The Respondent submitted on the issue of Penalty that:

- c) The evidence shows the Claimant did work and have earnings from Pride H2S and Can Am-West Carriers Inc. which he failed to declare;
- d) The Claimant argues that it was not himself but his father that processed his claims and received the money. Pursuant to section 91(2) of the Regulations by the virtue of the Claimant releasing his SIN and telephone access code, he was deemed to have given consent to his father to make a claim for benefit; and
- e) The Commission submits it used its discretion in a judicial manner and was reasonable based on the evidence, jurisprudence and legislation.

[59] The Appellant submitted on the issue of Notice of Violation that:

- a) He doesn't feel it is fair as although he is responsible for not declaring the earnings from Pride H2 there was mitigating circumstances in that he wasn't aware of declaring the money when he hadn't gotten paid as well this was his first offence. However he does understand that ultimately he was wrong in not declaring the money.

[60] The Respondent submitted on the issue of Notice of Violation that:

- a) The Commission submits that the Claimant's act of misrepresentation was serious enough to warrant an additional sanction in the form of a violation under section 7.1(1) of the Act. The Commission considered the factors presented and determined that these factors do not minimize the seriousness of the Claimant's act of misrepresentation. The Commission maintains that his exercised its discretion judicially under section 7.1(4) of the Act.

ANALYSIS

[61] The Tribunal will first address the issue of whether a third party fraudulently caused the Commission to make the overpayments and, if so, whether the fraud committed was with the claimant's knowledge and consent.

[62] The Appellant presents the argument that although he agrees he did not report his earnings while he was in receipt of employment insurance benefits while employed Pride H2S Safety he did not file any reports after September 1, 2009, and that it was his father who filed the reports and received the monies. Therefore he was a victim of fraud for the reports that were filed by his father between September 2009 and December 2009 and therefore disputes he did not declare his earnings from Can-Am West Carriers.

[63] The Respondent presents the argument that the Claimant had not proven that he did not make the telephone calls to complete the Claimant's reports for the periods in question. The onus is on the Claimant to ensure that he keeps his personal information, including his Social Insurance Number and Access Cod in safe place.

[64] In *Attorney General of Canada v. Lylander*, 2008 FCA 365, the Federal Court of Appeal dealt with situations where the claimant alleges that they have been the victim of fraud. In that case, the Court held in paragraph 13 that the question to be answered in all cases where an overpayment exists and fraud is alleged by the claimant is:

[W]ether a third party fraudulently caused the Commission to make the overpayments and, if so, whether the fraud committed with [the claimant's] knowledge and consent.

[65] The Tribunal finds from the evidence on the file that on May 14, 2009 the Appellant contacted the Commission stating he does not have a bank account and provided the banking information of his father to ensure that payments be made into his dad's account. The Commission informed the Appellant that procedures indicate that a claimant cannot use a third party bank account for direct deposit (AD2-95). The Tribunal finds from the evidence on the file and from the Appellant's oral evidence that he received his employment insurance benefit checks in the mail to his father's address.

[66] The Tribunal finds that the evidence supports that all checks issued from June 6, 2009 until December 7, 2009 were issued to the Appellant and mailed to an address of PO Box X, X, Alberta XXX XXX. The evidence also supports the monies were cashed or deposited into a bank account in X, Alberta in the name of the Appellant's mother and father and some were signed by the father and/or deposited by his father or his sister, as alleged by the Appellant.

[67] The Tribunal finds from the investigation by the Commission with the Appellant's father statements to be contradictory. The Tribunals from the evidence on the file that the Appellant's father denies that the Appellant provided him with his social insurance number or access code to his employment insurance claim, however the Appellant stated that he did and that he had his father complete a couple of reports in May 2009 while he was ill.

[68] The Tribunal finds the fathers statements support the Appellant's testimony that in 2009 his son was living with him and that his son used his mailing address of Box X X, Alberta and that he did in fact pick up the mail for his son.

[69] The Tribunal finds from the father's statements that he believes the checks were probably deposited in his (father's) bank account and he gave the money to his son as his son didn't have his own bank account to deposit the checks in. He states that he doesn't use that bank account at the Treasury Branch very much and doesn't know the account number.

[70] The Appellant's father stated that his son did give him some, or possibly all of them to deposit, however he doesn't remember how many he deposited or cashed for him. He stated his son does not have access to his account at the Treasury Branch and he wouldn't give his son access to any of his accounts. He states that his daughter, wife, himself or even his son could

have deposited money into the account. It was a long time ago and doesn't remember the specifics.

[71] He said his son would have access to his employment insurance money by either him giving him cash or bought him things that he needed. He stated to his knowledge his son didn't have his own bank account otherwise he thought he would have used it instead of his.

[72] The Appellant's father stated he believed his son moved to X around the end of 2009 but wasn't sure of the exact date; his son had cut off communication and stopped talking to them a couple of months after he moved.

[73] The Appellant's father stated he never continued to do his son's report cards after he moved to X and that he never made any reports, he stated he wouldn't know how to do it and that was the honest truth. His son always did his own reports.

[74] The Appellant's father was asked by the Commission how did his son get the money after he moved and the checks came to his address. The Appellant stated he would have sent him the money. He stated he would have wired the money to him or deposited the money into an account that he wanted me to deposit it in.

[75] The Appellant's father stated the Appellant owed him money from a business venture but he will never get the money back. He stated he has had issues with his son's creditors calling. He has never filed a police report against his son and he doesn't believe his son ever used his name to obtain credit. He states there is only the middle initial that his different in their names. He stated he asked to check the birth date.

[76] The Commission requested the Appellant's father to meet in person to show him the signatures and if he recognized them. He stated if he cashed a check for his son he would have signed his own name. He stated to the Commission he could not meet with them.

[77] The Tribunal finds the evidence on the file the record of employment supports that the Appellant was living in X, Manitoba as early as October 19, 2009 when he began working for Can-Am West Carriers Ltd. Therefore the statement from his father that his son didn't move

until the end of 2009 is unsubstantiated. The evidence on the file from the Appellant's father substantiates the Appellant moved to X and no longer was in contact with his father.

[78] The Tribunal finds from evidence on the file and from the Appellant's oral evidence that he moved to X in September 2009 and was supported by his spouse until he was able to find work. He stated he stopped doing his employment insurance reports because he believed he was no longer eligible because he changed provinces. He testified at that time he was not getting along with his family and made the decision to cut off all ties with his family and this situation exists today.

[79] The Tribunal finds from the Appellant's oral evidence that the family breakdown was caused by the failure of a family business venture and that his father believed he owed him money for that.

[80] The Tribunal finds from the Appellant's oral evidence that he never received any employment insurance money after September 2009 and he didn't expect any monies because he was not filing any reports.

[81] The Tribunal finds from the evidence on the file that the reports were still being filed and the checks were still being mailed to PO Box X, X, Alberta and being deposited into an account that was identified in the name of the Appellant parents, J. K. B. & V. L. B.

[82] The Tribunal finds there is evidence to support that at least some of the checks between September 2009 and December 2009 were signed and deposited by the Appellant's father, and some were simply deposited.

[83] The Tribunal finds the statements provided by the Appellant's father lack credibility and that there were no further questions asked by the Commission to provide otherwise. The Tribunal finds there lacks evidence to support that the Appellant's father sent the money to the Appellant after he cashed the checks. In fact when asked by the Commission the Appellant's father stated he "would" have wired the money to his son, or deposited in into an account his son requested. However the Appellant's father stated earlier that his son didn't have a bank account nor did the son have access to any of his father's account and specifically to the account where the Appellant's checks were being deposited. The Tribunal finds that having to wire money or

deposit money into another person's account would be a task that would be remembered, especially one that would have occurred every two weeks when the checks arrived. The Tribunal finds for this to occur the Appellant and the Appellant's father would have had to be in some form of contact.

[84] The Tribunal finds there is lack of evidence to prove that the father sent the money to the Appellant, and in particular because both the Appellant and the Appellant's father substantiate the Appellant had no contact with his entire family.

[85] The Tribunal finds that the evidence supports that the Appellant no longer resided at the address the check were being sent to, or even in the same province.

[86] The Tribunal finds that the Appellant's evidence supports that he did provide his father with his social insurance number and access code in May, and although the Appellant's father denies it, the Tribunal finds that at that time and until September 2009 a relationship still existed between the Appellant and his father. The evidence supports that the Appellant requested a direct deposit into his father's account and when that couldn't take place, requested he receive his payments by mail and subsequently were deposited into his parent's joint account.

[87] The Appellant testified that after he cut off his ties with his family and moved to X in September 2009 he alleges his father continued to file his report cards and receive his employment insurance checks without his knowledge.

[88] The Tribunal finds that in September 2009 the relationship no longer existed with his family and because he no longer had ties with them he could not have known that his employment insurance reports were still being made. He testified he was no longer filing reports because he believed because he moved provinces he was no longer eligible.

[89] The Tribunal finds from the evidence on the file the Commission was not thorough in their investigation with the Appellant's father. The evidence supports that the Appellant's father was not overly cooperative and did not want to meet with the Commission. The evidences supports the Commission accepted the Appellant's father's statements as is and did not investigate completely or seek confirmation the signatures on the checks were that of the father (AD2-201).

[90] The Tribunal finds the evidence is clear there was no way for the Appellant to know as he had no access to the mailbox where the checks were being sent or any access to the bank account the checks were being deposited into nor did he received the money. Therefore the Tribunal finds the reports were being done without the knowledge of the Appellant from September 2009 to December 2009.

[91] The Tribunal finds that the evidence supports that a third party fraudulently caused the Commission to make the overpayments as the monies were being sent to the Appellant's fathers address, the Appellant's father was depositing the checks into his own personal account and there is only one statement made by the father that he would have wired the money or deposited into another account, he did provide any evidence to support he "did" send the monies to the Appellant. The Tribunal finds there is no evidence to support that the Appellant was making his reports in order for his father to receive the benefits.

[92] The Tribunal finds that the Appellant's evidence on the file and from his oral evidence that he did provide his father with his access code to complete two reports in May 2009 while he was ill. The Tribunal finds that there is a consistent line of authority to the effect that a person who registers for employment insurance benefits must safeguard and protect their PIN and access code. However the Tribunal finds that the evidence supports that the Appellant no longer had any contact with his father or any family after September 2009 so there was no reason for the Appellant to believe that his benefit information was in any jeopardy or being misused.

[93] The Tribunal finds on the balance of probabilities the account of events given by the Appellant to be a more accurate account. The Tribunal finds the Appellant's testimony at the hearing was consistent with his original statements. The Tribunal finds the statements provided by the Appellant's father were vague and contradictory as well there was a lack of evidence to substantiate that he did not file the reports and in particular that he did send the money to the Appellant. Therefore the Tribunal prefers the Appellant's evidence and that from September 2009 to December 2009 he was a victim of fraud.

[94] In the case of the earnings from weeks beginning October 18, 2009 to November 22, 2009, the Tribunal finds that because it was determined that the Appellant was a victim of fraud he is not liable to repay benefits which were obtained fraudulently by another person without the knowledge or consent of the claimant (*Fournier v. Canada* 2002 FCA 138).

[95] The Tribunal finds from the evidence on the file and from the Appellant's oral evidence that he does not dispute that he had earnings from Pride H2S Safety and agrees that the total of (\$648.00 + \$1080.00 \$1080.00 = \$2808.00 is correct) and that he failed to make the declaration on three accounts for the weeks beginning July 12, 19 and 26, 2009.

[96] The Tribunal finds the Appellant agrees that he received employment insurance benefits in the amount of \$1341.00 for these three periods. The Tribunal finds that the evidence supports that the Appellant received monies in the amount of \$1341.00 in which he was not entitled to and this created an overpayment.

[97] The Tribunal finds the evidence is clear the monies constitute earnings in accordance with section 35 of the Regulations and that that they were received for services performed were allocated correctly in accordance with subsection 36(4) of the Regulations.

[98] The Tribunal finds from the Appellant's evidence on the file and from his oral evidence that he didn't report the monies because he had not actually received the money at the time he filed his report, however he still not report the monies when he did finally receive them.

[99] The Tribunal must determine if the imposition of a penalty pursuant to section 38 of the Act be imposed because the Appellant made a misrepresentation by knowingly provided false or misleading statements.

[100] The Tribunal finds that the Appellant failure to report his earnings from Pride H2S Safety was made knowingly and would warrant an imposition of a penalty providing two false or misleading statement however the three weeks under review fall prior to the 36 month limitation period for imposing a monetary penalty as per the Commission's findings (AD2-64) therefore the Tribunal finds the Appellant will not be imposed a penalty.

[101] The Tribunal must determine if a Notice of Violation pursuant to section 7.1 of the Act should be imposed.

[102] In order for the Tribunal to intervene with the Commission's decision, the Tribunal must determine that the Commission did not exercise its discretion in a judicial manner when it decided to issue the Notice of Violation.

[103] The Tribunal can rely not only on the evidence that was before the Commission but also on the evidence brought before the Tribunal. Additional evidence can be introduced and the Tribunal must make its own decision on it. The Tribunal finds the evidence from the Appellant provided the mitigating circumstances of victim of fraud existed at the time the penalty and notice of violation were issued and this is supported in the evidence on the file (*Canada (A.G.) v. Gagnon* 2004, FCA 351; *Canada (A.G.) v. Morin*, [1997] F.C.J. 112; *Rousseau v. Canada (A.G.)*, 2006 FCA)

[104] The Tribunal finds the Appellant was a victim of fraud and cannot be held liable for the overpayments from the period of October 19, 2009 to November 23, 2009. However is responsible for the overpayment for the weeks beginning July 12 to 26, 2009.

CONCLUSION

[105] On the issue of earnings and allocations the appeal is allowed in part and the Tribunal finds that the Appellant must repay the overpayment in the amount of \$1341.0 for the weeks beginning July 12, 2009, July 19, 2009 and July 26, 2009.

[106] The Tribunal finds on the earnings and allocations for the weeks beginning October 18, 2009; October 25, 2009; November 1, 2009; November 8, 2009; November 15, 2009 and November 22, 2009 the Appellant was a victim of fraud and not responsible to repay the monies and therefore on the issue of earnings and allocations for this period the appeal is allowed as the Appellant was a victim of fraud.

[107] The Tribunal finds that the imposition of penalty was imposed on the period for the weeks beginning October 18, 2009 to November 22, 2009 as the previous period for weeks beginning

July 12, 2009 to July 26, 2009 fell outside the 36 month period; therefore the issue of penalty the appeal is allowed.

[108] The Tribunal finds due to the mitigating circumstances the Tribunal finds that the Appellant's failure to report his earnings from the weeks beginning July 12, 19 and 26, 2009 shall result in one warning under section 41.1 of the Act and one unclassified violation under section 7.1(4)(a) of the Act. The Tribunal relies on (*Gill v. Canada* (AG), 2010 FCA 182).

[109] The Tribunal finds the issue of Notice of Violation the appeal is dismissed with modifications.

Teresa Jaenen
Member, General Division - Employment Insurance Section