Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *R. A. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 147

Tribunal File Number: GE-16-2092

BETWEEN:

R. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: November 16, 2016

DATE OF DECISION: November 23, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant, Mr. R. A., participated in the telephone hearing (teleconference) held on November 16, 2016. Mrs. L. L., his spouse, represented him.

INTRODUCTION

[2] On December 6, 2015, the Appellant submitted an initial application for benefits (sickness benefits), effective November 22, 2015. The Appellant stated that he had worked for M. A. Inc. (Garage M. A. Inc.) from April 1, 2013, to November 19, 2015, inclusively, and that he had stopped working for this employer because of leave for illness, injury or surgery. He stated that he had been covered by an indemnity plan provided by the employer in case of occupational illness (paid sick leave or wage-loss insurance) (Exhibits GD3-3 to GD3-13).

[3] On February 1, 2016, the Respondent, the Employment Insurance Commission of Canada (Commission) informed the Appellant that he had received $115.00 as "unregistered supplemental unemployment benefit [*sic*]" from his employer. The Commission told the Appellant that this amount, before deductions, was considered income, and that it would have to be allocated for benefit purposes to the period from December 7, 2015, to March 19, 2016 (Exhibits GD3-17 and GD3-18).

[4] On February 25, 2016, the Commission informed the Appellant that he had received $588.00 as an "unregistered supplemental unemployment benefit" from his employer. The Commission told the Appellant that this amount, before deductions, was considered income, and that it would have to be allocated for benefit purposes to the period from November 22 to 29, 2015 (Exhibits GD3-22 and GD3-23).

[5] On March 24, 2016, the Appellant submitted a request for reconsideration of an Employment Insurance decision (Exhibits GD3-25 to GD3-36).

[6] On April 21, 2016, the Commission informed the Appellant that it was upholding the decision that it had made on February 25, 2016 (Exhibits GD3-39 and GD3-40).

[7] On May 25, 2016, the Appellant filed a notice of appeal with the Employment Insurance Section of the General Division of the Social Security Tribunal of Canada (Tribunal) (Exhibits GD2-1 to GD2-21).

[8] On June 6, 2016, the Appellant sent to the Tribunal the duly completed "Authorization for the Release of Information" form indicating that Mrs. L. L., his spouse, was representing him (Exhibits GD5-1 and GD5-2).

[9] On November 22, 2016, in response to a request that the Tribunal had produced for that purpose on November 16, 2016, and pursuant to section 32 of the *Social Security Tribunal Regulations*, the Commission explained that the $588.00 amount mentioned in the letter that it had sent to the Appellant on February 25, 2016 (Exhibits GD3-22 and GD3-23), should actually have been $559.00, but that the situation changed nothing with respect to the overpayment amount that it had created (Exhibits GD7-1 to GD7-10).

[10] This hearing was held via teleconference for the following reasons:

a) The fact that the Appellant will be the only party in attendance;

b) The fact that the Appellant or other parties are represented;

c) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[11] The Tribunal must determine whether the sum of money that the Appellant received constitutes earnings under the terms of sections 35 and 37 of the *Employment Insurance Regulations* (Regulations) and, where applicable, determine whether these earnings were allocated in compliance with the provisions contained in section 36 of the Regulations.

EVIDENCE

[12] The evidence in the docket is as follows:

a) A Record of Employment dated December 2, 2015, indicates that the Appellant had worked as a "mechanic" for the employer, M. A. Inc., from April 8, 2013, to November 20, 2015, inclusively, and that he had stopped working for this employer due to an illness or injury (code D – Illness or injury) (Exhibit GD3-14);

b) On January 4, 2016, the Appellant indicated that he was receiving Supplemental Unemployment Benefits (SUB), and that he would receive an amount for the first two weeks of the waiting period as well, to offset the lost salary, with consideration for his weekly Employment Insurance benefits (Exhibit GD3-15);

c) On February 1, 2016, the Commission indicated that it had examined the Federal SUB Program and had determined that the employer, M. A. Inc., was not registered for this program. It indicated that it had advised the employer of the situation (Exhibit GD3-16);

d) In a document dated June 1, 2016, explaining overpayments concerning the SUB, the Commission explained the calculations conducted to establish the overpayment amounts made to the Appellant as follows: $805.00 representing seven weeks of benefits due to $115.00 per week over the period from December 6, 2015, to January 23, 2016 (7 X 115.00 = $805.00), and $888.00 for the two weeks beginning on November 21, 2015, at a weekly benefit rate of $444.00 (2 X 444.00 = $888.00) (Exhibit GD3-19);

e) In a document dated February 7, 2016 (and reproduced on June 1, 2016), providing details on the notice of debt (DH009), the total amount of the Appellant's debt was established at $805.00 (Exhibit GD3-20);

f) On February 17, 2016, the Appellant claimed to be eligible for the SUB from M. A. Inc., and that he had received $115.00 per week to that effect (Exhibit GD3-21);

g) In a document dated February 27, 2016 (and reproduced on June 1, 2016), providing details on the notice of debt (DH009), the total amount of the Appellant's debt was established as $888.00 (Exhibit GD3-24);

h) On March 24, 2016, the Appellant asked the Commission to reconsider his file with respect to the SUB that the Medavie Blue Cross insurance company had paid out (Exhibit GD3-25);

i) In his request for reconsideration filed on March 24, 2016, the Appellant sent the Commission a copy of the following documents:

    i. An excerpt from the page "My Payments – My Service Canada Account" indicating the net amounts paid in benefits to the Appellant over the course of the reported periods from November 22, 2015, to March 6, 2016 (Exhibits GD3-30 and GD3-31);

    ii. A letter from the Commission (initial decision) dated February 1, 2016 (Exhibit GD3-32, or Exhibits GD3-17 and GD3-18);

    iii. A statement from the Medavie Blue Cross insurance company indicating that the Appellant qualifies for an allocation (wage-loss insurance) of $115.00 for the week of February 8 to 16, 2016 (Exhibit GD3-33); and

    iv. A letter dated March 3, 2016, from the Medavie Blue Cross insurance company, letting him know that his insurance contract covers a maximum benefit period of 17 weeks and that this period would end on March 18, 2016. The document specifies that the Appellant's weekly benefit amount (short-term disability benefits) is $559.00, that this amount is taxable at source and that the amount obtained by Employment Insurance would be deducted from this amount (Exhibits GD3-34 to GD3-36).

j) On April 21, 2016, an agent with the SUB Program indicated that the employer had registered for this program as of February 7, 2016. The agent explained that the amounts that the Appellant had received in wage-loss insurance before that date had been deducted from his Employment Insurance benefits, and that it was not possible to revisit the employer's file retroactively (Exhibit GD3-37);

k) On April 21, 2016, the Appellant indicated that the wage-loss insurance that he had been receiving from the Medavie Blue Cross insurance company since November 22, 2015, was insurance connected to his job with M. A. Inc. The Commission indicated that it had told the Appellant that the employer was not registered for the SUB Program before February 7, 2016, which explains why the wage-loss insurance is considered earnings and must be deducted from his benefits (Exhibit GD3-38);

l) On April 25, 2016, the Appellant's spouse asked the Commission for information for the purpose of challenging the decision made regarding the Appellant (Exhibit GD3-41);

m) In his notice of appeal filed on May 25, 2016, the Appellant sent a copy of the following documents:

   i. A "*Relevé de compte(s)* / Statement of Account(s)" that Employment and Social Development Canada had issued on April 9, 2016, indicating that the Appellant's balance is $689.00 (Exhibits GD2-5 and GD2-6);

   ii. An excerpt from the page "My Payments – My Service Canada Account" indicating the net amounts paid in benefits to the Appellant over the reported periods from November 22, 2015, to March 6, 2016 (Exhibits GD2-7 and GD2-8, or Exhibits GD3-30 and GD3-31);

   iii. A letter from the Commission (reconsideration decision) addressed to the Appellant on April 21, 2016 (Exhibit GD2-10 or Exhibits GD3-39 and GD3-40);

   iv. A "Request for Reconsideration of an Employment Insurance (EI) Decision" form and explanatory letter from the Appellant, both submitted on March 22, 2016 (Exhibits GD2-11 to GD2-13, or Exhibits GD3-26 to GD3-29);

v. A letter from the Commission (initial decision) addressed to the Appellant on February 25, 2016 (Exhibit GD2-14, or Exhibits GD3-22 and GD3-23);

vi. A letter from an assessment agent with SUB – Service Canada addressed to the employer, M. A. Inc., on February 12, 2016, stating that the employer's documents had been received with respect to the SUB plan. In this letter, Service Canada states that all the conditions outlined in subsection 37(2) of the Regulations are met as of February 7, 2016, and until September 30, 2020 (Exhibit GD2-15);

vii. A "Notice of Appeal – General Division – Employment Insurance Section – Employer" form that the employer, M. A. Inc., had completed on May 10, 2016. In this form, the employer had claimed to be registered for the SUB Program and to have attached a letter to that effect (Exhibits GD-15 to GD2-17);

viii. A letter from the Commission (initial decision) addressed to the Appellant on February 1, 2016 (Exhibit GD2-18, or Exhibits GD3-17 and GD3-18);

ix. A statement from the Medavie Blue Cross insurance company indicating that the Appellant qualifies for an allocation (wage-loss insurance) of $115.00 for the week of February 8 to 16, 2016 (Exhibit GD2-19 or GD3-33); and

x. A letter from the Medavie Blue Cross insurance company addressed to the Appellant on December 22, 2015, informing him that his application for short-term disability benefits had been approved in accordance with his group insurance contract (policy number: X) (Exhibits GD2-20 and GD2-21).

n) On November 22, 2016, the Commission sent the following documents to the Tribunal:

   i. An excerpt from the Appellant's statements indicating that he had received a sum of $588.00 as wage-loss indemnities for each week of the period of the reports from November 22 to December 5, 2015 (Exhibits GD7-2 to GD7-9); and

   ii. A table entitled "Full Text Screens – Payments" describing the amounts paid out to the Appellant as benefits and the deductions from his benefits made over the course of the period from March 22, 2015, to March 19, 2016, inclusively (Exhibit GD7-10).

[13] The evidence presented at the hearing was as follows:

a) With the goal of demonstrating that the Appellant's earnings had not been allocated in compliance with sections 35, 36 and 37 of the Regulations, the Appellant's Representative reiterated the main elements of the file and the grounds compelling the Appellant to submit a notice of appeal to the Tribunal;

b) With respect to earnings that the Medavie Blue Cross insurance company had paid to the Appellant from November 21, 2015, to February 6, 2016, she mentioned that the amounts indicated in the file were accurate;

c) The Representative explained that, several years ago, the employer, M. A. Inc., had changed the insurance company with which it did business. She explained that the employer had registered for the SUB Program as of February 7, 2016. The Representative indicated that the employer had not been registered for this program over the course of the period from November 21, 2015, the onset date of the Appellant's disability, until February 6, 2016, inclusively. She emphasized that the employer had disregarded its duty to register for the SUB Program;

d) She explained that the compensation that the Appellant had received from Medavie Blue Cross insurance company was deducted from the Employment Insurance benefits that had been paid out to the latter for the period from November 21, 2015, to

February 7, 2016. The Representative explained that this situation prevented the Appellant from receiving 70% of his earnings, as provided for in his group insurance contract, care of the employer. She indicated that she had asked the Medavie Blue Cross insurance company to pay compensation to the Appellant so that he could receive 70% of his salary for the period in question, but that the insurance company had declined that request. The Representative emphasized that the insurance company had explained that it was not responsible for the fact that the employer had not registered for the SUB Program earlier;

e) The Representative explained that deductions had been made on the amounts paid to the Appellant as benefits in order to reimburse the overpayment amount that he had been asked to repay (Exhibits GD2-5 to GD2-7).

SUBMISSIONS

[14] The Appellant and his Representative made the following submissions and arguments:

a) The Appellant explained that the wage-loss indemnities that he had received as of November 22, 2015, come from the Medavie Blue Cross insurance company, not from his employer, M. A. Inc. He explained that it is wage-loss insurance that covers the difference between Employment Insurance benefits, for which he qualifies, and the amount of total earnings equivalent to 70% of his weekly salary, in effect as of the onset date of his disability (Exhibits GD2-4, GD2-12, GD2-13, GD2-20, GD2-21, GD3-3 to GD3-13, GD3-15 and GD3-38);

b) He explained that he had been eligible for SUB, but that his employer was not registered for the SUB Program when the Appellant could have benefited from it, namely, on November 21, 2015. The Appellant maintained that the Commission had withheld the amounts by mistake, and that he should not have to pay for the mistake that his employer had made. He indicated that the Commission had explained to him that it would adjust everything, but that that had not been done (Exhibits GD2-4, GD2-12, GD2-13, GD2-20, GD2-21 and GD3-38);

c) The Appellant argued that he should not be penalized or held hostage for his employer's failure to register for the SUB Program. He maintained that he should not suffer wage losses due to the sums that had been severed from his Employment Insurance benefits. The Appellant asked for the reimbursement of all the sums that had been withheld, namely, $1,064.00 according to his calculations, and the cancellation of the account statement indicating he has a balance of $689.00 (Exhibits GD2-1 to GD2-21).

d) The Representative argued that the Appellant had paid the price for the employer's failure to register for the SUB Program before February 7, 2016. She explained that the Appellant had been unable to work as of November 21, 2015, for medical reasons, and that he had been penalized for the employer's oversight or mistake in failing to register for the SUB Program. The Representative asked for the reimbursement of the sums owed to the Appellant (the overpayment amount).

[15] The Commission made the following submissions and arguments:

a) It explained that amounts received from an employer are considered earnings and must therefore be allocated, unless they are covered by the exceptions provided for in subsection 35(7) of the Regulations or do not come from a job (Exhibit GD4-3);

b) The Commission explained that the Appellant had received money from the Medavie Blue Cross insurance company, representing the employer, M. A. Inc., and that that money had been paid to him as SUB. The Commission submitted that this money constitutes earnings under the terms of section 35 of the Regulations because it had been provided to the Appellant as payment for SUB. It explained that it had correctly allocated those earnings to the weeks in question, in accordance with section 36 of the Regulations (Exhibit GD4-3);

c) It maintained that if no SUB plan was registered for regular, sickness, or training benefits, or if the plan fails to meet the conditions provided for in section 38 of the Regulations, with respect to parental benefits, maternity benefits, Employment Insurance (EI) benefits for Parents of Critically Ill Children (PCIC) or CCB (compassionate care benefits), SUB paid are considered earnings for the purposes of

benefits under section 36 of the Regulations. The Commission emphasized that the employer, M. A., Inc., had registered for the SUB Program and that the file had taken effect as of February 7, 2016. That explains the decision that it handed down to the Appellant. It specified that paragraph 37(2)(*g*) of the Regulations also requires that the plan be submitted to the Commission before its effective date (Exhibit GD4-3);

d) The Commission explained that it had allocated the sums that the Appellant had received from the Medavie Blue Cross insurance company as supplemental unemployment insurance benefits, only for the period where the employer, M. A. Inc., had not been covered by the SUB Program, as provided for in the Regulations (Exhibit GD4-4);

e) It indicated that it had applied, at the start, a sum of $588.00, as the Appellant himself had reported in his claimant’s statements (Exhibits GD7-2 to GD7-9). The Commission explained that, at the time of the request for reconsideration, it had been demonstrated that this amount should actually have been $559.00 (Exhibit GD3-36). It explained that because the Appellant’s weekly benefit rate is $444.00, the amendment made namely, $559.00 instead of $588.00, did not change the amount of the overpayment made to the Appellant (Exhibit GD7-1);

f) With respect to the calculation of the overpayment, the Commission indicated that the claim for benefits had begun on November 22, 2015, and that the Appellant had received benefits for the weeks of December 6, 2015, to January 23, 2016. It specified that, at the beginning, the weeks of the waiting period had been from November 22 to December 5, 2015, and that Appellant’s earnings had been $559.00 for each of those weeks (Exhibit GD3-36). The Commission explained that the waiting period had been postponed to the period from December 6 to 19, 2015, and that the Appellant had been paid over those weeks, which created an overpayment of $888.00 (2 weeks X 444.00 = $888.00) (Exhibits GD7-1 and GD7-10);

g) It specified that if earnings are allocated over the initial weeks of a benefit period and they exceed the benefit rate, the start of the waiting period is postponed. This situation

arises when the amount allocated over a pertinent week is equal to or greater than 125% of the benefit rate (Exhibit GD7-1).

ANALYSIS

[16] The relevant legislative provisions are outlined in the appendix of this decision.

[17] For an amount to be considered earnings, the income must be tied to employment. According to the Federal Court of Appeal (Court), the amounts will be considered earnings if an employee earns them due to their work, or in consideration of work, or if a "sufficient connection" exists between the claimant's employment and the sum received (***Roch***, **2003 FCA 356**).

[18] It is necessary to establish the genuine nature of the sums and review the facts, rather than relying solely on how these parties characterize those sums. The onus lies with the claimant to demonstrate that the sums received do not constitute earnings.

[19] The Court confirmed the principle that the amounts that constitute earnings under the terms of section 35 of the Regulations must be allocated under the terms of section 36 of the Regulations (***Boone et al.*****, 2002 FCA 257**).

[20] In **CUB 79048**, the Umpire stated:

> […]
>
> [translation]
> Unfortunately, neither the *Act* nor the *Regulations* contains any provisions authorizing the Commission to retroactively approve an employer's SUB plan. Subsection 37(2) of the *Regulations* specifies clearly under which conditions a plan can be approved and the Commission must apply the law to the letter as it is written and not as the claimant or the Board would like it to read. Not only does the Board have no power to amend the requirements of the *Act* or the *Regulations*, but it also has no power to advise the Commission on what to do (*Granger*, [1989] 1 S.C.R. 141).

[21] In ***Granger*** **(A-684-85)**, the Court stated:

> […] It is beyond question that the Commission and its representatives have no power to amend the law, and that therefore the interpretations which they may give of that law do not themselves have the force of law. It is equally

> certain that any commitment which the Commission or its representatives may give, whether in good or bad faith, to act in a way other than that prescribed by the law would be absolutely void and contrary to public order.

Sum Received by the Appellant

[22] The evidence on file demonstrates at the outset that the Appellant received an overall sum of $1,923.00 from the Medavie Blue Cross insurance company.

[23] This sum comprises the following amounts: two payments of $559.00 each for the weeks starting on November 21, 2015 [*sic*] [November 22, 2015], and November 29, 2015 (2 X 559.00 = $1,118.00) and seven payments of $115.00 each for the period from December 6, 2015, to January 23, 2016 (7 X 115.00 = $805.00), for a total of $1,923.00 (1,118.00 + 805.00 = $1,923.00) (Exhibits GD3-17 to GD3-19, GD3-22, GD3-23, and GD3-33 to GD3-36).

[24] The Appellant did not dispute the amounts that the Medavie Blue Cross insurance company had paid to him for the periods indicated.

[25] The Tribunal determines that these sums of money clearly constitute earnings under the terms of section 35 of the Regulations, because they were paid to the Appellant as SUB under his group insurance contract (group insurance contract number: X) through the Medavie Blue Cross insurance company (Exhibits GD2-20 and GD2-21).

[26] Subsection 35(2) of the Regulation stipulates the following:

> 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, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment […]

[27] The evidence shows that the employer was not registered for the SUB plan for the period from November 21, 2015, to February 6, 2016, inclusively, namely, the period in which the Appellant began receiving sums as SUB. The employer registered for this plan on February 7, 2016.

[28] In a letter dated February 12, 2016 (Notice of Registration – Supplemental Unemployment Benefits – SUB), the Commission (Service Canada) informed the employer, M. A. Inc., that it met all the conditions outlined in subsection 37(2) of the Regulations as of February 7, 2016, and until September 30, 2020 (Exhibit GD2-15).

[29] This situation ensures that the Appellant cannot claim, for the period before February 7, 2016, the provisions provided for under section 37 of the Regulations with respect to the SUB plan.

[30] For this reason, the sums that were paid out to him for the period from November 21, 2015, to February 6, 2016, as SUB constitute earnings.

[31] Under the "supplemental unemployment benefit plan," subsection 37(1) of the Regulations provides that:

> 37(1) Subject to the other provisions of this section, payments received by a claimant as an insured person under a Supplemental Unemployment Benefit plan are not earnings for the purposes of section 19, subsection 21(3), section 45 or 46, subsection 152.03(3) or section 152.18 of the Act.

[32] Subsection 37(2) of the Regulations specifies the conditions according to which the SUB plan can be approved.

[33] Paragraph 37(2)(*g*) of the Regulations specifies that:

> (2) For the purpose of subsection (1), a Supplemental Unemployment Benefit plan is a plan that […] g) requires that the plan be submitted to the Commission prior to its effective date and that written notice of any change to the plan be given to the Commission within 30 days after the effective date of the change;

[34] On that aspect, the Tribunal explains that in a letter from February 12, 2016 (Notice of Registration – Supplemental Unemployment Benefits – SUB), the Commission (Service Canada) informed the employer, M. A. Inc., that the employer met all the conditions outlined in subsection 37(2) of the Regulations as of February 7, 2016, and until September 30, 2020 (Exhibit GD2-15).

[35] The Tribunal emphasizes that neither the Act nor the Regulations contains any provisions enabling the Commission to retroactively approve an employer's SUB plan (***Granger***, **A-684-85**, CUB decision 79048).

[36] In its arguments, the Commission made the following specification:

> [translation]
> […] if no SUB [Supplemental Unemployment Benefits] plan was registered for regular, sickness, or training benefits, […] the SUB paid out are considered earnings for the purposes of benefits […]. The employer, M. A. Inc., registered for the SUB Program and the file went into effect on February 7, 2016. That explains the Commission's decision. Paragraph 37(2)*g*) of the *Regulations* also requires that the plan be submitted to the Commission for the effective date (Exhibit GD4-3).

[37] In this case, the sums of money that the Appellant received for the period from November 21, 2015, to February 6, 2016, inclusively, are consistent with the employment that he held with the employer, M. A. Inc., even if the employer did not directly pay him that sum (***Roch***, **2003 FCA 356**).

[38] These are amounts that arise from employment and that are not covered by the exceptions provided for in subsection 35(7) of the Regulations.

Allocation of Earnings

[39] The Tribunal determines that the sums paid to the Appellant for the period from November 21, 2015, to February 6, 2016, inclusively, must be subject to an allocation, in compliance with the provisions provided for in section 36 of the Regulations.

[40] The Tribunal cannot rule out the principle that the amounts that constitute earnings under the terms of section 35 of the Regulations must be allocated under the terms of section 36 of the Regulations (***Boone et al.*, 2002 FCA 257**).

[41] The Appellant's Representative specified that the calculations that the Commission had conducted to allocate the earnings were not the focus of the present case.

[42] In its arguments, the Commission specified that the allocation that it had made applied solely to the period in which the employer was not covered by the SUB plan, as provided for in the Regulations (Exhibit GD4-4).

[43] For the two weeks beginning on November 22, 2015, and November 29, 2015 respectively (November 22 to December 5, 2015, inclusively), the Appellant received $1,118.00, namely, $559.00 per week (2 X 559.00 = $1,118.00). The Commission explained that, based on the Appellant's weekly benefit rate, established at $444.00, this situation generated an overpayment of $888.00 (2 weeks X 444.00 = $888.00) (Exhibits GD3-19, GD7-1 and GD7-10).

[44] For the period of seven weeks from December 6, 2015, to January 23, 2016, inclusively, the Commission indicated that the Appellant had received $115.00 for each of those weeks, which generated an overpayment of $805 in that case (7 weeks X $115.00 = $805.00) (Exhibit GD3-19).

[45] The total amount of the overpayment to the Appellant was thereby established at $1,693.00 (888.00 + 805.00 = $1,693.00) (Exhibit GD4-2).

[46] In sum, the Tribunal determines that the Commission demonstrated that the earnings the Appellant had received from the Medavie Blue Cross insurance company as SUB, for the period in question, must be allocated.

[47] The Appellant failed to present any grounds that could have led the Tribunal to conclude that the earnings he had received should lead to an allocation different from the one that the Commission established.

[48] Relying on the above-mentioned case law, the Tribunal finds that the allocation of the earnings paid to the Appellant was made in accordance with the provisions of sections 35, 36 and 37 of the Regulations.

[49] The appeal on the issue has no merit.

CONCLUSION

[50] The appeal is dismissed.

Normand Morin
Member, General Division – Employment Insurance Section

APPENDIX

APPLICABLE LAW

Employment Insurance Act

Employment Insurance Regulations

35 (1) 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; and

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

income means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. (*revenu*)

pension means a retirement pension

(a) arising out of employment or out of service in any armed forces or in a police force;

(b) under the *Canada Pension Plan*; or

(c) under a provincial pension plan. (*pension*)

self-employed person has the same meaning as in subsection 30(5). (*travailleur indépendant*)

(2) 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, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account 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 remuneration from the proceeds realized from the property of a bankrupt employer;

(b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(c) payments a claimant has received or, on application, is entitled to receive under

(i) a group wage-loss indemnity plan,

(ii) a paid sick, maternity or adoption leave plan,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

(v) a leave plan providing payment in respect of the care or support of a critically ill child;

(d) notwithstanding paragraph (7)(*b*) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and

(f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for

(i) the claimant,

(ii) the claimant's unborn child, or

(iii) the child the claimant is breast-feeding.

(3) Where, subsequent to the week in which an injury referred to in paragraph (2)(*d*) occurs, a claimant has accumulated the number of hours of insurable employment required by section 7 or 7.1 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(3.1) If a self-employed person has sustained an injury referred to in paragraph (2)(*d*) before the beginning of the period referred to in section 152.08 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(4) Notwithstanding subsection (2), the payments a claimant has received or, on application, is entitled to receive under a group sickness or disability wage-loss indemnity plan or a workers' compensation plan, or as an indemnity described in paragraph (2)(*f*), are not earnings to be taken into account for the purpose of subsection 14(2).

(5) Notwithstanding subsection (2), the moneys referred to in paragraph (2)(*e*) are not earnings to be taken into account for the purposes of section 14.

(6) Notwithstanding subsection (2), the earnings referred to in subsection 36(9) and allowances that would not be deducted from benefits by virtue of subsection 16(1) are not earnings to be taken into account for the purposes of section 14.

(7) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(c) relief grants in cash or in kind;

(d) retroactive increases in wages or salary;

(e) the moneys referred to in paragraph (2)(*e*) if

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

(f) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

(8) For the purposes of paragraphs (2)(*c*) and (7)(*b*), a sickness or disability wage-loss indemnity plan is not a group plan if it is a plan that

(a) is not related to a group of persons who are all employed by the same employer;

(b) is not financed in whole or in part by an employer;

(c) is voluntarily purchased by the person participating in the plan;

(d) is completely portable;

(e) provides constant benefits while permitting deductions for income from other sources, where applicable; and

(f) has rates of premium that do not depend on the experience of a group referred to in paragraph (a).

(9) For the purposes of subsection (8), "portable", in respect of a plan referred to in that subsection, means that the benefits to which an employee covered by the plan is entitled and the rate of premium that the employee is required to pay while employed by an employer will remain equivalent if the employee becomes employed by any other employer within the same occupation.

(10) For the purposes of subsection (2), "income" includes

(a) in the case of a claimant who is not self-employed, that amount of the claimant's income remaining after deducting

(i) expenses incurred by the claimant for the direct purpose of earning that income, and

(ii) the value of any consideration supplied by the claimant; and

(b) in the case of a claimant who is self-employed in farming, the gross income from that self-employment, including any farming subsidies the claimant receives under any federal or provincial program, remaining after deducting the operating expenses, other than capital expenditures, incurred in that self-employment;

(c) in the case of a claimant who is self-employed in employment other than farming, the amount of the gross income from that employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein; and

(d) in the case of any claimant, the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.

(11) Subject to subsection (12), the value of the benefits referred to in paragraph (10)(*d*) shall be the amount fixed by agreement between the claimant and the claimant's employer and shall be an amount that is reasonable in the circumstances.

(12) Where the claimant and the employer do not agree on the value of the benefits referred to in paragraph (10)(*d*), or where the value fixed for those benefits by agreement between the claimant and the claimant's employer is not reasonable in the circumstances, the value shall be determined by the Commission based on the monetary value of the benefits.

(13) The value of living quarters referred to in paragraph (10)(*d*) includes the value of any heat, light, telephone or other benefits included with the living quarters.

(14) Where the value of living quarters is determined by the Commission, it shall be computed on the rental value of similar living quarters in the same vicinity or district.

(15) Where the remuneration of a claimant is not pecuniary or is only partly pecuniary and all or part of the non-pecuniary remuneration consists of any consideration other than living quarters and board furnished by the employer, the value of that consideration shall be included in determining the claimant's income.

(16) For the purposes of this section, living quarters means rooms or any other living accommodation.

36 (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

(2) For the purposes of this section, the earnings of a claimant shall not be allocated to weeks during which they did not constitute earnings or were not taken into account as earnings under section 35.

(3) Where the period for which earnings of a claimant are payable does not coincide with a week, the earnings shall be allocated to any week that is wholly or partly in the period in the proportion that the number of days worked in the week bears to the number of days worked in the period.

(4) Earnings that 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.

(5) Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the claimant returning to or beginning work shall be allocated to the period for which they are payable.

(6) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from the performance of services shall be allocated to the weeks in which those services are performed.

(6.1) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from a transaction shall be allocated

(a) if the aggregate amount of earnings that arise from a transaction occurring in a week is greater than the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the weeks in which the work that gave rise to the transaction was performed, in a manner that is proportional to the amount of work that was performed during each of those weeks or, if no such work was performed, to the week in which the transaction occurred; or

(b) if the aggregate amount of earnings that arise from a transaction occurring in a week is less than or equal to the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the week in which the transaction occurred or, if the claimant demonstrates that the work that gave rise to the transaction

occurred in more than one week, to the weeks in which the earnings were earned, in a manner that is proportional to the amount of work that was performed during each of those weeks.

(6.2) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that do not arise from the performance of services or from a transaction shall be allocated equally to each week falling within the period in which the earnings were earned.

(7) The earnings of a claimant who is self-employed in farming shall be allocated

(a) if they arose from a transaction, in accordance with subsection (6.1); and

(b) if they were received in the form of a subsidy, to the week in which the subsidy was paid.

(8) Where vacation pay is paid or payable to a claimant for a reason other than a lay-off or separation from an employment, it shall be allocated as follows:

(a) where the vacation pay is paid or payable for a specific vacation period or periods, it shall be allocated

(i) to a number of weeks that begins with the first week and ends not later than the last week of the vacation period or periods, and

(ii) in such a manner that the total earnings of the claimant from that employment are, in each consecutive week, equal to the claimant's normal weekly earnings from that employment; and

(b) in any other case, the vacation pay shall, when paid, be allocated

(i) to a number of weeks that begins with the first week for which it is payable, and

(ii) in such a manner that, for each week except the last, the amount allocated under this subsection is equal to the claimant's normal weekly earnings from that employment.

(9) Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

(10) Subject to subsection (11), where earnings are paid or payable to a claimant by reason of a lay-off or separation from an employment subsequent to an allocation under subsection (9) in respect of that lay-off or separation, the subsequent earnings shall be added to the earnings that were allocated and, regardless of the period in respect of which the subsequent earnings are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total.

(10.1) The allocation of the earnings paid or payable to a claimant by reason of a lay-off or separation from an employment made in accordance with subsection (9) does not apply if

(a) the claimant's benefit period begins in the period beginning on January 25, 2009 and ending on May 29, 2010;

(b) the claimant contributed at least 30% of the maximum annual employee's premium in at least seven of the 10 years before the beginning of the claimant's benefit period;

(c) the Commission paid the claimant less than 36 weeks of regular benefits in the 260 weeks before the beginning of the claimant's benefit period; and

(d) during the period in which the earnings paid or payable by reason of the claimant's lay-off or separation from an employment are allocated in accordance with subsection (9) or, if the earnings are allocated to five weeks or less, during that period of allocation or within six weeks following the notification of the allocation, the claimant is referred by the Commission, or an authority that the Commission designates, under paragraph 25(1)(*a*) of the Act, to a course or program of instruction or training

(i) that is full-time,

(ii) that has a duration of at least 10 weeks or that costs at least $5,000 or 80% of the earnings paid or payable by reason of the claimant's lay-off or separation from employment,

(iii) for which the claimant assumes the entire cost, and

(iv) that begins during one of the 52 weeks following the beginning of the claimant's benefit period.

(10.2) If any of the conditions under which the Commission may terminate the claimant's referral under paragraph 27(1.1)(*b*) of the Act exists, the earnings paid or payable to the claimant by reason of a lay-off or separation from an employment shall be re-allocated under subsection (9).

(11) Where earnings are paid or payable in respect of an employment pursuant to a labour arbitration award or the judgment of a tribunal, or as a settlement of an issue that might otherwise have been determined by a labour arbitration award or the judgment of a tribunal, and the earnings are awarded in respect of specific weeks as a result of a finding or admission that disciplinary action was warranted, the earnings shall be allocated to a number of consecutive weeks, beginning with the first week in respect of which the earnings are awarded, in such a manner that the total earnings of the claimant from that employment are, in each week except the last week, equal to the claimant's normal weekly earnings from that employment.

(12) The following payments shall be allocated to the weeks in respect of which the payments are paid or payable:

(a) payments in respect of sick leave, maternity leave or adoption leave or leave for the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act;

(b) payments under a group sickness or disability wage-loss indemnity plan;

(c) payments referred to in paragraphs 35(2)(*d*) and (*f*);

(d) workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(e) payments in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act; and

(f) payments in respect of the care or support of a critically ill child.

(13) A payment paid or payable to a claimant in respect of a holiday or non-working day that is observed as such by law, custom or agreement, or a holiday or non-working day immediately preceding or following a holiday or non-working day that occurs at the establishment of the employer or former employer from whom the claimant receives that payment, shall be allocated to the week in which that day occurs.

(14) The moneys referred to in paragraph 35(2)(*e*) that are paid or payable to a claimant on a periodic basis shall be allocated to the period for which they are paid or payable.

(15) The moneys referred to in paragraph 35(2)(*e*) that are paid or payable to a claimant in a lump sum shall be allocated beginning with the first week that those moneys are paid or payable to the claimant in such a manner that those moneys are equal in each week to the weekly amount, calculated in accordance with subsection (17), to which the claimant would have been entitled if the lump sum payment had been paid as an annuity.

(16) The moneys allocated in accordance with subsection (14) or (15) shall not be taken into account in the allocation of other earnings under this section.

(17) The weekly amount shall be calculated in accordance with the following formula, according to the claimant's age on the day on which the lump sum payment is paid or payable:

$$A / B$$

where

A is the lump sum payment; and

B is the estimated actuarial present value of $1 payable at the beginning of every week starting from the day on which the lump sum payment is paid or payable and payable for the claimant's lifetime, as calculated each year in accordance with the following formula and effective on January 1 of the year following its calculation:

$$B = [\Sigma_{t=0} \text{ to infinity of } ({}_tP_x / (1+i)^t) - 0.5] \times 52$$

where

${}_tP_x$ is the probability that the claimant will survive for “t” years from the claimant’s age “x” using the latest Canadian mortality rates used in the valuation of the Canada Pension Plan prorated in equal parts between males and females,

i is the annualized long-term Government of Canada benchmark bond yields averaged over the 12-month period beginning on the September 1 and ending on the August 30 before the January 1 on which the estimated actuarial present values are effective, expressed as a percentage and rounded to the nearest one tenth of a percentage, and

t is the number of years that the claimant survives according to the claimant’s age for which the probability of survival is estimated by ${}_tP_x$.

* Note: The estimated actuarial present values are published annually on the Service Canada website.

(18) Earnings that are payable to a claimant under a government program intended to encourage re-employment and that are payable to the claimant as a supplement to earnings arising from a contract of employment shall be allocated to the period for which they are payable.

(19) Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated

(a) if they arise from the performance of services, to the period in which the services are performed; and

(b) if they arise from a transaction, to the week in which the transaction occurs.

(20) For the purposes of this section, a fraction of a dollar that is equal to or greater than one half shall be taken as a dollar and a fraction that is less than one half shall be disregarded.

37 (1) Subject to the other provisions of this section, payments received by a claimant as an insured person under a supplemental unemployment benefit plan are not earnings for the purposes of section 19, subsection 21(3), section 45 or 46, subsection 152.03(3) or section 152.18 of the Act.

(2) For the purpose of subsection (1), a supplemental unemployment benefit plan is a plan that

(a) identifies the group or groups of employees covered by the plan;

(b) covers any period of unemployment by reason of a temporary stoppage of work, training, illness, injury, quarantine or any combination of such reasons;

(c) requires employees to apply for and be in receipt of benefits in order to receive payments under the plan but may provide for payments to an employee who is not in receipt of benefits for the reason that the employee

> **(i)** is serving the waiting period,
>
> **(ii)** has insufficient hours of insurable employment to qualify for benefits, or
>
> **(iii)** has received all of the benefits to which the employee is entitled;

(d) requires that the combined weekly payments received from the plan and the portion of the weekly benefit rate from that employment do not exceed 95 per cent of the employee's normal weekly earnings from that employment;

(e) requires that payments under the plan be financed by the employer and that the employer keep separate accounts for those payments;

(f) requires that, on termination of the plan, all remaining assets revert to the employer or be used for payments under the plan or for administrative costs of the plan;

(g) requires that the plan be submitted to the Commission prior to its effective date and that written notice of any change to the plan be given to the Commission within 30 days after the effective date of the change;

(h) provides that the employees have no vested right to payments under the plan, except to payments during a period of unemployment specified in the plan; and

(i) provides that payments in respect of guaranteed annual remuneration or in respect of deferred remuneration or severance pay benefits are not reduced or increased by payments received under the plan.