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

Citation: *J. B. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 19

Tribunal File Number: GE-16-2611

BETWEEN:

J. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: February 10, 2017

DATE OF DECISION: February 17, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended the hearing of his appeal via teleconference.

INTRODUCTION

[1] The Appellant established a claim for regular employment insurance benefits (EI benefits) effective March 10, 2013.

[2] The Canada Employment Insurance Commission (Commission) subsequently became aware that the Appellant had undeclared earnings during his benefit period. Following further investigations, the Commission determined that the amounts reported by the Appellant on his biweekly reporting declarations were different than the gross weekly earnings reported by the employer. By correspondence dated January 5, 2016, the Commission allocated the undeclared earnings. The allocation resulted in an overpayment on his claim of $581.00.

[3] On January 12, 2016, the Appellant requested the Commission reconsider its decision, explaining that he had previously provided voluminous information to verify that he had correctly reported his earnings on his claimant reports. On January 26, 2016, the Commission maintained its decision regarding the allocation of earnings and, on July 25, 2016, the Appellant appealed to the General Division of the Social Security Tribunal (Tribunal).

[4] The hearing was held by teleconference because 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.

ISSUE

[5] Whether the earnings received by the Appellant during his benefit period have been properly allocated against his claim.

EVIDENCE

[6] On March 18, 2013, the Appellant made an initial application for EI benefits (GD3-3 to GD3-13). On his application, he indicated that his last day of work for Bell Distribution Inc. was March 9, 2013 (GD3-6).

[7] The Appellant established a claim effective March 10, 2013 (GD4-1), submitted bi-weekly electronic claimant reports and was paid EI benefits based upon the information in those reports.

[8] A Record of Employment (ROE) was issued for the Appellant on December 20, 2013 by Rockwell Servicing Partnership (Rockwell) (GD3-14). According to the ROE, the Appellant worked as a Floorhand for Rockwell from August 2, 2013 to November 17, 2013 before quitting that employment.

[9] A subsequent audit of the Appellant's claim revealed a discrepancy between the earnings reported by the Appellant in his bi-weekly claimant reports and the earnings reported by Rockwell on the ROE. On February 27, 2014, the Commission issued a Request for Payroll Information to Rockwell (GD3-27 to GD3-28), who responded with a breakdown of the Appellant's gross earnings for the period of his employment (GD3-25 to GD3-26).

[10] On December 1, 2014, the Commission issued a Request for Clarification of Employment Information to the Appellant (GD3-21 to GD3-22), requesting an explanation for the difference between the earnings the Appellant declared and the employer's records of his gross earnings.

[11] On September 16, 2015, the Commission received 35 pages of documentation from the Appellant (GD3-29 to GD3-64), which he identified as:

> "Printed copies of pages from legal document drivers daily log book. Earnings for each day and EI reporting periods broken down on following pages."

The pages have notations thereon where the Appellant has broken down the figures "I imputed *(sic)* on my EI reports" (GD3-20), including his hourly rate (in shop and on site), travel rate, and overtime rate and multiplied the rate by the total number of hours for each.

[12] By letter dated January 5, 2016 (GD3-65 to GD3-66), the Commission advised the Appellant that, according to their records, he declared only some of his earnings from Rockwell. Therefore, the Commission had adjusted the allocation of his total earnings based on new information provided by the employer. The Appellant was further advised that this adjustment "means you will have to pay back any benefits you should not have received" and that if he owed any money, a notice of debt, with repayment instructions, would be sent to him shortly (GD3- 65).

[13] On January 12, 2016, ***before*** a Notice of Debt was issued, the Appellant filed a Request for Reconsideration with the Commission (GD3-67 to GD3-68), stating that it appeared not all of the information he sent in had been reviewed, and asking the Commission to look at the documents he had provided.

[14] On January 26, 2016, the Appellant spoke with an agent from the Commission regarding the overpayment on his claim and was advised it had not yet been established as the decision was only recently made, but that he would get a Notice of Debt and a statement every month (see Call Back at GD3-69).

[15] The same agent contacted Rockwell and reviewed every week of the allocation with the employer's representative to ensure the employer reported the gross earnings for the period worked. The agent noted that the employer confirmed that the earnings allocated in the Commission's decision letter "were all correct" (see Supplementary Record of Claim at GD3-70).

[16] The agent then contacted the Appellant and documented their conversation in a Supplementary Record of Claim (GD3-72). The agent noted:

> "Explained the audit process and that there was no penalty imposed; this is an adjustment to earnings only. Advised we did receive his log books disputing the amounts, so I went back to the employer and spoke to a different person there and we went over each week and their records show the claimant earned the amounts we allocated for each week. Advised that it is not the amount paid in a given week but was earned and we checked for that with them. Advised that, based on that, we will maintain the allocation in this case however he can got *(sic)* to them and reconcile the earnings information with them directly if he likes. Advised that if the employer has twice now

made a mistake as to earnings, he can get a letter from them stating there was an error and the correct details, and it would not be a problem to change the earnings."

[17] By letter dated January 26, 2016, the Commission confirmed that it was maintaining its January 5, 2016 allocation decision (GD3-73 to GD3-74).

[18] A Notice of Debt was issued to the Appellant on June 4, 2016 (GD3-75) for an overpayment in the amount of $581.00 on account of the discrepancy in his reported earnings.

[19] The Appellant contacted Service Canada's Office of Client Satisfaction regarding the Commission's treatment of his claim. The Service Canada agent that the Appellant spoke with documented their conversation in a Supplementary Record of Claim (GD3-76 to GD3-78). According to the chronology of events set out therein, the Insurance Processing Operational Unit did not complete their inputs to allocate the amended earnings and establish the overpayment until June 1, 2016 (GD3-78). Reviewing the Appellant's callback requests in connection with his claim, the agent noted:

> "Due to high claim intake, not all action was taken within the normal processing timeframes." (GD3-78)

[20] In his appeal materials (GD2), the Appellant set out his reasons for appealing as follows:

> "I believe the reconsideration decision is incorrect and should be changed. After having so many different representatives handle this case since 2013 it seems that a lot of information has been either lost, miscommunicated or misplaced and no-one seems to be on the same page anymore. I sent documents with and written notes detailing what I had worked and earned reflecting my EI reports from a daily work log book which was mandatory to fill out by law. All information provided was fact and accurate. This was taken into consideration and this matter was considered closed. I even went to the extent of calling representatives of E.I. Canada to confirm that the matter had been closed and that there was no balance owing. I even had them send me written confirmation in letter form, which I have attached, stating a zero dollar balance owing. To be exact it actually states a balance of $4.00 owing but the representative advised me that I did not have to pay that. However, after all of this hassle I would feel more comfortable to just clear that $4.00 balance owing before I receive another notice of debt for that.
>
> With that being a separate matter, I am requesting that the decision be reconsidered and new documents looked at. There must be notes somewhere indicating my phone call

with E.I. confirming this case was no longer an issue. From my understanding speaking with my new representative, Laura, all previously sent documents are stored on file for you to look at." (GD2-2 to GD2-3)

[21] A copy of the detailed statement of account from Employment and Social Development Canada is included in the Appellant's appeal materials (GD2-4 to GD2-5) and indicates that, ***as at March 1, 2016***, the Appellant had an outstanding balance of $4.00 regarding his "EI Debts with ESDC".

At the Hearing

[22] The Appellant testified as follows:

(a) **"**It should be pretty cold cut. After speaking to two of your employment insurance representatives – two of them – that confirmed that this amount owing was not on my account as an outstanding balance, and I even had them, because I had wanted to make sure for myself here, I had them send me a detailed statement of account, which I guess you would consider GD2-4 and GD2-5, sent to me on the first of March 2016. The only balance that was there was $4.00 and I was told that was not required to be paid back because it was such a small amount."

(b) "Also there are the documents that I sent in as well, like the employee log book that we were legally required to fill out on a daily basis. Those hours were given to me by my foreman, which were used to determine how much money we were going to be making. So if there was conflicting numbers from somebody, then maybe the company should be put in for investigation."

(c) "I did my part. And again, I also want to find out why I have been getting conflicting information over the last 4 years this has been going on. Honestly, it's like 4 years and I can't believe this."

(d) “The other thing I don’t understand is I pay into EI. This is my money that I’ve been paying into it anyway. So why am I being scrutinized for getting my own money back?”

[23] The Appellant further testified that the evidence from his log book (at GD3-29 to GD3-64) is his evidence of the hours he worked and the rate he was to be paid for those hours. Based on the calculations the Appellant did using this evidence, there is no overpayment on his claim.

SUBMISSIONS

[24] The Appellant submitted that he did his “due diligence” to make sure this was “all taken care of” and that two employment insurance representatives confirmed there was no amount owing on his account. It is not open to the Commission to now come after him for the $581.00 overpayment it says is outstanding on his account.

[25] The Appellant further submitted that, based on his own log book and calculations, there is no overpayment on his claim. Any discrepancy between his calculations and the employer’s evidence should be resolved in the Appellant’s favour and the employer “put under investigation”.

[26] The Commission submitted that the Appellant received monies from Rockwell while on claim, and that these monies constitute earnings pursuant to subsection 35(2) of the *Employment Insurance Regulations* (EI Regulations) and must be allocated against the Appellant’s claim to the weeks in which the work was performed. The Commission verified the earnings with Rockwell and has allocated the Appellant’s earnings correctly.

ANALYSIS

[27] The relevant legislative provisions are reproduced in the Annex to this decision.

[28] Where a claimant is in receipt of monies during a benefit period, consideration must be given to whether the monies received are ‘earnings’ and how these earnings should be allocated. Sections 35 and 36 of the EI Regulations define what monies are considered

'income', what is considered 'earnings' for the purposes set out in section 35, and to which weeks these earnings are to be allocated.

[29] In the present case, there is no dispute that the Appellant worked for and had earnings from Rockwell during his benefit period. Indeed, the Appellant reported earnings from Rockwell on his biweekly claimant reports, and this is why there has been no penalty for misrepresentation imposed in his case. However, there is a discrepancy between the amount of earnings the Appellant reported and the gross earnings figures reported by Rockwell.

[30] The employer reported the Appellant's gross earnings in an ROE issued on December 20, 2013 (GD3-14) and in its response to the Request for Clarification of Employment Information received at the Commission on May 9, 2014 (GD3-25 to GD3-26). The allocation was calculated on the basis of the employer's reporting. Following the Appellant's request for reconsideration, an agent of the Commission contacted the employer directly on January 26, 2016 and verified and the amount of the Appellant's gross earnings and the period in which they were earned (GD3-70). The earnings were confirmed and the allocation maintained.

[31] The Appellant disputes the earnings evidence provided by the employer and believes that the Commission should instead have relied upon his personal log of the number of hours worked and the rate he was entitled to be paid for those hours (see GD3-29 to GD3-64), which by his calculations results in no overpayment on his claim. The Appellant now asks the Tribunal to do the same. Unfortunately for the Appellant, his log book is not probative evidence of his gross earnings from the employment. At best, it is evidence of the ***wages*** the Appellant was ***entitled*** to be paid. However, it is not evidence of the ***earnings*** that were – ***in fact – paid or payable***.

[32] ***Earnings*** from employment include amounts in addition to wages. ***Earnings*** are any amount paid or payable that is related to or originated from employment. ***Earnings*** include a wide variety of payments, credits and allowances beyond an employee's wages, such as statutory holiday pay, vacation pay, shift premiums, sick days, paid leave, training allowances, costs of living allowances, bonus and incentive payments, and so on. ***Earnings*** received during a benefit period must be allocated against a claimant's entitlement to benefits. This is why the Commission relied upon the employer's reporting of the Appellant's gross ***earnings*** and not merely the Appellant's calculation of his wages. The Tribunal finds that the Commission

correctly relied upon the employer's evidence of the Appellant's gross earnings to adjust the Appellant's reported earnings for the period in question.

[33] While the Appellant has presented evidence of his wages, he has proffered no evidence of his gross ***earnings*** from his employment at Rockwell during the period in question. The Tribunal has reviewed the employer's evidence of the Appellant's gross earnings from Rockwell and finds that they have been properly allocated against the Appellant's claim as set out in the Commission's decision letter of January 5, 2016.

[34] The Tribunal further finds that, as a result of the allocation, the Appellant received EI benefits to which he was not entitled to and, therefore, has an overpayment on his claim in the amount of $581.00.

[35] The Tribunal acknowledges that there was an unfortunate delay with the input of the allocation (see GD4-1), such that the Notice of Debt was not sent at the time of the decision (January 5, 2016) or even the reconsideration (January 26, 2016), but was issued on June 4, 2016. However, the Appellant's submissions that the Commission is not entitled to recover the overpayment from him because he took steps to obtain a detailed statement of account showing a negligible balance (*albeit a statement of account which predates the issuance of any Notice of Debt on his claim*) and are not relevant to the issues on this appeal. While there are certain service standards the Commission aspires to, there is no legislative requirement for the Commission to issue a Notice of Debt within a specifically prescribed time period, nor is there anything in the legislation that provides for the forfeiture of collection rights in connection with an overpayment of EI benefits. The Appellant cannot, therefore, rely upon a statement of account as at March 1, 2016 as evidence that the Commission has somehow released him from liability for a debt that was established on his claim as at June 4, 2016.

[36] Moreover, the EI Regulations do not allow any discretion with respect to the application of the allocation provisions in sections 35 and 36 to the earnings received by the Appellant. Similarly, section 43 of the *Employment Insurance Act* (EI Act) explicitly establishes that ***liability for an overpayment is on the claimant,*** and section 44 of the EI Act clearly states that ***it is the person who received EI benefits in excess of their entitlement who must return the excess amount without delay***. The Tribunal does not have discretion to waive the liability for

an overpayment or to otherwise vary the clear wording in the legislation, no matter how compelling the circumstances. The Tribunal is supported in its analysis by the Supreme Court of Canada's statement in *Granger v. Canada (CEIC), [1989] 1 S.C.R. 141*, that a judge is bound by the law and cannot refuse to apply it, even on grounds of equity.

CONCLUSION

[37] The Tribunal finds that the Appellant's gross earnings from Rockwell have been properly allocated by the Commission pursuant to subsection 36(4) of the EI regulations, as set out in its decision letter of January 5, 2016.

[38] The Tribunal further finds that the Appellant is liable for an overpayment in the amount of $581.00 on account of excess EI benefits that were paid to him but which he was not entitled to.

[39] The appeal is dismissed.

Teresa M. Day
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

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:

$$B = \left[\sum_{t=0}^{\infty} \left({}_tP_x / (1+i)^t\right) - 0.5\right] \times 52$$

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 probablity of survival is estimated by tPx.

*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.