



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. Y. v Canada Employment Insurance Commission*, 2018 SST 1174

Tribunal File Number: GE-18-2445

BETWEEN:

M. Y.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: October 4, 2018

DATE OF DECISION: October 5, 2018

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant's father passed away on October 19, 2015. She was appointed the executor of his estate. The Appellant received \$20,151.36 in executor's fees on July 17, 2016 which was calculated, pursuant to the terms of the will, at 3% of the net worth of the estate. The Appellant had received 15 weeks of Employment Insurance (EI) sick benefits from June 19, 2016 to October 15, 2016. The Appellant completed virtually all the work of executor prior to July 15, 2016 at which time she made the first distribution of the estate to the beneficiaries. Her one remaining task after that was to wait to receive a tax clearance certificate which was required before she could issue the final cheques to the beneficiaries for the remainder of the estate. She issued the final cheques on August 4, 2017.

[3] The Respondent considered the executor's fees to be earnings. The Respondent considered the period in which the Appellant performed the services of executor to be from October 19, 2015 to August 4, 2017 and allocated the executor's fees payment to the Appellant's claim from June 19, 2016 to the week of July 30, 2017. This allocation created an overpayment of \$3225.00.

[4] The Appellant does not dispute that the executor fees are earnings. However, she argues that the allocation period is incorrect. The Appellant's position is that the allocation period should be from October 19, 2015 to July 15, 2016 when she made the first distribution of payments to the beneficiaries because all her executor duties had completed by that date, with the exception of the one final task of writing the cheques for the final distribution of the estate. She argues that the period in which she performed the services of executor was essentially complete on July 15, 2016.

PRELIMINARY MATTERS

[5] G. K. appeared as a witness for the Appellant. G. K. acted as the accountant for the estate.

ISSUES

[6] Issue 1: Is the payment of \$20,151.36 in executor's fees earnings?

[7] Issue 2: If so, how should the earnings be allocated?

ANALYSIS

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

[9] The *Employment Insurance Act* (Act) sets up an insurance scheme to protect against the loss of income resulting from unemployment. Therefore, the purpose is to compensate for a loss and not to pay benefits to those who have not suffered any loss (*Canada (Attorney General) v. Walford*, A-263-78).

[10] Earnings are defined under subsection 35(2) of the *Employment Insurance Regulations* (EI Regulations) as the entire income of a claimant arising out of any employment.

[11] Sums received from an employer are presumed to be earnings and must therefore be allocated unless the amount falls within an exception in subsection 35(7) of the EI Regulations or the sums do not arise from employment.

[12] Amounts that are determined to be earnings under section 35 of the EI Regulations must be allocated according to section 36 of the EI Regulations (*Boone et al v. Canada (Attorney General)*, 2002 FCA 257).

Issue 1: Is the payment of \$20,151.36 in executor's fees earnings?

[13] Yes. The Tribunal finds the \$20,151.36 in executor's fees constitutes earnings.

[14] The Appellant's testimony was that she was appointed to act as executor for his father under his will. She assumed her duties on his passing on October 19, 2015. She was paid \$20,151.36 for her duties as executor from the estate on July 17, 2016. The will indicated she was to be compensated for her executor duties at 3% of the net value of the estate.

[15] A T4 for tax purposes was issued by the estate indicating the payment of \$20,151.36 as employment income for the 2016 tax year.

[16] For income to be considered earnings pursuant to subsection 35(2) of the EI Regulations, the income must be earned by labour or given in return for work or there must be a sufficient connection between the claimant's employment and the sum received (*Canada (A.G.) v. Roch* 2003 FCA 356).

[17] The Appellant has the onus of proof to show that the sum in question is not derived from employment and should not be allocated. The Appellant does not dispute the executor fees are earnings. Rather, she takes issue over the period in which they were allocated.

[18] The Federal Court of Appeal has determined that executor fees are earnings from "employment" as defined in paragraph 35(1)(c) of the EI Regulations which provides that employment means the "tenure of an office as described in subsection 2(1) of the *Canada Pension Plan*. Subsection 2(1) of the Canada Pension Plan defines an "office" as meaning inter alia, "...the position of an individual entitling him to a fixed or ascertainable stipend or remuneration..." (*Attorney General of Canada v. Booton, Harvey*, 2010, #A-61-10).

[19] The Tribunal is bound by the *Booton* case and finds therefore that the executor's fees paid to the Appellant are earnings arising from employment within the meaning of subsection 35(2) of the EI Regulations. The sum does not fall within an exception in subsection 35(7) of the EI Regulations and there is a clear connection between the services the Appellant performed as an executor and the executor's fees she received.

Issue 2: how should the earnings be allocated?

[20] The Tribunal finds the executor's fees in the amount of \$20,151.36 are to be allocated pursuant to subsection 36(4) of the EI Regulations to the period in which the services were performed. The Tribunal finds that the period in which the Appellant performed the services of executor were from October 19, 2015 to August 4, 2017. Accordingly, the allocation must be over this period of time.

[21] Subsection 36(4) of the EI Regulations provides that 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.

[22] The Respondent argues that subsection 36(4) of the EI Regulations is the applicable section under which allocation is to occur as the Appellant received a fee for the executor's fees under a "contract of employment for the performance of services". The Appellant did not argue that allocation should occur under any other provisions of section 36 of the EI Regulations. The Tribunal agrees with the Respondent that subsection 36(4) is the appropriate provision under which the fees should be allocated.

[23] The Respondent asserts that the period the Appellant performed the duties of executor began October 19, 2015 and ended August 4, 2017 when she completed the final duty of writing the cheques to the beneficiaries for the remainder of the estate. As such it calculated the weekly allocation at \$215.00 ($\$20,131.56 / 656 \text{ days (October 19, 2015 to August 4, 2017)} \times 7 \text{ days} = \215.00). The Appellant's claim began on June 19, 2016. After allocating \$215.00 weekly from that date, an overpayment arose in the amount of \$3225.00 (15 weeks of sickness benefits x \$215 = 3225.00)

[24] The Appellant's argument is that this allocation is unfair. She points out that the bulk of her work as executor was completed by July 15, 2016 and the only task remaining after that was to await the clearance certificate from the Canada Revenue Agency (CRA) so she could issue the final cheques to the beneficiaries. The clearance certificate was issued on July 11, 2017 and she issued the final cheques on August 4, 2017. She submits that the delay in completing her duties was not attributable to her. She was required to wait for the clearance certificate before she could issue the final cheques.

[25] The Appellant testified that her father's will stated that she was entitled to a fee of 3% of the net worth of the estate. Her father had been in a care home for a number of years prior to his passing. Also she had been his Power of Attorney for a number of years. As such, matters were organized and there was not much she had to do as the executor. Her duties involved dealing with the funeral and paying the related expenses. She also prepared a net worth summary for the accountant. She related that there was no house or hard assets to sell. She was dealing with cash

and investments. All this work was done very soon after assuming her duties. The Appellant related that she made the first distribution of the estate to the beneficiaries on July 15, 2016 and the beneficiaries all signed off at that point that they would not make claims against the estate. After that, there were some tax matters being dealt with by the accountant but she had no more tasks herself to do until writing the final cheques after the tax clearance certificate had been obtained. She wrote the final cheques on August 4, 2017.

[26] The Appellant's witness testified that he felt the Appellant had completed 95 to 99 per cent of the work associated with her duties as executor by July 15, 2016. What was remaining was not "work" but rather having to wait for the CRA to provide a tax assessment and clearance letter. When this was received the Appellant was able to issue the final cheques on August 4, 2017. He asserted that it was odd the Appellant was being penalized when the delay was created by waiting for the CRA to complete their assessment. He explained that there was no business registration obtained from CRA but rather a payroll number. He advised this was necessary because the estate was paying the executor fees. As it was necessary to obtain a payroll number to make deductions and remittances to CRA from the estate for the executor's fees. He explained further that the Appellant's executor fees were based on 3% of the net worth of the estate. There was nothing in the will that said when the payment was to be made. However, the payment could not be made until they had final figures for all the expenses so they could determine the net worth of the estate. This is why this payment was not made until July 17, 2016 even though the Appellant had completed virtually all of the executor's work prior to this.

[27] The Appellant's witness explained further that there is 1 year allowed after the passing of the individual to file the final trust return with the CRA. This means that all the bills have to be paid prior to that 1 year date. He explained the Appellant's father's personal return was filed on April 24, 2016. After they received the assessment for that return, they estimated what was left in the estate to distribute and then on July 15, 2016 the cheques were actually issued. A small cushion of money was left in case there were any costs or expenses arising after that payout. From that point, they were just awaiting the clearance certificate from CRA.

[28] The Tribunal has considered what the phrase "the period in which the services were performed means."

[29] This issue was considered in CUB 18829. In that case a teacher was hired under a "contract of employment of teachers by the lesson" to teach a certain number of periods a week from 7 September 1988 to 23 June 1989. However she was paid only by the lesson and did not receive any earnings for the weeks in which she did not work. Under the terms of her collective agreement she also was not paid for 3 weeks of school breaks.

[30] The teacher argued that her earnings should have been allocated in accordance with the number of hours she taught each week, since she was hired as a teacher by the lesson. The Umpire considered subsection 58(3) (Tribunal note: the predecessor to subsection 36(4)) of the EI Regulations) and determined that, by signing a "contract of employment of teachers by the lesson", the claimant agreed to teach a certain number of periods a week from 7 September 1988 to 23 June 1989. The Umpire noted that there was no doubt that the Appellant may have taught more in some weeks than in others. However, the Regulations do not provide that the earnings should be allocated on the basis of the hours actually worked but on the basis of the period during which the services were performed, which in her case was thirty-nine weeks.

[31] The Tribunal is not bound by the ruling of an Umpire but finds the reasoning in CUB 18829 persuasive. Subsection 36(4) of the EI Regulations does not indicate that the allocation relates to hours worked or weeks worked. Rather, it refers to the "period" in which the services are performed. The use of the word "period" in the Tribunal's view, suggests the allocation is to be over the fixed length of time in which the services are performed.

[32] The Tribunal has considered what period the Appellant performed her services as executor. The Tribunal acknowledges that there was a disproportionate amount of time spent by the Appellant at the front end of the assumption of her duties on October 19, 2015 and until July 15, 2016 when the first cheques were wrote compared to the final duty of writing cheques compared to her actions after July 15, 2016. The Tribunal also acknowledges that the actual period of time in which she was required to provide her services was somewhat out of her hands, given the requirement to wait for the CRA clearance certificate before the final issuance of the cheques can be made.

[33] However, the difficulty the Tribunal has with the Appellant's argument is that the executor's fee is a fixed payment for the performance of the duties of executor. The fee is not

paid for time spent or in any way related to time spent. The Tribunal finds that the Appellant's services as executor did not end until the final cheques to the beneficiaries were written. The Appellant still had services to perform as an executor up until that point, whether or not they took only a brief amount of time to fulfill. Even though the Appellant had retained an estate accountant and had handed off the tax matters and the seeking of the CRA clearance certificate to the accountant, the Appellant, as executor, was still ultimately responsible for these matters. Accordingly, the Tribunal finds therefore that the period in which the Appellant performed the services as executor were from October 19, 2015 to August 4, 2017.

[34] The Tribunal finds that the Respondent has correctly allocated the executor's fees. The allocation from October 19, 2015 to August 4, 2017 results in a weekly amount of \$215. This allocation, when applied to the Appellant's 15 weeks of sick benefits beginning from June 19, 2016 results in an overpayment of \$3225 .00 (15 x 215).

[35] The Tribunal acknowledges the unfortunate result in this situation. Through no fault of her own, the Appellant has ended up with an overpayment. Despite the Tribunal's sympathy for the Appellant's situation, the Tribunal finds that subsection 36(4) of the EI Regulations does not lend itself to the interpretation suggested by the Appellant. The allocation is intended to cover the entire period in which the services are performed, regardless of when during that period the work is done.

CONCLUSION

[36] The appeal is dismissed.

Charlotte McQuade

Member, General Division - Employment Insurance Section

HEARD ON:	October 4, 2018
METHOD OF PROCEEDING:	Teleconference

APPEARANCES:	M. Y., Appellant Lorrie McLeod-Georget, Representative for the Appellant
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ANNEX

THE 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:

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

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.