



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DD v Canada Employment Insurance Commission*, 2019 SST 1747

Tribunal File Number: GE-19-1095

BETWEEN:

D. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Linda Bell

HEARD ON: May 15, 2019

DATE OF DECISION: May 17, 2019

DECISION

[1] The appeal is allowed. The Appellant D. D., whom I will refer to as the Claimant, did **not** *knowingly* make false representations. The penalty is rescinded.

OVERVIEW

[2] The Claimant collected sickness Employment Insurance (EI) benefits, for the same period he was in receipt of short-term disability (STD) benefits, which is a wage loss benefit paid by his employer from July 13, 2017, until August 25, 2017.

[3] The Respondent, who is the Canada Employment Insurance Commission (Commission), conducted a review in April 2018 and determined that the Claimant's STD benefits were earnings. These earnings were allocated to the Claimant's EI benefits, starting from July 13, 2017. This retroactive allocation resulted in a \$3,801.00 overpayment of benefits. The Commission also determined that the Claimant had *knowingly* made 4 false representations by failing to declare his STD benefits on his biweekly reports and they imposed a \$1,901.00 penalty and a violation classified as serious.

[4] Upon reconsideration, the Commission maintained their decision that the Claimant *knowingly* made 4 false representations and his STD benefits are earnings to be allocated. However, the Commission reduced the \$1,901.00 penalty to \$760.00 and rescinded the notice of violation. The Claimant appealed the penalty to the Social Security Tribunal (Tribunal) arguing that he did not *knowingly* make false representations.

PRELIMINARY MATTERS

[5] The Claimant's appeal was initially heard by the General Division of the Tribunal through written questions and answers. A decision was rendered on January 1, 2019, in which the Claimant's appeal was dismissed in its entirety. The Claimant appealed this decision and the Tribunal's Appeal Division held a settlement conference, during which the parties determined the matter was to be returned to the General Division and reheard on its merits.

[6] In their February 22, 2019, decision, the Appeal Division directed the General Division to review the form of hearing, as the Claimant recently stated that he is available to attend a teleconference hearing. As such, the hearing was scheduled to be hearing via teleconference.

[7] The Appeal Division also directed the General Division to provide the Claimant with a copy of the questions posed by the previous Member in November 2018, so that he be made aware of the information that was previously requested. Copies of those November 2018 questions were sent to the Claimant on April 15, 2019, via email. I am satisfied the Claimant received those questions because a response to some of these questions were submitted by the Claimant on April 16, 2019, and April 18, 2019.

ISSUES

[8] Were 4 false representations made on the Claimant's bi-weekly reports for the period from July 13, 2017, until August 25, 2017?

[9] If so, were those false representations made *Knowingly*?

[10] If not, should a penalty be imposed?

ANALYSIS

a) Were false or misleading representations made?

[11] Yes. An explanation of the meaning of false or misleading representations was provided to the Claimant during the hearing. The Claimant then conceded that when he answered "No," to the questions: "Did you or will you receive Wage Loss Insurance (WLI) for" the first and second weeks "of this report", he provided a misleading or false answer, or representation because he was advised at a later date that he was paid STD benefits for the period under review. (July 13, 2017, until August 25, 2017.)

[12] There is no dispute of the Commission's evidence consisting of the Claimant's initial claim for benefits; the ROE issued by his employer; or the Claimant's bi-weekly reports made in each week where he answered and attested to being correct, prior to the claim being made

successfully. Accordingly, I find there was sufficient evidence to prove that the Claimant made false or misleading statements when he failed to report his STD benefits on his biweekly reports.

b) Were the false or misleading representations made *knowingly*?

[13] **No.** I find that at the time the Claimant completed his bi-weekly reports for the period from July 13, 2017, until August 25, 2017, he was not aware of the fact that he was or would be in receipt of STD benefits; therefore, the false or misleading representations were not made knowingly.

[14] A subjective test must be used for the interpretation of the word “*knowingly*” to determine whether the required knowledge exists. This subjective test of knowledge takes objective evidence into account.¹

[15] The objective evidence provided by the Claimant includes an email from his employer that states, in part, that his employer did not receive approval to pay the Claimant STD benefits until August 22, 2017. This email also states that the Claimant was paid STD benefits effective from July 13, 2017, until August 27, 2017. I accept the Claimant’s testimony that the employer had to wait for approval before paying his STD benefits, and that they paid him for the approved period retroactively. That is to say that the payments were not issued to the Claimant until after August 22, 2017, and they were paid retroactively for the period from July 13, 2017, until August 27, 2017.

[16] The fact that the payments were made by the employer retroactively, also supports the Claimant’s statement that, at the time he completed his bi-weekly reports on August 15, 2017, and August 28, 2017, he was not aware that his claim for STD benefits had been approved. This is also supported by the Commission’s evidence that the Claimant’s reports were completed on August 15, 2017, and August 28, 2017.

[17] The Commission provided copies of pay stubs submitted by the Claimant that show that the first pay that he was paid STD benefits was not issued until August 29, 2017, which is after he completed his bi-weekly reports on August 15, 2017, and August 28, 2017. Further, I accept

¹ *Canada (Procureur général) c. Bellil*, 2017 CAF 104

the Claimant's statement that, given his medical condition at that time, and the fact that he did not receive copies of these paystubs until September 11, 2017, he was not aware that he had been approved for or paid STD benefits. Therefore, at the time the Claimant completed his bi-weekly reports for the period from July 13, 2017, until August 25, 2017, he did **not knowingly** make false or misleading representations.

c) Should a penalty be imposed?

[18] **No.** A penalty may only be imposed for false statements made *knowingly*.² As I have set out above, I find the Claimant did **not knowingly** make false statements when he failed to report on his bi-weekly reports that he would be receiving STD benefits for the period from July 13, 2017, until August 25, 2017. Further, in their July 11, 2018, submissions, the Commission conceded the issue. Accordingly, I find that the penalty is to be fully rescinded and therefore, no interest is to be charged on the overpayment of benefits.³

CONCLUSION

[19] The appeal is allowed.

Linda Bell

Member, General Division - Employment Insurance Section

HEARD ON:	May 15, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. D., Appellant (Claimant)

² Section 38 of the *Employment Insurance Act*

³ Subsections 56(1) and 56.1(1) of the *Employment Insurance Regulations*