



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. D. v Canada Employment Insurance Commission*, 2019 SST 951

Tribunal File Number: GE-19-2584

BETWEEN:

S. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: August 12, 2019

DATE OF DECISION: August 28, 2019

DECISION

[1] The appeal is dismissed with modification. The Claimant received net income from his self-employment that was earnings and the Commission has allocated those earnings to the correct weeks. The net earnings as determined by the Commission for the week of May 6, 2018 are to be modified to reflect the \$123.17 hotel cost incurred on May 9, 2018 as an operating expense. The Tribunal does not have jurisdiction to write off the overpayment arising from the allocation of earnings.

OVERVIEW

[2] The Claimant made a claim for regular employment insurance (EI) benefits on November 2, 2017. While in receipt of benefits, on February 26, 2018 the Claimant started a sole proprietorship providing X. He continued to job search until deciding to carry on the business full-time on August 20, 2018. The Claimant provided his services to one company that contracted out his services to various other employers who were terminating employees. The Claimant was paid an hourly fee to attend exit interviews. He was able to invoice the company he contracted with directly after completing the interviews. The Claimant was also paid to provide X packages, for which he invoiced different amounts, depending on the package authorized by the terminating employer. The Claimant was only permitted by the company he contracted with to invoice for the authorized amount of the package, thirty days after the clients had begun services with him. At that time, he would invoice for the entire authorized amount of the package, even though his services might continue past that thirty day period.

[3] The Claimant received revenue from his business and also incurred expenses in setting up and operating the business. The Commission determined that the Claimant had declared only some of his earnings from self-employment. The Commission looked at the Claimant's revenue and expenses from his business and made a determination of what expenses it would allow to calculate his net income. The Commission determined that this net income was earnings.

[4] The law says that all earnings have to be allocated. The earnings of a claimant who is self-employed are allocated differently depending on whether the earnings arise from the

performance of services or from a transaction or whether the earnings do not arise from the performance of services or from a transaction.

[5] The earnings of a claimant that is self-employed that arise from the *performance of services* are allocated to the weeks in which those services were performed.¹

[6] Where earnings *arise from a transaction*, the method of allocation depends on the amount of the transaction. If the earnings that arose from a transaction occurring in a week is greater than \$994.00 (maximum yearly insurable earnings for 2018 divided by 52) after deducting operating expenses (excluding capital expenditures), the earnings will be allocated 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 work was done, to the week in which the transaction occurred.

[7] If the amount of earnings from the transaction is \$994.00 or less, then it will be allocated to just the week of the transaction (unless the Claimant can demonstrate 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.²

[8] The earnings of a claimant who is self-employed that do not arise from the performance of services or from a transaction are allocated equally to each week falling within the period in which the earnings were earned.³

[9] The Commission determined the Claimant's earnings arose from the performance of services and allocated the earnings from February 25, 2018 to July 29, 2018 according to the weeks in which the services were performed. Specifically, for the earnings noted on the Claimant's invoices that specified a meeting date with a client, the earnings were allocated to the week of the meeting. For earnings that were not date specific, the earnings were pro-rated from

¹ Subsection 36(6) of the *Employment Insurance Regulations*.

² Subsection 36(6.1(a)) and 36(6.1(b)) of the *Employment Insurance Regulations*.

³ Subsection 36(6.2) of the *Employment Insurance Regulations*.

the date of an invoice, back to the date of the previous invoice. This allocation resulted in an overpayment of \$6,727.00.⁴

[10] The Claimant does not dispute that his net income is earnings. He also agrees with how the Commission has determined his net income, with the exception of a hotel stay he was required to make for his business on May 9, 2018. He says he had to incur that expense. However, the Claimant says he does not know whether the Commission has properly allocated his earnings as he was misdirected by the Commission concerning how to report his earnings. The Claimant says he reported his hours, when worked and his earnings when received, as directed by the Commission. He argues that the Commission is now using a different allocation method such that he has ended up with a large overpayment. Given the change in allocation methods, he wants the Tribunal to review the Commission's allocation to make sure it is correct. He says the fairest allocation that results in the lowest overpayment to him is what should be used.

[11] I find that the Commission has properly allocated the Claimant's net income.

JURISDICTION AND POST-HEARING DOCUMENTS

Jurisdictional Issue

[12] The Commission disputes that the Tribunal has jurisdiction to consider the allocation issue. The Commission says that it appears from the Claimant's reconsideration statement that he is objecting to the fact that he has an overpayment to repay, not the allocation itself. The Commission notes, however, that its reconsideration agent did not contact the Claimant to clarify this. The Commission says that Claimant's statements in his Notice of Appeal also support this conclusion. The Commission says that since its reconsideration decision refers to "earnings" only, then the appeal falls under that heading only.

[13] The Claimant said at his hearing that he was not disputing that his net income was "earnings". He is only disputing the calculation of "net income" for one expense that was disallowed for a hotel stay. However, he wants the Tribunal to review the allocation of earnings

⁴ GD6-2.

because he followed the Commission's advice about how to allocate his earnings and now he has a large overpayment.

[14] The law says that the Tribunal does not have jurisdiction to review a decision unless the Commission has conducted a reconsideration of that decision and made a reconsideration decision.⁵

[15] The Commission's initial decision of April 5, 2019 referred to both the earnings and the allocation issue. That letter advised the Claimant of the Commission's decision that he had declared only some of his earnings received as wages from self-employment and of the Commission's decision to allocate those earnings as set out in the letter.⁶ The Claimant stated in his request for reconsideration dated April 16, 2019 that he was requesting a reconsideration of the notice of debt. He also notes that he was advised to submit hours and earnings as transactional due to his invoices not being an hourly rate. He says it seems now that the service model is being applied. He says the Commission incorrectly advised him after he specifically requested how to report correctly.⁷ I find the Claimant's intent in his request for reconsideration was to have the amount of debt reviewed, which debt arose from both the Commission's calculation of his net income as earnings as well as the allocation of those earnings.

[16] The Commission says that the Claimant agreed with the allocation in a discussion with its Integrity officer.⁸ However, this agreement was prior to the initial decision letter and reconsideration request being made. I find therefore the Claimant's agreement has no relevance to the issue of whether a reconsideration was requested or a reconsideration decision rendered on the issue of allocation of earnings.

[17] The Commission did not argue that no reconsideration had been conducted on the allocation issue. The Commission in fact states in its submissions that, "Following the claimant's request for reconsideration, the Commission maintained the allocation of earnings"⁹, suggesting a reconsideration decision was rendered on the issue of allocation. There are no notes

⁵ Section 113 of the *Employment Insurance Act*.

⁶ GD3-47 to GD3-48.

⁷ GD3-53.

⁸ GD3-45 to GD3-46.

⁹ GD4-2.

on file concerning the Commission's reconsideration decision. However, I find that the June 14, 2019 reconsideration decision is broader than just an "earnings" decision. The decision letter provides: "We are writing concerning your request for reconsideration received on April 26, 2019 against the Employment Insurance decision(s) dated April 5, 2019. We have performed an in-depth review of the circumstances of the case and of any supplementary information provided and based on our findings and the legislation, we render the following decision(s):" Under a hearing "Issue: Earnings" the decision states, "We regret to inform you that we have not changed our decision regarding this issue. The decision, as communicated to you on April 5, 2019, is therefore maintained." While the heading only refers to "Earnings", the text of the letter refers specifically to the Claimant's request for reconsideration of the decision dated April 5, 2019 and also indicates that the decision, as communicated to Claimant on April 5, 2019 was being maintained. I am satisfied, despite the heading referring only to "Earnings", that a reconsideration was conducted by the Commission of both the earnings and allocation issues as described in the April 5, 2019 initial decision letter and the June 14, 2019 reconsideration decision is a decision on both those issues.

[18] I find further that the Commission has provided detailed submissions to the Tribunal regarding the allocation so there is no prejudice to the Commission in considering this issue as part of this appeal.

Post-hearing documents

[19] The Claimant advised at his hearing that he had not received a breakdown of the overpayment from the Commission. The material on file did not include such a breakdown. I find such information to be relevant to the matters under appeal. I therefore, requested, by way of Investigation and Report, that the Commission provide an overpayment breakdown as a post-hearing submission. The Commission provided the overpayment breakdown on August 12, 2019.¹⁰ This document was provided to the Claimant with an opportunity to provide submissions by August 20, 2019. The Claimant provided no submissions.

¹⁰ GD6.

ISSUES

[20] I have to decide:

1. Is the net income from self-employment that the Claimant received earnings?
2. Did the Commission properly determine the amount of the Claimant's earnings from his self-employment?
3. If it is earnings, did the Commission allocate the Claimant's earnings correctly?
4. Can the Tribunal write off the overpayment arising from the allocation?

ANALYSIS

Issue 1: Is the net income from self-employment that the Claimant received earnings?

[21] Yes. The net income that the Claimant received from his self-employment is earnings.

[22] For the purposes of section 35 of the Regulations, subsection 30(5) of the Regulations defines a "self-employed person" to include an individual who is or was engaged in a business.¹¹

[23] "Employment" is defined to include any self-employment.¹²

[24] I find that the Claimant was employed as a self-employed person. There is no dispute about this. The Claimant told the Respondent and gave evidence at his hearing that he started a sole proprietorship on February 26, 2018 to provide X.

[25] The law says that earnings are the entire income of a claimant arising out of any employment.¹³ The law defines "income" as including any income that a claimant did or will get from an employer or any other person, whether it is in the form of money or something else.¹⁴

¹¹ Paragraph 35(5)(a) of the *Employment Insurance Regulations*.

¹² Paragraph 35(1)(b) of the *Employment Insurance Regulations*.

¹³ Subsection 35(2) of the *Employment Insurance Regulations*.

¹⁴ Subsection 35(1) of the *Employment Insurance Regulations*.

[26] In the case of a claimant who is self-employed in employment other than farming, “income” is defined to include the amount of the gross income from that employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein.¹⁵

[27] The Claimant is the party who has to prove that it is more likely than not that the money is not earnings.

[28] The Claimant does not dispute the net income he received from his business is earnings. I find the Claimant’s net income from his business is earnings as it arises from the Claimant’s employment in his business.

Issue 2: Did the Commission properly determine the amount of the Claimant’s earnings from his self-employment?

[29] Yes, with the exception of the week of May 6, 2018, the Commission has properly determined the Claimant’s net income from earnings. The Commission disallowed the hotel expense of \$123.17 incurred on May 9, 2018.¹⁶ I find this to be an allowable operating expense in the week of May 6, 2018 and the net income for this week is to be recalculated to reflect that expense.

[30] In the case of a claimant who is self-employed in employment other than farming, “income” is defined to include the amount of the gross income from that employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein¹⁷

[31] It is the amount of income that Claimants earn “from that employment” that must be determined and the period of “that employment” is that during which the services were performed.¹⁸

[32] The Claimant’s testimony was consistent with the information he provided the Respondent. He opened up a sole proprietorship on February 26, 2018, doing X with one particular company who contracted him out to other employers who were terminating

¹⁵ Paragraph 35(10)(c) of the *Employment Insurance Regulations*.

¹⁶ GD3-88.

¹⁷ Paragraph 35(10)(c) of the *Employment Insurance Regulations*.

¹⁸ Paragraph 35(10)(c) of the *Employment Insurance Regulations*; *Attorney General of Canada v. Talbot*, A-424-11.

employees. He billed this one company directly for his services. He explained he was paid in two ways. When he attended onsite for an exit interview, he would be paid an hourly rate (\$60 per hour). He was usually there for 2 hours and could bill \$120.00 for that onsite meeting. The fee was the same no matter how many clients he saw in the on-site meeting. The Claimant explained he would invoice right away for this service.

[33] The Claimant testified that the other way he was paid was when an employer who had terminated an employee purchased an exit package for career counselling services through the company he contacted with. The Claimant was paid either a percentage of the package amount or a flat fee amount for the package. The package value varied per client and their worth ranged from \$500.00 to \$10,000.00. Once an employer authorized a package, the Claimant was sent a breakdown of how much time a client was to get and the amount of the package. The Claimant explained that his services might last three months to a year. He might work with the terminated employee from one to three hours a week for a few months until the person was into the interview process. He related that there is an intense period of work up front, then coaching all the way through and then another intense period when accepting a new position. The Claimant explained that sometimes his service would end as fast as three days if someone got a job quickly. He related that he might also begin providing service before knowing what the package was worth as the confirmation of that could take a few weeks. The Claimant explained that he was not permitted to bill for a package until thirty days after the client had engaged him. After the thirty day point, the Claimant would invoice the company he contracted with for the total package amount he was authorized to bill for. The company would then invoice the client's employer.

[34] The Claimant provided the Commission with three invoices: Invoice 1 dated March 23, 2018 for \$678.00;¹⁹ Invoice 2 dated April 13, 2018 for \$2531.20²⁰ and Invoice 3 dated May 15, 2018 for \$4446.55²¹. The Commission obtained two further invoices from the company that the Claimant billed. An invoice dated June 15, 2018 for \$3101.85²² and an invoice dated August

¹⁹ GD3-61.

²⁰ GD3-62.

²¹ GD3-63.

²² GD3-68.

15, 2018 for \$6644.40²³ These invoices all reflect the billing structure described by the Claimant. The invoices do not indicate dates for all the onsite meetings. For the package billing, some of the invoices reflect a date when the 30-day period was reached but others do not. None of the invoices show when the Claimant worked with the package clients.

[35] The Claimant advised the Commission that for capital resources, he made software updates to his laptop, purchased a tablet to take to client meetings and he spent approximately \$800.00 to obtain a domain name search and website address for his business name.²⁴

[36] . The Claimant advised the Commission that his monthly costs include fuel, vehicle repair costs, phone, internet, expenses of taking prospect clients to dinner/coffee and stationery, which amounts to approximately out \$200.00 per month. The Claimant advised that he uses a motorbike or public transit and the cost of filling up his motorbike was \$9 to \$15.

[37] In calculating the Claimant's net income, the Commission expensed the Claimant's gas receipts and public transit receipts to the weeks in which the transactions occurred. The Commission disallowed the business name registration invoice dated February 7, 2018 as the Claimant had advised that his self-employment activities did not commence until February 26, 2018. All meal receipts were disallowed as there was no information on which client the expense occurred for and whether the Claimant obtained and maintained the client; A receipt for the Claimant's stay at the X on May 9, 2018 was disallowed as the Claimant confirmed it was a personal choice to stay overnight as it was not previously authorized by the company he was contracting with. Two gas receipts (\$46.34 dated July 7, 2018) and (\$40.26 dated July 8, 2018) were disallowed, as the amount of fuel was inconsistent with the other receipts received for fuelling the motorbike throughout the period of claimant's self-employment activities. A parking receipt of \$2.50 dated July 24, 2018 was also disallowed but no explanation was provided.²⁵

[38] The Claimant is not disputing the expenses disallowed by the Commission to calculate his net income, with the exception of his hotel stay on May 9, 2018. The Commission's notes say that the Claimant told the Commission that he had an assignment where someone was being laid

²³ GD3-69.

²⁴ GD3-26.

²⁵ GD3-41 to GD3-42.

off and there was no X in the area so the Claimant had to travel to Picton, Ontario to be present for this meeting. He had not invoiced for the stay and it was not being covered by the company he contracted. He explained he was not expected to have to stay overnight after the meeting but made a personal choice to stay as it was getting late in the day to travel back home.²⁶ The Claimant testified that he was asked by the company he contracted with to travel to Picton to see a client on May 9, 2018. It was late in the day and the weather was bad so he decided to stay overnight in the hotel.

[39] The law requires that only operating expenses can be deducted, not capital expenses.

[40] I agree with the Commission that the business name registration cost should not be considered in determining net income. This is not an operating expense but rather a capital expenditure so must be excluded. The meal receipts, two gas receipts from July 7, 2018 and July 8, 2018 as well as the parking receipt of \$2.50 dated July 24, 2018 are in the nature of operating type expenses. The Claimant is not disputing the exclusion of these expenses and he has not proven they were valid operating expenses related to his business. There is no indication on these receipts which business client they are for or how they relate to business activities. As such, I agree with the Respondent that they are to be disallowed.

[41] I find the hotel expense that was disallowed by the Commission was an operating expense. The Claimant would not have incurred this expense but for the client he had to see in Picton. Whether or not the corporate client he was working for approved the expense or not, the Claimant incurred that expense to generate the revenue related to the onsite visit. The Claimant did not stay in the hotel for personal reasons. I accept his testimony that he stayed due to the weather conditions. I find this expense to be an allowable operating expense. The Claimant's net income is to be recalculated for the week of May 6, 2018 to allow for the deduction of this expense from his revenue that week.

Issue 3: Did the Commission allocate the Claimant's earnings correctly?

[42] Yes. I find the allocation was done correctly.

²⁶ GD3-29.

[43] The Claimant testified that as soon as he started his business he called Service Canada twice to ask how to report his earnings. He was told two different things so he went to Service Canada and discussed his situation with an agent who was unsure how he should report. He then met with a supervisor whom went though his situation in detail. The supervisor told him to report his hours as he worked but to record his income as it was received. The supervisor and he went through an example of how he should report. The Claimant says he followed those instructions in reporting. However, he then got a notification that he had reported incorrectly and now he has a large overpayment.

[44] The Claimant argues that he does not know if the allocation the Commission is using now maximizes the amount of overpayment or minimizes it. He wants the fairest allocation. He does not know which one is the fairest. He argues it seems like he is paying a lot back, given what he earned.

[45] The Commission submits that for invoices where the Claimant had recorded the date of his onsite meetings, the Commission allocated those earnings to the week in which the date of the meeting fell. The Claimant was not able to tell the Commission what dates the work was completed, as he had not kept track. As such, for earnings that are not date specific, the earnings were pro-rated from the date of the current invoice, back to the date of the previous invoice.

[46] The Commission allocated the Claimant's earnings as follows²⁷:

Week beginning:	Earnings allocated:	Instead of:
February 25, 2018	\$156.00	\$345.00
March 4, 2018	\$161.00	\$0.00
March 11, 2018	\$176.00	\$0.00
March 18, 2018	\$492.00	\$0.00
March 25, 2018	\$628.00	\$0.00

²⁷ GD3-46.

April 1, 2018	\$835.00	\$0.00
April 8, 2018	\$755.00	\$0.00
April 15, 2018	\$752.00	\$0.00
April 22, 2018	\$1,288.00	\$0.00
April 29, 2018	\$745.00	\$0.00
May 6, 2018	\$1,267.00	\$0.00
May 13, 2018	\$665.00	\$678.00
May 20, 2018	\$700.00	\$0.00
May 27, 2018	\$689.00	\$0.00
June 3, 2018	\$700.00	\$0.00
June 10, 2018	\$709.00	\$0.00
June 17, 2018	\$755.00	\$0.00
June 24, 2018	\$762.00	\$0.00
July 1, 2018	\$745.00	\$0.00
July 8, 2018	\$752.00	\$0.00
July 15, 2018	\$762.00	\$0.00
July 22, 2018	\$762.00	\$7,240.00
July 29, 2018	\$762.00	\$0.00

[47] This allocation resulted in an overpayment of \$6,721.00.²⁸

²⁸ GD6-2.

[48] To determine how the self-employment earnings are to be allocated, I first have to decide if the Claimant's self-employment earnings arise from the performance of services or arise from a transaction or from neither. I have to decide this because the allocation methods are different depending on how the earnings arise.

Onsite Meetings

[49] The Claimant testified for onsite meetings he invoiced \$60.00 per hour and the meetings were usually two hours. He invoiced right away for those meetings. However, the Claimant has only noted the dates the meetings occurred on some of his invoices. The Claimant told the Commission that he did not keep track of the dates of all the meetings and no evidence was presented that clarified any of the missing dates at the hearing.

[50] I find that the Claimant's earnings from the onsite meetings arose from the performance of services. In that regard, a flat fee amount is paid specifically for the performance of service of the onsite interview. As such, for the onsite meetings, the earnings are to be allocated to the weeks in which the services are performed.²⁹

[51] The difficulty is that the Claimant's invoices do not all contain the dates of the onsite meetings. For the earnings that specify the meeting dates with the client, the Commission allocated the earnings to the week of the meeting. For earnings that are not date specific, the Commission pro-rated the earnings equally from the date of the current invoice, back to the date of the previous invoice. I find the on-site meetings were held at some point between the time of the invoices. The Claimant has provided no evidence to show, for the clients who dates are not listed on the invoices, in what weeks the meeting were held. Accordingly, I accept the Commission's allocation as correct.

Packages

[52] The Claimant said the package durations varied. They could be three months to a year. He explained that there is an intense period up front, coaching all the way through and an intense

²⁹ Subsection 36(6) of the *Employment Insurance Regulations*.

period when the person is accepting a new position. With some people, his services only last days if they get a job.

[53] I find the Claimant's package earnings arose from the performance of services. While the Claimant was not permitted to invoice until 30 days after starting with the client, the sum he was invoicing for was the entire package of X services he was authorized to provide. Although his services might continue after the 30-day mark, the payment still was for the performance of the package services. I find these type of earnings are more related to the performance of services than to a transaction. No specific transaction occurred at the 30-day mark. This was simply the permitted invoicing date.

[54] Because the package earnings arise from the performance of services, the earnings from these services are also to be allocated to the weeks in which the services are performed.³⁰ The difficulty again is that the invoices do not identify the dates in which any of the package services were performed for any of the clients noted on the invoices. The Commission therefore averaged the total package earnings over the period from the date of the invoice back to the date to the previous invoice. I accept the Claimant's testimony that the work could be spread out over a number of months. However, the Claimant has provided no evidence to show what dates he performed work for the clients listed on each of the invoices. Accordingly, I accept the Commission's allocation as correct.

[55] I will now review the specific allocation of the earnings on each invoice.

Invoices

Invoice 1

[56] Invoice 1 dated March 23, 2018 is for \$678.00. A number of clients are listed but no dates of service. The earnings listed appeared to have been generated by onsite meetings as they are all billed at \$120.00. The Claimant testified this was the case³¹ The Claimant told the Commission he was unable to provide dates of when the work was completed as he did not track the dates. The Commission therefore averaged the earnings from the date the self-employment

³⁰ Subsection 36(6) of the *Employment Insurance Regulations*.

³¹ GD3-37.

activities commenced (February 26, 2018) through to the date of the invoice. I find the meetings were held over the course of the invoice period. No evidence of dates of meetings was provide by the Claimant at the hearing. I therefore accept the Commission's allocation with respect to the earnings on Invoice 1.

Invoice 2

[57] Invoice 2 dated April 13, 2018 is for \$2531.20.³² This amount is broken down between earnings from onsite meetings and package earnings. The onsite meetings do have dates on this invoice. For the packaged amounts, no dates were indicated. The Claimant was not able to tell the Commission what dates he conducted the package work with clients as it was ongoing.³³

[58] The Commission allocated the earnings for the onsite meetings for which dates were provided, to the weeks the work was performed. For the package amounts, the Commission averaged the total invoiced package fees from the date of Invoice 2 to the date of the prior invoice.³⁴ No evidence of dates of package work was provided by the Claimant at the hearing. I therefore accept the Commission's allocation with respect to the earnings on Invoice 2.

Invoice 3

[59] Invoice 3 dated May 15, 2018 is for \$4446.55.³⁵ This amount is broken down between earnings from onsite meetings and package earnings. The onsite meetings do have dates. For the packaged amounts, the invoice notes the clients are over 30 days but no dates of service are indicated.

[60] The Claimant was not able to tell the Commission what dates he conducted the package work with clients as it was ongoing.³⁶ The Commission allocated the earnings for the onsite meetings for which dates of work were provided to the weeks the work was performed. For the packaged amounts, the Commission averaged the total invoiced package from the date of Invoice 3 to the date of the prior invoice. No evidence of dates of package work was provided by the

³² GD3-66.

³³ GD3-37.

³⁴ GD3-37.

³⁵ GD3-63.

³⁶ GD3-38.

Claimant at the hearing. I therefore accept the Commission's allocation with respect to the earnings on Invoice 3.

Invoice 4

[61] Invoice 4 dated June 15, 2018 is for \$3101.85.³⁷ This amount is broken down between earnings from onsite meetings and package earnings. The onsite meetings do not have dates of service. The Claimant was not able to tell the Commission what dates the work was completed as he had not kept track. A list of clients over 30 days and invoiced package amounts were also noted but not dates of service.

[62] The Commission averaged the total invoiced amount from the date of invoice 3 to the date of invoice 4. The Claimant did not provide any dates of service of this work at his hearing. Without any evidence from the Claimant specifically as to the dates any of this work was performed, I accept the Commission's allocation.

Invoice 5

[63] Invoice 5 dated August 15, 2018 shows total earnings of \$6644.40.³⁸ This amount is broken down between earnings from onsite meetings and package earnings. The onsite meetings do not have dates of service. The Claimant was not able to tell the Commission what dates the work was completed, as he had not kept track. A list of clients over 30 days invoiced for package amounts were also noted.

[64] The Commission averaged the total invoiced amount from the date of Invoice 4 to the date of Invoice 5. The Claimant did not provide any dates of service of this work at his hearing. Without any evidence from the Claimant specifically as to the dates any of this work was performed, I accept the Commission's allocation.

Issue 4: Can the Tribunal write off the overpayment arising from the allocation?

[65] No. The Tribunal cannot write off the overpayment.

³⁷ GD3-68.

³⁸ GD3-69.

[66] The Commission submits that the Claimant's obligation to repay an overpayment is not subject to reconsideration or appeal.

[67] The Claimant says it is unfair that he have such a large overpayment. He says he followed the instructions of the Commission to report his earnings as received and now the Commission is allocating his earnings a different way causing him a large overpayment.

[68] The Commission may write off an amount payable if certain conditions are met.³⁹ The Commission may waive or reduce the amount of interest provided for in this section if certain conditions are met. The language in the legislation provides that "the Commission may..." which has been interpreted to mean that the decision in question is one that lies within the discretion of the Commission. In other words, it is not open to the Tribunal, on its own initiative, to make or interfere with these decisions.

[69] A decision of the Commission that is made under the EI Regulations regarding the writing off of any penalty owing, amount payable or interest accrued, is not subject to reconsideration⁴⁰. Since this type of decision cannot be the subject of a reconsideration, a claimant cannot appeal such a decision to the Tribunal.⁴¹

[70] The Tribunal has sympathy for the Appellant's situation. His situation is complicated and it is clear that he sought out guidance when he started his business and tried to follow the Commission's instructions with reporting his self-employment earnings. However, no matter how sympathetic the circumstances the Tribunal does not have jurisdiction to waive the Claimant's obligation to repay the overpayment or to order the Commission to write off the overpayment.⁴²

CONCLUSION

[71] The appeal is dismissed with modification. The Commission's determination of net income for the week of May 6, 2018 is to be modified to allow for a deduction of the hotel

³⁹ Subsection 56(1) of the *Employment Insurance Regulations*.

⁴⁰ Subsection 112.1 of the *Employment Insurance Act*.

⁴¹ Section 113 of the *Employment Insurance Act*.

⁴² *Canada (Attorney General) v. Buors*, 2002 FCA 372; *Canada (Attorney General) v. Woods*, 2002 FCA.

expense of \$123.17. The Claimant's self-employment earnings are to be allocated as determined by the Commission. Given the Claimant's efforts to report his self-employment earning as directed, I would recommend the Commission consider writing off the overpayment. The Tribunal, however, has no jurisdiction to waive repayment or order the write off of the overpayment.

Charlotte McQuade

Member, General Division - Employment Insurance Section

HEARD ON:	August 12, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	S. D., Appellant