



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *AS v Canada Employment Insurance Commission*, 2019 SST 1689

Tribunal File Number: GE-19-3332

BETWEEN:

A. S.

Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Bernadette Syverin

HEARD ON: November 1, 2019

DATE OF DECISION: November 25, 2019

DECISION

[1] I dismiss the appeal. The money that the Claimant received is earnings. They were correctly allocated and deducted from her benefits.

OVERVIEW

[2] The Claimant suffered injuries in a car accident and she collected employment insurance benefits. The Claimant told the Canada Employment Insurance Commission (Commission) that while collecting employment insurance benefits, she also received payments from her automobile insurance company. The Commission determined that the payments were earnings, allocated and deducted 50% of those earnings from the Claimant's employment insurance benefits. The Claimant appealed this decision before the Social Security Tribunal.

PRELIMINARY MATTERS

[3] In her notice of appeal, the Claimant asked for a hearing via videoconference which took place on October 28, 2019. However, during the hearing, I noticed that the Claimant wasn't feeling well as she constantly needed to stand up. Her representative confirmed that the Claimant couldn't sit down for prolonged periods. Therefore, I adjourned the hearing and we reconvened for a hearing via teleconference on November 1, 2019.

ISSUES

[4] The issue in this case is whether the payments the Claimant received are earnings. Therefore, I have to decide:

- a) Did the Claimant receive earnings? If so, how should they be allocated?
- b) If it's earnings, did the Commission correctly decide to deduct 50% of the earnings from benefits?

ANALYSIS

[5] The Claimant lives in Ontario where her automobile accident took place on February 6, 2019. After her accident, she sought compensation from her motor vehicle insurance plan and she received income replacement benefits in the amount of \$400 a week from February 13, 2019. The Commission submits that the income replacement benefits are earnings. The Claimant agrees that she received income replacement benefits but she disagrees that this income is earnings.

a) Did the Claimant receive earnings? If so, how should they be allocated?

[6] Payments received from a motor vehicle accident insurance plan are earnings when they meet the following three conditions:¹

- they are paid by a motor vehicle accident insurance plan provided under or pursuant to a provincial law;
- and they are paid to compensate the actual or presumed loss of employment;
- and the insurance provider didn't take into account employment insurance benefits in determining the amount of the payments.

Are the payments paid by a motor vehicle accident insurance plan provided under or pursuant to a provincial law?

[7] Yes, the Claimant's payments are paid by a motor vehicle accident insurance plan provided under or pursuant to a provincial law. This is made clear by the following evidence.

[8] The Claimant argues that in the province of Ontario, motor vehicle insurance is not provided under a provincial law. She adds that unlike the province of Quebec, the government doesn't administer the Ontario motor vehicle insurance scheme. This isn't accurate as the case law establishes that residents of Ontario are subject to the regulations concerning automobile

¹ Subsection 35(2) d) of the *Employment Insurance Regulations*.

insurance compensation in that province, and that payments received under the motor vehicle insurance scheme were earnings.²

[9] The Claimant says that the government of Ontario didn't directly pay her income replacement benefits, she received her payment from her private insurer, and therefore, the amount received isn't earnings. I can't agree, because the form of government intervention isn't important. As long as a payment is made to a claimant under a motor vehicle insurance scheme regulated by the provincial government that provides for the payment of benefits for loss of wages, the benefits paid are earnings.³

[10] Plus, the Claimant provides a copy of her insurance policy, which refers to the *Insurance Act*, a legislation in Ontario. The Claimant's policy warns about offences under the *Insurance Act*. The insurance policy also says that more specific details about the policy is available on the Financial Services Commission of Ontario's website, which is a department within the government of Ontario.

[11] The Claimant also provides a copy of the Ontario Regulation entitled the Statutory Accident Benefits Schedule, or Ontario Regulation 34/10. This Regulation, is also cited in the Claimant's insurance policy to explain how the amount of her weekly income replacement benefit is calculated in the event of a claim. Moreover, this Regulation states the benefits, which every insurer should provide in every contract.⁴ Plus, the Claimant confirmed that based on the *Insurance Act*, her insurer is obligated to pay her a minimum of \$400 a week as income replacement benefits.

[12] Plus, under the *Insurance Act*, if the Claimant disagrees with the amount that her insurer pays her, she can dispute it by filing an appeal before the Licence Appeal Tribunal-Automobile Accidence Benefits Service.⁵ This in my view is another service provided by the government of Ontario.

² *Gates v. Ontario (Ministry of Community and Social Services)* (1994), 19 O.R. (3d) 158 (Ont. Div. Ct.).

³ *Canada (Attorney General) v. Lalonde*, A-378-96.

⁴ See GD7-3.

⁵ See GD7-11.

[13] For all of these reasons, I find that the claimant's weekly payments were paid by a motor vehicle accident insurance plan provided under or pursuant to a provincial law.

Were the payments issued to compensate the actual or presumed loss of employment?

[14] The Claimant agrees that the weekly sum of \$400 is paid to compensate her for her loss of income from her previous employment. Plus, the insurer describes the \$400 weekly benefit as income replacement; it's calculated based on the Claimant's annual income earned during the 52 weeks prior to her accident. Therefore, I find that the \$400 weekly benefit is paid to compensate the Claimant for her actual or presumed loss of employment.

Did the insurance provider take into account employment insurance benefits in determining the amount of the payments?

[15] The case law says that weekly payments from the Ontario No Fault Insurance Plan are considered earnings as long as the plan doesn't take employment insurance benefits into account.⁶ As evidenced by a document entitled claim calculator, the insurer didn't take into account employment insurance benefits when it determined that the Claimant was eligible to receive \$400 a week.

[16] For all of these reasons, I conclude that the amount of \$400 a week that the Claimant received from her motor vehicle accident insurance plan is earnings. This is because it was paid by a motor vehicle accident insurance plan provided under or pursuant to a provincial law; as compensation for the actual or presumed loss of employment; the insurer didn't take employment insurance benefits into account when it determined the amount to be paid.

[17] The law says that earnings have to be allocated.⁷ How should the Claimant's earnings be allocated?

[18] The Claimant didn't dispute the allocation of \$400 a week if they were determined to be earnings or the way the Commission deducted those earnings from her benefits.

⁶ *Steel* 2011 FCA 153.

⁷ Section 36 of the *Employment Insurance Regulations*.

[19] The Claimant's earnings are payments that she received from a motor vehicle accident insurance plan provided under or pursuant to a provincial law. It was paid to compensate her for her actual or presumed loss of employment. So, those earnings are allocated to the weeks that they are paid or payable.⁸

[20] The Claimant doesn't dispute the fact that her payments of \$400 weekly from the insurance company starts on February 13, 2019. There was only three days of payment for that week. So, I find that the Commission correctly allocated the amount of \$80 a day for three days or \$240 from February 13 to February 15, 2019. The Commission is also correct when it allocated \$400 a week starting on February 17, 2019, until the end of the claim.⁹

b) If it's earnings, did the Commission correctly decide to deduct 50% of the earnings from benefits?

[21] I find that the Commission correctly decided to deduct 50% of the earnings or \$200 a week from the Claimant's benefits.

[22] When a claimant receives earnings during the benefit period, those earnings must be deducted from any benefits payable.¹⁰ But a claimant who receives earnings during any week of unemployment can also receive 50% of employment insurance benefits, if their earnings are less than or equivalent to 90% of the weekly insurable earnings used to establish their rate of benefit.¹¹ In this case, the Claimant's weekly insurable earnings are \$905¹², which is less than the \$400 of earnings that she receives weekly from her insurer. So this means that the Commission correctly deducted 50% or \$200 of those earnings from the Claimant's benefits.

[23] For these reasons, the payments that the Claimant received are earnings, which have to be allocated. Fifty percent of the Claimant's earnings have to be deducted from the benefits paid to her.

⁸ Subsection 36 (12) c) of the *Employment Insurance Regulations*.

⁹ See GD3-38.

¹⁰ Section 19 of the *Employment Insurance Act*.

¹¹ Subsections 19(2) of the *Employment Insurance Act*.

¹² See GD3-26.

CONCLUSION

[24] I dismiss the appeal.

Bernadette Syverin

Member, General Division - Employment Insurance Section

HEARD ON:	November 1, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. S., Claimant N. S., Representative for the Claimant