



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *MF v Canada Employment Insurance Commission*, 2018 SST 1441

Tribunal File Numbers: GE-17-3246 / GE-17-3248 / GE-17-3249 / GE-17-3250

BETWEEN:

**M. F.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Yoan Marier

HEARD ON: March 15, 2018

DATE OF DECISION: March 28, 2018

## REASONS AND DECISION

### OVERVIEW

[1] In recent years, the Appellant has made four initial claims for Employment Insurance (EI) benefits. After reconsidering those claims, the Canada Employment Insurance Commission (Commission) decided that amounts the Claimant had received retroactively from the Commission des normes, de l'équité, de la santé et de la sécurité du travail [Quebec's labour standards commission] (CNESST) constituted earnings to be allocated to his EI benefits. That allocation resulted in an overpayment that the Appellant is now being asked to repay. The Appellant asked the Commission to reconsider. After reconsideration, it decided, on September 1, 2017, to uphold its initial decisions. On October 10, 2017, the Claimant appealed the reconsideration decisions to the Social Security Tribunal (Tribunal).

[2] The Tribunal must decide whether the amounts the Appellant received constitute earnings under section 35 of the *Employment Insurance Regulations* (Regulations), and, if so, whether those earnings were allocated in accordance with the provisions of section 36 of the Regulations.

[3] In accordance with section 13 of the *Social Security Tribunal Regulations*, the Tribunal has decided to deal with the Appellant's four appeals jointly in a single decision. The Tribunal finds that the appeals raise a common question of law or fact and that no injustice is likely to be caused to any party.

[4] The Appellant attended the hearing. His mother, L. P., was with him. The hearing was held by teleconference, given:

- a) the fact that the Appellant would be the only party attending the hearing
- b) the information on file, including the need to obtain additional information
- c) the fact that this type of hearing is consistent with the requirement in the *Social Security Tribunal Regulations* to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit

[5] After reviewing the evidence and the parties' submissions, the Tribunal finds that the amounts the Appellant received from the CNESST as income replacement benefits constitute earnings that the Commission allocated in accordance with the regulatory requirements. The reasons for this decision are set out below.

## **EVIDENCE**

### **File GE-17-3246**

[6] The Appellant filed an initial claim for benefits on June 25, 2014. A benefit period was established effective June 22, 2014. (GD3-3 to 14, GD4-1)

[7] Because of a settlement agreement in his favour (GD3-24 and 25), the Appellant received many retroactive payments from the CNESST for 2013 to 2016. These payments were made to him as income replacement benefits. (GD3-15 to 23)

[8] On June 7, 2017, the Commission allocated the amounts the Appellant had received to the weeks from June 29, 2014, to March 29, 2015. That allocation resulted in an overpayment that the Appellant is now being asked to repay. (GD3-26 to 28)

[9] On September 1, 2017, the Commission informed the Appellant that it was upholding its initial decision. (GD3-32 to 34)

[10] The Commission made a table that provides a breakdown of the allocation of earnings. The table shows that the Appellant has to repay an overpayment of \$5,460 for that benefit period. (GD3-35)

### **File GE-17-3248**

[11] The Appellant filed an initial claim for benefits on May 21, 2013. A benefit period was established effective May 19, 2013. (GD3-3 to 14, GD4-1)

[12] On June 6, 2017, the Commission allocated the amounts the Appellant had received to the weeks from May 19, 2013, to September 29, 2013. That allocation resulted in an overpayment that the Appellant is now being asked to repay. (GD3-26 to 28)

[13] On September 1, 2017, the Commission informed the Appellant that it was upholding its initial decision. (GD3-32 to 34)

[14] The Commission made a table that provides a breakdown of the allocation of earnings. The table shows that the Appellant has to repay an overpayment of \$7,515 for that benefit period. (GD3-35)

**File GE-17-3249**

[15] The Appellant filed an initial claim for benefits on March 12, 2015. A benefit period was established effective April 5, 2015. (GD3-3 to 14, GD4-1)

[16] On June 6, 2017, the Commission allocated the amounts the Appellant had received to the weeks from April 5, 2015, to August 23, 2015. That allocation resulted in an overpayment that the Appellant is now being asked to repay. (GD3-26 to 28)

[17] On September 1, 2017, the Commission informed the Appellant that it was upholding its initial decision. (GD3-32 to 34)

[18] The Commission made a table that provides a breakdown of the allocation of earnings. The table shows that the Appellant has to repay an overpayment of \$5,929 for that benefit period. (GD3-35 and 36)

**File GE-17-3250**

[19] The Appellant filed an initial claim for benefits on June 16, 2016. A benefit period was established effective May 22, 2016. (GD3-3 to 13, GD4-1)

[20] On June 6, 2017, the Commission allocated the amounts the Appellant had received to the weeks from May 22, 2016, to December 11, 2016. That allocation resulted in an overpayment that the Appellant is now being asked to repay. (GD3-25 to 27)

[21] On September 1, 2017, the Commission informed the Appellant that it was upholding its initial decision. (GD3-33 to 35)

[22] The Commission made a table that provides a breakdown of the allocation of earnings. The table shows that the Appellant has to repay an overpayment of \$11,126 for that benefit period. (GD3-35 and 36)

[23] The total overpayment for all four files is \$30,030. However, having already paid back a portion of the overpayment through his taxes, the Appellant is left with an outstanding balance of \$26,945 (GD3-29).

### **At the Hearing**

[24] Together, the Tribunal and the Appellant went over the information in the Commission's breakdown tables in all four files. The Appellant raised some questions and concerns about the allocation of earnings, the table amounts, and the Commission's calculations.

[25] He also told the Tribunal that he wanted to change certain reports of earnings previously made to the Commission, specifically during the benefit periods beginning June 25, 2014, and April 5, 2015.

[26] A few days after the hearing, the Appellant sent the Tribunal a letter listing in greater detail the main questions raised at the hearing. The Appellant's letter also mentions his desire to change some of the reports of earnings he had previously made to the Commission. (GD5)

### **SUBMISSIONS**

[27] The Appellant argues as follows:

- a) There are some inaccuracies in the Commission's breakdown tables.
- b) He has trouble understanding the situation and the amounts he has to repay.
- c) He is dissatisfied with the quality of the service received from the Commission agents and the explanatory information he was given. This has greatly complicated his understanding of the amounts he has to repay.

[28] The Respondent argues as follows:

- a) In this case, the Claimant received money from the CNESST, and the money was paid to him in the form of income replacement benefits. The Commission submits that this money constitutes earnings under section 35(2)(b) of the Regulations because it was given to the Claimant as payment to replace his income. This means that, under section 36(12)(d), the Commission correctly allocated those earnings to the periods covered by those payments.

## ANALYSIS

[29] The relevant statutory provisions appear in the annex of this decision.

[30] The provisions related to the determination of earnings for benefit purposes and to the allocation of earnings for benefit purposes are mentioned in sections 35 and 36 of the Regulations, respectively. Section 35 defines what constitutes income and specifies what types of income must be considered earnings. Section 36 states how earnings must be allocated.

[31] The Federal Court of Appeal has confirmed the principle that amounts that constitute earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations. (*Boone v Canada (Employment Insurance Commission)*, 2002 FCA 257)

[32] Earnings include any receipt or consideration received for the work done. To be considered earnings, the income must arise out of employment, or there must be a “sufficient connection” between the claimant’s employment and the sum received. (*Canada (Attorney General) v Roch*, 2003 FCA 356)

[33] Here, the Commission allocated amounts the Appellant had received from the CNESST as income replacement benefits. This allocation affected the EI benefits payable to the Appellant during several benefit periods and resulted in an overpayment he is now being asked to repay. The benefit periods in question are those beginning May 19, 2013, June 22, 2014, April 5, 2015, and May 22, 2016, respectively.

[34] The letters from the CNESST on file clearly show that the disputed amounts were paid to the Appellant retroactively as income replacement benefits from May 16, 2013, to January 1, 2017.

[35] Section 35(2)(b) of the Regulations states that workers' compensation payments received or to be received by a claimant constitute earnings. Umpires also confirmed this in certain files with similar facts (see CUB 75298 and CUB 77475). The Tribunal finds that the amounts the Appellant received from the CNESST as income replacement benefits constitute earnings to be allocated in accordance with the regulatory requirements.

[36] Concerning the allocation of those earnings, section 36(12)(d) of the Regulations states that workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments, must be allocated to the weeks in respect of which the payments are paid or payable.

[37] At the hearing, the Appellant raised a number of questions and arguments concerning the documents and breakdown tables the Commission had provided. As a result, the Tribunal has reviewed the Commission's allocation of the disputed amounts for each benefit period in question.

[38] In the interest of conciseness, the Tribunal will not mention certain points the Appellant raised or certain clerical errors the Tribunal has noted that have no bearing on the issue, namely the allocation of the amounts received from the CNESST and the resulting overpayment.

[39] **For the benefit period beginning May 19, 2013 (file GE-17-3248)**, the Tribunal has not identified any errors in the allocation of the amounts received from the CNESST that could affect the overpayment the Appellant owes.

[40] **For the benefit period beginning June 25, 2014 (file GE-17-3246)**, the Tribunal has noticed that certain amounts in the Commission's breakdown table are inconsistent with the overpayments that were assessed. More specifically, the amounts in the "OP/(UP)" (overpayment/underpayment) column for the weeks of September 14, 21, and 28 are clearly incorrect because they are higher than the amounts shown for the benefits paid to the Appellant

or his earnings. These amounts seem to have been written in the wrong place or incorrectly added to the table.

[41] The Tribunal finds that this situation is likely related to clerical errors that occurred when the breakdown table was completed, since the overpayment amount in question (\$5,460) remains unchanged after the new calculations the Tribunal has made using the amounts that should have been in the OP/(UP) column of the table (week of Sept. 14: OP should have been \$438 / week of September 21: OP should have been \$455 / week of Sept. 28: no OP should have been recorded in the table). Therefore, it seems that, despite everything, the Commission allocated the earnings correctly in this file.

[42] **For the benefit period beginning April 5, 2015 (file GE-17-3249)**, the Tribunal has not identified any errors in the allocation of the amounts received from the CNESST that could affect the overpayment the Appellant owes.

[43] **For the benefit period beginning May 22, 2016 (file GE-17-3250)**, despite probable clerical errors in the “Benefits paid” or “Benefits payable” columns of the breakdown table (weeks of June 5 and 12), it seems that the amounts the Appellant received from the CNESST were allocated correctly and that the calculation of the resulting overpayment is not incorrect.

[44] As the Commission mentions in its arguments, in some files, including GE-17-3249 (April 5, 2015, benefit period), it had to apply the Appellant’s earnings during his waiting period to the first weeks when benefits were payable to him. This explains the higher overpayment amounts for those weeks.

[45] At the hearing, the Appellant mentioned wanting to change some of the reports of earnings previously made to the Commission, specifically during the benefit periods beginning June 25, 2014, and April 5, 2015 (see also GD5). According to him, some of the amounts he declared to the Commission are incorrect because they are based on an estimate of his earnings at the time, not on his actual pay stubs.

[46] The Tribunal wants to clarify that the issue here concerns only the allocation of income replacement benefits the Appellant received from the CNESST, not the amounts he previously



declared as earnings. The Tribunal lacks the necessary jurisdiction, tools, and information to make retroactive changes to the earnings previously declared by the Appellant, since the Commission accepted those amounts as accurate at the time, and they were never reconsidered under section 112 of the *Employment Insurance Act*. This means that the Tribunal cannot accept the Appellant's submissions on this point. If the Appellant wants to make retroactive changes to his past reports concerning his earnings, or if he has questions in this regard, he will have to contact the Commission directly.

[47] Concerning the earnings that the Commission established, the Appellant argues that the rounding of the amounts received from the CNESST cost him \$1 each week. On this point, section 36(20) of the Regulations states that, when allocating earnings, a fraction of a dollar that is equal to or greater than one half is to be taken as a dollar and a fraction that is less than one half is to be disregarded. Therefore, it seems that the Commission acted in accordance with the regulatory requirements when it rounded the earnings subject to allocation before calculating the weekly overpayment amount.

[48] The Appellant also submits that the total net amount of benefits received is lower than what the Commission is asking him to repay. This may be because taxes were deducted at source from the benefits paid to the Appellant. For the purposes of this case, the Tribunal confirms that the gross amount of benefits is what must be considered in calculating the overpayment, not the amount of benefits after tax deductions. The Appellant could contact the Canada Revenue Agency and inquire about the possibility of being reimbursed for the income tax that was deducted from the EI benefits he now has to repay. The same applies to all of the Appellant's questions concerning his taxes or his tax adjustment for 2016; these questions should be addressed to the Canada Revenue Agency, since they fall outside the Tribunal's jurisdiction.

[49] The Appellant also mentioned the difficulties he had faced confirming the amounts he has to repay because of the complexity of his situation and because of some inaccuracies in the Commission's breakdown tables. The Tribunal agrees that the Commission's breakdown tables are complex. In addition, they were completed in different ways across the different files (for example, the "Benefits payable" column was not always completed), and they definitely contain some clerical errors that the Commission should have caught. The Tribunal understands that all

of these things may have been a source of frustration for the Appellant by making it very difficult to understand the amounts he has to repay, which is unfortunate. Sadly, the Tribunal is unable to rectify this situation, since it has no control over the quality of the tables and explanatory information that the Commission provided.

[50] The same applies to the Appellant's dissatisfaction with the quality of the service received from the Commission agents and the insufficient information he was given concerning the debt he has to repay. The Tribunal is independent of the Commission and has no control over how it interacts with claimants.

[51] At the hearing, the Appellant said that he might receive other payments from the CNESST in the future. The Tribunal wants to clarify that this decision is being made based on the issues and the evidence available at this time. If the Appellant receives other amounts from the CNESST after this decision has been made, he will have to contact the Commission to declare those amounts to it.

[52] The Tribunal has not identified any errors in the Commission's allocation of the amounts the Appellant received from the CNESST.

[53] The Tribunal finds that the amounts the Appellant received from the CNESST as income replacement benefits constitute earnings. There is every indication that the Commission allocated those earnings in accordance with the regulatory requirements.

## **CONCLUSION**

[54] The appeal is dismissed.

Yoan Marier  
Member, General Division – Employment Insurance Section

**ANNEX**

**APPLICABLE LAW**

***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.