



Citation: *CH v Canada Employment Insurance Commission*, 2024 SST 863

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: C. H.

Respondent: Canada Employment Insurance Commission
Representative: Nikkia Janssen

Decision under appeal: General Division decision dated
February 9, 2024 (GE-23-3495)

Tribunal member: Glenn Betteridge

Type of hearing: Teleconference

Hearing date: July 16, 2024

Hearing participants: Appellant
Respondent's representative

Decision date: July 25, 2024

File number: AD-24-126

Decision

[1] I am allowing C. H.'s appeal.

[2] The General Division made an important factual error. It allocated and then deducted the incorrect weekly amount of workers' compensation benefits from Employment Insurance (EI) benefits he received.

[3] To remedy (fix) that error, I have made the decision the General Division should have made. I accept the parties' agreement about the allocation of the Claimant's workers' compensation benefits. And I accept their agreement about the overpayment the Claimant owes (\$1,989).

Overview

[4] C. H. is the Claimant in this case. In 2001, he was injured at work. He applied for and received EI sickness benefits starting July 25, 2021.

[5] Then the Nova Scotia Workers' Compensation Board (WCB) granted him Temporary Earnings Replacement benefits, effective September 7, 2021. He told the Commission about this. And he appealed the WCB decision.

[6] In June 2023, the Claimant won his case against the WCB. The WCB paid him benefits starting July 27, 2021. He received a retroactive lump sum payment, which included a rate increase (2023 lump sum WCB payment).

[7] The Commission went back and allocated the 2023 lump sum WCB payment to weeks of EI benefits he had received in 2021. This created a \$2,504 EI overpayment. The Commission upheld its decision when the Claimant asked it to reconsider. He appealed to the Tribunal's General Division. The General Division dismissed his appeal.

[8] The Claimant argues the Commission had no right to deduct his 2023 lump sum WCB payment from his 2021 EI benefits. The Commission disagrees. But it says the

General Division was wrong about the amount of workers' compensation benefits he received each week. The Claimant agrees.

Issues

[9] There are three issues in this appeal:

- Did the General Division make a legal error when it decided the 2023 lump sum WCB payment was earnings that had to be allocated and deducted from the 2021 EI benefits the Claimant received?
- Did the General Division make an important factual error when it confirmed the Commission's allocation and deduction of the 2023 lump sum WCB payment?
- If the General Division made an error, how should I fix the error?

Analysis

The Appeal Division's role

[10] The law gives the Appeal Division the power to fix a General Division decision where a claimant shows the General Division made one of these errors:

- It based its decision on a legal error.
- It based its decision on an important factual error.¹

The General Division didn't make a legal error—the lump sum WCB payment was earnings the Commission had to allocate

[11] The General Division makes a legal error where it misinterprets or doesn't use the proper legal test from the *Employment Insurance Act* (EI Act) or *Employment Insurance Regulations* (EI Regulations).

¹ Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) calls sets out these grounds of appeal. I will call these errors.

[12] The Claimant argues that the General Division made an error when it didn't decide his case based on what the Service Canada agent told him, the Commission's website, and the EI *Digest of Benefit Entitlement Principles* (Digest). Those sources all say the same thing—his workers' compensation benefits should not be deducted from his EI benefits, because he didn't **receive** the lump sum WCB payment **during** his period of illness or injury.

[13] The Commission argues the General Division didn't make a legal error. The lump sum WCB payment was earnings under section 35(2)(b) of the EI Regulations. So, the Commission had to allocate those earnings according to 36(12)(d) of the EI Regulations.

– **What the law says about earnings, allocation and deduction of earnings, and overpayments**

[14] Section 35 of the EI Regulations say **what types of income count as earnings**. Section 36 tells the Commission the week or weeks to which it should allocate (in other words, assign) the earnings.

[15] Where the Commission allocates earnings to a week when the person is entitled to get EI benefits, section 19(2) of the EI Act says the Commission has to deduct some of those earnings from EI benefits.

[16] As in this case, a person might receive income after they have received EI benefits. If that income counts as earnings, the Commission has to allocate it to certain weeks and then deduct it from the EI benefits the person received in each of those weeks. This will result in an overpayment, which the person has to repay to the Commission.²

² See section 43 of the *Employment Insurance Act* (EI Act).

– **The 2023 lump sum WCB payment was earnings and the Commission had to allocate it**

[17] I agree with the Commission’s argument. The General Division didn’t make a legal error.

[18] The General Division decided the workers’ compensation benefits the Claimant received in 2023 were earnings under section 35 of the EI Regulations.³ Although the General Division didn’t specifically refer to it, section 35(2)(b) says that earnings include “workers’ compensation payments received or to be received by a claimant other than a lump sum pension paid in full and final settlement for a clam for workers’ compensation payments.”

[19] The General Division considered whether those benefits were not earnings under the exception in section 35(7).⁴ It was correct to decide they didn’t fall under that exception. The evidence before the General Division shows that in 2023 the Claimant received a lump sum WCB payment (and rate increase) for Temporary Earnings Replacement. These benefits are not a pension.

[20] The General Division was also correct to find the Commission had to allocate the workers’ compensation payments under section 36(12) of the EI Regulations.⁵

[21] According to that section, the Commission had to allocate the workers’ compensation benefits to the weeks in which the payments are paid or **were payable**. In other words, it doesn’t matter that the Claimant actually received the lump sum WCB payment in 2023. It matters that the lump sum WCB payment was paid to him for the weeks in 2021 when he was legally entitled to those benefits.

– **I can’t accept the Claimant’s arguments about errors he says the General Division made**

[22] The Claimant argues that the General Division should have followed what the Service Canada agent told him in July 2023, after a full investigation. She told him he

³ See paragraph 6 of the General Division decision.

⁴ See paragraph 13 of the General Division decision.

⁵ See paragraph 23 of the General Division decision.

didn't have to pay back EI benefits on account of the lump sum WCB payment he got in June 2023. She told him that "no money was owed."

[23] Unfortunately for the Claimant, I can't accept his argument. The courts have said a person can't rely on misinformation from the Commission or its representatives that goes against the law.⁶ In other words, the Commission and this Tribunal have to follow the EI Act and EI Regulations.

[24] The Claimant also argued the General Division decision goes against the information on the Commission's website. He argues the website says only workers' compensation payments received "during" the period of illness or injury have value as earnings.⁷ He also argued that the website said he had to sign an undertaking to repay benefits.⁸ Because the Commission didn't make him do that, he doesn't have to repay the benefits.

[25] Unfortunately for the Claimant, I can't accept his argument. The Commission's website isn't law. And it doesn't have the force of law. So, the Commission can't change the EI Act or EI Regulations with what it writes on the website.

[26] It also seems the Claimant is misreading the Commission's website. "During" refers to employment income lost, not to benefits received, when the person was ill or injured. In the Claimant's case, he received WCB benefits to replace the income he lost during the period of his illness or injury. The Commission's website says those temporary payments have value as earnings for benefit purposes.⁹

[27] Finally, the Claimant argued at the Appeal Division hearing that the General Division should have followed what the Digest says. He argues it says the same thing

⁶ The Federal Court of Appeal recently stated this principle in *Puig v Canada (Attorney General)*, 2024 FCA 48 at paragraph 38.

⁷ See AD1-8.

⁸ See AD1-9.

⁹ Go to www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-5/compensation-incapacity.html#a5_11_3.

the website says about workers' compensation payments received "during" the period of illness or injury.

[28] Unfortunately for the Claimant, I can't accept this argument. The Digest is a non-binding guidance document.¹⁰ It doesn't have the force of law. So, the Digest can't override the EI Act or EI Regulations. Also, the Digest doesn't support the Claimant's argument—it supports the Commission's argument. Section 5.11.3 of the Digest says: "WCB payments received or to be received by a claimant, other than lump sums or pensions paid in full and final settlement of a WCB claim, are earnings for benefit purposes (EIR 35(2)(b))."

The General Division made an error about the amount of weekly workers' compensation benefits it had to allocate

[29] The General Division makes an important factual error if it bases its decision on a factual finding it made by ignoring or misunderstanding the evidence.¹¹ In other words, the evidence goes squarely against or doesn't support a factual finding the General Division made.

[30] The Commission conceded (in other words, accepted) that the General Division was wrong to accept the weekly amount of workers' compensation benefits the Commission used (\$800).¹² The General Division was wrong to reject the Claimant's argument that \$666 was the correct weekly amount.¹³

[31] The WCB documents and his bank records showed that the Claimant's weekly workers' compensation benefit was not \$800.¹⁴ For most weeks, he received \$667.

¹⁰ See *Sennikova v Canada (Attorney General)*, 2021 FCA 982 at paragraph 60.

¹¹ Section 58(1)(c) of the DESD Act says it's a ground of appeal where the General Division based its decision on an erroneous finding of fact it made in a perverse or capricious manner or without regard for the material before it. I have described this ground of appeal using plain language, based on the words in the Act and the cases that have interpreted the Act.

¹² See the Commission's documents AD2, AD9, and AD13.

¹³ See paragraphs 16 and 16 of the General Division decision.

¹⁴ See GD3-38 to GD3-40, GD3-49, and GD5-3 to GD5-7.

[32] Based on this mistake about the facts, the General Division confirmed the \$2,504 overpayment and dismissed the Claimant's appeal. In other words, it based its decision on this mistake. This means the General Division made an important factual error.

Fixing the error by making the decision the General Division should have made

[33] The law gives me the power to fix the General Division's error.¹⁵

[34] The Claimant and the Commission agreed that if I found an error, I should make the decision the General Division should have made. I agree. Both parties had a full and fair opportunity to present evidence at the General Division. And they both accept the evidence I need to make my decision.

[35] The Commission prepared a written explanation of its position on the revised allocation and overpayment.¹⁶ The Commission also sent in a helpful table that shows:

- how it allocated the Claimant's weekly workers' compensation benefits to weeks in 2021 when he also received EI benefits
- the amount of EI benefits he was entitled to get each week after deducting his weekly workers' compensation benefits from his weekly EI entitlement
- the revised overpayment¹⁷

[36] The Claimant reviewed that information. He agreed with the Commission's allocation based on the correct amounts of weekly workers' compensation benefits he received. And he agreed with the revised overpayment of \$1989 (rather than the \$2504 overpayment from the notice of debt).

[37] I accept the parties' agreement. It is supported by the law and by the evidence in the General Division record.

¹⁵ Section 59(1) of the DESD Act gives me these powers.

¹⁶ See AD2. The Commission also explained this in its written argument, AD13.

¹⁷ See AD9 for the Commission's overpayment breakdown table.

Conclusion

[38] I am allowing the Claimant's appeal.

[39] I have corrected the General Division's error by making the decision it should have made.

[40] I accept the parties' agreement about the allocation and deduction of the 2023 lump sum WCB payment. And I accept their agreement about the revised amount of the Claimant's overpayment (\$1,989).

Glenn Betteridge
Member, Appeal Division