Citation: *AT v Canada Employment Insurance Commission*, 2024 SST 1685

# Social Security Tribunal of Canada
## General Division – Employment Insurance Section

# Decision

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| **Appellant:** | A. T. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | Canada Employment Insurance Commission reconsideration decision (669494) dated June 28, 2024 (issued by Service Canada) |

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| **Tribunal member:** | Rena Ramkay |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | October 1, 2024, and October 4, 2024 |
| **Hearing participant:** | Appellant |
| **Decision date:** | October 22, 2024 |
| **File number:** | GE-24-2690 |

## Decision

[1] The appeal is allowed. I agree with the Appellant.[1]

[2] The Appellant didn't have earnings through wage loss insurance (WLI) from her employer. So, the Canada Employment Insurance Commission (Commission) can't consider potential payments under WLI to be earnings.

[3] This means the Commission must remove the allocation of WLI earnings from the Appellant's entitlement to Employment Insurance (EI) sickness benefits between February 25 and March 24, 2024.

## Overview

[4] The Appellant, A. T., stopped working on February 23, 2024, due to illness. She applied for EI sickness benefits on March 6, 2024. The Commission established her benefits to start on February 25, 2024.

[5] In her application for benefits, the Appellant said she wasn't covered under a sickness benefit plan through her employer.[2] But, the Record of Employment (ROE) issued by her employer said she was eligible for employer paid wage-loss insurance.[3]

[6] The Commission says the evidence on file shows that the Appellant's employer has a WLI plan and that she is eligible for it. It acknowledged that the Appellant hadn't applied for WLI and hadn't received any benefits. But it says the Appellant has an obligation to apply for the employer's WLI plan because it is a 'first payer'.[4] So, it

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[1] The *Employment Insurance Act* (EI Act) calls a person who applies for EI benefits a "claimant." A person who appeals a decision of the Canada Employment Insurance Commission (Commission) to the Tribunal is called an "Appellant."
[2] See GD3-8. All pages referenced are in the appeal file.
[3] Under section 18 Comments in the Record of Employment, the Appellant's employer wrote, "Employee eligible for employer paid short term disability," at GD3-16.
[4] Both employment insurance (EI) and wage-loss insurance (WLI) plans are 'payers.' A first payer is the insurance plan that an employee must go to first. The *Reducing your Employment Insurance (EI) Premiums Program Guide* at *Annex 1: Requirements for short-term disability plans,* under A(4), says that the WLI plan must be the first payer, meaning that the employer can't allow an employee to claim EI benefits as part of its payment structure. Sections 60 to 75 of the *Employment Insurance Regulations* (EI Regulations) set out the requirements of an employer's WLI plan in order for the employer to be eligible for a reduction of EI premiums.

decided that the Appellant was potentially entitled to payment from WLI in the amount of $640.13 per week and the WLI constitutes earnings.[5]

[7] The Commission then allocated (deducted) $640.13 per week for the whole period that the Appellant was requesting benefits.[6] It deducted the potential WLI benefits dollar for dollar from the Appellant's benefits for the weeks that those payments would have been paid, had the Appellant applied. The Commission decided the Appellant's weekly WLI benefits would be more than her EI benefit rate, so she can't receive any EI benefits for the same weeks she would have had WLI benefits.

[8] The Commission says if the Appellant makes a personal choice not to apply for WLI, any wage-loss payments to which she would have been entitled, had she applied for them, are still considered earnings.[7] And, it says the onus to prove that she wasn't entitled to WLI rests with the Appellant.

[9] The Appellant says she isn't eligible for her employer's WLI plan because it covers only non-work-related illness and injury, and her illness is work-related. She also says she isn't obligated to apply for benefits under the employer's WLI plan, according to her union's collective agreement.

[10] The Appellant says she won't apply for WLI because her employer told her she could lose her job or her seniority if her application is denied, and she is sure it will be, given that she doesn't meet the criteria of a non-work-related illness. And she says the WLI application requests unnecessary information and doesn't guarantee the privacy of

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[5] The Commission originally determined that the wage-loss insurance payment would be $1,200.00 at GD3-32 and GD3-33 but revised the amount to be $640.13 per week based on the information provided by the Appellant in her application and to the Commission regarding her hourly rate of $28.45 for 22.5 hours of work each week, at GD8-2. It says the amount was put in place to prevent the payment of benefits until such time that the Appellant provides either proof of denial from WLI or proof of the amount she would be entitled to receive if she was approved after applying. It says the allocation may require further modification later if the amount of WLI available to the Appellant, should she apply, is different from the allocation on file at GD8-3.

[6] The Commission allocated WLI earnings payable to the Appellant under section 36(12)(b) of the EI Regulations.

[7] The Commission says the WLI was paid or payable because the Appellant wasn't working due to illness, and that this constitutes earnings under section 35(2)(c) of the EI Regulations.

her information since she has to sign a waiver allowing the insurer to share information with a third party.

## Matters I have to consider first

### The hearing was adjourned so the Appellant's witness could testify

[11] In her submissions of September 23, 2024, and September 29, 2024, the Appellant asked that her witness participate in the hearing.[8] Her witness doesn't live in the same city so they could not attend the in-person hearing.

[12] At the hearing, I clarified with the Appellant how her witness' testimony was directly relevant to her appeal. The Appellant said the witness could provide testimony of her own experience with the WLI plan and confirm a pattern of behaviour with the employer's treatment of illness.

[13] I adjourned the hearing on October 1, 2024, and scheduled a videoconference hearing on October 4, 2024, to enable both the Appellant and her witness to participate. After the witness provided her testimony, the hearing was closed.

### This decision concerns whether the Appellant had earnings and whether those earnings were allocated correctly by the Commission

[14] The Appellant and her witness raised additional concerns about harassment by their employer and poor representation from their union. I have not addressed all these concerns in this decision because they are outside the scope of the legal test for the issue under appeal. And the court has confirmed that it is unnecessary to address arguments that are outside of my mandate.[9] There are other venues, such as the provincial human rights commission or the labour relations board, where the Appellant can raise these issues.

[15] I understand that the Appellant also believes she wasn't treated fairly by the Commission during the initial decision and reconsideration process.[10] But this isn't

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[8] See GD10-1; and GD12-32.
[9] See *Kuk v Canada (Attorney General)*, 2023 FCA 1134, at paragraph 45.
[10] See GD12-3 to GD12-24; and GD12-26 to GD12-32.

within my jurisdiction to consider. If she believes the Commission acted improperly, she needs to file a complaint with the Office for Client Satisfaction for ESDC.[11]

# Issues

[16] I have to decide the following issues:

a) Is the WLI the Appellant is eligible to apply for earnings?

b) If the WLI is earnings, has the Commission allocated the earnings correctly?

# Analysis

## Did the Appellant have earnings?

[17] No. I find that the Appellant didn't have earnings. Here are my reasons for deciding that the WLI the Commission said was "paid or payable upon application" isn't earnings.

[18] First of all, the law says that earnings are the entire income that you get from any employment.[12] The law defines both "income" and "employment." **Income** can be anything that you got or will get from an employer or any other person. It doesn't have to be money, but it often is.[13] **Employment** is any work that you did or will do under any kind of service or work agreement.[14]

[19] The EI Act defines certain types of payments as earnings. Payments made under a group wage-loss indemnity plan is one of these types.[15] This could include sickness or disability payments made through an employer's group insurance plan, like the Appellant's employer has.

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[11] The website for the Office for Client Satisfaction says that it is a neutral organization that receives, reviews, and responds to suggestions, compliments, and complaints about Service Canada's delivery of services. The website can be found at:. https://www.canada.ca/en/employment-social-development/corporate/service-canada/client-satisfaction.html
[12] See section 35(2) of the EI Regulations.
[13] See section 35(1) of the EI Regulations.
[14] See section 35(1) of the EI Regulations.
[15] See section 35(2)(c)(i) of the EI Regulations.

[20] The Commission acknowledges that the Appellant hasn't been paid any money under her employer's WLI plan. It says her employer indicated in the ROE that the Appellant was eligible for WLI, so it accepts that she is eligible. It says that, because the Appellant remains potentially payable under the WLI plan, the plan must act as first payer before EI benefits can be issued.

[21] The Commission says section 35(2)(c) of the *Employment Insurance Regulations* (EI Regulations) reinforces that, "payments a claimant has received or, on application, is entitled to receive" are considered earnings. It says the Appellant may be eligible for WLI, so she must apply. The Commission says if the Appellant can provide documentation to support that she has applied for this benefit and the plan administrator says she isn't entitled, it will rescind (or, remove) the allocation presently on her file.[16] But until then, it has allocated the potential payment that the Appellant might receive under her employer's WLI as earnings.

[22] The Appellant doesn't agree. She says her employer incorrectly wrote that she was eligible for the WLI plan on the ROE. She says she isn't eligible for her employer's WLI plan because it covers only non-work-related illness and injury.[17] The Appellant testified that her illness is work-related, as her medical note shows.[18] She also says her collective agreement doesn't require her to apply for WLI, instead it says she *may* apply.[19]

[23] This appeal raises two questions for me to consider in deciding if the Appellant has earnings:

- Is the WLI earnings?
- Does the Appellant have to apply for WLI?

[24] I will start with the first question.

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[16] See GD8-4.
[17] See the first and fourth paragraphs of a letter sent by the employer to the Appellant telling her she is required to apply for WLI for non-work-related injuries and illnesses at GD2-13.
[18] See GD12-25.
[19] See paragraph 26.3 of the Appellant's collective agreement at GD2-10.

- **Is the WLI earnings?**

[25] The Appellant and the Commission agree that the Appellant hasn't been paid any benefits under her employer's WLI. I accept this as fact. But the Commission says she has potential earnings under the WLI, and it considers these to be earnings for the purpose of allocating them against her benefits. So, I must decide if WLI that hasn't been paid, but may be "payable upon application," can be considered earnings for the Appellant.

[26] Since the Appellant hasn't received and accepted payment from the WLI, I have looked at what it means for earnings to be "payable upon application." The Employment Insurance Benefits and Leave section on the EI website says earnings are "payable" when:

- your employer or other person is required to pay you
- you can legally demand payment, and
- the obligation to pay the earnings is immediate.[20]

[27] It then states, "only earnings that are payable immediately will be allocated for EI benefit purposes. Earnings that are to be paid in the future will be considered and allocated when the obligation to pay them exists and only if the payment is for a period when benefits were claimed."

[28] The term "payable" isn't defined in the EI Regulations. In a *Federal Court* decision, *Attorney General of Canada v Yannelis*, it was determined that "payable" should be interpreted in light of its ordinary dictionary meaning.[21] While *Yannelis* was about the allocation of vacation pay, and there was no doubt the vacation pay was earnings, I find the court's discussion of the term "payable" to be relevant to this appeal.

[29] The dictionary definitions for payable found by the court included:

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[20] See Employment Insurance (EI) and the various types of earnings - Canada.ca

[21] See *Attorney General of Canada v Yannelis*, A-496-94.

> …that is to be paid; due; falling due (usually at or on a specified date, or to a specified person (*The Shorter Oxford English Dictionary*); and
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> …requiring to be paid… capable of being paid… due (*Webster's Third New International Dictionary*).

[30] *Yannelis* also referred to *R. v Palmer* (1980), 14 Alta. L.R. (2d) 265 (C.A.), where that court had to determine whether compensation (for flood damage) was "payable" under a provincial statute. In deciding it was not, the court said, at page 267:

> At the stage of this application, at least, there is no compensation payable under the Act or the regulations and, in my view, the section has no application. This is consistent with the generally understood meaning of "payable", namely (Jowitt's Dictionary of English Law, 2nd ed., p. 1337):
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> "A sum of money is said to be payable when a person is under an obligation to pay it. 'Payable' may therefore signify an obligation to pay at a future time, but when used without qualification 'payable' means that the debt is payable at once, as opposed to 'owing'".

[31] These court decisions guide me in defining "payable," as does the Commission's own information about earnings.[22] I find that "payable upon application" means that the claimant will be paid, not *may* be paid, after making an application or submitting the required form(s). The Commission itself has stated that only earnings that are immediately payable will be allocated against benefits. It says earnings that are to be paid in the future will be considered and allocated when the obligation to pay them exists. But it applied neither of these statements to the Appellant's claim.

[32] I find that, for an insurance plan like the WLI, there is no guarantee of payment upon application. The administrator of the WLI plan doesn't automatically pay a claimant as soon as they submit an application. Instead, it assesses the information submitted in

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[22] See Employment Insurance (EI) and the various types of earnings - Canada.ca

the claimant's application to decide *if* they will be compensated or paid. For this reason, I don't accept that the Appellant had earnings that were "payable upon application" to her employer's WLI.

[33] Furthermore, the evidence shows me the employer's WLI is for non-work-related illness.[23] I accept the medical note provided by the Appellant indicating that her illness is work-related.[24] In my view, the fact that the Appellant has a work-related illness which isn't covered under her employer's wage-loss insurance plan raises sufficient doubt that the Appellant would be eligible for WLI payments. And there is no guarantee the Appellant's claim would be approved, even if she was eligible. Accordingly, I find that there is no automatic payment of WLI upon the Appellant's application.

[34] The evidence shows me that the Appellant isn't guaranteed to be paid WLI upon application. As a result, I find that applying for WLI doesn't mean the potential WLI payments are earnings for the purposes of the EI Act and EI Regulations. This means the Commission can't allocate (deduct) the potential WLI payments because they do not constitute earnings.

- **Does the Appellant have to apply for WLI?**

[35] No, I find that the Appellant doesn't have to apply for her employer's WLI plan.

[36] The Commission says the onus is on the Appellant to show she would not receive payment, and therefore not have earnings, from the WLI plan. I acknowledge that the easiest way to prove she is not eligible for WLI would be for the Appellant to apply and be rejected. But I don't think the Appellant must apply for her employer's WLI and be rejected before she can receive EI benefits.

[37] The Appellant says her illness is work-related and her employer's WLI only applies to non-work-related illnesses. While her employer has said she is eligible for the plan, there is no evidence that this is the case, other than the employer's statements. The Appellant has provided sufficient documentation to show that the WLI plan is for

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[23] See GD2-13; GD3-19; GD3-22; and GD15-2.
[24] See GD12-25.

non-work-related illness.[25] And I accept as evidence her doctor's note indicating that her illness is work-related.[26]

[38] The Appellant also says her union's collective agreement says she isn't obligated to apply for benefits through her employer's WLI plan. She says her employer can't force her to apply to their plan. And she says the union has launched a grievance against the employer on behalf of a group of employees, herself included, who the employer has tried to force into the WLI process.

[39] The Appellant provided the application form for her employer's WLI.[27] She says the application requests unnecessary information and would require significant time for her doctor to complete it. The Appellant says that is a lot of effort for a claim (or, application) that is bound to fail, due to the fact her illness is work-related.

[40] And the Appellant is worried that her employer would have access to private information about her medical history that it isn't entitled to have because she has to sign a waiver allowing the insurer to share information with third parties. She says her employer told her she could lose her job or her seniority if her application is denied. She believes her employer is harassing and threatening her through the WLI program.

[41] The Appellant's witness, E.M., who was affirmed at the hearing, worked for the same employer and went through the process of applying for the WLI, as directed by her employer. E.M. testified that the employer applied for WLI on her behalf even though E.M.'s illness was also work-related. She says her medical leave was never accepted by the employer, and she was terminated within two or three weeks of completing the WLI application process. The Appellant says this shows a pattern of behaviour by the employer that she believes would happen to her if she applied for WLI.

[42] I agree that applying for WLI benefits when the Appellant knows she doesn't meet the criteria of a non-work-related illness is a lot of effort for a claim that will very likely fail. Making a decision on whether the Appellant is being harassed by her

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[25] See GD2-13; GD3-19; GD3-22; and GD15-2.
[26] See GD12-25.
[27] See GD10-8 to GD10-11.

employer is outside the scope of my authority. But I can accept that the Appellant had concerns about her private information being available to her employer through the process of applying for WLI. And I am satisfied that she believed there was a risk to her job, based on the experience of her witness.

[43] A Canadian Umpire Benefit (CUB) decision found that a claimant's withdrawal of his wage-loss application should not affect his entitlement to receive EI benefits.[28] In CUB 52557, the claimant withdrew his application for WLI because of a genuine fear that personal information wasn't secure and might be shared with his employer. He feared reprisal from his manager, as a result.

[44] In that case, the Appellant withdrew his application for WLI and negotiated a settlement with his former employer. The Commission said the money he was entitled to under the WLI should be allocated against his EI benefits. So, he received no benefits because of the allocation of potentially payable funds. The Umpire disagreed with the Commission and determined that an application for WLI could be withdrawn to pursue other alternatives. If the claimant did get other monies from the settlement those monies could be allocated once received.

[45] I am persuaded by the finding in CUB 52557 that an Appellant is not obliged to apply for WLI. This is because the circumstances in that case are the same as the Appellant's. In both cases the Commission allocated potential WLI money to EI benefits. In addition, both the claimant in CUB 52557 and the Appellant in this case had legitimate concerns about private information being insecure and shared with the employer, resulting in repercussions from the employer if deemed not eligible for WLI. If the Appellant receives compensation as a result of any action she takes against her

[28] Canadian Umpire Benefit (CUB) decisions are decisions of the Umpire, a Federal Court Judge, which was the second level of appeal under the previous appeal system for EI matters. I am not required to follow CUB decisions but may be persuaded by their reasoning. This CUB decision considers the issue of whether a claimant's decision to withdraw his application for WLI benefits didn't cancel his right to these benefits, which is similar to the Commission's argument here that the Appellant's refusal to apply doesn't cancel her right to the WLI benefits.

employer, the Commission can make a determination if that money should be allocated once it is received.

### Did the Commission allocate the earnings correctly?

[46] No. Only earnings can be allocated to (deducted from) EI benefits and I have determined that the Appellant had no earnings.[29]

## Conclusion

[47] The appeal is allowed.

[48] The Appellant didn't have earnings. There is nothing to allocate.

Rena Ramkay
Member, General Division – Employment Insurance Section

[29] See section 36 of the EI Regulations.