

PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision dated February 6, 2013 in which the Ministry of Social Development (the "ministry") decided that the Total Temporary Disability payments ("TTD") that the appellant received from ICBC were unearned income as defined in section 1 of the *Employment and Assistance for Persons with Disabilities Regulation* and, accordingly, no part of TTD was exempt from inclusion in the appellant's net income determined pursuant to section 24 of the Regulation.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), sections 1 (definitions of "earned" and "unearned income") and 24 and Schedule B, section 3

PART E – Summary of Facts

The evidence before the ministry on reconsideration included:

1. photocopies of various records and cheques from ICBC and from the appellant's lawyers confirming payment by ICBC of TTD to the appellant during the period of time material to this appeal; and
2. the appellant's handwritten statement forming Section 3 of the Employment and Assistance Request for Reconsideration.

At the hearing of the appeal the appellant's oral evidence included the following:

1. He had been injured in a motor vehicle accident in late 2011. ICBC had found him not to be at fault.
2. The injuries from the accident had rendered him unable to work until sometime in late 2012.
3. Prior to the accident he was employed as a part-time construction worker who was dispatched to various job sites by an employment broker.
4. During the period he was unable to work because of his accident-related injuries he received TTD from ICBC in the amount of \$232.50 every two weeks.
5. During that same period he received disability assistance as a family unit of one from the ministry.
6. The amount of TTD he received was calculated as a percentage of his average earnings prior to the accident.
7. At or about the time he began receiving TTD from ICBC he advised the ministry that he was receiving these payments. He was told by the ministry that TTD would be treated as earned income as these payments were to compensate him for lost wages. As earned income, the first \$500 of TTD would be exempt in calculating his net income each month. (On October 1, 2012 the EAPWDR was amended to increase the exempt amount to \$800 per month.)
8. In October, 2012, in the course of a review of his file, the appellant was informed by the ministry that TTD was unearned income and, as such, the exemption (referred to in item 7, above) was not available to him and he would have to repay some of the disability assistance he had received during the time that he was receiving TTD.
9. The ministry admitted that it had made an error when it had first advised him that TTD would be earned income to which the exemption, up to the limits set out in the EAPWDR, would be applied

The ministry, relying on the evidence set out in the reconsideration decision, led no evidence at the hearing of the appeal

The panel found as facts:

1. The appellant was in receipt of disability assistance as a sole recipient during the period material to this appeal.
2. In addition, during part of this same period the appellant received TTD from ICBC in the amount of \$232.50 every two weeks.
3. The appellant had been misinformed by the ministry when it advised him that TTD would be treated as earned income to which the earnings exemption would apply.

PART F – Reasons for Panel Decision

The issue

The issue on this appeal is whether or not the ministry reasonably determined that TTD the appellant received from ICBC was unearned income as defined in section 1 of the *EAPWDR* and, accordingly, no part of the TTD was exempt from inclusion in the appellant's net income determined pursuant to section 24 of the Regulation.

Excerpts from relevant legislation

EAPWDR

"earned income" means

(a) any money or value received in exchange for work or the provision of a service,

"unearned income" means any income that is not earned income, and includes, without limitation, money or value received from any of the following:

(d) insurance benefits, except insurance paid as compensation for a destroyed asset;

(g) employment insurance;

(j) workers' compensation benefits and disability payments or pensions;

Amount of disability assistance

24 Disability assistance may be provided to or for a family unit, for a calendar month, in an amount that is not more than

(a) the amount determined under Schedule A, minus

(b) the family unit's net income determined under Schedule B.

SCHEDULE B

Exemption — earned income

3 (1) The amount of earned income calculated under subsection (2) is exempt for a family unit if

(a) a recipient in the family unit has been receiving continuously for the 3 calendar months immediately preceding the calendar month for which the exemption is claimed

(i) disability assistance under the Act,

(ii) income assistance under the *Employment and Assistance Act*,

(iii) disability assistance or income assistance under a former Act,

(iv) a youth allowance under the *BC Benefits (Youth Works) Act*, or

(v) any combination of the assistance and allowances referred to in subparagraphs (i) to (iv).

(b) Repealed. [B.C. Reg. 369/2002.]

(2) The exempt amount for a family unit that qualifies under subsection (1),

(a) in the case of a family unit that is composed of one recipient who is

designated as a person with disabilities, is calculated as the lesser of

- (i) \$500, and
- (ii) the family unit's total earned income in the calendar month of calculation,

Position of the appellant on appeal

The position of the appellant on the appeal was that TTD was a wage replacement payment. The ministry acknowledged this, the appellant said, in the reconsideration decision when it described the appellant's TTD as being "for wage loss". Once that was conceded, the appellant argued, the obvious conclusion was that TTD was a form of "earned income", not "unearned income", as those terms are defined in section 1 of the EAPWDR. Thus, having established that TTD was earned income, the provisions of section 3 of the EAPWDR applied so as to exempt the first \$500 of TTD from the calculation of the appellant's net monthly income until October 1, 2012 and the first \$800 thereafter.

Position of the ministry on appeal

The position of the ministry on the appeal was that the reconsideration decision arrived at the only result that the legislation permitted. TTD did not fall within the definition of "earned income" in section 1 of the EAPWDR which required that "money or value [be] received in exchange for work or the provision of a service". The ministry submitted that the appellant did no work in exchange for the payments nor did he provide a service. The ministry argued that TTD was a form of insurance provided by ICBC and, as such, it was specifically included in the definition of "unearned income" in section 1 of the EAPWDR. The definition refers to "money or value received from ...insurance benefits" as one of the instances of "income that is not earned income".

Argument of the appellant on appeal

The appellant's advocate advanced three arguments in support of the position that TTD should properly be deemed to be earned income and, accordingly, the exemptions provided for in Schedule B, section 3 of the EAPWDR should be available to the appellant.

1. The advocate argued that TTD, as a wage loss payment, was rationally connected to the appellant's former employment. Had he not been employed prior to the accident he would not have been eligible for the benefit. Moreover, the benefit was closely tied to the appellant's employment because it was calculated as a percentage of the wage he had received prior to the accident, that is, the event which led to his eligibility for TTD. Though it was not a wage *per se*, it was, in the words of the definition of earned income set out in section 1 of the EAPWDR, in lieu of "money or value received in exchange for work or provision of a service". Accordingly, the advocate argued, it was neither rational nor fair that wages and amounts paid to replace wages should be treated differently, at least not in the context of calculating the net income of someone in the appellant's circumstances. They were both forms of earned income as that term is defined in section 1 of the EAPDWR.
2. The advocate conceded that TTD was a benefit derived from an insurance policy, in this appeal the insurance policy created by the *Insurance (Motor Vehicle) Act*. As such it might be thought that clause (d) of the definition of "unearned income", which included "insurance benefits" as unearned income, would conclusively establish that TTD was unearned income. However, the advocate pointed out that the reference to insurance benefits in the definition of

unearned income was not absolute. The full definition in clause (d) is "insurance benefits, *except insurance paid as compensation for a destroyed asset*" [emphasis added]. The advocate submitted that this exception applied in the appellant's circumstances because his ability to work was an asset. Alternatively, the wage he would have earned but for the accident was an asset. Thus, whether one viewed TTD as compensation for the loss of the ability to work or the wages from that work, the definition of "insurance proceeds" did not apply to the appellant and, accordingly, the TTD received by the appellant was not unearned income by virtue clause (d) of the definition of unearned income. It followed, the advocate argued, that if TTD was not unearned income, then it must be earned income.

3. The advocate also argued that there was a close connection between "worker's compensation benefits and disability payments" and TTD. The former are included in the definition of "unearned income" in section 1 of the EAPWDR. However, section 7.1 of Schedule B of the EAPWDR specifically exempts certain worker's compensation payments from inclusion in "unearned income" and provides that these benefits may be deducted in determining net income pursuant to section 24 of the EAPWDR in the same manner and in the same monetary amounts as earned income is deducted pursuant to section 3 of the Schedule B of the EAPWDR. Clearly, the advocate argued, this evidenced an intention on the part of the legislature to treat worker's compensation benefits as comparable to earned income for the purpose of determining the appellant's net income. Since TTD was analogous to worker's compensation, that is they are both wage loss programs designed to compensate injured persons for loss of wages, the treatment of TTD should be no different for the purpose of calculating net income for disability assistance purposes than worker's compensation benefits.

The panel's analysis of the evidence and arguments

The panel carefully considered the appellant's submissions. However, the panel was not persuaded that the clear language of the EAPWDR could be interpreted in the manner argued by the appellant's advocate. The panel concluded that the definition of earned income set out in section 1 of the EAPWDR clearly could not be interpreted to include TTD paid by ICBC to the appellant and, accordingly, it had to be unearned income since, pursuant to the preamble to the definition of "unearned income", "unearned income means any income that is not earned income".

The panel reached the conclusion set out in the previous paragraph on several grounds. Most importantly, the panel held that this conclusion, and not that of the appellant's, was consistent with the clear wording of the applicable legislation, in particular the definitions of earned and unearned income in section 1 of the EAPWDR. Moreover, it was the view of the panel that, had the minister intended to exempt TTD payments made by ICBC from being treated as unearned income in the calculation of net income under section 24 of the EAPDWR, the legislative scheme would have been drafted accordingly. Schedule B of the EAPWDR has scores of such very specific exemptions, some rather broad in application and others so narrow that one presumes that only a handful of individuals, if any, would be affected. Given the significant number of persons eligible for TTD from ICBC – that is, employed persons rendered temporarily unable to work to whom the no fault provisions of the universal automobile insurance program for British Columbia applies – it would be unreasonable to assume that the minister had not considered this group of potential claimants in drafting the categories of persons receiving disability assistance whose income would be exempt or partly exempt in calculating net income pursuant to section 24. In any event, even if the minister had not considered this very significant group, the panel has no jurisdiction to fill in what some persons might

consider a gap in the legislative scheme.

Dealing with the three arguments of the advocate set out above, the panel concluded as follows:

- 1 Though the panel agreed that TTD was rationally connected to the appellant's employment, that agreement does not lead inevitably to the conclusion that wages and wage loss payments are the same thing. Specifically, in the context of this decision, it does not lead to the conclusion that if wages are "earned income" then amounts received to compensate for wages not earned must also be "earned income". In the view of the panel "money or value received in exchange for work or the provision of service" does not logically include money or value paid to someone unable to work or provide service, whatever the reason for the inability. That the minister would consider one to be earned income and the other unearned income seems to the panel to be an entirely reasonable interpretation of the statutory definitions of these terms.
- 2 The panel was unable to accept the advocate's argument concerning insurance proceeds. To describe TTD as "insurance paid as compensation for a destroyed asset", the advocate had to establish that the appellant's ability to work or the wages he received from working (the advocate appeared to alternate between these two positions) was an asset. Perhaps in some circumstances these can be described as assets but the difficulty that the advocate did not adequately address was the adjective "destroyed" in the wording of the definition. In the view of the panel, had there been no such adjective, there might be some force to the advocate's submission. However, the panel concluded that the words "destroyed asset" limits the application of the exception to an asset which can be destroyed. Such a description is not apt in the appellant's circumstances. There was an interruption in his ability to work but not a destruction of that asset (if such it was). In any event, even if one somehow concluded that TTD was not an insurance benefit, one would still need to decide the question of whether or not TTD was earned income. For the reasons given in the previous section the panel concluded that it was not earned income and, accordingly, it was unearned income.
- 3 The worker's compensation analogy argued by the advocate is, like many analogies, a rather subjective, and hence imprecise, tool for ascertaining the proper interpretation of legislation. In analyzing the advocate's worker's compensation analogy the panel noted that exemption referred to by the advocate for worker's compensation benefits in Schedule B, section 7.1 of the EAPWDR is not as broad as the advocate suggested. It is rather specific. It is limited to compensation payments made under two sections of the *Worker's Compensation Act*, one dealing with temporary total disability, the other with temporary partial disability. There are other worker's compensation benefits that are not subject to the exemption section. Thus, the panel concluded that the advocate's argument that the treatment of worker's compensation benefits in the EAPWDR provided a template for treating the appellant's TTD was flawed. In any event, since, notwithstanding section 7.1, worker's compensation benefits is described in the EAPWDR as unearned income, this argument did not advance the advocate's fundamental objective of having TTD treated as earned income.

The panel's conclusion that TTD is unearned income is fortified by the inclusion of

"employment insurance" as one of the categories of income found within the definition of unearned income. Employment insurance payments are a form of wage loss benefit for persons, like the appellant, who are unable to work (albeit often for different reasons). The panel concluded that if employment insurance is unearned income then TTD, a very similar form of wage loss replacement income, would logically also be unearned income.

The foregoing discussion deals with the substantive submissions of the appellant. The appellant also argued that he was initially misled by the ministry into understanding that TTD was earned income. However, for the reasons stated, the panel concluded that whether or not the ministry misstated the proper characterization of TTD, such misstatement did not alter the proper characterization of TTD as unearned income and the consequent unavailability of an exemption of any part of that income pursuant to Schedule B, section 3 of the EAPWDR.

Conclusion

For the reasons given above, the panel concluded that the decision of the ministry – that TTD paid by ICBC to the appellant was unearned income as that term is defined in section 1 of the EAPWDR – was reasonably supported by the evidence and was a reasonable application of the relevant statutory provision in the circumstances of the appellant. The February 6, 2013 reconsideration decision is confirmed.