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EMPLOYMENT SECURITY ACT: Effect of unconstitutionality of workmen's compensation benefits off-set.

CONSTITUTIONAL LAW: Effect of unconstitutional statute.

Effect of unconstitutionality of section 27(m) of the Michigan Employment Security Act on deductions of workmen's compensation benefits from unemployment compensation benefits payable for the same week made prior to the decisions of the Michigan Supreme Court so holding discussed.

the doctrine of *res judicata* is applicable to Michigan Employment Security Commission determinations and redeterminations, referee and appeal board decisions, and to judgments, applying section 27(m) of the Michigan Employment Security Act.

Non-final judgments, Commission determinations and redeterminations, and referee and appeal board decisions, which have applied section 27(m) of the Michigan Employment Security Act, should be reconsidered and should be readjudicated by the judicial or quasi-judicial body still having jurisdiction.

No. 4628

March 25, 1968.

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This is in reply to your letter regarding the effect of the Michigan Supreme Court cases of *Fox v. Employment Security Commission*, 379 Mich. 579, and *Shaw v. Lakeway Chemicals, Inc.*, 379 Mich. 601, decided on November 7, 1967, holding that section 27(m) of the Michigan Employment Security Act[1] (hereinafter referred to as the Act), was from the beginning constitutionally invalid.

In view of these decisions, you have written:

1. What effect do these decisions have
   (a) On final decisions involving this section rendered by the courts, appeal board, referees and commission (determinations and redeterminations), and
   (b) On cases pending at each of these levels?
2. I would also like your specific advice with respect to the following:
   (a) Where deductions from unemployment benefits paid since September 6, 1963 have been made because of receipt of workmen's compensation, is the amount of such deduction now owed to the claimant by this Commission? Must he re-apply for such benefits?
   (b) Where restitution of unemployment benefits was required because of workmen's compensation payments received after payment of unemployment benefits, and the restitution as required was repaid by the claimant, are such restitution repayments to be refunded to the claimant?

[1] Act No. 1, P.A. 1936, ex. sess., as amended, being C.L.S. 1961 § 421.1 *et seq.*, M.S.A. 1960 Rev. and 1968 Cum. Supp. § 17501 *et seq.*

(c) If failure to report workmen's compensation received resulted in a determination of intentional misrepresentation, etc., and the appropriate penalties were imposed, including forfeiture of benefits, are forfeited benefits to be refunded to the claimant?

(d) Can retroactive claims be filed by and certifications taken from claimants who previously failed to file either because of advice given by a Branch Office or because of personal knowledge of ineligibility as the result of the application of the provisions of Subsection 27n prior to this decision?

The section of the Act,[2] which was declared unconstitutional, provides as follows:

"(1) If an individual claims and is otherwise eligible for weekly benefits under this act for a week with respect to which he has received weekly benefits, other than death benefits or scheduled benefits for a specific loss, under the workmen's compensation act of this state or under any similar law of another state or of the United States, the individual's weekly benefits otherwise payable under this act for such week shall be reduced to the amount, if any, by which the individual's workmen's compensation weekly benefit for such week was less than his benefits otherwise payable under this act for such week. If his workmen's compensation weekly benefit for such week equaled or exceeded his weekly benefits otherwise payable under this act for such week, no weekly benefits shall be payable under this act for such week.

(2) If an individual receives weekly benefits under this act for a week and within 1 year after such week files a claim as a result of which he is awarded or receives weekly benefits (other than death benefits or scheduled benefits for a specific loss) for the same week under the workmen's compensation act of this state or under any similar law of another state or of the United States, the amount of the weekly benefits paid under this act for such week shall be redetermined and reduced (or denied) in the manner provided in paragraph (1) of this subsection. Notwithstanding any other provision of this act, such individual shall also be required to make restitution for the amount of such reduction under section 62(a). Such reduction or denial and restitution shall not be required if the amount of the workmen's compensation weekly benefits awarded or paid has been reduced by the amount of weekly benefits received under this act for the same period.

(3) Weekly benefits which are paid in a reduced amount for any week under the provisions of this subsection shall be charged against the individual's maximum benefits under subsection (d) of section 27 as if an amount equal to ½ of the individual weekly benefit rate had been paid for such week."

By way of prologue, it should be observed that the prevailing view until 1940 was that an unconstitutional statute was inoperative as though it had never been passed. This doctrine of "void *ab initio*" found its classic ex-

[2] The Court identified the unconstitutional section as Section 27n but noted that Section 27n was repealed by Act 281, P.A. 1965, although the same section was re-enacted as subsection (m), M.S.A. 1968 Cum. Supp. § 17.529.

pression in *Norton v. Shelby County*, 118 U.S. 425 (1886). In *Norton*, Mr. Justice Field, in upholding the Supreme Court of Tennessee, which had declared a State statute unconstitutional because it was found to be repugnant to the constitution of that State, said, at page 442:

> "* * * An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

This view, however, was subsequently revised in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), in what is now the leading case as to the retroactive effect of the finding of the unconstitutionality of a statute. In *Chicot*, the bank was a bondholder of the county drainage district. Both were parties to a proceeding under an act of Congress providing for readjustments of municipal debts. After a readjustment decree was entered, the bank brought suit to recover the full value of its bonds, contending that, since the act of Congress had been declared unconstitutional in another and later case, it was not bound by the provisions of the decree with respect to the retirement of its bonds. The Federal District Court and Court of Appeals found for the bank. In reversing, the Supreme Court said (pp. 374-375):

> "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v. Shelby County*, 118 U.S. 425, 442; *Chicago, I. & L. Ry. Co. v. Hackett*, 228 U.S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effects of the subsequent ruling as to invalidity may have to be considered in various aspects, —with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified. Without attempting to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we appropriately confine our consideration to the question of *res judicata* as it now comes before us."

Additionally, in treating the principle that *res judicata* may be pleaded as a bar, not only as regards matters actually presented in earlier proceed-

ings, but also as to matters which could have, but were not, presented, the Supreme Court said (p. 378):

> "The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end. * * *' "

See, also, *National Labor Relations Board v. Rockaway News Supply Co., Inc.*, 345 U.S. 71 (1953), and *Dowd, Warden v. Grazer*, 116 N.E. 2d 108 (1953).

The Supreme Court thus held that the principle of absolute retroactive invalidity of an unconstitutional statute cannot be justified and that the doctrine of *res judicata* applies even though the issue that the parties failed to raise was the constitutionality of the statute under consideration. The Michigan Supreme Court, in *Dodge v. Detroit Trust Co.*, 300 Mich. 575 (1942), cited *Chicot* with approval, saying (pp. 611-612):

> "* * * In his present bill and statement of reasons and grounds of appeal, plaintiff makes a dozen or more distinct attacks on the validity of the settlement agreement, the constitutionality of Act No. 249, Pub. Acts 1921, and the conformity of the approval proceedings to the requirements of that statute and other statutes. Every point so advanced was either expressly passed upon in a manner unfavorable to plaintiff's present claim in the decree, or could have been, but was not, advanced by plaintiff (then defendant) to defeat the approval sought by the bill of complaint, in the 1921 suit. As against the former class of contentions, that decree is *res judicata,* under the rule of *Stoll v. Gottlieb, supra;* as against the latter class it is *res judicata* under the rule of *Chicot County Drainage District v. Baxter State Bank, supra.* Errors into which the judge may have fallen in disposing of one or more such contentions in 1921 (although we find none) do not entitle plaintiff to the relief sought by this bill, for the present suit is not an appeal from the former one. Though no question of any kind as to constitutionality was raised in the 1921 proceedings, the decree therein must be regarded as an adjudication against plaintiff's present contentions, that Act No. 249, Pub. Acts 1921, denies due process and that its title is inadequate to cover a grant of jurisdiction, just as in the *Drainage District case,* the readjustment decree was held by the United States Supreme Court to be *res judicata* against the contention (afterwards sustained in a different suit by the United States Supreme Court) that the municipal debt readjustment act unduly extended the Congressional bankruptcy power, though no claim of unconstitutionality had been made in the readjustment proceedings."

In view of the foregoing, it is my opinion that where a court of competent jurisdiction has rendered a judgment which has become final, based upon a statute subsequently declared unconstitutional, such judgment remains

effective and in full force. Final judgments, therefore, involving the application of section 27(m) of the Act are *res judicata* and are not to be disturbed as the result of the Michigan Supreme Court's decision in *Fox* and *Shaw*.

It is next appropriate to determine whether this doctrine is also applicable to the decisions of the Commission and its referees and of the Employment Security Appeal Board, hereinafter referred to as the appeal board.

In *Willis v. Michigan Standard Alloy Casting*, 367 Mich. 140 (1962), a claim for interest on an award of workmen's compensation was made after the period for taking an appeal had expired and before the Court issued a decision in another and unrelated case allowing interest on such awards, prospectively. In denying the claim for interest the Court, in *Willis*, held at page 142, that:

> "* * * the doctrine of *res judicata* applies to workmen's compensation claims before the department."

Further, in *Standard Automotive Parts Co. v. Employment Security Commission*, 3 Mich. App. 561 (1966), the Court of Appeals indicated its agreement with the following statement from 42 Am. Jur., Public Administrative Law, § 161, p. 520:

> "In general, the answer given by the courts to the question whether decisions of administrative tribunals are capable of being *res judicata* depends upon the nature of the administrative action involved. The doctrine of *res judicata* has been applied to administrative action that is characterized by the courts as 'judicial' or 'quasi judicial', while to administrative determinations of 'administrative', 'executive', or 'legislative' nature, the rules of *res judcata* have been held to be inapplicable."

The distinctions between quasi-judicial determinations, on the one hand, and legislative, executive, and ministerial determinations, on the other hand, were well covered in *Mulcahy v. Public Service Commission*, 117 P. 2d 298 (1941). There, the court with clarity and precision, beginning at page 302, said:

> " 'The rule which forbids the reopening of a matter once *judicially determined* by competent authority applies as well to the judicial and quasi-judicial acts of public, executive, or administrative officers and boards acting within their jurisdiction as to the judgments of courts having general judicial powers.' (Italics added) 34 C.J. page 878.
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> "* * * The test is: Was the particular decision judicial in its nature and effect? The measuring rod, the test to be applied in determining this question, is not to be found in the mechanics of the proceeding. The mere fact that hearings are had, evidence taken, and decisions rendered thereon, does not make the decision a judicial one. The proper test is the functional one. The powers and functions of government are either legislative, executive, or judicial. Constitution of Utah, Art. 5, § 1. The legislative function is the enactment of laws, that is, the creation of legal rights, liabilities, and remedies. Generally, they are to govern future conduct. The executive function is to carry

into effect, to put into operation and operate, the legislative mandates. It acts to perform the duties, the obligations, imposed upon the public body by law, and to see that the individuals duly render and perform the obligations and duties which the law has said they owe to the public body or the government. The judicial function is to define the legal rights and obligations conferred or imposed by law upon the community to the individual, the individual to the community, or one individual to another individual; and to apply the remedy when one such party has infringed the right of, or failed in his or its obligation to the other. * * * The judicial function is not self-activiating. It comes into operation only on request of the community or of an individual, when such party thinks another has interfered with his rights, or failed in obligations to him. The judicial function only plays a role when there is an apparent controversy over the extent or infringement of legal rights, and appeal to the judiciary is made by one party to define and fix the legal rights of the parties with respect to the matter in controversy. It is not concerned with determination of policy nor with the creation or termination of legal rights. It determines whether or not a claimed legal right exists; whether one has been infringed or denied; and if so, applies a remedy for the protection or enforcement of the right. Decisions which constitute an exercise of the judicial function and which, if not appealed, reversed, vacated or set aside become a final determination, are res adjudicata of the issues or legal controversy thereby decided. * * *"

Referring to the provisions of the Act applicable to the Commission's adjudicatory functions, it is noted that subsections (a), (b) and (c) of section 32 require that the Commission issue determinations and redeterminations only after affording all interested parties the right to present whatever evidence with respect to present and past facts they deem necessary. A formal appealable determination or redetermination adjudicating the rights of the parties is required to be issued by the Commission. Section 33 of the Act provides for *de novo* hearings by a Commission referee of such redeterminations. The referee's decision may, in turn, be appealed to the appeal board in accordance with said section 33.

Thus, it is manifest that the powers and functions delegated to the Commission and its referees and to the appeal board by sections 32, 33 and 34 of the Act authorize the issuance of decisions on an individual claimant basis, which are dispositive of statutory rights, in that they determine whether the claimed rights exist and whether they have been infringed or denied.

In view of the foregoing, it is my opinion that proceedings of this type, which can finally decide statutory rights and duties, are functions which are quasi-judicial in their legal consequences and effects and that the doctrine of *res judicata* is applicable to them.

In addition, it must be noted that the Act contains definite finality provisions which preclude the reopening of decisions, determinations and redeterminations beyond a specified period after their issuance.

Section 32a of the Act provides that determination and redeterminations shall become final unless an appeal is filed with the Commission within

15 days after the mailing or personal service of such determinations and redeterminations. This section also provides that the Commission may, for good cause, including any administrative clerical error, reconsider any prior determination or redetermination after the 15-day period has expired and issue a redetermination affirming, modifying or reversing the prior determination or redetermination, provided the request therefor is filed with the Commission, or reconsideration is initiated by the Commission, within one year from the date of mailing or personal service of the original determination on the disputed issue.

In this connection, I am not unmindful of *Lee v. Employment Security Commission,* 346 Mich. 171 (1956), *and Royster v. Employment Security Commission,* 366 Mich. 415 (1962). In *Lee,* the Commission, based upon a registration report to determine liability showing individual ownership of the business involved, issued a determination holding the alleged individual owner subject to the provisions of the Michigan Employment Security Act effective January 1, 1951. Later, after one year, information was received that the business was actually owned and operated by a partnership from January 1, 1951 to September 1, 1951, and that it was owned and operated by one of the partners individually subsequently to September 1, 1951. Despite the new facts, the Commission issued a determination and redetermination on April 9, 1953 and May 1, 1953, respectively, holding that the original liability determination issued January 2, 1952, could not be redetermined because more than one year had expired from the date of the mailing of said determination and that no refund of contributions could be made under section 16 of the Act. The Supreme Court held that the Commission erred in refusing to refund contributions erroneously collected because the claim for a refund involved a new disputed issue under section 16 of the Act, which was not subject to the one year limitation in section 32a. In *Royster,* the claimant reported to the Commission that he was unemployed and had no earnings during a particular week. Based upon this information he was paid full weekly benefits for the week involved (the benefit check under the Act is a determination). After one year had expired from the issuance of the check, the chargeable employer apprised the Commission that the claimant was actually fully employed in the week and was not, therefore, entitled to the unemployment benefits. Based upon this new information, the Commission issued a determination and redetermination under section 62 of the Act holding that the claimant was guilty of wilful non-disclosure of material information and was, therefore, not entitled to the unemployment benefits. The Michigan Supreme Court held that the Commission acted properly in issuing its determination under section 62 disqualifying the claimant for benefits. In *Lee,* as well as in *Royster,* a different factual matrix than that which existed at the time the Commission issued its original determination invoked a different section of the Act than that upon which the original determination was based, thereby creating a new disputed issue. Since, however, the questions presented for answer in this opinion do not involve situations in which different facts have come to light since the issuance of the Commission's original determination, *Lee* and *Royster* are not applicable.

Further, sections 33 and 34 of the Act, applicable to referee and appeal board decisions, respectively, provide that the referee and the appeal board may for good cause reopen and review their respective prior decisions and issue new decisions after the fifteen-day appeal period has expired, provided request for review is made within one year from the date of mailing of the prior referee or appeal board decision.

Non-final decisions, determinations and redeterminations, involving section 27(m) (formerly section 27n) of the Act, should be reconsidered and should be readjudicated by the appropriate administrative body in light of the decision in *Fox*. As to cases pending in Court, if the issue were properly raised by either party, the Court would be bound by the decision in *Fox*.

In answer to (a) of your second question, it is my opinion that where deductions from unemployment benefits paid to a claimant after September 6, 1963, have been made because of the receipt by him of workmen's compensation benefits, the amount of such deduction may not be paid to the claimant by the Commission by virtue of the *Fox* and *Shaw* decisions, if such deduction was based upon a judgment, appeal board or referee decision, Commission determination or redetermination which has become final. If, however, finality has not attached to such judgment, decision, determination or redetermination, the Commission should pay the amount of such deduction if the judgment, decision, determination or redetermination constituting the basis for the deduction is actually reconsidered and reversed.

The second sentence of paragraph (a) of your second question inquires whether a claimant must reapply for deducted unemployment benefits. Subject, of course, to the paragraph immediately above, the answer to this question is found in section 32a of the Act, which grants to the Commission authority to initiate reconsiderations within one year from the date of mailing or personal service of the original determination. Thus, the Commission should reopen such determinations and redeterminations as may be within its power to reconsider.

In answer to (b) of your second question, it is my opinion that where restitution of unemployment benefits was required (whether or not repayment was made) pursuant to a judgment, appeal board or referee decision, or commission determination or redetermination, the principles of finality discussed above are controlling.

In answer to (c) of your second question, it is my opinion that where forfeiture of benefits was required pursuant to a judgment, appeal board or referee decision, or commission determination or redetermination, the principles of finality discussed above are also controlling.

In answer to (d) of your second question, it is my opinion that, subject to the provisions of section 28 of the Act and in conformance with Commission regulation 210, tardy claim applications and certifications may be accepted from claimants.

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Attorney General.