

**OPINION NO. 71-032****Syllabus:**

By the injunction Order of the Federal District Court, Northern District of Ohio, Western Division, the Bureau of Employment Services is restrained from withholding unemployment benefits as a result of employer appeals from initial determinations by the Administrator on (1) applications for determination of benefit rights and (2) first and initial claims when the Administrator has allowed benefits by such initial determinations, regardless of whether such initial determinations were made prior or subsequent to the date of such injunction Order.

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**To: William E. Garnes, Administrator, Ohio Bureau of Employment Services,  
Columbus, Ohio**  
**By: William J. Brown, Attorney General, June 16, 1971**

I am in receipt of your request for my opinion which you phrase in the following manner:

"1. What is the effective date that I shall use in processing current allowed claims, when appeals are filed under Sections 4141.28 (G) and (H), Revised Code?

"2. Is this Order applicable to allowed claims subsequently appealed under Sections (G) and (H), and/or appeals were pending either prior to May 12, 1971, or the effective date you establish? If this Order applies to said claims, what effective date shall I apply for the payment of benefits on the prior claims?"

The questions arise from two recent judicial decisions, interpreting the law of unemployment compensation. In California

Department of Human Resources Development v. Java, No. 507, October Term, 1970, decided April 26, 1971, The Supreme Court of the United States considered provisions of California statutes, similar to those of Ohio, under which unemployment benefits were required to be withheld from a claimant during the pendency of an appeal from an initial administrative determination awarding him such benefits. Such provisions were held to be in conflict with the requirements of Section 303 (a)(1) of the Social Security Act, 42 U.S.C. §503 (a)(1) (the enabling and governing federal law), providing that benefits must be paid "when due". The Court said:

"We conclude that the word 'due' in §303 (a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment."

During the pendency of Java, an action was filed in the United States District Court, Northern District of Ohio, Western Division, against the Bureau of Employment Services, the Administrator and others, raising similar issues with respect to Ohio law and particularly the provisions of Section 4141.28 (G) and (H), Revised Code. Denominated Foard v. Ohio Bureau of Employment Services, et al., No. C-70-302, the matter was tried to a three-Judge District Court and was decided on May 12, 1971. That Court found the plaintiff's claim to be a class action, pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure, and to present "the exact issue which was recently decided by the Supreme Court" in Java. Accordingly, it issued an injunction against the Administrator, the Order being phrased as follows:

"FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, their agents, successors, assigns and all persons in active concert and participation with them be and the same are ENJOINED from in any way enforcing those requirements of Section 4141.28 (G) and (H) of the Ohio Revised Code that provide for withholding of payments on appeal after an initial award of benefits."

Divisions (G) and (H) of Section 4141.28, supra, affected by the Order, are respectively in pertinent part as follows:

"(G) Any interested part notified of a determination of an application for determination of benefit rights or a claim for benefits may, within ten calendar days after such notice was delivered to such person or was mailed to his last known post office address, apply in writing for reconsideration of the administrator's or deputy's determination, and the payment of future benefits affected by such application shall be withheld pending the decision upon reconsideration.

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"(H) Any interested party may appeal the

administrator's decision on reconsideration to the board and unless an appeal is filed from such decision on reconsideration with the board within ten calendar days after such notification was delivered to such person or was mailed to the last known post office address of the appellant such decision on reconsideration is final and benefits shall be paid or denied in accordance therewith. If an appeal is filed, payment of benefits which are in dispute shall be withheld pending the decision on the appeal; \* \* \*."

By your first question, I conclude you have no question concerning the substance of the Order in Foard but, rather, are inquiring with respect to certain of the legal-administrative implications thereof. Those implications are confined by your question to the consequences that may attach to the dates on which initial determinations were made, i.e., whether preceding May 12, 1971 (the date of the Order) or afterward.

Several types of determinations made by the Bureau are potentially affected by the injunction Order. These may be characterized briefly as determinations on (1) applications for determination of benefit rights (Sections 4141.01 (D); 4141.28 (C), Revised Code); (2) first and additional claims for benefits (Sections 4141.01 (C), (E) and (F); 4141.28 (D) (1), Revised Code; and (3) continued claims (Sections 4141.01 (C) and (E); 4141.28 (D) (2), Revised Code). In each case the Administrator is required to make a determination as to a claimant's eligibility for benefits (Sections 4141.28 and 4141.29, Revised Code). In each case, affected employers may apply for administrative reconsideration of such determination; and, except in unusual situations in which the reconsideration step may be passed over, either party aggrieved by the decision on reconsideration, may then appeal to a referee (see Divisions (G) and (H) of Section 4141.28, supra, quoted above).

The determination of "benefit rights" pertains primarily to the amount of weekly benefits and the total amount of benefits to which, potentially, a particular claimant may be entitled as a result of his employment history during the preceding year (Section 4141.01 (D), supra), customarily known as a "monetary" determination. Determination of a first or additional claim pertains primarily to a claimant's basic eligibility for benefits during any part of the period of his unemployment, in light of the circumstances under which he became unemployed, e.g., was unemployment due to discharge for just cause, a disqualification, or for simple lack of work (Section 4141.29 (B) and (D) (2), supra). Determination of a continued claim pertains primarily to a claimant's eligibility for benefits for a particular week of unemployment, involving a question, for example, of whether or not one was "actively seeking suitable work", a condition that a claimant might fail to meet in one only of several weeks of unemployment (Section 4141.29 (A) (4), Revised Code).

Both Java and Foard were concerned solely with the first or additional claim determination. There would appear to be no substantial reason, however, to differentiate between an application for determination of benefit rights and such first or additional claim, in as far as the withholding of benefits is concerned where benefits are allowed initially. The notice of the claimant's filing, sent to the employer, affords the employer opportunity to present his views on both issues, i. e., the "monetary" and the reason for unemployment (Section 4141.28 (B) (1), supra). It is that notice and opportunity

to present employer evidence and views, administratively, that the Court in Foard found to satisfy the test prescribed in Java. Since an employer appeal from either determination would cause payment of benefits to be withheld under the statute, it would seem that both types of determination are affected by the Order.

As to the continued claim procedure, however, a different set of problems may be involved. I do not understand your questions to relate to that procedure, probably because the great bulk of determinations in that category are routine. Accordingly, but without implication, one way or the other, I shall not address myself to that procedure. My opinion will be confined, therefore, to the "monetary" and first and additional claim procedure but, for simplicity, I will discuss the latter type of determination only.

As stated above, your questions pertain to two basic groups of claimants potentially affected by the injunction Order in Foard, (1) those on whose claims the initial determination was made on or after May 12, 1971, the date of the Order, and (2) those on whose claims the initial determination was made prior to such date.

There can be no question that the Order applies to the first group, i.e., those decided initially on and after May 12, 1971. To hold otherwise would be to vitiate the substance of Foard and to violate the express requirements of the Order.

As to the second group, those decided initially prior to the date of the Order, a more difficult question is involved. The Order is effective as of the date it was journalized (Rule 62. (a) of the Federal Rules of Civil Procedure). It restrains the Administrator, from that day forward, from enforcing certain provisions of the statutes of Ohio. It does not expressly purport to affect past transactions. Indeed, in Java, later lump sum payment of benefits was said not to serve the purpose of the law which was intended to alleviate, in part, the immediate hardships of job loss and the consequent adverse economic force of reduced purchasing power. It might be argued from the foregoing considerations that past transactions are not affected by the Order because (a) it does not purport to speak retroactively and (b) a current lump sum payment could not make up for the hardship and adverse economic effects already suffered. In the latter connection it can also be argued that such payments might well become a vain thing in that they are in various stages of progress toward final decision on the merits, some, no doubt, only a few days or weeks away from a final order. It is also conceivable that the entire lump sum amount could become repayable to the fund as a result of such final order.

On the other hand, it is necessary, of course, to give full effect to the judicial decisions without injecting undue technicality. In Foard, the Court was dealing with a named plaintiff whose benefits were withheld because of employer appeal from an initial determination in plaintiff's favor. Such withholding had occurred prior to the filing of the plaintiff's Complaint. While the plaintiff was held to represent a class, there could be no question but that the Court was confronted, after the decision in Java, with remedying an error of law suffered by the plaintiff. That error lay in failure to pay benefits "when due", i.e., when claimed following the Administrator's initial determination in plaintiff's favor. To restrict the Order in the case to the period of time following the date of its journalization would deprive the plaintiff of the remedy that was the essence of her Complaint. Indeed, such interpretation would make the Court's decision into an advisory opinion only, one appli-

cable in the future to a wide variety of potential claimants; not a decision immediately dispositive of the rights of an ascertainable group of claimants. (The foregoing, in my opinion, remains true notwithstanding the disposition, in other proceedings prior to the date of the Order involved here, of the merits of the plaintiff's individual claim.)

Consideration of the statutory provisions together with the wording of the Order leads to the conclusion, suggested in the preceding paragraph, that claims decided initially prior to the date of the Order must be paid as "due", even though delay has occurred and caused them to be past due. Sections 4141.28 (D) (2) and 4141.30 (B) and (C), supra, require benefits to be paid weekly when found by the Administrator to be properly claimed. In pertinent parts, these are as follows:

Section 4141.28 (D) (2) :

"The administrator or his deputy shall also examine each continued claim for benefits filed, and on the basis of any facts found by him shall determine whether such claim shall be allowed. If such claim is disallowed the administrator shall notify the claimant of such disallowance and the reasons therefor. If the claim is allowed and benefits are paid, the administrator shall promptly send notification of such payment of benefits to the employer to whose account benefits will be charged. This notification shall be for information only and shall not be appealable, and the notification shall so indicate."

Section 4141.30 (B) and (C) :

"(B) Benefits are payable to each eligible and qualified individual on account of each week of involuntary total unemployment after the specified waiting period at the weekly benefit amount determined by:

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"(C) Benefits are payable to each partially unemployed individual otherwise eligible on account of each week of involuntary partial unemployment after the specified waiting period in an amount equal to his weekly benefit amount less that part of the remuneration payable to him with respect to such week which is in excess of twenty percent of his weekly benefit amount, and the resulting amount increased to the next higher even multiple of one dollar."

The only statutory authorization or direction to withhold actual payment in these circumstances are the above quoted provisions of Section 4141.28 (G) and (H), supra, that apply when an appeal from such determinations is filed. Those provisions directing withholding, however, are the ones the Administrator is restrained from "enforcing". To that extent the Order constitutes an excision of statutory language so that the requirements to pay, contained in Sections 4141.28 (D) (2) and 4141.30 (B) and (C), supra, are now operative without such superseding bar. Without the bar to payment,

there is no legal basis for refusal to pay. Such continuing refusal could not be premised on the past withholding of payment under color of statutory direction because, to do so, would constitute a present and on-going "enforcement" of provisions the Administrator is now restrained from "enforcing". I must conclude therefore that both groups must be treated similarly and benefits be paid to claimants otherwise eligible, regardless of the date on which the initial determination in their favor was made.

In specific answer to your questions, it is my opinion and you are advised that by the injunction Order of the Federal District Court, Northern District of Ohio, Western Division, the Bureau of Employment Services is restrained from withholding unemployment benefits as a result of employer appeals from initial determinations by the Administrator on (1) applications for determination of benefit rights and on (2) first and initial claims when the Administrator has allowed benefits by such initial determinations, regardless of whether such initial determinations were made prior or subsequent to the date of such injunction Order.