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UNEMPLOYMENT COMPENSATION — SECTION 1.20 RC — PENDING PROCEEDINGS—AM. SB. 394, 101 GA, EFFECTIVE OCTOBER 10, 1955—PROVISIONS DO NOT APPLY TO APPLICATIONS TO DETERMINE BENEFIT RIGHTS FILED PRIOR TO DATE SECTION EFFECTIVE—CLAIMS FOR BENEFITS—APPELLATE PROCEEDINGS.

SYLLABUS:

By reason of the provisions of Section 1.20, Revised Code, relative to "pending proceedings," the provisions of Amended Senate Bill No. 394, 101st General Assembly, effective October 10, 1955, relative to unemployment compensation, do not apply to applications for determination of benefit rights filed prior to that date, nor to claims for benefits filed thereunder, nor to appellate proceedings in connection therewith.

Columbus, Ohio, February 3, 1956

Hon. Thomas J. Barrett, Chairman, Board of Review
Bureau of Unemployment Compensation
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"The Board of Review, Bureau of Unemployment Compensation, respectfully requests your opinions with respect to the matters hereinafter set forth.

"For the purpose of each inquiry it is assumed that the provisions of Amended Senate Bill No. 394 became effective on *October 10, 1955* (and not on October 2, 1955, as set forth in Section 3 of said Bill).

"Inquiry: Shall the amendments to the Ohio unemployment compensation law, effective *October 10, 1955,* with the exception of those set forth in Section 3 of Amended Senate Bill No. 394, apply to applications for determination of benefit rights filed prior to October 10, 1955, and to claims for benefits filed thereunder, and to appellate proceedings in connection therewith?

"We believe the answer to our inquiry depends largely upon interpretation of court decisions in State ex rel. The Cleveland Ry. Co. v. Atkinson, etc., 138 O. S. 157; Stough v. Industrial Commission of Ohio, 142 O. S. 446; the language in Section 1.20 Revised Code; and the language in Section 3 of Amended Senate Bill No. 394.

"Specific problems with respect to the foregoing inquiry are pointed up by the following examples:

"(1) Claimant files original application for determination of benefit rights on September 6, 1955. Application is allowed with benefit year beginning September 4, 1955; weekly benefit amount, $30; no dependencies. First week (week ending September 10, 1955) is allowed as a waiting week. Claimant claims week ending September 17, 1955 as first compensable week and is paid benefits for said week in the amount of $30. Then he becomes employed on September 21, 1955 and works until separated by reason of a labor dispute on *October 15, 1955* (subsequent to the effective date of amendment). Claimant then files a claim for benefits for week ending *October 22, 1955* and also claims for succeeding weeks. Labor dispute terminates on October 23, 1955, but normal operations are not resumed until *October 31, 1955.*

QUERY: Does the law in effect prior to or on and after *October 10, 1955* apply to the labor dispute situation, as it relates to resumption of normal operations?

"(2) The Administrator issues a decision on reconsideration on September 23, 1955 (prior to effective date of amended Section 4141.28 Revised Code). Within the ensuing 10-day period an appeal is filed on September 30, 1955 (prior to the effective date of the amendment). Hearing before a Referee is scheduled on *October 26, 1955* (subsequent to the effective date of the amendment).

QUERY: Is the Referee required to dismiss the appeal if appellant does not appear and submits no reason for non-appearance within the ensuing 10-day period? Is the old law or the new law applicable?

"(3) The Administrator issues a decision on reconsideration on October 7, 1955 (prior to the effective date of amendment). Within the ensuing 10-day period an appeal is filed, on *October 11, 1955* (subsequent to the effective date of amendment). Hearing before a Referee is scheduled on *October 28, 1955* (subsequent to effective date of amendment).

QUERY: Is the Referee required to dismiss the appeal if appellant does not appear and submits no reason for non-appearance within the ensuing 10-day period? Is the old law or the new law applicable?

"(4) Pursuant to an Application to Institute a Further Appeal from a Referee's decision the Board issues a decision on October 7, 1955 (prior to the effective date of the amendment).

QUERY: Is Notice of Intent to Appeal to Court and Request for Rehearing, filed on *October 17, 1955,* (subsequent to effective date of amendment but within 10-day period after date of Board's decision) a proper appellate action, or should the party file an appeal in the Court of Common Pleas within 30-day period following date of Board's decision?

"(5) Pursuant to Application to Institute a Further Appeal from a Referee's Decision, the Board of Review issues a decision on *October 13, 1955* (subsequent to effective date of amendment) and Notice of Intent to Appeal to Court and Request for Rehearing is filed within the ensuing 10-day period.

QUERY: Is such notice and request proper or should the party file an appeal in a Court of Common Pleas within the 30-day period following issue of Board's decision?"

The answers to your inquiry depend upon the interpretation and meaning to be given to Sections 2 and 3 of Amended Senate Bill No. 394 passed by the One Hundred-First General Assembly, which provide as follows:

> "Section 2. That existing sections 4141.01, 4141.24, 4141.28, 4141.29 and 4141.30 of the Revised Code are hereby repealed.
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> "Section 3. The provisions of this act shall become effective October 2, 1955, except that the increases in benefits and additional allowances for dependent children provided in section 4141.30 of the Revised Code shall apply to applications for determination of benefit rights filed on and after such date."

Amended Senate Bill No. 394 was passed by the General Assembly June 24, 1955, approved by the Governor July 8, 1955, and filed with the Secretary of State on July 11, 1955.

The effective date of legislation enacted by the General Assembly is determined by the Ohio Constitution, Article II, Section 1c, which reads in part:

> "* * * No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. * * *"

Section 1d of Article II provides that tax levies, appropriations for current expenses of the state government and institutions, and emergency laws necessary for the immediate protection of public peace, health or safety shall go into immediate effect.

In the instant case, as it is not an emergency measure, the former section, Article II, Section 1c, applies and the provisions of this act become effective on the 10th of October, 1955, being ninety days after the filing with the Secretary of State. Thus your assumption is correct that the provisions of Amended Senate Bill No. 394 became effective on October 10, 1955.

Your inquiry indicates you have taken cognizance of the specific provision which provides "except that the increases in benefits and additional allowances for dependent children provided in Section 4141.30 of the Revised Code shall apply to applications for determination of benefit rights filed on and after such (effective) date." The only other express language in the Amended Senate Bill No. 394 is that immediately pre-

ceding this specific provision, also found in Section 3, providing "The provisions of this Act shall become effective October 2, 1955, except * * *"; and the repealing section, Section 2 providing as follows:

> "That existing sections 4141.01, 4141.24, 4141.28, 4141.29 and 4141.30 of the Revised Code are hereby repealed."

This language might be compared to that found in Amended Senate Bill No. 174 passed by the One Hundredth General Assembly which was the subject of interpretation in Opinion No. 3101, Opinions of the Attorney General for 1953, page 491:

> "Section 4141.25 of this act shall become effective October 2, 1953, and the remaining sections of this Act shall become effective at the earliest date permitted by law; in cases where the application for determination of benefit rights was filed prior to the effective date of this act the claimant in claims for benefits filed pursuant to such application after the effective date of this act shall be entitled to the increased weekly benefit rates and increased total amount of benefits provided in Section 4141.30 of the Revised Code and the administrator shall amend his original determination to allow the increase in weekly benefit rates and total amount of benefits."

The syllabus in that opinion was as follows:

> "Where an application for determination of benefit rights shall have been filed with the Bureau of Unemployment Compensation pursuant to the provisions of Section 4141.28, Revised Code, prior to October 30, 1953, the claimant, in claims for benefits filed pursuant to such application after October 30, 1953, shall be entitled to the increased weekly benefit rates provided in Section 4141.30, Revised Code, as amended by Amended Senate Bill 174 of the 100th General Assembly; and the total benefits to which such claimant is entitled shall be increased proportionately to provide for such increased weekly benefits."

It is readily apparent the express language of Amended Senate Bill No. 174 is unlike that of Amended Senate Bill No. 394 and is, therefore, not dispositive of our present inquiry.

From an examination of the above provisions of Amended Senate Bill No. 394, I find no express language contained therein affecting pending actions or proceedings, with the exception of increases in benefits and additional allowances for dependent children, which is not in question.

Consequently, your attention is invited to Section 1.20, Revised Code, formerly Section 26, General Code, which provides:

> "When a statute is repealed or amended, such repeal or amendment does not affect pending actions, prosecutions, or proceedings, civil or criminal. When the repeal or amendment relates to the remedy, it does not affect pending actions, prosecutions, or proceedings, unless so expressed, nor does any repeal or amendment affect causes of such action, prosecution or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

The import of former Section 26, General Code was considered by the Ohio Supreme Court in a case involving the Bureau of Unemployment Compensation, The State, ex rel. The Cleveland Ry. Co. v. Atkinson, Administrator of Bureau of Unemployment Compensation, 138 Ohio St., 157, the syllabus therein reading:

> "1. An undisposed of application for a determination as to seasonal or casual employment, filed by an employer with the Unemployment Compensation Commission (created under the original act passed to establish a system of unemployment insurance, Section 1345-1 et seq., General Code, 116 Ohio Laws, part 2, 286), is a pending proceeding within the meaning of Section 26, General Code.
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> "2. Section 26, General Code, preserved the right of appeal from the decision of such commission, given by Section 1345-29, General Code (116 Ohio Laws, part 2, 306), against repeal or amendment unless express provision is made in the amending or repealing act.
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> "3. The amending act (Section 1346 et seq., General Code, 118 Ohio Laws, 32), creating the Bureau of Unemployment Compensation to supersede the commission, repealing Section 1345-29, General Code (giving the right of appeal from the commission), and at the same time providing for an appeal by the employer or employee from the decision of the Administrator of the Bureau of Unemployment Compensation (successor to the commission) on claims for benefits only and making decisions on other matters final, does not contain any express provision which affects pending proceedings before the commission within the purview of Section 26, General Code, and does not take away or modify the right of appeal under Section 1345-29 in such proceedings."

The Court, in the course of its opinion said in pertinent part therein:

> "* * * Under the new appellate procedure every appeal in a civil action is the identical case passing into the upper court.

> There is no new pleading to invoke appellate jurisdiction, no further issuance of process to be served. It was likewise with the appeal from the decision of the commission. Such an appeal when taken would constitute a part of the pending proceeding and could not be taken away without a clear and explicit expression to that affect in the amending statute. Implication or inference is insufficient; express provision is absolutely necessary. State, ex rel. Andrews et al., Board of Commrs., v. Zangerle, Aud., 101 Ohio St., 235, 128 N.E., 165. * * *
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> "* * * Section 26 is a salutary statute and should be preserved against emasculation by judicial interpretation. Its nature is such as to require it to be read in connection with every amending and repealing statute which affects pending actions, prosecutions or proceedings, for purposes of statutory construction. It is with knowledge of the existence of the general saving provision and its effect upon every revision or repeal of remedial statutes that the General Assembly acts. Moreover recognition has been given by the legislative body of the state to the necessity for express provision in order to affect the remedy in pending proceedings. As one illustration reference is made to Section 2293-5t(a), General Code (117 Ohio Laws, 849), effective March 14, 1938, in which, with respect to an entirely different matter, this language was used: 'This act shall apply to all proceedings, including those pending at the time this act takes effect.' It would have been a very simple matter to include a like provision in the amending act of concern here, had the legislative intent been to make the enactment apply to pending proceedings."

It is clear that the recent amendment did not affect pending actions or proceedings by any express provision contained therein, except as previously noted. Nor would any possible implication or inference of the same be sufficient; since express provision is absolutely necessary. See The State, ex rel. The Cleveland Ry. Co. v. Atkinson, Administrator of Bureau of Unemployment Compensation, 138 Ohio St., 157 at page 162; and State, ex rel. Andrews et al., Board of Commrs., v. Zangerle, Aud., 101 Ohio St. 235. Therefore, Section 1.20, Revised Code, should obviously be read in connection with Amended Senate Bill 394 regarding pending actions or proceedings, so as to prohibit any of the amended provisions of said Amended Bill from applying to any pending action or proceeding, whether or not such amendment relates to matters of remedy or substantial rights.

Our problem then resolves itself into a question of what constitutes a "pending proceeding or action" under the Unemployment Compensation

Law (Sections 4141.01 through 4141.99, Revised Code), within the meaning of these terms as used in Section 1.20 Revised Code.

A proceeding is defined in the case of The W. S. Tyler Company v. Rebic, 118 Ohio St., 522, at page 525, as follows:

> "A proceeding in the enforcement of a civil right is an act necessary to be done in order to attain a given end. It is a prescribed mode of action for carrying into effect a legal right."

Your basic inquiry reads as follows:

> "Shall the amendments of the Ohio unemployment compensation law, effective *October 10, 1955,* with the exception of those set forth in Section 3 of Amended Senate Bill No. 394, apply to applications for determination of benefit rights filed prior to October 10, 1955, and to claims for benefits filed thereunder, and to appellate proceedings in connection therewith?"

The Unemployment Compensation Law contemplates first the determination of maximum benefit rights for a year, followed by weekly claims for benefits within such benefit year.

The first phase is recognized in the following pertinent language of Section 4141.28, Revised Code:

> "When an unemployed individual files an application for determination of benefit rights, a notice shall promptly be given in writing to the last employer of the individual that such filing has been made, which notice shall request from the employer the reason for the individual's unemployment. * * *
>
> "The administrator or his deputy shall promptly examine any application for determination of benefit rights filed, and on the basis of any facts found by him shall determine whether or not such application is valid, and if valid the date on which the benefit year shall commence and the weekly benefit amount. All interested parties shall promptly be notified of the determination and the reasons therefor."

The first phase is further amplified in a pertinent portion of Section 4141.01 (R) as follows:

> "* * * Any application for determination of benefit rights made in accordance with section 4141.28 of the Revised Code shall be valid if the individual filing such application is unemployed, has been employed by an employer subject to sections 4141.01 to 4141.46, inclusive of the Revised Code, in at least twenty calendar weeks within his base period, and has earned

wages in his base period of not less than two hundred forty dollars."

The second phase or series of phases is the claim filed each week for a waiting period or benefits for a designated week, as provided in the following pertinent portion of Section 4141.28, Revised Code:

> "The administrator or his deputy shall examine the first claim for benefits filed in any benefit year, and on the basis of any facts found by him shall determine whether such claim shall be allowed or disallowed. * * *
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> "A notice of determination of any additional claim filed during the benefit year shall be mailed or delivered to all interested parties when it is contended that unemployment results from any cause other than lack of work.
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> "The administrator or his deputy shall also examine any other claim for benefits filed, and on the basis of any facts found by him shall determine whether such claim shall be allowed. * * *"

Section 4141.02 (E) provides:

> " 'Claim for benefits' means a claim for waiting period or benefits for a designated week."

A possible third phase is the appellate procedure provided in Section 4141.28, Revised Code, from determination made in either or both of the first two phases. The appellate procedure provided for in said Section includes provisions governing an appeal to the Court of Common Pleas.

It is readily apparent that the filing of an application for determination of benefit rights for a benefit year constitutes the commencement of a proceeding by a claimant. And it follows that a claim for benefits, i.e., a claim for a waiting week or benefits for a week, can only validly be filed if such application for determination of benefit rights for a benefit year has first been applied for and allowed and the weekly benefit amount established.

Determinations made in the second phase are further related to the first phase in that any payments made for weekly benefits are chargeable to employers in the base period as established in said determination. Further, the *amount* of weekly benefits payable in this second phase is solely dependent on the amount as established in the original determination based on the claimant's working experience in his base period.

An appeal from either or both of these determinations is a continuation of the original proceeding commenced by the filing of an application for determination of benefit rights. In cases involving workmen's compensation it has been held that the appellate procedure provided by that Act, in effect at the time of the filing of the original application for compensation, shall govern appeals arising from determinations made on such application. Industrial Commission v. Vail, 110 Ohio St. 304; State, ex rel., Podley v. Industrial Commission, 127 Ohio St. 583. Similarly, if the filing of an application for determination of benefit rights constitutes the commencement of a proceeding before the Bureau of Unemployment Compensation, any appeals taken from the determinations made on and pursuant to said application would be governed by the appellate procedure provided by the Unemployment Compensation Act in effect at the time of the filing of the original application.

The second paragraph of the syllabus in the case of Stough, v. Industrial Commission of Ohio, 142 Ohio St., 446, is as follows:

> "The filing of an application for compensation with the Industrial Commission constitutes the commencement of a proceeding within the meaning of Section 26, General Code, and all acts subsequent thereto are but steps in such pending proceeding. (Industrial Commission v. Vail, 110 Ohio St., 304, and State, ex rel. Thompson, v. Industrial Commission, 138 Ohio St., 439, approved and followed.)"

In that case the applicant for industrial compensation filed her application for compensation with the Commission on August 26, 1939; on October 14, 1940, the claim was disallowed; on October 23, 1940, an application for rehearing was filed and such rehearing was concluded on March 19, 1941. Section 231, General Code, under which a death certificate properly certified by the State Registrar was admissible as prima facie evidence of the facts therein stated, was repealed on April 30, 1941, but the repealing act was silent as to pending actions, prosecutions or proceedings; and the Commission denied the claim on rehearing on August 22, 1941. The Court therein held such repeal of Section 231, General Code, on April 30, 1941, would have no effect on the competency of the death certificate because the case was a pending proceeding. We note the following language in the Court's opinion:

> "Does the filing of an application for compensation commence a proceeding within the meaning of Section 26, General Code?

"In the case of State, ex rel. Thompson, v. Industrial Commission of Ohio, 138 Ohio St., 439, 35 N. E. 2d 727, this court held:

" 'The filing of an application for compensation constitutes the commencement of a proceeding and the subsequent filing therein of an application for modification of a former finding and order or proceeding that is pending within the meaning of Section 26, General Code.' See, also Industrial Commission v. Vail, 110 Ohio St., 304, 143 N. E., 716; Kossick v. Sharon Steel Hoop Co., 113 Ohio St., 33, 148 N. E., 343; Industrial Commission v. Hilshorst, 117 Ohio St., 337, 339, 158 N. E., 748; W. S. Tyler Co. v. Rebic, 118 Ohio St., 522, 525, 161 N. E., 790; State, ex rel. Podley, v. Industrial Commission, 127 Ohio St., 583, 584, 190 N. E., 407; Noggle v. Industrial Commission, 129 Ohio St., 495, 498, 196 N. E., 377; State, ex rel. Longano, v. Industrial Commission, 135 Ohio St., 165, 166, 20 N. E. 2d 230.

"Applying the rule there announced to the instant case a proceeding was commenced on August 26, 1939, when appellant filed her application for compensation; this was almost two years prior to the repeal of Section 209 and 231, General Code.

"We have no difficulty in concluding that the death certificate was admissible before the commission and on appeal in the Common Pleas Court, and was entitled to such weight and credence as was provided in Section 231, General Code."

I have no difficulty in similarly concluding that the filing with the Bureau of Unemployment Compensation of an application for the determination of benefit rights for a benefit year constitutes the commencement of a proceeding within the meaning of Section 1.20, Revised Code, formerly Section 26, General Code, and all acts subsequent thereto are but steps in such pending proceeding, whether it pertains to claims for benefits filed during such benefit year or to appellate proceedings in connection therewith.

In reaching the conclusion which I have expressed herein, I am not unmindful of my Opinion No. 1247, Opinions of the Attorney General for 1952, page 225, the syllabus of which opinion provided as follows:

"An employer who is entitled to receive notice of benefit payments under the provisions of Section 1345-4 (c) (4) (H), General Code, being an 'interested party' within the meaning of Section 1346-4, General Code, has the right to apply, within the time provided therein, for a reconsideration of the determination by the Administrator of the Bureau of Unemployment Compensation with respect to the benefits for the week appearing on such notice."

The whole gist of that opinion was that each weekly determination of benefit rights was a separate proceeding which could form the basis for an appeal.

However, that opinion did not deal with the question here involved of what law governed the Administrator in hearing each such separate appeal:—the law at the time of the initial determination of benefit rights, or some subsequent changes that may have intervened. And it is my opinion that the reasoning of the 1952 opinion should not affect my conclusion here.

Conceding that for the purposes of the Unemployment Compensation Law each weekly claim is a separate proceeding for purposes of appeal, we still must recognize that each such separate week is based in turn upon the original determination of benefit rights. So we have really a hybrid "proceeding" which is fixed at the time of original determination in the manner of the Industrial Commission procedure discussed above, but whose fixed nature is subject to constant change.

The problem presently before me is to determine what law governs this hybrid procedure when there has been a change of law after the original determination of benefit rights. I believe that if I were to concentrate on the changeable part of the procedure and to ignore its fixed characteristics, I would be allowing the tail to wag the dog. The overall "proceeding" with which you must deal is still the one which began with the original determination of benefit rights, and I believe that logic and judicial precedent freeze the "proceedings" at that point.

I am also impelled to this conclusion by a consideration of the administrative problems inherent in any other holding. Your Board of Review and the Administrator are required to follow a uniform and logical procedure. If each weekly allowance of benefits were considered as a separate "proceeding" so far as the new law is concerned, the legal and constitutional problems created would be beyond a prompt logical solution at the administrative level.

The conclusion I have expressed is consistent with the result in the recent decision in the case of Julius Jaskiewicz v. Board of Review, Bureau of Unemployment Compensation, et al., No. 23559, Cuyahoga County Court of Appeals, decided January 11, 1956, involving Amended Senate Bill No. 142, 123 Ohio Laws, 178, effective August 22, 1949.

Claimant therein filed an application for unemployment benefits on July 1, 1949. The initial determination dated July 11, 1949, allowed the application as a valid claim and established a benefit year beginning June 19, 1949; a weekly benefit amount of $21.00; and maximum potential benefits of $462.00, equivalent to 22 times the weekly benefit amount. No protest or appeal was taken therefrom. During the period of time from June 19, 1949, through December 24, 1949, claimant filed for, and received benefits for all the weeks for which he was entitled pursuant to the law in effect prior to August 22, 1949. Thus, the claimant up to and including the week ending August 20, 1949, received six benefit payments of $21.00 each. Subsequent to this week, he received 16 benefit payments of $21.00 per week. The Administrator in a redetermination on March 15, 1950, believing the new law effective August 22, 1949, had application, recomputed and increased claimant's weekly benefit amount and the maximum benefit amount, and thus authorized additional payments of $4.00 for each of the 16 weeks subsequent to the week ending August 20, 1949, or a total of $64.00. In addition thereto he authorized four more benefit payments of $25.00 each. Upon appeal by the base period employer, both the Referee and the Board of Review vacated and set aside the Administrator's redetermination. The Board of Review gave as one of its reasons for arriving at this decision that the filing of an initial application for unemployment benefits prior to August 22, 1949, and the subsequent approval of that application as a valid claim is the commencement of a proceeding and, therefore, comes within Section 26, General Code (now Section 1.20, Revised Code). The Board further found that nowhere in Amended Senate Bill No. 142 is there an expressed or implied authorization for the Administrator to give increased allowance to pending applications; and in the absence of express authorization, the presumption arises that the Amended Law is to apply to initial applications filed after the effective date of the Act and not to applications in force on or before August 22, 1949. The Common Pleas Court affirmed the decision of the Board of Review in written opinion by holding in essence that the earlier determination, which had established the benefit year, the weekly amount of benefits, and the maximum benefits equivalent to 22 times the weekly benefit amount—was final within the contemplation of Section 1346-4, General Code, now Section 4141.28, Revised Code; that the Administrator had no authority to reopen the case and recompute the allowances to allow an increased figure enacted by the Legislature effective August

22, 1949; and, therefore, found it unnecessary to discuss the application of Section 26, General Code, now Section 1.20, Revised Code, thereto. The Court of Appeals affirmed the decision of the Common Pleas Court without written opinion.

I recognize this decision is not yet final, and the ultimate conclusion thereof does not necessarily have application to our present question involving more recent legislation, but the decision of the Court of Appeals is consistent with the result I have reached.

Accordingly, in specific answer to your inquiry, it is my opinion that by reason of the provisions of Section 1.20, Revised Code, relative to "pending proceedings," the provisions of Amended Senate Bill No. 394, 101st General Assembly, effective October 10, 1955, relative to unemployment compensation, do not apply to applications for determination of benefit rights filed prior to that date, nor to claims for benefits filed thereunder, nor to appellate proceedings in connection therewith.

Respectfully,
C. WILLIAM O'NEILL
Attorney General