EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 92

Opinion of Attorney General

January 16, 1950

Subject: Employment Security Commission; Proviso of G. S. 96-15 (b); Double Affirmance Clause; Extent of Payment of Benefits Under Double Affirmance Clause.

You call our attention to the proviso at the end of subsection (b) of G.S. 96-15 of the Employment Security Act, which is commonly called the "double affirmance clause", and which reads as follows:

> "Provided further, however, that if an appeal tribunal affirms a decision of a deputy, or the commission affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's reserve account shall be charged with benefits so paid and such payments shall be charged to the pooled account."

You first state a case under the eligibility conditions of the Act. In the case stated, an individual is able and available for work, but a question arises as to whether he is actively seeking work as provided by such eligibility conditions. Upon hearing, the Claims Deputy finds that the claimant has met such conditions and allows benefits without disqualification. The employer appeals to the Appeals Deputy, and the Appeals Deputy likewise finds that this condition has been met, affirms the Claim Deputy's decision, and allows benefits without disqualification. The employer appeals to the full Commission, and upon this hearing, it is established that the claimant has not actively sought work, and the Commission reverses the Claims Deputy. Because of the double affirmance clause, the payment of benefits has been started upon the effective date of the decision of the Appeals Deputy affirming the Claims Deputy.

You inquire if the last proviso in G.S. 96-15(b) makes it mandatory upon the Commission to pay benefits to such claimant because of the double affirmance clause, irrespective of a reversal by the Commission.

You state that you know that benefits should be paid because of the double affirmance until there is a reversal but that your question is: Upon reversal by the Chairman or the Commission, shall the payment of benefits be stopped from that time on?

You state another question under the disqualification section of the Employment Security Act: An individual voluntarily quits his job, and the Claims Deputy determines that such individual left work with good cause attributable to the employer and that he is entitled to benefits. The Appeals Deputy affirms the decision of the Claims Deputy. Upon the double affirmance, you start to pay benefits. The matter is appealed to the Chairman or the Commission, and the Claims Deputy and the Appeals Deputy were reversed on the same statement of facts, the Commission holding that the claimant left work voluntarily without good cause attributable to the employer and imposes a penalty of six weeks.

Assuming that the claimant is still unemployed, and his status has not changed, you inquire if you are required to pay the claimant benefits without any disqualification for the full twenty weeks because of the double affirmance clause and irrespective of the reversal and penalty imposed by the Commission. You further inquire if you would be permitted to impose the penalty upon the claimant and deduct from the payments to him an amount equal to six times his benefit amount because of the decision of the Commission.

So far as I have been able to find in the limited time for research, the so called double affirmance provision appears in many of the Employment Security Acts enacted by the various states. I have been unable to find but five cases dealing with the double affirmance provision by appellate courts. In 1941, the Michigan Supreme Court criticized this provision (CHRYSLER CORP. v. SMITH, 135 A.L.R. 900), and in the year of 1942, this same court (CHRYSLER CORP. v. APPEAL BD. OF MICHIGAN U. S. COMUN., 3 N.W.2d 302) declared that this provision was unconstitutional as being in violation of the Due Process Clause of the Constitution. However, the Supreme Court of California (ABELLEIRA v. DISTRICT COURT, 132 A.L.R. 715) has declared that this is a proper and remedial provision and that the same is constitutional and valid. The same provision again came before the Supreme Court of California (MATSON TERMINALS v. CALIFORNIA EMPLOYMENT COMUN., 151 Pac. 2d 202), and the validity of the double affirmance provision was again upheld. We, of course, are not passing on the constitutionality of the Act as incorporated in your Law; but if the matter were presented, I think we would prefer to follow the reasoning and holding of the California Court, and, as a personal opinion, I think the Act is valid.

I do not find any case that defines the precise limitations of this provision and that would give me an exact answer to the questions presented by you. Perhaps the closest interpretation from an appellate Court will be found in the MATSON case, supra, from which I quote as follows:

> "The commission's power to limit the payment of benefits must be considered in the light of where the alternative course would lead. If the interpretation and administration of the act were left to the referee

instead of to the commission, any referee would have unrestricted power to distinguish, interpret or even disregard in later cases a controlling decision of the commission or the courts laid down as a precedent to govern future action Despite any disciplinary action that might be taken against the referee, the commission would be powerless to stop illegal payments until an appeal was filed, brought to a hearing, and decided.

"The second factor that distinguishes this case from the Abelleira case is the final determination by this court that the awards were unauthorized. If the commission's action in vacating the referee's decision is disregarded, there results the paradox that the claimants should receive payments under Section 67, even though they are not entitled under the act to any payments. The claimants contend that the silence of the Legislature in this regard indicates an intention that the payments be made, rightly or wrongly. Under this interpretation, the detailed substantive provisions of the statute would be subordinated to the procedural provisions of Section 67, and the award would be based, not on compliance with the terms of the act, but on a successful argument to a referee. Those who convince Referee A would be entitled to unemployment benefits; those who, in a similar situation, fail to convince Referee B would not be entitled to benefits. A legal right to public moneys cannot be based on such a dubious combination of an administrative officer's error and an obscurely worded statutory provision. The right to have payments begin upon a provisional determination of their correctness in no way establishes a right to payments once their impropriety is finally determined. CL. Baldwin v. Scott County Milling Co., 307 U.S. 478, 59 S. Ct. 943, 83 L. Ed. 1409.

"In accord with the statute as interpreted in the Abelleira case, payments must be made pursuant to the referee's determination. If subsequently, however, by a decision of the commission on appeal or by a court on review, the payments are found to be unauthorized and illegal, Section 67 does not make them valid. That section merely prevents a stay; it does not create a substantive right. Since the provision against stay does not create any rights in conflict with the substantive provisions of the statute, there is no ground upon which the illegal awards can be paid."

So far as the application of this provision is concerned, and as to its general principles, I can see no difference if it is invoked in a proceeding involving an eligibility condition or a disqualification. I would say therefore, in answer to your first questions that in applying the double affirmance clause, it is mandatory that the Commission begin payment of benefits to the claimant, but upon the effective date of a reversal by the Commission, you would stop the payment of benefits from that time on. The

Commission is charged with the administration of the act and is the highest authority inside the agency in making claims determinations. I do not think it was intended for the double affirmance provision to extend beyond an authoritative decision, holding that the two previous decisions are invalid. Upon a reversal by the Chairman or the Commission, the payment of benefits should be stopped, and, of course, would never be reinstated on that particular claim and set of facts unless upon order by a Court of review.

In the second case put by you on the disqualification provision, I would say, in answer to your questions, that you are not required to go ahead and pay the claimant the full twenty weeks without any disqualification because of the double affirmance provision. In my opinion, you would go ahead and impose the penalty determined by the Commission as provided by law and make the necessary charges or deductions. I think the double affirmance provision sanctions the payment of benefits so long as its validity lasts, and no further; but when an authoritative decision to the contrary intervenes, then the normal provisions of ineligibility or disqualification become operative. In this connection, it might be pointed out also that there can be a double affirmance when the decision of the Commission affirms a decision of the Appeals Deputy in favor of the claimant. In such a case, the same reasoning set forth above would be applicable. I think it might also be pointed out that, in our opinion, where there is a double affirmance by decisions of the Claims Deputy and Appeals Deputy and a reversal by the Commission, an entry of an appeal by the claimant would not continue the effectiveness or validity of the double affirmance provision. By the same token, if there is a double affirmance made up of a decision of the Appeals Deputy and the Commission, then an entry of appeal from a ruling of the Commission by the employer would not postpone or stay the operation of the double affirmance provision and benefits would continue to be paid. The employer is protected by the provision of the statute which requires that all benefits so paid be charged to the pooled account.

Adopted as an official Interpretation by the Commission on January 17, 1950.