

Opinion No. 72-09

March 2, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General James B. Mulcock, Jr.,
Assistant Attorney General

TO: Mr. Louis R. Bachicha, Chairman-Executive Director Employment Security
Commission of New Mexico, 505 Marquette, N. W., Albuquerque, New Mexico 87103

QUESTIONS

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May the Employment Security Commission withhold payment, pending the employer's appeal, of unemployment compensation benefits to those employees who have been found eligible for such benefits at the preliminary determination hearing?

CONCLUSION

No.

OPINION

{*11} ANALYSIS

Section 59-9-6, N.M.S.A., 1953 Comp. provides, in essence, that after an initial determination of the validity of the employee's claim for unemployment compensation, an interested party may appeal that determination within fifteen days, and if such an appeal is filed, no benefits may be paid until a final determination of the appeal is made by the Commission.

In construing the California Unemployment Compensation Act -- an act with identical effect and similar language to New Mexico's act -- the United States Supreme Court held, in **California Department of Human Resources Development v. Java**, U.S. , 28 L. Ed. 2d 666, 91 S. Ct. . (1971), that the California law's section prohibiting payment until a final determination of an appeal has been made, violates Section 303(a)(1) of the Social Security Act and the latter's mandate to pay unemployment benefits "when due."

{*12} Writing the decision for the Court, Chief Justice Burger relied on the history of the Unemployment Compensation program and determined that the term "when due" meant that payments should be made at the earliest stage of unemployment, that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard, and determined that this time was after the "initial determination" as New Mexico specifies it in Section 59-9-6(a), **supra**. Other factors the Supreme Court considered in **Java** were that the median time for a determination of an

appeal in California was seven weeks; that 95-98% of the former employers in California do not appear or seek a hearing; and that former employers in California are successful in less than 50% of the appeals. We are advised that these statistics are in close correlation to New Mexico's experience in administering her Unemployment Compensation Act.

As such, it is our conclusion that **Java** is controlling on the Employment Security Commission of New Mexico; therefore, benefits must be paid to workers who have been found eligible at the initial determination.

We also note Chapter 5, N.M. Laws 1972, in which the Legislature, by overwhelming votes, amended Section 59-9-6, **supra**, to conform with the **Java** decision.