

RESTITUTION, WAIVER, FRAUD

Sections 9, 54, 54a-54c, 62

<u>Case Name</u>	<u>Page</u>
Benczkowski (Ford Motor Co.) . . . . .	18.07
Burch v Chapel Hill Cemetery Dev . . . . .	18.08
Buxton v Chrysler Corp . . . . .	18.02
DLEG Unemployment Insurance Agency v Darden . . . . .	18.15
Drayton v Showcase . . . . .	18.01
Garza v Hilltop Orchards & Nurseries, Inc. . . . .	18.05
Heckaman (H & R Block) . . . . .	18.06
Knight v Holland Hitch Company . . . . .	18.04
MESC v Miller. . . . .	18.03
MESC v Westphal . . . . .	18.13
Miltgen v DSC Marywood Co . . . . .	18.14
Pardon v MESC. . . . .	18.09
Sallmen v Danti Tool & Die, Inc. . . . .	18.10
Sanders v MESC . . . . .	18.12
Stein v MESC . . . . .	18.11

Section 62(a)

RESTITUTION, Waiver of restitution, Retroactive amendment

CITE AS: Drayton v Showcase, No. 64272 (Mich App April 6, 1983).

Appeal pending: No

Claimant: Denise Drayton  
Employer: Showcase  
Docket No: B78 15173 67544

COURT OF APPEALS HOLDING: The 1980 amendment to Section 62(a) is to be given retroactive effect.

FACTS: The claimant was determined eligible for unemployment benefits and received \$268.00. On November 7, 1978, "The MESC determined that claimant was, in fact, ineligible for such benefits and ordered her to repay the \$268.00."

By virtue of the 1980 amendment in Section 62(a) effective January 1, 1981, the MESC was given discretion to waive restitution.

DECISION: The MESC must exercise "its discretion on the restitution issue ..."

RATIONALE: "The Michigan Employment Security Act is remedial. It's primary purpose is to relieve the stress of economic insecurity. Godsol v Unemployment Compensation Comm, 302 Mich 652; 5 NW2d 519; 142 ALR 910 (1942); Michigan Employment Security Comm v Wayne State University, 66 Mich App 26; 238 NW2d 191 (1975), lv den 396 Mich 857 (1976). Where an amendment is designed to correct an existing law, it is generally remedial and will be given retroactive effect. Lahti v Fosterling, 357 Mich 578.

"Because the amendment is to be construed retroactively, the MESC had the discretion to waive restitution. However, it has not exercised its discretion.

"We are remanding this case to the MESC to exercise its discretion and to reevaluate its decision in the light of the amendment and this opinion. The MESC must consider [claimant's] indigence in this case in exercising its discretion."

Section 62(a)

RESTITUTION, Employer credit, Late information from employer, Finality of determination

CITE AS: Buxton v Chrysler Corporation, No. 68053 (Mich App June 1, 1984).

Appeal pending: No

Claimant: Clark W. Buxton  
Employer: Chrysler Corporation  
Docket No: B74 12158 49663

COURT OF APPEALS HOLDING: The provision of finality in Section 32(b) "applies only to whether the employer is entitled to a credit to its rating account and not to benefits paid to the claimant."

FACTS: The claimant was paid benefits as a result of the employer's late response to the Commission's request for information to determine the claimant's entitlement to unemployment benefits. The claimant was ordered to make restitution pursuant to Section 62(a) for the benefits paid prior to the employer's response.

DECISION: "The benefits paid claimant were properly subject to restitution pursuant to Section 62(a)."

RATIONALE: The Court affirmed the decision of the Circuit Court which held:

"The language of Section 32(b) is specifically limited to the 'non-complying employer'. Had the legislature meant for this section to apply to benefits paid to a claimant, it would have so stated, as it has done in other sections of the act, i.e., Sections 62(a) and 32(d). The Court is of the opinion that Section 32(b) applies only to whether the employer is entitled to a credit to its rating account where benefits were paid as a result of its untimely submission of required information. Section 20(a) reinforces and compliments Section 32(b)."

"Accordingly, the decision of the MESC Appeal Board ... is hereby AFFIRMED."

18.03

Section 62(a)

RESTITUTION, Waiver of restitution, Equity and good conscience

CITE AS: MESC v Miller, No. 82-004889 AE, Tuscola Circuit Court (June 13, 1983).

Appeal pending: No

Claimant: James Miller  
Employer: Maiers Motor Freight  
Docket No: B81 97417 80745

CIRCUIT COURT HOLDING: The Board of Review has no statutory authority to waive restitution under Section 62(a).

FACTS: The claimant was paid benefits pursuant to a Referee's decision which held the claimant not disqualified under the labor dispute provisions of the Act. The Board of Review reversed the Referee's decision, but waived the repayment of benefits under Section 62(a).

DECISION: The case is remanded to the MESC to exercise its discretion concerning the waiver of restitution.

RATIONALE: "The Court having carefully reviewed the record and heard oral argument, is of the opinion that neither the Michigan Employment Security Act nor case law gives the Board of Review the right to waive restitution sua sponte and that therefore the decision of the Board of Review waiving restitution on its own initiative is contrary to law."

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3, 5:NA

Section 62a

RESTITUTION, Back pay award, Recovery of benefits, Unjust enrichment

CITE AS: Knight v Holland Hitch Company, No. 77-4046 CZ, Ottawa Circuit Court (November 4, 1983).

Appeal pending: No

Claimant: Howard V. Knight  
Employer: Holland Hitch Company  
Docket No: B77 19822 68271

CIRCUIT COURT HOLDING: Where a claimant is awarded back pay by an arbitrator for a contested discharge and he is paid full back pay minus the unemployment insurance benefits he earlier received from the MESC, the employer is liable for restitution to the MESC.

FACTS: The claimant grieved his discharge. He received an arbitration award of full back pay for all lost time less unemployment compensation received.

DECISION: The employer is liable to MESC for the unemployment compensation deducted from the back pay awarded claimant.

RATIONALE: "A review of the language of the Michigan Employment Security Act makes it clear that the legislative purposes giving rise to the act did not include permitting double recovery by a claimant-employee (later determined to have been wrongfully discharged and entitled to back pay) by permitting him to retain unemployment benefits and full back pay for the same period. Neither do such legislative purposes support the enrichment of an employer who wrongfully discharges an employee, at the expense of the state fund and other employers, by permitting the employer to retain unemployment benefits deducted from back wages paid to the employee after reinstatement.

Section 62(a)

RESTITUTION, Good Cause, Administrative clerical error, Late protest

CITE AS: Garza v Hilltop Orchards & Nurseries Inc., No. 15-485, Van Buren Circuit Court (December 17, 1981).

Appeal pending: No

Claimant: Silvestra J. Garza  
Employer: Hilltop Orchards & Nurseries, Inc.  
Docket No: B79 13459 70571

CIRCUIT COURT HOLDING: An administrative clerical error is good cause for a reconsideration of a determination no longer subject to review due to expiration of the protest period.

FACTS: The Commission held that claimant was disqualified and must serve a 13 week requalification period. Claimant's benefit entitlement was shown reduced from 16 to 3 weeks. After claimant completed requalification requirements, a determination was issued which erroneously showed that claimant was entitled to 16 weeks of benefits rather than 3 weeks. Claimant thus received 16 benefit checks. Upon receipt of information from the employer that an error had been made in claimant's entitlement, the Commission issued a reconsideration holding that claimant must repay the excess benefits.

DECISION: The claimant must repay the excess benefits.

RATIONALE: "The evidence shows a reduction was contemplated by the Commission but was not consummated. There is no doubt that the Commission determined that [claimant] must wait 13 weeks for her benefits. When [claimant] became entitled to her benefits, the very document which granted 16 weeks of benefits recognized that she had requalified after 13 weeks, but failed to make the required reduction. That the benefits were not reduced according to MCLA 421.219(4); MSA 17.531 (4), can only be attributed to an administrative clerical error, since no new determination or redetermination was made that [claimant] should not have had to fulfill the 13 week requalification period, and it was, therefore, clear that the statutory formula should have been applied. Further, at the point at which the formula should have been applied to reduce the benefit entitlement, the act of reduction is a statutory requirement, not a discretionary decision."

Section 62(a), 32(a)

RESTITUTION, Credit weeks, Employer protest, Untimely wage and credit week information

CITE AS: Heckaman (H & R Block), 1979 BR 61223 (OPB78 50339).

Appeal pending: No

Claimant: Helen A. Heckaman  
Employer: H & R Block  
Docket No: O/P B78 50339 RO1 61223

BOARD OF REVIEW HOLDING: Where the employer submits new information concerning credit weeks after the monetary determination has become final and after the claimant has received benefits based on the prior information submitted by the employer, the claimant is not required to repay the benefits improperly paid.

FACTS: The employer submitted wage and credit week information to the Commission in early May, 1977. On May 12, 1977, the Commission issued determinations which established claimant's benefit year and listed weeks of benefit entitlement chargeable to each base period employer. In subsequent weeks, claimant was paid the full amount of benefit entitlement. On August 8, 1977, the employer submitted information indicating claimant had two fewer credit weeks than had been reported originally in May. A redetermination issued November 15, 1977 held the claimant was required to repay benefits received for the period from July 3, 1977 through July 16, 1977.

DECISION: Pursuant to Section 32a(3) of the Act, the claimant is not required to pay restitution.

RATIONALE: "The Commission issued a determination on May 12, 1977 granting the claimant fifteen credit weeks with the employer. The employer did not protest the determination within the twenty-day protest period.

"Under these circumstances, the Board is of the opinion that restitution is not required pursuant to Section 32a(3) of the Act. Claimant did not receive the benefits as a result of non-disclosure of a material fact or administrative clerical error."

## Section 62(a)

RESTITUTION, Administrative clerical error, Credit to experience account, Insufficient credit weeks, Failure to appeal redetermination, Late information from employer, Restitution not required, Wages and credit weeks

CITE AS: Benczkowski (Ford Motor Co), 1980 BR 56917 (B77 14530).

Appeal pending: No

Claimant: Mary Benczkowski  
Employer: Ford Motor Co.  
Docket No: B77 14530 56917

BOARD OF REVIEW HOLDING: "[W]here the Commission could only rely on an 'administrative clerical error' to order restitution of benefits ...", such error must be specified.

FACTS: The claimant had insufficient credit weeks, but received two benefit checks through Commission error. Wage information from the employer was received late, at 11:30 a.m. on the day of the second benefit payment.

DECISION: No restitution is required; the employer is entitled to a credit for two of the four weeks of benefits.

RATIONALE: "[W]here the Commission could only rely on an 'administrative clerical error' to order restitution of benefits, it is the Commission's duty to explain with particularity what its 'administrative clerical error' is. The Commission failed to do so in this case ..."

"None of the three exceptions to non-restitution in regulation 205(6) applies to the present case." "Under Section 29(19) and Regulation 205 (6), avoidance of restitution ends with the receipt by the Commission of the employer's late information." "Without proof that the check was tendered to the claimant after the Commission's 11:30 a.m. receipt of the employer's submission, we conclude that the claimant received the check before 11:30 a.m. on June 9, 1977." The Commission's determination denied the employer credit for the first check and allowed credit for the second check. "The employer did not appeal the redetermination."



Section 62

RESTITUTION, Waiver of restitution, Administrative clerical error

CITE AS: Burch v Chapel Hill Cemetery Dev., No. 88-61881-AE, Ingham Circuit Court (November 26, 1990).

Appeal pending: No

Claimant: Ronald Burch  
Employer: Chapel Hill Cemetery Dev.  
Docket No: B87 10225 106685W

CIRCUIT COURT HOLDING: When a claimant knew or should have known he was not entitled to the benefits he was receiving the claimant cannot claim administrative clerical error as a basis for restitution waiver.

FACTS: The claimant had been issued a determination which indicated he was entitled to 26 weeks of unemployment benefits. Because of a computer error, the claimant received 45 weeks of benefits. When the Commission discovered claimant had received an additional 19 weeks worth of benefits it sought restitution. The claimant asserted he should be exempt from the restitution requirement because he had received the additional benefits as the result of an administrative clerical error.

DECISION: The claimant was required to make restitution.

RATIONALE: Section 62(a) of the MES Act provides that the Commission may waive restitution. As one of its internal guidelines the Commission provides that it will waive restitution for payment resulting from an administrative clerical error.

While in the instant matter a clerical error had been made it was found that the claimant had actual knowledge he was only supposed to receive 26 weeks of benefits and therefore could not claim to be exempt from the restitution requirement for the remaining 19 weeks.

Section 62(b)

FRAUD, Dependents, Availability, Attachment to labor market

CITE AS: Pardon v MESC, No. 82-219 979 AE, Wayne Circuit Court (November 8, 1984).

Appeal pending: No

Claimant: Larry A. Pardon  
Employer: Imperial Cab  
Docket No: B79 16525 77987

CIRCUIT COURT HOLDING: The claimant was not seeking work, was not available for work and wrongfully claimed his children as dependents for purposes of calculations. Consequently, he was subject to the fraud provision of the MES Act, Section 62(b).

FACTS: The claimant had owned a corporation which provided package transportation services. Ultimately the business went bankrupt. The assets of the claimant's corporation were sold to another corporation owned by his wife which also provided package delivery services. Thereafter, the claimant spent anywhere between 20 and 40 hours per week providing uncompensated services for his wife's corporation, and spent his free time at a health club.

During the period he was providing uncompensated services and spending a good deal of time at a health club the claimant was drawing unemployment benefits. For purposes of calculation of his benefit rate the claimant claimed his children as dependents. Although the claimant's four children were all under the age of 13, the wife's corporation paid them thousands of dollars per year for nominal services. Monies paid to the children were used for household purposes.

DECISION: The claimant was ineligible for benefits and subject to the penalty provision of MES Act Section 62(b) for intentional misrepresentation.

RATIONALE: Although he certified he was seeking work and available the claimant was not looking for a job but was providing uncompensated services to his wife and spending the bulk of his free time in athletic pursuits.

Section 62(b)

FRAUD, Duty to disclose earnings

CITE AS: Sallmen v Danti Tool & Die, Inc., No. 86-23988-AR-3, Saginaw Circuit Court (September 8, 1986).

Appeal pending: No

Claimant: Ermin Sallmen  
Employer: Danti Tool & Die, Inc.  
Docket No: B85 09103 100921W

CIRCUIT COURT HOLDING: Any and all earnings regardless of how small must be reported to the Commission when certifying for benefits.

FACTS: After becoming unemployed the claimant began to perform part time services for another employer. The services consisted of the claimant's participating in a sales training program. During this program the claimant received \$90.00 per week against future commissions.

Although earning \$90.00 per week, the claimant failed to disclose these earnings to the Commission when he certified for his weekly benefits. The claimant indicated he failed to do so because a Commission clerk had advised him that if he earned less than half of his weekly benefit rate he would still be entitled to his full weekly benefits. Therefore, he did not think it necessary to disclose he was working and earning \$90.00 per week since that was less than half of his benefit rate.

DECISION: Board decision modified. Claimant must pay restitution, but intentional misrepresentation not established. No fraud penalty.

RATIONALE: It was clear that the claimant had accepted and performed services for the new employer for remuneration and therefore had earnings within the meaning of Section 48(1) of the MES Act.

The claimant had a legal duty to disclose to the Commission that he was working and receiving pay from another employer regardless of the impact on his benefit rate.

Section 9

FRAUD, Search Warrant

CITE AS: Stein v MESC, 219 Mich App 118 (1996)

Appeal pending: No

Claimant: N/A

Employer: Melvin Stein (Modern Roofing, Inc.)

Docket No. N/A

COURT OF APPEALS HOLDING: Employees of the Michigan Unemployment Agency may seek and execute search warrants when investigating fraud claims arising out of the Michigan Employment Security Act. That there is statutory authorization for the issuance of subpoenas does not bar the use of a search warrant in appropriate circumstances (e.g., fraud).

FACTS: An employee of the MESC obtained and executed a search warrant to secure employer business records to aid in an investigation of fraudulently obtained unemployment benefits by present and former employees. In response, the owners brought an action against the MESC in the Court of Claims. The employer argued the MESC employee acted outside the scope of her authority in obtaining a search warrant as the MES Act does not expressly authorize the use of search warrants. The employer asserted the MESC employee was limited to the subpoena process as provided in Section 9 as that is the only means of gathering information specifically set forth in the Act.

DECISION: Challenge to search warrant dismissed.

RATIONALE: The use of a subpoena is one way for the MESC to obtain the employer's records. The statutory provision for a subpoena does not foreclose the option of seeking a search warrant. Relying on Richter v Dep't of Natural Resources, 172 Mich App 658 (1988), the Court of Appeals observed: "One of the investigative duties contemplated by the act is the duty to investigate fraud." The court went on to say:

"We believe that encompassed within this authority to conduct fraud investigations, which can lead, as in the instant case, to criminal prosecutions, is the ability to utilize the tools necessary to carry out such investigations, including search warrants. Accordingly, we hold that agents of the MESC are entitled to obtain and execute search warrants when investigating fraud claims arising pursuant to the MESA."

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N/A

Section 62(b)

FRAUD, Burden of proof

CITE AS: Sanders v MESC, Wayne Circuit Court No. 287-132 (April 30, 1957).

Appeal pending: No

Claimant: Early Sanders  
Employer: Chrysler Corporation  
Docket No. B56-769-18197

CIRCUIT COURT HOLDING: The burden of establishing fraud by competent evidence rests with the MESC.

FACTS: The claimant received a telegram on Thursday to return to work that same day. Also that day he reported to an office of the Commission and obtained a benefit check for the previous week. The following week he again reported to the Commission and certified for benefits for the prior week despite having returned to work for part of that week.

DECISION: The finding of claimant fraud was upheld.

RATIONALE: The Commission's agent testified the claimant was asked about his earnings in the week in question. She said she did not require the claimant to fill in the day of the week and it is conceivable that had she so required, the claimant would have changed his entries. But that is conjecture. The fact remains that the dates the claimant entered were wrong and that he had returned to work on the day he had received his previous benefit check.

The burden should be upon the Commission to establish that fraud was committed, and fraud should not be presumed but established by competent proof that persuades one that a proper inference may be drawn. For it must be conceded that the Commission could not be expected to secure an admission by a claimant that he had committed a fraud. So, to prove an intent to defraud an inference must be drawn from the facts themselves.

7/99  
N/A

Section 62(a)

RESTITUTION, Civil action, Statute of limitations

CITE AS: MESC v Westphal, 214 Mich App 261 (1995)

Appeal pending: No

Claimants: Larry A. Westphal & Steve G. Bussell

Employer: Mueller Brass Co.

Docket No. B92-21862-122898W

**HOLDING:** Where the Agency has issued a determination requiring restitution within three years of the date of a claimant's receipt of improperly paid benefits, the Agency must file a civil suit to recover those benefits within three years of the date of the determination requiring restitution.

**FACTS:** Claimant Westphal received benefits through April 27, 1985. On January 29, 1986, the Agency determined those benefits were improperly paid. The claimant did not protest. The Agency filed its civil action for restitution on May 9, 1991. Because the Agency filed its claim more than three years after the date of the determination requiring restitution, the circuit court granted Westphal's motion for summary disposition. Claimant Bussell's experience was similar.

**DECISION:** The Agency could not recover restitution.

**RATIONALE:** The statute unambiguously states that the limitation period for the recovery of improperly paid unemployment benefits is three years from the date of receipt of benefits unless one of three exceptions exists. See Section 62(a). The third enumerated exception applied here since in each instance the MESC made formal determinations requiring restitution within three years of the claimant's receipt of benefits. In Section 62(a), the "last antecedent" before the three qualifying exceptions is the date of accrual of the cause of action. Accordingly, the qualifying exceptions refer solely to the date of accrual and leave the three year limitations period intact.

7/99

19, 17, d12: H

## Section 54(b)

FRAUD, Duty to disclose earnings, Agency advice

CITE AS: Miltgen v DSC Marywood Co, Kent Circuit Court, No. 00-06060-AE (March 23, 2001)

Appeal pending: No

Claimant: Georgia Miltgen  
Employer: DSC Marywood Company  
Docket No. B95-06582-RRR-145902W/FSC95-00107-RRR-145903W

CIRCUIT COURT HOLDING: Being told by an Agency representative that monies received as "gifts" do not have to be reported as income is not a defense to fraud when claimant failed to disclose "significant particulars" as to the receipt of that money.

FACTS: While receiving unemployment benefits, claimant performed services and was being compensated. Claimant knew she was obligated to report income from work to the Agency, but failed to do so. Claimant spoke to a representative of the Agency about whether she had to report the monies. She asked whether personal monies from a friend had to be reported; she did not report the reasons for receiving the monies or why she received the monies. Claimant claimed the monies she received were "gifts," although she acknowledged the payments were at an hourly rate for the service she performed.

DECISION: Claimant knowingly and willfully failed to report the income and is subject to the fraud provision.

RATIONALE: Even if the payor told claimant that the monies were gifts, it was unreasonable for her to believe that she was receiving gifts, and not being paid for services rendered. "A purely subjective belief is not legally significant; the belief must also be objectively reasonable. A gift which happens to be in an amount which is a certain rate for actual hours of effort performed for the payor is compensation for work, not a gift . . . [L]abels are of 'little importance.'" See Allied Market v Grocer's Dairy, 391 Mich 729, 735 (1974), Abbey Homes v Wilcox, 89 Mich App 574, 581 (1979), lv app den 407 Mich 875 (1979). Had claimant disclosed the nature of the particulars of the monies, being told that the monies did not need to be reported would probably have entitled her to act as she did, Woods v State Employees Retirement System, 440 Mich 77, 81-82 (1992). Since claimant admitted she did not provide those particulars, the answer she said she got does not provide her with a defense. United States v King, 560 F2d 122 (1977), and United States v Smith, 523 F2d 771 (1975).

11/04

Section 62(a)

RESTITUTION, Statute of limitations

CITE AS: DLEG Unemployment Insurance Agency v Darden, Oakland County Court, No. 04-059568-AE (October 22, 2004)

Appeal pending: No

Claimant: Yvonne Darden  
Employer: Mastanuono & Assoc., Inc.  
Docket No. FSC2004-00036-173164W

CIRCUIT COURT HOLDING: When adjudicating whether the Agency has jurisdiction to issue a determination or redetermination requiring restitution, the 3-year limitation provision of Section 62(a) is applicable, not the 1-year period contained in Section 32a(2).

FACTS: The Agency issued a redetermination November 25, 2003 requiring restitution for benefits improperly paid for 5 weeks ending in November 2002. The Board of Review held that under Section 32a(2) the Agency did not have jurisdiction to issue the redetermination on November 25, 2003 because more than one year had passed since the unemployment checks had been issued and there was no finding of fraud on claimant's part.

DECISION: The Agency may pursue the recovery of restitution.

RATIONALE: When two statutes cover the same general subject matter, the more specific statute must prevail over the more general statute. MESC v Westphal, 214 Mich App 261 (1995). The 3-year provision of Section 62(a) takes precedence over the 1-year provision of Section 32a(2) because Section 62(a) is more specific.

11/04