COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of: Rene E. Meade S. S. No. Buster Brown Apparel, Inc. Norton, Virginia	Date of Appeal to Commission: October 20, 1997 Date of Hearing: November 21, 1997 Place: RICHMOND, VIRGINIA *Decision No.:* 54991-C Date of Mailing: November 25, 1997 Final Date to File Appeal with Circuit Court: December 25, 1997

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9712101), mailed October 9, 1997.

APPEARANCES

Attorney for Claimant

ISSUES

Was the claimant unemployed during the claim weeks at issue as provided in *Sections 60.2-612 and 60.2-226 of* the Code of Virginia (1950), as amended?

Did the claimant receive wages during the claim weeks at issue as defined in Section 60.2-229(A) of the Code of Virginia (1950), as amended?

Was the claimant overpaid any sum of benefits to which she was not entitled and which she is liable to repay the Commission as provided in Section 60.2-633 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On October 20, 1997, the claimant filed a timely appeal from the Appeals Examiner's decision which held that she was ineligible for benefits for the period of March 23, 1997, through April 26, 1997, and that she was overpaid benefits with respect to those weeks. The basis for that decision was the Appeals Examiner's conclusion that the claimant had received back pay with respect to those weeks.

The claimant last worked as many as 30 days for Buster Brown Apparel, Inc., in Coeburn, Virginia. On February 26, 1997, the employer announced that the plant where the claimant was working would close on April 26, 1997. The employer provided this notice as required by the Worker Adjustment and Retraining Notification Act, 29 U.S.C.A. §§ 2101, et seq. The claimant was laid off by the employer prior to the expiration of the 60-day notice period. Consequently, the claimant filed a claim for unemployment compensation benefits and was subsequently paid benefits for the claim weeks at issue.

At some point in June of 1997, the employer came to the realization that the company had violated the provisions of the WARN Act by laying off the claimant and her co-workers prior to the expiration of the 60-day notice period. Consequently, the employer remitted to the claimant and each affected employee a payment that was computed in accordance with 29 U.S.C.A. § 2104(a). The employer reported to the Commission that such a payment had been made to the claimant and other affected employees who had also filed claims for unemployment insurance benefits. As a result, the local office Deputy, and subsequently the Appeals Examiner, concluded that these payments constituted wages that were deductible from the claimant's weekly benefit amount.

OPINION

The fundamental issue that the Commission must decide is whether payments made pursuant to 29 U.S.C.A. § 2104 constitute wages for the purpose of determining a claimant's eligibility for state unemployment insurance benefits. If they do, then this claimant and her similarly situated co-workers would not meet the definition of being "unemployed" since they would have received wages in excess of their weekly benefit amount. See, Code of Virginia, Section 60.2-226. Accordingly, the Commission must determine whether the WARN Act payments constitute wages under Section 60.2-229(A) of the Code of Virginia. To make that determination, the Commission must look to both federal and state law, as well as the judicial interpretations of the respective statutes.

Section 60.2-229(A) of the Code of Virginia provides, in pertinent part, as follows:

> "Wages" means all remuneration paid, or which should have been paid, for personal services, including commission, bonuses, tips, back pay, dismissal pay, severance pay and any other payments made by an employer to an employee during his employment and thereafter and the cash value of all remuneration payable in any medium other than cash. Notwithstanding the other provisions of this subsection, wages paid in back pay awards shall be allocated to, and reported as being paid during, the calendar quarter or quarters in which such back pay would have been earned. (emphasis added).

The Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C.A. § 2101, et seq., provides for a 60-day notice period to be given to employees prior to a plant closing or mass layoff. For violations of the notice requirement, § 2104(a) of the WARN Act provides that:

> (1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for
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> > (A) back pay for each day of violation . . .(emphasis added).
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> (3) Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

Pursuant to Va. Code § 60.2-229(A), "wages" includes back pay provided it is "for personal services." Under this subsection, back pay typically represents the difference between the actual payment made for personal services and the amount that should have been paid. It is not enough to simply characterize a payment as back pay; rather, it must be shown that the payment was for

personal services. Examples of back pay include cases where the employee was underpaid for overtime hours worked, or Title VII discrimination cases where an employee was awarded a raise retroactively.

Here, it is undisputed that the claimant did not perform any personal services for the employer after being laid off during the 60-day notice period. As a practical matter, neither the claimant nor any other affected workers could have performed services during the claim weeks at issue since the plant was closed. Furthermore, the WARN payment that the claimant subsequently received was not related to any past personal services. Instead, it represented a penalty for the employer's closing the plant prematurely in violation of the WARN Act. Therefore, since the WARN payment was not for personal services nor reasonably related to any past personal services performed, it does not constitute "wages" within the meaning of Section 60.2-229(A) of the Code of Virginia.

Similar conclusions have been reached in several other jurisdictions. In Stone Forest Industries, Inc. v. Bowler, 147 Ore. App. 81, 934 P.2d 1138, the Court of Appeals of Oregon stated that "...there are no wages unless the employee renders services." The court continued by stating that, since the claimant provided no services for the employer "during or attributable to the period that he received WARN payments", the WARN payments "are not attributable to any period for which he did provide services." In United Paperworkers Int'l Union v. Specialty Paperboard, Inc., 999 F.2d 51, 55 (2d Cir. 1993), the U.S. Court of Appeals stated that "...the WARN claim is not a claim for back pay because it does not compensate for past services." In Georgia-Pacific Corporation v. Unemp. Comp. Bd., 157 Pa. Commw. 651, 630 A.2d 948 (Pa. Cmwlth. 1993) the Commonwealth Court of Pennsylvania stated that "...WARN payments ... were not made in recognition of any service Claimants performed for G-P either during those weeks or at any other time. In short, they were not remuneration."

WARN payments essentially are statutorily mandated damage awards imposed when an employer fails to comply with the notice provisions of the WARN Act. As such, the payments represent liquidated damages rather than wages and do not disqualify an employee from receiving unemployment compensation. The conclusion that these payments are actually liquidated damages is amply supported by the language of the statute and the legislative history.

First, as previously noted, a WARN payment is not made for personal services. Second, in addition to the damages aggrieved employees can recover, localities are also entitled to a damage award of $500 for each day of the violation. This underscores the punitive character of the statute. Third, the Act is not truly a

"make whole" statute since it does not permit the employer to offset its liability with wages an affected employee obtains from other sources such as subsequent employers.

Although this is a case of first impression in Virginia, several courts in other jurisdictions have classified WARN payments as "damages". In United Paperworkers Int'l Union v. Specialty Paperboard, Inc., infra, at 55, the Court stated that the WARN Act "requires simply that an employer provide sixty-days' notice before layoffs or plant closings and gives employees a cause of action for damages if the employer fails to do so." (emphasis added). The Court continued by quoting from the underlying District Court case, stating:

> "WARN Act damages compensate an employee for the injuries caused by his or her improper termination, much akin to either an action for wrongful discharge or severance pay...." United Paperworkers Int'l Union v. Specialty Paperboard Inc., No. 93-7093, at 6, 1992 WL 524306 (D.Vt. Aug. 31, 1992). (emphasis added).

In the case of Breedlove v. Earthgrains Baking Companies, Inc., 963 F.Supp. 802, 805 (E.D. Ark. 1997), the court held that:

> The clearest statement made with respect to the damages portion of the WARN Act is contained in the Senate Report:
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> > [f]or violations of the notice provision, damages are to be measured by the wages ... the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.
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> S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987) (emphasis added).

In Georgia-Pacific Corporation v. Unemp. Comp. Bd., infra, the court stated:

> The WARN payment is not intended as a means of replacing lost wages; rather it is "to provide an incentive and a mechanism for employers to satisfy their obligations to their employees in the event they fail to provide 60 days advance notice [of plant closure] to their employees." H.R.Rep. No. 576, 100th Cong., 2nd Session at 1053 (1988), reprinted in 1988 U.S.C.C.A.N. 2078, 2086. WARN payments then are damages owed employees for suffering an unexpected employment loss where they had a rightful expectation of continued employment with that employer. (citation in original). (emphasis added).

The Third, Fifth, and Sixth U.S. Circuit Courts of Appeals and one U.S. District Court in the Fourth Circuit have all characterized the WARN payments as "damages". See, United Steelworkers v. North Star Steel Co., 5 F.3d 39 (3d Cir. 1993), cert. denied, 510 U.S. 114, 114 S.Ct. 1060 (1994); Washington v. Aircap Industries, Inc., 860 F.Supp. 307 (D.S.C. 1994); Carpenters Dis. Council v. Dillard Dep't Stores, 15 F.3d 1275 (5th Cir. 1994), cert. denied, 513 U.S. 1126, 115 S.Ct. 933 (1995); Saxion v. Titan-C Manufacturing, Inc., 86 F.3d 553 (6th Cir. 1996).

Finally, 29 U.S.C.A. § 2105 provides that the rights and remedies provided to employees by the WARN Act "are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies...." This provision reinforces the conclusion that damage payments under the WARN Act should not be used to offset any other benefit payments the employee would be otherwise eligible to receive, including unemployment compensation benefits. As noted in the case of Capital Castings, Inc. v. Arizona Department of Economic Security, 171 Ariz. 57, 828 P.2d 781 (App.1992), "Because the federal [WARN] statute does not purport to govern the classification of payments made for purposes of state unemployment compensation, we will not assume Congress intended its use of the term 'backpay' to control a recipient's eligibility for state unemployment benefits". Accord, Carpenters Dis. Council v. Dillard Dep't Stores, 15 F.3d 1275 (5th Cir. 1994), cert. denied, 513 U.S. 1126, 115 S.Ct. 933 (1995); and United Paperworkers Int'l Union v. Specialty Paperboard, Inc., 999 F.2d 51, 55 (2d Cir. 1993).

For these reasons, the Commission concludes that the WARN payment represented liquidated damages, and not wages, within the

contemplation of Section 60.2-229(A) of the Code of Virginia. Accordingly, the WARN payment is neither deductible from the claimant's weekly benefit amount nor reportable by the employer for tax purposes.

In reaching a different result, the Appeals Examiner apparently reasoned that the term "back pay" necessarily means the same thing under both the WARN Act and the Virginia Unemployment Compensation Act. In support of that reasoning, the Appeals Examiner cited Joshlin v. Gannett River States Publishing Corporation, 840 F. Supp. 660 (E.D. Ark 1993), as standing for the proposition that the term "back pay" was "clear and simple." The Appeals Examiner's reasoning was erroneous, and her reliance on Joshlin was misplaced.

The fact that the term "back pay" appeared in two different statutes that had two entirely different purposes does not suggest that it necessarily means the same under both laws. For example, the term "suitable work" appears in both the Virginia Unemployment Compensation Act and the Virginia Workers' Compensation Act, but has very different meanings under each. To determine what is meant by "back pay," it is necessary to review the purpose and intent of the respective statutes, as well as the particular language that appears in them and how they have been interpreted by the courts. Contrary to the Appeals Examiner's opinion, the Joshlin court did not say that the term "back pay" was clear and simple; rather, the court was addressing a fundamentally different issue, which was the meaning of the phrase "back pay for each day of the violation." The court concluded that "each day of the violation" meant calendar days rather than workdays. Nothing in Joshlin suggested that the "back pay" under the WARN Act constituted "wages" under a state unemployment insurance statute.

DECISION

The Appeals Examiner's decision is reversed. The claimant is neither ineligible for nor overpaid benefits with respect to the claim weeks at issue by virtue of the WARN payment she received.

M. Coleman Walsh, Jr.

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Special Examiner