COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Richard A. Perry [redacted]

Newport News Shipbuilding, Inc.
Newport News, Virginia

Date of Appeal to Commission: July 30, 1992

Date of Hearing: September 11, 1992

Place: RICHMOND, VIRGINIA

Decision No.: 39082-C

Date of Mailing: September 12, 1992

Final Date to File Appeal with Circuit Court: October 2, 1992

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This case is before the Commission on appeal by the employer from Appeals Examiner's decision UI-9116414, mailed June 22, 1992.

APPEARANCES

None

ISSUE

Was the claimant discharged from employment due to misconduct in connection with work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The employer filed a timely appeal from the Appeals Examiner's decision which affirmed an earlier Deputy's determination and qualified the claimant for unemployment compensation, effective October 6, 1991, with respect to his separation from the employer's services.

The findings of fact made by the Appeals Examiner have been reviewed and are hereby adopted by the Commission with certain additions and corrections to be discussed in the following paragraphs.

In medical terms the word "idiopathic" means "of unknown origin." The claimant's sleep disorder had been noted on his 1986 merit evaluation.

In line four of paragraph four of the findings of fact, the word "was" should be inserted after the word "he." In line five of paragraph nine, "syndrom" should be corrected to read "syndrome."

OPINION

Section 60.2-618(2) of the Code of Virginia provides a disqualification if it is found that a claimant was discharged from employment due to misconduct in connection with work.

In the case of Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978), the Supreme Court of Virginia defined misconduct as follows:

> In our view, an employee is guilty of "misconduct connected with his work" when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer. . . . Absent circumstances in mitigation of such conduct, the employee is "disqualified for benefits", and the burden of proving mitigating circumstances rests upon the employee.

The Commission agrees with the Appeals Examiner's citation of the case of Robinson v. Smithfield Packing Company, Commission Decision 37615-C (March 6, 1982) as standing for the principle that sleeping on the job generally constitutes misconduct in connection with work, because virtually every employee has an obligation to remain alert while on duty. The only people who can expect to be paid for sleeping on the job are emergency response personnel who have to be on duty 24 hours a day, and medical research subjects. Based upon the facts in this case, the Commission must conclude that the employer has carried the initial burden of showing that the claimant's discharge was due to a prima facie case of misconduct so as to shift the burden to him to show mitigating circumstances in order to avoid a disqualification under this section of the Code.

Due to a combination of two factors, the Commission must find such mitigating circumstances to exist. The first is that the claimant's sleep disorder had been known to the employer for a considerable length of time, and that multiple incidents of him

sleeping on the job were apparently condoned without any discipline being taken against him. Thus, even though fault could be found with the claimant's decision not to seek medical treatment on the grounds that he did not want to take drugs, the fact that the employer never insisted upon him obtaining medical treatment until the very end of his employment tends to counteract this failure on his part. Moreover, the Commission must reject the employer's contention that the fact that the claimant's syndrome is described as "idiopathic" means that it has no basis. There is sufficient evidence in the record to indicate that he does have a sleep disorder; nevertheless, it apparently does not fit into any previously described medical category. The mere fact that it is labeled as being of unknown origin is not equivalent to saying that he was faking such a disorder.

The Commission concludes that the claimant has presented sufficient circumstances to mitigate the conduct which brought about his termination. Accordingly, he should remain qualified for benefits under this section of the Code of Virginia.

DECISION

The decision of the Appeals Examiner is hereby affirmed.

The claimant is qualified for unemployment compensation, effective October 6, 1991, with respect to his separation from the services of Newport News Shipbuilding, Inc.

Charles A. Young, III
Special Examiner