COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Elsayed Yousef
[redacted]

Avis Rent A Car System, Inc.
Alexandria, Virginia

Date of Appeal to Commission: October 25, 1993

Date of Hearing: December 16, 1993

Place: RICHMOND, VIRGINIA

Decision No.: 43933-C

Date of Mailing: January 7, 1994

Final Date to File Appeal with Circuit Court: January 27, 1994

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This case came before the Commission on appeal by the employer from a Decision of Appeals Examiner (UI-9315896), mailed October 7, 1993.

APPEARANCES

Claimant

ISSUES

Should the Commission direct the taking of additional evidence and testimony as provided in Regulation VR 300-01-4.3B of the Regulations and General Rules Affecting Unemployment Compensation?

Was the claimant discharged for misconduct connected with work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On October 25, 1993, the employer filed a timely appeal from the Appeals Examiner's decision which held that the claimant was qualified to receive benefits, effective July 25, 1993. The basis for that decision was the Appeals Examiner's conclusion that the employer had not carried its burden of proving that the claimant's discharge had been for reasons that would constitute misconduct in connection with work.

In addition to filing an appeal, the employer requested permission to submit the testimony of two individuals who allegedly observed the claimant sleeping on the job. The claimant had been discharged based upon the allegations made by these two individuals. Although these individuals were employees of the company, they did not attend the Appeals Examiner's hearing to testify. The instructions that appeared on the notice of the appeals hearing informed both parties of the importance of presenting all of their witnesses and documents at that hearing. In addition, the following instruction appeared on the front of the hearing notice in all capital letters.

> THIS MAY BE YOUR ONLY OPPORTUNITY TO PRESENT EVIDENCE AND TESTIMONY WITH RESPECT TO THIS CLAIM. THEREFORE, IT IS IMPORTANT THAT YOU ATTEND THIS HEARING AND BE PREPARED TO PRESENT YOU COMPLETE CASE.

A hearing was scheduled before the Commission for 10:15 a.m. on December 16, 1993. Written notice of that hearing was mailed to both parties and to the employer's agent on December 2, 1993. The employer had been informed that its request to present additional evidence would be taken under advisement. Neither the employer nor its agent appeared at the Commission hearing. Additionally, the employer did not make any written submission in support of its request to present evidence, or as written argument on the merits of the case.

The findings of fact of the Appeals Examiner are supported by the evidence in the record. Accordingly, they are adopted by the Commission with the following modifications.

The last sentence of the third paragraph of the findings of fact is modified to read, "As the managers walked toward the car, the claimant got out of the vehicle and greeted them." The claimant had just finished using that car to make his rounds at a satellite lot for which he was also responsible.

OPINION

Regulation VR 300-01-4.3B of the Regulations and General Rules Affecting Unemployment Compensation provides:

> Except as otherwise provided by this rule, all appeals to the Commission shall be decided on the basis of a review of the evidence in the record. The Commission, in its discretion, may direct the taking of additional evidence after giving written notice of such hearing to the parties, provided:

1. It is affirmatively shown that the additional evidence is material, and not merely cumulative, corroborative, or collateral; could not have been presented at the prior hearing through the exercise of due diligence; and it is likely to produce a different result at a new hearing; or

2. The record of proceedings before the appeals examiner is insufficient to enable the Commission to make proper, accurate, or complete findings of fact and conclusions of law.

In this case, the employer could have produced the two witnesses in question at the appeals hearing and had them testify at that time. The employer knew or should have known from the instructions that appeared on the hearing notice that all of its evidence should be presented to the Appeals Examiner. Since there is no evidence before the Commission to show that the employer was prevented by circumstances beyond its control from having the two witnesses testify at that proceeding, the due diligence criteria set out in the regulation has not been satisfied. Since the evidentiary record is otherwise sufficient to enable the Commission to properly adjudicate the case, the employer's request to submit additional evidence must be denied.

Section 60.2-618(2) of the Code of Virginia provides a disqualification if the Commission finds that a claimant was discharged for misconduct in connection with work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978). In that case, the Court held:

> 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 disqualification for misconduct is a serious matter which warrants careful consideration. The burden of proof is on the employer to prove by a preponderance of the evidence that the claimant was discharged for reasons which would constitute misconduct connected with his work. Dimes v. Merchants Delivery Moving and Storage, Inc., Commission Decision 24524-C (May 10, 1985); Brady v. Human Resource Institute of Norfolk, Inc., 231 Va. 28, 340 S.E.2d 797 (1986).

Sleeping on the job has generally been held to constitute misconduct in connection with work. Robinson v. Smithfield Packing Company, Commission Decision 37615-C (March 6, 1992); Perry v. Newport News Shipbuilding, Inc., Commission 39082-C (September 12, 1992). This is true because every employee has an obligation to remain alert while on duty. Moreover, if an employee such as a security guard was asleep on the job, that would constitute a willful disregard of the employer's business interests, and the duties and obligations owed the employer by that employee.

Nevertheless, the evidence presented by the employer is not sufficient to prove that the claimant was guilty of sleeping on the job. As a general proposition, the sworn testimony of a party or witness to a particular event will be afforded greater weight than the unsworn, hearsay statements of individuals who did not attend the evidentiary hearing. This does not mean that hearsay could never prevail against contradictory testimonial evidence offered at a hearing. Casey v. V.E.C. and Cives Steel Company, Circuit Court for the County of Frederick, Chancery No. C-86-168 (April 27, 1987); Parker v. Roadway Express, Commission Decision 36653-C (July 22, 1992). It does mean, however, that the party with the burden of proof may have difficulty prevailing if little or no first-hand, direct testimony is offered on the material issues.

The Commission has carefully weighed and evaluated the evidence submitted by the employer and the claimant at the appeals hearing. Based upon that evaluation, the Commission is of the opinion that the employer failed to carry its burden of proving that the claimant had been sleeping on the job. The hearsay evidence that the employer relied upon was not sworn. Furthermore, the claimant did not simply deny that he had been sleeping on the job. Instead, he gave a rational explanation for being in a vehicle as opposed to the guard shack, when the two managers entered the facility. The employer did not dispute that the claimant was responsible for the security at a satellite lot, and was permitted to use one of the vehicles to make his rounds at that location.

Accordingly, the Commission must conclude that the employer did not carry the burden of proving misconduct. Consequently, no disqualification may be imposed upon the claimant's receipt of unemployment insurance benefits.

DECISION

The employer's request to submit additional evidence and testimony is hereby denied.

The Appeals Examiner's decision is hereby affirmed. The claimant is qualified to receive benefits, effective, July 25, 1993, based upon his separation from work with Avis Rent A Car, Inc.

M. Coleman Walsh, Jr.
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Special Examiner