COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Thomas F. Billings
[redacted]

Regional Enterprises, Inc.
Hopewell, Virginia

Date of Appeal
to Commission: January 23, 1996

Date of Hearing: May 23, 1996

Place: RICHMOND, VIRGINIA

Decision No.: 50577-C

Date of Mailing: June 25, 1996

Final Date to File Appeal
with Circuit Court: July 15, 1996

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This case is before the Commission on appeal by the employer from Appeals Examiner's decision UI-9516944, mailed January 12, 1996.

APPEARANCES

Claimant; Attorney for Claimant; Observer with Claimant
Employer Representative; Attorney for Employer; Observer

ISSUE

Was the claimant discharged due to misconduct connected 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 an Appeals Examiner's decision which affirmed an earlier Deputy's determination and qualified the claimant for benefits, effective November 12, 1995, with respect to his separation from the employer's services.

Prior to filing his claim, the claimant last worked for Regional Enterprises, Incorporated of Hopewell, Virginia, between April 1, 1995, and November 3, 1995. His position was that of a tractor-trailer driver.

The employer operates pursuant to Department of Transportation regulations which place a limit on the number of hours an individual may drive a truck. No one subject to the regulations is supposed to drive more than ten hours in any 24-hour period; however, a driver is allowed to be on duty, but not driving for five additional hours. The driver is expected to properly maintain a log book which shows where he has been and whether he has been driving, on duty but not driving, or off duty. The claimant was paid by the hour; however, his log book was not used to calculate his pay. That was done from the bill of lading which the drivers were also expected to fill out for the employer.

The claimant drove a tanker truck, usually containing sulfuric acid which is considered a hazardous material. It is not entirely clear from the record, but apparently he had a regular run where he would drive empty from Hopewell to a site in Delaware where he would then load the tanker and return in one day. The entire trip would take between 12 and 13 hours, however, it was scheduled that the claimant would not be driving any more than ten of those hours.

On October 27, 1995, the claimant was initially scheduled to go on the Delaware run at 10:00 a.m. He had come in from his last run at 11:00 p.m. the night before and realized that he did not have enough hours left to him to take the run in the morning. At 8:00 a.m., he called the dispatcher to state this and it was agreed that the trip would be postponed until 7:00 p.m. Based on the claimant's own testimony, he was too tired to have made the run in the morning anyway. Nevertheless, rather than get some sleep, he spent the rest of the day working on his car. He then made the run to Delaware, loaded the tanker with acid, and started back. On Interstate 95 in Stafford County, he fell asleep at the wheel and ran off the road causing over $50,000 in damage to the company vehicle, as well as a small acid spill. The claimant suffered relatively minor injuries in the accident and was suspended from duty pending an investigation.

Because he was in some pain, the claimant decided to take a Tylenol pill containing codeine which he had left over from an old prescription. He was then required to take a drug test and told the person administering it that might test positive for the presence of codeine. In fact, the test results did bear this out. Additionally, the employer discovered four instances where there were discrepancies between the hours the claimant showed on the bills of lading for two dates in August and two dates in October and the hours he had shown on his driver's log. After a safety committee meeting decided that the accident had been preventable, the decision was made to terminate the claimant's services.

The claimant had been charged with reckless driving and causing a hazardous material spill. He was eventually convicted of the reckless driving charge and fined $200 plus court costs. The charges of causing the spill were satisfied when evidence was entered to show that the cost of cleaning it up had been paid by the employer.

OPINION

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

In the case of Israel v. V.E.C., 7 Va. App. 169, 372 S.E.2d 207 (1988), the Virginia Court of Appeals found that a truck driver who had two relatively minor accidents within the space of one week had not been discharged due to misconduct in connection with his work. This was because neither accident standing alone nor the two considered together demonstrated negligence of such a high degree as to manifest a willful disregard of the employer's legitimate business interests. From the language used, it is apparent that the possibility that only one accident could constitute misconduct was not ruled out.

In the case of Poland v. T. D. L. C., Inc., Commission Decision 30841-C (November 8, 1988), the claimant was a relatively inexperienced tractor-trailer driver who had been discharged after a serious accident. She had been driving in the left-hand lane of a four lane highway approaching a marked construction zone with a sign indicating that the right lane was closed up ahead. A car in front of her moved into the right lane and almost immediately swerved back in front of the claimant which caused her to brake suddenly. She ended up jackknifing the rig and causing $21,000 worth of damage. She was charged with driving at an unsafe speed for the conditions of the highway and simply paid the fine without appearing in court.

In that case, the Commission cited the three degrees of negligence recognized in Virginia. The first is ordinary or simple negligence which is the failure to use "that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another." Griffin v. Shively, 227 Va. 317, 315 S.E.2d (1984).

Gross negligence is defined as "that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of (another). It must be such a degree of negligence as would shock fair-minded men although something less than willful recklessness." Griffin v. Shively, 227 Va. at 321, 315 S.E.2d at 213, quoting Ferguson v. Ferguson, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971).

"Willful and wanton negligence is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the (individual) aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another." Griffin v. Shively, 227 Va. at 321, 315 S.E.2d at 213, Friedman v. Jordan, 166, Va. 65, 68, 184 S.E.2d 186, 187 (1936).

In Poland, the Commission concluded that although the accident was serious, both the claimant's inexperience and the contributory negligence of the driver who swerved in front of her meant that the negligence displayed was simple in nature only. The Commission went on to cite the case or Norwood v. Respiratory Home Care of Virginia, Commission Decision 30219-C (June 1988), in which it was stated:

> (T)he Commission has steadfastly declined to impose the disqualification for misconduct when the basis for doing so would have been a single act of simple, ordinary negligence. While there may be cases where a single act of gross negligence would be sufficient to constitute misconduct, a single act of simple negligence would rarely, if ever, sustain a finding of work-connected misconduct.

The Commission agrees with the claimant's argument that neither the positive drug test result showing codeine in his system nor evidence that there were discrepancies between the hours he reported in his log book and the hours he showed on the manifest sheet played a significant role in the decision to terminate his services. There has been no evidence introduced which would indicate that the claimant was under the influence of drugs at the time of the accident or that he received any pay to which he was not entitled. Accordingly, this case must be decided based upon an analysis of the accident itself.

The negligence displayed by the claimant with respect to the accident did not rise to the highest level recognized in Virginia because a preponderance of the evidence does not establish that it was the result of any conscious actions on the claimant's part. If the record showed that he knew that he was "nodding off" and that he continued to drive past places where he could have stopped with this knowledge then the highest level of negligence might have been attained. Nevertheless, the Commission has no reason to doubt his testimony to the effect that it was a sudden event which he never realized was going to happen.

The claimant's actions represented negligence far greater than that displayed by the driver in the Poland case. Neither inexperience, highway conditions, nor contributory negligence by another driver was involved in his accident. Additionally, he was hauling hazardous material at the time it occurred. Finally, the Commission cannot ignore the fact that he was convicted of reckless driving as a result of that accident. When this is combined with the fact the claimant knew he did not have enough sleep or hours available when he declined to take the run in the morning, yet he did not choose to use the extra time he had before taking it in the evening to get any rest, the Commission is even more convinced that he displayed gross negligence with respect to the accident.

Although the claimant cited the case of Catlett v. V.E.C., Rockingham County Circuit Court, Law Number 7135, 4 Va. Cir. 364 (January 7, 1986), as supporting the position that the claimant should be qualified for benefits, the Commission must disagree. In Catlett, the claimant was discharged after a single accident which occurred in bad weather when he was arguably driving too fast for conditions. He was not charged with any traffic offense as a result of that accident and although the judge was of the opinion that perhaps he had driven recklessly, he was found qualified for benefits. Nevertheless, this case was decided before the Israel case in which the Virginia Court of Appeals specifically allowed for the possibility that a single accident standing alone could demonstrate the type of negligence to establish misconduct in connection with work. When the Commission considers the gross negligence displayed by the claimant with respect to the accident in this case, it is concluded that it meets this standard. Although the claimant may not have deliberately or willfully fallen asleep at the wheel, he did deliberately and willfully take out the rescheduled load without getting any rest as he should have done. Accordingly, he should be disqualified under this section of the Code.

DECISION

The decision of the Appeals Examiner is hereby reversed.

The claimant is disqualified for unemployment compensation, effective November 12, 1995, for any week or weeks benefits are claimed until he has performed services for an employer during 30 days, whether or not such days are consecutive and he has subsequently become totally or partially separated from such employment, because he was discharged due to misconduct in connection with work.

The Deputy is instructed to calculate what benefits may have been paid to the claimant after the effective date of the disqualification which he will be liable to repay the Commission as a result of this decision.

Charles A. Young, III
Special Examiner