

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Leonard C. Wilson
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Four J's, Inc.
Roanoke, Virginia
Successor in Interest to
Jolere Limited Corporation
t/a Mail Boxes, Etc.

Date of Appeal
to Commission: April 29, 1997
Date of Review: November 24, 1997
Place: RICHMOND, VIRGINIA
Decision No.: 53842-C
Date of Mailing: December 12, 1997
Final Date to File Appeal
with Circuit Court: January 11, 1998

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This case came before the Commission pursuant to a timely appeal by the employer from Appeals Examiner's decision UI-9704141, mailed April 11, 1997.

ISSUES

Was the Notice of Deputy's Determination promptly rendered as provided in Section 60.2-619(C) of the Code of Virginia (1950), as amended?

Did the claimant leave work voluntarily without good cause as provided in Section 60.2-618(1) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The employer filed a timely appeal from an Appeals Examiner's decision which reversed an earlier Deputy's determination, which disqualified the claimant for benefits effective December 17, 1995. Although acknowledging that the claimant's reason for leaving work did not constitute good cause, the Appeals Examiner reversed the disqualification on the basis that the Deputy's determination had not been rendered promptly.

The claimant filed a claim for unemployment compensation benefits effective December 17, 1995. He listed Mail Boxes, Etc., 2018 Electric Road, Roanoke, Virginia 24018, as his last employer with dates of employment from July 1, 1990, through October 30, 1995. At the time of filing, he listed the cause of his unemployment by checking "lack of work." Under remarks, he entered the following statement: "I was former owner of business, forced to sell."

This resulted in an Employer's Report of Separation and Wage Information being sent to the Jolere Limited Corporation, which traded as Mail Boxes, Etc. This document was completed and signed by the claimant. On that form, he certified that he was "forced to sell Mail Boxes, Etc. business." He explained the business was sold because of poor marketing conditions, due to a downturn in sales, and increased competition from sources that included his own franchiser. He had learned that a second Mail Boxes, Etc., would be opened in a nearby mall.

In completing a form for the franchiser which asked the reason for selling, the claimant entered the following statement:

We are going to pursue an opportunity to open a food business in another region of the country with some relatives.

The claimant was found to be monetarily eligible to receive benefits in the sum of \$208 per week up to 18 weeks, with a maximum potential benefit amount of \$3,744. The claimant claimed and received benefits, exhausting his entitlement to such benefits during the compensable week ending April 27, 1996.

Effective November 1, 1995, the claimant and his wife sold their business operation to Four J's, Inc. The sale was an acquisition, and included the unemployment compensation tax experience of the Jolere Limited Corporation.

In July 1996, Four J's, Inc., received from the Virginia Employment Commission a quarterly charge statement for the quarter ending June 30, 1996. The form advised that their account was being charged for benefits received by the claimant. Four J's, Inc., immediately filed a protest with the Commission regarding this taxable charge, which resulted in an investigation.

Following the investigation, on September 12, 1996, the Deputy issued a determination which declared the claimant disqualified from receiving benefits effective December 17, 1995. That determination was based upon the finding that the claimant had left work voluntarily without good cause. The claimant filed a timely appeal from that determination.

An Appeals Examiner issued an order (UI-9613244) on October 25, 1996, which ruled that the Deputy's determination was void ab initio because it had not been promptly rendered. In Commission Order 52853-C, issued December 9, 1996, the case was remanded to First Level Appeals with instructions to the Appeals Examiner as follows:

The case is remanded to First Level Appeals for the purpose of scheduling and conducting another hearing in this case. Written notice of that hearing shall be afforded to Four J's, Inc., as the successor to Jolere Limited Corporation. The Appeals Examiner who presides at the next hearing shall receive from all parties any evidence and testimony that is relevant and material to determining whether the claimant voluntarily left work without good cause when he sold his business to Four J's, Inc. At the conclusion of the hearing, the Appeals Examiner shall issue a decision which adjudicates the claimant's entitlement to benefits under the provisions of Section 60.2-618(1) of the Code of Virginia.

This resulted in Decision UI-9704141, mailed April 11, 1997, in which the Appeals Examiner cited the statutory issue arising under Section 60.2-618(1) of the Code of Virginia; however, he went on to find that the claimant was qualified for benefits based on his conclusion that the Deputy's determination had not been promptly rendered in accordance with the principles outlined in In re Ardizzone, Commission Decision 10619-C (August 2, 1978).

OPINION

Section 60.2-619(A)(1) of the Code of Virginia provides as follows:

A representative designated by the Commission as a deputy, shall promptly examine the claim. On the basis of the facts found by him, the deputy shall either:

a. Determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof; or

b. Refer such claim or any question involved therein to any appeal tribunal or to the

Commission, which tribunal or Commission shall make its determination in accordance with the procedure described in Section 60.2-620. (emphasis supplied)

Section 60.2-619(C) of the Code of Virginia provides, in pertinent part, as follows:

Notice of determination upon a claim shall be promptly given to the claimant by delivering or mailing such notice to the claimant's last known address. In addition, notice of any determination which involves the application of the provisions of Section 60.2-618, together with the reasons therefor, shall be promptly given in the same manner to the most recent thirty-day employing unit by whom the claimant was last employed and any subsequent employing unit which is a party. . . . The deputy shall promptly notify the claimant of any decision made by him at any time which in any manner denies benefits to the claimant for one or more weeks. (emphasis supplied)

Promptness is a mandatory requirement under the provisions of Section 60.2-619 of the Code of Virginia. With the exception of fraud cases arising under the provisions of Section 60.2-618(4) of the Code of Virginia, there is no specific time limit setting forth when a Deputy's determination will be considered to be prompt. Nevertheless, the retroactive application of a disqualification or finding of an eligibility to a period of time for which benefits have already been paid should be done as soon as possible after the facts to support such a determination are made known to the agency.

The first case that addressed this issue was the case of In re Ardizzone, Commission Decision 10619-C (August 2, 1978). In that case, the claimant filed an untimely appeal from a Notice of Deputy's Determination, which was issued on August 23, 1977. That determination held that the claimant was ineligible to receive benefits for the period of July 27, 1975 through August 6, 1975, and was overpaid benefits in the amount of \$112 for those two weeks. In analyzing this issue the Commission stated:

It would be unconscionable in our opinion to hold, as a deputy did in 1977, that the claimant was overpaid. Section 60.1-61 (the predecessor to Section 60.2-619) of the Act mandates that the notice of determination of the claim shall be promptly given to the claimant. The Deputy is further mandated by such section to promptly notify the claimant of any decision to deny

benefits. Although the claimant was promptly notified that she was monetarily qualified for benefits, there was no notification, other than the receipt of benefits, of a determination of the claimant's eligibility for the period claimed from July 27, 1975 through August 9, 1975. The Deputy's determination dated August 23, 1977 which held the claimant overpaid can in no way be construed as a prompt notification upon the claim. (emphasis in original)

Based upon that analysis, the Commission found that the Deputy's determination was void ab initio because its failure to meet the promptness requirement of the statute was a fatal defect. As a result, the Commission also concluded that the issue of whether the claimant had filed a timely appeal was obviated. In the cases of Randolph v. Huff-Cook, MBA, Commission Decision 25734-C (July 11, 1986), Crone v. Kitchens Equipment Company, Commission Decision 18398-C (July 1, 1982), and Melton v. Monroe Systems for Business, Inc., Commission Order 38616-C (June 26, 1992), delays of seven months, 13 months, and 14 months, respectively, were found to be violative of the promptness requirement of the statute.

These same principles are applicable to the present case. The Deputy's determination was issued nearly 9 months after the claimant filed his claim for benefits. The delay did not result from incorrect information provided to the Commission by the claimant, but from failure to adequately notify the successor company of the fact that a claim had been filed. Given the totality of the circumstances presented by this case, the delay in issuing the Deputy's determination does not comply with the promptness requirement set out in Section 60.2-619 of the Code of Virginia and is, therefore, a fatal defect.

Section 60.2-521 of the Code of Virginia provides the Commission is authorized to compromise, settle, and adjust any tax or taxes, including interest, or any penalty assessed against any employer where in the judgement of the Commission the best interests of the Commonwealth will be promoted or served. The promptness requirement in Section 60.2-619(C) applies with equal force to claimants and employers. It is designed to promote and encourage administrative efficiency in examining and adjudicating claims. It was not designed to unfairly penalize one party over the other when the agency did not act promptly. Therefore, under the facts of this case and in the interest of fundamental fairness, the Commission rules that Four J's, Inc., will be relieved of any tax consequences resulting from this claim.

DECISION

The Notice of Deputy's Determination, issued September 12, 1996, which held that the claimant was disqualified from receiving benefits, effective December 17, 1996, is void ab initio. Therefore, the Appeals Examiner's decision (UI-9704141) is vacated and stricken from the Commission's docket.

This case is referred to the Field Operations Division to take such action as is reasonably necessary to implement the relief granted under the terms of this decision.

Lucy O. Bailey
Lucy O. Bailey
Special Examiner *ty*