COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:
Curtis A. Edwards
[redacted]

Newport News Shipbuilding, Inc.
Newport News, Virginia

Date of Appeal to Commission: July 17, 1992

Date of Hearing: August 19, 1992

Place: RICHMOND, VIRGINIA

Decision No.: 39240-C

Date of Mailing: August 31, 1992

Final Date to File Appeal with Circuit Court: September 20, 1992

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9208010), mailed July 2, 1992.

APPEARANCES

None

ISSUES

Does the claimant have good cause to reopen the Appeals Examiner's hearing as provided in Regulation VR 300-01-4.2I of the Regulations and General Rules Affecting Unemployment Compensation?

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

FINDINGS OF FACT

On July 17, 1992, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified him from receiving benefits, effective March 22, 1992. The basis for that disqualification was the Appeals Examiner's finding that the

claimant had been discharged for misconduct connected with his work. In addition to filing an appeal, the claimant requested that the Appeals Examiner's hearing be reopened, asserting that he never received the notice of that hearing.

The Appeals Examiner's hearing was conducted on June 23, 1992, at the Hampton office of the Virginia Employment Commission. Due notice of that hearing was mailed to the correct, last known addresses of both the claimant and the employer on June 10, 1992. At the time and place designated for the hearing, only an employer representative appeared to present evidence.

The Commission scheduled a hearing for 3:15 p.m. on August 19, 1992. The purpose of that hearing was to afford the claimant an opportunity to present evidence concerning his reopening request. Due notice of that hearing was mailed to the claimant's correct address on August 11, 1992. In addition, the Commission mailed the claimant a letter which informed him that he could submit an affidavit in lieu of a personal appearance. The letter informed the claimant of the procedure that he should follow if he desired to submit an affidavit. The claimant neither submitted an affidavit nor appeared for the Commission hearing.

Prior to filing his claim for benefits, the claimant last worked as a structural welder for Newport News Shipbuilding, Inc. He worked for this employer from September 8, 1987, until March 27, 1992. He was a full-time employee and was paid $11.53 an hour.

The employer has negotiated a collective bargaining agreement with the union that represents the hourly employees. Under the terms of that agreement, the employer can require an employee to submit to a drug test if that employee is involved in an on the job accident or suffers a job related injury. In the event that such a drug test is positive, the employee may be referred to the Employee Assistance Program for rehabilitation. Upon the successful completion of that program, which would include a negative drug screening test, the employee would be permitted to return to work. The employer, however, would have the right to require that employee to submit to up to three random drug tests over the next 12 months. If any of those drug tests were positive, the employee would be discharged.

In September of 1991, the claimant had an accident while he was at work. He submitted to a drug test on September 27, 1991, and that test was positive for cocaine. The claimant entered the company's Employee Assistance Program and completed it on December 12, 1991. The claimant was aware that he would be subject to up to three random drug tests in the next 12 months, and that a single positive test result could result in his termination.

On March 19, 1992, the claimant was instructed to report to the clinic and provide a specimen for a drug test. The claimant

provided a specimen which was tested and found positive for marijuana. The claimant's specimen was subjected to both a screening test and the more specific GC/MS test. The confirming GC/MS test reflected that the claimant had 60 ng/ml of cannabinoids in his system. The negative detection limit on this confirming test was 15 ng/ml.

The employer established an intact chain of custody for the specimen provided by the claimant. After receiving the test results, the claimant was suspended from March 24, through March 26, 1992, pending further investigation by the employer. On March 27, 1992, the claimant was discharged for testing positive for marijuana, in violation of the collective bargaining agreement.

In his statement to the local office Deputy, the claimant asserted that he had not used marijuana, but had been in the presence of some individuals who had been using that substance. The claimant did not provide the Deputy with any details concerning when he was allegedly exposed to marijuana smoke and the particular circumstances under which that occurred.

OPINION

Regulation VR 300-01-4.2I of the Regulations and General Rules Affecting Unemployment Compensation provides, in pertinent part, that an Appeals Examiner's hearing may be reopened upon a showing of good cause. In the case of Engh v. United States Instrument Rentals, Commission Decision 25239-C (July 12, 1985), the Commission held:

> In order to show good cause to reopen a hearing, the party making such a request must show that he was prevented or prohibited from participating in the hearing by some cause which was beyond his control and that, in the face of such a problem, he acted in a reasonably prudent manner to preserve his right to participate in future proceedings.

In this case, the notice of the Appeals Examiner's hearing was mailed to the claimant's correct, last known address 13 days before the hearing was scheduled to take place. It is a well-established principle of law that a letter properly addressed and posted is presumed to be received by the addressee. Although that presumption is not conclusive, denial of receipt by the addressee presents a question of fact that must be resolved by the fact-finder.

In this case, the claimant has made an unsworn assertion that he did not receive the hearing notice. He neither appeared for the Commission hearing nor submitted a sworn affidavit in support of that assertion. An unsworn assertion which denies receipt of a

hearing notice or decision is not, without more, sufficient to rebut the presumption of delivery. Under these circumstances, the Commission must conclude that the claimant has failed to carry his burden of proving good cause for a reopening. Therefore, his request that the Appeals Examiner's hearing be reopened must be denied, and the Commission will decide this case based solely upon the evidence developed at the Appeals Examiner's hearing.

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.

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).

In this case, the employer, pursuant to a collective bargaining agreement with the union that represents hourly workers such as the claimant, adopted a reasonable drug testing policy. Furthermore, the evidence establishes that the claimant was aware of that policy, but violated it on two occasions when he tested positive for illegal drugs. This is sufficient to establish a prima facie case of misconduct. Therefore, the burden shifts to the claimant to prove mitigating circumstances.

The only evidence of mitigation is the claimant's unsworn assertion denying use of marijuana and claiming that he had been exposed to it through his association with other individuals. The

Commission is not prepared to accept this unsworn assertion as proof of mitigating circumstances. In the case of V. E. C. v. Sutphin, 8 Va. App. 325, 380 S.E.2d 667 (1989), the Virginia Court of Appeals held that an employee could not be disqualified from receiving unemployment insurance benefits where the record established that the marijuana detected in his system was present as the result of inadvertent consumption. In that case, the claimant proved that he had smoked a cigarette which, unknown to him, had been laced with marijuana. That type of inadvertent conduct was found to be non-disqualifying.

The evidence in this case falls far short of that which was presented in the Sutphin case. Here, the claimant failed to appear to testify at the Appeals Examiner's hearing. Furthermore, his statement to the local office Deputy has little, if any, probative value because of its lack of specificity.

Therefore, the Commission must conclude that the claimant was discharged for misconduct connected with his work for which no mitigating circumstances have been proven. Consequently, he must be disqualified from receiving benefits as provided by the statute.

DECISION

The claimant's request that the Appeals Examiner's hearing be reopened is hereby denied.

The decision of the Appeals Examiner is hereby affirmed. The claimant is disqualified from receiving benefits, effective March 22, 1992, because he was discharged for misconduct connected with his work.

This disqualification shall remain in effect for any week benefits are claimed until the claimant performs services for an employer during thirty days, whether or not such days are consecutive, and he subsequently becomes totally or partially separated from such employment.

The case is referred to the Deputy, who is requested to investigate the claimant's claim for benefits and to determine if he has been overpaid any sum of benefits to which he was not entitled and which he must repay the Commission as a result of this decision.

M. Coleman Walsh Jr.

M. Coleman Walsh, Jr.
Special Examiner

NOTICE TO CLAIMANT

IF THE DECISION STATES THAT YOU ARE DISQUALIFIED, YOU WILL BE REQUIRED TO REPAY ALL BENEFITS YOU MAY HAVE RECEIVED AFTER THE EFFECTIVE DATE OF THE DISQUALIFICATION. IF THE DECISION STATES THAT YOU ARE INELIGIBLE FOR A CERTAIN PERIOD, YOU WILL BE REQUIRED TO REPAY THOSE BENEFITS YOU HAVE RECEIVED WHICH WERE PAID FOR THE WEEK OR WEEKS YOU HAVE BEEN HELD INELIGIBLE. IF YOU THINK THE DISQUALIFICATION OR PERIOD OF INELIGIBILITY IS CONTRARY TO LAW, YOU SHOULD APPEAL THIS DECISION TO THE CIRCUIT COURT. (SEE NOTICE ATTACHED)