COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

Date Referred or Appealed : 01/28/88

Claimant's SSN : [redacted]

DOUGLAS E SHELTON
P O BOX 444
WHITLEY CITY KY 42653

Date of Hearing: 02/23/88

Decision No. : [redacted]

Date Decision Mailed : 04/12/88

Final Date to File Appeal with Circuit Court: 05/02/88

(See Attached Notice)

IN THE MATTER OF:

CLAIMANT:
DOUGLAS E SHELTON
P O BOX 444
WHITLEY CITY KY 42653

LAST 30-DAY EMPLOYING UNIT:
DEPT OF LABOR
200 CONSTITUTION AVE
RM N1301
WASHINGTON DC 20240

---oOo---

This is a matter before the Commission pursuant to a request to reopen the hearing which resulted in Appeals Examiner's decision (UI-8710023), mailed January 7, 1988.

APPEARANCES

None

ISSUES

Does the employer have good cause to extend the statutory appeal period for appealing the Appeals Examiner's decision as provided in Section 60.2-620 B of the Code of Virginia (1950), as amended?

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

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

The claimant had filed a claim for unemployment compensation effective August 23, 1987 and a Deputy found him to be disqualified for benefits effective that date for having been discharged from employment due to misconduct in connection with work. He filed a timely appeal from that determination and a hearing was scheduled before an Appeals Examiner by telephone on Monday, October 26, 1987. At the appointed time only an employer representative called in to participate and the Appeals Examiner took testimony and entered exhibits into the record. Before a decision could be rendered, however, the claimant called in approximately an hour late to indicate that he had been involved in a family emergency and was not near a telephone at the time he was supposed to be calling in. Inasmuch as his call was received before the Appeals Examiner's decision was rendered, the second hearing was scheduled before the Appeals Examiner so as to take testimony and evidence concerning the issue of reopening as well to possibly take testimony concerning the merits of the case.

At the second hearing, the claimant explained that his ex-wife had a medical emergency which required that he drive three hours on the morning of the hearing to a hospital in Kingsport, Tennessee and take charge of his two young children ages, 10 and 14. Because of his involvement with the doctors, as well as the children, he was not able to call until approximately an hour after the hearing was scheduled to take place. The Appeals Examiner verbally ruled that this did constitute good cause to reopen the hearing and then chose not to play back the testimony from the first hearing over the telephone, preferring instead to take the testimony over again. After hearing from the claimant and the employer representative as well as introducing certain documents into the record as exhibits the hearing was recessed because it had run into the time scheduled for another hearing. An attempt to reconvene the hearing later that afternoon failed due to an excessive amount of noise on the telephone line. Accordingly, the parties were informed that a third hearing would be scheduled.

Notice of the third hearing scheduled for Thursday, December 10, 1987 at 1:00 p.m. was mailed to the parties at the same addresses to which the other two notices had been mailed. At the appointed time, only the claimant called in to participate and testimony from him as well as from witnesses on his behalf was then taken before the hearing was closed. The Appeals Examiner's decision which reversed the Deputy and qualified the claimant for benefits effective August 23, 1987 was mailed to the parties on January 7, 1988 and it carried a final date for appeal of January 20, 1988. By letter dated January 28, 1988, enclosed in a government franked envelope which was not postmarked, but received by the Commission on February 1, 1988, the employer requested that the hearing be reopened, contending that notice of the third hearing had not been received. In this letter, the attorney representing the employer certified that it was prepared and mailed on January 28, 1987.

By letter dated February 2, postmarked February 3, and received by the Commission on February 8, 1988, the claimant protested the employer's attempt to reopen the hearing and, although conceding that the letter was mailed on January 28, 1988 contended that since it could not have been received by the Commission by midnight that night, the employer's appeal was not timely.

Although duly notified, the employer did not appear at the hearing before the Commission to offer testimony and evidence concerning reopening the case. The claimant did not appear at the hearing; however, he did respond by letter dated February 17, contained in an envelope bearing no postmark, but received on February 22, 1988. In this letter he indicated that he would not be attending the hearing and he argued against reopening the Appeals Examiner's hearing or revising the decision.

Prior to filing his claim, the claimant last worked for the United States Department of Labor, Mine Safety and Health Administration between January 4, 1987 and June 16, 1987. His position was that of a coal mine safety and health inspector.

The claimant had previously worked in this same position between 1976 and 1977. In reapplying for the job he filled out a standard application for Federal employment which contained a section asking five questions concerning any past criminal record or pending criminal charges. The instructions indicated that: "he could omit traffic fines involving $100 or less, all violations committed before age 18 if finally decided in a juvenile court or under a youth offender law, any conviction set aside under the Federal Youth Corrections Act or similar state law, and any conviction whose (sic) record was expunged under Federal or State law." The instructions went on to indicate that: "if he answered 'yes' to any of those questions he would have to give details including the date, the charge, the place, the court, and the action taken." Question 42 specifically asked: "During the last 10 years have you forfeited collateral, been convicted, been imprisoned, been on probation, or been on parole?". The claimant answered all questions in this section, including number 42 by marking the box headed "No". At the bottom of the same page he signed his application on October 10, 1986. Immediately above his signature was the following statement:

> YOU MUST SIGN THIS APPLICATION. Read the following carefully before you sign.
>
> A false statement on any part of your application may be grounds for not hiring you, or for firing you after you begin work. Also, you may be punished by fine or imprisonment (U.S. Code, Title 18, Section 1001).
>
> I understand that any information I give may be investigated as allowed by law or Presidential order.
>
> I consent to the release of information about my ability and fitness for Federal employment by employers, schools, law enforcement agencies and

> other individuals and organizations, to investigators, personnel staffing specialists, and other authorized employees of the Federal Government.
>
> I certify that, to the best of my knowledge and belief, all of my statements are true, correct, complete, and made in good faith.

Sometime in late February, the claimant heard a rumor that he was being investigated by the employer and upon further inquiry he discovered that it had something to do with his employment application. On March 11, 1987 he submitted an amended application in which he answered question number 42 by checking the box marked "Yes" and providing additional information in its entirety as follows:

> #42. When I worked for the Elkins Energy (sic) I was employed as Mine Manager. During this time I took care of the dust sampling at the mine. It was Industry practice that when the dust samples were taken the sampler signed the employees (sic) dust cards with their names and the sampler's name. I pleaded qulity (sic) in order to stop harrassment from Mr. Al Goode, Special Investigation (sic) from Norton, Va MSHA Office.

In April, 1987 the employer received information from the United States District Court for the Western District of Virginia at Big Stone Gap indicating that on January 24, 1980 the claimant, with counsel, pled guilty to two counts of violating the Federal Coal Mine Health and Safety Act of 1969 by knowingly making false statements in record files required to be maintained with the Secretary of Interior. He was found guilty and fined $2000 with half to be suspended if the other half was paid within a year. The imposition of imprisonment was suspended and he was placed on unsupervised probation for a period of one year. After receiving this information the employer initiated removal proceedings against the claimant which culminated in his actual dismissal on June 6, 1987 for knowingly falsifying his application for Federal employment. His removal was upheld upon his appeal to the Merit System Protection Board.

In his testimony before the Appeals Examiner the claimant gave the following statement:

> I wish to make it clear I did not forget my conviction. To this date I haven't forgot (sic) it, but at the time the application was filled out by the lady and I went to pick it up, your honor, (sic) I had one thing on my mind at that time, and that was being employed with the agency and getting back to work with them and I wasn't concerned at that time with anything that I may or may not have done five or ten years ago.

OPINION

Section 60.2-620 of the Code of Virginia provides that an Appeals Examiner's decision shall become the final decision of the Commission unless an appeal is filed within 21 days of the date which it was mailed to the last known address of the party requesting the appeal. For good cause shown, the appeal period may be extended.

In the case of Barnes v. Economy Stores, Inc., Commission Decision 8624-C (November 22, 1976), the Commission held:

> The aforementioned statute enunciates the statutory time limit in which an appeal from a decision of an Appeals Examiner must be filed. It allows an extension of that 14-day (subsequently extended to 21 days) time limit where good cause is shown. A reasonable construction of the good cause provision of that statute is that in order for good cause to be shown, the appellant must show some compelling and necessitous reason beyond his control which prevented him from filing an appeal within the enunciated statutory time limit. Where such a reason is shown which clearly demonstrates that it was impossible or impractical for the appellant to initiate his appeal within the statutory time limit, the extension may be granted in order to obtain fundamental fairness rather than reaching an unconscionable result.

It is not necessary that an appeal be received by the Commission within the 21-day time limit in order to be considered timely; rather it need only be initiated, as seen in the cited language above. It has been Commission practice to consider the postmark date on an envelope rather than the date on the letter or any postage meter date as constituting the best evidence as to when an appeal was initiated. This is because only the postmark is applied when the letter is outside the control of the party that is sending it. The problem in this case is that there is no postmark date to consider.

The lack of a postmark does not make the employer's appeal automatically untimely. An appeal may be found timely when there is enough evidence to indicate that it was actually initiated and sent prior to midnight on the final date for filing an appeal. In the present case, there are a number of factors which support the conclusion that the employer's appeal is timely. First, in addition to bearing the date of January 28, 1988, it also bears certification from the attorney preparing it that it was indeed mailed to the other parties on that date. Secondly, the claimant in his letter virtually concedes the appeal was mailed on that date. Finally, the fact that the letter was received by the Commission only four days later further tends to confirm the date of mailing as being January 28. The fact that the claimant's letter in response was received five days after its postmark and his letter in lieu of appearance before the Commission was received five days after it was dated further reinforces the conclusion that the employer's appeal was timely filed and it is hereby accepted by the Commission as such.

Regulation VR 300-01-4.2I of the Rules and Regulations Affecting Unemployment Compensation provides that any party who is unable to appear at a hearing before an Appeals Examiner may request that the hearing be reopened. Such a request received before the Appeals Examiner's hearing is rendered shall result in withholding of the decision until a hearing on the issue of reopening is held. If the decision is to reopen the hearing, it shall be subject to review upon appeal to the Commission. If the decision is rendered before the request to reopen the hearing is received, the matter shall be referred to the Commission for a decision. If the decision is to reopen the case, the case shall be remanded for that purpose. If the decision is not to reopen the hearing, the request to reopen shall be treated as an appeal to the Commission and a decision rendered based upon the existing record.

In the case of Engh v. United States Instrument Rentals, et al., 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.

Here, the Commission must find that the claimant's request to reopen the hearing before the Appeals Examiner was properly granted. He did appear at a further hearing to show that he was prevented by a necessitous and compelling and family emergency to be unavailable at the time that hearing was held and he called in as soon as reasonably possible to indicate his desire to participate in future proceedings. The same, however, cannot be said of the employer's request to reopen the third hearing before the Appeals Examiner. By failing to appear before the Commission to back up the contention that notice of that hearing was not received even though it was sent to the same address as the other two notices, the Commission is unable to conclude that the employer has shown circumstances beyond his control which prevented participation at that hearing. Because of this, the hearing will not be reopened and a decision shall be rendered based upon the existing record. That record consists of the testimony and evidence submitted at the second and third hearings only, since the Appeals Examiner chose not to confront the claimant with the record at the first hearing which was made in his absence.

Section 60.2-618.2 of the Code of Virginia provides a disqualification if it found that a claimant was discharged from employment due to misconduct in connection with work.

In the case of Branch v. Virginia Employment Commission et al, 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.

In the case of Powell v. Sims Wholesale Company, Commission Decision 13448-C (June 10, 1980), the claimant was hired to be a bookkeeper after putting on her application that she had prior knowledge in that field and could type between 45 and 50 words per minute. After the employer discovered she could type no more than 10 to 12 words per minute and did not know the simplest bookkeeping terms she was discharged. The Commission held that this discharge was due to misconduct in connection with work because she had falsified her application for employment in order to obtain work.

In the present case, not only did the claimant falsify his application prior to being hired by the employer, his attempt to amend the application in March of 1987 still did not properly do so because he failed to list the date of any conviction, the charge, the place, the court, or the action taken. Thus, the second application was not true and complete to the best of his knowledge or belief. The Commission can only conclude that the employer has carried the initial burden of showing that the claimant was discharged for submitting false information on his application for employment. The burden now shifts to him to show mitigating circumstances if he is to avoid a disqualification under this section of the Code.

The claimant's attempt to explain away his convictions as having been prompted by a vendetta against him is quite irrelevant to the issue at hand. The fact remains that, in the presence of counsel, he did plead guilty to two charges of knowingly falsifying information relating to mine safety. Not only was he well aware of the consequences of his action in pleading guilty, but the type of offense (the falsification of official records) was exactly what caused him to be discharged from his job. Because of this, and in view of his testimony cited in the Findings of Fact, the Commission finds his contention that he merely overlooked his conviction when filing his application not to be credible. Thus, he has failed to show mitigating circumstances for the conduct which led to his termination and he should be disqualified for benefits under this section of the Code.

DECISION

The employer's appeal from the Appeals Examiner's decision is hereby accepted by the Commission as having been timely filed.

The employer's request to reopen the hearing before the Appeals Examiner is hereby denied.

The claimant's request to reopen the hearing before the Appeals Examiner was properly granted.

The Decision of Appeals Examiner is hereby reversed.

It is held that the claimant is disqualified for unemployment compensation effective August 23, 1987, for any week or weeks benefits are claimed until he has performed services for an employer during thirty days, whether or not such days are consecutive and he has subsequently become totally or partially separated from such employment because he was discharged from employment due to misconduct in connection with work.

When this decision becomes final, 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 refund to the Commission as a result of this decision.

Charles A. Young, III
Special Examiner

NOTICE TO CLAIMANTS

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)