COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 190.05
Evidence -- General.

DECISION OF COMMISSION

In the Matter of

Robert Dimes
[redacted]

Merchants Delivery Moving and
Storage, Inc.
Danville, Virginia

Date of Appeal
To Commission: December 17, 19

Date of Hearing: April 11, 1985

Place: RICHMOND, VIRGINIA

Decision No.: 24524-C

Date of Decision: April 11, 1985

Date of Mailing: May 10, 1985

Final Date to File Appeal
with Circuit Court: May 30, 1985

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This is a matter before the Commission on appeal by the claimant from a Decision of Appeals Examiner (No. UI-84-8252) mailed December 13, 1984.

APPEARANCES

Attorney for the Claimant, Attorney for the Employer

ISSUE

Was the claimant discharged for misconduct connected with his work as provided in Section 60.1-58(b) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On December 17, 1984, the claimant initiated a timely appeal from a decision of the Appeals Examiner which disqualified him from receiving unemployment insurance benefits, effective September 30, 1984, based upon the circumstances surrounding his separation from work.

Prior to filing his claim for benefits, the claimant last worked for as many as thirty days for Merchants Delivery Moving and Storage, Inc., of Danville, Virginia. He worked for this company as a helper from April 3, 1982 through July 30, 1984 and was paid $3.35 per hour. The claimant's last day of actual work was July 17, 1984.

During the course of his employment with the company, the claimant had exhibited a poor attendance record. However, a number of the days he missed were due to illness or injury and the employer had never warned him that his job was in jeopardy due to his absenteeism. In addition, the claimant was aware that the employer desired to be contacted whenever someone was unable to report for work. Although the claimant did not have a telephone, his wife would always borrow the use of their neighbor's telephone and contact the employer to apprise a company representative that the claimant would not be reporting for work and the reason for it.

On June 9, 1984, the claimant injured his leg on the job while moving a piano. As a result of this injury, his leg became swollen and caused him a considerable amount of discomfort. The claimant continued to work in spite of his injury and would generally soak his leg at night when he went home. This proved effective until the next day when continued work would eventually cause the leg to swell again. The claimant missed some time from work during June 1984 as a result of this injury and finally the employer admonished him to see a doctor concerning it or risk losing his job. The claimant did see a doctor and was advised to return to work.

The claimant was absent from work from July 18, 1984 through July 27, 1984, a total of eight work days. On each occasion other than July 27, 1984, the claimant's wife contacted the employer and advised the owner's daughter that the claimant would be unable to report for work due to his leg injury. On July 26, 1984, the claimant and his wife left town and traveled to Woodstock, Virginia to attend the funeral of his wife's grandmother. When they attempted to return home, their car broke down and the claimant's wife contacted her father who was requested to call the employer and advise that the claimant was not able to report for work the next day due to this car trouble. On July 27, 1984, the claimant's father-in-law contacted the employer and spoke with the owner of the business. He advised the owner of the fact that the claimant could not report for work that day due to the car trouble. On Monday, July 30, 1984, the claimant reported for work and the owner of the business spoke with him at that time. The claimant was given a written discharge notice which stated:

"DUE TO THE FACT THAT YOU FAILED TO REPORT TO WORK FROM JULY 13, 1984 TO JULY 27, 1984, WITHOUT NOTICE WE HAVE NO CHOICE BUT TO DISCHARGE YOU FROM EMPLOYMENT AT MERCHANTS DELIVERY MOVING & STORAGE, INC. AS OF THIS DATE: JULY 30, 1984.

OPINION

Before addressing the issue concerning the claimant's separation from work, the Commission must first consider the issue raised by the claimant's attorney concerning the burden of proof in misconduct cases. The claimant's attorney argued that past Commission decisions have consistently held that the employer bears the burden of proving misconduct by clear and convincing evidence. In support of that position, the cases of Cottee v. Stonewall Jackson Hospital, Commission Decision No. 6630-C (March 19, 1975) and Saunders v. City of Norfolk, Commission Decision No. 11701-C (March 8, 1979) were cited. In addition, there was language in the Decision of Appeal Examiner which suggests that the "clear and convincing" standard is the appropriate one to use in such cases.

For a number of years, the Commission did adhere to the position that an employer had to prove misconduct by clear and convincing evidence. However, the utilization of that standard was challenged in a case decided by the Circuit Court for the City of Lynchburg in the matter of The Kroger Company, t/a Westover Dairy v. Virginia Employment Commission, et al, (November 12, 1982). The Circuit Court held that the Commission erred as a matter of law in requiring that the employer prove work-related misconduct by clear and convincing evidence instead of by the preponderance of the evidence. Since that case was decided, the Commission has adopted the analysis and reasoning of the Lynchburg Circuit Court in requiring that misconduct be proved by only a preponderance of the evidence. Therefore, notwithstanding the language contained in any prior Commission decision, the Commission is of the opinion that the proper standard to be applied to this and all future cases is whether or not the employer has proven the allegation of misconduct by a preponderance of the evidence. (Underscoring supplied)

Section 60.1-58(b) of the Code of Virginia (1950), as amended, provides a disqualification if the Commission finds that a claimant was discharged for misconduct connected with his work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Vernon Branch, Jr. v. Virginia Employment Commission and Virginia Chemical Company, 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."

In the present case, the claimant was discharged by the employer based upon the allegation that he had been absent from work from July 13, 1984 through July 27, 1984 without notifying the employer. First, it should be noted that the evidence in the record establishes only that during the period of time in question, the claimant was absent for eight working days. This covered the period of July 18, 1984 through July 27, 1984. Second, although the claimant did have a poor attendance record, he had never received any warnings about it at all, and in essence, the lack of such warnings represents a condonation by the employer of those absences. Accordingly, the resolution of this case will focus on these last eight days that the claimant was absent from work.

Cases involving the discharge of employees for attendance-related reasons are certainly not new to the Commission. In the case of Elizabeth J. Hancock v. Mr. Casuals, Inc., #1, Commission Decision No. 6355-C (July 3, 1974), the Commission held that:

> ". . . Mere absenteeism, attributable to illness or injury, when the employer has been notified of the illness or injury, will not amount to misconduct. The sine qua non of wanton disregard of the employer's interest or malevolent intent is absent in such cases."

In the more recent case of James D. Strawn v. Pannill Knitting Company, Commission Decision No. 24614-C (February 22, 1985), the Commission stated:

> "The Commission has held in previous decisions that chronic absenteeism without adequate justification and due notification to the employer as well as chronic tardiness amounts to misconduct connected with work in that it reveals a willful disregard for the employer's interests. Before the Commission will impose a disqualification for absenteeism, however, there must be a pattern of absenteeism or tardiness which has become chronic in disregard of specific warnings by the employer that the absenteeism and/or tardiness will not be condoned. The Commission has generally held that mere absenteeism due to illness is not misconduct connected with work."

In the present case, it is undisputed that the claimant was absent from work from July 18, 1984 through July 27, 1984. However, the reason for the claimant's absences was a work-related injury that he had sustained. Also, either the claimant's wife or his father-in-law contacted the employer each day that he was absent to notify the company of the impending absence and the reason for it. Although the employer denied receiving any such telephone calls at all, the Commission must give greater weight to the testimony of the claimant's wife who testified, under oath, that she contacted the employer each day, with one exception when her father made the telephone call, and on each occasion spoke to the employer's daughter and left the message with her. The hearsay testimony of the employer that those messages were not received simply cannot be accorded greater weight than the sworn testimony of the claimant's wife. Furthermore, the testimony of the claimant's wife is very credible in light of the fact that the claimant testified on at least three separate occasions that he was aware that the employer expected to be notified and that he could lose his job for his failure to do so. Also, the employer admitted that the claimant's family members generally called whenever he had been absent previously.

It is apparent from the record that the claimant had a very poor attendance record and that his various illnesses and injuries made him an undependable employee. The Commission does not take issue at all with the employer's decision to discharge the claimant. However, the available evidence in the record is not sufficient to establish that the claimant's attendance record rose to such a level as would constitute work-related misconduct. Accordingly, the disqualification provided in Section 60.1-58(b) of the Code of Virginia may not be imposed.

DECISION

The decision of the Appeals Examiner is hereby reversed. It is held that the claimant is qualified to receive unemployment insurance benefits, effective September 30, 1984, contingent upon his satisfying all of the eligibility requirements of the Act for every week benefits are claimed.

The case is remanded to the Deputy with instructions to carefully examine the claimant's claim for benefits and to determine whether or not he has complied with the eligibility requirements of the Act for each week benefits have been claimed.

M. Coleman Walsh, Jr.
Special Examiner