COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 310.05
Neglect of Duty --
General.

DECISION OF COMMISSION

In the Matter of:

Janet S. Poland
[redacted]

T.D.L.C., Inc.
Montebello, CA

INTERSTATE

Date of Appeal to Commission: August 26, 1988

Date of Review: October 19, 1988

Place: RICHMOND, VIRGINIA

Decision No.: 30841-C

Date of Mailing: November 8, 1988

Final Date to File Appeal with Circuit Court: November 28, 1988

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This is a matter before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-8806586), mailed August 11, 1988.

ISSUE

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

On August 26, 1988, the claimant filed a timely appeal from the Decision of Appeals Examiner which disqualified her from receiving benefits, effective June 12, 1988. The basis for that disqualification was the Appeals Examiner's finding that the claimant had been discharged for misconduct connected with her work.

Prior to filing her claim for benefits, the claimant last worked for T.D.L.C., Inc. as a cross-country student truck driver. She was employed in this capacity from March 9, 1988, through May 2, 1988. She was paid at the rate of $.06 a mile.

The claimant was discharged by the employer on May 2, 1988. The basis for the claimant's dismissal was the fact that she had a major chargeable accident on April 21, 1988. A major chargeable accident is defined as any accident chargeable to the driver's conduct or negligence which results in property damage in excess of $4,400. This particular policy was never explained to the claimant until her dismissal on May 2, 1988.

The claimant was involved in an accident outside Carlisle, Pennsylvania on April 21, 1988, at approximately 3:20 p.m. She was driving a tractor-trailer rig pulling two empty trailers. The claimant was driving the truck in the lefthand lane at a speed of between 55 and 60 miles per hour. The posted speed limit on this portion of the interstate was 65 miles per hour. The claimant approached a blinking warning sign which advised motorists that the right lane was closed ahead due to construction. A car that was immediately in front of the claimant changed lanes to the righthand lane. This car then suddenly swerved back into the lefthand lane without using a turn signal. Along with changing lanes, this car also slowed down. The claimant slammed on her brakes to avoid hitting this vehicle. As a result, the tractor and trailers skidded approximately 500 feet and struck the guardrails in the median strip. No one was injured in the accident, and the only damage that occurred was to the truck, trailers, and guardrail. The claimant immediately contacted the employer as required by company policy to advise the dispatcher of what occurred. The claimant complied with the company policy with respect to the procedures that she was to follow in the event of an accident. Approximately $21,000 of damage was done to the truck and trailers. The claimant was charged with driving at an unsafe speed for the conditions of the highway. She did not appear in court on this charge, but paid the fine that was imposed.

OPINION

As a preliminary matter, the Commission needs to address certain items raised by both the claimant and the employer in correspondence with the Commission subsequent to the filing of this appeal. The claimant raised certain items in her letter of appeal which had not been entered into evidence at the Appeals Examiner's hearing. In addition, she forwarded to the Commission a copy of the employer's driver manual. She also mailed in a copy of a letter from a Linda C. Roush who was a witness to the accident and gave a statement to the investigating police officer which was recorded on the accident report. The employer, in its letter dated September 7, 1988, also attempted to introduce additional evidence. This included a response to the statement by

Linda Roush, various settlement forms and copies of the daily log for the claimant, and copies of two pages from the driver manual. However, all of this material is new evidence which could have been presented at the Appeals Examiner's hearing.

Regulation VR 300-01-4.3B of the Rules and Regulations Affecting Unemployment Compensation provides:

> Except as otherwise provided by this rule, all appeals to the Commission shall be decided on the basis of a review of the evidence in the record. The Commission, in its discretion, may direct the taking of additional evidence after giving written notice of such hearing to the parties, provided:
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> 1. It is affirmatively shown that the additional evidence is material and not merely cumulative, corroborative or collateral; could not have been presented at the prior hearing through the exercise of due diligence; and it is likely to produce a different result at a new hearing; or
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> 2. The record of proceedings before the appeals examiner is insufficient to enable the Commission to make proper, accurate, or complete findings of fact and conclusions of law.

All of the information that the claimant and employer have submitted since the date of the Appeals Examiner's hearing was evidence that could have been presented previously through the exercise of due diligence. Neither the claimant nor the employer have asserted any factors or circumstances beyond their control which prevented this information from being presented at that time. Neither of them have asserted that any of this information was unavailable to them at the time that hearing was conducted. Furthermore, the record of proceedings compiled by the Appeals Examiner is sufficient to enable the Commission to make proper findings of fact and conclusions of law. Accordingly, since neither the claimant nor the employer have satisfied the criteria set out in the regulation for the Commission to accept additional evidence, the decision in this case will be based solely upon the evidence presented 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, et al, 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. See, 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 claimant was discharged by the employer as a result of the accident that occurred on April 21, 1988. In order to determine if the claimant should be disqualified from receiving benefits, the Commission must address three issues. First, there must be a determination of whether or not the claimant was negligent. This will involve a careful analysis of the nature of the act and all the circumstances surrounding it to decide if the claimant violated some standard of care owed to the employer and/or others. Second, if the claimant was negligent, then the Commission must ascertain the degree of negligence. In reaching a decision on this factor, it will be necessary to consider the nature of the act, whether there was a single or multiple acts of negligence, the period of time during which multiple acts of negligence occurred, and the actual and potential consequences of the negligent act or acts. Third, the Commission must decide whether that negligence met the definition of "misconduct connected with work" set out by the Virginia Supreme Court in the Branch case.

In this case, it is apparent that the claimant owed her employer and other drivers a duty to operate her truck in a safe manner. This included not only a duty to obey the posted speed limit and other traffic laws, but to insure that she operated her vehicle in a manner that was safe for the conditions of the road. Given her occupation, training, and the potential hazards associated with the operation of a tractor-trailer, this duty of care is greater than what would ordinarily be expected of another motorist. While part of the responsibility for the accident must lie on the driver who swerved in front of the claimant without giving a signal, the claimant was driving too fast for the conditions of the road and that was a contributing cause of the accident. This area was clearly marked with a blinking sign that warned motorists that a lane of traffic was closed. Had the claimant slowed her vehicle to a speed that was safe for the conditions, she may have avoided the accident completely. Therefore, the claimant's operation of her truck was negligent and contributed to the accident. Accordingly, the Commission must now determine the degree of that negligence.

Virginia law recognizes three degrees of negligence, (1) ordinary or simple, (2) gross, (3) willful, wanton, and reckless. Ordinary or simple negligence 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, 321, 315 S.E.2d at 212-13, (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, 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, 227 Va. at 321, 315 S.E.2d at 213; Friedman v. Jordan, 166 Va. 65, 68, 184 S.E. 186 187 (1936). "Willful or wanton negligence involves a greater degree of negligence than gross negligence, particularly in the sense that in the former an actual or constructive consciousness of the danger involved is an essential ingredient of the act or omission." Griffin, 227 Va. at 321-22, 315 S.E.2d at 213, quoting Boward v. Leftwich, 197 Va. 227, 231, 89 S.E.2d 32, 35 (1955). (Underscoring supplied)

The Virginia Court of Appeals recently decided the case of Israel v. Virginia Employment Commission, et al, Record No. 0805-87-3, (September 20, 1988). That case involved a claimant who had been denied benefits based on the Commission's finding of work-connected misconduct which arose from the occurrence of two accidents approximately one week apart involving coal trucks driven by the claimant for his employer. In that case, the Court of Appeals cited with approval the test adopted by the Pennsylvania Commonwealth Court in the case of Schappe v. Unemployment Compensation Review Board, 38 Pa. Commw. 249, 392 A. 2d 353 (1978). In its analysis of the misconduct issue, the Schappe court stated:

> While the number of accidents cannot be said to be unimportant in a determination of whether such accidents constitute willful misconduct, we do not believe that the number is the sole and exclusive criterion. Rather, the controlling issue is whether the nature of the claimant's negligence is such as to demonstrate "manifest culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or the employee's duties and obligations." Obviously, each case will have to be decided on its own facts, irrespective of the number of accidents involved. 38 Pa. Commw. at 253, 392 A. 2d at 355-56 quoting Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review, 10 Pa. Commw. 90, 309 A. 2d 165 (1973) (emphasis added).

While Schappe involved two accidents within a one-month time period, the underscored language is certainly instructive in the case at bar since a determination of the nature of the claimant's negligence is essential to determining whether she was discharged for misconduct. While the number of negligent acts, the time period during which they occur, and the actual and potential consequences must be considered, the key issue is the nature of the negligent act itself.

The negligence exhibited by the claimant in this case was nothing more than simple or ordinary negligence. The claimant did not engage in a degree of negligence which manifested a complete neglect of the safety of others or would shock fair-minded men. Further, her actions did not amount to a conscious disregard of another's rights or a reckless indifference to the consequences of her actions. Admittedly, the claimant's negligence caused substantial financial loss and created a potential for serious injury or loss of life to herself and other drivers on the road.

Nevertheless, these factors are not dispositive of the issue because the primary criteria is the nature of the negligent act itself. When all of the circumstances surrounding the accident, including the actions of the other driver, are considered, the claimant's conduct amounted to nothing more than simple negligence. Accordingly, the final issue the Commission must decide is whether a single act of simple negligence constitutes misconduct connected with work.

That issue has been addressed by this Commission previously. In the case of Norwood v. Respiratory Home Care of VA, Commission Decision 30219-C, (June 9, 1988), the Commission stated:

> . . . the Commission has steadfastly declined to impose the disqualification for misconduct where 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.

See also, Evans v. Newport News Shipbuilding and Dry Dock Company, Commission Decision 30773-C, (September 22, 1988).

The Commission reaffirms its adherence to this principle. While a single, isolated incident of ordinary negligence could justify discharging an employee, it does not manifest a willful disregard of the employer's interests or the duties and obligations owed to the employer which would warrant a finding of work-connected misconduct. Norwood, supra; See also, Coulter v. Unemployment Compensation Board, 16 Pa. Commw. 462, 332 A. 2d 876 (1975). Accordingly, the Appeals Examiner's decision must be reversed since the claimant's negligence was not of such a degree or recurrence as would manifest a willful disregard of the employer's interest or the duties and obligations owed the employer. (Underscoring supplied)

DECISION

The Decision of Appeals Examiner is hereby reversed. The claimant is qualified to receive benefits effective June 12, 1988, because she was discharged by the employer for reasons which do not amount to misconduct connected with her work.

The case is remanded to the Interstate Deputy with instructions to carefully examine the claimant's claim for benefits and to determine if she has complied with the eligibility requirements of the Code for each week benefits have been claimed.

M. Coleman Walsh, Jr.

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Special Examiner