COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

PROCEDURE: 10.35
Timeliness of Appeals — Notice or Lack of Notice to Commission of Address Change as Good Cause.

DECISION OF COMMISSION

In the Matter of:

Steven J. Mallis [redacted]

Siegel's Super Markets, Incorporated
Richmond, Virginia

Date of Appeal to Commission: October 12, 1989

Date of Review: November 22, 1989

Place: RICHMOND, VIRGINIA

Decision No.: 32677-C

Date of Mailing: November 22, 1989

Final Date to File Appeal with Circuit Court: December 12, 1989

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This matter comes before the Commission as the result of an appeal filed by the employer from the Decision of Appeals Examiner (UI-8907158), mailed August 11, 1989.

ISSUES

Did the employer file a timely appeal from the decision of the Appeals Examiner, and if not, does the employer have good cause to extend the statutory appeal period as provided in Section 60.2-620B 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

On October 12, 1989, the employer filed an appeal from the decision of the Appeals Examiner which held that the claimant was qualified to receive benefits, effective June 11, 1989. The basis for that decision was the Appeals Examiner's finding that the claimant had left his job voluntarily for reasons that would constitute good cause.

The Appeals Examiner's decision was issued on August 11, 1989. It was mailed to the employer at Siegel's Super Markets, 640 W. Southside Plaza, Richmond, Virginia, 23224. When the employer returned the Employer's Report of Wage and Separation Information form to the Commission, an address change had been entered. The employer had placed a star by the address that was shown on the report and had written in, "All mail to P. O. Box 3-AF, Richmond, Virginia, 23208." This is the address for the employer's corporate headquarters. The Commission did not change its records, and all notices and correspondence continued to be sent to the Southside Plaza address. The employer's correct corporate headquarters address appeared on the letter of appeal it filed with the Commission when it protested the initial award of benefits made by the Deputy. That same address was given to the Appeals Examiner for mailing purposes, as evidenced by the company vice president's business card that was attached to the notice of hearing.

The employer never received a copy of the Appeals Examiner's decision. One of the company's vice presidents called the Commission on October 3, 1989 to inquire about the decision. At that time, a copy of the decision was mailed to the employer at its corporate headquarters address. The employer then filed its appeal from that decision on October 12, 1989.

Prior to filing his claim for benefits, the claimant last worked for Siegel's Super Markets, Inc. as a clerk in the frozen food and dairy department. He worked for the company from December 3, 1988 through June 2, 1989. Although he had originally been hired as a full-time employee, the claimant was working part-time hours at the time of his separation. He was paid a wage of $7.50 an hour.

During February of 1988, the claimant underwent back surgery. Following the surgery, his physician informed him that after two years, he would probably be unable to perform any work that involved bending or heavy lifting. Consequently, his physician recommended to him that he avoid any work that involved such activities.

After beginning work for Siegel's Super Markets, the claimant did not experience any difficulty with his back. Sometime during April of 1989, the claimant re-injured his back. He discussed this situation with the grocery supervisor, who was his immediate superior. He asked his supervisor if his hours of work could be reduced because of his back problem. In addition, the claimant made this request because he did not think he could continue to work in this position and desired to have the additional time to look for other employment. The claimant's request to have his hours reduced was made on May 22, 1989, and the employer granted that request one week later. The claimant then began working from 8:00 a.m. until 12:00 noon, five days a week.

On Friday, June 2, 1989, the claimant injured his back again. After leaving work that day he contacted the store manager and told him what had happened. The store manager agreed to take the claimant off the schedule until such time as he might be able to return to work.

During the period of June 2, 1989 through June 15, 1989, the claimant was looking for work on his own. Also, the claimant had made an appointment to see his doctor during the week ending June 10, 1989. The claimant went to the doctor's office for the appointment, but discovered that the doctor was at another office that day. He rescheduled the appointment for June 20, 1989. The claimant filed his claim for benefits on June 15, 1989, and was given a Physician's Certificate of Health to have his doctor complete. The claimant's physician indicated that, although he had not advised him to quit his last job, he was physically unable to work full-time at his regular occupation. The claimant was restricted from doing a lot of lifting, bending or stooping. The claimant's physician indicated that he would be able to do light lifting, walking and sitting.

After his last day of work, but before filing his claim for benefits, the claimant had spoken with his immediate superior, the grocery supervisor, and one of the store's managers concerning the possibility of working some other job that would not involve heavy lifting, bending or stooping. He specifically inquired about a position as a deli clerk, but was informed that no position was available in that department. In discussing the matter with the claimant, the grocery supervisor informed him that there were no other positions with the company he could fill because of the limitations imposed by his back problem. Because of his back problems and the employer's inability to place him in another job, the claimant quit work.

When the employer filed its appeal, the argument was raised that the claimant had misled the company about his back problem. Attached to the letter of appeal was a copy of the claimant's employment application. The employer did not offer any explanation regarding why this document could not have been presented at the Appeals Examiner's hearing.

OPINION

Section 60.2-620B of the Code of Virginia provides as follows:

> The parties shall be duly notified of such tribunals decision, together with its reasons therefor, which shall be deemed to be the final decision of the Commission, unless within twenty-one days after the date of notification or mailing of such decision, further appeal is initiated pursuant to Section

> 60.2-622. However, for good cause shown the twenty-one-day appeal period may be extended.

In this case, the employer's appeal was filed on October 12, 1989, over two months after the final date for doing so. The Commission has held that appellants who file untimely appeals must prove that compelling, necessitous circumstances beyond their control prevented the filing of a timely appeal. See, Barnes v. Economy Stores, Inc., Commission Decision 8624-C (November 22, 1976).

In this case, the Commission must conclude that the employer was not properly notified of the Appeals Examiner's decision as required by the statute. The Commission has interpreted the provisions of Section 60.2-620B to require that the parties be mailed a copy of the decision at their last known addresses. This interpretation is consistent with Section 60.2-619C which requires the Deputies to mail their determinations to the last known addresses of the parties.

Here, the employer informed the Commission of an address change. The Commission was informed of that when the employer returned the separation report to the Commission prior to the issuance of the Deputy's determination. The Commission failed to change its records accordingly. Furthermore, on at least two other occasions prior to the issuance of an Appeals Examiner's decision, the Commission was put on notice of the employer's correct mailing address. Since the Commission did not mail the Appeals Examiner's decision to the employer at its correct, last known address, it is understandable why the company did not receive a copy of it until after an inquiry was made in early October, 1989. For these reasons, the Commission must conclude that the employer has shown good cause to extend the statutory appeal period. Accordingly, its letter of appeal filed October 12, 1989, shall be deemed timely. (Underscoring supplied)

At this point, it would be appropriate to address the employer's request that the Commission consider the claimant's employment application as additional evidence. Section 60.2-622 of the Code of Virginia authorizes the Commission, in its discretion, to direct the taking of additional evidence and testimony. In order to ensure that this discretion is fairly, uniformly and consistently exercised, the Commission follows certain guidelines that are now a part of the agency's rules and regulations.

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:

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

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.

In its letter of appeal, the employer argued that the company had been misled by the claimant with respect to his pre-existing back condition. The claimant's employment application was offered as proof of that point. While it appears that the application would be relevant, material evidence, there has been no showing that the employer was precluded from introducing it at the Appeals Examiner's hearing. It is obvious from both the Notice of Deputy's Determination and the employer's appeal from that determination that the company was on notice that the claimant's back condition was a significant factual issue in the case. Furthermore, the employer representative who appeared at the Appeals Examiner's hearing neither offered the employment application as an exhibit nor testified that the company had been misled concerning the claimant's pre-existing back injury. Under these circumstances, the Commission must conclude that the claimant's employment application could have been introduced at the Appeals Examiner's hearing had due diligence been exercised. Consequently, the employer's request must be denied, and the Commission's decision will be limited solely to the evidence taken at the Appeals Examiner's hearing.

Section 60.2-618.1 of the Code of Virginia provides a disqualification if the Commission finds that a claimant left work voluntarily without good cause.

In interpreting the meaning of the phrase "good cause," the Commission has consistently limited it to those factors or circumstances which are so substantial, compelling, and necessitous as would leave a claimant no other reasonable alternative other than quitting work. See, Phillips v. Dan River Mills, Inc., Commission Decision 2002-C (June 15, 1955). Once it is established that the claimant left work voluntarily, the burden is then on the claimant to show by a preponderance of the evidence that the decision to leave work

was for reasons that would constitute good cause. See, Kerns v. Atlantic American, Inc., Commission Decision 5540-C (September 20, 1971).

In this case, the claimant left his job voluntarily for health related reasons. He had a pre-existing back problem which became worse during the latter period of his employment with Siegel's Super Markets. He requested a modification of his hours, which the employer granted. He explored the possibility of transferring to a position in the deli department that would have been less strenuous; however, no position was available for him at that time. After his last day of work, the claimant spoke with his immediate superior, the grocery supervisor, concerning the possibility of transferring to some other position within the company. At that time, the claimant was told that his back problem precluded him from holding any other position that might be available for him.

When a claimant leaves work voluntarily due to health reasons, the Commission has found such reasons to constitute good cause where the evidence establishes that the work was detrimental to the claimant's health and that he has made every reasonable effort to resolve the situation with the company in order to preserve and retain his employment. See, Weaver v. Ideal Laundry & Dry Cleaners, Commission Decision 3153-C (October 16, 1957); Weakley v. Sperry Marine Systems, Commission Decision 6680-C (April 7, 1975). In this case, the claimant has proven by a preponderance of the evidence that the job was detrimental to his health due to his back condition, and that he explored every reasonable alternative with the company in order to resolve the problem before he quit. Therefore, the Commission must conclude that the claimant is qualified to receive benefits since he left work voluntarily for reasons that would constitute good cause.

DECISION

It is held that the employer has established good cause to extend the appeal period, thus, its appeal filed October 12, 1989, is accepted as being timely.

The employer's request that the Commission take additional evidence and testimony in the matter is denied since that request did not meet all of the criteria set out in Regulation VR 300-01-4.3B of the Rules and Regulations Affecting Unemployment Compensation.

The decision of the Appeals Examiner is hereby affirmed. The claimant is qualified to receive benefits, effective June 11, 1989, because he left his job voluntarily for reasons that constitute good cause.

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

M. Coleman Walsh, Jr.
Special Examiner