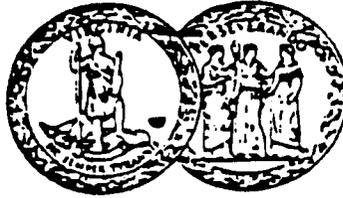


COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Thomas M. Mallory  
[REDACTED]

J. A. Jones Construction Company  
Charlotte, North Carolina

Date of Appeal  
to Commission:

July 8, 1991

Date of Review:

August 7, 1991

Place: RICHMOND, VIRGINIA

Decision No.:

36195-C

Date of Mailing: August 19, 1991

Final Date to File Appeal

with Circuit Court: September 8, 1991

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This case is before the Commission on appeal by the claimant from Appeals Examiner's decision UI-9109034, mailed July 3, 1991.

ISSUE

Was the claimant discharged from employment due to misconduct in connection with work as provided in Section 60.2-618.2 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal from the Appeals Examiner's decision which reversed an earlier Deputy's determination and disqualified him for unemployment compensation, effective January 20, 1991, for having been discharged from employment due to misconduct in connection with work.

Prior to filing his claim, the claimant last worked for the J. A. Jones Construction Company of Charlotte, North Carolina, between May 15, 1990, and January 16, 1991. His position was that of a carpenter.

The last jobsite the claimant worked was at a Virginia Power plant in Chesterfield County. Because of the proximity to high voltage electricity in the facility, all employees were given written safety

booklets informing them what practices they were to follow. These booklets also informed them that they could be terminated for violating any safety procedures. Included among the rules was the requirement that barriers, established by safety personnel as being the limits beyond which work could not be performed, always had to be respected.

On the claimant's last day of work, he was helping to construct a firewall between two transformers, one of which was "on-line." Steel rods were to be tied together within a wooden form into which concrete was to be poured. A safety engineer had marked a barrier beyond which no work was to be done.

The claimant was on a scaffold trying to thread a steel rod into the form as it was being passed to him by a man on the ground. He could not see where the end of the rod was going and he kept hitting other pieces of steel already in the form. Finally, he met no resistance, so he shoved the rod in approximately 4 feet. What he did not realize was that it had come out the other side of the form beyond the safety barricade to the point where it came in contact with a "hot" portion of the transformer on that side. Fortunately for all concerned, the current grounded out through the steel in the form without passing through the claimant or his co-worker. Otherwise, they would most probably have been killed. The transformer was out of service for two days and, at the time of the Appeals Examiner's hearing, the employer was expecting to receive a bill for its repair.

After the incident, the claimant was required to take a drug test which he passed. Despite this, he was terminated for violating safety procedures by allowing his work to pass beyond the barricade which had been marked off by the safety engineer.

#### OPINION

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

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

Considering the location where the claimant was working, it is apparent that the safety rules which were in effect were reasonably designed to protect a legitimate business interest. The Commission must also find a preponderance of the evidence indicates that the claimant deliberately and willfully violated the rule pertaining to allowing his work to go beyond the barricade set by the safety engineer. This means that the employer has carried the initial burden of showing a prima facie case of misconduct so as to shift the burden to the claimant to show mitigating circumstances if he is to avoid a disqualification under this section of the Code.

The claimant has attempted to do this in two ways. The first involves his contention that he did not think the rod was going beyond the barricade. Nevertheless, by his own admission, the barricade was not constructed to physically prevent the rod from penetrating it; rather, it was simply a demarcation line which was not to be penetrated in any way. This means that he was expected to use his own senses and judgment to make sure that the steel rod stayed within the forms as it was supposed to. It is obvious from what occurred that he did not do this.

The claimant's second attempt to provide mitigating circumstances involves his contention that since he could not see the end of the rod clearly, the man on the ground, as well as the safety engineer who was some distance away observing the process, should have seen it come out of the form so as to have stopped him from pushing it through. This attempt to shift the blame to others is misplaced. Based upon his own testimony, as soon as he felt no resistance to the rod, he shoved it in approximately four feet. This occurred so suddenly that no one could have stopped him. Had he pushed it through extremely slowly, then both the man on the ground and the safety engineer might have been able to see the rod begin to emerge from the other side of the form in time to have shouted out a warning to stop pushing. This was not a matter of simple negligence on the claimant's part; rather, it represented a conscious choice to act recklessly in disregard of established safety policies. The Commission concludes that he has not shown mitigating circumstances for the conduct which brought about his termination; therefore, he should remain disqualified for benefits under this section of the Code.

#### DECISION

The decision of the Appeals Examiner is hereby affirmed.

The claimant is disqualified for unemployment compensation, effective January 20, 1991, for any week or weeks benefits are claimed

until he has performed services for an employer during 30 days, whether or not such days are consecutive, and he has subsequently become totally or partially separated from such employment, because he was discharged due to misconduct in connection with work.

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

  
Charles A. Young, III  
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)