

employer had no objection; however, the claimant was obviously reluctant to proceed. She stated her reluctance on the record and mentioned that she had tried to retain a particular attorney to represent her in the case, but he declined on the basis that he was on the hospital's board of directors.

Following that comment, the Appeals Examiner again asked the claimant if she had any objection to him presiding. The claimant stated that, since all of the witnesses were present and the case had been postponed one time previously, she would go forward with the hearing because she knew what she could do if it was not fair. The Appeals Examiner did not disqualify himself, but proceeded to conduct the hearing and render the decision that is the subject of the present appeal.

Section 60.2-620(A) of the Code of Virginia provides that:

Appeals filed under Section 60.2-619 shall be heard by an appeal tribunal appointed pursuant to Section 60.2-621. Such appeal tribunal, after affording the claimant and any other parties reasonable opportunity for a fair hearing, shall have jurisdiction to consider all issues with respect to the claim since the initial filing thereof.

Section 60.2-621 provides for the creation of impartial appeal tribunals to hear and decide disputed claims in an expeditious manner. Regulation VR 300-01-4.2H of the Regulations and General Rules Affecting Unemployment Compensation provides a mechanism whereby parties who believed that an Appeals Examiner is not impartial may challenge the interest of the Appeals Examiner; however, such challenges may be reviewed by the Chief Appeals Examiner only if made prior to the date on which the decision is issued. The Commission's regulations do not define the term "impartial," so guidance must be sought from other sources.

Canon 3 of the Canons of Judicial Conduct for the State of Virginia provides, in pertinent part, as follows:

C. Disqualification.

(1) A judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

To this end, he should abstain from performing or taking part in any judicial act in which his personal interests are involved. He should not act in a

controversy where a near relative is a party. He should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by his kinship, rank, position or influence of any party or other person.

D. Remittal of Disqualification.

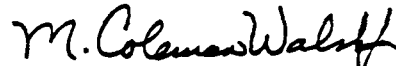
A judge disqualified by the terms of Canon 3C, may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing to waive the judge's disqualification, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Upon reviewing the claimant's request in light of the disclosure that was made, the Commission is of the opinion that the Appeals Examiner should have disqualified himself. First, the disclosure that he made was not sufficiently detailed to allow the claimant to make an informed decision. Where, as in this case, the parties were unrepresented, the Appeals Examiner had a duty to be particularly meticulous in fully disclosing the nature of his wife's employment with the employer and what knowledge, if any, she might have about the claimant's case. Second, the claimant's obvious reluctance to proceed with the hearing should have prompted the Appeals Examiner to disqualify himself. Furthermore, the Commission is of the opinion that the claimant should have been informed by the Appeals Examiner that considerations of convenience or the fact that the case had been postponed on one prior occasion were not relevant to the question of her consent to go forward, especially since benefits had been initially awarded. In the event of a postponement, the claimant would still have continued to receive benefits provided that she met the weekly eligibility criteria.

For these reasons, the Commission is of the opinion that the Appeals Examiner should have disqualified himself from hearing the case, and the claimant's reluctant agreement to go forward with the hearing did not constitute a knowing or voluntary remittal of the disqualification. Therefore, the Appeals Examiner's decision (UI-9308329) is hereby vacated.

This case is remanded to the Chief Appeals Examiner who is requested to assign the case to another Appeals Examiner who shall hear this matter de novo in accordance with all statutes and regulations adopted by the Commission. The evidence taken at the new hearing shall comprise the record of the case upon which another decision would be based.

The Clerk of the Commission is directed to prepare a transcript of the appeals hearing held on May 25, 1993, and to provide copies of that transcript to the claimant, the employer, any attorneys or representatives for the parties, and the Appeals Examiner assigned to hear the case. Upon agreement by the parties, all or part of the transcript may be incorporated into the record of the case and used in making a decision. Nothing contained in this Order shall be construed as preventing either party from using the transcript for impeachment purposes without the consent of the other party.


M. Coleman Walsh, Jr.
Special Examiner