



DECISION OF COMMISSION

In the Matter of:

Ricky W. Blake
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Howmet Corp.
Hampton, Virginia

Date of Appeal
to Commission: December 30, 1988

Date of Hearing: April 21, 1989

Place: RICHMOND, VIRGINIA

Decision No.: 31402-C

Date of Mailing: June 8, 1989

Final Date to File Appeal
with Circuit Court: June 28, 1989

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This matter comes before the Commission as a result of an appeal filed by the claimant from the Decision of Appeals Examiner (UI-88010063), mailed December 15, 1988.

APPEARANCES

None

ISSUES

Was the claimant in receipt of wages equal to or in excess of his weekly benefit amount so as to eliminate his entitlement to benefits during the week or weeks for which they were claimed in accordance with the provisions of Section 60.2-603 of the Code of Virginia (1950), as amended?

Was the claimant in receipt of a pension or any other similar periodic payment equal to or in excess of his weekly benefit amount payable with respect to the week or weeks for which benefits were claimed so as to eliminate his benefit entitlement under the provisions of Section 60.2-604 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal from the Appeals Examiner's decision which amended an earlier Deputy's determination and declared the claimant to be ineligible for unemployment compensation between December 13, 1987, and March 5, 1988. The Deputy's determination was issued under the provisions of Section 60.2-604 of the Code of Virginia, while the Appeals Examiner ruled under the provisions of Section 60.2-603 of the Code.

The claimant had filed a claim for unemployment compensation, effective December 13, 1987, and he monetarily qualified for benefits in the amount of \$167.00 per week for up to twenty weeks. Commission records reflect that he was paid benefits in the amount of \$135.00 for the week ending December 19, 1987, and \$167.00 for each of the ensuing eleven weeks through March 5, 1988.

The claimant had been injured on his job in October, 1986. Following surgery, he returned to work in August, 1987, but was unable to continue and was again advised by his doctor to stay home. He then resumed drawing workers' compensation benefits for each week he was off. On December 11, 1987, a check was issued to him in the amount of \$326.00 covering the period December 13, 1987, through December 20, 1987. On December 18, 1987, another check in an identical amount was issued to him for the following week. His benefits were then stopped after a dispute arose concerning whether or not he should have been able to return to work. In the meantime, his employer had released him for not coming back and this was what prompted him to file a claim for unemployment insurance.

The claimant appealed the cutoff of his workers' compensation benefits and on April 8, 1988, a hearing was held before a Deputy Commissioner of the Industrial Commission of Virginia. As a result of that hearing, a decision was rendered holding that the employer had failed to show that the claimant was physically able to resume his employment in December. Accordingly, his workers' compensation benefits were reinstated, effective December 30, 1987. On May 12, 1988, a check in the amount of \$5,939.00 was issued to him to cover those payments in the amount of \$326.00 per week between December 30, 1987, and May 11, 1988. On the same day, a separate check in the amount of \$255.00 was issued to the claimant's attorney and it was specifically noted that this amount was being drawn from the claimant's accrued compensation for the weeks in question.

OPINION

Section 60.2-603 of the Code of Virginia provides that for each eligible claimant who is unemployed in any week, his weekly benefit amount shall be reduced by the amount of any wages payable to him for such week which is in excess of \$25.00, with any excess being rounded to the next highest dollar.

Section 60.2-604 of the Code of Virginia provides:

The weekly benefit amount payable to an individual for any week which begins in a period for which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment under a plan maintained or contributed to by a base period or chargeable employer based on the previous work of such individual, including payments received by such individual in accordance with Section 65.1-54 or Section 65.1-55, shall be reduced, but not below zero, by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week.

In the case at hand, the Appeals Examiner made an analogy between the claimant's receipt of workers' compensation benefits and a back pay award which, under Section 60.2-635 of the Code of Virginia, is automatically allocated to the weeks in which the pay should have been received. He then concluded that the claimant had received wages in excess of his weekly benefit amount under the provisions of Section 60.2-603 of the Code. The Commission must point out that this is incorrect. Since the payments the claimant received were not wages at all, the provisions of Section 60.2-603 would not be applicable to his case. Based upon the decision of the Industrial Commission, which was introduced into the record as an exhibit, it is apparent that the worker's compensation payments the claimant received were paid under the provisions of Section 65.1-54 of the Code of Virginia due to the total impairment of his earning capacity during those weeks. It is also apparent that this award was based upon an average of his prior earnings for the employer so as to amount to a substitute for his wages. Inasmuch as payments under this particular section of the Code are specifically mentioned in Section 60.2-604 with respect to offsets against unemployment compensation, it is this section of the law which is applicable to his case as previously noted by the Deputy. (Underscoring supplied)

The claimant has made the argument that he did not actually receive the payments at the same time he received his unemployment compensation; nevertheless, this makes no difference. The quoted language clearly indicates that the reduction is to be made with respect to the amount of such payments "reasonably attributable to such week." The record of the claimant's workers' compensation claim clearly shows that checks were issued in the amount of \$326.00 for each of the last two complete weeks in December, 1987. This was followed in May by the issuance of two checks, one a lump sum award, and one for the claimant's attorney's fees to cover accrued payments in the amount of \$326.00 between December 30, 1987, and May 11, 1988. These payments were also specifically noted as being in the amount of \$326.00 per week. Since this amount is in excess of the weekly benefit amount for unemployment compensation to which he would have otherwise been entitled between December 13, 1987, and March 5, 1988, his weekly benefit amount for those weeks is effectively reduced to zero. See, Harlow v. Wes-Way Sprinkler Company, Commission Decision 24193-C (July 1, 1985).

The claimant has made the argument that this retroactive denial of benefits amounts to an ex post facto law which violates his rights to equal protection. The Commission could agree with this argument only if the claimant could show that the actual law was enacted after he received his benefits. Despite this, research will show that the particular language providing for a reduction in an individual claimant's weekly benefit amount for any workers' compensation received under Section 65.1-54 of the Code of Virginia was enacted by the General Assembly to become effective in 1978. The mere fact that the claimant's check for unemployment compensation and workers' compensation did not come in at the same time during the weeks in question is totally irrelevant to a determination of whether a reduction should apply since it is clear that the award of workers' compensation in the amount of \$326.00 per week was made attributable to the same weeks for which he received unemployment compensation in a lesser amount. It is not unusual for there to be a delay in the receipt of Social Security benefits, private pension benefits, or workers' compensation benefits and in this respect the analogy made by the Appeals Examiner to a back pay award is valid. The clear intent of both Section 60.2-603 and Section 60.2-604 of the Code is that unemployment compensation is to be payable only after all compensation stemming from a claimant's prior work for base period or chargeable employers is taken into consideration. This is why claimants have to report if they have worked any in a particular week and how much they earned even though they might not get paid until a subsequent week. This is also why claimants are asked when they file for benefits if they are receiving or if they have applied for any type of pension, including Social Security or disability retirement. The pension offset provision of this

section of the Code used to be much stricter inasmuch as it applied to any pension based upon any work and not just that performed for a base period or chargeable employer. In that form, it managed to pass constitutional muster so as not to represent a denial of due process in the case of Watkins v. Cantrell, 736 F.2d 933 (Fourth Cir. 1984). (Underscoring supplied)

DECISION

The decision of the Appeals Examiner is hereby amended.

It is held that, between December 13, 1987, and March 5, 1988, the claim weeks before the Commission, the claimant's weekly benefit amount is effectively reduced to zero since he was in receipt of workers' compensation payments in excess of his weekly benefit amount which was reasonably attributable to each of those weeks.


Charles A. Young, III
Special Examiner

Note: Aff'd by Circuit Court of the City of Hampton, Part III, Law No. 024530 (November 21, 1989).