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Clerk, Supreme Court of Appeals
Richmond, Va.

201VA128

Record No. 4942

In the Supreme Court of Appeals of Virginia at Richmond

THE PITTSTON COMPANY (Formerly CLINCHFIELD COAL CO.)

v.

RUFUS FULKS

FROM THE INDUSTRIAL COMMISSION OF VIRGINIA

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 4942

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 13th day of October, 1958.

CLINCHFIELD COAL COMPANY, Appellant,

against

RUFUS FULKS, Appellee.

From the Industrial Commission of Virginia

Upon the petition of Clinchfield Coal Company an appeal is awarded it from an award entered by the Industrial Commission of Virginia on the 24th day of July, 1958, in a certain proceeding then therein depending wherein Rufus Fulks was claimant and the petitioner was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the Secretary of the said Industrial Commission in the penalty of three hundred dollars, with condition as the law directs.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4942

VIRGINIA:

In the Cupreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 28th day of November, 1958.

THE PITTSTON COMPANY (FORMERLY CLINCHFIELD COAL CO.), Appellant,

against

RUFUS FULKS, Appellee.

Upon an appeal from an award entered by the Industrial Commission of Virginia on the 24th day of July, 1958.

This day came again the appellant, by counsel, and moved the court that this cause proceed in the name of The Pittston Company instead of the Clinchfield Coal Corporation, which motion was not opposed by the appellee.

And it appearing to the court from the petition of the appellant that the Clinchfield Coal Corporation has merged into the Pittston Company and this company assumed the liabilities of the Clinchfield Coal Corporation, the motion is granted.

RECORD

* * * * *

page 2 }

* * * * *

Hearing before EVANS, Commissioner, at Big Stone Gap, Virginia, on September 11, 1957.

All witnesses having been duly sworn, the following testimony was taken:

* * * * *

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* * * * *

MR. RUFUS FULKS,

Claimant.

By Mr. Cridlin:

Q. Mr. Fulks, where do you live at this time?

A. I live in South Carolina.

Q. What place?

A. Charleston.

Q. Are you working now?

A. No, sir.

Q. Why? Why aren't you working?

A. They cut me out.

Q. Well, I—

A. I'm not able to work.

Q. You're not able to work?

A. They won't even hardly let me go up and down stairways.

Q. When did you work for the defendant companies, say Clinchfield, when did you work for them?

page 5 } A. Well, I went to work there in '52 and the last—the first part of '54 they cut me off.

Q. You work for Kemmerer Gem Coal Company at any time?

A. Practically twenty-two years.

Q. What years?

Rufus Fulks.

A. Well, I went to work there when I was eighteen years old and I worked up until I believe it was '51, the last part of '51 when I left there.

Q. Did you ever work for Benedict Coal Company and, if so, during what year?

A. Yes, sir, I went over there the first part of '52 and worked for them about four months, around four months.

Q. Now, you last worked in the coal mine at what year, what month?

A. That was at Clinchfield.

Q. Clinchfield?

A. Yes, sir.

Q. What month, what year, do you remember?

A. No, sir, not exactly, but it was in the first part of '54.

Q. First part of '54?

A. First part of '54. I just worked about—I don't know, it might have been—I'm not saying exactly what, how many weeks it was, but it was around three or four weeks.

Q. Now, when did you go to work for Clinchfield, did you tell me that a minute ago?

A. '52.

Q. '52? Did they examine you when you went to work?

A. Yes, sir.

Q. Did they tell you anything was wrong with you page 6 } at that time?

A. No, sir.

Q. What type of work did you do for Clinchfield?

A. Well, I was what you call a handyman, I run a machine, or helped on machine; I set timbers; I rock dusted;

Q. What do you mean by rock dusted? Threw rock dust out?

A. No, I throwed it with my hands.

Q. Well, you threw it out in the air?

A. Oh, yeah, and it come back on me.

Q. When did you first find out you had anything wrong with your lungs, that is dust on them as you call it?

A. Well, when I went to Harlan, I couldn't find out from nobody else.

Q. Harlan Memorial Hospital?

A. Yes, sir. That's where I found out what was wrong with me.

Q. After that did you notify the company that you worked for?

A. Yes, sir.

C. R. Pate.

Q. How long after you found it out, do you remember?
A. Just as quick as I got a letter from the dust records, I notified the company.
Q. What did you do, write them a letter?
A. Yes, sir.
Q. Were you living in South Carolina at that time?
A. Yes, sir.
Q. Take the witness.

CROSS EXAMINATION.

By Mr. Bowen:
Q. Mr. Fulks, how old are you?
A. I'm forty-six.

* * * * *

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* * * * *

MR. C. R. PATE

By Mr. Stuart:
Q. Mr. Pate, you are the—C. R. Pate, you are the Clinchfield Coal Company compensation manager?
A. Yes, sir.
Q. Do you have a time chart on Mr. Fulks?
A. Yes.
Q. Wage chart?
A. Yes. Covering the entire period he worked for Clinchfield.
Q. What dates does that encompass?
A. He was employed on July 8th, 1952, and cut off January the 7th, 1954, by reason of reduction in force. I mean there were a number of people cut off at the same time.
Q. That was a cut off for lack of work?
A. Yes.
Q. During that period does your record show whether Mr. Fulks was off sick or not, at any time?
A. Yes. Yes.
Q. I believe it will just be easier to introduce this, Mr. Commissioner. We do introduce the statement of days worked and gross earnings form, wage chart of Mr. Fulks. Do you

C. R. Pate.

page 34 } have any information from the group insurance carrier as to the reason for Mr. Fulks being off from work during this period of time that he worked for Clinchfield?

A. Yes, I have three—copies of three vouchers, prepared by William F. Morgan who was the claims representative for Provident, and also in his own writing placed on the copies of the drafts the nature of the man's illness.

Q. You mean at the time that the drafts were issued?

A. Yes.

Q. What are the dates of those vouchers?

A. One is dated January 15, 1952. Wait a minute, that must be some other date. It says that date, apparently it must be wrong, because he wasn't even working for us then, was he?

By Commissioner Evans: Provident also had a policy on him with the other employer too.

A. Anyway, this covers forty-nine days covering asthma. There is a waiting period of seven days in each illness, incidently. The second one is dated 11-20-52. thirty-seven days for asthma. The third is dated 5-7-53, forty-one days for pneumonia.

Q. Those vouchers do run by number, do they?

A. Yes.

Q. Let's see those.

A. I'll be happy to have them introduced, though.

Q. We'd like to introduce the three copies of those vouchers.

page 35 } By Mr. Bowen: In view of the fact that this claimant lives in South Carolina, we have made a tentative appointment for him to see—to report to the Bluefield Sanatarium tomorrow at 10:30 A. M. for an examination with reference to his condition. And we shall be glad to furnish the necessary travel expenses.

By Commissioner Evans: Can you arrange to go to Bluefield for an examination tomorrow?

By Mr. Rufus Fulks, Claimant: Facts about it, I just don't know whether I can make a trip down there, or not, by myself.

By Commissioner Evans: How are you travelling up here, by automobile?

By Mr. Rufus Fulks, Claimant: Yes, sir, my brother-in-

law brought me in and my wife is supposed to come and get me. I don't know whether I can make it down there on the bus, or not, or train, or ever what it might be.

By Commissioner Evans: Do you have any relatives with an automobile who can drive you down, or can you all furnish him transportation down, someone take him in an automobile?

By Mr. Bowen: Van, can you arrange to take him down there?

By Mr. J. M. Vandeventer: Yes.

By Mr. Bowen: Yeah, we'll take you there.

(Witness excused).

(Case concluded).

page 36 } Rufus Fulks, Claimant,

v.

Benedict Coal Company, Employer, Self Insured and/or Clinchfield Coal Corporation, Employer Self Insured and/or Kemmerer Gem Coal Company, Employer Self Insured.

Claim No. 371-918.

Oct. 21, 1957.

Claimant appeared in person. Joseph N. Cridlin, Attorney at Law, Jonesville, Virginia, for the Claimant.

Penn, Stuart & Phillips (George Rogers Clark Stuart), Attorneys at Law, Abingdon, Virginia, for Clinchfield Coal Corporation.

Wm. T. Bowen, Attorney at Law, Norton, Virginia, for Benedict Coal Company and Kemmerer Gem Coal Company.

Hearing before EVANS, Commissioner, at Big Stone Gap, Virginia, on September 11, 1957.

page 37 } EVANS, Commissioner, rendered the opinion.

FINDINGS OF FACT.

On April 4, 1957, Rufus Fulks filed claim with the Industrial Commission for an occupational pneumoconiosis which was alleged to have been contracted while employed by the

captioned defendants. This condition is claimed to be totally disabling.

The record discloses this employee worked for Kemmerer Gem Coal Company for a period of twenty-two years, having voluntarily terminated his employment with that company during 1951. In 1952 claimant worked for a period of four months in the mines of Benedict Coal Company. From July 20, 1952 to January 17, 1954, claimant was employed by Clinchfield Coal Company. He was then terminated due to economic conditions and has not been employed since the date of termination.

Claimant gave a history of having been troubled with a lung condition for several years. However, he denied ever having been given a diagnosis of an occupational pneumoconiosis prior to December 12, 1956, at which time he received a letter from the Compensation Department of the United Mine Workers in which he was advised that he may have an occupational disease.

Claimant entered the Harlan Memorial Hospital on October 8, 1956, and remained there for a period of twenty-two days during which time he was examined by Dr. William H. Anderson, Associate Chief of Medicine at that hospital. Upon his discharge, claimant was not advised of the diagnosis made of his condition.

After receiving the above mentioned letter of December 12, 1956, claimant gave timely notice to the captioned employers of his claim for an occupational pneumoconiosis.

page 38 } Report of Dr. William H. Anderson covering examination and tests made of this employee during October, 1956, was filed in evidence. Pertinent parts of the report are as follows:

"He was hospitalized at the Harlan Memorial Hospital *from* October 8 to October 30, 1956. He gave a history of having worked in the mines for twenty-five years. He finally had to stop working about three years ago because of excessive shortness of breath. During most of this time he worked on the coal cutting machine. At the time on his onset of the shortness of breath, he also had dull aching pain in his chest, cough and occasional wheeze. He had been worked up in the Knoxville Chest Group approximately two and one-half years ago but according to the patient was told he had a stomach ulcer and he denied that he received any treatment for his chest. At the present time he is able to walk about one block on the level ground before he must stop for rest. He has had moderate cough which is productive of whitish sputum, no hemoptysis, occasional wheezing and no ankle edema. For the past two years he has had some epigastric

pain frequently following meals. He has had pneumonia three times, last time in 1951. He had a mine accident in 1945 with a fractured pelvis and a fracture of his foot.

"On physical examination he was a well developed, well nourished, thin male with a blood pressure of 110/80. He had retraction of his supraclavicular and suprasternal fossa. There is an increase in the AP diameter of his chest. He had hyperresonance and his breath sounds were distant. The heart was not enlarged. No murmurs or thrills were found. The remainder of the physical was essentially negative.

"Laboratory examination revealed that the electrocardiogram was compatible with cor-*pulmonle*. The upper gastrointestinal series revealed a normal upper gastrointestinal tract. He, also, had a normally functioning gall bladder without calculi. The x-ray of the chest revealed pulmonary fibrosis consistent with pneumoconiosis simple, category 2-M and pulmonary emphysema. His urinalysis and blood count were within normal limits except for mild polyeythemia, his hematocrit being 51, on another occasion 56. Studies for acid fast bacilli were done and none could be found. He also had pulmonary function studies done with the following results: Vital capacity was 49% of the predicted normal, maximum breathing capacity was 26%, the air flow rate was only 200 cc's per second. The conclusion to be drawn from these studies is that the patient is permanently and totally *disable* for any type of physical exertion since his x-ray is that of occupational pneumoconiosis. The final conclusion is that he is permanently and totally *disable* for all types of work by reason of occupational pneumoconiosis secondary to pulmonary emphysema.

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"At the time of discharge the patient had responded fairly well to the usual symptomatic medication but had not improved sufficiently so that he could be considered to be employable nor do we ever anticipate such improvement since he has irreversible anatomical change in his pulmonary structure."

Claimant's history reveals he had suffered numerous periods of disability since 1950 due to a chest condition. He received sickness benefits under a group health insurance policy for a period of eighty-six days beginning November 20, 1952, because of disability due to asthma. Beginning March 17, 1953, forty-one days' disability benefits were received covering an attack of pneumonia. During the time claimant was employed by Clinchfield Coal Company he

was absent from work for approximately twenty-
page 40 } two weeks due to sickness.

Defendants introduced in evidence report of Dr. Daniel Gabriel, Pennington Gap, Virginia. The report is herewith quoted:

"On March first *ninteen* hundred fifty one I saw Mr. Rufus Fulks in my office and sent him to the Lee General Hospital for chest x-ray. The diagnosis of Minimal anthracosis was made at that time and Mr. Fulks was so informed."

At the request of the defendants, this employee was examined by a group of physicians at Bluefield Sanitarium and a report covering the findings was submitted by Dr. S. G. Davidson, Roentgenologist, on September 18, 1957. Pertinent parts of the report are:

"Stereoscopic films of the chest shows a rather marked bilateral emphysema with some linear fibrosis throughout both sides of the chest. There is no definite nodulation. There is a well healed Ghon in the left base. Heart is normal in size. There is no x-ray evidence of clinical tuberculosis.

"Additional films on this patient were present for comparison with our films. The film dated March 1, 1951, made at Lee General Hospital, Pennington Gap, Virginia shows exactly the changes noted above, except there possibly has been a slight increase in the emphysema. The Ghon described above and the linear fibrosis was present on this film. No definite nodulation.

"A second film made July 2, 1952 was present but this film has deteriorated in storage to the point that it is impossible to interpret.

"Conclusion: It is our very definite opinion that this man does not have pneumoconiosis in any stage. The emphysema,
bronchitis and linear fibrosis described by us is
page 41 } consistent with asthma. There is certainly no
change in the fibrosis present in our film and the one made March 1951. It is easy to conceive that this film may have easily been interpreted as an early pneumoconiosis if a very definite history of asthma with relief by medication was not known. It is our opinion that this man is totally disabled to do any type of manual labor due to asthma."

It will be noted that Dr. Anderson reports that the x-ray of the chest reveals pulmonary fibrosis consistent with pneumoconiosis and pulmonary emphysema and he concludes that

claimant is permanently and totally disabled for all types of work by reason of the occupational pneumoconiosis secondary to pulmonary emphysema; while Dr. Davidson and his associates state that the emphysema, bronchitis, and linear fibrosis described by them is consistent with asthma. This group of physicians expressed the opinion claimant is totally disabled by asthma and that he does not have pneumoconiosis in any stage.

It follows that the medical diagnosis is in hopeless conflict as to the cause of claimant's disability for work. However, x-ray films made of claimant's chest by Dr. Gabriel in 1951 show that the condition of his lungs was the same as that existing when compared with x-rays made by Dr. Davidson in 1957. Dr. Gabriel diagnosed the condition as an occupational pneumoconiosis in 1951 and so informed claimant. This diagnosis was concurred in by Dr. Anderson in 1956.

If, in fact, claimant's disability is due to an occupational pneumoconiosis, he is barred from receiving compensation for the condition by virtue of failing to file claim with the Industrial Commission within one year of the date the diagnosis was made known to him in 1951, and also for failing to give notice to the employer within thirty days
page 42 } from the date the diagnosis was made known to him. See Sections 65-48 and 65-49, Code of Virginia, 1950.

Although it is well established that the provisions of the Workmen's Compensation Act must be construed liberally in favor of an employee, he must nevertheless prove his case by a preponderance of the evidence. *Rust Engineering Company* v. *Ramsey,* 194 Va. 975, 76 S. E. (2d) 195.

An award cannot be made on conjecture or surmise and where the evidence shows that it is equally probable that the condition for which claim is made could have been caused by the employment or independently of the employment, as employee has not borne the burden of proof. *Campbell* v. *Messenger,* 171 Va. 374, 199 S. E. 511; *Hopson* v. *Hungerford Coal Company,* 187 Va. 299, 46 S. E. (2d) 392.

In the instant case it is found that claimant has failed to prove by a preponderance of the evidence that his disability for work is due to an occupational pneumoconiosis.

Accordingly, the claim is dismissed and the case ordered stricken from the docket.

page 43 } INDUSTRIAL COMMISSION OF VIRGINIA

Richmond

Claim No. 371-918
Case of Rufus Fulks
To Benedict Coal Company
St. Charles, Virginia
and
Clinchfield Coal Company, (Employer)
Dante, Virginia and Kemmerer Gem Coal Company
Dorchester, Virginia
and Mr. Rufus Fulks (Claimant)
3223 Spruill Avenue
Charleston South Carolina
and Self Insured (Insurance Carrier)

Notice of Award
V.
Date October 21, 1957
cc. Mr. Joseph N. Cridlin, Atty.
Jonesville, Virginia R
cc. Penn, Stuart & Phillips, Attys.
Abingdon, Virginia R
cc. Mr. Wm. T. Bowen, Atty.
Norton, Virginia R

You are hereby notified that a hearing was held in the above styled claim before Evans, Commissioner, at Big Stone Gap, Virginia, on September 11, 1957, and a decision rendered by Evans, Commissioner, on October 21, 1957, directing that the claim be dismissed on the ground that claimant has failed to prove by a preponderance of the evidence that his disability for work is due to an occupational pneumoconiosis.

Accordingly, the claim is dismissed and the case removed from the docket.

INDUSTRIAL COMMISSION OF VIRGINIA
/s/ M. E. EVANS, Commissioner.

Attest:

/s/ W. F. BURSEY
Secretary.

* * * * *

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* * * * *

MOTION OF DEFENDANT CLINCHFIELD COAL COMPANY.

Now comes defendant Clinchfield Coal Company, and moves the Industrial Commission of Virginia to decide this claim on review upon the same evidence which was presented to the Hearing Commissioner for his decision, upon the following grounds:

1. By agreement of all parties, the case was submitted to the full Commission on review for decision upon the evidence before the Hearing Commissioner.
2. This defendant has not agreed and does not agree, for any evidence to be considered by the full Commission except that which was considered by the Hearing Commissioner.
3. The rules and regulations of the Industrial Commission and of the Code of Virginia do not provide for the taking of additional evidence without the consent of the parties, except in certain instances not here applicable.

Respectfully submitted,

CLINCHFIELD COAL COMPANY
By Counsel.

* * * * *

page 49 } Rufus Fulks, Claimant *v.* Benedict Coal Company, Employer self insured, and/or Clinchfield Coal Corporation, Employer self insured, and/or Kemmerer Gem Coal Company, Employer self insured.

Claim No. 371-918.

Jul. 24, 1958.

Joseph N. Cridlin, Attorney at Law, Jonesville, Virginia, for Claimant.
Penn, Stuart & Phillips, Attorneys at Law, Abingdon, Virginia, for Clinchfield Coal Corporation.
Greear, Bowen, Mullins & Winston, Attorneys at Law, Norton, Virginia, for Benedict Coal Corporation and Kemmerer Gem Coal Company.

REVIEW before the full Commission at Richmond, Virginia, on December 2, 1957.

CRENSHAW, Commissioner, rendered the opinion.

This case is before the full Commission for review upon application of the claimant who is aggrieved by a decision and award of the hearing Commissioner dated October 21, 1957, by which his claim for compensation was denied.

Rufus Fulks alleged a disability for work by reason of occupational pneumoconiosis. He had worked for
page 50 } Kemmerer Gem Coal Company for twenty-two years ending in 1951. For four months in the early part of 1952 he was employed in the mines of the Benedict Coal Company, and then, from July 20, 1952 to January 17, 1954, he worked in those of the Clinchfield Coal Company. His duties in his last employment included helping to operate the machine, setting timbers, and rock dusting. The last operation was the removal of rock dust by throwing it out with his hands. The evidence clearly shows that Fulks was last injuriously exposed to the hazards which causes or augments his disease in the employ of the Clinchfield Coal Company. We so find.

A diagnosis of an occupational pneumoconiosis was first communicated to him in a letter bearing date of December 12, 1956, and the several defendants were given timely notice of the claim thereafter. A preponderance of the evidence shows this to be the first disclosure to him of a diagnosis of an occupational disease, and we so find. There is no evidence of a distinct manifestation prior to the disclosure of the diagnosis. Upon conflicting medical evidence the hearing Commssioner held that the clamant had failed to prove by a preponderance of the evidence that his disability for work was due to an occupational disease. Faced with the same conflict we, upon review, determined to secure an examination and report from a disinterested physician in the sense explained in *Basham* v. *Lowe,* 176 Va. 485, 11 S. E. (2) 638, that is, one employed and paid by us.

We selected Dr. G. W. H. Schepers, one eminent in the field of chest disorders. We list his qualifications:

Born—August 10, 1914—Dewesdorp, Orange Free State, Union of South Africa.

University Training—

University of Witwatersrand, Johannesburg
page 51 } University of Pretoria
University of South Africa
New York University.

Academic Study Courses, Degrees and Fellowships—

B. A. II: Psychology
B. Sc. Physics
B. Sc. Hons.: Histology
M. Sc.: Neurology
M. B., B. Ch.: Pathology
D. Sc.: Neurology
M. D.: Internal Medicine
Fellow, American College of Chest Psysicians
Fellow, South African College of Physicians and Surgeons
Fellow, American College of Cardiology

Professional Posts—

1934-42: University of the Witwatersrand Medical School, Johannesburg—Instructor and Research Associate
1942-44: University of Pretoria—Dept. of Anatomy, Professor
1944-54: Department of Mines, Johannesburg, Union of South Africa Miner's Phthisis Bureau, Member. (Industrial hygiene and medicine, clinical problems, chest radiography, pathology, function evaluation, Silicosis medical bureau.)
1954-57: Saranac Laboratory, Saranac Lake, New York Director and Executive Vice-President. (Pathology: Industrial Chest Diseases)
1955-56: Trudeau Saranac Institute, Saranac Lake, New York, Executive Director. (Administrative)
page 52 } 1957-58: University of Michigan, Ann Arbor, Michigan, Institute of Industrial Health and Department of Pathology, Research Associate.
1958- : Haskell Laboratory for Toxicology & Industrial Medicine, E. I. DuPont DeNemours & Company, Newark, Delaware, Pathologist.

Honorary Positions—

1950 to present: Associate Editor, Journal of Industrial Medicine and Surgery.
1952 to present: Member, American Cancer Prevention Committee.
1954 to present: Secretary, Committee on Occupational Diseases of the Chest, American College of Chest Physicians.
1955: Member, Program Committee, McIntyre-Saranac Conference on Occupational Chest Disease.

1957 to present: Editorial Consultant, American Journal of Cardiology; Chairman, Publications Committee, American College of Cardiology; Member, Committee on Workmen's Compensation, American College of Cardiology; Member, Committee on Employment of Cardiacs in Industry, American College of Cardiology.

Distinctions—

1945: Award of 1000 Pounds (sterling) by South African Academy of Science and Humanities for monograph on "The Evolution of the Forebrain."
1949-50: Commonwealth Fund Fellow for Studies on Industrial Medicine in Great Britain, United States of America, Canada, and Europe.
1953: Awarded Queen's Coronation Medal.

Professional Societies—Membership—

American Association for the Advancement of Science.
American Association of Physical Anthropolo-
page 53 } gists.
American College of Chest Physicians.
American Industrial Hygiene Association.
American Industrial Medical Association.
American Trudeau Society.
American Association of Experimental Pathologists.
American College of Cardiology.
New York Academy of Science.
American Society of Anatomists.
South African Academy of Science.
South African College of Physicians and Surgeans.
Michigan Pathological Society.
American Association of University Professors.
University Michigan Research Club.
Washtenau County Medical Society.

Publications—

Among more than 70 journal publications he has the following:

Pneumokoniosis in South African. Proc. McIntyre Res. Foundation, 1950.

Industrial Medicine in South Africa. Indust. Med. & Surg., 23:278, 1954.

The Rheumatic Lung. *Idem,* 23:374, 1954.

Industrial Asthma and Bronchitis. *Idem,* 24:53, 1955.

Comparative Vascular Pathology of Occupational Chest Diseases: Preliminary Observations. A. M. A. Arch. Indust. H., 12:7, 1955.

Occupational Chest Diseases in Gold Miners. A review of Progress in the Union of South Africa. *Idem,* 12:33, 1955.

The Effects of Inhaled Talc-Mining Dust on the Human Lung. *Idem,* 12:182, 1955.

page 54 } Pathological Study of the Effects of Inhaled Gypsum Dust on Human Lungs. *Idem,* 12:209, 1955.

Cytobiological Manifestations of the Surface Properties of Quartz. *Idem,* 12:266, 1955.

The Antagonistic Biological Action of Quartz and Potassium Carbonate:

An Experimental Study on Guinea Pigs. *Idem,* 12:109, 1955.

The Biological Action of Glass Wool: Studies on Experimental Pulmonary Histopathology. *Idem,* 12:280, 1955.

The Biological Action of Tantalum Oxide: Studies on Experimental Pulmonary Histopathology. *Idem,* 12:121 1955.

The Biological Action of Cobaltic Oxide: Studies on Experimental Pulmonary Histopathology. *Idem,* 12:124, 1955.

The Biological Action of Particulate Cobalt Metal: Studies on Experimental Pulmonary Histopathology. *Idem,* 12:127, 1955.

The Biological Action of Particulate Tungsten Metal: Studies on Experimental Pulmonary Histopathology. *Idem,* 12:134, 1955.

The Biological Action of Tungsten Carbide and Cobalt: Studies on Experimental Pulmonary Histopathology. *Idem,* 12:140, 1955.

An Experimental Study of the Effects of Glass Wool on Animal Lungs. *Idem,* 12:276, 1955.

An Experimental Study of the Effects of Rare Earths on Animal Lungs. *Idem,* 12:297, 1955.

Correlations between the Pathology, Radiology, and Clinical Features in Silicosis. Proc. 7th Mexican National Congress on Tuberculosis and Silicosis, (IN PRESS), 1958.

The Pathology of Cor Pulmonale of Industrial Origin. Chapter in: American Encyclopedia of Cardiology, Chicago (TO APPEAR), 1958. (Precis of Conference on Recurrent Problems in Occupational Chest Diseases, 1957).

page 55 } The Prophylaxis of Silicosis by Aluminum: Experimental Studies by Subcutaneous Implantation Techniques. Proc. McIntyre Foundation, 1958.

The Influence of Silica and Alumina on the Prothrombin Levels in Guinea Pigs. *Idem,* 1958.

The Prevention of Silica Shock by Aluminum Agents. *Idem,* 1958.

The Role of Atypical Acid-Fast Mycobacteria in Silicosis. Proc. 4th Mexican Conference on Pneumoconiosis, 1958.

The Prophylaxis and Treatment of Silicosis by Aluminum. *Idem,* 1958.

The Biological Action of Inhaled Submicron Amorphous Silica Dusts. (Diseases of Chest, June, 1958).

His books and monographs include:

A Critique of the Concept Silicosis in South Africa. (Restricted and Confidential Monograph prepared for Beyers Commission. Inquiry into Pneumoconiosis Problems in South Africa.)

Proceedings of the McIntyre-Saranac Conference on Occupational Chest Diseases, February 1955. Published by American Medical Association. Edited by G. W. H. Schepers.

The Dust Diseases (IN PREPARATION) To appear: 1958. Publisher: Grune and Stratton, New York.

Chest Diseases of Industrial Origin. (IN PREPARATION) In collaboration with Edgar Mayer, M. D., Israel Rappaport, M. D., and J. Burns Amberson, M. D.

He has 43 other papers on various medical subjects awaiting publication.

A full statement of Doctor Scheper's qualifications has been included in the file in this case and is made a part of the record. To this procedure the defendants objected on the grounds that the full Commission could consider only the evidence before the hearing Commissioner, and page 56 } could not, without consent of the parties, hear additional evidence. They cite the rule of the Commission (No. 3) which provides that no additional testimony will be heard upon review except upon petition of the party requesting the same, conforming to those required in courts for introduction of after discovered evidence, and only where the petitioner is able to conform to the prevailing rule for the introduction of such evidence. Quite obviously, the rule does not inhibit the Commission itself. It is not a party. It could hardly petition itself. The after-discovered evidence rule could not apply to the forum which is not a party and not an investigative agency.

But the objection overlooks the fact that a hearing by the

full Industrial Commission upon review is a hearing *de novo*. It neither affirms nor reverses the hearing Commissioner, but makes its own findings upon its own considerations. *Eades* v. *Lucas,* 107 Ind. App. 144, 23 N. E. (2) 273; *McGuire* v. *Universal Gear Corp.,* 106 Ind. App. 107, 18 N. E. (2) 474. Upon application for review the award of the hearing Commissioner is superseded and has no force or effect. *Russell* v. *Johnson,* 220 Ind. 649, 46 N. E. (2) 219; *Pease* v. *Mann,* 88 Ind. App. 101, 163 N. E. 282. And upon review the full Commission may hear additional evidence, if it so desires, and consider defenses not put in issue at the original hearing. *Hoffer Bros.* v. *Smith,* 148 Va. 220, 138 S. E. 474; *Bell* v. *Mutual Home & Savings Ass'n.,* 105 Ind. App. 246, 14 N. E. (2) 738. The hearing being *de novo,* it is settled that additional evidence may be in the form of examination and report by a disinterested physician. *Walsh Construction Co.* v. *London,* 195 Va. 810, 80 S. E. (2) 524. The objection of the defendants is overruled, and the report of Doctor Schepers will be recieved and considered upon review.

As has been said, the medical evidence introduced at the original hearing as to whether this claimant is or is page 57 } not afflicted with occupational pneumoconiosis is in hopeless conflict, and no useful purpose would be served by detailing it here. Doctor Schepers reviewed the X-ray films upon which they were based, and made further studies of his own. His report is dated May 11, 1958, and especially pertinent parts follow:

"INTERPRETATION OF ELECTROCARDIOGRAPHS

"PR 0.16; QRS 0.1
"Right Axis deviation
"Peaked P in SL 11, AVF (0.45)
"Deep S in V2-V6
"ST depression SL 11-111, AVF, V1-2.
"Impression: Right ventricular and auricular hypertrophy."

"INTERPRETATION OF RADIOGRAPHS

"January, 1951: Thoracic cage about normal size but ribs well spaced apart; diaphragm just below 11th costovertebral articulation, somewhat flattened with blunting of the costphrenic angle on the left; heart small and central; lung parenchyma shows diffuse fine reticulation with marked micromottling which obscure the peripheral vascular pattern; a calcified Gohn's focus is present in the left midzone.

"10/3/56: The barium meal series is noncontributory except insofar as diaphragmatic hernia or ectopia or neoplasia of abdominal viscera, which could cause chest symptoms, have been excluded. The chest radiographs show: Hypertrophic thorax with slender skeletal components; low diaphragm (at level of 12th rib root); elongated heart with markedly prominent right outflow tract and conus pulmonalis; the heart has enlarged slightly since 1951;
page 58 } generalized increase in linear markings with a fine web effect and generalized micromottles; a few larger calcified nodules on the left in addition to the Gohn's focus; well marked substernal and basal emphysema.

"4/13/57: These chest radiographs contain no new features but bring out even more clearly the fine mottling and the substernal emphysema.

"4/23/57: Skull radiographs fail to demonstrate significant paranasal sinus disease.

"9/12/57: Chest radiographs taken with high contrast technique display the generalized increase in linear markings, fine reticulation, and micromottling; heavy leashes lead into the left lung apex from the left hilum.

3/31/58: Laminographs: The main features displayed in this complete series of coronal plane whole thorax laminographs are: marked distension of the proximal components of the pulmonary arteries with marked attenuation of peripheral arterial branches with distortion and beading along the intermediate sized vessels; in both apices the vascular components are crowded together whereas the branches are widely dispersed with blunt angulations elsewhere; generalized small nodulation is present between the blood vessels and in both apices these nodules are clustered together and some have conglomerated; around the Gohn's focus there are several medium sized nodules; slight pleural thickening occupies both costophrenic angles, a small apical calcified pericardial plaque is suggested."

"DISCUSSION

"The physicians who have studied this patient concur in the diagnosis of emphysema and affirm the total and permanent disability. The issue at dispute is whether the emphysema and cor pulmonale are of occupational origin
page 59 } or whether these lesions originated in non-industrial asthma.

"The case for asthma of the allergic variety has not been supported by sensitivity studies; there is no history of episodic or paroxysmal recurrence of the respiratory distress; the fact that the patient obtains relief from inhaling an unspecified medicinal agent cannot be accepted as proof of an asthmatic etiology of the pulmonary incapacitation. At the most this indicates the presence of bronchospasm which need not necessarily be of asthmatic origin.

"The radiographs are consistent with the changes induced by the prolonged inhalation of soft coal dust. The emphysema itself may be a direct expression of the action of the inhaled coal dust and the cor pulmonale is probably largely a direct effect of the peri-vascular coal dust lesions in the lungs though it may have been augmented by the arterial oxygen desaturation.

"The question of residual tuberculous infection should also be considered. The Gohn's focus in the left lung is apparently calcified but has satellite uncalcified lesions; the infiltration and atelectasis in the lung apices plus the recorded loss of weight raise the question of whether there perhaps is a hidden element of infection. However, loss of weight may be related to the digestive disturbances which lead to the studies of the alimentary tract.

"A further point of interest is that anthracosis was diagnosable in 1951, i. e., at the start of the history of chest symptoms. This suggests that the nodulation now present is not sequential to the emphysema but etiologically related to it."

page 60 } "OPINION

"Mr. Rufus Fulks is totally and permanently incapacitated for physical exertion as a result of pneumoconiosis, emphysema, and cor pulmonale which have their origin in the inhalation of dust during the prolonged performance of work in coal mines."

The finding is made that Rufus Fulks is totally and permanently incapacitated for work by reason of occupational pneumoconiosis and other occupational diseases having their origin in his employment. Fulks last worked on January 17, 1954, and we find that by reason of his occupational disease he has been unable to secure employment since. Average weekly wage at the time of the last injurious exposure and at the time of disability for work was $100.00.

An award shall enter in behalf of the claimant against Clinchfield Coal Corporation at the rate of $25.00 per week on account of total incapacity, beginning January 18, 1954,

and continuing during incapacity, but not to exceed 500 weeks nor $10,000.00. Compensation in arrears shall be paid in one sum upon receipt of the award. No provision is made for the payment of attorney's fee, since Joseph N. Cridlin appeared in behalf of the United Mine Workers Welfare Union and not as counsel for claimant. The case is dismissed as to Kemmerer Gem Coal Corporation and Benedict Coal Company.

page 61 } INDUSTRIAL COMMISSION OF VIRGINIA

Richmond

Claim No. 371-918 Case of Rufus Fulks	Notice of Award V. Date July 24, 1958
To Clinchfield Coal Corporation, (Employer) Dante, Virginai	cc. Mr. Joseph N. Cridlin, Atty. Jonesville, Virginia R
and Mr. Rufus Fulks, (Claimant) 3223 Spruill Avenue Charleston, South Carolina	cc. Penn, Stuart & Phillips, Attys. Abingdon, Virginia R cc. Greear, Bowen, Mullins & Winston, Attorneys
and Self Insured	Norton, Virginia R cc. Benedict Coal Company St. Charles, Virginia

cc. Kemmerer Gem Coal Co.
Dorchester, Virginia

You are hereby notified that a Review was held in the above styled case before the Full Commission at Richmond, Virginia, on December 2, 1957, and an opinion rendered by Crenshaw, Commissioner, on July 24, 1958, finding that Rufus Fulks is totally and permanently incapacitated for work by reason of occupational pneumoconiosis and other occupational diseases having their origin in his employment. The case is dismissed as to Kemmerer Gem Coal Company and Benedict Coal Company, and an award of compensation is directed against Clinchfield Coal Corporation, as follows:

$25.00 per week on account of total incapacity, beginning January 18, 1954, and continuing during incapacity, but not to exceed 500 weeks nor $10,000.00. Compensation in arrears shall be paid in one sum upon receipt of the award.

page 62 }

INDUSTRIAL COMMISSION OF VIRGINIA
/s/ J. G. CRENSHAW
Commissioner.

Attest:

/s/ W. F. BURSEY
Secretary.

page 63 }

* * * * *

NOTICE AND ASSIGNMENT OF ERRORS

To: Rufus Fulks, 3223 Spruill Avenue, Charleston, South Carolina.
Joseph N. Cridlin, Attorney at Law, Jonesville, Virginia.

You and each of you are hereby notified that the undersigned appeals from the decision of the Industrial Commission in this case and assigns the following errors as grounds of the appeal, namely:

1. The decision is not supported by the law and the evidence and is contrary to the law and the evidence.
2. By agreement of the parties, the cause was submitted for review by the full Commission upon the evidence given before the Hearing Commissioner (who was M. E. Evans) but notwithstanding this agreement the full Commission submitted certain X-rays and other portions of the record to one Dr. G. W. H. Schepers, for a diagnosis and opinion, and relying upon his report, has rendered a decision in favor of the claimant; such action was in direct conflict with the agreement of the parties.
3. The full Commission should have dismissed the claim, because (and it so appears from the opinion) the
page 64 } claimant failed to prove by a preponderance of the evidence that his disability was due to an occupational disease arising out of his employment, and the Commission has no legal power to submit certain of the documents in evidence to a doctor for an opinion, as has been done in this case, over the objection of the appellant. Such action is also in flagrant violation of the accepted rules of legal procedure and violates the Commission's Rule No. 3, which provides that no additional testimony will be heard

upon review except upon petition of the party requesting the same, and then only where the petitioner conforms to the rule of law permitting the introduction of after discovered evidence.

4. The claimant's occupational disease was diagnosed and he received notice thereof in March, 1951, but did not file his claim until April, 1957, and his claim was therefore barred by section 65-49 of the Virginia Code of 1950.

You are further notified that the undersigned appellant will apply to the Secretary of said Industrial Commission, at the office of said Commission, on August 12th, 1958, for a transcript of the record in this case for the purpose of applying to the Supreme Court of Appeals of Virginia for an appeal or writ of error. The undersigned appellant will request that all of the evidence and the exhibits constituting the record be included in the transcript and that the following letters and documents be made a part of the transcript, namely:

1. Decision of Hearing Commissioner M. E. Evans dated October 21, 1957.
2. Letter of Joseph N. Cridlin, claimant's attorney, to the Industrial Commission, dated Oct. 28, 1957.
3. Industrial Commission's notice to the parties
page 65 } of the date set for review of the claim, dated November 20, 1957.
4. Mr. Cridlin's letter to the Industrial Commission dated November 25, 1957.
5. Letter of W. T. Bowen to W. F. Bursey, Secretary of the Industrial Commission, dated November 27, 1957.
6. Letter of Penn, Stuart & Phillips to Industrial Commission, dated Nov. 27, 1957.
7. Letters of Industrial Commission to Bluefield Sanitarium, Lee General Hospital and Harlan Memorial Hospital, all dated Dec. 9, 1957.
8. Letter of Industrial Commission, with enclosure, to all counsel dated Feb. 27, 1958.
9. Penn, Stuart & Phillips' letter to the Industrial Commission dated March 14, 1958.
10. Form of motion forwarded to the Industrial Commission with Penn, Stuart & Phillips' letter of Mar. 14, 1958.
11. Penn, Stuart & Phillips' letter of Mar. 14, to Mr. Cridlin and Mr. Bowen serving copies of their motion
12. Letter of W. T. Bowen to Industrial Commission, dated Mar. 17, 1958.
13. Letter of the Industrial Commission to Penn, Stuart & Phillips dated March 17, 1958.

14. Letter of the Industrial Commission to all counsel, with enclosures, dated March 24, 1958.
15. Penn, Stuart & Phillips' letter to the Industrial Commission, dated April 8, 1958.
16. Letter of W. T. Bowen to Industrial Commission, dated April 11, 1958.
17. Decision of Full Commission dated July 24, 1958.

page 66 } The said Secretary will also be requested to let the transcript show that said Dr. Schepers did not examine the claimant in person.

This 5th day of August, 1958.

CLINCHFIELD COAL COMPANY
By Counsel.

* * * * *

page 67 } Department of Workmen's Compensation

INDUSTRIAL COMMISSION OF VIRGINIA

Richmond 14

November 20, 1957.

Claim No. 371-918

Re: Rufus Fulks,

v.

Benedict Coal Company, Clinchfield Coal Corp., Kemmerer Gem Coal Company.

Gentlemen:—

This is to advise that the above styled case will be reviewed by the full Commission at its office—Room #300 Blanton Building—(New State Office Building)—RICHMOND Virginia, on December 2, 1957, at 9:30 A. M.

A hearing was held in this case before Commissioner Evans at Big Stone Gap, Virginia, on September 11, 1957, and a decision rendered on October 21, 1957, directing that the claim be dismissed.

The claimant has requested a review before the full Commission as provided in Section 65-93 of the Act.

All parties in interest have the privilege, if they so desire, of being present at the above time and place.

Yours very truly,

INDUSTRIAL COMMISSION OF VIRGINIA
Secretary.

Copy to:

page 68 } Employee, Joseph N. Cridlin, Atty., Clinchfield Coal Corp., Penn, Stuart & Phillips, Attys., Benedict Coal Company, Kemmerer Gem Coal Company, Wm. T. Bowen, Atty.

page 69 }

Joseph N. Cridlin
Attorney at Law
Jonesville, Virginia

November 25, 1957.

Industrial Commission of Virginia
Department of Workmen's Compensation
Richmond, Virginia

Re: #371-918—Rufus Fulks *v.*
Benedict Coal Company,
Clinchfield Coal Corporation,
Kemmerer Gem Coal Company.

Gentlemen:

With reference to the review by the full Commission of the findings of Commissioner Evans in the above-styled matter, you are advised that we desire to submit the matter upon the evidence introduced at the previous hearing and do not desire to appear before the Commission in Richmond on December 2nd with reference to the matter.

Very truly yours,

/s/ JOSEPH N. CRIDLIN.

JNC:b

cc: PENN, STUART & PHILLIPS, Attys.
W. T. BOWEN, Atty.

* * * * *

page 71 } PENN, STUART & PHILLIPS
Attorneys at Law
Abingdon, Virginia

November 27, 1957.

Industrial Commission of Virginia
Richmond, Virginia.

Claim No. 371-918

Re: Rufus Fulks *v.* Benedict Coal Company, et al.

Dear Sirs:

We have received copy of letter written to you on November 25th by Mr. Cridlin, claimant's attorney, in which he requests that the Commission decide the case upon the present record, without oral argument or briefs. As counsel for Clinchfield Coal Corporation, we agree to this method of disposition.

Very truly yours,

/s/ PENN, STUART & PHILLIPS

GRCS:aag

cc: Mr. Cridlin
Mr. Bowen

page 72 } December 9, 1957.

Claim No. 371-918

Re: Rufus Fulks,

v.

Benedict Coal Corporation, et al.

Harlan Memorial Hospital,
Harlan, Kentucky

Gentlemen:

According to our records chest x-rays of *Rufus Fulks* were made at your hospital *in or about October of* 1956.

In order that a proper decision may be reached in this case, it is necessary that we have this evidence. Please forward the film to the undersigned at your very earliest convenience.

Very truly yours,

Commissioner.

JGC:gw

cc: to Mr. Joseph N. Cridlin, Atty., Jonesville, Virginia.
Penn, Stuart & Phillips, Attys., Abingdon, Virginia.
Mr. Wm. T. Bowen, Atty., Norton, Virginia.

page 73 } December 9, 1957.

Claim No. 371-918

Re: Rufus Fulks,

v.

Benedict Coal Corporation, et al.

Lee General Hospital,
Pennington Gap, Virginia

Gentlemen:

According to our records chest x-rays of *Rufus Fulks* were made at your hospital on or about *March 1, 1951.*

In order that a proper decision may be reached in this case it is necessary that we have this evidence. Please forward the film to the undersigned at your very earliest convenience.

Very truly yours,

Commissioner.

JGC:gw

cc: to Mr. Joseph N. Cridlin, Atty., Jonesville, Virginia.
Penn, Stuart & Phillips, Attys., Abingdon, Virginia.
Mr. Wm. T. Bowen, Atty., Norton, Virginia.

page 74 } December 9, 1957.

Claim No. 371-918

Re: Rufus Fulks,

v.

Benedict Coal Corporation, et al.

Bluefield Sanitarium,
Bluefield, West Virginia

Gentlemen:

According to our records chest x-rays of *Rufus Fulks* were made at your hospital on or about *September 18, 1957.*

In order that a proper decision may be reached in this case it is necessary that we have this evidence. Please forward the film to the undersigned at your very earliest convenience.

Very truly yours,

Commissioner.

JGC:gw

cc: to Mr. Joseph N. Cridlin, Atty., Jonesville, Virginia.
Penn, Stuart & Phillips, Attorneys, Abingdon, Virginia.
Mr. Wm. T. Bowen, Attorney, Norton, Virginia.

page 75 } February 27, 1958.

Claim No. 371-918

Re: Rufus Fulks,

v.

Benedict Coal Corporation, et al.

Mr. Joseph N. Cridlin, Attorney at Law,
Jonesville, Virginia

Mr. George R. C. Stuart, Attorney at Law,
118 East Main Street
Abingdon, Virginia

Mr. William T. Bowen, Attorney at Law,
Norton, Virginia

Gentlemen:

I have enclosed herewith copy of Dr. G. W. H. Schepers' letter of February 18, 1958, relative to the above matter.

In view of the complex and extensive nature of the studies requested by Doctor Schepers, it seems to me the better and most reasonable procedure would be for counsel to arrange to have this man travel to the University of Michigan at Ann Arbor, where the necessary examinations may be performed under the direct supervision of Doctor Schepers. If, because of the claimant's physical condition, or for other reasons, this cannot be accomplished, then the suggested studies should be undertaken at some hospital mutually agreeable to counsel.

Please advise at your earliest convenience whether or not the suggested studies can be accomplished in order
page 76 } that I may, in turn, communicate your plans to Doctor Schepers.

It is to be understood that the Commission will bear no part of expense of the examinations requested by Doctor Schepers.

Yours very truly,

Commissioner.

JGC:gw

page 77 } February 18, 1958.

J. G. Crenshaw, Esq.
Commissioner,
Industrial Commission of Virginia
Box 1794
Richmond 14, Virginia

Re: Rufus Fulks *v.* Benedict Coal Corp.

Claim 371-918

Dear Mr. Crenshaw:

Is it at all possible for me to see the electrocardiographs in this case? If no recent recordings are available, I wonder

whether new EKG's can be made by one of your physicians. If you *ar* going to arrange for the latter, could you have recordings made at rest and again after performance of a standard Master's step test?

Asthma has been mentioned as a diagnostic possibility. Can you ascertain whether there were any allergy studies? If not, can these be carried out?

Because of his poor pulmonary reserve it seems inadvisable to have biopsy or bronchographic studies. However, a mid-coronal tomograph should be of considerable aid. It would be useful also to have oblique and lateral views of the heart.

Is there anyone in your area with a fractional focus x-ray apparatus. If so, macroradiographs of one of the lung bases should prove instructive.

On receipt of the above information I shall render the fully motivated opinion which you requested. If you cannot get all this information I shall try with what is available.

page 78 } Yours sincerely,

/s/ G. W. H. SCHEPERS, M. D./kk.

GWHS:kjk

cc: L. W. Hulley, Jr., M. D., Medical Advisor, Industrial Commission of Virginia, Richmond 14, Virginia.

page 79 } PENN, STUART & PHILLIPS
Attorneys at Law
Abingdon, Virginia

March 14, 1958.

Mr. J. G. Crenshaw, Commissioner
Industrial Commission of Virginia
Richmond 14, Virginia

Claim No. 371-918

Re: Rufus Fulks *v.* Benedict Coal Corporation, et al.

Dear Mr. Crenshaw:

We are now back in our office after an absence of two weeks, and have before us your letter of February 27th enclosing

copy of Dr. G. W. H. Schepers' letter of February 19th to you.

It appears that the Industrial Commission has requested an opinion on the case from Dr. Schepers, and in connection with this request has forwarded to him at least some portions of the medical records.

Your letter of February 27th was our first knowledge that the case had been referred to Dr. Schepers for an opinion. We object to the action of the Commission in submitting the case to Dr. Schepers, and we object to the Commission's considering any evidence which was not before the Hearing Commissioner.

The record will reveal that on November 25, 1957, claimant's attorney wrote to the Commissioner requesting that on review this claim be considered by the full Commission "upon the evidence introduced at previous hearing," and counsel for all defendants joined in this request.

We believe that our position in this matter is
page 80 } confirmed by the provisions of the Code of Virginia and by the Rules and Regulations of the Commission, particularly Rule No. 3.

It of course follows that we must decline to pay any portion of the expense of additional examinations of the claimant, and we object to the Commission's consideration of the reports of any such examinations, or any other evidence which was not before the Hearing Commissioner.

We enclose herewith a formal motion stating our objections, which we request that you file in the record together with this letter.

Very truly yours,

/s/ PENN, STUART & PHILLIPS.

GRCS:GVT

Enc.

cc: Joseph N. Cridlin, Esq.
Wm. T. Bowen, Esq.

* * * * *

page 82 } March 24, 1958.

Claim No. 371-918

Re: Rufus Fulks,

v.

Benedict Coal Corporation.

Mr. Joseph N. Cridlin,
Attorney at Law,
Jonesville, Virginia

Penn, Stuart and Phillips,
Attorneys at Law,
118 East Main Street,
Abingdon, Virginia

Mr. William T. Bowen,
Attorney at Law,
Norton, Virginia

Gentlemen:

Reference is made to my letter of February 27, 1958, and to the letter of Dr. G. W. H. Schepers dated February 18, 1958, enclosed therewith.

We were advised that the preliminary studies requested by Doctor Schepers would be quite expensive, and that it was improbable that the equipment to make the studies existed in Virginia. The Commission did not have funds to pay the costs of the studies, hence, my first letter of February 27, 1958, was written to counsel to inform them of Doctor Schepers' request and of the fact that, if the preliminary studies were made, they would not be at the expense of the Commission.

Because the last sentence of the letter of February 27, 1958, might be subject to misconstruction this letter is to make it abundantly clear that the Commission intends to pay the fee of Doctor Schepers for his examination and opinion. It is the cost of the preliminary studies which cannot be paid by the Commission.

page 83

Yours very truly,

Commissioner.

JGC:gw

page 84 }

Penn, Stuart & Phillips
Attorneys at Law
Abingdon, Virginia

April 8, 1958.

J. G. Crenshaw, Esq., Commissioner
Industrial Commission of Virginia,
Richmond 14, Virginia

Claim No. 371-918

Re: Rufus Fulks *v.* Benedict Coal Corporation, et al.

Dear Mr. Crenshaw:

We have received your letter of March 24th, relative to this claim.

We adhere to the position taken in our letter to you of March 14th and in the motion which accompanies our letter, that we object to consideration of any evidence by the Commission on review which was not before the Hearing Commissioner.

Very truly yours,

/s/ PENN, STUART & PHILLIPS.

GRCS:aag

cc: Joseph N. Cridlin, Esq.
W. T. Bowen, Esq.

* * * * *

page 87 }

JOSEPH N. CRIDLIN
Attorney at Law
Jonesville, Virginia

August 12, 1958.

J. G. Crenshaw, Commissioner
Industrial Commission of Virginia
Department of Workmen's Compensation
Richmond 14, Virginia.

Claim No. 371-918

Re: Rufus Fulks *v.* Clinchfield Coal Company.

Dear Sir:

Pursuant to your request contained in your letter of August 8, 1958, you are advised that Mr. Rufus Fulks was not examined in person by Dr. G. W. H. Schepers, and it is satisfactory with claimant for the record to so show.

It is requested that this letter be made a part of the record for that purpose.

Very truly yours,

/s/ JOSEPH N. CRIDLIN.

JNC:b

cc: Penn, Stuart and Phillips
Attorneys at Law,
Abingdon, Virginia

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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