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Supreme Court of Appeals
Richmond, Va.

Record No. 5046

In the Supreme Court of Appeals of Virginia at Richmond

POCAHONTAS FUEL COMPANY, INCORPORATED

v.

OLIVER G. BARBOUR

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.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5046

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 19th day of June, 1959.

POCAHONTAS FUEL COMPANY, INCORPORATED,
Appellant,

against

OLIVER G. BARBOUR, Appellee.

From the Industrial Commission of Virginia

Upon the petition of Pocahontas Fuel Company, Inc., an appeal is awarded it from an award entered by the Industrial Commission of Virginia on the 14th day of April, 1959, in a certain proceeding then therein depending wherein Oliver G. Barbour 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.

RECORD

• • • • •

COMMONWEALTH OF VIRGINIA
Department of Workmen's Compensation
INDUSTRIAL COMMISSION OF VIRGINIA
Richmond

APPLICATION FOR A HEARING IN NON-FATAL CASE.

Case of:

Oliver G. Barbour (Employee)

v.

Pocahontas Fuel Co., (Employer)

Not being able to reach an agreement as to compensation in the above styled case the undersigned hereby respectfully requests the Industrial Commission of Virginia for a hearing at a time and place to be fixed by said Commission in accordance with Section 65-91 of the Virginia Workmen's Compensation Act.

I hereby certify that when the hearing is held I expect to be able to prove the facts in the case as follows:

1. That on the 23 day of December, 1957, I was injured by accident arising out of and in the course of my employment while in the employ of Pocahontas Fuel Co.; I was advised that I had silicosis on June 13, 1958; was compelled to quit work on the .... day of .....; that my employer was notified within 30 days from date thereof; that my average weekly wages prior to the accident were $111.25.

2. That the nature of my injury is as follows: Second State Silicosis.

3. Place where accident happened Boissevain, Virginia.

4. (a) That I returned to work on the .... day of ....., at a weekly wage of $....; or (b) That I am still unable to return to work, and my estimated period of disability is .... weeks from this date. or (c) That I returned to work on the .... day of ....., 19...., at a weekly wage of $...., but again became disabled as a result of this injury on the .... day of ....., 19.....

5. That I have been paid compensation in the sum of $ none.
6. That as a result of this accident I have sustained a permanent injury as follows: Second Stage Silicosis.

page 2 } 7. That I am unable to reach an agreement as to compensation with my employer for the following reasons: The Company denies liability.

When a date for the hearing is fixed, I respectfully request the Commission to issue subpoenas for the following witnesses:

..... Address .....
..... Address .....
..... Address .....

Signed this 26 day of August, 1958.

Signature:

/s/ OLIVER G. BARBOUR
Employee.
Address: Yards, Virginia.

page 3 } Oliver G. Barbour, Claimant,

v.

Pocahontas Fuel Company, Inc., Employer Self insured.

Claim No. 432-920.

Claimant appeared in person.

Hubert Peery, Attorney at Law, Tazewell, Virginia, for Claimant.
John W. Gillespie, Attorney at Law, Tazewell, Virginia for the Defendant.

Hearing before EVANS, Chairman, at Richlands, Virginia, on November 17, 1958.

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

By Chairman Evans: All right, Mr. Peery.

MR. OLIVER G. BARBOUR,
Claimant.

By Mr. Peery:
Q. I believe your name is Oliver G. Barbour?
A. That's right.
Q. Where do you live, Mr. Barbour?
A. Yards, Virginia.
Q. How old are you?
A. I'll be 53 the 28th of March.
Q. Have you heretofore been an employee of the Pocahontas Fuel Company?
A. Yes, sir.
Q. When were you last employed by the Pocahontas Fuel Company?
A. December the 23rd, 1957.
Q. Where was that?
A. Boissevain, Virginia.
Q. How long had you worked for the Pocahontas
page 4 } Fuel Company prior to that time?
A. The best I can recollect I went to work for them in 1925.
Q. And you worked continuously then for about twenty-seven years?
A. That's right.
Q. Why did you leave the employ of the Pocahontas Fuel Company in December '57?
A. Well, the mines shut down.
Q. And you along with other employees were cut off?
A. That's right.
Q. At any time after that were you called back to work?
A. Not until June the 13th.
Q. That is June the 13th, 1958?
A. That's right.
Q. At that time did you report for work or an examination in connection with work?
A. How's that again?
Q. At that time did you report for work, or did you—
A. Yes, sir, on—
Q. —submit to an examination—
A. On the 13th, the 13th of June,the same day.
Q. To whom did you report for work?
A. Dr. Ballard at Pocahontas.
Q. That's Dr. H. H. Ballard and I believe he is the company physician?
A. That's right.

Oliver G. Barbour.

Q. At his request did you report to Bluefield Sanitarium for an examination and x-ray?

A. That's right.

Q. And on that date, did you report back to Dr. Ballard with a report from Bluefield Sanitarium?

A. Yes, sir.

page 5 } Q. On that date, June 1st—June 13th, 1958, did Dr. Ballard give you this memorandum addressed to Mr. A. V. Sproles, Jr.?

A. That's right.

Q. Do you know what position Mr. Sproles has with the Pocahontas Fuel Company?

A. Well, I think he looks after hiring the men and placing the men from the different mines, I think that's his job.

Q. I would like to file this with the Commission, if you please, if you'd like to read it into the record.

By Chairman Evans: The note of Dr. Ballard dated 6-13-58 is made a part of the record.

Q. Did the company offer you employment after that report?

A. No, sir. They told me that if it would just show*ed* first stage that they could put me back to work, but said second stage that they absolutely couldn't put me back to work, that they'd have to pay me for it, Mr. Sonny Sproles is the man told me that.

Q. Prior to the time of this examination, Mr. Barbour, did you have any knowledge that you were suffering from silicosis?

A. No, sir.

Q. Then when you got this report from Dr. Ballard was the first information that you had that you had silicosis?

A. Yes, sir.

Q. If the Commission please, we have here a report from Bluefield Sanitarium dated June 13th, 1958, that is a copy of a report; also a copy of a report from St. Luke's Hospital of Bluefield, West Virginia, dated June 14th, 1958; and a copy of a report from Clinch Valley Clinic Hospital dated June 16th, 1958, which were evidently in Dr. Ballard's files and they were delivered to Mr. Barbour along with a note from Dr. Ballard dated 6-20-58; x-ray reports from

page 6 } Bluefield Sanitarium, St. Luke's Hospital, Richlands Clinic, indicate second stage silicosis, and signed

by Dr. H. H. Ballard. If they're admissible like they are, we'd like to offer them; if not, we'd like to get signed statements from the proper parties at the hospital.

By Chairman Evans: I will receive them if there's no objection on the part of opposing counsel. If there is any, we will have to have them signed.

Q. Mr. Barbour, did you work for anyone between December 23rd, '57 and June 13th, '58?
A. No, sir, I don't think so.
Q. Well, did you follow any regular employment during that period?
A. No, sir.
Q. Have you worked any since that date?
A. Very little bit.
Q. Are you able to do a day's work now?
A. Not a full day's work, I give out. I can start out, work a few hours and go pretty good, but I just—I can't hardly hold out at hard labor all day long. I just give out, just tired down and have to quit.
Q. How about working in your garden in the summer, could you do that?
A. Very little bit. The only way I had to do that, that is not whatever was a push plow and it takes a man to do it, a sick man can't do it.
Q. What about your breathing condition, do you breathe hard after working?
A. Yes, sir, that's when I can tell it most. Walking up a hill pretty fast, or long pair of steps, or carrying something heavy on my shoulder, or throwing down, why, it just seems like that I'm going to lose my breath. That's when I can tell it the most.
Q. Now, what type of work did you do for the last few years at the Boissevain operation of the Pocahontas
page 7 } Fuel Company?
A. Well, in the last few years I was the main drill man there with the drilling with jack hammer, I drilled all the ditches there, shot them and drilled slate piles and I was an extra man to help on roof bolting. I was on one section of roof bolting about two months at one time. And any day that there was a man absent on any of the crews, why, they would put me on roof bolting to replace that man. And I hung canvas and I set timbers. I cleaned track on the main line; I set timbers on the main line; and about two

years time there I built thirteen overcasts in Boissevain mine, all of them is across the main line, that's to separate the intake from the outlift and motors was passing by, I don't know how many trips a day, pulling trips by, you know.

Q. Is there sandstone in that mine?

A. Yes, sir.

Q. Well, now, where you were working there near the tracks at different times, would the motors use sand on the tracks?

A. Oh, yes, sir, that's the only way they can pull a trip, them hills, is to drop sand down on the rails.

Q. And you were exposed to that over the years?

A. Yes, sir. Get more of it working alongside the main line than anywhere else in the mines, and the most of my work was along the main line.

Q. I believe that's all.

CROSS EXAMINATION.

By Mr. Gillespie:

Q. You went to see Dr. Robinson down at Clinch Valley Clinic along in June, did you?

A. Yes, sir.

Q. And then he made a report back to Dr. Ballard about you, didn't he?

A. Yes, sir.

page 8 } Q. Did you ever see that report, is it a letter?

A. No, sir, I didn't see nothing except the one that I got from Ballard myself. He gives the age there wrong, I'm 52 instead of 62.

Q. Have you ever seen that letter before?

A. No, sir, I don't think so.

Q. We'd like to introduce this what purports to be a photostatic—photographic copy of a letter from J. A. Robinson, Clinch Valley Clinic Hospital, June the 16th, 1958, to Dr. H. H. Ballard, Pocahontas, Virginia, pertaining to an examination made on the claimant, Mr. Oliver G. Barbour, June 16th, 1958. We also ask permission to introduce a letter or what purports to be a copy of a letter, however it's not signed, from Dr. S. G. Davidson of Bluefield Sanitarium to Mr. T. F. Waddington, Director of Compensation, Pocahontas Fuel Company, Pocahontas, Virginia, dated July the 17th, 1958, which is a report of an examination made by the Bluefield Sanitarium upon the claimant, Oliver G. Barbour. If there is any question as to the authenticity of this letter, we would like permission to have the original version introduced.

Oliver G. Barbour.

By Chairman Evans: I assume Mr. Peery has no objection, since you made no objection to his.

By Mr. Peery: I have no objection to that, but I would like to have a copy of it, and I want permission to cross examine Dr. Davidson because that is contrary to a large extent to his former report in the case.

By Chairman Evans: All right, sir.

Q. I'm sorry I don't have but one copy of it, but I can get another one.

By Chairman Evans: I'll leave this with you
page 9 } and you can make a copy, send it to him and send that to me in Richmond. Now, when—about the cross examination of Dr. Davidson, would you like to—

By Mr. Peery: At any time that they can arrange it, I'll be glad to.

By Chairman Evans: All right, sir, do you want to take it in the form of deposition, or do you want to talk with him together and then let him give you a formal written report? I don't know—

Q. If he wants it, I guess it's up to him to make the selection.

By Chairman Evans: Well, it's a question of cost. I didn't know whether you wanted to go to the expense of depositions if you could dismiss it with him and then get—I'll leave it entirely with you as to how you want it done.

By Mr. Peery: I believe I might take his deposition.

By Chairman Evans: All right. If you'll arrange for that; get together with Mr. Gillespie and you all agree on the date.

Q. After you left Boissevain, which was because the mine was shut down, wasn't it, in December?

A. Yes, sir.

Q. You left the Boissevain mine because they cut you off?

A. Yes, sir.

Q. Now, they've closed that mine down, haven't they?

A. Yes, sir.

Q. Did you apply for unemployment compensation?

A. Yes, sir.

page 10 } Q. How long did you draw it?

A. Eighteen weeks, I believe.

Q. Did you apply in Virginia or West Virginia?
A. Virginia.
Q. And you drew it for full time, did you?
A. Yes, sir.
Q. That's all.

By Mr. Peery: That's all.

(Witness excused).

MRS. O. G. BARBOUR,

By Mr. Peery:
Q. I believe you're Mrs. Barbour, the wife of the claimant here?
A. Yes, sir.
Q. Mrs. Barbour, how long have you and your husband been married?
A. Twenty-six years.
Q. How many children do you have?
A. Six.
Q. During the past summer what has been the condition of your husband with reference to being able to perform manual labor and work around the house?
A. Well, he's hardly done anything. He just hasn't felt like doing anything as far as work is concerned.
Q. Was he able to do any heavy work in the garden?
A. No, sir. Me and the children did all the gardening.
Q. When he would try to work, what would be his condition?
A. He just seemed to give out, do a little and seemed to give out easy.
Q. And have you noticed that condition all summer?
A. Yes, sir, all summer.
page 11 } Q. And has he done anything to amount to anything?
A. No, sir, very little. Little jobs that take a few minutes to do.
Q. Is he able to sleep at night?
A. No, sir, he doesn't sleep very good at all, up and down, he just doesn't seem to be able to sleep at all.
Q. And going up steps, do you notice that he gets short of breath?
A. Well, yes, he more or less, you know. I don't pay so much attention to him climbing steps as I do when he's trying

Mrs. O. G. Barbour.

to do something, because I'm not close to him at that time, but we don't have so many steps around the house. But I've noticed in his work he's so short of breath.

Q. From your observation do you think he's able to do a day's work now?

A. No, sir, I don't.

Q. Does he rest most of the time around the home?

A. Well, he rests quite a bit, but see, he seems restless, he isn't able to lay down too much and wants to walk, you know, around through the house like. But he rests quite a bit through the day.

Q. The first knowledge that you knew that he had silicosis was at the time of this x-ray?

A. Yes, sir, that's the first knowledge any of us knew he actually had silicosis.

Q. I believe that's all.

CROSS EXAMINATION.

By Mr. Gillespie:

Q. What had been his condition before this?

A. Well, he hadn't, I couldn't say he had felt good; of course, he tried to work when he was a-working and practically had to because of the family we had but he worked as long as he was in the mines of course.

Q. And when the mines shut down—

A. When the mines shut down he was out of

page 12 } work.

Q. And when did you notice that he was sick?

A. Well, mostly this summer he'd get so short-winded and just hasn't felt like doing—

Q. You hadn't noticed it before they told you he had silicosis?

A. Well, yes, I have noticed that he has been going downhill for several years.

Q. For several years?

A. Well, I'd say the last two years you could tell he'd lost some weight, when he was working in the mines.

Q. Did he go to the doctor?

A. No, sir, he was working, of course he didn't complain too much.

Q. He worked 'til the mine shut down?

A. He worked until the mine shut down.

Q. Regularly, didn't he?

A. Yes, sir.

Mrs. O. G. Barbour.

Q. And you didn't notice anything wrong with him particularly except that he'd begun to go down for the past two years up until June the 13th when he was x-rayed and told he had silicosis?

A. Oh, yes, I could tell his health was failing, but I didn't know what it was.

Q. When did you first start noticing his health failing?

A. Well, I couldn't say exactly, but I'd say in the last two years I have noticed it quite a bit.

Q. Had he noticed it two years ago and said something to you about it?

A. Well, no, sir, no, he just you know felt kinda bad and short-winded of course after a day's work.

Q. Did he tell you he was short-winded?

A. After a day's work he was awfully tired.

Q. Did he tell you that he was short-winded? Two years ago?

A. No, sir, he didn't tell me, but I could—I mean page 13 } when you live with any—

Q. It was obvious to you, wasn't it, you could see it?

A. Well, I could tell his health was failing quite a bit and I had—

Q. And he was short-winded and was losing weight two years ago?

A. Well, I wouldn't say it altogether in two years ago. I had been able you know to tell some difference in his health.

Q. That's all.

(Witness excused).

(Case concluded).

page 14 } COPY.

CLAIMANT'S EXHIBIT #1.

Written on Prescription blank:

DR. H. H. BALLARD, Pocahontas, Va. Reg. No. 7187

Name
Address Date 6-13-58

R/ Mr. A. V. Sproles, Jr.
Mr. Oliver G. Barber had chest X-Ray this A. M. and it

shows, Reported, as 2nd Stage Silicosis—Would this be passing?

/s/ H. H. BALLARD, M. D.

CLAIMANT'S EXHIBIT #5.

Written on Prescription blank:

DR. H. H. BALLARD, Pocahontas, Va. Reg. No. 7187

Name Oliver G. Barbour M. W. 52
Address Date 6-20-58

R/ X-Ray Reports from (1) Bluefield Sanitarium
(2) St. Luke's Hosp., Blfd., W. Va.
(3) Richlands Clinic
indicate Second Stage Silicosis

/s/ H. H. BALLARD, M. D.

page 15 } CLAIMANT'S EXHIBIT #2.

COPY.

H. H. BALLARD, M. D.
Phone 926
Pocahontas, Va.

BLUEFIELD SANITARIUM
X-RAY DEPARTMENT

Serial No. C 25596
June 13, 1958

Name: Oliver G. Barbour—Yards, Va.
Responsible Party: Poca. Fuel—Boissevain, Va.
Referred by: Dr. Ballard
Parts Examined: CHEST

FINDINGS:

Flat film of the chest shows a bilateral nodular fibrosis consistent with an early 2nd stage silicosis.

S. G. DAVIDSON, M. D.
Roentgenologist—

(COPY)

page 16 } CLAIMANT'S EXHIBIT #3.

COPY.

H. H. BALLARD, M. D.
Phone 926
Pocahontas, Va.

DEPARTMENT OF ROENTGENOLOGY
St. Luke's Hospital
Bluefield, W. Va.

June 14, 1958.

Name: Oliver Grady Barbour, Sr.—Age: 52
Yards, Virginia

Doctor: Higginbotham
Ballard
X-Ray No. C 37473
Part Examined: CHEST
X-Ray and Fluoroscopic Findings:

There is diffuse fine nodular fibrosis throughout both lungs. There is some coalesence in the right apex. The lungs are emphysematous. The cardiac contour is normal.

Conclusions: Findings are suggestive of second stage silicosis.

WEC/b W. E. COPENHAVER, M. D.

(COPY)

page 17 } CLAIMANT'S EXHIBIT #4.

COPY.

H. H. BALLARD, M. D.
Phone 926
Pocahontas, Va.

CLINCH VALLEY CLINIC HOSPITAL

June 16, 1958.

Name: Oliver G. Barbour, Yards, Va.,—Age: 52
Responsible Party: H & W
R&eferred by: Dr. Robinson
X-ray No. 7600
Parts Examined: CHEST

FINDINGS: There is a diffuse pulmonary fibrosis which is heavier superiorly where there is probably nodulation with the appearance being indicative of second stage silicosis. No acute abnormality is recognized. The heart is of normal size.

DORRIS A. CUNNINGHAM, M. D.
Roentgenologist—

(COPY)

page 18 } DEFENDANT'S EXHIBIT "A."

COPY.

CLINCH VALLEY CLINIC HOSPITAL
Richlands, Virginia

June 16, 1958.

Dr. H. H. Ballard,
Pocahontas, Va.

Dear Dr. Ballard:

Mr. Oliver G. Barbour, age 62 years, of Yards, Virginia, was here today for examination. This man states that he worked in the coal mine from 1925 until he was cut off from work in December 1957. He was supposed to go back to work at the mine last week but a routine chest X-ray showed evidence of silicosis. The man states that he drilled rock in the mines for about two and one-half years. He has had no chest pain, no dyspnea, or cough. He has had no findings consistent with sinusitis though he has had fairly frequent headaches for approximately twenty years. He had a nasal turbinate operation at the Bluefield Sanitarium approximately ten years ago. There have been no symptoms referable to the digestive tract or the genitourinary tract. The man has six children living and none dead.

Mr. Barbour is slender but he is fairly active and he has a good color. There is a slight curving of the fingernails. Temperature and pulse rate were normal, blood pressure 114/80, weight 128 pounds, and height 66 inches. The circumference of the chest is 34 inches on inspiration and 33 inches on expiration. There are a few diseased teeth. Heart, lungs, and abdomen seemed normal by physical examination. Copy of the chest X-ray report is attached. Hemoglobin is reported 17 gms., white blood count 7,300 with polys. 67%. Blood sedimentation rate is only slightly increased. Blood serology is reported negative and urinalysis normal. The vital capacity was found to be 85% of normal.

Mr. Barbour apparently has second stage silicosis and at the present time he is surprisingly symptom free. He was advised to moderately restrict his activities and to avoid exposure to dusty and damp atmospheres.

Yours sincerely,

/s/ J. A. ROBINSON, M. D.

JAR:s
Enclosure

page 19 } Before the Industrial Commission of Virginia:

Oliver G. Barbour, Claimant,

v.

Pocahontas Fuel Company, Inc., Defendant.

CLAIM NO. 432-920.

Pursuant to permission granted by Commissioner Evans at the hearing of this case in Richlands, Virginia, on November 17, 1958, Counsel for the Claimant cross-examined Dr. S. G. Davidson at his offices in the Bluefield Sanitarium Clinic in Bluefield, West Virginia, on December 22, 1958, at 2:30 P. M., and the foregoing is a transcript of his evidence and also the evidence of Dr. Henry F. Warden, Jr., taken on behalf of the Defendant at the same time and place. The oath of the witnesses was waived by agreement of Counsel.

Present: Hubert Peery, Counsel for the Claimant;
John W. Gillespie, Counsel for the Defendant.

page 20 } DR. S. G. DAVIDSON,

CROSS EXAMINATION.

Questions by Mr. Peery, Counsel for the Claimant:

Q. I believe you are Dr. S. G. Davidson.

A. That is correct.

Q. And you are connected with the Bluefield Sanitarium and the Bluefield Sanitarium Clinic in Bluefield, West Virginia?

A. That is correct.

Q. Doctor, I have before me a letter dated July 17, 1958, addressed to Mr. T. F. Waddington, Director of Compensation, Pocahontas Fuel Company, Pocahontas, Virginia, with reference to the examination of Oliver G. Barbour, Yards, Virginia, which letter is signed by you. Do you have a copy of that letter before you?

A. I do.

Q. Was it your diagnosis and the diagnosis of your associates in this case that Oliver G. Barbour was suffering from second stage silicosis at the time of the examination in July, 1958?

A. That is true.

Q. Now, with reference to the last paragraph of your letter in which you state that the pulmonary function studies show no deceased capacity to do work: how do you explain this?

A. Well, in the first place, Dr. Warden performed this test on Mr. Barbour, and this is a standard, reliable test which is recognized, I think, pretty generally by the medical profession as being completely reliable, and certainly in our experience we have been impressed with the accuracy of the test, and further in our experience it hasn't been unusual to find a man suffering from silicosis as demonstrated on x-ray film of the chest in which we were unable to demonstrate decreased capacity to do work. I think there are a number of factors that enter into it; one is the age of the individual and probably the larger factor.

page 21 } Q. Has it been your recommendation in a great many of these cases that where a man is suffering from first stage silicosis that you advise him that he should not go back into the mines where there is dust and dampness?

Objection by Mr. John W. Gillespie, Counsel for the Defendant:

Objection: The above question is objected to by Counsel for the Defendant as being irrelevant and immaterial to the case.

Dr. S. G. Davidson.

A. Actually, I very seldom advise a patient along this line. It is usually done by the medical man. I think that actually a man who has a first stage silicosis and has developed it in his occupation, I think that it is good advice to tell him to stay out of dust. I think it is only logical that a man who develops a first stage silicosis and continues in the same occupation and the same dust hazards will in time develop a second stage and in time a third stage.

Q. Do you think it would be advisable for Mr. Barbour in this case to continue to work in the mines where there is dust and dampness?

A. I don't think the dampness would bother him, but I don't think he should expose himself to further dust exposure.

Q. And from your knowledge and the history of these cases, where they work in the mines would be exposure to more dust?

A. If he continues in the same occupation in which he obtained his second stage silicosis, he would go ahead and progress with third stage.

Questions by Mr. John W. Gillespie, Counsel for the Defendant:

Q. That same reason would apply to a man who had no silicosis and was subjected to the causes of silicosis. I mean by that, any man who goes in the mines where there is silica.

A. That is correct.

Q. As to this patient, Mr. Barbour, as a result of the examination which you and your associates at this hospital gave this man, is it your opinion that he has no decreased capacity to work?

page 22 } A. That is true, and that opinion is developed on his pulmonary function study.

Q. Dr. Davidson, will you explain to us a little about this pulmonary function study. How does it compare in accuracy and reliability with the exercise tolerance test?

A. Well, Dr. Warden is an authority on it, and he is here, but in my experience there is no comparison in our opinion. We rely on the pulmonary function study.

Q. You mean it is far superior to the exercise tolerance test?

A. That is true. Dr. Warden, I am sure, would be glad to go into more detail than I can with the test, but I am certainly impressed with its accuracy and reliability.

Question by Mr. Peery:

Dr. Henry F. Warden, Jr.

Q. Do you authorize the stenographer to sign your name to this deposition?
A. Yes.

And further this deponent saith not.

/s/ DR. S. G. DAVIDSON
By Stenographer.

Counsel for the Defendant stated that he desired to call Dr. Henry F. Warden, Jr., as a witness on the behalf of the Defendant.

DR. HENRY F. WARDEN, JR.,
a witness for the Defendant testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Gillespie:
Q. You are Dr. Henry F. Warden, Jr.
A. I am.
page 23 } Q. And you are a practicing physician and associated with the Bluefield Sanitarium in Bluefield, West Virginia?
A. I am.
Q. Are the qualifications of Dr. Warden waived?

Response by Mr. Peery: Yes.

Q. Dr. Warden, there has been reference made to some pulmonary function study you made with reference to the subject of this examination, Oliver G. Barbour, of Yards, Virginia. I am not familiar with this method of determining the capacity of the patient to work, and would you explain, if you would, please, the methods used and the results and reliability of this study?
A. The pulmonary function studies are compiled to determine ventilation and diffusion of gases by the lungs. At the same time it is possible to measure the various capacities in volumes of the lungs. There are standards that are well-established which are considered as normal values. Now, these standards are primarily based on weight, height, age and body surface area. This test performed on Mr. Barbour was compared with the standard tables of normality for people of his build and age. Insofar as measuring his lung

volumes the most accurate portion of the examination is known as the time vital capacity. The time vital capacity is a measure of the total lung volume, excluding dead space, plus his ability to exhale air rapidly, thus determining the flow rate of expiration. The normal individual should be able to expire 75% of his air in one second, 85% in two seconds, and 95% in three seconds. You will note that Mr. Barbour could expire 91% in one second and 100% in three seconds, and that his total vital capacity was 119% of normal. Now the test that is primarily used to determine a person's capacity to perform physical work is known as the maximum breathing capacity; that is, the maximum amount of ventilation that a person can perform in one minute. You will note that Mr. Barbour had a predicted maximum breathing capacity of 98 liters per minute, and he performed
page 24 } 114 liters per minute, or 117% of normal. In reviewing the other calculations contained on this man, he has a normal absorption for oxygen and a normal movement of air with each respiration. The accuracy of this test is far superior to the exercise tolerance test in the evaluation of pulmonary function. This is strictly a test of the physiology of the lung with the exclusion of the heart and other factors that may add to the incapacity to do work.

Q. Was it your opinion at the time you examined Mr. Barbour that he had no decreased capacity for work?

A. It is my opinion.

Question by Mr. Peery:

Q. Dr. Warden, would you think it would be advisable for this man to return to his old occupation in the mine?

A. No, sir.

Question by Mr. Gillespie:

Q. Dr. Warden, if he returned to the mine, could he do a full day's work?

A. He could.

Q. Do you authorize the stenographer to sign your name to this deposition?

A. Yes.

And further this deponent saith not.

/s/ DR. HENRY F. WARDEN, JR.
By Stenographer.

I, Ruth Chambers, do hereby certify that the foregoing

evidence of Dr. S. G. Davidson and Dr. Henry F. Warden, Jr., was taken by me in shorthand and thereafter transcribed, and that said evidence taken by me is true and correct.

Given under my hand this December 22, 1958.

/s/ RUTH CHAMBERS.

page 25 } Oliver G. Barbour, Calimant,

v.

Pocahontas Fuel Company, Inc., Employer self insured.

Claim No. 432-920.

Jan. 16, 1959.

Claimant appeared in person.

Hubert Peery, Attorney at Law, Tazewell, Virginia, for Claimant.
John W. Gillespie, Attorney at Law, Tazewell, Virginia, for the Defendant.

Hearing before Chairman EVANS, at Richlands, Virginia, on November 17, 1958.

EVANS, Chairman, rendered the opinion.

FINDINGS OF FACT.

Claimant was employed by Pocahontas Fuel Company, Inc., from 1925 to December 23, 1957, at which time his employment was terminated due to economic conditions. His average weekly wage was $111.25.

On June 13, 1958, claimant was recalled for work and required to undergo a physical examination before starting to work. The pre-employment examination, as well as subsequent examinations of the claimant, disclosed that he had second stage silicosis. The employer was notified of the occupational disease immediately thereafter and a claim for the occupational disease filed with the Industrial Commission on August 27, 1958.

The employer defends on the ground that it is in no way liable to the claimant for payment of compensation because

the employee has not contracted any disease which in any manner decreases his capacity to work.

Dr. J. A. Robinson, Richlands, Virginia, examined claimant on June 16, 1958, and reported on the examination in part as follows:

page 26 } "Mr. Barbour apparently has second stage silicosis and at the present time he is surprisingly symptom free. He was advised to moderately restrict his activities and to avoid exposure to dusty and damp atmospheres."

Claimant testified that he was unable to do a full day's work because of shortness of breath. He denies having been gainfully employed and states that his condition was such that he was physically unable to perform the duties required in caring for his vegetable garden and that other members of the family had to perform the major portion of the gardening chores.

The evidence conclusively shows claimant has contracted the occupational disease of silicosis; that he was last exposed to the hazards of that disease while employed by the defendant and that he was refused re-employment by the defendant by virtue of the existence of the occupational disease.

All of the examining physicians agree that the claimant has a second stage silicosis but that this condition was producing little, if any, disability for work. The medical opinion in regard to physical ability to do work was predicated on pulmonary function studies performed by Dr. H. F. Warden, Jr., Bluefield Sanitarium, Bluefield, West Virginia. This physician expressed the positive opinion that claimant could return to his usual occupation as a miner and perform a full day's work. However, he was of the opinion that it would not be advisable for claimant to attempt to do so as further exposure to dust would adversely affect the silicotic condition and make it become progressively worse.

Dr. J. A. Robinson, Richlands, Virginia, advised claimant to moderately restrict his acitvity and to avoid exposure to dusty and damp atmospheres.

Dr. S. G. Davidson, Bluefield Sanitarium, Bluefield, West Virginia, was of the opinion claimant should not attempt to work where he was exposed to any dust hazard.

An occupational disease is not compensable per se. Before compensation may be awarded it must be shown page 27 } that the occupational disease has produced a total or partial wage loss. In the instant case, from the medical evidence, it must be concluded that claimant has not

been materially affected by the existence of the occupational disease insofar as it concerns his physical ability to perform the normal duties required of him as a coal miner. Nevertheless, it is conclusively shown by the evidence that the mere existence of the occupational disease has resulted in a refusal on the part of the defendant employer to afford employment to the claimant. But for the existence of the occupational disease, claimant would have been re-employed when he was called back to work on June 13, 1958. Claimant has suffered a total wage loss since re-employment was refused him and has been unable to secure other employment.

The evidence in this case overwhelmingly preponderates in showing that the existence of the occupational disease of silicosis contracted while employed by the defendant has caused claimant to be totally disabled insofar as he is able to resume his normal occupation as a miner since the existence of the occupational disease precludes him from obtaining such employment, and if such employment could by chance be secured, acceptance of it would be contrary to the recommendations of all of the examining physicians. It is therefore held that claimant has sustained a total wage loss as a result of the occupational disease of silicosis contracted while last exposed to the hazards of that disease during the period of employment with Pocahontas Fuel Company, Inc.

An award shall enter in behalf of Oliver G. Barbour against Pocahontas Fuel Company, Inc., providing for compensation benefits at the rate of $30.00 per week beginning June 13, 1958, and continuing for the statutory period unless subsequent conditions justify a modification of the award.

All accured compensation due under this award shall be paid in one sum and future payments made each two weeks thereafter.

From the compensation awarded there shall be deducted the sum of $750.00 to be paid to Hubert Peery, Attorney at Law, Tazewell, Virginia, for legal assistance rendered claimant in prosecuting his claim.

page 28 } COMMONWEALTH OF VIRGINIA
Department of Workmen's Compensation
INDUSTRIAL COMMISSION OF VIRGINIA
Richmond

Claim No. 432-920

Notice of Award

Case of Oliver G. Barbour
Acc. 6-13-58

Date January 16, 1959

To Pocahontas Fuel Company, Inc., (Employer) Pocahontas, Virginia	Hubert Peery, Atty. Tazewell, Virginia	R
and Mr. Oliver G. Barbour, (Claimant) Yards, Virginia	John W. Gillespie, Atty. Tazewell, Virginia	R
and Self Insured, (Insurance Carrier)		

You are hereby notified that a hearing was held in the above styled claim before Evans, Chairman, at Richlands, Virginia, on November 17, 1958, and a decision rendered by Evans, Chairman, on January 16, 1959, finding claimant has sustained a total wage loss as a result of the occupational disease of silicosis contracted while last exposed to the hazards of that disease during the period of employment with Pocahontas Fuel Company, Inc. and directing an award be entered in his behalf as follows:

"$30.00 per week beginning June 13, 1958, and continuing for the statutory period unless subsequent conditions justify a modification of the award.

"All accrued compensation due under this award shall be paid in one sum and future payments made each two weeks thereafter.

"The sum of $750.00 is directed to be deducted from the compensation awarded and paid to Hubert Peery, Attorney, for legal assistance rendered claimant."

INDUSTRIAL COMMISSION OF VIRGINIA
/s/ M. E. EVANS
Chairman.

Attest:

/s/ W. F. BURSEY
Secretary.

page 29 } Oliver G. Barbour, Claimant,

v.

Pocahontas Fuel Company, Incorporated, Employer self insured.

Claim No. 432-920.

Apr. 14, 1959.

Hubert Peery, Tazewell, Virginia, for Claimant.
John W. Gillespie, Tazewell, Virginia, for Defendant.

REVIEW before the full Commission at Richmond, Virginia, on March 2, 1959.

CRENSHAW, Commissioner, rendered the opinion.

This case is before the full Commission for review upon the application of the defendant, who is aggrieved by the decision and award of January 16, 1959.

A careful review of the evidence in this case leads us to the conclusion that the findings of fact and conclusions of law of the hearing Commissioner are plainly right, and are hereby affirmed upon review.

page 30 } NUCKOLS, Commissioner, dissenting:

The record as now made up does not support the award.

Barbour worked regularly for the Pocahontas Fuel Company from 1925 to December 23, 1957, when he, along with others, was laid off when the mine shut down due to lack of orders. During this period he fully performed his work with no apparent difficulty. When the mines were reopened in June of 1958 he and others were recalled at which time he was required to submit to a pre-employment examination. It was then, for the first time, determined that he had silicosis, and while the record is not conclusive, it appears that the disease was probably contracted in the course of his employment with the Pocahontas Fuel Company. He was refused re-employment since further exposure to the hazard of silica dust would augment the disease.

The medical evidence shows beyond peradventure that the employee is not wholly or partially physically incapacitated for work by reason of the silicosis.

Barbour apparently made no effort to obtain employment of any nature or description elsewhere subsequent to the time that he was refused employment in June of 1958. Certainly the record fails to disclose that any such effort was made.

Silicosis is not *per se* compensable. It is incumbent upon the employee to establish not only that he has contracted the occupational disease, but that he has become disabled therefrom. *Grollemond* v. *Ind. Comm.*, 5 Ill. (2) 541, 126 N. E. (2d) 211. The Act provides for compensation for disabilities from

occupational diseases and not for contracting such
page 31 } diseases. *Hirst* v. *Chevrolet Muncie Div.*, 110 Ind.
App. 22, 33 N. E. (2d) 773. The *sine quanon* is disability. *Durham Manufacturing Co.* v. *Hutchins,* 115 Ind. App. 479, 58 N. E. (2d) 444. And the burden is upon the claimant to establish such disability as a part of his cause. *Grollemond* v. *Ind. Comm., supra.*

Total disability exists when the workman is disqualified from pursuing the usual tasks of a workman in such a way as to enable him to procure and retain employment. *J. A. Foust Coal Co.* v. *Messer*, 195 Va. 762, 80 S. E. (2d) 533.

This employee was refused employment in the mines of the Pocahontas Fuel Company because of the presence of silicosis and because further exposure to the hazard of silicon dioxide would augment the disease. But I do not believe that that alone makes out a case for compensation. Is that proof that he is unable "to procure and retain employment?" The vast majority of employments do not involve exposure to the hazard of silicosis. The issue of whether a workman is able to obtain and retain employment requires a showing that at least some effort to procure work has been made.

No injury or occupational disease is compensable as a total incapacity until it is proven that the injury or disease has effectually closed the labor market to the employee. A showing that he may not return to his former occupation*al* is not such proof. Such a showing, I believe, would require proof of his educational, vocational, mental, and physical capacities plus unsuccessful effort to find work within those capacities. To require less, except for the indemnities provided for injuries to scheduled bodily members in Section 65-53, Code of
1950, is to disregard the whole concept of work-
page 32 } men's compensation benefits to compensate only
upon resultant loss of wage earning capacity.

I would restore the case to the docket and develop the evidence in respect to the facts as set out in the paragraph next above.

page 33 } COMMONWEALTH OF VIRGINIA
Department of Workmen's Compensation
INDUSTRIAL COMMISSION OF VIRGINIA
RICHMOND

Claim No. 432-920

NOTICE OF AWARD

Case of Oliver G. Barbour

Date April 14, 1959

To Pocahontas Fuel Company, Inc., (Employer) Pocahontas, Virginia

cc. Mr. Hubert Peery, Attorney Tazewell, Virginia R

and Mr. Oliver G. Barbour, (Claimant) Yards, Virginia

cc. Mr. John W. Gillespie, Attorney Tazewell, Virginia R

and Self Insured , (Insurance Carrier)

You are hereby notified that a Review was held in the above styled case before the full Commission at Richmond, Virginia, on March 2, 1959, and a decision rendered by Crenshaw, Commissioner, on April 14, 1959, (Nuckols, Commissioner, dissenting) adopting the Findings of Fact and Conclusions of Law of the hearing Commissioner as those of the full Commission and affirming the award of January 16, 1959.

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

Attest:

/s/ W. F. BURSEY
Secretary.

page 34 } I, W. F. Bursey, Secretary, Industrial Commission of Virginia, do hereby certify that the foregoing, according to the records of this office, is a true and correct copy of statement of Findings of Fact, Conclusions of Law and other matters pertinent to the questions at issue in Claim No. 432-920, Oliver G. Barbour, Claimant *v.* Pocahontas Fuel Company, Inc., Employer, Self Insured.

I further certify that claimant had notice that the defendant would request the Secretary of the Industrial Commission of Virginia to furnish certified copy of the record for the purpose of an appeal to the Supreme Court of Appeals of Virginia. Furthermore, in requesting that the evidence be certified, counsel representing the defendant advised the Secretary of the Industrial Commission of Virginia that he would allege in his petition to the Supreme Court of Appeals that the

award of the Industrial Commission of Virginia is wholly unsupported by the evidence.

I further certify that, as evidenced by U. S. Postal Registry Return Receipt Card, counsel representing the defendant received, under date of April 16, 1959, copy of award of the Industrial Commission of Virginia, dated April 14, 1959.

Given under my hand and the seal of the Industrial Commission of Virginia this the 28th day of April, 1959.

Seal

W. F. BURSEY
Secretary, Industrial Commission
of 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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SUPREME COURT OF APPEALS
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