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Richmond, Va.

Record No. 5047

In the Supreme Court of Appeals of Virginia at Richmond

POCAHONTAS FUEL COMPANY, INCORPORATED

v.

CLINTON WILLARD AGEE

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. 5047

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

CLINTON WILLARD AGEE, 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 22nd day of April, 1959, in a certain proceeding then therein depending wherein Clinton Willard Agee 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.

437-519

Case of:

Clinton Willard Agee, (Employee)

v.

Pocahontas Fuel Co., Inc., (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 .... day of ....., 19 ...., I was injured by accident arising out of and in the course of my employment while in the employ of .....; that as a result of my accident I was compelled to quit work on the .... day of .....; that my employer had knowledge of my accident within 30 days from date thereof; that my average weekly wages prior to the accident were $.....

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

3. Place where accident happened Boissevain, Virginia.

4. (b) That I am still unable to return to work, and my estimated period of disability is *unknown* weeks from this date.

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: Silicosis.

7. That I am unable to reach an agreement as to compensation with my employer for the following reasons:

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

page 2 }

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

Signed this 3d day of December, 1958.

Signature:

/s/ CLINTON WILLARD AGEE
Employee.

Address: Pocahontas, Virginia.

page 3 } Clinton Willard Agee, Claimant,

v.

Pocahontas Fuel Company, Inc., Employer Self Insured.

Claim No. 437-519.

Claimant appeared in person.

David T. Kennedy, Attorney at Law, Box 511, Beckley, West Virginia, for the Claimant.
John W. Gillespie, Attorney at Law, Tazewell, Virginia, for the Defendant.

Hearing before EVANS, Chairman, at Tazewell, Virginia, on January 5, 1959.
All witnesses having been duly sworn, the following testimony was taken:

By Chairman Evans: This case is here on application of the claimant wherein he alleges that he is disabled by the occupational disease of silicosis. It is stipulated that if in fact he does have such disease, that it was a result of exposure to the hazards of that disease encountered during the

employment with the defendant. The claim is defended on the grounds that it is denied that claimant suffers from the disease of silicosis contracted while in the employ of the defendant, and defendant denies has suffered or sustained any decreased capacity to perform work commensurate with his former employment as a result of the occupational disease. All right, Mr. Kennedy.

MR. CLINTON WILLARD AGEE,
Claimant,

By Mr. Kennedy:
Q. Your name is Clinton Willard Agee?
A. Yes, sir.
Q. Where do you live, Mr. Agee?
A. Blue Stone, West Virginia.
Q. Are you working now?
page 4 } A. No, sir.
Q. Where and for what company did you last work?
A. Pocahontas Fuel Company.
Q. At which mine?
A. Boissevain.
Q. How long did you work at Boissevain?
A. When I moved down here, I forget just the exact time. Boissevain, October the 10th, 1955.
Q. And when did you last work there?
A. I was cut off October the 30th, 1957.
Q. About two years then, is that right?
A. Yes, sir, two years and twenty days I have.
Q. And where did you work just before you worked at Boissevain?
A. Pocahontas.
Q. For the same employer?
A. Yes, sir.
Q. How long did you work there?
A. Fifteen years.
Q. I don't know whether I asked you this or not, but what kind of work did you do at Boissevain?
A. Roof bolter.
Q. And what kind of work did you do at Pocahontas?
A. Coal loader 'til I started roof bolting in1953, September the 25th.
Q. Now, that's seventeen years you worked in the mines in Virginia; is that all the work you've done in the mines?

Clinton Willard Agee.

A. No, sir. I worked for the Pocahontas Fuel Company at Mayberry, West Virginia, in the Norfolk mines at Mayberry; and I worked in the Cassapeake side at Mayberry.

Q. How many years altogether did you work for this employer, in both Virginia and West Virginia?

page 5 } A. Twenty-nine years and a half.

Q. Have you done any other kind of work besides coal mining?

A. No, sir.

Q. Have you had any training in any other kind of work besides coal mining?

A. No, sir.

Q. How much education do you have?

A. Seventh grade.

Q. Since you have been off from work, since you were cut off, have you made an effort to secure employment?

A. Yes, sir.

Q. In coal mining?

A. Yes, sir.

Q. Have you been successful?

A. No, sir.

Q. Have you been required to take any x-rays in connection with any other jobs?

A. No, sir.

Q. What is your condition, your physical condition at the present time?

A. Well, if I exert myself a little bit, I get so short-winded that I can't hardly breathe, and I have a hurting through my chest and occasionally through my back. In the morning when I get up, I cough until, well, sometimes I just turn blind. I cough up a good deal of stuff in the morning and then the rest of the day I just have kind of a dry cough.

Q. I think that's all I want to ask the claimant.

CROSS EXAMINATION.

By Mr. Gillespie:

Q. You were cut off when the Boissevain mine shut down?

A. Yes, sir.

Q. And where have you tried to get any job since?

page 6 } A. Well, I went back and tried to get on at Laurel Creek.

Q. Well, you weren't on the panel for Laurel Creek?

A. I wasn't on the panel, but I tried to get on. I wasn't on

the panel anywhere, but I've tried at Jenkinjones and I've tried—

Q. Well, you weren't on the panel in Jenkinjones either, were you?

A. No, sir.

Q. Where else?

A. Well, I've tried at Amonate.

Q. You weren't on the panel at Amonate?

A. No, sir.

Q. And there were men being taken back up there and only men who were on the panel?

A. Yes, sir.

Q. That's right.

By Mr. Kennedy: He would be only on the panel at the place he last worked, wouldn't he?

Q. I think so.

By Mr. Kennedy: Which would mean—

Q. But none of these mines at which you have applied for work are taking anybody who was not already on the panel, were they?

A. No, sir, that's what they told me.

Q. There were just no new men being hired, were they?

A. That's what I was told.

Q. Have you been to a doctor?

A. Yes, sir.

Q. Who?

page 7 } A. I went to Dr. Porter before I went to get these examinations.

Q. When did you see Dr. Porter?

A. Well, it was some time before the 15th of September, I don't know the exact date, but I think it was along in September, probably the 10th or somewhere along in there.

Q. Did he send you to see anybody, any other doctors? Did you go to the Beckley Hospital?

A. Yes, sir, I went to Beckley Hospital on September the 15th.

Q. Did they x-ray you over there?

A. Yes, sir.

Q. What other hospital did you go to?

A. I went to St. Luke's.

Q. Were you x-rayed at St. Luke's?
A. Yes, sir.
Q. Dr. Copenhaver do it?
A. Yes, sir.
Q. That's the only place you've been?
A. Went to Richlands to Clinch Valley Clinic.
Q. Who x-rayed you there?
A. I don't know, sir, it's on the report.
Q. Were you x-rayed?
A. Yes, sir.
Q. Have you got a copy of that report?
A. Yes, sir.

By Mr. Kennedy: Didn't I give you a copy of that?

Q. I don't see any x-ray report.

By Mr. Kennedy: I have three here.

page 8 } Q. We would like the opportunity to have this man examined by physicians of our choosing too, Mr. Commissioner, and we'd like to make arrangements for him to appear at the Bluefield Sanitarium for x-ray and pulmonary tests and the necessary examinations to ascertain whether or not he is incapacitated from work.

By Chairman Evans: All right, sir, if you will do it forthwith, please, sir.
By Mr. Kennedy: That's Bluefield Sanitarium?

Q. Yes. One other question I want to ask you. After you were cut off up at Boissevain, did you go to the unemployment office?
A. Yes, sir.
Q. When did you report there?
A. Well, I reported there on Monday after I was cut off, I believe it was on the last of the week, but I went on Monday following the day I was cut off.
Q. Did you sign up, up there, for work?
A. Yes, sir. Yes, sir.
Q. And they didn't call you?
A. No, sir.
Q. But you worked the last day they worked at Boissevain, didn't you?
A. Yes, sir.

Q. And you had worked regularly and steadily up to that time?

A. Yes, sir.

Q. And since you went to the unemployment office to get application for work, you were ready to work anywhere you could find a job, weren't you?

A. Yes, sir.

Q. That's all by me.

(Witness excused).

page 9 } By Mr. Kennedy: At this time I should like to offer the reports which have been referred to, the report of the Clinch Valley Clinic Hospital dated October 8, 1958; report from Beckley Memorial Hospital dated October 27, 1958; and report from St. Luke's Hospital dated October 22, 1958. We offer these three reports and ask that they be marked for identification, Claimant's Exhibits Numbers 1, 2, and 3, respectively, and filed on behalf of the claimant.

By Chairman Evans: So ordered.

By Mr. Kennedy: Before we conclude this hearing, I'd like to ask Mr. Waddington just one question.

MR. T. F. WADDINGTON,

By Mr. Kennedy:

Q. Mr. Waddington, when new employees are hired by your company, aren't they given a pre-employment x-ray now?

A. That's right.

Q. A man who has silicosis is not hired, is he, as a new employee?

A. That's right.

Q. As far as you know, that's the general practice with all the larger employers in this area, is it not?

A. The major coal companies, yes, sir.

Q. That's all.

CROSS EXAMINATION.

By Mr. Gillespie:

Q. Mr. Waddington, with reference to people page 10 } who have contacted and are suffering from first stage silicosis, and who have been cut off from their employment with any of the given mines of Pocahontas

Fuel Company in Virginia, if those persons are on the panel and men are recalled to work in that mine, and it is demonstrated that they have a first stage silicosis, does the company take them back in spite of the fact that they still have a first stage silicosis?

A. Yes, sir, it does; no x-rays pre—I mean re-employment x-rays are required.

Q. That's all.

By Mr. Kennedy:

Q. On the other hand, Mr. Waddington, if they have as much as second stage, the employer is not required to put them back to work though?

A. That is correct.

Q. Now, we're talking about stage of silicosis, Mr. Commissioner, we're actually I think talking about a definition that is used in the State of West Virginia. I might say for the record, I'm sure the Commissioner knows this, that in West Virginia the definition of first stage is that the earliest detectable signs of silicosis exist with no disability resulting therefrom; any disability whatsoever constitutes second stage silicosis under the West Virginia statute. That's all.

(Witness excused).

(Case concluded).

page 11 } CLAIMANT'S EXHIBIT #1.

COPY.

CLINCH VALLEY CLINIC HOSPITAL

Richlands, Virginia

Oct. 8, 1958.

Dr. H. A. Porter,
Pocahontas, Va.

Dear Mr. Porter:

Mr. Clinton W. Agee, age 47 years, of Pocahontas, Virginia, was here today for examination. He tells us that during the past two years he has been annoyed by a mild chronic

productive cough and some catchy pains at intervals through the left lower chest anteriorly. He also gives a history of having had frequent attacks of sinusitis in the past. Except for a mild heartburn the man has had no symptoms referable to the digestive tract. He has had no complaints referable to his genitourinary tract. The patient has had no operations except for a tonsillectomy. He believes that he had influenza about two months ago. The man has eleven children. He has worked in the mines for thirty years and states that he was informed at one of the hospitals in Beckley, West Virginia a few weeks ago that he probably has silicosis.

Mr. Agee is well nourished, he has a good color, and is active. Temperature and pulse rate were normal, blood pressure 160/92, and weight 163 pounds. The teeth are greatly worn. Dr. Armentrout reports evidence of a chronic maxillary sinusitis on the right side. Heart, lungs, and abdomen seemed normal by physical examination. Urinalysis was normal, blood serology negative, blood sedimentation rate slightly increased, hemoglobin 13.6 gms., white blood count 6,950 with polys. 64%. Copy of the X-ray report is attached.

Mr. Agee evidently has an early stage of silicosis. As is indicated above he also has a chronic maxillary sinusitis and he is to be kept under observation for the possibility of having a mild type of essential hypertension. Thank you for referring Mr. Agee to us.

Yours sincerely,

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

JAR:s
Enclosure

page 12 } CLAIMANT'S EXHIBIT #2.

COPY.

BECKLEY MEMORIAL HOSPITAL

MINERS MEMORIAL HOSPITAL ASSOCIATION

Beckley, West Virginia
October 27, 1958

Dr. H. A. Porter
Pocahontas, Virginia

Re: Clinton Willard Agee, 02-54-47
Pocahontas, Virginia
SS 235 09 5214, D 29, LU 6114

Dear Dr. Porter:

I examined your patient, Mr. Agee, at the Beckley Memorial Hospital on October 22, 1958. This patient gives a history of increasing shortness of breath for the past six years. On slightly increasing his pace or walking up grade, the patient will experience dyspnea. He has a chronic cough producing one to two tablespoons of gray sputum daily on the average. It is sticky and tenacious. He has had no hemoptysis. At times, he will experience wheezing when he is short of breath. He also has a sharp pain in his left lower anterior chest which is accentuated by breathing. This usually comes on after a period of dyspnea. He has had occasional nocturnal dyspnea. He has had a weight loss of approximately 20 pounds during the past year.

In his systems review, he has "popping" sound in his right ear and periodically will have bouts of dimness of vision. This is unexplained. He has a good appetite but has frequent heart burn, bloating and belching. This is somewhat relieved by alkali. He is also troubled with hemorrhoids that come down but has no rectal bleeding. Past medical history: 1953 he was in a slate fall with laceration of the eye, fractured ribs and several contusions. He averages approximately two colds per winter. He has had chronic frontal sinusitis which has been drained on previous occasions. He has used no tobacco for the past four years. Aspirin is his only medication. He has worked in the mines for 30 years.

On physical examination he has a blood pressure of 160/90, pulse rate 98, weight 163 lbs. He is a well developed, well nourished, 47 year old white male. EENT examination was grossly negative with exception of many unreplaced extractions. His neck veins were flat. The thyroid was not palpable. Chest-there was moderate increase in the AP diameter of the chest and it was partially fixed. His breath sounds were emphysematous and he had many fine crepitant rales over both bases but more marked over the left. There was no audible wheezing. Heart-he had normal sinus rhythm, a Grade I high pitched, basal systolic murmur. He had no apparent cardiac enlargement. Abdominal examination was negative. Rectally, he had small hemorrhoidal tags. The prostate was normal. On neurological his tendon reflexes were active and equal.

Laboratory—he had a hemoglobin of 13.8 grams, hemato-

crit of 40, white count of 6,100, differential eosinophils 1, segs 72, lymphs 26, mono 1. Urinalysis was negative with specific gravity of 1.016. Serology was negative. X-ray of the chest was interpreted by R. A. Bearor, M. D. as follows: 1) Pulmonary fibrosis, consistent with occupational pneumoconiosis, including silicosis, International Classification Category III, pneumoconiosis, simple. 2) Emphysema, mild to moderate. 3) Old healed fractured ribs, involving the fifth, sixth and seventh. Electrocardiogram was normal. Final
page 13 } diagnoses: 1) Pulmonary fibrosis, on the basis of occupational pneumoconiosis, probably silicosis. 2) Pulmonary emphysema, moderately severe.

The pulmonary disease in this man is definitely symptomatic and feel he is partially disabled from it. I am not familiar with the classifications in your state but would feel that he would have a partial disability between 33½ and 50%. I also do not feel that he would be an unsuitable candidate for re-employment in the mining industry.

I hope this is the information you desire.

Sincerely yours,

/s/ RICHARD G. STARR, M. D.

RS:mj
cc: Dr. Deane F. Brooke

page 14 } CLAIMANT'S EXHIBIT #3.

COPY.

ST. LUKE'S HOSPITAL
P. O. Box 388
Bluefield, W. Va.

October 22, 1958.

Dr. H. A. Porter
Pocahontas
Virginia

Dear Doctor Porter:

Mr. Clinton Agee had a chest x-ray here recently and the diagnosis was a first stage silicosis. He stopped by the hospital last week and wanted an estimate of disability as determined from the films.

It is impossible to get a true disability estimate without clinical evaluation, however, from a radiological standpoint, I would say that this man has a 10 per cent permanent disability.

Yours very truly,

/s/ W. E. COPENHAVER, M. D.

WEC/1p

page 15 } DEFENDANT'S EXHIBIT "A."

COPY.

BLUEFIELD SANITARIUM
BLUEFIELD SANITARIUM CLINIC
BLUEFIELD, W. VA.

January 22, 1959.

Mr. John Gillespie
Attorney at Law
Tazewell, Virginia

Dear Mr. Gillespie:

Re: Clinton Willard Agee, Pocahontas, Virginia, age 48

This man was referred to the Bluefield Sanitarium Clinic by you for a complete examination to determine the presence or absence of silicosis, and if present to what stage it had advanced, and an estimate of his general disability due to the disease silicosis.

The history and physical examination was done by H. F. Warden, Jr., M. D., the laboratory work by David Bell, M. D., and the x-rays and this report by me.

This man's chief complaint is shortness of breath, cough and chest discomfort. About 3 years ago he came to note undue dyspnea in smoky or dusty atmosphere. He noted at about the time the mines shut down his dyspnea was of such a degree that he could hardly complete a shift. Since being out of the mines he has noted severe increase in his dyspnea. At present he has to rest at the end of climbing 15-18 steps, but he has no undue dyspnea at a normal pace on a flat surface. During this interval he has had a cough on arising

productive of about a large tablespoonful of sputum. No hemoptysis. He has an occasional wheeze. In the past 2-3 years he has had a recurrent stabbing pain in his left parasternal region. Sleeps on 1 pillow. Sleeps well. He has had sinusitis for years and uses nose drops frequently. Has had sinuses irrigated 3 times. Notes a postnasal drip. He has lost about 10 pounds since being off from work.

This patient has not worked since the mines shut down in October 1957. His occupations were as follows: 1) Pocahontas Fuel Company, 28 years, 24 years as a coal loader and 4 years as a roof bolter. 2) Yukon Pocahontas Coal Company, 1 year (1929-1930) as a coal loader.

He filed his claim for silicosis compensation in September of 1958.

page 16 } Previous x-rays of his chest: United Mine Workers Hospital, September 1958, Clinch Valley Clinic Hospital, Richlands, Virginia, 1958, and St. Luke's Hospital, Bluefield, W. Va., 1958. Apparently all 3 hospitals told him he had silicosis, the United Mine Workers making it third stage.

Physical examination shows a normally developed, ruddy-faced man in no distress at rest. Weight 163 pounds. Height 5 feet 10 inches. Temperature 98.6. Blood pressure 164/86. Pulse 78. Examination of the head shows the eyes normal. The nasal septum is deviated slightly to the right and antra are dull on transillumination. Neck normal. There is an increase in the A. P. diameter of the chest. Breath sounds are distant. There are coarse, late inspiratory rales over the lower 1/4 of the left lung. The chest is hyperresonant throughout. Heart, abdomen, genitalia and extremities negative. Rectal examination shows a few internal hemorrhoids.

Electrocardiogram shows a normal tracing. Laboratory work shows a normal complete blood count with a corrected sedimentation rate of 23 mm. in 1 hour, negative serology, urinalysis normal, and smear of the sputum for tubercle bacilli negative.

Dr. Warden did pulmonary function studies on this man which showed a total vital capacity of 4900 c. c., predicted vital capacity 3970 c. c. or 123% of predicted vital capacity. His maximum breathing capacity was 76 liters, predicted maximum breathing capacity 117 liters, or 65% of predicated maximum breathing capacity. Dr. Warden concludes that this man has obstructive ventilatory insufficiency with 10% decreased capacity to do work.

Stereoscopic films of the chest show a bilateral, early, nodular fibrosis throughout both sides of the chest consistent with an early silicosis. The heart is normal as regards size. The

aortic knob is slightly prominent. There is no x-ray evidence of superimposed active tuberculosis. There is evidence of an old, healed fractured rib on the left which is in good position.

Conclusion: It is our combined opinion that this man has an early second stage silicosis. Judging by the results of the pulmonary function studies he has a 10% decreased capacity to do work.

Very truly yours,

/s/ S. G. DAVIDSON, M. D.

SGD:jb

page 17 } COPY.

PULMONARY FUNCTION EXAMINATION

178 cm.

Name Clinton W. Agee Age 48 Height 5'10" Weight 163

Address Box 746, Poca., Va. BSA 1.9 M^2		BARA 746	Spiro. Temp. 25
Date 1-22-59	Factor	1.075	
Inspiratory Capacity 2705	BTPS	2905 cc.	
Expiratory Reserve Volume		1720 cc.	
Total Vital Capacity		4900 cc.	
Predicted Vital Capacity		3970 cc.	
Percentage PVC		123%	
1 Sec. VC		3940 cc.	80% of TVC
3 Sec. VC		4650 cc.	95% of TVC
Tidal Volume			
Respiratory Rate		16/min.	
Minute Ventilation			Uncontrollable leak due to poor bite.
Minute Ventilation / M^2 BSA			
Max. Breathing Capacity		76 L	
Predicted MBC		117 L	
% Predicted MBC		65%	
Air Velocity Index		.53	
Capacity Ratio (L/Min/L)		15.5 L/min/L	
Breathing Reserve at Rest			
O_2 Uptake STPD			Uncontrollable leak
O_2 Uptake M^2 STPD			
Ventilatory Equivalent O_2			
FRC			

Comment: Obstructive ventilatory insufficiency with 10% disability to do physical work.

page 18 } ClintonWillard Agee, Claimant,

v.

Pocahontas Fuel Company, Inc., Employer Self Insured.

Claim No. 437-519.

Feb. 10, 1959.

Claimant appeared in person.

David T. Kennedy, Attorney at Law, Box 511, Beckley, West Virginia, for the Claimant.
John W. Gillespie, Attorney at Law, Tazewell, Virginia, for the Defendant.

Hearing before Chairman EVANS at Tazewell, Virginia, on January 5, 1959.

EVANS, Chairman, rendered the opinion.

FINDINGS OF FACT.

Clinton W. Agee was last employed by Pocahontas Fuel Company on October 30, 1957, On that date his employment was terminated due to economic conditions. On September 15, 1958, claimant was examined by Dr. H. A. Porter, Pocahontas, Virginia, and informed that he was suffering from the occupational disease of silicosis. Notice of claim for this condition was filed with the employer and the Industrial Commission within the statutory limit. The average weekly wage during the last year of employment amounted to $106.39.

The employer defends the claim on the grounds that the claimant has not contracted silicosis while engaged in its employ and that if the occupational disease does exist that the employee has not suffered any decreased capacity to perform the work for which he was last employed.

The employer stipulated that if the employee had in fact contracted silicosis that he was last exposed to the
page 19 } hazards of that disease while employed with Pocahontas Fuel Company.

Subsequent to September 15, 1958, this employee was examined by Dr. J. A. Robinson, Richlands, Virginia, Dr. W. E. Copenhaver, Bluefield, West Virginia, Dr. Richard G. Starr, Beckley, West Virginia, Dr. S. G. Davidson and Dr. H. F. Warden, Jr., Bluefield, West Virginia.

All of these physicians are in accord that claimant is suffering from the occupational disease of silicosis and that this condition has produced a decreased ability to perform labor. Dr. Davidson and Dr. Warden are of the opinion claimant has an early second stage silicosis with a ten per cent decreased ability for work, while Dr. Starr estimates the general partial disability at something between thirty-three and one-half and fifty per cent.

The medical evidence conclusively proves that Clinton Willard Agee has contracted the occupational disease of silicosis and this condition has caused a general partial disability. Claimant was last exposed to the hazards of this occupational disease while employed by the defendant. It is therefore found that the claimant contracted the occupational disease of silicosis as a result of exposure to the hazards of that disease while employed by Pocahontas Fuel Company.

The diagnosis of second stage silicosis which was made by the employer's physician is sufficient to preclude claimant from re-employment by the defendant and the mere existence of the occupational disease is sufficient to prevent claimant from obtaining employment in any other mine. Although claimant is not permanently totally disabled, the existing occupational disease effectively bars any possibility for him to become employed in the only field of labor for which he is trained and qualified. He is suffering a total wage loss by virtue of the occupational disease.

page 20 } An award shall enter in behalf of Clinton W. Agee against Pocahontas Fuel Company providing for payment of compensation benefits at the rate of $33.00 per week beginning September 15, 1958, and to continue for the statutory period unless subsequent conditions justify a modification. All accrued compensation due under this award shall be paid upon receipt of same 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 David T. Kennedy, Attorney at Law, Beckley, West Virginia, for legal assistance rendered the claimant.

page 21 } COMMONWEALTH OF VIRGINIA
Department of Workmen's Compensation
INDUSTRIAL COMMISSION OF VIRGINIA
Richmond

Claim No. 437-519

Case of Clinton Willard Agee — Notice of Award
Accident—Silicosis 9/15/58

Date February 10, 1959

To Pocahontas Fuel Co., Inc., (Employer) Pocahontas, Virginia — David T. Kennedy, Atty. Box 511 Beckley, West Virginia — R

and Mr. Clinton Willard Agee, (Claimant) Pocahontas, 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 Tazewell, Virginia, on January 5, 1959, and a decision rendered February 10, 1959, by Evans, Chairman, directing an award be entered in behalf of the claimant as follows:

"$33.00 per week beginning September 15, 1958, and to continue for the statutory period unless subsequent conditions justify a modification.

"All accrued compensation due under this award shall be paid upon receipt of same 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 David T. Kennedy, Attorney, for legal assistance rendered the claimant."

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

Attest:

/s/ W. F. BURSEY
Secretary.

page 22 } OPINION by NUCKOLS, Commissioner.

Apr. 22, 1959.

Clinton Willard Agee, Claimant

v.

Pocahontas Fuel Company, Inc., Employer Self Insured.

Claim No. 437-519.

David T. Kennedy, Attorney at Law,
Box 511, Beckley, West Virginia,
for the Claimant.

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

REVIEW before the full Commission at Richmond, Virginia, on April 15, 1959.

From an award of February 10, 1959, directing the payment of compensation at the rate of $33.00 per week during incapacity, this case is before the full Commission upon review.

Counsel for the defendant concedes injurious exposure to the hazard of silicosis while in its employ. The evidence shows that the employee is suffering from the occupational disease of silicosis. On the record we find that the workman has silicosis and that the malady is the result of injurious exposure in his employment with the defendant.

The issue remaining is whether the silicosis has produced a compensable incapacity for work.

Agee last worked on October 30, 1957, when he was laid off in a reduction in force. He is forty-seven years old and has a seventh grade education. His only employment has been in the mines of this employer. He is trained for no other work.

The diagnosis of silicosis was made on September 15, 1958. He says that the malady so affects him that the slightest exertion causes a shortness of breath to the point that he can barely breathe, and causes chest and back pains, and severe coughing.

page 23 } Dr. Richard G. Starr of the Beckley Memorial Hospital medically estimated the decreased capacity for work to be between 33-1/3% to 50%, and stated that he was not a suitable candidate for re-employment in the mining industry.

The employer was permitted to have an examination by a physician of its choice at the Bluefield Sanitarium. The report of Dr. S. G. Davidson, dated January 22, 1959, describes the complaints as follows:

"This man's chief complaint is shortness of breath, cough and chest discomfort. About 3 years ago he came to note undue dyspnea in smoky or dusty atmosphere. He noted at about the time the mines shut down his dyspnea was of such a

degree that he could hardly complete a shift. Since being out of the mines he has noted severe increase in his dyspnea. At present he has to rest at the end of climbing 15-18 steps, but he has no undue dyspnea at a normal pace on a flat surface. During this interval he has had a cough on arising productive of about a large tablespoonful of sputum. No hemoptysis. He has an occasional wheeze. In the past 2-3 years he has had a recurrent stabbing pain in his left parasternal region. * * *

"CONCLUSION: It is our combined opinion that this man has an early second stage silicosis. Judging by the results of the pulmonary function studies he has a 10% decreased capacity to do work."

The estimate of 10% decreased capacity to do work appears to be based altogether upon pulmonary function studies without regard to the symptoms and manifestations hereinabove set forth. When the mines shut down this employee was suffering with shortness of breath to such an extent that he could hardly complete a shift, and since his employment was terminated there has been a severe increase in the dyspnea.

Whatever the precise medical percentages may be, the evidence shows that this man, by reason of his silicosis, is precluded from any employment requiring physical effort. Nevertheless he has made diligent, though unsuccessful, effort to obtain employment in the industry, the only type of employment for which he is fitted by experience, training and education. This constitutes a total incapacity for work. *J. A. Foust Coal Co.* v. *Messer,* 195 Va. 762, 80 S. E. (2d) 533.

page 24 } We find the claimant to be totally incapacitated for work and direct that the award of February 10, 1959, be modified to provide for compensation on that basis.

An award shall enter in behalf of the claimant at the rate of $33.00 per week on account of total incapacity, beginning September 15, 1958, and continuing for the statutory period, unless subsequent conditions justify a modification. From the award there shall be deducted the sum of $750.00 to be paid to David T. Kennedy, Attorney, for legal services rendered the claimant.

page 25 } COMMONWEALTH OF VIRGINIA
Department of Workmen's Compensation
INDUSTRIAL COMMISSION OF VIRGINIA
Richmond

Claim No. 437-519

Notice of Award

Case of Clinton Willard Agee
Acc. Silicosis 9-15-58

Date April 22, 1959

To Pocahontas Fuel Co., Inc., (Employer) Pocahontas, Virginia — David T. Kennedy, Atty. R, Box 511, Beckley, West Virginia

and Mr. Clinton Willard Agee, (Claimant) Pocahontas, Virginia — John W. Gillespie, Atty. R, Tazewell, Virginia

and Self Insured, (Insurance (Carrier)

You are hereby notified that a Review was held in the above styled claim before the full Commission at Richmond, Virginia, on April 15, 1959, and a decision rendered April 22, 1959, by Nuckols, Commissioner, finding claimant to be totally incapacitated for work and directing that the award of February 10, 1959, be modified as follows:

"$33.00 per week on account of total incapacity, beginning September 15, 1958, and continuing for the statutory period, unless subsequent conditions justify a modification.

"The sum of $750.00 is directed to be deducted from the above compensation awarded and paid to David T. Kennedy, Attorney, for legal services rendered the claimant."

INDUSTRIAL COMMISSION OF VIRGINIA
/s/ M. E. NUCKOLS, JR.
Commissioner.

Attest:

/s/ W. F. BURSEY
Secretary.

page 26 } 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. 437-519, Clinton Willard Agee, Claimant *v.* Pocahontas Fuel Company, Inc., Employer, Self Insured.

I further certify that counsel representing the 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 23, 1959, copy of award of the Industrial Commission of Virginia, dated April 22, 1959.

Given under my hand and the seal of the Industrial Commission of Virginia this the 4 day of May, 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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