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Record No. 5093

In the Supreme Court of Appeals of Virginia at Richmond

ISLAND CREEK COAL COMPANY

v.

LESLIE EARL FLETCHER

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. 5093

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 9th day of October, 1959.

ISLAND CREEK COAL COMPANY, Appellant,

against

LESLIE EARL FLETCHER, Appellee.

From the Industrial Commission of Virginia

Upon the petition of Island Creek Coal Company an appeal is awarded it from an award entered by the Industrial Commission of Virginia on the 30th day of June, 1959, in a certain proceeding then therein depending wherein Leslie Earl Fletcher 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

Case of:

Leslie Earl Fletcher, (Employee)

v.

Island Creek Coal Co., (Employer)

APPLICATION FOR A HEARING IN NON-FATAL CASE.

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 58 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 8th day of May, 1958, I was injured by accident arising out of and in the course of my employment while in the employ of Island Creek Coal Co.; that as a result of my accident I was compelled to quit work on the 8th day of May; that my employer had knowledge (was notified) of my accident within 30 days from date thereof; that my average weekly wages prior to the accident were $200.00.
2. That the nature of my injury is as follows: Pneumoconiosis, Advanced second stage.
3. Place where accident happened Keen Mountain, Buchanan County, Virginia.
4. (c) That I returned to work on the 15 day of August, 1958, at a weekly wage of $100.00, but again became disabled as a result of this injury on the 15 day of October, 1958.
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: Breathing capacity limited to the

point I am unable to work at mild or hard work. Dr. advises not to return to mine work.

7. That I am unable to reach an agreement as to compensation with my employer for the following reasons: Due to my age I have several years before I can obtain any retirement and the employer has not offered me enough to compensate for this loss, also my earning ability had been greatly reduced.

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

Dr. S. G. Davidson	Address 804 Edgewood Road Bluefield, W. Va.
Dr. Henry F. Warden	Address 1423 Whitethorn, Bluefield, W. Va.
Mr. James P. Farmer	Address Richlands, Virginia
Dr. James M. Peery	Address Richlands, Virginia
Dr. James P. Williams	Address Richlands, Virginia
Mr. Milton Harper	Address Keen Mountain, Virginia
Mr. O. G. Barber	Address Oakwood, Virginia
Mr. Allen Hayes	Address Oakwood, Virginia

Signed this 6th day of November, 1958.

Signature: /s/ LESLIE EARL FLETCHER
Employee
Address: RFD #2—Cedar Bluff, Virginia.

page 3

Leslie Earl Fletcher, Claimant,

v.

Island Creek Coal Company, Employer Self Insured.

Claim No. 442-384.

Claimant appeared in person.

Hubert Peery, Attorney at Law, Tazewell, Virginia, for Claimant.

C. H. Combs, Attorney at Law, Grundy, Virginia, for Defendant.

Hearing before EVANS, Chairman, at Grundy, Virginia, on February 18, 1959.

Leslie Earl Fletcher.

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

MR. LESLIE EARL FLETCHER,
Claimant.

By Mr. Peery:
Q. Please state your name, age, and residence.
A. Leslie Earl Fletcher, R. F. D. 2, Cedar Bluff, Virginia.
Q. And what is your age?
A. Fifty-eight.
Q. Are you employed now?
A. No, sir.
Q. Where did you last work?
A. Worked for Nin(?) Coal Company.
Q. When was that?
A. From August the 15th to November the 15th.
Q. Were you employed at one time by Island Creek Coal Company?
A. Yes, sir.
Q. Where?
A. Keen Mountain.
Q. How long were you employed by Island Creek Coal Company?
A. Practically right close on to three years, I
page 4 } don't know exactly.
Q. Did you work for the Red Jacket Coal Company prior to that time?
A. Yes, sir.
Q. How long?
A. I started working July the 13th, '41.
Q. What position did you have there?
A. I was general night foreman and then I was transferred on to general day foreman.
Q. When did you cease working there for Island Creek Coal Company?
A. May the 10th, 1958.
Q. Why did you stop work there, Mr. Fletcher?
A. Because I was advised that I had silicosis.
Q. Who advised you that?
A. Dr. James Perry Williams and Dr. Peery at Richlands and Dr. Warthen up at the Clinic at Bluefield.
Q. Did you enter the hospital, the Mattie Williams Hospital on May 12th, 1958?
A. Yes, sir.

Leslie Earl Fletcher.

Q. Why did you go there?

A. Well, I felt like there was something wrong with me. I had a little kidney infection to start with and they kept me there and treated me three days and x-rayed me and found out I had silicosis.

Q. Was that the first information that you had, or knowledge that you had, that you were suffering from silicosis?

A. Yes, sir.

Q. After you found that you had silicosis, when did you report it to the company?

A. Well, I reported to my superintendent about ten days after I come out of the hospital.

Q. And what was your conversation with him?

page 5 } A. Well, I just told him at that time that I had silicosis, and I seen I wasn't going to get no better and then I went and talked to him again and told him that I wouldn't be able to return to work at the present job because I couldn't work inside any more, that I'd take a job outdoors, outside, that he had to secure a man to take my position.

Q. And did he have anything for you outside?

A. No, sir, he said not.

Q. While you were working there in the mine for Island Creek Coal Company and Red Jacket Coal Company, its predecessor, were you exposed to dust?

A. Yes, sir.

Q. Sandstone dust?

A. Yes, sir, following trips it was very very dusty.

Q. Did they use right much sand on the tracks?

A. Yes, sir.

Q. Well, to what extent would it be dusty, could you see very far at times?

A. Not at times, you couldn't, no, sir.

Q. How far about?

A. You couldn't see thirty car lengths, the dust was so thick.

Q. What is your condition now, Mr. Fletcher, are you able to do any work?

A. Not very much. I seem to be growing worse.

Q. Have you tried to work any since you left Island Creek?

A. Well, I went up there like I told you and piddled around there for Nin Coal Company, supervising the little job outdoors for a couple of months, you see.

Q. And who was that for?

A. Jim Farmer.

Leslie Earl Fletcher.

Q. Were you able to continue at that work?
A. No, sir, I wasn't able to continue at that work, no, sir.
Q. How much did you earn there the two months
page 6 } you were employed?
A. I got $400.00 a month.
Q. I presume there's a wage chart in the file, isn't there?

By Chairman Evans: No, we don't have a wage chart. Mr. Evans, if you will make up one and furnish us with it.

Q. How much were you making when you were employed by Island Creek Coal Company?
A. I was making a little better than $800.00 a month, counting my bonus. My salary was $745.00, but I got a bonus that run over a hundred dollars each month.
Q. Are you short of breath now?
A. Yes, sir.
Q. Can you stand to be around where there's any dust?
A. No, sir.
Q. Are you receiving any treatment from doctors now?
A. No, sir, not now. They say there's nothing they can do.
Q. We'd like to file Dr. Peery's letter. Did you report to Dr. Davidson in Bluefield, West Virginia, at Bluefield Sanitarium for an examination at the request of the Island Creek Coal Company?
A. Yes, sir.
Q. Do you recall when you were examined there?
A. Not exactly the date, no, sir.
Q. Was it around or in September?
A. Yeah, I believe it was, yes, sir, I didn't keep the date of that.
Q. In his report he states that, "previous x-rays of his chest were made at Mattie Williams Hospital, Richlands, Virginia, six months ago." Did you tell him that?
A. No, sir. No, sir, I did not.
Q. Do you know where he got that information?
page 7 } A. No, sir.
Q. Were you x-rayed six months prior to September 2nd?
A. No, sir.
Q. When were you first x-rayed, Mr. Fletcher?
A. Oh, back several years ago, I was x-rayed but I didn't know exactly what—when it was at, or anything. In other words, it cleared up, there wasn't anything wrong with me.

Leslie Earl Fletcher.

Q. Well, I mean when were you first x-rayed at the Mattie Williams Hospital that you recall, in connection with this?
A. Well, I went in there on Monday, on Tuesday, x-rayed on Tuesday.
Q. May the 13th?
A. Yes, sir.
Q. Was that the first x-ray that you had there at the Mattie Williams Hospital?
A. Yes, sir, evidently, yes, sir.
Q. But you certainly weren't x-rayed there six months prior to September 2nd, 1958, were you?
A. No, sir.
Q. This is a copy of Dr. Davidson's report that was sent to me by Mr. Combs. We'd like to file that. I believe that's all.

By Mr. Combs: I'll file that.
By Chairman Evans: Do you have the original of it?
By Mr. Combs: Yes, sir.
By Chairman Evans: This one is unsigned.
By Mr. Combs: I'll file the original. Is that all?

page 8 } Q. Yes, sir.

CROSS EXAMINATION.

By Mr. Combs:
Q. Mr. Fletcher, how long have you been working in the mines?
A. About forty-five or forty-six years.
Q. And where have you worked prior to the time you worked for Island Creek Coal Company?
A. I worked some for Jewell Ridge Coal Company.
Q. Didn't you run a motor twenty-three years for Jewell Ridge?
A. No, sir.
Q. How long?
A. I run a motor three or four years and I bolted the rest of the time.
Q. And then after that did you work for Page Pocahontas Coal Company?
A. I worked up there two or three months and then I went to Red Jacket.
Q. What was your job at Page?
A. Section foreman.

Leslie Earl Fletcher.

Q. Isn't it true that most men are exposed to more silica dust running the—operating the motor than they are as a mine foreman?

A. No, sir, in some places, no.

Q. Well, isn't that where you get it, from the sand that's on the rail when you're operating the motor?

A. Well, the motorman's usually up front, you see, and that comes behind you.

Q. Well, where do you stay as general mine foreman?

A. Travel the main lines.

Q. And do you have to stay right close to the—where they're hauling the trips?

A. Yes, sir, that's where, you usually follow a trip.

Q. How much of the time do you spend inside the mine during the day?

A. All day.

page 9 } Q. All day?

A. Yes, sir.

Q. When did you first notice any shortness of breath?

A. Just a few days before I—couple or three weeks before I entered the hospital.

Q. You never had experienced any loss of breath on long walking or exertion before that?

A. Not too much, no, sir.

Q. When you went to the hospital on May the 12th, 1958, I believe they found you had a kidney infection, didn't they?

A. A little slight, yeah.

Q. And it was up—didn't they tell you that was what was causing your pain that you were having?

A. No, I was just kinda sick from that.

Q. Well, up to the time that you went to the hospital, had you been able to carry on your duties as general mine foreman there?

A. Not as good a performance as I thought I should.

Q. What couldn't you do?

A. Well, you can't travel so much, you see, that slows you down, short of breath.

Q. I thought you said you hadn't had any shortness of breath except for two or three days?

A. Well, oh, two or three months, not two or three days.

Q. You had noticed this shortness of breath for two or three months?

A. Yes, sir.

Q. Well, after you, after they cured your kidney infection,

Leslie Earl Fletcher.

weren't you in as good a shape as you were prior to the time you went to the hospital?

A. Yes, sir.

Q. Could you have at that time continued your

page 10 } job as general mine foreman?

A. I could, but if I get in more dust I'd be a dead man, that's what I was advised by four doctors. They say I might go on for a year and then I'd be plumb knocked out.

Q. And when you returned to Island Creek Coal Company, you told them that you wouldn't go inside, is that right?

A. I told them that I couldn't afford to.

Q. And what kind of outside work did you want?

A. Well, just general outside work, supervisory, that's what I've always been.

Q. When did you come back to work, if you remember?

A. Come back up to Island Creek?

Q. Yes, sir.

A. Around the 1st of July, 1st or 15th, somewheres along there, I didn't keep the exact date I come.

Q. And is that when you told Mr. Harper that you had been diagnosed as silicosis?

A. No, I told him before that I'd been diagnosed as silicosis. I come back to talk about my work proposition then.

Q. Well, I understood you to say on direct examination that when you came back to Island Creek to go back to work, that you told the superintendent that you had silicosis?

A. Yeah, I did, I told him that I had silicosis, that I wasn't permitted to return inside.

Q. Uh huh. Is that when you reported that to him, on July the 1st or 15th?

A. I reported it—no, I reported it to him before that about the silicosis, but we was talking about the work on the—

Q. Well, when did you report it to him?

A. About in—about ten days after I got out of the hospital. He come over to see me on a week-end and I talked to him about me having silicosis.

Q. Well, when did you get out of the hospital?

page 11 } A. Around—I stayed in there four days, got out about the 16th.

Q. Did you ever give any written notice to the company that you had sil—had been diagnosed as having silicosis?

A. No, but I give them two oral notices.

Q. Well, who did you give notice to?

A. Mr. Harper.

Leslie Earl Fletcher.

Q. And who else?

A. I give it to him twice and I give it to that timekeeper there, Junior Hicks.

Q. Do you know Mr. Kern?

A. Yes, sir.

Q. Don't you know that he's in charge of all the compensation cases?

A. Well, I presumed that they would call him, they was my—he was my supervisor.

Q. And you—were you aware of the fact that Dr. James Peery gave notice to the company on July the 15th that you had silicosis and is that the first written notice that you had given the company?

A. Yeah, Dr. Peery sent that in, yes, sir. That was the first written notice, yeah.

Q. And had you notified them prior to that time yourself?

A. Yes, sir.

Q. And you'd notified Mr. Harper?

A. Yes, sir.

Q. You say that you were x-rayed several years ago. Where was that?

A. Well, I couldn't recall, I thought at the time it was Mattie Williams, but it must not have been, but it was clear, my lungs was clear at that time.

Q. Well, how do you know it was clear?

A. Because I talked to them about the x-ray.

Q. Well, who did you talk to?

page 12 } A. The ones that made it, I don't remember where it was at now.

Q. Well, if you don't remember where it was made and who you talked to, how do you remember what they told you?

A. Well, if probably there had been anything wrong with me, I'd have done the same thing we're doing today.

Q. Didn't you tell Dr. Davidson in Bluefield that for the past year you'd had difficulty breathing which condition had remained unchanged?

A. You mean Dr. Warden, don't you?

Q. Yes, sir, Warden or Davidson, either one.

A. I didn't talk to Dr. Davidson, I talked to Dr. Warden, didn't talk to Dr. Davidson until I got ready to leave there.

Q. Did you tell him that, that you'd had for the past year you'd had difficulty breathing?

A. I could have, yes, sir.

Q. Well, you had had some symptom that you had some-

thing wrong with you before you went to the hospital this time, then, hadn't you?

A. Yeah, there was something a-cutting me down, I knowed that.

Q. What kind of work did you do for Nin Coal Company?

A. I just done some looking around outside where they was opening up a little mine is all, I wasn't in the mines.

Q. I believe that is owned by your son and James Farmer, isn't it?

A. Yes, sir.

Q. And were you a partner in it?

A. No, sir.

Q. I believe that's all. Were you ever x-rayed at one of these State Mobile Units that come around?

A. No, sir. No.

page 13 } Q. Do you remember whether or not you were x-rayed at one of those at Keen Mountain during the time that John Damron was superintendent of Red Jacket?

A. No, I wasn't, no.

Q. And you don't remember where you had had a previous x-ray of the chest?

A. Not right off-hand, no.

Q. Were you ever x-rayed while you were working for Jewell Ridge Coal Corporation?

A. It could have been, yeah, but—

Q. All right, I believe that's all.

By Mr. Peery:

Q. I believe you stated that all of the doctors that examined you, advised you not to go back in the mines to work?

A. That's right, just—

Q. That's all.

(Witness excused).

MRS. LESLIE EARL FLETCHER,

By Mr. Peery:

Q. I believe you are Mrs. Leslie Earl Fletcher?

A. Yes, sir.

Q. How long have you and your husband been married?

A. About thirty-five years.

Q. Mrs. Fletcher, what is his condition now with reference to being able to do any work?

Orvil Lee Barber.

By Mr. Combs: Well, we object to that, I don't believe that she could testify—

By Chairman Evans: As far as the silicosis is concerned, the medical reports bear out his testimony here, he is disabled for mine work; he's suffering a partial disability and he says he's suffering a total wage loss. If it is an occupational disease for which Island Creek is liable, he will draw maximum compensation, whether it's 10% or 100%.

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Q. All right. Okay, we won't need you.

(Witness excused).

MR. ORVIL LEE BARBER,

By Mr. Peery:

Q. State your name.

A. Orvil Lee Barber.

Q. How old are you, Mr. Barber?

A. Fifty-four.

Q. Are you employed at this time?

A. Yes, sir.

Q. Where?

A. Island Creek Coal Company.

Q. How long have you been employed by Island Creek Coal Company?

A. Well, ever since they've had the job, right at three years.

Q. Did you work for Red Jacket prior to that time?

A. Twenty-two years up there altogether.

Q. Mr. Barber, do they use sand in the mine on the tracks?

A. Yes, sir.

Q. A considerable amount of it?

A. Well, I—each trip about four boxes.

Q. About how large are the boxes?

A. Oh, I don't know, that's pretty hard to say, I'd say maybe five or six gallons to the box, I'd say. I might be stretching it a little bit, it might be a little less, it's a great—special built sand box, it's a great big box.

Q. Are there grades in the mine for the—

page 15

A. Oh, yeah.

Q. And have to use considerable sand on them?

A. Oh, yes, going up with a trip of coal, you do. We've got about, oh, I don't know, maybe a half a mile, something

like that. About all the way from the dispatcher's office to the outside.

Q. And the grinding of this sand on the tracks, does that cause a fog in the air?

A. Oh, yes, quite a bit.

Q. And you worked there while Mr. Fletcher was there?

A. Oh, yeah.

Q. And was he exposed to that dust in his regular work?

A. When he was behind the trip, he was.

Q. And was he there frequently?

A. Yes, quite a bit.

Q. That's all.

CROSS EXAMINATION.

By Mr. Combs:

Q. What do you do in the mine, Mr. Barber?

A. Run a motor.

Q. Is the motorman also exposed to that dust?

A. Well, no. In coming out with a trip of coal, the motor wheels is blowing all the dust away from the motor. It's blowing it back away from you, you see, I'm running in clear air coming out with loads. But anybody behind the trip, they're in to it.

Q. Well, what about if you're following another trip?

A. I use a respirator; it's bad.

Q. Well, how often is the general mine foreman, how often is it necessary for the general mine foreman to be

page 16 } behind the trip?

A. Now, that I couldn't answer very well, because I don't know where he might be called unbeknowingst to me, you see, I don't know, I might start out with a trip and him be not nowheres close to me. Well, then, maybe he get a call and maybe he catches me before I get over the hill, or something.

Q. Well, would it be possible for a person to step over to the side a little and get out of the way of that dust?

A. No. You don't have but about, oh, that much clearance from the track to the rib, see.

Q. Yeah, but there's places where they cut through, isn't there, that—

A. Oh, yeah, breakthroughs, yeah.

Q. Breakthrough that you can get in?

A. Yeah. Some of them. Some of them you can, some of

them's—most of them is filled in to where you can't get through.

Q. Do you know whether there's any silica in that dust or not?

A. No, I couldn't say.

Q. Do you know whether they use any more sand in there than they do in any other mine?

A. Well, I—it depends on your grades; maybe the other mines wouldn't have such grades where they wouldn't use so much sand.

Q. Well, is the grade exceedingly steep in this mine?

A. Oh, roughly, I would say 2%, a percent and a half or two percent.

Q. Have you ever had an x-ray to determine whether you had silicosis?

A. No, I haven't. Here I got sick on a little cable smoke here about two months ago and I went to the hospital at the Clinic and they told my wife that they couldn't find anything that caused it to hurt me in there so I—they x-rayed me there every kind of way a man could be x-rayed, what they found I don't know, they never did tell me. That's the only time that I know of.

Q. All right, that's all.

(Witness excused).

page 17 } MR. FRANKLIN W. KERN,

By Mr. Combs:

Q. Is your name Franklin W. Kern?

A. It is.

Q. By whom are you employed, Mr. Kern?

A. Island Creek Coal Company.

Q. What is your position with Island Creek Coal Company?

A. Attorney and administrator of compensation.

Q. Do you handle all the compensation claims that arise in the mines of Island Creek Coal Company in Buchanan County?

A. I do.

Q. State when you were first notified that Mr. Fletcher had been diagnosed as having silicosis?

A. I received a letter from Dr. James M. Peery on the stationery of the Mattie Williams Hospital, Richlands, Virginia, the letter is dated July 15, 1958. I do not recall just

when I received the letter, but I presume it was in a few days thereafter.

Q. Is that the first notice that you had that Mr. Fletcher claimed to have silicosis?

A. Yes, sir.

Q. I believe that's all.

CROSS EXAMINATION.

By Mr. Peery:

Q. The notice wouldn't have to be given to you, it could be given to the superintendent, couldn't it?

A. Well, I can only testify as to the first notice that I received.

Q. That you received. That's all.

(Witness excused).

page 18 } MR. MILTON HARPER,

By Mr. Combs:

Q. Is your name Milton Harper?

A. It is.

Q. How old are you, Mr. Harper?

A. Thirty-nine.

Q. By whom are you employed?

A. Island Creek Coal Company.

Q. What capacity or what job do you hold with Island Creek Coal Company?

A. Superintendent.

Q. Were you superintendent at the time Mr. Fletcher worked for Island Creek Coal Company at Keen Mountain?

A. I was.

Q. Were you notified that he had been diagnosed as having silicosis?

A. In a conversation visiting him on a week-end he told me that he had silicosis, or thought he had silicosis, but formally I received nothing, but that was orally, he did tell me that.

Q. Do you know when that was?

A. Approximately a week or a week and a half after he went off sick, approximately May the 17th.

Q. Approximately the 17th of May?

A. Or some time thereafter.

Milton Harper.

Q. When he came back to Island Creek Coal Company in July, did he refuse to go back in the mines?

A. He did not refuse to go back into the mines, he said he had been advised not to return to the mines. To clarify the statement I made before, he said in the conversation that he had silicosis and was to be examined by more doctors; he did not say that it was second stage or first stage or page 19 } third stage silicosis and at that time a first stage silicosis a man is sometimes permitted to return to work and I did not know of the second stage silicosis until a later date.

Q. What is the condition of the Keen Mountain mine with reference to dust?

A. There is considerable, I assume you mean sand dust from the motors, and there is considerable dust when you are behind the trip.

Q. Is it necessary for the general mine foreman to be behind the trips?

A. In the carrying out of his duties, he could very readily have to be behind the trip.

Q. Well, could he just as easily get away from the trip?

A. The movement of traffic is under the direction of the dispatcher and the movement of coal only has prerequisite only over all other movement except the accident patient.

Q. I believe that's all.

CROSS EXAMINATION.

By Mr. Peery:

Q. You say you were over to his home on the week-end about a week or week and a half after he was in the hospital?

A. Yes, sir.

Q. And at that time he told you that he's been advised he had silicosis?

A. That's right.

Q. Did he tell you then that the doctors had advised him not to go back in the mines any more?

A. Not to my recollection, no.

Q. But you gathered from the conversation there, that he had been advised while he was off sick, that he had silicosis?

A. He had silicosis, but not what stage.

Q. That's all.

page 20 } By Mr. Combs:

Q. Had you had any complaints from Mr.

Milton Harper.

Fletcher prior to the time that he went off from work and went to the hospital, about his physical condition?

A. Mr. Fletcher is very close-mouthed and he will never complain, I had never heard of him complaining previous to that. At the time he was sick, I had to tell him to go home, he didn't want to go then and so he's very loyal, very very loyal to his work and kept it up well.

Q. Did he ever give you any written notice that he had silicosis?

A. No.

Q. Did you, when he told you what you say he told you at his home, did you make any record of that or—in his file?

A. No, I knowed that I was a-visiting him a week or a week and a half after he was off work and was told of his possible silicosis then.

Q. All right, that's all.

By Mr. Peery:

Q. You are his immediate superior in employment over there, or you were?

A. I was.

Q. That's all.

(Witness excused).

(Case concluded).

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BLUEFIELD SANITARIUM
BLUEFIELD SANITARIUM CLINIC
Bluefield, W. Va.

September 2, 1958.

Franklin W. Kern, Administrator
Compensation Department
Island Creek Coal Company
Holden, West Virginia

Dear Mr. Kern:

Re: Leslie Earl Flecther, Cedar Bluff, Virginia.

The above was referred by you to the Bluefield Sanitarium

Clinic for a complete examination to determine the presence 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. In the past year he has had exertional dyspnea which has remained unchanged, and is only noticeable on fast walking over a considerable distance. He can climb steps at a slow pace without resting. He has no cough. In the past year he noted at the end of the day, upon exertion, a feeling of heaviness across his upper chest, shoulders, and back, and down his arms to the elbows. No paresthesia. No orthopnea. He has lost a few pounds weight in the last 6 months. System review is negative. About 6 months ago, he consulted a doctor because of backache, and has several chest x-rays at that time, and was told he had silicosis.

This man has worked inside the mines 48 years. He has been a foreman since 1923. He last worked May 6, 1958, when he was place on leave of absence. He could perform his job with no difficulty when he last worked. His occupations are as follows: 1) Carter Coal Company, Seaboard, Virginia, mule driver. 2) Jewell Ridge Coal Corporation, 23 years, motorman and mine foreman. 3) Page Coal Company, Mt. Airy, Virginia, foreman. 4) Ritter Coal Company, (now Island Creek Coal Company) 17 years, foreman.

Previous x-rays of his chest were made at the Mattie Williams Hospital, Richlands, Virginia, 6 months ago.

Physical examination shows a slightly obese man with a limp of his right leg, in no distress at rest. Weight 209 1/2 pounds. Height 5 feet 10 3/4 inches.

page 22 } Temperature 97.4. Blood pressure 124/76. Pulse 66. Examination of the head shows the eyes normal. He wears glasses. The sinuses are dull on transillumination. Teeth are worn. Neck normal. There is a slight increase in the A. P. diameter of the chest. The chest is clear to percussion and auscultation. Heart, abdomen, and genitalia negative. Prostate is boggy. The right leg is 1 1/2 inches shorter due to lateral and anterior bowing of the femur. No clubbing or edema of the extremities.

Laboratory work shows a normal electrocardiogram, normal complete blood count, sedimentation rate of 11 mm. in 1 hour, negative serology, normal urinalysis, except for 2-4 red blood cells per high power field and 6-8 pus cells per high

power field. A smear of the sputum for tubercle bacilli was negative.

Dr. Warden did pulmonary function studies which showed: Total vital capacity 4570 c. c., predicted vital capacity 3800 c. c. or 120% of predicted vital capacity. Maximum breathing capacity 64 liters, predicted maximum breathing capacity 118 liters, or 54% of predicted maximum breathing capacity. Dr. Warden concludes that this man has obstructive and ventilatory insufficiency with rather marked decreased capacity to do physical work.

Stereoscopic films of the chest show a bilateral nodular fibrosis scattered throughout both sides of the chest, with a tendency for the nodules to become confluent in the left upper chest. The heart is normal in size. Moderately tortuous aorta. There is no x-ray evidence of superimposed active tuberculosis.

Conclusion: It is our combined opinion that this man has a late second stage silicosis. Judging by the results of the pulmonary function studies, he has a 30% decreased capacity to do physical work.

Very truly yours,

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

SGD:jb

page 23 } COPY.

MATTIE WILLIAMS HOSPITAL
Richlands, Virginia

February 13, 1959.

Mr. Hubert Peery
Tazewell
Virginia

Re: Leslie Earl Fletcher, Sr.

Dear Mr. Peery:

Leslie Earl Fletcher, Sr. was admitted to this hospital on May 12, 1958 complaining of weakness, loss of weight, and poor appetite for about three months duration. He also complained of general malaise and aching all over of about three

days duration due to what he thought was influenza. He said that he had had a cough which was not productive.

Family history and past history were non-contributory. He stated that he had always been in good health in the past and able to work.

On admission the temperature was 101. The general physical examination was essentially normal except for some tenderness over the costovertebral angle on the right. Examination revealed many pus cells in the urine. However, the chest was clear to percussion and on auscultation.

Patient was admitted to the hospital with a preliminary impression of pyelitis. On routine antibiotic therapy the infection in his urine cleared up. However, he still felt poorly. Routine chest x-ray revealed a diffuse stringy to nodular fibrosis of both lungs. There was coalescence of these nodules in the apices. There were small focal areas of emphysema present. The heart shadow was normal. Impression was second stage pneumoconiosis.

On his discharge from the hospital the patient was advised not to work in dust any more. There is apparently some question as to when this pneumoconiosis developed and as far as my records are concerned this is the first time I could find any record of a chest x-ray. This was done on May 12, 1958.

In my opinion this patient is definitely unable to work in a coal mine and will not be able to work in a coal mine again.

Yours very truly,

/s/ JAMES M. PEERY
James M. Peery, M. D.

JMP/mkb

page 24 } Leslie Earl Fletcher, Claimant,

v.

Island Creek Coal Company, Employer Self Insured.

Claim No. 442-384.

Mar. 5, 1959.

Claimant appeared in person.

Hubert Peery, Attorney at Law, Tazewell, Virginia, for Claimant.

C. H. Combs, Attorney at Law, Grundy, Virginia, for Defendant.

Hearing before Chairman EVANS at Grundy, Virginia, on February 18, 1959.

EVANS, Chairman, rendered the opinion.

FINDINGS OF FACT.

Leslie Earl Fletcher last worked for Island Creek Coal Company on May 10, 1958. He earned an average weekly wage of $200.00. On May 13, 1958, after undergoing various examinations at Mattie Williams Hospital, Richlands, Virginia, claimant was advised that he had contracted silicosis. This diagnosis was later confirmed by Dr. S. G. Davidson and Dr. H. F. Warden, Jr., Bluefield, West Virginia.

Claimant was exposed to substantial quantities of silica dust during his period of employment with Island Creek Coal Company and a finding is made that his last injurious exposure to the hazards of silicosis occurred during his employment with Island Creek Coal Company.

Doctors Davidson and Warden expressed the opinion Fletcher is suffering a thirty per cent decreased capacity to do physical work by virtue of his occupational disease. Dr. James M. Peery is of the opinion this employee is physically unable to return to work in a coal mine and recommended that the claimant remove himself from any employment in which he was exposed to dust.

page 25 } The evidence conclusively shows claimant has contracted silicosis and that he was last injuriously exposed to the hazards of silicosis while employed by Island Creek Coal Company. It is further shown that he is physically unable to resume his former employment as mine foreman and no suitable employment has been afforded him although he has sought such employment.

Claimant has suffered a total loss of earnings since May 10, 1958, except for an eight week period during which he obtained work of a supervisory nature outside of the mine for which he was paid a weekly wage of $100.00.

The employer's defense of this claim under the provisions of Section 65-48 of the Act is without merit, since the employer's superintendent acknowledged that claimant had advised him that he was suffering from the occupational disease of silicosis on or about May 17, 1958, at a time well within thirty days from the date claimant was first given a diagnosis of the existence of the disease.

At the present time claimant is only partially disabled although his wage loss has continuously been such as to require the payment of maximum compensation benefits of $30.00 per week.

An award shall enter in behalf of Leslie Earl Fletcher against Island Creek Coal Company providing for the payment of general partial disability benefits at the rate of $30.00 per week beginning May 11, 1958, with payments to continue at that rate for the statutory period or until such time as subsequent conditions may justify a modification.

All accrued compensation due under this award shall be paid in one sum upon receipt of same, after first deducting therefrom the sum of $600.00 to be paid to Hubert Peery, Attorney at Law, Tazewell, Virginia, for legal assistance rendered the claimant.

page 26 } COMMONWEALTH OF VIRGINIA
Department of Workmen's Compensation
INDUSTRIAL COMMISSION OF VIRGINIA
Richmond

Claim No. 442-384

NOTICE OF AWARD

Case of Leslie Earl Fletcher Accident—5-8-59	Date March 5, 1959	
To Island Creek Coal Company, (Employer) Keen Mountain, Virginia	Hubert Peery, Atty. Tazewell, Virginia	R
and Mr. Leslie Earl Fletcher, (Claimant) R. F. D. #2 Cedar Bluff, Virginia	C. H. Combs, Atty. Grundy, 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 Grundy, Virginia, on February 18, 1959, and a decision rendered by Evans, Chairman, on March 5, 1959, directing an award be entered in behalf of claimant as follows:

"$30.00 per week on account of general partial disability beginning May 11, 1958, with payments to continue at that

rate for the statutory period or until such time as subsequent conditions may justify a modification.

All accrued compensation due under this award shall be paid in one sum upon receipt of same.

"The sum of $600.00 is directed to be deducted from the compensation awarded and paid to Hubert Peery, Attorney, for legal assistance rendered the claimant."

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

Attest:

/s/ W. F. BURSEY
Secretary.

page 27 } Leslie Earl Fletcher, Claimant *v.* Island Creek Coal Company, Employer self insured.

Claim No. 442-384

Jun. 30, 1959.

Hubert Peery, Tazewell, Virginia, for Claimant.
C. H. Combs, Grundy, Virginia, for Defendant.

REVIEW before the full Commission at Richmond, Virginia, on June 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 March 5, 1959.

It is manifest from the record that the claimant suffers from the occupational disease, silicosis, which was contracted in the course of employment with the defendant, and we so find. The evidence clearly shows the employer had proper notice of the workman's condition within the time provided by law. The average weekly wage of the employee was $200.00.

As we read the brief of counsel for the defendant the issue presented for our determination concerns the ability of the claimant to work and his efforts to obtain gainful employment suitable to his capacity. The defendant's position is apparently twofold. First, it is contended that the employee

should return to his former employment as a foreman in the defendant's coal mine. Secondly, counsel for the defendant contends that claimant has not established a decrease in wage earning ability such as will entitle him to benefits under the Act.

page 28 } In a report dated February 13, 1959, Dr. James M. Peery expresses opinion that Fletcher should not return to work in a coal mine. When questioned by defendant's counsel relative to his ability to return to his former employment, the employee answered in the following manner:

"Q. Could you have at that time continued your job as general mine foreman?

"A. I could, but if I get in more dust I'd be a dead man, that's what I was advised by four doctors. They say I might go on for a year and then I'd be plumb knocked out."

It is universally recognized that one who suffers from silicosis should be protected from the causative factors or aggravation of the disease may result. There is no evidence before us that this employee will not again be exposed to silica dust if he returns to work inside the defendant's mine. No outside work has been offered by the defendant. Obviously, a workman cannot be expected to undertake employment detrimental to his health if not dangerous to his life. The suggestion is so preposterous as to preclude further consideration.

The report of Dr. S. G. Davidson dated September 2, 1958, indicates that the workman's occupational disease has resulted in a substantial decrease in capacity to perform physical work. Fletcher's testimony bears out the physician's opinion, as evidenced by the following excerpts from the transcript:

"By Mr. Peery:

"Q. What is your condition now, Mr. Fletcher, are you able to do any work?

"A. Not very much. I seem to be growing worse.

"Q. Have you tried to work any since you left Island Creek?

"A. Well, I went up there like I told you and piddled around there for Nin Coal Company, supervising the little job outdoors for a couple of months, you see.

"Q. And who was that for?

page 29 } "A. Jim Farmer.

"Q. Were you able to continue at that work?

"A. No, sir, I wasn't able to continue at that work, no, sir."

* * * * *

"By Mr. Combs:

"Q. Well, up to the time that you went to the hospital, had you been able to carry on your duties as general mine foreman there?

"A. Not as good a performance as I thought I should.

"Q. What couldn't you do?

"A. Well, you can't travel so much, you see, that slows you down, short of breath.

"Q. I thought you said you hadn't had any shortness of breath except for two or three days?

"A. Well, oh, two or three months, not two or three days.

"Q. You had noticed this shortness of breath for two or three months?

"A. Yes, sir."

While it is true that claimant was employed as a foreman in the defendant's mine, we cannot reasonably assume that work of a supervisory nature is freely available to him on the general labor market where his years of experience in the mines may be of little or no value. Certainly the evidence justifies the conclusion that Fletcher is disabled for work' requiring physical exertion by reason of the occupational disease he suffers.

Except for the period beginning August 15, 1948, and ending November 15, 1958, during which claimant was employed by the Nin Coal Company at an average weekly wage of $100.00, Fletcher has been unsuccessful in his efforts to obtain suitable work. The claimant states that his job at the Nin mine was outdoors and in a supervisory capacity, but he was unable to continue this work.

page 30 } Upon careful consideration of the record we are convinced that this claimant is suffering partial incapacity for work by reason of the occupational disease contracted in the defendant's employ, and such is the finding. With the exception of the period mentioned above the incapacity has resulted in total wage loss and must be compensated pursuant to the provisions of Section 65-51 of the Act. *J. A. Foust Coal Co.* v. *Messer*, 195 Va. 762, 80 S. E. (2d) 533.

An award shall enter in behalf of Leslie E. Fletcher at the rate of $30.00 per week on account of total disability beginning May 11, 1958, and ending August 14, 1958; at the same rate on account of partial incapacity beginning August 15, 1958, and continuing through November 14, 1958; and at the same rate on account of total incapacity beginning November

15, 1958, to continue within the limits prescribed by Section 65-51, unless subsequent conditions require modification. Arrears of compensation shall be paid in one sum upon receipt of this award and that to accrue, each two weeks.

From the above award shall be deducted the sum of $1,000.00 to be paid Carl C. Gillespie, Attorney at Law, for legal services rendered claimant by himself and Hubert Peery, deceased.

Nuckols, Commissioner, concurring:

The employer admits that this employee has silicosis the result of prolonged exposure to the hazard in its mines. At the hearing before Commissioner Evans the defense was lack of timely notice. There is no merit in this contention. Upon review the sole defense appears to be that the injured employee has failed to establish a disability or incapacity for work the result of the malady.

page 31 } The only work available to this man is that of general mine foreman, the job in which he was engaged for many years, and the job in which he was exposed to silicon dioxide in sufficient quantities to produce silicosis. Dr. James M. Perry has advised Fletcher not to return to work under conditions where he will be exposed to silicon dioxide, or other irritants likely to augment the disease.

While the employee probably has the physical capacity to do some work, silicosis has effectively closed to him the labor market. I do not believe that the Legislature intended that the worker place his head upon the guillotine or forfeit compensation benefits.

When this case is tried by the test in the case of *J. A. Foust Coal Co.* v. *Messer*, 195 Va. 762, 80 S. E. (2d) 533, compensation must at this time be awarded under Section 65-51, Code of 1950, however, the basis of compensation may shift to Section 65-52, Code of 1950, should the employee procure work suitable to his capacity, or showing made that he could by the exercise of reasonable diligence obtain suitable work.

page 32 } COMMONWEALTH OF VIRGINIA
Department of Workmen's Compensation
INDUSTRIAL COMMISSION OF VIRGINIA
Richmond

Claim No. 442-384

NOTICE OF AWARD

Case of Leslie Earl Fletcher
Acc. 5-8-58

Date June 30, 1959

To Island Creek Coal Company, (Employer)
Keen Mountain, Virginia

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

and Mr. Leslie Earl Fletcher, (Claimant)
R. F. D. 2
Cedar Bluff, Virginia

cc. Mr. C. H. Combs, Attorney
Grundy, Virginia R

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 June 2, 1959, and a decision rendered by Crenshaw, Commissioner, on June 30, 1959, (Nuckols, Commissioner, concurring) directing an amended award, as follows:

$30.00 per week on account of total disability beginning May 11, 1958, and ending August 14, 1958; at the same rate on account of partial incapacity beginning August 15, 1958, and continuing through November 14, 1958; and at the same rate on account of total incapacity beginning November 15, 1958, to continue within the limits prescribed by Section 65-51, unless subsequent conditions require modification. Arrears of compensation shall be paid in one sum upon receipt of this award and that to accrue, each two weeks.

From the above award it is directed that the sum of $1,000.00 be deducted and paid to Carl C. Gillespie, Attorney, for legal services rendered claimant by himself and Hubert Peery, deceased.

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

Attest:

/s/ W. F. BURSEY
Secretary.

page 33 } I, W. F. Bursey, Secretary, Industrial Commission of Virginia, do hereby certify that the fore-

going, 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. 442-384, Leslie Earl Fletcher, Claimant *v.* Island Creek Coal Company, 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 July 2, 1959, copy of award of the Industrial Commission of Virginia, dated June 30, 1959.

Given under my hand and the seal of the Industrial Commission of Virginia this the 24 day of July, 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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