215 Va 806

IN THE SUPREME COURT OF VIRGINIA

JOE COOPER APPELLANT

v.

MARY E. COAL CO.,
ET AL APPELLEES

RECORD NO. 740335

APPENDIX TO BRIEF

SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

IN THE
SUPREME COURT OF VIRGINIA

JOE COOPER — PETITIONER

v.

MARY E. COAL CORPORATION and
OLD REPUBLIC INSURANCE COMPANY — RESPONDENT

APPENDIX

S. Strother Smith, III, Esquire
Robert Austin Vinyard, Esquire
Smith, Robinson & Vinyard
Attorneys-at-Law, Inc.
180 East Main Street
Abingdon, Virginia 24210

1 JOE A. COOPER, Claimant

2 v. Claim No. 281-811

3 MARY E. COAL COMPANY, INC. and/or
MARY E. COAL COMPANY, Employer
4 OLD REPUBLIC INSURANCE COMPANY, Insurer

5 S. Strother Smith, III, Esq.
P. O. Box 311
6 Norton, Virginia 24273
for the Claimant
7

N. D. Street, Esq.
8 Grundy
Virginia
9 for the Defendants

10 Hearing before Commissioner EVANS, at Grundy, Vir-
11 ginia, on October 31, 1973.

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

14 MR. SMITH:

15 Your Honor, this is an occupational disease case.
16 Mr. Cooper was first told on April 2, 1972, so it would
17 come - but it would still be under the old 1971 law.
18 Checking the medicals--
19 (Off the record)

20 MR. STREET:

21 We would like to file the wage chart for Mary E.
22 Coal Company, Inc.

23 MR. SMITH:

24 No objection to that, Your Honor.

25 Statements

1 MR. STREET:

2 And we would like to file a letter from the Depart-
3 ment of Health, Education and Welfare, dated June 22,
4 1973, to Mr. Davis.

5 MR. SMITH:

6 Your Honor, we very strongly object to the intro-
7 duction of that evidence or anything to do with it.

8 COMMISSIONER EVANS:

9 On what grounds?

10 MR. STREET:

11 Wait a minute, let me get it filed and you can ob-
12 ject to all of it. And its attachments in response to a
13 letter dated June 19, 1973 from Mr. Davis, which we
14 would also like to file.

15 MR. SMITH:

16 Your Honor, we object to that - we don't object to
17 the letter from Mr. Davis, but we do object to the let-
18 ter from Mrs. Popovich on the following grounds: Number
19 1, that no letter was sent to us - that no letter was
20 sent to social security until after one year had run
21 from the time of April 2, 1972, therefore, it would have
22 been impossible for us to have amended our pleadings.
23 On the grounds number 2, that we were not informed of
24 any letter going to social security until October 23,
25 Statements

1973, just about a week prior to this hearing. And grounds number 3 that it is a violation of Federal law for any records of the Social Security Administration be made available to anybody without release. As a matter of fact, I - the man's own lawyer sometimes can't get the records and we had no access to this evidence, we had no way of knowing the date that the original x-ray was taken, we feel that if Mary E. Coal Company or its carrier was going to say that they weren't the employer at the time the x-ray was taken, that they should have gotten the evidence, that they could have done so prior to the time that the statute of limitations had run and notified us so that we could have amended our application. We had no way of getting the evidence, this is not something that is Mr. Cooper's fault, it is not something that is our fault, I am very highly indignant that the Social Security Administration would make this information available and I intend to do whatever is necessary to see that this doesn't happen again. I'm not trying to hide evidence, I just don't think that it is fair or proper for the defendant to have information which bears directly on the man's claim and not make it available to him.

MR. STREET:

Statements

SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

It seems to me that Mr. Smith's statement is contradictory, he doesn't want to hide information, he doesn't want this information in.

MR. SMITH:

I don't think its fair for it to be in when the insurance carrier, if we got the information, could have gotten the same information when it was put on notice and could have notified us that they would not be the carrier so that we could have amended our application and I think that they waived the right to make any claim that it was not the right company when they failed to let us know about it in time to amend our application for hearing.

MR. STREET:

Well, of course, as the Commissioner knows--

MR. SMITH:

And by the way, Your Honor, I would like a copy of this transcript so I can ask social security about it.

MR. STREET:

The letter from the social security people is dated June 22, 1973. Mr. Cooper, according to his attorney's own statement, got his diagnosis on April 2, 1972, so the limitation had run before we got it, there's nothing we can do about it.

Statements

1 MR. SMITH:

2 You could have gotten it a year or six months be-

3 fore. That's the point I'm making.

4 MR. STREET:

5 Why didn't you get it, Strother?

6 MR. SMITH:

7 Because we didn't know that it was available.

8 MR. STREET:

9 I didn't either.

10 MR. SMITH:

11 All right. And I have not been able to get infor-

12 mation for my own clients from social security and how

13 Mr. Weldon Ridge can get it I don't know because he cer-

14 tainly didn't have a release to get it from social

15 security or if he did I want to know it. Did you have

16 a release to get it from social security?

17 MR. RIDGE:

18 I'm not testifying.

19 (Off the record)

20 MR. SMITH:

21 The other objection that I have in any evidence as

22 to when this x-ray was taken was that this Commission

23 and the Supreme Court of Appeals of Virginia and the

24 Legislature of Virginia, has always, in every single

25 Statements

case, dated back to the date that the information was communicated to the man and the idea of predicating a claim - saying that you can't go - that you lose your case because the trial is held eighteen months after the man is told that he has the claim and a year after he has filed his claim and, therefore, he has no way of knowing that the company has any defense, or it's a defense that he knows absolutely nothing about, I think it is wrong, I think it is unjust, I think it is unfair. Furthermore, I think that when you have a situation where the man doesn't know anything about the x-ray until he is informed of it, that you can't go behind the date he was informed of it period. Now we all know that everyone of these mines that these men work in contribute to the dust situation, they contribute to the disease. Now the only reason that the responsible employer is named as the last employer in the case is that the Commission has to have somebody to go against. As a matter of fact the last Legislature recognized that in saying that the Commission could set up standards for prorating the liability and the idea of introducing evidence on the basis that "a-ha" we aren't liable for the thing when this is the company that the man worked for when he got his notice, I don't think he can go behind that notice under

Statements

1 the ex post facto or any other doctrine, fairness, or
2 constitution or otherwise, you can't go behind the date
3 that he first knew about it because you can't hold him
4 responsible for that.
5 MR. STREET:
6 Well, my only comment would be that he's Mr. Smith's
7 client and he ought to be able during his initial meeting
8 or second meeting or whatever/he has to get the infor-
9 mation that we have to write all over the country to get.
10 And he talks about "ex post facto," how would it be to
11 make Mary E. Coal Corporation pay for a claim when the
12 man never had worked for them when he had the x-ray
13 taken. How would that be as to Mary E. Coal Corporation,
14 there are two sides to it.
15 MR. SMITH:
16 He had worked for them when he was told and there
17 is no question I don't believe that he was subjected to
18 the same dust with Mary E. Coal as he was subjected to
19 for any other coal company and that the only reason for
20 holding Mary E. Coal Company or for holding the last em-
21 ployer liable is simply as a matter of convenience to the
22 Industrial Commission so that they could say who will be
23 liable when some of these men skip from one employer to
24 another, employer to another. And if this type of thing
25 Statements

can happen, then the only way we can go is to have some kind of system where the Industrial Commission has to prorate it between every employer he has ever worked with for more than ninety days for surely every employer that he has worked with for more than ninety days is at least partially responsible; I'm talking about working in the coal mines. And this is a matter of convenience to the Industrial Commission and it should not allow a man to lose his case as a matter of convenience simply and solely because he was employed by one company when he was informed of his disease, but had been employed by another company when he took the x-ray.

MR. STREET:

Well, Strother, I let the statute of limitations run on a claim one time because it was my fault and you know what I did, I just went ahead and paid it.

MR. SMITH:

I didn't let any statute of limitations run, I didn't know it, and I couldn't get the information and I want to know how Mr. Ridge--

MR. RIDGE:

Did you try to get it?

MR. SMITH:

I've tried to get it before--

Statements

1 MR. RIDGE:

2 You didn't try to get it then.

3 MR. SMITH:

4 I've tried to get it before. I don't know where

5 you got the name, Mrs. Popovich, I'd like to know that.

6 (Off the record)

7 COMMISSIONER EVANS:

8 There was a release signed by the claimant to re-

9 lease the information for them to have been allowed to

10 have been offered.

11 MR. STREET:

12 Either by the claimant or his attorney.

13 MR. SMITH:

14 Not by the attorney I assure you.

15 MR. STREET:

16 One or the other.

17 MR. SMITH:

18 It was by the claimant.

19 ooo - ooo

20 JOE A COOPER, CLAIMANT

21 BY MR. STREET:

22 Q Mr. Cooper, in 1970, I believe you were working for

23 Enterprise Mining Company?

24 A Yes.

25

Statements
Joe A. Cooper, Claimant

1 Q Did they send you to have a x-ray?
2 A Yes.
3 Q Do you recall having that x-ray?
4 A I don't know whether it was in '70 or '69.
5 Q Okay, but you did have an x-ray in '69 or '70 that
6 Enterprise sent you to get?
7 A Well, they didn't sent us, we just - we all went
8 on our own and took x-rays.
9 Q In '69 or '70?
10 A Yeah, I don't know whether it was '69 or '70.
11 Q Did you ever have - that's all.
12 BY MR. SMITH:
13 Q Mr. Cooper, did you ever hear any word from - that
14 you knew was from that x-ray?
15 A Yes, I heard.
16 Q When did you hear?
17 A Well, just to up and say, I can't recollect what
18 time it was when I heard.
19 BY MR. STREET:
20 Q Was it a letter from the Department of Health, Ed-
21 ucation, and Welfare?
22 A Yes, it was.
23 Q And you knew that was from the x-ray that you took
24 in '69 or '70 when you was working for Enterprise?
25

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180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

1 A Yes, I figured it was, but I didn't know for sure.
2 BY MR. SMITH:
3 Q You didn't know for sure it was from that or some-
4 thing else?
5 A No.
6 Q Have you taken any other x-rays while you worked
7 for Mary E. Coal Company?
8 A Yes, I believe I went to Dr. Sutherland and took
9 one.
10 BY MR. STREET:
11 Q But you got a letter from HEW in April 2nd, '72,
12 and that's when you first knew you had an occupational
13 lung disease isn't that right?
14 A Yes.
15 Q And the only x-ray that you had had at that time
16 was the one you took in '69 or '70 while working for En-
17 terprise; is that right?
18 A Yeah, that's right.
19 (Off the record)
20 (Witness excused)
(Case concluded)
21
22 CLAIM NO. 281-811
23 COMMISSIONER EVANS:
24 This is being recalled for an additional motion.
25 Statements

1 MR. SMITH:

2 Your Honor, in the case of Joe A. Cooper v. Mary E.
3 Coal Company, we have some information now to the effect
4 that Mary E. Coal Company is the successor corporation
5 of the company that Mr. Cooper was working for when the
6 x-ray was taken. If so, we would like to take the depo-
7 sitions of Mary E. Coal Company, owners, to determine
8 whether it is a successor corporation and whether, in
9 fact, there is any difference between us filing against
10 Mary E. and the previous corporation.

11 MR. STREET:

12 We don't think it's material even if it is a sep-
13 arate corporation and just for the record if we were to
14 dispose that the owners were the same, it's certainly
15 a different entity, and the suit would not be proper un-
16 less it would be brought against the Enterprise Coal
17 Corporation and we think that the evidence he is attemp-
18 ting to offer at this time be included in the material
19 for this record.

20 MR. RIDGE:

21 They're two separate corporate entities?

22 MR. STREET:

23 I don't even know that.

24 MR. SMITH:

25 Statements

1 We don't know, that's why we are going to take the
2 deposition--
3 (Off the record)
4
5 (Case concluded)
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25 12/5/73-jw Statements

OLD REPUBLIC INSURANCE CO. ...NY
GREENSBURG, PA.

USE OF THIS FORM IS REQUIRED UNDER THE PROVISIONS OF THE WORKMEN'S COMPENSATION ACT.

M. E. NUCKOLS, JR., COMMISSIONER
J. G. CRENSHAW, COMMISSIONER
M. E. EVANS, COMMISSIONER
W. F. BURSEY, SECRETARY

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF WORKMEN'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
RICHMOND

STATEMENT OF DAYS WORKED AND GROSS EARNINGS OF INJURED EMPLOYEE

1972	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Amount Earned
Jan.										X	X	X	X	X				X	X	X				X	X	X	X	X			X	436 00
Feb.		X	X	X				X	X	X	X				X	X	X				X	X	X	X	X			X	X			530 00
Mar.	X	X	X			X	X	X	X	X				X	X	X	X			X	X	X	X	X			X	X	X	X	X	676 00
Apr.					X	X	X				X	X	X				X	X	X		X			X	X	X	X	X				464 00
May		X	X		X			X				X			X	X	X	X	X			X	X	X	X	X				X	X	516 00
June	X	X			X	X		X	X			X	X		X	X			X	X	X	X	X									458 69
July										X	X	X	X	X			X	X	X	X	X			X	X	X	X	X			X	508 00
Aug.	X	X	X	X			X	X	X	X	X			X	X	X	X	X			X		X	X	X			X	X	X	X	646 00
Sept.	X																															32 00
Oct.																																
Nov.																																
Dec.																																

Joe A. Cooper last day worked for us September 1, 1972 TOTAL 4,266 69
This chart covers all Joe A. Cooper worked for Mary E. Coal Corp.

Was this employee furnished rent, lodging, fuel, lights or other farm or dairy products? No. (Yes or No)

If so, state what he was furnished _____

Did he receive a bonus, commissions, tips, meals or other advantages? No. (Yes or No) If so, give definite information as to what he received and whether it was on a weekly, monthly or yearly basis _____

avw $135.76 tc 10-4-74

Joe A. Cooper
Employee

Mary E. Coal Co., Inc.
Employer

Date of Accident _____ By Bernice Hobbs, secretary

Industrial Commission No. _____

Dated at Whitewood this 13 day of April, 19 73

$4,266.69 ÷ 220 = 19.3940
19.3940 X 7 = $135.76 avg. weekly wage

INSTRUCTIONS

In filling out this form place a check mark in the proper squares to indicate days worked and leave blank spaces to indicate days not worked. Fill in the proper column to indicate weekly, semi-weekly or monthly earnings. If the nature of employee's work changed during the period reported on, this fact should bereported, indicating what the nature of the change was and what, if any, was the change in rate of pay.

This form must show claimant's gross earnings, including overtime, before any deductions are made for taxes, social security, etc.

Judy Smith 10-23-73

VIRGINIA
IN THE INDUSTRIAL COMMISSION

JOE A. COOPER, Claimant

v. Claim No. 281-811 Opinion by EVANS Commissioner.

MARY E. COAL CORPORATION, Employer
OLD REPUBLIC INSURANCE COMPANY, Insurer Jan. 7, 1974

Claimant appeared in person.

S. Strother Smith, III, Attorney at Law, P. O. Box 311, Norton, Virginia 24273, for the Claimant.

N. D. Street, Attorney at Law, Grundy, Virginia 24614, for the Defendant.

Hearing before EVANS, Commissioner, at Grundy, Virginia, on October 31, 1973.

Claimant first obtained a diagnosis of an occupational pneumoconiosis on April 2, 1972, when he received a letter from Dr. W. K. C. Morgan, dated March 11, 1972, after that physician had interpreted a chest x-ray film claimant had made on October 17, 1970. At the time claimant received the diagnosis he was employed by Mary E. Coal Corporation and had been so employed since January 10, 1972.

Claim was filed with the Industrial Commission on October 10, 1972, based on the diagnosis of Dr. Morgan.

The medical evidence preponderates in proving that claimant has a 1st stage penumoconiosis and that the disease

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ABINGDON, VIRGINIA 24210

had reached that stage prior to the time he was employed by the defendant. It follows that the employer for whom he worked prior to October 17, 1970, would be the employer with whom claimant was last injuriously exposed to the causative hazards of his pneumoconiosis and not this defendant.

A W A R D

Since claimant was not last injuriously exposed to the causative hazards of pneumoconiosis while employed by the defendant, the claim must be and hereby is dismissed against this defendant.

SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

VIRGINIA
IN THE INDUSTRIAL COMMISSION

JOE A. COOPER, Claimant

v. Claim No. 281-811 Opinion by JOYNER, Commissioner

MARY E. COAL CORPORATION, Employer
OLD REPUBLIC INSURANCE COMPANY, Insurer Mar. 12, 1974

S. Strother Smith, III, Attorney at Law,
P. O. Box 311, Norton, Virginia 24273,
for the Claimant.

N. D. Street, Attorney at Law,
Grundy, Virginia 24614,
for the Defendants.

REVIEW before the full Commission at Richmond, Virginia, on March 5, 1974.

The full Commission upon review adopts the findings of fact and conclusions of law contained in the decision and award of January 7, 1974.

Accordingly, the said decision and award appealed from are

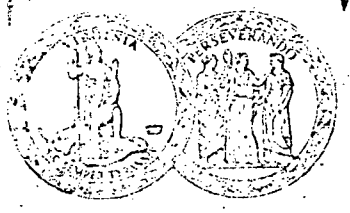
AFFIRMED.

SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

E. EVANS, COMMISSIONER
MAS M. MILLER, COMMISSIONER
ERT. P. JOYNER, COMMISSIONER

E. M. SCOTT, CLERK

COMMONWEALTH OF VIRGINIA



DEPARTMENT OF WORKMEN'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
P. O. BOX 1794
RICHMOND, VIRGINIA 23214

April 9, 1974

S. Strother Smith, III, Esq.
180 East Main Street
Abingdon, VA 24210

Re: Joe A. Cooper, Claimant
v.
Mary E. Coal Corporatin, Employer
Old Republic Insurance Company, Insurer
Claim No. 281-811

Dear Mr. Smith:

The certified copy of the record in the above case was delivered by hand to the Clerk, Supreme Court of Virginia, today.

A copy the TABLE OF CONTENTS is enclosed.

Very truly yours,

INDUSTRIAL COMMISSION OF VIRGINIA

Helen G. Cooper

Helen G. Cooper
Secretary

Encl: Table of Contents
Bill for preparation of record

CC: N. D. Street, Esq.
Grundy, VA 24614
(Encl: Copy of TABLE OF CONTENTS)

E. EVANS, COMMISSIONER
OMAS M. MILLER, COMMISSIONER
ROBERT. P. JOYNER, COMMISSIONER

E. M. SCOTT, CLERK

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF WORKMEN'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
P. O. BOX 1794
RICHMOND, VIRGINIA 23214

April 9, 1974

Honorable Howard G. Turner, Clerk
Supreme Court of Virginia
Supreme Court Building
Richmond, Virginia 23219

Re: Joe A. Cooper, Claimant
v.
Mary E. Coal Corporation, Employer
Old Republic Insurance Company, Insurer
Claim No. 281-811

Dear Mr. Turner:

Notice of Appeal and Assignment of Error was filed in the Industrial Commission on March 27, 1974 by counsel for the claimant, W. H. C. Venable, Esq.

A certified copy of the record is enclosed.

Very truly yours,

INDUSTRIAL COMMISSION OF VIRGINIA

Helen G. Cooper
Secretary of Commission

CC: W. H. C. Venable, Esq.
Cocklin House - 422 East Main Street
Richmond, VA 23219

CC: S. Strother Smith, III, Esq.
150 East Main Street
Abingdon, VA 24210

CC: H. D. Street, Esq.
Gate City, VA 24251

VIRGINIA
IN THE INDUSTRIAL COMMISSION

JOE A. COOPER, Claimant

v. CLAIM NO. 281-811

MARY E. COAL CORPORATION, Employer
OLD REPUBLIC INSURANCE COMPANY, Insurer

RECORD FOR APPEAL TO SUPREME COURT OF VIRGINIA:

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SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

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SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 29th *day of* August, 1974.

Joe A. Cooper, Appellant,

against Record No. 740335

Mary E. Coal Corporation, et al., Appellees.

From the Industrial Commission of Virginia

Upon the petition of Joe A. Cooper an appeal is awarded him from an award entered by the Industrial Commission of Virginia on the 12th day of March, 1974, in a certain proceeding then therein depending, wherein the said petitioner was claimant and Mary E. Coal Corporation and another were defendants; upon the petitioner, or some one for him, entering into bond with sufficient security before the secretary of the said Industrial Commission in the penalty of $300, with condition as the law directs.

A Copy,

Teste:

Clerk

SUPREME COURT OF VIRGINIA

Joe A. Cooper, Appellant,

against

Mary E. Coal Corporation and Old Republic Insurance Company, Appellees.

From the Industrial Commission of Virginia

CERTIFICATE

Pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia, I, Howard G. Turner, Clerk of the said Court, do hereby certify that an appeal was awarded on August 29, 1974, from an award entered by the court below on March 12, 1974, in the suit therein depending under the short style of Joe A. Cooper v. Mary E. Coal Corporation, et al.

Appeal bond is required in the penalty of $300 in conformity with Code, §8-477, and within the time allowed by Code, §8-489.

This certificate, constituting the summons on appeal, was this day mailed to the court below and to

S. Strother Smith, III, 180 East Main Street, Abingdon, Virginia 24210 Counsel for Appellant

N. D. Street, P. O. Drawer S, Grundy, Virginia 24614 Counsel for Appellees

Given under my hand this 30th day of August, 1974.

/s/ H.G. Turner
Clerk

SMITH, ROBINSON & VINYARD
ATTORNEYS AT LAW, INC.
180 EAST MAIN STREET
ABINGDON, VIRGINIA 24210