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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD No. 740653

ROY COOK,

Appellant,

v.

CLINCHFIELD COAL CO., ET AL.,

Appellees.

APPENDIX TO BRIEF OF APPELLEES

J. THOMAS FOWLKES
Of Counsel

PENN, STUART & ESKRIDGE
208 East Main Street
Abingdon, Virginia 24210
Counsel for Appellees

PRELIMINARY STATEMENT

This appendix to appellees' brief is being filed because of appellant's failure to comply with the applicable Rules of the Supreme Court of Virginia as to the printing of an appendix. The appellant did not file with the Clerk a designation of those parts of the record that he intended to include in his appendix, as required by Rule 5:36(a). Consequently, appellees were not aware of the contents of that appendix until served with a copy of the appellant's brief. The appendix which was filed did not include those matters required to be included under Rule 5:37.

The matters printed herein are all those portions of the record deemed by appellees to be relevant and germane to the assignments of error.

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APPLICATION FOR HEARING

Filed March 27, 1968

Case of:

Roy E. Cook (Employee)

Clinchfield Coal Co. Division of The Pittston Co. (Employer)

Application For Hearing In Non-Fatal Case
(To be used by injured employee.)

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 the Commission in accordance with Section 65-91 of the Virginia Workmen's Compensation Act.

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

(Fill in only the facts applicable to your case)

1. That on or about the middle of July, 1967, I was injured by silicosis arising out of and in the course of my employment while in the employ of Clinchfield Coal Co. Div. of the Pittston Co., that as a result of my injury I was compelled to quit work on the ..... day of .....; that my employer had knowledge (was notified) of my accident within thirty days from the date thereof; that my average weekly wage prior to the accident was $140.00.

2. That the nature of my injury is as follows: I am disabled due to accident of 9/21/67—I was examined and told by Dr. S. G. Ketron and Dr. W. C. Elliot about middle of July, 1967 I had "Rock Dust" on my lungs. Both doctors told me they would notify the Company and I relied on their statement. I was also told by the x-ray man at Lebanon Hospital I had "Rock Dust." No one told me how much.

I also told the president of the union and he told me he would look into it and let me know—later on he was killed. I also told Mullins, our committeeman, and he said he would look into it. I think I also told Mr. Billy Thompson just before I returned to work on January 2, 1968.

* * *

6. That as a result of this accident I have sustained a permanent injury as follows: I have rock dust on my lungs.

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

It seems neither Dr. Ketron or Dr. Elliot have notified the Company although both said they would and I relied on their doing so.

* * *

Signed this 27th day of March, 1968.

I am temporarily located 2113 Edwards Drive, Richmond, Virginia.

Signature: /s/ Roy E. Cook (Employee)

Address: Honaker, Virginia

OPINION OF DEPUTY COMMISSIONER RUSHBROOKE

Filed August 26, 1968

* * *

Hearing before Deputy Commissioner Rushbrooke at Clintwood, Virginia, on July 24, 1968.

This case is before the Industrial Commission upon claimant's application, filed March 27, 1968, claiming compensation for the occupational disease of silicosis allegedly contracted in claimant's employment with Clinchfield Coal Company.

On July 5, 1968 Industrial Commission forwarded written notice to the employee advising that the case would be set down for hearing on his application at Clintwood, Virginia, on July 24, 1968, at 11:00 o'clock A.M. When the case was called for hearing there was no appearance by the claimant, but the record reveals that he did have notice of the time and place of hearing and actually discussed the matter with Attorney Montie S. Meeks on the morning of the day that the case was scheduled. No explanation has been offered to the Commission for claimant's failure to appear at the scheduled hearing. Upon the calling of the case at Clintwood the defendant, by counsel, moved for the dismissal of claimant's application on account of claimant's failure to appear and prosecute his claim.

No evidence was offered by the claimant in support of his application and the medical evidence contained in the file, which includes a

report of Dr. William D. Deep, a physician seen by the claimant on his own initiative, fails to disclose the existence of any occupational disease.

On the record before us we must, and hereby do, order that the application filed March 27, 1968 be dismissed for failure of the claimant to produce evidence in support of his claim for occupational disease.

The application is ordered dismissed and the case is stricken from the hearing docket subject to the right of the claimant to have it reinstated on the Commission's hearing docket should good cause therefor be shown.

* * *

APPLICATION FOR HEARING

Filed October 1, 1973

File No.: .....

Employee: Roy E. Cook

Employer: Clinchfield Coal Company, Lebanon, Va. 24266

Date of Accident: (Date of diagnosis) July 7, 1973

Average Weekly Wage: $200.00 + or —

Place Where Accident Occurred: Dickenson County, Virginia

Nature of Injury or Occupational Disease: Coal worker's pneumoconiosis

* * *

The applicant requests a hearing before the Industrial Commission of Virginia on the grounds of:

* * *

(2) Occupational Disease ☒

* * *

Signature of Applicant: /s/ Roy Cook

Address: Box 207, Honaker, Va. 24260

Signed this 27th day of September, 1973

Subpoenas for witnesses will be issued by the Industrial Commission on request or may be obtained at the Clerk's Office of the City or County where the hearing will be held (§ 65.1-21, Code of Va.). Medical reports are acceptable in lieu of physicians' personal appearances.

/s/ S. Strother Smith, III
Counsel for Claimant
Norton, Va. 24273

TRANSCRIPT OF HEARING

Filed February 27, 1974

[1] * * *

Hearing before Commissioner Evans, at Clintwood, Virginia, on February 27, 1974.

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

Mr. Robinson: This is tried on the medicals of—(Off the Record)

Mr. Fowlkes: For the record, Mr. Cook earlier filed an occupational disease case, I.C. No. 966-836, and it was dismissed by Deputy Commissioner Rushbrooke on August 26, 1968 for failure of the claimant to appear and prosecute and it did state it could be reinstated upon showing of good cause, so if it is any good cause why—

Commissioner Evans: I expect that file has been destroyed.
(Off the Record)

[2] Roy Cook, Claimant

By Mr. Robinson:

Q Mr. Cook, it has been stated here that you submitted a claim for occupational disease to the Industrial Commission in 1968 and that the claim was dismissed on August 26 for failure to prosecute your claim. What reason do you know that this claim was not pursued —Montie Meeks is the attorney filed in this case? A I don't ever remember having Montie Meeks for not lawyer unless it—not while he was in the Union, but this now happened when I had my neck broke

and was in Richmond and the Commissioner told me up there I had rock dust, said the report showed it and he sent the case down hisself and I never did appear at Lebanon, I went right back to work and didn't appear on that. I had my neck broke and I was up there five months.

Q You had your neck broke while you were under that— A He sent me over to the medical center and they said I had dust and I never did even try to file for it.

Q To your knowledge, you never did know a claim was filed? A No, he was the one who tole me that up there.

Q What Commission told you that? A I don't know. A real old man, big heavy set guy down there.

Commissioner Evans: In the Industrial Commission or at Clinchfield?

A No, it was the Industrial Commission at Richmond. He was old like now, a big heavy set guy.

Q Can you explain why the claim was filed and then not pursued? A I don't. He called Mr. Thompson when—

Mr. Thompson: Bill—what was his name?

[3] Commissioner Evans: Bill Robinson, maybe in the Claims Department?

A He called you while I was up there.

Mr. Thompson: I remember vaguely the discussion concerning it, y'know, back then. And then we have a hearing over at Lebanon on the case and Roy didn't appear.

Commissioner Evans: That was Bill Robinson in the Claims Department down there. He was a man about 70 years old, in fact, he's retired now.

A That's right. He called Mr. Thompson on my neck. I was up there to see—he was sending the checks down here to Cleveland—

Mr. Thompson: Yes, that was about your payments for temporary total on that and then at that time he had knowledge of this you see. He had an injury case and then he—

Commissioner Evans: He probably filled out an application for hearing for your own interest is the way this got on the docket.

A I didn't know it. That's the reason I didn't appear was because I didn't know nothing about it.

Mr. Thompson: Well, you got notice didn't you?

[4] Commissioner Evans: You got notice it was going to be heard didn't you?

A No. I got a notice it was going to be heard about my neck. See they didn't rule nothing for my neck. If it starts bothering me anymore, the doctor is supposed to be paid. That's the only thing they ruled me on it. And I went over there for the hearing on my neck.

(Off the Record)

By Mr. Fowlkes:

Q Mr. Cook, you say you were in Richmond because you had a broken neck at that time? A Uh, huh.

Q And you went to a doctor and somebody told you on that occasion that you had an occupational disease? A No, the doctor didn't tell me.

Q Who told you that you had it? A It was that Commissioner that filled this one out and sent it in I reckon. I went over there to see him to get paid for where I had my neck broke so I could bring it back.

Q But somebody filled out an application for hearing for an occupational disease; is that right? A According to that they must have done it. I didn't know nothing about that you see. Now I went over there for the trial that day and the Commissioner ruled that I didn't get nothing because my neck was broke because I done went back to work at the same pay. The only thing he ruled was that I would receive medical care if anything happened after that.

Commissioner Evans: This opinion states in it: "On July 5, 1968, [5] the Industrial Commission forwarded written notice to the employee advising that the case would be set down for hearing on his application at Clintwood, Virginia, on July 24, 1968, at 11:00 o'clock A.M. When the case was called for hearing there was no appearance by the claimant, but the record reveals that he did have notice of the time and place of hearing and actually discussed the matter with Attorney Montie S. Meeks on the morning of the day that the case was scheduled. No explanation has been offered to the Commission for

claimant's failure to appear at the scheduled hearing. Upon the calling of the case at Clintwood the defendant, by counsel, moved for the dismissal of claimant's application on account of claimant's failure to appear and prosecute his claim." I assume that Montie Meeks was present that morning because it shows that he was present and said he had actually discussed the case with you that morning. Do you remember talking to Montie Meeks on the morning of any—

A The only lawyers I have ever talked to is these here from down at Norton. They're the only ones I have ever talked to.

(Off the Record)

By Mr. Fowlkes:

Q Mr. Cook, you say that first notice you had of an occupational disease was when you had a film made by the black lung people? A Yeah.

Q They said there was a spot on it? [6] A That's right.

Q When was that now? When did you go and have the x-ray made and they found you had a spot? A It was sometime just before July, I don't remember—it was about, it must have been about a week after I went until they sent me a notice and then I went to Dr. Elliott.

Q You saw Dr. Elliott in June 13, '73, at least that is what you wrote Mr. Thompson, so you had to see the x-ray people— A I never wrote Mr. Thompson. The only time ever I wrote Mr. Thompson was when Mr. Meeks filled me out one and sent me over there.

Q Mr. Cook, is that your letter? A No, it's not, that is not my signature.

Q Who is Roy E. Cook, are you Roy E. Cook? A That's my name, but that's not my signature.

Q Are you married? A Yes, I'm married.

Q Could your wife have written that? A No, she didn't write it. That is when I went to see—there is the one I got from—July.

Q Who is that letter from, Mr. Cook?

By Mr. Robinson:

Q This says: "My family doctor, W. C. Elliott, made x-rays on

June 13, 1973 and said that I have second stage silicosis." A Do you have the letter there where I signed for Mr. Meeks.

Mr. Thompson: Compare the signatures on his notice.

(Off the Record)

[7] By Mr. Fowlkes:

Q It was before July 1, '73 that you received a diagnosis? A According to his slip it is.

Q Okay. Does that satisfy you? A It will have to.

(Witness excused)

(Case Concluded)

OPINION BY COMMISSIONER EVANS

Filed March 22, 1974

* * *

Hearing before Evans, Commissioner, at Clintwood, Virginia, on February 27, 1974.

On October 1, 1973, claimant filed claim with the Industrial Commission for an occupational pneumoconiosis alleged to have been contracted as a result of exposure to the causative hazards of that disease while employed by the defendant at an average weekly wage of $200.00.

The application is based on a diagnosis of an occupational pneumoconiosis communicated to the employee on June 13, 1973.

The record reveals that a claim was filed in behalf of the claimant for an occupational pneumoconiosis on March 27, 1968. When the hearing was held on July 24, 1968, claimant did not appear. The hearing Commissioner found that the medical evidence contained in the Industrial Commission's file failed to disclose the existence of an occupational disease and the claim was dismissed for failure to prove the existence of the disease.

The evidence before the Commission fails to disclose that claimant obtained a diagnosis of the occupational disease for which claim is presently made prior to June 13, 1973.

The medical evidence preponderates in proving that claimant has contracted a 1st stage pneumoconiosis and we find so.

Award

An award is hereby entered in behalf of Roy Cook against Clinchfield Coal Company providing for the payment of specific disability benefits at the rate of $70.00 a week beginning June 13, 1973, and continuing thereafter for a period of 50 weeks and covering 1st stage pneumoconiosis.

All accrued compensation due under this award shall be paid upon receipt of same and future payments made each two weeks thereafter as they accrue.

APPLICATION FOR REVIEW

Filed March 28, 1974

* * *

Comes now the defendant, Clinchfield Coal Company, and applies for a review of the opinion rendered by Commissioner Evans in the above styled case on March 22, 1974.

Clinchfield Coal Company

By Counsel

Penn, Stuart & Eskridge
208 East Main Street
Abingdon, Virginia 24210

By /s/ J. Thomas Fowlkes
J. Thomas Fowlkes
Counsel for Defendant

Certificate Of Service

I certify that I have forwarded a copy of the foregoing Application for Review to S. Strother Smith, III, Esq., claimant's counsel of record, this 25th day of March, 1974.

/s/ J. Thomas Fowlkes
J. Thomas Fowlkes

REVIEW OPINION BY COMMISSIONER JOYNER

Filed June 12, 1974

* * *

Review before the full Commission at Richmond, Virginia on May 7, 1974.

This claim is before the full Commission for review of the opinion of Commissioner Evans of March 22, 1974.

The claimant had previously filed an application for hearing on March 27, 1968. The application was signed by the claimant and carried the notation: "I am temporarily located at 2113 Edwards Ave., Richmond, Va." In that application the claimant stated that:

> "I am disabled due to accident of 9/21/67. I was examined and told by Dr. S. G. Ketron & Dr. W. C. Elliot about middle of July 1967 I had 'rock dust' on my lungs. Both doctors told me they would notify the company and I relied on their statement. I was also told by the x-ray man at Lebanon Hospital I had 'rock dust.' No one told me how much. I also told the president of the union and he told me he would look into it and let me know. Later on he was killed. I also told Mullins, our committeeman, and he said he would look into it. I think I also told Mr. Billy Thompson just before I returned to work on Jan. 2, 1968."

That claim was heard by Deputy Commissioner Rushbrooke on July 24, 1968, at which time the claimant failed to appear. Deputy Commissioner Rushbrooke's opinion of August 26, 1968 notes that "... no evidence was offered by the claimant in support of his application and the medical evidence contained in the file, which includes a report of Dr. William D. Deep, a physician seen by the claimant on his own initiative, fails to disclose the existence of any occupational disease."

The application was then dismissed for failure of the claimant to produce evidence in support of his claim, the dismissal being "subject to the right of the claimant to have it reinstated on the Commission's hearing docket should good cause therefor be shown."

The claimant again filed application for hearing on October 1, 1973, which was the subject of the hearing before Commissioner Evans on February 27, 1974, and his opinion of March 22, 1974.

Commissioner Evans found that the record failed to disclose that the claimant had obtained a diagnosis of an occupational disease prior to June 13, 1973. However, the claimant testified [T-2] that ". . . he [Montie Meeks, attorney] sent me over to the medical center and they said I had dust and I never did even try to file for it." This was in reply to a question to the claimant regarding his claim of pneumoconiosis filed on March 27, 1968.

Although the claimant denied that he filed an application for hearing, it is clear from the claimant's testimony in this case that he underwent a medical examination and was advised that he had "dust" and it is also clear from the application for hearing, dated March 27, 1968, that the claimant was advised that he had an occupational disease and that he applied for compensation.

Upon review of this evidence we cannot agree that the claimant had not obtained a diagnosis prior to June 13, 1973. His own testimony at the hearing of this claim, as well as his own previous action in applying for compensation for an occupational disease and then failing to prosecute that claim, conflicts with this finding. The claimant can rise no higher than his own testimony, and for these reasons, the award of March 22, 1974 is reversed and set aside, and the claim is

Dismissed.

Evans, Commissioner, dissenting:

I am not in accord with the majority opinion which denies compensation benefits to the claimant for a proven case of occupational pneumoconiosis based on a diagnosis communicated to the employee on July 7, 1973.

According to the testimony of the claimant he first obtained an oral diagnosis of an occupational penumoconiosis during 1967. A claim on that diagnosis was timely filed and a hearing scheduled for July 24, 1968. When the case was called claimant did not appear although his counsel was present. The only medical evidence submitted at the hearing was a report of Dr. Wiliam D. Deep, a physician seen by the claimant on his own initiative.

Subsequent to the hearing the hearing Commissioner entered an award. Pertinent portions of the award are herewith quoted:

> "No evidence was offered by the claimant in support of his application and the medical evidence contained in the file, which includes

a report of Dr. William D. Deep, a physician seen by the claimant on his own initiative, fails to disclose the existence of any occupational disease.

"On the record before us we must, and hereby, do order that the application filed March 27, 1968, be dismissed for failure of the claimant to produce evidence in support of his claim for occupational disease."

I am of the opinion that the Deputy Commissioner found that there was insufficient evidence to establish the existence of an occupational pneumoconiosis. On the basis of this finding, claimant had a right to bring a new claim upon again obtaining a positive diagnosis of an occupational pneumoconiosis. Such a diagnosis was subsequently obtained and proof of the existence of the disease made at the hearing held on February 27, 1974, and an award accordingly entered.

I am of the opinion that compensation should be awarded since the claim filed in 1967 was denied on the basis of failure to prove the existence of the occupational pneumoconiosis.

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

Filed June 27, 1974

Notice of Appeal

To: Clerk of the Industrial Commission
P.O. Box 1794
Richmond, Virginia 23214

J. Thomas Fowlkes, Esquire
208 East Main Street, P.O. Box 759
Abingdon, Virginia 24210

Take notice that the claimant, by counsel, submits this notice of appeal from the decision of the full commission of June 12, 1974 and announces his intentions of appealing for a writ of error and supersedes to the Supreme Court of Virginia, transcript of this case will hereinafter be filed.

Assignment Of Error

I.

The Commission erred in not finding that Roy Cook was eligible for benefits set forth in Section 65.1-56 Sub-Section 20A Code of Virginia, 1950, as amended.

II.

The Commission erred in its findings that the claimant had obtained a compensable diagnosis of an occupational disease prior to June 13, 1973.

Roy Cook

By Counsel

Counsel
White, Elliott & Bundy
160 East Main Street
Abingdon, Virginia 24210

By: /s/ Dennis E. Jones
Dennis E. Jones

Certificate

I, Dennis E. Jones, do hereby certify that I have this day mailed a true copy of the above Notice of Appeal and Assignment of Errors to J. Thomas Fowlkes, Esquire, Counsel for the Defendant, 280 East Main Street, P. O. Box 759, Abingdon, Virginia 24210.

/s/ Dennis E. Jones
Dennis E. Jones

* * *

In The
SUPREME COURT OF VIRGINIA
At Richmond

Record No. 740653

Roy Cook,

Appellant,

v.

Clinchfield Coal Company, et al.,

Appellees.

MOTION TO DISMISS

Come now the appellees, by counsel, and move this Court to dismiss the appeal for failure of appellant to comply with Rules 5:36 and 5:37 of the Supreme Court of Virginia. In support thereof, appellees direct this Court's attention to its decision of *Vaughan* v. *Johnson, et al.,* 215 Va. ....., ... S.E.2d ..... (No. 730909, Dec. 2, 1974).

Clinchfield Coal Company
By Counsel

Penn, Stuart & Eskridge
208 East Main Street
Abingdon, Virginia 24210

By /s/ J. Thomas Fowlkes

Certificate

I hereby certify that I have filed a true copy of the foregoing Motion to Larry G. Browning, Esquire, appellant's Counsel of Record, this 16th day of December, 1974.

/s/ J. Thomas Fowlkes