REPORT OF THE

JOINT SUBCOMMITTEE STUDYING

COMPENSATION FOR BYSSINOSIS VICTIMS

TO

THE GOVERNOR

AND

THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 8

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Report of the Joint Subcommittee
Studying Compensation for Byssinosis Victims

November, 1981

To: Honorable Charles S. Robb, Governor-Elect
and
The General Assembly of Virginia

INTRODUCTION

The Joint Subcommittee Studying Compensation for Byssinosis Victims was established pursuant to House Joint Resolution No. 245 of the 1981 General Assembly, which reads as follows:

"HOUSE JOINT RESOLUTION NO. 245

Offered January 19, 1981

Requesting the House Committee on Labor and Commerce and the Senate Committee on Commerce and Labor to establish a joint subcommittee to study whether the Commonwealth should change its laws which relate to the payment of workmen's compensation benefits to victims of brown lung disease.

WHEREAS, byssinosis, or brown lung disease, is an occupational ailment caused by inhalation of cotton dust; and

WHEREAS, brown lung disease results in shortness of breath, chronic coughing, chest tightness and other disabling symptoms, with the consequence that many victims of that disease must retire years before their normal retirement age; and

WHEREAS, national studies conducted by both the United State Department of Labor and by independent researchers indicate that brown lung effects ten to twelve percent of the cotton textile workforce; and

WHEREAS, brown lung has been compensable under the Commonwealth's workmen's compensation laws since nineteen hundred seventy; but because of the lack of information available regarding that disease, only one victim has been awarded compensation since the law was enacted; and

WHEREAS, Virginia's occupational disease statute of limitations allows five years from the date of retirement, or two years from the date a diagnosis of brown lung is made, whichever occurs first, for a victim to file a claim for workmen's compensation benefits; and

WHEREAS, because of the lack of information concerning brown lung available to textile workers and their physicians, often a diagnosis of that disease is not made within five years after the date of retirement; and

WHEREAS, some parties believe that § 65.1-53 of the Code of Virginia, which allows an employee with brown lung to waive in writing compensation for any aggravation of his condition that may result from his working or continuing to work in a textile mill, should be repealed; and

WHEREAS, Virginia law groups brown lung with black lung and other pneumoconioses even though medical evidence seems to indicate that brown lung is a different type of disease; and

WHEREAS, it may be necessary for the General Assembly to change the law if victims of brown lung are to be reasonably compensated in the Commonwealth; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the House Committee on Labor and Commerce and the Senate Committee on Commerce and Labor are requested to establish a joint subcommittee to study whether the Commonwealth should change its laws which relate to the payment of workmen's compensation benefits to victims of brown lung disease.

It is requested that the joint subcommittee consist of five members of the House Committee on Labor and Commerce and three members of the Senate Committee on Commerce and Labor. Appointment of members to the joint subcommittee shall be made by the chairmen of the respective committees.

The joint subcommittee is requested to complete its study not later than November one, nineteen hundred eighty-one, and to introduce any legislation it deems appropriate.

The cost of conducing this study shall not exceed four thousand dollars."

Delegate Lewis P. Fickett, Jr., of Fredericksburg, chief patron of House Joint Resolution No. 245, served as Chairman of the Subcommittee. Other members of the House of Delegates who served on the Subcommittee were Warren G. Stambaugh of Arlington, Claude V. Swanson of Gretna, Franklin P. Hall of Richmond and Robert S. Bloxom of Mappsville.

Senator Elmon T. Gray of Waverly served as Vice-Chairman of the Subcommittee. Other Senate members who served were Charles J. Colgan of Manassas and Frank W. Nolen of New Hope.

C. William Cramme', III, and Hugh P. Fisher, III, of the Division of Legislative Services served as legal and research staff for the Subcommittee. Administrative and clerical services for the Subcommittee were performed by the Clerk's Office of the House of Delegates.

WORK OF THE SUBCOMMITTEE

The subcommittee held meetings on June 10, July 13, July 14, August 26 and November 9, 1981. During its meetings the Subcommittee heard a great deal of oral testimony. The study group also received voluminous amounts of written materials during and between meetings.

Prior to the Subcommittee's first meeting, its staff furnished each member with a copy of a staff report which discussed the following areas: (1) the authority for the Subcommittee's study; (2) suggested objectives; (3) a tentative schedule for the study group to follow; (4) a thorough discussion of certain medical, diagnostic and legal aspects of the byssinosis issue; and (5) resources available to the Subcommittee.

A copy of the staff's initial report, minus the report's lengthy appendices, is attached as Appendix I of this report.

The Subcommittee's first meeting, which was held on June 10, was mainly an organizational meeting in which the study group elected its Chairman and Vice-Chairman and adopted a timetable for the study. During the meeting the Subcommittee heard testimony from Mr. Robert P. Joyner of the Virginia Industrial Commission, Mr. Julian Carper of the State AFL-CIO, and Ms. Elizabeth Scott of the Virginia Brown Lung Association. Also, the study group decided that during the study it should focus its attention on the following issues:

(1) Whether there should be changes in the way that medical evidence is furnished the Industrial Commission in byssinosis cases (i.e., whether a medical advisory committee should be established in Virginia);

(2) Possible changes to the occupational disease statute of limitations (Virginia Code § 65.1-52);

(3) Possible changes to the Code's waiver provision (§ 65.1-53);

(4) Possible changes to the burden of proof which the Industrial Commission requires a byssinotic claimant to carry; and

(5) Whether byssinosis should be removed from paragraph (20) of Code § 65.1-56, which

classifies byssinosis as a pneumoconioses.

The study group reviewed pages 4-21 of the initial staff study, which discuss the issues named above, as well as medical and diagnostic problems related to byssinosis.

The Subcommittee also decided that it would hold two public hearings in Danville. It was agreed that the first public hearing would be held on the evening of July 13 and would consist of testimony from cotton mill workers, byssinosis victims and the textile industry. The other hearing would be held the morning of July 14 and would be limited to medical testimony regarding the byssinosis issue.

Prior to the Danville hearings, representatives of the textile industry notified the Subcommittee that the industry would not be able to present testimony during those hearings. However, the industry invited the study group and its staff to make a tour of some of the plants operated by Dan River, Inc., the largest textile employer in the Commonwealth. The tour was scheduled for the morning of July 13; and a majority of the Subcommittee members, as well as the staff, went on the tour. The Subcommittee found the tour informative and felt that it was a productive learning experience.

At the July 13 public hearing the Subcommittee heard testimony from former cotton mill workers, as well as from individuals presently employed in the textile industry. At the July 14 public hearing the study group heard extensive testimony from two Yale University researchers whose testimony had been solicited by the Virginia Brown Lung Association. E. Neil Schachter, M.D., an Associate Professor of Internal Medicine, and Gerald J. Beck, Ph.D., an Associate Professor of Biostatistics in the Department of Epidemiology and Public Health, gave testimony regarding medical and diagnostic aspects of byssinosis.

While in Danville the Subcommittee agreed that its next meeting would be held on August 26 in Richmond. The study group decided that the primary business of that meeting would be the presentation of medical evidence by the textile industry.

During the August 26 meeting the study group heard testimony from the following physicians, whose testimony had been sought by the textile industry: Mario Battigelli, a Professor of Medicine at the University of North Carolina; Byron D. McLees, a Professor of Medicine at Wake Forest University; Ellsworth F. Mariner, Corporate Medical Director of Dan River, Inc.; Clifford G. Gaddy, a Certified Internist practicing in Danville; Edwin Harvie, also a Certified Internist practicing in Danville; Thomas J. O'Neill, a Pulmonologist practicing in Danville; Harold R. Imbus, Director of Health and Safety for Burlington Industries, Inc.; and William W. O'Neill, an Associate Professor of Medicine at Wake Forest University.

The Subcommittee also heard testimony from James A. Merchant, M.D., Director of the Division of Respiratory Disease Studies of the National Institute for Occupational Safety and Health. Dr. Merchant's testimony had been solicited by the Virginia Brown Lung Association.

In addition, the study group heard testimony from the following individuals: Donald G. Pendleton, an attorney from Amherst County and a former member of the House of Delegates; George Perkel, a consultant to the Amalgamated Clothing and Textile Workers Union; Ben Bowen, an attorney in private practice in Greenville, South Carolina; Paul Michaels, a North Carolina attorney in private practice; and Gerald Sharp, General Counsel of the United Mine Workers' Local 28.

At the end of the meeting the Subcommittee decided that its final meeting would be held on November 9. It was agreed that the meeting would be a work session in which the study group would formulate its recommendations.

Prior to the November 9 meeting the Subcommittee's staff furnished each member with a summary report regarding the disposition of byssinosis cases in Virginia, North Carolina and South Carolina. A copy of that summary report is attached as Appendix II.

In addition, prior to the study group's last meeting, the staff furnished each member with a copy of a paper which summarizes how the workmen's compensation systems in Georgia, South Carolina, North Carolina and Virginia affect byssinotic claimants. A copy of that paper constitutes Appendix

III of this paper.

At its final meeting the Subcommittee thoroughly discussed and carefully considered which recommendations to make to the 1982 General Assembly. During the meeting the study group heard testimony from the following individuals: Robert P. Joyner, Chairman of the Virginia Industrial Commission; Robert E. Payne, an attorney for the law firm of McGuire, Woods & Battle, which represented Fieldcrest Mills, Inc., during the study; Z.C. Dameron, Jr., President of the Virginia Manufacturers Association; and Karen Hart of the Virginia Brown Lung Association.

RECOMMENDATIONS

The Subcommittee offers the following recommendations to the General Assembly:

(1) Virginia Code § 65.1-53 should not be repealed or amended. That section allows an employee or prospective employee found to be affected by, or susceptible to, a specific occupational disease to waive in writing compensation for any aggravation of his condition that may result from his working in the same or similar occupation for the same employer.

(2) The occupational disease statute of limitations, Virginia Code § 65.1-52, should be amended so that any claim which is based on byssinosis would be valid as long as it is filed with the Industrial Commission within two years after diagnosis of the disease is first communicated to the worker or within seven years from the date of the last injurious exposure in employment, whichever first occurs.

(3) Byssinosis should be removed from paragraph (20) of Code § 65.1-56, which groups byssinosis as a pneumoconiosis along with silicosis, asbestosis and coal miner's pneumoconiosis; and a new paragraph within that section, which would relate only to byssinosis, should be enacted.

(4) A five member Advisory Medical Committee on Byssinosis, appointed by the Governor and consisting of pulmonary specialists, should be created. When a byssinosis case involving conflicting medical evidence reached the full Commission level, the Industrial Commission would send the claimant to one of the members of the Advisory Medical Committee for a thorough examination. The Committee member would submit a report of his medical findings and conclusions to the Commission; and the Commission would consider that report, along with the reports submitted by the claimant's physician and the insurer's physician, prior to making a decision or rendering an opinion. The findings and conclusions in the report submitted by the Committee physician would not be binding on the Commission.

REASONS FOR RECOMMENDATIONS

Recommendation No. 1: Virginia Code § 65.1-53 should not be repealed or amended. That section allows an employee or prospective employee found to be affected by, or susceptible to, a specific occupational disease to waive in writing compensation for any aggravation of his condition that may result from his working in the same or similar occupation for the same employer.

Representatives of the Virginia Brown Lung Association, as well as certain other interested parties, testified before the Subcommittee that they favor a repeal of the waiver provision. Those parties believe it is unfair for an employer to ask a worker to waive his right to compensation if that worker is affected by, or susceptible to, byssinosis. Certain companies in the Commonwealth's textile industry, including Dan River, Inc., have indicated that they would not oppose the repeal of the waiver provision.

However, Mr. Robert P. Joyner, Chairman of the State Industrial Commission, testified that the Industrial Commission has not approved any waivers for employees of Dan River, Inc. during the last three years. Futhermore, the Virginia Brown Lung Association has indicated that it is not aware of a recent case in which the Commission has approved a waiver of future benefits for a cotton mill worker in the State.

Also, the Subcommittee would point out that § 65.1-53 is a specific, rather than a general, waiver provision, and that only a few cotton mill workers in the Commonwealth are eligible to sign such a

waiver. § 65.1-53 allows only an employee "found to be affected by, or susceptible to, a specific occupational disease," to waive his right to future benefits for any aggravation of his condition that may result from his working or continuing to work in the same or similar occupation for the same employer.

Mr. Joyner testified that prior to approving a waiver, the Industrial Commission requires that medical evidence be submitted which shows that the employee either has byssinosis or is susceptible to the disease. Since the Industrial Commission receives very few undisputed diagnoses of byssinosis, very few workers are judged by the Commission to be "affected by or susceptible to" byssinosis. Therefore, very few workers are eligible to waive their right to future compensation.

For the reasons cited above, the Subcommittee believes there is no compelling reason to repeal the waiver provision.

Recommendation No. 2: The occupational disease statute of limitations, Virginia Code § 65.1-52, should be amended so that any claim which is based on byssinoisis would be valid as long as it is filed with the Industrial Commission within two years after diagnosis of the disease is first communicated to the worker or within seven years from the date of the last injurious exposure in employment, whichever first occurs.

§ 65.1-52 now provides that for all occupational diseases except coal worker's pneumoconiosis, the right to compensation shall be forever barred unless a claim is filed with the Industrial Commission within two years after a diagnosis of the disease is first communicated to the employee or within five years from the date of the last injurious exposure in employment, whichever first occurs. Hence the only change to the statute recommended by the Subcommittee relates to increasing from five to seven years the length of time a byssinotic claimant would have to file a claim after leaving the cotton mill. The Subcommittee heard testimony that in certain cases of chronic byssinosis, an employee's health may continue to deteriorate even after the employee retires from a mill. Futhermore, because of the considerable problems associated with diagnosing the disease, it may not be possible for an employee to be diagnosed as a byssinotic until he has been retired for longer than five years. Indeed, the Subcommittee learned that even though public awareness concerning and medical knowledge regarding the disease has increased appreciably during the last decade, undisputed medical diagnoses regarding byssinosis still are the exception rather than the rule.

The Virginia Brown Lung Association favors amending § 65.1-52 so that in byssinosis cases the worker would have two years from the date of diagnosis to file a claim. Dan River, Inc. has proposed increasing the five year provision to seven years. Fieldcrest Mills, Inc., the Commonwealth's other large textile company, has opposed any increase in the five year provision.

Because the health of a chronic byssinotic may continue to deteriorate even after he retires from the mill, and because of the considerable problems associated with diagnosing someone as a byssinotic, the Subcommittee believes that the five year provision in Code § 65.1-52 should be increased. On the other hand, because the likelihood of a worker becoming a chronic byssinotic diminishes once he retires from a mill, the Subcommittee feels that seven years from the date of retirement is a sufficient period of time for him to be diagnosed as a byssinotic and to file a claim.

A copy of the occupational disease statute of limitations proposed by the Subcommittee is attached as Appendix IV.

Recommendation No. 3: Byssinosis should be removed from paragraph (20) of Code § 65.1-56, which groups byssinosis as a pneumoconiosis along with silicosis, asbestosis and coal miner's pneumoconiosis; and a new paragraph within that section, which would relate only to byssinosis, should be enacted.

Code § 65.1-56 specifies what percentage of an employee's average weekly wage he would receive in the form of compensation if he sufferd any of certain work-related disabilities. The statute also specifies the maximum length of time for which an employee would be able to receive compensation if he suffered any of the disabilities specified in the section. Paragraph (20) of that section relates to compensation for persons disabled by silicosis, asbestosis, coal miner's pneumoconiosis and byssinosis.

The Subcommittee heard extensive testimony which indicated that byssinosis is substantially different from the other diseases specified in paragraph (20) of § 65.1-56. One major difference is that byssinosis cannot be diagnosed or staged by X-rays or autopsy, while silicosis, asbestosis and coal miner's pneumoconiosis can be. This difference probably is due to the fact that the other lung diseases specified in paragraph (20) are caused by the inhalation of mineral or metallic particles, while byssinosis is caused by exposure to cotton dust.

The Subcommittee would point out that both the Virginia Brown Lung Association and the Commonwealth's textile industry favor the reclassification of byssinosis within § 65.1-56. Given that fact, and given that byssinosis appears to be a different type of disease from black lung, silicosis and asbestosis, the Subcommittee believes it would be appropriate to create a new paragraph within the statute which would relate only to compensation for byssinosis victims.

Enclosed as Appendix V of this report is a copy of the legislation recommended by the Subcommittee to effect this change.

Recommendation No. 4: A five member Advisory Medical Committee on Byssinosis, appointed by the Governor and consisting of pulmonary specialists, should be created. When a byssinosis case involving conflicting medical evidence reached the full Commission level, the Industrial Commission would send the claimant to one of the members of the Advisory Medical Committee for a thorough examination. The Committee member would submit a report of his medical findings and conclusions to the Commission; and the Commission would consider that report, along with the reports submitted by the claimant's physician and the insurer's physician, prior to making a decision or rendering an opinion. The findings and conclusions in the report submitted by the Committee physician would not be binding on the Commission.

Prior to making this recommendation the Subcommittee thoroughly analyzed the operation of the North Carolina byssinosis medical panel. That panel now consists of 17 members, all of whom are certified in pulmonary medicine or eligible for certification in pulmonary medicine. When a claim alleging byssinosis is filed, the North Carolina Industrial Commission chooses a physician on the panel to examine the claimant. The insurance carrier, or the employer, (if self insured) pays for the claimant's medical exam. The panel physician thoroughly tests the worker, and he also asks numerous questions regarding family medical histoy and the worker's exposure history. Within 30 days from the date of the exam the physician submits a report of his findings and conclusions. Usually, if the panel physician makes a diagnosis of byssinosis, the Industrial Commission almost automatically makes an award in favor of the claimant.

The Subcommittee was impressed by the North Carolina system, though the study group also felt that Virginia should not adopt an identical system. The Subcommittee believes that the problems associated with diagnosing byssinosis make it desirable for the Commonwealth to establish an Advisory Medical Committee on Byssinosis, so that in certain cases a claimant alleging byssinosis would be examined by an impartial, disinterested physician with training and experience in the field of pulmonary diseases.

The Subcommittee learned that presently in byssinosis cases the Industrial Commission receives two medical reports – one from a physician chosen by the employee and one from a physician chosen by the employer. Usually these two medical reports contain different findings and conclusions. Typically, the report submitted by the employee's physician will state that the employee's chronic obstructive lung disease is due primarily to exposure to cotton dust, while the report submitted by the employer's physician will state that the employee's chronic obstructive lung disease is due primarily to smoking, heredity, or some other non-work- related factor. Mr. Joyner testified before the Subcommittee that quite often the report submitted by the employer's physician is the more impressive because it spells out in greater detail the reasons for the physician's findings and conclusions. Mr. Joyner further testified that many times the two medical reports differ substantially in their quality and length.

The Subcommittee believes that given the conflicting medical testimony which is usually presented the Commission in byssinosis cases, it would be advantageous if the Commission were presented with a report from a third physician who had no interest in the case.

The study group would point out that presently the Industrial Commission has the statutory authority to send a claimant to an impartial medical expert. However, Mr. Joyner testified that the

Commission sends a claimant to an impartial physician only when the medical evidence presented the Commission is hopelessly contradictory. He further testified that the Commission has not been sending byssinotic claimants to an impartial physician. The Subcommittee feels that in certain cases it should be mandatory that the claimant be sent to a third physician, given the differences in the content, length and quality of the medical reports presently being submitted in byssinosis cases.

The Subcommittee does not believe it is necessary or advisable for the Industrial Commission to refer all byssinotic claimants to a member of the Advisory Medical Committee for examination. Indeed, the study group is of the opinion that there is no need to send a claimant to a Committee member unless the case involves conflicting medical testimony. Also, the study group believes there is no need to refer a claimant to a Committee member until a timely application for review before the full Commission has been filed.

The Subcommittee recommends that the findings and conclusions submitted by the Committee member not be binding on the Commission as to any disputed medical issues. The study group feels that the Industrial Commission, not the medical profession, should continue to decide byssinosis cases. The Subcommittee believes that the Industrial Commission should simply review and consider the report submitted by the physician serving on the Advisory Medical Committee.

Mr. Joyner advised the Subcommittee that the cost of operating an Advisory Medical Committee on Byssinosis would be approximately $100 for each case referred to a Committee member. Hence, the Subcommittee projects that the cost of operating an Advisory Medical Committee would be low, given the small number of byssinosis claims filed annually. (As of July 1, 1981, only 18 claims based on byssinosis had been filed with the Industrial Commission since the disease become compensable in 1970). The study group therefore projects that the establishment of an Advisory Medical Committee will not have a significant financial impact on either the insurance industry or the general public.

Attached as Appendix VI of this report is a copy of the Subcommittee's recommended legislation establishing an Advisory Medical Committee on Byssinosis.

Appendix VII consists of Delegate Robert S. Bloxom's dissenting opinion regarding the establishment of the Advisory Medical Committee.

CONCLUSION

The Subcommittee expresses it appreciation to all parties who participated in its study. The study group's recommendations have been offered only after carefully and thoroughly studying the data and information it received. The Subcommittee believes that its recommendations are in the best interests of the Commonwealth, and it encourages the General Assembly to adopt those recommendations.

Respectfully submitted,

Lewis P. Fickett, Jr.
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Appendix I

INITIAL STAFF STUDY FOR THE JOINT SUBCOMMITTEE STUDYING COMPENSATION FOR BROWN LUNG VICTIMS

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AUTHORITY FOR STUDY

The Joint Subcommittee Studying Compensation For Brown Lung Victims was established pursuant to House Joint Resolution No. 245 of the 1981 General Assembly. Appendix I of this report consists of a copy of that resolution.

OBJECTIVES

It would appear that the subcommittee should strive to achieve the following objectives:

(1) A clear understanding of how brown lung (byssinosis) victims are effected;

(2) An understanding of the medical controversy concerning brown lung and the methods by which the disease may be diagnosed;

(3) An understanding of the Commonwealth's workmen's compensation laws which relate to byssinosis;

(4) Identification of possible problems with those laws and consideration of changes to the statutes;

(5) The drafting of appropriate legislation to effect any changes in the law which the subcommittee deems appropriate.

SCHEDULE

The subcommittee is respectfully requested to hold its first meeting of the year at the earliest possible date. Also, it is requested that the subcommittee try to complete its work by the earliest possible date.

House Joint Resolution No. 245 states that "the joint subcommittee is requested to complete its study not later than November one, nineteen hundred eighty-one, and to introduce any legislation it deems appropriate." Given the November one completion date specified in the resolution, it would be appropriate for the subcommittee to attempt to conclude its deliberations by October fifteen. If the subcommittee was to conclude its deliberations by October fifteen, this would allow its staff ample time, prior to the opening of the 1982 General Assembly Session, to draft any legislation desired by the subcommittee, as well as ample time to write a report, if the subcommittee desires a written report. Moreover, if the subcommittee was to conclude its deliberations by October fifteen, this would allow the study group members to devote more attention to their other studies.

DISCUSSION OF ASPECTS OF THE BROWN LUNG ISSUE

Medical and Diagnostic Aspects

It is now generally recognized that the inhalation of cotton dust over a period of time can cause, in certain individuals, a potentially severe lung disease called byssinosis or brown lung. It has been estimated that as many as 35,000 cotton workers in this country may have been forced to retire prematurely because of a disablng loss of lung function due to dust exposure.

It is important to keep in mind that there is tremendous disagreement over the number of persons in this country who actually suffer from byssinosis. While the Occupational Safety and Health Administration projects that there are approximately 84,000 brown lung cases of one degree or another in the cotton textile manufacturing and cotton producing industries, the American Textile Manufacturers Institute arrives at a figure of 2,330. (See Appendix II of this report).

Cotton dust is present wherever raw cotton is used. Raw cotton may come as floor sweepings

and other waste from cotton processing operations, as well as in bales. Cotton dust gets into the air during the handling and processing of raw cotton. It is the invisible particles of cotton dust - the particles small enough to enter the lungs during breathing - that appear to be the disease-causing agents.

Workers show extremely varied reactions to cotton dust. Some individuals have been able to work around cotton dust for forty years or more with very little, if any, impairment to their health. Other individuals may begin to exhibit acute symptoms of lung disorders after only several years exposure. Indeed, no two individuals are affected by cotton dust in exactly the same way.

Byssinosis does not cause nodules to form or create fibrosis, which distinguishes it from other occupational lung diseases that change the structure or visual appearance of the lungs. For that reason, brown lung cannot be diagnosed by autopsy or X-ray. If fact, there is no fool-proof test which can be used to distinguish it from non-occupational -related lung ailments.

Traditionally, medical researchers have attempted to differentiate between byssinosis and chronic bronchitis by subjectively identifying a specific pattern of initial symptoms which are not experienced by persons suffering from non-work-related bronchitis. Specifically, some experts believe that the "typical" byssinosis victim experiences the following symptoms:

After working for years with no trouble except a little cough, a cotton mill worker experiences an intensification of the cough or severe attacks of breathlessness. The intensification of the cough or the severe attacks of breathlessness initially occurs on Mondays, and the worker does not experience the severe cough or breathlessness the rest of the week. However, over a period of time the "Monday fever" begins to appear during the other days of the work week. After awhile the worker suffers continuously. The worker may have to give up work, and there may be some improvement if he does so. However, if the worker resumes work, eventually he will have to quit again.

Believing that this pattern characterized the typical byssinosis victim, Dr. Richard Schilling, a leading British researcher, designed a questionnaire on respiratory conditions and work history. This questionnaire is the common diagnostic tool for byssinosis. Schilling believes that brown lung can be diagnosed by thoroughly reviewing an employee's work history and his pattern of respiratory symptoms while on the job. The worker's group of symptoms are then characterized as Grade 0, Grade 1/2, Grade 1, Grade 2 or Grade 3. A key characteristic of Schilling's technique is that it is subjective in that it relies upon a worker's own description of his symptoms.

Because of the imperfections relating to the Schilling approach, sometimes more objective breathing tests are used in conjunction with the Schilling method to diagnose brown lung. One such method was developed by the late Dr. Arend Bouhuys, formerly a Yale University Professor of Medicine. Bouhuys' method involves objective lung function testing in which a worker's ability to expire air after exposure to cotton dust is compared to his ability to expire air prior to exposure to cotton dust. A worker showing a decrease in lung function capability is graded as to the severity of the impairment. The diagnosis is supplemented by the Schilling questionnaire.

A paper published by Dr. Bouhuys regarding presumptive criteria for disability compensation constitutes Appendix III of this paper.

Joseph Hughes, a Research Associate for the Institute for Southern Studies, made the following remarks after conducting a thorough study of the brown lung problem in the Carolinas:

"Unfortunately, both of these methods [Schilling and Bouhuys] have proved to be inadequate in diagnosing byssinosis among workers who have already been exposed to cotton dust over a long period of time. Using the method of pulmonary function testing before and after exposure has proved to be an unreliable diagnostic tool because, as Bouhuys and others have shown, 90% of the individuals exposed to cotton dust experience some decrement in their function, not just the certain individuals who may be susceptible to the disease. For severely disabled individuals, further exposure for measuring reactions to cotton dust have proved to be both ethically unwise and practically impossible." (Joseph Hughes, Brown Lung Disability: Costs, Compensation & Controversy , 1979, p. 19).

Attached as Appendix IV of this report is a copy of Hughes' complete report.

Distinguishing byssinosis from non-work-related chronic lung diseases is of vital importance in wokmen's compensation cases, where work-related disabilities and diseases are compensable, while non-work-related disabilities and diseases are not. Yet, the diagnosis of brown lung is still highly controversial; because once the disease becomes chronic, its clinical symptoms closely resemble other severe lung diseases, such as emphysema and chronic bronchitis. Specifically, chronic bronchitis, emphysema and brown lung all result in breath shortness, obstruction of small airways and severe coughing with sputum. Consequently, claimants who say they have brown lung often have a difficult time proving that their disability is due to the work environment rather than to smoking or some other non-work-related cause.

The Brown Lung Problem in the Carolinas and Virginia

The textile industry traditionally has been, and remains, the major manufacturing industry in many southern states. North Carolina and South Carolina produce far more cotton textile products than any other states in the country. It is estimated that approximately 391,500 Carolinians work in the textile industry. It is further estimated that approximately one-third of those persons work in plants using cotton.

The Charlotte Observer , in a stunning series of articles published during February, 1980, said that approximately 18,000 cotton mill workers in the Carolinas suffer from brown lung. The Observer further stated that only about 320 of the 1,136 disabled workers filing claims have received workmen's compensation. The Observer pointed out that some workers died while waiting for compensation, while others found that the settlements they received sometimes did not cover medical expenses and lost wages.

The Charlotte Observer won a Pulitzer Prize for its series of articles dealing with byssinosis. Those articles are attached as Appendix V of this report.

Although medical experts have been aware of the existence of brown lung for some time, it was not until the formation of the Carolina Brown Lung Association in the mid 1970s that the byssinosis issue came to the attention of the general public. For the last six years the Carolina Brown Lung Association has been lobbying before state and federal legislative and regulatory bodies in an attempt to make state and federal laws more favorable to brown lung victims. Recently a similar organization, the Virginia Brown Lung Association, began operating in the Danville-Martinsville area.

The Virginia Brown Lung Association says that byssinosis is a serious, but virtually unrecognized problem in the Danville-Martinsville area. Further, the organization says that although brown lung has been compensable under Virginia's workmen's compensation law since 1970, the problems of disease recognition and limitations in the State Code have resulted in only one award of compensation by the State Industrial Commission. The Virginia Brown Lung Association has advocated changes in the following provisions of Virginia law:

(1) The occupational disease statute of limitations, which is found in Code § 65.1-52. (Attached as Appendix VI is a copy of that Code section). This section provides that for brown lung victims, the right to collect workmen's compensation shall be forever barred unless a claim is filed with the Industrial Commission within two years after a diagnosis of the disease or within five years from the date of the last injurious exposure in employment, whichever first occurs. The Virginia Brown Lung Association (VBLA) has said that it is extremely difficult for brown lung victims in Southside Virginia to obtain a diagnosis of the disease within the five year period. Therefore, that organization argues that byssinosis, like certain other diseases, should be exempted from the five year statute of limitations and that any claim should be valid as long as it is filed with the Commission within two years after a diagnosis of brown lung.

(2) Code section 65.1-56, which groups brown lung with black lung and other pneumoconioses. (Attached as Appendix VII is a copy of that Code section). Medical evidence to date appears to indicate that byssinosis is a different type of disese from the other diseases listed in paragraph (20) of that section. The fact that byssinosis cannot be diagnosed or staged by X-rays underscores that difference. Despite this difference, the VBLA says that the Industrial Commission practice is to compensate disabled cotton mill workers according to the severity of their disability, based on X-rays, just as the Commission does for workers suffering from coal miner's pneumoconiosis, silicosis and asbestosis. Of course, as was pointed out previously, brown lung can be staged using "Shilling Grades," which have been used in Great Britain for compensation purposes since 1946, or by using a

combination of the Schilling technique and the criteria developed by Dr. Arend Bouhuys, which are based on a worker's forced expiratory volume in one second. (See Hughes, p. 18, and Bouhuys, pp. V and VI, for a description of the diagnostic criteria used by Schilling and Bouhuys, respectively).

(3) Code section 65.1-53, which permits an employee who is affected by, or susceptible to, an occupational disease, subject to the approval of the Industrial Commission, to waive in writing compensation fc- any aggravation of his condition which may result from his working for an employer or continuing to work in the same occupation for the same employer. (Attached as Appendix VIII is a copy of that Code section). The Virginia Brown Lung Association says that in practice, an employer may imply to a worker that he either sign such a waiver or else lose his job or not be hired. The VBLA states that in most cases mill workers depend on the advice of a company physician in deciding whether or not to sign a waiver. The VBLA claims that because of the lack of public and professional awareness regarding byssinosis, a worker seldom makes an informed decision regarding the waiver.

In addition to changes to the three Code sections referred to above, the VBLA believes that the Industiral Commission should not rule against a claimant who has a history of smoking if there has been a clear diagnosis of an occupational disease by a qualified physician. As a reason for its position, the VBLA cites studies which indicate that lung disease is several times more prevalent among cotton mill workers than among smokers.

The VBLA points out that presently the medical community cannot distinguish between damage to the lungs resulting from cigarette smoking and damage to the lungs resulting from cotton dust. Yet, the VBLA claims that in the first case heard by the Industrial Commission since the formation of the VBLA, the Commission denied compensation to a claimant who had a history of smoking, despite the fact that a clear diagnosis of an occupational disease had been made by two physicians. The VBLA said the Commission's opinion in this case has the effect of requiring claimants to prove their claims of an occupational disease by distinguishing between the effects of smoking and cotton dust exposure on their lungs, which is a medical impossibility.

A Summary of Four Industrial Commission Decisions

Attached as Appendix IX of this paper are copies of the opinions rendered by Industrial Commission members in the following byssinosis cases:

(1) Janie L. Simpkins V. Dan River, Inc. (Claim No. 639-117; opinion rendered by Chief Deputy Commissioner Hiner);

(2) The review of the Simpkins case before the full Commission on October 3, 1980 - opinion rendered by Commissioner Joyner;

(3) Evelyn Adams Smith V. Fieldcrest Mills, Inc. (Claim No. 660-914; opinion rendered by Deputy Commissioner Yates);

(4) The review of the Smith case before the full Commission on March 4, 1981 - opinion rendered by Commissioner James.

Both of these claims for compensation were denied, and a brief summary of the two claims and the Commission's opinions may prove enlightening.

At the time she filed her claim, Janie Simpkins was a sixty-year old textile worker who had been employed by Dan River, Inc. from 1942 to 1966 and from 1975 to 1979. In mid-March, 1979, upon medical advice, Ms. Simpkins took a leave of absence from Dan River. It is important to keep in mind that the claimant has been a cigarette smoker for most of her adult life.

A Duke University pulmonary specialist, Dr. Herbert A Saltzman, diagnosed Ms. Simpkins as suffering from chronic bronchitis and Stage 3 byssinosis (the most disabling and chronic stage of that disease). Another pulmonary specialist, Dr. T. Reginald Harris, agreed with the diagnosis of Stage 3 byssinosis and chronic bronchitis. Dr. Ellsworth F. Mariner, a general practitioner, and plant physician for Dan River, diagnosed her condition as chronic obstructive lung disease.

Dr. Saltzman indicated that in his opinion, Ms. Simpkins' byssinosis was directly related to her

employment. However, he stated that it is not possible from testing to separate the effects of exposure to cotton dust and the effects of smoking. Furthermore, he stated, all of the claimant's symptoms could have come from cotton dust exposure or all of them could have come from cigarette smoking.

Dr. Harris indicated that in his opinion, both cotton dust exposure and cigarette smoking probably contributed to the claimant's byssinosis and chronic bronchitis. Dr. Mariner testified that cigarette smoking often is a contributing factor in chronic obstructive lung disese.

Based upon this testimony, Chief Deputy Commissioner Hiner concluded that:

"From a review of the medical evidence, we find that the actual diagnosis of claimant's condition is chronic bronchitis caused by two specific irritants: cigarette smoking and cotton dust exposure. It is apparent from the medical reports filed that these causative factors of the diagnosed bronchitis are of nearly equal severity and that a diagnosis of byssinosis as claimant's sole condition cannot be made. For this reason, we cannot award compensation benefits pursuant to Code Section 65.1-56 (20)." (Page 5 of the Hiner opinion).

The full Commission, in a two to one vote, upheld Chief Deputy Commissioner Hiner's decision.

The Smith case involved a similar set of facts. The claimant was a fifty-one year old female who had continuously been employed with Fieldcrest Mills, Inc. for thirty-four years and who is still employed by that company. Evidence submitted indicated that Ms. Smith had smoked between one and a half and two packs of cigarettes daily for approximately ten years immediately prior to the filing of her claim.

During this case testimony was received from Dr. Saltzman and Dr. Harris. Dr. Saltzman concluded that the claimant suffers from Stage 3 byssinosis, emphysema and chronic bronchitis. As he had in the Simpkins case, Dr. Saltzman stated that it was his opinion that Ms. Smith's byssinosis was directly related to her employment. However, as he had in the Simpkins case, he also indicated that all of the claimant's symptoms could have come from cotton dust exposure or all of them could have come from cigarette smoking. He also stated that he had staged the claimant's byssinosis by using the Schilling Index.

Dr. Harris testified that Ms. Smith probably suffers from both byssinosis and emphysema.

In deciding against the claimant, Deputy Commissioner Yates stated that:

"From the record before us it is apparent that there are several imponderables present in this case from the plaintiff's standpoint, such as the history of heavy cigarette smoking, the lack of a diagnostic staging acceptable to this Commission, and the incidence of chronic bronchitis among non-cotton workers. We cannot accept staging, as presented by this plaintiff in acordance with the determination thereof by symptoms only, as binding on this Commission. It is just as likely that this plaintiff has been afflicted with her bronchial problems as an ordinary disease of life (as aggravated by heavy cigarette smoking over a period of ten or more years) as that she sustained her bronchial problems by prolonged exposure (thirty-three years) in this employer's work place..." (PP. 2 and 3 of the Yates opinion).

On March 4, 1981, the full Commission affirmed the decision rendered by Deputy Commissioner Yates.

The Controversy Regarding the Effects of Smoking

A fair amount of research has been conducted to date regarding the degree to which cigarette smoking contributes to chronic lung disease among cotton mill workers. Although there is substantial controversty regarding this issue, many experts believe that exposure to cotton dust is a much greater factor in inducing chronic lung disorders than is cigarette smoking. For example, Dr. Arend Bouhuys, who conducted a great deal of research relating to brown lung before his death in 1979, stated that:

"Studies in industry are not unanimous in their conclusions about the importance of smoking in relation to the acute effects of cotton dust exposure; some have concluded that such an interaction

exists, others have not found it. However, all data agree with the view that the effect of smoking, if it exists, is relatively minor - and our laboratory results are consistent with this view." (Arend Bouhuys, M.D., "Cotton Dust and Lung Disease: Presumptive Criteria For Disability Compensation," April, 1979, p. 7). As was pointed out previously, a copy of Dr. Bouhuys' paper is attached as Appendix III of this report.

Bouhuys has also stated that:

"Epidemiological studies of active and retired cotton textile workers in the U.S. have shown a high prevalence of chronic lung disease and of loss of lung function. The excess disease occurred among nonsmokers as well as among those who had smoked cigarettes in the past, or who still smoked at the time of the survey. Comparisons with the prevalence of disabling lung disease in the general population of three communities, in South Carolina and in Connecticut, confirmed the considerable excess of lung disease among the cotton textile workers." (Bouhuys, p. 3).

Dr. Gerald Beck and Dr. Neil Schachter, associates of Bouhuys at Yale, completed the latter's work and strongly confirmed his findings of earlier studies. Attached as Appendix X of this paper is a copy of a paper presented by Beck and Schachter on March 7, 1980, in Raleigh, North Carolina, before the Governor's Commission on Brown Lung Compensation. In this paper, Dr. Schachter states "that the prevalence of chronic bronchitis amond nonsmoking cotton textile workers age 45 or greater is over 14% compared to a prevalence of only 3 to 4% among nonsmoking healthy subjects not exposed to cotton bract." (Gerald Beck, Ph.D. and Neil Schachter, M.D., "Testimony for the Governor's Commission on Brown Lung Compensation," March 7, 1980, p.3).

On pages 8, 9, and 10 of that testimony, Dr. Beck cites statistics designed to show that cotton dust, and not factors such as sex, race, age and smoking, are primarily responsible for the significant differences in respiratory health found among cotton mill workers on the one hand, and community residents on the other.

However, it should be kept in mind that certain parties strongly disagree with the conclusions reached by Bouhuys, Beck, Schachter, Schilling and others. In an official position paper dealing with the brown lung issue, Dan River, Inc. of Danville, Virginia, offers the following conclusions:

(1) Textile workers in Danville live as long as the general population.

(2) Dan River's workers in cotton and non-cotton textile enviromnments have approximately the same incidence of lung disease.

(3) Cigarette smoking, not cotton dust, is the most important factor in lung disease among textile workers.

Concerning the third conclusion, Dan River states that:

"Obstructive lung disease in the U.S. is on the increase. Dan River test results reveal that approximately 12% of its work force has lung dysfunction ranging from mild to severe and, not unexpectedly, that this group falls into that portion of our work force who are also heavy cigarette smokers...Why should textile workers who evidence irreversible obstructive lung disease now be presumed to be suffering byssinosis symptoms even when they have smoked one or more packs of cigarettes per day for twenty, thirty or forty years?" (Cotton Dust and Occupational Illnesses, A Dan River Position Paper, May, 1980, pp. 10 and 11).

A copy of Dan River's position paper is attached as Appendix XI of this paper.

An article which appeared in the October 17, 1980, edition of the Journal of the American Medical Association has further fueled the controversy over the importance of cigarette smoking and cotton dust in contributing to lung disease. The authors of the article, Dr. Philip Pratt and Dr. Siegfried Heyden of the Duke University Medical Center, imply that chronic lung disease in cotton textile workers is primarily the result of cigarette smoking, not cotton dust exposure. In the article, which was based upon a study conducted by Pratt, Robin T. Vollmer, M.D., and James A. Miller, M.D., Pratt and Heyden make the following comments:

"To those who are responsible for making legislative decisions in such difficult matters, it is

urgent to note that data exist that suggest that byssinosis does not evolve into its more advanced stages amond nonsmokers but does so among smokers. Furthermore, as pointed out earlier, this condition may sometimes reverse itself even in its more severe form if the patient ceases smoking. This reversal occurs despite the patient's continuing to work in the high exposure area... It is difficult to conceive the need for compensation of a disease that rarely reaches irreversible disabling degrees among exsmokers or nonsmokers who continue to work under the same cotton dust exposure." (Philip Pratt, M.D. and Siegfried Heyden, M.D., Ph.D., "Exposure to Cotton Dust and Respiratory Disease," The Journal of the American Medical Association , October 17,1980, Vol. 244, No. 16, p 1798).

A copy of the Pratt and Heyden article is attached as Appendix XII of this report.

It should be noted that for a number of reasons, the Pratt and Heyden article has been strongly attacked by Schachter, Beck, Schilling and others. Schachter and Beck have criticized the Pratt, Vollmer and Miller study by maintaining that the sample size was too small, the worker's exposure to cotton dust was inadequately defined and the statistical analyses was faulty.

Moreover, Schilling stated that it is impossible to draw reliable conclusions regarding the pathology of brown lung from a limited sample of workers. He also describes as totally unwarranted the authors' final conclusion that occupational exposure is not usually the cause of irreversible respiratory disease among cotton mill workers.

Appendix XIII of this paper consists of comments in rebuttal to the Pratt and Heyden article and Pratt's rebuttal to the rebuttals.

RESOURCES

For the purposes of this study, the following organizations appear to be excellent sources for testimony, data or other materials which the subcommittee may desire:

Dan River, Inc.; Fieldcrest Mills, Inc.; The American Textile Manufacturers Institute, Inc.; The North Carolina and South Carolina Industrial Commissions; The Carolina Brown Lung Association; The Virginia Brown Lung Association; The Virginia Industrial Commission; The State Department of Health.

Appendix II

SUMMARY REPORT OF BYSSINOSIS CASES IN VIRGINIA, NORTH CAROLINA AND SOUTH CAROLINA

VIRGINIA (as of July 1, 1981)

No. of awards	* 2
No. of denials by Industrial Commission	6
No. of settlement agreements	1
No. of other cases	** 9
Total number of cases - - - - -	18

* one of the two cases was not contested
** includes those cases in which applications were withdrawn or the cases were not heard by the Industrial Commission for other reasons.

NORTH CAROLINA (as of June 1, 1981)

No. of cases found compensable (by opinion and award or compromise agreement)	652
No. of denials by Industrial Commission	29
No. of cases pending (no request for hearing)	310
No. of cases voluntarily withdrawn	242
No. of cases dismissed	124
No. of cases in hearing status	504
Total number of cases - - - - - - - - - -	1861

SOUTH CAROLINA (as of October 1, 1981)

No. of awards	50
No. of denials by Industrial Commission	70
No. of settlement agreements	243
No. of cases pending	223
No. of cases withdrawn	12
No. of cases dismissed	26
No. of other cases	266
Total number of cases - - - - - - - - - -	890

Appendix III

A Summary of How Workmen's Compensation Systems in
Four Southeastern States Affect Byssinotic Claimants

Prepared by Chip Fisher,
Division of Legislative Services

Georgia

In Georgia an employee takes the initiative to see a physician if he suspects that he has byssinosis. The employee pays for his medical examination. If the physician diagnoses byssinosis, the worker may decide to file a claim.

Georgia law provides that immediately after a diagnosis of an occupational disease is first communicated to an employee, he or someone in his behalf must give written notice to his employer of the diagnosis. After being notified of the diagnosis of byssinosis, the employer usually will send the worker to another physician. If the findings and conclusions of the two physicians are similar, the employee and employer may try to work out a settlement agreement. If the findings and conclusions of the two physicians are substantially different, probably it will not be possible to reach a settlement agreement.

Georgia law provides that in any occupational disease case where medical questions are in controversy, the State Board of Workmen's Compensation must refer the case to a Medical Board for investigation and report. No award can be made in such a case until the Medical Board investigates the case, examines the employee and makes a report to the State Board of Workmen's Compensation with respect to all the disputed medical questions.

The Medical Board consists of five physicians who are appointed by the Governor from a list of nominees submitted by the Medical Association of Georgia. Those persons nominated by the Medical Association to serve on the Board must have training and experience in the fields of roentgenology, internal medicine, pathology, diseases of the chest, toxicology, and diseases of the skin. One of the Board members is designated by the Governor to act as chairman. The State Board of Workmen's Compensation reimburses Board members for their necessary expenses and pays each member a per diem of not more than $50 per day.

When a case involving disputed medical issues is referred to the Medical Board, the Board provides that one of its members examines the claimant. The Board member who examines the claimant then submits to the Board a report of his findings and conclusions. The Medical Board considers that report, as well as X-rays and testimony of other physicians or witnesses, and submits a report to the State Board of Workmen's Compensation. As soon as practicable after the Medical Board files its report, the State Board of Workmen's Compensation sends a copy of the report to the claimant and a copy to the employer and its insurance carrier, if any.

Within 30 days from the date the Medical Board's report is mailed, either party to the dispute may appeal from the decision of the Board. The Medical Board may, in its discretion, schedule the claimant for another examination or take additional evidence it deems proper. After considering the appeal, the Medical Board files its findings and conclusions with the

Compensation Board. The Compensation Board then mails a copy of those findings and conclusions to the claimant, the employer and its insurance carrier, if any.

The report submitted by the Medical Board, either upon original examination or upon appeal, becomes a part of the record in the case and that report is accepted by the Compensation Board as conclusive in regards to the disputed medical questions. The decision made thereafter by the Compensation Board must conform to the medical findings and conclusions in the report.

The Compensation Board may make one of the following decisions in a byssinosis case:

(1) deny the claim;

(2) award the claimant compensation for total disability. A claimant awarded compensation for total disability receives a weekly benefit equal to 66 2/3% of his weekly wage, but not more than $115 per week nor less than $25 per week.

(3) award the claimant compensation for permanent partial disability. A claimant awarded compensation for permanent partial disability because of byssinosis receives weekly income benefits equal to 66 2/3% of his average weekly wage for up to 350 weeks. The weekly income benefits may not exceed $115 per week nor be less than $25 per week.

Regarding another issue, Georgia law provides that in byssinosis cases the employer or insurance carrier shall not be liable for compensation if disablement occurs later than one year after the employee's last injurious exposure to cotton dust. Georgia does not have a "minimum exposure rule" which is applicable to byssinosis cases.

In Georgia a person affected by, or susceptible to, byssinosis cannot waive compensation for any aggravation of his condition which may result from his continuing to work in a cotton mill.

Georgia has an apportionment statute which provides that in any case where an occupational disease is aggravated by any other disease or infirmity not itself compensable or where disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by the occupational disease, the compensation payable must be reduced by the proportion which the non compensable cause contributes to the disability. A representative of the State Board of Workmen's Compensation has stated that in practice the apportionment statute is used to reduce the compensation of a claimant who, in the opinion of the Medical Board, has become disabled due to both a compensable and a non-compensable cause.

Georgia law provides that attorneys' fees related to occupational disease cases must be approved by the State Board of Workmen's Compensation. The attorneys' fees approved by the Board are among the highest in the country for occupational disease cases.

Attorneys' fees can be up to 25% of the settlement amount if the employee and employer reach a settlement and if the settlement is approved by the Board. If a hearing is scheduled but not held, the plaintiff's attorney may receive up to 30% of any income benefits awarded the claimant. If the claimant is awarded income benefits after a hearing, his attorney may receive up to 33 1/3% of those income benefits. Of course, if the claimant does not receive any compensation, then his attorney will not receive a fee for his work.

As was pointed out previously, a workmen's compensation claimant in Georgia alleging an occupational disease automatically is sent to the Medical Board if his case involves disputed medical findings and conclusions. A representative of the State Board of Workmen's Compensation has stated that the use of the Medical Board makes it more difficult for a claimant to win compensation than would be the case if the Board did not exist. That representative further stated that the system in Georgia has not worked well; because, he said, the physicians comprising the Medical Board are very reluctant to state that a disability is work related.

He added that those physicians require that a great deal of scientific proof support the claimant's contention before they will make a diagnosis of an occupational disease. The scientific proof required by the Medical Board, he said, usually is more difficult to obtain than is the judicial proof required by the Compensation Board. The result is that the Medical Board seldom sides with the claimant in regards to disputed medical issues. Furthermore, Georgia law provides that where a claim before the State Board of Workmen's Compensation involves the question of whether the employee is disabled as a result of an occupational disease, sole jurisdiction to decide the medical issue lies with the Medical Board and the only jurisdiction of the Compensation Board is to enter an award in conformity with the findings and conclusions of the Medical Board.

South Carolina

When South Carolina passed legislation in 1950 which made occupational diseases compensable under that state's workmen's compensation act, an occupational disease medical review panel was established to aid in the diagnoses of occupational diseases. However, between 1950 and 1972 the physicians on the panel never made a diagnosis of an occupational disease. Consequently, during that time period the South Carolina Industrial Commission did not enter any awards for claimants alleging occupational diseases. The occupational disease medical panel has since been abolished.

Presently a worker in South Carolina filing a claim for compensation based on byssinosis is examined by a physician chosen by the insurance carrier or the employer if self-insured. In addition, the worker may, of course, be examined by a physician of his choosing. If requested by either the worker or the insurer, the Industrial Commission sends the worker to one of the state's two medical schools, which are located in Columbia and Charleston.

The claimant is given a thorough examination at the school by a pulmonary specialist, and the pulmonary specialist submits a medical report to the Industrial Commission. Although there is no time limit on how long the physician may take to submit his report, most of the medical reports are submitted to the Commission within 30 to 60 days. The Commission distributes a copy of the report to the claimant and the insurer.

The physician's medical report is advisory only, and any recommendations which may be in the report are not binding on the Industrial Commission.

The expenses and fees associated with the medical exam are paid by the Industrial Commission. However, if the claimant subsequently wins his case, the insurance carrier or the employer reimburses the Commission for those expenses and fees.

Voluntary settlements made by and between an employee and employer are valid in South Carolina so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of the workmen's compensation act and so long as the settlement agreement is approved by the Industrial Commission.

If a case goes to hearing before the Industrial Commission, the Commission may make any one of the following decisions:

(1) deny the claim;

(2) award the claimant compensation for total disability. In such a case the claimant is paid a weekly compensation equal to 66 2/3% of his average weekly wages, but not less than $25 a week nor more than the state's average weekly wage for the preceding fiscal year. The period covered by such compensation cannot exceed 500 weeks.

(3) award the claimant compensation for partial disability. In such a case the claimant is paid a weekly compensation equal to 66 2/3% of the difference between his average weekly wages before the disablement and the average weekly wages which he is able to earn thereafter, but not more than the state's average weekly wage for the preceding fiscal year. The period covered by such compensation cannot exceed 340 weeks from the date of disablement.

South Carolina law provides that a worker filing a claim for benefits based on byssinosis must have been exposed to cotton dust for at least seven years.

The state also has a statute which provides that a worker who has previously suffered from an occupational disease may, subject to the approval of the Industrial Commission, waive his right to receive further benefits for disablement or disability from such disease. Although this provision is still in the South Carolina Code, the Industrial Commission does not approve waivers in cases of byssinosis.

South Carolina law also provides that in cases of occupational disease, the right to compensation shall be forever barred unless a claim is filed with the Commission within two years of the date the worker is notified of a diagnosis of the disease.

South Carolina also has an apportionment statute, which reads as follows: "When an occupational disease prolongs, accelerates or aggravates or is prolonged, accelerated or aggravated by any other cause or infirmity not otherwise compensable, the compensation payable for disability or death shall be limited to the disability which would have resulted solely from the occupational disease if there were no other such cause or infirmity and shall be computed by the proportion which the disability from occupational disease bears to the entire disability."

Despite the existence of the apportionment statute, the South Carolina Industrial Commission presently does not apportion between compensable and non-compensable causes of a disease and apparently never has done so. To some degree at least, the need for apportionment has been made unnecessary by the use of the state's Second Injury Fund to reimburse an employer or carrier when disability results from a combination of a preexisting impairment and subsequent injury or exposure.

In comparison to Virginia, a byssinotic claimant in South Carolina is not required to carry as great a burden of proof in order to win his case before the Industrial Commission. Contrary to the situation in Virginia, a byssinotic claimant in South Carolina does not have to prove that his disability is solely the result of cotton dust exposure before he is awarded benefits.

A claimant's attorney in South Carolina receives 33 1/3% of any settlement amount or 33 1/3% of any award.

North Carolina

North Carolina has established a medical review panel to aid in the diagnosis of byssinosis. The panel was not established by statute. Rather, it was established by the Industrial Commission under the Commission's authority to promulgate those rules and regulations necessary for its efficient operation. The byssinosis medical review panel now consists of 17 members, all of whom are certified in pulmonary medicine or eligible for certification in pulmonary medicine.

When a claim alleging byssinosis is filed, the Industrial Commission chooses a physician on the panel to examine the claimant. The insurance carrier, or the employer, (if self insured) pays for the claimant's medical exam.

Panel physicians administer the following tests to each worker who has filed a claim for compensation based on byssinosis: (1) comprehensive pulmonary function tests; (2) lung volume tests; (3) arterial blood gas studies and carbon monoxide diffusion tests; and (4) a complete physical, including chest x-ray and EKG. In addition to these tests, the physician asks the claimant numerous questions regarding: (1) family medical history; (2) personal work and exposure history; and (3) symptoms the claimant may have noticed.

In the reports they submit to the Industrial Commission, panel physicians sometimes make estimates regarding the degree to which they believe various factors are responsible for the claimant's disability. For example, a physician may state in his report that he estimates that 55% of a claimant's disability is due to cotton dust exposure and 45% is due to cigarette smoking. However, because such apportionment of causation in byssinosis cases is subject to a great magnitude of error, some of the physicians on the panel do not make such estimates.

The physician examining a claimant submits a report of his findings within 30 days from the date of the exam. Quite often the claimant's attorney and the insurer attempt to reach a settlement after the issuance of the medical report. The claimant's attorney may dismiss the case after receiving the medical report. If the case is not dismissed and if a settlement agreement cannot be reached, within 90 days after the receipt of the medical report a hearing before the Industrial Commission can be requested. If a byssinosis case goes to hearing, the Commission can take any of the following actions:

(1) deny the claim;

(2) award the claimant compensation for total disability. During his incapacity a claimant judged to be totally incapacitated receives a weekly compensation equal to 66 2/3% of his average weekly wages, up to the present weekly maximum of $210.

(3) award the claimant compensation for partial incapacity. During his incapacity a claimant judged to be partially incapacitated receives a weekly compensation equal to 66 2/3% of the difference between his average weekly wages before the disablement and the average weekly wages which he is able to earn thereafter, up to the present weekly maximum of $210. The period covered by such compensation cannot be greater than 300 weeks from the date of disablement.

(4) make an award because of the loss of or permanent injury to any important external or internal organ. For example, a byssinosis victim can be awarded up to $10,000 if one lung is permanently injured and $20,000 if both lungs are permanently injured.

North Carolina has no "minimum exposure rule" which is applicable in byssinosis cases.

Regarding the occupational disease statute of limitations, the North Carolina Code states that: "The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be." This statute has been interpreted several different ways and the case law on this issue is confusing. The Chairman of the North Carolina Industrial Commission has stated that because of the conflicting case law, the Commission is uncertain as to when the occupational disease statute of limitations should begin to run in byssinosis cases. However, he has also stated that in recent cases the statute has been interpreted as meaning that a byssinosis victim has two years from the date of diagnosis of the disease to file a claim.

North Carolina does not allow either byssinosis victims or those persons susceptible to the disease to sign agreements whereby they waive their rights to any future benefits.

Plaintiffs' attorneys in North Carolina receive 20% of the settlement if the case is settled prior to hearing, 25% of the amount of compensation awarded if it goes to hearing, and 33 1/3% of the amount of compensation if the original decision is appealed. All attorneys' fees must be approved by the Industrial Commission.

In comparison to Virginia, a byssinotic claimant in North Carolina is not required to carry as great a burden of proof in order to win his case before the Industrial Commission. Contrary to the situation in Virginia, a byssinotic claimant in North Carolina does not have to prove that his disability is solely the result of cotton dust exposure before he is awarded benefits.

The only byssinosis case in which the North Carolina Industrial Commission has employed the concept of apportionment was the case of Elsie T. Morrison v. Burlington Industries and Liberty Mutual Insurance Company. The claimant in this case had worked for 27 years in the cotton spinning department of a Burlington mill and had developed chronic obstructive lung disease. The Industrial Commission determined that 55% of Mrs. Morrison's disability was due to exposure to cotton dust and 45% of the disease resulted from factors unrelated to her work (chronic bronchitis, diabetes, and phlebitis of the left leg). It should be noted that Mrs. Morrison was a cigarette smoker.

The Commission found that while Mrs. Morrison was totally disabled, she was entitled to compensation for partial rather than total disability. The Commission indicated that Mrs. Morrison was awarded compensation for partial rather than total disability due to the fact that it had attributed part of her incapacity to work to pre-existing or latent illnesses or infirmities.

The Commission's decision was appealed to the North Carolina Court of Appeals. In an opinion dated June 3, 1980, the Court of Appeals reversed the Industrial Commission opinion and stated that "if an employee's incapacity to

work is total and that incapacity is occasioned by a compensable injury or disease, the employee's incapacity to work cannot be apportioned to other pre-existing or latent illnesses or infirmities, nor may the entitlement to compensation be dismissed for such conditions." The Morrison case presently is before the North Carolina Supreme Court.

Virginia

In Virginia an employee takes the initiative to see a physician if he suspects that he has byssinosis. The employee pays for his medical examination. If the physician diagnoses byssinosis, the worker may decide to file a claim.

Virginia law provides that within sixty days after a diagnosis of an occupational disease is first communicated to an employee, he or someone in his behalf must give written notice to his employer of the diagnosis. After being notified of the diagnosis of byssinosis, the employer usually will send the worker to another physician. If the findings and conclusions of the two physicians are similar, the employee and employer may try to work out a settlement agreement. If the findings and conclusions of the two physicians are substantially different, a settlement agreement probably will not be possible.

If the employee and employer do not reach a settlement, the employee may either dismiss his case or ask for a hearing. If the case goes to hearing before the Industrial Commission, the Commission may either deny the claim or make an award under Virginia Code § 65.1-56, a copy of which is enclosed. That section provides that the incapacity in each case of byssinosis shall be deemed to continue for the following specified period and the compensation awarded for the disablement shall be as follows:

(1) 66 2/3% of the employee's average weekly wage for 50 weeks if the disease is medically determined to be in the first stage;

(2) 66 2/3% of the employee's average weekly wage for 100 weeks if the disease is medically determined to be in the second stage;

(3) 66 2/3% of the employee's average weekly wage for 300 weeks if the disease is medically determined to be in the third stage.

In addition, § 65.1-56 apparently provides that an individual who is still incapacitated at the end of 300 weeks may receive compensation pursuant to § 65.1-54 (total incapacity) or § 65.1-55 (partial incapacity). Attached are copies of §§ 65.1-54 and 65.1-55.

Byssinosis, along with silicosis, asbestosis and black lung, is included as a pneumoconiosis in § 65.1-56. Most parties agree that byssinosis should not be classified as a pneumoconiosis in the State Code. Byssinosis appears to be a different type of disease; and whereas silicosis, asbestosis and black lung can be diagnosed and staged by x-ray, byssinosis cannot. One Industrial Commission representative commented recently that in regards to the brown lung controversy, the inclusion of byssinosis in paragraph (20) of §65.1-56 is the single problem most in need of remedy.

Alternatives to the present law would include providing for compensation for byssinosis victims under §§ 65.1-54 (total incapacity) and 65.1-55 (partial incapacity) or adding a new paragraph to § 65.1-56 which would deal with compensation for byssinosis victims only.

Various parties contend that the State's occupational disease statute of limitations, §65.1-52, also needs to be changed. Enclosed is a copy of that statute.

Presently §65.1-52 provides that the right to compensation for byssinosis shall be forever barred unless a claim be filed with the Industrial Commission within two years after a diagnosis of the disease is first communicated to the employee or within five years from the date of the last injurious exposure in employment, whichever first occurs. The Virginia Brown Lung Association believes that the statute should be amended so that a claim based on byssinosis would be valid as long as it was filed within two years after diagnosis of the disease. Alternatively, the largest textile company in Virginia, Dan River, Inc., has proposed that the period of time from the last injurious exposure be increased to seven years.

The Brown Lung Association also has advocated repeal of the waiver provision found in Virginia Code § 65.1-53. That section provides that when an employee or prospective employee is found to be affected by, or susceptible to, a specific occupational disease, he may, subject to the approval of the Industrial Commission, waive in writing compensation for any aggravation of his condition that may result from his working or continuing to work in the same or similar occupation for the same employer.

Although the statute does permit a possible byssinosis victim to waive his right to compensation, the Industrial Commission has not approved such a waiver during the last three years for any employee of Dan River, Inc. The textile industry in Virginia has indicated that it can support changes to, and possibly the repeal of, the waiver provision.

Regarding another issue, Virginia does not have a "minimum exposure rule" which is applicable to occupational diseases.

A brown lung claimant in Virginia must carry a great burden of proof if he is to be awarded benefits by the Industrial Commission. In its most recent opinions, the Industrial Commission has implied that a byssinosis victim must prove that his disability is caused solely by cotton dust in order to win his case. Such a viewpoint makes it virtually impossible for a byssinotic smoker to win his case before the Commission.

The Chairman of the State Industrial Commission, Mr. Robert P. Joyner, has stated that in regards to byssinosis cases, the primary difference between the North Carolina and Virginia Industrial Commissions has to do with how the law is administered. Mr. Joyner has pointed out that the Virginia Commission receives testimony from some of the same physicians who serve on the byssinosis review panel in North Carolina. He has further pointed out that the Virginia Commission is more likely than the North Carolina Commission to rule against byssinotic claimants.

Mr. Joyner also has stated that the Virginia Commission is reluctant to abdicate to the medical profession in brown lung cases. It should be kept in mind that the North Carolina Industrial Commission usually awards a claimant compensation if the medical panel member who examines the claimant makes a diagnosis of byssinosis.

In summary, it would be fair to say that the North Carolina Industrial Commission treats the byssinosis issue as more of a medical problem, while the Virginia Commission treats it more as a legal problem in which the claimant usually fails to carry the burden of proof.

In Virginia all attorneys' fees associated with byssinosis cases are subject to the approval and award of the Industrial Commission. The fees approved by the Commission vary greatly from case to case, depending on the amount of time an attorney devotes to a particular case. The greater the amount of time which a plaintiff's attorney devotes to an occupational disease case, the greater his share of any settlement or award.

An Industrial Commission representative has stated that although the amount of fees awarded varies greatly from case to case, typically a plaintiff's attorney is awarded approximately 12% of any settlement.

There is no apportionment statute in the Virginia Code. An Industrial Commission representative has stated that the Commission has never used apportionment to reduce a claimant's benefits, nor does that representative foresee that the Commission will use the apportionment concept in the future.

§ 65.1-52. Limitation upon claim; "injurious exposure" defined; diseases covered by limitation. — The right to compensation under this chapter shall be forever barred unless a claim be filed with the Industrial Commission within three years for coal worker's pneumoconiosis and two years for all other occupational diseases after a diagnosis of an occupational disease is first communicated to the employee or within five years from the date of the last injurious exposure in employment, whichever first occurs; and, if death results from the occupational disease within either of said periods, unless a claim therefor be filed with the Commission within three years after such death. The limitations imposed by this section as amended shall be applicable to occupational diseases contracted before and after July one, nineteen hundred sixty-two, and § 65.1-87 shall not apply to pneumoconiosis.

"Injurious exposure" as used in this section and in § 65.1-50 means an exposure to the causative hazard of such disease which is reasonably calculated to bring on the disease in question. Exposure to the causative hazard of pneumoconiosis for ninety work shifts shall be conclusively presumed to constitute injurious exposure. This limitation on time of filing will cover all occupational diseases, except:

Cataract of the eyes due to exposure to the heat and glare of molten glass or to radiant rays such as infrared;

Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to pitch, tar, soot, bitumen, anthracene, paraffin, mineral oil or their compounds, products or residues;

Radium disability or disability due to exposure to radioactive substances and X ray;

Ulceration due to chrome compound or to caustic chemical acids or alkalies and undulant fever caused by the industrial slaughtering and processing of livestock and handling of hides;

Mesothelioma due to exposure to asbestos;

Angiosarcoma of the liver due to vinyl chloride exposure.

In any case in which a claim is being made for benefits for a change of condition in an occupational disease (that is, advancing from one stage or category to another) the claim must be filed with the Commission within three years from the date for which compensation was last paid for an earlier stage of the disease. (Code 1950, § 65-49; 1952, c. 205; 1960, c. 297; 1962, c. 588; 1968, c. 660; 1970, c. 470; 1972, c. 612; 1974, c. 201; 1975, cc. 27, 471; 1979, cc. 80, 201.)

§ 65.1-53. Waiver. — When an employee or prospective employee, though not incapacitated for work, is found to be affected by, or susceptible to, a specific occupational disease he may, subject to the approval of the Industrial Commission, be permitted to waive in writing compensation for any aggravation of his condition that may result from his working or continuing to work in the same or similar occupation for the same employer. The Industrial Commission shall approve a waiver for coal worker's pneumoconiosis and silicosis only when presented with X-ray evidence from a physician qualified in the opinion of the Industrial Commission to make the determination and which demonstrates a positive diagnosis of the pneumoconiosis or the existence of a lung condition which makes the employee or prospective employee significantly more susceptible to the pneumoconiosis.

In considering approval of a waiver, the Commission may supply any medical evidence to a disinterested physician for his opinion as to whether the employee is affected by the disease or has the preexisting condition. (Code 1950, § 65-50; 1968, c. 660; 1970, c. 517; 1979, c. 201.)

§ 65.1-54. Compensation for total incapacity; computation of average wage. — When the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total incapacity, a weekly compensation equal to sixty-six and two-thirds per centum of his average weekly wages, with a minimum not less than twenty-five per centum and a maximum of not more than one hundred per centum of the average weekly wage of the Commonwealth as defined herein. In any event, income benefits shall not exceed the average weekly wage of the injured employee. Any farm employer who continues to furnish benefits while the employee is incapacitated, shall be given credit for the value of such benefits so furnished when computing the compensation due the employee.

For the purpose of this section the average wage in the Commonwealth shall be determined by the Industrial Commission as follows: On or before January one of each year, the total wages reported on contribution reports to the Virginia Employment Commission for the twelve-month period ending the preceding June thirtieth shall be divided by the average monthly number of insured workers (determined by dividing the total insured workers reported for that twelve-month period by twelve). The average annual wage thus obtained shall

be divided by fifty-two and the average weekly wage thus determined rounded to the nearest dollar. The average weekly wage as so determined shall be applicable for the full period during which income benefits are payable, when the date of occurrence of injury or of disablement in the case of disease falls within the year commencing with the July one, following the date of determination.

The minimum or the maximum weekly income benefits shall not be changed for any year unless the computation herein provided results in an increase or decrease of two dollars or more, raised to the next even dollar in the level of the minimum or the maximum weekly income benefits.

In no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed the result obtained by multiplying the average weekly wage of the Commonwealth as defined herein for the applicable year by five hundred, except that weekly compensation on account of total and permanent incapacity as defined by § 65.1-56 (18) shall continue for the lifetime of the injured employee without limit as to total amount. (Code 1950, § 65-51; 1952, c. 226; 1954, c. 654; 1956, c. 243; 1958, c. 568; 1960, c. 556; 1962, c. 503; 1964, c. 94; 1966, c. 64; 1968, cc. 8, 660; 1970, c. 470; 1972, c. 229; 1973, c. 542; 1974, c. 560; 1975, c. 447.)

§ 65.1-55. Compensation for partial incapacity. — Except as otherwise provided, in § 65.1-56, when the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such incapacity a weekly compensation equal to sixty-six and two-thirds per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than one hundred per centum of the average weekly wage of the Commonwealth as defined in § 65.1-54. In no case shall the period covered by such compensation be greater than five hundred weeks from the date of the injury. In case the partial incapacity begins after a period of total incapacity, the latter period shall be deducted from the maximum period herein allowed for partial incapacity. (Code 1950, § 65-52; 1952, c. 226; 1954, c. 654; 1956, c. 243; 1958, c. 568; 1960, c. 556; 1962, c. 503; 1964, c. 94; 1966, c. 64; 1968, cc. 8, 660; 1970, c. 470; 1972, c. 229; 1973, c. 542; 1974, c. 560; 1975, c. 447.)

§ 65.1-56. Cases in which incapacity shall be deemed to continue for periods specified in section; compensation. — In cases included by the following schedule the incapacity in each case shall be deemed to continue for the period specified and the compensation so paid for such injury shall be as specified therein and shall be in lieu of all other compensation; provided, however, after compensation has been paid as provided herein, the employee may within one year from the date compensation was last due under this section file an application for compensation for incapacity to work, subject to the provisions of §§ 65.1-54 and 65.1-55. Such application shall be considered and determined as of the date incapacity for work actually begins or as of the date fourteen days prior to the date of filing whichever is later.

(1) For the loss of a thumb sixty-six and two-thirds per centum of the **average** weekly wages during sixty weeks.

(2) For the loss of the first finger, commonly called the index finger, **sixty-six** and two-thirds per centum of the average weekly wages during **thirty-five** weeks.

(3) For the loss of the second finger sixty-six and **two-thirds per centum** of average weekly wages during thirty weeks.

(4) For the loss of a third finger sixty-six and **two-thirds per centum** of average weekly wages during twenty weeks.

(5) For the loss of a fourth finger, commonly called the little finger, **sixty-six** and two-thirds per centum of average weekly wages during **fifteen weeks.**

(6) The loss of the first phalange of the thumb or any finger **shall be** considered to be equal to the loss of one half of such thumb or **finger and the** compensation shall be for one half of **the periods of time above specified.**

(7) The loss of more than one phalange shall be considered the **loss of the** entire finger or thumb; provided, however, that in no **case shall the amount** received for more than one finger exceed the amount provided **in this schedule** for the loss of a hand.

(8) For the loss of a great toe sixty-six and two-thirds **per centum of the** average weekly wages during thirty weeks.

(9) For the loss of one of the toes other than a **great toe sixty-six and** two-thirds per centum of the average weekly wages **during ten weeks.**

(10) The loss of the first phalange of any toe shall be considered to **be equal** to the loss of one half of such toe and the compensation shall be **for one half of** the periods of time above specified.

(11) The loss of more than one phalange shall be considered as the loss of the entire toe.

(12) For the loss of a hand sixty-six and two-thirds per centum of the average weekly wages during one hundred fifty weeks.

(13) For the loss of an arm sixty-six and two-thirds per centum of the average weekly wages during two hundred weeks.

(14) For the loss of a foot sixty-six and two-thirds per centum of average weekly wages during one hundred twenty-five weeks.

(15) For the loss of a leg sixty-six and two-thirds per centum of average weekly wages during one hundred seventy-five weeks.

(16) For the permanent total loss of the vision of an eye sixty-six and two-thirds per centum of the average weekly wages during one hundred weeks; and for the permanent partial loss of the vision of an eye the percentage of one hundred weeks equivalent to the percentage of the vision so permanently lost.

(17) For the permanent total loss of the hearing of an ear sixty-six and two-thirds per centum of the average weekly wages during fifty weeks; and for the permanent partial loss of the hearing of an ear the percentage of fifty weeks equivalent to the percentage of the hearing so permanently lost.

(18) The loss of both hands, both arms, both feet, both legs or both eyes, or any two thereof, in the same accident, or an injury for all practical purposes resulting in total paralysis as determined by the Commission based on medical evidence, or an injury to the brain resulting in incurable imbecility or insanity, shall constitute total and permanent incapacity, to be compensated according to the provisions of § 65.1-54.

(19) For severely marked disfigurement of the body resulting from an injury not above mentioned in this section sixty-six and two-thirds per centum of the average weekly wages not exceeding sixty weeks.

(20) For the pneumoconiosis, including but not limited to silicosis, asbestosis, coal miner's pneumoconiosis and byssinosis, medically determined to be in the:

(a) First stage, sixty-six and two-thirds per centum of the average weekly wages during fifty weeks.

(b) Second stage, sixty-six and two-thirds per centum of the average weekly wages during one hundred weeks.

(c) Third stage, sixty-six and two-thirds per centum of the average weekly wages during three hundred weeks.

In construing this section the permanent loss of the use of a member shall be held equivalent to the loss of such member and for the permanent partial loss or loss of use of a member compensation may be proportionately awarded.

The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maxima and minima as set out in § 65.1-54. (Code 1950, § 65-53; 1964, cc. 116, 190; 1968, cc. 347, 660; 1970, c. 470; 1972, c. 229; 1975, cc. 446, 450; 1976, c. 655.)

Appendix IV

A BILL to amend and reenact § 65.1-52 of the Code of Virginia, relating to the occupational disease statute of limitations for workmen's compensation benefits.

Be it enacted by the General Assembly of Virginia:

1. That § 65.1-52 of the Code of Virginia is amended and reenacted as follows:

§ 65.1-52. Limitation upon claim; "injurious exposure" defined; diseases covered by limitation.– The right to compensation under this chapter shall be forever barred unless a claim be filed with the Industrial Commission within ~~three years for coal worker's pneumoconiosis and two years for all other occupational diseases after a diagnosis of an occupational disease is first communicated to the employee or within five years from the date of the last injurious exposure in employment, whichever first occurs; and, if death results from the occupational disease within either of said periods~~ *one of the following time periods:*

1. for coal miners' pneumoconiosis, three years after a diagnosis of the disease is first communicated to the employee or within five years from the date of the last injurious exposure in employment, whichever first occurs;

2. for byssinosis, two years after a diagnosis of the disease is first communicated to the employee or within seven years from the date of the last injurious exposure in employment, whichever first occurs;

3. for all other occupational diseases, two years after a diagnosis of the disease is first communicated to the employee or within five years from the date of the last injurious exposure in employment, whichever first occurs .

If death results from an occupational disease within any of such periods, the right to compensation under this chapter shall be barred , unless a claim therefor be filed with the Commission within three years after such death. The limitations imposed by this section as amended shall be applicable to occupational diseases contracted before and after July ~~one, nineteen hundred sixty-two~~ *1, 1962* , and § 65.1-87 shall not apply to pneumoconiosis.

"Injurious exposure" as used in this section and in § 65.1-50 means an exposure to the causative hazard of such disease which is reasonably calculated to bring on the disease in question. Exposure to the causative hazard of pneumoconiosis for ninety work shifts shall be conclusively presumed to constitute injurious exposure. This limitation on time of filing will cover all occupational diseases, except:

Cataract of the eyes due to exposure to the heat and glare of molten glass or to radiant rays such as infrared;

Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to pitch, tar, soot, bitumen, anthracene, paraffin, mineral oil or their compounds, products or residues;

Radium disability or disability due to exposure to radioactive substances and X ray;

Ulceration due to chrome compound or to caustic chemical acids or alkalies and undulant fever caused by the industrial slaughtering and processing of livestock and handling of hides;

Mesothelioma due to exposure to asbestos;

Angiosarcoma of the liver due to vinyl chloride exposure.

In any case in which a claim is being made for benefits for a change of condition in an occupational disease (that is, advancing from one stage or category to another) the claim must be filed with the Commission within three years from the date for which compensation was last paid for an earlier stage of the disease.

Appendix V

A BILL to amend and reenact § 65.1-56 of the Code of Virginia, relating to payment of workmen's compensation benefits to byssinosis victims.

Be it enacted by the General Assembly of Virginia:

1. That § 65.1-56 of the Code of Virginia is amended and reenacted as follows:

§ 65.1-56. Cases in which incapacity shall be deemed to continue for periods specified in section; compensation.–In cases included by the following schedule the incapacity in each case shall be deemed to continue for the period specified and the compensation so paid for such injury shall be as specified therein and shall be in lieu of all other compensation; ~~provided,~~ however, after compensation has been paid as provided herein, the employee may within one year from the date compensation was last due under this section file an application for compensation for incapacity to work, subject to the provisions of §§ 65.1-54 and 65.1-55. Such application shall be considered and determined as of the date incapacity for work actually begins or as of the date fourteen days prior to the date of filing whichever is later.

(1) For the loss of a thumb sixty-six and two-thirds ~~per centum~~ *percent* of the average weekly wages during sixty weeks.

(2) For the loss of the first finger, commonly called the index finger, sixty-six and two-thirds ~~per centum~~ *percent* of the average weekly wages during thirty-five weeks.

(3) For the loss of the second finger sixty-six and two-thirds ~~per centum~~ *percent* of average weekly wages during thirty weeks.

(4) For the loss of a third finger sixty-six and two-thirds ~~per centum~~ *percent* of average weekly wages during twenty weeks.

(5) For the loss of a fourth finger, commonly called the little finger, sixty-six and two-thirds ~~per centum~~ *percent* of average weekly wages during fifteen weeks.

(6) The loss of the first phalange of the thumb or any finger shall be considered to be equal to the loss of one half of such thumb or finger and the compensation shall be for one half of the periods of time above specified.

(7) The loss of more than one phalange shall be considered the loss of the entire finger or thumb; ~~provided,~~ however, ~~that~~ in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(8) For the loss of a great toe sixty-six and two-thirds ~~per centum~~ *percent* of the average weekly wages during thirty weeks.

(9) For the loss of one of the toes other than a great toe sixty-six and two-thirds ~~per centum~~ *percent* of the average weekly wages during ten weeks.

(10) The loss of the first phalange of any toe shall be considered to be equal to the loss of one half of such toe and the compensation shall be for one half of the periods of time above specified.

(11) The loss of more than one phalange shall be considered as the loss of the entire toe.

(12) For the loss of a hand sixty-six and two-thirds ~~per centum~~ *percent* of the average weekly wages during ~~one hundred fifty~~ *150* weeks.

(13) For the loss of an arm sixty-six and two-thirds ~~per centum~~ *percent* of the average weekly wages during ~~two hundred~~ *200* weeks.

(14) For the loss of a foot sixty-six and two-thirds ~~per centum~~ *percent* of average weekly wages

during ~~one hundred twenty-five~~ *125* weeks.

(15) For the loss of a leg sixty-six and two-thirds ~~per centum~~ *percent* of average weekly wages during ~~one hundred seventy-five~~ *175* weeks.

(16) For the permanent total loss of the vision of an eye sixty-six and two-thirds ~~per centum~~ *percent* of the average weekly wages during ~~one hundred~~ *100* weeks; and for the permanent partial loss of the vision of an eye the percentage of ~~one hundred~~ *100* weeks equivalent to the percentage of the vision so permanently lost.

(17) For the permanent total loss of the hearing of an ear sixty-six and two-thirds ~~per centum~~ *percent* of the average weekly wages during fifty weeks; and for the permanent partial loss of the hearing of an ear the percentage of fifty weeks equivalent to the percentage of the hearing so permanently lost.

(18) The loss of both hands, both arms, both feet, both legs or both eyes, or any two thereof, in the same accident, or an injury for all practical purposes resulting in total paralysis as determined by the Commission based on medical evidence, or an injury to the brain resulting in incurable imbecility or insanity, shall constitute total and permanent incapacity, to be compensated according to the provisions of § 65.1-54.

(19) For severely marked disfigurement of the body resulting from an injury not above mentioned in this section sixty-six and two-thirds ~~per centum~~ *percent* of the average weekly wages not exceeding sixty weeks.

(20) For the pneumoconiosis, including but not limited to silicosis, asbestosis, *and* coal miner's pneumoconiosis ~~and byssinosis~~ , medically determined to be in the:

(a) First stage, sixty-six and two-thirds ~~per centum~~ *percent* of the average weekly wages during fifty weeks.

(b) Second stage, sixty-six and two-thirds ~~per centum~~ *percent* of the average weekly wages during ~~one hundred~~ *100* weeks.

(c) Third stage, sixty-six and two-thirds ~~per centum~~ *percent* of the average weekly wages during ~~three hundred~~ *300* weeks.

(21) For byssinosis medically determined to be in the:

(a) First stage, sixty-six and two-thirds percent of the average weekly wages during fifty weeks.

(b) Second stage, sixty-six and two-thirds percent of the average weekly wages during 100 weeks.

(c) Third stage, sixty-six and two-thirds percent of the average weekly wages during 300 weeks.

In construing this section the permanent loss of the use of a member shall be held equivalent to the loss of such member and for the permanent partial loss or loss of use of a member compensation may be proportionately awarded.

The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maxima and minima as set out in § 65.1-54.

Appendix VI

A BILL to amend the Code of Virginia by adding in Chapter 6 of Title 65.1 sections numbered 65.1-91.1 through 65.1-91.4, providing for the establishment of an Advisory Medical Committee on Byssinosis.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 6 of Title 65.1 sections numbered 65.1-91.1 through 65.1-91.4 as follows:

§ 65.1-91.1. Advisory Medical Committee on Byssinosis.– There shall be an Advisory Medical Committee on Byssinosis composed of five physicians licensed to practice medicine in the Commonwealth. The members of the Committee shall be appointed by the Governor, and each member shall be certified in pulmonary medicine or eligible for certification in pulmonary medicine.

Of the members first appointed to the Advisory Medical Committee on Byssinosis, one member shall be appointed for a term of one year, two members shall be appointed for terms of two years and two members shall be appointed for terms of three years. Thereafter, appointments shall be made for terms of three years or the unexpired portions thereof. A vacancy created other than by expiration of term shall be filled by the Governor for the unexpired term. No person shall be eligible to serve on the Committee for more than two consecutive three-year terms.

§ 65.1-91.2. Advisory Medical Committee on Byssinosis to examine certain employees.–The Industrial Commission shall obtain the assistance of a member of the Advisory Medical Committee on Byssinosis only in reference to cases in which:

1. The employee has filed a claim for workmen's compensation benefits based on byssinosis and a hearing has been held before the Commission or any of its members or deputies and a decision rendered pursuant to subsection A of § 65.1-96;

2. The Commission has received conflicting medical evidence from qualified physicians regarding the nature of the employee's disability or whether the employee's disability has arisen out of and in the course of his employment; and

3. A timely application for review before the full Commission has been made pursuant to § 65.1-97.

§ 65.1-91.3. Examination of and report regarding employee alleging byssinosis.–A. When a case meets the provisions set forth in § 65.1-91.2, the Industrial Commission shall direct the employee to a place designated by the Commission, where the employee shall submit to a physical examination by a member of the Advisory Medical Committee on Byssinosis. Within thirty days after the completion of the examination, the Committee member conducting the examination shall submit a written report to the Commission setting forth:

1. The clinical procedures used in arriving at his findings and conclusions;

2. Whether or not the employee has developed byssinosis;

3. Whether or not the employee has a disability which has arisen out of and in the course of his employment;

4. His opinion regarding the degree to which the employee is impaired in his ability to perform normal labor in the same or any other employment; and

5. His opinion on any other matter deemed pertinent.

B. Prior to rendering a decision or making an award in any case involving on examination by a member of the Advisory Medical Committee on Byssinosis, the Industrial Commission shall review the report submitted by the Committee member, along with any reports and evidence regarding the

case submitted by any other physicians and interested parties.

C. When a competent physician certifies to the Industrial Commission that the employee's physical condition is such that his movement to the place of examination ordered by the Commission as herein provided would be harmful or injurious to the health of the employee, the Industrial Commission shall cause the examination of the employee to be made by the Committee member at some place in the vicinity of the residence of the employee suitable for the purposes of making such examination.

D. The refusal of an employee to submit to any such examination shall bar such employee from compensation or other benefits provided by this title for disability or death resulting from byssinosis.

§ 65.1-91.4. Compensation of Committee members.—A member of the Advisory Medical Committee on Byssinosis who conducts an examination pursuant to § 65.1-91.3 shall be paid the actual costs of such examination and shall be reimbursed for any necessary expenses incurred. Such cost and compensation shall be paid from funds appropriated to the Industrial Commission for its operation.

Appendix VII

MINORITY OPINION OF DELEGATE ROBERT S. BLOXOM REGARDING THE RECOMMENDATION TO ESTABLISH AN ADVISORY MEDICAL COMMITTEE ON BYSSINOSIS

Presently the Industrial Commission may send a claimant to an impartial medical expert if it feels that the medical evidence presented in a case is insufficient or contradictory. The Chairman of the Commission has testified that the Commission has not been sending claimants alleging byssinosis to impartial medical experts, because it has felt that the medical evidence presented in byssinosis cases has been sufficient for it to make a decision.

In my opinion, the chief point regarding this issue is that present law already provides a mechanism whereby the Commission may send a claimant to an impartial physician if the medical evidence presented by the employee's physician and the insurer's physician is insufficient or contradictory. Hence, I do not believe there is a need to create an Advisory Medical Committee on Byssinosis; and I therefore dissent from the recommendation to establish such a Committee.