REPORT OF THE
WORKERS' COMPENSATION COMMISSION ON

# A Study of Coal Workers' Pneumoconiosis Under the Virginia Workers' Compensation Act

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

# HOUSE DOCUMENT NO. 2

COMMONWEALTH OF VIRGINIA
RICHMOND
1993

# COMMONWEALTH of VIRGINIA

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September 1, 1992

To: The Honorable L. Douglas Wilder, Governor of Virginia and Members of the General Assembly

House Joint Resolution 249, passed by the General Assembly in 1992, requested the Virginia Workers' Compensation Commission to study coal workers' pneumoconiosis cases reviewed in 1990 and 1991 to determine the reason for denial of claims.

In response to the House Resolution, the Virginia Workers' Compensation Commission is pleased to submit "A Study of Coal Workers' Pneumoconiosis Under the Virginia Workers' Compensation Act".

Respectfully submitted,

Charles G. James
Chairman

## PREFACE

House Joint Resolution 249 of the 1992 session of the Virginia General Assembly directed the Workers' Compensation Commission study coal workers' pneumoconiosis cases reviewed in 1990 and 1991 to determine the reason for denial of claims.

In response to the General Assembly's direction personnel of the Virginia Workers' Compensation Commission analyzed opinions issued and claims processed in calendar years 1990 and 1991 to determine the bases on which claims were awarded and denied for coal workers' pneumoconiosis. This report contains the conclusions reached from that study.

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## EXECUTIVE SUMMARY

House Joint Resolution 249 of the 1992 session of the Virginia General Assembly requested the Workers' Compensation Commission to study coal workers' pneumoconiosis cases reviewed in 1990 and 1991 to determine the reason for denial of claims.

The Virginia Workers' Commission examined 639 claims processed in 1990 and 1991. Approximately 20 percent of all claims were accepted by agreement or were the subject of compromise settlements. A total of 525 claims were the subject of hearings. Of these 8 percent were denied due to procedural reasons such as lack of jurisdiction. Approximately 92 percent were denied because x-ray evidence failed to meet the minimum standard for compensability.

A significant number of claims filed and referred to the Commission hearing docket were filed by miners for the sole purpose of protecting their right to future compensation benefits. Before July 1, 1992, the Virginia Workers' Compensation Act required an employee who received a diagnosis of pneumoconiosis to file for benefits within the period required by statute, regardless of whether the level of pneumoconiosis was compensable. The General Assembly amended Code §65.2-406 as of July 1, 1992 to require filing only when x-rays established the presence of the minimum compensable level of coal workers' pneumoconiosis.

The Commission has established an independent Pulmonary Committee composed of physicians specializing in pulmonary disease and radiology to act as a tie-breaker when x-ray evidence is in dispute. These specialists, certified by the National Institute of Occupational Safety and Health and known as "B" readers, consider disputed x-rays by comparing them with standard radiographs. A three-physician consensus determines whether the x-ray evidence meets the necessary standard. After a technical medical decision from the Pulmonary Committee is communicated to the Commission, the Commission determines compensability under the Pneumoconiosis Guide.

Differences between the opinions of employees' and emplcyers' medical experts are basically subjective. The Commission believes that the system it has formulated to resolve subjective differences of opinion through the Pulmonary Committee is the most scientific means to provide fair and unbiased analysis of x-rays and to obtain reliable resolution of claims.

## INTRODUCTION

House Joint Resolution 249 of the 1992 session of the Virginia General Assembly requested the Workers' Compensation Commission study the number of coal miner pneumoconiosis cases that the Commission reviewed during the 1990 and 1991 and determine the reasons why a high percentage of the claims are denied. This report discusses the results of that study.

## STATUTORY PROVISIONS

The Virginia Workers' Compensation Act was passed during the 1918 session of the General Assembly and became effective on January 1, 1919. The original Act provided compensation only for accidental injuries. Limited coverage for occupational diseases was added to the Act in 1944.

Coal workers' pneumoconiosis claims are usually presented as occupational disease claims because of the gradual nature by which exposure occurs. Effective July 1, 1970 then §65.1-56, Code of Virginia, was amended to include coal workers' pneumoconiosis as a scheduled disability. Unlike other disease where indemnity payments are contingent on loss of earnings, pneumoconiosis benefits are provided for a specific number of weeks according to the schedule established by the General Assembly, without regard to the employee's work status or capabilities. While the Virginia Act also provides for benefits when an employee is disabled from working in a mining environment, qualifying employees often elect to receive disability benefits under the Federal Black Lung Benefits Act.

Benefits are awarded to an employee if radiographic (x-ray) evidence classified in accordance with the 1980 International Labour Organization Classification of Radiographs of the Pneumoconioses (ILO) shows the worker has a certain level, referred to as a category, of the disease.

The benefit schedule for coal workers' pneumoconiosis in Section 65.2-504 of the Code is:

| Stage | Period of Indemnity Benefit Payment |
|---|---|
| First Stage | 50 weeks |
| Second Stage | 100 weeks |
| Third Stage | 300 weeks |

Employees who are unable to continue work in a mine or dusty environment are considered to be permanently disabled. They receive weekly indemnity benefits for their lifetime.

Section 65.2-406 of the Code, requires a worker file a claim for coal workers' pneumoconioses benefits within 3 years from

the date of communication of the occupational disease or 5 years from the date of last injurious exposure in the employment, whichever first occurs. Employees may receive additional benefits if the disease progresses from one stage to an advanced stage. This additional claim must be filed within 2 years from date compensation was last paid for the earlier stage.

Employees must file their claim within the applicable statute of limitations. Before July 1, 1992 the statute of limitations began whenever an employee received any communication diagnosing the disease. For example, an employee was required to file a claim if the employee was merely told by a doctor of the existence of "dust in the lungs," even if the employee knew the disease level was not sufficient to receive benefits. The Commission would have to issue a decision dismissing the claim.

Effective July 1, 1992 the General Assembly changed the statute of limitations period for coal workers' pneumoconiosis. A claim must now be filed within three years after the employee receives a communication diagnosing the disease as category 1/0 or greater under the 1980 International Labour Organization Classification of Radiographs of the Pneumoconioses (ILO) or within five years from the date of last injurious exposure in employment, whichever first occurs.

The Code of Virginia further provides in Section 65.2-404 for a "conclusive presumption" that exposure to the causative hazard of pneumoconiosis for ninety work shifts constitutes injurious exposure and that the employer where the last injurious exposure occurred is liable for the payment of benefits. For this section injurious exposure means "exposure to the causative hazard of such disease reasonably calculated to bring on the disease in question."

Since there are many different forms of pneumoconiosis which are at times difficult to distinguish, the Act contains another special provision. Section 65.2-504 C provides that if there is any question whether an employee's condition is coal workers' pneumoconiosis or some other type of pneumoconiosis, for example, silicosis, there is a "conclusive presumption" that the condition is coal worker's pneumoconiosis if injurious exposure to coal dust is shown.

Section 65.2-407 of the Code permits an employee or prospective employee who is not incapacitated for work but is susceptible to a specific occupational disease to waive any compensation for an aggravation of the condition as a result of continuing to work in the same or similar conditions.

For coal worker's pneumoconiosis and silicosis, the Commission will approve a waiver only if there is x-ray evidence, from a qualified physician, showing a positive diagnosis of pneumoconiosis or other lung condition that makes the employee or prospective employee significantly more susceptible to pneumoconiosis.

## PNEUMOCONIOSIS DISEASE

Pneumoconiosis is a disease process of the lungs caused by inhalation and retention of inorganic mineral dust resulting in histological changes in pulmonary tissue. Coal workers' pneumoconiosis occurs as a result of inhalation of coal dust. Other pneumoconiosis conditions include silicosis, asbestosis, siderosilicosis, and berylliosis. In each type of pneumoconiosis, x-ray evidence is the primary diagnostic tool.

Under the Workers' Compensation Act the diagnosis of coal workers' pneumoconiosis is established by x-ray evidence classified under the 1980 International Labour Organization Classification of Radiographs of the Pneumoconioses (ILO). Pulmonary function tests, clinical examination, and work incapacity are considered as evidence only in cases which involve total disability for work.

The 1980 ILO classification system provides for recording the radiographic changes in the chest caused by the inhalation of various types of mineral dust including coal, silica, asbestos and beryllium. The employee's x-ray is compared to a standard set of films so that an objective determination can be made of the existence and degree of pneumoconiosis.

While the comparison may be done by any one qualified to read x-rays, physicians certified as "B" Readers are specialist in this area. After comparing the x-rays the reader completes a chart listing the quality of the x-ray, parenchymal abnormalities and pleural abnormalities. An example of the chart is included in the appendix.

Parenchymal abnormalities are of greater significance in staging coal workers' pneumoconiosis. Severity is based on the profusion of the opacities. Small opacities are classified by location, profusion, extent, size and shape.

The reader divides each lung into three zones and compares the small opacities of the profusion seen on the employee's x-ray to the standard radiographic film. For pneumoconiosis, profusions are more frequently seen in the upper lobes. There are 4 categories of profusions, each for a greater level of opacities in an area. Category 0, which is normal, shows that small opacities are absent or are less profuse than the lower

limit of Category 1. Categories 1,2,3, show increasing profusions of small opacities.

Within each category there are 3 subcategories for different degrees of profusions. The first number within a subcategory reflects the reader's final interpretation. The second number shows consideration was given to this category as a possible choice. For example a 1/0 means the reader decided the x-ray showed Category 1 but that some consideration was given to category 0. A 1/2 means the reader decided the profusions represented Category 1 although category 2 was also considered.

The categories and subcategories are:

| | | | |
|---|---|---|---|
| Category 0 = | 0/- | 0/0 | 0/1 |
| Category 1 = | 1/0 | 1/1 | 1/2 |
| Category 2 = | 2/1 | 2/2 | 2/3 |
| Category 3 | 3/2 | 3/3 | 3/4 |

Different types of pneumoconioses are classified based on the shape and size of opacities in the lungs. Small round opacities are described as "p", "q", and "r". A "p" indicates a diameter up to 1.5 mm; "q" signifies a diameter greater than 1.5 mm but less than 3 mm and "r" designates a size greater than 3 mm but less than 10 mm.

Round opacities described as "p" are indicative of coal workers' pneumoconiosis. The "q" opacities reflect silicosis or coal workers' pneumoconiosis. Generally "r" is indicative of only silicosis. No matter what shape opacities are seen, Section 65.2-504 C of the Code mandates a presumption that the condition is coal workers' pneumoconiosis if there has been injurious exposure to coal dust.

Small irregular opacities are characterized as "s," "t," and "u" based on size. Opacities whose width is less than 1.5 mm are shown as "s," widths between 1.5 and 3 mm are referred to as "t" and "u" indicates width greater than 3 mm but less than 10 mm. Irregular opacities are associated with asbestosis and not coal workers' pneumoconiosis.

While it is not unusual to find both regular and irregular opacities in a x-ray, one type will usually dominate. The ILO standards allow for this by providing for both types to be noted. For example a q/t would reflect a dominance of "q" opacities with a significant number of the "t" type present.

Large opacities described as "A," "B," and "C" are generally found in complicated pneumoconiosis or progressive massive fibrosis. These conditions are usually in addition to a stage 2 or stage 3 simple pneumoconiosis.

## RULES AND PROCEDURES

The Act requires that the stages of coal worker's pneumoconiosis be determined based on radiographic evidence and classified under the 1980 ILO standard. To balance the x-ray interpretation of the ILO standards with the proper stage of benefits, the Commission established a Pneumoconioses Guide. The Pneumoconioses Guide which is used for all pneumoconioses is:

| | | | |
|---|---|---|---|
| First Stage: | Category | 1 and 2 | p, s |
| | Category | 1 | q, t |
| Second Stage | Category | 3 | p, s |
| | Category | 2 and 3 | q, t |
| | Category | 1,2 and 3 | r, u |
| Third Stage | Category | A, B, C | |

Consistent with the requirements of all workers' compensation cases, the employee has the legal burden to establish the existence of a compensable claim by a preponderance of the evidence. A reading of 1/0 is sufficient to award benefits. Tiller v. Island Creek Coal Company, 67 O.I.C. 136. The Federal Black Lung Act requires a miner to be disabled for work in the mines. Pulmonary function tests assist in determining qualification for federal benefits.

In determining the presence or absence of pneumoconiosis the Commission does not rely solely on the numerical preponderance of positive or negative readings. The qualifications of the physicians reading the x-rays is also considered along with the totality of the other evidence presented. Tiller v. Island Creek Coal Company, 67 O.I.C. 136.

The Commission, in recognition of the need for medical assistance in interpreting x-rays, routinely seeks the opinions of physicians in coal workers' pneumoconiosis cases by referring x-rays to Medical College of Virginia pulmonary specialists.

Although this procedure was followed for many years, this procedure was formalized in 1989 when the Commission, after receiving advice from representatives of employees and employers, established the Medical College of Virginia Committee on Occupational Pulmonary Disease (known as the Pulmonary Committee).

The Commission has tried to establish other pulmonary committees, to serve in addition to the Medical College of Virginia Committee. The Commission has not been able to

establish other committees because of an insufficient number of physicians qualified to interpret films by ILO standards in any geographic area.

The Pulmonary Committee is composed of 5 physicians,[1] each certified as a "B Reader" and qualified by NIOSH to interpret x-rays using the ILO standard. Each x-ray referred to the Pulmonary Committee is read by at least three certified B readers, compared to the standard ILO films and a consensus opinion is reached. The Pulmonary Committee advises the Commission of its conclusion and the names of the physicians participating in the decision. The members of the Pulmonary Committee are subject to pre- or post-hearing discovery by deposition or interrogatory. The Pulmonary Committee's opinion is not legally binding on the Commission. Musick v Virginia Pocahontas # 1, 68 O.I.C. 146.

Decisions in contested cases rely heavily on x-ray interpretation. For many years pneumoconiosis claims deteriorated into a "battle of x-rays," with each party submitting as many x-ray interpretations as time and financial resources allowed. This procedure was seen by most as too costly and burdensome.

In 1989, the Commission members consulted with interested parties and held a special public hearing in Southwest Virginia. Commission Rule 17 B was adopted in response to the concerns expressed at these meetings. A copy of this Rule is included in the appendix.

Rule 17 B applies to all claims in which the date of communication of disease is on or after April 1, 1989. Except in unusual circumstance, a party may not submit more than three medical interpretations of x-ray evidence. In unusual circumstances, the Commission may allow the submission of additional interpretations.

Parties may also agree to submit the x-ray for interpretation by the Pulmonary Committee. If the parties agree to accept the Pulmonary Committee's decision, or if the Commission refers the case, the cost of reading the x-ray is borne by the Commission. In practice, nearly all disputed cases are referred to the Pulmonary Committee by the Commission.

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[1] As of 1992, the number was reduced from five to four "B" readers at the request of one physician who no longer desired to be on the panel.

## STATISTICAL RESULTS

Consistent with the requirements of House Joint Resolution 249, the Commission studied each case in which a claim for coal workers' pneumoconiosis was processed by the Commission during calendar years 1990 and 1991. For those cases which required a hearing by a deputy commissioner, each opinion was reviewed and analyzed. All cases appealed to the Full Commission were also analyzed. The appendix contains a comprehensive summary of the empirical data obtained from this analysis.

In the two years studied, 639 claims for coal workers' pneumoconiosis were processed by the Commission. In 126 claims, the employee received payment of benefits because the employer either accepted the claim, settled the claim or the employee received a favorable judicial decision. Benefits were denied in 513 cases.

In 1990, the first year after the Commission's adoption of Rule 17 B, 366 claims for coal workers' pneumoconiosis were processed. In 97 of these, the employee received payment of benefits because the employer either accepted or settled the claim.

Hearings by a deputy commissioner were required in the other 269 cases. Of these 8 claims were awarded; 7 for stage 1 and 1 for stage 2. Of the 261 cases in which benefits were denied, 18 cases were denied because the claim was filed after the statute of limitation expired, the employee did not receive a valid communication of an occupational disease, the employee did not prove injurious exposure with the named employer, or for some other procedural reason.

Benefits were denied in 243 case because the evidence failed to establish the presence of a compensable level of pneumoconiosis. The x-ray evidence did not preponderate in showing a level of at least category 1/0.

Of these 243 cases, in 64 the parties stipulated that the level of disease had not reached a compensable level or that all readings were negative. Opinions were issued in these cases without referral to the Pulmonary Committee.

In the other 179 cases, x-rays were sent to the Pulmonary Committee where they were evaluated by 3 certified B readers and determined by consensus as not showing a compensable level of disease. In 133 of these cases the x-rays were referred to the Pulmonary Committee because the 6 readings introduced by the parties were equally divided between positive and negative. In the other 45 cases, x-rays were submitted to the Pulmonary Committee because more than 6 readings were

submitted or because the readings were so dissimilar that an independent opinion was needed.

In 1990 the Full Commission was asked to review only 12 cases involving the award or denial of a coal workers' pneumoconiosis by a deputy commissioner. Employers requested review of 3 cases in which the deputy commissioner awarded benefits; 2 cases awarded benefits for Stage 1, 1 case awarded benefits for Stage 2. The Full Commission affirmed all three awards.

Employees requested review in 9 cases. In 4 cases, the deputy commissioner determined the statute of limitations expired before the claim was filed. The Full Commission reversed 2 of these decisions. In 2 cases the deputy commissioner denied the claims because the employee had not shown injurious exposure with the named employer. The Full Commission reversed 1 of these decisions. The other case was settled before a review decision was issued. The 3 other appeals by employees involved cases in which the deputy commissioner found the disease had not reached a compensable level. The Full Commission affirmed all 3 decisions.

In 1991, 273 cases of coal workers' pneumoconiosis were processed by the Commission. In 17 the employee received benefits because the employer either accepted or settled the claim. Hearings by a deputy commissioner were required in 256 cases. Of these, 4 claims were awarded; 2 for stage 2 and 2 awards were entered for stage 3.

Benefits were denied in the remaining 252 cases that went to hearing. Of these, 24 cases were denied for procedural reasons such as the claim being filed after the expiration of the statute of limitations; there was no communication of an occupational disease; no injurious exposure with the named employer; or for some other procedural reason.

In the other 228 cases benefits were denied because the evidence failed to establish a level of pneumoconiosis of at least 1/0. In 15 cases the parties stipulated that the level was not compensable or all readings were negative. Opinions were issued in these cases without referral to the Pulmonary Committee.

In 213 cases x-rays were sent to the Pulmonary Committee and evaluated by 3 certified B readers and determined by consensus as not showing a compensable level of disease. In 165 cases the x-rays were referred to the Pulmonary Committee because the 6 x-ray readings introduced by the parties were equally divided between positive and negative readings. In 25 cases the readings were so dissimilar that an independent opinion was needed.

As in 1990, in 1991 the Full Commission was requested to review the deputy commissioners decision in only 12 cases in which benefits were claimed for coal workers' pneumoconiosis. Employers requested review in 2 cases in which the deputy commissioner awarded benefits for Stage 2. The Full Commission affirmed the award in both cases.

Employees requested review in 10 cases in which benefits were denied. In 4 cases benefits were denied because the claim was filed after the statute of limitation had run. The Full Commission affirmed 1 of these decisions, reversed 2 and reversed, in part, 1 of these decisions. In 1 case the deputy commissioner denied benefits because the employee had not received a valid communication and in 1 case benefits were denied because the employee had an award in another state. The Full Commission affirmed both of these decisions.

In 4 cases benefits were denied because the evidence did not establish a compensable level of disease. The majority of the Commission affirmed all of these cases.

## DISCUSSION

This study conclusively shows that the principal reason coal workers' pneumoconiosis claims are denied is because the medical x-ray evidence fails to preponderate in establishing a level compensable under the Virginia Workers' Compensation Act.

The law places the burden of proof on the employee seeking benefits to establish by a preponderance of the evidence that the disease has reached a compensable level of coal workers' pneumoconiosis. In most cases the employee failed to meet this legal burden.

The study also shows that 73.7 percent of the cases referred for hearing where the issue was compensable level were sent to the Pulmonary Committee. This is because the claims procedure follows a routine protocol. An employee submits positive readings from three local physicians, who may or may not be certified B readers. The employer submits negative readings from three certified B readers, usually from doctors at out of state medical schools.

While the readings are to be based on the 1980 ILO standards, some physicians provide a reading reflecting their recollection of the standard films and clinical experience rather then conducting a side-by-side comparison of the submitted x-ray and the standard film. Studies suggest that the failure to compare each x-ray with the standard film

interjects a more subjective element into the decision and may result in inaccurate readings.[2]

As a result of conflict in readings submitted by the employee and employer or because of the methodology used in reading the film, the deputy commissioner will refer the x-ray to the Pulmonary Committee. By requiring that each x-ray be compared to the ILO standard film and that a consensus be reached by the three member panel, the Pulmonary Committee increases the objectiveness of its decision. The study revealed that in most cases the Pulmonary Committee's decision was negative.

In most cases, the evidence before the deputy commissioner was an equal number of positive and negative readings submitted by the parties' experts and the negative consensus opinion from the Pulmonary Committee. Since a preponderance of the evidence failed to establish a level of pneumoconiosis for which benefits could be awarded, the deputy commissioner denied the claim.

Review by the Full Commission of the deputy commissioner's decision was rarely requested. This indicates that the parties agree the evidence failed to establish a compensable coal workers' pneumoconiosis and that the cases are properly adjudicated in accordance with the statutory provisions of the Virginia Workers' Compensation Act.

Only claims in which the parties cannot reach agreement that the medical evidence establishes a compensable pneumoconiosis are submitted for a hearing. If compensability is not questioned, the claim is processed by agreement or compromise settlements. Therefore the deputy commissioner is required to adjudicate claims for which the medical evidence is least compelling.

In addition, during the period studied the Act's statute of limitations provision encouraged filing of claims even though all parties knew the claim was not compensable. The 1992 amendment to Section 65.2-406, Code of Virginia, should assist in resolving this problem.

It should also be noted that the x-ray readings that trigger the filing of a claim often are taken pursuant to the Federal Mine Safety and Health Administration Act. Original x-rays are not made available to the parties. Therefore, medical

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[2]See, Morgan, W.K.C., et al., "The Middling Tendency," 29 Arch. Environmental Health 334 (1974); Rogers, R. B. and Morgan, W.K.C., "On the Factors Influencing Consistency in the Radiological Diagnoses of Pneumoconiosis", 102 American Review of Respiratory Disease 905 (1970).

experts for the employee and employer must go to Morgantown, West Virginia to examine original x-rays.

## CONCLUSION

In 1990 and 1991, 639 claims for benefits for coal workers' pneumoconiosis were processed by the Workers' Compensation Commission. Employees received benefits in 126 cases (approximately 20%). Only 8 percent of the cases were denied for procedural reasons. The majority of cases (92%) were denied because the evidence submitted did not establish a level of coal workers' pneumoconiosis for which benefits can be awarded.

One reason for the high denial rate is that claims that meet the compensable level are usually accepted by agreement or compromise settlement, and a hearing is unnecessary. Another reason is that the statute of limitation provision of §65.2-406, Code of Virginia, prior to July 1, 1992 encouraged the filing of claims that were without any merit. Cases were filed, nevertheless, to preserve the right to file at a future date.

However, the most important reason why claims are denied is the law requires that a threshold level of disease must be shown before benefits can be awarded. Claims must be denied if the evidence does not show this threshold level is met. In most cases adjudicated by the Commission, the evidence did not meet the level established by required radiographic standards and the compensability was denied.

Virginia law establishes compensable stages of pneumoconiosis on the basis of radiographic standards whether or not the employee is actually disabled for work. The Federal Black Lung Act does not permit any compensation unless the miner is totally disabled from work as a result of the disease.

# APPENDICES

## APPENDICES

# APPENDIX A

## House Joint Resolution No. 249

# GENERAL ASSEMBLY OF VIRGINIA--1992 SESSION

## HOUSE JOINT RESOLUTION NO. 249

*Requesting the Workers' Compensation Commission to study the awarding of coal workers' pneumoconiosis (black lung) benefits.*

Agreed to by the House of Delegates, January 31, 1992
Agreed to by the Senate, March 4, 1992

WHEREAS, coal miners are exposed to coal dust on a daily basis in the course of their employment; and

WHEREAS, each exposure frequently results in the development of coal workers' pneumoconiosis or black lung disease, an occupational ailment caused by the inhalation of coal dust; and

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

WHEREAS, black lung disease is compensable under Chapter 5 of Title 65.2 of the Code of Virginia, but because of lack of information, the statutes of limitations involved, and that Chapter 5 provides the exclusive remedy for compensation due to coal miners' pneumoconiosis, few victims over the years have been awarded compensation; and

WHEREAS, the Workers' Compensation Commission currently denies compensation to coal miners in approximately 95 percent of the contested cases; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Workers' Compensation Commission be requested to study the number of coal miner pneumoconiosis cases that the Commission reviewed during 1990 and 1991 and determine the reasons why such claims are denied, particularly in such a high percentage of the cases reviewed.

The Commission is requested to complete its study and submit its report to the Governor and the General Assembly on or before September 1, 1992, as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

## Appendix B

## Statutes Applicable to Coal Workers' Pneumoconiosis

§65.2-404
§65.2-406
§65.2-406 Effective July 1, 1992
§65.2-407
§65.2-504

§ 65.2-404. **What employer and carrier liability.** — A. When an employee has an occupational disease that is covered by this title, the employer in whose employment he was last injuriously exposed to the hazards of the disease and the employer's insurance carrier, if any, at the time of the exposure, shall alone be liable therefor, without right to contribution from any prior employer or insurance carrier.

B. For the purposes of this section, "injurious exposure" 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.

C. The operator of a coal mining business covered by this title who acquires the business or substantially all of the assets thereof is liable for, and must secure the payment of, all benefits which would have been payable by the prior operator under this section with respect to persons previously employed by such business if the acquisition had not occurred and the prior operator had continued to operate the business; and the prior operator of the business is not relieved of any liability under this section. (Code 1950, §§ 65-47, 65-49; 1952, c. 205; 1960, c. 297; 1962, c. 588; 1968, c. 660, §§ 65.1-50, 65.1-52; 1970, c. 470; 1972, cc. 612, 619; 1974, c. 201; 1975, cc. 27, 471; 1979, cc. 80, 201; 1982, c. 82; 1983, c. 469; 1984, c. 411; 1985, c. 191; 1989, c. 502; 1990, c. 417; 1991 c. 355.)

§ 65.2-406. Limitation upon claim; diseases covered by limitation. — A. The right to compensation under this chapter shall be forever barred unless a claim is filed with the Commission within 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 asbestosis, two years after a diagnosis of the disease is first communicated to the employee;

4. For symptomatic or asymptomatic infection with human immunodeficiency virus including acquired immunodeficiency syndrome, two years after a positive test for infection with human immunodeficiency virus; or

5. 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.

B. 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 is 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 1, 1962, and § 65.2-601 shall not apply to pneumoconiosis. The limitation on time of filing will cover all occupational diseases except:

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

2. 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;

3. Radium disability or disability due to exposure to radioactive substances and X-rays;

4. 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;

5. Mesothelioma due to exposure to asbestos; and

6. Angiosarcoma of the liver due to vinyl chloride exposure.

C. When a claim is made for benefits for a change of condition in an occupational disease, such as advance from one stage or category to another, a claim for change in condition 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, except that a claim for benefits for a change in condition in asbestosis must be filed within two years from the date when diagnosis of the advanced stage is first communicated to the employee and no claim for benefits for an advanced stage of asbestosis shall be denied on the ground that there has been no subsequent accident. For a first or an advanced stage of asbestosis or mesothelioma, if the employee is still employed in the employment in which he was injuriously exposed, the weekly compensation rate shall be based upon the employee's weekly wage as of the date of communication of the first or advanced stage of the disease, as the case may be. If the employee is unemployed, or employed in another employment, the weekly compensation rate shall be based upon the average weekly wage of a person of the same or similar grade and character in the same class of employment in which the employee was injuriously exposed and preferably in the same locality or community on the date of communication to the employee of the advanced stage of the disease or mesothelioma. The weekly compensation rates herein provided shall be subject to the same maximums and minimums as provided in § 65.2-500. (Code 1950, § 65-49; 1952, c. 205; 1960, c. 297; 1962, c. 588; 1968, c. 660, § 65.1-52; 1970, c. 470; 1972, c. 612; 1974, c. 201; 1975, cc. 27, 471; 1979, cc. 80, 201; 1982, c. 82; 1983, c. 469; 1984, c. 411; 1985, c. 191; 1989, c. 502; 1990, c. 417; 1991, c. 355.)

§ 65.2-406. Limitation upon claim; diseases covered by limitation. — A. The right to compensation under this chapter shall be forever barred unless a claim is filed with the Commission within one of the following time periods:

1. For coal miners' pneumoconiosis, three years after a diagnosis of the disease, as category 1/0 or greater as classified under the International Labour Office Classification of Radiographs of the Pneumoconiosis (1980), 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 asbestosis, two years after a diagnosis of the disease is first communicated to the employee:

4. For symptomatic or asymptomatic infection with human immunodeficiency virus including acquired immunodeficiency syndrome, two years after a positive test for infection with human immunodeficiency virus; or

5. 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.

B. 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 is 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 1, 1962, and § 65.2-601 shall not apply to pneumoconiosis. The limitation on time of filing will cover all occupational diseases except:

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

2. 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;

3. Radium disability or disability due to exposure to radioactive substances and X-rays;

4. 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;

5. Mesothelioma due to exposure to asbestos; and

6. Angiosarcoma of the liver due to vinyl chloride exposure.

C. When a claim is made for benefits for a change of condition in an occupational disease, such as advance from one stage or category to another, a claim for change in condition 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, except that a claim for benefits for a change in condition in asbestosis must be filed within two years from the date when diagnosis of the advanced stage is first communicated to the employee and no claim for benefits for an advanced stage of asbestosis shall be denied on the ground that there has been no subsequent accident. For a first or an advanced stage of asbestosis or mesothelioma, if the employee is still employed in the employment in which he was injuriously exposed, the weekly compensation rate shall be based upon the employee's weekly wage as of the date of communication of the first or advanced stage of the disease, as the case may be. If the employee is unemployed, or employed in another employment, the weekly compensation rate shall be based upon the average weekly wage of a person of the same or similar grade and character in the same class of employment in which the employee was injuriously exposed and preferably in the same locality or community on the date of communication to the employee of the advanced stage of the disease or mesothelioma. The weekly compensation rates herein provided shall be subject to the same maximums and minimums as provided in § 65.2-500. (Code 1950, § 65-49; 1952, c. 205; 1960, c. 297; 1962, c. 588; 1968, c. 660, § 65.1-52; 1970, c. 470; 1972, c. 612; 1974, c. 201; 1975, cc. 27, 471; 1979, cc. 80, 201; 1982, c. 82; 1983, c. 469; 1984, c. 411; 1985, c. 191; 1989, c. 502; 1990, c. 417; 1991, c. 355; 1992, c. 475.)

§ 65.2-407. Waiver. — A. 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 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.

B. The 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 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.

C. 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, § 65.1-53; 1970, c. 517; 1979, c. 201; 1991, c. 355.)

§ 65.2-504. Compensation for disability from coal worker's pneumoconiosis; insurance of coal operator. — A. An employee eligible for an award for coal worker's pneumoconiosis benefits shall be compensated according to the following schedule:

1. For first stage coal worker's pneumoconiosis medically determined from radiographic evidence and classified under International Labour Office Classification of Radiographs of the Pneumoconioses (1980) where there is no present impairment for work, 66 ⅔ percent of the average weekly wage during the three years prior to the filing date, for fifty weeks, up to 100 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500.

2. For second stage coal worker's pneumoconiosis medically determined from radiographic evidence and classified under International Labour Office Classification of Radiographs of the Pneumoconioses (1980) where there is no present impairment for work, 66 ⅔ percent of the average weekly wages for 100 weeks, up to 100 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500.

3. For third stage coal worker's pneumoconiosis medically determined from radiographic evidence and classified under International Labour Office Classification of Radiographs of the Pneumoconioses (1980) and involving progressive massive fibrosis or medically classified as being A, B or C under the International Labour Office (hereafter referred to as I.L.O.) classifications but where there is no apparent impairment for work, 66 ⅔ percent of the average weekly wages, for 300 weeks, up to 100 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500.

4. For coal worker's pneumoconiosis medically determined to be A, B or C under the I.L.O. classifications or which involves progressive massive fibrosis, or for any stage of coal worker's pneumoconiosis when it is accompanied by sufficient pulmonary function loss as shown by approved medical tests and standards to render an employee totally unable to do manual labor in a dusty environment and the employee is instructed by competent medical authority not to attempt to do work in any mine or dusty environment and if he is in fact not working, it shall be deemed that he has a permanent disability and he shall receive 66 ⅔ percent of his average weekly wages during the three years prior to the date of filing of the claim, up to 100 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500 for his lifetime without limit as to the total amount.

B. In any case where partial disability as mentioned in subsection A of this section later results in total disability, the employer shall receive credit on any permanent disability payments by being allowed to deduct 25 percent of each weekly payment until payments for partial disability hereunder have been fully accounted for.

C. In any case where there is a question of whether a claimant with pneumoconiosis is suffering from coal worker's pneumoconiosis or from some other type of pneumoconiosis such as silicosis, it shall be conclusively presumed that he is suffering from coal worker's pneumoconiosis if he has had injurious exposure to coal dust.

D. In the event that any coal operator wishes to insure himself under standard workers' compensation insurance rather than be self-insured against the risks and liabilities imposed by this section or by § 65.2-513, any such insurance issued in this Commonwealth covering such risks shall be rated separately for premium purposes and shall not affect workers' compensation rates for any other employers not exposed to such risks. (1972, c. 619, § 65.1-56.1; 1973, c. 436; 1974, cc. 201, 560; 1975, c. 447; 1990, c. 610; 1991, c. 355.)

# Appendix C

## Virginia Workers' Compensation Commission

## Pneumoconiosis Guide

# PNEUMOCONIOSES GUIDE

The Virginia Workers' Compensation Commission has established the following guide for determination of compensable stages of the pneumoconioses. Interpretation of radiographic evidence shall be based upon the ILO 1980 International Classification of Radiographs of the Pneumoconioses.

| | | | |
|---|---|---|---|
| *First Stage:* | Category | 1 and 2 | p, s |
| | " | 1 | q, t |
| *Second Stage:* | Category | 3 | p, s |
| | " | 2 and 3 | q, t |
| | " | 1, 2 and 3 | r, u |
| *Third Stage:* | Category | A, B, C | |

This guide shall be effective September 1, 1989.

# Appendix D

## Virginia Workers' Compensation Commission

## Rule 17

**Rule 17. Required Filing of Medical Reports.**

A. All medical reports received by any party in any proceeding in the Workers' Compensation Commission shall, as soon as received, be forthwith filed with the Commission. In any contested pending claim, copies of such medical reports shall be simultaneously forwarded to the opposing party. In any claim, copies of medical reports herein named shall be provided the opposing party without cost upon request:

1. Workers' Compensation Commission Form 6 or equivalent
2. Hospital Emergency Room reports
3. Narrative reports of doctors and consultants
4. Doctors' cumulative progress notes
5. Return to work or disability slips
6. Hospital admission summaries
7. Operative notes
8. Hospital discharge summaries

The required filing of such medical report with the Commission shall constitute a required report and is subject to provisions of § 65.2-902, Code of Virginia.

B. In any claim for coal workers' pneumoconiosis for first, second or third stage/category, the employer and the employee each shall be limited to submission of not more than three medical interpretations (readings) of x-ray evidence without regard to the number of x-rays. For good cause shown, additional interpretations may be admitted if deemed necessary by the Commission. Any party to a contested claim, or the parties upon agreement, may submit the x-ray evidence to the Commission for interpretation by the Pulmonary Committee. If a party agrees to accept the x-ray reading of the Pulmonary Committee as the binding classification, the costs of evaluation shall be borne by the Commission.

The Commission shall appoint a Pulmonary Committee to be composed of at least three qualified physicians certified as "B" readers under standards promulgated by the International Labour Organization (ILO). Commission Guidelines for stages of pneumoconioses shall be based upon current ILO standards for x-ray classification.

Rule 17B shall apply to any claim in which the employee receives a communication on or after April 1, 1989.

# Appendix E

## 1980 International Labour

## Organization Classification Form

ROENTGENOGRAPHIC INTERPRETATION BASED ON THE ILO 1980 CLASSIFICATION OF THE PNEUMOCONIOSES

PSE&J

Name

ID#

CHEST PA RAO - LAO LAT

Facility:

**1A. DATE OF X-RAY**

**1B. FILM QUALITY** If Not Grade 1 Give Reason: 1 | 2 | 3 | U/R

**1C. IS R/T/M COMPLETELY NEGATIVE?** YES ☑ Proceed to Section 5 NO ☐ Proceed to Section 2

**2A. ANY PARENCHYMAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS?** YES ☐ COMPLETE 2B and 2C NO ☐ PROCEED TO SECTION 3

**2B. SMALL OPACITIES**

a. SHAPE/SIZE — PRIMARY: p | s / q | t / r | u — SECONDARY: p | s / q | t / r | u

b. ZONES: R L

c. PROFUSION: 0/ | 0/0 | 0/1 / 1/0 | 1/1 | 1/2 / 2/1 | 2/2 | 2/3 / 3/2 | 3/3 | 3/+

**2C. LARGE OPACITIES**

SIZE: O | A | B | C

PROCEED TO SECTION 3

**3A. ANY PLEURAL ABNORMALITIES CONSISTENT WITH PNEUMOCONIOSIS?** YES ☐ COMPLETE 3B, 3C and 3D NO ☐ PROCEED TO SECTION 4

**3B. PLEURAL THICKENING**

a. DIAPHRAGM (plaque) — SITE: O | R | L

b. COSTOPHRENIC ANGLE — SITE: O | R | L

**3C. PLEURAL THICKENING . . . Chest Wall**

a. CIRCUMSCRIBED (plaque)

| | O \| R | O \| L |
|---|---|---|
| SITE IN PROFILE i. WIDTH | O \| A \| B \| C | O \| A \| B \| C |
| ii EXTENT | O \| 1 \| 2 \| 3 | O \| 1 \| 2 \| 3 |
| FACE ON iii EXTENT | O \| 1 \| 2 \| 3 | O \| 1 \| 2 \| 3 |

b. DIFFUSE

| | O \| R | O \| L |
|---|---|---|
| SITE IN PROFILE i. WIDTH | O \| A \| B \| C | O \| A \| B \| C |
| ii EXTENT | O \| 1 \| 2 \| 3 | O \| 1 \| 2 \| 3 |
| FACE ON iii EXTENT | O \| 1 \| 2 \| 3 | O \| 1 \| 2 \| 3 |

**3D. PLEURAL CALCIFICATION**

| | O \| R EXTENT | O \| L EXTENT |
|---|---|---|
| a. DIAPHRAGM | O \| 1 \| 2 \| 3 | O \| 1 \| 2 \| 3 |
| b. WALL | O \| 1 \| 2 \| 3 | O \| 1 \| 2 \| 3 |
| c. OTHER SITES | O \| 1 \| 2 \| 3 | O \| 1 \| 2 \| 3 |

PROCEED TO SECTION 4

**4A. ANY OTHER ABNORMALITIES?** YES ☐ COMPLETE 4B and 4C NO ☐ PROCEED TO SECTION 5

**4B. OTHER SYMBOLS (OBLIGATORY)**

SEE DOCTOR

OTHER DISEASE ☐ | O | ax | bu | ca | cn | co | cp | cv | di | ef | em | es | fr | hi | ho | id | ih | kl | pi | px | rp | tb |

YES ☐

**4C. OTHER COMMENTS**

# Appendix F

## Empirical Data

**1990**
**1991**

## 1990 CLAIMS COAL WORKERS' PNEUMOCONIOSIS

| | |
|---|---|
| Total claims considered | 286 |
| Total claims placed on hearing docket | 269 |
| Total claims awarded by agreement | 97 |
| Total claims denied: | 261 |
| Total claims awarded: | 8 |

7 stage 1 claims awarded
1 stage 2 claims awarded

Pulmonary Committee Input:
5 x-ray read as stage 1
1 x-ray read as stage 2
2 x-ray unreadable

### Denied For Reasons Other Then Level Not Compensable

10 Barred by Statute of Limitations
4 Denied because of no exposure with employer named in claim
1 No jurisdiction
2 Failure to appear at hearing/or no x-ray submitted
1 Settled

### Claims Denied Because Level Was Not Compensable

Total Claims Denied: 243

| 3/3split Reading* | Multiple Reading# | Party Requested Referral | Pulmonary Committee Referral | Not Referred | Pulmonary Committee Denial** |
|---|---|---|---|---|---|
| 133 | 45 | 1 | 179 | 64 | 179 |

* 3/3 split means 3 positive and 3 negative readings were submitted and case was referred to Pulmonary Committee.
\# Multiple readings means either more than 6 readings were submitted or a wide range of readings were submitted.
** This includes x-rays that were found to be unreadable.

### Reviews Before the Full Commission

Total Reviews before the Full Commission: 12

Review of Award by deputy commissioner: 3

| Deputy Commissioner | Review Result |
|---|---|
| 2 Award stage 1 | Affirmed |
| 1 Award stage 2 | Affirmed |

Review of Denial by deputy commissioner: 9

| Reason Denied by deputy: | Review Result |
|---|---|
| 4 Statute of Limitations | 2 Reversed and Remanded |
| | 2 Affirmed |
| 2 No injurious exposure with named employer | 1 Reversed in part |
| | 1 Settled |
| 3 Level not compensable | 3 Affirmed |

## 1991 CLAIMS COAL WORKERS' PNEUMOCONIOSIS

| | |
|---|---|
| Total claims considered | 353 |
| Total claims placed on hearing docket: | 256 |
| Total claims awarded by agreement | 17 |
| Total claims denied: | 252 |
| Total claims awarded after hearing: | 4 |

2 stage 3 claims awarded
2 stage 2 claims awarded

Pulmonary Committee Input:
1 x-ray read as stage 3
1 x-ray read as stage 2
1 x-ray unreadable

### Denied For Reasons Other Than Level Not Compensable

| | |
|---|---|
| 15 | Barred by Statute of Limitations |
| 1 | Denied because no communication of an occupational disease |
| 5 | Denied because of no exposure with employer named in claim |
| 1 | Benefits awarded in another state |
| 2 | No jurisdiction |

### Claims Denied Because Level Was Not Compensable

Total Claims Denied: 228

| 3/3split Reading* | Multiple Reading# | Party Requested Referral | Pulmonary Committee Referral | Not Referred | Pulmonary Committee Denial** |
|---|---|---|---|---|---|
| 165 | 25 | 23 | 213 | 15 | 213 |

* 3/3 split means 3 positive and 3 negative readings were submitted and case was referred to Pulmonary Committee.
\# Multiple readings means either more than 6 readings were submitted or a wide range of readings were submitted.
** This includes x-rays that were found to be unreadable.

### Reviews Before the Full Commission

Total Reviews before the Full Commission: 12

Review of Award by deputy commissioner: 2

| Deputy Commissioner | Review Result |
|---|---|
| 2 Stage 2 awarded | 2 Affirmed |

Review of Denial by deputy commissioner: 10

| Reason Denied by deputy: | Review Result |
|---|---|
| 4 Statute of Limitations | 2 Reversed and Remanded |
| | 1 Reversed in part |
| | 1 Affirmed |
| 1 No communication | 1 Reversed and Remanded |
| 1 Award in other state | 1 Affirmed |
| 4 Level not compensable | 4 Affirmed (1 dissent) |