

West Virginia law firm accused of “cutthroat approach” to fighting black lung claims

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As part of its year-long investigation into the resurgence of black lung disease entitled “Breathless and Burdened,” the nonpartisan investigative news organization The Center for Public Integrity has exposed what it calls the “cutthroat approach to fighting miners’ [black lung] claims” employed by lawyers working for coal companies.

Through its investigation, the Center found that, for decades, the prominent West Virginia law firm Jackson Kelly PLLC has withheld key evidence, such as doctors’ reports, and presented incomplete or potentially misleading evidence in their defense of coal companies against black lung claims by miners. As a result of Jackson Kelly’s work, the Center claims that hundreds of “sick and dying miners have been denied benefits.”

Black lung is the common name for coal workers’ pneumoconiosis, an irreversible and debilitating lung disease contracted from the inhalation of coal dust. Miners afflicted by the painful disease slowly lose the ability to breathe, eventually suffocating to death over a period of years. According to the Centers for Disease Control and Prevention, while black lung is incurable, it is “entirely man-made, and can be avoided through appropriate dust control.”

After declining precipitously in the aftermath of the 1969 Coal Mine Health and Safety Act, which established legal dust limits and implemented the black lung compensation program, numerous reports and studies have documented the alarming resurgence of black lung throughout the industry since the 1990s. Both the rate and overall number of coal miners afflicted with black lung have more than doubled, including among younger miners, whose entire careers have been spent under the lower dust limits set by the 1969 legislation (see “Black lung on the rise among US

coal miners”).

According to the National Institute for Occupational Safety and Health (NIOSH), more than 76,000 miners died from black lung between 1968 and 2010. Between 1995, when the NIOSH first recommended tightening the dust limits, and 2010, the last year for which statistics are available, black lung has killed 13,675 miners, according to the NIOSH. New regulations drafted by the Mine Safety and Health Administration cutting the legal dust limit in half to 1 milligram per cubic meter are currently stalled pending approval by the Obama administration (see “US stalls on new coal dust rules as black lung disease spreads”).

The Labor Department receives thousands of claims for black lung benefits each year, but rarely grants initial approval. In 2012, only 14 percent of claims were granted by the federal government at the initial level. Most of these awards are appealed. Even when a judge rules in favor of a claimant, the case is invariably appealed by the coal companies.

The Center’s accusations against Jackson Kelly reveal only part of a broader conspiracy against coal miners who contract the disease. This conspiracy extends not only into the regulatory agencies of the government, it also involves the medical community, from whose ranks coal companies employ prestigious and high-priced doctors to consistently deny the existence of black lung. As a result of the Center’s exposure of radiologists at Johns Hopkins Hospital, the university suspended its black lung unit last November (see “US university hospital suspends its black lung unit”).

The Center describes the process of applying for black lung benefits as a “foreign world—one populated by administrative law judges who must make sense of reams of medical evidence, sophisticated legal

arguments and arcane rules.” Jackson Kelly is one of “the most prominent denizens of this world,” claims the Center.

The Center notes the huge disparity of power that exists once a miner enters the courts in pursuit of a claim. Fewer than one third of claimants have legal representation at the outset due to the hurdles involved and the extremely low payout in the event of victory. A successful black lung claim brings a miner as little as \$600 a month in benefits and is capped at about \$1,250 per month when the miner has three or more dependents to support.

“Time and money are on the side of the coal company,” explains the Center, “which can hire scads of experts and drag cases out for years or decades.” During this time, lawyers are legally barred from charging claimants any fees. As a result, more and more claimant attorneys have fled the federal black lung system in recent decades.

To highlight its charges, the Center tells the stories of several miners in their struggles for black lung benefits against Jackson Kelly. One of those is West Virginia coal miner Gary Fox, who worked underground in the mines for more than 30 years. Fox first applied for black lung benefits in 1999 after he began experiencing shortness of breath and coughing up black mucus. A U.S. Labor Department doctor diagnosed Fox with the most severe form of black lung. However, Fox’s employer, a subsidiary of Massey Energy, appealed the government’s order to begin paying him \$704.30 in monthly benefits.

Unable to find a lawyer to take on his case, Fox entered the courts in 2000 without legal representation, armed only with his testimony and the opinion of the Labor Department doctor. Jackson Kelly, representing the coal company, on the other hand, produced “medical reports, depositions, and resumes of eminent doctors who’d reviewed the evidence.” What the law firm did not submit were the reports of two coal company pathologists who had concluded that a suspicious mass removed from Fox’s lung two years prior was likely complicated by black lung.

Relying only on the evidence presented in Fox’s case, presiding judge Edward Terhune Miller denied his claim in 2001, forcing Fox to return to the mines to support his family. Fox, when he retired in 2007, enlisted the help of attorney John Cline. By that time,

Fox was physically unable to continue working even in a capacity above ground.

Through his involvement with other black lung cases involving Jackson Kelly, Cline was aware of their tactics and found it suspicious that the law firm hadn’t presented any pathology evidence from their own doctors. In handling Fox’s second claim for benefits, Cline requested Jackson Kelly turn over any evidence not previously presented.

When the law firm refused, Cline filed a discovery motion with presiding judge Thomas Burke, who sided with Cline. After repeated stalling, Jackson Kelly eventually conceded the case.

Judge Burke found in Fox’s favor in February 2009, awarding him benefits dating back to 1997. Burke also ruled that Jackson Kelly’s actions had in fact raised to the level of “fraud on the court,” writing that the “Employer’s ‘zealous’ representation strategy instills uncertainty and cynicism into a program intended to compensate miners disabled from black lung.”

Judge Burke’s ruling was eventually overturned by the review board, which was recently upheld by the U.S. Court of Appeals for the Fourth Circuit. Gary Fox passed away on April 14, 2009, at the University of Pittsburgh Medical Center after breathing problems caused his heart to fail. An autopsy conducted ruled that Fox had complicated black lung.



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