In the

Supreme Court of the United States

JOHN R. DILLARD and WILLIE WILLIAMS, etc.,

Appellants,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, et al.,

Appellees.

Docket No. 73-5412

Pages 1 thru 60

Washington, D. C.
March 26, 1974

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JOHN R. DILLARD and WILLIE WILLIAMS, etc., Appellants,	:	
v.	:	No. 73-5412
INDUSTRIAL COMMISSION OF VIRGINIA, et al., Appellees.	:	

Washington, D. C.,

Tuesday, March 26, 1974.

The above-entitled matter came on for argument at 1:02 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN M. LEVY, ESQ., 300 East Clay Street, Richmond, Virginia 23219; for the Appellants.

STUART H. DUNN, ESQ., Assistant Attorney General of Virginia, Supreme Court-State Library Building, 1101 East Broad Street, Richmond, Virginia 23219; for the Appellees, Industrial Commission of Virginia and individual Commissioners.

APPEARANCES [Contd.]:

J. ROBERT BRAME, III, ESQ., McGuire, Woods & Battle, 1400 Ross Building, Richmond, Virginia 23219; for the Appellee Aetna Casualty and Surety Company.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Dillard against Industrial Commission, 73-5412.

Mr. Levy, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN M. LEVY, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LEVY: Mr. Chief Justice, and may it please the Court:

I represent the appellants.

The issue in this case is whether the procedures in Virginia for the suspending of Workmen's Compensation benefits meet the requirements of procedural due process.

The procedures which are in effect now in Virginia, under Rule 13 of the Rules of the Industrial Commission, require that an employer or a Workmen's Compensation carrier submit to the Commission a verified application for a hearing and whatever evidence it has as to the worker's disability or lack of disability.

The Commission will then make an ex parte determination that probable cause exists to believe that the worker is no longer eligible.

The lower three-judge federal court, with one judge dissenting, held that since there was a post-suspension hearing, which all parties agree does provide due process, it's a judicial type hearing, that since there was this

hearing after the suspension, that is all that due process required.

Appellants' position is that notice, which is adequate and timely, must be given to the worker, and that he have an opportunity to present his side of the dispute.

QUESTION: And meanwhile payments continue.

MR. LEVY: And meanwhile payments continue, yes, sir.

QUESTION: Until?

MR. LEVY: Until a determination is made after a due process hearing.

QUESTION: And if adverse to the employee at that stage?

MR. LEVY: At that stage they may be terminated.

QUESTION: What about written participation?

MR. LEVY: In some instances we would think that written submission of documentary evidence would certainly suffice.

QUESTION: But only if he didn't ask for more?

MR. LEVY: No. I think --

QUESTION: Would he have the right -- would he have the right always to an evidentiary hearing, to cross-examine and present witnesses?

MR. LEVY: No. No, I do not think -- no, that is not our position. An example would be where the insurance

carrier says that he can no longer be located. Obviously, all that would be required would be a submission in writing, what-have-you, that in fact he can be located. There are a myriad of different factual situations in which it arises.

And our position is only that adequate and timely notice must be given, and an opportunity to present his side of the dispute.

The main plaintiffs in this suit were both injured on their job, received Workmen's Compensation, an award of Workmen's Compensation approved by the Commission; both had their compensation discontinued, one for 116 days, one for 100 days, and then had it restored retroactively after the post due process hearing was had.

QUESTION: Was there any more usual or common ground of disctoninuance?

MR. LEVY: I would think in the amici's brief says that medical evidence, that the doctor who treated the workers says he is able to go back. This is the most usual, I think statistically, evidence that --

QUESTION: Well, in cases like that, what kind of hearing would you think is required?

MR. LEVY: I think in most instances what would be required would be the ability of the worker to submit,time to get his own medical evidence and submit it. Possibly --

QUESTION: In writing?

MR. LEVY: Right, a doctor's report, an evidentiary documentary report.

Possibly there would be instances where he could -- would need oral argument. There are doctors -- the most -- the example that comes to mind would be a psychiatric report, where oral argument, I think by his counsel or even his presence before the decider of fact, would be essential.

QUESTION: And who do you think should be the decider?

MR. LEVY: Well, the decider is, under Virginia law, the Industrial Commission or an employee of the --

QUESTION: And there's no problem in that respect?

MR. LEVY: No problem in that.

QUESTION: Unh-hunh.

QUESTION: What's the difference in the position of Williams and Dillard with respect to the continuing dispute in this case; is there any?

MR. LEVY: Mr. Dillard settled his individual claim with Aetna, his employer's comp carrier. Mr. Williams has taken his case all the way through. He has been denied the subsequent due process hearing. He has appealed that, and is in an adversary situation, as opposed to his compensation carrier.

QUESTION: Where -- he appealed to the Supreme Court of Virginia?

MR. LEVY: Right. Which was denied. He has noted or filed a petition for certiorari in this Court.

QUESTION: Did he raise before the Supreme Court of Virginia his due process contentions that he made before the three-judge district court?

MR. LEVY: No, that was not before the Supreme Court of Virginia, since all he was appealing was a finding by the Commission that he was no longer disabled.

It was not raised below. And the Industrial Commission of Virginia has considered, itself, that issue, and, on the strength of the lower court opinion here, found it --

QUESTION: The Commission, I gather, had a post-termination hearing.

MR. LEVY: At a post-termination hearing.

QUESTION: Which you agree provides due process.

MR. LEVY: Most definitely. The post-termination hearing provides due process.

QUESTION: And that was before the Virginia Supreme Court in his case?

MR. LEVY: No --

QUESTION: The appeal from its determination, adverse to him?

MR. LEVY: Correct. A factual question whether Mr. Williams is disabled or not.

QUESTION: But wasn't that affirmed by the Virginia Supreme Court?

MR. LEVY: Yes, it was, Your Honor.

QUESTION: And what, conceivably, are your grounds in the petition for certiorari here from that affirmance?

MR. LEVY: That there was no evidence before the court -- before the Commission, to hold that his evidence, that his disability had ended, and therefore it denied him due process.

QUESTION: So it's a sufficiency of the evidence point entirely?

MR. LEVY: Yes, Your Honor.

QUESTION: But if -- even if you lose there, there's still a live controversy here, isn't there?

MR. LEVY: I believe that this case is not moot. There is declaratory relief asked for, for one thing. Second of all, this is brought as a class action to determine such, on remand from this Court, --

QUESTION: Are you -- aren't you arguing that even if it were later determined that he was validly terminated, aren't you claiming that if his initial termination wasn't proper because of inadequate procedures, that you were entitled to payment until proper procedures were provided?

MR. LEVY: Yes, Your Honor.

I -- my mootness, or my response to mootness --

QUESTION: If you're right on that, it isn't moot. Or then you'd have some back -- you'd have some so-called back pay involved here.

MR. LEVY: That was not asked for in our complaint.

QUESTION: It wasn't?

MR. LEVY: We did not ask for damages.

QUESTION: Well, you didn't enjoin Travelers, so you really couldn't join -- ask for any money, could you?

MR. LEVY: Correct.

QUESTION: This really is a question about mootness, isn't it?

MR. LEVY: Your Honor, we feel that this case fits precisely within what Mr. Justice Blackmun spoke of in Roe v. Wade. It is capable of repetition yet evading review.

The case would always moot out, as the facts show, within one month or two a year, or maybe eight months. A hearing will be held, a due process hearing will be held.

QUESTION: But here if you enjoin Travelers and preserve the claim for money judgment, it wouldn't have mooted out.

MR. LEVY: That would have been a possibility. Our question is whether any injured worker cannot be mooted out by having his insurance company resist and withdraw, pay him off, moot him out. And this is specifically the

type of case which will evade review forever. If -- when a valid class representative goes his -- has his procedure done, has his welfare benefits or her pregnancy terminated, there can be no live, in the sense that I think this Court was talking about in the case before us, a live plaintiff.

QUESTION: But that was true in Burns vs. Indiana Employment Security Commission, too, wasn't it, that was decided last year?

QUESTION: Berney.

MR. LEVY: Berney?

QUESTION: Berney, yes.

MR. LEVY: The distinguishing factor in Berney, and I do not know whether this is what the Court meant in Berney, was here there are -- there was an intervention of a new member of the class, Mr. Williams, after this Court remanded back to the lower court, the three-judge court, they made a finding that it's a proper class, allowed intervention.

Now, I think arguably, the intervenor is in the same position as the original named appellant was.

But if this Court holds that this case is moot on those facts, I think it will be flying in the face of an opinion which was just rendered, I think in January, American Pipe and Construction Company, dealing with class actions and the statute of limitations. Where the Court said that a federal class action is truly a representative suit, designed

to protect against unnecessary motions for intervention and joinder.

What counsel, any counsel bringing a class action, a civil rights, a (b)(2), Rule 23 (b)(2) class action would have to do if this case is moot would be to file endless motions to intervene other members of the class, and hope that by the time the case reached the highest level, appellate level, it would, there would still be someone who is "alive".

QUESTION: Now, will you say again why it is that these cases disappear in the course of litigation?

MR. LEVY: Because a hearing is held --

QUESTION: That is, a post-termination --

MR. LEVY: Post-termination hearing.

QUESTION: You mean the time limits within which that must be held are so short, --

MR. LEVY: Is so short --

QUESTION: -- that inevitably it will have been concluded before the case can get to us?

MR. LEVY: Correct, Your Honor.

QUESTION: I see.

QUESTION: Well, I'm not sure about that. At the hearing his claim has either to be sustained or not; if it's sustained he's going to get retroactive benefits --

MR. LEVY: Correct.

QUESTION: -- for the entire period. If it's

terminated -- if he's -- if his claim is rejected, then it isn't going to disappear if somebody has preserved the claim against the insurance company that meanwhile -- that meanwhile, pending a due process hearing, he's entitled to payments. Because they weren't terminated with due process.

MR. LEVY: I would have to agree that that would be one solution to this problem.

QUESTION: Well, the issue doesn't just wash out, anybody in some subsequent case who claims against the insurance company for interim benefits, where they've been terminated without due process, as you claim, could preserve his claim.

MR. LEVY: Correct. They could preserve the claim by asking for monetary damages.

QUESTION: That's right.

MR. LEVY: Correct. The issue of due process would have been -- would be moot, and wouldn't --

QUESTION: Oh, no, it wouldn't be moot, because he wouldn't -- if he obtained -- if this present procedure complied with due process, he couldn't get his interim payments.

MR. LEVY: Correct.

Appellants' position is that, I think it is beyond argument that Workmen's Compensation benefits are property under a long line of cases that this Court has decided, I

Board of Regents v. Roth gives the best definition.

And that once this is found, that it is property within the meaning of the Fourteenth Amendment, that whatever process is due has to precede the deprivation.

The fatal defects in Virginia's system is that there is absolutely no notice required of -- required to be given to the injured worker. The first notice that he will probably get is going to his mailbox, expecting his weekly Workmen's Compensation check and find that it's not there. Or he will get a copy of a letter to the Commission saying that it wants a hearing.

QUESTION: Does each employee in Virginia enter into some kind of an agreement when he goes to work, covering his Workmen's Compensation?

MR. LEVY: Under the statute in Virginia, every contract of employment, the whole Workmen's Compensation system is read into every contract of employment. There is no -- well, I do not think employers require an employee to sign their master --

QUESTION: So that the worker's contract is with the employer.

MR. LEVY: For employment, correct.

QUESTION: And he's the one who has the obligations imposed by the Workmen's Compensation system.

MR.LEVY: Yes, sir.

QUESTION: So it's really the employer that owes -- it's the employer who really owes the payments.

MR. LEVY: The statutes of Virginia provide for two ways to fulfill the duty. The duty is primarily on the employer.

QUESTION: Well, even if the employer gets an insurance carrier to carry his load for him, it's -- the worker hasn't any relationship to the insurance company.

MR. LEVY: Except possibly third-party beneficiary.

QUESTION: Well, but his contract is with the employer.

MR. LEVY: But each contract of employment in Virginia, by statute, has read into it a --

QUESTION: Well, my real question is whether this employee, if he was denied procedural due process in connection with termination of his benefits, has a claim against the employer.

MR. LEVY: Yes, Your Honor.

QUESTION: Well, you didn't need to enjoin Travelers then.

QUESTION: Well, did you enjoin his employer?

MR. LEVY: No, Your Honor.

QUESTION: They can opt out of this thing, can't they, by affirmative action?

MR. LEVY: No, the statute of Virginia, as the

brief for the amici, the insurance industry, pointed out that as of January 1st, '74, neither the employer nor the employee can opt out.

QUESTION: It's mandatory on both.

MR. LEVY: Mandatory on both. So it used to be that the employee could opt out.

The second defect we find is that without notice there is no opportunity for the employee, for the injured worked, to present his side of the case.

As was brought out earlier, the questions in Workmen's Compensation cases can be very complex. For example, whether an employer, an employee has unjustifiably refused medical treatment.

What the decider of fact, the Workmen's Comp -- the Industrial Commission of Virginia has before it in this probable-cause procedure is merely one side's, the employer or carrier's side of the evidence.

There is nothing before it, under this procedure, as to the worker's justification for refusing a further medical treatment.

I think what this Court said in Bell v. Burson is apposite in this sense. It is a proposition which hardly seems to need explication, that a hearing which excludes consideration of an element essential to a decision does not give due process. In Bell v. Burson it was fault, in

taking away the driver's license.

Here, Virginia's procedure excludes, in this instance whether the worker is justified or unjustified.

An example, cited at page 8 of appellants' reply to amici for the industry, the case of Thompson v. United Piece and Dye Works, the carrier had said the injured worker was unjustifiably refusing a back operation.

When it got to the Commission and the worker was able to submit his side, it was shown that this worker had undergone three prior back operations, with no improvement. And the Commission, I think, obviously found that of course he was justified in refusing to go through another one.

Also there are questions which are, you know, able to be determined very summarily, such as the example I gave of whether the worker is no longer can be found.

What we are asking this Court to do, as it is done in most of the procedural due process cases, is to set the broad parameters of what due process requires: notice, and the opportunity to be heard in a meaningful manner.

As I think the Court said in Fuentes, it is peculiarly the State's function to set the procedures exactly, balance the interest as to how much, how close to a judicial type proceeding it should be, and this Court, though I feel should give the broad outlines, the fundamental and basic fairness, as the Court recently said in Groppe?, which

procedural due process is always required.

I'd like to reserve the rest of my time.

QUESTION: Mr. Levy, I think there's a suggestion somewhere in the briefs, perhaps, that if you prevail here, employers might be less willing to commence payments and to reach settlements at that end of the disability period. Do you agree with that?

MR. LEVY: I would not agree with it. I am not expert on the insurance industry's side. I would not think that the lack of good -- I would not posit a lack of good faith on the insurance industry.

I think the amici's brief shows that there is 95 percent of Workmen's Compensation benefits at all ends, at the inception and termination, are voluntarily settled. And I do not see any reason to believe that any, or much greater percentage would -- that this percentage would change with a decision in this case.

QUESTION: What are we talking about as a practical matter? How much delay is there between the date of suspension and in the Virginia system, the actual post-termination hearing?

MR. LEVY: There is some ambiguity in the record. What the lower court found was an average one-month delay. The answers to interrogatories, I think, would -- in the Appendix -- would bear a reading that there is probably more

delay, probably closer to three or four months. The interrogatories were framed in a variety of fact situations.

But the lower court found one-month delay.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Dunn.

ORAL ARGUMENT OF STUART H. DUNN, ESQ.,
ON BEHALF OF THE APPELLEES, INDUSTRIAL
COMMISSION OF VIRGINIA AND INDIVIDUAL
COMMISSIONERS

MR. DUNN: Mr. Chief Justice, may it please the Court:

I will address myself to the question basically of the due process aspect of the case. Mr. Brame, representing Aetna, with the permission of the Court, will address himself to the jurisdictional point, with respect to whether or not there is a property right here and whether or not it has been taken.

At the outset I would refer the Court to the yellow brief of the Amici, American Insurance Association and the American Mutual Insurance Alliance, at page 15, where there is a factual error.

This is in the guidelines, where they set out five guidelines, and this statement is found on line 4:

"The doctor's medical report must indicate that the

employee can return to work within seven days; speculation as to the employee's condition further into the future will not support a probable cause finding."

Apparently there is simply a lack of communication between the amici in this case and the Industrial Commission. The Industrial Commission takes the position that this is in fact not true, there is no ability for a prospective determination. No doctor can say, I believe that this employee will be able to go back to work in three or four days, or seven days, or fifteen days, and obtain a probable cause finding on that.

There is absolutely no prospective result.

There are other less substantial errors, but I think this is the only one that bears comment.

QUESTION: In other words, the doctor's report has to say that he is able to go back to work now.

MR. DUNN: Yes, sir.

Perhaps the seven days is a confusion between this process and the process whereby an employee must be off work more than seven days before he ever gets into being eligible for Workmen's Compensation benefits.

QUESTION: Unh-hunh.

MR. DUNN: But that's just speculation on my part. But, at any rate, it's untrue.

QUESTION: I notice that list of guidelines is

preceded by a sentence, "The Commission uses the following guidelines"; and you just suggest that's not --

QUESTION: Right.

MR. DUNN: You Honor, I --

QUESTION: At least to that extent that's not the case.

MR. DUNN: That is not the case, Your Honor, with respect to this comment, and also with respect to several others that are not as substantial. But this was apparently based on communication between the amici and the Commission, which we were not a party to.

I believe an important note, and what we believe is important about this case, in that it's fairly unique. And it's unique for this reason:

First of all, there is the probable cause determination under Rule 13.

The second thing is with respect to the, what amounts to a tripartite rights in property. We have the interest, of course, of the employee, the interest of the employer, and we have the interest of the government.

I think to understand the way that this system actually works, one needs to look at what exactly Workmen's Compensation is. And if I may spend just a few moments outlining the way the system works in Virginia.

Of course, Workmen's Compensation is basically a

substitute for a common law tort. And under this procedure, the basic changes regard the fact that the employee no longer has a suit in tort, and therefore would not get as much money, perhaps, in particular cases under Workmen's Comp as he would get under common law.

On the other hand, the employer gives up certain defenses, such as the doctrine of fellow servant, of contributory negligence and so forth, and therefore there is at least compensation in every case of an industrial accident.

The system provides basically for two types of payment: one, a medical; the second is temporary compensation.

Now, there may in fact be permanent incapacity. The provision in the law there will be a rating of a percentage of capacity, and there will be payments on the basis of that.

But up until a doctor is able to rate an employee, there will be temporary compensation. The statute provides for payments during incapacity. The award in the case of Mr. Williams and of Mr. Dillard provides for payment during incapacity.

So, then, it's to be anticipated that this payment will not go on forever, and that in fact there are generally three ways in which it will end, one is of course that the employee recovers and is able to go back to work; secondly, it is clear that he has progressed to whatever point he's

going to with respect to his incapacity, and he's rated; or, third, he may have been permanently or partially incapacitated for the entire statutory period of 500 weeks, and essentially his payments will run out under that system.

Now, with respect to a question that Justice Blackmun raised, this gets me really to my next point. This is what we think is the touchstone of the system in Virginia, and what makes it work as well as it does, and that is the voluntariness.

As counsel for the appellants has already suggested, roughly 95 percent of the cases are decided without any opinion. They are handled by the employer, employee, and the insurance company is acting in good faith.

Now, Mr. Levy has suggested in his reply brief that -- and also in response to Mr. Justice Blackmun's question he suggested that he would not impute any bad faith.

We submit that's not the problem.

The problem is that at the present time it is in the insurance company's self interest and in the employer's self interest to very promptly undertake payment to an employee in a Workmen's Comp situation.

This is done because it is a morale factor for the employee, the employer likes to get the employee getting paid very soon, and in fact the Commission knows that often payment is made to the employee prior to there even being

an award.

Now, this is also based on the fact that when -- if the employer finds out that there's been some sort of a mistake, the representation of the employer turns out to be something different from what it had been represented, it is readily easy to terminate this.

Of course, under the present system where there's been a change of condition, he can terminate it and set it for a hearing.

We submit that the problem will be not simply, as you have in Coldberg, you will have a hearing every time somebody wants one, that's not all you'll have; you'll have all the extra hearings from the people who want them, and then, on top of that, you will have all the hearings that are caused on the front end, not because of any bad faith, but simply because it has become, in the insurance company's and employer's economic self-interest, to look much harder at the claim before they ever take it, to be sure that this is a compensable claim.

QUESTION: Are the interests of the insurer and the employer always identical in this situation? Does the employer's premium depend on his experience?

MR. DUNN: The system in Virginia is that it is value rated, it is value rated by industry. For example, all employers of bricklayers would pay a similar premium as

all other employers of bricklayers, but they might not pay the same premium as metalworkers.

So that an individual company's experience will not affect its insurance premium, but the industry's experience will.

Now, to that extent, I think, Mr. Justice Rehnquist, you raise a good point, to separate the insurance company from the self-employer, or self-insured employer. The self-insured employer, of course, across the street from each other, two competitors, one having a claim and the other not, may be in a competitive situation such that he can't absorb. It may be a small business. He just simply cannot absorb it.

This, of course, wouldn't happen where there were insurance companies, because the competitive angle is then gone. That is, every other bricklayer has got to pay the same premium, if they're inflated, as this bricklayer does.

QUESTION: Well, then, I should think in that situation, particularly a small employer might not have an identical interest with the insurer. He might have an interest in obtaining compensation for an employee, perhaps even when the literal provisions of the law weren't complied with, if it isn't going to affect his premium.

MR. DUNN: He would not, but his carrier, of course, would have a legitimate interest in it. And the employer had the interest to the extent that he would not want his

premium to go up, which it necessarily would as a result of this system. It would be quite easy for any employee simply to say no, when asked if his change of condition had occurred, and asked for the hearing.

I might further respond, as far as the time limit is concerned, I don't think in fact that the interrogatories reflect what the time limit is, I think it's interrogatory No. 14 is the answer to the question about what is the time limit for change of condition hearings; that is, what is the delay between the request for the hearing and the time of the hearing. And the answer is to refer back to answer 6, and answer 6 refers to the interrogatory to the fact that these records are simply not available in that form, and they could come to the office.

So what we end up with is simply no statistics in the record to show what the delay is. The Commission was unable to obtain them without going through all of its files.

There are some other statistics with respect to the one month and the one to three months, and I might say, based on my own knowledge, having been advised by my client, that these are probably in the better part, for these types of hearings as well; but they are not, there are no statistics in the record as such.

The important thing, we think, from the point of view of the voluntariness, with respect to the increased

litigation, which the Commission expects to occur, is the fact that this is not in the employee's best interest. The Commission, in a sense, is biased toward the employee. That's really its raison d'etre, that's what it's there for. The rules in the statute make it very clear, it's very liberal for the employee. Hearsay evidence can be presented by the employee. All sorts of loosening of normal judicial constraints are there.

And the Commission believes it will not be in the employee's best interest in the sense that the employee, for example, often will have returned to work by the time he will have ever gotten his hearing, if the insurance company denies that they have a claim.

Often these actions don't incapacitate the employee for more than several weeks or several months, and he's likely to be back at work. If he of course has been living on his income and has no savings, he's not going to be able to get to that.

The very argument which the appellants make for having the benefits continue comes back on the front end, to show that it's a very good reason for not having it work that way.

Now, as far as, again, the employer's or insurance company's ability to abuse this process, one can't lose sight of the fact that there is a probable cause determination.

By a disinterested, perhaps even biased toward the employee, party.

And another important thing to note is with respect to this case is that all the actions which took place with respect to these two appellants took place prior to amended Rule 13.

That is, under old Rule 13 there was no probable cause finding. The Commission simply, in a ministerial fashion, received applications for hearings and set them, without making any finding with respect to the probable cause of the determination.

For example, in the case of Mr. Dillard, the letter fairly read from Dr. Sibley indicates that Mr. Dillard was predicted to be able to go back to work in a couple of weeks. Under present procedures there would have been no probable cause finding in this respect.

Mr. Levy for the appellants suggests in his brief that there is no reason to think that the employee will not go back to work when he's able, because it's not in his economic self-interest to do so.

I think the statistics show that this is apparently not a reasonable conclusion.

First of all, his 66 and two-thirds percent is very close to -- being taxfree, is very close to a situation for a person who is not earning more than the maximum anyway,

of what he's taking home.

Further, the statistics would show that indeed a great number of these employees do ask for hearings, and in our footnote 8 in our brief, we set out for the Court what was a representative sample of a six-month period, not all of the hearings in a six-month period, but a representative sample, in which over 91 percent of the claims in which probable cause had been found were affirmed by the Court. Excuse me, by the Commission.

This would suggest that there are a great number of employees who, although able to return to work, at least as found by the Commission, are willing to ask for these hearings.

I would like to very briefly highlight a couple of very important protections for the employee under this case, first of all is the probable cause determination, as I've already mentioned, secondly, as we've said in our brief, is the fact that the employee himself is able to choose a doctor from a panel of three selected by the employer; and, in fact, the Commission is very liberal in permitting the employee to have another doctor, if he wishes one, as was done both in the case of Mr. Dillard and Mr. Williams.

QUESTION: Mr. Dunn.

MR. DUNN: Yes, sir.

QUESTION: In some States, I believe the Commission not only administers the system but also has its own insurance

program, so that in effect the Commissioners can wear two hats when they're making a decision as to compensation. Now, does Virginia have a State insurance fund which covers some employers, or is it all privately insured?

MR. DUNN: It's all privately insured.

QUESTION: So all the Commission does, basically, is find facts, they don't act as actuarial managers of an insurance fund.

MR. DUNN: No, they do not. As a matter of fact, and this was one of the points I was going to get to, they cannot even enforce their own decrees.

Section 65.1-100 of the Virginia Code provides for enforcement of these decrees in a court of record, so that the Commission cannot require an employer to pay. The only ability it has in this respect is that under Rule 13 he could refuse to grant a hearing to an employer who had not complied with the constraint to that rule. That is, had not paid up to the time that the probable cause determination was made.

But it does not control the funds, it cannot order the employer to pay; it can only -- if he refuses to pay an initial award, for example, they could assess attorney fees when it got to hearing, but it cannot essentially make the judgment good for the employee. It has no ability to do this.

And this is the important factor, that these funds

are private funds, they're not controlled by the Commission and every dollar that's taken from the employer or his insurance company and given to the employee is a dollar that he doesn't have any more for the private purposes.

I would like to mention one more point, with respect to the protection for the employee, and that's this question of notice. I would note to the Court that both parties received notice. Mr. Levy has suggested that often the employee only finds out that his payment has been cut when he goes to the mailbox and it's not there.

There's absolutely no evidence in this record to suggest that anybody finds it in that way. All the evidence that we have is that both of these employees did receive notice. One got the letter specifically, that is Mr. Williams. Mr. Dillard, it is noted at the bottom of his form which is in the record, received a copy.

QUESTION: Mr. Dunn, is there anything in the record which indicates when there's a post-termination hearing, how soon the ultimate determination at that hearing is made? Is it made at the hearing or --

MR. DUNN: Typically -- well, I should withdraw that word.

Based on my own reading, it appears that there are a substantial number of cases in which it is not. I don't know that --

QUESTION: You mean it may be sometime before the final decision?

MR. DUNN: Yes. Just as the Court does.

QUESTION: I see.

MR. DUNN: Obviously it depends, to an extent, on the complexities of the matter before the Commission.

QUESTION: Those decisions, are they written in form?

MR. DUNN: They are. For example, the opinions with respect to Mr. Dillard are in this record.

We submit to the Court that the appellants, on the basis of a number of rather speculative assumptions about what the Commission is doing now under Rule 13, recognizing that we have no evidence on the operation of amended Rule 13, because the case was actually decided only a couple of months after it came into effect, that on the basis of these speculative assumptions, for which there is no evidence, asking the Court to conclude that these laws are ineffective in Virginia; and by presenting their argument for a hearing in a vacuum, they ignore the substantial effect which this is going to have on the entire system.

We submit that the appellants are asking this Court to dismantle a carefully structured system by balancing -- which balances very many interests and very many factors, and we respectfully request that this Court decline to do so.

QUESTION: Well, do I gather from your last remark that if this case is reversed, that Virginia will have to revise its system substantially?

MR. DUNN: The gravamen of my remark was toward the effect which it would have upon the operation in the system. If Your Honor is asking the question, would there have to be a change in State law in order to permit this. Is that your question?

QUESTION: Well, I just wondered if you're going to have an entirely new world in which to live.

MR. DUNN: Well, I think it's difficult to determine, because under the brief the argument seemed to be by the appellants that they were entitled to a Goldberg hearing.

Now here today before this Court they suggest that there are a whole myriad of types of due process that might be available in any particular case.

We thought we were arguing about a Goldberg type hearing. And that is the way we've argued this case all along.

Now, under that assumption, we think it would be a serious disruption of the entire system, for the reasons that we stated, with regard to increased litigation and so forth.

I don't mean to suggest that there's going to be a wholesale change of legislation, necessarily, which would require this; simply that the system will not function as it

has, and we think to the detriment of the employee.

QUESTION: Well, when you speak of a Goldberg type hearing, are you suggesting that the hearing officer who could consider the matter in the Goldberg case would be more objective, more neutral than the Commission hearing?

MR. DUNN: Depending on the --

QUESTION: Or were you addressing yourself to the content of the hearing?

MR. DUNN: I was addressing myself to the procedures, that is, cross-examination, presentation of evidence, et cetera.

QUESTION: I see.

Very well, Mr. Dunn.

MR. DUNN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Brame.

ORAL ARGUMENT OF J. ROBERT BRAME, III, ESQ.,
ON BEHALF OF APPELLEE AETNA CASUALTY AND
SURETY COMPANY

MR. BRAME: Mr. Chief Justice, may it please the Court:

I think the argument before this Court already indicates the reason that we ask the Court to grant us the right to argue, to split the appellees' argument.

You've heard about the interest of the employee, and you've heard about the interest of the State. But our

position here is that the interest that has been forgotten is the interest of the employer.

This Court has long held that the Fourteenth Amendment is a shield which protects the liberties and properties of our citizens.

What the appellants today ask is that this shield be converted into a sword, and that this sword be used to deprive the employers of their property without due process of law.

Appellants ask this Court to weigh the private competing interest of the employer on one hand, and the employee on the other, and upon finding that the employee's need is greater, to order that the employer yield up his funds to an employee for whom you've had an independent finding of probable cause that the employee is not entitled to these funds.

And after the employer has established his defense, plus the fact that under Virginia law all funds that are paid to an employee, whether under mistake or whatever, by an employer under the Workmen's Compensation system, can never be recouped. There's no right of an employer to recoup any funds. But yet if the employee's suspension is later found to be erroneous, then the employee must, is immediately paid up to date.

QUESTION: Mr. Brame, as I read appellants' brief,

they agree that Virginia could change the law if this thing were reversed, and permit recoupment.

MR. BRAME: They could permit recoupment. I think probably the answer -- and this gets again to the State's argument, the delicate balance here that the State has struck. And they have weighed it against the employers, because I think they found -- the State found it was not in the State's interest to have the employers pursuing persons who have just come off of Workmen's Compensation.

This is, I think, an indication of the State's concern for the well-being of the employees. It's something that we employers have to live with.

But to date it hasn't become excessive. I think if it does, we may be in this Court on the other side of the case.

QUESTION: Has there ever been any attack on the Virginia statute on the grounds that it's a denial of due process? The irrebutable presumption, in effect, about the recoupment?

MR. BRAME: No, Your Honor, not that the annotations show. It's not a presumption, it just says -- well, it may be helpful to explain this, because I don't think the Court -- it hasn't been explained to the Court exactly how this system operates.

In Virginia, if there's an accident that appears to be a compensable accident, the disability has to run more

than seven days, or there has to be medical expenditures. The employer and the employee in 95 percent of the cases enter into a stipulation, and it is then entered by the Commission as an order. The order states that the employer shall pay specified benefits during incapacity.

By statute this order continues until it is amended or altered by the Commission after a full due process hearing.

Any amounts paid thereunder are not recouped by the employer.

What the Rule 13 that you've heard about is is a procedural addition or enhancement of the employee's rights. As was stated earlier, these Commission awards are not enforcible by the Commission, they must be enforced in a court of record.

So if the employer or the insurance carrier didn't pay, you'd have to go into court and sue.

The Industrial Commission, in the Thirties, created Rule 13, which says in effect: The only way an employer can alter this award is to come to us for a hearing. But we're not going to receive an application for a hearing until you've paid that employee up until the date of the application.

And in subsequent amendments it said, we're not even going to give you a hearing until you have given us

evidence which shows probable cause to believe that there's been a change in condition.

What they have done, what the Commission has done, is to limit the employer's right to the due process hearing. And a byproduct of this has been to give the employee some additional claims to funds without having to go to a court. And what they are claiming as their property right is this future extension, which they've never had.

And the Roth case, I think recognizes that it's sort of a unilateral wish, but it's nothing that's found in the State statute that you can really claim as property rights.

A couple of corrections on the error in the record. Coverage does not extend to all employers and all employees in the State. By statute it's mandatory for employers of three or more employees. Employers with small numbers can come under the Act, but they do so voluntarily. Coverage, thus, is not mandatory.

And, furthermore, the contract does issue to the employee. He doesn't get a written copy, but the Virginia Code, Section 65.1-111 says in effect that the employee shall be allowed to bring an action in his own name against the insurance company on the contract.

The real question I think is the property that the employer is going to lose. You've got a system where the

employer's natural interest is to suspend payment. Now, the fact that he suspends payment after this initial hearing doesn't mean that the employee cannot go into the court and enforce it, because he can.

He can always go into court and enforce it, even after the Commission found probable cause to believe that there is a change in condition.

QUESTION: That doesn't meet the time problem that was involved, for example, in Goldberg, does it?

MR. BRAME: Well, Your Honor, if you read Goldberg together with Roth, I think it does. The right that they have got, the enforcible right, is in this award. And this award must be enforced in a court of record.

And even after the employer has gotten a hearing, until that order issues out of the Commission at some later date, that award continues to be in force. And he gets -- it can be sued on, and get judgment, almost a confession of judgment, even up until the day the Commission decides -- rescinds that order, amends that order.

So he still has the enforcible right in court.

What he's asking for is some sort of decision by the Commission to call up the employer and say, Well, we've got a favorable decision for you that this man is not entitled to money, but we're not going to release this decision until you pay him up to date.

And that's the time situation. You get to the point there are two competing claims of a contractual nature between the employer and the employee. Every dollar the employer pays comes out of his pocket or his insurance company's pocket, and they will get it back from him.

And this is -- but what money he pays that's unjustified, he can never recover from the claimant.

QUESTION: And the employee has a lot of trouble recovering his leg, too, doesn't he?

MR. BRAME: Well, that would be a permanent disabili Your Honor, and there's no provision for any payment for --

QUESTION: Well, I mean, I just think it's a two-way street. And I think what the appellants are complaining about is your suspending that award after you give it.

MR. BRAME: That's right. It's the same type of --

QUESTION: And suspending it without him knowing a thing about it.

MR. BRAME: In case -- well, he's notified, but even assuming that's true, what we say --

QUESTION: Does he know anything about it before he's suspended?

MR. BRAME: It depends on the circumstances, Your Honor. But assuming that he's not -- I mean, I'm willing to assume for the purpose of my argument that he's not, that the employer doesn't tell the employee. But our argument is

that there's no jurisdiction under 1983, because our suspensic is pursuant to the right of a person in free society to do that which is not by law prohibited.

The law does not prohibit us from suspending under certain situations.

QUESTION: That's why this case is here, to see if you are prohibited.

MR. BRAME: That's right. The case is here to determine whether or not State inaction is State action under 1983. And as we read 1983, it requires either a positive State law, requiring someone to terminate, or such a degree intertwining between the employers in the State so that the employers' actions are the State's actions.

QUESTION: Supposing the Commission, as of May 15th, finds there's probable cause to terminate, and then the employee goes into the circuit court and seeks to recover payments due under the award from May 15th to June 1st.

Now, can the circuit court make any independent review of whether there was cause to terminate in that sort of an action, or was it found by the Commission's determination of probable cause?

MR. BRAME: It was -- the Commission's decision, determination of probable cause is completely irrelevant. It has no relationship to the award. The award is still outstanding, the award has not been modified. Hence, it's

enforcible of right under section 100 or 101.

QUESTION: You mean the employee could recover the payment in a circuit court action?

MR. BRAME: Yes. And the employer, as far as we can tell, has no real defense. It's a system that has not been abused, and so it hasn't been particularly attacked. But that's our point, that he always has that right, even after the determination of probable cause, to go into court and to enforce the judgment on the award itself.

QUESTION: Mr. Brame, as I understand it, it's in 90 percent or so of these cases, compensation is agreed upon between the employer and the employee, and they never go to the State agency, is that right?

MR. BRAME: Well, they go to the State agency, Your Honor. The 95 percent figure, I believe is the question of initial entitlement.

QUESTION: Right.

MR. BRAME: In any award -- well, any agreement between the employer and the employee respecting compensation payments after an injury must be approved by the Industrial Commission. The employer and the employee, if they agree to entitlement, and it's really just a question, was it a compensable accident, beyond seven days; sign a form, which I believe is in the record, entitled A Memorandum of Agreement.

That Memorandum of Agreement is submitted to the

Industrial Commission, which, if they review it and find it to be in satisfactory order and properly protecting the interes of the employee, will enforce it. Then it will issue as an order of the Commission requiring compensation payments to be made during incapacity.

QUESTION: And then termination of 90 percent or so of the cases is also by a voluntary agreement, is that right?

MR. BRAME: I'm not sure of that figure, if the figure is that high. It's very high. It's very, very much an informal system, in the sense that you don't have a lot of play by counsel. It works pretty much by the voluntary system, overseen by the Industrial Commission, which significantly favors the employee.

QUESTION: And then in those cases, in the vast majority of cases you say they are, in which termination of compensation is by voluntary agreement, must that agreement then go to the Industrial Commission to be approved also?

MR. BRAME: Yes. If it's not, there have been some cases where the agreement was not approved by the Commission, the Commission -- unless they approve it and enter an order affecting the initial award, the initial award remains outstanding. As in the Manchester case, which I think everybody has cited to the Court, the award remained outstanding perhaps a year and a half after the employee went back to work.

The question was, is it enforcible in these circumstances, because of the harsh results to the employer, and the Court held that you can only get to the Commission through Rule 99. The employer hadn't done it to a specified date, and that year and a half's award, although perhaps he wasn't entitled to it, was enforcible in a court of record.

QUESTION: Unh-hunh.

QUESTION: Mr. Brame, to sum it up, an order is entered in every case authorizing or approving the payments, and an order must be entered in every case to terminate it.

MR. BRAME: That's right, Your Honor. And that order is affected only by a hearing, which I believe everybo admits, is a due process hearing.

QUESTION: I understand that.

Would you clarify for me the apparent confusion as to whether or not notice was given in this case to the two appellants -- to appellees; appellants, right.

MR. BRAME: Notice was given to Mr. Dillard, Your Honor, on the -- one of the papers filed in the record shows a carbon copy to Mr. Dillard. That was not under Rule 13 -- Rule 13 as it now stands has been changed. That was sort of an old Rule 13 thing, although he did get notice on it, nevertheless.

And then Mr. Williams, the exhibit in Mr. Williams case, which is Exhibit A, on page 75 of the record, also

shows that he gets notice. It's not in the record, but the Industrial Commission has a practice that if they receive an application for a hearing on change of condition, and there is no indication that the employee has been notified, they have a form upon which they immediately notify the employee.

QUESTION: Well, what's the purpose of notifying the employee if he doesn't have an opportunity to participate in the probable cause determination?

MR. BRAME: I'm not sure that -- how to -- if I can answer that completely. The -- if the employee calls up and submits a medical report, I think they would consider it. They want him to know, as soon as possible, and I think probably as a practical matter if it turns out to be a mistak on the part of the employer, what I understand the Industrial Commission's workings, that application is going to be withdrawn right quickly, and things will be restored to the statu quo.

It's sort of a --

QUESTION: The letter which you have referred to, at page 75, calls for the employee, if he agrees, to indicate agreement, and I suppose in a great many of the cases, if not a majority, the employee does agree and he indicates that in response to this notice; is that correct?

MR. BRAME: Your Honor, there is a fair degree of response, I can't characterize it as a high degree or a low

degree, I think the answer is that only maybe ten percent of these go to a hearing and eventually go to a hearing where both parties appear. Hearing is automatically scheduled. An employer has the obligation of scheduling the hearing, as this shows, the obligation of coming forward.

The number of these that go to hearing are not substantial, so, on way or another, there's an agreement reached. Sometimes it's difficult from a practical matter to get people in that wage bracket to sign an agreement to anything.

QUESTION: Well, in any event, after receiving this notice, he has the opportunity to respond to it if he wishes to. But if he goes back to work on the following Monday, then there's no problem, I take it.

MR. BRAME: Well, there's no problem under the situation as it now exists. Although that award continues, and he can go into court, presumably, and enforce it even then, up until the hearing. After the hearing and the order issues, confirming that he's back at work --

QUESTION: Yes. The letter states that it does not terminate the award, does it not?

MR. BRAME: Right. I'm not sure the letter does or not.

QUESTION: Yes, it does.

MR. BRAME: It does? Well, the Court's read it a

little more closely than I have.

QUESTION: Do I understand you correctly that there' nothing in the record on phase, on this one way or the other, and you don't know of your own personal knowledge?

MR. BRAME: Now, as to what, Your Honor?

QUESTION: Did I get your correctly?

MR. BRAME: As to what?

QUESTION: As to the number of these that are signed and the number that are agreed to.

MR. BRAME: That's right, there's nothing in the record.

QUESTION: Nothing in the record; and you don't know, either?

MR. BRAME: No.

QUESTION: Would you interpret that as advising an employee that, quoting the vernacular of the street, "you've had it"?

MR. BRAME: Yes.

QUESTION: You say he's entitled to go to court pending the appeal or pending the hearing.

MR. BRAME: Yes, Your Honor.

QUESTION: Well, to prevail, he would have to show there wasn't probable cause to terminate, wouldn't he?

MR. BRAME: No. It has no relationship, Your Honor The --

QUESTION: Well, what do you have to show? You just show the award and say, pay me?

QUESTION: That hasn't been determined.

MR. BRAME: It's in the Appendix to our brief, which is the green brief, it's Virginia Code Section 65.1-100 and all he has to do is show the Court that he's got an award by the Commission that's outstanding and it's not been modified.

And the amounts that haven't been paid, and he gets an order immediately.

QUESTION: Well, why hasn't it been modified by the termination based on probable cause?

MR. BRAME: The termination based on probable cause does not -- has no relationship to the award. The award continues until the due process hearing.

What the Commission says in that rule, we will not let the employer even file an application for a hearing, we won't give the employer standing to even argue a change in conditions until he has paid the employee up to date, and shown probable cause.

It's a device of controlling, as much as anything, controlling the number of cases which they receive. It's like the old common law court requiring it to be on oath.

QUESTION: But at any time until after the so-called due process hearing and the final official termination

by the Industrial Commission, the employee can go into cour and collect under the award?

MR. BRAME: Yes.

I can construe this section no other way.

QUESTION: And the employer has no defense?

MR. BRAME: That's right. That's the holding in the Manchester --

QUESTION: After the due process hearing, after the full hearing and the award is terminated, I would suppos the employee, if he hasn't been paid meanwhile, could still go back in and sue for the interim period.

MR. BRAME: No, the --

QUESTION: Because it wasn't terminated during that time.

MR. BRAME: It wasn't terminated during that peri but the Commission's order in most cases dates back to the date the application was received.

Now, if it's been enforced meantime, then the employer's --

QUESTION: Well, I'm puzzled. I thought -- does this procedure, did you say, operate that the employer neve gets the post-termination hearing until he has paid up to the date of that hearing?

MR. BRAME: Not to the date of the hearing, to the date of the application.

QUESTION: To the date of his application.

QUESTION: The date of the application.

MR. BRAME: That's right.

QUESTION: I see. Yes. All right.

MR. BRAME: In answer to the question on the --

QUESTION: What's the lawsuit about then?

MR. BRAME: Your Honor, we asked the same question.

QUESTION: Well, the fact is you haven't been -- your clients haven't been paying, the employer doesn't pay meanwhile; that's it.

MR. BRAME: That's right.

QUESTION: He doesn't pay it over, although he's legally obligated to, you tell me.

MR. BRAME: That's the way we read this section.

QUESTION: Although the Commission has told him not to pay --

MR. BRAME: No, no, that's not --

QUESTION: Although the Commission has said there' probable cause to terminate.

MR. BRAME: That's right.

QUESTION: And he's terminated.

MR. BRAME: Right.

QUESTION: And he's quit paying; nevertheless, he' legally obligated to pay.

QUESTION: If the court orders him to do so.

MR. BRAME: That's right. As this section --

QUESTION: Well, but the award -- what the court would say is that the award has never been affected.

MR. BRAME: Right.

QUESTION: Namely, you've been ordered before to pay, to live up to the award. Now, why haven't you done it?

MR. BRAME: At what point in time, now?

QUESTION: Well, the employee goes to court.

MR. BRAME: Right.

QUESTION: Pending the hearing.

MR. BRAME: Right.

QUESTION: And the court -- he wins in court, the court says, Pay according to the award, it's never been terminated.

MR. BRAME: That's right.

QUESTION: I assume there was a legal obligation to pay, whether the court said so or not.

MR. BRAME: Well, in a sense there is, in a sense it's a contractual --

QUESTION: Well, so the employer is just ignoring his legal duty, you suggest?

QUESTION: By relying on the probable cause.

MR. BRAME: I almost have to -- well, it's a contractual duty. Now, whether, you know, the moral goes to something else. But they do have a continuing award requiring

them to pay and they don't pay.

QUESTION: Have you had a Virginia -- decided case that says that?

MR. BRAME: The decision on this -- the best I can find from quickly looking at the annotations, is one called Peregrin vs. Long, 134 S.E. 562, which says that under Section 100, which is the enforcement section, that the court's duties are strictly ministerial. It can't inquire --

QUESTION: Well, -- excuse me; excuse me.

MR. BRAME: It can't inquire into the -- whether or not the employee was actually entitled.

It goes back to what we've said. We've got a system that's worked well on the voluntary basis. The employees -- the hearing is on a fairly short basis, and there hasn't been a large number of suits of this type. But I think the answer is that most of the terminations, particularly under new Rule 13, are justified. The employees are back at work.

QUESTION: And then you told us, I think, of a case where the court awarded compensation for a period of a year and a half after the man had been back at work, simply because there had been no official termination.

MR. BRAME: That was the --

QUESTION: Did I misunderstand it?

MR. BRAME: That was the Manchester case, --

QUESTION: The Manchester case.

MR. BRAME: -- which is cited in our brief. I think it's cited in everybody's brief.

QUESTION: Right.

MR. BRAME: Manchester Board and Paper Company.

MR. CHIEF JUSTICE BURGER: Mr. Levy, do you have anything further?

REBUTTAL ARGUMENT OF JOHN M. LEVY, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LEVY: I might --

QUESTION: Tell us why you're here, Mr. Levy.

MR.LEVY: Pardon?

QUESTION: You tell us why you're here, if that's of assistance.

MR. LEVY: First of all, there has been absolutely no litigation under Section 100, under a Rule 13 procedure.

If the employer and the employee went to court --

QUESTION: Pending a hearing.

MR. LEVY: -- pending a hearing, once the benefits are suspended, there has been no determination as to what the court would do.

After the due process hearing, the court might look at it this way; after the due process hearing the Commission terminates the award retroactively, therefore, there would be nothing, it would be like going in to enforce something

which there is a preliminary injunction on.

QUESTION: Yes, but if you happen to get into court before the hearing, and the court wasn't very busy and heard your case right away, do you agree that the employer would be ordered to pay pending the hearing?

MR. LEVY: The court, under that statute, the languag of that statute, would have to enter a judgment. The employee would then have to try to collect under that judgment. And I would assume that there would be no --

QUESTION: Well, can't you have a -- there wouldn't be an order to pay, or the employer would just say: Awfully sorry, I know you've got a judgment, but I won't pay it.

QUESTION: In my years of practice, a judgment against Travelers or against Aetna was always thought to be a pretty valuable thing.

MR. LEVY: Where you have before you a judgment of the Commission to pay until disability is --

QUESTION: But then you have a judgment of the circuit court, don't you, after you go to court?

MR. LEVY: But still you have a judgment, and I would assume that that court would say: If there is a hearing, when this hearing comes to effect, we are not going to force Travelers to pay, since the very basis for that decision will be terminated retroactively.

QUESTION: Really, then, it's your submission that there's an undecided question of Virginia law in that case, as to what the effect of a suit in the circuit court during this period of time would be.

MR. LEVY: Well, I think it is clear that the whole intent of that statute could be interpreted no other way. I --

QUESTION: I suppose by the time you got your suit filed, the time for the post-termination hearing would have arrived, and been concluded, wouldn't it?

MR. LEVY: That is another aspect.

QUESTION: Then what happens? Then what happens to the lawsuit? In the circuit court.

MR. LEVY: That is an undecided question of State law, certainly.

QUESTION: Is that the way they do things in Virgini

[Laughter.]

MR. LEVY: Yes, Your Honor.

QUESTION: So it was decided, apparently, that until there's an official termination by order of the Industrial Commission, the award is in effect, as the Manchester case holds, doesn't it?

MR. LEVY: This is prior to what the --

QUESTION: Giving a man compensation for a year and a half after he's back at work. Simply because the award

had not been officially terminated.

MR. LEVY: But there has been no litigation, first, under the old Rule 13, and certainly under the new Rule 13. And it would defy common sense for the Virginia courts to hold that you will give a judgment and let it be collected when that judgment is going to be, or possibly will be retroactively terminated.

QUESTION: Well, that -- doesn't seem to be common-sensible, that's what has caused all the interrogation from the bench.

[Laughter.]

QUESTION: Well, the Commission enters an order that there is probable cause to suspend.

MR. LEVY: Correct.

QUESTION: Now, that's just meaningless, you think.

MR. LEVY: It is not meaningless to the injured worker. This is --

QUESTION: Well, I know, the employer relies on it and quits, but apparently it doesn't affect the prior award at all.

QUESTION: That's right.

MR. LEVY: It affects legally before a court, a circuit court in Virginia, that is a question of what the effect, that is.

QUESTION: All right. Well, --

MR. LEVY: But in actuality --

QUESTION: I'm sorry you brought it up!

[Laughter.]

MR. LEVY: One other response that I'd like to make is --

QUESTION: Before you go to the response, aren't you really asking some kind of a judicial command from someone some court, somewhere, to keep up the payments until there's been a full adversary hearing?

MR. LEVY: Yes, Your Honor.

QUESTION: In other words, sort of a specific performance equity relief.

MR. LEVY: We are asking that this Court say that Rule 13 does not provide due process, by, in reality, terminating, suspending benefits.

QUESTION: Well, as I understand Mr. Brame, he says if you go into circuit court you'll get just that. You want the money ahead of time.

MR. LEVY: We will get another judgment, which is a ministerial act of the court, which any insurance company will treat the same way as the judgment of the Commission.

QUESTION: You mean the judge -- you mean there is no way in Virginia to enforce a judgment against an insurance company?

MR. LEVY: Yes. There are the traditional common-

law remedies that --

QUESTION: I thought so.

MR. LEVY: Yes. Attachment.

QUESTION: So it's just like any other judgment.

MR. LEVY: Correct, Your Honor.

QUESTION: Well, then they -- the court will give you what you want the Commission to give -- what you want us to give you.

MR. LEVY: No, Your Honor. What --

QUESTION: Well, what do you want? You want money? In between the two hearings. Right.

MR. LEVY: We want a notice, first of all, the fact is --

QUESTION: Well, if you get your money, do you want notice?

MR. LEVY: No.

[Laughter.]

MR. LEVY: No.

QUESTION: So you're asking us to order the company to pay you the money until they have the due process hearing.

MR. LEVY: No. What we --

QUESTION: Well, would you be satisfied with it?

MR. LEVY: Certainly. But I don't --

QUESTION: Well, as I understand, all you have to do is file a piece of paper in a court and you get just that.

MR. LEVY: I think that is not clear in Virginia law.

Second of all, that does not solve the problem of notice.

QUESTION: If you get the money?

MR. LEVY: Yes, but you have to have -- you have to go --

QUESTION: If you give me the money, I don't care about notice.

MR. LEVY: No, but the filing of the court -- the papers in the court does not give you the money. That --

QUESTION: You can even -- if you owe me money and you pay me money, you can even deny me due process, if you give me my money. Am I right?

MR. LEVY: The procedures -- yes, you are right.

[Laughter.]

MR. LEVY: No. I'm sorry. No. That is of course not our position.

The procedures which in reality are in effect in Virginia show that benefits are paid -- this goes to the voluntariness of the system. If this is the position that is being required, or would be required in the court, then you would have a procedure which would throw the Workmen's Compensation system all out of kilter.

As the National Commission on Workmen's Compensation

said.

The Industrial Commission of Virginia does not have, quote, "enforcement power". Meaning that the State of Virginia set up the system so that the Commission would not go out and attach insurance company's property.

They gave that that power, or they left that power alone in the court. And that is the only thing that section 100 of the Code gives.

It's just the very rare instance, and the only litigation that could be found under that is thirty years old. This is just leaving with the traditional common-law court the power to garnishee, to attach property, and all that.

This system works under a voluntary system, with penalties which are assessed against an insurance company for not paying when due, with the ability of the State Corporation Commission to pull an insurance company's license if they are not meeting their obligation under this procedure.

QUESTION: Sounds to me as though what you're doing is conceding that you have an adequate remedy at law, but it's too complicated and takes too long.

Therefore you want something -- you want a shortcut.

MR. LEVY: No. By the very fact that it is complicated and takes too long, the plaintiffs in Goldberg had a procedure, they could have gone in to federal court and

enforced their welfare benefits.

QUESTION: That was not a contractual case, was it?

No. Welfare.

MR. LEVY: It was not a contractual case.

The plaintiffs in -- length of time is what we are talking about, and that is what procedural due process within a prior hearing is what we're talking about. And we do not have that in Virginia.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Levy.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:15 o'clock, p.m., the case in the above-entitled matter was submitted.]