

COURT OF APPEALS OF VIRGINIA

Present: Judges Baker, Elder and Fitzpatrick

JIMMIE ROGER TESTER

v. Record No. 1836-96-3

MEMORANDUM OPINION*

PER CURIAM

JIMMIE ROGER TESTER TRUCKING

FEBRUARY 18, 1997

AND

LIBERTY MUTUAL INSURANCE COMPANY

FROM THE VIRGINIA WORKERS' COMPENSATION COMMISSION

(John A. Martin; Browning, Lamie & Sharp, on brief), for appellant.

(Monica L. Taylor; Christopher M. Kite; Gentry, Locke, Rakes & Moore, on brief), for appellees.

Jimmie Roger Tester (claimant) contends that the Workers' Compensation Commission (commission) erred in finding that his claim for benefits under Code § 65.2-400 for coal miner's pneumoconiosis filed on June 24, 1995 was barred by the statute of limitations contained in Code § 65.2-406(A)(1). Claimant argues that the commission's consideration on the merits of his previous claim for benefits for coal miner's pneumoconiosis filed on March 21, 1994, rendered the statute of limitations issue moot, subject to the doctrine of res judicata. Upon reviewing the record and the briefs of the parties, we conclude that this appeal is without merit. Accordingly, we summarily affirm the commission's decision. Rule 5A:27.

*Pursuant to Code § 17-116.010 this opinion is not designated for publication.

Claimant did not argue before the deputy commissioner or the full commission that the doctrine of res judicata prevented it from invoking the statute of limitations with respect to his claim filed on June 24, 1995. Therefore, we cannot consider this argument for the first time on appeal. See Green v. Warwick Plumbing & Heating Corp., 5 Va. App. 409, 413, 364 S.E.2d 4, 6 (1988); Rule 5A:18. In addition, claimant did not appeal the commission's findings with respect to the merits of employer's statute of limitations defense nor did he appeal the commission's finding that the medical evidence failed to establish that he had contracted a compensable level of coal workers' pneumoconiosis. Accordingly, these findings have become final. Therefore, they are binding and conclusive upon this Court.

For these reasons, we affirm the commission's decision.

Affirmed.