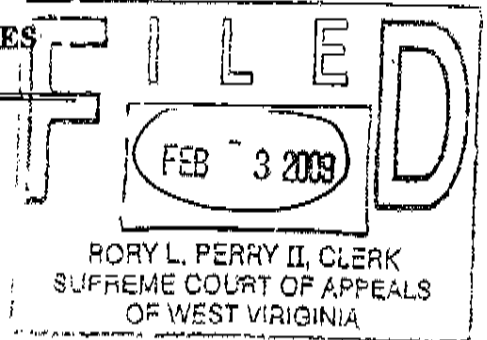


**BEFORE THE LAWYER DISCIPLINARY BOARD  
STATE OF WEST VIRGINIA**

**In Re:** DOUGLAS A. SMOOT, a member of  
The West Virginia State Bar

**Bar No.:** 3495  
**I.D. No.:** 07-01-078

**STATEMENT OF CHARGES**



**To:** Douglas A. Smoot, Esquire  
Post Office Box 553  
Charleston, West Virginia 25322

**YOU ARE HEREBY** notified that a Hearing Panel Subcommittee of the Lawyer Disciplinary Board will hold a hearing pursuant to Rules 3.3 through 3.16 of the Rules of Disciplinary Procedure, upon the following charges against you:

1. Douglas A. Smoot (hereinafter "Respondent") is a lawyer practicing in Charleston, Kanawha County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to The West Virginia State Bar on September 15, 1981.
2. The Office of Disciplinary Counsel opened this complaint after the United States District Court for the Southern District of West Virginia entered an Order on August 30, 2006, and had the same forwarded to the Office of Disciplinary Counsel for

consideration of whether Respondent's actions in a black lung case violated applicable Rules of Professional Conduct.

3. Elmer Daugherty filed a *pro se* claim for federal black lung benefits on or about May 30, 2000. Respondent represented his employer, Westmoreland Coal Company.
4. Mr. Daugherty was initially awarded benefits on or about January 26, 2001, but his employer then requested a formal hearing before an Administrative Law Judge ("ALJ") by letter dated January 30, 2001. On March 19, 2001, the case was transferred to the Office of Judges.
5. Meanwhile, pursuant to the employer's request, Mr. Daugherty was examined by Dr. George L. Zaldivar, on or about February 7, 2001.
6. On or about May 22, 2001, Dr. Zaldivar sent Respondent a packet which included Mr. Daugherty's history and physical examination report, test results, and a narrative report dated May 16, 2001.
7. On or about November 12, 2001, Respondent provided to Mr. Daugherty a copy of a letter addressed to ALJ Daniel L. Leland which purported to include the "Exam Report of Dr. George L. Zaldivar dated February 7, 2001."<sup>1</sup> However, this "Exam Report" only included the history and physical examination report and the test results.

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<sup>1</sup> The November 12, 2001 cover letter sent to ALJ Leland and copied to Mr. Daugherty was signed by a legal assistant on behalf of Respondent.

It did not include the narrative report in which Dr. Zaldivar diagnosed Mr. Daugherty with complicated pneumoconiosis.<sup>2</sup>

8. On or about March 30, 2004, Robert F. Cohen, Jr., submitted a notice of representation on behalf of Mr. Daugherty.
9. An initial hearing on Mr. Daugherty's claim was finally held on October 19, 2004, before ALJ Lesniak.<sup>3</sup>
10. On or about September 9, 2004, Mr. Daugherty's attorney, Mr. Cohen, filed Interrogatories and Requests for Production of Documents.
11. In response, Kathy L. Snyder, Esquire, an attorney at Jackson & Kelly PLLC, provided the "Supplemental Report of Dr. George L. Zaldivar dated September 20, 2004" which included the narrative report dated May 16, 2001, not previously disclosed to Mr. Daugherty.<sup>4</sup>
12. On or about October 15, 2004, Mr. Daugherty's attorney, Mr. Cohen, filed a Motion to Compel Discovery requesting Respondent provide descriptions and copies of all

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<sup>2</sup> In an Order dated October 21, 2005, ALJ Michael P. Lesniak determined that the official file at the Office of Administrative Law Judges did not contain either the November 21, 2001 letter from Respondent or the report attached thereto.

<sup>3</sup> It appears that part of the delay in having an initial hearing in the underlying matter was due to six continuances granted to Mr. Daugherty for the purpose of finding counsel to represent him during this stage of the proceedings.

<sup>4</sup> Respondent is employed at Jackson Kelly, PLLC. Ms. Snyder is employed at the Morgantown office of Jackson Kelly. In April of 2004, Respondent forwarded Mr. Daugherty's file to the Morgantown office of Jackson Kelly because Dorothea J. Clark, Esquire, an associate in the Morgantown office, was scheduled to appear at the October 19, 2004 hearing. Ms. Clark worked under the supervision of Ms. Snyder.

medical evidence in its possession which had not previously been disclosed to Mr. Daugherty.

13. At the October 19, 2004 hearing, Mr. Cohen alleged that Respondent had disassembled the May 2001 medical report before providing it to Mr. Daugherty, who was unrepresented at the time, in or about November 2001. In addition, Mr. Cohen also alleged that Respondents provided to their own medical experts only that information which was favorable to their clients' position.
14. At the hearing, Ms. Clark admitted that the narrative portion of Dr. Zaldivar's report was removed in November 2001 before providing the same to Mr. Daugherty. Respondent appeared at the hearing and also acknowledged a portion of Dr. Zaldivar's report was removed before providing it to Mr. Daugherty.
15. After the hearing and by Order entered October 22, 2004, ALJ Lesniak granted the Motion to Compel and scheduled a second hearing on November 10, 2004.
16. By letter dated October 27, 2004, Ms. Snyder notified ALJ Lesniak that her client had decided to accept the District Director's January 26, 2001 Initial Determination Awarding Benefits. Accordingly, her client withdrew its request for a hearing before the Office of Administrative Law Judges. Finally, Ms. Snyder requested that ALJ Lesniak issue an Order remanding the claim to the District Director for processing of the pay order.
17. By Order entered November 9, 2004, ALJ Lesniak rescheduled the November 9, 2004 hearing for December 16, 2004, and directed Respondent to deliver to Mr. Cohen by

November 19, 2004, "all medical records and/or reports in its possession regarding [Mr. Daugherty]."

18. On or about November 17, 2004, Ms. Snyder filed a Motion to Cancel Hearing and Remand Claim to District Director asserting that ALJ Lesniak no longer had jurisdiction to decide the matter.
19. ALJ Lesniak denied Ms. Snyder's motion by Order entered December 6, 2004. In this Order, ALJ Lesniak again directed Respondent to comply with his November 9, 2004 directive to immediately produce all medical records and reports in their possession.
20. William S. Mattingly, another attorney at Jackson Kelly, and Ms. Snyder appeared at the December 16, 2004 hearing and Ms. Snyder stated, after direct questioning by ALJ Lesniak, that Respondent had not complied with ALJ Lesniak's Orders of October 22, November 9, and December 6, 2004, to turn over all requested discovery documents because it was their client's position that as they had accepted liability on or about October 27, 2004, ALJ Lesniak no longer had jurisdiction in the matter.
21. Furthermore, the only remaining documents not turned over were non-testifying expert reports which, in their opinion, were not discoverable.
22. After the hearing, ALJ Lesniak issued an Order on March 21, 2005, remanding the case to the District Director. In addition, while ALJ Lesniak declined at that time to certify the case to the United States District Court for consideration of Respondent's conduct, ALJ Lesniak found that Respondent disobeyed a lawful order and

admonished Respondent "not to tamper with exhibits, potential exhibits and/or any type of documents which may be entered into evidence in the future."

23. On or about April 20, 2005, Mr. Cohen filed a motion for reconsideration of the March 21, 2005 Order and specifically requested that ALJ Lesniak reconsider his decision not to certify the case to the United States District Court for consideration of Respondent's actions in the underlying matter.
24. By Order entered June 27, 2005, ALJ Lesniak again denied Mr. Cohen's motion to certify the matter to the United States District Court for consideration of Respondent's conduct. However, ALJ Lesniak suggested that the attorneys involved attempt to reconcile the matter on an informal basis.
25. On or about August 18, 2005, Mr. Cohen again wrote to ALJ Lesniak stating that Respondent had not contacted him to discuss the disassembly of Dr. Zaldivar's May 16, 2001 report and again requested that the matter be certified to the United States District Court for consideration.
26. Thereafter, despite noting that Mr. Cohen's request for reconsideration was filed out of time, by Order entered October 21, 2005, ALJ Lesniak found good cause to certify the matter to the United States District Court for consideration of sanctions against Respondent for his conduct in the underlying case.
27. By Order entered August 30, 2006, the United States District Court for the Southern District of West Virginia granted Respondent's Motion to Dismiss on several

grounds, namely that the Court considered the certification to be a criminal contempt action which was not properly before the Court.

28. Nonetheless, the Court discussed Respondent's actions in failing to comply with ALJ Lesniak's discovery orders and his disassembly of the May 16, 2001 medical report. The Court noted that while Respondent's actions in failing to comply with the discovery orders was "clearly contrary to law and subject to contempt sanctions[.]" the Court was without power to impose any sanction because "[t]he time for civil sanctions had passed since such sanctions are designed solely to force a recalcitrant litigant to act in compliance with a previous court order."<sup>5</sup> With regard to the disassembly of the May 16, 2001 medical report and after a discussion of 20 C.F.R. § 725.41.4(c), the Court noted that Respondent had "done a great disservice to our legal system . . . ."<sup>6</sup>

29. Because Respondent disassembled the May 16, 2001 report of his client's own expert, Dr. Zaldivar, before providing the same to Mr. Daugherty in November 2001 during the course of the underlying black lung proceedings, Respondent violated Rules 3.4(a) of the Rules of Professional Conduct, which provides as follows:

**Rule 3.4. Fairness to opposing party and counsel.**

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material

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<sup>5</sup> See August 30, 2006 Order at p. 10.

<sup>6</sup> *Id.* at p. 12.

having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

- 30. Because Respondent disassembled that portion of Dr. Zaldivar's May 16, 2001 report which diagnosed Mr. Daugherty with complicated pneumoconiosis when under the Black Lung Benefits Act, Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended 30 U.S.C. § 901 *et seq.*, and 20 C.F.R. § 718.304, there is an irrebuttable presumption that a miner found to have complicated pneumoconiosis is totally disabled by it, Respondent violated Rule 4.3 of the Rules of Professional Conduct, which provides in pertinent part:

**Rule 4.3. Dealing with unrepresented persons.**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

- 31. Because Respondent engaged in misconduct by improperly withholding material having evidentiary value and which conduct consequently had a significant effect on a legal proceeding, Respondent violated Rules 8.4(c) and 8.4(d) of the Rules of Professional Conduct, which provide as follows:

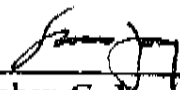
**Rule 8.4. Misconduct.**

- It is professional misconduct for a lawyer to:
  - (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
  - (d) engage in conduct that is prejudicial to the administration of justice.

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Pursuant to Rule 2.9(d) of the Rules of Lawyer Disciplinary Procedure, the Investigative Panel has found that probable cause exists to formally charge you with a violation of the Rules of Professional Conduct and has issued this Statement of Charges. As provided by Rules 2.10 through 2.13 of the Rules of Lawyer Disciplinary Procedure, you have the right to file a verified written response to the foregoing charges within 30 days of service of this Statement of Charges by the Supreme Court of Appeals of West Virginia. Failure to file a response shall be deemed an admission of the factual allegations contained herein.

**STATEMENT OF CHARGES ORDERED** on the 31<sup>st</sup> day of January, 2009, and  
**ISSUED** this 2<sup>nd</sup> day of FEBRUARY, 2009.

  
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**Stephen G. Jory, Chairperson**  
 Investigative Panel  
 Lawyer Disciplinary Board