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# Recognition of Disaster

Work on the Hawk's Nest Tunnel had begun at the end of March 1930. Whatever rumors may have been heard in Gauley Bridge during the ensuing months, no word of them found its way into public print until mid-February of the following year. On the eighteenth of that month a startling item appeared in the *Fayette Journal:* "This is a great deal of comments [sic] about town regarding the unusually large number of deaths among the coloured laborers at tunnel works of the New Kanawha Power Company. The deaths total about 37 in the past two weeks."

A reader might wonder what height a local death toll must reach to merit mention in the newspapers of a rural town. In fact, when white residents of some prominence in Fayette County died in accidents or of disease, their lives and deaths were recognized on the front pages. The number of tons of coal dug out of the mountains, elevation to positions of some corporate or institutional authority, crimes, or the resolution of property disputes—all of these were deemed the reportable stuff of local white society. Religious life, formal church activities, and the country wisdom of the white clergy belonged to the inside pages. Suitably amiable activities of black society too were acknowledged in two columns entitled "News of Colored Folks." But it would not have occurred to either journalists or their readers that events in the lives of black workers—especially southern migrant workers—deserved notice in the public press.

This widespread attitude of condescension, if not contempt, toward blacks, exacerbated by hostility toward migrants from the South, no doubt contributed greatly to the lack of notice taken of the largest construction project in the history of Fayette County. In all of 1931,



the principal year of tunnel drilling, only three sizable stories on the largest construction project in the county's history appeared in local newspapers.

If this attitude abetted the press's long silence about conditions in the tunnel, it had equally serious consequences for the effects of those conditions. There can be little doubt that recognition of lung disease at Gauley Bridge was retarded by the racist currents of the period and the region. Even today alternative theories are heard there that attribute the high incidence of death among blacks to their self-destructive activities. In spite of all the evidence to the contrary, some people still say that knifings, shootings, and beatings took the greatest toll. Gambling out of doors before open fires in the cold is another supposed cause of death.

In the first accounts of lung disease related to the tunnel, it was often assigned to poor habits of nutrition and unusual susceptibility among blacks to pneumonia. During the extremely cold winter of 1930–31, deaths among workers from respiratory disease, which did not occur among the permanent population, were at first attributed to climate and the general inability of the Negro to resist disease.

The revelation of suffering by industrial workers, however vague the details, could arouse sympathy and outrage among legislators, journalists, and the public. For a long time, however, the events at Gauley Bridge were trapped locally and dissipated. Significant though racial indifference was in accounting for the press's failure to report on the plight of the tunnel workers, a story published on 20 May 1931 in the *Fayette Tribune* suggests that there were other causes: "Rumors and reports of various conditions known to exist at the tunnel and dam project are discussed generally by residents but little first hand information is obtainable because of the 'gag rule' enforced by executives of the contracting company which employs about 1200 men. Officers of the law state that company officials refuse to converse with them and laborers do so with the fear of losing their jobs. The *Tribune* has been appealed to on more than one occasion to lay bare these atrocious conditions against humanity, but facts obtainable have not been provable."

That fear and intimidation played a role in erasing the events at Gauley Bridge from popular sensibilities can be deduced only indirectly. There seems little doubt, however, that local editors were dissuaded from publishing stories that might rouse negative feelings toward the Hawk's Nest Tunnel project. On 3 June, two weeks after printing the article just quoted, the *Fayette Tribune,* which had also called on the Department of Mines and the Attorney General's office to release the Lambie report on the tunnel, saw fit to reprint a glowing account from the *Charleston Gazette,* entitled "Army of Workmen Drilling Through Gauley Mountain":

No one would gaze down into the gorge and not come away without a lasting impression of the rugged mountains rising all about, in their bleak ugliness.

But modern man came with his passion for mastering the works of nature, and seeing the hard and barren rocks, gashed everywhere with water courses, set about to put a bridle on the roaring, plunging wild river. The task is slow and tedious because of the ruggedness of the country, but today there is taking form one of the greatest engineering conquests of the present era.

The beginning of mining of this silica sandstone gave the state official supervision in the operation because of the law creating the department of mines specifically puts sand mines under the supervision of the state mining department and Chief R. M. Lambie has placed field men of the department on the operation. The contracting company is cooperating with the state regarding laws governing safety measures to be observed.[1]

On the same day that the *Tribune* ran its accusatory article, another Fayette County newspaper, the Democratic *State Sentinel,* strongly committed to the New Deal and the principles of public works and labor union organizing, wrote: "Strange and weird tales are afloat concerning the number of fatalities. They are said to number four a week." The newspaper found reason to add, however:

The Union Carbide Co., for whom the tunnel is being bored have nothing to do with the work. It is let to contract to Dennis and Rinehart [sic], a Virginia contracting firm and this company is in charge of the work. Very little native labor is employed. Most of the common laborers are colored men who came from Virginia, Alabama and the Carolinas. The wage scale is low ranging from 15 to 30 cents an hour.

A serious menace to health is suggested by the conditions under which some of the workmen live.

The power of a modern industrial corporation to influence the modest organs of public communication in a sparsely populated rural region is formidable. Union Carbide's ability, evidenced here, to remain detached, in the eyes of both the public and the law, from responsibility for the events in the tunnel would serve it well during the proceedings that would later be held in the Fayette County Courthouse.

The voices feebly raised in the public press in May 1931 were soon quieted. The Department of Mines, after its fleeting show of authority, assumed its cloak of silence. Work on the tunnel proceeded at the swift pace it had maintained from the first. In fact, a document prepared by the New Kanawha Power Company, comparing projected milestones with actual progress, shows that performance exceeded plan



by the largest margin from May 1931, when the Department of Mines conducted its first survey, through August and September, when the tunnel was "holed through." The main drilling of the three-mile-long tunnel required less than fifteen months. "Trimming" the interior surfaces occupied only another three months, ending on 1 December 1931.[2] With this part of the operation, serious exposure to silica dust would have ceased, a year and a half after it had begun. At the end of 1931 the greater part of the work force was dismissed and left the Gauley Bridge area. Fewer than 2 percent of these men had been with the project when drilling began. Final construction work on the tunnel and the New River Dam was not completed until 1934. Well before this time, Fayette County had found itself embroiled in a bitter controversy that centered in the county courthouse. There, voices of the Hawk's Nest Tunnel workers, or of their survivors, had at last begun to be heard.

The defendant named in the first of these trials was not Union Carbide, which had designed the tunnel and required the rapid schedule that exacerbated the conditions leading to the hundreds of claims of injury or death from silicosis. Instead the defendant was the contractor, which had maintained that schedule under its contract of 13 March 1930. Another section of that contract required Rinehart and Dennis to insure itself against claims of injuries related to work on the tunnel. This provision permitted the New Kanawha Power Company to extricate itself from responsibility for such injuries:

The Contractor shall maintain such insurance as will protect it and the Company against claims for compensation for bodily injuries or death of any person whether or not employed by the Contractor which may arise from any operation of the Contractor or its subcontractors on The Work, and shall furnish all medical and hospital services required by any Workman's Compensation and Employer's Liability and Owners' and Builders' Contingent Liability and Teams and Automobile Liability, in amounts as required by the Contractor and approved by the Engineer.

In the event of suits being brought, or claims made, or threatened to be brought or made against the Company for damages on account of the Contractor's operations, the whole, or so much of the moneys due under and by virtue of this contract as shall or may be considered necessary by the Engineer, may, as its option, be retained by the Company until all suits or claims for damages as aforesaid shall have been settled, and evidence to that effect furnished to the satisfaction of the Engineer.[3]

Between July and December 1932, local attorneys had filed eighty separate claims with the West Virginia Compensation Commission, alleging that their clients had contracted silicosis from work on the

Hawk's Nest Tunnel. At the same time, individual lawsuits were also filed in the circuit court of Fayette County. The fate of the earliest lawsuits depended upon whether the courts would rule that Rinehart and Dennis was fully covered under West Virginia's workmens' compensation laws or was itself liable for disease related to work in the tunnel. The first of these suits was filed in the fall of 1932 in the name of Cecil Jones, a twenty-three-year-old former tunnel worker from Gamoca, West Virginia. It was brought by his widow, Dora Jones, who had become administratrix of his estate upon his death on 25 September. Rinehart and Dennis demurred on the grounds that allegations of silicosis were covered under West Virginia's workmen's compensation laws. The contractor paid ninety-eight thousand dollars into the state's workmen's compensation fund, almost all of which was recouped in benefits for accident victims. But in West Virginia—or in any other state at the time—compensation was not available specifically for victims of silicosis. In September 1932, the contractor's plea was quickly overruled in a reading by Judge J. W. Eary, of the Fayette County District Court, in Fayetteville. Rinehart and Dennis appealed to the state supreme court in January 1933. The claims of both parties were summed up as follows in the court's decision:

> It is alleged that much of the stone removed from the tunnel was more than 99 percent silica; that compressed air drills were used for the drilling of holes in said stone for the purpose of inserting explosives to dislodge same; that large quantities of dust arose from this operation; that water was not used in the drillholes to keep down the dust, nor was any other means employed by the defendants to protect plaintiff's decedent from the deleterious effects of the dust. . . .
>
> Their [the defendants'] primal and basic proposition is that the compensation act relieves subscribing employers, not in default, from liability to respond in damages for injury or death of an employee, however occurring, regardless of whether there be involved a compensable injury. The defendants urge that the precise question before the court is whether the plaintiff's decedent's injury is actionable in light of the provision of action 3515 of the compensation act.[4]

On 14 February the supreme court ruled against the demurral. Although this ruling was not equivalent to an award, it opened the legal sluice gates to a flood of personal liability lawsuits against the contractor. Even in the face of two court decisions, Rinehart and Dennis persisted in its efforts to circumvent such actions.[5] Its appeal to have the cases removed from the jurisdiction of the Fayette County Circuit Court was finally rejected after the first trial was already in progress.



Within two weeks after the decision by the supreme court, 111 suits had been filed for remuneration totalling $2.725 million. According to the *Charleston Daily Mail* of 24 February 1933, eighteen suits had been filed on 25 February alone. Twelve of these were filed by administrators for deceased workers, asking for ten thousand dollars each. Most of the other suits demanded from twenty-five to fifty thousand dollars for surviving workers. By the beginning of the first trial, 145 suits had been filed.[6] That number had surpassed 250 by the last week of testimony, six weeks later.[7] When final awards were made, in August, the total of tunnel workers or their survivors suing either Rinehart and Dennis, the New Kanawha Power Company, or both, had reached 336.

If the court's decision encouraged tunnel workers to believe that suits might be heard, that hope had arisen among a few workers considerably earlier. By the spring of 1932 several workers who believed themselves to be suffering from silicosis had made their first contacts with local attorneys. In June, W. E. Teubert, a lawyer in Gauley Bridge, had made inquiries of Dr. Leroy Harless on behalf of three Jones brothers and Raymond Johnson. Thereafter, Teubert recommended that other lawyers handling similar cases refer them to Harless. This accounts in part for the large number of cases evaluated by this unusually knowledgeable local physician.

When it became evident that the tunnel workers might soon have their days in court, the newspapers of Fayette County suddenly abandoned their practice of ignoring deaths and disease associated with work on the Hawk's Nest Tunnel. The subject was discovered to be newsworthy. Although the Jones brothers and Johnson were white, it was with reporting the death from silicosis of a thirty-year-old black man, Samuel Ward, that the *Fayette Journal* broke its long tradition of silence, on 24 February 1933. The same edition referred to twelve autopsies performed by Harless and reported that 130 men had died and 350 were left severely afflicted by exposure to silica. Though no source was cited for this statement, it is likely to have been an interview with Harless.

Pending a rehearing of the first case, that of Cecil Jones, the case of *Raymond Johnson* v. *Rinehart and Dennis and E. J. Perkins* came to trial on 16 March 1933. Johnson was a thirty-eight-year-old white, a local resident and the uncle of Jones. He had been employed on the Hawk's Nest Tunnel project for sixty-seven weeks, although he had spent only a year underground, beginning in March 1931, by which time the heaviest construction was half completed. He had worked chiefly as a driller in Shaft 1. Johnson filed with Teubert a trespass suit for twenty-five thousand dollars against Rinehart and Dennis on 17 August 1932.[8] He was officially represented at his trial by the Fayetteville law firm of Hubbard and Bacon, though his actual legal team

was made up of three local lawyers, F. N. Bacon, Frank Love, and Teubert, and a renowned trial lawyer from Charleston, Abraham A. Lilly. Rinehart and Dennis was represented by two local attorneys, C. W. Dillon and W. L. Lee, and by George Couch of Charleston.

With this trial and those that followed, an economically powerless group found a forum in which it might demand recompense for injuries it claimed to have received at the hands of corporations that had never lacked means to make their claims known to the public and, locally at least, to receive a sympathetic hearing. The transformation from voiceless laborer to litigant involved more than a change of status. A subtle process took place in which vividly recalled personal grievances, class resentment, physical suffering, and the need for recompense were translated into the abstract concept of corporate negligence, and the outcome of the trials depended upon refining the definition of that concept. Importantly for history—thanks to the legal profession's preoccupation with dates, places, and persons—the workers' attainment of this specialized sort of equity also guaranteed that the events would be committed to a permanent record, however faulty.

Word of the trials and of the state supreme court's decision followed the migrations of men who only a few months earlier had made their homes in the camps near Gauley Bridge. As former tunnel workers dispersed through the Southeast, suits were brought in both state and federal courts. All were transferred for resolution to the small county court in Fayetteville, in an obscure region of West Virginia. Thus a series of cases that would reverberate through state capitols and corporate offices, and would have sweeping effects on the knowledge of a dire disease and on laws governing workmen's compensation, were confined to a modest local stage.

The trial of the Johnson case was the longest in the history of the Fayette County Circuit Court. Jury selection began on 16 March 1933. In all, the attorneys interviewed twenty-nine persons. The twelve finally chosen appeared to be a people's jury: two farmers, four miners, one merchant, one electrician, two mechanics, and two employees of the Chesapeake and Ohio Railroad. During the course of the trial, the plaintiff subpoenaed 175 witnesses, the defense called 75.

Testimony for the plaintiff consisted largely of anecdotal accounts by former tunnel workers, many of whom were potential litigants, and some medical testimony. In the opening statement for the plaintiff, Bacon cited seven separate counts against Rinehart and Dennis: (1) willful negligence in drilling through silica without providing workers with adequate protection or information on risk; (2) willful negligence in creating unsafe working conditions; (3) refusal of on-site inspections by the West Virginia Department of Mines until ordered by the court to permit them; (4) maintenance of a system of signals and watchmen



to frustrate mine inspections; (5) negligent failure to use water while drilling; (6) negligent failure to provide proper ventilation; and (7) misrepresentation involving the extraction of commercial grade silica while officially running a nonmining operation.

Oddly, Hubbard and Bacon called O. M. Jones as their first witness. He gave a factual account of tunnel construction and explained the blueprints.[9] After Jones, eighteen former tunnel workers testified over a period of four days about general working conditions. Wilson Harling described the onset of serious physical impairment within six months of work; A. G. Leake asserted that the airborne dust in the tunnel limited vision to only a few feet; George Hill stated that water had not been used during drilling; and Laird King, a motorman, explained an intricate system of subterfuge to confound mine inspectors. James B. Simms, the first employee of the New Kanawha Power Company to testify, confirmed the tunnel workers' account.[10] On the fifth and sixth days of testimony, two other former employees of the power company broke rank and gave particularly condemning testimony. Arthur Peyton described dust so thick as to interrupt visual surveys and told of the mandatory outfitting of the engineering staff with respirators. Eli Carver described the insufficient ventilation system and confirmed the use of respirators by the staff of New Kanawha.

The first week of testimony concluded as six of Johnson's personal acquaintances from Gauley Bridge each averred that he had been a robust and muscular man, now reduced to a dyspneic wreck. When Johnson himself testified, on 29 March, he demonstrated his disability by stripping to the waist to reveal an emaciated frame and restricted breathing.[11] He described a weight loss from 175 to 143 pounds. Harless, his personal physician, testified that Johnson was suffering from advanced second-stage or early third-stage silicosis and had only a year to live.[12]

During the course of the anecdotal testimony by workers, a grim rumor that had circulated locally was heard in a public tribunal for the first time, though not the last. It was alleged that Rinehart and Dennis had paid a large sum of money to Hadley C. White, an undertaker from Nicholas County, to dispose of an undetermined number of unclaimed corpses of workers who had died on the job. The burials, so the story went, were carried out in great haste and with no medical evaluation. Bodies were stuffed into canvas bags and buried, several to a site, in an unidentified field distant from Gauley Bridge.

At the trial, White conceded that he had received fifty-five dollars for each burial—twenty-five dollars more than the going rate for burying the county's paupers—but denied that this had involved any impropriety. He estimated that he had buried thirty bodies (under examination he specified the more exact number of thirty-three) at a cemetery he had laid out on his family farm on the outskirts of

Summersville, the county seat of Nicholas County. Each corpse had its own pine coffin and grave. In the popular account, White performed 169 such clandestine burials. The source of this figure is no longer identifiable, but it came to be widely and uncritically cited, and several years later it would be repeated in the radical press.

Medical testimony, which consumed the last four days of the plaintiff's case, was dramatized by the introduction into evidence of the preserved lungs of Jones and also those of Walter Lewis Scott, another local man. Five physicians testified for the plaintiff. Mitchell, the former company physician, stated that he examined more than a hundred men with silicosis; Harless testified to his own positive diagnosis of silicosis in more than 150 living tunnel workers and in the cadavers of nine others. In further testimony he revealed that he had first recognized an association between tunnel dust and silicosis in 1931 and had made the first diagnosis of acute silicosis that appeared on a death certificate in Fayette County. When asked about the character of these examinations, Harless asserted that he had obtained the worker's industrial, medical, and family histories, conducted physical examinations on about 175 men, and had recorded the results. When asked to recall how many of the men so examined had suffered from acute silicosis, Harless responded, "I think I am safe in saying that perhaps those that I have a record of, practically ninety-five per cent." Dr. Elmer Hayhurst, from Columbus, Ohio, and Drs. W. H. Hughey and A. C. Lambert, radiologists from Charleston, concurred with Harless on the severity of Johnson's pneumoconiosis.[13] Hayhurst, a nationally renowned expert on occupational lung disease, had earlier refused to be retained by the defense.

Testimony for the defense formally began on Tuesday morning, 4 April, and lasted three weeks. Compared to the plaintiff's case, arguments were more complex and subtle. They rested to only a limited extent on testimony of former tunnel workers and foremen, relying most substantially on expert witnesses who had not been directly involved in the operations at Gauley Bridge. Like the plaintiff's attorneys, those for the defense also called O. M. Jones as their first witness. Jones sounded the keynotes of the contractor's case: There had been no appreciable levels of either dust or carbon monoxide in the tunnel, and wet drilling had been used at all times. He skirted the issue of the involvement of the Department of Mines in the tunnel—and with it that of Union Carbide—by defining the relationship as having been exclusively between the contractor and the director of the department, Lambie. On cross-examination, Jones revised his contention that carbon monoxide levels on the streets of New York City exceeded the levels in the tunnel by conceding that the company had conducted only two restricted measurements during the course of tunnel construction.



Six workers next testified to the clarity of tunnel air conditions, the excellence of the ventilation system, and the use of wet drilling methods. Next came the New Kanawha Power Company staff. Several engineers testified to visibility of three to six hundred feet. R. E. Buckley contradicted the testimony of Arthur Peyton, claiming that the company had issued respirators for eye protection only. Henry Abernathy, an electrical supervisor, denied the descriptions of dust-coated workers by claiming that the men had actually been wet from the drilling and covered with muck. Both W. W. Cunningham, a drill mechanic for Rinehart and Dennis, and C. C. Waugh, the head foreman in Shaft 1, testified that drilling was always done wet. Within two years of his testimony, Waugh died of silicosis.

After a week of rebuttals of the plaintiff's claims by witnesses who had also known the tunnel work at first hand, the defense turned to its expert witnesses. Two national experts in the field of medicine contradicted the analyses of local physicians and that of Hayhurst. They were James A. Britton, a renowned pulmonologist from Chicago, and Henry Pancoast of Philadelphia, the American authority on the radiological diagnosis of pneumoconioses.[14]

Britton testified that Johnson was suffering from tuberculosis, not silicosis, and the plaintiff's attorneys subsequently weakened their own case by refusing to allow an examination of their client. Pancoast's testimony proved more devastating. He asserted that the ill-defined pulmonary nodules apparent in Johnson's hazy chest X-ray differed from the distinct round opacities typical of silicosis and were, in fact, an expression of tuberculosis. Tragically for the tunnel workers, the orthodoxy of this distinguished physician, who had pioneered the reading of industrial chest films, prevented him from appreciating a new medical entity. As Lewis and William Cole would later describe it in their 1940 work, *Pneumoconiosis*, the roentgenology of acute silicosis matched precisely the X-ray of Raymond Johnson's lungs:

> The roentgenological findings are a diffuse haze or cloudiness involving both lung fields, which tends to obscure the normal lung markings. Within this general haze there are more definite localized patches of actual consolidation. The ventilation of the lung is materially diminished, and yet there seems to be no characteristic pattern on the roentgenogram. This cloudiness is so diffuse that in the past it has often been overlooked or attributed to an error in the technique of examination.[15]

It was more than the novelty of the circumstances prevailing at Gauley Bridge that led to confusion in identifying acute silicosis as a distinct pathological entity. Silicosis is the only pneumoconiosis that produces a significantly elevated incidence of tuberculosis, which re-

mains its most important infectious complication. It was a small step from the medical knowledge that victims of traditional silicosis were susceptible to tuberculosis to the popular impression that the two diseases could not be easily distinguished.

It may have significantly harmed the plaintiff's case that its only expert witnesses were from the field of medicine and were directly contradicted by two nationally recognized experts, whereas the defense had retained a retinue of unchallenged experts from a variety of engineering fields.

Third party experts followed the physicians. Regrettably, the assumption of expertise on the part of these witnesses stemmed more from their local prestige than from direct experience with the tunnel. H. W. Nelson of Princeton, New Jersey, contended that his company had drilled twelve tunnels and that he had never heard of silicosis resulting from silica dust.[16] C. M. Faulkner, superintendent of the A. Guthrie Company of New York and contractor for the Nicholas, Fayette, and Greenbrier railroad lines, also testified that he had never heard of silicosis. After establishing silicosis as a novel condition in the industrial community, each of the experts then testified, rather remarkably, that they had visited Shaft 1 on one occasion and found the air clear. The supplier of the ventilation equipment to the tunnel then refuted the workers' descriptions of perforated hosing by testifying that he had found the equipment intact upon its salvage from the project. With the testimony on 18 April by Lambie and two inspectors from the State Department of Mines—which, as already described, contradicted their own departmental reports and letters—the defense rested its case.

An unexpected development on 14 April had only slightly clouded the case for the defense. A black tunnel worker, Albert Young, had asked to change his support of the defense to that of the plaintiff. Denying that his original testimony to the clear air and good working conditions prevailing in the tunnel had been true, he now swore that, though the defense had threatened and bribed him, his conscience forced him to speak out.[17]

The plaintiff called a series of witnesses to rebut the defense's claims. Thirteen residents of Gauley Bridge contended that workers had left the tunnel each day covered with white dust that marked their tracks for hundreds of feet.[18] The Reverend G. A. Musick of Gauley Bridge, who had given the invocation at the groundbreaking three years earlier, now testified to the harm that had been done to the men. Other local witnesses testified that the chief foreman from Shaft 1, Charles Gilmore, also suffered from severe silicosis. In their defense, Rinehart and Dennis called a single witness, the general manager, E. J. Perkins, who simply denied any negligence or any knowledge of silicosis, and



asserted that he never heard a single complaint about tunnel conditions during the two years of construction.

Testimony ended on 20 April. On 24 April, the presiding magistrate, J. W. Eary, issued instructions to the jury which, if strictly followed, would make a guilty verdict difficult to reach. Among the chief provisions of his instructions, Eary stated that, on the one hand, a worker's ignorance of the hazards at Hawk's Nest was not a sufficient basis for compensation. On the other hand, alleged knowledge of tunnel hazards, quite independent of the employer's actions, *was* a sufficient basis for exclusion from compensation. Also, if the contractor's performance had reflected customary practices in the field, no basis for compensation existed, even if Hawk's Nest had presented a greater hazard than other construction projects and the contractor had failed to supply tools and equipment to reduce the hazards related to tunnel dust. Moreover, even if the contractor knew of the presence of large deposits of silica rock, the plaintiff deserved no compensation, provided that the contractor could claim ignorance of the disease of silicosis, or that medical uncertainty existed involving the differentiation between tuberculosis and silicosis. Finally, the judge suggested that if the plaintiff's case was less than absolute, he should receive no compensation.

After deliberating for twenty hours, the jury remained deadlocked seven to five in favor of the plaintiff. Eary dismissed the case. He later issued a contempt of court citation against one of the jury members, who had been chauffeured to and from the courtroom by employees of Rinehart and Dennis. The Charleston law firm of Townshend, Bock, and Moore attempted to resurrect Raymond Johnson's case in 1934 under terms of chancery, based upon Johnson's personal suffering.[19] But before the case reached the courts, Johnson died of acute silicosis.

In the light of these events, the court decision deserves some examination. It seems evident that the defendants exerted, or attempted to exert, improper influence on the outcome of the trial. James Mason, who abandoned the neutral position of official investigator hired by the state legislature for the stance of plaintiff's attorney, criticized the darker side of the Fayette County legal process before Congress: "I can only say in passing that I think the payment of that money, the suspicious tampering with the jury system, was about the most damnable outrage that had been perpetrated in any State up to that time."[20] Yet to argue only that corporate power bought witnesses and that corporate prestige intimidated the jury neglects other components of the decision. The fact that the jury, which was composed of peers of the plaintiff, reached an evenly split verdict suggests genuine doubt rather than bias. Substantial controversy existed in the testimony of the experts on both the diagnosis of silicosis and the adequacy of the

precautions taken by the contractor. The strategy of the plaintiff's attorneys contributed to the outcome in that they failed to anticipate the contractor's case, whereas the defense carefully negated the strongest claims of the tunnel workers. Although disparities in available resources no doubt gave an advantage to the defense in that it could call on witnesses of national prominence, the plaintiff was able to summon the respected talents of Abraham Lilly, one of the state's best-known lawyers.

The plaintiff presented a straightforward case, based on anecdotal accounts by tunnel workers and the testimony of local physicians, to the effect that: (1) many men from Shaft 1 had suffered and died from a terrible lung disease; (2) medical experts identified the disorder as silicosis; (3) dusty tunnel conditions had made massive dust inhalation inevitable; and (4) the company had criminally neglected to inform or protect the men from this danger. The defense presented a more complex case. By raising doubts about both the true nature of the plaintiff's disease and the conditions that had prevailed in the tunnel, it severely weakened both confidence in the plaintiff's witnesses and the cumulative impact of his lawyers' case. Finally, it is likely that Eary's instructions to the jury considerably restricted any inclinations its members may have felt to reach a clear verdict for the plaintiff. In fact, there is a striking logical consistency between the judge's instructions to the jury and the positions advanced by the defendant's attorneys.

On 5 June, the first suit to be filed, that of Cecil Jones, was finally to have reached the court. Hubbard and Bacon were again lawyers for the plaintiff, Jones's widow. Medical ambiguities had contributed to their loss in the Johnson trial; this time they had the advantage of being able to base their case upon clear medical evidence derived from the bodies of victims. The attorneys had decided to proceed with the case of a deceased worker, their reasoning being that the jury's confusion over similarities between silicosis and tuberculosis would be obviated by findings from an autopsy proving the presence of silica in the lungs. The case of Cecil Jones, whose suit had tested the applicability of the state's workmen's compensation law and then been pushed aside in favor of the Johnson case, was a reasonable choice for the next contest between the tunnel workers and the contractor.

In a deposition filed for the plaintiff during the Johnson trial, a professor of physiological chemistry at Ohio State University, Clayton S. Smith, had already analyzed specimens of tissue from the lungs of both Cecil Jones and Walter Lewis Scott, another tunnel worker. Having assigned a range of 3.2 to 10.0 as the percentage of silica in the lung ash of the average working man, he had testified that the proportions in the lungs of Jones and Scott were, respectively, 50 and 44 percent.[21] Such evidence that silicosis, not tuberculosis, had been involved in the workers' deaths seemed likely to outweigh contradictory medical testimony.



The attorneys for Dora Jones were soon deprived of their opportunity to test the weight of this evidence by the rapidly growing backlog of cases in the Fayette County Court. The prospect of dealing with two hundred bitterly contested cases presented an insoluble problem to the local authorities and attorneys. An alternative to legal remedies might have been found if the West Virginia legislature had chosen to take account of silicosis in the state's workmen's compensation law. During its discussion of the question in late May, it did not do so, despite the strong advocacy of the labor movement. A leading West Virginia legislator attributed this failure to intense lobbying from companies in the state. The Jones case, which had initially raised the issue, was postponed for seven days. Many cases were transferred to neighboring Nicholas County, but this move brought insufficient relief to the crowding of the court calendars. The routine work of the county court was postponed for an unspecified period. Theoretically, the resolution of each case individually could have preoccupied Fayette County officials for decades. More to the point, the almost inevitable settlement of a single case in the plaintiff's favor would have set a precedent for substantial remuneration in outstanding cases. The stage was set for a settlement out of court when Eary dismissed the jury in the Jones case on 13 June 1933.

Two weeks later Rinehart and Dennis and the seventeen Fayette County attorneys representing the Gauley Bridge plaintiffs confirmed abundant rumors in announcing that an out-of-court agreement had been reached.[22] Outstanding suits amounting to $4 million were to be settled for the sum of $130 thousand. A half of this award was to go to the attorneys in return for their agreement not to prosecute. The other half was to be divided among the plaintiffs, whose number had by this date reached 157, and was still growing. It was later disclosed that the plaintiffs' lawyers had secretly signed a contract with E. J. Perkins, vice president of Rinehart and Dennis, providing for payment of another twenty thousand dollars to the lawyers in return for their agreeing not to engage in further legal action. Once this agreement was revealed, Eary ordered that a half of it should be added to the plaintiffs' share of the total award. Nevertheless, a particularly crucial requirement of the agreement—that the plaintiffs' lawyers surrender all their case records to the defense—was allowed to remain in force. The out-of-court settlement was made final by Eary on 5 August.

If the terms of the settlement seem heavily weighted against the plaintiffs, they can best be understood in the context of courthouse bargaining. There, the defense could deploy powerful forces to prevent the precedent-setting loss of a case, whereas the plaintiffs' at-

torneys, limited in both means and altruism, could find a personally advantageous solution. The multitude of suits of a relatively uniform type amounted in effect to a class action suit, though the failure of the state to provide legislative solutions made the complexities of individual settlements necessary. Since the plaintiffs' attorneys had been hired on a 50 percent contingency basis, their rewards for successful prosecution of a single suit for twenty-five thousand dollars would be substantial. But their opponents appeared to be cleverly building a nearly impregnable stone wall against which they might have to batter themselves during many months of costly action. Expert witnesses of national reputation would need to be enlisted, and, with the passage of time, either dispersal or death would place many witnesses with firsthand knowledge of the tunnel construction beyond subpoena. Moreover, although Union Carbide's surrogate, the New Kanawha Power Company, had not been named in the Johnson case, it had been in the Jones case and in two hundred additional suits. Direct confrontation in court with Union Carbide would have been a formidable prospect.[23] Settlement out of court offered an attractive alternative. Although the claims of the Hawk's Nest workers were frustrated and betrayed, the attorneys who had represented them were able to share considerable economic rewards.

The passage of time would further dilute the distribution of compensation to the plaintiffs. By the end of the Raymond Johnson trial, in early July 1933, 84 more suits had been filed, most with the Charleston law firm of Lilly and Lilly, only three with Hubbard and Bacon. These brought the total number of litigants to 232.

The final number and size of individual awards was as yet undetermined. The mechanism set up for their distribution called for a panel of three physicians, one to be chosen by the plaintiffs, two by the defense. This panel was to decide upon the degree of disability of each plaintiff and fix compensation accordingly. The physicians eventually agreed upon by the attorneys and the court included none associated with the defense. They were Harless, Hayhurst, and W. H. Hughey, a radiologist from Charleston. All three had testified on behalf of Raymond Johnson. Since the total sum of the compensation had already been limited by the settlement, there was no threat to Rinehart and Dennis in choosing panel members whose sympathy for the workers was clearly established. The three physicians were placed in a paradoxical position, however. The larger the number of plaintiffs whose claims they accepted, the less compensation each claimant would receive.

The court established a tentative compensation schedule for afflicted workers, although this necessarily remained advisory because the number of recipients was as yet unknown. The Judge suggested that the money be distributed as follows: $400 for an unmarried black man; $600 for a married black man; $800 for an unmarried white man; and $1,000 for a married white man. The families of deceased married white men should receive an additional $600, making $1600 the maximum judgment. Contrary to the original announcement, compensation depended not upon the severity of disability but instead upon race and marital status. In practice this meant that only about 150 men or their survivors could receive $500 or more.



By the end of summer 1933, 347 men had claimed damage resulting from silicosis. The number of applications diminished slightly before cases were reviewed. A small number of men misrepresented their employment on the tunnel, and several workers did not pursue settlement even though they had filed for compensation, either withdrawing altogether or choosing to press their individual suits. The cases of several deceased workers were rejected because their survivors could not supply documented (X-ray) evidence of silicosis. In all, the board reviewed the cases of 307 living and 13 posthumous claimants. On the basis of chest X-rays and other evidence, the panel found silicosis in 146 cases. Thirty-one were declared to be in the first stage, 36 in the second or third stage, and 79 had acute silicosis. Settlements eventually ranged from $30 to $1600, with single black laborers receiving the least and families of deceased whites, such as Cecil Jones, receiving the maximum payment.

After the disclosures of jury tampering and deals out of court in connection with the Johnson trial, Townshend, Bock, and Moore began actively recruiting Gauley Bridge cases. The attorneys assembled 269 cases; 202 were new, 67 were of former litigants who had been excluded from the settlement. It had been a condition of the agreement in 1933 between the plaintiffs' attorneys and the defense that cases which had been reviewed would not be refiled, even if there were no settlement. The courts refused to reinstate any of these cases.

The trial involving Donald Shay—the last, and only the second, to be fully adjudicated in the Gauley Bridge episode—came to court in June and July of 1934. Shay, who had worked as a Rinehart and Dennis foreman in Shaft 1, sued the contractor and the New Kanawha Power Company for fifty thousand dollars. The trial was a scaled-down version of the Johnson trial of a year before. The attorneys called only a third as many witnesses. Again, the defense relied almost exclusively on its retinue of experts, which included engineers and drilling sales representatives from Ingersoll-Rand.[24] W. H. Hughey and A. C. Lambert, who had figured prominently during the earlier trial with their testimony for the plaintiff, now appeared as witnesses for the defense. The associate news editor of the *Engineering News-Record*, H. W. Richardson, offered one of the more remarkable testimonies for the defense, in a metamorphosis from journalist to partisan. Richardson had been the only national correspondent to cover the Johnson

trial in significant detail. Now he took a more active role. Appearing as a witness, he testified not only to the exemplary working conditions in the tunnel but also to the risks of silicosis racketeering against responsible contractors.

The ninety-nine pieces of evidence presented by the plaintiff—rock analyses, chest X-rays, and Department of Mines reports—replicated almost exactly those offered in the previous trial. This time, the fact that the presence of silicosis among tunnel workers in Fayette County had been established during the settlements played a crucial role in the plaintiff's legal strategy. Although the trial ended with a hung jury, the split was now ten to two in the plaintiff's favor.

Townshend, Bock, and Moore next filed a writ of error and supersedeas, and argued for a change of venue to Charleston. It was granted for about sixty cases. The documented case involved Donald Shay. The attorneys contended that conditions in Fayette County precluded a fair trial, a situation all the more poignant because the afflicted workers could not afford the costs of an appeal. Further, ample evidence now supported the workers' claims of silicosis. In the affidavit, Harless established that he had personally examined three hundred workers and found that 60 percent suffered from silicosis.[25] A. C. Lambert confirmed that he had diagnosed silicosis from chest X-rays of two hundred workers.[26]

Judge Eary chose to transfer the cases on 29 October 1934, over the objections of Rinehart and Dennis and the New Kanawha Power Company. He wrote:

> I have decided to transfer all or some of these cases to another circuit, chiefly for the reason that I have become aware that there is now in this county a sharp division of sentiment among the people as to the merits of these cases, to the extent that, even though we may be able to qualify a jury so far as it is possible to do by the usual voir dire questions to them, yet they would probably be influenced, maybe unconsciously, by this pronounced sentiment.[27]

However, Eary also transmitted the final decision for certification to the state supreme court, over the objections of Townshend, Bock, and Moore. On 8 November that court voted to transfer all future legal action for the sixty cases to Kanawha County. The court barred more than two hundred additional suits amounting to five million dollars on the grounds that they had been resolved under prior settlements or did not fall within the statute of limitations.[28]

Before the Kanawha County Circuit Court could bring any of the new cases to trial, the West Virginia State Legislature turned its attention to the problem of silicosis compensation. By 1932, when the legal controversies had arisen about the events at Gauley Bridge, no



state had yet enacted a law providing compensation specifically for silicosis. Only six states—California, Connecticut, Massachusetts, Missouri, North Dakota, and Wisconsin—had legislation worded broadly enough to cover the disease.[29] In the spring of 1933 the legislature of West Virginia had considered a bill intended to compensate the tunnel workers afflicted with silicosis. Although narrowly confined to a specific population, the bill had represented an effort to make the disease compensable. According to the testimony of Senator Rush D. Holt, then a member of the state legislature, the bill was strongly endorsed by the West Virginia Federation of Labor and by legislators from the mining counties. It was defeated under strong pressure from industry.[30]

On 8 March 1935, the West Virginia House of Delegates enacted a new provision of the state's workmen's compensation law that established terms for compensating workers with silicosis. This time, for reasons not hard to fathom, state industries endorsed the bill. In a national effort to control occupational lung disease, silicosis at Gauley Bridge would eventually come to symbolize the dark side of progress. Meanwhile, the West Virginia statute was an unmitigated disgrace. Nearly every clause protected the employer from responsibility for the unique conditions that had prevailed in the Hawk's Nest Tunnel. The merits of the statute must be weighed against four criteria: (1) compensation should be available to affected workers, under the limitations of the definition of the disease, (2) the terms of the financial settlements should be realistic and fair, (3) the definition of the employer's negligence and degree of liability should be clear, and (4) the statute should enjoy an advantage in simplicity and effectiveness over provisions of common law.

In stark contrast to these criteria, the West Virginia statute required two years of continuous employment with the last employer of record in order to establish eligibility. Despite the variable and potentially long latency period of silicosis, which had been recognized in other state laws, the West Virginia statute placed a one-year limitation on the filing of claims. Any claims by men who had worked on the Hawk's Nest Tunnel were excluded not only by this limitation, but also by a requirement that a claimant should have been subjected to at least twenty-four months of exposure. Drilling at Hawk's Nest had lasted for no more than eighteen months, and the statute of limitations would have expired twenty-nine months before the enactment of the new law, thus excluding new claims. The lack of provision for retroactive claims and the prolonged exposure requirement were more than academic distinctions. None of the eighty claims filed with the West Virginia State Compensation Commission in 1932 were ever acted upon, although many had been filed within a year of the last date of em-

ployment. As a company document written in 1936 pointed out, the 1935 statute "outlawed" these cases, since their required refiling would have exceeded the single year statute of limitations.

Grounds for exclusion of individual workers' claims were extremely broad. A prevailing principle in laws concerned with workmen's compensation had been to limit the exclusion of benefits due to an employee's failure to disclose details of personal history or to follow all work rules—so-called self-exposure. The West Virginia statute offered ample opportunity to dismiss almost any claim. A worker could be denied benefits on three grounds: (1) for failing to observe an employer's work rules as approved by the West Virginia Silicosis Commission; (2) for nondisclosure to the employer of exposures from previous work; and (3) for failing to supply all relevant history of personal health at the time of employment.[31] In contrast, provisions for extra compensation due to the negligence of an employer—or what was called willful determination—which might have aided the victims at Gauley Bridge, were left vague, hinging on the terms *conscious* and *willful*. Alleged unawareness of the dangers of silica and compliance with industry norms had been at the heart of Rinehart and Dennis's defense against the Gauley Bridge plaintiffs.

That even a stronger law would not have prevented efforts at circumvention on the part of unscrupulous industries is evidenced by the actions of the Caterpillar Tractor Company in Illinois, sixteen days before the state enacted the Illinois Occupational Diseases Act, which compensated silicotics. The company took chest X-rays of 1,400 workers in one of its foundries; six days later it dismissed 179 workers whose lungs showed signs of pneumoconiosis.

At the congressional hearings held less than a year after passage of the West Virginia law, the state's freshman congressman, Jennings Randolph, attempted to justify the statute: "I find that only 11 States in the Union have a law under which silicosis is compensable, and that West Virginia is one of them. Of course, there is need for revision of statutes, as we find each year."[32] In rebuttal, Senator Holt described the law as improper coverage. And Congressman Vito Marcantonio read into the record of the hearings a severe indictment of the law that had been published in 1935 in the bulletin of the International Juridical Association: "Whether or not the West Virginia workmen's silicosis law is declared unconstitutional, the subservience of the West Virginia Legislature to the interests of employers is almost unparalleled in its hypocrisy, and the statute must be wiped out."[33]

The West Virginia statute did, however, define three stages of silicosis as compensable. Stage 1 was recognizable by early signs and symptoms, presumably diagnosed by chest X-ray; stage 2 required evidence of diminished work capacity; and stage 3 involved silicosis compounded by tuberculosis. Larger compensation accompanied a



finding of second- or third-stage silicosis. By granting special measures to men with asymptomatic disease, the West Virginia statute actually exceeded the national recommendations of the Committee on Silicosis convened by Secretary of Labor Frances Perkins in 1936. However, with this one gleam of enlightenment must be contrasted the actual monetary terms of compensation. A finding of a first-stage disability entitled a worker to five hundred dollars as a lump sum payment. Acceptance of this sum required him to abandon all future claims to compensation. A series of additional benefits for medical services might result from a finding of a second- or third-stage disability. Nevertheless, maximum compensation could never exceed a thousand dollars. Death from silicosis earned no award whatever for the worker's family. Finally, the statute made participation in the compensation regime voluntary for employers.

It is an often-stressed principle of workers' compensation laws that the employer accepts the burden of responsibility for injury to workers in return for a guarantee of limited financial liability, regardless of damage or cause, whereas workers accept modest awards in return for avoidance of expensive contest. In the West Virginia statute the scales were heavily weighted in favor of the employer. The language of this law had an immediate impact on those Gauley Bridge workers who, now represented by an aggressive and principled law firm, appeared to be on the brink of victory in a Charleston courthouse.

In May 1935, the Kanawha County Circuit Court called the case of Lewis Scott as the first of the sixty filed under the change of venue. But the court then declined to hear the case on the grounds that it abridged the statute of limitations: more than a year had passed between the filing of the lawsuit and the last workday. Walter Lewis Scott had ended his tenure of employment in late 1931 but did not file with Townshend, Bock, and Moore until October 1933. On 28 May the state supreme court voted three to zero to uphold the lower court's ruling. Citing the one-year statute of limitations considered traditional in personal injury suits, the court ruled that, in the absence of willful concealment on the part of the wrongdoer, ignorance by the injured party did not offer sufficient grounds for admission of the suit. Specifically, the court held that any suit associated with the Hawk's Nest Tunnel filed after October 1933 exceeded the statute of limitations provision of the West Virginia silicosis compensation law. As authority, the court reiterated the language of that statute, which argued that the injured party always knows of the existence of an occupational disease, just as with an injury, and that the legislature had never intended to exclude occupational disease from the one-year statute of limitations. Being ineligible for workmen's compensation, Scott was, by extension, denied access to the criminal court.

This holding, in which a law passed after the filing of a suit was

cited as the theoretical ground for disqualification, was one of the more extraordinary official actions taken during the whole history of the Gauley Bridge disaster. The declaration in the court syllabus that "the construction of a statute by a court of last resort becomes a component part of the statute" finally deprived the tunnel workers of any hope of legal redress, through either the court or the workers' compensation claims process. Any newly filed suit would encounter the same provisions of the law. Seeing that further action had been rendered futile, Townshend, Bock, and Moore acknowledged defeat and negotiated a block settlement with Rinehart and Dennis for seventy thousand dollars. This sum was divided among the remaining plaintiffs on 9 July 1935.

Thus legislators and judges ended three years of effort by the workers of the Hawk's Nest Tunnel to correct the injustices they believed had been done to them. Rinehart and Dennis and Union Carbide were freed from further claims and the danger of scandal.

The settlement of 1935, like that of 1933, obliged the plaintiffs' attorneys to turn over all legal papers to the defense, thereby helping to erase the events at Gauley Bridge from public memory. Townshend, Bock, and Moore waived all fees after the settlement, though they had invested considerable effort in the case. Ben Moore was known to have completed a detailed study of disease related to work on the tunnel. Since the courts had already insulated the companies from financial liability, it might be hypothesized that the final monetary settlement—and the accompanying surrender of all evidence—was designed mainly to vitiate the efforts of this last and most determined legal adversary. Senator Holt said much to support such a conjecture in an attempt in December 1935 to investigate the Gauley Bridge disaster:

> I went to West Virginia before Christmas to discuss with the lawyers who had handled these cases certain aspects of these matters. I tried to get data and information about the cases, and I was informed by the lawyers that the evidence and the data, all facts connected with the cases, had been turned over to the Union Carbide and Carbon Co. or the Rinehart and Dennis Co. when the compromise was made. In other words, they agreed definitely when they compromised the cases, after they were thrown out by the supreme court, that they would turn over all data that had been compiled against the contractors. . . . It was part of the compromise reached. They paid the men so much. The lawyers realized that they had no cases, since the decision of the court was against them, and in order to get something for the men they felt they should compromise rather than lose everything. Therefore the data was turned over to the company.[34]



In a little over two years, tunnel workers from Hawk's Nest had filed 538 suits for damages resulting from exposure to silica dust. Thirty-four of these suits were posthumous. The workers settled for a sum of two hundred thousand dollars, only two-thirds of which actually accrued to them. In effect, the convergent acts or decisions of powerful corporate entities, state officials, and the courts had determined that less than four hundred dollars was the average worth of a tunnel worker's health or life. Union Carbide, which had dictated the conditions under which the tunnel was to be dug, interpreted the terms of the settlement as a grand victory. The willingness of the plaintiffs' attorneys to settle for so little was cited as evidence of the weakness of the workers' case. An internal memorandum from Leonard Davis summed up the company's position on the suits: "From first to last 538 men were plaintiffs in these suits. Of these 5 were never on the Contractor's payroll and another 49 were never employed in the tunnel. This indicates how little basis these lawyers required for the acceptance of a client, and why, although suing for millions in the aggregate, the plaintiffs' attorneys were glad to get about 1-1/2% of the total sued for."[35] Davis went further in characterizing the role of the lawyers, at least by innuendo:

> The nature of the disease silicosis, its slowness of development, the similarity of many of its symptoms to other and very common diseases of the respiratory tract, the difficulty of differentiating it from tuberculosis and some other diseases by X-ray photographs of the chest region except by highly qualified experts and the difficulty and expense of defense in lawsuits brought for alleged injuries from it, have opened up a fertile field for racketeering in cases of alleged silicosis.[36]

As Henry B. Selleck has aptly pointed out, such terms as *silicosis racket* and *silicosis fraud* evoked images in the popular mind of ambulance chasers, perfunctory screening clinics, and legal contingency fees amounting to one-half or two-thirds of the award.[37] In the early 1930s, professional skepticism over claims of silicosis in part reflected confusion over the nature of the disease. This seemed, however, to be particularly true in states that resisted providing compensation for silicosis victims. The readiness to suspect fraud helped Union Carbide to dismiss both the workers it had victimized and the attorneys it had bribed with a self-righteous accusation of corruption.

In the middle of July 1935, it might have seemed that the occurrences at Gauley Bridge were destined never to be known outside the confines of a small rural region of West Virginia. In the fall of 1930, New York financial pages might have noted the improving prospects of the Union Carbide and Carbon Corporation as a result of the ex-

pansion of its holdings in West Virginia. But during the five years after the ground breaking for the tunnel that was to realize those prospects, public knowledge of the subsequent events had spread only very slowly beyond its immediate environs. Even news of the assembling of five thousand men and the discovery of deadly disease had been contained to a part of Fayette County. The trials of 1933 and 1934 had involved county authorities and a few organs of the West Virginia press. Now, in 1935, the possibility that implications of local events would influence state policy had been effectively shut as legal recourse for diseased workers was denied. In the nation, events that would one day transform the laws of compensation for such workers were noticed by only a few with special interests. In March and April of 1933, the case of Raymond Johnson was written up by stringers for the Associated Press, but there is no evidence that the story reached farther than the regional cities of Beckley and Charleston.

The year 1935 opened, however, with an unspectacular but significant event. The leftist writer Albert Maltz published a story called "Man on a Road" in the New York literary journal *New Masses*.[38] It told of an encounter with a despairing and sullen hitchhiker whom Maltz supposedly had picked up while driving through a railroad tunnel in a town named Gauley, in West Virginia. The man described a tunnel thick with dust, where many had died and his own health had been destroyed. The only certainty left to him was his own imminent death. "I couldn't understand the glazed quality in his eyes. It wasn't the glassy stare of a drunken man or the wild mad glare I saw once in the eyes of a woman in a fit of violence. I could only think of a man I once knew who had died of cancer. Inside there was an ugly scraping sound as though cold metal were being rubbed on the bones of his ribs."[39] The story contained enough inaccuracies to suggest that the author had no firsthand knowledge of the region. Through the fictional device of being asked to transcribe a final letter to the man's wife, he described terrible conditions that had left a thousand men sick and dying, and himself with only four months to live. Yet however obviously contrived the story was, it conveyed an important message about industrial calamities.

The role of the *New Masses* did not end with Maltz's story. Over the next two weeks it published a two-part series of articles entitled "Two Thousand Dying on the Job," written by "Bernard Allen."[40] Purporting to be an investigative report inspired by the Maltz story, the articles included reports of silica content in the rock ranging from 97 to 99.44 percent, descriptions of life in the black camp, and details from the trial in the Johnson case. Bernard Allen was in fact a pen name for Phillipa Allen, a social worker from New York who, a year earlier, had gone to Gauley Bridge to investigate rumors of death in



the tunnel. Art and journalism were thus combined in the radical journal to arouse public interest in the Hawk's Nest disaster.

Although the Maltz story gained a place in New Deal anthologies, its eventual effect on national news and a federal investigation did not represent a direct transformation of literature into workmen's compensation policy. Maltz conveyed his findings to Frank Palmer, editor of the *People's Press*, a radical labor tabloid published in Detroit. Palmer sent William J. Finke, a New York retailer and amateur reporter, to Gauley Bridge to document the story and take photographs. Finke paid his own expenses to visit the "village of walking skeletons," as Palmer called it. In Finke's article, published in November 1935, he retold many of the allegations from the Johnson case: dust so thick that visibility was confined to five feet, men buried in unmarked graves in a nearby cornfield. And 476 men dead from silicosis. This figure, which came to be accepted as official, had in fact grown out of Finke's misunderstanding of other statistics mentioned by Harless during an interview. Another of Finke's figures, the supposed total of 169 bodies secretly buried by Hadley C. White, may have been purely fictional, although it was a rumor widely repeated locally. Eventually the stories and numbers would be told, almost verbatim, for wider circulation in the pages of the *Literary Digest*.

*People's Press* was too small to be noticed by the public, but Finke's articles eventually had their effect. Gilbert Love, a reporter with the *Pittsburgh Press* and the Scripps-Howard newspaper chain, traveled to Gauley Bridge in December 1935 to verify that a tragedy had occurred. He interviewed Harless, who told him that seventy men had died in the winter of 1931. But though Love spent several days researching his story, he was unable to construct a fuller quantitative account of total mortality.[41]

More importantly, the articles came to the attention of Vito Marcantonio, a Republican congressman from New York well known as a spokesman for working-class rights. As a member of the Subcommittee on Labor of the Seventy-fourth Congress, Marcantonio arranged for hearings on the dangers of silicosis, to be scheduled for 16 January 1936. At last the Gauley Bridge workers, who had exhausted all legislative or judicial remedies in their own state, would have at least a theoretical opportunity to carry their case to the nation.

The subcommittee, under the chairmanship of Glenn W. Griswold, a Democrat from Indiana, depended heavily on the moral and intellectual guidance of Marcantonio. Other members were Matthew A. Dunn and Jennings Randolph, Democrats respectively from Pennsylvania and West Virginia, and W. P. Lambertson, a Republican from Kansas. The hearings were nominally called to conduct "an investigation relating to health conditions of workers employed in the con-

struction and maintenance of public utilities." In fact, the inquiry remained narrowly focused on the cases of silicosis at Hawk's Nest. This focus, and the limited sources of information available to the subcommittee, were reflected in a searing description in the preamble to the joint resolution that established it:

> Whereas four hundred and seventy-six tunnel workers employed by the Rinehart and Dennis Company, contactors for the New Kanawha Power Company, subsidiary of the Union Carbide and Carbon Company, have from time to time died from silicosis contracted while employed in digging out a tunnel at Gauley Bridge, West Virginia; and
>
> Whereas one thousand five hundred workers are now suffering from silicosis contracted while employed in the construction of said tunnel at Gauley Bridge, West Virginia; and
>
> Whereas one hundred and sixty-nine of said workers were buried in a field at Summersville, West Virginia, with cornstalks as their gravestones and with no other means of identification.[42]

As a source of historical insight into the events at Gauley Bridge, the hearings provided little information not already available in newspaper accounts or from court sources. The statistics reported in the preamble are attributable to Congressman Marcantonio's reading of an unsubstantiated source—the *People's Press*. In contrast to the trial in the case of Raymond Johnson, where 250 witnesses received subpoenas and 169 testified, only fourteen persons testified before the subcommittee. Because the subcommittee had no power of subpoena, both Rinehart and Dennis and Union Carbide declined to send representatives to testify in person. The position of the two companies was presented only in written reports. Even testimony for the workers was mainly indirect, recapitulating that given at the trials. Witnesses who had experienced conditions in the tunnel at first hand were few. This was the quorum that would review the six years of grief experienced by the Gauley Bridge workers.

The first person to testify was Phillipa Allen. Motivated by concern over the staggering needs of the surviving workers still at Gauley Bridge, she had conducted studies there during the summers of 1934 and 1935, contributing her time without recompense. For two years she had written and spoken tirelessly in an attempt to make the public aware of the full story. Mr. and Mrs. Charles Jones, residents of Gauley Bridge whose three sons had died of silicosis, also testified. Jones had also worked on the project, but mainly up-tunnel.

The medical testimony before the hearings was startling. Hayhurst refused to attend because the subcommittee could not provide funds for travel. His written statement was merely a partial transcript of his testimony in the Johnson case. Harless had agreed to appear before



the subcommittee on 20 January, but three days before that date he sent a telegram indicating his unwillingness to participate. Less than three years earlier Harless had testified to having examined almost two hundred men afflicted with silicosis.. He was one of three physicians who had declared 146 men eligible for compensation. Now, in a letter addressed to the chairman of the House Committee on Labor, William P. Connery, Jr., he denied all his previous testimony in court: "I examined a large number of these workmen, perhaps as many as 200, on most of whom I kept no record, who claimed to be affected by reason of their employment. I found very little if any impairment of their health which I could attribute to their work in the tunnel."[43]

Harless cited only fifteen known cases of silicosis. This claim could have been justified only by the narrowest legal definition, since it was based on the thirteen posthumous settlements made by the medical review panel, and on two other death certificates identifying silicosis as the cause of death that bore Harless's signature—those of Raymond Johnson and Owen Jones.

Several of the witnesses were tunnel workers who had also testified at the trials of 1933 and 1934. Arthur Peyton, an engineer for the New Kanawha Power Company, repeated his testimony from the Johnson trial of 1933 that his company's employees had been issued respirators. Now, claiming that he was himself suffering from silicosis, he attributed it to seven months of exposure before the staff had received the protection in the winter of 1931.

Jennings Randolph, who had been included on the subcommittee because he was a West Virginian, interpreted this testimony in a manner that echoed the press of his home state. The New Kanawha Power Company, unlike the contractor, which came from another state, had acted responsibly by providing protection for its staff once the hazard had been recognized.

Hiram Skaggs, a former plaintiff who had worked as a drill mechanic for Ingersoll-Rand, a subcontractor, testified that, though he had worked for only six weeks in the tunnel, he had developed "tunnel pneumonia." He now claimed to be suffering from silicosis. He estimated the number of deaths among tunnel workers at more than a thousand.[44]

The final worker to appear was George Robison, a black driller who claimed to have worked less than a year. He said that he suffered from a wheeze and severe silicosis.[45] Recalling that he had attended thirty-five burials himself, he claimed to have known of about 118 deaths of other workers and believed that five hundred had died. In an unpublished review of the hearings, Union Carbide was particularly derogatory in its characterization of Robison. It claimed that he had worked only twenty-six days, in Shaft 3, and that Harless, Hayhurst, and Hughey had considered his chest X-ray to be negative in their

review of litigants applying for compensation in 1933. The report concluded: "On this meagre basis this negro is now enjoying notoriety, travel without cost to himself, and the pleasure of making an impression on white people for probably the first time in his life."[46]

After Robison, two journalists testified: Gilbert Love of the *Pittsburgh Press* and William J. Finke of *People's Press*.[47] Finke bitterly denounced the letter from Harless, whom he had interviewed only two months earlier. Reading from his notes, he quoted the physician's claim to have examined 250 men afflicted with silicosis. In the process, however, he inadvertently revealed the error that had given birth to the estimate, well known by now, of 476 deaths. Finke had confused the number of X-rays screened by Harless (307) with actual deaths and added them to the number of anonymous burials allegedly carried out by Hadley C. White.

Six remaining witnesses made contributions to the modest body of information gathered at the hearings. Senator Holt and James Mason clarified the role played by state politics in the events. Holt's testimony was particularly revealing about the lack of public discussion in his own state:

> All through West Virginia there has been much silence about this particular operation. Whenever anything was discussed in the legislature it was discussed quietly because of the danger of stepping on the toes of some industrialist at that particular time. . . .We find there a general coordination and combination of the manufacturers, industrialists, and coal operators, and they feel that if one brings out anything it is inadvisable, because West Virginia has received so much unfavorable mention and publicity due to industrial tragedies of the past.[48]

Holt was remarkably frank, too, about the treatment of the workers: "This is the most barbaric example of industrial construction that has ever happened in this world. That company well knew what it was going to do to those men. They brought up those transients, especially from the South, and treated them worse than dumb animals should be treated."[49]

Four expert witnesses discussed silicosis and mine protection: John W. Finch, director of the United States Bureau of Mines; William P. Yant, chief of industrial hygiene in that bureau; Dr. Roy R. Sayers of the Public Health Service, an authority on pneumoconioses; and Leonard J. Goldwater, director of the occupational disease clinic of New York University. Although they all confirmed that the effects of silica had been generally known by 1930, none had any specific knowledge of the outbreak of silicosis at Gauley Bridge.

The hearings had occupied only nine sessions. The findings of the subcommittee were submitted to Connery on 5 February 1936. This



final report was reluctantly written by Jennings Randolph, who during the hearings had made rather naive efforts to defend corporate, individual, and governmental reputations in his home state. Nevertheless, the document that emerged was a strong indictment of the builders of the Hawk's Nest Tunnel. Its main conclusions can be easily summarized:

1. The adverse effects on health resulting from the inhalation of silica had been publicized by the Bureau of Mines for more than twenty years. Well-recognized protective measures included suppression of dust with water, proper ventilation, the use of respirators, and drills equipped with suction devices.
2. The hazards to health from silica and the methods needed to prevent dangerous exposure had been uniformly ignored by the builders of the Hawk's Nest Tunnel.
3. An inhumane disregard for the health of the workers had persisted through the drilling of the tunnel, even after unmistakable patterns of disease had emerged.
4. Many workmen had been affected by silicosis and had died from it. The level of negligence shown had reflected either outright willfulness or indefensible ignorance.
5. Silicosis remained a risk in other states where mining and tunneling operations had been performed and were in progress. The subcommittee regarded its work as only a preliminary step in a larger and more thorough investigation.
6. It was the opinion of the subcommittee that P. H. Faulconer and E. J. Perkins, president and vice president, respectively, of Rinehart and Dennis, should be subpoenaed to appear before the subcommittee with all their books and records.
7. A resolution should be presented to the full House requesting adequate funds and powers of subpoena in order to initiate a full investigation of the Hawk's Nest Tunnel and the problem of silicosis.

The subcommittee ended its report to Connery with this recommendation: "Your subcommittee can do no more. Congress should do no less than to see that these citizens from many States who have paid the price for the electricity to be developed from the tunnel are vindicated. If by their suffering and death they will have made life safer in future for the men who go beneath the earth to work, if they will have been able to establish a new and greater regard for human life in industry, their suffering may not have been in vain."[50] But the subcommittee's eloquence fell on deaf ears. Though its request for funding—at first five thousand dollars, then raised to ten thousand—was modest, it was not granted by the House of Representatives. Neither were the powers of subpoena that could have required Rinehart and Dennis to submit full reports. But formal accomplishments may

not take into account the evolution of public attitudes, the ultimate litmus of a controversy. The hearings indirectly achieved an objective of immense significance in awakening recognition of the need to protect workers exposed to silica. This led to legislation that will be discussed in the epilog. As for the victims of the tragedy at Gauley Bridge, the hearings did nothing either to relieve or to compensate for their suffering. Neither did it effectively place responsibility for that suffering on the two companies that had most profited by it.

# 4
# A National Issue

The hearings catapulted Gauley Bridge onto a national stage, but the inquiry by an outraged congressman was only the initial step in a process of transmission that involved the organs of the national press. Prior to 1936, some of the lack of notoriety of the Hawk's Nest Tunnel episode can be accounted for by the transience of the project and the isolation of the region. Over a relatively short time, the migrants were dispersed, the contractor had returned to Virginia, and the New Kanawha Power Company had become an administrative memory. The impression also remains that through the suppression of evidence and the seeding of more palatable explanations, a cosmetic reconstruction took place, quite independent of the passage of time. For example, many years later, in the official state history of the tunnel, only company men who had been associated with the project, and the former mining official Robert Lambie, were cited as sources.[1] The national press, however, was large enough to pursue its inquiries through independent means. The treatment of the events by newspapers and magazines may show how the public came to understand Gauley Bridge and how the themes of silicosis and industrial health were presented.

Not until two weeks before the congressional hearings opened was any notice of the occurrence at Gauley Bridge taken by the national press. On 6 January 1936, the first widely read news story to mention it appeared in the medicine section of *Time*. In a broad discussion of silicosis the article discussed the progressive decision of the Supreme Court of California to outlaw the state's statute of limitations in claims of silicosis. Contrasted to this decision was the opportunistic legislation recently passed in West Virginia. In that context *Time* essentially re-