

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-000874-WC

JESSE GARDNER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-07-01156

VISION MINING, INC.;  
HON. DOUGLAS W. GOTT,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: KELLER AND WINE, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Jesse Gardner seeks review of an opinion and  
order of the Workers' Compensation Board (Board), affirming the dismissal of his

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

claim against Vision Mining, Inc. (Vision) by an Administrative Law Judge (ALJ). Gardner contends that KRS 342.316, which defines the procedure for coal workers' pneumoconiosis<sup>2</sup> claims (CWP), is unconstitutional in violation of his right to equal protection under the law.<sup>3</sup> We agree that the statute as applied to coal workers is unconstitutional and, therefore, we reverse and remand.

Gardner is a 62-year-old former coal miner who worked in the underground coal mines of Western Kentucky for approximately 37 years. On September 4, 2007, Gardner filed a CWP claim for compensation. Attached to the application, as required by KRS 342.316(3)(a)(1), was an x-ray interpretation performed by Dr. Robert Powell. The interpretation indicated that Gardner was positive for CWP, category 2/2.

Vision Mining filed a notice of resistance and a notice of denial of Gardner's claim. Vision countered Dr. Powell's x-ray interpretation with its own x-ray interpretation performed by Dr. Jerome Wiot. Dr. Wiot found no evidence of CWP but noted evidence of emphysema.

Pursuant to KRS 342.316(3)(b)4.e., Gardner's x-ray was then referred to a three-physician panel of "B" readers, consisting of Dr. Kenneth Anderson, Dr. Thomas Jarboe, and Dr. Robert Pope. Dr. Anderson's reading indicated that Gardner was positive for CWP, category 1/0. Dr. Jarboe and Dr. Pope both

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<sup>2</sup> Pneumoconiosis is more commonly known as black lung disease.

<sup>3</sup> Pursuant to KRS 418.075, Gardner noticed the Attorney General of Kentucky of this constitutional challenge. The Attorney General elected not to defend and therefore is not a party to this appeal.

indicated that Gardner was negative for CWP. As a result of the two-physician consensus, pursuant to KRS 342.316(3)(b)4.f., the ALJ dismissed Gardner's claim. Gardner appealed to the Board, and the Board affirmed the ALJ. This appeal followed.

Our standard of review of a decision of the Workers' Compensation Board "is to correct the Board only where the the [sic] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The burden of persuasion is on the claimant to prove every element of a workers' compensation claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Of course, the Court of Justice is empowered and required to decide a proper challenge to the constitutionality of a state statute. This case presents such a challenge.

It is axiomatic that courts shall presume the constitutionality of statutes and that statutes shall be upheld when there is a rational basis for the legislative enactment. *Stephens v. State Farm Mut. Auto. Ins. Co.*, 894 S.W.2d 624 (Ky. 1995). Where denial of equal protection of the law is the basis for the constitutional challenge, we must search for a rational basis to justify disparate treatment of those who appear to be similarly situated. Only if we are unable to discover a rational basis may the equal protection challenge be sustained.

Gardner argues that the statute unconstitutionally violates his equal protection rights as a coal miner who suffers from pneumoconiosis by imposing more stringent procedural and substantive law requirements on coal worker claimants than on other pneumoconiosis claimants. He relies on *Durham v. Peabody Coal Co.*, 272 S.W.3d 192, 195 (Ky. 2008), as the decisional law standard established by Kentucky's highest Court:

The 14th Amendment to the United States Constitution requires persons who are similarly situated to be treated alike. Workers' compensation statutes concern matters of social and economic policy. Statutes are presumed to be valid and those concerning social or economic matters generally comply with federal equal protection requirements if the classifications that they create are rationally related to a legitimate state interest. Sections 1, 2, and 3 of the Kentucky Constitution provide that the legislature does not have arbitrary power and shall treat all persons equally. A statute complies with Kentucky equal protection requirements if a "reasonable basis" or "substantial and justifiable reason" supports the classifications that it creates. Analysis begins with the presumption that legislative acts are constitutional. [Emphasis added, internal citations omitted.]

Pneumoconiosis is defined as:

[I]nflammation commonly leading to fibrosis of the lungs due to the irritation caused by the inhalation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc.; the most prominent symptoms are: pain in the chest, cough, little or no expectoration, dyspnea, reduced thoracic excursion, sometimes cyanosis, and fatigue after slight exertion.

*Stedman's Medical Dictionary* 1109 (4th Lawyers' ed. 1976).

KRS 342.316 provides that a claimant alleging CWP must submit an x-ray, with an interpretation of the x-ray. The employer may then submit its own x-ray and interpretation. If the claimant's x-ray interpretation and the employer's x-ray interpretation are not in agreement, the highest quality x-ray is sent to a panel consisting of three individual "B" readers, chosen at random, for x-ray interpretation. If a consensus<sup>4</sup> is not reached by the panel of "B" readers, the ALJ shall decide the claim on the evidence submitted. However, if a consensus is reached, the "classification shall be presumed to be the correct classification of the employee's condition unless overcome by *clear and convincing evidence*." KRS 342.316(13) (emphasis added).

The clear and convincing evidence standard for coal workers sharply contrasts with the prevailing standard applied to workers seeking compensation for other pneumoconiosis claims such as exposure to limestone, various particulates, talc, graphite, etc. Not only is there a different evidentiary standard applied to coal workers than to others suffering from pneumoconiosis of a different etiology, the statutory scheme for adjudicating coal worker pneumoconiosis claims is significantly different. The principal difference in the statutory scheme is the use of the three physician "B" reader panel. Only coal worker pneumoconiosis claims are subjected to this procedure and to overcome a consensus of the three "B" reader panel, a claimant must show error by clear and convincing evidence. As a practical matter, overcoming the presumption created by a "B" reader consensus is

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<sup>4</sup> Under KRS 342.316(3)(b)4.f., a consensus is reached when two readers' findings of pneumoconiosis are in the same major category and within one minor category.

impossible. Non-coal worker pneumoconiosis claimants are not subjected to the foregoing procedure, and the standard of proof required is preponderance of the evidence rather than clear and convincing evidence.

A constitutional challenge to KRS 342.316 is not new to Kentucky courts. The Kentucky Supreme Court has held that KRS 342.316 does not violate equal protection of the law by treating CWP claims differently from claims for traumatic injury. *See Durham*, 272 S.W.3d 192. In support of its decision, the Court in *Durham* stated:

We conclude, however, that inherent differences between coal workers' pneumoconiosis and traumatic injuries provide a reasonable basis or substantial and justifiable reason for different statutory treatment.

Pneumoconiosis develops gradually and can be difficult to diagnose . . . [and] legislators relied on testimony from medical experts that coal workers who suffer from pneumoconiosis should be encouraged to find other employment. . . . As a rule, traumatic injuries occur suddenly and are more easily diagnosed. Workers who sustain traumatic injuries are not, as a rule, advised to change employment to avoid the risk of further injury.

*Id.* at 195-96. The Court also addressed the different *types* of evidence needed to prove the existence of pneumoconiosis in contrast to the types of evidence needed to prove the existence of other injuries.

X-ray is the objective method by which physicians diagnose the presence of pneumoconiosis and categorize its severity. A worker's statements concerning the nature and duration of his exposure to coal dust may assist a physician in determining the *cause* of pneumoconiosis but are not objective medical findings regarding the *presence* of the disease or the disease category. Nor are a

worker's statements describing symptoms such as breathing difficulties.

*Id.* at 197 (emphasis added). Said otherwise, radiographic examination determines the *presence* of pneumoconiosis, and oral testimony merely assists in determining the *cause*; *i.e.*, the particulate source of pneumoconiosis. Where a claim is based only on exposure to coal dust, presence or absence of the disease is determined exclusively by X-ray examination.

The *Durham* Court specifically declined to reach the issue presented here:

The workers failed to raise to the Court of Appeals their present, more comprehensive argument that the statute unfairly treats individuals who suffer from coal workers' pneumoconiosis differently from those who sustain traumatic injuries or suffer from other occupational pneumoconiosis or diseases. Thus, the argument is not preserved for our review.

*Id.* at 194-95 n.2. The foregoing statement leaves no doubt that the Court did not address the constitutionality of the statute as applied to those who claim pneumoconiosis from coal dust as opposed to those who claim pneumoconiosis from other sources.

The Kentucky Supreme Court has addressed the constitutionality of the types of evidence that may be considered and the stage at which a claim is subjected to the three-member consensus panel process. *See Hunter Excavating v. Bartrum*, 168 S.W.3d 381 (Ky. 2005); *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d

39 (Ky. 2009).<sup>5</sup> However, these prior holdings did not reach the issue presented here. They did not compare CWP to the same disease or to an indistinguishable disease derived from other sources. However, the *Cain* Court determined that subjecting a worker to the second phase of the consensus process merely because the claimant's and the employer's category of positive results differed, notwithstanding that both reports confirmed the presence of the disease, was discriminatory.

KRS 342.316(3)(b)4.e. denied the claimant equal protection because it discriminated between him and a similarly-situated worker whose employer also submitted evidence of category 1 disease but whose claim was not subject to the second phase of the consensus process [due to the absence of any discrepancy]. KRS 342.316(3)(b)4.e. creates two classes of workers based solely on the amount of discrepancy between the worker's and employer's evidence. We discern no rational or reasonable basis for such discrimination where the employer's evidence effectively concedes the worker's entitlement to a RIB. We conclude, therefore, that KRS 342.[316](3)(b)4.e. denies equal protection under both the federal and state constitutions when applied to such a claim.

*Id.* at 43. The *Cain* case denounced the classification of workers, where the disease was confirmed, based solely on the amount of discrepancy between the worker's and the employer's evidence of disease. In this case, the discrepancy is between the different burdens of proof imposed on CWP claimants and other occupational pneumoconiosis claimants and with CWP claimants being subjected to the consensus panel while other pneumoconiosis claimants are spared the

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<sup>5</sup> Opinion rendered on March 19, 2009, petition for rehearing denied on August 27, 2009, finality in Supreme Court on August 27, 2009.



consensus panel. As such, *Cain* appears to support Gardner's contention that the statute as applied is unconstitutional.

It is clear that pneumoconiosis claims are appropriate for different treatment than traumatic injury claims. As the Court in *Durham* pointed out, traumatic injuries develop differently, they are diagnosed differently, and they result in different employment recommendations than do pneumoconiosis sufferers. As such, it is not unreasonable to require specific articulation of the evidence necessary to prove the presence of pneumoconiosis. The legislature has rationally determined that a different standard should apply.

*The existence and category of pneumoconiosis are proven with x-ray evidence, but the evidence necessary to prove the existence and extent of a traumatic injury varies with the type of injury. That difference provides a reasonable basis for treating the conditions differently.*

*Durham*, 272 S.W.3d at 198 (emphasis added). While this distinction is clear, it fails to articulate any basis for applying different requirements for pneumoconiosis claims where the disease is caused by different substances.

Although the sources of pneumoconiosis can differ, only claimants who contract the disease through inhalation of coal dust are subject to the three-member consensus panel and the consequent clear and convincing evidence standard necessary to overcome an adverse panel determination. As there is no discernable difference between a claimant who has contracted pneumoconiosis through the inhalation of coal dust and one who has contracted the disease through the inhalation of another particulate, we see no rational basis or "substantial and

justifiable reason” for imposing a different procedure and a higher burden on CWP claimants than on other occupational pneumoconiosis claimants. Accordingly, KRS 342.316 is unconstitutional insofar as it requires the three-member consensus panel and imposes a higher burden of proof upon CWP claimants than on other pneumoconiosis claimants. Simply stated, there is no rational basis for disparate treatment of industrial workers with the same occupational disease based on nothing more than the industry in which the disease was contracted.

Although the parties are represented by experienced Workers’ Compensation practitioners, neither party has paid more than passing attention to *Kentucky Harlan Coal Co. v. Holmes*, 872 S.W.2d 446 (Ky. 1994), a decision of the Supreme Court decided 4-3. We infer from their failure to elaborate on the *Holmes* decision a belief that it is not of great significance to our decision in this case. The majority in *Holmes* upheld the constitutionality of KRS 342.732, a statute providing for income benefits and retraining incentive benefits for coal worker pneumoconiosis claimants. The statute was upheld against claims that treating coal workers pneumoconiosis differently from pneumoconiosis contracted in other industries was unconstitutional in violation of various state and federal constitutional provisions. The *Holmes* case contains broad dicta that can be read to support both sides of the argument. It concluded, however, that the statute was not unconstitutional based on the economic impact of an extraordinary number of coal workers pneumoconiosis cases at that time and the need to incentivize coal workers with pneumoconiosis to leave the industry, receive retraining, and to use

objective medical criteria when awarding benefits. In the context of KRS 342.732, the *Holmes* case recognized a compelling economic rationale for distinguishing between coal workers pneumoconiosis and pneumoconiosis contracted in other industries. As such, KRS 342.732 has a highly prospective feature in that it sought to remove diseased workers from the industry before they reached disability. When the goals of the statute are considered, as did the majority in *Holmes*, the outcome is reasonable and the statute was properly upheld.

We have carefully considered the *Holmes* case as it may apply to the instant case. We have discovered little application. The case at bar involves a 37-year coal worker who claims that he has been deprived of equal protection of the law by having his case, unlike non-coal worker pneumoconiosis cases, referred to a three-member consensus panel and being required to overcome the consensus panel decision by clear and convincing evidence, a practical impossibility. Moreover, while not dispositive perhaps, we note that the statutory provisions under consideration here were not enacted until after the Supreme Court's decision in *Holmes*. Perhaps no area of the law is more statutorily intensive or less appropriate for traditional legal reasoning than Workers' Compensation. In Workers' Compensation cases, courts merely read the statutes and apply them as written unless a determination is made that the statute is unconstitutional.

This Court is not unmindful that funding sources for CWP claims and other such claims differ:

Income benefits for coal-related occupational pneumoconiosis shall be paid fifty percent (50%) by the Kentucky coal workers' pneumoconiosis fund as established in KRS 342.1242 and fifty percent (50%) by the employer in whose employment the employee was last exposed to the hazard of that occupational disease.

Compensation for all other occupational disease shall be paid by the employer in whose employment the employee was last exposed to the hazards of the occupational disease.

KRS 342.316(11). Although the foregoing statute provides for different payment sources depending on the etiology of the disease, this is insufficient to establish a rational basis for imposing additional burdens on Gardner and other CWP claimants based only on the *source* of the claimant's disease, rather than on the *presence* of the disease, and we can find no other reason for the disparity.

Although the statutes at issue here and throughout the Workers' Compensation Act are complex and frequently subjected to legislative modification, as we apply the presumption of constitutionality, fundamental principles should not be overlooked. Where the constitutional challenge is based on equal protection of the law, courts should refrain from embracing artificial distinctions merely to uphold a statutory provision. Likewise, merely because we must presume constitutionality does not require tortured reasoning, abandonment of common sense or ascribing unreasonable meaning to language. A fine statement of Kentucky law in this regard was written by Justice Charles Reynolds in the *Holmes* case:

The primary purpose of Kentucky Constitution, Section 59 is to prevent special privileges, favoritism, and discrimination, and to insure equality under the law. “A special law is legislation which arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others.” *Bd. of Educ. of Jefferson County v. Bd. of Educ. of Louisville, Ky.*, 472 S.W.2d 496, 498 (1971).

While appellants assert the Act as special legislation, the appellees insist otherwise. As we have generally established in this jurisdiction, in order for a law to be general in its constitutional sense it must meet the following requirements: (1) it must apply equally to all in a class, and (2) there must be distinctive and natural reasons inducing and supporting the classification. The second requirement is as essential as the first. *The legislature may not arbitrarily designate the severed factions of the original unit as two classes and thereupon enact different rules for the government of each. It is equally established that the classification, as made, must be based upon some reasonable and substantial difference in kind, situation or circumstance which bears a proper relation to the purpose of the statute.*

*Holmes*, 872 S.W.2d at 452 (emphasis added). The only distinction between CWP claimants and other pneumoconiosis claimants is the source of the disease. In all other respects, the disease process and the nature, extent and duration of the disease are the same. Imposing more onerous procedural and substantive burdens on coal workers than on others fails the test of “reasonable and substantial difference in kind, situation or circumstance[.]” The legislation under review does indeed “arbitrarily designate the severed factions of the original unit as two classes[.]” *Id.*

For the foregoing reasons, the April 17, 2009, opinion of the Workers' Compensation Board is reversed, and this cause is remanded for further proceedings consistent with this opinion.

WINE, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

KELLER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with that portion of the majority's opinion holding that the "clear and convincing" evidentiary standard in coal workers' pneumoconiosis claims violates the constitutionally guaranteed right to equal protection. However, I respectfully dissent from that portion of the majority's opinion finding that the consensus panel procedure in coal workers' pneumoconiosis claims also violates that right.

As noted by the majority, the Supreme Court of Kentucky held that treating workers' compensation claimants who suffer from traumatic injuries differently from those who suffer from coal workers' pneumoconiosis does not violate the right to equal protection. *See Durham*, 272 S.W.3d 192. The Commonwealth has a rational basis for treating the two types of claimants differently because of the differences between traumatic injuries and coal workers' pneumoconiosis. However, as noted by the majority, there is no rational basis for placing a higher standard of proof on coal workers' pneumoconiosis claimants than on claimants suffering from other types of pneumoconiosis.

On the other hand, I believe that there is a rational basis for putting coal workers' pneumoconiosis claims through the consensus panel process while exempting other pneumoconiosis claims from that process. That rational basis can be found in the method used to determine the benefits available to the two types of claimants. To qualify for any benefits, a coal worker must first establish that he or she has coal dust related changes in his or her lungs via positive x-ray findings. Once a claimant establishes that, the amount of benefits available is directly tied to the severity of x-ray findings and the severity of breathing impairment. The entitlement to benefits for other pneumoconiosis claimants is determined using the same method as used in other occupational disease and traumatic injury claims. With other pneumoconiosis claims x-ray findings may be relevant, but they are not necessarily a threshold requirement to qualify for benefits or determinative of the benefit rate. Coal workers' pneumoconiosis claimants' benefits, unlike the benefits of any other claimants, are closely tied to x-ray findings. Therefore, I believe the legislature had a rational basis for establishing the consensus panel procedure to aid the ALJs in determining the accuracy of those findings.

BRIEF AND ORAL ARGUMENT  
FOR APPELLANT:

Thomas E. Springer, III  
Madisonville, Kentucky

BRIEF FOR APPELLEE, VISION  
MINING, INC.:

Anthony K. Finaldi  
Ward Ballerstedt  
Louisville, Kentucky

ORAL ARGUMENT FOR  
APPELLEE, VISION MINING, INC.:

Ward Ballerstedt  
Louisville, Kentucky