COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2013-CA-001968-WC
CLAIM NO. 2009-99663

MARSHALL D. PARKER, SR. 2014-SC-526 APPELLANT

V.

BRIEF OF APPELLEE, WEBSTER COUNTY COAL, LLC (DOTIKI MINE), IN RESPONSE TO APPEAL OF MARSHALL D. PARKER, SR.

WEBSTER COUNTY COAL, LLC (DOTIKI MINE) STEVEN G. BOLTON, ALJ, MULTICARE MADISONVILLE, DR. RICHARD HOLZKNECHT, COOP HEALTH SERVICES, DEACONESS HOSPITAL, DAVID D. EGGERS, M.D., NEUROSURGICAL CONSULTANTS, JAMES M. DONLEY, M.D., CENTER FOR ORTHOPEDICS, WAYNE C. COLE, D.O., KELLY L. COLE,D.O., WORKERS' COMPENSATION BOARD & KENTUCKY COURT OF APPEALS APPELLEES

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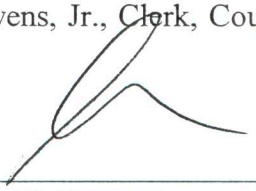
Hon. Stanley S. Dawson, Esq.
FULTON & DEVLIN, LLC
1315 Herr Lane, Suite 210
Louisville, Kentucky 40222
(502) 813-7804
Attorneys for Appellee
Webster County Coal, LLC (Dotiki Mine)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on January 23, 2015, by hand-delivering the original and nine copies to Susan Stokley Clary, Clerk, Kentucky Supreme Court, State Capitol Building, Room 209, 700 Capital Avenue, Frankfort, KY 40601-3488, with true copies hereof to: T. Lawrence Hicks, Esq. Cetrulo, Mowery & Hicks, PSC, 130 Dudley Road, Ste. 200, Edgewood, KY 41017; and Hon. Steven G. Bolton, Administrative Law Judge, 657 Chamberlin Avenue, Frankfort, KY 40601; John Morton, Esq., P.O. Box 883, Henderson, KY 42419; Deaconess Hospital, 600 Mary St., Evansville, IN 47747; Deaconess Hospital, P.O. Box 152, Evansville, IN 47701; Deaconess Health System, P.O. Box 1230, Evansville, IN 47706; Neurosurgical Consultants, 520 Mary St., Ste. 470, Evansville, IN 47710; David D. Eggers, M.D., 520 Mary St., Ste. 470, Evansville, IN 47710; Center for Orthopaedic Services, 44 McCoy Ave., Madisonville, KY 42431; James M. Donley, M.D., 44 McCoy Ave., Madisonville, KY 42431; Center for Orthopedics, P.O. Box 280, Madisonville, KY 42431; Wayne C. Cole, DO, P.O. Box 310, Providence, KY 42450; Kelly L. Cole, DO, P.O. Box 310, Providence, KY 42450, Workers' Compensation Board, Department of Workers' Claims, Appeals Division, Prevention Park 657 Chamberlin Avenue, Frankfort, KY 40601, and Hon. Sam Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.



Stanley S. Dawson

MAY IT PLEASE THE COURT:

INTRODUCTION

This is a response brief by Appellee, Webster County Coal, LLC (Dotiki Mine) (hereinafter "WCC") to the appeal taken herein by Appellant, Marshall D. Parker, Sr. (hereinafter "Parker"), of the workers' compensation decision of Administrative Law Judge Steven G. Bolton (hereinafter the "ALJ"), affirmed by the Workers' Compensation Board and Court of Appeals, determining that Parker is not entitled to income benefits for permanent disability due to the operation of KRS 342.730(4). This matter is also the subject of an appeal by WCC of the ALJ's finding of a compensable low back condition from the subject work accident, which has been separately briefed by the parties. WCC respectfully submits that the decision denying income benefits under KRS 342.730 (4) must be affirmed.

STATEMENT CONCERNING ORAL ARGUMENT

WCC respectfully disputes Parker's assertion that oral argument would assist the Court in deciding the issues presented, because the issues raised by Parker are well settled and are already the subject of relatively recent published decisions of the Kentucky Supreme Court.

COUNTER-STATEMENT OF POINTS AND AUTHORITIES

Pages

COUNTERSTATEMENT OF THE CASE

Parker is a 75 year old resident of Clay, Kentucky. He was injured when he was 68 years old on September 8, 2008. (Parker Form 101) Parker is a high school graduate and took some college classes. (Parker depo, 7) Parker is married. The Parkers have lived in the same home for 37 years. (Parker depo, 5) The Parkers had 3 children: a son, Marshall Jr., who was 50 years old at the time of Parker's deposition on January 3, 2012; Terry, a daughter who was 47 at the time of Parker's deposition, and Michelle, who passed away in 2010. Marshall Jr. is partially paralyzed and disabled due to an accident. He draws disability benefits. Terry is a nurse and is not dependent upon the Parkers for support. (Parker depo, 6-7) Parker's wife draws Social Security retirement benefits. (Hearing transcript, 49) Michelle was disabled and receiving SSI at the time of her death in 2010. (Hearing transcript, 44) Marshall Parker, Jr. has been disabled for over 20 years. (Hearing transcript, 44) Parker, Sr., the claimant herein, has drawn Social Security benefits as well. His testimony suggests that that while he had reached the age of eligibility for Social Security retirement by the time of his work accident herein, he was not drawing those benefits, continuing to work in part to obtain health coverage through WCC. (Hearing transcript, 17, 43; Parker depo, 41-43). He is now drawing Social Security retirement as well as two pensions. (Parker depo, 41-43).

Parker's work injury of September 8, 2008, occurred when, in his work as a coal miner for WCC, he attempted to step over a beltline and slipped. He initially obtained treatment of a condition of the right knee. He later obtained treatment of the low back. (Parker depo, 26-34; Form 101) WCC accepted liability for the right knee injury but denied the low back claim. The low back condition was also found to be compensable by the ALJ, and that determination is on appeal to the Court and was separately briefed by the parties. Herein, WCC has summarized what it believes to be the relevant facts in regard to the current appeal relating to KRS 342.730 (4). It respectfully refers

the Court to the parties' briefs on the low back compensability appeal for a summary of other facts.

WCC paid Parker two years of temporary total disability benefits in relation to the right knee condition before terminating all income benefits based on KRS 342.730(4), which states in pertinent part that, "[a]ll income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits under the United States Social Security Act, 42 USC Sections 301 to 1397f, or two (2) years after the employee's injury or last exposure, whichever last occurs." It is undisputed that Parker, having been born in 1939, became eligible for full Social Security Retirement benefits at age 65 years and 4 months, or on or about February 5, 2004, and that he was well past his eligibility date for full Social Security Retirement benefits on the date of the work accident, even though there is no evidence he drew them until after he ceased work due to his work injury. Parker's age on the date of injury results in the applicable provision of KRS 342.730(4) being the limitation of income benefits to two years after the date of the work injury. Although Parker argued to the Administrative Law Judge that this portion of KRS 342.730(4) should be interpreted to allow payment of two years of income benefits for permanent disability in addition to any period of TTD, the ALJ rejected that argument, stating that Parker "...would be limited to two years of benefits, regardless of whether they were TTD, PPD, or PTD" and that "[t]he statute clearly provides that the two year benefit period shall include all types of income benefits, whether they be for temporary or permanent disability." (ALJ Opinion & Award, p. 25) Parker has not advanced the argument that the two year benefit limitation applies only to permanent disability benefits to this Court, and it has now been waived.

Despite waiving the argument that KRS 342.730 (4) should be interpreted to allow two years of permanent disability benefits in addition to a period of TTD, Parker has continued to appeal the ALJ's limitation of his award to the two years of temporary total disability benefits previously paid

on constitutional grounds. This matter is now before the Court on the constitutionality of KRS 342.730(4), in addition to WCC's subsequent appeal of the finding of a work-related low back condition. The limitation of income benefits herein has been affirmed by the Workers' Compensation Board and Court of Appeals, as has the finding of a compensable low back condition. WCC respectfully submits that clear Kentucky legal precedent requires that the termination of benefits under KRS 342.730(4) must be affirmed by the Court.

ARGUMENT

I. PARKER'S APPEAL MUST BE DENIED BECAUSE THE ISSUES RAISED THEREIN HAVE ALREADY BEEN RESOLVED IN FAVOR OF WCC'S POSITION BY THIS COURT

The ALJ's decision limiting Parker to no more than two years of income benefits must be affirmed because KRS 342.730(4) was previously determined to be constitutional by this Court. In McDowell v. Jackson Energy RECC, 84 S.W.3d 71 (Ky. 2002), this Court determined that KRS 342.730(4) does not violate the due process or equal protection rights of claimants affected by it. In Keith v. Hopple Plastics, 178 S.W.3d 463 (Ky. 2005), this Court revisited and reiterated its finding that KRS 342.730(4) is constitutional under both the U.S. and Kentucky Constitutions. The Court also reiterated the constitutionality of KRS 342.730(4) in the context of determining when income benefits payable to spouses and dependents of deceased workers terminate. Morsey, Inc. v. Fraser, 245 S.W.3d, 757 (Ky. 2008). It also recognized KRS 342.730(4) as constitutional by implication in Styles v. Elkhorn Truck Parts and Service, (Ky. 2010) which pertained to an argument by claimant Styles that he was entitled to two (2) years of permanent disability benefits in addition to whatever temporary total disability benefits he had been paid. As stated, the argument advanced by Styles was originally advanced by Parker but has apparently be abandoned before the Supreme Court.

Despite the substantial body of law noted above, Parker has taken this appeal. He seemed to

advance the position that the enactment of the "Senior Citizens Freedom to Work Act of 2000" 42 USC 403(f)(8)(E) somehow changed the proper analysis of KRS 342.730(4) and rendered the analysis offered in McDowell incorrect. The "Senior Citizens Freedom to Work Act of 2000" reduced from 70 to 65 the age at which an earnings test would not be applied to reduce Social Security Benefits. This argument is misleading because the "Senior Citizens Freedom to Work Act of 2000" was in full force and effect at the time of the McDowell decision. Indeed, this Court specifically considered and rejected the argument that this Federal law had any effect on the constitutionality of KRS 342.730(4). In McDowell, this Court, through Justice Cooper, stated as follows:

> [42 USC 403(f)(8)(E)] did not extend to unemployed persons over age 65 a right to receive earned income, for which workers' compensation benefits are intended as a substitute, and only extended to employed persons over age 65 a right to receive Social Security Retirement benefits in addition to any earned income. Nor did it purport to extend anyone the right to draw workers' compensation benefits. Thus, the Act had no effect on McDowell who was already entitled to draw Social Security benefits at age 65. It specifically did not confer upon her the right to draw workers' compensation benefits in addition to Social Security Retirement benefits. McDowell at 77.

Parker also advances the idea that decisions in other jurisdictions require this Court to reverse its long-standing position that KRS 342.730(4) is constitutional, and that those decisions for other jurisdictions somehow render the Court's decision in McDowell obsolete. Parker has attached an unpublished opinion from the Kansas Court of Appeals in Hoesli v. Triplet, 109 448 (Kan App. 2014) to support his position. The first obvious problem with applying the Hoesli decision in an

effort to overturn precedent established by the Kentucky Supreme Court is that the Hoesli decision is an unpublished decision of an intermediate appellant court of another state. The second problem is that Parker has supported this argument with a misleading summary of another (published) Kansas decision, Dickens v. Pizza Company, 974 P 2d 601 (Kan. 1999). Parker incorrectly asserts that the Dickens decision, in favor of allowing payment of income benefits notwithstanding the Kansas Social Security offset provision, was constitutionally-based. However, the Kansas Supreme Court did not reach the issue of constitutionality of the Kansas statute. The Kansas Supreme Court determined in Dickens that the Kansas statute, by its own terms, did not apply to Social Security retirees injured while working to supplement their Social Security income that they were already receiving at the time of the injury, and did not reach the issue of the constitutionality of the statute. Additionally, the Dickens decision was rendered some three years prior to this Court's McDowell decision and does not represent a new trend in legal thought that has arisen since McDowell.

Parker further offers a misleading argument by insinuating that the decision in the unpublished Hoesli decision was constitutionally based. However, the unpublished Hoesli decision, which again was rendered by an intermediate Kansas court, also specifically states that it is based on an interpretation of the Kansas Social Security offset statute as opposed to any sort of constitutional determination.

Parker advances a third fallacy by insinuating that he is similarly situated to the claimant in Dickens, who was already receiving Social Security retirement when he sustained his work injury. As noted in the Counterstatement of Facts, while he was eligible to take retirement before his injury, there is no evidence that Parker was actually receiving Social Security retirement when he was injured, and the testimony suggests that he did not draw Social Security retirement until after his employment with WCC was terminated. Thus, even if Parker's assertions as to the nature and basis

of the Hoesli and Dickens decisions were correct, which they are not, the theories behind those decisions would likely not apply to him. Parker also mistakenly refers to KRS 342.730(4) as a Social Security "offset" provision when this Court has specifically held that KRS 342.730 (4) is not an "offset" provision. McDowell at 77. The Kansas law cited by Parker is an actual offset provision as opposed to a provision that directs that no benefits shall be awarded due to age. This is another reason the Kansas holdings are inapplicable and should not affect this Court's decision herein.

Other than Hoesli, Parker cites only one other out of state decision in support of its position that directly relates to income benefit coordination with Social Security retirement that was not rendered before this Court's McDowell decision. That is the decision of the Utah Supreme Court in Merrill v. Utah Labor Commission, 223 P 3d 1089 (Utah 2009). However, the Merrill case is not instructive in Parker's claim. First, the Merrill decision was based solely on the Utah constitution. The Utah Supreme Court specifically noted in Merrill that its "...review of legislative classifications under article I, section 24 of the Utah constitution...is at least as exacting and, in some circumstances, more rigorous than the standard applied under the [14th Amendment of the] federal constitution...." (Merrill at 1092, quoting Mountain Fuel Supply v. Salt Lake City Corp., 752 P 2nd 884,889) The Utah Supreme Court specifically stated that "...[w]e evaluate the constitutionality of the statute under Utah Law." Merrill at 1092. Even in reaching its decision in Merrill, the Utah Supreme Court noted that "...other jurisdictions have come to the opposite conclusion" and that Larson's Workers' Compensation Law supports the proposition that workers' compensation and Social Security retirement are both wage loss replacement income and should be offset against each other. Merrill at 1097, (citing 9 Arthur Larson and Lex Kay Larson, Workers' Compensation Law, 15704 (2008)) Additionally, There is no question that even after the enactment of the "Senior Citizens Freedom to Work Act of 2000," Kentucky workers' compensation benefits are still

considered a substitute for earned income. See McDowell at 77; Morsey, Inc. v. Fraser, 245 S.W.3d, 757, 760 (Ky. 2008); Keith v. Hopple Plastics, 178 S.W.3d 463, 467 (Ky. 2005); Autozone, Inc. v. Brewer, 127 S.W.3d 653, 655 (Ky. 2004). Each of these Kentucky Supreme Court decisions was rendered after the enactment of the "Senior Citizens Freedom to Work Act of 2000."

Because the logic and reasoning behind the out-of-state decisions rendered since Kentucky's McDowell decision are inapplicable to KRS 342.730(4) and the claim at bar, they are not persuasive in support of Kentucky changing its long-held position, which has been espoused by this Court on multiple occasions, that KRS 342.730(4) is constitutional under both the U. S. and Kentucky Constitutions. McDowell its progeny are still good law. No events have occurred that suggest that the McDowell holding should be altered. Therefore, the decisions of the ALJ, Workers' Compensation Board, and Court of Appeals finding that WCC has no liability to Parker for any additional income benefits aside from the two (2) years of temporary total disability already paid must be affirmed, based on McDowell and the later decisions flowing from it.

II. KRS 342.730(4) IS NOT VIOLATIVE OF DUE PROCESS UNDER THE US OR KENTUCKY CONSTITUTION

Without waiving its position that judicial precedent in and of itself requires denial of Parker's appeal, WCC submits that KRS 342.730(4) does not, from a substantive standpoint, violate Parker's due process rights or those of similar injured workers. The logic of this Court in the McDowell decision in support of its decision at that time that due process is not violated by KRS 342.730(4) still holds true. It should be noted that Parker fails to cite any law from any source in regard to his substantive due process argument that was not in existence at the time of this Court's decision in McDowell and the subsequent Kentucky cases noted in Argument I. WCC recognizes that Parker

and other workers do have due process rights in workers' compensation benefits. However, as noted by this Court in McDowell, and as previously decided in Meade v. Reddy Coal Company, 13 S.W. 3d, 619, 620 (Ky. 2000), the law of the date of the injury controls the rights of the parties in respect to a workers' compensation claim. Parker was injured on September 9, 2008, at which time the current version of KRS 342.730(4) is being challenged herein was in effect. While under Goldberg v. Kelly, 397 U.S. 254 (1970), a person receiving benefits under statutory administered standards defining eligibility for them as an interest in those benefits safeguarded by due process, that interest is defined by whatever the interest was at the time of the injury. That interest in Parker's case was a potential right to income benefits until Social Security retirement age under the current KRS 342.730 (4). Parker was awarded, and could be awarded, only the benefits allowed by the Workers' Compensation Act as it existed on the date of his injury. Termination of benefits is not precluded. Additionally, Parker was provided notice and hearing in the form of a full opportunity to litigate the claim and a hearing before the ALJ. Thus, the lack of an award of benefits does not violate his due process rights.

In addition to suggesting that his due process rights under the Federal Constitution were violated, Parker has also argued that his jural rights under Section 14, 54 and 241 of the Kentucky Constitution were violated. However, this Court has held on multiple occasions that the jural rights doctrine serves only to prevent the General Assembly from abolishing or restricting a common law right of recovery for personal injury or wrongful death, and that the jural rights doctrine does not bar the General Assembly from altering and limiting remedies available under statutory claims arising out of the Kentucky Workers' Compensation Act. Johnson v. Gaines Furniture Industries, Inc., 114 S.W.3d 850, 854 (Ky. 2003); McDowell at 73. There is simply no basis to assert a violation of Parker's jural rights by KRS 342.730(4). As neither Parker's due process nor jural rights have been

violated by the application of KRS 342.730(4), the ALJ's decision cannot be reversed on due process grounds under either constitution.

III. KRS 342.730(4) IS NOT VIOLATIVE OF PARKER'S EQUAL PROTECTION RIGHTS UNDER THE U.S. AND KENTUCKY CONSTITUTIONS

While it cannot be disputed that KRS 342.730(4) creates a "suspect class" consisting of injured employees who have qualified for normal old-age Social Security retirement benefits, WCC submits that, consistent with this Court's line of decisions on the subject, there is a rational basis for discrimination against Parker's suspect class on the basis of age in the form of lack of entitlement to workers' compensation income benefits. Parker concedes in his brief that all Courts across the United States that have addressed the level of scrutiny to which Parker's suspect class is entitled have concluded that the classification is properly considered to be one of either age or of receipt of workers' compensation benefits, and as a result such class is entitled to receive the lowest level of scrutiny as to any equal protection question. There are multiple specific rulings that establish that as long as there is a rational basis for a statute's perceived discrimination against a class receiving the benefit of low scrutiny, the statute will be upheld if it furthers a legitimate stated objective. This is consistent with the decisions of the United States Supreme Court and this Court. Heller v. Doe, 509 U.S. 312 (1993); Dandridge v. Williams, 397 U.S. 471 (1970); Vision Mining, Inc. v. Gardner, 364 S.W.3d 455 (Ky. 2011); Keith v. Hopple Plastics, 178 S.W.3d 463 (Ky. 2005); McDowell at 75; Wynn v. Ibold, Inc., 969 S.W.2d 695 (Ky. 1998); Kentucky Harlan Coal Company v. Holmes, 872 S.W.2d, 446 (Ky. 1994).

In arguing that there is no rational basis for KRS 342.730(4), Parker focuses on the idea that workers' compensation income benefits are designed to replace lost income and his assertion that they actually do not replace lost income As set forth in Argument I herein, under Kentucky law,

notwithstanding any decisions by any other state interpreting its own statute, workers' compensation income benefits under KRS Chapter 342 remain at least partially income replacement benefits. Parker's "logic," if followed, would lead to the illogical conclusion that workers' compensation income benefits awarded to younger workers are for income replacement and those awarded to older workers or payable at a later portion in the injured workers' life, suddenly become something else. Regardless, there are other rational bases for ending entitlement to income benefits after a certain age. These include, but are not necessarily limited to reducing benefit costs and a desire to promote business activity within the Commonwealth. See McDowell at 75.

While Parker asserts that placing at least part of the burden for cost reduction and business promotion on older workers is "unfair," it is well established that unfairness is not a basis to declare a statute unconstitutional under the equal protection clauses of the U.S. and Kentucky Constitution. Indeed, a pre-requisite for the discussion of a possible equal protection violation is the presence of an unfairness to a class. The question is not whether the discrimination is unfair but instead is whether or not there is a rational basis for the perceived discrimination. See McDowell at 75; Steven Lee Enterprises v. Varney, 36 S.W.3d, 391, 395 (Ky. 2000). Kentucky Courts have repeatedly held that costs savings and business promotion are rational bases for either reduction of termination of workers' compensation income benefits due to age, even before the McDowell decision. In Wynn v. Ibold, supra, Claimant's challenged the prior "tier down" provision of the pre-1996 version of KRS 342.730(4), which provided for incremental annual reductions in income benefits between the age of 65 and 70. This Court unanimously held the statute challenged in Wynn, with its benefits of reducing costs and improving the economic climate for all citizens, provided rational bases for any discrimination caused by the statute. In Brooks v. Island Creek Coal Company, 678 S.W.2d, 791 (Ky. App. 1984), the Kentucky Court of Appeals found a statute almost identical to KRS 342.730(4)

that was in effect from 1980 to 1982 to pass muster on equal protection grounds. Incidentally, the 1980 to 1982 statute was eventually repealed by the General Assembly. As stated by the Court in McDowell, "Fairness...is an aspect of public policy reserved to the legislature." Fairness is not the test to determine if the equal protection rights of a class have been violated. KRS 342.730(4) can and should only be changed by the legislature, in a manner similar to its repeal of the benefit limitation statute that was in effect from 1980 to 1982, followed by the "tier down" provision that was in effect and then the current version of KRS 342.730(4), when the General Assembly attempted to swing the pendulum in the other direction.

IV. WCC RESPECTFULLY ASKS THE COURT TO RECOGNIZE THE POTENTIAL CONSEQUENCES OF A REVERSAL OF DECADES OF PRECEDENT

Finally, WCC respectfully submits to the Court that in addition to the multiple constitutional and legal reasons why the decision of the ALJ and the lower courts denying Parker additional income benefits must be affirmed, the potential effects of a contrary result must also be kept in mind. Parker shows a cavalier attitude to the potential effects of a decision in his favor. However, WCC submits that a reversal of the lower decisions could be cataclysmic, not only for the Kentucky workers' compensation system, but for the economic and legal future of the Commonwealth as a whole. As the undersigned is certain the Court recognizes, all workers' compensation underwriting and reserving activities in the Commonwealth since 1996 have been based on the supposition that income benefits are, generally, only payable to those who have not reached individual Social Security Retirement eligibility age. It is likely that every insurer, self-insurance group and self-insured employer would be under-reserved for its claims if Parker succeeds in having KRS 342.730(4) declared unconstitutional. In short, the Court could be taking action that would result in monies being awarded that cannot be paid by the obligors. This could, in turn, create extreme and perhaps

untenable financial pressure on the Commonwealth's workers' compensation insurance and self-insurance guaranty funds. Any decision could affect all industries, not just coal, even though Parker was a coal miner. That means that companies like Toyota, Ford, General Electric, Yum, and the like could all be under reserved for their liabilities. It could also mean that your local small businesses, or at least their insurers, would be unable to meet their workers' compensation obligations through no fault of their own. A negative decision would also discourage new business and economic development, and would dissuade businesses currently operating in the Commonwealth from expanding operations here. Why would any business invest money to hire employees in a state in which it cannot come close to predicting its future liabilities, and those liabilities could change on a political whim? With all due respect, any decision in favor of Parker on this issue in the face of decades of legal precedent, would amount to a political decision. It would also serve to erode the authority and reliability of this Court's own precedents in other cases involving other aspects of law. It would create unpredictability that would affect workers' compensation, business and law. Such a decision, in addition to being extra-legal, would be ill-advised.

CONCLUSION

WCC respectfully requests that the Court follow its own long-standing precedents and affirm the decisions of the ALJ, Workers' Compensation Board, and Court of Appeals, and that it find KRS 342.730(4) constitutional, both as a whole and in its application to Parker's claim.

Respectfully submitted,

Hon. Stanley S. Dawson
FULTON & DEVLIN, LLC
1315 Herr Lane, Suite 210
Louisville, Kentucky 40222
(502) 813-7804
Attorneys for Appellant/Appellee
Webster County Coal, LLC (Dotiki Mine)