TENDERED

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2010-SC-000311-WC
DWC CLAIM NO. 07-01156

VISION MINING, INC., APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
NO. 2009-CA-00874
WORKERS' COMPENSATION NO. 07-WC-01156

JESSE GARDNER, ET AL. APPELLEES

AND 2010SC-000438-WC

PEABODY COAL COMPANY APPELLANT

ON APPEAL FROM COURT OF APPEALS
NO. 2009-CA-000927
V. WORKERS' COMPENSATION NO. 02-WC-01692

JOE MARTINEZ, ET AL. APPELLEE

AMICUS CURIAE BRIEF ON BEHALF OF UNITED MINE WORKERS OF AMERICA, KENTUCKY CHAPTER OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), APPALACHIAN CITIZENS' LAW CENTER, AND KENTUCKY WORKERS' ASSOCIATION

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CERTIFICATE OF SERVICE

On this the 11th day of July, 2011, I hereby certify that I have mailed the foregoing Amicus Curiae Brief to: Hon. Anthony Finaldi, FERRERI & FOGLE, 203 Speed Bldg., 333 Guthrie Green, Louisville, KY 40202; Hon. Peter J. Glauber, Boehl, Stopher & Graves, LLP, 2300 Aegon Center, 400 West Market Street, Louisville, KY 40202; Hon. Thomas E. Springer, III, 18 Court Street, Madisonville, KY 42431; Hon. Douglas Gott, Pushin Bdg., 400 E. Main St., Bowling Green, KY 42420; Workers' Compensation Board, Office of Workers' Claims, 657 Chamberlin Ave., Frankfort, KY 40601; Mike Dixon, Commissioner, Dept. of Workplace Standards, 1047 U.S. HWY 127 S., Ste. 4, Frankfort, KY 40601; Hon. Jack Conway, Attorney General, Commonwealth of Kentucky, 1024 Capital Center Dr., Ste. 200, Frankfort, KY 40601; Hon. Dwight T. Lovan, Commissioner, Department of Workers' Claims, 657 Chamberlin Ave., Frankfort, KY 40601; Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; and, an original and ten (10) copies were filed with the Kentucky Supreme Court Clerk, 700 Capital Avenue, State Capitol, Room 209, Frankfort, KY 40601.

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INTRODUCTION

This is a consolidated appeal of two Court of Appeals Decisions which held that KRS 342.316 unconstitutionally denies equal protection to coal miners in proving their claims for pneumoconiosis through the consensus process. The Amicus Curiae support upholding these Court of Appeals Decisions.

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STATEMENT OF THE CASE

The first comprehensive system in Kentucky to address work-related injuries was instituted in 1916 with the Worker's Compensation Act (the "Act"). The Act excluded occupational diseases[1] until 1944, when KRS 342.316 was first enacted, allowing compensation for occupational diseases.[2] In 1987, the legislature enacted KRS 342.732, which provided benefits specifically for coal workers' pneumoconiosis ("CWP"), including a retraining incentive benefit (RIB) for coal miners who had contracted category 1 pneumoconiosis, but who had no pulmonary impairment. The basis for these benefits was to encourage miners to detect the presence of the disease early and to avoid further exposure and progression of the disease by retraining them to leave the coal mining industry.[3] In Kentucky Harlan Coal Co. v. Holmes, 872 S.W.2d 446 (Ky., 1994), this Court declared that KRS 342.732 was constitutional, but did not address the constitutionality of KRS 342.316, the method of proving the existence of the disease, as it was written at that time.

In 1996, amendments to the Act were embodied in House Bill 1 which were adopted into law during the Extraordinary Session of 1996. Along with sweeping changes to the procedural aspects of the Worker's Compensation system, House Bill 1 also substantially increased certain thresholds for obtaining compensation. As a result of the 1996 Amendments, Coal Worker's Pneumoconiosis ("CWP") claims were required to be evaluated by physicians from either the University of Louisville or the University of Kentucky. The effect of these University Evaluations on CWP claims was devastating. In the fourth quarter of 1997, 538 CWP claims were filed with the Department of Worker's claims; of those 538, only 47 were found to have a

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[1] See Nolley v. Diamond Coal Co., 165 S.W. 2d 841, 291 Ky. 849 (1942)
[2] Enact. Acts 1944, Ch. 82, §3
[3] Enact. Acts 1987 (Ex. Sess.), ch. 1 § 56, effective October 1987; Thornsberry v. Aero Energy, 908 S.W.2d 109 (Ky., 1995), Leeco, Inc. v. Brock, Ky. App 919 S.W.2d 229 (Ky. App., 1996).

permanent impairment (36 class I; 11 class II). Only ten of the 47 coal workers found to have an impairment were deemed work-related and ultimately found compensable.[4]

Six years later, Governor Paul Patton said of the 1996 Amendments: "I have wronged the coal miners in Kentucky ... We have eliminated the compensation for pneumoconiosis, but we have not eliminated the disease."[5] Patton delivered these remarks amidst another round of changes to the Worker's Compensation system, aimed at increasing the availability of and lowering the threshold to obtaining benefits for CWP. Enacted in 2002, the amendments to Chapter 342 focused primarily on the implementation of a system of "B" Readers, trained and certified by the National Institute of Occupational Safety and Health ("NIOSH").[6] Since that time, few claims have been granted, falling victim to the consensus process established by KRS 342.316[7].

The consensus procedure requires that two of three "B" readers, each of whom selects the highest quality film of the coal miner's lungs, either finds Category A, B or C progressive massive fibrosis, or findings with regard to simple pneumoconiosis that are both in the same major category and within one minor category of each other. (e.g., 1/0 and 1/1 would create a consensus, but 1/1 and 2/1 readings would not). If a consensus is reached, the finding established by the panel may only be overcome by clear and convincing evidence. KRS 342.316(13).[8]

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[4] *See* KY. DEP'T OF WORKERS CLAIMS, COMMISSIONER'S QUARTERLY ACTIVITY REPORT (October 1 - December 31, 1997) (1998).

[5] Patton X. Clines, *Statehouse Journal; Kentucky Governor Admits Wronging Coal Miners,* New York Times, Jan 24. 2002.

[6] (Acts 2002, CH. 340, Section 2, Effective July 15, 2002).

[7] Data obtained from the Department of Workers' Claims showed that of 1936 claims filed since 2002, 76 permanent partial awards were made, 8 permanent total awards were granted, and 82 RIB claims were granted, approximately 8.5%. There were 207 agreements made.

[8] There are three possible negative x-ray readings: -/0, 0/0, and 0/1. There are nine possible positive readings, ranging from 0/1 to 3/+. A "B" Reader places the x-ray for reading simple pneumoconiosis into one of the major categories, then assigns a minor category based upon whether the next lower or next higher category entered into

This Honorable Court has examined KRS 342.316 previously, but has never considered how it may violate coal miners' rights to equal protection under the law, as it relates to similarly situated claimants for other occupational diseases. In Hunter Excavating v. Bartrum, 168 S.W.3d 381 (Ky., 2005), the Court addressed whether the statute denied coal miners due process of law. In that case, the Commissioner of the Department of Workers' Claims had enacted regulations which prohibited a party from submitting additional reports of x-rays that the consensus panel evaluated, and prohibited an Administrative Law Judge from considering such reports. This Court found that the prohibition created by that regulation on admission of this other evidence, which could be used to rebut a consensus finding, was beyond the authority of the Department of Worker's Claims, and were therefore declared invalid. The Court in Hunter Excavating, *supra* recognized that unlike the university evaluator process provided in KRS 342.315, a coal miner is required to overcome a finding of consensus by clear and convincing evidence. The Court in that case recognized that the Constitutional right to due process requires a meaningful opportunity to present evidence to rebut the presumption that the consensus finding is correct. While that decision stated that a coal miner could present evidence such as additional x-ray interpretations to overcome the clear and convincing standard to rebut the panel's consensus, it did not address whether the application of the consensus process to coal miners and not to other occupational disease claimants denied coal miners equal protection of the law. Instead, the decision struck down the regulation limiting the introduction of proof after a consensus had been reached, as being beyond the statutory authority of the Commissioner of the Department of Workers' Claims. The Court in that case recognized that KRS 342. 316(3)(b) limited evidence

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serious consideration for classification. If no other category was seriously considered, the reader assigns the same category for major and minor categories, e.g., 2/2. *Guidelines for the use of the ILO International Classification of Radiographs of Pneumoconiosis* Occupational Safety and Health Series No. 22, Rev.2000, International Labour Office, Geneva.

in coal workers' pneumoconiosis claims to only x-rays read by "B" readers, but did not address whether this limitation as applied to coal workers' pneumoconiosis claims and not to other pneumoconiosis claims, denied coal miners equal protection of the law.

In Durham v. Peabody Coal Co., 272 S.W. 3d 192 (Ky., 2008), this Court considered whether KRS 342.316 imposed a greater burden in proving their case upon claimants who have occupational diseases as compared to those who claim medical treatment and compensation for traumatic injuries. The Court at that time concluded that the differences between traumatic injuries and occupational disease, in that the former occur suddenly and are more easily diagnosed, while occupational diseases develop gradually and are more difficult to detect, constituted a rational relationship to a legitimate state interest. However, as noted by the Court of Appeals in this case, the Supreme Court has never addressed whether a rational basis exists for subjecting coal miners who suffer from occupational pneumoconiosis to the limitations upon evidence, the consensus process, and a clear and convincing standard to overcome a consensus finding, while the statute does not subject claimants who suffer from different occupational diseases, or pneumoconiosis developed from exposure to irritants other than coal to the same process.[9]

This Honorable Court has previously found that the application of the consensus procedure is an unconstitutional denial of equal protection of the law in a narrow circumstance. In Cain v. Lodestar Mining, Ky., 302 S.W.3d 39 (2009), the Court held that where both the plaintiff's x-ray reading and the defendant's x-ray reading found that the coal miner suffered from pneumoconiosis, but differed as to degree, there was no rational basis for referring the claim to the consensus panel. Id. at 43. In that case the employer had effectively conceded the presence of the disease through its proof, but the consensus panel found that there was no

[9] Court of Appeals Opinion, Gardner v. Vision Mining, Inc., et al., No. 2009-CA-000874-WC, p. 7

disease. The Court in Cain did not address the issue of whether KRS 342.316 denies equal protection of the law to coal miners who seek workers' compensation medical and income benefits as a result of occupational pneumoconiosis resulting from exposure to coal dust, when considered as similarly situated with other workers who claim workers' compensation benefits as a result of pneumoconiosis resulting from exposure to other substances.

Two distinguished panels of the Court of Appeals[10] have found the consensus procedure established in KRS 342.316 to be a violation of the Kentucky Constitution. Recognizing that the Kentucky Constitution's equal protection provisions, Sections 1, 2, and 3 of the Kentucky Constitution, are much more detailed and specific than the Equal Protection Clause of the United States Constitution, the Court of Appeals in each case held that the consensus process denied equal protection to coal miners because there was no rational basis for treating coal workers differently from victims of other pneumoconioses caused by exposure to silica or other respirable irritants while working.

ARGUMENT

THE CONSENSUS PROCESS ESTABLISHED BY KRS 342.316 DENIES EQUAL PROTECTION OF THE LAW TO COAL MINERS UNDER SECTIONS 1, 2 AND 3 OF THE KENTUCKY CONSTITUTION AND THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION

The purpose of the consensus panel process was to accurately diagnose coal workers' pneumoconiosis in those miners who indeed suffer from it. If the consensus panel process has no rational relationship to this legitimate state interest, it is unconstitutional under Sections 1, 2,

[10] Former Chief Justice of the Supreme Court, Joseph E. Lambert authored the well-reasoned majority Opinion in this case, and the consolidated appeal of Peabody Coal Company v. Martinez was authored by a panel of Judges Clayton, Combs and Stumbo.

and 3 of the Kentucky Constitution. This is because the Kentucky Constitution declares unequivocally that all men are free and equal, that arbitrary power over the lives, liberty and property of persons exists nowhere in a republic, and that all people, when they form a social compact, are equal and no grant of exclusive or separate privileges are valid. Coal miners are entitled to equal protection of the law under these provisions of the Kentucky Constitution, and under the 14th amendment to the Constitution of the United States. A statute does not comply with equal protection requirements if no reasonable basis or substantial justifiable reason supports the classification that it creates. Elk Horn Coal Corp. v. Cheyenne Resources, 163 S.W.3d 408 (Ky., 2005). In areas of social and economic policy, the Kentucky Supreme Court has construed the Kentucky Constitution as requiring "a reasonable basis in fact," or a "substantial and justifiable reason" for setting apart classes of similarly situated individuals for differing treatment under the law. Tabler v Wallace, 704 S.W.2d 179, 183 (Ky., 1986). Federal equal protection requires that a classification created by a legislative act must be rationally related to a legitimate state interest. City of Cleburne Texas v. Cleburne Living Center, 473 U.S. 432, 439; 105 S.Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985). The consensus panel process must be rationally related to finding whether a coal miner truly suffers from coal workers' pneumoconiosis. Procedurally, and statistically, the consensus panel does not achieve this goal. Therefore it is not rationally related to this state interest, and is an unconstitutional and arbitrary act.

In any occupational disease claim under the Kentucky Workers' Compensation Act such as silicosis, (a disease acquired by inhaling rock dust or other silica dust), the procedure for proving a claim of work related lung disease includes submitting x-ray examinations, but the process is not limited to the introduction of x-rays alone. KRS 342.316(3)(a)2 states: "Each

clinical examination must include an x-ray examination and appropriate pulmonary function tests." However, nothing limits the introduction of proof such as more sensitive CT scans of the lung, or bronchoscopy biopsy results which are performed in accordance with accepted medical standards and performed by a duly licensed physician. In Dravo Lime Co., Inc. v. Eakins, Ky., 156 S.W.3d 283, (2005), for example, this Honorable Court held that evidence of an occupational lung disease such as CT scans and biopsy reports were admissible and competent evidence for the Administrative Law Judge to consider in making his findings, as well as the testimony of medical and scientific experts, and the workers' own testimony.

In contrast, the procedure for determining medical evidence in a Coal Worker's Pneumoconiosis case must comply with KRS 342.316(3)(b). This statute requires that to be admissible, medical evidence in proceedings for determining a claim for occupational pneumoconiosis resulting from exposure to coal dust must be chest x-rays of acceptable quality, read by "B" readers certified by National Institute of Occupational Safety & Health (NIOSH). [11] Furthermore, in Coal Workers' Pneumoconiosis cases, the legal process required to prove a claim is directed toward giving authority to the consensus panel to decide the presence and degree of pneumoconiosis, where other occupational lung disease cases are not. The consensus process, and the clear and convincing standard of proof to overcome it, cannot be shown to be rationally related to any legitimate state interest, and therefore denies equal protection of the law to coal miners.

KRS 342.316(3)(b)4 requires that, in the case of occupational diseases except for coal workers' pneumoconiosis claims, the Commissioner of the Department of Workers' Claims shall

[11] The NIOSH program itself has recognized the limitations of chest x-ray readings, stating in its B- Reader code of ethics: "B Readers shall recognize the limitations of chest radiograph classifications, and shall not make clinical diagnoses about pneumoconioses based on chest radiograph classification alone."

promptly refer to the employee to such physician or medical facility as the Commissioner may select for examination. In contrast, coal miner seeking benefits and as a result of pneumoconiosis acquired while mining coal is directed to be examined by a physician of the employer's choice. Given that the records and results of "B" readers are required to be kept by the Commissioner of the Department of Workers' Claims, the tendencies toward reading x-rays as negative are well known.[12] Since these statistics come from claims filed with an X-ray, also read by a "B" reader, that show the coal miner does indeed suffer from the disease, it is clear that entrance into the consensus procedure is virtually guaranteed in coal miner's pneumoconiosis cases by the discriminatory preference of allowing coal mine employers to select the initial examining physician, instead of an unbiased physician selected by the Commissioner of the Department of Workers' Claims.

Once it has been established that the coal miner's x-ray submitted with his application, and the employer's physician's x-ray do not form a consensus, proof in a coal miner's case is taken out of the control of the coal miner and his attorney and given to three, randomly selected "B" readers, the "consensus panel". If consensus is found among the panel, which requires that two out of the three "B" readers agree as to class of progressive massive fibrosis , or findings that agree with respect to the major category and within one degree of the minor category, the miner is subjected to a high burden of proof to overcome the consensus finding, that of clear and convincing evidence. KRS 342.316 (13). Because only x-ray readings are admissible in this process, only another x-ray reading can be introduced. The Court of Appeals in the Gardner

[12] KRS 342.794. Some of the "B" readers who are listed by the Commissioner of the Department of Workers' Claims read x-rays as negative as much as 100% of the time. Original counsel for Joe Martinez, Dick Adams, obtained the testimony of Thomas Lewis, Deputy Commissioner of the Department of Workers' Claims in 2002, which showed that several of the B-readers, in cases which had been filed and therefore must have been accompanied by a positive x-ray reading by a B-reader, read x-rays as negative over 90% of the time, and in the case of one, Dr. Lockey, 100% of the time, at the taking of that deposition.

case stated that the clear and convincing standard of overcoming a consensus finding was, as a practical matter, impossible to overcome[13].

> "Consensus" is reached between two (2) chest X-ray interpreters when their classifications meet one (1) of the following criteria: each finds either category A, B, or C progressive massive fibrosis; or findings with regard to simple pneumoconiosis are both in the same major category and within one (1) minor category (ILO category twelve (12) point scale) of each other."

The twelve point scale referenced in KRS 342.316(b)(4)(e) consists of three non-compensable findings, (-/0, 0/0, and 0/1), and nine compensable findings, (1/0, 1/1, 1/2, 2/1, 2/2, 2/3, 3/2, 3/3, and 3/+). Accordingly, when the statutory definition of "consensus" is juxtaposed against the possible x-ray interpretations, a consensus determination by the "B" reader panel is highly likely for a negative reading of pneumoconiosis because there are only three possible categories. On the other hand, there are a myriad of possible combinations of positive findings which can result in a finding of no consensus, because there are nine possible positive x-ray readings. Given the variability of the x-ray readings, the consensus process is much more likely to arrive upon a "consensus" of no pneumoconiosis, therefore creating a presumption of no pneumoconiosis that can only be overcome by clear and convincing evidence. Several x-ray readings that find the presence of pneumoconiosis are not as likely to create a consensus and thereby do not gain the advantage of the presumption in the statute. This statutory scheme has unlawfully "stacked the deck" against coal miners, compelling them to overcome the consensus panel's finding by clear and convincing evidence, while giving them little chance of gaining the advantage of the presumption if "B" readers on the consensus panel have interpreted the x-rays as positive, but of varying major or minor categories.

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[13] *Gardner v. Vision Mining, Inc., et al.* No. 2009-CA-000874-WC, pp.5-6

The consensus process requires significantly more of a coal miner to prove entitlement to workers' compensation medical and income benefits than a worker who suffers from pneumoconiosis resulting from other occupational exposure. This discriminatory treatment is not rationally related to the legitimate state interest of finding out the truth of whether a coal miner suffers from the disease or not. In statistics obtained from the Kentucky Department of Workers' Claims, it was shown that of 2835 claims submitted to the consensus panel, it failed to find consensus in 1440, or 51%, of the cases. In 1395, or 49% of the claims, the panel reached a consensus, showing that the consensus process is not rationally related to providing a more certain determination of the presence of the disease.[14] In Cain, the Court's holding that the consensus process was unwarranted where the parties essentially agreed that the miner was suffering from pneumoconiosis, implied that the legitimate state purpose of applying the consensus process to a coal workers' pneumoconiosis claim was to come to a more certain determination of whether the coal miner suffered from pneumoconiosis. This has not been the experience of the Department of Workers' Claims, as can be seen by the arbitrary results of the consensus process. As often as not, the "B" Reader panel will agree as to the degree of pneumoconiosis or that the miner does not suffer from the disease. Just as often, the experts will disagree as to the presence or degree of pneumoconiosis. There is simply no rational reason for imposing an arbitrary process such as this upon coal miners while the law does not impose this burden on pneumoconiosis claimants who were exposed to respiratory irritants outside of the coal mining industry.

Finally, the Amicus Curiae is compelled to address the argument of the Appellant Peabody Coal that KRS 342.732 extends benefits for pneumoconiosis without pulmonary impairment, and therefore KRS 342.316 may grant or deny those benefits based on the consensus

[14] Case data obtained from Department of Workers' Claims.

process without regard to its constitutionality. Peabody Coal's argument is essentially that, because the legislature was not required to grant miners with no pulmonary impairment any benefits at all, once the decision to grant benefits has been made, it can be administered in an arbitrary or unconstitutional way. Respectfully, the Amicus Curiae disagree.

It is well settled that legislation, in matters of economic and social legislation, does not deny a class of persons equal protection if the classifications are not arbitrary and if the law is rationally related to a legitimate state objective. KEM Coal Co. v. Baker, 918 S.W. 2d 236 (Ky. App. 1996); Waggoner v. Waggoner, 846 S.W.2d 704 (Ky. 1992); Kentucky Ass'n of Chiropractors, Inc. v. Jefferson County Medical Society, 549 S.W. 2d 817 (Ky., 1977). That reasoning must apply to each and every law, as does the Kentucky Constitution and the 14th Amendment to the United States Constitution. KRS 342.316, the method for proving the existence of pneumoconiosis, must also provide equal protection of the law to those seeking to prove the disease which they have acquired though their occupation. The classes created by that statute must also be rationally related to the legitimate state objective of proving that a worker, whether he is working in a coal mine or a rock quarry, suffers from an occupational disease. While KRS 342.732 has been found to create classifications which are rationally related to legitimate state goals, that finding does not justify an arbitrary and unconstitutional restriction upon coal miners' rights to prove their claims, as compared to other workers' opportunities to prove their occupational disease claim. The consensus process assigned to coal miners under KRS 342.316 simply does not bear any rational relationship to the state interest of discovering which persons suffer from pneumoconiosis.

CONCLUSION

The consensus process denies equal protection of the law to coal miners. There is no rational reason to subject coal miners to the consensus process, when similarly situated workers who claim workers' compensation benefits as a result of pneumoconiosis resulting from exposure to other substances, are not. The limitations in evidence, and the arbitrary nature of the consensus process, as well as the clear and convincing standard required to overcome the consensus finding, create a burden in sustaining a coal miner's case that does not exist in other occupational disease cases. The Amicus Curiae submits that there is no rational basis for treating coal worker's pneumoconiosis claims differently, and patently less fairly than other occupational pneumoconiosis claims. The Supreme Court should uphold the decisions of the panels of the Court of Appeals in the cases below.

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