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COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2010-SC-000438

FILED
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VISION MINING, INC. APPELLANT

v.

ON APPEAL FROM COURT OF APPEALS
NO. 2009-CA-000874
WORKERS' COMPENSATION NO. 07-WC-01156

JESSE GARDNER, ET AL. APPELLEES

AND 2010SC-000438-WC

PEABODY COAL COMPANY APPELLANT

v.

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

JOE MARTINEZ, ET AL. APPELLEE

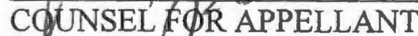
* * * * *

Appeal from Court of Appeals of Kentucky
No. 2009-CA-000927-WC
(Workers' Compensation Board No. 02-01692)

REPLY BRIEF FOR APPELLANT PEABODY COAL COMPANY

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed to the following this 2nd day of December, 2010 to: Hon. Thomas E. Springer, 18 Court Street, Madisonville, KY 42431; and, the Hon. R. Scott Borders, Administrative Law Judge, 8120 Dream Street, Florence, KY 41042; Hon. Douglas W. Gott, Administrative Law Judge, 400 East Main Street, Suite 300, Bowling Green, KY 42101; Hon. Christopher H. Smith, Office of Workplace Standards, Kentucky Labor Department, 1047 U.S. 127 South, Frankfort, KY 40601; Workers' Compensation Board, 657 Chamberlin Avenue, Frankfort, KY. 40601; and, Hon. Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The original and ten copies were hand-delivered and/or mailed via overnight express mail this day to the Clerk, Supreme Court Commonwealth of Kentucky, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601.



COUNSEL FOR APPELLANT

MAY IT PLEASE THE COURT:

ARGUMENT

In our first Brief, we made the point that Joe Martinez did not claim pulmonary impairment in his Application for Resolution of Coal Workers' Pneumoconiosis Claim nor did he ever amend his claim to include pulmonary impairment. We demonstrated in the first Brief that for all injuries and for all occupational disease claims other than coal workers' pneumoconiosis, the Kentucky worker must prove impairment using the latest available edition of the Guides to the Evaluation of Permanent Impairment of the American Medical Association. We further demonstrated that those Guidelines measure impairment on the basis of pulmonary function studies for lung diseases. Radiographic evidence would be used to identify the occupational diseases but not to measure impairment. Thus, for CWP claims, had Joe Martinez been able to prove radiographic evidence of CWP, he would be entitled to receive retraining incentive benefits even without proof of pulmonary impairment which would have been required of him had he had a traumatic injury to his lungs or another occupational disease of the lungs. The same statements are true also of Jesse Gardner in the case he filed against Vision Mining, Inc. If anything, the law discriminated in favor of coal workers who have radiographic evidence of CWP but no pulmonary impairment since they would not be entitled to benefits if benefits had to be awarded on the basis of the Guides to the Evaluation of Permanent Impairment of the American Medical Association. We rhetorically ask when workers in the same class as Martinez and Gardner (people claiming CWP and no pulmonary impairment) can receive benefits without evidence of impairment, why it would offend equal protection to ask them to have an extra step not required of other

workers with occupational diseases with impairment requiring them to go through the consensus process or that the opinion of said consensus panel should not have presumptive weight.

Because neither Martinez nor Gardner ever alleged a pulmonary impairment in their Application for Resolution of Claim nor were pulmonary function studies ever produced to demonstrate any pulmonary impairment, it is submitted that both Martinez and Gardner lack standing to challenge this claim on the narrow issue that equal protection of the US and State Constitutions are violated because workers with claims for coal workers' pneumoconiosis are treated differently than workers who have other occupational diseases. Stated a different way, a person who is seeking to raise the question of the validity of a discriminatory Statute has no standing for that purpose unless that person belongs to the class which is allegedly prejudiced by the Statute. Martinez and Gardner are claiming to have CWP but they did not even claim the necessary impairment which they would have to prove had they had any traumatic injury to the lungs or occupational disease other than coal workers' pneumoconiosis. See the case of Jones v. Weyerhauser Company, 141 N.C. App. 482, 539 S.E. 2d 380 (North Carolina, 2000).

The case cited above may also suggest to this Court why various occupational diseases could be treated differently under the Law and not violate "equal protection" because there are differences in the actual occupational diseases themselves. In the North Carolina case cited above, the Statute in effect at the time the case was decided, was such that if the North Carolina Industrial Commission found that at the first hearing the employee either had asbestosis or silicosis or the parties entered into an agreement to the

effect that the employee had silicosis or asbestosis, the Commission would order that the employee be removed from any occupation which exposes him to the hazardous asbestosis or silicosis. Further, if the employee thereafter engaged in any occupation which exposed him to the hazards of asbestosis or silicosis without having written approval of the Industrial Commission, neither he nor his dependents or personal representative shall be entitled to any compensation for disablement or death resulting from asbestosis or silicosis. In our first brief we demonstrated that the Guides to the Evaluation of Impairment of the American Medical Association in the pulmonary section suggested that anyone with early pneumoconiosis should remove themselves from the environment before they became disabled. We submit the Kentucky Statute, KRS 342.316 and KRS 342.732, awarding the educational or retraining incentive benefits actually encourages the coal miners to apply for these benefits so that they can leave the coal mining industry before they become impaired from a pulmonary standpoint. However, the Kentucky Legislature quite clearly does not treat coal workers' pneumoconiosis as the North Caroline Statute treated silicosis and asbestosis. In Kentucky, KRS 342.197 (2)(a)(b) specifically prohibits discrimination in hiring for coal miners who have only category 1 CWP and no pulmonary impairment.

We also would point out that the Statute of Limitations in Kentucky for occupational diseases treats different occupational diseases differently. The general Statute which applies to coal workers' pneumoconiosis at KRS 342.316(4)(a) has a three year Statute of Limitations after the last injurious exposure to the occupational hazard or when the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted a

disease. That could be as much as five years exposure. However, for asbestosis and radiation diseases, Kentucky provides for a 20 year Statute of Limitations.

It is clear from the North Carolina case that North Carolina Legislature definitely believe that asbestosis and silicosis progress even with no further exposure for two years or more after the person being exposed leaves that exposure. This is not to suggest that CWP is a benign disease, but the Kentucky Legislature's decision to prohibit discrimination in employment when a respective employee has category 1 CWP and no pulmonary impairment should be compared to the North Carolina Statute where workers with asbestosis or silicosis are not allowed to work in areas where they would subject themselves to further exposure and should they choose to do that they will not be eligible for compensation. Not all occupational diseases are the same and the decision as to how each occupational disease should be in a workers' compensation system should be more of a legislative than a judicial decision.

In our first Brief as we do now, we do take the position that if a coal worker has CWP and pulmonary impairment, neither KRS 342.316 nor KRS 342.732 offend equal protection in requiring the worker to go through the consensus process or have the opinion of the consensus panel be given presumptive weight. Coal workers' pneumoconiosis is, after all, a radiographic disease and a consensus panel is a panel made up of three B-readers randomly chosen by the Department of Workers' Claims to ensure neutrality. Moreover, they allow a coal worker to file a claim with one x-ray interpretation and actually have four interpretations made of an x-ray. Also, if there is no "consensus" then the ALJ is free to believe whatever doctor the ALJ wishes to believe and award or refuse to award benefits accordingly. However, in the case of both

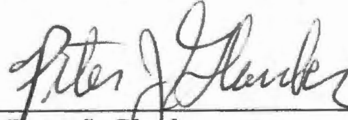
Martinez and Jesse Gardner, neither of these workers were workers claiming CWP and pulmonary impairment and for that reason we submit they are not in a class to even claim that they are discriminated against because one would have to prove pulmonary impairment if one did not have coal workers' pneumoconiosis.

Before closing, we are pleased that the Appellee agrees that this Court's decision in Cain v Lodestar Energy, 302 S.W. 3d 39 (Ky. 2009) is not controlling in this case. We also note in the Appellee's Brief that he states the case of Kentucky Harlan Coal Company v. Holmes, 872 S.W. 2d 446 (Ky. 1994) does not directly support the constitutionality of the present version of KRS 342.316. We submit that this case does demonstrate this Court's recognition that the legislature has noted over the years the effect on the entire workers' compensation system of coal workers' pneumoconiosis claims and how these claims have had a tremendous economic impact on industry in Kentucky, attracting industry in Kentucky, and attracting insurance companies who would we willing to underwrite workers' compensation in Kentucky.

CONCLUSION

It would appear from the prohibition against discrimination in employment of coal miner's with category 1 pneumoconiosis and no pulmonary impairment that while the Kentucky Legislature does not recognize CWP as a benign disease, it may very well conclude that it is not as dangerous to the individual worker as asbestosis, silicosis, or radiation exposure. We submit that the Court of Appeals was wrong in finding that KRS 342.316 and KRS 342.732 violate equal protection. The decision of the Administrative Law Judge and the Workers' Compensation Board in both Martinez and Gardner should be affirmed and the Court of Appeals' decision in this case should be reversed.

BOEHL STOPHER, & GRAVES, LLP



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